10-1981

Brief Amici Curiae of the East Asiatic Company, Ltd, the East Asiatic Company, Inc., and the Heidelberg Eastern, Inc., in Support of Sumitomo Shoji America, Inc.

The East Asiatic Company Ltd, et al

Nos. 80-2070 and 81-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner & Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents & Cross-Petitioners.

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

BRIEF *AMICI CURIAE* OF THE EAST ASIATIC COMPANY, LTD., THE EAST ASIATIC COMPANY, INC., AND HEIDELBERG EASTERN, INC. IN SUPPORT OF PETITIONER SUMITOMO SHOJI AMERICA, INC.

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QUESTION PRESENTED

In the complete absence of an expression of Congressional intent, has Title VII of the Civil Rights Act of 1964, as amended, impliedly revoked the express right of Japanese corporations set forth in Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan to fill management-level positions in their United States branches and subsidiaries with Japanese citizens?

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STATEMENT OF INTEREST

Amici curiae herein are three corporations, one, The East Asiatic Company, Ltd., incorporated in the Kingdom of Denmark and the other two, Heidelberg Eastern, Inc. and The East Asiatic Company, Inc., incorporated pursuant to the laws of the State of New York. The East Asiatic Company, Ltd. is the

parent corporation of The East Asiatic Company, Inc., which in turn controls Heidelberg Eastern, Inc. Like Petitioner, The East Asiatic Company, Ltd. has claimed the right to select Danish citizens "of its choice" to serve as managerial personnel in its United States branches and subsidiaries pursuant to a Treaty of Friendship, Commerce and Navigation between the United States and Denmark (the "Danish Treaty"). The complete text of the Danish Treaty is attached hereto as Appendix A.

The *amici curiae* herein have an interest in this litigation due to the great similarity between the Danish Treaty and the Treaty of Friendship, Commerce and Navigation between the United States and Japan (the "Japanese Treaty" or the "Treaty") at issue in the instant litigation. The Danish Treaty, Article VII(4) provides in pertinent part that (emphasis added):

> *Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party,* accountants and other technical experts, *executive personnel*, attorneys, agents and other specialized employees *of their choice, regardless of nationality.*

12 U.S.T. at 915.

Similarly, the Japanese Treaty, Article VIII(1) provides in pertinent part that (emphasis added):

> *Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party,* accountants and other technical experts, *executive personnel*, attorneys, agents and other specialists *of their choice.*

4 U.S.T. at 2070.

Accordingly, any judicial or legislative action which affects the interpretation of the rights of Japanese corporations under the Japanese Treaty also will clearly affect the interests of Danish corporations under the Danish Treaty.

Moreover, Danish corporations are not the only foreign governments, nationals, and corporations with a substantial

interest in the Court's interpretation of the Japanese Treaty herein. The Danish Treaty is one of many Treaties of Friendship, Commerce and Navigation entered into between United States and other countries,[1] and these FCN Treaties, most of which contain a similar provision for staffing executive-level positions with citizens of the foreign country, affect a substantial amount of the foreign trade which the United States conducts worldwide. One report of the massive volume of this international trade states that the direct investment abroad of United States corporations totaled in excess of $192 billion in 1979, and that foreign direct investment in the United States in the same year exceeded $52 billion. Petitioner's Pet. for Cert. at 9 n. 7. Consequently, the rights of a substantial number of both United States and foreign corporations, which rights help these corporations generate the billions of dollars in international trade involving the United States, will either be significantly protected or dismantled by this Court's decision herein.

Like Petitioner, the *amici curiae* herein are defendants in an action brought by a former employee, a United States citizen, who alleges that the failure of his U.S. employer, Heidelberg Eastern, Inc., to promote him and his subsequent termination from employment violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et seq.* ("Title VII") and were not protected by Article VII(4) of the Danish Treaty. *See Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979). On a motion for reconsideration made subsequent to the decision of the Second Circuit herein below and of

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1 The United States is a party to approximately thirty such Treaties of Friendship, Commerce and Navigation ("FCN Treaties") with various nations, including Italy, Ireland, Colombia, Greece, Israel, Denmark, Japan, Federal Republic of Germany, Haiti, Nicaragua, Uruguay and others. *See* Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 373 n. 1 (1956); Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 230 n. 3 (1956); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan. L. Rev. 947, 948 n. 6 (1979) (and accompanying text).

the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 343 (5th Cir. 1981), the District Court in *Linskey* refused to reverse its position even though it found the rationale in *Spiess* "quite compelling". Petitioner's Suppl. Brief in Supp. of Pet. for Cert., App. C at 22a.

Moreover, like Petitioner, the *amici curiae* herein have similarly defended their hiring and promotion practices in the *Linskey* action by claiming protection from such claims under Title VII by virtue of valid and enforceable rights granted to them by the Danish Treaty, which allows the *amici curiae* herein, as well as all Danish corporations, the unfettered right to appoint Danish citizens "of their choice" to management positions in their U.S. branches and subsidiaries.

Because of the significance of the Treaty rights at stake herein and in the several lawsuits involving similar treaties, a decision by this Court adverse to Petitioner will have a substantial detrimental impact on the international trade carried on between the United States and many other countries throughout the world. However, as demonstrated below, a decision herein adverse to Petitioner is completely unnecessary since the Treaty neither conflicts with Title VII nor has been revoked or superseded by it.

In order to protect the great volume of international trade involving the United States, and because any decision by this Court herein will substantially resolve the issues raised by the litigation in which the *amici curiae* herein are involved, the *amici curiae* herein respectfully submit this Brief urging this Court to uphold the rights granted Petitioner by the Japanese Treaty against Respondents' challenge below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated January 9, 1981 is reported at 638 F.2d 552. The opinion of the United States District Court for the Southern District of New York dated June 5, 1979 is reported at 473 F. Supp. 506. Certification for immediate appeal pursuant to 28 U.S.C. § 1292(b) was granted in an opinion of the United States District Court for the Southern District of New York dated August 9, 1979, unofficially reported at 20 Empl. Prac. Dec. (CCH) ¶ 30,205 and 20 Fair Empl. Prac. (BNA) 72. The opinion of the United States District Court for the Southern District of New York on reargument, dated November 29, 1979, is unofficially reported at 21 Empl. Prac. Dec. (CCH) ¶ 30,501 and 21 Fair Empl. Prac. (BNA) 580.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 9, 1981. On November 3, 1981, this Court granted Petitioner's Request for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. 50 U.S.L.W. 3334 (1981). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

This brief *amici curiae* is submitted pursuant to Rule 42 of the Rules of the United States Supreme Court, by the consent of all parties to this action which is on file with this Court.

TREATY, STATUTES, AND REGULATION INVOLVED

1. Article VIII(1) of the Treaty provides in relevant part (4 U.S.T. 2063, 2070):

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

2. Article VII(1) of the Treaty provides (4 U.S.T. at 2069):

> 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.

3. Section 703(a) of Title VII (42 U.S.C. § 2000e-(2)(a)) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

4. Section 703(e) of Title VII (42 U.S.C. at § 2000e-2(e)) provides in relevant part:

> (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice

> for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

5. Section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101(a)(15)(E), provides in relevant part:

> [A]n alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . .

6. 22 C.F.R. § 41.40(a)(1981) provides in relevant part:

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

STATEMENT OF THE CASE

Petitioner Sumitomo Shoji America, Inc. ("Sumitomo" or "Petitioner"), defendant in the District Court below, is established under the laws of the State of New York, is a wholly-owned subsidiary of a Japanese commercial enterprise, and, as such, is "controlled" by such Japanese commercial enterprise as contemplated in Article VII(1)(c) of the Treaty.

Respondents, plaintiffs in the District Court below, claim with one exception to be citizens of the United States and past or present female secretarial employees of Sumitomo, and claim, *inter alia,* that Sumitomo's practice of hiring male, Japanese citizens for management-level positions discriminates against them on the basis of U.S. nationality in violation of Section 7(a) of Title VII. Petitioner's Pet. for Cert., App. A at 3a.

SUMMARY OF ARGUMENT

The FCN Treaties, including the Japanese Treaty, create rights on behalf of foreign corporations to exercise control over their United States branches and subsidiaries and to appoint and employ foreign citizens "of their choice" as managers in those United States branches and subsidiaries. Since these FCN Treaties, including the Japanese Treaty, create rights on behalf of foreign corporations to use their own *citizens* as managerial personnel, these FCN Treaties do not come into conflict with the provisions of Title VII or the judicial decisions promulgated thereunder, which statutory provisions and judicial decisions do not prohibit discrimination on the basis of citizenship. Moreover, the right of both foreign and Japanese corporations to use entirely their own citizens, if they so choose, as managerial personnel could not have been modified or abrogated by Title VII, since there is absolutely no Congressional intent, express or implied, or statutory mandate, to do so.

These conclusions are in every respect as true for the Japanese Treaty as they are for FCN Treaties as a whole. The language of Article VIII(1) of the Japanese Treaty expressly grants Japanese corporations a right to appoint to the executive positions in their United States branches and subsidiaries Japanese citizens of their choice, which right neither conflicts with nor has been expressly or impliedly amended or revoked by Title VII.

ARGUMENT AND AUTHORITIES

THE 1953 TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND JAPAN CREATES A TREATY RIGHT TO STAFF MANAGERIAL PERSONNEL OF AMERICAN SUBSIDIARIES OF JAPANESE CORPORATIONS WITH JAPANESE CITIZENS OF THEIR CHOICE, WHICH RIGHT HAS NOT BEEN ABROGATED OR AMENDED.

A. Article VIII(1) of the Treaty Confers a Right on Japanese Corporations to Employ Japanese Citizens of their Choice as Managerial Personnel in the United States.

The 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan entered into force on October 30, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863, as a self-executing Treaty which became part of the domestic law of the United States without the necessity of further legislative action. *See, e.g., Asakura v. Seattle,* 265 U.S. 332, 341 (1924); *Bacardi Corp., Inc. v. Domenech,* 311 U.S. 150, 161 (1940).[2]

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2 That Petitioner and similarly situated United States subsidiaries of foreign corporations have standing to invoke the rights of the Treaty has already been favorably determined in the Second Circuit decision below, 638 F.2d at 555-558, and in *Spiess v. C. Itoh & Company (America), Inc.,* 643 F.2d, 353, 356-359, *reh. granted,* 654 F.2d 302 (5th Cir. 1981). We rely on the arguments set forth in those decisions in concluding that Petitioner's standing to invoke the rights granted by the Treaty cannot seriously be disputed.

The language of the Japanese Treaty expressly grants Japanese corporations the right to fill management-level positions in their United States branches and subsidiaries with Japanese nationals of their choice. Article VIII(1) of the Treaty provides in relevant part that:

> *Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party,* accountants and other technical experts, *executive personnel,* attorneys, agents and other specialists *of their choice.*

4 U.S.T. at 2070 (emphasis added).

In addition to the express language in the Treaty itself, the Department of State has unambiguously interpreted Article VIII(1) of the Treaty to confer on Japanese companies and their branches and subsidiaries the right to use Japanese citizens as managerial personnel in the United States. This Court should give meaning to the Treaty consistent with these genuine shared expectations of the contracting parties. *See Maximov v. United States,* 299 F.2d 565, 568 (2d Cir. 1962), *aff'd,* 373 U.S. 49 (1963); *Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 35 (2d Cir. 1975); *Compagnie Financiere de Suez et de L'Union Parisienne v. United States,* 492 F.2d 798, 810-811 (Ct. Cl. 1974).

One source of the State Department's interpretation of the Treaty is its interpretation of FCN Treaties given to Congress at the time several FCN Treaties were being negotiated. During hearings held on July 13, 1953 before the Senate Subcommittee on Commercial Treaties, Committee on Foreign Relations, reported as *Commercial Treaties,* Hearing before the Subcommittee of the Committee on Foreign Relations, U.S. Senate, 83d Cong., 1st Sess. (the "1953 Hearings"), the State Department presented a tabular comparison of several proposed FCN Treaties and compared, *inter alia,* the Japanese Treaty to the 1949 Treaty of Friendship, Commerce and Navigation between the United States and Uruguay. That tabular comparison contains the following entries:

APPROVED TREATIES	PROPOSED TREATIES
URUGUAY	JAPAN
Art. V(4): Right to engage technical and managerial personnel *regardless of nationality.* Such employees may perform limited duties in other country without necessarily having qualified to practice a profession therein.	Art. VIII(1): *Same.*

1953 Hearings, *supra* at 6-9 (emphasis added).

Another source of the State Department's interpretation of the Treaty is found in a letter dated October 17, 1978 to Abner W. Sibal, General Counsel of the Equal Employment Opportunity Commission, by the State Department Deputy Legal Advisor, Lee R. Marks, who stated that:

> Article VIII(1) of the [Japanese] FCN Treaty gives nationals and companies of each Party the right to employ, in the territory of the other, "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." This provision was intended to ensure that U.S. companies operating in Japan could have U.S. personnel for critical positions, and vice versa. *The phrase "of their choice" should be interpreted to give effect to this intention, and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders.*

Letter of Lee R. Marks, State Department Deputy Legal Advisor, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, dated October 17, 1978, *re-*

printed in 73 Am. J. Int'l L. 281 (1979) (Joint Appendix at 94a) (emphasis added).[3]

Thus, the above tabular comparison between the Uruguay Treaty and the then-proposed Japanese Treaty, as well as the Marks letter, demonstrates that both the original State Department interpretation and the United States Senate's understanding of the Treaty at the time of the Treaty's self-execution unambiguously embrace a right of Japanese corporations to fill management-level positions in their United States branches and subsidiaries with Japanese citizens of their choice.

Therefore, the express language of Article VIII(1) of the Treaty, the legislative understanding of the Treaty, and the original State Department interpretation of the Treaty all recognize that Japanese nationals and companies have a right under the Treaty to use Japanese citizens "of their choice" as managerial personnel in their United States branches and subsidiaries.

The right of a foreign corporation to control completely the operation of its United States branches and subsidiaries has been recognized in contexts other than that of the Japanese

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3 Two additional letters have been issued by individuals within the State Department subsequent to the letter by Deputy Legal Advisor Marks quoted herein; both subsequent letters purported to interpret the rights granted by FCN Treaties. However, the Second Circuit below refused to heed either letter, 638 F.2d at 558 n.5, and this Court should do the same. With respect to the first letter dated September 11, 1979, *reprinted in* 74 Am. J. Int'l L. at 158-59 (1980), from James R. Atwood, Deputy Legal Advisor, U.S. Department of State, to Lutz Alexander Prager, Esq., Assistant General Counsel, Equal Employment Opportunity Commission, the Second Circuit noted that the Atwood letter, although it disagreed with the Marks letter, did not carry any weight with the court since it never explained how the Marks letter was in error. *Id.* With respect to the second letter dated September 9, 1980 from the U.S. Department of State to the Government of Denmark, the Second Circuit dismissed that letter after it found evidence that the EEOC, which was *amicus* on the appeal in support of the plaintiffs below, had participated in the preparation of the letter. *Id.*

Treaty. For example, in a statement by Tyge Lehmann, Head of Division, Legal Department, Ministry of Foreign Affairs, Kingdom of Denmark (Appendix B hereto), the Danish Government has unambiguously declared that:

> Danish companies which control and manage enterprises established or acquired in the United States according to Article VIII(1) [of the Danish Treaty] are entitled to engage Danish nationals in positions such as specified in Article VII(4). American companies, of course, enjoy the equivalent right in Denmark. *This interpretation is not only expressly underlined by the use in Article VII(4) of the words ". . . employees of their choice, regardless of nationality . . .", but is likewise mandated if the right [provided in the Danish Treaty] to control and manage enterprises in the territories of the other Party is to be maintained.*

App. B at 1 (emphasis added). This statement is similar to a previous statement by the Danish Ministry in a letter dated October 17, 1979 to The East Asiatic Company, Ltd., Joint Appendix at 309a. In the October 17, 1979 letter, the Danish Ministry commented that:

> Art. VII, paragraph 4, under which national companies of either Party are permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialized employees of their choice, regardless of nationality, *has the direct aim of ensuring these companies the right to engage own [sic] citizens, i.e. foreigners in the eyes of the other Party, to fill the said posts.*

Joint Appendix at 309a. These statements demonstrate that the right of a foreign corporation to exercise control over the selection of the executive personnel in its U.S. operations is recognized by Denmark as well as many other governments who are parties to FCN Treaties.

A conclusion that Article VIII(1) of the Japanese Treaty guarantees Japanese nationals and corporations the ability to control completely the citizenship of managerial personnel in their United States branches and subsidiaries furthers the express policy of the Treaty to promote international trade. As the Assistant Secretary of State for Economic Affairs, Samuel C. Waugh, testified before the Senate:

> The object of the Department of State in negotiating treaties of this type is to facilitate the protection of American citizens and their interests abroad.
>
> * * *
>
> Such treaties facilitate the protection of American interests because they contain definite commitments with regard to specific rights.

1953 Hearings, *supra* at 2. Further:

> Of special concern to investors [under the FCN Treaties] are such assurances as . . . the right of the owner to manage his own affairs and employ personnel of his choice. . . .

1953 Hearings, *supra* at 2.

It must be kept in mind that the policy of promoting international trade, in part through the use of the executive selection rights granted in Article VIII(1) of the Japanese Treaty by our own country's nationals and companies operating through branches or subsidiaries in Japan, was not ignored by the Department of State in negotiating the Treaty. As Assistant Secretary of State Waugh further testified before the Senate:

> The extension of reciprocal privileges to aliens in this country has not, as an object in itself entered into the planning or execution of the program of negotiating in these treaties, *but it is necessary in order to secure*

> *American rights abroad.* Mutuality is the only basis upon which it is possible to obtain the assurances required.

1953 Hearings, *supra* at 3 (emphasis added).

Further, a Senate Executive Report of hearings regarding FCN Treaties, entitled "General Nature of Commercial Treaties", states:

> It must be borne in mind in considering these conventions that they are based on the principal of mutuality in that when the United States gives a right or privilege to an alien to carry on activities in the United States, or assumes an obligation with respect to protecting the rights of aliens, the United States *in turn obtains similar rights and privileges for American citizens in the foreign country with which the Treaty is concluded. Conventions of this type are advantageous to the United States since so many Americans conduct business in foreign countries.*

S. Exec. Rep. No. 5, 82d Cong., 1st Sess., at 3 (1953) (emphasis added).

Since the Treaty grants Japanese corporations freedom to select Japanese citizens of their choice for executive positions in their United States branches and subsidiaries, any analysis of this case or of a Japanese corporation's rights under the Treaty in general pursuant to the *bona fide* occupational qualification ("bfoq") exception of Title VII, 42 U.S.C. § 2000e-2(e), is unwarranted. Although the Second Circuit below noted that the bfoq exception might appropriately be applied herein, 638 F.2d at 559, any decision that a Japanese corporation must justify its executive selection decisions under the bfoq exception to Title VII, whether such exception is narrowly or expansively drawn, effectively ignores the meaning and dismantles the effect of Article VIII(1) of the Treaty. Such a decision would strip a party protected by the Treaty of its rights under the Treaty and would place it in the same position as if the Treaty and Article VIII(1) thereto had never been

enacted. Consequently, to the extent that Petitioner's Treaty rights are enforced herein, any bfoq analysis is unnecessary.

In summary, the Treaty was negotiated by the United States and Japan more than a quarter of a century ago to provide a right to Japanese corporations to fill executive positions in their United States branches and subsidiaries with Japanese citizens of their choice, with reciprocal rights granted to U.S. nationals and corporations. The Treaty was developed for the purpose of facilitating international trade among the parties and was predicated on the right of nationals to establish and thoroughly control corporate enterprises in the host country through management personnel of their choice. Many other FCN Treaties have also been enacted, and the rights granted foreign corporations by all of these FCN Treaties have assisted in the development of a substantial volume of international trade involving the United States. Since the Japanese Treaty and other FCN Treaties provide the foundation for a significant portion of the foreign economic policy of the United States toward Japan and of Japan toward the United States, the rights granted by the Japanese Treaty should be given full effect. *See Bacardi Corp. v. Domenech,* 311 U.S. 150 (1940); *Factor v. Laubenheimer,* 290 U.S. 276 (1933); *Reed v. Wiser,* 555 F.2d 1079 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977).

B. Since Article VIII(1) of the Treaty Provides Japanese Corporations the Right to Appoint Only Japanese Citizens of their Choice to Managerial Positions in their United States Branches and Subsidiaries, the Treaty Does Not Conflict with the Provisions of Title VII of the Civil Rights Act of 1964, As Amended.

It is clear from the Legislative Hearings conducted concurrent to the enactment of the Treaty and from the legislation implementing the Treaty and enabling the rights established therein to become available to the Parties, that Article VIII(1) of the Treaty grants, *inter alia,* a Japanese corporation only the right to use Japanese *citizens* "of its choice" in executive positions for its United States branches and subsidiaries. First,

Section 101(a)(15)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(E)(i)—which effectuates the Treaty rights of nationals and companies of Japan to appoint executive personnel "of their choice" to positions in their enterprises in the United States—provides "Treaty Trader" status to Japanese *citizens* seeking to enter the United States for the purpose of carrying on international trade from within the United States. Hence, this legislation effectuating the Treaty circumscribes the scope of the rights granted by Article VIII(1) of the Treaty by granting a right to enter the United States under the Treaty solely on the basis of the entering employee's Japanese citizenship.

Second, in 1952, at Hearings before the Subcommittee on Commercial Treaties and Consular Conventions, Senate Committee on Foreign Relations, 82d Cong., 2d Sess. 6 (1952) (the "1952 Hearings"), the term "nationality", which is the operative term in Article VIII(1) of the Treaty, and the term "citizen" were used synonymously. *See, e.g.*, Letter from Jack Tate, Acting Legal Advisor of the Department of State, to Senator Sparkman, 1952 Hearings, *supra* at 40; *see also,* Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 Stan. L. Rev. 947, 952 (1979).

Accordingly, Article VIII(1) of the Treaty grants Japanese companies the right to select Japanese *citizens* "of their choice" for managerial positions in their United States subsidiaries and branches. Since the rights granted by Article VIII(1) of the Treaty to Japanese companies only involve the *unrestricted* selection of Japanese citizens to fit limited positions, such Treaty rights do not conflict with the express provisions of Title VII of the Civil Rights Act of 1964 or the judicial decisions promulgated thereunder.

The express language of Title VII does not prohibit employment decisions purely on the basis of alienage or citizenship. Section 7(a) of Title VII provides, in pertinent part, only that:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any

> individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*. . . .

42 U.S.C. § 2000e-2(a)(1) (emphasis added). Thus, the operative language of Title VII herein does not expressly prohibit the selection of Japanese citizens, solely on the basis of their citizenship, by a Japanese corporation for managerial positions in such Japanese corporation's United States branches or subsidiaries.

Additionally, the conclusion that the clear statutory language of Title VII does not prohibit citizenship-conscious employment decisions, is supported by prior decisions of this Court. In this Court's decision in *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973), an employer's refusal to hire a person because of her foreign citizenship was held by this Court not to violate the provisions of Title VII of the Civil Rights Act. Instead, this Court held that, by the term "national origin", Congress had not intended to refer to distinctions based upon citizenship. *Id.* at 89-91. *See also, Ramirez v. Sloss*, 615 F.2d 163, 167 n. 5 (5th Cir. 1980) ("The 1964 Act [Title VII] does not apply to employment discrimination on the basis of alienage."); *cf. Nguyen v. Montgomery Ward & Co., Inc.*, 513 F. Supp. 1039 (N.D.Tex. 1981).

Finally, the primary policy considerations underlying Title VII are not implicated by the citizenship-conscious employment selection in this case. It must be kept in mind that Title VII is much more compellingly applied to cases of discrimination against insular and discrete minorities than in situations, as here, where a majority of United States citizens is attempting to invoke Title VII to prohibit the employment of members of a discrete minority of Japanese citizens. *See, e.g., Fullilove v. Klutznick,* 448 U.S. 448, 449 (1980); *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress . . . to

eliminate those discriminatory practices and devices which have fostered . . . stratified job environments to the disadvantage of *minority* citizens") (emphasis added). Since Article VIII(1) of the Treaty furthers the legitimate policy of promoting international trade—without discriminating against any "minority" group—a decision herein upholding Article VIII(1) of the Treaty does not undermine Title VII's special solicitude for protecting discrete and insular minorities.

Accordingly, since Petitioner's right under Article VIII(1) of the Treaty to employ Japanese nationals in its United States operations is based solely upon such employees' Japanese citizenship, and since Title VII does not prohibit employment discrimination on the basis of citizenship, the selection of Japanese citizens to fill executive-level positions of United States branches and subsidiaries of Japanese corporations neither violates Title VII of the Civil Rights Act, nor even implicates the policy of Title VII to protect insular minorities against unjust discrimination. Therefore, the rights granted by Article VIII(1) of the Treaty should be upheld.

C. The Rights Conferred by Article VIII(1) of the Treaty to Manage and Control Branches and Subsidiaries of Japanese Corporations Have Not Been Amended or Revoked by Title VII of The Civil Rights Act, As Amended.

A holding herein that Title VII has neither amended nor rescinded rights established by Article VIII(1) of the Treaty is consistent with the language of and practice surrounding the Treaty, with the legislative history of Title VII, and with this Court's long-standing practice of enforcing to the greatest extent possible international treaties vis-a-vis subsequent domestic legislation.

1. The Rights Granted by Article VIII(1) of the Treaty Were Intended to Have Effect Regardless of Other Conflicting Domestic Legislation.

For several reasons, a Japanese corporation's right pursuant to the Treaty to fill executive-level positions in its United States

branches and subsidiaries with Japanese citizens of its choice is not circumscribed by federal or state laws which might otherwise affect the employment practices of a U.S. domestic corporation.

First, the language of the Treaty itself supports this conclusion. Article VIII(1) provides that the Japanese companies may select management-level personnel "of their choice". These words would be rendered virtually meaningless if they were interpreted to be impliedly qualified by a phrase such as "except as elsewhere provided."

Second, and more importantly, one State Department negotiator of the Treaty and of similar Treaties of Friendship, Commerce and Navigation has recognized expressly that the right granted by the Treaty to Japanese corporations to fill the management-level positions in their United States branches and subsidiaries with Japanese citizens is effective regardless of existing U.S. laws which otherwise regulate employment practices. Herman Walker, Jr., a member of the Department of State who negotiated the Treaty and many other FCN Treaties between the United States and other nations, has, in several articles without official attribution, commented in relation to this managerial-level employee selection right:

> Though equal provision for subordinate investor-enterprise employees is not yet possible owing to lack of statutory authority, such personnel is to an extent provided for, in that *management is assured freedom of choice* in the engaging of essential executive and technical employees in general, regardless of their nationality, *without legal interference* from "percentile" restrictions and the like. . . .

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 Am. J. Comp. L. 229, 234 (1956) (emphasis added). Further, noting that the rights granted by certain FCN Treaty provisions were not "contingent" on whether domestic laws were favorable, Mr. Walker noted:

> There is also a certain margin for the play of non-contingent standards, or "absolute" rules, in the formulation of [these] treaty provisions.

Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn. L. Rev. 805, 811 (1958).

Hence, although a substantial portion of the Treaty grants Japanese corporations only those rights also available to domestic United States corporations ("national treatment"), *see, e.g.,* Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am. J. Int'l L. 373, 384 (1956), the affirmative grant to Japanese corporations of a right to use Japanese citizens as managerial and technical personnel in their United States branches and subsidiaries goes "beyond national treatment. . . ." Walker, *Provisions on Companies in United States Commercial Treaties, supra* at 386.

Third, the other provisions in Article VIII of the Treaty demonstrate that Article VIII of the Treaty unconditionally provides Japanese corporations the right of "free choice" in selecting Japanese citizens to serve as managerial-level personnel in their United States branches and subsidiaries. In addition to the language of Article VIII(1) quoted above that Japanese companies may "engage . . . executive personnel . . . of their choice," Article VIII(1) also permits certain Japanese professionals to engage in certain types of employment within the United States regardless of their compliance with United States statutes and regulations which regulate the employment of United States citizens who are professionals in the same occupations. Article VIII(1) of the Treaty further provides, in pertinent part that (emphasis added):

> Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts *regardless of the extent to which they have qualified for the practice of a profession within the territories of such other Party,* for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and compa-

> nies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

See also, Walker, *Provisions on Companies in United States Commercial Treaties, supra* at 386. This other Article VIII(1) right of a Japanese corporation to employ certain professionals in its United States operations regardless of U.S. laws regulating the qualifications of those professionals, demonstrates that all Article VIII(1) rights, including the right at issue here of selecting executive personnel, have been negotiated to be exempt from, and in fact are not subject to, the restrictions of laws which otherwise affect United States citizens and corporations.

In summary, the language of, the practice surrounding, and the clear import of the remaining portions of Article VIII(1) demonstrate that the rights granted by the Treaty to Japanese corporations to staff their United States branches and subsidiaries with Japanese executives is not contingent in any way upon the existence of other domestic United States legislation.

The above conclusion that the "of their choice" provision of Article VIII(1) the Treaty creates a limited but absolute rule that permits foreign nationals and corporations to control their overseas investments through the selection of a few executive-level personnel has already been expressly set forth by the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.,* 643 F.2d 353 (5th Cir. 1981). In that decision, the Court stated:

> [c]onsidering the Treaty as a whole, the only reasonable interpretation is that ["of their choice"] means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, *without regard to host country laws.*

643 F.2d at 361 (emphasis added).

And:

> [i]t is apparent that *article VIII(1)*'s "of their choice" provision *was intended*, not to guarantee national treatment, but *to create an absolute rule permitting foreign nationals to control their overseas investments.*

643 F.2d at 360 (emphasis added).

Hence, the rights granted to Japanese corporations by Article VIII(1) of the Treaty are not contingent upon other domestic United States legislation.

It must be noted that the right granted by the Treaty to Japanese companies to fill managerial-level positions with Japanese citizens of their choice, despite the existence of U.S. laws regulating employment practices, does not depend upon whether such U.S. laws would be characterized as "ultranationalistic" or "progressive". First, the clear language of Article VIII of the Treaty does not distinguish between those two "types" of statutes but, instead, grants the executive-selection right unconditionally. Second, such a characterization of legislation is difficult at best and must necessarily presume an improper intent on the part of Congress if the statute is viewed other than as "progressive" or otherwise well-intended. Finally, any attempt to abrogate the Article VIII(1) Treaty rights on a selective basis as a result of necessarily loose characterizations of the conflicting domestic legislation subverts the purpose and legislative understanding of the Treaty, which is to promote international trade by allowing foreign investors complete control over their investments abroad. Accordingly, it is irrelevant whether the source of potential interference with the Treaty is viewed as "progressive" or "ultranationalistic" legislation—the Treaty rights should prevail.

2. *Title VII Has Neither Amended Nor Revoked the Rights Granted by Article VIII(1) of the Treaty.*

Although Congress was fully aware of the privilege created by Article VIII(1) of the Japanese Treaty and the other FCN Treaties at the time it enacted Title VII and its subsequent

amendments, the legislative history of Title VII and its amendments, as well as the statute itself are devoid of any intention to amend or supersede these long-standing Treaty rights.

First, Title VII should not be held to amend or revoke Article VIII(1) of the Treaty since Congress never expressed any intention to do so. This Court will not give effect to any attempt to revoke a treaty without a clear expression from Congress. As this Court has said elsewhere, "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 285 n. 13 (1974). *Itzcovitz v. Selective Service Local Board No. 6, New York,* 301 F. Supp. 168 (S.D.N.Y. 1969), *appeal dismissed,* 422 F.2d 828 (2d Cir. 1970); *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963). Similarly, a fundamental principle of treaty interpretation is that:

> A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.

Cook v. United States, 288 U.S. 102, 120 (1933). As has been stated regarding the rule established in *Cook, supra*:

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

Itzcovitz, supra, at 181 (emphasis added); *see also, McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963). Similarly, in *Asakura v. Seattle,* 265 U.S. 332 (1924), this Court stated:

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

265 U.S. at 342. *See also, Bacardi Corp. v. Domenech,* 311 U.S. 150 (1940); *Factor v. Laubenheimer,* 290 U.S. 276 (1933); *United States v. A.L. Burbank & Co., Ltd.,* 525 F.2d 9 (2d Cir. 1975).

Title VII has not amended or revoked Article VIII(1) of the Treaty, since Congress neither debated nor even mentioned the Japanese Treaty and the other FCN Treaties in enacting Title VII. Pursuant to the long-standing principles of treaty interpretation set forth above, this utter silence is insufficient to bring about any change in the force of the Article VIII(1) Treaty rights. If Congress had intended in 1964 to modify or revoke the vast number of long-standing Treaty rights of nationals and corporations of Japan and of many other countries throughout the world to employ managerial personnel of their choice in the United States, such a fundamental departure from the rights of foreign nationals and corporations surely would have been the subject of intense debate during the legislative hearings and discussions on Title VII and its 1972 Amendments. However, neither does the language of Title VII, its amendments, or the legislative history thereof contain any reference to the many Treaty commitments of the United States, nor do they refer in any way to any intent to modify those Treaty commitments. *See generally,* U.S. Code Cong. & Admn. News, 88th Cong., 2d Sess. (1964) at 2355; U.S. Code Cong. & Admn. News, 92d Cong. 2d Sess. (1972) at 2137. Moreover, although Congress had further opportunity to modify, revoke, or even comment upon the FCN Treaty rights while it considered the 1972 Amendments to Title VII, its continued silence regarding the FCN Treaties is ample evidence of its unwillingness to abrogate in any way the rights created therein.

It cannot be imagined even for a moment that Congress in enacting Title VII would intend to revoke rights under numer-

ous FCN Treaties protecting uncounted thousands of foreign nationals and corporations, of which rights Congress was well aware, without as much as a single statement either in the legislative history of Title VII or in the statute itself. To believe that Congress would silently revoke such substantial and long-standing Treaty rights is sheer folly.

Second, the failure of Congress to revoke expressly or even mention the Treaty rights of foreign nationals and corporations is in stark contrast to the clear Congressional action taken upon the passage of the Foreign Boycotts Act, 91 Stat. 244. In that Act, Congress expressly provided that the United States Civil Rights Laws should be applied to foreign corporations, noting that:

> [n]othing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.

50 U.S.C. app. § 2403-1a, Section 4A(a)(4), 91 Stat 244, 246 (1977). Thus, the Foreign Boycotts Act demonstrates that, when Congress intends to bring foreign corporations operating in the United States within the ambit of the laws of the United States, it does so in a clear, unambiguous manner.

Third, a long-continued practice under a treaty, known and acquiesced in by Congress, raises a presumption of Congressional consent to it. *Dames & Moore v. Regan,* 49 U.S.L.W. 4969, 4978 (July 2, 1981) (citing *United States v. Midwest Oil Co.,* 236 U.S. 459, 474 (1915)). Consequently, the failure of Congress expressly to revoke these Treaty rights demonstrates that it had no intention of superseding, modifying, or revoking, *inter alia,* the Article VIII(1) Treaty rights of Japanese corporations to use Japanese citizens as managerial personnel in their United States branches and subsidiaries.

Finally, this Court should apply to the instant action the reasoning of its decision in *Morton v. Mancari,* 417 U.S. 535 (1974), that the repeal of a Treaty by implication is not favored, in holding that the Treaty rights of Japanese corpora-

tions have not been amended or revoked by Title VII. In *Morton v. Mancari, supra,* this Court reviewed the relationship between Title VII and a previously enacted statute authorizing preferential treatment in the employment of Indians on or near Indian reservations. This Court held that the preferential employment reference in that statute, which was in contradiction to Title VII, had not in fact been repealed by the 1972 Amendments to Title VII. 417 U.S. at 545-547. In so holding, the Court noted that:

> This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference [in the Indian employment statute] is a long standing important component of the government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

417 U.S. at 550; *see also, Watt v. Alaska,* 49 U.S.L.W. 4433 (Apr. 21, 1981); *United States v. Will,* 449 U.S. 200, 221 (1980); *T.V.A. v. Hill,* 437 U.S. 153, 189 (1978). In *Morton v. Mancari, supra,* the Court also stated that, while the Indian preference statute was a specific provision applying to a specific situation:

> [t]he 1972 [Civil Rights] Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.

417 U.S. at 550-51. *See also, Rossi v. Brown,* 467 F. Supp. 960 (D.D.C. 1979), *rev'd,* 642 F.2d 553 (D.C. Cir. 1980), *cert. granted,* 50 U.S.L.W. 3244 (October 5, 1981) (District Court *held* that specific provisions of 5 U.S.C. (Supp. III) 7201 note, which allows certain specific forms of discrimination, "controls over the general provisions of Title VII"); *Radzanower v.*

Touche Ross & Co., 426 U.S. 148, 155 (1976); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957).

In summary, the Treaty creates for Petitioner Sumitomo the right to fill all of its managerial positions in the United States with Japanese citizens. This limited treaty privilege to appoint citizens of Sumitomo's choice does not conflict with either the express terms of Title VII or the judicial decisions promulgated thereunder, and the rights created by this Treaty have not been expressly amended or revoked by Title VII or other subsequent act of Congress.

Accordingly, this Court should protect the international network of rights established by the FCN Treaties by upholding the rights granted to Japanese corporations in Article VIII(1) of the Japanese Treaty to appoint Japanese citizens as executive-level personnel in their United States operations. Such a result herein in favor of Petitioner would be consistent with the language of the Treaty and Title VII, the original State Department and Congressional understanding of the Treaty, and the legislative history of Title VII, and such a result would also protect the substantial international trade network which has developed with the assistance of the FCN Treaties.

CONCLUSION

For the reasons stated above, this action should be remanded to the District Court below with instructions to dismiss the nationality discrimination action for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark.

The United States of America and the Kingdom of Denmark, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements encouraging mutually beneficial investments, promoting mutually advantageous commercial intercourse and otherwise establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded, and for that purpose have appointed as their Plenipotentiaries,

The President of the United States of America:

His Ambassador Extraordinary and Plenipotentiary, Mrs. Eugenie Anderson,

and

His Majesty the King of Denmark:

His Minister for Foreign Affairs,

Mr. Ole Bjorn Kraft,

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following Articles:

Article I.

Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party.

Article II.

1. Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and for the purpose of engaging in related commercial activities; and (b) for other purposes subject to the laws relating to the entry and sojourn of aliens.

2. Nationals of either Party, within the territories of the other Party, shall be permitted: (a) to travel therein freely, and to reside at places of their choice; (b) to enjoy liberty of conscience; (c) to hold both private and public religious services; (d) to gather and to transmit material for dissemination to the public abroad; and (e) to communicate with other persons inside and outside such territories by mail, telegraph and other means open to general public use.

3. The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and necessary to protect the public health, morals and safety.

Article III.

1. Nationals of either Party within the territories of the other Party shall be free from unlawful molestations of every kind, and shall receive the most constant protection and security, in no case less than that required by international law.

2. If, within the territories of either Party, a national of the other Party is accused of crime and taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel.

Article IV.

1. Nationals of either Party shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that establish a pecuniary compensation on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment.

2. In addition to the rights and privileges provided in paragraph 1 of the present Article, nationals of either Party shall, within the territories of the other Party, be accorded national treatment in the application of laws and regulations establishing a system of compulsory insurance in the case of the United States of America and a system of voluntary insurance in the case of the Kingdom of Denmark, under which benefits are paid without an individual test of financial need against loss of wages or earnings due to unemployment.

Article V.

1. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in either business or nonprofit activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

2. Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to

any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party.

Article VI.

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to unlawful entry or molestation. Official searches and examinations of such premises and their contents, when necessary, shall be made with careful regard for the convenience of the occupants and the conduct of business.

3. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for public purposes nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

4. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied.

5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 3 of the present Article. Moreover, enterprises in which nationals and

companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

Article VII.

1. Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to engaging in commercial, manufacturing, processing, financial, construction, publishing, scientific, educational, religious and philanthropic activities.

2. Nationals and companies of either Party shall further be accorded, within the territories of the other Party, most-favored-nation treatment with respect to:

a) the activities listed in paragraph 1 of the present Article;

b) exploring for and exploiting mineral deposits;

c) engaging in fields of economic and cultural activity in addition to those listed in paragraph 1 of the present Article or in sub-paragraph b) of the present paragraph;

d) organizing, participating in and operating companies of such other Party.

3. With respect to professional activities, nationals of either Party shall be accorded national treatment within the territories of the other Party, except as to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute exclusively to citizens of the country.

4. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel,

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

Article VIII.

1. Nationals and companies of either Party shall be accorded within the territories of the other Party the right to constitute companies for engaging in commercial, manufacturing, processing, financial, construction, mining, publishing, scientific, educational, religious and philanthropic activities, and to control and manage enterprises which they have been permitted to establish or acquire within such territories for the foregoing and other purposes.

2. Companies, controlled by nationals and companies of either Party and constituted under the applicable laws and regulations within the territories of the other Party for engaging in the activities listed in paragraph 1 of the present Article, shall be accorded national treatment therein with respect to such activities.

Article IX.

1. Nationals and companies of either Party shall be accorded national treatment within the territories of the other Party with respect to acquiring all kinds of movable property by testate or intestate succession or through judicial process and all kinds of immovable property by testate or intestate succession.

2. Nationals and companies of either Party shall be accorded national treatment within the territories of the other

Party with respect to acquiring, by purchase, lease or otherwise, and with respect to owning movable property of all kinds, both tangible and intangible, subject to the right of such other Party to limit or prohibit, in a manner that does not impair rights and privileges secured by Article VIII, paragraph 1, or by other provisions of the present Treaty, alien ownership of particular materials that are dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on particular types of activities.

3. Nationals and companies of either Party shall be accorded, with respect to acquiring immovable property within the territories of the other Party, the treatment generally accorded to foreigners under the laws of the place where the property is situated; and they shall be permitted to maintain tenure of immovable property necessary and proper to the exercise of rights and privileges secured by Article VII or by other provisions of the til [sic] present Treaty, in conformity with the applicable laws and regulations.

4. Nationals and companies of either Party may be required, within the territories of the other Party, to dispose of property they may have acquired:

a) in the case of movable property, if the alien ownership thereof is limited or prohibited pursuant to paragraph 2 of the present Article;

b) in the case of immovable property, if the property is held for purposes other than those referred to in paragraph 3 of the present Article.

Conditions or requirements shall not be imposed upon such disposition that would prevent the realization of full and just value. Particularly, a term of at least five years shall be allowed in which to effect such disposition.

5. Nationals and companies of either Party shall be accorded national treatment within the territories of the other Party with respect to disposing of property of all kinds, subject to the provisions of paragraph 4 of the present Article.

Article X.

Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment with respect to obtaining and maintaining patents of invention, and with respect to rights in trade marks, trade names, trade labels and industrial property of all kinds.

Article XI.

1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

4. In the case of companies of either Party engaged in trade or other gainful pursuit within the territories of the other

Party, and in the case of nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party but not resident therein, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

5. Notwithstanding the provisions of the present Article, each Party may: (a) accord specific advantages as to taxes, fees and charges to nationals, residents and companies of third countries on the basis of reciprocity, if such advantages are similarly extended to nationals, residents and companies of the other Party; (b) accord to nationals, residents and companies of a third country special advantages by virtue of an agreement with such country for the avoidance of double taxation or the mutual protection of revenue; and (c) accord to its own nationals and to residents of contiguous countries more favorable exemptions of a personal nature with respect to income taxes and inheritance taxes than are accorded to other nonresident persons.

Article XII.

1. Nationals and companies of either Party shall be accorded by the other Party national treatment and most-favored-nation treatment with respect to payments, remittances and tranfers of funds or financial instruments, between the territories of the two Parties as well as between the territories of such other Party and of any third country.

2. Neither Party shall impose exchange restrictions as defined in paragraph 5 of the present Article except to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people and to prevent its monetary reserves from

falling to a very low level or to effect a reasonable increase in very low monetary reserves. It is understood that the provisions of the present Article do not alter the obligations either Party may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a Party to impose such particular restrictions.

3. If either Party imposes exchange restrictions in accordance with paragraph 2 above, that Party shall make provisions at the earliest possible date and to such an extent as may be practicable for the withdrawal of: (a) the compensation referred to in Article VI, paragraph 3, of the present Treaty, (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, amounts originating from depreciation of direct investments, and capital transfers; however, transfers dealt with under (c) shall be considered in the light of special needs for other transfers. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

4. Exchange restrictions shall not be imposed by either Party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, trade, and other interests of the nationals and companies of the other Party, nor to the competitive position thereof. Each Party shall afford the other Party adequate opportunity for exchanging views at any time regarding problems that might arise from the application of the present Article.

5. The term "exchange restrictions" as used in the present Article includes all restrictions, regulations, charges, taxes or other requirements imposed by either Party which burden or interfere with payments, remittances, or transfers of funds or

of financial instruments between the territories of the two Parties.

Article XIII.

Commercial travelers representing nationals and companies of either Party engaged in business within the territories thereof shall, upon their entry into and departure from the territories of the other Party and during their sojourn therein, be accorded most-favored-nation treatment in respect of the customs and other matters, including, subject to the exceptions in Article XI, paragraph 5, taxes and charges applicable to them, their samples and the taking of orders.

Article XIV.

1. Each Party shall accord most-favored-nation treatment to products of the other Party, from whatever place and by whatever type of carrier arriving, and to articles destined for exportation to the territories of such other Party, by whatever route and by whatever type of carrier, in all matters relating to customs duties and other charges, and with respect to all other regulations, requirements and formalities imposed on or in connection with imports and exports.

2. Neither Party shall impose any prohibition or restriction on the importation of any product of the other Party, or on the exportation of any article to the territories of the other Party, that:

a) if imposed on sanitary or other customary grounds of a non-commercial nature or in the interest of preventing deceptive or unfair practices, arbitrarily discriminates in favor of the importation of the like product of, or the exportation of the like article to, any third country;

b) if imposed on other grounds, does not apply equally to the importation of the like product of, or the exportation of the like article to, any third country; or

c) if a quantitive regulation involving allotment to any third country with respect to an article in which such other Party has an important interest, fails to afford to the commerce of such other Party a share proportionate to the amount by quantity or value supplied by or to such other Party during a previous representative period, due consideration being given to any special factors affecting the trade in the article.

3. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to all matters relating to importation and exportation.

4. As used in the present Treaty the term "products of" means "articles the growth, produce or manufacture of". The provisions of the present Article shall not apply to advantages accorded by either Party:

a) to products of its national fisheries;

b) to adjacent countries in order to facilitate frontier traffic; or

c) by virtue of a customs union or free trade area of which either Party may become a member, after having informed the other Party of its plans and having afforded it opportunity to express its views thereon.

Article XV.

1. Each Party shall promptly publish laws, regulations and administrative rulings of general application pertaining to rates of duty, taxes or other charges, to the classification of articles for customs purposes, and to requirements or restrictions on imports and exports or the transfer of payments therefor, or affecting their sale, distribution or use; and shall administer such laws, regulations and rulings in a uniform, impartial and reasonable manner. As a general practice, new administrative requirements affecting imports, with the exception of requirements imposed on sanitary grounds or for reasons of public

safety, shall not go into effect before the expiration of 30 days after publication, or alternatively, shall not apply to articles en route at time of publication.

2. Each Party shall provide an appeals procedure under which nationals and companies of the other Party, and importers of products of such other Party, shall be able to obtain prompt and impartial review and correction of administrative action relating to customs matters, including the imposition of fines and penalties, confiscations, and rulings on questions of customs classification and valuation by the administrative authorities. Penalties imposed for infractions of the customs and shipping laws and regulations shall be merely nominal in cases resulting from clerical errors or when good faith can be demonstrated.

Article XVI.

1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use.

2. Articles produced by nationals and companies of either Party within the territories of the other Party, or by companies of the latter Party controlled by such nationals and companies, shall be accorded therein treatment no less favorable than that accorded to like articles of national origin by whatever person or company produced, in all matters affecting exportation, taxation, sale, distribution, storage and use.

Article XVII.

1. Each Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other Party solely in accordance with commercial considerations including price, quality, availability, marketability, transportation and other

conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to complete for participation in such purchases and sales.

2. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies, (b) the awarding of concessions and other government contracts, and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

Article XVIII.

1. The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.

2. The Parties recognize that conditions of competitive equality should be maintained in situations in which publicly owned or controlled trading or manufacturing enterprises of either Party engage in competition, within the territories thereof, with privately owned and controlled enterprises of nationals and companies of the other Party. Accordingly, such private enterprise shall, in such situations, be entitled to the benefit of any special advantages of an economic nature accorded such public enterprises, whether in the nature of subsidies, tax exemptions or otherwise. The foregoing rule shall not apply, however, to special advantages given in connec-

tion with: (a) manufacturing goods for government use, or supplying goods and services to the government for government use; or (b) supplying, at prices substantially below competitive prices, the needs of particular population groups for essential goods and services not otherwise practically obtainable by such groups.

3. No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Article XIX.

1. Between the territories of the two Parties there shall be freedom of commerce and navigation.

2. Vessels under the flag of either Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that Party both on the high seas and within the ports, places and waters of the other Party.

3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other Party; but each Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.

4. Vessels of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to the right to carry all articles that may be carried

by vessel to or from the territories of such other Party; and such articles shall be accorded treatment no less favorable than that accorded like articles carried in vessels of such other Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.

5. Vessels of either Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other Party, and shall receive friendly treatment and assistance.

6. The term "vessels", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraph 2 and paragraph 5 of the present Article, include fishing vessels or vessels of war.

Article XX.

There shall be freedom of transit through the territories of each Party by the routes most convenient for international transit:

a) for nationals of the other Party, together with their baggage;

b) for other persons, together with their baggage, en route to or from the territories of such other Party; and

c) for articles en route to or from the territories of such other Party.

Such persons and articles in transit shall be exempt from customs duties, from duties imposed by reason of transit, and from unreasonable charges and requirements; and shall be free from unnecessary delays and restrictions. They shall, however, be subject to measures referred to in Article II, paragraph 3, and to nondiscriminatory regulations necessary to prevent abuse of the transit privilege.

Article XXI.

1. The present Treaty shall not preclude the application of measures:

a) regulating the importation or exportation of gold or silver;

b) relating to fissionable materials, to radioactive by-products of the utilization or processing thereof or to materials that are the source of fissionable materials;

c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;

d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; and

e) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly a controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.

2. The most-favored-nation provisions of the present Treaty relating to the treatment of goods shall not apply to advantages accorded by the United States of America or its territories and possessions to one another, to the Republic of Cuba, to the Republic of the Philippines, to the Trust Territory of the Pacific Islands or to the Panama Canal Zone.

3. The provisions of the present Treaty shall not preclude action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade during such time as such Party is a contracting Party to the General Agreement on Tariffs and Trade. In case a Party is not a contracting Party to the General Agreement on Tariffs and

Trade it shall nevertheless have the right to depart from the provisions of the present treaty to the extent necessitated by its international balance of payments position, in a manner contemplated by said agreement as nearly as may be practicable, and subject to the principle set forth therein that such departures shall be conformable with a policy designed to promote the maximum development of nondiscriminatory foreign trade and to expedite the attainment both of a balance of payments position and of reserves of foreign exchange which will obviate the necessity of such departures. The most-favored-nation provision of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid agreement.

4. The present Treaty does not accord any rights to engage in political activities.

5. Nationals of either Party admitted into the territories of the other Party for limited purposes shall not enjoy rights to engage in gainful occupations in contravention of limitations expressly imposed, according to law, as a condition of their admittance.

Article XXII.

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

2. The term "most-favored-nation 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 any third country.

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or

not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

4. National treatment accorded under the provisions of the present Treaty to companies of the Kingdom of Denmark shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories and possessions of the United States of America.

Article XXIII.

The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each of the Parties, other than Greenland, the Panama Canal Zone and the Trust Territory of the Pacific Islands.

Article XXIV.

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.

Article XXV.

The present Treaty shall replace the convention of friendship, commerce and navigation signed April 26, 1826, except Articles 8, 9, and 10 thereof, which shall remain in force until replaced by a consular convention between the two Parties or

until one year after either Party shall have given to the other Party written notice of termination of the aforesaid Articles.

Article XXVI.

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Washington as soon as possible.

2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.

3. Either Party may, by giving one year's written notice to the other Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Danish languages, both equally authentic, at Copenhagen, this first day of October, one thousand nine hundred and fifty-one.

/s/ EUGENIE ANDERSON

PROTOCOL

At the time of signing the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark the undersigned Plenipotentiaries, duly authorized by their respective governments, have further agreed on the following provisions, which shall be considered integral parts of the aforesaid Treaty:

1. The term "access" as used in Article V, paragraph 1, comprehends, among other things, access to free legal aid and right to exemption from providing security for costs and judgment.

2. The provisions of Article VI, paragraph 3, providing for the payment of compensation shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party.

3. The provisions of Article VII, paragraph 1, shall not be construed to affect the policy of Denmark of requiring that aliens may not be employed in Denmark unless the appropriate permits have been granted. However, in keeping with the terms of that paragraph, the regulations governing employment shall be applied in a liberal fashion.

4. Notwithstanding the provisions of Article VII, paragraph 1, a Party may require companies desiring to engage in retail trade, within its territories, to be organized pursuant to Article VIII, paragraph 1.

5. The term "mineral", as used in Article VII, paragraph 2(b), refers to petroleum as well as to other mineral substances.

6. The term "financial" in Article VII, paragraph 1, and Article VIII, paragraph 1, includes banking activity. Such activity in Denmark is the activity, and that alone, which can be conducted pursuant to and under observance of the provisions in the Danish banking legislation. Applications concerning permission to establish branches of American banks in

Denmark for the conduct of banking activity as defined above will be given favorable consideration.

In the United States of America permission to inititate a banking business as defined by the applicable State and Federal laws shall be dependent on the provisions of such laws.

7. Article XII, paragraph 2, shall not be construed to prevent a Party from exercising necessary regulation over the inflow of capital pursuant to article VI, section 3 of the Articles of Agreement of the International Monetary Fund, provided that such regulation shall not as a general rule be exercised in a manner which impairs paragraphs 1 and 2 of article VII, paragraph 1 of Article VIII, or the provisions of other Articles of the Treaty.

8. The provisions of Article XVII, paragraph 2 (b) and (c), and of Article XIX, paragraph 4, shall not apply to postal services.

9. The provisions of Article XXI, paragraph 2, shall apply in the case of Puerto Rico regardless of any change that may take place in its political status.

10. Article XXIII does not apply to territories under the authority of either Party solely as a military base or by reason of temporary military occupation.

11. Notwithstanding Article XXIII, the provisions of Article XIV, paragraphs 1 and 2, and of Article XVII, shall, subject to the reservations and exceptions pertinent thereto, extend to Greenland.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed this Protocol and have affixed hereunto their seals.

DONE in duplicate, in the English and Danish languages, both equally authentic, at Copenhagen, this first day of October, one thousand nine hundred and fifty-one.

/s/ EUGENIE ANDERSON

MINUTES OF INTERPRETATION

concerning Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark signed at Copenhagen, October 1, 1951.

The following notes record the common understanding of the representatives of the United States of America and the Kingdom of Denmark with regard to certain questions of interpretation that arose during the course of negotiating the provisions of the Treaty of Friendship, Commerce and Navigation between the two countries signed this day:

ad Articles VII and VIII:

The word "commercial" as used in Article VII, paragraph 1, and Article VIII, paragraph 1, and the word "professional" as used in Article VII, paragraph 3, do not extend to the fields of navigation and aviation. The word "commercial" relates primarily but not exclusively to the buying and selling of goods and activities incidental thereto.

ad Article VII, paragraph 1:

It is understood that either Party may, consistently with the terms and intent of the Treaty, apply special requirements to alien insurance companies with a view to assuring that such companies maintain standards of accountability and solvency comparable to those required of like domestic companies, so long as such requirements do not have the effect of discrimination in substance against such alien companies.

ad Article VIII, paragraph 1:

It is understood that either Party may consistently with the terms of this paragraph, maintain special requirements with respect to the residence or nationality of the founders, members of the boards of directors, and managing directors of companies constituted under its laws.

ad Article XI:

Nothing in this Treaty shall be construed to supersede any provisions of the convention between the United States of America and the Kingdom of Denmark for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed May 6th, 1948.

ad Article XIV, paragraph 4:

It shall be sufficient for the purposes of subparagraph (c) if the information and views mentioned therein are imparted in the course of appropriate multilateral discussions (as pursuant to the General Agreement on Tariffs and Trade) in which both Parties participate.

ad Article XIX, paragraph 2:

The word "flag" in Article XIX, paragraph 2, shall also comprise a reference to the Faroese flag.

Ad paragraph 6 of the Protocol:

The provisions of paragraph 6 of the Protocol do not imply discriminatory measures against duly authorized banking enterprises.

(sign.) *E. A.*

NOTEVEKSLING VEDRØRENDE ARTIKEL VII, STK. 3.

THE FOREIGN SERVICE OF THE
UNITED STATES OF AMERICA.

No. 49.

Excellency,

With reference to the treaty of friendship, commerce and navigation between the United States and Denmark, signed at Copenhagen on October 1, 1951, I have the honor to inform you that the Senate on July 21, 1953, gave its advice and consent to the ratification of the said treaty in a resolution as follows:

> ,,Resolved, (Two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive I, Eighty-second Congress, second session, a treaty of friendship, commerce, and navigation between the United States of America and Denmark, together with a protocol relating thereto, signed at Copenhagen on October 1, 1951, subject to the folowing [sic] reservation, which shall be agreed to by the other high contracting party before ratifications are exchanged:
>
> ,,Article VII, paragraph 3, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions."

It will be observed that by this resolution the advice and consent of the Senate to the ratification of the treaty are given subject to a reservation to the provision that concerns the practice of professions.

It is the hope of my Government that your Government will find acceptable the reservation which the Senate has made a condition of its advice and consent to the ratification of the treaty. An acknowledgment of this note prior to the exchange of ratifications accepting by direction and on behalf of your Government, the said reservation will be considered as completing the acceptance by the two Governments of that reservation.

Copenhagen, August 5, 1953.

(sign.) JOHN O. BELL.
Chargé d'Affaires ad interim.

His Excellency
Ole Bjørn Kraft,
Minister of Foreign Affairs,
Copenhagen.

MINISTRY OF FOREIGN AFFAIRS.

Monsieur l'Ambassadeur,

As it is the intention of the Danish Government to ratify in the near future the treaty of friendship, commerce and navigation between the United States and Denmark, signed at Copenhagen on October 1, 1951, I have the honour to refer to the Embassy's note No. 49 of August 5, 1953, which reads as follows:

> „With reference to the treaty of friendship, commerce and navigation between the United States and Denmark, signed at Copenhagen on October 1, 1951, I have the honour to inform you that the Senate on July 21, 1953, gave its advice and consent to the ratification of the said treaty in a resolution as follows:
>
> „Resolved, (Two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive I, Eighty-second Congress, second session, a treaty of friendship, commerce, and navigation between the United States of America and Denmark, together with a protocol relating thereto, signed at Copenhagen on October 1, 1951, subject to the following reservation, which shall be agreed to by the other high contracting party before ratifications are exchanged:
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> „Article VII, paragraph 3, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions."

It will be observed that by this resolution the advice and consent of the Senate to the ratification of the treaty are

given subject to a reservation to the provision that concerns the practice of professions.

It is the hope of my Government that your Government will find acceptable the reservation which the Senate has made a condition of its advice and consent to the ratification of the treaty. An acknowledgment of this note prior to the exchange of ratifications accepting by direction and on behalf of your Government, the said reservation will be considered as completing the acceptance by the two Gowernments [sic] of that reservation."

During previous discussions between this Ministry and your Embassy it has been agreed that the reservation of the Senate, if accepted by the Danish Government, is mutual in its effect and operative equally upon each party and thus constitutes an identical reservation on the part of the Danish Government.

In view of this understanding I have the honour to confirm that my Government find acceptable the reservation made by the Senate of the United States. I am in agreement with the Embassy's suggestion that the above-mentioned note of August 5, 1953 and the present reply constitute an integrating part of the treaty of friendship, commerce and navigation between Denmark and the United States of America.

I avail myself of this opportunity to renew to you, Monsieur l'Ambassadeur, the assurance of my highest consideration.

Copenhagen, January 26, 1960.

(sign.) J. O. KRAG.

His Excellency
Mr. Val Peterson,
Ambassador of the United States of
America,
Copenhagen.

The Ministry of Foreign Affairs hereby confirms that the above is a true copy of the "Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark", incl. Minutes of Interpretation, signed October 1, 1951 in Copenhagen.

MINISTRY OF FOREIGN AFFAIRS

For the Minister
b.a.
Julie Rechnagel
JULIE RECHNAGEL

KINGDOM OF DENMARK
CITY OF COPENHAGEN
EMBASSY OF THE UNITED
STATES OF AMERICA
} SS

I, Mildred J Hall, Consul of the United States of America at Copenhagen, Denmark, duly commissioned and qualified, do hereby certify that Julie Rechnagel whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was on the 22 day of April 1981, the date thereof an official of the Danish Foreign Ministry duly commissioned and qualified, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Embassy at Copenhagen, Denmark this 22 day of April 1981

Mildred J. Hall
Consul of the
United States of America

APPENDIX B

MINISTRY OF FOREIGN AFFAIRS

File No. R.I.3.S.123/8

Statement of the Danish Government concerning the interpretation of the Treaty of Friendship, Commerce and Navigation between the Kingdom of Denmark and the United States of America, signed on 1 October 1951

During 1980 and 1981 the Danish Government has on several occasions informed the Government of the United States of America of its interpretation of the above mentioned Treaty, particularly in connection with the case Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181 (E.D.N.Y. 1979), leave to appeal denied, Civ. 79-8475 (2d Cir. Jan. 23, 1980). The position of the Danish Government in this regard can be summarized as follows:

The Danish Government is of the opinion that under Article VII (4), seen in conjunction with Article VIII (1) of the Treaty, Danish companies which control and manage enterprises established or acquired in the United States according to Article VIII (1) are entitled to engage Danish nationals in positions such as specified in Article VII (4). American companies, of course, enjoy the equivalent right in Denmark. This interpretation is not only expressly underlined by the use in Article VII (4) of the words ". . . employees of their choice, regardless of nationality . . .", but is likewise mandated if the right provided in Article VIII (1) to control and manage enterprises in the territories of the other Party is to remain unimpaired.

As to the question of the applicability of Article VII (4) to companies constituted under Article VIII, the minutes of interpretation attached to the Treaty state re Article VIII, paragraph 1:

> "It is understood that either Party may consistently with the terms of this paragraph, maintain special requirements with respect to the residence or nationality of the founders, members of the boards of directors, and managing directors of companies constituted under its laws".

In the view of the Government of Denmark this interpretative statement leaves no doubt that it was the intent of the negotiators that the right to engage personnel regardless of nationality as stipulated in Article VII (4) would apply also to companies constituted under Article VIII, subject to the reservation agreed upon in the minutes of interpretation. Otherwise the said minutes of interpretation re Article VIII (1) would have no meaning.

This understanding of the relevant treaty provisions is furthermore borne out by the fact that the right to control and manage enterprises established or acquired within the territory of the other Party, cf. Article VIII (1), would, in the nature of things, be of practically no value if the company in control were not granted the right to engage personnel of its own nationality at the executive level. The unitary structure of Article VII and VIII further supports this conclusion.

This interpretation of the Treaty does not in any way imply that under the U.S.-Danish Treaty of Friendship a foreign company may disregard all domestic discrimination laws relating to employment, for instance in regard to race, religion, age, sex, etc. What the Treaty provides, however, is that locally incorporated subsidiaries of Danish or United States corporations basing themselves on pertinent business considerations shall have the right to make employment decisions concerning executive level personnel irrespective of the nationality of the employee.

Copenhagen, December 23, 1981

Tyge Lehmann
Head of Division
Legal Department
Ministry of Foreign Affairs

KINGDOM OF DENMARK
CITY OF COPENHAGEN
EMBASSY OF THE UNITED
STATES OF AMERICA
} ss

I, JOSEPH ST. JOHN, VICE CONSUL of the United States of America at Copenhagen, Denmark, duly commissioned and qualified, do hereby certify that TYGE LEHMANN whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was on the 23rd day of DECEMBER 1981, the date thereof AN OFFICIAL OF THE DANISH MINISTRY OF FOREIGN AFFAIRS duly commissioned and qualified, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Embassy at Copenhagen, Denmark this 28th day of DECEMBER 1981

Joseph A. St. John
American Vice Consul

The following is a photocopy of the Danish Ministry Letter dated December 23, 1981 printed herein at pages 31a-33a

MINISTRY OF FOREIGN AFFAIRS

File No. R.I.3.S.123/8

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In the view of the Government of Denmark this interpretative statement leaves no doubt that it was the intent of the negotiators that the right to engage personnel regardless of nationality as stipulated in Article VII (4) would apply also to companies constituted under Article VIII, subject to the reservation agreed upon in the minutes of interpretation. Otherwise the said minutes of interpretation re Article VIII (1) would have no meaning.

This understanding of the relevant treaty provisions is furthermore borne out by the fact that the right to control and manage enterprises established or acquired within the territory of the other Party, cf. Article VIII (1), would, in the nature of things, be of practically no value if the company in control were not granted the right to engage personnel of its own nationality at the executive level. The unitary structure of Article VII and VIII further supports this conclusion.

This interpretation of the Treaty does not in any way imply that under the U.S.-Danish Treaty of Friendship a foreign company may disregard all domestic discrimination laws relating to employment, for instance in regard to race, religion, age, sex, etc. What the Treaty provides, however, is that locally incorporated subsidiaries of Danish or United States corporations basing themselves on pertinent

business considerations shall have the right to make employment decisions concerning executive level personnel irrespective of the nationality of the employee.

Copenhagen, December 23, 1981

Tyge Lehmann
Head of Division
Legal Department
Ministry of Foreign Affairs

KINGDOM OF DENMARK
CITY OF COPENHAGEN
EMBASSY OF THE UNITED
STATES OF AMERICA } SS

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IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Embassy at Copenhagen, Denmark this 28th day of DECEMBER 1981

Joseph A. St. John
American Vice Consul