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The Importation of Sexism: A Cost-Benefit Approach to the U.S.-South Korea Friendship, Commerce and Navigation Treaty

Jennifer D. Fease

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The Importation of Sexism: A Cost-Benefit Approach to the U.S.-South Korea Friendship, Commerce and Navigation Treaty

ABSTRACT

The U.S.-South Korea Friendship, Commerce and Navigation Treaty was entered into by the signatory countries following World War II and governs the actions of corporations operating in a foreign country. One provision of the Treaty allows foreign corporations in the United States to choose executives "of their choice," arguably without regard to the statutory protections that the United States affords in the hiring process. In this Note, the Author contends that the U.S.-South Korea Friendship, Commerce and Navigation Treaty results in discrimination against women in the United States because South Korean employers tend to choose South Korean men to fill particular positions. To address this discrimination, the Author proposes that the United States either abolish the U.S.-South Korea Friendship, Commerce and Navigation Treaty or, alternatively, replace it with a bilateral investment treaty.

TABLE OF CONTENTS

I.	INTRODUCTION	826
II.	GENDER ROLES IN SOUTH KOREA	829
	A. <i>Home and Personal Lives</i>	829
	B. <i>Corporate Culture</i>	830
III.	SOUTH KOREAN EMPLOYMENT LAWS	834
	A. <i>Statutory Protections</i>	834
	B. <i>Laws in Practice</i>	835
IV.	SOUTH KOREAN COMPANIES OPERATING IN THE UNITED STATES: TREATMENT OF AMERICAN WOMEN	837
V.	U.S.-SOUTH KOREA FCN TREATY: DO THE COSTS—IMPORTED SEXISM—OUTWEIGH THE BENEFITS?	841

A.	<i>Original Purpose of the Treaty</i>	841
B.	<i>The Courts Weigh In</i>	843
	1. Fifth Circuit: <i>Spiess v. C. Itoh & Co. (America), Inc.</i>	843
	2. Supreme Court: <i>Avigliano v. Sumitomo Shoji America, Inc.</i>	844
	3. Recent Circuit Court Interpretations.....	845
VI.	ANALYSIS AND PROPOSED SOLUTION: BILATERAL INVESTMENT TREATIES.....	847
VII.	CONCLUSION.....	850

I. INTRODUCTION

The Friendship, Commerce and Navigation (FCN) Treaty has been called “one of the most familiar instruments known to diplomatic tradition.”¹ The first FCN treaty negotiated by the United States was with France in 1778,² and in accord with most of the earliest treaties, mainly concerned the treatment of citizens abroad. Since 1945, however, FCN treaties have increasingly focused on protecting corporations and attempting to define their rights.³ Following World War II, as the United States looked to promote and advance international investment, the United States entered these treaties with more than two dozen countries, including Japan, Germany, and Greece.⁴

Generally, FCN treaties protect persons by defining the treatment each signatory country owes the citizens of the other, the rights of those citizens to engage in business and other activities

1. Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 805 (1958) [hereinafter *Modern Treaties*].

2. See, e.g., Tram N. Nguyen, Note, *When National Origin May Constitute a Bona Fide Occupational Qualification: The Friendship, Commerce, and Navigation Treaty as an Affirmative Defense to a Title VII Claim*, 37 COLUM. J. TRANSNAT'L L. 215, 235 (1998); Keith Sealing, *The Current Legal Framework of Sex/Gender Discrimination Law: Sex, Allies and BFOQS: The Case for Not Allowing Foreign Corporations to Violate Title VII in the United States*, 55 ME. L. REV. 90, 91 (2003).

3. See Nguyen, *supra* note 2, at 235; see also Laird M. Street, *International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices*, 31 HOW. L.J. 497, 504 (1988) (noting the preservation of labor mobility as another reason many countries have ratified FCN treaties).

4. See Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230 (1956); see also Gerald D. Silver, Note, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives “Of Their Choice”*, 57 FORDHAM L. REV. 765, 765 (1989).

within the boundaries of the other signatory nations, and the respect due those citizens, their property, and their enterprises.⁵ Under the terms of a typical FCN treaty, a corporation is protected by receiving legal recognition from each signatory to the treaty.⁶ Those corporations may then conduct business in a signatory foreign country on a comparable basis with that country's domestic companies.⁷

The FCN Treaty between the United States and South Korea, signed in 1956 by President Dwight D. Eisenhower and Foreign Affairs Minister Chung W. Cho, gives Korean and U.S. companies mutual rights while operating within the other's borders.⁸ The nations signed it with the goals of "strengthening the bonds of peace and friendship traditionally existing between" each other and of "encouraging closer economic and cultural relations between their peoples."⁹

One particular provision in many FCN treaties, including that between the United States and South Korea, is the "employer choice provision," which gives companies the right to hire the executive personnel "of their choice" in their operations abroad.¹⁰ The provision provides a protection to foreign corporations that hire their own citizens to fill high-level positions.¹¹ Article VIII(1) of the FCN Treaty between the United States and South Korea provides that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."¹²

Employer choice provisions have sparked much debate among courts and commentators. Some read the provision broadly, arguing that it authorizes foreign companies to "control their investment" by hiring their own citizens, for whatever reason, to fill high-level positions.¹³ Others believe that the authorization should be read

5. *Modern Treaties*, *supra* note 1, at 806.

6. Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States, EEOC Enforcement Guidance No. 915.002 (Oct. 20, 1993) [hereinafter Enforcement Guidance].

7. *Id.*

8. *See* Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-S. Korea, 8 U.S.T. 2217 [hereinafter FCN Treaty]; *see also* Street, *supra* note 3, at 504.

9. Treaty of Friendship, Commerce and Navigation, *supra* note 8, at proclamation.

10. *Id.* art. VIII, para. 1.

11. *See, e.g.*, Linda Maher, *Drawing Circles in the Sand: Extraterritoriality in Civil Rights Legislation after ARAMCO and the Civil Rights Act of 1991*, 9 CONN. J. INT'L L. 1, 32-33 (1993).

12. FCN Treaty, *supra* note 8, at art. VIII, para. 1 (emphasis added).

13. Silver, *supra* note 4, at 766.

narrowly, extending only to the hiring of one's own citizens solely because of their citizenship, and not because of any other factors such as sex or age.¹⁴ The central controversy over the employer choice provision in the U.S.-South Korea FCN Treaty concerns its potential inconsistency with Title VII of the U.S. Civil Rights Act of 1964. Title VII provides, in part, that "[i]t shall be an unlawful employment practice for an employer—(1) to fail 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. . . ."¹⁵ Title VII, by using the broad term "any individual" to describe those within its statutory coverage, applies to nationals and aliens alike.¹⁶

Absent potential constraints, Title VII applies to a foreign employer when it discriminates within the United States.¹⁷ But a treaty—such as the U.S.-South Korea FCN Treaty—confers special privileges or immunities on foreign firms and their operations in the United States.¹⁸ The U.S.-South Korea FCN Treaty and Title VII are thus in conflict, particularly with respect to U.S. subsidiaries of South Korean firms. It is notable that the U.S.-South Korea FCN Treaty was negotiated before the adoption of the Civil Rights Act of 1964.¹⁹ One court thus concluded that "in the absence of evidence suggesting Congress intended subsequent legislation to affect existing treaty rights, and in the event the enactments conflict, the Treaty must prevail."²⁰ The court went on to note that there was no evidence that Congress, in enacting Title VII, "intended to abrogate" the right granted by the employer choice provision "in any way."²¹ One commentator challenged the court's point of view by considering how the 1964 Congress would answer the following question: "In passing this legislation did you intend to assure that Ford and General Motors can no longer discriminate on the basis of sex, but that such discrimination is permissible at Honda's American plant?"²²

If indeed U.S. subsidiaries of South Korean firms may hire executive personnel of their choice without regard to U.S. antidiscrimination laws, the effect on the employment of women in

14. See *id.*; see also *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1144 (3d Cir. 1988).

15. 42 U.S.C. § 2000e-2(a) (2004).

16. Maher, *supra* note 11, at 4-5.

17. Enforcement Guidance, *supra* note 6.

18. *Id.*

19. See Sealing, *supra* note 2, at 92.

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

21. *Id.*

22. Sealing, *supra* note 2, at 92.

the United States at these subsidiaries may be devastating, given the cultural differences in gender roles. South Korean women, in the Confucian tradition, have a different social position from men.²³ South Korean customs and practices prevent women from fully benefiting from their economic and social rights, even in the twenty-first century.²⁴ This Note will explore whether women employed by U.S. subsidiaries of South Korean companies are entitled to Title VII protections.

To answer that question, this Note will analyze the relationship between the employer choice provision in the U.S.-South Korea FCN Treaty and Title VII, focusing specifically on South Korean companies doing business in the United States and their treatment of women in the United States. Part II will examine gender roles in South Korea, both at home and in the workplace. In order to understand a South Korean company's actions abroad, it is first important to understand its cultural roots. With the same goal in mind, Part III will analyze current South Korean employment laws, as compared to those in the United States. Part IV will then specifically address U.S.-based South Korean firms' treatment of American women. Part V will examine the U.S.-South Korea FCN Treaty in order to assess whether the Treaty itself promotes the importation of South Korean corporate sexism. Finally, this Note will conclude that the costs of the U.S.-South Korea FCN Treaty are greater than the benefits, ultimately suggesting either abolishment of the Treaty or, alternatively, adoption of a bilateral investment treaty.

II. GENDER ROLES IN SOUTH KOREA

A. *Home and Personal Lives*

From the fifteenth century to the present, Confucianism, based on the teachings of the Chinese philosopher Confucius, has had a powerful influence on South Korean society.²⁵ One writer described Confucianism as "not a religion . . . but rather a type of humanism aimed at social ethics."²⁶ South Koreans have taken Confucius' teachings much more seriously and integrated his values in their attitudes and behaviors with a greater intensity than have the people

23. See Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants*, 14 MICH. J. INT'L L. 705, 722 (1993).

24. *Id.* at 723.

25. L. ROBERT KOHLS, *LEARNING TO THINK KOREAN: A GUIDE TO LIVING AND WORKING IN KOREA* 38 (2001).

26. DONALD N. CLARK, *CULTURE AND CUSTOMS OF KOREA* 30 (2000).

of other Asian countries.²⁷ In historical Confucian ideology, every person had a proper place in society and a corresponding role to play.²⁸ Author Donald N. Clark notes that “[i]t was important to define the proper spheres for men and women in Korean society and to enforce their adherence to the rules of propriety.”²⁹ The ethical justification for restrictions on women in society is found in Confucian ideology.³⁰ In the historical Confucian tradition, women were expected to follow the ideals of modesty, seclusion, faithfulness, sacrificial motherhood, and even loyalty to their husbands after the husband’s death.³¹

The historical Confucian tradition has continued, and even today a South Korean woman’s role is traditionally confined to household affairs.³² A common Chinese saying is often repeated in South Korea: “When a girl is young, she is ruled by her father; when she marries, by her husband; and when she is widowed, by her eldest son.”³³ Though women’s social status has improved as South Korea has become more industrialized, South Korean women still do not fully enjoy their rights.³⁴

B. Corporate Culture

South Korea’s long tradition of men and women existing in separate societal roles extends to the workplace.³⁵ Unfortunately, this tradition still serves as a prominent factor in the hiring, placement, and treatment of female employees.³⁶ One writer commented, “The notion that women are primarily, if not exclusively, responsible for household maintenance and child rearing is often advanced, in the home as well as in the office, to legitimize both short-term employment for women and a long working day for men.”³⁷

27. KOHLS, *supra* note 25, at 38 (noting how “the Confucian worldview fits so comfortably into the Korean pattern of accepting hierarchy, structure, and control in life”).

28. CLARK, *supra* note 26, at 164.

29. *Id.*

30. *Id.*

31. *Id.* (explaining how women were not allowed to request a divorce nor remarry after a husband’s death, though men were free to request a divorce for numerous reasons).

32. Lee, *supra* note 23, at 722-23.

33. KOHLS, *supra* note 25, at 108.

34. Lee, *supra* note 23, at 723.

35. BOYE LAFAYETTE DE MENTE, *KOREAN ETIQUETTE AND ETHICS IN BUSINESS* 68 (2d ed. 1994).

36. *Id.*

37. Roger L. Janelli & Dawnhee Yim, *Gender Construction in the Offices of a South Korean Conglomerate*, in UNDER CONSTRUCTION: THE GENDERING OF

Male chauvinism is a “potent force” in the corporate culture of South Korea, and few women hold managerial or other positions of public power.³⁸ It is rare for any woman to rise above the level of assistant director.³⁹ Indeed, there are no female CEOs of major South Korean companies.⁴⁰ In political life, there have been no women in the National Security Council, Government Legislative Administration Agency, Ministry of Home Affairs, Ministry of Commerce and Industry, and Ministry of Construction.⁴¹ The few women who occupy positions in which they oversee men must be careful not to “upset the egos” of their male underlings.⁴² What power women do have is more likely to come from a high social position than from a professional position.⁴³ Therefore, although many educated, talented young South Korean women are increasingly seeking employment with foreign companies located in South Korea, the “face” that the foreign company presents to society must be male to ensure that the company receives acceptance and cooperation.⁴⁴

Although women composed forty percent of the South Korean workforce in the 1990s, most had unskilled jobs, and their average salary was only fifty-seven percent that of a similarly skilled man.⁴⁵ In response to complaints of a “glass ceiling,” South Korean companies note that women are “temporary” workers, while the men are “permanent.”⁴⁶

South Korean employers generally prefer that their female employees possess little more than an attractive appearance. An example of this preference can be seen in the qualifications for secretarial work for high school and even college graduates.⁴⁷ In the

MODERNITY, CLASS, AND CONSUMPTION IN THE REPUBLIC OF KOREA 115, 118 (Laura Kendall ed., 2002).

38. DE MENTE, *supra* note 35, at 69.

39. CLARK, *supra* note 26, at 173.

40. KOHLS, *supra* note 25, at 108.

41. Seungsook Moon, *The Production and Subversion of Hegemonic Masculinity: Reconfiguring Gender Hierarchy in Contemporary South Korea*, in UNDER CONSTRUCTION: THE GENDERING OF MODERNITY, CLASS, AND CONSUMPTION IN THE REPUBLIC OF KOREA 19, 103 n.9 (Laurel Kendall ed., 2002).

42. DE MENTE, *supra* note 35, at 69.

43. *Id.*

44. Janelli & Yim, *supra* note 37, at 118.

45. See Elaine H. Kim, *Men's Talk: A Korean American View of South Korean Constructions of Women, Gender, and Masculinity*, in DANGEROUS WOMEN: GENDER AND KOREAN NATIONALISM 67, 87 (Elaine H. Kim & Chungmoo Choi eds., 1998); see also CLARK, *supra* note 26, at 176 (noting Korean women workers make just over half what is normally paid to men in similar jobs).

46. KOHLS, *supra* note 25, at 108; see generally CLARK, *supra* note 26, at 173 (noting that young women have short careers).

47. Cho Haejoang, *Living with Conflicting Subjectivities: Mother, Motherly Wife, and Sexy Woman in the Transition from Colonial-Modern to Postmodern Korea*, in

early 1990s, an employment document of several major companies sent to women's commercial high schools specifically requested that applicants be at least 160 centimeters tall.⁴⁸ While women's groups were outraged, representatives of the personnel departments who made these requests felt that this policy was reasonable, as attractive young women were good for the company's image.⁴⁹ Many men considered this policy merely a "matter of taste" or even joked about it, saying that it was "a fair policy because attractive women with no brains could have jobs too."⁵⁰

After interviewing fifty-four South Korean men in Seoul between 1987 and 1988, researcher Elaine H. Kim received various statements that provide an interesting insight into South Korean men's view of women. For instance, one man suggested to Kim that men were more intelligent than women because their brains are larger, which makes men better suited for creative and conceptual work.⁵¹ Kim writes, "More than one man believed that women are passive and better suited for staying at home with the family because their genitals are 'inside' their bodies, while men are outgoing and active and better suited for working for society because their genitals are on the 'outside.'"⁵² Even men in medical and scientific fields upheld such biological notions of female inferiority.⁵³ One high-income executive insisted that "women are like ceramics that break easily when they go outside."⁵⁴ One company manager informed Kim of a saying: "Work plus liquor plus women equals business."⁵⁵ A wealthy businessman noted, "Women are like property; you always want more."⁵⁶

In the late 1980s, researcher Roger Janelli conducted fieldwork at one of South Korea's four largest companies in order to study the relationship between gender and rank in the workplace.⁵⁷ Janelli discovered that "[o]ne of the most significant actions" taken by the company was to channel women into lower-paying, dead-end jobs through the recruiting and hiring processes.⁵⁸ Janelli observed that male office employees were hired through semiannual nationwide

UNDER CONSTRUCTION: THE GENDERING OF MODERNITY, CLASS, AND CONSUMPTION IN THE REPUBLIC OF KOREA 164, 184-85 (Laura Kendall ed., 2002).

48. *Id.*

49. *Id.*

50. *Id.*

51. Kim, *supra* note 45, at 73.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 77.

56. *Id.* at 78.

57. Janelli & Yim, *supra* note 37, at 116.

58. *Id.* at 119.

campaigns announced in front-page ads in major South Korean newspapers, and took part in a written test and a follow-up interview in order to ensure qualified employees.⁵⁹ All hired male employees entered the company at the same level within the company's ranking system, with the ready opportunity for promotion, regardless of their place of origin, university, major, or performance on the entrance exam.⁶⁰ Conversely, female employees were hired through a very different process. Usually hired on the recommendations of their high school officials during their last year, female applicants were required to pass a secretarial test.⁶¹ Females entered the company, if and when there was an opening, at a level lower than new male entrants, and promotion opportunities for female employees were nonexistent.⁶²

Janelli also observed that the amount of training given to men and women once hired differed, accurately reflecting South Korean perceptions of gender.⁶³ The company provided newly hired male employees with extensive information and training, including several organized two-week training courses and further specific guidance.⁶⁴ Female employees, on the other hand, were given only a few days of training.⁶⁵ Janelli notes that "[t]he varying lengths of the respective training programs implicitly contributed to an expectation that men were somehow more 'valuable' because they would be lifetime employees, whereas women's membership in the company was expected to be temporary."⁶⁶

Though traditional male attitudes toward women in South Korea may be changing with the turn of a new century, such deeply engrained customs are difficult to abandon altogether.⁶⁷ Some observers say that disadvantages for women are "so basic a part of the Korean system" that women will never receive equal opportunities.⁶⁸ One writer noted that a young woman who graduates from high school or college may perhaps be welcome in the workforce, but "it is assumed that she will quit when she gets married, and there is no point putting her on the career track by investing expensive training in her future."⁶⁹

59. *Id.* at 119-20.

60. *Id.* at 120.

61. *Id.*

62. *Id.*

63. *Id.* at 121.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See generally* KOHLS, *supra* note 25, at 109.

68. CLARK, *supra* note 26, at 177.

69. *Id.* at 173.

III. SOUTH KOREAN EMPLOYMENT LAWS

A. *Statutory Protections*

South Korea is similar to most industrialized countries in that it is governed by numerous labor laws. The Constitution of the Republic of Korea, established in 1948, contains provisions that guarantee freedom of association, the right to bargain collectively, and the right to collective action.⁷⁰ The Constitution also prohibits forced labor and affords special protection to working women and children.⁷¹ Five separate laws apart from the Constitution specifically focus on labor relations, while many others address labor standards more generally.⁷²

In 1988, South Korean feminists' demand for equal pay for equal work led to the passing of the Equal Employment Act, a piece of legislation guaranteeing equal rights in employment.⁷³ The Act mandates equal opportunity and treatment of men and women in private sector employment and requires employers to pay equal wages for work of equal value.⁷⁴ According to the Act, employers are strictly prohibited from discriminating against women on the grounds of age, marriage, pregnancy, or childbirth.⁷⁵ Such discrimination is punishable by imprisonment for up to five years or a fine of thirty million won.⁷⁶ In addition, in 1999, the South Korean legislature amended the Act to prohibit sexual harassment in the private sector and command employers to take disciplinary action against employees who have committed sexual harassment.⁷⁷ The Act

70. BUREAU OF INTERNATIONAL LABOR AFFAIRS & U.S. EMBASSY, SEOUL, U.S. DEPT. OF LABOR, FOREIGN LABOR TRENDS: KOREA, 11 (2003) [hereinafter FOREIGN LABOR TRENDS]; see also Lee, *supra* note 23, at 706-07 (discussing the reformation of Korea's human rights image).

71. FOREIGN LABOR TRENDS, *supra* note 70, at 11.

72. *Id.* at 11-12. The five laws that specifically focus on labor relations are the Trade Union and Labor Relations Adjustment Act (TULRAA); the Labor Relations Commission (LRC) Act; the Act concerning the Promotion of Worker Participation and Cooperation; the LRC Act on the Establishment and Operation, among others, of Trade Unions for Teachers; and the Act on the Establishment and Operation of the Tripartite Commission. *Id.* Labor standards are also addressed in the Labor Standards Act; the Equal Employment Act; the Gender Discrimination Prevention and Relief Act; the Minimum Wage Act; the Wage Claim Guarantee Act; the Industrial Safety and Health Act; and the Act on the Prevention of Pneumoconiosis and Protection, among others, of Pneumoconiosis Workers. *Id.*

73. Haejoang, *supra* note 47, at 178-79.

74. Law No. 3989 of Dec. 4, 1987, amended by Law No. 4126 of Apr. 1, 1989 (Korea); FOREIGN LABOR TRENDS, *supra* note 70, at 16.

75. FOREIGN LABOR TRENDS, *supra* note 70, at 16.

76. *Id.* In U.S. dollars, the fine would be approximately \$24,590. *Id.*

77. *Id.* at 4, 16.

further requires companies to conduct a yearly education program for workers on the prevention of sexual harassment.⁷⁸

South Korea has also enacted the Gender Discrimination Prevention and Relief Act, which prohibits gender discrimination and sexual harassment in public institutions.⁷⁹ The government also established the Ministry of Gender Equality to administer the Act.⁸⁰ In 2002, the Ministry of Labor undertook an effort to monitor gender discrimination in employment advertisements appearing in newspapers, magazines, and job market circulars.⁸¹ Regulations stipulated a penalty of up to five million won for ads containing gender-discriminatory messages.⁸² Last, the legislature has recently charted a special law prohibiting sexual violence.⁸³

B. Laws in Practice

South Korea is a modern country with modern laws; arguably the country's labor laws are steps ahead even of those of the United States.⁸⁴ Unfortunately, employers have not enforced the protections mandated by the laws that oppose traditional Confucian ideals. Korean men's perception of women in the workplace is inconsistent with the equality provided for by law, and most often equal benefits fail to be realized.⁸⁵ For example, according to a late-1990s Korean Women's Coalition survey, eighty-seven percent of working women report that they have been sexually harassed.⁸⁶ Asia's 1997 economic crisis further set back any progress in equality by making companies reassess their hiring needs, so that women employees became "the first fired and last hired."⁸⁷ A 1998 survey of 808 women workers, 384 unemployed women, and fifty-two labor unions revealed that female employees were twice as likely to be laid off as their male counterparts in the existing economic environment.⁸⁸ A newspaper devoted to women's affairs reported in December of 1998:

78. *Id.* at 16.

79. *Id.* at 4.

80. *Id.*

81. Lee Joo-hee, *Gov't to Monitor Employment Postings for Gender Discrimination*, KOREA HERALD, Feb. 4, 2002.

82. *Id.*

83. Haejoang, *supra* note 47, at 179.

84. *See, e.g.*, FOREIGN LABOR TRENDS, *supra* note 70, at 17 (noting that female workers in Korea are entitled to one day's menstruation leave per month).

85. KOHLS, *supra* note 25, at 109.

86. Kim, *supra* note 45, at 92; *see also* KOHLS, *supra* note 25, at 108 (noting that reports of sexual harassment are common).

87. Moon, *supra* note 41, at 80-81.

88. *Id.* at 103 n.6.

It is strikingly evident that women employees were the first to be let go among the financial institutions, where women [workers] are concentrated. The records of an official inspection of the Ministry of Labor last October showed that up to 93 percent of the honorary dismissals in the banking industry during the first half of the year were those of women bank employees.⁸⁹

In the area of employment advertisements, an October 2003 survey revealed that one out of every five online recruitment advertisements in South Korea discriminates against jobseekers based on their gender.⁹⁰ Twenty-two percent of the approximately 3,000 online hiring advertisements examined offered more posts for one sex than the other.⁹¹ This sexual discrimination has also spread across many job types. For instance, more than half of the ads for clerical workers discriminated based on gender. Sales workers, professionals, and mechanics were also among the jobs for which sex preferences were advertised.⁹²

A 2003 survey of more than 2,000 employed South Korean women revealed that sixty-six percent of the women had experienced unequal opportunities and discrimination while attempting to secure employment.⁹³ More specifically, forty-seven percent of the women respondents claimed that employers evaluated them more critically with regard to their age, while thirty-three percent made the same claim with regard to marriage status, and thirteen percent did so as to physical appearance.⁹⁴ Almost seventy-five percent of the women surveyed said they suffered from unfairness in job promotion or inequality in wages because of their sex.⁹⁵ Furthermore, nearly seventy percent said that their workplaces did not offer a system for women employees such as an in-house daycare center and special monthly leave, both requirements "mandated" by South Korean law.⁹⁶

Increasingly, South Korean women are receiving higher education, marrying at older ages, and raising fewer children, thus freeing themselves to devote more time to an occupation; however, the use of female labor remains much lower in South Korea than in other developed countries.⁹⁷ Women in South Korea have undertaken

89. Janelli & Yim, *supra* note 37, at 134.

90. *20% of Job Ads Discriminate Based on Gender*, KOREA HERALD, Oct. 18, 2003.

91. *Id.*

92. *Id.*

93. *72% of Female Employees Experience Discrimination: Survey*, KOREA HERALD, Mar. 7, 2003.

94. *Id.*

95. *Id.*

96. *Id.*

97. Lee Jeong-il, *Changes in Employment Practices in Korea*, KOREA HERALD, May 6, 2002.

a major effort to seek the enforcement of laws equalizing opportunity and income in the workplace.⁹⁸ As more South Korean women receive an education, demands for freedom and equality in the workplace have increased.⁹⁹ In the field of education, there are many female school principals, and there are many women on college and university faculties.¹⁰⁰ Some union organizers have arranged classes for female workers to teach them how to better communicate with management and negotiate effectively for better wages and working conditions, using arguments based on the South Korean Constitution and the ancillary laws that supposedly reflect South Korea's commitment to equality.¹⁰¹ Despite these advances, sexism in the workplace persists. Women's jobs continue to be "characterized predominantly by low pay, low prestige and power, low security, paucity of opportunity for promotion, or all of the above."¹⁰²

IV. SOUTH KOREAN COMPANIES OPERATING IN THE UNITED STATES: TREATMENT OF AMERICAN WOMEN

Given the differences between the two nations' cultural norms and employment practices, will South Korean executives know how to treat women in the United States professionally? Or will they base their employment practices in the United States on their traditional view of gender roles, thus leading to discrimination against U.S. women? With the increased globalization of the business world, the issue of foreign companies asking for applications for employment in the United States only from individuals of a particular citizenship, national origin, religion, or sex has arisen frequently in recent years.¹⁰³ And the issue raises one important question—as one author notes, "When in Rome, do as the Romans do"?¹⁰⁴

The United States has statutes governing the employment relationships at issue that protect both U.S. and non-U.S. citizens. In addition to the previously mentioned Title VII of the Civil Rights Act of 1991, the Equal Employment Opportunity Commission (EEOC), the U.S. body charged with making equal employment policy, issues advisory guidelines for investigators handling complaints of discrimination by foreign corporations doing business in the United

98. CLARK, *supra* note 26, at 176.

99. *Id.* at 164.

100. *Id.* at 173.

101. *Id.*

102. Moon, *supra* note 41, at 80.

103. Rochelle Kaplan, "When in Rome . . .": *Hiring in the International Arena*, 54 J. OF CAREER PLAN. & EMP. 12 (Spring 1994).

104. *Id.*

States.¹⁰⁵ The EEOC's guidelines provide that a foreign company—one that is headquartered and incorporated in a country outside of the United States—that hires workers in the United States has the same obligations, for the most part, as a U.S. company hiring for an operation located in the United States. These guidelines prescribe that foreign corporations doing business in the United States are indeed liable for Title VII violations that occur within the United States. Last, the Immigration Reform and Control Act (IRCA) of 1986 prohibits discrimination based upon national origin and citizenship.¹⁰⁶

Japan and South Korea share similar values concerning gender roles, both at home and in the workplace. A helpful analogy, therefore, for understanding and analyzing potential South Korean hiring practices in the United States is the experience of Japanese companies also operating in the United States, particularly given that these companies maintain a substantial presence in the U.S. economy.¹⁰⁷ In 1988, in settling charges of discrimination, Honda of America, the U.S. subsidiary of the Japanese auto company, acknowledged having failed to hire qualified women for its U.S. operations in the mid-1980s.¹⁰⁸ In reviewing Honda's mistake, University of Southern California School of Business Professor John L. Graham noted, "The Japanese stereotype of an American manager is a white, Anglo-Saxon Protestant male."¹⁰⁹ After the Honda case, in December 1990, former employees of Matsushita Electric's Quasar Co., a Japanese firm operating in the United States, won \$4.8 million in a discrimination suit.¹¹⁰ More than fifteen years ago, Graham predicted that "the publicity surrounding the Honda case will provide an important role model for other Japanese [and, presumably, South Korean] firms establishing business operations in the United States."¹¹¹ However, whether foreign firms responded to Honda and Quasar by changing their employment practices remains unanswered.

The differing perceptions of professional women in South Korea and the United States raise questions about whether South Korean executives are able to relate professionally to U.S. women. It is often through their international professional contacts that South Korean men first realize that foreign women may refuse to accept the

105. *Id.*

106. *Id.*

107. See Nguyen, *supra* note 2, at 218-19.

108. John L. Graham, *Honda Learns Late About Bias, but it is Not Alone*, L.A. TIMES, Mar. 31, 1988, at 7.

109. *Id.*

110. Deborah L. Jacobs, *Costly Lessons in Discrimination*, FORBES, May 27, 1991, at 186.

111. Graham, *supra* note 108.

invisible role to which South Korean women have become accustomed.¹¹² One member of a group of executives from a Japanese company recently visiting the Los Angeles headquarters of its U.S. subsidiary asked a woman during a meeting if she would make copies of several documents.¹¹³ The woman recalled, "I looked him straight in the eye and said, 'No, but I'll have my secretary do it.'"¹¹⁴ Of course, it must be noted that U.S. companies are constantly involved in discrimination cases as well, and unfortunately, the same scenario plays out routinely at numerous companies in the United States. But it cannot be denied that in the United States, great strides have been made in gender relations in the workplace—strides that South Korea has failed to match.

It should be noted, however, that there are significant positive values that South Korean companies assert in their employment practices and from which U.S. companies can learn. Perhaps the most dominant principle guiding South Korean management in large and small companies alike has been familism—employers overseeing and controlling employees' lives like attentive parents.¹¹⁵ In fact, many South Korean companies, in their hiring practices, favor relatives of current employees.¹¹⁶ Sometimes called "corporate paternalism," this principle can lead to the employer's involvement in virtually every aspect of a worker's life.¹¹⁷ As a Daewoo manager explained, "In the United States, hiring is too inflexible. In Korea, we will sometimes hire those who are under-qualified but have a strong connection to the company, either through their family or through the community. We would be inclined to hire the *sons* of important residents, like bankers."¹¹⁸ Under the principle of familism, a potential employee's family and social contacts may have an even greater importance than test scores and academic records.¹¹⁹

South Koreans have attempted to graft some of their desire for a "family feeling"—arguably paternalism—onto their U.S. operations. Managers will attend office parties, visit sick employees, and make a sincere effort to know their workers personally.¹²⁰ At Samsung's color television plant in New Jersey, management has celebrated

112. KOHLS, *supra* note 25, at 112.

113. Douglas Frantz, *Japanese Unaccustomed to Either: Roles of Working Women, Minorities Pose Challenge*, L.A. TIMES, July 13, 1988, at 1. Presumably, the same rationale applies to South Korean firms.

114. *Id.*

115. ROBERT P. KEARNEY, *THE WARRIOR WORKER: THE CHALLENGE OF THE KOREAN WAY OF WORKING* 146-47 (1991).

116. *Id.* at 147.

117. *Id.*

118. *Id.* at 157 (emphasis added).

119. *Id.*

120. *Id.* at 147.

Thanksgiving by giving its employees a buffet lunch.¹²¹ The President of Samsung International's plant in Ledgewood, N.J., Hae-Min Lee, believes that "[a]ll workers are members of the Samsung family."¹²² Lee maintains an open-door policy, and walks around the factory once or twice a day to meet with employees and watch them work.¹²³ In their spare time, Samsung employees participate in the company's ski club, bowling club, softball team, and newspaper.¹²⁴ P.W. Suh, President of Goldstar of America, Inc., a U.S. subsidiary of South Korea-based Goldstar Co. Ltd., stated that employee loyalty represents the major difference between U.S. and Korean workers: "In Korea, employee life centers around the company. In the United States, the average worker is an eight-hour person."¹²⁵

It is also notable that some women in the United States have found opportunities and have had positive experiences with foreign firms. Susan J. Insley, vice president of corporate planning at Honda's U.S. manufacturing plant in Ohio, did not experience sexism. She states, "There's a basic philosophy here of respecting the individual. . . . It doesn't seem to make any difference, whether you are a woman or a man."¹²⁶ Unfortunately, despite Insley's experience, some existing South Korean values have a discriminatory effect when applied in the workplace. South Korean companies look for "modesty and subservience" in a job interview, according to Candace Kim, managing partner of Halcyon Search International, a South Korean executive search firm.¹²⁷ A Halcyon consultant noted that a foreign interviewer asked a number of South Korean CEO candidates, "Everyone you're going to be reporting to in Hong Kong are women. Do you have a problem with that?"¹²⁸ The answers were astounding: about thirty percent stated that they did have a problem, and another twenty percent simply asked, quite genuinely, "Well, is she good-looking?"¹²⁹

Author Robert P. Kearney notes, "Any consideration of Korean management style must eventually grapple with the issue of portability: can Korea's methods be applied in other nations, acting independently or with Korean participation?"¹³⁰ Kearney believes

121. *Id.*

122. Rose A. Horowitz, *Management Korea-Style: It's all in the Family*, J. OF COM., Apr. 8, 1987, at 1A.

123. *Id.*

124. *Id.*

125. *Id.*

126. Frantz, *supra* note 113.

127. Kim Mi-hui, *Becoming a CEO at Multinational Firm*, KOREA HERALD, July 30, 2001.

128. *Id.*

129. *Id.*

130. KEARNEY, *supra* note 115, at 241.

that certain economic policies are much more likely to “take root in foreign soil” than social and cultural traits.¹³¹ Kearney also states that “the methods behind Korea’s success are often anathema to American values and could never be duplicated in the American workplace.”¹³² He concludes by noting that “Korean-American competition must be addressed within the United States.”¹³³

V. U.S.-SOUTH KOREA FCN TREATY: DO THE COSTS—IMPORTED SEXISM—OUTWEIGH THE BENEFITS?

A. *Original Purpose of the Treaty*

Several lower courts in the United States have addressed the legislative history of various FCN treaties and concluded that the parties wrote the treaties to address certain issues that no longer exist. For example, the U.S. Court of Appeals for the Sixth Circuit, in *Wickes v. Olympic Airways*, analyzed the general history of FCN treaties:

The post-World War II Friendship, Commerce and Navigation treaties were negotiated in a period characterized by so-called “percentile” restrictions which required American companies operating abroad to hire a certain percentage of citizens of the host country. These restrictions were thought to have the effect of inhibiting American companies operating abroad from hiring the people in whom they had the greatest confidence. . . . The legislative history of the post-war treaties suggests that both parties deemed the right to utilize the services of their own nationals in managerial, technical, and confidential capacities to be critical.¹³⁴

The Third Circuit reached a similar conclusion in *MacNamara v. Korean Air Lines*, focusing specifically on the legislative history of the U.S.-South Korea FCN Treaty:

[T]his history persuasively demonstrates that the target of [the employer choice provision in the U.S.-South Korea FCN Treaty] was domestic legislation that discriminated on the basis of citizenship and that the provision was necessary for the *limited* purpose of securing to foreign investors the freedom to place their own citizens in key management positions, thus facilitating their operational success in the host country.¹³⁵

131. *Id.*

132. *Id.* at 240-41.

133. *Id.* at 248.

134. *Wickes v. Olympic Airways*, 745 F.2d 363, 367-68 n.1 (6th Cir. 1984).

135. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1144 (3d Cir. 1988).

The employer choice provision generally seeks to allow a company's employment of its own nationals to the extent necessary to ensure its success in a foreign country.¹³⁶ Now, fifty years after the implementation of the U.S.-South Korea FCN Treaty, the changing economic climate has led the costs of the employer choice provision to outweigh its benefits. Clearly, the United States no longer has a need to aid South Korean corporations in establishing their U.S. subsidiaries. Consider the growth that South Korean companies have had not only in the United States but in the world: Samsung has production facilities in, among other places, the United States, Portugal, Mexico, Thailand, and England.¹³⁷ Daewoo produces components for the U.S. F-16 fighter jet, the Pontiac Le Mans, and several thousand other products among its twenty-nine affiliates.¹³⁸ In December 2001, the Korea International Trade Association conducted a survey of South Korean subsidiary companies and financial institutions doing business in the United States. Approximately eighty-three percent of the 225 subsidiaries surveyed expected that South Korean exports to the United States would increase in the following year.¹³⁹

Moreover, there is evidence suggesting that FCN treaties as a whole have become obsolete. The United States has not entered into any FCN treaties since the 1960s.¹⁴⁰ FCN treaties are today seldom used as a basis for trade negotiation by the United States.¹⁴¹ The FCN treaties "were negotiated by the United States from a position of strength [after World War II], and with more concern for the rights of Americans in a foreign country than for the reciprocal rights of that nation's nationals in the United States, which was generally perceived as granting greater protections."¹⁴² It can be argued that the authors of the FCN treaties could not have foreseen the current political and economic situation: rapid expansion of foreign corporations into U.S. markets.¹⁴³

136. *Id.*

137. KEARNEY, *supra* note 115, at 45.

138. *Id.* at 46.

139. Hong Taek Chung, *Doing Business in the United States: A Korean Perspective*, Address at the 15th Annual U.S.-Korea Business Council Joint Steering Committee Meeting (2002), at <http://www.kwrintl.com/library/2002/chungspeech.html>

140. Michael S. Kimm, *Domestic Employees and Title VII Versus Foreign Employers and "FCN" Treaties: A 21st Century Perspective*, 9 B.U. INT'L L.J. 95, 140-41 (1991).

141. *Id.* at 141.

142. Sealing, *supra* note 2, at 91.

143. Madelene C. Amendola, *American Citizens as Second Class Employees: The Permissible Discrimination*, 5 CONN. J. INT'L L. 651, 651 (1990).

B. *The Courts Weigh In*

It is important to delineate the progression of cases through U.S. courts dealing with the employer choice provision in various FCN treaties. Among the U.S. circuits, there is conflict as to the extent to which these provisions immunize a foreign employer from the U.S.'s civil rights laws.¹⁴⁴ Though courts are split on the issue of the relationship between employer choice provisions in FCN treaties and Title VII, no court has held that the provisions make employers immune from U.S. antidiscrimination laws with respect to *all* hiring.¹⁴⁵ But Professor Keith Sealing recently argued that “[t]he progression of the cases through the circuit courts delineates a path to the least amount of protection for American women . . . working for multinational companies of FCN Treaty partners.”¹⁴⁶

1. Fifth Circuit: *Spiess v. C. Itoh & Co. (America), Inc.*

Before the Supreme Court's landmark ruling in *Avigliano v. Sumitomo Shoji America, Inc.*,¹⁴⁷ the Fifth Circuit confronted the employer choice provision in the U.S.-Japan FCN Treaty in *Spiess v. C. Itoh & Co. (America), Inc.*¹⁴⁸ The defendant, C. Itoh-America, was a New York subsidiary of a Japanese corporation.¹⁴⁹ A group of U.S. employees filed a Title VII class action, alleging that the defendant discriminated against them by making managerial promotions and other benefits available only to Japanese citizens.¹⁵⁰ The defendant asserted that the employer choice provision provided it with an absolute exemption from U.S. employment discrimination laws.¹⁵¹

The Fifth Circuit held that the employer choice provision exempted the defendant “from domestic employment discrimination laws to the extent of permitting discrimination in favor of Japanese

144. *Id.*

145. See Wayne N. Outten, *Legal Restraints on Foreign Employers Doing Business in the United States 2* (1998), at <http://www.bna.com/bnabooks/ababna/rnr/98/RROUTTEN.doc>; see also *Wickes*, 745 F.2d at 367 (rejecting the employer's argument that the U.S.-Greek FCN Treaty offered complete insulation from state anti-discrimination law).

146. Sealing, *supra* note 2, at 109.

147. *Avigliano v. Sumitomo Shoji Am., Inc.*, 57 U.S. 176 (1982).

148. *Spiess v. C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353 (5th Cir. 1981). The “employer choice” provision in the U.S.-Korea FCN Treaty is identical to that in the U.S.-Japan FCN Treaty. FCN Treaty, *supra* note 8, at 2223. Additionally, the U.S.-Japan FCN treaty is one of the most litigated FCNs. See Nguyen, *supra* note 2, at 218-19.

149. *Spiess*, 643 F.2d at 355.

150. *Id.*

151. *Id.* at 359.

citizens in employment for executive and technical positions.”¹⁵² In reaching this conclusion, the court interpreted the employer choice provisions as “creat[ing] an absolute rule permitting foreign nationals to control their overseas investments” and found that “[a]bsolute rules were intended to protect vital rights and privileges of foreign nationals in any situation, whether or not a host government provided the same rights to the indigenous population.”¹⁵³ Accordingly, the court held that “the only reasonable interpretation is that [the employer choice provision] means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws.”¹⁵⁴ As further support for its holding, the court accepted the defendant’s argument that the legislative history of the provision demonstrated that Congress was “concerned about the right of American companies to use American personnel to control their investments in Japan.”¹⁵⁵

2. Supreme Court: *Avigliano v. Sumitomo Shoji America, Inc.*

In 1982, the Supreme Court addressed the same issues in *Avigliano v. Sumitomo Shoji America, Inc.*, perhaps the leading case analyzing the tensions between U.S. civil rights laws, particularly Title VII, and FCN treaties.¹⁵⁶ Like *Spiess*, *Sumitomo* involved the employer choice provision in the U.S.-Japan FCN Treaty. A class action was brought against Sumitomo, a New York subsidiary of a Japanese company, by U.S. female employees who claimed that Sumitomo’s alleged practice of hiring only male Japanese citizens to fill executive, managerial, and sales positions violated Title VII.¹⁵⁷ The company defended its practices by citing the employer choice provision of the U.S.-Japan FCN Treaty.¹⁵⁸

The Supreme Court held that because the defendant had been incorporated in the United States, it was no longer a foreign corporation, and thus its operations were not covered by the FCN Treaty.¹⁵⁹ Of equal significance, however, was the Court’s specific refusal to determine whether a wholly-owned domestic subsidiary of a foreign parent corporation, rather than a company actually incorporated in the United States, would be protected by a FCN

152. *Id.*

153. *Id.* at 360.

154. *Id.* at 361.

155. *Id.*

156. *Avigliano*, 457 U.S. at 176.

157. *Id.* at 178.

158. *Id.* at 179.

159. *Id.* at 182-83; *see also* Maher, *supra* note 11, at 36.

Treaty.¹⁶⁰ The Court did observe that the purpose of the FCN treaties “was not to give foreign corporations greater rights than domestic companies” but rather to free them from “discrimination based on their alienage.”¹⁶¹

3. Recent Circuit Court Interpretations

Since *Sumitomo*, the circuit courts confronting the employer choice provision in FCN treaties have consistently ruled that such provisions “[do] not provide an absolute, blanket exemption from the duties and obligations” of Title VII, even if the text appears to state otherwise.¹⁶² Beyond this agreement, however, the decisions of the circuit courts have differed concerning the proper scope of the rights created by employer choice provisions.¹⁶³ One writer notes that the majority of circuit courts have concluded that employer choice provisions provide foreign employers with one narrow exemption from Title VII obligations: the limited right to hire their own citizens over U.S. citizens.¹⁶⁴

The Sixth Circuit was the first to attempt to apply the Supreme Court’s analysis in *Sumitomo* in the case of *Wickes v. Olympic Airways*.¹⁶⁵ The plaintiff, a sixty-one-year-old U.S. man, brought claims of age and national origin discrimination against the defendant, a foreign corporation owned by the government of Greece, after the corporation terminated his employment.¹⁶⁶ The defendant claimed that the employer choice provision in the U.S.-Greece FCN Treaty exempted it from U.S. antidiscrimination laws. The Court concluded that the employer choice provision was intended to be “a narrow privilege to employ Greek citizens for certain high level positions, not a wholesale immunity from compliance with labor laws prohibiting other forms of employment discrimination.”¹⁶⁷ The court therefore allowed the plaintiff to bring discrimination actions both on age and national origin grounds.¹⁶⁸

160. *Id.* at 190 n.19; *see also* Maher, *supra* note 11, at 36.

161. *Id.* at 187-88. In 1991, the Supreme Court also implied that Title VII does require U.S. subsidiaries of foreign companies to look into charges of discrimination and take corrective action when possible. *See* EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244 (1991); *see also* Maher, *supra* note 11, at 2.

162. *See* Nguyen, *supra* note 2, at 223.

163. *Id.*

164. *Id.* at 223 n.40.

165. *Wickes v. Olympic Airways*, 745 F.2d 363, 363 (6th Cir. 1984).

166. *Id.* at 364.

167. *Id.* at 365; *see also* Sealing, *supra* note 2, at 100.

168. *Wickes*, 745 F.2d at 369.

The Third Circuit decided a case involving the U.S.-South Korea FCN treaty, *MacNamara v. Korean Airlines*, in 1988.¹⁶⁹ In *MacNamara*, Korean Airlines terminated six U.S. managers and replaced them with four Korean citizens.¹⁷⁰ The EEOC, representing the plaintiffs, argued that the original purpose of the various FCN treaties was to protect foreign businesses against the discriminatory effects of particular *local* laws that require, for example, a fixed percentage of local employees, or laws that altogether forbade the hiring of non-citizens.¹⁷¹ Title VII, the EEOC said, had no such effects on foreign corporations.¹⁷² The Third Circuit stated that the U.S.-South Korea FCN Treaty "was not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically . . . conflict with the right to select one's own nationals as managers *because of their citizenship*."¹⁷³ The court ultimately held that Korean Air Lines could not purposefully discriminate on the basis of age, race, or national origin.¹⁷⁴ The Treaty's employer choice provision, therefore, did not preclude a finding of liability under Title VII.¹⁷⁵

In 1991, the Seventh Circuit decided *Fortino v. Quasar*.¹⁷⁶ In *Fortino*, the defendant marketed U.S. products made in Japan by Matsushita, which assigned several of its own executives to the defendant on a temporary basis to assist in marketing.¹⁷⁷ After losing a significant amount of money, the defendant terminated a number of its executives. Only U.S. executives of non-Japanese origin were discharged, however, while all the Japanese executives retained their employment.¹⁷⁸ Judge Posner stated that though this conduct amounted to "favoritism," "discrimination in favor of foreign executives given a special status by virtue of a treaty and its implementing regulations is *not equivalent* to discrimination on the basis of national origin."¹⁷⁹ Judge Posner further noted that Title VII does not forbid discrimination on the grounds of citizenship.¹⁸⁰ Rather, he stated:

[T]he most important question is whether a claim of discrimination on the basis of national *origin* is tenable when . . . the discrimination is in

169. 863 F.2d 1135 (3d Cir. 1988).

170. *Id.* at 1137-38.

171. *Id.*; see also Maher, *supra* note 11, at 33-34.

172. *MacNamara*, 863 F.2d at 1137.

173. *Id.* at 1140.

174. *Id.* at 1147.

175. *Id.* at 1147-48.

176. 950 F.2d 389 (7th Cir. 1991).

177. *Id.* at 392.

178. *Id.*

179. *Id.* (emphasis added).

180. *Id.* at 391-92.

favor of foreign citizens employed temporarily in the United States in accordance with a treaty . . . that entitles companies of each nation to employ executives of their own choice in the other one."¹⁸¹

It should be noted that the court did point out that this right for subsidiaries of foreign companies operating in the United States was reciprocal: the same privilege which allowed the defendant to assert the employer choice provision also protected the jobs of U.S. citizens working abroad for the foreign subsidiaries of U.S. corporations.¹⁸² The EEOC sharply disagreed with the Seventh Circuit in *Fortino*, stating that "permitting a U.S. subsidiary of a Japanese corporation to assert its parent treaty rights [under the holding in *Sumitomo*] enables that subsidiary 'to accomplish indirectly what it cannot accomplish directly.'"¹⁸³

VI. ANALYSIS AND PROPOSED SOLUTION: BILATERAL INVESTMENT TREATIES

While political correctness in sexual discrimination issues is a hot-button topic in the United States, perhaps South Koreans simply do not assign the issue the same degree of importance. Perhaps many view U.S. society as overly litigious, subjecting foreign firms to lawsuits for maintaining the important values of the culture of their nation of origin. Indeed, familiarity with a particular culture in the business world can be incredibly helpful, perhaps even necessary, in certain workplaces and occupations. But the benefits of familiarity cannot continue to be achieved through measures that discriminate against U.S. women. With the U.S.-South Korea FCN Treaty still in effect, sexism against U.S. women represents a major cost. The U.S.-South Korea FCN Treaty allows South Korea to import the corporate sexism that pervades its culture into the United States, a different culture, without any repercussions. Women in the United States have already experienced the "glass ceiling" in employment by U.S. companies. Why invite or, worse, *allow* additional discrimination by foreign companies?

One commentator believes that in the current business climate, in which multinational firms with offices in multiple countries with different laws and beliefs are becoming the norm, companies must abide by three principles.¹⁸⁴ First, companies must have a respect for core human values, which determine the absolute moral threshold for

181. *Id.* at 391.

182. See *id.* at 393-94; see also Nguyen, *supra* note 2, at 225.

183. Enforcement Guidance, *supra* note 6 (internal citations omitted).

184. Thomas Donaldson, *Values in Tension: Ethics Away from Home*, 74 Harv. Bus. Rev. 48, 52 (1996).

all business activities.¹⁸⁵ Second, companies must have a respect for local traditions.¹⁸⁶ And last, companies “must hold the belief that context matters when deciding what is right and what is wrong.”¹⁸⁷

Taking into account these principles, with emphasis on the first two, the United States must balance these values by abolishing the U.S.-South Korea FCN Treaty. Though a laudable agreement fifty years ago, the Treaty is simply too overbroad for current times. Abolishing the U.S.-South Korea FCN Treaty would not serve as a detriment to foreign corporations seeking to establish a subsidiary corporation in the United States. Employment laws in the United States would govern the hiring processes, and foreign employers would benefit from the ability to invoke the protections of these laws.¹⁸⁸

The United States should alternatively look to the desired ends of the U.S.-South Korea FCN Treaty—open investment with South Korea—and find a better means to achieve these ends. One proposed means to achieve the desired end is the replacement of FCN treaties with bilateral investment treaties (BITs).¹⁸⁹ BITs were introduced in Europe during the 1960s and 1970s as an alternative to FCN treaties.¹⁹⁰ These agreements preserve certain principles contained in the post-war FCN treaties while explicitly guaranteeing that Title VII and other employment laws will be respected.¹⁹¹

The U.S. BIT program was launched by the Reagan administration partially as an attempt to prevent employment discrimination claims.¹⁹² One writer notes that “[w]hile continuing the traditions begun by FCN treaties, the model BITs represent improvements which were clearly desirable in United States treaty practice, being dedicated exclusively to treatment matters.”¹⁹³ A U.S.-South Korea BIT has been discussed for more than four years, but has not yet been implemented, mainly because the South Korean film industry is concerned with a provision that would prohibit the maintenance of domestic film quotas for local theaters.¹⁹⁴

The United States should convert to a BIT with South Korea for several reasons. First, by converting to a BIT with South Korea, the

185. *Id.*

186. *Id.*

187. *Id.*

188. Enforcement Guidance, *supra* note 6.

189. Kimm, *supra* note 142, at 136.

190. *Id.*

191. *Id.* at 139.

192. *Id.* at 10.

193. *Id.* at 141.

194. Don Kirk, *Korea is Trying to Mend Fences*, *N.Y. TIMES*, Feb. 4, 2003, at W1; see also South Korea, *U.S. Discuss Free Trade Possibilities*, BBC Worldwide Monitoring, Feb. 3, 2005.

United States can ensure a fresh start with the country and bring documents that govern the relationship between South Korea and the United States up to date and make them consistent with current employment antidiscrimination statutes. BITs are more precise than FCN treaties, and several BITs specifically establish that the employer choice provision applies only to staff at the very top of a corporation, such as chief executives and presidents.¹⁹⁵ Additional language is provided in BITs to ensure that foreign companies comply with U.S. antidiscrimination laws.¹⁹⁶ For example, the BIT between the United States and Egypt provides that companies of either country may choose professional employees "subject to employment laws of each Party."¹⁹⁷ Though some countries have withdrawn this particular language from their BIT with the United States, the U.S.-South Korea BIT should include antidiscrimination language because of the historical and cultural differences between the two countries, particularly in the area of gender equality.

Fifty years have passed since the enactment of the U.S.-South Korea FCN Treaty, and in that time the United States has enacted civil rights laws and statutes governing the employment relationship. In addition, important and helpful EEOC guidelines have been promulgated. Most FCNs were written before the enactment of these U.S. civil rights laws. Most likely, these civil rights laws did not address the relationship with FCN treaties simply because Congress was not contemplating foreign relations when drafting domestic employment laws and policies.¹⁹⁸ It is nonetheless disconcerting that these authorities are in conflict with the employer choice provisions in many FCN treaties. A U.S.-South Korea BIT would provide the important opportunity for credibility and consistency between domestic laws and foreign treaties.

Second, the BIT would provide an opportunity for the United States and South Korea to take into account the rise in South Korean investment in the United States since the FCN Treaty was enacted, particularly in the last twenty years. South Korea is now the U.S.'s seventh largest trade partner, and trade in 2003 between the two countries exceeded \$61 billion.¹⁹⁹ In 2000, South Korea's foreign

195. Kimm, *supra* note 140, at 139.

196. *Id.* at 138.

197. Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, U.S.-Egypt, art. 5(b).

198. See Michael H. Gottesman, *Chickens Come Home to Roost: Have American Treaties Fenced Off Some of Our Best Jobs from Americans?*, 27 LAW & POL'Y INT'L BUS. 601 (1996).

199. American Chamber of Commerce in Korea, *Information Resources: Issues: 2004*, available at http://www.amchamkorea.org/publications/information_detail.jsp?id=12 (n.d.).

direct investment in the United States exceeded \$1 billion.²⁰⁰ At the time of the signing of the U.S.-South Korea FCN Treaty in 1956, the countries likely could not have predicted the current global market, and thus could not have seen the ready need for employment protections for U.S. citizens working for Korean companies in the United States.

Though it would be preferable to have an existing a U.S.-South Korea BIT, it is encouraging that negotiations have reportedly stalled on the issue of theater quotas, rather than the issue of employment discrimination. It is a goal of the current U.S. Chamber of Commerce in South Korea to have a treaty enforced as soon as possible.²⁰¹ The two countries recently concluded their first working-level meeting in Seoul to determine the workability of a bilateral trade agreement.²⁰²

In summary, a U.S.-South Korea BIT would provide a fresh start and update documents that govern the relationship between South Korea and the United States. The BIT would also provide an opportunity for the United States and South Korea to enact a new trade treaty given the rise in foreign investment in the past twenty years. The BIT should thus strive to be consistent with Title VII and the EEOC guidelines prohibiting discrimination in employment within the United States. The BIT should specifically address the interplay between the treaty and Title VII. The BIT should take care to close the loophole currently existing in the U.S.-South Korea FCN Treaty that enables corporations to violate Title VII with no repercussions.²⁰³ It is important to attempt to strike a balance between the preservation of culture and the important value of nondiscrimination. A historical preference for a particular gender is not sufficient to override the value of nondiscrimination

VII. CONCLUSION

Thankfully, the outlook is not entirely bleak. In 2003, upon the direction of the chairman of Samsung, the Samsung Economic Research Institute formed a joint task force with the Group Reformation Headquarters. The task force's duty was to study the proper utilization of female human resources, noting specifically what was being done at top international firms, such as IBM, GE, Deloitte,

200. *Korean Investment in China Up, U.S. Down*, ASIA TIMES ONLINE, Feb. 7, 2002, <http://www.atimes.com/koreas/DB07Dg01.html>.

201. See Kirk, *supra* note 194, at W1.

202. *South Korea, U.S. Discuss Free Trade Possibilities*, BBC WORLDWIDE MONITORING, Feb. 3, 2005, LEXIS.

203. Sealing, *supra* note 2, at 92.

Corning, and HP.²⁰⁴ Lee Ju-hee from the Korea Labor Institute stated that “[w]hen it comes to utilization of women resources, Samsung has played a role as a pioneer and stands at a level close to those of more industrialized nations.”²⁰⁵ But while the chairman of Samsung was eager to implement reforms at Samsung in the 1990s, he faced skepticism and reluctance within the company. Some affiliates expressed dissatisfaction about Chairman Lee Kun-hee’s initiative for gender equality because it meant a significant amount of additional labor expenses.²⁰⁶ Nevertheless, Lee Kun-hee has introduced a recruiting quota—30 percent—that must be filled with women.²⁰⁷

South Koreans hold dearly the historical values of their culture, and this should be commended. South Koreans strive to follow the teachings of Confucius in both home and the workplace. When these values are transferred to the employment context in other countries, however, the potential result is discrimination. The U.S.-South Korea FCN Treaty embodies this potential for discrimination, and the United States and South Korea should thus seek an alternative route to govern South Korean corporations in the United States. The current South Korean government is looking to change the landscape of South Korean corporations working abroad, and a less discriminatory treaty, such as the proposed U.S.-South Korea BIT, would be a step in the right direction.

*Jennifer D. Fease**

204. Kim Sung-hong & Woo In-ho, Samsung Hires, *Trains More Female Employees; Lee’s ‘No Discrimination’ Policy Challenges Korea’s Male-Oriented Corporate Culture*, KOREA HERALD, Aug. 19, 2003.

205. *Id.*

206. *Id.*

207. *Id.*

* J.D. Candidate, Vanderbilt University Law School, May 2005. B.A. Lee University, 2002.
