

Legal Disincentives to Japanese Direct Investment in the United States

I. INTRODUCTION

The 1980s saw a massive increase in foreign direct investment (FDI) in the United States.¹ FDI in the United States increased by approximately 200 percent through the 1980s,² reaching its peak at nearly \$73 billion in 1989.³ This massive increase brought with it intense debate regarding the extent to which foreign countries should invest in the United States.⁴ The cornerstone of this debate was the increasing Japanese role in the United States economy. The global success of the Japanese economy, combined with several highly publicized acquisitions in the United States, led many people to fear that Japan was buying our country.⁵

Since 1989, however, FDI in the United States has plummeted. The 1992 level of \$13.5 billion marked the lowest since 1983, representing a 47 percent decline from 1991, and a 61 percent decline from 1990.⁶ Japanese direct investment in the United States fell 57 percent

1. EDWARD M. GRAHAM & PAUL R. KRUGMAN, *FOREIGN DIRECT INVESTMENT IN THE UNITED STATES*, 1991. Foreign Direct Investment is defined as ownership of 10 percent of the assets of a foreign resident for purposes of controlling the use of those assets. FDI, which is fundamentally distinct from international trade in that it deals solely with a long-term investment for the manufacture and marketing of goods and/or services in the foreign country, comes in two general forms: (1) creation of assets by foreigners, called "greenfield investments" and (2) purchase of existing assets by foreigners. *Id.* See also Deanne Julius, *Foreign Direct Investment: The Neglected Twin of Trade* (GROUP OF THIRTY, NO. 33, 1991) at 2.

2. See GRAHAM & KRUGMAN, *supra* note 1, at 2.

3. See *id.* at 21.

4. Robert T. Kudrle, *Good for the Gander? Foreign Direct Investment in the United States*, 45 INT'L ORG. 397 (1991). "The political issue of the '90's isn't going to be imports; its going to be the foreign invasion of the United States." *Id.* at 398 (quoting Paul R. Krugman, Massachusetts Institute of Technology Economist, *Foreign Firms Build U.S. Factories, Vex American Rivals*, WALL ST. J., July 24, 1987, at A6).

5. Ilana Debare, *Rising Sun, Generates Heated Debate on Japan's Power*, Sacramento Bee, August 1, 1993, at A1 (discussing Michael Crichton's novel and movie "Rising Sun" which illustrates the American fear and distrust towards the Japanese, based partially on Japanese purchases in the 1980s of American landmarks, such as Pebble Beach Golf Course and the Rockefeller Center).

6. Mahnaz Fahim-Nader, *U.S. Business Enterprises Acquired or Established by Foreign Direct Investors in 1992*, SURVEY OF CURRENT BUSINESS, May 1993, at 113.

in 1992, which followed a 73 percent decrease in 1991.⁷ People are now asking themselves: "where has all the money gone?"

This analysis of the decrease of FDI in the United States will assume that FDI represents a value to America and should not be feared or avoided.⁸ Japanese investment in particular has been and should continue to be a valuable source of investment capital, which, in the long run, translates into American jobs,⁹ technological progress,¹⁰ and the fostering of American competitiveness.¹¹

A. *Disturbing Trends*

When viewed from a global perspective, the recent decrease in Japanese direct investment in the United States reveals disturbing trends. First is the economic explosion of Southeast Asia. The 1980s, were considered by many to be the decade of Asia's economic ascendancy,¹² with Japanese investment reaching unprecedented levels in Southeast Asian countries.¹³

Another disturbing trend is the constant promulgation of laws and regulations passed in the United States which directly or indirectly increase the cost of doing business. While many of these laws represent positive social progress, oftentimes the threat of liability and subsequent enforcement of these laws causes frequent litigation and punitive dam-

7. *Id.*

8. *Foreign Direct Investment in the United States, Hearings Before the Cong. Joint Econ. Comm.*, 102nd Cong., 2nd Sess., May 13, 1992. (hereinafter *Hearings*) (quoting Karl P. Sauvart, acting Asst. Dir., Research & Policy Analysis Branch, Transnational Corporations & Management Division, United Nations Dept. of Economic & Social Development). "Because of its absolute and relative importance to flows of trade, technology and training, FDI is today the most important form of international economic transaction." *Id.*

9. *See, e.g.*, GRAHAM & KRUGMAN, *supra* note 1, at 57-59.

10. *Hearings, supra* note 8, at 3 (arguing that Foreign Direct Investment is the principal source of technology transfer).

11. *See, e.g.*, GRAHAM & KRUGMAN, *supra* note 1, at 57-59; *cf.* TOLCHIN & TOLCHIN, *BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION*, 1988 (arguing the negative side of FDI in the United States, claiming that the Japanese are stealing American jobs and threatening national security).

12. HAZEL J. JOHNSON, *DISPELLING THE MYTH OF GLOBALIZATION: THE CASE FOR REGIONALIZATION* 38 (1991).

13. *Id.* at 32; *see also* THOMAS ANDERSSON, *THE ROLE OF JAPANESE FOREIGN DIRECT INVESTMENT IN THE 1990's* (The Industrial Institute for Economic and Social Reform Working Paper No. 329, 1992).

ages, which has a negative effect on businesses operating in the United States.¹⁴

The recent trend of economic protectionism, commonly referred to as "Japan bashing" because of its xenophobic characteristics,¹⁵ acts as another disincentive to Japanese direct investment.¹⁶ From a legal perspective, Japanese investors fear harassment in the form of meritless claims, or in a worst case scenario, punitive damages imposed by a prejudiced American jury.¹⁷ More fundamental than potential "legal costs", however, are the actual "business costs" of anti-Japanese rhetoric. Although there are legal loopholes for the Japanese corporation to escape liability, the social and political friction which results from a direct investment in the United States translates into real operating costs for breaking into the American market. The realistic Japanese investor understands the long-term effects of operating in the United States and therefore must anticipate future laws and regulations and execute strict compliance in order to overcome the inherent and sometimes unfair bias against Japanese business. These economic anti-Japanese biases stand in stark contrast to Southeast Asian nations which, not only welcome, but actively recruit Japanese direct investment.¹⁸

B. *The Changing World Economy*

The economic dynamics of the world are changing almost daily. The United States is no longer the only market attracting international

14. This Comment recognizes the social values of moderate business regulation and does not advocate the total elimination of environmental and employment discrimination laws. However, the negative effect of American laws on businesses operating in the United States is undeniable and mandates a closer look at the vast amount of regulations and the burdens placed on business.

15. This Comment does not discuss whether economically-based anti-Japanese rhetoric is an accurate reflection of the American market, or more a politically popular media creation. What is important for this discussion is the Japanese perception that Americans have an existing bias against Japanese business.

16. See, e.g., Gerald Pascual, *State Buy American Laws in a World of Liberal Trade*, 7 CONN. J. INT'L L. 311 (1992) (describing purpose and effect of "buy American" statutes, which impose restrictions on the purchase of foreign goods when goods are purchased by or for the enacting state).

17. See, e.g., Alfred W. Cortese Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity with Our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1 (1992). Similarly, American businesses often complain about the existing tort and product liability systems, which arguably prevent them from competing internationally because of the increased legal and insurance costs. See, e.g., Alfred W. Cortese & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us At Our Own Game?*, 9 J.L. & COMM. 167 (1990).

18. See Camellia Ngo, *Foreign Investment Promotion: Thailand as a Model for Economic Development in Vietnam*, 16 HASTINGS INT'L & COMP. L. REV. 67 (1992).

investors. Currently, many parts of the world are experiencing unprecedented economic opportunity; the fall of communism has opened up previously closed markets in Eastern Europe, and Southeast Asia is quickly moving from third world status to a world economic superpower.¹⁹ Southeast Asia today represents a formidable competitor for Japanese investment. The traditional American laws and regulations inhibiting the flow of business, which were overlooked for years because of the superiority of the American market, now demand additional scrutiny. Those laws and regulations, which investors may have tolerated as necessary legal hassles ten years ago, have evolved into substantial legal disincentives to foreign direct investment in the United States.

This Comment focuses on two of the major legal disincentives to foreign investors operating businesses in the United States: environmental law and labor and employment law. Since much has already been written on these laws from the perspective of American business,²⁰ this Comment focuses on the perspective of the foreign investor, and in particular the Japanese investor.²¹ The Comment begins with an analysis of recent trends of Southeast Asian regionalization and how Japan has redirected much of her investment focus toward the developing countries of Southeast Asia. These American legal disincentives and the economic regionalization of Southeast Asia have combined to deter valuable Japanese direct investment from the United States.

II. JAPAN'S REGIONALIZATION OF SOUTHEAST ASIA

There are increasing signs of economic regionalization throughout the world.²² The current world economy, often referred to as the "Triad," consists of the three major economic regions of the European Community (EC), the Americas, and Asia.²³ Although not formally involved with a regional trade group such as the EC or NAFTA, Japanese trade and investments over the past decade reveal strong trends of regionalization.²⁴

19. *Hearings*, *supra* note 8, at 13 (citing testimony of Edward J. Ray, Prof. of Econ. Ohio State Univ.).

20. See Cortese & Blaner, *Civil Justice Reform in America: A Question of Parity With Our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1, 5 (1992) (discussing the President's Council on Competitiveness: Agenda for Civil Justice Reform).

21. See, e.g., Fahim-Nader, *supra* note 6, at 7. Japan represents the largest single country source of foreign direct investment in the United States. *Id.*

22. See JOHNSON, *supra* note 12, at 1; see also Joseph L. Brand, *The New World Order of Regional Trading Blocks*, 8 AM. U. J. INT'L L. & POL'Y 155.

23. *Hearings*, *supra* note 8, at 9.

24. See JOHNSON, *supra* note 12, at 32.

A. *The United States as a Declining Japanese Market*

Japan views the United States, and possibly the entire Western Hemisphere, as a trading partner of declining importance.²⁵ Total investments from Japanese investors to acquire or establish an American business decreased 57 percent in 1992, following a 73 percent decrease in 1991.²⁶ This substantial decrease resulted in part to a sluggish Japanese economy, whose declining stock prices and reduced corporate profits restrained many Japanese corporations from investing overseas.²⁷

Of at least equal importance has been the sluggish American economy and the decreasing returns on Japanese investments in the United States, particularly in real estate.²⁸ In addition, the incentive to invest in the United States has decreased due to the constant political friction surrounding Japanese investments.²⁹ Japan's desire to establish a local presence is now confronted with an arguably realistic Japanese concern that they have been targeted as scapegoats for America's domestic problems.³⁰

Existing Japanese companies in the United States have responded by attempting to "Americanize" their products and operations.³¹ For certain Japanese products, such as high-tech consumer goods, the United States will remain the premier market due to the comparatively high wealth and the American consumer's willingness to spend. However, the Southeast Asian economy has exploded into the fastest growing economic region in the world and now represents a very real competitor for much of Japan's future FDI.³²

25. *Id.*

26. Fahim-Nader, *supra* note 6, at 113 and accompanying text.

27. *Id.*

28. *Id.* See also DeBare *supra* note 5; GRAHAM & KRUGMAN, *supra* note 1, at 28 ("Of all the various aspects of Foreign Direct Investment in the United States, the ownership of U.S. real estate has emerged as one of the most sensitive."); and see DENNIS LAURIE, *YANKEE SAMURAI: AMERICAN MANAGERS SPEAK OUT ABOUT WHAT IT'S LIKE TO WORK FOR JAPANESE COMPANIES IN THE U.S.*, 38 (1992) ("My God, came the cry of the 1980s, the Japanese are buying the United States! My God, comes the cry of the early 1990s, the Japanese are selling the United States!").

29. See ANDERSSON, *supra* note 13, at 17.

30. *Id.*; see also Donald D. Jackson, *Tilting the Playing Field: Japan's Unwarranted Advantage Under the Civil Rights Act of 1991 and Fortino v. Quasar Co.*, 28 TEX. INT'L L.J. 391 ("Tensions between the U.S. and Japan recently entered a new era after the demise of Soviet Communism eliminated traditional defense ties as an excuse to overlook Japanese 'sins'. Many now view Japan as a clear threat to United States business, and economic competition between the two nations has become a priority.").

31. See ANDERSSON, *supra* note 13, at 17.

32. *Id.* at 2. See also *Japanese Manufacturing; Asian Promise*, THE ECONOMIST, June

B. *The Growing Southeast Asian Market*

The Pacific Basin has surpassed the Atlantic Basin as the core of world economic relations.³³ This dramatic upsurge in Asian prosperity is largely due to Japanese assistance and investment, which for years has been the main supply of direct investment capital in Asia.³⁴ This increasing flow of Japanese capital and investment has strengthened Japan's economic grip on Southeast Asia, giving it the form, appearance, and effects of a regional trading bloc.³⁵

Japan's preference for Southeast Asia may be most apparent through its investment in developing countries such as Indonesia and Malaysia.³⁶ Japan increased its governmental loans to developing Asian countries by \$23 billion from 1985-88, most of it specifically targeted for the building of infrastructure, such as roads and ports, in order to accommodate Japanese investors with a more efficient production and marketing of goods within Southeast Asia.³⁷ The location and purposes of these government loans are tailored to the plans of Japanese industry, and are largely influenced by the particular country's division of labor.³⁸ For example, Indonesia has been targeted for the production of textiles, forest products and plastics, while loans to Malaysia are earmarked for the manufacture of sneakers, photocopiers, and television picture tubes.³⁹

The opening up of China's markets is another factor in Japan's trend toward Southeast Asian regionalization. Although the short-term future of China's economy remains a mystery, the potential size of the

12, 1993, at 74. Although Japanese investment decreased worldwide, Japanese foreign direct investment in Southeast Asia rose from 12 percent in 1990 to currently 19 percent of its total foreign direct investment. *Id.*

33. See ANDERSSON, *supra* note 13, at 26; see also JOHNSON, *supra* note 12, at 42-43 ("Massive shifting of world wealth and by 1989, Japan, Taiwan, China, South Korea, Singapore, Malaysia, Indonesia and Thailand controlled close to 1/3 of the official financial resources of the world.").

34. See ANDERSSON, *supra* note 13, at 26. In 1989, Japanese investment in Asia was five times that of American investment in the area. *Id.* See also JOHNSON, *supra* note 11, at 29.

35. See JOHNSON, *supra* note 12, at 29; see also John Burgess, *Trade Blocks: Friend or Foe? In Asia, if it looks like a Trade Bloc . . . Some say Japan and its Neighbors Have the Earmarks of One*, WASH. POST, June 2, 1991, at H1 ("Even though the countries of Asia don't call themselves a trade bloc, Japanese trade and investment in the region suggests otherwise."); and see *Japan ties up the Asian market*, THE ECONOMIST, April, 24, 1993, at 33.

36. See Julius, *supra* note 1, at 9-11; see also JOHNSON, *supra* note 12, at 30.

37. See JOHNSON, *supra* note 12, at 14.

38. *Id.*

39. *Id.*

Chinese consumer market of over 1.2 billion people commands the attention of Japanese investors.⁴⁰ Japan has already invested heavily in China's coastal provinces, the principal areas of Chinese economic development.⁴¹

Japan's investment in China also promotes Asian regionalization due to China's high level of interaction with Taiwan, Hong Kong, Macao, and Singapore.⁴² These countries, referred to as the "2-3 Chinas" illustrate the institutional and cultural similarity between the Southeast Asian nations.⁴³ Furthermore, this interaction should increase in 1997 when Hong Kong returns to Chinese sovereignty.⁴⁴

A number of economic and political factors will continue to pull Japanese direct investment to Southeast Asian countries through the 1990s.⁴⁵ Favorable economic policies and conditions, including open trade, low taxes, and high growth potential, provide a profitable environment for investment.⁴⁶ In addition, the political policies of these countries make economic development a national priority and thus welcome Japanese investment.⁴⁷ Finally, the similar institutional and cultural conditions of Southeast Asia promote a work ethic easily managed and motivated by the Japanese.⁴⁸

Two examples of this welcome attitude towards Japanese direct investment are Vietnam and Thailand.⁴⁹ Vietnam is widely recognized as the "next Asian tiger" due to its abundant and inexpensive labor force and its large energy reserves.⁵⁰ Vietnam correspondingly recog-

40. See Murray Weidenbaum, *Greater China: A New Economic Colossus?*, WASH. QUARTERLY, at 71 (Autumn 1993) ("It is no exaggeration to state that greater China is a potential economic superpower.").

41. *Id.* at 72; see also Burgess, *supra* note 35 ("Tens of thousands of people in Singapore, Thailand and China's coastal cities report daily to Japanese owned factories.").

42. See Weidenbaum, *supra* note 40, at 71

43. *Id.*

44. See, e.g., Matt Miller, *China pours cash into Hong Kong—Down payment on future of city it takes over in '97*, SAN DIEGO TRIB., July 25, 1993, at A-1.

45. See ANDERSSON, *supra* note 13, at 8. In the 1980s, the drastic increase of Japanese direct investment in Southeast Asia as shown through stock relative to GDP: Thailand from 1.2 to 5.1 percent; Hong Kong from 4.2 to 17.3 percent; Singapore from 7.6 to 22.2 percent; and Malaysia from 2.4 to 6.7 percent. *Id.*

46. *Id.* at 16.

47. *Id.* See also ELLIOTT J. HAHN, *JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM* 113-29, (1984). Heavy cooperation between government and big business is a trademark of "Japan Inc.," and represents a fundamental difference between Japan and the United States.

48. *Id.*

49. See Ngo, *supra* note 18, at 67.

50. *Id.*

nized that foreign investment is an efficient and necessary vehicle for reaching economic prosperity, and to this end passed the Law on Foreign Investment (FIL) in 1987.⁵¹ The FIL represents one of the most liberal foreign investment codes of any developing nation, although it still requires government approval prior to proposed FDI activity.⁵²

Thailand's Investment Promotion Act is an even more liberal foreign investment code.⁵³ The Thai Act requires no prior government approval of foreign investment and encourages all such activity to begin immediately.⁵⁴ This Act, passed in 1977, is responsible for the massive influx of FDI into Thailand during the 1980s, which resulted in double digit annual economic growth rates.⁵⁵

C. *The EC as an Alternative*

During the recent slowdown of Japanese direct investment in the United States, the EC has evolved into another alternative for Japanese investors.⁵⁶ The harmonization of trade laws, German reunification, and the opening up of eastern European economies has resulted in a European consumer market with a potentially greater demand than the United States.⁵⁷ Furthermore, the establishment of a single common market makes the EC increasingly attractive to Japanese investors.⁵⁸ In addition, similar to the nations of Southeast Asia, the majority of EC member nations welcome FDI by offering investment incentives.⁵⁹

D. *Summary*

The recent trend of economic regionalization throughout the world, especially the regionalization of Southeast Asia, has begun to redirect Japanese investment focus. The recent decrease of Japanese direct investment in the United States, combined with the general decrease of American economic influence worldwide, mandates an examination

51. *Id.*

52. *Id.* at 68.

53. *Id.*

54. *Id.*

55. *Id.* at 67. *See also* ANDERSSON *supra* note 13, at 9 (The influx of FDI into Thailand included a 325 percent increase in Japanese direct investment from 1979-89).

56. *See* ANDERSSON, *supra* note 13, at 17-18 (Of total Japanese direct investment in Europe from 1951-1989, over two-thirds occurred after 1985).

57. *See* JOHNSON, *supra* note 12, at 31.

58. *See* ANDERSSON, *supra* note 13, at 18-19.

59. *Id.* *See also* Julius *supra* note 1, at 11.

of the legal disincentives to foreign direct investment in the United States.

III. ENVIRONMENTAL LAW

A threshold legal issue confronting the Japanese investor is the American environmental movement. The massive increase in environmental legislation, combined with current social and political views, has placed environmental concerns at the forefront of corporate America.⁶⁰ The cost of complying with complex, constantly changing laws and regulations is a heavy burden on businesses operating in the United States.⁶¹ These costs, which are a major consideration to the potential Japanese investor, act as a legal and economic disincentive to foreign direct investment in the United States.⁶² An initial compliance cost for the potential Japanese investor involves understanding the relevant laws and regulations applicable to the investor's business. Although a comprehensive description is beyond the scope of this Comment, a brief overview of the main federal environmental regulations and their applicability to the foreign investor is given below.⁶³

A. *The Clean Air Act*

The Clean Air Act regulates the discharge of stationary and moving sources of air pollution.⁶⁴ One of the first major pieces of environmental legislation passed in the United States, the Clean Air Act presents a complex set of regulations to the foreign investor.⁶⁵ The Japanese investor, whether investing in a new or existing business, should be

60. John Smith, *Clean Up Costs*, BUS. NEWS, September 25, 1991, at 20 ("A CEO of a Fortune 50 company calls the environment 'the single most important business issue facing corporate America in the 1990's.'").

61. *Id.* A 1991 Price Waterhouse survey classifies compliance with environmental regulations as a "staggering" cost to corporate America. *Id.*

62. See Scott H. Peters, *A Guide for Foreign Investors to Environmental Laws in the United States*, 28 SAN DIEGO L. REV. 897 (1991). American environmental regulations are just one of the legal disincentives to foreign direct investment and the existence of numerous scholarly writings regarding American environmental regulations precludes an extensive discussion. *Id.*

63. See *id.* for a comprehensive discussion of the relevant environmental laws and regulations for the potential foreign investor.

64. 42 U.S.C.A. §§ 7401-7642 (West Supp. 1993).

65. See Peters, *supra* note 62, at 903 (citing Delaware Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256, 260 (3rd Cir. 1991)) ("The arcane knowledge essential to resolve . . . disputes [over appropriate air pollution control measures under the Act] is foreign to non-experts, including judges.'").

especially aware of certain "nonattainment areas"⁶⁶ which may impose abnormally strict controls on a business' emission standards.⁶⁷ In addition, the foreign investor must thoroughly investigate whether the potential investment involves hazardous air pollutants, which are strictly regulated under the Clean Air Act.⁶⁸ Although the applicability of the Clean Air Act to foreign investors depends largely on the type and location of the investment, Japanese investors must factor in compliance with the Clean Air Act when estimating his operating costs.⁶⁹

B. *Federal Water Pollution and Control Act*

The Federal Water Pollution and Control Act (Clean Water Act) regulates discharges of pollutants into the waters of the United States.⁷⁰ Enforcement of the Clean Water Act is ensured by the National Pollutant Discharge Elimination System (NPDES), from whom permits must be obtained.⁷¹ The Japanese investor must determine whether the potential investment enterprise discharges toxic pollutants into American waters,⁷² and should also investigate the location's "point sources."⁷³ In addition, the potential investor should investigate whether an existing target business is in total compliance with the Clean Water Act requirements.

C. *The Resource Conservation and Recovery Act*

The Resource Conservation and Recovery Act (RCRA) regulates the generation, storage, transportation, treatment, and disposal of hazardous waste,⁷⁴ and requires the owner or operator of a facility engaging

66. *Id.* Nonattainment areas are specific locations which do not meet the National Ambient Air Quality Standards (NAAQS) prescribed by the Clean Air Act. *Id.*

67. *Id.* at 903, n.56.

68. *Id.* at 903, n.58 (citing 42 U.S.C. § 7412 (West Supp. 1993) (listing of hazardous air pollutants)).

69. *Id.* at 904 (citing 42 U.S.C. § 7413 (West Supp. 1993) (authorizing monetary fines, imprisonment, or both on "any responsible corporate officer" for failure to comply with the Clean Air Act)).

70. 33 U.S.C.A. §§ 1251-1387 (West Supp. 1993).

71. *See* Peters, *supra* note 62, at 905, n.73 (citing 40 C.F.R. §§ 121-125 (1991) (NPDES regulations)).

72. Peters, *supra* note 62, at 905, n.71 (citing 33 U.S.C. § 1317 (1988)). Discharges of toxic pollutants are regulated under stricter standards. *Id.*

73. Peters, *supra* note 62, at 904, n.69 (citing 33 U.S.C. § 1362(14) ("A 'point source' is any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged.")).

74. *See* Peters, *supra* note 62, at 906 ("Hazardous waste is certain listed waste and other waste which is ignitable, corrosive, reactive, or toxic.").

in *any* of these activities to comply with statutory requirements.⁷⁵ The Japanese investor must initially determine whether the proposed investment involves hazardous waste, and then research the business' previous compliance with RCRA regulations. The RCRA transportation provisions pose a particular source of confusion to the investor because individual states impose different standards on the movement of hazardous waste, thus requiring manifests for passage through particular states.⁷⁶

D. The Comprehensive Environmental Response, Compensation and Liability Act

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund") addresses the cleanup of waste from previous activities.⁷⁷ CERCLA is especially important to foreign investors due to its broad scope of liability and the potential liability for cleanup costs.⁷⁸ In general, American courts have liberally assigned liability for CERCLA cleanup costs.⁷⁹

CERCLA imposes strict liability,⁸⁰ and more importantly for the foreign investor, this liability may be applied retroactively.⁸¹ There is no minimum standard for a hazardous release, and therefore any traceable amount of a hazardous substance is sufficient to support liability.⁸² Courts have extended the already broad scope of liability

75. 42 U.S.C.A. §§ 6901-6991i (West Supp. 1993).

76. Peters, *supra* note 62, at 906.

77. 42 U.S.C.A. §§ 9601-9675 (West Supp. 1993).

78. See Peters, *supra* note 62, at 907-08. "These cleanup costs may include costs of monitoring, investigation, laboratory fees, and fees of contractors and consultants." *Id.* at 908, n.103.

79. See, e.g., *Witco Corporation v. Beekhuijs*, 822 F.Supp. 1084 (D. Del. 1993); see also *U.S. v. Reilly Tar & Chemical Corporation*, 546 F.Supp. 1100, 1112 (D. Minn. 1982) ("CERCLA should be given a broad and liberal construction.").

80. 42 U.S.C.A. § 9601(32) (West Supp. 1993); see *U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993) ("What is not required is that the government show that a specific defendant's waste caused incurrence of clean-up costs."); see also *U.S. v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) ("[A]pplying liability without regard to fault, knowledge, or intent.").

81. 42 U.S.C.A. § 9607(a) (West Supp. 1993); see also Peters, *supra* note 62, at 910. The statute classifies those statutorily responsible into three general categories: (1) current and post owners or operators of facilities from which a hazardous substance has been released; (2) those who arranged for disposal of hazardous substances at such facilities; (3) and those who transported the hazardous substances to such facilities. *Id.* at 910-11.

82. See *Alcan Aluminum*, 990 F.2d at 720; see also Peters, *supra* note 62, at 908, (citing *Eagle-Pitcher Indus. v. EPA*, 759 F.2d 922, 927-31 (D.C. Cir. 1985)).

under CERCLA to pierce the corporate veil and reach the shareholders.⁸³ This potentially extends liability to a foreign parent corporation for any environmental responsibilities of its American subsidiary. Liability under CERCLA is joint and several, and unless the defendant corporation can show a reasonable basis for apportionment, one "deep pocketed" corporation may be held liable for all cleanup costs.⁸⁴

The crippling effects that Superfund liability imposes on a business has sparked a recent movement to remove retroactive and joint and several liability.⁸⁵ This movement focuses on channelling money towards the actual cleanup of toxic waste sites, rather than towards the legal and transactional costs inherent in retroactive and joint and several liability.⁸⁶ For American businesses, this represents a positive response to their consistent complaints that the Superfund program has weakened their ability to compete internationally. However, for the Japanese investor's estimation of the long-term business costs of operating in the United States, Superfund continues to threaten investments with potentially business-crippling liability.

E. Costs of Compliance to the Foreign Investor

The complex set of American environmental laws and regulations is a significant factor for the Japanese investor in calculating the costs of doing business in the United States. Notwithstanding the cost of

83. See *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993); see also *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (holding that an owning stockholder who was managing the corporation was liable, and even suggested that active management may not be necessary to trigger CERCLA liability).

84. See *Chesapeake and Potomac Telephone Co. of Virginia v. Peck Iron & Metal Co.*, 814 F.Supp. 1269, 1278 (E.D. Va. 1992), (citing *Monsanto*, 858 F.2d at 171 n.22) ("[E]quitable factors are not pertinent to the question of joint and several liability which focuses principally on the divisibility among responsible parties of the harm to the environment.").

85. See *Environmental Protection Agency v. Sequa Corporation*, 3 F.3d 889 (5th Cir. 1993) (holding that joint and several liability cannot be imposed if there is a reasonable way of apportioning damages); see also *A Clean Shot at Superfund*, Bus. Ins., Oct. 18, 1993, at 8. The U.S. Treasury Department is calling for a radical overhaul of the Superfund liability scheme by eliminating retroactive and joint and several liability for cleanup costs. *Id.* And see *EPA Administrator calls for Sweeping Reform of Superfund Law*, PR Newswire, November 8, 1993 (calling for reform of Superfund law which needs "not just cosmetic changes, but a fundamental change.").

86. *Superfund Slammed in Study by I.I.I.*, NAT. UNDERWRITER, February 1, 1993 at 13.

actual liability,⁸⁷ the mere threat of litigation and cost of complying with the mass of constantly changing regulations serves as a strong disincentive to foreign investors.⁸⁸ In particular, the unique American "three-tier" legislative structure forces the potential investor to conduct a time-consuming investigation into the environmental laws of the federal government (EPA), the individual state, and the specific community or municipality of the potential investment.

The Japanese investor should first investigate all federal laws and regulations relevant to the proposed investment.⁸⁹ The potential investor must also research relevant state law, as many states impose more stringent regulations than does the EPA.⁹⁰ In addition, environmental laws and regulations differ between states, an issue particularly important to the transportation of "hazardous materials."⁹¹ Finally, the Japanese investor must take notice of the laws and regulations, particularly zoning, of each community or municipality where he might locate his investment.⁹²

The Japanese investor must make a complete environmental audit of the proposed site or location.⁹³ This audit should include inquiries to ensure current compliance with all existing laws and regulations.⁹⁴ The potential investor should investigate past owners of the property to ensure their compliance with environmental regulations in order to prevent retroactive liability.⁹⁵ Finally, the investor should investigate all adjoining sites to prevent liability for environmental violations caused by a neighboring site.⁹⁶

87. See Peters, *supra* note 62, at 902 (citing *Sterling v. Velsicol Chem. Corp.*, 647 F.Supp. 303 (W.D. Tenn. 1986)). The court awarded \$7.5 million in punitive damages for hazardous waste disposal. *Id.*

88. *Id.* at 930.

89. See *id.* at 930-32.

90. See Reed D. Rubinstein & Timothy M. Wittebort, *Environmental Law and Foreign Investment in the United States and in the EEC: A Practitioner's Guide*, 69 MICH. B.J. 642 (1990).

91. See Peters, *supra* note 62, at 906. For example, classification of material as "hazardous waste" in a particular state requires a manifest to transport through that state, regardless of whether the state where the shipment originated classified it as "hazardous waste." *Id.*

92. A vital factor in determining where to locate a business in the United States is whether the municipality and its local enforcement agencies hold a cooperative or an adversarial attitude between environmental and business concerns.

93. Janie L. Rosman, *Worried Buyers, Wary Lenders Hunting Out Ugly Environmental Surprises*, WESTCHESTER COUNTY BUS. J., January 18, 1993, at 11.

94. See Peters, *supra* note 62, at 932.

95. See *id.* at 930-32.

96. *Id.* at 931.

Once the investigation is complete, the potential investor must still factor in compliance with these regulations. Investment in an existing business may incur substantial costs to update technology in order to maintain a proactive stance towards environmental compliance. If the investment is made into a new business or a corporate relocation from another country, the Japanese investor faces massive training costs in order to emphasize absolute compliance with these complex environmental laws and regulations.

IV. LABOR AND EMPLOYMENT LAW

A second threshold issue confronting the Japanese investor is the recent explosion of American employment discrimination law. Employers in the United States are subjected to a barrage of legislation regulating the employer/employee relationship, which promotes increased litigation over alleged employer discrimination. The resulting surge in litigation imposes increasing costs on employers, and acts as a significant disincentive to foreign direct investment in the United States.

The constantly changing employment laws and regulations warrant a brief description of the major pieces of legislation relevant to the foreign investor. Title VII of the Civil Rights Act of 1964 (Title VII) forbids employment decisions to be made on the basis of race, color, religion, sex, or national origin.⁹⁷ The Age Discrimination in Employment Act (ADEA) prohibits employers from making employment decisions on the basis of age.⁹⁸ The American Disabilities Act (ADA) protects persons with disabilities from employment discrimination.⁹⁹

The Civil Rights Act of 1991 ('91 Act), which amended both Title VII and the ADEA in order to strengthen federal employment discrimination law, is especially relevant to the foreign investor.¹⁰⁰ By allowing compensatory *and* punitive damages for intentional discrimi-

97. 42 U.S.C.A. §§ 2000e-2000e(17) (West Supp. 1993).

98. 29 U.S.C.A. §§ 623-634 (West Supp. 1993). The ADEA prohibits employers from refusing to hire, discharging, or otherwise discriminating against, individuals 40 years old or older with respect to compensation, terms, conditions or privileges of employment because of the individual's age. *Id.*

99. 42 U.S.C.A. §§ 12112-12117 (West Supp. 1993). The ADA prohibits private employers from discriminating against disabled job applicants and requires the employer to make a "reasonable accommodation." *Id.*

100. 42 U.S.C.A. §§ 2000e-2000-e-2 (West Supp. 1993); *see also* Jeffrey A. Blevins & Gregory J. Schroedter, *The Civil Rights Act of 1991: Congress Revamps Employment Discrimination Law and Policy*, 80 ILL. B.J. 336.

nation, the '91 Act exposes a Japanese corporation to increased liability at the discretion of an unpredictable jury.¹⁰¹ The '91 Act also expressly provides for disparate impact claims of employment discrimination,¹⁰² although courts appear reluctant to apply this disparate impact theory to foreign-owned corporations.¹⁰³

A. *Discrimination on Basis of Race or National Origin*

American employees have brought numerous claims against foreign-owned corporations for employment discrimination on the basis of race or national origin.¹⁰⁴ The bulk of this litigation revolves around the conflict between Title VII¹⁰⁵ and the particular Friendship, Commerce and Navigation Treaty (FCN) of the foreign corporation's home country.¹⁰⁶ Specifically, the employer choice provision in the U.S.—Japan

101. Cf. 42 U.S.C.A. § 2000e-2(102)(b)(3) (West Supp. 1993). Recognizing the substantial increase in potential liability, the '91 Act imposes caps on recoverable damages based on the size of the employer's workforce: 15-100 employees capped at \$50,000; 101-200 employees capped at \$100,000; 201-500 employees capped at \$200,000; 500 + employees capped at \$300,000. *Id.*

102. 42 U.S.C.A. 2000e-2(k) (West Supp. 1993). The '91 Act expressly overturned *Wards Cove Packing Co. v. Atonio* 490 U.S. 642 (1989), which had severely limited an employee's ability to bring disparate impact claims. *Id.*

103. See *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991); see also *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3rd Cir. 1989).

104. See, e.g., *Adames v. Mitsubishi Bank, Ltd.*, 751 F.Supp. 1548 (E.D.N.Y. 1990); *Fortino*, 950 F.2d at 393; *MacNamara*, 863 F.2d at 1140-41; *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984); *Sumitomo Shoji America Inc. v. Avagliano*, 457 U.S. 176 (1982); *Speiss v. C. Itoh & Company (America) Inc.*, 643 F.2d 353 (5th Cir. 1981).

105. 42 U.S.C. §§ 2000e-2000e(17) (1988) (Title VII forbids employment discrimination on the basis of race, color, religion, sex, or national origin. An exception is granted to the extent that the characteristics relied upon can be shown to be a "bona fide occupational qualification" (bfoq). See also *Goyette v. DCA Advertising*, 1993 WL 334712 (holding that a Japanese subsidiary failed to satisfy the bfoq requirements based on a failure to show that the position required: (1) Japanese linguistic or cultural skills, (2) knowledge of Japanese products, markets, customs and business practices; (3) familiarity with the parent enterprise in Japan; (4) acceptability to those with whom the company does business).

106. See Gerald B. Silver, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Foreign Companies to Hire Executives of Their Choice*, 57 *FORDHAM L. REV.* 765 (1989). FCN: Treaties were passed shortly after World War II with the intent of encouraging foreign investment by ensuring fair and equal treatment of foreign corporations. *Id.* at 765.

FCN Treaty,¹⁰⁷ which gives Japanese corporations carte blanche in hiring "executives, managers, and any other specialist," conflicts with Title VII's prohibition of employment decisions based on race or national origin.

Courts have adopted conflicting views on the applicability of Title VII to foreign-owned corporations, largely based on the interpretation of the intent and weight of the existing FCN Treaty.¹⁰⁸ For instance, a literal reading and broad interpretation of the employer choice provision in the U.S.—Japan FCN Treaty gives a Japanese-owned business the ability to hire executive personnel based on whatever criteria they choose, with total immunity from Title VII.¹⁰⁹

However, the trend is toward a more restrictive interpretation of the FCN treaty, which argues that the employer choice provision gives foreign corporations the authority to make employment decisions on the basis of *citizenship*, and is therefore distinguishable from Title VII's prohibition of employment discrimination based on *national origin*.¹¹⁰ It is unclear under this limited interpretation exactly how much, if any, Title VII immunity an FCN treaty confers on a foreign corporation.¹¹¹

107. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION, April 2, 1953, United States—Japan, art. VIII, 4 U.S.T. 2063, T.I.A.S. No. 2864 (hereinafter Treaty) ("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.").

108. See Silver, *supra* note 106, at 771-74.

109. See Speiss, 643 F.2d at 353 (basing its broad interpretation on argument that subjecting foreign corporations to Title VII liability would negatively affect foreign investment). See also Pauling C. Reich, *After Avagliano v. Sumitomo Shoji America, Inc.: What Standard of Title VII will Apply to Foreign-Owned U.S. Subsidiaries and Branches?*, 10 B.C. THIRD WORLD L.J. 259 (1990), (quoting the Japanese External Trade Organization's amicus brief in *Avagliano*) ("To limit the right [under Title VII] of Japanese investors to control and manage their enterprises in the United States . . . will tend to discourage such mutually beneficial investment.").

110. See *Fortino*, 950 F.2d at 392-93 ("[A contrary holding would have] Title VII taking back from the Japanese with one hand what the treaty had given them with the other."). See also *MacNamara* 863 F.2d at 1144. And *Wickes*, 745 F.2d at 366-67.

111. See *Fortino*, 950 F.2d at 393 (holding expressly refused to articulate how much immunity from Title VII an FCN treaty confers on the foreign corporation); cf. *MacNamara* 863 F.2d at 1140-41 ("We agree . . . that Article VIII(1) goes beyond securing the right to be treated the same as domestic companies and that its purpose, in part, is to assure foreign corporations that they may have their business in the host country managed by their own nationals if they so desire. We also agree . . . that Article VIII(1) was not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically or prag-

The confusion may be magnified for the Japanese investor because of the expansive language of the U.S.—Japan FCN treaty: “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*.”¹¹² The phrase “other specialists of their choice” varies significantly depending on the interpretation and is a fertile ground for litigation.¹¹³

The distinction between citizenship and national origin presents difficulties when dealing with a homogeneous population such as Japan’s, where citizenship and race are essentially synonymous.¹¹⁴ For instance, a Japanese company operating under the U.S.—Japan FCN could arguably hire managers and executives of only Japanese citizenship. Due to the homogeneous population, this will invariably appear statistically as disproportionate effects on a hiring practice based on national origin. Thus, the U.S.—Japan employer choice provision, which gives the right to hire executives “of their choice” will almost always show disproportionate effects on their management hirings.¹¹⁵ Courts have therefore held that FCN treaties and disparate impact claims are irreconcilable, and foreign corporations are largely exempt from disparate impact claims under Title VII.¹¹⁶

The Japanese investor should be aware, however, that the Civil Rights Act of 1991 expressly recognizes disparate impact claims.¹¹⁷

matically conflict with the right to select one’s own nationals as managers *because of their citizenship*.”) (emphasis added).

112. See TREATY, *supra* note 107 (emphasis added).

113. See, e.g., *Adames*, 751 F.Supp. 1548; *Fortino*, 950 F.2d 389; *MacNamara*, 863 F.2d 1135; *Wickes*, 745 F.2d 363; *Sumitomo*, 457 U.S. 176; *Speiss*, 643 F.2d 353.

114. See Angelo A. Paparelli et al, *The Quasar Case: Hidden Problems of Employment, Immigration, and Tax Law*, 26 INT’L LAW. 1037 (1991). See also, LAURIE *supra* note 28, at 252-53.

115. See *MacNamara* 863 F.2d at 1140 (“In establishing this kind of disparate impact liability, parties generally rely exclusively on statistical evidence of disproportionate effect.”); see also *Adames*, 751 F.Supp. 1548.

116. See *MacNamara*, 863 F.2d at 1148; cf. Steven Mark Tapper, *Building on MacNamara v. Korean Air Lines: Extending Title Disparate Impact Liability to Foreign Employers Operating Under Treaties of Friendship, Commerce and Navigation*, 24 VAND. J. TRANSNAT’L L. 757 (1991).

117. See, e.g., 42 U.S.C.A. § 2000e-2000e-2 (West Supp. 1993). Disparate impact theory, which originated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is expressly revived under the Civil Rights Act of 1991. This means that a challenged employment criteria or condition, which adversely affects members of a protected class disproportionately, can impose Title VII liability on an employer even though the employer acted without discriminatory intent. *Id.*

Because of their homogeneous population and familial style of management,¹¹⁸ application of disparate impact to Japanese corporations operating in the United States would almost certainly result in massive claims for alleged discrimination on the basis of national origin. Although the decisions excluding Japanese corporations from disparate impact claims still stand, the future is not as definite after the passage of the '91 Act.

Another source of potential litigation and cost to the foreign investor involves the distinction courts have made regarding American subsidiaries of foreign corporations.¹¹⁹ The general rule is that the employer choice provision and its rights of protection from Title VII liability do not extend to wholly-owned subsidiaries incorporated in the United States.¹²⁰

In *Fortino v. Quasar*, the 7th Circuit carved out an exception, holding that an American subsidiary, although not technically a foreign corporation, was exempt from Title VII liability based on a showing that its discriminatory conduct was dictated by the parent corporation.¹²¹ This opinion has been criticized for giving too much latitude to Japanese-owned corporations operating in the United States, and extending the unequal "playing field" between Japanese and American businesses.¹²² To avoid Title VII liability under this reasoning, in cases where FCN treaties exist, an unincorporated subsidiary must only show that its foreign parent directed the alleged discrimination in favor of its own citizens.¹²³

However, the trend appears to be toward expanded application of Title VII to foreign corporations.¹²⁴ In addition, the Japanese investor

118. See, e.g., MARK ZIMMERMAN, *HOW TO DO BUSINESS WITH THE JAPANESE*, 64-75 (1985).

119. See *Avagliano*, 457 U.S. at 176. See also *Quasar*, 950 F.2d 389.

120. See *Avagliano*, 457 U.S. at 176 (holding Title VII employment discrimination laws applicable to Sumitomo, an American subsidiary, by focusing on fact that Sumitomo was incorporated under the laws of New York, and therefore was not covered under the plain meaning of the U.S.—Japan FCN Treaty).

121. 950 F.2d at 393 ("A judgment that forbids Quasar to give preferential treatment to the expatriate executives that its parent sends would have the same effect on the parent as it would have if it ran directly against the parent: it would prevent Matsushita from sending its own executives to manage Quasar in preference to employing American citizens.").

122. See Andrea Crowley, *American Subsidiaries of Foreign Corporations Immune from Title VII: Fortino v. Quasar Co.*, 34 B.C. L. REV. 422 (1993).

123. *Id.* at 429.

124. See Jackson, *supra* note 30, at 403 ("Exemption for Japanese companies

should be aware of the perception that Japanese corporations have been given preferential treatment in the past, and the corresponding trend to hold them to stricter legal standards. This awareness is directly related to the Japanese investor's understanding of the more broadly based and long-term business costs of successfully entering the United States market.

B. *Discrimination on the Basis of Sex*

Liability for employment discrimination on the basis of sex represents a major source of potential liability for the Japanese investor.¹²⁵ Currently in Japan, women are subject to employment discrimination at every level.¹²⁶ Any significant Japanese investment in the United States will expose the Japanese company to an aspect of business which it has rarely confronted: women in management.¹²⁷

Strong arguments exist for the applicability of Title VII's prohibition against gender discrimination to foreign companies operating in the United States.¹²⁸ The employer choice provision argument for Title VII immunity,¹²⁹ if applicable at all, stands on shaky ground.¹³⁰ In addition, a Japanese company's refusal to hire women for managerial positions cannot be justified under the bona fide occupational quali-

from Title VII's racial and national origin anti-discrimination provisions makes no sense for Japan of the U.S.''); see also Dana Marie Crom, *Clash of the Cultures: U.S.—Japan Treaty of Friendship, Title VII, and Women in Management*, 3 *TRANSNAT'L L.* 337 (1990).

125. See, e.g., Ellen M. Marin, Gerald D. Skonig & Patricia K. Gillette, *Recent Developments in Sexual Discrimination*, 441 *PLI/Lit* 647 (1992). See also LAURIE, *supra* note 28, at 269-70.

126. See William H. Lash III, *Unwelcome Imports: Racism, Sexism, and Foreign Investment*, 13 *MICH. J. INT'L L.* 1, 21 (1991). Japanese female college graduates are often limited to employment as "office ladies," whose duties are to greet visitors and tidy desks. *Id.* at 21. See also David L. Gregory, Book Review, 44 *MD. L. REV.* 926 (1985) (reviewing William B. Gould, *JAPAN'S RESHAPING OF AMERICAN LABOR LAW* (1984)).

127. See Crom, *supra* note 124, at 340. See also Lash, *supra* note 124, at 24 ("Given the level, nature and amount of discrimination present in Japan, it seems likely that Japanese firms would export sexist and racist attitudes when they invest in the United States.").

128. See Crom, *supra* note 124, at 341.

129. See *supra* part III.A. discussing Title VII conflict with the U.S.—Japan FCN treaty.

130. See David Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, C779 *ALI-ABA* 639, 679-80 (1992) ("Federal courts have interpreted these [employer choice] provisions to give foreign companies the right to discriminate in favor of their own nationals. The treaties do not confer the right to discriminate on any other basis.").

fication exception (BFOQ), which would require a showing that sex discrimination is essential for their business and that as a class, women are unable to perform the job efficiently.¹³¹ Most importantly for the market-hungry Japanese investor, any overt sex discrimination would be contrary to American public policies against sex discrimination and in favor of a diversified workplace.¹³² The Japanese investor faces an additional cost in retraining Japanese managers stationed in the United States that sexist attitudes and behavior are not culturally acceptable, and may be grounds for a sex discrimination lawsuit against the individual manager and the employer.

C. *Discrimination on the Basis of Age*

The Age Discrimination in Employment Act (ADEA) prohibits employers of over twenty individuals from basing on age employment decisions concerning individuals forty years old or older.¹³³ The express purpose of the ADEA was to "promote employment of older persons based on their ability rather than age."¹³⁴

In order to prove a prima facie case of age discrimination, the complainant must establish:

1. membership in the protected class;
2. qualification for the position;
3. applicant was rejected or otherwise discriminated against;
4. the position was filled by younger person.¹³⁵

The burden then shifts to the employer, who must present a legitimate non-discriminatory reason for the employment decision, and then back to the plaintiff to show that defendant's reason(s) are a mere pretext for age discrimination.¹³⁶

131. See *Crom*, *supra* note 124, at 350.

132. *Id.*

133. 29 U.S.C.A. § 621 (West Supp. 1993) ("It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.").

134. See Ira A. Turret, *Age Discrimination in Employment: Recent Trends and Developments*, 820 PLI/CORP. 349 (1993) (citing 29 U.S.C. § 621(a)(1) and (b)). See also *EEOC v. Wyoming*, 460 U.S. 226 (1983) (U.S. Supreme Court noting that the ADEA was prompted by Congressional concern that older workers were discriminated in employment based on inaccurate or stigmatizing stereotypes).

135. See Michael J. Crisafulli, *Age Discrimination in Employment*, 623 PLI/COMM 349 (1992).

136. *Id.* at 354. Although a showing of disparate impact is sufficient to make a prima facie case of age discrimination, it is rarely used because most statistical disparities of age can usually be explained by factors other than age discrimination. *Id.*

Japanese investors must be aware of the recent trends in American business and law which have made age discrimination a frequent source of litigation.¹³⁷ For example, with the exception of a narrow bona fide occupational qualification defense, the ADEA prohibits almost all mandatory retirement practices.¹³⁸ The foreign investor should also be aware that the broad ADEA definition of employment practices includes hiring, promotions, discharges, layoffs, demotions, transfers, and failure to rehire.¹³⁹ The ADEA also prohibits age discrimination with regard to sick leave, vacation benefits, insurance benefits, pension and other retirement benefits, severance pay, and access to training programs.¹⁴⁰

D. *Discrimination on the Basis of Disability*

The American with Disabilities Act (ADA), which became effective in 1992, prohibits private employers from discriminating against job applicants and employees who are disabled with respect to any term, condition, or privilege of their employment.¹⁴¹ The ADA represents the broadest expansion of civil rights since the enactment of the Civil Rights Act of 1964, and marks a strong American trend to eliminate the stigmatizing of individuals with disabilities.¹⁴² This codification of the broader societal trend represents another disincentive to the Japanese investor.

What sets the ADA regulations apart from other employment anti-discrimination legislation is its requirement that employers make "reasonable accommodations" for the applicant's or employee's disability,

137. See Turrett, *supra* note 134, at 349.

138. See Crisafulli, *supra* note 135, at 351.

139. *Id.*

140. *Id.* at 354. Reasonable factors upheld in employment decisions involving age include business cutbacks, lack of qualifications, and poor health. Contrast with factors rejected as a defense: corporate image and the greater cost of employing older workers. *Id.*

141. Francis X. Dee, *Employment Litigation in the 90's: The Impact of the 1990 American Disabilities Act and the Civil Rights Act of 1991*, 455 PLI/LIT. 725 (1993) ("An employer may not discriminate against any 'qualified individual with a disability' because of such individual's disability with respect to job application procedures, the hiring or discharge of employees, employee compensation, advancement, job training and other terms, conditions, and privileges of employment.").

142. See Frank C. Morris, Jr., *Americans With Disabilities Act: Overview of the Employment Provisions*, C780 ALI-ABA 185 (1993) ("Every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.") (quoting President Bush).

as long as it would not result in "undue hardship" on the business.¹⁴³ This requirement to account for the person's disability by making reasonable accommodations places an extremely heavy burden on the employer.¹⁴⁴ Unlike discrimination on the basis of citizenship, which is arguably shielded by the FCN treaty,¹⁴⁵ there is no apparent protection for a Japanese employer from potential liability under the ADA. Similar to American corporations, Japanese investors are faced with three major sources of confusion and cost under the ADA.¹⁴⁶

First, the employer must determine what constitutes a disability.¹⁴⁷ The broad definition of disability includes a physical or mental impairment¹⁴⁸ that substantially limits one or more of the major life activities, a record of such impairment, or being regarded as having such an impairment. Whether an impairment is substantially limiting is evaluated on a case-by-case analysis involving the following factors: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long-term impact, or the expected long-term impact of the impairment.¹⁴⁹

The broad definition of disability may surprise and discourage many Japanese investors. For example, the ADA classifies a recovering drug addict or alcoholic, who has completed some form of rehabilitation, as disabled and therefore entitled to the benefits of this Act.¹⁵⁰ In addition, the ADA expressly extends coverage to persons with AIDS, the AIDS virus, and even those perceived as having AIDS.¹⁵¹

143. See *Dee*, *supra* note 141, at 725-26. See also Lisa Lavelle, *The Duty to Accommodate: Will Title I of the American with Disabilities Act Emancipate Individuals with Disabilities only to Disable Small Businesses?*, 66 NOTRE DAME L. REV. 1135 (1991).

144. See Thomas H. Barnard, *The American with Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229 (1990). See also Morris, *supra* note 142, at 213. During the period July 26, 1992 through March 31, 1993, 7,129 charges under the ADA were filed with the EEOC; approximately 2,235 were filed in February 1993 alone. *Id.*

145. See *supra* part III.A. discussing Title VII conflict with the U.S.—Japan FCN treaty.

146. See, e.g., Barnard, *supra* note 144, at 232-35.

147. See *Dee*, *supra* note 141, at 728-30; see also James M. Zappa, *The Americans with Disabilities Act of 1990: Improving Judicial Determinations of Whether an Individual is "Substantially Limited,"* 75 MINN. L. REV. 1303 (1991) (giving comprehensive discussion of legislative history of disability definition under the ADA).

148. See *Dee*, *supra* note 141, at 728. Major life activities are defined as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *Id.* at 730.

149. See Lavelle, *supra* note 143, at 1143-44 (citing 29 C.F.R. § 1630.2(j)(1)).

150. 42 U.S.C.A. § 12114(b) (West Supp. 1993).

151. See Morris, *supra* note 142, at 191.

The second issue, and major cost imposed by the ADA, is the requirement that the employer make reasonable accommodations for the employee's disability.¹⁵² If the individual can perform the essential functions of the job¹⁵³ *with or without* reasonable accommodations, then the employer cannot deny employment because of the disability or the need for such accommodation.¹⁵⁴ This requirement places the burden on the employer to alter normal operating procedures in order to reasonably accommodate individuals with disabilities.¹⁵⁵ In essence, the reasonable accommodations requirement mandates that employers grant preferential treatment to individuals with disabilities.¹⁵⁶

The third issue confronting the potential Japanese investor involves the defense of undue hardship.¹⁵⁷ The ADA provides that the employer is not required to offer an accommodation to a disabled employee if it would impose an "undue hardship" on the operations of the em-

152. Barnard, *supra* note 144, at 245 ("That is, *avored* rather than simply that *equal* treatment is required.').

153. 29 C.F.R. § 1630.2(n)(1). Essential functions are tasks fundamental, not marginal, to the job. Essential functions exist if it is the reason that the job exists; because there are only a few employees available who can do it; or because a highly skilled individual is hired to perform the function. Consideration is given to the employer's judgment, although it is not dispositive. *Id.*

154. See Lavelle, *supra* note 143, at 1153. See also Barnard, *supra* note 144, at 246. The ADA defines discrimination to include: "(A) not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such a denial is based on the need of such covered entity to make *reasonable accommodation* to the physical or mental impairments of the employee or applicant." Lavelle, *supra* note 143, at 1153.

155. See Rosalie K. Murphy, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 SO. CAL. L. REV. 1607 (1991).

156. See Barnard, *supra* note 144, at 231; see also Murphy, *supra* note 156, at 1618 (citing 42 U.S.C.A. § 12111(9) (West Supp. 1991)). The ADA defines "reasonable accommodation" as: (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C.A. § 12111(9) (West Supp. 1993).

157. 42 U.S.C.A. § 12111(10)(A) ("The term undue hardship means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).").

ployer.¹⁵⁸ The defense of undue hardship is to be considered in light of the general cost of the reasonable accommodations versus the financial resources of the covered entity.¹⁵⁹

The Japanese investor must be aware that the defense of undue hardship is to be narrowly construed by the courts.¹⁶⁰ The ADA, in anticipating potential costs to employers, suggests a cost-benefit analysis regarding the costs to the specific employer versus the societal cost of continuing discrimination against disabled persons.¹⁶¹ This rather cryptic defense of the potential for expansive liability under the ADA seems to ignore the realistic costs of operating a business.

The potential costs imposed by the ADA represent a major concern for the Japanese investor. If the proposed investment is a new operation, the investor must build or acquire workplaces with facilities that are readily accessible to individuals with disabilities.¹⁶² This may incur additional design and construction costs. In addition, the investor should try to anticipate potential costs involving disabled individuals, including the provision of qualified readers, training materials, interpreters, and other similar accommodations.¹⁶³ Finally, the Japanese investor will have to structure the proposed organization with enough flexibility to allow modified work schedules and job restructuring in order to reasonably accommodate workers with disabilities.¹⁶⁴

If the proposed investment is an existing business, the Japanese investor may be faced with massive construction costs if all facilities

158. *Id.* The ADA defines "undue hardship" as one that requires "significant difficulty or expense." See also *Murphy, supra* note 156, at 1619-20. The ADA also permits employment discrimination against disabled individuals who pose a significant threat to the health and safety of other workers. See 42 U.S.C.A. § 12113(a)-(b).

159. 42 U.S.C.A. § 12111(10)(B) ("In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include: (i) the nature and cost of the accommodation; (ii) the overall financial resources of the facility involved in the provision of the reasonable accommodation; the number of persons employed at such a facility; the net effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility in question to the covered entity.").

160. See *Morris, supra* note 142, at 190-91.

161. See *Murphy, supra* note 156, at 1634.

162. See 42 U.S.C.A. § 12111(9)(A).

163. See 42 U.S.C.A. § 12111(9)(B).

164. *Id.*

within the workplace are not readily accessible to individuals with disabilities.¹⁶⁵ In addition, the investor should determine acquisition and modification costs of any existing equipment.¹⁶⁶ Finally, the Japanese investor should also investigate the flexibility of the management structure of the corporation, and determine whether the company could reasonably accommodate employees with disabilities through job restructuring, modified work schedules, or similar accommodations.¹⁶⁷

Although the reasonable accommodation requirement is based on sound moral principles,¹⁶⁸ the requirement of reasonable accommodations for individuals with disabilities and the narrow construction of "undue hardship" makes the ADA a potential disincentive for the Japanese investor.

E. Costs to the Foreign Investor

From the standpoint of a potential Japanese investor, the law regarding Title VII liability of foreign corporations is in a state of confusion.¹⁶⁹ For the Japanese company to be successful, it must assume a proactive approach and long-term attitude towards American employment law. This will entail substantial short-term legal and operating costs.

The Japanese investor must be especially wary of American sexual discrimination and harassment law.¹⁷⁰ In addition, the broad, inclusive definitions of "disability" and the corresponding responsibilities placed on employers demand extensive research into the current state of the ADA and how it affects the employer.

Further burdening the Japanese investor is his need to stay abreast of trends and societal changes, and anticipate their effect on current and future employment regulations. For instance, the '91 Act and its opening up of disparate impact liability, although currently precluded

165. *Id.*

166. *Id.*

167. *Id.*

168. See Murphy, *supra* note 156, at 1609 ("Buildings, office equipment, and job tasks have long been designed around the unstated norm of an able-bodied worker: a person who can, for example, see, hear or climb stairs . . ."). Recognizing that equal treatment itself may be discriminatory is a necessary step toward ending discrimination based on disability. *Id.*

169. See Paparelli, *supra* note 114, at 1037.

170. See LAURIE, *supra* note 28, at 270 ("Japanese management style has been built around a system of male dominance that is a reflection of the larger culture. The corporation is a male sanctuary.").

from foreign corporations,¹⁷¹ is of particular concern to Japanese investors. In addition, the indefiniteness surrounding the ADA and the uncertain scope of what constitutes "reasonable accommodations" for the employee versus "undue hardship" on the employer represents an area that the Japanese investor must consider when calculating his costs. The recurring issue of anti-Japanese bias and how it will affect future generations of American employees is especially relevant to the Japanese investor. If the Japanese investor perceives future American legal and social prejudices in the form of harassing, meritless discrimination claims, the disincentive to future investment already exists for the next twenty-five to fifty years.

Similar to the stringent environmental regulations, America's priority of eliminating employment discrimination cannot be faulted on a moral and ethical basis. However, unless attempts are made to reduce the amount of discrimination claims whenever an employee is not hired or terminated, the potential for employment based litigation and liability will continue to increase. This has a direct effect of needlessly increasing a business' operating costs and consequently acts as another disincentive to foreign direct investment.

V. CONCLUSION: A LOOK TO THE FUTURE

Recent attempts by the United States to attract foreign direct investment have met with little success. Individually, the failure of these programs may represent poor planning or insufficient preparation. However, this low success rate also illustrates the overall decreasing sphere of American economic influence over foreign economies.

For example, the Immigration Act of 1990 (IA 1990) was intended to promote foreign direct investment through the loosening of immigration restrictions.¹⁷² The IA 1990 specifically targeted the region of Hong Kong, whose 1997 return to Chinese control is causing a flood of capital from Hong Kong to be invested abroad, mainly in Canada and Australia.¹⁷³ The IA 1990 provides an automatic two year visa to any foreigner who invests one million dollars in a commercial enterprise

171. See *supra* note 116 and accompanying text.

172. See Gary Endelman & Jeffrey Hardy, *Uncle Sam Wants You: Foreign Investment and the Immigration Act of 1990*, 28 SAN DIEGO L. REV. 671 ("Stimulus for the investor provision was twofold: (1) a recognition that foreign investment is both beneficial and necessary to the U.S. economy; and (2) an awareness that American must resist stiff competition from other countries for the foreign investor dollar.").

173. *Id.* at 671.

which creates at least ten jobs in the United States.¹⁷⁴ Although this program was denounced by some due to its shift to employment based immigration,¹⁷⁵ many business executives and attorneys expected a massive surge of foreign direct investment in the United States and for the demand to quickly consume the allotted 10,000 visas.¹⁷⁶ However, the investor visa provision has fallen flat on its face, with only 750 applications having been filed during the first two years.¹⁷⁷

One of the primary reasons for its failure is the one million dollar investment requirement. Even a lowering of the requirement to \$500,000 did not spark interest in the investor visa provision. This is in stark contrast to Canada's visa program, which requires only \$250,000 for an initial investment and which attracted nearly 7000 investors in 1991. Judging from the poor response to the investor visa provision, the attraction of the United States to potential investors from Hong Kong was drastically overrated.¹⁷⁸ The United States no longer possesses the only market for foreign investment, and now must compete with other markets for the limited supply of foreign investment dollars.

The second method of attracting foreign direct investment is conducted through the individual states.¹⁷⁹ States often attempt to lure foreign investors through economic incentives including direct and indirect financial assistance and tax breaks.¹⁸⁰ Contrary to popular perception, however, these state incentives to foreign investors appear to have little effect on the final decision of the potential investor.¹⁸¹ Instead, Japanese firms favor long-term macro-economic conditions, such as proximity to the relevant market, availability of international transportation, and environmental and infrastructural factors.¹⁸²

174. *Id.*

175. *Id.* at 676. Criticisms centered primarily on the perceived "cheapening" of American citizenship, and that this investor visa provision put a price tag on American citizenship. *Id.*

176. Sam Fulwood III, *Would-Be Advisers Bank on Visas for Foreign Millionaires*, L.A. TIMES, May 7, 1991, at A5.

177. Michael S. Arnold, *Special visas abundant as rich foreigners fail to apply*, WASH. POST, July 26, 1993, at A1.

178. *Id.* (quoting John Basel, management consultant) ("I think when the law was passed it looked like foreign investors would be willing to pay a premium to come to the United States. . . . I think we were a little arrogant in our position.').

179. See Kuo-Tsa Liou, *Foreign Direct Investment in the United States: Trends Motives, and the State Experience*, 23 AMERICAN REVIEW OF PUBLIC ADMINISTRATION 1. According to a 1990 study, forty-one states have set up offices in foreign countries in Asia for the sole purpose of recruiting foreign investment. *Id.* at 7.

180. *Id.* at 6.

181. *Id.* at 12.

182. See Anne Veigle, *Seat of Power, Lap of Luxury; Foreign Firms find D.C. area*

This long-term focus of foreign investors is clearly illustrated in the success of North and South Carolina and surrounding areas in recruiting foreign investment.¹⁸³ The Carolinas have succeeded in attracting foreign investment because they have gone beyond their cheap labor and low taxes; the foreign investors are lured by the area's commitment to the creation and maintenance of long-term infrastructure¹⁸⁴ and a cooperative approach to foreign industry.¹⁸⁵ In particular, foreign companies are attracted by the area's progressive educational programs and the promotion of cooperative research with the area universities.¹⁸⁶ With the increasing competition for Japanese direct investment, the United States, as a nation, must demonstrate a similar long-term cooperative commitment to potential investors in order to compete with the booming Southeast Asian region.

The future for Japanese direct investment in the United States does not look bright. The same laws which prevent American businesses from competing internationally also act as significant disincentives to foreign investment. These disincentives are becoming increasingly important due to the emergence of the Southeast Asian regional economy and Japan's growing influence in that economy. America's continuing perceived prejudice against Japanese business further deters foreign investment. These factors combine to produce an unattractive United States market for many Japanese investments, thus further weakening American economic influence abroad.

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Best for Business, WASH. TIMES, Jan. 5, 1992, at A12 (quoting from a KPMG Peat Marwick survey) ("[S]tate and local tax incentives are heavily outweighed by economic, environmental and infrastructural issues in attracting foreign investment.").

183. See Dean Foust & Maria Mallory, *The Boom Belt: There No Speed Limit on Growth Along the South's I-85*, BUS. WK., Sept. 27, 1993, at 98. Between 1990 and 1992, North Carolina lured 93 new foreign owned plants. South Carolina attracted 45—as many as New England and the mid-Atlantic region combined. *Id.*

184. *Id.* at 101. These infrastructure attractions include Atlanta's Hartsfield International Airport, and Tennessee's state of the art phone system. *Id.*

185. *Id.* ("To land the BMW plant, South Carolina agreed to screen all job applicants and then train BMW's entire work force through the state's technical schools.").

186. *Id.* at 100 ("The prime draw [for foreign investment]: Research Triangle Park, a state-conceived development designed to lure companies to the research conducted at nearby schools such as Duke University and the University of North Carolina.").

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