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Brief of Amicus Curiae, Michael E. Spiess, et al, in Support of Lisa M. Avagliano, et al

Michael E. Spiess et al

No. 80-2070
No. 81-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner and Cross-Respondent,

v.

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,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* MICHAEL E. SPIESS, *et al* IN SUPPORT OF LISA M. AVIGLIANO, *et al*

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INTEREST OF THE *AMICUS CURIAE*

This Brief is submitted by Michael E. Spiess, Jack K. Hardy, Benjamin F. Rountree and the other members of the multiple nationwide classes certified under FED. R. CIV. P. 23(b)(2) by the district court in *Spiess* v. *C. Itoh & Company (America), Inc.* 469 F.Supp. 1 (S.D. Tex. 1979), *rev'd,* 643 F.2d 353 (5th

Cir. 1981), *rehearing en banc granted,* 654 F.2d 302 (Aug. 7, 1981), *order granting rehearing en banc vacated,* No. 79-2382 (Dec. 9, 1981). Although important differences exist between the *Spiess* case and the case now under consideration by this Court, both cases involve interposition of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863 (the "Treaty" or the "FCN Treaty") as an alleged bar to claims of national origin discrimination under Title VII of the civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.,* (1976) ("Title VII"). With respect to the Treaty defense, Spiess et al stand in substantially the same position as Ms. Avigliano and the other Respondents and Cross-Petitioners in the case now before the Court.

Plaintiffs in the *Spiess* case prevailed on the Treaty issue in the district court. The Fifth Circuit reversed the district court in a split decision and ordered plaintiffs' case dismissed. The Fifth Circuit then granted rehearing *en banc,* vacating the prior 2-1 panel opinion against plaintiffs. While the *Spiess* case was awaiting *en banc* rehearing by the Fifth Circuit, this Court granted certiorari in the *Avigliano* case. C. Itoh & Company (America), Inc. ("Itoh-America") then filed a Motion to Stay Further Proceedings before the Fifth Circuit pending a decision by this Court in *Avigliano.* The Motion to Stay was unopposed by plaintiffs. In response to the Motion to Stay, the Fifth Circuit vacated its Order requiring the case to be reheard *en banc* and reinstated the 2-1 panel opinion in favor of Itoh-America. On February 10, 1982, plaintiffs in the *Spiess* case filed a Petition for Certiorari with this Court. The Petition was docketed in this Court as No. 81-1496.

SUMMARY OF THE ARGUMENT

Sumitomo Shoji America, Inc.'s ("Sumitomo") claim that it has an "unqualified right" to discriminate against persons of non-Japanese national origin rests on Articles I(1), VII(1) and

VIII(1) of the FCN Treaty. Article I(1) applies only to persons, not companies, and therefore confers no rights whatever on Sumitomo. Article VII(1) applies to both Sumitomo and its Japanese parent. However, the rights conferred by Article VII(1) are limited by the "national treatment" standard of Article XXII(1). Thus, under Article VII(1), Sumitomo is clearly not entitled to the preferential treatment it seeks. Attention is therefore focused on Article VIII(1), which provides that companies of Japan are entitled to engage, within the territory of the United States, personnel of their choice. As pointed out by Fifth Circuit Judge Reavley in his dissenting opinion in *Spiess* v. *C. Itoh & Company (America), Inc.*, 643 F.2d 353 (5th Cir. 1981), United States incorporated subsidiaries of Japanese companies are companies of the United States rather than companies of Japan under the Treaty. Sumitomo, being a company of the United States, therefore falls outside the scope of whatever rights may be conferred by Article VIII(1). Spiess et al respectfully adopt Circuit Judge Reavley's dissent and urge that it is the most cogent and persuasive analysis yet written concerning the FCN Treaty rights of United States incorporated subsidiaries of companies of Japan.

Even assuming, however, that Article VIII(1) applies to Sumitomo, it is clear that the Treaty was not intended to create an island of Japanese immunity within the United States. Bestowing immunity from Title VII on United States incorporated subsidiaries of Japanese corporations is contrary to the initial interpretation of Article VIII(1) by both parties, and is further contrary to the subsequent practice of both parties. In addition, such immunity is contrary to the Charter of the United Nations and to United States policy toward multinational corporations.

ARGUMENT

I. ARTICLE VIII(1) OF THE TREATY, UPON WHICH SUMITOMO'S CLAIM TO IMMUNITY RESTS, DOES NOT APPLY TO UNITED STATES INCORPORATED SUBSIDIARIES OF JAPANESE COMPANIES.

A. Article VIII(1) Is the Cornerstone of Sumitomo's Alleged "Unqualified Right" to Discriminate.

Simply stated, Sumitomo argues that it has the "unqualified right" to discriminate against employees of non-Japanese national origin, derived from the interaction of Articles I(1), VII(1) and VIII(1) of the Treaty. Article I(1) permits entry into the United States of Japanese managerial personnel, referred to as "treaty traders". By permitting entry of such personnel, however, Article I(1) merely effectuates whatever rights are bestowed by Articles VII(1) and VIII(1). It confers no substantive rights *on Sumitomo.* The reason for this is that legal entitles such as Sumitomo are not as such entitled to treaty trader status. Article I(1) of the Treaty speaks of "Nationals" of either party, in contradistinction to "Nationals and companies" as used in Articles VII(1) and VIII(1). Similarly, the Immigration and Nationality Act of 1952 ("I&N Act"), which is also relied upon by Sumitomo and which provides for a specific means of entry of Japanese managerial personnel into the United States, speaks of "nonimmigrants" and "nonimmigrant aliens". 8 U.S.C. §§1201(a)(2) & §§1201(a)(15)(1970). This underlines the uncontested fact that Sumitomo, as such, does not itself have any "unqualified right", or indeed any other right, under Article I(1) of the Treaty. The mere right of an individual to enter the United States in furtherance of international commerce engaged in by his employer does not itself purport to confer on that employer a right to immunity from the application of United States anti-discrimination laws.

Article VII(1) is equally unsupportive of Sumitomo's alleged unqualified right to discriminate. That Article confers rights on

two distinct groups of beneficiaries. However, as will be seen below, Article VII(1) accords neither group of beneficiaries immunity from United States law.

The first group of beneficiaries is described in the first sentence of Article VII(1) as "Nationals and companies of . . . [one] . . . Party . . . engaging in business activities within the territories of the other Party, . . ." Under that sentence, such nationals and companies are entitled to "national treatment". The second group of beneficiaries is described in the third (last) sentence of Article VII(1) to consist of enterprises *controlled by* nationals and companies of the other party. Under the third sentence of Article VII(1), such controlled enterprises are entitled to "treatment no less favorable than that accorded like enterprises controlled by nationals and companies of . . . [the] . . . other Party." Sumitomo Shoji Kabushiki Kaisha (hereinafter referred to as "Sumitomo-Japan"), Sumitomo's Japanese parent, being a company of Japan, is in the first group of beneficiaries. Sumitomo itself, being a company controlled by a company of Japan, is clearly within the second group of beneficiaries.

The "national treatment" standard applicable to the first group of beneficiaries, *i.e.*, to companies of Japan as opposed to companies which they control, is defined by Article XXII(1) as:

> . . . treatment accorded within the territories of a Party under terms no less favorable than the treatment accorded therein, in like situations, to nationals . . . [and] . . . companies . . . of such Party.

This "national treatment" standard as it relates to *companies of Japan* (as opposed to companies which they control) is slightly modified by Article XXII(4), which provides:

> National treatment accorded under the provisions of the present Treaty to companies of Japan shall, in any State, Territory or possession of the United States . . ., be the treatment accorded therein to companies created or

> organized in other States, Territories, and possessions of the United States . . . .

Thus, the drafters of the Treaty drew a distinction between companies of Japan on the one hand, and enterprises which they control on the other. While the two categories of benefits conferred by Article VII(1) have "national treatment" as a common denominator, the treatment accorded to "companies of Japan" is subject to more qualifications than that accorded to enterprises controlled by such companies. As is demonstrated below, the right to "national treatment" is no grant of a privilege to disobey valid domestic laws of the host country.

Article VII(1) was construed in *United States* v. *R. P. Oldham Company,* 152 F.Supp. 818 (N.D. Cal. 1957). As the Court there said:

> Although ... [Article VII of the Treaty] ... equates domestic subsidiaries with their foreign parents, it does so only for purposes of that Article, which has the effect of according nationals of one party engaging in business within the territory of the other party the same treatment accorded nationals of the other party. For example, an American subsidiary of a Japanese parent is to have the same rights as any domestically owned American corporation. The Article nowhere attempts to give greater rights to such subsidiaries.

152 F.Supp. at 823-24.

This construction of Article VII(1) as it relates to enterprises controlled by companies of Japan is supported by the tabular treaty comparison incorporated into the record of hearings on the FCN Treaty before the Subcommittee of the Committee on Foreign Relations. The following tabulation is part of the tabular comparison just mentioned:

Approved Treaties	Proposed Treaties	
	Israel	Japan
Uruguay Article VI(2): *National treatment* for local companies, controlled by nationals and companies of the other party, engaging in activities listed in Article VI(1).	Article VII(1): Same in substance.	Article VII(1): Same as Israel provision.

"Commercial Treaties", *Hearings before the Subcommittee of the Committee on Foreign Relations, United States Senate,* 83d Cong., 1st Sess., July 13, 1953, at p. 9. (Emphasis added.) Thus, under Article VII(1), Sumitomo, as a "local" company controlled by a company of Japan, is entitled to "national treatment", nothing more, nothing less.

This result would not materially change even if Sumitomo were assumed to be a *company of Japan* for Article VII(1) purposes. The portions of Article VII(1) dealing with the entitlements of companies of Japan operating within the United States are contained in the first two sentences of that section. They read as follows:

> 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. [(Emphasis added.)]

The standard thus prescribed for companies of Japan is "national treatment", and this standard governs the second sentence as well, which starts with the word, "Accordingly". The specific contents of the benefits listed in sentences 1 and 2 are

thus subject to the "national" legislation of the host country, *i.e.*, the United States.

As stated in the *Oldham* case, "[t]he tenor of the entire Treaty is *equal* treatment to nationals of the other party, not *better* treatment. 152 F.Supp. at 822 & 823. (Emphasis in original.) The portion of the *Oldham* case just quoted is reproduced in the digest of that case in 6 M. WHITEMAN, DIG. OF INT'L L., 148, 149 & 150 (1968), which is the current and most recent official compilation of United States practice in international law.

This interpretation of Article VII(1) is supported by Dr. Herman Walker, who formulated the post World War II form of friendship, commerce and navigation treaty and negotiated many such treaties. As 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 of the period since 1946, therefore, has been the explicit extension to company activity of *the same long-established principle.* These treaties (with such exceptions and qualifications as will be mentioned below) 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,* Ch. VII, in R. R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW, 182, 197-98 (1960). (Emphasis added.)

The same view of the matter is held by Professor Dan F. Henderson of the University of Washington, the leading authority on the legal aspects of Japanese-United States trade relations. After setting forth the full text of Article VII, Professor Henderson writes:

> The straightforward provisions established the rights of U.S. citizens to "national treatment" in the establishment and operation of businesses in Japan *and vice versa,* and the apparent purpose is to accord the "foreign enterprise" the *same* rights, *duties,* and privileges, legally, as those enjoyed by domestic business.

D. F. Henderson, *Foreign Enterprise in Japan, Law and Policies* 274 (1973). (Emphasis added.)

This proposition is accepted by Japanese commentators as well. Thus, in discussing the application of certain trade secret disclosure rules of the Japanese Commercial Code to the acquisition of corporate shares through exchanges of property, Professor Fujita has written: "This is a domestic law applicable to the Japanese as well. Therefore, there is no violation of the 'national treatment' clause." Fujita, *Does Japan's Restriction on Foreign Capital Entries Violate Her Treaties?* 3 LAW IN JAPAN 162, 172 note 29 (1969).

Article I(1) applies to individuals, not to companies, and Article VII(1) is limited by the "national treatment" standards of Article XXII. Thus, neither Article I(1) nor article VII(1) supplies Sumitomo with the preferential treatment it seeks. Attention is thus focused on Article VIII(1).

B. Sumitomo Is a Company of the United States for Purposes of Article VIII(1) of the Treaty and Is Thus Entitled to No Greater Rights Than Any Other United States Company.

That portion of Article VIII(1) upon which Sumitomo's claim to immunity rests provides that *"Nationals and companies of either Party* shall be permitted to engage, *within the territories of the other Party* . . . . executive personnel and other specialists

of their choice." (Emphasis added.) Stated otherwise, in terms applicable to Sumitomo's claim to immunity, a *company of Japan* is entitled to engage within the territory of the United States, personnel of its choice. The pivotal inquiry thus becomes the nationality of Sumitomo, since if Sumitomo is a company of the United States rather than of Japan, it falls outside the scope of Article VIII(1) for purposes of this case.

In *Spiess* v. *C. Itoh & Company (America), Inc.*, 469 F.Supp. 1 (S.D. Tex. 1979), *rev'd* 643 F.2d 353, (5th Cir. 1981), *rehearing en banc granted*, 654 F.2d 302 (Aug. 7, 1981), *order granting rehearing en banc vacated*, No. 79-2382 (Dec. 9, 1981), Spiess et al briefed at considerable length the question whether Itoh-America is a company of the United States or a company of Japan for Article VIII(1) purposes. The dissenting opinion of Fifth Circuit Judge Reavley (643 F.2d at 363) held that Itoh-America is a company of the United States rather than a company of Japan, and therefore falls outside the scope of Article VIII(1). Sumitomo, like Itoh-America, is a United States corporation wholly owned by a company of Japan. Judge Reavley's analysis is therefore equally applicable to Sumitomo, and Spiess et al adopt it and respectively direct this Court's attention to it as the most cogent and scholarly analysis yet written concerning the Article VIII(1) FCN Treaty rights of United States incorporated subsidiaries of companies of Japan.

C. The Administrative Determination of Corporate Nationality for "Treaty Trader" Purposes Does Not Alter the Conclusion That Sumitomo Is A Company of the United States and Is Thus Entitled to No Direct Benefits Under Article VIII(1) of the Treaty.

Article I(1) of the Treaty, which allows Japanese nationals to enter the United States for the purpose of carrying on trade, is statutorily implemented by 8 U.S.C. §1201(a)(2)(1970), which provides that under the conditions of the I&N Act or "regulations issued thereunder", United States consular officers may

issue visas to nonimmigrants as defined in 8 U.S.C. § 1101(a)(15) (1970). Subsection (E)(i) of this latter provision defines nonimmigrant aliens to include aliens entitled to enter the United States under a treaty of commerce and navigation for the purpose of carrying on substantial trade between the United States and the foreign state of which the alien is a national.

These "treaty trader" and "treaty investor" provisions are implemented by State Department Regulations codified in 22 C.F.R. 41.40 and 41.41 (1979), respectively. 22 C.F.R. 41.40 provides, in part, that an alien is classifiable as a treaty trader if he 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. However, this administrative determination of corporate "nationality" is strictly limited in purpose to a specific requirement for the issuing of treaty trader visas pursuant to United States immigration legislation and regulations adopted in connection therewith. *Matter of N.....S.....*, I. & N. 426 (1957). It is connected to the Treaty only through the statutory requirement that the applicant be a national of a country with which the United States has a treaty of commerce and navigation.

The limited scope of the administrative determination of corporate nationality *for treaty trader purposes* is further demonstrated by the July 23, 1952 cable from Secretary of State Dean Acheson to the United States Embassy in Tokyo, which is reproduced in Appendix 1 to this Brief. The cable states that Article XXII(3) of the Treaty:

> ... establishes that whether or not a juridical entity is a "company" of either Party, for *treaty* purposes, *is determined solely by the place of incorporation.* Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded. [(Emphasis added.)]

It is apparent from the date and contents of the cable that it was intended to be communicated to the Japanese negotiators of the Treaty, which was eventually signed on April 2, 1953.

The same position was taken by the State Department in the telegrams which are reproduced in Appendices 2 and 3 of this Brief. As shown in Appendix 2, the Embassy originally informed the Japanese Ministry of Foreign Affairs "as to view of U.S. that nationality of a majority of the stockholders constitutes the nationality of the company". However, the incorrectness of that position was expressly noted in a State Department response to the Tokyo Embassy dated January 9, 1976, signed by Secretary of State Henry Kissinger. (Appendix 3). Thus, it is the official United States position, expressed by Secretary of State Acheson in 1951 and reiterated by Secretary of State Kissinger in 1976, that under the Treaty, a company has the nationality of the place where it is established, irrespective of the nationality of the majority of its shareholders. Sumitomo is therefore a company of the United States rather than a company of Japan, and falls outside the scope of whatever rights are conferred by Article VIII(1).

II. EVEN IF SUMITOMO IS SOMEHOW COVERED BY ARTICLE VIII(1) OF THE TREATY, IT DOES NOT HAVE THE "UNQUALIFIED RIGHT" TO HIRE AND COMPENSATE PERSONS OF JAPANESE NATIONAL ORIGIN IN A RACIALLY DISCRIMINATORY MANNER, IN VIOLATION OF AMERICAN LAW PROSCRIBING DISCRIMINATION IN EMPLOYMENT.

A. The Initial Interpretation Of Article VIII(1) Indicates That It Was Intended To Prohibit Racial Discrimination, Not To Shield It.

In the article by Dr. Herman Walker entitled *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373 (1956), there is almost contemporaneous authority on the intent of the parties with respect to Article VIII(1) of the

Treaty. Dr. Walker wrote that Article VIII was a provision designed "*to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel.*" 50 AM. J. INT'L L. at 386. (Emphasis added.)

It is unlikely that a provision designed to *prevent* imposition of "ultra-nationalistic policies with respect to essential executive and technical personnel" was intended by the parties as conferring upon each other's nationals and companies the "unqualified right" to engage in this same conduct in the face of fair employment legislation. The existence of such legislation could not have been unknown to the contracting parties during the time the Treaty was being negotiated, for in 1951, the State of New York had enacted its Human Rights Law, which expressly declared:

> It shall be an unlawful discriminatory practice:
>
> (a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

New York Executive Law, § 296(a) (first enacted by N.Y. Laws 1951, ch. 800).

Moreover, during the time the Treaty was being negotiated, and prior to the effective date of the Treaty in both countries, the parties clearly contemplated additional legislation of this general type, as is apparent from the second paragraph of the preamble of the Treaty of Peace with Japan of September 8, 1951, 3 U.S.T. 3171, which recites that:

> Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights; to seek to create within Japan conditions of stability and well-being as defined in Articles 55 and 56 of the Charter of the United Nations and

> already initiated by post-surrender Japanese legislation; and in public and private trade and commerce to conform to intentionally accepted fair practices.

This clause was drafted by the United States, and accepted by Japan without objection. 1951 IV *U.S. For. Rel.* 1024, 1025 & 1171. In Articles 55 and 56 of the Charter of the United Nations, 59 Stat. 1037, 1045-46, the members of that Organization 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 distinction as to race, sex, language, or religion."

Civil rights legislation relating to employment is one of the prototypes of action for the achievement of that goal. It follows that the parties knew, or were highly likely to be aware of, civil rights legislation then actually in effect and proscribing the type of conduct here involved; that they condemned such conduct as a matter of policy; and that Japan undertook to proscribe it by legislation while at the same time being aware of the Treaty commitment of the United States to do likewise. Thus, the most reasonable interpretation of Article VIII(1) as originally conceived is that it was intended to prevent "ultra-nationalistic" employment practices based on criteria such as race, not to create a shield against civil rights legislation proscribing such employment practices altogether.

B. The Subsequent Practice of the United States and Japan Demonstrates That the Application of Title VII to Sumitomo Does Not Violate the Treaty.

Subsequent agreements of the parties, as well as their subsequent practice, are to be taken into account in the interpretation of treaties. *Vienna Convention of the Law of Treaties*, 1969, article 31(3)(a) & (b), 63 AM. J. INT'L L. 875, 885 (1969). Although this convention is not yet in effect, its provisions are accepted as accurate statements of present-day international law. *See generally*, KEARNEY & DALTON, *The Law of Treaties*,

64 AM. J. INTL'L L. 495 (1969), and *e.g.*, the *Fisheries Jurisdiction* Cases, 1973 I.C.J. Rep. 3, 18-19 (U.K. v. Iceland); *Id.* 49, 59 (West Germany v. Iceland).

In this connection, both Japan and the United States are members of the Organization for Economic Cooperation and Development ("OECD"), established by treaty on December 14, 1960, 12 U.S.T. 1729. On June 21, 1976, the OECD Council adopted a Declaration on International Investment and Multinational Enterprises, with an Annex of Guidelines for Multinational Enterprises. (*See* 1976 *Digest of United States Practice in International Law* 518-19.) In the Declaration, the OECD members "jointly recommend to multinational enterprises operating in their territories the observance of the guidelines as set forth in the annex" thereto. *Id.* 520-24. As regards "Employment and Industrial Relations," the Guidelines provide that enterprises should "within the framework of law, . . . in each of the countries in which they operate:"

> (4) observe standards of employment and industrial relations not less favorable than those observed by comparable employers in the host country;
>
> (5) in their operations, to the greatest extent practicable, utilize, train and prepare for upgrading members of the local labor force in cooperation with representatives of their employees and, where appropriate, the relevant governmental authorities;
>
> . . . .
>
> (7) implement their employment policies including hiring, discharge, pay, promotion and training without discrimination unless selectivity in respect of employee characteristics is in furtherance of established governmental policies which specifically promote greater equality of employment opportunity; . . . .

Id. at 524. (Emphasis added.)

While the Guidelines are not legally enforceable as such, they clearly embody the policy of the member states of the OECD. They constitute, as their inclusion in the State Department's official *State Practice* volume for 1976 indicates, the "state practice" of the participating states as that term is understood in international law.

It follows that since these Guidelines constitute state practice of Japan and the United States, and since, moreover, they embody an agreement between these two countries (among others) as to policy with respect to multinational corporations, they serve as aids in the interpretation of Article VIII(1) of the Treaty. This leads to the further conclusion that the application of Title VII to the components of Japanese multinational enterprises operating in the United States does not, in the view of these countries, violate agreements existing between them. Quite the contrary, Title VII is manifestly an "established governmental polic[y] which specifically promote[s] greater equality of employment opportunity; . . . ." and as such, is fully endorsed by both the United States and Japan in a statement specifically dealing with multinational enterprises.

C. Title VII Is the Type of Legislation Contemplated and Encouraged by the Charter of the United Nations, Which Prevails Over the FCN Treaty to the Extent of Any Conflict Between the Two.

In the preamble of the Peace Treaty with Japan quoted above, Japan declared its intention to seek membership in the United Nations. On December 12, 1956, by General Assembly Resolution 1113(XI), Japan was admitted to the United Nations. Japanese Association of International Law, *Japan and the United Nations* 226, note 12. (*See* U.N. Charter, Articles 2 & 4.) It follows that the Charter of the United Nations is, so far as Japan and the United States are concerned, a treaty concluded subsequent to the coming into force of the Treaty here in issue.

The application of successive treaties relating to the same subject matter is regulated by Article 30 of the Vienna Convention of the Law of Treaties. 63 AM. J. INT'L L. at 884-85. As there stated, where (as here) all the parties to an earlier treaty are parties to a later treaty but the earlier treaty is not expressly terminated or suspended by the later one, "the earlier treaty applies only to the extent that its provisions are compatible with the later one, ..." *Id.* at Article 30(3). Moreover, Article 103 of the United Nations Charter provides:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under *any other international agreement,* their obligations under the present charter shall prevail.

59 Stat. at 1053.

Thus, the Charter of the United Nations prevails over the FCN Treaty both as *lex posterior* and as *lex superior.* The United Nations Charter, as the later, and in any event, the higher law prevailing in case of a conflict between it and the FCN Treaty, provides that one of the four stated "Purposes of the United Nations" is:

> To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

Chapter I(3), 59 Stat. at 1037.

The subject of human rights and fundamental freedoms is further dealt with in Chapter IX of the Charter, entitled "International Economic and Social Cooperation." 59 Stat. at 1045-46. Article 55, which is the initial provision of Chapter IX, provides that the United Nations shall promote universal respect for, and observance of, human rights without distinction as to race. Article 56 provides:

> All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

59 Stat. 1045-46.

There has been much dispute as to the legal significance of these provisions of the Charter. *See* SCHLUTER, *The Domestic Status of the Human Rights Clauses of the United Nations Charter,* 61 CALIF. L. REV. 110 (1973). Debate focuses primarily on the question whether Articles 55 and 56 of the Charter are "self-executing", *i.e.,* whether they are effective domestic law of the United States by virtue of the Supremacy Clause (U.S. Const., art. VI(2)), or in need of implementing legislation. The leading authority for the proposition that these provisions are not self-executing is *Sei Fujii* v. *State,* 38 Cal.2d 718, 242 P.2d 617 (1952). After observing that the Preamble of the Charter imposed no legal obligations upon member nations and created no rights in private persons, the California Court went on to state, in a much-quoted passage:

> *Although the member nations have obligated themselves* to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that *future legislative action by the several nations would be required to accomplish the declared objectives,* and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

242 P.2d at 621 (Emphasis added.)

Surely, Title VII is an instance of "future legislative action by the several nations" required for transforming the obligations of the member states into binding rules of domestic law. This is demonstrated not only by the contents of Title VII itself, but also by the practice of the United States after passage of Title VII. Information describing the substance of Title VII was officially made available by the United States to the United

Nations for inclusion in the United Nations' *Yearbook on Human Rights for 1964*, see *Id.* 283 note 1, and characterized therein as "Landmark Legislation, *Id.* 283-84.

Moreover, a specific reference to Articles 55 and 56 of the Charter of the United Nations, together with an undertaking by Japan to seek to create within Japan the conditions contemplated by these provisions, was incorporated into the 1951 Peace Treaty with Japan, 3 U.S.T. 3171, at the instance of the United States. This demonstrates that the human rights clauses of Chapter IX of the Charter were deemed to be of particular significance between Japan and the United States. As the Charter of the United Nations is both the "higher law" by virtue of Article 103 thereof and, in any event, 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.

D. United States Policy Toward Multinational Corporations Supports the Conclusion That United States Incorporated Subsidiaries of Foreign Companies Are Subject To Title VII.

The 1976 *Digest of United States Practice In International Law*, at 505 & 506, contains two pertinent statements on multinational corporations. First, Deputy Secretary of State Robert S. Ingersoll, on March 5, 1976, stated:

> In international discussions of enterprise behavior, the United States has supported two basic principles:
>
> — First, *all sovereign states have the right to regulate the activity of foreign investors in their territory*, consistent with the minimum standards of justice called for by international law; and
>
> — Second, *investors must respect the laws of the nations in which they operate and conduct themselves as good corporate citizens of these nations*, refraining from improper interference in their internal affairs. [(Emphasis added.)]

The second pertinent statement was made by Secretary of State Kissinger at the June 21, 1976 OECD Council meeting:

> We are able to announce today the acceptance by OECD member governments of a declaration on investment. This declaration extends the cooperation which has characterized our trade and monetary relations into the area of investment. It includes:
>
> — Recommended guidelines for the activities of multinational corporations;
>
> *The United States strongly endorses this declaration and urges its widest possible adoption and observance.*

75 Dep't State Bull. 73, 76 (1976) (Emphasis added.)

As pointed out at page 15, *supra*, the Guidelines for the Activities of Multinational Enterprises, which received the strong endorsement of the United States, include several statements prescribing non-discriminatory employment policies to be followed by multinational enterprises. To the extent that the "international foreign policy of the United States" is relevant to the present context, therefore, both the principles governing that policy and the consequences deriving therefrom with respect to the employment and promotion of management-level personnel have been spelled out by officially reported high level policy statements. These statements squarely support the application of Title VII to United States-incorporated subsidiaries of Japanese companies such as Sumitomo.

Finally, Congress has recently dealt with the subject of employment discrimination by multinational corporations in the Foreign Boycotts legislation of June 22, 1977, 91 Stat. 244 and 50 U.S.C. app. §2403a (1981). Pursuant to §2403-1a, (a) (1) thereof, the President is directed to:

> ... issue rules and regulations prohibiting any United States person from complying with, furthering, or supporting any foreign boycott directed against a third country friendly to the United States through, among other things, (b) Refusing, or requiring any other person to refuse, to

> employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

The term "United States person", as used in this context, is defined to include:

> . . .any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), *any domestic concern (including any permanent domestic establishment of any foreign concern)* and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President.

50 U.S.C. app. §2410(2) (1981). (Emphasis added.)

Sumitomo is thus a "United States person" for purposes of the Foreign Boycotts legislation. The conduct complained of in the case now before the Court would constitute a violation of that statute but for the lack of intent to act in furtherance of a foreign boycott. The lack of such intent does not mean, however, that discriminatory employment practices as described by 50 U.S.C. app. §2403-1a, (a)(1)(B) (1981) is immunized from other federal legislation in point. Clause (4) of this subsection expressly provides:

> Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or *civil rights laws* of the United States [(Emphasis added.)]

The Boycott Prohibition legislation demonstrates, once more, the extreme gravity of Congressional disapproval of employment discrimination.

E. Article VIII(1) Was Not Intended to Create an Island of Japanese Immunity from United States Civil Rights Laws.

In the final analysis, Sumitomo's claim to preferential treatment is based on the words "of their choice" in Article VIII(1). As appears below, the purpose of including these words in the Treaty was to avoid "percentile" legislation which remained in effect in many states following World War II. "Percentile" legislation refers to laws imposed by many states which required a foreign employer to maintain a certain proportion of Americans in his workforce. The Foreign Service Despatch from the High Commissioner for Germany to the Department of State, No. 2529, March 18, 1954 (Appendix 4), makes clear the intent of the words "of their choice" as used in Article VIII(1). There, commenting on Article VIII(1) of the proposed German Treaty, which was identical for present purposes to Article VIII(1) of the Treaty here in issue, Carl H. Boehringer, United States Commercial Attache to Germany, stated that the major "special purpose of Article VIII(1) was to preclude the imposition of "percentile" legislation.

Sumitomo's contention that the words "of their choice" operate in addition to avoid subsequently enacted fair employment laws is simply incorrect. The critical distinction between the percentile laws in effect at the time of the Treaty's passage and the subsequently enacted fair employment laws which Sumitomo seeks to avoid is that exempting companies of Japan from percentile laws placed them on an equal footing with United States companies, whereas exempting companies of Japan from Title VII would place them in a preferred position to United States companies. This was not the intent of the Treaty's drafters.

The significance of the distinction discussed above has been explained by Dr. Herman Walker, whose writings elsewhere are heavily relied upon by Sumitomo. In 1958, Dr. Walker wrote:

> The specific content of the treatment, [provided by a treaty], at any given point of time and in connection with any given subject, is determinable *not from a reading of the treaty itself, but by reference to an [existing] exterior state of law and fact. The objective is to secure non-discrimination, or equality of treatment: a sort of "equal protection of the laws" objective.*

H. WALKER, *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805 (1958). (Emphasis added.)

Dr. Walker's statement makes it clear that Article VIII(1) is best understood against the background of providing *national treatment* in order to ensure *equality of competitive opportunity.* With respect to employment in particular, the clear purpose of the Treaty was to insure that Japanese companies would not be discriminated against. It was not to put such companies in a preferred position vis-a-vis their United States counterparts.

In line with Dr. Walker's statement that the treatment afforded by a treaty, at any given point in time and in connection with any given subject, is to be determined by reference to then existing law rather than from a reading of a treaty itself, it must be remembered, as pointed out above, that in 1951, prior to the effective date of the Treaty, the State of New York (in which Sumitomo was incorporated) (App. 34a) enacted its Human Rights Law, which declared:

> It shall be an unlawful discriminatory practice:
>
> (a) For an employer, because of the age, *race,* creed, *color, national origin* or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual *or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.*

New York Executive Law, §296(a) (first enacted by N.Y. Laws 1951, ch. 800.) (Emphasis added.)

Sumitomo, at page 20 of its Brief, cites Dr. Walker for the proposition that the Treaty accords it the right to employ executive personnel of its choice on a " 'non-contingent' or unconditional basis." Attribution of such a conclusion to Dr. Walker, without further explanation, can be misleading. According to Dr. Walker, post-war treaties of friendship, commerce and navigation are organized along three basic standards of treatment: national treatment, most-favored-nation treatment, and absolute rules. National and most-favored-nation treatment are so-called "contingent standards". H. WALKER, *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805, 811 (1958). Absolute rules, on the other hand, are often referred to as "non-contingent" standards or terms. *Id.* at 811. According to Sumitomo, the fact that the language of Article VIII(1) is couched in terms of an absolute ("non-contingent") rule rather than a contingent standard (national treatment) shows that Article VIII(1) goes beyond national treatment and provides a non-contingent rule of preferential treatment.

Appellees respectfully submit that this conclusion is incorrect. As stated by Dr. Walker with regard to absolute rules:

> An attempt to construct a treaty primarily in non-contingent terms [absolute rules] can prove self-defeating because increases in specificity spawn corresponding increases in reservations. This tends to rob the reference rules of the very definiteness it was their aim to accomplish. You agree to something concrete, but reserve your "public policy" or your "internal legislation." This is for the two-fold reason that prudent governments will wish escapes for future contingencies *and will also wish to avoid purporting to attribute to aliens independent rights placing them in a privileged status over citizens of the country.*

H. WALKER, *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805, 812 (1958). (Emphasis added.) The Treaty was simply never intended to confer privileged status upon companies such as Sumitomo.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, EDWARD JOHN O'NEILL, JR., attorney for *amicus curiae* Michael E. Spiess, et al, do hereby certify that contemporaneous with depositing the foregoing Brief in the United States mail, addressed to the Clerk of the United States Supreme Court, that three copies of the Brief were mailed to the following counsel for Petitioner and Cross-Respondent, Sumitomo Shoji America, Inc.:

J. Portis Hicks
Wender, Murase & White
400 Park Avenue
New York, New York 10022.

EDWARD JOHN O'NEILL, JR.

APPENDICES

APPENDIX 1

FORM DS-323
12-27-50

OUTGOING AIRGRAM

Department of State

RESTRICTED
CLASSIFICATION

2449

AMEMBASSY,

TOKYO

A-49, July 23, 1952

SUBJECT: FCN Treaty. Interpretation of Certain Provisions Embassy Despatch 269, June 19, 1952.

There follow comments on the specific questions raised in reference Despatch:

a. The analysis of this question begins with the second sentence of Article XXII, Paragraph 3, which establishes that whether or not a juridical entity is a "company" of either Party, for treaty purposes, is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded. Under such a simple test, however, nationals of third countries could indirectly but effectively secure valuable treaty rights through taking advantage of liberal corporation laws. Thus to take a hypothetical example, citizens of country X which had refused to make a reciprocity treaty with Japan, and which was even on bad relations with Japan, might, nevertheless, enjoy unilaterally many business advantages in Japan, ordinarily accruing only to friendly treaty nations, by the device of setting up and operating through a Delaware corporation. The purpose of Paragraph 1(e) of Article XXI is to leave each party free to protect itself against such an eventuality, as it might wish, by allowing it to "pierce the corporate veil" of companies chartered under the laws of the other Party, for most treaty purposes.

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A-49, July 23, 1952

The rule of Article XXI, Paragraph 1(e) has to do with the treatment one party is obligated to accord to "companies" of the other party, such companies being as defined in Article XXII(3). The rule of the second sentence of Article VI, Paragraph 5, on the other hand, relates to "enterprises" in which such companies (or nationals) have a substantial interest. The word "enterprises" is not a synonym for "companies"; it is a much broader term, having to do with a business undertaking or establishment in the large and popular sense, regardless of juridical form, nationality, etc.

The rule of paragraph 1(e), Article XXI, has bearing on the second sentence of Article VI(5) only to the extent that the word "companies" is used therein. If an American-chartered company had a substantial interest in an enterprise in Japan, the Japanese Government would be obligated to give the treatment specified if such company were in fact American controlled, but not if such a company were controlled by nationals of third countries. The question of who controls the company is quite distinct from the question of who has what interest in the "enterprise" itself.

Thus the Japanese supposition that there is conflict between the provisions of VI(5) and XXI(1)(e) is not well grounded.

b. Article IX(1)(a) provides that Japanese nationals and companies shall have rights with respect to acquiring, using, and occupying land, structures, and other realty appropriate to the conduct of any activity in which they are entitled to engage

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pursuant to Article VII. The last sentence of Article VII(2) clearly provides for establishing and maintaining branches and agencies for the conduct of international transportation activity, which in the Department's intent covers international shipping. In order to make the last point clear, however, the Department authorizes the insertion of the words "shipping or other" before the word "transportation". Insofar, therefore, as tenure rights to wharves, warehouses, and other installations are reasonably necessary to the effective conduct of an international shipping operation, such rights are assured by Article IX(1)(a). Precisely what tenure rights may be reasonably necessary to the effective conduct of such an operation in a particular case, cannot, of course, be determined *in vacuo*; but the Department does not believe it is necessary to attempt to write more categorical language into the treaty on this point.

It should be further noted that Article XIX(3) provides for non-discrimination as to the access of vessels to ports, and to port and shipping facilities, insofar as such access is afforded to any international shipping on an other than tenure basis.

The right to enjoy the use of all appropriate facilities thus appears to be amply covered, without any further modification.

c. In analyzing the question here presented, it is necessary to distinguish between the ship operator, on the one hand, and the ship builder on the other. The ship operator engages in an establishment activity reserved from the treaty (Article VII(2), first

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sentence). Thus each party, so long as it does not violate some other provision of the treaty, retains full freedom to subsidize its own citizen-owned, national shipping, without being obliged to extend such subsidies to shipping owned by nationals of the other party.

The "citizens" referred to in 46 USC 1151 are ship operators. The construction subsidy is granted upon application of the ship operator, and on his behalf. The law does not specify that the ship builder, who is ultimately awarded the construction contract, be a citizen. The law speaks only of a "shipyard within the continental limits of the United States" (Sec. 1155) without reference to the nationalities of the owners of the shipyard. By contrast, the citizenship of the ship operator is repeatedly mentioned; and the avowed objective of the act (Sec. 1101) is to foster a citizen-owned merchant marine (not citizen-owned shipyard). As to the precise question of how this law is "interpreted", the Department is unaware that there has been occasion to interpret it on this specific point, or that any problem has ever arisen over it. The Department does not have the function of interpreting such laws; it can only point out that the law, contrary to the Japanese reading of it, does not provide that shipbuilding subsidies be restricted to American citizens.

The Department understands that the Embassy would like also two other points to be clarified, as follows:

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Tokyo,
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1. As to the right of non-resident recipients of benefits under Article IV to convert yen payments into dollars. This Article provides national treatment. This means that insofar as this Article is concerned, the American non-resident beneficiary has a treaty right to exchange convertibility only to the extent that a Japanese non-resident would enjoy this privilege under Japanese law and regulation.

Further than this, however, it may be noted that the non-resident American would have such rights as are provided in Article XII; that is, no restrictions on convertibility except as may be allowed by the second paragraph of that Article, and, in situations where restrictions are necessary and allowable, he would enjoy such advantages as may be afforded by the phrase "giving consideration to special needs for other transactions" in paragraph 3 and by the "no arbitrary discrimination" precept of paragraph 4.

2. As to the precise meaning of the terms "trade names" and "trade labels" in Article X — the Department would have only the following observation to add to the Embassy's previous report of its explanation: These terms are merely by way of illustrating, along with "patents" and "trade-marks", the more common types of industrial property. The phrase "industrial property of every kind" is all-inclusive. It is thus unnecessary to have, in connection with the treaty, highly refined and precise definitions of the concepts "marks", "names" and "labels". It

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12-27-50

OUTGOING AIRGRAM

Department of State

RESTRICTED
CLASSIFICATION

Tokyo,
A-49, July 23, 1952

would indeed be quite permissible for Japanese and American law to differ substantially from each other in this and other industrial property matters. The Article's purpose is to provide national treatment with respect to whatever the laws of the country happen to provide with respect to recognizing and protecting industrial property; and the Japanese may make a free translation of secondary technical terms if transliteration proves to be difficult.

ACHESON

APPENDIX 2

Department of State

R 130506Z AUG 75
FM AMEMBASSY TOKYO
TO SELSTATE WASHDC 2418

UNCLAS TOKYO 11177

FOR L/SCA

E.O. 11652:N/A
TAGS: CGEN, CVIS, JA
SUBJECT: GOJ INTERPRETATION OF FCN TREATY

REF: TOKYO 3989, 28 MAR 75

1. AS INDICATED IN REFTEL GOJ FINALLY AUTHORIZED COMMERCIAL VISAS IN TWO CASES IN QUESTION ON STRICTLY AD HOC BASIS CONTENDING AMERICANS INVOLVED HERE WERE NOT ENTITLED TO TREATY BENEFITS. MFA STATES THAT ITS LEGAL ADVISERS HAVE NOT COMPLETED STUDY BUT ARE PRESENTLY OF VIEW THAT UNDER THE WORDING OF THE SECOND SENTENCE OF PARAGRAPH THREE OF ARTICLE XXII OF THE TREATY A COMPANY INCORPORATED IN JAPAN, OR AN INDIVIDUAL DOING BUSINESS AS SINGLE PROPRIETOR, EVEN THOUGH WHOLLY AMERICAN OWNED, IS NEVERTHELESS A JAPANESE COMPANY AND EXCLUDED FROM TREATY BENEFITS. THE SENTENCE IN QUESTION READS: QUOTE COMPANIES CONSTITUTED UNDER THE APPLICABLE LAWS AND REGULATIONS WITHIN THE TERRITORIES OF EITHER PARTY SHALL BE DEEMED COMPANIES THEREOF AND SHALL HAVE THEIR JURIDICAL STATUS RECOGNIZED WITHIN THE TERRITORIES OF THE OTHER PARTY. UNQUOTE.

2. EMB HAS ARGUED THAT GOJ INTERPRETATION CONFLICTS WITH THE GENERAL AIM OF THE

Department of State

TREATY WHICH IS TO PROMOTE TRADE AND INVESTMENTS BETWEEN OUR COUNTRIES. EMB HAS FURNISHED COMPLETE INFO TO MFA AS TO VIEW OF U.S. THAT NATIONALITY OF A MAJORITY OF THE STOCKHOLDERS CONSTITUTES THE NATIONALITY OF THE COMPANY. IT HAS ALSO POINTED OUT THAT NATIONALS OF A THIRD COUNTRY COULD NOT OBTAIN TREATY BENEFITS SIMPLY BY INCORPORATING IN JAPAN.

3. ACTION REQUESTED: IN ORDER THAT EMB MAY PURSUE THIS QUESTION FURTHER IN AN EFFORT TO OBTAIN MORE RECIPROCAL TREATMENT FOR AMERICANS DOING BUSINESS IN JAPAN, WITHOUT RELYING ON AD HOC DECISIONS, WHICH ARE TIME CONSUMING AND DIFFICULT TO OBTAIN, IT WILL BE APPRECIATED IF DEPT WILL FURNISH INFO AS TO WHETHER ANY OTHER COUNTRIES WITH WHOM WE HAVE FCN TREATIES ADHERE TO INTERPRETATION GIVEN BY JAPANESE. VIEWS OF MAJOR TRADING COUNTRIES SUCH AS FRANCE, GERMANY, ITALY, UNITED KINGDOM, NORWAY AND DENMARK WOULD BE MORE PERSUASIVE THAN SMALLER COUNTRIES. ANY OTHER IDEAS DEPT MIGHT HAVE ON THIS SUBJECT WOULD ALSO BE WELCOME. SHOESMITH.

UNCLASSIFIED

APPENDIX 3

Department of State

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 Japanese 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.

Department of State

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

Department of State

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

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APPENDIX 4

Department of State

Foreign Service Despatch

From: HICOG BONN 2529
To: The Department of State, Washington March 18, 1954
Ref: OURDES nos. 1355, October 28, 1953; 1372, October 30, 1953; and 2501 March 16, 1954
Subject: New Treaty of Friendship, Commerce, and Navigation: Report on March 16, 1954 Meeting with German Negotiators

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.

R. N. Levy
Reporter

(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 wihin 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 Eesse.

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

Acquisition of Realty by Alien Juridical Persons Residing Abroad

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

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

The U.S. side reviewed U.S. treaty policy on this point and noted that only the 1853 treaty with Argentina provided for national treatment with respect to acquisition of title to real property, and then only in the case of natural persons. They added that the treaty with France originally negotiated about 100 years ago had contained a similar provision but had been rejected by the Senate as constituting undue interference in State rights; and that the policy of the Federal Government for years had been to abstain from interfering with State regulation of land ownership. They stated that the present text of paragraph 1, U.S. Article IX, which granted national treatment with respect to the leasing of land needed for treaty purposes without according a similar right for the holding of land by title, represented an internal U.S. compromise on the question of how far alien land tenure should be the subject of treaty commitments.

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

reciprocity since any German *Land* could withhold rights to a U.S. natural or juridical person seated or domiciled in a State which imposed restrictions on Germans.

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

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

The Germans countered that insofar as Germany was concerned sentence 2, paragraph 2 conveyed an apparent but not a real reciprocity since they had no federal law which afforded a possibility to prohibit U.S. nationals to own land. They added that the lack of comprehensive laws to apply the treaty provisions for natural persons as distinct from juridical persons, for

whom restrictions existed in practically all *Laender*, would make paragraph 2 meaningless. Referring to paragraph 4, U.S. Article IX, they observed that under the German license system the authorization, once granted, could not be revoked and that these considerations made it difficult for them to accept the U.S. formulation in paragraph 2.

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

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

This German suggestion was followed by a further discussion of the merits of the U.S. proposal, which was answered by a German assertion that they feared that the U.S. draft might

provoke political difficulties for the treaty. Its conspicuous difference from the way the treaty generally was set up would necessitate justifications in detail before parliament at the time of ratification; and they were not confident that they could give explanations that would readily allay suspicions in the Bundestag and Bundesrat. They feared that maintenance of the U.S. proposed text might, therefore, prejudice early and harmonious ratification.

At this point, Dr. Pecker being temporarily called from the room, the discussion disgressed 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.

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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 viewpoints.

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

Carl H. Boehringer
Commercial Attache
Commercial Attache Division

Department of State

Enclosure:

Suggested Redraft,
Article IX, paragraph 1

Coordination:

Mr. Herman Walker, Jr.

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