NOTE

THE 1953 UNITED STATES-JAPAN FCN TREATY: CAN TITLE VII PROTECT AMERICAN WOMEN?*

INTRODUCTION

In *MacNamara v. Korean Air Lines*[1], the Third Circuit broadly interpreted the 1956 United States-Korean Friendship, Commerce, and Navigation Treaty (FCN)[2] in a manner which may enable future courts to dismiss disparate impact Title VII claims against discriminatory foreign employers here in the United States. This interpretation applies to all other similarly worded treaties, including, most importantly, the 1953 United States-Japan Friendship, Commerce, and Navigation Treaty (FCN).[3] The Third Circuit's interpretation

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[1] 863 F.2d 1135 (3rd Cir. 1988). *Korean Air Lines* addressed the issue of whether a foreign employer with branch offices within the United States could be held to violate Title VII by dismissing six managers in its American offices who were American citizens and replacing them with four Korean citizens. The plaintiff was a 57-year-old American citizen who was terminated, allegedly as part of a reorganization in the United States.

[2] Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Korea, art. 8, U.S.T. 2217, T.I.A.S. No. 3947.

[3] Treaty of Friendship, Commerce and Navigation, April. 2, 1953, United States-Japan, art. VIII, para. 1, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863 [hereinafter United States-Japan FCN Treaty]. *See also* Convention of Establishment, Protocol and Declaration, Nov. 25, 1959, United States-France, art. VI(1)(2), Protocol (9), 11 U.S.T. 2398, T.I.A.S. No. 4625; Treaty of Friendship, Commerce and Navigation, Nov. 12, 1959, United States-Pakistan, 12 U.S.T. 110, T.I.A.S. No. 4683; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-The Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-West Germany, art. VIII(1), 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. 4797; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, 63 Stat. 2255, T.I.A.S. No. 1965; Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Taiwan, 63 Stat. 1299, T.I.A.S. No. 1871.

will frustrate efforts to eliminate gender hierarchy[4] among professional and managerial employees in the United States.

The enabling provision, Article 8, Section 1, of the United States-Japan FCN Treaty reads: "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."[5] In 1982, the Fifth Circuit held that the United States-Japan FCN Treaty enabling provision permits a Japanese company in the United States to have a hiring policy which grants managerial promotions to only Japanese citizens.[6] This holding may not appear to violate Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of "race, color, religion, sex, or national origin."[7] Because the Treaty permits only discrimination on the basis of "citizenship,"[8] the court's interpretation of the Treaty appears wholly consistent with Title VII.[9]

However, the Third Circuit's logic in *Korean Air Lines* contradicts the Supreme Court rule in *Griggs v. Duke Power.*[10] *Griggs* held that the practice of hiring based on the test scores of Title VII claimants, while not prohibited under Title VII, are nevertheless subject to disparate impact claims.[11] In

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[4] Gender hierarchy exists where men, more often than women, hold positions of power and economic influence, or where men on the whole are economically better off than women in society and have access to more economic opportunities. Lucinda M. Findley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1122 n.14 (1986).

[5] United States-Japan FCN Treaty, *supra* note 3, at para. 1, 4 U.S.T., 2070.

[6] Spiess v. C. Itoh and Co. (America), 643 F.2d 353 (5th Cir. Unit A Apr. 1981), *cert. dismissed*, 454 U.S. 1130 (1982).

[7] The relevant provision of Title VII provides:

(a) It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to 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.

42 U.S.C. § 2000e-2(a) (1964).

[8] Fortino v. Quasar, 950 F.2d 389, 391 (7th Cir. 1991).

[9] 42 U.S.C. §2000e-2(a) (1964).

[10] 401 U.S. 424 (1971).

[11] The relevant provision of Title VII provides:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.

Griggs, the Supreme Court held that Title VII prohibits not only overt discrimination but also acts which have a discriminatory effect.[12] The Third Circuit held, however, that the words "of their choice" in the Korean FCN Treaty, mean that United States law will only hold Korean employers liable for employment decisions that are invidiously discriminatory.[13] Since the Japanese FCN Treaty language contains terms identical to the Korean FCN Treaty, it can be assumed that the Courts would apply the same reasoning to an analysis of the Japanese Treaty.

The Third Circuit's interpretation of the FCN treaty should concern women in the United States, as it will close the door for disparate impact claims against foreign employers operating within the United States under FCN treaties. The United States has concluded similar treaties with at least thirteen countries.[14] The fact that more than three million United States citizens currently work for foreign companies doing business in the United States indicates the gravity of this issue.[15]

This Note deals with the United States-Japan Treaty for several reasons. First, the potential impact of these treaties coincides with a growing awareness of Japan as an economic and cultural influence on the lives of Americans. In addition, the issues facing American women coincide with rampant gender discrimination and the rising women's rights movement in Japan.[16] Finally, cases involving Japanese corporate activity helped develop much of the important case law interpreting the FCN Treaties as they relate to employment issues.[17]

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42 U.S.C. § 2000e-2 (1964).

[12] 401 U.S. at 431. The *Griggs* requirement for making a discriminatory impact case was subsequently overruled in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). *Wards Cove* required the plaintiff to identify, if possible, the particular employment practice causing the disparate impact. Congress attempted to restore the *Griggs* analysis in the Civil Rights Act of 1991, section 105, 42 U.S.C. section 2000e-2(k)(1) (West Supp. 1992). The results of that effort are less than certain. *See* Donald O. Johnson, *The Civil Act of 1991 and Disparate Impact: The Response To Factionalism*, 47 U. Miami L. Rev. 469 (1992); Note, *The Civil Rights Act of 1991 and Disparate Impact Litigation*, 106 HARV. L. REV. 1621, (1993).

[13] *See* MacNamara v. Korean Airlines, 863 F.2d 1135, 1137-38 (3rd Cir. 1988).

[14] *Id.*

[15] *Japanese Pass Britain to Become Largest Foreign Investor in U.S.*, L.A. TIMES, June 28, 1989, at D1.

[16] The largest number of charges filed against Japanese-owned companies, approximately 37%, raise the issue of race discrimination. Sex discrimination accounts for 34% of the 115 charges. *See Congressional Testimony by E.E.O.C. Chairman and O.F.C.C.P. Deputy Director on Discrimination by Japanese-owned Companies*, Daily Labor Report (BNA) No. 142, at D-1 (1991) [hereinafter Congressional Testimony].

[17] *See* Fortino v. Quasar, 950 F.2d 389, 391 (7th Cir. 1991); Spiess v. C. Itoh and Co. (America), 643 F.2d 353, 359 (5th Cir. Unit A Apr. 1981), *cert. dismissed*, 454 U.S. 1130, 1139 (1982); Avagiliano v. Sumitomo Shoji America, Inc., 638 F.2d 552 (2nd Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982); Adames v. Mitsubishi Bank Ltd., 751 F. Supp. 1548, 1552 (E.D.N.Y. 1990).

This Note specifically addresses the following issues: sexism in Japanese corporate culture and the negative experiences of women with sexist Japanese employers in the United States; the sexism in Japanese corporate culture which contributes to employment discrimination; the relationship between employment protection in the United States and the United States-Japan FCN Treaty; and finally, protecting women in the American labor market.

I. SEXISM IN JAPAN'S CORPORATE CULTURE

"[An equal number of male and female executives] would deprive men of jobs and cause social unrest. By nature women are better suited for raising children and domestic responsibilities."

"[Female university graduates] tend to stop work after a few years. And quite frankly we find them rather headstrong."[18]

Corporate Japan's presence as one of the world's most male-oriented and homogeneous societies increases the friction between Japanese companies and American women. Some Japanese businessmen may feel uncomfortable when dealing with foreigners, regardless of those foreigners' sex or race.[19] This fact is exacerbated by the reality that many successful Japanese businessmen view a woman's position and rights in society very differently than would an American businessman.[20]

A. *The Three Steps Behind Rule*

In order to appreciate the danger of employment discrimination to American women in the Japanese employment process, one must understand that Japan still maintains a sexist corporate culture. This prevailing sexism will not soon change. During the last two decades, Japanese society has not dramatically liberalized its view of women in society.[21]

Sexism in Japan is blatant. As recently as 1992, the classified section of *The Japan Times*, a major national newspaper, classified employment opportunities according to the gender of prospective employees. Posters and calendars depicting nude women have decorated Japanese corporate and government

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[18] FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 128, (1987). (quoting Ohtsuki Bunpei, President of the Japan Federation of Employers Associations, and Furuuchi Masaru, Personnel Director of Kinokuniya Shoten, one of the largest Japanese bookstores (with a branch in New York City), respectively).

[19] Deborah L. Jacobs, *Costly Lessons in Discrimination*, FORBES, May 27, 1991, at 186. (quoting Yoshi Tsurumi, a professor at New York's Baruch College).

[20] Kathryn Graven, *Sex Harassment at the Office Stirs Up Japan*, WALL ST. J., Mar. 21, 1990, at B1. In 1990, Masahira Dozen, President of Daiwa Securities Co., refused to take the issue of women's employment rights seriously. His view of sexual harassment: "Beauty is beauty. The men are just admiring the ladies. It's a wish or hope. It's nothing serious." *Id.* at B10.

[21] UPHAM, *supra* note 18, at 144.

offices for years.[22] Some Japanese women even believe that popular attitudes have become more traditional since the 1950s.[23]

Japanese society has balked at adopting the Western conception of women's rights. Both men and women regard the Japanese Equal Employment Opportunity Act as unrepresentative of the social consensus on a woman's role in society.[24] Critics of women's liberation maintain that Japanese women are satisfied with current positions.[25] In one survey, fifty-five percent of the 3,000 Japanese women polled stated that they were not being treated equally with men at work. However, only twenty-six percent felt they should organize to bring about change.[26]

As explained below, Japanese law has done little to change the situation of women in Japan. Litigation over employment discrimination in Japan began in the mid-1960s over the issues of explicit wage discrimination, retirement, and reduction-in-force policies. Because the Japanese have failed to enact sufficient legislative protection against gender discrimination, a handful of lawyers have fought for equal employment opportunity in Japan at a drudgingly slow pace in court.[27]

The fact that Japan's first ruling on sexual harassment, or *sekuhara* in Japanese, came in 1992, best portrays the degree of apathy for equal employment rights in Japanese society.[28] Demonstrating an even more disturbing trend, a Japanese citizens' group, Sexual Harassment in the Workplace Network, surveyed seventy harassment victims in 1990 and found that employers fired more

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[22] Graven, *supra* note 20, at B10.

[23] UPHAM, *supra* note 18, at 144.

[24] *Id.* at 151.

[25] Yumiko Ono, *Reluctant Feminists, Women's Movement in Corporate Japan Isn't Moving Very Fast*, WALL ST. J., June 6, 1991, at A1. Some commentators insist that the long working hours and commuting distances, not to mention other enormous pressures at work in Japan, discourage women from attempting to build careers and cause women to seek a life of married leisure. Takashi Kashima, *Women Find Not-So-Equal Employment Opportunities*, THE NIKKEI WEEKLY, Apr. 19, 1993, at 21. According to a 1992 survey by the Management and Coordination agency, the number of women preferring a "permanent career" dropped to only 14.4% in 1989, compared to 16.6% in 1983. Sumiko Iwao, a psychology professor at Keio University in Tokyo believes Americans only seem to know Japanese women can pursue a freer lifestyle than men. While Americans tend to evaluate other women in terms of income or social status, Japanese women are less concerned about rigid concepts of equality. Japanese women are likely to take into account other criteria such as whether or not they have a good lifestyle. *Id.*

[26] Ono, *supra* note 25, at A10.

[27] *See generally* UPHAM, *supra* note 18, at 124-165.

[28] Judge Takashi Kawamoto of the Fukuoka District Court ordered a local publishing company and its senior male editor to pay $12,500 in damages to a former female employee. The editor harassed the woman for two years with lewd remarks and spread rumors in the office regarding the woman. Irene Kunii, *Japanese Employers Get Message From Courts*, CHI. TRIB., Apr. 26, 1992, at 11.

than half of the victims who had protested.[29]

Sexism in Japanese culture continues due to social apathy and deeply ingrained traditions. For example, many middle-aged Japanese managers still operate by the "three steps behind rule."[30] This unwritten rule required women to walk three steps behind men in public. This rule survives in the Japanese workplace where women must serve tea to guests, wait on male colleagues, and perform jobs that men refuse to do.[31]

Until the 1960s Japanese women adhered strictly to traditional employment patterns. Women entered the labor force early, worked in private industry, and usually retired in their early twenties to assume the role of housewife and mother.[32] At that point, the woman usually received the encouragement of her peers and the reward of an early retirement payment based on the number of years she worked for the company, thus encouraging the trend.[33]

In contrast to Japanese women of the pre-1960s, however, the typical female employee now returns to the labor market sometime after reaching thirty years of age, after raising children.[34] Although labor force participation has increased, educational attainment, age, and length of service exhibit little corresponding growth.[35] Women who return to work often return to entry level and part-time positions and are not considered for prospective management.[36] In 1991, Japanese women comprised at least forty percent of the work force, including part-time workers, but only one percent of these women held managerial positions.[37] The acceptance of traditional roles for women persists, and without an impetus for social change, a radical advancement of women's rights

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[29] Graven, *supra* note 20, at B10.

[30] This old saying in Japanese is "sanpo sagatte aruku." Ronald Yates, *Japanese Firms in the U.S. Make Efforts to Fit In*, CHI. TRIB., Jan. 13, 1992, at C1 (quoting Tsugio Kusajima, executive director of the Japan External Trade Organization in Chicago).

[31] *Id.* A 1985 study of both American and Japanese women executives found that while the number of respondents from both countries who believed that the business world disadvantages women was 68%, women executives in Japan felt more strongly that discrimination affected their qualifications for promotions to executive positions. In Japan, 74% of the responding women felt differences existed; 24% could not answer either way; and 4% did not think differences existed. In the United States, the answers were, respectively, 42%, 28%, and 17%, with 12% not answering the question. Haruo Takagi, *Aspiration of Women Executives: A U.S.-Japan Comparison*, JAPANESE ECONOMIC STUDIES 29 (Winter 1988-1989).

[32] UPHAM, *supra* note 18, at 125.

[33] Ono, *supra* note 25, at A1.

[34] *Id.* at A14.

[35] *Id.*

[36] UPHAM, *supra* note 18, at 126.

[37] Ono, *supra* note 25, at A1. In a 1992 survey, 30.7% of Japanese women employed outside the home worked less than 35 hours a week. Kashima, *supra* note 25, at 21. In 1991, women filled 3.6% of middle-management positions at firms with more than 100 employees. *Id.*

in the workplace remains unlikely.

In Japan, women earn about half of what men earn,[38] and this gap increases yearly.[39] In 1988, while women represented one in every three working Japanese adults, the percentage of women in management positions such as section chiefs (*kacho*) or higher, in corporations listed on the Tokyo Stock Exchange amounted to only 0.1 percent.[40] Furthermore, an examination by the Council on Economic Priorities, a non-profit research organization in New York, found no women among 1,493 managers at five diverse Japanese companies in 1987.[41]

The lack of social pressure for change within Japanese society combined with traditional corporate sexism and lax employment laws, will likely propel Japanese corporate sexism into the twenty-first century. As direct Japanese foreign investment continues to grow in the United States, the effects of the Japanese sexist labor practices on American employees will increase.

B. *Modern Japanese Employment Laws Are Not Causing Dramatic Advancements for Japanese Women*

Japanese employment laws have not completely ignored women. The Japanese legislature enacted numerous laws for the alleged purpose of protecting women. Most of the laws, however, reflected a paternalistic attitude which has reinforced gender stereotypes. For example, Article 63 of the Labor Standards Act[42] (L.S.A.) forbids women over the age of eighteen from working more than two hours of overtime per day, six hours of overtime per week, and one hundred and fifty hours of overtime per year. Under the same act, an employer could not employ women over the age of eighteen on holidays. Under Article 62, paragraph 1 of the L.S.A., an employer could not employ adult females between eleven in the evening and five in the morning nor, under Article 63, could women be employed in dangerous jobs.[43]

The policy behind these laws reflects a traditional attitude towards women in the workplace dating back to the 1911 Factory Act,[44] which protected women so they would give birth to healthy workers and soldiers.[45] The Japa-

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[38] Douglas Frantz, *Japanese Unaccustomed to Either; Role of Working Women Minorities Pose Challenge*, L.A. TIMES, July 13, 1988, at A1.

[39] UPHAM, *supra* note 18, at 126. *But see Economic Figures*, THE NIKKEI WEEKLY, Mar. 22, 1993, at 4 (citing a recent survey showing that the average monthly starting salary for males in 1993 will be 193,304 yen ($1,652) while the average starting monthly salary for women will be 184,723 yen).

[40] Takagi, *supra* note 31, at 24. (Prime Minister's Office, *Fujin nohoshin kettei sanka jokyo chosa*, Survey of participation in policy decision-making by women).

[41] Frantz, *supra* note 38, at A15.

[42] *Rodo Kijun Ho*, Law Number 49 of 1947.

[43] *Id.*

[44] Law Number 46 of 1911.

[45] Masahiro Ken Kuwahara, *The Equal Opportunity Employment Act*, *in* DOING BUSINESS IN JAPAN, vol. 6, ch. 4, § 2. (Z. Kitagawa ed., 1991). A June 1991 report by

nese legislature amended the old laws under the 1985 Labor Standards Act Amendment.[46] The new laws reflect a growing Japanese policy of increased worker equality.

Until 1985, only the L.S.A. Act of 1947 covered private gender discrimination by prohibiting wage discrimination under Article 4. However, the L.S.A. did not deal directly with problems in areas other than wage discrimination.[47] For example, Article 3 of the L.S.A. does not include "gender" in its prohibition of discrimination on the grounds of citizenship, religion, or social origin.[48] In 1985, the Japanese legislature enacted the Japanese Equal Employment Opportunity Act (J.E.E.O.A.) in an attempt to prohibit gender discrimination.[49] Even after the passage of the J.E.E.O.A., however, Japanese women must base discrimination in employment cases upon vague statutory and constitutional language. For example, Article 14 of the Japanese Constitution prohibits gender discrimination, but reasonableness standards and state action requirements weaken its application.[50] In addition, enforcement remains difficult because the J.E.E.O.A. establishes no penalties for violations.[51]

While the J.E.E.O.A. does not provide remedies in cases involving an employer's violation of the J.E.E.O.A.'s requirements, a woman can take legal action under the 1890 Civil Code Article 90 which prohibits acts conflicting with public policy and good morals.[52] Since 1966, courts have employed this provision to declare employment rules which discriminate between men and women to be null and void.[53]

In light of the recent laws, and the Japanese court decision on sexual harassment,[54] women in both the United States and Japan can expect some favorable shifts in Japanese corporate awareness of women's rights. In the meantime, however, the careers of women working for Japanese companies in both countries are in limbo. Given the slow pace of social change in Japan, women can expect to wait a long time before real benefits are secured.

II. IMPORTED SEXISM

Management and labor experts warn that the Japanese treatment of Ameri-

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the Management and Coordination Agency determined that clauses in labor law designed to protect women are one reason why women do not receive equal treatment. *See* Kashima, *supra* note 25, at 21.

[46] Law Number 45 of 1985.

[47] Kuwahara, *supra* note 45, at vol. 12, ch. 4, § 4(2)(2).

[48] *Id.*

[49] Law Number 45 of 1985.

[50] UPHAM, *supra* note 18, at 120.

[51] Kuwahara, *supra* note 45, at vol. 12, ch. 4, § 3.

[52] Law Number 89 of 1890, Art. 90.

[53] *Kuwahara v. Sumitomo Cement K.K.*, Tokyo District Court, 467 *Hamejiho* 26, Dec. 20, 1966.

[54] *See* Kunii, *supra* note 28, at 11.

can women could become a major source of social and economic tension.[55] Many Japanese firms in the United States face at least one pending discrimination case, and the number of legal actions is likely to increase with the recent Japanese acquisitions of large American companies.[56] Many Americans have already experienced the harmful side effects of unregulated foreign corporate employment practices in America. A panel of American workers recently told a congressional hearing that their Japanese employers subjected Americans to widespread and systematic discrimination.[57] The employees alleged that Japanese employers subjected them to different hiring, promotion, and benefit standards than those of their Japanese counterparts.[58]

American corporate culture may tolerate sexism in Japanese companies in order to reap the short-term economic gains that occur when foreign investors manage their labor force unhindered by Title VII. However, direct foreign investment which brings with it a sexist corporate culture does not offer women a fair share in the opportunities that the new investment brings. It is unjust to force women to endure additional discrimination in order to facilitate Japanese foreign investment in the United States.

Allegations of discrimination by Japanese employers against female employees in the United States are already occurring. For example, in the early 1980s a female managerial employee sued C. Itoh and Co. in New York, alleging that her Japanese employers treated her differently from the male managers in the office.[59] Unlike her male colleagues, her employers never provided her with a business card (*meishi*) even though the *meishi* denotes one's status as a manager and serves as an extremely important tool for developing business contacts in Japanese corporations.[60] In addition, Japanese managers never introduced her to visiting clients and her Japanese employers did not provide her with any clerical help.[61]

In 1992, a female employee in the Chicago office of the Sumitomo Corporation of America alleged that her Japanese employer retaliated with hostility and reduced her responsibilities after she told a House subcommittee about sexual harassment in her workplace.[62] She also testified that the Japanese

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[55] *See* Frantz, *supra* note 38, at A1.

[56] Jacobs, *supra* note 19, at 186 (quoting Yoshi Tsurumi, a professor at New York's Baruch College). *But see* Congressional Testimony, *supra* note 16, at 1 (citing testimony by the Chairman of the E.E.O.C. stating that Americans brought only 115 charges against Japanese companies representing only 0.19% of the E.E.O.C.'s workload).

[57] Congressional Testimony, *supra* note 16, at A14.

[58] *Id.*

[59] Frantz, *supra* note 38, at A15.

[60] *Id.* For example, *Kaishajin*, the salaried Japanese employees, open business relationships with the ceremonial trading of the *Meishi*, called *Meishi Kookan.*

[61] *Id.*

[62] Dallas Gatewood, *U.S. Worker Complains of Japanese Job Retaliation*, NEWSDAY, Feb. 27, 1992, at 45.

management left magazines and calendars with nude women in plain view at the office and that a G-string lay on one manager's desk.[63] While this behavior might shock Americans, such sexist practices are common in Japan.

Not all Japanese employers practice sexist behavior. However, these incidents, and other recent examples of discrimination against American women at Japanese companies, illustrate the need to hold Japanese employers accountable to the same laws and standards that are adhered to by American employers.

III. The Impact of Japanese All-Male Managerial Staff Transfers to the United States

A. *Women at Risk*

Japanese companies have traditionally rotated executive and managerial staffs overseas to manage their subsidiaries. In the 1991 case *Fortino v. Quasar*[64], the court decided whether a plaintiff may assert a claim of discrimination on the basis of national origin despite the United States-Japan FCN Treaty.[65] In dictum, Judge Posner noted that the Treaty permitted discrimination only on the basis of "citizenship".[66] However, employee "citizenship" in the context of Japanese rotated staff is virtually synonymous with employee gender. Japanese companies almost never send women overseas as rotating personnel, or *kaigaitenkinsha*.[67]

The *Fortino* case, which involved the Quasar company's use of the Japanese system of *kaigaitenkin*,[68] or overseas transfers, demonstrates one of the ways in which discriminatory Japanese policies affect American workers. Quasar, a Japanese subsidiary of Matsushita, markets Japanese-made Matsushita products in the United States. When Matsushita first acquired Quasar, the company assigned several of its own financial and marketing executives to Quasar on a temporary rotating basis. Although Quasar retained day-to-day managerial control of the transferred executives, they were considered by Quasar to be Matsushita employees.[69] Matsushita evaluated employee performance, kept personal records of each employee, fixed their salaries and assisted with relocating the transferred employee families during the assignment period.[70] The employees stayed in the United States under E-1 or E-2 VISA status and

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[63] *Id.*

[64] 950 F.2d 389 (7th Cir. 1991).

[65] *Id.* at 391.

[66] *Id.* at 392.

[67] Ronald C. Brown, *The Faces of Japanese Labor Relations in Japan and the U.S. and the Emerging Legal Issues under Labor Laws*, 15 Syracuse J. Int'l L. & Com. 240, 249 (1989).

[68] *Fortino*, 950 F.2d at 392.

[69] *Id.*

[70] *Id.*

Matsushita designated them as executives engaged in supervisor work.[71]

The *kaigaitenkinsha* are usually exempt from American employment discrimination laws under the citizenship preference policies legitimized by the United States-Japan FCN Treaty.[72] Regardless of whether the near exclusive role for Japanese males within the *kaigaitenkin* system comes about intentionally, the application of this system for managing subsidiaries in the American labor market reinforces the glass ceiling for female employees in Japanese firms.

Under the *Korean Air Lines* interpretation of Article 8, Section 1, which seems to prohibit disparate impact claims, American women are denied remedies for lost employment opportunities that would otherwise be available for them in the management sector of the American job market. Women are therefore subject to hostile management practices without the protections of Title VII. The importation of Japanese male management furthers the sexist policies that exist in Japanese corporate practice. The injustice in Article 8, Section 1, therefore, lies in its perpetuation of women as an inferior class in the job market.

1. The glass ceiling

Because Japanese men fill almost all of the managerial positions at the 2,225 Japanese business entities in America, the practice of *kaigaitenkin* results in the loss of white-collar job opportunities, some of which would otherwise go to women. By 1990, Americans occupied only thirty-one percent of the senior management positions at Japanese subsidiaries in the United States.[73] Not surprisingly, women fared less well than men. In 1989, female officials and managers were under-represented in Japanese-owned companies. Other foreign-owned companies in the United States employed women in 32.3% of official and management positions and the national average for women in management was 28.6%.[74] Japanese companies employed women at a rate of 15.9% for such positions.[75] The harm caused by denying these positions to women extends beyond the mere number of lost jobs. Co-workers and peers of the replaced employees are also adversely affected by the reinforcement of the gender and racial hierarchy. American management workers are replaced by Japanese *kaigaitenkinsha*, and experience indicates that these replacements will probably be men. For example, in the late 1970s, Sumitomo Shoji America, Inc. employed over 200 people in its New York offices. The all-male rotated staff at Sumitomo comprised nearly forty-five percent of the employees in key positions at the New York subsidiary.[76] This further limits management

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[71] *Id.*

[72] Yates, *supra* note 30, at C1.

[73] *Id.*

[74] Congressional Testimony, *supra* note 16, at D1.

[75] *Id.*

[76] Brown, *supra* note 67, at 250.

opportunities which might otherwise have been open to women.

2. Article 8, Section 1 encourages direct discrimination against women

In addition to the reinforcement of the glass ceiling, other adverse effects flow from the decision to allow Japanese firms to freely displace Americans with Japanese rotating staff. In 1991, the Chairman of the Equal Employment Opportunity Commission testified that conclusions cannot be drawn about whether Japanese companies are more likely to discriminate than other companies.[77] Furthermore, some studies indicate that Japanese companies in the United States generally do not discriminate between Americans any more than their American-owned counterparts.[78] However, unlike American corporations, under the current interpretation of Article 8, Section 1 Japanese corporations can discriminate without fear of retribution.

For example, the practice of *kaigaitenkin* permits Japanese corporations to practice gender discrimination under the guise of a "citizenship" preference.[79] Suppose, for example, that the executive of a Japanese company purchased an American-owned company and fired all of the American executives, because the Japanese manager felt "uncomfortable" working with women. Suppose then that the same company replaced the Americans with an all-male Japanese managerial work force. In a discrimination suit, the burden of proving an intent to eliminate American women because of their gender would be difficult.

Intentional discrimination cases such as *Shiseido Cosmetics (America) Ltd. v. State Human Rights Appeal Board*[80] have proven difficult to win. Shiseido replaced an American woman in a retrenchment that left the Japanese male staff intact. The court upheld the retrenchment because no evidence existed to support a finding of national origin discrimination.[81] Gathering evidence of direct discriminatory intent to support an intentional discrimination case can amount to an impossible task when the employer makes his statements, and writes his documents and memos, in Japanese. It is easy to see the magnified burden that women face in challenging foreign employers in direct discrimination cases.

3. The effect upon women differs from the effect upon other Americans

Although this Note confines itself to the topic of women and Japanese

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[77] Generalizations based on reports which the E.E.O.C. administers potentially mislead casual observers and can be used either to prove or disprove criticism of Japanese hiring practices in the United States. Congressional Testimony, *supra* note 16, at A14.

[78] *Id.*

[79] *See* Adames v. Mitsubishi Bank Ltd., 751 F. Supp. 1548, 1552 (E.D.N.Y. 1990). (plaintiffs alleged that the practice created a "dual staff system" and that the discriminatory practices were not justified by any legitimate preference for Japanese citizens).

[80] 421 N.Y.S.2d 589 (1979), *aff'd*, 419 N.E.2d 346 (N.Y. 1981).

[81] *Id.* at 590.

employers, similar issues exist for American ethnic groups. Japan, like the United States, has not conquered racism in its society.[82] Furthermore, the Japanese often have little experience in the hiring and employment of minorities.[83] This increases the risk for racially discriminatory behavior by Japanese corporate management. There have been allegations, for example, that the Japanese more willingly invest in rural areas because they seek to avoid employing minorities in the United States.[84] Unfortunately, these claims are very difficult to prove, as other economic incentives such as lower wages, land costs, and taxes, make rural areas attractive to foreign investors.[85]

The effects of Japanese discrimination on minorities is similar to its effects on women. The replacement of American staff with Japanese staff eliminates jobs for American minorities. Because Japan possesses a nearly homogeneous society, Japanese corporations are not able to transfer African-American or Hispanic *kaigaitenkinsha* from Japan to fill positions in American subsidiaries and branch offices. Therefore, it arguably contributes to the glass ceiling by removing African-Americans, Hispanics and other ethnic-racial minorities from white-collar employment positions.

While the effects are the same, the reasons for the absence of women and ethnic minorities from the *kaigaitenkin* system are different. The absence of African-Americans, Hispanics, and other minority groups for the *kaigaitenkinsha* population results from the fact that Japan is an extremely homogeneous society. The absence of women among the ranks of the *kaigaitenkinsha* in the United States, however, results from discrimination against women in Japan.

IV. THE 1953 TREATY PROMOTES THE IMPORTATION OF FOREIGN CORPORATE SEXISM

A. *The Treaty*

The 1953 United States-Japan FCN Treaty belongs to a group of sixteen treaties negotiated in the years immediately following World War II. Since its enactment, Article 8, Section 1 has guided Japanese hiring practices in the United States. This provision allows foreign companies in the United States to hire employees "of their choice" for certain high-level positions.[86] The Ameri-

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[82] *See* YURI IWASAWA, LEGAL TREATMENT OF KOREANS IN JAPAN: THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ON JAPANESE LAW, International Human Rights Law Group, Washington, D.C, 1986.

[83] Frantz, *supra* note 38, at A15. There is no doubt that Japan's characteristic as one of the world's most homogeneous and male-oriented societies lends to the friction between Japanese companies and American employees. (The largest minority group in Japan, the Koreans, are a mere 700,000 in a population of 120 million and there are few white-collar opportunities for them in Japan). *Id.*

[84] *Id.* at A1.

[85] *See* Congressional Testimony, *supra* note 16, at A-16.

[86] United States-Japan FCN Treaty, *supra* note 3.

can statesmen in power in 1953 did not consider equal opportunity in employment an important issue.[87] The lack of safeguards in Article 8, Section 1 designed to prevent discrimination results from this disregard for issues involving equal employment opportunity.

Unfortunately, the discriminatory impact of the treaty cannot be alleviated by the enactment of remedial domestic legislation. The Treaty now has the "force and effect of a legislative enactment."[88] It represents the "supreme law of the land" and supersedes inconsistent domestic laws.[89]

1. The Treaty ignores the plight of women

The American and Japanese negotiators of the FCN treaties both failed to pay sufficient attention to the public interest. The Treaty failed to provide protection to workers of both countries against sexist hiring practices.[90] This oversight resulted from the fact that the negotiators drafted Article 8, Section 1 with broad permissive terms in order to reap the benefits that result from increased foreign investment. As a result, the provision ignores the harm that American women incur from gender discrimination.

When the law remains "[gender] blind, it will be most blind to [the problems of women]."[91] One can say the same of treaties. Although the FCN Treaties categorically removed all Americans from Title VII protection, the treaties cause disproportionate harm to American women. Article 8, Section 1 harms women by decreasing the relative percentage of women in key employment sectors and by permitting sexist employment practices by foreign corporations.

Because the issue of gender discrimination was ignored in the drafting of the Treaty, discriminatory corporate policies and actions may not be remedied. As a result, the legal and moral principles of fairness embodied in American civil rights laws, such as Title VII, may be ignored.[92] The phenomenal surge in Japanese investment in the United States does not legitimize the sacrifice of women's rights or the violation of American labor, civil rights, and anti-dis-

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[87] Nobuhisa Ishizuka, *Subsidiary Assertion of Foreign Parent Corporation Rights Under Commercial Treaties to Hire Employees "Of Their Choice"*, 86 COLUM. L. REV. 139, 142 (1986) (legislative history does not indicate negotiators specifically addressed possible conflicts with civil rights laws).

[88] Whitney v. Robertson, 124 U.S. 190, 193 (1988).

[89] Spiess v. C. Itoh & Co. (America), 643 F.2d 353, 356 (5th Cir. Unit A Apr. 1981).

[90] Iwasawa, *supra* note 82, at 140.

[91] *Id.*

[92] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964), makes it an unfair employment practice for an employer to discriminate against any individual with respect to hiring or the terms and conditions of employment because of such individual's race, color, religion, sex, or national origin. Title VII not only prohibits overt discrimination but also practices that are fair in form but discriminatory in practice. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

crimination laws.

2. Economic interests versus human rights

Negotiations concerning Article 8, Section 1 focused on relaxing the regulation of private commerce between American citizens and citizens of foreign countries.[93] The negotiations emphasized protecting American property interests abroad.[94] In order to protect American capitalists from the legal uncertainty and risks of investing overseas, the United States drafted the employer "choice" term as broadly as possible.[95]

At the time of the Treaty's negotiation, the United States ranked as the world's sole economic power. One may reasonably assume that, as a dominant power, the United States pushed for the inclusion of Article 8, Section 1 for its own advantage. Article 8, Section 1 provided greater leniency for American capitalists prospecting abroad by obtaining the maximum legal freedom for the management of American direct overseas investment.[96] The fact that Japan once opposed the insertion of the clause supports the theory that the clause granted nearly absolute immunity to foreign employers.[97] The treaty negotiators did not foresee the economic *jujitsu* of the 1980s, wherein Japan would become the dominant foreign investor in the relationship between Japan and the United States.

B. *Judicial Interpretation*

American employees have asserted, in a number of cases, that American employment law should guarantee protection for Americans against discrimination by foreign employers in the United States.[98] Japanese defendants, how-

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[93] *See* Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958). *See also Hearing Before the Subcommittee of the Committee on Foreign Relations on Treaties of Friendship, Commerce and Navigation Between the United States and Columbia, Israel, Ethiopia, Italy, Denmark, and Greece*, 82nd Cong. 2d Sess. 6 (1952) (statement of Harold F. Linder, Deputy Assistant Secretary of State for Economic Affairs).

[94] Walker, 42 MINN. L. REV. at 806.

[95] *See* Gerald D. Silver, *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, 767 (1989).

[96] Thomas A. Coulter, *Testing The United States' Commitment to International Law: The Conflict Between Title VII and Treaties of Friendship, Commerce and Navigation*, 25 WAKE FOREST L. REV. 287, 306 (1990).

[97] Sumitomo v. Avagliano, 457 U.S. 176, 181, n.6 (1982). *See also Commercial Treaties*, 1953: Hearings on S. 243 Before the Subcomm. of the Senate on Foreign Relations, 83d Cong., 1st Sess. 2, 3 (1953).

[98] *See* Sumitomo v. Avagliano, 457 U.S. 176 (1982); Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991); MacNamara v. Korean Air Lines, 863 F.2d 1135 (3rd Cir. 1988); Spiess v. C. Itoh and Co. (America), 643 F.2d 353 (5th Cir. Unit A Apr. 1981); Adames v. Mitsubishi, 751 F. Supp. 1548 (E.D.N.Y. 1990).

ever, have successfully countered this assertion by arguing that FCN treaties exempt Japanese hiring practices from American employment laws.[99] A definitive ruling by the Supreme Court has yet to pronounce which takes precedence - the 1954 FCN Treaties or the 1964 Civil Rights Act. Federal district courts have created complicated and inconsistent grounds for dealing with the question. However, the courts grant great deference to the FCN treaties.

The Constitution does not refer to situations in which duly ratified treaties conflict with federal statutes. As a result, the Supreme Court has addressed the issue. Two doctrines have emerged from their decisions in this area. First, the *Whitney v. Robertson*[100] "later-in-time" doctrine holds that, while the Constitution lends no "superior efficacy" to either the treaties or the federal statutes, the courts will endeavor to construe them consistently. If inconsistencies arise, the law that was last in time will prevail.[101]

While the Supreme Court has not overruled *Whitney*, it has avoided the "later-in-time" approach by holding that new statutes will supersede existing treaties only upon a showing of express congressional intent favoring abrogation.[102] Under this second view, legislative silence will not abrogate treaty law.[103]

1. The *Citizenship* exemption

In *Fortino*, Judge Posner noted that Title VII forbids discrimination on the basis of "national origin" but not on the basis of "citizenship."[104] As a result, the Treaty's allowance of discrimination on the basis of "citizenship" was permissible.[105] Furthermore, Judge Posner stated that, "[i]n the case of a homogeneous country like Japan, citizenship and national origin are highly corre-

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[99] *See* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) (court noted that the exemption could have been used although it was not claimed as a defense); MacNamara v. Korean Air Lines, 863 F.2d 1135 (3rd Cir. 1988) (the United States-Korean FCN Treaty provides a complete exemption from a citizenship discrimination suit); Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984) (treaty conflicts with state law gave corporation limited right to discriminate on the basis of citizenship); Spiess v. C. Itoh and Co. (America), 643 F.2d 353 (5th Cir. Unit A Apr. 1981), *vacated on other grounds*, 457 U.S. 1128 (exempted Japanese company's policy of granting managerial promotions only to Japanese citizens). *But see* Avagiliano v. Sumitomo Shoji America, Inc., 638 F.2d 552 (2nd Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982) (a subsidiary incorporated in the United States is not a Japanese company under the Treaty).

[100] 124 U.S. 190 (1888).

[101] *Id.* at 194.

[102] *See, e.g.*, Cook v. United States, 288 U.S. 102, 120 (1933).

[103] *See* Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 254 (1984); Weinberger v. Rossi, 456 U.S. 25, 34 (1982); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963).

[104] Fortino v. Quasar Co., 950 F.2d 389, 391 (7th Cir. 1991).

[105] *Id.*

lated" and courts must not infer "national origin discrimination" from a preference for national "citizens."[106] The Sixth Circuit came to the same conclusion in *Wickes v. Olympic Airways*, holding that FCN treaties exempt discrimination based on "citizenship."[107]

In practice, the general rule allowing discrimination on the basis of citizenship makes it irrelevant whether the plaintiff actually suffered employment discrimination based on age, race, national origin, or sex, so long as Japanese employers can justify their employment decision on the basis of citizenship preference. Therefore, FCN exemptions permit foreign employers to conduct business with less regard for the rights embedded in domestic employment law. *Fortino* sent the message that if management wants to discriminate against the female staff of an American subsidiary, then they need only replace the American staff with all-male *kaigaitenkinsha* from the parent company. A foreign employer could apparently justify most, if not all discriminatory employment practices in court under the rubric of "citizenship" preferences.

a. The legal nexus between gender and citizenship discrimination

In *Espinoza v. Farah Manufacturing Co., Inc.*,[108] the Supreme Court held that an employer's refusal to hire on the basis of American citizenship does not constitute employment discrimination on the basis of national origin.[109] Farah Manufacturing denied petitioner Cecilia Espinoza, a lawful resident alien of the United States and citizen of Mexico, employment on the basis of a longstanding company policy of hiring only citizens of the United States.[110] The Court justified its holding by citing the intent of Congress to allow the Civil Service Commission to prohibit aliens from taking examinations for federal employment.[111] The Court concluded that Congress could not have intended to permit federal agencies to discriminate and at the same time to forbid private employers to discriminate on the basis of citizenship.[112]

However, dictum in *Espinoza* might permit victims of discrimination by a foreign employer to challenge employers where citizenship requirements are "one part of a wider scheme of unlawful national origin discrimination" or "a pretext to disguise what is in fact national origin discrimination."[113] If a foreign employer in the United States engages in citizenship discrimination

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[106] *Id.* at 392.

[107] *See* Wickes v. Olympic Airways, 745 F.2d 363, 367 (6th Cir. 1984). Although the FCN treaties allow foreign companies to hire employees "of their choice . . . regardless of nationality" the words "regardless of nationality" were limited to employees in certain "high level positions." *Id.*

[108] 414 U.S. 86 (1973).

[109] *Id.* at 86.

[110] *Id.* at 87.

[111] *Id.* at 89.

[112] *Id.* at 91.

[113] *Id.* at 92.

meant to disguise intentional gender discrimination, a woman alleging such discrimination may have a valid legal claim.

b. Disparate impact cases and citizenship discrimination

Even if a woman is successful in convincing a court that her Japanese employer's policies have a discriminatory effect, she must still overcome the precedent set by the Third Circuit in *MacNamara v. Korean Air Lines*.[114] In *MacNamara*, the court ruled that American law only holds Korean employers liable for invidiously discriminatory employment decisions.[115] Invidious discrimination arises when an employer treats an individual or group different from another because of race, color, religion, sex, or national origin.[116] The Third Circuit upheld the legitimacy of Korean employment practices which choose managers in any manner that is not invidiously discriminatory.[117] This liability offers little consolation, because years of civil rights cases show that proving intentional discrimination presents a much more difficult task than merely proving adverse impact.

The holding in *MacNamara*, however, is inconsistent with *Espinoza*, which allows disparate impact claims brought against foreign employers who discriminate on the basis of citizenship. Dictum in *Espinoza* reaffirms an earlier decision, *Griggs v. Duke Power Co.*,[118] a case dealing with the use of employment tests as a mode of disparate impact race discrimination. *Espinoza* extended, the *Griggs* rationale to apply to citizenship discrimination cases.[119] The *Espinoza* Court stated that Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.[120] By analogy, citizenship requirements by foreign employers which discriminate on the basis of gender should be subjected to disparate impact challenges. Therefore, the Third Circuit's holding in *MacNamara*, which forbids disparate impact claims against Korean employers in the United States, contradicts the Supreme Court's interpretations of Title VII in *Espinoza* and *Griggs*.

As a matter of public policy, a more lenient interpretation of *Espinoza* seems warranted. The legislative intent, cited by the *Espinoza* Court, was to allow the continuation of citizenship requirements in federal employment positions.[121] These restrictions arguably benefit American citizens seeking employment while at the same time advancing further important bureaucratic interests within state agencies regarding loyalty to the state. Citizenship

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[114] 863 F.2d 1135, 1137-38 (3rd Cir. 1988).
[115] *Id.*
[116] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 325 (1977).
[117] *MacNamara*, 863 F.2d at 353.
[118] 401 U.S. 424 (1971).
[119] *Espinoza*, 414 U.S. at 92.
[120] *Id.* at 95.
[121] *Id.* at 96.

discrimination by foreign private companies under FCN treaties causes much harm, and little benefit, to Americans. In addition, there is no federal interest in unquestioningly protecting private foreign discrimination.

2. The "Japanese Corporation" element

In *Spiess v. C. Itoh & Co. (America)*, the plaintiffs alleged, in a disparate treatment case, that only Japanese citizens received executive positions at C. Itoh, a New York corporation wholly owned by a Japanese corporation. The Fifth Circuit held that "the absolute language of Art.8 (1) . . . fully insulated the company from domestic anti-discrimination laws with respect to the hiring of executives."[122] The court held that the plain language of the United States-Japan FCN treaty exempted a "Japanese company's" American employment practices and absolved the defendant of any liability.[123] The Supreme Court denied certiorari.[124]

After the *Spiess* decision, a group of female secretaries brought a class action suit against an American branch of the Sumitomo corporation. The branch was incorporated in New York and wholly owned by the Japanese company.[125] This alleged discrimination resulted from Sumitomo's hiring of only Japanese males for managerial positions.[126] The plaintiffs claimed that these practices discriminated against them on the basis of gender and national origin. Sumitomo claimed the same defense as C. Itoh and Co. had in the *Spiess* case.[127] The *Sumitomo* Court limited the rule in *Spiess*, however, and held that a court may not consider a domestically incorporated subsidiary to be a Japanese company for FCN exemption purposes.[128]

Sumitomo marked the advent of the "corporate citizen test" as the rule for deciding when the court will apply the Article 8, Section 1 FCN exemptions. Courts do not generally extend the FCN treaties' citizenship exemption to wholly foreign-owned subsidiaries incorporated in the United States.[129] However, the right of an American subsidiary of a Japanese corporation to assert

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[122] Spiess v. C. Itoh & Co. (America), 643 F.2d at 359.

[123] *Id.*

[124] 454 U.S. 1130 (1982).

[125] Avigliana v. Sumitomo Shoji America, Inc., 457 U.S. 176, 182-88 (1982).

[126] *Id.* at 180.

[127] *Id.* at 182-88.

[128] *Id.* In 1990 Sumitomo settled the lawsuit. Under the agreement, the company will raise the base salaries of non-Japanese employees by as much as 15%, add more American workers to its senior management group, and pay back wages to American employees. The company will also add a career development program designed to give non-Japanese employees a better shot at management jobs. Wade Lambert, *Sumitomo Sets Accord on Job Bias Lawsuit*, WALL ST. J., Nov. 8, 1990, at B1.

[129] *See Sumitomo*, 457 U.S. at 182-88 (1982). *But see* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) (distinguishing between a Japanese corporation asserting the exemption in its own right and the same corporation asserting the exemption on behalf of the parent).

the treaty rights of its parent corporation may exist. This right depends upon the length of time since the parent's acquisition, the nature of subsidiary business, and the autonomy of the subsidiary in hiring.[130]

3. Subsidiaries asserting parent exemptions

In *Fortino v. Quasar*,[131] the Seventh Circuit added an exception to the "Japanese Corporation" test. This exception allows American subsidiaries of Japanese corporations to assert the Treaty rights of the Japanese parent company.[132] However, this right exists only if forbidding the subsidiary to give preferential treatment to expatriates of the parent company would "have the same effect on the parent as it would have if it ran directly against the parent."[133]

Judge Posner's rule in *Fortino* addressed the issue of whether an American corporation could still rely on the FCN Treaty "although not being a Japanese company in the technical sense in which the term is used in the treaty."[134] Judge Posner reasoned that because "foreign businesses clearly have the right to choose citizens of their own nation as executives," forbidding Quasar's preferential treatment of Japanese executives would have the same effects on the parent company.[135] The court held that this would directly violate the United States-Japan Treaty, and denied Fortino's claim.[136]

4. Exempted employment positions

Once a court determines whether the foreign business entity fits within the scope of the FCN exemption as a Japanese corporation, it then has to determine whether American employment law is applicable to the employment position. In general, Title VII does not protect technical and managerial positions such as accountants, lawyers, technicians, and executive personnel, because the Treaty exemption applies in these situations.[137] However, the Treaty exemption does not generally extend to secretarial positions nor to low-

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[130] *See* Ishizuka, *supra* note 87, at 139 (1986). The Court, in 1982, specifically declined to resolve whether a branch or division of a foreign company doing business in the United States is always subject to American law. *See Sumitomo*, 457 U.S. at 189 n.19. The employer choice provision may still apply to joint ventures between a foreign corporation and a domestic corporation. *See Employment Rights of Japanese-American Joint Ventures in the United States Under the United States-Japan Treaty of Friendship, Commerce, and Navigation*, 16 LAW AND POL'Y INT'L BUS. 1225, 1248 (1984).

[131] 950 F.2d 389 (7th Cir. 1991).

[132] *Id.* at 392.

[133] *Id.* at 393.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 389.

[137] Spiess v. C. Itoh and Co. (America), 643 F.2d 353, 358 (5th Cir. Unit A Apr. 1981).

level staff positions in subsidiaries.[138] Therefore, a Japanese corporation cannot hire low-level staff employees "of its choice" under the FCN Treaty.

C. *Theories in Support of a Broad Exemption*

Some legal scholars scorn the liberal interpretation techniques applied in recent cases involving the FCN Treaties.[139] They argue that the courts have ignored the intent and benefits of the bargain. Instead, they assert that the exemption in the Treaties should be much broader.

1. Liberal interpretations counter treaty law

Certain scholars have criticized the *Sumitomo* court's use of the negotiating history of the FCN for the purpose of determining the intent of the treaty drafters.[140] In *Sumitomo*, the Court decided that the clear meaning of treaty language controls unless this would effect a result inconsistent with the intent or expectations of the drafters.[141]

This method of interpretation contradicts established principles of international law, which demand that in treaty interpretation a court must consider the plain textual meaning of the treaty.[142] In addition, the *MacNamara* case was decided using a "textual" interpretation.[143] The plain meaning of the words "of their choice" do not indicate a restriction to "citizenship."[144] If the *Sumitomo* analysis had been used, the holding in *MacNamara* may have been different. Because treaties represent contracts between independent nations, in constructing them, courts must take words in their ordinary meaning and not in any artificial or special sense which local law impresses upon them,. unless the parties clearly intended such an interpretation.[145]

If courts strictly adhere to the mandates of a pure textual interpretation of the term "of their choice," workers will lose rights that the *Sumitomo* Court

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[138] In *Sumitomo*, the Second Circuit ruled that foreign employers must show how the "successful operation of its business" reasonably necessitates discriminatory employment decisions. Therefore, it follows that the Treaty would not exempt a low-level position, wherein "citizenship" could not bear any relationship to job qualifications. *See Sumitomo*, 457 U.S. at 179-180.

[139] *See* Coulter, *supra* note 96, at 301.

[140] Coulter, *supra* note 96, at 301.

[141] *Sumitomo*, 457 U.S. at 181.

[142] *See generally* Coulter, *supra* note 96, at 296-297. *See also Vienna Convention on the Law of Treaties*, U.N. Conference on the Law of Treaties, U.N. Doc. A/3927 (1969) [hereinafter VCLT]. The Vienna Convention has been established as customary international law. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 624 (3d ed. 1979).

[143] Coulter, *supra* note 96, at 304-305.

[144] Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956). *See also* Silver, *supra* note 95.

[145] DeGeofrey v. Riggs, 133 U.S. 258, 271 (1890).

affirmed by limiting the exemptions to only companies not incorporated in the United States.[146] This practice could allow the Supreme Court to read the Treaty literally and hold that any Japanese company can choose to hire or not hire any person "of its choice" for reasons including gender, ethnicity, and race. All Japanese-owned companies could then overtly discriminate in their hiring for upper-level management positions. Since the Supreme Court has found that the intent of the Treaty assured only the right to conduct overseas business without suffering discrimination, there are legitimate fears about how the Supreme Court would implement the *Sumitomo* analysis.[147]

2. Protecting Japan's benefit of the bargain

While subjecting foreign companies to American law would hurt many Americans, particularly women and minorities, some legal theorists argue that liberal judicial interpretation of the Treaties extends beyond the province of the courts.[148] For example, although the *MacNamara* court refused to hold that the signatories intended total exemption of foreign-owned companies from American employment laws, it has been argued that an examination of FCN treaties shows that the signatories intended to have an absolute exemption.[149] Also, because Congress did not clearly make reference to the intent of Title VII of the Civil Rights Act to override earlier treaties, those earlier commitments must prevail.[150] If courts subject foreign companies to anti-discrimination laws, these companies may lose the very privileges for which they negotiated.[151] As a result of this liberal interpretation, Japanese companies would be unjustly deprived of the benefits found in the "of their choice" provisions.

Past judicial restrictions on the exemption, such as those which permit only "citizenship" discrimination, have not impeded the hiring objectives of Japanese corporations. Japan's Ministry of International Trade and Industry (MITI) conducted a 1990 survey which indicated that Americans only occupied five percent of the senior management positions at Japanese subsidiaries in the United States.[152] Japanese firms have managed to maintain control of the management of subsidiaries in the United States even though American employment law has attempted to restrict such behavior.

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[146] *Sumitomo*, 457 U.S. at 176.

[147] *Id.* at 189.

[148] United States v. Stuart, 489 U.S. 353, 373-74 (1989) (Scalia, J., concurring). *See also* Chan v. Korean Air Lines, 490 U.S. 122, 134-35 (1989).

[149] Coulter, *supra* note 90, at 306.

[150] The courts do not favor a repudiation of an international obligation by implication and require clear indication that Congress, in enacting legislation, intended to supersede the earlier agreement or other international obligation. *See* United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988).

[151] Coulter, *supra* note 85, at 312.

[152] Yates, *supra* note 30, at D1. In contrast, Americans hold only 80% of executive positions in American corporations in Japan.

V. INCREASING THE REGULATION OF JAPANESE HIRING PRACTICES IN THE UNITED STATES

A. *Some Japanese Companies Adapt Slowly to American Customs*

There are legitimate concerns about the persistence of the status quo in Japanese hiring practices. It is true that Japanese corporations have recently taken voluntary action in order to improve relationships with American employees. For example, Japan's Kyoei Marine and Fire Insurance Company recently produced a video on sexual harassment (*seku hara*).[153] The Japanese corporate community in the United States uses the video to try to educate their executives on how to behave in the American corporate environment.[154] In 1988, Honda expanded its recruitment of African-Americans and its promotion of women.[155] In addition, the Japanese External Trade Organization, through MITI, has begun funding programs to educate small and mid-sized Japanese firms about American employment laws and regulations.[156]

It is unclear, however, whether these changes have actually helped women working in Japanese companies. Between 1985 and 1989, the percentage of female managers at Japanese companies increased at a rate of 27.5% a year, compared to the average American annual increase of 6%.[157] However, despite recent efforts by the Japanese, William H. Davidson, a professor of international management at the University of Southern California, predicts that the Japanese will shed traditional practices slowly when it comes to dealing with minorities and women.[158] A possible explanation for their reluctance to change is their continued adherence to strong Japanese corporate traditions. The goal of achieving a "harmonious family relationship" qualifies as one such Japanese tradition.[159] As a result, when hiring foreigners, Japanese hiring officers prefer those who are familiar both with the Japanese language and Japanese culture.[160]

B. *Women Need Special Protection*

Ignorance of American employment law and social mores will result in a continued disregard of women's legal rights.[161] This ignorance contributed to

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[153] *Id.*

[154] *Id.*

[155] Frantz, *supra* note 38, at A1.

[156] Yates, *supra* note 30, at D1.

[157] *See* Congressional Testimony, *supra* note 16, at D2.

[158] Frantz, *supra* note 38, at A1.

[159] Brown, *supra* note 67, at 249.

[160] Ishizuka, *supra* note 87, at 167.

[161] C. Itoh & Co. faces another suit, this time regarding gender discrimination. The case arose in federal court in White Plains, New York. The claim stated, among other things, that college educated women worked as clerks while men with similar backgrounds served in middle management. *See* Deborah L. Jacobs, *Costly Lessons in Discrimination*, FORBES, May 27, 1991, at 186.

the problems at American Honda where, in March of 1988, the Equal Employment Opportunity Commission (E.E.O.C.) determined that Honda's American subsidiary wove a pattern of discrimination against women and minorities at Honda in the United States.[162] Three hundred and seventy African-American and female employees of Honda filed suit in the same year.[163] Honda Manufacturing Co., Inc. agreed to a $6 million out of court settlement with the E.E.O.C. on race and gender discrimination charges in 1988. Another settlement occurred in 1988 for nearly $500,000 for age discrimination charges.[164]

The Honda incident demonstrates that American employment laws, such as Title VII, must be enforced against foreign employers if women are to be treated fairly. Many foreign societies lack experience with minority and women's issues and, as noted above, Japan and the United States exhibit striking cultural differences in their respective attitudes toward women. Our laws, therefore, should not entrust basic rights such as equal opportunity in the work force to the discretion of employers, even if the employer is foreign.

The fact that subsidiaries will not hire white-collar employees without permission from their parent companies compounds the likelihood of discriminatory practices.[165] In the selection process, Japanese parent corporations use highly selective practices and highly subjective factors, even when hiring Japanese candidates.[166] This selectivity results from the high value placed on social harmony by Japanese culture, or *wa*. For some Japanese citizens, social harmony justifies gender discrimination. Some Japanese corporate workers believe that women will not fit harmoniously within the corporate family, and may therefore be excluded from Japanese corporate management.[167]

The selectivity of Japanese hiring practices has resulted in a number of lawsuits against companies such as Sumitomo, Honda, Toshiba, Hoya, Cannon, and NEC Electronics.[168] In a highly publicized case, the E.E.O.C. investigated Recruit and Interplace, two California corporations operating employment referral services primarily for Japanese companies.[169] The E.E.O.C. filed a

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[162] Frantz, *supra* note 38, at A15.

[163] Brown, *supra* note 67, at 249.

[164] *Id.*

[165] *See Id.* at 244-45 (discussing importance of parent-child relationship between Japanese companies and American subsidiaries). *See also* Ishizuka, *supra* note 87, at 156 (discussing how subsidiary companies generally have little control over the appointment of upper level management). This could bring about issues of the legal liability of the parent, especially when parent companies are actively involved in coordinating the labor and management policies of the subsidiary.

[166] Brown, *supra* note 67, at 249.

[167] UPHAM, *supra* note 18, at 128.

[168] John Junkerman, *Nissan, Tennessee, It Ain't What It's Cracked Up to Be*, THE PROGRESSIVE, June 1987, at 16.

[169] E.E.O.C. v. Recruit U.S.A., Inc., 939 F.2d 746, 748 (9th Cir. 1991). Interplace Transworld is based in Los Angeles and is an employment agency with several offices in the United States.

lawsuit against both companies in response to two articles published by the San Francisco Chronicle.[170] These articles revealed Recruit's discriminatory hiring practice of excluding women, and certain minorities, from the recruiter's agenda.[171]

Court documents submitted at trial included a memorandum by Interplace Transworld Recruit. The memo described a code used by the company on employee orders which included a preference for employees of a particular age, sex, or race. In part, the memo stated that "talk to Mary" meant the employer preferred Caucasians, "Adam" meant men.[172] The case was subsequently settled in an agreement requiring Recruit U.S.A. to establish a $100,000 fund to be distributed among victims of discrimination and to hold two Equal Employment Opportunity training seminars in Japan to educate Japanese managers on fair employment law.[173]

The emphasis on women's employment rights in the United States may come as a culture shock for Japanese executives transferred to the United States. As discussed in Part Four, the FCN Treaty exemption allows the transfer of all-male white-collar staffs to the United States. When Japanese companies send a traditional Japanese managerial force to manage the more integrated subsidiaries in the United States, the odds of gender discrimination arising in the relationship between these all male upper-level *kaigaitenkinsha* and their female coworkers must increase. More protection of women, and the addition of women to upper-level management positions, will compel a change of attitude. In order to increase diversity in the upper-level management at Japanese companies in the United States, changes could be made in the scope of the Article 8, Section 1 exception.

VI. Good Jurisprudence Compels Changes in the Enforcement of Article 8, Section 1

Sustaining the FCN Treaty exemptions, as an act of judicial policy-making, clashes with principles of modern law relating to Title VII exemptions. In *E.E.O.C. v. Fremont Christian School*,[174] the court expressed three factors used to determine if a neutrally based statute, such as Title VII or the Act, violates a countervailing right such as the free exercise clause: (1) the degree to which Title VII affects the exercise of a religious belief; (2) the existence of a compelling state interest which justifies the burden placed on the countervailing right; and (3) the degree to which recognizing the exemption impedes

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[170] *Id.* at 749.

[171] *Id.*

[172] *Id. See also* Stephen Labaton, *Bias Rulings Aid Japan's U.S. Units*, N.Y. Times, June 19, 1989, at D2.

[173] Congressional Testimony, *supra* note 16, at A14.

[174] E.E.O.C. v. Fremont Christian Sch., 781 F.2d 1362, 1367 (9th Cir. 1986) (discussing when Title VII was preempted by the countervailing right to religious freedom).

Title VII's central objectives.

A. *The Impact of American Employment Law Restrictions Upon Countervailing Treaty Rights*

The application of the first factor used in the *Fremont* analysis favors a liberal interpretation of the Treaties. Title VII affects the countervailing Japanese FCN Treaty right to the extent that it forces the Japanese to defend their "citizenship" requirements against discriminatory impact and discriminatory intent claims brought by white-collar women employed in American subsidiaries.

Proponents of a blanket exemption point out that the removal of any Japanese right to practice selective employment practices in the United States will be costly for the Japanese. For example, as stated above, in March of 1988, an American manufacturing division of Honda agreed to pay $6 million to 377 female and African-American employees as a result of past discrimination in hiring and promotion.[175] However, the Third Circuit has indicated that, regardless of how much it may cost foreign employers, they will be required to defend questionable personnel decisions in court.[176] Stronger protection will result in stiffer legal penalties and court costs. Although it is true that eliminating Japanese discrimination has its costs, it is necessary to weigh those costs against the important interest in ending employment discrimination by foreign employers.

It is unclear whether a liberal interpretation which subjects the Japanese to American employment regulation would excessively restrict the business practices of Japanese corporations. However, it is important to note that existing American employment law provides other means for Japanese corporations to protect their legitimate interests. For example, in disparate impact cases, defendants can assert the Title VII "business necessity" affirmative defense,[177] and in disparate treatment cases they can assert the "bona fide occupational qualification" (BFOQ) defense.[178] These defenses protect "legitimate" business interests.

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[175] Frantz, *supra* note 38, at A1.

[176] MacNamara v. Korean Air Lines, 863 F.2d 1135, 1147 (3rd Cir. 1988).

[177] An employment practice that results in a disparate effect on a protected group might still survive Title VII if it sufficiently constitutes a job-related business necessity. Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). The employer carries the burden of producing evidence of a business justification for the employment practice. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989). The burden of persuasion, however, remains with the plaintiff. *Id.*

[178] The Court in *Sumitomo* noted, "there 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." *Sumitomo*, 457 U.S. at 189 n.19 (1982).

1. Disparate treatment and the Bona Fide Occupation Qualifications defense

The bona fide occupational qualification defense (BFOQ) provides that a business employment requirement is "a bona fide occupational qualification reasonably necessary to the normal operation of a particular business or enterprise."[179] Using the BFOQ defense, Japanese corporations could refute Title VII sexual discrimination claims by citing the understandably "unique requirements" of Japanese management to successfully manage their subsidiary in the United States and to maintain close contact with the parent corporation.[180] Indeed, the Circuit Court in *Sumitomo* held that a Japanese company could justify its policy of employing foreign nationals under a modified version of the BFOQ.[181] Although the Supreme Court did not directly rule on this issue in *Sumitomo* upon appeal, it left the possibility distinctly open.[182] In a gender discrimination case, a prima facie case would require proof that the plaintiff belonged to a protected class, that she possessed the necessary qualifications, that she applied to the Japanese company and was rejected for a for which the Japanese employer continued accepting male applicants and that a particularized practice of the employer caused the disparate impact unless the employer's practices are not susceptible to such analysis.[183]

In order to assert a BFOQ defense, an employer must judge both women and men on the basis of individual performance capacities, not on preconceived notions of the individual's capacities based on his or her gender.[184] The Supreme Court has held that the Title VII BFOQ defense offers only a very narrow exception to the general prohibition on gender discrimination.[185]

BFOQ defenses that have been previously recognized by the Courts fall within two categories: "ability to perform" and "contact".[186] The Fifth Circuit

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[179] International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991); *see also* 42 U.S.C. § 2000e-2(e)(1) (1988)

[180] *Sumitomo*, 457 U.S. at 190.

[181] *Sumitomo*, 638 F.2d at 559.

[182] The appeals court did not "discuss the bona fide occupational qualification exception in relation to the respondents' sex discrimination claim or the possibility of a business necessity defense." Accordingly the Supreme Court did not rule on its effects. *Sumitomo*, 457 U.S. at 189, 190 n.19.

[183] *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (listing the first three requirements); *see* Civil Rights Act of 1991, section 105, 42 U.S.C. Section 2000e-2(k)(1) (West Supp. 1992) (adding the fourth requirement). The restriction on hiring based on forbidden classifications is clearly spelled out. An employer violates Title VII if discrimination plays any part in the employment action. Once discrimination is established, the degree to which such discrimination influences the employment action is irrelevant under Title VII. Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

[184] Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

[185] Dothard v. Rawlinson, 433 U.S. 321 (1977).

[186] Sutton v. National Distillers Prod. Co., 445 F. Supp. 1319, 1325 (D.C. Ohio

developed a general test for "ability to perform" BFOQ's.[187] This test requires a showing, by the employer, of a reasonable cause to believe, upon a factual basis, that all or substantially all of the excluded sex would be incapable of performing safely and efficiently.[188] The "contact" BFOQ defense applies to jobs which involve privacy interests, such as nurse's aides for single sex nursing homes. However, this defense is not available where the alleged discriminatory practice is based solely on customer or client preference.[189] The EEOC also declared that gender does not qualify as a BFOQ for purposes of: assumptions of comparative employment qualities of the sexes in general;[190] stereotyped characterizations;[191] or the preferences of co-workers, clients, or customers.[192]

In the case of the *kaigaitenkin*, Japanese employers could use the "ability to perform" defense, and demonstrate that the other Japanese applicants possessed better qualifications than the plaintiff.[193] Although courts construe BFOQ exemptions narrowly, a court could give weight to the unique requirements of a Japanese company which does business in the United States.[194] Courts could examine such factors as Japanese linguistic and cultural skills; knowledge of Japanese products, markets, customs, and business practices; and familiarity with the personnel and workings of the parent enterprise in Japan.[195] After these justifications are presented, the burden again shifts to the plaintiff to demonstrate that the Japanese corporation's articulated hiring practices are merely a pretext for unlawful discrimination.[196]

2. Business necessity defenses

Disparate impact discrimination occurs when facially neutral employment policies and practices disproportionately harm women and/or minorities.[197] Title VII permits the use of the business necessity defense for disparate impact claims.[198] If a selection procedure has a disproportionately negative impact on protected persons, its use is unlawful unless the selection procedure constitutes

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1978).

[187] Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

[188] *Id.*

[189] Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir. 1972), *cert. denied*, 404 U.S. 950 (1971).

[190] 29 C.F.R. § 1604.2(a)(1)(i) (1993).

[191] 29 C.F.R. § 1604.2(a)(1)(ii) (1993).

[192] 29 C.F.R. § 1604.2(a)(1)(iii) (1993).

[193] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[194] Avagliano v. Sumitomo Shoji Am., Inc, 638 F.2d 552, 559 (2nd Cir. 1981).

[195] *Id.*

[196] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805 (1973).

[197] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[198] *Id.*

a reasonable means of measuring job performance, or business necessity.[199] The defense applies to nonintentional discrimination claims.[200]

In the case of employment tests, the employers bear the burden of proof.[201] If the employer cannot show a necessary correlation between the test results and the job, then Title VII forbids the test's application regardless of whether the employer's actual intention in using the test was to eliminate job applicants of a particular race or color.[202] The same rationale should apply to the use of overseas rotating personnel. If the replacement of American managagers with Japanese employees has a disparate impact on women, it should be upheld only in cases of real business necessity.

The *MacNamara* court indicated that for corporations based in homogeneous countries like Korea (and Japan), any attempt at exclusively hiring citizens of these foreign countries creates the requisite showing of disproportionality. However, in a narrow decision calculated to avoid an overwhelming number of disparate impact cases, the *MacNamara* court held Korean Air Lines liable only for invidious discrimination under the FCN Treaty.[203]

If courts enforce Title VII proscriptions against disparate impact discrimination, Japanese employers would not lose the ability to hire the best qualified employees. The court would simply scrutinize overseas transfers which, while appearing facially neutral, may operate unjustly to deprive women of management positions. Foreign corporations, like American corporations, would then be permitted to defend their actions on the ground that the nature of their business necessitates the hiring practice in question.[204] An employer need only demonstrate that the practice substantially promotes the proficient operation of the business.[205] However, the challenged practice must relate to an essential and compelling purpose.[206] Although courts prefer statistical validation for establishing business necessity, in-depth testimony by company officials regarding the reason for the particular job requirement has been deemed sufficient to establish business necessity.[207]

Using the business necessity defense, Japanese companies can work within a labor market which forbids disparate impact employment discrimination. In fact, some Japanese employers in the United States have willingly attempted

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[199] *Id.*

[200] Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 652 (5th Cir. 1980), *cert. denied*, 449 U.S. 891 (1980).

[201] Kirkland v. New York State Dep't of Correctional Servs., 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part and rev'd in part on other grounds*, 531 F.2d 5 (2nd Cir. 1975).

[202] Harper v. Baltimore, 359 F. Supp. 1187 (D. Md. 1973), *aff'd in part and mod. in part on other grounds*, 486 F.2d 1134 (4th Cir. 1973).

[203] MacNamara v. Korean Air Lines, 863 F.2d 1135, 1147 (3rd Cir. 1988).

[204] Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

[205] Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262 (6th Cir. 1981).

[206] Williams v. Colorado Springs Sch. Dist., 641 F.2d 835, 842 (10th Cir. 1981).

[207] Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983).

to eliminate underrepresentation problems. In 1987, the Sumitomo corporation settled a suit brought by female employees claiming sex discrimination. In the agreement, Sumitomo promised restructured job titles, job descriptions, and company benefits which would better reflect the work done by female employees in the United States. Sumitomo, in a later suit, also promised "good faith efforts" and an increase in the number of senior non-Japanese managers.[208]

B. *The Existence of a Compelling Interest Which Justifies Burdening Japanese Employers*

The compelling interest in protecting equal opportunity employment for all Americans in the workplace signficantly reduces the impact of the countervailing treaty right. This is evidenced by the high priority Congress placed on eliminating most forms of discrimination under Title VII.[209] Equal opportunity legislation grants certain basic liberties to all Americans. Therefore, the United States should not support a labor policy which allows discrimination by foreign employers in hiring and employment practices, except in cases of actual business necessity. Such a policy insures a balance between the compelling interest of equal employment opportunity and the business interest in direct foreign investment.

Proponents of the blanket FCN Treaty exemptions argue that during a period of economic depression, there is a compelling state interest in encouraging direct foreign investment in the American economy. They allege that since foreign investment may create job opportunities for minorities and women in the long run, discouraging this investment may actually result in a loss of opportunities. There is some measure of truth to this statement. Japanese investment has created jobs and incentives for Americans to produce better products. Furthermore, Japanese presence in the United States urged American businesses to compete in the world economy. Japanese investment in the United States has fostered efficiency, and encouraged research and development.[210] Depite these benefits, it is not clear that Japanese direct foreign investors need a broad Article 8, Section 1 exemption in order to conduct profitable business in the United States.

In considering this question, architects of a new relationship between American workers and Japanese employers must try to predict how Japanese corporations will react to the abolition of the treaty exemptions. In the past, Japanese companies showed growth even when subjected to American employment restrictions. During the 1980s, when *Sumitomo*, *MacNamara*, and other legal decisions intensified employment restrictions upon Japanese employment practices in the United States, Japanese investment still increased at a rapid

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[208] *See* Lambert, *supra* note 128, at B-1.

[209] 42 U.S.C. § 2000e-2(a) (1982) (mentions neither citizenship nor sexual preference).

[210] Silver, *supra* note 95, at 783. At present, approximately 401,000 Americans work for 2,225 Japanese companies in the United States. Yates, *supra* note 30, at C1.

pace.[211] In fact, Japan became the second largest foreign investor in the United States.[212] This growth occurred despite the fact that the majority of Japanese companies no longer asserted treaty exemptions.[213] Although FCN exemptions are clearly of value to Japanese companies, Japanese foreign investors have continued investing in the United States despite tighter employment law regulations.

C. *The Treaty Exemption Disregards the Central Purpose of Civil Rights Acts*

Although Japanese companies have legitimate economic interests in a harmonious workplace, the United States has a compelling interest in protecting women and minorities from employment discrimination. Citizenship discrimination allows employers to hire employees based on where an applicant acquired certain skills rather than to what degree the applicant actually possesses these skills. Allowing this harm to continue conflicts with the labor policies promoted by Congress since 1953. In particular, Congress provided, in Title VII of the Civil Rights Act of 1964, that it is unlawful for an employer to hire and employ an individual on the basis of religion, sex, or national origin, except when these categories act as a bona fide occupational qualification reasonably necessary for the normal operation of a particular business.[214]

The FCN Treaty undermines the condemnation of discrimination present not only in Title VII, but also in the American Civil Rights Act of 1866.[215] In addition, the FCN Treaties also oppose the many state statutes dealing with job discrimination.[216] Regardless of what the drafters of the 1953 Treaty may have intended, modern American society mandates protection for women. Because the United States and Japan can enjoy both direct foreign investment and greater employment rights, the exemption in the 1953 Treaty is unnecessary.

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[211] Some of the increased foreign investment has been attributed to the weak dollar. *See* Jonathan P. Hickes, *The Takeover of American Industries*, N.Y. TIMES, May 28, 1989, § 3, at 1.

[212] *Id.*

[213] *Id.*

[214] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)(1982). In addition to prohibiting employment decisions that have discriminatory motives, Title VII also prohibits those practices which are facially neutral but discriminatory in impact. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[215] 42 U.S.C.S. § 1981 (Law. Co-op. Supp. 1990). This Act requires that all persons within the jurisidiction of the United States have the same rights in every state and territory to make and enforce contracts and to the full and equal benefit of all laws and proceedings for the security of persons and property, regardless of race. *Id.*

[216] 45A AM. JUR. 2D *Job Discrimination* § 146 (1993) (stating that many states prohibit gender or pregnancy discrimination in their Fair Employment practice laws, equal pay laws of similar applicability, and government contracts statutes).

VII. SOLUTIONS TO THE PROBLEM

Having concluded that the Article 8, Section 1 exemption as applied after *MacNamara* is unnecessarily broad; contrary to moral and legal principles of our society; and in practice constitutes an unfair compromise of the rights of women and minorities, it is necessary to seek an effective solution to this problem. Section VII of this article indicated that the present judiciary will probably not settle this issue. Thus, alternative avenues for change must be explored. The United States has several means for changing the current situation. The legislature could attempt to override the treaty provisions or the executive branch could terminate, suspend, or renegotiate the treaty.

A. *Overriding Legislation*

Congress may regulate private discrimination under Art. 1, Section 8 of the United States Constitution[217] as long as it is even remotely connected with interstate commerce.[218] It is clear that the FCN Treaty exemption affects interstate commerce in several ways. Article 8, Section 1 of the Treaty infringes upon the rights of Americans to compete for employment positions in certain Japanese corporations in the United States. Interstate commerce is also affected when a Japanese entity purchases an American corporation, or fills a market place that domestic entrepreneurs would otherwise assume.

Congressional acts can supersede earlier international laws or international agreement provisions[219] only if there is a clear congressional purpose to supersede the earlier rule and the earlier rule cannot be fairly reconciled with the Congressional Act.[220] Unfortunately, international repercussions could follow such congressional activity. In the case of a subsequent and conflicting statute, although the treaty may no longer have force in American courts, it may still have legally binding effects in the international legal system.[221] Generally, under international law, a nation may not invoke a provision of its internal law as justification for its failure to perform a treaty.[222]

Japan could claim that the failure to perform the Treaty as commanded by the Article 8, Section 1 obligation constitutes a material breach or a "violation of a provision essential to the accomplishment of the object or purpose of the treaty."[223] A material breach by the United States entitles the Japanese to invoke the breach as grounds for terminating the treaty or suspending its oper-

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[217] U.S. CONST. art. I, § 8, cl. 3. (the "Commerce Clause").

[218] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[219] Missouri v. Holland, 252 U.S. 416 (1920).

[220] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1115 (1987). *See also* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

[221] MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 77 (1988).

[222] VCLT, *supra* note 142, at 289.

[223] *Id.* at Art. 60(3)(b).

ation in whole or in part.[224] While the termination seems implausible, the suspension of it would affect Americans working in Japan. It was pointed out in *Fortino* that "the rights granted are reciprocal . . . Americans employed abroad, . . . but for the Treaty, would lose their jobs."[225] However, studies show that in 1990 American citizens held only 42.1% of all senior management positions with Japanese subsidiaries in the United States, while Japanese citizens held 79.8% of the executive positions at American-owned Japanese companies.[226]

Because of the potential negative effects on Japanese-American relations, a congressional remedy would likely be limited to legislating around Article 8, Section 1 rather than attempting to terminate the FCN Treaty. Alternative legislation could take the form of tax incentives to quickly incorporate foreign companies in the United States and, under *Sumitomo*, subject them to American employment law. If a corporation is based in the United States, it can only use the exemption in situations such as that in *Fortino* where the application of American law on an American subsidiary of a Japanese corporation had the same direct effect as if it were applied against the Japanese parent company.

B. *Executive Suspension or Treaty Termination*

Though the ability of the President to suspend or terminate a treaty is not expressly stated in the Constitution, the President's power to act in this capacity has never been questioned.[227] However, executive suspension or termination carries with it some of the same unattractive consequences that might occur if Congress were to act. Futhermore, American law does not provide the basis for a failure to recognize a treaty obligation. A treaty may occasionally be deemed invalid because of a manifest violation of a "fundamental" law.[228] However, even if one considers Title VII rights fundamental in nature, the legislature did not embody its principles in law until 1964. Therefore, Title VII rights do not meet the requirement of being manifest at the time the parties concluded the treaty.[229]

Generally, "[a] ground for invalidating, terminating, withdrawing from, or suspending the operation of a treaty may not be invoked with respect to the

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[224] *Id.* at Art. 60(1).

[225] Fortino v. Quasar Co., 950 F.2d 389, 393 (7th Cir. 1991).

[226] Yuko Inoue, *Foreign Staff Learn the "Matsushita Way,"* THE NIKKEI WEEKLY, Mar. 15, 1993, at 11.

[227] *Id.*

[228] *See* VCLT, *supra* note 142, Art. 46.

[229] JANIS, *supra* note 221, at 23. *See also* International Arbitral Tribunal: Award on the Merits in Dispute Between Texaco Overseas Petroleum Co./California Asiatic Oil Co. and the Government of Libyan Arab Republic, 17 INTERNATIONAL LEGAL MATERIALS 1, 24 n. 71 (1978). ("Any changes which may result from the adoption of new laws and regulations must, to affect the contracting parties, be agreed to by them . . . [T]he recognition by international law of the right to nationalize is not sufficient ground to empower a State to disregard its commitments . . . .")

whole treaty."[230] The executive branch may, however, object to some treaty clauses and accept the remainder. The objectionable clauses must be "separable from the remainder of the treaty with regard to their application [and] not an essential basis of the consent" of other FCN parties, and so long as "continued performance of the remainder of the treaty would not be unjust."[231] As noted above, American negotiators insisted upon including the FCN exemption in its broadest form.[232] It would be hypocritical for the United States to take the position that the clause may be separated from the remainder of the treaty, or that the United States does not consider the clause an essential basis of consent. In addition, a unilateral executive agreement would cast doubt upon the validity of the other American bilateral treaties. Unilateral action would indicate to other countries that the United States does not respect its bilateral commitments. For these reasons, renegotiation offers the better solution.

C. *Renegotiation: The Most Plausible Option*

Parties to a treaty have the right to amend the treaty by agreement.[233] Renegotiation offers the safest and most plausible solution to the problems that result from the FCN Treaty exemption. Unilateral action by the legislature or judiciary could not only disrupt diplomatic relations, but also risks interfering with the executive branch's foreign relations agenda. Relations between Japan and the United States are currently undergoing major shifts. The United States occupies a position of power, not only as a major consumer of Japanese products, but also as a major capital market for Japanese investment.[234]

These circumstances coincide with the equal rights movement in Japan, and the recognition, on the international level, of equal employment opportunity as a *basic human right*.[235] As a result, the time is ripe for renegotiation of Article 8, Section 1 of the FCN Treaty. Ample opportunity exists for renegotiating the terms of Article 8, Section 1 to afford greater protection to minorites

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[230] JANIS, *supra* note 221, at 29. *See also* VCLT, *supra* note 142, Art. 44(2).

[231] JANIS, *supra* note 221, at 29. *See also* VCLT, *supra* note 142, Art. 44(1), (3).

[232] Silver, *supra* note 95, at 767.

[233] *See* VCLT, *supra* note 142, at Art. 39.

[234] Japanese foreign investment in the United States increased from over $4.7 billion in 1980 to $53.3 billion in 1988. Japan is now one of the top foreign investors in the United States. U.S. BUREAU OF THE CENSUS, PUB NO. 1390, STATISTICAL ABSTRACTION OF THE UNITED STATES 794 (1991).

[235] Promotion of women's rights as a fundamental social end has been recognized on not only the national level but on the international level as well. *See* Charter of the United Nations, A. 1(3), Art. 55(b), Universal Declaration of Human Rights, Preamble, A. 23, G.A.R. 217 (III) Dec. 10, 1948. U.N.G.A.O.R., 3rd Sess., Res. (A/810), p.71. International Covenant on Economic, Social and Cultural Rights. A.7, 993 U.N.T.S. 3. (this covenant entered into force on Jan. 3, 1976). As of Dec. 31, 1986, 88 states were parties to this covenant; the United States was not a party as of that date.

and women. Renegotiation will avoid Japanese accusations that the American judiciary or legislature breached or threatened to breach the Treaty by either a liberal interpretation of Article 8, Section 1 or by overriding legislation. Renegotiation would also alleviate American apprehension of the discriminatory employment practices that follow Japanese investment in the United States.

Perhaps the most appealing aspect of renegotiation lies in the possibility of a mutual and final solution. Japan might not accept unilateral acts in the United States which would override or limit the Treaty. Furthermore, unilateral acts would not allow Japan sufficient opportunity to voice and negotiate legitimate concerns regarding the management of its investments in the United States. The current situation necessitates a forum for mutual discussion of both the legitimate concerns of international business, and those of women on both sides of the Pacific.

VIII. CONCLUSION

One reason that the drafters of the Treaty neglected the possibility of its negative impact on American women is that the FCN Treaty negotiations took place in the 1950s when few Americans paid attention to the importance of equal opportunity in employment. Employment opportunities for women have increased in both quantity and quality since the conclusion of the 1954 treaty. Women in the 1990s have more rights to lose than their counterparts did four decades ago. As Japanese direct investment in the United States approaches $100 billion, and increasing numbers of Americans work at Japanese companies in the United States, the importation of sexist Japanese culture into the American job market is a growing concern.[236] While some Americans will enjoy rewarding and fulfilling employment as a result of this investment surge,[237] many others will not.

The United States and Japan should review Article 8, Section 1 with the goal of either renegotiating it, replacing it with Congressional legislation, or reducing its harmful side-effects through the judicial process. The United States must protect the equal opportunity advancements of women against the harmful discrimination that direct foreign investment can transplant into American workplaces. American workers deserve full protection against unfair employment practices, regardless of their citizenship or the citizenship of their employer. The United States does not allow foreigners to commit criminal acts against people in the United States without consequence. Similarly, we should not allow foreign employers to use their direct capital investments in a manner which harms American workers.

In order to stop the importation of discriminatory corporate environments, the United States should alter the scope of the FCN Treaty exemption so that it excludes all employment acts which are outlawed under Title VII. The cur-

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[236] Yates, *supra* note 30, at C1.

[237] Frantz, *supra* note 38, at A1.

rent situation discriminates against women, who have already struggled through traditional barriers to enter the shrinking market of management positions. Americans working for Japanese companies in the United States deserve fair treatment under American labor laws.

It is questionable whether, in the 1990s, the United States and Japan could have concluded the FCN Treaty in the form that it was written in the 1950s. Legitimate concerns have arisen which cast into doubt the propriety of the broad exemption of Article 8, Section 1. The Treaty should only assure Japanese investors the right to conduct business in the United States without suffering discrimination themselves.[238] Article 8, Section 1 should not extend to Japanese corporations greater rights than are granted to domestic corporations. As a result, renegotiation of Article 8, Section 1 is both appropriate and necessary.

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[238] *See* Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 188, n.19 (1982).