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Brief of Amicus Curiae C. Itoh and Company (America), Inc., In Support of Petitioner

Amicus Curiae, C. Itoh & Company (America), Inc.

Nos. 80-2070, 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 CUMINS, 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 OF AMICUS CURIAE C. ITOH & COMPANY (AMERICA), INC. IN SUPPORT OF PETITIONER

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INTRODUCTION

C. Itoh & Company (America), Inc. (hereinafter referred to as "C. Itoh"), with the written consent from counsel of all parties on file with this Court, submits this Brief as *Amicus Curiae* in support of Petitioner and Cross-Respondent Sumitomo Shoji America, Inc. (hereinafter referred to as "Sumitomo").

INTEREST OF AMICUS CURIAE

C. Itoh is a wholly-owned subsidiary of C. Itoh & Company, Ltd., of Japan and is organized under the laws of New York.

Like Sumitomo, C. Itoh is a Japanese trading company ("sogo shosha") engaged in substantial international trade between the United States and Japan. Its principal commercial activity involves arranging for the import to the United States of Japanese produced goods and services and the export to Japan of United States produced goods and services. C. Itoh functions as one component of a global trading system coordinated by its parent corporation.

This coordination is achieved through the assignment of Japanese nationals from the parent company to C. Itoh for purposes of management and control. Like Sumitomo, C. Itoh's managerial structure is composed of Japanese nationals assigned to it by its parent company for the purpose of carrying on trade between the United States and Japan. The Japanese staff personnel enter the United States as nonimmigrant "treaty traders" under the provisions of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101(a)(15)(E)(i)(1976). As a general rule, C. Itoh's Japanese managerial personnel remain in the United States for periods of between three and five years before returning to Japan to resume duties with the parent company. C. Itoh's practice of rotating its Japanese managerial staff is typical of other Japanese trading companies operating in the United States, such as Sumitomo.

In 1976, three white American plaintiffs brought suit against C. Itoh in the United States District Court for the Southern District of Texas, alleging that C. Itoh's staffing of management level positions with Japanese nationals constituted unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1976) (hereinafter referred to as "Title VII") and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976) (hereinafter referred to as "Section 1981"). The district court certified a nationwide class consisting

of all C. Itoh employees other than porters, secretaries and clerical personnel, who were not of Japanese national origin, not of yellow color, and not of the Oriental race.

In May 1978, C. Itoh filed its Motion to Dismiss on the grounds that Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan[1] reserves to C. Itoh the absolute right to fill all of its managerial positions with Japanese nationals. The district court denied this Motion, holding that C. Itoh was not entitled to invoke the protection of the Treaty because it was incorporated in the United States and therefore was not a "company of Japan" as defined in Article XXII(3) of the Treaty. The district court also declined to recognize the standing of C. Itoh to invoke the protection of the Treaty in behalf of its Japanese parent. *Spiess* v. *C. Itoh & Co. (America), Inc.*, 469 F. Supp. 1 (S.D. Tex. 1979).

On interlocutory appeal, the Fifth Circuit reversed, concluding that the clearly established intent of the parties to the Treaty was that companies such as C. Itoh "may assert all rights extended to 'companies of either party' by the Japanese Treaty." 643 F.2d 353, 358-59. The majority further ruled that the staffing privilege conferred upon such companies by Article VIII(1) of the Treaty was not limited to national treatment:

> Considering the Treaty as a whole, the only reasonable interpretation is that Article VIII(1) 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.

Id. at 361.[2]

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[1] Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863. (hereinafter referred to as the "Japanese Treaty" or the "Treaty").

[2] On August 7, 1981, the Fifth Circuit ordered the case to be reheard *en banc*, thereby vacating the panel decision of April 24. 654 F.2d 302 (5th Cir. 1981). The panel decision was reinstated, however, by

As a direct beneficiary of the favorable trade and investment provisions of the Treaty, C. Itoh has a profound interest in assuring that the Treaty rights and privileges it has enjoyed over the past three decades are neither diminished nor altered as a result of this litigation.

SUMMARY OF ARGUMENT

1. A wholly owned United States incorporated subsidiary of a Japanese company such as Sumitomo has standing to raise the protection of the Treaty through its status as a company entitled to claim the benefits of the Treaty through Section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952 and the Rules and Regulations of the Department of State implementing the Immigration and Nationality Act. In addition, such a corporation has standing to claim the protection of the Treaty in behalf of its parent company, which is not a party to this litigation but which would be injured by a decision denying the protection of the Treaty to its wholly owned subsidiary.

2. The Department of State has consistently interpreted the Treaty to apply to wholly owned United States incorporated subsidiaries of Japanese corporations.

3. The Treaty created a right in behalf of Japanese companies to employ Japanese managerial personnel of their choice in United States incorporated subsidiaries engaged in carrying on trade between the United States and Japan. This Treaty right has not been modified or abrogated by Title VII or Section 1981.

4. The Treaty and United States civil rights laws may be harmonized by recognizing that the Treaty and the civil rights laws are predicated on different but complementary policies of the United States. If the Treaty right is to be modified, the proper forum for such modification is either Congress or the President.

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the Order of the Fifth Circuit on December 9, 1981, which vacated the previous order granting rehearing *en banc*.

ARGUMENT

I. A UNITED STATES INCORPORATED SUBSIDIARY WHOLLY OWNED BY A JAPANESE CORPORATION IS PROPERLY DEEMED A COMPANY OF JAPAN UNDER THE JAPANESE TREATY

A. A Treaty Is To Be Liberally Construed To Accomplish its Evident Purpose.

A fundamental principle of treaty interpretation is that a treaty is to be liberally construed to accomplish its overriding purpose. *See, e.g., Factor* v. *Laubenheimer,* 290 U.S. 276 (1933); *Nielsen* v. *Johnson,* 279 U.S. 47 (1929); *Geofroy* v. *Riggs,* 133 U.S. 258 (1890). Consistent with this principle of liberal construction, this Court has developed the following working maxim:

> [W]here a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred.

Hauenstein v. *Lynham,* 100 U.S. 483, 487 (1880). This maxim has been applied so consistently through the years that it is no longer subject to dispute. *See Factor* v. *Laubenheimer,* 290 U.S. 176 (1933); *Nielsen* v. *Johnson,* 279 U.S. 47, 52 (1929); *Asakura* v. *Seattle,* 265 U.S. 332 (1924); *Tucker* v. *Alexandroff,* 183 U.S. 424, 437 (1902); *Geofroy* v. *Riggs,* 133 U.S. 258, 272 (1890).

The Supreme Court has recognized the special importance of this maxim as applied to commercial treaties. The Court has traditionally construed commercial treaties in an expansive manner, both in determining the parties entitled to claim treaty protection and the means by which those parties exercise their treaty rights. *Kolovrat* v. *Oregon,* 366 U.S. 187 (1961); *Jordan* v. *Tashiro,* 278 U.S. 123 (1928).

B. The Design and Structure of the Treaty Clearly Establish that United States Incorporated Subsidiaries of Japanese Corporations Are Entitled to Claim Full Rights Under the Treaty.

The commercial treaty program is the oldest continuing economic program of the United States government.[3] The first treaty concluded with a foreign country is usually a treaty of friendship, commerce, and navigation ("FCN treaty"), which sets the framework in which economic relations can be conducted on a stable basis. Such an intention is clearly reflected in the Preamble to the 1953 Treaty with Japan, which refers to the promotion of "mutually advantageous commercial intercourse," the encouragement of "mutually beneficial investments," and the establishment of "mutual rights and privileges."

The Japanese Treaty was one of a new series of FCN treaties negotiated after World War II with greatly increased emphasis on the encouragement of American private investment abroad.[4] During the legislative hearings on the Japanese Treaty, Assistant Secretary of State for Economic Affairs Samuel C. Waugh, testified that the Japanese Treaty and companion FCN treaties were intended by the Department of State to secure for American nationals and corporations certain specific rights pertaining to investment and control over American enterprises abroad:

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[3] The first such treaty was with France in 1778. *See generally* Metzger, *Commercial Treaties of the United States and Private Foreign Investment*, 19 FED. B.J. 367 (1959); Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958).

[4] *See* "Commercial Treaties — Treaties of Friendship, Commerce & Navigation between the United States and Columbia, Israel, Ethiopia, Italy, Denmark, and Greece," *Hearings Before the Subcomm. of the Senate Comm. on Foreign Relations*, 82d Cong., 2d Sess. at 4 (1952) (hereinafter referred to as "1952 *Legislative Hearings*").

> *The object of the Department of State in negotiating treaties of this type is to facilitate the protection of American interests abroad.* . . . Such treaties facilitate the protection of American interests because they contain certain definite commitments with regard to specific rights. . . . Of *special concern to investors are such assurances as* those regarding rights to engage in extensive fields of business activity upon as favorable terms as the nationals of the country, *the right of the owner to manage his own affairs and employ personnel of his choice.* . . .

"Commercial Treaties — Treaties of Friendship, Commerce & Navigation, with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan," *Hearings Before the Subcomm. of the Senate Comm. on Foreign Relations,* 83d Cong., 1st Sess. at 2 (1953) (hereinafter cited as "1953 *Legislative Hearings*") (emphasis supplied).

The Japanese Treaty and its companion treaties contained several new provisions recognizing the widespread use of the corporate form of business. Such provisions granted companies the same rights as individuals in such important matters as establishing, acquiring, controlling, and managing the affairs of business enterprises. The basic purpose of these new provisions was "to safeguard the investor against the nonbusiness hazards of foreign operations."[5] As Deputy Assistant Secretary of State Linder testified:

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[5] *Id.* The particular importance of the Japanese Treaty was also emphasized in the testimony of U. Alexis Johnson, Deputy Assistant Secretary of State, Far Eastern Affairs, who informed the Senate Subcommittee on Foreign Relations that:

> The treaty with Japan is of particular significance because of the magnitude of present and potential United States investment in and trade with Japan. . . . The provisions of the treaty concerning investment creates a climate favorable to increased American investment in Japan under conditions of mutual benefit to both countries. . . . The establishment of conditions for the maintenance and expansion of United States — Japanese trade is, consequently, of considerable importance to both countries.

1953 *Legislative Hearings* at 27.

> [These hazards] assume many forms: inequitable tax statutes, confiscatory expropriation laws, *rigid employment controls,* special favors to state-owned enterprises, drastic exchange restrictions, and other discriminations against foreign capital.

1952 *Legislative Hearings* at 4 (emphasis supplied). Nowhere in Linder's testimony, or indeed in any other aspect of the legislative history of these treaties, is there any indication of a preference for one form of business enterprise over another.

Although the entire treaty is designed to facilitate commercial intercourse between the two countries, the provisions of primary importance to foreign investors are contained in Articles I, VII, and VIII.[6] Article VII, frequently described as the core of the Treaty,[7] authorizes nationals and companies of Japan to establish, manage, and control enterprises in the United States. Article VIII(1), an elaboration on the right to manage and control provided in Article VII(1), identifies the types of personnel that may be sent to the United States by a company of Japan to manage and control its investment. Article I(1) is an essential component of the Article VII(1) right to establish enterprises in the United States, because it identifies the purposes for which the categories of personnel listed in Article VIII(1) may enter the United States. Thus, the logical and functional interrelationship of these articles is clear.

The unitary structure of these articles was explicitly recognized by those who drafted and negotiated this series of

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[6] The rights granted by these provisions are of course reciprocal and are enjoyed by nationals and companies of the United States.

[7] Airgram from Secretary of State Acheson to U.S. Political Adviser, Tokyo, No. A-453, Jan. 7, 1952 (*see* Joint Appendix, hereinafter cited as "Jt. App.", 130a).

post-war FCN treaties.[8] The interrelationship of the entry provisions of Article I to Articles VII and VIII is manifest in a statement by Secretary of State Acheson describing the similar provisions in the FCN treaty with Uruguay:[9]

> [The treaty] provides for example that citizens of one country may set up and operate business enterprises in the other on the same footing as citizens of that country. *They will also be able to obtain entry into that country for managers and technicians from their own country who are needed in order to operate their enterprises effectively.*

21 DEP'T STATE BULL. 909 (1949) (emphasis supplied). Secretary of State Kissinger has reflected a similar understanding of the integral nature of Article I to Article VII in the Japanese Treaty. Telegram of Secretary of State Henry Kissinger to United States Embassy in Tokyo, No. A-105, Jan. 9, 1976, p. 2 (*see* Jt. App. 157a).

The rights of entry provided by Article I(1) are implemented through the provisions of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101 *et seq.* (1976). Section 101(a)(15)(E)(i) of the Act allows the admission into the United States of non-immigrant "treaty traders," who are aliens entering the country for the purpose of carrying on substantial trade pursuant to an FCN treaty. This section defines "treaty trader" in terms very similar to those of Article I(1)(a) of the Treaty.

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[8] *Id.* During the negotiations of the 1954 German FCN Treaty, 7 U.S.T. 1839, T.I.A.S. No. 3593, the United States representatives described the first sentence of Article VIII(1) as *"being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto* by emphasizing the freedom of management to make its own choices about personnel." Foreign Service Despatch No. 2529, from High Commissioner for Germany to Department of State, Mar. 18, 1954, p. 1 (*see* Jt. App. 181a) (emphasis supplied). *See also* Diplomatic Note from U.S. High Commissioner for Germany to the German Federal Ministry of Foreign Affairs, Dec. 15, 1953, p. 3 (*see* Jt. App. 254a) (interpreting Articles VII and VIII uniformly).

[9] S. EXEC. D., 81st Cong., 2d Sess. (1949).

Moreover, the implementing Department of State regulations require that a treaty trader employed by a foreign-owned company 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.

22 C.F.R. § 41.40(a) (emphasis supplied). This job level requirement is derived from the Article VIII(1) Treaty right to engage "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."[10] Thus, the relationship between the Treaty and the treaty trader provisions of the Immigration and Nationality Act and its regulations is explicit.[11]

That treaty trader privileges are not limited by the form of the business entity involved is well documented in a State Department dispatch to the U.S. High Commissioner in Bonn, Germany:

> The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. *There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on.* Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified

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[10] This job level requirement has been a part of this regulation at least since the Treaty was signed in 1953. *See Matter of N.S.*, 7 I. & N. 426 (1957).

[11] Further evidence of the integrated relationship of the Immigration and Nationality Act and FCN treaties is found in Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 813 (1958).

> aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. *The important consideration is not whether the corporate employer is domestic or alien as to juridical status.*

Foreign Service Despatch from Department of State to U.S. High Commissioner for Germany, No. A-852, Jan. 21, 1954, p. 1 (*see* Jt. App. 160a) (emphasis supplied).

The Department of State regulations adopting this practice have continued in force virtually unchanged. The current version provides that, in order to be eligible for treaty trader status, an alien must be employed in the United States by

> an individual employer having the nationality of the treaty country who is maintaining the status of a non-immigrant treaty trader, *or by an organization which is principally owned by a person or persons having the nationality of the treaty country* and, if not residing abroad, maintaining non-immigrant treaty trader status.

22 C.F.R. § 41.40(a) (1980) (emphasis supplied). The term "principally owned" has been further defined by internal Department of State guidelines as more than 50 percent owned by nationals of the treaty country. 9 FOREIGN AFFAIRS MANUAL, *Part II, "Visas."* It is a basic canon of treaty interpretation that the meaning of a treaty may be ascertained by the actual practice of the parties to that treaty. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §147 (1965). The unbroken practice of the United States under the Treaty has been to accord the full protection of the Treaty (including Article VIII) to U.S. incorporated subsidiaries of Japanese corporations.

The Immigration and Nationality Act, its implementing regulations, and these Treaty articles form a coherent whole, as reflected in the uniform practice of the United States under the Treaty. If a company meets the test set out in the Immigration and Nationality Act and the implementing regulations, then it is

afforded the protections and privileges set out in Articles I, VII, and VIII. Because Sumitomo is a company of Japan for purposes of the Act, it is of necessity a company of Japan for purposes of the Treaty, and is therefore entitled to claim the rights and privileges provided therein.

C. Article XXII(3) of the Treaty Does Not Limit Substantive Treaty Rights

Article XXII(3) of the Treaty does not preclude U.S. incorporated subsidiaries of Japanese corporations from claiming substantive treaty rights. This interpretation has been confirmed by the circuit courts which have considered the question. *Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981); *Spiess* v. *C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981).

The Article is composed of two sentences, only one of which is a definition to be applied throughout the Treaty:

> 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.

The second sentence does not purport to be a definition of general applicability, but rather a statement imposing a conditional obligation of recognition upon the host country with regard to foreign companies:

> 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.

This sentence simply obligates the host country to recognize the juridical status of entities duly constituted under the laws of the other country, without the imposition of additional legal requirements.[12] Since different countries had different legal

[12] An example of such additional legal requirements if seen in the 1923

forms which business enterprises could take, it was necessary to provide a simple test by which such enterprises could be juridically recognized when operating abroad. There was obviously no need to include domestically incorporated subsidiaries of foreign parents within the scope of these recognition provisions; such companies would have already gained juridical recognition by virtue of their incorporation in the host country.

The negotiating history of Article XXII(3) firmly establishes that its design was simply to guarantee legal recognition to diverse forms of legal entities without additional requirements. When the Japanese negotiators requested an explanation of the meaning of Article XXII(3), Jules Bassin, Legal Attaché to the United States Embassy in Tokyo, explained that the purpose of the United States in proposing this article was to clarify what is meant by a "company," which is used but not defined throughout the substantive articles of the Treaty. Bassin further explained that the Article XXII(3) definition of juridical status was intended by the United States to mean merely recognition of

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Treaty with Germany, containing a forerunner of Article XXII(3) which provided in part:

> Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State, or Provincial, of either High Contracting Party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided they pursue no aims within its territories contrary to its laws.

Treaty of Friendship, Commerce and Consular Rights with Germany of 1923, 44 Stat. 2132, art. XII. Thus juridical recognition was conditioned upon the company's maintaining a "central office" within the territories of its origin, as well as adhering to local law concerning corporate purpose. Obviously, these somewhat vague legal requirements operated to hamper foreign investment because of the uncertainty they created. The post-war FCN treaties were evidently designed to remove these legal ambiguities. *See* Walker, *Provisions on Companies in United States Commercial Treaties,* 50 AM. J. INT'L L. 373, 379-81 (1956).

existence as a juridical person and nothing more. Memorandum of Conversation of Jules Bassin, Dispatch No. 13, April 8, 1952, prepared by the Office of the United States Political Advisor, Tokyo, Japan (*see* Jt. App. 136a).

A similar understanding of Article XXII(3) has been expressed by Herman Walker, an advisor to the Department of State on FCN treaties:

> The adoption of the simple test has been undoubtedly facilitated by the clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus the acknowledgment of a fact — the existence and legitimate paternity of an association — is not confused with problems associated with the functional rights and activities of alien-bred associations. . . .

Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 383 (1956). This clear distinction between the civil and functional capacities of companies was also recognized and reconfirmed in 1976 by Secretary of State Kissinger. After a thorough analysis of the history and purpose of Article XXII(3), Kissinger concluded that:

> While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. . . In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrued to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.

Telegram of Secretary of State Henry Kissinger to United States Embassy in Tokyo, No. A-105, Jan. 9, 1976 (*see* Jt. App. 157a).

An immediate predecessor of Article XXII(3) is found in Article XX(3) of the 1949 FCN Treaty with Uruguay.[13] During the negotiations Secretary of State Acheson made it evident that the second sentence of this article was intended solely to provide a simple test for recognition of a company as a legal entity, and to prevent the host country from imposing additional legal preconditions for juridical recognition. *See* Telegram from American Embassy, Montevideo, to the Secretary of State, No. 351, July 22, 1949, p. 3 (*see* Appendix No. 1, *infra*); Telegram from Secretary of State Acheson to American Embassy, Montevideo, No. 937, Aug. 3, 1949 (*see* Appendix No. 2, *infra*); Telegram from Secretary of State Acheson to American Embassy, Montevideo, No. 6289, Oct. 25, 1949, p. 2 (*see* Appendix No. 3, *infra*). From the very inception of its use in FCN treaties, therefore, this article was not intended to create, limit, or deny any other substantive rights of companies provided elsewhere in the Treaty.[14]

D. Rights Under The Japanese Treaty Were Not Intended To Be Contingent Upon The Organizational Form Of The Foreign Investment

In a Department of State position letter of October 17, 1978, Deputy Legal Advisor Lee Marks stated:

> In determining the scope of Article VIII, we see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for

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[13] S. EXEC. D., 81st Cong. 2d Sess. (1949).

[14] In reaching this same conclusion in *Avigliano*, Judge Mansfield took note of an exchange concerning this provision during the negotiation of the Dutch FCN Treaty in 1955. The thrust of this exchange was that controlled companies are entitled to the same rights as parent companies, notwithstanding a "superficial appearance to the contrary" in Article XXIII(3) (the equivalent of Art. XXII(3) in the Japanese Treaty). *See Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d at 556-57.

Airgram from Secretary of State Acheson to American Embassy, Tokyo, No. A-49, July 23, 1952 (*see* Jt. App. 145a) (emphasis supplied).

Thus, the purpose of the final sentence of Article VII is to provide a minimum standard of treatment for all enterprises. Far from restricting rights already conveyed by the first sentence to companies operating "directly or by agent or through the medium of any form of lawful juridical entity," this sentence extends those rights to enterprises not conducted in the form of a juridically recognized entity (*e.g.*, a sole proprietorship). Thus construed, the final sentence of Article VII(1) is a necessary complement to the rights conferred by the first sentence and does not contradict or restrict the broad rights conferred in the first sentence upon companies operating in any juridically recognized form. A similar analysis can be applied to other sections of the Treaty which deal with controlled enterprises.[17]

The term "controlled enterprise" is applicable not only to subsidiaries, but also to branches, partnerships, joint ventures, sole proprietorships, and any other form of business activity, whether or not juridically recognized. If a controlled enterprise could claim only those rights specifically granted to controlled enterprises by the Treaty, then treaty rights granted to "companies of either Party" would be meaningless. A company of either Party can operate in the territories of the other Party *only through the medium of a controlled enterprise.* Certainly it was not the parties' intent that the dozens of treaty provisions granting rights to companies of either Party actually convey no rights at all, and

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[17] More than 90% of all foreign direct investment in the United States is in companies in which foreign nationals hold majority or 100% ownership. U. S. DEP'T OF COMMERCE, REPORT TO THE CONGRESS, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, Vol. 1, pp. 17-22; Vol. 5, pp. 6.8-6.36 (1976). By the end of 1980, Japanese direct investment in the United states totalled $4.2 billion. ECONOMIC WORLD, Dec. 1981, at 10.

the few provisions dealing with controlled enterprises actually convey all the treaty rights a company could claim.

E. Sumitomo Is a Company of Japan for Purposes of Article VIII(1) of the Treaty as Well as Other Laws and Regulations Pertaining to Foreign Investment

The question of the ascription of nationality to corporate entities has long been unsettled. Following World War I, for example, a committee of the League of Nations was formed to study the question of corporate nationality, and their survey indicated a wide divergence of practice among various countries. *See* REPORT BY THE LEAGUE CODIFICATION COMMITTEE ON RECOGNITION OF LEGAL PERSONALITY OF FOREIGN COMMERCIAL CORPORATIONS AND NATIONALITY OF COMMERCIAL CORPORATIONS, *reprinted in 22* AM. J. INT'L L. SPEC. SUPP. 157-214 (1928). The League of Nations made no further progress on this issue. Nor has the question been resolved since that time.[18]

U. S. domestic law has also lacked a single test for determining corporate nationality.[19] In fact, the great variety in definitions has made it possible for corporations to possess "dual

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[18] Immediately after the Second World War, one commentator noted that, as to a recognized test of nationality, "in the corporate field, we find confusion and uncertainty." Timberg, *Corporate Fictions*, 46 COL. L. REV. 533, 572 (1946). Nor was the question of corporate nationality settled during the time the post-war series of FCN treaties (including the 1953 Japanese Treaty) was signed. Kronstein, *The Nationality of International Enterprises*, 52 COL. L. REV. 983, 990 (1952) ("clear-cut rules cannot yet be given"); Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 382 (1956) ("the question of what should constitute a proper test [of corporate nationality] has been much debated"); 5 J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 144 (1977).

[19] *See* Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints On Foreign Enterprise*, 74 HARV. L. REV. 1489 (1961). The author evaluates six different tests of corporate nationality which have been used at various times: (1) the state of incorporation; (2) principal place of business; (3) nationality of stockholders;

nationality."[20] Despite this lack of uniformity, domestic laws of the United States consistently "pierce the corporate veil" to determine the ownership or control of a corporation for purposes of regulating alien enterprise. *see, e.g.*, Trading with the Enemy Act, 50 U.S.C. App. § 2 (1976), as interpreted in *Uebersee Finanz-Korporation, A.G.* v. *McGrath,* 343 U.S. 205 (1952); Shipping Act of 1916, §§ 52(b)(a), (c)(a), as amended, 46 U.S.C. § 802 (b)(a), (c)(a) (1976); *United States* v. *The Meacham,* 107 F. Supp. 997 (E.D. Va. 1952). In addition to these laws, there are numerous statutes and regulations specifically pertaining to foreign investment which disregard place of incorporation in determining the foreign character of an enterprise. [21]

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(4) nationality of overall investment; (5) nationality of management; and (6) control. *Id.* at 1524-50. The author notes a trend away from the state-of-incorporation test since 1900, as Congress found it was "intolerably naive" and "inappropriate" in dealing with the increasingly sophisticated corporate structures of this century. *Id.* at 1527.

[20] *Id.* at 1518 n. 139.

[21] International Investment Survey Act of 1976, 22 U.S.C. § 3101 *et seq.* (1976); 15 C.F.R. § 806, *et seq.* (1980); Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C. § 3501 *et seq.* (Supp. II 1978); 7 C.F.R. § 781.2(g) and (i) (1980); Domestic and Foreign Investment Improved Disclosure Act of 1977, 15 U.S.C. § 78(m) (Supp. II 1978); Federal Communications Act 47 U.S.C. §§ 222(d), 310(a), 734(d)(1976); Foreign Agents Registration Act, 22 U.S.C. § 611 (1976); Atomic Energy Act, 42 U.S.C. §§ 2133, 2134 (1976); Mineral Leasing Act of 1920, 30 U.S.C. §§ 22, 24, 71, 181, 185, 352 (1976); 42 C.F.R. § 3102.1-1 (1980); Federal Aviation Act, 49 U.S.C. §§ 1301(1) and (13), 1367(f) (1976); *see generally* U.S. DEP'T OF TREASURY, SUMMARY OF FEDERAL LAWS BEARING ON FOREIGN INVESTMENT IN THE UNITED STATES, *reprinted in* S. Singer, *Regulation of Foreign Investments in the United States* 19-43 (1976).

State alien land laws also look beyond place of incorporation to the nationality of the owners and/or controllers of the business enterprise. *See, e.g.,* IOWA CODE ANN. § 567.1 (1975); MINN. STAT. ANN. § 500.221 (2) (1978 Supp.); NEB. REV. STAT. § 76-406, 76-407 (1943); N. M. CONST. art. 2, § 22; S. C. CODE ANN. § 72-13-30 (1979); WIS. STAT. ANN. § 710.02 (1979).

II. A WHOLLY OWNED U.S. SUBSIDIARY OF A JAPANESE CORPORATION IS ENTITLED TO CLAIM SUBSTANTIVE TREATY RIGHTS IN BEHALF OF ITS PARENT

In addition to whatever Treaty rights a wholly owned U.S. incorporated subsidiary of a Japanese parent may claim in its own behalf, such a company has standing to assert the Treaty rights undeniably possessed by its parent.

Under Article VII(1), a Japanese corporation has the right to manage and control its U.S. business enterprise, regardless of the form that enterprise takes. The Article VIII(1) staffing privilege is merely an elaboration of this right of control and management. Japanese trading companies routinely exercise this Treaty right in staffing their U.S. subsidiaries, which are an integral part of a global trading network.

Ordinarily, the issue of standing arises in the context of a *plaintiff* seeking to bring a cause of action to redress a claimed injury. *See Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970). The issue occasionally emerges when (as here) a litigant asserts rights defensively as a bar to judgment against it. In such cases, the constitutional considerations of Article III standing do not apply, since a case or controversy is obviously present. *Warth* v. *Seldin,* 422 U.S. 490, 500 n. 12 (1975).

Standing to assert the rights of third parties has been recognized when enforcement of the challenged restrictions against the litigant would result indirectly in the violation of the third parties' rights or would "preclude or otherwise adversely affect a relationship existing between them and the persons whose rights assertedly are violated." *Warth* v. *Seldin,* 422 U.S. at 510; *Doe* v. *Bolton,* 410 U.S. 179 (1973); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 237 (1969); *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965); *Barrows* v. *Jackson,* 346

U.S. 249 (1953); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925).

The abridging of Treaty staffing rights by the application of the employment laws here in question would adversely affect the parent company's ability to control and manage its U.S. subsidiary. Unless Sumitomo is permitted to invoke the protection of Article VIII(1) either in its own behalf or that of its parent, these valuable Treaty rights will be lost to the parent company. In these circumstances, Sumitomo clearly has standing to assert the Article VIII(1) staffing rights of its parent company. *See Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F.2d 674, 693 (9th Cir.), *cert. denied* 429 U.S. 940 (1976), recognizing that a U.S. incorporated subsidiary of a foreign corporation has standing to assert treaty rights of its parent which may be affected by court ordered relief in an antitrust case.[22]

III. ARTICLE VIII(1) CONFERS THE ABSOLUTE RIGHT TO STAFF WHOLLY OWNED U.S. SUBSIDIARIES OF JAPANESE CORPORATIONS WITH MANAGERIAL PERSONNEL OF THEIR CHOICE.

At the heart of this controversy lies the proper interpretation of the freedom of choice language in Article VIII(1) of the Treaty. That provision reads in pertinent part:

> 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, agent and other specialists *of their choice.*

(emphasis supplied). The unqualified phrase "of their choice" is unambiguous. It grants to U.S. companies in Japan and Japanese companies in the United States the vital right to select

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[22] The *Calnetics* decision implicitly overruled an earlier district court case which had denied standing to an American subsidiary of a Japanese corporation to assert Article XVIII of the Treaty as a defense to a criminal antitrust prosecution. *United States* v. *Oldham,* 152 F.Supp. 818 (N.D. Cal. 1957).

their own management and technical personnel without interference from the host country. This is the plain meaning of those words. *Spiess, supra,* 643 F.2d at 359. [23]

The post-war FCN treaties are organized along three basic standards of treatment: national treatment, most-favored-nation treatment, and absolute rules. *See* Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805, 810-11 (1958). Though the "contingent" standards of national treatment and most-favored-nation treatment were widely used throughout these treaties, absolute rules also played a crucial role. As the Fifth Circuit noted:

> Absolute rules were intended to protect vital rights and privileges of foreign nationals in any situation, whether or not a host government provided the same rights to the indigenous population . . . According to Walker, foreign nationals were to receive "not only equal protection, but also a certain minimum degree of protection, as under international law, regardless of a Government's possible lapses with respect to its own citizens." *United States Practice, supra,* at 232.

643 F.2d at 360. Examples of such absolute rules in the Japanese Treaty include Article I (rights of entry, liberty of conscience, religious freedom, and other personal rights), Article VI(3) (right of just compensation for expropriated property), and Article XX(a) (freedom of transit.) [24]

The language of Article VIII(1) is undeniably couched in terms of an absolute rule, not merely national treatment. As Dr. Walker has noted, Article VIII(1) technically goes beyond

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[23] It should be noted that the dissent did not take issue with the panel majority's opinion on this issue.

[24] The inadequacy of the national treatment standard with respect to full compensation in case of nationalization was specifically noted by Deputy Assistant Secretary of State Linder. 1952 *Legislative Hearings* at 8 (1952).

national treatment, to prevent the imposition of ultra-nationalistic policies with regard to essential executive and technical personnel. Walker, *Provisions on Companies in United States Commercial Treaties,* 50 AM. J. INT'L L. 373, 386 (1956). Certainly, had the drafters of the Treaty intended to tie these rights to the national treatment standard, they would have expressed that intention as they did in at least a dozen other parts of the Treaty.[25]

This interpretation of Article VIII(1) is consistent with the design of its drafters. The Senate Executive Report accompanying the Japanese Treaty and its companion treaties described Article VIII(1) as follows:

> Article VIII(1). Paragraph 1 of this Article states that companies doing business in the territory of the other party may hire "accountants and other technical experts," attorneys, agents, etc. of their choice and that *laws regarding the nationality of employees are not to prevent such nationals and companies from carrying on their activities in connection with the planning and operation of the specific enterprises with which they are connected.*

S. EXEC. REP. NO. 5, 82d Cong., 1st Sess. at 3-4 (1953) (emphasis supplied); *see also* remarks of Senator Hickenlooper, Chairman of the Subcommittee on Foreign Relations, 1952 *Legislative Hearings,* at 38.

The legislative history of the Treaty explicitly recognizes that Article VIII means precisely what it says: United States companies may use the personnel of their choice in Japan and Japanese companies enjoy a reciprocal right in the United States. Only through express recognition of this reciprocal right could United States nationals and companies obtain a meaningful guarantee of the rights under Article VII to "organize companies under the general company laws of such other Party, and . . . to control

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[25] *See, e.g.,* Articles III, IV, VI(4), VII(1), VIII(3), IX, X, XII(1), XIV(5), XVI, XIX(3), and XIX(4).

and manage enterprises which they have established or acquired."

The absolute nature of this Article VIII(1) right is well illustrated by comparing the language used in other treaties having similar provisions. In 1960, seven years after the Japanese Treaty entered into force, the United States Senate advised and consented to the Treaty of Friendship and Commerce between the United States and Pakistan. [1959] 12 U.S.T. 110, T.I.A.S. No. 4683. Article VIII of that Treaty provides:

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

Id. (emphasis supplied).

This limiting language in the Pakistani Treaty subjects employment of United States nationals in Pakistan and the employment of Pakistani nationals in the United States to laws governing employment that exist or may be enacted by the United States or Pakistan. The Japanese Treaty contains no such limitation. *Compare with* Treaty of Amity and Economic Relations Between the United States and Ethiopia, art. VIII(5), [1951] 4 U.S.T. 2134, T.I.A.S. No. 2864; Treaty of Friendship, Commerce & Navigation Between the United States and Italy, art. I, 63 Stat. 2255 (1949).

The absence of such limiting language in the Japanese Treaty conclusively demonstrates that the United States created an unqualified privilege to Japanese companies to operate and control their corporate entities through Japanese nationals "of their choice." *See Santovincenzo* v. *Egan,* 284 U.S. 30, 36-39 (1931).

There can be little doubt that Article VIII was intended to eliminate the possibility of host country interference in the selection of managerial level personnel. As Dr. Walker has explained:

> [M]anagement 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*, 9 AM. J. COMP. L. 229, 234 (1956). "Percentile restrictions" refer to laws requiring foreign employers to maintain a certain proportion of local nationals in its workforce.[26] These and similar laws regarding nationality were viewed as a significant infringement on a company's right to select its own personnel and protect its investment abroad.

If Article VIII(1) were construed to provide merely a "national treatment" standard, it would be superfluous. Article VII already grants companies of either Party national treatment with respect to engaging in all types of business activities within the territories of the other Party. Article VIII(1) serves no purpose if it merely conveys rights already conveyed by Article VII.

That Article VIII(1) was not considered a superfluity by the Treaty drafters is well illustrated by the negotiations on the German FCN Treaty. When the Germans proposed the deletion of Article VIII(1) on grounds that it was "unnecessary and self-evident," the American negotiators strongly and successfully resisted this proposal:

> [T]he paragraph embodies a sound and desirable principle that ought to be asserted in the treaty. The provision is

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[26] As an example, Nicaragua had such percentile restrictions in effect at the time the United States negotiated their FCN Treaty. *See* S. EXEC. DOC. G., 84th Cong., 2d Sess. at 3 (1956). The final treaty text compromised on this issue by restricting the "of their choice" provision to employees "essential to the conduct of their affairs." Treaty of Friendship, Commerce & Navigation between the United States and Nicaragua, art. VIII, para. 1, [1956] 9 U.S.T. 449, T.I.A.S. No. 4024. At the time of the Japanese Treaty, several American states had similar laws restricting the employment opportunities of aliens. *See* 1953 *Legislative Hearings* at 28.

> attributed some importance by American interests; and its omission from the treaty would be calculated to arouse apprehension concerning Germany's intentions, as well as set a bad precedent for negotiations with countries where its presence would be most helpful in curbing extreme tendencies to discriminate against, for example, American accounting firms there established for the purpose of servicing American investments.

Diplomatic Note from the U.S. High Commissioner for Germany to the German Federal Ministry of Foreign Affairs, Dec. 15, 1953, p. 2 (*see* Jt. App. 254a).

Obviously, a "national treatment" standard with regard to staffing rights would be inadequate to avoid the detrimental impact of these nationality restrictions. Even if such a law nominally applied to all employers, domestic or foreign, only foreign companies would be forced to operate under a disadvantage, since only they would be expected to employ a substantial number of aliens in managerial positions. Local companies would naturally tend to employ local citizens and have no need (unlike foreign enterprises) to engage foreign managerial and technical personnel. Thus, a percentile law applying equally to domestic and foreign companies may have an extremely detrimental impact only upon the foreign enterprise. Only an absolute rule such as that contained in Article VIII(1) is sufficient to accomplish the parties' intent to overcome such restrictive employment laws, whatever their nature.[27]

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[27] Even if this Treaty privilege were viewed as preferential treatment of foreign nationals, Congress has on many occasions authorized such special treatment. *Mathews* v. *Diaz*, 426 U.S. 67, 78 n. 12 (1976). *See, e.g.*, 19 U.S.C. § 1586(e) (1976) (liability for unlawful unlading or transshipment); 50 U.S.C. App. § 453 (1976) (draft registration); Diplomatic Relations Act § 5, 22 U.S.C.A. § 254d (1979)(diplomatic agents, administrative and technical staff, and their families); International Organizations Immunities Act, § 7, 22 U.S.C. § 288d (1976) (foreign representatives to, and officers and employees of international organizations); Agreement Between the United Nations and the United States of America regarding the Headquarters of the United Nations, § 15, 61 Stat. 756 (1947).

The evident purpose of Article VIII(1) was to avoid domestic employment restrictions such as percentile laws. Civil rights laws regarding employment, although perhaps enacted for different purposes, affect employee selection practices in essentially the same way as percentile laws. A mere numerical imbalance in racial and ethnic representation in the employer's work force may sometimes be sufficient to establish a prima facie violation of Title VII. *See Dothard* v. *Rawlinson,* 433 U.S. 321, 329 (1977). In practice, civil rights laws are the functional equivalent of percentile laws, differing only in that they are stated in the form of negative prohibitions rather than positive mandates.

Neither Title VII nor Section 1981 has abrogated the staffing rights created by Article VIII(1). The Treaty is self-executing and became part of the domestic law of the United States without the necessity of further legislative action. *See, e.g., Bacardi Corp. of America, Inc.* v. *Domenech,* 311 U.S. 150, 161 (1940). A subsequent statute will abrogate an earlier one only where such an intention has been clearly expressed. *Cook* v. *United States,* 288 U.S. 102, 120 (1933). As the Fifth Circuit has observed, "No evidence suggests that Congress intended to repudiate Article VIII(1) when it enacted Title VII." 643 F.2d at 362. Removing this limited exemption from Title VII and Section 1981 would reduce the Article VIII staffing privilege to a nullity.

The Economic Recovery Tax Act of 1981[28] gives clear evidence of the high priority which Congress continues to place on the reciprocal right of U.S. companies to utilize American employees in their foreign operations. This act allows qualifying Americans working for U.S. companies abroad to elect a substantial exclusion from U.S. tax for their foreign earned income. Thus, more than 28 years after the ratification of the Japanese

[28] Pub. L. No. 97-34, 95 Stat. 172.

Treaty, Congress continues to recognize the importance of Treaty staffing rights to U.S. companies operating abroad, and has created special tax incentives to enable U.S. companies to make greater use of these rights.

The right conferred by Article VIII is an essential component of American trade and economic policy toward Japan. This policy removes the artificial barriers inhibiting trade and commerce with Japan by American investors, and with the United States by Japanese investors. This Court has recognized exceptions to Title VII where justified by long-standing policy considerations of high importance. *See Morton* v. *Mancari,* 417 U.S. 535 (1974). This is another such case. This Court should "decline to abrogate the American government's solemn undertaking with respect to a foreign nation." *Spiess, supra,* 643 F.2d at 362.

CONCLUSION

For these reasons, it is submitted that the Court of Appeals for the Second Circuit's decision limiting the scope of Sumitomo's rights under Article VIII(1) of the Japanese Treaty is erroneous. This Court should adopt the views of the Court of Appeals for the Fifth Circuit as expressed in *Spiess.*

Respectfully submitted,

By 

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CERTIFICATE OF SERVICE

I, Neil Martin, one of the attorneys for C. Itoh & Company (America), Inc., do hereby certify that on this the 18th day of January, 1982, three (3) copies of the foregoing Brief were placed in the United States mail, postage prepaid, to each of the following counsel of record:

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APPENDICES

APPENDIX
No. 1

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

CONFIDENTIAL

No. 351 American Embassy, Montevideo, Uruguay.
July 22, 1949.

Subject: Progress in Negotiations of Treaty of Friendship, Commerce, and Economic Development between the United States and Uruguay.

The Honorable
The Secretary of State,
Washington.

Sir:

I have the honor to refer to the Embassy's confidential telegram no. 209 of June 16 and the Department's confidential telegram no. 152 of June 29 concerning the negotiation of a Treaty of Friendship, Commerce and Navigation between the United States and Uruguay, and specifically concerning points raised by the Uruguayan Bank of the Republic. Reference is also made to this Embassy's confidential telegram no. 266 of July 21 on the same subject.

Sr. Ariosto GONZALEZ, the Uruguayan negotiator, returned to Montevideo this week and negotiations were resumed on Wednesday, July 20. González showed the Embassy's representative the formal comment of the Bank of the Republic on the latest Spanish draft of the Treaty, (a copy of which comment is enclosed) and expressed concern over the Bank's note, especially over the contents of paragraph four, page one. He then suggested the possibility of a confidential exchange of notes at the time or signing of the Treaty (rather than a

modification of the Additional Protocol, as the Bank had suggested), which would establish the fact that during the course of the negotiations the right of Uruguay was recognized to apply restrictions, by currencies, on imports, exports and capital transfers so long as Uruguay had favorable balances of inconvertible currencies and so long as there was no return to multilateral trade.

The Embassy's representative then proposed that the changes in Article XVI (2) and (4) and the omission of Article XIX (1) (E), as contained in the Department's telegram no. 152, be considered prior to considering the possibility of any further exchange of notes or revision of the Additional Protocol. González approved the suggested revisions but expressed some doubt as to whether they would be sufficient to satisfy the Bank. He agreed, however, to present the revised articles to the Bank, although he requested that the Department consider the possibility of an exchange of confidential names as mentioned above, in the eventuality that the Bank might continue to object to the financial provisions of the Treaty.

González emphasised that for political reasons and in order to afford reasonable assurances of the approval of the Treaty by the Uruguayan Congress, the approval of the Treaty by the Bank was vital. Anticipating possible continued objections of the Bank, he suggested one other possibility, in case the Department should not approve the idea of an exchange of confidential notes. This was to the effect that at the time of the signing the Treaty, the Uruguayan Government might present a note to the

Embassy requesting that the right of Uruguay to apply discriminatory measures on the basis of currencies in the issuance of import licenses and in permitting capital transfers so long as she held favorable balances of inconvertible currencies and so long as there was no return to multilateral trade, be clarified. He suggested that the Embassy might reply, stating that such a clarification was not necessary since the terms of the Treaty established this point, in accordance with the rights and obligations reserved to Uruguay under the Articles of Agreement of the International Monetary Fund.

González proposes to present to the Bank without delay the revisions of Article XVI proposed by the Department, and the suggested omission of Article XIX (1) (E). These will be presented under cover of an note in which González proposes to point out: (1) that the provisions of the Treaty, including the proposed revisions of Articles XVI and XIX, do not imply any immediate obligation on the part of Uruguay to change existing regulations and controls on exports, imports and capital transfers; (2) that the Additional Protocol clearly establishes Uruguay's right to apply quantitative restrictions on imports and exports in keeping with the provisions of Article XIV (2) of the International Monetary Fund Agreement.

The Embassy's representative, in discussing with González objections noted in the Bank's note of June 20, expressed some surprise that the Bank would raise objections to terms of the Treaty based on regulations set up in the International Monetary Fund Agreement (see paragraph four, page two of enclosed

note from Bank), since the Uruguayan Government had subscribed to the Agreement. González agreed and stated that he would call attention to this point in his covering note to the Bank. He also stated that he would talk personally to the Uruguayan President; to Sr. SILVEIRA Zorzi, the General Manager of the Bank; and to Sr. Rotkohi, the Manager of the Foreign Trade Department of the Bank, in an effort to obtain the approval of the Bank without delay.

Further progress in the negotiations of the Treaty is largely dependent upon the Bank's examination of the proposed revisions of Article XVI and XIX and its reaction to the proposals.

With reference to Embassy Despatch no. 222 of May 12 and the Department's confidential telegram no. 132 of June 2, the following points have been agreed upon. The Department's revision of Article II was adopted by González. In Article VI (1) (a), "the practice of law" has been eliminated, as reflected in the latest Spanish text of the Treaty, sent to the Department under cover of Despatch no. 225 of May 16. In Article XII (2), the changes noted in the Department's telegram no. 132 have been accepted. In Article XIIX (2) the final sentence has been deleted and this deletion is reflected in the latest Spanish text, now in possession of the Department.

In regard to Article XX (3) (Spanish text), González proposed to replace the period at the end of the paragraph by a comma and continue

> "debiendo sujetarse a las prescripciones establenidas por las leyes de la Parte en cuyos territorios intenten realizar el

> ejercicio habitual de actos comprendidos en el objeto de an institucion."

The English text of Article XX (3) might be extended by replacing the period at the end of the paragraph by a comma, and continuing

> "but shall be obliged to comply with regulations established by the laws of the Party in whose territories they propose to carry on regularly the activities for which they are organized."

González pointed out that companies of the United States as defined in Article XX (3) of the Treaty will, upon the signing of the Treaty, enjoy privileges accorded other foreign companies by the Treaty of International Commercial Law signed by Uruguay, Argentina, Bolivia, Brazil, Chile, Paraguay and Perú on February 13, 1889, and the Treaty of International Law of Terrestrial Commerce signed by Uruguay, Brazil, Colombia, Bolivia, Argentina and Chile on March 19, 1940. Provisions of these treaties establish, in González's opinion, the right of companies organized and with recognized juridical status in signatory countries, or in other countries enjoying the privileges accorded in the treaties, to have their juridical status recognized in other signatory countries, to enjoy civil rights in such other signatory countries, and to appeal to or defend themselves before the courts of such countries. Such companies may even carry on isolated commercial operations, provided such operations do not constitute "the regular exercise of the operations for which the company was organized". In other words, such companies are

obliged to comply with the Uruguayan legal regulations governing organization of companies, activities, etc. only when they plan actively to conduct business, commerce, or other normal transactions in Uruguay in a regular and continued manner.

González called attention to the fact that his suggested addition to Article XX (3) follows as nearly as possible the wording of Title II, Article 8 of the Treaty of March 19, 1940.

Pages 407-416, inclusive, and pages 661-672, inclusive, of the "Colección de Tratados, Convenciones, y Acuerdos Económico-Comerciales", vol. I, published by the Ministry of Foreign Relations are enclosed. These pages contain the full text of the two commercial treaties referred to above.

Title II, Articles 4, 5, 6, and 7 of the Treaty of February 13, 1889 and Title II, Articles 6, 7, 8, 9, 10 and 11 of the Treaty of March 19, 1940, which González noted are applicable to the points covered in Article XX (3) of the proposed Treaty between Uruguay and the United States, follow.

"TITULO II
De las sociedades

Artículo 4°. El contrato social se rige, tanto en su forma como respecto a las relaciones jurídices entre los socios, y entre la sociedad y los terceros, por la ley del país en que ésta tiene su domicilio comercial.

Art. 5°. Las sociedades o asociaciones que tengan carácter de persona jurídica se regirán por las leyes del país de su domicilio; serán reconocidas de pleno derecho como

tales en los Estacos, y hábiles para ejercitar en ellos derenchos civiles y gestionar su reconocimiento ante los Tribunales.

Mas para el ejarcicio de actos comprendom dos en el objectô de su institución, su dujetan . . a las prescripciones establecioas en el estano en el cual intenten realizerlos.

Art. 6°. Las sucursales o agencias constituídas en un Estado por una sociedad radicada en otro, se considerarán comiciliadas en el lugar en que funcionan y sujetas a la jurisdicción de las autoridades locales, en lo concerniante a las operaciones que practiquen.

Art. 7°. Los Jueces del país en que la sociedad tiene su domicilio legal, son competentes para conocer de los litigios que surjan enbre los socios o que inicien los terceros contra la sociedad.

Sin embargo, si una sociedad domiciliada en un Estado realiza operaciones en otro, que den mérito a controversias judiciales, podrá ser demandada ante los Tribunales del último.

TITULO II

De las sociedades

Artículo 6°. La ley del domicilio comerciel rige la calidad del documento que requiere el contrato de sociedad.

Los requisitos de forma del contrato se rigen por la ley del lugar de su celebración.

Las formas de publicidad queden sujetas a lo que determine cada Estado.

Art. 7°. El contenido del contrato social; las relaciones jurídicas entre los social; entre estos y la sociedad; y entre le

misma y terceros, se rigen por la lay del Estado en donde la sociedad tiene domicilio comercial.

Art. 8°. Las sociedades mercantiles se regirán por las leyes del Estado de su domicilio comercial; serán reconocidas de pleno derecio en los otros Estados contratantes y se reputarán hábiles para ejercer actos de comercio y comparcer en juicio.

Mas, para el ejercicio habitual de los actos comprendidos en el objeto de su institución, se ejecutarán a las prescripciones establecidas por las leyes del Estado en el cual intenten realizarlos.

Los representantes de dichas sociedades contraen para con terceros las mismas responsabilidades que los administradores de las sociedades locales.

Art. 9°. Las sociedades o corporaciones constituidas en un Estadeo bajo una especie desconocide por las leyes de otro, pueden ejercer en este último actos de comercio, ragatendose a las prescripciones locales.

Art. 10°. Las condiciones legales de emisión o de negociación de acciones o titulos de obligaciones de las sociedades comerciales, se rigen por la ley del Estado en donde esas emisiones o negociaciones se lleven a efecto.

Art. 11°. Los jueces del Estado en donde la sociedad tiene su domicilio, son competentes para conocer de los litigios que surjan entre los socios en su carácter de tales, o que inicien los terceros contra la sociedad.

Sin embargo, si una sociedad domiciliada en un Estado realiza en otro operaciones que den mérito a controversias judiciales, podrá ser demandada ante los jueces o tribunales del segundo."

It is the embassy's opinion that Article XX (3) with the addition proposed by Gonzáles guaranteed to companies organized and with recognized juridical status in the United States, those rights and privileges sought by the inclusion of this section in the Treaty; viz., the right to appeal to, to be heard by, and to defend themselves before the courts and administrative tribunels and agencies of Uruguay; to enjoy recognized civil rights in general; and to be required to comply with legal regulations only when they carry on their regular business or other activities in Uruguay.

If this amendment to Article XX (3) is acceptable to the Department, it is believed that the only serious obstacle remaining to the acceptance of the Treaty in its present form is the opinion of the Bank of the Republic concerning restrictions on financial transactions as now covered by the Treaty.

Respectfully yours,
For the Ambassador:

L. O. Sanderhoff
Second Secretary

Enclosures:

1. Comment from Bank of the Republic on Treaty, dated June 20, 1949.

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2. Tratado de Derecho Comercial Internacional, Febrero 13, 1889.
3. Tratado de Derecho Comercial Terrestre Internacional, Marzo 19 de 1940.

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APPENDIX
No. 2

OUTGOING TELEGRAM

Department of State

CONFIDENTIAL

CLASSIFICATION

AMEMBASSY

MONTEVIDEO

URUG interpretation ART XX(3) Treaty appears very close to that of DEPT (EMBDES 351, JULY 22), but proposed additional language seems unnecessarily broad and might be susceptible of construction that would restrict rights set forth elsewhere in Treaty.

VERBATIM TEXT: EMB requested propose that in place of additional clause FOL sentence be added: QTE It is understood that recognition of juridical status does not of itself confer rights upon a company to engage in the activities for which it was organized UNQTE

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Since paragraph provides only for recognition of juridical rights, the understanding should be related only to that recognition and not to the general meaning or extent of rights of juridical persons. If Urug insists, however, language quoted Urdes 515 acceptable.

Changes Protocol (6) and add para Protocol satisfactory, also proposed changes Spanish translation.

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APPENDIX
No. 3

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AMEMBASSY,

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FCN Treaty. Art IX(2). Substance of change unobjectionable but phrase QUOTE Each Party UNQUOTE is ambiguous. Propose QUOTE made in accordance with the applicable laws, which shall at least assure UNQUOTE. If this is unacceptable, propose QUOTE made in accordance with the laws of the Party within whose territories the property is located UNQUOTE. Quoted Spanish not in accord previous agreed translation. Emb pls check. Emb requested make strong effort add following sentence: QUOTE 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 UNQUOTE. (Dept A-231 at 17) Final clause recognizes advanced character Urug law. Urdes 515 Oct 14.

Art XIII(2). Change unobjectionable.

Art XX(3). Change acceptable as to second sentence. Final sentence should read QUOTE It is understood that the recognition of such rights does not of itself confer rights upon a company to engage regularly in the business activities for which it was organized. UNQUOTE Since paragraph provides only for recognition of juridical rights, the understanding should be related only to that recognition and not to the general meaning

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or extent of rights of juridical persons. If Urug insists, however, language quoted Urdes 515 acceptable.

Changes Protocol (6) and add para Protocol satisfactory, also proposed changes Spanish translation.

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