In the

ORIGINAL

Supreme Court of the United States

SUMITOMO SHOJI AMERICA, INC.	)	
	)	
Petitioner,	)	
v.	)	NO. 80-2070
	)	
LISA M. AVAGLIANO ET AL., and	)	
	)	
LISA M. AVAGLIANO ET AL.,	)	
	)	
Petitioners,	)	
v.	)	NO. 81-24
	)	
SUMITOMO SHOJI AMERICA, INC.	)	

Washington, D. C.

April 26, 1982

Pages 1 thru 48

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400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

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Washington, D.C.

Monday, April 26, 1982

The above-entitled matters came on for oral argument before the Supreme Court of the United States at 1:51 o'clock p.m.

APPEARANCES:

ABRAM CHAYES, ESQ., Washington, D.C.; on behalf of Sumitomo Shoji America, Inc.

LEWIS M. STEEL, ESQ., New York, New York; on behalf of Avagliano et al.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Sumitomo Shoji against Avagliano.

Mr. Chayes, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ABRAM CHAYES, ESQ.,
ON BEHALF OF SUMITOMO SHOJI AMERICA, INC.

MR. CHAYES: Mr. Chief Justice, and may it please the Court, this case concerns the international obligations of the United States under the Treaty of Friendship, Commerce, and Navigation with Japan and similar treaties with many other countries, an obligation to permit a foreign investor to manage and control its investment in this country by engaging executives and other specialists of its choice.

Sumitomo Shoji America is a company organized and existing under the laws of the State of New York. It is a wholly owned subsidiary of Sumitomo Japan, a general trading company or Sogo Shoji, with more than 100 offices around the world. Plaintiffs below are women who are or were employed as secretaries by Sumitomo. They brought suit under Title VII of the Civil Rights Act, alleging two principal causes of action.

First, in Paragraph 12 of the complaint, they

allege that Sumitomo discriminated against them by restricting them to clerical positions on the ground that they were women, and second, in Paragraph 13, that Sumitomo had discriminated against them by restricting them to clerical positions on the ground of their nationality.

Sumitomo answered denying the claims of discrimination and asserting that its employment practices challenged in the complaint were authorized by the Friendship, Commerce and Navigation Treaty, and on this basis Sumitomo moved to dismiss the complaint for failure to state a claim on which relief could be granted.

The district court denied this motion, holding that Sumitomo as a New York company was not entitled to the benefit of the Treaty. That question was certified for interlocutory appeal under Section 1292(b) of the judicial code. On the issue certified, the Second Circuit reversed the district court. It held, as did the Fifth Circuit in a substantially identical case, Spiess versus C. Itoh, Incorporated, that a wholly owned U.S. subsidiary of a Japanese investor could indeed invoke the protection of the Treaty, but contrary to the Fifth Circuit, the Second Circuit went on to hold that on the merits the Treaty did not preclude examination

under Title VII of Sumitomo's employment practices with respect to senior personnel.

On this ground, it affirmed the district court's denial of the motion to dismiss, and we took our petition for certiorari from that decision.

Now, I want to go directly to the Treaty issues that I think are at the heart of this case. Indeed, in my view, the deeper question of this case is whether the United States will faithfully carry out Treaty obligations undertaken with two dozen foreign countries, obligations that it placed in the Treaty and placed in the Treaty for its own purposes.

There are two issues under the Treaty, two components to the Treaty question. The first is who may invoke the employment right under the Treaty, and the second is what is the scope of that right. As to the first, who may invoke the right, I think that need not detain us long. Both courts of appeals decided that a wholly owned subsidiary of a foreign investor was entitled to the benefit of the employment right. And why? Because neither court of appeals could perceive any sound reason or basis in policy for distinguishing in terms of the employment right between foreign investment carried out through a branch and foreign investment carried out through a locally organized

subsidiary.

QUESTION: I suppose, Professor Chayes, you would carry that down to a subsidiary of a subsidiary.

MR. CHAYES: Well, I think that is true. That is our -- our position is that the foreign investor has a right to manage and control his investment in the United States by engaging executive personnel of his choice, and if his investment is -- takes the form of a subsidiary of a subsidiary, the answer is the same.

QUESTION: What about a subsidiary, if you want to call it that, owned 40 percent by a foreign parent, or 55 percent?

MR. CHAYES: Fifty-five percent wouldn't bother me. The regulations --

QUESTION: How wouldn't it bother you?

MR. CHAYES: Well, the regulations under the Immigration and Naturalization Act provide and have provided always that a 51-percent controlled subsidiary has the nationality of the state of its owner. If you go below that, below 51 percent, then you are not talking about a controlled subsidiary, and it is the right to control and manage the investment that is at stake. If you look at Article VII of the Treaty, Article VII says that the foreign investor has the right to invest in this country in any lawful juridical form.

QUESTION: I take it the brief filed by the United States is also filed on behalf of the State Department.

MR. CHAYES: Well, it is hard to say --

QUESTION: At least the legal advisor's name is on the brief.

MR. CHAYES: Yes. I was going to say, it is hard to say in whose behalf the brief on the part of the United States was filed, because --

QUESTION: Or whom it supports.

MR. CHAYES: Yes, or whom it supports.

(General laughter.)

MR. CHAYES: It seems to be that the brief discloses a compromise between various points of view in the government, and that is what I would like to say on this branch of the case. The essential point is, there should not be distinction as between branch investment and subsidiary investment. Nobody has been able to adduce a reason why one should distinguish between investment carried out through branches or investment carried out through subsidiaries.

On the contrary, the major objective of these treaties, post-World War Two treaties, was to accommodate investment through locally incorporated subsidiaries. That was a new element in 1952, although

already quite popular. By now, it is the predominant form of overseas investment. In the United States, 85 percent of our direct investment abroad takes the form of locally incorporated subsidiaries. That is why the State Department said, the same State Department, Justice White --

QUESTION: Yes, but you wouldn't suggest that the State Department supports your position.

MR. CHAYES: Well, I am going to suggest that in a moment --

(General laughter.)

MR. CHAYES: -- but I want to say that as late as July, 1979, the State Department said that an interpretation of the Treaty that would exclude locally incorporated subsidiaries would gut the Treaty of much of its value for the United States. Now, that is colorful language for the State Department.

QUESTION: Well, it doesn't say that now.

MR. CHAYES: Well, now I think what the State Department says now is a little bit different. It says this. It says, we don't want to call the locally incorporated subsidiary a company of Japan for the purposes of Article VIII. It says, we don't want for the purposes of Article VIII to pierce the corporate veil.

QUESTION: What are the differences functionally between the two types of structures, the subsidiary and the branch?

MR. CHAYES: Well, of course, the subsidiary is a corporation. It has limited liability. It is taxed as a separate entity, and so on. The branch is a part of the foreign enterprise, and it does not have limited liability. It is a presence in this jurisdiction of a foreign enterprise, and so on.

QUESTION: For the purposes we are here today, what do you think are the critical differences?

MR. CHAYES: I think there are no differences for the purposes we are here today.

QUESTION: Functionally, they are the same.

MR. CHAYES: Functionally, none, and --

QUESTION: There may be -- conceivably there might be some tax consequences of being one or the other?

MR. CHAYES: Well, yes, but not for the purposes of employment, Your Honor. If you look at Article VI-C, it says, first, the foreign investor may establish branches. That is VI-1-A. VI-1-B says it may establish locally incorporated subsidiaries, and then VI-1-C says, it may manage and control its enterprises without distinguishing at all between them.

Now, I want to say -- I want to return to

Justice White's question, because I do think it is important to see that although the State Department doesn't want to call us the company of Japan for the purposes of Article VIII, it is perfectly willing that we should have the benefits of Article VIII protection derivatively, so to speak, through the right of our parent. If you look at Page 6 of the brief of the United States in its summary of argument, it says that in so many words.

Accordingly, it says, as a wholly Japanese owned trading company, Sumitomo may continue to obtain the services of Japanese nationals to the extent they qualify for treaty trade or visas under the standards described above even if the court concludes that Sumitomo is not a company of Japan that may invoke the special employment privileges of the Treaty, and you will find similar expressions scattered throughout the State Department's brief, wherever one side or the other won the particular negotiating battle.

QUESTION: How would you distinguish that statement from a functional analysis?

MR. CHAYES: I would not at all, sir. I would say that that -- we are perfectly prepared that this Court should decide that we are a company of Japan for the purposes of Article VIII, or that we get the right

derivatively from the right of the parent. We have no vested interest in which rationale the Court uses to reach that result, and as we suggested in our brief, the courts below apparently look both ways on the question of rationale, and they do so for the very reason you say, Your Honor, because functionally there is no difference. Functionally, the right of the foreign investor to manage and control has got to be the same and was designed to be the same in this Treaty, whether his investment took the form of a branch or of a subsidiary.

Now, I would like, therefore, Your Honor, and --

QUESTION: May I just interrupt with one question? What function does the definition in Article XXII perform in your view?

MR. CHAYES: Well, that, as you see from the briefs, is the subject of a lot of scholastic exigesis. I think that it performs a function that has not been very fully called to our attention, and that is this. I think Article XXII was really designed to say what companies of -- what kinds of enterprises or entities in the foreign country did we have to recognize, and conversely, what kinds of entities in our country did the Japanese have to recognize, and all this talk about

a single simple case is not a test about the nationality of the company.

It is really a test about what kind of entity in the foreign milieu we have to recognize as a company, and the reason why this article was drafted in these terms was that previously, previously in the U.S. Treaties of Friendship, Commerce and Navigation with Germany, for example, or with Japan, the Treaties in the 19 teens and the twenties, a whole series of requirements were established before a company could claim recognition by the other party. It had not be not only organized within the territory of one party, but have its seat there, and so on, if you look at the German Treaty or the Japanese Treaty.

And so they said, now let's sweep all that aside. Let's have a simple test that tells me when I have to recognize a Japanese enterprise, and tells the Japanese when they have to recognize my enterprise, and that is when it is incorporated in the other party's -- it is organized under the other party's laws. It has little or nothing to do, I think, Mr. Justice Stevens, with what we have to do about companies organized under our own laws.

But even if you take that view, then it seems to me, as I said before, it may be that the State

Department has some concerns about calling a company organized under the United States, a "company of Japan" for the purposes of Article VIII, because that may have a carry-over, a carry-over effect in other parts of the Treaty, but in fact, the State Department says, you can get there by a different route. All you have to say is, it is the parent that is --

QUESTION: They just say that for the purpose of identifying the Treaty traders, don't they?

MR. CHAYES: Excuse me, sir?

QUESTION: Don't they just say that for the purpose of identifying --

MR. CHAYES: No.

QUESTION: -- individuals who would be treaty traders?

MR. CHAYES: No, sir. I think they say, again, if you want to look at another example, the government's brief at Page, I think, 21, "Because Sumitomo's parent corporation" -- I am reading now down at the bottom -- "apparently is a company of Japan" --

QUESTION: Where are you reading?

MR. CHAYES: Down at the bottom of the government's brief at Page 21, sir.

QUESTION: Twenty-one. Okay.

MR. CHAYES: Yes. And it says, "apparently a

company of Japan". I don't think there is anybody who denies that Sumitomo Japan is a company of Japan. "The parent might well have discretion protected by the Treaty to select Japanese nationals for certain top level managerial positions in Sumitomo through the exercise of the parent's right under Article XIII-1 to engage executive personnel." In other words, that is --

QUESTION: Well, what about non-top level management?

MR. CHAYES: We don't claim that we don't -- that we have the right to engage anything other than executive personnel and the other categories mentioned in Article VIII of the Treaty, and if I could --

QUESTION: Well, that executive personnel isn't top level, is it?

MR. CHAYES: Well, if I could, Mr. Justice, to go the --

QUESTION: Well, maybe you are going to tell me what the Treaty means, then.

MR. CHAYES: That's right. I want to talk about what the scope of the treaty right is, because I honestly think there isn't much substance to the argument that whatever the Treaty right is, this company doesn't get the benefit of it. And in talking about the scope of the Treaty right, I want to make two points.

First, Sumitomo is not claiming a general immunity from Title VII.

We are speaking only of a narrow group of top executives and specialists necessary to manage and control the investment, and second, I think it is essential to keep in mind that these employment rights were put in the Treaty not by the Japenese, not by the Germans, not by the Danish, not by the Israelis, but by the United States. We were the draftsmen of this Treaty, and what we wanted out of Article VIII of this Treaty is also stated in the government's brief.

It appears in Footnote 14 at Page 24-25, and what we wanted was, it says, the purpose of Article VIII was to override these restrictions, host country restrictions on employment of aliens, and I am quoting now, "so that American businessmen operating abroad would be able to select U.S. nationals for essential positions," and that is the right that Sumitomo is seeking.

Now, to define the scope of that right, as I say, I think the government in sort of general terms accepts that statement of what the right is, but then they say, oh, well, on this record we can't say that all these people that occupy challenged positions are really executive personnel, are really specialists of the kind

mentioned in the treaty, so we have got to send the whole thing back for a case by case examination of what these executive positions amount to and what these specialist positions amount to.

Your Honors, we believe that that question can be settled as a matter of law on this record by this Court, and it can be settled if we expand our horizon a little bit and take into account additional legal materials that are not referred to by the government, and essentially the legal materials involved are the Immigration and Naturalization Act of 1952 and the regulations thereunder. Now --

QUESTION: May I interrupt once more --

MR. CHAYES: Surely.

QUESTION: -- because I want to get these levels of employees firmly in mind, if I may. The derivative right that they agree you may have, they are not -- they are somewhat -- on Page 21 --

MR. CHAYES: Yes.

QUESTION: -- is top level management through another provision of the Treaty that would authorize management and control of the subsidiary, which is -- would you agree that is not coextensive with the concept of people of their choice, attorneys, agents, and other specialists of their choice?

MR. CHAYES: Well, it is executive personnel, attorneys, agents, and other specialists of their choice.

QUESTION: Right.

MR. CHAYES: Well, Mr. Justice Stevens, let me say that if we had nothing but the Treaty to go on, that would be a fair or a possible reading, but we do have more than the Treaty to go on, and that is what I am trying to bring into the picture right now.

QUESTION: But what I am really asking, you don't construe their brief as conceding that those two concepts are coextensive.

MR. CHAYES: I do not, and I am saying that on the face -- we don't have to confine ourselves to the face of the Treaty, because we've got the Immigration and Naturalization Act, which was passed at the same time, contemporaneously. Section 101(a)(15)(e) of the Immigration and Naturalization Act was the part of the Immigration and Naturalization Act designed to carry out these provisions of the Treaty, and if you look at that section of the Act and the regulations promulgated thereunder, they evidence contemporaneous and continuous Congressional understanding of what the scope of that right was, and administrative understanding of what the scope of the right was.

QUESTION: The scope of which right, the top

management right or the executive of their choice right?

MR. CHAYES: The entire treaty right.

QUESTION: But they are two different. That is what I am trying to --

MR. CHAYES: Well, all right. I think it is the right that we are claiming. That is what we are claiming. We are claiming --

QUESTION: The executives of their choice language.

MR. CHAYES: We are claiming executives of their choice, and we are saying the scope of that right is defined. We don't have to sort of look at the ceiling and say, is it top, or low, or what. The scope of that right is defined by the contemporaneous Congressional expression of the INA and the contemporaneous and continuous administrative expression of the regulations.

QUESTION: It is still a question of Treaty construction, though.

MR. CHAYES: Well, Treaty construction, yes, but I think it is fair to say that we can use the contemporaneous statute by which the Congress attempted to carry out U.S. Treaty obligations, and the regulations thereunder, as defining the Treaty right, as defining what the Treaty means, and if you look at

those, you will see that the Act says that to get a Treaty trader visa, an E-1 visa, you must be an alien entitled to enter pursuant to a Treaty of Friendship, Commerce and Navigation, and a national of the state under which the Treaty -- under whose Treaty you claim.

So that that means our right of free choice is limited at the outset to nationals of our own country, that is, Japanese nationals in the case of Japanese investments in the United States, U.S. nationals in the case of U.S. investment abroad. That is exactly what we wanted, the right to put U.S. nationals in our management positions abroad.

Then, if you look at the regulations, you see that there are further criteria defining the scope of this Treaty right. The regulations, which appear in our brief, I think, at Page 6, talk about executive and supervisory positions on the one hand, and specialist positions on the other, where the qualifications are essential to carrying on the investment's activities, the activities of the enterprise. Yes, sir?

QUESTION: In your brief, you note that the regulation comes from a 1981 codification. Was the regulation as contemporaneous as the statute?

MR. CHAYES: I think there were regulations promulgated at the time of the statute. Yes, Your

Honor. They have been clarified, as appears in the footnote of our brief at that point. I think it is in the reply brief, perhaps, at Footnote -- well, I think it may be 9 or 10 of the reply brief -- Footnote 11 of the reply brief. No, I'm sorry. It was Footnote 9, but it appears at Page 11.

And it shows you the historic evolution of those regulations. I think they amount to a continuous -- a continuous administrative interpretation that is of much more interest here than the sort of back and forth badminton game that the letterwriters in the State Department played with each other.

Here is the way the United States construed this Treaty when they had to administer it. Now, if you go further beyond the regulations you will see that there are interpretative notes, and as you look at the government's brief, the interpretative directions are provided in the government's brief at Appendix B-A, I think, and at Page 3-a of the government's brief, you will see what it says about executives, and it says they do have to be top executives in order to qualify for a visa, with important supervisory functions, and you will see what it says about specialists at Page 6-a in the government's brief.

QUESTION: To what extent does the knowledge,

the command of the Japanese language and a knowledge of Japanese customs and traditions in business enter into this?

MR. CHAYES: Well, it is more than that, even, Your Honor. These general trading companies are a very special kind of organization. These employees have been recruited after college, and they stay in this company for their lives, for the most part. They are like a civil service, or even a foreign service. They serve in the Japanese office for a while. Then they are sent overseas to the American office. Then they come back to Japan, and go out again to the office in Germany perhaps. These are part of -- these people are part of this company. That's their lives, is to be part of this company.

Now, I want to say just one word about why we still shouldn't go back and find out whether these regulations and laws have been accurately applied. The answer to that is this. To go back and decide whether these positions were truly executive positions, and whether the person truly had these qualifications, would be in fact to review the consular officer's decision, and that is something this Court has never permitted.

QUESTION: Well, if the government thought we were going to agree with you up to this point, they

might agree.

MR. CHAYES: I'm sorry, sir?

QUESTION: If the government thought we were going to agree with you up to this point, they might agree --

MR. CHAYES: They might agree to --

QUESTION: -- that the consular decision should not be reviewed.

MR. CHAYES: Should not be reviewed.

QUESTION: Yes.

MR. CHAYES: Well, I think they would. I think they would, Mr. Justice White.

QUESTION: Well, we may ask them.

MR. CHAYES: And I think people who have had responsibility in the Justice Department understand --

QUESTION: Well, we may ask them.

MR. CHAYES: Thank you, sir.

(General laughter.)

MR. CHAYES: I think they understand how important it is to preserve this immunity from review of the consular officer's visa decision.

QUESTION: What is your authority for saying that the consular officer's judgment is final in a suit in a federal court involving some Treaty provision?

MR. CHAYES: There is no Supreme Court case

which states that the -- which decides the point exactly. There are legion of Supreme Court cases that say that these issues are committed to executive and legislative discretion, to the political branch --

QUESTION: Well, that is true so far as letting a person into the country, but the question here isn't whether they should have been let into the country or not, but whether they qualify under the Treaty so as to afford a defense to a Title VII action.

MR. CHAYES: Our argument, Mr. Justice Rehnquist, is that it has been determined by the consular officer that they do qualify under the Treaty. Now you say, well, why shouldn't we review that determination just like we review all sorts of administrative determinations, and the answer is that consular determinations on visa issues have always been held immune to review. Why?

QUESTION: But that is a question of whether the man's visa is all right. We are not asking that here.

MR. CHAYES: Well, our position, Mr. Justice Rehnquist, is that our right extends to people whom we have been able to convince, the consular officer under the State Department regulations and the INA to issue an E-1 visa. That is why it is a matter of law, and that

the determination ought not to be reviewed, not because it wouldn't be a nice thing to have a review of this administrative determination, but because for other reasons having to do with the integrity of the administration of the immigration laws, this Court has continuously refused to subject those determinations to review.

QUESTION: Mr. Chayes, may I ask you another question that troubles me about the way in which the case comes to us? As I understand it, the 1292(b) appeal was just on the issue of what kind of a company is the subsidiary. It seems to me not only do we have a possible difference between top executives and people of their own choice. We might also have a difference between that category and the jobs that the plaintiffs are seeking --

MR. CHAYES: Well, it is that, sir, that --

QUESTION: -- and it is perfectly clear that everything can be resolved beyond the first issue.

MR. CHAYES: Mr. Justice Stevens, that is our position. Our position is that the Treaty, which might be ambiguous on its face, is defined in the Immigration and Naturalization Act that was passed to implement it, and in the regulations thereunder, and all those issues are determined as a matter of law.

Now, the only possible argument, as I suggested, is that we ought to review the consular officer's determination. It ought to be entitled to some kind of judicial review. And my answer to that is that this Court has been very careful, I would say, has never permitted the review of consular officer's determinations because the administration of the Immigration and Naturalization Act and the immigration laws of the United States has been held to be a paramount political --

QUESTION: Yes, but as Mr. Justice Rehnquist points out, it is quite one thing -- it is one thing to say that these people may come in and work here, give them permission to come, and quite another thing to say that that necessarily means that no woman in New York can be eligible for any of these jobs, which is in fact what they are claiming.

MR. CHAYES: Well, our reply to that is quite different. We say that we are entitled to executives of our choice -- I am sorry, I will have to answer your question -- as long as we have somebody we want to put there and we can get an E-1 visa for him. If we take him out of there and don't substitute another person with an E-1 visa, our belief is that that position is then subject to the Title VII laws.

That is, the only right that we have is to get visas for people entitled to enter under the Treaty. That is what the laws says, entitled to enter under the Treaty. They must be entitled to enter under the Treaty, and there is no way they can be entitled if they don't fall within this category, and once we do, that choice is foreclosed, but if we don't, Title VII applies just as it always does. I am sorry to have gone over --

QUESTION: Mr. Chayes, one of the complaining women below was a Japanese national, was she not?

MR. CHAYES: Yes, she was, Your Honor. We -- There are two answers to that.

QUESTION: So Title VII applies to her.

MR. CHAYES: Well, there are two answers to that question, Your Honor. In the first place, we conceded, and it appears in our reply brief, that as to that person, the Japanese national, who was a plaintiff, female Japanese national, she might have a claim that withstands a motion to dismiss, but on the other hand -- and so that concession stands in the record, and, I think, meets your question, but on the other hand, if you are talking about executive personnel of their choice, and you are talking about how a Japanese company manages its top executives worldwide, it does seem to me that this Court might wish to hesitate before it imposed

our notions, to which I subscribe wholeheartedly, of non-discrimination, on decisions taken by Japanese companies in Japan to send people to the United States, but that is by the side.

The main answer to your question, Justice O'Connor, is that we have conceded that as to her, a claim that is proof against 12(d)(6) has been stated.

Again, pardon me for carrying beyond the allotted time.

CHIEF JUSTICE BURGER: Well, our questions brought that on, counsel. We take responsibility.

Mr. Steel.

ORAL ARGUMENT OF LEWIS M. STEEL, ESQ.,

ON BEHALF OF AVAGLIANO, ET AL.

MR. STEEL: Mr. Chief Justice, and may it please the Court, I would like to pick up this argument by calling to Your Honor's attention precisely who the plaintiffs are and what the class is that they seek to represent. They are clerical employees. They do not seek to be president of Sumitomo America. They seek to move up in an orderly fashion through training programs and through their own qualifications at this point in time to the lower level management positions, and I would point out that we have record evidence in the form of the EEO-1 reports that show that fully 40 percent of

the work force today is apparently reserved for the people who are categorized as Treaty traders, so that when counsel for Sumitomo talks about high level executives, in reality, he is talking about every single person in that company with the exception of a few white males, except clericals, so that we have a real live issue on that score which in no way has been answered by the pleadings, and must be answered by a trial on the merits.

I would like to say that we are presenting here two propositions. First, we claim that Sumitomo Shoji America is a domestic corporation, and therefore it has no rights under Article VIII of the Treaty. That is, the of their choice provision. Second, we claim that even if Article VIII were to apply to an American subsidiary, then the of their choice language would not exempt Sumitomo from American civil rights laws, and would not grant it a license to discriminate.

QUESTION: Mr. Steel, what would you suggest are the differences functionally between a branch and a subsidiary?

MR. STEEL: Well, I see many differences. One, you obviously have tax differences which may be significant. Secondly --

QUESTION: How would they relate to the

Article III aspect of the Treaty?

MR. STEEL: I am not sure I --

QUESTION: It doesn't affect their function, does it?

MR. STEEL: No, that doesn't --

QUESTION: That doesn't have anything to do with the reason why the Japanese parent creates -- establishes the branch or the --

MR. STEEL: Well, it may well have a reason, Your Honor.

QUESTION: -- subsidiary, does it?

MR. STEEL: It may well have an important reason. There may well be some advantages which have not been developed in this record at this point between functioning as a domestic subsidiary and functioning as a branch. One of them could be in the field of tax. Secondly, you could have bankruptcy questions. Thirdly, you could have questions as to immunity from jurisdiction of suit.

It seems to me there are many possibilities why a parent in Japan might well choose the protection of using a corporate form here, a domestic corporate form rather than appearing in this country as a branch, and I think that some of those have been developed in my brief, some of those have been developed and alluded to,

I think, in both the government brief and also in the amicus AJC et al. brief, and I think those well could be significant, but I don't think we have that burden of trying to resolve that question because, contrary to counsel for Sumitomo's statement that the Treaty is ambiguous, it is not ambiguous at all.

Section 22-3 has a precise definition and precisely states that companies such as Sumitomo will be treated as American corporations, not corporations of Japan, and Article VIII within the article refers to situations involving both nationals and companies of Japan in the very first sentence, which discusses the "of their choice" right, and in a final sentence in the very same subsection of Article VIII refers to a situation where a subsidiary corporation would gain certain rights, and that is the situation where accountants and other experts are needed by the subsidiary.

So, you start out here in your analysis by looking at this case from its plain language, and it seems to me that once you do that, the burden is really on Sumitomo to overcome a very clear situation, because I do understand there are cases from this Court indicating that you can look behind plain language, but certainly plain language is very important. Certainly,

it is the heavy starting point for analysis.

QUESTION: Do you agree that the United States or the State Department had a different view than it now expresses in years gone by, even in the face of this plain language?

MR. STEEL: Well, the United States apparently has had three views, and it has --

QUESTION: As to this plain language.

MR. STEEL: Yes, Your Honor, but it started out with a view that by a attorney advisor, Diane Wood -- I don't have the page reference, but it is referred to in the brief -- saying that Sumitomo was subject to jurisdiction. That is when EEOC first asked the State Department for its opinion. That opinion letter was then withdrawn by Mr. Marks, who promulgated the Marks letter, and then the Marks letter was withdrawn when the Atwood letter came into being, but there is a very, very big difference between the Atwood letter and the Marks letter.

Marks was clearly shooting from the hip. Atwood, on the other hand, clearly stated that before his letter was promulgated, the State Department had carefully reviewed the documents in question and the negotiating history.

QUESTION: The court of appeals described both

of the letters as cursory, didn't it?

MR. STEEL: They both certainly were short, Your Honor, but when you --

(General laughter.)

MR. STEEL: That is cursory. I would have liked from Mr. Atwood more detail. I agree with that. But you see, when you look at the Atwood letter, you know, as we know now, that certain documents were available to Atwood that apparently Marks didn't consider. For example, there is a very, very long communication which we discuss in our brief relating to the concept of subsidiaries being put into Article VI(4).

Now, you have a back and forth in the correspondence between Japan and the United States about Article VI(4), and the State Department concludes that Article VI the way it was originally written would not protect subsidiaries from certain problems, namely, expropriation.

In order to ensure that subsidiaries had that protection, VI(4) was put in, which put into that section the concept of protecting a controlled corporation. So, when Mr. Atwood was evaluating the Treaty, he was able to look at the negotiating documents, which made clear that it wasn't accidental as to which sections referred to controlled corporations

and which sections didn't.

QUESTION: Unless the administrator has put some of the reasoning into his communication, we haven't customarily gone into that degree of psychoanalysis, have we, of saying that he must have had all this available, and presumably he relied on it even though there is no evidence in the communication?

MR. STEEL: Well, he did say that he had it available. He did say he relied on it, and it has been released. We can certainly assume that if he is a truthful man, he evaluated the documents that he released to the parties, including this very significant document.

QUESTION: Yes, but so far as the supporting reasoning, to the extent that under cases like the Swift, Skidmore analysis of the weight that is given to administrative construction, neither of these letters would appear to have a great deal of supporting reasoning contained in them.

MR. STEEL: I would have liked more reasoning in the Atwood letter. That is true, Your Honor, and I do understand that it may be entitled to less weight than it would be entitled if it were not so cursory. I do agree with that. But if you look at the timing of the Atwood letter, and understand what Atwood had before

him, which is the documents we all have before us now, it seems to me that the letter is entitled to weight, and we do know that after the Atwood letter, the position of the State Department in conformity with the Atwood letter was communicated to the government of Denmark, and that letter is also in the record.

I would like to turn to a major argument of counsel for Sumitomo. Even though I believe that Sumitomo, given the plain language of the Treaty, has the burden of persuasion, counsel attempts to put that burden on us, and says, we have not shown any reason whatsoever for the distinction between branches and subsidiaries.

I would suggest that if Your Honors look at the section in our brief concerning legislative history, which is the section involving what the State Department representatives said to Senator Hickenlooper and his committee when this Treaty and the series of treaties in 1952 were presented to that body, that -- those questions and answers and those statements are very significant, because they tell us what we all know from understanding our history, and that was, back in 1950, and throughout that entire period, the United States Senate was very, very concerned about the rights of Americans and American entities, and the mood of the

Senate was that it would object to treaties which infringed upon American sovereignty at home.

Very clearly, the State Department representatives, who not only had the burden of convincing foreign governments to sign treaties, but also had the burden of convincing the Senate to ratify those treaties, was trying to do everything that it could possibly do to let the Senate know that it was not taking away from either the federal government or state governments their traditional powers to regulate corporations.

And if we have to speculate as to why people would make that type of distinction between branches and corporations, we have the dialogues in those two hearings which tell us very, very clearly that Senator Hickenlooper was extremely concerned lest this Treaty would take away the traditional rights of the state governments to regulate corporations, and each and every time that question was asked of State Department representatives over a period of two years, the State Department representative made clear that this Treaty and its companion Treaties would take nothing away from the states to regulate -- to regulate in this area.

Now, that is very, very significant, because in 1953, as we have pointed out in our brief, there were

states that had antidiscrimination laws. Those laws were in effect, and it is clear that it was not the purpose of Congress or of the Senate in ratifying these treaties to in any way infringe upon the States of New York, where Sumitomo is incorporated, to enforce its law, or other states.

QUESTION: Do the states have any reciprocal problems with other states of the United States that Americans have with overseas operations? I am addressing now the reciprocity aspect that has been mentioned of Article VIII.

MR. STEEL: Well, let me say this. Obviously, the State of New York is not in the same situation as the United States in terms of the fact that it doesn't have a foreign policy to consider, but very, very clearly it did have an antidiscrimination statute on its books which meant a lot to it. The Attorney General has filed an amicus brief in this Court. And more importantly, Senator Hickenlooper and his committee was very concerned that these treaties would not erode the powers of the states to regulate domestic corporations, and that is precisely what Sumitomo America is, and I suggest if we have to look for an answer as to why the Treaty was structured in this way, we may well look to those Congressional hearings.

QUESTION: Well, I understood your colleague on the other side to say that even if you treat subsidiaries different from divisions, he still doesn't lose this case.

MR. STEEL: Well, I would like to turn my attention to --

QUESTION: You are going to -- He spent a lot of time on that.

MR. STEEL: Yes, I would like to turn my attention to that, and I would like also in turning my attention to that to refer to the Senate hearings which is set forth on Page 23, I believe, of our brief, in which when the Senate was considering this, the State Department representatives said that the Treaty rights were to be, and I quote, "upon as favorable terms", and let me stop and underline that, "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 own choice."

Now, Sumitomo maintains that Article VIII sets up a non-contingent right, that it is an absolute right, and yet the State Department representative very clearly told the Senate committee in question that the right was to be upon as favorable terms as the nationals of the country. That is a contingent right. That is not a

right which is non-contingent, because it must be the same right as is available to nationals at home. It is very clear that the employer -- that the employment rights in this Treaty are national rights, are national treatment rights, and not rights that go above the concept of national treatment.

I would like therefore to suggest that at the point in time that this Treaty was passed, it was perfectly appropriate for Congress to pass Title VII and not have that statute be in conflict with this particular Treaty. More than that, it is very clear that the parties could have contemplated the passage of Title VII, because of the U.N. charter provisions which are in our brief and concepts of equality which were developing at that point in time.

Secondly, I point out that Title VII has specific exemptions. Congress well understood, and I have a section in my brief about that, that it could exempt certain areas from Title VII protection, and in fact did so, and did so in two areas relating to foreign policy, and those sections are also set forth in my brief.

I would like to make a comment about the government. I believe that its brief in which it wonders whether or not Article VIII constitutes a

legislative type validation for the top jobs, I suggest that that is entirely an unnecessary approach to take, precisely because the business necessity concept under Title VII would give Sumitomo all the protection that it needs there, and you must remember when you are talking about top jobs, business necessity becomes a very potent weapon. It is rather difficult for a plaintiff to overcome business necessity at the top levels where the employer says, I need in this --

QUESTION: You don't agree with the United States then that these companies can achieve the same result --

MR. STEEL: Absolutely not.

QUESTION: -- derivatively through the Treaty trader.

MR. STEEL: Right, and I don't believe the government says that. It wonders as to whether or not in the future it may take that position, but I think the Treaty trader exception -- excuse me, the business necessity approach carefully and would completely take care of that problem.

I would also like to point out with regard to the Immigration and Naturalization argument that has been made by Sumitomo the following. It strikes me that the INA and its supporting regulations do not meet the

issues here for at least three reasons.

One, those regulations and that statute involve individual rights, the individual who wants to come into the country. They do not involve corporate rights. They do not involve the right of a corporation, but instead the right of the individual who applies to come in as a Treaty trader.

QUESTION: Could I ask you, the issue we were just talking about, the Treaty trader, is that issue even here? What issue do you think is before us?

MR. STEEL: Well, I am not sure which one you are talking --

QUESTION: I am talking -- what do you think the issue is before us now?

MR. STEEL: Well, I think the main issue that is certainly before this Court is whether or not Sumitomo is exempt from Title VII strictures --

QUESTION: Yes.

MR. STEEL: -- and I think that there are a series of arguments that have been made by --

QUESTION: Just by virtue of the face of the Treaty. Is that it?

MR. STEEL: Well, that's right, and counsel for Sumitomo tries to extend that and say by virtue of INA, and by virtue of those regulations under --

QUESTION: Must we get to that latter part?

MR. STEEL: Well, this case has now been going on since 1977. This is a civil rights case. We would like to get going with it. We would be most appreciative to have the guidance of this Court so that we can get going with it, and --

QUESTION: Even if you lost it?

MR. STEEL: I would rather lose it now than lose it five years from now, and frankly, I don't think we are going to lose it. I am hopeful we won't.

QUESTION: Mr. Steel, just as a matter of curiosity, do any of your people still have employment with Sumitomo?

MR. STEEL: Yes, they do, Your Honor.

QUESTION: Many?

MR. STEEL: One person at present is an employee. Another person has filed an EEOC charge in the recent months.

QUESTION: You are now into your colleague's time, Mr. Steel.

MR. STEEL: Okay, I had two more points under the INA, but let me just say them briefly. One is, you have to --

QUESTION: At his expense. At his expense.

MR. STEEL: Okay. Thank you very much, Your

Honor.

CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. WALLACE: Mr. Chief Justice, and may it please the Court, in the view of the United States, the dispositive issue before this Court at the present stage of the case is whether the special employment privilege of Article VIII is conferred on a subsidiary incorporated in the host country, such as the Petitioner.

The answer given by the Treaty's text is that that privilege is not conferred on such a subsidiary, and the contracting parties to the Treaty are in agreement that the textual answer is the correct one, that the Treaty means what it says in this regard.

Now, the Court has noted that the views of the contracting parties to a treaty are entitled to great weight, and I think that principle applies particularly when we are talking about the interpretation of a provision that is obviously meant to impose reciprocal obligations because it is only by a decision agreeing with the views of the contracting parties that the actual application of the reciprocal obligation can be assured, and otherwise, there is some question introduced that will cause questions to be resolved in

our international relations of whether reciprocity can be preserved if the views of the contracting parties are determined not to be the correct views.

QUESTION: Now, the view of the Japanese government is consistent with the view you have taken. Is that correct?

MR. WALLACE: That is correct. One thing that we have set forth with great clarity is that both governments, and the Japanese government has consistently taken this position, agree on the meaning of Article VIII of the Treaty with respect to subsidiaries incorporated in the host country, and this view comports completely with the plain text of the Treaty. It is only by going behind that text for other reasons that the court below or the Fifth Circuit reached a contrary result.

The definition that appears, and the text of the pertinent provisions is set forth in Petitioner's brief. The definition that appears in Article XXII, which is set forth on Page 5 of that brief, is one of four subsections of that article, all of which are definitional in nature, and none of which would have any function in the Treaty unless they were to illuminate the usage of terms in other provisions of the Treaty. There is no other meaning to Article XXII of the Treaty.

QUESTION: In your view, should we stop there, Mr. Wallace, or should we go on and resolve the question raised about the difficulty of interpreting who is covered by the Treaty trader?

MR. WALLACE: Well, I don't really think there is a difficulty. Perhaps I should turn to that immediately. I was just going to further elucidate about Article VIII itself, gives an example of the usage of these terms in a way, in the second sentence of Article VIII, it is obviously designed to draw a distinction between the subsidiary incorporated in the host country which would not be allowed to have accountants and others practicing for it who could not qualify under local law, whereas the parent in the foreign country would be allowed to send in such a person.

And right there, in Article VIII itself, the distinction is drawn for a very plausible reason, and there is no reason to think that the first sentence of Article VIII means anything different, and let me try to clarify what has been said about our discussion of Treaty trader visas, because I think considerable confusion has been introduced by the Petitioner's contention that the securing of a Treaty trader visa in any way illuminates the rights of the employing company.

All we meant on Page 6 of our brief, in the sentence that was quoted, if one hypothesizes that as we contend, Title VII applies to the subsidiary and to its hiring decisions, nonetheless, the Treaty, through Article I and through Article VII, gives the subsidiary rights with respect to its operations here, and it can consider Japanese nationals in filling its positions, and it can do that consistently with Title VII either on a non-discriminatory basis by deciding that the Japanese national is the better qualified person for a particular position, or by showing as a matter of business necessity that others need not be considered for that position.

QUESTION: Would that be quite independently of the Treaty?

MR. WALLACE: It is independent of the Treaty. It is a right under Title VII, but what is needed from the Treaty is the way to get that person into the country to be employed, and that is what is conferred by Article I of the Treaty and by the Immigration and Naturalization law that allows these people to come in under Treaty trader visas.

QUESTION: But the right to defend the Title VII action in you view, doesn't it depend on the Treaty, and the Treaty doesn't give them anything added?

MR. WALLACE: No, the Treaty only -- through Article VII the Treaty gives them the very valuable right of standing on an equal footing with other companies incorporated in the United States. They are entitled to national treatment. The heart of the Treaty, as it has been defined. But this has no implications for whether Title VII applies or not. All we are pointing out in this first part of the discussion is that they can bring in a Japanese national, but in doing so they might or might not be violating someone else's rights under Title VII.

That is a separate question, and when a consular official issues a visa, all that official is determining is whether the individual applying to him qualifies for the visa. He makes no determination about the company's rights. The consular official sees to it that the individual who has applied to him for the visa has been offered a job in the United States that qualifies as one of the jobs for which he is entitled to the issuance of a visa.

It may be that the company in offering him that job has violated someone else's Title VII rights. That is a separate question that is not even addressed, and need not be addressed by the consular official, because it has nothing to do with his right to the

visa. Even if it were later determined that Title VII were violated by that appointment, Title VII remedies do not bump an incumbent employee out of the job.

So, it would have nothing to do with his right to enter the United States to take the job, and we were talking about something quite separate on Page 21 when we talked about the possibility that the parent company may claim a right to assign certain persons to the subsidiary. It is premature in this case to know whether that question is presented at all.

On the face of things, all of these people are employees of the subsidiary, and there has been no proof made that any of them were assigned to the subsidiary by the parent company, nor do we know yet the circumstances under which that assignment was made, whether it really could be argued to have been made in exercise of the parent company's treaty right to manage and control the subsidiary, or whether it might have been, for example, just part of a training program for the parent company's personnel, to give them some experience here and there, so that they will be better employees in the parent company in future years, which would raise a different question of whether there is a right under the Treaty to assign persons for that kind of reason.

The record simply is not developed enough to

address, in our view, any question other than the Article VIII question on which the contracting parties agree and the language of the Treaty is clear, and in response to this, all the Petitioners have been able to do is try to introduce some possible ambiguities or inconsistencies in the negotiating history or the subsequent interpretation of the Treaty, and that cannot be enough to overturn the meaning of the plain language agreed to by the contracting parties.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:55 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

SUMITOMO SHOJI AMERICA, INC. v. LISA M. AVAGLIANO et al # 80-2070

LISA M. AVAGLIANO ET AL., v. SUMITOMO SHOJI AMERICA, INC. #81-24

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Irene Hammond