Vanderbilt Journal of Transnational Law

Volume 14
Issue 1 *Winter 1981*

Article 6

1981

Recent Development: Amenability of Foreign Corporations to United States Employment Discrimination Laws

Kevin C. Tyra

RECENT DEVELOPMENT

AMENABILITY OF FOREIGN CORPORATIONS TO UNITED STATES EMPLOYMENT DISCRIMINATION LAWS

TABLE OF CONTENTS

I. INTRODUCTION

Two trends are shaping the United States economy and labor market. In the legal field, increasing enforcement of federal employment-discrimination legislation is causing a redistribution of employment and wages among various groups. In the financial field, the burgeoning investment of foreign capital in the United States economy is causing a redistribution of profits and capital. At the intersection of these two trends lies the following question:

whether foreign corporations and their United States-incorporated subsidiaries ("United States subsidiaries") are amenable to United States employment-discrimination legislation with respect to their activities within the United States?

Federal employment-discrimination legislation, embodied, *inter alia*, in the fifth and fourteenth amendments to the United States Constitution, Title VII of the Civil Rights Act of 1964,[1] the Equal Pay Act of 1963,[2] the Age Discrimination in Employment Act of 1967,[3] and 42 U.S.C. § 1981,[4] broadly prohibits any form of discrimination by a private employer on the basis of race, religion, sex, age, or national origin.[5] Because many foreign multinational corporations are incorporated in countries with treaty ties to the United States, consideration of the amenability issue must include the effect of potential exemptions accorded these corporations under Treaties of Friendship, Commerce, and Navigation (FCN Treaties). The United States is currently bound by over 100 bilateral FCN treaties, of which more than 30 have been ratified since World War II.[6] FCN Treaties are designed to facilitate the commercial and personal activities of one party's nationals in another party's territory.

There is an extensive amount of foreign direct investment[7] in the United States. In 1974 foreign direct investment was $26.5 billion.[8] By 1977 the figure had reached $34 billion.[9] Although the rate of foreign direct investment has declined since the peak year of 1974,[10] 1976 investments accounted for businesses valued at

---

1. 42 U.S.C. § 2000e *et seq.* (1976).
2. 29 U.S.C. § 206 (1976).
3. 29 U.S.C. § 621 *et seq.* (1976).
4. 42 U.S.C. § 1981 was part of the Civil Rights Act of 1870, c. 114, § 16, 16 Stat. 144, May 31, 1870.
5. 42 U.S.C. § 2000e-2(a).
6. Historical note to 8 U.S.C.A. § 1101 (1970).
7. "Foreign direct investment" is "the direct or indirect ownership of 10 percent or more of the voting securities of an incorporated business enterprise, or an equivalent interest in an unincorporated business enterprise." Department of Commerce, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 2 (December 1978).
8. Department of Commerce, 2 REPORT TO THE CONGRESS, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 10 (April 1976).
9. Department of Commerce, 58 SURVEY OF CURRENT BUSINESS No. 8, 39-40 (August 1978).
10. Department of Commerce, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 15 (December 1978).

over $2 billion.[11] Furthermore, foreign corporations employed 1.08 million workers within the United States in 1974.[12] That figure increased by well over 100,000 in 1976.[13]

In addition to investment capital, foreign corporations frequently bring cultural differences or biases which conflict with the United States law, such as a preference for hiring and promoting management personnel on the basis of national origin. While foreign corporations may have real business reasons for preferring managers of their own nationality,[14] the growth of foreign business activity in the United States is subjecting increasing numbers of United States employees to the dictates of these preferences, possibly in violation of United States law. When employment practices are challenged, some corporations have raised treaty defenses based on provisions ratified more than a decade before the United States made equal employment opportunity in private employment a national policy.

Three recent cases present the issue of whether foreign corporations and their United States subsidiaries are amenable to United States employment-discrimination law with respect to employment within the United States despite FCN Treaty exemptions. In *Spiess v. C. Itoh & Co.*[15] and *Avigliano v. Sumitomo-Shoje Corp.*,[16] United States district courts considered first, whether a United States subsidiary may claim its parent's treaty exemption, and second, to what extent the courts should defer to State Department opinions on this matter. In *Linskey v. Heidelberg Eastern*,[17] a United States district court considered not only whether a foreign corporation is entitled to a treaty exemption but also whether a foreign corporation is an "employer" of its subsidiaries' employees. A thorough analysis of these three cases requires first, a review of the law governing foreign corporations and employment discrimination as well as the rules of treaty and

---

11. *Id.* at 13.

12. Department of Commerce, 2 REPORT TO CONGRESS at 160.

13. Department of Commerce, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 19-42 (1978).

14. See, e.g., the discussion of Japanese corporate preference for Japanese managers by Sethi and Swanson. *Are Foreign Multinationals Violating U.S. Civil Rights Laws?*, EMPLOYEE RELATIONS L.J. 485, 502-08 (Spring 1979), [hereinafter cited as *Sethi and Swanson*].

15. 469 F. Supp. 1 (S.D. Tex. 1979).

16. 473 F. Supp. 506 (S.D.N.Y. 1979).

17. 470 F. Supp. 1181 (E.D.N.Y. 1979).

statutory interpretation; second, an examination of the courts' holdings in the three instant cases; and third, a critical comparison of the cases to the legal background and consideration of the impact of these cases.

II. LEGAL BACKGROUND

A. *Amenability of Foreign Corporations and their Subsidiaries to United States Law*

1. Foreign Corporations

A state must have both prescriptive and enforcement jurisdiction over a foreign corporation or its subsidiary in order to make it amenable to United States law.[18] Prescriptive jurisdiction is a state's jurisdiction to prescribe a rule of law attaching consequences to conduct that occurs within its territory or relates to a thing located, or a status or other interest localized in its territory.[19] A state has enforcement jurisdiction when it seeks to execute a validly prescribed rule of law within its territory.[20] In the instant cases, either the foreign corporations or their subsidiaries had operations that employed United States residents within United States territory. As the corporations engaged in conduct and vested an interest localized in the territory of the United States, they were amenable as defendants in federal courts unless they could claim a treaty immunity.

2. United States Subsidiaries

Domestic corporations operating within domestic territory are bound by domestic law. Also, foreign-controlled domestic corporations are bound by domestic law.[21] When an entity is owned and operated by foreign interest but incorporated in the United States, a problem arises as to whether to define such entity as a domestic or foreign corporation. This distinction is critical because the FCN treaties apply to foreign corporations only. Ac-

---

18. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 6 (1965).

19. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965).

20. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 20 (1965).

21. Wolff, PRIVATE INTERNATIONAL LAW 302-07 (1950) [hereinafter cited as Wolff].

cordingly, courts use the following three tests to distinguish domestic from foreign corporations under public international law:[22] the "classical" test, the "central office" test, and the "control" test.

The "classical" test determines the corporation's domesticity by its place of incorporation.[23] The advantage of this test is simplicity: place of incorporation is relatively easy to prove. The difficulty with this test, however, is that it can be manipulated and used fraudulently by owners who incorporate in a foreign state solely to gain benefits of domesticity in that state.[24] Nevertheless, the "classical" test is used by United States courts,[25] appears in most of the United States' FCN Treaties,[26] and has been adopted by the Restatement (Second) of Foreign Relations Law.[27]

The "central office" test, also known as the doctrine of *siege social,* locates the corporation's nationality where "its functions are discharged."[28] Although the "seat" of the corporation is usually the jurisdiction of incorporation the crucial factor in the "central office" test is the location of "the main administration

---

22. Corporate domesticity may also be approached as a set of factors to be weighed, Steiner and Vagts, TRANSNATIONAL LEGAL PROBLEMS 74-76 (1976); Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise,* 74 HARV. L. REV. 1526 (1961) [hereinafter cited as Vagts]. The factors include:

1) Jurisdiction of incorporation
2) Principal place of business
3) Nationality of shareholders
4) Nationality of equity-funds holders
5) Nationality of corporate management
6) Locus of administrative "control."

Id. at 1526. These factors, however, are incorporated to varying degrees in the three tests discussed here. Historically, the weighting of each factor has varied according to the industry in which the corporation is engaged. *Id.* at 1497-1524.

23. Wolff, *supra* note 21, at 299.

24. *Id.*

25. Behn Meyer & Co. v. Miller, 266 U.S. 457, 472-73 (1925). *Behn Meyer* is discussed in Kronstein, *The Nationality of International Enterprises,* 52 COL. L. REV. 983, 987 (1952).

26. *See, e.g.,* Treaty of Friendship, Commerce, and Navigation Between the United States and Japan, art. XXII(3), 4 U.S.T. 2065, 2079-80 (1953).

27. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 27 (1965).

28. Wolff, *supra* note 21, at 297. Nations subscribing to the doctrine include France, Germany, Italy, Spain, Austria, Switzerland, and Poland.

centre."[29] When the degree of control which the parent corporation exerts over the subsidiary's management and operation is unknown, this test may be ambiguous when applied to foreign subsidiaries incorporated in the United States. The "central office" test is predominantly used in Western Europe.[30]

The "control" test grants foreign nationality to a United States-incorporated subsidiary if it is an "instrumentality of a foreign enterprise" or if the majority of the shares and actual management are under foreign control.[31] Thus the "control" test, unlike the "central office" test, focuses on the ownership of the corporation rather than on its locus of administration. Though the control test has been used by the Department of State,[32] and the Department of Commerce,[33] it has been rejected by the Supreme Court in favor of the "classical" test.[34]

While it is generally understood that foreign corporations and their United States subsidiaries may be subject to United States law, it is also possible that the parent corporation may be liable as an "employer" for the employment practices of its subsidiary. If the parent and subsidiary form an "integrated enterprise,"[35] or if the subsidiary is an agent or instrumentality of the parent,[36] then the parent and subsidiary may be consolidated as the "employer" for employment actions in the United States. The National Labor Relations Board determines what constitutes an "employer" under Title VII.[37] The four factors used by the Board to characterize an "integrated enterprise" are as follows: 1) interrelationship of operations, 2) common management, 3) centralized control of labor relations, and 4) common ownership or financial control.[38] Although the courts liberally apply the inte-

29. *Id.* at 297-98.

30. *Id.*

31. Kronstein, *The Nationality of International Enterprises,* 52 COL. L. REV. 983, 1001-02 (1952).

32. U.S. FOREIGN RELATIONS: 1913 at 1003 (Dept. of State 1920). The control test was applied by Secretary of State Cordell Hull to find that Mexican corporations were "controlled" by British and American stockholders.

33. Department of Commerce, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 2 (1978).

34. Behn Meyer & Co. v. Miller, 266 U.S. 457, 472-73 (1925).

35. Baker v. Stuart Broadcasting Co., 560 F.2d 389, 392 (8th Cir. 1977).

36. Woodford v. Kinney Shoe, 369 F. Supp. 911, 916 (N.D. Ga. 1974).

37. Williams v. New Orleans S.S. Ass'n, 341 F. Supp. 613 (E.D. La. 1972).

38. National Labor Relations Board, 21ST ANNUAL REPORT 14 (1956).

grated enterprise test in employment-discrimination litigation,[39] they have not revealed how the test is applied to the facts of each case.[40] Additionally, a parent may be liable for its subsidiary's discriminatory practices "*if* the parent corporation so controls the subsidiary that the subsidiary is merely the agent or instrumentality of the parent."[41] Such control may be established when the parent "exercise[s] substantial control of employee relations and supervision" of the subsidiary and the subsidiary is "part of an integrated system."[42]

Despite the above limitations, a subsidiary may receive treaty protection, regardless of its nationality, if it is classified as a "treaty-trader." A "treaty-trader" is defined by Department of State guidelines as an employee or an employer having the nationality of the treaty company (i.e., a corporation which enjoys treaty rights), or a person employed by an employee of an organization that is principally owned by a person, or persons having the nationality of the treaty country.[43] Nationality of the employer firm is determined by those persons who own more than fifty percent of the firm's stock regardless of the place of incorporation.[44] It is important to note that "treaty-trader" is a status independent of any particular treaty, and is a means of acquiring rights under treaties.

3. FCN Treaties

Each corporate defendant in the *Linskey*,[45] *Spies*,[46] and *Avigliano*[47] cases raised the defense of immunity under a United States FCN Treaty with that corporation's home country. FCN Treaties have certain provisions in common. In the three instant cases, the common provision was the exemption of managerial-employment choices from the operation of the host country's domestic law. Because treaties are part of the "supreme law of the

---

39. Baker v. Stuart Broadcasting Co., 560 F.2d at 392. *Cf.* Hassell v. Harmon Foods, Inc., 336 F. Supp. 432, 433 (1972).

40. 560 F.2d at 392. Equal Employment Opportunity Commission v. Upjohn Corp., 445 F. Supp. 635, 638-39 (N.D. Ga. 1977).

41. Woodford v. Kinney Shoe Corp., 369 F. Supp. at 916.

42. *Id.*

43. 22 C.F.R. § 41.40 (1977).

44. 9 Foreign Affairs Manual Part II.

45. 470 F. Supp. 1181.

46. 469 F. Supp. 1.

47. 473 F. Supp. 506.

land,"[48] a treaty exemption which has not been superseded by a subsequent treaty or legislative act bars United States jurisdiction over the foreign corporation's exempted activity. Even if a treaty is superseded by a legislative act, however, another party to the treaty can hold the United States to the original treaty under public international law. This presents the court with the dilemma of whether to uphold the superseding domestic law or to give effect to a superseded treaty which is still binding under international law.[49] Thus there were two issues in each of the instant cases: first, whether the exemption applied to the defendant; and second, whether the exemption was effective despite subsequent legislation. After defining the corporation's nationality and granting it FCN Treaty exemption, the instant courts sought to determine whether United States employment-discrimination laws applied to the corporation regardless of the treaty exemption.

B. *United States Employment Discrimination Law*

Discriminatory employment practices violate both international and United States law. Japan and Denmark, the home countries of the defendant in each of the three principal cases, are bound by a variety of international agreements proscribing discrimination. The United Nations Charter prohibits racial discrimination.[50] The Universal Declaration of Human Rights proscribes discrimination based upon national origin.[51] The International Labor Organization's Convention on Employment Discrimination requires employee "advancement in accordance with their individual character, experience, ability, and diligence."[52] In addition, the United States has enacted statutes against employment discrimination which are more specific and more easily enforced than the international prohibitions. The most comprehensive statute is Title VII of the Civil Rights Act of 1964, which prohibits *inter alia,* discrimination by employers in hiring, promotions, benefits, terms, conditions, privileges, or termination on the basis of race, sex, religion, or national origin.[53] Although the law does

48. U.S. CONST. art. VI, § 2.
49. Hackworth, 5 DIGEST OF INTERNATIONAL LAW 185-86 (1943).
50. Art. 55(c).
51. G.A. Res. 217 (Dec. 10, 1948).
52. Section 2(b), 362 U.N.T.S. 31 (June 25, 1958).
53. Section 703(a), 42 U.S.C. § 2000e-2(a).

not extend to discrimination on the basis of citizenship,[54] it clearly applies to all instances of national-origin discrimination except in the rare instances where national origin is a bona fide occupational qualification.[55]

Given this broad prohibition of such discriminatory practices, foreign corporations and their United States subsidiaries are liable for discriminatory practices against a United States employee within the United States unless the definition of "employer" excludes them. No federal anti-discrimination statute mentions foreign corporations. The first extensive anti-discrimination provision, Title 42 U.S.C. section 1981, is phrased in terms of the rights of the person discriminated against to be free from discriminatory acts, without in any way describing what constitutes a discriminator.[56] Although legislation passed subsequent to section 1981 has defined "employer," none of these statutes exempt, or even mention foreign corporations. The only limitation on the application of employment-discrimination legislation to foreign corporations is that they must employ the statutory minimum number of employees, when applicable,[57] within the United States.[58] In summary, United States employment-discrimination law grants no statutory exemption to foreign corporations or their United States subsidiaries.

C. *Interpretation of Treaties and Statutes*

The fundamental rule of treaty interpretation is succinctly stated in *Asakura v. City of Seattle*.[59] Treaties must be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and

---

54. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

55. Section 703(e), 42 U.S.C. § 2000e-2(e).

56. All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. § 1981.

57. *E.g.*, an "employer" under Title VII must have a minimum of fifteen full-time employees. Section 701(b), 42 U.S.C. § 2000e(b).

58. EEOC General Counsel Opinion (July 15, 1966).

59. 265 U.S. 332 (1923).

the other favorable, the latter is preferred.[60] The rationale is that domestic courts should grant the fullest rights to treaty beneficiaries so as not to interfere with United States foreign policy. Consistent with this policy, the *Asakura* rule provides that treaties should be interpreted upon the principles which govern the interpretation of written contracts between individuals. In addition, the rule states that all parts of a treaty should receive a reasonable construction with a view to giving a fair operation to the whole.[61] This construction includes an examination of the purpose, history, practice, and circumstances of the treaty.[62]

Federal courts must consider whether, and to what extent, to defer to the State Department's interpretation of the relevant treaty. Judicial deference varies according to the subject of the State Department opinion.[63] Ordinarily, courts defer absolutely to the State Department opinion[64] on political questions such as recognition and sovereign immunity. Although the Supreme Court has not deferred to the State Department opinion in all cases, the Court has acknowledged that a contrary holding on a fundamental foreign-relations issue may interfere with the conduct of foreign relations by the executive branch.[65]

The current standard for judicial deference of United States courts to State Department treaty interpretation was articulated in *Kolovrat v. Oregon*.[66] Under this standard courts must accord "great weight" to the interpretation given to the treaty terms by the government departments that negotiate and enforce the treaty provisions.[67] In other words, the courts must interpret treaties using the basic rules of contract interpretation.[68] First, the court will examine the treaty language. If the treaty language is unclear, the court then consults the State Department opinions in order to determine the parties' intentions.[69] The courts, however,

60. *Id.* at 342.
61. Sullivan v. Kidd, 254 U.S. 433, 438-39 (1921).
62. 5 Hackworth 236-55 (1927).
63. *See* Charney, *Judicial Deference in the Submerged Lands Cases*, 7 VAND. J. TRANS'L L. 383, 385-413 (1974) [hereinafter cited as Charney].
64. *Id.* at 387-400.
65. *Id.* at 385.
66. 366 U.S. 187 (1960).
67. *Id.* at 194. The court cited to Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933).
68. 254 U.S. 433.
69. Amiable Isabell, 19 U.S. 1, 70 (1821).

give less deference to State Department interpretation in cases in which the State Department opinion limits individual rights under a treaty.[70] This implies that courts accord the State Department opinion greater weight when it liberally construes individual rights under the treaty in accordance with *Asakura*.[71]

In the interpretation of a federal statute, the primary consideration of the court is legislative intent.[72] When the language of the statute is unambiguous, the court must use the plain meaning of the statutory wording, rather than extrinsic evidence, for interpretation.[73] When the language is ambiguous, the court may examine legislative history,[74] and legislative purpose.[75] The court may also grant great deference to a "consistent and contemporaneous construction" by the enforcing agency.[76]

When an apparent conflict exists between a treaty and a statute, the court should attempt to reasonably construe the documents to avoid the conflict.[77] A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.[78] If the conflict is unavoidable, the rule is that the one later in point of time must prevail.[79] As a corollary, the Supreme Court has held that, as to a subsequently-modified treaty provision, "no person acquires any vested right to the continued operation of a treaty."[80]

---

70. Charney, *supra* note 63, at 402.

71. 265 U.S. at 342.

72. United States v. N.E. Rosenblum Truck Lines, Inc., 315 U.S. 50, 53 (1941).

73. Caminetti v. United States, 242 U.S. 470, 485 (1916); Hamilton v. Rathbone, 175 U.S. 414, 421 (1899): "The province of construction lies wholly within the domain of ambiguity."

74. Tidewater Oil Co. v. United States, 409 U.S. 151, 157 (1972). In the event of ambiguity, "it is essential that we place the words of the statute in their proper context by resorting to the legislative history."

75. United States v. American Trucking Associations, 310 U.S. 534, 543 (1939).

76. NLRB v. Boeing, 412 U.S. 67, 75 (1972). Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971), deferring to EEOC construction of Title VII.

77. Whiteman, 14 DIGEST OF INTERNATIONAL LAW 316-17 (1963).

78. Cook v. United States, 288 U.S. 102, 120 (1933).

79. 5 Hackworth 185 (1927).

80. Rainey v. United States, 232 U.S. 310, 316-17 (1914).

III. Recent Cases

A. *Linskey v. Heidelberg Eastern, Inc.: Parent Foreign Corporation as Defendant*

In *Linskey v. Heidelberg Eastern, Inc.*,[81] plaintiff was a financial officer employed by defendant Heidelberg. Heidelberg is a United States incorporated subsidiary of defendant East Asiatic Company, Inc. (EAC-American), which in turn is a United States subsidiary of defendant East Asiatic Company, Ltd., a Danish corporation[82] (EAC-Denmark). Plaintiff claimed defendants discriminatorily discharged him on the basis of age and national origin in violation of Title VII and the Age Discrimination in Employment Act of 1967 (ADEA). Defendants EAC-American and EAC-Denmark moved for dismissal or summary judgment.[83] Defendants argued first, that no claim could lie against them because they were not plaintiff's immediate employer, and second, that EAC-Denmark was exempt from the provisions of Title VII and ADEA under the United States-Denmark FCN Treaty of 1951.[84]

The 1951 United States-Denmark Treaty is similar in its terms to over thirty post-war commercial treaties now in effect.[85] The terms of the treaty allow liberal travel privileges for each party's nationals in the other's territory,[86] accord "national treatment" to each party's nationals,[87] and give "most-favored-nation" status to

---

81. 470 F. Supp. 1181.
82. 470 F. Supp. at 1182.
83. Pursuant to Fed. R. Civ. P. 12(b) and 56.
84. 12 U.S.T. 908, Oct. 1, 1951.
85. 8 U.S.C.A. § 1101 (1970) (historical note).
86. Article II(1), (2), 12 U.S.T. at 910:

1. Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and for the purpose of engaging in related commercial activities; and (b) for other purposes subject to the laws relating to the entry and sojourn of aliens. 2. Nationals of either Party, within the territories of the other Party, shall be permitted: (a) to travel therein freely, and to reside at places of their choice; (b) to enjoy liberty of conscience; (c) to hold both private and public religious services; (d) to gather and to transmit material for dissemination to the public abroad; and (e) to communicate with other persons inside and outside such territories by mail, telegraph, and other means open to general public use.

87. Article VIII(1), 12 U.S.T. at 914: "1. Nationals and companies of either

nationals and companies of each party.[88] In sum, the Treaty protects the rights of each party's nationals and companies to commercially operate without prejudice by the host country. Whether there may be an exemption from United States employment discrimination law for Danish corporations depends upon one's reading of article VII section 4 of the Treaty. This section provides that "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 specialized employees of their choice, regardless of nationality."[89] Protocol 3 of the Treaty amplifies article VII section 4 by exempting Danish alien work-permit laws and by providing that "the regulations governing employment shall be employed in a liberal foundation."[90]

In the *Linskey* litigation, the court rejected defendants' first argument that they were not plaintiff's immediate employer. The *Linskey* court defined "employer" under Title VII as "a person engaged in an industry affecting commerce . . . and any agent of

---

Party shall be accorded, within the territories of the other Party, national treatment with respect to engaging in commercial, manufacturing, processing, financial, construction, publishing, scientific, education, religious, and philanthropic activities."

88. Article V(1), 12 U.S.T. at 912:

> Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in either business or nonprofit activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

Article VI(5), 12 U.S.T. at 914:

> Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 3 of the present Article. Moreover, enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

89. 12 U.S.T. at 915.

90. *Id.*

such a person;" a "person" including one or more corporations.[91] Although acknowledging that there was a split in authority on whether a parent corporation can be a "employer,"[92] the court followed the line of cases that liberally defined "employer" to include the parent.[93] The court then found that EAC-American and EAC-Denmark, as parents of Heidelberg, could be regarded as one entity for the purposes of this action.[94] Thus, the court concluded, both entities could be held liable for employment discrimination committed by Heidelberg.[95]

The *Linskey* court also rejected defendant's argument that the treaty expressly exempted EAC-Denmark from any liability. Relying on article VII section 4, EAC-Denmark had claimed that plaintiff was "executive personnel" and therefore defendant was justified in replacing plaintiff with a Danish citizen.[96] In interpreting article VII section 4, the court reviewed the legislative history of the treaty and other treaties with similar provisions.[97] Because the legislative history of similar Haitian and Iranian treaties indicated intent to exempt only specialized employees from the host country's admission requirements, the court concluded that there was no intent to immunize foreigners from claims under the host country's employment discrimination laws.[98]

Next, the court compared article IV section 6[99] of the United

---

91. 42 U.S.C. § 2000e(a), (b).

92. Hassel v. Harmon Foods, Inc., 336 F. Supp. 432.

93. 470 F. Supp. at 1183. The court cited Baker v. Stuart Broadcasting Co., 560 F.2d 389; EEOC v. Upjohn Corp., 445 F. Supp. 635; Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978); Brennan v. Ace Hardware Corp., 362 F. Supp. 1156 (D. Neb. 1973), *aff'd*, 495 F.2d 368 (8th Cir. 1974); and Woodford v. Kinney Shoe Corp., 369 F. Supp. 911. The cited cases construed Title VII and ADEA.

94. 470 F. Supp. at 1183.

95. The motion to dismiss was denied. On the "employer" issue the court also denied the motion for summary judgment, noting the two bases on which plaintiff could establish liability. Plaintiff could either prove that the corporation was an "integrated enterprise," or that an agency existed. Because a material issue of fact remained on this issue, the motion was denied. *Id.* at 1184.

96. *Id.* at 1185.

97. *Id.* at 1186-87.

98. *Id.* at 1186.

99. "Nationals and companies of either party shall be permitted to engage, in accordance with applicable laws, accountants and other technical experts, executive personnel, attorneys, agents, and other specialized employees of their choice." 19 U.S.T. at 5849.

States-Thailand Treaty of Amity and Economic Relations (1966)[100] with article VII section 4 of the United States-Danish FCN Treaty. Because the Thai treaty was ratified three years after the passage of Title VII, the court found that the absence of discussion on the provision's effect on Title VII indicated that such a provision was not intended to exempt foreign countries and companies from the requirements of Title VII.[101] The court then retroactively applied this interpretation of the Thai provisions to the 1951 United States-Denmark Treaty and concluded that defendant was not exempt from the Title VII requirements.[102] The court held EAC-Denmark liable under Title VII, noting the exemption of the corporations of more than thirty foreign countries "would provide an unjustified loophole in Title VII enforcement."[103]

B. *Spiess v. C. Itoh Co.: United States Subsidiary as Defendant*

In *Spiess v. C. Itoh Co.*,[104] plaintiff claimed that defendant's[105] promotion practices discriminated against him on the basis of national origin in violation of section 703(a)[106] of Title VII, and 42 U.S.C. § 1981.[107] The action was brought against the United States subsidiary C. Itoh Co. (Itoh-America) of the Japanese parent corporation C. Itoh Ltd. (Itoh-Japan). On defendant's motion to dismiss[108] for failure to state a claim upon which relief could be granted, the court considered the issue of whether the 1953 FCN Treaty between the United States and Japan[109] provided United States subsidiaries of Japanese corporations the absolute right to

---

100. 19 U.S.T. 5843, May 29, 1966.

101. 470 F. Supp. at 1187.

102. In light of the added "in accordance with applicable laws" provision in the Thai treaty, the court concluded that article VII(4) in the Danish treaty was merely a vehicle for granting "treaty trader" status. *Id.*

103. *Id.*

104. 469 F. Supp. 1.

105. A New York subsidiary of a Japanese firm.

106. "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . national origin."

107. *Supra,* note 56.

108. Pursuant to Fed. R. Civ. P. 12(b).

109. 4 U.S.T. 20.

hire managerial, professional, and other specialized personnel of their choice, irrespective of United States law proscribing discrimination in employment.[110] Defendant argued that articles I, VII, and VIII interact to grant this right. Article VII authorized Japanese corporations to organize United States subsidiaries; article VIII authorized them to staff these subsidiaries with managers of their choice that they could bring into the United States pursuant to article I.[111] Article VIII, in fact, specifically provided that: 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."[112] Plaintiff re-

110. 469 F. Supp. at 2.

111. Article VII(1), 4 U.S.T. at 2069-70:

> 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 business; (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.

Article VIII, 4 U.S.T. at 2070; *see* Article I, 4 U.S.T. at 2066:

> 1. Nationals of either Party shall be permitted to enter the territory of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens.
>
> 2. Nationals of either Party, within the territories of the other Party, shall be permitted: (a) to travel therein freely, and to reside at places of their choice; (b) to enjoy liberty of conscience; (c) to hold both private and public religious services; (d) to gather and to transmit material for dissemination to the public abroad; and (e) to communicate with other persons inside and outside such territories by mail, telegraph and other means open to general public use.

112. 4 U.S.T. at 2070.

sponded that the treaty did not apply to United States subsidiaries and that the immunity of Itoh-America's parent corporation, Itoh-Japan, was immaterial. Furthermore, plaintiff claimed that even if Itoh-America had standing to raise Itoh-Japan's rights, the employment violations in question were committed by Itoh-America, not Itoh-Japan. Finally, plaintiff argued that article VIII section 1 was not designed to shield the imposition of "ultra-nationalistic policies with respect to employment" and, in any event, the United Nations Charter forbids any such discrimination.[113]

The court denied defendant's motion, holding that Itoh-America did not come within the purview of article VIII section 1 and therefore could not invoke that exemption from the operation of Title VII on its employment policies.[114] Because article VIII section 1 grants the right of choice only to "nationals and companies of either party," Itoh-America had to be a Japanese entity in order to acquire the rights of a national of one party in the territory of another. The court also considered the status of United States subsidiaries of Japanese corporations under article XXII section 3 of the treaty. Under this section, 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."[115] Finding neither of these provisions helpful to defendant's case, the court held Itoh-America subject to United States law as a United States corporation unless it could establish immunity by virtue of treaty-trader status or Protocol 2 of the treaty.

In weighing defendant's treaty-trader status argument, the court rejected the contention that State Department treaty-trader

---

113. 469 F. Supp. at 2-3.

114. United States v. R.P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1951). In its opinion denying defendant's motion to dismiss an antitrust indictment, the *Oldham* court ruled that a United States incorporated subsidiary is a domestic corporation and may not invoke its parent's treaty rights.

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

Id. at 823.

115. *Id.* at 823.

guidelines should grant a wholly-owned subsidiary the treaty-trader status of its Japanese parent. Instead, the court determined that the unambiguous definition in article XXII, section 3 precluded subsidiary immunity,[116] and therefore, United States subsidiaries should be subject to the same restrictions as other United States corporations.[117]

Article VI section 3, like article VIII section 1, refers to rights of "nationals and companies."[118] Protocol 2 of the treaty specifies that this term in article VI section 3 refers to "interests held directly or indirectly by nationals or companies of either Party," which would include a company such as Itoh-America.[119] Nevertheless, the court reasoned that because Protocol 2 did not extend to article VIII section 1, article VIII section 1 was not intended to include United States subsidiaries such as Itoh-America. Similarly, the court discounted the legislative history of article VIII section 1 because the meaning of the article is unambiguous.[120]

The court next considered whether Itoh-America had standing to invoke Itoh-Japan's treaty immunity. Adopting the two-prong test of *Association of Data Processing Service Organizations, Inc. v. Camp*,[121] the court stated that a party has standing to sue only when the claim alleges injury in fact, and the interest sought to be protected is "within the zone of interest to be protected or regulated by the [law] in question."[122] Because Itoh-Japan's article VIII section 1 immunity was "inapplicable to the hiring practices of Itoh-America,"[123] the court concluded that Itoh-America lacked standing.

In summary, the court found that Itoh-America, as a United States corporation, was not protected by article VIII section 1,

---

116. 469 F. Supp. at 6.

117. *Id.* at 6-7.

118. 4 U.S.T. at 2069.

119. 4 U.S.T. at 2082.

120. *Id.* at 7.

121. 397 U.S. 150 (1970).

122. 469 F. Supp. at 8, citing to 397 U.S. 152-53.

123. 469 F. Supp. at 8. Defendant raised as a defense the liberal standing applied to a subsidiary in *Calnetics v. Volkswagen of America*, 532 F.2d 674 (9th Cir. 1976), but the court distinguished *Calnetics* because the court order in that case would have affected the foreign parent as well as the United States subsidiary, triggering treaty protection. The court determined here that Itoh-Japan would not be similarly affected by a ruling on Itoh-America's employment practices.

and did not have standing to assert Itoh-Japan's treaty rights. Thus, Itoh-America was subject to suit for employment discrimination.[124] Upon learning of the pending *Avigliano* case and the "Marks Letter"[125] expressing a State Department opinion contrary to that of the court on the issue of United States subsidiaries,[126] the court certified the article VIII section 1 issue to the court of appeals.

C. *Avigliano v. Sumitomo-Shoje America, Inc.: United States Subsidiary as Defendant*

In *Avigliano v. Sumitomo-Shoje America, Inc.*,[127] plaintiffs, female secretarial employees, sued defendant, Sumitomo-Shoje America, (Sumitomo), an "integrated trading company" incorporated in New York as a wholly-owned subsidiary of a Japanese corporation.[128] Plaintiffs claimed that the defendant discriminated against them in promotions on the basis of sex and national origin in violation of section 703(a) of Title VII and 42 U.S.C. § 1981. Defendant moved for dismissal,[129] claiming that the 1953 United States-Japan FCN Treaty[130] insulated defendant against federal review of its employment practices.[131]

In denying defendant's motion to dismiss, the court held that Sumitomo was a United States corporation under the definition in article XXII and *United States v. R.P. Oldham Co.*[132] This determination was based on the incorporation, regardless of stockholder nationality, and on the *Spiess* court's determination that Itoh-America was a United States corporation under an "essentially identical" motion.[133]

A new element considered by the instant court was a State Department opinion (the Marks Letter) issued in response to an Equal Employment Opportunity Commission (EEOC) inquiry.[134]

---

124. 469 F. Supp. at 9.
125. Letter from Lee R. Marks, Deputy Legal Adviser, Department of State, to Abner W. Sibal, General Counsel, EEOC, Oct. 17, 1978.
126. The court cited Kolovrat v. Oregon, 366 U.S. 187 (1960).
127. 473 F. Supp. 506.
128. 473 F. Supp. at 508.
129. Pursuant to Fed. R. Civ. P. 12(b)(6).
130. 4 U.S.T. 20.
131. 473 F. Supp. at 509.
132. 152 F. Supp. 818.
133. 473 F. Supp. at 510.
134. *Supra* note 125.

The EEOC asked whether the treaty permits the United States-incorporated subsidiaries to select management personnel of their choice. The State Department's Deputy Legal Advisor responded in the Marks Letter that, under State Department interpretation, "Article VIII section 1, permits United States subsidiaries of Japanese companies to fill all of their 'executive personnel' positions with Japanese nationals admitted to this country as treaty traders. . . ."[135] The letter explicitly equated branches of Japanese corporations with United States subsidiaries in this regard, apparently contradicting *Oldham.*[136] The court recognized its duty under *Kolovrat v. Oregon*[137] to give great weight to the opinions of executive departments.[138] Because the State Department did not fully explain its position in the Marks Letter, however, the court balanced the *Spiess* court's contractual method of interpretation against the authority of the letter and concluded that the letter alone should not displace "the Treaty's clear definition of corporate nationality and the consequent unambigious meaning of Article VIII(1)."[139]

Proceeding to the defendant's treaty-trader argument based on State Department guidelines and regulations,[140] the court again followed the *Speiss* rationale, using only "the clear definitional provisions included in Article XXII(3) of the Treaty itself."[141] The motion to dismiss on the basis of the treaty was denied.[142]

IV. ANALYSIS

The three instant opinions may be analyzed on two levels: legal interpretations, whether the courts used sound legal reasoning and properly applied precedent, and policy, whether the courts

---

135. *Id.*

136. "We see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese corporation and those operating as unincorporated branches of a Japanese corporation . . ." 152 F. Supp. 818.

137. 366 U.S. 187.

138. 473 F. Supp. at 511.

139. *Id.* at 512.

140. *Supra* notes 43 and 44.

141. 473 F. Supp. at 512 (citing *Spiess*).

142. The court then dismissed plaintiff's § 1981 claim and defendant's § 706(k) counterclaim, but granted defendant leave to prove that plaintiff is making a "spurious and frivolous" claim in violation of § 705(k) and the principle of tortious legal action.

correctly weighed government policy and the practical impact of the decisions.

A. *Legal Interpretation*

These three rulings taken together restrict the exemption provisions, contrary to the rule established in *Asakura,* by subjecting a foreign parent to United States law and by precluding United States subsidiaries from effectively claiming their parents' treaty exemptions. There are several flaws in the instant court's use of rules governing the interpretation of treaties, treaty-statute conflicts, State Department opinions, and subsequent treaties. First, although the *Asakura* rule states that a treaty should be construed broadly to protect the individual rights afforded therein, these courts have focused on the wrong individual rights of the wrong party. These courts considered the rights of the employee to equal employment opportunity under United States law, rather than the right of the foreign corporation to freely choose its managers. By liberally construing the treaty provisions in favor of employee rights, the courts construed the provisions restrictively against employer rights. This is anomalous since the treaties were designed to protect the rights of foreign corporations and not their employees. Therefore the courts should have found a construction of the treaties which granted the foreign corporations and their United States subsidiaries the exemption they sought. The foreign corporations are clearly protected by the managerial-choice exemptions, and the subsidiaries are arguably protected by treaty-trader status under State Department guidelines or by the "control" of "central office" tests of nationality.

Second, even when the courts found an applicable exemption, as in *Linskey,* the courts inappropriately found a conflict with Title VII. By the rule of superseding legislation, Title VII superseded the treaty exemption. But the conflict may have been avoidable, for "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[143] Although the purpose of Title VII was to eliminate the effects of discrimination in the United States, that statement of purpose was not a clear expression of Congressional intent to abrogate relatively narrow treaty exemptions. In fact, the Congressional debates did not dis-

143. Cook v. United States, 288 U.S. 102.

cuss foreign corporations or treaties. It appears that the courts needlessly concluded that the treaties and Title VII conflict.

Third, the *Avigliano* court may not have granted sufficient deference to the State Department opinions. The *Kolovrat* holding requires courts to give great weight to State Department opinions,[144] but the *Avigliano* court declined to do so because of the State Department's failure to explain its position.[145] This is insufficient justification for discarding the State Department opinion. Article XXII is not as clear on the issue of applying the exemption to subsidiaries as the *Avigliano* court would suggest. Article XXII states only that companies will be identified with their place of incorporation; it does not say that subsidiaries may not be integrated with their parents for purposes of the exemption. Under these circumstances, a more restrained course would have been to defer to the State Department opinion. Militating in favor of such deference is the State Department's opinion which granted more liberal treaty rights under *Asakura*. On the other hand, the three instant cases involved the balancing of non-political treaty rights against domestic rights under United States law. This balancing is a decision-making process more suited for judicial than executive consideration.

The issue of the State Department letter has become moot since the Atwood Letter[146] was drafted three months after the *Avigliano* court filed its opinion. In this letter, State Department Legal Advisor James R. Atwood informed the EEOC General Counsel that State Department policy regarding United States subsidiaries would henceforth conform with the *Avigliano* decision, thus barring article VIII, section 1, protection for United States subsidiaries.[147]

A further problem lies in the *Linskey* court's casual interpretation of article VII, section 4, as merely a vehicle for treaty-trader status.[148] Assuming that each provision of a treaty has a specific and distinct purpose, this interpretation would make article VIII,

---

144. 366 U.S. 187.

145. 473 F. Supp. at 511-12.

146. Letter from James R. Atwood, Deputy Legal Adviser, Department of State, to Lutz A. Prager, Assistant General Counsel, EEOC, Sept. 11, 1979.

147. "On further reflection . . . we have established to our satisfaction that it was not the intent of the negotiations to cover locally-incorporated subsidiaries, and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of Article VIII(1) of the treaty." *Id.*

148. 470 F. Supp. at 1187.

section 1, superfluous.[149] Also, being a treaty-trader is a status independent of treaty rights.[150] The *Spiess* court did not make this mistake,[151] and the *Avigliano* court followed the *Spiess* holding.[152]

Finally, the *Linskey* court may have misused the 1965 Thai Treaty. The court cited the treaty for the proposition that the 1951 Danish treaty implicitly deferred to the 1965 Civil Rights Act. A subsequent treaty using the same language, however, would not necessarily indicate that Congress implicitly approved retroactive extension of Title VII to prior treaties. In fact, the opposite is likely in view of the Thai Treaty's express provision that "[n]ationals and companies of either party shall be permitted, *in accordance with the applicable laws,* to engage, within the territories of the other Party, accountants or other technical experts, executive personnel, attorneys, agents and other specialists of their choice."[153] (emphasis added) If the drafters of the Danish or Japanese treaties had desired mitigation of the exemptions, the applicable provision could have been included in their treaties. The absence of such language in the earlier treaties suggests that those exemptions were designed to be, and should remain, absolute under public international law.

B. *Policy Considerations*

In addition to the foregoing analytical problems in the three opinions, the decisions will have a significant impact on transnational commerce and on the United States economy. Certainly the judges were aware of this impact, as evidenced in part by the *Linskey* court's observation that to hold otherwise would leave an unjustified loophole in United States anti-discrimination enforcement.[154] Perhaps such impact should be determinative: the judiciary cannot, whatever the technical argument to the contrary,

---

149. "Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and for the purpose of engaging in related commercial activities; and (b) for other purposes subject to the laws relating to the entry and sojourn of aliens."

150. *See* text accompanying notes 43 and 44 *supra.*

151. 469 F. Supp. at 5-7.

152. 473 F. Supp. at 511-13.

153. 19 U.S.T. 5843.

154. 470 F. Supp. at 1187.

countenance large-scale violations of United States employment discrimination laws. But the opinions do not consider the countervailing policy considerations of foreign corporate organizations. The Japanese, for example, discriminate on the basis of national origin because they have different concepts of the relationship between the corporation and its employees and of group decision-making which do not lend themselves to either Western-style merit promotions or high-level participation by persons not raised in the Japanese culture.[155] This cultural distinction between United States and foreign business operations was presumably one reason for the treaty exemptions. Casting aside the exemptions suggests that the pattern of foreign direct investment in the United States may change in two ways. First, the threat to the Japanese management structure may deter further acquisition of United States subsidiaries. Second, foreign corporations are encouraged to change the structure of the business organization in the United States from subsidiaries to branch offices, since the latter are more likely to be accorded the benefit of their parents' treaty exemptions than are United States subsidiaries.[156]

V. CONCLUSION

As the *Linskey* court noted, the existence of employment exemption provisions in over thirty commercial treaties, if liberally construed, would create a loophole in Title VII enforcement.[157] Given the ever-increasing number of United States employees of foreign-owned corporations, liberal treaty constructions could decrease the scope of Title VII.

Nevertheless, the effect on international commerce must be considered. Although equal employment opportunity is a laudable goal, this goal may conflict with the values of other cultures, as it did with the culturally-based organization and management philosophy of the C. Itoh Co.[158] A more prudent approach to the problem of subsidiaries might have been to apply the NLRB integration test to United States subsidiaries so that subsidiaries that

155. Sethi and Swanson at 502-08.

156. 152 F. Supp. at 823.

157. 470 F. Supp. at 1187.

158. The C. Itoh Co. values non-merit and non-quantifiable qualities in its employees and believes that the subtleties of Japanese management can only be fully mastered by a person raised in the Japanese culture. Sethi and Swanson at 502-08.

are closely linked in management with their parent corporations would be at least partially exempt from the application of Title VII to their employment of managerial personnel. Combining different types of parent-subsidiary relationships, the *Spiess/Avigliano* reasoning oversimplifies the problem.

These courts could also have interpreted the treaties more liberally. The courts reached a hasty conclusion that the treaty provisions were unambiguous, thereby circumventing State Department opinions on the matter, as in *Avigliano*. By narrowly construing the treaties, the courts breached existing international treaty obligations.

The ultimate effect of the decisions is expansion of the jurisdiction of United States employment discrimination law both to United States subsidiaries and to foreign parent corporations whose only contact with the United States may be their interest in the subsidiary. This will afford United States residents maximum protection against infringement of their civil rights and will effect the intent of Title VII. The decisions are, however, a possible springboard for judicial infringement of State Department treaty interpretation and of United States treaty obligations.

Kevin Clarey Tyra