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Sumitomo Shoji America, Inc. v. Avigliano

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INTERNATIONAL LAW—DISCRIMINATION ON THE BASIS OF SEX AND CITIZENSHIP UNDER COMMERCE TREATY—*Sumitomo Shoji America, Inc. v. Avigliano* — In a recent decision, *Sumitomo Shoji America, Inc. v. Avigliano,*[1] the Supreme Court interpreted the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan.[2] Presented with an interpretation of a treaty employment provi-

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1. 457 U.S. 176 (1982). The procedural history of this case is extensive. Plaintiffs, past and present female secretarial employees of defendant Sumitomo Shoji America, Inc., brought suit in federal district court, charging discrimination on the bases of sex and national origin in violation of title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 (1982). Sumitomo moved to dismiss these claims under Fed. R. Civ. P. 12(b)(6) on the ground that its practices were protected under article VIII(1) of the Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States–Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863, 206 U.N.T.S. 143.

The motions to dismiss plaintiffs' section 1981 claim and defendant's first counterclaim were granted, and the motions to dismiss the title VII claim and the remaining counterclaim were denied. Avigliano v. Sumitomo Shoji America, Inc., 473 F. Supp. 506, 508-09 (S.D.N.Y. 1979) [hereinafter cited as *Avigliano #1*].

On appeal by Sumitomo, the court of appeals held that the defendant was entitled to invoke the employment provisions of the Treaty but nevertheless the Treaty did not exempt the defendant from title VII. The court therefore affirmed the lower court's denial of defendant's motion for dismissal of plaintiff's title VII claims. The case was remanded to the district court for further proceedings. Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552 (2d Cir. 1981) [hereinafter cited as *Avigliano #2*].

The Supreme Court granted certiorari, 456 U.S. 912 (1981). Reversing the court of appeals, the Supreme Court held that Sumitomo was not a Japanese company and was thus not covered by article VIII(1) of the Treaty. The case was then remanded. 457 U.S. 176 (1982) [hereinafter cited as *Avigliano*].

2. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States–Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Commerce Treaty]. The pertinent articles of the Treaty are:

Art. VII, para. 1:

> Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their businesses; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

sion that would have tested federal and state employment discrimination laws, the Court created an immunity from these laws for foreign-owned corporations operating within the United States.[3] The Court held that foreign-owned corporations, incorporated in the United States, are subject to the same employment policies and laws as domestic-owned corporations.[4] With this decision, the Supreme Court has continued to construe treaties in accordance with the view maintained by the State Department.[5] In cases in which the literal language of the treaty agreement is unclear, an examination of negotiation records and diplomatic correspondence is required to effectively determine the treaty framers' intent.[6]

In *Avigliano,* the Court considered the narrow issue of whether Sumitomo, a trading company[7] incorporated in New York, had stand-

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Art. VIII, para. 1:

Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

Art. XXII, para. 1:

The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

Art. XXII, para. 3:

As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

3. *Avigliano,* 457 U.S. at 181-82.

4. *Id.* at 183.

5. *Id.* at 184 n.10. For a discussion of the view maintained by the State Department, *see infra* note 97.

6. *Avigliano,* 457 U.S. at 184-85.

7. General trading companies are a unique fixture of the Japanese economy. These companies market large numbers of Japanese products and have a major role in the importation and exportation of raw materials and products in Japan. *See* Krause & Sekiguchi, *Japan and the World Economy,* in ASIA'S NEW GIANT: HOW JAPANESE ECONOMY WORKS 383, 389-97 (H. Patrick & H. Rosousky eds. 1976).

ing to invoke article VIII(1) of the 1953 Commerce Treaty.[8] Article VIII(1) in relevant part states: "[N]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice.*"[9] Sumitomo contended that because article VIII(1) specifically sanctioned employment of personnel chosen by the employer, Sumitomo's actions were insulated from judicial review.[10] Recognizing Sumitomo's contention would have created a judicially accepted immunity for foreign-owned companies, even though incorporated within the United States, from prosecution under state and federal civil rights statutes.[11]

The Supreme Court held that Sumitomo did not have standing to invoke article VIII(1) because, under the language of the Commerce Treaty, Sumitomo was a company of the United States and not of Japan.[12] The Court reasoned that since article VIII(1) could be invoked only by Japanese companies operating within the United States and United States companies operating in Japan, Sumitomo, a United States company operating within the United States, was without standing.[13] Sumitomo's employment responsibilities, therefore, were held to be the same as those of any other domestic corporation.[14]

The holding in *Avigliano* illuminates the framework that foreign-owned companies and their subsidiaries operating within the United

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8. *Avigliano*, 457 U.S. at 177-78. The Court did not hear the argument of Sumitomo that discrimination on the basis of national citizenship as opposed to national origin was not covered under title VII. *See id.* at 180 n.4.

9. Commerce Treaty, *supra* note 2, art. VIII, ¶ 1, 4 U.S.T. at 2070 (emphasis added).

10. *Avigliano #1*, 473 F. Supp. at 508. Sumitomo argued that plaintiffs' title VII and § 1981 actions must yield to the right of Sumitomo to hire any personnel of its choice. *Id.* This reasoning follows from the determination of some courts that treaties of Friendship, Commerce and Navigation, including the Japanese Treaty, are self-executing treaties. *See* Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 494 F. Supp. 1263, 1266 (E.D. Pa. 1980). If the 1953 Treaty is self-executing then it is "the supreme law of the land," and supersedes any inconsistent state and federal law. United States v. Pink, 315 U.S. 203, 230 (1942). *See also* The Changing Betsy, 6 U.S. (2 Cranch) 64 (1804), *quoted in* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963); Oregon-Pacific Forest Products Corp. v. Welsh Panel Co., 248 F. Supp. 903, 910 (D. Or. 1965) (Japanese Treaty is "supreme law of the land").

11. *See Avigliano*, 457 U.S. at 182 n.7. As of 1979, United States affiliates of foreign corporations employed more than 1.6 million workers. *Id.* Clearly, a ruling that Sumitomo could employ any employee of its choice, to the extent that its employment practices would be in derogation of title VII, would create a large class of citizens whose substantive rights would be comparatively less than its counterpart in American-owned corporations.

12. *Avigliano*, 457 U.S. at 183.

13. *Id.*

14. *Id.*

States can employ to determine their employment rights and responsibilities under similar commercial treaties.[15] These treaties affect approximately 1.6 million American workers.[16]

In *Avigliano*, female clerical workers of the defendant company brought a class action suit against Sumitomo under title VII of the 1964 Civil Rights Act[17] and 42 U.S.C. section 1981,[18] charging that Sumitomo restricted female employees of United States citizenship to clerical positions while promoting only Asian males to executive, managerial and sales positions.[19] Plaintiffs sought compensatory and injunctive relief.[20]

Sumitomo denied that it discriminated against plaintiff clerical workers and moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[21] Sumitomo counterclaimed, alleging abuse of legal process and tortious interference with business activities.[22] Alternatively, Sumitomo sought immunity from prosecution under title VII of the 1964 Civil Rights Act—based on article VIII's freedom of employment provision—in the event the district court found that Sumitomo had discriminated against the plaintiffs.[23]

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15. *Id.* at 182 n.6. Provisions similar to article VIII are found in many of the post World War II commercial treaties. *Id. See, e.g.*, Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States–China, 63 Stat. 1299, T.I.A.S. No. 1871, 25 U.N.T.S. 69; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States–Italy, 63 Stat. 2255, T.I.A.S. No. 1965, 79 U.N.T.S. 71.

16. Howenstine, *Selected Data on the Operations of U.S. Affiliates of Foreign Companies, 1978 and 1979*, SURV. CURRENT BUS., May 1981, at 35, 36.

17. 42 U.S.C. § 2000e-(2)(a) (1982). All plaintiffs filed timely complaints with the Equal Employment Opportunity Commission (EEOC). *Avigliano*, 457 U.S. at 178. The EEOC then issued "right to sue" letters on October 27, 1977, *id.* at 178-79 n.3, and this suit was subsequently filed within the statutory period of 90 days. 42 U.S.C. § 2000e-(5)(f)(1).

Section 2000e in relevant part states: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire . . . or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . ." 42 U.S.C. § 2000e-(2)(a)(1).

18. 42 U.S.C. § 1981 (1981).

19. *Avigliano #1*, 473 F. Supp. at 508.

20. *Id.* Plaintiffs specifically asked for an order (1) enjoining Sumitomo from engaging in the allegedly unlawful employment practices, both current and future; (2) directing the defendant to promote plaintiffs to various sales, managerial and executive positions and to institute a training program to upgrade plaintiffs' present positions; (3) for compensatory and punitive damages; and (4) for the cost of reasonable attorney fees. *Id.*

21. FED. R. CIV. P. 12(b)(6) (failure to state a cause of action).

22. *Avigliano #1*, 473 F. Supp. at 508-09. The EEOC filed an *amicus curiae* brief in support of plaintiffs' motion to dismiss Sumitomo's counterclaims. *Id.* at 511.

23. *Id.* at 509. Past employment figures for Sumitomo indicated an unbalanced hiring

The district court denied Sumitomo's 12(b)(6) motion, which sought dismissal of the title VII claim,[24] but it granted dismissal of the section 1981 claim.[25] The district court interpreted article VIII of the Treaty as exclusively applicable to companies of one party operating within the other party's territory.[26] It interpreted "companies," as used in article VIII(1) and defined in article XXII of the Treaty,[27] to mean corporations, partnerships, companies and associations.[28] The citizenship of Sumitomo was determined by invoking article XXII(3), which states "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party."[29]

Since Sumitomo was incorporated in New York, it was deemed to be a United States corporation operating within the United States.[30] As a result it was held that Sumitomo lacked standing to invoke article VIII(1), which expressly requires diversity of sovereignty between the subsidiary's place of incorporation and that of its parent.[31]

Sumitomo then sought an interlocutory appeal under 28 U.S.C. section 1292(b)[32] on the question of its standing to invoke the freedom

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preference for Asian males. Sumitomo's EEOC report for its New York City offices for the years 1975 and 1976 listed 31 persons as officials and managers, 28 of whom were Asians, all of whom were male. Under the heading of professionals, Sumitomo stated that it hired 35 persons, 25 Asians, all male. Under the category of sales workers Sumitomo employed 43 persons, 37 Asians, all male. Brief for Plaintiffs' Interlocutory Appeal at 3, *Avigliano #1*, 473 F. Supp. at 506.

24. *Avigliano #1*, 473 F. Supp. at 513.

25. *Id.* at 514. The district court interpreted the provisions of § 1981 to be limited in their scope of proscription of discrimination. The court stated that "[d]iscrimination on other grounds, such as religion, sex, or national origin to which white citizens may be subject as well as white non-citizens, non-white citizens . . . is not proscribed by the statute [§ 1981]." *Id.* at 513-14 (footnote omitted) (quoting Jones v. United Gas Improvement Corp., 63 F.R.D. 1, 15 (E.D. Pa. 1975)).

26. *Avigliano #1*, 473 F. Supp. at 509-10.

27. *See* Commerce Treaty, *supra* note 2, art. XXII, 4 U.S.T. at 3079-80.

28. *Avigliano #1*, 473 F. Supp. at 509.

29. Commerce Treaty, *supra* note 2, art. XXII, ¶ 3, 4 U.S.T. at 2070-71 (emphasis added).

30. *Avigliano #1*, 473 F. Supp. at 510.

31. *Id.*

32. 28 U.S.C. § 1292(b) (1982). Section 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may there upon, in its discretion, permit an appeal

of employment provision in article VIII.[33] The Court of Appeals for the Second Circuit certified for review the question of Sumitomo's standing and reversed the district court's determination.[34]

According to the court of appeals, adherence to the district court's holding would have created two distinct classes of companies under article VIII—the branch and the subsidiary.[35] The court of appeals was concerned that a bifurcated application of article VIII would create a "crazy quilt pattern"[36] in which the substantive rights of Japanese branches operating directly in the United States would be greatly superior to the rights of locally incorporated subsidiaries of Japanese companies,[37] thus creating a dramatic distinction between the forms of business operation in a seemingly haphazard way.[38] Article VIII was construed to be determinative of Sumitomo's nationality for the purpose of recognizing its status as a legal entity,[39] but not to limit the scope of substantive rights granted to Sumitomo elsewhere in the Treaty.[40]

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to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id.

33. *Avigliano #2,* 638 F.2d at 553.

34. *Id.* Although the district court limited the question on interlocutory appeal to Sumitomo's standing to invoke article VIII, the court of appeals determined that it was not limited to the question formulated by the district court since the failure to resolve the applicability of title VII to Sumitomo would have created a wasteful second appeal. *Id.* at 558 n.6.

35. *Id.* at 556.

36. *Id.*

37. *Id.* The court of appeals stated in regard to the noted divergence of power between foreign branches and subsidiaries: "It is illogical to infer that the drafters of the Treaty intended to make such an inartistic distinction between forms of business operation or to act in such a haphazard way." *Id.*

38. *Id.* The court also noted that "such a reading would overlook the purpose of the Treaty, which was not to protect foreign investments made through branches, but rather to protect foreign investments generally." *Id.* The means used by the drafters of the 1953 Treaty to assure protection of foreign investment was the recognition that domestic and foreign businesses should be treated equally. By establishing equality of treatment for both foreign and domestic companies, the drafters intended to promote competitive equality between both parties. *See* Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 STAN. L. REV. 947 (1979).

39. *Avigliano #2,* 638 F.2d at 558.

40. *Id.* at 557. Herman Walker, who negotiated and drafted many of the Treaties of Friendship, Commerce and Navigation, has stated:

> [T]here is a clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with else-

The Supreme Court granted certiorari to decide the narrow issue of whether article VIII of the Treaty provided a defense to Sumitomo from title VII actions and, in addition, whether Sumitomo could invoke the employment provision of article VIII.[41] Interpreting the 1953 Treaty by relying on a textual analysis approach, the Court discerned the intent of the Treaty framers by examining the literal language of the Treaty.[42]

This method of treaty construction was first developed in *The Amiable Isabella.*[43] In *Isabella,* the Supreme Court interpreted a 1795 treaty with Spain that dealt with the validity of certain passports of the United States and Spain.[44] The Court held the passport provision in question to be inoperative due to the treaty framers' failure to designate in the treaty the particular form of passport required.[45]

Justice Story, writing for the majority, stated that the Court was obligated to give effect to the stipulations of any treaty entered into by the United States and another sovereign nation.[46] Since there was no designation in the Spanish treaty of the correct form of passport, the Court was without power to provide a *casus omissus.*[47] The Court stated that "the doctrine of a performance *cy pres,* so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret and enforce them."[48]

The Supreme Court affirmed its doctrine of strict literal construction of foreign treaties in *Maximov v. United States.*[49] In *Maximov,* proceeds from an American trust, created in the United States by an American trustee under Connecticut state law, were held not to be exempt from federal income tax under an Income Tax Convention between the United States and the United Kingdom.[50] The petitioner contended that according to a specific exemption provision in the Con-

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where on their own merits. Thus the acknowledgement of a fact—the existence and legitimate paternity of an association—is not confused with problems associated with the functional rights and activities of alien-based associations.

See Walker, *Provisions on Companies in United States Commercial Treaties,* 50 AM. J. INT'L L. 373, 383 (1956).

41. Avigliano v. Sumitomo Shoji America, Inc., 456 U.S. 912 (1981).
42. *Avigliano,* 457 U.S. at 180.
43. 20 U.S. (6 Wheat.) 1 (1821).
44. *Id.* at 68.
45. *Id.* at 70-72.
46. *Id.* at 72.
47. *Id.* at 71.
48. *Id.* at 73.
49. 373 U.S. 49 (1963).
50. *Id.* at 50-51.

vention, capital gains of United Kingdom residents were exempted from taxation.[51] The Court concluded that it could not deviate from the clear import of a solemn treaty when, as in *Maximov*, there was no indication that the application of the literal language of the Convention would effect a result inconsistent with the intent of the treaty framers.[52] The *Maximov* Court implied, however, that if the wording of the treaty differed from the treaty framers' intent, the Court would ignore the provision in question to the extent that the provision was inconsistent.[53]

The Court has also recognized the interpretation given a treaty by the governmental department charged with enforcement of that treaty.[54] In *Factor v. Laubenheimer*,[55] the Supreme Court partially indicated the extent to which the Court would defer to a departmental interpretation of a foreign treaty.[56] In *Factor*, the Court had to choose between two conflicting interpretations of a treaty obligation.[57]

Petitioner claimed that under an 1842 extradition treaty with Great Britain, he could only be extradited to Great Britain if the act he had been charged with was also a criminal act pursuant to the laws of the place of refuge.[58] Respondent contended that petitioner could be extradited regardless of the status of the act committed in the place of refuge, since an 1899 Convention[59] between the United States and Great Britain had dispensed with the restriction that the petitioner's offense must be a crime both in the United States and in Great Brit-

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51. *Id.* at 51-52. The exemption provided by article XIV of the Convention applied under the terms of the Convention only to United Kingdom residents. *Id.* at 52.

52. *Id.* at 54.

53. *Id.* In Eck v. United Airlines, Inc., 360 F.2d 804 (2d Cir. 1966), the court stated:

> [T]he inquiry may lead the court to conclude that the provision's language accurately reflects its purpose; in such a situation the court is most faithful to the purpose if the language is interpreted literally. Conversely, the inquiry may lead the court to conclude that the language of the provision only imperfectly manifests its purpose, or that when its words were first chosen its language accurately reflected the provision's purpose but that today the same words imperfectly reflect this purpose because conditions have changed in the area to which the words of the provision refer.

Id. at 812. *See also* Cawley v. United States, 272 F.2d 443, 445 (2d Cir. 1959).

54. *See* Charlton v. Kelly, 229 U.S. 447 (1912). In *Charlton*, the Supreme Court stated: "[a] construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight." *Id.* at 468.

55. 290 U.S. 276 (1933).

56. *Id.* at 294-95.

57. *Id.* at 290-93.

58. *Id.* at 292-95.

59. Blaine-Pauncefort Convention of 1889, July 12, 1889, United States–Great Britain–Germany, 1 MALLOY'S TREATIES 740.

ain.[60] In a situation of doubt concerning a treaty provision, the Court stated that it was free to look beyond the treaty language and to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter in question.[61] The Court then explicitly chose to defer to the Department of State's interpretation because it specifically had been charged with the enforcement of the treaty provision in question.[62]

In *Kolovrat v. Oregon*,[63] the Court again deferred to an executive department's interpretation of a treaty provision.[64] Justice Black stated that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."[65]

This method of treaty interpretation, utilizes the literal language to ascertain the treaty's application unless the intention expressed by its framers is at odds with the text of the treaty. The method provided the analytic framework for the determination that article VIII of the 1953 Commerce Treaty was inapplicable to wholly foreign-owned domestic subsidiaries.[66]

The first case to interpret article VIII of the Treaty was *United States v. Oldham*.[67] In *Oldham*, an American subsidiary wholly owned by a Japanese corporation was indicted for conspiracy to restrain commerce.[68] The defendant corporation argued that article XVIII of the Treaty, which dealt with antitrust violations, was the sole remedy provision because the Treaty superseded conflicting federal law.[69] The district court held that article XVIII provided a supplemental rather than an exclusive remedy.[70] Moreover, even if the defendant could prove that article XVIII was the sole remedy, the court concluded that the defendant did not have standing to invoke the Treaty.[71]

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60. *Factor*, 290 U.S. at 293.
61. *Id.* at 295.
62. *Id.*
63. 366 U.S. 187 (1961).
64. *Id.*
65. *Id.* at 194. Unlike *Factor*, the Court in *Kolovrat* was not faced with two conflicting interpretations of a treaty between sovereign countries. The Supreme Court in *Avigliano* cited *Kolovrat* with approval for the proposition that the State Department's interpretation of the 1953 Treaty should be afforded great weight. *See Avigliano*, 457 U.S. at 181.
66. 457 U.S. at 181. *See also supra* note 2 for the text of art. VIII, ¶ 1 of the Commerce Treaty.
67. 152 F. Supp. 818 (N.D. Cal. 1957).
68. *Id.* at 820.
69. *Id.* at 822-23.
70. *Id.* at 823.
71. *Id.*

Specifically relying upon article XXII of the Treaty to establish the citizenship of the defendant,[72] the court determined that the defendant was a United States corporation since it was incorporated in the United States. The court concluded that "by the terms of the Treaty itself, as well as by established principles of law, a corporation organized under the laws of a given jurisdiction is a creature of that jurisdiction, with no greater rights, privileges or immunities than any other corporation of that jurisdiction."[73] In addition, the *Oldham* court addressed the important question of why foreign branches and subsidiaries were seemingly treated differently under the Treaty.[74] The court stated:

> If the defendant had wished to retain its status as a Japanese corporation while doing business in this country, it could have easily operated through a branch. Having chosen instead to gain the privileges accorded American corporations by operating through an American subsidiary, it has for the most purposes surrendered its Japanese identity with respect to the activities of this subsidiary.[75]

The specific question of a foreign subsidiary's standing to invoke article VIII was first addressed in *Spiess v. C. Itoh & Co.*[76] In *Spiess*, like *Avigliano*, employees of the defendant, C. Itoh, filed suit pursuant to title VII of the 1964 Civil Rights Act[77] and 42 U.S.C. section 1981,[78] alleging racially discriminatory employment practices.[79] Incorporated in New York and wholly owned by a Japanese trading company,[80] the defendant sought dismissal of plaintiffs' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[81] The defendant argued that

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72. *Id. See also Avigliano #1*, 473 F. Supp. at 509.

73. *Oldham*, 152 F. Supp. at 823.

74. *Id.*

75. *Id.* The *Oldham* court noted that article VII of the Treaty equated domestic subsidiaries with their foreign parents but concluded that this was only for the purposes of article VII, and not for the entire Treaty. *Id.* at 823-24. Unlike *Oldham*, the court in *Avigliano #2* construed articles VII and VIII as a "unitary structure." *Avigliano #2*, 638 F.2d at 555. This may account for the "crazy quilt pattern" that the court in *Avigliano #2* perceived. The court in *Avigliano #2* stated: "it is unlikely that the parties to the Treaty would have agreed to grant each other broad rights to establish and manage subsidiaries abroad in Article VII, and then gone on to bar these same subsidiaries from invoking almost all of the substantive provisions which the Treaty contains." *Id.*

76. 469 F. Supp. 1 (S.D. Tex. 1979) [hereinafter cited as *Spiess #1*].

77. 42 U.S.C. § 2000e-(2)(a) (1981).

78. 42 U.S.C. § 1981 (1981).

79. *Spiess #1*, 469 F. Supp. at 2.

80. *Id.* The trading company was known as C. Itoh & Co., Ltd. of Japan.

81. FED. R. CIV. P. 12(b)(6). Defendant moved to dismiss for failure to state a claim.

article VIII(1) provided it with an absolute right to hire personnel of its choice, and thus, to discriminate in favor of its own citizens.[82]

Applying the *Oldham* analysis, the district court in *Spiess*[83] concluded that the defendant was a New York corporation and, therefore, lacked standing to assert article VIII as a defense to a title VII action.[84] Judge Bue, writing for the court, strictly construed article XXII[85] and determined that C. Itoh lacked standing to invoke the employment provision of article VIII.[86] The *Spiess* court expressly rejected the *Kolovrat*[87] and *Factor*[88] holdings by ignoring the Department of State's first determination that the Treaty and article VIII were applicable to foreign subsidiaries incorporated within the United States.[89]

The district court's determination in *Spiess* was overruled by the Fifth Circuit Court of Appeals.[90] The court of appeals held that Itoh & Co. had standing to invoke article VIII and thus was immune from prosecution under state and federal discrimination statutes, because the 1953 Treaty was a self-executing treaty that superseded conflicting domestic law.[91] Noting that this interpretation was in accordance with the Department of State's construction of article VIII, the court of appeals stated that "the consistent view of the State Department has been that American subsidiaries of Japanese corporations are entitled to the full protection of the Treaty."[92] The court of appeals decision in

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Spiess #1, 469 F. Supp. at 1.

82. *Spiess #1*, 469 F. Supp. at 2.

83. *Id.* at 4-5.

84. *Id.* at 4.

85. Commerce Treaty, *supra* note 2, art. XXII, ¶ 3, 4 U.S.T. at 2070-71.

86. *Spiess #1*, 469 F. Supp. at 4. The *Spiess* court also stated that it would not apply the *Kolovrat* framework of foreign treaty interpretation. In a letter from the State Department to the EEOC, concerning the *Avigliano* case, the State Department replied to specific questions from the EEOC as follows:

> In determining the scope of Article VIII we see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form.

Id. at 10.

87. *See* Kolovrat v. Oregon, 366 U.S. 187 (1961).

88. *See Factor*, 290 U.S. at 276.

89. *Spiess #1*, 469 F. Supp. at 10.

90. *Spiess v. C. Itoh & Co.*, 643 F.2d 353 (5th Cir. 1981).

91. *Id.* at 362. The court stated: "thus, we hold that the article VIII(1) 'of their choice' provision permits Japanese companies to discriminate in favor of their fellow citizens." *Id.*

92. *Id.* at 357-58. The court of appeals referred to a September, 1979 letter from Mr. James R. Atwood, Deputy Legal Advisor, United States Department of State, to the EEOC, which acted as *amicus curiae* on behalf of the plaintiffs. The letter stated: "it

Spiess was subsequently scheduled to be heard *en banc*.[93] However, as a result of the grant of certiorari by the Supreme Court in *Avigliano*, the order of the *Spiess* court was vacated.[94]

The Supreme Court determined in *Avigliano* that the Treaty language would be literally applied unless such an application would cause a result inconsistent with the intent of the parties.[95] The Court noted, "[o]ur role is limited to giving effect to the intent of the parties. When the parties to a treaty both agree as to the meaning of a treaty provision and that interpretation follows from the clear treaty language we must, absent extraordinarily strong contrary evidence, defer to that interpretation."[96] The Court held that Sumitomo was a New York corporation, and thus lacked standing to invoke article VIII as a defense to plaintiffs' title VII action,[97] stating: "Sumitomo is constituted under

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was not the intent of the negotiators to cover locally incorporated subsidiaries." The court responded, calling the letter "an aberration in State Department policy." *Id.* at 358 n.3.

93. 654 F.2d 302 (5th Cir. 1981).

94. 664 F.2d 480 (5th Cir. 1981).

95. *Avigliano*, 457 U.S. at 180.

96. *Id.* at 185.

97. *Id.* at 189. The Supreme Court relied in part on Deputy Advisor Atwood's letter to the EEOC of September, 1979, in reaching its decision. The Court, while recognizing that the court of appeals had disregarded the Atwood letter, stated:

> However ambiguous the State Department position may have been previously, it is certainly beyond dispute that the Department now interprets the Treaty in conformity with its plain language, and is of the opinion that Sumitomo is not a company of Japan and is not covered by Article VIII(1) . . . that interpretation and the identical position of the Government of Japan, is entitled to great weight.

Id. at 184 n.10. The Ministry of Foreign Affairs, the Office of the Government of Japan responsible for the interpretation of the Treaty, stated with reference to Sumitomo: "For the purpose of the Treaty, companies constituted under the applicable laws . . . of either Party shall be deemed companies thereof and, therefore, a subsidiary of a Japanese company which is incorporated under the laws of New York [Sumitomo] is not covered by Article 8, Paragraph 1 when it operates in the United States." *Id.* at 183-84.

Much of the confusion surrounding the conflicting interpretation given article VIII is apparently a result of the State Department's ambiguous position on the interpretation of the article. On October 17, 1978, in a letter from Mr. Lee Marks to the EEOC, the official Department of State position was that the Treaty was applicable to American subsidiaries of Japanese corporations. Eleven months later, Deputy Legal Advisor James Atwood stated that the Department had "conducted an extensive review of the negotiating files on bilateral treaties of friendship, commerce and navigation, including the 1953 Treaty with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty . . . ." Brief for Plaintiffs' Interlocutory Appeal at 10-11, *Avigliano #1*, 473 F. Supp. at 506. The letter continued: "it was not the intent of the negotiators to cover locally-incorporated subsidiaries . . . by the general provisions of Article VII(1) and (4), which respectively provide for national and most-favored-nation treatment of the activities of such subsidiaries." *Id.* at 11.

the applicable laws and regulations of New York; based on Article XXII(3), it is a company of the United States."[98]

According to the Court the literal language of article XXII(3) and the employment provisions of article VIII(1) could only be invoked by Japanese branches operating within this country and United States branches operating within Japan.[99] Contrary to the views expressed by Sumitomo and the court of appeals, the Court explained that adherence to the literal language of the Treaty would not overlook the purpose of the Treaty.[100] What appeared on its face to be an indiscriminate treatment of the substantive rights of branches and subsidiaries under article VIII was actually predicated upon the choice of the subsidiary, who through incorporation gained privileges generally afforded to all locally incorporated companies.[101] This reasoning was substantially similar to that in *Oldham*, where the Court determined that the subsidiary made a conscious choice to forgo Treaty coverage in ex-

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For the text of articles VII(1) and XXII(1) of the Commerce Treaty, see *supra* note 2. With respect to these provisions one commentator has noted: "In short, national treatment of corporations means equal treatment of corporations with domestic corporations. It is the highest level of protection afforded by commercial treaties." *See* Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 811 (1958).

98. *Avigliano*, 457 U.S. at 182. It appears that much of the conflicting interpretations of article VIII center around the State Department's own confusion as to the applicability of the 1953 Treaty to locally incorporated, foreign-owned subsidiaries.

99. *Avigliano*, 457 U.S. at 183.

100. *Id.* at 185. On the purpose of the 1953 Treaty, the Deputy Assistant Secretary of State for Economic Affairs Harold Linder stated:

> Perhaps the most striking advance of the postwar treaties [Friendship, Commerce and Navigation] is the cognizance taken of the widespread use of the corporate form of business organization in present-day economic affairs. In the treaties antedating World War II, American corporations were specifically assured only small protection against possible discriminatory treatment in foreign countries. In the post-war treaties, however, corporations are accorded essentially the same treaty rights as individuals in such vital matters as the right to do business, taxation on a nondiscriminatory basis, the acquisition and enjoyment of real and personal property, and the application of exchange controls. Furthermore, the citizens and corporations of one country are given substantial rights in connection with forming local subsidiaries under the corporation laws of the other country and controlling and managing the affairs of such local companies.

Commercial Treaties: Hearings on Treaties of Friendship, Commerce and Navigation Between the United States and Columbia, Israel, Ethiopia, Italy, Denmark and Greece Before a Subcommittee of the Senate Committee on Foreign Relations, 82d Cong., 2d Sess. 4-5 (1952) (opening statement of Harold Linder).

101. *Avigliano*, 457 U.S. at 189. The Court's determination is substantially the same as the *Oldham* court's conclusion that substantive rights are determined through the form of organization the company chooses to take. *See Oldham*, 152 F. Supp. at 823.

change for the many privileges and rights afforded United States corporations.[102]

Interpreting the history of the Treaty, the Court concluded that the primary function of the Treaty was to promote and to protect the foreign investment interests of both signatories and to "assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."[103] The need for protection of foreign investments had, since the termination of World War II, substantially increased. This was due not only to the changing nature of the corporate entity, with corporate existence frequently transgressing national boundaries, but also to the development of restrictive employment provisions abroad.[104] The Court explained that the intention of the Treaty framers was to assure equal national treatment[105] and competitive equality between participating countries.[106]

The Court specifically addressed the court of appeals' view that any distinction between branches and subsidiaries under the Treaty would lead to a "crazy quilt pattern"[107] between the substantive rights of each.[108] "[T]hat this is not the case is obvious; the subsidiaries as companies of the United States, would enjoy all of the rights of the branches and more."[109]

The *Avigliano* decision determined that Sumitomo, like any other local corporation, is bound by state and federal discrimination statutes.[110] In light of the decision in *Avigliano*, the question arises: Can the unique qualities and expectations of foreign-owned companies, such as Sumitomo, provide an immunity from prosecution under title VII of the 1964 Civil Rights Act? Is there a "bona fide occupational qualification" ("bfoq") exemption?[111] The "bfoq" exception recognizes

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102. *Avigliano*, 457 U.S. at 189.

103. *Id.* at 188.

104. *See* Note, *supra* note 38, at 950-51.

105. *Avigliano*, 457 U.S. at 188. On the subject of national treatment, Walker states that "in applicable situations nowadays, the first-class treatment tends to be national treatment; that which the citizens of the country enjoy." *See* Walker, *supra* note 97, at 811.

106. *Avigliano*, 457 U.S. at 188.

107. *See Avigliano #2*, 638 F.2d at 556.

108. *Avigliano*, 457 U.S. at 189.

109. *Id.* at 189.

110. *Id.*

111. 42 U.S.C. § 2000e-2(e) (1981). Sumitomo argued in district court that discrimination on the basis of national citizenship, as opposed to national origin, was not prohibited under section 2000e-2 of the 1964 Civil Rights Act. Section 2000e-2(e) expressly provides:

> It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis . . . of natural origin in those instances

an employer's right to discriminate on the basis of sex, national origin and religion when it can be shown that unless the exemption is granted that employer's business will be substantially undermined.[112]

The Supreme Court hinted that a "bfoq" exemption might be available to Sumitomo when it stated: "There can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan but also the culture, customs and business practices of the country."[113]

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where . . . national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . . 42 U.S.C. § 2000e(2)(e)(1).

The district court disagreed with Sumitomo's contention. The court cited Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973), in which the Supreme Court stated that "[t]itle VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." *Id.* at 92.

The Supreme Court did not, however, reach the question of discrimination on the basis of national citizenship because that question was not certified for appellate review. *See Avigliano*, 457 U.S. at 180 n.4.

112. *See* Diaz v. Pan Am World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), where the court found that the overwhelming preference for female stewardesses was not a valid reason to discriminate against males who applied to fill those positions with Pan Am. The court held that the "bfoq" exception is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively. *Id.* at 388. In reference to customer preferences, the court stated: "similarly we do not feel that the fact that Pan Am's passengers prefer female stewardesses should alter our judgment." *Id.* at 389. The court quoted the relevant EEOC guidelines on the subject stating "that a 'bfoq' ought not be based on the refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers . . . ." *Id.*

113. *Avigliano*, 457 U.S. at 189 n.19. The court of appeals in *Avigliano #2* outlined certain factors it considered relevant in the determination of whether a "bfoq" exemption was applicable. The court stated: "we believe that as to a Japanese company enjoying rights under Article VIII of the Treaty it [the "bfoq" exemption] must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company . . . ." *Avigliano #2*, 638 F.2d at 559. The court of appeals listed the following relevant factors: (1) Japanese linguistic and cultural skills; (2) knowledge of Japanese products, markets, customs and business practices; (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan; and (4) acceptability to those persons with whom the company or branch does business. *Id.* It appears that the fourth relevant factor is at odds with the decision in *Diaz*. The court of appeals made it clear in *Avigliano #2*, however, that Sumitomo had the burden of proof to establish applicability of the "bfoq" exemption in defense of the plaintiffs' title VII action. *See Avigliano #2*, 638 F.2d at 559. It is possible that the court of appeals and the Supreme Court were willing to accept a lower standard of hardship than the standard outlined in *Diaz*; this may be due in part to the unique requirements of Sumitomo. Both the Supreme Court and the court of appeals failed to address Dothard v. Rawlinson, 433 U.S. 321, 334 (1977), which specifically held that the "bfoq" exemption of title VII is to be construed narrowly in the normal context. It is possible the unique requirements of

If Sumitomo were to invoke the "bfoq" exemption of title VII, it must make an affirmative showing that application of title VII would impose an undue burden on its ability to function efficiently.[114] Domestic civil rights laws will clearly be tested in a novel way when applied to foreign subsidiaries. While no definitive framework exists for evaluating the unique needs and requirements of foreign subsidiaries, it would appear that any "bfoq" exemption should be construed narrowly.[115]

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some foreign-owned domestic corporations take them outside the normal context of title VII application.

114. *See Avigliano* #2, 638 F.2d at 559.

115. This is so due to the widespread use of foreign-owned subsidiaries in the United States. If most foreign-owned companies were able to take advantage of the "bfoq" exemption, more than one and a half million workers might ultimately be affected. It is at least questionable that Congress intended the "bfoq" exemption to include such a large number of citizens. Moreover, any ruling that would sanction employers' preferences to discriminate on the basis of their customers' prejudices seems clearly at odds with the overall intent of title VII. For a more detailed discussion of this subject, see Note, *supra* note 38, at 946.