



1-1-1993

Fortino v. Quasar Co.: Invocation of Parents' U.S.-Japan FCN Treaty Rights Gives Japanese-Owned U.S. Subsidiaries a Defense Against Title VII

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**Fortino v. Quasar Co.: Invocation of Parents' U.S.-Japan
FCN Treaty Rights Gives Japanese-Owned U.S.
Subsidiaries a Defense Against Title VII**

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I. INTRODUCTION

Congress enacted title VII of the Civil Rights Act of 1964¹ to end employment practices that discriminate on the basis of "race, color, religion, sex, or national origin."² Congress intended the Act to apply to corporations and businesses engaged in commerce in the United States.³ However, an American corporation that is the wholly owned subsidiary⁴ of a foreign company may not be subject to title VII claims by executive employees if a treaty of friendship, commerce, and navigation (FCN treaty) exists between the United States and the foreign country.⁵ In 1982, the U.S. Supreme Court held that foreign-owned subsidiaries incorporated in the United States are generally not entities covered by an FCN treaty.⁶ However, in a footnote, the Court suggested that under some circumstances, these subsidiaries may invoke the FCN treaty rights of their parent companies.⁷ To date, the Court has not declared what those circumstances might be.

More recently, however, in *Fortino v. Quasar Co.*,⁸ the Seventh Circuit allowed Quasar Company, a subsidiary incorporated in the United States and wholly owned by a Japanese firm, to invoke the U.S.-Japan FCN Treaty (Japan FCN Treaty)⁹ rights of its parent company to defeat a title VII discrimination claim brought by three American executive employees.¹⁰ This case is the first to hold that a foreign-owned, U.S. corporation has a right conferred by an FCN treaty to discriminate against its American employees. Under *Fortino*, American-owned corporations in the United States have essentially fewer rights than their foreign-owned counterparts.

The *Fortino* case is extremely important because it creates uncertainty among the federal circuit courts in an area of law where many individuals are affected. Furthermore, since the parties in *Fortino* have settled and will not be filing for certiorari to the U.S. Supreme Court,¹¹ there will continue to be a period of uncertainty on the FCN treaty-title VII issue for the parties in employment discrimination suits. Courts will need to decide whether to follow *Fortino's* analysis of the interaction between FCN treaty rights and the civil rights in title VII.

1. 42 U.S.C. § 2000e (1993).

2. *Id.* § 2000e-2(a)(1). See discussion *infra* part II.B (discussing title VII).

3. *Id.* §§ 2000e(a) to (b). Title VII generally applies to businesses affecting interstate commerce which have fifteen or more employees. *Id.* See *infra* note 41 and accompanying text.

4. In this Note, unless otherwise indicated, the term "subsidiary" generally refers to a corporation incorporated in the United States that is owned by a foreign parent company.

5. *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991). Many FCN treaties provide that businesses of the foreign country may hire executives "of their choice." *E.g.*, Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VIII, para. 1, 4 U.S.T. 2063, 2070 [hereinafter Japan FCN Treaty]. See *infra* note 31 and accompanying text (listing some of the nations that have FCN treaties with the U.S. containing an "of their choice" provision). *Fortino* held that the "of their choice" language provides U.S. incorporated subsidiaries of foreign companies a defense to title VII. *Fortino*, 950 F.2d at 393. See discussion *infra* parts II.A, II.B, III (discussing the U.S.-Japan FCN Treaty, title VII, and the *Fortino* decision).

6. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 189 (1982).

7. *Id.* at 189 n.19.

8. 950 F.2d 389 (7th Cir. 1991).

9. Japan FCN Treaty, *supra* note 5.

10. *Id.* at 393.

11. Thomas J. Piskorski, *Fortino v. Quasar Co.: Are Japanese-Owned Companies Immune from Title VII?*, 18 EMPLOYEE REL. L.J. 61, 70 (1992).

The problem is particularly alarming due to the increasing number of foreign firms establishing subsidiaries in the United States.¹² Many people have focused special attention on Japanese subsidiaries because of the large number of these subsidiaries and the numerous discrimination allegations made by American employees at these firms.¹³ At Japanese subsidiaries, many employees have found an environment of discriminatory hiring and promotion practices.¹⁴ This discrimination has usually been based either on gender¹⁵ or lack of Japanese nationality.¹⁶ In a 1990 survey of 585 U.S. subsidiaries of Japanese firms, thirty percent reported that they had been accused by their employees of discriminatory practices.¹⁷ Because the number of positions at Japanese firms in the United States has steadily increased and is expected to continue to increase,¹⁸ the number of discrimination claims is also likely to grow.

This Note examines the *Fortino v. Quasar Co.* decision. Part II analyzes the provisions of FCN treaties and title VII and court decisions affecting foreign-owned U.S. subsidiaries.¹⁹ Part III summarizes the facts of *Fortino* and reviews the district and appellate court decisions.²⁰ Part IV discusses the legal ramifications of this decision on future title VII actions and on American employees of foreign-owned subsidiaries in the United States.²¹ Finally, Part V suggests an approach for reconciling the Japan FCN Treaty and title VII.²²

II. LEGAL BACKGROUND

This section analyzes those provisions of the Japan FCN Treaty and title VII affecting Japanese-owned U.S. subsidiaries. In addition, this section examines the court decisions

12. See, e.g., Ronald E. Yates, *A Collision of Corporate Cultures—Bias Charges Grow at Japanese Firms in U.S.*, CHI. TRIB., Jan. 12, 1992, Business, at 1.

13. Eileen M. Mullen, Note, *Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law*, 45 STAN. L. REV. 725, 726-58 (1993) (discussing in detail the allegations of discrimination at Japanese firms and typical justifications for these practices); Yates, *supra* note 12. Currently, there are more than 2000 Japanese subsidiaries in the United States, which employ over 400,000 Americans. *Id.*

14. Mullen, *supra* note 13, at 726-40; Yates, *supra* note 12. The Employment and Housing Subcommittee of the House Committee on Government Operations has heard many complaints of discrimination from many displeased American employees at Japanese companies. *Id.* An aide on the House subcommittee acknowledged that there has been a pattern of complaints against Japanese firms regarding sexual harassment and discrimination based on race and gender. *Id.*

15. See Dana Marie Crom, Comment, *Clash of the Cultures: U.S.-Japan Treaty of Friendship, Title VII, and Women in Management*, 3 TRANSNAT'L LAW. 337 (1990) (discussing gender discrimination for managerial positions at Japanese firms in the United States in the context of title VII and the Japan FCN Treaty).

16. Yates, *supra* note 12.

17. *Id.*

18. Estimates are that the number of Americans who work for Japanese firms in the United States will increase to one million by the year 2000. Sully Taylor, *American Managers in Japanese Subsidiaries*, PAC. NORTHWEST EXECUTIVE, July 1990, at 22. See Yates, *supra* note 12, at 1.

19. See *infra* notes 23-104 and accompanying text.

20. See *infra* notes 105-68 and accompanying text.

21. See *infra* notes 169-96 and accompanying text.

22. See *infra* notes 197-205 and accompanying text.

that had considered the FCN treaty-title VII issue before the Seventh Circuit decided *Fortino*.

A. *The U.S.-Japan Treaty of Friendship, Commerce and Navigation*

The United States entered into its first amity and commerce treaty, of which the FCN treaty is the most modern form, with France in 1778, and thereafter entered similar treaties with other nations throughout the nineteenth and early twentieth centuries.²³ After World War II, the United States entered into FCN treaties with a series of nations in order to promote private international commerce.²⁴

Since the first such treaty in 1778, the goal of an FCN treaty has been to establish or confirm that the governmental policy in the host country is one of equity and hospitality to the private foreign investor.²⁵ The enterprise and property of aliens is respected and granted the same legal protections that are enjoyed by citizens of the host country.²⁶ In essence, an FCN treaty is the medium through which nations seek to secure the reciprocal respect for their private interests abroad according to agreed rules of law.²⁷

In 1953, the United States entered into an FCN treaty with Japan.²⁸ At the time the Japan FCN Treaty was signed, Japan had recently been defeated in World War II and the

23. *E.g.*, Treaty of Amity and Commerce with France, 8 Stat. 12 (1778), Treaty of Amity, Commerce and Navigation with Great Britain, 8 Stat. 116 (1794); Treaty with Sweden, 8 Stat. 232 (1816); Treaty with the King of the Netherlands, 8 Stat. 524 (1839); Treaty of Commerce and Navigation with Belgium, 8 Stat. 606 (1845); Treaty with the Kingdom of Italy, 17 Stat. 845 (1871); Agreement—Spain, 23 Stat. 750 (1884); Convention—Germany, 31 Stat. 1935 (1900); Treaty—China, 33 Stat. 2208 (1903). *See also* Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 374 (1956) [hereinafter Walker, *Commercial Treaties*]; Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 805 n.4 (1958) [hereinafter Walker, *Modern Treaties*]. Herman Walker was the primary architect of the postwar FCN treaties. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 181 n.6 (citing Department of State Airgram A-105, dated Jan. 9, 1976).

24. Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230-31 (1956) [hereinafter Walker, *United States Practice*]; Walker, *Commercial Treaties*, *supra* note 23, at 374-75; Walker, *Modern Treaties*, *supra* note 23, at 809. Between 1946 and 1956, the United States signed substantially similar FCN treaties with 16 nations: Republic of China (Taiwan), 1946; Italy, 1948; Uruguay, 1949; Ireland, 1950; Columbia, 1951; Ethiopia, 1951; Israel, 1951; Greece, 1951; Denmark, 1951; Japan, 1953; Federal Republic of Germany (West Germany), 1954; Haiti, 1955; Iran, 1955; Nicaragua, 1956; Netherlands, 1956; and South Korea, 1956. *Id.* at 805 n.4.

25. Walker, *United States Practice*, *supra* note 24, at 230-31. The preamble of the Japan FCN Treaty states its purpose is to strengthen "bonds of peace and friendship" between the two nations and to encourage "closer economic and cultural relations between" the people. Japan FCN Treaty, *supra* note 5, pmbl., 4 U.S.T. at 2066.

26. Japan FCN Treaty, *supra* note 5, 4 U.S.T. at 2069. Article VII(1) states: "Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party." *Id.* *See* Walker, *United States Practice*, *supra* note 24, at 230; Walker, *Modern Treaties*, *supra* note 23, at 805.

27. Walker, *Modern Treaties*, *supra* note 23, at 805.

28. Japan FCN Treaty, *supra* note 5, 4 U.S.T. at 2063. By 1993, the United States had similar treaties with approximately 50 nations. Yates, *supra* note 12. This Note focuses heavily on the Japan FCN Treaty because this was the subject of the *Fortino* decision. However, the *Fortino* decision probably extends to subsidiaries of parent companies from nations other than Japan as long as an FCN treaty with the United States is involved and the treaty contains the "of their choice" provision.

United States was in a predominant position in the world. The United States used its superior bargaining position during the postwar period to enter into many FCN treaties to protect American foreign investments.²⁹ During the Japan FCN Treaty negotiations, the negotiators probably did not envision that Japanese-owned subsidiaries would be asserting their Treaty rights in the United States some thirty years later.³⁰

Article VIII(1) of the Japan FCN Treaty states: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."³¹

During the Japan FCN Treaty negotiations, it was the United States that insisted on this "of their choice" provision, while Japan opposed it.³² This provision allows companies of either nation to hire employees "of their choice" for the positions enumerated in the Treaty, which includes "executive" employees.³³ The provision has stirred much debate and litigation over whether it actually confers upon foreign-owned, U.S. subsidiaries a right to discriminate against American employees.³⁴

When determining whether an FCN treaty right was exercised properly, a court will initially inquire whether an individual is an executive as contemplated by the FCN treaty. In making this determination, a court considers the issuance of a treaty trader visa, also known as an E visa, to an employee as strong evidence that the employee is covered by the treaty.³⁵ The U.S. State Department will grant treaty trader visas only to persons

29. Robert Abraham, *Limitations on the Right of Japanese Employers to Select Employees of Their Choice Under the Treaty of Friendship, Commerce and Navigation*, 6 AM. U. J. INT'L L. & POL'Y 475, 490 (1991). See also *supra* note 24 (listing 16 FCN treaties the United States entered into between 1946 and 1956).

30. See Abraham, *supra* note 29.

31. Japan FCN Treaty, *supra* note 5, art. VIII, para. 1, 4 U.S.T. at 2070 (emphasis added). Many other nations have bilateral FCN treaties with the U.S. containing an "of their choice" provision. See, e.g., Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951 and Dec. 26, 1951, U.S.-Greece, art. XII, para. 4, 5 U.S.T. 1829, 1857, 1859; Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-Korea, art. VIII, para. 1, 8 U.S.T. 2217, 2223; Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, U.S.-Taiwan, art. III, para. 3, 63 Stat. 1299, 1302-03; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, art. I, para. 2(c), 63 Stat. 2255, 2258. See also *supra* note 24 and accompanying text (listing 16 FCN treaties the United States entered into between 1946 and 1956). In many of the FCN treaties, the "of their choice" provision is found in article VIII, paragraph 1. See Walker, *Modern Treaties*, *supra* note 23, at 807-08.

32. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 181 n.6 (1982), cited in *Fortino v. Quasar Co.*, 950 F.2d 389, 394 (7th Cir. 1991).

33. Japan FCN Treaty, *supra* note 5, art. VIII, para. 1, 4 U.S.T. at 2070.

34. E.g., *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982); *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988); *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. Unit A Apr. 1981); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984); *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991). See also discussion *infra* part II.C (discussing the judicial attempts to reconcile the "of their choice" provision and title VII).

35. See, e.g., *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1141-42 (3d Cir. 1988) (concluding that an employee was an executive covered under an FCN treaty primarily because the employee was issued an E-1 visa); *Fortino*, 950 F.2d at 389, 392 (concluding that the parent company's proper exercise of its FCN treaty right to assign its own executives was further confirmed by the issuance of E-1 and E-2 visas).

In an *amicus curiae* brief filed in *Fortino*, however, the Equal Employment Opportunity Commission (EEOC) disputed the argument that all rights flow from the Treaty simply because an individual possesses a

who qualify as executives under the “of their choice” provision of an FCN treaty.³⁶ The State Department guidelines provide that for treaty trader status, the person must be planning to engage in duties of a “supervisory or executive character,” or have special qualifications that make his services essential to the enterprise.³⁷

A court’s next inquiry is whether the entity claiming an FCN Treaty right is a company of the other nation. This issue is the subject of the *Fortino* decision³⁸ and was considered by the U.S. Supreme Court in *Sumitomo Shoji America, Inc. v. Avagliano*.³⁹

B. Title VII of the Civil Rights Act of 1964

Congress intended title VII of the Civil Rights Act of 1964 to end discriminatory employment practices with regard to an “individual’s race, color, religion, sex, or national origin.”⁴⁰ Title VII applies to employers of fifteen or more employees engaged in interstate commerce in the United States.⁴¹ The Equal Employment Opportunity Commission

treaty trader visa. Scott Mozarsky, Comment, *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, 1124 (1991-92). To support its contention, the EEOC suggested that E visas may be issued to a broader class of employees than those identified in article VIII(1); for example, employees of a U.S. company may obtain visas if a Japanese company owns more than 50% of the company. *Id.* at 1125. However, according to Article VII, a company is covered under the Japan FCN Treaty if a Japanese business has a majority interest in that company. *Id.* Therefore, the Japan FCN Treaty does permit the situation that the EEOC believed overbroad and this argument is probably invalid. *Id.* at 1126.

36. 8 U.S.C. § 1101(a)(15)(E) (1993). The Immigration and Nationality Act of 1952 (INA) governs treaty trader visa issuance. *Id.* § 1101. An alien is allowed entry into the United States under the provisions of an FCN treaty between the U.S. and foreign nation either to (1) solely carry on substantial trade between the U.S. and other nation or (2) solely develop and direct an enterprise in which he has, or is in the process of making, a substantial investment. *Id.* § 1101(a)(15)(E).

37. 22 C.F.R. § 41.40(a) (1987). In common usage, “executive” often refers to a person in upper level management. BLACK’S LAW DICTIONARY 569 (6th ed. 1990). However, under § 41.40(a), the State Department considers a person in a managerial role to be an “executive.” Significantly, according to this scheme, people may be classified as executives even if their positions are not particularly high in the hierarchy of the business.

38. See discussion *infra* part III (discussing the *Fortino* decision).

39. 457 U.S. 176 (1982). See discussion *infra* part II.C.1 (discussing the *Sumitomo* decision).

40. 42 U.S.C. § 2000e-2(a)(1) (1993). The provision states:

It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id. §§ 2000e-2(a)(1) to (2).

41. *Id.* §§ 2000e(a) to (b). The Civil Rights Act of 1964 applies to an employer, who is a person “engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year[.]” *Id.* § 2000e(b). The term “person” includes “one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, [and] trustees[.]” *Id.* § 2000e(a).

(EEOC) is the agency charged with enforcing title VII and investigates and prosecutes alleged violations filed by employees.⁴²

Congress's objective for title VII was "to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution."⁴³ Courts have generally construed title VII liberally because of Congress's broad intent to end all remnants of discrimination in the American workplace.⁴⁴

Title VII makes no reference to FCN treaties.⁴⁵ Title VII is also silent as to whether it can be applied to foreign companies doing business in the United States.⁴⁶ Further, the U.S. Supreme Court has not had occasion to determine whether Congress intended title VII to apply to foreign companies in the United States. However, due to its broad construction of title VII in the past, the Court will likely find that title VII does apply to foreign companies in the United States.⁴⁷

1. *Distinction Between National Origin and Citizenship*

Title VII prohibits employment practices having the purpose or effect of discriminating on the basis of national origin.⁴⁸ In 1973, the U.S. Supreme Court held in *Espinoza v. Farah Manufacturing Co.*⁴⁹ that title VII does not extend to discrimination on the basis of "citizenship."⁵⁰ The *Espinoza* Court distinguished national origin, which refers

42. EEOC Guidelines, 29 C.F.R. §§ 1604.2(a)(2), 1606.4 (1982).

43. *Ward v. W & H Voortman*, 685 F. Supp. 231, 232 (M.D. Ala. 1988) (citing H.R. REP. NO. 914, 88th Cong., 2d Sess., reprinted in 1964 U.S.C.C.A.N. 2391, 2402).

44. *E.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (finding that Congress's intent for title VII was the removal of artificial, arbitrary, and unnecessary barriers to employment); *Ward v. W & H Voortman*, 685 F. Supp. 231, 232 (M.D. Ala. 1988) (concluding that Congress had a broad purpose to end all vestiges of employment discrimination); *Williams v. City of Montgomery*, 742 F.2d 586 (11th Cir. 1984) (construing liberally the definition of employer in title VII); *Quijano v. University Fed. Credit Union*, 617 F.2d 129 (5th Cir. 1980) (construing liberally the definition of employer in title VII).

45. 42 U.S.C. § 2000e-2(a)(1) (1993).

46. *Id.*

47. *See Crom*, *supra* note 15, at 347 (finding that the U.S. Supreme Court has determined that the purpose of title VII is to remove discriminatory barriers to employment, which has resulted in a broad reading of title VII).

Congress passed the Civil Rights Act of 1991 to provide that title VII applies to Americans working for U.S. corporations abroad. Jacqueline E. Bailey, Note, *Title VII Protections Do Not Extend to Americans Working Overseas*. EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991), 5 TRANSNAT'L LAW. 417, 442-44 (1992) (discussing the *Arabian American Oil Co. (Aramco)* decision, its ramifications, and the Civil Rights Act of 1991). The Civil Rights Act of 1991 was specifically designed to reverse the U.S. Supreme Court's holding in *Aramco* so that title VII applies to Americans working in U.S. companies abroad. *Id.*

48. 42 U.S.C. § 2000e-2(a)(1) (1993).

49. 414 U.S. 86 (1973) (holding that an employer's policy against hiring aliens did not violate title VII).

50. *Id.* at 88. After reviewing the legislative record, the U.S. Supreme Court interpreted the term "national origin" in title VII of the Civil Rights Act of 1964 to mean the country from which a person or his forbears came. *Id.* at 89. The Court further supported its holding by finding that because "ancestry" was deleted from the final version of the Act, Congress must have considered ancestry and national origin synonymous. *Id.*

Although not covered by title VII, discrimination on the basis of citizenship may be illegal under the Immigration Reform and Control Act (IRCA). 8 U.S.C. § 1324b(a) (1993). For a discussion of the conflict caused by *Fortino* regarding the IRCA and Japan FCN Treaty, see Angelo A. Paparelli et al., *The Quasar*

to the country from which one's ancestors came, from citizenship.⁵¹ Specifically, the Court noted that a person's ancestors do not necessarily come from the place where the person is a citizen.⁵² Still, citizenship may not be used as a pretext to discriminate on the basis of national origin.⁵³

Unlike U.S. citizens, who have diverse ethnic backgrounds, the citizens of Japan are predominantly of the same race.⁵⁴ Any discrimination by Japanese companies on the basis of national origin can be easily characterized as discrimination on the basis of citizenship.⁵⁵ Thus, foreign companies can attempt to avoid title VII by arguing that they are preferring Japanese citizens when they are in fact discriminating against Americans for racial reasons.

2. *Bona Fide Occupational Qualification Exception*

Title VII has a bona fide occupational qualification (BFOQ) exception which allows an employer to legally discriminate in cases where it is "reasonably necessary" for business operations.⁵⁶ The U.S. Supreme Court has confirmed that the BFOQ exception is meant to be an extremely narrow exception to the general prohibition of discrimination.⁵⁷

When applied to a foreign company, the BFOQ exception takes into consideration factors that are unique to doing business within a given culture.⁵⁸ In the case of a Japanese corporation, these factors may include a person's (1) knowledge of the Japanese

Case: Hidden Problems of Employment, Immigration, and Tax Law, 26 INT'L LAW. 1037, 1052-54 (1992) (concluding that future litigation is necessary to determine whether the IRCA prohibits discrimination in favor of foreign nationals at foreign-owned subsidiaries). See also Abraham, *supra* note 29, at 521 (concluding that Congress probably intended for the IRCA to prevail over an FCN treaty).

51. *Espinoza*, 414 U.S. at 88. The Supreme Court found no legislative history suggesting that Congress intended to overturn its longstanding practice of permitting discrimination on the basis of citizenship for federal employees. *Id.* at 89-90.

52. *Id.*

53. *Id.* at 92. The Court reaffirmed the holding of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), that the Civil Rights Act of 1964 covers practices that are discriminatory in operation, as well as overt discrimination. *Id.*

54. *Quasar Lawyers Cite Reciprocal Benefits of Decision on Preference for Japanese*, BNA INT'L BUS. DAILY, Dec. 17, 1991. Japan is a homogeneous nation; its citizens are almost exclusively native-born Japanese. *Id.*

55. *Id.* (discussing the ease with which Japanese firms can disguise national origin discrimination as citizenship discrimination). See also Jeffrey J. Mayer, *A Critical Analysis of Judicial Attempts to Reconcile the United States-Japan Friendship, Commerce and Navigation Treaty with Title VII*, 13 NW. J. INT'L L. & BUS. 328, 343 (1992) (concluding that no meaningful difference exists between the preference for Japanese citizens and discrimination against Americans).

56. 42 U.S.C. § 2000e-2(e) (1993). This provision states:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . .

Id. § 2000e-2(e)(1).

57. *International Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1204 (1991) (interpreting the BFOQ exception at length). See EEOC Guidelines, 29 C.F.R. §§ 1604.2(a), 1606.4 (1982) (providing that the BFOQ exception should be interpreted narrowly).

58. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1139 (3d Cir. 1988).

language and culture; (2) knowledge of Japanese products, markets, customs, and business practices; (3) familiarity with the personnel and inner workings of the parent company in Japan; and (4) acceptability by those with whom the company transacts business.⁵⁹

Japanese companies can claim the BFOQ exception applies when a position requires an employee to speak Japanese or know the business practices, culture, and customs of Japan in order to coordinate with the home office in Japan. However, the U.S. Supreme Court has not specifically decided this issue.⁶⁰

C. Judicial Attempts to Reconcile the “of Their Choice” Provision and Title VII

Because title VII is silent as to whether it preempts the “of their choice” provision of an FCN treaty,⁶¹ there can be a conflict if a foreign company exercises its FCN right by employing executives of its choice and also discriminates on any basis covered by title VII—race, color, religion, sex, or national origin. Other unresolved issues include the scope of the rights conferred by an FCN treaty and whether a foreign-owned subsidiary can assert these rights.

The court decisions that had considered the FCN treaty and title VII issue prior to the Seventh Circuit decision in *Fortino* were the U.S. Supreme Court’s decision in *Sumitomo Shoji America, Inc. v. Avagliano* and appellate decisions in the Third, Fifth, and Sixth Circuits.⁶² Generally, courts have avoided finding that title VII and the Japan FCN Treaty conflict.⁶³

1. The U.S. Supreme Court and the Sumitomo Decision

In *Sumitomo Shoji America, Inc. v. Avagliano*,⁶⁴ the U.S. Supreme Court was faced with the issue of whether the Japan FCN Treaty could be used by a U.S. subsidiary of a Japanese company as a defense against a title VII civil rights discrimination claim.⁶⁵ However, instead of addressing that issue, the Court held that the Japanese-owned U.S.

59. *Id.*

60. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 189 n.19 (1982). The U.S. Supreme Court expressed no view as to whether Japanese citizenship may provide a basis for a BFOQ exception. *Id.* However, the Court recognized that some positions at Japanese-owned U.S. subsidiaries may require knowledge of the Japanese language, culture, and business practices. *Id.* For an analysis of the *Sumitomo* decision, see discussion *infra* part II.C.1.

61. See discussion *supra* parts II.A, II.B (discussing the Japan FCN Treaty and title VII).

62. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982); *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988); *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. Unit A Apr. 1981); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984).

63. The court cases which have considered the issue have generally involved claims of national origin discrimination. The courts were often able to avoid a clash between the FCN treaty and title VII by drawing a distinction between discrimination based on national origin and citizenship, which is not prohibited by title VII. It may be harder for a court to draw this distinction when the discrimination claims are on the basis of gender.

64. 457 U.S. 176 (1982).

65. *Id.* at 179. This is the same issue that was presented in *Fortino*. See discussion *infra* part III (discussing the *Fortino* decision).

subsidiary could not properly raise any FCN rights because it did not come within the coverage of the Treaty.⁶⁶

In *Sumitomo*, American female secretarial employees⁶⁷ brought a class action suit against their employer, Sumitomo Shoji America, Inc. (Sumitomo), a wholly owned subsidiary of Sumitomo Shoji Kabushiki Kaisha, a Japanese trading company.⁶⁸ The complaint alleged Sumitomo's practice of favoring Japanese males for executive, managerial, and sales positions violated title VII's prohibitions against gender and national origin discrimination.⁶⁹ In its defense, Sumitomo claimed article VIII(1) of the Japan FCN Treaty allowed it to choose "executive personnel . . . of their choice."⁷⁰

Writing for a unanimous Court, Chief Justice Burger found that according to its language, the Japan FCN Treaty only covers "companies of Japan."⁷¹ The Court adopted a place-of-incorporation test to determine the nationality of corporations under the Treaty.⁷² Since Sumitomo was incorporated and operated in the United States, it was not a company of Japan.⁷³ As such, Sumitomo could not invoke the Japan FCN Treaty.⁷⁴ In amicus curiae briefs, both the Ministry of Foreign Affairs of Japan⁷⁵ and the U.S. Department of State agreed that a U.S. corporation, even when wholly owned by a Japanese company, is not a company of Japan under the Japan FCN Treaty.⁷⁶

Since Sumitomo was not covered by the Japan FCN Treaty, the Court had no occasion to resolve the conflict between article VIII(1) and title VII. However, the Court declared in dicta that the purpose of an FCN treaty was not to give foreign corporations greater rights than domestic companies, but instead, to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.⁷⁷ In footnote 19, the Court left open the possibility that a foreign-owned subsidiary could assert the FCN treaty rights of its parent.⁷⁸

66. *Id.* at 182-83.

67. One of the plaintiffs was a Japanese citizen living in the United States. *Id.* at 178.

68. *Id.*

69. *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 508 (S.D.N.Y. 1979). In the lower courts, "Avagliano" was misspelled as "Avigliano."

70. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 179 (1982); Japan FCN Treaty, *supra* note 5, 4 U.S.T. at 2070.

71. *Id.* at 180-82.

72. *Id.* at 182-85.

73. *Id.* at 182-83, 188-89.

74. *Id.* at 182-83, 189.

75. The Ministry of Foreign Affairs is the office of the government of Japan that is responsible for the interpretation of the Japan FCN Treaty. *Sumitomo*, 457 U.S. at 183.

76. *Id.*

77. *Id.* at 187-88.

78. *Id.* at 189-90 n.19. The Court stated that it "express[ed] no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent." *Id.*

2. The Circuit Courts

Before the *Fortino* decision, the Fifth, Sixth, and Third Circuits had considered the rights which an FCN treaty confers, each reaching differing conclusions.⁷⁹

a. The Fifth Circuit

Prior to *Sumitomo*, in *Spiess v. C. Itoh & Co.*,⁸⁰ the Court of Appeals for the Fifth Circuit had determined that the Japan FCN Treaty conferred a complete immunity to Japanese-owned subsidiaries incorporated in the United States from title VII.⁸¹ However, after *Sumitomo*, the U.S. Supreme Court reversed and remanded *Spiess*.⁸²

On remand, the Fifth Circuit followed *Sumitomo* and dismissed the case because the defendant, C. Itoh America, was a corporation of the United States, and as such could not properly raise the Japan FCN Treaty.⁸³ Furthermore, the Fifth Circuit rejected C. Itoh America's attempt to assert its parent's FCN treaty rights:⁸⁴ "The defendant, by contending that it has standing to assert the substantive treaty rights of its parent, is attempting to accomplish indirectly what it cannot accomplish directly. The Court does not believe that either the Treaty or the *Sumitomo* case would permit that to occur."⁸⁵

As a result, the Fifth Circuit held C. Itoh America was subject to title VII despite the "of their choice" provision of the Japan FCN Treaty and footnote 19 of *Sumitomo*.⁸⁶

b. The Sixth Circuit

In *Wickes v. Olympic Airways*,⁸⁷ the Court of Appeals for the Sixth Circuit held that an FCN treaty allows foreign entities only a "narrow privilege" to discriminate in favor of their own citizens.⁸⁸

In *Wickes*, the plaintiff, an American citizen, was district sales manager for Olympic Airways, a foreign corporation⁸⁹ owned by the government of Greece.⁹⁰ When the

79. *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988); *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. Unit A Apr. 1981); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984). The Ninth Circuit has not addressed the FCN treaty issue, but will probably have the opportunity to do so in the near future. For a discussion of the developments in the district courts in the Ninth Circuit, see discussion *infra* part IV.C.

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

81. *Spiess*, 643 F.2d at 358. In *Spiess*, the complaint charged that C. Itoh-America had discriminated against its American employees by making managerial promotions and other benefits available only to Japanese citizens. *Id.* at 355. C. Itoh-America is a subsidiary incorporated in New York, wholly owned by C. Itoh & Co., a Japanese corporation. *Id.*

82. *Spiess v. C. Itoh & Co. (Am.)*, 457 U.S. 1128 (1982).

83. *Spiess v. C. Itoh & Co. (Am.)*, 725 F.2d 970, 972-73 (1984).

84. *Id.*

85. *Id.* (favorably quoting the district court).

86. *Id.* at 971-73. See *supra* note 78 and accompanying text (discussing footnote 19).

87. 745 F.2d 363 (6th Cir. 1984).

88. *Id.* at 368.

89. Olympic Airways was not incorporated within the United States. *Id.* at 364.

90. *Id.*

plaintiff was dismissed, he brought a discrimination suit under a Michigan civil rights statute substantially similar to title VII.⁹¹ Olympic Airways argued that the U.S.-Greece FCN Treaty immunized it from all employment discrimination claims.⁹² The lower court agreed, interpreting the "of their choice" language as conferring upon the foreign corporation an absolute right to discriminate against non-Greek citizens.⁹³ Therefore, the plaintiff's claim was barred as a matter of law.⁹⁴

On appeal, however, the Sixth Circuit held that the FCN treaty right only extends to those who are executive personnel as defined under the FCN treaty and outlined by the State Department's rules for issuing treaty trader visas.⁹⁵ The Sixth Circuit reversed and remanded the case to consider whether the plaintiff's position was covered by the FCN treaty.⁹⁶

c. *The Third Circuit*

In *MacNamara v. Korean Air Lines*,⁹⁷ the Court of Appeals for the Third Circuit held that an FCN treaty will not shield a foreign company from title VII liability for discriminating on the basis of national origin.⁹⁸ However, the court also concluded that a foreign-owned subsidiary may exercise its FCN treaty rights and discriminate on the basis of citizenship in executive positions without violating title VII.⁹⁹

The Third Circuit acknowledged that because of the homogeneous nature of the population in many foreign countries, a foreign-owned subsidiary exercising its FCN treaty right would appear to violate title VII.¹⁰⁰ Therefore, according to the court, these title VII suits could not be brought based merely upon an allegation that an employer's conduct resulted in a discriminatory effect.¹⁰¹ To alleviate this problem, the court required that some evidence of the employer's actual discriminatory motive must be alleged.¹⁰² This motive may be shown by introducing evidence of statistical disparities suggesting discriminatory conduct.¹⁰³ The court reasoned that this would allow plaintiffs to bring title VII actions without unfairly burdening a company from exercising its "of their choice" treaty right.¹⁰⁴

91. *Id.*

92. *Wickes*, 745 F.2d at 364.

93. *Id.* at 365.

94. *Id.*

95. *Id.* at 368-69. See *supra* notes 35-37 and accompanying text (discussing treaty trader visas).

96. *Id.* at 368.

97. 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

98. *Id.* at 1147. In *MacNamara*, an American district sales manager for Korean Air Lines, a Korean company, was replaced by a Korean citizen. *Id.* at 1137-38. The plaintiff claimed a violation of title VII, while the Korean company invoked the U.S.-Korea FCN Treaty. *Id.*

99. *Id.* at 1146-47.

100. *Id.* at 1148.

101. *Id.* This theory of recovery, which relies on the discriminatory effect of the employer's conduct, is referred to as the "disparate impact" liability theory. See *id.*

102. *MacNamara*, 363 F.2d at 1148. A suit based upon an allegation of the employer's discriminatory motive is referred to as a "discriminatory treatment case." See *id.*

103. *Id.*

104. *Id.*

III. THE CASE

A. The Facts

In 1985, the plaintiffs, John Fortino, Carl Meyers, and F. William Schulz,¹⁰⁵ were employed by Quasar Company (Quasar).¹⁰⁶ Fortino was Assistant General Manager of the Advertising, Sales Promotions and Public Relations Department;¹⁰⁷ Meyers was Manager of Sales Administration;¹⁰⁸ and Schulz was National Manager of Physical Distribution.¹⁰⁹ All plaintiffs were native-born Americans.¹¹⁰ Quasar considered the plaintiffs excellent employees and had given them good performance evaluations, regular promotions, and steady pay increases.¹¹¹

Quasar was a division of a U.S. corporation, Matsushita Electric Corporation of America (Matsushita), which was a wholly owned subsidiary of Matsushita Electric Industrial Company, Ltd. (MEI), a Japanese company.¹¹² Quasar did not manufacture the products it sold, but purchased them from MEI.¹¹³ Quasar maintained an affirmative action program which required it not to discriminate on the basis of national origin.¹¹⁴

In 1985, Quasar had an operating loss of approximately \$20 million.¹¹⁵ To prevent future losses, Kiyoshi Seki, Matsushita's president, and Mr. Tami, MEI's president, discussed reorganizing Quasar, including the appointment of a new executive vice president, Kenichi Nishikawa.¹¹⁶ In March 1986, MEI sent Nishikawa from Japan to manage Quasar.¹¹⁷ In April and May, 1986, Nishikawa reorganized the company and reduced the workforce.¹¹⁸

105. Sophie Mustachio was also a plaintiff at the district court level. *Fortino v. Quasar Co.*, 751 F. Supp. 1306, 1307 (N.D. Ill. 1990). However, her claim was for discrimination on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 631. *Id.* She had voluntarily dismissed her claim of discrimination on the basis of national origin. *Id.* She was not a party in the Seventh Circuit. *Fortino v. Quasar Co.*, 950 F.2d 389, 389 (7th Cir. 1991).

106. *Fortino*, 751 F. Supp. at 1308-09.

107. *Id.* at 1308.

108. *Id.* at 1309.

109. *Id.*

110. *Id.* at 1308-10.

111. *Fortino*, 751 F. Supp. at 1308-11. Fortino had been employed by Quasar for 10 years. *Id.* at 1308. Meyers had been employed by Quasar for nine years. *Id.* at 1309. Schulz had been employed by Quasar for 29 years. *Id.*

112. *Id.* at 1307. Matsushita is incorporated in Delaware. *Fortino*, 751 F. Supp. at 1308. Matsushita purchased Quasar from Motorola, an American corporation, in 1974. *Id.* Quasar's principal place of business and headquarters is in Franklin Park, Illinois. *Id.*

113. *Id.* at 1308.

114. *Id.* at 1313-14.

115. *Id.* at 1309.

116. *Fortino*, 751 F. Supp. at 1309. The district court did not elaborate greatly on either the scope or depth of these discussions.

117. *Id.* at 1309-10.

118. *Id.* at 1311.

MEI occasionally assigned some of its own financial and marketing executives, referred to as "expatriates,"¹¹⁹ from Japan to Quasar on a temporary basis.¹²⁰ At the time of the 1986 workforce reduction, Quasar employed ten managerial employees from MEI of Japanese national origin, including Nishikawa.¹²¹ The expatriates entered the United States on E-type temporary visas and were designated as MEI personnel in Quasar's books.¹²² MEI evaluated the expatriates' performance, kept their personnel records, determined their salaries, and aided in the relocation of their families.¹²³ However, they were paid by Quasar.¹²⁴ Quasar conceded it used a different salary structure for managerial employees of Japanese national origin from that for Americans.¹²⁵

The plaintiffs were discharged as part of the May 1986 workforce reduction and were not offered any other positions within the company.¹²⁶ In addition, Quasar fired sixty-six managers of American national origin; however, none of the expatriates were discharged.¹²⁷ Instead, all the expatriates received salary increases.¹²⁸ Believing they

119. Expatriation usually refers to voluntarily renouncing or abandoning one's country to become the citizen of another. BLACK'S LAW DICTIONARY 576 (6th ed. 1990). However, in *Fortino*, "expatriates" has an entirely different meaning. These expatriates enter the United States temporarily using E visas. *Fortino*, 751 F. Supp. at 1310. They do not become U.S. citizens, but retain Japanese citizenship. *Fortino*, 950 F.2d at 392.

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

121. *Fortino*, 751 F. Supp. at 1310.

122. *Id.* at 1310-11; *Fortino*, 950 F.2d at 392.

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

124. *Fortino*, 751 F. Supp. at 1311.

125. *Id.* Japanese managers' salaries were adjusted using the following factors: (1) whether the employee lives in an apartment or owns a home; (2) the size of the employee's family; and, (3) whether the employee's children attend public or private school. *Id.* See *infra* note 128 and accompanying text (listing the salary schedules for several of Quasar's expatriates).

126. *Fortino*, 751 F. Supp. at 1308-09. Without advance notice, Fortino was dismissed because his advertising department was being eliminated. *Id.* at 1312. Eventually, Fortino became a sales representative for Spectrum Graphics. *Id.* at 1313. His earnings were \$1200 in 1987 and \$11,000 in 1988. *Id.* Similarly, Meyers was dismissed because his job function was eliminated. *Id.* Meyers asked to be transferred to another position and told Quasar he was willing to take any position within the organization. *Id.* Although capable of performing in many of the positions held by the expatriate managers, Meyers was not offered any other position. *Id.* After his dismissal, Meyers contacted 300-400 executive search companies. *Id.* However, he was only able to obtain temporary positions with companies such as H & R Block during the tax season. *Id.* He was unemployed at the time of trial. *Id.* Schulz was dismissed and not offered any other position because, according to Quasar, he was overqualified for many of the "new" positions created by the reorganization. *Id.* Schulz attempted to find new employment through an outplacement firm, sending out 3300 resumes, but he was unable to find a position. *Id.* Eventually, he purchased a hardware store but had not realized any profits by the time of trial. *Id.*

127. *Id.* at 1312; *Joseph M. Winski, Japanese Companies Cited in Other Discrimination Complaints*, ADVERTISING AGE, Mar. 22, 1993, at 18. Two of three Japanese-American nonexecutive employees were among those who were discharged. *Fortino*, 950 F.2d at 392.

128. *Fortino*, 751 F. Supp. at 1311-12. Immediately preceding and continuing through the workforce reduction, Quasar increased the salaries of its ten managerial employees of Japanese national origin. *Id.* at 1312. The salary schedule of several of these employees is as follows: Tasuka Ikeda: Sept. 1986, \$70,476; Apr. 1987, \$71,436; Sept. 1987, \$76,776; Moritaka Saigusa: Apr. 1986, \$84,516; Apr. 1987, \$85,816; and Kenichi Nishikawa: Sept. 1986, \$63,300; Sept. 1987, \$67,860. *Id.* Moreover, before the workforce reduction, when Quasar was losing money "hand over fist," two expatriates received substantial increases. *Id.* at 1311. From May 1984 to July 1984, Ikeda's salary increased from \$37,200 to \$56,640. *Id.* From October

had been unfairly discriminated against, the plaintiffs filed discrimination charges against Quasar with the EEOC.¹²⁹ In March 1987, the EEOC issued "right to sue" letters, and in May 1987, the plaintiffs brought a title VII action against Quasar for national origin discrimination.¹³⁰

B. The District Court Opinion

In December 1990, the district court entered judgment in favor of the plaintiffs.¹³¹ The court found as a matter of law that Quasar impermissibly discriminated against the plaintiffs by discharging them solely on the basis of their American national origin.¹³² Applying the *Sumitomo* place-of-incorporation test, the court easily found that Quasar, a division of a Delaware corporation, was a U.S. company.¹³³ Thus, Quasar was obligated to comply with American employment discrimination laws.¹³⁴

The plaintiffs introduced sufficient evidence to demonstrate a prima facie case of national origin discrimination by showing that managerial employees of American national origin were adversely affected by the Quasar workforce reduction, but those of Japanese origin were not.¹³⁵ To rebut this, Quasar claimed it had discharged the plaintiffs because (1) its dire financial condition necessitated the dismissals and (2) the ability to speak Japanese was necessary to perform in those positions reserved for the managerial employees of Japanese origin.¹³⁶ However, the plaintiffs were successful in establishing that the proffered reasons were merely pretextual by showing that Quasar had segregated its workforce along the lines of national origin.¹³⁷ Notably, in the district court, Quasar did not claim any defense based on the "of their choice" provision of the Japan FCN Treaty.¹³⁸

In its conclusions of law, the district court found that Quasar had used discriminatory practices when it reserved managerial positions for employees of Japanese origin, evaluated and paid its managers of Japanese origin on entirely different criteria from those of American origin, and exempted those of Japanese origin from the workforce reduction, all without any lawful justification.¹³⁹ Furthermore, the court declared that Quasar acted

1985 to April 1986, Akira Mishima's salary increased from \$41,600 to \$68,160. *Id.*

129. *Fortino*, 751 F. Supp. at 1308-11, 1314.

130. *Id.* at 1307, 1314.

131. *Id.* at 1316.

132. *Id.*

133. *Fortino*, 751 F. Supp. at 1315 (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982)).

134. *Id.*

135. *Id.* at 1314-16.

136. *Id.* at 1315.

137. *Id.* The plaintiffs could demonstrate that Quasar's reasons were pretextual in one of two ways by showing that (1) the discriminatory motive more likely than not motivated Quasar's action, or (2) Quasar's proffered explanations were not credible. *Id.* At trial, the plaintiffs also showed that in the past, many managerial employees of American national origin, who did not speak Japanese, performed the managerial duties which Quasar contended could only be performed by employees of Japanese national origin. *Id.* at 1316. These duties included traveling to Japan and communicating with employees in Japanese. *Id.*

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

139. *Fortino*, 751 F. Supp. at 1315.

in "reckless disregard of the law in its treatment of the plaintiffs" because Quasar had knowledge of its legal obligations by maintaining its affirmative action program.¹⁴⁰ In the end, the court ruled that Quasar had violated title VII by depriving the plaintiffs of employment opportunities based solely on their national origin and awarded the plaintiffs \$2.5 million in damages.¹⁴¹

C. The Court of Appeals Opinion

Quasar appealed the district court decision, and in December 1991, the Court of Appeals for the Seventh Circuit reversed.¹⁴² In an opinion written by Circuit Judge Richard Posner, the Seventh Circuit held that the Japan FCN Treaty permitted Quasar to discriminate on the basis of citizenship for managerial employees in executive positions without violating title VII of the Civil Rights Act of 1964.¹⁴³ Quasar could rely on the Japan FCN Treaty by invoking the treaty rights of its Japanese parent, MEI.¹⁴⁴

Ordinarily, when an issue is not raised at the district court level, that issue cannot be considered later on appeal.¹⁴⁵ Although Quasar did not claim its Japan FCN Treaty rights in the district court, the Seventh Circuit allowed Quasar to raise the issue for the "sake of international comity, amity, and commerce . . . when . . . consider[ing] the bearing of a major treaty with a major power and principal ally of the United States."¹⁴⁶ As a further justification, the court analogized to the comity between the federal government and states which allows courts to consider issues that otherwise would have been waived if not raised below.¹⁴⁷

The Seventh Circuit found that the expatriates were executives as contemplated by the Japan FCN Treaty primarily because they had been issued E visas.¹⁴⁸ Other reasons included that they had remained employees of MEI while at Quasar, performed work that was executive or supervisory in character, were Japanese citizens, worked for a company in the United States that was "at least half owned by Japanese nationals," and were doing work authorized under the FCN Treaty.¹⁴⁹

Turning to the question of discrimination, the Seventh Circuit agreed with the district court that in Quasar's 1986 workforce reduction, the company did favor Japanese executives over managers of American national origin.¹⁵⁰ However, the court also found that the favoritism toward the expatriates was not the same as national origin discrimination

140. *Id.* at 1314.

141. *Id.* at 1315; Stephanie B. Goldberg, *Firing Line—Treaty Limits Title VII Actions Against Foreign-Owned Companies*, A.B.A. J., Mar. 1992, at 72.

142. *Fortino*, 950 F.2d at 399.

143. *Id.* at 391-92.

144. *Id.* at 393.

145. *Id.* at 391 (citing *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)).

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

147. *Id.* (citing *Younger v. Harris*, 401 U.S. 37, 40 (1971)). The Court of Appeals also acknowledged that Quasar did not allege the Japan FCN Treaty as a defense, but as "essential background" as to why the case is not within the scope of title VII. *Id.*

148. *Id.* at 392. E visas are also known as treaty trader visas. See *supra* notes 35-37 and accompanying text (discussing treaty trader visas).

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

150. *Id.*

because the expatriates had a special status conferred upon them by the Japan FCN Treaty.¹⁵¹ The court's principal concern was to give effect to the Japan FCN Treaty in general, and to the article VIII(1) "of their choice" provision in particular.¹⁵² The court explained that title VII would nullify the Japan FCN Treaty if discrimination were found each time a Japanese business chose Japanese citizens as executives.¹⁵³

The Court of Appeals avoided a collision between the Japan FCN Treaty and title VII by distinguishing national origin from citizenship.¹⁵⁴ According to the court, title VII does not forbid discrimination on the basis of citizenship and the Japan FCN Treaty permits it.¹⁵⁵ Under the *Fortino* facts, where the expatriates were precisely those persons contemplated by the Japan FCN Treaty, Quasar's action must necessarily be construed as discrimination on the basis of citizenship, as this was the only way to avoid an FCN treaty conflict.¹⁵⁶ Thus, under the Seventh Circuit's approach, Japanese businesses could exercise their treaty right to select Japanese citizens as executives without violating title VII.¹⁵⁷

The next question addressed by the Seventh Circuit was whether Quasar could properly invoke the FCN treaty. Using the place-of-incorporation test and reasoning from *Sumitomo*, the court acknowledged that Quasar, being a division of a U.S. corporation, was not a company of Japan and, as such, was not technically covered by the Japan FCN Treaty.¹⁵⁸ However, the court was again concerned with giving full effect to the FCN Treaty.¹⁵⁹ The court reasoned that a judgment that forbids Quasar from giving preferential treatment to the expatriates would have the same effect on the parent as if the judgment were issued directly against the parent: MEI would not be allowed to exercise its FCN Treaty rights.¹⁶⁰ Therefore, Quasar must be allowed to invoke the treaty rights of its parent "to prevent the [T]reaty from being set at naught."¹⁶¹

The Seventh Circuit noted that in footnote 19 of *Sumitomo*, the U.S. Supreme Court had left open the issue of a subsidiary's invocation of the treaty rights of its parent.¹⁶² The court distinguished *Fortino* from *Sumitomo*: In *Sumitomo*, there was no contention that the parent company had dictated its subsidiary's discriminatory conduct;¹⁶³ in

151. *Id.*

152. *Id.* at 392-93.

153. *Id.* at 392. The court rationalized that because citizenship and national origin are highly correlated in a racially homogeneous nation like Japan, any Japanese business exercising its Japan FCN Treaty rights would necessarily appear to be a violation of title VII. *Id.* at 392-93. The Japan FCN Treaty "right would be empty if the subsidiary could be punished for treating its citizen executives differently from American executives Title VII would be taking back from the Japanese with one hand what the [T]reaty had given them with the other." *Id.* at 393.

154. *Id.* at 393.

155. *Id.* at 391-92.

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

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

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

162. *Id.* See discussion *supra* note 78 and accompanying text (discussing footnote 19).

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

Fortino, MEI had sent its own executives to manage Quasar.¹⁶⁴ The court based its conclusion on this distinction.¹⁶⁵

As if expecting criticism of its opinion, the Seventh Circuit explained that its decision was not unsympathetic toward Americans because FCN treaty rights are reciprocal.¹⁶⁶ According to the court, but for the "of their choice" provision of an FCN treaty, there would be Americans employed abroad at subsidiaries of U.S. corporations who would lose their jobs to foreign nationals.¹⁶⁷ In the end, the court reversed the district court decision.¹⁶⁸

IV. LEGAL RAMIFICATIONS

This section discusses the legal ramifications of the *Fortino* decision. The U.S. Supreme Court will not have an opportunity to consider the *Fortino* case because the parties have settled.¹⁶⁹ Still, *Fortino* may be analyzed comparatively with *Sumitomo* and other decisions to help determine the future of the FCN treaty and title VII controversy.

A. *Fortino Gives Japanese-Owned Subsidiaries Incorporated in the United States a Legal Advantage Not Enjoyed by Domestically Owned Corporations*

The *Fortino* decision allows Japanese-owned corporations to raise the article VIII(1) "of their choice" provision of the Japan FCN Treaty as a defense to title VII discrimination claims, which is not a right enjoyed by domestically owned corporations. Clearly, *Fortino* grants Japanese-owned subsidiaries incorporated in the United States a legal advantage not enjoyed by U.S. corporations.¹⁷⁰ However, this inequity may be the very reason why *Fortino* will not be adopted by other circuits.

164. *Id.*

165. *Id.*

166. *Fortino*, 950 F.2d at 393-94.

167. *Id.* The court presented no factual evidence to support this assertion.

168. *Id.* at 398. The Seventh Circuit Court of Appeals expressed no opinion as to whether an FCN Treaty confers a blanket immunity. *Id.* at 393. Thus, the court did not address whether the Japan FCN Treaty allows a Japanese company to buy an American company, fire all of its American executives, and replace them with Japanese citizens, motivated purely by discrimination against Americans on the basis national origin. *Id.*

169. Piskorski, *supra* note 11, at 70.

170. *See Fortino*, 950 F.2d at 393-94 (remarking that although the decision may seem callous toward Americans, FCN treaty rights are reciprocal). As a result, some commentators have called for Congress to amend title VII to statutorily overrule *Fortino*. *See* Donald D. Jackson, Note, *Tilting the Playing Field: Japan's Unwarranted Advantage Under the Civil Rights Act of 1991 and Fortino v. Quasar Co.*, 28 TEX. INT'L L.J. 391, 412-13 (1993) (calling for immediate action by Congress to amend title VII to remedy the unwarranted advantage Japanese-owned subsidiaries have over American-owned corporations).

B. Other Circuits May Decline to Follow Fortino Because of Its Inconsistency with Sumitomo

The Seventh Circuit contended that the decision does not give Japanese-owned subsidiaries greater rights because the Japan FCN Treaty is reciprocal.¹⁷¹ From the *Fortino* opinion, it is evident that in the Seventh Circuit's view, the purpose of the Japan FCN Treaty is to ensure that a company can employ whomever it desires to manage and control its investments in the host country.¹⁷²

However, this cannot be reconciled with *Sumitomo*, where the U.S. Supreme Court unanimously determined the intent of the negotiators of the Japan FCN Treaty was to ensure that enterprises of one nation would be treated equally in the other—not to give foreign-owned corporations greater rights than domestically owned companies.¹⁷³ Moreover, according to Herman Walker, the chief architect and negotiator of the postwar FCN treaties for the United States, the purpose of an FCN treaty is “to secure non-discrimination, or equality of treatment: a sort of ‘equal protection of the laws’ objective.”¹⁷⁴ In addition, in *Sumitomo*, both the U.S. State Department and the Ministry of Foreign Affairs of Japan¹⁷⁵ determined from their files regarding the negotiation history that a Japanese-owned subsidiary incorporated in the United States should not be allowed to raise the Japan FCN Treaty.¹⁷⁶

Therefore, the Seventh Circuit's interpretation of the Treaty's objective cannot be squared with *Sumitomo* and the overwhelming evidence supporting that decision. To be sure, during the Treaty negotiations, the United States may have insisted on the “of their choice” provision,¹⁷⁷ but the reason was to secure equal protection of the laws for American businesses operating in the host nation.

This inconsistency between the Seventh Circuit and U.S. Supreme Court regarding the purpose of the Japan FCN Treaty may prevent the adoption of *Fortino* by other circuits.

C. The Ninth Circuit Will Probably Have an Opportunity to Decide Whether to Follow Fortino in the Near Future

The Court of Appeals for the Ninth Circuit has not addressed the FCN treaty and title VII issue. However, based upon *Fortino*, a number of defendants in title VII suits have asserted their parents' FCN treaty rights in the district courts in the Ninth Circuit.¹⁷⁸

171. *Fortino*, 950 F.2d at 393-94.

172. *See id.* at 393 (stating that a Japanese-owned subsidiary must be allowed to invoke the treaty rights of its parent to prevent the Japan FCN Treaty “from being set at naught”).

173. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 187-88 (1982).

174. Walker, *Modern Treaties*, *supra* note 23, at 811.

175. The Ministry of Foreign Affairs is the office of the government of Japan that is responsible for the interpretation of the Japan FCN Treaty. *Sumitomo*, 457 U.S. at 183.

176. *Sumitomo*, 457 U.S. at 183-84.

177. *Fortino*, 950 F.2d at 394.

178. *E.g.*, *Kieran v. Samsung Semiconductor, Inc.*, No. C-93-20103 RMW (EAI), 1993 WL 262454, at *3-4 (N.D. Cal. Jul. 7, 1993); *Kocher v. Acer Inc.*, No. C-93-20132 RMW (PVT), 1993 WL 149077, at *6-7 (N.D. Cal. May 7, 1993); *Mackentire v. Ricoh*, No. C90-20077 (N.D. Cal. Feb. 26, 1992).

Moreover, at least two cases arising in the district courts of the Ninth Circuit have seriously considered *Fortino*.¹⁷⁹

In *Kieran v. Samsung Semiconductor, Inc.*,¹⁸⁰ the defendant, a foreign-owned subsidiary incorporated in the United States, claimed its employment decisions were protected from title VII by an "of their choice" FCN treaty provision.¹⁸¹ In response, District Judge Ronald Whyte cited *Fortino* as carving out "a narrow exception to the general holding of *Sumitomo* where the foreign parent company exercises substantial control over discriminatory employment decision made by the subsidiary."¹⁸² However, the defendant in *Kieran* had alleged no facts to show that the parent company controlled the subsidiary's employment decisions, and the court ultimately decided that the subsidiary was not protected by the FCN treaty.¹⁸³ Significantly, had this court been unwilling to entertain *Fortino*, it could easily have cited *Spiess*¹⁸⁴ for a contrary proposition.¹⁸⁵

Because of the large number of discrimination suits involving foreign subsidiaries,¹⁸⁶ the Ninth Circuit will likely have an opportunity to decide whether to follow *Fortino* in the near future.

D. Other Considerations May Prevent *Fortino* from Being a Favorable Decision for Japanese-Owned U.S. Subsidiaries

Although *Fortino* is generally favorable for Japanese-owned subsidiaries, public relations concerns as well as economic and tax considerations may dissuade these subsidiaries from embracing *Fortino*-type activities.

As shown by the United States' antidiscrimination laws, Americans have generally determined that discriminatory conduct based on race, gender, or national origin is socially

179. *Kieran v. Samsung Semiconductor, Inc.*, No. C-93-20103 RMW (EAI), 1993 WL 262454, at *3-4; *Kocher v. Acer Inc.*, No. C-93-20132 RMW (PVT), 1993 WL 149077, at *6-7.

180. 1993 WL 262454 (N.D. Cal. Jul. 7, 1993).

181. *Id.* at *3.

182. *Id.* at *4.

183. *Id.*

184. See discussion *supra* part II.C.2.a (discussing the Fifth Circuit's decision in *Spiess*).

185. In *Kocher*, the foreign-owned subsidiary was not permitted to raise the FCN treaty as a defense to title VII because the plaintiff was replaced with an American citizen, not an expatriate as in *Fortino*. *Kocher*, 1993 WL 149077, at *7. A district court in the Ninth Circuit had the opportunity to address this issue in *Mackentire v. Ricoh*, No. C90-20077 (N.D. Cal. Feb. 26, 1992). In *Mackentire*, the attorney for the defendant filed a supplemental motion for summary judgment that relied entirely on *Fortino*. *Treaty May Kill Claim of Japanese Bias; Discrimination Suit Against Ricoh Hinges on 7th Circuit Ruling Regarding '53 Pact*, THE RECORDER, Feb. 20, 1992, at 1. However, the district court dismissed the case on other grounds. *Federal Judge Dismisses Bias Claim Filed by U.S. Citizen Against Japanese Firm*, BNA WASH. INSIDER, Mar. 5, 1992. *Kieran* and *Kocher* exemplify a court's willingness to apply the *Fortino* approach to situations involving FCN treaties other than the Japan FCN Treaty. *Kieran*, 1993 WL 262454, at *3 (involving the U.S.-Korea FCN Treaty); *Kocher*, 1993 WL 149077, at *7 (involving the U.S.-China (Taiwan) FCN Treaty).

186. E.g., Mullen, *supra* note 13, at 726-58 (discussing employment discrimination at Japanese-owned subsidiaries); Yates, *supra* note 12 (discussing Congress' concern regarding employment discrimination at Japanese-owned subsidiaries).

undesirable in the workplace.¹⁸⁷ Consequently, a company is usually unwilling to disclose that it has committed discriminatory acts because, among other reasons, it would lower the public esteem of the company and may make it more difficult for the company to hire good employees.

However, in *Fortino*, the parent's assignment of its expatriates and exercise of substantial control over the subsidiary's discriminatory actions during the workforce reduction were the very factors that allowed the subsidiary to assert its parent's FCN treaty rights.¹⁸⁸ In effect, when a foreign parent company confesses to mandating the subsidiary's discriminatory practices, the subsidiary will be allowed to use the "of their choice" provision as a defense to title VII. As a result, *Fortino* encourages parent corporations to carefully document or even publicly disclose their involvement in a discriminatory action in order to immunize their subsidiaries from discrimination suits brought by disgruntled executive employees.

To be sure, there already has been considerable concern about discriminatory practices at Japanese-owned subsidiaries.¹⁸⁹ Needless to say, with documented proof from the Japanese parent or subsidiary of its discriminatory practices, Americans will have a basis for their outrage. This will have an impact on the reputation of Japanese companies and will likely result in decreased sales of Japanese-made goods. Therefore, Japanese companies have an economic incentive not to exercise their Japan FCN Treaty rights.

Further, Japanese parent firms may also be unwilling to exercise their Japan FCN Treaty rights because they may lose the tax advantage enjoyed by incorporating their subsidiaries in the United States.¹⁹⁰ Under the U.S. Internal Revenue Code, a foreign parent company must file a U.S. federal income tax return and is subject to tax at regular corporate income tax rates on income "effectively connected" with the conduct of a U.S. trade or business.¹⁹¹ However, the U.S.-Japan Income Tax Treaty (Japan Tax Treaty)¹⁹² exempts a Japanese parent firm from tax on its business profits as long it has no "permanent establishment" in the United States.¹⁹³ The Japan Tax Treaty provides that a subsidiary incorporated in the United States does not, in itself, create a permanent establishment of the parent firm.¹⁹⁴

However, *Fortino*-type activities—parents assigning their expatriates to manage their subsidiaries—may be sufficient to create a permanent establishment for the parent firm within the meaning of U.S. income tax law.¹⁹⁵ As a result, the Japanese parent engaging in *Fortino*-type activities would be subject to U.S. federal income tax on the

187. See, e.g., 42 U.S.C. § 2000e (1993). In addition, nearly all states have similar statutes prohibiting discrimination.

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

189. Yates, *supra* note 12. See also Mullen, *supra* note 13, at 725-58.

190. Paparelli et al., *supra* note 50, at 1060-65 (describing possible adverse U.S. federal income tax consequences if a foreign parent corporation exercises its FCN treaty rights and assigns executive employees to its subsidiary in the United States to perform business-related activities).

191. 26 U.S.C. § 882(a)(1) (1993); *id.* §§ 864(b)-(c).

192. U.S.-Japan Income Tax Treaty, Convention for Avoidance of Double Taxation, Mar. 8, 1971, U.S.-Japan, 23 U.S.T. 967.

193. *Id.* art. 8, para. 1.

194. See *id.* art. 9, para. 6.

195. Paparelli et al., *supra* note 50, at 1065.

income attributable to that U.S. permanent establishment.¹⁹⁶ Furthermore, the Japanese parent would be required to file U.S. federal income tax returns, divulging potentially sensitive information.

For these reasons, *Fortino* may not be as significant a decision for American employees as would seem at first glance.

V. RECOMMENDATIONS

At least one commentator has suggested that Congress amend title VII to expressly override the Japan FCN Treaty.¹⁹⁷ However, this approach is not warranted; instead, any action Congress may take should preserve the intention of the parties to the Treaty. Congress may have the power to statutorily overturn the *Fortino* decision, thereby disallowing the use of an FCN treaty within the jurisdiction of the United States,¹⁹⁸ but doing so will not affect the validity of the treaty for purposes of international law.¹⁹⁹

The world is on the eve of becoming a great transnational community and the United States no longer has the bargaining clout it enjoyed in the 1950s. By not upholding its end of a treaty, the United States will diminish its reputation and invite criticism from around the world. Other nations would have reason to be suspicious of the United States during treaty negotiations. Any action by Congress may compromise the integrity of the United States in the international community. A better approach would be for the governments of the United States and Japan to negotiate amendments to the Japan FCN Treaty clarifying article VIII(1). However, since Congress has not taken any action and no negotiations are planned, the judiciary will probably have the first opportunity to address the controversy between the FCN treaty and title VII.

Although the parties in *Fortino* have settled,²⁰⁰ the U.S. Supreme Court will probably have an opportunity to consider the conflict between title VII and article VIII(1) in

196. *Id.* at 1060. U.S. tax authorities have been scrutinizing the activities at foreign-owned corporations and the practice of assigning expatriates from the parent to the subsidiary for this very purpose. *Id.*

197. *See, e.g.*, Jackson, *supra* note 170, at 412 (concluding that immediate action by Congress is necessary to avoid the *Fortino* decision's inequitable result and to respond to the growing popular sentiment in America that Japan is unfairly exploiting the United States).

198. *See, e.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (providing that when a treaty and federal legislation relate to the same subject matter, courts should endeavor to construe them so as to give effect to both if possible, without violating the language of either; but when the two are inconsistent, the one last in date will control the other). *See also* Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269, 1286 (1991) (noting that "[u]nlike federal statutes, which may be repealed only through the normal lawmaking process prescribed in the Constitution, [treaties] may be drained of [their] domestic applicability by a superseding federal statute").

199. Breaking the provisions of a treaty is a very serious matter that has in the past generated much tension between nations, sometimes even resulting in war. Realistically, in view of the position of the Japanese government in *Sumitomo* regarding the Japan FCN Treaty, it is unlikely Japan will be concerned if Congress amends title VII. However, any modification of title VII would affect FCN treaties with other nations who may not view the situation in the same way that the Japanese government does. Note that in *Sumitomo*, the Court did not express an opinion as to whether its decision could be applied to FCN treaties with nations other than Japan because there almost certainly would have been a different negotiation history with each such nation. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 n.12 (1982). *See discussion supra* part II.C.1 (discussing the *Sumitomo* decision).

200. Piskorski, *supra* note 11, at 70.

the near future because of the numerous discrimination cases brought against foreign-owned subsidiaries.²⁰¹ Even if parties would rather settle than request certiorari, a public interest law firm will probably bring a test case before the Court in order to resolve the issue because this is such an important area of the law.²⁰²

The *Sumitomo* decision is an excellent example of the analysis the Court will use in deciding a future *Fortino*-type case because of the substantial similarity between the facts in the two cases and that *Sumitomo* was delivered by a unanimous Court. The Court will focus primarily on the intent of the parties when they adopted the “of their choice” provision in the Japan FCN Treaty.²⁰³ In *Sumitomo*, the Court concluded that the purpose of an FCN treaty was to ensure that each nation would treat foreign-owned enterprises and domestically owned enterprises equally—not to give foreign-owned corporations greater rights than domestically owned companies.²⁰⁴ The Court should be able to overturn the *Fortino* result on this basis alone.

However, the Court could find further that the purpose of the “of their choice” provision was to prevent unfair discrimination. Herman Walker supported this proposition when he stated that the purpose of article VIII(1) of the Japan FCN Treaty was “to prevent the imposition of ultra-nationalistic policies with respect to essential executive and technical personnel.”²⁰⁵ The advantage of construing the purpose of the “of their choice” provision in this fashion is that it will be reconcilable with title VII, which also has a similar policy of preventing unfair discrimination. Under this approach, the Japan FCN Treaty will be harmonized with title VII.

VI. CONCLUSION

Congress intended title VII of the Civil Rights Act of 1964 to end discriminatory employment practices based on race, color, sex, religion, or national origin.²⁰⁶ The “of their choice” provision in the Japan FCN Treaty allows companies of Japan to hire executive employees of their choice.²⁰⁷ In *Sumitomo*, the U.S. Supreme Court held that based upon a place-of-incorporation test, a Japanese-owned subsidiary incorporated in the United States was not a company of Japan and therefore not entitled to raise the Japan FCN Treaty as a defense to a title VII discrimination suit.²⁰⁸ However, in a footnote, the

201. See Yates, *supra* note 12.

202. Although it may seem unlikely a public interest law firm would bring a test case on behalf of executive employees, many nonexecutive plaintiffs are affected by the FCN treaty-title VII issue too; foreign-owned subsidiaries often attempt to claim the “of their choice” provision even in cases where the plaintiffs are not executives. *E.g.*, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982) (involving American female secretarial employees claiming that the Japanese-owned subsidiary had excluded them from managerial positions based on their gender and national origin). As a defense, the Japanese-owned subsidiary alleged that the Japan FCN Treaty permitted it to choose executives of their choice. *Id.* at 179.

203. *Sumitomo*, 457 U.S. at 185.

204. *Id.* at 187-88.

205. Walker, *Commercial Treaties*, *supra* note 23, at 386.

206. 42 U.S.C. § 2000e-2(a)(1) (1993).

207. Japan FCN Treaty, *supra* note 5, art. VIII, para. 1, 4 U.S.T. at 2070.

208. *Sumitomo*, 457 U.S. at 182-83; *see id.* at 184-85 & n.10.

Court left open the possibility that a foreign-owned subsidiary could invoke its parent's FCN treaty rights.²⁰⁹

In *Fortino*, a case similar to *Sumitomo*, the Seventh Circuit acknowledged that Quasar was "technically" not a company of Japan, but permitted Quasar to raise the FCN treaty rights of its Japanese parent because the parent had dictated Quasar's conduct of preferring executives of Japanese citizenship.²¹⁰ The *Fortino* decision was surprising because it is the first case to allow a foreign-owned subsidiary incorporated in the United States to invoke its parent's FCN treaty rights. In the near future, other circuits will probably have the opportunity to follow or reject *Fortino* because many defendants are citing *Fortino* as persuasive authority in their briefs.

Fortino clearly grants Japanese-owned subsidiaries incorporated in the United States a legal advantage not enjoyed by domestically owned corporations in the United States.²¹¹ However, in *Sumitomo*, a unanimous U.S. Supreme Court said that the purpose of the Japan FCN Treaty was to ensure that enterprises of one nation would be treated equally in the other—not to give foreign-owned corporations greater rights than domestically owned companies.²¹² In view of this policy, other circuits may decline to follow *Fortino* because of its inconsistency with *Sumitomo*.

The *Fortino* decision may not be as favorable a decision for Japanese-owned subsidiaries as appears at first glance. One reason is that the decision tends to encourage the documentation and disclosure of discriminatory employment practices at foreign-owned subsidiaries because before the subsidiary may invoke its parent's FCN treaty rights, the subsidiary must show that its parent directed the subsidiary's discriminatory conduct. This direct evidence of discriminatory conduct at Japanese companies will certainly cause an uproar among the American public and that company's sales will be directly affected. Another reason is that the Japanese parent company may lose the tax advantage of incorporating its subsidiary in the United States and be required to file a U.S. federal income tax return. Therefore, despite the *Fortino* decision, Japanese parent companies will have other factors to consider when it prefers expatriates over American executive employees.

Some have suggested that Congress amend title VII to statutorily overturn *Fortino*. However, this approach is not advisable because of probable negative consequences to the United States from the transnational community. A better approach would be for the United States and Japan to negotiate a modification of the Japan FCN Treaty. Further, if the U.S. Supreme Court has the opportunity to address the issue, the Court should find that the policy behind the Japan FCN Treaty was to prevent unfair discrimination, which would enable article VIII(1) to be construed consistently with the policy of title VII.

In conclusion, the "of their choice" provision of the Japan FCN Treaty and title VII of the Civil Rights Act of 1964 will not be resolved short of future legislation, litigation, or negotiations between the governments of the United States and Japan. Until then,

209. *Id.* at 189 n.19.

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

211. *See id.* at 393-94. *See also* discussion *supra* part IV.A (concluding that *Fortino* gives Japanese-owned subsidiaries a legal advantage not enjoyed by domestically owned corporations).

212. *Sumitomo*, 457 U.S. at 187-88.

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Japanese-owned subsidiaries incorporated in the United States will have an additional defense in discrimination cases.

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