8-9-1979

Opinion

Lewis M. Steel '63

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al.,	:	
Plaintiffs,	:	77 Civ. 5641 (CHT)
-against-	:	
SUMITOMO SHOJI AMERICA, INC.,	:	
Defendant.	:	OPINION

APPEARANCES

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TENNEY, J.

In this action for redress of alleged employment discrimination both parties have filed applications directed at the Court's Opinion and Order dated June 5, 1979 which denied dismissal of the instant Complaint and certain of the counterclaims and dismissed one counterclaim and one jurisdictional base asserted by the plaintiffs. The defendant seeks an immediate appeal under 28 U.S.C. § 1292(b), asking the Court to certify for appellate review the primary question posed in its original motion to dismiss; that is, whether the defendant is exempted under the terms of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan ("the Treaty") from sanctions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") against certain allegedly discriminatory employment practices. The plaintiffs also make applications to the Court, first for a certification under section 1292(b) of the question whether their allegation of sex and nationality discrimination constitutes a valid cause of action under 42 U.S.C. § 1981, and second for reargument of this Court's refusal to dismiss certain of defendant's counterclaims sounding in common law tort. The Court finds that only the question of the relationship between the Treaty and the civil rights law is suitable for section 1292(b) treatment. Therefore, the certification will be granted

only as to that question and all other applications will be denied.

Section 1292(b) requires that a district judge

> making in a civil action an order not otherwise appealable under [section 1292 who is of] the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . shall so state in writing in such order.

The question whether defendant's employment practices are insulated from redress through civil rights actions is a pure question of law. If defendant is protected by the Treaty, it is not answerable in court to these claims of discrimination. If not, then its practices are exposed to judicial evaluation. Since there is a dearth of authority on the matter, this Court deems it prudent to follow the lead of Judge Bue of the United States District Court for the Southern District of Texas, who in Spiess v. C. Itoh & Co. (America), Inc., 469 F. Supp. 1 (S.D. Tex. 1979), faced almost the identical question as is here posed and certified the following question to the United States Court of Appeals for the Fifth Circuit:

> Does the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan provide American subsidiaries of Japanese corporations with the absolute right to hire managerial, professional or other specialized personnel of their choice, irrespective of American law proscribing racial discrimination in employment?

Id. at 10. Although in contrast to Spiess there has been no class certification yet in the case at bar, the Court expects that the litigation will be sufficiently complicated that it would be a waste of judicial time to try it with the novel jurisdictional question in limbo. Moreover, because the Court studied and rejected a Department of State opinion letter which construed the Treaty favorably to the defendant, see Opinion and Order at 9; cf. Spiess v. C. Itoh & Co. (America), Inc., supra; the instant matter now reflects the tension generated by the principle that "[c]ourts are to give substantial weight to the construction . . . which is placed upon the treaty by the political branch" although "they are not required to abdicate what is basically a judicial function." Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne, 242 F. Supp. 129, 136 (E.D.N.Y. 1965). Therefore, the Court deems it wise to seek the instruction of the United States Court of Appeals for the Second Circuit and certifies that the interpretation of the Treaty poses a controlling question of law upon which the Court and the Department of State differ, the resolution of which will materially advance the prosecution of this case.

As for plaintiffs' application to certify the question whether 42 U.S.C. § 1981 applies to these civil rights claims, the Court seeks no reason to grant interlocutory appeal. Any reversal on the section 1981 issue could not be made in a

vacuum and construction of the Treaty could not be avoided in reaching that decision. Therefore, immediate appeal on section 1981 would be a superfluity, for if the court of appeals finds that the Treaty does not immunize the defendant from employment discrimination suits then the Title VII avenue will be adequate for plaintiffs to press their claims, and if the Treaty is found to protect the defendant then such immunization will be invoked whether the civil rights claim is filed pursuant to Title VII or to section 1981.

Finally, the plaintiffs again ask for dismissal of counterclaims 2, 3, and 4, seeking under Rule 9(m) of the General Rules of the United States District Court for the Southern District of New York ("General Rules") to convince the Court that its refusal to dismiss those counterclaims was error. Although the Court sees nothing in plaintiffs' Memorandum of Law on Reargument that might be called "matters or controlling decisions which counsel believes the court has overlooked," General Rule 9(m), in a Memorandum of Law submitted by the Equal Employment Opportunity Commission ("EEOC") as amicus curiae the agency argues that Harris v. Steinem, 571 F.2d 119 (2d Cir. 1978), controls here, and in their Reply Memorandum of Law the plaintiffs adopt the EEOC position. The Court does not agree that Harris is dispositive. There the complaint alleged a violation of federal securities law, and the defendants counterclaimed for libel purportedly committed in the complaint itself and on sub-

sequent occasions in published statements by the plaintiff. The district court found that the libel charge was a compulsory counterclaim, was therefore ancillary to the court's federal question jurisdiction over the complaint, and consequently was jurisdictionally valid despite the fact that it had no independent base of federal jurisdiction. The court of appeals disagreed, holding that the libel charge was not a compulsory counterclaim measured by the rule that analyzed "whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." Id. at 123. Contrasting the issues to be proved in a securities case with those to be proved in libel, the Harris court found no overlap and called the logical relationship between complaint and counterclaim "at best attenuated," id. at 124, and dismissed for lack of jurisdiction.

This Court sees a distinction between, on the one hand, facts involving a sale of stock and a subsequent, purportedly libelous statement and, on the other hand, a claim of employment discrimination accompanied by an allegation of continuing retaliatory activity provoked by the policy complained of. In this case the defendant claims that

> prior to commencing [this action] . . . [the plaintiffs] entered into a conspiracy to coerce Sumitomo to accede to plaintiffs' unreasonable demands for assignment to work for which they were not qualified and for payment of additional

> compensation to which they were not entitled, and to retaliate against Sumitomo for its refusal to make such assignments or pay such additional compensation, by injuring Sumitomo in its business and trade.

Answer and Counterclaim, ¶ 19. Defendant goes on to complain that "as part of carrying out their conspiracy, plaintiffs in bad faith vexatiously, willfully and wrongfully commenced sham administrative proceedings before the Division of Human Rights of the Executive Department of the State of New York, and before the United States Equal Employment Opportunity Commission." Id., ¶ 20. These are allegations that state a claim for malicious abuse of process, not--as in Harris--malicious prosecution. A counterclaim for malicious prosecution would be barred regardless of its compulsory or permissive nature because the tort is not actionable until the termination of the main action favorably to the defendant. By contrast, the tort of malicious abuse of process may be pleaded at any time because it does not rest on the course of a court proceeding. Moreover, the Harris court found that its counterclaim fell "within the well-established narrow line of decisions involving counterclaims based solely on the filing of the main complaint and allegedly libelous publication thereafter." Id. at 125. There is no such special niche for these counterclaims. They purport to involve pre-suit harassment by the plaintiffs and, beyond complaining of the motive behind bringing the instant case, the defendant complains of previous actions before governmental agencies brought

for allegedly coersive purposes. Intimating no judgment on the merits of the counterclaims the Court adheres to its original finding that they have a logical relationship to the main action and meet the threshold test for stating a valid claim upon which relief can be granted.

The defendant's question concerning the relationship of Title VII to the Treaty is hereby certified; all other applications are denied.

So ordered.

Dated: New York, New York
August 9, 1979

CHARLES H. TENNEY

U.S.D.J.

The issue of Sumitomo's standing under Article VIII(1) must be resolved on the terms of the Treaty and the documents--against the backdrop of the Court's prior decision. The documents raise doubt about the intent of the negotiators on the narrow question before the Court; accordingly, they render a decision less certain. Nevertheless, the Court concludes that Sumitomo, while not denied all protection under the Treaty, does not have standing to rely on the freedom-of-choice provision.

Sumitomo's Standing Under the Treaty Generally

The terms of the Treaty support the proposition that Article XXII(3) was not intended to bar locally incorporated subsidiaries of foreign companies from claiming any substantive rights under the Treaty. The negotiators appear to have intended a distinction between the status and nationality attributes of a company as governed by Article XXII(3) and rights a company may claim under the Treaty's substantive provisions. In other words, Article XXII(3) cannot be read to the exclusion of the Treaty's other provisions. For example, Article VI(4) provides that

> 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.

Subsidiaries also have rights under Article VII(1) & (4). Under Article VII(1), nationals and parties can

> organize companies under the general company laws of such other Party, and . . . acquire majority interests in companies of such other Party; and . . . control and manage enterprises which they have established or acquired. Moreover, enterprises which they control . . . 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.

Paragraph 4 of Article VII provides that "[n]ationals and companies of either Party, as well as enterprises controlled by such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article."

The documents also support the distinction between a company's rights under the Treaty's substantive provisions and a company's nationality and status under Article XXII(3). Kissinger concluded that Article XXII(3) established a "procedural test" of an entity's status to determine "whether or not to recognize it as a 'company' for purposes of the Treaty." Kissinger Airgram. In his view, one then looks to the substantive provisions of the Treaty to determine the company's rights. Id. He concluded on the basis of this distinction that Japan could not deny treaty rights to a United States sub-

sidiary set up in Japan. The substantive rights he chose as examples, however, do not support his conclusion directly. The examples all refer to the Treaty rights of nationals and companies, not to rights of the subsidiaries that they control. See id. Nevertheless, the distinction between "company" in the "procedural" and "substantive" senses lends support to Sumitomo's contentions.

In determining the intent of the Treaty negotiators, Kissinger looked to Herman Walker, a principal formulator and negotiator--according to Kissinger-- of many Friendship, Commerce and Navigation Treaties. In the law review article quoted above--which was personal and not on behalf of the Department of State, 50 Am. J. Int'l Law at 373 n.--Walker set out the distinction between a company's civil attributes (status and nationality) and its functional or substantive ones. In a section entitled "Utilization of the Domestic Company Device," he gave a brief history of the right to organize and operate domestic companies. Id. at 386-88. He concluded that the treaties current at the time he was writing --including the Treaty with Japan at Article VII(1)--have revised the previous approach to rights regarding domestic companies in three ways. One revision was assuring the "'controlled' domestic company . . . national treatment; discrimination against it in any way by reason of its domination by alien interests is not permissible." Id. at 388.

During negotiation of the Treaty, a United States representative suggested the same distinction between civil and substantive attributes by stating the limited purpose of Article XXII(3): "The recognition mentioned in the second sentence of paragraph 3 . . . meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party." Despatch No. 13, at 5. The same document suggests that subsidiaries have rights to hire treaty traders, id. at 4, as does Department of State Instruction No. A-852. The statements regarding treaty traders do not bear directly on the rights of the subsidiaries themselves, but they do suggest that subsidiaries have a place within the scheme of the Treaty and its implementing regulations. See generally discussion at 473 F. Supp. at 512-13.

Sumitomo's Claim of Standing Under Article VIII(1)

Articles VI(4) and VII(1) & (4), by their terms, give "enterprises in which nationals and companies . . . have a substantial interest" and enterprises controlled by nationals and companies, respectively, substantive rights. The drafters knew how to give locally incorporated subsidiaries rights under specific articles. In Article VIII(1) they did not do so. The freedom-of-choice rights are given to "nationals and companies of either Party . . . within the territories of the other Party." Because the provision does not by its own terms

extend to locally incorporated subsidiaries,[1/] the Court must look to Article XXII(3) to determine whether "nationals and companies" can be read to include subsidiaries. That Article provides that "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed parties thereof." By this language Sumitomo is a United States company. It is not a Japanese company and is thereby ineligible for freedom-of-choice protection within the territories of the United States.

The documents do not enable Sumitomo to escape this plain-term reading of the provision. They do not establish that the negotiators intended to give locally incorporated subsidiaries rights under the freedom-of-choice provision. A liberal reading of the Kissinger Airgram and its background suggest that he might have given a locally incorporated subsidiary rights under the freedom-of-choice provision. He did not, however, explicitly conclude that a subsidiary has such rights, nor did he refer to any documents that would establish such a right running to Sumitomo. In his law review article, Walker explained the difference between the civil attributes and the functional rights of a company, but he does not indicate that domestic subsidiaries have standing under Article VIII(1). He indicates only that such companies are entitled to national treatment--discrimination against it is impermissible. 50 Am. J. Int'l Law at 380-83, 385-88. Despatch No.

13 does not even discuss Article VIII(1), and its discussion of Article XXII(3) merely supports the proposition--discussed above--that that article does not by its own terms exclude subsidiaries from all substantive rights under the Treaty. Sumitomo has failed to point out any documents that directly support its claims under Article VIII(1).

Correction of August 9, 1979 Opinion and Order

On page 3 of its Opinion and Order dated August 9, 1979, ___ F. Supp. at ___, the Court stated:

> If defendant is protected by the Treaty, it is not answerable in court to these claims of discrimination. If not, then its practices are exposed to judicial evaluation.

The Court need not, and does not, reach the question whether Article VIII(1), were it available to Sumitomo, would exempt Sumitomo from judicial review against any or all of plaintiffs' discrimination claims. The Court has no view on that issue, but in the language quoted above it suggested otherwise. Accordingly, it deletes the quoted language from its August 9, 1979 Opinion and Order.[2/]

Additionally, the word "seeks" on page 4 (second line from the bottom) of the August 9, 1979 Opinion and Order should be changed to "sees."

CONCLUSION

In summary, the Department of State documents support the conclusion that Article XXII(3) does not bar Sumitomo from standing under the Treaty generally. However, the Court reaffirms its conclusion that the terms of the Treaty do not give Sumitomo standing under Article VIII(1) and further concludes that the documents do not establish otherwise.

Finally, the Court directs that its August 9, 1979 Opinion and Order be amended in the manner indicated herein.

So ordered.

Dated: New York, New York
November 29, 1979

CHARLES H. TENNEY
U.S.D.J.

LISA M. AVIGLIANO, et al.,
Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,
Defendant.

77 Civ. 5641 (CHT)

FOOTNOTES

1/ Although nationals and companies have some employment rights in connection with enterprises in which they have financial interests, the subsidiaries themselves are not in any plain terms given employment rights.

2/ Much of the EEOC's brief is directed to the argument that the Treaty generally and Article VIII(1) specifically would not entitle Sumitomo, if it had standing, to more than national treatment. Walker, however, stated that the Treaty's employment rights "technically [go] beyond national treatment," 50 Am. J. Int'l Law at 386; but cf. Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181, 1184-87 (E.D. N.Y. 1979) (under freedom-of-choice provision in treaty with Denmark, foreign corporation does not have absolute privilege to hire specialized personnel regardless of American laws prohibiting employment discrimination), but the Court does not reach the issue of the substantive scope of the Treaty's employment rights.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Plaintiffs,

77 Civ. 5641 (CHT)

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

OPINION

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TENNEY, J.

Defendant Sumitomo Shoji America, Inc. ("Sumitomo") has moved for reargument of the Court's denial of its motion to dismiss the claims against it, Opinion and Order dated June 5, 1979, reported at 473 F. Supp. 506 (S.D.N.Y. 1979). In its June 5 decision, the Court held, inter alia, that Sumitomo, as a United States subsidiary of a Japanese corporation, is not exempt under Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1975] 4 U.S.T. 2063, T.I.A.S. 2863 (effective October 30, 1953) ("the Treaty"), from sanctions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") against certain allegedly discriminatory employment practices. 473 F. Supp. at 509-13. The provision on which Sumitomo sought, and still seeks, to rely provides in pertinent part: "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." Article VIII(1). In not allowing Sumitomo--a United States sub-

sidiary--to rely on that provision, the Court looked primarily to Article XXII(3) of the Treaty. Paragraph 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).

In moving for reargument of the June 5 decision, Sumitomo relies on documents recently released by the Department of State that purportedly bear on the intent of the negotiators of the Treaty. The Court grants the motion to reargue, but concludes that oral argument is unnecessary. The Court finds that the documents lend some support to Sumitomo's contentions, but does not find them sufficiently persuasive to alter its June 5 decision.

BACKGROUND

Additional Procedural Background

Pursuant to 28 U.S.C. § 1292(b), Sumitomo sought an immediate appeal of the Court's decision. The Court agreed to an immediate appeal, but limited its certification to the issue of Sumitomo's standing under the Treaty's freedom-of-choice provision. Opinion and Order dated August 9, 1979, reported

at ___ F. Supp. ____ (S.D.N.Y. 1979). Prior to filing a notice of appeal, Sumitomo requested this Court to withdraw its certification because the Department of State had on August 15 released documents that Sumitomo wanted the Court to consider. Letter from J. Portis Hicks to the Court, dated August 16, 1979 Because the ten-day period for filing a notice of appeal after certification was about to elapse, see Federal Rule of Appellat Procedure 5(a), Sumitomo filed its notice of appeal without waiting for action from this Court, but requested that the court of appeals stay any action until this Court had had a chance to consider the Department of State documents. On Augus 17, the court of appeals denied Sumitomo permission to appeal, but did so without ruling on the merits and without prejudice to renewal of the appeal after this Court had had the opportunity to consider the documents--in effect, a remand of the action to this Court. Order dated August 17, 1979 in No. 79-8460. Sumitomo subsequently moved for reconsideration of the Court's June 5 decision denying it standing under Article VIII(1). All parties have since been given the opportunity to file briefs on the effect of the Department of State documents on the Court's decision.

In its previous motion to dismiss, Sumitomo relied on an October 17, 1978 letter from the Department of State to the Equal Employment Opportunity Commission ("EEOC"). In the Department of State's view of the Treaty, as expressed in that

letter, Sumitomo has the freedom of choice to fill all of its top management positions with Japanese nationals without being subject to Title VII sanctions. The Department of State drew no distinctions "between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company." See 473 F. Supp. at 511. The Court, in considering this letter, was mindful that the meanings given treaties by government departments charged with their negotiation and enforcement are given great weight. Id., quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1960). Nevertheless, it rejected the meaning given the Treaty by the Department of State. "[I]n the absence of analysis or reasoning offered by the State Department in support of its position, this Court does not find in the letter sufficiently persuasive authority to reject the Treaty's clear definition of corporate nationality and the consequent unambiguous meaning of Article VIII(1)" or to reject established principles of corporate law and applicable precedents. Id. at 511-12 (footnote omitted).

During the course of the briefing on this motion for reargument, the Department of State indicated that it had changed its view on whether the first sentence of Article VIII(1) of the Treaty (freedom-of-choice provision) covers United States subsidiaries of foreign corporations. Letter from James R. Atwood, Department of State Deputy Legal Adviser, to Lutz

Alexander Prager, EEOC Assistant General Counsel, dated September 11, 1979, attached, e.g., as Exh. 1 to Affidavit of Lewis M. Steel, sworn to September 17, 1979. Because of the importance of this letter in the consideration of this motion, it is set out at length:

> [T]he Department has conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty, an issue in Spiess v. C. Itoh & Co. [, 469 F. Supp. 1 (S.D. Tex.), appeal docketed, No. 79-2382 (5th Cir. 1979),] and two other cases more recently decided in the district court in New York (Avigliano v. Sumitomo Shoji America, Inc., [473 F. Supp. 506 (S.D.N.Y. 1979),] and Linskey v. Heidelberg Eastern, Inc., [470 F. Supp. 1181 (E.D. N.Y. 1979))].
>
> The manner of coverage of subsidiaries is in many instances complex, making it necessary to rely on the intent of the negotiators to fully comprehend certain provisions. On further reflection on the scope of application of the first sentence of Paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover locally-incorporated subsidiaries, and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII (1) and (4), which respectively provide for national and most-favored-nation treatment of the activities of such subsidiaries. While we do not necessarily agree with all points expressed by the Court in deciding the Itoh case on the question of subsidiary coverage, we do concur in general terms with the Court's reasoning, and specifically in the result reached in interpreting the scope of the first sentence of Article VIII, paragraph 1.

Arguments

The positions of Avigliano, Sumitomo, and the EEOC may be stated briefly as follows. Avigliano argues that Sumitomo has no rights under the freedom-of-choice provision in Article VIII(1). Its foreign owner gave up those rights, as far as Sumitomo is concerned, when it chose to operate in the United States as a locally incorporated subsidiary rather than as a branch. The documents, in Avigliano's view, indicate that the Treaty was designed to ensure only national treatment for foreig controlled companies. They show that the intent behind the Treaty was not to exempt such companies from United States civil rights laws.

The EEOC, in its amicus brief, argues that the September 11 Department of State letter should be given great weight by the Court. The documents should not alter the conclusion reache by the Court in its June 5 Opinion and Order: Sumitomo's rights are governed by Article XXII(3), which provides that companies constituted under the laws of a particular country shall be deemed companies of that country. Accordingly, Sumitomo may be granted no greater or lesser rights than any other domestically created company. Moreover, Article VIII(1), even were it applicable, would not allow discrimination in favor of or against Japanese nationals or anyone else. Article VIII(1) and Title VII and section 1981 are consistent: all three prohibit discrimination against anyone.

Sumitomo argues that the Court should disregard the September 11 Department of State letter because it, like the October 17, 1978 letter expressing a contrary view, offers no authority or reasoning in support of its position. Sumitomo argues that the Court should instead rely on the Department of State documents to establish the intent of the Treaty negotiators. It relies on these documents to establish that Sumitomo has standing under Article VIII(1), as an intended beneficiary, to assert freedom of choice in hiring certain personnel. The confusion, according to Sumitomo, results from the drafters' failure to distinguish clearly between provisions defining corporate nationality and those granting specific rights. Corporate nationality is not the intended test for determining standing under the Treaty, Sumitomo continues; Sumitomo--though technically a United States company--is entitled to specific rights under the Treaty, as purportedly demonstrated by the documents, because it is foreign-owned.

Documents

The documents released by the Department of State address negotiation and enforcement of this Treaty and similar treaties with other countries. The first document on which Sumitomo relies is a Department of State Airgram, signed "Kissinger" and dated January 9, 1976, to the American Embassy in Tokyo ("Kissinger Airgram"), Exh. A to Sumitomo Memorandum.

The subject was the proper interpretation of Article XXII(3) of the Treaty. Because of the differing interpretations of the Kissinger Airgram, the Court sets it out in its entirety:

> Department Legal Adviser's office has examined meaning of paragraph 3 of Article XXII of the U.S.-Japanese FCN Treaty signed at Tokyo April 2, 1953, and fully concurs with Embassy's general position as set forth reftel.
>
> Most persuasive arguments we have found are (a) law review article on FCNs by Herman Walker, Jr., who formulated modern (i.e., post-WW II) form of FCN treaty and negotiated many FCNs; and (b) negotiating record of U.S.-Japan FCN, especially Dispatch No. 13 from Tokyo of April 8, 1952. Both documents are enclosed. Walker cites (pp 380-81), para 3 of Japanese FCN as standard definition of company for purposes of treaty, i.e., in the standard FCN treaty "A 'company' is defined simply and broadly to mean any corporation, partnership, company or other association which has been duly formed under the laws of one of the contracting parties; that is, any 'artificial' person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit." This formulation is intended to avoid such complex questions as the law to be applied in determining company status. Every association meeting test of valid existence must have its "company" status duly recognized and is then eligible for substantive rights granted to companies under the treaty.
>
> In Dispatch 13 (p. 5), Jules Bassin, Legal Attache to Embassy, stated to Mr. Mikizo Nagai, Chief, Sixth Section, Economic Affairs Bureau, that "the recognition mentioned in the second sentence of paragraph 3...meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party."
>
> Thus, all that para 3 is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted,

the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

For reasons stated above, argument in para 2 of reftel that nationality of a company is determined by nationality of shareholders is not correct. Rather, a company has nationality of place where it is established (see pp. 382-83 of Walker). However, this does not mean that [the Government of Japan] is free to deny treaty rights to U.S. subsidiary set up in Japan. While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, an American Company (i.e., one organized under U.S. law), may manage its Japanese subsidiary (i.e., a company set up under Japanese law). So too, under Article I, a U.S. national may enter Japan to direct his investment, even though the investment is a Japanese company. In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrue to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.

KISSINGER

Kissinger relied on a law review article by Herman Walker, Jr., "who formulated modern . . . form of [Friendship, Commerce and Navigation Treaty] and negotiated many FCNs." Id. Walker set out the definition of corporate status as found in Article XXII(3) of the Treaty. "Provisions on Companies in United States Commercial Treaties," 50 Am. J. Int'l Law 373, 380-81 & n.34 (1956). He thereafter explains that

> [t]he adoption of the simple test [of status and nationality by place of incorporation] has been undoubtedly facilitated by the clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus the acknowledgment of a fact--the existence and legitimate paternity of an association--is not confused with problems associated with the functional rights and activities of alien-bred associations. . . .

Id. at 383.

Kissinger also relied, as Sumitomo now does, on a Memorandum of Conversation from the Office of the United States Political Adviser for Japan, Tokyo, Despatch No. 13, April 8, 1952 ("Despatch No. 13"), Exh. E to Sumitomo Memorandum. In Despatch No. 13, at 5, quoted in small part in the Kissinger Airgram, the following portion of a discussion of Article XXII appears:

> [The Japanese representative] asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned in paragraph 3 meant anything more than the recognition of the existence of a juridical person.
>
> [The U.S. representative] replied that "juridical status" meant "legal status", the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph 3, he added, meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party.

Sumitomo also relies on a statement of a United States negotiator concerning treaty trader employees. The negotiator

stated that Japanese treaty trader employees "would not be permitted to resign from a Japanese firm in order freely to seek employment in the United States. It was possible, however, for this employee to leave one Japanese branch firm to work for an affiliate or subsidiary of that firm." Despatch No. 13, at 4. Sumitomo points to this language to demonstrate that the negotiators did not intend to distinguish between branches and subsidiaries regarding employment of treaty trader executives under the Treaty. It quotes from a document addressing a similar provision in a treaty then being negotiated between the United States and the Federal Republic of Germany.

> There is no intent . . . to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. . . . The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under . . . applicable regulations.

Department of State Instruction No. A-852 to HICOG, Bonn, January 21, 1954, at 1, Exh. 9 to Affidavit of Lance Gotthoffer, sworn to September 10, 1979 ("Gotthoffer Aff.").

Avigliano and the EEOC, in addition to arguing on the basis of the above documents, refer to other Department of State documents for the proposition that the Treaty negotiators did not seek to give foreign companies greater rights than those accorded domestic companies, but rather to ensure national treatment by barring employment discrimination against aliens. E.g., Foreign Service Despatch No. 2529 from HICOG, Bonn to Department of State, March 18, 1954, at 1, Exh. 11 to Gotthoffer Aff. (the major special purpose of the freedom-of-chose provision "is to preclude the imposition of 'percentile' legislation").

DISCUSSION

Introduction

The issue on this motion for reconsideration is a narrow one. The Court is addressing the effect of the recently released Department of State documents on its June 5, 1979 Opinion and Order. Specifically, by examining these documents, the Court seeks to determine whether, in the intent of the Treaty negotiators, Article XXII(3) bars Sumitomo from standing under the first sentence of Article VIII(1) or whether Sumitomo is otherwise barred from standing under that sentence. The issue whether Article VIII(1), if applicable, would insulate Sumitomo from review of any or all of its employment practices is beyond the scope of this opinion.

In determining whether Sumitomo has standing under the freedom-of-choice provision of Article VIII(1), the Court examines the Department of State documents and the terms of the Treaty to infer the intent of the parties to the agreement. Maximov v. United States, 299 F.2d 565, 568 (2d Cir. 1962), aff'd, 373 U.S. 49 (1963). The Court should "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties." Id.

The Department of State looked to the intent of the negotiators because it found that the "manner of coverage of subsidiaries is in many instances complex." Letter dated September 11, 1979, set out supra. After "an extensive review of the negotiating files" on the Friendship, Commerce and Navigation Treaties, the Department of State concluded that Sumitomo lacks standing under the first sentence of Article VIII(1). Sumitomo's rights are instead governed by Article VII(1) & (4), which provides for national and most-favored-nation treatment. Id. The Court does give some weight to the Department's view on a manner within its purview, see Kolovrat v. Oregon, supra, but not decisive weight in this case. The Department undoubtedly gave the question serious and thoughtful attention, but the letter indicates neither the documents on which the Department relies nor its analysis. In the absence of either, the letter little aids the Court in its determination.