
Court of Appeals

Sumitomo Shoji America, Inc. v. Avagliano, 457
US 176 - Supreme Court 1982

1980

**Supplement to Petition for Permission to Appeal Pursuant to 28
U.S.C. §1292 (b)**

Lewis M. Steel '63

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NOTICE OF ENTRY

Sir:-Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on _____ 19

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

===== NOTICE OF SETTLEMENT =====

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

the _____ day of _____ 19
at _____ M.

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No.

Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMITOMO SHOJI AMERICA, INC.

Petitioner,

-against-

LISA M. AVIGLIANO, et al.,

Respondents.

===== SUPPLEMENT TO PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. §1292 (b) =====

WENDER, MURASE & WHITE

Attorneys for Petitioner

Office and Post Office Address, Telephone

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

(212) 832-3333

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....
Attorney(s) for

WENDER, MURASE & WHITE

REC'D JAN 02 1979

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.
 Attorney's Affirmation shows: deponent is

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Individual Verification the being duly sworn, deposes and says: deponent is in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

Corporate Verification the of in the within action; deponent has read the a corporation, and knows the contents thereof; and the same foregoing is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at being duly sworn, deposes and says: deponent is not a party to the action,

Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Affidavit of Personal Service On 19 at upon deponent served the within

herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

The name signed must be printed beneath

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
SUMITOMO SHOJI AMERICA, INC., :
Petitioner, : No. 79-8460
-against- :
LISA M. AVIGLIANO, et al., :
Respondents. :
-----X

SUPPLEMENT TO PETITION FOR PERMISSION TO
APPEAL PURSUANT TO 28 U.S.C. §1292(b)

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, Sumitomo Shoji America, Inc. ("Sumitomo"), files this document to supplement its Petition for Permission to Appeal filed with this Court pursuant to 28 U.S.C. §1292(b) on December 10, 1979. Sumitomo seeks permission to appeal an Opinion and Order of the United States District Court for the Southern District of New York (Tenney, J.), dated June 5, 1979, as amended by an Opinion and Order dated August 9, 1979 which certified for appeal the question of the relationship of United

States civil rights laws to the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. 2863 (the "Treaty").

This supplemental document is submitted because only after filing its aforesaid Petition, Sumitomo obtained from the record file of the United States District Court for the Eastern District of New York a copy of an October 17, 1979 letter of the Ministry of Foreign Affairs of the Kingdom of Denmark which opines on a freedom of choice in employment provision of the 1951 Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of Denmark (12 U.S.T. 908, T.I.A.S. 4797). Said letter and a translation thereof were filed with that District Court on December 11, 1979 in an action entitled Linskey v. Heidelberg Eastern, Inc., et al., 77 Civ. 833(MC) in connection with a motion by defendants therein for reconsideration of a decision denying a motion to dismiss the complaint on the ground that the hiring practices at issue therein are protected by freedom of choice in employment provisions of the treaty between the United States and Denmark*. Copies of said letter and its translation into English are attached hereto as Exhibit "A".

The relevant provision covering freedom of choice in employment contained in Article VII(4) of the treaty between the

*The Court's decision in Linskey is reported at 470 F. Supp. 1181 (E.D.N.Y. 1979). Upon information and belief, a petition for permission to appeal such decision pursuant to 28 U.S.C. §1292(b) has been filed with this Court and is sub judice.

United States and Denmark (12 U.S.T. 908, 915), and the relevant provision relating to juridical status of Danish and United States companies contained in Article XXII(3) of that treaty (12 U.S.T. 908, 934), are virtually identical to provisions covering the same matters found in Article VIII(1) and Article XXII(3), respectively, of the 1953 Treaty between the United States and Japan. The Danish government has interpreted the provision covering freedom of choice in employment of the treaty between the United States and Denmark to extend its coverage to locally incorporated subsidiaries. In contrast to such interpretation, the June 5 Opinion and Order of the Court below holds to the contrary.

Sumitomo believes that the position of the Danish government on subsidiary hiring rights, which directly contradicts the position taken by the Court below in its June 5, 1979 Opinion and Order, further demonstrates that there is a substantial basis for difference of opinion on the controlling question of law described in Sumitomo's Petition. The position of the Danish government also emphasizes the importance of prompt resolution of this question, not only to materially advance the termination of this action and other litigation raising similar issues in this Circuit, but also to clarify the application of bilateral international treaties and related provisions of the Immigration and Nationality Act which may affect the foreign relations of the United States under other

bilateral international treaties containing provisions comparable to those at issue herein.

Dated: New York, New York
December 28, 1979

Respectfully submitted,

WENDER, MURASE & WHITE

By J. Portis Hicks
(A Member of the Firm)
Attorneys for Petitioner
Sumitomo Shoji America, Inc.
400 Park Avenue
New York, New York 10022
(212) 832-3333

Ministry of Foreign Affairs
Department for Foreign Economic Affairs
Economic Division

12, Stormgade
1470 Copenhagen K
Phone (01) 12 28 25

A/S Det Østasiatiske Kompagni
(The East Asiatic Company Ltd.)
2, Holbergsgade
1099 Copenhagen K

17th October, 1979

Ref: ØP.1 No. 64.D.25.

Dear Sirs,

In reply to your letter of 9th October, 1979, concerning the interpretation of Articles VII and VIII of the Treaty on Friendship, Commerce and Shipping between Denmark and the United States (1951) we would inform you that an opinion has been given by the Legal Affairs Department of this Ministry. We quote below the full wording of the opinion:-

"Art. VII, paragraph 4, under which nationals and companies of either Party are permitted to engage, within the territories of the other Party; accountants and other technical experts, executive personnel, attorneys, agents and other specialized employees of their choice, regardless of nationality, has the direct aim of ensuring these companies the right to engage own citizens, i.e. foreigners in the eyes of the other Party, to fill the said posts. Accordingly, any assertion of discrimination against American citizens when these seek employment with Danish companies in the USA is totally unfounded in the wording of the Treaty and its motives.

Further, this Ministry has been given to understand that the provision contained in Art. VII, paragraph 4, governing permission to engage personnel regardless of their nationality should be seen as a general provision which, in the absence of other stipulations, will apply to any company, controlled and managed by the citizens or companies of either Party, in the territories of the other Party, including the companies constituted in pursuance of Art. VIII. This understanding is supported by the construction of Art. VIII, which the Parties to the Treaty have voiced in the "Report on Interpretation", attached to the Treaty, and is also supported by the actual reasons behind the authorization in the same Article to control and manage a company constituted within the other Party's territories.

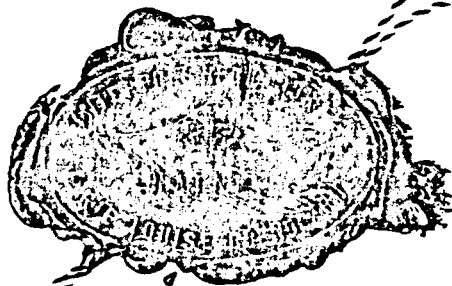
Otherwise, attention is directed to Art. XXIV of the Treaty, under which any dispute between the Parties as to the interpretation or application of the Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means (paragraph 2). Further, each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the Treaty (paragraph 1). This provision involves that authoritative interpretation of the provisions of the Treaty may be made only by the Parties to the Treaty, jointly, or by a third Party (e.g. court or arbitration), to whom the Parties will have agreed to submit the matter for settlement. Even though, under the transformation system ruling in the USA, the Treaty is directly applicable in the legal system of the Federation or of the individual Federal States and that, accordingly, the provisions of the Treaty may be invoked direct at the national courts, it will clearly appear from the provision of Art. XXIV that an American court cannot authoritatively interpret the provisions of the Treaty."

On behalf of the Minister
by authority

(signed) Lars Vissing

I the undersigned, Marie-Louise Brendstrup, Official Interpreter and Translator commissioned by the Royal Danish Ministry of Commerce, Industry and Shipping, hereby certify the foregoing to be a true and faithful translation of the original in the Danish language, produced to me this 29th day of October, 1979, at Copenhagen.

Witness my hand and official seal



Maria-Louise Brandstrup
sworn translator and interpreter of the English language.

THE MINISTRY OF COMMERCE.

Copenhagen, 18 . 1979

On behalf of the Minister.

By order.

Tom Loesch

Tom Loesch
Ass.

Tom Loesch

30 OCT 1979

Vibeke Ekberger
VIBEKE EKBERGER

KINGDOM OF DENMARK
CITY OF COPENHAGEN
EMBASSY OF THE UNITED
STATES OF AMERICA } SS

I, Jean A. Louis, VICE CONSUL of the United States of America at Copenhagen, Denmark, duly commissioned and qualified, do hereby certify that VIBEKE EKBERGER whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was on the 30TH day of OCTOBER 1979, the date thereof an official at the Ministry of Foreign Affairs duly commissioned and qualified, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Embassy at Copenhagen, Denmark this 31ST day of OCTOBER 1979

Jean A. Louis
JEAN A. LOUIS
AMERICAN VICE CONSUL

DEPARTEMENTET FOR UDENRIGSØKONOMI

Den økonomisk-politiske afdeling

A/S Det Østasiatiske Kompagni,
Holbergsgade 2,
1099 Kbh. K.

STORMGADE 12
1470 KØBENHAVN K.
TELEFON (01) 12 28 25

BILAG ØP.1 NR 64.D.25.
BEDES ANFØRT VED BESVARELSE

DATE 17. oktober 1979.

I besvarelse af Kompagniets skrivelse af 9. oktober d.å. vedrørende fortolkning af artiklerne VII og VIII i venskabs-, handels- og søfartstraktaten mellem Danmark og De Forenede Stater (1951) kan udenrigsministeriet meddele, at en udtalelse i sagen er indhentet i ministeriets retsafdeling. Udtalelsen følger nedenfor i sin fulde ordlyd:

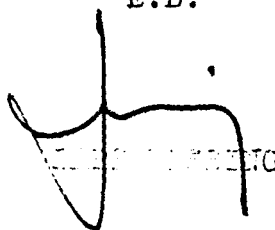
" Art. VII stk. 4, hvorefter det tillades hver parts statsborgere og selskaber inden for den anden parts områder efter eget valg at beskæftige revisorer og andre tekniske sagkyndige, overordnede funktionærer, sagførere, repræsentanter og andet personale med specialuddannelse uden hensyn til de pågældendes nationalitet, har direkte til formål at sikre disse selskaber retten til at ansætte egne borgere, dvs. udlændinge set fra den anden parts side, i de omhandlede stillinger. En påstand om diskrimination over for amerikanske borgere ved ansættelse i danske selskaber i USA har derfor ikke noget holdepunkt i traktatens ordlyd eller dens motiver.

Det er endvidere udenrigsministeriets forståelse, at bestemmelsen i artikel VII stk. 4 om adgang til at ansætte personale uden hensyn til de pågældendes nationalitet må ses som en generel bestemmelse, der, hvor andet ikke er fastsat, må gælde ethvert selskab, som kontrolleres og ledes af en parts statsborgere eller selskaber, på den anden parts område, således også de i medfør af artikel VIII oprettede selskaber. Denne opfattelse be- styrkes af den forståelse af artikel VIII, som traktatparterne har givet udtryk for i det "referat vedrørende fortolkning", som er vedhæftet traktaten, og støttes tillige af reale grunde bag beføjelsen i samme artikel til at kontrollere og lede et på den anden parts område oprettet selskab.

Opmærksomheden henledes i øvrigt på traktatens artikel XXIV, hvorefter enhver tvistighed mellem parterne om traktatens fortolkning og anvendelse, der ikke på tilfredsstillende måde er blevet afgjort ved diplomatisk forhandling, skal indankes for Den Mellemløselige Dom-

stol, med mindre parterne enes om, at afgørelsen skal træffes ved andre fredelige midler (stk. 2). Endvidere skal hver part velvilligt overveje henvendelser, som den anden part måtte rette angående spørgsmål om traktatens gennemførelse, og give passende lejlighed til rådslagning vedrørende sådanne henvendelser (stk. 1). Denne bestemmelse indebærer, at en autoritativ fortolkning af traktatens bestemmelser alene kan fastsættes af traktatparterne i forening eller af en tredje part (f.eks. domstol eller voldgift), til hvem traktatparterne måtte være enige om at overlade afgørelsen. Selv om traktaten efter det i USA gældende transformerings-system er umiddelbart anvendelig i forbundsstatens eller enkeltstaternes retssystem, og traktatens bestemmelser derfor kan påberåbes direkte ved de nationale domstole, må bestemmelsen i artikel XXIV gøre det klart, at en amerikansk domstol ikke autoritativt kan fortolke traktatens bestemmelser."

P.M.V.
E.B.



THE ABOVE SIGNATURE OF

Lars Vitting

20 OCT 1979



VIBEKE EKBERGER

of each of the Parties, other than Greenland, the Panama Canal Zone and the Trust Territory of the Pacific Islands.

Article XXIV.

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.

Article XXV.

The present Treaty shall replace the convention of friendship, commerce and navigation signed April 26, 1826,¹ except Articles 8, 9, and 10 thereof, which shall remain in force until replaced by a consular convention between the two Parties or until one year after either Party shall have given to the other Party written notice of termination of the aforesaid Articles.

Article XXVI.

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Washington as soon as possible.

overhøjhed med undtagelse af Grønland, Panamakanalzonen og formynderkabsområdet Stillehavsøerne.

Artikel XXIV.

1. Hver part vil velvillig overveje henvendelser, som den anden part måtte rette angående spørgsmål om nærværende traktats gennemførelse, og give passende lejlighed til rådslagning vedrørende sådanne henvendelser.

2. Enhver tvistighed mellem parterne om nærværende traktats fortolkning og anvendelse, der ikke på tilfredsstillende måde er blevet afgjort ved diplomatisk forhandling, skal indankes for Den Mellemfolkelige Domstol, medmindre parterne enes om, at afgørelse skal træffes ved andre fredelige midler.

Artikel XXV.

Nærværende traktat træder i stedet for den den 26. april 1826 undertegnede venskabs-, handels- og skibsfartskonvention, dog at sidstnævntes artikler 8, 9 og 10 skal forblive i kraft, indtil de måtte blive erstattet af en konsularoverenskomst mellem de to parter, eller indtil der er forløbet eet år efter, at en af parterne ved skriftligt varsel til den anden part måtte have opsagt de pågældende artikler.

Artikel XXVI.

1. Nærværende traktat skal ratificeres og ratifikationsinstrumenterne snarest mulig udveksles i Washington.

¹ TS 65; 8 Stat. 340.

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of , one thousand nine hundred and

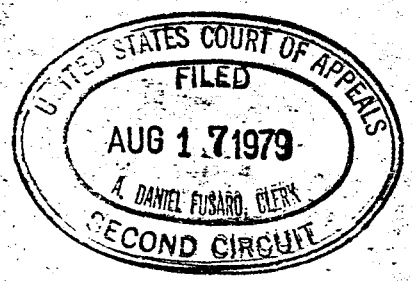
Sumitomo Shoji America, Inc.,
Petitioner,

v.

79-8460

79-8460

Lisa M. Avigliano, et al.,
Respondents



It is hereby ordered that the motion made herein by counsel for the

~~appellant~~ ~~appellee~~ petitioner ~~respondent~~

by notice of motion dated August 16, 1979 for leave to appeal pursuant to 28 USC §1292(b)

be and it hereby is ~~granted~~ denied *without ruling on the merits without prejudice to the motion's being renewed after Judge Tenney has had an opportunity to consider the Hicks affidavit (Exhibit I)*
~~It is further ordered that~~

Thomas M. ...
Roscoe ... U.S.J.
William ... U.S.J.
Circuit Judges