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Eric K. Kawabata

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POTENTIAL DISREGARD OF THE CORPORATE ENTITY & U.S. SUBSIDIARY INVOCATION OF JAPANESE PARENT'S TREATY RIGHTS

Eric K. Kawabata[†]

Abstract: U.S. corporate subsidiaries of Japanese parent companies enjoy the same advantages of incorporation (e.g., liability limited to the amount of investment) and the same legal protections extended to domestically-held U.S. corporations (e.g., access to courts and various legal remedies). Thus, it would be a natural and logical assumption that U.S. subsidiaries of Japanese parent companies are required to comply with U.S. law in the same manner as domestically-held corporations. However, some U.S. subsidiaries, by asserting that they are, in reality, inseparable from their Japanese parent companies, have been allowed to avail themselves of exceptions to U.S. law under the U.S.-Japan Friendship, Commerce and Navigation Treaty ("FCN Treaty"). Thus, the paradox arises where Japanese subsidiaries are not required to comply with provisions of the U.S. legal system, but enjoy the same advantages of incorporation and legal protection as domestically-held U.S. corporations. A notable example of such use (or misuse) of the FCN Treaty is the avoidance of liability for discriminatory practices in employment, in particular, wrongful discharge. However, as this Article explains, such use of the FCN Treaty is not without consequence, as the invocation of Treaty rights by a U.S. subsidiary poses the potential danger of disregard of the corporate entity and thus unlimited liability to the Japanese parent company.

I. INTRODUCTION

Direct investment by Japanese companies in the United States is both beneficial and detrimental from the American perspective. Japanese investment creates employment in the United States, while at the same time increasing competition and lowering domestic market prices, which, although a benefit to the consumer, may hurt U.S. companies. There are many varied opinions on the foreign direct investment topic; however, the long-standing policy of the United States has favored promotion of international investment. Accordingly, the United States has entered into treaties with many countries to protect foreign investment.¹ One such agreement is the Treaty and Protocol

[†] Postgraduate Research Student, University of Tokyo, Graduate School of Law and Politics; LL.M., University of Washington School of Law, Asian and Comparative Law Program; J.D., Pepperdine University School of Law; B.A., University of California at Berkeley.

The author humbly dedicates this article to his mentor, Professor Daniel H. Foote, whose teachings have given the author a greater understanding and appreciation of the law and whose guidance and encouragement have helped the author achieve many of his goals (including the writing of this article, which the author pursued upon Professor Foote's suggestion).

¹ 3 DEP'T ST. DISPATCH 1 (1992); KENNETH J. VANDELDELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 20-22 (1992).

Between the United States of America and Japan Regarding Friendship, Commerce and Navigation ("FCN Treaty").²

The FCN Treaty, while doing much to promote investment by the protection it offers, has come into conflict with other laws and interests in the United States. One issue which has been the subject of much debate is the conflict of the FCN Treaty Article VIII and the Civil Rights Act of 1964 Title VII³ prohibition of discrimination in employment.⁴ This Article examines the conflicting opinions on whether a U.S. subsidiary of a Japanese company should be able to claim the treaty rights of its parent in order to avoid Title VII liability. In addition, this Article examines whether, by claiming FCN Treaty protection from Title VII, a Japanese company might increase its liability in potential civil suits seeking disregard of the corporate entity.

II. THE FCN TREATY

Treaties dealing with investments have tremendous influence on the degree to which investors are willing to venture their capital in foreign lands.

² Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063 [hereinafter FCN Treaty].

³ 42 U.S.C. § 2000e (1996). Title VII § 703 states as follows:

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.

⁴ For an example of the opinion that FCN Treaty rights do not apply to U.S. subsidiaries of Japanese parent companies, see Monroe Leigh, *Treaties—Application of Local Law to Wholly Owned Subsidiaries of Foreign Corporation—Friendship, Commerce and Navigation Treaty with Japan—Freedom of Choice Employment Provision—Employment Discrimination*, 76 AM. J. INT'L L. 853, 855 (1983) (expressing the opinion that the *Sumitomo* holding implies "that international enterprises that wish to take advantage of Article VIII(1) of the Treaty will need to convert their foreign-incorporated subsidiaries into branch operations."). For an example of the opinion that FCN Treaty rights should and do apply to U.S. subsidiaries of Japanese parent companies, see Yochiro Hamabe, *The JFCN Treaty Preemption of U.S. Antidiscrimination Laws in Executive Positions: Analysis in International Contexts*, 27 L. & POL'Y INT'L BUS. 67, 135 (1995) (stating, "[N]either Article VIII nor federal anti-discrimination laws need to be amended to resolve the JFCN Treaty issues. The strict policy of anti-discrimination does not necessarily have to extend fully to executive positions" and "Article VIII is a good mechanism to bridge the gap between the Japanese employment practices and the U.S. anti-discrimination laws."). For a general discussion of the FCN Treaty Defense to employment discrimination, see Wayne N. Outen & Jack A. Raisner, *Multinational Employment: U.S. Employees of Foreign Employers and Employees of U.S. Employers Abroad*, 586 PLI/LIT. 577, 583-93 (1998).

To promote the free international movement of capital, such treaties must offer assurance that the investment interest of the foreign person or company will be afforded legal protection no less favorable than that of accorded citizens.⁵ FCN Treaties exemplify such agreements which serve to protect foreign investment interests of both countries.⁶

FCN Treaties were first established after World War II.⁷ Between 1946 and 1966, forty-eight FCN Treaties were entered into by the United States and its various trading partners, including Japan. The proclamation of the United States - Japan FCN Treaty introducing the terms of the Treaty expresses its altruistic intentions of

promoting mutually advantageous commercial intercourse, promoting mutually beneficial investments, establishing mutual rights and privileges . . . based in general upon the general principles of national and of most-favored-nation treatment unconditionally accorded.⁸

The Treaty is commercial in the broadest sense: it is a treaty of establishment concerned with the protection of persons, natural and juridical, and of property and interests of such persons.⁹

A. *Most-Favored-Nation*

The term "most-favored-nation" ("MFN") used in the FCN Treaty originated in the seventeenth and eighteenth centuries.¹⁰ As countries negotiated for protection of their traders abroad, MFN became convenient shorthand to incorporate, by reference, the advantages previously granted in other treaties. MFN was used to combat effects of contrary, foreign policy retaliation. In the FCN Treaty, inclusion of the MFN provision accordingly reflects the intent for reciprocal, equal treatment of international trade.¹¹ Prior to World War II, the scope of FCN treaties tended to cover only

⁵ See Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 229-32 (1956).

⁶ See *id.* at 229 (stating that post-war FCN treaties were intended to protect individuals and corporations in pursuit of overseas investment opportunities).

⁷ *Id.* at 229-32.

⁸ FCN Treaty, *supra* note 2.

⁹ Herman Walker, Jr., *Modern Treaties of Friendship, Commerce, and Navigation*, 42 MINN. L. REV. 805, 806 (1958).

¹⁰ JOHN JACKSON HOWARD, *WORLD TRADE AND THE LAW OF GATT (A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE)* 249-55 (1969).

¹¹ FCN Treaty, *supra* note 2, art. XXII, para. 4.

international trade and activities relevant and incidental thereto as reflected by MFN language.¹² In order to address the need of support for the expansion of international investment interests and broaden the protections offered, the FCN Treaty also promised "national treatment."

B. *National Treatment*

"National treatment" under the FCN Treaty is the treatment a country owes the nationals of the other, such as their rights to engage in business and other activities within the boundaries of the former, and the respect due them, their property, and their enterprises.¹³ In prior treaties, "national treatment" dealt with investment rights of foreign nationals and citizens; however, such treaties did not offer much guidance, if any at all, as to the treatment of corporations.¹⁴

In drafting provisions addressing corporate investment in the FCN treaty, particular attention was given to the problem of avoiding conflicts with the laws of the States of the Union as to the admission and regulation of foreign corporations.¹⁵ Fortunately, in the United States a corporation is foreign in any given State if it is chartered in any other jurisdiction.¹⁶ The solution was, accordingly, an interpretive clause assimilating the "corporations of the other Party, in any State of the Union, to those of other States of the Union."¹⁷ Thus, the FCN Treaty offers assurance that a Japanese company can establish a business presence in the United States knowing that it will receive, under federal law, at least the same treatment as any U.S. company and, under State law, as any company chartered in a sister State.

III. TREATY RIGHTS AND THE U.S. SUBSIDIARY OF A JAPANESE PARENT COMPANY

It is undisputed that the FCN Treaty and its protections apply to Japanese companies in the United States. However, it would be impossible for a U.S. company, and thus for a U.S. subsidiary of a Japanese company, to use the Treaty to circumvent compliance with U.S. domestic laws. The

¹² Walker, *supra* note 5, at 231-32.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 233.

¹⁶ *Id.*

¹⁷ *Id.* (referring to FCN Treaty art. XXII, para. 4).

U.S. Supreme Court affirmed this interpretation of the Treaty's applicable scope in the Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano* ("Sumitomo").¹⁸

A. *The Sumitomo Decision*

*Sumitomo*¹⁹ involved a class action Title VII²⁰ sexual discrimination claim against Sumitomo Shoji America ("Sumitomo"), a wholly owned U.S. subsidiary of a Japanese company.²¹ Sumitomo raised Article VIII of the FCN Treaty as a defense to the Title VII discrimination charges.²² Article VIII of the Treaty provides that the "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."²³ The Court granted certiorari to resolve dispute among the Federal Circuit Courts of Appeal, the Second and Fifth in particular, as to whether the wholly owned U.S. subsidiary of a Japanese company may avail itself of rights under the FCN Treaty.²⁴

The Court relied on the meaning of the term "companies"²⁵ in Article VIII as defined in Article XXII(3) of the Treaty, which states that

[a]s 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."²⁶

¹⁸ *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

¹⁹ *Id.*

²⁰ 42 U.S.C. § 2000e (1996).

²¹ *Sumitomo*, 457 U.S. at 176.

²² *Id.*

²³ FCN Treaty, *supra* note 2, art. VIII.

²⁴ *Compare Spiess v. C. Itoh & Co. (Am.)*, 725 F.2d 970 (5th Cir. 1984) (before vacating its order of reversal after grant of certiorari by the U.S. Supreme Court, the Fifth Circuit expressed its opinion that the wholly-owned U.S. subsidiary could invoke the FCN Treaty as a defense to a Title VII action) *with Avagliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (2d Cir.1981) (holding, on interlocutory appeal, that the wholly-owned U.S. subsidiary of a Japanese company could not use Article VIII of the FCN Treaty to bar a Title VII action against it).

²⁵ FCN Treaty, *supra* note 2, art. VIII.

²⁶ *Sumitomo*, 457 U.S. at 182.

The *Sumitomo* Court, opting for a literal interpretation of the Treaty,²⁷ held that Sumitomo, a corporation chartered under U.S. laws, was not a company of Japan and, thus, was not covered by Article VIII of the Treaty.²⁸

Before reaching the Supreme Court, the Second Circuit stated its opinion on this case that adherence to the language of the Treaty would overlook the purpose of the Treaty.²⁹ The Second Circuit opined that denial of protection under Article VIII would contravene the purpose of allowing the Japanese company to control its investment interest in the U.S.³⁰ Rejecting the Second Circuit's opinion, the Supreme Court reasoned that the denial of Treaty rights to Sumitomo did not contravene the Treaty's intent, because the "purpose of the [FCN] Treaties was *not to give foreign corporations greater rights* than domestic companies, but instead to assure them the right to conduct business on an *equal basis* without suffering discrimination based on their alienage."³¹

Sumitomo appeared to provide a clear resolution to the issue, by holding Sumitomo liable under Title VII in the same manner as other domestic employers would be. However, footnote nineteen obfuscated the *Sumitomo* holding. Footnote nineteen stated:

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

²⁷ *Id.* at 180 (stating that the clear import of treaty language controls unless such application is inconsistent with the intent behind the treaty).

²⁸ *Id.* at 189-90. Both the U.S. and Japan governments supported the Court's opinion. Japan's Ministry of Foreign Affairs stated its position that a subsidiary of a Japanese company incorporated under U.S. (New York) law was not covered by Article VIII(1) of the FCN Treaty. *Id.* at 183-84 (referring to State Department Cable, Tokyo 03300, dated Feb. 26, 1982).

²⁹ *Avagliano v. Sumitomo*, 638 F.2d at 556.

³⁰ *Id.*

³¹ *Sumitomo*, 457 U.S. at 188-89 (emphasis added).

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.³²

The Court made no decision as to whether Japanese citizenship or sex was a bona fide qualification exception or whether business necessity may be available as a defense;³³ thus, in footnote nineteen, the Court left open the possibility for alternative (to FCN Article VIII) defenses. The Court also opened the door to another potential defense when it raised the issue of whether discrimination on the basis of citizenship would be considered different from discrimination based on national origin,³⁴ thus opening the door to another potential defense. However, the Court cast doubt on the availability of this alternative defense by reference in footnote four³⁵ to the plaintiff's reliance on *Espinoza v. Farah Manufacturing Co.*³⁶ The Court noted 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."³⁷

Finally, although the Court held that a company chartered under U.S. laws could not be a Japanese company, and therefore, could not seek protection under the Treaty, the Court, stated in footnote nineteen that it did not decide whether Sumitomo may assert the Article VIII rights of its parent.³⁸ Thus, the Court left open the possibility that a domestic subsidiary might be permitted to claim the rights of its foreign parent. The only reason to allow a subsidiary to claim the Treaty rights of its parent, where the subsidiary itself had no such rights, would be a situation in which denial of such protection would have had the effect of trampling the rights of the parent; i.e., a situation in which the parent and the subsidiary were so closely tied that they should be considered one entity. Therefore, it is not unreasonable to conclude that, by suggesting the possibility that a subsidiary might invoke its parent's rights, the Court implied the use of the doctrine of

³² *Id.* at 190 n.19.

³³ *Id.*

³⁴ *Id.* at 180 n.4.

³⁵ *Id.*

³⁶ *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973).

³⁷ *Sumitomo*, 457 U.S. at 180 n.4 (quoting *Espinoza*, 414 U.S. at 92).

³⁸ *Id.* at 190 n.19.

“piercing the corporate veil”?³⁹ Indeed, the Seventh Circuit Court’s decision in *Fortino v. Quasar Co.*,⁴⁰ which relied on the language of footnote nineteen of the *Sumitomo*⁴¹ case supports such a conclusion.

*B. Fortino v. Quasar Co.*⁴²

In *Fortino v. Quasar Co.* (“*Fortino*”), Quasar Company (“Quasar”) was a wholly owned U.S. subsidiary of a Japanese company, Matsushita Electric Industrial Company, Ltd. (“Matsushita”).⁴³ Quasar marketed Matsushita products made in Japan, and Matsushita assigned several of its own financial and marketing executives to Quasar on a temporary basis.⁴⁴ In 1985, Quasar suffered a \$20 million loss. Matsushita responded by sending one of its executives, Nishikawa, to Quasar to prevent recurrence of such losses.⁴⁵ Nishikawa, who was put in charge of Quasar, instituted a reduction of the work force, cutting half of management.⁴⁶ *Fortino*, Meyers, and Schulz (Plaintiffs), who were of non-Japanese origin, were among the Quasar executives dismissed.⁴⁷ Plaintiffs, pointing to the fact that none of the ten Japanese employees from Matsushita had been dismissed,⁴⁸ charged Quasar with discriminating against American executives on the basis of national origin in violation of Title VII of the Civil Rights Act.⁴⁹

In the *Fortino* opinion, the Seventh Circuit referred to the fact that footnote nineteen in the *Sumitomo*⁵⁰ opinion left open the possibility that, although the U.S. subsidiary itself was not covered by the Treaty, such subsidiary might be able to invoke the rights of its foreign parent.⁵¹ The

³⁹ A court will “pierce the corporate veil” when a corporation and subsidiary are organized in separate corporate form, yet operate as a single entity. PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS* 9-10 (1983).

⁴⁰ *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991).

⁴¹ *Sumitomo*, 457 U.S. at 190 n.19.

⁴² *Fortino*, 950 F.2d at 391-92.

⁴³ *Id.* at 391 (noting that Quasar Company was an unincorporated division of a U.S. corporation wholly-owned by a Japanese company, Matsushita Electric Industrial Company, Ltd.). Quasar was created through Matsushita’s 1974 purchase of the Consumer Electronics Division of Motorola. *Fortino v. Quasar Co.*, 751 F. Supp. 1306, 1309 (N.D. Ill. 1990).

⁴⁴ *Fortino*, 950 F.2d at 392.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Two Japanese employees were rotated back to Japan and replaced by only one. *Id.*

⁴⁹ *Id.* Not discussed here is the claim of Plaintiff Meyers and Schultz of violation of the Age Discrimination in Employment Act. The Circuit Court held there was sufficient evidence of age discrimination to constitute a jury issue, but that a new trial to determine that issue was required due to trial error. *Id.*

⁵⁰ *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 190 (1982).

⁵¹ *Fortino*, 950 F.2d at 393.

Seventh Circuit thus held, in relevant part, that Quasar, a wholly owned U.S. subsidiary of a Japanese company, may assert the rights of its parent under Article VIII(1) of the Treaty,⁵² at least to the limited extent necessary to avoid controverting the purpose of such Treaty.⁵³ The court additionally found that Quasar did not violate Title VII's prohibition against employment discrimination based on national origin; in reaching this decision, the court differentiated between citizenship and national origin.⁵⁴

Judge Posner distinguished discrimination on the basis of citizenship from that of national origin, noting that the real source of discrimination was Fortino's lack of Japanese citizenship and that he was not a Matsushita employee, not his lack of Japanese ancestry.⁵⁵ Given that Japan is a such a homogenous society, there is a correlation between citizenship and national origin, and thus, not dismissing the Japanese executives from Matsushita may have had an effect similar to national origin discrimination. However, as Judge Posner explained, "the treaty prevents equating the two forms of discrimination or, what as a practical matter would amount to the same thing, allowing the first [discrimination based on citizenship] to be used to prove the second [discrimination based on national origin]."⁵⁶ Accordingly, the Circuit Court dismissed the Title VII claim based on the determination that citizenship and national origin could not be equated for employment discrimination purposes,⁵⁷ and that the FCN Treaty prevented a contrary decision. Thus, although Judge Posner cited alternative grounds for dismissal of the case against Quasar, he did include the FCN Treaty as one defense supporting his holding, stating that it was necessary to allow the U.S. subsidiary to invoke the Treaty rights of its Japanese parent.

Interestingly, Judge Posner, in justifying his decision, stated that prohibiting Quasar from giving preferential treatment to the Japanese executives would have run directly against the parent, Matsushita.⁵⁸ He further stated that such a denial to Quasar would prevent Matsushita from

⁵² FCN Treaty, *supra* note 2.

⁵³ *Fortino*, 950 F.2d at 393.

⁵⁴ *Id.*

⁵⁵ *Id.* Posner explained his reasoning:

No favoritism was shown Quasar's Japanese American employees, which would have been true national origin discrimination since they are not citizens of Japan . . . whatever his ancestry, Fortino would have had the irremediable disability of not being an executive of Matsushita. That was the real source of "prejudice" against him, and it is not prejudice based on national origin.

Id.

⁵⁶ *Id.*

⁵⁷ However, the Supreme Court has not yet addressed the distinction of citizenship from national origin under Title VII. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 n.4 (1982).

⁵⁸ *Id.*

further stated that such a denial to Quasar would prevent Matsushita from using its own executives in preference to U.S. citizens.⁵⁹ Although Judge Posner did not expressly mention the legal basis for his assertion, it certainly appears that he referred to disregarding the corporate entity. By stating that forbidding Treaty rights to Quasar would be doing the same to Matsushita, the Circuit Court suggested that the two companies should be treated as one entity. Hence, the Circuit Court looked through the subsidiary to find that it was one and the same as its parent; i.e., the separate corporate entity of the subsidiary, Quasar, was disregarded. This concept of "looking through" the subsidiary corporation to its parent is commonly referred to as "piercing the corporate veil," and Judge Posner's opinion offered strong implications of this legal doctrine's use in justifying his holding.

C. *The Legal Theory Behind the Fortino Decision*

Herman Walker, Jr., who served as Advisor on Commercial Treaties at the State Department and who was quoted by the U.S. Supreme Court in the *Sumitomo* opinion,⁶⁰ suggested the concept that the FCN Treaty apply to U.S. subsidiaries of foreign parents.⁶¹ Mr. Walker stated that application of the FCN Treaty only to branches of the foreign company would not be sufficient protection, because one must consider the fact that investors choose to operate abroad through subsidiaries chartered under the laws of the foreign country.⁶² Although treaties normally do not apply to such subsidiaries, Walker explained that the "corporate veil is pierced" for the purpose of making economic interest, rather than legal relationship, the justification and the basis for protection."⁶³

If "piercing the veil" is the legal theory by which a U.S. subsidiary may claim treaty rights of its Japanese parent, then the invocation of such rights necessarily implies that the subsidiary and the parent should be treated as one entity (the very basis for the Circuit Court's decision in *Fortino*).⁶⁴ Equity certainly comes into question where the U.S. subsidiary of a foreign parent is allowed to enjoy rights as a domestic corporation without fulfilling normally required responsibilities. When a Japanese parent seeks to establish a business presence in the United

⁵⁹ *Fortino*, 950 F.2d at 393.

⁶⁰ *Sumitomo*, 457 U.S. at 181 n.6.

⁶¹ Walker, *supra* note 5, at 244.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991).

States, with the expectation that Treaty rights will apply to such business presence, the parent has the option of installing a branch rather than a subsidiary.

IV. JAPANESE PARENT'S CONTROL OVER THE SUBSIDIARY

A. *Choice of Entity*

Choosing to incorporate a subsidiary is unquestionably a deliberate act of the parent company. U.S. protectionism is one factor which encourages Japanese companies to establish U.S. subsidiaries. Import quotas, transport costs, tariff liability, customer contact, and unstable exchange rates all contribute to the decision to incorporate in the U.S. as opposed to establishing branches.⁶⁵ Furthermore, by forming a subsidiary as a separate corporate entity, the Japanese parent limits its liability to the value of its foreign investment. The Japanese parent is thus able to avail itself of the benefits of incorporation.

However, as a U.S. corporation, the subsidiary is not a Japanese company, and in accordance with *Sumitomo*⁶⁶ is not protected by the Treaty. If, however, American courts adopt the *Fortino*⁶⁷ case approach, and allow these U.S. subsidiaries to claim the Treaty rights of their Japanese parent companies, then the parent is allowed to benefit on both ends: limited liability and avoidance of protectionism without corporate responsibility. Regardless, of the fairness issue, one thing is certain, even if the parent chooses to establish a separate corporate entity in the U.S., such entity may be disregarded where the extent of control by the parent company is so great that the two are actually one company. This, in fact, is the case for a great number of large, Japanese companies operating through subsidiaries in the U.S.: between 1991 and 1993, 56.4% of Japanese foreign direct investment has been in the form of wholly-owned subsidiaries (as of December 1997, there were at least 520 leading U.S. corporations which were wholly-owned by Japanese parent companies).⁶⁸

⁶⁵ AMES C. ABEGLLEN ET AL., *THE JAPANESE CORPORATION* 251-53 (1985).

⁶⁶ *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 n.4 (1982).

⁶⁷ *Fortino*, 950 F.2d at 389.

⁶⁸ Author's research, conducted December 1997, using *Corporate Affiliates*, a directory database produced by Reed Reference Publishing, a division of Reed Publishing (USA) (combines information from the print directories *Directory of Corporate Affiliations*, *International Directory of Corporate Affiliations*, and *Directory of Leading Private Companies* (although the data resulting from this search shows evidence of control, it does not necessarily imply absolute unity or disregard of formalities)).

B. *Rotation of Employees*

How do Japanese companies view their subsidiaries? An examination of the parent's interaction with its subsidiaries reveals that the parent treats its subsidiary similar to a branch. In many cases there is complete ownership, leaving unquestionable control in the hands of the parent, as in *Sumitomo*⁶⁹ and *Fortino*.⁷⁰ Further evidence of the exercise of control is the use of the rotation system.⁷¹

In Japanese companies, internal labor shifts, i.e., rotations, are frequently used for two primary purposes, to re-educate employees and to allow them to experience more jobs.⁷² Rotation benefits the company by ensuring that its employees, especially managers, have a better understanding of the company's operations as a whole.⁷³ Additionally, the employees benefit from re-education at the company's expense.⁷⁴ Another characteristic of the internal rotation system is that regardless of rotation, as long as a Japanese employee remains with the same company, his salary and employment conditions are not changed.⁷⁵ It is through this rotation system that Japanese companies exercise management control over their U.S. subsidiaries. This fact reflects the treatment of U.S. subsidiaries as being part of the Japanese parent.⁷⁶

The Japanese parent, through the transfer of management to its subsidiaries, essentially exports its formula for success to its U.S. subsidiary. Furthermore, including U.S. subsidiaries in the system of rotation, reveals treatment of the subsidiary as part of the Japanese parent company. In the case of production subsidiaries, plant managers are likely to be rotated to ensure that quality and procedural standards match those of the Japanese parent.⁷⁷ In consumer and commercial electronics businesses, the transfer of technology to a subsidiary requires a transfer of managers and experts to maintain the parent's control over the use and development of such

⁶⁹ *Sumitomo*, 457 U.S. at 176.

⁷⁰ *Fortino*, 950 F.2d at 389.

⁷¹ Paul W. Beamish & Andrew C. Inkpen, *Japanese Firms and the Decline of the Japanese Expatriate*, COLUM. J. WORLD BUS., Mar. 22, 1998, available in 1998 WL 16802180.

⁷² KOJI MATSUMOTO, KIGYO SHUGI NO KORYU [THE RISE OF THE JAPANESE CORPORATE SYSTEM: THE INSIDE VIEW OF A MITI OFFICIAL] 133-36 (Thomas I. Elliott trans., Kegan Paul International 2d ed. 1993) (1991).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Fortino* provides an example of this practice. *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991). See also *supra* notes 42-49 and accompanying text.

⁷⁷ TOYOHIRO KONO, STRATEGY & STRUCTURE OF JAPANESE ENTERPRISES 165 (1984).

technology.⁷⁸ There is almost complete integration between the parent and subsidiary.⁷⁹ In 1992, only one in three senior management positions at U.S. subsidiaries of Japanese parent companies were non-Japanese.⁸⁰

This rotation system, as used in the *Fortino* case, was a means for the Japanese parent company, Matsushita to implement the termination of American executives employed by the subsidiary, Quasar, which was the basis of the Title VII claim.⁸¹ Nishikawa, a Japanese executive from Matsushita, was rotated to Quasar and was charged with the complete reorganization of the corporation to prevent recurrence of losses.⁸² Through the rotation of Nishikawa and other executives, Matsushita, implemented its own policies,⁸³ and thus its control over Quasar.

V. PIERCING THE CORPORATE VEIL

Alter ego, instrumentality, puppet, shell, agent, and conduit are all metaphors for exceptions to the protection from liability provided by the corporate entity.⁸⁴ Behind these metaphors are the two traditional exceptions which may allow for piercing 1) where courts conclude that on the facts the parent and the subsidiary corporation possess a common identity for legal purposes, or 2) where courts regard parent and subsidiary as two companies, but attribute the acts of one corporation to the other by the concept of "agency."⁸⁵

As to the common identity scenario: most courts require 1) identity of interests, and 2) that failure to pierce would cause inequitable results.⁸⁶ Thus, the opponent to piercing, may still benefit from the protection of the corporate entity so long as there is not a common identity. However, where, as in *Fortino*,⁸⁷ the defendant corporation has argued that not allowing it to

⁷⁸ *Id.*

⁷⁹ According to a MITI survey of U.S. subsidiaries, reporting that 42 percent of all managers in manufacturing companies and 70 percent of managers in trade companies are Japanese. *Id.* (citing MITI survey).

⁸⁰ Jim Impoco et al., *The Great Divide U.S.-Japanese Business Deals are Often Unable to Bridge a Vast Culture Gap*, U.S. NEWS & WORLD REP., July 6, 1992 available in 1992 WL 8934446.

⁸¹ *Fortino*, 950 F.2d at 392; see discussion *supra* notes 42-59 and accompanying text.

⁸² *Id.* For further details, see *Fortino v. Quasar Co.*, 751 F. Supp 1306, 1309-10 (N.D. Ill. 1990).

⁸³ *Id.*

⁸⁴ BLUMBERG, *supra* note 39, at 8.

⁸⁵ *Id.* at 9. The agency concept is not discussed, as common identity is emphasized in the parent and subsidiary relationship situations relevant to the topic of this paper. Additionally and sometimes alternatively, courts may require a finding of fraudulent use of the corporate entity or that failure to allow piercing would produce inequitable results. See 18 AM. JUR. *Corporations* §§ 43, 44 (1985).

⁸⁶ See 18 AM. JUR., *supra* note 85.

⁸⁷ *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991); see also discussion *supra* notes 42-59 and accompanying text.

invoke rights of its parent would contravene the FCN Treaty applicable to its parent, it may be difficult to argue that there is no common identity. Where a U.S. subsidiary and its Japanese parent company are so closely tied to the extent that denying rights to the subsidiary would be doing the same to the parent and where strong control has been established, there certainly appears to be strong evidence of uniform identity and thus, a strong argument in favor of piercing.

VI. PROCEDURAL AND EVIDENTIARY ISSUES CONCERNING USE OF PRIOR PROCEEDINGS

In situations like *Fortino*,⁸⁸ the danger of potential piercing might prove even greater, where the basis for allowing the subsidiary to invoke its parent's Treaty rights is an application of piercing principles.⁸⁹ Indeed, it may be tremendously difficult for a Japanese parent company to refute evidence that their subsidiary was previously protected from Title VII claims through a judgment which used piercing principles to allow the subsidiary protection under its parent's Treaty rights. This increased danger of piercing, however, only arises where the prior proceeding may be used against a parent in a subsequent proceeding.

A. *Collateral Estoppel*

The most difficult situation for the Japanese parent company would be one in which a court allows the use of collateral estoppel. The concept behind collateral estoppel is preservation of the finality of judgments and considerations of judicial economy.⁹⁰ The effect of application is preclusion of re-litigation of an issue, such that the determination in the previous case will be binding in the subsequent case. Generally, collateral estoppel will apply, regardless of the correctness of the first determination of the issue, if 1) the issue was clearly decided in the prior proceedings, and 2) the issue was necessary to the determination of the prior proceedings.⁹¹

Whether an issue was clearly decided is a question of finality; therefore, if the determination was definitive it is considered final for issue preclusion purposes.⁹² Specific factors used in making this determination

⁸⁸ *Fortino*, 950 F.2d 389, 392.

⁸⁹ See discussion *supra* notes 42-59 and accompanying text.

⁹⁰ *Montana v. U.S.*, 440 U.S. 147, 153-54 (1979).

⁹¹ JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.9 (2d ed. 1993).

⁹² *Id.*

are 1) whether the decision is final not tentative, 2) the adequacy of the hearing, and 3) the opportunity for review.⁹³ Applying these principles in *Fortino* reveals a final judgment that determined that the relationship between the subsidiary and the parent required the same treatment under the Treaty.⁹⁴ The hearing was well litigated and reached the level of appellate review.⁹⁵ Thus, there was a final, clear determination of the case.

Furthermore, the determination of the issue of the invocation of Treaty rights by Quasar in *Fortino*⁹⁶ was necessary to the determination of the case. In fact, this was the central issue of the case, whether the subsidiary and parent relationship was such that a court could not deny the subsidiary the rights of its parent.

Estoppel also requires identity of issues in prior and present proceedings.⁹⁷ Identity of issues depends on factual identity, legal standards, and burdens of proof.⁹⁸ Relevant to the parent-subsidiary issue would be facts concerning the existence of common identity, the structure and relationship between the two corporations. These facts were central to the case in *Fortino* and they would be central to a court's decision whether to pierce. Thus, the main inquiry remaining would likely be whether these factors have changed between the time of the prior and present cases. But if the proponent of piercing is able to establish that corporate structure is generally an enduring condition, i.e., that it is not likely to change quickly, the burden will shift to the opponent to establish changes exist. It would be difficult to predict this outcome, where courts vary as to the necessary burden.⁹⁹

As to legal standards and burdens of proof, the outcome will depend on the situation: there may be piercing cases brought under CERCLA, brought by creditors or victims in product liability tort cases, etc. But, as long as they are civil proceedings, this is not likely to prevent application of estoppel.

Courts may also inquire as to whether the facts in both cases are "ultimate" facts.¹⁰⁰ As to the cases regarding invocation of parent's Treaty

⁹³ *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir.), cert. denied 368 U.S. 986 (1962).

⁹⁴ See discussion *supra* notes 42-59 and accompanying text.

⁹⁵ *Id.*

⁹⁶ *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991).

⁹⁷ *FRIEDENTHAL ET AL.*, *supra* note 91, § 14.10 (referring to *Commissioner v. Sunnen*, 333 U.S. 591, 599-600, 68 S.Ct. 715, 720 (1948)).

⁹⁸ *Id.*

⁹⁹ *Id.* at 664-66 (provides examples of mental incompetence as being enduring and the extreme metaphors of a bubble as opposed to Mount Everest).

¹⁰⁰ *Id.* at 667.

rights and "piercing," the outcomes would depend on the facts involving common identity; therefore, the piercing proponent would likely prevail as to this factor. But, it must be noted that some courts do not even inquire as to ultimacy of facts.¹⁰¹

Problems which the proponent of piercing might face include establishing that the issue is one of fact and not law, that the previous case was not decided on alternate grounds, and that there is mutuality of the parties in both cases. One factor leaning in the favor of the proponent of the use of collateral estoppel would be that courts generally allow application in cases of mixed law and fact issues.¹⁰²

In a case like *Fortino*, the legal issue was dependent on the facts, as the determination depended on the relationship between and structure of the companies.¹⁰³ Therefore, in the very least there was a mixed issue. Working against a piercing case, there may be an argument for alternate grounds, as in *Fortino* where the Circuit Court noted the distinction between national origin and citizenship.¹⁰⁴

Mutuality requires privity among the parties in both cases. Although there are many views on the meaning of the mutuality requirement, one prominent case favors the "piercing" proponent. In a California Supreme Court case, *Bernhard v. Bank of America National Trust and Savings Association*,¹⁰⁵ Justice Traynor stated that the proper inquiry is whether the person against whom the estoppel was asserted was a party or in privity with a party to the prior law suit.¹⁰⁶ Thus, in a case like that of *Fortino*, if a subsequent piercing case were instituted, whether estoppel principles apply will depend on privity between the parent and subsidiary, not on the identity of the party or parties seeking to invoke estoppel. The concern here is whether the parent had an interest in the prior proceeding. This appeared to be the case in *Fortino*,¹⁰⁷ where the Circuit Court stated that failure to allow the protection of the Treaty would be equal to denying the rights of Matsushita, the parent company.¹⁰⁸

Finally, collateral estoppel, being an equitable doctrine, may depend on fairness as perceived by the court.¹⁰⁹ The court may inquire as to

¹⁰¹ RESTATEMENT (SECOND) OF JUDGMENTS § 2, cmt. j (1982).

¹⁰² FRIEDENTHAL ET AL., *supra* note 91, § 14.10 n.43.

¹⁰³ See discussion *supra* notes 42-59 and accompanying text.

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

¹⁰⁵ *Bernhard v. Bank of Am. Nat'l Trust & Savs. Ass'n*, 122 P.2d 892 (Cal. 1942).

¹⁰⁶ *Id.* at 895.

¹⁰⁷ See discussion *supra* notes 42-59 and accompanying text.

¹⁰⁸ *Id.*

¹⁰⁹ See generally 47 AM. JUR. 2d *Judgments* §§ 652, 650 n.79 & accompanying text (1991).

substantive policies that might outweigh policies of judicial economy and the avoidance of inconsistent results.¹¹⁰ Depending on the situation, this may pose a barrier to the application of estoppel where international relations and Treaty rights are concerned; however, there is the counter argument of corporate responsibility being synonymous with protection from liability where a subsidiary has previously hid behind the Treaty to avoid Title VII liability.

B. Use of Prior Proceedings as Evidence

An alternative to collateral estoppel is the use of the prior pleadings, on public record, as evidence of common identity in a subsequent piercing case. Federal Rule of Evidence ("FRE") 807¹¹¹ provides that pleadings in a prior proceeding are made in court and under oath, and therefore, are trustworthy.¹¹² This equivalent guarantee of trustworthiness provides an exception for admission of otherwise excludable hearsay evidence. The level of trustworthiness required is such that the proffered evidence would be as reliable as that allowed under the other hearsay exceptions.¹¹³ For example, under certain circumstances, testimony from a prior proceeding may be used as evidence, regardless of availability of the witness.¹¹⁴ Part of the rationale behind this exception is the reliability of in-court proceedings.¹¹⁵ Thus, the proceedings in a prior case, given the solemnity of oath and examination of witnesses, may very well find exception under FRE 807.

The requirement of probativeness will likely prove more difficult. Where all records and witnesses are available, a court will likely require some exceptional circumstances in such a case.¹¹⁶ However, this

¹¹⁰ CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4425 n.1 (1999 Supp.).

¹¹¹ FED. R. EVID. 807 reads as follows:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ FED. R. EVID. 803.

¹¹⁵ MCCORMICK ON EVIDENCE § 301 (John William Strong et al. eds., 4th ed. 1992).

¹¹⁶ *Id.* § 324.

requirement does not limit the hearsay exception to essential evidence.¹¹⁷ Some courts interpret this relative necessity as requiring a weighing of the cost of obtaining alternative evidence as compared to the need for the statement in the case.¹¹⁸ Other courts interpret the provision to require diligence on the party proffering the evidence.¹¹⁹ Given adequate efforts, the complexity of corporate structure, and the geographical distance from the Japanese parent, there may indeed be a valid argument that there are significant cost saving benefits to allowing the evidence.

As to whether the best interests of justice will be served by admission of the evidence, such a determination will ultimately depend, not on the preceding case, but on the reasons behind the piercing case. However, one might keep in mind how a judge would feel about a case like *Fortino* and whether this might influence his discretionary decisions.

C. *Impeachment*

Finally, even in the case where neither use of collateral estoppel nor FRE 807 is allowed, there is the possibility of admission for a non-hearsay purpose. FRE 806 allows use of hearsay to impeach the testimony of a witness.¹²⁰ For example, if there were a piercing case involving Quasar and Matsushita,¹²¹ testimony arguing the clear division of corporate control and operations may be impeached by evidence from prior proceedings in which Quasar argued that denying Treaty protection to the subsidiary was the same as denying the rights of the parent. Examination of the prior record would likely reveal extensive evidence of common identity (rotation of employees, implementation of the parent's policies, arguments in the prior case, etc.), and all this might be used for impeachment purposes against Matsushita in a piercing case.¹²²

VII. CONCLUSION

The FCN Treaty, through the protection it provides, continues to promote international direct investment in the United States. Under the Treaty, subsidiaries of Japanese companies incorporated under U.S. law

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ FED. R. EVID. 806.

¹²¹ See discussion *supra* notes 42-59 and accompanying text.

¹²² *Id.*; see discussion *supra* notes 65-83 and accompanying text.

receive the same rights and privileges as other domestic U.S. companies. Problems arise, however, when Treaty rights conflict with laws requiring corporate responsibility. Where a subsidiary of a foreign company is granted the legal protections of the U.S. legal system, yet is able to avoid compliance with certain laws (such as Title VII) of that same system, it seems that such a foreign-owned corporation enjoys the best of both worlds: limited corporate liability under domestic law and immunity from compliance with that same domestic law under an international treaty. Indeed, such was the case in *Fortino*,¹²³ where the Seventh Circuit Court allowed a U.S. subsidiary of a Japanese parent company to invoke the FCN Treaty rights of its Japanese parent company and avoid liability under Title VII prohibition against discriminatory employment practices.¹²⁴

True, there is the argument that because the Treaty is intended to protect the right of the Japanese parent to exercise control over its U.S. subsidiary, Japanese parent companies must be allowed discretion in exporting its method of management through rotation of employees from Japan. It might also be true that such an argument may be valid in asserting that decisions in employment are based not on race or even nationality, but rather, that due to the homogeneity of the Japanese population and the lack of non-Japanese employees at the parent company, there, quite simply, were no non-Japanese employees available to be rotated to the U.S. subsidiary. Nevertheless, as explained above, such an argument may still be vulnerable to an assertion that discrimination on the basis of nationality (as distinguished from race) is not an exception to Title VII.

Whatever one's opinion on the issue may be, one thing is certain; the *Fortino* case opened the door for other U.S. subsidiaries of Japanese parent companies to cite to judicial precedent favoring invocation of the Treaty.¹²⁵ However, Japanese-owned¹²⁶ subsidiaries should keep in mind that hiding

¹²³ *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991).

¹²⁴ *Id.*

¹²⁵ *Papaila v. Uniden America Corp.*, 51 F.3d 54, 55 (5th Cir. 1995) (holding "we agree, following the lead of our sister circuit that has held that a subsidiary may assert the Treaty rights of the parent.").

¹²⁶ Although many of the FCN Treaties include similar provisions, with language similar to U.S.-Japan FCN Treaty Article VIII immunity, the use of the *Sumitomo* or *Fortino* (which relied on the ambiguous footnote 19 of *Sumitomo*), cases as precedent may prove problematic, as the U.S. Supreme Court in *Sumitomo* stated that its analysis was restricted to the U.S.-Japan FCN Treaty and did not necessarily apply to "other Friendship, Commerce and Navigation Treaties which, although similarly worded, may have different negotiating histories." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 n.12, 102 S.Ct. 2374 (1982). However, despite the *Sumitomo* Court's stated restriction on the application of *Sumitomo* as precedent, *Fortino* was cited in a case involving the U.S.-France FCN Treaty to avoid the provisions of Title VII. See, e.g., *W.G. Bennett v. Total Minatome Corp.*, 138 F.3d 1053 (5th Cir. 1998) (permitting a U.S. subsidiary of a French corporation to assert U.S.-France FCN Treaty rights as a defense to avoid enforcement of Title VII provisions as to discrimination in favor of French citizens).

behind the shield of the FCN Treaty may lead to the disregard of the corporate entity, which would likely prove costly to the parent company.

If the situation were to arise, in which a successful claim is made against a U.S. subsidiary of a Japanese parent company (e.g., by a creditor or a plaintiff in a tort claim), and the subsidiary is unable to pay, the existence of prior proceedings, in which the subsidiary claimed common identity to justify the use of its parent's Treaty rights to escape Title VII liability, may prove problematic to both the subsidiary and the parent. In a case where piercing of the the subsidiary's corporate veil is sought, prior assertions, by such subsidiary, of common identity might be used effectively to refute any of the subsidiary's arguments against piercing, and thus place unlimited liability on the parent for claims against the subsidiary. The use of collateral estoppel might preclude any re-litigation of the issue of uniform identity between parent and subsidiary.¹²⁷ Alternatively, the prior pleadings of the subsidiary that it was inseparable from its Japanese parent company might be used as evidence of common identity.¹²⁸ Additionally, even in the event that the subsidiary is able to overcome the use collateral estoppel and prior pleadings as evidence, prior pleadings by the subsidiary claiming common identity might be used to impeach any testimony to the contrary.¹²⁹

In cases, such as *Fortino*,¹³⁰ where a U.S. subsidiary of a Japanese company seeks protection under Treaty rights of the parent, such subsidiary may make a necessary, and possibly inadvertent argument for the existence of common identity (and thus for the application of piercing the corporate veil). Although the concern about liability under U.S. domestic law may appear most important (and definitely more immediate) at the time, the Japanese parent company should be aware that arguments made by the subsidiary might increase the potential danger of future successful piercing cases aimed at the parent. Therefore, Japanese parent companies should encourage their subsidiaries to weigh potential losses in a Title VII suit against the potential risks and costs of piercing (as well as alternative grounds for defense) before deciding to argue Treaty rights apply, especially where the subsidiary is already in a financially precarious situation.

¹²⁷ See discussion *supra* notes 90-110 and accompanying text.

¹²⁸ See discussion *supra* notes 110-119 and accompanying text.

¹²⁹ See discussion *supra* notes 119-122 and accompanying text.

¹³⁰ *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991).