Clash of the Cultures: U.S.-Japan Treaty of Friendship, Title VII, and Women in Management

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Clash of the Cultures: U.S.-Japan Treaty of Friendship, Title VII, and Women in Management

I. INTRODUCTION

A large gap exists between the number of women holding management positions in the United States and Japan. Currently, women represent 37% of top managerial positions in U.S. corporations. Figures in Japan are significantly lower. Only 1.29% of the managers in Japanese companies are female and less than 0.2% hold the higher managerial positions of division chief or corporate director. These statistics, coupled with current problems of sex discrimination in Japan, suggest that as business contacts between these countries increase so will the likelihood of sex discrimination by corporations in both countries.

In 1987, the United States was Japan's largest export market, receiving more than 30% of its total exports. During that same year,

1. This Comment defines the phrase "management position" or "management" consistently with the definition of "manager" in BLACK'S LAW DICTIONARY 865 (5th ed. 1979). Black's defines "manager" as "One who has charge of a corporation and control of its business, or of its branch establishments, divisions, or departments, and who is vested with a certain amount of discretion and independent judgment." Id.

The Treaty of Friendship, discussed infra notes 58-65 and accompanying text, does not define "management," but the history of the treaty language suggests that the above definition is consistent with the parties' intended meaning of the term.

4. See Los Angeles Times, July 13, 1988, at 1, col. 1. See also JEI REPORT, supra note 3 (explaining attitudes toward women in the Japanese corporate workforce).
11.7% of the United States' total exports were sent to Japan, representing the United States' second largest export market. Although U.S. exports to Japan have steadily increased during the past three years, the nearly 20% differential in the 1987 numbers has forced the United States to rethink current trade arrangements with Japan. Pressure placed on Congress by U.S. businesses, urging equal trade distributions between the two countries, has been successful in slowly tearing down the trade barriers erected by the Japanese.

As trade barriers fall, trade between the United States and Japan will likely grow as will the contact between all international businesses. The increase in contact between Japanese and U.S. businesses will expose Japanese companies to a facet of the business world that they are not accustomed to dealing with: women in management positions. Japanese corporations have not yet accepted women into their business world.

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7. Id. Japan is the second largest export market for the United States. Exports to Japan have increased from U.S. $26.9 billion in 1986, to U.S. $28.2 billion in 1987 and U.S. $37.7 billion in 1988. In 1988, exports to Japan comprised 11.7% of the United States' total exports. Id.
8. N.Y. Times, Mar. 4, 1990, at 1, col. 1. President George Bush and Japanese Prime Minister Joshiki Kaifu pledged to take serious action to improve the trade equalities between the two countries. Id.
9. Chanda, Taking the Middle Road, 135 FAR E. ECON. REV. 1, 55-56 (1987). Congress attempted to end "unfair trade practices" by toughening up the United States trade policy. The proposed legislation would require the President to impose tariffs on countries which do not have equal trade distributions. Japan's virtual exclusion of United States firms from competing on the Osaka airport project and from the supercomputer market is especially troublesome to the legislators. Id.
10. These increases will likely reflect the communication between newly formed overseas branch offices and their corporate headquarters. Also, the increase in trade between the United States and Japan will increase the contacts between international trade businesses.
11. "According to a Harvard Business Review survey, men have come a long way in their thinking about working women in the last two decades. In 1965, 50 percent of men surveyed said they thought women did not want top jobs; fewer than 10 percent of a group of men surveyed 20 years later held the same belief." Royer, Jarvis, Borger & Schafer, The Breakthrough Generation, 20 CORP. REP. MINN. 9 (1989). In addition to this increase, the number of women in managerial positions increased 150% during the same period. Brown, Unsteady Progress Myths Hover Like a Haze Over Women's Abilities, Chicago Tribune, Aug. 27, 1989, at 5, zone C. Furthermore, the number of women holding bachelor degrees in business and management jumped from 20% in 1975-76, to 44% in 1984-85. The number of masters degrees in the same subject area increased from 12% to 31%. Timmons, A Woman's Place is in the Upper Ranks, BUS. INS., Apr. 11, 1988, at 29.
12. JEI REPORT, supra note 3, at 2, 4-5. A Japanese poll discovered that even though 65% of the respondents surveyed in 1986 favored women holding supervisory positions, only 23% said they would actually want to work for a woman. This is true even though the Equal Employment Opportunity Law of 1986 was passed in order to make unlawful discriminatory practices such as advertising that a position should be filled by a specific sex. In a survey by Nihon Keizai Shimbun only three and one-half percent of the responding companies said they provided new management positions to women under the new law, and 25% of those already had programs for women managers. Id.
management may create fears in U.S. businesses. American companies may encourage their overseas management to discriminate against females by refusing to promote them into management positions. Moreover, Japanese imports now include more than just the products they sell; sex discrimination by Japanese employers is allegedly on the increase. As Japanese businesses grow in the United States, their practice of sex discrimination will grow proportionately unless U.S. laws are applied to stop its growth.

This comment will first examine the question of whether Title VII of the 1964 Civil Rights Act applies to foreign corporations operating in the United States. It will then determine if jurisdiction under Title VII is altered in any way by the United States-Japan Treaty of Friendship, Commerce and Navigation. The paper will determine if there is a way in which the two may be read consistently, and if not, which should control. Finally, this paper will examine the extraterritorial application of Title VII to U.S. corporations operating abroad.

II. APPLICATION OF TITLE VII TO JAPANESE CORPORATIONS PROTECTED BY THE U.S.-JAPAN TREATY OF FRIENDSHIP

In the United States, Title VII of the 1964 Civil Rights Act (hereinafter Act or Title VII) is the premier employment law regulating a corporation's power to hire, promote, or retain employees. The Act's specific prohibitions are an essential weapon in the war against sex discrimination. A violation of Title VII subjects the

(a) It shall be an unlawful employment practice for an employer—
(a)(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.
Id.
19. See infra note 23 for a definition of sex discrimination.
offender to severe legal consequences.\textsuperscript{20} Japanese corporations discriminating in the United States, however, may not face these consequences. Article VIII(1) of the 1953 Treaty of Friendship between the United States and Japan allows Japanese corporations operating in the United States to hire management employees "of their choice."\textsuperscript{21} Some Japanese companies argue that this language permits them to hire management employees without being subjected to U.S. employment laws, including Title VII.\textsuperscript{22}

If the Treaty truly allows Japanese corporations to discriminate, a direct conflict with Title VII exists. Such a conflict renders either Title VII or the Treaty ineffective. The only way to avoid this result is to reconcile the provisions which appear to conflict. In order to reconcile the apparently conflicting provisions in Title VII and the Treaty, one must look past the plain language of the provisions to the purpose and intent behind them.

A. Title VII

1. General Purpose and Intent of the Act

Title VII was designed to end employment discrimination based on race, creed, color, national origin, and sex.\textsuperscript{23} The Act specifically states:

[i]t shall be unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex or national origin, or . . . to...

\textsuperscript{20} Depending upon the violation, an employer may be subject to an order to cease its discriminatory practices, be forced to reinstate the employee, pay back wages, or take other action to eliminate the discrimination. U.S. COMM’N ON CIVIL RIGHTS, A GUIDE TO FEDERAL LAWS PROHIBITING SEX DISCRIMINATION, CLEARINGHOUSE PUB. NO. 46, at 12 (1974).

\textsuperscript{21} See infra notes 61-65 and accompanying text.


\textsuperscript{23} Id. Title VII restrictions encompass both discrimination based on gender and sexual harassment. See Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977) (sexual harassment prohibited by Title VII), rev’d on other grounds, 587 F.2d 1240 (D.C. Cir. 1978). This Comment will refer to both forms of discrimination as “sex discrimination.”

This Comment does not address sexual orientation discrimination. Sexual orientation discrimination has not been prohibited under Title VII. See DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979) (Title VII’s prohibition of sex discrimination applied only to gender discrimination).
limit, segregate, or classify his employees or applicants for employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex or national origin.24

Under the Act, “employer” is defined as “a person engaged in an industry affecting commerce who has fifteen or more employees ...”25, while an “employee” is “an individual employed by an employer.”26 The Act also enumerates classes of employees who are exempt from coverage.27

Title VII does not specifically address foreign corporations doing business in the United States,28 nor does it address corporations operating abroad.29 Because the Act is silent in these two areas, its jurisdictional reach will extend to these employers only if Congressional intent to extend such jurisdiction can be shown.30

2. Congressional Intent under Title VII

When Congress enacted Title VII, its purpose was to ‘remove obstructions to the free flow of interstate commerce and foreign commerce and to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution.’ The Act evinces Congress’ broad purpose to eliminate all vestiges of discrimination in the American workplace.31

In McDonnell Douglas Corp. v. Green,32 the United States Supreme Court found that Congress intended for Title VII to ensure “the
removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."  

3 Discriminatory acts under Title VII are punishable absent the existence of a valid defense.  

3. The Bona Fide Occupational Qualification Exception

Under Title VII, an employer may legally discriminate if it can show that the selection was based on a Bona Fide Occupational Qualification (BFOQ). The BFOQ exception allows an employer to discriminate if the discrimination is reasonably necessary to business operations. In order to successfully defend a discrimination charge on the basis of a valid business necessity, an employer must meet two requirements: (1) the BFOQ is necessary to business operations, and (2) there is reasonable cause to believe that, in the case of a preference for males, females would be unable to perform the job efficiently.

Regarding the first requirement, the Fifth and Seventh Circuits have held that the business necessity test is not merely a business convenience test. In Diaz v. Pan American World Airlines, the Fifth Circuit held that "discrimination based on sex is only valid when the essence of the business operation would be undermined by

33. Id. at 801 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971)). See also Quijano v. University Fed. Credit Union, 617 F.2d 129 (5th Cir. 1980) (definition of employer in Title VII entitled to liberal construction); Williams v. City of Montgomery, 742 F.2d 586 (11th Cir. 1984) (definition of employer in Title VII should be liberally construed).

Notwithstanding any other provision of this title, (1) it shall not be an unlawful practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

Id.
36. Id.
38. See Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 862 (7th Cir. 1974). In Diaz, the court rejected Pan American's BFOQ defense to the charge of sex discrimination. Pan American argued that its female-only restriction on flight attendants was a BFOQ because male attendants could not cater to the psychological needs of the passengers as adequately as females. The court rejected this claim and found that this was merely tangential to the essence of the business involved. Diaz, 442 F.2d at 388.
not hiring members of one sex exclusively." As to the second requirement, in *Weeks v. Southern Bell Telephone and Telegraph*, the Fifth Circuit also held that the employer has the burden to prove that "he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." Moreover, opinions by the Equal Employment Opportunity Commission (EEOC), Title VII's enforcing agency which investigates and prosecutes alleged violations filed by employees, confirm that the BFOQ exception is "meant to be an extremely narrow exception to the general prohibition of discrimination."

**B. Treaties of Friendship, Commerce and Navigation**

In 1982, the United States Supreme Court, in *Sumitomo Shoji America, Inc. v. Avagliano*, held that a Japanese subsidiary incorporated in the United States was not protected from U.S. discrimination regulations under the United States-Japan Treaty of Friendship. The Court reasoned that by virtue of its domestic incorporation, Sumitomo was a U.S. corporation and, therefore, subject to U.S. law. Finding that the corporation was not protected under the Treaty, the Court did not reach the question of whether the "of your choice" language expressed in Article VIII(1) of the Treaty provides a viable defense for a sex discrimination charge.

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39. 442 F.2d 385, 388 (5th Cir. 1971). The essence of this holding was followed in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 862 (7th Cir. 1974).
40. 408 F.2d 228 (5th Cir. 1969).
41. *Id.* at 235.
42. U.S. COMM'N ON CIVIL RIGHTS, A GUIDE TO FEDERAL LAWS PROHIBITING SEX DISCRIMINATION 7-8, 12 (1974). The Commission may conduct independent investigations of discrimination. The Commission also issues administrative opinions regarding Title VII. *Id.*
44. 457 U.S. 176, 179 (1982). In *Sumitomo*, an American subsidiary of a Japanese corporation was sued under Title VII for sex discrimination. The plaintiffs claimed that the corporation refused to promote them because they were female. The United States Supreme Court determined that the Friendship Treaty, *supra* note 15, did not protect the subsidiary from Title VII violations since it was incorporated in the United States. Incorporation in the United States transformed the Japanese corporation into a United States corporation. This caused Sumitomo to lose whatever protection that may have been available under the Treaty and assume the same obligations as a United States corporation. *Id.*
45. *Id.* at 189.
46. *Id.* at 179. The Court stated that "we are persuaded, as both signatories agree, that under the literal language of Article XXII(3) of the Treaty, Sumitomo is a company of the United States; we discern no reason to depart from the plain meaning of the Treaty language. Accordingly, we hold that Sumitomo is not a company of Japan and thus is not covered by Article VIII(1) of the Treaty." *Id.* at 189.
under Title VII. In order to determine whether Article VIII(1) provides a viable defense, the Treaty’s plain language, purpose and history must be examined.

Following World War II, a series of separate treaties were entered into between the United States and various countries, including Japan. Generally, the treaties were enacted to ensure that corporations, both foreign and domestic, operate on equal footing. The purpose of these treaties, called Treaties of Friendship, Commerce and Navigation, was two-fold. First, the treaty afforded participating countries the opportunity to control their domestic corporations abroad while at the same time promoting international trade. Prior to the adoption of friendship treaties, few countries legally recognized foreign corporations. Without legal recognition, international business operations proved difficult. Corporations lacked access to foreign court systems and could not, therefore, sue or defend suits brought against them. Access to legal recourse was available only after incorporation in the host country. Foreign incorporation proved a costly alternative and hampered international trade. Second, the treaties were intended to serve as vehicles for increasing international trade by providing protection to foreign businesses.

47. Id.
48. The United States has entered into Treaties of Friendship with countries such as China, 1946; Korea, 1956; Italy, 1948; Ireland, 1950; Colombia, 1951; the Federal Republic of Germany, 1954; and the Netherlands, 1956. For more on the Treaties of Friendship and the countries who have entered into them, see Walker, Jr., Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am. J. Comp. L. 229, 230 (1956) [hereinafter Walker, Jr., United States Practice]. For a partial list of the Friendship Treaties, see 1 I.L.M. 92, 94 (1962).
52. Id.
53. Id. Most treaties up until the last quarter of the nineteenth century extended rights to "citizens" or "nationals." These titles did not include corporations. On this point, Chief Justice Taney noted that "[a] corporation . . . is a creature of sovereignty which can exist only within the jurisdiction of the state creating it and cannot move or migrate outside that jurisdiction." Id. at 375 (citing Bank of Augusta v. Earle, 13 Pet. 519, 588 (1839)).
54. Id.
55. Id.
56. Walker, Jr., United States Practice, supra note 48, at 232. The author found that these treaties were made to address the right of citizens of each country to establish and carry on business activities within the other country and to receive due protection for their persons and businesses. Additionally, the treaties were to afford equal protection of the laws of the host country and allow the corporation to enjoy the same legal opportunity allowed to the citizens of their own country. Id.
treaty terms provide national treatment for foreign corporations, including equal access to the court systems.\footnote{57}

C. United States-Japan Treaty of Friendship, Commerce and Navigation

In 1953, the United States entered into a Treaty of Friendship, Commerce and Navigation with Japan (hereinafter Treaty).\footnote{58} The Treaty provides various rights to corporations, including equal access to court systems, leasing and purchasing land, and obtaining trademarks.\footnote{59} In addition to granting legal recognition to foreign corporations, the Treaty gives corporations the right to control their management.\footnote{60}

Article VIII(1) of the Friendship Treaty states, “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.”\footnote{61} A literal reading of this provision suggests that a corporation can choose any person it desires when hiring employees who fall into one of the enumerated positions.\footnote{62} If applied literally, Article VIII(1) conflicts with the Title VII restrictions.\footnote{63} With the increase in business contacts between Japan and the United States,\footnote{64} the effect of the Treaty language on Title VII must be resolved, particularly in light of increasing evidence that Japanese employers may be importing discriminatory business practices to the United States.\footnote{65}

\footnote{57. Walker, Jr., Provisions, supra note 50, at 384. Additionally, foreign corporations were granted equal access to administrative tribunals and agencies. Furthermore, foreign corporations who entered the host country for the sole purpose of litigation would not have to meet the business registration requirements they would have to meet if they were doing business in the host country. \textit{Id}.}

\footnote{58. Friendship Treaty, supra note 15, at art. VIII(1).}

\footnote{59. \textit{Id}. at art. IV(1). Article IV(1) provides equal access to the parties’ court systems. \textit{Id}.}

\footnote{60. \textit{Id}.}

\footnote{61. \textit{Id}. at art. VIII(1).}

\footnote{62. \textit{Id}. It is clear that this language would not give such freedom for positions which do not fit into the named classes. In discussing the purpose of employment provisions in treaties such as the Friendship Treaty, supra note 15, Herman Walker, Jr., noted that the provisions were to apply to “essential executive and technical personnel.” Walker, Jr., Provisions, supra note 50, at 386.}


\footnote{64. \textit{See supra} notes 1-9 and accompanying text.}

\footnote{65. \textit{See supra} note 13.}
D. Application of Title VII to Foreign Corporation Operations in the United States

Foreign corporations doing business in the United States have been held liable under Title VII\(^{66}\) even though the Act does not specifically address them.\(^{67}\) In *Ward v. W & H Voortman*,\(^{68}\) the Federal District Court, Middle District of Alabama, held a Canadian company liable for Title VII violations.\(^{69}\) The court reached its finding by examining the plain language of Title VII.\(^{70}\) The court stated that the language of Title VII, when reasonably construed, is sufficiently broad in scope to cover all corporations operating in the United States.\(^{71}\) The court relied on the provisions in Title VII which specifically exclude various groups\(^{72}\) to support its finding.\(^{73}\) The court reasoned that

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\(^{66}\) 685 F. Supp. 231 (M.D. Ala. 1988). In *Voortman*, the plaintiff sued a Canadian company for sex discrimination in violation of Title VII. The plaintiff was a United States citizen who applied for a position with the defendant to work for the defendant as its product distributor in Alabama. *Id.* The court held that Title VII prohibits foreign corporations from discriminating against American employees who work for the company in the United States. Additionally, the court found that Title VII forbids sex discrimination regardless of where the business is incorporated. The court reasoned that if Congress did not want these corporations to be within the reach of Title VII, they would have specifically excluded them from coverage just as they did other employment situations, *i.e.*, employment of aliens abroad by U.S. corporations. *Id.* at 232-33.


\(^{68}\) 685 F. Supp. 231 (M.D. Ala. 1988).

\(^{69}\) *Voortman*, 685 F. Supp. at 231.

\(^{70}\) *Id.*

\(^{71}\) From the plain meaning of its words, Title VII does appear to apply to all corporations operating in the United States, whether domestic or foreign. Certain foreign corporations may benefit from various treaties or international agreements which exclude them from this coverage. See infra notes 84-91. The Act defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b) (1982 & Supp. 1985).

"Commerce" is defined in the Act as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." 42 U.S.C. § 2000e(g) (1982 & Supp. 1985).

The Act then states

(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 his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.


\(^{73}\) *Voortman*, 685 F. Supp. at 231.
Congress' failure to explicitly exempt foreign corporations from the Act, coupled with the specific delineation of those groups free from coverage, bolsters its contention. If Congress had intended to exclude foreign corporations from coverage under Title VII, the court argued, express language specifically reflecting this intent would be present.\textsuperscript{74} The court concluded that by not expressly or impliedly excluding foreign corporations, Congress undoubtedly intended Title VII restrictions on sex discrimination to apply to corporations operating in the United States regardless of the place of their incorporation.\textsuperscript{75}

Although the United States Supreme Court has not addressed the issue of whether Title VII applies to foreign corporations doing business in the United States, the \textit{Voortman} analysis will likely be adopted. As noted previously,\textsuperscript{76} the United States Supreme Court has stated that the purpose of Title VII is to remove discriminatory barriers to employment.\textsuperscript{77} This pronouncement has caused other courts to interpret Title VII, particularly the definition of employer, as requiring a liberal construction.\textsuperscript{78} A broad reading of Title VII most certainly encompasses a foreign corporation operating in the United States.

The EEOC's stated policy is that Title VII applies equally to foreign and domestic employers operating within the United States.\textsuperscript{79} Furthermore, the United States Supreme Court gave great deference to EEOC policy and opinion in \textit{Griggs v. Duke Power}.\textsuperscript{80} In \textit{Griggs}, the Equal Employment Opportunity Commission issued an advisory opinion concerning the seminal issue in dispute.\textsuperscript{81} On review, the Supreme Court stated that "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference."\textsuperscript{82} This

\begin{footnotes}
\item[74.] Id.
\item[75.] Id.
\item[76.] See supra note 31 and accompanying text.
\item[78.] See \textit{Quijano v. University Fed. Credit Union}, 617 F.2d 129 (5th Cir. 1980); \textit{Williams v. City of Montgomery}, 742 F.2d 586 (11th Cir. 1984).
\item[81.] Id. at 433. The Court stated "since the Act and its legislative'history support the commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." Id. at 434.
\item[82.] Id. at 433-34.
\end{footnotes}
opinion is another strong factor indicating that the Supreme Court will follow *Voortman* and hold foreign corporations doing business in the United States liable under Title VII. Despite these holdings, the application of Title VII to foreign corporations operating in the United States leaves unanswered the question concerning the effect that Article VIII(1) of the Friendship Treaty will have when a Japanese corporation violates Title VII.

1. **Statutory Rights vs. Treaty Obligations: Which Controls?**

If Article VIII(1) of the Treaty permits a Japanese company to hire at its own discretion, may the company do so in a way that violates Title VII? In *Sumitomo Shoji America, Inc. v. Avagliano*, a Japanese company argued that upon literal reading, the Article's language permitted it to fill the positions enumerated in the Article regardless of Title VII's provisions. Without reaching this issue, the United States Supreme Court held that the Treaty did not apply since the defendant, *Sumitomo*, was incorporated in the United States.

*Sumitomo*’s argument, when considered in light of general international and U.S. law governing conflicts between statutes and treaties, must fail because the Treaty is not a defense to Title VII.

Customary international law requires that in treaty interpretation, the parties' intentions are determined by reference to the express words used in light of the surrounding circumstances. When inter-

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83. *Id.* at 434.
85. *Id.* at 179, 189. See *MacNamara v. Korean Air Line*, 863 F.2d 1135 (3d Cir. 1988). In *Sumitomo*, the Court determined that the defendant corporation did not benefit from the protection of the treaty since it was incorporated in the United States. *Sumitomo*, 457 U.S. at 189. In *MacNamara*, the Court found that the treaty protected companies from Title VII restraints in that they could hire their own citizens over United States citizens. *MacNamara*, 863 F.2d at 1141.
87. LORD MCNAIR, LAW OF TREATIES 365 (1961) [hereinafter McNAIR]. Lord McNair also states that:

[i]n any definition or description of interpretation some reference to the words actually used is essential, because it can happen that a party sometimes has a mental reservation as to the meaning that he may hope to attribute to them in the future in the event of a dispute arising.

*Id.*

Lord McNair cites to a study done by Fitzmaurice of the decisions of the International Court of Justice involving interpretation of treaties. Fitzmaurice detected five principles in treaty interpretation.

1. Actuality (or textual interpretation);
2. Natural or ordinary meaning;
3. Integration (or interpretation of the treaty as a whole);
4. Effectiveness;
5. Subsequent Practice; Contemporaneity (interpretation of texts and terms in light of their normal meaning at the date of conclusion.)

interpreting treaty language, the United States Supreme Court requires that "[t]he 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.'" However, if a treaty conflicts with an act of Congress "the last expression of the sovereign will control." Congressional acts are held to be in conflict with treaties only if there is clear legislative intent that the subsequent legislation was meant to affect the treaty obligations. Applying this analysis to Title VII and Article VIII(1) of the Treaty, Title VII would control.

2. Reconciling the United States-Japan Treaty of Friendship and Title VII

There are no provisions in Title VII which state that it was intended to affect the rights and obligations of the United States under the Treaty. Therefore, a literal reading of the Treaty tentatively indicates that sex discrimination is permissible. However, a thorough analysis of the Treaty requires one to examine the motives and intent of the drafters. United States case law provides guidance in interpreting the Treaty. Although the Treaty has been interpreted to provide equal treatment of domestic and foreign corporations, the Fifth Circuit, in Spiess v. Itoh, found the "of your choice" language in Article VIII(1) to be an exception to the equality of treatment. The

88. Sumitomo, 457 U.S. at 176 (citing Maximov v. United States, 373 U.S. 49 (1963)).
89. Fong Yue Ting v. United States, 149 U.S. 698, 720-21 (1893). The Court also held that "[b]y the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land and no paramount authority is given to one over the other." Id.
91. See infra notes 94-111 and accompanying text.
92. See supra notes 23-34 & 58-65 discussing relevant sections of Title VII and Friendship Treaty.
93. McNair, supra note 87, at 365.
94. In Sumitomo, the Court stated that the plain language would control 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." Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180 (1982) (citing Maximov v. United States, 373 U.S. 49 (1963)).
95. See supra notes 58-65.
97. Id. at 360-61. In Spiess, the court found the "of your choice" language was "not to guarantee national treatment, but to create an absolute rule permitting foreign nationals to control their overseas investments." Id. at 360. The court then went on to say "considering the Treaty as a whole the only reasonable interpretation is that Article VIII(1) means exactly what it says: companies have a right to decide which executives and technicians will manage their investments in the host country without regard to host country laws." Id. Reading the negotiation history of both Title VII and the Treaties together with the interpretation of the provision, the court held that the "of your choice" language provided a defense to Title VII. Id. at 361.

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Spiess court held that Article VIII(1) gives Japanese companies the unbridled right to hire employees of their choice without regard to Title VII's provisions.98 This holding is in direct conflict with the more recent U.S. Supreme Court opinion of Sumitomo.99 In Sumitomo, the Supreme Court stated that the Treaty’s purpose is “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.”100 Even though the Court’s statements are dicta, they indicate that the Spiess interpretation of the Treaty is inaccurate.

Moreover, the history of the Treaty negotiations supports the conclusion that Article VIII(1) does not provide a defense to Title VII.101 First, when the Treaty was negotiated, the Japanese Constitution already prohibited sex discrimination.102 The Treaty drafters could not have intended to allow sex discrimination in contravention of the Japanese Constitution. Second, the plain language of Article VIII(1), together with the underlying motives for its inclusion, indicates that the main purpose of Article VIII(1) is to allow foreign corporations to hire upper management employees without regard to citizenship.103 The “of your choice” terminology in Article VIII(1) was added to the Treaty at the urging of the United States,104 which wanted that specific language in order to maintain control of U.S. corporations doing business outside its borders.105 The United States was motivated by a desire to avoid hiring quotas,106 and to ensure the ability of U.S. corporations to control the management of their overseas operations.107 The negotiation history suggests that the language was envisioned only as an exception to a quota requirement,

98. Id. at 360-61.
100. Id.
101. See supra notes 58-65 and accompanying text.
102. KENPO (JAPANESE CONST.), ch. III, art. 14. Article 14 provides: “All the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.” Id.
103. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). Citizenship differs from national origin. National origin refers to “the country where a person was born, or more broadly, the country from which his or her ancestors came.” In footnote 2 of the Espinoza opinion, the Court stated “the term national origin does not embrace a requirement of United States citizenship.” Id. at 88 n.2.
104. Walker, Jr., United States Practice, supra note 48, at 236-37. See also, Treaty Privileges, supra note 37, at 382-83.
106. Id. The hiring quotas the United States wanted to avoid would require corporations to employ a certain percentage or number of Japanese citizens. Id.
107. Id.
not as a blanket defense to any and all employment laws. Finally, since Title VII does not prohibit discrimination based on citizenship, allowing protected corporations to avoid citizenship quotas is consistent with both the history of the Treaty and the requirements of Title VII. The failure to find a conflict between the two allows Title VII to stand without interfering with the Treaty's protection. Therefore, allowing sex discrimination under Article VIII(1) contravenes the purpose of the Treaty and violates Title VII.

3. Public Policy Concerns

In addition to the historical interpretation above, strong U.S. public policy concerns dictate that the Treaty cannot permit sex discrimination in contravention of Title VII. Title VII was enacted because of the United States' aversion to needless discriminatory barriers to employment. Certain evidence now suggests that the Japanese are importing their homogenous employment practices to the United States. If so, these practices are in direct conflict with U.S. public policy. United States policy concerns should outweigh any concerns the Japanese may raise in defending a continuation of their all male managerial workforce. A Japanese company's refusal to hire women for managerial positions erects the exact barrier that Congress intended for Title VII to tear down. Clarence Thomas, chairman of the EEOC, expressed the United States' aversion to a homogenous

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108. Id.
109. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). In Espinoza, the Court held that the term "national origin" in Title VII did not include citizenship. By looking at the history of discrimination based on citizenship in federal employment and Congress' deletion of the word "ancestry" from the final version of Title VII, the Court reasoned that Congress did not intend for citizenship discrimination to be included in Title VII. Id. at 89-91.
110. Id. See Walker, Jr., Provisions, supra note 50.
111. See supra notes 31-34 and accompanying text.
112. Id. As originally introduced, the bill did not address sex discrimination. It was later amended to prohibit discrimination based on sex. The amendment was made by Congressman Smith, Chairman of the House Rules Committee. Congressman Smith's motives for the amendment appear less than commendable. It has been noted that "[h]is purpose was to sink civil rights for blacks by adding a similar guarantee for women; although some congressmen would grant equal rights for men of both races, Smith was certain that they would never extend those rights to women." B. Diemer, Keeper of the Rules 194-96 (1987). It was further noted that in addition to wanting to derail the civil rights legislation, the addition of sex discrimination to the act would assist southern businessmen, Congressman Smith's constituency. His plan eventually backfired as the amendment was incorporated into the Act and provided power for the women's movement. Id.
114. See generally JEI REPORT, supra note 3. See also supra notes 1-4 & 11-13 and accompanying text (discussing the attitude towards women in the Japanese business world).
workforce. Thomas said that "homogeneity is antagonistic to what we believe in this country . . . I don't think we should import those approaches which are antagonistic to civil rights or to the equal employment opportunity laws in this country." Additionally, the United States Supreme Court has stated that Congress' purpose in enacting Title VII was to remove the discriminatory barriers to employment. Congress declared that the purpose of Title VII was to provide "the opportunity for employment without discrimination." Together, these statements evince a strong policy in the United States against sex discrimination and in favor of a diversified workforce.

Express policies against sex discrimination espoused by both Japan and the United States support the proposition that the Treaty should not provide a valid defense to sex discrimination actions brought under Title VII. If Article VIII(1) of the Treaty is limited to citizenship discrimination, Japanese employers will be able to discriminate on the basis of sex only within the defenses to Title VII.

4. Potential Japanese Attempts to Defend Against Title VII Complaints

The Bona Fide Occupational Qualification (BFOQ) provides a defense to sex discrimination in certain limited circumstances. Japanese corporations, due to their apprehension in hiring women for upper management positions, may assert the BFOQ exception to justify an all male management team. Two problems stand in the way of this argument. First, it necessitates a broad application of the BFOQ defense, which is narrowly construed

116. Id.
119. See supra notes 35-43 and accompanying text.
120. See supra note 35.
121. See supra notes 35-43 and accompanying text.
122. See supra notes 2-4 & 12-13.
123. Japanese employers in the United States have had a difficult time accepting females as equals. Los Angeles Times, July 13, 1988, at 1, col. 1. See also 8 KODANSHA ENCYCLOPEDIA OF JAPAN 265 (1983) (traditional Japanese view that women should devote their lives to their homes and families; perpetuating discrimination of women in workforce).
by the courts. Second, Japanese employers would have to meet both prongs of the "business necessity" test under the BFOQ exception. Under the first prong, the employer's action must be necessary for the business. Under the second, they must demonstrate that there is reasonable cause to believe that, in the case of a preference for males, females would be unable to perform the job efficiently.

Even though continual contacts between a branch office and its home office in Japan may implicate certain aspects of the Japanese culture, a Japanese company will have difficulty justifying the BFOQ defense. When claiming that sex discrimination is essential to their businesses, companies may argue that Japanese culture effectively prevents them from hiring female managers. Similar to the arguments made during the civil rights era in the United States, assertions by Japanese employers will reflect a fear that Japanese businesses will falter if women are employed. However, just as the fears by U.S. employers proved baseless, so will those of Japanese employers. Japanese businesses operating in the United States cannot demonstrate that sex discrimination is "essential" for their business operations. Although an all male management team may be convenient for Japanese firms, mere convenience will not justify the BFOQ defense. Japanese constitutional provisions which prohibit sex discrimination strengthen this conclusion.

Japanese employers should have an equally difficult time meeting the second prong of the BFOQ defense. The second prong would require the Japanese employer to prove that gender renders the applicant unable to perform the job. Given the increase of U.S. women receiving advanced degrees in business and the number of women currently holding managerial positions, a Japanese company would not be successful in arguing that, as a class, women would be unable to perform efficiently. Similar concerns are raised when

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124. See supra note 43 and accompanying text.
125. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235-36 (5th Cir. 1976). See also Treaty Privileges, supra note 37, at 399.
126. See supra notes 3-12.
127. See supra notes 35-43 and accompanying text.
128. Chapter III, Article 14, of the Japanese Constitution states that "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." KENPÔ, (JAPANESE CONST.), ch. III, art. 14.
129. See supra note 11.
130. A Japanese company would probably meet the second requirement by demonstrating the need for an employee who was familiar with their language and culture. See Treaty Privileges, supra note 37, at 399. But this would be citizenship, not sex, discrimination. See supra note 109 and accompanying text.
U.S. employers discriminate against American employees in Japan. Since the Treaty protects rather than regulates corporations operating abroad, the Treaty is not an effective means for preventing sex discrimination in these circumstances. Therefore, the issue of sex discrimination by U.S. corporations operating abroad must be resolved under Title VII.

III. APPLICATION OF TITLE VII TO UNITED STATES CORPORATIONS OPERATING ABROAD

A generally accepted proposition in international law is that a country may regulate the foreign operations of its corporations to the extent that the regulation does not infringe upon the authority of the host nation. However, in the United States, a presumption exists that Congress is concerned only with the domestic application of its laws. Thus, U.S. law will not be applied extraterritorially unless one can show that Congress intended otherwise. Sex discrimination by U.S. corporations operating in Japan will not be prohibited by Title VII unless this congressional intent is found. The courts are split on the question of whether Congress intended for Title VII to be applied to the employment practices of U.S. corporations operating abroad. Title VII does not specifically address the status of U.S. citizens employed by U.S. corporations abroad, but does expressly exclude from coverage those aliens employed by the same U.S. corporations. This “alien exemption provision” is the basis upon which the courts have analyzed the question of extraterritorial application.

A. District Court Decisions

In Boureslan v. Aramco, the Fifth Circuit held that Congress' failure to expressly grant extraterritorial jurisdiction to Title VII

131. Steel v. Bulova Watch Co., 344 U.S. 280, 285-86 (1952). The Court stated the principle as “the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.” Id. at 286 (citing Skiriotes v. Florida, 313 U.S. 69, 73 (1941)).


135. Id.

136. See infra notes 140-44 and accompanying text.

137. 857 F.2d 1014 (5th Cir. 1988). In Boureslan, the plaintiff was a United States citizen.
prohibits its application to U.S. corporations operating abroad. Applying the generally accepted view that Congress is concerned only with domestic conditions, the court’s initial presumption was that Congress did not intend for Title VII to apply extraterritorially. After addressing both the specific language of the Act and the lack of any substantial legislative history supporting extraterritorial application, the court held that the Act must be read narrowly. The plaintiff argued that the Act’s “alien exemption provision” created a negative inference supporting extraterritorial application. In rejecting the plaintiff’s negative inference argument, the Fifth Circuit held that the presumption against extraterritorial application of U.S. laws had not been rebutted. Furthermore, the court rejected the argument that legislative history demonstrated congressional intent to apply Title VII extraterritorially. The court held that neither the express language nor the legislative history of the Act overcomes the inference against extraterritorial jurisdiction.

The Fifth Circuit view was specifically rejected in Bryant v. International School Services, Inc. In Bryant, the defendant argued that Title VII did not apply extraterritorially and therefore, the court lacked subject matter jurisdiction. Rejecting this argument, the court

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working in Saudi Arabia for Aramco, a Delaware corporation with its principal place of business in Saudi Arabia. Boureslan claimed he was subjected to racial, religious, and ethnic harassment which eventually culminated with his termination. He claimed his termination violated Title VII. Id. at 1016-18.

138. Id.

139. Id. at 1018. The court stated “Extraterritorial application is not directly addressed in Title VII.” Id. The court based its holding on the definitional sections in Title VII, specifically the definition of “employer” and the definition of “commerce.” Id. See also supra note 71 (defining “employer” and “commerce”).


141. Boureslan, 857 F.2d at 1018. The court reasoned that this exemption supported the finding in Espinoza v. Farah Mfg. Co. that aliens were protected employees in the United States. Id.

142. Id. The court stated that the “[l]egislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used ‘cautiously.’” Id.

What the court fails to recognize is the use by the United States Supreme Court of legislative history when it determined the extraterritorial application of the Eight Hour Law. See Foley Brothers v. Filardo, 336 U.S. 281 (1949). See also infra notes 156-60 and accompanying text (explaining use of legislative history when determining extraterritorial application of United States law).

143. Boureslan, 857 F.2d at 1021.

144. Bryant v. International School Serv., Inc., 502 F. Supp. 472 (D.N.J. 1980). In Bryant, the plaintiffs were teachers employed by the defendant, an American corporation, to teach overseas. The plaintiffs charged that the defendant’s practice of using two different contracts for hiring overseas teachers amounted to sex discrimination in violation of Title VII. Id. at 479-80.
adopted an approach contrary to that of the Boureslan court. The Bryant court held that extraterritorial jurisdiction could be inferred from the language of Title VII.\textsuperscript{145} The court based its finding of extraterritorial jurisdiction on the “alien exemption provision”. Since Title VII expressly excludes protection of aliens employed abroad, Congress must have intended for Title VII to apply to Americans employed abroad.\textsuperscript{146}

B. General Principles of Extraterritorial Application of U.S. Laws

The Boureslan court agrees that the U.S. government is not precluded by international law from governing the conduct of its own citizens in foreign countries.\textsuperscript{147} However, by requiring an express grant of extraterritorial jurisdiction, the court erred in its interpretation of congressional intent. The court’s analysis is in direct conflict with prior case law regarding extraterritorial application of U.S. laws.\textsuperscript{148}

Extraterritorial application was applied to the Lanham Trademark Act in Steele v. Bulova Watch Co.\textsuperscript{149} In Steele, the United States Supreme Court found an American citizen manufacturing watches in Mexico liable for violations under the Trademark Act.\textsuperscript{150} The Court began its analysis with the general premise that U.S. laws do not extend beyond its borders absent congressional intent to the contrary.\textsuperscript{151} The Court found the requisite congressional intent in the broad jurisdictional language of the statute.\textsuperscript{152} Like Title VII, the

\textsuperscript{145} See also Love v. Pullman Co., 569 F.2d 1074 (10th Cir. 1978) (applying Title VII extraterritorially); Street, Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad, 19 J. Int’l L. & Pol. 357, 369 (1987). Mr. Street suggests that, in addition to the holdings of Bryant and Love, the broad language used in Title VII supports extraterritorial jurisdiction. Id. at 370.

\textsuperscript{146} Bryant, 502 F. Supp. at 482; Boureslan, 892 F.2d at 1274-75 (King, J., dissenting).

\textsuperscript{147} Boureslan, 857 F.2d at 1017; see also Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952) (citing Skiriotes v. Florida, 313 U.S. 69, 73 (1941)) (a sovereign may control its citizens abroad).

\textsuperscript{148} See Steele, 344 U.S. 280 (1952); Foley Bros. v. Filardo, 336 U.S. 281 (1949).

\textsuperscript{149} 344 U.S. 280 (1952).

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 282-83, 285.

\textsuperscript{152} Id. at 283-84. See also 15 U.S.C. § 1127 (1988). The Act specifically states that its intent is:

to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks in such commerce; to protect registered marks used in such commerce [sic] from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations
Lanham Trademark Act does not specifically address extraterritorial application. The Trademark Act, however, defines the commerce to which it applies as being "all commerce which may be lawfully regulated by Congress." The Court relied heavily on this definition in finding that Congress intended for the Act to apply extraterritorially.

Likewise, in Foley Brothers v. Filardo, the United States Supreme Court focused on the question of whether Congress intended for the Eight Hour Law to apply extraterritorially. In finding that the law did not extend extraterritorially, the Court first examined the plain language of the statute; next, the Court examined the legislative intent; and finally, administrative interpretations. Because Congress had not distinguished between U.S. citizen employees and foreign citizen employees, the Court found that Congress did not intend to apply the statute extraterritorially. The Court noted that by failing to make this distinction, the statute would invariably conflict with the domestic law of the foreign country. If the Eight Hour Law were enforced without this distinction, non-citizens working for a U.S. corporation would be included in the statute's jurisdictional scope. The Court noted that the only way to avoid potential conflicts was for Congress to distinguish between citizens and non-citizens. Since Congress failed to make this distinction, the Court denied extraterritorial application in order to avoid infringing upon the foreign host's sovereignty.

The Supreme Court used a consistent approach in Steele and Foley. Extraterritorial application of a law may be found without an explicit statement by Congress. Extraterritorial application will follow if

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of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.

Id. 153. Steele, 344 U.S. at 283-84.
155. Steele, 344 U.S. at 286.
156. 336 U.S. 281 (1949). In Foley, the employee, a United States citizen, worked for an employer who has contracted to build certain public works for the United States in Iraq and Iran. During his work in Iraq and Iran, the employee requested overtime pay for the hours worked over eight hours a day. The employer refused and the employee brought suit under the Eight Hour Law. The employer claimed that the law did not apply extraterritorially to contracts in foreign lands. Id. at 283.
157. Id.
158. Id. at 285-88.
159. Id. at 286, 289.
160. Id.
evidence demonstrates that Congress intends to regulate conduct beyond U.S. borders. Evidence may come from an act’s express provisions, its legislative history, or administrative interpretations of the law. Application of this analysis to Title VII shows that Congress intended for Title VII to extend extraterritorially.

The Boureslan court downplayed the significance of legislative history in determining extraterritorial jurisdiction. The court’s cautious approach to legislative history directly conflicts with the approach in Steele and Foley. In Foley, legislative history was one of three factors the Court weighed in determining that the Eight Hour Law did not apply abroad. The express language of the Eight Hour Law revealed that it could be read only in a way which would create potential conflicts in international law. Its legislative history did not indicate whether Congress intended to regulate work hours of foreign operations, and the administrative opinions were silent regarding the law’s geographical scope. The Supreme Court gave credence to each factor despite its finding that none supported extraterritorial jurisdiction.

The Supreme Court’s step-by-step approach establishes a model for analyzing any question concerning extraterritorial application of U.S. law. Failure of a lower court to follow the Foley test creates suspicion regarding that court’s decision. Only after a thorough Foley-type analysis should extraterritorial application be accepted or rejected. In Boureslan, the Fifth Circuit’s rejection of the plaintiff’s evidence regarding legislative intent, and of his negative inference argument, creates a new test which does not conform to the U.S. Supreme Court’s model in Foley. In effect, by refusing to acknowledge the plaintiff’s evidence, the Fifth Circuit has said that extraterritorial jurisdiction can be granted only by express congressional provision. This approach is unsupported by prior case law. Moreover, Foley and Bulova clearly reject this arbitrary approach. If the factors specified by the Supreme Court in Foley, specifically, statutory language, legislative intent, and administrative interpretations, are applied to Title VII, a finding of extraterritorial jurisdiction is warranted.

163. Id. at 285.
164. Id. at 286.
165. Id. at 288.
C. Application of General Principles of Extraterritorial Application to Title VII

1. Plain Language of Title VII

Title VII does not expressly state that it will apply extraterritorially. The Bryant court and the dissent in Boureslan argued that the "alien exemption provision" created a negative inference supporting the extraterritorial application of Title VII. The Foley decision supports this analysis. Title VII's exclusion of aliens employed abroad prevents the potential conflicts with foreign law which had concerned the Foley court. Congress would not have included an alien exemption if it had not been concerned with potential conflicts that extraterritorial application would create. If Congress had not intended for Title VII to have applied to U.S. employees working outside the United States, it would not have specifically excluded aliens, since aliens logically would have been included in the general exclusion. By including the "alien exemption provision," Congress recognized and resolved the concerns expressed by the Supreme Court in Foley.

Additionally, congressional intent for extraterritorial application of Title VII is found through a process of statutory incorporation. Title VII defines "industry effecting commerce," in part, as "any industry which affects commerce within the meaning of the Labor-Management Reporting and Disclosure Act of 1959" (LMRDA). The LMRDA, in turn, specifies that an "industry affecting commerce" includes any activity or industry under the Labor Management Relations Act (LMRA). Therefore, the definition of commerce in the LMRA must apply to Title VII. The LMRA defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or

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167. See supra notes 144-48.
168. Foley, 336 U.S. at 286.
170. Id.
between any foreign country . . . .” 174 In as much as the LMRA covers “trade between foreign countries,” it follows that so must Title VII. Furthermore, just as the Bulova Court found extraterritorial application based on the broad definition of commerce in the Lanham Trademark Act, future courts should apply the same analysis and reach the same conclusion in regard to Title VII’s jurisdiction. Therefore, the incorporation of the LMRDA and the LMRA into Title VII clearly shows that Congress intended for Title VII to apply to U.S. corporations operating in foreign countries.

2. Legislative History

The dual purpose of Title VII, to prevent discrimination in the workplace175 and to protect the free flow of commerce domestically and with foreign nations, 176 shows that Congress contemplated the extraterritorial reach of Title VII. General principles underlying Title VII also support such a finding. In order to remove discriminatory barriers to employment,177 Title VII must uniformly protect U.S. citizens employed by U.S. corporations, regardless of where that employment exists. Title VII will bring down the barriers which would otherwise be fortified if U.S. corporations were allowed to discriminate among U.S. citizens in foreign countries.

3. Administrative Agencies

As the administrative agency in charge of administering Title VII, the EEOC has issued opinions stating its policy that Title VII applies to U.S. corporations operating abroad. 178 According to the U.S. Supreme Court, such administrative opinions should be given great weight when interpreting statutes. 179 Therefore, even if the statutory language and legislative history are not entirely convincing, giving great weight to the clear mandates of the EEOC will certainly guarantee extraterritorial application of the Act.

176. See supra notes 172-74 and accompanying text.
177. See supra notes 31-34.
179. Id.
IV. Conclusion

Japanese corporate hiring practices which stem from its culture are at odds with Title VII. Because of this conflict, application of Title VII either extraterritorially or to Japanese companies operating in the United States could slow the equalization of U.S.-Japan trade. For example, Japanese employers may argue that because few Japanese companies employ women in managerial positions, Japanese corporations operating in the United States may be put to a competitive disadvantage with their home country counterparts. Moreover, given the current trade disparity between the United States and Japan, and the possibility that application of Title VII would expand this gap, American employers doing business in Japan may argue that extraterritorial application is not a desirable goal.

These concerns, however, only echo those heard when the Civil Rights Act of 1964 was enacted. Legitimizing the same types of fears which have already been resoundingly disproved would gut the effectiveness of Title VII. Furthermore, if Title VII is not applied, corporations would benefit by escaping U.S. public policy which condemns discrimination, while at the same time reaping the benefits from public policies which protect free enterprise. Corporations should not be allowed to enjoy both the benefits of some U.S. public policies while choosing to avoid others.

The courts should not undermine the very purpose for which Title VII was enacted: to break down discriminatory employment barriers. If corporations, either U.S. or Japanese, are able to avoid Title VII, these barriers flourish rather than dissipate. Barriers to equal employment opportunities will be fortified by these newly recognized exceptions. Equality for women can never be reached in the United States if Japanese corporations operating within the United States, or U.S. corporations operating in Japan, are allowed to practice sex discrimination.

Dana Marie Crom