Employment discrimination by foreign multinational enterprises operating in the United States: Seeking sanctuary from Title VII in treaties of friendship, commerce and navigation

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EMPLOYMENT DISCRIMINATION BY FOREIGN MULTINATIONAL ENTERPRISES OPERATING IN THE UNITED STATES: SEEKING SANCTUARY FROM TITLE VII IN TREATIES OF FRIENDSHIP, COMMERCE AND NAVIGATION

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"Now our generation of Americans has been called on to continue the unending search for justice within our own borders."
President Lyndon Johnson
Address to the Nation
July 2, 1964
The Washington Post, July 3, 1964, A1.

INTRODUCTION

There are many competing considerations at work when foreign corporations do business with United States subsidiaries. This paper focuses on the legal issue of selecting individuals to run these state-side facilities, and the protection from Title VII scrutiny afforded to foreign-owned companies whose countries are signatories to Treaties of Friendship, Commerce & Navigation [FCN Treaties].[1] FCN treaties

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[1] Treaties of Friendship, Commerce & Navigation [FCN treaties] are treaties of establishment as well as providing for trade and shipping. Many of these treaties were enacted after World War II. Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L. L. 353 (1956). The scope of concern is large in that one in twenty Americans worked at foreign-owned United States companies as of 1990. "One in Twenty Americans are found to work for foreign firms," Boston Globe, p. 12 (Oct. 22, 1992).

are commercial agreements between countries that were designed to encourage international investment after World War II. They are primarily investment treaties that seek to create a favorable climate for foreign investors,[2] as well as providing for "equality of treatment as between the alien and the citizen of the country."[3] FCN treaties are "fundamentally economic and legal," as distinguished from political in nature.[4] They are "concerned with the protection of persons. . .and property," having an objective of securing "nondiscrimination, or equality of treatment."[5]

With respect to employment, FCN treaties generally contain a provision allowing free choice in selecting "accountants and other technical experts, executive personnel, attorneys, agents and other specialists," with an intent to avoid "imposition of ultra-nationalistic policies."[6] The United States insisted upon such provisions in order to ensure that American-owned or controlled companies operating abroad would not be forced to hire percentages of citizens of a host country based upon local laws. Now these provisions reciprocally are providing a grant of immunity to foreign-owned or controlled companies operating within the United States to select citizens of the foreign country to operate the United States-based facilities. Much attention has been afforded the FCN treaty with Japan, enacted in 1953, and its "of their choice" provision because it was the subject of the sole Supreme Court decision and also other lower federal court decisions.[7] How broad the discretion to select employees "of their choice" is or should be is a matter of considerable debate at this time pending explicit clarification by the Supreme Court or Congress.

In the interim, the Equal Employment Opportunity Commission [EEOC] has recently issued enforcement guidance outlining how the agency's internal personnel should apply Title VII, *inter alia*, to

[2] Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 244 (1956).

[3] *Id.* at 232.

[4] Herman Walker, Jr., *Modern Treaties of Friendship, Commerce & Navigation*, 42 MINN. L. REV. 805, 806 (1958).

[5] *Id.* at 806, 811.

[6] Walker, *supra* note 1, at 386 & n. 62. Such a provision was first included in the treaty from Uruguay. (1949) *Id.* at 386, n. 62.

[7] *See* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982). Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863. Art. VIII, para. 1, 4 U.S.T. at 2070 provides: "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." *Id. See infra* notes 9-19 and accompanying text discussing *Sumitomo*, 457 U.S. 176.

foreign employers with facilities in the United States.[8] The guidance of the EEOC is discussed below, prefaced by a brief outline of the facts and issues involved in the only Supreme Court case decided on the point to date.

THE UNITED STATES SUPREME COURT

In *Sumitomo v. Avagliano*, the Supreme Court unanimously expressed the view that a corporation based and incorporated within the United States is subject to the requirements of Title VII of the Civil Rights Act of 1964 even though the corporation is a wholly-owned subsidiary of a Japanese general trading company.[9] The plaintiffs, past and present secretarial employees of the New York corporation, alleged, *inter alia*, that respondents violated Title VII by hiring only male Japanese citizens for executive, managerial, and sales positions.[10] Respondents asserted in defense to this claim that their employment practices were exempt from Title VII scrutiny because of Article VIII (1) of the Treaty of Friendship, Commerce, and Navigation (FCN) between the United States and Japan, which allows "companies of either Party . . . to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice," with companies "defined under Article XXII (3) as "companies constituted under the applicable laws and regulations within the territories of either Party."[11] This defense rested upon the premise that Sumitomo was a Japanese company, but the Court held that Sumitomo was a United States company.[12] Thus, the rights under Article VIII (1) were not applicable because such rights are available only to companies *of Japan* operating in the United States.[13] The Court held that for a foreign company to be protected by an FCN treaty exemption, it should be a company of the foreign country.

[8] EEOC Enforcement Guidance on Seniority Systems, Extraterritoriality, and Coverage of Federal Reserve Banks [EEOC Guidance], EEOC Notice No. 915. 002 (Oct. 20, 1993), 203 Daily Lab. Rep. (BNA) D-1 (Oct. 22, 1993).

[9] 457 U.S. 176 (1982). General trading companies market large numbers of products from Japan, import raw materials and manufactured products to Japan and are involved in financing Japan's international trade. *Id.* at 178, n. 1.

[10] *Id.* at 178.

[11] *Id.* at 179. Interestingly, Japan sought to delete Article VIII (1) from the treaty but the United States insisted on the provision in order "to avoid strict percentile limitations on employment of Americans abroad and 'to prevent the imposition of ultranationalistic policies'" regarding essential personnel. 457 U.S. 176, 181, n. 6, *quoting* Walker, *supra* note 1, at 386.

[12] *Id.* at 182. This holding was based upon the company's place of incorporation, the state of New York. *Id.*

[13] *Id.* at 183 (emphasis added).

Both the United States and the Japanese governments supported this interpretation of the Treaty,[14] an interpretation upheld by the Court and which essentially permits the location of incorporation to determine national identity for the purpose of invoking the rights provided in Article VIII (1). This reading follows from a literal construction of the legal locus of a business and from the plain language and purpose of the Treaty. The intent of the Treaty was not to grant *greater* rights to foreign corporations than to domestic ones, rather, it was merely "to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."[15] Thus, the entitlement granted foreign corporations was termed "national treatment" which meant treatment terms "no less favorable" than that afforded to the Parties to the Treaty. This "national treatment" is deemed "first-class" and to be preferred even to "most-favored-nation treatment" which the Court considered less advantageous.[16]

The Supreme Court responded to the argument of the Second Circuit Court of Appeals that such a holding would result in greater rights for Japanese companies operating directly in the United States than for locally incorporated subsidiaries of Japanese companies by noting that subsidiaries, "as companies of the United States, would enjoy all of those rights [meaning rights of Japanese companies operating directly in the United States] and more. The only significant advantage branches may have over subsidiaries is that conferred by Article VIII."[17] Most significantly, the Court set out in a footnote that it expressed "no view as to whether Japanese citizenship may be a bona fide occupational qualification for certain positions or as to whether a business necessity defense may be available" since these questions were not placed before the Court.[18] The Court also refused to determine whether Sumitomo could assert its parent corporation's FCN treaty right under Article VIII (1).[19] This footnote reference

[14] *Id.*

[15] *Id.* at 188 (emphasis added).

[16] *Id.* at 188 and n. 18. *See* Madeline C. Amendola, *American Citizens as Second Class Employees: The Permissible Discrimination*, 5 CONN. J. INT'L. L. 651, at 654 (1990).

[17] 457 U.S. 176, at 189.

[18] *Id.* at 189, n. 19.

[19] *Id.* It is noteworthy that if Sumitomo were to assert its parent's FCN rights, then it would be based on the parent corporation's control of the labor relations matters of the locally incorporated subsidiary. This should mean that liability for labor relations matters should also flow beyond the assets of the subsidiary. *See generally* Eileen M. Mullen, *Note: Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Discrimination Law*, 45 STAN. L. REV.

raised an issue that obscured what could have been a bright line defining the extent of the treaty exemption, leaving open the possibility that locally incorporated subsidiaries could assert their foreign parent's treaty rights.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT GUIDANCE

Within the current national concern over trade issues is imbedded the issue of the extent to which concerns over free trade should be allowed to impact on domestic policy mandating equality in our workplace. In this context, the policies of foreign employers, particularly employers from countries which do not have diverse populations, often contradict American policies meant to afford equal employment opportunities to our diverse population. Clearly, this is an issue where our economic and foreign relations interests often clash directly with our domestic employment and public policy agenda. In attempting to tread softly on the line between astute protection of American economic and foreign relations interests and our internal mandate against employment discrimination, the EEOC guidelines rightly interpret the meager judicial guidance on this issue in a way which minimizes erosion of the rights of American workers to equality in the workplace. Generally, the EEOC affirms that "absent constraints imposed by treaty or by binding international agreement ... Title VII applies to a foreign employer when it discriminates within the United States."[20] Here, the Commission both affirms and limits the reach of Title VII and the Americans with Disabilities Act [ADA], focusing on the central issue with which the guidelines grapple: the extent to which FCN treaties can override the mandates of Title VII.[21]

That foreign employers are, in theory, expected to play by the rules of the American workplace has been established in *Ward v. Voortman* where the Court held that, absent constraints imposed by treaty or other agreement, "any company ... that elects to do business in this country falls within Title VII's reach."[22] This principle has been reaffirmed in various EEOC decisions which essentially

725, 760 (1993) (discussing loss of limited liability as disadvantage of parent corporation's admission of control over policies of subsidiary).

[20] EEOC Guidance, *supra* note 8, at D-7, *citing* Ward v. W & H Voortman, 685 F. Supp. 231, 233 (M.D. Ala. 1988).

[21] This paper will focus on the interrelationship of Title VII and FCN treaties. The EEOC Guidance and numerous cases also refer to other equal employment opportunity statutes such as the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623 (1967), and the Americans with Disabilities Act, 42 U.S.C. 12101 (1990).

[22] Ward v. W & H Voortman, 685 F. Supp. 231, 233 (M.D. Ala. 1988).

make clear that, when a foreign company does business in the United States, this company is in a position to invoke the benefits and protections of United States law, but also makes itself accountable for acts of workplace discrimination directly arising from its business in this country.[23] The primary issue here, then, is not whether foreign employers doing business in the United States must abide by our anti-discrimination statutes, but to what extent treaty provisions might mitigate their responsibilities under Title VII.

To determine the impact of international agreements on Title VII compliance, the EEOC guidelines examine the kinds of international agreements which are germane to the issue, and then outline when foreign employers are protected by such treaties and the kinds of protections these treaties are liable to offer. The kinds of international agreements which might interfere with full enforcement of Title VII include protocol agreements, multinational conventions, and treaties negotiated between the United States and another country.[24] By far, the most typical of these agreements is an FCN treaty in which two countries agree to grant legal status to each other's corporations. The purpose of such treaties, which generally confer certain reciprocal privileges and immunities on employers, is to allow companies from each signatory country to conduct business in the other country on an equal footing with that country's domestic businesses. What causes these treaties to impact on United States anti-discrimination statutes is the reality that when foreign employers do business in the United States, they often want to hire their own citizens to work in their United States-based subsidiaries. To protect the right of foreign corporations to staff facilities abroad with individuals familiar with the parent company's business and its customs and culture, most countries negotiate this right into FCN treaties with the United States.

In determining whether a respondent is protected by a treaty which permits preference for citizens of the foreign employer's nation, the first issue the EEOC considers is whether the offending employer is actually covered by a relevant treaty or agreement.[25] The Supreme Court, in *Sumitomo Shoji America, Inc. v. Avagliano*, concluded that a company's place of incorporation controls the applicability of the treaty, as confirmed by the treaty's language and negotiating history. Thus only companies incorporated in Japan are protected by the United States-Japan FCN treaty when they are charged with dis-

[23] EEOC Guidance, *supra* note 8, at D-7.
[24] *Id.* at D-8.
[25] *Id.* at 25.

criminating here. In *Sumitomo*, the Court held that the United States-Japan FCN treaty did not exempt wholly-owned subsidiaries of Japanese companies from Title VII. The *Sumitomo* Court based its finding on the language and negotiating history of the United States-Japan FCN, but refused to suggest extension of this finding to other FCN's which, although similar in language, might have different negotiating histories. The rule of the case is limited therefore, to this FCN treaty. Based upon this decision, the EEOC counsels automatic use of the place of incorporation in determining if the FCN treaty between the United States and Japan covers a Japanese company.[26]

Sumitomo is of limited assistance, however, when analyzing issues of treaty interpretation since the Court's holding addressed only one particular FCN treaty. The Seventh Circuit circumvented the *Sumitomo* holding in *Fortino v. Quasar Company*.[27] Matsushita Electric Industrial Company, Ltd. of Japan discharged American executives at Quasar, a Matsushita subsidiary, in order to replace them with Japanese executives sent from Japan.[28] The suit charged Quasar with discrimination against its American executives on the basis of their age and national origin. The Court considered whether a national origin discrimination claim was tenable when the discrimination was "in favor of foreign *citizens*" in accordance with the FCN treaty entitling companies of each nation to employ executives of their own choice in the other one.[29] The treaty thus permits discrimination on the basis of citizenship even while Title VII forbids it on the basis of national origin.[30] The two forms of discrimination are deemed discrete and separate, or rather the Seventh Circuit finds that the treaty "prevents equating the two forms."[31]

The Seventh Circuit held that, although Quasar was incorporated in the United States, to apply *Sumitomo* to this case would in effect cause the FCN treaty to be "set at naught."[32] The *Fortino* Court explained that "forbidding Quasar to give preferential treatment to the expatriate [Japanese] executives that its parent sends would have the same effect on the parent as it would have if it ran directly against the parent; it would prevent the parent from sending its own executives to manage Quasar in preference to employing American citizens in these posts."[33] The treaty-sanctioned preference for Jap-

[26] *Id.*
[27] 950 F. 2d 389 (7th Cir. 1991).
[28] *Id.* at 392.
[29] *Id.* at 391.
[30] *Id.* at 393.
[31] *Id.*
[32] *Id.*
[33] *Id.*

anese citizens would be nullified in the Court's eyes by an inference that citizenship is completely correlated to national origin.[34] The treaty prevents equating the two forms of discrimination even though they may sometimes have the same effect.[35] The Court thus allowed Quasar to assert Matsushita's treaty rights, unlike the *Sumitomo* case, because of evidence that Matsushita had dictated Quasar's conduct.[36]

Although bound in the Seventh Circuit to consider whether the parent company dictated the discriminatory behavior, the EEOC considers only place of incorporation and the principle enunciated in *Sumitomo*, in all other circuits, because the Commission disagrees with the *Fortino* holding.[37] Clearly, the Seventh Circuit's decision in *Fortino* grants a broader construction to the protections afforded by FCN's than the EEOC has been willing to grant.[38] In fact, the EEOC agrees with the Fifth Circuit's narrow construction in *Spiess v. C. Itoh & Co.*, where the Court held the Treaty was not intended "to confer immunity from the litigation process as such, certainly not to American subsidiaries of Japanese companies. . . ."[39] The Court reasoned that permitting a United States subsidiary of a Japanese corporation to assert its parent's treaty rights enables that subsidiary "to accomplish indirectly what it cannot accomplish directly" under *Sumitomo*.[40] At present, the EEOC is attempting to hold that line where legally possible, reinforcing the concept that companies incorporated in the United States can no longer be considered foreign companies and are no longer entitled to the protection of FCN's when facing Title VII charges.[41]

Even when a foreign employer doing business in the United States is clearly operating under the aegis of an FCN or other protective international agreement, there is still considerable room for disagreement between that foreign employer and the EEOC, most noticeably pertaining to which employment practices are shielded from

[34] *Id.* at 392-93.

[35] This is particularly true where Japanese citizens are chosen by Japanese parent corporations to operate subsidiaries within the United States in that Japanese citizens are almost uniformly of Japanese national origin. *See* Mullen *supra* note 19, at 765, n. 239 (discussing that 99% of population of Japan is Japanese). The Seventh Circuit also noted the homogeneity of Japan in Fortino v. Quasar, 950 F. 2d 389, 392 (7th Cir. 1991).

[36] 950 F. 2d at 393.

[37] EEOC Guidance, *supra* note 8, at D-8.

[38] *Id.*

[39] Spiess v. C. Itoh & Co., 725 F. 2d 970, 975 (1984).

[40] 725 F. 2d at 973; EEOC Guidance *supra* note 8, at D-8.

[41] EEOC Guidance, at D-8, D-9.

charges of discrimination under these treaties.[42] In general, the issue here is what positions and personnel actions are immune to application of United States anti-discrimination laws under a given treaty. As might be expected, foreign employers tend to claim protection which demands a loose construction of the relevant treaties, while the EEOC attempts to be more inclusive as to the types of positions and employment actions foreign employers are governed by notwithstanding the presence of FCN treaties.[43]

When considering which employment practices to exempt from charges of Title VII discrimination, then, the EEOC advocates careful attention to the language and negotiating history of the treaty in question.[44] The EEOC guidelines include a hypothetical example to illustrate its position on this issue. Here, the language of the illustrative FCN treaty between the United States and the Republic of Xenon states that "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."[45] Typically, Xenocorp, a company incorporated in Xenon, would attempt to claim coverage of a wide range of employment practices under this treaty. However, should someone be denied a clerical position in Xenocorp's word-processing plant in Georgia on the basis of the Charging Party's national origin and instead a Xenon national was hired, the EEOC has suggested that Xenocorp will not succeed with a defense based on the FCN treaty.[46]

The EEOC will assert that this employment decision was not protected by the treaty from charges of discrimination. The Commission's reasoning is that "the treaty's protection is limited to the selection of 'accountants and other technical experts, executive personnel, attorneys, agents and other specialists,'" and that this treaty would not shield Xenocorp from a discrimination charge involving an employment practice relating to a clerical position.[47] Clearly, Xenocorp is attempting to favor its citizens across the board, as opposed to within the already wide-ranging parameters of the FCN. Understandably, many foreign employers attempt to do this. Further, the EEOC attempts to prevent foreign employers from playing semantic games with job titles to reserve more positions for their citizens

[42] *Id.* at D-9.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*

than is permitted by treaty. In this context, the Commission suggests that the actual job title may not be determinative.[48]

When determining whether a particular employment decision is protected by a given treaty, the EEOC also suggests that one must look at the actual employment practice as it relates to actions permitted by the treaty.[49] For example, the Commission allows that a treaty which permits a foreign employer to "engage certain personnel of its choice," probably also permits this employer to fire these same personnel.[50] The EEOC's position is based on *MacNamara v. Korean Air Lines*, which held that the right to "engage executives under the United States-Korean FCN treaty includes the right to terminate current personnel and replace them with executives who share the defendant's nationality."[51] However, the EEOC makes clear that such a treaty-protected right to hire and discharge personnel would not extend to a right to engage in wage discrimination with impunity.[52] Here, the Commission is again urging a narrow reading of treaty rights, based on a strict interpretation of a given treaty.[53] In this way, the EEOC is attempting to make certain that treaties do not give foreign employers blanket immunity from compliance with all employment and labor laws beyond the exemptions provided in the FCN treaties.

CONCLUSION

> "America is woven of many strands; I would recognize them and let it so remain.... Our fate is to become one, and yet many."
>
> —Ralph Ellison
> The Invisible Man [1952], epilogue

Since the passage of the Civil Rights Act of 1991, Title VII covers discriminatory employment practices against United States citizens

[48] *Id.* Investigators directed to identify actual job functions and duties rather than allowing job titles to suffice. *Id.*

[49] *Id.* It should be noted that the citizenship protection does not extend to allow foreign companies operating in the United States "to select among American citizens on the basis of their age, race, sex, religion, or national origin." *Id.*, *citing* MacNamara v. Korean Air Lines, 863 F. 2d 1135, 1143 (3rd Cir. 1988). The *MacNamara* case is of particular import in that the United States Supreme Court denied *certiorari*, allowing the Third Circuit's decision to stand. 110 S. Ct. 349 (1989). *See* Eric Grasberger, Note, *MacNamara v. Korean Air Lines: The Best Solution to Foreign Employer Job Discrimination Under FCN Treaty Rights*, 16 N.C. J. INT'L. L. & COM. REG. 141 (1991).

[50] EEOC Guidance, *supra* note 8, at D-9.

[51] 863 F. 2d 1135, 1141-42 (3rd Cir. 91988).

[52] EEOC Guidance, at D-9.

[53] *Id.*

abroad by United States or United States-controlled employers.[54] Moreover, employment discrimination statutes regulate discrimination by foreign companies within the United States regardless of whether the charging party is a United States citizen. The extent of coverage, however, is variable, depending upon the existence and language of treaties or international agreements and their negotiating histories.

The EEOC has indicated that when processing charges it will determine the following: (1) whether the respondent/employer is protected by the treaty; (2) if so, whether the challenged employment practices are covered by the treaty; and (3) if so, the impact of the treaty on the application of Title VII. As to the first issue, *Sumitomo* instructs that as to the United States-Japan FCN treaty, only the employer's place of incorporation controlled the applicability of the treaty. Thus, only companies incorporated in Japan benefit from this FCN treaty, even when the discrimination occurs in the United States. The *Fortino* Court disagreed, concluding that a United States subsidiary of a Japanese company could assert rights under the FCN treaty as the employment practices were essentially directed by the Japanese parent. The EEOC has adopted the *Sumitomo* rule, applying it in all other circuits.

Regarding the second part of the EEOC's analysis, the answer depends largely on the language and intent of the treaty. For example, if the treaty allows discretion in hiring executive personnel of their choice, it is probable that such language includes discharge as well, but certainly does not include discrimination in pay or benefits, and so these last two practices would be actionable.

Finally, in assessing how such treaty protections impact application of Title VII, treaties and international agreements generally will control. Thus, some discriminatory conduct will be permitted to the extent that it is allowed in the treaty based upon the language and the parties' intent. The EEOC will construe conduct not covered in treaties so as to be subject to United States laws. Immunity from United States discrimination laws will be as narrow as possible, then,

[54] *Id.* at D-11. Under Section 109 of the Civil Rights Act of 1991, 42 U.S.C. 1981, Title VII only protects United States citizens employed by United States companies operating abroad where such protection does not violate the law of the host country. Even in this regard, the United States takes implicit notice of the long-held concept that the country where a person is employed has a special interest in the terms and conditions of the employment carried on therein. It seems a reciprocal expectation that foreign employers operating in the United States should abide by equal employment opportunity principles embodied in our federal law, absent clear immunity under FCN treaty.

unless the treaty explicitly exempts certain positions or practices from Title VII.