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## Fortino v. Quasar Co.: Parent-Right Invocation of Rights for U.S. Subsidiaries of Japanese Companies Under U.S.-Japan Treaty of Friendship, Commerce, and Navigation

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# Fortino v. Quasar Co.: Parent-Right Invocation of Rights for U.S. Subsidiaries of Japanese Companies Under U.S.-Japan Treaty of Friendship, Commerce, and Navigation

Jerry Choe

## Abstract

This Comment argues that the Seventh Circuit's decision in *Fortino* undermined the U.S. Supreme Court's holding in *Sumitomo Shoji Am., Inc. v. Avigliano*. In *Sumitomo*, the Supreme Court rejected the right to assign defense and unanimously held that U.S. subsidiaries of Japanese companies can not take advantage of the parent's rights conferred by Article VIII(1). Although not explicit in the Court's published opinion, the Supreme Court precluded the subsidiary's use of Article VIII(1) upon virtually identical facts and arguments as those before the Seventh Circuit and, more specifically, upon the subsidiary's contention that the parent dictated its discriminatory conduct. Part I describes the background of the parent-right invocation principle in the context of an Article VIII(1) defense to Title VII claims against Japanese companies. Part I of this Comment sets forth a detailed analysis of the *Sumitomo* decision. Finally, Part I discusses the cases which bear on the issue of whether a U.S. subsidiary can invoke its parent's Article VIII(1) rights. Part II discusses the background and holding of the Seventh Circuit's decision *Fortino*. Part III demonstrates that the Seventh Circuit erred in both finding an Article VIII(1) right to assign and in permitting the subsidiary to invoke its parent's rights to defeat the Title VII claim because neither the FCN Treaty nor the *Sumitomo* decision permits this result. Part III further illustrates that after finding an Article VIII(1) right to assign, the court erroneously assumed that the parent's system of assignment, rather than the subsidiary's independent conduct, caused the Title VII violation. Finally, Part III demonstrates that the principle of parent-right invocation rests upon inapposite theories, violates fundamental principles of U.S. corporate law, and results in illogical consequences. This Comment concludes that courts should not permit Japanese companies to ignore the corporate form of their U.S. subsidiaries by allowing subsidiaries to invoke their parents' FCN Treaty rights in defense of Title VII claims.

## COMMENTS

### *FORTINO v. QUASAR CO.*: PARENT-RIGHT INVOCATION OF RIGHTS FOR U.S. SUBSIDIARIES OF JAPANESE COMPANIES UNDER U.S.-JAPAN TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION\*

#### INTRODUCTION

Title VII of the Civil Rights Act of 1964 ("Title VII")<sup>1</sup> prohibits employers from discriminating in favor of employees on the basis of race, sex and national origin.<sup>2</sup> As Japanese companies continue to operate in the United States through wholly-owned U.S.-incorporated subsidiaries, the U.S. employees of these subsidiaries continue to claim Title VII violations based on the disproportionately high number of Japanese executives the subsidiaries employ.<sup>3</sup> In defense of these Title VII

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\* This Comment is dedicated to the late Professor Edward Yorio, my mentor. See Jerry Choe in *A Dedication to Edward Yorio*, 60 *FORDHAM L. REV.* 803, 816 (1992).

1. 42 U.S.C. § 2000e (1988) (amended 1991). The Civil Rights Act of 1991 amends Title VII of the Civil Rights Act of 1964 [hereinafter Title VII] in various respects. See Pub. L. No. 102-166, 105 Stat. 1071 (1991). The 1991 Act was enacted to strengthen the federal civil rights laws by providing additional protections against unlawful discrimination in employment. See Pub. L. No. 102-166, § 2(3), 105 Stat. 1071 (1991).

2. 42 U.S.C. § 2000e-2(a) (1988) (amended 1991); see *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976) (stating that Title VII prohibits discriminatory preference).

3. *E.g.*, *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (alleging disproportionate hiring of Japanese males); *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (alleging discriminatory lay-off and disproportionate number of Japanese executives remaining after reduction in force); *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. 1981) (alleging disproportionate hiring of Japanese males), *vacated on other grounds*, 457 U.S. 1128 (1982); *Mackentire v. Ricoh Corp.*, 58 Fair Empl. Prac. Cas. (BNA) 495, 1992 U.S. Dist. LEXIS 3318 (N.D. Cal. 1992) (alleging discriminatory lay-off and disproportionate number of Japanese executives remaining after reduction in force); *Mattison v. Canon, U.S.A.*, 28 Fair Empl. Prac. Cas. (BNA) 1685 (N.D. Ill. 1981) (alleging disproportionate hiring of Japanese males); *Porto v. Cannon, U.S.A.*, 28 Fair Empl. Prac. Cas. (BNA) 1679 (N.D. Ill. 1981) (same); EEOC Decision No. 86-2, 40 Fair Empl. Prac. Cas. (BNA) 1879 (Nov. 22, 1985) (alleging that almost half of total number of employees were Japanese males in upper-management level positions); see *Americans Complain of Bias by Japanese Bosses in U.S.*, N.Y. TIMES, June 3, 1991, at A1, col. 5 [hereinafter *Bias News*] (describing Japanese owned companies as "top heavy" with Japanese managers and reporting continued expansion of Japanese-owned companies in United States).

The Author does not distinguish between Japanese citizenship and Japanese national origin because this Comment does not concern the extent of the right to dis-

claims, the subsidiaries argue that they employ Japanese executives because of their parents' practice of assigning their own executives to manage their U.S. subsidiaries.<sup>4</sup> The subsidiaries contend that their parent companies' assignment practice is permitted under Article VIII(1) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan ("FCN Treaty"),<sup>5</sup> which authorizes "companies of [Japan]

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criminate under commercial treaties. The Author does, however, assume that discrimination in favor of Japanese executives violates Title VII because Title VII prohibits discrimination on the basis of national origin and discrimination on any other bases which has the effect of national origin discrimination or which otherwise causes an adverse impact on groups of different national origin. See 42 U.S.C.A. § 2000e-2(a), (k) (West 1982 & Supp. 1992); *Griggs v. Duke Power Co.*, 401 U.S. 86, 88 (1973) (stating that "[c]ertainly, Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin"); 29 C.F.R. § 1606.5(a) (1991). For persons from homogenous countries such as Japan, citizenship discrimination clearly has the effect of national origin discrimination thereby causing an adverse impact on personnel of non-Japanese national origin. Cf. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1148 (3d Cir. 1988) (noting irreconcilability of Title VII with FCN treaty right to discriminate on the basis of citizenship in case involving persons from homogeneous country). In addition, the issues contained in this Comment are relevant only insofar as discriminatory practices violate Title VII. For a fuller description of the FCN treaty right to discriminate, see Scott Mozarsky, Note, *Defining Discrimination on the Basis of National Origin Under Article VIII(1) of the Friendship Treaty Between the United States and Japan*, 15 *FORDHAM INT'L L.J.* 1099 (1992).

4. See, e.g., Brief for Sumitomo Shoji Am. at 8, 14, *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24) [hereinafter Brief for Sumitomo] (alleging that parent company assigned Japanese executives to U.S. subsidiary); Brief of C. Itoh & Co. (America), Inc. as *Amicus Curiae* at 8, 14, *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24) [hereinafter Brief of C. Itoh] (alleging that parent company assigned Japanese nationals to U.S. subsidiary for purposes of management and control); Brief for Quasar Co. at 15-19, *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991) (Nos. 91-1123, 91-1197, 91-1564) [hereinafter Brief for Quasar] (arguing exemption from Title VII on basis that parent company had assigned Japanese executives to managerial positions in U.S. subsidiary); see also *Spieß v. C. Itoh & Co. (Am.)*, 725 F.2d 970, 972 (5th Cir. 1984) (allegation that Japanese parent exercised right "to engage" Japanese personnel in U.S. subsidiary by assigning individuals to U.S. subsidiary on temporary basis); *Avigliano v. Sumitomo Shoji Am., Inc.*, 103 F.R.D. 562, 579 (S.D.N.Y. 1984) (allegation that Japanese executives in subsidiary were assigned by Japanese parent) *on remand from* 457 U.S. 176 (1982).

5. Apr. 2, 1953, U.S.-Japan, art. VIII(1), 4 U.S.T. 2063, 2070 [hereinafter FCN Treaty]. Article VIII(1) of the FCN Treaty provides in pertinent part that

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

*Id.*

. . . to engage, within the territories of the [United States], . . . executive personnel . . . of their choice.”<sup>6</sup>

In *Fortino v. Quasar Co.*,<sup>7</sup> the U.S. Court of Appeals for the Seventh Circuit found that Article VIII(1) gave a Japanese parent company the right to assign Japanese executives to its U.S. subsidiary<sup>8</sup> and permitted the subsidiary to invoke its parent’s Article VIII(1) rights to defeat a Title VII claim.<sup>9</sup> In *Fortino*, U.S. executives brought a discrimination claim against the wholly-owned U.S. subsidiary of a Japanese company which had a system of assigning its own executives to manage its U.S. subsidiary.<sup>10</sup> As the first court to permit a subsidiary to invoke its parent’s rights under an international treaty, the Seventh Circuit did so because, through the parent’s system of assignment, the parent had “dictated the subsidiary’s discriminatory

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6. *Id.*; see, e.g., Brief for Sumitomo, *supra* note 4, at i, 19-35 (answering question whether Japanese companies have Article VIII(1) right to control and manage U.S. investments by engaging executive personnel in affirmative); Remarks of Abram Chayes, Esq., on behalf of Sumitomo Shoji Am., Inc., Transcript of Oral Argument at 3 (Apr. 26, 1982), *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24) [hereinafter Oral Argument on Behalf of Sumitomo] (arguing that FCN Treaty places obligation on United States “to permit a foreign investor to manage and control its investment in this country by engaging executive and other specialists of its choice”); Brief of C. Itoh, *supra* note 4, at 21 (describing Article VIII(1) as privilege of Japanese companies to staff their U.S. subsidiaries); Brief for Quasar, *supra* note 4, at 15-19 (arguing that parent company had right to assign pursuant to Article VIII(1)); see also *Spieß*, 725 F.2d at 972 (allegation that Japanese parent has right “to engage” Japanese personnel in U.S. subsidiary); *Avigliano*, 103 F.R.D. at 579.

The U.S. courts of appeal are in conflict regarding the right to discriminate by virtue of Article VIII(1)’s “of their choice” provision. See *infra* note 40. This Comment does not consider the right to discriminate under Article VIII(1) by virtue of the “of their choice” provision but only the right to assign by virtue of Article VIII(1)’s “to engage” provision.

7. 950 F.2d 389 (7th Cir. 1991).

8. *Id.* at 392. After quoting the text of Article VIII(1), the court stated that “[t]he propriety of [the parent’s] assigning its own executives to [its U.S. subsidiary] is further confirmed by the issuance of E-1 and E-2 visas to the Japanese expatriate executives.” *Id.* The court’s clear implication is that Article VIII(1) confirms the propriety of the Japanese parent’s assignment of its executives to its U.S. subsidiary. See *U.S. Bias Decision Voided by Treaty*, N.Y. TIMES, Dec. 6, 1991, at A25, Col. 3 (reporting statement by Paul Bressan, attorney for Quasar Co. that Seventh Circuit’s “ruling was significant because it allowed American subsidiaries of foreign companies to cite the FCN Treaty rights of their parent company in assigning people to top management jobs”) [hereinafter *Bias Decision*].

9. *Fortino*, 950 F.2d at 393.

10. *Id.* at 392.

conduct.”<sup>11</sup> The court permitted the subsidiary’s defense based upon the parent’s alleged Article VIII(1) right to assign and allowed the subsidiary to invoke its parent’s FCN Treaty rights to defeat the Title VII claim.

This Comment argues that the Seventh Circuit’s decision in *Fortino* undermined the U.S. Supreme Court’s holding in *Sumitomo Shoji Am., Inc. v. Avigliano*.<sup>12</sup> In *Sumitomo*, the Supreme Court rejected the right to assign defense and unanimously held that U.S. subsidiaries of Japanese companies can not take advantage of the parent’s rights conferred by Article VIII(1).<sup>13</sup> Although not explicit in the Court’s published opinion, the Supreme Court precluded the subsidiary’s use of Article VIII(1) upon virtually identical facts and arguments as those before the Seventh Circuit and, more specifically, upon the subsidiary’s contention that the parent dictated its discriminatory conduct.<sup>14</sup> Part I describes the background of the parent-right invocation principle in the context of an Article VIII(1) defense to Title VII claims against Japanese companies. Part I of this Comment sets forth a detailed analysis of the *Sumitomo* decision. Finally, Part I discusses the cases which bear on the issue of whether a U.S. subsidiary can invoke its parent’s Article VIII(1) rights. Part II discusses the background and holding of the Seventh Circuit’s decision *Fortino*. Part III demonstrates that the Seventh Circuit erred in both finding an Article VIII(1) right to assign and in permitting the subsidiary to invoke its parent’s rights to defeat the Title VII claim because neither the FCN Treaty nor the *Sumitomo* decision permits this result. Part III further illustrates that after finding an Article VIII(1) right to assign, the court erroneously assumed that the parent’s system of assignment, rather than the subsidiary’s in-

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11. *Id.* at 393.

12. 457 U.S. 176 (1982).

13. *Id.* at 188, 189 (stating that subsidiaries “are entitled to the rights, and subject to the responsibilities of other [U.S.] corporations” and that “[t]he only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1)”; see *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 319, 324 n.3 (3d Cir. 1983) (stating that “[t]he national status of the company determines whether that company may claim the benefit conferred by Article VIII”), *cert. granted on other grounds*, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 471 U.S. 1002 (1985).

14. The Author reviewed court briefs, the oral argument transcript, and the record contained in the parties’ joint appendix to their briefs.

dependent conduct, caused the Title VII violation. Finally, Part III demonstrates that the principle of parent-right invocation rests upon inapposite theories, violates fundamental principles of U.S. corporate law, and results in illogical consequences. This Comment concludes that courts should not permit Japanese companies to ignore the corporate form of their U.S. subsidiaries by allowing subsidiaries to invoke their parents' FCN Treaty rights in defense of Title VII claims.

I. *PARENT-RIGHT INVOCATION IN THE CONTEXT OF AN  
ARTICLE VIII(1) DEFENSE TO TITLE VII CLAIMS  
AGAINST JAPANESE COMPANIES*

Title VII discrimination suits against Japanese-owned companies recur in similar factual settings due to the uniform manner in which Japanese companies operate in the United States.<sup>15</sup> In *Sumitomo*,<sup>16</sup> the U.S. Supreme Court resolved Title VII claims against the wholly-owned U.S. subsidiaries of two of Japan's largest companies, each with similar systems of assignment.<sup>17</sup> Despite the subsidiaries' contention that Article VIII(1) gave their parents the right to engage the executives causing the alleged discrimination, the Court held that because U.S. subsidiaries have the same rights and responsibilities of other U.S. companies, they cannot take advantage of the rights conferred in Article VIII(1).<sup>18</sup> However, due to a footnote in the Supreme Court's opinion,<sup>19</sup> commentators have developed theories according to which U.S. subsidiaries of Japanese companies can take advantage of Article VIII(1) by invoking their parents' Article VIII(1) rights.<sup>20</sup> Aside from the theories, two reported cases also bear on the issue of whether a U.S. subsidiary is able to invoke its parent's treaty rights.<sup>21</sup>

A. *The Japanese Multinational Operation*

U.S. subsidiaries of Japanese companies often face Title

15. *See infra* text accompanying notes 22-38.

16. 457 U.S. 176 (1982).

17. *See infra* text accompanying notes 45-97.

18. *See infra* text accompanying notes 56-72, 84-94.

19. *Sumitomo*, 457 U.S. at 189 n.19 (stating that Court "express[es] no view as to whether *Sumitomo* may assert any Article VIII(1) rights of its parent").

20. *See infra* text accompanying notes 98-120.

21. *See infra* text accompanying notes 121-141.

VII discrimination charges due to the disproportionate number of Japanese personnel occupying management-level positions within the subsidiaries.<sup>22</sup> This imbalance may result from the way Japanese companies structure their multinational operations.<sup>23</sup>

### 1. Management Through Systems of Assignment

Japanese companies uniformly manage their U.S. subsidiaries by assigning their own executives to their subsidiaries.<sup>24</sup> The assignments are made through in-house "rotation" systems by which Japanese companies train and educate executive personnel before assigning them to their U.S. subsidiaries.<sup>25</sup> The assignments are temporary, lasting from two to five years, and enable the executives to retain their long-term status as employees of the parent.<sup>26</sup> The parent companies often evaluate the performance of the assigned executives and determine

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22. See *supra* note 3 (listing cases).

23. See TOYOHRO KONO, STRATEGY AND STRUCTURE OF JAPANESE ENTERPRISES 164-66 (1984) (describing management of subsidiaries outside of Japan); See, e.g., *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991) (describing system of Matsushita Electric Industrial Company); *Spiess v. C. Itoh & Co. (Am.)*, 725 F.2d 970, 972 (5th Cir. 1984) (describing system of Japanese company C. Itoh & Co., Ltd.); *Avigliano v. Sumitomo Shoji Am., Inc.*, 103 F.R.D. 562, 569, 579 (S.D.N.Y. 1984) (describing assignment of rotational executives of Japanese company) *on remand from* 457 U.S. 176 (1982); EEOC Decision No. 86-2, 40 Fair Empl. Prac. Cas. (BNA) 1879, 1879 (Nov. 22, 1985).

24. E.g., *Spiess*, 725 F.2d at 972; *Avigliano*, 103 F.R.D. at 569, 579; *EEOC Decision*, 40 Fair Empl. Prac. Cas. (BNA) at 1879; see TAKASHI KIUCHI, *Strategy for Overseas Markets*, in THE MANAGEMENT CHALLENGE 123 (1985); KONO, *supra* note 23, at 164-166; NATOTO SASAKI, MANAGEMENT AND INDUSTRIAL STRUCTURE IN JAPAN 124 (1981).

25. See MAX ELI, JAPAN INC.: GLOBAL STRATEGIES OF JAPANESE TRADING CORPORATIONS 99 (1991); KONO, *supra* note 23, at 166; YOSHINARA KUNIO, SOGO SHOSHA: THE VANGUARD OF THE JAPANESE ECONOMY 231-232 (1982); SASAKI, *supra* note 24, at 33-38, 41, 47-48, 124 (discussing rotation program of Japanese trading companies); e.g., *Fortino*, 950 F.2d at 392; *Spiess*, 725 F.2d at 972; *Avigliano*, 103 F.R.D. at 569, 579; *Horton v. Toyota*, 57 Fair Empl. Prac. Cas. (BNA) 1371, 1991 U.S. Dist. LEXIS 20046, \*1 (C.D. Cal. 1991) (alleging that subsidiary was used as "rotating ground" for Japanese executives); *EEOC Decision*, 40 Fair Empl. Prac. Cas. (BNA) at 1879.

26. See KONO, *supra* note 23 at 166; KUNIO, *supra* note 25, at 232; SASAKI, *supra* note 24, at 124 (stating that assignment lasts two to three years); *id.* at 41, 47 (describing life-time employment with the parent); see, e.g., *Fortino*, 950 F.2d at 392 (describing system as temporary); *Spiess*, 725 F.2d at 972 (describing three to five year assignment period); *EEOC Decision*, 40 Fair Empl. Prac. Cas. (BNA) at 1879 (stating that "[r]otational employees are permanent employees of [the subsidiary's] overseas parent who have been temporarily assigned to fill upper-level management positions at the [subsidiary]").



their salaries and promotions during the period of their assignment.<sup>27</sup> The executives' immediate families may accompany them during their temporary assignment in the United States until they are rotated back to Japan.<sup>28</sup> Japanese executives assigned to U.S. subsidiaries generally apply for non-immigrant "E" visas to gain entry into the United States.<sup>29</sup> The provisions of the Immigration and Nationality Act ("INA") and its implementing U.S. State Department regulations authorize the issuance of "E" visas to applicants who will perform supervisory or executive work for companies in the United States that have substantial trade or investment relations with Japan so long as the applicant will perform work authorized by the FCN Treaty.<sup>30</sup>

## 2. The Choice to Operate Through U.S. Subsidiaries Rather Than U.S. Branches

Japanese companies operating in the United States generally choose to do so through wholly-owned U.S.-incorporated subsidiaries rather than through U.S. branches.<sup>31</sup> Under tradi-

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27. See e.g., *Fortino*, 950 F.2d at 392; *Spies*, 725 F.2d at 973 (alleging that Japanese trading company parent determines the positions of each executive assigned to U.S. subsidiary as well as determining compensation and promotions); cf. *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548, 1553 (E.D.N.Y. 1990) (allegation that Japanese parent determines salaries for executives assigned to U.S. branch, including compensation for costs associated with living in United States).

28. See 8 U.S.C. § 1101(a)(15)(E) (1988 & 1992 Supp.); e.g., *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991).

29. See, e.g., *Fortino*, 950 F.2d at 392 (describing "E"-visa status of executives of U.S. subsidiary of Matsushita); Brief for Sumitomo, *supra* note 4, at 8 (describing "E"-1 treaty trader status of U.S. subsidiary of Sumitomo Shoji); Reply Brief for Sumitomo Shoji Am., Inc. at 18, *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24) [hereinafter Reply Brief for Sumitomo] (stating that "the positions in controversy are occupied by Japanese nationals carrying E-1 FCN Treaty trader visas"); cf. *Adames*, 751 F. Supp. at 1553 (stating allegations that Japanese executives assigned to U.S. branch were admitted as "E" visa treaty traders).

30. See 8 U.S.C. § 1101(a)(15)(E) (1988 & 1992 Supp.); 22 C.F.R. § 41.51 (1991); *Fortino*, 950 F.2d at 392.

31. See *supra* note 3 (listing cases involving wholly-owned U.S. incorporated subsidiaries of Japanese companies); see also ELI, *supra* note 25, at 100 (depicting table of controlled overseas companies by Japanese trading firms). As do other multinational companies, Japanese companies typically establish one main wholly-owned subsidiary in the United States named after the parent, which then branches out into several divisions throughout the United States. Telephone Interview with Yoshi Tsurumi, Professor of International Business, Baruch College, May 20, 1992 (notes available at office of *Fordham International Law Journal*). The advantage of branching out across the United States rather than creating legally distinct subsidiaries is the tight control

tional principles of U.S. corporate law, or "entity" law, when establishing U.S. subsidiaries, even if wholly-owned, Japanese companies create separate and distinct legal entities with independent substantive rights and duties.<sup>32</sup> Japanese companies establishing U.S. branches, on the other hand, do not create separate juridical entities because a company and its branch are one and the same company.<sup>33</sup>

Operating through U.S. subsidiaries rather than U.S. branches provides non-U.S. companies with the advantages of separate incorporation.<sup>34</sup> As an entity separate from the U.S. subsidiary, the non-U.S. company does not expose itself to the jurisdiction of U.S. courts.<sup>35</sup> Moreover, as with any parent-subsidiary relationship, the non-U.S. company generally takes no responsibility for the acts of its subsidiaries. Moreover, its liability is generally limited to the extent of its investment in

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that a main U.S. subsidiary is able to maintain over its operations around the United States. At the same time, the Japanese company is able to retain control over the main U.S. subsidiary's operations because it wholly owns the main subsidiary.

32. See *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925) (stating that "existence of [wholly-owned subsidiary] as a distinct corporate entity is, however, in all respects observed"); *Krane v. Gravely Motor Plow & Cultivator Co.*, 69 N.Y.S.2d 175 (App. Div. 1947); *Saraceno v. S.C. Johnson & Son, Inc.*, 83 F.R.D. 65, 67 (S.D.N.Y. 1979); PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: STATUTORY LAW GENERAL at xxxix* (1989); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 414 cmt. a* (1987) [hereinafter *RESTATEMENT*] (stating that "a foreign subsidiary . . . is . . . a distinct juridical entity").

33. See *RESTATEMENT*, *supra* note 32, at § 414 cmt. a (stating that "[u]nlike a foreign subsidiary, a foreign branch is not a distinct juridical entity"); C. ROHRlich, *ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES § 10.01* (5th ed. rev. 1983) (stating that branch is not legal entity separate from parent); see, e.g. *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548 (E.D.N.Y. 1990) (Japanese bank establishing U.S. branch).

34. See *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 369 (5th Cir. 1981) (Reavley, J., dissenting), *vacated on other grounds*, 457 U.S. 1128 (1982); *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 510 (S.D.N.Y. 1979) (quoting *United States v. R. P. Oldham Co.*, 152 F. Supp. 818, 823 (N.D. Cal. 1957) that a Japanese company surrenders its Japanese identity when it establishes a U.S. subsidiary), *aff'd on other grounds*, 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

35. See *RESTATEMENT*, *supra* note 32, § 414(2) (stating that "[a] state may not ordinarily regulate activities of corporations organized under the laws of a foreign state on the basis that they are owned or controlled by nationals of the regulating state"); see also *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1334 (E.D.N.Y. 1981) (stating that "[t]he parent-subsidiary relationship has not in itself been treated as sufficient to establish personal jurisdiction over the foreign parent").

the subsidiary.<sup>36</sup> On the other hand, if the non-U.S. company had chosen to operate in the United States through a U.S. branch, the non-U.S. company's presence in the United States would bring the non-U.S. parent within the jurisdiction of U.S. courts.<sup>37</sup> The parent company would be liable for all acts of the U.S. branch because the U.S. branch is part of the same non-U.S. company.<sup>38</sup>

### B. Article VIII(1) of the FCN Treaty

U.S. subsidiaries of Japanese companies facing Title VII suits by their employees have repeatedly attempted to defeat the claims using Article VIII(1) of the FCN Treaty.<sup>39</sup> Article VIII(1) provides, in pertinent part, that "companies of [Japan] shall be permitted to engage, within the territories of the [United States], executive personnel . . . of their choice."<sup>40</sup> These subsidiaries have attempted to utilize Article VIII(1) in

36. See PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW* § 1.02 (1987).

37. See generally PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROCEDURAL LAW* §§ 3.03, 3.04.2, 3.08, 4.05 (1983) (describing "presence" and "doing business" standards for jurisdiction); *Bulova Watch Co.*, 508 F. Supp. at 1333-46 (analyzing "doing business" requirements of jurisdiction).

38. See ROHRLICH, *supra* note 33, § 10.01 (stating that branch is not legal entity separate from parent); see also *Coulliard v. Bank of New Mexico*, 548 P.2d 459, 462-63 (N.M. 1976) (stating that term "branch" creates relationship of principal and agent between parent and branch).

39. See e.g., *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982); *Spieß v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982); *Mattison v. Canon, U.S.A.*, 28 Fair Empl. Prac. Cas. (BNA) 1685 (N.D. Ill. 1981); *Porto v. Cannon, U.S.A.*, 28 Fair. Empl. Prac. Cas. (BNA) 1679 (N.D. Ill. 1981); EEOC Decision No. 86-2, 40 Fair Empl. Prac. Cas. (BNA) 1879 (Nov. 22, 1985).

40. FCN Treaty, *supra* note 6, 4 U.S.T. 2063, 2070. The right to discriminate by virtue of Article VIII(1)'s "of their choice" provision is an unresolved issue in the several U.S. circuit courts, although the prevailing view holds that the FCN Treaty permits discrimination only on the basis of citizenship, not national origin. Compare *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (holding that Article VIII(1) permits discrimination on the basis of citizenship but not national origin) and *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984) (same) with *Spieß v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. 1981), (holding that Article VIII(1) provides blanket immunity from Title VII claims), *vacated on other grounds*, 457 U.S. 1128 (1982) and *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982) (holding that Article VIII(1) provides no right to discriminate in violation of Title VII although defense under "bona fide occupational qualification" exception is relaxed for companies able to assert Article VIII(1)). For further discussion, see *Mozarsky, Note, supra* note 3.

two ways depending on which companies (the subsidiaries or their parents) the subsidiaries allege exercised the Article VIII(1) right "to engage" executive personnel of their choice.<sup>41</sup> The subsidiaries have argued that *they* (the subsidiaries) exercised their right "to engage" executive personnel of their choice when they hired or employed the Japanese executives.<sup>42</sup> The subsidiaries have also argued that their *parents* exercised their right "to engage" executive personnel of their choice by assigning Japanese executives to manage their subsidiaries.<sup>43</sup> The difference between the two applications of Article VIII(1) is whether "to engage" means to hire or employ or whether it means to assign or send.<sup>44</sup>

### C. *The Sumitomo Decision*

The repeated attempts by U.S. subsidiaries of Japanese companies to take advantage of Article VIII(1) were shut down by the 1982 U.S. Supreme Court decision in *Sumitomo Shoji Am., Inc. v. Avigliano*.<sup>45</sup> The *Sumitomo* case and the case of *Spiess v. C. Itoh & Co. (Am.)*<sup>46</sup> involved Title VII claims against wholly-owned U.S.-incorporated subsidiaries of two of Japan's largest and most well-known multinational companies, Sumitomo Shoji Kabushiki Kaisha ("Sumitomo Japan") and C. Itoh &

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41. Compare *Spiess*, 643 F.2d at 355 (describing subsidiary's allegation that Article VIII(1)'s language permitting companies to engage personnel "of their choice" cloaks subsidiary with immunity) with Brief for Sumitomo, *supra* note 4, at 25 (describing reason for Article VIII(1) right of Japanese investor to engage key personnel of their choice) and *Spiess v. C. Itoh & Co. (Am.)*, 725 F.2d 970, 972 (5th Cir. 1984) (describing subsidiary's allegation that Japanese parent had exercised its right to engage managerial and other specialists in its U.S. subsidiary).

42. See, e.g., *Spiess*, 643 F.2d at 363 (stating that Article VIII(1) permits the U.S. subsidiary "to hire only Japanese personnel for executive and technical positions").

43. See e.g., *Fortino v. Quasar*, 950 F.2d 389, 392 (7th Cir. 1991) (stating that propriety of Japanese parent corporation's act of "assigning" its own executives to its U.S. subsidiary is confirmed by text of Article VIII(1)); *Spiess*, 725 F.2d at 971 (describing allegation that as exercise of Article VIII(1) right, parent assigns Japanese executives to work for U.S. subsidiary). *Avigliano*, 638 F.2d at 554-55 (stating that Article VIII(1) was intended "to facilitate the [parent's] staffing of overseas operations").

44. Compare *Spiess v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1, 2 (S.D. Tex. 1979) (stating that Article VIII(1) creates right to hire), *rev'd*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982) with *Fortino*, 950 F.2d at 392 (stating that propriety of Japanese parent corporation's act of "assigning" its own executives to its U.S. subsidiary is confirmed by text of Article VIII(1)).

45. 457 U.S. 176 (1982).

46. 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

Co., Ltd. ("C. Itoh Japan").<sup>47</sup> Like all Japanese multinational companies, each company had systems of regularly assigning their own executives to manage their U.S. subsidiaries.<sup>48</sup> Despite the subsidiaries' contentions that their parent companies had assigned the executives pursuant to their Article VIII(1) rights, the Supreme Court, resolving both cases through its *Sumitomo* holding,<sup>49</sup> precluded the subsidiaries from taking advantage of Article VIII(1).

### 1. The Facts

In *Sumitomo*, female secretarial employees of Sumitomo Shoji Am., Inc. ("Sumitomo"), the wholly-owned subsidiary of Sumitomo Japan, brought a class action against Sumitomo claiming that its practice of exclusively hiring Japanese males for management-level positions violated Title VII.<sup>50</sup> In support of a motion to dismiss the complaint,<sup>51</sup> Sumitomo alleged that its parent had assigned its own executives to Sumitomo in an effort to manage and control its U.S. subsidiary.<sup>52</sup> Like other Japanese companies, these Japanese executives were assigned on a rotating basis.<sup>53</sup> They retained their long-term sta-

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47. See Lawrence B. Krause & Suetō Sekiguchi, *Japan and the World Economy, in ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS* 383, 392 (Hugh Patrick & Henry Rosovsky eds., 1976) (describing firms as being among largest trading companies).

48. See Brief for Sumitomo, *supra* note 4, at 8; Brief of C. Itoh, *supra* note 4, at 2.

49. See *Sumitomo*, 457 U.S. 176; *Spieß v. C. Itoh & Co. (Am.)*, 457 U.S. 1128 (1982) (vacating judgment and remanding case for further consideration in light of *Sumitomo*).

50. *Sumitomo*, 457 U.S. at 178.

51. *Id.* at 179. Because the case was decided on a motion to dismiss, there was no record of facts in the case.

52. Affidavit of J. Portis Hicks in Support of Motion, Joint Appendix to Briefs at 74a, *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24) [hereinafter affidavit of J. Portis Hicks] (stating that "[f]or purposes of Sumitomo's operations in the United States . . . many qualified Japanese nationals have been, and still are assigned to Sumitomo by its parent company . . . to serve in executive . . . positions"); Brief for Sumitomo, *supra* note 4, at 8 (stating that "[i]n accordance with the general practice of *sogo shosha* [Japanese trading companies], Sumitomo's Japanese parent sends members of its organization to fill key positions in Sumitomo"); *id.* at 14 (stating that "Japanese nationals [were] assigned to it by its parent company in Japan"); *cf.* Brief of C. Itoh, *supra* note 4, at 2 (stating that Sumitomo's parent assigns Japanese executives for "purposes of management and control"); *Avigliano v. Sumitomo Shoji Am., Inc.*, 103 F.R.D. 562, 569, 579 (S.D.N.Y. 1984) (alleging that Japanese executives were "rotating staff" assigned by Japanese parent) *on remand from* 457 U.S. 176 (1982).

53. Brief for Sumitomo, *supra* note 4, at 8 (stating that Japanese parent trains

tus as employees of the parent and returned to the parent after their temporary assignment was completed.<sup>54</sup> All of these executives allegedly entered the United States under “E” visas as “treaty traders.”<sup>55</sup>

## 2. Sumitomo's Asserted Right to Assign Defense

In brief and by oral argument, Sumitomo argued that the FCN Treaty gave its parent the right to manage and control its U.S. subsidiary by engaging executive personnel of its choice; Sumitomo contended that the subsidiary should be given Article VIII(1) protection against a Title VII claim because liability placed on the subsidiary would derogate the parent's FCN Treaty rights.<sup>56</sup>

Sumitomo based its argument on a relation among several

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executives and rotates them throughout the various divisions of the company as well as to offices in Japan); Brief of C. Itoh, *supra* note 4, at 2 (stating that Sumitomo Japan, like other trading companies, had a rotation system of assigning executives); *Avigliano*, 103 F.R.D. at 579 (describing allegations that Japanese executives were “rotating staff” assigned by Japanese parent).

54. Brief of C. Itoh, *supra* note 4, at 2.

55. Affidavit of Portis Hicks, *supra* note 52, at 74a (stating that assigned executives were “treaty trader” personnel); Reply Brief for Sumitomo, *supra* note 29, at 18 (stating that “the positions in controversy are occupied by Japanese nationals carrying E-1 treaty trader visas”); Brief for Sumitomo, *supra* note 4, at 8 (stating that “[t]hese personnel are admitted to the United States as ‘treaty traders’ under nonimmigrant E-1 visas”); Brief of C. Itoh, *supra* note 4, at 2 (explaining that Sumitomo's managerial staff is comprised of Japanese nationals who entered as non-immigrant treaty traders).

56. See Brief for Sumitomo, *supra* note 4, at i, 19 (presenting question whether Japanese companies have Article VIII(1) right to control and manage U.S. investments by engaging executive personnel and answering in affirmative); Reply Brief for Sumitomo, *supra* note 29, at 3, 10; Oral Argument on Behalf of Sumitomo, *supra* note 6, at 3 (arguing in introduction that “this case concerns . . . an obligation to permit a foreign investor to manage and control its investment in this country by engaging executive and other specialists of its choice”); see also Brief for Sumitomo, *supra* note 4, at 25 (stating that if host country can limit right of foreign investor to engage key personnel, “it would severely undercut the ability of investors to control and manage their investments”); Brief of C. Itoh, *supra* note 4, at 21 (describing Article VIII(1) as privilege of Japanese companies to staff their U.S. subsidiaries).

Several amicus briefs were filed on behalf of Sumitomo, each developing the similar “right to engage” arguments. See Brief of C. Itoh, *supra* note 4, at 21 (right “to staff”); Brief of the Japan External Trade Organization as *Amicus Curiae* at 12-13, *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24) (right “to send”); Brief of East Asiatic Company, Ltd., the East Asiatic Company, Inc., and Heidelberg Eastern, Inc. at iv, *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24) (right “to appoint”).

Articles of the FCN Treaty.<sup>57</sup> Sumitomo explained that under Article VII(1) of the FCN Treaty, Japanese companies have the right to establish branches and subsidiaries in the United States and the right to “control and manage” those enterprises.<sup>58</sup> The Article VIII(1) right to engage executive personnel is, therefore, merely an elaboration of the Article VII(1) right of management and control.<sup>59</sup> Further, Sumitomo explained that Article I(1) of the FCN Treaty relates to Articles VIII(1) and VII(1) because Article I(1) permits executives sent by the Japanese company to enter the United States to carry on substantial trade between the United States and Japan.<sup>60</sup>

Sumitomo argued that the “E” visa status of its Japanese executives demonstrated that their employment resulted from its parent’s proper exercise of its Article VIII(1) rights.<sup>61</sup> Sumitomo argued that the INA and its implementing State Department regulations governing the issuance of “E” visas effectuate the FCN Treaty Article I(1) right of entry and the Article VIII(1) right to engage executive personnel because both sets of provisions permit entry into the United States for individuals who will perform executive or supervisory work for compa-

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57. See generally Brief for Sumitomo, *supra* note 4, at 10-19; Reply Brief for Sumitomo, *supra* note 29, at 10-19; Brief of C. Itoh, *supra* note 4, at 6-11.

58. Brief for Sumitomo, *supra* note 4, at 21; Reply Brief for Sumitomo, *supra* note 29, at 18; see Brief of C. Itoh as *Amicus Curiae*, *supra* note 4, at 8, 21; see also FCN Treaty, *supra* note 5, art. VII(1), 4 U.S.T. 2063, 2069.

59. Brief for Sumitomo, *supra* note 4, at 21; Reply Brief for Sumitomo, *supra* note 29, at 18 (stating that what is implicit in Article VII(1) is made explicit in Article VIII(1)); see Brief of C. Itoh, *supra* note 4, at 8, 21.

60. Brief for Sumitomo, *supra* note 4, at 21-22; *id.* at 28 (describing “linkage” between Article I(1) and Article VIII(1)); Reply Brief for Sumitomo, *supra* note 29, at 10-11 (explaining that Article I(1) must be “read together” with Article VII(1) and Article VIII(1)); see Brief of C. Itoh, *supra* note 4, at 8; FCN Treaty, *supra* note 5, art. I(1), 4 U.S.T. 2063, 2066.

61. See Reply Brief for Sumitomo, *supra* note 29, at 10-13; Brief for Sumitomo, *supra* note 4, at 32-35. After explaining that the FCN Treaty permits Japanese companies to manage and control their U.S. subsidiaries by engaging executive personnel of their choice, Reply Brief for Sumitomo, *supra* note 29, at 10-11, Sumitomo argued that “E-visas are only issued to the key executives and specialists [listed in Article VIII] necessary for the investor to manage and control its U.S. enterprise.” *Id.* at 13. According to Sumitomo, “the question whether a particular Sumitomo employee falls within the protection of Article VIII(1) . . . depends on whether that employee has been able to demonstrate to the State Department and the Immigration and Naturalization Service that he is entitled to hold an E-1 visa.” *Id.* at 12. In other words, the issuance of E-1 visas to its Japanese executives demonstrated that any particular executive was “engaged” pursuant to the parent’s Article VIII(1) rights.

nies in the United States when the purpose of entry is to carry on substantial trade between the United States and Japan.<sup>62</sup> By inferring the connection between the issuance of "E" visas and the parent's right to engage executive personnel, Sumitomo argued that the "E" visa status of its Japanese executives conclusively demonstrated that the Japanese executives were engaged pursuant to Article VIII(1).<sup>63</sup>

After showing that Japanese companies have the right to engage Japanese executives in the United States, Sumitomo emphasized that the Japanese companies' FCN Treaty rights are effective whether the company operated through a U.S. branch or a U.S. subsidiary.<sup>64</sup> Sumitomo argued that under the FCN Treaty, the legal form of the parent's U.S. investment is not significant.<sup>65</sup> Although Sumitomo recognized that juridical formalities normally govern the rights of companies under treaties,<sup>66</sup> Sumitomo argued that the main objective of the FCN Treaty is to permit Japanese investors to choose the form of U.S. investments without sacrificing their rights to control the enterprises.<sup>67</sup> According to Sumitomo, the FCN Treaty ignores the legal form of U.S. subsidiaries, or "pierces the corporate veil," for the purpose of making the Japanese company's economic interest in U.S. investments the justification and basis for FCN Treaty protection.<sup>68</sup> Sumitomo argued that Article VIII(1) must protect subsidiaries from Title VII claims.<sup>69</sup> According to Sumitomo, holding otherwise would undercut and cause the derogation of its parent's treaty rights.<sup>70</sup> The parent's rights would be ineffective if the subsidi-

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62. Brief for Sumitomo, *supra* note 4, at 28-29; Reply Brief for Sumitomo, *supra* note 29, at 11 n.8, 12; *see* Brief of C. Itoh, *supra* note 4, at 9-10.

63. *See* Reply Brief for Sumitomo, *supra* note 29, at 12.

64. *See id.* at 10; Brief of C. Itoh, *supra* note 4, at 21.

65. *See* Reply Brief for Sumitomo, *supra* note 29, at 10; Brief of C. Itoh, *supra* note 4, at 21.

66. Reply Brief for Sumitomo, *supra* note 29, at 6.

67. *Id.* at 7.

68. *Id.* at 6-7; *see* Brief for Sumitomo, *supra* note 4, at 39-40; Brief of C. Itoh, *supra* note 4, at 10-11.

69. *See* Brief for Sumitomo, *supra* note 4, at 19-41; Reply Brief for Sumitomo, *supra* note 29, at 1-19.

70. Brief for Sumitomo, *supra* note 4, at 30 (stating in support of Article VIII protection that if plaintiffs prevailed against the subsidiary, "there would be no doubt that the result would be a significant derogation from [the foreign investor's] FCN Treaty rights"); *id.* at 25 (stating in support of Article VIII(1) protection that if host country can limit right of foreign investor to engage key personnel, "it would se-



ary were found liable for the parent's employment practices.<sup>71</sup> Sumitomo, a U.S. subsidiary of a Japanese corporation, argued that it was a "company of Japan" entitled to invoke Article VIII(1).<sup>72</sup>

### 3. The Decision by the Court of Appeals: Acknowledging the Right to Assign Defense

The U.S. Court of Appeals for the Second Circuit adopted Sumitomo's analysis of the FCN Treaty.<sup>73</sup> The court held that, because the Japanese parent had the right to manage and control its U.S. subsidiary by staffing it with executives of its choice, the U.S. subsidiary of a Japanese company must be permitted to invoke Article VIII(1) as a "company of Japan."<sup>74</sup>

The Second Circuit found that the purpose of Article VIII(1) and I(1) of the FCN Treaty is to facilitate the Japanese parent's "staffing of its overseas operations."<sup>75</sup> The right under Article VIII(1) was, according to the court, "unitary" with the Article VII(1) right to manage and control U.S. enterprises.<sup>76</sup> Finally, the court recognized that the State Department regulations governing the issuance of "E" visas are intended to facilitate the entry of Japanese nationals who will work for Japanese trading "units" set up in the United States pursuant to the Article VII(1) right to organize U.S. branches and subsidiaries.<sup>77</sup>

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verely undercut the ability of investors to control and manage their investments"); see Brief of C. Itoh, *supra* note 4, at 22.

71. Brief for Sumitomo, *supra* note 4, at 26 (stating in support of Article VIII protection that "for the right to control to be effective, the investor must be free to choose management personnel").

72. Brief for Sumitomo, *supra* note 4, at 35-41; Reply Brief for Sumitomo, *supra* note 29, at 1-10.

73. See *Avigliano v. Sumitomo Shoji Am. Inc.*, 638 F.2d 552, 554-56 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

74. See *id.* at 554, 556, 557 (finding Article VIII(1) "staffing" right unitary with Article VII right to manage and control, finding it unlikely that FCN Treaty would grant rights and then bar subsidiaries from invoking Article VIII(1), and holding that Sumitomo was "company of Japan").

75. See *id.* at 554-55, 559 (quoting Article VII(1) and stating that Articles VIII(1) and I(1) were meant to "facilitate the staffing of overseas operations" and stating that Article VIII(1) allows companies of either party to engage executive personnel of their choice when operating in the other Party).

76. *Avigliano*, 638 F.2d at 554-55 (stating that Articles VII(1) and VIII(1) are "unitary" and that Article VII(1) contains the right to manage U.S. subsidiaries).

77. *Id.* at 554.

The Second Circuit held that the Japanese parent's treaty rights apply equally whether the parent chooses to operate through a U.S. branch or through a U.S. subsidiary.<sup>78</sup> The purpose of the FCN Treaty, the court held, is to allow Japanese companies to protect their investments in both branches and subsidiaries.<sup>79</sup> The court found that if the FCN Treaty were construed so that the Japanese company forfeited its rights when operating through a subsidiary, the company could easily circumvent the construction by transforming its subsidiary into a branch.<sup>80</sup> Finding it unlikely that the FCN Treaty would permit Japanese companies to manage U.S. subsidiaries while depriving the subsidiaries of the parent's ability to invoke the FCN Treaty's protections, the court held that Sumitomo was a "company of Japan" protected by Article VIII(1).<sup>81</sup>

In its analysis, the court addressed the definitional section of the FCN Treaty under Article XXII(3), according to which companies "constituted under" the laws of the United States are U.S. companies, not companies of Japan.<sup>82</sup> Although Sumitomo was constituted under U.S. laws, the court nevertheless permitted Sumitomo to invoke Article VIII(1) as a "company of Japan." The court believed that Article XXII(3) defined a company's nationality by its place of incorporation only for the purpose of recognizing its status as a legal entity within the territories of either treaty country, but not for the purpose of defining substantive rights under the FCN Treaty.<sup>83</sup>

#### 4. The Case in the Supreme Court: Reversing the Second Circuit on the Issue

On appeal to the U.S. Supreme Court, Sumitomo again stressed its primary "company of Japan" method of invoking Article VIII(1).<sup>84</sup> However, Sumitomo added an alternative "parent's right" method of invoking Article VIII(1) for the first

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78. *Id.* at 556.

79. *Id.*

80. *Id.*

81. *See id.* at 556, 557-58.

82. *See id.* at 556-57; FCN Treaty, *supra* note 5, art. XXII(3), 4 U.S.T. 2063, 2079-80.

83. *See Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552, 557 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

84. *See* Brief for Sumitomo, *supra* note 4; Reply Brief for Sumitomo, *supra* note 29.

time in the case.<sup>85</sup> Sumitomo argued that even if the U.S. subsidiary of a Japanese company is not a “company of Japan” under Article VIII(1), the subsidiary can still invoke Article VIII(1) by invoking the Article VIII(1) rights of its parent.<sup>86</sup>

The Supreme Court limited its interpretation to the FCN Treaty between the United States and Japan.<sup>87</sup> The Court examined the language of the FCN Treaty’s definitional section as well as the intent of the treaty signatories and concluded that Sumitomo was not a “company of Japan.”<sup>88</sup> According to the Court, both analyses mandated that courts utilize a place-of-incorporation test to determine the nationality of corporations.<sup>89</sup> The Supreme Court held that because Sumitomo was incorporated in the United States, it was a U.S. company rather than a Japanese company.<sup>90</sup>

According to the Court, a company’s nationality determined not only its legal status in either country, but also determined its ability to invoke the substantive rights under the FCN Treaty.<sup>91</sup> The Court held that as U.S. companies, U.S.-incorporated subsidiaries are “entitled to the rights, and subject to the responsibilities of other domestic corporations.”<sup>92</sup> As U.S. companies, U.S. subsidiaries can not take advantage of the rights conferred in Article VIII(1);<sup>93</sup> only U.S. branches can exercise a parent’s Article VIII(1) rights.<sup>94</sup>

In response to Sumitomo’s alternative “parent’s right” method of asserting Article VIII(1) protection, the Supreme Court stated in a footnote that it “express[ed] no view as to whether Sumitomo may assert any Article VIII(1) rights of its

85. See Brief for Sumitomo, *supra* note 5, at 35-41; Reply Brief for Sumitomo, *supra* note 35, at 1-10.

86. Reply Brief for Sumitomo, *supra* note 29, at 3; Brief for Sumitomo, *supra* note 4, at 40-41 (stating that “[a] slightly different technical approach is to treat the U.S. subsidiary as asserting the rights of its Japanese parent, which is admittedly a ‘company of Japan’”).

87. *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176, 185 & n.12 (1982).

88. *Id.* at 180-89.

89. *Id.* at 182, 185.

90. *Id.* at 182.

91. *Id.* at 182-83.

92. *Id.* at 188.

93. *Id.* at 189 (“[t]he only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1)”).

94. *Id.* at 182 (stating that “[c]learly, Article VIII(1) only applies to companies of one of the FCN Treaty countries operating in the other country”).

parent.”<sup>95</sup> Despite the Supreme Court’s holding that U.S. subsidiaries cannot take advantage of the rights conferred by Article VIII(1), commentators have interpreted the footnote as leaving open the possibility that a subsidiary might take advantage of Article VIII(1) by invoking its parent’s Article VIII(1) rights.<sup>96</sup> Although it is unlikely that the Court intended to leave the issue open,<sup>97</sup> several theories have emerged attempt-

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95. *Id.* at 189 n.19.

96. *See infra* text accompanying notes 98-120 (discussing theories).

97. The manner in which the parent’s-right approach was raised demonstrates that the Court simply did not reach the issue of whether a subsidiary can invoke its parent’s FCN Treaty rights. Sumitomo had raised its parent-right method of invoking Article VIII(1) for the very first time in its Petitioner’s Brief when in made the singular statement that “[a] slightly different technical approach is to treat the U.S. subsidiary as asserting the rights of its Japanese parent.” Brief for Sumitomo, *supra* note 4, at 40-41; *see* Interview with Lewis M. Steel, Esq., Partner of Steel, Bellman & Ritz, Counsel for Plaintiffs, *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982), in New York, N.Y. (Feb. 20, 1992) (notes available at office of *Fordham International Law Journal*). Plaintiff-Respondents did not respond to Sumitomo’s singular statement due to its less than meritorious appeal. *See* Interview with Lewis M. Steel, *supra* (stating that “[w]e thought that it was of such slight merit that we never responded to it”). Then in its Reply Brief, Sumitomo very forcefully and elaborately argued the issue. *See* Reply Brief for Sumitomo, *supra* note 29, at 3-10. Sumitomo also raised the parent’s right method of invocation in its oral argument to the Supreme Court. *See, e.g.*, Oral Argument on Behalf of Sumitomo, *supra* note 6, at 10-11.

The most plausible explanation for the sudden, “last minute” method of invoking Article VIII(1) in its Reply Brief was the “panic” Sumitomo’s attorneys may have felt when, between the filing of Sumitomo’s Petitioner’s Brief and Reply Brief, the government of Japan made its first statement in regard to the case on Feb. 26, 1982 stating that a U.S. subsidiary of a Japanese company was not covered by Article VIII(1). *See Sumitomo*, 457 U.S. at 183-84; Brief for Sumitomo, *supra* note 4 (filed Jan. 18, 1982); Reply Brief for Sumitomo, *supra* note 29 (filed Apr. 19, 1982). At this point, Sumitomo’s attorneys knew that it could not rely on its “company of Japan” method of invoking Article VIII(1). While the *Sumitomo* case was in the district court, the U.S. State Department agreed with Sumitomo that Article VIII(1) applies to U.S. subsidiaries of Japanese companies. *See Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 511 (S.D.N.Y. 1979), *aff’d on other grounds*, 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982). However, before the Second Circuit heard Sumitomo’s appeal, the U.S. State Department took the opposite position. *See Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552, 558 n.5 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982). Therefore, when the Japanese government submitted its statement that U.S. subsidiaries were not covered by Article VIII(1), both the U.S. and Japanese agencies charged with the duty of treaty interpretation disagreed with Sumitomo’s position that it was a company of Japan. Sumitomo’s attorney’s knew that it could not rely on the “company of Japan” method of invoking Article VIII(1).

After hearing the parties’ arguments, the *Sumitomo* Court declined to rule on a number of issues in the case because they were not set forth or “fairly included” in the question presented for review by the Supreme Court. *Sumitomo*, 457 U.S. at 180

ing to explain the situations in which U.S. subsidiaries may be able to invoke their parents' FCN Treaty rights.

#### D. *Theories of Parent-Right Invocation*

Three theories attempt to explain the situations in which a U.S. subsidiary might be permitted invoke its non-U.S. parent's FCN Treaty rights: "integration," "necessity," and third-party standing.<sup>98</sup> Under the "integration" theory of parent-right invocation, a U.S. subsidiary may invoke the treaty rights of its non-U.S. parent when the parent exercises sufficient control over the subsidiary in its business and personnel decisions to justify treating the two entities as a "common entity." Under the "necessity" theory, the U.S. subsidiary may assert its parent's Article VIII(1) rights based on the importance of

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n.4, 189 n.19. The parent-right invocation issue was not "fairly included" in the question presented for review by the Supreme Court. See *Cross-Petition for a Writ of Certiorari, Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (No. 81-24) (LEXIS, Genfed library, Briefs file) (presenting issue of "[w]hether Article VIII(1) . . . which permits nationals and companies of either party to engage executive personnel of their own choice, is applicable to a domestic corporation which is a wholly owned subsidiary of a Japanese corporation"). Nor was the issue of parent-right invocation included in the questions certified by the District Court for interlocutory review by the Court of Appeals as required by 28 U.S.C. § 1292(b). See *Avigliano v. Sumitomo Shoji Am., Inc.*, 20 Fair Empl. Prac. Cas (BNA) 805, 805 (S.D.N.Y. 1979) (stating that "only the question of the relationship between the treaty and the civil rights law is suitable for section 1292(b) treatment"). In fact, during oral argument, a member of the Court panel noted that "the 1292(b) appeal was just on the issue of what kind of a company is the subsidiary." Remarks of Supreme Court Panel, Transcript of Oral Argument at 24 (Apr. 26, 1982), *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24).

As a result, the Court did not reach the parent's right issue because the issue was improperly raised. However, the fact that the Court did not consider the parent's right issue does not mean that the Court failed to consider Sumitomo's defense based upon its parent's right to assign because the right to assign defense is a basis for finding that Sumitomo is a company of Japan. See, e.g., Dushica D. Babich, Note, *Discriminatory Hiring Practices By Foreign Corporations in the United States—A Limited Right*, 5 *FORDHAM INT'L L.J.* 509, 524, 525 (1982) (noting that U.S. subsidiaries of Japanese companies should be considered companies of Japan because FCN Treaty gives parent right to manage and control U.S. enterprises with executives of their choice). Indeed, the Second Circuit had relied upon the right to assign defense to find that Sumitomo was a company of Japan. See *supra* notes 73-83 and accompanying text.

98. These theories are a compilation of arguments from commentators who have advocated the subsidiary's ability to invoke its parent's rights. See John B. Lewis & Bruce L. Outley, *Title VII and Friendship, Commerce, and Navigation Treaties: Prognostications Based upon Sumitomo Shoji*, 44 *OHIO ST. L.J.* 45, 61-68 (1983); Nobuhisa Ishizuka, Note, *Subsidiary Assertion of Foreign Parent Corporation Rights Under Commercial Treaties to Hire Employees "Of Their Choice,"* 86 *COLUM. L. REV.* 139, 151-68 (1986).

the discriminatory conduct for which treaty protection is sought. Finally, under the third-party standing theory, a U.S. subsidiary may have third-party standing to invoke the Article VIII(1) rights of its parent because the subsidiary's inability to invoke the right might materially impair the parent's right to manage and control its investment in the subsidiary.

### 1. Integration

According to "integration" theory, U.S. courts should look beyond the formality of separate incorporation. The courts should examine the substance of the parent-subsidiary relationship to determine whether a "single" or "common" identity between the parent and its subsidiary exists.<sup>99</sup> If there is a single or common identity between them, the U.S. subsidiary may invoke its parents' Article VIII(1) rights.<sup>100</sup> Proponents of the integration theory point to the "integrated enterprise" doctrine in employment discrimination law through which courts treat parent and subsidiary corporations as "single employers" for purposes of Title VII liability.<sup>101</sup>

Under the integrated enterprise doctrine, courts may join parent corporations as defendants and find them liable for the discriminatory acts of their subsidiaries if the parent and its subsidiary are so integrated in their operations as to be a "single employer."<sup>102</sup> The doctrine, developed by the National Labor Relations Board ("NLRB"), permits joinder of the parent when there exists a high degree of interrelated operations, common management, centralized control of labor relations, and common ownership or financial control between the parent and the subsidiary.<sup>103</sup> Based upon the NLRB test, the integration theory of parent-right invocation concludes that when the parent regularly participates in and exercises a high degree of control over the personnel and business decisions of its U.S.

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99. See Lewis & Ottley, *supra* note 98, at 62-65, see also Ishizuka, Note, *supra* note 109, at 152-55.

100. See Lewis & Ottley, *supra* note 98, at 61 (stating that subsidiary could argue that the parent and subsidiary are single employer to permit subsidiary to successfully assert "of their choice" provision); see also Ishizuka, Note, *supra* note 98, at 152.

101. See Lewis & Ottley, *supra* note 98, at 61-65; see also Ishizuka, Note, *supra* note 98, at 152-54, nn.94 & 95.

102. See BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1000 (2d ed. 1983).

103. See *id.*

subsidiary, the two entities should be treated as a “common entity,” giving the subsidiary the ability to assert its parent’s FCN Treaty rights.<sup>104</sup>

## 2. Necessity

Under the necessity theory of parent-right invocation, the subsidiary may invoke its parent’s FCN Treaty rights to defeat Title VII liability absent integration.<sup>105</sup> The theory permits parent-right invocation if the discriminatory conduct for which parent-right invocation is sought is important in light of the parent’s investment in the subsidiary.<sup>106</sup> In this analysis, courts should consider three factors.<sup>107</sup> The first concerns the management level affected by the discriminatory conduct.<sup>108</sup> The higher the management level, the greater the need to have the particular executives in the subsidiary and the more reason to allow the subsidiary to invoke its parent’s FCN Treaty rights to defeat Title VII claims.<sup>109</sup> The second considers the stage of development of the subsidiary.<sup>110</sup> If the subsidiary is in the early stages of development, especially in the initial start-up period, it is purportedly more important for the parent to have its own executives in the subsidiary to protect its investment. Thus, there is greater reason to allow the U.S. subsidiary to invoke its parent’s FCN Treaty rights.<sup>111</sup> The third factor considers the nature of the industry.<sup>112</sup> Purportedly, for U.S. subsidiaries of multinational industries which closely coordinate their operations with base offices in the home country, the U.S. subsidiary’s need to place personnel with special training and knowledge to manage the subsidiary is extremely high.<sup>113</sup> In

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104. See Lewis & Ottley, *supra* note 98, at 61; see also Ishizuka, Note, *supra* note 98, at 152-53.

105. See Ishizuka, Note, *supra* note 98, at 154 (stating even “[w]hen there is a very low degree of integration . . . courts should examine the additional criteria . . . [which] will indicate whether a subsidiary can appropriately assert a parent’s FCN Treaty right to hire managerial and technical personnel of its choice without potential liability for its hiring decisions”).

106. See *id.*

107. See *id.* at 155.

108. See *id.* at 155-59.

109. *Id.* at 155-56.

110. See *id.* at 159-60.

111. *Id.* at 159.

112. See *id.* at 160-162.

113. *Id.* at 160-161 (citing Yoshi Tsurumi, *The Multinational Spread of Japanese*

sum, the necessity theory of parent-right invocation permits the subsidiary to assert its parent's FCN Treaty rights to defeat Title VII claims when the discriminatory conduct is necessary to protect the parent's investment.

### 3. Third-Party Standing

Third-party standing is the third ground upon which a U.S. subsidiary may invoke the Article VIII(1) rights of its non-U.S. parent.<sup>114</sup> The theory is premised on the fact that denying standing would materially impair the parent's FCN Treaty right to manage and control its U.S. investment because the subsidiary's liability would restrict the parent's ability to appoint specific managerial personnel to its U.S. subsidiary.<sup>115</sup> By virtue of such impairment, a U.S. subsidiary arguably may have third-party standing to assert its parent's FCN Treaty rights.<sup>116</sup>

In determining whether a litigant can assert the rights of a third party, courts traditionally consider the closeness of the relationship between the litigant and the third party, the ability of the third party to assert its own rights, and the risk that the rights of the third party will be materially impaired if third-party standing is not permitted.<sup>117</sup> The third-party standing theory states, however, that there has been a "shift of emphasis to the third factor."<sup>118</sup> The theory relies upon Supreme Court precedent stating that a litigant has standing to assert a third party's rights so long as the prohibition against invocation would impair the third-party's interests.<sup>119</sup> Because imposition

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*Firms and Asian Neighbors Reactions*, in *THE MULTINATIONAL CORPORATION AND SOCIAL CHANGE* 118, 143 (D. Apter & L. Goodman eds. 1976)) (stating that executives in trading industry must understand complexities of international trade as well as the Japanese market).

114. See Lewis & Ottley, *supra* note 98, at 65-68; Ishizuka, Note, *supra* note 98, at 151 n.87.

115. See Lewis & Ottley, *supra* note 98, at 68; Ishizuka, Note, *supra* note 98, at 151 n.87.

116. See Ishizuka, Note, *supra* note 98, at 151 n.87; see also Lewis & Ottley, *supra* note 98, at 68.

117. Ishizuka, Note, *supra* note 98, at 151 n.87; see also Lewis & Ottley, *supra* note 98, at 66-67.

118. See Ishizuka, Note, *supra* note 98, at 151 n.87; see also Lewis & Ottley, *supra* note 98, at 66.

119. See Ishizuka, Note, *supra* note 98, at 151 n.87 (stating that "[t]he Supreme Court has stated that evidence of indirect impairment of third parties' constitutional



of Title VII liability allegedly would materially impair the parent's right to control and manage its investment in the subsidiary, the theory argues that a U.S. subsidiary should be able to invoke its parent's FCN Treaty rights to defeat Title VII claims.<sup>120</sup>

*E. Cases Bearing on the Resolution of Whether a U.S. Subsidiary Can Invoke Its Parent's Treaty Rights*

Two cases particularly bear on the issue of whether a U.S. subsidiary is able to invoke the FCN Treaty rights of its parent. First, the *Spiess*<sup>121</sup> case on remand from the Supreme Court considered the question "left open" in *Sumitomo*. Second, *Calnetics Corp. v. Volkswagen of America, Inc.*<sup>122</sup> involved circumstances different from, and FCN Treaty provisions other than, Article VIII(1) of the U.S.-Japan FCN Treaty, but may nevertheless stand for the proposition that a U.S. subsidiary can invoke the FCN Treaty rights of its parent.

1. *Spiess* on Remand from the Supreme Court

The Supreme Court remanded *Spiess* in light of their decision in *Sumitomo*. On remand the U.S. District Court for the Southern District of Texas considered whether the U.S. subsidiary had standing to invoke its parent's Article VIII(1) rights. The facts in *Spiess* were identical to those in the *Sumitomo*. C. Itoh & Co. (America), Inc. ("C. Itoh"), a wholly-owned U.S.-incorporated subsidiary of a large Japanese multinational company, was sued under Title VII for exclusively hiring Japanese males for management level positions.<sup>123</sup> C. Itoh alleged that its Japanese executives were assigned by its parent company in an effort to manage its U.S. subsidiary.<sup>124</sup> The assignments were allegedly made on a rotating basis so

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rights, and the 'impact of the litigation on the third-party interests,' is sufficient to obtain standing" (citations omitted)); cf. Lewis & Ottley, *supra* note 98, at 68.

120. See Ishizuka, Note, *supra* note 98, at 151 n.87; see also Lewis & Ottley, *supra* note 98, at 68.

121. *Spiess v. C. Itoh & Co.* 725 F.2d 970 (5th Cir. 1984) (quoting No. 75-H-267 (S.D. Tex. Sept. 27, 1983) (unpublished opinion)), on remand from 457 U.S. 1128 (1982).

122. 532 F.2d 674 (9th Cir.), cert. denied, 429 U.S. 940 (1976).

123. *Spiess v. C. Itoh & Co.* (Am.), 643 F.2d 353 (5th Cir. 1981), vacated on other grounds, 457 U.S. 1128 (1982).

124. *Spiess v. C. Itoh & Co.* (Am.), 725 F.2d 970, 972 (5th Cir. 1984) (quoting

that the Japanese executives retained their status as long term employees of the parent while on temporary assignment to the United States.<sup>125</sup> The parent, not the subsidiary, determined the salaries as well as the promotions of these executives.<sup>126</sup>

C. Itoh argued that the presence of its "Japan staff" resulted from its parent's proper exercise of its right "to engage" executive personnel.<sup>127</sup> C. Itoh asserted that it had standing to invoke its parent's rights in defense of the Title VII claim.<sup>128</sup> In an unpublished opinion, the Texas district court, however, precluded C. Itoh from invoking its parent's FCN Treaty rights.<sup>129</sup> The court held that neither *Sumitomo* nor the FCN Treaty would permit this result.<sup>130</sup>

## 2. The *Calnetics* Case

Courts have suggested that *Calnetics Corp. v. Volkswagen of America, Inc.*<sup>131</sup> may support a U.S. subsidiary's invocation of its parent's FCN Treaty rights.<sup>132</sup> *Calnetics* involved a private anti-trust action against Volkswagen of America, Inc. ("Volkswagen"), the U.S. subsidiary of Volkswagenwerk, A.G., a West

from *Spiess*, No. 75-H-267 (S.D. Tex. Sept. 27, 1983) (unpublished opinion)), *on remand from* 457 U.S. 1128 (1982).

125. *See id.*

126. *See id.*

127. *See id.* (stating C. Itoh's argument that parent had exercised its "right 'to engage' managerial and other specialists in this instance" by assigning Japan staff to U.S. subsidiary).

128. *See id.* at 972.

129. *Spiess v. C. Itoh & Co. (Am.)*, 725 F.2d 970, 973 (5th Cir. 1984) (quoting from *Spiess*, No. 75-H-267 (S.D. Tex. Sept. 27, 1983) (unpublished opinion)), *on remand from* 457 U.S. 1128 (1982).

130. *Id.*

131. 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976).

132. *See, e.g. Spiess v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1, 9 (S.D. Tex. 1979) (stating that "[r]ead in a light most favorable to [the defendant-U.S. subsidiary], *Calnetics* stands for the proposition that a United States incorporated subsidiary of a foreign corporation has standing to raise the claim that the FCN Treaty rights of its parent may be affected by court ordered relief"), *rev'd on other grounds*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982)); *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 510-11 n.8 (S.D.N.Y. 1979) (concurring in statement in *Spiess*, 469 F. Supp. at 9), *aff'd on other grounds*, 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982). *But see Spiess*, 469 F. Supp. at 8 (stating that "analysis of *Calnetics* reveals that it does not stand for the proposition that a United States-incorporated subsidiary of a foreign corporation has, in addition to all FCN Treaty rights specifically granted it, those FCN Treaty right granted its foreign parent").

German corporation.<sup>133</sup> The United States District Court for the Central District of California found that Volkswagen had violated U.S. antitrust laws. As part of the remedy, the court enjoined Volkswagen for seven years from importing into the United States certain German-manufactured automobiles that were equipped with factory installed air-conditioning, including those automobiles manufactured by Volkswagen's German parent.<sup>134</sup> In the U.S. Court of Appeals for the Ninth Circuit, Volkswagen contested the imposition of the import ban by submitting a memorandum from the Federal Republic of Germany to the U.S. State Department. The memorandum challenged the propriety of the import ban under Article XVI(1) of the Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany ("German Treaty")<sup>135</sup> and under Article III and Article I(1) of the General Agreement on Tariffs and Trade ("GATT").<sup>136</sup> The treaty provisions, according to Volkswagen, prohibited the United States from discriminating against German automobile manufacturers.<sup>137</sup> Volkswagen argued that the import ban discriminates against German manufacturers by restricting them from selling cars with factory-installed air-conditioners in the United States while imposing no similar restriction on U.S. automobile manufacturers.<sup>138</sup> In dictum,<sup>139</sup> the Ninth Circuit agreed with Volkswagen, stating that the district court failed to consider properly the application of the treaties and the discriminatory effect the import ban would have on German automobile manufacturers.<sup>140</sup> The court's dictum may support a U.S. subsidiary's ability to invoke its parent's FCN Treaty

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133. *Calnetics*, 532 F.2d at 678 n.3.

134. *Id.* at 692.

135. Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-Germany, art. XVI(1), 7 U.S.T. 1839, 1857 [hereinafter German Treaty].

136. Oct. 30, 1947, art. I(1), III, 61 Stat. A5, A12, A18, 55 U.N.T.S. 188 [hereinafter GATT]; *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219, 1221 n.4, 1226 (C.D. Cal. 1973) (reprinting memorandum), *rev'd on other grounds*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976).

137. *See Calnetics*, 532 F.2d at 693; *see also Calnetics*, 353 F. Supp. 1219.

138. *See Calnetics*, 532 F.2d at 693.

139. *Id.* at 691 (stating that "[o]ur resolution of the jury trial issue makes it unnecessary to deal . . . with . . . challenges to the equitable relief granted by the district court").

140. *Id.* at 693-94.

rights because the court permitted Volkswagen to raise the effect the import ban would have on German manufacturers, including Volkswagen's German parent as a defense to the anti-trust claim.<sup>141</sup>

## II. THE DECISION IN FORTINO

*Fortino v. Quasar Co.*<sup>142</sup> is the first case to permit a subsidiary to invoke its parent's rights under an international treaty.<sup>143</sup> As in *Sumitomo* and *Spiess*, the plaintiffs in *Fortino* alleged that a wholly-owned U.S.-incorporated subsidiary of a large Japanese multinational company had violated Title VII by discriminating on the basis of national origin.<sup>144</sup> Upon facts and arguments virtually identical to those in *Sumitomo* and *Spiess*, speaking through Judge Posner, the U.S. Court of Appeals for the Seventh Circuit held that the U.S. subsidiary can invoke its Japanese parent's Article VIII(1) rights because, through its system of assigning executives to its U.S. subsidiary, the parent had "dictated the subsidiary's discriminatory conduct."<sup>145</sup>

### A. Facts and Procedural History

In *Fortino*, three former U.S. executives of Quasar Company, a division of Matsushita Electric Corporation of America, a wholly-owned U.S.-incorporated subsidiary of Matsushita Electric Industrial Company ("Matsushita") claimed, *inter alia*, that Quasar had impermissibly discharged them from their executive positions on the basis of their national origin in violation of Title VII.<sup>146</sup>

In 1986, Quasar employed ten Japanese executives temporarily assigned by Matsushita to Quasar as part of Matsushita's assignment system.<sup>147</sup> Under the system, these executives

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141. *Id.*

142. 950 F.2d 389 (7th Cir. 1991).

143. Even if language in *Calnetics* supports the parent's invocation of its parent's FCN treaty rights, the language was merely dictum. See *Calnetics Corp. v. Volkswagen of America*, 532 F.2d 674, 691 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976).

144. *Fortino*, 950 F.2d at 391.

145. *Id.* at 393.

146. *Id.* at 391. Because Quasar was a division of the U.S. subsidiary, for all relevant purposes Quasar was also a wholly-owned subsidiary of Matsushita. See *id.* (noting that Quasar is "American subsidiary of a Japanese company").

147. *Id.* at 392.

were employees of Quasar and under its day-to-day control, but they retained their long term status as employees of Matsushita<sup>148</sup>—the executives were designated as Matsushita personnel in Quasar's records, and Matsushita kept their personnel records.<sup>149</sup> In addition, Matsushita evaluated the executives' performance, fixed their salaries, and assisted with the relocation of their families to the United States during the period of their assignment period until they were "rotated" back to Japan.<sup>150</sup> Finally, each Japanese executive entered the United States under an "E" visa.<sup>151</sup>

In 1985, after Quasar suffered operating losses of approximately US\$20 million dollars, Quasar began to reorganize.<sup>152</sup> Quasar executive Kenichi Nishikawa was in charge of the reorganization. Matsushita sent him to prevent a recurrence of the loss.<sup>153</sup> As part of the reorganization, Mr. Nishikawa reduced the work force, including its management, by half.<sup>154</sup> While more than half of the non-Japanese executives, including plaintiffs, were discharged in the reduction in force ("RIF"), none of the Japanese executives were discharged.<sup>155</sup> Indeed, the Japanese executives received salary increases while the U.S. executives who were not discharged did not.<sup>156</sup>

The U.S. District Court for the Northern District of Illinois found that Quasar impermissibly discriminated on the basis of national origin.<sup>157</sup> The court found that even apart from the RIF, Quasar had paid salaries to their Japanese executives on an entirely different basis from those of their U.S. executives because Quasar adjusted its Japanese executives' salaries in accordance with their living quarters, the size of the employees'

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148. *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991)

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*; *Fortino v. Quasar*, 751 F. Supp. 1306, 1309 (N.D. Ill. 1990), *rev'd*, 950 F.2d 389 (7th Cir. 1991).

153. *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991); *Fortino*, 751 F. Supp. at 1308. The district court described Nishikawa as one of the executives who were employees of Quasar and under its day to day control, but who also retained his long term status as an employee of Matsushita. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1315-16.

families, and their children's schooling.<sup>158</sup> Moreover, during the two years prior to Quasar's RIF while Quasar was losing money "hand over fist," Quasar substantially increased the salary of at least two of its Japanese executives.<sup>159</sup> The different salaries, together with the Japanese executives' exemption from the RIF, formed the basis for the Title VII violation.<sup>160</sup>

### B. Quasar's Right to Assign Defense

Raising the FCN Treaty for the first time on appeal, Quasar argued a defense based upon its parent's right to assign by referring to Article VII(1) and Article VIII(1) of the FCN Treaty.<sup>161</sup> Quasar argued that by virtue of Article VII(1), Matsushita had the right to manage and control its U.S. subsidiary.<sup>162</sup> Quasar explained that Article VIII(1) gave Matsushita the right to assign personnel to its U.S. subsidiary to ensure Matsushita's ability to protect its U.S. investment.<sup>163</sup> Quasar

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158. *Id.*

159. *Id.*

160. *Fortino v. Quasar*, 751 F. Supp. 1306, 1315 (N.D. Ill. 1990), *rev'd* 950 F.2d 389, 391-92 (7th Cir. 1991). As an additional basis for the Title VII violation, the district court also found that Quasar reserved certain of its managerial positions for Japanese employees and made no attempt to fill these positions with U.S. employees. *Fortino*, 751 F. Supp. at 1311, 1315.

161. *See generally* Brief for Quasar, *supra* note 4, at 15-22 (arguing that Japanese executives could be excluded from reduction in force because they were assigned by Matsushita pursuant to FCN Treaty); Reply Brief for Quasar Co. at 3-14, *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (Nos. 91-1123, 91-1197, 91-1564) [hereinafter Reply Brief for Quasar].

In addition to the Article VIII(1) right to assign, Quasar also alluded to the right to discriminate under Article VIII(1). Brief for Quasar, *supra* note 4, at 16 (arguing Article VIII(1) permits discrimination on basis of citizenship). A component of Quasar's defense was that the district court below had inferred national origin discrimination in violation of Title VII when the discrimination was in fact on the basis of citizenship. *See id.* at 22-25; Reply Brief for Quasar, *supra*, at 18-19.

The Article VIII(1) right to discriminate is an issue separate from the subsidiary's ability to assert its parent's rights because it is necessary first to determine whether the subsidiary can take advantage of Article VIII(1) before reaching the issue of whether the FCN Treaty permits citizenship or national origin discrimination. Even if the discrimination involved was only that of citizenship, if the subsidiary was not protected by the Article VIII(1), the non-intervened application of Title VII would result in a violation because Title VII prohibits citizenship discrimination which has the "purpose or effect" of national origin discrimination. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

162. Brief for Quasar, *supra* note 4, at 15; Reply Brief for Quasar, *supra* note 161, at 12.

163. Brief for Quasar, *supra* note 4, at 15-16.

concluded that, reading the Articles together, the FCN Treaty gives Japanese companies the right to manage and control U.S. subsidiaries by assigning executive personnel of their choice.<sup>164</sup>

According to Quasar, the issuance of “E” visas to all the executives demonstrated that the presence of the executives at Quasar was a result of Matsushita’s proper exercise of its FCN Treaty right to assign.<sup>165</sup> Quasar argued that the INA provisions governing entry into the United States and their implementing State Department regulations governing the issuance of “E” visas constitute the only mechanism by which Matsushita could exercise its FCN Treaty right to assign personnel to oversee its U.S. investment.<sup>166</sup> Therefore, when the Japanese executives were issued “E” visas, the State Department expressly recognized that they were sent pursuant to the FCN Treaty.<sup>167</sup>

According to Quasar, the alleged discriminatory conduct resulted from Matsushita’s “expatriate” system implemented pursuant to its FCN Treaty right to assign.<sup>168</sup> Under this rotation system, Matsushita educated and trained the executives, temporarily assigned them to Quasar, evaluated their performance, maintained their personnel files, and determined their compensation until their return to Matsushita.<sup>169</sup> The Japanese executives were insulated from the RIF because Matsushita had assigned the executives to work for Quasar pursuant to the FCN Treaty.<sup>170</sup> Japanese executives were given higher

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164. Reply Brief for Quasar, *supra* note 161, at 12; *see also* Brief for Quasar, *supra* note 4, at 14-15.

165. Brief for Quasar, *supra* note 4, at 17 (stating that “[t]he U.S. State Department expressly recognized MEI’s [Matsushita] treaty right to assign these ten Japanese citizens to these managerial positions at Quasar when it issued the E-1 and E-2 visas to them . . . [because] . . . [i]n order to qualify for their E-visas, the [Matsushita] Managers had to occupy executive positions in a company that was formed under the provisions of the FCN Treaty”). *See generally* Reply Brief for Quasar, *supra* note 161, at 10-14.

166. Reply Brief for Quasar, *supra* note 161, at 11.

167. Brief for Quasar, *supra* note 4, at 17-18.

168. Brief for Quasar, *supra* note 4, at 18 n.3; *id.* at 15 (arguing that Matsushita assigned executives pursuant to FCN Treaty thereby justifying exemption from reduction in force); *id.* at 19-22 (arguing that Matsushita determined Japanese executives’ salaries thereby justifying their high salaries).

169. Reply Brief for Quasar, *supra* note 161, at 4; Brief for Quasar, *supra* note 4, at 19-20.

170. Brief for Quasar, *supra* note 4, at 15.

salaries because Matsushita evaluated the executives' performances and determined their salaries in accordance with Matsushita procedures, which considered typical "expatriate" factors including housing, family and educational expenses.<sup>171</sup> According to Quasar, the Article VIII(1) right to assign included the right to evaluate the executives' performances and determine their salaries because the right to assign "would be an empty one" if it did not include those other rights.<sup>172</sup> In short, the Title VII violation resulted from Matsushita's exercise of its Article VIII(1) rights.<sup>173</sup>

Quasar argued that because it was really the conduct of Matsushita that caused the alleged discrimination, it would be unfair to hold Quasar liable under Title VII for Matsushita's actions and yet deprive Quasar of the opportunity to assert the Matsushita rights that prompted those actions.<sup>174</sup> As its basis for asserting Matsushita's right, Quasar argued that it had third-party standing to raise its parent's Article VIII(1) rights.<sup>175</sup>

### C. *The Court of Appeals' Holding*

Judge Posner, speaking for the Seventh Circuit, permitted Quasar to invoke Matsushita's FCN Treaty right to assign in response to the Title VII claim.<sup>176</sup> Permitting Quasar to raise the treaty argument for the first time on appeal,<sup>177</sup> the court

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171. *See id.* at 19-22.

172. *See id.* at 20.

173. *Id.* at 18 n.3 (stating that "Quasar is being held liable under Title VII for [Matsushita's] assignment of the . . . Managers to Quasar under the FCN treaty").

174. *See Reply Brief for Quasar, supra* note 161, at 8.

175. *Id.* at 7-10.

176. *See Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991). It is important to take note of the distinction between the court's discussion of the FCN Treaty right to assign and its discussion of the FCN Treaty right to discriminate on the basis of citizenship. *See id.* at 392-93. The court makes two basic distinct points throughout the opinion. First, Matsushita's assignment of its own executives to its U.S. subsidiary is entirely proper under the FCN Treaty, and no Title VII violation should be inferred from the parent's proper exercise of that right. *See id.* at 392, 393. Second, discrimination on the basis of citizenship is also proper under the FCN Treaty so that no Title VII violation should be inferred from the parent's proper exercise of the FCN Treaty right to discriminate on the basis of citizenship. *See id.* at 391, 392. Other statements by the court may be interpreted as discussing both the FCN Treaty right to assign and the FCN Treaty right to discriminate, or a combination of the two that is a FCN Treaty right to assign on the basis of citizenship. *See id.* at 392-93.

177. *Id.* at 391.



explained that Article VIII(1), authorizing Japanese companies to engage executive personnel of their choice, confirmed the propriety of Matsushita's assignments of its own executives to Quasar.<sup>178</sup> Moreover, the issuance of "E" visas to these executives "further confirmed" the propriety of Matsushita's assignment.<sup>179</sup> Because the assignments were proper, the court opined that the district court should not have found a Title VII violation.<sup>180</sup> Conceding the favoritism shown to Quasar's Japanese executives, the court held that discrimination in favor of executives who were given a "special status" by virtue of a treaty and its implementing State Department regulations is not equivalent to discrimination on the basis of national origin.<sup>181</sup>

The court held that because Japanese parent companies have the right to assign their executives to their subsidiaries, the proper exercise of that right may not be made the basis for inferring a Title VII violation.<sup>182</sup> According to the court, Title VII would be taking back from the Japanese with one hand what the FCN Treaty had given them with the other if the subsidiary could be punished as a result of a proper exercise of its parent's FCN Treaty rights.<sup>183</sup>

The court next considered whether the subsidiary could

178. *Id.* at 392. After quoting the text of Article VIII(1), the court stated that "[t]he propriety of [the parent's] assigning its own executives to [its U.S. subsidiary] is further confirmed by the issuance of E-1 and E-2 visas to the Japanese expatriate executives." The court's clear implication is that Article VIII(1) confirms the propriety of the Japanese parent's assignment of its executives to its U.S. subsidiary. *Id.*; see also *Bias Decision*, *supra* note 9.

179. *Fortino*, 950 F.2d at 392.

180. *Id.*

181. See *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991). Elaborating on this point, the court next discussed the FCN Treaty right to discriminate rather than the FCN Treaty right to assign. *Id.* The court's discussion focused on the fact that the district court inferred national origin discrimination from a FCN Treaty right to discriminate on the basis of citizenship. *Id.*

182. *Id.* at 393. There are three plausible interpretations of the court's statement that "[t]he exercise of a FCN treaty right may not be made the basis for inferring a violation of Title VII." *Id.* "That right" may have referred to the parent's right to assign executives, the parent's right to discriminate on the basis of citizenship, or a combination of the two which would be the parent's right to assign executives on the basis of citizenship. "That right," however, did not refer to the subsidiary's FCN Treaty right to discriminate because, as the court later noted, *Sumitomo* "held that an American subsidiary of a foreign parent was not protected by the FCN Treaty." *Id.* at 393.

183. *Fortino*, 950 F.2d at 393.

invoke its parent's Article VIII(1) right to assign in response to the Title VII claim.<sup>184</sup> Noting that the Supreme Court decision in *Sumitomo*<sup>185</sup> had "left open" the possibility that the U.S. subsidiary might invoke its parent's FCN Treaty rights, the court distinguished *Sumitomo* from *Fortino* on the basis that, in *Sumitomo*, "there was no contention that the parent had dictated the subsidiary's discriminatory conduct."<sup>186</sup> The court cited one commentator who advocated the three theories of parent-right invocation.<sup>187</sup> The court reasoned that "[a] judgment that forbids Quasar to give preferential treatment to the expatriate executives that its parent sends would have the same effect on the parent as if it ran directly against the parent: it would prevent Matsushita from sending its own executives to manage Quasar in preference to employing American citizens in these posts."<sup>188</sup> The court permitted the subsidiary to invoke its parent's FCN Treaty rights because denying the subsidiary the ability to assert its parent's right to assign would set the parent's FCN Treaty rights "at naught."<sup>189</sup>

Accordingly, the Seventh Circuit held that the district court erred because the district court, in finding a Title VII violation, relied upon conduct which resulted from Matsushita's proper assignment of executives to Quasar.<sup>190</sup> The real cause of the discrimination, therefore, was not in being non-Japanese, but rather in not being a executive of Matsushita.<sup>191</sup> After declining to decide the extent to which Article VIII(1) permits discrimination in violation of Title VII,<sup>192</sup> the court

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184. *Id.*

185. 457 U.S. 176 (1982).

186. *See Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991).

187. *Id.* (citing Ishizuka, Note, *supra* note 109).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991)

192. *See id.* The court stated that it "need not choose sides" on whether "the treaty of friendship in effect confers a blanket immunity from Title VII." *Id.* This statement appears to conflict with the court's earlier statement that "[t]he treaty permits discrimination on the basis of citizenship, not of national origin." *Id.* at 391. This inconsistency is explained by the fact that there are two sources for the right to discriminate under the FCN Treaty.

The issue the court declined to decide was the extent of the right to discriminate by virtue of Article VIII(1)'s "of their choice" provision. The cases the court cited offer conflicting views with respect to that Article VIII(1) question. *See Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. 1981) (holding that Article VIII(1)'s "of

dismissed the Title VII claim.<sup>193</sup>

### III. FORTINO v. QUASAR CO. UNDERMINES SUPREME COURT PRECEDENT, RELIES ON ERRONEOUS ASSUMPTIONS, AND PERMITS PARENT-RIGHT INVOCATION IN VIOLATION OF THE FCN TREATY, SUMITOMO AND PRINCIPLES OF CORPORATE LAW

Because the subsidiary in *Fortino* was able to invoke its parent's Article VIII(1) rights to defeat Title VII liability, the *Fortino* court came to the opposite result from the *Sumitomo* Court based upon virtually identical facts and arguments.<sup>194</sup> Moreover, in permitting the subsidiary to invoke its parent's Article VIII(1) rights, the court erroneously assumed that Article VIII(1) creates the right to assign despite the fact that no such right exists.<sup>195</sup> Furthermore, the court misidentified the source of the discriminatory conduct by ignoring the subsidiary's separate corporate existence.<sup>196</sup> Finally, the court applied a principle of parent-right invocation, which relies on inapposite theories and which violates the FCN Treaty's intent and the U.S. Supreme Court's *Sumitomo* decision.<sup>197</sup> The principle of parent-right invocation defies basic corporate law which treats separate corporations as distinct entities with discrete substantive rights.<sup>198</sup> The illogical consequences of this principle demonstrate that parent-right invocation should be abolished.<sup>199</sup>

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their choice" provision confers immunity from Title VII), *vacated on other grounds*, 457 U.S. 1128 (1982); *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1143-47 (3d Cir. 1988) (stating Article VIII(1)'s "of their choice" provision only allows discrimination based upon citizenship with no conflict with Title VII); *Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181, 1185-87 (E.D.N.Y. 1979) (holding that Article VIII(1) does not inhibit application of Title VII).

However, even apart from Article VIII(1)'s "of their choice" provision, a treaty right to discriminate on the basis of citizenship may be derived from the FCN Treaty's general construction which implicitly licenses citizenship discrimination by defining rights of "nationals" or "companies" "of their Party." See FCN Treaty, *supra* note 5, arts. I-XVIII, XX-XXIII, 4 U.S.T. 2063, 2066-77, 2078-80.

193. See *Fortino v. Quasar Co.*, 950 F.2d 389, 394 (7th Cir. 1991).

194. See *infra* text accompanying notes 200-15.

195. See *infra* text accompanying notes 216-47 (discussing forfeiture scheme and "right to hire" interpretation).

196. See *infra* text accompanying notes 248-57.

197. See *infra* text accompanying notes 263-304.

198. See *infra* text accompanying notes 322-31.

199. See *infra* text accompanying notes 322-31.

A. *Fortino Was Erroneously Decided*1. *Fortino Did Not Correctly Distinguish Sumitomo*

In *Fortino*, the court allowed Quasar to invoke its parent's Article VIII(1) rights only because it could distinguish the *Sumitomo* case. According to the court, "no contention" was made in *Sumitomo* that the parent had "dictated the subsidiary's discriminatory conduct."<sup>200</sup> Although the parties' contentions were not apparent from the Supreme Court's published *Sumitomo* opinion, Sumitomo had argued, as Quasar did, that its parent had dictated its discriminatory conduct.

When the *Fortino* court stated that Matsushita had dictated the discriminatory conduct, the court meant that Matsushita had, through its assignment system, caused the Title VII violation.<sup>201</sup> Therefore, when the court stated that the Japanese parent had "dictated the subsidiary's discriminatory conduct," the court meant that Matsushita assigned the executives to work for Quasar and that Matsushita fixed their salaries in accordance with Matsushita procedures which took into account their temporary stay in the United States and the temporary relocation of their families. Matsushita's assignment of the executives to work for Quasar "dictated" Quasar's conduct in exempting the executives from the reduction in force, and Matsushita's determination of their salaries "dictated" Quasar's conduct in paying them on a different basis from their U.S. employees.

In *Sumitomo*, the subsidiary also contended that its parent

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200. See *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991).

201. By "dictating the subsidiary's discriminatory conduct," the court did not simply mean that Matsushita sent and/or ordered Kenichi Nishikawa to implement the reorganization plan that led to the discriminatory conduct because this would not explain the discriminatory conduct which occurred prior to Nishikawa's arrival at Quasar such as the discriminatory payment of salaries and Quasar's reservation of management positions for Japanese executives. See *Fortino v. Quasar Co.*, 751 F. Supp. 1306, 1315 (N.D. Ill. 1990), *rev'd*, 950 F. 2d 389 (7th Cir. 1991). The district court noted that

Quasar accomplished its discrimination by reserving certain of its managerial positions for employees of Japanese national origin, by evaluating and paying Quasar's managerial employees of Japanese national origin on an entirely different basis from that used to evaluate and pay Quasar's managerial employees of American national origin, and by exempting all of its managerial employees of Japanese national origin from Quasar's RIF, all without lawful justification.

*Id.*

had dictated its discriminatory conduct. The discriminatory conduct in *Sumitomo* involved the hiring of a disproportionate number of Japanese personnel for management-level positions.<sup>202</sup> Although not explicit in the Supreme Court's published opinion,<sup>203</sup> in support of Sumitomo's motion to dismiss the complaint, Sumitomo alleged by affidavit that "many qualified Japanese nationals have been, and still are, assigned to Sumitomo by its parent company as 'treaty trader' personnel to serve in executive and other supervisory, specialist and professional positions."<sup>204</sup> Also not apparent from the published opinion were Sumitomo's repeated contentions to the Supreme Court, by brief and oral argument, that its Japanese executives were assigned by its parent company.<sup>205</sup> If the alleged assignments were relevant to the subsidiary's use of Article VIII(1), the Supreme Court would have remanded the case for that factual determination before denying the subsidiary Article VIII(1) protection.<sup>206</sup>

As a result, just as Matsushita's assignment of the Japanese executives to work for Quasar dictated Quasar's conduct in exempting them from the reduction in force, Sumitomo Japan's assignment of the Japanese executives to work for Sumitomo dictated Sumitomo's conduct in hiring them.<sup>207</sup> Therefore, in *Sumitomo* the subsidiary in fact contended that its parent had dictated its discriminatory conduct. Because the decision in

202. See *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176, 178 (1982).

203. See *id.* at 176-89.

204. Affidavit of J. Portis Hicks, *supra* note 52, at 74a.

205. *E.g.*, Brief for Sumitomo, *supra* note 4, at 8, 14; Oral Argument on Behalf of Sumitomo, *supra* note 6, at 26-27 (arguing that decision at issue is Japanese company's decision to send people to United States).

206. *E.g.*, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, — U.S. —, 112 S.Ct. 683, 694 (1992) (conditioning resolution of issue in case on remand and factual findings by district court); *Bishop v. Wood*, 426 U.S. 341, 354 (1976) (same); *Laduer v. United States*, 358 U.S. 169, 178-79 (1958) (same); see FED. R. CIV. P. 1, 52(a) (stating that findings of facts are to be made by district court). The Supreme Court should also have remanded the case to determine the "E" visa status of Sumitomo's Japanese executives if such status had been relevant to Article VIII(1) protection.

207. In fact, where the assignment dictates the subsidiary's act of hiring executives there is a stronger "dictation" at work than where the assignment dictates the subsidiary's act of exempting them from a reduction in force, because the subsidiary's act of hiring is an immediate effect of the parent's act of assigning or sending the executives, whereas the subsidiary's act of exempting them from a reduction in force does not necessarily follow from the parent's act of assignment.

*Fortino* relies on the absence of any contention in *Sumitomo* that the parent had dictated the subsidiary's discriminatory conduct the court failed to properly distinguish the *Sumitomo* case.

## 2. *Fortino* Failed to Acknowledge the Supreme Court's Rejection of the Right to Assign Defense

In addition to failing to acknowledge the subsidiary's contentions in *Sumitomo*, the Seventh Circuit also failed to acknowledge the Supreme Court's rejection of the defense based upon the threatened derogation of the parent's alleged right to assign. The Seventh Circuit gave the subsidiary Article VIII(1) protection on the same rationale which the Supreme Court had rejected.

*Sumitomo's* rationale for Article VIII(1) protection was based upon the parent's FCN Treaty right to control and manage its U.S. subsidiary by engaging Japanese executives and the fact that deprivation of Article VIII(1) protection would severely undercut its parent's treaty rights.<sup>208</sup> The Second Circuit agreed with *Sumitomo*. Finding it unlikely that the FCN Treaty would give Japanese companies the right to manage its U.S. subsidiaries and yet bar those same subsidiaries from invoking treaty protection, the court permitted the subsidiary to invoke Article VIII(1) as a "company of Japan."<sup>209</sup> With regard to this right to assign defense, however, the Supreme Court reversed the Second Circuit and precluded the U.S. subsidiary's use of Article VIII(1).<sup>210</sup>

The Supreme Court likely realized that the subsidiary's use of Article VIII(1) alone would not prevent the alleged derogation of the parent's treaty rights because any Title VII judgment against the subsidiary, not just those due to the denial of Article VIII(1) protection, would equally undercut the parent's treaty rights.<sup>211</sup> What was actually required, therefore, to pre-

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208. See *supra* notes 56-72 and accompanying text (discussing *Sumitomo's* right to assign defense).

209. See *supra* notes 73-83 and accompanying text (discussing Second Circuit's decision).

210. See *supra* text accompanying notes 84-97 (discussing Supreme Court's holding).

211. For example, the alleged derogation of the parent's rights would take place if the application of Article VIII(1) did not ultimately protect the subsidiary from the Title VII claim. See, e.g., *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (2d Cir.

vent the alleged derogation was not merely the invocation of Article VIII(1), but complete exemption from the Title VII claims. The Court was apparently not prepared to allow the collateral effect on the Japanese parent to justify complete exemption for Sumitomo, a U.S. company, from enforcement of U.S. anti-discrimination laws.<sup>212</sup> The Seventh Circuit permitted the subsidiary's use of Article VIII(1) because a judgment against the subsidiary purportedly would prevent the parent from sending its own executives to manage its U.S. subsidiary.<sup>213</sup> Holding otherwise would, according to the court, set the parent's treaty rights "at naught" or, in other words, would cause the derogation of the parent's treaty rights.<sup>214</sup> In short, the Supreme Court heard and rejected virtually the identical arguments which the Seventh Circuit subsequently adopted in permitting Article VIII(1) protection.<sup>215</sup>

### 3. Article VIII(1) Permits Japanese Companies to Place Executives "Of Their Choice" Only in Their U.S. Branches

#### a. *Sumitomo* Endorses an "Entity" Law Interpretation of Article VIII(1): The "Forfeiture" Scheme

The Second Circuit, by permitting the Japanese parent to ignore the corporate form of its U.S. subsidiary, endorsed a

1981) (permitting subsidiary to invoke Article VIII(1) without allowing exemption from Title VII), *vacated on other grounds*, 457 U.S. 176 (1982).

212. Assuming that liability of the subsidiary does in fact set the parent's treaty rights "at naught," not only would the imposition of Title VII liability undercut its parent's treaty rights, but so would any unfavorable civil or criminal remedy which, due to the nature of the sanction, would in any way restrict the subsidiary's autonomy in its employment practices. If infringement on the parent's right to assign was an acceptable basis for exempting U.S. companies from certain U.S. laws, the U.S. subsidiary would be completely exempt from U.S. age discrimination laws, child labor laws (if the parent wanted to assign child specialists), and all other employment discrimination laws because such employment regulations restrict the parent's freedom to assign. *See generally* Schlei & Grossman, *supra* note 102 (discussing U.S. employment discrimination laws).

213. *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991).

214. *Id.*

215. Only the method of invoking Article VIII(1) differed between *Sumitomo* and *Fortino*—the "company of Japan" method versus the parent-right invocation method. Although the methods differed, the rationale for both methods was the same—the threatened derogation of the parent's FCN Treaty rights by denial of Article VIII(1) protection. This rationale, however, did not persuade the Supreme Court to permit the subsidiary's use of Article VIII(1).

“piercing the corporate veil” or “enterprise” interpretation of the FCN Treaty.<sup>216</sup> Consistent with enterprise theory, the Second Circuit also held that the definitional section of the FCN Treaty, which defined the nationality of corporations by their place of incorporation, merely conferred legal status on the enterprise but did not govern its substantive rights under the FCN Treaty.<sup>217</sup> Because the legal status of enterprises was insignificant for determining substantive rights, the Second Circuit did not believe that a Japanese company would forfeit its Article VIII(1) right to staff its U.S. enterprise by operating through a U.S. subsidiary rather than a U.S. branch.<sup>218</sup>

By reversing the Second Circuit on the issue, the Supreme Court implicitly rejected the “piercing the corporate veil” and “enterprise” interpretation of the FCN Treaty and endorsed a traditional corporate “entity law” interpretation, thereby forcing Japanese companies to acknowledge their subsidiaries’ corporate forms.<sup>219</sup> The Court reinforced an entity law interpre-

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216. See Herman Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 233 n.11 (1956); *supra* notes 78-81 and accompanying text (reporting portion of opinion). See generally BLUMBERG, *supra* note 36, §§ 1.01-1.03.

217. See *supra* text accompanying notes 82-83 (reporting portion of opinion).

218. See *supra* text accompanying notes 82-83 (reporting portion of opinion). The Second Circuit was responding to the opinion by the district court first stated which believed that a Japanese company would forfeit its identity by operating as a U.S. subsidiary. See *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 510 (S.D.N.Y. 1979) (concurring with decision in *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 823 (N.D. Cal. 1957), and stating that Japanese company surrendered its Japanese identity with respect to activities of its U.S. subsidiary, the Japanese identity otherwise giving company Article VIII(1) rights, by operating through U.S. subsidiary), *aff'd on other grounds*, 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

219. See, e.g., *Avigliano*, 473 F. Supp. at 510 (concurring in decision in *R.P. Oldham Co.*, 152 F. Supp. at 823); see also *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 369 (5th Cir. 1981) (Reavley, J., dissenting), *vacated on other grounds*, 457 U.S. 1128 (1982).

A combination of letters from the U.S. Department of State to the EEOC interpreting Article VIII(1) also suggests that Japanese companies may not ignore the legal form of their U.S. investment. A 1978 letter answered a number of questions. Letter from Lee R. Marks, State Department Deputy Legal Advisor, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, dated October 17, 1978, Joint Appendix, *supra* note 52, at 94a. In answering the first question, the State Department advisor stated that Article VIII(1) permits Japanese companies to fill executive positions within their U.S. enterprises with Japanese nationals admitted as “E” visa treaty traders. *Id.* at 95a. The second question asked whether “the situation is different if the company doing business in the United States is not incorporated in the United States” *Id.* The advisor answered in the negative. *Id.* at 96a. However, in a subsequent letter, the State Department reneged on the answer to



tation by holding a company's juridical form to be the sole factor in determining the applicability of Article VIII(1).<sup>220</sup> The Court held that the definitional section of the FCN treaty defined both the legal status of enterprises *and* their substantive rights.<sup>221</sup> As an application of traditional corporate entity theory, under the "forfeiture" interpretation of the FCN Treaty, Japanese companies forfeit their Article VIII(1) rights by operating through a U.S. subsidiary.<sup>222</sup> Only Japanese companies choosing to operate through U.S. branches retain their Article VIII(1) rights.<sup>223</sup>

Consistent with this forfeiture scheme, if we assume that Article VIII(1) contains a right to assign executives "of their choice," then Japanese companies would forfeit that right when operating through a U.S. subsidiary.<sup>224</sup> Therefore, Japanese companies could only assign executives "of their choice" to their U.S. branches.<sup>225</sup> To put it another way, when Japa-

question two, stating that U.S.-incorporated subsidiaries were not covered by Article VIII(1). Letter from James R. Atwood, Deputy Legal Adviser, U.S. Department of State, to Lutz Alexander Prager, Assistant General Counsel, Equal Employment Opportunity Commission, dated Sept. 11, 1979, Joint Appendix, *supra* note 52, at 307a; see *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176, 185 n.10 (1982). These letters interpret the FCN Treaty as precluding Japanese companies from ignoring the corporate form of their U.S. subsidiaries.

220. See generally BLUMBERG, *supra* note 32, at Preface (discussing entity law and enterprise law). The place-of-incorporation test for determining the citizenship of corporations is consistent with the traditional rules of corporate law that treats corporations and entities distinct from their shareholders. See *Avigliano*, 473 F. Supp. at 509.

221. See *Sumitomo*, 457 U.S. 176 (1982).

222. See *Spiess*, 643 F.2d at 369 (Reavley, J., dissenting) (stating that if Japanese company chooses to cross bright line between two forms of business association in order to gain all benefits of our legal system, it is reasonable that they accept legal consequences); *Avigliano*, 473 F. Supp. at 510 (agreeing with decision in *R.P. Oldham Co.*, 152 F. Supp. at 823, and stating that Japanese company surrendered its Japanese identity with respect to activities of its U.S. subsidiary, Japanese identity otherwise giving company Article VIII(1) rights, by operating through U.S. subsidiary).

223. See *Sumitomo*, 457 U.S. at 182 (stating that "[c]learly, Article VIII(1) only applies to companies of one of the treaty countries operating in the other country").

224. See, e.g., *Spiess v. C. Itoh & Co.*, 643 F.2d 353, 369, *vacated on other grounds*, 457 U.S. 1128 (1982) (Reavley, J., dissenting); *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 510 (S.D.N.Y. 1979) (agreeing with decision in *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 823 (N.D. Cal. 1957)), *aff'd on other grounds*, 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

225. See, e.g., *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548, 1552, 1562-63 (E.D.N.Y. 1990) (permitting Article VIII(1)'s license to discriminate on basis of citizenship pursuant to "of their choice" provision to apply to assignments made by head office in Japan to U.S. branch).

nese companies assign executives to manage their U.S. subsidiaries, the assignment is not made pursuant to Article VIII(1),<sup>226</sup> and Article VIII(1)'s "of their choice" provision, which may permit discrimination in violation of Title VII,<sup>227</sup> would never attach. Under the forfeiture scheme, only an assignment made from a Japanese company to a U.S. branch would be entitled to Article VIII(1) protection.<sup>228</sup>

The practical significance of the Article VIII(1) forfeiture is to force a Japanese company to acknowledge the form of its U.S. investment by limiting the number of executives a Japanese company can assign to its U.S. subsidiary. Japanese companies that retain their Article VIII(1) right to assign executives "of their choice" can place a large number of Japanese executives in their U.S. branches depending on the extent of permissible discretion under the "of their choice" provision.<sup>229</sup> On the other hand, a Japanese company which has forfeited its Article VIII(1) rights by incorporating a U.S. subsidiary could only place a limited number of key executives to manage its U.S. enterprise. The actual number of permissible executives would be reflected by the subsidiary's need to employ such executives, and the legal medium allowing their employment would be the traditional Title VII defenses.<sup>230</sup> The Japanese

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226. Even without Article VIII(1) protection, Japanese companies may still assign executives and the executives may enter and remain in the United States if the executives satisfy the requirements for the issuance of E-visas. See 22 C.F.R. § 41.51 (1991) (stating requirements).

227. See, e.g., *Spieß*, 643 F.2d 353 (holding that Article VIII(1) provides blanket immunity from Title VII claims). In addition, because the assignment is not made pursuant to any treaty right, the FCN Treaty right to discriminate on the basis of citizenship, derived from the general construction of the FCN Treaty, also does not attach. E.g., *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (permitting discrimination on basis of citizenship otherwise violating Title VII because it has effect of discrimination on basis of national origin because of FCN Treaty right to discriminate on basis of citizenship derived from general construction of FCN Treaty); see *supra* note 192 (discussing right to discriminate on basis of citizenship apart from Article VIII(1)'s "of their choice" provision).

228. See, e.g., *Adames*, 751 F. Supp. at 1552, 1562-63 (permitting Article VIII(1)'s license to discriminate on basis of citizenship pursuant to "of their choice" provision to apply to assignments made by head office in Japan to U.S. branch); cf. *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984).

229. See *supra* note 40 (discussing conflict in circuits over extent of right to discriminate under Article VIII(1)'s "of their choice" provision).

230. See *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176, 189 n.19 (1982) (stating with regard to Title VII defenses that "[t]here can be little doubt that some

company's forfeiture of its FCN treaty rights is just, given the company's voluntary choice to gain the advantages of establishing a U.S. subsidiary rather than a U.S. branch, including limited liability and immunity from U.S. courts' exercise of jurisdiction.<sup>231</sup>

b. Article VIII(1) Creates No Right to Assign or Send, But Only the Right to Hire, Employ, or Use Japanese Executives for Their Branches "Within the Territories of the United States"

Although the forfeiture interpretation would serve Article VIII(1)'s purpose of forcing Japanese companies to acknowledge the form of their U.S. investment by giving the companies the right to place executives "of their choice" only in their U.S. branches, a more accurate interpretation of Article VIII(1), which has the same effect as the forfeiture scheme, denies the existence of a right to assign. Because a non-U.S. company and its U.S. branch are the same company, an Article VIII(1) right permitting Japanese companies to hire, employ or use executives "of their choice" would be sufficient to give the companies the right to place such executives in their U.S. branches.<sup>232</sup> On the other hand, because non-U.S. companies and their U.S. subsidiaries are separate and distinct entities, an Article VIII(1) right to hire, employ or use executives "of their choice" would not give Japanese companies the right to place such executives in their U.S. subsidiaries.<sup>233</sup> In order for Japa-

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positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country").

231. See *Spiess v. C. Itoh & Co.*, 643 F.2d 353, 369 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982) (Reavley, J., dissenting); *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 510 (S.D.N.Y. 1979), *aff'd on other grounds* 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982); *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 823 (N.D. Cal. 1957).

232. See *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548, 1563 (E.D.N.Y. 1990) (stating that "the treaty allows the [Japanese company] to employ managers in its New York branch office on the basis of their Japanese citizenship"); *MacNamara*, 863 F.2d 1135; *Wickes*, 745 F.2d 363; *cf.* *Couillard v. Bank of New Mexico*, 548 P.2d 459, 463 (N.M. 1976) (holding that "employees of the branch are employees of the parent bank [because] [t]he action or inaction of the branch bank is the action or inaction of the parent bank").

233. See *e.g.*, *Spiess v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1, 8 (S.D. Tex. 1979) (stating that right of Japanese parent to hire executives of their choice would not

nese companies to place executives "of their choice" in U.S. subsidiaries, the companies need a right to send or assign such executives.<sup>234</sup> However, Article VIII(1) does not contain a right to assign or send. Rather, the Article VIII(1) right "to engage" executive personnel is the right of Japanese companies to "hire," "employ," or "use" within the territories of the United States executive personnel of their choice. Overwhelming judicial and legislative support exists for the proposition that "to engage" means to hire, employ, or use, not to assign or send.<sup>235</sup> Moreover, by the English definition, "to engage" means "to obtain or contract for the services of: employ."<sup>236</sup> Furthermore, the Japanese term in the Japanese ver-

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protect hiring practices of subsidiary), *rev'd*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

234. *E.g.*, *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991).

235. *See* S. EXEC. REP. No. 5, 82.d Cong., 1st Sess. at 3-4 (1953) (explaining that Article VIII(1) "states that companies doing business in the territory of the other party may hire" executive personnel of their choice), *reprinted in part in* Brief of C. Itoh as *Amicus Curiae*, *supra* note 4, at 24; Letter from Lee R. Marks, State Department Deputy Legal Advisor, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, dated October 17, 1978, Joint Appendix, *supra* note 52, at 94a-95a (stating that "Article VIII(1) of the [U.S.-Japan] Treaty gives nationals and companies of each Party the right to employ, in the territory of the other, executive personnel . . . of their choice. This provision was intended to ensure that U.S. companies operating in the Japan could hire U.S. personnel for critical positions"); Testimony of Senator Hickenlooper, Testimony before the Subcommittee of the Senate Committee on Foreign Relations at 45, 82d Cong., 2d Sess., on Treaty of Friendship, Commerce, and Navigation with Colombia, Israel, Ethiopia, Italy, Denmark, and Germany (May 9, 1952) (stating that Article VIII(1) attempts to permit "the nationals of either party to use their own technical and professional experts within the territory of the other"); Diplomatic Note from United States High Commissioner for Germany to the German Federal Ministry of Foreign Affairs (Dec. 15, 1957), *reprinted in* Joint Appendix, *supra* note 52, at 255a (stating that under Article VIII(1) of U.S.-Germany FCN Treaty, the right to engage is right "to have the services of"); *cf.* *Lemnitzer v. Philippine Air Lines*, 783 F. Supp. 1238, 1242-44 (N.D. Cal. 1991) (holding that Article VIII(1) of Air Transport Agreement between United States and Republic of Philippines providing that airlines of one Party are permitted to "bring in and maintain" in the territory of the other Party certain managerial and skilled personnel was intended to be analogous to and function the same as FCN Treaties); *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1140 (3rd Cir. 1988) (to hire and discharge); *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552, 558 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982); *Spiess v. C. Itoh & Co.*, 643 F.2d 353, 355 (5th Cir. 1981) (to hire), *rev'd on other grounds*, 457 U.S. 1128 (1982); *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548, 1563 (E.D.N.Y. 1990) (employ); *Wickes v. Olympic Airways*, 745 F.2d 363, 368-69 (6th Cir. 1984) (to hire); *Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181, 1185 (E.D.N.Y. 1979) (to hire).

236. *See MacNamara*, 863 F.2d at 1141 (quoting WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 433 (1984) and holding that Article VIII(1)'s right "to en-

sion of the FCN Treaty which is the counterpart to the word "engage" in the English version means to "use" or "make use of."<sup>237</sup>

The only court to consider this issue was the U.S. District Court for the Southern District of Texas in *Spiess*.<sup>238</sup> Before the case reached the Supreme Court, C. Itoh attempted to avoid Title VII liability by invoking its parent's alleged right to "staff" its U.S. subsidiary with executive personnel "of its choice."<sup>239</sup> In response to the subsidiary's "right to staff" argument, the district court held that Article VIII(1) creates no right to staff but only the right to hire.<sup>240</sup> Therefore, invoking its parent's Article VIII(1) rights would only protect its parent's own act of hiring and would not shield the subsidiary's independent hiring practices.<sup>241</sup>

In *Fortino*, the court suggested that the issuance of "E" visas to the subsidiary's executives supported the parent's exercise of its right to assign.<sup>242</sup> However, nothing in the INA or its implementing State Department regulations governing the issuance "E" visas requires that an applicant be an employee of, or be assigned by, a Japanese company.<sup>243</sup> Rather than

gage" includes right to fire); see also BLACK'S LAW DICTIONARY 528 (6th ed. 1990) (defining "[e]ngage" as, among other things, "[t]o employ").

237. See Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VIII(1), 4 U.S.T. 2085, 2097 (Japanese version); KENNETH G. HENSHALL, A GUIDE TO REMEMBERING JAPANESE CHARACTERS 60 (2d ed. 1989) (defining symbol *mochiiru* as "use"); KENKYUsha's LIGHTHOUSE JAPANESE-ENGLISH DICTIONARY 1611 (1984) (defining symbol as "use" or "make use of"); Vienna Convention of the Law of Treaties, opened for signature May 23, 1969, art. 33(1), 25 I.L.M. 543, 564 (1986) (stating that "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language").

238. 469 F. Supp 1 (S.D. Tex. 1979), *rev'd on other grounds*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

239. *Id.* at 8.

240. *Id.*

241. *Id.* Under the *Spiess* holding, a U.S. branch would be protected by the Japanese parent's right to hire because the parent's act of hiring is also the branch's act of hiring. Cf. *Couillard v. Bank of New Mexico*, 548 P.2d 459, 463 (N.M. 1976) (holding that "employees of the branch are employees of the parent bank [because] [t]he action or inaction of the branch bank is the action or inaction of the parent bank").

242. See *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991) (stating that the "E" visa status of Japanese executives further confirmed the parent's propriety in assigning the executives).

243. See 8 U.S.C. § 1101(a)(15)(E) (1988) (amended 1991); 22 C.F.R. § 41.51 (1991). The only visa which would require an applicant to previously be employed by a Japanese company immediately prior to entry is the L-1 "intra-company trans-

demonstrating the exercise of a right to assign, the "E" visa status of an executive demonstrates only proper entry into and employment in the United States.<sup>244</sup>

As a result, a careful reading of Article VIII(1) provides that "companies of [Japan] . . . shall be permitted to [hire, employ, or use], within the territories of the [United States], . . . executive personnel . . . of their choice."<sup>245</sup> In light of *Sumitomo's* entity law interpretation of Article VIII(1), the only time a company of Japan could be "within the territories of the United States" in order to hire, employ or use executives of its choice is when the Japanese company operates through a U.S. branch. Under *Sumitomo*, only a Japanese company operating through a U.S. branch can assert Article VIII(1)'s right to hire, employ or use executive personnel of their choice in response to a Title VII claim.<sup>246</sup> Consequently, when Japanese companies assign executives to their U.S. subsidiaries, the assignments are not made pursuant to Article VIII(1)'s right to hire,

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ferree" visa. See 8 U.S.C. § 1101(a)(15)(L) (1988) (amended 1991); 22 C.F.R. § 41.54 (1991).

Whatever the connection between Article VIII(1) of the FCN Treaty and the issuance of "E" visas may be, it is no more or less than the connection between Article VIII(1) and the issuance of "L"-1, "H"-1 visas, each of which require that the visa applicant perform executive or otherwise skilled duties. See 8 U.S.C. § 1101(a)(15)(H), (L) (1988) (amended 1991); 22 C.F.R. § 41.54 (1991). Indeed, the INA section for the issuance of "E" visa's reference to the FCN Treaty refers not to Article VIII(1), but rather to Article I(1) of the FCN Treaty. Compare 8 U.S.C. § 1101(a)(15)(E) (1988) (amended 1991) with FCN Treaty, *supra* note 5, art. I(1), at 2066.

244. See *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 513 n.14 (S.D.N.Y. 1979) (stating that "[t]he State Department guidelines are promulgated for the purpose of determining an individual's immigration status"), *aff'd on other grounds*, 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982); State Dept. telegram No. 089624 to Japanese Posts ¶ 3,9, *reprinted in* Brief of United States as *Amicus Curiae*, Appendix A, at 2a, 6a-7a, *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24) (describing requirement that applicant is "destined" for proper position); 22 C.F.R. § 41.51 (1991).

245. FCN Treaty, *supra* note 5, art. VIII(1), 4 U.S.T. 2063, 2070.

246. See *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176, 182 (stating that "[c]learly, Article VIII(1) only applies to companies of one of the treaty countries operating in the other country"); *e.g.*, *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548, 1562-63 (E.D.N.Y. 1990) (permitting Japanese company operating through branch to invoke Article VIII(1) right to hire). See generally Gerald D. Silver, Note, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "Of Their Choice,"* 57 *FORDHAM L. REV.* 765 (1989) (discussing application of Article VIII(1) to non-U.S. companies operating through U.S. branches).

employ or use and therefore are not protected by Article VIII(1)'s "of their choice" provision. The practical import of the "right to hire" interpretation of Article VIII(1) is the same as that under the forfeiture scheme—it forces Japanese companies to acknowledge the corporate form of their U.S. investment by limiting the number of Japanese executives the company can place in their U.S. subsidiaries.<sup>247</sup>

#### 4. *Fortino* Failed to Acknowledge the True Nature of the Discriminatory Conduct

In reversing the district court on the Title VII claim, the *Fortino* court relied primarily on the notion that the parent's proper exercise of its FCN Treaty rights was the basis for the Title VII violation.<sup>248</sup> The court opined that the Title VII violation resulted from Matsushita's assignment of the executives to Quasar and Matsushita's determination of their salaries. The court's premise is erroneous because it ignores the subsidiary's separate corporate existence.

As previously noted, a wholly-owned U.S. subsidiary is a separate legal entity from its parent.<sup>249</sup> As a distinct corporate "person," the subsidiary always acts as an independent entity, taking full responsibility for its actions.<sup>250</sup> Therefore, regardless of whether the parent had the right to assign the executives employed by the subsidiary, the subsidiary's own actions are those which are subject to scrutiny.<sup>251</sup>

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247. See *Sumitomo*, 457 U.S. at 189 n.19 (stating with regards to defenses to Title VII claims that "[t]here can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country").

248. See *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991) (holding that "[t]he exercise of a treaty right may not be made the basis for inferring a violation of Title VII").

249. See *supra* text accompanying note 32.

250. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (4 Wheat. 1819) (stating that "[a]mong the most important [properties of corporations] are immortality, and, if the expression may be allowed, individuality: properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual"); HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS* §§ 79-80 (3d ed. 1983) (describing corporation as independent "person" which acts as natural persons do); e.g., Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141 (1982) (discussing corporation's criminal responsibility).

251. See, e.g., *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176, 179 (1982)

Applying this basic corporate principle to *Fortino*, the actual basis for the Title VII violation was Quasar's independent actions, not those of Matsushita. The discriminatory conduct was not Matsushita's assignment of its executives to Quasar, but Quasar's independent acts of not only hiring all the executives whom the parent wished to assign but also exempting them from the RIF.<sup>252</sup> The discriminatory conduct was not Matsushita's fixing the Japanese executives' salaries, but Quasar's independent act of paying salaries on a discriminatory basis.<sup>253</sup>

When a subsidiary is sued because of the employment of Japanese executives assigned by a Japanese parent, the subsidiary discriminates by the implementation of an in-house policy to hire and employ anyone the parent wishes to assign.<sup>254</sup> This facially neutral in-house policy may have a discriminatory impact if, for example, the parent assigns only Japanese executives to its U.S. subsidiary.<sup>255</sup> If the neutral hiring practice has

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(describing employment practices as "[the subsidiary's] employment practices" despite arguments in Brief that parent had exercised its employment practices pursuant to right to engage executives in U.S. subsidiary); *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 510-11 n.8 (S.D.N.Y. 1979) (concurring in opinion in *Spies v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1, 8 (S.D. Tex. 1979) that despite U.S. subsidiary's contention that its Japanese parent had right to staff U.S. subsidiary by sending Japanese executives employment practices at issue are subsidiary's "own employment practices," not those of parent), *rev'd on other grounds*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982)).

252. See *Fortino v. Quasar Co.*, 751 F. Supp. 1306, 1315 (N.D. Ill. 1990) (reciting bases for Title VII violation including *Quasar's* reserving positions for Japanese executives and excluding them from the RIF), *rev'd* 950 F.2d 389 (7th Cir. 1991).

253. See *id.*

254. *E.g.*, *Avigliano v. Sumitomo Shoji Am., Inc.*, 103 F.R.D. 562, 579 (S.D.N.Y. 1984) (describing Sumitomo's contention that its hiring practices were dictated by its Japanese parent), *on remand from* 457 U.S. 176 (1982); Telephone Interview with Professor Tsurumi, *supra* note 31 (stating that U.S. subsidiaries hire all expatriates parent assigns). In *Avigliano*, the U.S. subsidiary, Sumitomo, was asked by interrogatory whether it utilized any selection criteria by which it determined whom it hired or promoted. *Avigliano*, 103 F.R.D. at 579. In reply, Sumitomo stated that "the determination of whom would be employed in [executive, managerial and/or sales] positions was made by [Sumitomo's] parent . . . in Japan." *Id.*

255. Telephone Interview with Professor Tsurumi, *supra* note 31 (stating that rotating "expatriate" executives in U.S. subsidiaries are all Japanese because they are sent from Japan); see, *e.g.*, *Avigliano*, 103 F.R.D. at 569 (reporting that between 40% and 45% of entire staff, managerial and non-managerial, of U.S. subsidiary was comprised of "rotating staff" exclusively Japanese executives assigned from Japan during at least 1974-77); EEOC Decision No. 86-2, 40 Fair Empl. Prac. Cas. (BNA) 1879 (Nov. 22, 1985) (stating that Japanese company assigned rotational executives to U.S. subsidiary, all of rotational employees being Japanese males).



such an effect, the subsidiary must solve the problem either by hiring more non-Japanese executives, or by declining to hire all of the executives whom its parent wishes to assign.<sup>256</sup>

The *Fortino* court justified Matsushita's determination of the salaries of the Quasar's executives in part because the executives retained their long-term status as employees of Matsushita.<sup>257</sup> However, Quasar should have paid salaries to its executives on a non-discriminatory basis regardless of whether its Japanese executives had second jobs with Matsushita. If Matsushita wanted to compensate the executives for relocating their families while on temporary assignment to the United States, then Matsushita should have paid them additional salaries from Matsushita's own Japanese-earned revenues. However, the salaries that the Japanese executives received from Quasar were revenues generated by a U.S. company. Therefore, the salaries from Quasar's revenues should have been paid on a non-discriminatory basis.

Contrary to the Seventh Circuit's opinion, the Title VII violation was based upon Quasar's own conduct, not upon the parent's exercise of its FCN Treaty rights. As an application of basic corporate law, a parent's exercise of a treaty right does not excuse the subsidiary's own discriminatory hiring, firing and salary functions. Accordingly, Matsushita's rotation program does not excuse Quasar's Title VII violation.

##### 5. The Seventh Circuit's Assumption Regarding the "E" Visa Status of Quasar's Executives Is Erroneous

In *Fortino*, the court also assumed that discrimination in favor of Japanese executives who were given a special "E" visa status by virtue of the FCN Treaty and its implementing regulations does not amount to a violation of Title VII.<sup>258</sup> However, discrimination in favor of Japanese executives violates Ti-

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256. See 42 U.S.C.A. § 2000e-2(k) (Supp. 1992) (codifying disparate impact discrimination); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971); see *supra* note 3.

257. See *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991) (stating that assigned executives retain their status as employees of parent).

258. See *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991) (stating that "discrimination in favor of foreign executives given a special status by virtue of a treaty and its implementing regulations is not equivalent to discrimination on the basis of national origin").

tle VII regardless of their "E" visa status.<sup>259</sup> When reviewing visa requests, the State Department does so on an individual basis only and does not study the employment practices of the individual's prospective U.S. employer.<sup>260</sup> Therefore, the State Department's processing of visa applicants is not a substitute for Title VII enforcement procedures<sup>261</sup> and the "E" visa status of a company's employees does not exempt the company *itself* from Title VII review. In short, an "E" visa holder can not act as a "portable conduit" of rights flowing to the companies of his or her employment.<sup>262</sup>

B. *None of the Three Theories of Parent-Right Invocation Support the Court's Decision in Fortino*

In holding that U.S. subsidiaries can invoke their parent's Article VIII(1) rights, the *Fortino* opinion did not clearly articulate the theory of parent-right invocation on which the court relied.<sup>263</sup> The court only cited, as its single supporting source, one commentator who advocates the three theories of parent-right invocation.<sup>264</sup> However, none of the theories of parent-right invocation supports the Seventh Circuit's decision in *Fortino*. Moreover, each theory of parent-right invocation relies upon inapposite theories.

1. Third-Party Standing Does Not Support Quasar's Right to Invoke Matsushita's Article VIII(1) Rights

In permitting the subsidiary to assert its parent's rights, the Seventh Circuit most likely relied upon third-party standing theory of parent-right invocation. The court permitted Quasar to assert Matsushita's FCN Treaty rights because pre-

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259. See Brief for Avigliano at 28-30, *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24); see *supra* note 3 (noting that discrimination in favor of Japanese executives violates Title VII).

260. See Letter of Lee R. Marks, State Department Deputy Legal Advisor, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, dated October 17, 1978, *reprinted in* Joint Appendix to Briefs, *supra* note 52, at 96a; Brief for Avigliano, *supra* note 259, at 29.

261. Brief for Avigliano, *supra* note 259, at 28.

262. See Brief of Equal Employment Opportunity Commission as *Amicus Curiae* at 8, *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (Nos. 91-1123, 91-1197, 91-1564).

263. See *Fortino*, 950 F.2d at 393.

264. See *id.* at 393. The court cited only the authority contained in Ishizuka, Note, *supra* note 98.

cluding Quasar from doing so would prevent Matsushita from sending executives to manage Quasar.<sup>265</sup> In other words, Matsushita's right to manage Quasar would have been materially impaired if Quasar could not invoke its parent's FCN Treaty rights.

Even assuming that third-party standing theory of parent-right invocation is correct in stating that impairment of the third party's interests is sufficient to obtain third-party standing,<sup>266</sup> the theory still fails to support the Seventh Circuit's conclusion in *Fortino* because a judgment which forbids the subsidiary from invoking Article VIII(1) does not necessarily prevent Japanese companies from sending their own executives to manage their U.S. subsidiaries.<sup>267</sup> Japanese companies have continued to use rotation programs since 1982 when the Supreme Court took Article VIII(1) away from U.S. subsidiaries.<sup>268</sup> Moreover, Japanese companies have been successful in

265. See *Fortino*, 950 F.2d at 393 (stating that "[a] judgement that forbids Quasar to give preferential treatment to the expatriate executives that its parent sends . . . would prevent Matsushita from sending its own executives to manage Quasar").

266. According to third-party standing theory of parent-right invocation, the impairment of the third party's rights is the only element required for a subsidiary to invoke its parent's FCN treaty rights. See Ishizuka, Note, *supra* note 98, at 151 n.87 (stating that "[t]he Supreme Court has stated that evidence of indirect impairment of third parties' constitutional rights . . . and the 'impact of the litigation on the third-party interests . . . is sufficient to obtain standing'" (citations omitted)); see *supra* text accompanying notes 114-20 (discussing third-party standing theory of parent-right invocation).

267. See *infra* notes 268-69 and accompanying text (citing sources).

268. Telephone Interview with Professor Tsurumi, *supra* note 38 (stating that Japanese companies have continued to rotate "expatriate" executives over the past ten years and that the decision in *Sumitomo* "does not necessarily prevent rotating expatriates to [U.S.] subsidiaries"); e.g., *Fortino v. Quasar Co.*, 950 F.2d 389(7th Cir. 1991) (reporting assignment of Japanese executives); *U.S. Workers Tell House Subcommittee of Discrimination by Japanese-Owned Firms*, 154 Daily Lab. Rep. A-11 (August 9, 1991) (reporting statement by U.S. executive of U.S. subsidiary of Japanese company that subsidiary is used as a "rotating ground" for executives of parent). Numerous discrimination charges against Japanese-owned subsidiaries in the United States prompted a study done by the Equal Employment Opportunity Commission on Japanese-owned companies. See *Congressional Testimony by EEOC Chairman and OFCCP Deputy Director on Discrimination by Japanese-Owned Companies*, 142 Daily Lab. Rep. D-1 (1991) [hereinafter *EEOC Study*]. The study reported the continued existence of Japanese executives in management level positions in the subsidiaries. See *id.* In the study, the EEOC reported that with respect to officials and managers, the employment participation of Asians or Pacific Islanders was significantly higher in Japanese-owned companies during the 1980's. *Id.* In 1989, for instance, it was 22.7 percent in such companies, compared to 2.1 percent in other foreign-owned companies and 1.8 percent in all companies. *Id.* Most, if not all, the Asian executives of these Japanese-

managing their subsidiaries since that time.<sup>269</sup>

However, contrary to the parent-right invocation theory, material impairment of the third party's rights alone is insufficient for third-party standing.<sup>270</sup> Absent a special relationship between the litigant and the third party,<sup>271</sup> third-party standing requires that the third party be sufficiently unable to assert his or her own rights.<sup>272</sup> However, when a U.S. subsidiary seeks to

owned companies are Japanese executives on expatriate programs. Telephone Interview with Professor Tsurumi, *supra* note 31.

Japanese companies have continued their rotation programs through their subsidiaries despite the subsidiaries' assumption that Article VIII(1) was not available to them. See Interview with Lewis M. Steel, *supra* note 97 (expressing his surprise over the *Fortino* decision because lawyers have looked at the problem of whether Article VIII(1) was available to subsidiaries since the *Sumitomo* decision and "had gotten nowhere"). Indeed, the Sumitomo enterprise, after the Title VII suit against them, did not discontinue their rotation programs, but rather dealt with their discrimination problem by promoting and hiring more non-Japanese personnel. Telephone Interview with Professor Tsurumi, *supra* note 31.

269. See *EEOC Study*, *supra* note 269 (reporting that as of 1989, Japanese owned companies had a 100 percent increase in number of employees compared to approximately 50 percent (350,000/530,000) increase for other non-U.S. owned businesses, much of increase taking place despite recession); Silver, *supra* note 246, at 765 n.2 (citing Johnson, *Japanese-Style Management in America*, CAL. MGMT. REV. 34-35 (1988) (stating that since 1984, Japan has made more investments in the United States than any other nation); *Bias News*, *supra* note 3 (reporting that "Japanese companies continue to expand in the United States"); e.g., FIRM RESUME, MATSUSHITA ELECTRIC CORPORATION OF AMERICA 16-17 (1991) (reporting company's tremendous growth, including growth since 1982); MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., 1991 ANNUAL REPORT 7 (1991) (reporting Matsushita's success in the United States).

270. See *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991) (outlining elements for third-party standing); *Powers v. Ohio*, 111 S. Ct. 1364, 1370-71 (1991) (same); *Warth v. Seldin*, 422 U.S. 490, 510 (1975) (same). If material impairment was sufficient to confer third-party standing, then all subsidiary corporations could assert the rights of their parents because any judgment against the subsidiary would materially impair the parent's investment in its subsidiary, since the subsidiary may lose money in the judgment. The widespread application of this principle results in illogical consequences. See *infra* text accompanying notes 322-31.

271. A relationship based upon share ownership most likely fails to rise to a level that the Supreme Court would consider special. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (doctor-married persons); *Singleton v. Wulff*, 428 U.S. 106 (1976) (doctor-patient); *United States Dep't of Labor v. Triplett*, 494 U.S. 715 (1990) (attorney-client). Non-special relationships have been the basis for third-party standing if the very existence of the relationship is at stake. E.g., *Craig v. Boren*, 429 U.S. 190 (1976).

272. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.3.4 (1989); see, e.g., *Edmondson*, 111 S. Ct. at 2087 (permitting party to civil action to invoke equal protection rights of potential jurors not to be excluded from jury panel solely on basis of race because "the barrier to a suit by an excluded juror are daunting") (quoting *Powers*, 111 S. Ct. at 1373); *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990) (denying "next friend" standing due to lack of showing of inability); *Warth*, 422 U.S. at 510 (preclud-

invoke the FCN Treaty rights of its non-U.S. parent in defense of a Title VII claim, nothing prevents the parent from raising its own rights except the company's reluctance to subject itself to U.S. jurisdiction. For example, in *Sumitomo*, Sumitomo Japan did not intervene to raise its own treaty rights because it did not want to subject itself to federal jurisdiction.<sup>273</sup>

As a matter of equity, courts considering the subsidiary's standing to assert its parent's Article VIII(1) rights should invariably require the parent to be sufficiently unable to assert its own rights. In Title VII suits against U.S. subsidiaries of Japanese companies, plaintiffs will attempt to join parent companies as party defendants, but will generally fail because the parent is beyond the reach of U.S. courts. Particularly in cases such as *Fortino* where the treaty defense is not raised until the case is on appeal,<sup>274</sup> it is unfair to permit the subsidiary to in-

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ing third party standing because "there is no indication that [third parties] are disabled from asserting their own rights in a proper case"); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (stating that third party would be "denied a forum in which to assert their own rights"); *NAACP v. Alabama* 357 U.S. 449, 459 (1958); *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). Even in cases traditionally standing for the proposition that third-party standing may be found on a special relationship, the third-party was sufficiently unable to assert her own rights. *E.g.*, *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (stating that obstacles exist to womans' ability to assert her own right to abortions because of imminent mootness of any woman's claim and because of desire to protect privacy).

The Supreme Court has excused the requirement that the third party be sufficiently unable to assert his or her own rights when it is apparent that the dismissal of the case would only result in immediate reinstatement of the suit by the third party. *See, e.g.*, *Craig*, 429 U.S. at 193-94 (permitting third-party standing because "a decision by [the Court] to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence").

273. *See Lewis & Ottley, supra* note 98, at 68 n.157.

274. The subsidiary's invocation of its parent's right was particularly inequitable in *Fortino* because the court permitted the Quasar to raise the treaty argument for the first time on appeal, when it was too late for plaintiffs to join Matsushita as a party defendant. *Fortino*, 950 F.2d at 391. In order for plaintiffs to have joined Matsushita as a party defendant, plaintiffs would have had to show that Matsushita exercised control over Quasar's employment practices, or perhaps that Matsushita had dictated Quasar's discriminatory conduct. *See generally* SCHLEI & GROSSMAN, *supra* note 102, at 1000-03. At the same time, a necessary component of Quasar's treaty argument was that its parent had dictated its discriminatory conduct. *See Fortino*, 950 F.2d at 393. Therefore, had Quasar raised the treaty argument in the district court, it may have exposed its parent to liability in the suit. As a tactical matter, Quasar most likely deliberately failed to raise the treaty argument to protect its parent from liability in the suit. Evidencing the deliberate failure is the fact that Quasar had developed testi-

voke its parent's treaty rights without a sufficient showing of the parent's inability to assert its own rights because the parent, by failing to assert its own rights, shields itself from liability in the case. Absent the parent's inability, the subsidiary should not be permitted to invoke its parent's Article VIII(1) rights—if the parent joins the lawsuit, the subsidiary may be permitted to do so.<sup>275</sup>

## 2. Integration Does Not Support Quasar's Right to Invoke Matsushita's Article VIII(1) Treaty Rights

The "integration" theory of parent-right invocation likewise fails to support the *Fortino* decision. This theory describes certain circumstances in which courts should look beyond the formality of separate incorporation to the substance of parent-subsidiary relationships in order to find a "common identity" between the two otherwise separate entities.<sup>276</sup> It relies on the "integrated-enterprise" doctrine in employment discrimination law, which enables a plaintiff-employee suing a company for employment discrimination to join the company's parent as a party defendant upon proving that the company and its parent are sufficiently integrated in their business operations.<sup>277</sup> However, the integrated-enterprise doctrine is not applicable to the *Fortino* situation because the plaintiffs in *Fortino* were not attempting to show integration between Matsushita and Quasar in order to hold Matsushita liable for Quasar's discriminatory conduct. On the contrary, the subsidiary was attempting to take advantage of the integration between itself and its parent in order to relieve itself of any Title VII liability.

The purposes underlying the integrated-enterprise doc-

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monial evidence during the trial relating to issues only pertinent to the treaty issue, such as the issuance of "E" visas to all of Quasar's executives, without raising the treaty argument until the appeal. See, e.g., Brief for Quasar, *supra* note 4, at 9. It was unfair to permit the the subsidiary to invoke Article VIII(1) for the first time on appeal on the same basis which would have permitted the plaintiffs to join the parent had the issue been timely raised in the district court.

275. See *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 263-64 & n.9 (1977) (declining to reach the third party standing issue because at least one individual had demonstrated standing to assert rights as his or her own); *Doe v. Bolton*, 410 U.S. 179, 189 (1973) (same); *Women's Medical Center Providence, Inc. v. Roberts*, 512 F. Supp. 316, 319 (D.R.I. 1981).

276. See *supra* text accompanying notes 99-104 (discussing theory).

277. See *Ishizuka*, Note, *supra* note 98, at 152-54 & nn.94 & 95; *Lewis & Ottley*, *supra* note 98, at 61-65.

trine further undermine the doctrine's application to *Fortino*. The doctrine originated to enable employee-plaintiffs to sue their employers by joining a sufficient number of employers to satisfy the definition of "employer" under labor law statutes.<sup>278</sup> Employees would join their employer's parent company upon discovering that their immediate employer did not have a sufficient number of employees to meet the jurisdictional requirement.<sup>279</sup> The integrated-enterprise doctrine's purpose, therefore, is to join parent corporations for purposes of counting employees and imposing liability on parent corporations, not to enable the subsidiary to invoke its parent's FCN Treaty rights.<sup>280</sup>

### 3. Necessity Does Not Support Quasar's Invocation of Matsushita's Treaty Rights

The necessity theory of parent-right invocation also fails to justify the *Fortino* decision. Under this theory, the U.S. subsidiary should be able to assert its parent's FCN Treaty rights if the discriminatory conduct is crucial to the successful operation of the business.<sup>281</sup> This theory fails to support the Seventh Circuit's opinion, first, because in *Fortino* none of the

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278. See Lewis & Ottley, *supra* note 98, at 62-63. Under Title VII, for example, an "employer" is a company with fifteen or more employees for each working day of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b) (1988).

279. See Lewis & Ottley, *supra* note 98, at 63.

280. See SCHLEI & GROSSMAN, *supra* note 102, at 1000 (stating that "separate entities are combined and treated as a single employer for purposes of counting and liability"); BLUMBERG, *supra* note 32, § 14.01.

Integration theory of parent-right invocation states nothing more than the general proposition that when the parent and subsidiary are sufficiently integrated to be considered "single," rights given to one entity should be given to the other entity. At most, the theory merely restates the principle of "piercing the corporate veil" whereby corporate formalities between parent and subsidiary corporations are displaced and the parent is liable for the acts of its subsidiaries. See HENN & ALEXANDER, *supra* note 251, at 344 (stating that concept of "piercing the corporate veil" is "converse of corporateness"). According to Professor Phillip Blumberg, "piercing the veil jurisprudence" emerged as a safety valve providing for the disregard of the corporate entity and imposition or liability upon parent corporations when separate incorporation would lead to unacceptable results and "serve as a cloak for fraudulent or other iniquitous practices." See PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: STATUTORY LAW SPECIFIC* xlv (1992). On the other hand, holding subsidiary corporations liable for their own acts is not an unacceptable result. On the contrary, to relieve subsidiaries for their own acts would lead to inequitable results.

281. See *supra* text accompanying notes 105-13 (discussing theory).

three plaintiffs held high-level management positions within Quasar.<sup>282</sup> Second, at the time the challenged conduct took place, Quasar was not in its start up phase.<sup>283</sup> Finally, the plaintiffs had the requisite skill necessary to perform successfully as managers in the industry in which Quasar was engaged.<sup>284</sup>

Even if we assume that Quasar could have satisfied the three factors for necessity, necessity should not be the basis for determining the substantive treaty rights of subsidiary corporations. By gauging the importance of the discriminatory conduct, necessity theory of parent-right invocation does nothing more than articulate the business necessity defense.<sup>285</sup> This is a defense to "disparate impact" Title VII claims once plaintiffs have demonstrated a Title VII violation.<sup>286</sup> Therefore, a sub-

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282. See *Fortino v. Quasar Co.*, 751 F. Supp. 1306, 1308-09 (N.D. Ill. 1990), *rev'd on other grounds*, 950 F.2d 389 (7th Cir. 1991). Prior to their discharges from Quasar, plaintiff John Fortino was Assistant General Manager of Quasar's Advertising, Sales Promotions and Public Relations Department; plaintiff Carl Meyers was Quasar's Manager of Sales Administration; and plaintiff F. William Schulz was head of the Order Administration Department. *Id.*

283. See *id.* at 1308, 1309. Quasar was established in 1974 when Matsushita Electric Corporation of America, the wholly-owned subsidiary of Matsushita Japan, bought the Consumer Electronics Division of Motorola Company. *Id.* Therefore, Quasar was in existence over ten years when the alleged discriminatory conduct occurred in 1986. See *id.* at 1309-11.

284. See *id.* at 1309 (stating that each plaintiff "received good performance evaluations, regular promotions and steady pay raises"). As part of his duties, plaintiff Fortino went to Japan annually, visiting the factories and corporate headquarters in Japan and meeting with Matsushita's Japanese advertising department. *Id.* at 1308. Although Fortino did not speak Japanese, all of Quasar's Japanese management as well as all the Matsushita personnel with whom Fortino met in Japan spoke English, so that knowing Japanese was not necessary to the successful performance of his duties. *Id.* According to the court, "[f]or more than a decade, the non-Japanese-speaking managerial employees of American national origin performed marketing and financial functions in conjunction with Matsushita." *Id.* at 1311 (footnotes omitted).

285. See 42 U.S.C.A. § 2000e-2(k) (codifying business necessity defense); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). The business necessity defense is established by showing that the selection policy is job-related or is compelling enough to constitute a business necessity. See 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (Supp. 1992).

286. See 42 U.S.C.A. § 2000e-2(k)(1)(B)(ii) (stating that business necessity is not required to be demonstrated until after disparate impact discrimination is found). "Disparate impact" discrimination occurs when an employment policy that is neutral on its face has a discriminatory impact on a protected group. See *id.*; *Griggs*, 401 U.S. at 431-32. For discussion of Title VII issues in suits against Japanese multinationals, see Stacey M. Rosner, Note, *Beyond the FCN Treaty: Japanese Multinational Under Title VII*, 51 *FORDHAM L. REV.* 871 (1983).



sidiary will have the opportunity to argue business necessity even if it is precluded from invoking its parent's Article VIII(1) rights.

The U.S. Congress has set forth the appropriate situations in which the business necessity defense may be raised against a Title VII claim.<sup>287</sup> The invocation of another corporation's FCN Treaty rights is not one of these situations.<sup>288</sup> Although necessity may be a sufficient reason to insulate the subsidiary following a *prima facie* showing of discrimination, it hardly demonstrates that the subsidiary should be able to assert the FCN Treaty rights of its parent. In sum, all three theories of parent-right invocation rely on inapposite theories. None of them states a meritorious basis upon which a U.S. subsidiary may invoke its parent's FCN Treaty rights, and none of them support the Seventh Circuit's decision in *Fortino*.

D. *Neither the FCN Treaty Nor the Sumitomo Decision Permits the U.S. Subsidiary to Invoke Its Parent's Article VIII(1) Rights*

Even assuming that a subsidiary were able to invoke its parent's FCN Treaty rights under the theories of parent-right invocation, the Seventh Circuit nevertheless should not have permitted Quasar to invoke Matsushita's treaty rights because rights under international treaties, including the right to invoke them, must be determined under the applicable treaties themselves.<sup>289</sup>

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287. See 42 U.S.C.A. § 2000e-2(k). The business necessity defense may be raised against a charge of "disparate impact" discrimination. *Griggs*, 401 U.S. at 431-32.

288. See 42 U.S.C.A. § 2000e-2(k) (Supp. 1992).

289. See *Kolovrat v. Oregon* 366 U.S. 187, 191-94 (1961); *Asakura v. Seattle*, 265 U.S. 332, 341-43 (1924); *United States v. Rauscher* 119 U.S. 407, 418-19 (1886); *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir. 1991); *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 547-50 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *Sneaker Circus, Inc., v. Carter*, 457 F. Supp. 771, 795 (E.D.N.Y. 1978), *aff'd*, 614 F.2d 1290 (2d Cir. 1979); RESTATEMENT, *supra* note 32, § 907(1) (stating that "[a] private person having rights against the United States under an international agreement may assert those rights in courts in the United States of appropriate jurisdiction either by way of claim or defense" (emphasis added)); see also Bart I. Mellits, Note, *The Rights of a Foreign Corporation and Its Subsidiary Under Title VII of the Civil Rights Act of 1964 and Treaties of Friendship, Commerce, and Navigation*, 17 GEO. WASH. J. INT'L L. & ECON. 607, 613 (1983).

For example, assume that third-party standing doctrine permits a U.S. subsidiary to invoke the rights of its parent, but the FCN Treaty, based upon its language and

Generally, the right to invoke international treaty obligations belongs only to the contracting government itself and not to private parties.<sup>290</sup> Treaties which ultimately benefit private persons do not necessarily give them justiciable rights.<sup>291</sup> A treaty may, however, give private parties the right to invoke a treaty as a basis for a cause of action or as a defense to a civil or criminal suit.<sup>292</sup> Whether a treaty provides persons with the right to invoke a provision is a matter of treaty interpretation, determined by the language and intent of the treaty.<sup>293</sup>

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intent, did not. The result would be a conflict between the FCN Treaty and judicially created doctrine. See CHARLES A. WRIGHT, LAW OF FEDERAL COURTS, § 13 (4th ed. 1983) (stating that third-party standing, as opposed to standing under Art. III of the U.S. Constitution, is "prudential," or judicially self-imposed). When such a conflict exists, the FCN treaty prevails. Cf. RESTATEMENT, *supra* note 32, § 115 cmt. a (stating that absent congressional intent otherwise, treaty prevails over statute); *id.* § 111(3) (stating that courts must give effect to international agreements).

290. *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) (stating that "[u]nder international law, it is the contracting foreign government, that has the right to complain about a violation") (citing *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981)); *United States v. Williams*, 617 F.2d 1063, 1090 (5th Cir. 1980) (en banc) (stating that "rights under international common law must belong to sovereign nations, not to individuals, just as treaty rights are the rights of the sovereign"); RESTATEMENT, *supra* note 32, § 902 cmt. a (stating that "[o]rdinarily, claims for violation of an international obligation may be made only by the state to whom the obligation was owed").

291. RESTATEMENT, *supra* note 32, § 111 reporter's note 4; see *id.* § 907 cmt. a (stating that "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts").

292. *Rauscher*, 119 U.S. at 418 (stating that "a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits") (quoting *Head Money Cases*, 112 U.S. 580, 598-99 (1884)); RESTATEMENT, *supra* note 32, § 907(1) (stating that "[a] private person having rights against the United States under an international agreement may assert those rights in courts in the United States under an international agreement may assert those rights in courts in the United States of appropriate jurisdiction either by way of claim or defense").

Court of appeals decisions which have permitted criminal defendants to invoke the extradition treaty rights of surrendering nations have also done so based upon the intent of the treaties. See, e.g., *Rauscher*, 119 U.S. at 418-19 (stating that "a treaty may also contain provision which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits"); *United States v. Martin-Verdugo-Urguidez*, 939 F.2d 1341, 1354 (9th Cir. 1991) (basing holding on "[t]he entire purpose of the Treaty, as well as treaty law in general . . ."); *United States v. Riviere*, 924 F.2d 1289, 1297-300 (3rd Cir. 1991) (analyzing court of appeals decisions); see also Christopher J. Morvillo, Note, *Individual Rights and the Doctrine of Speciality: The Deterioration of United States v. Rauscher*, 14 FORDHAM INT'L L.J. 987 (1990/1991).

293. RESTATEMENT, *supra* note 32, § 907 reporter's note 1 (1987); *id.* at § 907

Neither the plain language nor the negotiating history of the FCN Treaty indicates an intent to permit U.S. subsidiaries to invoke the Article VIII(1) rights of their parents.<sup>294</sup> By its terms, the FCN Treaty permits some of its provisions to be invoked by "nationals of [Japan]," others by "companies of [Japan]," and still others by "companies controlled by companies of [Japan]."<sup>295</sup> By categorically separating the provisions which Japanese companies may invoke from those which companies controlled by companies of Japan may invoke, the FCN treaty intends that controlled companies (subsidiaries) can only invoke the provisions expressly conferring rights on controlled companies.<sup>296</sup>

The negotiating history of the FCN Treaty similarly fails to indicate an intent to permit subsidiaries to invoke their parent's Article VIII(1) rights.<sup>297</sup> Rather, the negotiating history of the FCN Treaty indicates an intent to treat Japanese companies and companies controlled by Japanese companies as separate and distinct entities with separately invocable substantive rights.<sup>298</sup> The negotiating history of other provisions of the FCN Treaty demonstrates that U.S. subsidiaries were to be considered "juridically distinct from . . . companies [of Japan]."<sup>299</sup>

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cmt. a (stating that "[w]hether an international agreement provides a right or requires that a remedy be made available to a private person is a matter of interpretation of the agreement").

294. *Spiess v. C. Itoh & Co. (Am.)*, 725 F.2d 970, 973 (5th Cir. 1984) (quoting from unpublished opinion in *Spiess v. C. Itoh & Co. (America)*, No. 75-H-267 (S.D. Tex. Sept. 27, 1983)) (stating that the FCN Treaty would not permit the subsidiary to invoke its parent's FCN treaty rights); Mellits, Note, *supra* note 289, at 613-627.

295. See FCN Treaty, *supra* note 5; Mellits, Note, *supra* note 289, at 613-14.

296. *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 365 (5th Cir. 1981) (Reavley, J., dissenting) (stating that "[t]he very creation of these three terms of art is a strong indication that the drafters viewed each as representing a distinct entity"), *vacated on other grounds*, 457 U.S. 1128 (1982); *Porto v. Canon, U.S.A.*, 28 Fair Empl. Prac. Cas. (BNA) 1679, 1682 (N.D. Ill. 1981) (stating that "[t]he fact that the framers used three separate terms indicates that each term was to represent a distinct entity"); Mellits, Note, *supra* note 289, at 613-14.

297. See *Spiess*, 643 F.2d at 369-72 (Reavley, J., dissenting); Mellits, Note, *supra* note 289, at 618-27.

298. See Mellits, Note, *supra* note 289, at 618-19, 620-21; see also *Spiess*, 643 F.2d at 369-72 (Reavley, J., dissenting); *Spiess v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1, 7 (S.D. Tex. 1979) (discussing history behind Article VI(3) of FCN Treaty), *rev'd*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

299. *E.g.* Airgram No. A-22 from the U.S. State Department, Washington, D.C., to U.S. Embassy, Tokyo 3 (May 7, 1952), *reprinted in part in* Brief for Avigliano, *supra*

In addition to the FCN Treaty, the *Sumitomo* decision does not support the subsidiary's invocation of its parent's FCN Treaty rights. Even though the Supreme Court failed to reach the issue of whether the U.S. subsidiary can invoke its parent's Article VIII(1) rights because of the procedural defects in the manner in which the issue was raised,<sup>300</sup> based upon the Court's analysis and interpretation of the FCN Treaty, the Court would have precluded the subsidiary from invoking its parent's Article VIII(1) rights had the issue been properly raised. In *Sumitomo*, the Court critically considered both the treaty language and the intent and expectations of the parties, and drew two significant conclusions from its analysis. First, the court stated that U.S. branches of Japanese companies have an Article VIII(1) advantage over U.S. subsidiaries.<sup>301</sup> The conclusion that subsidiaries cannot invoke their parents' Article VIII(1) rights logically follows from the court's statement because if subsidiaries could invoke their parent's Article VIII(1) rights, the U.S. branch would no longer have an Article VIII(1) advantage over subsidiaries.<sup>302</sup> Second, the Court observed that under the FCN Treaty, U.S. subsidiaries of Japanese companies are entitled to the same rights and subject to the same responsibilities as other U.S. companies.<sup>303</sup> Taking the Court's reasoning to its logical conclusion, if other U.S. companies are guilty of a Title VII violation, because their hiring practices, dictated by their shareholders, cause them to hire exclusively white executives, then U.S. subsidiaries of Japanese companies must also be guilty if their hiring practices, dictated by their parent, cause them to hire exclusively Japanese executives. If other U.S. companies are guilty of a Title

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note 260, at 14 (regarding Article VI(3) of FCN Treaty); Mellits, Note, *supra* note 290, at 620-21.

300. See *supra* note 97 (explaining that issue was improperly raised).

301. *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176, 189 (1982) (stating that "[t]he only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1)"); see *In re Japanese Electronics Products Antitrust Litigation*, 723 F.2d 319, 324 n.3 (3d Cir. 1983) (stating that "[t]he national status of the company determines whether that company may claim the benefit conferred by Article VIII"), *cert. granted on other grounds*, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 471 U.S. 1002 (1985).

302. *But see* Ishizuka, Note, *supra* note 98, at 150-51 (inferring from Court's statement that "a subsidiary may be able to assert the article VIII(1) rights or 'advantages' of its parent as a defense to employment practice suits").

303. *Sumitomo*, 457 U.S. at 188.

VII violation because their salary practices, dictated by their shareholders, cause them to pay white executives twice the amount paid to black executives, then U.S. subsidiaries of Japanese companies must also be guilty if their salary practices, dictated by their parents, cause them to pay their Japanese executives twice the amount paid to non-Japanese executives. Application of *Sumitomo's* interpretation of the FCN Treaty to the issue of parent-right invocation results in the conclusion that U.S. subsidiaries cannot invoke their parent's Article VIII(1) rights.

As a result, Article VIII(1) permits only "companies of Japan" to invoke its provisions. Neither the FCN Treaty language nor its negotiating history suggests otherwise. As correctly held by the U.S. district court in *Spiess*, neither the FCN Treaty nor the *Sumitomo* decision permits the subsidiary to invoke its parent's FCN Treaty rights.<sup>304</sup>

*E. The Dictum in Calnetics Does Not Support Parent-Right  
Invocation of Rights Under Article VIII of the U.S.-Japan  
FCN Treaty*

The Ninth Circuit dictum in *Calnetics*<sup>305</sup> does not support the *Fortino* decision either. Rather, *Calnetics* is distinguishable from *Fortino* on three grounds.

First, in *Calnetics*, Volkswagen's German parent did not have rights under the treaties which Volkswagen could have invoked. *Calnetics* involved Article XVI(1) of the U.S.-Germany FCN Treaty and Articles I(1) and III of GATT, both of which prevent the United States from discriminating against *products* of Germany.<sup>306</sup> Unlike Article VIII(1) of the U.S.-Japan FCN Treaty in *Fortino*, the FCN treaty provisions in *Calnetics* did not confer rights on *companies* of the treaty country.<sup>307</sup> Because the treaty provisions in *Calnetics* protected products of Germany

304. *Spiess v. C. Itoh & Co. (Am.)*, 725 F.2d 970, 973 (5th Cir. 1984) (quoting from *Spiess v. C. Itoh & Co. (Am.)*, No. 75-H-267 (S.D. Tex. Sept. 27, 1983) (unpublished opinion)).

305. 532 F.2d 674, 692 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *see supra* text accompanying notes 131-41 (discussing case).

306. German Treaty, *supra* note 135, art. XVI(1), 7 U.S.T. at 1857; GATT, *supra* note 136, art. I, III, at A12, A18; *Calnetics*, 532 F.2d at 693.

307. *In re Japanese Electronics Products Antitrust Litigation*, 723 F.2d 319, 324 n.3 (3d Cir. 1983) (distinguishing Article XVI from Article VIII(1) stating that Article XVI protects products so that national status of products not company producing

and not companies of Germany,<sup>308</sup> German manufacturers themselves could not have invoked the provisions of the treaties.<sup>309</sup> If Volkswagen's German parent could not itself raise a violation of the treaties, Volkswagen could not have invoked its parent's treaty rights.

Second, because the treaty provisions did not confer rights on German companies, only the German government could properly invoke the treaty violations.<sup>310</sup> The German government did so by memorandum addressed to the U.S. State Department protesting the effect the import ban would have on U.S. treaty obligations and on its nation's manufacturers.<sup>311</sup> Therefore, when the court considered the effect the import ban would have on German manufacturers, the court was

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products that is at issue), *cert. granted on other grounds*, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 471 U.S. 1002 (1985).

308. *Id.*

309. RESTATEMENT, *supra* note 32, § 111 reporter's note 4 (stating that "many agreements that may ultimately benefit individual interests do not give them justiciable rights"); *id.* at § 907 cmt. a (stating that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts"); *see supra* notes 310-13 and accompanying text (citing sources).

The court in *Calnetics* stated that on remand, another German manufacturer, Porsche, should be given a chance to be heard. *Calnetics*, 532 F.2d at 694. The court, however, never stated that that German company, or any other German company, had any right to invoke treaty violations. *Id.* at 693-94. Rather, the court believed that elementary fairness requires notice to Porsche by virtue of its "importation agreement" with Volkswagen, not by virtue of having treaty rights. *Id.* at 694. The agreement was the basis for the notice, not the company's treaty rights. If the court believed that all German manufacturers had rights under the treaties, it could have ordered notice to all German manufacturers.

310. RESTATEMENT, *supra* note 32, § 902 cmt. a (stating that "[o]rdinarily, claims for violation of an international obligation may be made only by the state to whom the obligation was owed"); *id.* § 902(2) (stating that government has right to protest for injuries resulting to its nationals or to other persons on whose behalf it is entitled to make a claim under international law).

311. *Calnetics v. Volkswagen of America, Inc.*, 353 F. Supp. 1219, 1225-26 (C.D. Cal. 1973) (reprinting memorandum), *aff'd in part and rev'd in part*, 532 F.2d 674, 692 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976). There exists authority for the proposition that private parties may complain about a treaty violation upon a protest by the contracting state. *See, e.g.*, *United States v. Noriega*, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990) (stating that "[a]s a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved"); *see also Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973) (permitting criminal defendants to invoke extradition rights of surrendering nations upon formal protest by the surrendering nation).

not permitting the subsidiary to invoke its parent's rights, but merely considering the German government's protest against the court's imposition of an import ban because of the effect it would have on its nation's companies. In *Fortino*, neither of the two entities permitted to invoke Article VIII(1) raised any potential violation of the FCN Treaty.<sup>312</sup> The Japanese government did not protest by correspondence with the State Department, and Matsushita did not intervene in the suit.

Third, *Calnetics* involved the importation of goods, whereas *Fortino* involved the enforcement of Title VII. The language of both treaties involved in *Calnetics* (GATT and the U.S.-Germany FCN Treaty) expressed a clear intent to regulate U.S. imposition of import bans.<sup>313</sup> In other words, the parties to the agreement intended to prohibit U.S. courts from imposing certain import restrictions, such as the one in issue in *Calnetics*.<sup>314</sup> This intent is manifested by subsequent acts of the German government,<sup>315</sup> i.e. the protest concerning the court's

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312. See *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991); *Fortino v. Quasar Co.*, 751 F. Supp. 1306 (N.D. Ill. 1990), *rev'd*, 950 F.2d 389 (7th Cir. 1991).

313. See German Treaty, *supra* note 135, art. XIV(2), 7 U.S.T. at 1855; GATT, *supra* note 136, art. I, 61 Stat. 5, at A12. Article I(1) of GATT provides in relevant part that

[w]ith respect to all rules and formalities in connection with importation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

*Id.*

Although not in issue in *Calnetics*, Article XIV(2) of the U.S.-German FCN Treaty provides in relevant part that "[n]either party shall impose restrictions or prohibitions on the importation of any product of the other Party . . . unless the importation of the like product of . . . all third countries is similarly restricted or prohibited." German Treaty, *supra* note 135, art. XIV(2), 7 U.S.T. at 1855.

314. See RESTATEMENT, *supra* note 32, § 111(3) (stating that U.S. courts are bound to give effect to international agreements); see also *Maximov v. United States*, 373 U.S. 49, 54 (1963) (holding that the language of treaties control unless inconsistent with intent of signatories).

315. *Husserl v. Swiss Air Transport Co.* 351 F. Supp. 702, 707 (S.D.N.Y. 1972) (stating that "a prime canon of treaty construction is to look to the subsequent actions of the parties for the interpretation of the treaty in areas clearly unanticipated at the time"), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); see also *Pigeon River Improvement Slide and Bloom Co. v. Cox*, 291 U.S. 138, 160-61 (1934); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975) (stating that "[t]he conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proposed construction to accord the treaty's various provisions"), *cert. denied*, 429 U.S. 890 (1976).

anticipated injunction. On the other hand, the U.S.-Japan FCN Treaty involved in *Fortino* does not prohibit the enactment or enforcement of anti-discrimination laws such as Title VII.<sup>316</sup> To the contrary, the parties to that treaty intended to *prohibit* discriminatory practices.<sup>317</sup> The lack of intent to preclude U.S. enactment and enforcement of Title VII may be evinced by the Japanese government's silence when the U.S. Congress passed Title VII<sup>318</sup> and its acquiescence during U.S. enforcement of Title VII against Japanese owned subsidiaries.<sup>319</sup> In fact, in the *Sumitomo* case resolving claims against the U.S. subsidiaries of two of Japan's largest companies, Japan not only acquiesced in the enforcement of Title VII, but the Japanese government concurred in the Supreme Court's interpretation of the treaty prohibiting the subsidiary from invoking Article VIII(1).<sup>320</sup> Accordingly, in *Fortino*, the Japanese government neither protested enforcement of Title VII nor interpreted the FCN treaty to permit subsidiary invocation of its parent's treaty rights.

Instead of permitting the subsidiary to invoke its parent's treaty rights, the court in *Calnetics* was considering a protest by the German government regarding the effects of the import ban on its nation's companies, the subject matter of the ban clearly being regulated under the treaties. *Calnetics* is clearly distinguishable from *Fortino* and thus does not support the *Fortino* decision. *Calnetics* is inapplicable when a U.S. subsidiary

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316. *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552, 559 (2d Cir. 1981) (stating that "[s]ubjecting a Japanese company to Title VII is consistent with the language and purpose of Article VIII of the Treaty . . ."), *vacated on other grounds*, 457 U.S. 176 (1982); Brief for Avigliano, *supra* note 260, at 21-34 (arguing that, based upon State Department documents and Senate hearings, the FCN Treaty never intended to prevent enactment or enforcement of Title VII).

317. *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176, 188 (1982) (stating that "[t]he purpose of the Treaty provisions was to assure that corporations of one Treaty party have the right to conduct business within the territory of the other party without suffering discrimination as an alien entity"); *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552, 559 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982) (stating that Article VIII(1) "was primarily intended to exempt companies operating abroad from local legislation restricting the employment of noncitizens"); Brief for Avigliano, *supra* note 259, at 21-34.

318. See 1964 U.S.C.C.A.N. 2355-2519; DIGEST OF U.S. PRACTICE IN INT'L LAW (1964).

319. See *supra* note 3 (listing cases against Japanese owned subsidiaries).

320. See *Sumitomo*, 457 U.S. at 183-84.



seeks to invoke rights under Article VIII(1).<sup>321</sup>

D. *The Implications of Fortino: The Illogical Consequences of Parent-Right Invocation*

The court in *Fortino*, instead of merely allowing the U.S. subsidiary to assert its parent's rights in the limited context before the court, created a broad principle whereby a parent's exercise of control over allegedly illegal conduct of the subsidiary would allow the subsidiary to invoke its parent's rights.<sup>322</sup> The illogical consequences of applying the principle to other provisions of the FCN Treaty and other areas of U.S. law demonstrate that U.S. courts should not allow the principle of parent-right invocation to survive.

Under Article XI(4) of the FCN Treaty, the United States is obligated to tax "companies of Japan" doing business in the United States only on U.S. source income and not on their world-wide income.<sup>323</sup> U.S. subsidiaries of Japanese companies, on the other hand, cannot invoke Article XI(4) and become subject to taxation as Japanese companies because, under the *Sumitomo* decision, U.S. subsidiaries are U.S. companies.<sup>324</sup> As U.S. companies, the subsidiaries are taxed on their world-wide income.<sup>325</sup> However, if the subsidiary is able to invoke the Treaty rights of its parent on the ground that the par-

321. See *Spieß v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1, 8 (S.D. Tex. 1979) (stating that "analysis of *Calnetics* reveals that it does not stand for the proposition that a United States-incorporated subsidiary of a foreign corporation has, in addition to all Treaty rights specifically granted it, those Treaty rights granted its foreign parent"), *rev'd on other grounds*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982); see also *In re Japanese Electronics Products Antitrust Litigation*, 723 F.2d 319, 324 n.3 (3d Cir. 1983) (distinguishing Article VIII(1) and application of *Sumitomo* from circumstances when considering FCN Treaty provision relating to "products" of a treaty country), *cert. granted on other grounds*, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 471 U.S. 1002 (1985).

322. See *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991) (permitting parent-right invocation because the parent had "dictated the subsidiary's discriminatory conduct").

323. FCN Treaty, *supra* note 5, art. XI(4), 4 U.S.T. at 2072; Walker, *supra* note 216, at 238.

324. See *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982).

325. See I.R.C. §§ 61, 11, 7701 (1988) (imposing tax on corporations created or organized in the United States on income from whatever source derived); BORIS I BITTKER & LAWRENCE LOKKEN, *FUNDAMENTALS OF INTERNATIONAL TAXATION* § 65.3 (1991) (stating that "[d]omestic corporations . . . are taxed on their worldwide incomes").

ent had dictated its business operations, the U.S. subsidiary would no longer be taxed as a U.S. company, but would instead be taxed as a Japanese company on the basis of U.S. source income alone. Simply put, the subsidiary could accomplish indirectly what it could not accomplish directly.

The FCN Treaty contains twenty-six provisions defining rights pertaining to "companies of [Japan]."<sup>326</sup> U.S. subsidiaries of Japanese companies cannot directly invoke any of these provisions because, according to *Sumitomo*, the subsidiaries are U.S. companies.<sup>327</sup> However, if a U.S. subsidiary is able to invoke the FCN Treaty rights of its Japanese parent, the subsidiary could circumvent the *Sumitomo* decision and invoke all twenty-six provisions of the FCN Treaty.

Application of the parent-right invocation principle produces similar consequences when applied to other areas of U.S. law. For example, subsidiary corporations entering into contracts with third parties are normally liable on those contracts.<sup>328</sup> At the same time, the subsidiaries' parents are generally not liable on the contracts.<sup>329</sup> Applying the principle of parent-right invocation, if subsidiaries sued for breach of contract were able to invoke their parents' rights on the ground that the parents had dictated the breach of contract, neither the subsidiaries nor their parents would be liable on the contracts.

Similarly, subsidiaries which negligently cause harm to third parties are liable in tort to those third parties.<sup>330</sup> On the other hand, parent companies are generally not liable for the

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326. See FCN Treaty, *supra* note 5, art. IV(1), (2) art. V(1), art. VI(1), (2), (3), (4), art. VII(1), (4), art. VIII(1), (3), art. IX(1), (2), (3), (4), art. X, art. XI(1), (3), (4), art. XII(1), art. XIII, art. XIV(2), (5), art. XV(3), art. XVI(2), art. XVII(2), art. XXII(3), at 2067-76, 2080. Many of those provisions define rights already enjoyed by other U.S. companies. See *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176, 189 (1982).

327. See *Sumitomo*, 457 U.S. 176.

328. See HENN & ALEXANDER, *supra* note 250, § 146 (stating that "[b]y the general rule, contractual obligations of a corporation subject it . . . to liability thereon").

329. *E.g.*, *Whitehurst v. FCX Fruityard Vegetable Service*, 32 S.E.2d 34 (N.C. 1944); see HENN & ALEXANDER, *supra* note 250, § 146 (stating that "[b]y the general rule, contractual obligations of a corporation [do not subject] its shareholders . . . to liability thereon").

330. See HENN & ALEXANDER, *supra* note 250, § 79 (stating characteristics of corporations including ability to be sued in corporate name as any other natural persons may be sued).

tortious acts of their subsidiaries.<sup>331</sup> Applying the principle of parent-right invocation, if subsidiaries were able to assert their parents' rights on the grounds that the parent had dictated the negligent conduct, neither the subsidiaries nor their parents would be liable for the tortious conduct.

The illogical consequences of parent-right invocation are apparent. In essence, whenever a subsidiary's rights are different from the parent's rights, the subsidiary's rights would suddenly be the same as the parent's rights as long as the parent had dictated the challenged conduct. The principle of parent-right invocation permits companies to disregard the fact that the two corporations are separate entities with separate substantive rights. It therefore allows corporations to violate basic principles of corporate law.

### *CONCLUSION*

The *Fortino* decision should not be followed by other U.S. courts because it ignores Supreme Court precedent and relies on numerous erroneous assumptions and conclusions. Courts should maintain the status quo as it stands under the *Sumitomo* decision according to which subsidiaries of Japanese companies do not have the advantage of Article VIII(1), especially considering the slight impact the *Sumitomo* decision has had on Japanese companies' assignment practices and their management systems. U.S. subsidiaries of Japanese companies should be forced to conform to U.S. laws. Courts should not allow the subsidiaries to hire in a discriminatory manner nor allow them to pay their parents' employment bills by compensating rotating executives with U.S. revenues when such conduct discriminates against U.S. workers. Courts considering Title VII claims against U.S. subsidiaries should fully appreciate the Supreme Court's reinforcement of principles of entity law as well as its clear message precluding Japanese companies from ignoring the form of their U.S. investment. The principle of parent-right invocation undermines *Sumitomo's* efforts, relies

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331. *E.g.*, *Bujosa v. Metropolitan Transp. Authority*, 355 N.Y.S.2d 800 (App. Div. 1974); see HENN & ALEXANDER, *supra* note 250, § 146 (stating that "[s]hareholders as such are generally not liable to persons injured by torts committed by a corporate agent").

upon inapposite theories and violates principles of corporate law.

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