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## States, Industrial Policies & Antidumping Enforcement in Japan, South Korea and Taiwan

John K.M. Ohnesorge

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**STATES, INDUSTRIAL POLICIES & ANTIDUMPING  
ENFORCEMENT IN JAPAN, SOUTH KOREA AND TAIWAN**

*John K.M. Ohnesorge\**

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## I. INTRODUCTION

The subject of this paper is the antidumping regimes of Japan, South Korea and Taiwan. Though it would be possible for nations to construct antidumping regimes to function with some autonomy from economic and political forces, this has not been the case in jurisdictions with traditionally active antidumping regimes.<sup>1</sup> Even introductory texts on antidumping law quickly move beyond narrow explications of the rules to discuss historical, economic, political, diplomatic, and other non-legal variables that affect antidumping practices.<sup>2</sup> Following in this "realist" vein, this paper will examine the antidumping practices of Japan, South Korea and Taiwan in light of broadly similar national industrial policies pursued by the three nations. These industrial policies merge politics and economics in pursuit of national goals, so that as in other jurisdictions, non-legal concerns will influence antidumping practices. What distinguishes these antidumping regimes from the United States model is the extent to which the impinging political, economic and other influences originate in or are filtered through relatively insulated and autonomous government bureaucracies, rather than the legislative branch or the private sphere.

Through the 1950s and into the 1960s, the industrial preeminence of the United States allowed it to progressively liberalize imports, while its industries seldom needed protection. But as Japan rebuilt its industrial base and its exports regained the ability to

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<sup>1</sup> Since 1980, four jurisdictions, the United States, Canada, Australia and the European Community, were responsible for roughly 98% of the antidumping actions notified to the GATT's Committee on Antidumping Practices. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 231 (1989). In the United States, for example, where the International Trade Commission ("USITC") functions as a quasi-judicial body, the debate does not generally concern whether the USITC should be more or less independent, but instead concerns which other branch of government, the executive, the legislative, or the judiciary, will have greater influence over USITC decisions.

<sup>2</sup> See, e.g., JACKSON, *supra* note 1, chapter 10 and *passim*.

threaten United States industry,<sup>3</sup> it became one of the prime targets of United States protectionist measures. Taiwan and South Korea began their major industrialization drives somewhat later, but as exports began to threaten United States manufacturers they were also targeted in a series of protective actions. In the 1970s and 1980s, exports from these three Asian nations were at the center of United States trade policy debates, and much attention had been paid to United States antidumping actions vis-a-vis their exports. Very little has been written, however, on the antidumping regimes of these nations, or their enforcement.

Although Japan, South Korea and Taiwan began their post-World War II development with high levels of protection in many areas,<sup>4</sup> their economic success makes it increasingly difficult for them to stave off multilateral and/or bilateral pressures for greater import liberalization. Industries in all three nations face competition from imports in their domestic markets, a trend that is only likely to grow in the foreseeable future. Not surprisingly, all three governments have their own antidumping regimes in place, and have accepted petitions for antidumping relief from domestic industries.<sup>5</sup>

Because Japan, South Korea and Taiwan have recently all begun active antidumping enforcement, and because these nations arguably share a common orientation toward international trade, it seems appropriate to explore, at this juncture, the wider non-legal environments in which these antidumping regimes exist and will be enforced. Therefore, rather than probing the depths of any one

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<sup>3</sup> In the 1930s Japan's textile exports threatened United States and other textile producers to such an extent that Japan was forced into a series of voluntary export restraint agreements. Kent Jones, *Voluntary Export Restraint: Political Economy, History and the Role of the GATT*, 23 JOURNAL OF WORLD TRADE 125, 129 (1989). For a journalistic account of turn-of-the-century Japan's trade regime, see THOMAS F. MILLARD, AMERICA AND THE FAR EASTERN QUESTION 15-38 (1909).

<sup>4</sup> See *infra* notes 164-66 and accompanying text.

<sup>5</sup> In the United States context, it is generally understood that GATT-driven lowering of trade barriers resulted in increased import penetration by the mid-1970s, which in turn translated into political pressure for more "user friendly" antidumping rules. See JACKSON, *supra* note 1, at 229.

regime, this paper will first attempt to provide a broad historical context for understanding the trade regimes of these three nations. It will then outline the individual antidumping regimes of Japan, South Korea and Taiwan, and how they have been applied to date. Finally, it will offer some predictions on how these regimes are likely to be enforced in the future, with specific reference to whether commonalities in trade outlooks will lead to convergence, or whether political, economic, or other factors will overcome any pressure for convergence and lead to divergent practices.

## II. ANTIDUMPING LAW IN THE BRETTON WOODS SYSTEM

Notwithstanding recent concern over revived protectionism in the wealthy industrialized nations,<sup>6</sup> since the end of World War II, the world has seen an exceptional liberalization of trade in manufactured goods as facilitated by the General Agreement on Tariffs and Trade ("GATT")<sup>7</sup> and the larger Bretton Woods system. Yet, although the GATT has been a force for import liberalization, it has always allowed Members<sup>8</sup> to protect their domestic industries against dumped imports.

### *A. Discipline over Dumping in International Trade*

The GATT system was primarily the brainchild of the United

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<sup>6</sup> See, e.g., JAGDISH BHAGWATI, *PROTECTIONISM I* (1988).

<sup>7</sup> General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. As a result of the successful conclusion of the Uruguay Round negotiations, the GATT as drafted in 1947 and thereafter amended has been incorporated into the General Agreement on Tariffs and Trade 1994, available in JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 79-96 (Documents Supp. 1995) [hereinafter GATT 94]. GATT 94 is in turn annexed to the Agreement Establishing the World Trade Organization, available in JACKSON, *Id.* at 3-14 [hereinafter WTO Charter].

<sup>8</sup> Nations party to the GATT will be referred to throughout as "Members." With the creation of the WTO as a body having international legal personality, the term "Member" has become a legally accurate description of their status.

States and Great Britain,<sup>9</sup> two nations that had been engaged in competitive industrialization throughout the nineteenth and early twentieth centuries. The United States in particular complained of dumped imports as early as 1791,<sup>10</sup> and adopted its first modern antidumping statute in 1916.<sup>11</sup> Although some now question on economic grounds the likelihood of predatory dumping,<sup>12</sup> or the logic of counteracting dumping if it does occur,<sup>13</sup> the terms of the debate in the pre-GATT world were much more clear. In the words of Lord Brougham to the House of Commons:

It was well worth while to incur a loss upon the first exportation, in order, by the glut, to stifle in the cradle those rising manufactures in the United States which the war had forced into existence contrary to the natural course of things.<sup>14</sup>

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<sup>9</sup> Or perhaps the English supplied the brains, the United States the economic and political "brawn." BHAGWATI, *supra* note 6, at 2.

<sup>10</sup> The history of United States' antidumping policies is discussed in more detail, *See infra* notes 429-45 and accompanying text.

<sup>11</sup> Revenue Act of 1916, ch. 463, sections 800-801, 39 Stat. 798, 15 U.S.C. §72 [1976]). Although this law still exists, there has never been a case in the U.S. which has been successful under this statute. JACKSON, *supra* note 1, at 228 & n.43. The current United States antidumping statute was enacted in its original form in 1921. For a discussion of the origins of the 1916 and 1921 laws, *see* JACKSON, *id.* at 225 n.26, 228 & n.45.

<sup>12</sup> The standard argument is that few cases of predatory dumping have been proven, and further, that the conditions necessary for predatory dumping to create a profitable monopoly or oligopoly situation are unlikely to be met. *See, e.g.,* Alan V. Deardorff, *Economic Perspectives on Antidumping Law*, in ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY 35-36 (John H. Jackson & Edwin A. Vermulst eds., 1989)[hereinafter Deardorff].

<sup>13</sup> The argument being that if dumping does occur, it functions as a transfer of wealth from the exporting to the importing nation, in spite of damage it may cause to individual firms and their employees in the importing nation. *See, e.g.,* Deardorff, *supra* note 12, at 26-29.

<sup>14</sup> *Quoted in* 1 MICHAEL HUDSON, TRADE, DEVELOPMENT AND FOREIGN DEBT: A HISTORY OF THEORIES OF POLARISATION AND CONVERGENCE IN THE INTERNATIONAL ECONOMY 141 (1992). Lord Brougham was speaking of the Napoleonic Wars (1793-

The "natural course of things", to which Lord Brougham referred, involved a colonial division of labor in which Britain would import raw materials from its colonies and export manufactures in return. A newly independent America, like later developing countries, did not accept that this trade pattern was natural, or that exporting raw materials would lead to national wealth, as the free trade theory predicted.<sup>15</sup> Americans feared the effects of dumped British goods on their infant manufacturing industries, and this "common sense" fear of dumping seems to have dominated political debate and policy making through the nineteenth century and up to the creation of the GATT system.<sup>16</sup>

### *B. The GATT Antidumping Framework*

The United States and other nations adopted antidumping legislation during the early part of this century,<sup>17</sup> in the absence of multilateral harmonization mechanisms. This changed with the

1814) that provided a boost to infant industries in the United States (and in other nations) by diverting Britain's manufacturing might away from exports. *Id.* at 107-111.

<sup>15</sup> David Ricardo, John Stuart Mill, and other free trade writers argued that equalization mechanisms that would function in an international free trade regime would make it irrelevant to a developing country's national wealth whether that nation industrialized, or continued to trade its raw materials for British manufactures. Hudson, *supra* note 14, at 92 (arguing that this position arose in conjunction with the need among British statesmen for an internationalist argument to convince less developed countries to join in dismantling world tariff barriers).

<sup>16</sup> As Judith Goldstein notes of late eighteenth and early nineteenth century Americans, "[W]hile they embraced John Locke, Americans shunned Adam Smith. This rejection of the logic of liberal trade occurred not only with full knowledge of Smithian ideas but also with the understanding that these ideas were more compatible with the American conception of limited government than was the protectionist alternative." JUDITH GOLDSTEIN, *IDEAS, INTERESTS, AND AMERICAN TRADE POLICY* 239 (1993). Despite growing influence of free trade theory in academia and elsewhere, protectionism remained the fundamental trade orientation of the United States until the passage of institutional reform legislation in 1934. *Id.* at 137-54.

<sup>17</sup> Japan had antidumping legislation of some sort as early as 1920. Shintaro Hagiwara, *First Application of Japanese Antidumping Law*, 21 *INTERNATIONAL BUSINESS LAWYER* 378, 378 (1993).

creation of the Bretton Woods system in the late 1940s, as the GATT took on the role of providing basic ground rules with which Members' national antidumping regimes must comply, at least vis-a-vis other Members.<sup>18</sup> Until the completion of the Uruguay Round and the establishment of the WTO Charter, GATT discipline over the antidumping actions of its Members was provided by GATT Article VI and the Antidumping Code negotiated during the Tokyo Round of GATT negotiations (1973-1979).<sup>19</sup> GATT 94 incorporates the original GATT agreement and prior "side agreements", such as the Antidumping Code, into a single document for legal purposes, but retains Article VI as the basic source of law, with the incorporated Antidumping Code providing necessary elaboration.

GATT Article VI defines dumping as that which occurs when "products of one country are introduced into the commerce of another country at less than the normal value of the products."<sup>20</sup> "Normal value" being defined as:

- (a) the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporter's market, or,
- (b) in the absence of such domestic price,
  - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
  - (ii) the cost of production of the product in the country of origin plus a

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<sup>18</sup> The fact that this GATT discipline applies only to antidumping actions vis-a-vis other GATT Members becomes important in the context of antidumping actions by Japan, South Korea, and Taiwan against exports from the People's Republic of China.

<sup>19</sup> Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT, B.I.S.D. 26S/171 (1980) [hereinafter "Antidumping Code"]. The earlier antidumping code, negotiated during the Kennedy Round of GATT negotiations (1962-1967) was effectively replaced by the Tokyo Round Antidumping Code. JACKSON, *supra* note 1, at 226-27.

<sup>20</sup> GATT, *supra* note 7, at art. VI.

reasonable addition for selling cost and profit.<sup>21</sup>

If dumped products cause or threaten material injury to an established industry in the territory of the importing Member producing like products or materially retard the establishment of such an industry, the importing Member may levy an antidumping duty less than or equal to the amount by which the normal value of the products exceeds their export price (the "dumping margin").<sup>22</sup>

As time passed, calls arose for further GATT discipline on antidumping procedures, which ultimately led to the creation of the Antidumping Code.<sup>23</sup> The Antidumping Code supplements Article VI by clarifying definitions of "dumping," "material injury," and "domestic industry," as well as providing procedural rules for the conduct of antidumping investigations. The Antidumping Code also provides rules concerning the collection of evidence, the use of price undertakings, and the imposition and collection of antidumping duties. Finally, the Antidumping Code requires that Members provide avenues for judicial review of antidumping decisions, and creates a Committee on Anti-Dumping Practices to supervise Members' antidumping practices.

Japan joined the GATT in 1955,<sup>24</sup> while South Korea joined

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<sup>21</sup> *Id.* at art. VI(1).

<sup>22</sup> *Id.*

<sup>23</sup> JACKSON, *supra* note 1, at 226.

<sup>24</sup> Japan received provisional GATT status in 1953 and was admitted as a Contracting Party in 1955. Kazuo Sato, *Trade Policies in Japan*, in NATIONAL TRADE POLICIES 109, 112, 2 HANDBOOK OF COMPARATIVE ECONOMIC POLICIES (Dominick Salvatore ed., 1992). Japan's GATT membership was supported by the United States, and the only other countries to accord Japan full GATT benefits were Canada, West Germany, and the Scandinavian countries. *Id.* For a discussion of the Cold War context of the United States sponsorship of Japan, see DAL-JOONG CHANG, ECONOMIC CONTROL AND POLITICAL AUTHORITARIANISM: THE ROLE OF JAPANESE CORPORATIONS IN KOREAN POLITICS 1965-1979, 39-40 (1985).

in 1967.<sup>25</sup> Both nations subsequently joined the Antidumping Code and have now signed the WTO Charter. Taiwan has not been a member of the GATT during recent decades, has not signed the Antidumping Code, and has not been admitted to the WTO. So in theory, Taiwan's antidumping practice is constrained only by economic and political considerations.<sup>26</sup> But Taiwan's major political concern with regard to trade policy is admission to the WTO, so that its antidumping and other trade practices are to a great extent constrained by GATT standards.<sup>27</sup>

### III. JAPAN, SOUTH KOREA AND TAIWAN: HISTORICAL DEVELOPMENT AND COMMON TRADE REGIMES

Stories of East Asian miracles, which have continued unabated since the 1960s,<sup>28</sup> are supplemented now with predictions of a Pacific

<sup>25</sup> Chan Jin Kim, *New Antidumping Law of Korea*, 15 KOREAN JOURNAL OF COMPARATIVE LAW 1, 2 (1987).

<sup>26</sup> The government of the Republic of China, which in 1944 ruled much of China from its wartime capital in Chongqing, was represented at Bretton Woods and was an original GATT Member. That government, which has governed only Taiwan since 1949, arguably renounced GATT membership in 1950. Jackson, *supra* note 1, at 47 & n.103. Since that time, neither Taiwan nor the People's Republic of China have been GATT Members.

<sup>27</sup> Taiwan applied to join/rejoin the GATT in 1990, and the GATT began formal consideration of its application in September, 1992. *Taiwan Plans U.S.-Style Trade Law*, January 13, 1993, available in LEXIS, World Library, Txtlne File. As part of the application process, GATT/WTO Members have submitted to the Taiwanese government as many as 300 questions concerning Taiwan's trade practices. Osman Tseng, *New Trade Law Sets Rules on Free, Open Commerce*, BUSINESS TAIWAN, February 1, 1993, available in LEXIS, World Library, Txtlne File. Taiwan's Economics Minister P.K. Chiang, then chairman of Taiwan's Trade Investigation Committee, reportedly said that the panel will function according to the guidelines set by the GATT. *Import Relief Panel - Stainless Steel Rods*, China Economic News Service, July 28, 1994, available in LEXIS, World Library, Txtlne File.

<sup>28</sup> Chalmers Johnson cites the ECONOMIST issues of September 1 and 8, 1962, as the first of the "miracle" pieces by Western writers on post-war Asia. CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975* 1 (1982).



Century and a rehabilitation of "Confucian values."<sup>29</sup> Although its level of development (and perhaps its current deep recession) make Japan a "Western" country in the eyes of some, it is Japan's example that continues to inform economic and political thinking in Asia.<sup>30</sup> Japan weathered the storm of nineteenth century Western imperialism with its sovereignty more or less intact,<sup>31</sup> while at the same time

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<sup>29</sup> For a critique of "miracle" literature, see Bruce Cumings, *Rimspeak; or The Discourse of the "Pacific Rim"*, in WHAT IS IN A RIM?: CRITICAL PERSPECTIVES ON THE PACIFIC REGION IDEA 29 (Arif Dirlik ed., 1993).

<sup>30</sup> Michael P. Ryan, *Industrial Policy: Concepts and Theory*, in INDUSTRIAL POLICIES IN THE PACIFIC 1, 11-12 (Gunnar K. Sletmo & Gavin Boyd eds., 1994). Bruce Cumings, *The Origins and Development of the Northeast Asian Political Economy*, 38 INTERNATIONAL ORGANIZATION 1, *passim* (1984) (reprinted in THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALIZATION (Fredric C. Deyo, ed. 1987)). On South Korea, see ALICE H. AMSDEN, ASIA'S NEXT GIANT: SOUTH KOREAN AND LATE INDUSTRIALIZATION 51, and *passim*, (1989). On Taiwan, see ROBERT WADE, GOVERNING THE MARKET 47-50, and *passim* (1990).

<sup>31</sup> China relinquished autonomy to set tariff rates by treaties signed with Great Britain in 1842 and 1843 ending the Opium War (1839-1842). Mingchien Joshua Bau, *The Tariff Autonomy of China*, in PROBLEMS OF THE PACIFIC, 1929 PROCEEDINGS OF THE THIRD CONFERENCE OF THE INSTITUTE OF PACIFIC RELATIONS 313, 313. China then lost control of her national Maritime Customs Administration to Great Britain through treaties of 1898 and 1901. *Id.* China submitted to British extra-territorial legal jurisdiction over certain of her port cities through the same 1842 and 1843 treaties, after which other foreign powers demanded and received equal treatment in their trade treaties with China. Mingchien Joshua Bau, *The Relinquishment of Extra-Territoriality in China*, in PROBLEMS OF THE PACIFIC, *id.* at 323, 323. See also, JOHN KING FAIRBANK, THE UNITED STATES AND CHINA 163-71 (4th ed. 1983). Japan became subject to a similar regime of foreign extra-territorial rights and loss of tariff rate autonomy through a series of treaties beginning in 1858, but unlike China, Japan was able to end all extra-territorial rights by 1898, EDWIN O. REISCHAUER, THE JAPANESE 78, 89 (1981), and reassert full tariff autonomy by 1911. Bau, *The Tariff Autonomy of China*, *id.* at 321. Japan in turn was the first foreign power to demand extra-territorial rights and fixed tariff rates from Korea, under the 1876 Treaty of Kangwha. KI-BAIK LEE, A NEW HISTORY OF KOREA 268-69 (Edward W. Wagner et al. trans., 1984). Western powers later obtained similar rights, though on terms somewhat more generous to Korea. John Chay, *The First Three Decades of American-Korean Relations, 1882-1910*, in U.S.-KOREAN RELATIONS 1882-1982, at 15, 19-24 (Tae-Hwan Kwak et al. eds., 1982).

achieving the accoutrements of a modern nation state and a high level of industrialization. What makes Japan an even more attractive model for its neighbors is that it has accomplished all this while preserving much of its social stability and cultural identity.

In the economic sphere, of which international trade is a key element for these nations, Japan achieved success through the combination of a "strong" state and an interventionist industrial policy. Taiwan and South Korea began to follow in Japan's footsteps after World War II, and they now occupy a second development tier far ahead of comparable countries in Asia.<sup>32</sup> In each nation a strong state has created an economic policy bureaucracy to implement a growth-oriented industrial policy, with a premium on exports of manufactured goods of steadily increasing technology and value-added. To assist "infant" industries entering new fields of industry, and to conserve scarce foreign exchange, Japan, South Korea and Taiwan have all been quite protectionist in certain areas.<sup>33</sup> On the legal and administrative side, all three nations adopted Continental civil law legal systems, heavily influenced by German commercial law.<sup>34</sup> These code systems, which were superimposed upon existing neo-Confucian societies, have since all been influenced to varying degrees by American models. Viewing antidumping enforcement as a legalistic expression of industrial policy, similarities in trading and legal regimes would seem to favor convergence in antidumping enforcement among Japan, South Korea and Taiwan. On the other hand, economic and

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<sup>32</sup> I exclude Hong Kong and Singapore from consideration here not because their governments have not played important roles in their economies, but because those roles have not been in the capitalist development model of Japan, South Korea and Taiwan.

<sup>33</sup> On Japan, see EDWARD J. LINCOLN, *JAPAN'S UNEQUAL TRADE* (1990). On South Korea, see RICHARD LUEDDE-NEURATH, *IMPORT CONTROLS AND EXPORT-ORIENTED DEVELOPMENT* (1986). On Taiwan, see WADE, *supra* note 30, at 126-39.

<sup>34</sup> On Japan, see DAN F. HENDERSON, *FOREIGN ENTERPRISE IN JAPAN: LAWS AND POLICIES* 164-72 (1973). On South Korea, see SANG HYUN SOHN, *INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA* (1983). On Taiwan, see Man-Ling Li, *The Administrative Litigation System on Taiwan* (1980)(unpublished S.J.D. dissertation, Harvard Law School).

political concerns specific to each nation may lead their antidumping practices in different directions.

*A. "Strong" States and the State-Private Distinction*

In Weberian terms, the state is "a set of organizations invested with the authority to make binding decisions for people and organizations juridically located in a particular territory and to implement those decisions using, if necessary, force."<sup>35</sup> Writers on Northeast Asian political economy commonly describe Japan, South Korea and Taiwan as having "strong" or "hard" states, which can be taken generally to mean states that are capable of:

1. formulating policy goals independently of particular classes or groups within society ("insulation"),
2. coercively altering group or class behavior, and
3. intervening to change the structure of society, or to substitute for other structures, such as the market.<sup>36</sup>

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<sup>35</sup> Ryan, *supra* note 30, at 5 (citing Dietrich Rueschemeyer and Theda Skocpol, *The State and Economic Transformation*, in *BRINGING THE STATE BACK IN* 46 (Peter B. Evans et al. eds., 1985).

<sup>36</sup> This formula for assessing state "strength" appears in Stephen D. Krasner, *US Commercial and Monetary Policy: Unravelling the Paradox of External Strength and Internal Weakness*, in *BETWEEN POWER AND PLENTY: FOREIGN ECONOMIC POLICIES OF ADVANCED INDUSTRIAL STATES* 51-52 (Peter J. Katzenstein ed., 1978). An alternative formula is developed in JOEL MIGDAL, *STRONG SOCIETIES AND WEAK STATES: STATE-SOCIETY RELATIONS AND STATE CAPABILITIES IN THE THIRD WORLD* (1988). On Japan, see Chalmers Johnson, *Political Institutions and Economic Performance: The Government-Business Relationship in Japan, South Korea, and Taiwan*, in *THE POLITICAL ECONOMY OF NEW ASIAN INDUSTRIALIZATION* 137 (Frederic C. Deyo ed., 1987). On South Korea, see JUNG-EN WOO, *RACE TO THE SWIFT: STATE AND FINANCE IN KOREAN INDUSTRIALIZATION* 1-6 (1991)(citing Krasner but discussing the potentially limiting nature of state-centered analysis). On Taiwan, see WADE, *supra* note 30, at 337-42 (citing Migdal).

This relative state strength in the economic sphere has allowed governments in Japan, South Korea and Taiwan to implement highly interventionist industrial development policies, of which antidumping policies are potentially an important part. It therefore may be useful to explore the origins of Japan's strong state, and its role as the model for states in South Korea and Taiwan.

In comparative historical context, one way to understand the rise of the strong state in Asia and elsewhere is as a growth in the power of the public sphere at the expense of private, or civil society. Norberto Bobbio traces the "public / private" dichotomy in Western political and social thought to Justinian's *Corpus iuris (Institutiones, 1, 1, 4; Digesto, 1, 1, 1, 2)*,<sup>37</sup> but credits Kant with "bringing to its conclusion" the historical evolution which finally located the sources of public and private law in the state and the 'state of nature,' respectively.<sup>38</sup> According to Bobbio, this distinction provided the theoretical basis for the liberal conception of states, as arising out of private law contractual arrangements between free and equal actors in the state of nature.<sup>39</sup> This contractualist liberal tradition, which includes Hobbes and Locke and may have achieved its zenith with such nineteenth century writers as Herbert Spencer, celebrates the primacy of the private over the public by arguing, in line with classical economics, that the common good can be reduced to the sum of individual welfare.<sup>40</sup> In this view, the ideal of a "weak" state went hand in hand with the "birth, growth and hegemony of the bourgeois classes" in the nineteenth century.<sup>41</sup>

For later critics of the liberal conception, private law contract was an inadequate explanation of the origins of state power. A

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<sup>37</sup> NORBERTO BOBBIO, *DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER I* (Paul Kennealy trans., 1989).

<sup>38</sup> *Id.* at 7.

<sup>39</sup> *Id.* at 12.

<sup>40</sup> HUDSON, *supra* note 14, at 86.

<sup>41</sup> BOBBIO, *supra* note 37, at 14. *See also* HUDSON, *supra* note 14, at 108-109 (connecting the rise of free trade in Britain with the adoption of laissez-faire principles by industry and the rising middle classes).

reaction against liberalism arose in the latter half of the nineteenth century that called for a reassertion of the public over the private, based on the Aristotelian and Hegelian belief that the common good cannot be reduced to the sum of individual interests pursued in the private sphere.<sup>42</sup> This anti-liberal reaction, which could in theory take democratic or autocratic forms, grew in influence through the late nineteenth and early twentieth centuries, precisely during the creation of the modern Japanese state.

In the passages that follow, I argue that the Japanese state that formed in the decades following the Meiji Restoration of 1868,<sup>43</sup> was in the heritage of this anti-liberal reaction. Though unlike its Western counterparts, the Meiji state did not need to reassert itself over a "hegemonic bourgeoisie" because such an economic class had not fully developed in Japan at Meiji.<sup>44</sup> Instead, Japan's leaders sought to forestall the development of a powerful and independent capitalist class, which they felt would lead to the alienated workers, social strife, and threats of socialism they had witnessed in the West,<sup>45</sup> and which, probably not incidentally, would have rivalled the state for power. According to Pyle, "It became an *idée fixe* of Japanese social policy thought that the timing of Japan's industrialization gave her the advantage of learning from Westerners' mistakes and thereby avoiding

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<sup>42</sup> *Id.* at 14.

<sup>43</sup> For a description of the Meiji Restoration see, *infra*, notes 50 to 91, and accompanying text.

<sup>44</sup> For a description of economic development in pre-Meiji Japan, see Sydney Crawcour, *The Tokugawa Period and Japan's Preparation for Modern Economic Growth*, in 1 *THE JOURNAL OF JAPANESE STUDIES* 113, (1974). Crawcour attributes the dominant tendency to view traditional Japan as an obstacle to economic progress partly to the influence of the European Historical School of economic development. *Id.* A better known example of this view was expressed by Max Weber concerning traditional China. MAX WEBER, *THE RELIGION OF CHINA: CONFUCIANISM AND TAOISM* (Hans H. Gerth ed. & trans., 1951). Weber was an active member of the *Verein für Sozialpolitik*, an influential group of German social scientists, which was formed by economists of the German Historical School in 1872. Kenneth B. Pyle, *Advantages of Followership: German Economics and Japanese Bureaucrats, 1890-1925*, in 1 *THE JOURNAL OF JAPANESE STUDIES* 127 (1974).

<sup>45</sup> Pyle, *supra* note 44, at 143.

or mitigating the social problems of industrialism."<sup>46</sup> I argue that the state developed by the Meiji oligarchs, which rejected *laissez faire* and which embraced capitalism while distrusting capitalists, provided the most important model for post-colonial governments in Korea and Taiwan.<sup>47</sup>

It is important to note that in developmental/historical terms the distinction here is not between the "liberal and framework state," characteristic of the nineteenth century, and the "managerial, regulatory and welfare state," characteristic of post-World War II advanced capitalism,<sup>48</sup> although the latter also involves a reassertion of the public over the private. The vision of the state presented here is essentially corporatist, meaning that "the state charters or creates a small number of interest groups, giving them a monopoly of representation of occupational interests in return for which it claims the right to monitor them in order to discourage the expression of 'narrow,' conflictful demands."<sup>49</sup>

### *B. The Meiji Restoration and Japan's Rise as a "Late Developing" Industrial Power*

The Meiji Restoration of 1868 is commonly seen as marking the beginning of Japan's drive to become a modern nation state.<sup>50</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> While it seems correct to emphasize the instrumental aims of Meiji leaders in preventing the rise of class strife and possibly socialism, the rejection of *laissez faire* in Confucian and neo-Confucian political thought certainly provided important background support for a strong state in Japan (and later South Korea and Taiwan). See LEONARD SHIHLIEN HSU, *THE POLITICAL PHILOSOPHY OF CONFUCIANISM* 157-59 (Curzon Press 1975)(1932).

<sup>48</sup> Henry J. Steiner, *Justification and Social Vision in Common Law* Change 6 (July, 1983)(unpublished manuscript used in course materials for Sargentich, *Theories About Law*, Spring Term, 1995).

<sup>49</sup> WADE, *supra* note 30, at 27.

<sup>50</sup> For a detailed historical exposition see Crawcour, *supra* note 44 (discussing pre-Meiji Restoration developments which helped provide the foundation for industrial capitalism, and positing a transition phase from 1868 until roughly 1885).

Those efforts, which laid the foundation for twentieth century Japan, forced Japan's leaders (the "Meiji oligarchs") to make decisions which have had lasting implications. Two of their most important decisions were: i) to create a strong, centralized bureaucratic state, and ii) for the state's duties to include the active promotion and guidance of capitalist industrialization. The second objective, which has taken the form of Japan's industrial policy, depends upon and thus cannot be truly separated from the first. Industrial policy, of which I argue antidumping enforcement is one facet, is an expression of and depends upon the strong state.

1. Building the "Strong" State: Constitutional Monarchy, Civil Law, and Powerful Bureaucracy.

Japan's political structure during the Tokugawa period (1600-1868) has been described as one of "centralized feudalism."<sup>51</sup> Two hundred to three hundred fiefdoms were ruled by vassal lords ("daimyo"), who were in turn subjects of the central military overlord, or shogun. The position of shogun was hereditary, and in time the shoguns became largely figureheads, as administration of the government passed to a country-wide bureaucracy headed by two councils of elders.<sup>52</sup> During the Tokugawa period Japan's contacts with the outside world, including Korea and China, were strictly limited, as the nation embarked on "more than two centuries of self-imposed seclusion."<sup>53</sup>

By the mid-nineteenth century, Japan had witnessed China's subjugation at the hands of the technologically advanced Western powers, had lost its own tariff autonomy, and had been forced to

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<sup>51</sup> EDWIN O. REISCHAUER, *THE JAPANESE* 64-77 (1977). The following description of Tokugawa Japan relies heavily on Reischauer.

<sup>52</sup> *Id.* at 67.

<sup>53</sup> *Id.* at 68.

accept foreign extra-territorial jurisdiction over certain of its ports.<sup>54</sup> In the 1868 Meiji Restoration, the Tokugawa shogunate was overthrown and the Emperor "restored" to the throne, in fact rule simply passed to the leaders of the two fiefdoms that had led the revolt.<sup>55</sup> The Meiji oligarchs were driven to industrialize and modernize Japan out of a general fear for the nation's sovereignty, while the particular drive to adopt a Western legal system was given added impetus by the fact that the Western powers made such a system a prerequisite to them giving up their extraterritorial rights.<sup>56</sup>

As the Meiji oligarchs studied foreign political systems for possible models, it was Prussian "constitutional monarchy" that they found most applicable to their and Japan's situation.<sup>57</sup> In the constitutional monarchy model the monarch would retain power over the prime minister and the military, the imperial bureaucracy would hold broad powers, and the parliament would be relatively weak.<sup>58</sup> As constitutional monarchy was implemented in Japan, the Meiji oligarchs took the place of the monarch, and as they aged and passed from the scene the bureaucracy, civilian and military, solidified its dominance over the legislative branch.<sup>59</sup> In adopting a modern legal system the Continental civil law system was selected over the Anglo-American common law, with particular codes showing either more German or

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<sup>54</sup> See *supra* note 31, and accompanying text. As Chalmers Johnson points out, because Japan did not recover tariff autonomy until 1911 her policy makers were forced to seek alternative means to protect and nurture local industry. JOHNSON, *supra* note 28, at 25.

<sup>55</sup> JOHNSON, *supra* note 28, at 37.

<sup>56</sup> HENDERSON, *supra* note 34.

<sup>57</sup> JOHNSON, *supra* note 28, at 36. See also, JAMES M. WEST, EDUCATION OF THE LEGAL PROFESSION IN KOREA 7 (1991). For an exhaustive study of one German advisor's role in the creation of the Meiji state, see JOHANNES SIEMES, HERMANN ROESSLER AND THE MAKING OF THE MEIJI STATE; AN EXAMINATION OF HIS INFLUENCE ON THE FOUNDERS OF MODERN JAPAN & THE COMPLETE TEXT OF THE MEIJI CONSTITUTION ACCOMPANIED BY HIS PERSONAL COMMENTARIES AND NOTES (1968).

<sup>58</sup> SIEMES, *supra* note 57, at 19-20. See also, JOHNSON, *supra* note 28, at 36-38 (discussing implementation of the system in Japan).

<sup>59</sup> JOHNSON, *supra* note 28, at 37-38.



more French influence.<sup>60</sup> Finally, a modern, bureaucratic civil service was created on contemporary German lines.<sup>61</sup> Together, these three consciously selected institutions provided a system of governance capable of functioning with the autonomy that is at the heart of the strong state.

## 2. Interventionist Economic Policy: The Influence of the German Historical School of Economics.

The Meiji Restoration came at a time when the United States and Germany were overtaking Great Britain as industrial powers, and were doing so with interventionist trade regimes.<sup>62</sup> Theories advocating free trade for developing countries were certainly known to the Meiji oligarchs, but one of the advantages of being a "late developer" is that under the right circumstances a nation may have the latitude pick and choose among policies which others have tried.<sup>63</sup> As I have argued above, the Meiji state must be understood as part of a historical anti-liberal reaction, which included a rejection of liberalism's separation of politics and economics. Those conceptions of state and economy which most influenced Meiji political and legal structures contained, and were inseparable from, criticisms of economic liberalism.

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<sup>60</sup> HENDERSON, *supra* note 34. For a detailed examination of the various codes, see KENZO TAKAYANAGI, *A Century of Innovation: The Development of Law in Japan, 1868-1961*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 5* (ARTHUR T. VON MEHREN ed. 1963).

<sup>61</sup> REISCHAUER, *supra* note 51, at 88-89.

<sup>62</sup> AMSDEN, *supra* note 30, at 12-13 & n.10. Although both were interventionist, the United States was the more protectionist of the two in terms of its use of tariffs. Goldstein, *supra* note 16, at 95.

<sup>63</sup> ALEXANDER GERSCHENKRON, *ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE A BOOK OF ESSAYS* (1962).

a. *The socio-economic component of the anti-liberal reaction: the historical school in Germany and the United States.*

Of direct importance to understanding Japan's subsequent trade policies is the extent to which Meiji Japan's economic modernization was influenced by the ideas of the Historical School of Economics, then active in Germany.<sup>64</sup> In broad terms the German Historical School arose as a reaction to classical political economy, and thus can be understood as part of the resurgent state movement.<sup>65</sup> Historical economics began to emerge in Germany in the 1840s, but did not constitute a true "school" until the emergence of the Younger Historical School in the 1870s.<sup>66</sup> It was the ideas of the Younger Historical School, particularly as put forth by Gustav Schmoller, that influenced Japan most directly.<sup>67</sup> The fundamental tenets of the Younger Historical School have been summarized as follows:

1. That economic life must be understood in light of the particular society's culture, history, and stage of development, thus rejecting universal economic theories and instead emphasizing empirical and historical research;
2. That "economic phenomena [are] organically related to other social phenomena and therefore

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<sup>64</sup> An English Historical School developed during the same period, but from different origins. ROGER BACKHOUSE, *A HISTORY OF MODERN ECONOMIC ANALYSIS* 212 (1985). Interestingly, Sir Henry Maine's jurisprudence, emphasizing history and culture rather than rational principles, is considered one of the inspirations for historical economics. *Id.* at 213.

<sup>65</sup> *Id.* at 212.

<sup>66</sup> *Id.* at 219.

<sup>67</sup> Pyle, *supra* note 44, at 135. According to GOLDSTEIN, by the 1870s Schmoller was the only well-known German academic advocating high tariffs. Goldstein, *supra* note 16, at 87. Like Weber, Schmoller was influential in the *Verein fur Sozialpolitik*, which was "committed to drawing the working class away from revolutionary causes by a policy of social reform." BACKHOUSE, *supra* note 64, at 219.

economic research must maintain a close relationship with the other social sciences";

3. The connection of economics and ethics, emphasizing "the interest of the whole society, the requirements of social harmony, national greatness, and cultural creativity";

4. A view of the modern nation state as the highest cultural institution, made up of a socially conscious monarch and a professional bureaucracy strong enough to mediate conflicts between social classes for the common good;

5. Intervention by the state in economic and social affairs to protect the legitimate interests of various private actors for the good of the nation;

6. A rejection of universalist socialism in favor of German solutions to social problems which would "preserve the German institutions and ethics they admired";

7. "Unabashed nationalism" and eventual support of German imperialism.<sup>68</sup>

In Germany, the Historical School provided economic support for the

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<sup>68</sup> Pyle, *supra* note 44, at 135-136. According to Pyle, in the 1890's Schmoller came to link solution of Germany's social ills with national expansion, predicting that if Germany failed to acquire overseas possessions the consequence would be "a lowering of wages,... a proletarianization of the masses." *Id.* at 136 (quoting Abraham Ascher, *Professors as Propagandists: The Politics of the Kathedersozialisten*, 23 *JOURNAL OF CENTRAL EUROPEAN AFFAIRS* 282, 291 (1963)). It would be interesting to explore the extent to which Japan's late nineteenth century and early twentieth century militarism was influenced by Schmoller's ideas, or perhaps an intrinsic failure which Schmoller recognized in the economic design he promoted.

paternalistic 'state socialism' promoted by Bismark's constitutional monarchy to combat revolutionary socialism.<sup>69</sup> In Japan, the influence of the Historical School should also be seen as reinforcing the Meiji oligarchs' choice of constitutional monarchy as the political form.<sup>70</sup> According to Marxist historian Kohachiro Takahashi, "in Prussia and Japan the erection of capitalism under the control and patronage of the feudal absolute state was in the cards from the very first....The socio-economic conditions for the establishment of modern democracy were not present; on the contrary capitalism had to make its way within an oligarchic system - the 'organic' social structure - designed to suppress bourgeois liberalism."<sup>71</sup>

The Historical School was also influential in the United States, in part because the founders of the School were themselves influenced by the writings of Freidrich List, the German-American political economist, whose writings on strategic protectionism were influential in nineteenth century America.<sup>72</sup> Toward the end of the nineteenth century some influential American academics adopted the tenets of the Historical School quite explicitly, including Richard Ely of Johns Hopkins, who studied in Heidelberg with one of the School's leaders.<sup>73</sup> Ely helped found the American Economic Association in 1885 on the platform that:

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<sup>69</sup> Pyle, *supra* note 44, at 132. Bismark combined "hard" approaches, such as anti-socialist legislation, with "soft" social legislation that would rob radical socialism of its *raison d'etre*. *Id.*

<sup>70</sup> The relationship between politics and economics is not a simple one. Hermann Roesler, a German law professor who seems to have greatly influenced the Meiji Constitution and Commercial Code, was a supporter of constitutional monarchy for Japan, yet was also an opponent of Bismark's rule. SIEMES, *supra* note 57, at 8. While Roesler adhered to a theory of law, economy and society that rejected laissez faire capitalism in favor of a more society-centered approach, his approach differed from that of the Historical School of Schmoller. *Id.* at 4.

<sup>71</sup> Kohachiro Takahashi, *A Contribution to the Discussion, in THE TRANSITION FROM FEUDALISM TO CAPITALISM* 68, 95-96 (1976).

<sup>72</sup> Pyle, *supra* note 44, at 132.

<sup>73</sup> *Id.* at 137.

We regard the state as an educational and ethical agency whose positive aid is an indispensable condition of human progress. While we recognize the necessity of individual initiative in industrial life, we hold that the doctrine of *laissez faire* is unsafe in politics and unsound in morals, and that it suggests an inadequate explanation of the relations between the state and the citizens.<sup>74</sup>

But whereas List emphasized the necessity of protectionist state intervention to develop national industrial and technological capabilities against outside threats,<sup>75</sup> the Historical School seemed more concerned with the purely domestic threat of social strife resulting from a hegemonic bourgeoisie. This difference in emphasis may represent the fact that List was writing from the prospective of a developing America that as yet had not experienced the worst of nineteenth century industrialization, whereas the economists of the Historical School were either in Germany, where class conflict and industrial strife arose somewhat earlier than in America, or were in late nineteenth century America, which no longer believed in an American "exceptionalism" from class conflict. In the American context the Historical School can be understood as proposing an alternative to Social Darwinism and the excesses of the Gilded Age, which helped provide justification for progressive intervention in the economy.<sup>76</sup>

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<sup>74</sup> *Id.* at 137 (quoted in HENRY STEELE COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880'S*, 234 (1950)).

<sup>75</sup> HUDSON, *supra* note 14, at 246-48.

<sup>76</sup> Pyle, *supra* note 44, at 137-138.

b. *Demonstrating the influence of the historical school on Japan.*

The ultimate influence of the Historical School on Japanese economic and political thought is impossible to quantify, or even to prove in any real sense, but there are several ways to explore its possible influence. First, it may be useful to explore why Japanese elites might have found the ideas of the Historical School more appealing than liberalism, the major competing ideology. Like Germany, Japan was trying to simultaneously industrialize and unify a group of loosely organized political entities, and doing so in an extremely hostile international environment. Second, an argument can be made that central tenets of political and economic liberalism conflict with basic ideals of Confucianism, which had become increasingly influential during the Tokugawa period.<sup>77</sup> The liberal notion of an expansive private sphere consisting of formally equal actors, interacting on the basis of freedom of contract, is fundamentally inconsistent with Confucian ideals of society built upon the harmony of stable, but essentially unequal, hierarchical relationships.<sup>78</sup> According to one scholar of Confucian political philosophy, in classical Confucianism the state is part of society, and is neither the product of a social contract, nor the creation of the sovereign.<sup>79</sup> One of the central functions of this embedded state is to regulate wealth so as to avoid destabilizing inequalities, a clear rejection of *laissez faire*.<sup>80</sup> Finally, economic liberalism celebrates economies built upon multiple transactions between formally equal private actors, acting in their own self-interest. In this acknowledgement, and perhaps celebration, of human greed, this

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<sup>77</sup> REISCHAUER, *supra* note 51, at 73.

<sup>78</sup> Ideal Confucian society would be organized according to the principle of *li*, which can be seen as defining (i) hierarchical status relations within society, (ii) the duties of individuals toward one another, and (iii) the duties of individuals toward to society. HSU, *supra* note 47, at 95-96.

<sup>79</sup> *Id.* at 30.

<sup>80</sup> *Id.* at 157-58.

vision of humanity seems diametrically opposed to the Confucian belief that human nature is fundamentally good.<sup>81</sup> This is not to say that Confucian and neo-Confucian<sup>82</sup> statecraft ever functioned according to these ideals, because the Legalist and other cultural traditions have been of great practical importance.<sup>83</sup> However, to the extent that Confucian ideals have become embedded in the moral belief systems of the Japanese (and Korean and Chinese) people, the basic precepts of classical liberalism may make it difficult for rulers and the ruled to accept them as a legitimating, state-sanctioned ideology.

A second approach to understanding the influence of the Historical School is to identify particular Japanese economists and politicians who came into contact with the School and adopted elements of its platform in their own work in Japan. Pyle focuses on the first generation of Western-influenced Japanese economists, identifying Kanai Noburu (1865-1933) and Kuwata Kumazo (1868-1932) as the two individuals most responsible for "introducing German economic thought in the universities and implanting its influence in the bureaucracy."<sup>84</sup> In a more recent work, historian Laura Hein focuses on three economists of the next generation, Arisawa Hiromi (1896-1988), Nakayama Ichiro (1898-1980), and Tsuru Shigeto (1912-), who were influential in both pre and post-war

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<sup>81</sup> "At men's beginning their nature is fundamentally good, by nature they are similar but in practice they grow apart." Three Character Classic, quoted in Fairbank, *supra* note 31, at 67.

<sup>82</sup> The term "neo-Confucian" is used here to describe the variant of Confucianism that became dominant in China during the Song dynasty (907-1279), and remained the state-sanctioned ideology through the nineteenth century. FAIRBANK, *supra* note 31, at 65-68. The neo-Confucianism espoused in particular by Zhu Xi became dominant in Korea during the Yi (Choson) dynasty (1392-1910), DAE-KYU YOON, *LAW AND POLITICAL AUTHORITY IN SOUTH KOREA* 5-12 (1990), and was also influential, though to a lesser degree, in Tokugawa Japan. REISCHAUER, *supra* note 51, 72-74.

<sup>83</sup> For a discussion of "imperial Confucianism" as a mixture of Legalist, Confucian, and other influences in the Chinese context, see FAIRBANK, *supra* note 31, at 60-62, 117-39.

<sup>84</sup> Pyle, *supra* note 44, at 139.

Japan.<sup>85</sup> According to Hein, "Many of the fundamental assumptions of these thinkers reflected the spirit of several other schools of Western economic thought--neither Marxist nor neoclassical."<sup>86</sup> Chief among these other schools of thought were the German social-policy school and the American institutional school, both of which have roots in the Historical School.<sup>87</sup>

A third approach is taken by Johnson in *MITI and the Japanese Miracle*, which asserts the influence of the Historical School on Japan,<sup>88</sup> but doesn't seek to prove the assertion through comparisons between the theories of the Historical School and Japan's actual political economy. Rather, Johnson describes in great detail the relationship between state and economy in Japan's post-war economic development, seeking to make that relationship comprehensible to an American audience accustomed to equating strong, interventionist states with Soviet-style command economies.<sup>89</sup> Johnson discusses the Historical School and Bismark's constitutional monarchy separately, focusing on the effectiveness of the latter for separating power and authority, or "ruling" and "reigning," and thus contributing to the autonomy, or strength of the state.<sup>90</sup>

This discussion of the Historical School is relevant for understanding Japan's present antidumping practice because it shows the depth of anti-liberal economic and political thinking that would have had to have been overcome for liberal ideology to become

<sup>85</sup> Laura E. Hein, *In Search of Peace and Democracy: Japanese Economic Debate in Political Context*, 53 JOURNAL OF ASIAN STUDIES 752 (1994).

<sup>86</sup> *Id.* at 755.

<sup>87</sup> *Id.* at 755-756. Hein finds some disagreement among the three economists over the ideal strength of the state, but believes that at least two of the three accepted the strong state. *Id.* at 756.

<sup>88</sup> "Japan's political economy can be located precisely in the line of descent from the German Historical School." JOHNSON, *supra* note 28, at 17.

<sup>89</sup> Although the thrust of *MITI AND THE JAPANESE MIRACLE* is to describe the post-war structures of the Japanese economy, rather than to explore its basis in the Historical School or in nineteenth century Prussian state-craft, Johnson does cite "Bismark's personal influence on a few key Meiji leaders." JOHNSON, *supra* note 28, at 36.

<sup>90</sup> *Id.*



dominant in Japan. If liberal ideology is not now dominant in Japan, and if Japan has provided the economic and political model for post-World War II South Korea and Taiwan, then one needs to understand antidumping enforcement in these nations in a non-liberal framework.<sup>91</sup> Because liberalism or neo-liberalism has been the mainstream American ideology for several decades, and because the GATT is based upon essentially liberal principles, the standard American paradigm for understanding antidumping law may be insufficient for understanding antidumping enforcement in Japan, South Korea and Taiwan.

### 3. Development of Industrial Policy Pre-World War II.

Although Johnson and others trace modern Japan's industrial policy institutions to reforms of the 1920s and 1930s,<sup>92</sup> in the area of international trade, Japan's interventionist policies appear to have been functioning by the early 1900s. As a contemporary observer wrote of Japan, "Here we find, for the first time in modern civilization, a great government extensively operating as a business corporation, and including under its direct control and supervision all activities which enter into the proposition."<sup>93</sup> To control international trade flows to serve national development goals, Japan reportedly employed certain "legitimate" devices including protective tariffs, subsidies, financial support, free transportation of products, rebates and bonuses on exports, and organization and centralization under Government direction.<sup>94</sup> In addition, Japan was accused of employing "illegitimate"

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<sup>91</sup> According to one author, Japan is not alone among leading industrialized nations in not accepting liberal free trade theory as a governing paradigm for trade policy, but is joined in this respect by France, Italy, and perhaps Germany. Winfried Ruigrok, *Paradigm Crisis in International Trade Theory*, 25 *JOURNAL OF WORLD TRADE* 77, 78 n.2 (1991). Of course, a rejection of free trade as a governing ideology does not necessarily lead to protectionism, as has been shown by Germany's high levels of intra-industry trade. *Id.* at 86.

<sup>92</sup> See, e.g., JOHNSON, *supra* note 28, at 114; Cumings, *supra* note 30, at 12.

<sup>93</sup> MILLARD, *supra* note 3, at 16.

<sup>94</sup> *Id.* at 30-31. Note the expansive definition of "legitimate" government action.

methods including secret remission of taxes and duties (presumably meaning Japanese government reimbursement of charges imposed by importing nations on Japanese exports), secret rebates of transportation charges, exercise of military and political authority to handicap competitors, and imitation and counterfeiting of competing articles.<sup>95</sup> Writing of Japanese government involvement in the cotton textile trade, a United States consular report stated:

The Government sustains this industry; first, by protective tariff; second, by organizing a trust for marketing the goods; third, by advancing money to carry on the enterprise at 4½ per cent. interest; fourth by cheap rates of transportation on lines controlled by the Government. With these various methods of support it is clear that foreign cotton manufacturers expecting to hold their trade in the Orient must meet practically the Government of Japan as a competitor. I am fully convinced that this governmental policy will not only continue, but will be expanded to cover many other lines of industrial development.<sup>96</sup>

Although from the 1880s the Japanese government had begun reducing its reliance on direct ownership of industry,<sup>97</sup> one can clearly see in these passages dating from the early 1900s the origins of the strategic, interventionist, trade policy pioneered by Japan and later adopted by South Korea and Taiwan. Japan had made a colony of Taiwan following its 1895 war with China, and was gradually increasing its control over Korea prior to full annexation in 1910.

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<sup>95</sup> *Id.* at 31.

<sup>96</sup> Quoted in MILLARD, *id.* at 32.

<sup>97</sup> According to Johnson, most direct Japanese government investment in mines, railroads, arsenals and factories took place prior to the Matsukata Reforms of 1880, after which the government began nurturing private industry by directing investment to strategic industries, providing exclusive licenses, and in some cases, providing capital funding. JOHNSON, *supra* note 28, at 84-85.

Taiwan and Korea thus became integrated into the economic empire being built by the Japanese state.

World War I set off an economic boom in Japan, as exports increased to supply the warring countries, and as imports of advanced goods such as chemicals declined, giving indigenous producers an opportunity to develop.<sup>98</sup> This boom was followed in the 1920s by economic and trade stagnation, which led to the first attempts at industrial policy in its modern, institutionalized form, in which the state is neither the direct commander, nor the mere regulator of the economy.<sup>99</sup> Some of these initial attempts failed as Japan became increasingly militaristic in the 1930s, when the state increased its dominance over the private sphere by moving toward direct control of industry.<sup>100</sup> Militarism aside, however, the 1930s are seen as the period of institutional innovation from which modern Japanese industrial policy arose.<sup>101</sup>

#### 4. Post-War Continuity.

The essential continuity between Japan's pre and post-World War II economic policies is now well documented. In spite of the legal and economic reforms imposed by the Supreme Command Allied Powers ("SCAP") in the immediate post-war years, by the mid-1950s the furthest reaching of these reforms were being reversed or emasculated.<sup>102</sup> Leaving to one side the question of whether reshaping

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<sup>98</sup> *Id.* at 89-90.

<sup>99</sup> *Id.* at 114. For a description of institutional changes during the first years of this "new testament" period of Japan's industrial policy, see *id.* at 100-115.

<sup>100</sup> *Id.* at 114-15.

<sup>101</sup> *Id.* at 308; Cumings, *supra* note 30, at 12-16 (pointing to the 1930s for the birth of both the Northeast Asian regional economy, and Japanese economic policy). Cumings sees in 1930s Japan the model for later state-led development in Taiwan and South Korea. *Id.* at 15.

<sup>102</sup> On securities law, see Alan L. Beller et al., *Looks Can Be Deceiving--A Comparison of Initial Public Offering Procedures under Japanese and U.S. Securities Laws*, 55 *LAW AND CONTEMP. PROBS.* 77 (1992); Dan Fenno Henderson, *Foreign Takeover of Japanese Corporations*, in *JAPANESE COMMERCIAL LAW IN AND*

Japan into a liberal, regulatory state would have been a legitimate role for the SCAP, such an essential reshaping never occurred. Indeed, the argument is made that because pre-war challengers for power such as the *zaibatsu* and the military were severely weakened during the occupation, the fact that bureaucracy emerged basically intact left the Japanese state more autonomous than before World War II.<sup>103</sup> Whether or not this is correct, the role of the state in Japan's post-World War II economy has been strong. Despite the intervening decades, this state strength is best understood as descended from decisions taken during the early decades of modern Japan, which rejected liberalism as a governing economic or political paradigm.

The following sections explore Japan's role as a model for state-economy relations in South Korea and Taiwan in their post-World War II development. If Japan has indeed provided the basic model for state industrial policies in these nations, then a common framework may exist for understanding the antidumping policies of these three nations.

### C. *South Korea's Emergence as a Modern Nation State*

The following section traces the history of the modern South Korean state, and will attempt to show that, in the areas which affect international trade, the state-economy relationship in Korea is very similar to that in Japan.

#### 1. 1876 to 1910: The End of the Confucian Order.

Through much of the nineteenth century Korea maintained its traditional Confucian monarchy and its political status as a tributary of Qing China. Though aware of the Western powers' incursions into

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ERA OF INTERNATIONALIZATION 89 (Hiroshi Oda ed., 1994). On antitrust, *see* Johnson, *supra* note 28, at 175, 221-27. On labor regulation, *see* KAZUO SUGENO, JAPANESE LABOR LAW 8-10 (Leo Kanowitz trans., 1992); KAREL VON WOLFEREN, THE ENIGMA OF JAPANESE POWER 67-71 (1989).

<sup>103</sup> Cumings, *supra* note 30, at 21.

China,<sup>104</sup> as well as Japan's nationalist industrial modernization,<sup>105</sup> Korea's leaders failed to adopt a strategy capable of ensuring the country's independence. Proponents of a Korean "Enlightenment" had called for an opening to foreign trade and foreign learning since the late eighteenth century,<sup>106</sup> but the government instead pursued isolation. By the time more forward-looking leadership took power in 1873, Japan was already too far down the path of aggressive nationalist "modernization" to leave the weaker Korea in peace. Exhibiting a remarkable facility with international law as practiced by the Western powers, Japan used an orchestrated naval "incident" to force the 1876 Treaty of Kangwha upon Korea.<sup>107</sup> The Treaty was a turning point for Korea, in part because it opened three treaty ports to Japanese extraterritorial jurisdiction, but also because it was the first instance of Korea receiving modern legal recognition as a sovereign nation.<sup>108</sup> After the Treaty of Kangwha, missions were sent to Japan and China to study modernization efforts there. Prompted by the reports he received, King Kojong began serious reforms of the government and military in 1880 and 1881. These efforts triggered a wave of reaction from conservative Confucian forces, however, and a military revolt in 1882 forced King Kojong to return *de facto* control of the government to the conservatives.<sup>109</sup> During the revolt a Japanese military instructor was killed and the Japanese minister of legation was forced to flee the country.<sup>110</sup>

This conservative revolt was a crucial point for modern Korea because Japan's plans for a military reprisal lead China to send in troops to assert its interests.<sup>111</sup> If Kojong and Queen Min had not been forced to give up reform efforts it is possible that Korea could

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<sup>104</sup> KI-BAIK LEE, *A NEW HISTORY OF KOREA* 263 (Edward W. Wagner trans., 1984).

<sup>105</sup> *Id.* at 266.

<sup>106</sup> *Id.* at 267.

<sup>107</sup> *Id.* at 268.

<sup>108</sup> *Id.* at 269. Japan's later aggression toward Korea suggests that Japan's recognition of Korean sovereignty was aimed at countering China's claims to suzerainty.

<sup>109</sup> *Id.* at 272-73.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 273-75.

have modernized while maintaining some autonomy from both China and Japan. As it turned out, for the next three decades Korea was a stage on which territorial rivalries between China, Russia and Japan were played out, at great cost to Korea. With Japan's victory over China in the Sino-Japanese War Korea came under Japan's *de facto* control in 1894.<sup>112</sup> Japan's control was tightened after its victory over Russia in 1905, when Japan forced Korea to accept the "Protectorate Treaty," under which Japan assumed control over Korea's external relations.<sup>113</sup> Finally, in 1910 a comprehensive annexation treaty was concluded and Korea ceased to exist as a sovereign nation.<sup>114</sup>

In 1894, though still retaining some formal independence, Korea was forced by Japan to institute reforms of its legal and political institutions. Known as the *Kab-o* reforms, these measures introduced a separation of judicial and administrative functions, as well as a nation wide system of courts.<sup>115</sup> The system imposed by Japan was quite naturally influenced by the statist system adopted in Meiji Japan just a few years earlier.<sup>116</sup> Although the laws enacted during the *Kab-o* reforms were abrogated in 1910 by the Japanese colonial government, they provided an important precedent for Korea's later assimilation of Japanese law.

## 2. 1910 to 1945: The Colonial Period.

During the colonial period (1910-1945) Korea was heavily influenced by the contemporary society of Japan. In addition to its obvious influence as the colonial ruler, it appears in retrospect that during this period Japan was able to usurp China's traditional role as the model for Korean statecraft. By virtue of geography and shared culture Korea is uniquely situated to evaluate developments in China

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<sup>112</sup> The Treaty of Shimonoseki which ended the Sino-Japanese War included in its first article a recognition of Korea's sovereign status. *Id.* at 289.

<sup>113</sup> *Id.* at 309-11.

<sup>114</sup> *Id.* at 313.

<sup>115</sup> WEST, *supra* note 57, at 6.

<sup>116</sup> *Id.* at 7.

and Japan. At a time when Korean exposure to the West was limited, Japan's rapid development presented an obvious contrast to China's disintegration and civil war, in spite of the fact that Japan had chosen the imperialist path.

### 3. Independence and the Rhee Regime.

By August of 1945, when U.S. troops took the Japanese surrender in the southern half of the Korean peninsula, the lines of the Cold War were being drawn. Complex political maneuvering continued over the next three years, both inside Korea and internationally, until in 1948 a conservative government took power and the Republic of Korea was declared in the South.<sup>117</sup> The new president was Syngman Rhee, a conservative independence leader who had been living in the United States for many years, and who received at least the initial blessing of the American occupation government.<sup>118</sup> Rhee remained in power in South Korea from 1948 until 1960, and although his regime has been criticized as corrupt, undemocratic, and ineffective, recent scholarship has shown that at least some economic measures taken during these years served important purposes.<sup>119</sup> Of most importance for understanding current South Korean economic and trade policy is that Rhee rejected political and economic liberalism in favor of a strong state and an interventionist trade policy.

Rhee's trade policy is generally characterized as one of import substitution ("ISI") rather than the export oriented policy of later years, and it is argued that he was able to pursue ISI over the

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<sup>117</sup> LEE, *supra* note 104, at 379. For histories of these years *see*, BRUCE CUMINGS, *ORIGINS OF THE KOREAN WAR*, Volumes I & II (1981, 1990); GREGORY HENDERSON, *KOREA: THE POLITICS OF THE VORTEX* 113-82 (1968).

<sup>118</sup> HENDERSON, *supra* note 117, at 128-29, 151-62.

<sup>119</sup> WOO, *supra* note 36, at 43-72. Many criticisms of the Rhee regime parallel those levelled against the China's Nationalist regime during World War II, when that obviously corrupt regime was able to parlay its status as an ally against Japan and against communism into enormous sums of American aid. BARBARA W. TUCHMAN, *STILLWELL AND THE AMERICAN EXPERIENCE IN CHINA* (1971).

objections of his American benefactors by exploiting a fundamental contradiction in American policy. American development theory of the 1950s called for a small state, which would leave direction of the economy to market forces, while America's geopolitical design for Northeast Asia called for South Korea to be a market for Japanese exports.<sup>120</sup> What allowed Rhee to parry these two prongs of America's agenda was a third prong, which was America's military need to have South Korea as a strong ally against communism.<sup>121</sup> This military reality arguably allowed Rhee the breathing space to implement ISI and anti-Japanese policies of which his American advisers disapproved, without being punished with a cutoff of United States aid.<sup>122</sup>

#### 4. Park Chung Hee and the Turn to Export Oriented Development.

The toppling of the Rhee regime by student demonstrations in 1960 opened the door for the 1961 coup d'etat lead by Park Chung Hee. The Park regime, which lasted until Park's assassination in 1979, brought into being the strong South Korean state that continues to this day. Park was an eclectic nationalist, who graduated from the Japanese Army's military academy in Manchuria (Manchukuo),<sup>123</sup> rose to the rank of lieutenant in the Japanese Kwantung Army,<sup>124</sup> was detained for participating in a violent local rebellion against the Rhee government in the 1940s,<sup>125</sup> and was suspected by the CIA of being a communist.<sup>126</sup> As Park's background would suggest, the fact that he was on the political Right did not mean that he believed in laissez faire politics or liberal economics. Park was very public in his admiration

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<sup>120</sup> WOO, *supra* note 36, at 47-48.

<sup>121</sup> *Id.* at 48.

<sup>122</sup> *Id.*

<sup>123</sup> MARTIN HART-LANDSBERG, *THE RUSH TO DEVELOPMENT: ECONOMIC CHANGE AND POLITICAL STRUGGLE IN SOUTH KOREA* 138-39 (1993).

<sup>124</sup> WOO, *supra* note 36, at 40.

<sup>125</sup> CUMINGS, *II ORIGINS OF THE KOREAN WAR*, *supra* note 117, at 266 & n.75.

<sup>126</sup> WOO, *supra* note 36, at 79 & n.22. *See also* CUMINGS, *II ORIGINS OF THE KOREAN WAR*, *supra* note 117, at 266 & n.75.



for the Meiji Restoration, and his desire to create a similar state-society order in Korea.<sup>127</sup>

Park benefitted from the land reform carried out under American pressure during the Rhee regime, which eliminated any possibility of a landlord class that might challenge his government's power.<sup>128</sup> Shortly after taking power, Park moved to eliminate another potential private-sector power base, the independent entrepreneurs who had become wealthy off the rents available under Rhee's corrupt economic system.<sup>129</sup> After arresting a number of these "illicit profiteers" and threatening them with prosecution, Park brought them into the state's embrace by releasing them in exchange for shares in private companies they were encouraged to establish.<sup>130</sup> Park also nationalized South Korea's banks, thus beginning the state control over capital and finance that has not completely ended today.<sup>131</sup>

It was during the early part of Park's rule that South Korea committed itself to export promotion, and American writers on South Korean development often explain the Park regime's success as an acceptance of market-oriented policies, as opposed to the import-substitution policies of the Rhee regime. In fact, as several writers cited in this paper have shown, although Park's policies were both different from and more successful than Rhee's, the differences were not simply "market" vs. "non-market." The important contribution of the Park regime, which lasts to this day, was a South Korean state built around economic and trade institutions modelled on those of pre-World War II Japan.<sup>132</sup>

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<sup>127</sup> AMSDEN, *supra* note 30, at 14, 51-52; HART-LANDSBERG, *supra* note 123, at 138-39.

<sup>128</sup> AMSDEN, *supra* note 30, at 37-38, 147.

<sup>129</sup> WOO, *supra* note 36, at 83-84.

<sup>130</sup> *Id.* at 84. On this episode, *see also* AMSDEN, *supra* note 30, at 72.

<sup>131</sup> WOO, *supra* note 36, at 84; AMSDEN, *supra* note 30, at 72-73.

<sup>132</sup> For a list of some of the parallel institutions, *see* HART-LANDSBERG, *supra* note 123, at 138-40.

*D. Taiwan's Emergence as the Republic of China*

The following section traces the history of Taiwan and its government, and will attempt to show that in areas affecting international trade policy, the state-economy relationship in Taiwan is also very similar to that in Japan.

1. Formation of the Guomindang ("KMT") and its Mainland China Period.

Like their Korean counterparts, the rulers of post-World War II Taiwan had also witnessed Japan's rise into a modern nation state capable of dealing on equal terms with the Western powers. Taiwan's situation differed from South Korea's however, in that Taiwan's post-colonial government, the KMT, had been in existence since roughly 1910, and had governed at least parts of the Mainland under the leadership of Chiang Kai Shek since the 1920s.<sup>133</sup>

To this day the KMT pays homage to the political philosophy of Dr. Sun Yat Sen, which was influenced more by Bismark's Germany or Meiji Japan than by liberal models.<sup>134</sup> Dr. Sun rejected federalism, advocated by some as a solution to China's fragmentation, and became disillusioned with prospects for a Western parliamentary system in China.<sup>135</sup> He argued instead for a dictatorship under a vanguard party,<sup>136</sup> and in the early 1920s received Comintern assistance in reorganizing the KMT along Leninist lines.<sup>137</sup> Legal reform in the last years of the Qing dynasty (1644-1911) had been heavily influenced by Meiji Japan, both through Chinese students studying in Japan, and through Japanese legal experts employed by the Chinese government.<sup>138</sup> Dr. Sun continued this emphasis on Japanese

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<sup>133</sup> FAIRBANK, *supra* note 31, at 222, 235-43.

<sup>134</sup> WADE, *supra* note 30, at 257-58.

<sup>135</sup> FAIRBANK, *supra* note 31, at 225-26.

<sup>136</sup> WADE, *supra* note 30, at 230.

<sup>137</sup> FAIRBANK, *supra* note 31, at 237-39.

<sup>138</sup> Li, *supra* note 34, at 70-76.

legal models by appointing Japanese jurists to act as legal advisors when he became head of a Nanjing provisional government in 1912.<sup>139</sup> In the economic sphere, Dr. Sun advocated a strong role for the state, including "state operation of industries, state control of capital, and state ownership of profits."<sup>140</sup> But although he emphasized the need to develop national capital, Dr. Sun also advocated private ownership over small enterprises in competitive markets.<sup>141</sup>

Dr. Sun Yat Sen died in 1925, and by 1927 Chiang Kai Shek had consolidated his leadership over the KMT.<sup>142</sup> Chiang maintained the Leninist structure of the KMT, and under his leadership, party and state essentially merged.<sup>143</sup> In 1930s the KMT also had extensive contacts with the fascist governments in Germany and Italy, some of whose tactics it consciously emulated.<sup>144</sup> Without carrying this line of analysis too far, it does seem clear that the KMT leadership were predisposed toward the kind of strong state necessary, but not sufficient, to carry out state capitalist development in the Japanese model. In the economic sphere, Chiang opposed Western liberalism for its predilection against government interference in economic life, and proposed instead an eclectic "anti-Marxist Confucian totalitarianism," that would merge Confucian social values with Western technology.<sup>145</sup>

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<sup>139</sup> *Id.* at 71.

<sup>140</sup> H.C. Tai, *The Kuomintang and modernization in Taiwan*, in *AUTHORITARIAN POLITICS IN MODERN SOCIETY* (S. Huntington and C. Moore eds.)(1970), cited in WADE, *supra* note 30, at 258.

<sup>141</sup> WADE, *id.*

<sup>142</sup> FAIRBANK, *supra* note 31, at 241.

<sup>143</sup> Stephan Haggard and Chien-Kuo Pang, *The Transition to Export-Led Growth in Taiwan*, in *THE ROLE OF THE STATE IN TAIWAN'S DEVELOPMENT* 47, 48 (Joel D. Aberbach ed., 1994). See also FAIRBANK, *supra* note 31, at 246-47 (on "Party Dictatorship").

<sup>144</sup> FAIRBANK, *supra* note 31, at 252-53.

<sup>145</sup> *Id.* at 253-54.

## 2. Taiwan's Colonial Development.

Japan's colonization of Taiwan must be condemned, but as was the case in Korea, the colonial period left Taiwan with some attributes which were conducive to economic development once liberation came.<sup>146</sup> As Bruce Cumings points out, Japan was one of the few colonizers that located modern heavy industry in its colonies, building steel, chemical, and hydroelectric facilities in Korea, Manchuria, and, to a lesser degree in Taiwan.<sup>147</sup> Taiwan's main colonial role, however, was to be a "bread basket" for Japan, and it was in agriculture that Japan's colonial policies left Taiwan best prepared for economic development under the KMT.<sup>148</sup>

## 3. The KMT in Taiwan.

When the KMT set up in Taiwan in 1948 and 1949, circumstances seemed to converge to push it toward further emulation of Japan's economic and trade policies. Many saw the Mainland KMT as "weak" and riddled with corruption, which prevented its economic planners from carrying out land reform and other necessary modernizing measures, and ultimately contributed to its loss to the communists.<sup>149</sup> Taiwan, emerging from the colonial period, did not have an entrenched economic elite capable of challenging the government, and by carrying out land reform and other measures the KMT guaranteed that any such *loci* of independent economic power would not develop for some time.<sup>150</sup> The KMT's economic planners knew that they had been unable to implement much needed reforms

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<sup>146</sup> Alice Amsden, *Taiwan's Economic History: A Case of Etatism and a Challenge to Dependency Theory*, 5 MODERN CHINA 341 (1979).

<sup>147</sup> Cumings, *supra* note 30, at 12-13.

<sup>148</sup> Haggard and Pang, *supra* note 143, at 52.

<sup>149</sup> See, e.g., FAIRBANK, *supra* note 31, at 343-49; General Joseph W. Stillwell, *Solution in China* (Probably July, 1944), in THE STILLWELL PAPERS 321-22 (Theodore H. White ed., 1948); Haggard & Pang, *supra* note 143, at 50-51.

<sup>150</sup> Haggard & Pang, *supra* note 143, at 48, 52-58.

while on the Mainland because the KMT was too greatly "penetrated" by landlords, big city capitalists, and others.<sup>151</sup> Once on Taiwan, the decision was made that such interests would be prevented from "capturing" state policy making to the extent they had on the Mainland. In order to do this a strong state was necessary, not a corrupt, "weak" dictatorship.

As in South Korea, the legacy of Japanese colonization left the native Taiwanese with language, educational and cultural ties to Japan that continued in the post-colonial era. In addition, by the late 1940's the Cold War order was taking shape in North Asia, and the KMT, like the Rhee government in South Korea, could invoke the threat of communism to cut short pressure from the United States for greater democracy.<sup>152</sup> As we have seen, by this time the SCAP occupation government in Japan was already backing off from its earliest post-war attempts to establish a more liberal democratic order, and in South Korea the Rhee government was capitalizing on the Cold War for breathing space to implement its agenda.<sup>153</sup>

#### 4. Taiwan's Industrial Policy in the 1950s.

On Taiwan, the KMT took over the centralized administrative structure left by the Japanese, and to strengthen its economic governance established a number of powerful economic agencies

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<sup>151</sup> WADE, *supra* note 30, at 260.

<sup>152</sup> The following description of the internally divided United States policy toward the KMT in the 1940s could easily have been written of the Rhee regime:

Actually we had a divided objective: to press the KMT leaders into reform which would diminish their autocratic power and facilitate internal peace; at the same time to strengthen the KMT-controlled regime as a step toward political stability in East Asia. We became involved in continuing to build up the KMT dictatorship materially at the same time that we tried to get it to tear itself down politically.

FAIRBANK, *supra* note 31, at 343-44.

<sup>153</sup> See *supra* notes 118-22 and accompanying text.

which exist to this day.<sup>154</sup> Like South Korea in the 1950s, Taiwan's industrial policy began with a period of import substitution which lasted through the 1950s. Political economists point to the year 1958 as a turning point for Taiwan's economy, when the KMT seems to have given up its goal of recapturing the Mainland, and turned to economic growth as its main objective.<sup>155</sup> In the late 1950s and early 1960s, as in South Korea, broad import substitution was replaced by the combination of export promotion and selective protection that lasts to this day.<sup>156</sup> As in Park Chung Hee's South Korea, pre-World War II Japan appears to have provided the inspiration for much of Taiwan's subsequent economic and trade regime.<sup>157</sup> A fundamental difference between South Korea and Taiwan, however, is that the KMT was influenced by the Japanese and other economic models both as the government of the Mainland, where it attempted to implement some of its own reforms, and later as the government of Taiwan.

#### *E. "Strong" States and the Capitalist Development Model*

The existence of a strong state does not indicate that the state will use its power to intervene in the economy, or what form that intervention will take if it does occur. Thomas Biersteker has identified the following six forms that state intervention can take: influencing, regulating, mediating, distributing or redistributing, producing goods and/or services, or planning.<sup>158</sup> Having determined that strong states exist in Japan, Korea and Taiwan, and having chronicled the influence of Japan's development model on South Korea and Taiwan, it is necessary to look at specific aspects of the industrial policies of these nations that can be expected to influence

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<sup>154</sup> Haggard & Pang, *supra* note 143, at 61-65; WADE, *supra* note 30, at 195-217.

<sup>155</sup> Haggard & Pang, *supra* note 143, *passim*.

<sup>156</sup> *Id.* at 47.

<sup>157</sup> WADE, *supra* note 30, at 189, 326, 334-35; Cumings, *supra* note 30.

<sup>158</sup> Thomas J. Biersteker, *Reducing the Role of the State in the Economy: A Conceptual Exploration of IMF and World Bank Prescriptions*, 34 INT'L STUD. Q. 477, 480 (1990).

antidumping enforcement.

IV. ECONOMIC CHARACTERISTICS OF STYLIZED EAST ASIAN  
DEVELOPMENT STATE, AND POSSIBLE IMPLICATIONS  
FOR ANTIDUMPING ENFORCEMENT

Once Park Chung Hee consolidated his power in South Korea in the early 1960s it was possible to say that Japan, South Korea and Taiwan were all consciously following a state-lead capitalist development path that Japan had embarked upon before World War II. Described by Johnson as the "capitalist development state," the model holds up well for each of the countries described here. In spite of national differences in policy and in emphasis, Robert Wade sums up the economic policy array well when he writes,

Since Japan was the 'textbook' for Taiwan and Korea, it is no surprise that it shows the same array of governed market elements: redistributivist land reform, postreform ownership ceilings, restrictions on financial institutions, a bank-based financial system able to sustain high debt/equity ratios, exchange rate controls, protection, direct foreign investment controls, export promotion, and selective government leadership in investment and technology.<sup>159</sup>

The following are elements of this stylized East Asian development state, found to some degree in each of the nations studied here, which might be expected to have implications for antidumping policy and enforcement.

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<sup>159</sup> WADE, *supra* note 30, at 326.

*A. Strong and Relatively Insulated National Economic and Trade Bureaucracies*

Japan's economic and trade bureaucracy has been the subject of the most comment, however Korea and Taiwan have their functional equivalents.<sup>160</sup> Although the names and the duties of the various ministries shift over time, the important implication for antidumping policy remains the same. Each nation has created bureaucratic institutions which oversee international trade in connection with broader economic planning. These institutions are more powerful than any potential equivalent in the United States system, and to this point have been relatively isolated from popular politics.<sup>161</sup> As we shall see, the antidumping regimes of Japan, South Korea and Taiwan are for the most part implemented by these institutions and their career bureaucrats. I argue that the economic bureaucrats of Japan, South Korea and Taiwan have relied, and arguably still rely, on Historical School and Listian economic thinking in implementing capitalist development policies. Although industrial policies involve complex webs of interconnected and mutually reinforcing policies, the following are three such policies which are potentially relevant to antidumping administration.

*B. Capital Shortages Leading to Encouraged Savings and Directed Credit to Strategic Industries*

Each of these nations faced serious capital shortages in the early stages of development, which lead each government to become

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<sup>160</sup> The most comprehensive account of Japan's economic bureaucracy remains JOHNSON, MITI AND THE JAPANESE MIRACLE, *supra* note 28. For a more critical account, see KAREL VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER 109-58 (Vintage Books 1990)(1989). On South Korea, see HART-LANDSBERG, *supra* note 123, at 48-55, 139-40. On Taiwan, see WADE, *supra* note 30, at 195-217.

<sup>161</sup> It is interesting to note the central role engineers, as opposed to Western-trained economists, have played in at least two of these bureaucracies. On Japan, see JOHNSON, *supra* note 28, at 25-26. On Taiwan, see WADE, *supra* note 30, at 219-20.



involved in directing financing toward "strategic" industries, often those with export potential.<sup>162</sup> In Taiwan and South Korea, where the state owned the banks, this was easy; in Japan it was accomplished through coordinated "administrative guidance" by the Ministry of Finance and the Ministry of International Trade and Industry.<sup>163</sup> To the extent that decisions to direct credit and to grant antidumping relief both involve judgments about the importance and the viability of the company or industry in question ("picking winners"), this suggests that those who enforce the antidumping laws of Japan, South Korea and Taiwan will be unlikely to oppose antidumping relief on ideological grounds, as being an improper use of government power to pick winners.

### *C. Protection of Strategic Domestic Industries*

Protection, tariff or non-tariff, takes many forms, and can be applied broadly or selectively. Protection can be implemented through broad measures, such as tariffs, foreign exchange controls and import licensing requirements, which are often used to preserve scarce foreign exchange, or can be targeted to nurture "strategic" industries. Protection can take the form of *ad hoc* measures enacted in response to specific political demands, or can result from formal, quasi-legal proceedings such as antidumping or safeguard actions. The hallmark of protection in Japan, South Korea and Taiwan is that it has generally been neither universal, such as in import substitution regimes, nor the *ad hoc* result of pressures from political constituents. Protection has been one of the tools available to economic planners implementing capitalist development policies in Japan, South Korea and Taiwan, and in this sense protectionism in these nations should be understood primarily as strategic, Listian protectionism, though such

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<sup>162</sup> On Japan, see Kozo Yamamura & Jan Vandenberg, *Japan's Rapid-Growth Policy on Trial*, in *LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY* 238, 240-42 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986). On Taiwan, see WADE, *supra* note 30, at 165-172. On Korea, see WOO, *supra* note 36.

<sup>163</sup> Yamamura & Vandenberg, *supra* note 162, at 240-41.

protectionism can certainly coexist alongside "interest group" protectionism of the sort common in the United States.<sup>164</sup> In the case of Japan, this strategic protectionism has been connected to low levels of intra-industry trade,<sup>165</sup> which have been the focus of complaints from trading partners.<sup>166</sup>

One of the major arguments against protection, whether in the form of antidumping duties or otherwise, is that it redistributes wealth from consumers, who must pay higher prices, to the producers who receive protection. Two assumptions underlying this critique are i) that the interests of consumers and producers can be defined and weighed separately, and ii) that redistribution by government policy is bound to be inefficient from an economic standpoint compared to distribution by market forces. Both of these assumptions are founded on liberal as opposed to Historical School or Listian views of the economy, and as such cannot be expected to be followed dogmatically in Japan, South Korea or Taiwan. What in fact seems more plausible is that economic and trade bureaucrats in these nations behave, and

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<sup>164</sup> On List and Japan, see RICHARD SAMUELS, "RICH NATION, STRONG ARMY": NATIONAL SECURITY AND THE TECHNOLOGICAL TRANSFORMATION OF JAPAN 7 (1994)(stating that "Japanese ideas about the relationship between wealth and might, ... are more consonant with Listian neomercantilism than with Smithian liberalism"). On South Korea, see LUEDDE-NEURATH, *supra* note 33 (positing List as an early development economist, then demonstrating the Listian protectionism of South Korea's trade regime). On the strategic role of protection in Taiwan, see WADE, *supra* note 30, at 136-37.

<sup>165</sup> Intra-industry trade is the import-export flow of similar products. Japan's exports of manufactured goods have shown extraordinary growth, which in other industrialized countries has been accompanied by increased imports of manufactured goods. Japan's manufactured imports have not kept pace however, with the result being that Japan's levels of intra-industry trade in manufactured goods are far below those of the United States, Germany, or France. LINCOLN, *supra* note 33, at 47.

<sup>166</sup> The concern is that Japan is engaged in strategic protection of its manufacturing industries to assist their export efforts. *Id.* at 92-94. It seems likely that South Korea and Taiwan aspire to such trading patterns, but at present they still need to import machine tools and manufactured inputs for the products they export, and these imports come primarily from Japan. For a discussion of the origins and seemingly perpetual nature of this problem for Taiwan and South Korea, see Cumings, *supra* note 30.

will continue to behave, as though consumers, in spite of paying higher than necessary prices, will benefit along with the society in general from the protection of domestic production and employment. Such policies are not necessarily inconsistent with utilitarian notions of pursuing the greatest good for the greatest number, but they are arguably based on longer term and more dynamic views of comparative advantage than liberal economics.

*D. Ambivalence toward Foreign Direct Investment and Reliance on Controlled Technology Licensing*

Each of these nations has sought to develop its own industries, meaning industries owned by its nationals rather than industries simply located within its borders. This reflects a view, now contested by some,<sup>167</sup> that local ownership and control of industry is important for the long term well being of a nation. Yet as Amsden and others have suggested, economic development is intimately linked with technological advancement, and while the Industrial Revolution in England was based upon invention, and the Second Industrial Revolution in the United States and Germany was based upon innovation, in the twentieth century development has been largely based upon learning and exploiting technology developed by others.<sup>168</sup> Japan, South Korea and Taiwan are all examples of this learning-based development, and as such, have all faced the dilemma of needing foreign technology while at the same time fearing foreign domination of their industrial structures. In order to attract foreign capital and technology while maintaining domestic control over their industries and trade flows, each of these nations set up systems which restricted foreign direct investment, and tended to channel most projects that

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<sup>167</sup> The view is contested on two fronts. For free traders the decision of what gets produced where, let alone who owns the production facilities, should be left to market forces. From a somewhat different perspective, Robert Reich, who is often described as an advocate of managed trade, argues that the concept of corporate nationality is now largely outmoded. ROBERT REICH, *THE WORK OF NATIONS* (1991).

<sup>168</sup> AMSDEN, *supra* note 30, at 4.

were allowed into minority shares in joint ventures with local companies.<sup>169</sup> For foreign companies that did not find the joint venture form attractive, the only alternative for entering these markets was to license their technologies to local manufacturers, with no equity participation.

Although foreign direct investment continues to be liberalized in each of these nations, recognizing the depth of this nation-centered view of industry may be important for understanding antidumping enforcement in Japan, South Korea and Taiwan. To the extent this view still prevails in these countries, one would expect there to be a strong inclination to protect local industry faced with foreign competition, particularly where infant industry arguments apply.

#### V. ANTIDUMPING REGIMES OF JAPAN, SOUTH KOREA AND TAIWAN IN PRACTICE

Having attempted a hypothesis about conceptions of the state in Japan, South Korea and Taiwan, and having outlined potential economic and trade policy implications of such a role for the state, it is necessary to turn to empirical data. The following section briefly describes the sources of antidumping law in Japan, South Korea and Taiwan, then presents data on the use of such laws to date. The focus here is not on legal aspects of the decisions, but on what, if anything, these actions tell us about these nations' industrial policies.

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<sup>169</sup> Taiwan has been the most receptive to wholly-owned foreign direct investments, but maintains screening structure and policies. *See* WADE, *supra* note 30, at 148-56. On Japan, *see* Yoko Sazanami, *Japanese Industrial Policy, in* INDUSTRIAL POLICY IN THE PACIFIC, *supra* note 30, at 115, 121; JOHNSON, *supra* note 28, at 217, 278-79. On Korea, *see* AMSDEN, *supra* note 30, at 74-76; WOO, *supra* note 36, at 131 (speaking particularly of the 1970s).

*A. Japan*

Japan's antidumping legislation is found in Article 9 of the Customs and Tariff Law,<sup>170</sup> an accompanying Cabinet Decree on antidumping duties, and in the interministerial Guidelines on the Procedure of the Antidumping and Countervailing Duties and Related Matters.<sup>171</sup> Japan amended its antidumping rules in 1980, after becoming a signatory to the Antidumping Code, so definitions of "dumping," "normal value," "material injury," "domestic industry," etc. generally track those in the Antidumping Code.<sup>172</sup> The following is a brief outline of Japan's antidumping regime, followed by a review of the cases handled to date. It should be noted that Japan will likely amend at least some aspects of its antidumping system to conform to changes brought about by GATT 94.<sup>173</sup>

### 1. Administrative Organs and Procedures.

Japan's Ministry of Finance ("MOF") has primary authority over revenue matters such as taxes and tariffs, and it is given primary authority over antidumping enforcement.<sup>174</sup> The MOF does not act alone, however, but administers the law in concert with MITI and the

<sup>170</sup> Horei Zensho (Complete Laws and Ordinances), Law No. 228, of 1949.

<sup>171</sup> The Guidelines were issued December 24, 1986, by the Ministries of Finance, Health & Welfare, Agriculture, Forestry & Fisheries, International Trade & Industry, and Transport [hereinafter "Guidelines"]. They were not enacted as legislation, and are described as not having the force of law, but controlling antidumping enforcement nonetheless. Shintaro Hagiwara et al., *Anti-Dumping Laws in Japan*, 22 *J. OF WORLD TRADE L.* 35, 35 (1988).

<sup>172</sup> For a summary, see MITSUO MATSUSHITA, *INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN* 207-14 (1993). The Guidelines, though not legally binding, state that Japan's antidumping system shall be operated in accordance with the Antidumping Code. Guidelines, *supra* note 171, at item 12.

<sup>173</sup> Shintaro Hagiwara, *The New Anti-dumping Code: What it Means for Japan* (Paper presented to the International Bar Association 25th Biennial Conference, Oct. 9-14, 1994).

<sup>174</sup> MATSUSHITA, *supra* note 172, at 9, 209.

Ministry with jurisdiction over the industry in question (the "relevant Ministry").<sup>175</sup> An interested party files a petition with the Customs and Tariff Section of the MOF, which is then referred to an ad hoc committee made up of officials from the MOF, MITI, and from the relevant Ministry (hereinafter the "Investigation Committee").<sup>176</sup> The Investigation Committee will conduct the preliminary review of the petition to see whether a formal investigation is warranted, and if appropriate, will also carry out the investigation and recommend antidumping duties.<sup>177</sup> Antidumping duties are finally imposed by way of Cabinet Order.<sup>178</sup>

## 2. Practice to Date.

The following are summaries of cases which have progressed to the point of petitions being filed with the MOF, though in most instances formal investigations were never initiated.<sup>179</sup>

### a. *Cotton yarn from South Korea.*

On December 27, 1982 the Japan Spinners' Association petitioned the MOF for antidumping relief against cotton thread

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<sup>175</sup> *Id.* at 209.

<sup>176</sup> *Id.* It has been reported that in the early 1980's MITI intended to create an affiliated body similar to the USITC, except that unlike the USITC, the MITI body would have handled both dumping investigations and injury determinations. *MITI Plans Forming Organ Similar to America's ITC*, JAPAN ECON. J., July 27, 1982, available in LEXIS. This apparent power play by MITI was unsuccessful, but in 1993 it was again reported that "[t]he amendment of the law to enable a decision through a single Administrative Agency is expected." Hagiwara, *supra* note 17.

<sup>177</sup> MATSUSHITA, *supra* note 172, at 209-10.

<sup>178</sup> Hagiwara et al., *supra* note 171, at 40.

<sup>179</sup> These case summaries, as well as those on antidumping enforcement in South Korea and Taiwan, rely upon GATT reports, academic and professional publications, and press reports. Due to practical limitations, no attempt has been made to obtain and translate official materials from the antidumping authorities in these countries.

imports from Korea.<sup>180</sup> This was the first petition filed under Japan's modern antidumping statute, and it was withdrawn in July 1983, after Korea put in place voluntary export restraints.<sup>181</sup>

A recent article on Japan's textile industry began with the following description: "Textiles have been a sunset industry in Japan for years. In some sectors, the years of decline stretch close to a century."<sup>182</sup> Japan's earliest export successes were in the textile sector,<sup>183</sup> and even when low-wage Taiwan and South Korea tried to compete with Japanese textiles in the 1960s they had great difficulty.<sup>184</sup> Japan is a signatory to the Multi-Fibre Arrangement, but is unusual in that it has never taken action under that agreement to

<sup>180</sup> I GATT TRADE POLICY REVIEW: JAPAN at 62, GATT Sales. No. 1990-12 (1990)[hereinafter I GATT TRADE POLICY REVIEW: JAPAN (1990)]. See also Hagiwara et al., *supra* note 171, at 46; MATSUSHITA, *supra* note 172, at 215. At the same time the Spinners Association filed a petition seeking countervailing duty relief against cotton yarn imports from Pakistan. An official investigation was launched in April 1983, but was terminated in February 1984. I GATT TRADE POLICY REVIEW: JAPAN (1990), *supra*, at 62-63. The Japanese government reported to the GATT that the case was closed "as the Pakistani Government decided to abolish part of the subsidies," while the GATT Secretariat reported that Pakistan agreed to maintain minimum export prices for cotton yarn between 1985 and 1987. *Id.* at 63, 241.

<sup>181</sup> Hagiwara et al., *supra* note 171, at 47; MATSUSHITA, *supra* note 172, at 216.

<sup>182</sup> Henny Sender, *Hanging By a Thread: The Grim Reaper Calls on Japan's Textile Industry*, FAR EAST ECON. REV., Nov. 3, 1994, at 61.

<sup>183</sup> Prompting the first documented use of voluntary export restraints, see *supra* note 3 and accompanying text.

<sup>184</sup> Alice H. Amsden, "Post-Industrial" Policy in East Asia, Asia Project Working Paper, Council on Foreign Relations, February, 1995, at 5. Hikino and Amsden attribute 1930s Japan's superior competitiveness in textiles to "its more modern and integrated production facilities ..., its cartelized bulk-purchase of raw cotton, its better distribution channels, and superior management ...." Takashi Hikino & Alice H. Amsden, *Staying Behind, Stumbling Back, Sneaking Up, Soaring Ahead: Late Industrialization in Historical Perspective*, in CONVERGENCE OF PRODUCTIVITY: CROSS-NATIONAL STUDIES AND HISTORICAL EVIDENCE 285, 293 n.6 (William J. Baumol et al. eds., 1994) (citing B.E. HUBBARD, EASTERN INDUSTRIALIZATION AND ITS EFFECTS ON THE WEST (1938)).

limit textile imports.<sup>185</sup> But by the 1980s, Japan's textile industry was ready to ask for protection, and this action against Korean cotton yarn was the first in what may be a long series of cases.

b. *Ferrosilicon from Norway and France.*

In the early 1980s, Japan's ferro-alloy industry was experiencing serious difficulties, and was undergoing MITI orchestrated reorganization under the Law to Promote Improvement of Industrial Structure in Specific Industries.<sup>186</sup> Finally, on March 6, 1984, the Japan Ferro-Alloy Association petitioned the MOF for antidumping relief against imports of ferro-silicon from Norway and France.<sup>187</sup>

The Association claimed dumping margins of 1% to 27% for exports from Norway and France during the years 1981 to 1983, and claimed that the dumping was leading to increased imports, reduced prices for domestic products, lower domestic production, and therefore lost profits.<sup>188</sup> Both MITI and the MOF held hearings on the matter, after which the French and Norwegian Embassies indicated that exporters in their countries i) recognized that Japanese producers were injured by increased import penetration, ii) agreed not to export to Japan "under terms and conditions which may infringe GATT rules," and iii) expected that the Japanese government would take adequate measures against dumping by third country ferrosilicon exporters.<sup>189</sup> Following these representations, the Japan Ferro-Alloy

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<sup>185</sup> I GATT TRADE POLICY REVIEW: JAPAN (1990), *supra* note 180, at 241. *See also* Sender, *supra* note 182, at 61.

<sup>186</sup> Hagiwara et al., *supra* note 171, at 47-48; MATSUSHITA, *supra* note 172, at 216.

<sup>187</sup> I GATT TRADE POLICY REVIEW: JAPAN (1990), *supra* note 180, at 63. *See also* Hagiwara et al., *supra* note 171, at 47-48; MATSUSHITA, *supra* note 172, at 216. On the same date a petition for countervailing duty relief was filed against ferro-silicon imports from Brazil. This petition was also withdrawn on June 14, without a formal investigation being initiated. I GATT TRADE POLICY REVIEW: JAPAN (1990), *supra* note 180, at 63; Hagiwara et al., *supra* note 171, at 48.

<sup>188</sup> Hagiwara et al., *supra* note 171, at 48.

<sup>189</sup> *Id.* at 49.



Association withdrew its petition, and the MOF was able to terminate its "pre-investigation" without initiating a formal investigation.<sup>190</sup>

What is interesting about the French and Norwegian embassy statements is that dumping by itself does not "infringe GATT rules."<sup>191</sup> Even if it causes or threatens material injury, dumping is only "to be condemned" under Article VI, which is understood as being different from an infringement of a GATT obligation.<sup>192</sup> The promises extracted from the French and the Norwegian governments thus seem somewhat empty, even assuming that they have the power and the inclination to monitor prices at which their nationals export.<sup>193</sup> What the Norwegian and French exporters seem to have gotten for their trouble is a promise by Japan to organize a market in which they could safely raise their prices to levels acceptable to the Japanese petitioners, without fear of being undercut by a third country's exports. They were probably quite willing to do so, with the increased cost of ferro-silicon being absorbed by Japanese steelmakers or passed along to purchasers of Japanese steel. MITI presumably felt that these higher prices would smooth its reorganization of the domestic industry.

### *c. Knitwear from South Korea.*

Imports of South Korean textiles continued to grow during the 1980s, and in July 1988 the South Korean government reportedly began to urge South Korean producers to "voluntarily" restrict knitwear exports to Japan.<sup>194</sup> Imports did not slow sufficiently, however, so on October 21, 1988 the Japanese Knitwear Industry

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<sup>190</sup> *Id.*; see also MATSUSHITA, *supra* note 172, at 216.

<sup>191</sup> JACKSON, *supra* note 1, at 227 & n.38.

<sup>192</sup> *Id.*

<sup>193</sup> For a discussion of the common misperception that dumping is "illegal" and can be policed by exporting countries, see *id.* at 227 & n.39.

<sup>194</sup> *Japanese Knitwear Makers File Suit Against S. Korea*, Japan Economic Newswire, Oct. 21, 1988, available in LEXIS; *Antidumping Duties Sought on ROK Knit Imports*, Jiji Press Ticker Service, Oct. 20, 1988, available in LEXIS.

Association petitioned the MOF for antidumping relief.<sup>195</sup> Meanwhile, MITI continued to press Seoul for voluntary restrictions, and in February 1989 the Korean Garment and Knitwear Association announced the implementation of a 'check-price' system for exports to Japan of sweaters, cardigans and vests until 1991, as well as promising to limit export growth to 1% per year.<sup>196</sup> The petition was then withdrawn in March 1989, without an investigation being initiated.<sup>197</sup>

The facts surrounding the "voluntary" measures by South Korean producers to limit their exports to Japan are in dispute. A Japanese news report from the day the relief petition was filed quotes Eiichi Tamori, Deputy Director General of MITI's Consumer Goods Industry Bureau, to the effect that Japan would "continue to urge Seoul to press for 'orderly' knitwear exports."<sup>198</sup> The Asahi newspaper also doubted the voluntariness of the agreement, comparing it to the "voluntary" restraints the United States has convinced Japan to impose on Japan's own exports.<sup>199</sup> Yet in 1990, when the issue of Korean export restraints was raised with Japan's representative to the GATT Trade Policy Review body, "he reiterated that as far as the Government was concerned, it had never requested other contracting parties to take voluntary export restraint measures, and it had no intention to do so in the future."<sup>200</sup> While it seems unlikely that Japan's representative to the GATT body would be intentionally dishonest about such a matter, it seems equally unlikely that Korean sweater exporters would volunteer to forego exports to Japan. In fact, in Japan's 1992 Trade Policy Review, the Korean representative charged that Korean sweaters and Korean-caught tuna "were subject

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<sup>195</sup> I GATT TRADE POLICY REVIEW: JAPAN (1990), *supra* note 180, at 63. See also MATSUSHITA, *supra* note 172, at 216; *Japanese Knitwear Makers File Suit Against S. Korea*, *supra* note 194.

<sup>196</sup> I GATT TRADE POLICY REVIEW: JAPAN (1990), *supra* note 180, at 242.

<sup>197</sup> *Id.* at 63.

<sup>198</sup> *Japanese Knitwear Makers File Suit Against S. Korea*, *supra* note 194; see also *Antidumping Duties Sought on ROK Knit Imports*, *supra* note 194.

<sup>199</sup> Sam Jameson, *Protectionist Policy Emerges in S. Korean Deal: Japan's Textiles Limit Contradicts Claim on Imports*, L.A. TIMES, Feb. 8, 1989, at 2.

<sup>200</sup> I GATT TRADE POLICY REVIEW: JAPAN (1990), *supra* note 180, at 355.

to VERs at Japan's request."<sup>201</sup>

*d. Ferrosilico-Manganese from Norway, South Africa, and the People's Republic of China.*

On October 8, 1991, the Japan Ferro-Alloy Association filed a petition for antidumping relief against imports of ferrosilico-manganese from the People's Republic of China, Norway, and South Africa.<sup>202</sup> Association figures showed dumping margins of 75% for China, 54.8% for Norway, and 67.4% for South Africa.<sup>203</sup> In late November 1991, a formal investigation was begun, the first ever in Japan's antidumping practice, and in December 1991 an Investigation Committee was convened with representatives from MITI and the MOF.<sup>204</sup>

In June 1992, the Investigation Committee released preliminary investigation results, showing dumping margins of 4.5% to 27.2% for the seven Chinese exporters investigated, 10.5% for the single Norwegian exporter, and 0.8% and 1.8% for the two South African exporters.<sup>205</sup> No provisional duties were imposed, however, because imports of ferrosilico-manganese from the three nations had dropped sharply since the start of the investigation.<sup>206</sup> This drop reportedly was the result of voluntary reductions in imports by Japanese trading companies.<sup>207</sup>

The Committee also decided at this time or shortly thereafter that imports from Norway and South Africa were not injuring Japan's domestic industry, so the investigation was terminated with regard to

<sup>201</sup> II GATT TRADE POLICY REVIEW: JAPAN 147 (1992).

<sup>202</sup> *Id.* at 64-65. For a detailed analysis of the case, see Hagiwara, *supra* note 17. See also, *Japan Will Investigate Allegations of Dumping*, ASIAN WALL ST. J. 3, Dec. 2, 1991, available in WESTLAW, WSJ-ASIA 3.

<sup>203</sup> *Japan Will Investigate Allegations of Dumping*, *supra* note 202.

<sup>204</sup> II GATT TRADE POLICY REVIEW: JAPAN (1992), *supra* note 201, at 64.

<sup>205</sup> Hagiwara, *supra* note 17, at 378.

<sup>206</sup> II GATT TRADE POLICY REVIEW: JAPAN (1992), *supra* note 201, at 64-65.

<sup>207</sup> Leslie Helm, *Japan Deftly Fends Off 'Dumped' Wares*, L.A. TIMES, Feb. 16, 1993, at H3.

imports from these two nations.<sup>208</sup> The investigation went forward with regard to Chinese imports, however, and eventually involved approximately 100 separate Chinese exporters.<sup>209</sup>

On January 29, 1993 Japan announced that it would impose final antidumping duties of 4.5% to 27.2% on more than 100 Chinese exporters, effective February 3, 1993.<sup>210</sup> Because of the large number of Chinese exporters involved, and because some of them apparently did not cooperate in the investigation, Japan imposed a duty of 27.2% on ferrosilico manganese imports from China generally, with lower duties of 4.5% to 19.1% for those individual exporters who cooperated with the investigation.<sup>211</sup>

*e. Cotton yarn from Pakistan.*

In December 1993 the Japan Spinners Association petitioned for antidumping relief against cotton yarn imports from Pakistan.<sup>212</sup> No further information was found on the status of this case.

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<sup>208</sup> Hagiwara, *supra* note 17, at 378. The legal basis for this termination is somewhat unclear. Hagiwara indicates that it was because few sales by exporters from these two nations were considered diversions of sales that would have gone to Japanese suppliers, *id.* at 384, while another source reports MITI as saying that the termination came because Norway's exports were too small, and South Africa's dumping margins too narrow. Jacob M. Schlesinger and Masayoshi Kanabayashi, *Japan Imposes Dumping Duty on China*, ASIAN WALL ST. J., Feb. 1, 1993, available in WESTLAW, WSJ-ASIA 3. The discrepancy is important because it suggests a potential lack of transparency in Japan's antidumping administration.

<sup>209</sup> Hagiwara, *supra* note 17, at 378. Two of the original seven Chinese exporters offered price undertakings and were dropped from the investigation. *Id.*

<sup>210</sup> Schlesinger and Kanabayashi, *supra* note 208.

<sup>211</sup> Hagiwara, *supra* note 17, at 380-81. Country-wide antidumping duties are allowed under Article 9.1 of the Anti-Dumping Code.

<sup>212</sup> *Japanese Spinners Accuse Taiwan of Dumping*, ASIAN ECON. NEWS, Feb. 14, 1994, available in WESTLAW, AECON.

*f. Rayon fibers from Taiwan and Indonesia.*

In May 1993 the Japan Spinners' Association and the Japan Chemical Fibers Association sent investigators to Taiwan to collect evidence concerning local market and export prices there.<sup>213</sup> In early February 1994, the chairman of the Japan Spinners Association said that his group and the Chemical Fibers Association were considering filing a joint petition for antidumping relief against spun rayon fibers from Taiwan,<sup>214</sup> then in late February the two groups reported that they planned to file an antidumping petition in the summer of 1994.<sup>215</sup> It was later reported that a second mission had been sent to Taiwan in February 1994, and that as a result of that mission Taiwan's export prices to Japan had been raised and the dumping issue quelled.<sup>216</sup> Finally, in June 1994 it was reported that the Chemical Fibers Association would send an investigation team to Indonesia to collect local market and export pricing data,<sup>217</sup> suggesting that the problem had not been resolved.

### 3. Conclusions from Japan's Antidumping Practice to Date.

The central theme that emerges from examining Japan's antidumping practice is the ability of MITI and the MOF to maintain their discretion in trade matters by arranging settlements of most dumping disputes without even formal investigations being started.<sup>218</sup> This ability appears to be under strain, however, especially in textiles.

Japan's trade bureaucrats take pride in the fact that they have

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<sup>213</sup> *Fiber Groups Prepare Dumping Charges Against Taiwan*, Comline News Service, Feb. 28, 1994, available in LEXIS, News Library, Txtnews File.

<sup>214</sup> *Japanese Spinners Accuse Taiwan of Dumping*, *supra* note 212.

<sup>215</sup> *Fiber Groups Prepare Dumping Charges Against Taiwan*, *supra* note 213.

<sup>216</sup> *Team to Examine Indonesia Rayon Dumping*, Comline News Service, June 1, 1994, available in LEXIS, News Library, Txtnews File.

<sup>217</sup> *Id.*

<sup>218</sup> This preference for informal administration, not subject to judicial review, is discussed further below. See notes 454-68 and accompanying text.

never invoked the Multifibre Arrangement to limit imports,<sup>219</sup> yet to preserve that record they appear to pressure less developed countries into restraining exports. In addition to the antidumping and countervailing duty measures described above, Japan's raw silk imports are subject to state trading, raw silk and silk cocoon prices are subject to a government price stabilization scheme, China maintains orderly export arrangements on its raw silk, silk yarn, and silk product exports, and South Korea maintains orderly export arrangements on its silk yarn and silk fabrics.<sup>220</sup> Japan's textile industry is still in trouble however, and MITI is reportedly considering a freeze of up to five years on cotton thread and cotton weave imports.<sup>221</sup>

MITI is caught in a dilemma familiar to United States policymakers, as the textile industry itself is divided between larger companies, who have moved production off-shore and thus oppose import restrictions, and smaller companies who still provide many jobs at home.<sup>222</sup> This appears to represent a breakdown of the old textile protection system, under which MITI could reportedly make antidumping or safeguard actions unnecessary by simply contacting importers and asking that they "please be more orderly" in their imports.<sup>223</sup>

With regard to the ferro-silicon and ferro-silicon manganese cases, while the exact relationship between the two substances is unclear, both are used in steelmaking, and both industries are represented by the Ferro-Alloy Association. If MITI's reorganization plans of the early 1980s were carried out, yet antidumping relief was still necessary less than ten years later, it is perhaps correct to expect continuing requests for protection by this industry in the future.

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<sup>219</sup> Jameson, *supra* note 199.

<sup>220</sup> I GATT TRADE POLICY REVIEW: JAPAN (1990), *supra* note 180, at 241.

<sup>221</sup> Sender, *supra* note 182, at 61.

<sup>222</sup> *Id.*

<sup>223</sup> Helm, *supra* note 207, quoting Tomoyuki Takeuchi of the Japan Textiles Importers Association. Helm reports Takeuchi as saying that "[i]f there is a sudden increase in imports of any product, ... the most likely way of resolving the problem is not to file a dumping case, but for the domestic industry to contact MITI." *Id.*

*B. South Korea*

South Korea's antidumping law is found in Article 10 of the Customs Act,<sup>224</sup> its accompanying Enforcement Decree,<sup>225</sup> and guidelines issued by the Ministry of Finance ("MOF").<sup>226</sup> The basic statutory design of South Korea's antidumping law thus parallels that of Japan's, though administrative structures and enthusiasm for enforcement differ significantly between the two systems.

The first South Korean antidumping law was enacted in 1963,<sup>227</sup> when South Korea was not yet a member of the GATT, and was just beginning its export push under Park Chung Hee's new government. These 1963 provisions were never used, and in fact no implementing legislation was ever enacted.<sup>228</sup> South Korea became a signatory to the GATT in 1967, and in 1969 Article 10 was amended to conform with GATT Article VI.<sup>229</sup> Then in 1983, although the law had still never been used, Article 10 was amended once again.<sup>230</sup> In discussing this era, one commentator states that "[a]lthough petitions filed by domestic industries against foreign manufacturers were routinely investigated, the Korean government was by and large

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<sup>224</sup> Customs Act, Law No. 1976 (1967), *amended by* Law No. 4674 (1993)[hereinafter "Act"].

<sup>225</sup> The Enforcement Decrees governing implementation of the Act and many other statutes are Presidential Decrees, which are amended by later Presidential Decrees. The Enforcement Decree for the Act is Presidential Decree No. 4449 (1969), *amended by* Presidential Decree 14044 (1993)[hereinafter Decree].

<sup>226</sup> In the same manner as the Japanese Interministerial Guidelines, the guidelines issued by the MOF [hereinafter Guidelines] govern antidumping enforcement without having the force of law. For an overview of the South Korean trade regime, including the antidumping system, *see* David A. Laverty, *Regulation and Liberalization of Imports and Foreign Investment and the Role of Trade Actions in the Republic of Korea*, 11 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 423, 439-51 (1990).

<sup>227</sup> Chan Jin Kim, *supra* note 25, at 2.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Hyung Jin Kim, *The Current Korean Anti-Dumping System*, 21 *KOREAN JOURNAL OF COMPARATIVE LAW* 1, 2 (1993).

reluctant to regulate foreign companies until 1985."<sup>231</sup> It is unclear whether the petitions and investigations referred to were formal or informal, but none of the complaints proceeded to the point of formal action against imports.

South Korea became a signatory to the Antidumping Code in February 1986, and immediately thereafter amended the Decree and Guidelines. As the passage quoted above indicates, the South Korean government felt that dumping was becoming a serious problem even before the 1986 amendments, but found the existing law inadequate to cope with the problem.<sup>232</sup> The first formal antidumping investigation was initiated in April 1986, the same month as the Enforcement Decree was amended, thus effectively marking the beginning of South Korean antidumping practice. In a related development, the Foreign Trade Act was amended to create the Korean Trade Commission ("KTC") as of July 1, 1987.<sup>233</sup>

The Decree was amended again in December 1988, and in February 1989 the MOF enacted new Guidelines.<sup>234</sup> The Act and the Decree received GATT approval in October 1989, and were then amended again in December 1990.<sup>235</sup> The current Decree and Regulations came into force January 1, 1993. Like Japan, South Korea will likely amend its antidumping system in light of GATT 94.<sup>236</sup>

### 1. Administrative Organs and Procedure.

The MOF has jurisdiction over revenue matters, including tariff administration, so as in Japan the MOF has ultimate authority

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<sup>231</sup> *Id.* at 2-3.

<sup>232</sup> *Id.* at 3.

<sup>233</sup> *Id.* at 22.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Dong Woo Seo, *The New Anti-Dumping Code: What it Means for Korea?* (Paper presented to the International Bar Association 25th Biennial Conference, 9-14 Oct. 1994).



over antidumping duties. However, while Japan establishes ad hoc panels to handle each case, South Korea established the KTC to have jurisdiction over certain aspects of all antidumping matters. The MOF exercises its authority through its Customs Deliberation Committee ("CDC"), which can ultimately recommend that antidumping duties be imposed.<sup>237</sup> The basic division of labor is that the CDC instructs its subordinate, the Office of Customs Administration ("OCA"), to investigate dumping, while the KTC investigates injury to the domestic industry.<sup>238</sup> If the OCA finds dumping and the KTC finds material injury, the CDC recommends to the Minister of Finance that antidumping duties be imposed.<sup>239</sup> If the Minister of Finance agrees, duties will be imposed by Presidential Decree. The KTC is under the authority of the Ministry of Trade, Energy and Industry ("MOTIE," formerly the Ministry of Trade and Industry, or "MTI"), which creates at least a formal separation between the treasury functions of the MOF, and the trade and industrial policy competence of the MOTIE.

## 2. Practice to Date.

The following are antidumping matters which have arisen to date. As was the case with Japanese practice described above, these summaries focus on economic effects, rather than on legal procedures.

### a. *Dicumyl Peroxide ("DCP") from Japan and Taiwan.*

This was the first investigation initiated after the 1986 amendments, and was South Korea's first major antidumping action. The petition was filed in April 1986, by a single South Korean

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<sup>237</sup> Kim, *supra* note 230, at 36-37. The CDC is chaired by the Vice-Minister of Finance, and consists of senior members of the other economic and relevant ministries, the National Tax Administration, the Customs Administration, and "an expert" appointed by the MOF. I GATT TRADE POLICY REVIEW: KOREA 109 n.55 (1992).

<sup>238</sup> *Id.* at 25.

<sup>239</sup> There seems to be disagreement over whether KTC and OCA determinations are binding on the CDC. See Kim, *supra* note 230, at 25.

producer against two Japanese and two Taiwanese exporters.<sup>240</sup> The petitioner alleged dumping margins of 49.6% on DCP from Japan, and 55% on Taiwanese DCP.<sup>241</sup> One of the Japanese companies indicated that it would stop exporting to South Korea altogether, while the other three companies offered price undertakings effective January 1, 1987.<sup>242</sup> The MOF accepted the offers of the four companies, and halted its investigation in December 1986.

b. *Acetaldehyde from Japan.*

At the same time as the DCP complaint, a complaint was filed by a single South Korean producer of acetaldehyde against a single Japanese exporter.<sup>243</sup> The petitioner alleged that the Japanese exporter was selling acetaldehyde in South Korea at \$449 per ton less than the price in Japan.<sup>244</sup> An investigation found a dumping margin of 54.4%, but was terminated in December 1986 because material injury was not found.<sup>245</sup>

c. *Slide fasteners (zippers) from Japan.*

This petition was filed in October 1986 by multiple petitioners, including the trade association and over 70 individual zipper producers, against a single Japanese exporter.<sup>246</sup> Petitioners alleged

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<sup>240</sup> *Id.* at 39-40. See also, *South Korea Invoking Antidumping Claims*, Jiji Press Newswire, May 21, 1986, available in LEXIS, News Library, Txtnws File.

<sup>241</sup> *South Korea Invoking Antidumping Claims*, *supra* note 240.

<sup>242</sup> Kim, *supra* note 230, at 39.

<sup>243</sup> *Id.* at 38. See also, *South Korea Invoking Anti-Dumping Claims*, *supra* note 240. It appears that at the same time a complaint was filed against alginic acid from Hong Kong, but no further information was found. Dong Woo Seo, *supra* note 236, at 5 n.16.

<sup>244</sup> *South Korea Invoking Anti-Dumping Claims*, *supra* note 240.

<sup>245</sup> Kim, *supra* note 230, at 38.

<sup>246</sup> *An Overall Review of Korean Anti-Dumping Laws and Procedure*, III ASIA PATENT LAW MONTHLY 3 (Min, Sohn & Kim, Seoul, Korea), May & June, 1990. An earlier report had the petition being filed in July, 1986, but this seems to have been

that the Japanese products were being sold at 40% to 60% less than Japanese prices to offset a blow to their price competitiveness caused by an appreciation in the value of the Japanese Yen vis-a-vis the South Korean Won.<sup>247</sup> In January 1987 an official investigation was begun, which was finally terminated in February 1988. The investigation found that 111 of 165 categories of slide fastener products were being dumped, at an average dumping margin of 19.76%, but found no material injury to the South Korean industry.<sup>248</sup> The MTI (now MOTIE) reportedly was against imposing antidumping duties on the zippers because they were used as inputs in South Korean export goods, which would thus become more expensive, and to avoid trade friction with Japan.<sup>249</sup>

d. *Dicumyl Peroxide ("DCP") from Japan and Taiwan ("DCP II")*.

This second DCP case began in July 1988, after the petitioner requested a review of the undertakings given in DCP I, and the Japanese respondent requested an increase in the undertaking price.<sup>250</sup> During re-examination, the two Taiwanese respondents were found to have violated their undertakings by giving refunds to their South Korean customers to reduce the effective import price, so in October 1988 the MOF required that they deposit security of 46% to 52% of

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premature. *YKK to Face Antidumping Suit in ROK*, Jiji Press Ticker Service, July 25, 1986, available in LEXIS, News Library, Txtnws File.

<sup>247</sup> *YKK to Face Antidumping Suit in ROK*, *supra* note 246.

<sup>248</sup> *ROK Withholds Dumping Duty on Y.K.K. Fasteners*, Jiji Press Ticker Service, Feb. 19, 1988, available in LEXIS, News Library, Txtnws File.

<sup>249</sup> *South Korean Ministry Opposes Dumping Duty on Zippers*, Kyodo News Service, Japan Economic Newswire, Jan. 18, 1988, available in LEXIS, News Library, Txtnws File. This is a recurring dilemma in South Korean and Taiwanese trade relations with Japan, as Japan still supplies machine tools, auto parts, electronic components, and manufacturing technology necessary for the export industries of South Korea and Taiwan.

<sup>250</sup> Kim, *supra* note 230, at 39.

the export price of DCP imported from them, plus an additional tax.<sup>251</sup> The provisional measure remained in effect during the re-investigation, which lasted until January 1989.<sup>252</sup> At that time the MOF issued a final ruling that the original undertakings would end December 31, 1989, and that if at that time it appeared necessary, the investigation would be re-opened and antidumping duties of 24.5%, 12.5% and 13.6% would be assessed against the three respondents.<sup>253</sup>

*e. Alumina cement from France.*

The petition was filed in September 2, 1988 by a single South Korean cement producer against a single French exporter.<sup>254</sup> A preliminary investigation found probability of dumping in the range of 61.5% to 96.6%, and injury to the domestic industry, so a formal investigation was initiated in January 1989.<sup>255</sup> The investigation was terminated, however, after the respondent agreed to a price undertaking covering exports between September 1, 1989 and September 1, 1991, by which it guaranteed a minimum export price of \$338.70 per ton.<sup>256</sup>

The South Korean petitioner reportedly began producing alumina cement in September 1987, which, if correct, means that the petition was filed after approximately one year of production.<sup>257</sup> The petitioner indicated that the price difference between its cement and the cement produced by the respondent was between \$227 and \$302

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<sup>251</sup> *Id.*; *Penalties Assessed Against Taiwan Firms for Dumping Bonding Agent*, KOREA ECONOMIC DAILY, Oct. 19, 1988, available in LEXIS, Reuter Textline.

<sup>252</sup> Kim, *supra* note 230, at 39.

<sup>253</sup> *Id.* at 39-40.

<sup>254</sup> *An Overall Review of Korean Anti-Dumping Laws and Procedure*, *supra* note 246, at 3. See also, *Cement Antidumping Complaint Filed*, Chemicals Business News Base, Dec. 1, 1988, available in LEXIS, Reuter Textline.

<sup>255</sup> Lavery, *supra* note 226, at 451; *An Overall Review of Korean Anti-Dumping Laws and Procedure*, *supra* note 246, at 3.

<sup>256</sup> *An Overall Review of Korean Anti-Dumping Laws and Procedure*, *supra* note 246, at 3.

<sup>257</sup> *Cement Antidumping Complaint Filed*, *supra* note 254.

per ton, and that it had been forced to cut its operations by 74% in the third quarter of the 1987-88 fiscal year.<sup>258</sup> Although details of the case were not obtained for this paper, it appears to have been a case of using antidumping law to assist the establishment of an "infant" industry.

f. *Polyacrylamide ("PAA") from England, France and Germany.*

The petition was filed October 6, 1989 by a single South Korean producer against one English, one French, and one German exporter.<sup>259</sup> The petitioner alleged that they and two other South Korean PAA producers had been forced to reduce their operating rates by 29% to 33% as a result of imports which were being sold at 28% to 54% below home market prices.<sup>260</sup> On February 17, 1990, after a preliminary investigation, the MOF initiated a formal investigation.<sup>261</sup>

In order to make its injury determination the KTC had to i) define the domestic industry, ii) determine whether the industry as defined had suffered material injury, and iii) determine whether such injury had been caused by the allegedly dumped imports.<sup>262</sup> To define the domestic industry the KTC had to decide to what extent three different forms of PAA should be treated as distinct products.<sup>263</sup> The KTC found that two of the forms constituted a single product, while the third form constituted a separate and distinct product. The KTC then eliminated certain domestic producers from the two "industries"

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<sup>258</sup> *Id.*

<sup>259</sup> Kim, *supra* note 230, at 40.

<sup>260</sup> *Foreign Firms Investigated for Dumping PAA*, KOREA ECONOMIC DAILY, February 23, 1990, available in LEXIS, Reuter Textline.

<sup>261</sup> Kim, *supra* note 230, at 40. See also, *Foreign Firms Investigated for Dumping PAA*, *supra* note 260.

<sup>262</sup> The following description of the PAA case relies upon Kim, *supra* note 230, at 40-44.

<sup>263</sup> The three different forms are anion, nonanion, and cation. *Id.* at 41.

because they had imported the relevant forms of polyacrylamide within the previous six months. With two domestic "industries" thus defined, the KTC examined the health of the industries to determine whether material injury had occurred.

In investigating material injury the KTC considered the following factors: domestic production capacity, operating rates, volume of domestic shipments, market share fluctuations, total sales, total operating profits, pre-tax profits, fluctuations in the sales price of domestic goods, and absolute and relative increases in import volumes.<sup>264</sup> For the industry producing two of the polyacrylamide forms, the KTC found that declining net profits were caused by unrelated factors such as increased wages and costs.<sup>265</sup> Total imports were increasing no more than the rise in domestic demand, suggesting that the single South Korean producer in the "industry" was maintaining its market share (ie., marginal imports were not increasing), and it seemed that imports from the respondents were in part simply replacing imports from Japan.<sup>266</sup>

The second polyacrylamide "industry" consisted of two South Korean producers. One producer was experiencing downturns in several areas, but the KTC found that these were primarily attributable to labor disputes rather than dumped imports.<sup>267</sup> The other domestic producer in the "industry" was showing downturns in some production figures, but its profits were rising. The KTC concluded that this producer had not suffered material injury, and therefore did not need to consider causation.<sup>268</sup> The KTC also found that no threat of material injury existed that would have warranted the imposition of antidumping duties.<sup>269</sup>

This case was important for the development of South Korean antidumping law, despite the fact that no injury was found and no

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<sup>264</sup> Kim, *supra* note 230, at 42.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 43.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

duties imposed. Because the case progressed to a formal KTC decision being rendered, the KTC was required to issue formal rulings with regard to central issues such as definitions of the domestic industry, and material injury. This case thus marked a step away from informality and discretion in favor of transparency and ultimately, accountability.

*g. Polyacetal Resin from the United States and Japan.*

The case that has drawn the most outside attention to South Korean antidumping practices involved imports of polyacetal resin from two producers in the United States and one in Japan. The petition was filed May 8, 1990 by a single South Korean producer against one Japanese and two United States producers.<sup>270</sup> Following a three month preliminary investigation, a formal investigation was begun on August 25, 1990.<sup>271</sup> On February 20, 1991 the OCA announced dumping margins of 20.6% to 107.6%, and on April 24, 1991 the KTC announced its determination that the domestic industry had suffered material injury.<sup>272</sup> On July 19, 1991 it was reported that the MOF was threatening antidumping duties of 85.2% to 92.2%,<sup>273</sup> but the final MOF recommendation was for a minimum import price equivalent to an additional 4% duty on top of the standard 13% duty on polyacetal resin imports.<sup>274</sup> In late August 1991 the Cabinet approved the MOF recommendation,<sup>275</sup> and duties were imposed as

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<sup>270</sup> *Id.* at 44. See also, *South Korea: Government Investigates Acetal Antidumping Charges Filed Against Du Pont and Hoechst*, Chemicals Business News Base, July 18, 1990, available in LEXIS, Reuter Textline.

<sup>271</sup> Kim, *supra* note 230, at 44.

<sup>272</sup> *Id.*

<sup>273</sup> *S. Korea to Impose Stiff Dumping Duties on Plastic Resin*, Kyodo News Service, Japan Economic Newswire, July 19, 1991, available in LEXIS.

<sup>274</sup> Damon Darlin, *Seoul Places Price Penalty on Foreign Plastics Firms*, ASIAN WALL ST. J., July 24, 1991, at 3, available in WESTLAW, WSJ-ASIA 3.

<sup>275</sup> *ROK to Levy Dumping Duty on Resin Imports*, Jiji Press Ticker Service, August 29, 1991, available in LEXIS.

of September 14, 1991.<sup>276</sup> This case marked the first affirmative injury determination by the KTC, and the first instance of antidumping duties being imposed. Considering the controversial nature of the KTC's injury finding, which became the basis of a GATT complaint by the United States, and because the facts of the case present a pattern that may be repeated, it will be useful to examine the injury finding in some detail.

The domestic "industry" consisted of the single South Korean producer of polyacetal resin, Korea Engineering Plastics Co., Ltd. ("KEP"). KEP started resin production during the last quarter of 1988, so when it filed its petition in May 1990, KEP had been in production approximately 18 months.<sup>277</sup> When KEP started production the three respondents supplied over 60% of the market, but during the period of the investigation (January 1, 1989 to March 31, 1990) KEP increased its market share from 1% to 57%.<sup>278</sup> During the investigation period the price of resin remained constant or declined slightly, depending upon the grade, and KEP reported profits during 1989 and the first quarter of 1990.<sup>279</sup> Profits during the first quarter of 1990 were down from 1989 levels, however, and the KTC's material injury finding was reportedly based on the fact that KEP's pre-tax profits of 1.6% were below the industry average of 3.24%.<sup>280</sup> Recalling the factors on which the KTC based its injury findings in the PAA case,<sup>281</sup> it is unclear why the KTC chose to give such weight to a slight decline in profits, when other important factors such as domestic production capacity, market share and sales price all seemed to militate against a finding of material injury.

As might have been expected, the respondents were not content with the KTC's finding. The concern was expressed that, even though the duties imposed were small, the KTC precedent could be

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<sup>276</sup> Kim, *supra* note 230, at 44.

<sup>277</sup> *Id.* at 45.

<sup>278</sup> *Id.* See also, Darlin, *supra* note 274.

<sup>279</sup> Kim, *supra* note 230, at 45.

<sup>280</sup> *Id.*

<sup>281</sup> See *supra* notes 259-69 and accompanying text.



used to block the importation of other goods whose producers lowered prices to meet South Korean competition.<sup>282</sup> Given the lack of effective judicial review of antidumping determination,<sup>283</sup> other than diplomatic channels the only forum available to review the decision was GATT, which required that the United States and/or Japanese governments espouse the claims of their nationals. Although Japan raised the case with South Korean representatives in Geneva, ultimately it was the United States alone that pursued GATT dispute resolution. After preliminary negotiations, mediation, etc. failed, a GATT panel was convened at the request of the United States. The panel found that the KTC's injury determination was inconsistent with its GATT obligations, and South Korea did not move to block adoption of the panel report.<sup>284</sup> In April 1993 the MOF announced that it would revoke the antidumping duty.<sup>285</sup>

This case highlights one potential problem with antidumping statutes being administered by industrial policy bureaucracies such as exist in Japan, South Korea and Taiwan. In a country where financing decisions were largely market driven, it seems unlikely that KEP would have been able to raise the capital necessary to enter the resin market. DuPont, Asahi and Hoechst, all world leaders in petrochemicals, together controlled 60% of the market. South Korea had no domestic production, and the only way the market would ever have allocated capital to KEP would have been if there had been an understanding that substantial government protection would have been forthcoming. Financing was not cheap in South Korea in 1988, and petrochemicals are not a labor intensive industry in which South Korea would still retain some competitive advantage based on its comparatively low wage structure. This case provides an excellent example of a state rejecting static comparative advantage in favor of

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<sup>282</sup> Darlin, *supra* note 274.

<sup>283</sup> See *infra* notes 469-80 and accompanying text.

<sup>284</sup> See, Report of the Panel adopted by the Committee on Anti-Dumping Practices on Apr. 27, 1993. BISD-S-(GATT Doc. ADP/92, Apr. 2, 1993).

<sup>285</sup> *Asian Pacific Brief: Du Pont Co.*, *ASIAN WALL ST. J.* 4, Apr. 28, 1993, available in WESTLAW, WSJ-ASIA 4.

purposeful advancement into higher levels of technology and technologically driven industrialization; unfortunately, this is not an internationally accepted use of antidumping statutes.

The industrial policy reasoning seems to have been that South Korea needed a domestic source of resin, which is an upstream component of plastic auto body parts, among other things. This would be essentially an "infant" industry argument, based ultimately upon desires to localize technology and to preserve foreign exchange by reducing imports. On the other hand, this case might be an example of what could be termed "backward industrial policy," whereby KEP made the enormous investment to obtain the technology and build the production capacity, then let the government know that if protection were not forthcoming the project would fail. This would presume, however, that KEP had obtained its financing originally without government approval, which is unlikely in the South Korean economy.

According to the respondents, KEP came into the market by underpricing,<sup>286</sup> and the fact that prices didn't fall significantly during the period of the investigation (January 1990 to March 1991) indicates that KEP entered the market at a low price, rather than being forced to lower its prices by dumped imports. That in turn suggests that KEP sold at a loss to gain market share, but because it could not drive its competition out of the market entirely, it had to leave its prices low. Under this scenario, when it could not sustain the low prices any longer, KEP asked the government for relief in the form of antidumping duties. The respondents admitted from the outset that their prices on the South Korean market were lower than their home market prices, but alleged that they lowered prices to meet KEP's.<sup>287</sup> This phenomenon, sometimes known as "technical dumping," would normally not be actionable because injury could hardly be attributed to the imports, even if dumped, but under GATT Article VI, antidumping duties are permitted where dumped goods are materially

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<sup>286</sup> Darlin, *supra* note 274.

<sup>287</sup> *Id.*

retarding the formation of a domestic industry.<sup>288</sup> "Technical dumping" would be an obvious means to retard the establishment/development of an "infant" local competitor, because the most obvious way for the new local industry to compete would be on price. By "technical dumping" the established international suppliers could take away any ability the local entrant might have to compete on price, thus making market entry extremely difficult.

#### *h. Ball bearings from Thailand.*

On June 3, 1992 the sole South Korean producer of miniature ball bearings for use in VTR head drums and printers petitioned for antidumping relief against imports from NMB Thai Limited., a Thai subsidiary of Minebea Corporation of Japan.<sup>289</sup> The petitioner alleged that the bearings were being sold in South Korea for 83% less than the Thai market price.<sup>290</sup> In August 1992 the MOF initiated a formal investigation of the matter, which resulted in preliminary findings of dumping and material injury. In late October 1992 the MOF imposed a provisional antidumping duty of 12.5%, and continued the investigation.<sup>291</sup> This marked the first time South Korea had imposed provisional antidumping duties. On January 15, 1993 the MOF announced a final dumping margin of 6.27%, and on January 28, 1993 the KTC announced its decision that the establishment of the domestic industry was being materially retarded by the dumped imports.<sup>292</sup> In February 1993 it was reported that the government had accepted a promise by the respondent to refrain from dumping, and would

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<sup>288</sup> GATT, *supra* note 7, at art. VI(1).

<sup>289</sup> Kim, *supra* note 230, at 48-49; *Dumping Suits in Korea Target Minebea, Others*, ASIAN WALL ST. J. 3, July 8, 1992, available in WESTLAW, WSJ-ASIA 3.

<sup>290</sup> *Dumping Suits in Korea Target Minebea, Others*, *supra* note 289.

<sup>291</sup> Kim, *supra* note 230, at 49; *Seoul Imposes Duties in Dumping Cases*, ASIAN WALL ST. J. 4, Oct. 22, 1992, available in WESTLAW, WSJ-ASIA 4.

<sup>292</sup> Kim, *supra* note 230, at 49.

therefore postpone imposing antidumping duties.<sup>293</sup> However, on April 1, 1993 a Presidential Decree was issued imposing a final antidumping duty of 6.27%, applicable for five years from the date of the provisional duties, October 27, 1992.<sup>294</sup>

In its injury determination the KTC found that the domestic industry had not been established, and that its potential establishment was being retarded by the dumped imports.<sup>295</sup> The petitioner was in fact operating two production lines, but these were losing money and the petitioner's claim seems essentially to have been that it needed to expand production in order to reach economies of scale necessary to break even.<sup>296</sup> Planned expansions had not been carried out because the dumping kept prices unprofitably low, and the KTC found that this constituted material retardation of the local industry.<sup>297</sup>

*i. Phosphoric acid from China.*

This case was brought by the South Korean Chemical Industry Association against Chinese phosphoric acid producers.<sup>298</sup> The share of the South Korean phosphoric acid market held by Chinese exports had risen from 26% in 1989 to 45% in 1991, and South Korean producers alleged that the lower Chinese prices were due to dumping.<sup>299</sup> In October 1992, provisional antidumping duties of 44.73% to 59.34% were imposed on exports by eleven Chinese and Hong Kong exporters, and investigations were continued.<sup>300</sup> In February 1993 the investigation concluded, and the government imposed final antidumping duties of 40.46% to 54.28% for a period

<sup>293</sup> *South Korean Duties Imposed for 'Dumping,'* ASIAN WALL ST. J. 4, Feb. 8, 1993, available in WESTLAW, WSJ-ASIA 4.

<sup>294</sup> Kim, *supra* note 230, at 49.

<sup>295</sup> *Id.* at 49-50.

<sup>296</sup> *Id.* at 50-51.

<sup>297</sup> *Id.* at 50.

<sup>298</sup> *Dumping Suits in Korea Target Minebea, Others,* *supra* note 289.

<sup>299</sup> Damon Darlin, *South Korea Feels Effects of China Trade,* ASIAN WALL ST. J. 1, Nov. 17, 1992, available in WESTLAW, WSJ-ASIA 1.

<sup>300</sup> *Seoul Imposes Duties in Dumping Cases,* *supra* note 291.

of three years.<sup>301</sup> This marked South Korea's second imposition of final antidumping duties.

j. *Hydroxynaphthlene-disulfonic acid ("H-Acid") from Japan, India and China.*

In this case a single South Korean producer of H-acid sought antidumping duties against imports from one Japanese, two Indian, and one Chinese exporter.<sup>302</sup> The petitioner claimed that the respondents were selling H-acid on the South Korean market for 83% less than on the Japanese market.<sup>303</sup> On October 26, 1992 preliminary antidumping duties of 17.6% were imposed on H-acid from Japan, 5.03% to 9.81% on H-acid from India, and 5.92% to 9.89% on H-acid from China.<sup>304</sup> Three days later the MOF reported that the South Korean petitioner had withdrawn its petition.<sup>305</sup>

k. *Disodium carbonate from China.*

In March 1993 South Korea levied antidumping duties of 66.11% for a period of three years on imports of disodium carbonate from several Chinese producers.<sup>306</sup>

l. *Printing plates from Japan.*

In July 1993, OCA announced preliminary antidumping duties of 84% to 89% on printing plates produced by three Japanese

<sup>301</sup> *South Korean Duties Imposed for 'Dumping,' supra* note 293.

<sup>302</sup> *Kim, supra* note 289.

<sup>303</sup> *Id.* The petitioner did not rely on home market prices for sales by the Indian or Chinese respondents.

<sup>304</sup> *Customs Office Imposes Anti-Dumping Fee on H-Acid*, KOREA ECONOMIC DAILY, Oct. 29, 1992, available in LEXIS, Reuter Textline.

<sup>305</sup> *Asian-Pacific Brief: Pungkuk Oil Co.*, ASIAN WALL ST. J., Oct. 29, 1992, at 19, available in WESTLAW, WSJ-ASIA 19.

<sup>306</sup> *Antidumping Duties Placed on Glass Fibers*, PAC RIM INTELLIGENCE REPORT, Aug. 2, 1994, available in LEXIS.

companies.<sup>307</sup> In 1994, final duties of 25.41% to 38.16% were imposed for a three year period.<sup>308</sup>

m. *Sodium hydroxide from the United States, China, France and Belgium.*

A petition was filed by the Korea Soda Production Association in April 1993 against imports of sodium hydroxide.<sup>309</sup> In August, 1994 the MOF was quoted as saying that it would finish its investigation soon.<sup>310</sup>

n. *Glass fiber products from the United States, Japan and Taiwan.*

This petition was filed in August 1993 by a single South Korean glass producer against several producers from the United States, Japan, and Taiwan.<sup>311</sup> In February 1994 provisional antidumping duties of between 9.1% and 82.4% were imposed on five products from eight companies in Japan, Taiwan and the United States,<sup>312</sup> and investigations continued. In August 1994, the MOF imposed final antidumping duties of 10.3% to 58.7% on glass fiber imports from the three targeted nations, which are to remain in place

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<sup>307</sup> *Japanese Charged with Dumping Printing Plates*, KOREA ECONOMIC DAILY, July 20, 1993, available in LEXIS, Reuter Textline.

<sup>308</sup> *Antidumping Duties Placed on Glass Fibers*, supra note 306.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *S.Korea to Probe Glass Fibre Dumping Complaints*, Reuter Financial Service, Sept. 8, 1993, available in LEXIS, Reuter Textline.

<sup>312</sup> *Seoul Imposes Anti-Dumping Duty on Fiberglass from Taiwan*, CHINA ECONOMIC NEWS SERVICE, Feb. 8, 1994, available in LEXIS, Reuter Textline; *Antidumping Duties on Glass Fibre*, CHEMICALS BUSINESS NEWS BASE, Apr. 3, 1994, available in LEXIS, Reuter Textline.

for a period of five years from April 12, 1994.<sup>313</sup>

*o. Disintegrated calcined calcium phosphates from Russia.*

A petition was filed against Russian phosphates in late 1993 or early 1994, and preliminary antidumping duties of 80% were imposed for a period of four months from March, 1994.<sup>314</sup>

*p. Other miscellaneous antidumping actions.*

In 1988 South Korean cigarette interests threatened to file antidumping complaints against imports of cigarettes from the United States,<sup>315</sup> and in 1989 a petition and then withdrawn against imports of organic peroxides from Japan and the Netherlands.<sup>316</sup> In 1991 South Korean computer makers reportedly were preparing to request antidumping relief against personal computers from Taiwan,<sup>317</sup> and in 1992 South Korean nylon producers were reported to be preparing complaints against nylon imports from England and Taiwan.<sup>318</sup> Finally, in August 1993 it was reported that an antidumping complaint was being prepared against exports from Taiwan of tubes for protecting electrical wires.<sup>319</sup> No further information was found on these matters.

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<sup>313</sup> *Antidumping Duties Placed on Glass Fibers*, *supra* note 306; *S. Korea Sets Anti-Dumping Duties on Glass Fiber Imports*, DOW JONES INTERNATIONAL NEWS, Aug. 2, 1994, available in WESTLAW, DJINS.

<sup>314</sup> *Antidumping Duties Placed on Glass Fibers*, *supra* note 306.

<sup>315</sup> *U.S. Cigarette Exporters to Face Antidumping Suit*, JIJI PRESS TICKER SERVICE, June 28, 1988, available in LEXIS.

<sup>316</sup> Seo, *supra* note 236, at 5 n.14; I GATT TRADE POLICY REVIEW: KOREA (1992), *supra* note 237, at 109.

<sup>317</sup> *South Korea Accuses Taiwan of Dumping PCs*, China Economic News Service, Oct. 5, 1991, available in LEXIS, Reuter Textline.

<sup>318</sup> *Nylon Cos. to Launch Dumping Suit*, KOREA ECONOMIC DAILY, Dec. 24, 1992, available in LEXIS, Reuter Textline.

<sup>319</sup> *Korean Anti-Dumping Claims Grow*, KOREA ECONOMIC DAILY, Aug. 6, 1993, available in WESTLAW, AECON.

### 3. Conclusions from South Korea's Antidumping Practice to Date.

What is most striking about South Korean antidumping practice is the dramatic increase in claims during the 1990s, and, in contrast to Japan, how many formal petitions are filed, and how many formal investigations are begun. Some cases, such as those involving alumina cement, polyacetal resin, or the ball bearings from Thailand, appear to be efforts to protect new domestic producers of previously imported products.<sup>320</sup> Other cases, such as the case against phosphoric acid from China, appear more familiar to an American observer, as they involve new, low-priced exporters threatening local production. So long as bilateral and multilateral pressure on South Korea for open markets remains strong, and so long as South Korea's balance of trade does not grow into embarrassing surpluses, the remarkable growth in South Korean antidumping proceedings seem certain to continue.

#### C. Taiwan

Taiwan's first modern antidumping law was enacted in June 1984, in a statute specifically for that purpose. The law was reportedly enacted in conjunction with efforts by Taiwan to lower its tariff barriers and liberalize imports generally.<sup>321</sup> In January, 1993

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<sup>320</sup> This use of antidumping proceedings can be thought of as "Hamiltonian" because it is based on concerns similar to those referred to by Hamilton in his *Report on Manufactures*, in which a late developing, "infant" industry fears predatory dumping by more advanced, established competitors. There is a clear overlap between "Hamiltonian" antidumping actions and injury claims based on "material retardation" of the establishment of a domestic industry, though a "Hamiltonian" action might not necessarily be based on a claim that the domestic industry had not yet been established.

<sup>321</sup> *Taiwan has Adopted an Anti-Dumping Law to Prevent Foreign Countries from Selling Goods in Taiwan More Cheaply than in Their Own Domestic Markets*, BUSINESS TIMES (Singapore), June 19, 1984, available in LEXIS, Reuter Textline. Taiwan reportedly had some type of antidumping provision as early as 1967, which was never used. See, *MOF To Impose Anti-Dumping Tax on Hulett Aluminium*,



Taiwan enacted its first comprehensive legislation governing international trade, the Foreign Trade Act ("FTA"), which became effective February 5, 1993.<sup>322</sup> Although the drafting of the FTA extended over many years, the final version, including the antidumping provisions, was drafted with Taiwan's 1990 GATT/WTO application in mind.<sup>323</sup> It is therefore not surprising that Taiwan's basic antidumping law, found in Article 20 of the FTA, follows GATT antidumping standards. In the same style as Japanese or Korean legislation, the FTA is a broadly worded statute that must be fleshed out with implementing legislation.

### 1. Administrative Organs and Procedure.

Under the 1984 law, Taiwan's antidumping administration was administered by the Ministry of Finance ("MOF"), which accepted petitions, conducted dumping and injury investigations, and could recommend to the Executive Yuan that antidumping duties be imposed. This administrative structure changed with the enactment of the 1993 FTA, which creates an International Trade Commission ("ITC")<sup>324</sup> within the Ministry of Economic Affairs ("MOEA"), and splits injury and dumping investigations along the lines of the United States and South Korean systems. Petitions may now be filed with either the MOF or the MOEA.<sup>325</sup> The ITC determines whether the domestic industry is being injured by the allegedly dumped imports, while the MOF investigates whether dumping actually occurred. As

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China Economic News Service, Sept. 13, 1991, available in LEXIS, Reuter Textline.

<sup>322</sup> For a legal analysis of the FTA, see Sui-Yu Wu, *Taiwan's First Comprehensive Foreign Trade Legislation*, EAST ASIAN EXECUTIVE REPORTS 9, Apr. 1993; Sui-Yu Wu, *New Era of Taiwan's Foreign Trade Regime*, 21 INTERNATIONAL BUSINESS LAWYER 369, (1993). For a general analysis, see Tseng, *supra* note 27.

<sup>323</sup> Sui-Yu Wu, *New Era of Taiwan's Foreign Trade Regime*, *supra* note 322, at 369; TSENG, *supra* note 322.

<sup>324</sup> Sui-Yu Wu, *Taiwan's First Comprehensive Foreign Trade Legislation*, *supra* note 322, at 24.

<sup>325</sup> MOF, MOEA to Jointly Fight 'Unfair' Competition by Imports, China Economic News Service, Dec. 7, 1994, available in LEXIS, Reuter Textline.

in the past, the MOF still retains final authority to recommend antidumping relief measures to the Executive Yuan, which must approve the recommendation and forward it to the cabinet for implementation.

The inaugural meeting of the ITC was held in July 1994.<sup>326</sup> The ITC is chaired by Economics Minister P.K. Chiang, and is made up of deputy chiefs of the Ministry of Finance, the Council for Economic Planning and Development, the Council of Agriculture, plus eight economists and legal specialists.<sup>327</sup> According to Minister Chiang, the Committee will conform with GATT antidumping discipline, despite Taiwan's non-GATT/WTO status.<sup>328</sup>

## 2. Practice to Date.

In the eight-and-a-half years from June 1984 to December 1991, the Customs Administration received 14 petitions for unfair trade relief.<sup>329</sup> Of these fourteen, six were rejected, two were withdrawn after arrangements were reached with the respondents, two were "put on hold," and four triggered official investigations.<sup>330</sup> In the single year from December 1991 to December 1992 seven new petitions were filed, bringing the total from June 1984 to December 1992 to twenty-one, of which twenty were for antidumping relief, and one was for countervailing duties.<sup>331</sup>

In order to assist local industries seeking antidumping protection, the Executive Yuan's Industrial Development Bureau ("IDB") has helped industry associations in petrochemicals, textiles,

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<sup>326</sup> *Import Relief Panel - Stainless Steel Rods*, China Economic News Service, July 28, 1994, available in LEXIS, Reuter Textline.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Taiwan Puts Anti-Dumping Duty on Chemical*, ASIAN WALL ST. J., Dec.2, 1992, at 4, available in WESTLAW, WL-WSJA (quoting Mr. Wang Deh-Hwei, Director, Customs Administration, Ministry of Finance).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

artificial fibers, steel, paper, pharmaceuticals and metal refining establish "alarm systems" against dumping, and has assisted these industries in filing antidumping petitions.<sup>332</sup> The government-sponsored Chinese National Federation of Industries ("CNFI") also has an Import Relief Committee, which assists particular industries in preparing and filing antidumping petitions.<sup>333</sup> It has been reported that in certain cases the Executive Yuan has asked the CNFI to provide such assistance.<sup>334</sup> The following are antidumping proceedings that have been reported to date. Again, these summaries focus on the economic and commercial effects of these cases, rather than on their legal aspects.

*a. Colored steel plate from South Korea.*

In September 1990 an antidumping petition was filed by Anmau Corporation of Taiwan against color steel sheets exported by two South Korean steel producers.<sup>335</sup> The government began an investigation and requested information from the South Korean producers, who provided information in July 1991.<sup>336</sup> As of August 1991, the investigation was still underway, and no provisional duties had been imposed.<sup>337</sup>

This case is interesting because the petitioner was a joint venture between Australian, Japanese and Taiwanese investors, with the Taiwanese partner reportedly only holding 11% of the equity.<sup>338</sup> The case reportedly also marked the first time that South Korean

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<sup>332</sup> *IDB Helping ROC Industry Fight Dumping by Foreign Suppliers*, China Economic News Service, Aug. 19, 1992, available in LEXIS, Reuter Textline.

<sup>333</sup> *Id.*; *Hurt By 'Dumping,'* China Economic News Service, May 21, 1994, available in LEXIS, Reuter Textline.

<sup>334</sup> *Legislators Urge Government to Investigate ROK's Dumping of Petrochemicals*, China Economic News Service, Dec. 26, 1991, available in LEXIS, Reuter Textline.

<sup>335</sup> *Taipei Investigating Dumping Charges on ROK Color Steel Sheets*, Korea Economic Daily, Aug. 27, 1991, available in LEXIS, Reuter Textline.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

exports were assessed antidumping duties by a country outside the "industrialized" world.<sup>339</sup> The South Korean and Taiwanese industry associations met in Taipei in early September 1991, at which time the Taiwanese steelmakers reported that South Korean colored steel plate was selling for \$890 per metric ton domestically, compared with \$450 per metric ton overseas.<sup>340</sup> They also reported that they had filed an antidumping complaint against colored steel plate from South Africa several years before, which had been handled diplomatically.<sup>341</sup>

b. *Aluminum from South Africa.*

In November 1990 the Ministry of Finance announced that it would investigate a complaint by state-owned China Steel Corporation against imports of aluminum sheet, plate and foil from a single South African producer.<sup>342</sup> China Steel's petition reportedly complained that the respondent's products were selling in Taiwan for approximately \$1,300 per ton less than its domestic market price, and that as a result China Steel had suffered a sharp drop in sales.<sup>343</sup> Although it would be necessary to have more information before drawing any conclusions about China Steel's petition, in the three previous years (1987-1989) the respondent's exports had accounted for only 1.25% of Taiwan's total aluminum imports, while the existing tariff was already 12.5%.<sup>344</sup>

In September 1991 the Ministry of Finance recommended to the Executive Yuan that antidumping duties be imposed on the

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<sup>339</sup> *Id.*

<sup>340</sup> *ROC Makers Accuse South Korea of Dumping Colored Steel Plate*, China Economic News Service, Sept. 6, 1991, available in LEXIS, Reuter Textline.

<sup>341</sup> *Id.*, cf. *MOF to Impose Anti-Dumping Tax on Hulett Aluminum*, *supra* note 321 (in which an MOF official is quoted as saying that the 1990 investigation of Hulett Aluminum Limited would be Taiwan's first against a South African firm).

<sup>342</sup> *Taiwan to Probe South African Firm for Dumping*, Reuter News Service - Far East, Nov. 28, 1990, available in LEXIS, Reuter Textline; *MOF to Impose Anti-Dumping Tax on Hulett Aluminum*, *supra* note 321.

<sup>343</sup> *Taiwan to Probe South African Firm for Dumping*, *supra* note 342.

<sup>344</sup> *Id.*

respondent's products, though a Customs Administration official noted that if the dumping ceased, the investigation would be terminated.<sup>345</sup>

*c. Sodium dithionite from Japan.*

A petition was filed by the Taiwan Association of Acid & Alkali Industries in August 1991, under the pre-FTA system, alleging dumping of sodium dithionite from Japan.<sup>346</sup> Sodium dithionite is a chemical used to bleach textiles.<sup>347</sup> In December 1992 the Ministry of Finance announced that the Executive Yuan had decided to impose an antidumping duty of 45.76%, over and above an existing 5% tariff, raising the effective tariff rate to 50.76%.<sup>348</sup> The case marked the first time Taiwan imposed antidumping duties on imported products.

*d. Maleic anhydride from Japan.*

The petition was filed in December 1991 by Taiwan's sole producer of maleic anhydride against a single Japanese exporter.<sup>349</sup> Because the case was handled under the 1984 law, the petition was filed with the Committee on Import Injury Relief of the Chinese National Federation of Industries, which undertook an initial investigation.<sup>350</sup> The Committee was then to forward its findings to the MOF, which would decide whether to impose antidumping duties.<sup>351</sup>

Although details are not clear, the petitioner appears to have begun production in April 1991, just eight months before asking for

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<sup>345</sup> *MOF to Impose Anti-Dumping Tax on Hulett Aluminum*, *supra* note 321.

<sup>346</sup> *Taiwan Puts Anti-Dumping Duty on Chemical*, *supra* note 329.

<sup>347</sup> *Taiwan Slaps Anti-Dumping Tax on Japanese Chemical*, Reuter Library Report, Dec. 1, 1992, available in LEXIS, Reuter Textline.

<sup>348</sup> *Id.*

<sup>349</sup> *Taiwan Manufacturer Accuses Firm of Dumping*, *ASIAN WALL ST. J.*, Dec. 18, 1991, available in WESTLAW, WSJ-ASIA.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

relief.<sup>352</sup> Maleic anhydride is an upstream product used in polyester and alkyd resin production, so having domestic production would fit into Taiwan's plans to become more self-sufficient in petrochemicals.<sup>353</sup> According to the petitioner, the market price in Japan was over \$1,500 per metric ton, while the respondent was selling in Taiwan for roughly \$510 per metric ton, which was less than petitioner's cost of production.<sup>354</sup>

*e. Hot and cold-rolled steel from Brazil and South Korea.*

In September 1992 it was reported that Taiwanese steelmakers were expected to ask for antidumping relief against imports of hot-rolled and cold-rolled steel, as well as zinc products from South Korea.<sup>355</sup> In March 1993 the MOF decided to investigate antidumping petitions filed by the state-run China Steel Corporation against imports of hot-rolled steel from South Korea and Brazil.<sup>356</sup> That same month China Steel announced that its pre-tax profits and earnings per share for the last six months of 1992 had dropped by 43% and 45% respectively from a year earlier, and blamed the declines on price suppression caused by imports.<sup>357</sup> Sales during the period had declined by only 0.2% from the previous year.<sup>358</sup>

In October 1993 the MOF announced that it would also

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<sup>352</sup> *Id.*

<sup>353</sup> *Id.* For a discussion of Taiwan's petrochemical expansion plans, see Claire Tsai, *Petrochemical Expansion Projects in Taiwan - Formosa Plastics Group*, BUSINESS TAIWAN, May 16, 1994, available in LEXIS, ASIAPC Library, TXTFE File.

<sup>354</sup> *Id.*

<sup>355</sup> *Iron and Steel Makers to Ask Government to Halt South Korean Dumping*, China Economic News Service, Sept. 1, 1992, available in LEXIS, ASIAPC Library, TXTFE File.

<sup>356</sup> *Taiwan Holds Steel Dumping Probe for Korea, Brazil*, Reuter News Service - Far East, Mar. 17, 1993, available in LEXIS, ASIAPC Library, TXTFE File.

<sup>357</sup> *China Steel's Profit Fell 43% in 1st Half*, ASIAN WALL ST. J. 3, Mar. 25, 1993, available in WESTLAW, 1993 WL-WSJA 2032298.

<sup>358</sup> *Id.*

investigate imports of cold-rolled steel from South Korea.<sup>359</sup> The petition by Taiwanese steel makers complained that steel imports had increased by a factor of 14.6 times from 1990 to 1992, and that this had led to lower prices, increased inventories, and reduced profits for Taiwanese producers.<sup>360</sup>

In early March 1994 the MOF announced that it had recommended to the cabinet that antidumping duties of 13.6% be imposed on imports of hot-rolled steel plate from South Korea and Brazil.<sup>361</sup> On March 10, 1994 Korean industry sources reported that Taiwan was in fact already assessing preliminary antidumping duties of 13.6%, and that this represented a reversal of an earlier Taiwanese government decision to accept voluntary export restraints from Korean steelmakers.<sup>362</sup> Taiwanese sources make no reference to preliminary duties, however, and indicate that as of late April 1994 the cabinet was reportedly still reviewing the MOF recommendation of early March.<sup>363</sup>

f. *Steel rod and wire from Brazil and Japan.*

Also in March 1994 the MOF recommended to the cabinet that antidumping duties of between 19.66% and 31.6% be imposed on steel rod and wire from Brazil.<sup>364</sup> The cabinet approved the recommendation and began imposing the recommended duties

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<sup>359</sup> *Taiwan to Investigate Korean Steel Imports*, ASIAN WALL ST. J., Oct. 4, 1993, available in WESTLAW, WSJ-ASIA 3.

<sup>360</sup> *Id.* See also, *Taiwan Considers S. Korea Duties*, AM. METAL MKT. 4, Oct. 5, 1993, available in WESTLAW, AMMTLMKT.

<sup>361</sup> *Taiwan Proposes Steel Dumping Tax on Brazil, Korea*, Reuter News Service - Far East, March 8, 1994, available in LEXIS, Reuter Textline.

<sup>362</sup> *Taiwan Slaps (sic) Dumping Duties on Korean Thick Steel Plates*, KOREA ECONOMIC DAILY, March 12, 1994, available in WESTLAW, KOREAECON.

<sup>363</sup> *Taiwan Starts Duties on Brazil Steel Rod/Wire*, Reuter News Service - Far East, April 25, 1994, available in LEXIS, Reuter Textline.

<sup>364</sup> *Taiwan Proposes Steel Dumping Tax on Brazil, Korea*, Reuter News Service - Far East, March 8, 1994, available in LEXIS, Reuter Textline.

effective April 25, 1994.<sup>365</sup>

In July 1994 the newly-formed Trade Investigation Committee of the MOEA assigned one of its members to investigate a charge of dumping made by a Taiwanese company against steel rods and wires from Japan.<sup>366</sup>

*g. Polypropylene and high and low density polyethylene from Japan and South Korea.*

High density polyethylene (HDPE), low density polyethylene (LDPE), and polypropylene (PP) are petrochemical raw materials used in plastic products, and although separate antidumping petitions were filed, they will be treated together here.

Antidumping actions against all three products began in August 1992, when Taiwan's largest PP and polyethylene (PE) producers petitioned for antidumping relief against PP and PE imports from South Korea and Japan.<sup>367</sup> The timing of the actions seems to have been related to the deterioration in Taiwan-South Korea relations brought about by South Korea's switch of diplomatic recognition from Taiwan to the People's Republic of China.<sup>368</sup> Although conditions for antidumping relief seem to have been ripe in late 1992, it appears that no action was taken on the case for over one year.

In October 1993, the ITC held a public hearing on the matters, attended by representatives of both petitioners and exporters.<sup>369</sup> The petitioners complained that over-capacity in South Korea was leading to dumping on the Taiwanese market, resulting in increased import

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<sup>365</sup> *Taiwan Starts Duties on Brazil Steel Rod/Wire*, Reuter News Service - Far East, Reuter Economic News, April 25, 1994, available in LEXIS, Reuter Textline.

<sup>366</sup> *Import Relief Panel - Stainless Steel Rods*, China Economic News Service, July 28, 1994, available in LEXIS, Reuter Textline. It is not clear from the source whether a formal petition was filed.

<sup>367</sup> *Taiwan Taking Hard Line of Dumping*, WALL ST. J. September 4, 1992, available in WESTLAW, WL-WSJ 4.

<sup>368</sup> *Id.*

<sup>369</sup> *Petrochemical Firms Declare War on Korean Dumping*, China Economic News Service, October 21, 1993, available in LEXIS, Reuter Textline.



penetration.<sup>370</sup> In December 1993 the MOF took action, recommending to the Executive Yuan that preliminary antidumping duties of 7% to 30% be imposed on South Korean HDPE and LDPE.<sup>371</sup> At the same time, the MOF decided to postpone action on PP imports until March 1994.<sup>372</sup>

In mid-February 1994, before even preliminary duties on PE had been imposed, it was reported that South Korean producers were offering voluntary volume restraints and minimum C&F price restraints on HDPE, LDPE and PP in exchange for assurances that Taiwan would reduce or eliminate the antidumping duties.<sup>373</sup> These negotiations evidently came to naught, because on February 25, 1994 the Executive Yuan imposed provisional antidumping duties of 6.7% to 29.1% on HDPE and LDPE from South Korea, marking the first time Taiwan had imposed provisional antidumping.<sup>374</sup> At roughly the same time, the MOF also recommended four-month provisional antidumping duties ranging from 6.57% to 110.68% on PP from South Korea and Japan.<sup>375</sup>

In mid-March 1994 the MOF proposed final antidumping duties on imports of PP from South Korea and Japan, HDPE and LDPE from Korea.<sup>376</sup> The proposed duties on PP ranged from 4.77% to 68.71%, and those on HDPE and LDPE from 4.17% to 9.45%.<sup>377</sup>

<sup>370</sup> *Id.*

<sup>371</sup> *Trade Update: Taiwan to Impose Tariffs on Korean PE Imports*, PLATT'S INT' PETROCHEMICAL REP., December 23, 1993, available in WESTLAW, PLATTIPR 6.

<sup>372</sup> *Id.*

<sup>373</sup> *Trade Update: Korea and Taiwan in Talks Over Polymer Import Quotas and Duties*, PLATT'S INT'L PETROCHEMICAL REP. 5, February 17, 1994, available in WESTLAW, PLATTIPR 5.

<sup>374</sup> *Asian-Pacific Brief: Taiwanese Antidumping Duties*, ASIAN WALL ST. J. 12, February 28, 1994, available in WESTLAW, WSJ-ASIA 12; Claire Tsai, *Japanese, Korean Petrochemical Imports Hit with Anti-Dumping Duty*, BUSINESS TAIWAN, March 7, 1994, available in LEXIS, Reuter Textline.

<sup>375</sup> *Taiwan Set to Impose Interim Duties on Japanese and Korean PP*, PLATT'S INT'L PETROCHEMICAL REP. 1, March 3, 1994, available in WESTLAW, PLATTIPR 1.

<sup>376</sup> *Taiwan Proposes Dumping Duties on Japan, Korea*, Reuter News Service - Far East, Mar. 20, 1994, available in LEXIS, Reuter Textline.

<sup>377</sup> *Id.*

In April 1994 a panel of the Executive Yuan approved the MOF proposal for antidumping duties of 4.17% to 9.45% on HDPE and LDPE from South Korea, and sent their approval to the cabinet for final approval and implementation.<sup>378</sup> The duties went into effect in mid-May 1994.<sup>379</sup> Then, also in mid-May 1994 the cabinet approved final antidumping duties of 5.16% to 68.71% on PP imports from ten Japanese producers, and 4.77% to 35.01% on PP imports from eight South Korean producers, to become effective for June 1994 shipments.<sup>380</sup>

Despite the nearly two years spent considering these matters, it quickly became apparent that economic implications had been thought through. By August 1994 a split had appeared between domestic PE and PP producers, who had asked for antidumping relief, and the domestic downstream users of PE and PP, who were unhappy about having to pay higher prices for their inputs.<sup>381</sup> The downstream processors charged that, with protections in place, the domestic producers were unable to meet demand and were raising their prices, and therefore asked the MOF to revoke the recently implemented duties.<sup>382</sup> The 8,000 domestic processors, represented by the Association of Finished Plastics Products, constitute an \$11.5 billion industry, account for 5.6% of all industrial production, employ over 180,000, and had export earnings of \$5.05 billion, roughly 6% of Taiwan's total exports.<sup>383</sup> The processors rely upon imports for

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<sup>378</sup> *Korean Plastics - Anti-Dumping Duties to be Imposed on Polyethylene*, China Economic News Service, Apr. 27, 1994, available in LEXIS, Reuter Textline.

<sup>379</sup> *Taiwan to Levy Dumping Duties on S.Korea*, Reuter News Service - Far East, May 14, 1994, available in LEXIS, Reuter Textline.

<sup>380</sup> *Taiwan Slaps Dumping Surcharges on Japan, ROK Homopolymers*, PLATT'S INT'L PETROCHEMICAL REP. 8, May 19, 1994, available in WESTLAW, PLATTIPR 8; Comline News Service, June 20, 1994, available in LEXIS, Reuter Textline.

<sup>381</sup> *Downstream PP, PE Processors Ask for End to Dumping Duty*, China Economic News Service, Aug. 18, 1994, available in LEXIS, Reuter Textline.

<sup>382</sup> *Id.*

<sup>383</sup> *Taiwan Processors Oppose Dumping Duties*, Stephen Moore ed., 24 Mod. Plastics 16B, Dec. 1, 1994, available in WESTLAW, MODPLST 16B.

roughly 50% of their HDPE, LDPE and PP needs,<sup>384</sup> and were being hurt by price increases of 20% to 50% from a year earlier.<sup>385</sup>

The MOF met on August 30, 1994 to discuss the matter, and reportedly announced that the antidumping duties on both PP and PE from South Korea would be rescinded September 1, 1994.<sup>386</sup> A procedural snag appears to have arisen with regard to revoking the final duties, however, caused by the fact that Taiwan's antidumping law would require a reversal of the dumping determination in order to revoke final duties.<sup>387</sup> In September the Executive Yuan reportedly announced that it would undertake a one-month investigation to determine whether dumping had actually occurred.<sup>388</sup> Then, in October, an ITC investigation reportedly found that domestic producers were no longer being injured by PP and PE imports, but the ITC decided to continue monitoring the market situation.<sup>389</sup>

In October the MOF announced that it would partially rescinded the antidumping duties on Japanese PP, leaving duties on Japanese PE in place.<sup>390</sup> Then in December 1994, with all duties apparently still in force, the MOF announced that it would reopen both the PP and PE investigations.<sup>391</sup> In late January the ITC completed its second reinvestigation of market conditions, again finding that conditions for domestic producers were improving.<sup>392</sup>

<sup>384</sup> *Id.*

<sup>385</sup> *Taiwan to Abolish Dumping Tariff on South Korean PE, PP*, JAPAN CHEMICAL WEEK, Sept. 1, 1994, available in LEXIS, Reuter Textline.

<sup>386</sup> *Id.*

<sup>387</sup> *Taiwanese Polymer Processors Call for Re-Think on Tariffs*, 13 *Platt's Int'l Petrochemical Rep.* 4, Sept. 9, 1994, available in LEXIS.

<sup>388</sup> *Id.*

<sup>389</sup> *Gov[ernment] Expected to Soon Suspend Dumping Duties on Korea, Japan, China* Economic News Service, January 24, 1995, available in LEXIS, Reuter Textline.

<sup>390</sup> *MOF to Partially Lift Anti-Dumping Rate on Japanese PP, PE*, China Economic News Service, Oct. 22, 1994, available in LEXIS, Reuter Textline.

<sup>391</sup> *Platt's News Digest: Asia Anti-Dumping*, 13 *Platt's Int'l Petrochemical Rep.* 8, available in WESTLAW, PLATTIPR 8.

<sup>392</sup> *Gov[ernment] Expected to Soon Suspend Dumping Duties on Korea, Japan*, *supra* note 389.

These results were forwarded to the MOF, whose parallel investigation still needed to find that no dumping had occurred in order for the duties to be rescinded.<sup>393</sup>

*h. PBT engineering plastic from South Korea.*

In early 1991 the Taiwan Plastic Materials Manufacturers' Association, assisted by the Import Relief Commission of the CNFI, successfully petitioned the MOF to investigate dumping of PBT by Korean producers.<sup>394</sup> Data supplied by the domestic industry showed Korean over-capacity, dumping, and a doubling of import penetration, from 5.6% to 10.6%.<sup>395</sup> The Import Relief Commission reportedly urged the Korean exporters to raise their prices for the Taiwan market,<sup>396</sup> and the lack of further action on the matter suggests that this is how it was resolved.

*i. Styrene monomer ("SM") and carbon black from South Korea.*

In August 1993, while investigations into South Korean PE and PP exports were ongoing, investigations were also begun into South Korean exports of styrene monomer ("SM") and carbon black.<sup>397</sup> The South Korean producers reportedly urged government-level action,<sup>398</sup> and the matter seems to have been settled without duties being imposed.

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<sup>393</sup> *Id.*; *Taiwan's Dumping Duties*, Dow Jones Int'l News Serv., Jan. 24, 1995, available in WESTLAW, DJINS.

<sup>394</sup> *ROC Makers Say South Korea id Dumping PBT Plastic Material*, China Economic News Service, Apr. 2, 1991, available in LEXIS, Reuter Textline.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Taiwan Moving to File Dumping Charges on Two More Petrochemical Products*, KOREA ECONOMIC DAILY, Aug. 7, 1993, available in WESTLAW, KOREAECON.

<sup>398</sup> *Id.*

j. *Cellulose nitrates (nitrocellulose) from Brazil.*

An investigation was begun into imports of cellulose nitrates from Brazil, and in February 1994, provisional duties were imposed, while the investigation continued.<sup>399</sup>

k. *Paper pulp from the United States, Canada, Brazil and Indonesia.*

In November 1994 the MOF concluded an investigation into alleged dumping of paper pulp by twelve exporters from the United States, Canada, Brazil and Indonesia.<sup>400</sup> The investigation, which was in response to a petition by two Taiwanese pulp makers, found dumping margins ranging from 5.59% to 63.23% on pulp imported from the four nations between late 1990 and early 1993.<sup>401</sup> However, rather than immediately recommending to the Executive Yuan that duties be imposed, the MOF allowed the respondents a one month grace period to raise their prices, in which case antidumping duties could be avoided.<sup>402</sup> In mid-December the MOF announced that it would recommend antidumping duties of between 15.92% and 63.23% on pulp from Brazil and Canada, but because United States and Indonesian exporters had provided price undertakings their pulp would not be affected.<sup>403</sup> The MOF noted further, however, that pulp from any United States or Indonesian exporters who failed to provide price undertakings would be subject to duties of 14.28% to 24.33%.<sup>404</sup>

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<sup>399</sup> *Asian-Pacific Brief: Taiwanese Antidumping Duties*, ASIAN WALL ST. J. 12, Feb. 28, 1994, available in WESTLAW, WSJ-ASIA 12.

<sup>400</sup> Dow Jones Int'l News Service, November 8, 1994, available in WESTLAW, DJINS.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Taiwan Levies Dumping Duties on Foreign Firms*, Reuter News Service - Far East, Dec. 15, 1994, available in LEXIS, Reuter Textline.

<sup>404</sup> *Paper Dumping*, China Economic News Service, Dec. 17, 1994, available in LEXIS, Reuter Textline.

1. *Cotton yarn from Pakistan.*

In 1993 the Taiwan Cotton Spinners Association petitioned for antidumping relief from cotton yarn imports from Pakistan.<sup>405</sup> The petition seems to have relied upon a 1992 study, privately commissioned by the Association, that found that Pakistani cotton yarn was being dumped in Taiwan.<sup>406</sup> In November 1994 the MOF announced that it would begin an investigation,<sup>407</sup> and in February 1995 the Trade Investigation Committee announced its determination that local producers were being injured by dumped Pakistani cotton yarn. Under the new bifurcated procedure the Tariff Commission of the MOF then needed to reach a final determination that dumping had occurred.<sup>408</sup>

m. *Other miscellaneous antidumping actions.*

In June 1992 it was reported that Taiwanese machine tool makers had asked the government to take action against dumping of Japanese machine tools.<sup>409</sup> In September 1993, while other steel cases were being investigated,<sup>410</sup> the Taiwan Steel and Iron Industrial Association complained of dumping by Thai steel producers, and indicated that it would file an antidumping petition if its negotiations with Thai exporters were not successful.<sup>411</sup> In October 1993 it was

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<sup>405</sup> Dow Jones Int'l News Serv., Feb. 9, 1995, available in WESTLAW, DJNS.

<sup>406</sup> The study was carried out jointly by the accounting firm of Wang and Tang, and the law firm of Lee and Li. *TCSA Charges Pakistan with Dumping Cotton Yarn*, China Economic News Service, June 11, 1992, available in LEXIS, Reuter Textline.

<sup>407</sup> *Paper Dumping - Duty Rates*, China Economic News Service, Nov. 9, 1994, available in LEXIS, Reuter Textline.

<sup>408</sup> Dow Jones Int'l News Serv., Feb. 9, 1995, *supra* note 405 (referring to the Trade Investigation Committee as the "International Trade Commission").

<sup>409</sup> *Machine Tool Makers Complain of Japanese Dumping*, China Economic News Service, June 16, 1992, available in LEXIS, Reuter Textline.

<sup>410</sup> See *supra* notes 355-66 and accompanying text.

<sup>411</sup> *Taiwanese Seek Talks with Steel Exporters*, BANGKOK POST, Sept. 14, 1993, available in LEXIS, Reuter Textline.

reported that the Taiwan Silk and Filament Weaving Industrial Association was investigating imports of synthetic fibers and woven fabrics from Korea, and that an antidumping petition would be filed.<sup>412</sup> In addition, until January 1995, a United States pharmaceutical company's exports of hepatitis-B products were being monitored by the MOF in connection with a price undertaking the company had offered in response to an antidumping investigation.<sup>413</sup> After five years of monitoring the MOF has indicated that the investigation will be terminated.<sup>414</sup>

### 3. Conclusions from Taiwan's Antidumping Practice to Date.

Taiwan's antidumping enforcement is much closer to South Korea's than to Japan's, no doubt partly reflecting similarities in the levels of development of the two nations. Taiwan is therefore likely to feel pressure to grant "Hamiltonian" antidumping relief, as it appears to have done in the maleic anhydride case, as well as the more typical antidumping relief for established but no longer competitive industries. Petrochemical imports pose a special problem for Taiwan, as its relatively open markets have made it a "dumping" ground for excess capacity in South Korea and Japan, which stymies Taiwan's efforts to increase its own petrochemical capacity. Like South Korea, Taiwan is now facing competition from labor intensive imports where it is no longer competitive, while at the same time it is trying to improve its own technological level and reduce its reliance on high technology imports. Like South Korea, Taiwan is also moving rapidly toward a more pluralistic and law-centered economic order, in which it will be increasingly difficult for the government to avoid taking action on antidumping complaints from its citizens, which it appears to have done in the past for diplomatic reasons. What may work to

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<sup>412</sup> *Fabric Manufacturers Protest Korean Dumping Here*, China Economic News Service, Oct. 22, 1993, available in LEXIS, Reuter Textline.

<sup>413</sup> *Taiwan Ends Dumping Procedures on Abbott*, Reuter News Service - Far East, Jan. 12, 1995, available in LEXIS, Reuter Textline.

<sup>414</sup> *Id.*

constrain Taiwan's antidumping practices are its move to become a WTO member, and its need to maintain political ties around the world. These concerns aside, antidumping enforcement in Taiwan is likely to grow as its markets become increasingly open.

## VI. PROJECTIONS ABOUT FUTURE ANTIDUMPING PRACTICES OF JAPAN, SOUTH KOREA AND TAIWAN

Having described the state-centered capitalist development industrial policies of Japan, South Korea and Taiwan, and having also looked at the actual antidumping practices of the three nations, it is now possible to attempt some general predictions about their future antidumping practices. Certain factors seem to favor convergence among antidumping practices in these three nations, while other factors are indeterminate, and still other factors suggest divergent antidumping enforcement.

### *A. Harmonizing National Antidumping Practices and the Quest for Predictability in the World Trading System*

The tightening of GATT standards for antidumping practices and for dispute resolution favor harmonization among antidumping practices worldwide. To understand the attention given to national antidumping practices it is helpful to think of the Bretton Woods system as an attempt to "lock-in" free markets on a global scale, thus avoiding the escalating protectionism that occurred in the 1920s and 1930s. If one accepts the Weberian thesis that capitalism on the national level depends upon a legal system that guarantees the predictability of market transactions and that enjoys relative autonomy from narrow political considerations,<sup>415</sup> then at the international level the existence of national discretion in granting antidumping relief may

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<sup>415</sup> For a summary of Weber's "rational" legal system I have relied primarily upon David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WISC. L. REV. 720, and David M. Trubek *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE LAW JOURNAL 39 (1972).



be a hinderance to the project of creating a global market economy.<sup>416</sup>

Antidumping relief is sought after contracts have been concluded and at least partially performed, and therefore it is difficult to anticipate if standing and other requirements for bringing antidumping actions are loose. Because antidumping petitions are difficult to predict in advance, if any predictability at all can be installed in the system it will be through transparent and consistent enforcement of antidumping laws once cases enter the national systems. As noted above, this requires either harmonization among national systems to the greatest extent possible, or strict GATT discipline over unharmonized, but disciplined, national antidumping regimes. Second, antidumping relief is requested by outsiders, for what are normally two-party transactions, and although their interests could conceivably be factored into contract terms, they are by definition competitors of the importers.<sup>417</sup> Agreeing at the outset to import at a higher price in order to avoid antidumping petitions would undermine the competitive logic of the market system, and could lead to "transfer pricing" problems with the taxing authorities of the importing nation where transactions are between affiliates. Finally, unpredictability has been exacerbated by the fact that national antidumping systems have not functioned autonomously from political interests.<sup>418</sup> In spite of their legal trappings, antidumping decisions involve tariff policy, which, as an element of national sovereignty, is inherently political. One great virtue of formal tariffs is that they are transparent and predictable, whereas dumping enforcement is not. Ironically, the more effective the GATT/WTO is in removing tariffs as a tool of national trade policy, the more pressure is likely to arise

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<sup>416</sup> Predictability would be served by either a complete absence of national antidumping mechanisms, or by strong GATT supervision of national antidumping regimes to remove their political, unpredictable, aspects. Harmonization among national systems would not be strictly necessary, so long as each national system was predictable on its own terms. However, to the extent that national systems remain free from GATT control they are likely to retain their political, unpredictable aspects.

<sup>417</sup> Petitioners must buy producers of 'like products,' or must represent the industry of such producers. GATT, *supra* note 7, at art VI.

<sup>418</sup> On the United States, see JAMES BOVARD, *THE FAIR TRADE FRAUD* (1993).

for unpredictable protectionist measures such as antidumping relief. This in turn creates the need for a more legalistic GATT/WTO structure to reintroduce predictability.

GATT has been moving gradually toward less national discretion in antidumping administration through the creation of the Kennedy Round and Tokyo Round Antidumping Codes, which provide more detailed standards for importing governments to follow when taking antidumping actions.<sup>419</sup> The second major means by which GATT has attacked national discretion in the antidumping area, and in others, has been by strengthening GATT dispute resolution mechanisms. Whereas early GATT disputes were resolved through multilateral diplomacy, since approximately 1955 GATT disputes have been referred to panels of three to five independent experts, who are directed to "arrive impartially at the truth of the facts and the best interpretation of the law."<sup>420</sup> This "legalization" of GATT dispute resolution continued with the 1979 adoption of the Tokyo Round "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance,"<sup>421</sup> which functioned as a sort of "Restatement" of GATT dispute resolution procedures.<sup>422</sup> Writing before the creation of the WTO Charter, John Jackson made the Weberian case for "legalized" dispute resolution in the following terms:

[I]t must be recognized that in most cases it is not the resolution of the specific dispute under consideration which is most important. Rather, it is the efficient and just future functioning of the overall system which is the primary goal of a dispute-settlement procedure.

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<sup>419</sup> See *supra* notes 17-27 and accompanying text. An alternative source of predictability would "manage" trade, which is equally attractive to the exporter, but which does not satisfy the efficiency demands of the market-oriented approach.

<sup>420</sup> Jackson, *supra* note 1, at 95.

<sup>421</sup> GATT, B.I.S.D (26th Supp.) at 210 (1980) [hereinafter Dispute Resolution Understanding].

<sup>422</sup> Jackson, *supra* note 1, at 96.

Thus, it may be more important to *clarify and provide predictive guidance about the application of a rule*, than it is to determine that a 'judgment' is acceptable to either or both parties of the immediate dispute.<sup>423</sup>

Of course, the infamous "failure" of this method was that the panels were not judicial in nature, and thus issued "reports" rather than "decisions." Panel reports could be adopted by the members, thus authorizing countermeasures by the complaining member, but adoption required the unanimous approval all members. Members who "lost" in panel decisions were therefore able to prevent panel reports from having any binding effect.

Rationalization of GATT dispute resolution took a major step forward with the adoption of the WTO Charter, which includes an enhanced "Understanding on Rules and Procedures Governing the Settlement of Disputes" as its Annex 2.<sup>424</sup> Under the Dispute Settlement Understanding, panel reports no longer need to be adopted by all members to become effective, but instead will become effective unless the new Dispute Resolution Body decides by consensus *not* to approve the report.<sup>425</sup> Consensus requires that no member present at the relevant meeting of the Dispute Resolution Body formally object to the decision,<sup>426</sup> so in effect, a panel report supported by even one member cannot be blocked. The Dispute Settlement Understanding thus advances the intended role of WTO dispute settlement as "a central element in providing *security and predictability* to the multilateral trading system."<sup>427</sup>

How this legalization project will affect Japan, South Korea and Taiwan remains to be seen. If Japan continues its practice of avoiding formal antidumping actions, it is likely to benefit overall from the additional discipline the new regime will impose on Japan's export

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<sup>423</sup> *Id.* at 112 (emphasis added).

<sup>424</sup> WTO Charter, *supra* note 7, at Annex 2.

<sup>425</sup> *Id.* at art. 16(3).

<sup>426</sup> *Id.* at art. 3, n.1.

<sup>427</sup> *Id.* at art. 3(2)(emphasis added).

markets. Taiwan's antidumping practice is already largely constrained by the GATT framework, but until Taiwan becomes a member of the WTO it will not be subject to the WTO's dispute resolution discipline, so only one of the two legalization tools will affect Taiwan. South Korea may have the most difficulty with this increased discipline, because while it is under increasing WTO and bilateral pressures to liberalize imports, South Korea does not accumulate the huge trade surpluses of Japan and Taiwan. This increased discipline therefore threatens one of South Korea's protectionist tools at a somewhat difficult time.<sup>428</sup>

### *B. Hegemony of Protectionist Ideology*

A second factor common to Japan, South Korea and Taiwan that can be expected to influence antidumping enforcement is a shared ideological attachment to Listian protectionism that arises out of the capitalist development industrial policy. As was discussed above, protectionism was an element of Japan's industrial policy that was later adopted by both South Korea and Taiwan. That Japan, and later South Korea and Taiwan, adopted protectionist measures during initial industrial development should come as no surprise, but for Americans seeking to understand protectionist ideology in these countries, it may be useful to look at protectionist ideology in nineteenth century America, when this country was undergoing industrialization.

#### 1. Comparison with Nineteenth Century United States.

In post-GATT America, free trade rhetoric and ideology has achieved remarkable hegemony, to the extent that "protectionist" has

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<sup>428</sup> For a summary of structural problems arguably inherent in South Korea's development strategy, see Hart-Landsberg, *supra* note 123, at 282-307.

taken on a connotation akin to "Luddite."<sup>429</sup> This is somewhat ironic, however, because protectionist theories enjoyed a similar degree of hegemony through the latter nineteenth and early twentieth centuries; a time when America was experiencing enormous industrial expansion.<sup>430</sup> Although Adam Smith, David Ricardo, and other English free trade theorists were well known in America, strategic Listian protectionism was consistently advocated as the means to develop domestic industry. While before the Civil War there had been genuine political debate over the merits of free trade versus protectionism,<sup>431</sup> in the latter half of the nineteenth century the Republican Party was consistently protectionist, while the Democratic Party proposed tariff reforms that did not challenge the basic protectionist system.<sup>432</sup> Although the European countries were not as protectionist as the United States, only Great Britain advocated free trade,<sup>433</sup> and her attitude was rightly seen by both Democrats and Republicans as an element of British imperialism.<sup>434</sup> As the world's preeminent industrial and trading power, Britain's interests were best served by free access to others markets, and because they were far ahead technologically the British felt they had little to fear from imports.<sup>435</sup>

A large number of Americans now seem to view protection for industry as a sort of dirty favor negotiated between "special interests"

<sup>429</sup> See generally, GOLDSTEIN, *supra* note 16. This is not to suggest that protectionist sentiments are not alive and well in the United States, but protectionism has been forced into an ideological and rhetorical "underground." Any sophisticated protectionist will now employ euphemisms such as "level playing field," or "fair trade," with the result that these phrases have themselves become tainted.

<sup>430</sup> *Id.*

<sup>431</sup> Opposition to protectionism came from Southern agricultural interests, who imported their machinery, and from Northern trading interests. Pro-protection calls were primarily from Northern manufacturers. GOLDSTEIN, *supra* note 16.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.* at 95.

<sup>434</sup> *Id.* at 128. According to HUDSON, *supra* note 14, the fact Britain's leaders saw free trade primarily as a way to further national interests has been largely ignored by later free trade economists.

<sup>435</sup> The parallels with America in the 1950s and 1960s are striking.

and weak politicians, usually in Congress, but sometimes in the Oval Office. Consistent with free trade theory, protectionism is seen as coming at the expense of the general welfare.<sup>436</sup> While these views may reflect political and economic reality, they are diametrically opposed to the protectionist tradition of nineteenth century America, which I believe has many parallels in the trade policies of Japan, later adopted by South Korea and Taiwan.

In the first half of the nineteenth century the primary protectionists were the Federalists, and later the American Whigs. In his 1791 *Report on Manufactures*, Alexander Hamilton stated,

[T]he influence of habit, the fear of failure, the inequalities existing between nations in point of industrial organization, the granting of aid to established industries by rival nations, and the concerted action of competitors through the media of dumping, underselling, extension of long-term credit and other devices might easily ruin or seriously hamper the existence of any newly established industry.<sup>437</sup>

Hamilton, and later the American Whigs, believed in active government intervention to support industry, and felt that supporting developing industries included providing protection from imports.<sup>438</sup> The public interest was seen to be coterminous with economic

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<sup>436</sup> BHAGWATI, *supra* note 6; Bovard, *supra* note 418; cf. James Brander, *Rationales for Strategic Trade and Industrial Policy*, in Paul R. Krugman (ed.) STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS (1986).

<sup>437</sup> THE WORKS OF ALEXANDER HAMILTON, (Henry C. Lodge ed., 1904)(cited in GOLDSTEIN, *supra* note 16, at 31).

<sup>438</sup> The American Whigs were opposed by the Jeffersonian and Jacksonian Democrats on the grounds that protection for industry enriched industrialists at the expense of the consuming public, and because Southern Democrats represented agricultural interests who needed to import equipment and who were less interested in industrialization. GOLDSTEIN, *supra* note 16, at 33-74.

growth, rather than with economic efficiency,<sup>439</sup> which parallels distinctions made between "efficient" and "effective" economic policy in Japan. This Whig belief in government intervention in the economy to support industry is barely alive in American political debate circa 1995,<sup>440</sup> but it has direct parallels with the industrial policies discussed here.

The Whigs espoused a national unity of interests among all Americans, which denied the inevitability of class conflict. This seems to be a common stance among protectionists, presumably because they seek to justify protection on the basis of long term national goals such as industrial development or agricultural self-sufficiency.<sup>441</sup> This also has its counterpart in modern Japan, which, as we have seen, looked for ways to industrialize without the class conflict Europe had experienced.<sup>442</sup> The architects of Japan's industrial policy seem to have felt a similar commitment to placing economic growth before efficiency, where efficiency is defined in terms of a static economic model.

After the Civil War the Whig party was replaced by the Republicans as the party of industry, and protectionist economics increased its hold on political debate.<sup>443</sup> Although nineteenth century

<sup>439</sup> MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780 TO 1860*, at 260-61 (1977)(associating the imperative for economic growth with instrumentality in the law).

<sup>440</sup> The Clinton Administration includes advocates of a more active American industrial policy, notably Robert Reich and Laura Tyson, but with a Republican majority in Congress that wants to abolish the Commerce Department, it seems unlikely that any funding will be available for proactive industrial policy measures.

<sup>441</sup> To deny the existence of a national good separate from the aggregate of individual interests, as free trade rhetoric does, complicates a protectionist program because it implies that an accurate cost/benefit analysis can be done for any protectionist measure. Whether or not the protectionists were right to claim a value for such national interests, doing so makes the weighing of interests more difficult, or even impossible.

<sup>442</sup> *Supra* notes 43-46 and accompanying text.

<sup>443</sup> On the dominance of protectionist ideology between the Civil War and the Great Depression, see GOLDSTEIN, *supra* note 16, at 81-136.

America is sometimes seen as a high point of laissez faire and Social Darwinism, these doctrines were never extended to the point of subjecting American industry to international competition.

## 2. "Stickiness" of Protectionist Ideology.

In her study of United States trade policy, Judith Goldstein argues that it was only the shocks of the Great Depression, the Democratic party's takeover of Congress and the Presidency, and World War II that allowed free trade ideology to become dominant in the United States.<sup>444</sup> These shocks were required before political change could occur, even though academia had abandoned protectionist economic theories much earlier. Political elites had been educated in free trade ideology for 30 to 40 years before the political change came, and the political change came long after economic conditions indicated that America's economic interests would have been better served by freer trade.<sup>445</sup>

I believe that protectionist thought is as hegemonic in Japan, South Korea and Taiwan today as it was in America until the early twentieth century, by which I mean that most people believe that protection of domestic industry, even if it results in higher prices, is basically the correct policy, and good for their countries. Although protectionism in these nations is not enforced by "log-rolling" politicians as it was in pre-1934 America, because the industrial policy bureaucracies are more insulated than the United States government from political forces, it may be that these countries will retain their protectionist orientations even longer than did the United States. If the Uruguay Round had failed over Japan's and South Korea's protection of their agricultural markets, for example, it might have provoked the kind of ideological realignment that occurred in America in the 1930s. Short of that kind of shock, however, it appears that GATT and bilateral pressures to liberalize will not affect the

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<sup>444</sup> *Id.* at 136-139.

<sup>445</sup> *Id.* at 88, 135-36.



underlying protectionist ideology, but will be seen as simply a price that must be paid to ensure access to foreign markets. Even if local leaders in Japan, South Korea or Taiwan believe strongly in free trade they do not need to say so publicly, and doing so would only invite a protectionist backlash. They can pursue import liberalization while casting it as foreign pressure, and thus avoid the politically risky and difficult task of trying to sell the populace on free trade as a guiding ideology.

Although both political parties in the United States have their protectionist moments, the Republican party includes free trade as a consistent element of its political platform, while the more conservative wing of the Democratic party generally agrees. This type of political commitment to free trade seems absent in the nations discussed here, at least so far. This may reflect a basic difference in political economies, because whereas labor in the United States is now too weak to bring about broad protectionism, even if it wished to, in Japan, South Korea and Taiwan it seems that one of the ways labor has been kept weak is through an implied promise of protectionism to avoid market-driven layoffs.<sup>446</sup> For these nations to truly abandon protectionism might require a drastic realignment of their societies.

### 3. New Confidence in Protectionist Ideology.

Although economic progress is usually equated with financial and trade liberalization, the new self-confidence Japan, South Korea and Taiwan are demonstrating in their dealings with the West may actually work against an ideological reorientation toward free trade.<sup>447</sup> This self-confidence is evident in new relativist formulations of "Asian democracy," "Asian human rights," and "Confucian values," but in

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<sup>446</sup> I would not suggest that this has been the only way labor has been kept weak in these nations, but I do believe an implied promise of little import competition can play a role in pre-empting labor activism.

<sup>447</sup> From *THE JAPAN THAT CAN SAY 'NO'* to Lee Kwan Yu's discourses on the failings of Western liberal democracy, to the rehabilitation of Confucius in the People's Republic of China, this phenomenon is operating in many areas.

economics it sometimes appears as a form of "Asian exceptionalism," reminiscent of the "exceptionalism" proclaimed by nineteenth century Americans.<sup>448</sup> Northeast Asia's industrial policies are now beginning to be laid out in public, for example, in the World Bank's Asian Miracle Report,<sup>449</sup> and to the extent that free trade ideology is seen as a foreign ideology that conflicts with what has been working so well, growing economic and social self-confidence may make rejection easier. As was the case with the United States in the nineteenth century, these countries that are developing successfully with protectionist policies may see calls for free trade by their trading partners as simply self-serving.

#### 4. GATT Membership and the Maintenance of Protectionist Ideology.

Japan and South Korea have benefitted greatly from the GATT's historical practice of accepting nations with protectionist trade regimes, then using GATT discipline to force liberalization. This practice, which certainly seems related to the role of the Bretton Woods system in the Cold War, highlights one of the contradictions between free trade rhetoric and GATT practice. Free trade rhetoric, based on Ricardian comparative advantage, holds that any country will benefit most from freeing imports and exporting those products in which it holds a comparative advantage. The GATT's practice, however, seems to admit that a developing country benefits most when it can export relatively freely, while still being able to control imports. This is of course the essence of the export-driven

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<sup>448</sup> This recalls the "exceptionalism" felt by nineteenth century Americans, which held that America's unique circumstances allowed it to avoid the class strife which began plaguing Europe as industrialization proceeded. On the relationship between exceptionalism and protectionist ideology in America, see Goldstein, *supra* note 16, at 34, 86-87. Japan's lifetime employment system, though in the best of times only applicable to certain segments of the workforce, is one facet of this "exceptionalism" that is now under severe strain.

<sup>449</sup> WORLD BANK POLICY RESEARCH REPORT, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY (1993).

development model, but it contradicts free trade theory to the extent that it extends beyond "infant" industry protection. The alternative policy for the GATT would have been to demand real liberalization as a condition of GATT entry, which would have forced countries to make the difficult adjustments prior to entry, and would certainly have delayed entry for many developing countries.

An important aspect of this "join, then liberalize" pattern has been that it inadvertently encourages the use of nationalism as a tool of protectionism. Rather than forcing prospective members to undertake the difficult political task of selling their populaces on the benefits of freeing imports as well as exports, the reality, at least in the countries discussed here, has been that the governments have been able to cast import liberalization as the result of foreign pressure. Given the history of Western Imperialism in Asia, the colonization of Taiwan and Korea, and Japan's defeat in World War II, any of these governments can easily tap into a reserve of nationalism if they portray themselves as resisting foreign trade pressure.

Import liberalization has also been largely separated from the ability to export by the fact that the ability to export, particularly to the United States market, came before real pressure to liberalize imports began. In a sense, publics became used to the idea that a product need only be good and cheap to compete on the United States market, while never being forced to take the same view of foreign products in their own markets. This situation has been exacerbated in South Korea by the way in which imports have been carried out and publicized. Although South Korea imports a wide range of products, from grain to machine tools to cosmetics, it is "luxury" consumer good imports that become the center of media and public attention.

In addition, controlling imports through import licensing has tended to favor those who have government connections or access to independent sources of hard currency. At least in the South Korean context, this has tended to associate importing with cronyism and

privilege.<sup>450</sup> Korean importers of consumer goods are often connected in some way to *chaebols* or *chaebol* families, because they have independent sources of capital not subject to government credit allocation policies. It is therefore quite easy for protectionists to exploit class antagonisms to decry such imports, though from a strict consumer welfare perspective, middle and lower class consumers would certainly benefit from lower priced imports.

If these suggestions about the strength of protectionist ideology in Japan, South Korea and Taiwan are correct, antidumping enforcement is unlikely to encounter the sustained, ideological attacks that it does in the United States. This is not to say that ideology alone can determine trade policy outcomes, but so long as protectionism is a generally accepted trade orientation, enforcers of antidumping regimes will have more political space to protect local producers, should they choose to do so.

### C. "Strong" Bureaucracies and the Lack of Effective Judicial Review of Antidumping Actions

The rule of law in the Western liberal conception requires that the state also be subject to the laws of the land. In modern terms this entails, *inter alia*, that bureaucratic discretion be exercised only within limits allowed by law, and that private parties have the right to obtain court review of bureaucratic measures. Weber and others have argued that a state's adherence to the rule of law increases its legitimacy, and thus its strength,<sup>451</sup> and this element of the liberal paradigm has been enshrined in the legal systems of Japan, South Korea, and Taiwan. Antidumping determinations are state actions with potentially substantial effects on a range of parties in society, so one would expect judicial review of antidumping determinations to be available in Japan, South Korea and Taiwan. In addition, Article 13 of the Antidumping Code provides that each member having an

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<sup>450</sup> This began during the Rhee regime, and continues to this day. On rents earned through importing during the Rhee regime, see WOO, *supra* note 36, at 67.

<sup>451</sup> Trubeck, *supra* note 415, at 749.

antidumping regime shall maintain mechanisms for review of that regime's decisions.<sup>452</sup> Since the Antidumping Code was enacted in 1979, judicial review of antidumping determinations has become widespread in traditionally active antidumping jurisdictions such as the United States and the European Union.<sup>453</sup>

Yet, administrative review arguably exists in considerable tension with elements of the capitalist development state discussed here.<sup>454</sup> Particularly in the economic sphere, such a state must be able to implement its economic agenda generally free from capture by private interests. Japan, South Korea and Taiwan have clearly been strong states in this sense,<sup>455</sup> largely through their professionalized and relatively insulated bureaucracies. Part of the "insulation" for which these bureaucracies are known, however, arises from the reality that their decisions are seldom subject to outside review. This phenomenon extends to decisions made in connection with antidumping enforcement.

### 1. Judicial Review of Antidumping Decisions in Japan.

In democratic Japan, limitations on judicial review are maintained largely through discretion-enhancing interpretations of justiciability, standing, and scope of bureaucratic discretion.<sup>456</sup> To be

<sup>452</sup> The Antidumping Code requires that "[e]ach Member shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations ... Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question." Antidumping Code, *supra* note 19, art. 13.

<sup>453</sup> Edwin A. Vermulst, *The Antidumping Systems of Australia, Canada, the EEC and the USA*, in *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* 425, 429 (John H. Jackson & Edwin A. Vermulst eds., 1989).

<sup>454</sup> For an in-depth exploration of this problem, see FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987) (especially Chapter 5: Legal Informality and Industrial Policy).

<sup>455</sup> Though, with its relatively advanced democracy postwar, Japan has had to be more creative than the other two in maintaining its leadership role.

<sup>456</sup> UPHAM, *supra* note 454, at 170.

reviewable under the Administrative Case Litigation Law (ACLL), an agency action must constitute an "administrative disposition or other exercise of public power," which standard has been interpreted by the Supreme Court as limited to administrative acts that "immediately and directly create or delimit private rights and duties."<sup>457</sup> If this justiciability hurdle is overcome, a potential plaintiff must then demonstrate injury to its "legal" as opposed to "factual" interests.<sup>458</sup> Finally, if justiciability and standing are shown, the potential plaintiff must then demonstrate that the government agency acted outside the scope of the authority granted to it under the relevant statute.<sup>459</sup>

Although in environmental litigation and other areas these threshold barriers have perhaps been lowered in recent decades, typical industrial policy measures remain beyond the reach of judicial review.<sup>460</sup> Justiciability is avoided because most industrial policy measures are informal, and thus not the final and legally formal acts that would directly affect legal rights and duties.<sup>461</sup> Standing has been limited historically to "individual interests that an administrative agency has been specially charged by statute with protecting."<sup>462</sup> Under current doctrine, this excludes diffuse interests such as those of consumers, labor unions, environmentalists, or even customer or supplier industries.<sup>463</sup> Finally, most statutes relevant to industrial policy grant wide agency discretion, so that it would be difficult for a plaintiff to show that the agency had applied criteria not authorized under the relevant statute, or had reached a decision inconsistent with the terms of that statute.<sup>464</sup>

Japan's antidumping practice to date has been marked by a

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<sup>457</sup> *Id.* at 170-71.

<sup>458</sup> *Id.* at 171.

<sup>459</sup> *Id.* at 173.

<sup>460</sup> *Id.* at 176.

<sup>461</sup> *Id.* at 171. See also, Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984).

<sup>462</sup> UPHAM, *supra* note 454, at 171-72.

<sup>463</sup> *Id.* at 173.

<sup>464</sup> *Id.* at 173.

preference for informal dispositions, and thus the formal legal actions required for justiciable challenges are rare. Even if formal legal action were taken, a leading Japanese trade practitioner states that it is "widely acknowledged" that a decision to impose an anti-dumping duty would not be reviewable for two reasons.<sup>465</sup> First, such a decision would be implemented finally by a Cabinet order, which under current practice arguably would not be subject to judicial review.<sup>466</sup> Second, any potential plaintiff would lack standing,<sup>467</sup> which presumably means that no potential plaintiff could possess a legal as opposed to a merely factual interest in the disposition. As noted above, given Japan's restrictive standing doctrines one would expect that groups representing more generalized interests, such as consumer groups or unions, would lack standing to either challenge antidumping duties, or to challenge rejections of antidumping requests. What would be more difficult to justify legally would be a refusal to recognize standing in a foreign exporter or a Japanese importer positively affected by the imposition of antidumping duties. This issue has not yet arisen, but as Hagiwara notes, this is a very sensitive issue because its resolution could affect the availability of judicial review of other administrative actions.<sup>468</sup> In spite of its GATT obligation to provide judicial review, one would expect the Japanese government to be reluctant in granting rights of judicial review to foreigners that are not available to its own citizens.

## 2. Judicial Review of Antidumping Decisions in South Korea.

South Korea provides for judicial review of agency actions through the Administrative Litigation Act (ALA), which is based on

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<sup>465</sup> Shintaro Hagiwara, *The New Anti-dumping Code: What it Means for Japan* 7 (Oct. 9-14, 1994) (Paper Presented at the International Bar Association 25th Biennial Conference, copies available from the International Bar Association, London).

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

Japan's ACLL of 1962.<sup>469</sup> Given the nation's short history of democracy, it is not surprising that until recently its government has not relied upon legal mechanisms such as judicial review to buttress its legitimacy.<sup>470</sup> Now that democracy is taking root it might be hoped that judicial review of administrative actions would become fully available; however, this does not appear to be happening with any great speed.<sup>471</sup> Given the basic similarities in the industrial policies and the legal orders of South Korea and Japan, it should come as no surprise if the South Korean government also resists effective judicial review in order to preserve the flexibility and discretion of its agencies in implementing economic and trade policies.

Turning to judicial review of antidumping decisions, South Korea's antidumping law also provides no avenue for judicial review, so a potential plaintiff would look to the ALA.<sup>472</sup> Under the ALA, justiciability requires that the challenged agency action be an "administrative act."<sup>473</sup> According to Supreme Court doctrine, an administrative act must: i) constitute an exercise of public authority, ii) cause direct legal effect to the potential plaintiff, iii) constitute the final and conclusive stage in the administrative process, and iv) be at the point of having immediate effect.<sup>474</sup> The second prong of this test seems to incorporate standing concerns, presumably leaving an examination of the scope of agency discretion until justiciability and standing have been found. As in Japan, standing rules appear to deny

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<sup>469</sup> Joon-Hyung Hong, *The Rule of Law and Administrative Law Reforms in Korea* 59 ( ) (unpublished manuscript, on file with author).

<sup>470</sup> On recent progress in establishing the rule of law in South Korea, *see generally*, James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex*, 40 *AMERICAN JOURNAL OF COMPARATIVE LAW* 73 (1992); James M. West & Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence*, 1 *HARVARD HUMAN RIGHTS YEARBOOK* 135 (1988).

<sup>471</sup> Hong, *supra* note 469, at 59-61.

<sup>472</sup> Kim, *supra* note 230, at 35.

<sup>473</sup> *Id.*

<sup>474</sup> *Id.*



standing to groups pursuing collective interests.<sup>475</sup>

To date no South Korean antidumping actions have been challenged in South Korean courts. However, existing analysis suggests that judicial review of antidumping actions remains problematic, in spite of South Korea's obligations under Article 13 of the Antidumping Code.<sup>476</sup> Injury findings by the Korean Trade Commission (KTC) do not bind the Customs Deliberation Council (CDC), and thus would arguably be simple inter-ministry recommendations, not final and conclusive administrative acts reviewable under the ALA.<sup>477</sup> If the CDC accepts a KTC recommendation, the CDC sends its recommendation to the Minister of Finance, and as with KTC recommendations, CDC recommendations arguably would not constitute final and conclusive administrative acts.<sup>478</sup> Coming to the end of this progression of informal, and thus unreviewable, recommendations, it appears that under existing Supreme Court doctrine a final Ministry of Finance or Presidential Decree ordering the collection of antidumping duties is also an informal act.<sup>479</sup> Actual collection of antidumping duties by the local customs authority arguably would be a reviewable administrative act, so upon exhausting administrative remedies within the Office of Customs Administration, it might be possible for an injured party to obtain court review of this act.<sup>480</sup> If this is indeed the only way antidumping rulings could be reviewed, then it would seem that review would be limited to positive determinations, excluding negative injury or dumping findings. In addition, the doctrine denying standing to plaintiffs seeking to vindicate collective interests would seem to preclude bodies such as consumer groups or unions from challenging antidumping decisions.

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<sup>475</sup> Hong, *supra* note 469, at 60.

<sup>476</sup> Kim, *supra* note 230, at 36-38.

<sup>477</sup> *Id.* at 36.

<sup>478</sup> *Id.* at 37.

<sup>479</sup> *Id.* This parallels the non-appealability of Cabinet orders under Japanese doctrine. *Supra* text accompanying note 466.

<sup>480</sup> Kim, *supra* note 230, at 37-38.

### 3. Judicial Review of Antidumping Decisions in Taiwan.

Taiwan provides for judicial review of administrative action under the Law of Administrative Litigation Procedure (LALP) and the Law of Organization of the Administrative Court, both of which have roots in the administrative law reforms of Meiji Japan.<sup>481</sup> Although post-World War II Japan abolished its administrative court system and granted jurisdiction over administrative suits to the ordinary courts, Taiwan has retained the Prussian-Austrian administrative court system originally adopted by Meiji Japan.<sup>482</sup>

A party wishing to challenge an agency action may file suit in the Administrative Court, provided, however, that all administrative remedies have been exhausted.<sup>483</sup> The Administrative Court is a court of first and last instance, and although it exists within the judicial system under the Judicial Yuan, its decisions are not subject to review by any other body.<sup>484</sup> The Administrative Court has jurisdiction over "unlawful" administrative actions, which include actions in excess of an agency's authority, or which are abuses of agency power, but do not include decisions which are merely "improper."<sup>485</sup> This distinction between unlawful and improper actions is central to administrative litigation in Taiwan, and turns on a determination of whether the disputed measure was within the discretion of the agency. The general rule seems to be that "acts conferring benefits on individuals or involving elements of expertise or public policy are considered discretionary, while those restricting or invading the rights of

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<sup>481</sup> Li, *supra* note 34, at 84-89. The discussion that follows is not applicable to constitutional challenges to administrative action, which are heard by a Council of Grand Justices, under the Judicial Yuan. Lawrence Shao-Liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 AMERICAN JOURNAL OF COMPARATIVE LAW 509, 516-19 (1991).

<sup>482</sup> Li, *supra* note 34, at 84-86.

<sup>483</sup> *Id.* at 64, 88.

<sup>484</sup> *Id.* at 90. An exception exists for decisions of the Administrative Court challenged on constitutional grounds, which may be heard by the Council of Grand Justices. See Liu, *supra* note 481, at 533-37.

<sup>485</sup> Li, *supra* note 34, at 138.

individuals are not."<sup>486</sup> If an action is found to be within the agency's discretion, the only dispute can be over whether the action was proper or improper, and this will not be reviewed by the Administrative Court.

The Administrative Court has applied this unlawful/improper distinction quite strictly, which has resulted in numerous cases being dismissed for lack of jurisdiction.<sup>487</sup> This has been traced not only to statutory limitations on the Court's competence, but also to a "time-honored tradition of deference to administrative discretionary power."<sup>488</sup> In addition, the Administrative Court is limited to hearing disputes arising out of "administrative dispositions," and strict interpretation of this justiciability standard has also worked to limit review of agency measures.<sup>489</sup> General policy measures do not qualify as administrative acts reviewable by the Court, and in the past both the Court and various agencies have used this distinction to avoid Court review of agency actions.<sup>490</sup>

Although no information was found concerning judicial review of antidumping actions, there are reasons to be pessimistic about the potential for effective judicial review. Actions taken pursuant to Taiwan's new Foreign Trade Act are potentially subject to judicial review, but for ordinary actions the requirement to first exhaust administrative remedies would require appeals to the Board of Foreign Trade, the Ministry of Economic Affairs, and finally, to the Executive Yuan, before a complaint could be brought to the Administrative Court.<sup>491</sup> In addition, as is the case in South Korean practice, it seems quite possible that all steps in the antidumping process could be held to be merely informal recommendations, except for the final Cabinet action ordering the collection of antidumping duties.<sup>492</sup> If Taiwan, like

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<sup>486</sup> *Id.* at 140.

<sup>487</sup> *Id.* at 137-42.

<sup>488</sup> *Id.* at 145.

<sup>489</sup> *Id.* at 147-48.

<sup>490</sup> *Id.* at 147-54.

<sup>491</sup> WU, *supra* note 322, at 372.

<sup>492</sup> See *supra* text accompanying notes 476-80.

South Korea, finds that Cabinet actions are not subject to judicial review, then the only remaining option would be to seek review of the actual collection of the duties by the customs authorities.

4. Prospects for More Effective Administrative Law in Japan, South Korea, and Taiwan.

Recent developments in administrative law in Japan, South Korea and Taiwan may signal growing pressure on these governments to move away from bureaucratic discretion and toward transparency and accountability. Japan's 1993 Administrative Procedure Act, while apparently less far-reaching than might have been hoped, at least recognizes "administrative guidance" as a legal phenomenon.<sup>493</sup> In 1994, Korea enacted the Basic Act on Administrative Regulation and Administration of Civil Affairs (AARACA), which empowers a National Grievance Council to investigate citizen complaints and could potentially limit arbitrary agency actions and the use of "internal" guidelines.<sup>494</sup> There has also been discussion of a Korean Administrative Procedures Act and a freedom of information law, although so far neither have been enacted.<sup>495</sup> Finally, Taiwan's Council of Grand Justices has made progress in recent years in constitutional review of legislation and administrative actions,<sup>496</sup> though it is not clear whether the Administrative Court has been moving forward as quickly as the Council.

These moves toward reform have the potential to strengthen judicial review over agency actions, including antidumping determinations, but it remains to be seen whether they will prove to be of practical benefit. If standing rules remain restrictive, if judges are

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<sup>493</sup> Lorenz Kodderitzsch, *Japan's New Administrative Procedure Law: Reasons for its Enactment and Likely Implications*, 24 LAW IN JAPAN: AN ANNUAL 105, 117 (1991).

<sup>494</sup> HONG, *supra* note 469, at 49-51.

<sup>495</sup> *Id.* at 51-54, 58-59. See also, James M. West, *Administrative Procedure in Korea*, AMCHAM-KOREA JOURNAL, Dec. 1992, at 9.

<sup>496</sup> LIU, *supra* note 481, at 534-39.

not willing to exercise the activism necessary to extend the jurisdiction of their courts over agency actions, if aggressive and reasonably priced lawyers are unavailable, or if damage awards are too limited to make suits economically feasible, then these apparent developments in the laws will be of little practical use.

#### *D. Weakness of Both Protectionist and Anti-Protection Forces in Civil Society*

The key attribute of the strong state is its ability to act autonomously from particular interest groups in society. In the area of trade policy this seems to result in weaknesses in both protectionist and anti-protection forces in the civil societies of Japan, South Korea, and Taiwan.

##### 1. Weakness of Protectionist Forces.

Despite the basically protectionist orientations of the industrial policies of Japan, South Korea, and Taiwan, the strength of these states may make the abandonment of protection easier than for "weaker" governments, which are potentially more penetrable by the natural constituents of protection. Part of the strength of these states has come at the expense of an effective voice for organized labor in government policy, including industrial policy.<sup>497</sup> As Goldstein and others have pointed out, the owners of industrial corporations may be protectionist or not, depending upon the particular circumstances, and they cannot be counted upon to support protection if they feel it will injure their ability to export. This is especially true of multinational corporations, which have production facilities around the world, and which depend heavily on the free movement of goods and capital. The story is different for organized labor, however, which represents

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<sup>497</sup> On Japan, see VAN WOLFEREN, *supra* note 102, at 65-72. On South Korea, see James M. West, *South Korea's Entry into the ILO: Perspectives on Corporatist Labor Law* (1986)(unpublished LL.M. thesis, Harvard Law School). On Taiwan, see Cumings, *supra* note 30, at 75.

those who feel the effects of import penetration in the form of lost jobs and/or downward pressure on wages.

By suppressing as best they can the emergence of strong, politically effective unions, Japan, South Korea, and Taiwan may have preserved the ability to reverse course on protectionism more easily than might be expected, given their histories of reluctance to open their markets. There is nothing inherently protectionist about their industrial policies, and as we have seen, Japan, South Korea and Taiwan have been only selectively protectionist for many years. At this stage the main visible and politically active opposition to import liberalization appears to come from agricultural interests, who have enjoyed disproportionate political representation in Japan, South Korea, and Taiwan. Rural populations have declined drastically in each of these nations since their modern political systems were established, however, and as political power shifts from rural to urban voters, it may be that political pressure for agricultural protection will decline. If such a shift occurs, the economic bureaucracies could find themselves able to change quite quickly, provided that they can overcome the "stickiness" of protectionist ideology, their past policies, and their own bureaucratic inertia.

## 2. Weakness of Anti-Protection Forces.

While societal forces for protectionism may be weak, forces that could be expected to oppose protectionist measures are also relatively weak in these nations. Anti-protection activity can be defined as "steps taken by individuals or groups to influence government decisionmaking on a particular trade issue [...] when the stated preference of the actor is to prevent or minimize new trade restrictions."<sup>498</sup> Interests engaging in anti-protection activities can be divided between: i) general interests, such as household consumers, multinational corporations, and business coalition organizations, and

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<sup>498</sup> I.M. DESTLER & JOHN S. ODELL, *ANTI-PROTECTION: CHANGING FORCES IN UNITED STATES TRADE POLITICS* 23 (Institute for International Economics, Policy Analyses in International Economics No. 21, 1987).

ii) special anti-protection interests such as exporters, business and industrial import users, retailers, and targeted countries' exporters and governments.<sup>499</sup> General anti-protection interests are those whose members gain broadly from trade, but gain only marginally from trade in any particular product.<sup>500</sup> Special anti-protection interests are those who will be affected by import restrictions on specific products.<sup>501</sup> At least in the United States context, general anti-protection interests tend to be less active than specific interests in opposing trade restrictions on particular products,<sup>502</sup> which is the type of protection sought in antidumping actions. Although this topology was developed for purposes of analyzing anti-protection activities in the United States, any market economy engaged in international trade should produce a similar array of interests.

a. *Weakness of general anti-protection forces.*

One general anti-protection force that is noticeably weak in Japan, South Korea, and Taiwan is independent consumer groups. To a certain extent, the corporatist natures of these societies have resulted in the "penetration" or co-opting of independent groups that one would expect to arise in the civil society of a capitalist democracy, including consumer groups.<sup>503</sup> This can be expected to change with the growth of political and social pluralism in these societies, but at present it seems unlikely that a consumer group in one of these nations would assert itself legally or politically to oppose an antidumping or other protectionist measure.

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<sup>499</sup> *Id.* at 31, 35.

<sup>500</sup> *Id.* at 31.

<sup>501</sup> *Id.* at 35.

<sup>502</sup> *Id.* at 30.

<sup>503</sup> On consumer behavior in Japan, see LINCOLN, *supra* note 33, at 80-87; VAN WOLFEREN, *supra* note 102, at 52-53. On Taiwan, see WADE, *supra* note 30, at 290-92 (describing recent steps toward a more independent consumer group). On South Korea, see AMSDEN, *supra* note 30, at 131 n.12 (also expressing some optimism).

b. *Weakness of special anti-protection forces.*

Special anti-protection forces are also relatively weak in these nations, due in part, certainly, to economic structures. Particularly in Japan and South Korea, the import trade has been dominated by "general trading companies" (GTCs), which in Japan have been affiliated with the *zaibatsu* and now the *keiretsu*, and in Korea are connected with the *chaebol*. In the anti-protection context, the importance of this dominance is that the economically powerful importers, whose economic interests one would suppose would oppose protection, are connected with industrial groups that are subject to government trade policy controls. An importer that is part of a large manufacturing group must be wary of opposing government industrial policy for fear of consequences to the group's larger interests.

Large-scale retailing interests also might be expected to oppose import restrictions of almost any kind, but at least in South Korea and Japan, large-scale domestic retailers also tend to be associated with large business groups, so they may also be hesitant to openly oppose protectionist government policies. In addition, until quite recently foreign investors in all three nations were blocked from establishing their own large-scale import and distribution subsidiaries, either by restrictions on the granting of unlimited trading licenses, or by size limits on foreign-owned retail space. This hurdle is slowly being overcome in Japan and South Korea, but trade disputes over legal restrictions on large-scale retailing have been serious and protracted. This also can be expected to change with time, and to the extent that large-scale pure foreign or domestic retailers are allowed to grow in economic influence, one can expect them to increase their anti-protection activities.

*E. Economic and Geopolitical Constraints Potentially Influencing Antidumping Enforcement*

In addition to the factors discussed above, which seem to be inherent in the capitalist economic development model, there are



larger economic and geopolitical realities that are likely to influence antidumping practices in Japan, South Korea, and Taiwan. Some factors will be common to two of these nations, if not all three, while other concerns will primarily affect just one nation.

### 1. Issues Common to Japan, South Korea and Taiwan.

All three economies are moving from relatively protected to more open economies, and although they are at different stages of this liberalization process, the very fact of this dynamic suggests that there will be increased pressure for antidumping relief. However, the industrial policy bureaucracies of all three nations still engage in targeting of strategic new industries, which in the past has included both subsidization and protection from foreign competition. If liberalization removes other tools for protecting targeted industries, and if a targeted industry is faced with serious import penetration, the pressure for the antidumping arm of the bureaucracy to assist the strategic industry arm of the same bureaucracy will be strong. Finally, all three nations are losing or have lost their competitiveness in labor-intensive industries. Unless these governments provide long-term protection for such industries, they will be forced to engage in defensive measures to cushion the displacements caused by increased imports. It seems inevitable that antidumping actions against labor-intensive imports will increase as these industries in Japan, South Korea, and Taiwan continue to lose competitiveness.

### 2. Issues Specific to Japan.

Japan's huge trade surpluses already appear to make the government reluctant to use antidumping measures. For Japan, to invoke antidumping measures against manufactured goods from other developed nations could draw additional attention to its skewed intra-industry trade patterns, and could invite retaliation. But Japan may also be reluctant for political reasons to use antidumping measures against its former colonies, or against developing countries in Asia which are growing markets for Japanese products and where Japanese

companies have established factories.

### 3. Issues Specific to South Korea.

Unlike Japan and Taiwan, South Korea has never enjoyed large trade surpluses, except for a few years in the late 1980s. South Korea is dependent upon Japan for imports of capital goods and components for its exports, but at the same time is attempting to lessen this dependence by "localizing" technologies. Such concerns are likely to lead to "Hamiltonian" or "retardation" antidumping actions, particularly if other means for protecting "infant" industries are limited by WTO or bilateral pressures. In addition, wages in South Korea have risen very quickly in connection with increased democracy, which may result in a large number of low-skill, labor intensive industries becoming uncompetitive in a short period of time. Although South Korea might prefer to follow Japan's highly informal, discretionary approach, domestic pressures for protection may be too great.

South Korea also faces interesting political issues with regard to its relations with China and North Korea. South Korea has seen a flood of imports from China since relations between the two were normalized, and has taken a number of "escape clause" actions against Chinese products. So long as China is not a member of the WTO South Korea does not need to conform to WTO rules with regard to Chinese products, but it does need China's cooperation in dealing with North Korea, and it does see China as a new market for its own exports.

### 4. Issues Specific to Taiwan.

Taiwan also has a large trade surplus, particularly with the United States, though it maintains consistent trade deficits with Japan. Taiwan is very concerned about a flood of imports from China if both nations join the WTO, and reportedly is considering invoking the Article XXXV exemption, which allows a country to refuse GATT

treatment to a political adversary.<sup>504</sup> Like South Korea, Taiwan is heavily dependent upon imports of capital goods and high-technology inputs from Japan, and will try to develop its own production to reduce its reliance on Japan. As new Taiwanese competitors are established, Japanese exporters can be expected to keep their prices as competitive as possible, which is likely to lead to antidumping complaints of the "Hamiltonian," or "retardation of industry" types.

## VII. CONCLUSION

In the history of antidumping enforcement in the Bretton Woods era, a pattern developed whereby mature industries in developed countries would seek import relief before quasi-judicial administrative bodies, in relatively open and adversarial proceedings. Often the targets of these actions were newly developed export industries in the countries of East Asia, and other parts of the developing world. In historical terms this represents something of a change in emphasis for antidumping enforcement, which in the nineteenth century "Hamiltonian" view sought to protect "infant" industries, in the original "late developers", from predatory dumping by established and more advanced foreign competitors.

In recent years, Japan, South Korea, and Taiwan have enacted and begun to apply their own antidumping legislation, in ways that reflect their own political and economic circumstances, and perhaps a different view of the state's role in coordinating economic activity. In the "Hamiltonian" pattern, industries in South Korea and Taiwan appear ready to seek protection from dumped imports during their early development, as opposed to during their mature or declining stages, although these "late developers" also now have mature or declining industries needing protection in the pattern prevailing in the West. Japan is now at such a high technological level that "Hamiltonian" antidumping actions seem unlikely, though if Japan had

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<sup>504</sup> Osman Tseng, *Fears of Mainland Products Flooding Taiwan After Gaining GATT Membership*, BUSINESS TAIWAN, Oct. 3, 1994, at \_\_\_, available in LEXIS, Textline Library, Far East File.

no other industrial policy tools to protect an important new industry, an "infant" industry antidumping action would not be out of the question. Japan's antidumping actions to date, few as they are, are primarily standard, developed country attempts to protect labor intensive industries facing price competition from lower cost, foreign competitors.

Finally, the state has played a central role in the development processes of these countries, and the antidumping laws which they have adopted maintain a central role for economic planning bureaucrats. When combined with the relative absence of effective judicial review of administrative action, it appears that the adversarial, quasi-judicial model of antidumping proceedings in the United States will not be followed in Japan, South Korea, and Taiwan, though particularly in the latter two nations, pressures for openness and economic democracy are strong. Although WTO discipline requires the adoption of certain formal elements mirroring those in use in the West, the underlying reality will continue to reflect significantly different beliefs, circumstances, and objectives.

