8-16-1979

Defendant Counsel's Affidavit in Support of Application with Exhibits (State Department Documents)

Wender, Murase & White

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------x

SUMITOMO SHOJI AMERICA, INC., :

Petitioner, :

v. : AFFIDAVIT

LISA M. AVIGLIANO, ET AL., :

Respondents. :

----------x

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

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

1. I am a member of the bar of this Court and of the law firm of Wender, Murase & White, counsel for petitioner, Sumitomo Shoji America, Inc. I make this affidavit in support of an application for an order (1) staying proceedings herein; (2) extending the time limits governing the filing of papers in respect of appeals pursuant to 28 U.S.C. §1292(b), and (3) preserving jurisdiction of the United States District Court for the Southern District of New York (Tenney, J.) to reconsider its Order dated June 5, 1979 denying in part Sumitomo's motion to dismiss the complaint herein.

2. The procedural background herein is set forth in a letter written today by my law firm to Judge Tenney, a copy of which is annexed hereto as Exhibit "1". As may be seen therein, Sumitomo's motion to dismiss plaintiff's complaint below

was made in reliance on provisions of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan (4 U.S.T. 2063), granting Sumitomo freedom of choice in the hiring of managerial and executive personnel. That motion was denied, but leave to seek permission to appeal was granted by Judge Tenney by Opinion and Order entered August 10, 1979. On August 16, 1979, pursuant to Rule 5, F.R.A.P., Sumitomo filed its petition seeking permission to appeal.

3. On August 15, 1979, the United States Department of State released for the first time numerous documents germane to the Treaty at issue. Such documents materially cast into question the decision of Judge Tenney denying Sumitomo's motion based on the rights granted by the Treaty.

4. As may be seen from Exhibit 1 hereto, we are attempting to bring these documents to the attention of Judge Tenney so that he may withdraw his certification order and reconsider his earlier decision denying Sumitomo's motion to dismiss in light of this newly discovered evidence. We are advised by Judge Tenney's law clerk that Judge Tenney is out of town and will not return until sometime next week.

5. Rather than run the risk of losing its right to petition for permission to appeal, Sumitomo has filed its petition on this date. However, as presently posited, there is an appeal being sought in this Court on an incomplete record and the District Court has not yet had an opportunity to determine whether it should reconsider its June 5, 1979 Opinion and Order which is the subject of Sumitomo's appeal. In light of the evidence newly

provided by the State Department, Sumitomo believes it would be more economical and would conserve judicial resources to have such appellate review held in abeyance until Judge Tenney has had a chance to evaluate this new evidence.

6. Because Judge Tenney is presently unavailable, in order to provide him the opportunity to review the new evidence, and to assure that Sumitomo does not forfeit its right to petitio for interlocutory appeal, Sumitomo respectfully requests an order of this Court as follows:

(a) Staying all proceedings herein;

(b) Granting Sumitomo leave to file supplemental or amendatory papers in support of its petition 10 days after Judge Tenney determines Sumitomo's request that he reconsider the June 5, 1979 Opinion and Order; and

(c) Granting Judge Tenney the right to withdraw hi August 9, 1979 Opinion and Order without prejudice to the re-enti or re-filing of same, or a similar order, upon his determination of Sumitomo's request for reconsideration.

7. We will continue to seek a conference with Judge Tenney on this matter at the earliest moment practicable for the District Court. Because the issues raised by this application, absent an order from this court as requested, may be rendered moot, we respectfully request this matter be heard by this Court on oral argument as soon as possible.

8. No previous application has been made for the relief sought herein.

J. PORTIS HICKS

Sworn to before me this
16th day of August, 1979.

PAMELA ROTH
Notary Public, State of New York
No. 41-4622480
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1981

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PARTNERS RESIDENT IN
DÜSSELDORF
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LONDON
TOKYO
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WASHINGTON, D.C.

August 16, 1979

Hon. Charles H. Tenney
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Avigliano, et al. v. Sumitomo Shoji America, Inc., 77 Civ. 5641 (CHT)

Dear Judge Tenney:

We are counsel for Sumitomo Shoji America, Inc. ("Sumitomo"), defendant in the above-captioned civil rights action. We are writing this letter to request that this Court, on the basis of evidence just released to the parties by the United States Department of State, reconsider its June 5 Opinion and Order (the "Order") insofar as the Order denied Sumitomo's motion to dismiss plaintiffs' Title VII claims herein. Because Rule 5(a) FRAP, imposes a ten day limitation on filing a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), we also request that this Court withdraw its Opinion and Order dated August 9, 1979, certifying for immediate appellate review the primary question posed in Sumitomo's motion to dismiss; i.e., whether Sumitomo is exempted under the terms of

the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan (the "Treaty") from sanctions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") against certain allegedly discriminatory practices of Sumitomo in its employment of managerial and executive personnel.

On Sumitomo's original motion to dismiss, this Court, like the Court in Spiess, et al. v. C. Itoh & Co. (America), Inc., 469 F. Supp. 1 (S.D. Tex. 1979), criticized an October 17, 1978 opinion letter of the Department of State construing the Treaty favorably to Sumitomo's position, because such opinion letter failed to offer analysis or reasoning in support.

On August 13, 1979 (the date on which this Court's Opinion and Order of August 9 was reported in the New York Law Journal), we obtained a copy thereof and transmitted it to the United States Department of State. On August 14, 1979 our firm was informed by George Lehner, Esq., an attorney adviser in the Department of State, that the State Department was prepared to release various documents regarding hiring rights granted by the Treaty which it had searched for and located subsequent to this Court's Opinion and Order of June 5, 1979. Copies of such documents were released yesterday to counsel for all parties herein. We believe that such documents bear

significantly on the relationship between the Treaty and Title VII, and most particularly on the issue of the standing of United States subsidiary of a Japanese corporation to raise as a defense to the maintenance of this action the managerial and executive hiring rights granted by the Treaty.

As may be seen from the enclosures, which constitute but a few of the documents furnished by the Department of State, contemporaneous legislative history shows, and the State Department has in fact long taken the position, that under the 1953 Treaty, subsidiaries of United States or Japanese companies established in the territory of the other nation may claim the hiring rights provided for in Article VIII(1) of the Treaty. The enclosures also show that the State Department has for years rejected any limitation on that right by reason of Article XXII(3) of the Treaty, see, e.g., copy of January 9, 1976 cable from Secretary of State Kissinger addressed to the U.S. Embassy in Japan, citing relevant authority and negotiating history of the Treaty.*

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* In respect of standing to assert rights under the Treaty, Secretary Kissinger states "....[Article XXII(3) of the Treaty] does not mean that [the Government of Japan] is free to deny treaty rights to U.S. subsidiary set up in Japan. [W]hile the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the Treaty."

In view of the importance of the Treaty rights at issue herein, and the fact that this new evidence could not have been discovered by Sumitomo nor used by it prior to the issuance of this Court's Opinion and Order of June 5, 1979, Sumitomo respectfully requests that this Court grant it the opportunity to submit papers to this Court defining the significance of this new evidence, and speaking to the matters outlined in our firm's letter to the Court dated April 23, 1979, which requested leave to submit a memorandum dealing with the Spiess decision.

Sumitomo must, pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure, file by no later than Monday, August 20, a petition for leave to appeal this Court's June 5, 1979 Opinion and Order. Under the circumstances, we respectfully suggest that it appears appropriate for this Court to withdraw or vacate its Opinion and Order of August 9, 1979, granting certification for appeal, until it has determined whether to reconsider its June 5 Opinion and Order insofar as it relates to Sumitomo's motion to dismiss, and determined whether it will entertain the submission of further papers by the parties and by amicus curiae, pursuant to a briefing schedule. We believe that this Court has the power to vacate its Opinion and Order of August 9, 1979 for purposes

of considering this substantial issue in light of new facts. See, Nakhleh v. Chemical Construction Corporation, 366 F. Supp. 1221 (S.D.N.Y. 1973).

It appears obvious that time and expense to the parties and to the Court can be greatly conserved if reconsideration of the June 5, 1979 Opinion and Order is had prior to prosecution of Sumitomo's appeal. Whether or not the Court decides the matter differently, there will at the least be a fuller record for the Court of Appeals to consider, i.e., the State Department's recently produced documents will be part of the record.

While we could make a formal motion for reargument, and also make a motion for an order withdrawing this Court's August 9, 1979 Opinion and Order, it appears to us that much resource would be wasted in the preparation and submission of the various papers which would be required for such applications.

In view of the foregoing, we request an immediate conference with the Court to discuss what procedures the Court might wish the parties to follow in order to reach a speedy and economical disposition of this matter. We respectfully request a conference with the Court as soon as may be

convenient. Since we are informed that your Honor is away from the Court, we are concurrently herewith requesting an order from the United States Court of Appeals for the Second Circuit which would have the effect of preserving this Court's jurisdiction of the subject matter.

Respectfully,

J. Portis Hicks

cc: Lewis Steel, Esq. (By Hand)

Lutz Alexander Prager, Esq.

Enclosures:

1. Cable of Secretary of State Henry A. Kissinger, to U.S. Embassy, Tokyo, Japan, dated January 9, 1976.
2. Dispatch No. 13, dated April 8, 1952, from Office of U.S. Political Adviser for Japan (see pp. 3-4).
3. Memorandum of Department of State, A-852, dated January 21, 1954, to HICOG, Bonn, Republic of Germany.
4. Memorandum of HICOG Bonn, dated March 18, 1954, to the Department of State (see pp. 1-2).

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HANDLING INDICATOR NO.

FCN 2
Japan

TO : AmEmbassy TOKYO

E.O. 11652: N/A
TAGS: CGEN, CVIS, EINV, JA

FROM : Department of State DATE: 1976 JAN -9 AM 9:45

SUBJECT : GOJ Interpretation of FCN Treaty

REF : Tokyo 11177

Department Legal Adviser's office has examined meaning of paragraph 3 of Article XXII of the U.S.-Japanese FCN Treaty signed at Tokyo April 2, 1953, and fully concurs with Embassy's general position as set forth reftel.

Most persuasive arguments we have found are (a) law review article on FCNs by Herman Walker, Jr., who formulated modern (i.e., post-WW II) form of FCN treaty and negotiated many FCNs; and (b) negotiating record of U.S.-Japan FCN, especially Dispatch No. 13 from Tokyo of April 8, 1952. Both documents are enclosed. Walker cites (pp 380-81), para 3 of Japnese FCN as standard definition of company for purposes of treaty, i.e., in the standard FCN treaty "A 'company' is defined simply and broadly to mean any corporation, partnership, company or other association which has been duly formed under the laws of one of the contracting parties; that is, any 'artificial' person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit." This formulation is intended to avoid such complex questions as the law to be applied in determining company status. Every association meeting test of valid existence must have its "company" status duly recognized and is then eligible for substantive rights granted to companies under the treaty.

In Dispatch 13 (p. 5), Jules Bassin, Legal Attache to Embassy, stated to Mr. Mikizo Nagai, Chief, Sixth

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Section, Economic Affairs Bureau, that "the recognition mentioned in the second sentence of paragraph 3...meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party."

Thus, all that para 3 is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted, the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

For reasons stated above, argument in para 2 of reftel that nationality of a company is determined by nationality of shareholders is not correct. Rather, a company has nationality of place where it is established (see pp. 382-83 of Walker). However, this does not mean that GOJ is free to deny treaty rights to U.S. subsidiary set up in Japan. While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, an American Company (i.e., one organized under U.S. law), may manage its Japanese subsidiary (i.e., a company set up under Japanese law). So too, under Article I, a U.S. national may enter Japan to direct his investment, even though the investment is a Japanese company. In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrue to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.

KISSINGER

Enclosures:
Herman Walker Law Review Article on FCNs
Dispatch No. 13 from Tokyo Apr. 8, 1952

RESTRICTED
(Classification)

Enclosure No. 4
Page 1 of 5
Despatch No. 13 — Tokyo

Office of the United States Political Adviser for Japan,
Tokyo.

FCN 2 Japan

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEMITSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Mikizo NAGAI, Chief, Sixth Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan.

Date: Tuesday, April 8, 1952. FOURTEENTH INFORMAL MEETING

ARTICLE XX

Mr. Otabe stated that in order to avoid any possible differences in interpretation it should be clearly understood that the meaning of the word "transit", as used in Article XX, was the same as that used in Article V, paragraph 1 of the GATT, which states:

> "Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this Article 'traffic in transit'."

Mr. Otabe added that it should also be understood that "transit through the territories of each Party", mentioned in Article XX, includes passengers, baggage, and products carried by aircraft.

Mr. Singer replied that the GATT definition of "transit" was acceptable in interpreting Article XX, and that Mr. Otabe's understanding with reference to

the inclusion of aircraft traffic was correct.

Mr. Otabe stated that under present regulations, export validations are required in Japan for the temporary unloading and trans-shipment of cargoes when these involve specific commodities subject to export licensing under Japan's security export control procedures. He asked for confirmation of his understanding that the implementation of security export controls would not be regarded as constituting "unnecessary delays and restrictions", as mentioned in Article XX.

Mr. Adams replied that Mr. Otabe was correct in his understanding, and that security measures, including export validations and licenses, were permissible under paragraph 1 (d), Article XXI.

ARTICLE XXI

Mr. Otabe referred to previous discussions on Article VIII (at the fifth meeting, March 7, 1952) when the Japanese side had proposed that the second sentence of paragraph 3 (i.e. "Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities.") be deleted from that Article in as much as this clause was of general application. Mr. Otabe stated that this provision might more appropriately fit in Article XXI, and he now proposed that it be inserted in the latter Article.

Mr. Adams replied that when this clause was included in the provision on general exceptions in other United States FCN Treaties (for example in the Treaties with Colombia, Israel, Uruguay and others), the phraseology employed was: "The present Treaty does not accord any rights to engage in political activities". Subject to the views of the Department of State, which might prefer to use the terminology just mentioned, Mr. Adams suggested that this Article be amended as proposed by Mr. Otabe (i.e., that the second sentence, paragraph 3, Article VIII be inserted in Article XXI as paragraph 3-bis, for subsequent re-numbering in the final draft).

Mr. Otabe stated that the Japanese side earnestly desired that the second sentence of paragraph 3, Article XXI, reading, "Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement" (i.e., GATT), be deleted from this Article. Mr. Otabe pointed out that since Japan is not a member of the GATT, such concessions as are granted by the United States under a multilateral Agreement not yet open to Japan, would be outside the scope of the Application of most-favored-nation treatment. The purpose of the present treaty prescribing unconditional most-favor d-nation treatment would therefore actually be defeated in practice. Furthermore, he said, since the United States is in fact granting the GATT concessions to Japan, the deletion of this sentence would have no effect on the actual relations between the two countries. He again pointed out that the present FCN Treaty will become a model for future treaties to be negotiated between Japan and other countries, and that it was feared that the inclusion of this sentence would establish an unfavorable and most unfortunate precedent, particularly in connection with early negotiations anticipated between Japan and countries already in the GATT.

Mr. Singer stated that the Department of State had proposed and secured the standard GATT reservation in previous negotiations on the assumption that the country concerned was actually free to come into the GATT, and that any failure on its part to be in the GATT, being of its own choosing, had no effect on the propriety of this reservation. He pointed out that it was not the desire of the United States to use the GATT reservation in order to impose unequal trade relations, and that the Department of State had indicated that some adjustment might be made in the present case in view of the special circumstances involved. There was as yet no definite idea as to what the appropriate solution might be, but it was believed that it should be in the nature of a clarification or qualification of the third paragraph.

Mr. Adams added that paragraph 3 was essential to the FCN Treaty, but that the American side would be most willing to consider any solution the Japanese would desire to submit. He stated that a bilateral treaty could not, of course, commit the United States to any course of action inconsistent with its obligations under the GATT, and that it appeared therefore that any qualification suggested by the Japanese side should be made with reference to the second sentence of paragraph 3, and not to the first sentence.

Mr. Bassin added that the Department of State wished to reassure the Japanese representatives that their point of view was fully appreciated, and that it was prepared to approach this problem in a sympathetic manner, fully confident that a mutually satisfactory solution can be found.

Mr. Otabe replied that further consideration would be given this matter, and that the Japanese side would be prepared to discuss a proposed clarification or qualification of this paragraph, possibly at the next meeting.

With respect to paragraph 4, Article XXI, Mr. Otabe asked for a definition of "limited purposes". He asked whether a treaty trader or an employee of a Japanese company, permitted to enter the United States in connection with the activities of that company, might subsequently enter the employment of another company, for example of a domestic American firm, without violating the provisions of this paragraph. He also inquired whether employment in another Japanese firm, for example a subsidiary or affiliate of the company originally employing this individual, would be permissible.

Mr. Adams replied that a treaty trader or an employee of the type mentioned by Mr. Otabe would be permitted entry into the United States as a non-immigrant, subject to specific limitations on his activities. He added that various types of visas of a non-immigrant or temporary character are issued for entry into the United States; these are granted subject to varying conditions, qualifications or restrictions, and are valid for varying periods, ranging from a few months (for tourists) to an indefinite period of stay (for the so-called treaty traders). The latter are issued a visas of indefinite tenure, valid for so long as they continue to promote trade and commerce between the United States and their country. These individuals could change employment while in the United States, provided, of course, the character of their employment remained unchanged and they continued to promote trade and commerce between the United States and their country. This change could be made with the prior knowledge and approval of the appropriate officials of the

Department of Justice (the Immigration and Naturalization Service of the United States).

In reply to further questions put by Mr. Nagai, Mr. Adams stated that it is only the individual who enters the United States as an immigrant for permanent residence who is not subject to specific limitations or restrictions on his business or professional activities. Mr. Adams added that the Japanese employee previously mentioned by Mr. Otabe would not be permitted to resign from a Japanese firm in order freely to seek employment in the United States. It was possible, however, for this employee to leave one Japanese branch firm to work for an affiliate or subsidiary of that firm, or even for another legitimate Japanese enterprise also engaged in promoting commerce between Japan and the United States, without losing his treaty trader status, provided the prior approval of the Department of Justice were obtained.

ARTICLE XXII

Mr. Otabe asked for a clarification as to the difference between corporation and company, and for a definition of partnerships and other associations as used in paragraph 3, Article XXII.

Mr. Bassin replied that a company is a society or association of persons interested in a common object and uniting themselves for the prosecution of some commercial or industrial undertaking or other legitimate business. The word, he added, is a generic and comprehensive term which may include individuals, partnerships and corporations. Furthermore, the term is not necessarily limited to a trading or commercial body, but may include organizations to promote fraternity among its members and to provide mutual aid and protection. He added that the word is sometimes applicable to a single entrepreneur.

Mr. Bassin stated that a corporation, on the other hand, is an artificial person or legal entity, created under the authority of the law of a state or subdivision thereof. It consists of an association of numerous individuals as a group under a special denomination which is regarded in law as having a personality and existance distinct from that of its several members. A corporation is vested with the capacity of continuous succession, either in perpetuity or for a limited term of years, and acts as a unit or single individual in matters related to the common purpose of the association within the scope of the powers and authority conferred upon it by law. The words "company" and "corporation" are commonly used as interchangeable terms. Strictly speaking, however, Mr. Bassin said, a company is an association of persons for business or other purposes and may be incorporated or not.

Mr. Bassin further stated that a partnership is a voluntary contract or association between two or more persons to place the money, effects, labor and/or skill of some or all of them in lawful commerce or business, with the understanding that there shall be a proportionate sharing of the profits and losses among them. An association, Mr. Bassin stated, is the union of a number of persons for some special purpose or business. It is generally an unincorporated society, and may consist of a body of persons united and acting together without a charter but pursuant to the methods and forms used by incorporated bodies for the prosecution of a common enterprise. The word "association" is a generic term and may at different times

comprehend a voluntary association, such as a partnership, which is dissoluble by the persons who formed it, or a corporation dissoluble only by law.

Mr. Otabe stated that these definitions were satisfactory and would be helpful in properly translating this Article into Japanese. He then asked if the various religious groups and foundations in the United States were considered juridical persons, and whether they were included in paragraph 3.

Mr. Bassin replied that organized religious groups and foundations may be juridical persons, but are usually unincorporated associations.

Mr. Otabe inquired whether a Zaidan Hojin was covered by paragraph 3, and, if so, what would be the nature of national treatment accorded such organizations in the United States. He explained that a Zaidan Hojin is a duly organized juridical person with given property, established for the purpose of employing or disposing of said property for a given public purpose. An example of a Zaidan Hojin, he added, would be an endowed private library.

Mr. Bassin replied such an organization would be considered a juridical person in the United States, pursuant to the provisions of paragraph 3, if it were so considered in Japan.

Mr. Nagai then asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned in paragraph 3 meant anything more than the recognition of the existence of a juridical person.

Mr. Bassin replied that "juridical status" meant "legal status", the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph 3, he added, meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party.

It was then agreed that the next meeting would be held on Friday, April 11, 1952, with discussions to begin on Article XXIII.

DEPARTMENT OF STATE INSTRUCTION

1872

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NO.: A-852 January 21, 1954

SUBJECT: Treaty of Friendship, Commerce and Navigation.

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TO: HICOG, BONN

Reference HICOG despatch No. 1904, January 8, 1954.

There follow the Department's comments with respect to the points raised by Dr. Paulich at the January 4 meeting regarding the provisions of Article II, paragraph 1.

1. The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under 22 CFR 41.70, 41.71 and other applicable regulations.

2. The apparent discrepancy between the treaty and the Immigration and Nationality Act with respect to use of the term "substantial" is of no legal or practical significance either when considered in the treaty trader clause alone or taken together with

the treaty

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DRAFTED BY: EDT:CP:CHSullivan:hc 1/19/54

APPROVED BY: CP: V. C. Setser

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the treaty investor clause. Use of the term "substantial" in the treaty trader provision of the Act merely gives explicit recognition in the law to an administrative practice of long standing. It was not deemed necessary to reword the treaty as a consequence, for the treaty provision as now worded has long been applied in a manner requiring that the trade for which entry is permitted shall be substantial in character. This does not derive from Article II(1)(c), however, but from Article II(3), taken together with the general right to apply reasonable and nondiscriminatory regulations consistent with the intent and purpose of the treaty provision in order to implement the commitment and to protect the privileges accorded thereby from abuse. In the case of the treaty investor provision, however, the term "substantial" has been carried over from the law to the treaty as an aid to its construction and implementation. This was done simply because the investor clause, unlike the trader clause, is new and an established body of interpretation has not yet developed.

It may be noted in connection with hypothetical cases involving substantiality of trade that this requirement is applied in a liberal manner. In determining the substantiality of the trade within the meaning of the treaty trader clause, monetary or physical volume are not used as the exclusive criteria. The intent is to assure that the trade in question is not a brief, isolated excursion into international trade but a sustained volume of bona fide commercial transactions. Consequently, the number of transactions, the continuous character of the operations and a number of other factors are taken into consideration as well.

(It is believed that Dr. Paulich, in discussing this point, had reference to an unofficial summary of the new immigration legislation prepared by Mr. Frank Auerbach of the Visa Office of the Department of State. This work is entitled The Immigration and Nationality Act: A Summary of its Principal Provisions, and copies presumably are available in the office of the Supervisory Consul General.)

3. Dr. Paulich's observation that the fixing of the period of sojourn for aliens entering the United States as nonimmigrants is done by immigration officers at the port of entry rather than by consular officers when the visa is issued is correct. However, this procedure is specifically required by law and hence not merely a matter of administrative convenience. Section 214(a) of the Immigration and Nationality Act expressly vests the Attorney General with authority to prescribe by regulation the period of time for which nonimmigrant aliens may be admitted to the United States. A treaty trader or treaty investor, by reason of the purposes of the treaty, is regarded as admitted on an indefinite basis as to sojourn, provided, of course, that he maintains his status as a trader or investor under the treaty. Hence the administrative regulations governing entry and sojourn (8 CFR 214e2) contain no specific limitation as to time. This does not preclude, however, requirements that the alien comply with reasonable procedures designed to assure that

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he is maintaining his status as a treaty alien and otherwise complying with the conditions of his admission; and the measures referred to by Dr. Paulich are in the nature of such requirements.

SMITH, ACTING

AIR POUCH
PRIORITY

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611.62A4/3-1854

FOREIGN SERVICE DESPATCH

FROM : HICOG BONN

2529
DESP. NO.

TO : THE DEPARTMENT OF STATE, WASHINGTON

March 18, 1954
DATE

REF : OURDES nos. 1355, October 28, 1953; 1372, October 30, 1953; and 2501 March 16, 1954

For Dept. Use Only	ACTION	DEPT.
	E-4	INFO REP-2, DC/R-2, GER-4, OLI-6, L-2
	REC'D 3/26	OTHER CIA-5, COM-8, FOA-10, TR-3

SUBJECT: New Treaty of Friendship, Commerce, and Navigation: Report on March 16, 1954 Meeting with German Negotiators

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The 32nd regular business meeting for negotiation on the subject matter was held at the Foreign Office on March 16, 1954. Dr. BECKER, as usual, served as chairman of the German team which included representatives of the Foreign Office and the Ministries of Economics, Justice, Labor and Interior. The U.S. side included Messrs. BOEHRINGER, LEVY, and WALKER.

The meeting on March 16 was devoted to a detailed discussion of U.S. Article VIII on employment, professions, and non-profit activities, and U.S. Article IX on property rights.

Article VIII, Paragraph 1

The Germans stated that their preference remained to delete this paragraph, as being unnecessary, but that they were prepared to accommodate U.S. wishes for its retention in the treaty. They felt it to be in general acceptable as drafted, subject perhaps to linguistic clarifications and verification of their understanding of its intent. They had some questions to ask, in response to which the U.S. side developed answers as follows during the course of the discussion:

(1) The first sentence is of a general nature, being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel. Its major special purpose is to preclude the imposition of "percentile" legislation. It gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law. The Germans said they might wish to suggest some linguistic revisions to clarify this last point. The U.S. side said they did not feel that further clarification was essential, especially as the juxtaposition of the contrasting wording of the first and second sentences gives clear clarification by implication; but declared their willingness to consider any reasonable proposal, in deference to German views. No express clarification had been necessary in any other treaty, to the best recollection of the U.S. side.

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(2) The second sentence deals with a special and limited situation, and within its framework goes beyond the first sentence, inasmuch as it waives professional qualification requirements in the cases stipulated. These have to do with temporary jobs requiring special skills (e.g., for an American firm, competence in American law and accounting methods) for internal management purposes; and no right is created to engage in the general practice of a profession in the host country. In reference to the question of entry into the country, necessary entry privileges are implied. With specific reference to the needs of a German firm in the United States, procedures are understood to be available whereunder temporary visas can be issued in properly justified cases.

(3) The word "moreover" introducing the second sentence is merely a convenient connective, and has no special substantive significance. The Germans said that it did not carry over very well into German; and it was agreed that it be translated as jedoch in the German text.

(4) It was agreed to frame the first sentence in a manner similar to that agreed on for Article VII, paragraph 1, to wit:

> "Nationals and companies of Germany shall be permitted to engage within the territories of the United States of America, and reciprocally nationals and companies of the United States of America shall be permitted to engage within the territories of Germany, accountants .....et cetera."

Article VIII, Paragraph 2

It was agreed, as in the case of the preceding paragraph, to reframe the first sentence along the following lines:

> "2. Nationals and companies of Germany shall be accorded within the territories of the United States of America, and reciprocally nationals and companies of the United States of America shall be accorded within the territories of Germany, national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities, and shall be accorded the right to form associations for that purpose under the laws of the country....."

Article IX

Dr. von SPRECKELSEN from the Justice Ministry, who acted as principal technical spokesman for the German side, commented that some legal difficulties had arisen which had not been considered during the earlier discussion of U.S. Article IX in October, 1953 (see reference despatches)

which required additional explanation. He noted that these difficulties pertained to existing German legislation with respect to the acquisition of real property by alien natural persons and by alien juridical persons "residing abroad".

Acquisition of Realty in Germany by Alien Natural Persons

The German side noted that limited restrictions only were applicable regarding the acquisition of real property by alien natural persons and that these curtailments were based not on Federal but on old Laender legislation applicable in Hamburg, Hesse, and the part of the Rhineland-Palatinate which formerly belonged to Hesse.

They explained that in the above-cited Laender the acquisition of real property by alien natural persons depended on authorization granted by the Land authorities and that the purchase contract could not be fulfilled until the required authorization had been obtained. They noted that the date of the purchase contract became valid for the acquisition once the authorization had been accorded, but that the purchase contract was voided if the required authorization were denied. They added that the acquisition of real property by alien natural persons was subjected to such an authorization not only in cases of acquisition by contract but also in instances of acquisition by intestate or testate succession. They stressed that the existing provisions were being liberally applied, and that reciprocity treaties had been in the past concluded by Germany with other countries which waived the authorization requirement if likewise the countries concerned did not impose restrictions for the acquisition of real property by German nationals.

Acquisition of Realty by Alien Juridical Persons Residing Abroad

Dr. von Spreckelsen observed that for the acquisition of real property by alien juridical persons residing abroad practically all Laender required the granting of an authorization before a purchase contract became valid. He stated that the Laender applied the provisions on a liberal basis, and that old German treaties had renounced the application in case other countries had been prepared to grant reciprocity to German juridical entities.

He concluded that in view of these existing requirements it was difficult for the German side to accept paragraph 2 of U.S. Article IX, and asked whether the United States had ever granted natural and juridical alien persons in the United States national treatment as a treaty right.

The U.S. side reviewed U.S. treaty policy on this point and noted that only the 1953 treaty with Argentina provided for national treatment with respect to acquisition of title to real property, and then only in the case of natural persons. They added that the treaty with France

originally negotiated about 100 years ago had contained a similar provision but had been rejected by the Senate as constituting undue interference in State rights; and that the policy of the Federal Government for years had been to abstain from interfering with State regulation of land ownership. They stated that the present text of paragraph 1, U.S. Article IX, which granted national treatment with respect to the leasing of land needed for treaty purposes without according a similar right for the holding of land by title, represented an internal U.S. compromise on the question of how far alien land tenure should be the subject of treaty commitments.

They stressed that the present text granted the greatest advantages for practical treaty purposes and added, with respect to clause 1 (b), that many States did not have discriminatory provisions in their legislation. In this connection, they noted that half the States had no disability laws, and perhaps 15 - 18 other States had variously slight or partial disability provisions, such as South Carolina and Pennsylvania which applied acreage limitations of a rather mild sort; Nebraska, which permitted full ownership inside municipalities but not in rural areas; and Wisconsin which prevented large scale holding of farmland by aliens by imposing acreage limitations in rural areas. They added that only seven or eight States had severe disability laws as to alien tenure. They concluded that, accordingly, an alien would for the most part be accorded either national treatment or very liberal treatment in the United States with respect to matters of treaty concern, and that the U.S. proposed language granted de facto reciprocity since any German Land could withhold rights to a U.S. natural or juridical person seated or domiciled in a State which imposed restrictions on Germans.

The U.S. side noted that the issue of property rights by treaty was sensitive in the United States; and also that the proposed text placed the responsibility for any right withheld from a U.S. national abroad on the States which maintained disability provisions in their law, and gave the legislatures concerned a practical occasion for reviewing the need for maintaining disabilities which had been first adopted long ago when conditions were different.

As to the enforcement of alien disabilities in the States, they said that no known permit system had been established and that the disability clauses were typically latent legal provisions that allowed the alien to take title good as against all the world except the State itself. As a consequence, they stated, an alien could buy land, use it, and in the typical jurisdiction have this right challenged only by public authority through the writ of office found. They explained that this ancient writ was often subject to limitations; in Minnesota, for instance, if the Attorney General of the State did not challenge the alien's right within a specified number of years, the title became immune to challenge. They concluded that, although paragraph 1 contained a reservation, its effects were normally of small consequence since there existed a large degree of alien ownership either by virtue of liberal laws or practical toleration.

The Germans countered that insofar as Germany was concerned sentence 2 paragraph 2 conveyed an apparent but not a real reciprocity since they had no federal law which afforded a possibility to prohibit U.S. nationals to own land. They added that the lack of comprehensive laws to apply the treaty provisions for natural persons as distinct from juridical persons, for whom restrictions existed in practically all Laender, would make paragraph 2 meaningless. Referring to paragraph 4, U.S. Article IX, they observed that under the German license system the authorization, once granted, could not be revoked and that these considerations made it difficult for them to accept the U.S. formulation in paragraph 2.

The U.S. side answered that paragraph 4, U.S. Article IX, was a practical commitment to safeguard the alien against enforcement of the old common law theory under which he had no heritable blood, and its European counterpart the droit d'aubaine. They added that the five year period allowed the alien to sell his property at a full market price and thus protected him against spoliation or sacrifice sales. Regarding sentence 2 of paragraph 2, they stressed that it contained a latent reservation only, and that there was no problem in Germany since the treaty did not wish a country to worsen its laws but sought only to establish minimum rights. They explained that in accordance with its provision a Land could deny an authorization if similarly a State had a disability law and that on the other hand, a Land would grant the authorization automatically in case no State disability law existed. If a Land, however, did not in absence of the treaty impose an alien disability, the treaty most certainly would not in any way oblige it to change its system.

The German side countered that Article IX was the only Article in the present treaty with a marked and unbalanced reciprocity provision; and they suggested that paragraph 1 be redrafted in a mutual manner to parallel the other treaty provisions, and that paragraph 2 be deleted.

This German suggestion was followed by a further discussion of the merits of the U.S. proposal, which was answered by a German assertion that they feared that the U.S. draft might provoke political difficulties for the treaty. Its conspicuous difference from the way the treaty generally was set up would necessitate justifications in detail before parliament at the time of ratification; and they were not confident that they could give explanations that would readily allay suspicions in the Bundestag and Bundesrat. They feared that maintenance of the U.S. proposed text might, therefore, prejudice early and harmonious ratification.

At this point, Dr. Becker being temporarily called from the room, the discussion digressed to the following three questions asked by Dr. von Spreckelsen:

(1) With respect to clause 1 (b) whether the words "other rights" included mortgages, or what, stressing that in Germany restrictions were applicable for only acquisition of real property.

The U.S. side replied that a sure treaty right being only accorded under clause (a), the words "other rights" had been used on purpose to cover everything not in (a) falling within the scope of the concept "tenure of property".

(2) The second German question was whether it would be possible to stipulate sure treaty rights in those States whose laws made specific exception for treaty rights, specific mention being made of Missouri. In reply to that question, the U.S. side stated that, aside from the fact that the Missouri law, at one time at least, apparently pertained only to treaties existing at the time the law had been enacted, they felt the treaty had to be geared to the situation existing in the "hard core" group of States.

(3) The third German question pertained to the phrase "acquiring through judicial process" in paragraph 4. They asked whether this phrase was designed to cover a change of ownership as a result of sale of property under execution in case a mortgage on such property had not been repaid. They further went on to say that in Germany alien and German alike would not become the owner of a property by mere purchase contract, but only after finalization by a contract of transfer (Auflassung). If a purchase contract was not fulfilled, suit could be brought against the seller. They asked whether such a law suit was also meant to be covered by the words "judicial process".

The U.S. side replied that if the reason for failure to fulfill the purchase contract was not due to interference by public authorities but solely based on willful and personal action of the seller, they did not see offhand the relevance of the latter question, though they would not hazard any final opinion. They suggested that Dr. von Spreckelsen was better qualified to analyze such a question; and they noted that their own legal counsel was unfortunately unable to attend today's session. They stated that though primarily the words "judicial process" had been motivated by a desire to cover mortgage foreclosures, wording had been chosen broad enough to cover other cases wherein a legal interest in property might be established by judgment of a court; for example, attachment in satisfaction of a debt other than a mortgage; enforcement of a dower right; or the property settlement growing out of a dissolution of marriage in a community property State. Dr. von Spreckelsen said that he would probably offer some language designed to clarify the term "judicial process", which was not a term that would be easily understood in Germany.

Conclusion

Dr. Becker reverted to his proposal that paragraph 1 be mutualized, and paragraph 2 deleted. He stated that he wanted to stress that notwithstanding the resultant narrowing of the scope of the treaty provision, U.S. citizens and companies could rest assured of being accorded liberal treatment in Germany, in keeping with the basic purposes of the treaty to

promote friendly intercourse and encourage broader business relations. He did not foresee that Americans would experience any difficulties in getting the property they might need in future.

It was finally agreed that the U.S. side would submit a redraft in compliance with Dr. Becker's proposal, and recommend it to the Department. The U.S. side stated, however, that they would be most happy to revert to the original U.S. proposal, if later after further consideration the Germans concluded that it would be feasible from the parliamentary viewpoint.

The redraft in question was prepared and handed to the Germans on March 17, copy enclosed.

Carl H. Boehringer
Commercial Attache
Commercial Attache Division

Enclosure:

Suggested Redraft,
Article IX, paragraph 1

Coordination:

Mr. Herman Walker, Jr.

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