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## CHAPTER II

# A BASIC INTRODUCTION TO TRANSNATIONAL LAW

International business transactions occur within a web of legal frameworks. Some are national, like the legal systems of the parties' countries, while others are international, like the systems created by various treaties or the rules of customary international law. Yet the division between national and international should not be overstated. In fact, as we shall see, international law penetrates and influences national systems in a variety of ways, while national laws and practices shape international law. To avoid misleading distinctions, Professor Philip Jessup (later a judge on the International Court of Justice) proposed the phrase "transnational law." Jessup defined this phrase "to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories."<sup>1</sup>

In the best of all possible intellectual worlds, the student of international business transactions would already have acquired a familiarity with international law and its relation to domestic legal systems in a course like Public International Law or Transnational Law. But realism and experience suggest that this is not always the case. This chapter therefore provides a brief introduction to some of the concepts an international business lawyer must understand. We begin with a brief discussion of terminology and of the relationship between international and national law. This is followed by sections on the two principal types of international law: customary international law and treaties. A final section examines the extraterritorial reach of national legal systems and the rules of international law that may constrain them.

### A. A SKETCH OF TRANSNATIONAL LAW

At the outset, one confronts a bewildering array of terms: "transnational law," "the law of nations," "international law," "public international law," "private international law," "customary international law," "general principles of law," "conventions," "treaties," "executive agreements." Confusion may be heightened by the fact that such terms overlap and are not always used consistently.

"International law" is a relatively modern term. Coined by Jeremy Bentham in 1789, it entered into common usage only in the nineteenth century. An older term, used at the time the United States was founded, was "the law of nations." [Article I, section 8 of the U.S. Constitution](#) gives Congress the power "[t]o define and punish. . . Offenses against the Law of Nations," while the Alien Tort Statute, [28 U.S.C. § 1350](#), first passed as part of the Judiciary Act of 1789, gives the

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<sup>1</sup> Jessup, *Transnational Law* 2 (1956).

federal district courts jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” In the eighteenth century, the law of nations covered not only rules that applied between states but also maritime law, the law merchant, and the conflict of laws. Today, some of these topics have been domesticated, while new rules of international law have emerged in areas like human rights.

One may begin to understand what is meant by “international law” today by considering the directions given to the International Court of Justice by Article 38 of its Statute:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply;

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

“International conventions” refers to agreements between two or more countries, also commonly called “treaties.” Within the United States’ legal system, “treaties” refer to those agreements made with the concurrence of two-thirds of the Senate, as provided in [Article II, section 2 of the U.S. Constitution](#). The Japan-U.S. Friendship Commerce and Navigation Treaty and the United Nations Convention on Contracts for the International Sale of Goods (CISG) are two examples we shall encounter later. However, U.S. practice also recognizes international agreements known as “executive agreements,” which do not go through the Article II process but are nevertheless binding on the United States as a matter of international law. The General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA) are important examples.

Next on this list comes “international custom,” also called “customary international law.” “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” [Restatement \(Third\) of Foreign Relations Law § 102\(2\) \(1987\)](#). One may think of customary international law as unwritten law, in the sense that nations consent to it not through express agreements but tacitly through practice, though of course there is no shortage of written works expounding on the rules of customary international law. For the international business lawyer, two particularly important examples of custom are the rules governing the expropriation of foreign owned property and the rules limiting “prescriptive jurisdiction”—that is, the authority of nations to prescribe rules for particular persons or conduct, sometimes outside of their own borders.

The best evidence of customary international law is the actual practice of states. It is often convenient, however, to refer to secondary sources that have collected and examined the primary evidence, such as the writings of scholars—“publicists” in the words of Article 38(1)(d)—and the decisions of international courts and tribunals. This has long been the U.S. practice. See *United States v. Smith*, 18 U.S. 153, 160–161, 5 L.Ed. 57 (1820) (“What the law of nations . . . is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”). Note that, in keeping with the civil law tradition, international law has no system of precedent, and Article 59 of the ICJ Statute accordingly states “The decision of the Court has no binding force except between the parties and in respect of that particular case.” Nevertheless the opinions of the International Court of Justice and of other international tribunals are persuasive evidence of what customary international law is and are typically given great weight.

Customary international law must be distinguished from the “general principles of law,” to which Article 38(1)(c) refers. The idea of “general principles” refers to practices by states with respect to their internal law, as distinguished from custom which is behavior vis-à-vis other states. General principles have largely been referred to by international tribunals in relation to such issues as estoppel and other procedural matters. If national courts would estop a complainant in a given case an international court might do likewise.

Customary international law and treaties are grouped together under the heading of “public international law.” But there is also “private international law,” a phrase that is used in two distinct ways. Outside the United States, it generally refers to the rules for resolving private disputes having a significant relationship to more than one jurisdiction, what Americans call the “conflict of laws.” Although historically part of the “law of nations,” these rules are largely rules of domestic law today. Traditionally, private international law is divided into three parts. First, it deals with the question when a court can take jurisdiction over a party or property identified as “foreign.” Second, it deals with the extent to which the judgment of a court in Country A is entitled to recognition or enforcement by the courts of Country B. Third, it deals with the choice of law question—what rules of law are to be applied in resolving a transborder dispute? If the case is being tried in Country A’s courts, should that court apply its own law (the forum’s) or the law applicable where the contract was made or is to be performed? We have encountered the first two questions in Chapter I, see *supra* pp. \_\_\_–\_\_\_, and shall examine the third in Problem 1, see *infra* pp. \_\_\_–\_\_\_. “Private international law” is sometimes used in a different sense, however, to refer to the substantive rules of domestic law that govern private transactions across borders.

“Transnational law,” in Jessup’s definition, includes all of the above. The law that “regulates actions or events that transcend national frontiers” obviously includes a good deal of domestic law—from the law of contracts to antitrust law. It also includes domestic rules for mediating among national systems, that is, the rules of conflicts or of “private international law” narrowly defined. Finally, it includes rules

of “public international law,” found in treaties and in customary international law, that may limit the ways in which national governments may regulate or that may treat directly some topics usually governed by domestic law (for example, the CISG’s rules of substantive contract law).

The abilities to navigate among different systems of law and to understand the ways in which they penetrate and influence each other are among the most difficult and most important skills of an international lawyer. Nations often use their domestic experience as the basis for drafting treaties. Domestic legal systems serve as the basis for “general principles of law,” and domestic practice (if followed out of a sense of legal obligation) may contribute to the development of customary international law.

But international law also penetrates to the domestic level. International law is sometimes applied directly as a rule of decision to decide cases in U.S. courts. Under [Article III of the U.S. Constitution](#) the jurisdiction of the federal courts may extend to cases arising under treaties, and the Supremacy Clause of Article VI provides that treaties are part of the “supreme Law of the Land” binding on the judges in every state. Federal and state courts have interpreted and applied self-executing treaties like Friendship Commerce and Navigation Treaties and the CISG in a great many cases, some of which are excerpted below. See [infra](#) pp. \_\_\_–\_\_\_, \_\_\_–\_\_\_.

U.S. courts have also long applied rules of customary international law. At the turn of the twentieth century, the United States Supreme Court wrote: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.” [The Paquete Habana](#), 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900). The matter involved the right of American naval personnel to sell as lawful wartime prizes two Spanish fishing vessels they had captured in the course of the Spanish-American War. The Court investigated the practices of all the states then possessing navies and concluded that a custom of not seizing fishing vessels was in force. More recently, federal courts have applied customary international law rules prohibiting human rights abuses in cases brought under the Alien Tort Statute, a jurisdiction the Supreme Court confirmed in [Sosa v. Alvarez-Machain](#), 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004), but limited in [Kiobel v. Royal Dutch Petroleum Co.](#), 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013). Some of these cases have been brought against corporations based on their activities abroad. See [infra](#) pp. \_\_\_–\_\_\_. Occasionally, customary international law rules on expropriation have been applied directly by U.S. courts, see [Banco Nacional de Cuba v. Chase Manhattan Bank](#), 658 F.2d 875 (2d Cir. 1981), though as we shall see there are substantial barriers to such suits. See [infra](#) pp. \_\_\_–\_\_\_.

Customary international law and treaties also have an indirect influence on U.S. domestic law through the so-called Charming Betsy canon. Chief Justice Marshall wrote in [Murray v. Schooner Charming Betsy](#), 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804), that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” A more recent application of the

rule is *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953). There the Jones Act purported to apply to “any seaman who shall suffer personal injury in the course of his employment.” Noting that this language would extend to “a hand on a Chinese junk, never outside Chinese waters,” the Court decided to apply the Jones Act “only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law.” Section 114 of the Restatement (Third) of Foreign Relations Law states the presumption this way: “Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”

What if it is not fairly possible to construe a statute not to conflict with international law? Since the late nineteenth century it has been established that Congress has authority to supersede a treaty or a rule of customary international law as domestic law. See *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884). Instances of a treaty superseding an earlier statute are quite unusual, but do exist. See *Cook v. United States*, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933). This “later-in-time” rule does not apply to state law; treaties prevail over inconsistent state law regardless of timing by virtue of the Constitution’s Supremacy Clause. It is also worth noting that the later-in-time rule operates only on the level of domestic law. “That a rule of international law or of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.” *Restatement (Third) of Foreign Relations Law § 115(1)(b)* (1987).

Other countries treat the relationship between international and national law differently from the United States. In the United Kingdom, treaties (with very limited exceptions) are not binding as domestic law until incorporated by an act of Parliament. In the Netherlands, the question whether a statute or treaty prevails in the case of inconsistency is settled by *Article 94 of the Constitution*, which provides that a statute shall not be applicable if it conflicts with a treaty. In Germany, the same is true with respect to customary international law. Article 25 of the *Grundgesetz*, or Basic Law, provides: “The general rules of international law form part of federal law. They take precedence over domestic law and create rights and duties directly for the inhabitants of the federal territory.”

**Additional reading:** Jessup, *Transnational Law* (1956); Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 *Penn. St. Int’l L. Rev.* 397 (2004). For casebook coverage, see Steiner, Vagts & Koh, *Transnational Legal Problems* (1994). On the Charming Betsy canon, see Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 *Geo. L.J.* 479 (1998). On the later-in-time rule, see Vagts, *The United States and Its Treaties: Observance and Breach*, 95 *Am. J. Int’l L.* 313 (2001); Dodge, *Customary International Law, Congress and the Courts: Origins of the Later-in-Time Rule*, in *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Bekker, Dolzer & Waibel 2010). A very compact starter is Burgenthal & Murphy, *Public International Law in a Nutshell* (5th ed. 2013). The most

comprehensive modern English-language treatise is Oppenheim's *International Law* (9th ed. Jennings & Watts 1992). For a history of international law in U.S. courts, see *International Law in the U.S. Supreme Court: Continuity and Change* (Sloss, Ramsey & Dodge 2011).

## B. CUSTOMARY INTERNATIONAL LAW

Customary international law is generally thought to have two elements—"general practice" (the material element) and "acceptance as law" (the psychological element), sometimes given the Latin tag *opinio juris sive necessitatis*. Each part of the idea carries complications. How general must practice be? It is rare that one could find examples of state practice on a given issue from each of the 196 or so members of the family of nations. At times in the nineteenth century when there were fewer countries to count that might have been possible. Nowadays some of the 196 are too small to have active practices in any case. Most likely there will be actions by a handful of states and nothing to report for the others. Is that enough? Even more difficult is the case where there is a fair representation of states that have acted in one way and one or two that have adamantly and consistently denied the proposed rule and have behaved as if it did not exist. Particularly if the nay-sayers are powerful and prominent states—the only ones with substantial navies or nuclear weapons, for example—it may be futile to talk of a consensus. An international tribunal bent on achieving a particular result because of its views about justice and policy might be more ready to find adequate evidence of practice than a court bent on avoiding assuming responsibility for laying down a rule to bind reluctant countries.

And there is a basic question—what constitutes practice? The term is an expansive one, including decisions to prosecute or not prosecute criminal cases, protests against actions of other states, statutes and decrees, and judicial opinions. So disparate a variety of activities is hard to locate; life is made easier for the researcher by some states that publish their practice at regular intervals, but many states do not, and none of the repertoires of practice can be called really comprehensive. The psychological element of custom comes into play when one asks whether these practices are engaged in because the states felt that they were bound to or simply preferred to do so because of prudential considerations. Thus a state might not prosecute somebody who acted outside of its territory either because it felt that it would violate the rules if it did so or because it could not obtain jurisdiction over the intended defendant or because a trial would be too expensive or because proceeding might irritate close allies.

Customary international law rules concerning the expropriation of foreign investments have been central to international business lawyers. To the extent that investors do not feel secure against sudden governmental incursions, they will either decline to invest in a country or will do so only if they can count on a rate of return high enough to counterbalance that risk. What the rules of customary international law concerning expropriation are was a subject of considerable controversy during the twentieth century. The Permanent Court of International Justice noted in 1928 that expropriations required "the payment of fair compensation." *The Factory at Chorzów (Merits)*, P.C.I.J., Ser. A, No.

17, at 46 (1928). In 1938 the United States and Mexico differed dramatically over the compensation customary international law would require for Mexico's expropriation of American-owned agricultural lands. U.S. Secretary of State Cordell Hull wrote that "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore"—the so-called Hull Doctrine—while Mexico maintained that only national treatment was required "for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land."<sup>2</sup>

The growing number of "Third World" states used the United Nations General Assembly to express their views in the 1960s and 70s. General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources declared in 1962 that the expropriation of natural resources required "appropriate compensation . . . in accordance with international law." (The United States voted in favor of the Resolution after declaring that "appropriate" was the equivalent of "prompt, adequate, and effective.") In 1974, Resolution 3281, The Charter of Economic Rights and Duties of States, repeated the "appropriate compensation" standard, but without reference to international law, and declared that "[i]n any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals."

Surveying the legal landscape in 1986, the Restatement (Third) of Foreign Relations Law summarized the rules of customary international law as follows:

**§ 712. State Responsibility for Economic Injury to Nationals of Other States**

A state is responsible under international law for injury resulting from:

(1) a taking by the state of the property of a national of another state that

(a) is not for a public purpose, or

(b) is discriminatory, or

(c) is not accompanied by provision for just compensation;

For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national;

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In recent years, rules governing expropriation have been incorporated in Bilateral Investment Treaties and Free Trade Agreements. See *infra* pp. \_\_\_–\_\_\_. Such treaties have also allowed investors to bring expropriation claims directly against host

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<sup>2</sup> 3 Hackworth, Digest of International Law 655–61 (1942).

governments before panels of arbitrators. Earlier attempts to bring suit for expropriation under customary international law in U.S. courts faced substantial obstacles, like the act of state doctrine discussed in the following case.

### **Banco Nacional de Cuba v. Sabbatino**

Supreme Court of the United States, 1964.  
376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804.

[In February and July 1960, an American company Farr, Whitlock & Co. contracted to buy sugar from a subsidiary of Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.), a Cuban company principally owned by American investors. In August, Cuba expropriated C.A.V., and to obtain the release of the sugar Farr Whitlock entered new contracts with an instrumentality of the Cuban government. Both C.A.V. and Cuba subsequently claimed the right to payment for the sugar. Banco Nacional de Cuba brought suit for the proceeds in U.S. district court, which held that the expropriation violated customary international law because it was retaliatory, discriminatory, and failed to provide adequate compensation. The Second Circuit affirmed. The Supreme Court granted certiorari and reversed. After concluding that Cuba's status as an unfriendly power did not bar it from suing in U.S. courts, Justice Harlan turned to the act of state doctrine.]

#### IV

The classic American statement of the act of state doctrine . . . is found in *Underhill v. Hernandez*, 168 U.S. 250, p. 252, 18 S.Ct. 83, at p. 84, 42 L.Ed. 456, where Chief Justice Fuller said for a unanimous Court:

“Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.”

Following this precept the Court in that case refused to inquire into acts of Hernandez, a revolutionary Venezuelan military commander whose government had been later recognized by the United States, which were made the basis of a damage action in this country by Underhill, an American citizen, who claimed that he had had unlawfully assaulted, coerced, and detained in Venezuela by Hernandez.

None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from Underhill. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826; *Oetjen v. Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726; *Ricaud v. American Metal Co.*, 246 U.S. 304, 38 S.Ct. 312, 62 L.Ed. 733; *Shapleigh v. Mier*, 299 U.S. 468, 57 S.Ct. 261, 81 L.Ed. 355; *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134; *United States v. Pink*, 315



## C. THE LAW OF TREATIES

The likelihood of a private lawyer being concerned with a question of treaty law is much higher than with respect to customary rules. In the absence of international institutions with legislative functions, the treaty is effectively the only way in which rules can be generated to keep up with the variety and complexity of transnational economic activity. There is, of necessity, an international law underlying that treaty structure. That body of rules, now codified in the Vienna Convention on the Law of Treaties,<sup>13</sup> addresses such questions as the objections to the validity of a treaty on grounds such as fraud, mistake, or coercion, the rights of states not parties to a treaty, the effect on rights under a treaty of subsequent unforeseen events, the rights of the state parties to a treaty to denounce it, and so forth. These are questions that private lawyers are almost certain not to encounter in practice. The question whether, for example, the United States is no longer bound by a treaty because of changed circumstances (*rebus sic stantibus* is the international law phrase) cannot be raised by a private party but only by authority of the President.

What is important for the private practitioner is the way in which a treaty becomes imbedded in the law of the United States—or of a foreign country. First of all one has to absorb a distinction that has been important in United States practice although it has no counterpart in the outside world. That is the distinction between treaties and executive agreements. From the point of view of foreign legal systems there is no distinction between the two—they all are commonly referred to as treaties. In the United States we are familiar with the treaty in the sense of an agreement that after being negotiated by the President comes into effect after receiving the consent of two thirds of the Senate. Alongside the “treaty” in the sense of [Article II of the Constitution](#) has come to flourish the executive agreement. In fact in numerical terms the executive agreement is now by far the commoner way of dealing with an international problem. The category “executive agreement” in turn is divided into three subcategories. There is the legislative-executive agreement in which Congress, acting through a simple majority of both its houses, authorizes the President to enter into an agreement or agreements or else approves it after the President has acted. There is the sole executive agreement in which the President acts on the basis of powers given that office directly by the Constitution—usually commander-in-chief powers. Finally there are a few cases in which a treaty contains authorization for the President to fill in details. There have been few cases in which either of the latter two types of agreements have affected private rights. But there are many cases in which private rights are affected by legislative-executive agreements. Most conspicuous in this regard have been agreements on trade, such as the North American Free Trade Agreement (NAFTA) and the Uruguay Round agreements revising the General Agreement on Tariffs and Trade (GATT), both of which were approved by Congress as legislative-executive agreement. The fact that NAFTA did not pass the Senate by a two-thirds majority reawakened interest in the question

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<sup>13</sup> 1155 U.N.T.S. 331. The United States has never ratified the Convention, but has stated that it regards it as codifying the customary rules on treaties. See Restatement (Third) of Foreign Relations Law, Part III, Introductory Note (1987).

whether legislative-executive agreements are constitutional.<sup>14</sup> The U.S. Court of Appeals for the Eleventh Circuit held that this was a nonjusticiable political question. *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir.), cert. denied 534 U.S. 1039, 122 S.Ct. 613, 151 L.Ed.2d 536 (2001).

Then one confronts the question of the internal effect of a treaty or an executive agreement, which includes the extent to which a private person can rely on it as a party in a court proceeding. The U.S. Constitution in Article VI says quite simply that treaties, like statutes, “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Despite that straightforward assertion, the U.S. Supreme Court has held since *Foster v. Neilson*, 27 U.S. 253, 7 L.Ed. 415 (1829), that some treaties (or portions thereof) are non-self-executing and cannot be enforced in court until implementing legislation has been enacted. The Supreme Court reaffirmed that principle in *Medellín v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008), holding that Article 94 of the U.N. Charter—under which each Member of the United Nations “undertakes to comply” with decisions of the ICJ—was not self-executing and that ICJ decisions were therefore not enforceable in U.S. courts without an act of Congress. On the other hand, the Court noted that a number of Friendship, Commerce, and Navigation Treaties are self-executing. “Our cases simply require courts to decide whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.” *Id.* at 521, 128 S.Ct. at 1365–66. Since *Medellín*, the Senate has adopted a practice of declaring whether a treaty is self-executing in its resolution of advice and consent. See, e.g., Extradition Treaties with the European Union, S. Exec. Rep. No. 110–12, at 9–10 (2008).

Sometimes the statute executing a treaty is a long and detailed separate piece of legislation, as in the case of the statute bringing into effect the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. §§ 201–208). Sometimes it is terse and sweeping, as in the case of § 894(a)(1) of the *Internal Revenue Code* that makes effective a large array of different income tax treaties by simply saying that “the provisions of this title shall be applied . . . with due regard to any treaty obligation of the United States.” Other provisions of law executing treaties are buried in statutes of a more general character. For example, the United States conformed its rules on patents to the TRIPS Agreement by amending the Patent Law, 35 U.S.C. § 154, to provide for the life of a patent being 20 years from the date of filing rather than 17 years from the date of grant.

Occasionally, Congress specifies that what otherwise might be self-executing provisions of an international agreement cannot be enforced in court by private parties. NAFTA Article 1102, for example, provides for national treatment of foreign investors from Canada and Mexico. Congress, however, provided in NAFTA’s implementing legislation that

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<sup>14</sup> See Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995); Ackerman & Golove, *Is NAFTA Constitutional?* 108 Harv. L. Rev. 799 (1995).

“[n]o person other than the United States . . . shall have any cause of action or defense” under NAFTA or may challenge any action or inaction of the United States, a state, or a subdivision of a state “on the ground that such action or inaction is inconsistent with” NAFTA. 19 U.S.C. § 3312(c). Cf. *Asakura v. City of Seattle*, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041 (1924) (holding that national-treatment provision in U.S. treaty with Japan “operates of itself without the aid of any legislation”). The Senate has tried to achieve the same result with respect to Bilateral Investment Treaties after Medellín by giving its advice and consent subject to the declaration that only certain provisions are self-executing and that none confers a private right of action. See Investment Treaty with Rwanda, Treaty Doc. 110–23, at 13 (2010).

In actual practice the question that is most likely to involve the private practitioner is that of interpretation. What does the agreement mean? Much of the time of every practitioner is expended on efforts to work out how a statute or a regulation should be construed. The focus here must be on differences between modes of interpretation applied to treaties and those used in approaching domestic documents. One difference is a supposed need to construe treaties literally. Treaties are characteristically hammered out by diplomats and lawyers in rather formal processes and the results should be given their stated meaning. It may be appropriate for a national court construing its own legislation to inject into the process its own ideas about policy and its own sense of the general background from which the statute arose. Such approaches are dangerous in regard to treaties because they could lead to divergent interpretations by different national courts that would cause confusion and charges of treaty violation. For example, some American courts approached the task of applying provisions of the Warsaw Convention limiting the rights of passengers with a general pro-plaintiff predisposition that was not shared in countries where the damage limitations in the Convention were viewed as consistent with local practice in other cases.

We then have a special set of questions about the use of the treaty equivalents of legislative history. These are generally referred to by their French name—*travaux préparatoires*. The use of such history in statutory construction has been a source of division between the justices of the Supreme Court in recent years, and that controversy has lapped over into the question of treaty interpretation. Note that the sources of information about the way in which a treaty developed are different from those surrounding a statute. There are, first of all, some records of the negotiations between the parties. In the case of bilateral agreements these are apt to be modest in scope. But in the case of multilateral conventions they can be bulky and detailed. Such a convention may emerge from the processes of the International Law Commission. That body will approach the task of drafting a convention on a given topic by assigning the project to a reporter who presents a draft backed by an explanatory report. That draft is debated in the Commission, the members of which are supposed to be experts in international law; drafts are usually extensively revised. It may then be taken up by a diplomatic convention that debates the draft article by article. In the reports and the stenographic debates one can get an extensive and detailed picture of the views of the different governments

involved and the degree to which one view or the other prevailed on debated questions. It is generally agreed that such materials may be used to interpret treaties where the text leaves one in doubt.

There has been some controversy about the use of internal U.S. legislative history in treaty interpretation. A treaty in the Article II sense is transmitted by the President to the Senate for its advice and consent. It is accompanied by a report which seeks to explain what the purpose of the agreement is and what its principal provisions mean. The Senate Foreign Relations Committee may then hold hearings on the document and may issue a report that accompanies it to the floor of the Senate. Sometimes the Senate debates the treaty before it gives its consent—it may also attach reservations or understandings that affect the treaty's meaning. It has been asserted that it is unfair to the other party or parties to the convention to apply to an arrangement with them records of deliberations that are strictly internal to the United States.

Finally, there is an issue of the weight to be given to interpretations by the executive branch. There are special factors to be taken into account in this calculation, such as the desirability of keeping consistent the positions the United States takes in its external representations with respect to a treaty and in its internal application. Section 326 of the Restatement (Third) of Foreign Relations says the President has authority to determine the interpretation of a treaty to be asserted by the United States in its relations with other nations. With respect to the effect of treaties as law in the United States, courts “have final authority to interpret an international agreement . . . , but will give great weight to an interpretation made by the Executive Branch.”

The following case illustrates a number of questions of the methodology of treaty interpretation in a context that significantly affected business interests.

### **Sumitomo Shoji America, Inc. v. Avagliano**

Supreme Court of the United States, 1982.  
457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765.

[Plaintiffs were past and present secretarial employees of Sumitomo Shoji America, Inc. (Sumitomo), a New York corporation and wholly owned subsidiary of Sumitomo Shoji Kabushiki Kaisha, a Japanese company. All of the plaintiffs were United States citizens, except for one who was a citizen of Japan. They brought a class action claiming that Sumitomo's alleged practice of hiring only male Japanese citizens to fill executive, managerial and sales positions violated *inter alia* Title VII of the Civil Rights Act of 1964, which makes it unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.” Sumitomo argued that its employment practices were protected under the 1953 Treaty of Friendship Commerce and Navigation between the United States and Japan. After stating the facts, Chief Justice Burger continued.]

\* \* \*

Interpretation of the Friendship, Commerce and Navigation Treaty between Japan and the United States must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless “application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.” *Maximov v. United States*, 373 U.S. 49, 54, 83 S.Ct. 1054, 1057, 10 L.Ed.2d 184 (1963). See also *The Amiable Isabella*, 6 Wheat. (19 U.S.) 1, 72, 5 L.Ed. 191 (1821).

Article VIII(1) of the Treaty provides in pertinent part:

“[C]ompanies 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.” (Emphasis added.)<sup>16</sup>

Clearly Article VIII(1) only applies to companies of one of the Treaty countries operating in the other country. Sumitomo contends that it is a company of Japan, and that Article VIII(1) of the Treaty grants it very broad discretion to fill its executive, managerial and sales positions exclusively with male Japanese citizens.

Article VIII(1) does not define any of its terms; the definitional section of the Treaty is contained in Article XXII. Article XXII(3) provides:

“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.” (Emphasis added.)

Sumitomo is “constituted under the applicable laws and regulations” of New York; based on Article XXII(3), it is a company of the United States, not a company of Japan. As a company of the United States operating in the United States, under the literal language of Article XXII(3) of the Treaty, Sumitomo cannot invoke the rights provided in Article VIII(1), which are available only to companies of Japan operating in

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<sup>16</sup> Similar provisions are contained in the Friendship, Commerce and Navigation Treaties between the United States and other countries. . . .

These provisions were apparently included at the insistence of the United States; in fact, other countries, including Japan, unsuccessfully fought for their deletion. . . .

According to Herman Walker, Jr., who at the time of the drafting of the Treaty served as Adviser on Commercial Treaties at the State Department, Article VIII(1) and the comparable provisions of other treaties were intended to avoid the effect of strict percentile limitations on the employment of Americans abroad and “to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel.” *Walker, Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int’l L. 373, 386 (1956); *Walker, Treaties for the Encouragement and Protection of Foreign Investment; Present United States Practice*, 5 Am. J. Comp. L. 229, 234 (1956). . . .

the United States and to companies of the United States operating in Japan.

The Governments of Japan and the United States support this interpretation of the Treaty. Both the Ministry of Foreign Affairs of Japan and the United States Department of State agree that a United States corporation, even when wholly owned by a Japanese company, is not a company of Japan under the Treaty and is therefore not covered by Article VIII(1). The Ministry of Foreign Affairs stated its position to the American Embassy in Tokyo with reference to this case:

“The Ministry of Foreign Affairs, as the Office of [the Government of Japan] responsible for the interpretation of the [Friendship, Commerce and Navigation] Treaty, reiterates its view concerning the application of Article 8, Paragraph 1 of the Treaty: 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 incorporated under the law of New York is not covered by Article 8 Paragraph 1 when it operates in the United States.”

The United States Department of State also maintains that Article VIII(1) rights do not apply to locally incorporated subsidiaries. Although not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiating and enforcement is entitled to great weight. [Kolovrat v. Oregon, 366 U.S. 187, 194, 81 S.Ct. 922, 926, 6 L.Ed.2d 218 \(1961\)](#).

Our role is limited to giving effect to the intent of the Treaty 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.

### III

Sumitomo maintains that although the literal language of the Treaty supports the contrary interpretation, the intent of Japan and the United States was to cover subsidiaries regardless of their place of incorporation. We disagree.

Contrary to the view of the Court of Appeals and the claims of Sumitomo, adherence to the language of the Treaty would not “overlook the purpose of the Treaty.” [638 F.2d at 556](#). The Friendship, Commerce and Navigation Treaty between Japan and the United States is but one of a series of similar commercial agreements negotiated after World War II. The primary purpose of the corporation provisions of the Treaties was to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms. Although the United States negotiated commercial treaties as early as 1778, and thereafter

throughout the 19th and 20th centuries, these early commercial treaties were primarily concerned with the trade and shipping rights of individuals. Until the 20th century, international commerce was much more an individual than a corporate affair.

As corporate involvement in international trade expanded in this century, old commercial treaties became outmoded. Because “corporation[s] can have no legal existence out of the boundaries of the sovereignty by which [they are] created,” [Bank of Augusta v. Earle](#), 13 Peters (38 U.S.) 519, 588, 10 L.Ed. 274 (1839), it became necessary to negotiate new treaties granting corporations legal status and the right to function abroad. A series of treaties negotiated before World War II gave corporations legal status and access to foreign courts, but it was not until the postwar Friendship, Commerce and Navigation Treaties that United States corporations gained the right to conduct business in other countries. The purpose of the treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.

The treaties accomplished their purpose by granting foreign corporations “national treatment” in most respects and by allowing foreign individuals and companies to form locally-incorporated subsidiaries. These local subsidiaries are considered for purpose of the Treaty to be companies of the country in which they are incorporated; they are entitled to the rights, and subject to the responsibilities of other domestic corporations. By treating these subsidiaries as domestic companies, the purpose of the Treaty provisions—to assure that corporations of one treaty party have the right to conduct business within the territory of the other party without suffering discrimination as an alien entity—is fully met.

Nor can we agree with the Court of Appeals view that literal interpretation of the Treaty would create a “crazy-quilt pattern” in which the rights of branches of Japanese companies operating directly in the United States would be greatly superior to the right of locally incorporated subsidiaries of Japanese companies. [638 F.2d at 556](#). The Court of Appeals maintained that if such subsidiaries were not considered companies of Japan under the Treaty, they, unlike branch offices of Japanese corporations, would be denied access to the legal system, would be left unprotected against unlawful entry and molestation, and would be unable to dispose of property, obtain patents, engage in importation and exportation, or make payments, remittances and transfers of funds. [638 F.2d at 556](#). That this is not the case is obvious; the subsidiaries, as companies of the United States, would enjoy all of those rights and more. The only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1).

## IV

We are persuaded, as both signatories agree, that under the literal language of Article XXII(3) of the Treaty, Sumitomo is a company of the United States; we discern no reason to depart from the plain meaning of the Treaty language. Accordingly, we hold that Sumitomo is not a company of Japan and is thus not covered by Article VIII(1) of the Treaty.<sup>17</sup> The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

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In 1987 Sumitomo settled this action, at a reported cost of \$2.8 million including pay increases for class members and educational expenses to prepare them for promotion. See BNA Corporate Counsel Report, Jan. 21, 1987, p. 5.

Despite the broad “of their choice” language of the Japan-U.S. FCN treaty and similar treaties with other countries, Court of Appeals decisions after Sumitomo have tended to read such provisions to allow only discrimination based on citizenship, which Title VII and state antidiscrimination laws generally do not prohibit. The U.S. State Department has argued in favor of this interpretation. Courts adopting it have relied upon the apparent purpose of these provisions to avoid foreign laws requiring American companies to hire a certain percentage of host country nationals and upon representations made to the Senate during ratification. See, e.g., [Wickes v. Olympic Airways](#), 745 F.2d 363 (6th Cir. 1984); [MacNamara v. Korean Airlines](#), 863 F.2d 1135 (3d Cir. 1988), cert. denied, 493 U.S. 944, 110 S.Ct. 349, 107 L.Ed.2d 337 (1989); [Ventress v. Japan Airlines](#), 486 F.3d 1111 (9th Cir. 2007). More recent U.S. treaties have focused specifically on prohibiting requirements to “appoint to senior management positions individuals of any particular nationality.” NAFTA Art. 1107(1); see also 2012 U.S. Model Bilateral Investment Treaty Art. 9(1).

Limiting the employment rights granted by these treaties to citizenship discrimination has reduced the potential for conflict with Title VII, since the Supreme Court has held that Title VII does not prohibit discrimination on the basis of citizenship. See [Espinoza v. Farah Manufacturing Co.](#), 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). On the other hand, Title VII does prohibit discrimination on the basis of “national origin” and would reach citizenship discrimination “whenever it has the purpose or effect of discriminating on the basis of

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<sup>17</sup> We express no view as to whether Japanese citizenship may be a bona fide occupational qualification for certain positions at Sumitomo or as to whether a business necessity defense may be available. 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 that country. However, the Court of Appeals found the evidentiary record insufficient to determine whether Japanese citizenship was a bona fide occupational qualification for any of Sumitomo’s positions within the reach of Article VIII(1). Nor did it discuss the bona fide occupational qualification exception in relation to respondents’ sex discrimination claim or the possibility of a business necessity defense. Whether Sumitomo can support its assertion of a bona fide occupational qualification or a business necessity defense is not before us. . . .

We also express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent.



national origin.” *Id.* at 92, 94 S.Ct. at 338. Faced with this possible conflict, the Courts of Appeals have tended to resolve it in favor of the treaties. See *MacNamara*, 863 F.2d at 1147–48; *Fortino v. Quasar Co.*, 950 F.2d 389, 392–93 (7th Cir. 1991).

Sumitomo’s final footnote left open the question whether an American subsidiary might assert the treaty rights of its foreign parent. Some Courts of Appeals have answered this question in the affirmative, at least where the foreign parent “dictated the subsidiary’s discriminatory conduct,” *Fortino*, 950 F.2d at 393, or “made all the allegedly discriminatory decisions.” *Papila v. Uniden America Corp.*, 51 F.3d 54 (5th Cir.), cert. denied, 516 U.S. 868, 116 S.Ct. 187, 133 L.Ed.2d 124 (1995). But another court has pointed out that this turns Sumitomo “on its head,” since “[t]he parent company will *always* have the power to control the management of its subsidiary.” “It will be a rare case in which the subsidiary cannot produce evidence that its foreign parent ‘dictated’ the employment decision in question.” *Kirmse v. Hotel Nikko of San Francisco, Inc.*, 51 Cal. App. 4th 311, 319–20, 59 Cal. Rptr. 2d 96, 101 (Cal. Ct. App. 1996).

Can an employee’s race, color, religion, sex, or national origin ever constitute a bona fide occupational qualification (BFOQ)? Sumitomo also left this question open in its final footnote. In *Kern v. Dynalelectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), the court held that conversion to Islam was a BFOQ for helicopter pilots flying to Mecca because non-Muslims entering Mecca were punished with death.

### QUESTIONS

(1) Upon what factors does the Sumitomo Court rely to interpret the treaty? How does it weight them to the extent they may be inconsistent? Looking to those same factors, have the Courts of Appeals been correct to hold that the protection afforded by such treaties is limited to citizenship discrimination?

(2) Does the distinction between the treatment of branches and subsidiaries make sense in this context? When, if ever, should a subsidiary be allowed to assert the treaty rights of its foreign parent?

(3) Assume that an American branch of a Japanese company discriminates on the basis of citizenship and is alleged to have thereby violated Title VII’s prohibition against national-origin discrimination. How should a court resolve the conflict between the treaty and Title VII? How should a court resolve a conflict between the treaty and state law prohibiting discrimination on the basis of national origin or citizenship?

**Additional reading:** Ackerman & Golove, *Is NAFTA Constitutional?* 108 *Harv. L. Rev.* 799 (1995); Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 *Harv. Int’l L.J.* 135 (2012); Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 *Am. J. Int’l L.* 695 (1995); Vagts, *Treaty Interpretation and the New American Ways of Law Reading*, 4 *Eur. J. Int. L.* 472 (1993).