10-1980

Cross Petition for a Writ of Certiorari to the United States Court of Appeals

Lewis M. Steel '63

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Cross-Petitioners,

v.

SUMITOMO SHOJI AMERICA, INC.,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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QUESTIONS PRESENTED

1. Whether Article (VIII)(1) of the 1953 Treaty of Friendship, Commerce and Navigation, between the United States and Japan, which permits nationals and companies of either party to engage executive personnel of their own choice, is applicable to a domestic corporation which is a wholly owned subsidiary of a Japanese corporation.

2. Whether the "bona fide occupational qualification" exception to Title VII (42 U.S.C. §2000e-2(e)) should be relaxed when applied to an American subsidiary of a Japanese corporation in deference to the 1953 Treaty of Friendship, Commerce and Navigation.

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Lisa M. Avigliano, Dianne Chenicek, Rosemary T. Cristofari, Catherine Cummins, Raellen Mandelbaum, Maria Mannina, Sharon Meisels, Frances Pacheco, Joanne Schneider, Janice Silberstein, Reiko Turner and Elizabeth Wong cross-petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Second Circuit pursuant to Rule 19.5 of this Court. Sumitomo Shoji America, Inc. ("Sumitomo"), the cross-respondent herein, on June 6, 1981, petitioned for a writ of certiorari (No. 80-2070) to review the same judgment which is the subject matter of this cross-petition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated January 9, 1981 (Ap. A, 1a-15a)[1] is reported at 638 F.2d 552. The opinion of the United States District Court for the Southern District of New York dated June 5, 1979 (App. C, 19a-37a) is reported at 473 F.Supp. 506. Certification of immediate appeal pursuant to 28 U.S.C. §1292(b) was granted in an opinion of the United States District Court for the Southern District of New York dated August 9, 1979 (App. D, 39a-44a), unofficially reported at 20 Empl. Prac. Dec. (CCH) §30,205 and 20 FEP Cases 72. The opinion of the United States District Court for the Southern District of New York on reargument dated November 29, 1979 (App. E, 45a-61a) is unofficially reported at 21 Empl. Prac. Dec. (CCH) §30,401 and 21 FEP Cases 580.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 9, 1981 (App. B, 17a-

[1] In this cross-petition the appendix attached to the petition filed by Sumitomo, No. 80-2070, shall be referred to as App. A, B, C, D, E or F, with the appropriate page reference. The appendix in the court below, shall be referred to as Jt. App, 2d Cir., __a.

18a). On March 31, 1981, Mr. Justice Marshall signed an order extending the time for filing a petition for writ of certiorari up to and including June 6, 1981. On that date, Sumitomo filed its petition. This cross-petition is filed pursuant to Rule 19.5 of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

TREATIES AND STATUTES INVOLVED

1. Article VIII(1) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 (the "Treaty"), provides (4 U.S.T. at 2070):

> 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. . . .

2. Article XXII of the Treaty provides in relevant parts (4 U.S.T. 2079-2080):

> 1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.
>
> * * *
>
> 3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their judicial status recognized within the territories of the other Party.

3. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §2000e-2(a), provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

4. Section 703(e) of Title VII, 42 U.S.C. §2000e-2(e), provides in relevant part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

STATEMENT OF THE CASE

Cross-petitioners are, with one exception,[2] citizens of the United States and past or present female clerical employees of

[2] Reiko Turner is a subject of Japan who resides in New York City (Jt. App., 2d Cir., 2a).

Sumitomo (App. C, 20-a).[3] They claim that Sumitomo has engaged in unlawful employment practices both on the basis of sex and national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, by restricting them to clerical jobs and by failing to train or promote them to executive, managerial and/or sales positions (Jt. App., 2d Cir., 4a-5a).

Sumitomo is a corporation organized under the laws of the State of New York and is a wholly owned subsidiary of a Japanese commercial enterprise (App. A, 2a). Sumitomo moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing the complaint, claiming that Article VIII(1) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, 2070 (1953) (hereinafter the "Treaty" or "FCN") permitted them to employ management level personnel of their own choice, and exempted them from the application of Title VII (App. A, 2a).

The district court, on June 5, 1979, denied Sumitomo's motion to dismiss, relying on Article XXII(3) of the Treaty which states that "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof," 4 U.S.T. at 2079-2080. The court held that this definition was consistent with traditional rules of corporate law which "afford the corporation the citizenship of its place of incorporation." Therefore, the court found that Sumitomo had "no standing to invoke the freedom of choice provision granted by Article VIII(1) to companies of Japan within the territory of the United States" (App. C, 22a-23a).

Thereafter, the district court granted Sumitomo reargument based upon certain documents released by the Department of

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[3] Cross-petitioners filed their action individually and as representatives of a class. Pursuant to a stipulation extending their time to seek certification until the validity of their cause of action has been decided, no motion has been made to certify. Cross-respondent is wholly owned by Sumitomo Shoji Kabushiki Kaisha, a Japanese corporation. Sumitomo states in footnote 1 of its petition that it has the following subsidiaries or affiliates: Distributor Metals Corp., Emko Stainless Steel, Inc., Fairway Village, Inc., Industrial Metals, Inc. and Rising Sun Stainless Steel, Inc.

State relating to the intent of the negotiators of the Treaty and other FCN's (App. C, 42a). After studying these documents, as well as the different sections of the Treaty, it determined that while a locally incorporated subsidiary of a Japanese corporation may have certain rights under the Treaty, such corporations were not given rights under the Article VIII(1) freedom of choice provision. Thus, the court found such companies "are entitled to national treatment—discrimination against it is impermissible" (App. E, 60a). The district court also pointed out that the Deputy Legal Adviser to the Department of State, after having conducted what that official called "an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN) including the 1953 FCN with Japan," had concluded that "it is 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 ["of their choice"] provision of the treaty" (App. E, 49a-50a).

The district court certified for immediate appeal pursuant to 28 U.S.C. §1292(b) the "question concerning the relationship of Title VII to the Treaty" (App. D, 44a).

The Second Circuit, on appeal, disagreed with the district court's interpretation of the State Department documents and decided to reject the State Department's position which was expressed in the letter of its Deputy Legal Adviser (reprinted in 74 Am. J. Int'l Law, at 158-9). Further, the court of appeals gave no weight to a September 9, 1980 State Department letter to the Government of Denmark in which the State Department reiterated that it was not the intent of negotiators of FCN's to permit locally incorporated subsidiaries to invoke the "of their choice" provision in question here (App. A, 12a, fn. 5).

Having found that Sumitomo could invoke Article VIII, the court of appeals nonetheless affirmed the result reached by the district court. It did so by ruling that both Japanese corporations and their domestic subsidiaries were not exempted by the freedom of choice language of Article VIII from Title VII. The Second Circuit also determined that the bona fide occupational

qualification ("bfoq") exception of Title VII, 42 U.S.C. §2000e-2(e), should be construed more liberally than in the usual case in order to meet the needs of a Japanese company doing business in the United States. Thus the Circuit instructed the district court to consider:

> . . . such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business. (App. A, 15a).

Sumitomo's petition for writ of certiorari in No. 80-2070 challenges the validity of the Second Circuit's ruling that it, as well as Japanese corporations, must obey the mandate of Title VII. This cross-petition raises issues as to whether Sumitomo as a domestic corporation can assert Article VIII(1) treaty rights, and whether the Second Circuit was correct when it expanded the bfoq exception because of Sumitomo's status as a subsidiary of a Japanese corporation.

REASONS FOR GRANTING THE CROSS-PETITION

I.

The United States Court of Appeals for the Second Circuit in this case has decided an important question of federal law which has not been, but should be, settled by this Court. In ruling that a domestic subsidiary of a Japanese corporation is entitled to the same protection as its parent corporation under the Treaty, the court rendered a decision of extreme importance. If this Court grants Sumitomo's petition for a writ of certiorari in No. 80-2070 in order to consider whether Article VIII(1) exempts corporations having treaty rights from Title VII scrutiny, then this Court also should consider the narrower question as to whether domestic corporations which are subsidiaries of foreign corporations in

treaty countries are exempt from Title VII coverage. If this Court were to decide only the question presented by Sumitomo, such domestic corporations within the jurisdiction of the Second Circuit could be exempted from coverage, even though this Court did not rule on the question of the validity of the court of appeals' decision in this regard. Such an exemption from Title VII could adversely affect the employment rights of untold numbers of employees and could allow for massive discrimination, not only based upon national origin, but upon any other grounds, such as race, religion, or as in this case, sex.

Moreover, this result would obtain despite the clear wording of the Treaty which reserves the "of their choice" language to foreign business entities themselves, and notwithstanding the opinion of the State Department as expressed in the Deputy Legal Adviser's letter of September 11, 1979, 74 Am. J. Int'l. L. at 158-159 (1980), as well as the State Department's letter to the Government of Denmark to the contrary (App. A 12a, fn. 5). The Second Circuit's opinion also raises an important question of federal law as it decides this issue in a manner which conflicts with basic principles of international law. The principle that a domestic subsidiary of a foreign corporation has the nationality of its place of incorporation was clearly stated in the decision of the International Court of Justice in *Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain,* 1970, I.C.J. Rep. 3, 42 (1970)). See discussion in *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981) (App. F, 83a) [dissenting opinion].[4]

II.

The Second Circuit has decided an important federal question in a way which conflicts with applicable decisions of this Court. In its opinion, the Second Circuit concluded that Sumitomo should not be considered a domestic corporation for purposes of Treaty protection, but rather a corporation of Japan. This ruling

[4] The *Spiess* dissent also discusses the structure of the Treaty in great detail to illustrate that the drafters meant to distinguish between companies of Japan and enterprises controlled by such companies (App. F, 84a-92a).

conflicts with the general theory of corporate personalities which has historically been accepted by this Court. Under the traditional theory applied by this Court, a corporation is deemed to be a citizen of the state by which it was created. *Doctor v. Harrington*, 196 U.S. 579, 586 (1905); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844). As this Court said more recently in *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946):

> While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.

Moreover, this Court has held that trade treaties do not exempt aliens from complying with provisions of local laws after having accepted treaty benefits. *Todok v. Union State Bank*, 281 U.S. 449, 456 (1929). Applying the logic of *Todok*, Sumitomo should be treated as a domestic corporation, fully subject to American law.

Deviation from this traditional approach towards corporate citizenship has grave consequences. This Court should therefore determine whether or not foreign corporations in countries having FCN's with the United States can acquire American corporations, operate them as subsidiaries and enjoy the full benefits of their incorporation in this country, yet at the same time manage these subsidiary corporations in total disregard of American civil rights laws.

III.

The Second Circuit's ruling that Sumitomo is entitled to a relaxed bona fide occupational qualification exception under

Title VII in order to "give due weight to the treaty rights and unique requirements of a Japanese company doing business in the United States" (App. A, 15a) decides another important question of federal law which is in conflict with an applicable decision of this Court.

This Court has ruled in *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) "that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination based on sex." Yet, without the benefit of briefs or argument on this issue in the court below, the Second Circuit expanded the bfoq exception to such an extent that the district court was ordered to consider on remand facts so broad as to include "acceptability to those persons with whom the company or branch does business." (App. A, 15a). Clearly, this expansion of the bfoq exception will have a strong negative effect on the ability of any grievant who happens to work for an American subsidiary of a foreign corporation organized in a country having an FCN to enforce her rights. This Court should review this aspect of the Second Circuit's opinion in order to preserve the principles in *Dothard*.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted if this Court grants Sumitomo's petition in No. 80-2070.

Respectfully submitted,

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