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Subsidies under United States Countervailing Duty Law: The Case of Taiwan

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Subsidies Under United States Countervailing Duty Law: The Case of Taiwan

*Clyde D. Stoltenberg**

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I. INTRODUCTION

The rapid industrialization of the Republic of China on the island of Taiwan during the past thirty years has been accompanied by the entry of goods "made in Taiwan" into markets around the world. Indeed, foreign trade has become the backbone of Taiwan's economy and the impetus for its economic growth. Between 1976 and 1984, for example, year-to-year growth rates of imports ranged from 7.4% to 34.0%, while export growth ranged from 14.1% to 53.8%.¹ In its ninth medium-term economic plan, the Council of Economic Planning and Development ("CEPD") calls for Taiwan's economy to grow by an annual average of 6.5% and exports of merchandise to increase by 8.2% annually from 1986 to 1989.² The four-year plan projects merchandise exports of \$40.3 billion and imports of \$30.4 billion by 1989.³

These achievements can be traced to a number of unique social, political, and geographic factors. Not the least important of these factors has been the government's success in nurturing an economic environment which has allowed the country's businesses to take advantage of Taiwan's comparative advantage with a reasonable degree of consistency. Among the relevant factors influenced or controlled by the Taiwan government are the country's system of business taxation, customs duties, investment capital structure, commodity pricing and labor supply and costs. These factors have evolved in such a way as to make exporting

¹ INDUSTRIAL DEVELOPMENT AND INVESTMENT CENTER, A BRIEF INTRODUCTION TO GENERAL INVESTMENT OPPORTUNITIES IN THE REPUBLIC OF CHINA (April 1986).

² *Id.* at 3.

³ *Id.*

very profitable both for the Taiwan companies and for the nation as a whole, resulting in accumulated foreign exchange reserves exceeding \$42 billion by the end of 1986.⁴

To the extent that any of these factors constitutes a preferential benefit bestowed by Taiwan's government, directly or indirectly, upon a product exported to the United States, it may be held to be a subsidy countervailable under United States import law.⁵ The rationale behind the United States countervailing duty law is that "no domestic manufacturer, regardless of how efficient, is able to compete against a foreign company or companies that are subsidized by their governments."⁶ However, not all foreign government policies affecting production by companies which export to the United States can possibly represent subsidies countervailable under United States law.⁷ This Article analyzes Taiwan's government policies affecting production for export and their treatment under United States countervailing duty law. After describing the evolution of Taiwan's trade policy and the present formulation of Taiwan's law and regulation affecting production for export, the Article sets forth the applicable provisions of United States countervailing duty law. Discussion then focuses upon recent countervailing duty proceedings involving Taiwanese products, and concludes with the observation that the Taiwanese government subsidizes its exports minimally, if at all.

⁴ Ni, ROC Government's Efforts in Promoting Two-Way Investments Between the ROC and the USA, Paper delivered at the 10th Joint Conference of USA-ROC and ROC-USA Economic Councils 5 (Dec. 5, 1986).

⁵ The relevant United States statute and regulations are at 19 U.S.C. § 1303 (1982), 19 U.S.C.A. § 1671 (1985), and 19 C.F.R. § 355 (1987). For a good summary of the countervailing duty law, see Sander, *Primer on United States Trade Remedies*, 19 INT'L LAW. 761, 769-72 (1985). International rules on countervailing duties are derived from Article VI of the General Agreement on Tariffs and Trade ("GATT") as well as the GATT Subsidies Code. *Id.* at 769.

⁶ Perry, *Trade Laws' Aim: Ease Dislocation and Counteract Unfair Practices*, 9 BUS. AM. 3 (Dec. 8, 1986).

In the United States, the first general purpose countervailing duty law was enacted in 1897. It was based on earlier laws designed to protect the domestic sugar industry from unfair foreign competition caused by foreign government subsidies ("bounties") paid to private manufacturers on the exportation of refined sugar. Congress perceived that these bounties allowed foreign producers to sell below market prices with the effect of injuring domestic sugar companies.

Id.

⁷ All governments undertake policies that affect production. They range from the very general, such as maintaining a non-inflationary macro-economic environment conducive to long-term growth; to the very specific, such as providing direct grants to keep a faltering firm in production. These policies include positive actions such as building roads and enforcing contracts, and negative actions such as taxation and pollution controls. If the U.S. countervailing duty laws were to apply across the board to all policies that may benefit production (or, e.g., that penalize production abroad less than comparable U.S. policies), it would be completely unworkable in its current non-discretionary form.

Horlick, Bello & Levine, *The Countervailability of Subsidies: Specificity*, in UNITED STATES IMPORT RELIEF LAWS — CURRENT DEVELOPMENTS IN LAW AND POLICY 37-38 (H. Applebaum & A. Victor, eds. 1985) [hereinafter IMPORT RELIEF].

This observation will refute the recurring argument that Taiwanese export subsidies have contributed to the United States-Taiwan trade deficit.

II. THE EVOLUTION OF TAIWAN'S TRADE POLICY

A. The Japanese Colonial Period: 1895 to 1945

Taiwan was under the colonial rule of Japan from 1895 until 1945. The generally accepted view of Taiwan's economy under Japanese colonial rule is that it constituted "a principally agricultural appendage to the Japanese economy—with governmental policy focused mainly on increasing agricultural productivity—via both organizational and infrastructural investments."⁸ Gustav Ranis, however, has demonstrated several developments which indicate that this view is misleading. For instance, the food processing industry became increasingly important, due to fiscal incentives, and to tariff protection after 1911. Furthermore, during the 1930's, Japan recognized Taiwan's strategic location and began to invest more heavily in such non-agricultural infrastructure as power and transport, as well as in basic industries, such as cement, chemicals, pulp and paper, fertilizer, petroleum refining and metallurgy. Finally, the transport network and electrification works were directed not toward the narrow purpose of extracting and exporting primary raw materials or minerals, but instead toward the purpose of a broad agricultural mobilization.⁹

B. The Immediate Post-War Period: 1945 to 1949

Allied bombing during World War II resulted in significant damage to both industrial plant and infrastructure. In addition, Taiwan's return to Chinese control after World War II necessitated shifting Taiwan's export markets from Japanese to mainland Chinese markets. Soon, however, Taiwan again had to shift its export markets to Japanese and other international markets following the Communist victory on the mainland and the establishment of the Nationalist government on Taiwan.¹⁰ At the same time, as a result of the termination of colonial ties to Japan, Taiwan companies began domestic production of a number of essential

⁸ Ranis, *Industrial Development*, in *ECONOMIC GROWTH AND STRUCTURAL CHANGE IN TAIWAN* 208 (W. Galenson ed. 1979) [hereinafter *GROWTH IN TAIWAN*].

⁹ *Id.* at 208-09. For an expanded discussion, incorporating political and social aspects of the Japanese occupation period, see T. GOLD, *STATE AND SOCIETY IN THE TAIWAN MIRACLE* 32-46 (1986).

¹⁰ Ranis, *supra* note 8, at 209. The main product for export at this point consisted of processed foods, but capacity to export cement, paper and aluminum also existed. *Id.*

consumer items, including textiles, leather goods, soaps and oils.¹¹ As a result of poor quality and high production costs, however, many of these enterprises encountered difficulties not only in marketing products abroad but also in competing domestically with Japanese products imported to Taiwan.¹²

C. The Import Substitution Period: 1949 to 1958

Confronting such obstacles, the Taiwan government began to adopt a series of import substitution policies. In June 1949, the government mandated surrendering foreign exchange earnings at the official rate.¹³ As a result of a trade deficit and inflation, applications for foreign exchange soon exceeded available supply, and in December 1950, the government adopted a procedure to regulate foreign exchange applications on the basis of the strength of domestic demand.¹⁴ Then, in April 1951, the authorities prohibited private transactions in gold and foreign exchange and severely restricted such transactions in exchange settlement certificates ("ESCs").¹⁵

At the same time, officials introduced a multiple exchange rate to govern both import payments and export receipts:

Imports of goods by the public sector, and of plant equipment and important raw materials and intermediate inputs by the private sector, were given a lower "official" rate; imports of other goods, including many finished consumer goods, were given a higher ESC rate. On the export side, exchange earnings of public enterprises were given a lower rate and those of private enterprises a higher rate. . . . During the early 1950s the exchange rates were structured in a way that gave the most favorable treatment to the importers of plant equipment and U.S.-aid-financed goods, followed by the exporters of traditional goods, and importers of "ordinary" goods (mainly finished consumer goods).¹⁶

The effect of this multiple exchange rate system, of course, was the subsidization of import-substituting industries by export industries.

¹¹ *Id.*

¹² C. LIN, *INDUSTRIALIZATION IN TAIWAN, 1946-72* 43 (1973); S. KUO, *THE TAIWAN ECONOMY IN TRANSITION* 297 (1983). For an expanded discussion of the period immediately following World War II, incorporating political and social issues, see T. GOLD, *supra* note 9, at 47-55.

¹³ Exporters and other recipients of foreign exchange were required to sell their foreign-exchange earnings to the Bank of Taiwan at the official rate of NT\$5 per U.S. dollar, receivable 20 percent in cash and 80 percent in exchange settlement certificates ("ESCs") of equivalent value. These ESCs were freely negotiable in the market, or could be sold to the Bank of Taiwan at the official rate. Importers applying for official foreign exchange were required to submit ESCs.

C. LIN, *supra* note 12, at 43.

¹⁴ *Id.* at 43-44.

¹⁵ *Id.* at 44.

¹⁶ *Id.* at 44-45. See also Liang & Liang, *Trade and Incentive Policies in Taiwan*, in *EXPERIENCES AND LESSONS OF ECONOMIC DEVELOPMENT IN TAIWAN* 221 (Li & Yu eds. 1982).

The imposition of import controls constituted another tool of infant industry promotion and protection in Taiwan. The following major commodities were placed under import control during this period of development of import-substitution industries:¹⁷

Table 1

Placed under control by September 1949	Placed under control between September 1949 - 1955
Cotton piece goods, bleached or dyed*	Cotton yarn
Woolen velvets, plushes	Cotton piece goods, gray
Glutamic acid	Cotton piece goods, bleached or dyed (all)
Monosodium glutamate and other seasoning powders	Woolen yarn
Plywood	Man-made fibers, and yarn spun thereof
Leather manufacturers	Wheat flour
Cement	Soy oil
Caustic soda	Gluten
Liquid chlorine	Upper leather
Hydrochloric acid	Polyvinylchloride
Bleaching powder	Sulfur
Glass bottles	Ammonia
Soap and cleaning compounds	Ammonium sulfate and other chemical fertilizers
Printing paper	Soda ash
Rubber boots, etc.	Sheet glass
Aluminum ingots	Gasoline and diesel oil
Aluminum kitchenware	Antibiotics, packed
Pig iron	Motor vehicle tires
Tin plate, decorated	Aluminum sheet
Sewing machines, household	Vessels, motored
Automobiles, whole*	
Motorcycles, whole	
Household refrigerators, whole	

These products could be imported only with the approval of the trade control authorities. Import controls were favored over tariff manipulation for various reasons.¹⁸

¹⁷ C. LIN, *supra* note 12, at 48. Import controls were applicable to part, but not all of the goods under the categories marked with an asterisk.

¹⁸ *See id.* at 47-50. The choice of import controls over tariff manipulation probably resulted in the bulk of the benefits of price increases in imports and import substitutes going into the pockets of traders and domestic producers instead of being absorbed by the government in the form of fiscal revenue. *Id.* at 50. The government's decision to strike the balance in favor of leaving more of the benefits in the hands of a relatively inexperienced private industrial entrepreneurial class rather than increasing government funds appears to have paid off. Another example during this period of the government's faith in private initiative is the manner in which it established a number of industry-

The government's import substitution policies yielded rapid results. During the years from 1952 to 1957, the share of consumer goods in total imports fell from 19.8% to 6.6%.¹⁹ During the same period, exports as a fraction of gross domestic product ("GDP") rose only slightly, from 8.0% to 9.5%.²⁰ Total industrial production (which had only regained its 1940 peak in 1951) doubled between 1951 and 1954, and import substitution was responsible for more than 90% of the sources of total market demand between 1937 and 1954.²¹ Within the manufacturing industry, the dominance of food processing gave way to a number of primarily import substitution industries, such as textiles, rubber and leather goods, wood products and bicycles.²² As might be expected in this context, the overall trade orientation of the economy declined from the pre-war period; this trend continued during the 1950s.²³ Ranis summarized the basic purposes of the total policy package as 1) to capture the foreign exchange resources necessary for public sector overhead construction; 2) to maintain existing industry; and 3) to expand consumer goods industries.²⁴

By the mid-1950s, however, the negative consequences which economists commonly associate with a primary import substitution policy began to manifest themselves in Taiwan. Attainment of a high rate of import substitution means that growth of domestic output depends

oriented technology and investment institutes to provide management training and technical assistance along with credit for industrial entrepreneurs:

While the effort to provide such packages is a common phenomenon in developing countries, the concentration [in Taiwan] on usefulness to the private sector in areas of expanding activity compares favorably with the "search for major break-throughs" approach to technology financed by government subsidies frequently encountered elsewhere. In general, the government avoided the splashy "white elephant" route and seemed more interested in enhancing the capacity of the infant entrepreneur to stand on his own feet—presumably the basic purpose of erecting the primary import-substitution hothouse in the first place—rather than to force-feed him continuously into the need for permanent protection from foreign and domestic competition.

Ranis, *supra* note 8, at 215-17. Ranis also points out a number of other factors distinguishing Taiwan's import-substitution phase as a much milder version of the normal developing country stereotype. These include: 1) various measures taken to ensure the simultaneous vigorous growth of agricultural activity; 2) relatively (by developing country standards) lower levels of protection by way of tariffs and quantitative restrictions; 3) monetary policies (such as relatively high interest rates) more favorable to the establishment of a relatively more competitive and efficient industrial sector; and 4) a fairly general disinclination to resort at will to the whole range of direct allocative devices (e.g., in the areas of steel, cement, fertilizer, etc.) often in evidence during periods of primary import-substitution. *Id.* at 214-15.

¹⁹ *Id.* at 211.

²⁰ *Id.*

²¹ *Id.* at 213; C. LIN, *supra* note 12, at 67.

²² Ranis, *supra* note 8, at 217-8.

²³ *Id.* at 217.

²⁴ *Id.* at 213.

“mainly upon net increases in domestic demand.”²⁵ By the mid- to late-1950s, the gradual exhaustion of the protected domestic market had become apparent.²⁶ At the same time, balance of payments deficits persisted,²⁷ and many of Taiwan’s traditional and new manufactured export products confronted a market glut.²⁸

Ranis suggests the following two possible responses at such a point in a newly industrializing country’s development: 1) actions “directed toward the maintenance of growth in the more labor-intensive nondurable consumer goods industries, to facilitate the shift from domestic to export markets”; or 2) actions “directed toward a further expansion of the more capital- and technology-intensive durable consumer and capital goods industries, to induce secondary import substitution in other areas of the domestic market.”²⁹ In Taiwan, policymakers attempted a variety of responses. On the export promotion side, these included creation of a system of subsidies for a number of traditional exports in excess supply, enlargement of the scope of export products benefiting from preferential exchange rates, periodic exchange rate devaluation and development of a system of tax rebates for industrial exports.³⁰ At the same

²⁵ C. LIN, *supra* note 12, at 68.

²⁶ This exhaustion at the aggregate level exhibited itself by the bottoming out of the percentage of the total supply of nondurable consumer goods still being imported, a decline of the growth rate of industrial output . . . and, at the micro level . . . by a record of falling prices, increased competitiveness, and businessmen’s pressure for cartelization and other government action to avoid bankruptcy.

Ranis, *supra* note 8, at 213. *See also* Liang & Liang, *supra* note 16, at 221-23; C. LIN, *supra* note 12, at 70. Nor had growth of output in the intermediate goods and capital goods sectors picked up. Lin attributes this to “the limitations of the small size of the domestic market and the sophisticated nature of production technology required.” *Id.* This may be due, at least in part, to the fact that, in contrast to other countries where adoption of import substitution policies tended to favor the relatively large-scale and capital-intensive, “Taiwan’s manufacturing sector was already unusually labor-intensive and decentralized.” Ranis, *supra* note 8, at 218.

²⁷ “Throughout the first half of the 1950s, deficits on goods and services amounted to as much as 35-64 percent of annual imports, reflecting the slow growth of exports and the continued large imports of capital equipment and intermediate goods.” C. LIN, *supra* note 12, at 70.

²⁸ *Id.* at 72-74.

²⁹ Ranis, *supra* note 8, at 213.

³⁰ In 1952 a total of 20 traditional export items then in a market glut were taken up for government assistance, first by allowing the retention of foreign exchange earned by the exporters of those products and then by giving the exporters cash subsidies (although the cash system was soon discontinued for want of funds.) Exchange rates applicable to private exporters and inward remittances were raised several times during 1951-53 and then in 1955, by giving the traders and other holders of foreign exchange certain ratios of negotiable foreign exchange certificates in addition to converting their foreign exchange earnings at the official rates. . . . In 1954 a system of tax rebates was introduced for reimbursing the manufacturers-cum-traders for import duties paid on raw material used in the manufacturer of export products. In 1956 a system of foreign exchange entitlements was introduced whereby these manufacturers-cum-traders were to be entitled to certain proportions of their foreign exchange earnings for use in importing raw materials.

C. LIN, *supra* note 12, at 74. *See also* Liang & Liang, *supra* note 16, at 223.

time, a number of steps were taken which must be regarded as consistent with maintaining an import substitution policy. These steps included the organization of domestic cartels to resist price cutting, and a search for new (and an expansion of old) secondary import substitution industries, such as chemicals, rayon fiber, urea fertilizer, pre-vulcanized plastics and compact cars.³¹

D. Export Promotion: 1958 to Present

In 1958 the Taiwan government initiated a number of major policy changes emphasizing exports. Some of these policies were aimed at reducing the advantages of import substitution: 1) the multiple exchange rate system was gradually dismantled as exchange rates were unified;³² and 2) the budgeting and allocation of foreign exchange was rendered more flexible through the gradual elimination of the system of commodity-by-commodity foreign exchange allocation.³³ Other policies were specifically designed to enhance export activity directly. Tax rebates applicable to industrial exports were extended and their governing rules liberalized, and ratios of foreign exchange entitlements for industrial exporters were raised to 100% of export earnings. A system of low-cost export loans was also introduced in order to facilitate export financing.³⁴

Among the objectives of the nineteen-point reform program adopted by the government in February 1960 were the promotion of measures encouraging export expansion and the improvement of procedures governing the settlement of foreign exchange earned by exporters.³⁵ The Statute for Encouragement of Investment ("SEI"), enacted pursuant to the nineteen-point reform program, contained a number of export enhancement provisions. These provisions included a deduction from taxable income of 2% of annual export proceeds within certain limits; an exemption or reduction of the stamp tax in many cases, and an allowable set-aside of 7% (to be regarded as profits before taxation) of the unpaid balance of foreign currency debt calculated in local currency as a reserve against possible losses caused by exchange rate revision.³⁶ The Income Tax Law, as revised in December 1955, had already provided for certain

³¹ Ranis, *supra* note 8, at 219. For an expanded discussion, incorporating political and social aspects of the import substitution period, see T. GOLD, *supra* note 9, at 56-73.

³² Ranis, *supra* note 8, at 219; Liang & Liang, *supra* note 16, at 223-230. For a summary of the steps taken between April 1958 and October 1963, see C. LIN, *supra* note 12, at 75-76.

³³ Ranis, *supra* note 8, at 219-20. For a summary of the steps taken between April 1958 and September 1959, see C. LIN, *supra* note 12, at 76.

³⁴ C. LIN, *supra* note 12, at 76-7; see also Ranis, *supra* note 8, at 220.

³⁵ S. KUO, *supra* note 12, at 300.

³⁶ *Id.* at 301; Liang & Liang, *supra* note 16, at 234.

tax reductions, credits and holidays for qualified enterprises.³⁷ The requisite criteria for receipt of government approval for such credits included the attainment of both import substitution and export expansion; new entries could be added to the list of qualified enterprises provided at least 50% of additional output was exported.³⁸

In July 1954, the system of tax rebates, which had been used on a limited basis since 1951 in Taiwan to facilitate importation of raw materials and their processing for export, was extended to cover all export goods.³⁹ Similarly, the scope of rebates was expanded from refunds only of customs duties to include a variety of commodity taxes and other duties accruing to manufactured goods.⁴⁰ The government also reduced or liberalized over time the fees, time limits, and other conditions required of exporters applying for tax rebates.⁴¹ Further, authorities allowed a combination of the system of tax refunds with a system that offset tax liabilities on exporting in lieu of actual collection of taxes, if the exporter satisfied certain conditions.⁴²

The system of foreign exchange control which the government developed in the early 1950s and its role in enhancing import substitution are described above.⁴³ A system of foreign exchange retention, dating from 1952, existed for Taiwan's traditional export items and private sector exports in general.⁴⁴ It was not until August 1956 that a system of foreign exchange entitlements applicable more specifically to manufactured goods was put in place. Under this system, "exporters of manufactured goods were to be entitled to a certain percentage of their foreign-exchange earnings for the purpose of importing the needed raw materials approved by the authorities, or for selling to other end users."⁴⁵ After

³⁷ These incentives included a 10% reduction in payable income tax for qualified profit-seeking enterprises and a three-year tax holiday for new investments or expansion of investments (resulting in an increase of production by 30% or more) by such enterprises. The tax holiday was extended from three to five years in September 1960. C. LIN, *supra* note 12, at 85.

³⁸ *Id.* at 86.

³⁹ *Id.* at 100-01.

⁴⁰ These included the commodity tax and defense surtax beginning in 1955, the harbor charge in 1958, the salt tax in 1960, and the slaughter tax in 1964. *Id.* at 101.

⁴¹ *Id.*

⁴² *Id.* at 102-03.

⁴³ See *supra* notes 13-16 and accompanying text.

⁴⁴ The system, initially introduced for twenty traditional export items handled by private sector traders then experiencing a market glut, was replaced in September 1952 by a system of cash subsidies. The number of products receiving subsidies, however, was soon reduced as a result of a shortage of funds. During the period from July 1953 to February 1955, export performance was among the factors taken into account by authorities when screening private sector traders' import exchange applications. C. LIN, *supra* note 12, at 97.

⁴⁵ *Id.*

the 1958 foreign exchange reform, exchange entitlements were increased to 100% of export earnings for most items.⁴⁶ This system was coupled with commodity import restrictions which had the effect of conferring a cost advantage on exporters of manufactured goods as compared with manufacturing firms catering only to the domestic market.⁴⁷ As foreign exchange supplies increased, the usefulness of the system of exchange entitlement as a method for encouraging exports also gradually diminished, and it was abolished in January 1971.⁴⁸

In July 1957 the Bank of Taiwan initiated a system of low-cost export loans. The rates of interest were 6% per annum for loans repayable in foreign currencies (increased to 7.5% in March 1962) and 11.88% per annum for loans repayable in domestic currency. At that time, loans available to private sector enterprises for general business purposes bore interest at the rate of 19.8% for secured loans and 22.32% for unsecured loans.⁴⁹ Although the export loan program met the short-term fund needs of manufacturers for export across the entire scope of their operations,⁵⁰ since 1974 these loans never represented more than 2-3% of the total loans outstanding in Taiwan.⁵¹

A major revision of the foreign exchange system occurred in November 1958, one which allowed ESCs to be applied to all kinds of imports and exports.⁵² In the process of simplifying the multi-tiered foreign exchange system first to a two-tiered system and then to a single exchange rate in 1961,⁵³ the price of ESCs came to be fixed at a level close to the market price.⁵⁴ The ESC system was eventually abolished and replaced by the direct exchange settlement system now in effect.⁵⁵ At the same time, the New Taiwan dollar was devalued, thereby encouraging

⁴⁶ *Id.* at 98.

⁴⁷ An exporter of manufactured goods could apply for the import of required raw materials if they were not produced domestically, or if the selling price of the equivalent domestic product exceeded 10% of CIF costs, whereas manufacturing firms producing for the domestic market could apply to import a product only if the selling price of the domestic product exceeded a certain percentage (25% prior to 1964, 15% from 1964 to 1968, 10% after 1968) of the duty-paid import costs. *Id.* at 98-100.

⁴⁸ *Id.* at 100.

⁴⁹ *Id.* at 105.

⁵⁰ *Id.* at 105-06.

⁵¹ S. KUO, *supra* note 12, at 303-04.

⁵² *Id.* at 298.

⁵³ Sun & Lee, *Economic Development of the Republic of China on Taiwan With Special Reference to ROC-US Trade and Investment Relations*, in *TRADE AND INVESTMENT IN TAIWAN* 60-61 (H. Ma ed. 1985) [hereinafter *TRADE AND INVESTMENT*].

⁵⁴ S. KUO, *supra* note 12, at 298-99.

⁵⁵ *Id.* at 299.

exports.⁵⁶

During this period, revision of import duties and reduction of import restrictions also evidenced movement toward liberalization of discretionary controls. In 1955, tariff rates were raised on both finished goods and intermediate inputs for many products.⁵⁷ This trend was reversed in 1959, however, when tariff rates were reduced for a number of finished goods as well as their principal imported inputs and in 1965, when tariff rates were reduced on a number of important manufactures.⁵⁸ As a result of the imposition of a defense surtax and harbor charges, however,⁵⁹ the rates of total import duties on a number of goods were substantially higher than their tariff rates would suggest. Thus, during the 1960s, the remission of taxes and duties became increasingly important to the promotion of export manufacture.⁶⁰ At the same time that import duties were under revision, the conditions for import restriction were gradually tightened during the 1960s.⁶¹

In addition to the government's foreign exchange, trade, and financial policies just described, two other developments affecting export growth warrant some attention. First, several manufacturing sectors organized during the late 1950s and throughout the 1960s to regulate output and to promote export sales through a system of mutual subsidies.⁶²

⁵⁶ *Id.* "From the beginning of 1958 to the middle of 1959, the NT\$ was devalued, depending on the type of transaction, by 50-80 percent." S. HO, *ECONOMIC DEVELOPMENT OF TAIWAN, 1860-1970*, at 196 (1978).

⁵⁷ C. LIN, *supra* note 12, at 87.

⁵⁸ *Id.* at 87-88; see Liang & Liang, *supra* note 16, at 230-31.

⁵⁹ These charges evolved in such a way as to provide further incentives for exports. From April 1958 until July 1968, the defense surtax was 20% on the customs tariff of all imported goods; then a variable rate structure was adapted as follows: 20% on raw materials for use in the manufacturing of export goods (to be written off at the time of exporting the finished goods); 26% on plant equipment, scientific and medical instruments and equipment, and daily essentials; and 30% on all other goods. An additional 20% surtax was temporarily collected on goods used for consumption purposes between May 1962 and June 1963. C. LIN, *supra* note 12, at 88. In November 1958, the harbor charge on traded goods (which had been collected at 2% each on the duty-paying value of both imports and exports) was eliminated on exports and increased to 3% on imports. In August 1967, an additional 0.75% was levied on imports for a period of 10 years. *Id.*

⁶⁰ *Id.* at 90.

⁶¹ *Id.* at 90-95; Liang & Liang, *supra* note 16, at 231-33. According to Kuo's analysis, "when manufactured products are classified into four categories—export competing, export-import competing, import competing and non-import competing . . . the highest rate of protection [during 1961-1971] was extended to export competing industries." S. KUO, *supra* note 12, at 303-05.

⁶² These sectoral associations function by collecting from their member firms an agreed amount for a so-called cooperative fund. The fund thus established is used to pay out an agreed amount of so-called export bonuses to the exporters of finished goods. Each firm is allocated an export quota in proportion to its output, and is required to pay a penalty to the cooperative fund if its export sales fall short. The exact amount of the agreements signed between the firms must be submitted for approval by the proper government agencies.

C. LIN, *supra* note 12, at 108. See also Liang & Liang, *supra* note 16, at 234.

Manufacturers of various products formed such cartels, including manufacturers of cotton textiles, paper, steel products, rubber manufactures, monosodium glutamate, cement, and woolen textiles.⁶³ Their penalties on domestic sales and encouragement of export sales thus supplemented the various government-administered export incentives. Second, the government in January 1965 enacted a statute for establishing export processing zones ("EPZs"). In addition to receiving the benefit of all export incentives otherwise available, plants in the zones had

access to well-developed plant sites or factory buildings, water and power supply, and harbor or warehouse facilities at costs comparable to or much lower than those available in other parts of the Far East, as well as enjoying a remarkable cutback in the red tape associated with applications for and licensing of investment, plant establishment, export, import, inward and outward remittances.⁶⁴

Plants in the zones also effectively received more favorable import duty treatment than plants located elsewhere in Taiwan.⁶⁵

The government's export incentive policies, (in combination with Taiwan's competitive labor supply, the continuation of sustained steady advances in the agricultural sector, and the contributions of foreign investment) yielded significant results:

[B]etween 1962 and 1972 exports of goods and services rose from 13 to nearly 43% of GDP and the share of industrial products—primarily nondurable consumer goods—in these exports increased from 50 to 83%. . . . By the end of the decade, Taiwan's export ratio was one of the highest on record, and the shift in the composition of exports certainly one of the most spectacular. During this period, imported raw-material-based industries (such as textiles, leather and wood products) dramatically increased their importance relative to domestic raw-material-based industries. . . .⁶⁶

From 1961 to 1971, exports grew at a 22% annual rate in real terms.⁶⁷

In spite of the challenge posed by the oil crises of 1973 and 1979-

⁶³ C. LIN, *supra* note 12, at 109.

⁶⁴ *Id.* at 107.

⁶⁵ *Id.* For brief descriptions of zone development, see *id.* at 107-08; S. HO, *supra* note 56, at 197-98; Liang & Liang, *supra* note 16, at 234-35; Ranis, *supra* note 8, at 237-39.

Developed country customers, such as the United States, in turn, by permitting the waiver of tariffs upon reentry on all but the value added portion of the product, provided additional encouragement for this new form of international subcontracting by process. Moreover, multinational companies became heavily . . . involved in this type of industrial activity and thus, given the enhanced flexibility for intrafirm pricing and profit location decisions, provided it with additional cost-reducing advantages."

Id. at 239.

⁶⁶ *Id.* at 221; see also Liang & Liang, *supra* note 16, at 235-40.

⁶⁷ S. KUO, *supra* note 12, at 315. For an expanded discussion, incorporating political and social aspects of the export orientation period from 1960 to 1973, see T. GOLD, *supra* note 9, at 74-96.

1980,⁶⁸ the fact that exports continued to grow at an annual rate of 19.2% in real terms during the decade from 1971 to 1981⁶⁹ suggests that the basic export orientation of Taiwan's economy remained intact. At the same time that a variety of significant import liberalization policies were gradually introduced,⁷⁰ a real effective exchange rate favorable to foreign trade was maintained from 1976 to 1981.⁷¹ Although a number of trends in the late 1970's indicated that Taiwan's industrial sector was entering a period of secondary import substitution,⁷² its high export ratios⁷³ and underlying support system have been maintained.

III. THE PRESENT FORMULATION OF TAIWAN'S LAW AND REGULATION AFFECTING PRODUCTION FOR EXPORT

The structure of Taiwan's law and regulation which has evolved since 1958 to facilitate exports includes relevant provisions in the areas of taxation, customs duties, financing, pricing, and labor.

⁶⁸ For accounts of Taiwan's response to these shocks to its economy, see Ranis, *supra* note 8, at 255-260; S. KUO, *supra* note 12, at 199-221.

⁶⁹ S. KUO, *supra* note 12, at 315.

⁷⁰ For example, import duties were reduced during the first half of 1972 for fifteen categories of import goods. C. LIN, *supra* note 12, at 188. This trend continued, when the tariff rate adjustment in 1974 lowered the tariff on 200 import items (while raising the tariff on only seven items). S. KUO, *supra* note 12, at 214. In spite of these adjustments, however, rates remained relatively high; in 1981, tariffs still comprised 19% of government tax revenue. *Id.* at 318. In addition, financial costs of importers were reduced "through increased provision for foreign-exchange loans, reduction in interest charges for such loans, and reduction in the proportion of performance bond required for importing plants and equipment by installment payments." C. LIN, *supra* note 12, at 188. To a limited extent, export incentives were also reduced during the period:

A program under which exporters could borrow for working capital against a credit line based on their previous year's trade performance was discontinued in January 1974. Pre-shipment preferential export credit to finance working capital needs is currently available only with [Letter of Credit] backing. Furthermore, stricter rules were applied to rebates on customs duties.

Liang & Liang, *supra* note 16, at 242.

⁷¹ S. KUO, *supra* note 12, at 306-08.

⁷² These trends included: 1) a gradual increase in the relative size of domestic intermediate and capital goods industries; 2) some domestic activity (in terms of raw materials utilized and sales) by the EPZs; and 3) growth of the public sector's role in the economy. Ranis, *supra* note 8, at 258-60.

⁷³ Exports have constituted more than 50% of Taiwan's GDP every year since 1978. DIRECTORATE GENERAL OF BUDGET, ACCOUNTING AND STATISTICS, EXECUTIVE YUAN, QUARTERLY ECONOMIC TRENDS IN TAIWAN AREA, THE ROC (August 1986). Taiwan's 1986 foreign trade totaled \$63.9 billion, up 25.8% over 1985; of this amount, \$39.78 billion was for exports (a 29.5% increase over 1985) and \$24.17 billion was for imports (a 20.3% increase over 1985). Taiwan International Trade 89 (March 1987). For an expanded discussion, incorporating political and social aspects of the post-oil crisis period, see T. GOLD, *supra* note 9, at 97-121; Liang & Liang, *supra* note 16, at 240-48.

A. Taxation

In recent years the standard income tax rates for profit-seeking enterprises⁷⁴ in Taiwan has been 30 and 35% of annual taxable income.⁷⁵ However, the Statute for Encouragement of Investment ("SEI") provides for two preferential income tax rate ceilings relevant to exporters. First, if a firm qualifies as a "productive enterprise" for purposes of the SEI,⁷⁶ its income tax (including surcharges) shall not exceed 25% of its annual taxable income.⁷⁷ Second, the statute also permits "venture capital investment enterprises, big trading companies⁷⁸ and basic metal production

⁷⁴ The term "profit-seeking enterprise" as used in the Statute for Encouragement of Investment, as amended through January 26, 1987 ("SEI"), refers to "any public-operated, private, or joint organization with a business name or place engaged in industry, commerce, agriculture, forestry, fishery, pasturage, mining, metallurgical operation or other activity for profit-seeking purposes, and organized in the form of sole proprietorship, partnership, company, or in any other form of organization." SEI art. 4. For a general discussion of taxation of domestic business enterprises, partnerships and other business entities, see Wang, *Taxation of Income in the Republic of China*, in TRADE AND INVESTMENT, *supra* note 53.

⁷⁵ The statute for income tax rates is adjusted every year by the legislature to fix the tax rates for the coming fiscal year. *Id.* at 331. The 1985 rate on taxable business income in excess of \$500,000 was 30%. *Id.* at 341.

⁷⁶ The term "productive enterprise" as used in the SEI refers to any one of a number of described types of operation "which produces goods and/or renders services, and which is organized as a company limited by shares in accordance with [Taiwan's] Company Law." SEI, art. 3. The types of operations included are manufacturing, handicraft, mining, agriculture, forestry, fishery, animal husbandry, transportation, warehousing, public utility, public facility construction and development, public housing construction, technical services, hotels and heavy machinery construction. The respective categories and criteria of encouragement for the different operations are to be prescribed and promulgated by the Executive Yuan. *Id.* The Executive Yuan has carried out this mandate by issuing a 107-page CATEGORIES AND CRITERIA OF PRODUCTIVE ENTERPRISES ELIGIBLE FOR ENCOURAGEMENT.

⁷⁷ SEI, art. 15.

⁷⁸ Since 1978, six large trading companies have been established under government guidance. Wang, *supra*, note 74. According to standards published by the Board of Foreign Trade ("BOFT") in early 1987, in order to be officially reorganized as a large trading company, a company must have an annual import/export volume of \$125 million. In addition, it should have NT\$200 million in paid-in capital and more than three foreign branch offices, and must be a limited company. China Post, Feb. 9, 1987, at 7, col. 1. Application for large trading company status must be submitted to the BOFT, and the company's export volumes must be validated by the tax collection office, while import volumes must be substantiated by Customs. *Id.* The required import/export volume has not remained static at \$125 million; in order to qualify as a big trader, a company's annual transactions must reach a certain level, which moves up in proportion to the country's overall trade growth. Designated big traders are disqualified when they cannot keep pace with the country's trade growth. As a result, only three (Collins Co., E-Hsin International Corp., and Pan Overseas Corp.) of the six originally-designated big traders still qualified in 1987. Taiwan International Trade 81 (June 1987); China News, June 20, 1987, at 8, col. 7. In addition to being allowed to take a 5% deduction in business taxes, a big trader is also allowed to get easy loans from banks totaling 2.5 times the amount of its capital. *Id.* col. 8. To reverse the diminution in the number of companies qualifying for "big trading company" status, the Board of Foreign Trade promulgated a number of revisions in July 1987. These included: lowering the minimum required annual business turnover from NT\$200 million to NT\$100 million, lowering required paid-in capital from NT\$200 million to NT\$150 million,

industries, heavy machinery industries, petrochemical industries or other important productive enterprises which conform with the needs for development of economic and national defense industries and are capital-intensive and/or technology-intensive in nature” to use a marginal tax rate of no more than 20%.⁷⁹

In addition to preferential income tax rate ceilings, the Statute for Encouragement of Investment also establishes a variety of tax holidays and an accelerated depreciation schedule. A newly established productive enterprise may select one of the following benefits: 1) a tax holiday of up to five years, provided that the company depreciates its assets according to Taiwan’s Service Life of Fixed assets;⁸⁰ or 2) accelerated depreciation on the service life of fixed assets.⁸¹ In addition, expanding enterprises may select a tax holiday of up to four years on the income derived from increased capacity, provided that the company depreciates its assets according to Taiwan’s Service Life of Fixed Assets,⁸² or accelerated depreciation of the newly purchased equipment beginning in the year in which the machines begin operation.⁸³

The Statute for Encouragement of Investment also authorizes the Executive Yuan to permit a productive enterprise to credit 5 to 20% of the amount invested in production equipment during a tax year against the income tax payable for that tax year.⁸⁴ In the event that the income

repealing the foreign branch office requirement, and allowing the previous year’s top 10 trading companies to acquire big trading company status. *China Post*, July 16, 1987, at 7, col. 3-4.

⁷⁹ SEI, art. 15. Prior to the 1987 amendment of the statute, the rates were 25% for big trading companies and venture capital investment enterprises and 22% for the other designated industries to be encouraged.

⁸⁰ SEI, art. 6.

⁸¹ If the service life of machinery and/or equipment is 10 years or more, it may be accelerated to 5 years; if it is less than 10 years, it may be accelerated by half; if the residual period after the acceleration is less than one year, the residual period shall not be counted. The prescribed service life of buildings, construction facilities, and communication and transport facilities may be accelerated by one-third; the residual period after the acceleration is less than one year, the residual period shall not be counted. If there is any undepreciated value during the accelerated service life, it may continue to be depreciated in one year or in several years within the prescribed service life until it is fully depreciated. *Id.*

⁸² The exemption is limited to the increase of capital for additional establishment of independent production or service units, or for expansion of major production or service equipment. *Id.*

⁸³ *Id.*

⁸⁴ SEI, art. 10. The Executive Yuan promulgated its Measures Governing the Application for Tax Deduction for Investment in Procurement of Machinery and Equipment by Private Production Enterprises by decree of June 29, 1985. The measures applied to purchases with a total cost in excess of NT\$600,000 and provided for deductions in the amount of 15% of the purchase price if purchased from domestic manufacturers and 5% if purchased from foreign suppliers. *Id.* art. 2. A March 1987 report by the Industrial Development Bureau indicated that since July 1985, when the investment tax credit program was implemented, total capital exceeded NT\$66 billion, resulting in NT\$4.2 billion in tax savings. *China Post*, Mar. 19, 1987, at 7, col. 3. However, in April 1987 the Finance

tax payable for the current year is less than the credit amount, the enterprise may credit the balance against its income tax in the ensuing five years.⁸⁵

The Statute for Encouragement of Investment also allows productive enterprises to set aside a reserve of up to 1% of the previous year's amount of export exchange settlement, to be used exclusively for compensating export losses actually incurred for the current year.⁸⁶ The reserve is treated as a deduction from taxable income and is identified as a liability on company accounts. Should a company's export loss reserve exceed 1% during the tax year, excess funds are carried forward as taxable income in the subsequent year.

Taiwan implemented a value-added tax ("VAT") system on April 1, 1986, pursuant to which a tax is collected from the purchaser at a flat rate of 5% on the value which has been added to a product at each stage of production or distribution.⁸⁷ However, exporters and a variety of enterprises related to the export trade pay VAT at a zero tax rate.⁸⁸ All previous VAT paid may be refunded, provided that the exporter provides all export documentation and documentation of purchases and approved expenses.⁸⁹ VAT is also applied to all imported goods except those im-

Ministry announced that it had decided to scrap the investment tax rebate system after its expiration at the end of June, 1987. *China News*, Apr. 20, 1987, at 2, col. 7. The decision was based on a ministry survey of more than one thousand local manufacturers revealing that the tax rebate had not been a decisive factor in their investment plans and had not been as effective in stimulating private investment as expected. *Id.* The ministry reported, however, that it would work out new regulations governing tax rebates for local manufacturers who make investments in pollution control programs. *Id.* The Industrial Development Bureau soon responded, taking the position that the tax credit program had been of great assistance in the upgrading of productivity and quality, and should be further extended. *China Post*, May 11, 1987, at 7, col. 1. Just prior to the scheduled expiration of the investment tax credit, a compromise was reached whereby the Finance Ministry agreed to prolong the measure for one more year and the Ministry of Economic Affairs agreed not to expand the list of eligible machinery and equipment. *China Post*, June 20, 1987, at 7, col. 2.

⁸⁵ The amount of tax credit in each ensuing year (except for the last year) cannot exceed 50% of the amount of income tax payable by the enterprise in the then current year. *China Post*, June 20, 1987, at 7, col. 2.

⁸⁶ SEI, art. 31.

⁸⁷ J. CHENG, *DOING BUSINESS IN TAIWAN* 1986, 62 (1986). Although most businesses are subject to the VAT system, financial institutions, special food and drink establishments and small businesses instead pay tax on monthly gross business receipts. *Id.*

⁸⁸ Zero tax rate enterprises include: 1) export of goods; 2) services related to exports or services offered within the territory of Taiwan but used in foreign countries; 3) goods sold to outbound or transit passengers by lawfully established tax free shops; 4) sale of machinery and equipment, material, supplies, fuel and unfinished goods to export enterprises inside the duty free export processing zones, enterprises inside the science-based industrial park, or to bonded factories or bonded warehouses supervised by the customs house; 5) international transportation; 6) vessels and aircraft used in international and deep sea fishing; and 7) sales of goods and maintenance services to vessels and aircraft used for international transportation and deep sea fishing. *Id.* at 62-63.

⁸⁹ *Id.* at 62.

ported into the science-based industrial park, government-approved tax free export zones, and bonded factories or warehouses, and to goods delivered from such enterprises, factories or warehouses into other areas in Taiwan.⁹⁰ Prior to implementation of the VAT and its zero tax rate for exporters, comparable benefits existed with respect to Taiwan's business and stamp taxes.⁹¹

Harbor taxes have been levied at a rate of 1% to 4% on the duty-paying value of all dutiable import goods. Export products have been exempted, and the tax can be offset or refunded for imported raw materials used in the manufacture of goods for export.⁹² In early 1987, the Ministry of Finance proposed changing the harbor fee to 1% for imports and to 0.5% of FOB prices for exports and eliminating the right to receive rebates of fees collected on imports processed for eventual export.⁹³

⁹⁰ *Id.* at 64.

⁹¹ The authorities in Taiwan levied a business tax on selling goods, rendering services or other profit seeking activities within the territory of Taiwan. Article 29 of the SEI exempted export sales (including sales to trading companies and to manufacturers for further processing before export) from the business tax. The amount of the exemption equaled the amount of business tax due on each sale destined for export. Companies paid the business tax monthly and received exemptions for export at that time. However, if the export remained unconfirmed at the time the taxes were due, or, if goods were sold to trading companies or to other manufacturers for further processing before export, companies initially reported the sale as a domestic sale, then applied for the business tax exemptions at the time of export. Such exemptions took the form of a rebate of taxes paid. Article 29 of the SEI was deleted, effective January 26, 1987, as a result of the implementation of the new business law and VAT law. *Econ. News*, Mar. 9-15, 1987, at 4, col. 4.

The authorities on Taiwan levied a stamp tax of 0.4% on sales invoices. Article 33 of the SEI permitted reduction of the stamp tax to 0.1% for all invoices issued by a profit-seeking enterprise for transactions exempted from the business tax by Article 29 of the SEI. Article 33 of the SEI was deleted at the same time as Article 29 for the same reasons. *Id.*

⁹² J. CHENG, *supra* note 87, at 62; *China Post*, Mar. 18, 1987, at 7, col. 1.

⁹³ *Id.* The evolution of this proposal is an example of how difficult it has been to resolve some of the trade tensions between the United States and Taiwan. In the course of the October 1985 consultations between the American Institute in Taiwan ("AIT") and Taiwan's Coordination Council for North American Affairs ("CCNAA"), AIT asked Taiwan to cut the harbor tax rate and apply it to both imports and exports. *Econ. News*, Nov. 24-30, 1986, at 5, col. 2. In August 1986 CCNAA indicated that Taiwan would consider restructuring the harbor tax. *Id.* at col. 2-3. The United States has reportedly protested the Finance Ministry's proposal as violating the spirit of the parties' understanding that port surcharges would "be levied on those who use the ports, meaning both imports and exports." *China News*, Mar. 19, 1987, at 2, col. 5. The United States reportedly has expressed the opinion that levying a lighter surcharge on exports is tantamount to encouraging exports to the United States and demanded that port surcharges should be the same for exports and imports. *Id.* The Finance Ministry based its argument on the fact that no port surcharge has been imposed on exports for the past 20 years and the sudden addition of a charge would put exporters at a disadvantage against foreign competition. *Id.* col. 5-6. The Economics Ministry, on the other hand, recommended a fee of 0.5% for both exports and imports, reflecting the differing perspectives of the two ministries. Taiwan's Council for Economic Planning and Development noted that the Finance Ministry's proposal might still dissatisfy the United States because of its different rates for imports and exports and "suggested that the government set the same rates for imports and exports in compliance with the principle of fair trade." *China News*, Mar. 23, 1987, at 2, col. 8. Even the

A commodity tax system also exists in Taiwan. This tax is a one-time tax payable regardless of whether the article is imported or manufactured locally; it is levied against the domestic manufacturer, or the holder of the article in the case of an imported item (assessed at the time of import).⁹⁴ The tax is computed according to a formula incorporating tax rates ranging from 2% for natural gas to 100% for certain cosmet-

Finance Ministry's proposal, however, caused concern in the export industry. In a meeting with Finance Minister Chien on March 23, 1987, a group of industry representatives led by the chairman of the Chinese National Federation of Industries pointed out that the NT dollar's gains against the United States dollar had already dampened local industry competitiveness and that the proposed levy would add to exporters' burdens and further cut their competitive edge in the world market. Finance Minister Chien, in response, cited U.S. complaints about the current levy system and said that if the fee were dropped altogether, as some had suggested, the government could suffer loss of revenues. He concluded that the Finance Ministry needed more time to make an overall review of all the problems before making a final decision. *China News*, Mar. 24, 1987, at 8, cols. 4-5. In May 1987, it was reported that the Ministry of Finance and the Ministry of Communications had reached consensus on harbor fees, with the Communications Ministry to submit a proposed amendment stipulating that all export items would be subject to the harbor construction fee at a rate not to exceed 4% of a product's export value; a ranking official noted that "the actual rate [would] not exceed 1% even though the upper limit is set at 4%." *China Post*, May 9, 1987, at 7, col. 1. At a symposium shortly thereafter sponsored by the Importers and Exporters Association of Taipei (including importers, exporters, and representatives from the Ministry of Finance, Ministry of Communications, Board of Foreign Trade, Industrial Development Bureau, and Legislative Yuan), the participants found that the tax for harbor construction had reached NT\$14.8 billion in 1986, only 25% of which was actually used for harbor construction; they also noted that the fee, combined with an appreciating NT dollar, was causing serious problems for manufacturers and exporters. The symposium resulted in a consensus against calling the tax a "harbor construction fee" and suggesting that it be suspended or lowered to 0.5% of the import or export value. *China Post*, May 23, 1987, at 7, col. 2. The Executive Yuan at the end of May approved and submitted to the Legislative Yuan an amendment lowering the ceiling from 4% to 2% and also subjecting exports to the levies. It was simultaneously reported that the government had tentatively set rates of 1% for imports and 0.5% for exports at the initial stage of enforcement of the revised law and had decided to freeze annual revenues at the amount of NT\$14.6 billion then projected for 1987 (meaning that rates for both imports and exports could be lowered if import-export quantities increased). *China News*, May 29, 1987, at 8, col. 1. Shortly thereafter, the Finance Ministry instructed the Inspectorate General of Customs to review the list of items not subjected to port charges (among them, industrial and agricultural products and raw materials for the export processing zones, science industrial park and bonded factories) in an effort to reduce the number of items exempt. Officials said that except for those that still must enjoy such privilege because of military and diplomatic considerations, all commercial items should be subjected to port surcharges in the future; to avoid "double taxation," however, the Finance Ministry was considering giving rebates on the charges for export products of which the raw materials had already been subjected to port surcharges during importation. *China News*, June 8, 1987, at 12, cols. 1-2.

In July, the Legislative Yuan gave final approval to a revision of Article 7 of the Commercial Harbor Law limiting the harbor construction tax to no more than 1% of the value of imported and exported goods. The revision reserved discretion to the Executive Yuan to reduce or revoke the tax on the basis of policy needs and further expressly limited the use of the tax to construction of commercial harbors and related facilities. *China Post*, July 17, 1987, at 7, col. 3-4. In August, the Executive Yuan exercised its discretion to set the fee at a rate of 0.5% of the value of both imported and exported commodities. *China Post*, Aug. 4, 1987, at 7, col. 1.

⁹⁴ J. CHENG, *supra* note 87, at 64-65.

ics.⁹⁵ However, export goods are exempted, and commodity tax paid on exported goods or raw materials used for exported goods will be refunded or offset.⁹⁶

B. Customs Duties

Productive enterprises are allowed to pay import duties and dues on selected capital equipment in a series of installments beginning one year from the date the equipment begins to produce goods or to render services.⁹⁷ For machinery and equipment imported by qualified corporations designated as important for economic or technological development and producing items only for export, the customs duties may be deferred for five years.⁹⁸ In addition, qualified enterprises are exempted from import

⁹⁵ *Id.* at 65-66.

⁹⁶ *Id.* at 66. The significance of the export exemption may diminish in the future, inasmuch as the Finance Ministry is contemplating narrowing the scope of the commodity tax as its next step in rationalizing Taiwan's business tax following the successful introduction of the value-added tax. China News, Mar. 23, 1987, at 8, col. 8. Changes under consideration would remove daily necessities and raw materials from the list of goods subject to commodity taxes and subject only the following categories of commodities to the tax: 1) vehicles and energy; 2) commodities that might cause pollution; 3) luxury items; and 4) tobacco, wines and commodities that might affect health. *Id.* Prior to the enactment of VAT, the authorities abolished the commodity tax on plastics, leather and leather boots, paper products and steel round bars, and made those items eligible for the VAT. China Post, Mar. 30, 1987, at 7, col. 1.

⁹⁷ SEI, art. 21. The qualifying imports are defined as consisting of "machinery or equipment for use by the enterprise for production of goods or rendition of services . . . [and] component parts and materials specifically needed for manufacture of the said machinery and equipment, which are not yet domestically manufactured. . . ." *Id.* The term "machinery and equipment" is defined as "machinery and equipment needed in the process of the manufacture and production of goods in a factory and inspection apparatus necessary for quality control, equipment necessary for the prevention of pollution, equipment attached to machinery and equipment for industrial safety and equipment necessary for loading, unloading, piling and transporting purposes within the factory area." Enforcement Rules of the SEI, art. 38.1. The term "component parts and materials" is defined as, "the component parts and materials needed for manufacture of the aforesaid machinery and equipment and materials necessary for framing, fixing, supporting, or hanging the said machinery and equipment or specific amount of catalyst or accelerator necessary for installation of units of machinery and equipment, but not including materials of a consuming nature and indirect materials." *Id.*, art. 38.2. Determination and recognition of "machinery or equipment which are not yet domestically manufactured" shall be made "on the basis of individual items of machinery and equipment, which are not interrelated, of the complete set of machinery and equipment required for the entire production system or on the basis of individual items of the component parts and materials, which are not interrelated, needed for manufacture of the said machinery and equipment." *Id.* art. 38.3.

In the case of "component parts and materials" imports, "approval of the authority-in-charge of the enterprise" is required. *Id.* The enterprise must in all cases furnish a guarantee to be eligible for installment payments. *Id.* For a general discussion of import procedures and customs procedures relating to imports, see Pan and Huang, *Export-Import Procedures and Regulations Applicable to Foreign Trade in the Republic of China*, in TRADE AND INVESTMENT, *supra* note 53, at 693-715, 725-27.

⁹⁸ Customs Law, art. 27. The corporation must be limited by shares and organized in accordance with the Company Law. *Id.* The Ministry of Finance, in consultation with the Ministry of

duties on selected capital equipment used for the establishment or expansion of an approved project,⁹⁹ or for research and development.¹⁰⁰ Capital equipment may also be imported on a duty-free basis into Taiwan's Export Processing Zones and the Hsinchu Science-based Industrial Park, as long as it remains there.¹⁰¹

Imported raw materials to be used for processing articles for export within one year are exempted from customs.¹⁰² Customs duty paid on raw materials for use in the manufacture of articles for export may be refunded after exportation of the finished products.¹⁰³ Raw materials may also be imported on a duty-free basis into the Export Processing Zones and the Hsinchu Science-based Industrial Park,¹⁰⁴ as well as bonded warehouses and factories,¹⁰⁵ if they are processed for re-export.

Economic Affairs, is charged with determining the categories of industrial enterprises regarded as having important bearings on economic development or involving highly sophisticated technology. *Id.* The import duty and taxes are recorded on account against a guaranty for a period of five years starting from the date of importation and are payable upon expiration of the five year period. *Id.* Original authorization of the five-year recording period will be revoked and the duty recorded on account collected in the event the enterprise either 1) fails to export all of its products or 2) transfers the items imported to others in a form of lease, resale or by any other means. *Id.*, art. 27-1.

⁹⁹ SEI, art. 21. Qualified enterprises include "industrial, mining, or other operations conforming to the criteria established by the Executive Yuan." *Id.* Arts. 20-21. The statute provides for reassessment of import duties or dues originally exempted if within five years of import the enterprise involved reduces its capital or transfers the subject machinery, equipment, components, parts or materials to others, unless the transfer is made to a like enterprise. *Id.*, art. 21.

¹⁰⁰ SEI, art. 21. The exemption applies to a productive enterprise's import of "instruments and equipment exclusively for research, development, experiment or quality inspection services, of which domestically manufactured items are unavailable, for use in development of new products, improvement of quality, conservation of energy, prevention of public pollution, promotion of utilization of wastes, or improvement of manufacturing method." *Id.* In accordance with Article 21 of the SEI, the Ministry of Finance has prescribed Enforcement Rules Governing the Payment in Installments of and Exemption from Duties and Dues Leviable on Machinery and Equipment Imported by Productive Enterprises.

¹⁰¹ Wang, *supra* note 78, at 125.

¹⁰² Customs Law, art. 32. With some exceptions, if the raw material is not exported in finished goods within the prescribed time limit, the duty on the raw material must be paid together with a "delinquent fee" of 0.05% per day from the day of importation. *See* Customs Law, art. 16.

¹⁰³ *Id.*, Arts. 32, 36. Refunds are to be made in accordance with the Executive Yuan's Regulations Governing the Offsetting or Refund of Duties and Taxes on the Raw Materials of Export Products. Duty drawback is given on certain imported materials used to produce certain export products, according to criteria determined and approved by the Ministry of Economic Affairs. Duty drawback is refunded on a shipment-by-shipment basis and is calculated by applying a pre-established duty drawback rate to the cut weight of the finished product in each export shipment. The duty drawback rate is approved by the Taiwan authorities for each export product based on raw material usage and production yield data submitted by manufacturers of the export product. *Id.*, Arts. 6-7.

¹⁰⁴ Wang, *supra* note 78, at 125.

¹⁰⁵ Customs Law, art. 35. Regulations governing the establishment and control of bonded warehouses and factories have been promulgated by the Ministry of Finance.

C. Financing

The Export Loan Discount Regulations of the Central Bank of China permit registered exporters in possession of a letter of credit to apply for low-cost export loans covering up to 85% of the value of the export transaction. Authorized commercial foreign currency banks arrange export loans at normal commercial rates; then the lender may apply for an interest rate reduction from the Central Bank. If the Central Bank approves the reduction, the commercial bank correspondingly reduces the lending rate to the exporter. Exporters must settle the loan with foreign exchange within 180 days or pay an interest rate penalty on the full amount of the loan.¹⁰⁶

The Executive Yuan possesses authority to establish and to administer a special development fund to promote investments of interest to national economic development.¹⁰⁷ Disbursements may be made from the fund for the following purposes:

(1) For sole investments in important productive enterprises, as included in the economic development plans, which are beyond the capability of private investors or of no interest to private investors;

(2) For joint investments in technology-intensive and important enterprises, as included in the economic development plans, which are promoted by private investors with insufficient capital;

(3) For financing a technology-intensive and important enterprise, as included in the economic development plans, which requires the purchase of machinery and equipment for own use but without sufficient capital; or

(4) In order to upgrade and improve the technology of a productive enterprise, the organization which manages the development fund may utilize the fund to finance the introduction of special technology, patent or advanced design.¹⁰⁸

D. Pricing

Taiwan maintains a number of state-owned industries.¹⁰⁹ There is some evidence that state-owned industries maintain pricing policies

¹⁰⁶ Export Loan Discount Regulations of the Central Bank of China. The Central Bank sets the maximum and minimum interest rates for commercial lending in Taiwan. Export loans are customarily set at rates equal to or below the minimum rates established for commercial lending. *See* 51 Fed. Reg. 19,584 (1986).

¹⁰⁷ SEI, art. 84.

¹⁰⁸ *Id.*

¹⁰⁹ Among the state-owned companies are the Chinese Petroleum Corporation, China Steel Corporation, Taiwan Fertilizer Co., Taiwan Salt Works, China Petrochemical Development Corp., Taiwan Sugar Corp., Taiwan Power Co., Taiwan Aluminum Corp. and Taiwan Metal Mining Corp. As in many other countries, considerable attention is being given to the privatization of at least some of the government-run firms. *See, e.g., State Firms Going Public Could Stabilize Stocks*, China News, Apr. 23, 1987, at 8.

designed to favor downstream purchaser-manufacturers who produce primarily for export. For example, China Steel Corporation ("CSC"), a supplier of pipe and tube inputs to downstream Taiwan manufacturers, follows a two-tiered pricing policy. The first-tier price applies to domestic producers who manufacture goods for the Taiwan market. It is based on the landed, duty-paid price of imported hot-rolled coil. CSC offers the second-tier price to manufacturers who purchase coil to produce export products. That price is based on the landed duty-free price of hot-rolled coil.¹¹⁰

E. Labor

Taiwan has utilized a number of forms of labor training, including vocational training centers:¹¹¹ "Shipbuilding trainees, for example, typi-

¹¹⁰ The rationale for this two-tiered pricing policy is as follows:

CSC's pricing policy is to structure its domestic prices based on the prices which it can obtain on the open market overseas. When customers use imported steel for their exported products, they may obtain duty drawback from the government. Therefore CSC must compete with imported steel on a duty-free basis, and set its price for any one product at the level no higher than the average of the F.O.B. Taiwan export prices it can obtain for the same product. For steel consumed for domestically sold products, CSC adds an amount, which is less than the duty for that steel, thus taking only partial advantage of tariff protection.

M. KING, THE CREATION AND BUILDING-UP OF CHINA STEEL CORPORATION 11. Unlike the situation in many developing countries where creation of steelmaking capacity has "as much to do with nationalism and industrial prestige as economic growth," *Global Overcapacity Plagues Industries*, Asian Wall Street J., Mar. 13-14, 1987, at 22, col. 3 (Asian ed.), the creation of China Steel Corporation "was purely in the interest of the steel consumers who take in steel as their primary material for their operations, to relieve them from the mercy of foreign steel makers during shortages (which did occur in 1974, and near shortages occurred in the third quarter of 1980, and the fourth quarter of 1983), and to make available close-by sources with the advantage that inventory can be kept delivery at low level." M. KING, *supra* at 4. Recent domestic/export shipment ratios support this; its export sales for the year ending June 30, 1987 were expected to total 600,000 metric tons (against total production of 3.3 million tons). Its exports the previous year were some 810,000 tons (against total production of 3.27 million tons). *Taiwan's Steel Exports*, Asian Wall Street J., Mar. 20-21, 1987, at 15, col. 5 (Asian ed.). After completing its third-phase expansion project in April 1988, yearly output will reach 5.65 million metric tons, of which 3.5 to 3.65 million metric tons will be reserved for domestic manufacturers. China Post, Jan. 20, 1987, at 7, col. 1-2. Although almost all of the company's stock is owned by the government, it operates "in all respects . . . like any corporation in Taiwan. It pays taxes as required by law. It is on its own as far as profit and loss is concerned. The government does not underwrite its losses in the form of subsidies." M. KING, *supra* at 6.

The company has received protection by way of government controls and restrictions on imports of steel, but Taiwan's Industrial steel products will be gradually removed over a six-year period, so that by 1993 the only protection for the local industry will be "reasonable import tariffs." *Government Will Lift Import Restrictions on Steel, Cars, Tires*, China News, Apr. 22, 1987, at 2, col. 7. Relaxation of import restrictions has already begun; for example, in late 1986 China Steel Corporation decided that local manufacturers could freely import cold-rolled steel coils beginning in the first quarter of 1987. China Post, Nov. 29, 1986, at 7, col. 1.

¹¹¹ For a detailed description of the various vocational training programs in Taiwan, see T. DJANG, *INDUSTRY AND LABOR IN TAIWAN* ch. 9 (1976).

cally spend three years at a vocational school, followed by six months in a special shipbuilding vocational training center run by the government in cooperation with an enterprise. The final step in the process is a six-month training period on the job.”¹¹² In 1972 Taiwan established a National Vocational Training Fund, which has directed a good deal of its money to private enterprises for approved training programs, often in cooperation with vocational schools.¹¹³ Aside from these traditional forms of vocational training support, it has been suggested that there are also other institutions called vocational training centers that utilize convict labor under the supervision and direction of the judicial branch of the government.¹¹⁴

IV. BASIC APPLICABLE PROVISIONS OF UNITED STATES COUNTERVAILING DUTY LAW

Under governing law,¹¹⁵ countervailing duties are imposed when 1) the United States Department of Commerce (“Commerce”) determines that a country under the agreement on subsidies and countervailing measures, or a person or organization of that country,¹¹⁶ is providing a subsidy with respect to a class or kind of merchandise imported into the United States, and 2) the United States International Trade Commission (“ITC”) determines that an industry in the United States is materially injured or threatened with material injury, or that the establishment of

¹¹² Galenson, *The Labor Force, Wages, and Living Standards*, in *GROWTH IN TAIWAN supra* note 8, at 399.

¹¹³ A payroll tax of 1.5% was established to finance the Fund. *Id.* at 400.

¹¹⁴ See *Fireplace Mesh Panels from Taiwan*, (Petitioner’s Memorandum), USITC Pub. 1284, Inv. No. 701-TA-185.

¹¹⁵ *Tariff Act of 1930*, Pub. L. No. 71-361 (codified as amended at 19 U.S.C. § 1671(1982))(amended by the *Trade and Tariff Act of 1984*, Pub. L. No. 98-573, 98 Stat. 2948 (1986)).

¹¹⁶ Taiwan exporters are subject to the same law as exporters of the signatory status of the Agreement on Subsidies and Countervailing Measures, because the United States law provides for the same treatment of a country “which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement, as determined by the President. . . .” This provision apparently covers Taiwan, because Congress had Taiwan in mind when it passed this provision, and whatever derecognition may mean in diplomacy, Taiwan is considered a country for purposes of countervailing duty law, a fact made clear by the *Taiwan Relations Act of 1979*. The law applicable to the Agreement signatories is the one presently being applied in respect to Taiwan. In September 1982 the United States International Trade Commission (USITC) made a preliminary material injury determination in respect to fireplace mesh panels from Taiwan. Since a material injury determination has been required in that case, and since the USITC stated it was applying the law which would be applicable to the Agreement signatories, it is clear that petitions filed against imports from Taiwan will trigger investigations in which both subsidy and injury must be found before there is any violation of countervailing duty law.

Torbert, Clubb & Peele, *Exporting from Taiwan to the United States*, in *TRADE AND INVESTMENT, supra* note 53, at 855-56 (footnotes omitted).

an industry is materially retarded, by reasons of that subsidized merchandise.

A countervailable subsidy may be defined simply as "a preferential benefit bestowed by a government, directly or indirectly, upon a product exported to the U.S."¹¹⁷ One commentator, after reviewing the governing statutory definition,¹¹⁸ suggested that, "generally speaking, a sub-

¹¹⁷ Horlick, *Subsidies and Suspension Agreements in Countervailing Duty Cases*, in THE COMMERCE DEPARTMENT SPEAKS ON DUMPING AND COUNTERVAILING DUTIES, 31 (S. Unger ed. 1982) [hereinafter COMMERCE SPEAKS ON DUMPING].

¹¹⁸ Section 771(5) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(5) defines "subsidy" as follows:

The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 303 of this Act, and includes, but is not limited to the following:

(A) Any export subsidy described in Annex A to the Agreement relating to illustrative list of export subsidies.

(B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

(i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

(ii) The provision of goods or services at preferential rates.

(iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(iv) The assumption of any costs or expenses of manufacture, production, or distribution.

Annex A to the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, 55 U.N.T.S. 186-310, T.I.A.S. 1700 (Subsidies Code)[hereinafter GATT] provides as follows (footnotes omitted):

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowance for waste) in the exported product.

(i) The remission or drawback of import charges in excess of those levied on imported

sidy exists when: (1) there is selective government or privately sponsored treatment; (2) the selective treatment is different than that which the recipient would otherwise receive in the marketplace; and (3) the selective treatment results in promotion of export activity."¹¹⁹

There are two basic types of subsidies: export subsidies and domestic subsidies. With some exceptions, such as remission of local sales or value-added taxes, all benefits given by a government upon the export of a particular product constitute improper export subsidies; these can include direct subsidies, preferential internal transport and freight charges, price preferences for inputs to be used in the production of goods for export, direct and indirect tax programs, remission or drawback of import charges, export financing and insurance, and export promotion.¹²⁰ Export subsidies are allocated only to export sales revenue for purposes of determining the subsidy margin.¹²¹

Domestic subsidies are benefits conferred to promote the production

goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement.

For a good discussion of the origins and derivation of United States countervailing duty law, see Horlick, *Current Issues in Countervailing Duty Law*, in *THE TRADE AGREEMENTS ACT OF 1979—FOUR YEARS LATER*, 11-32 (H. Applebaum & A. Victor eds. 1983).

¹¹⁹ Victor & Benjamin, *Major Decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit*, in *IMPORT RELIEF*, *supra* note 7, at 230.

¹²⁰ See *supra* note 118. For a more detailed discussion of each category, see Holmer, Haggerty & Hunter, *Identifying and Measuring Subsidies Under the Countervailing Duty Law: An Attempt at Synthesis*, in *THE COMMERCE DEPARTMENT SPEAKS ON IMPORT ADMINISTRATION AND EXPORT ADMINISTRATION* 328-67 (Practising Law Institute ed. 1984) [hereinafter *COMMERCE SPEAKS ON IMPORT ADMINISTRATION*]; Horlick, *supra* note 118 at 81-88.

¹²¹ See, e.g., 50 Fed. Reg. 41,925 (1985).

or sale of products which may or may not be exported; if the product is later exported, a subsidy question would then arise. A key question is whether the benefit is generally available to all business in the country or whether it is conferred on a particular business or industry; only in the latter case is the subsidy countervailable.¹²² Countervailing duties have been imposed to offset government grants, soft government loans, government loan guarantees, and certain government equity contributions to state-owned firms.¹²³ The critical issue is whether a government payment or assistance to a specific firm is consistent with commercial considerations that would be applied by a private investor engaging in the same transaction; if a loan, guaranty or payment to a specific firm is not expected to produce the type of return that a private investor would expect, Commerce may recognize a subsidy.¹²⁴ Domestic subsidies are allocated to total sales revenue for purposes of determining the subsidy margin.¹²⁵

Material injury is defined by the Trade Agreements Act as harm "which is not inconsequential, immaterial or unimportant."¹²⁶ Factors which the ITC must consider in making its material injury determination include the volume of imports (either absolutely or relative to production or consumption), the effect of these imports on prices in the United States (requiring consideration of price-underselling, suppression or depression), and the imports' impact on domestic producers of the product (requiring consideration of declines in output, sales, market share, profits, productivity, return on investment, utilization of capacity, pricing, cash flow, inventories, employment, wages, growth, ability to raise capital, and investment).¹²⁷ When assessing threat of material injury, the ITC looks at the following for trends: the rate of increase of the exports in question to the United States market; increases in importers' inventories; capacity in the exporting country to generate additional exports; and the likelihood that such exports will be directed to the United States market taking into account the availability of other export markets.¹²⁸ The threat must be real and the injury resulting from it must be imminent, not a mere possibility based on supposition, speculation or

¹²² For more detailed discussion of the specificity requirement, see Horlick, Bello & Levine, *supra*, note 7, at 35-76.

¹²³ See Subsidies Code, *supra* note 118; for a more detailed discussion of each category, see Holmer, Haggerty & Hunter, *supra* note 120, at 367-409; Horlick, *supra* note 118, at 32-80.

¹²⁴ Holmer, Haggerty & Hunter, *supra* note 120, at 369.

¹²⁵ See, e.g., 47 Fed. Reg. 57,311 (1982).

¹²⁶ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 771(7)(A) (July 26, 1979).

¹²⁷ *Id.* Sections 771(7)(B)(i)-(ii), (C)(i)-(iii).

¹²⁸ See H.R. REP. NO. 317, 96th Cong., 1st Sess. 47 (1979); S. REP. NO. 249, 96th Cong., 1st Sess. 88-89 (1979).

conjecture.¹²⁹

A countervailing duty proceeding involves several distinct determinations. First, the ITC determines whether there is a reasonable indication that injury to a domestic industry exists by reason of subsidized imports; if the determination is negative, the proceeding terminates. If the determination is affirmative, Commerce makes a preliminary determination, based on the best evidence available at the time, of whether there is a reasonable basis to believe or suspect that a subsidy exists. Regardless of the outcome of the preliminary determination, Commerce then proceeds to make a final determination of whether a subsidy exists. If this determination is negative, the proceeding ends; if it is affirmative, the ITC then proceeds to a final determination of whether the domestic industry is being materially injured by reason of the subsidized imports. If subsidy and injury both exist, Commerce enters a final countervailing duty order.¹³⁰

The effect of the various determinations may be summarized as follows. In the event of a preliminary determination of subsidy, Commerce directs the United States Customs Service ("Customs") to preclude imports unless a bond or cash deposit is posted to cover the preliminary duty amount. If a final countervailing duty order is entered, a bond no longer suffices; Customs will not release the goods unless the importer makes a cash deposit covering the estimated countervailing duties. The duties are later finalized on an annual basis based upon updated price and cost information.¹³¹ A countervailing duty order usually must remain in effect for at least twenty-four months.¹³² After twenty-four months, an application may be made for review of the underlying determination on grounds that the subsidies have been eliminated¹³³ or that changed circumstances render the imports no longer injurious.¹³⁴ If either is established, the order may be revoked as to future imports.

¹²⁹ S. REP. NO. 249, *supra* note 128, at 88-89; S. REP. NO. 1298, 93rd Cong., 2nd Sess. 180 (1974). For further discussion of the concepts of material injury and threat of injury, see Victor & Benjamin, *supra* note 119, at 246-60; Applebaum, *Recent Developments in ITC Injury Determinations in Antidumping and Countervailing Duty Cases*, in UNITED STATES TRADE LAW AND POLICY, 173-91 (H. Applebaum & G. Kaplan ed. 1987).

¹³⁰ For more complete discussion of the various phases of the proceeding, see OFFICE OF INVESTIGATIONS, IMPORT ADMINISTRATION, DEPARTMENT OF COMMERCE, [hereinafter OFFICE OF INVESTIGATIONS], *Processing Antidumping and Countervailing Duty Investigations*, in COMMERCE SPEAKS ON DUMPING, *supra* note 117, at 56-75; Kaplan, *Processing Antidumping and Countervailing Duty Investigations*, in COMMERCE SPEAKS ON IMPORT ADMINISTRATION *supra* note 120, at 16-34.

¹³¹ Kaplan, *supra* note 130, 16-34.

¹³² 19 C.F.R. §§ 54(b), 355.42(b).

¹³³ Shambon, *Annual Review of Antidumping and Countervailing Duty Orders*, in COMMERCE SPEAKS ON DUMPING, *supra* note 117, at 191-92.

¹³⁴ *Id.* at 191.

Before a final order is issued in the first place, however, the possibility exists for suspending or settling the case.¹³⁵

Commerce and the ITC rely primarily on questionnaires for their data. If a foreign party does not respond, the agencies may simply use the "best information available," which may be unfavorable information supplied by the United States petitioners. If foreign parties do cooperate, they usually receive confidential protection for their data if they request it. Commerce seeks to verify all foreign data through mini-audits in the foreign country.¹³⁶

V. COUNTERVAILING DUTY PROCEEDINGS INVOLVING PRODUCTS FROM TAIWAN: 1980 TO 1986

During the past few years, countervailing duty proceedings involving imports from Taiwan have covered a variety of products, including bicycle tires and tubes, fireplace mesh panels, welded carbon steel line pipe, oil country tubular goods, porcelain-on-steel cooking ware, and certain stainless steel cooking ware. The following table summarizes the preliminary and final determinations in each case as to whether benefits constituting subsidies within the meaning of the countervailing duty law were being provided to manufacturers, producers or exporters,¹³⁷ and whether a domestic industry was materially injured or threatened with material injury as a result.¹³⁸

¹³⁵ Horlick, *supra* note 117, at 42-51; Kaplan, *supra* note 130, at 35-42.

¹³⁶ OFFICE OF INVESTIGATIONS, *supra* note 130, at 85-95; Kaplan, *supra* note 130, at 43-52.

¹³⁷ Bicycle Tires and Tubes: 46 Fed. Reg. 39,464, 53,201 (1981); Fireplace Mesh Panels: 47 Fed. Reg. 57,310 (1982), 48 Fed. Reg. 11,305 (1983); Welded Carbon Steel Line Pipe: 50 Fed. Reg. 41,924, 53,363 (1985); Oil Country Tubular Goods: 50 Fed. Reg. 49,977 (1985), 51 Fed. Reg. 19,583 (1986); Porcelain-on-Steel Cooking Ware: 51 Fed. Reg. 7982, 36,453 (1986); Certain Stainless Steel Cooking Ware: 51 Fed. Reg. 15,523, 42,891 (1986).

¹³⁸ Bicycle Tires and Tubes: USITC Pub. 1258, Inv. No. 701-TA-94 (July 1982); Fireplace Mesh Panels: USITC Pub. 1284, Inv. No. 701-TA-185 (Sept. 1982); Welded Carbon Steel Line Pipe: USITC Pub. 1742, Inv. Nos. 701-TA-251-53, 731-TA-291-94 (Aug. 1985); Oil Country Tubular Goods: USITC Pub. 1747, Inv. Nos. 701-TA-255, 256 (Sept. 1985); Porcelain-on-Steel Cooking Ware: USITC Pub. 1800, Inv. Nos. 701-TA-265-66, 731-TA-297-99 (Jan. 1986); Top-of-the-Stove Stainless Steel Cooking Ware: USITC Pub. 1820, Inv. Nos. 701-TA-267-68, 731-TA-304-05 (Mar. 1986), and USITC Pub. 1936 (Jan. 1987).

Table 2

	Preliminary		Final		Injury?
	Injury?	Subsidy?	Subsidy?	Injury?	
Bicycle Tires and Tubes ¹³⁹	Yes	Yes	Yes	(.9%)	Yes
Fireplace Mesh Panels	Yes	No	No	(.012%)	—
Welded Carbon Steel Line Pipe	Yes	Yes	No	(.02%)	—
Oil Country Tubular Goods	Yes	No	No	(.11%)	—
Porcelain-on-Steel Cooking Ware	Yes	No	No	(.17%)	—
Certain Stainless Steel Cooking Ware	Yes	No	Yes	(2.14%)	Yes

Based on a subsequent investigation, the ITC determined that the domestic bicycle tire and tube industry would not be materially injured or threatened with material injury, nor would the establishment of an industry in the United States be materially retarded, by reason of imports of bicycle tires and tubes from Taiwan, if the countervailing duty order covering those imports were revoked.¹⁴⁰ The countervailing duty order covering bicycle tires and tubes was thus revoked,¹⁴¹ leaving the recent order covering stainless steel cookware as the only outstanding countervailing duty order against imports from Taiwan for the period under consideration.

A few initial observations may be made at this point. First, preliminary determinations are just that. Although they provide reasonable predictions of the final determination, continuing investigation and additional arguments can yield a different final result. Second, the fact that preliminary injury determinations were affirmative in all the cases suggests that the petitioner's burden of proof at that stage is not too stringent, or that the domestic industry petitioning for relief is unlikely to initiate such a proceeding in the absence of real harm, or perhaps some combination of the two. Third, particularly in view of the adverse preliminary injury determinations, it is in the respondents' joint interest in each case to devote considerable attention to overcoming the petitioner's allegation that the benefits in question do in fact constitute subsidies. If none of the benefits constitute subsidies, that disposes of the case. Even if a benefit is found to constitute a subsidy, however, individual respon-

¹³⁹ The original determination found that although benefits had been received under three programs (preferential income tax ceiling, preferential export financing, and deferred duty payments on imported machinery and equipment), the net benefit received was *de minimis*. 44 Fed Reg. 1815 (1979). However, on appeal the Court of International Trade remanded, holding that the *de minimis* rule is applicable to countervailing duty cases but that factual questions as to the tax ceiling and the export financing remained, requiring further investigation. *Carlisle Tire and Rubber Co. v. United States*, 517 F. Supp. 704, (Ct. Int'l Trade 1981). The final determination found greater than *de minimis* benefit. 46 Fed. Reg. 53,201 (1981).

¹⁴⁰ 48 Fed. Reg. 24,795 (1983); USITC Pub. 1382 (May 1983).

¹⁴¹ 48 Fed. Reg. 26,655 (1983).

dents may still prevail by establishing that they did not avail themselves of the benefit. Finally, even respondents who have taken advantage of a subsidy can prevail if they can demonstrate the effect is *de minimis*. Thus, both issues of law and questions of fact can be important. Fourth, the collective results of these cases tend to suggest that Taiwan is not a heavy subsidizer of exports of either consumer or capital goods.

Given this brief overview of the results of the proceedings under consideration, let us proceed to an analysis of how the various incentives described in Part II have fared under the countervailing duty law.

A. Taxation

In the *Fireplace Mesh Panels* case, decided in 1983, Commerce considered whether the preferential income tax rate for productive enterprises constituted a countervailable subsidy.¹⁴² Commerce noted that the SEI as it then existed had been amended recently to remove some restrictive criteria limiting the categories of industries eligible for encouragement.¹⁴³ Commerce reasoned, however, that "the remaining general eligibility criteria in the regulation [under the statute] still appear to limit the availability of the benefits and appear to target certain categories of industries of encouragement," and accordingly determined that the preferential income tax rate ceiling provided a benefit which constituted a subsidy.¹⁴⁴ Inasmuch as it represented "an incentive program for increased general investment in eligible industries and, for [the product in question, did] not appear to be tied to export performance," Commerce characterized it as a domestic subsidy, with the result that the tax savings were allocated over total sales revenue.¹⁴⁵

Less than two years later, however, in the *Welded Carbon Steel Line Pipe* case Commerce changed its mind about the preferential income tax rate for productive enterprises, reasoning as follows:

Article 15 benefits are available to all productive enterprises, defined in the SEI as stock companies engaged in manufacturing, handicrafts, mining, agriculture, forestry, fishing, animal husbandry, transportation, warehousing, public utilities, public facility construction and development, public

¹⁴² There were only two known producers in Taiwan exporting the product to the U.S. during the relevant period. One was not eligible for the preferential rate because it was not organized as a company limited by shares; its tax rate was the normal 35%. The other did qualify and had a tax rate of 25%. 48 Fed. Reg. 11,306 (1983).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* The measure of the benefit was the difference in the tax due under the normal 35% rate and the preferential 25% rate for 1981, which was known and accounted for in 1982. This figure was then divided by total sales for 1981, resulting in a benefit of 0.012% ad valorem. *Id.*

housing construction, technical services, hotels and heavy machinery construction.

In prior cases, we found this program to be a subsidy based upon insufficient evidence that the program is non-specific. However, the evidence in this case indicates that these benefits are not limited to an industry or enterprise or group of industries or enterprises. Therefore, we determine that this program does not confer countervailable benefits within the meaning of the countervailing duty law.¹⁴⁶

The Oil Country Tubular Goods case confirmed this analysis.¹⁴⁷ However, in the Porcelain-on-Steel Cooking Ware case initiated in December 1985, the respondents included Collins Co. Ltd., one of Taiwan's big trading companies. Commerce noted that in previous cases it had grouped the tax benefits granted to big trading companies under the program with the income tax ceiling granted to productive enterprises.¹⁴⁸ Commerce noted that, at verification, big trading company status was granted only to companies which met certain criteria established by the Ministry of Economic Affairs ("MOEA").¹⁴⁹ Reasoning that "the criteria established by the MOEA clearly indicate that the preferential tax treatment extended to big trading companies is based on export performance," Commerce determined that the program conferred a benefit constituting an export subsidy and allocated the tax savings over the value of Collins' export sales.¹⁵⁰

Collins was also a respondent in the Stainless Steel Cooking Ware case, in which it received similar treatment with respect to the preferential tax ceiling.¹⁵¹ In that case, Commerce allocated a portion of the tax savings to the manufacturers who exported the subject products to the United States through Collins, then divided the benefits allocated to those manufacturers by their exports of the subject product to the United States during the period in question.¹⁵²

None of the cases yielded a decision on whether the tax preferences for venture capital investment enterprises or the other industries to be encouraged specifically referred to in SEI Article 15 gave rise to countervailable subsidies. The specificity test applied by Commerce in the Welded Carbon Steel Line Pipe case¹⁵³ should also be controlling

¹⁴⁶ 50 Fed. Reg. 53,364 (1985).

¹⁴⁷ 51 Fed. Reg. 19,588 (1986).

¹⁴⁸ 51 Fed. Reg. 36,455 (1986).

¹⁴⁹ *Id.* See also *supra* note 78.

¹⁵⁰ *Id.* The calculation yielded an estimated net subsidy of 0.1610% *ad valorem*.

¹⁵¹ 51 Fed. Reg. 42,893 (1986).

¹⁵² *Id.* The estimated net subsidy was 0.010% *ad valorem*.

¹⁵³ See *supra* note 146 and accompanying text. The specificity test has been explained as follows:

The approach Commerce developed in regard to the specificity question is to examine the legislation or implementing regulations of a government program under investigation to deter-

with respect to such situations if they are brought into issue in future cases. If the fifteen categories of activity to which productive enterprises are limited by SEI Article 3¹⁵⁴ do not constitute a "group of industries or enterprises" for purposes of applying the specificity test, then it is not readily apparent why the other industries to be specially encouraged under Article 15 should be treated any differently.¹⁵⁵ Whether the SEI's tax holiday and accelerated depreciation provisions¹⁵⁶ constitute countervailable subsidies¹⁵⁷ should also turn on a consistent application of the specificity test.

The investment tax credit was originally found to be countervailable "because respondents were unable to demonstrate that these benefits were not limited to a specific enterprise or industry, or group of enterprises or industries."¹⁵⁸ If a respondent could show, however, that it received the benefit of the credit only for investments in equipment for the production of merchandise other than that involved in the particular proceeding, it was not regarded as a countervailable benefit with respect to sale of the merchandise at issue.¹⁵⁹ In the Welded Carbon Steel Line Pipe case, however, Commerce found that a benefit available to all productive enterprises was not limited to an industry or enterprise or group of industries or enterprises and thus was not a countervailable subsidy.¹⁶⁰

Commerce has consistently held that because the export loss reserves program is "contingent upon export sales," it confers a benefit which constitutes an export subsidy.¹⁶¹ To calculate the benefit received in one calendar year, Commerce treats the tax savings from the export loss reserve as a one-year interest-free loan received in the middle of the preceding year at the time the income tax forms were filed. The interest-free rate is then compared with the maximum lending rate set by the

mine its statutory availability. If a program is by law or by its nature limited to certain participants (as most programs are), Commerce must rule whether that limitation is stringent enough to warrant possible countervailing duties. If the law does not limit benefits to particular recipients, or the limitation is not stringent enough to warrant possible countervailing duties, Commerce examines the actual implementation of the program to determine whether in fact the benefits of the program are limited to a specific industry or group of industries, including the industry under investigation.

Horlick, Bello & Levine, *supra* note 7, at 47.

¹⁵⁴ See *supra* note 76.

¹⁵⁵ Just as the Executive Yuan has published *Categories and Criteria of Productive Enterprises Eligible for Encouragement*, so has it published *Categories and Criteria for Special Encouragement of Important Productive Enterprises*.

¹⁵⁶ See *supra* notes 80-83 and accompanying text.

¹⁵⁷ The cases have yielded no express determinations one way or the other.

¹⁵⁸ 51 Fed. Reg. 19,585 (1986).

¹⁵⁹ 49 Fed. Reg. 14,778 (1984).

¹⁶⁰ 50 Fed. Reg. 53,365 (1985).

¹⁶¹ 50 Fed. Reg. 53,364 (1985).

Central Bank. The benefit is then divided by the value of the respondent's total exports for the year to yield the net subsidy.¹⁶²

The old business and stamp tax exemptions or rebate for export sales (which correspond to the VAT zero rate for export sales) were held not to constitute countervailable benefits on grounds that under the countervailing duty act, the nonexcessive remission of indirect taxes levied at the final stage is not considered a subsidy.¹⁶³ Thus, if the amount of the exemption or rebate was not greater than the amount of business or stamp tax due, there was no subsidy. Presumably, the same result would pertain under the new VAT system. Although the VAT is not limited by its terms to the final stage transfer of goods, the business tax apparently was not so limited either, inasmuch as its export sale exemption expressly extended to sales to manufacturers for further processing before export. In any event, the nonexcessive rebate of prior-stage cumulative indirect taxes borne by inputs that are physically incorporated into the final product is not considered a subsidy under United States countervailing duty law.¹⁶⁴

No cases have discussed the issue of the harbor and commodity tax export exemptions. The commodity tax appears to fall within the scope of indirect taxes, the nonexcessive remission of which is not considered a subsidy.¹⁶⁵ Although collection of a harbor tax on imports only certainly smacks of discriminatory treatment, it does not necessarily follow that no collection of the harbor tax on exports should be regarded as a subsidy. Even if it were, the intrinsic difficulty of calculating the value in a particular case of such a subsidy defies comprehension.

B. Customs Duties

With respect to the remission of duties on imported raw materials incorporated in re-exported products, Commerce noted in the Bicycle Tires and Tubes case a Taiwan regulation which provided that if the raw material was not exported in finished goods within 18 months from the date of importation, the duty on the raw material had to be paid, together with a delinquent fee of 0.05% per day from the day of importa-

¹⁶² These calculations yielded subsidies of 0.02% *ad valorem* in the Welded Carbon Steel Line Pipe Case, 50 Fed. Reg. 53,364 (1985), 0.01% *ad valorem* in the Oil Country Tubular Goods case, 51 Fed. Reg. 19,585 (1986), and 0.001% *ad valorem* in the Stainless Steel Cooking Ware case. 51 Fed. Reg. 42,893 (1986).

¹⁶³ 50 Fed. Reg. 53,364 (1985). For a discussion of the rules governing indirect tax programs, see Holmer, Haggerty & Hunter, *supra* note 120, at 335-42.

¹⁶⁴ 50 Fed. Reg. 41,925 (1985).

¹⁶⁵ See Holmer, Haggerty & Hunter, *supra* note 120, at 335-42, and *supra* notes 94-96 and accompanying text.

tion. Commerce found that this fee was greater than the comparable commercial interest rate. The program thus did not provide funds at less than commercial rates, and it therefore did not give rise to a countervailable subsidy.¹⁶⁶

In the Stainless Steel Cooking Ware case, however, Commerce found a subsidy on grounds that the duty drawback for raw materials incorporated into exports was overrated.¹⁶⁷ Under the Taiwan duty drawback system, duties paid on imported raw materials incorporated in exports are refunded on a shipment-by-shipment basis and are calculated by applying a pre-established duty drawback rate to the net weight of the finished product in each export shipment. The Taiwan authorities approve the duty drawback rate for each export product based on raw material usage and production yield data submitted by manufacturers of the export product. For the stainless steel cooking ware under investigation, the Taiwan authorities established an authorized loss rate for raw materials used in the manufacture of exported goods. Duty drawback included the amount of duty remitted on the loss or wastage of the raw material.¹⁶⁸

The problem is that these allowable loss rates included material which might later be sold as scrap. Although a duty drawback program which includes some amount for loss or wastage in the calculation of the amount to be remitted on raw materials used in the manufacture of exported goods is not necessarily countervailable, unreasonable or excessive rates do become countervailable. Duty drawback received on recoverable scrap constitutes an unreasonable or excessive rebate of customs duties. To determine whether a subsidy was present in the Stainless Steel Cooking Ware case, the verification team reviewed summary worksheets used by the Taiwan authorities to calculate the loss rate. However, the loss rates were not based directly on stainless steel cooking ware, but

¹⁶⁶ 49 Fed. Reg. 14,778 (1984).

¹⁶⁷ The applicable Commerce rule provides:

Drawback of duties: The drawback, rebate or remission of Customs duties not in excess of the actual duties due or paid, on imported items physically incorporated in the final product is not regarded as a subsidy. The drawback, rebate or remission of duties on imported capital goods or other items involved in the production but not physically incorporated in the exported merchandise would be countervailable.

¹⁹ C.F.R. § 355, Annex I, 1.3. For a general discussion of the governing principles on remission or drawback of import charges, see Holmer, Haggerty & Hunter, *supra* note 120, at 342-46; Kaplan & Varga, *Recent Developments in the Antidumping and Countervailing Duty Area*, in *IMPORT RELIEF* *supra* note 7, at 89-93.

¹⁶⁸ For stainless steel sheet or coil used in the production of cooking ware, the input ratio imputed in the duty drawback rate was 1.48. This means that to claim duty drawback on an exported pot weighing one kilogram, 1.48 kilograms of stainless steel was assumed to be physically incorporated in the exported pot. 51 Fed. Reg. 42,893 (1986).

rather on other stainless steel kitchenware grouped and classified by the Taiwan authorities in the same duty drawback category as cookware. Thus, the verification team considered it necessary to examine the companies' information concerning loss rates. Comparing the loss rate approved by the Taiwan authorities to the actual loss rate, excluding from the comparison the loss attributable to recoverable scrap, Commerce found the approved loss rate to be excessive. Thus, a portion of the imported raw materials duty drawback was countervailable.¹⁶⁹

Also, imported materials not physically incorporated into export merchandise cannot give rise to duty drawback. In the Stainless Steel Cooking Ware case, one of the manufacturers had received duty drawback on two types of liquid polish used to polish stainless steel metal in the subject merchandise. Because the manufacturer was unable to demonstrate at verification that the liquid metal polishes were physically incorporated into the exported product, the drawback of import duties and indirect harbor taxes on the imported liquid polish was held to constitute a countervailable subsidy.¹⁷⁰

None of the respondents in the cases under consideration took advantage of the duty exemptions and deferrals provided under the SEI for productive enterprises importing selected machinery and equipment. For the same reason applicable to the income tax preferences for productive enterprises, the opportunity afforded generally to productive enterprises to pay import duties and dues on selected capital equipment in a series of installments beginning one year from the date use commences is probably not a subsidy for countervailing duty law purposes.¹⁷¹ However, to the extent the remaining capital goods customs duties benefits in

¹⁶⁹ To calculate the benefit from the excessive drawback, the percentage of the excessive duty drawback was multiplied by each exporter's total amount of duty drawback. Dividing by total exports of the subject producers, a net 2.128% *ad valorem* subsidy resulted. *Id.*

¹⁷⁰ Duty drawback on the two types of polish had been received by one of the manufacturers only on export shipments of the subject merchandise made on or after November 26, 1985 (the review period was calendar year 1985). For those export shipments made after November 26, 1985, and during the review period, Commerce computed the amount of duty drawback attributable to the liquid metal polish and divided this amount by total 1985 exports of the three manufacturers for which it had information concerning duty drawback to arrive at a net subsidy of 0.002% *ad valorem*. 51 Fed. Reg. 42,894 (1986).

¹⁷¹

[The remission or drawback of import duties on imported capital goods] may not be a subsidy, or at least not countervailable in full, if the program is generally available; i.e., if duties on imported capital goods are rebated regardless of whether the capital goods are used to produce output for the home or foreign markets. In this situation, all users of capital goods may take advantage of the duty rebates. Therefore, the duty-free or reduced duty treatment of imported capital goods is the normal market condition facing users of capital goods in that country.

Holmer, Haggerty & Hunter, *supra* note 120, at 346.

Taiwan are keyed to export production,¹⁷² their utilization would probably give rise to a subsidy.¹⁷³

C. Financing

Exporters utilized the low-cost export loans available pursuant to the Central Bank's Export Loan Discount Regulation in the cases involving welded carbon steel line pipe, oil country tubular goods and porcelain-on-steel ware. Commerce found that these loans depended upon export performance and that they therefore provided funds to borrowers at interest rates lower than those available for other purposes. Thus, they were determined to confer benefits constituting export subsidies.¹⁷⁴ To calculate the benefit, the differences between the Central Bank's export-loan rate and its maximum short-term loan rate was multiplied by the principal amount of the subject loans. This benefit was then allocated against the value of the borrower's exports of the product under investigation to the United States for the period in question.¹⁷⁵

None of the cases under consideration involved equity infusions under the Executive Yuan's special development fund to promote investments of interest to national economic development. The purposes specified for use of the fund are not keyed to export performance; thus, utilization of the fund would not give rise to an export subsidy unless it could be established that the fund was used for that purpose in practice. However, if utilization resulted in provision of capital, loans or loan guarantees on terms inconsistent with commercial considerations, it could constitute a domestic subsidy.¹⁷⁶ If utilization gave rise to a research and development subsidy, it could also be countervailable if not

¹⁷² See *supra* notes 98-101 and accompanying text.

¹⁷³

[I]f the duty drawback for capital goods is contingent upon the export performance of the user of the capital good, the exporter essentially receives a grant which reduces his cost of manufacturing the exported product. With respect to the deferral of import duty payments on imported capital equipment used to produce for export, the exporter obtains the use of money at an interest rate (zero) below that which he would have paid had he borrowed that money commercially. Thus, the deferral of import duty payments on imported capital goods is also a subsidy, and Commerce treats it like an interest-free loan.

Holmer, Haggerty & Hunter, *supra* note 120, at 346-47.

¹⁷⁴ 50 Fed. Reg. 53,363-64 (1985); 51 Fed. Reg. 19,584 (1986); 51 Fed. Reg. 36,455 (1986). For a general discussion of the principles governing export financing in this context, see Holmer, Haggerty & Hunter, *supra* note 120, at 347-60.

¹⁷⁵ The net subsidies were 0.002% *ad valorem* for welded carbon steel line pipe, 50 Fed. Reg. 53,364 (1985); 0.10% *ad valorem* for oil country tubular goods, 51 Fed. Reg. 19,583 (1986); and 0.0073% *ad valorem* for porcelain-on-steel cooking ware. 51 Fed. Reg. 19,583 (1986); and 0.0073% *ad valorem* for porcelain-on-steel cooking ware. 51 Fed. Reg. 36,455 (1986).

¹⁷⁶ For a general discussion of the circumstances under which such infusions constitute domestic subsidies, see Holmer, Haggerty & Hunter, *supra* note 120, at 368-97; Victor & Benjamin, *supra* note 119, at 236-40.

made available to a wide number of industries or groups of industries.¹⁷⁷

D. Pricing

Under GATT, a price preference for inputs used in the production of export goods constitutes a subsidy only if the preference lowers the price below world market levels.¹⁷⁸ China Steel's second-tier oil prices to the pipe and tube producers in the Carbon Steel Line Pipe and Oil Country Tubular Goods cases were found to be at world-market levels. Accordingly, its two-tiered pricing policy was held not to confer a countervailable benefit within the meaning of the countervailing duty law.¹⁷⁹

E. Labor

In the Fireplace Mesh Panels case, Commerce found that no manufacturers, producers, or exporters in Taiwan had made use of vocational training centers during the period for which subsidization was being measured or since that time.¹⁸⁰ Their utilization, however, would not necessarily have given rise to a countervailable subsidy. With respect to programs available nationally, Commerce has refused to find countervailable, due to lack of specificity, such programs as business industry cooperative training, vocational training for school-leavers, assistance for improvement in working conditions, short-time work assistance for travel expenses for workers living far from their jobs, and some early retirement plans.¹⁸¹ Where aid lowers wages of selected workers, however, thereby reducing production costs, a domestic subsidy could result.¹⁸²

VI. TRENDS AND ISSUES

The following table summarizes the analysis of Part V with respect to each of the incentives described in Part III, demonstrating those incentives that have been held to constitute subsidies and the amount of the subsidy in the cases under consideration:

¹⁷⁷ For a general discussion of research and development subsidies, see Horlick, *supra* note 118, at 67-70.

¹⁷⁸ For a general discussion of price preferences for inputs to be used in the production of goods for export, see Holmer, Haggerty & Hunter, *supra* note 120, at 331-33.

¹⁷⁹ 50 Fed. Reg. 53,364 (1985); 51 Fed. Reg. 19,585 (1986).

¹⁸⁰ 48 Fed. Reg. 11,306 (1983).

¹⁸¹ Horlick, *supra* note 118, at 77.

¹⁸² See *id.* at 78-79.

Table 3

	<u>Subsidy?</u>	<u>Amount</u>
<u>Taxation</u>		
Income Tax Preference		
Productive Enterprise	No	.9%, .012%
Big Trading Company	Yes	.161%, .01%
Industries to be Encouraged	No Determination	
Tax Holidays/Accelerated Depreciation	No Determination	
Investment Tax Credit	No	
Export Loss Reserve	Yes	.02%, .01%, .001%
Tax Exemptions		
VAT (Business/Stamp)	No	
Harbor Tax	No Determination	
Commodity Tax	No Determination	
<u>Customs</u>		
Deferral/Exemption		
Machinery/Equipment	No Determination	
Raw Materials	No (if not excessive)	2.128%, .002%
<u>Financing</u>		
Low-cost Export Loans	Yes	.002%, .1%, .0073%
Special Development Fund	No Determination	
<u>Pricing</u>		
Preferential Raw Material Prices	No (if world market price)	
<u>Labor</u>		
Vocational Training Centers	No Determination	

As indicated by the table, Commerce has not agreed with the petitioners with respect to a majority of the incentives alleged to constitute countervailable subsidies. Although the income tax preference for productive enterprises and investment tax credit were earlier regarded as countervailable subsidies, these two incentives have since escaped that adverse characterization. The income tax preference for big trading companies, the export loss reserve, and low-cost export loan financing are the only incentives which have been uniformly characterized as countervailable subsidies. Even in those cases, however, the degree of subsidization is minimal. In this context, several trends and issues warrant further analysis.

A. Particular Incentives

A number of changes relating to existing export incentives are already underway. Although the investment tax credit will survive

through mid-1988, it very nearly expired at the end of July 1987.¹⁸³ The prospects for its general continuation beyond the present 1988 termination date pose problems. The harbor tax will no longer be levied only on imports.¹⁸⁴ In addition, the Finance Ministry has announced plans to greatly reduce the number of import items exempted from port surcharges.¹⁸⁵

The role of the export processing zones also appears to be changing. The Export Processing Zone Administration in 1986 made a number of proposals for additional tax benefits and other encouragements to manufacturers in the zones.¹⁸⁶ The Ministry of Economic Affairs vetoed them in order to avoid discrepancies between the EPZs and general industrial zones.¹⁸⁷ The Ministry decided, however, to allow companies inside the EPZs to sell a specified amount of their annual production to the local market after paying commodity taxes.¹⁸⁸ This represents a shift of emphasis, as all EPZ-manufactured goods had previously been for export only.

The practice of awarding enterprises the privilege of paying on an account basis import tariffs for raw materials to be processed for eventual export¹⁸⁹ is consistent with a policy of encouraging exports, because until the deferred payments are due such enterprises have the advantage of being able to use their funds for investment purposes. However, in 1984 and 1985 collection became increasingly difficult.¹⁹⁰ Accordingly, the Inspectorate General of Customs in 1986 tightened the qualifying require-

¹⁸³ See *supra* note 84.

¹⁸⁴ See *supra* note 93.

¹⁸⁵ The Finance Ministry instructed the Inspectorate General of Customs to review the list of items exempt from port surcharge. Among them are industrial and agricultural products and raw materials for the export processing zones, science industrial park and bonded factories. Finance Ministry officials said that except for those that still must enjoy such privileges because of military and diplomatic considerations, all commercial items should be subjected to port surcharges. *China News*, June 18, 1987, at 8, col. 1-2.

¹⁸⁶ The Administration's proposals included a tax reduction from 25% to 22% for manufacturers in the EPZs, setting up of warehouses and transshipment stations, and relaxing restrictions on foreign exchange. *China Post*, Jan. 17, 1987, at 7, col. 4.

¹⁸⁷ *Id.*

¹⁸⁸ *China News*, May 23, 1987, at 8, col. 1. It was reported in late 1987 that

in order to encourage makers in export processing zones to import more raw materials and manufacture more goods for domestic sale, the MOEA has decided to revise processing zone regulations to raise the rate of domestic sales allowed to 50% from the original 20% and, also, to allow manufacturers to engage in distribution.

Asia Business Weekly, Dec. 9, 1987, at 53.

¹⁸⁹ See *supra* notes 102-105 and accompanying text.

¹⁹⁰ In 1984, there were 55 tax evasion cases involving NT\$260 million in unpaid accounts; after court proceedings only NT\$10 million was recovered. In 1985, there were 107 cases involving NT\$430 million in unpaid accounts, of which only NT\$30 million was recovered. *China Post*, July 12, 1986, at 7, col. 2.

ments for privileged duty payments. Now, when importing raw materials to be processed for eventual export, only those enterprises with annual export sales in excess of 100 million New Taiwan dollars ("NT dollars" or "NT\$") have the right to pay import tariffs on an account basis against a guarantee that deferred payment will be made within the 5-year period specified by law.¹⁹¹

The Central Bank has already altered its loan policies encouraging export sales.¹⁹² A review of the Central Bank's interest rates on accommodations to banks reveals that the historical spread between the rediscount rate and accommodations for export financing has closed.¹⁹³ Similarly, a review of the historical spread between general unsecured loan rates and export loan rates charged by banks demonstrate a narrowing of the spread.¹⁹⁴ The increases in the foreign exchange banks' export

¹⁹¹ *Id.* col. 1. Previously, enterprises had been allowed to manage the payment of their tariff duties on an account basis: 1) when their average export revenues for the past two years exceeded NT\$60 million, or their refunded/offset import tax value totaled more than NT\$20 million annually; 2) when their average export revenues for the last four years exceeded NT\$20 million or their refunded/offset import duties were more than NT\$10 million annually, and when such enterprises did not have delinquent tax payments during that period; and 3) when they belonged to industries as stipulated in Article 20 of the SEI. *Id.*, col. 1-2.

¹⁹² See *supra* note 106 and accompanying text.

¹⁹³ Table 24 at page 102 of the March 1987 *Taiwan Financial Statistics Monthly* published by the Central Bank reveals the following interest rates of the Central Bank on accommodations to banks, measured in percent/annum:

¹⁹⁴ Table 24 at page 106 of the March 1987 *Taiwan Financial Statistics Monthly* published by the Central Bank reveals the following loan interest rates of domestic banks, measured in percent/annum:

bill negotiated interest rates since the beginning of 1987¹⁹⁵ also reflect the ending of the era of bank-subsidized exports is drawing to a close. Beginning in May 1987, the Central Bank ceased providing special foreign exchange financing to domestic banks that provide loans to businesses for

Table 4

Effective Date of Change	Rediscounts	Accommod. against secured loans	Temporary Accommod.	Import Financing in Foreign Exchange	Accommod. in Foreign Currency	Accommod. for Export Financing (NT\$)
3/16/71	9.8	10.5	12.5		7.5	
5/29/71	9.25	10.0	12.0		7.5	
7/01/72	8.5	9.25	11.25		7.5	
1/24/73	8.5	9.25	11.25	5.5 - 6.5	7.5	6.5
4/24/73	8.5	9.25	11.25	5.5 - 6.5	7.5	6.5
7/26/73	9.5	10.5	12.0	5.5 - 6.5	7.5	7.5
10/24/73	10.75	11.75	13.25	5.5 - 6.5	7.5	8.75
1/27/74	14.0	15.5	17.5	9 - 10	10.0	12.0
5/04/74	14.0	15.5	17.5	9 - 10	10.0	10.0
9/19/74	12.5	14.0	16.0	9 - 10	10.0	8.5
12/13/74	12.0	13.5	15.5	9 - 10	10.0	8.0
2/22/75	11.5	12.75	14.75	9 - 10	10.0	7.25
4/21/75	10.75	12.0	14.0	9 - 10	10.0	6.5
11/27/75	10.75	12.0	14.0	9 - 10	10.0	6.0
5/01/76	10.75	12.0	14.0	8 - 10	10.0	6.0
10/22/76	10.0	11.25	13.25	8 - 10	9.0	6.0
12/15/76	9.5	10.75	12.75	8 - 10	9.0	6.0
4/01/77	8.75	10.0	12.0	8 - 10	8.5	5.5
6/10/77	8.25	9.5	11.5	8 - 10	8.5	5.5
6/16/78	8.25	9.5	11.5	8.0	8.5	5.5
5/16/79	9.5	11.0	13.25	9.5	10.0	8.5
8/22/79	11.0	12.5	14.75	10.5	11.0	9.5
1/05/81	12.0	13.5	15.75	11.5	12.5	10.0
6/15/81	13.25	14.75	17.0	12.5	13.5	11.25
10/21/81	12.25	13.25	15.75	11.75	12.75	10.5
12/17/81	11.75	12.75	15.25	11.25	12.5	10.0
2/26/82	11.25	12.5	14.75	11.25	12.25	10.0
4/17/82	10.25	11.5	13.75	10.25	11.25	9.0
7/12/82	9.25	10.5	12.5	9.75	10.75	8.25
9/18/82	8.5	9.75	11.5	9.25	10.25	7.75
12/30/82	7.75	9.0	10.75	8.5	9.5	7.75
3/16/83	7.25	8.5	10.25	8.25	9.0	7.0
3/09/84	7.0	8.25	10.0	8.25	9.0	6.75
11/24/85	6.75	8.0	10.0	8.25	9.0	6.75
3/22/85	6.75	7.75	10.0	8.25	9.0	6.75
6/17/85	6.25	7.25	10.0	7.75	8.5	6.25
9/17/85	5.75	6.75	9.75	7.75	8.5	5.75
11/23/85	5.25	6.25	9.5	7.5	8.25	5.25
3/04/86	4.75	5.75	9.0	7.0	7.75	4.75
10/18/86	4.5	5.5	9.0	6.75	7.5	4.5

¹⁹⁵ Under the government policy of encouraging exports, Taiwan's forex designated banks previously calculated interest payments according to the low-level interest rates of the New Taiwan dollar. However, since the Central Bank began to absorb most of the forex long positions of forex designated banks, they were forced to borrow U.S. dollars for customers and decided to bring their interest rates in line with that of the U.S. dollar. This resulted in an increase in the export bill negotiated interest rate from 5.75% per annum to 8% from the end of 1986 to mid-March 1987. See *China Post*, Jan. 7, 1987, at 7, col. 2 and Mar. 24, 1987, at 7, col. 2-3.

importing daily necessities and important industrial raw materials.¹⁹⁶

The export incentives repeatedly raised in the countervailing duty cases discussed in this Article appear to be diminishing in importance, relative to new policy initiatives now under consideration in Taiwan. The Taiwanese Export-Import Bank ("Eximbank") announced in De-

Table 5

Effective Date of Change	Unsecured Loans	Secured Loans	Discounts	Loans for Export (NTS)
9/19/74	16.0	15.25	13.75	9.5
12/13/74	15.5	14.75	13.25	9.0
2/22/75	14.75	14.0	12.75	8.25
4/21/75	14.0	13.25	12.0	7.5

Table 6

Effective Date of Change	Unsecured Loans		Secured Loans		Discounts		Loans Max	less than (3 Mos) Min	Loans for Export
	Max	Min	Max	Min	Max	Min			
7/28/75	14.0	13.75	13.25	13.0	12.0	11.75			7.5
11/27/75	14.0	13.75	13.25	13.0	12.0	11.75			7.0
10/23/76	13.25	13.0	12.5	12.25	11.25	11.0			7.0
12/15/76	12.75	12.5	12.0	11.75	10.75	10.5			7.0
4/01/77	12.0	11.75	11.25	11.0	10.0	9.75			6.5
6/10/77	11.5	11.25	10.75	10.5	9.5	9.25			6.5
5/16/79	13.25	12.75	12.5	12.0	11.0	10.5	11.0	10.5	9.5
8/22/79	14.75	14.25	14.0	13.5	12.5	12.0	13.0	12.5	10.5

Table 7

Effective Date of Change	Short-term (1 yr or less)				Medium & Long-term Loans		Loans for Export
	Maximum		Minimum		Max	Min	
	Unsecured	Secured	Unsecured	Secured			
11/17/80	16.2	16.2	14.25	13.5	16.2	14.5	10.5
1/06/81	16.8	16.8	14.75	14.0	16.8	15.0	11.0
6/15/81		18.0		15.25	18.0	16.25	12.25
8/25/81		17.4		14.5	18.0	15.0	12.25
10/21/81		16.0		13.5	16.75	14.0	11.5
12/17/81		15.25		13.0	16.0	13.5	11.0
2/26/82		14.75		12.5	15.5	13.0	11.0
4/17/82		13.75		11.5	14.5	12.0	10.0
7/12/82		12.5		10.5	13.25	11.0	9.25
9/18/82		11.5		9.75	12.25	10.25	8.75
12/30/82		10.75		9.0	11.5	9.5	8.25
3/16/83		10.25		8.5	11.0	9.0	8.5
5/09/84		10.0		8.25	10.75	8.75	7.75
11/24/84		10.0		8.0	10.75	8.5	7.75
3/22/85		10.0		7.75	10.75	8.25	7.75
6/17/85		10.0		7.25	10.75	7.75	7.25
9/17/85		9.75		6.75	10.5	7.25	6.75
11/23/85		9.5		6.25	10.25	6.75	6.25
1/20/86		9.5		6.0	10.25	6.5	6.25
3/07/86		9.0		5.5	9.75	6.0	5.75
10/18/86		9.0		5.0	9.75	5.5	5.75

¹⁹⁶ China News, Apr. 25, 1987, at 8, col. 8. By late 1987, these measures, together with the central bank's action to freeze local banks' foreign debt ceilings on October 13, had begun to exert a noticeable adverse impact on small and medium-size export enterprises. China Post, Nov. 24, 1987, at 12, col. 1.

ember 1986 that a statute regulating medium- and long-term import loans had been approved by the Ministry of Finance for the purpose of encouraging and expanding imports; according to the statute, the Eximbank would offer medium- and long-term import loans at low interest rates for the importation of advanced machinery, equipment, essential industrial raw materials, high-end parts and components, and the transfer of technology.¹⁹⁷ In May 1987, the Ministries of Economic Affairs and Foreign Affairs proposed the establishment of an overseas economic cooperation development fund; the fund would aim to encourage developing countries to purchase Taiwan-made products and whole plant equipment, as well as to stimulate overseas investment by Taiwan investors.¹⁹⁸ In June 1987, the Ministry of Economic Affairs announced that it was studying the feasibility of establishing a revolving fund to help finance imports of United States machinery in a bid to cut down the United States-Taiwan trade imbalance.¹⁹⁹ Authorities announced a variety of programs geared toward developing higher technology and service industries²⁰⁰ and helping small and medium businesses upgrade their operations and management²⁰¹ in the first half of 1987. While the impetus for these measures may be to slow the New Taiwan dollar's appreciation and thereby maintain export competitiveness, even their partial enactment would promote importing, open up the Taiwan market somewhat, and reduce the subsidization of exports.

B. Problems with United States Countervailing Duty Law: Its Application to Taiwan

Application of United States countervailing duty law to imports from Taiwan raises problems on both procedural and substantive levels. In the context of any particular case, the process of collecting information in Taiwan presents any number of difficulties. In making its determinations, Commerce relies primarily upon respondents' questionnaire responses and information obtained at verification; it also has available to it information obtained in previous investigations and information sub-

¹⁹⁷ China Post, Dec. 6, 1986, at 7, col. 2.

¹⁹⁸ China Post, May 26, 1987, at 7, col. 1. As proposed, the fund would initially be raised by means of a bond issuance, budgeting, and use of foreign exchange reserves. *Id.*

¹⁹⁹ China News, June 2, 1987, at 8, col. 7.

²⁰⁰ See, e.g., *New Approach Expected in Programs to Develop Strategic Industries*, China News, Mar. 31, 1987, at 8, col. 1-3; *Large Service Firms to Get Incentives*, China Post, Mar. 28, 1987, at 7, col. 2.

²⁰¹ See e.g., *Small Businesses to Get Low-interest Bank Loans*, China News, Mar. 16, 1987, at 2, col. 7-8; *MOEA Completes Plan to Help Businesses Upgrade Operations*, China News, Apr. 8, 1987, at 2, col. 4-5.

mitted by the petitioners, as well as published reports and studies.²⁰² The questionnaires presented by Commerce to the respondents and Taiwan government address the issues raised in the petitions and any additional relevant issues raised in prior investigations; the questions attempt to elicit information which will aid Commerce in determining whether subsidization is occurring.²⁰³ A verification team visits Taiwan to confirm the accuracy and completeness of the information submitted by respondents and used by Commerce in making its final determination.²⁰⁴

Even with questionnaire responses and a verification team's on-site inspection, however, questions arise as to the accuracy of the factual information made available. Knowledgeable commentators on the Taiwan business scene have pointed out significant deficiencies in the information systems utilized by Taiwan business enterprises. The standardization of accounting systems and procedures is questionable.²⁰⁵ With respect to communication of information generally, "in Taiwanese firms it can well be argued that distortion is both more systematic and severe than in many Western societies."²⁰⁶ Problems of business corruption have been cited by both academics²⁰⁷ and government officials.²⁰⁸ Although there

²⁰² Kaplan, *supra* note 130, at 43-44.

²⁰³ *Id.* at 44.

²⁰⁴ *Id.* at 45.

²⁰⁵ Robert Silin in his classic anthropological study, *Leadership and Values: The Organization of Large-Scale Taiwanese Enterprises* (1976), makes the following observations in connection with his discussion of Taiwan stock and bond markets: "As of now there is no viable system by which company statements can be substantiated. The public accounting system (CPA), instituted primarily at the request of American AID [Agency of International Development] officials, is neither well understood nor accepted. Allowing outsiders access to financial records continues to engender considerable concern." *Id.* at 27. His observations on the superior/subordinate relationship also shed light on this issue:

Superiors often make changes in work done by subordinates without explanations, even when the subordinate has superior knowledge, either because the superior assumes his greater competence or simply to exhibit his superior status. Such actions . . . undermine effective operations both by violating the utility of technical procedures and by reducing the commitment of subordinates who find that careful work is not utilized by superiors. The lack of sound cost accounting procedures in most Taiwanese firms stems in part from such practices. One junior executive has remarked: "Even if they wanted to, [employees] would be unable to prepare proper cost accounting materials. The person above the one who does the original calculations does not really trust him so he adds a bit to his calculation. As you go up, each person tacks on a bit so that by the time you get through, the amount they say it costs to produce something and the real cost are quite different."

Id. at 84.

²⁰⁶ *Id.* at 86.

²⁰⁷ Silin quotes a professor as commenting, "Most people in industry have not made their money legitimately. Instead, they have done something dishonest or at least have not worked hard." *Id.* at 29.

²⁰⁸

If [Commerce] is unable to verify satisfactorily the information . . ., [it] will notify the submitter of its intent to proceed with the investigation on the basis of the best information available. The "best information available" may include information submitted by the peti-

are incentives for respondents to provide complete and accurate information,²⁰⁹ the context just described would be bound to leave doubts about any information received.

The tracing of subsidies and their impact on the price of any particular product can present computational difficulties. Two examples from the Bicycle Tires and Tubes case illustrate the problem. One of the respondents maintained that instead of allocating its total income tax benefit over total sales, Commerce should calculate the tax benefit on income earned on bicycle tire and tube sales and allocate that benefit over sales of bicycle tires and tubes; Commerce responded that the income tax preference was based upon the respondent's total income and was therefore a benefit bestowed on all of the respondent's production, not just bicycle tire and tube production.²¹⁰ Conversely, the petitioner argued that preferential loans and income tax deductions the respondent had received with respect to products other than bicycle tires and tubes represented an indirect benefit to its bicycle tire and tube production because of the fungibility of capital; Commerce responded that benefits received for particular purposes were not fungible and not equally beneficial to all products made by the firm in question.²¹¹ While the distinction may be clear conceptually, it may be difficult to draw in practice. An even more complicated tracing problem arises with respect to causality analysis when considering the effects of subsidized imports where there is already a final

tioner If a respondent unreasonably refuses to provide requested information, that fact will be taken into account in determining what constitutes the best information available.

Kaplan, *supra* note 130, at 45-46.

Because the governments policies and regulations are brought into issue in a countervailing duty case, it takes an active role in encouraging and coordinating responses. A lawyer in the Board of Foreign Trade is responsible for coordinating compliance by individual respondents, and the government absorbs at least a portion of legal defense costs. Interviews with May Yi-Meei Guo of the Board of Foreign Trade (Jan. 23, 1987), and Thomas H. McGowan, a partner with the law firm of Kaplan, Russin, Vecchi and Parker in Taipei (Mar. 13, 1987). In antidumping cases, by contrast, the government's involvement on behalf of respondents is significantly reduced, inasmuch as it regards export sale pricing as a matter largely within the respondent's own discretion. *Id.*

²⁰⁹ In 1987, the Finance Ministry moved to revise the current law to allow significant rewards (a maximum NT\$2.4 million) "in order to encourage people to cooperate with tax authorities to crack down on rampant tax evasion." China News, June 15, 1987, at 8, col. 8.

²¹⁰ 48 Fed. Reg. 43,367 (1983).

²¹¹ While the law clearly envisions reaching subsidies which benefit

a product indirectly as well as directly, it would be inconsistent with the clear intent of the statute, as reflected in its legislative history, to allocate to products under review any portion of benefits clearly tied to products not under review. We allocate fully to products under review any subsidies directly tied to them. To allocate tied subsidies fully to the products to which they were tied and simultaneously to allocate any part of the same subsidies to other products would result in double counting, which would be inconsistent with both the statute and the Subsidies Code.

48 Fed. Reg. 43,366 (1983).

dumping finding in place on the same imports.²¹²

Finally, United States countervailing duty law in its entirety is subject to criticism. Professor Tarullo has argued that although the countervailing duty law may be justified by an efficient-market rationale, in practice it fails to promote the goal of economic efficiency; moreover, it is undemocratic in operation and often unfair to both workers and consumers.²¹³ Professor Yoffie has demonstrated how it is possible for import control laws to "create opportunities as well as dangers for exporting countries"²¹⁴ and how, in the case of the shoe orderly marketing arrangement in the late 1970's, the United States footwear industry bore the greatest losses.²¹⁵ The extent to which countervailing duty should apply to imports from state-controlled economies has long been a muddy issue as well.²¹⁶ Despite possible criticism that can be leveled against the law and its operation, it remains an integral part of the current system of international trade law and has been adopted and applied by Taiwan itself.²¹⁷ Indeed, the Taiwan government is considering ways to strengthen the function of its countervailing duty system.²¹⁸ As the Taiwan economy continues to develop, its own perceived need to respond to

²¹² 47 Fed. Reg. 40,729-30 (1982).

²¹³ Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 547, 552-79 (1987).

²¹⁴ D. YOFFIE, *POWER AND PROTECTIONISM — STRATEGIES OF THE NEWLY INDUSTRIALIZING COUNTRIES* 3 (1983).

²¹⁵ *Id.* at 169-203.

²¹⁶ See Stoltenberg, *Trends in PRC Import Cases Under U.S. Trade Law*, 21 COLUM. J. WORLD BUS., 41, 43-44 (1986).

²¹⁷ Article 46 of Taiwan's Customs Law provides:

When a bounty or subsidy has been received either directly or indirectly during the process of manufacturing, production or export shipment of the imported goods in the exporting or manufacturing country whereby constituting a harmful effect to the industries of the Republic of China, the imported goods shall be liable to pay an appropriate Countervailing Duty in addition to the Customs duty leviable in accordance with the Customs Import tariff.

Article 46-2 goes on to define "harmful effect" as referring to "cases whereunder the import of such goods will cause substantial damage to or impose a threat of substantial damage to the relevant industry or industries of the Republic of China or will cause a substantial delay in the establishment of any particular industry in the Republic of China."

The Executive Yuan promulgated Enforcement Rules for Imposition of Countervailing Duties and Anti-Dumping Duties on July 3, 1984. A review of these rules reveals a number of similarities to U.S. countervailing duty law, described *supra* in Part IV.

²¹⁸ A government official recently stated:

[G]overnment efforts in the liberalization of trade and internationalization of the economy will step-by-step eliminate all high-duty trade barriers and self-control of commodity imports, which have protected the local market. How to establish a system of countervailing taxation to prevent dumping by protectionist trade partners, therefore, has become an urgent task for the government.

China News, Apr. 16, 1987, at 2, col. 8.

low-priced imports from other, less developed countries²¹⁹ will probably cause it to be less critical of the rules and principles embodied in the United States import control law system.

C. Structural Economic Issues and Policy Considerations

Perhaps the most significant "subsidies" of Taiwan's exports to the United States in recent years exist in two factors which do not come directly into play in the operation of the countervailing duty law: the exchange rate and the cost of labor.

One of the Taiwan government's more notable achievements has been its role in bringing under control rampant inflation following World War II. In 1948, prices on the island shot up 1,145%.²²⁰ Beginning with the monetary reform of June 1949, a series of contractionary monetary policies and efforts to encourage savings were credited with restoring stability, so that by 1952 the rate of inflation had dropped to 23%.²²¹ The government's fiscal policies since 1949 can quite properly be characterized as conservative; yet, from the institution of its first economic construction plan in 1953, Taiwan has enjoyed one of the world's highest rates of sustained economic growth.²²² At the same time, per capita income has risen significantly; in 1953, United States per capita income was 25 times that in Taiwan, while in 1983 it was only 5.3 times the Taiwan level.²²³ While this was happening, the New Taiwan dollar exchange rate saw little variation. From 1971 through mid-1986, the exchange rate remained within a 38-40:1 range except for the 1978-1980 period when it dropped to 36:1.²²⁴ Since the New Taiwan dollar was pegged to the United States dollar, Taiwan's comparative advantage grew as other currencies, particularly the yen, began to appreciate against the dollar. This must certainly be regarded as a factor in the 29.52% increase in Taiwan's exports from 1985 to 1986, and the 30.8% increase in its exports to the United States during the same period. It is not surprising, therefore, that the exchange rate has received considerable attention from the United States. Due at least in part to such pressure, the NT dollar appreciated 25% against the United States dollar

²¹⁹ Taiwan's first dumping case, brought in 1987, found dumping margins of 25% and 40% on two different types of plywood imported from Indonesia. *China Post*, Mar. 3, 1987, at 7, col. 2.

²²⁰ T. GOLD, *supra* note 9, at 53.

²²¹ Sun & Lee, *supra* note 53, at 58-59.

²²² From 1953 until 1983, Taiwan's annual economic growth rate averaged 8.7%, while the industrialized countries recorded an annual 3.8% growth rate. *Id.* at 63.

²²³ *Id.* at 63-64.

²²⁴ FINANCIAL STATISTICS MONTHLY (March 1987), table 27.

from mid-1986 to mid-1987.²²⁵ Time will tell if the past year's revaluation will produce a commensurate change in the Taiwan-United States trade imbalance.²²⁶ In any event, the "exchange rate subsidy" has surely been reduced.

As already noted, average per capita income in Taiwan was one-fifth of that in the United States during 1983. According to a United States Department of Labor survey, the average United States factory worker earned \$12.82 an hour, while his counterpart in Taiwan was earning \$1.48 an hour.²²⁷ At the same time, Taiwan companies have been slow to comply with some legal requirements mandating employee benefits; for example, it was reported recently that only 6,000 of the 70,000 firms requested by the Labor Standards Bureau in April 1987 to meet the requirements of the Labor Standards Law for setting aside retirement funds had complied.²²⁸ Thus, it is no wonder that a product made in Taiwan can be sold more cheaply than the same product made in the United States.

But this situation, too, continues to change. The average monthly income of workers in Taiwan in 1986 was NT\$12,851, up NT\$822 from 1985.²²⁹ After having received a complaint from an American Chamber of Commerce member about rising wages, Vice Economics Minister Li Mo expressed fears that wages were pushing up production costs and driving away prospective investors.²³⁰ Similarly, Economics Minister Lee Ta-hai expressed concern during a spring 1987 interview that rising wages are hurting the labor-intensive industries and urged factories to raise their productivity or be crowded out of the market.²³¹ At the same time, reports are surfacing in the American financial press observing that

²²⁵ Tung, *NT\$ to Bottom Out at 30:1 For A While*, Econ. News, Aug. 24, 1987, at 1, col. 1.

²²⁶ In late 1986 and early 1987 (when the exchange rate was approaching 35:1), reports were circulating of surveys that "25 to 50% of local enterprises would suffer if the exchange rate hit NT\$35," or that "NT\$34 was a bottom line for some industries, while others could manage to survive at NT\$32 dollars." China Post, Jan. 24, 1987, at 7, col. 2. By mid-1987, however, one was beginning to see articles like *NT\$ Appreciation Provides Stimulus for Higher Productivity*, China News, May 21, 1987, at 8, col. 1 and *Local Businessmen Learn Quickly How to Deal With Changing Exchange Rates*, China News, June 1, 1987, at 8, col. 1. Indeed, the NT dollar appreciation was a boon of sorts to the government, which stood to save some NT\$50 billion from its foreign exchange spending during fiscal 1988 as a result, China News, May 28, 1987, at 2, col. 7, while the dollar's fall has already had the effect of increasing prices in the U.S. Asian Wall St. J., Mar. 5, 1987, at 1, 5, col. 6.

²²⁷ China Post, Jan. 16, 1987, at 3, col. 7.

²²⁸ China News, May 12, 1987, at 8, col. 6.

²²⁹ China Post, May 19, 1987, at 11, col. 7.

²³⁰ China News, May 19, 1987, at 8, col. 3.

²³¹ *Id.*

“the gap between U.S. and foreign pay is disappearing quickly.”²³² Thus, Taiwan’s “labor subsidy” may also have begun to erode.

The role of United States influence in Taiwan during the import substitution period of the 1950’s described in Part II.C. of this article and the subsequent formulation of export promotion policies described in Part II.D also deserves attention. Professor Neil Jacoby’s masterful study of United States economic assistance to Taiwan over the period from 1951 to 1965 documents strong support for adoption of export incentives. After focusing on infrastructure development and industrial projects from 1956 to 1960, United States Agency of International Development (“AID”) emphasis shifted in 1961 to fostering of private enterprise, promotion of exports, and termination of United States concessional assistance.²³³ Jacoby described United States AID input as follows:

The establishment during 1959 of an Industrial Development and Investment Center and of the China Development Corporation in Taiwan reflected these new purposes. During the same year the Director of AID Mission to China proposed that the Chinese government should adopt a comprehensive set of public policies to foster private investment and expand exports, looking toward the phasing-out of U.S. aid. In 1960, stimulated by a promise of special U.S. aid, the Chinese government agreed to a 19-Point Program of Economic and Financial Reform.²³⁴

Thus, Taiwan’s export promotion policies described in Part II.D and the legal and regulatory provisions effectuating them described in Part III were put in place with the active encouragement of the United States government.

In addition to encouraging Taiwan’s adoption of export incentives, the United States AID mission “went on to publicize Taiwan as an investment site, and the United States government utilized several programs to facilitate and protect the flow of private capital to Taiwan.”²³⁵ Following the establishment by General Instruments of a bonded electronics factory near Taipei in 1964, “its rapid success demonstrated the potential of off-shore assembly in Taiwan to other American firms.”²³⁶

²³² Asian Wall St. J., Mar. 24, 1987, at 1, col. 4.

²³³ N. JACOBY, U.S. AID TO TAIWAN: A STUDY OF FOREIGN AID, SELF-HELP, AND DEVELOPMENT 34 (1966).

²³⁴ *Id.* at 35. Other commentators confirm these observations. E.g., T. GOLD, *supra* note 9, at 77; Cumings, *The Origins and Development of the Northeast Asian Political Economy: Industrial Sectors, Product Cycles, and Political Consequences*, in THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM 70-71 (F. Deyo ed. 1987); Koo, *The Interplay of State, Social Class, and World Systems in East Asian Development: The Cases of South Korea and Taiwan*, in THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM 168-69 (F. Deyo ed. 1987).

²³⁵ T. GOLD, *supra* note 9, at 79.

²³⁶ *Id.*

Thus, United States companies have increasingly used Taiwan as a sourcing site, encouraged by the dual investment and export incentives which the United States government helped to put in place. The resulting impact on Taiwan's exports to the United States has been significant. From 1981-1983, for example, about 68% of the products produced in Taiwan by United States companies were shipped to the United States at a total value of \$2.4 billion, or 14.2% of Taiwan's trade surplus with the United States during the three-year period.²³⁷ In addition to United States invested producers or subcontractors in Taiwan, United States importers, particularly mass marketers, have also benefited indirectly from Taiwan's export incentives, as they source materials there and sell them in the United States at very competitive prices.²³⁸ United States companies themselves are therefore among the beneficiaries of Taiwan's export incentives.

Taiwan, of course, is not the only Asian country which has promoted exports in order to enhance its economic development. Comparison of its export incentive structure with those of its Asian neighbors indicates significant differences. Relevant points of comparison in this regard would include the relative size of companies and the nature of the business/government relationship as between countries, since these factors necessarily influence the manner in which energies can be mobilized toward attaining a particular policy objective—in this case, enhancing export sales through subsidization. A number of commentators have observed the proliferation of small and medium size companies in Taiwan relative to the comparatively larger business enterprises and combinations more frequently found in Japan and Korea.²³⁹ With respect to gov-

²³⁷ Sun & Lee, *supra* note 53, at 74; see also J. WHEELER & P. WOOD, *BEYOND RECRIMINATION: PERSPECTIVES ON U.S.-TAIWAN TRADE TENSIONS* 137-38 (1987); Sease, *U.S. Firms Fuel Taiwan's Trade Surplus*, *Asian Wall St. J.*, June 8, 1987, at 1, 16.

²³⁸ See T. GOLD, *supra* note 9, at 81-82; Sease, *supra* note 237.

²³⁹

In Taiwan 42 percent of all employees worked in factories of at least one hundred persons in 1961; the percentage rose to 64 percent in 1971, thereafter declining to 33 percent by 1980. Contrary to this pattern of smaller enterprises, South Korea workers in factories of at least one hundred employees rose from 33 percent of the workforce in 1960 to 56 percent in 1968 and 74 percent in 1974.

Deyo, *State and Labor: Modes of Political Exclusion in East Asian Development*, in *THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM* 195 (F. Deyo ed. 1987). According to the January 1987 ROC MONTHLY BULLETIN OF LABOR STATISTICS, 24% of Taiwan's industrial employees, (1,891,000 of 7,986,000) worked in establishments of 100 or more, while 76% (6,095,000) worked in establishments of less than 100; indeed 54 1/2% of the total were shown as working in establishments of less than 10. SILIN, *supra* note 205, at 14, on the other hand, has pointed out that at the end of 1966, firms employing 100 or more people, while only 2.8% of the total firms, represented 82.7% of capital and had 74.5% of the total revenue. Yet, although observers were able to distinguish about 100 significant business groups (Kuan-hsi ch'i-ye) in Taiwan by 1976, T. GOLD, *supra* note 9, at 89, characterizes them as "but a shadow of their East Asian cousins, Japan's zaibatsu and

ernment-business relations, commentators have also pointed out distinct differences between Taiwan on the one hand and Japan and Korea on the other.²⁴⁰ Gold has characterized Taiwan's private sector as "much more anarchic and self-directed than its Japanese or Korean counterparts."²⁴¹ These underlying differences help to explain why, although "it is true that both South Korea and Japan have reduced or eliminated many of the subsidies and other selective targeting measures they have employed in the past, Taiwan has always used less."²⁴²

VII. CONCLUSION

In attempting to explain why the falling dollar has not helped to shrink America's trade deficit, Jeff Faux, president of the Economic Policy Institute, has written:

[T]he high dollar lured new foreign firms into markets that had been held by Americans. These competitors have not disappeared with the lower dollar but are fighting more fiercely to keep their market shares. Since many of them are subsidized by their governments, they are willing to take lower profits, often losses to maintain production and employment at home.²⁴³

Staffan Burenstam Linder has succinctly described the demonstration effect of Asia's newly industrialized countries' ("NICs") shift of emphasis

Korea's chaebol, in terms of capital, scale, control of their own trade, and government connections." Although "the government has identified the small size of the typical Taiwanese firm as a barrier to Taiwan's long-term competitiveness, [its] efforts to encourage mergers and the formation of large trading companies . . . have not met with notable success." J. WHEELER & P. WOOD, *supra* note 237, at 126. Although the small size of Taiwan firms may limit their ability to respond to protectionist pressures in their major markets or to explore new markets, *id.*, the same factor has made them "highly adaptable [and able to] quickly adjust their operations to meet the import needs of the US." Sun & Lee, *supra* note 53, at 73.

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Whereas in Japan, regularized consultations between MITI and industry representatives helped determine industrial policy, and Korea has seen a more brutish, commandist approach, in Taiwan planners retained an aloof posture. They met to formulate policy and then relayed their decisions and attendant mechanisms to implement it to the business community and watched what happened.

T. GOLD, *supra* note 9, at 126; *see also* J. WHEELER & P. WOOD, *supra* note 237, at 14-19. SILIN, *supra* note 205, at 20, quotes a Taiwan executive as follows:

In Korea the government helps business plan and is cooperative. Here there are more problems and government controls. In large firms you need lots of materials for economic planning, but government does not supply them . . . [We] have four-year plans but they are always the same—expand, expand . . . There is no coordination or planning in depth.

For a more detailed discussion of the planning process, see Chao, *Planning in a Market Economy—The Experience of Taiwan, ROC*, 226 *ECON. REV.* 8-17 (Jul-Aug. 1985).

241 T. GOLD, *supra* note 9, at 126.

242 J. WHEELER & P. WOOD, *supra* note 237, at 167.

243 Faux, *Here Lies Free Trade R.I.P.*, N.Y. Times, Aug. 31, 1987, at 19, col. 1.

from import substitution to export promotion.²⁴⁴ The impact is self-evident: "The four Asian NICs, with under 2% of the total population of the developing world, have almost 7% of its GDP, close to 20% of its total trade, and nearly 60% of its manufactured exports."²⁴⁵

To attribute such results to subsidies in the case of Taiwan, however, ignores the only logical conclusion that can be drawn from the countervailing duty cases which are the subject of this Article. Many of the export incentives employed by Taiwan have been determined not to constitute subsidies. Those that have been regarded as subsidies have not involved excessive sums; the highest was 2.128%.²⁴⁶ Given the fact that these are the results of proceedings initiated by United States petitioners who apparently believed that injurious subsidies existed, it is unlikely that a significant number of Taiwan subsidies presently lurk in the bushes, simply waiting to be exposed.

Perhaps Taiwan's relatively low level of subsidization reflects an understanding of the problems associated with introduction of a set of distortive policies rendering export more profitable than production for the home market.²⁴⁷ Perhaps Taiwan's recent efforts to reduce the level of its import barriers²⁴⁸ reflects an appreciation of the fact that rather than reduce imports and expand exports, protectionism reduces both imports and exports.²⁴⁹ The United States-Taiwan trade imbalance demands attention. To develop an effective solution, however, requires a correct definition of the problem. The United States countervailing duty cases since 1980 involving imports from Taiwan indicate unequivocally that the problem is not excessive subsidization.

²⁴⁴ S. LINDER, *THE PACIFIC CENTURY: ECONOMIC AND POLITICAL CONSEQUENCES OF ASIAN-PACIFIC DYNAMISM* 39-41 (1986).

²⁴⁵ *Id.* at 39.

²⁴⁶ See *supra* notes 139-82 and accompanying text.

²⁴⁷ As Linder points out, "it is certainly possible to waste resources by pushing goods onto the international markets at prices that do not reflect the full sacrifice needed to produce them." S. LINDER, *supra* note 244, at 35.

²⁴⁸ For descriptions of these efforts, see Chao, *Liberalization, Internationalization and Systemization: New Currents in Taiwan's Economic Development*, 227 *ECON. REV.* 1-5 (Sept.-Oct. 1985); Tsiang, Chen & Hsieh, *Progress in Trade Liberalization Taiwan, Republic of China*, 230 *ECON. REV.* 1-13 (Mar.-Apr. 1986).

²⁴⁹ S. LINDER, *supra* note 244, at 102. This principle, of course, is not uniformly accepted. See, e.g., R. LUEDDE-NEURATH, *IMPORT CONTROLS AND EXPORT-ORIENTED DEVELOPMENT: A REASSESSMENT OF THE SOUTH KOREAN CASE* (1986).