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9-14-1979

Memorandum of the Equal Employment Opportunity Commission, Amicus Curiae, in Opposition to Defendant's Motion for Reconsideration

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 77 Civ. 5641
	)	(CHT)
SUMITOMO SHOJI AMERICA, INC.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
AMICUS CURIAE, IN OPPOSITION TO DEFENDANT'S
MOTION FOR RECONSIDERATION

MARCIA B. RUSKIN
Attorney

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COMMISSION
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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al., Plaintiffs, v. SUMITOMO SHOJI AMERICA, INC., Defendant.	)	No. 77 Civ. 5641 (CHT) MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS CURIAE, IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION.

STATEMENT

In its Order and Opinion of June 5, 1979, 20 FEP Cases 71, 20 EPD ¶30,119, this Court held that Sumitomo Shoji America, a Japanese subsidiary incorporated under the laws of the state of New York, is a domestic corporation and, as such, is fully subject to United States domestic laws and therefore "has no standing to invoke the freedom of choice provision granted by Article VII" of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan. Id. at 73. The Court of Appeals, without prejudice, denied Sumitomo's petition to appeal and Sumitomo has moved this Court to reconsider its June 5th Order on the basis of what it calls "new evidence." This "new evidence" consists of correspondence between the State Department and its overseas branches which the Department released to the parties in August as a result of a Freedom of Information Act request.

On September 11, 1979, the Department of State, having analyzed the treaty, its history, the history of similarly worded treaties with other nations, and the correspondence on which Sumitomo relies, informed the Commission[1/] that

> 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.

The Department of State added that it concurred generally with the reasoning of Spiess v. C. Itoh & Co. (America,) Inc., 469 F.Supp. 1 (S.D. Tex. 1979), appeal docketed, 5th Cir. No. 79-2382 (1979), and "specifically in the result [Spiess] reached in interpreting the scope of the first sentence of Article VIII, paragraph 1." Atwood letter, supra, n.1, at 2.

1/ The September 11, 1979 letter from James R. Atwood, Deputy Legal Advisor, Department of State, to Lutz Alexander Prager, Assistant General Counsel, Equal Employment Opportunity Commission, is attached to this memorandum. Copies of this letter have previously been furnished to counsel for both sides.

ARGUMENT

JAPANESE COMPANIES, ESPECIALLY THEIR DOMESTICALLY INCORPORATED SUBSIDIARIES, ARE NOT SHIELDED FROM UNITED STATES CIVIL RIGHTS LEGISLATION BY THE 1953 FCN TREATY.

After "extensive review of the negotiating files on. . . bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN [treaty] with Japan," the Department of State concurs in this Court's June 5, 1979 determination that Sumitomo America, as a New York corporation, is subject to domestic civil rights legislation, including Title VII. That the interpretation of the treaty by the Executive Branch should receive great deference is well-settled law. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Shafter v. United States, 273 F.Supp. 152, 157-58 (S.D.N.Y. 1967), affirmed, 400 F.2d 584, cert. denied, 393 U.S. 1086 (1969).

As the State Department letter affirms, and this Court has previously held, 20 FEP Cases at 73, Japanese-owned locally-incorporated subsidiaries are companies of the place where incorporated, see Article XXII(3), and have no greater or lesser rights than other domestically incorporated firms, irrespective of the nationality of their owners.

The Court's and Department of State's conclusion that domestically incorporated, Japanese-owned subsidiaries have no rights or duties other than those available to all domestically incorporated firms stems from the basic purpose of the FCN treaty, which, as the Department notes, is to

provide for "national treatment".[2/] The Court of Appeals for the Second Circuit has held that those called upon to construe a treaty should "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties." Maximov v. United States, 299 F.2d 565, 568 (2d Cir. 1962), aff'd, 373 U.S. 49 (1963).

2/ Article VII(1) reads:

> 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. (Emphasis supplied).

Article XXII(1) reads:

> 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.

"National treatment" means that there is to be no discrimination against, or in favor of, foreign-owned enterprises. According to Herman Walker, one of the chief FCN treaty negotiators for the Department of State, the intent of providing national treatment was to create "equality of treatment as between the alien and the citizen of the [host] country." Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 Amer. J. Comp. L. 229, 232 (1956).

With respect to employment in particular, the purpose of the treaty was to insure that Japanese citizens would not be discriminated against by local law. At the time the treaty was negotiated the Japanese placed "great importance" on the fact that Japanese nationals were barred from the practice of certain professions "merely by reason of their alienage" under the laws of a number of states.[3/]

3/ See, Foreign Service Despatch No. 915, from USPOLAD, Tokyo, to Department of State, re FCN Treaty with Japan, dated December 17, 1951, at pages 2 and 3, attached as Exhibit 2 to Affidavit by Lance Gotthoffer, sworn to on September 10, 1979, submitted with Memorandum of Law of Defendant Sumitomo Shoji America, Inc. In Support of Motion for Reconsideration [Exhibit 2]; Outgoing Airgram No. A-453, from Department of State (Acheson) to USPOLAD, Tokyo, re FCN Treaty with Japan and Despatch No. 915, dated January 7, 1952 [Exhibit 3], item 3 at page 4. These state alienage restrictions were not the concern of the Japanese alone. See Foreign Service Despatch No. 2529, from HICGO, Bonn, to Department of State, re FCN treaty with Germany, dated March 18, 1954, [Exhibit 11] at page 1.

By bestowing a right of "national treatment" on these treaty companies, the treaty safeguards their ability to compete on an equal footing with domestic concerns, free from inhibiting local "percentile" or "alienage" legislation.[4/] Seen in this context, Article VIII(1) is designed

4/ The "new evidence" on which Sumitomo relies, far from suggesting that the treaty permits domestically-incorporated Japanese-owned subsidiaries to avoid evenly-applied non-discriminatory civil rights litigation, demonstrates that such subsidiaries are to receive national treatment. Thus, for example, the January 9, 1976 airgram from the State Department to American Embassy Tokyo, [Exhibit 8].

> 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. (Emphasis added).

A careful reading of this airgram reveals no mention of rights greater than those afforded by Article XXII(1)'s definition of national treatment. Article I permits an "investor" entry into the other country "for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities. . . ." Neither Article VII(1) nor Article VIII(1) enlarges the foreign investor's right to "control and manage" or to "engage accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice," beyond the comparable rights enjoyed by local investors.

solely to make discrimination by the host country in favor of its nationals impossible. Where domestic legislation might place limitations on employers by restricting the hiring of aliens, Article VIII(1) removes those limitations with respect to executive personnel and technical specialists. Article VIII(1) thus gives foreign employers a form of national treatment in that it permits them to hire their own nationals in the same manner as local employers have traditionally been free to hire host country citizens.

It is therefore apparent the treaty's intent was to permit the treaty companies to function free from discrimination. It is perverse to suggest, as Sumitomo does, that the very vehicle which protected them from discrimination in the past now harbors the mechanism which permits treaty companies to discriminate against citizens of the host country. Quite the contrary, it is clear that Article VIII(1) and the provisions of Title VII (and §1981) are wholly consistent with each other: all three prohibit discrimination in favor of or against Americans or Japanese. Article VIII(1) thus does not permit violations of the civil rights acts. Instead, Article VIII(1) was concerned with eliminating the then prevalent restrictions against the employment of aliens and "the imposition of ultra-nationalistic policies with respect to essential executive and technical personnel."[5/]

5/ R. Wilson, United States Commercial Treaties and International Law, 198 (1960).

CONCLUSION

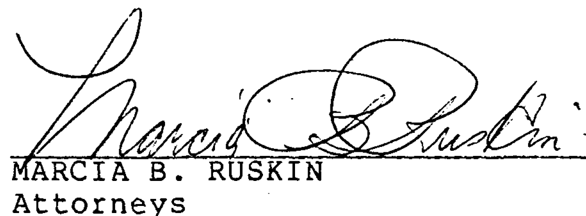
Sumitomo's motion to reconsider the Court's Opinion and Order of June 5, 1979, should be denied.

Respectfully submitted,

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER



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DEPARTMENT OF STATE

Washington, D.C. 20520

September 11, 1979

Lutz Alexander Prager, Esq.
Assistant General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Prager:

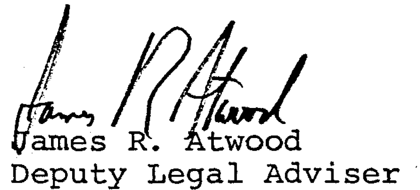
In response to your letters of March 14 and June 21, the Department has conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty, an issue in Spiess v. C. Itoh & Co. (Civ. No. 75-H-267, S.D. Tex.) and two other cases more recently decided in the district court in New York (Avigliano v. Sumitomo Shoji America, Inc., 77 Civ. 5641 (S.D.N.Y.) and Linskey v. Heidelberg Eastern, Inc., 77 Civ. 833 (E.D.N.Y.)).

The manner of coverage of subsidiaries is in many instances complex, making it necessary to rely on the intent of the negotiators to fully comprehend certain provisions. 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.

Thank you for the opportunity to comment on this issue.

Sincerely yours,



James R. Atwood
Deputy Legal Adviser

CERTIFICATE OF SERVICE

I hereby certify that copies of the Equal Employment Opportunity Commission's Memorandum as Amicus Curiae In Opposition to Defendant's Motion for Reconsideration were today mailed to the following counsel of record.

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New York, New York 10013

J. Portis Hicks, Esq.
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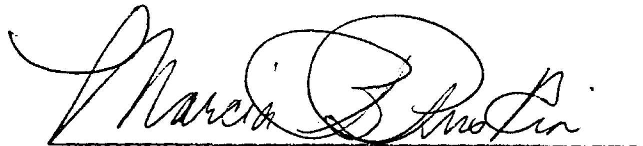

MARCIA B. RUSKIN
Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
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(202) 634-6150

September 14, 1979

PHONE-O-GRAM® for: Lewis

M Jim Rosen of Judge Tenney's Chambers

☑ Telephoned ☐ Please return the call ☐ Will call again ☐ Came in ☐ See me

Message: briefing schedule in Sumitomo re State dept documents – def papers by 9/10; π responding papers by 9/18, def reply by 9/25. Argument

Phone: 791-0940 Date 8/23 Time ______ By EJ

to be rd after papers are in
If any problems let him know

BURTON Z. ALTER
CAROL SEABROOK BOULANGER
JONATHAN H. CHURCHILL
PETER A. DANKIN
WILLIAM L. DICKEY*
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BY HAND

September 17, 1979

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

Attention: James Regan, Esq.

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

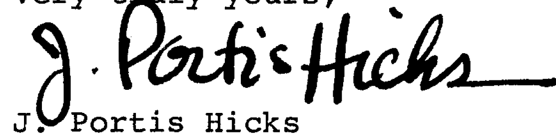
Dear Judge Tenney:

We enclose under cover of this letter a copy of a letter of the United States Department of State, dated September 11, 1979 and addressed to Lutz Alexander Prager, Esq., an attorney for the Equal Employment Opportunity Commission. We received the enclosure in today's mail. In view of the possible effect which the enclosure may have upon the resolution of this Court's reconsideration of defendant Sumitomo's motion to dismiss, we respectfully suggest that the briefing schedule of the parties should be further adjourned for one week, so that counsel for plaintiffs, and the EEOC, may have adequate opportunity to express their views regarding the enclosure. In this regard, counsel for Sumitomo also wishes such an adjournment, particularly since the Department of State issued its latest opinion regarding the Treaty only after Sumitomo had filed its memorandum asking for reconsideration.

Accordingly, we respectfully request that counsel for plaintiff and the EEOC be allowed until September 25, 1979 to file their answering memoranda of law, and that

Sumitomo be allowed until October 2, 1979 to file its reply.

Very truly yours,



J. Portis Hicks

JPH/mr
enclosure
cc: Lewis M. Steel, Esq. (By Hand) ✓

DEPARTMENT OF STATE

Washington, D.C. 20520

September 11, 1979

Lutz Alexander Prager, Esq.
Assistant General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Prager:

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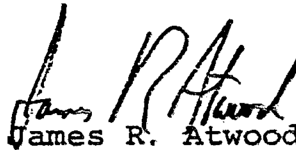
Sincerely yours,



James R. Atwood
Deputy Legal Adviser