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Keith Sealing

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SEX, ALLIES AND BFOQS: THE CASE FOR NOT ALLOWING FOREIGN CORPORATIONS TO VIOLATE TITLE VII IN THE UNITED STATES

Keith Sealing

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SEX, ALLIES AND BFOQS: THE CASE FOR NOT ALLOWING FOREIGN CORPORATIONS TO VIOLATE TITLE VII IN THE UNITED STATES

*Keith Sealing**

I. INTRODUCTION

The extent to which foreign corporations as well as their domestic subsidiaries can discriminate against American employees on the basis of sex, age, religion, and national origin in a manner that would be acceptable under their own laws and customs but inimical to American law is currently determined by a muddled jumble of circuit court opinions interpreting a “[w]e express no view” Supreme Court footnote.¹ As a result, American victims of sexual discrimination have much less protection under Title VII of the Civil Rights Act of 1964² when the discriminating actor is a foreign corporation or its domestic subsidiary than they do when the discrimination is by a wholly domestic corporation. This results from the courts’ interpretations of the relationship between a common Treaty of Friendship, Commerce and Navigation (FCN) provision that allows foreign corporations to hire executive-level employees “of their choice,” and Title VII and its § 703 bona fide occupational qualification (BFOQ) exception³ that allows discrimination on the basis of religion, sex, or national origin (but not race) for certain jobs.

This Article will argue that this result, repugnant to the purpose of civil rights laws, is the result of a series of badly reasoned courts of appeal cases and a lack of guidance by the Supreme Court. However, because of the current Court’s stance in civil rights cases, now is perhaps not the best time for certiorari on any of the issues raised herein. This Article will focus generally on sex discrimination under Title VII, and will focus specifically on Japanese companies and their subsidiaries,⁴ although the cases involve other countries and other antidiscrimination provisions.

II. THE CIVIL RIGHTS ACT VERSUS THE FCN TREATY

A. *The Civil Rights Act*

Title VII states in pertinent part:

[I]t shall *not* be an unlawful employment practice for an employer to hire and

* Visiting Assistant Professor of Law, Syracuse University College of Law. J.D., 1985, Temple University School of Law; B.S., 1982, University of Northern Colorado.

1. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 189-90 n.19 (1982).

2. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

3. *Id.* at § 2000e-2(e).

4. There is no intent to single out the Japanese for particular opprobrium, however Japan is not only an extremely heterogeneous society, but one in which the business world is also extremely male dominated. In addition, this Author has previously advised Japanese executives new to United States culture on similar labor issues. For a succinct summary of the problem see, Becky Kukuk, Note, *Eastern Men, Western Women: Coping with the Effects of Japanese Culture in the United States Workplace*, 28 GOLDEN GATE U. L. REV. 177 (1998) (describing Japanese men’s treatment of female employees in Japan and the United States).

employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.⁵

B. The Treaty

The United States has a long history of negotiating bilateral FCN treaties; the first was negotiated with France in 1778.⁶ The purpose of such treaties is to provide rules to protect the citizens of one country, and their property and other interests in the other country, as well as rules to govern trade and shipping.⁷ The Japanese Treaty was one of sixteen negotiated in the aftermath of World War II that reflected the long standing tradition of FCN treaties but that were adapted to the realities of the post-war growth in the importance of international commerce.⁸

Under the treaties, foreign nationals were entitled to three levels of protection. In looking at the treaties it should be noted that they were negotiated by the United States from a position of strength, and with more concern for the rights of Americans in a foreign country than for the reciprocal rights of that nation's nationals in the United States, which was generally perceived as granting greater protections.⁹ At one level, foreign nationals were guaranteed "national treatment," or the same treatment accorded citizens.¹⁰ However, at another level, in sensitive areas such as shipbuilding and domestic air transport, foreigners were not guaranteed full national treatment status but rather "most favored nation" treatment, a guarantee that the foreign national would be treated as well as the nationals of any other country in the host country.¹¹ Finally, "[a]bsolute rules [in treaty provisions] were intended to protect vital rights and privileges of foreign nationals in any situation, whether or not a host government provided the same rights to the indigenous population."¹²

The key treaty provision (here using the Japanese Treaty, Article VIII(1) as exemplar), provides that: "[C]ompanies 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."¹³

5. 42 U.S.C. § 2000e-2(e) (emphasis added).

6. *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 355 (5th Cir. 1981) [hereinafter *Spiess I*] (citing Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958)).

7. *Id.* at 356 (citing Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230-31 (1956)).

8. *Id.* at 359.

9. Thus the issues raised in the cases that followed, such as the rights of American workers in America, were not in the minds of American negotiators or Congressional ratifiers of the treaties.

10. *Spiess I*, 643 F.2d at 359.

11. *Id.* at 360 (citing Walker, *supra* note 7, at 236).

12. *Id.* (citing Walker, *supra* note 6, at 811, 823; Walker, *supra* note 7, at 232). The *Spiess I* court held that Article VIII(1) was just such an absolute rule, entitling Japanese corporations to ignore United States civil rights laws. *Id.*

13. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VIII, para. 1, 4 U.S.T. 2063 [hereinafter *Treaty*] (emphasis added by the Court in *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 181 (1982)).

To determine whether a company is a company of the United States or a company of Japan it is necessary to look at Article XXII(3) of the Japanese Treaty which states:

As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party.¹⁴

Thus, any American corporation, even if it is the wholly owned subsidiary of a Japanese corporation, is an American corporation under Article XXII(3) of the Japanese Treaty and is not entitled to the protection of Article VIII(1) in the United States; or at least this would seem to be the case. But, in fact, it is not, in the viewpoints of several circuits, as the cases below will demonstrate.

C. *The Act Versus the Treaty*

Most of the treaties being considered were negotiated in the immediate aftermath of World War II, prior to the adoption of the Civil Rights Act of 1964. Should the subsequent legislation affect existing treaties? Turning to the issue of the Treaty versus domestic American antidiscrimination statutes, one court concluded that "in the absence of evidence suggesting Congress intended subsequent legislation to affect existing treaty rights, and in the event the enactments conflict, the Treaty must prevail. . . . [T]here is no evidence that Congress intended to abrogate the Article VIII(1) right in any way when it enacted Title VII and the ADEA."¹⁵ But there is likewise no evidence that Congress intended these treaty provisions to create a broad loophole that would enable foreign corporations to violate Title VII and the civil rights of their American employees. The record is silent and provides no support to either side. How would one guess that the 1964 Congress would answer the following question: In passing this legislation did you intend to assure that Ford and General Motors can no longer discriminate on the basis of sex, but that such discrimination is permissible at Honda's American plant?

The above court also noted that federal statutes should not be construed to violate a treaty unless there is no other possible construction.¹⁶ But here would seem to be the exception that proves the rule: it is an impossible construction to assume that Congress acted to stop discrimination in America by Americans while allowing it to continue unchecked if perpetrated by Japanese (or Korean or Greek or Italian) corporate branches operating here. Finally, treaties, including the FCN Treaty in its various iterations, supercede inconsistent state law as well.¹⁷

14. *Id.* at XXII (emphasis added by the Court in *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. at 179).

15. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1146 (3d Cir. 1988) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963)); *Spiess I*, 643 F.2d at 356.

16. *Spiess I*, 643 F.2d at 356 (citing *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (quoted in *McCullough v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 21)).

17. *Papaila v. Uniden Am. Corp.*, 840 F. Supp. 440, 447 (N.D. Tex. 1994) (citing U.S. CONST. art. VI, cl. 2 (treaties are the "supreme law of the land")); *United States v. Pink*, 315 U.S. 203, 230 (1942); *DeTenorio v. McGowan*, 510 F.2d 92, 95 (5th Cir. 1975).

III. THE CASES

This section looks at the various opinions on the issue over a twenty-year period. Most involve the Japanese Treaty, but others examine a similar provision in treaties with Denmark, Korea, Greece, and Italy. The claims involve sex discrimination and national origin discrimination under Title VII, and age discrimination under the ADEA. In the first case, *Linskey v. Heidelberg Eastern, Inc.*,¹⁸ the United States District Court for the Eastern District of New York held that a United States subsidiary of a Danish corporation could not assert the Treaty protections of its parent.¹⁹ Then in 1981, the Second Circuit in *Avagliano v. Sumitomo Shoji America, Inc.*²⁰ held that a subsidiary could not rely on blanket protection under the Treaty with Japan²¹ and the Fifth Circuit in *Spiess I*, over a strong dissent, held that a subsidiary could do so.²² Asked to reexamine its opinion in light of the conflict, the *Linskey*²³ court reaffirmed its original opinion.²⁴ The following year the Supreme Court reversed the Second Circuit in *Sumitomo* but left open the question of whether a subsidiary could assert its parent's Treaty rights.²⁵ Then, between 1984 and 1999 the Third, Fifth, Sixth, and Seventh Circuits²⁶ all answered the Court's question by holding that subsidiaries could assert their parents' Treaty protections. The only contrary opinion issued in this time period, despite substantial academic commentary in opposition to the trend,²⁷ was *Kirmse v. Hotel Nikko of San Francisco, Inc.*,²⁸ a state case out of California.²⁹

A. *Linskey v. Heidelberg Eastern, Inc.*

Linskey was an early case involving the Treaty with Denmark. James Linskey was fired from the domestic subsidiary of a Danish corporation and claimed national origin discrimination under Title VII and age discrimination under the ADEA.³⁰ The Danish parent argued, inter alia, that the Treaty protected it from

18. 470 F. Supp. 1181 (E.D.N.Y. 1979).

19. *Id.*

20. 638 F.2d 552 (2d Cir. 1981) [hereinafter *Avagliano II*] (affirming *Avagliano v. Sumitomo Shoji Am., Inc.*, 475 F. Supp. 506 (S.D.N.Y. 1979) [hereinafter *Avagliano I*]).

21. *Id.*

22. *Spiess I*, 643 F.2d at 355.

23. No. 77-C833, 1981 WL 27015, at *1 (E.D.N.Y. Oct. 6, 1981).

24. *Id.*

25. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. at 189-90.

26. See discussion *infra* Parts III.G, I, F, and H, respectively.

27. See, e.g., Eric K. Kawabata, *Potential Disregard of the Corporate Entity & U.S. Subsidiary Invocation of Japanese Parent's Treaty Rights*, 8 PAC. RIM L. & POL'Y J. 241 (1999); Gregory S. Lane, *Friendship, Commerce and Navigation Treaties: An Analysis of the Foreign Corporation's Exemption From United States Labor Standards*, 16 PEPP. L. REV. 383 (1989); Tram N. Nguyen, *When National Origin May Constitute a Bona Fide Occupational Qualification: The Friendship, Commerce, and Navigation Treaty as an Affirmative Defense to a Title VII Claim*, 37 COLUM. J. TRANSNAT'L L. 215 (1998); Stacey M. Rosner, *Beyond the FCN Treaty: Japanese Multinationals Under Title VII*, 51 FORDHAM L. REV. 871 (1983).

28. 59 Cal. Rptr. 2d 96 (Cal. Ct. App. 1996).

29. *Id.*

30. *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. 1181, 1182-83 (E.D.N.Y. 1979). *Linskey* was employed by Heidelberg Eastern, Incorporated, a New York corporation, which was a wholly owned subsidiary of East Asiatic Company, Incorporated, a New York corporation, which was, in turn, wholly owned by East Asiatic Company, Limited, a Danish corporation. *Id.* at 1182.

claims under Title VII and the ADEA.³¹ But the United States District Court for the Eastern District of New York found nothing in the history of the Treaty that would convince it that a foreign corporation had an absolute privilege to hire professionals without regard for American laws prohibiting discrimination.³²

The court first noted that although some twenty-five post-World War II treaties contained substantially similar provisions, the legislative reports and testimony are silent as to their actual intent.³³ However, the legislative history of two 1955 treaties (Haiti and Turkey) containing the same provisions convinced the court that: "[t]he purpose of these provisions was to exempt specialized employees of foreign countries and companies from the admission requirements of the host country in specialized areas of endeavor. It was not intended to immunize foreigners from claims under the host country's employment discrimination laws."³⁴ Further, the court noted that the Thailand Treaty was ratified by the Senate in 1967, three years after Title VII was enacted as part of the Civil Rights Act of 1964, and no discussion took place regarding the Treaty's effect on Title VII.³⁵ The court concluded that the only possible inference was that the Treaty was not intended to exempt foreign companies from Title VII.³⁶ The court saw the provision as primarily aimed at granting foreign nationals "treaty trader" status under the Immigration and Nationality Act of 1952,³⁷ which allows aliens from nations with which the United States has a Treaty of Friendship, Commerce and Navigation to enter the United States to operate an enterprise without being considered an immigrant subject to immigration quotas and other restrictions.³⁸ The court concluded with the important observation that "[a] different ruling would provide an unjustified loophole with wide ranging effects for the enforcement of Title VII."³⁹

B. *Avagliano v. Sumitomo*

In *Avagliano II*,⁴⁰ the Second Circuit held that the New York corporate subsidiary of a Japanese trading company faced with a class action suit by female

31. *Id.* at 1183. The Danish Treaty contained essentially the same provision in Article VII(4) as contained in the Japanese Treaty in Article VIII(1). *Id.* at 1183-86.

32. *Id.* at 1185. The court noted that the only other court to be confronted with this defense did not reach the merits of the issue. *Id.* at 1185 n.1. This was *Spiess v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1 (S.D. Tex. 1979), which at that time was in the Southern District of Texas. Two years later the Fifth Circuit would reach a conclusion opposite to that of the *Linskey* court. *Spiess I*, 643 F.2d at 355. *Spiess* is discussed below.

33. *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. at 1185-86 n.5.

34. *Id.* at 1186.

35. *Id.*

36. *Id.* at 1186-87.

37. 22 C.F.R. § 41.40 (1995).

38. *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. at 1187 (citing *Nippon Express, Inc. v. Esperdy*, 261 F. Supp. 561 (S.D.N.Y. 1968) (employee of New York subsidiary of Japanese corporation denied continuation of treaty trader status because of menial level of her work; relationship of treaty trader under Immigration and Nationality Act and Article VII(1) of the Treaty explained); *Tokyo Sansei v. Esperdy*, 298 F. Supp. 945 (S.D.N.Y. 1969) (employee of New York office of Japanese corporation denied treaty trader status because of menial level of his work; relationship of treaty trader under Immigration and Nationality Act and Article VII(1) of the Treaty explained)).

39. *Id.* at 1187. *Linskey* had also argued that the defendants discriminated against women, but the court held that as a male he lacked standing to make the argument. *Id.*

40. *Avagliano II*, 638 F.2d 552 (2d Cir. 1981), *aff'g* 473 F. Supp 506 (D.C.N.Y. 1979), *rev'd* 457 U.S. 176 (1982).

secretarial employees alleging violations of 42 U.S.C. § 1981 and Title VII could rely on the protection of the U.S.-Japan FCN Treaty, but that this protection did not insulate it from all Title VII scrutiny.⁴¹ The court concluded that discrimination on the basis of Japanese citizenship could be a BFOQ under certain circumstances based on factors such as, *inter alia*, "acceptability to those persons with whom the company . . . does business."⁴² As a practical matter, this would result in exactly the structure that emerged at Sumitomo New York: American women working in clerical roles for Japanese men.

The *Avagliano* plaintiffs were past and present female secretarial employees of Sumitomo (America). All but one was a United States citizen; the exception was a Japanese citizen living in the United States.⁴³ The suit was a class action in which they argued that Sumitomo's practice of hiring only male Japanese citizens to top level positions violated 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964.⁴⁴

Sumitomo moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that discrimination on the basis of Japanese citizenship does not violate Title VII or § 1981 and that Sumitomo's practices were protected under Article VIII(1) of the Friendship, Commerce and Navigation Treaty between the United States and Japan.⁴⁵

In *Avagliano I*, the United States District Court for the Southern District of New York, holding that neither sex discrimination nor national origin discrimination actions could be brought under § 1981, dismissed that portion of the claim.⁴⁶ However, the court held that because Sumitomo had incorporated in the United States, it was not covered by Article VIII(1), and certified this issue for interlocutory appeal to the Second Circuit under 28 U.S.C. § 1292(b).⁴⁷

In *Avagliano II*, the Second Circuit reversed in part.⁴⁸ Initially, the court concluded that the Treaty parties intended Article VIII(1) to cover locally incorporated subsidiaries of foreign companies, thus protecting Sumitomo Japan's American subsidiary.⁴⁹ However, the court held that the Treaty language nevertheless did not protect Sumitomo from Title VII.⁵⁰ Finally, the court held Japanese citizenship could be a BFOQ for high-level employment with a Japanese owned domestic corporation, and thus remanded the matter to determine if Sumitomo's employment practices might fit this exception to Title VII.⁵¹

41. *Id.* at 558-59.

42. *Id.* at 559. But, as discussed more fully below, this is certainly *not* the law, at least outside the context of FCN treaties. See *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (sex not a BFOQ even though foreign clients might react negatively to a woman); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (sex not a BFOQ even though most airline passengers prefer female flight attendants).

43. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 178 (1982).

44. *Id.*

45. *Id.* at 179.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 179-80.

C. Spiess v. C. Itoh & Co. (America)

Spiess v. C. Itoh & Co. (America),⁵² involved the New York subsidiary of the Japanese corporation C. Itoh. Michael Spiess and other Americans argued that C. Itoh's discrimination against American employees in hiring and promoting Japanese nationals to management positions violated both Title VII and 42 U.S.C. § 1981.⁵³

The United States District Court for the Southern District of Texas held that Article XXII(3) clearly stated that the nationality of a corporation was determined by its place of incorporation, and thus C. Itoh & Co. (America) was an American company for purposes of the Treaty.⁵⁴ But the Fifth Circuit rejected this contention, admitting that the district court's interpretation was "compatible with the text of the Treaty."⁵⁵ The court held that Article XXII(3) was "not [intended] to determine which forms of corporate organization were entitled to assert Treaty rights, but to ensure that unfamiliar organizations would be recognized as 'companies' by the legal institutions of the respective countries."⁵⁶ After deciding to ignore the wording of the Treaty, the court relied upon the following authorities to conclude that "the consistent view of the State Department has been that American subsidiaries of Japanese corporations are entitled to the full protection of the Treaty": a memorandum by State Department negotiators of the Treaty, an ambiguous statement by FCN authority Herman Walker,⁵⁷ a 1976 airgram from Secretary of State Henry Kissinger, and a 1978 letter from the State Department.⁵⁸ Any other interpretation of the Treaty would create an "unreasonable distinction" between American subsidiaries of Japanese companies and Japanese companies operating in the United States through subsidiaries.⁵⁹

Turning to Article VIII(1), the court concluded that C. Itoh was exempt from American employment discrimination laws to the extent that it could favor Japanese over Americans in executive and technical positions.⁶⁰ The court rejected Spiess's argument that Article VIII(1) should be read to grant national treatment to the Japanese in their employment decisions.⁶¹

The court then turned to the question of whether Title VII, enacted after the Treaty, was intended to invalidate inconsistent Treaty obligations.⁶² Even while

52. 643 F.2d 353 (5th Cir. 1981), *vacated by* 457 U.S. 1128 (1982) [hereinafter *Spiess II*].

53. *Id.* at 355.

54. *Id.* at 356 (citing *Spiess v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1, 6 (S.D. Tex. 1979)).

55. *Id.*

56. *Id.*

57. Walker "formulated the modern concept of FCN treaties," *id.* at 357 n.2, and wrote extensively about treaties. See, e.g., Walker, *supra* notes 6, 7.

58. *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d at 357-58.

59. *Id.* at 357. The court here followed the reasoning of the Second Circuit in *Avagliano II*, which had been published but not yet vacated by the Supreme Court. *Id.* *Spiess I* was also subsequently vacated and remanded in light of the Supreme Court's opinion in *Sumitomo*. *Spiess II*, 457 U.S. 1128 (1982). The court was also aware of (and rejected the "literalism" of) the opinions in *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 823 (N.D. Cal. 1957), and *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1263, 1265 n.4 (E.D. Pa. 1980). *Spiess I*, 643 F.2d at 358.

60. *Spiess I*, 643 F.2d at 363.

61. *Id.* at 360.

62. Section 1981, which Spiess also invoked, was enacted before the Treaty and therefore is not part of this analysis. See *Spiess I*, 643 F.2d at 362 n.9 (citing *Hijo v. United States*, 194 U.S. 315, 324 (1904)).

noting that employment discrimination laws "occupy a high priority on the nation's agenda," the court applied the rule that congressional intent to abrogate a Treaty provision with subsequent legislation must be clearly expressed,⁶³ and found no such expression.⁶⁴

Finally, the court held that any right to discriminate pursuant to the Treaty was not violative of Article 55 of the United Nations Charter,⁶⁵ which encourages respect for all human rights regardless of race, sex, language, or religion. The court reached its conclusion because the issue at hand was national origin discrimination (not one of the enumerated characteristics), the Charter was not a self-executing obligation, and Title VII did not serve to execute the Charter but rather was a completely independent statute.⁶⁶

D. *Linskey v. Heidelberg Eastern, Inc. (Linskey II)*

In *Linskey v. Heidelberg Eastern, Inc.*,⁶⁷ the United States District Court for the Eastern District of New York was asked to reconsider its opinion in light of the conflict created by *Spiess I* and *Avagliano II*. The court noted that the *Avagliano II* opinion had solved the conflict between the Treaty and Title VII by imposing the BFOQ requirement.⁶⁸ The imposition forced the foreign company to show that foreign citizenship was a BFOQ for a particular position rather than allowing blanket exclusion from Title VII. The Fifth Circuit, however, in *Spiess I* held the opposite by stating that foreign companies were not subject to the BFOQ requirement at all.⁶⁹ Admitting that the Fifth Circuit's argument was quite compelling,⁷⁰ the court concluded that in light of the "firm commitment" to support Title VII's attempt to wipe out "all forms of invidious discrimination," the court found no reason "to put a chink in that armor."⁷¹ Finally, the court held that it would not be overly burdensome to require foreign corporations to justify personnel decisions by proving BFOQs.⁷²

E. *Sumitomo v. Avagliano*

In *Sumitomo Shoji America Inc. v. Avagliano*,⁷³ the Supreme Court reversed the Second Circuit, holding that the New York subsidiary could not directly rely on the protection of Article VIII(1).⁷⁴ However, the Court ended its opinion with a footnote in which it stated that it expressed no view as to whether or not Japanese citizenship could be a BFOQ, and whether the New York subsidiary, which had only sought to directly invoke the Treaty's protection, could "assert any Article

63. See *supra* note 15 and accompanying text.

64. *Spiess I*, 643 F.2d at 362.

65. U.N. CHARTER art. 55.

66. *Spiess I*, 643 F.2d at 362-63.

67. No. 77-C833, 1981 WL 27015, at *1 (E.D.N.Y. Oct. 6, 1981) [hereinafter *Linskey II*].

68. *Id.* at *2-3.

69. *Id.* The court rejected the argument that differences in the language of the two treaties were significant. *Id.* at *2. The Japanese Treaty allowed foreign companies to select executives "of their choice" whereas the Danish Treaty allowed selection "regardless of nationality." *Id.*

70. *Id.* at *3. Curiously, the *Linskey* court does not mention the Reavley dissent, *Spiess I*, 643 F.2d at 363, which supports its position.

71. *Id.*

72. *Id.*

73. 457 U.S. 176 (1982).

74. *Id.* at 189-90.

VIII(1) rights of its parent."⁷⁵

The Court first looked at whether Article VIII(1) of the Japanese Treaty provided a defense to a Title VII employment discrimination suit against an American subsidiary of a Japanese company.⁷⁶ The Court began its analysis by noting that interpretation of the treaty "must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'"⁷⁷ Accordingly, the Court turned to the Treaty language⁷⁸ that allowed companies of Japan or the United States to hire certain upper level employees of their choice while in the other country's territory.⁷⁹

The Court noted the ironic fact that these provisions were enacted at the insistence of the United States despite the opposition of other countries, including Japan, to protect the employment of Americans abroad, and "to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel."⁸⁰

Having concluded that the Treaty "clearly" only applied to the companies of one country operating in the other, the Court turned to the definitional section of the Treaty, Article XXII(3), which states that a company incorporated in the territory of a party is a company of that party.⁸¹

Based upon the language of Article XXII(3), the Court concluded that Sumitomo was a company of the United States, not of Japan, and as such could not "invoke the rights provided in Article VIII(1), which are available only to companies of Japan operating in the United States and to companies of the United States operating in Japan."⁸²

The Court then noted that the governments of Japan and the United States, speaking through the Japanese Ministry of Foreign Affairs and the State Department respectively, agreed with the Court's interpretation of the Treaty.⁸³ In light of these facts, the Court stated:

Our role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.⁸⁴

The Court concluded that Sumitomo was not covered by Article VIII(1) of the Treaty, vacated the judgment of the Second Circuit, and remanded.⁸⁵ This ending would have accorded American workers in the employ of the American subsidiaries of Japanese corporations all the rights protected by Title VII. However, at the end of the opinion was footnote nineteen, which stated:

75. *Id.* at 190 n.19.

76. *Id.* at 177-78.

77. *Id.* at 180 (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)).

78. *See supra* note 13 and accompanying text.

79. *Sumitomo Shoji Am. Inc. v. Avagliano*, 457 U.S. at 181.

80. *Id.* at 181 n.6 (quoting *Walker, supra* note 7, at 234).

81. *Id.* at 182.

82. *Id.* at 182-83.

83. *Id.* at 183-85.

84. *Id.* at 185.

85. *Id.* at 189-90.

We express no view as to whether Japanese citizenship may be a bona fide occupational qualification for certain positions at Sumitomo or as to whether a business necessity defense may be available. 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. However, the Court of Appeals found the evidentiary record insufficient to determine whether Japanese citizenship was a bona fide occupational qualification for any of Sumitomo's positions within the reach of Article VIII(1). Nor did it discuss the bona fide occupational qualification exception in relation to respondents' sex discrimination claim or the possibility of a business necessity defense. Whether Sumitomo can support its assertion of a bona fide occupational qualification or a business necessity defense is not before us.

We also express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent.⁸⁶

Thus, the Court left open two avenues with which to undermine the purpose of Title VII: (1) a finding that Japanese citizenship was a BFOQ would result in a homogeneous management team of all Japanese ethnic males; and (2) a finding that an American subsidiary could assert the Treaty rights of its Japanese parent would put Treaty Article VIII(1) at odds with Title VII. Both avenues of attack on Title VII would eventually be explored.

The two issues thus raised were not answered by the case itself, as the class action was settled after about four more years of discovery and negotiation.⁸⁷ The ambiguity as to the applicability of the BFOQ defense clearly affected the settlement terms. The United States District Court for the Southern District of New York, in approving the settlement, stated that "[i]t is not clear how broad a BFOQ defense would have been recognized by the Court in this case, but it may be assumed that this defense would have limited the scope of any relief granted to some or all of the class."⁸⁸ The company was required to make good faith efforts to place women in twenty-three to twenty-five percent of the company's exempt positions. However, the top ten management spots were still to be staffed by rotating employees from the Japanese parent,⁸⁹ clearly resulting in the positions being filled by male Japanese nationals. The agreement also required that after three years, five percent of the women in exempt jobs would obtain senior management positions, and seven percent would obtain senior sales positions.⁹⁰ The company also agreed to provide back-pay and damages.⁹¹

F. Wickes v. Olympic Airways

In *Wickes v. Olympic Airways*,⁹² the Sixth Circuit found a limited, not a blan-

86. *Id.* at 189-90 n.19 (citation omitted).

87. *Avagliano v. Sumitomo Shoji Am., Inc.*, No. 77 Civ. 5641 (CHT), 82 Civ. 4930 (CHT), 1987 WL 14653 (S.D.N.Y. Mar. 30, 1987) [hereinafter *Avagliano III*]. The consent decree provided remedial and monetary relief for approximately 1200 class members. *Id.* at *3.

88. *Id.* at *6.

89. *Id.* at *3.

90. *Id.*

91. *Id.* at *4-5. The company was to establish a \$580,000 fund that would pay \$1500 to \$6000 to each former employee with two or more years of service, and a \$400,200 fund to pay similar amounts to present employees with two or more years of service. *Id.* In addition, the named plaintiffs were awarded \$15,000 each for their ten-year-long effort. *Id.*

92. 745 F.2d 363 (6th Cir. 1984).

ket, right under the U.S.-Greece Treaty.⁹³ *Wickes* is not precisely on point because in addition to involving a different treaty⁹⁴ and culture, it involved a foreign corporation owned by the Greek government, not a domestic subsidiary thereof.⁹⁵ Also, the issue was resolved under Michigan's statute prohibiting discrimination on the basis of age or national origin, not the ADEA and Title VII.⁹⁶ However, the case is instructive as to the extent of protection from domestic antidiscrimination that a similar treaty provision allows.⁹⁷

In light of the court's careful review of the Treaty's legislative history, the court concluded that it contained: "substantial evidence that Article XII was intended to be a narrow privilege to employ Greek *citizens* for certain high level positions, not a wholesale immunity from compliance with labor laws prohibiting other forms of employment."⁹⁸ The court noted that the post-World War II treaties were negotiated in the context of percentile restrictions that required American companies working abroad to hire certain percentages of host country citizens.⁹⁹ The treaties were enacted before the Civil Rights Act or the ADEA. The court noted that nine states had already enacted antidiscrimination employment laws, even though there was nothing in the legislative history of the treaties that suggested they were intended to override these laws, and a State department spokesman stated that such laws would be unaffected.¹⁰⁰

The court did hold that the Treaty would prevail over Michigan law if the plaintiff were to argue on remand that citizenship (discrimination upon which Michigan law does prohibit) and national origin (discrimination upon which Michigan does not prohibit) are synonymous.¹⁰¹

93. *Id.* at 366.

94. However, the Treaty was negotiated in the same time period as the Japanese Treaty and was considered in the same Senate hearings. *Id.* at 366 (citing *Commercial Treaties: Hearings on Treaties of Friendship, Commerce and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan Before the Subcomm. on Commercial Treaties of the Senate Foreign Relations Comm.*, 83d Cong. 6 (1953) [hereinafter *1953 Hearings*]).

95. *Wickes v. Olympic Airways*, 745 F.2d at 364.

96. *Id.* *Wickes* sued under the Elliott-Larsen Civil Rights Act of 1976, MICH. COMP. LAWS ANN. § 37.2202 (West Supp. 1984). He failed to make timely administrative claims under the ADEA and Title VII before the applicable statutes of limitation expired. *Wickes v. Olympic Airways*, 745 F.2d at 364.

97. Article XII(4) of the 1951 Treaty with Greece allows companies of either party to hire nationals "of their choice" in the other country. *Wickes v. Olympic Airways*, 745 F.2d at 365 (citing Treaty of Friendship, Commerce & Navigation, Aug. 3 & Dec. 26, 1951, U.S.-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057).

98. *Id.*

99. *Id.* at 367 n.1 (citing HENRY STEINER & DETLEV VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 37-38 (1968)); *Commercial Treaties: Hearings on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece Before a Subcomm. of the Comm. on Foreign Relations of the United States Senate*, 82d Cong. 26 (1952) [hereinafter *1952 Hearings*]. The Steiner and Vagts text has been superseded by DETLEV VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* 21-29 (2d ed. 1998) (including abbreviated version of *Sumitomo*).

100. *Wickes v. Olympic Airways*, 745 F.2d at 368 (citing *1953 Hearings*, *supra* note 94, at 4-5; Jonathan B. Schwartz, Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 *STAN. L. REV.* 947, 951 n.23 (1978-79) (the states were Connecticut, Indiana, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Washington)).

101. *Id.*

G. MacNamara v. Korean Air Lines

The task of interpreting footnote nineteen of *Sumitomo* fell first upon the Third Circuit in *MacNamara v. Korean Air Lines*,¹⁰² a case not involving sexual discrimination, but rather involving discrimination based on national origin and age, and also not involving Japan, but rather involving South Korea, albeit a similar culture and an identical Treaty provision.¹⁰³ The court held that the BFOQ exception not only applied but should be construed more broadly in the international context in light of Article VIII(1) of the FCN Treaty.¹⁰⁴ Next, the court concluded that conflicts between Article VIII(1) and Title VII must be resolved in favor of the Treaty.¹⁰⁵ Further, the plaintiffs were held not to prevail just by proving "disparate impact," as they could in the case of domestic corporations under *Griggs v. Duke Power Co.*,¹⁰⁶ rather, they were faced with the more difficult burden of proving intent to discriminate.¹⁰⁷

Thomas MacNamara, a fifty-seven-year-old American citizen, began working for Korean Airlines (KAL) in 1974.¹⁰⁸ KAL discharged six American managers nationally and replaced them with four Korean citizens, replacing MacNamara with a forty-two-year-old Korean man who previously had been in charge of KAL's Washington office.¹⁰⁹ MacNamara argued that KAL had discriminated against him "on the basis of race, national origin and age, and additionally that he was entitled to recover because 'all of Defendant's American Sales Managers in the United States were replaced by Koreans.'"¹¹⁰

KAL's motion to dismiss was based on the argument that its conduct was privileged under the terms of the Korean FCN Treaty, which like the Japanese Treaty provides in Article VIII(1) that companies of either party are allowed to hire certain upper level employees of their choice within the other country.¹¹¹ The United States District Court for the Eastern District of Pennsylvania had held that Title VII and the ADEA were in conflict with Article VIII(1) of the Treaty and that the Treaty controlled in employment situations involving essential personnel that favored Korean citizens.¹¹² The Third Circuit noted that the district court's decision was consistent with *Spiess I*,¹¹³ in which the Fifth Circuit held that the wholly owned American subsidiary of a Japanese company was protected by the Treaty.¹¹⁴ This essentially answered the question left open by the Supreme Court in footnote nineteen.

102. 863 F.2d 1135 (3d Cir. 1988).

103. *Id.* at 1138.

104. *Id.* at 1148.

105. *Id.*

106. 401 U.S. 424 (1971). *Griggs* involved Title VII, the employment discrimination provision of the Civil Rights Act of 1964. *Id.* at 425. An intelligence test and a high school diploma were required for the job. *Id.* at 426. This had a discriminatory *impact* on African-American applicants but there was no proof of discriminatory *intent*. *Id.* at 428. A unanimous Court held that where the effect was to disadvantage African-Americans, and there was no showing that the criteria used actually affected job performance, there was a violation of Title VII. *Id.* at 429-33.

107. *MacNamara v. Korean Air Lines*, 863 F.2d at 1148.

108. *Id.* at 1137.

109. *Id.* at 1138.

110. *Id.* at 1137.

111. *Id.*

112. *Id.*

113. 643 F.2d 353 (5th Cir. 1981).

114. *Id.* at 356.

The Third Circuit then turned to the Second Circuit's analysis of *Avagliano II*, describing its position as suggesting that:

The Treaty and Title VII could be reconciled by reference to Title VII's "bona fide occupational qualification" (BFOQ) exception. Although ordinarily the BFOQ exception is narrowly construed, the Second Circuit Court of Appeals reasoned that interpreting it more broadly in the context of FCN Treaties was warranted by the terms of Article VIII(1) and would give foreign employers reasonable latitude to hire solely nationals for its management positions.¹¹⁵

Further, the court took heed of the Second Circuit's interpretation of the BFOQ exception in the international context, which justified discrimination where:

The unique requirements of a Japanese company doing business in the United States, including such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) *acceptability to those persons with whom the company or branch does business*.¹¹⁶

As discussed more fully below, the fourth basis provides an avenue for sexual discrimination for the American subsidiaries of any foreign nation whose culture finds men more "acceptable" than women in business relations.¹¹⁷ However, the court noted that the Supreme Court vacated the judgment, leaving open the issues discussed in the final footnote.¹¹⁸

Because the court agreed that MacNamara was an "executive" within the meaning of the Treaty and that the right to "engage"¹¹⁹ foreign nationals must include the right to replace an American with a foreign national, the court was confronted with the issues raised by other circuits in *Spiess I*, *Avagliano II*, and *Wickes*.¹²⁰ The court stated:

We agree with the Courts of Appeals for the Fifth and Sixth Circuits that Article VIII(1) goes beyond securing the right to be treated the same as domestic companies and that its purpose, in part, is to assure foreign corporations that they may have their business in the host country managed by their own nationals if they so desire.¹²¹

The court saw no conflict between the Treaty, Title VII, and the ADEA, which proscribe discrimination on the basis of race, national origin, or age,¹²² where the company was simply hiring its own nationals.¹²³ Thus, a foreign corporation could not "deliberately" reduce the age of its workforce by hiring younger nationals.¹²⁴ However, the court stated:

On the other hand, to the extent Title VII and the ADEA proscribe personnel decisions based on citizenship solely because of their disparate impact on older managers, a particular racial group, or persons whose ancestors are not from the

115. *MacNamara v. Korean Air Lines*, 863 F.2d at 1139 (footnote omitted).

116. *Id.* (quoting *Avagliano II*, 638 F.2d 552, 559 (2d. Cir. 1981)) (emphasis added).

117. *See infra* notes 174-75 and accompanying text.

118. *MacNamara v. Korean Air Lines*, 863 F.2d at 1139-40.

119. *Id.* at 1141. *MacNamara* had unsuccessfully argued that the Treaty right to "engage" personnel did not incorporate the right to fire or reassign personnel. *Id.*

120. *Id.* at 1140.

121. *Id.*

122. Note that because *MacNamara* was an ADEA age discrimination case, sex was not discussed, but the analysis is the same. *Id.* 1140-41.

123. *Id.* at 1141.

124. *Id.*

foreign country involved, we perceive a potential conflict and conclude that it must be resolved in favor of Article VIII(1).¹²⁵

The court agreed with the parties that Article VIII(1) gave foreign businesses "the right to engage 'executive personnel . . . of their choice' . . . [and that this power] includes the right to discriminate on the basis of citizenship; thus foreign businesses clearly have the right to choose citizens of their own nation as executives *because they are such citizens*."¹²⁶ However, the court rejected KAL's argument that Article VIII(1) provides immunity from Title VII and the ADEA for any executive hiring decision that favors a citizen of one's own nation.¹²⁷

Turning to the issue of the Treaty versus the antidiscrimination statutes, the court concluded that in the "absence of evidence suggesting Congress intended subsequent legislation to affect existing treaty rights, and in the event the enactments conflict, the Treaty must prevail. . . . [T]here is no evidence that Congress intended to abrogate the Article VIII(1) right in any way when it enacted Title VII and the ADEA."¹²⁸ Further, the court found no conflict between proscribed national origin discrimination and permitted citizenship discrimination, describing them as "distinct phenomena," and holding that the trier of fact can distinguish one from the other.¹²⁹

The court, having held that KAL could not *purposefully or intentionally* discriminate on the basis of age, race, or national origin, noted that Title VII and the ADEA, following *Griggs*, prohibit "facially neutral employment practices [that] have a discriminatory effect or 'disparate impact' on protected groups, without proof that the employer adopted these practices with a discriminatory motive."¹³⁰ Noting that imposing such a standard would "pose a substantial problem in disparate impact litigation for corporations hailing from countries, including perhaps Korea, whose populations are largely homogeneous," the court concluded that disparate impact liability under Title VII and the ADEA conflicted with Article VIII(1) and could not be imposed.¹³¹ Thus, MacNamara was forced to prove the more difficult point that KAL's intent was to discriminate against him on the basis of his age.

H. Fortino v. Quasar Co.

Further eroding the protection accorded to Americans, the Seventh Circuit in *Fortino v. Quasar Co.*,¹³² held that an American corporation *could* assert the Treaty rights of its Japanese parent in defending a discrimination claim.¹³³ However, Judge Posner's opinion is based at least in part on a factual misunderstanding of Japanese culture.

Quasar is a division of an American subsidiary wholly owned by Matsushita of Japan.¹³⁴ After a year in which Quasar lost \$20 million, Matsushita sent Mr.

125. *Id.*

126. *Id.* at 1144.

127. *Id.*

128. *Id.* at 1146 (citations omitted).

129. *Id.* However, as discussed below, such is not the case when dealing with very homogeneous societies such as Korea or Japan.

130. *Id.* at 1147-48.

131. *Id.* at 1148.

132. 950 F.2d 389 (7th Cir. 1991).

133. *Id.* at 393.

134. *Id.* at 391.

Nishikawa from Japan to correct the problem.¹³⁵ In the reorganization, a number of American executives were fired, including plaintiffs Fortino, Meyers, and Schultz. No Japanese nationals were fired, although two were rotated back to Japan and replaced with one Japanese national.¹³⁶ All Japanese nationals received pay increases; none of the retained Americans received pay increases.¹³⁷ Two of the three Japanese-Americans, none of whom were executives, were fired.¹³⁸ In a videotape (the admission of which was ultimately held to be reversible error) another Japanese expatriate stated that the reorganization of another Quasar group would result in a younger average age which, in turn, would enable these younger, more vigorous employees to spend more time helping the other staff.¹³⁹ The plaintiffs claimed age and national origin discrimination under the ADEA and Title VII.¹⁴⁰ The judge and jury agreed, awarding \$2.5 million in damages and \$400,000 in attorneys' fees and costs.¹⁴¹

While Title VII protects Americans of non-Japanese origin from discrimination in favor of persons of Japanese origin, it does not forbid discrimination on the ground of citizenship, Judge Posner stated.¹⁴² Further, even though citizenship and national origin are "highly correlated" in countries like Japan, he concluded that using this fact to infer national origin discrimination would "nullify" the Treaty, regardless of whether one is attempting to prove intent or disparate impact.¹⁴³

Judge Posner, noting the Supreme Court's expression in footnote nineteen of the *Sumitomo* decision, then turned to the key issue: whether Quasar, not a Japanese company "in a technical sense," could rely on the Treaty.¹⁴⁴ The court concluded that, at least on the facts presented, a subsidiary may assert a parent's Treaty right "at least to the extent necessary to prevent the treaty from being set at naught."¹⁴⁵ But what facts would justify the opposite conclusion? Judge Posner asked:

But suppose a Japanese company buys an American company, fires all of its new subsidiary's occidental executives because it is prejudiced against occidentals, and replaces them with Japanese citizens. The question would then arise whether the treaty of friendship in effect confers a blanket immunity from Title VII. On this there are different views.¹⁴⁶

But how does one obtain evidence of prejudice, particularly if the disparate impact test cannot be applied? Here the court noted as evidence of a lack of national

135. *Id.* at 392.

136. *Id.*

137. *Id.*

138. *Id.* Judge Posner's misplaced reliance on this fact is discussed *infra*. See *infra* text accompanying notes 144-49.

139. *Fortino v. Quasar Co.*, 950 F.2d at 395.

140. *Id.* at 391.

141. *Id.* at 392. In the court below, the ADEA claim went to a jury but Title VII authorized only equitable relief and so was decided by the judge. *Fortino v. Quasar Co.*, 751 F. Supp. 1306, 1307 (N.D. Ill. 1990). Note that as to events occurring after the passage of the Civil Rights Act of 1991, Title VII plaintiffs can seek monetary damages. *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1057 (5th Cir. 1998) (bifurcating claim where some alleged damages occurred before November 21, 1991, and some occurred after).

142. *Fortino v. Quasar Co.*, 950 F.2d at 392.

143. *Id.* at 392-93.

144. *Id.* at 393 (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 189 n.19 (1982)).

145. *Id.*

146. *Id.* Posner compares *MacNamara* and *Linskey* with *Spieß*. *Id.*

origin discrimination the fact that two of Quasar's Japanese-American employees were fired.¹⁴⁷ Judge Posner seems to believe that since the Japanese-Americans had a national origin in Japan but were not Japanese citizens, this demonstrates that firing decisions were made on the basis of citizenship, not national origin or race. This assumption requires that the Japanese nationals harbor a national origin based affection for Japanese-Americans that they apparently ignored in making personnel decisions based solely on citizenship. But in fact the opposite is the case; Japanese nationals are uncomfortable with what they perceive as the ambiguous loyalties of Japanese-Americans and are actually more at ease with white Americans who present no such ambiguities. Thus, Quasar's decision to fire two of the three Japanese-Americans provided no evidence of whether Fortino was fired because he was not ethnically Japanese or because he was not a Japanese citizen.

Turning to the ADEA claim, the court held that there was enough evidence of age discrimination to make a case before the jury, but stated that there must be a new trial because of two errors by the lower court,¹⁴⁸ and that, in any case, Fortino (but not Meyers and Schultz) had signed a valid waiver of the claims presented.¹⁴⁹

I. *Papaila v. Uniden America Corp.*

In yet another blow to the protection accorded to Americans, the United States District Court for the Northern District of Texas in *Papaila v. Uniden America Corp.*,¹⁵⁰ held that an American corporation *could* assert the Treaty rights of its Japanese parent in defending a discrimination claim.¹⁵¹

Theodore Papaila argued that Uniden America, an Indiana corporation and subsidiary of Uniden Corporation (Uniden Japan), an electronics manufacturer, breached his contract on April 1, 1992, by reducing his compensation, demoting him to the position of Vice President, and engaging in a pattern of discriminatory conduct based on his age, race, and national origin, and ultimately firing him.¹⁵² Papaila sued under Title VII for race and national origin discrimination, and under the ADEA for age discrimination. Uniden America defended by asserting that the Treaty allowed it to exercise the rights of Uniden Japan, its parent corporation, to favor Japanese citizens in employment, and therefore, it was not liable for dis-

147. *Id.* at 393-94.

148. *Id.* at 394-95. First, a videotape was admitted, in which Mr. Omoto stated that the reorganization of another Quasar group would result in a younger average age which, in turn, would enable these younger, more vigorous employees to spend more time helping the other staff. *Id.* at 395. The court held this was inadmissible because Omoto was in an entirely different division of Quasar and had no part in the firing of the plaintiffs. *Id.* 395-96. Second, Anthony Mirabelli, who was also fired from Quasar but who was not a plaintiff, testified that Nishikawa's predecessor told him that Nishikawa "planned 'to reduce costs by targeting the older employees' for termination." *Id.* at 396. However, even though Mirabelli was listed on a list of 109 "may call" witnesses, the court held that Fortino had violated Federal Rule of Civil Procedure 26(e) by failing to supplement an early discovery request to warn Quasar of Mirabelli's "smoking gun" testimony, and that the appropriate sanction should have been to bar Mirabelli's testimony. *Id.* at 396-97.

149. *Id.* at 394-95. Fortino signed the release in exchange for additional severance benefits but testified at trial that he did not understand it. *Id.* at 394. The jury's belief of this "went beyond the bounds of reason." *Id.*

150. 840 F. Supp. 440 (N.D. Tex. 1994).

151. *Id.* at 447.

152. *Id.* at 443.

criminating against Papaila on the basis of his race and national origin.¹⁵³

Uniden did not dispute that such employees were treated differently than American employees, and argued that the only basis for Papaila's claims of race and national origin discrimination is the preferential treatment given to Japanese expatriates.¹⁵⁴

The court noted that the Supreme Court had held that a subsidiary incorporated in the United States is not directly covered by Article VIII(1), but that it had left open in footnote nineteen in *Sumitomo* the question of whether an American company could assert its Japanese parent's rights under Article VIII(1), and then noted that *Fortino* was the only opinion to address that issue.¹⁵⁵ *Fortino* had held that an American subsidiary of a Japanese parent company *could* assert the Article VIII(1) FCN Treaty rights of its parent. The *Papaila* court decided to follow the Seventh Circuit and concluded that "Uniden must be allowed to assert the treaty rights of Uniden Japan in order to 'prevent the treaty from being set at naught.'"¹⁵⁶ However, the court added, a Japanese company does not have "blanket authority" to discriminate on the basis of race, color, religion, sex, or national origin, but "[t]he FCN Treaty language does, however, mean that '[c]ompanies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws.'"¹⁵⁷

J. Kirmse v. Hotel Nikko

In *Kirmse v. Hotel Nikko of San Francisco, Inc.*,¹⁵⁸ the Court of Appeal of California lauded Judge Reavley's *Spiess I* dissent, criticized *Fortino* and *Papaila*, and held that a California subsidiary of a Japanese company cannot make a blanket claim for immunity under Article VIII(1).¹⁵⁹ The court noted, however, a company still might succeed in such an argument "under appropriate circumstances," such as where the discriminatory decision was made in Japan by the parent and imposed upon the subsidiary.¹⁶⁰

W. Andrews Kirmse was fired from his management position in Hotel Nikko of San Francisco, Inc., a California corporation, which in turn is wholly owned by a Japanese corporation.¹⁶¹ After he was replaced by a Japanese national, Kirmse filed suit alleging four causes of action: breach of contract, discrimination on the basis of race and national origin in violation of the California Fair Employment and Housing Act, wrongful termination in violation of public policy, and intentional interference with contractual relations.¹⁶² The trial court granted summary

153. *Id.* Uniden did not dispute that Japanese employees were treated differently than American employees. *Id.*

154. *Id.* at 446.

155. *Id.*

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

157. *Id.* at 446-47 (quoting *Spiess I*, 643 F.2d 353, 361 (5th Cir. 1981)).

158. 59 Cal. Rptr. 2d 96 (Cal. Dist. App. 1996).

159. *Id.* at 100.

160. *Id.*

161. *Id.* at 97. More precisely, Nikko was wholly owned by Japan Airlines Development (U.S.A.), which is wholly owned by Japan Airlines Development Corporation, Ltd., a Japanese Corporation. *Id.* at 97 n.1.

162. *Id.* at 97.

judgment for Hotel Nikko on all four issues, stating that the second and third issues were barred by the FCN Treaty.¹⁶³

The Court of Appeal of California began its analysis by stating that the Supreme Court held in *Sumitomo* that the Treaty “does not apply to a domestically incorporated subsidiary of a Japanese corporation.”¹⁶⁴ This is the strongest possible interpretation of the *Sumitomo* holding. The court next turned to Justice Reavley’s *Spiess I* dissent, describing it as a “remarkably detailed and cogent textual analysis of the treaty”¹⁶⁵ The court then concluded that “[t]he Supreme Court evidently found the [Reavley] opinion persuasive since it vacated the *Spiess I* judgment and remanded the case for further consideration in light of the *Sumitomo* decision.”¹⁶⁶ Endorsement of the court’s opinion is also a bit of a stretch, as the Supreme Court likely would have vacated and remanded *Spiess I* regardless of the dissent.

The court then turned to the *Fortino* decision and the *Papaila* case that “followed the *Fortino* decision without adding any new analysis.”¹⁶⁷ The court noted that in *Fortino*, the Seventh Circuit distinguished *Sumitomo* on the “slender factual basis” that the plaintiffs in *Sumitomo* failed to allege that the Japanese parent had dictated the subsidiary’s discriminatory behavior.¹⁶⁸ The court concluded: “We doubt that this distinction has much practical significance. The parent company will *always* have the power to control the management of its subsidiary”¹⁶⁹ The court assailed the *Fortino* court’s assertion that any other conclusion would render the Treaty’s protection meaningless.¹⁷⁰ Again turning to Judge Reavley’s dissent in *Spiess I*, the court stated that the drafters of the Treaty had gone to great pains to distinguish the rights of foreign corporations operating in the United States and domestically incorporated subsidiaries of foreign corporations.¹⁷¹ The court further stated that the purpose of the Treaty is to allow foreign companies to operate on an equal basis with domestic companies, in part by allowing them to form domestic subsidiaries.¹⁷² Also, it is consistent with this purpose to subject foreign corporations to the same laws as the domestic ones with which they compete.¹⁷³ Finally, the court argued that the parent could avoid the problem by operating as a branch rather than a domestic subsidiary.¹⁷⁴

The court, however, did admit that the issue raised by the *Sumitomo* Court in footnote nineteen “continues to pose serious and unresolved questions.”¹⁷⁵ The court concluded that “a domestic subsidiary of a Japanese company may well be able to fashion, under appropriate circumstances, a valid basis for asserting standing to raise the parent’s treaty rights, at least with respect to certain employees.”¹⁷⁶

163. *Id.*

164. *Id.* at 99.

165. *Id.* at 100.

166. *Id.*

167. *Id.* at 101.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 101-02.

172. *Id.* at 102.

173. *Id.*

174. *Id.*

175. *Id.* The court supported its opinion with the examples of piercing the corporate veil of a subsidiary to reach the parent or asserting the rights of a closely related third party. *Id.*

176. *Id.*

However, the court gave no indications as to what those circumstances might be, and couched its conclusion in terms of standing to raise the parent's Treaty rights. Hotel Nikko did not couch its argument in terms of standing but instead relied on the *Fortino* holding.¹⁷⁷ Further, the decision to fire Kirmse was made in the United States by an executive of the domestic subsidiary, albeit a Japanese national without the Japanese parent's involvement.¹⁷⁸

K. Weeks v. Samsung Heavy Industries

In *Weeks v. Samsung Heavy Industries Co.*,¹⁷⁹ the Seventh Circuit relied upon *MacNamara, Papaila, Fortino, and Wallace v. SMC Pneumatics, Inc.*¹⁸⁰ in a case arising under the Korean Treaty.¹⁸¹ Harry Weeks claimed, inter alia, race and national origin discrimination after he was fired by an American subsidiary of Samsung Heavy Industries Co., Ltd., a Korean company.¹⁸² The case adds little additional insight into the issues being considered herein.

L. Bennett v. Total Minatome Corp.

In *Bennett v. Total Minatome Corp.*,¹⁸³ the Fifth Circuit confronted a claim involving the French Treaty when W.G. Bennett filed claims under Title VII, the ADEA, and § 1981.¹⁸⁴ Bennett, an employee of Total Minatome Corp. (TMC), a Delaware corporation that was the wholly owned subsidiary of TOTAL, S.A., a French corporation, was demoted and replaced with a younger French expatriate.¹⁸⁵ A jury agreed with his claims and awarded him \$1,422,100 in back pay, compensatory and punitive damages, and \$391,722.73 in legal fees.¹⁸⁶ The Fifth Circuit followed its earlier decision in *Papaila*, concluded that TMC's decisions were dictated by its French parent, and saw no race or national origin discrimination, but only permissible discrimination based upon French citizenship.¹⁸⁷

177. *Id.*

178. *Id.* There will be no further discussion of *Kirmse* as the judgment was nevertheless affirmed for reasons unknown, and the opinion was only certified for partial publication. *Id.* at 96.

179. 126 F.3d 926 (7th Cir. 1997).

180. 103 F.3d 1394 (7th Cir. 1997). In *Wallace*, Judge Posner was again faced with a situation in which a American was fired from the American subsidiary of a Japanese company. *Id.* at 1402. The bulk of Posner's opinion focused on the propriety of summary judgment in an employment discrimination case. However, Posner concluded that the plaintiff was caught between Sylla and Charybdis. *Id.* at 1401. Wallace was fired by his American supervisor for substantial failings and could not make out a prima facie case under Title VII. *Id.* If, however, Wallace argued that the firing was engineered by a Japanese executive who had told him that "all Americans are stupid," then "Wallace runs smack into Article VIII(1) of the Treaty . . ." *Id.* He concluded "[i]f, however, the parent dictates the personnel decisions of the U.S. subsidiary, those decisions are protected by the Treaty." *Id.*

181. *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d at 934.

182. *Id.* at 929.

183. 138 F.3d 1053 (5th Cir. 1998).

184. *Id.* at 1056.

185. *Id.*

186. *Id.* at 1057.

187. *Id.* at 1058-59.

M. Santerre v. Agip Petroleum Co.

Most recently, *Santerre v. Agip Petroleum Co.*¹⁸⁸ summarized the law as allowing an American subsidiary to assert Article VIII(1) protection where the parent dictates personnel decisions.¹⁸⁹ *Santerre*, an American woman, alleged sexual harassment and retaliation against Agip, a Delaware corporation that was the subsidiary of an Italian corporation.¹⁹⁰ Applying a differently worded Treaty provision, the United States District Court for the Southern District of Texas also stated that the U.S.-Italian Treaty did not shield Agip from a Title VII sexual discrimination claim.¹⁹¹

IV. ANALYSIS—LEAST POSSIBLE PROTECTION IS ACCORDED

The progression of the cases through the circuit courts delineates a path to the least amount of protection for American women (and others protected by Title VII and the ADEA) working for multinational companies of FCN Treaty partners, whether operating as domestically incorporated subsidiaries or as branches. This Part first critically reviews that progression.

First, this Part begins with an ambiguous Treaty provision that allows companies of one party to “engage accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.”¹⁹² This issue was addressed correctly the first time a court faced it. Recall that in *Linskey* the Danish parent argued, inter alia, that the Treaty protected it from claims under Title VII and the ADEA.¹⁹³ The United States District Court for the Eastern District of New York concluded that “[w]hile this defense to a Title VII action is a novel one, the history of the provision belies any claim that a foreign corporation has an absolute privilege to hire professional and other specialized employees of their choice irrespective of the American laws prohibiting employment discrimination.”¹⁹⁴

The court first noted that although some twenty-five post-World War II treaties contained substantially similar provisions, the legislative reports and testimony are silent as to their actual intent.¹⁹⁵ However, the legislative history of two 1955 treaties—one with Haiti, one with Turkey—containing the same provisions convinced the court that: “the purpose of these provisions was to exempt specialized employees of foreign countries and companies from the admissions requirements of the host country in specialized areas of endeavor. It was not intended to immunize foreigners from claims under the host country’s employment discrimi-

188. 45 F. Supp. 2d. 558 (S.D. Tex. 1999).

189. *Id.* at 572 n.2.

190. *Id.* at 564.

191. *Id.* at 577.

192. Treaty, *supra* note 13.

193. *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. 1181, 1183 (E.D.N.Y. 1979). The Danish Treaty contained essentially the same provision in Article VII(4) as contained in the Japanese Treaty in Article VIII(1). *Id.*

194. *Id.* at 1185. The court noted that the only other court to be confronted with this defense did not reach the merits of the issue. *Id.* at 1185 n.1. This was the *Spiess* case, which at that time was in the Southern District of Texas. See *Spiess v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1 (S.D. Tex. 1979). Two years later, the Fifth Circuit in *Spiess I* would reach a conclusion opposite that of the *Linskey* court.

195. *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. at 1185-86 n.5.

nation laws."¹⁹⁶ Further, the court noted that the Thailand Treaty was ratified by the Senate in 1967, three years after Title VII was enacted as part of the Civil Rights Act of 1964, and no discussion took place regarding the Treaty's effect on Title VII.¹⁹⁷ The court concluded that the only possible inference was that the Treaty was not intended to exempt foreign companies from Title VII.¹⁹⁸ The court saw the provision as primarily aimed at granting foreign nationals "treaty trader" status under the Immigration and Nationality Act of 1952,¹⁹⁹ which allows aliens from nations with which the United States has a Treaty of Friendship, Commerce and Navigation, to enter the United States to operate an enterprise without being considered an immigrant subject to immigration quotas and other restrictions.²⁰⁰ The court concluded with the important observation that "[a] different ruling would provide an unjustified loophole with wide ranging effects for the enforcement of Title VII."²⁰¹

Second, there exists what should be a not so ambiguous Treaty provision that states that for purposes of the Treaty, a company is simply a company of the country in which it is incorporated. Thus, for example, a subsidiary of a Japanese corporation that is incorporated under the laws of New York should clearly be a New York corporation, and not subject to the first Treaty provision, regardless of how it is interpreted. That should end the discussion for domestically incorporated subsidiaries, but as demonstrated, it does not.

The best refutation of this argument is found in *Spiess I*. Judge Reavley's dissent remains the best articulated rebuttal to the position held by the majority of circuits; it has been unrefuted (but essentially ignored) after more than twenty years. In *Spiess I*, the majority rejected Spiess's argument that Article VIII(1) should be read to grant national treatment to the Japanese in their employment decisions.²⁰² Instead, the court found it apparent from the phrase "of their choice" that Article VIII(1) did not merely grant national treatment, but rather was an "absolute rule" permitting the Japanese to staff their overseas investments with their nationals.²⁰³ But if it is truly absolute, why can't Japanese companies hiring executives "of their choice" choose to hire only white males for the positions staffed by Americans? The court created a conundrum by holding that Article VIII(1) is an absolute rule, but applying it as absolute only as to nationality.

Judge Reavley began his dissent by stating that the purpose of the definitional section of the Treaty, Article XXII(3), was to bridge the cultural gap between the

196. *Id.* at 1186 (citations omitted).

197. *Id.*

198. *Id.* at 1186-87.

199. *Id.* at 1187 (citing 8 U.S.C. § 1101(a)(15)(E)(i) (2000)).

200. *Id.* at 1185 n.10. See also *Nippon Express U.S.A., Inc. v. Esperdy*, 261 F. Supp. 561 (S.D.N.Y. 1968) (employee of New York subsidiary of Japanese corporation denied continuation of treaty trader status because of menial level of her work; relationship of treaty trader under Immigration and Nationality Act and Article VII(1) of the Treaty explained); *Tokyo Sansei (N.Y.) Inc. v. Esperdy*, 298 F. Supp. 945 (S.D.N.Y. 1969) (employee of New York office of Japanese corporation denied treaty trader status because of menial level of his work; relationship of treaty trader under Immigration and Nationality Act and Article VII(1) of the Treaty explained).

201. *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. at 1187. *Linskey* had also argued that the defendants discriminated against women, but the court held that as a male he lacked standing to make the argument. *Id.*

202. *Spiess I*, 643 F.2d 353, 360 (5th Cir. 1981).

203. See *id.* at 360-61.

United States and Japan regarding the various forms of commercial entities; all such business associations were defined as “companies.”²⁰⁴ Next, Judge Reavley looked at the plain meaning of the phrase “[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof”²⁰⁵ It is in keeping with a “well-established principle” of international law to follow the Article XXII(3)’s plain meaning, Judge Reavley argued.²⁰⁶ Judge Reavley found this position confirmed by the structure of the Treaty as a whole,²⁰⁷ as well as in secondary sources.²⁰⁸ Finally, Judge Reavley saw his result as fair to all parties:

204. *Id.* at 364.

205. *Id.* (quoting Treaty, *supra* note 13). If the phrase does not mean what it says, Reavley argued, the majority must first decide what it does mean; second, explain why the drafters of the Treaty nowhere explicitly answered the question of how to determine corporate nationality; and third, justify its choice of using the determinate of an unspecified percentage of the companies’ shareholders. *Id.* at 364-65. This last point is interesting because the instant case and all other cases on point involve *wholly owned* subsidiaries. What would the majority say about an American corporation that is owned 90% by a Japanese company and 10% by an American partner? 51% to 49%? 50% to 50%?

206. *Id.* at 365 n.6 (citing *Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J. Rep. 3, 42; Herman Walker, Jr., *Companies*, in R.R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 182, 193 (1960) (defining the place of incorporation test as the “simple classical test” of corporate nationality)).

207. *Id.* at 365-69. According to Judge Reavley, the drafters of the Treaty created three terms of art to describe the various potential actors: nationals, companies, and “enterprises controlled by such nationals or companies.” *Id.* at 365. If, as the majority held, an enterprise controlled by a company is treated the same as a company, there is no need for separate classifications. *Id.* Two provisions of the Treaty support the argument that a company has the nationality of its place of incorporation. *Id.* First, Article VIII(1) accords companies of Japan national treatment in the United States for commercial activities, industrial, financial, and business activities (and likewise for companies of the United States in Japan). *Id.* Second, Article XXI(1)(e) empowers, for example, the United States to deny national treatment to a company of Japan if it is owned and controlled by North Korea. *Id.* at 366. Under the majority’s holding, this provision would not be necessary because the exemplar company would be deemed a company of North Korea. *Id.* A number of articles in the Treaty grant rights to companies of either party and then specifically extend those rights to enterprises controlled by such companies, however Article VIII(1) extends its rights only to companies of either party and does not mention enterprises controlled by such companies. *Id.* at 366-67 nn.7-11 (citing Articles VII(1), VII(4), XVI(2), VI(3), paragraph 2 of the Protocol, and VI(4)). Further, “[u]nder normal principles of statutory interpretation, if a party or item is specifically enumerated in one section of a statute but omitted from a similar enumeration in a closely-related section, the exclusion is held to be intentional and meaningful unless plain reason or authoritative sources indicate otherwise.” *Id.* at 366.

208. *Id.* at 369-72. Again, in an attempt to sum up his analysis as briefly as possible, Judge Reavley began with a quote from a contemporaneous memo by Secretary of State Dean Acheson that seems to definitively answer the issue posed:

[A]rticle XXII, Paragraph 3, which establishes that whether or not a juridical entity is a “company” of either Party, for treaty purposes, is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded.

Id. at 370. This Author, like Judge Reavley, “cannot imagine a more authoritative or explicit rejection of the majority’s view.” *Id.* Faced with the same fact pattern in reverse (a Japanese-incorporated subsidiary of a United States corporation operating in Japan), Secretary of State Henry Kissinger explained to the United States embassy in Tokyo that the company was a company of Japan, regardless of its American ownership. *Id.* (citing Telegram from Henry Kissinger, Secretary of State, to the Department of State, Tokyo 11177 (Aug. 15, 1975)). Judge Reavley also came to opposite conclusions regarding the secondary sources cited by the majority. *Id.*

The line between Japanese incorporation and American incorporation is a bright and distinct one. If Japanese investors choose to cross that line in order to gain all the benefits of our legal system on a basis equal with American corporations, I find it eminently reasonable that they accept legal responsibilities and duties on an equal basis as well.²⁰⁹

Third, turn to Title VII, which protects against discrimination on the basis of race, sex, national origin, or religion, but has its own inherent weakness: the BFOQ exception.²¹⁰ The exception allows discrimination on the basis of sex, religion, and national origin, but not race, where such characteristic is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."²¹¹ This presents a loophole in the best of times, one that can be expanded and exploited by one intent upon turning back the clock in the field of employment discrimination. Why interpret it even more broadly in the international context where the possibility for abuse by a foreign corporation with a worse record of sex discrimination is even greater?

What is the worst possible way to interpret the potential ambiguities and conflicts created by the interaction of the Treaty and Title VII? It is, of course, the result that languishes as the law today, presumably imparting a chilling effect on any future litigation or settlement negotiations.

The courts began to move astray with *Avagliano II*, in which the Second Circuit, wherein many international businesses are headquartered or represented, held that the Treaty *did* protect locally incorporated subsidiaries of Treaty partners and, although it did hold that the Treaty did *not* exempt it from Title VII, held that Japanese citizenship could be a BFOQ.²¹² The court was wrong on the first issue and unaware of the implications of its holding on the second issue, particularly its statement that in determining whether Japanese citizenship was a BFOQ, the court could consider, in the words of the district court, *inter alia*, "acceptability to those persons with whom the company does business."²¹³ What the court failed to realize is that as a practical matter, this would result in exactly the structure that emerged at Sumitomo New York: American women working in clerical roles for Japanese men. This is because at the executive level the Japanese workforce is extremely homogeneous, consisting of men who in addition to being all of the same national origin, are all of the same race. Thus the "acceptability" language used by the court allows a Japanese company to legitimately (as the law stands) find Japanese nationality a BFOQ and hire only acceptable applicants who will all be of the same race and gender.

The Fifth Circuit in *Spieß I* followed *Avagliano II* in finding that a domestically incorporated subsidiary of a Japanese parent was indeed covered by the Treaty,

209. *Id.* at 369.

210. Discussion about the propriety of the BFOQ exception and how broadly or narrowly it should be applied in the wholly domestic context are worthy topics for consideration, but outside the scope of this Article. See Rachael L. Cantor, Comment, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 493 U. OF CHI. LEGAL F. (1999); Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473 (2001).

211. See Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000-e(2)(e)(i) (2000); *supra text* accompanying note 5.

212. *Avagliano II*, 638 F.2d 552, 558-59 (2d. Cir. 1981).

213. *Id.* at 559.

but went one step further in holding that Title VII did not abrogate the right to discriminate allowed by the Treaty.²¹⁴ However, the Supreme Court then took up *Avagliano II*, *sub nom. Sumitomo*. It wasn't so much what the Court did in *Sumitomo* that has caused harm, but rather what it did not do. In footnote nineteen, reproduced in full above,²¹⁵ the Court "expressed no view" as to whether a subsidiary could not directly invoke the Treaty rights of its parent, and second, remanded to determine if *Sumitomo* could demonstrate that it was entitled to use Japanese nationality as a BFOQ.²¹⁶

As noted above, the case thereafter settled and the task of answering those two questions fell upon the Third Circuit in *MacNamara*, which held not only that a BFOQ exception could be applied, but that the exception should be applied more broadly in the international context.²¹⁷ If that wasn't enough, the court then held that plaintiffs could not use *Griggs*' "disparate impact" analysis, but must prove intent to discriminate.²¹⁸ How, one asks, can the plaintiff prove intent, especially in the new, broader international standard, when dealing with an extremely homogeneous, male-dominated nation such as Japan, or in *MacNamara*'s case, Korea? This heightened standard must inevitably impose a chilling effect on litigation.

Further, why should an American subsidiary of a foreign corporation be allowed to assert its parent's Treaty rights? *MacNamara* involved a Korean branch operation, not a subsidiary, so the issue of a subsidiary invoking the parent's Treaty rights was not answered there. But the Seventh Circuit in *Fortino* and the Fifth Circuit in *Papaila* soon held that the answer was "yes." This flies in the face of the plain language of the Treaty. Equally clear, it is fair to require a foreign company seeking Treaty protection to simply operate as KAL did, as a branch, thus avoiding the whole issue. It seems fair to require that if a company wants the benefits of incorporation under state law within the United States, that it live up to the responsibilities that incorporation entails.

Thus, the result that stands today is that branch offices and domestically incorporated subsidiaries of a Treaty partner may invoke Treaty protection. They may, to the extent still burdened by Title VII, invoke the BFOQ exception for national origin discrimination; they may have the degree of the exception construed more broadly than in a wholly domestic situation; and they may be immune from a *Griggs* "disparate impact" analysis, requiring the plaintiffs to prove discriminatory intent.

As a final point of contention, recall that the court rejected Spiess's argument that Article VIII(1) should be read to grant national treatment to the Japanese in their employment decisions. Instead, the court found it apparent from the phrase "of their choice" that Article VIII(1) did not merely grant national treatment but rather was an "absolute rule" permitting the Japanese to staff their overseas investments with their nationals.²¹⁹ But if it is truly absolute, why can't Japanese companies hiring executives "of their choice" choose to hire only white males for the positions staffed by Americans? The court created a conundrum by holding that Article VIII(1) is an absolute rule, but applying it as absolute only as to nationality.

214. Spiess I, 643 F.2d 353, 363 (5th Cir. 1981).

215. See *supra* text accompanying note 86.

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

217. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1148 (3d Cir. 1988).

218. *Id.*

219. Spiess I, 643 F.2d at 360.

As noted above, “absolute rules” in Treaty provisions were “intended to provide vital rights and privileges of foreign nationals in any situation, whether or not a host government provided the same rights to the indigenous population.”²²⁰ Although the *Spiess I* court held that Article VIII(1) was such an absolute rule, entitling Japanese corporations to ignore United States civil rights laws, its own analysis indicates that the opposite effect was intended. In the Treaty, absolute rules were used to assure freedom of travel, liberty of conscience, and religious freedom,²²¹ the right to notification of one’s embassy if arrested,²²² just compensation for expropriated property,²²³ and the right to travel through the host country by the most convenient route.²²⁴ Thus, any absolute rules contained in the Treaty guaranteed *greater* civil rights to (in most cases) Americans in foreign countries with *lesser* civil liberties. Even ignoring the direction in which the Treaty operates (Japanese into the United States or Americans into Japan) it turns the Treaty completely on its head to claim that Article VIII(1) is an absolute rule which guarantees Japanese the absolute right to apply a *lesser* civil rights standard to American citizens in derogation of the greater civil rights to which they are entitled under the United States Constitution and statutes.

Further, if Article VIII(1) is truly absolute, as the *Spiess I* court believed, why can’t Japanese companies hiring executives “of their choice” choose to hire only white males for the positions staffed by Americans?²²⁵ No court has (or would) assert that position.

What then could Article VIII(1) be intended to guard against? The *Spiess I* majority inadvertently provided one answer. Perhaps the Treaties were guarding against laws that foreign corporations operating in a host country be required to hire a certain percentile of host country executive-level employees, such as is required in, for example, India.²²⁶

V. CONCLUSION

As has been shown, the various circuits’ interpretations of the relationship between FCN Treaties and Title VII of the Civil Rights Act have created the worst of all possible worlds for victims of sex-based discrimination who are working for American subsidiaries or branches of foreign Treaty partners. The cases, along with other trends in discrimination law,²²⁷ cannot help but have a chilling effect on legal actions to block sexual discrimination.

220. *Id.* at 359 (citing Walker, *supra* note 6, at 811, 823; Walker, *supra* note 7, at 232).

221. Treaty, *supra* note 13, article I.

222. *Id.* at article II(2).

223. *Id.* at article VI(3).

224. *Id.* at article XX(a).

225. The *Spiess I* court even asks (but does not answer) the question of whether Japan could violate other labor relations statutes, such as child labor laws. See *Spiess I*, 643 F.2d at 362 n.8 (noting that the Avagliano II court also noted this issue). See Avagliano II, 638 F.2d 552, 559 (2d Cir. 1981).

226. *Spiess I*, 643 F.2d at 359 (citing Walker, *supra* note 7, at 234, 234 n.15).

227. For example, since 1996, a victorious plaintiff pays federal income tax on not just her award but on the lawyers’ fees she is awarded in a sexual discrimination case. In one recent instance, a police officer was awarded \$3 million by a jury for gross sexual harassment. The judge gave her the options of a reduced award of \$300,000 or a new trial. When she took the money, he then awarded fees of \$850,000 and costs of \$100,000. The net result? She owed \$99,000 to the Internal Revenue Service and took home nothing. Adam Liptak, *Tax Bill Exceeds Award to Officer in Sex Bias Suit*, N.Y. TIMES, Aug. 11, 2002, available at 2002 WL 25400985.

Considering the current Supreme Court's recent cases in the area of civil rights, it is perhaps fortunate that a major BFOQ/Treaty case has not appeared on its docket since *Sumitomo*. But the legislature, whose silence on the issue is at least one part of the problem, need not remain silent. For example, when the Court held that under Title VII discrimination based on pregnancy was not sexual discrimination in *General Electric Co. v. Gilbert*,²²⁸ Congress responded by amending Title VII to prohibit "sex discrimination on the basis of pregnancy."²²⁹ Since a constitutional question is not involved in the instant controversy, Congress could do the same thing here and demonstrate its intent to close this loophole.

228. 429 U.S. 125, 145-46 (1976).

229. The Pregnancy Discrimination Amendment, 42 U.S.C. § 701(k) (1978).