1980

Brief for Plaintiffs-Appellees

Lewis M. Steel '63

Eisner Levy Steel & Bellman, P.C.

80-7418

To be argued by
LEWIS M. STEEL

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 PLAINTIFFS-APPELLEES

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

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court correctly determine that Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan is not applicable to a domestic corporation which is wholly owned by a Japanese business entity?

2. Does the 1953 Treaty of Friendship, Commerce and Navigation exempt Japanese business entities, or their domestic subsidiaries, from Title VII's prohibition against employment discrimination?

PRELIMINARY STATEMENT

This appeal raises the issue of whether a New York corporation, which is a wholly-owned subsidiary of a Japanese corporation, is exempt from Title VII of the Civil Rights Act of 1964, as a result of language in a treaty between the United States and Japan which allows "nationals and companies of either party" to hire certain categories of personnel "of their choice". Appellant, Sumitomo Shoji America, Inc., claims such an exemption. Appellees, all of whom are women, and all of whom are Americans, except for one appellee who is a national of Japan, claim that the civil rights laws apply to Sumitomo Shoji America, Inc. in the same way these laws apply to any American corporation. Appellees maintain that the plain language of the treaty as well as the evidence concerning what the parties intended when they negotiated the treaty, the legislative history before the Senate, the passage of certain laws since the treaty's approval, and the opinion of the United States Department of State fully support their position.

COUNTER-STATEMENT OF THE CASE

A counter-statement of the case is necessary because the statement in appellant's brief is incomplete, and at times inaccurate.

A. THE COMPLAINT

Appellees' complaint alleges two separate causes of action. The first cause of action asserts that Sumitomo Shoji America, Inc. (hereinafter "Sumitomo") has engaged in unlawful employment practices against appellees and the class they represent by "discriminating against women by restricting them to clerical jobs" and "discriminating against women by refusing to train them or promote them to executive, managerial and/or sales positions" (4a).

The second cause of action alleges discrimination on the basis of nationality. Again, it is claimed that plaintiffs and those represented are restricted to clerical jobs and are denied training and promotions to executive, managerial and/or sales positions (5a).*

B. FACTS RELATING TO SUMITOMO'S WORK FORCE

Certain basic facts concerning Sumitomo's work force emerge from Sumitomo's answers to interrogatories.

Sumitomo is incorporated in the State of New York (35a) and has its principal place of business in New York City (36a). It has branch offices in Los Angeles and San Francisco, California, Chicago, Illinois, Southfield, Michigan, Dallas and Houston, Texas, Pittsburgh, Pennsylvania, Portland, Oregon, and Seattle, Washington (37a). Sumitomo claims that

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* A third cause of action alleges that one of the individual appellees was retaliated against for filing her charge with the Equal Employment Opportunity Commission (5a).

each of its branch offices "has autonomous control" over labor relations policies for what appear to be non-managerial and non-executive positions. Sumitomo states it does not report to Sumitomo's corporate parent in Japan with regard to these practices except on an informational basis (37-38a).

Approximately 230 of Sumitomo's 464 employees work in its two offices in New York City (38a). Nationwide, Sumitomo employs 199 women, 96 of whom work in New York City (42a).

Sumitomo uses job titles (e.g. manager, salesperson, secretary) to classify its employees (39a). Employees are also classified as executive, managerial and supervisor, and others (41a).

C. SUMITOMO'S "EEO-1" REPORT

Sumitomo has filed reports called "EEO-1's" with the Equal Employment Opportunity Commission (hereinafter "EEOC") for its New York City offices for the years 1975 and 1976 (46a; 59-62a).

The 1976 New York City report reveals that Sumitomo listed 31 persons out of 219 persons employed in its 345 Park Avenue location as "officials and managers". According to the report, 28 of these 31 positions were filled by "Orientals". All of the officials and managers were male. Presumably, therefore, Sumitomo hired three American

males in this category.

Under the heading "Professionals," Sumitomo states it employed 35 persons. According to the form, 25 of these were "Orientals". The other 10 were American males. No women were employed as professionals.

Under the category, "Sales Workers," Sumitomo employed 43 persons. 37 persons in this category were Oriental males. 6 were American. No women were employed as sales workers. Only in the technician category, and in the office and clerical category, did Sumitomo employ women (62a).

Sumitomo states in its brief at page 6 that its executive, managerial and specialist positions are filled by "non-immigrant aliens, sent from Japan to Sumitomo in the United States by its Japanese parent corporation as so-called 'treaty traders'." In light of the EEO-1 reports, this statement is inaccurate. At least some of these persons, according to Sumitomo's own figures, are American males. On the other hand, women are represented only in lower level classifications.

D. RELEVANT TREATY PROVISIONS

Sumitomo seeks the dismissal of the complaint in this action by asserting it is exempt from the application of the civil rights laws as a result of the passage of a Treaty of Friendship, Commerce & Navigation (hereinafter "FCN") between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. 2863 (1953).

The most relevant provisions of the Treaty are reproduced in an appendix attached to this brief. These provisions include Article I(1) which allows nationals of either party to enter the territories of the other party for the purposes of directing their enterprises or developing a particular enterprise in which they have a substantial capital investment.

Article VII(1) accords nationals and companies of either party national treatment with respect to engaging in all types of business activities in the other party's territories, including the right to organize companies under the general corporate laws of the other party and to control and manage such enterprises.

Article VIII(1), the specific article upon which Sumitomo relies in this case, permits nationals and companies of either party operating within the other's territory to engage "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice". Under this Article, accountants and technical experts may be engaged by nationals and companies of either party for certain specified purposes "regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other parties". When reporting to nationals and companies of the foreign party, accountants and technical experts who are not qualified

in the host country may also render reports about enterprises in which the foreign company or national has "a financial interest".

Article XXII(1) defines "national treatment" and Article XXII(2) defines "most favored nation treatment". Article XXII(3) states:

> As used in the present treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not 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.

E. THE STATE DEPARTMENT LETTERS

The record contains three letters from the Department of State to the Equal Employment Opportunity Commission concerning the relationship of Title VII to the FCN treaty. In the first and third letters, the Department of State representatives took the position that the civil rights laws were fully applicable to Sumitomo. In the second letter, however, the State Department representative equivocated, taking the position that although Sumitomo received the right of freedom of choice under Article VIII(1) of the FCN, it nonetheless could not discriminate when exercising this right.

1. THE MARCH 15, 1978 LETTER. On March 15, 1978, Department of State attorney adviser Diane Wood wrote the EEOC in reply to a letter from that Commission which sought the Department's views concerning the jurisdiction of the Commission to investigate and process claims of discrimination relating to "treaty trader positions" (93a). The Department of State in this letter specifically considered Article VIII(1) of the FCN -- the article relied upon by Sumitomo in defense of this lawsuit. The State Department advisor concluded:

> 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 than 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 issued under the Act contain any specific exemption 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. (94a)

2. THE OCTOBER 17, 1978 LETTER. On July 28, 1978, Department of State Deputy Legal Advisor Lee Marks notified the EEOC that it had been asked by Sumitomo and a similar corporation to reconsider the views expressed in the March 15 letter.* The Department of State did reconsider and issued a second opinion letter over Mr. Marks' signature on October 17, 1978.

In this second letter, the Department took the position that Article VIII(1) of the FCN treaty was applicable to American subsidiaries of Japanese corporations. After expressing the belief that this Article permitted such subsidiaries to fill all their "executive personnel positions" with Japanese nationals admitted to the United States as treaty traders, the State Department qualified this by stating it expressed no opinion as to what positions would qualify as

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* The July 28, 1978 State Department letter is attached as Exhibit A to the affidavit of J. Portis Hicks, sworn to on August 15, 1978. See docket entry #32 of the Record on Appeal.

"executive personnel" (88-89a). Further, the letter stated:

> We do not believe the phrase "of their choice" should be read as insulating the employment practices of foreign companies from all local laws....[W]e do not believe that [the phrase "of their choice"] confers any right to discriminate against a particular sex, religious or minority group.
> (89a)

In coming to this conclusion that the phrase "of their choice" did not confer the right to discriminate, the Department pointed out:

> 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.
> (89a, footnote)

Further, the Department letter made clear that determinations that a particular individual could enter the country as a treaty trader did not foreclose the possibility that the employment of that person or similar persons would be violative of Title VII:

> 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.
> (90a)

The court below, in denying Sumitomo's motion to dismiss, specifically considered and rejected the October 17, 1978 letter.

3. THE SEPTEMBER 11, 1979 LETTER. Thereafter, Sumitomo filed a motion for reconsideration based upon documents it had received from the Office of the Legal Advisor of the Department of State on August 15, 1979 (171-172a). Sumitomo claimed that these documents supported its position that the complaint in this action should be dismissed. On September 11, 1979, however, the Department of State issued a third letter which came to precisely the opposite conclusion as to the significance of these documents.

In a letter to EEOC from Deputy Legal Advisor James Atwood, the Department stated it had "conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty, an issue in Spiess v. C. Itoh & Co. [citation omitted] and two other cases more recently decided in the District Court in New York (Avigliano v. Sumitomo Shoji America, Inc. [citation omitted] and Linskey v. Heidelberg Eastern, Inc. [citation omitted])"(357a).

This final Department of State letter then concluded:

> On further reflection on the scope of application of the first sentence of Paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to

> our satisfaction that it was not the intent of the negotiators to cover locally-incorporated subsidiaries, and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII(1) and (4), which respectively provide for national and most-favored-nation treatment of the activities of such subsidiaries. While we do not necessarily agree with all points expressed by the Court in deciding the Itoh case on the question of subsidiary coverage, we do concur in general terms with the Court's reasoning, and specifically in the result reached in interpreting the scope of the first sentence of Article VIII, paragraph 1. (357-358a)

F. THE DECISIONS BELOW

The court below rendered its first decision, denying Sumitomo's motion to dismiss the complaint on June 5, 1979 (108-133a). In that opinion, the court rejected Sumitomo's contention that Article VIII(1) of the treaty exempted it from Title VII. Relying essentially on Article XXII, paragraph 3 of the FCN, the court below found that Sumitomo was a New York corporation and, therefore, did not have standing to invoke Article VIII. The court pointed out that its ruling was consistent with "traditional rules of corporate law which ... accord to the corporation the citizenship of its place of incorporation" (112a). In reaching this con-

clusion, the court below rejected the position taken by the State Department in its second letter, dated October 17, 1978, because that letter contained no analysis or reasoning in support of its positions (116a). The court also rejected Sumitomo's contention that Department of State regulations relating to the admission of aliens as treaty traders should control the outcome of this litigation (116-118a).*

Thereafter, Sumitomo sought certification pursuant to 28 U.S.C. §1292(b) regarding the Title VII-FCN issue (135a).** On August 9, 1979, the court below granted certification (138-145a). The District Court stated it was doing so in light of the conflict between its decision and the October 17 State Department letter (141a).

Thereafter, Sumitomo moved for reargument, citing the August 15, 1979 documents which the State Department had released to the parties. The District Court considered and discussed these documents in detail in its decision denying Sumitomo's motion (359-380a).

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* The court below, however, did dismiss appellees' claims under 42 U.S.C. §1981 on the ground that it did not believe that national origin discrimination was indistinguishable from racial discrimination (119-120a). The District Court also ruled on motions made by appellees to dismiss Sumitomo's counterclaims, holding that Sumitomo could sue the plaintiffs for abuse of process and for a prima facie tort for bringing this Title VII suit (122-127a).

** The appellees crossmoved for certification regarding the court's decision to dismiss the 42 U.S.C. §1981 claims and its failure to dismiss all of Sumitomo's counterclaims (137a). This motion was denied.

By the time the court below rendered its final decision in this matter, it had before it the third State Department letter in which the Department determined that Sumitomo, as a locally incorporated subsidiary, could not claim coverage under Article VIII of the FCN. In rendering this decision, the court determined to give some, but not decisive weight to this letter, because, in the court's view, the letter did not indicate the documents upon which the Department relied nor its analysis (372a).

Instead, the court conducted an independent analysis of the August 15 State Department documents, and determined that they merely established that Sumitomo was entitled to national treatment which would protect it against discrimination (373-378a). In reaching this conclusion, the District Court pointed out that the drafters of the FCN specifically gave locally incorporated subsidiaries certain rights under certain other articles of the treaty, while they did not do so under Article VIII(1). The court, therefore, concluded that the negotiators had carefully considered which rights they intended to give subsidiaries and which rights were reserved for the foreign entity only (376a).

ARGUMENT

INTRODUCTION

Sumitomo contends that it is entitled to fill all of its non-clerical positions with Japanese male nationals notwithstanding that such a policy may violate Title VII. In support of this claim, Sumitomo points to Article VIII(1) of the FCN which permits "nationals and companies of either party...to engage, within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." Sumitomo apparently believes that because of Article VIII it is entitled to limit women to clerical work, and in the process deny them access to every job category above that level -- including sales positions, a classification not even referred to in the Article. See "EEO-1" Report (62a) which documents the patterns of exclusion.*

Appellees assert that the District Court was correct in determining that Article VIII(1) is inapplicable to Japanese-controlled domestic corporations. Furthermore, even if this Court were to determine that Sumitomo may invoke Article VIII(1), it should nonetheless find that Title VII is fully applicable to the appellant.

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* According to Sumitomo's "EEO-1" Report, the employment opportunities of non-Orientals, whether male or female, appear severely restricted, although males of American national origin do hold some managerial and sales jobs.

I.

ARTICLE VIII(1) OF THE TREATY DOES NOT APPLY TO AMERICAN SUBSIDIARIES OF JAPANESE CORPORATIONS

The court below ruled that the "of their choice" clause in Article VIII(1) did not apply to Sumitomo as that Article gives rights only to "nationals and companies of either party". In reaching the conclusion that a domestic subsidiary was not a national or company of either party, the District Court looked to Article XXII(3) which specifically states that the place of incorporation determines a company's nationality. The court below also pointed out that the treaty specifically gave domestic corporations controlled by foreign nationals and companies certain rights under certain articles, but did not do so under Article VIII(1). As a result, the court concluded, "The drafters knew how to give locally incorporated subsidiaries rights under specific articles." (376a). Thus, the court concluded that the failure of the drafters of the Treaty to include locally incorporated subsidiaries of foreign corporations within Article VIII(1) was not inadvertent. As a result, the lower court held that it would be guided by the plain meaning of the Treaty. The court's analysis in this regard is replete with record citations.

The court below also noted the Department of State in its September 11, 1979 letter came to the conclusion that the negotiators did not intend to cover domestic subsidiaries

when they approved Article VIII. The court gave some, but not decisive weight, to the Department's opinion because the letter did not indicate specifically the documents relied upon or the analysis used by the State Department (372a). Appellees contend that the court below did not give the State Department letter the full weight to which it is entitled.

It is well settled that the interpretation given a treaty by the executive branch deserves great deference. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933). In its letter, the State Department specifically stated that in reaching its conclusion, it had not only conducted an extensive review of the U.S.-Japan negotiating file, but also studied the files of other FCNs (357a). While the Department did not specify particular documents, obviously it studied in detail the documents it submitted to the parties on August 15, 1979 and made a part of this record (173-355a).

A critical document turned over by the State Department was an airgram of July 23, 1952 sent by Secretary of State Acheson to the American Embassy in Tokyo. This airgram, sent when the treaty was in the final stages of negotiation, apparently responded to an inquiry as to what would happen if citizens of a third country, which had refused to enter into an FCN with Japan, sought to gain treaty advantages by incorporating in the United States and then claiming privileges under the U.S.-Japan FCN. The airgram stated that the problem

was resolved by Article XXI(1)(e) which allows the host country to pierce the corporate veil under such circumstances. The airgram included the following analysis:

> ...Article XXII, paragraph 3...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 the location of the principal place of business or the nationality of the major stockholders are disregarded.
> (208a)

Secretary Acheson's analysis was consistent with traditional rules of corporate law (see the citations in the first opinion of the court below (112a)) as well as with Amtorg Trading Corp. v. United States, 71 F. 2d 524 (Ct. of Customs and Patent Appeals, 1934). In that case, the claim was made that Amtorg could not appear in the courts of the United States inasmuch as it was an agent of the Soviet Government which had not been recognized at that time by the United States. After analyzing the links between the Soviet Union and Amtorg, the court found that the corporation was under the direct control of the Soviet Union. However, the court held that Amtorg was a citizen of the State of New York, as it was a corporation, organized in New York and doing business under the laws of New York. Thus, the court held, "it was, therefore, a citizen of that state, invested with the right to sue and be sued...." 71 F. 2d at 528.

Rejecting an argument that it could look behind the state of incorporation in order to determine who owned the stock and controlled the operation of Amtorg, the court ruled:

> In this proceeding, which is purely statutory, we are not concerned with the ownership of the stock, nor does it make any difference where the stockholders reside. Citation omitted. The character of the corporation, and its powers and responsibilities, depend upon the place where the charter was granted. Citation omitted. 71 F. 2d at 528.

The State Department position is fully consistent with basic principles of international law. In Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. Rep., the International Court of Justice stated:

> In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with a rule governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments.

In the event of any dispute between the United States and Japan, the International Court of Justice is deemed the final authority on the interpretation of the FCN treaty. Article XXIV(2).

Furthermore, the leading authority on this type of treaty has stated, "any corporation...which has been duly formed under the laws of one of the contracting parties...must be accounted by the other party as a company of the party of its creation." H. Walker, Companies, Chapter 7, in R.R. Wilson, United States Commercial Treaties and International Law, 182-193 (1960).

The Acheson airgram does raise the possibility that a corporate veil may be pierced by a signatory nation in order to preserve the purposes of the treaty. In the example given, Japan was concerned that an enterprise controlled by nationals of an unfriendly nation might seek to take advantage of treaty terms by incorporating in the United States. In this event, the veil could be pierced to prevent the corporation from obtaining an advantage the FCN had not intended to bestow. In this case, however, it is not a signatory nation which seeks to pierce a corporate veil. Instead, Sumitomo argues it is entitled to pierce its own corporate veil for its own benefit. Corporations, however, may not do this. Schenley Distillers Corp. v. United States, 326 U.S. 432, 437 (1946). In a situation analogous to this case, the National Labor Relations Board rejected the argument of an American subsidiary of a foreign corporation that it should be allowed to pierce its own corporate veil to exempt itself from American labor laws. S K Products Corp., 230 NLRB 1211, 95 LRRM 1498 (1977).

The judgment of the executive branch as to the interrelationship of Articles XXII and VIII is, therefore, firmly based on underlying documentation and traditional legal theory. This being so, the position set forth in the September 11 letter is entitled to great deference.

Notwithstanding the clear language of the treaty and the State Department's most recent opinion, Sumitomo argues against the place of incorporation doctrine because nationals of Japan may be admitted under the treaty into the United States as treaty traders to work for Japanese controlled domestic corporations pursuant to Article I(1) of the FCN and Section 1101(a)(15)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. §1101, et seq. Sumitomo points out that under an implementing State Department regulation, 22 C.F.R. 41.40, aliens are classifiable as treaty traders if they will be employed in the United States by an organization which is principally owned by a person or persons having the nationality of the treaty country. Thus, Japanese nationals can gain entry into the United States to be employed by Sumitomo.

The wording of 22 C.F.R. 41.40, however, is totally consistent with Article I(1) which allows access to nationals of either party in order to direct enterprises in which the foreign party has invested. This article is, therefore, much broader than Article VIII(3). Moreover, even in the second State Department letter -- the only letter in which Sumitomo

finds any comfort -- the Department's deputy legal advisor specifically pointed out that the handling of visa applications is not determinative of the issues raised by this case. The letter states:

> 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.* (90a)

There can be no doubt that the court below was correct in ruling that the immigration laws and regulations are not controlling on the issue of whether Sumitomo should be considered a domestic corporation or a Japanese company for purposes of application of Article VIII (117-118a).

Sumitomo also relies heavily on a State Department airgram dated January 9, 1976, sent over Secretary Kissinger's signature (appellant's brief at 25-26) for its proposition that domestic subsidiaries have the same "of their choice" rights as their foreign parents. The purpose of the Kissinger airgram was to give American Embassy officials in Japan arguments to convince the Government of Japan that it should grant treaty trader status to two Americans seeking entry in order to work for a United States citizen-owned business incorporated in Japan.

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* See also Matter of N---------- S----------, 7 I. & N. 426, 428 (1957), which makes clear that rulings with regard to visas are merely for the purpose of determining entry into the country.

This airgram, however, does not aid Sumitomo. It does not state that a foreign-owned domestic corporation is entitled to invoke Article VIII(1) of the FCN. Instead, the airgram concludes that "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."

This position is consistent with the State Department September 11 letter and is in accord with the language of the FCN. Article VII(1) refers not only to "nationals and companies of either party," but to "enterprises which they have established or acquired," and speaks of "enterprises which they control". By contrast, Article VIII(1) gives rights only to "Nationals and companies of either Party." According to the Kissinger airgram, Article VII(1) necessarily means that some foreign nationals should be allowed entry in order to control and manage such a foreign owned corporation. The airgram, however, goes no further, and is no justification whatsoever for claiming immunity from local antidiscrimination employment laws. Moreover, the airgram was composed 13 years after the passage of the FCN, and the very fact that the State Department was drawn into a visa dispute reveals that the Government of Japan was taking a contrary position as to the FCN's meaning on the question of whether even a limited number of American citizens had the right to enter Japan in order to direct American financed businesses.

Contrary to the position urged by Sumitomo, every court which has considered the question has held that subsidiaries of foreign corporations that are incorporated in the United States are domestic corporations, fully subject to United States laws. See Spiess v. C. Itoh & Co. (America) Inc., 469 F. Supp. 1 (S.D. Tex. 1979); Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181 (E.D.N.Y. 1979); United States v. R.P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1957).* Sumitomo has pointed to nothing which in any way weakens the strength of these well-reasoned opinions.

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* Individuals who enter the country as aliens also may not accept benefits under domestic law, and at the same time seek exemptions under a trade treaty. In Todok v. Union State Bank, 281 U.S. 449 (1929), an alien argued that a trade treaty exempted him from complying with the requirement of the Nebraska Homestead Laws. Rejecting this claim, the Court stated:

> When Knudson selected the homestead, he sought the advantages of the provisions of the local laws to Homesteads, and he could not properly obtain the benefits of these provisions without accepting the property with the quality which the law attached to it.
> 281 U.S. at 456.

II.

ASSUMING SUMITOMO MAY INVOKE ARTICLE VIII(1), IT STILL MUST MAKE EMPLOYMENT DECISIONS IN CONFORMITY WITH TITLE VII

As appellees understand the history, meaning and purpose of Article VIII(1) which gives foreign nationals and companies the right to hire certain employees "of their choice," this right must nonetheless be exercised consistent with the prohibitions against discrimination contained in Title VII.

Both the treaty in question and Title VII have important purposes. The treaty is designed to promote and protect foreign investments. The civil rights acts are designed to implement the higher aspirations of the American people that each individual is entitled to be judged on his or her own merits, rather than on the basis of arbitrary classifications. In studying the interrelationships between the treaty and the civil rights laws, it must be remembered that "the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either...." Whitney v. Robertson, 124 U.S. 190, 194 (1888). A harmonious interpretation of both Article VIII(1) and Title VII would allow a foreign employer to engage in hiring of its own choice in the categories specified by the Article consistent with its duty not to discriminate.

Harmonizing the treaty and statute in this manner is consistent with the philosophy underlying Article VIII(1).

In this regard, the State Department documents which are part of the record here make clear that the Japanese negotiators sought assurances that state laws which discriminated against aliens would not apply to their nationals. For example, a Foreign Service dispatch from Tokyo to the Department of State dated December 17, 1951 (187-195a), emphasizes that the Japanese negotiators were interested in eliminating American employment bars "merely by reason of alienage" (189a). In response, the State Department pointed out in a telegram dated January 7, 1952 (195-199a) that there were various state laws in effect at the time which would adversely affect aliens seeking work in the United States. The telegram stated that, "to the extent that the treaty contained a national treatment provision on the professions, any contrary provisions of state law would be ipso facto overridden, insofar as Japanese nationals were concerned."

Documents submitted to the court below relating to other FCN's confirm that a major purpose of the treaties' sections concerning the employment of personnel was to override state laws which discriminated against nationals of foreign countries. Thus, a Foreign Service dispatch dated March 18, 1954 relating to the German FCN (239-253a) stated with regard to Article VII that "its major special purpose is to preclude the imposition of 'percentile' legislation" (240a). Clearly, these documents indicate that the employment provisions of the treaty were intended to eliminate discrimination, not to

allow the foreign enterprise the right to discriminate in the host country.

Sumitomo relies heavily on the writings of Dr. Herman Walker, a scholar who played a leading role in formulating the post-World War II FCN's. The appellant, however, has misread Dr. Walker's writings. Dr. Walker makes clear that the purpose of the FCN's is to eliminate discriminatory bars. Dr. Walker has written:

> Traditionally, the standard of "national treatment" for the activities of natural persons has been written into United States commercial treaties so that such persons are enabled freely to go about their affairs without discriminatory burdens or harassments. A salient characteristic of the treaties for the period since 1946, therefore, has been the explicit extension to company activities of this same long-established principle. These treaties...thus assure to companies of either party equality of treatment with companies of the other party, with respect to engaging in all ordinary business activities, commercial, industrial and financial. This principle applies to both the initial establishment of an enterprise (the entry into the activity) and to the terms and conditions under which the company is entitled subsequently to conduct its enterprise (carry on the activity).
>
> H. Walker, Companies, Chapter 7 in R.R. Wilson, United States Commercial Treaties & International Law, 182, 197-98 (1960).

A leading Japanese commentator has taken the same view of the FCN, pointing out that Japan is fully entitled to enforce its laws against foreign enterprises which function in Japan pursuant to an FCN as long as the laws are "applicable to the Japanese as well". Fujita, Does Japan's Restriction on Foreign

Capital Entries Violate Her Treaties?, 3 Law in Japan 162, 172, note 29 (1969).

The legislative history of the FCN's as developed in the hearings before the Senate also confirms that the Treaty provisions and Title VII are not at odds. The purpose of the FCN treaty* was explained to the Senate Subcommittee considering its approval by Samuel Waugh, Assistant Secretary of State for Economic Affairs. Mr. Waugh noted that investors wanted assurances concerning their rights to engage in business activities "upon as favorable terms as the nationals of the country, the right of the owner to manage his own affairs and employ personnel of his choice...." (1953 Hearings, 2).** [Emphasis added. Sumitomo's brief at 19 cites this statement, but omits the clause emphasized above.] Mr. Waugh continued his explanation:

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* A series of FCN treaties was approved by the Senate in 1953, all of which adhered to the same substantive pattern. See U.S. Department of State Press Release, April 2, 1953, reported at U.S. Department of State Bulletin 531.

** See "Hearing Before Subcommittee of the Committee on Foreign Relations, U.S. Senate," 83rd Congress (July 13, 1953). The hearing minutes are appended to plaintiffs' Memorandum in Opposition to defendant's motion to dismiss the complaint. This document appears in the record as Docket No. 27. Hereinafter it is referred to as "1953 Hearings".

> The extension of reciprocal privileges to aliens in this country has not as an object in itself, entered into the planning or execution of the program of negotiating these treaties, but it is necessary in order to secure American rights abroad. Mutuality is the only basis upon which it is possible to obtain the assurances required. In the current series of treaties of the type now before you it has not been the intent to introduce any new provisions that would be at variance with state or federal laws.... (1953 Hearings, 3) (Emphasis added)

This statement was followed by a colloquy relating to state legislation which restricted certain professions to citizens. Waugh had previously mentioned that the FCN's might affect such laws in "relatively minor respects". In response to this remark, Senator Hickenlooper sought and obtained assurances that the treaty would not apply to professions involving public health and safety. Id. This discussion establishes that the State Department was well aware of how the nuances of state law could impact upon both citizens and aliens. It is significant, therefore, that at no time did the State Department representative state that the FCN's would act to repeal or in any way modify state anti-discrimination laws. At the time of the hearings, anti-discrimination laws had been passed in several states specifically prohibiting employment discrimination based upon race, creed, color or country of national origin. See e.g. New Jersey Law Against Discrimination, Chapter 169, L145; New

York State Human Rights Law, Executive Law, Article §296(a).*

The intent of the American negotiators to leave state laws intact was given special emphasis at the hearings. Following up after Mr. Waugh's testimony was concluded, Senator Hickenlooper asked Vernon G. Setser, Chief, Economic Treaties Branch Commercial Policy Staff, Department of State:

> Is it the intent of the Department or the administration, in negotiating these treaties, either to enlarge the authority of the Federal Government for legislation within the States, or to curtail or restrict the authority of the States themselves in any manner where they have formerly had authority?

The Department of State representative answered:

> No, sir.
> (1953 Hearings, 4)

This answer was consistent with the policy set forth by the State Department at the 1952 FCN Hearings:

> In undertaking treaty commitments that would formally confirm to foreigners a substantial body of rights in the United States, the Department of State has exercised great care to frame provisions that would be in conformity with Federal law.... Furthermore, where the subject matter covers fields in which the States have a paramount interest, such as the formation and regulation of corporations and the ownership of property, the treaty

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* Since 1938, the Constitution of New York State -- the state in which Sumitomo chose to incorporate -- has prohibited discrimination by, among others, any corporation. (New York State Constitution, Article I, Section XI, as adopted by the Constitutional Convention of 1938 and approved by the electorate November 8, 1938.)

> provisions have been worked out with the same careful regard for the States' prerogatives and policies that has traditionally characterized agreements of this type.
>
> Senate Foreign Relations Subcommittee Hearing on the Friendship Treaties Between the United States, Columbia, Israel, Ethiopia, Italy, Denmark and Greece. (May 9, 1952, p. 6).

The United States Supreme Court has held that wherever possible, a treaty should not be construed in a manner which brings it into conflict or overrules State law. Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 143 (1938); United States v. Pink, 315 U.S. 203, 230 (1940). In light of the legislative history it is clear that approval of the FCN's did not deprive the states of the right to pass antidiscrimination laws. Obviously, if this right remained with the states, the purpose of the treaty was not to exempt foreign businesses from laws prohibiting discrimination. A fortiori, federal antidiscrimination laws cannot be deemed in conflict with treaty provisions.

That Japan and the United States contemplated the passage of antidiscrimination legislation by their governments is also apparent from a review of the history of the Treaty of Peace between the two nations. The preamble of the Treaty of Peace with Japan, of December 8, 1951, 3 U.S.T. 3171 recites that Japan declares its intentions to apply for United Nations membership, to conform to the principle of that organization's Charter, to strive to realize the objectives of the Universal

Declaration of Human Rights and to seek to create within Japan conditions of stability and well-being as defined by Articles 55 and 56 of the Charter. Members of the United Nations, in compliance with Articles 55 and 56 of the Charter, 59 Stat. 1037, 1045-46, pledge themselves to "take joint and separate action" for the achievement of "universal respect for and observance of human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion." *

Article VIII(1) of the FCN can, therefore, hardly be read to prohibit the passage of civil rights legislation which would effectuate the purposes of Articles 55 and 56 of the Charter. Given this background, when Professor Walker wrote that Article VIII was a provision "technically going beyond national treatment, to prevent the imposition of ultra-nationalistic policies with respect to essential executive and

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* Japan was admitted to the United Nations on December 12, 1956 by General Assembly Resolution 1113 (XI). Assuming a conflict between the FCN and Title VII, the parties' obligations under Articles 55 and 56 of the Charter must prevail. See Article 103 of the United Nations Charter, 59 Stat. at 1053. See also Article 30(3) of the Vienna Convention on the Law of Treaties, 63 Am. J. Int'l L. at 884-85. This Court has applied this principle in Fotochrome, Inc. v. Copal Co., Ltd., 517 F. 2d 512, 518, n. 4 (2d Cir. 1975). While it may be argued that Articles 55 and 56 of the United Nations Charter are not self-executing, it is clear that Title VII does execute the intent of the Charter to eliminate discrimination. Therefore, a member of the United Nations certainly is not in a position to object to the application of Title VII to the member country's nationals and companies. As the Charter of the United Nations is both the "higher law" by virtue of Article 103 and the later law in relation to the FCN treaty, it follows that any conflict between the treaty and Title VII must be resolved in favor of Title VII.

technical personnel," (50 AM. J. Int'l. L. 373, 386, 1956), he obviously meant that the Article was intended to eliminate nationalistic barriers rather than permit the imposition of new discriminatory devices. This is the explanation of the FCN employment articles given by other scholars. See Steiner and Vagts, Transnational Legal Problems, 37-38 (Foundation Press, 1968).

It is therefore clear that Sumitomo's argument in Point II of its brief that Title VII cannot be applied to either foreign corporations or domestic subsidiaries of foreign corporations operating in the United States pursuant to the FCN unless appellees are able to point to a clear expression of Congress to abrogate the FCN's "of their choice" provision, is based upon an obviously incorrect assumption. Title VII did not abrogate the FCN; it is in harmony with the treaty. Given the obligation of the courts "to construe [the treaty and statute] so as to give effect to both, if that can be done without violating the language of either...." (Whitney v. Robertson, 124 U.S. 190, 194 (1888); see also Baker v. Carr, 369 U.S. 186, 212 (1962)), Sumitomo's argument should be rejected.

Finally, Sumitomo argues that Congress did not intend to have Title VII apply to entities like itself because nothing in that statute proscribes discrimination on the basis of citizenship or alienage. Sumitomo constructs this argument by attempting to stretch the Supreme Court's holding in Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1974) to fit its

needs in this case.

At the outset, appellees point out that their first cause of action alleges discrimination on the basis of sex. This cause of action is independent of the second cause of action. Moreover, the second cause of action does not allege discrimination on the basis of citizenship. Instead, it alleges discrimination on the basis of nationality. In seeking evidence in support of this cause of action, appellees have filed interrogatories seeking statistics concerning the country of national origin of Sumitomo's employees (42a).

More importantly, with regard to the second cause of action, Sumitomo's explication of the Espinoza case is woefully inadequate. In that case, the Court did rule that citizenship discrimination was not per se illegal under Title VII. But the Court said more. It instructed:

> In some instances, for example, a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national origin discrimination. Certainly, Tit VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.
> 414 U.S. at 92 (emphasis added)

In Espinoza, the Court pointed out that the record negated the possibility that the citizenship requirement utilized

by the employer had the purpose or effect of producing national origin discrimination. In this case, only a few of the employees above the clerical level are persons of non-Japanese national origin. The reasons why this is so must be explored at trial.

Sumitomo also suggests that the reasoning employed in Morton v. Mancari, 417 U.S. 535 (1974), creates a Title VII exemption for itself. Morton, however, cannot be so distorted. In that case, the Supreme Court dealt with historic preferences which had been granted to Indians who worked for the Bureau of Indian Affairs (BIA) or were employed by Indian tribes for industries located on or near Indian reservations. The purpose of these preferences was to correct historic discrimination against Indians and to further Indian self-government. In Morton, it was contended that the 1972 extension of Title VII to cover Federal employment sub silentio repealed an earlier Congressional Act which called for Indian preference in the BIA. The Court disagreed. It pointed to a series of Acts which were passed after the 1972 Title VII Amendment which included new Indian preferences, and also noted that the Indian preference in private employment was specifically exempted from the coverage of the 1964 Act. In determining that the anti-discrimination laws did not repeal the Indian preference laws, the Supreme Court pointed out that the two statutes were designed to deal with obviously different

problems. Thus, they were not in conflict and were capable of co-existence. As the Supreme Court said, "A provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily exist with a general rule prohibiting employment discrimination on the basis of race." (417 U.S. at 550-1).

By contrast, a law designed to eliminate employment discrimination can hardly exist side by side with dozens of FCN Treaties interpreted to allow certain domestic corporations as well as their foreign parents who choose to operate in the United States to practice massive employment discrimination. The interpretations of both the Treaty and Title VII which Sumitomo urges upon this Court accord with neither the plain meaning nor legislative and/or negotiating history of both laws.

CONCLUSION

For all the above reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs-Appellees

LEWIS M. STEEL
RICHARD F. BELLMAN
IRA PEARLSTEIN
Of Counsel

APPENDIX

RELEVANT PROVISIONS OF THE TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION BEWTEEN THE UNITED STATES AND JAPAN.

ARTICLE I

1. 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; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens.

* * *

[1953] 4 U.S.T. 2063, 2066; T.I.A.S. No. 2863.

ARTICLE VII

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage

enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

* * *

4 U.S.T. at 2069.

ARTICLE VIII

1. 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. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territies.

2. Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party.

* * *

4 U.S.T. at 2070.

ARTICLE XXII

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

* * *

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies therof and shall have their juridical status recognized within the territories of the other Party.

* * *

4 U.S.T. at 2079-2080.