NEW YORK LAW SCHOOL

DigitalCommons@NYLS

Briefs

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

1980

Interlocutory Appeal from the United States District Court for the Southern District of New York

Lewis M. Steel '63

Follow this and additional works at: https://digitalcommons.nyls.edu/sumitomo_briefs

80-7418

In The

United States Court of Appeals

For the Second Circuit

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,

Plaintiffs-Appellees,

vs.

SUMITOMO SHOJI AMERICA, INC.,

Defendant-Appellant.

Interlocutory Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

WENDER, MURASE & WHITE
Attorneys for Defendant-Appellant
400 Park Avenue
New York, New York 10022
(212) 832-3333

EISNER, LEVY, STEEL
& BELLMAN, P.C.
Attorneys for Plaintiffs-Appellees
351 Broadway
New York, New York 10013
(212) 966-9620

3848

LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288

TABLE OF CONTENTS

Contents

Contents

Contents

Contents

DOCKET ENTRIES

DATE		PROCEEDINGS
11-21-77	1	Filed complaint. Issued summons.
11/21/77	2	Filed Order appointing Lydia A. Read and/or Jules Lobel to serve process. - Clerk.
12-21-77	3	Filed Stip. & Order that the deft. Sumitomo Shoji America,Inc. shall answer by 1-13-78. Tenney,J.
1/17/78	**4**	**Filed ORDER that this case has been ~~assigned~~ referred to Mag. Raby for the purposes indicated. So Ordered: Tenney, J. m/n**
1/19/78	**5**	**Filed stip. and order that the date by which deft. Sumitomo Shoji America, Inc. shall answer, move, etc. is extended to Jan. 27, 1978. So Ordered: Tenney, J.**
02-08-78	6	Filed Stip. & Order that the date by which deft. Sumitomo Shoji America,Inc. to answer is ext. to 2-3-78,etc.....Tenney,J.
2/21/78	7	Filed ANSWER AND COUNTERCLAIM of deft. Sumitomo Shoji America, Inc. to the complaint.
2/21/78	8	Filed deft's objections to pltffs' interrogatories.
2/21/78	9	Filed deft's answers to pltffs' interrogatories.
3/8/78	10	Filed stip. and order that the date by which pltffs shall answer to the Answer and Counterclaims filed by deft. Sumitomo Shoji America, Inc. is extended 3/17/78. So Ordered: Tenney, J.
3/15/78	11	Filed deft. Sumitomo Shoji America, Inc.'s first interrogatories to each pltff.
2/2/78	—	PRE-TRIAL Mag Raby
3/28/78	12	Filed stip. and order that the date by which pltffs may respond to the answer and counterclaim by deft. is extended to 3/31/78. So Ordered: Tenney, J.
4/3/78	13	Filed MEMORANDUM AND ORDER of Mag. Raby. re: pltff. be relieved from compliance with the provisions of Rule 11A of the Civil Rules(Motion for Class Action status wit in 60 days after the filing of the complain). So Ordered: Raby, J. m/n
3/29/78	----	Pre-Trial conference held by Mag. Raby.
4/13/78	14	Filed stip. and order that the date by which pltffs shall answer or move with respect to the answer and counter-claim of deft is extended to 4/28/78. So Ordered: Tenney, J
4/13/78	15	Filed stip. and order that the date by which pltffs. shall answer or respond to the answer and counter-claim by defts. Sumitomo Shoji is extended to 4/28/78. So Ordered: Tenney, J.
4/28/78	16	Filed stip. and order that the date by which pltffs and deft shall make the mdions referred to in this court's order of 3/31/78 is extended to 5/8/78. So Ordered: Tenney, J.
5/8/78	17	Filed EEOC's Notice of Motion to participate as Amicus Curiae. ret - 6/23/78 at 9:30 a.m.
5/8/ 78	18	Filed EEOC's MEMORANDUM as Amicus Creiae in support of pltffs' motion to dismiss deft's counterclaim.
5/9/78	19	Filed pltffs' Notice of motion to dismiss the counterclaim for failure to state a claim etc. ret - 6/23/78 at 9:30 before Tenney, J.
5/9/78	20	Filed pltffs' memorandum of law in support of motion to dismiss counterclaim pur. to FRCP 12(b).
5/18/78	21	Filed deft's Notice of Motion for an order pur. to Rule 12(b)(6) dismissing the class action claims for fail ure to state a claim and for an order pur. to 12(b)(1) & 12(b)(6) dismissing the complaint etc. ret - 6/23/78 at 10:00 in room 906.
5/18/78	22	Filed deft. Sumitomo's memorandum of law in support of motion to dismiss.
5/23/78	23	Filed transcript of record of proceedings dated 5/9/78 before Mag. Raby.
5/9/78	—	ORDER REFERRED BY Mag Raby
6/19/78	24	Filed deft's First amended ANSWER and counterclaims.
7/13/78	25	Filed deft's affdvt in opposition to pltff's motion for an order dismissing the counter-claims .
7/13/78	26	Filed memo of law of deft in opposition to pltff's motion to dismiss.

CIVIL DOCKET CONTINUATION SHEET

FPI-NI—8-14-78-500M-8811

PLAINTIFF	DEFENDANT	DOCKET NO. 77 Civ 5644
LISA M. AVIGLIANO, ET AL	SUMITOMO SHOJI AMERICA, INC.	PAGE 3 OF ____ PAGES

DATE	NR.	PROCEEDINGS
7/14/78	27	Filed pltff's memo in opposition to deft's motion to dismiss the complaint.
7/17/78	28	Filed new pg 12 of a memo in opposition to deft's motion to dismiss filed 7/14/78.
7/21/78	29	Filed Stip & Order-briefs responding to the pending motions to dismiss the complaint and to dismiss the counter-claims shall be served by 7.12/78, and shall serve their reply briefs by 7/26/78. TENNEY,J.
7-28-78	30	Filed Exparte ORDER- the date for dft Shoji to answer amended as indicated TENNEY J m/n
7/31/78	31	Filed pltffs reply memo in support of its motion to dsm counterclaims.
08/15/78	32	Filed deft's notice of motion and affdvt in support thereof for setting a date certain for the filing of all papers in respect to defts motion to dismiss.
08/25/78	33	Filed response of the Equal Opportunity Commission to Sumitomo's motion for the filing of papers.
08/28/78	34	Filed affdvt of Lewis M. Steel in response to deft's motion for an order fixing a briefing schedule.
08/31/78	35	Filed reply affdvt in support of deft's motion for an order fixing a briefing schedule.
11/02/78	36	Filed ltr from EEOC, Re: Treaty traders under the FCN Treaty.
11/02/78		Filed Memo End. on document #32= the within motion is Granted in modified form as follows: 1. ltr to this Court fr EEOC dtd 10/26/78 stating that they anticipate filing an Amicus Curiae brief in this matter therefor the time for filing such briefis set no later than 11/20/78. 2. The time for deft to file its reply papers with respect to its motion to dismiss is extended to 11/29/78. TENNEY,J.
11/21/78	37	Filed Memo of the Equal Employment Opportunity Commission, Amicus Curiae, in opposition to deft's motion to dismiss.
12/08/78	38	Filed reply memo of deft in support of motion for an order dismissing complaint.
01/03/79	39	Filed pltff's reply memo in opposition to deft's motion to dismiss the complaint.
01/12/79	40	Filed surrebuttal memo of law in support of motion to dismiss complaint.
01/31/79	41	Filed EEOC's motion for leave to file a supplemental memo w/ rt dt of 02/12/79.
02/09/79	42	Filed affdvt in opposition to motion by EPOC for leave to file supp. memo of law.
03/08/79		Filed memo endOn doc. #41- the within motion is Denied. TENNEY,J. m/n
06-6-79	43	Fld OPINION # 48679 pltffs 1981 claims are denied & dfts section 796k counterclaim for atty's fees are dsmd . All other motion are denied TENNEY J m/n
06-18-79	44	Fld pltffs notice of motion for reargument & dism of counterclaims 2,3,4 ret 6/29/79
6-18-79	45	Fld pltffs memo of law in support of its motion to reargue.
6-19-79	46	Fld deft's Notice of Motion to amend opinion and order ret on 6-29-79,
6-19-79	47	Fld Memorandum of Law in support of motion to amend order.
6-28-79	48	Fld pltffs notice of motion re: an order pur 28:1292 amending the Courts Opinion . ret 7/1/6/79
6-28-79	49	Fld pltffs memo in support of its motion to amend an order.
7/6/79	50	Fld memo by EEOC Amicus Curia in support of pltffs motion for reconsideration
7/6/79	51	Fld Notice of Motion by EEOC to file as amicus Curia. of the motion for
7-11-79	52	Filed Deft's Memorandum of Law in opposition to Plaintiffs Motion for Order granting leave to Reargue etc..
7-11-79	53	Filed Deft's Memorandum of Law in Opposition to plaintiffs Cross Motion requesting Amendment of Order..

DC-111A REV. (1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 77-5641
AVIGLAINO LISA et al.,	SUMITOMO SHOJ AMERICA, INC.	PAGE 4 OF ____ PAGES

DATE	NR.	PROCEEDINGS
7-11-79	54	Filed Stip & Order that Pltiff's Motion for reargument and dismissal etc. be adjourned to 7-16-79.....So ordered. Tenny J.
7-18-79	55	Filed reply memo. of law in support of pltffs.' motion for an order granting leave to reargue and for dismissal of counterclaims.
08/10/79	56	Filed Opinion #48964-defts question concerning the relationship of Title VII to the Treaty is hereby certified;all other applications are Denied.TENNEY,J.m/n
8-24-79	57	Fld true copy of order ffom the USCA motion dtd 8-16-79 for leave to appeal is denied without ruling on the merits without prejudice etc, mn
09/12/79	58	Filed affdvt of Lance Gotthoffer in support of defts motion for reconsideration of this Courts opinion of 6/5/79.
09/12/79	59	Filed memo of law of deft in support of its motion to reconsider.
9-18-79	60	Fld pltffs' Memorandum in opposition to deft's motion for reconsideration.
9-18-79	61	Fld pltff's Affdvt of Lewis M. Steel in further supplement to motion for reconsideration.
9-18-79	62	Fld Memorandum of Equal Employment Opp. Comm. in opposition to deft's motion for reconsideration.
10-2-79	63	Fld Reply Memorandum of deft Sumitomo Shohi America, Inc. in support of request for reconsideration.
11-28-79	64	Fld Letter to Judge Tenney dtd 8-16-79 from J. Portis Hicks.
11-30-79	65	Filed OPINION # 49381...Finally, the Court directs that its Audust 9,1979 opinion and order be amended in the manner indicated herein. Tenney,J. m/n
12/07/79	66	Filed order- the opinion and order of this Court dtd 11/29/79 is hereby amended by substituting the attached corrected pages for previous pages 2,8,12,13,14 and 18. TENNEY,J.
3-10-80	67	Fld pltff's REPLY TO COUNTERCLAIMS of deft's.
5-28-80	68	Fld true copy of order from the USCA that motion for rehearing is granted, and that order denying motion to appeal is vacated etc, mn

A TRUE COPY
RAYMOND F. BURCHARDT, Clerk
BY [signature]
Deputy Clerk

DC-111A REV. (1/75)

SUMMONS AND COMPLAINT DATED NOVEMBER 21, 1977

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-44)
(Formerly D. C. Form No. 45 Rev. (4-42))

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. _____

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

Plaintiffs

v.

SUMITOMO SHOJI AMERICA, INC.,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

LEWIS M. STEEL, ESQ.
EISNER, LEVY, STEEL & BELLMAN, P.C.

plaintiff's attorney , whose address

351 Broadway
New York, New York 10013

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[illegible]
Clerk of Court.

Deputy Clerk.

Date: November 21, 1977

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

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

On Behalf Of Themselves And All Others Similarly Situated,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

- X

Civ. No.

COMPLAINT 77 Civ 5641

CLASS ACTION

JUDGE TENNEY

JURISDICTION

1. This case involves sex and national origin discrimination in employment. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., §§1331,1343,2201, and 2202. This case arises under the Equal Employment Opportunity Act of 1964, 42 U.S.C., §2000e, et seq., 42 U.S.C., §1981, and the Thirteenth Amendment to the United States Constitution.

THE PARTIES

2. Plaintiffs, Avigliano, Chenicek, Cristofari, Cummins, Mandelbaum, Mannina, Meisels, Pacheco, Schneider, Silberstein, and Wong, are female citizens of the United States. They reside in the State of New York, with the exception of Mandelbaum, who resides in the State of New Jersey.

3. Plaintiff Turner is a citizen of Japan, who resides in the State of New York.

4. Plaintiffs Avigliano, Cristofari, Pacheco, and Wong are presently employed by defendant at its 345 Park Avenue, New York, New York office.

5. Plaintiffs Mannina, Schnieder and Turner are employees of the defendant presently on maternity leave.

6. Plaintiffs Chenicek, Cummins, Mandelbaum, Meisels, and Silberstein, are former employees of defendant, who left their employment with the defendant because of its discriminatory practices.

7. Defendant Sumitomo Shoji America, Inc. is a corporate entity doing business in the State of New York, and upon information and belief, incorporated under the laws of the State of New York. The defendant maintains a principal office at 345 Park Avenue, New York, New York 10022.

CLASS ACTION ALLEGATIONS

8. Plaintiffs bring this as a class action pursuant to 23(a) and (b)(2), of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all women who have worked for the defendant, are working for the defendant, have left the employ of the defendant because of its discriminatory policies, or may seek employment with the defendant. The members of this class, or classes, are discriminated against in ways which deprive them or have deprived them of equal employment opportunities by reason of their sex, and/or nationality.

9. As to the class or classes described in paragraph 5 of the Complaint:

(1) The number of members in said class or classes is in the thousands and is, therefore, so numerous that joinder of all members is impracticable;

(2) There are questions of law and fact common to the class or classes, said common questions being whether the customs, practices and policies of defendant violate their Federal civil rights;

(3) The claims of the plaintiffs are typical of the class or classes;

(4) The plaintiffs will fairly and adequately protect the interest of the class or classes as they are women, and with the exception of plaintiff Turner, citizens of the United States desirous of obtaining equality for women and equality for United States citizens;

(5) The defendant has acted or failed to act on grounds applicable generally to the class or classes, thus making final relief appropriate with respect to the class or classes as a whole.

JURISDICTIONAL PREREQUISITES

10. Plaintiffs Avigliano, Cristofari, Cummins, Mandelbaum, Mannina, Meisels, Pacheco, Schneider, Silberstein, Turner, and Wong have filed timely and proper complaints before the Equal Employment Opportunity Commission, alleging denial by defendant of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C., §2000e, et seq.

11. On or about October 21, 1977, plaintiffs were advised that they were entitled to institute a civil action in the appropriate United States District Court within ninety (90) days of receipt of their notices of right to sue. A copy of said notices of right to sue is attached hereto and made a part hereof, and marked Exhibits A-1 to A-11.

FIRST CAUSE OF ACTION

12. Defendant has engaged in unlawful employment practices against plaintiffs and the class and/or classes they represent by:

(a) Discriminating against women by restricting them to clerical jobs;

(b) Discriminating against women by refusing to train them or promote them to executive, managerial, and/or sales positions.

SECOND CAUSE OF ACTION

13. Defendant has engaged in unlawful employment practices against plaintiffs Avigliano, Chenicek, Cristofari, Cummins, Mandelbaum, Mannina, Meisels, Pacheco, Schneider, Silberstein, Wong, and the class or classes they represent, by:

(a) Discriminating against plaintiffs on the basis of nationality by restricting them to clerical jobs;

(b) Discriminating against these plaintiffs on the basis of nationality by refusing to train them or promote them to executive, managerial, and/or sales positions.

THIRD CAUSE OF ACTION ON BEHALF OF ELIZABETH WONG

14. On or about December 7, 1977, the defendant increased the work load and responsibilities of plaintiff Wong and refused to give her additional pay or to promote her.

15. Plaintiff Wong alleges upon information and belief that defendant took this action in reprisal for the filing of her charge with the Equal Employment Opportunity Commission.

16. On or about September 28, 1977, plaintiff Wong filed an additional charge with the Equal Employment Opportunity Commission alleging that she was retaliated against for the filing of her initial charge.

17. Plaintiff Wong alleges upon information and belief, that the Equal Employment Opportunity Commission will no longer process her retaliation charge, after issuing her a right to sue letter with regard to her initial charge. Therefore, plaintiff Wong has exhausted all procedural requirements, and may properly allege retaliation in this complaint.

EQUITY

18. The plaintiffs and those they represent have no ade-

quate or complete remedy at law to redress the wrongs alleged, and this suit for a permanent injunction is the only means of securing adequate relief. Plaintiffs and those they represent are now suffering and will continue to suffer irreparable injury from defendant's policies, practices and customs of discrimination in its employment practices unless this Court enjoins such policies, practices and customs.

WHEREFORE, plaintiffs respectfully request this Court:

(a) To assign this case for a hearing at the earliest possible date and cause the case to be expedited in every possible way;

(b) Issue a permanent injunction:

(1) Enjoining defendant from engaging in the aforesaid unlawful employment practices;

(2) Directing defendant to promote plaintiffs and the class or classes they represent to executive, managerial, and/or sales positions;

(3) Directing defendant to institute a training program to upgrade plaintiffs and the class or classes they represent and to take such affirmative steps as may be necessary to remedy the effects of defendant's discriminatory practices;

(4) Enjoining defendant from discriminating on the basis of sex and nationality in hiring new employees.

(c) Award plaintiffs and their class or classes:

(1) Compensatory and punitive damages for injuries suffered by plaintiffs and the class or classes they represent by reason of defendant's unlawful employment practices;

(2) The costs of this action together with reasonable attorneys fees.

(d) Grant plaintiffs and the class or classes they represent such other and further relief as may be necessary and proper.

Dated: New York, New York
November 21, 1977

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, New York 10013
(212) 966-9620

By: _____
LEWIS M. STEEL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 7a

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Ms. Lisa M. Avagliano c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-1366	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

OCT 27 1977
(Date)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B
SEP 77

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

8a

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Ms. Rosemary T. Cristofari c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-1361	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

OCT 27 1977

(Date)

Arthur W. Stern, District Director

(Typed Name and Title of EEOC Official)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B
SEP 77

E. A-7

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

9a

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Ms. Catherine Cummins c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-1367	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

OCT 27 1977
(Date)

Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B
SEP 77

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE 10a

(Issued on Request)

TO:	FROM:
Ms. Raellen Mandelbaum c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-1362	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

OCT 27 1977

(Date)

Arthur W. Stern, District Director

(Typed Name and Title of EEOC Official)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B
SEP 77

Ex 4-4

EQUAL PLOYMENT OPPORTUNITY COMMISSIC 11a

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Ms. Maria Mannina c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-1363	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

XX With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

OCT 27 1977

(Date)

Arthur W. Stern, District Director

(Typed Name and Title of E.E.O.C. Official)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B
SEP 77

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Ms. Sharon Meisels c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-1364	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

XX With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

Arthur W. Stern, District Director

(Typed Name and Title of EEOC Official)

OCT 27 1977

(Date)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B SEP 77

NOTICE OF RIGHT TO SUE 13a

(Issued on Request)

TO:	FROM:
Ms. Frances Pacheco c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-1744	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

OCT 27 1977
(Date)

Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B
SEP 77

Ex. 4-7

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Ms. Joanne Schneider c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-0049	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

OCT 27 1977
(Date)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B
SEP 77

5-4-8

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

15a

NOTICE OF RIGHT TO SUE

(Issued on Request)

Ms. Janice Silberstein c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	FROM: Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-1360	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

- ☐ More than 180 days have expired since the filing of this charge.
- ☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.
- ☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.
- ☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

OCT 27 1977
(Date)

Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B
SEP 77

Ex. 7-9

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

16a

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Ms. Reiko Turner c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-1670	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

OCT 27 1977
(Date)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B
SEP 77

Ex. 7 - 10

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Ms. Elizabeth Wong c/o Lewis M. Steel, Esq. 351 Broadway New York, New York 10013	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
021-77-1365	Ralph Munoz, District Counsel	264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Arthur W. Stern

OCT 27 1977
(Date)

Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

EEOC FORM 161-B
SEP 77

EX A-11

ANSWER AND COUNTERCLAIM OF DEFENDANT SUMITOMO SHOJI AMERICA, INC.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER, ELIZABETH WONG, On Behalf of Themselves And All Others Similarly Situated, Plaintiffs, -against- SUMITOMO SHOJI AMERICA, INC., Defendant.	77 Civ. 5641 (CHT) ANSWER AND COUNTERCLAIM

Sumitomo Shoji America, Inc. ("Sumitomo"), by its attorneys, Wender, Murase & White, for its Answer to the Complaint, alleges as follows:

I

RESPONSES TO PLAINTIFFS' PLEADINGS

1. Except as hereinafter expressly admitted or denied, Sumitomo denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the Complaint.

2. Admits so much of paragraph 1 of the Complaint as alleges that plaintiffs purport to bring this action pursuant to the statutes and other provisions of law referred to therein, and denies any violation of said statutes or provisions of law.

3. Admits so much of Paragraph 2 of the Complaint as alleges that the persons named therein are females.

4. Admits the allegations of Paragraphs 4 and 5 of the Complaint.

5. Admits so much of Paragraph 6 of the Complaint as alleges that the five persons named therein are former employees of Sumitomo, and denies the remaining allegations of said paragraph 6.

6. Admits the allegations of Paragraph 7 of the Complaint.

7. Admits so much of Paragraph 8 of the Complaint as alleges that plaintiffs purport to bring this action as a class action, and denies the remaining allegations of said Paragraph 8.

8. Denies the allegations of Paragraph 9 of the Complaint.

9. Denies the allegations of Paragraphs 12 through 13, inclusive, of the Complaint.

10. Denies that plaintiffs are entitled to the relief prayed for or any part thereof.

II.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

11. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

12. This Court lacks jurisdiction over the subject matter of this action.

THIRD AFFIRMATIVE DEFENSE

13. Sumitomo's employment practices are proper and permissible and are sanctioned and privileged pursuant to the Treaty of Friendship, Commerce & Navigation between the United States and Japan, and applicable statutes, rules, regulations and practices.

FOURTH AFFIRMATIVE DEFENSE

14. Sumitomo's employment practices are proper, permissible and justified because they are founded upon and exist pursuant to bona fide occupational qualifications and business necessity.

FIFTH AFFIRMATIVE DEFENSE

15. All or portions of the plaintiffs' claims are barred by applicable statutes of limitations and unclean hands.

SIXTH AFFIRMATIVE DEFENSE

16. Plaintiffs lack standing to assert the claims made in the Complaint.

SEVENTH AFFIRMATIVE DEFENSE

17. The statutes and other provisions of law pursuant to which plaintiffs purport to bring this action do not provide the relief demanded in the Complaint.

III.

COUNTERCLAIM

18. Jurisdiction herein is based on the doctrine of ancilliary jurisdiction.

19. Upon information and belief, plaintiffs on a date or dates unknown to Sumitomo but prior to commencing the proceedings referred to hereinafter, 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.

20. Upon information and belief 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, therein making baseless claims that Sumitomo had discriminated against them. Both the proceedings before the Division of Human Rights of the Executive Department of the State of New York, as well as the proceedings before the United States Equal Employment Opportunity Commission, have been terminated by such agencies with no action being taken and with no finding by either agency of reasonable or probable cause for plaintiffs' making of such claims.

21. Upon information and belief as a part of carrying out their conspiracy, plaintiffs also commenced the within action. The within action, upon information and belief, is brought in bad faith, vexatiously and is willfully and wrongfully brought for the purpose of coercing Sumitomo into acceding to plaintiffs' improper demands concerning work assignment and additional compensation, and in retaliation for Sumitomo's refusal to accede to such demands.

22. Plaintiffs have maliciously and tortiously abused process by commencing proceedings before the Division of Human Rights of the Executive Department of the State of New York, the United States Equal Employment Opportunity Commission, and this Court, all for the wrongful collateral purposes of coercion and retaliation.

23. Sumitomo has been damaged as a result of plaintiffs' abuse of process, and claims actual damages to date in the amount of approximately $75,000 plus punitive damages in the amount of $250,000.

WHEREFORE, defendant-counterclaimant Sumitomo Shoji America, Inc., prays judgment as follows:

(1) That the Complaint herein be dismissed with prejudice;

(2) That it be awarded judgment on its counterclaims in the amount of $75,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(3) That it be awarded the costs of this action, including reasonable attorney's fees; and

(4) That it be awarded such other and further relief as to this Court may seem just and proper.

WENDER, MURASE & WHITE

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

DEFENDANT'S OBJECTIONS TO PLAINTIFFS' INTERROGATORIES DATED FEBRUARY 3, 1978

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RECEIVED FEB 3 1978

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

On Behalf of Themselves And All Others Similarly Situated,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

77 Civ. 5641 (CHT)

DEFENDANT'S OBJECTIONS TO PLAINTIFFS' INTERROGATORIES

Defendant Sumitomo Shoji America, Inc. (hereinafter "Sumitomo"), by its attorneys Wender, Murase & White, hereby objects to "Plaintiffs First Interrogatories and Request for Production of Documents", as follows:

INTERROGATORY

7. Does the Corporation use job titles? If the answer is yes, list all job titles which have been utilized by the Corporation since April 1, 1969, and state as to each job title when it came into being, and until what date the job title was utilized.

OBJECTION

7. Sumitomo has answered this Interrogatory for the period December 1, 1974 through December 1, 1977, which period of time is approximately three years prior to commencement of this action.* Sumitomo objects to furnishing the information requested for the period prior to December 1, 1974. Even if

* See Defendant's Answers to Plaintiffs' Interrogatories served and filed herewith (hereinafter "Sumitomo's Answers").

Sumitomo were adjudjed liable to plaintiffs for any of the acts or conduct alleged in the complaint, damages, if any, would by applicable law be limited to a period of time of approximately three years prior to commencement of this action. Furthermore, it would be unduly burdensome to require that Sumitomo search its records for such additional period of time to try to determine whether job titles other than the titles already identified for plaintiffs were used, particularly where such job titles may have been used for only a brief period of time.

INTERROGATORY

12. As of the last day of the pay period closest to December 1, 1977, give:

(a) the number of female employees at each of the Corporation's offices, further broken down to give:

1. the number of female employees at each office by category, such as executive, managerial, professional, clerical,etc.
2. the number of female employees at each office, by job title.

(b) the number of employees whose country of national origin is not Japan at each of the Corporation's offices, further broken down to give:

1. the number of employees whose country of national origin is not Japan at each office by category, such as executive, managerial, professional, clerical,etc;
2. the number of employees whose country of national origin is not Japan at each office by job title.

OBJECTION

12. (a) Sumitomo has answered this Interrogatory to the extent that it requests the number of female employees at each of its offices (see Sumitomo's Answers). Sumitomo objects to furnishing the additional information requested by Interrogatory 12(a). Prior to determination by this Court whether this action may be maintained as a class action, the additional information requested does not appear reasonably calculated to lead to discovery of admissible evidence.

INTERROGATORY

15. Does the Corporation have a table of organization, or other chart or document(s) which sets forth the Corporation's supervisory chain of command? If such a document or documents exist, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories. If a table of organization exists which has not been reduced to writing, please set forth in this answer.

OBJECTION

15. Sumitomo has answered this Interrogatory with information as of December 1, 1977 and has no objection to answering this Interrogatory for the period commencing December 1, 1974. Sumitomo objects to furnishing the information requested for the period prior to December 1, 1974. Even if Sumitomo were adjudged liable to plaintiffs for any of the acts or conduct alleged in the complaint, damages, if any, would by applicable law be limited to a period of time of approximately three years prior to commencement of this action. Whether Sumitomo had a table of organization prior to December 1, 1974 is not reasonably calculated to lead to discovery of

admissible evidence.

INTERROGATORY

18. Has the Corporation filed with the Equal Employment Opportunity Commission Standard Form 100, known as the Employer Information Report EEO-1? If the answer is yes, please state for what years since 1969 this form has been filed, and attach a copy of the form filed for each year through the present year.

OBJECTION

18. Sumitomo has answered this Interrogatory in respect of its New York City offices for the years 1975 and 1976 and will furnish such information for 1977 when available (see Sumitomo's Answers). Sumitomo objects to furnishing such information or documents for the years prior to 1975, and to furnishing such information or documents for its branch offices. Sumitomo objects to furnishing such information for the period prior to 1975 because even if Sumitomo were adjudged liable to plaintiffs for any of the acts or conduct alleged in the complaint, damages, if any, would by applicable law be limited to a period of time approximately three years prior to commencement of this action. Prior to determination by this Court whether this action may be maintained as a class action, the information requested, insofar as it encompasses branch offices, does not appear to be reasonably calculated to lead to admissible evidence.

INTERROGATORY

20. List the name, age, address, sex, country of national origin, and school years completed by each employee

who is presently employed by the Corporation, and with respect to each such employee state:

(a) the office in which employee is employed;

(b) all job titles held since date of initial employment, including present job title;

(c) the date of each job title change;

(d) salary received during the 12 month period from December 1, 1976 through November 30, 1977;

(e) the date of initial employment.

OBJECTION

20. Sumitomo does not maintain this information in a manner which would permit retrieval without undue burden to Sumitomo. Much of the information requested is not verifiable by Sumitomo. Sumitomo does not in any event maintain information relating to country of national origin of its employees. Prior to a determination by this Court whether this action may be maintained as a class action, the information requested does not appear reasonably calculated to lead to discovery of admissible evidence. The information requested is confidential. Absent an appropriate stipulation of confidentiality, and consent by the affected employees to disclosure of the information requested, Sumitomo objects to furnishing the information requested upon the grounds that release of such information by Sumitomo might expose Sumitomo to liability to such employees for the release of such information.

INTERROGATORY

21. List the name, age, address, school year completed of each woman hired by the Corporation who has left the employ of the Corporation since October 8, 1973, and with respect to each such former employee state:

(a) the date of initial employment;

(b) all job titles held since date of initial employment;

(c) date of each job title change.

OBJECTION

21. Sumitomo does not maintain this information in a manner which would permit retrieval without undue burden to Sumitomo. Much of the information requested is not verifiable by Sumitomo. Prior to determination by this Court whether this action may be maintained as a class action, the information requested does not appear reasonably calculated to lead to discovery of admissible evidence. The information requested is confidential. Absent an appropriate stipulation of confidentiality, and consent by the affected employees to disclosure of the information requested, Sumitomo objects to furnishing the information requested upon the grounds that release of such information by Sumitomo might expose Sumitomo to liability to such employees for the release of such information. If Sumitomo is required to collect and furnish any such information to plaintiffs, it should be limited to the period commencing December 1, 1974.

INTERROGATORY

22. List the name, age, address, school years completed of each person whose country of national origin is not Japan hired by the Corporation who has left the employ of the Corporation since October 8, 1973, and with respect to each such former employee state:

(a) the date of initial employment;

(b) all job titles held since date of initial employment;

(c) date of each job title change.

OBJECTION

22. Sumitomo does not maintain this information in a manner which would permit retrieval without undue burden to Sumitomo. Much of the information requested is not verifiable by Sumitomo. Sumitomo does not in any event maintain information as to "country of national origin" of its employees. Prior to a determination by this Court whether this action may be maintained as a class action, the information requested does not appear reasonably calculated to lead to discovery of admissible evidence. The information requested is confidential. Absent an appropriate stipulation of confidentiality, and consent by the affected employees to disclosure of the information requested, Sumitomo objects to furnishing the information requested upon the grounds that release of such information by Sumitomo might expose Sumitomo to liability to such employees for the release of such information. If Sumitomo is required to collect and furnish any such information to plaintiffs, it should be limited to the period commencing December 1, 1974.

INTERROGATORY

25. List the name, address, sex, country of national origin, titles and office where employed of all employees from April 1, 1969 to date who have held, or continue to hold, supervisory positions. With respect to each such employee, state:

(a) Date of initial employment;

(b) All job titles held since date of initial employment, including present job title.

(c) If not presently employed by the Corporation, the date the employee left the Corporation.

(d) Date of each job title change.

(e) Describe the unit, department, section, or other component of the Corporation which the employee supervises, or supervised prior to leaving the Corporation.

(f) The number of employees under the supervision of the supervisor at present, or when the supervisor left the employment of the Corporation.

OBJECTION

25. Sumitomo does not maintain this information in a manner which would permit retrieval without undue burden to Sumitomo. Much of the information requested is not verifiable by Sumitomo. Sumitomo does not in any event maintain information relating to "country of national origin" of its employees. Prior to a determination by this Court whether this action may be maintained as a class action, the information requested does not appear reasonably calculated to lead to discovery of admissible evidence. The information requested is confidential. Absent an appropriate stipulation of confidentiality, and consent by the affected employees to disclosure of the information requested, Sumitomo objects to furnishing the information requested upon the grounds that release of such information by Sumitomo might expose Sumitomo to liability to such employees for the release of such information. If Sumitomo is required to collect and furnish any such information to plaintiffs, it should be limited to the period commencing December 1, 1974.

INTERROGATORY

26. List the name, agree, address, sex, country of national origin, and school years completed by each present employee of the Corporation, or former employee of the Corporation who worked with the Corporation during the period April 1, 1969 to date, who functions or functioned in a sales or selling capacity. With respect to each such employee, state:

(a) date of initial employment;

(b) all job titles held since date of initial employment, including present job title;

(c) date of each job title change;

(d) salary, including all commission payments, etc.

OBJECTION

26. Sumitomo does not maintain this information in a manner which would permit retrieval without undue burden to Sumitomo. Much of the information requested is not verifiable by Sumitomo. Sumitomo does not in any event maintain information relating to "country of national origin" of its employees. Prior to a determination by this Court whether this action may be maintained as a class action, the information requested does not appear reasonably calculated to lead to discovery of admissible evidence. The information requested is confidential. Absent an appropriate stipulation of confidentiality, and consent by the affected employees to disclosure of the information requested, Sumitomo objects to furnishing the information requested upon the grounds that release of such information by Sumitomo might expose Sumitomo to liability to such employees for the release of such information. If Sumitomo is required to collect and furnish any such information to plaintiffs, it should be limited to the period commencing December 1, 1974.

INTERROGATORY

35. Does the Corporation maintain personnel files for individual employees? If the answer is in the affirmative, answer the following:

(a) Are the files maintained on all employees. If not, list the job titles for which such files are maintained.

(b) Identify all standard documents contained in such employee's personnel file, stating during that period of

time from April 1, 1969 to date, each document was utilized, and attach blank copies of each form utilized. If different types of files are maintained for different categories of employees, or for employees with different job titles, answer this question category by category, and/or job title by job title.

OBJECTION

35(b) Prior to a determination by this Court whether this action may be maintained as a class action, the information requested does not appear reasonably calculated to lead to discovery of admissible evidence. If Sumitomo is required to collect and furnish such information to plaintiffs, it should be limited to the period commencing December 1, 1974.

INTERROGATORY

36. Has the Corporation ever been charged with discrimination on the basis of sex and/or national origin in any other court, or before any public agency, federal, state or local, in any jurisdiction of the United States? If the answer is in the affirmative, list each case name individually, setting forth the forum, the case identification number, and the status of each case.

OBJECTION

36. Plaintiffs are aware of charges which they filed against Sumitomo with the United States Equal Employment Opportunity Commission and the Division of Human Rights of the Executive Department of the State of New York. Plaintiffs are further aware that neither agency in such proceedings found reasonable or probable cause for the filing of such complaints. In the

course of such proceedings, plaintiffs also became fully aware of another proceeding filed against Sumitomo. The information requested is a matter of public record easily accessible to plaintiffs.

INTERROGATORY

38. Identify separately and with particularity sufficient for use as a description in a subpoena each document (not already identified in the answers to the foregoing interrogatories or produced in response to the requests contained herein) which contains any of the information given in answer to each of the foregoing interrogatories.

OBJECTION

38. The information requested imposes an unreasonable burden on Sumitomo. Many, many documents of Sumitomo may contain some or all of the information given in Sumitomo's Answers. By mere example, Interrogatory "1" asks the state of incorporation of Sumitomo. To demand that Sumitomo search for every document which contains such information is patently unfair and seeks to impose undue burden and expense on Sumitomo. Plaintiffs should be required to frame their own document requests and not try to impose that burden on Sumitomo.

Dated: New York, New York
February 3, 1978

WENDER, MURASE & WHITE

by _____
(A Member of the Firm)
Attorneys for Defendant Sumitomo
Shoji America, Inc.
400 Park Avenue
New York, New York 10022
(212) 832-3333

DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES SWORN TO FEBRUARY 3, 1978

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RECEIVED FEB 3 1978

LISA M. AVIGLIANO, et al., Plaintiffs,	76 Civ. 5641 (CHT)
-against-	DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES
SUMITOMO SHOJI AMERICA, INC., Defendant.	

Defendant Sumitomo Shoji America, Inc. (hereinafter "Sumitomo") hereby answers "Plaintiffs' First Interrogatories and Request for Production of Documents" as follows:

INTERROGATORY

1. In what state of the United States is the Corporation incorporated?

ANSWER

1. New York.

INTERROGATORY

2. State whether the Corporation is a subsidiary of any other corporation. If so, state the name of the parent and state the location of the parent's principal offices.

ANSWER

2. Sumitomo is a wholly-owned subsidiary of Sumitomo Shoji Kaisha, Ltd., a Japanese corporation which maintains its principal place of business at 15, Kitahama 5-Chome, Higashi-Ku, Osaka, Japan, and 2-2 Hitosubashi 1-Chome, Chiyoda Ku, Tokyo, Japan.

INTERROGATORY

3. State where the Corporation maintains its principal office, giving the full address.

ANSWER

3. 345 Park Avenue, New York, New York 10022.

INTERROGATORY

4. (As amended by December 29, 1977 letter of counsel for plaintiffs to counsel for defendant): State where the corporation maintains other offices, listing the full address of each office.

(a) As to each office, state whether the personnel practices in effect are substantially the same as the personnel practices in effect in the Corporation's principal office.

(b) As to each office where the personnel policies are not substantially the same as the policies in effect at the principal office, please state in detail how the policies differ from the principal office in respect to methods of hiring, promotion, testing, transfer, requirements for any job title, or other distinctions relating to the question of qualifications to fill similar job titles or perform similar work as may exist at the principal offices.

(c) State whether any employee of the Corporation has general authority over personnel practices in all of the offices of the Corporation. If the answer to the question is in the affirmative, please state the name, title, and address of said employee, and set forth the scope of his authority over the personnel practices in all offices. If the answer is in the negative, state who has the general supervisory authority over the personnel offices in each of the Corporation's offices, and state whether said employee or employees report to anyone at the principal office, or any other office and, if so, to whom, listing addresses for all employees and titles mentioned in this answer.

ANSWER

4. 350 Fifth Avenue, Room 7100
New York, New York 10001

John Hancock Center, Suite 3818
875 North Michigan Avenue
Chicago, Illinois 60611

26500 Northwestern Highway
Suite 406
Southfield, Michigan 48076

1100 Milam Building, Suite 3434
Houston, Texas 77022

Room 315, Cotton Exchange Building
Dallas, Texas 75201

One California St. Suite 630
San Francisco, California 94111

900 Fourth Ave., Suite 3101
Seattle, Washington 98164

3108 First National Bank Tower
1300 S.W. Fifth Avenue
Portland, Oregon 97201

1014 City National Bank Bldg.
606 South Olive Street
Los Angeles, Calif. 90014

Room 3929, United States Steel Building
600 Grant Street
Pittsburgh, Pennsylvania 15219

(a) No.

(b) Each branch office, except the office at 350 Fifth Avenue, New York, New York has autonomous control over salary, hiring, promotion, testing, transfer and requirements for job titles of certain employees including secretaries, clerks, office business machine operators, maintenance personnel, guards, chauffers, messengers, receptionists, telex machine operators, etc. Such policies differ according to standards set by the branches, labor conditions and standards in the areas where the branches are located, customs and policies in the areas where the branches are located, and the requirements of each of the branches.

(c) No. Insofar as the employees described in subparagraph (b) hereof are concerned, personnel practices of the branches, except the office at 350 Fifth Avenue, New York, New York, are under general supervisory authority of the general managers of each such branch, who do not report on such matters except on an informational basis to Sumitomo's principal office

(addresses for each of such general managers are furnished above). In New York, insofar as the employees described in subparagraph (b) hereof are concerned, personnel practices of both the offices at 345 Park Avenue and at 350 Fifth Avenue are under the general supervisory authority of Mr. H. Tsuwano, Personnel Manager, 345 Park Avenue, New York, New York 10022.

INTERROGATORY

5. State the total number of employees employed by the Corporation.

ANSWER

5. 464 (approximately, as at December 1, 1977).

INTERROGATORY

6. State the total number of employees employed by the Corporation at each of its offices.

ANSWER

6.

New York, New York (345 Park Avenue)	209
New York, New York (350 Fifth Avenue)	21
Pittsburgh, Pennsylvania	2
Chicago, Illinois	73
Detroit, Michigan	2
Houston, Texas	36
Dallas, Texas	6
San Francisco, California	44
Seattle, Washington	11
Portland, Oregon	12
Los Angeles, California	48
	464

INTERROGATORY

7. Does the Corporation use job titles? If the answer is yes, list all job titles which have been utilized by

the Corporation since April 1, 1969, and state as to each job title when it came into being, and until what date the job title was utilized.

ANSWER

Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer this Interrogatory with information as of December 1, 1977 without prejudice to Sumitomo's right to object to furnishing an answer to this Interrogatory for any period of time prior to December 1, 1977. Sumitomo does not object to answering this Interrogatory for the period December 1, 1974 through December 1, 1977 but objects to furnishing information for any period prior thereto (see Sumitomo's Objections to Plaintiffs' Interrogatories, hereinafter "Sumitomo's Objections", served and filed herewith). With respect to the period December 1, 1974 through December 1, 1977, Sumitomo's answer is as follows:

7. Yes. General Manager, assistant general manager, department manager, sub-branch manager, manager, assistant manager, assistant to general manager, administrator, supervisor, senior clerk, senior secretary, clerk, secretary, business machine operator, maintenance, salesperson, guard, chauffer, messenger, receptionist, telex machine operator. Not all such titles are formally assigned and other designations may be used from time to time. All such titles were used prior to December 1, 1974 and all are still utilized except supervisor, use of which was discontinued September 1, 1977.

INTERROGATORY

8. Does the Corporation use job descriptions? If the answer is yes, identify all job descriptions which have been

in use since April 1, 1969, and annex copies of all documents containing job descriptions which have been utilized at any time by the Corporation since April 1, 1969 to date, specifying the periods when said descriptions have been utilized.

ANSWER

8. No.

INTERROGATORY

9. If the Corporation has utilized job descriptions which have not been reduced to writing, please list each job by title, stating next to each job what the description of the job is, and state when the Corporation has employed persons to fill such job from April 1, 1969 until the present.

ANSWER

9. Not applicable.

INTERROGATORY

10. Does the Corporation classify employees into categories such as executive, managerial, professional, technical, clerical, etc.? If the answer is in the affirmative, identify all documents which describe how the classification is accomplished, and attach copies to these answers. Also list all job titles which fall within each category.

ANSWER

10. Yes. Sumitomo maintains no documents which describe how such classification is accomplished. Job titles are not formally tied to employee classification nor do job

titles in all cases fall exclusively within one employee classification. The following list relates job titles, informal or otherwise, to employee classification only to the extent that such job titles usually do fall within employee classification:

Employee Classification	Job Title Usually Within Classification
Executive	General Manager, Assistant General Manager and Department Manager (if made executives)
Managerial and Supervisory	General Manager, Assistant General Manager, Department Manager, Sub-branch Manager, Manager, Assistant Manager, Assistant to General Manager, Administrator, Senior Clerk, Senior Secretary
Others	Clerk, Secretary, Business Machine Operator, Maintenance, Salesperson, Guard, Chauffer, Messenger, Receptionist, Telex Machine Operator.

INTERROGATORY

11. If the Corporation orally classifies employees, and/or refers to employees as executive, managerial, professional, technical, clerical, etc., please list all such categories utilized and list all job titles which fall within each category.

ANSWER

11. See answer to Interrogatory 10, above.

INTERROGATORY

12. As of the last day of the pay period closest to December 1, 1977, give:

(a) the number of female employees at each of the Corporation's offices, further broken down to give:

1. the number of female employees at each office by category, such as executive, managerial, professional, clerical, etc.;
2. the number of female employees at each office, by job title.

(b) the number of employees whose country of national origin is not Japan at each of the Corporation's offices, further broken down to give:

1. the number of employees whose country of national origin is not Japan at each office by category, such as executive, managerial, professional, clerical, etc.;
2. the number of employees whose country of national origin is not Japan at each office by job title.

ANSWER

12.

(a) Sumitomo has no objection to furnishing plaintiffs with the number of female employees at each of Sumitomo's offices. As to the balance of the information requested by Interrogatory 12(a), see Sumitomo's Objections served and filed herewith.

Office	Number of Female Employees at Office
New York (345 Park Avenue)	80
New York (350 Fifth Avenue)	16
Pittsburgh	1
Chicago	28
Detroit	1
Houston	14
Dallas	2
San Francisco	23
Seattle	4
Portland	6
Los Angeles	24

12. (b) Sumitomo does not maintain information as to "national origin" of its employees.

INTERROGATORY

13. Does the Corporation utilize any selection criteria by which it determines, or which aids in the determination of whom it will hire for jobs, or promote? If the answer to this question is in the affirmative, please answer the following additional questions.

(a) Has the criteria which is or has been utilized in writing? If so, identify all documents containing such criteria from April 1, 1969 to date, and attach copies of all such documents to the responses to these interrogatories.

(b) If the criteria utilized has not been reduced to writing, list what the criteria is for each job title and/or classification utilized by the Corporation since April 1, 1969 to date in descending order of importance, specifying for what period the criteria has been in effect and state whether the criteria has changed from time to time, and, if so, list the appropriate changes for the relevant time periods.

ANSWER

13. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

14. Does the Corporation utilize career paths and/or progression ladders as methods of determining eligibility for promotion? If the answer to this interrogatory is yes, please answer the following questions:

(a) Does the Corporation have any documents which identify career paths or progression ladders? If so, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories.

(b) If the Corporation utilizes career paths and/or progression ladders which are oral, please set forth any such career path or progression ladders which have been utilized from April 1, 1969 to date, specifying the period in which each career path and/or progression ladder was utilized.

ANSWER

14. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

15. Does the Corporation have a table of organization, or other chart or document(s) which sets forth the Corporation's supervisory chain of command? If such a document or documents exist, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories. If a table of organization exists which has not been reduced to writing, please set it forth in this answer.

ANSWER

15. Yes. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer this Interrogatory with information as of December 1, 1977 without prejudice to Sumitomo's right to object to furnishing an answer to this Interrogatory for any period of time prior to December 1, 1977. Sumitomo does not object to answering this Interrogatory for the period

December 1, 1974 through December 1, 1977 but objects to furnishing such information for any period prior thereto (see Sumitomo's Objections served and filed herewith). With respect to Sumitomo's documents reflecting its supervisory chain of command as of December 1, 1977, see Exhibit "1" hereto.*

INTERROGATORY

16. Has the Corporation since April 1, 1969 to date, utilized an employee's country of national origin, for example, Japanese citizenship, as a criterion for eligibility to hold certain jobs with the Corporation? If the answer to this interrogatory is yes, please answer the following questions:

(a) For which jobs has this criterion been utilized, and state the time period of utilization from April 1, 1969 to date.

(b) For any of the jobs listed in answer to subsection (a) above, is the criterion mandatory? If so, state for which jobs the criterion is mandatory, and over what time periods from April 1, 1969 to date.

ANSWER

16. No.

INTERROGATORY

17. Has the Corporation utilized sex as a criterion for eligibility for any job with the Corporation from April 1, 1969 to date? If the answer to this question is yes, please answer the following questions:

*Information for the period commencing December 1, 1974 will be furnished at a later date to be mutually agreed upon by counsel.

(a) For which jobs has this criterion been utilized, and state the time period of utilization from April 1, 1969 to date.

(b) For any of the jobs listed in answer to subsection (a) above, is the criterion mandatory? If so, state for which jobs the criterion is mandatory, and over what time periods from April 1, 1969 to date.

ANSWER

17. No.

INTERROGATORY

18. Has the Corporation filed with the Equal Employment Opportunity Commission Standard Form 100, known as the Employer Information Report EEO-1? If the answer is yes, please state for what years since 1969 this form has been filed, and attach a copy of the form filed for each year through the present year.

ANSWER

18. Yes. Sumitomo does not object to furnishing the information requested by this Interrogatory for its New York City offices for the years 1975, 1976 (and 1977 when available) but objects to furnishing such information for any period prior thereto, and for any of its offices other than New York (see Sumitomo's Objections served and filed herewith). For Employer Information Report EEO-1 for Sumitomo's New York City offices for the years 1975 and 1976, see Exhibit "2" hereto.

INTERROGATORY

19. Does the Corporation maintain any documents reflecting the composition of its employees, containing break

downs of number of employees by sex, race, and/or country of national origin? If the answer to this question is yes, specify for what years since April 1, 1969 such documents have been kept, identify each document, and annex a copy of each document to the answers to these interrogatories.

ANSWER

19. No.

INTERROGATORY

20. List the name, age, address, sex, country of national origin, and school years completed by each employee who is presently employed by the Corporation, and with respect to each such employee state:

(a) the office in which each employee is employed;

(b) all job titles held since date of initial employment, including present job title;

(c) the date of each job title change;

(d) salary received during the 12 month period from December 1, 1976 through November 30, 1977;

(e) the date of initial employment.

ANSWER

20. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

21. List the name, age, address, school years completed of each woman hired by the Corporation who has left the employ of the Corporation since October 8, 1973, and with respect to each such former employee state:

(a) the date of initial employment;

(b) all job titles held since date of initial employment;

(c) date of each job title change.

ANSWER

21. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

22. List the name, ages, address, school years completed of each person whose country of national origin is not Japan hired by the Corporation who has left the employ of the Corporation since October 8, 1973, and with respect to each such former employee, state:

(a) the date of initial employment;

(b) all job titles held since date of initial employment;

(c) date of each job title change.

ANSWER

22. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

23. State whether the Corporation has maintained a personnel manual or any document containing personnel policies since April 1, 1969 to date. If the answer is yes, identify the manual or manuals, and/or documents stating dates in which each has been in use by the Corporation and attach copies to the answers to these interrogatories.

ANSWER

23. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

24. State whether the Corporation has any documents setting forth employee pay rates and/or benefits, or which set forth opportunities for employee advancement, or materials which in any way explain career opportunities with the Corporation. If the answer is yes, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories.

ANSWER

24. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

25. List the name, address, sex, country of national origin, title, and office where employed of all employees from April 1, 1969 to date who have held, or continue to hold, supervisory positions. With respect to each such employee, state:

(a) Date of initial employment;

(b) All job titles held since date of initial employment, including present job title.

(c) If not presently employed by the Corporation, the date the employee left the Corporation.

(d) Date of each hcb title changed.

(e) Describe the unit, department, section, or other component of the Corporation which the employee supervises, or supervised prior to leaving the Corporation.

(f) The number of employees under the supervision of the supervisor at present, or when the supervisor left the employment of the Corporation.

ANSWER

25. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

26. List the name, age, address, sex, country of national origin, and school years completed by each present employee of the Corporation, or former employee of the Corporation who worked with the Corporation during the period April 1, 1969 to date, who functions or functioned in a sales or selling capacity. With respect to each such employee, state:

(a) date of initial employment;

(b) all job titles held since date of initial employment, including present job title;

(c) date of each job title change;

(d) salary, including all commission payments, etc.

ANSWER

26. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

27. Does the Corporation have any written criteria it utilizes to determine eligibility for hire, transfer or promotion to sales or selling jobs? If the answer is yes, identify each document which contains such criteria and attach copies to the answers to these interrogatories.

ANSWER

27. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

28. If the Corporation does not have written criteria with regard to eligibility for sales or selling jobs, does the Corporation have oral criteria? If the answer is yes, list all criteria utilized in order of importance, stating which, if any, of the criteria utilized are mandatory.

ANSWER

28. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

29. State whether the Corporation has any standard procedure by which an employee may seek a promotion, or by which the Corporation grants promotions on its own initiative. If the answer to this interrogatory is in the affirmative, please answer the following questions:

(a) Is the procedure in writing? If the answer to this question is in the affirmative, please answer the following:

(i) identify the document or documents and attach copies to the answers to these interrogatories;

(ii) by whom were the procedures promulgated?

(iii) how were they communicated to the employees?

(iv) to employees in which job titles were the procedures communicated, and when were they communicated?

ANSWER

29. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

30. Does the Corporation have oral, rather than written standard procedures for promotion? If the answer is yes, answer the following additional questions:

(a) By whom are the oral procedures promulgated?

(b) How are they communicated?

(c) To which employees, and when?

(d) State in detail what the procedures are.

ANSWER

30. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

31 Does the Corporation have oral, rather than written procedures by which employees may become salespersons? If the answer is yes, answer the following questions?

(a) By whom are the oral procedures promulgated?

(b) How are they communicated?

(c) to what employees and when?

(d) State in detail what the procedures are.

ANSWER

31. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

32. Has the Corporation utilized any tests from April 1, 1969 to date for the purpose of selecting applicants for employment in, or promotion or transfer to, any job. If the answer to this question is yes, answer the following questions.

(a) Identify all such tests and attach copies to the answers to these interrogatories, and state when each test was used.

(b) As to each test, unless the test is attached to the answers, describe in detail the nature of the test and the questions asked.

(c) As to each test, describe the criteria which the Corporation applied, including the passing grade, etc.

(d) As to each test, state who judged or judges the test results, and/or made or makes determinations as a result thereof.

ANSWER

32. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

33. State whether the Corporation has had, or presently has a training or education program which employees may utilize to seek promotions or transfers. If so, describe

in detail, including the dates of initiation and termination; what employees are eligible for inclusion; how the existence of the program was communicated to employees; and, the numbers of employees who enrolled, year by year, from April 1, 1969 to date, indicating sex and country of national origin during each program. Also state as to each such program whether the Corporation actually ran the program, and if not, who did. Also list the address where each program was conducted.

ANSWER

33. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

34. State whether the Corporation utilizes any system of written evaluations or efficiency reports regarding the quality and quantity of work performed by employees. If so, answer the following:

(a) Identify all such documents, stating during what period of time from April 1, 1969 to date each report was utilized, and attach blank copies of each form utilized.

(b) For each evaluation utilized, state which categories of employees by job title were, or are, evaluated.

(c) For each category of employee by job title evaluated, state how often they are evaluated, listing the date of the last evaluation.

ANSWER

34. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

35. Does the Corporation maintain personnel files for individual employees? If the answer is in the affirmative, answer the following:

(a) Are the files maintained on all employees. If not, list the job titles for which such files are maintained.

(b) Identify all standard documents contained in such employee personnel file, stating during what period of time from April 1, 1969 to date, each document was utilized, and attach blank copies of each form utilized. If different types of files are maintained for different categories of employees, or for employees with different job titles, answer this question category by category, and/or job title by job title.

ANSWER

35. Yes.

(a) Yes.

(b) See Sumitomo's Objections served and filed herewith.

INTERROGATORY

36. Has the Corporation ever been charged with discrimination on the basis of sex and/or national origin in any other court, or before any public agency, federal, state or local, in any jurisdiction of the United States? If the answer is in the affirmative, list each case name individually, setting forth the forum, the case identification number, and the status of each case.

ANSWER

36. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

37. With regard to each question above which requires the Corporation to set forth information which is not based on documents, please given the source of information, stating the name and address of the informant(s).

ANSWER

37. Mr. M. Tsuge, Manager
Bunker Section
Petroleum Products Department
Sumitomo Shoji Kaisha, Ltd.
24-1, Kandanishikicho
3-chome, Chiyoda-ku
Tokyo, Japan

Mr. H. Nakagawa, Manager, Legal Department
Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

INTERROGATORY

38. Identify separately and with particularity sufficient for use as a description in a subpoena each document (not already identified in the answers to the foregoing interrogatories or produced in response to the requests contained herein) which contains any of the information given in answer to each of the foregoing interrogatories.

ANSWER

38. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

39. State whether the Corporation asserts that either sex and/or country of national origin is a bona fide occupational qualification (hereinafter "b.f.o.q.") for holding of any job with the Corporation. If the answer is in the affirmative, list all job titles and/or categories in which the Corporation asserts a b.f.o.q. defense; listing for each job title or job category what defense is asserted, and stating in detail the basis for the assertion of the defense.

ANSWER

39. No.

Dated: New York, New York
February 3, 1978

H. Nakagawa
H. NAKAGAWA

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

H. Nakagawa, being duly sworn, deposes and says that deponent is Manager, Legal Department of Sumitomo Shoji America, Inc., defendant in the within action, that he has read the foregoing answers to plaintiffs' first interrogatories and request for production of documents and knows the contents thereof, and that the same is true to deponent's own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

H. Nakagawa
H. NAKAGAWA

Sworn to before me this
3rd day of February, 1978

Pamela Soth
Notary Public

PAMELA SOTH
Notary Public, State of New York
No. 41-4622430
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1979

Standard Form 100 (Revised)
Approved BOB Circular A-64, Rev. 1
100-207

EQUAL EMPLOYMENT OPPORTUNITY
EMPLOYER INFORMATION REPORT EEO-1

Joint Reporting Committee
- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance

J 6102315 CO 6102315 S 3 SIC 5099
51302700 51302600 E.I. 135612163

SUMITOMO SHOJI AMERICA INC P 9-0024400 MC 07471P
345 PARK AVE
NEW YORK NY 10022 2 OF 5 COMPANY UNITS

PLEASE USE THIS FORM FOR HEADQUARTERS REPORT.

Section A—TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report
(3) ☒ Headquarters Unit Report
(4) ☐ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B—COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (If same as label, skip to item 2, this section)

a.

Address (Number and street)	City or town	County	State	ZIP code	b.

b. Employer Identification No.

2. Establishment for which this report is filed.

a. Name of establishment SUMITOMO SHOJI AMERICA, INC.

c.

Address (Number and street)	City or town	County	State	ZIP Code	d.
345 Park Avenue	New York		N.Y.	10022	

b. Employer Identification No. (If same as label, skip.)

3. Parent of affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company b. Employer Identification No.

Address (Number and street)	City or town	County	State	ZIP code

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

☒ Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

☒ Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

NOTE: If the answer is NO to BOTH questions, skip to Section G; otherwise complete ENTIRE form.

☐ Yes ☒ No 3. Does the company or any of its establishments (a) have a prime contract with any agency of the Federal Government, a Federally-assisted construction contract, or a subcontract at any tier under any prime Government contract, amounting to more than $10,000; or (b) serve as a depository of Federal Government funds; or (c) serve as an issuing and paying agent of U.S. Savings Bonds and Notes; or (d) hold a Federal Government bill of lading in any amount?

specifically excluded as set forth in the instructions. Enter the appropr... 60a ...es on all lines and in all columns. Blank spaces will be considered as zeros. *In columns 1, 2, and 3, includ... employees in the es... ...ent including t... in minority groups.*

Job Categories (See Appendix (4) for definitions)	TOTAL EMPLOYEES IN ESTABLISHMENT			MINORITY GROUP EMPLOYEES (See Appendix (5) for definitions)							
				MALE				FEMALE			
	Total Employees Including Minorities (1)	Total Male Including Minorities (2)	Total Female Including Minorities (3)	Negro (4)	Oriental (5)	American Indian * (6)	Spanish Surnamed American (7)	Negro (8)	Oriental (9)	American Indian * (10)	Spanish Surnamed American (11)
Officials and managers	30	30			27						
Professionals	29	29			24						
Technicians	1	1			1						
Sales workers	44	44			40						
Office and clerical	100	25	75		5			2	11		8
Craftsmen (Skilled)											
Operatives (Semi-skilled)	1	1									
Laborers (Unskilled)											
Service workers											
TOTAL →	205	130	75		97			2	11		8
Total employment reported in previous EEO-1 report	173	104	69		79			1	10		7

(The trainees below should also be included in the figures for the appropriate occupational categories above)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Formal On-the-job trainees	White collar											
	Production											

*In Alaska include Eskimos and Aleuts with American Indians

1. NOTE: On consolidated report, skip questions 2-5 and Section E.
2. How was information as to race or ethnic group in Section D obtained?
   1 ☒ Visual Survey
   2 ☒ Employment Record
   3 ☐ Other—Specify.....
3. Dates of payroll period used—
   4/1 - 4/30/75
4. Pay period of last report submitted for this establishment
   3/1 - 3/31/74
5. Does this establishment employ apprentices?
   This year? 1 ☐ Yes 2 ☒ No
   Last year? 1 ☐ Yes 2 ☒ No

Section E—ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
   1 ☒ Yes 2 ☐ No 3 ☐ Did not report last year 4 ☐ Reported on combined basis
2. Is the major business activity at this establishment the same as that reported last year?
   1 ☒ Yes 2 ☐ No 3 ☐ No report last year 4 ☐ Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manfacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity

Import & Export

e.

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

Section G—CERTIFICATION (See instructions G)

Check one
1. ☐ All reports are accurate and were prepared in accordance with the instructions (check on consolidated only)
2. ☒ This report is accurate and was prepared in accordance with the instructions.

Name of Authorized Official	Title	Signature	Date
Shigehiro Kumamoto	Exective Vice President		5/29/75

Name of person to contact regarding this report (Type or print)	Address (Number and street)				
Allan Roberts					
Title	**City and State**	**ZIP code**	**Telephone Area Code**	**Number**	**Extension**
Ass't Mgr-Personnel	New York, N.Y.	10022	212	935-7000	

All reports and information obtained from individual reports will be kept confidential as required by Section 709 (e) of Title VII

WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE, TITLE 18, SECTION 1001

GACB 180541 (R0077)

61a

EQUAL EMPLOYMENT OPPORTUNITY
EMPLOYER INFORMATION REPORT EEO-1

Committe

- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance

1976 USE THIS FORM FOR YOUR HEADQUARTERS REPORT

S1302700 3 S=3 SIC=509

CO=6102315 U=6102315 EI=135612163 6

SUMITOMO SHOJI AMERICA INC
345 PARK AVE
NEW YORK NY 10022 1 91236440

Section A — TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report
(3) ☒ Headquarters Unit Report
(4) ☐ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B — COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (If same as label, skip to item 2. this section) — a.

Address (Number and street)	City or town	County	State	ZIP code	b.

b. Employer Identification No.

2. Establishment for which this report is filed. — c.

a. Name of establishment Sumitomo Shoji America, Inc.

Address (Number and street)	City or town	County	State	ZIP code	d
345 Park Avenue	New York		N.Y.	10022	

b. Employer Identification No. (If same as label, skip.)

3. Parent of affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company — b. Employer Identification No.

Address (Number and street)	City or town	County	State	ZIP code

Section C — EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

☒ Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

☒ Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

☐ Yes ☒ No 3. Does the company or any of its establishments (a) have 50 or more employees AND (b) is not exempt as provided by 41 CFR 60-1.5, AND either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to $50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?

NOTE: If the answer is yes to ANY of these questions, complete the entire form; otherwise skip to Section G.

Columns 1, 2, and 3, include ALL employees in the establishment including those in minority groups.

Job Categories (See Appendix (5) for definitions)	TOTAL EMPLOYEES IN ESTABLISHMENT			MINORITY GROUP EMPLOYEES (See Appendix (4) for definitions)							
				MALE				FEMALE			
	Total Employees Including Minorities (1)	Total Male Including Minorities (2)	Total Female Including Minorities (3)	Negro (4)	Oriental (5)	American Indian * (6)	Spanish Surnamed American (7)	Negro (8)	Oriental (9)	American Indian * (10)	Spanish Surnamed American (11)
Officials and managers	31	31			28						
Professionals	35	35			25						
Technicians	5	3	2								1
Sales workers	43	43			37						
Office and clerical	103	16	87		4		1	2	12		9
Craftsmen (Skilled)											
Operatives (Semi-skilled)	2	2									
Laborers (Unskilled)											
Service workers											
TOTAL →	219	130	89		94		1	2	12		10
Total employment reported in previous EEO-1 report	205	130	75		97			2	11		8

(The trainees below should also be included in the figures for the appropriate occupational categories above)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Formal On-the-Job Trainees	White collar											
	Production											

* In Alaska include Eskimos and Aleuts with American Indians

NOTE On consolidated report, skip questions 2-5 and Section E.

How was information as to race or ethnic group in Section D obtained?

1 [X] Visual Survey
2 [X] Employment Record
3 [ ] Other — Specify .....

Dates of payroll period used — 3/1 - 31/76

4. Pay period of last report submitted fo this establishment: 4/1 - 30/75

5. Does this establishment employ apprentices?
This year? 1 [ ] Yes 2 [X] No
Last year? 1 [ ] Yes 2 [X] No

Section E — ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
[X] Yes 2 [ ] No 3 [ ] Did not report last year 4 [ ] Reported on combined basis

2. Is the major business activity at this establishment the same as that reported last year?
1 [X] Yes 2 [ ] No 3 [ ] No report last year 4 [ ] Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

Import and Export

e

Section F — REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

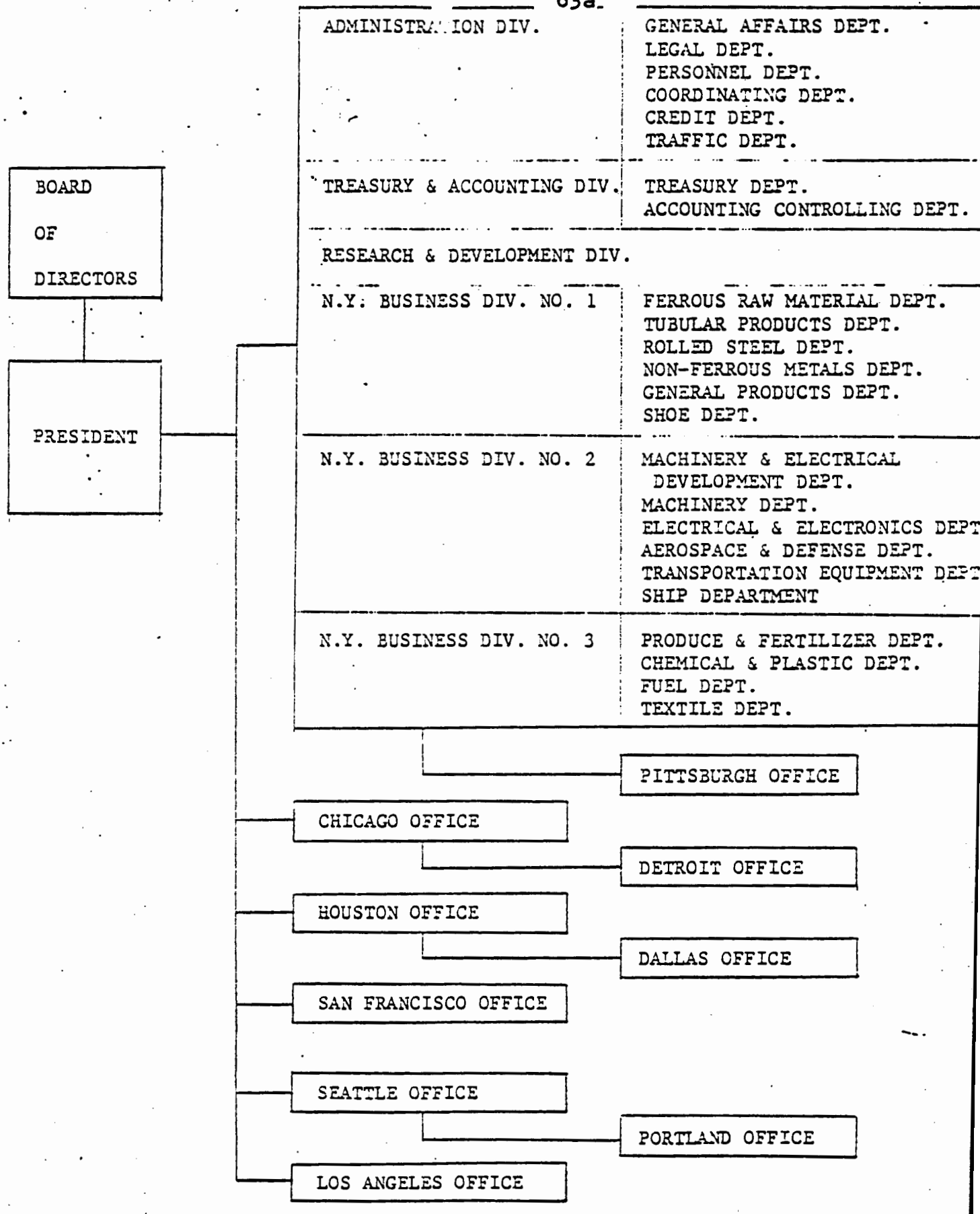
Section G — CERTIFICATION (See instructions G)

Check one
1. [ ] All reports are accurate and were prepared in accordance with the instructions (check on consolidated only)
2. [X] This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official	Title	Signature	Date
S. Kumamoto	Executive Vice-President		6/30/76

Name of person to contact regarding this report (Type or print)	Address (Number and street)				
Allan Roberts	345 Park Avenue				
Title	**City and State**	**ZIP code**	**Telephone Area Code**	**Number**	**Extension**
Ass't Personnel Mgr.	New York, N.Y.	10022	212	935-7000	

All reports and information obtained from individual reports will be kept confidential as required by Section 709 (e) of Title VII


BOARD OF DIRECTORS
PRESIDENT
ADMINISTRATION DIV.
GENERAL AFFAIRS DEPT.
LEGAL DEPT.
PERSONNEL DEPT.
COORDINATING DEPT.
CREDIT DEPT.
TRAFFIC DEPT.
TREASURY & ACCOUNTING DIV.
TREASURY DEPT.
ACCOUNTING CONTROLLING DEPT.
RESEARCH & DEVELOPMENT DIV.
N.Y. BUSINESS DIV. NO. 1
FERROUS RAW MATERIAL DEPT.
TUBULAR PRODUCTS DEPT.
ROLLED STEEL DEPT.
NON-FERROUS METALS DEPT.
GENERAL PRODUCTS DEPT.
SHOE DEPT.
N.Y. BUSINESS DIV. NO. 2
MACHINERY & ELECTRICAL DEVELOPMENT DEPT.
MACHINERY DEPT.
ELECTRICAL & ELECTRONICS DEPT
AEROSPACE & DEFENSE DEPT.
TRANSPORTATION EQUIPMENT DEPT
SHIP DEPARTMENT
N.Y. BUSINESS DIV. NO. 3
PRODUCE & FERTILIZER DEPT.
CHEMICAL & PLASTIC DEPT.
FUEL DEPT.
TEXTILE DEPT.
PITTSBURGH OFFICE
CHICAGO OFFICE
DETROIT OFFICE
HOUSTON OFFICE
DALLAS OFFICE
SAN FRANCISCO OFFICE
SEATTLE OFFICE
PORTLAND OFFICE
LOS ANGELES OFFICE

DEFENDANT'S NOTICE OF MOTION FOR AN ORDER DISMISSING THE COMPLAINT PURSUANT TO RULE 12(b)(1) and 12(b)(6) DATED MAY 18, 1978

ENTERED
Date 5/15/78
WENDER, MURASE & WHITE
Attorneys For Sumitomo
By JPH

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----------x

LISA M. AVIGLIANO, et al.,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

----------x

77 Civ. 5641 (CHT)

NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of J. Portis Hicks, sworn to May 18, 1978, the Memorandum of Law submitted herewith, and all prior proceedings heretofore had herein, defendant Sumitomo Shoji America, Inc. will move this Court before the Hon. Charles H. Tenney in Room 906, United States Courthouse, Foley Square, New York, New York, at 10:00 A.M. on June 23, 1978 or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the class action claims of the complaint on the ground that plaintiffs fail to state a claim upon which relief can be granted, and for an order pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure dismissing so much of the complaint as purports to assert a claim pursuant to 28 U.S.C. §§2201 and 2202

FILED IN COURT
5/15/78

or the Thirteenth Amendment to the United States Constitution on the ground that such claims fail to invoke the subject matter jurisdiction of this Court and also fail to state a claim upon which relief can be granted.

Dated: New York, New York
May 18, 1978

Yours, etc.

WENDER, MURASE & WHITE

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

TO: EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiff
351 Broadway
New York, New York 10013

AFFIDAVIT OF J. PORTIS HICKS IN SUPPORT OF MOTION
SWORN TO MAY 18, 1978

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----------x

LISA M. AVIGLIANO, et al., :

Plaintiffs, : 77 Civ. 5641 (CHT)

-against- : AFFIDAVIT

SUMITOMO SHOJI AMERICA, INC., :

Defendant. :

----------x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

J. PORTIS HICKS, being duly sworn, deposes and says:

1. I am a member of the firm of Wender, Murase & White, attorneys herein for Sumitomo Shoji America, Inc. ("Sumitomo"), defendant in this action. I am fully familiar with the facts of this matter, and make this affidavit in support of defendant's motion for an order dismissing the class action claims of the complaint herein on the ground that plaintiffs fail to state claims upon which relief can be granted pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.), or pursuant to 42 U.S.C. §1981. Defendant also moves pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing so much of the complaint as purports to assert a claim for declaratory relief pursuant to 28 U.S.C. §§2201 and 2202 (the Federal Declaratory

Judgment Act), or pursuant to the Thirteenth Amendment to the United States Constitution, on the ground that such claims fail to invoke the subject matter jurisdiction of this Court, and also fail to state claims upon which relief can be granted.

2. In the main, this motion speaks to the fundamental issue of whether Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.), and 42 U.S.C. §1981, must yield to treaty rights of freedom of choice of employment assured by the Treaty of Friendship, Commerce and Navigation of 1953 between the United States and Japan (4 U.S.T. 2063, T.I.A.S. 2863, hereinafter the "Treaty").

3. Plaintiffs in this action claim that defendant Sumitomo has discriminated against them by reason of their sex (all are females) and by reason of their national origin (all claim to be U.S. citizens, except plaintiff Turner, who claims she is a "citizen" of Japan), and thus violated Title VII of the Civil Rights Act of 1964 as well as 42 U.S.C. §1981. Plaintiffs claim they have been restricted to clerical jobs and not trained for, or promoted to, "executive, managerial and/or sales positions" (complaint, paras. 12 and 13). In addition, plaintiff Wong asserts an individual claim to the effect that Sumitomo refused to give her additional pay, or promote her, in retaliation for her having filed charges against Sumitomo with the United States Equal Employment Opportunity Commission ("E.E.O.C.").

4. Plaintiffs also purport to assert claims in this litigation pursuant to 28 U.S.C. §§2201 and 2202 (the Federal Declaratory Judgment Act), and the Thirteenth Amendment to the United States Constitution. Insofar as their purported claim under the Thirteenth Amendment is concerned, plaintiffs have agreed to "withdraw" such claim, but refuse to agree that such claim will be discontinued with prejudice. According to counsel for plaintiffs, this is because at a later date, the law might change and plaintiffs would then want to reassert their purported claim of enslavement. Such argument is sheer nonsense. It amounts to nothing more than an assertion of a "right" by plaintiffs to subject Sumitomo to any inappropriate, insufficent or wholly frivolous charge on the theory that should the law change, such claim might later have some basis. Plaintiffs' cavalier attitude, which has caused Sumitomo cost and expense in preparation of its motion relating to the purported Thirteenth Amendment claim, should not be countenanced by this Court. Defendant Sumitomo should be awarded its attorneys' fees for that part of its present motion.

5. Sumitomo is incorporated in New York and operates its business as a wholly-owned subsidiary of Sumitomo Shoji Kaisha, Ltd. ("SSK"), a Japanese corporation.

6. For purposes of Sumitomo's operations in the United States, pursuant to applicable law including the Immigration and Nationality Act and rules and regulations promulgated

thereunder, many qualified Japanese nationals have been, and still are, assigned to Sumitomo by its parent company as "treaty trader" personnel to serve in executive and other supervisory, specialist and professional positions.

7. I am informed by Sumitomo and believe that each and every one of the plaintiffs herein originally applied to Sumitomo for employment in secretarial positions (not for employment in the "executive, managerial and/or sales positions" they now purport to seek), and that each and every one of the plaintiffs herein was in fact originally hired by Sumitomo as a secretary.

8. It is well known fact that Japan has few national resources upon which it can rely for production or consumption. Reference to any number of standard works on the subject verifies that since that is the case, Japan depends on foreign trade for survival, and has particularly seen the growth of the institution known as the "trading company" more than any other nation. See e.g., Ballon, Japan's Market and Foreign Business, 217-27 (1971); 3 The Japan Interpreter, Vol. 8, 353-73 (Autumn, 1973). Trading companies engage primarily in the purchase and resale of goods, and carry on their activities for the most part in import and export markets.

9. Sumitomo is an integrated trading company or "sogo-shosha", a uniquely Japanese institution. While there

are thousands of trading companies in Japan, there are fewer than a dozen integrated trading companies or sogo shoshas. The latter group accounts for more than 50% of Japanese imports and exports. See Ballon and The Japan Interpreter, both cited above.

10. About 90% of the business of the major sogo shosha involves import and export trade concluded with Japan, i.e., imports from or exports to that country. Thus, it is imperative that the managers, executives and "traders" (a more appropriate term than "salesperson" for the functions performed by those who buy and sell goods for a sogo shosha) comprehend sophisticated questions of international finance, international investment, international trade, shipping and related business matters, as well as local and foreign potential market conditions for a wide variety of products -- chemicals, fertilizers, steel products, machinery, industrial plants, textiles, airplane parts, rubber, raw materials, energy, ceramics, etc. It is equally imperative that such persons, whether working for the parent corporation or for its branches, representative offices or subsidiaries, intimately comprehend the Japanese marketplace and Japanese business practices, culture and language. Ballon, supra; The Japanese Interpreter, supra.

11. For the reasons set forth in Sumitomo's Brief submitted herewith, defendant Sumitomo respectfully requests

that this Court dismiss the complaint herein.

J. Portis Hicks

J. PORTIS HICKS

Sworn to before me this

day of May, 1978

Notary Public

CONNIE STAVROS
Notary Public, State of New York
No. 31-4611726
Qualified in New York County
Commission Expires March 30, 19....

PLAINTIFFS' NOTICE OF MOTION TO DISMISS COUNTERCLAIM PURSUANT TO RULE 12(b) DATED MAY 18, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

LISA M. AVIGLIANO, et al.,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

77 Civ. 5641 (CHT)

NOTICE OF MOTION

- X

S I R S:

PLEASE TAKE NOTICE that, upon the complaint and answer and counterclaim, the plaintiffs will move before the Honorable Charles H. Tenney on June 23, 1978 at 9:30 AM, or as soon thereafter as counsel may be heard, at the United States Courthouse, Foley Square, New York, New York, to dismiss the counterclaim for failure to state a claim upon which relief may be granted and for lack of jurisdiction, pursuant to Rule 12(b), Federal Rules of Civil Procedure.

Dated: New York, New York
May 8, 1978

Yours, etc.,

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, N. Y. 10013
(212) 966-9620

By: _____
Lewis M. Steel

TO: WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022

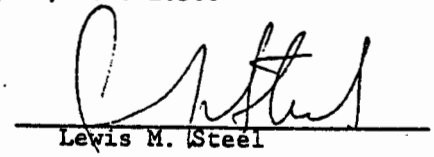
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Attention: John Schmelzer, Esq.
Appellate Section
2401 E Street, N.W.
Washington, D.C. 20506

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing motion to dismiss defendant's counterclaim and memorandum in support were forwarded this 5th day of May, 1978, via first class mail, postage prepaid, to the following:

WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Attention: John Schmelzer, Esq.
Appellate Section
2401 E Street, N.W.
Washington, D.C. 20506



Lewis M. Steel

FIRST AMENDED ANSWER AND COUNTERCLAIMS OF DEFENDANT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER, ELIZABETH WONG, On Behalf of Themselves And All Others Similarly Situated,	:	77 Civ. 5641 (CHT)
Plaintiffs,	:	FIRST AMENDED ANSWER AND COUNTERCLAIMS
-against-	:	
SUMITOMO SHOJI AMERICA, INC.,	:	
Defendant.	:	

Sumitomo Shoji America, Inc. ("Sumitomo"), by its attorneys, Wender, Murase & White, for its Answer to the Complaint, alleges as follows:

I

RESPONSES TO PLAINTIFFS' PLEADINGS

1. Except as hereinafter expressly admitted or denied, Sumitomo denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the Complaint.

2. Admits so much of paragraph 1 of the Complaint as alleges that plaintiffs purport to bring this action pursuant to the statutes and other provisions of law referred to therein, and denies any violation of said statutes or provisions of law.

3. Admits so much of Paragraph 2 of the Complaint as alleges that the persons named therein are females.

4. Admits the allegations of Paragraphs 4 and 5 of the Complaint.

5. Admits so much of Paragraph 6 of the Complaint as alleges that the five persons named therein are former employees of Sumitomo, and denies the remaining allegations of said paragraph 6.

6. Admits the allegations of Paragraph 7 of the Complaint.

7. Admits so much of Paragraph 8 of the Complaint as alleges that plaintiffs purport to bring this action as a class action, and denies the remaining allegations of said Paragraph 8.

8. Denies the allegations of Paragraph 9 of the Complaint.

9. Denies the allegations of Paragraphs 12 through 18, inclusive, of the Complaint.

10. Denies that plaintiffs are entitled to the relief prayed for or any part thereof.

II.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

11. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

12. This Court lacks jurisdiction over the subject matter of this action.

THIRD AFFIRMATIVE DEFENSE

13. Sumitomo's employment practices are proper and permissible and are sanctioned and privileged pursuant to the Treaty of Friendship, Commerce & Navigation between the United States and Japan, and applicable statutes, rules, regulations and practices.

FOURTH AFFIRMATIVE DEFENSE

14. Sumitomo's employment practices are proper, permissible and justified because they are founded upon and exist pursuant to bona fide occupational qualifications and business necessity.

FIFTH AFFIRMATIVE DEFENSE

15. All or portions of the plaintiffs' claims are barred by applicable statutes of limitations and unclean hands.

SIXTH AFFIRMATIVE DEFENSE

16. Plaintiffs lack standing to assert the claims made in the Complaint.

SEVENTH AFFIRMATIVE DEFENSE

17. The statutes and other provisions of law pursuant to which plaintiffs purport to bring this action do not provide the relief demanded in the Complaint.

AMENDED COUNTERCLAIMS

18. Jurisdiction of the within counterclaims in invoked pursuant to 28 U.S.C. §§1331 and 1343 and the doctrine of ancillary jurisdiction.

19. Upon information and belief, plaintiffs, on a date or dates unknown to defendant Sumitomo but prior to commencing certain proceedings referred to hereinafter, entered into a conspiracy to coerce Sumitomo to accede to plaintiffs' 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 harassing Sumitomo and by injuring Sumitomo in its business and trade.

20. Upon information and belief, as part of carrying out their conspiracy, plaintiffs in bad faith, vexatiously, willfully and wrongfully commenced spurious and frivolous administrative proceedings before the Division of Human Rights of the Executive Department of the State of New York (the "Division of Human Rights"), and before the United States Equal Employment Opportunity Commission (the "EEOC"), making baseless claims in such proceedings that Sumitomo had discriminated against them. In the course of such proceedings, Sumitomo was subjected to interference with its person and property by the purported issuance against it by the EEOC of administrative subpoenae which were, upon information and belief, issued by the EEOC in violation of its own rules and regulations at the instance of and with the cooperation of plaintiffs, and as a result of which Sumitomo was required to spend substantial amounts of time and money responding thereto.

21. Both the proceedings before the Division of Human Rights and before the EEOC were terminated by such agencies with no action being taken and with no finding by either agency of reasonable or probable cause for the making of such claims by plaintiffs.

22. Upon information and belief, during the pendency of both of the aforesaid administrative proceedings plaintiffs interfered therewith for the purpose of preventing such proceedings from coming to determinations on the merits because plaintiffs were aware that such determinations would likely be adverse to them, and because in any event plaintiffs' purpose in bringing such proceedings was not to obtain a determination on the merits but instead was to coerce Sumitomo to accede to their demands for assignment to work for which they were not qualified and for payment of additional compensation to which they were not entitled.

23. Upon information and belief, in furtherance of carrying out such conspiracy, plaintiffs also commenced the within action. The within action, upon information and belief, is brought by plaintiffs in bad faith and vexatiously, and is willfully and wrongfully brought for the purpose of coercing Sumitomo into acceding to plaintiffs' improper and unjustified demands concerning work assignments and additional compensation and in retaliation for Sumitomo's refusal to accede to such demands.

24. Upon information and belief, plaintiffs, also as part of and in furtherance of their wrongful conspiracy, have engaged in various other wrongful acts to disrupt the business of Sumitomo and injure it in its person and property, including by failing to perform their work properly, by engaging

in acts of insubordination, by making divers misrepresentations about Sumitomo, by making attempts to induce other employees to breach their fiduciary duties to Sumitomo, by making efforts to purloin confidential documents and business records of Sumitomo, by coercing female employees not to accept promotions from Sumitomo during the pendency of this litigation, and by harassing and treating openly with scorn and contempt those employees who refused to accede to plaintiff's wrongful efforts thus to injure Sumitomo, all to the detriment and injury of Sumitomo.

25. As a result of the foregoing, defendant Sumitomo has been injured in its person and property and has accrued attorneys' fees and other costs. Further, by reason of plaintiffs' maintenance of the wrongful proceedings heretofore described, and this litigation, defendant Sumitomo has been injured in that it has been required to retain as employees one or more of the plaintiffs herein notwithstanding the fact that good and sufficient cause for their discharge exists, and has been required to give raises and other remuneration to one or more plaintiffs in excess of that to which they were properly entitled, for fear that were Sumitomo to do otherwise it would be subject to charges of wrongful retaliation, notwithstanding the fact that any such action by Sumitomo should have been justified, proper and not retaliatory.

26. As a result of the foregoing, Sumitomo has sustained the following damages to date:

a) Attorneys' fees: $125,000

b) Retention of plaintiffs: $65,000

c) Lost personnel time and other incidental and/or consequential damages: $40,000

AS AND FOR A FIRST COUNTERCLAIM

27. Paragraphs 18 through 26 hereof are hereby incorporated by reference and repeated as though realleged in full.

28. Plaintiffs have instituted in bad faith, vexatiously willfully and wrongfully a spurious and frivolous Title VII action against defendant Sumitomo, knowing full well that such action has no basis in fact or law.

29. As a result of plaintiffs' wrongful conduct in commencing such spurious and frivolous Title VII action, defendant Sumitomo, pursuant to 42 U.S.C. §2000(e)(5), is entitled to its attorneys' fees herein, and claims recovery against plaintiffs of attorneys' fees in the amount of $125,000 expended to date; and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

AS AND FOR A SECOND COUNTERCLAIM

30. Paragraphs 18 through 26 and 28 and 29 hereof are hereby incorporated by reference and repeated as though realleged in full.

31. Plaintiffs have instituted in bad faith, vexatiously, willfully and wrongfully a spurious and frivolous federal administrative proceeding and a spurious and frivolous federal civil action against defendant Sumitomo, knowing full well that such proceeding and action had, and have, no basis in fact or law, for the purpose of coercing and harassing Sumitomo.

32. Plaintiffs have tortiously abused the federal administrative and judicial process.

33. As the result of the foregoing, defendant Sumitomo has been injured and claims $230,000 in damages to date, and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

AS AND FOR A THIRD COUNTERCLAIM

34. Paragraphs 18 through 26, 28 and 29 and 31 and 32 hereof are hereby incorporated by reference and repeated as though realleged in full.

35. Plaintiffs have instituted in bad faith, vexatiously, willfully and wrongfully spurious and frivolous federal and state administrative proceedings and a spurious and frivolous federal civil action against defendant Sumitomo, knowing full well that such proceedings and action had, and have, no basis in fact or law for the purpose of coercing and harassing Sumitomo.

36. Plaintiffs have deliberately and intentionally abused process under New York State Law.

37. As the result of the foregoing, defendant Sumitomo has been injured and claims $230,000 in damages to date, and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

AS AND FOR A FOURTH COUNTERCLAIM

38. Paragraphs 18 through 26, 28 and 29, 31 and 32 and 35, 36 and 37 hereof are hereby incorporated by reference and repeated as though realleged in full.

39. Plaintiffs have instituted in bad faith, vexatiously, willfully and wrongfully spurious and frivolous

federal and state administrative proceedings and a spurious and frivolous federal civil action against defendant Sumitomo, knowing full well that such proceedings and action had, and have, no basis in fact or law, for the purpose of coercing and harassing Sumitomo and have acted otherwise to disrupt and injure the business and trade of Sumitomo.

40. Plaintiffs have deliberately and intentionally inflicted temporal economic harm upon defendant Sumitomo without privilege or justification.

41. As the result of the foregoing, Sumitomo has been injured and claims $230,000 in damages to date, and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

WHEREFORE, defendant-counterclaimant Sumitomo Shoji America, Inc., prays judgment as follows:

(1) That the complaint herein be dismissed with prejudice;

(2) That it be awarded judgment on its first counterclaim in the amount of $125,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(3) That it be awarded judgment on its second counterclaim in the amount of $230,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(4) That it be awarded judgment on its third counterclaim in the amount of $230,000 actual

damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(5) That it be awarded judgment on its fourth counterclaim in the amount of $230,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(6) That it be awarded the costs of this action, including reasonable attorney's fees; and

(7) That it be awarded such other and further relief as to this Court may seem just and proper.

WENDER, MURASE & WHITE

By _____
(A Member of the Firm)
Attorneys for Defendant
Sumitomo Shoji America, Inc.
400 Park Avenue
New York, New York 10022
Tel: (212) 832-3333

84a

DIVISION OF COMMUNICATIONS AND RECORDS
TELEGRAPH BRANCH

DEPARTMENT OF STATE
INCOMING TELEGRAM

ACTION COPY

COPY OF INCOMING TELEGRAM, U.S. EMBASSY, MONTEVIDEO, URUGUAY, TO U.S. DEPARTMENT OF STATE DATED NOVEMBER 8, 1949

Action Assigned to
Action Taken Tel. drafted in reply
CONFIDENTIAL
Date of Action 11/10
Action Office Symbol ITP-C
Name of Officer V G Setser
Control 3472
Rec'd November 8, 1949
8:41 p.m.
To DC/R File

OFFICE OF INTERNATIONAL TRADE POLICY
1949 NOV 9 AM 9 25

3

Action: ITP
Info:
E
P
ARA
L
OLI
CIA
DCL
TRC
DCR

FROM: Montevideo

TO: Secretary of State

NO: ~~386~~ 385, November 8, 5 p.m.

711.332/11-849

Foreign Minister has incorporated suggestion re modification FCN treaty (EMBTEL 374, October 28) in revised draft, which Embassy has seen and which is to be presented for discussion tomorrow. In general, Foreign Minister's suggestions less drastic than anticipated. Foreign Minister reportedly after consulting President and Administration-sponsored Presidential candidate, desires deletion Article III re military service and limitation of rights under Article XVII--3 and 4 of MFN. Elsewhere, concerning granting of both nationality and MFN rights, Foreign Minister wishes exclude least favorable. Itemization other specific proposals follows:

Article 5 (next to last line). Strike out "and technology": substitute "technology and modern equipment".

Article VI--2, strike out subparagraph (A), (C) and (D).
Article VI--1(A) insert "cultural" after "scientific".

Article VI--add what was formerly VI--2(D) as new subparagraph (D).

Article VI--2(B) retain as uninterrupted continuation of text.

Foreign Minister's proposal would give nationality treatment to entire content Article VI--1 and 2, except for mineral rights. Embassy sees no objection unless Department, for technical reasons, unable grant similar treatment.

Article VI--4

ACTION / INFORMATION
ITP ✓
OIF ✓
CGH
...

DEPARTMENT OF STATE

NOV 15 1949

FILED

CONFIDENTIAL

Correction Desk

PERMANENT RECORD COPY: THIS COPY MUST BE RETURNED TO DC/R CENTRAL FILES WITH NOTATION OF ACTION TAKEN.

16--52018-1 U.S. GOVERNMENT PRINTING OFFICE

CONFIDENTIAL

Article VI--4 (first sentence) after "nationality" add "on condition that, in the selection of the persons referred to, discrimination against nationals of the other party shall be avoided, and without prejudice to laws designed to protect their employment". Embassy recognizes this amendment would seriously weaken rights which this paragraph seeks to safeguard, and proposes resist acceptance.

Article VIII--4(A), strike out "and most favored nation". Reverse positions of subparagraphs (A) and (B).

Article IX--1(A), strike out. Embassy believes Foreign Minister has not clearly understood meaning this paragraph and will try explain to his satisfaction.

Article X--2, Foreign Minister prefers translate following portion, "in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories," into Spanish as, "en exceso de lo que corresponda a los negocios que se realicen en sus territorios, ni conceder deducciones y exenciones menores que las que razonablemente se deban conceder con relacion a los mismos".

Embassy believes that if above Spanish text acceptable, change in English unnecessary.

Article XIII--1 (second sentence). After "sanitation", add "for the protection of the balance of payments". Embassy proposes explain Uruguay already protected by Article XIV--2 of IMF agreement.

Article XV--1(A). After "availability" add "of merchandise and means of payment". If Uruguayans insist, Embassy proposes yield this point since availability foreign exchange is commercial consideration and use accumulated balances guaranteed in Protocol 6.

Foreign Minister stated late today Uruguay will propose no further changes.

RAYMAL

JSP:EMF

CONFIDENTIAL

FORM DS-322
7-1-48

INDICATE
Collect
Charge Department

COPY OF OUTGOING TELEGRAM, U.S. DEPARTMENT OF STATE TO U.S.EMBASSY, MONTEVIDEO, URUGUARY DATED NOVEMBER 10, 1949

Department of State

P.

CONTROL
3100
NOV 10 1949
FOR DC/T USE ONLY

Charge to

CONFIDENTIAL
CLASSIFICATION

711.33/11-849
711.33/11-949

AMEMBASSY,

MONTEVIDEO.

262

FCN Treaty. Reopening by URUG NEGOTS on provisions previously accepted by them disturbing. URTELS 385 NOV 8; 387 NOV 9. Difficult understand value proposed changes from standpoint URUG interests. DEPT has on several occasions made concessions in belief NEGOT CLD be concluded, only to be confronted with demands for additional changes. Is there any assurance present proposals represent final position URUG GOVT? As counter negotiating tactic, WLD it be helpful for EMB reopen questions on which compromise reached with Gonzalez, or re-propose provisions previously rejected; e.g., those referred to second PARA DEPT A-231 OCT 17 and second PARA DEPTEL 193 AUG 5. Also ART II(1) and IX(1,2), although accepted by DEPT as amended by Gonzalez, are not entirely satisfactory, and DEPT's original draft preferable. Since NEGOT began, DEPT has developed additional provisions that might be introduced at this time.

711.33/11-949

Re XVII(3,4), DEPT's position remains as in DEPTEL 250 OCT 29. Although number other proposed changes appear of no substantive importance, others may create serious difficulties. Proposals re VI(4) and Add. Protocol definitely in latter category. Revised translation

711.33/11-949
CS/H

DISTRIBUTION DESIRED
(OFFICES ONLY)

CONFIDENTIAL
CLASSIFICATION

Corrections made on this original MUST be made on all copies before delivery to Telegraph Branch.

OUTGOING TELEGRAM 87a

INDICATE
Collect
Charge Department
Charge to

Department of State

CONFIDENTIAL
CLASSIFICATION

-2-

FOR DC/T USE ONLY

portion ART X(2) introduces substantive change and is unacceptable. EMB SHLD obtain explanation URUG objective so DEPT can consult TREAS expert re possible change English text. INSTRS on certain other details possibly ready early next week; others will require longer study.

WEBB (Acting)

DISTRIBUTION DESIRED (OFFICES ONLY)

ITP:CP:VGSetser:lhj
November 10, 1949

ITP OFD EC (Cleared with Oakley) L/T L/E

11/10/49 11/10/49

CONFIDENTIAL
CLASSIFICATION

Corrections made on this original MUST be made on all copies before delivery to Telegraph Branch.

LETTER OF LEE R. MARKS, DEPUTY LEGAL ADVISER, U.S. DEPARTMENT OF STATE TO ABNER W. SIBAL, GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DATED OCTOBER 17, 1978

DEPARTMENT OF STATE

Washington, D.C. 20520

October 17, 1978

Abner W. Sibal
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Sibal:

This responds to your June 9, 1978 letter to Mr. Hansell about the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan (the FCN Treaty). Your letter asks for our views on four questions; the questions and our views are set forth below.

1. Does the treaty permit subsidiaries of Japanese companies which are organized under the laws of a state of the United States to fill all its top management positions with Japanese nationals admitted as treaty traders? Would it be inconsistent with the terms of the treaty to rule that even top management positions are subject to Title VII of the Civil Rights Act of 1964 prohibiting discrimination on the basis of race, sex or national origin?

Article VIII(1) of the FCN Treaty gives nationals and companies of each Party the right to employ, in the territory of the other, "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." This provision was intended to ensure that U.S. companies operating in Japan could hire U.S. personnel for critical positions, and vice versa. The phrase "of their choice" should be interpreted to give effect to this intention, and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders. We express no opinion on what positions

would, in a particular case, qualify as "executive personnel."

We do not believe the phrase "of their choice" should be read as insulating the employment practices of foreign companies from all local laws. For example, the Treaty does not in our view confer any right to hire in violation of child labor laws, nor does it require the Department to issue a treaty trader visa to persons otherwise ineligible to enter the United States under the Immigration and Nationality Act. Similarly, we do not believe that it confers any right to discriminate against a particular sex, religious, or minority group.* The right granted by the Japanese FCN Treaty to Japanese enterprises operating in the United States is simply the right to fill certain positions with Japanese nationals; American companies operating in Japan enjoy the equivalent right.

2. Is the situation different if the company doing business in the United States is not incorporated in the United States?

Article VIII is addressed to "nationals and companies of either Party...within the territories of the other Party." Article XXIII defines "companies" as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." In

---

* Both the Japanese and United States Governments have subscribed to a number of international declarations calling on multinational enterprises to respect human rights and avoid discrimination. See point 7 of the 1976 OECD Guidelines for Multi-national Enterprises and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. These are not binding, but they reinforce our view that Article VIII should not be read as conferring a license to discriminate.

determining the scope of Article VIII, we see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form.

3. What criteria are used by the Department of State in determining what positions are within the scope of the treaty when it issues non-immigrant visas to treaty traders?

The criteria derive from section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952, as amended, and 22 C.F.R. § 41.40 et. seq. In addition to the statute and regulations (which do not define "executive personnel"), consular officers have access to the Advisory Opinions of the State Department's Visa Office (special guidance to U.S. consular officers upon request); the Administrative Decisions Under the Immigration and Nationality Laws of the United States by the Board of Immigration Appeals of the INS; and judicial decisions rendered upon appeals from the rulings of the INS.

The Department of State, through its consular officers in American embassies and under limited circumstances its Visa Office in the United States, and the Immigration and Naturalization Service in the case of change of visa requests, determines on an individual basis whether an applicant is entitled to a non-immigrant visa as a treaty trader. In making this determination, both the qualifications of the applicant and proposed position of employment are examined.

In granting a non-immigrant treaty trader visa, the Department (or INS) thus makes an administrative determination that a visa applicant will fill an "executive personnel" position, but this determination is made for the limited purpose of administering the visa laws. We do not believe that the determination should preclude judicial review of the scope of the term "executive personnel" for other purposes, including the application of Title VII.

4. Is any supervision exercised to determine if persons admitted as treaty traders do in fact operate in the type of position for which they were admitted? What sanctions are imposed if violations are found?

Under the terms of their visas, treaty traders must file annual reports with the INS to show that they are maintaining their treaty trader status. If, on the basis of information furnished in an annual report, the INS determines after investigation that an alien no longer qualifies as a treaty trader, the INS is authorized to order the alien to leave the country, and, if necessary, to deport the alien (8 U.S.C. Section 1257(9); 8 C.F.R. Sections 241.2 and 241.9). During the course of a nonimmigrant's stay in the United States, the INS also has authority to monitor the alien's employment to insure that it complies with the terms of the alien's visas. Private parties may trigger such an INS investigation by lodging a complaint with the district INS office.

If you have any further questions or if we can provide further help, please let us know.

Sincerely,

Lee R. Marks
Deputy Legal Adviser

COVER LETTER FROM LUTZ ALEXANDER PRAGER, ASSISTANT GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO LEWIS STEEL, ESQ., DATED DECEMBER 14, 1978, WITH ENCLOSURE FROM DEPARTMENT OF STATE (MARCH 15, 1978 LETTER OF DIANE WOOD, ATTORNEY ADVISER, U.S. DEPARTMENT OF STATE)

RECEIVED DEC 19 1978

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF THE
GENERAL COUNSEL

December 14, 1978

Lewis Steel, Esq.
Eisner, Levy, Steel and
Bellman
351 Broadway
New York, New York 10013

Dear Mr. Steel:

As you requested, I enclose a copy of the State Department's March 15, 1978, letter to the Commission concerning the relationship between Title VII and the 1953 United States-Japanese Treaty of Friendship, Commerce and Navigation.

Very truly yours,

Lutz Alexander Prager

DEPARTMENT OF STATE
Washington, D.C. 20520

March 15, 1978

Mr. Earl Harper, Jr.
Assistant General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Harper:

I have been asked to reply to your letter of December 21, 1977, to the Department of State requesting its views on the jurisdiction of the Equal Employment Opportunity Commission (EEOC) to investigate and process claims of discrimination relating to "treaty trader" positions. The specific question is whether the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan (the FCN Treaty) should be interpreted to preclude EEOC jurisdiction in a case involving allegations of national origin discrimination in hiring for such positions.

For the reasons stated below, it is our opinion that the FCN Treaty does not divest the EEOC of jurisdiction.

The Civil Rights Act of 1964, as amended, gives the Commission broad jurisdiction to investigate any charge filed by a person "claiming to be aggrieved,. . . alleging that an employer has engaged in an unlawful employment practice." Sec. 706(b), 42 U.S.C. §2000e-5(b). Sumitomo Shoji America, Inc. (Sumitomo), a U.S. corporation, is an "employer" within the meaning of section 701(b), of the Act, and the employee positions involved fall within the meaning of section 701(f). Unlawful employment practices are defined in section 703(a), and they include, inter alia, the failure or refusal to hire an individual because of his or her "race, color, religion, sex, or national origin."

Unless the Treaty somehow changes things for purposes of jurisdiction over the subject matter, jurisdiction exists if the charging party claims national origin

discrimination and satisfies the other jurisdictional prerequisities, such as the 180 day filing period. The charging parties in this case have done so, as we understand the facts. Since the Civil Rights Act is silent as to the relationship between its provisions and those of the FCN Treaty, it is necessary to read the Treaty with the Act, and see if the two can be reconciled.

The mere fact that Article VIII(1) of the FCN Treaty gives employers the right to employ persons "of their choice" does not mean that the class of employers composed of subsidiaries of foreign companies protected by FCN Treaties is exempt from general U.S. law. In fact, Article I of the FCN Treaty with Japan is the article that provides the general authorization for issuance of "E-1" visas to Japanese treaty traders. However, even assuming Article VIII(1)'s language is fully applicable to treaty traders, our conclusion is the same. Every employer in the United States has the right to employ the persons of his choice, but that does not mean that he is free to engage in unlawful practices, such as discrimination or unfair labor practices. The right granted by Treaty to subsidiaries of Japanese companies doing business in the United States is simply the right to employ Japanese persons on the same basis as American nationals. The treaty trader immigration laws and rules implement this objective by permitting entry of Japanese "treaty traders" through procedures far less burdensome that the normal procedures for non-treaty trader aliens seeking to enter the United States for purposes of employment.

Neither the Civil Rights Act nor the regulations issue under the Act contain any specific ememption for "treaty trader" positions. Moreover, the Act's legislative history is also silent. The Act expresses the firm policy of the United States against all forms of discrimination and the FCN Treaty's language does not compel a finding of exemption for "treaty traders." Therefore, we believe that the Commission does have jurisdiction in this case.

Concluding that the Commission has jurisdiction, however, does not dispose of the various issues raised in [redacted] letter to the Commission concerning the merits of the claim, such as whether the charging parties have alleged national origin discrimination or merely citizenship discrimination, whether "treaty traders" somehow qualify for an exception similar to the job-related

exception, and whether "treaty traders" are entitled to any benefits at all beyond the procedural benefits spelled out in the immigration laws.

We would be happy to provide the Commission with our views on these questions if the investigation proceeds.

I hope that you find these comments useful. If you have any questions, or wish to discuss anything in this letter, feel free to call me, at 632-0349, or Victor Vilaplana, at 632-2149.

Sincerely,

Diane Wood

Diane Wood
Attorney Adviser

AFFIDAVIT OF J. PORTIS HICKS SUBMITTED IN OPPOSITION TO MOTION BY EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM, SWORN TO FEBRUARY 9, 1979

Date 2/12/79
WENDER, MURASE & WHITE
Attorneys For Def't
By JPH

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al.,	:	77 Civ. 5641 (CHT)
Plaintiffs,	:	AFFIDAVIT IN OPPOSITION TO MOTION BY EEOC FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM OF LAW.
-against-	:	
SUMITOMO SHOJI AMERICA, INC.,	:	
Defendant.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

J. PORTIS HICKS, being duly sworn, deposes and says:

1. I am a member of the law firm of Wender, Murase & White, counsel in this action for defendant Sumitomo Shoji America, Inc. ("Sumitomo"). I submit this affidavit in opposition to a motion made by the United States Equal Employment Opportunity Commission ("EEOC"), requesting leave as amicus curiae to file a "supplemental" memorandum of law in support of plaintiffs' motion to dismiss Sumitomo's counterclaims.

2. On or about May 5, 1978 the EEOC filed a memorandum of law as amicus curiae in support of plaintiffs'

motion. Plaintiffs filed a memorandum of law in support of their motion at about the same time. Sumitomo filed a memorandum of law on or about July 11, 1978, answering both the EEOC and plaintiffs. Plaintiffs filed a reply memorandum on or about July 28, 1978; the EEOC chose not to reply. Recognizing that it has had since July 1978, to file "supplemental" papers, the EEOC offers the feeble excuse that it makes its motion at this late date because it only "now" understands that it is "unlikely" that the Court will schedule oral argument on plaintiffs' motion (EEOC Motion at 1).

3. The EEOC's motion is frivolous. It should be denied because of the EEOC's delay, because it blatantly violates rules of this Court, because it contravenes procedural rules for the filing of such supplemental papers, and because it raises no new matters, and indeed urges inaccurate law to this Court.

4. Delay by the EEOC. The EEOC delayed almost seven months, until January 30, 1979, before profferring its so-called supplemental memorandum. During the over one-half year interim, the EEOC remained silent as to its purported desire to have oral argument or to file any such supplemental papers, although it clearly had repeated opportunity to express itself. It could have raised the matter independently. It could have raised the matter in response to Sumitomo's

motion to this Court in August, 1978, which requested that a briefing schedule be set on Sumitomo's motion to dismiss the complaint (a motion made for the very purpose of preventing just this kind of endless paper war of attrition and expense). The EEOC could have raised the matter when it knew thereafter that plaintiffs were seeking leave to file supplemental rebuttal papers opposing Sumitomo's companion motion to dismiss plaintiffs' complaint. It also could have raised the matter when counsel for plaintiffs wrote to this Court on December 18, 1978, requesting leave to argue "this case", which Sumitomo opposed by letter dated December 20, 1978 (copies of both letters were sent to the EEOC). The EEOC offers no reason at all why it remained silent in the face of all of the foregoing.

5. Violation of this Court's Rules by the EEOC. The EEOC merely says it "now" understands that it is "unlikely that there will be oral argument of plaintiffs' motion (EEOC Motion at 1). This is nonsense. First, there has been no ruling on plaintiffs' application to have argument. Second, the EEOC itself never requested oral argument on this motion, as provided for by this Court's specific published rule:

> "...Oral argument will be heard only upon request and at the discretion of this court. Communicate this request to chambers by letter, stating the reason why oral argument is necessary for determination of the motion and

> giving an estimate of the length of the argument." (Published in The New York Law Journal Tuesday of each week).

The EEOC offers no excuse at all for its failure to abide this Court's rules.

6. Violation of Other Procedural Rules by the EEOC. As if the above were not enough, the EEOC engages in obvious game-playing by enclosing with its motion papers a copy of the "supplemental" memorandum it seeks leave to file. That kind of transparent effort to make a motion a fait accompli has been specifically censured by the Courts of this District:

> "...The proposed reply papers should not accompany the request for leave to submit them. To permit the reply papers to accompany the request, as they do in the instant case, is to enable the requesting party to accomplish its goal of placing the papers before the court, thereby reducing the question of whether the papers should be accepted for filing to relative unimportance. Therefore, the reply papers themselves shall not be submitted until the court, having received and reviewed the application to file, invites them." United States v. International Business Machines, 66 F.R.D. 384, 385 (S.D.N.Y. 1975).

In its motion papers, the EEOC offers no reason why it should be permitted to file its papers without observing the guidelines laid down in the IBM decision, supra.

7. The EEOC Concedes That its Papers Say Nothing New. No less relevant, the EEOC also admits that its papers address no new issues.* The EEOC thus essentially admits that all it wants is a chance to say again what it, and plaintiffs, have both said before, exactly what the Court in IBM, supra, said should not be allowed:

> "Clearly, nothing but delay, unnecessary work, and unwarranted expense can result from the routine filing of reply and, inevitably, surreply papers which do nothing more than restate in a different form or with additional detail material set forth in the moving and opposing papers. It is the experience of this court that most proposed reply papers fall within this category....
>
> * * *
>
> "...repetition of arguments made in prior submissions will not be condoned and is scrupulously to be avoided." 66 F.R.D. at 384.

8. The EEOC Proposed "Supplemental" Memorandum is Inaccurate. Finally, the EEOC's proposed supplemental memorandum is filled with inaccuracies.

(a) For example, the EEOC's "supplemental" memorandum, at 5-6, argues in substance that Sumitomo's second counterclaim should be dismissed because a federal court has no power to create a federal common law tort remedy against a private party. The Second Circuit, in Prescription Planned

---

* EEOC Motion at 1.

Services Corp. v. Franco, 552 F.2d 493 (2nd Cir. 1977), involving a suit between a corporation and a union pension plan, says quite the contrary:

> "... it is now clear that, in appropriate cases, the federal courts may recognize or create common law torts ... and that section 1331 jurisdiction will support claims founded upon federal common law." 552 F.2d at 495.

If the EEOC wanted to argue a point, it could have tried to argue - which it does not - that this is not an appropriate case for the Court to recognize such a tort. But the EEOC merely argues, incorrectly, that this Court lacks the power to do so.

(b) Similarly, in its argument regarding whether a state law claim for abuse of process has been stated, the EEOC purports to address the meaning of the decision of the Appellate Division of the Supreme Court of the State of New York in Drago v. Buonagurio, 61 A.D.2d 282, 402 N.Y.S.2d 250 (3d Dept. 1978), regarding whether a summons is "process" for purposes of the tort of "abuse of process". The EEOC fails to advise this Court that the Appellate Division decision in in Drago has been reversed.* The Court of Appeals in Drago

---

* Such reversal was reported in the New York Law Journal of December 21, 1978, at page 1, col. 2. The EEOC seems particularly unable to keep up to date on Drago. In its first brief filed in support of plaintiffs' motion, the EEOC cited the trial court's decision in Drago but did not then advise this Court that the trial court's decision had been reversed by the Appellate Division. Now, in dealing with the Appellate Division's decision, the EEOC does not advise this Court that the Appellate Division's decision, as well, has been reversed.

did not, however, consider whether a summons is "process" for purposes of the tort of abuse of process, and thus the Appellate Division's decision on that point remains good law. The Court of Appeals decision in fact deals only with the question of whether plaintiff therein had stated a cause of action in abuse of process or prima facie tort against the lawyer who had represented the party which allegedly asserted invalid claims against plaintiff, holding that New York courts have not recognized liability of a lawyer to third parties where the facts do not fall within one of the acknowledged categories of tort or contract liability.* Sumitomo has properly pleaded such acknowledged torts against plaintiffs herein, and does not counterclaim against their attorney.

(c) Last, in its argument that prima facie tort does not lie as a counterclaim here, the EEOC, in rearguing the position it has already briefed to this Court, ignores obvious decisions in point, e.g., Smith v. Fidelity Mutual Insurance Co., 444 F. Supp. 594 (S.D.N.Y. 1978). There, this Court, after an exhaustive study of the law of prima facie tort in New York, concluded that a claim was stated where defendants had in an earlier action improperly named the plaintiff as parties in a lawsuit despite defendants'

** A copy of the Court of Appeals decision in Drago is annexed hereto as Exhibit "1".

knowledge of an agreement not to sue, and their knowledge of plaintiff's status as a mere nominally interested party. It is respectfully submitted that this Court's decision in Smith stands for the proposition that such an abuse of the judicial process i.e., instituting a suit known to be baseless, for the purpose of harassing or injuring another party, is actionable under New York law.*

9. In sum, the EEOC motion for an order granting it leave to file a "supplemental" memorandum should be denied because:

(a) The EEOC has been guilty of gross delay and proposes to serve its "supplemental" memorandum only some seven months after it could have done so, with no explanation for its delay;

(b) The EEOC has ignored published rules of this Court regarding applications for oral argument;

(c) The EEOC has ignored procedural rules relating to the filing of supplemental papers and has attempted to usurp the function of the Court on this motion by serving its proposed

---

* A proposition recently confirmed by the Supreme Court of the State of New York in Capuano v. La Melle (N.Y.L.J., August 11, 1978, p. 12, col. 6, p. 13, col. 1) where the Court denied defendant's motion to dismiss a defamation complaint, noting that "[n]either law nor reason supports a view that one who maliciously institutes a human rights complaint knowing such a complaint to be unfounded is insulated from all legal liability for such action."

papers along with its motion for leave to file such papers; and

(d) The EEOC's belated papers concededly say nothing new, and indeed rely upon outdated and reversed authorities.

10. The EEOC is an agency of the government, but that does not excuse it from adhering to the same standards of practice applicable to other litigants. Its tactics have merely caused further delay in the disposition of this matter, a prejudice to the parties and the Court condemned by this Court in IBM, supra, resulting also in expense to Sumitomo for no good reason. As set forth in Sumitomo's original memorandum in support of its motion to dismiss plaintiffs' complaint, this Court has the power to award attorneys' fees where it finds that party has acted unreasonably in bad faith to harass or to be vexatious (Stratton Group, Ltd. v. Chelsea National Bank, 54 F.R.D. 227, (S.D.N.Y. 1972)). Sumitomo respectfully requests as against the EEOC the sum of Five Hundred Dollars ($500.00) as its reasonable attorneys' fees in connection with the EEOC's frivolous motion.

J. Portis Hicks

J. Portis Hicks

Sworn to before me this
9th day of February, 1979

Notary Public

PAMELA ...OTH
Notary Public, State of New York
No. 41-4622...30
Qualified in Queens County
Certificate f... New York County
Commission Expires March 30, 1979

State of New York
Court of Appeals

3 No. 561
Eugene E. Drago,
Respondent,
vs.
Madeline Buonagurio, &c.,
Defendant,
and
Jerome D. Brownstein, Attorney,
Appellant.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

(561) James S. Carter & William P. Soronen, Jr., Albany, for appellant.
Harold E. Blodgett, Schenectady, for respondent.

MEMORANDUM.

The order of the Appellate Division should be reversed, with costs, and the order of Special Term granting defendant Brownstein's motion to dismiss the complaint as against him for failure to state a cause of action reinstated.

The allegations of the complaint are described in the opinions at Special Term and in the Appellate Division. We agree with those courts, and for the reasons stated by them, that the complaint does not state a cause of action in negligence, abuse of process or malicious prosecution. Nor does it allege a cause of action for what is sometimes labeled a "prima facie tort", i.e., "the intentional malicious injury to another by otherwise lawful means without economic or social justification, but solely to harm the other" (Morrison v National Broadcasting Co., 24 AD2d

284, 287, revd on other grds 19 NY2d 453). Whatever may be the constraints imposed by the Code of Professional Responsibility with the associated sanctions of professional discipline when baseless legal proceedings are instituted by a lawyer on behalf of a client, the courts have not recognized any liability of the lawyer to third parties therefor where the factual situations have not fallen within one of the acknowledged categories of tort or contract liability. That there are proposals before the Legislature to create new liabilities in such a circumstance (e.g., Senate Bill No. 8002 and Assembly Bill No. 10586, 1978, to amend Civil Rights Law, § 70) is an additional reason for judicial restraint in response to invitations to recognize what is conceded to be perhaps a "new, novel or nameless" cause of action. We conclude that the complaint fails to state a cognizable cause of action.

* * * * * * * * * * * * * * *

Order reversed, with costs, and the order of Special Term reinstated in a memorandum. Question certified answered in the affirmative. All concur.

Decided December 20, 1978

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Judith M. Hall being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 66 Orange Street, Brooklyn, N.Y. 11201.

That on the 9th day of February, 1979, deponent served the within

AFFIDAVIT IN OPPOSITION TO MOTION BY EEOC FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM OF LAW

upon

Lewis M. Steel, Esq.
Eisner, Levy, Steel & Bellman, P.C.
351 Broadway
New York, New York 10013

Abner W. Sibal, Esq.
Equal Employment Opportunity Commission
2401 E. Street, N.W.
Washington, D.C. 20506

at the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed envelope, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Judith M. Hall

Sworn to before me this

9th day of February, 1979

Pamela Lock

OPINION NO. 48679, TENNEY, J. GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS COMPLAINT AND PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS DATED JUNE 5, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al.,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

77 Civ. 5641 (CHT)

OPINION

APPEARANCES

For Plaintiffs: EISNER, LEVY, STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013

Of Counsel: LEWIS M. STEEL, ESQ.

For Defendant: WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022

Of Counsel: JIRO MURASE, ESQ.
J. PORTIS HICKS, ESQ.
EDWARD H. MARTIN, ESQ.
LANCE GOTTHOFFER, ESQ.

Amicus Curiae: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

Of Counsel: ABNER W. SIBAL
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER, ESQ.

JOHN D. SCHMELZER, ESQ.

Local Counsel (E.E.O.C.):

RONALD COPELAND, ESQ.
Regional Counsel
26 Federal Plaza
New York, New York 10007

TENNEY, J.

In this civil rights case, plaintiffs charge discrimination on the bases of sex and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1974), and of 42 U.S.C. § 1981 (1970).[1] They seek class action status. Plaintiffs are past and present female secretarial employees of defendant Sumitomo Shoji America, Inc.[2] ("Sumitomo"). Sumitomo is an "integrated trading company"[3] incorporated in New York as a wholly-owned subsidiary of a Japanese corporation. The parent corporation is not a party to this action. Plaintiffs, seeking injunctive and compensatory relief, claim that they have been restricted to clerical jobs and not trained for or promoted to executive, managerial or sales positions for which Sumitomo favors male citizens of Japan. Jurisdiction is based upon 28 U.S.C. § 1331 and § 1343.[4]

Sumitomo denies that the company discriminates and now moves pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the claims asserted under Title VII and section 1981. Sumitomo claims that the provisions of Title

VII and of section 1981 must yield to the right of freedom of choice in employment assured by the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. 2863 (entered into force Oct. 30, 1953) ("the Treaty"). In addition to positing that Sumitomo is insulated from federal review of its employment practices by the Treaty, Sumitomo claims that plaintiffs' allegations of discrimination based on sex and national origin fail to state a claim under 42 U.S.C. § 1981.

Sumitomo also interposes four counterclaims, invoking this Court's ancillary jurisdiction essentially to seek redress for plaintiffs' alleged abuse of legal process and tortious interference with Sumitomo's business activities. Plaintiffs cross-move for dismissal of the counterclaims pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that none states a claim upon which relief can be granted and that the Court lacks subject matter jurisdiction. For the reasons discussed below, the motions to dismiss plaintiffs' section 1981 claim and Sumitomo's first counterclaim are granted, and the motions to dismiss the Title VII claim and the remaining counterclaims are denied.

The Treaty

On April 2, 1953 the United States and Japan entered into a Treaty of Friendship, Commerce and Navigation. The

purpose of the Treaty is

> [to strengthen] the bonds of peace and friendship traditionally existing between them and [to encourage] closer economic and cultural relations between their peoples . . . by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges . . . based in general upon the principles of national and most-favored-nation treatment unconditionally accorded 5/

4 U.S.T. at 2066. The effect of the Treaty is to assure that nationals of one party are not discriminated against within the territory of the other party.6/

Article VIII(1) of the Treaty provides, in pertinent part, that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." Id. at 2070. Sumitomo, in moving to dismiss the discrimination claims against it, frames the issue before this Court as whether Title VII and section 1981 of the Civil Rights Act of 1964 must yield to the right of freedom of choice in executive and other specialist personnel granted by Article VIII(1) of the Treaty. However, the Court finds that the issue before it is even more fundamental; that is, whether Sumitomo can invoke the aegis of the Treaty as sanction for its employment practices. The initial inquiry concerns the nationality of Sumitomo.

Article VIII(1) of the Treaty provides that Japanese

and American corporations may engage within the territory of the other certain personnel of their choice. Article XXII, the definitional section of the Treaty, states in paragraph 3 that:

> [a]s 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.

Id. at 2079-80.[7/] This is entirely consistent with traditional rules of corporate law which, for most purposes, treat a corporation as an entity distinct from its shareholders and accord to the corporation the citizenship of its place of incorporation:

> The theory of "corporate personality" permits a corporation to be regarded as a "person" with an existence--in the state of incorporation--separate from the natural persons who own it. . . . [F]or purposes of federal court jurisdiction . . . a corporation is "deemed" to be a citizen of the state by which it was created.

Hornstein, Corporate Law and Practice § 281 (1959) (citing Louisville, Cincinnati, and Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 555 (1844). Sumitomo is incorporated under the laws of New York. Therefore, according to the very terms of the Treaty, Sumitomo is a company of the United States, not of Japan, and as such has 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.

This conclusion is supported by two district court decisions in which the 1953 Japanese-American Treaty was raised by way of defense. In United States v. R. P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1957), a wholly owned American subsidiary of a Japanese corporation was one of five corporations indicted for conspiracy in restraint of commerce in Japanese wire nails. The defendant argued that Article XVIII of the Treaty, which dealt with antitrust violations, denied the federal court jurisdiction by providing the exclusive remedy. Not only did the district court hold that Article XVIII provided a supplemental rather than exclusive remedy, but it also found that, even were Article XVIII an exclusive remedy, the California-incorporated subsidiary lacked standing to invoke this provision. The nationality of the defendant was determined by the terms of Article XXII and the traditional principles of corporate law. Moreover, the Oldham court found this conclusion not inconsistent with the policies underlying the Treaty:

> If [the defendant] had wished to retain its status as a Japanese corporation while doing business in this country, it could easily have operated through a branch. Having chosen instead to gain privileges accorded American corporations by operating through an American subsidiary, it has for most purposes surrendered its Japanese identity with respect to the activities of this subsidiary.

United States v. R. P. Oldham Co., supra, 152 F. Supp. at 823.

In Spiess v. C. Itoh & Co. (America), Inc., ____ F. Supp. ____ (S.D. Tex. Mar. 1, 1979), Judge Bue of the Southern District of Texas recently held that the 1953 Treaty did not provide the New York-incorporated subsidiary of a Japanese corporation with immunity from Title VII and section 1981. The motion before Judge Bue was essentially identical to that before this Court. Non-Japanese employees of a wholly owned domestic subsidiary of a Japanese corporation filed suit against their employer alleging racially discriminatory employment practices. The defendant C. Itoh & Co. (America), Inc. ("Itoh-America") moved to dismiss, arguing that under the Treaty it has an absolute right to hire personnel of its choice. In a well reasoned opinion, Judge Bue held:

> Given the Treaty's own definitional terms, Itoh-America is a company of the United States for purposes of the interpretation of Article VIII(1), which applies only to companies of one party within the territories of the other party . . . . Itoh-America is a United States company for purposes of Title VIII and, like other United States companies, is subject to suit on the grounds that its employment practices are racially discriminatory.
> 8/

Id. at ____.

To avoid the conclusion that it has no standing to invoke the Treaty, Sumitomo relies upon a four-page letter submitted on November 17, 1978 by the United States Department of State to the Equal Employment Opportunity Commission ("EEOC"). The EEOC, which has submitted an amicus curiae brief here in

opposition to Sumitomo's motion to dismiss,[9] had posed certain questions to the State Department. To one, "[d]oes the treaty permit subsidiaries of Japanese companies which are organized under the laws of a state of the United States to fill all its top management positions with Japanese nationals admitted as treaty traders,"[10] the State Department replied, in pertinent part:

> The phrase "of their choice" should be interpreted to give effect to [the intention that United States companies operating in Japan could hire United States personnel for critical positions, and vice versa], and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders. . . .

Letter from Lee R. Marks, Deputy Legal Adviser, Department of State, dated October 17, 1978, to Abner W. Sibal, General Counsel, EEOC.

To another question, "[i]s the situation different if the company doing business in the United States is not incorporated in the United States," the State Department replied, in pertinent part:

> [W]e see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form.

Id.

Sumitomo relies upon these statements to confirm its "preferential right and privilege to hire non-immigrant Japanese nationals" under the Treaty. The Court has carefully considered the State Department letter and is mindful of the Supreme Court's admonition in Kolovrat v. Oregon, 366 U.S. 187, 194 (1960), that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." See also Factor v. Laubenheimer, 290 U.S. 276, 295 (1933). However, in the absence of analysis or reasoning offered by the State Department in support of its position,[11/] 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 the precedents in the Fifth and Ninth Circuits.[12/]

Sumitomo also contends that it retains Japanese identity by virtue of United States regulations and guidelines adopted in connection with Article I of the Treaty, which enables nationals of either the United States or Japan to enter the territories of the other and to remain therein for specified purposes. In connection with Article I of the Treaty, section 1101(c)(15) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq., provides:

> The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens . . . .
>
> . . . .
>
> (E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . .

The Department of State has promulgated regulations that an alien must satisfy in order to obtain a treaty trader visa pursuant to section 1101(c)(15)(E)(i). Among these is that if the employer is not an individual, it "must be . . . an organization which is principally owned by a person or persons having the nationality of the Treaty country." 22 C.F.R. § 41.40 (1977). The parameters of this regulation are further described in 9 FOREIGN AFFAIRS MANUAL PART II, which states: "the nationality of the employing firm is determined by those persons who own more than 50% of the stock of the employing corporation regardless of the place of incorporation."[13/]

Sumitomo seizes on the regulatory standard to urge that nationality for purposes of the Treaty should be determined by the State Department guidelines, explaining that it is by interaction with Article I that the Article VIII "freedom of choice" provision is implemented. As Sumitomo is a wholly owned subsidiary of a Japanese company, by this test Sumitomo also would be a Japanese company. The Court agrees with Judge Bue who, when presented with the same argument, found that

"resort to the treaty trader guidelines to determine corporate nationality for purposes of interpretation of the Treaty provisions is unwarranted in the face of the clear definitional provisions included in Article XXII(3) of the Treaty itself." Spiess v. C. Itoh & Co., supra, ____ F. Supp. at ____.[14/] The purpose of the Treaty is to assure that Japanese companies operating in the United States, and vice versa, will not be discriminated against in favor of domestic corporations. Sumitomo is a domestic corporation and as such has neither standing nor need to invoke the aegis of the Treaty. Accordingly, the motion to dismiss the discrimination claims on the basis of the Treaty is denied.

The Section 1981 Claims

The second issue before the Court is whether the provisions of 42 U.S.C. section 1981[15/] apply to claims alleging discrimination based on sex and national origin. The law in this circuit, as in others, is clear that section 1981 does not apply to sex discrimination. New York City Jaycees, Inc. v. United States Jaycees, Inc., 377 F. Supp. 481 (S.D.N.Y. 1974), rev'd on other grounds, 512 F.2d 856 (2d Cir. 1975); O'Connell v. Teachers College, 63 F.R.D. 638 (S.D.N.Y. 1974). See also Vera v. Bethlehem Steel Corp., 448 F. Supp. 610 (M.D. Pa. 1978); Apodaca v. General Electric Co., 445 F. Supp. 821 (D.N.M. 1978).

However, there is a split of authority among the courts which have considered the question whether claims of discrimination based on national origin are actionable under section 1981--a question, it appears, that the Second Circuit has not yet addressed. Compare, e.g., Apodaca v. General Electric Company, supra; Vera v. Bethlehem Steel Corp., supra; Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186 (D. Md. (1977); Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977); Kurylas v. United States Department of Agriculture, 373 F. Supp. 1072 (D.D.C. 1974), aff'd, 514 F.2d 894 (D.C. Cir. 1975), with LaFore v. Emblem Tape & Label Co., 448 F. Supp. 824 (D. Colo. 1978); Ortega v. Merit Insurance Co., 433 F. Supp. 135 (N.D. Ill. 1977).

In Jones v. United Gas Improvement Corp., 68 F.R.D. 1 (E.D. Pa. 1975), the court reviewed carefully the legislative history of section 1981 and concluded that the section applies to discrimination based on race and alienage only. It then characterized the alleged discrimination against Spanish surnamed individuals as based on national origin and held that no action lay under section 1981. The court held

> that the provisions of 42 U.S.C. § 1981 are limited in their application to discrimination, the effect of which is to deny to any person within the jurisdiction of the United States any of the rights enumerated in that section, to the extent that such rights are enjoyed by white citizens of this nation. Discrimination on other grounds, such as religion, sex, or national origin, to which white citizens may be subject, as well as white non-citizens, non-white citizens, or non-white non-citizens, is not proscribed by the statute.

68 F.R.D. at 15 (emphasis in original).[16/]

A few courts have held that if national origin discrimination is motivated by or indistinguishable from racial discrimination, a claim will be actionable under section 1981.[17/] However, even were this Court to find the Jones analysis unpersuasive, on the facts of the instant action it could not equate plaintiffs' claims that they have been discriminated against because they are not Japanese nationals with discrimination based on their race. Indeed, from a superficial perusal of the plaintiffs' names it appears that at least one of the plaintiffs is non-Caucasian. As plaintiffs have, and are exercising, an adequate remedy for redress under Title VII, there is no need for them to strain to fit their grievances into the mold of racial discrimination. The Court concludes that the plaintiffs' allegations of discrimination based on sex and national origin are insufficient to sustain a cause of action under section 1981 and that these claims should be dismissed.

The Counterclaims

Plaintiffs cross-move pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss Sumitomo's amended counterclaims for failure to state a claim upon which relief can be granted. Sumitomo counterclaims, first, for attorney's fees pursuant to 42 U.S.C. § 2000e-5(k) and punitive damages by reason of plaintiffs' "frivolous and spurious" institution

of this lawsuit "in bad faith, vexatiously, willfully and wrongfully"; second, for damages by reason of plaintiffs' alleged abuse of the federal administrative and judicial process; third, for damages by reason of plaintiffs' common-law abuse of process; and fourth, for damages by reason of plaintiffs' tortious interference with Sumitomo's business operations.

For the reasons discussed below, the motion is granted as to the first counterclaim only. The remaining counterclaims, overlapping as Sumitomo's theories may be, satisfy the low threshold required to withstand a Rule 12(b) motion.

I. Attorney's Fees

Sumitomo, predicating its first counterclaim on section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), seeks recovery for attorney's fees expended to date and punitive damages for plaintiffs' wrongful conduct in commencing an allegedly spurious and frivolous Title VII action. Plaintiffs move to dismiss this counterclaim on the ground that section 706(k) will not support an independent claim for relief.

The question whether a defendant can request section 706(k) relief by way of counterclaim appears to be a novel one. The Court concludes that he cannot. Section 706(k) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a rea-

sonable attorney's fee as part of the costs . . . ." To treat this section as creating a separate cause of action is to ignore the words of the statute, which provide for reasonable attorney's fees to the "prevailing party," in the context of an existing action or proceeding "as part of the costs" thereof. This language necessarily implies a finality that this litigation does not yet approach. Accordingly, the first counterclaim is not yet justiciable and does not state a claim upon which relief can be granted. It will be stricken without prejudice to Sumitomo's right to make later application to the Court for reasonable attorney's fees if the Title VII action is found to be frivolous or without foundation.[18/]

II. Abuse of Process

The second and third counterclaims are based upon plaintiffs' alleged abuse of process in state and federal administrative and judicial proceedings. The gravamen of the tort of abuse of process is "misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish," Prosser, Torts § 121, at 856 (4th ed. 1971); or, stated in another way, the tortious use of "legal process to attain some collateral objective." Board of Education v. Farmingdale Classroom Teachers, 38 N.Y.2d 397, 402, 380 N.Y.S.2d 635, 641, 343 N.E.2d 278 (1975). Sumitomo alleges that plaintiffs' purpose in bringing proceedings before

administrative and judicial tribunals has been to coerce Sumitomo into acceding to their demands for work assignments for which they were unqualified and for payment of additional compensation to which they were not entitled. Such allegations clearly satisfy the intentional elements of the tort of abuse of process.

For purposes of a motion to dismiss, the court must accept the allegations of the complaint as true. Conley v. Gibson, 355 U.S. 41 (1957). Hence Sumitomo is entitled to prove that the true intent of the plaintiffs was not legitimately to invoke the processes of the administrative agencies and the courts, but to coerce Sumitomo into yielding to their demands for promotion and higher pay. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

III. Prima Facie Tort

The intentional infliction of temporal damages without a legal motive--commonly referred to as prima facie tort--is a tort recognizable at law. Smith v. Fidelity Mutual Life Insurance Co., 444 F. Supp. 594 (S.D.N.Y. 1978); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946). Its elements are: (1) the infliction of intentional harm (2) resulting in damages (3) without excuse or justification (4) by acts or series of acts that would otherwise be lawful. All must be established for the cause of action to be upheld.

Sommer v. Kaufman, 59 App. Div. 2d 843, 399 N.Y.S.2d 7, 8 (1st Dep't 1977).

In Board of Education v. Farmingdale Classroom Teachers, supra, the Board of Education brought an action against a teachers association and its attorney for abusing legal process by subpoenaing, with intent to injure and harass the school district, 87 teachers to compel their appearances at an initial hearing before the public employees' relations board and refusing to stagger the appearances, so that the school district was forced to hire 77 substitutes. The New York Court of Appeals held that the complaint stated a cause of action for both abuse of process and prima facie tort. Discussing the prima facie tort claim, the court stated:

> The operative fact here is that defendants have utilized legal procedure to harass and oppress the plaintiff who suffered a grievance which should be recognizable at law. Consequently whenever there is an intentional infliction of economic damage, without excuse or justification, we will eschew formalism and recognize the existence of a cause of action.

38 N.Y.2d at 406, 380 N.Y.S.2d at 644.

Sumitomo's fourth counterclaim alleges that by the institution of vexatious federal and state administrative and judicial proceedings and by disruptive and harassing activity in the office, plaintiffs deliberately and without justification inflicted temporal and economic harm upon Sumitomo. The Court concludes that this allegation satisfies the elements of

prima facie tort and states a claim upon which relief can be granted.

IV. Section 704(a)

Finally, both plaintiffs and the EEOC, as amicus curiae, assert that the counterclaims must be dismissed because the filing of charges before the EEOC and the bringing of a Title VII suit are absolutely privileged. As the basis for this theory, they cite section 704(a) of Title VII, which forbids "discrimination against . . . employees for attempting to protest or correct allegedly discriminatory conditions of employment." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 (1973).[19/]

The Supreme Court has declined to resolve the issue whether "the protection afforded by § 704(a) extends only to the right of access [to the EEOC and federal courts] or well beyond it." Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 71 n.25 (1975). However, the Court has stated that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it." McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 803. In attempting to define the limits of protected conduct under section 704(a), lower courts have relied upon the McDonnell Douglas language to conclude that illegal activity and activity that unreasonably inter-

feres with the employer's legitimate interests are not immunized by this provision. See Novotny v. Great American Federal Savings and Loan Ass'n, 584 F.2d 1235, 1261 (3d Cir. 1978); Hochstadt v. Worcester Foundation, 545 F.2d 222, 231 (1st Cir. 1976). In EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 71-72 (S.D.N.Y. 1975), the court stated:

> Under some circumstances, an employee's conduct in gathering or attempting to gather evidence to support his charge may be so excessive and so deliberately calculated to inflict needless economic hardship on the employer that the employee loses the protection of section 704(a), just as other legitimate civil rights activities lose the protection of section 704(a) when they progress to the point of deliberate and unlawful conduct against the employer.

The Court concludes that the cases cited above are dispositive of plaintiffs' contentions of immunity. Sumitomo alleges not only that plaintiffs instituted spurious administrative and judicial proceedings, but also that plaintiffs have been disruptive in the office, have endeavored to sabotage Sumitomo's business, have engaged in calculated acts of insubordination, have urged other employees to violate their fiduciary duties to Sumitomo and have harassed and coerced those who would not, and have attempted to "purloin" confidential corporate documents. Affidavit of J. Portis Hicks, sworn to July 11, 1978, ¶ 9. Allegations of such aggressive and hostile tactics, which must be accepted as true for purposes of a Rule 12(b) motion, cannot be dismissed on the basis

of section 704(a).

Accordingly, plaintiffs' section 1981 claims and defendant's section 706(k) counterclaim for attorney's fees are dismissed. All other motions are denied.

So ordered.

Dated: New York, New York

June 5, 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/ The complaint also includes a claim under the thirteenth amendment to the United States Constitution. As this claim apparently has been dropped, the Court sees no need to consider its merits.

2/ The plaintiffs are eleven women, all of whom claim to be citizens of the United States except for one who claims to be a citizen of Japan. The complaint offers no other details of plaintiffs' claims.

3/ "Integrated trading companies" engage primarily in the purchase and resale of goods, mainly in import and export markets. According to the Affidavit of J. Portis Hicks, sworn to May 18, 1978, there are fewer than a dozen integrated trading companies and these account for more than 50% of Japan's imports and exports.

4/ Reference in the jurisdictional statement to 28 U.S.C. §§ 2201 and 2202 (the Federal Declaratory Judgment Act) remains a mystery to the Court, which can discern no basis for this relief. Plaintiffs seek judgment (1) enjoining the defendant from engaging in the alleged unlawful employment practices, both current and future; (2) directing the defendant to promote plaintiffs to executive and other managerial and sales positions and to institute a training program to upgrade plaintiffs and to take affirmative action to remedy the effects of past discriminatory practices; (3) for compensatory and punitive damages; and (4) for the cost of the action with reasonable attorney's fees. Unless plaintiffs wish to enlighten the Court, the demand for declaratory relief will be stricken.

5/ Preface, Treaty of Friendship, Commerce and Navigation Between The United States of America and Japan (April 2, 1953).

6/ See United States v. R.P. Oldham Company, 152 F. Supp. 818 (N.D. Cal. 1957).

FOOTNOTES
ii

7/ This provision has been paraphrased by the court in United States v. R.P. Oldham Company, supra, 152 F. Supp. at 823:

> [B]y the terms of the Treaty itself as well as by established principles of law, a corporation organized under the laws of a given jurisdiction is a creature of that jurisdiction, with no greater rights, privileges or immunities than any other corporation of that jurisdiction.

8/ Itoh-America contended, as does Sumitomo, that subsequent developments and expansion of the concept of standing renders obsolete the Oldham analysis of the standing of corporate subsidiaries. Citing Calnetics Corp. v. Volkswagon of America, Inc., 532 F.2d 674 (9th Cir. 1976), both Itoh-America and Sumitomo argue that the Oldham test has been implicitly overruled by a liberalized standard. In Calnetics, a private antitrust action was commenced against a United States-incorporated subsidiary of a West German corporation and its wholly owned American-incorporated air conditioning subsidiary. The district court found that the defendants had violated the antitrust laws and ordered, inter alia, a seven-year import ban in the United States of Volkswagons with factory-installed air conditioning.

The Ninth Circuit reversed the finding of antitrust violations and questioned the remedy imposed because the effect might be to discriminate against West German products in contravention of the German-American Treaty of 1954. Judge Bue has distinguished Calnetics, and this Court concurs in his analysis:

> Read in a light most favorable to Itoh-America, Calnetics stands for the proposition that a United States incorporated subsidiary of a foreign corporation has standing to raise the claim that the Treaty rights of its parent may be affected by court ordered relief. . . . In Calnetics the Court of Appeals determined that the import ban ordered by the trial court might discriminate against the products of VW-Germany in contravention of that company's Treaty rights. By contrast . . . Itoh-Japan [the parent company of Itoh-America] has no Article VIII(1) right to staff Itoh-America. Ac-

FOOTNOTES
iii

> cordingly . . . even if Itoh-America has standing to invoke the Treaty rights of Itoh-Japan, it can claim no shield against application of Title VII to its own employment practices.

Spiess v. C. Itoh & Co. (America), Inc., supra, ____ F. Supp. at ____.

9/ The EEOC also filed an amicus brief in support of plaintiffs' motion to dismiss the counterclaims. See text infra.

10/ See text infra.

11/ It is disturbing that, in concluding that companies doing business and companies incorporated in the United States are to be treated equally under the Treaty, the State Department quotes only the first portion of the definitional section: "Article XXIII [sic] defines 'companies' as 'corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.'" The State Department neglects to quote the following sentence, which states that companies formed under the applicable laws of one of the parties are deemed companies thereof.

12/ Subsequent to the filing of the district court's Memorandum and Opinion in Spiess v. C. Itoh & Co. (America), Inc., supra, the opinion letter submitted by the Department of State to the EEOC was brought to the attention of that court, and a motion was filed requesting certification of the March 1, 1979 Order to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b).

Reconsidering his decision in light of the State Department letter, Judge Bue reaffirmed his holding that Itoh-America is a company of the United States under the terms of the Treaty and concluded that the opinion letter did not warrant reversal of the court's prior order.

Nevertheless, certification was granted because

> [t]he Court concludes that the March 1 Order involves a controlling question of law as to which there are substantial grounds for difference of opinion and that an immediate appeal may materi-

FOOTNOTES
iv

ally advance the ultimate determination of this litigation.

Spiess v. C. Itoh & Co. (America), Inc., ____ F. Supp. ____ (S.D. Tex. Apr. 10, 1979).

Accordingly, the following question was certified to 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 ____.

13/ The Manual is distributed to all State Department consular offices and to the offices of District Directors of Immigration.

14/ The State Department guidelines are promulgated for the purpose of determining an individual's immigration status; they are not designed for the purpose of defining a corporation's juridical status. Two decisions from this district lend support to this conclusion.

In Tokyo Sansei v. Esperdy, 298 F. Supp. 945 (S.D.N.Y. 1969), an action for review of the determination of the district director of the Immigration and Naturalization Service ("INS") was brought by individuals who had been denied treaty trader status. Their corporate employer, a wholly owned subsidiary of a Japanese corporation, joined in the action as a plaintiff. The district court upheld the administrative determination denying treaty trader status and noted that

> the question [whether the employer has standing] is substantial and it seems likely that without the individual plaintiffs, the corporation, however great its incidental "interest" as a business matter, could not maintain the suit. And

FOOTNOTES
V

with the individuals in the case, the corporation, strictly speaking, is unnecessary . . . .

Id. at 948 n.4.

Similarly, in Nippon Express U.S.A., Inc. v. Esperdy, 261 F. Supp. 561 (S.D.N.Y. 1966), a subsidiary of a Japanese express company sought review of the denial by the INS district director of an application made by the corporate employer on behalf of an alien employee for continuation of her status as a treaty trader. The district court concluded that

> [t]he Immigration and Naturalization Service has the responsibility for deciding [treaty trader status]. There is no merit to plaintiffs' contention that the Japanese employer itself may confer that status upon any employee it chooses.

Id. at 565.

15/ Section 1981 provides:

> All persons with the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

16/ Although the Supreme Court has not yet considered whether an allegation of national origin discrimination may be actionable under section 1981, it has extended the protection of that provision to "racial discrimination in private employment against white persons." McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 287 (1976).

17/ A number of courts have permitted Hispanic individuals to sue under section 1981 upon evidence that the alleged discrimination was racial in character. See Enriquez v.

FOOTNOTES
vi

Honeywell, Inc., 431 F. Supp. 901 (W.D. Okla. 1977); Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186 (D. Md. 1977); Cubas v. Rapid American Corp., Inc., 420 F. Supp. 663 (E.D. Pa. 1976). However, in Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977), an employee's allegation of discrimination based on his Slavic national origin failed to state a cause of action under section 1981. Similarly, an allegation of discrimination by a Polish-American failed to state a cause of action under this provision in Kurylas v. United States Department of Agriculture, 373 F. Supp. 1072 (D.D.C. 1974), aff'd, 514 F.2d 894 (D.C. Cir. 1975).

18/ In Christiansburg Garment Co. v. EEOC, 98 S. Ct. 694, 701 (1978), the Supreme Court defined the circumstances under which an attorney's fee should be awarded when the defendant is the prevailing party:

> [A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

19/ 42 U.S.C. § 2000e-3(a). That section provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

PLAINTIFFS' NOTICE OF MOTION FOR REARGUMENT AND FOR DISMISSAL OF COUNTERCLAIMS 2, 3 AND 4, DATED JUNE 14, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al.,	:	
Plaintiffs,	:	77 Civ. 5641 (CHT)
-against-	:	NOTICE OF MOTION FOR REARGUMENT AND DISMISSAL OF COUNTERCLAIMS 2, 3 AND 4
SUMITOMO SHOJI AMERICA, INC.,	:	
Defendant.	:	

S I R S:

PLEASE TAKE NOTICE that upon all of the prior proceedings had herein, and the affidavit of Lewis M. Steel, dated June 14, 1979, the plaintiffs will move before the Hon. Charles H. Tenney, on June 29, 1979, at 9:30 a.m., or as soon thereafter as counsel may be heard at the United States Courthouse, Foley Square, New York, New York, for an order granting reargument on plaintiff's motions to dismiss defendant's second, third and fourth counterclaims, and for an order dismissing said counterclaims after reargument and for such other and further relief as may be just and equitable under the circumstances.

Dated: New York, New York
June 14, 1979

Yours, etc.,

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, New York 10013
(212) 966-9620

by _____
LEWIS M. STEEL

TO: Wender, Murase & White
400 Park Avenue
New York, New York 10022

Equal Employment Opportunity Commission
Attn.: Lutz Alexander Prager
2401 E Street, N.W.
Washington, D.C. 20506

DEFENDANT'S NOTICE OF MOTION FOR AN ORDER PURSUANT TO 28 U.S.C. §1292(b) FOR ORDER AMENDING THE COURT'S JUNE 5 OPINION AND ORDER DATED JUNE 18, 1979

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----------x

LISA M. AVIGLIANO, et al., :

Plaintiffs, :

-against- : 77 Civ. 5641

SUMITOMO SHOJI AMERICA, INC., : NOTICE OF MOTION

Defendant. :

----------x

S I R S:

PLEASE TAKE NOTICE that upon the annexed opinion and order of this Court dated June 5, 1979, the Memorandum of Law in Support of Motion to Amend Order submitted herewith, and all prior proceedings heretofore had herein, defendant Sumitomo Shoji America, Inc. will move this Court before the Hon. Charles H. Tenney in Room 906, United States Courthouse, Foley Square, New York, New York, at 10:00 A.M. on June 29, 1979 or as soon thereafter as counsel can be heard, for an order pursuant to 28 U.S.C. §1292(b) for an order amending this Court's aforesaid opinion and order so as to include a finding that it involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal therefrom may materially advance the ultimate determination of this litigation, and for such other relief as may be appropriate.

Dated: New York, New York
June 18, 1979

Yours, etc.

WENDER, MURASE & WHITE

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

TO: EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, New York 10013

Equal Employment Opportunity Commission
Attn.: Lutz Alexander Prager
2401 E. Street, N.W.
Washington, D.C. 20506

PLAINTIFFS' NOTICE OF CROSS-MOTION FOR AN ORDER PURSUANT TO 28 U.S.C. §1292(b) AMENDING THE COURT'S JUNE 5 OPINION AND ORDER DATED JUNE 25, 1979

UNITES STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al.,

Plaintiffs,

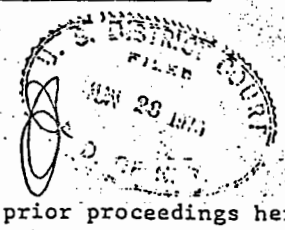
-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

77 Civ. 5641

NOTICE OF CROSS-MOTION



S I R S:

PLEASE TAKE NOTICE that upon all the prior proceedings here tofore had herein and the Memorandum of Law in Support of Cross-Motion submitted herewith, plaintiffs will move this Court before the Hon. Charles H. Tenney, in Room 906, United States Courthouse, Foley Square, New York, New York, at 10 a.m. on July 16, 1979, or as soon thereafter as counsel can be heard, for an Order, pursuant to 28 U.S.C. §1292(b) amending this Court's aforesaid Opinion and Order as set forth in the Supporting Memorandum, and for such other relief as may be appropriate.

Dated: New York, New York
June 25, 1979

Yours, etc.,

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, New York 10013
(212) 966-9620

by _____
LEWIS M. STEEL

TO: Wender, Murase & White
Attorneys for Defendant
400 Park Avenue
New York, New York 10022

Equal Employment Opportunity Commission
Attn.: Lutz Alexander Prager
2401 E Street, N.W.
Washington, D.C. 20506

OPINION NO. 48964, TENNEY, J., CERTIFYING FOR INTERLOCUTORY APPEAL CERTAIN ASPECTS OF THE COURT'S JUNE 5 OPINION AND ORDER DATED AUGUST 9, 1979

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

For Plaintiffs: EISNER, LEVY, STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013
Of Counsel: LEWIS M. STEEL, ESQ.

For Defendant: WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022
Of Counsel: J. PORTIS HICKS, ESQ.
LANCE GOTTHOFFER, ESQ.

Amicus Curiae: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
Of Counsel: ISSIE L. JENKINS
Acting General Counsel
JOSEPH T. EDDINS
Associate General Counsel
LUTZ ALEXANDER PRAGER, ESQ.

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.

... 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.

ORDER NO. 3379, DATED AUGUST 16, 1979, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DENYING LEAVE TO APPEAL WITHOUT PREJUDICE TO THE RENEWAL OF SUCH MOTION

#3379 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.

Lisa M. Avigliano, et al.,

Respondents

79-8460

79-8460

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 J. Meskill

Robert J. Ellsworth U.S.D.J.

William H. Timbers U.S.D.J.

Circuit Judges

LETTER DATED AUGUST 16, 1979 to JUDGE TENNEY FROM J. PORTIS HICKS, ESQ., COUNSEL FOR SUMITOMO SHOJI AMERICA, INC., CONCERNING DOCUMENTS RELEASED BY THE DEPARTMENT OF STATE, TOGETHER WITH COPIES OF VARIOUS DOCUMENTS RELEASED BY THE DEPARTMENT OF STATE

WENDER, MURASE & WHITE
ATTORNEYS - AT - LAW
400 PARK AVENUE
NEW YORK, NEW YORK 10022

(212) 832-3333
CABLE WEMULAW
DOMESTIC TELEX 125476
INTERNATIONAL TELEX 236562
TELECOPIER (212) 752-5378

SURTON Z. ALTER
CAROL SEABROOK BOULANGER
PETER A. DANKIN
WILLIAM L. DICKEY*
SAMUEL M. FEDER*
PETER FIGDOR
JOHN J. FINLEY
PETER J. GARTLAND
ROBERT M. GOTTSCHALK
J. PORTIS HICKS
RICHARD LINN*
MATTHEW J. MARKS
EDWARD H. MARTIN
GENE Y. MATSUO
JIRO MURASE
ALDEN MYERS
PETER J. NORTON
IRA TENSARD WENDER
JOHN TOWER WHITE
* (ADMITTED IN D.C. ONLY)

PARTNERS RESIDENT IN
DÜSSELDORF
SÃO PAULO
LONDON
TOKYO
TORONTO
BEIRUT
WASHINGTON, D.C.

August 16, 1979

Hon. Charles H. Tenney
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Avigliano, et al. v. Sumitomo Shoji America, Inc., 77 Civ. 5641 (CHT)

Dear Judge Tenney:

We are counsel for Sumitomo Shoji America, Inc. ("Sumitomo"), defendant in the above-captioned civil rights action. We are writing this letter to request that this Court, on the basis of evidence just released to the parties by the United States Department of State, reconsider its June 5 Opinion and Order (the "Order") insofar as the Order denied Sumitomo's motion to dismiss plaintiffs' Title VII claims herein. Because Rule 5(a) FRAP, imposes a ten day limitation on filing a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), we also request that this Court withdraw its Opinion and Order dated August 9, 1979, certifying for immediate appellate review the primary question posed in Sumitomo's motion to dismiss; i.e., whether Sumitomo 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 practices of Sumitomo in its employment of managerial and executive personnel.

On Sumitomo's original motion to dismiss, this Court, like the Court in Spiess, et al. v. C. Itoh & Co. (America), Inc., 469 F. Supp. 1 (S.D. Tex. 1979), criticized an October 17, 1978 opinion letter of the Department of State construing the Treaty favorably to Sumitomo's position, because such opinion letter failed to offer analysis or reasoning in support.

On August 13, 1979 (the date on which this Court's Opinion and Order of August 9 was reported in the New York Law Journal), we obtained a copy thereof and transmitted it to the United States Department of State. On August 14, 1979 our firm was informed by George Lehner, Esq., an attorney adviser in the Department of State, that the State Department was prepared to release various documents regarding hiring rights granted by the Treaty which it had searched for and located subsequent to this Court's Opinion and Order of June 5, 1979. Copies of such documents were released yesterday to counsel for all parties herein. We believe that such documents bear

significantly on the relationship between the Treaty and Title VII, and most particularly on the issue of the standing of United States subsidiary of a Japanese corporation to raise as a defense to the maintenance of this action the managerial and executive hiring rights granted by the Treaty.

As may be seen from the enclosures, which constitute but a few of the documents furnished by the Department of State, contemporaneous legislative history shows, and the State Department has in fact long taken the position, that under the 1953 Treaty, subsidiaries of United States or Japanese companies established in the territory of the other nation may claim the hiring rights provided for in Article VIII(1) of the Treaty. The enclosures also show that the State Department has for years rejected any limitation on that right by reason of Article XXII(3) of the Treaty, see, e.g., copy of January 9, 1976 cable from Secretary of State Kissinger addressed to the U.S. Embassy in Japan, citing relevant authority and negotiating history of the Treaty.*

---

* In respect of standing to assert rights under the Treaty, Secretary Kissinger states "....[Article XXII(3) of the Treaty] does not mean that [the Government of Japan] is free to deny treaty rights to U.S. subsidiary set up in Japan. [W]hile 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."

In view of the importance of the Treaty rights at issue herein, and the fact that this new evidence could not have been discovered by Sumitomo nor used by it prior to the issuance of this Court's Opinion and Order of June 5, 1979, Sumitomo respectfully requests that this Court grant it the opportunity to submit papers to this Court defining the significance of this new evidence, and speaking to the matters outlined in our firm's letter to the Court dated April 23, 1979, which requested leave to submit a memorandum dealing with the Spiess decision.

Sumitomo must, pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure, file by no later than Monday, August 20, a petition for leave to appeal this Court's June 5, 1979 Opinion and Order. Under the circumstances, we respectfully suggest that it appears appropriate for this Court to withdraw or vacate its Opinion and Order of August 9, 1979, granting certification for appeal, until it has determined whether to reconsider its June 5 Opinion and Order insofar as it relates to Sumitomo's motion to dismiss, and determined whether it will entertain the submission of further papers by the parties and by amicus curiae, pursuant to a briefing schedule. We believe that this Court has the power to vacate its Opinion and Order of August 9, 1979 for purposes

of considering this substantial issue in light of new facts. See, Nakhleh v. Chemical Construction Corporation, 366 F. Supp. 1221 (S.D.N.Y. 1973).

It appears obvious that time and expense to the parties and to the Court can be greatly conserved if reconsideration of the June 5, 1979 Opinion and Order is had prior to prosecution of Sumitomo's appeal. Whether or not the Court decides the matter differently, there will at the least be a fuller record for the Court of Appeals to consider, i.e., the State Department's recently produced documents will be part of the record.

While we could make a formal motion for reargument, and also make a motion for an order withdrawing this Court's August 9, 1979 Opinion and Order, it appears to us that much resource would be wasted in the preparation and submission of the various papers which would be required for such applications.

In view of the foregoing, we request an immediate conference with the Court to discuss what procedures the Court might wish the parties to follow in order to reach a speedy and economical disposition of this matter. We respectfully request a conference with the Court as soon as may be

convenient. Since we are informed that your Honor is away from the Court, we are concurrently herewith requesting an order from the United States Court of Appeals for the Second Circuit which would have the effect of preserving this Court's jurisdiction of the subject matter.

Respectfully,

J. Portis Hicks

cc: Lewis Steel, Esq. (By Hand)

Lutz Alexander Prager, Esq.

Enclosures:

1. Cable of Secretary of State Henry A. Kissinger, to U.S. Embassy, Tokyo, Japan, dated January 9, 1976.

2. Dispatch No. 13, dated April 8, 1952, from Office of U.S. Political Adviser for Japan (see pp. 3-4).

3. Memorandum of Department of State, A-852, dated January 21, 1954, to HICOG, Bonn, Republic of Germany.

4. Memorandum of HICOG Bonn, dated March 18, 1954, to the Department of State (see pp. 1-2).

L-2

AIRGRAM

153a/AM

RM/R	REP	AF	ARA
EUR	FE	NEA	CU
INR	EA 4	P	IO
L	FBO	AID	EB 4
AGR	COM 10	FRB	INT
LAB	TAR	TR	XMB
AIR	ARMY	NAVY	OSD
USIA	NSA	CIA	

SUGGESTED DISTRIBUTION

POST ROUTING TO:	Action	Info.	Initials
AMB/PO			
DCM			
POL			
ECON			
CONS			
ADM			
AID			
USIS			
FILE			

Action Taken:

Date:

Initials:

Original to be Filed in _____ Decentralized Files.

(2) FILE DESIGNATION m

UNCLASSIFIED

A-105

HANDLING INDICATOR NO.

FCN 2
Japan

TO : AmEmbassy TOKYO

E.O. 11652: N/A
TAGS: CGEN, CVIS, EINV, JA

FROM : Department of State DATE: 1976 JAN -9 AM 9:45

SUBJECT : GOJ Interpretation of FCN Treaty

REF : Tokyo 11177

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 Japnese 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

UNCLASSIFIED

FORM 10-64 DS-323

For Department Use Only
☐ In ☒ Out

Drafted by:	Drafting Date:	Phone No.:	Contents and Classification Approved by:
L/EB:SRSond:lms	1-7-67	20347	L/EB:PRTimble

Clearances: L/T:JBoyd EA/J:DFSmith L/EA:PNorton

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 GOJ 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

Enclosures:
Herman Walker Law Review Article on FCNs
Dispatch No. 13 from Tokyo Apr. 8, 1952

RESTRICTED
(Classification)

Enclosure No. 4
Page 1 of 5
Despatch No. 13 — Tokyo

Office of the United States Political Adviser for Japan,
Tokyo.

FCN 2
Japan

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEMITSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Mikiso NAGAI, Chief, Sixth Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan.

Date: Tuesday, April 8, 1952. FOURTEENTH INFORMAL MEETING

ARTICLE XX

Mr. Otabe stated that in order to avoid any possible differences in interpretation it should be clearly understood that the meaning of the word "transit", as used in Article XX, was the same as that used in Article V, paragraph 1 of the GATT, which states:

> "Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this Article 'traffic in transit'."

Mr. Otabe added that it should also be understood that "transit through the territories of each Party", mentioned in Article XX, includes passengers, baggage, and products carried by aircraft.

Mr. Singer replied that the GATT definition of "transit" was acceptable in interpreting Article XX, and that Mr. Otabe's understanding with reference to

the inclusion of aircraft traffic was correct.

Mr. Otabe stated that under present regulations, export validations are required in Japan for the temporary unloading and trans-shipment of cargoes when these involve specific commodities subject to export licensing under Japan's security export control procedures. He asked for confirmation of his understanding that the implementation of security export controls would not be regarded as constituting "unnecessary delays and restrictions", as mentioned in Article XX.

Mr. Adams replied that Mr. Otabe was correct in his understanding, and that security measures, including export validations and licenses, were permissible under paragraph 1 (d), Article XXI.

ARTICLE XXI

Mr. Otabe referred to previous discussions on Article VIII (at the fifth meeting, March 7, 1952) when the Japanese side had proposed that the second sentence of paragraph 3 (i.e. "Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities.") be deleted from that Article in as much as this clause was of general application. Mr. Otabe stated that this provision might more appropriately fit in Article XXI, and he now proposed that it be inserted in the latter Article.

Mr. Adams replied that when this clause was included in the provision on general exceptions in other United States FCN Treaties (for example in the Treaties with Colombia, Israel, Uruguay and others), the phraseology employed was: "The present Treaty does not accord any rights to engage in political activities". Subject to the views of the Department of State, which might prefer to use the terminology just mentioned, Mr. Adams suggested that this Article be amended as proposed by Mr. Otabe (i.e., that the second sentence, paragraph 3, Article VIII be inserted in Article XXI as paragraph 3-bis, for subsequent re-numbering in the final draft).

Mr. Otabe stated that the Japanese side earnestly desired that the second sentence of paragraph 3, Article XXI, reading, "Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement" (i.e., GATT), be deleted from this Article. Mr. Otabe pointed out that since Japan is not a member of the GATT, such concessions as are granted by the United States under a multilateral Agreement not yet open to Japan, would be outside the scope of the Application of most-favored-nation treatment. The purpose of the present treaty prescribing unconditional most-favor d-nation treatment would therefore actually be defeated in practice. Furthermore, he said, since the United States is in fact granting the GATT concessions to Japan, the deletion of this sentence would have no effect on the actual relations between the two countries. He again pointed out that the present FCN Treaty will become a model for future treaties to be negotiated between Japan and other countries, and that it was feared that the inclusion of this sentence would establish an unfavorable and most unfortunate precedent, particularly in connection with early negotiations anticipated between Japan and countries already in the GATT.

Mr. Singer stated that the Department of State had proposed and secured the standard GATT reservation in previous negotiations on the assumption that the country concerned was actually free to come into the GATT, and that any failure on its part to be in the GATT, being of its own choosing, had no effect on the propriety of this reservation. He pointed out that it was not the desire of the United States to use the GATT reservation in order to impose unequal trade relations, and that the Department of State had indicated that some adjustment might be made in the present case in view of the special circumstances involved. There was as yet no definite idea as to what the appropriate solution might be, but it was believed that it should be in the nature of a clarification or qualification of the third paragraph.

Mr. Adams added that paragraph 3 was essential to the FCN Treaty, but that the American side would be most willing to consider any solution the Japanese would desire to submit. He stated that a bilateral treaty could not, of course, commit the United States to any course of action inconsistent with its obligations under the GATT, and that it appeared therefore that any qualification suggested by the Japanese side should be made with reference to the second sentence of paragraph 3, and not to the first sentence.

Mr. Bassin added that the Department of State wished to reassure the Japanese representatives that their point of view was fully appreciated, and that it was prepared to approach this problem in a sympathetic manner, fully confident that a mutually satisfactory solution can be found.

Mr. Otabe replied that further consideration would be given this matter, and that the Japanese side would be prepared to discuss a proposed clarification or qualification of this paragraph, possibly at the next meeting.

With respect to paragraph 4, Article XXI, Mr. Otabe asked for a definition of "limited purposes". He asked whether a treaty trader or an employee of a Japanese company, permitted to enter the United States in connection with the activities of that company, might subsequently enter the employment of another company, for example of a domestic American firm, without violating the provisions of this paragraph. He also inquired whether employment in another Japanese firm, for example a subsidiary or affiliate of the company originally employing this individual, would be permissible.

Mr. Adams replied that a treaty trader or an employee of the type mentioned by Mr. Otabe would be permitted entry into the United States as a non-immigrant, subject to specific limitations on his activities. He added that various types of visas of a non-immigrant or temporary character are issued for entry into the United States; these are granted subject to varying conditions, qualifications or restrictions, and are valid for varying periods, ranging from a few months (for tourists) to an indefinite period of stay (for the so-called treaty traders). The latter are issued a visas of indefinite tenure, valid for so long as they continue to promote trade and commerce between the United States and their country. These individuals could change employment while in the United States, provided, of course, the character of their employment remained unchanged and they continued to promote trade and commerce between the United States and their country. This change could be made with the prior knowledge and approval of the appropriate officials of the

Department of Justice (the Immigration and Naturalization Service of the United States).

In reply to further questions put by Mr. Nagai, Mr. Adams stated that it is only the individual who enters the United States as an immigrant for permanent residence who is not subject to specific limitations or restrictions on his business or professional activities. Mr. Adams added that the Japanese employee previously mentioned by Mr. Otabe 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, or even for another legitimate Japanese enterprise also engaged in promoting commerce between Japan and the United States, without losing his treaty trader status, provided the prior approval of the Department of Justice were obtained.

ARTICLE XXII

Mr. Otabe asked for a clarification as to the difference between corporation and company, and for a definition of partnerships and other associations as used in paragraph 3, Article XXII.

Mr. Bassin replied that a company is a society or association of persons interested in a common object and uniting themselves for the prosecution of some commercial or industrial undertaking or other legitimate business. The word, he added, is a generic and comprehensive term which may include individuals, partnerships and corporations. Furthermore, the term is not necessarily limited to a trading or commercial body, but may include organizations to promote fraternity among its members and to provide mutual aid and protection. He added that the word is sometimes applicable to a single entrepreneur.

Mr. Bassin stated that a corporation, on the other hand, is an artificial person or legal entity, created under the authority of the law of a state or subdivision thereof. It consists of an association of numerous individuals as a group under a special denomination which is regarded in law as having a personality and existance distinct from that of its several members. A corporation is vested with the capacity of continuous succession, either in perpetuity or for a limited term of years, and acts as a unit or single individual in matters related to the common purpose of the association within the scope of the powers and authority conferred upon it by law. The words "company" and "corporation" are commonly used as interchangeable terms. Strictly speaking, however, Mr. Bassin said, a company is an association of persons for business or other purposes and may be incorporated or not.

Mr. Bassin further stated that a partnership is a voluntary contract or association between two or more persons to place the money, effects, labor and/or skill of some or all of them in lawful commerce or business, with the understanding that there shall be a proportionate sharing of the profits and losses among them. An association, Mr. Bassin stated, is the union of a number of persons for some special purpose or business. It is generally an unincorporated society, and may consist of a body of persons united and acting together without a charter but pursuant to the methods and forms used by incorporated bodies for the prosecution of a common enterprise. The word "association" is a generic term and may at different times

comprehend a voluntary association, such as a partnership, which is dissoluble by the persons who formed it, or a corporation dissoluble only by law.

Mr. Otabe stated that these definitions were satisfactory and would be helpful in properly translating this Article into Japanese. He then asked if the various religious groups and foundations in the United States were considered juridical persons, and whether they were included in paragraph 3.

Mr. Bassin replied that organized religious groups and foundations may be juridical persons, but are usually unincorporated associations.

Mr. Otabe inquired whether a Zaidan Hojin was covered by paragraph 3, and, if so, what would be the nature of national treatment accorded such organizations in the United States. He explained that a Zaidan Hojin is a duly organized juridical person with given property, established for the purpose of employing or disposing of said property for a given public purpose. An example of a Zaidan Hojin, he added, would be an endowed private library.

Mr. Bassin replied such an organization would be considered a juridical person in the United States, pursuant to the provisions of paragraph 3, if it were so considered in Japan.

Mr. Nagai then 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.

Mr. Bassin 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.

It was then agreed that the next meeting would be held on Friday, April 11, 1952, with discussions to begin on Article XXIII.

DEPARTMENT OF STATE INSTRUCTION

1872

UNCLASSIFIED

NO.: A-852 January 21, 1954

SUBJECT: Treaty of Friendship, Commerce and Navigation.

83 MS
ORIGIN
E
INFO
DCL
GER
OLI
L
VO

CIA
COM
FOA
JUS
TR

TO: HICOG, BONN

Reference HICOG despatch No. 1904, January 8, 1954.

There follow the Department's comments with respect to the points raised by Dr. Paulich at the January 4 meeting regarding the provisions of Article II, paragraph 1.

1. The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. 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 22 CFR 41.70, 41.71 and other applicable regulations.

2. The apparent discrepancy between the treaty and the Immigration and Nationality Act with respect to use of the term "substantial" is of no legal or practical significance either when considered in the treaty trader clause alone or taken together with the treaty

DRAFTED BY: ~~EET:CP:CHSullivan:hc~~ ~~1/19/54~~ APPROVED BY: ~~CP:~~ ~~V. C. Setser~~

CLEARANCES:

L/EUR VO L/E CPA

UNCLASSIFIED
(Security Classification)

the treaty investor clause. Use of the term "substantial" in the treaty trader provision of the Act merely gives explicit recognition in the law to an administrative practice of long standing. It was not deemed necessary to reword the treaty as a consequence, for the treaty provision as now worded has long been applied in a manner requiring that the trade for which entry is permitted shall be substantial in character. This does not derive from Article III(1)(c), however, but from Article III(3), taken together with the general right to apply reasonable and nondiscriminatory regulations consistent with the intent and purpose of the treaty provision in order to implement the commitment and to protect the privileges accorded thereby from abuse. In the case of the treaty investor provision, however, the term "substantial" has been carried over from the law to the treaty as an aid to its construction and implementation. This was done simply because the investor clause, unlike the trader clause, is new and an established body of interpretation has not yet developed.

It may be noted in connection with hypothetical cases involving substantiality of trade that this requirement is applied in a liberal manner. In determining the substantiality of the trade within the meaning of the treaty trader clause, monetary or physical volume are not used as the exclusive criteria. The intent is to assure that the trade in question is not a brief, isolated excursion into international trade but a sustained volume of bona fide commercial transactions. Consequently, the number of transactions, the continuous character of the operations and a number of other factors are taken into consideration as well.

(It is believed that Dr. Paulich, in discussing this point, had reference to an unofficial summary of the new immigration legislation prepared by Mr. Frank Auerbach of the Visa Office of the Department of State. This work is entitled The Immigration and Nationality Act: A Summary of its Principal Provisions, and copies presumably are available in the office of the Supervisory Consul General.)

3. Dr. Paulich's observation that the fixing of the period of sojourn for aliens entering the United States as nonimmigrants is done by immigration officers at the port of entry rather than by consular officers when the visa is issued is correct. However, this procedure is specifically required by law and hence not merely a matter of administrative convenience. Section 214(a) of the Immigration and Nationality Act expressly vests the Attorney General with authority to prescribe by regulation the period of time for which nonimmigrant aliens may be admitted to the United States. A treaty trader or treaty investor, by reason of the purposes of the treaty, is regarded as admitted on an indefinite basis as to sojourn, provided, of course, that he maintains his status as a trader or investor under the treaty. Hence the administrative regulations governing entry and sojourn (8 CFR 214.2) contain no specific limitation as to time. This does not preclude, however, requirements that the alien comply with reasonable procedures designed to assure that

he is

UNCLASSIFIED
(Security Classification)

UNCLASSIFIED
(Security Classification)

he is maintaining his status as a treaty alien and otherwise complying with the conditions of his admission; and the measures referred to by Dr. Paulich are in the nature of such requirements.

SMITH, ACTING

AIR POUCH
PRIORITY

UNCLASSIFIED
(Security Classification)

DO NOT TYPE IN THIS SPACE
611.62A4/3-1854

FOREIGN SERVICE DESPATCH

FROM : AMCONGEN BONN

2529
DESP. NO.

TO : THE DEPARTMENT OF STATE, WASHINGTON

March 18, 1954
DATE

REF : CURTES nos. 1355, October 28, 1953; 1372, October 30, 1953; and 2501, March 16, 1954

For Dept. Use Only	ACTION	DEPT.
	E-4	INFO REP-2, DC/R-2, GER-4, OLI-6, L-2
	RECD 3/26	OTHER CIA-5, COM-8, FOA-10, TR-3

SUBJECT: New Treaty of Friendship, Commerce, and Navigation: Report on March 16, 1954 Meeting with German Negotiators

DC/R Central File

The 32nd regular business meeting for negotiation on the subject matter was held at the Foreign Office on March 16, 1954. Dr. BECKER, as usual, served as chairman of the German team which included representatives of the Foreign Office and the Ministries of Economics, Justice, Labor and Interior. The U.S. side included Messrs. BOEHRINGER, LEVY, and WALKER.

The meeting on March 16 was devoted to a detailed discussion of U.S. Article VIII on employment, professions, and non-profit activities, and U.S. Article IX on property rights.

Article VIII, Paragraph 1

The Germans stated that their preference remained to delete this paragraph, as being unnecessary, but that they were prepared to accommodate U.S. wishes for its retention in the treaty. They felt it to be in general acceptable as drafted, subject perhaps to linguistic clarifications and verification of their understanding of its intent. They had some questions to ask, in response to which the U.S. side developed answers as follows during the course of the discussion:

(1) The first sentence is of a general nature, being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel. Its major special purpose is to preclude the imposition of "percentile" legislation. It gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law. The Germans said they might wish to suggest some linguistic revisions to clarify this last point. The U.S. side said they did not feel that further clarification was essential, especially as the juxtaposition of the contrasting wording of the first and second sentences gives clear clarification by implication; but declared their willingness to consider any reasonable proposal, in deference to German views. No express clarification had been necessary in any other treaty, to the best recollection of the U.S. side.

RHLevy/igl
REPORTER

UNCLASSIFIED

ACTION COPY—DEPARTMENT OF STATE

The action office must return this permanent record copy to DC/R files with an endorsement of action taken.

This Document Must Be Returned to DC/R Central File

611.62A4/3-1854

LWC

(2) The second sentence deals with a special and limited situation, and within its framework goes beyond the first sentence, inasmuch as it waives professional qualification requirements in the cases stipulated. These have to do with temporary jobs requiring special skills (e.g., for an American firm, competence in American law and accounting methods) for internal management purposes; and no right is created to engage in the general practice of a profession in the host country. In reference to the question of entry into the country, necessary entry privileges are implied. With specific reference to the needs of a German firm in the United States, procedures are understood to be available whereunder temporary visas can be issued in properly justified cases.

(3) The word "moreover" introducing the second sentence is merely a convenient connective, and has no special substantive significance. The Germans said that it did not carry over very well into German; and it was agreed that it be translated as jedoch in the German text.

(4) It was agreed to frame the first sentence in a manner similar to that agreed on for Article VII, paragraph 1, to wit:

> "Nationals and companies of Germany shall be permitted to engage within the territories of the United States of America, and reciprocally nationals and companies of the United States of America shall be permitted to engage within the territories of Germany, accountants .....et cetera."

Article VIII, Paragraph 2

It was agreed, as in the case of the preceding paragraph, to reframe the first sentence along the following lines:

> "2. Nationals and companies of Germany shall be accorded within the territories of the United States of America, and reciprocally nationals and companies of the United States of America shall be accorded within the territories of Germany, national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities, and shall be accorded the right to form associations for that purpose under the laws of the country....."

Article IX

Dr. von SPRECKELSEN from the Justice Ministry, who acted as principal technical spokesman for the German side, commented that some legal difficulties had arisen which had not been considered during the earlier discussion of U.S. Article IX in October, 1953 (see reference despatches)

which required additional explanation. He noted that these difficulties pertained to existing German legislation with respect to the acquisition of real property by alien natural persons and by alien juridical persons "residing abroad".

Acquisition of Realty in Germany by Alien Natural Persons

The German side noted that limited restrictions only were applicable regarding the acquisition of real property by alien natural persons and that these curtailments were based not on Federal but on old Laender legislation applicable in Hamburg, Hesse, and the part of the Rhineland-Palatinate which formerly belonged to Hesse.

They explained that in the above-cited Laender the acquisition of real property by alien natural persons depended on authorization granted by the Land authorities and that the purchase contract could not be fulfilled until the required authorization had been obtained. They noted that the date of the purchase contract became valid for the acquisition once the authorization had been accorded, but that the purchase contract was voided if the required authorization were denied. They added that the acquisition of real property by alien natural persons was subjected to such an authorization not only in cases of acquisition by contract but also in instances of acquisition by intestate or testate succession. They stressed that the existing provisions were being liberally applied, and that reciprocity treaties had been in the past concluded by Germany with other countries which waived the authorization requirement if likewise the countries concerned did not impose restrictions for the acquisition of real property by German nationals.

Acquisition of Realty by Alien Juridical Persons Residing Abroad

Dr. von Spreckelsen observed that for the acquisition of real property by alien juridical persons residing abroad practically all Laender required the granting of an authorization before a purchase contract became valid. He stated that the Laender applied the provisions on a liberal basis, and that old German treaties had renounced the application in case other countries had been prepared to grant reciprocity to German juridical entities.

He concluded that in view of these existing requirements it was difficult for the German side to accept paragraph 2 of U.S. Article IX, and asked whether the United States had ever granted natural and juridical alien persons in the United States national treatment as a treaty right.

The U.S. side reviewed U.S. treaty policy on this point and noted that only the 1853 treaty with Argentina provided for national treatment with respect to acquisition of title to real property, and then only in the case of natural persons. They added that the treaty with France

originally negotiated about 100 years ago had contained a similar provision but had been rejected by the Senate as constituting undue interference in State rights; and that the policy of the Federal Government for years had been to abstain from interfering with State regulation of land ownership. They stated that the present text of paragraph 1, U.S. Article IX, which granted national treatment with respect to the leasing of land needed for treaty purposes without according a similar right for the holding of land by title, represented an internal U.S. compromise on the question of how far alien land tenure should be the subject of treaty commitments.

They stressed that the present text granted the greatest advantages for practical treaty purposes and added, with respect to clause 1 (b), that many States did not have discriminatory provisions in their legislation. In this connection, they noted that half the States had no disability laws, and perhaps 15 - 18 other States had variously slight or partial disability provisions, such as South Carolina and Pennsylvania which applied acreage limitations of a rather mild sort; Nebraska, which permitted full ownership inside municipalities but not in rural areas; and Wisconsin which prevented large scale holding of farmland by aliens by imposing acreage limitations in rural areas. They added that only seven or eight States had severe disability laws as to alien tenure. They concluded that, accordingly, an alien would for the most part be accorded either national treatment or very liberal treatment in the United States with respect to matters of treaty concern, and that the U.S. proposed language granted de facto reciprocity since any German Land could withhold rights to a U.S. natural or juridical person seated or domiciled in a State which imposed restrictions on Germans.

The U.S. side noted that the issue of property rights by treaty was sensitive in the United States; and also that the proposed text placed the responsibility for any right withheld from a U.S. national abroad on the States which maintained disability provisions in their law, and gave the legislatures concerned a practical occasion for reviewing the need for maintaining disabilities which had been first adopted long ago when conditions were different.

As to the enforcement of alien disabilities in the States, they said that no known permit system had been established and that the disability clauses were typically latent legal provisions that allowed the alien to take title good as against all the world except the State itself. As a consequence, they stated, an alien could buy land, use it, and in the typical jurisdiction have this right challenged only by public authority through the writ of office found. They explained that this ancient writ was often subject to limitations; in Minnesota, for instance, if the Attorney General of the State did not challenge the alien's right within a specified number of years, the title became immune to challenge. They concluded that, although paragraph 1 contained a reservation, its effects were normally of small consequence since there existed a large degree of alien ownership either by virtue of liberal laws or practical toleration.

The Germans countered that insofar as Germany was concerned sentence 2, paragraph 2 conveyed an apparent but not a real reciprocity since they had no federal law which afforded a possibility to prohibit U.S. nationals to own land. They added that the lack of comprehensive laws to apply the treaty provisions for natural persons as distinct from juridical persons, for whom restrictions existed in practically all Laender, would make paragraph 2 meaningless. Referring to paragraph 4, U.S. Article IX, they observed that under the German license system the authorization, once granted, could not be revoked and that these considerations made it difficult for them to accept the U.S. formulation in paragraph 2.

The U.S. side answered that paragraph 4, U.S. Article IX, was a practical commitment to safeguard the alien against enforcement of the old common law theory under which he had no heritable blood, and its European counterpart the droit d'aubaine. They added that the five year period allowed the alien to sell his property at a full market price and thus protected him against spoliation or sacrifice sales. Regarding sentence 2 of paragraph 2, they stressed that it contained a latent reservation only, and that there was no problem in Germany since the treaty did not wish a country to worsen its laws but sought only to establish minimum rights. They explained that in accordance with its provision a Land could deny an authorization if similarly a State had a disability law and that on the other hand, a Land would grant the authorization automatically in case no State disability law existed. If a Land, however, did not in absence of the treaty impose an alien disability, the treaty most certainly would not in any way oblige it to change its system.

The German side countered that Article IX was the only Article in the present treaty with a marked and unbalanced reciprocity provision; and they suggested that paragraph 1 be redrafted in a mutual manner to parallel the other treaty provisions, and that paragraph 2 be deleted.

This German suggestion was followed by a further discussion of the merits of the U.S. proposal, which was answered by a German assertion that they feared that the U.S. draft might provoke political difficulties for the treaty. Its conspicuous difference from the way the treaty generally was set up would necessitate justifications in detail before parliament at the time of ratification; and they were not confident that they could give explanations that would readily allay suspicions in the Bundestag and Bundesrat. They feared that maintenance of the U.S. proposed text might, therefore, prejudice early and harmonious ratification.

At this point, Dr. Becker being temporarily called from the room, the discussion digressed to the following three questions asked by Dr. von Spreckelsen:

(1) With respect to clause 1 (b) whether the words "other rights" included mortgages, or what, stressing that in Germany restrictions were applicable for only acquisition of real property.

The U.S. side replied that a sure treaty right being only accorded under clause (a), the words "other rights" had been used on purpose to cover everything not in (a) falling within the scope of the concept "tenure of property".

(2) The second German question was whether it would be possible to stipulate sure treaty rights in those States whose laws made specific exception for treaty rights, specific mention being made of Missouri. In reply to that question, the U.S. side stated that, aside from the fact that the Missouri law, at one time at least, apparently pertained only to treaties existing at the time the law had been enacted, they felt the treaty had to be geared to the situation existing in the "hard core" group of States.

(3) The third German question pertained to the phrase "acquiring through judicial process" in paragraph 4. They asked whether this phrase was designed to cover a change of ownership as a result of sale of property under execution in case a mortgage on such property had not been repaid. They further went on to say that in Germany alien and German alike would not become the owner of a property by mere purchase contract, but only after finalization by a contract of transfer (Auflassung). If a purchase contract was not fulfilled, suit could be brought against the seller. They asked whether such a law suit was also meant to be covered by the words "judicial process".

The U.S. side replied that if the reason for failure to fulfill the purchase contract was not due to interference by public authorities but solely based on willful and personal action of the seller, they did not see offhand the relevance of the latter question, though they would not hazard any final opinion. They suggested that Dr. von Spreckelsen was better qualified to analyze such a question; and they noted that their own legal counsel was unfortunately unable to attend today's session. They stated that though primarily the words "judicial process" had been motivated by a desire to cover mortgage foreclosures, wording had been chosen broad enough to cover other cases wherein a legal interest in property might be established by judgment of a court; for example, attachment in satisfaction of a debt other than a mortgage; enforcement of a dower right; or the property settlement growing out of a dissolution of marriage in a community property State. Dr. von Spreckelsen said that he would probably offer some language designed to clarify the term "judicial process", which was not a term that would be easily understood in Germany.

Conclusion

Dr. Becker reverted to his proposal that paragraph 1 be mutualized, and paragraph 2 deleted. He stated that he wanted to stress that notwithstanding the resultant narrowing of the scope of the treaty provision, U.S. citizens and companies could rest assured of being accorded liberal treatment in Germany, in keeping with the basic purposes of the treaty to

promote friendly intercourse and encourage broader business relations. He did not foresee that Americans would experience any difficulties in getting the property they might need in future.

It was finally agreed that the U.S. side would submit a redraft in compliance with Dr. Becker's proposal, and recommend it to the Department. The U.S. side stated, however, that they would be most happy to revert to the original U.S. proposal, if later after further consideration the Germans concluded that it would be feasible from the parliamentary viewpoint.

The redraft in question was prepared and handed to the Germans on March 17, copy enclosed.

Carl H. Boehringer
Commercial Attache
Commercial Attache Division

Enclosure:

Suggested Redraft,
Article IX, paragraph 1

Coordination:

Mr. Herman Walker, Jr.

Copies to:

DEC
PA:OD
PA:LA
SUPCONGEN
OGC
E:OD
E:FNP
E:IND
E:FA
HICOG BERLIN ELEMENT (2)
Amcongen Bremen
Amcongen Hamburg
Amcongen Duesseldorf
Amcongen Frankfurt
Amcongen Stuttgart
Amcongen Munich

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

J. Portis Hicks, being duly sworn, deposes and says that deponent is a member of the firm of WENDER, MURASE & WHITE, attorneys for the within named petitioner herein. That deponent is over 18 years of age and is not a party to this action. That on the 16th day of August, 1979, deponent served a true copy of the within Notice of Motion and Affidavit on:

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Respondents
351 Broadway
New York, New York 10013

LUTZ ALEXANDER PRAGER, ESQ.
General Counsel
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

at the addresses set forth hereinabove, by depositing a true copy of the within enclosed petition in a post paid properly addressed envelope in an offical depository under the exclusive care and custody of the United States Postal Service within the State of New York.

J. Portis Hicks

Sworn to before me this
16th day of August, 1979.

Pamela Roth

PAMELA ROTH
Notary Public, State of New York
No. 41-4622480
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30 1981

AFFIDAVIT OF LANCE GOTTHOFFER SUBMITTED IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION, SWORN TO SEPTEMBER 10, 1979 WITH EXHIBITS ATTACHED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

LISA M. AVIGLIANO, et al.,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

----------x

AFFIDAVIT

77 Civ. 5641

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

LANCE GOTTHOFFER, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Wender, Murase & White, counsel for defendant Sumitomo Shoji America, Inc., ("Sumitomo"). I make this affidavit in support of Sumitomo's motion for reconsideration of this Court's Opinion and Order dated June 5, 1979 to the extent that it denies Sumitomo's motion for an order dismissing the complaint herein.

2. This motion is based upon newly discovered evidence -- certain heretofore unavailable documents only recently made available to the parties by the United States Department of State. This affidavit is submitted to resolve now, at the outset, any possible question as to authenticity.

3. On August 15, 1979, I received in hand from George Lehner, Esq., an attorney advisor in the office of the

Legal Advisor, Department of State, Washington, D.C., documents which Mr. Lehner represented to me were true copies of documents from the files of the United States Department of State where such documents were kept. I attach hereto true copies of all the documents given to me by Mr. Lehner, and represented by him to be authentic State Department documents as described above. For the convenience of the Court, an index to the documents is also attached.

4. In light of the foregoing, defendant respectfully submits that these documents have been sufficiently authenticated, and that absent any showing by plaintiffs on this motion that further authentication is required, such documents should be for all purposes in this case, considered duly authentic as required by law.

LANCE GOTTHOFFER

Sworn to before me this
10th day of September, 1979

DOUGLAS J. DANZIG
Notary Public, State of New York
No. 60-4607413
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1981

(INDEX TO AFFIDAVIT OF L. GOTTHOFFER)

1. Communication of Department of State to United States Political Adviser for Japan, Tokyo, marked "RESTRICTED No. 63", stamped Nov. 1, 1951, and Annex thereto.

2. Foreign Service Despatch No. 915, from USPOLAD, Tokyo, to Department of State, re FCN Treaty with Japan, dated December 17, 1951.

3. Outgoing Airgram No. A-453, from Department of State (Acheson) to USPOLAD, Tokyo, re FCN Treaty with Japan and Despatch No. 915, dated January 7, 1952.

4. Despatch No. 13, by Office of United States Political Adviser for Japan, Tokyo, re Japanese FCN Treaty, dated April 8, 1952.

5. Outgoing Airgram No. A-49, from Department of State (Acheson), to American Embassy, Tokyo, re Japanese FCN Treaty, dated July 23, 1952.

6. Telegram No. 3989 from American Embassy, Tokyo, to Secretary of State, dated March 28, 1975.

7. Telegram No. 11177 from American Embassy, Tokyo, to Secretary of State, dated August 13, 1975.

8. Department of State Airgram No. A-105 (Kissinger) to American Embassy, Tokyo, dated January 9, 1976.

9. Department of State Instruction, No. A-852, to HICOG, Bonn, re FCN Treaty with Germany, dated January 21, 1954.

10. Foreign Service Despatch No. 2413, from HICGO, Bonn, to Department of State, re FCN Treaty with Germany, dated March 8, 1954.

11. Foreign Service Despatch No. 2529, from HICGO, Bonn, to Department of State, re FCN treaty with Germany, dated March 18, 1954.

12. Letter of April 29, 1954, from Office of United States High Commissioner for Germany, to Secretary of State, and enclosures, consisting of 16 Notes from the Office of the United States High Commissioner for Germany to the German Ministry of Foreign Affairs re the FCN Treaty with Germany, dated November 2, 1953, November 4, 1953 (1st note); November 4, 1953 (2nd note); November 5, 1953; November 12, 1953; November 23, 1953; December 9, 1953; December 10, 1953; December 12, 1953; December 14, 1953; December 15, 1953; December 16, 1953 (1st note); December 16, 1953 (2nd note); February 5, 1954; February 8, 1954; February 9, 1954.

13. Letter of the Trade Agreements and Treaties Division to the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, dated September 16, 1955.

14. Letter of the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, to the Commercial Policy Staff, Department of State, dated September 28, 1955.

15. Letter of the Trade Agreements and Treaty Division Department of State, to the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, dated October 28, 1955.

16. Letter of the Netherlands negotiator to the Counselor for the U.S. Embassy for Economic Affairs, The Hague dated October 22, 1955.

17. Letter of the Netherlands negotiator to the Economic Counselor of the U.S. Embassy, The Hague, dated October 6, 1955.

18. Letter of the Trade Agreements and Treaty Division, Department of State, to the Counselor for Economic Affairs, American Embassy, The Hague, Netherlands, dated November 8, 1955.

19. Letter of the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, to the Commercial Policy Staff, Department of State, dated November 4, 1955.

20. Letter of the Netherlands negotiator to the Economic Counselor U.S. Embassy, The Hague, dated November 8, 1955.

21. Letter of the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, to the Trade Agreements Division, Department of State, dated November 14, 1955.

[Comment: Date "Nov 1 (year illegible)" stamped in upper right of page.]

RESTRICTED

No. [Comment: Number "63" handwritten]

[Comment: Numbers "611.944/6-1651" handwritten]

To the [blank]

United States Political Adviser for Japan,

Tokyo.

The Secretary of State refers to the Mission's Despatch 246 of August 16, 1951, with enclosures, regarding the development of a negotiation between the United States and Japan for a new treaty of friendship, commerce and navigation. This Government shares the desire expressed by the Japanese, and as set forth in Article 12 of the Peace Treaty, to proceed expeditiously with discussions of such a treaty, with a view to arriving at a mutually agreed text which may be ready for signature as soon after the formal restoration of peace as may be possible. The fact that the Japanese Government has seen fit to pattern its tentative treaty draft upon the model afforded by treaties of the type which the United States has lately entered into with other countries suggests that there is general agreement on the nature, scope and content of a treaty of sufficient extent to augur well for the success of a negotiation.

Ordinarily, the Department prefers to use, and has used in all negotiations to date (except in the special case of Ethiopia), its own "standard" model as a basis for negotiating a treaty of friendship, commerce and navigation. This draft has the advantage, inter alia, of being a document which the Senate has previously approved and with which it is now familiar. Six mimeographed copies thereof are enclosed. Copies of this draft should be furnished to the

[Comments: Numbers "611.944/6-1651" stamped on right side of letter as well as handwritten. Letters "CS/R" also stamped on right side. File stamp, which is initialled, appears on lower left side of letter].

Japanese for their study, and as the latest illustration of the Department's views and preferences as to the most suitable approach. However, although the Department would be happy if the Japanese Government should be willing to substitute the Department's standard draft for its own initial proposals as a basis for discussion, the Department will refrain from insisting that this be done. If the Japanese strongly desire, the Department is willing, in deference to the Japanese initiative and as a token of good will, to use the Japanese draft, with certain amendments, as the starting point for developing the negotiation. These amendments are set forth in the Annex hereto.

In the

RESTRICTED

[End of page]

In the present instruction and its Annex, the Department has confined itself to setting forth certain basic considerations that affect the formulation, in major outline, of what it would regard as an appropriate basis for treaty discussions. Comments on the details of, and proposals for secondary modifications in, the various provisions of the Japanese draft, are deferred until after a basic negotiating draft is definitely ready and the two Governments are thereupon in a position to commence detailed discussion. (As to the Japanese indication of desire to negotiate also with respect to tariff concessions, consular rights, shipwrecks and double taxation, the Japanese correctly appreciate that these matters are properly treated separately from our FCN Treaty).

The Department is mindful that the Japanese draft proposals forwarded under cover of the despatch in reference, and which constitute the object of the comments in the present instruction, are tentative and that the Japanese expect to give further study and consideration to perfecting their ideas of the kind of treaty they would like to negotiate. The Department hopes that with the information contained in the present instruction and its enclosures, the Japanese will be able within the reasonably near future to

prepare, or assent to, a definitive negotiating draft which will be satisfactory to both Governments as the starting point of detailed discussions. It is understood that the acceptance, as basis for discussion, of the Department's standard draft, or of the Japanese draft amended in the manner suggested in the Annex to the present instruction, will not prejudice the position of the Japanese or of the United States as to the final text of the treaty, nor will it prejudice the right of either to seek such modifications and amendments as it may wish during the course of negotiation.

There are enclosed, in addition to six copies of the Department's standard draft, three copies each of treaties of friendship, commerce and navigation most recently signed by the United States, namely: Greece (August 3, 1951), Israel (August 23, 1951) and Denmark (October 1, 1951), plus the Supplementary Agreement with Italy (September 27, 1951). These treaties, like those with Colombia, Ireland, Uruguay and Italy previously signed and supplied to the Mission and interested Japanese officials, were all developed from the Department's standard proposals of the day. While reflecting many variations and adaptations to the views and special circumstances of the different countries, they all embody the same common denominator of treaty principle and coverage. Copies of all of this material should be furnished to the appropriate Japanese officials, along with comments on their draft along the lines set forth in the Annex to the present instruction.

The Department will await with interest the Mission's report on the reactions of the Japanese Government to the views set forth herein. If the Japanese Government is prepared to accept as a basic negotiating draft the Department's standard draft, or, alternatively, its own draft with revisions corresponding generally to those suggested by the Department, the Department is prepared, as stated in the Department's telegram No. 621 of October 17, to undertake negotiations at an early date with a view to agreement on a final document. The Department is further prepared to give full

consideration

consideration to the preference of the Japanese Government for either Tokyo or Washington as the site of negotiations.

The Department's comments on the views of the American Chamber of Commerce on a treaty of friendship, commerce and navigation between the United States and Japan (the Mission's despatch No. 440 of September 19) will be submitted shortly.

Enclosures:

1. Six copies of FCN Treaty (in blank).
2. Three copies of FCN Treaty with Greece.
3. Three copies of FCN Treaty with Israel.
4. Three copies of FCN Treaty with Denmark.
5. Three copies of Supplementary Agreement with Italy.

[Comment: File stamp appears on lower right of page]

EET:CP:HWalker:jn
October 22, 1951

L/E	L/T	SD	BPT	Cleared in draft; OFD - Mr. Young 10/15/51 Commerce - Miss Espenshade 10/1 NA - Mrs. Kallis 10/19/51

RESTRICTED

[Comment: Various initials appear on lower part of page along with file stamp dated Oct 26 1951 and Nov 1 1951 at bottom of page].

ANNEX

Amendments to the draft treaty of friendship, commerce and navigation which was forwarded under cover of Mission despatch 246 of August 16.

In the main, the Japanese draft is in general outline sufficiently close to United States ideas to be an adequate basis for commencing the process of arriving at a mutually agreed final text. In some respects, however, the Japanese draft would need to be amended, if it is so to be used. Such amendments fall into three classes, as described below.

The first type of amendment is of a stylistic order, and is merely desirable rather than essential. It is proposed to substitute the term "companies" for "corporations and associations" wherever used; the simple terms "national treatment" and "most-favored-nation treatment", respectively, with definitions thereof in the definitions Article, for the more lenghy [sic] references to these concepts throughout the treaty; and the term "products" for the expression "articles the growth, produce or manufacture". These devices, used in all United States treaties signed subsequent to that with Italy, save a considerable amount of wordage and contribute to concise sentence structure.

The second group of amendments would be the addition, at appropriate points, of several provisions found in most of the recent United States treaties which are missing from the Japanese draft. These include, notably, the following, the texts of which may be found in the enclosed standard draft at the points indicated in parentheses: provision on commercial arbitration (Article V, paragraph 2); rule concerning the treatment of private enterprises which are under competition from state enterprises (Article XVIII, paragraph 2); paragraph on the employment of technical personnel (Article VIII, paragraph 1); paragraph regarding the national treatment of corporations in the United States, in consequence of the nature of the federal system (Article XXII, paragraph 4); provision regarding the impairment of vested rights and interests (Article VI, paragraph 4); and reservations with respect to fissionable materials, United States territorial preferences, and the GATT (Article XXI, paragraphs 1 (d), 2 and 3). Should there be special problems with respect to the GATT in the case of Japan, they can be dealt with during negotiation. Paragraph 4 of Article XXI of the United States draft is also necessary. (It may further be noted that the Department has under consideration the adding of new material to its industrial property

article, designed to encourage technological interchanges. Should such a proposal be formulated, it will be presented later.)

The third group of amendments consists of several Articles from the Department's standard draft to be substituted in texto for certain Articles of the Japanese draft which diverge so widely from what the Department considers appropriate formulations as to be unsuitable bases for discussion. The substitutions accordingly proposed below are, of course, without prejudice to changes in other provisions in the Japanese version which the Department will wish to introduce during the course of the discussions. Further Japanese study of current United States treaty policy may, indeed, lead the Japanese on their own motion to introduce appropriate secondary revisions in some of their

[End of page]

[Comment: Handwritten on right of page are illegible letters plus "611.944/6-1651"].

proposals in advance of the opening of detailed discussions

Article I of the Japanese draft should be replaced by Article II, paragraphs 1 and 3, of the Department's standard draft. It is not possible for the Department to use a treaty of this kind as a vehicle for a wholesale setting aside of United States immigration policy. National treatment is, of course, out of the question; and, since immigrant quotas vary widely from country to country, it is not possible to assure even most-favored-nation treatment to any country as a general proposition. It is, however, possible to stipulate most-favored-nation treatment for one special category of entrants, namely, those entering for the purpose of engaging in international trade (i.e., "treaty traders") and who are covered in sub-paragraph (a) of the Department's draft. (The formulation on this subject in the treaty with Ireland, for example, is in most-favored-nation terms). Also, the Department would wish to substitute paragraph 2(d) and (e), of the same Article of its draft, for Article IV, paragraph 3, of the Japanese draft, because the national treatment proviso of the latter gravely weakens a sound rule on freedom of communication and of reporting.

The Mission is undoubtedly aware that there has been pending in Congress a proposal, patterned after Acts already passed in behalf of the Chinese, Filipinos and others, to remove the existing racial bar to the immigration and naturalization of Japanese. The enactment of this proposal, which is now being considered in connection with a comprehensive revision and recodification of the immigration code, would remove not only the feature of United States immigration policy which the Japanese have found peculiarly objectionable but also the particular disabilities in the land laws of Western states which are in terms of aliens ineligible to citizenship.

Article V should be replaced by Article IX of the Department's standard draft. Interference by treaty with State prerogatives in the control of land policies has historically been a subject of great delicacy. On at least two occasions in the past the Senate has rejected treaties with Western European powers that provided national treatment as to land ownership; and it will be noted that none of the recent treaties signed by the United States (China, Italy, Uruguay, Ireland, Colombia, Greece, Israel, Ethiopia and Denmark) attempts to prescribe State policies with respect to ownership of real property.

On the other hand, it has been acceptable to provide national treatment with respect to the leasing of real property necessary to the conduct of treaty activities, notwithstanding some State laws circumscribing alien leaseholds. The right to lease is a valuable treaty right in the United States, as was demonstrated in the case of the 1911 treaty of commerce and navigation with Japan. The Department, in proposing the formulation in the United States standard draft, is offering to assure leasehold rights.

With respect to ownership rights, the Department is proposing to deal in a special way: namely, through the "de facto reciprocity" formula first broached in the treaty of 1937 with Siam. This formula, devised in an effort to approach the national treatment ideal as nearly as practicable, provides in effect for reciprocal national treatment on ownership to the extent that the State laws

permit

[End of page]

permit; but it envisages that Japan would be free to withhold this standard of treatment from citizens and corporations

of States that do not accord national treatment to Japanese nationals and corporations. A like formula in the 1946 Treaty with China is said to have influenced the disabilities of their real property laws; and the adoption of the formula in treaties with Japan and other countries would undoubtedly be of pertinence to the reconsideration, now variously evident in the United States, of alien land disabilities still persisting in certain State laws. Expressly anti-Oriental laws have been declared unconstitutional in Arkansas, Oregon and in the lower courts of California; and are understood to have been liberalized by legislative action in Utah and Nevada. In half the States, aliens at present enjoy the same rights as citizens with respect to landholding; and in only a comparatively few States are the disabilities against the generality of aliens of serious proportions insofar as commercial property is concerned.

As to Articles III and VI, attention is invited to Articles VII and VIII of the Department's standard draft, as an improved and definitely preferable approach to the framing of sound rules on the business activities of persons and corporations. It will be noted that the second paragraph of the latter deals with a subject apparently missing from the Japanese draft, but which the Department did not include in the list, given above, of provisions which it proposes be added to the Japanese draft. For other illustrations of treaty drafting deemed to be an improvement over the China and Italy treaties, see Articles VII and VIII of the Colombia Treaty and Articles XII and XIII of the Greek Treaty. The later formulation of the standard draft (upon which the Israel Treaty is incidentally, based), it may be emphasized, is considered to be superior to these.

Article IX. It is requested that the Japanese withdraw this Article altogether. It is no longer the policy of the United States to enter into treaty undertakings to grant exemptions from military service; and treaties most recently negotiated (Uruguay, Colombia, Greece, Israel, Ethiopia and Denmark) therefore contain no military service provisions. The necessity of maintaining this policy in future negotiations is underscored by action Congress took this summer in amending the Selective Service Act so as to make aliens entered for permanent residence henceforth subject to the draft.

Articles XI through XVII. Since the negotiation of the treaty with Italy, the Department has concluded that

all essential provisions on navigation can be compressed into the confines of a single Article. (See Article XIX of the Department's standard). The abbreviated formulation now favored by the Department has, aside from the virtue of compactness, the advantage of closing loopholes that might be present in the longer formulation of the Italy Treaty, through application of the inclusio unius exclusio alterius maxim. Substitution of the Department's standard navigation article is therefore requested. It may be noted that material of the sort treated in Article XIV of the Japanese draft is not included in the Department's draft. The formulation of an acceptable treaty rule on this would require some exploration. (Note: the only provision in this connection to which the Department has thus far agreed in any recent commercial treaty negotiation is Article XXII, paragraph [Comment: handwritten paragraph "3" written in], of the Treaty with Greece).

Article

[End of page]

- 4 -

Article XXII. Since the negotiation of the treaty with Italy in 1948, on which the Japanese proposal is presumably based, the Department has restudied the whole question of exchange controls, with a view to the formulation of improved rules, especially as the interests of investors are affected. This reformulation, as reflected in Article XII of the Department's standard draft, should be substituted for the Japanese proposal. It may be noted that the major deficiencies of the exchange control article of the 1948 Italian Treaty have now been corrected in a Supplementary Agreement with Italy, signed September 27 of this year (see Article III and IV of same).

Article XXIV. This Article creates difficulties. An agreement in which tariff concessions are made (e.g., a trade agreement) is a more suitable vehicle for this sort of thing than is a treaty of the present sort. The establishment of a general valuation policy, moreover, is more properly the function of a multilateral than a bilateral negotiation. Finally, Congress has indicated opposition to the abandonment of the so-called "American selling price" feature of the United States Customs Law. (Note. The valuation rules set forth in the GATT are only provisional, and are applicable only to the extent that the legislation of each contracting party permits).

Article XXVII. The Department proposes that this Article be deleted, and that in lieu thereof there be inserted in the Protocol a provision tentatively worded as follows:

> "With reference to (Article XXXI, paragraph 1 (7)), it is understood that either High Contracting Party may prohibit the importation into its territory or seize, in accordance with the law of such High Contracting Party, any goods of the other High Contracting Party which bear, through labelling, marking, or otherwise, a false indication of geographic or commercial origin or which produce a false impression of their true origin. Each High Contracting Party agrees to take appropriate steps to prevent unfair practices involving false indications, of whatever nature, that goods produced or sold in or exported from the territory of such High Contracting Party originate within the territory of the other High Contracting Party or any distinctive place within such territory or are the product of a national of such other High Contracting Party."

The reason for suggesting a Protocol position is that clause (a) of the Japanese Article XXVII (the first sentence of Department's redraft) is already covered in the general language of paragraph 1(7) of Article XXXI of the Japanese draft, and is a specific illustration of the deceptive and unfair practices alluded to therein. The technique suggested obviates possible duplication in the text of the treaty. Another reason for handling the matter in the manner proposed is that the assertion of the right in question, although quite desirable for purposes of emphasis, is strictly speaking superfluous, inasmuch as each Party has this right whether or not the treaty so states.

The second sentence of the Department's counterdraft is a restatement of clause (b), and following, of the Japanese proposal, in what is deemed to be clearer and more meaningful language. It

furthermore

[End of page]

furthermore orients the provision away from the subject of alleged abusive use of what is often known as "distinctive regional and geographical appellations of origin" - e.g.,

the label "Port" or "Champagne" on vinous beverages not produced in the official Port and Champagne regions of Portugal and France. It is not known that Japan has any name-products of this sort of which she is jealous; and the United States would not wish to undertake to make its own regulations more severe than at present, inasmuch as present regulations do in fact prevent the use of such names in a manner calculated actually to deceive the customer as to the true nature and origin of the product, and the United States has been unable to agree with the very restrictive views on the matter nurtured by some foreign governments.

Article XXX. While this Article is not necessarily objectionable, the Department does not perceive any particular need for its inclusion.

Article XXXII. The Department proposes that this Article should be replaced by Article XXIV of its standard draft which, it will be noted, contains a paragraph on consultation as well as one on the ultimate submission of unresolved disputes to the International Court at the Hague. The development of the standard submission clause, which has been included with Senate approval and without significant alteration in each of the nine treaties of the present [Comment: illegible word] signed by the United States since World War II, is regarded by the Department as an outstanding achievement of its current treaty program; and its inclusion is the clearest kind of indication that the treaty establishes a rule of law.

The Japanese proposal on this score appears to be ambiguous and inconclusive. The objective of a submission, or "compromissory", clause is to provide definitely for the settlement of a dispute. This the Department's formulation does, in the most straightforward manner, by simply saying that any dispute not otherwise settled may be taken to the Court. This ultimate step would presumably be resorted to, in actual practice, only very rarely. The Department's formulation is framed with a view to achieving harmonization of differences of opinions about the treaty before differences emerge into real disputes; is designed to give the greatest encouragement [Comment: word cut from page on left] resolving differences by ordinary diplomatic procedures; and allows every leeway to the two countries to refer any particular dispute to arbitration, or other forum, as they might mutually desire.

[Comment: Note that several words in last paragraph are cut from left portion of page].

[Comment: Illegible initials on lower left of page along with name "HWalker:jn" plus illegible date. These have been initialled by hand "HW"]

[End of page]

AIR PRIORITY PRIORITY	RESTRICTED Security Information (Security Classification)	DO NOT TYPE IN THIS SPACE 611.944/12-1751

[Comment: Illegible initials appear in upper right of page]

FOREIGN SERVICE DESPATCH

FROM : USPOLAD, Tokyo 915 Desp. No.

TO : THE DEPARTMENT OF STATE, WASHINGTON

December 17, 1951
DATE

REF : Misdes 871, December 7, 1951

4 For Dept. Use Only bs	ACTION FE REC'D DEC 22	I N F O	DEPT. REP DCR OLI E L OTHER COMM TAR TR

SUBJECT : FCN Treaty with Japan

Further exploratory talks have been held with officials of the Ministry of Foreign Affairs in connection with the Department's standard draft for an FCN Treaty. In addition to the points raised regarding the preamble and first five articles of the standard draft - as reported in the despatch under reference - the Ministry's representatives have made the following informal proposals and requests for further clarification by the Department:

Article VI:

1 The Japanese propose that the phrase, "shall not be subject to molestation or to entry without just cause", be amended to read "shall not be subject to unlawful entry or molestation". They declare that the latter phraseology is not only clearer when translated into Japanese, but also that it follows more closely the wording employed in the treaties with Ireland, Israel, Greece, and Denmark.

2. The phrase "full equivalent of the property taken", is still under consideration by the Japanese who state that local laws permit compensation in kind in certain cases. It is not believed, however, that they will press their suggestion for a modification in this wording.

3. The Japanese believe that Paragraph 4 of this Article should - because of its subject - be an entirely separate article, employing exactly the same phraseology. They point to the treaty with Greece as an example of this separate treatment.

4. The Japanese further propose that the extension of national and MFN treatment in Paragraph 5, Article VI, should not be limited to Paragraphs 2 and 3, as specified in the standard draft, but should also extend to Paragraph 1. Their suggested change reads "with respect to the matters set forth in Paragraphs 1, 2, and 3 of the present Article".

Article VII:

[Comment: Illegible initials lower left of page]

REPORTER

RESTRICTED
Security Information

INFORMATION COPY

[End of page]

RESTRICTED
Security Information

(Classification) 2 Tokyo 915

1. In view of restrictions already in effect regarding the business activities of foreigners in Japan, the Ministry's representatives declared that Article VII in its present form was far too general and would be subject to various interpretations when translated into Japanese. They raised a number of questions regarding this article and concluded that they preferred the more precise form employed in the treaties with other countries. They proposed, therefore, that Articles VII and VIII of the treaty with Colombia be substituted for Article VII of the standard draft.

2. The Japanese further pointed out that Japan presently restricts the purchase of stocks in local currency by foreigners, and propose that a reservation on this point be incorporated in a protocol to the treaty.

3. In connection with Paragraph 2, Article VII, of the standard draft, the Japanese questioned whether certain rights acquired by foreigners under the Occupation would be exempt from the application of new limitations imposed on aliens. This is another expression of the Japanese hope that none of the "unusual conditions of Occupation" will be further supported under the provisions of the treaty.

4. If their proposal regarding the use of Articles VII and VIII of the treaty with Colombia is not acceptable, the Japanese will request consideration of a new draft Article VII clearly enumerating the various types of business activities contemplated under this article.

Article VIII:

1. The Japanese stated that they prefer the wording employed in the treaty with Greece, and propose that Paragraph 1 of this article be so amended. They propose, therefore, the additional phrase "on a temporary basis" after the clause "shall be permitted to engage". They further propose another addition towards the end of the paragraph so that this might read, "such nationals and companies, for the exclusive account of their employers in connection with the planning..." The Department's comments on these points would be appreciated, since an explanation of why this wording may have been necessary only in connection with Greece might satisfy the Japanese representatives.

2. The Japanese further propose that Paragraph 2 be amplified to enumerate the professions reserved to nationals (pilots, notaries public, et cetera) [Comment: "et cetera" is underlined by hand], as was done in the treaties with Greece and Denmark.

3. Also in connection with Paragraph 2, the Ministry's represtatives [sic] questioned whether Japanese in the United States were not in fact barred from certain professions by various State laws "merely by reason of their alienage". Further information was requested regarding

the practice of law, medicine, and engineering in the various States. The Department's comments on this point - regarded as of great importance by the Japanese - would be most helpful.

4. The question was also raised as to whether Paragraph 3 of this article should not be included in Article VII, because of its similar subject matter.

Article IX:

1. The Ministry officials urged that the standard draft article - the only one which specifically establishes one set of standards for Japanese and another for Americans - be revised. They strongly requested the deletion of Paragraphs 1 and 2, and the adoption of a "uniform formula applicable to both parties" as in the treaty with Denmark. They pointed out that Article IX in its present form would raise serious problems in the Diet regarding Japanese ownership of real property in various States - a subject on which Japanese officials are particularly sensitive. The Ministry's representatives declared that they plan to discuss this point with the Prime Minister, but will await the Department's reply on the acceptability of the wording employed in the treaty with Denmark.

2. The Japanese requested information as to the "enterprises carrying on particular types of activity" (Paragraph 4) in which alien interests are restricted. They expressed particular interest regarding the types of enterprises of this kind which might exist in the United States.

Article X:

The Japanese representatives stated that they understood that the question of copyright protection need not be covered in a treaty of this kind, since other appropriate international agreements refer specifically to copyrights. They added, however, that industrial property rights are similarly treated under the "Convention d'Union pour la Protection de la Propriete Industrielle", recently ratified by both the United States and Japan. They question the need, therefore, for dealing with industrial property

rights - and not with copyrights - in the present treaty and request full clarification of this point in order that an adequate explanation may be made to other Ministries and the Diet.

Article XI:

1. With respect to clauses (a) and (b) of Paragraph 5, Article XI, the Japanese expressed a preference for the terminology employed in the treaty with Colombia. They propose, therefore, that "specific tax advantages" in the standard draft be amended to read "specific advantages as to taxes, fees and charges", and that the following clause (b) read "accord special advantages" instead

RESTRICTED
Security Information

[END OF PAGE]

RESTRICTED
Security Information
(Classification) 4 Tokyo 915

of the standard draft's "accord special tax advantages".

2. In clause (c) of Paragraph 5, the standard draft mentions special provisions with respect to "non-residents", while the treaty with Ireland (Article IX) uses the terminology "non-resident nationals". The Japanese indicated they prefer the latter phraseology, but that they will study this point further if any clarification of the standard draft wording can be furnished.

Article XII:

The Ministry's representatives appeared to agree with Mission officers that this article on exchange controls will permit the continuation of measures to safeguard Japan's balance of payments position. The Japanese pointed out, however, that it will be necessary at times to limit import allocations in one currency in order to promote imports from a specific area (an example is the present emphasis on imports from the Sterling Area because of Japan's

excessive holdings of sterling). If such freedom of action is not contemplated under Article XII - or if it might be restricted under Paragraphs 3 (b) and 5 of Article XIV - the Japanese may request the addition of another clause similar to that on inconvertible currencies covered in Paragraph 5 of the Protocol to the treaty with Uruguay. The Department's earliest comments on the question raised by the Japanese - and on their proposal for an additional clause similar to that in the Protocol with Uruguay, or in Paragraph 6 of the Protocol to the treaty with Israel - would be appreciated.

Article XIII:

No questions were raised on this article by the Ministry's representatives.

Article XIV:

1. The Japanese point out that the last sentence in Paragraph 1, beginning "A like rule...", is not contained in any other United States treaty. Although they indicated they had no objection to this clause, they requested its further clarification. According to the Japanese interpretation, MFN treatment with regard to the international transfer of payments for imports and exports refers to the actual transfer formalities, and does not limit Japan's right to discriminate against any currency or country in the implementation of its quarterly foreign exchange budgets. The same reservation is made in connection with Paragraphs 2 and 3 b regarding restrictions on imports under the quarterly budget system.

2. With respect to Paragraph 3, the Japanese point out that sub-paragraph (a) is not included in the treaties with Colombia and other countries. Japan presently publicizes its quarterly foreign exchange budgets and issues specific import allocation notices.

RESTRICTED
Security Information

[End of page]

RESTRICTED
Security Information
(Classification) 5 Tokyo 915

Government officials believe, however, that the latter probably result in price increases on the part of foreign

suppliers, and it is possible that the import notice system may be modified. Although the Japanese are not opposed in principle to this sub-paragraph, they do not feel that it is a matter properly included in a bilateral treaty. Since this is a general subject of interest to all countries, multilateral treatment is preferred. The Department's comments on the need for the inclusion of sub-paragraph (a) with respect to Japan alone have been requested by the Ministry's representatives.

3. The Japanese wish to impose restrictions on imports of prison-made goods, and on exports of national treasures and certain natural resources subject to conservation controls. They inquired whether such restrictions were properly covered by Paragraph 4 ("prohibitions or restrictions on sanitary or other customary grounds of a non-commercial nature"). The Mission's explanation that this clause gave Japan the right to impose restrictions along the lines indicated above was accepted by the Ministry's representatives.

4. The rather broad terminology employed in Paragraph 5 regarding national and MFN treatment "with respect to all matters relating to importation and exportation" has also been questioned in connection with foreign exchange budget allocations. The Japanese want to make certain that their present frankly discriminatory import allocation policies are permissible under the various articles of the treaty.

Article XV:

No reservations on the part of the Japanese representatives.

Article XVI:

No reservations.

Article XVII:

A number of questions were raised by the Japanese in connection with state trading in view of the existence of the Government Monopoly system (e.g., on tobacco and salt) in Japan. All points were explained satisfactorily, but the Japanese again requested assurances that their Monopoly trading could be carried out under foreign exchange budget policies without contravening this or other articles in the standard draft. They pointed out that Government Monopoly purchases could be made from certain sources, despite higher costs as compared with other suppliers, in order to

utilize inconvertible currencies. At the present time, Sterling Area prices on some commodities are 30 per cent higher than dollar area prices. Clarification is requested as to whether a Government Monopoly could procure Sterling Area goods regardless of the price factor - thus

RESTRICTED
Security Information

[End of page]

RESTRICTED
Security Information
(Classification) 6 Tokyo 915

reducing Japan's mounting sterling credits - within the framework of Article XVII.

Although progress has been somewhat slow in the past four informal conferences - the Japanese attaching great importance to the various points outlined above - it is believed that the exploratory talks may be concluded by December 18. The Ministry's representatives have indicated that they will begin discussions about December 18 with other Ministries to ascertain their views on what may be points of negotiation in the contemplated formal negotiations. They have informed the Mission that, in order to prevent leakages to the press which they regard as likely, they will use the published text of the treaty with Colombia in their discussions with other Ministries. They have requested, however, that the various proposals and questions now reported, receive prompt consideration as they may be called upon for detailed explanations by other Government agencies. The Ministry's representatives stated that they believe that the Japanese Government would be ready to proceed with formal negotiations by about January 15, 1952.

The Department's earliest reply on the various questions and proposals set forth above would be appreciated.

For the Political Adviser:

[Comment: Document is signed]
Peyton Kerr
First Secretary of Mission

RESTRICTED
Security Information

[End of page]

[Comment: Imprinted on top of page:

OUTGOING AIRGRAM
DEPARTMENT OF STATE DIVISION OF COMMUNICATIONS AND RECORDS TELEGRAPH BRANCH

Crossed out initials "WH L/E" appear on upper right plus "L/T" plus doodles]

83 RESTRICTED SECURITY INFORMATION
ORIGIN
E
INFO USPOLAD,
L
FE TOKYO
DCL
OLI A-453 Jan 7,1952
CIA
DCR Subject: FCN Treaty with Japan. Mission's despatch 915.
COMM DMC 17.
TR

This is the fourth in the series of replies to ref. despatch.

Article VII.

1. The first paragraph of this Article can be considered the heart of the treaty; it is the basic "establishment" provision, prescribing the fundamental principle governing the doing of business and the making of investments, in a treaty which is above all a treaty of establishment. A satisfactory formulation of it, and its corollary provisions in the remainder of the Article, is therefore of particular importance and to be approached with especial care.

The new standard formulation of Article VII (and its companion, VIII) as proposed to Japan has already appeared in the treaty with Israel, but was developed too recently for use in the negotiations leading to the other treaties hitherto signed. Its inclusion in a treaty with Japan would not, therefore, be unprecedented, as the Japanese appear to suppose. The formulation proposed to Japan is considered to be more precise than that formerly in use (as appearing in the Colombia treaty, for example); and it is not believed

that the substitution of the Colombia treaty wording would meet the avowed Japanese desire for greater precision. Rather, the contrary is probably the case.

While the formulation as found in the Colombia treaty is a respectable, worthy and much used one, it has been open to certain criticisms. The use of the recitative technique ("commercial, manufacturing ... etc.") for describing the types of activities

covered by

RESTRICTED SECURITY INFORMATION

[End of page]

RESTRICTED SECURITY INFORMATION

covered by the national treatment rule needlessly leaves play for interpretation as to exactly what businesses are and what are not covered, especially the borderline cases; and the residual rule applicable to types of activities not covered by national treatment is not as adequate as might be, among the latter being activities in which Americans have heavy investment interests abroad (mining, petroleum, public utilities and tropical agriculture). This formulation has also led sometimes to translation difficulties, as well as to the need for devising various explanatory materials in the Protocol and interpretative minutes. The Department has endeavored to remove or reduce such criticisms by the device employed, in the new standard formulation, of first stipulating the principle of swooping coverage for all business activities, of every type and in whatever juridical form (paragraph 1), and, second, of then drafting an exception precisely defining what is not so covered and of stipulating the rule applicable thereto (paragraph 2). Although the Department considers the new standard formulation definitely preferable in general, it will keep open mind about the possible substitution therefor of the Colombia formulation in the Japanese case, if after

further discussion and study of Japanese views and circumstances it should transpire that this would be expedient.

2. As to restrictions applicable to alien purchase of Japanese securities, reference may be made to paragraph 4 of Article D for Department's standard provision in this connection. This reservation is of limited scope, in conformity with the purposes and scheme of the Department's treaty proposals. If it is not adequate for the Japanese, it will be necessary to have exact information as to wherein and why it is inadequate, as a prelude to exploring what if any adjustment may be satisfactory and proper. The Department approaches with caution any proposal to weaken the principles it advocated with respect to equality of opportunity in investment and business.

3. The FCN treaty is not designed to continue the occupation or any features thereof. Except that the conclusion of the treaty presupposes full Japanese sovereign status, the treaty in and of itself

itself is in principle entirely neutral as to occupation matters. However, the bearing of paragraph 2 of Article VII on the continuance of private rights that may have become established under and during the occupation may be a different question, concerning which the Department would not care to venture an opinion in vacuo. It is therefore requested that the Japanese explain just what situations and problems they visualize in this connection.

4. As mentioned under point 1 above, the Department, while not yet ready to concur in substituting the Colombia treaty wording, does not foreclose the possibility of accepting the Japanese suggestion to

this effect after further exploration of the exact Japanese objections to the present standard wording. It would probably help in the analysis of the problem to have from the Japanese more concrete information as to what they mean by a "new draft clearly enumerating the various types of business activities contemplated."

Article VIII.

1. The Japanese suggestions evidently relate to the second sentence of paragraph 1, and not to the first sentence. The two additional phrases mentioned, as incorporated in the Greek treaty, were not there regarded as changing in any significant way the intent of the provision. They rendered explicit what was already pretty much implicit in the original wording. In the Department's opinion they are rather unnecessary, as they merely add superfluous wordage to an already wordy sentence; but the Department would undoubtedly be willing to accept them if the Japanese feel they would be necessary and appropriate.

2. Before discussing a possible enumeration of particular professions to be excepted from the rule of paragraph 2, the Department would wish to have a complete list of those which the Japanese would want to be so enumerated; and a serious consideration of whether, in light of the remarks under "3" below, the Japanese

indeed

indeed wish to press for any exceptions. While it may be possible, if necessary, to consider excepting a limited number of professions that enjoy an especially sensitive status, the Department might be inclined rather to favor dropping paragraph 2 altogether than

to have it seriously undermined by an immoderate list of reserved professions.

3. There are indeed numerous state laws barring aliens from the practice of various professions. All states (including the District of Columbia) require that attorneys-at-law be citizens. As to physicians, thirteen impose citizenship requirements and an additional twelve do not license aliens to practice unless they have filed declaration of intention to become citizens, making a total of 25 having alienage disabilities. As to engineers, seven impose citizenship requirements, and an additional seven exclude non-declarant aliens, for a total of 14. (The foregoing is derived from a compilation made in 1946. If past experience is a reliable guide, more up-to-date information could be expected to show a greater, rather than a less, amount of restrictions against aliens). There are, of course, numerous other professions and occupations (ranging from accountant to wrestling promoter) which are reserved in the laws of one, several, or many states. The pattern is very variable and uneven.

The existence of such statutory disabilities, of course, underscores the advantage to the Japanese of including paragraph 2 in the treaty. The treaty, being the supreme law of the land and enforceable as such before the court, is paramount over all state legislation. To the extent that the treaty contained a national treatment provision on the professions, any contrary provisions of state law would be ipso facto overriden, insofar as Japanese nationals were concerned.

4. The question of where the provisions of paragraph 3 may most logically be carried is essentially a question of force; and the Department does not visualize any difficulty in reaching perfect agreement thereon with the Japanese.

[Comment: Illegible initials appear on lower left along with date "1/3/52". Illegible word appears on lower right of page plus unreadable initials at bottom].

RESTRICTED SECURITY INFORMATION

[End of page]

RESTRICTED
(Classification)

Encl. No. 4
Page #1 of 5
Desp No. 13 - Tokyo

Office of the United States Political Adviser for Japan,
Tokyo.

[Comment:
"FCN 2 Japan"]

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Mikizo NAGAI, Chief, Sixth Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan.

Date: Tuesday, April 8, 1952.

FOURTEENTH INFORMAL MEETING

ARTICLE XX

Mr. Otabe stated that in order to avoid any possible differences in interpretation it should be clearly understood

that the meaning of the word "transit", as used in Article XX, was the same as that used in Article V, paragraph 1 of the GATT, which states:

> "Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this Article 'traffic in transit'."

Mr. Otabe added that it should also be understood that "transit through the territories of each Party", mentioned in Article XX, includes passengers, baggage, and products carried by aircraft.

Mr. Singer replied that the GATT definition of "transit" was acceptable in interpreting Article XX, and that Mr. Otabe's understanding with reference to

[End of page]

the inclusion of aircraft traffic was correct.

Mr. Otabe stated that under present regulations, export validations are required in Japan for the temporary unloading and trans-shipment of cargoes when these involve specific commodities subject to export licensing under Japan's security export control procedures. He asked for confirmation of his understanding that the implementation of security export controls would not be regarded as constituting "unnecessary delays and restrictions", as mentioned in Article XX.

Mr. Adams replied that Mr. Otabe was correct in his understanding, and that security measures, including export validations and licenses, were permissible under paragraph 1(d), Article XXI.

ARTICLE XXI

Mr. Otabe referred to previous discussions on Article VIII (at the fifth meeting, March 7, 1952) when the Japanese

side had proposed that the second sentence of paragraph 3 (i.e. "Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities.") be deleted from that Article in as much as this clause was of general application. Mr. Otabe stated that this provision might more appropriately fit in Article XXI, and he now proposed that it be inserted in the latter Article.

Mr. Adams replied that when this clause was included in the provision on general exceptions in other United States FCN Treaties (for example in the Treaties with Colombia, Israel, Uruguay and others), the phraseology employed was: "The present Treaty does not accord any rights to engage in political activities". Subject to the views of the Department of State, which might prefer to use the terminology just mentioned, Mr. Adams suggested that this Article be amended as proposed by Mr. Otabe (i.e., that the second sentence, paragraph 3, Article VIII be inserted in Article XXI as paragraph 3-bis, for subsequent re-numbering in the final draft).

Mr. Otabe stated that the Japanese side earnestly desired that the second sentence of paragraph 3, Article XXI, reading, "Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement" (i.e., GATT), be deleted from this Article. Mr. Otabe pointed out that since Japan is not a member of the GATT, such concessions as are granted by the United States under a multilateral Agreement not yet open to Japan, would be outside the scope of the Application of most-favored-nation treatment. The purpose of the present treaty prescribing unconditional most-favored-nation treatment would therefore actually be defeated in practice. Furthermore, he said, since the United States is in fact granting the GATT concessions to Japan, the deletion of this sentence would have no effect on the actual relations between the two countries. He again pointed out that the present FCN Treaty will become a model for future treaties to be negotiated between Japan and other countries, and that it was feared that the inclusion of this sentence would establish an unfavorable and most unfortunate precedent, particularly in connection with early negotiations anticipated between Japan and countries already in the GATT.

Mr. Singer stated that the Department of State had proposed and secured the standard GATT reservation in previous negotiations on the assumption that the country concerned was actually free to come into the GATT, and that any failure on its part to be in the GATT, being of its own choosing, had no effect on the propriety of this reservation. He pointed out that it was not the desire of the United States to use the GATT reservation in order to impose unequal trade relations, and that the Department of State had indicated that some adjustment might be made in the present case in view of the special circumstances involved. There was as yet no definite idea as to what the appropriate solution might be, but it was believed that it should be in the nature of a clarification or qualification of the third paragraph.

Mr. Adams added that paragraph 3 was essential to the FCN Treaty, but that the American side would be most willing to consider any solution the Japanese would desire to submit. He stated that a bilateral treaty could not, of course, commit the United States to any course of action inconsistent with its obligations under the GATT, and that it appeared therefore that any qualification suggested by the Japanese side should be made with reference to the second sentence of paragraph 3, and not to the first sentence.

Mr. Bassin added that the Department of State wished to reassure the Japanese representatives that their point of view was fully appreciated, and that it was prepared to approach this problem in a sympathetic manner, fully confident that a mutually satisfactory solution can be found.

Mr. Otabe replied that further consideration would be given this matter, and that the Japanese side would be prepared to discuss a proposed clarification or qualification of this paragraph, possibly at the next meeting.

With respect to paragraph 4, Article XXI, Mr. Otabe asked for a definition of "limited purposes". He asked whether a treaty trader or an employee of a Japanese company, permitted to enter the United States in connection with the activities of that company, might subsequently enter the employment of another company, for example of a domestic American firm, without violating the provisions of

this paragraph. He also inquired whether employment in another Japanese firm, for example a subsidiary or affiliate of the company originally employing this individual, would be permissible.

Mr. Adams replied that a treaty trader or an employee of the type mentioned by Mr. Otabe would be permitted entry into the United States as a non-immigrant, subject to specific limitations on his activities. He added that various types of visas of a non-immigrant or temporary character are issued for entry into the United States; these are granted subject to varying conditions, qualifications or restrictions, and are valid for varying periods, ranging from a few months (for tourists) to an indefinite period of stay (for the so-called treaty traders). The latter are issued a visas of indefinite tenure, valid for so long as they continue to promote trade and commerce between the United States and their country. These individuals could change employment while in the United States, provided, of course, the character of their employment remained unchanged and they continued to promote trade and commerce between the United States and their country. This change could be made with the prior knowledge and approval of the appropriate officials of the

Department of Justice (the Immigration and Naturalization Service of the United States).

In reply to further questions put by Mr. Nagai, Mr. Adams stated that it is only the individual who enters the United States as an immigrant for permanent residence who is not subject to specific limitations or restrictions on his business or professional activities. Mr. Adams added that the Japanese employee previously mentioned by Mr. Otabe 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, or even for another legitimate Japanese enterprise also engaged in promoting commerce between Japan

and the United States, without losing his treaty trader status, provided the prior approval of the Department of Justice were obtained.

ARTICLE XXII

Mr. Otabe asked for a clarification as to the difference between corporation and company, and for a definition of partnerships and other associations as used in paragraph 3, Article XXII.

Mr. Bassin replied that a company is a society or association of persons interested in a common object and uniting themselves for the prosecution of some commercial or industrial undertaking or other legitimate business. The word, he added, is a generic and comprehensive term which may include individuals, partnerships and corporations. Furthermore, the term is not necessarily limited to a trading or commercial body, but may include organizations to promote fraternity among its members and to provide mutual aid and protection. He added that the word is sometimes applicable to a single entrepreneur.

Mr. Bassin stated that a corporation, on the other hand, is an artifical person or legal entity, created under the authority of the law of a state or subdivision thereof. It consists of an association of numerous individuals as a group under a special denomination which is regarded in law as having a personality and existance distinct from that of its several members. A corporation is vested with the capacity of continuous succession, either in perpetuity or for a limited term of years, and acts as a unit or single individual in matters related to the common purpose of the association within the scope of the powers and authority conferred upon it by law. The words "company" and "corporation" are commonly used as interchangeable terms. Strictly speaking, however, Mr. Bassin said, a company is an association of persons for business or other purposes and may be incorporated or not.

Mr. Bassin further stated that a partnership is a voluntary contract or association between two or more persons to place the money, effects, labor and/or skill of some or all of them in lawful commerce or business, with the understanding that there shall be a proportionate sharing of the profits and losses among them. An association, Mr. Bassin stated, is the union of a number of persons for some special purpose or business. It is generally an incorporated society, and may consist of a body of persons united and

acting together without a charter but pursuant to the methods and forms used by incorporated bodies for the prosecution of a common enterprise. The word "association" is a generic term and may at different times

comprehend a voluntary association, such as a partnership, which is dissoluble by the persons who formed it, or a corporation dissoluble only by law.

Mr. Otabe stated that these definitions were satisfactory and would be helpful in properly translating this Article into Japanese. He then asked if the various religious groups and foundations in the United States were considered juridical persons, and whether they were included in paragraph 3.

Mr. Bassin replied that organized religious groups and foundations may be juridical persons, but are usually unincorporated associations.

Mr. Otabe inquired whether a Zaidan Hojin was covered by paragraph 3, and, if so, what would be the nature of national treatment accorded such organizations in the United States. He explained that a Zaidan Hojin is a duly organized juridical person with given property, established for the purpose of employing or disposing of said property for a given public purpose. An example of a Zaidan Hojin, he added, would be an endowed private library.

Mr. Bassin replied such an organization would be considered a juridical person in the United States, pursuant to the provisions of paragraph 3, if it were so considered in Japan.

Mr. Nagai then 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.

Mr. Bassin 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.

It was then agreed that the next meeting would be held on Friday, April 11, 1952, with discussions to begin on Article XXIII.

RESTRICTED

OUTGOING AIRGRAM

[LETTERHEAD OF DEPARTMENT OF STATE]

RESTRICTED
Classification

2449

[Comment: Stamp "2449" on right of page]

AMEMBASSY,
TOKYO

A-49, July 23, 1952

[Comment: Handwritten across page are nos. "611.944/6-1952"]

SUBJECT: FCN Treaty. Interpretation of Certain Provisions Embassy Despatch 269, June 19, 1952.

There follow comments on the specific questions raised in reference Despatch:

a. The analysis of this question begins with the second sentence of Article XXII, Paragraph 3, which establishes that whether or not a juridical entity is a "company" of either Party, for treaty purposes, is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded. Under such a simple test, however, nationals of third countries could indirectly but effectively secure valuable treaty rights through taking advantage of liberal corporation laws. Thus to take a hypothetical example, citizens of country X which had refused to make a reciprocity treaty with Japan, and which was even on bad relations with Japan, might, nevertheless, enjoy unilaterally many business advantages in Japan, ordinarily accruing only to friendly treaty nations, by the device of setting up and operating through a Delaware corporation. The purpose of Paragraph 1(e) of Article XXI is to leave each party free to protect itself against such an eventuality, as it might wish, by allowing it to "pierce the corporate veil" of companies chartered under the laws of the other Party, for most treaty purposes.

The rule of Article XXI, Paragraph 1(e) has to do with the treatment one party is obligated to accord to "companies" of the other party, such companies being as defined in Article XXII(3). The rule of the second sentence of Article VI, Paragraph 5, on the other hand, relates to "enterprises" in which such companies (or nationals) have a substantial interest. The word "enterprises" is not a synonym for "companies"; it is a much broader term, having to do with a business undertaking or establishment in the large and popular sense, regardless of juridical

form,

RESTRICTED
Classification

[Comments: File stamp on upper right of page. Also stamp indicating nos. "611.944/6-1952"upper right of page.
Stamp "C SA" on lower right of page, as well as handwritten nos. "611.944/6-1952"
Bottom left of page words imprinted on page, partially deleted.
Bottom center of page file stamp with handwritten no. "40".
Imprinted on bottom of page is sentence: "Corrections made on this original MUST be made on all copies before delivery to Airgram Section, Telegraph Branch."]

[End of page]

[Comment: Second page letterhead]

RESTRICTED
Classification

Tokyo,
A-49, July 23, 1952

form, nationality, etc.

The rule of paragraph 1(e), Article XXI, has bearing on the second sentence of Article VI(5) only to the extent that the word "companies" is used therein. If an American-chartered company had a substantial interest in an enterprise in Japan, the Japanese Government would be obligated to give the treatment specified if such company were in fact American controlled, but not if such a company were controlled by nationals of third countries. The question of who controls the company is quite distinct from the question of who has

what interest in the "enterprise" itself.

Thus, the Japanese supposition that there is conflict between the provisions of VI(5) and [Comment: "XXI(a) crossed out with X's and "XXI(1)(e)" is inserted] is not well grounded.

b. Article IX(1)(a) provides that Japanese nationals and companies shall have rights with respect to acquiring, using, and occupying land, structures, and other realty appropriate to the conduct of any activity in which they are entitled to engage pursuant to Article VII. The last sentence of Article VII(2) clearly provides for establishing and maintaining branches and agencies for the conduct of international transportation activity, which in the Department's intent covers international shipping. In order to make the last point clear, however, the Department authorizes the insertion of the words "shipping or other" before the word "transportation". Insofar, therefore, as tenure rights to wharves, warehouses, and other installations are reasonably necessary to the effective conduct of an international shipping operation, such rights are assured by Article IX(1)(a). Precisely what tenure rights may be reasonably necessary to the effective conduct of such an operation in a particular case, cannot, of course, be determined in vacuo; but the Department does not believe it is necessary to attempt to write more categorical language into the treaty on this point.

It should be further noted that Article XIX(3) provides for non-discrimination as to the access of vessels to ports, and to port and shipping facilities, insofar as such access is afforded to any international shipping on an other than tenure basis.

RESTRICTED
Classification

[Comments: Bottom left of page words imprinted on page, partially deleted.

Imprinted on bottom of page is sentence: "Corrections made on this original MUST be made on all copies before delivery to Airgram Section, Telegraph Branch."]

[End of page]

[Comment: Third page letterhead]

RESTRICTED
Classification

The right to enjoy the use of all appropriate facilities thus appears to be amply covered, without any further modification.

c. In analyzing the question here presented, it is necessary to distinguish between the ship operator, on the one hand, and the ship builder on the other. The ship operator engages in an establishment activity reserved from the treaty (Article VII(2), first sentence). Thus each party, so long as it does not violate some other provision of the treaty, retains full freedom to subsidize its own citizen-owned, national shipping, without being obliged to extend such subsidies to shipping owned by nationals of the other party.

The "citizens" referred to in 46 USC 1151 are ship operators. The construction subsidy is granted upon application of the ship operator, and on his behalf. The law does not specify that the ship builder, who is ultimately awarded the construction contract, be a citizen. The law speaks only of a "shipyard within the continental limits of the United States" (Sec. 1155) without reference to the nationalities of the owners of the shipyard. By contrast, the citizenship of the ship operator is repeatedly mentioned; and the avowed objective of the act (Sec. 1101) is to foster a citizen-owned merchant marine (not citizen-owned shipyard), [sic] As to the precise question of how this law is "interpreted", the Department is unaware that there has been occasion to interpret it on this specific point, or that any problem has ever arisen over it. The Department does not have the function of interpreting such laws; it can only point out that the law, contrary to the Japanese reading of it, does not provide that ship-building subsidies be restricted to American citizens.

The Department understands that the Embassy would like also two other points to be clarified, as follows:

1. As to the right of non-resident recipients of benefits under Article IV to convert yen payments into dollars. This Article provides national treatment. This means that insofar as this Article is concerned, the American non-resident beneficiary has a treaty right to exchange convertibility only to the extent that a Japanese non-resident would enjoy this privilege under Japanese law and regulation.

Further than this, however, it may be noted that the non-resident American would have such rights as are provided in Article XII; that is, no restrictions on convertibility except as may be allowed by the second paragraph of that Article, and, in situations where restrictions are necessary and allowable, he would enjoy such advantages as may be afforded by the phrase "giving consideration to special needs for other transactions" in Paragraph 3 and by the "no arbitrary discrimination" precept of paragraph 4.

Classification

RESTRICTED

[Comments: Bottom left of page words imprinted on page, partially deleted.

Imprinted on bottom of page is sentence: "Corrections made on this original MUST be made on all copies before delivery to Airgram Section, Telegraph Branch." Word "RESTRICTED" is typed over this sentence.]

[End of page]

Comment: Fourth page letterhead]

RESTRICTED
Classification

Tokyo,
A-49, July 23, 1952

2. As to the precise meaning of the terms "trade names" and "trade labels" in Article X -- the Department would have only the following observation to add to the Embassy's previous report of its explanation: These terms are merely by way of illustrating, along with "patents" and "trade-marks", the more common types of industrial property.

The phrase "industrial property of every kind" is all-inclusive. It is thus unnecessary to have, in connection with the treaty, highly refined and precise definitions of the concepts "marks", "names" and "labels". It would indeed be quite permissible for Japanese and American law to differ substantially from each other in this and other industrial property matters. The Article's purpose is to provide national treatment with respect to whatever the laws of the country happen to provide with respect to recognizing and protecting industrial property; and the Japanese may make a free translation of secondary technical terms if transliteration proves to be difficult.

ACHESON

[Comment: Signed by Acheson with initials "(V.G.S.)" on right of page.

Stamp "S/S-CR Jul 23 1952 A.M." initialled on lower left.]

Clear with: OFD SD L/E L/T NA

[Comment: Handwritten initials above each]

EDT:CP:HJWalker:dil
7/11/52

RESTRICTED
Classification

[Comment: Imprinted on bottom of page is sentence: "Corrections made on this original MUST be made on all copies before delivery to Airgram Section, Telegraph Branch."]

[End of page]

Department of State TELEGRAM

UNCLASSIFIED 0314

PAGE 01 TOKYO 03989 280337Z

14-11
ACTION EA-10

INFO OCT-01 ISO-00 H-02 L-02 SCA-01 VOE-00 /016 W
018438

P 280315Z MAR 75
FM AMENEASSY TOKYO
TO SECSTATE WASHDC PRIORITY 8965

UNCLAS TOKYO 3989

E.O. 11652: N/A
TAGS: CGEN, CVIS, JA, L
SUBJECT: CONGRESSIONAL CORRESPONDENCE: MELVIN CRONIN'S JAPANESE VISA APPLICATION

REF: STATE 27746, TOKYO 1664 AND PREVIOUS

PASS TO SENATOR CRANSTON AND CONGRESSMAN BURTON

1. EMB HAS BEEN ADVISED BY MFA THAT AFTER CAREFUL CONSIDERATION ITS LEGAL STAFF IS OF OPINION THAT THE CASE OF CRONIN AND ANOTHER INVOLVING THE EMPLOYEE OF AN INDIVIDUAL AMERICAN PROPRIETOR DOING BUSINESS IN JAPAN DO NOT RPT NOT COME WITHIN THE PROVISION OF THE TREATY, APPARENTLY BECAUSE CRONIN'S EMPLOYER IS A JAPANESE CORPORATION EVEN THOUGH ALL STOCK OWNED BY AN AMERICAN. EMB HAS REQUESTED AN EXPLANATION IN WRITING OF THE REASONING ON WHICH THIS OPINION WAS BASED AND THIS SHOULD BE FORTHCOMING NEXT WEEK. AT THAT TIME EMB WILL SUBMIT THE MFA REASONING AND ITS OWN VIEWS WITH RESPECT TO FURTHER ACTION BY EMB AND DEPT AS JAPANESE VIEW OF TREATY OBLIGATIONS IN THESE CASES IS DIRECTLY OPPOSITE THAT BEING FOLLOWED BY U.S.

2. HOWEVER, IN THE INTERESTS OF OUR MUTUAL GOOD RELATIONS, MFA OFFICIAL STATED THAT IT HAD REQUESTED BUREAU OF IMMIGRATION TO ENDEAVOR TO WORK OUT SOME AD HOC BASIS UPON WHICH THE VISA TO CRONIN AND THE OTHER AMERICAN COULD BE ISSUED. AFTER DELAY OF SEVEAL WEEKS BUREAU OF IMMIGRATION HAS INFORMED MFA THAT IT HAS WORKED

UNCLASSIFIED

Department of State TELEGRAM

UNCLASSIFIED

PAGE 02 TOKYO 03989 280337Z

OUT A QUOTE RATIONALE UNQUOTE AND HAS THEREFORE APPROVED ISSUANCE OF COMMERCIAL VISAS IN THESE TWO CASES. THIS INFO HAS BEEN CONVEYED TO CRONIN'S EMPLOYER WHO IS CONTACTING CRONIN WITH INSTRUCTIONS TO REAPPLY FOR HIS VISA AT THE JAPANESE CONSULATE GENERAL IN SAN FRANCISCO. HOPEFULLY, CRONIN CASE HAS BEEN RESOLVED.
SHOESMITH

Department of State
216a

TELEGRAM

LEGAL ADVISER

UNCLASSIFIED 6071 AUG 15 1975

PAGE 01 TOKYO 11177 1305242 DEPARTMENT OF STATE

21
ACTION L-03

INFO OCT-01 EA-09 ISO-00 SCA-01 SCSE-00 EB-07 COME-00
TRSE-00 VOE-00 /021 W
---------- 047657

R 1305062 AUG 75
FM AMEMBASSY TOKYO
TO SECSTATE WASHDC 2418

UNCLAS TOKYO 11177

FOR L/SCA

E.O. 11652:N/A
TAGS: CGEN, CVIS, JA
SUBJECT: GOJ INTERPRETATION OF FCN TREATY

REF: TOKYO 3989, 28 MAR 75

1. AS INDICATED IN REFTEL GOJ FINALLY AUTHORIZED COMMERCIAL VISAS IN TWO CASES IN QUESTION ON STRICTLY AD HOC BASIS CONTENDING AMERICANS INVOLVED WERE NOT ENTITLED TO TREATY BONEFITS. MFA STATES THAT ITS LEGAL ADVISERS HAVENOT COMPLETED STUDY BUT AREPRESENTLY OF VIEW THAT UNDER THE WORDING OF THE SECOND SETENCE OF PARAGRAPH THREE OF ARTICLE XXII OF THE TREATY A COMPANY INCORPORATED IN JAPAN, OR AN INDIVIDUAL DOING BUSINESS AS SINGLE PROPRIETOR, EVEN THOUGH WHOLLY AMERICAN OWNED, IS NEVERTHELESS A JAPANESE COMPANY AND EXCLUDED FROM TREATY BENEFITS. THE SENTENCE IN QUESTION READS: QUOTE 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. UNQUOTE.

2. EMB HAS ARGUED THAT GOJ INTERPRETATION CONFLICTS WITH THE GENERAL AIM OF THE TREATY WHICH IS TO PROMOTE TRADE AND INVESTMENTS BETWEEN OUR COUNTRIES. EMB HAS FURNISHED COMPLETE INFO TO MFA AS TO VIEW OF U.S. THAT

UNCLASSIFIED

Department of State TELEGRAM

UNCLASSIFIED

PAGE 02 TOKYO 11177 130524Z

NATIONALITY OF A MAJORITY OF THE STOCKHOLDERS CONSTITUTES THE NATIONALITYOF THE COMPANY. IT HAS ALSO POINTED OT THAT NATIONALS OF A THIRD COUNTRY COULD NOT OBTAIN TREATY BENEFIS SIMPLY BY INCORPORATING IN JAPAN.

3. ACTION REQUESTED: IN ORDER THAT EMB MAY PURSUE THIS QUESTION FURTHER IN AN EFFORT TO OBTAIN MORE RECIPROCAL TRATMENT FOR AMERICANS DOING BUSINESS IN JAPAN, WITHOUT RELYING ON AD HOC DECISIONS, WHICH ARE TIME CONSUMING AND DIFFICULT TO OBTAIN, IT WILL BE APPRECIATED IF DEPT WILL FURNISH INFO AS TO WHETHER ANY OTHER COUNTRIES WITH WHOM WE HAVE FCN TREATIES ADHERE TO INTERPRETATION GIVEN BY JAPANESE. VIEWS OF MAJOR TRADING COUNTRIES SUCH AS FRANCE, GERMANY, ITALY, UNITED KINGDOM, NORWAY AND DENMARK WOULD BE MORE PERSUASIVE THAN SMALLER COUNTRIES. ANY OTHER IDEAS DEPT MIGHT HAVE ON THIS SUBJECT WOULD ALSO BE WELCOME. SHOESMITH

UNCLASSIFIED

DEPT. DISTRIBUTION

ORIGIN/ACTION: L-2

RM/R	REP	AF	ARA
EUR	FE	NEA	CU
INR	EA 4	P	IO
L	FBO	AID	EB 4
AGR	COM 10	FRB	INT
LAB	TAR	TR	XMB
AIR	ARMY	NAVY	OSD
USIA	NSA	CIA	

SUGGESTED DISTRIBUTION

POST ROUTING TO:	Action	Info.	Initials
AMB/PO			
DCM			
POL			
ECON			
CONS			
ADM			
AID			
USIS			
FILE			

Action Taken:

Date:

Initials:

DEPARTMENT OF STATE AIRGRAM

P760004-1074

Original to be Filed in _____ Decentralized Files.

(2) FILE DESIGNATION: m

UNCLASSIFIED

HANDLING INDICATOR

A-105

NO.

FCN 2

Japan

TO : AmEmbassy TOKYO

E.O. 11652: N/A
TAGS: CGEN, CVIS, EINV, JA

FROM : Department of State

DATE: 1976 JAN -9 AM 9:45

SUBJECT : GOJ Interpretation of FCN Treaty

REF : Tokyo 11177

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 Japnese 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

6 JAN 1976

UNCLASSIFIED

FORM 10-64 DS-323

For Department Use Only ☐ In ☒ Out

Drafted by:	Drafting Date:	Phone No.:	Contents and Classification Approved by:
L/EB:SRBond:lms	1-7-67	20347	L/EB:PRTrimble

Clearances: L/T:JRoyd EA/J:DFSmith L/EA:PNorton

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 GOJ 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

Enclosures:
Herman Walker Law Review Article on FCNs
Dispatch No. 13 from Tokyo Apr. 8, 1952

[SEAL] DEPARTMENT OF STATE INSTRUCTION

UNCLASSIFIED (Security Classification)	1872	1872
	FOR DC USE ONLY	

NO.: A-852 January 21, 1954

SUBJECT: Treaty of Friendship, Commerce and Navigation.

[Comment: Nos. "611.62a4/1-854" handwritten on page]

TO: HICOG, BONN

Reference HICOG despatch No. 1904, January 8, 1954.

There follow the Department's comments with respect to the points raised by Dr. Paulich at the January 4 meeting regarding the provisions of Article II, paragraph 1.

1. The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. 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 22 CFR 41.70, 41.71 and other applicable regulations.

2. The apparent discrepancy between the treaty and the Immigration and Nationality Act with respect to use of the term "substantial" is of no legal or practical significance either when considered in the treaty trader clause alone or taken together with

the treaty

[Comment: Initialed stamp "S/S-CR Jan 21 1954 P.M." appears lower left of page]

UNCLASSIFIED
(Security Classification)

[Comment: Department stamp appears sideways on right of page. Handwritten nos. "611.62a4 1-854" appears sideways lower right of page.]

DRAFTED BY:		APPROVED BY:	
EDT:CP:CHSullivan:hc	1/19/54	CP: V.G. Setser	
[Comment: Initialed by CHSullivan]		[Comment: Initialed by V.G. Setser]	

CLEARANCES:

L/EUR [Comment: Initialed by hand]
VO [Initialed]
L/E [Initialed]
GEA
[Initialed]

[Comment: Department file stamp appears on left of page]

[End of page]

the treaty investor clause. Use of the term "substantial" in the treaty trader provision of the Act merely gives explicit recognition in the law to an administrative practice of long standing. It was not deemed necessary to reword the treaty as a consequence, for the treaty provision as now worded has long been applied in a manner requiring that the trade for which entry is permitted shall be substantial in character. This does not derive from Article II(1)(c), however, but from Article II(3), taken together with the general right to apply reasonable and nondiscriminatory regulations consistent with the intent and purpose of the treaty provision in order to implement the commitment and to protect the privileges accorded thereby from abuse. In the case of the treaty investor provision, however, the term "substantial" has been carried over from the law to the treaty as an aid to its construction and implementation. This was done simply because the investor clause, unlike the trader clause, is new and an established body of interpretation has not yet developed.

It may be noted in connection with hypothetical cases involving substantiality of trade that this requirement is applied in a liberal manner. In determining the substantiality of the trade within the meaning of the treaty trader clause, monetary or physical volume are not used as the exclusive criteria. The intent is to assure that the trade in question is not a brief, isolated excursion into international trade but a sustained volume of bona fide commercial transactions. Consequently, the number of transactions, the continuous character of the operations and a number of other factors are taken into consideration as well.

(It is believed that Dr. Paulich, in discussing this point, had reference to an unofficial summary of the new immigration legislation prepared by Mr. Frank Auerbach of the Visa Office of the Department of State. This work is entitled The Immigration and Nationality Act: A Summary of Its Principal Provisions, and copies presumably are available in the office of the Supervisory Consul General.)

3. Dr. Paulich's observation that the fixing of the period of sojourn for aliens entering the United States as nonimmigrants is done by immigration officers at the port of

entry rather than by consular officers when the visa is issued is correct. However, this procedure is specifically required by law and hence not merely a matter of administrative convenience. Section 214(a) of the Immigration and Nationality Act expressly vests the Attorney General with authority to prescribe by regulation the period of time for which non-immigrant aliens may be admitted to the United States. A treaty trader or treaty investor, by reason of the purposes of the treaty, is regarded as admitted on an indefinite basis as to sojourn, provided, of course, that he maintains his status as a trader or investor under the treaty. Hence the administrative regulations governing entry and sojourn (8 CFR 214e2) contain no specific limitation as to time. This does not preclude, however, requirements that the alien comply with reasonable procedures designed to assure that

he is

UNCLASSIFIED
(Security Classification)

[Comment: Illegible stamp appears sideways on page as well as handwritten numbers "611/62a4 1-854"]

[end of page]

NO.: A-852 XX HICOG BONN Page 3

UNCLASSIFIED
(Security Classification)

he is maintaining his status as a treaty alien and otherwise complying with the conditions of his admission; and the measures referred to by Dr. Paulich are in the nature of such requirements.

SMITH, ACTING

[Comment: Handwritten nos. "611.62a4/1-854" appear on page]

[Comment: Illegible stamp appears sideways on right of page as well as handwritten nos. "611.62a4/1-854"]

UNCLASSIFIED
(Security Classification)

[End of page]

[SEAL] DEPARTMENT OF STATE INSTRUCTION

1872

UNCLASSIFIED

NO.: A-852 January 21, 1954

SUBJECT: Treaty of Friendship, Commerce and Navigation

83 ms
ORIGIN
E
INFO
DCL
GER
OLI
L
VO
CIA
COM
FOA
JUS
TR

TO: HICOG, BONN

[Comment: Handwritten nos. "611.62a4/1-854" appear on right of page]

Reference HICOG despatch No. 1904, January 8, 1954.

There follow the Department's comments with respect to the points raised by Dr. Paulich at the January 4 meeting regarding the provisions of Article II, paragraph 1.

1. The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. 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 22 CFR 41.70, 41.71 and other applicable regulations.

2. The apparent discrepancy between the treaty and the Immigration and Nationality Act with respect to use of the term "substantial" is of no legal or practical significance either when considered in the treaty trader clause alone or taken together with

the treaty

UNCLASSIFIED

DRAFTED BY:	APPROVED BY:
EDT:CP:CHSullivan:hc 1/19/54	CP: V.G. Setser

CLEARANCES:
L/EUR VO L/E GEA

[Comment: Stamped on right of page are nos. "611.62A4/1-854" plus letters "CJC". Also handwritten are nos. "611.62A4/1-854"]

[End of page]

NO.: A-852 HICOG BONN

Page 2

UNCLASSIFIED
(Security Classification)

the treaty investor clause. Use of the term "substantial" in the treaty trader provision of the Act merely gives explicit recognition in the law to an administrative practice of long standing. It was not deemed necessary to reword the treaty as a consequence, for the treaty provision as now worded has long been applied in a manner requiring that the trade for which entry is permitted shall be substantial in character. This does not derive from Article II(1)(c), however, but

from Article II(3), taken together with the general right to apply reasonable and nondiscriminatory regulations consistent with the intent and purpose of the treaty provision in order to implement the commitment and to protect the privileges accorded thereby from abuse. In the case of the treaty investor provision, however, the term "substantial" has been carried over from the law to the treaty as an aid to its construction and implementation. This was done simply because the investor clause, unlike the trade clause, is new and an established body of interpretation has not yet developed.

It may be noted in connection with hypothetical cases involving substantiality of trade that this requirement is applied in a liberal manner. In determining the substantiality of the trade within the meaning of the treaty trader clause, monetary or physical volume are not used as the exclusive criteria. The intent is to assure that the trade in question is not a brief, isolated excursion into international trade but a sustained volume of bona fide commercial transactions. Consequently, the number of transactions, the continuous character of the operations and a number of other factors are taken into consideration as well.

(It is believed that Dr. Paulich, in discussing this point, had reference to an unofficial summary of the new immigration legislation prepared by Mr. Frank Auerbach of the Visa Office of the Department of State. This work is entitled The Immigration and Nationality Act: A Summary of its Principal Provisions, and copies presumably are available in the office of the Supervisory Consul General.)

3. Dr. Paulich's observation that the fixing of the period of sojourn for aliens entering the United States as nonimmigrants is done by immigration officers at the port of entry rather than by consular officers when the visa is issued is correct. However, this procedure is specifically required by law and hence not merely a matter of administrative convenience. Section 214(a) of the Immigration and Nationality Act expressly vests the Attorney General with authority to prescribe by regulation the period of time for which non-immigrant aliens may be admitted to the United States. A treaty trader or treaty investor, by reason of the purposes of the treaty, is regarded as admitted on an indefinite basis as to sojourn, provided, of course, that he maintains his status as a trader or investor under the treaty. Hence the administrative regulations governing entry and sojourn (8 CFR 214e2) contain no specific limitation as

to time. This does not preclude, however, requirements that the alien comply with reasonable procedures designed to assure that

he is

UNCLASSIFIED
(Security Classification)

[End of page]

NO.: A-852 HICOG BONN Page 3

UNCLASSIFIED
(Security Classification)

he is maintaining his status as a treaty alien and otherwise complying with the conditions of his admission; and the measures referred to by Dr. Paulich are in the nature of such requirements.

SMITH, ACTING

UNCLASSIFIED
(Security Classification)

[End of page]

[Form of Foreign Service Despatch Memo]

AIR POUCH
Priority

UNCLASSIFIED
(Security Classification)

DO NOT TYPE IN THIS SPACE

[Comment: Hand-written nos. "611.62a4/5-854" appear in this box]

FOREIGN SERVICE DESPATCH

FROM: HICOG BONN

2413
Desp. No.

TO: THE DEPARTMENT OF STATE, WASHINGTON

March 8, 1954
Date

REF: OURDES 2394, March 5, 1954, and previous

For Dept. Use Only	ACTION E-4	INFO	DEPT. Rep. 2 DC/R-2 OLI-6 GER-4 L-2
	REC'D 2012		OTHER CIA-7 COM-8 TR-3 FOA-10

[Comment: Above inserts are handwritten]

SUBJECT: New Treaty of Friendship, Commerce, and Navigation: Report on March 4, 1954, Sub-Committee Meeting on U.S. Article V

The Sub-Committee on U.S. Article V regarding judicial rights and commercial arbitration held its second meeting on March 4, 1954. The Sub-Committee members were the same as those reported in reference despatch.

The German side recapitulated the reasons why they could not accord national treatment with respect to security for costs and judgment and submitted the following new formulation for a clause to be inserted into the protocol, adding that it was intended as an "authentic interpretation" of paragraph 1, U.S. Article V:

> Die vertragschliessenden Teile sind darin einig, dass Artikel V, Abs. 1 des Vertrags den Angehoerigen oder den Gesellschaften des einen Teils als Klaeger oder Intervenient vor den Gerichten des anderen Teils von der Zahlung der

Kaution judicatum solvi dann Befreiung erteilen sollen, wenn sie

a) entweder ihren Wohnsitz oder ihren dauernden Aufenthalt oder ihren Sitz oder

b) ausreichendes Vermoegen

in dem Gebiet des Teils haben, vor dessen Gericht die Klage erhoben wird.

A provisional translation, prepared by the writer, is given herewith:

"The Contracting Parties agree that Article V, paragraph 1, of the present treaty shall give exemption from security for costs and judgment judicatum solvi to the nationals and/or the companies of one Party appearing as plaintiffs or intervenors before the courts of the other Party if

a) they have either their domicile or permanent residence or seat, or

b) sufficient property

[Initials]

RNLevy/il
Reporter

UNCLASSIFIED

ACTION COPY--DEPARTMENT OF STATE

The action office must return this permanent record copy to DC/R files with an endorsement of action taken.

[Comments: Illegible file stamp appears sideways on right of page.
Stamp "611.62A4/3-854" appears sideways on right of page.
Illegible initials appear sideways on bottom right of page]

[End of page]

in the territory of that Party before the court of which the case is heard."

The U.S. side said the German proposal was interesting and asked whether they were correct in their interpretation that "domicile" and "residence" pertained solely to individuals, whereas "seat" applied to corporations. The Germans confirmed that only natural persons could have a "domicile" or a "residence" and that a juridical person was understood to have a "seat".

The U.S. then asked whether the omission of the word "domicile" would be acceptable. The Germans replied in the affirmative, and the U.S. side then observed that they would consider further whether they wanted to suggest the deletion.

The U.S. side then inquired what requirements a U.S. corporation would have to fulfill in order to be considered as having its "seat" in Germany under German law. The Germans repeated their previous explanations to the effect that a corporation was deemed to be "seated" in a locality in which its administration was. They added that German corporations were registered in the commercial register and that such registration included data concerning the administration of the company. They further commented that a U.S. corporation having a registered branch in Germany, yet being subordinated to its New York administrative headquarters, might be considered having its seat in Germany if the German branch of the U.S. corporation constituted an independent juridical person. The U.S. side remarked that this explained the basis for their concern, because U.S. corporations would not be able to fulfill the qualifications under German law unless they reincorporated in Germany and thus became a German juridical domestic entity, in which case they would lose their legal status as American juridical entities and become lost from the purview of the provisions. They stressed that a virtually impossible condition would thus be created and, therefore, suggested deletion of the reference to "seat", leaving only the property test for companies. Alternatively, they proposed as a substitute for "seat" the inclusion of the words "permanent establishment". As examples for their theoretical position, they explained

that, in accordance with the German statement, the Chase National Bank or the American Express Company, both located at Frankfurt, Germany, would be considered as branches of American enterprises without having their seats in Germany, since their administrative headquarters were in each instance at New York. On the other hand, the Ford A.G. of Cologne and the Opel Works of Ruesselsheim, though owned by American corporations, were incorporated in Germany and were German juridical entities.

The Germans said they understood the difficulties regarding the word "seat" and remarked that the U.S. substitute proposal to insert the words "permanent establishment" (staendige Niederlassung) appeared to reflect the practicalities, though they wondered whether "permanent establishment" might not create problems since courts would have to consider whether or

UNCLASSIFIED

[End of page]

Page ____ of ____
Encl. No. ____
Desp. No. ____
From ____

UNCLASSIFIED
(Classification)

Page 3 of
Desp. No. 2413
From HICOG BONN

not a given establishment was of a fictitious nature, and since the courts further might be reluctant to grant exemption from security if an insubstantial establishment were involved. Both sides agreed, however, to consider "permanent establishment" on a tentative and exploratory basis pending further internal consultation.

Some discussion followed as to the requirements a U.S. corporation would have to fulfill to do business in Germany and be considered having its "permanent establishment" there. The Germans stated that, in principle, the registration conditions were the same for a U.S. corporation as for a domestic company. With respect to "permanent establishment", they remarked that these words comprised a de facto rather than a legal description.

A third question from the U.S. side was framed as a request for an addition in order to ensure adequate linkage between the protocol and paragraph 5, U.S. Article V: namely,

to insert the words "within the framework of" after "the Contracting Parties agree that". In reply to a German question, the U.S. side stated that their suggestion was based on a necessary consideration from the viewpoint of the U.S. to clarify that aliens, in equal circumstances, would not be granted exemptions exceeding those accorded U.S. nationals; and to stress that no special privilege was being established for the treaty alien.

The Germans asked for additional clarification as to the intent of the U.S. proposed insert and noted that in the State of California security for costs and judgment was imposed on a non-resident immaterial of his nationality or his holding of property within the jurisdiction of the court. Concluding that the property test was not applicable in California, the U.S. version would have to be interpreted to mean that a German national, though holding sufficient property in California but residing in Germany, would be subjected to the posting of security. The U.S. side countered that they were not familiar with the California practices and that security requirements varied among the States. They stressed, however, that it was out of the question for the U.S. Government to submit a treaty to the Senate containing a special privilege for foreign nationals not available in the U.S. in like situations to U.S. citizens.

The Germans commented that they had assumed the exemption to be applicable on the basis of the property test to their advantage. They held that acceptance of the U.S. proposed insert would result in unilateral disadvantages for Germany, since, in view of German past experiences based on the reciprocity clause of section 110 of the German Civil Code, only residence criteria were being followed in the United States. They were regretfully prepared, however, for political reasons, to support the U.S. suggestion before their superiors.

The U.S. side replied to this last remark by emphasizing that no special privileges or favors were being asked; and that the U.S. sought the provisions of a treaty of friendship on the theory that they were mutually

beneficial. They remarked that their proposal would not become an unbalanced provision solely advantageous to the United States, and in support of this proposition briefly summarized the situation in the United States with respect to security for costs and judgment. In this connection, they stated that 53 independent jurisdictions existed of which some might not give the desired benefits but some others might grant a better treatment to German nationals under the treaty than was accorded them at present. They referred to those States which under their laws required aliens to post security regardless of their residence or holding of property and stressed that the alienage test would be overcome by the treaty. They added that while perhaps exact reciprocity might not be achieved everywhere, in some States considerable advantage would result for Germans under the treaty. They noted that some States granted more with respect to security for costs and judgment to German nationals than U.S. citizens obtain in Germany, and argued that an overall balance would probably be achieved if all benefits and disadvantages were properly compared. They confirmed that the U.S. position was that a German holding property in a given State would be exempted from posting security for costs and judgment only if holding of property was likewise considered a reason for exemption for a U.S. national. They added that the procedural provisions of some States considered the holding of sufficient property reason for granting exemption from posting cash or a bond as security. In this connection, they stated that whether or not the holding of property was considered technically to be a ground for "exemption" from security might be a matter of definition of terms, for the provisional attachment of the property pending outcome of the litigation might of itself be regarded as a posting of security. The U.S. side handed the Germans, for their information a brief informal summary, prepared by Mr. Houston S. LAY, copy of which is enclosed.

The Germans requested the U.S. side to draft a counter-proposal to be discussed at the next meeting, and agreed in the interim to raise the principles with their superiors in order to obtain advance clearance.

Pauper's Right

A preliminary discussion was then held on the pauper's right.

The Germans proposed that consideration should be given to granting the pauper's right on the basis of reciprocity provided the national of the other Party was domiciled or had his permanent residence within the jurisdiction of the court.

The U.S. side asked whether the pauper's right would be granted in Germany to a destitute seaman who was not domiciled there, but merely a transient, yet wanted to go before a German court in order to recover wages or damages for injury suffered while in port. They commented that in the United States a seaman, irrespective of his nationality or domicile, would be granted the pauper's right in Federal courts if his suit pertained to his profession. They added that under the Jones Act seamen could take personal injury cases arising out of their employment into Federal courts;

UNCLASSIFIED

[End of page]

Page ___ of
Encl. No. _____
Desp. No. _____
From _____

UNCLASSIFIED
(Classification)

Page 5 of
Desp. No. 2413
From HICOG BONN

and that there was an exception in favor of seamen from the general Federal rule that suits in forma pauperis were restricted to citizens. With respect to State courts, they explained that the different laws varied. They stressed that the U.S. proposal would provide for national treatment in the pauper's right regardless of contrary Federal or State statutes; and thus would automatically establish the reciprocity required by German legislation.

The Germans commented that their final position regarding the granting of pauper's right for seamen would have to be reserved since it was a novel concept for them to have two courts apply different provisions, specific mention being made of the Federal district court of New York granting the pauper's right to a seaman irrespective of the $3,000 limitation, whereas a New York State court might not grant

this right. The German side continued that the pauper's right could not be considered in Germany under section 114 of the German Civil Code on a case by case reciprocity basis in contrast to the provisions applicable for the exemption from security for costs and judgment; and added that the pauper's right was not at present in general available to Americans since all cases involving litigation of an amount exceeding $3,000 could be transferred from the State to Federal courts where, except for seamen, U.S. nationality was a determining prerequisite, and the German authorities accordingly looked solely to the Federal rule in determining whether reciprocity existed. They explained that seamen presented a special situation, since seamen could bring cases involving payment for wages before a special labor tribunal where decisions were rendered free of charge. They noted that usually Union officials represented the plaintiffs before such labor courts and that lawyers were only admitted in cases where the value in dispute exceeded DM 600.

Both sides agreed to continue the discussion in the next Sub-Committee meeting scheduled to be held on March 9.

[Signed]
Carl H. Boehringer
Commercial Attache
Commercial Attache Division

Enclosure: [Initialled]

Informal summary.

Coordination:

[Initialled]
Mr. Herman Walker, Jr.
OGC - Mr. S.H. Lay [Signed "S.H. Lay"]

Copies to:

see page 6

UNCLASSIFIED

[End of page]

Page ___ of
Encl. No. _____
Desp. No. _____
From _____

UNCLASSIFIED
(Classification)

Page 6 of
Desp. No. 2413
From HICOG BONN

Copies to:

DHC
OES
PA:OD
PA:LA
PUB:OD
SUBCONGEN
OGC
E:OD
E:FNP
E:IND
E:FA
HICOG BERLIN ELEMENT (2)
Amcongen Bremen
Amcongen Hamburg
Amcongen Duesseldorf
Amcongen Frankfurt
Amcongen Stuttgart
Amcongen Munich.

UNCLASSIFIED

[End of page]

Costs; and Pleadings in Forma Pauperis

Statutes in the U.S. relating to security for costs vary as to particular types of pleadings and as to jurisdiction. Many pleadings in the Federal courts where jurisdiction is based on diversity of citizenship follow the rule of the State law, although at least one Federal District has its own rules on the subject. Wherever the subject matter is covered by Federal legislation such legislation, of course, prevails. A detailed analysis of the laws of each State and each Federal district would be too lengthy for our purposes and the most valuable explanation is a rather abbreviated statement of the more general practices.

In numerous instances, security for costs may be required regardless of citizenship, residence or property. In other cases, security may be required on the basis of residence outside the jurisdiction of the court regardless of citizenship, legal domicile or property location. In these jurisdictions an alien receives the same consideration as does a citizen. That is, if the alien is resident within the jurisdiction of the court, no security for cost is required. In other jurisdictions, the fact that a plaintiff is an alien is cause for demanding security for cost regardless of residence or property qualifications.

It would appear that in many jurisdictions, a corporation is assimilated to the status of a natural person although where there is a difference, it is usually in favor of requiring a corporation to give security for cost where a natural person would not be so required. Although there are many differences in the various U.S. jurisdictions on the question of security for cost, the Germans would acquire valuable rights under Article V and the protocol as proposed in the U.S. version of the FCN treaty.

State and Federal procedures in connection with pleadings in forma pauperis are equally divergent although here there appears to be a decided tendency to give the benefit only to citizens or residents and to exclude from the benefits aliens. In this connection, 28 USC, 1915 is of particular interest. In the Federal courts, citizenship

is a basic qualification required to allow a plaintiff to commence a proceeding in forma pauperis.

Dr. Paulig had made reference to 28 USC, 32, (undoubtedly intended 28 USC 832) which has been incorporated into Section 1915. Under Section 1915, it is doubted that a corporation could qualify as a "citizen" to commence action in forma pauperis. 28 USC 1916 provides that seamen may commence action for their own benefits for wages or salvage or the enforcement of laws enacted for their safety, without prepaying fees or costs or furnishing security therefor. It does not appear that seamen need be citizens of the U.S. in order to take advantage of this section.

UNCLASSIFIED

[End of page]

AIR POUCH PRIORITY | UNCLASSIFIED (Security Classification) | DO NOT TYPE IN THIS SPACE 611/62a4/3-1854 [Comment: above nos. are handwritten] [Comment: Illegible handwritten initials appear on upper right]

FOREIGN SERVICE DESPATCH

FROM: HICOG BONN [Comment: "BONN" is circled by hand]

2529 Desp. No.

TO: THE DEPARTMENT OF STATE, WASHINGTON

March 18, 1954 DATE

REF: OURDES nos. 1355, October 28, 1953; 1372, October 30, 1953; and 2501, March 16, 1954

18 For Dept. Use Only	ACTION E-4	I N	DEPT Rep-2, DC-2, GER-4, OLI-6, L-2
	REC'd 3/26	F O	OTHER CIA-5, COM-8, FCA-10, TR-3

SUBJECT: New Treaty of Friendship, Commerce, and Navigation: Report on March 16, 1954 Meeting with German Negotiators

[Comment: Above nos. in boxes are handwritten]

The 32nd regular business meeting for negotiation on the subject matter was held at the Foreign Office on March 16, 1954. Dr. BECKER, as usual, served as chairman of the German team which included representatives of the Foreign Office and the Ministries of Economics, Justice, Labor and Interior. The U.S. side included Messrs. BOEHRINGER, LEVY, and WALKER.

The meeting on March 16 was devoted to a detailed discussion of U.S. Article VIII on employment, professions, and non-profit activities, and U.S. Article IX on property rights.

[Comment: Department of State seal appears on right of page including "L/T Mar 31 1954, TREATY BRANCH, OFFICE OF THE LEGAL ADVISER"]

Article VIII, Paragraph 1 [Comment: This heading is circled by hand]

The Germans stated that their preference remained to delete this paragraph, as being unnecessary, but that they

were prepared to accommodate U.S. wishes for its retention in the treaty. They felt it to be in general acceptable as drafted, subject perhaps to linguistic clarifications and verification of their understanding of its intent. They had some questions to ask, in response to which the U.S. side developed answers as follows during the course of the discussion:

(1) The first sentence is of a general nature, being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel. Its major special purpose is to preclude the imposition of "percentile" legislation. [Comment: the foregoing sentence is underlined by hand]. It gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law. The Germans said they might wish to suggest some linguistic revisions to clarify this last point. The U.S. side said they did not feel that further clarification was essential, especially as the juxtaposition of the contrasting wording of the first and second sentences gives clear clarification by implication; but declared their willingness to consider any reasonable proposal, in deference to German views. No express clarification had been necessary in any other treaty, to the best recollection of the U.S. side.

RNLevy/igl
REPORTER

UNCLASSIFIED

[Comment: The foregoing message is on Foreign Service Despatch memo paper]

[End of page]

[Form of "Foreign Service Despatch"]

AIR POUCH / Priority	UNCLASSIFIED (Security Classification)	DO NOT TYPE IN THIS SPACE [handwritten nos. "611.62a/3-1854" appears in box.

FROM: HICOG BONN

2529
DESP. NO.

TO: THE DEPARTMENT OF STATE, WASHINGTON

March 18, 1954
DATE

[Comment: Handwritten nos. with illegible writing appears under "TO" entry]

REF: OURDES nos. 1355, October 28, 1953; 1372, October 30, 1953; and 2501, March 16, 1954

For Dept. Use Only	ACTION	INFO DEPT.
	REC'D	OTHER

[Comment: For Dept. Use Only, handwritten "18" appears.

ACTION entry, handwritten E-4 appears.

REC'D entry, handwritten "3/26" appears.

DEPT. entry, handwritten "REP-2, DC/R-2, GER-4, OLI-6, L-2" appears.

OTHER entry, "CIA-5, COM-8, FOA-10, TR-3" appears.

SUBJECT: New Treaty of Friendship, Commerce, and Navigation: Report on March 16, 1954 Meeting with German Negotiators

[Comment: Illegible handwriting appears under SUBJECT entry.]

The 32nd regular business meeting for negotiation on the subject matter was held at the Foreign Office on March 16, 1954, Dr. BECKER, as usual, served as chairman of the German team which included representatives of the Foreign Office and the Ministries of Economics, Justice, Labor and