1981

Brief for Defendant-Appellant Sumitomo Shoji America, Inc.

WENDER, MURASE & WHITE

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

BRIEF FOR DEFENDANT-APPELLANT SUMITOMO SHOJI AMERICA, INC.

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PRELIMINARY STATEMENT

This is an appeal pursuant to 28 U.S.C. §1292(b) from an opinion and order of the United States District Court for the Southern District of New York (Tenney, J.) dated June 5, 1979 (reported at 473 F. Supp. 506 and 30 EPD ¶30,119), as amended by opinion and order dated August 9, 1979 (reported at 20 EPD ¶30,205). The June 5, 1979 opinion and order was

reconsidered on reargument and adhered to by opinion and order dated November 29, 1979 (reported at 21 EPD ¶30,501 and 21 FEP 580).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan authorize a New York corporation which is wholly-owned by a Japanese corporate entity to hire Japanese nationals for its executive, managerial and specialist positions?

2. Does the hiring of Japanese nationals for such key positions pursuant to that Treaty violate Title VII of the Civil Rights Act of 1964?

STATEMENT OF THE CASE

The Nature of the Case

This civil rights action presents the question of the relationship of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (1978) ("Title VII"), to the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. 2863 (hereinafter referred to as the "Treaty" or the "Japanese Treaty"). Appellees, plaintiffs below, sue Sumitomo Shoji America, Inc. ("Sumitomo"), alleging purported individual and class action claims of "sex and/or nationality" discrimination by Sumitomo in hiring and promoting for executive, managerial and sales positions in violation of Title VII and the Civil Rights Act of 1866, 42 U.S.C. §1981 (1976), and also purporting to claim against Sumitomo pursuant to the Thirteenth Amendment to the United States Constitution (Complaint, ¶¶8, 12 and 13, set forth in Joint Appendix at 3, 4 and 5).[1] Sumitomo denies

1. References to the Joint Appendix are hereinafter indicated by "A".

plaintiffs' allegations of discrimination and asserts affirmative defenses including that Sumitomo's hiring of Japanese nationals to fill key positions is authorized pursuant to the Treaty and complementary provisions of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §1101 *et seq.* (1976) ("INA") (Amended Answer and Counterclaims of Sumitomo at A74 *et seq.*).

Summary of Proceedings and Disposition Below

Plaintiffs filed the complaint on November 21, 1977. Sumitomo filed an answer and counterclaim on February 21, 1978, and an amended answer and counterclaims on June 19, 1978. On May 18, 1978, Sumitomo moved the District Court for an order pursuant to Rule 12(b)(6), FED. R. CIV. P., dismissing plaintiffs' claims upon the grounds that Sumitomo's hiring of Japanese nationals is protected by the Treaty and the INA, and that the complaint otherwise fails to state a claim. Opposing papers were filed by plaintiffs and by the United States Equal Employment Opportunity Commission ("EEOC") as *amicus curiae.*

By opinion and order dated June 5, 1979 (the "June 5 Order", A108; *et seq.*), the District Court granted Sumitomo's motion insofar as it sought dismissal of plaintiffs' 42 U.S.C. §1981 claims, and also determined that plaintiffs had abandoned their Thirteenth Amendment claims (June 5 Order at A127, 128). The Court below denied Sumitomo's motion insofar as it sought dismissal of plaintiffs' Title VII claims (June 5 Order at A127). The District Court did not reach the substance of Sumitomo's contentions regarding the intent of the negotiators and the purpose of the provisions of the Treaty invoked by Sumitomo, including Article VIII(1) of the Treaty which grants a right of freedom of choice to engage home country nationals for executive, managerial and specialist positions.

Sumitomo sought an immediate appeal under 28 U.S.C. §1292(b). By opinion and order dated August 9, 1979 (the

"August 9 Order"; A138 *et seq.*), the District Court amended its June 5 Order by certifying for immediate appeal the question of the relationship of Title VII to the Treaty (August 9 Order at A145).

On August 15, 1979, the Department of State released documents from its files relating to negotiation of the Treaty and other similar bilateral treaties of friendship, commerce and navigation ("FCN treaties"), showing the intent of the negotiators to extend the hiring rights claimed by Sumitomo to subsidiary establishments and also showing enforcement of those rights by the United States on behalf of United States interests doing business in other countries, including Japan (the "State Department Documents"; A175-356).[2] Sumitomo therefore asked the District Court to reconsider its June 5 Order in light of the new and material evidence contained in the State Department Documents (Letter to District Court of J. Portis Hicks dated August 16, 1979; A147).

Following procedures in this Court to assure Sumitomo the right to pursue an interlocutory appeal from the June 5 Order,[3] the Court below on reargument received copies of the State Department Documents and further memoranda of law relating thereto were filed by the parties and the EEOC. By opinion and order dated November 29, 1979 (the "November 29 Order", A359; *et seq.*, amended to reflect corrections on December 6, 1979), the District Court again denied Sumitomo's motion to dismiss plaintiffs' Title VII claims. Sumitomo's petition for an order pursuant to 28 U.S.C. §1292(b) granting permission to appeal was denied by order of this Court filed January 24, 1980 and, on reargument, was granted by order filed May 19, 1980.

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2. Many of the State Department Documents as furnished to the parties were reproductions of poor quality. These have been retyped for purposes of presentation in the Joint Appendix.

3. Reflected in two orders of this Court dated August 17, 1980 (Nos. 3379 and 3380).

Statement of The Facts

With one exception, plaintiffs claim that they are "female citizens of the United States" (Complaint, ¶2; A2). Plaintiffs allege that the remaining plaintiff, Reiko Turner, is a "citizen of Japan" (Complaint, ¶3; A2). Plaintiffs also claim that they are past or present employees of Sumitomo who have not been promoted to "executive, managerial and/or sales positions" (Complaint, ¶¶4-6, 12-13; A2-5), and that they therefore have been deprived of "equal employment opportunities by reason of their sex, and/or nationality" (Complaint, ¶8; A3). As putative class-based causes of action, plaintiffs accuse Sumitomo of "[d]iscriminating against women" and (again with the exception of Reiko Turner) of discriminating against plaintiffs "on the basis of nationality" (Complaint, ¶¶12, 13; A4-5). Plaintiffs seek an unspecified amount of damages as well as injunctive relief, among other things "[e]njoining [Sumitomo] from engaging in the aforesaid unlawful employment practice", and, in addition, "[e]njoining [Sumitomo] from discriminating on the basis of sex and nationality in hiring new employees" (Complaint, demand for relief; A6).

It is not controverted that Sumitomo is an "integrated trading company" incorporated in New York as a wholly-owned subsidiary of a Japanese corporation (Hicks affidavit of May 18, 1978, submitted in support of Sumitomo's motion to dismiss, ¶¶5, 9; A68, 69). Integrated trading companies engage primarily in the purchase and resale of goods in import and export markets (*Id.*, ¶10; A70). About 90% of the business of the major integrated trading companies of Japan involves import and export trade concluded with Japan, *i.e.*, imports from or exports to that country (*Id.*, ¶10; A70)[4].

4. The "integrated trading company", or *sogo shosha,* is uniquely a Japanese institution (Hicks affidavit, ¶9; A69). While there are thousands of trading companies in Japan, there are fewer than a dozen integrated trading companies or *sogo shosha.* The latter group accounts for more than 50% of Japanese imports and exports (*Id.* ¶9; A69). Since Japan has few national resources upon which it can rely for production or consumption, it depends on foreign trade for survival, and has thus seen the growth of the institution known as the "trading company" more than any other nation (*Id.*, ¶8; A69).

It is also uncontroverted that the Japanese nationals hired by Sumitomo for its executive, managerial and specialist positions are nonimmigrant aliens, sent from Japan to Sumitomo in the United States by its Japanese parent corporation as so-called "treaty traders" (*Id.*, ¶6; A68-69), whose entry and stay in the United States, specifically for the purpose of employment by Sumitomo in such positions, have been authorized in each case by the Department of State and the Immigration and Naturalization Service (the "INS"). "Treaty trader" is the common designation for nonimmigrant aliens admitted to the United States pursuant to such governmental authorizations under provisions of FCN treaties such as Article I(1)(a) of the Japanese Treaty and §101(a)(15)(E)(i) of the INA (8 U.S.C. §1101(a)(15)(E)(i)).[5] Sumitomo points out that it engages such treaty trader Japanese nationals in reliance on Article VIII(1) of the Treaty, which provides in relevant part that:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice (4 U.S.T. at 2070).

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5. Article I(1) of the Treaty reads in relevant part:

> Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities . . . 4 U.S.T. at 2066.

§101(a)(15)(E)(i) of the INA provides for a treaty trader category of nonimmigrant aliens entitled to enter and remain in the United States for the purpose of specific employment pursuant to FCN treaties. Such category (also known as E-1 visa status) is comprised of aliens

> . . . entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and

(Cont'd)

Thus, plaintiffs, all of whom applied for and were hired by Sumitomo in positions as secretarial employees (Hicks affidavit of May 18, 1978, ¶7; A69), are directing their grievance against a hiring practice based on nationality which is authorized by the Treaty, the INA and long-standing regulations, rules and practices implementing the Treaty and the INA, pursuant to which Sumitomo's parent corporation in Japan assigns to the United States home country nationals who are engaged by its United States subsidiary in key positions to control and manage the parent's investment in the United States, just as the Treaty provides and its negotiators intended.

SUMMARY OF ARGUMENT

1. The Treaty is designed to promote and protect foreign investment by allowing enterprises of Japan and the United States to control and manage their business establishments in each other's country, whether in branch or subsidiary form. The District Court thus incorrectly interpreted the Treaty by holding that Sumitomo, because incorporated in New York, is by the "plain terms" of the Treaty not entitled to rely on the Treaty's right of freedom of choice in employment granted by Article VIII(1) of the Treaty. Sumitomo has standing to invoke the protection of the Treaty, including Article VIII(1).

2. Sumitomo's Treaty-based right to fill its key positions with Japanese nationals is not inconsistent with Title VII of the Civil Rights Act of 1964 and does not violate that statute.

(Cont'd)

> navigation between the United States and the foreign state of which he is a national . . . : (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; . . . 8 U.S.C. §1101(a)(15)(E)(i).

ARGUMENT

I.

SUMITOMO IS AUTHORIZED BY THE TREATY AND THE INA TO FILL ITS KEY POSITIONS WITH JAPANESE NATIONALS

A. The Court Below Erred Because it Failed to Properly Examine the Intent of the Negotiators and the Purpose of the Treaty Provisions Invoked by Sumitomo.

The District Court erred in declining to examine the purpose of the Treaty provision granting the right to engage Japanese nationals for executive, managerial and specialist positions. Following the reasoning of the District Court in *Spiess v. C. Itoh & Co. (America), Inc.*, 473 F. Supp. 506 (S.D. Tex. 1979), the Court below decided instead that the issue before it was "whether Sumitomo can invoke the aegis of the Treaty as sanction for its employment practice" (June 5 Order at A111). Then, resorting to a plain reading interpretation, the District Court looked to an irrelevant definitional section of the Treaty which deals only with juridical status, and not substantive rights, specifically Article XXII(3), and held that:

> . . . 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 territories of the United States (June 5 Order; A112-113).[6]

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6. Article XXII(3), relied on by the Court below to define Sumitomo as a "company of the United States" not able to raise hiring right provisions of the Treaty, reads in its entirety as follows:

> As used in the present Treaty, the term 'companies' means corporations, partnerships, companies and other

(Cont'd)

The District Court therefore denied Sumitomo's motion to dismiss plaintiffs' Title VII claims, concluding that:

> 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 (June 5 Order; A118).

In its November 29 Order, the District Court shifted its ground, but only slightly, in affirming its denial of Sumitomo's motion to dismiss plaintiffs' Title VII claims. The Court first retreated from its wholesale reliance on Article XXII(3) of the Treaty (November 29 Order; A373):

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

However, the Court below persisted in applying a strict rule of construction, without examination of the intent of the

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(Cont'd)

> 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. (4 U.S.T. at 2079-80).

negotiators or the purpose of the substantive provisions of the Treaty invoked by Sumitomo, and concluded:

> The drafters knew how to give locally incorporated subsidiaries rights under specific articles. In Article VIII(1) they did not do so . . . Because [Article VIII(1)] does not by its own terms extend to locally incorporated subsidiaries, the Court must look to Article XXII(3) to determine whether "nationals and companies" can be read to include subsidiaries. . . . By [Article XXII(3)'s] language Sumitomo is a United States company. It is not a Japanese company and is thereby ineligible for freedom-of-choice protection within the territories of the United States (November 29 Order at A376-377).[7]

This "plain reading" approach disregards the teaching of this Circuit, firmly laid down in *Maximov v. United States,* 299 F. 2d 565, 568 (2d Cir. 1962), *aff'd,* 373 U.S. 49 (1963), where Judge Clark expressed the proper inquiry to be made:

> The basic aim of treaty interpretation is to ascertain the intent of the parties who have entered into the agreement, in order to construe the document in a manner consistent with that intent.

That both the intent of the negotiators and the purpose of the provision being interpreted should be examined and followed by the Court, instead of a "plain reading" approach used by the Court below, was instructed by this Court in *Reed v. Wiser,* 555 F. 2d 1079 (2d Cir. 1977), *cert. denied,* 434 U.S. 922 (1977).

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7. The District Court expressly observed that it was using a "plain-term reading" of Article VIII(1) and Article XXII(3) (November 29 Order at A377 and A380).

There, this Court reversed a District Court's decision which relied largely on a similar plain reading approach to interpretation of an international treaty and said (quoting from *Eck v. United Arab Airlines,* 360 F. 2d 804, 812 (2d Cir. 1966)):

> "A Court faced with this problem of interpretation, or another problem like it, can well *begin with an inquiry into the purpose of the provision that requires interpretation.* The language of the provision that is to be interpreted is, of course, highly relevant to this inquiry, but it should never become a 'verbal prison.' *Other considerations, such as the court's sense of the conditions that existed when the language of the provision was adopted, its awareness of the mischief the provision was meant to remedy, and the legislative history available to it, are also relevant as the court attempts to discern and articulate the provision's purpose. . . .* The inquiry may lead the court to conclude that the language of the provision only imperfectly manifests its purpose. . . . It would be inconsistent with the 'wise counsel to reject "the tyranny of literalness," ' if the Court in the latter situations did not seek to interpret the provision so as to effectuate its purpose, even if this requires departing in some measure from the letter and reading the language in a practical rather than literal fashion." 555 F. 2d at 1088 [Emphasis supplied.]

See also, United States v. A.L. Burbank & Co., Ltd., 525 F. 2d 9, 14 (2d Cir. 1975), *cert. denied,* 426 U.S. 934 (1976); *Smith v. Canadian Pacific Airways, Ltd.,* 452 F. 2d 798, 803 (2d Cir. 1971).

By concluding that Sumitomo lacked "standing", or otherwise was not an intended beneficiary of the Treaty

provisions pursuant to which it employs Japanese nationals for key positions, the Court below fell into the "verbal prison" warned against by *Reed v. Wiser, supra.* It ignored the overall purpose of the Treaty to promote and protect private investment, and also negated the specific purpose of relevant provisions of the Treaty which were intended to ensure the foreign investor the right to control and manage enterprises established in the host country by granting those enterprises the right to hire home country nationals for key positions.

B. The Overall Purpose of the Treaty Is to Promote and Protect Private Investment Abroad.

In historical context, the Treaty, which entered into force on October 30, 1953, is one of a number of bilateral FCN treaties entered into by the United States as a result of a program undertaken by the executive and legislative branches of the United States government following World War II.[8] At the time the United States Senate gave its advice and consent to ratification of the Japanese Treaty, the Senate also gave its advice and consent to seven other bilateral FCN treaties or amendments to preexisting treaties of that type. 99 CONG. REC. 9312 *et seq.,* 83d Cong., 1st Sess. (1953).

The overall purpose of the Japanese Treaty and other United States post-war FCN treaties was to promote and protect private American investment abroad. Thus, in the 1953 Senate proceedings for advice and consent to the Japanese Treaty and other FCN treaties, the Chairman of the Subcommitee on

8. *See generally,* Report of the Senate Foreign Relations Committee, S. EXEC. REP. NO. 5, 83d Cong., 1st Sess. (1953) (the "1953 Senate Executive Report"); Hearing before a Special Subcommittee on Commercial Treaties and Consular Conventions of the Committee on Foreign Relations, United States Senate, 82d Cong., 2d Sess. (1952) (the "1952 Senate Hearing"); Hearing before the Subcommittee on Commercial Treaties of the Committee on Foreign Relations, 83d Cong., 1st Sess. (1953) (the "1953 Senate Hearing"); and 99 Cong. Rec. 9312 *et seq.,* 83d Cong., 1st Sess. (1953).

Commercial Treaties of the Senate Foreign Relations Committee emphasized the goal of promoting such investment:

> . . . the eight treaties now before the Senate are part of the comprehensive series of modern commercial treaties being negotiated between the United States and other nations with which we carry on trade. More than 130 treaties of this type have been concluded since 1778. Congress has asked that treaties of this kind be negotiated *in order to promote private investment.* (99 CONG. REC., 9312 83d Cong., 1st Sess. (1953)). [Emphasis supplied.]

And, in the 1953 Senate Hearing dealing with the Japanese Treaty and other FCN treaties then being considered, the Department of State underscored the related purpose of securing protection for private United States investment abroad:

> The object of the Department of State in negotiating treaties of this type is to facilitate the protection of American citizens and their interests abroad. The protection of such interests is a basic responsibility of the United States Government.
>
> * * *
>
> Such treaties facilitate the protection of American interests because they contain definite commitments with respect to specific rights. (Statement of Samuel C. Waugh, Assistant Secretary of State for Economic Affairs, 1953 Senate Hearing at 2).

Specifically with respect to the Japanese Treaty, the Department of State testified in 1953:

> The treaty [with Japan] is designed to protect American interests already established in Japan or which may become established in the future. (Statement of U. Alexis Johnson, Deputy Assistant Secretary for Far Eastern Affairs, United States Department of State, 1953 Senate Hearing at 26.)

By disregarding such legislative history, the Court below failed to perceive that the overall purpose of the Treaty is to promote, and to provide specific protections for, private American and Japanese investments on a reciprocal basis.[9] Instead, it examined the Treaty's provisions as discrete, isolated components to be strictly construed. This error, it will be seen below, led to a result which totally destroys both the general and specific private investment aims of the Treaty.

C. The Specific Purpose of the Treaty Provisions Invoked by Sumitomo is That a Subsidiary Establishment in the Host Country Shall Have the Right to Engage Home Country Nationals to Fill Key Positions.

In its motion to dismiss plaintiffs' Title VII claims, Sumitomo invoked Articles VIII(1) and I(1) of the Treaty, contending that it was the intent of the negotiators and the purpose of those provisions to ensure that private investors will enjoy the opportunity to manage and control their foreign establishments by using home country nationals in key positions in those establishments, including subsidiaries. In rejecting this argument on the basis that Sumitomo has no "standing" to invoke the Treaty, the District Court in its June 5 order pointed to its belief that no rights extend to a United States subsidiary of

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9. An essential aspect of the Japanese Treaty and other FCN treaties is their reciprocity, which the Department of State underscored in the 1953 Senate Hearing (*e.g.*, Statement of Samuel Waugh, *supra*, 1953 Senate Hearing, p. 3); *see also*, 1953 Senate EXEC. REP. No. 5 at 3.

a Japanese entity under the Treaty. In its November 29 Order, the Court admitted error in this regard but pointed to a new belief, to the effect that while some Treaty rights might extend to such a United States subsidiary, the rights granted by Article VIII(1) do not. In doing this, the District Court relied incorrectly on two factors. First, it said that since, among others, Article VII(1) of the Treaty expressly extends rights to subsidiaries and Article VIII(1) does not, then Article VIII(1) must be read to exclude subsidiaries from coverage (November 29 Order at A376-377). Second, the Court further reasoned that one must read Article XXII(3) of the Treaty to define a New York subsidiary of a Japanese entity as a "company of the United States" for purposes of substantive rights granted by the Treaty and concluded that such a New York subsidiary is therefore excluded from coverage of rights afforded by Article VIII(1) (November 29 Order at A377).

In its effort to contrast Article VII(1) with Article VIII(1), the District Court did not perceive the critical relationship of those Articles to each other and to the entire Treaty. Article VII(1) provides that nationals and companies of each contracting State shall have the right to do business in the other contracting state "directly or by an agent or through the medium of any form of lawful juridical entity" (4 U.S.T. at 2069). Elaborating upon this language, Article VII(1) also provides specifically for the rights to (a) establish branches, (b) organize or acquire companies under local law, and (c) "control and manage enterprises which they have established or acquired." (*Id.*).[10]

The State Department documents pertaining to negotiation of the Japanese Treaty show the essential cohesive relationship between these provisions of Articles VII(1) and VIII(1):

10. A review of the Treaty and its legislative history (cited at footnote 8, *supra*) shows that the drafters in their terminology used generic terms such as entreprises, investments or establishments. There is no evidence that they intended that one mode of investment, *e.g.*, branches, should be favored over another, *e.g.*, subsidiaries.

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. . .
>
> The new standard formulation of Article VII (and its companion, VIII) as proposed to Japan has already appeared in the treaty to Israel. . .(Outgoing Airgram No. A-453, Department of State to USPOLAD, Tokyo, dated January 7, 1952; A195).[11]

The intended interrelationship of the Treaty's establishment and management provisions was also explained in the context of Article I(1) of the Treaty when Department of State officials explained to Japan, in response to its inquiries, that a significant limitation applies to treaty traders, whose right to remain in this country is dependent upon their continuous employment with an enterprise (including expressly a subsidiary), controlled by nationals of the home treaty country:

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11. The interrelationship of Articles VII(1) and VIII(1) is also demonstrated in the State Department Documents relating to comparable provisions in the proposed FCN treaty between the United States and the Federal Republic of Germany:

> The first sentence [of Article VIII(1)] 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 (Foreign Service Despatch No. 2529, from High Commissioner for Germany to the Department of State, dated March 18, 1954, p. 1; A240).

> [Mr. Otabe] 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 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 (Department of State Despatch No. 13, April 8, 1952, pp. 1-2; A203-204). [Emphasis supplied.]

The importance of reading such FCN treaty provisions as part of a whole, and not phrase by phrase or sentence by sentence as done by the Court below, is stressed by Herman Walker:[12]

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12. Herman Walker is identified in the State Department Documents as the person "who formulated the modern (*i.e.*, post-WWII) form of FCN treaty and negotiated many FCNs. . ." (*See* Department of State Airgram No. A-105 to U.S. Embassy, Tokyo, dated January 9, 1976; A153).

> In a real sense . . . the FCN treaty as a whole *is* an investment treaty; not a mosaic which merely contains discrete investment segments. It regards and treats investment as a process inextricably woven into the fabric of human affairs generally; and its premise is that investment is inadequately dealt with unless set in the total "climate" in which it is to exist. (Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 AM. J. COMP. L. 229, 244 (1956)).

Specifically, Walker pointed out:

> Provisions on such matters as visa rights for merchants . . . can . . . assume material significance in the process of reaching a meeting of minds on purely "investment" questions. (*Id.,* at 244).

Thus, to read Article VIII(1)'s hiring right provision, because it does not expressly mention "subsidiary," as intending to exclude from protection subsidiary establishments in the United States, *i.e.,* establishments such as Sumitomo, ignores the *raison d'etre* of Article VIII(1), which was made part of the Treaty in order to ensure the foreign investor's control and management of the host country establishment, whatever the form, through use of home country nationals permitted to enter and remain in the host country pursuant to the Treaty.

Consistent with such negotiating history and commentary, the legislative history of the Japanese Treaty reveals that the State Department expressed to the Senate its intent that these FCN treaty provisions would ensure control and management of subsidiaries established in the host country. In the 1952 Senate Hearing, the Department of State pointed out:

> Perhaps the most striking advance of the postwar treaties over the earlier treaties is the cognizance taken of the widespread use of the corporate form of business organization in present-day economic affairs.
>
> * * *
>
> . . . the citizens and corporations of one country are given substantial rights in connection with forming local subsidiaries under the corporation laws of the other country *and controlling and managing the affairs of such local companies.* (1952 Senate Hearing at 4-5). [Emphasis supplied.]

See generally, Walker, *Provisions on Companies in United States Commercial Treaties,* 50 AM. J. INT'L L. 373 (1956).

During the 1953 Senate Hearing, the Department of State again emphasized the central interrelationship of the management right of Article VII(1) and the hiring right of Article VIII(1):

> Of special concern to investors are such assurances as those regarding . . . *the right of the owner to manage his own affairs and employ personnel of his choice.* (1953 Senate Hearings at 2). [Emphasis supplied.]

Commentators on the subject have also recognized that the primary purpose of Article VIII(1) is to ensure the right to employ home country nationals to manage and control enterprises established in the host country:

> This provision [Article VIII(1)] is valuable to American companies in particular because it means that . . . they may utilize, without regard

> to local laws which might otherwise enjoin them to use local nationals, employees of their own choice . . . METZGER, INTERNATIONAL LAW, TRADE AND FINANCE: REALITY AND PROSPECTS 151 (1963).

See also, Schwartz, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 STAN. L. REV. 947 (1979). There, the author observes that the contracting parties:

> . . . probably intended the "of their choice" language simply to permit foreign employers to appoint key personnel from among their own citizens (*Id.* at 953).

Schwartz concludes that the freedom of choice provisions of Article VIII(1) should be read to allow the employment of home country nationals. *Id.* at 954.[13]

The District Court's persistent reading of the definitional provision of Article XXII(3) as controlling over the specific substantive rights granted by these interrelated articles of the Treaty is thus demonstrably at odds with the negotiating history

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13. These authorities demonstrate that in *Linskey v. Heidelberg Eastern, Inc.,* 470 F. Supp. 1181 (E.D.N.Y. 1979), the District Court erred when it read a provision of the Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of Denmark (12 U.S.T. 908, T.I.A.S. 4797 [1961]), corresponding to Article VIII(1) of the Japanese Treaty, as providing merely that home country nationals engaged thereunder would be exempted from host country professional licensing requirements, such as those applicable to the practice of accountancy or law. In so holding, the Court in *Linskey* failed to perceive that the two sentences in Article VII(4) of the FCN Treaty there being considered, just like the two sentences of Article VIII(1) of the Japanese Treaty, should be read in the disjunctive, and that, accordingly, the first sentence assures a right generally to engage home country nationals for management positions, whereas the second sentence is directed toward host country professional licensing requirements which might restrain employment of unlicensed home country nationals in enterprises established in the host country.

of the Treaty. It also misperceives the purpose of Article XXII(3), which is not intended to limit substantive rights granted elsewhere in the Treaty. This was made clear in 1952 by a United States negotiator who represented to the Japanese negotiator who questioned the meaning of Article XXII(3):

> 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 [of Article XXII] 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. (Department of State despatch No. 13, *supra* at A207).[14]

All this means is that a subsidiary establishment like Sumitomo, or its counterpart doing business in Japan, is considered to have the nationality of the host country for purposes of recognition of its status as an entity. As Walker explains it, there is a

> . . . clear distinction maintained in the [FCN] treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus the acknowledgement of a fact — the existence and legitimate parternity of an association — is not confused with problems associated with the functional rights and activities of alien-bred associations . . . (Walker, *Provisions on Companies, supra,* at 383).

14. The same point was made by the United States to Germany in 1953 during negotiation of that FCN Treaty. *See,* Note of High Commissioner for Germany to German Federal Ministry of Foreign Affairs, dated December 13, 1953 (A314 at A315-16).

Legislative and negotiating histories of other FCN treaties also show that both before and after ratification of the Japanese Treaty, the United States intended that FCN treaty provisions concerning the right of employment of executive, managerial and specialist personnel ensure that home country nationals could be engaged to manage and control enterprises in the host country, without regard to the form of the investment. For example, in 1950, in connection with the then proposed FCN treaty with Uruguay, the Senate observed in its comment on the similar hiring right provision of that treaty[15] that:

> One of the difficulties that Americans have encountered in the conduct of their business abroad has been their inability to employ Americans, as distinguished from foreign, technical experts, executive personnel, attorneys, and other specialized employees. (Treaty of Friendship, Commerce and Economic Development with the Oriental Republic of Uruguay, S. EXEC. REP. No. 5, 81st Cong., 2d Sess. (1950)).

Documents in the record obtained from the State Department show that when the United States negotiators proposed to include a provision in the Uruguayan FCN treaty comparable to Article VIII(1) of the Japanese Treaty, the Uruguayan Foreign ministry attempted to introduce a limitation on the right to employ home country nationals, by adding at the end of the hiring article a proviso to the effect that no discrimination against host country nationals in the hiring of executives would be permitted, stating that the executive and managerial hiring right would be extended only

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15. Herman Walker noted in *Provisions on Companies, supra,* at 386, n. 62 (1956), with respect to Article VIII(1) of the Treaty with Japan, that "[a] provision of this kind first appeared in the proposed Uruguay treaty. . ."

> . . . on condition that, in 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 (*See* Telegram No. 385 of U.S. Embassy in Montevideo, addressed to the Department of State, Washington, D.C., November 8, 1949; A85).

The United States Embassy in Montevideo commented on this proposal as follows:

> Embassy recognizes this amendment would seriously weaken rights which this paragraph seeks to safeguard, and proposes resist acceptance. (*Id.*)

In response, the State Department agreed that the change proposed by Uruguay could not be tolerated, noting that it "may create serious difficulties". (November 10, 1949 Telegram of Department of State, Washington, D.C., addressed to United States Embassy in Montevideo, Uruguay; A86).[16]

Additional proof of the purpose of the interrelationship of these provisions and their purpose is seen in the 1954 negotiating history of a similar FCN treaty with the Federal Republic of Germany. In Department of State Instruction No. A-852, addressed to the High Commissioner for Germany ("HICOG Bonn"), dated January 21, 1954 (A224) the State Department made it clear to its negotiators in Germany that such treaties are not intended to regulate the form of investment:

> [t]he basic purpose of the treaty trader provision

16. The Senate gave its advice and consent to the proposed treaty with Uruguay on August 9, 1950. That treaty did not come into force, due to Uruguay's failure to ratify it.

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 C.F.R. § 41.70, § 41.71 and other applicable regulations (A224-225). [Emphasis supplied.][17]

17. The State Department regulations cited are the predecessor to present 22 C.F.R. §41.40, and required that to obtain a treaty trader visa

> (3) If he is employed or to be employed, his employer shall be a foreign person or organization. . . 22 CFR §41.71(b)(3), 33 DEPT. STATE BULL. 477 (1955).

(Cont'd)

Documents in the record also demonstrate that the United States has in fact had occasion to assert through diplomatic representations that the Treaty's rights extend to subsidiary establishments, when those rights were questioned in 1975 by Japan. Thus, the State Department Documents[18] show that an establishment incorporated in Japan, owned by a United States citizen, sought to hire two other United States citizens to work for it in Japan pursuant to the Treaty, and that Japan's Ministry of Foreign Affairs took a position similar to that adopted by the Court below. It refused to issue visas to the two United States citizens under Article I(1) of the Treaty to permit them to enter and remain in Japan for purposes of such employment. To justify such refusal, the Japanese government asserted that Article XXII(3) of the Treaty meant that the establishment in Japan was a "company of Japan" and thus was not entitled to claim the benefits of the Treaty.

In response to this refusal, Secretary Kissinger refuted Japan's interpretation of Article XXII(3) of the Treaty by pointing out that it

> . . .does not mean that [Government of Japan] is free to deny treaty rights to U.S. subsidiary set

(Cont'd)

The Explanatory Note to §41.71(b)(3) provided:

> A foreign organization within the meaning of this Section is an organization which possesses the nationality of the alien desiring to qualify as a 'treaty trader'. The fact that an organization is incorporated under the laws of a State of the United States does not necessarily determine that it is not a foreign organization. The nationality of such a corporation may be determined for visa purposes by the nationality of those persons who own the principal amount (*i.e.*, 51 percent or more of the stock of that corporation). *Id.*

18. Telegram No. 3989 from American Embassy, Tokyo, to Secretary of State, dated March 28, 1975 (A214, *et seq.*), and Telegram No. 11177 from American Embassy, Tokyo, to Secretary of State, dated August 3, 1975 (A216, *et seq.*).

> 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 (Department of State Airgram No. A-105, to American Embassy, Tokyo, January 9, 1976; A218, A219).

In conclusion, Secretary Kissinger stated:

> 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 (*Id.*)

This same view was expressed by the Department of State after commencement of this action in a detailed opinion given in reply to inquiries propounded to it about the Treaty by the EEOC (Letter of October 17, 1978, to Lee R. Marks, Deputy Legal Adviser, Department of State, to Abner W. Sibal, General Counsel, EEOC (A88) (also reprinted in 73 AM. J. INT'L. L. at 281-284 (1979)). There, the State Department opined that Article

VIII(1) in the treaty was intended to ensure that United States companies operating in Japan could hire United States nationals for key positions, and that in determining the scope of that right no distinction should be made between subsidiaries incorporated in the United States owned and controlled by Japanese entities, and those operating in the United States as unincorporated branches *(Id.* at A89-90).

The District Court chose in its June 5 Order to reject such opinion on the basis that it did not employ sufficient reasoning or analysis (June 5 Order at A116). The Court below ignored the fact that the October 17, 1978 opinion of the State Department was entirely consistent with the demonstrated purpose of the Treaty and long-standing regulations, rules and practices of the Department and the INS enforced and carried out since the time the Treaty came into force and down to today's date.

A later letter to the EEOC, signed by a new Deputy Legal Adviser, James R. Atwood, and dated September 11, 1979 (A347 *et seq.*) (reprinted in 74 AM. J. INT'L. L. at 158-159 (1980) disagrees with the Department of State's October 17, 1978 opinion insofar as the earlier document opines that the Treaty's hiring right extends to subsidiaries. This September 11, 1979 letter, however, also "indicates neither the documents on which the [State] Department relies nor its analysis" (November 29 Order at A372).

Putting aside the obvious — that the parties disagree about which of the State Department's conflicting letters is correct, and that both were criticized by the Court below it is apparent that the District Court erred in failing to give due weight to the conduct of the United States subsequent to the effective date of the Treaty, which is relevant to the proper construction to be given its provisions. *Day v. Trans World Airlines, Inc.,* 393 F. Supp. 217 (S.D.N.Y. 1975), *aff'd,* 528 F. 2d 31 (2d Cir. 1975),

cert. denied, 429 U.S. 890 (1976). Since ratification of the Japanese treaty, the United States has consistently recognized that United States subsidiaries of Japanese investors are entitled by the Treaty and by the INA to employ home country (*i.e.,* Japanese nationals) in key positions, as a means of control over and management of subsidiary establishments in the United States.

Such practice of the United States is shown by regulations adopted by the Department of State pursuant to the INA, specifying the criteria to be met by treaty trader aliens under the Japanese Treaty and other FCN treaties:

> An alien shall be classifiable as a nonimmigrant treaty trader if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(E)(i) of the Act and that: (1) He intends to depart from the United States upon the termination of his status; and (2) *if he is employed by a foreign person or organization having the nationality of the treaty country which is engaged in substantial trade as contemplated by section 101(a)(15)(E)(i), he will be engaged in duties of a supervisory or executive character,* or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity. *The employment must be* by an individual employer having the nationality of the treaty country who is maintaining the status of a nonimmigrant treaty trader, or *by an organization which is principally owned by a person or persons having the nationality of the treaty country* and, if not residing abroad,

> maintaining nonimmigrant treaty trader status (22 C.F.R. §41.40(a) as amended). [Emphasis supplied.]

Supplementing these regulations, the Department of State has set forth rules and practices in 9 *Foreign Affairs Manual,* Part II (Visas) which elaborate upon the requirements to be met for treaty traders to enter and remain in the United States. These rules and practices specify, with respect to the nationality of corporations eligible to employ treaty traders, that

> The nationality of a firm is determined for the purpose of section 101(a)(15)(E) by the nationality of those persons who own the principal amount (i.e., more than 50 percent) of the stock of that corporation, regardless of the place of incorporation. (9 *Foreign Affairs Manual,* Part II, §41.40, Note 8; *See also,* Note 16).

This rule has long been applied by the United States. *See, e.g., Matter of N.S.,* VII I. & N. Decs. 426, 428 (1958), where the INS stated:

> Since at least 1949 this Service and the Department of State have held that a "foreign" firm within the meaning of this provision is a firm which possesses the nationality of the alien desiring to qualify as a treaty trader under the provisions of the applicable commercial treaty; that the fact that a firm is incorporated under the laws of a State of the United States does not necessarily determine that it is not a foreign firm; and that the nationality of such a corporation may be determined for this purpose by the nationality of those persons who own the principal amount (i.e., more than 50 percent) of the stock of that corporation.

See also, Matter of Z and R, VIII I. & N. Decs. 482 (1959).

The foregoing shows that the District Court's June 5 and November 29 Orders do violence to the purpose of the Treaty and the intent of its negotiators, demonstrated by the legislative and negotiating histories of the Japanese Treaty and other FCN treaties, by authoritative commentators on the subject, by judicial authority, and by subsequent conduct including long-standing administrative regulations, rules and practices. Plaintiffs' purported Title VII claims attacking the Treaty-based employment rights relied on by Sumitomo should therefore be dismissed.

D. United States Subsidiaries of Japanese Corporations Have Standing to Assert a Right to Engage Japanese Nationals Under the Treaty and the INA.

The District Court disregarded practical reality by failing to take into account the manner in which international investments are made and controlled. For more than twenty-five years Sumitomo has in fact been recognized by the Department of State and by the INS as a beneficiary of the provisions of the Treaty relied on herein, and remains so today. It and other similar establishments in the United States are controlled and managed by their Japanese parent entities pursuant to the interrelated provisions of the Treaty invoked by Sumitomo herein. By holding that Sumitomo is unable to assert rights under those provisions, the Court below destroyed valuable protections the Treaty was intended to afford Sumitomo and other Japanese investments in the United States, and has placed at risk the Treaty's reciprocal protections for the similar subsidiary establishments of United States investors in Japan and the United States citizens they employ. It seems illogical to assume, as did the Court below, that the negotiators constructed this elaborate scheme of employment rights without intending for them to be available to subsidiary establishments.

Such a construction of the Treaty rights under attack herein is also at odds with the fundamental doctrine that treaties are to

be liberally construed in order to effectuate their purpose. Such doctrine was articulated by the Supreme Court in *Asakura v. Seattle,* 265 U.S. 339 (1924); where the treaty at issue before the Court was the Treaty of Commerce and Navigation between the United States and Japan, 37 Stat. 1504, entered into force July 17, 1911:

> Treaties are to be construed in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. 265 U.S. at 342.

The Supreme Court again articulated a liberal interpretation doctrine in *Jordan v. Tashiro,* 278 U.S. 123, 128 (1928), where it upheld the right of a Japanese national to establish a corporation in the United States to conduct activities consistent with the purpose of the 1911 United States-Japan FCN Treaty, *supra.* Using language equally appropriate to the case at bar, the Court stated:

> The principle of liberal construction of treaties will be nullified if a grant of enumerated privileges were held not to include the use of the usual methods and instrumentalities of their exercise . . . It would be difficult to select any single agency of more universal use or more generally recognized as a usual and appropriate means of carrying on commerce and trade than the business corporation. And it would, we think, be a narrow interpretation indeed, which in the absence of restrictive language, would lead to the conclusion that the treaty had secured to citizens of Japan the privilege of engaging in a particular business, but had denied to them the privilege of conducting that business in corporate form. (278 U.S. 123 at 128).

Similar reasoning was more recently applied by the Supreme Court in *Kolovrat v. Oregon,* 366 U.S. 187 (1961). There, the Court faced the question of whether rights under an FCN treaty could be claimed by treaty aliens not resident in the United States. In rejecting a restrictive "plain meaning" interpretation of the treaty's language, the Supreme Court declared in language also appropriate to apply herein:

> . . . if these rights of "acquiring, possessing or disposing of every kind of property" were not be afforded to merchants and businessmen conducting their trade from their own homeland, the Treaty's effectiveness in achieving its express purpose of "facilitating . . . commerical relations" would obviously be severely limited. It is not in such a niggardly fashion that treaties designed to promote the freest kind of traffic, communications and associations among nations and their nationals should be interpreted, unless such an interpretation is required by the most compelling necessity. (366 U.S. at 194) [Footnote omitted.]

Although the Court below acknowledged that under the Treaty ". . . nationals and companies have some employment rights in connection with enterprises in which they have financial interests . . ." (November 29 Order at A380), and that the State Department Documents ". . . do suggest that subsidiaries have a place within the scheme of the Treaty and its implementing regulations". (November 29 Order at A376), it failed to liberally construe those rights and, instead, expressly restricted them to a "plain reading" strict construction, failing thus to follow the teachings of the Supreme Court.

Furthermore, Sumitomo as an employer of treaty trader aliens has an interest in asserting claimed rights in litigation which places at issue its practice of employing such aliens. No genuine doctrine of "standing" bars the right to assert this claim.

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). In *Data Processing,* the Supreme Court articulated a two-pronged test for determining whether a plaintiff has standing to maintain an action: Plaintiff must suffer "injury in fact, economic or otherwise," and must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 152-53. It was not asserted below — by plaintiffs, the EEOC, or the District Court — that Sumitomo fails to meet such standard herein. The right of Sumitomo to rely on the Treaty's hiring right provision is not truly a standing question, but rather one of whether Sumitomo is an intended beneficiary of such right. Since the record shows that it is, and indeed that the United States has recognized that it is, then plaintiffs' Title VII claims against Sumitomo should be dismissed for failure to state a claim upon which relief may be granted.

II

TREATIES ARE THE SUPREME LAW OF THE LAND, AND THE JAPANESE TREATY HAS NOT BEEN ABROGATED BY TITLE VII

A. Treaties Are the Supreme Law of the Land And Are Not Abrogated by a Subsequent Act of Congress Unless Congressional Intent to Abrogate Is Clearly Manifested.

The United States Constitution declares treaties to be "the Supreme Law of the Land." Art. VI, Cl. 2. The courts have recognized the Treaty invoked herein by Sumitomo — and its 1911 predecessor — to be self-executing and, therefore, enforceable in the courts in the same manner as a statute. *In re Fotochrome, Inc.,* 377 F. Supp. 26, 29 (E.D.N.Y. 1974), *aff'd,* 517 F.2d 512 (2d Cir. 1975); *Oregon-Pacific Forest Products Corp. v. Welsh Panel Co.,* 248 F. Supp. 903, 910 (D.C. Ore. 1965); *Asakura v. Seattle, supra; Jordan v. Tashiro, supra.*

A self-executing treaty will not be deemed abrogated or modified by a later statute unless Congressional intent to do so is clear. Restatement, Second, Foreign Relations Law of the United States §145(1).

In fact, another District Court in this Circuit has more recently suggested that repeals of treaty obligations by later statute are especially not favored. Thus, in *Itzcovitz v. Selective Service Local Board, No. 6, New York,* 301 F. Supp. 168, 181 (S.D.N.Y. 1969), *appeal dismissed,* 422 F. 2d 828 (2d Cir. 1970), the District Court noted:

> It must be remembered that "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States,* 288 U.S. 102, 120, 53 S. Ct. 305, 311, 77 L. Ed. 641 (1933). This familiar rule

> should be strictly applied because relations with other countries are directly affected. Courts should be more hesitant to find that statutes of Congress modify or abrogate treaty provisions than to find that they repeal existing legislation because Congress was not the principal draftsman or actor in making the treaty part of the "supreme law of the land." Thus, the standard repealer clause contained in [the Selective Service Act] cannot be read to affect the treaty right unless the legislative history manifestly evidences such intention. . .

See also, Morton v. Mancari, 417 U.S. 535, 549-51 (1974).

The Court below suggested no reasoning which would support the contention that Title VII has repealed the freedom of choice in employment and related provisions of the Treaty relied on by Sumitomo. Absent a demonstration of a clear intent by Congress to effect such a repeal, none should be found by implication.

B. Congress Did Not Intend to Abrogate the Treaty. There is No Conflict Between the Rights Claimed Pursuant to the Treaty and the Classifications Proscribed by Title VII.

In this action, neither plaintiffs nor the EEOC have been able to point to even a suggestion in the legislative history of Title VII (including its amendments) that Congress intended to abrogate the nationality-based hiring practice authorized by the Treaty and the INA. Moreover, plaintiffs and the EEOC have not identified any inconsistency between the classifications proscribed by Title VII and the hiring practice authorized by the Treaty and the INA. Sumitomo contends there is no such conflict.

This follows from an examination of "what kinds of discrimination [Title VII] makes illegal." *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86, 95 (1974). The Supreme Court has

stressed that there must be a finding of the type of discrimination the statute makes illegal before a violation of Title VII can exist:

> The central focus of the inquiry in a [Title VII] case . . . is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin'. *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978), quoting *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335, n. 15 (1978).

Plaintiffs' grievance is that Sumitomo hires Japanese nationals for key positions. Plaintiffs have made it abundantly clear throughout this litigation that their complaint is directed against a hiring practice which distinguishes between Japanese nationals and United States citizens. However, discrimination between citizens and aliens is not proscribed by Title VII. As the Supreme Court flatly declared in *Espinoza v. Farah Mfg. Co., supra:*

> . . . nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage. 414 U.S. at 95.

The Court in *Espinoza* noted that to hold otherwise would achieve a bizarre result, because

> [t]o interpret the term 'national origin' to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. 414 U.S. at 90.

Also applying the teaching of *Espinoza,* the District Court in *Novak v. World Bank,* 20 EPD (CCH) ¶30,021 (D.C.D.C. 1979), dismissed a citizenship discrimination complaint for

failure to state a claim under Title VII, where, as here, the plaintiff claimed discrimination *against* United States citizens.[19] Similarly, expressly as to this litigation, in a recent commentary the author concludes:

> The [Article VIII(1)] "right of choice" provisions . . . were intended only to promote foreign investment by assuring foreign employers the right to choose their own citizens for important positions.
>
> Title VII does not impede this treaty right because it does not prohibit citizenship discrimination. Schwartz, *supra,* at 975.

Accordingly, any alleged conflict between Title VII's five prohibited classifications, and the nationality-based hiring practice authorized by the Treaty and the INA, is "more apparent than real," and any effort to build up such a conflict for purposes of trying to construct an argument that Title VII must take precedence over the Treaty, where no conflict between the two has been demonstrated, does not bear scrutiny. *Morton v. Mancari, supra,* 417 U.S. at 550. In *Morton v. Mancari,* the Supreme Court held that Title VII did not repeal by implication an earlier statute affording preferential hiring rights to members of federally recognized Indian tribes. In so holding, the Supreme Court concluded that the preference given to members of federally recognized Indian tribes was "political rather than racial in nature." 417 U.S. at 553, n. 24, *i.e.,* the preference there under attack was predicated on tribal citizenship, not a racial classification. The employment practice permitted by the Treaty is, as well, predicated on a political classification, *i.e.,*

19. So, too, an attempt to engraft a sex discrimination claim onto a challenge to Sumitomo's employment of Japanese nationals pursuant to the Treaty and the INA is insufficient to state a "sex plus" discrimination claim under Title VII. *See, e.g., Spirides v. Reinhardt,* 22 EPD (CCH) ¶30.740 at 14,825-14,826 (D.C.D.C. 1979).

citizenship, and therefore not on the basis of any classification made actionable by Title VII. Thus, as in *Morton v. Mancari,* Title VII is designed to deal with an "entirely different question" than the nationality-based hiring right granted by the Treaty. 417 U.S. at 550. Just as the Supreme Court recognized that the compelling policy of furthering Indian self-government, underlying the statute favoring Indian tribes in *Morton v. Mancari,* could co-exist with Title VII, the compelling policies of promoting and protecting private international investment, including measures to assure their control and management by home country nationals, can and should co-exist with Title VII.

In summary, plaintiffs' purported Title VII claims present no conflict justifying the conclusion that the Treaty provisions relied on by Sumitomo were abrogated by the enactment of Title VII.

CONCLUSION

For the above reasons, the District Court's decision denying Sumitomo's motion to dismiss the complaint for failure to state a claim upon which relief can be granted was erroneous and should be reversed.

Respectfully submitted,

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