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## The Development of Laws to Regulate Foreign Trade in the Republic of Korea

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# The Development of Laws to Regulate Foreign Trade in the Republic of Korea

Eun Sup Lee\*

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## I. INTRODUCTION

In the Republic of Korea (Korea) the basic<sup>1</sup> and comprehensive<sup>2</sup> law to regulate international trade is the Foreign Trade Act, where the Minister of Trade and Industry has the final word in applying the laws and regulations of international trade.<sup>3</sup> The provision for Foreign Trade Regulation under Decree Number 39 of the

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1. Eun Sup Lee, *Regulation of Foreign Trade in Korea*, 26 GA. J. INT'L & COMP. L. 135, 138 (1996). The Foreign Trade Act is superior to other Korean statutes relating to foreign trade. Subsequent statutes cannot supersede the Foreign Trade Act in matters of international trade, unless specifically provided for in the later statute. However, if certain provisions of the Act regulate a particular trade which is also regulated by another statute, both statutes must be complied with as much as possible. *Id.* The Foreign Trade Act, Law No. 3895 (1986), amended by Law No. 5211 (1996), art. 6(1), provides that all matters related to international trade are governed by the terms and conditions prescribed in the Act. As a result, even when someone attains permission to import certain goods based on a statute other than the Foreign Trade Act, that person still should obtain permission pursuant to the Foreign Trade Act, if the goods are classified as the restricted approval items under the terms of the Act. *See also* Foreign Trade Act, Law No. 3895, art. 13 (1986). For examples of other statutes where obtaining permission under the Foreign Trade Act is still advisable, see Hemp Control Act, Law No. 2895 (1976), as amended by Law No. 3215 (1979); Agrochemicals Management Act, Law No. 3322 (1980), as amended by Law No. 5023 (1995); Toxic Chemical Substance Control Act, Law No. 1492 (1963), as amended by Law No. 3332 (1980).

2. Eun Sup Lee, *supra* note 1, at 138. The Foreign Trade Act, having been enacted by consolidating other related laws and regulations, is a comprehensive law regarding international trade which operates through several major substantive provisions. *Id.*

3. Sang Don Lee, *Trade Law and Customs of Korea*, in *DOING BUSINESS WITH KOREA* 6 (Thomas J. Schoenbaum & Sang Don Lee eds., 1990) (citing Eun Sup Lee, *supra* note 1, at 137, n.13). Measures taken frequently by the Minister are in the form of administrative guidance, a kind of informal or formal request made by an administrative body for private companies or persons concerned about following certain government policies. For example, the government often influences domestic commercial banks from which trading companies could get loans, except in case of a formal administrative guidance such as directives or orders. Business people are not obliged to follow the guidance. However, because the Minister is in charge of all business administration, few business people would willfully ignore this discretionary guidance. The Minister of Trade and Industry is ultimately responsible for trade administration and as such is given wide discretion in taking measures to promote and regulate trade. Eun Sup Lee, *supra* note 1, at 137.

United States Military Occupation Authority in 1946<sup>4</sup> constituted the first appearance of foreign trade law in Korea. Since that regulation, trade-related laws in Korea have been developed in a series of three major legislative acts (*viz.*, the Foreign Trade Act<sup>5</sup> to administer general trade with foreign countries, the Customs Act<sup>6</sup> to administer customs formalities involving traded goods, and the Foreign Exchange Control Act<sup>7</sup> to administer obligatory rights and liabilities associated with international payments). Additionally, four legislative periods may be delineated to describe the development of trade law in Korea, as detailed in Parts II through V.<sup>8</sup>

This paper discusses the development of the laws regulating foreign trade of goods in Korea and seeks to demonstrate the Korean government's efforts to open domestic markets and establish fair<sup>9</sup> trade systems and practices to both accommodate free trade requirements of the General Agreement on Tariffs and Trade (GATT),<sup>10</sup> and to meet the demands of major trading partners like the United States.

Part II describes the first legislative period involving the establishment and preparation of the Foreign Trade Act of 1957 and covers the time span from August 15, 1945, when Korea was released from the control of the Japanese government, to 1957, when the Foreign Trade Act of 1957 was placed in force.

Part III explores the second legislative period, from December 1957 to January 1967, the period during which the Foreign Trade Act of 1957 was enforced as originally promulgated.

Part IV examines the third legislative period, beginning in January 1967 with the introduction of the Trade Transaction Act of 1967, and ending in December 1986, when the current Foreign Trade Act of 1986 was promulgated.

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4. See *infra* note 14 and accompanying text.

5. Foreign Trade Act, *supra* note 1.

6. See *infra* note 152 and accompanying text.

7. See *infra* note 19 and accompanying text.

8. See *infra* notes 15-150 and accompanying text.

9. There appears to be disagreement about what constitutes "fairness" among various countries that do not share the same socio-economic rationale. For example, subsidies, in the form of direct and indirect governmental intervention in the private sector, which are well received and accepted economic mechanism in Korea as in other developing countries, fail to gain acceptance in the United States. Consequently it is not an easy task to identify whether a subsidy exists in a particular case for purposes of United States countervailing laws. See Moon Soo Chung, *Current United States Regulation of Escape Clause, Antidumping and Countervailing Duties as Applied to Goods Imported from the Republic of Korea*, 13 KOREAN J. COMP. L. 41-54 (1985).

10. General Agreement on Tariffs and Trade, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (Jan. 1, 1948) [hereinafter GATT]. The separate enforcing arm of the GATT and the term GATT were often used from January 1, 1948 to January 1, 1995, to refer to either (1) the Agreement and its organization that conducted negotiations to reduce or end tariffs and trade barriers, or (2) its Secretariat that administered the appointment of panels and their activities aimed at enforcement of the negotiated agreements. The WTO has taken over the staff of the former GATT Secretariat and will perform both former functions of GATT—negotiation and enforcement. FRANK W. SWACKER, ET AL., *World Trade Without Barriers*, in THE WORLD TRADE ORGANIZATION (WTO) AND DISPUTE RESOLUTION 444, 445 (1996).

Part V focuses on the fourth legislative period, from January 1987 to December 1996, when the Foreign Trade Act of 1986 was modified<sup>11</sup> substantially to cope with the new World Trade Organization (WTO)<sup>12</sup> system and the provisions of the Organization for Economic Cooperation and Development (OECD).<sup>13</sup>

Part VI discusses additional foreign trade mechanisms that are currently in effect in Korea. Finally, Part VII concludes with the recognition that the Korean government may need to further modify the Foreign Trade Act to expand the authority of the Trade Commission and thereby create an independent and quasi-judicial agency that could deflect criticism regarding the fairness and impartiality of decisions resolving trade disputes.

## II. ESTABLISHMENT OF LAWS TO REGULATE FOREIGN TRADE

### A. *Establishment of Trade-Related Laws and Regulations*

After Korea was released from the control of the Japanese government and gained its independence on August 15, 1945, the first objective of Korean economic policy was to stabilize prices. Severe inflation was inevitable due to the lack of domestic production equipment, insufficiency of domestic products, and disruption of distribution mechanisms. Foreign trade policy was mainly focused on imports, and it was hardly possible to establish a comprehensive mechanism to expand foreign trade. Foreign trade in Korea was controlled by provisional administrative orders and decrees. These orders and decrees came first from the United States Military Occupation Authority and then from the President of Korea and the Ministry of Commerce and Industry. During this period, trade between Korea and other nations was regulated without statutes.

On January 3, 1946, the Foreign Trade Regulation<sup>14</sup> was promulgated. The regulation required that all transactions between Korea and other countries should be subject to the United States Military Occupation Authority. This decree was modified some months later to include provisions to regulate import and export business. The decree was further modified in 1947 in order to tighten import and export business licensing. According to the provisions of the decree, all international transactions should be subject to advance permission from the Military Occupation Authority. In general, international business was strictly controlled.

At that time the provisional public notices and decrees were the basis for the administration of trade. However, the trade regulation made under the United States

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11. Foreign Trade Act, Law No. 3895 (1986), amended by Law No. 5211 (1996) [hereinafter Amended Foreign Trade Act].

12. World Trade Organization [hereinafter WTO].

13. Organization for Economic Cooperation and Development [hereinafter OECD]. In addition, Korea has been a member country of the OECD since Dec. 13, 1996.

14. Decree No. 39 of the United States Military Occupation Authority (1946).

Military Occupation Authority was too restrictive and inconsistent. The regulation therefore brought about disorder in Korean foreign trade policy. Consequently, the system of administering foreign trade transactions was not sufficient to get the country through such domestic economic difficulties as the lack of production equipment and need for enhancement of foreign trade volume. Records showed that the number of foreign transactions was insignificant. Yet the notices and decrees had to be modified and repealed continuously because they could not meet the real needs of international transactions. These problems in trade administration were aggravated by the corruption of government officials who had free reign in the absence of a systematic legal authority.<sup>15</sup>

The Korean government responded to these difficulties by adding Article 87 to its Constitution, which established a legal authority for the administration of trade. Article 87 declared "Foreign business transactions shall be under control of the State according to statute."<sup>16</sup>

In 1956, the Export Regulation was enacted to expand exports by guaranteeing partial direct compensation for losses or expenses incurred from exporting.<sup>17</sup> However, this step was not adequate for the consistent administration of foreign trade, so it became necessary to promulgate a comprehensive foreign trade law. The government enacted the Foreign Trade Act in 1957 as the first general law governing foreign trade in Korea.

### B. The Foreign Trade Act of 1957

The Foreign Trade Act of 1957 provided for a Trade Committee, established within the Ministry of Commerce and Industry, to contribute advice and suggestions relating to trade policy planning and other important matters concerning international

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15. Trade Policy Research Group in the Ministry of Trade and Industry, Foreign Trade Act (in Korean), 45 (1988).

16. When the first Constitution was adopted in 1948 by Korea's National Assembly, it established a so-called "state-controlled economic system" by declaring in Article 87 that "[f]oreign business transactions shall be under control of the State." In 1954, the National Assembly appeared to adopt a more "private or capitalistic economic system" when it amended Article 87 to state "[f]oreign business transactions shall be under control of the State according to statute." The revised provision means that foreign trade would be under State control, but the National Assembly would be allowed to establish a more liberalized trade regime. See Sang Don Lee, *supra* note 3, at 3.

17. At that time, Korea's inability to compete successfully in the export business led exporters to sustain losses from their trade. These losses have even continued through today in most fields of heavy and chemical industry. The government should compensate these losses in order to implement their export policy. The major method for compensation of losses was to permit exporters to import in proportion to their export records. Obtaining import licenses was a shortcut to receiving benefits during the period of import control. These controls were strictly followed until the first half of 1980s. See Korea Trade Promotion Corporation, Export of Korea (in Korean) 100-07 (1982); Ministry of Trade and Industry, *infra* note 25, at 369, 371. In addition, the grant of import licenses in proportion to export records could be classified as one kind of government subsidy for purposes of the countervailing laws of economically advanced countries like the United States. See BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW 470 (1991).

trade. The Trade Committee later developed into the Trade Commission, with broader authority, such as the power to investigate industrial injuries. These developments were made effective by means of the enactment of the Foreign Trade Transaction Act of 1967, the Foreign Trade Act of 1986, and the 1996 amendments to the Foreign Trade Act of 1986.

Further, the import of aid merchandise,<sup>18</sup> which had not been included in the approved item lists of the importation and exportation plan of the Ministry of Commerce and Industry, were now included in the plan. This provision was made in view of the importance of importing aid merchandise to the Korean economy. It was repealed in 1967 when the aid was no longer needed.

Also, the Foreign Trade Act of 1957 required the Minister of Commerce and Industry to make public quarterly announcements about importation and exportation plans thirty days before the plans were to be placed in effect. The plans were to contain lists of approved items which could be imported or exported without any restrictions. The system of making public announcements has since developed into publishing public notices on imports and exports under the 1986 Act, thereby meeting the requirements for the promotion of import liberalization planned by the government.

The Minister of Commerce and Industry was given authority by the government to generally direct and supervise import and export operations. However, authority was delegated to the presidents of the foreign exchange banks<sup>19</sup> to grant approval for the import and export of normally approved items (automatic approval items and restricted approval items) and the authority to grant approval for export by normally

18. Foreign aid was the major source of financing the nation's balance of payments deficits throughout the 1950s and the 1960s. In particular, from the nation's liberation in 1945 until the late 1950s, foreign aid was virtually the sole source of foreign capital. As the following table indicates, more than 70% of imports were financed by foreign aid during the period of 1953-60 (this was the period of reconstruction after the Korean War, from 1950-1953), demonstrating how heavily the Korean economy depended on foreign aid. See IL SAGONG, KOREA IN THE WORLD ECONOMY, 96 (1993).

Foreign aid and imports, 1953-1960.  
(Unit: millions of United States dollars except where noted)

Year	1953	1954	1955	1956	1957	1958	1959	1960
Total imports@	345.4	243.3	341.4	386.1	442.2	378.2	303.8	343.5
Aid-financed imports	191.8	149.4	232.8	319.9	374.0	311.0	210.7	231.9
Aid-financed imports as a share of total imports	54.1	61.6	68.2	82.9	84.6	82.2	69.4	67.5
Foreign aid	194.2	153.9	236.7	326.7	382.9	321.3	222.2	245.5
Foreign aid as a share of total Imports	54.8	63.3	69.3	84.6	86.6	85.0	73.1	71.4
Total imports as a share of GNP	9.8	7.4	10.0	13.2	12.0	10.8	10.3	12.7

@ Imports of goods and services.

Source: *Id.* at 100, citing BANK OF KOREA, ECONOMIC STATISTICS YEARBOOK 216 (1962).

19. A "foreign exchange bank" is a general commercial bank that has received approval by the Ministry of Finance and Economy to manage foreign exchange transactions. Article 7 of the Foreign Exchange Control Act, Law No. 933 (1961), amended by Law No. 5040 (1995).

granted settlement of accounts.<sup>20</sup> This provision was enacted to move the regulation of foreign trade away from the so-called “state-controlled economic system,” which was developed as an affirmative measure to approve imports and exports under the 1986 Act,<sup>21</sup> and closer to the “private economic principle.” Also, the provision provided a negative measure to approve imports and exports in restricted special cases under the 1996 amendments to the 1986 Act.<sup>22</sup>

There was a revised provision in the Foreign Trade Act of 1957 regulating the license requirements of importers and exporters. According to earlier regulations, anyone who desired to import or export goods had to obtain an importer or exporter license from the government. However, under this new provision, any native with certain minimum qualifications can automatically create an import or export business without waiting for permission by simply registering with the government. Still, just as before, foreigners desiring to create an import or export business were required to obtain permission from the government. The system of foreign trade licensing was retained until the 1986 Act, when the qualifications for traders was modified, and finally the provision was reduced to a simple notification system under the 1996 amendments.<sup>23</sup> In 1958, by Presidential decree, regulations applying the Foreign Trade Act of 1957 were established. This allowed the Korean trade administration to be carried out according to provisions prescribed by systematic laws.

As described above, the major feature of the Foreign Trade Act of 1957 was the adoption of a less restrictive trade system. Furthermore, it provided incentives for export, such as the furnishing of export subsidies, favorable exporter treatment in respect of tax administration (e.g., tax reduction or tax exemption), or the granting of import licenses. In particular, import licenses were very difficult to obtain from the appropriate authority under the restrictive import policy of that time.<sup>24</sup> However, Korean industries in the 1950s were still very underdeveloped, so such export incentives could not bring about any visible progress.<sup>25</sup> Consequently, foreign trade policy

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20. At that time, in the import and export business, the normal means for granting settlement of accounts were by irrevocable letter of credit, UNESCO Coupon, and documents against payment (D/P) or documents against acceptance (D/A) methods. Settlement by advance payment, deferred payment, or installments were regarded as abnormal. This distinction between the normally granted settlement of accounts and the abnormally granted settlement of accounts was maintained with substantial relaxation until now according to certain provisions of the Foreign Exchange Control Act. *Id.*

21. Foreign Trade Act, *supra* note 1, art. 19.

22. Amended Foreign Trade Act, *supra* note 11, art. 14.

23. *Id.* art. 10.

24. See *supra* note 16 and accompanying text.

25. During this period the records of exports and imports were insignificant as the following table indicates.



was led by heavy regulation of imports, including the allotment of foreign aid funds to finance imports,<sup>26</sup> and import quota and high tariff rate systems.

### III. PERIOD OF THE FOREIGN TRADE ACT OF 1957

#### A. Enforcement of the Foreign Trade Act of 1957

In the late 1950s, Syngman Rhee,<sup>27</sup> President of Korea, dedicated his leadership and energy primarily to solidifying the new nation and rehabilitating the Korean economy. In 1960, he was ousted by a national student revolt. Under the leadership of his successor, Myon Chang, Korea could have laid a foundation for successful export-oriented economic growth by investing in education, introducing land reform,<sup>28</sup> and completing the first stage of import substitution. However, the military coup led by General Chung Hee Park toppled the short-lived Myon Chang government in May 1961, and the nation witnessed the reemergence of a political leadership committed to economic development.<sup>29</sup>

With the beginning of the 1960s came a substantially expanded legal system affecting matters of international trade and supporting the military government's ambitious economic development program. The government of Major General Chung Hee Park,<sup>30</sup> from 1961 to 1963, particularly emphasized export-oriented industrialization. This export-driven policy was energetically promoted, pursuing a

Exports and Imports, 1946-1957.

(Unit: millions of United States dollars except where noted)

Year	Exports	Imports (Ratios of imports by aid funds)	Balance
1946	4	61 (97.0)	-57
1947	27	233 (91.8)	-206
1948	22	208 (94.5)	-186
1949	7	126 (92.6)	-119
1950	11	60 (97.1)	-49
1951	16	133 (80.3)	-117
1952	27	214 (75.3)	-187
1953	40	354 (56.2)	-314
1954	24	243 (63.2)	-219
1955	18	341 (69.3)	-323
1956	25	386 (84.6)	-361
1957	22	442 (86.6)	-420

Source: MINISTRY OF TRADE AND INDUSTRY, THE HISTORY OF FORTY YEARS IN EXPORT DRIVE POLICY (in Korean) 7 (1988).

26. For the ratio of imports by aid funds out of total imports, see *supra* notes 18 and 25.

27. Korea had been under the leadership of Syngman Rhee since the inception of the republic in 1948.

28. Up to that time substantial portions of cultivated land in Korea have been owned by a few wealthy farmers. This concentration in ownership was viewed as a chronic social problem that led to poor agricultural productivity and a deficiency of income distribution. The government implemented land reform to establish a ceiling for individual ownership of cultivated land and also to regulate long-term tenancy in certain cases.

29. IL SAGONG, *supra* note 18, at 3.

30. Korea was under the leadership of Major General Chung Hee Park from 1961 to 1979.

quantitative expansion of exports under the slogan "exports first." The President presided over monthly export-promotion meetings, which began to associate export promotion with patriotism, thereby drumming up public support for exports. According to the 5-year plan for economic development in effect at that time,<sup>31</sup> the basic direction of foreign trade policy was changed from a policy of import regulation to aggressive export promotion.<sup>32</sup> Further, the development of light industry, from which Korea has achieved some competitive advantage, was encouraged for greater expansion of exports.

As a general economic policy, the Korean government concentrated on the establishment of an industrial equipment industry through rapid economic growth, intensive investment, and consumption enlargement.<sup>33</sup> In order to realize these goals, export policy was weighted on the establishment of export orders through increased provisions of export subsidies and through the enactment of the Trade Association Act.<sup>34</sup>

Customs policy focused on several factors: first, the protection of import-substituted industries; second, the sufficient supply of raw materials imported from foreign countries for export products; and finally, the application of low tariff rates or the exemption of duties on products considered impossible to produce in domestic markets. Foreign exchange policy concentrated on restrictions of foreign exchange payments according to supply and demand. Its goals were to improve the international balance of payments and smooth the supply of necessities. It was supported

31. Korea has launched a five-year economic development plan seven times since 1962. In 1962 the government launched their first five-year economic development plan. This first plan period, from 1962-1966, was the most important five-year period in the history of Korean economic development. It was during this period that the government established the basic strategies for economic development to which it adhered over the following decades. See CHO SOON, THE DYNAMICS OF KOREAN ECONOMIC DEVELOPMENT 27 (1994).

Target and performance of the First Five-Year Plan, 1962-1966

Indicator	Targets	Performance
Economic growth rate (percentage)	7.1	7.8
Investment as a share of GNP	22.6	17.0
Foreign saving as a share of GNP	9.2	8.2
Current account in 1966 (millions of dollars)	-246.6	-103.4
Exports in 1966@ (millions of dollars)	137.5	250.4
Annual average percentage change		43.7
Imports in 1966@ (millions of dollars)	492.3	679.9
Annual average percentage change		19.1

@ Denotes figures that represent balance of payments.  
Source: *Id.* at 29.

32. Through the 1960s, the government introduced numerous measures to stimulate exports, such as fiscal incentives with respect to import duties and domestic taxes, preferential interest rates on loans, and a wastage allowance on imports of intermediate goods for export purposes. Furthermore, the government accorded successful exporters a variety of non-pecuniary rewards such as citations and decorations. *Id.* at 146.

33. Ministry of Industry and Trade, *supra* note 25, at 8-11.

34. Trade Association Act, Law No. 711 (1961).

by a policy of finance entrenchment.<sup>35</sup> Under these circumstances, various trade-related laws and regulations were enacted, as described in the following paragraphs.

On September 9, 1961, the Trade Association Act was enacted to regulate the establishment, management, and organization of the import and export trade associations. The Provisional Measures Act for the Sanction of Export Subsidies<sup>36</sup> was enacted on September 18, 1961, to grant subsidies to exporters who met certain requirements under the Act.

To effectuate this foreign-exchange policy, the Foreign Exchange Control Act<sup>37</sup> was promulgated on December 31, 1961. This Act has been modified six times through the current 1996 version. On March 20, 1962, the Export Promotion Act<sup>38</sup> was enacted to provide preferential allocation of foreign exchange to importers of raw materials for use in the manufacture of exported goods. In addition, the Export Promotion Act contained restrictions on imports; specifically, it encouraged importers linking exports with imports, guaranteed freedom of foreign trade activity, and provided import and export financing by joint guarantees with financial institutions. On October 4, 1962, the Export Insurance Law<sup>39</sup> was enacted to maintain and enhance the quality and international reputation of exported Korean goods.

The Constitution of 1962 stated that "the state may regulate and coordinate foreign trade."<sup>40</sup> Thus, the role of government in international trade was changed from "controller" to "coordinator."<sup>41</sup> Consequently, the laws governing international trade in Korea such as the Foreign Trade Act, the Export Promotion Act, and the Provisional Measures Act for the Sanction of Export Subsidies expressed similar goals (i.e., promotion of exports, adjustment of imports, maintaining balance of international payments, and accelerating economic development).<sup>42</sup>

In 1964, the government began operating the Comprehensive Export Promotion Measure to encourage exports by planning export promotions and examining the results. That same year Korea achieved an economic milestone: total annual exports of 100 million dollars.<sup>43</sup> The government celebrated this accomplishment by naming November 30 "Export Day."<sup>44</sup> On the anniversary of Export Day, the President

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35. Ministry of Industry and Trade, *supra* note 25, at 61-63.

36. Provisional Measures Act for the Sanction of Export Subsidies, Law No. 716 (1961).

37. Foreign Exchange Control Act, *supra* note 19.

38. Export Promotion Act, Law No. 1033 (1962).

39. Export Insurance Law, Law No. 2063 (1968), amended by Law No. 3107 (1976). In Korea, export insurance covers the political and commercial risk in international transactions and protects all interests that engage in the export business including manufacturers of exported goods, bankers that finance exporters, foreign direct investors, and constructors doing business in foreign countries. This insurance is operated by the Korean Export Insurance Corporation, a non-profit government institute.

40. S. KOREA CONST. art. 119 (1987). This clause, modified in the 1987 amendments to the Constitution of Korea, currently states: "the state may regulate and coordinate economy." *Id.*

41. Sang Don Lee, *supra* note 3, at 4.

42. Trade Policy Research Group in the Ministry of Trade and Industry, *supra* note 15, at 24.

43. *See infra* note 50.

44. Sang Don Lee, *supra* note 3, at 4.

confers awards to business people who have made exemplary contributions to the annual promotion of exports.<sup>45</sup>

That same year the foreign exchange system was changed from a fixed exchange rate system to a single flexible exchange rate system.<sup>46</sup> With the introduction of a flexible exchange rate the import quota system was repealed. Thus, the quantitative restrictions on foreign exchange and imports were transferred to an indirect control method, such as the imposition of import tariffs and advance payment on high scale imports. After the flexible exchange rate was introduced, the export support system gradually shifted from direct support methods (like export subsidies and import-export linkages), to indirect methods (like export financing and exemption of customs on raw materials for exported products).<sup>47</sup> Also, a local letter of credit<sup>48</sup> system was operated to finance the domestic supplies of export goods. In 1967, Korea became a member of the General Agreement on Tariffs and Trade (GATT)<sup>49</sup> and took part in the Kennedy Rounds. The Korean government began changing the basic direction of their trade policy to move towards an open economic system, while still providing for cultivation of international competitive power, domestic consumer protection, and trade liberalization.

Based on the positive effect of these governmental policies, international trade increased rapidly,<sup>50</sup> and the methods of international transactions and their incident

45. In 1987, Export Promotion Day was changed to "Day of International Trade" to reverse Korea's image of being too oriented towards export.

46. The single flexible exchange rate system was a strictly managed floating system in which the value of the Korean Won was modified, within limits, according to the fluctuations of the United States dollar.

47. Even though officials in charge of making trade policy decisions in Korea at that time seemed to think these methods were not subsidies, they could be construed as examples of government subsidies, for example, according to the countervailing laws of the United States. See 19 U.S.C. § 1671 (1997).

48. In Korea, local letters of credit are issued at the request and according to the instructions of the beneficiary of the master credit by his bank, to finance the beneficiary's domestic supplier. The master credit opened by the ultimate buyer, or the sales contract in case of the D/P or D/A payment method, can be used as security for local credit that the beneficiary has to open for his own supplier.

49. GATT, *supra* note 10.

50. During this period the records of exports and imports were insignificant as indicated by the following table.

Exports and Imports, 1958-1967  
(Unit: millions of United States dollars)

Year	Export	Import	Balance
1958	16	378	-362
1959	20	304	-284
1960	33	344	-311
1961	50	283	-233
1962	55	422	-367
1963	87	560	-473
1964	119	404	-285
1965	175	463	-288
1966	250	716	-466
1967	320	996	-676

Source: Trade Policy Research Group in the Ministry of Trade and Industry, *supra* note 15, at 36.

payments began to diversify. For example, payments that were formerly transacted by advance payment or letters of credit began to be transacted by D/A, D/P, deferred payments, counter purchases, or clearing agreements. Further, separate trade laws were required to be consolidated into a single statute for effective application. This was the background of the Trade Transaction Act of 1967, which changed the Foreign Trade Act of 1957.<sup>51</sup>

*B. The Trade Transaction Act of 1967*

The Trade Transaction Act of 1967 replaced the Foreign Trade Act of 1957, the Export Promotion Act, the Provisional Measures Act for the Sanction of Export Subsidies, and the Trade Associations Act. The main provisions of the act are as follows.

*1. Approval of Particular Imports and Exports*

Since the beginning of the 1960s, the circumstances of international trade have changed very rapidly. The growth of world trade increased by 7.6 percent of the annual average rate during the period from 1961 to 1967, and growth of the world's gross domestic product (GDP) was increased by 5.4 percent of the annual average rate during the period from 1963 to 1968.<sup>52</sup> Under these circumstances, most Korean businesses wanted to export their products to foreign countries. Even if they suffered a loss from exportation, businesses could indemnify the loss fully through the government's direct and indirect support measures.<sup>53</sup> It appeared necessary for the Korean government to strictly regulate the qualifications of foreign traders to enhance the reputation of Korean products in international commodity markets.

The Trade Transaction Act of 1967 established a system of Periodic Public Notice for efficient approval of imports and exports and re-established the restricted licensing system that was in force prior to adoption of the registration system by the Foreign Trade Act of 1957. Under this licensing system, an importer or exporter obtaining a trading business license under the provisions of the Trade Transaction Act had to obtain individual permission from the Ministry of Commerce and Industry in order to import or export particular goods.<sup>54</sup> This trade approval system, as well

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51. In Korea, if the government enacts a new act or modifies a previous act, this new act or amended act replaces and repeals the previous act. Therefore, the Foreign Trade Act of 1957, the Trade Transaction Act of 1967, and the Foreign Trade Act of 1986 were all repealed and superseded by the current Foreign Trade Act of 1986, modified in 1996. This is a different dynamic from the fact that, for example, the Tariff Act of 1930 is still effective unless there is any contrary provisions in the new or revised act, even though there have been many enactments or amendments of the Act in the United States.

52. Trade Policy Research Group in the Ministry of Trade and Industry, *supra* note 15, at 25-26.

53. For example, in 1967 the export financing interest from the commercial bank was 6% yearly, while the normal financing interest was 26%. See The Ministry of Trade and Industry, *supra* note 25, at 375.

54. Trade Transaction Act, Law No. 1878, art. 6 (1967).

as the business license system, has played an important role in import and export regulation since Korea changed from a "positive list system"<sup>55</sup> to a "negative list system"<sup>56</sup> in 1967, as required under the provisions of the Periodic Public Notice.

The main provision of the Periodic Public Notice was the comprehensive classification of all traded goods into three categories: (1) automatic approval items, (2) restricted approval items, and (3) prohibited items. The Periodic Public Notice also specified the restrictions on restricted approval items.

According to this classification system, the Korean government was able to make semi-annual public notice of levy limitations and other desired conditions while still continuing to allow importation. This gave the government flexible means to control international trade. At that time, Korea was a developing nation which needed balance of payments protection. Therefore, the system was fully justified by Article XVIII (b) of GATT.

Further, the Minister of Commerce and Industry could appraise import and export goods and, if necessary, determine standard prices for the goods.<sup>57</sup> The import and export goods would then be subject to those standard prices.<sup>58</sup> This import and export approval system adopted by the Trade Transition Act served as both an *ex ante* and an *ex post facto* foreign trade administration, meaning the Minister of Commerce and Industry would check whether the import or export transactions were carried out properly in accordance with related laws and decrees.<sup>59</sup>

Those provisions were carried forward into the Foreign Trade Act of 1986 with minor modifications concerning qualifications of the trader, operation of the Periodic Public Notice system, and other matters, which again were substantially modified with the 1996 amendments.<sup>60</sup>

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55. This is the system that lists only those items that are completely liberalized (imports not prohibited or restricted in public announcements or other notices like the Periodic Public Notice to regulate import or exports according to the economic policy or law). This system is generally adopted by developing countries which have more items prohibited or restricted compared with items that are liberalized.

56. This is the system that lists only those items that are regulated (imports that are prohibited or restricted). Under this system any items not listed in public announcements or other notices as import prohibited or restricted approval items could obtain approval of importation without any limitation or condition. However, for listed items approved under limitation or condition according to the outlines and procedures in the public notices is still required. Compared with the "positive list system," the "negative list system" more effectively promotes import liberalization.

57. Trade Transaction Act, *supra* note 54, art. 10.

58. At that time some Korean business people tried to manipulate import or export prices for the purpose of diverting the United States dollar into other countries. Specifically, they tried to divert into foreign countries the difference in amount of foreign currency by declaring the export price lower and the import price higher than the contract price on the commercial invoices and other related transportation documents contrary to the other party's understanding. The standard prices were used to check the invoice value, not only to establish orderly foreign trade but also to prevent such diversion.

59. Trade Transaction Act, *supra* note 54, art. 25.

60. Amended Foreign Trade Act, *supra* note 11, art. 10, 13.

## 2. The Import Supervision System

The import supervision system was introduced to supplement the import-liberalization policy by helping protect infant domestic industries and achieve balance in international payments. Under this system, the Minister of Commerce and Industry had the power to take certain measures to restrict the import of specific goods such as agricultural products or luxury items that may have an injurious effect on domestic industries.<sup>61</sup>

However, there have been many problems in the operation of the import supervision system. The system lacked sufficient criteria for determining injurious effect on domestic industries. As a result, Korea has provoked criticism from its trading partners, including the United States, for unduly harsh protective measures.<sup>62</sup> Later, under the Foreign Trade Act of 1986<sup>63</sup> this system developed into an import relief mechanism that provided a method for investigation of industrial injury from imports. This relief mechanism was upheld with minor modification in the 1996 amendments to the Foreign Trade Act of 1986.<sup>64</sup>

## 3. Import and Export Associations

The Trade Transition Act of 1967 allowed importers and exporters who traded in the same type of goods to establish associations in order to help promote their common interests.<sup>65</sup> This provision was also carried forward into the Foreign Trade Act of 1986, and modified in 1996, with additional provisions relating to the respective functions of association. Some of the association functions were: (1) agreement for maintenance of order in trade; (2) prevention of unfair export and import practices of goods; (3) exchange of public information, market surveys, intermediation of transactions, and removal of obstacles related to export and import of goods; (4) improvement of the design and quality of the imported or exported goods; (5) establishment of common facilities and the intermediation of financing for the

61. Trade Transaction Act, *supra* note 54, art. 25.

62. Enforcement of this system has been criticized for many reasons, including the fact there were no provisions relating to causation between imports and the concerned industries' injury. Further, the Minister of the Commerce and Industry had the authority to nominate automatic approval (fully liberalized) items in the Periodic Public Notice for import supervision but there was no established criterion for this decision. Owing to these problems, restrictions under this system were criticized by trading partner countries as unfair trade practices. This system was repealed in 1988.

Change of the numbers of the import supervision items.

Year	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988
Number of Items	19	35	274	283	165	142	111	106	48	25

For standards clarifying total items, *see infra* note 95.

Source: Ministry of Trade and Industry, *supra* note 25, at 719.

63. Foreign Trade Act, *supra* note 1, arts. 32-36.

64. *Id.* arts. 26-31.

65. Trade Transaction Act, *supra* note 54, art. 15.

promotion of common interests; (6) import or export of goods in case of necessity for the common interest; and (7) business entrusted by the Minister of Trade and Industry to maintain order in trade.<sup>66</sup>

#### *4. Government Support for the Promotion of Exports*

The Minister of Commerce and Industry has the authority to grant export subsidies to specific exporters with the required qualifications and also take other measures to support or regulate exports.<sup>67</sup> Since the middle of the 1960s, the Korean government's direct support of exporters has been a target of criticism among its trading partners. Especially since GATT requires each member country to abide by the provision of GATT Article 16, which provides that in order to expand the scale of world trade, all member countries, irrespective of their development stages, must prohibit any direct support to their own exported goods. As a result of this criticism, the Korean government repealed the direct export support provisions and developed a system of indirect support, which included such provisions as export financing and tax reduction or exemption.<sup>68</sup>

#### *5. The Prohibition of Unfair Export Activities*

Exporters were prohibited from exporting goods in breach of the terms and conditions of particular sales contracts and for which country origins were falsely indicated. Exporters were also required to export in accordance with internationally accepted terms of international trade.<sup>69</sup> With enactment of the Foreign Trade Act of 1986 and the further modifications of the 1996 amendments,<sup>70</sup> this provision has been developed into a system that maintains order in the import and export of goods.

### IV. PERIOD OF THE TRADE TRANSACTION ACT OF 1967

#### *A. Enforcement of Trade Transaction Act of 1967*

Since 1967 the domestic and foreign circumstances of international trade have changed dramatically as follows:

1. The economy of Korea has grown very rapidly to become one of the leading newly industrialized countries. The current gross national product has increased twenty times from \$4.3 billion in 1967 to \$83.7 billion in 1985; exports have

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66. Foreign Trade Act, *supra* note 1, arts. 45-46.

67. Trade Transaction Act, *supra* note 54, art. 16.

68. Those indirect supports by the Korean government should be considered an export subsidy under the countervailing law of the United States. See Clubb, *supra* note 17, at 470-71.

69. Trade Transaction Act, *supra* note 54, art. 29.

70. Amended Foreign Trade Act, *supra* note 11, arts. 39-44.



increased 116 times from \$300 million to \$34.7 billion; imports have increased 32 times from \$1 billion to \$31.6 billion; and Korea has consistently been ranked within the fifteen largest trading countries in the world.<sup>71</sup>

2. The structure of export goods has also changed from a decrease in the ratio of light industry goods from 63.9 percent in 1967 to 41.8 percent in 1986, to an increase in the ratio of heavy industry goods from 6.2 percent in 1967 to 52.8 percent in 1986. So the structure of export goods has advanced rapidly.<sup>72</sup>

3. Since the 1970s, developed countries have begun to adopt neoprotectionism to strengthen the import restrictions for the protection of their countries' fading industries. Certain industries began to fade and unemployment began to increase due to the slow growth of the world economy and the retardation of industrial structure adjustment. Fair trade and the principle of mutuality were emphasized over liberalism in trade, so developed countries increased the pressure on developing countries to open up their domestic markets.<sup>73</sup>

Industrial and trade policy in Korea was changed to meet these trends and the changes in domestic and world trade circumstances. For example, instead of being unilaterally controlled by the government, industrial and trade policy has substantially been directed from early planning stages through full implementation by business organizations, such as private trade associations, the Korea Chamber of Commerce and Industry, and the Korea Industrial Corporation. The purpose of Korea's economic policy has begun to move away from comprehensive protectionist measures and towards voluntary restraints and liberalization.

### B. Problems With Regulation of Trade

As a result of these changes in internal and external economic circumstances, the legal system in Korea regulating international trade, which had been modified and supplemented three times since enactment of the Trade Transaction Act of 1967, still could not cope with the rapid increase in the quantity of trade, diversification of the modes of international trade transactions, and frequent fluctuation in the orders and circumstances of international trade. There were several reasons for this.

First, there had been the problem of excessively strict regulations on international trade. The purpose of the Trade Transaction Act of 1967 was to promote exports, to regulate imports, and to accelerate the sound development of international trade.<sup>74</sup> Therefore, the Act mainly included regulations that controlled imports and promoted and encouraged exports, rather than provisions that pursued fair and reciprocal trade with other partner countries. The restrictions on trade included limiting the

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71. Korea's Trade Association, *Trade Year Book* (in Korean) (1970); Bank of Korea, *National Accounts* (in Korean) (1987, 1994); Ministry of Trade and Industry, *supra* note 25, at 159.

72. *Id.*

73. Trade Policy Research Group in the Ministry of Trade and Industry, *supra* note 15, at 64.

74. Trade Transaction Act, *supra* note 54, art. 1.

qualifications of importers and exporters,<sup>75</sup> and requiring them to: (1) obtain approval from the Minister of Commerce and Industry for importing or exporting particular goods,<sup>76</sup> (2) trade according to publicly recognized standards,<sup>77</sup> and (3) import or export in strict compliance with the licensed conditions.<sup>78</sup> Importers were additionally required to make advance deposits.<sup>79</sup>

Second, there had not been a sufficient protection system to assist the domestic industry in coping with import liberalization. As the Korean government stepped up the import liberalization process, the possibility of injury to the domestic industry increased due to rapid growth of imports. However, a suitable import relief system that would limit injury to the domestic industry was not established until the enactment of the Foreign Trade Act of 1986.

Third, a comprehensive and systematic law to promote and regulate fair trade, a separate issue from the regulation of foreign trade, had not been established. Private companies in Korea had to deal with protectionist measures taken by developed countries, such as the United States and European Community, by voluntarily maintaining the order of fair trade. To facilitate this behavior the Korean government needed to encourage free and fair trade. But no appropriate measures had been developed to prevent and take sanction against unfair trading activities, such as importation and exportation of goods that infringe intellectual property rights. Also, there had not been any systematic legal procedures developed for private companies to organize import and export trade associations to voluntarily regulate their international businesses.

Fourth, it was necessary to consolidate many provisions of international trade statutes into a single comprehensive statute. There were overlapping provisions among the various international trade laws such as the Foreign Trade Transaction Act, the Plant Export Promotion Act, and the Importer and Exporters' Association Act. Many of the subordinate provisions in these acts were contradictory to their stated purposes, and in application, many of the transaction provisions were found unnecessary.

These factors enhanced the necessity to establish a new legal system that would meet the requirements arising from these changed circumstances and operate in accordance with the government's new trade policy objective of free and fair trade. As a result, a new Foreign Trade Act was enacted in December 1986, and to

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75. *Id.* art. 23(1).

76. *Id.* art. 24.

77. *Id.* art. 25.

78. *Id.* art. 23(3).

79. *Id.* art. 27.

implement the Act, an Enforcement Decree<sup>80</sup> and an Ordinance<sup>81</sup> were concurrently issued by the President and the Minister of Trade and Industry.<sup>82</sup>

### C. The Foreign Trade Act of 1986

#### 1. The Purpose and Principle

The purpose of the Foreign Trade Act of 1986 was to contribute to the development of a strong national economy through the promotion of foreign trade and the establishment of a fair trade order.<sup>83</sup> The statement of purpose emphasizes that the Foreign Trade Act of 1986 is to pursue an expanded system of balanced imports and exports instead of unilaterally encouraging exports and regulating imports,<sup>84</sup> and to promote a fair trade order that would prohibit unfair trade practices.<sup>85</sup> The basic principle of the Act is the promotion of "free and fair trade."<sup>86</sup> The principle implies that Korea will restrict international trade according to international laws and treaties only when it is necessary to do so, and revert to the free and fair trade system without delay when it is not necessary. In other words, the regulatory provisions on trade in

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80. Enforcement Decree of the Foreign Trade Act, Decree No. 12191 (1987), amended by Decree No. 15296 (1997).

81. Ordinance to Administer Foreign Trade, Ordinance of the Minister of Trade and Industry No. 87-17 (1987), amended by Ordinance No. 97-32 (1997).

82. The English name of the Ministry was changed from the Ministry of Commerce and Industry to the Ministry of Trade and Industry in 1984, which signified the ever increasing role of the Ministry in foreign trade affairs. The Ministry of Trade and Industry expanded to absorb the Ministry of Energy's administration of energy affairs in 1995.

83. Foreign Trade Act, *supra* note 1; Amended Foreign Trade Act, *supra* note 11, art. 1.

84. Article 1 of the Trade Transaction Act of 1967 declared "[t]he purpose of this act is to make a contribution to the development of a strong national economy and the attainment of balanced international payments through the development of foreign trade by the encouragement of export and the regulation of imports" (emphasis added). The Act represented a trading system heavily regulated by the government, and by pursuing a policy of strict compliance with these purposes, the government thereby brought about trade disputes with foreign trading partners. Trade Transaction Act, *supra* note 54, art. 1. Article 1 of the Foreign Trade Act of 1986 was revised to state "the enlargement of international transactions," instead of "the encouragement of export and the regulation of import," reflecting the clear intention that the purpose of the Act was to expand economic development by increasing international trade through the balanced promotion of imports and exports. Foreign Trade Act, *supra* note 1; Amended Foreign Trade Act, *supra* note 11, art. 1.

85. This provision of the Foreign Trade Act stated that "for the establishment of a fair trade order," unfair export trade practices will be prohibited, such as dumping export goods, and exporting goods that were produced with government subsidies or which indicate false origins or false trade marks. Also included in the Act are provisions to restrict imports from foreign countries which unfairly restrict Korean exports. Foreign Trade Act, *supra* note 1, art. 3, 5; Amended Foreign Trade Act, *supra* note 11, art. 3.

86. Article 2 stated that "The Government shall make it a principle to promote free and fair trade under the conditions prescribed by treaties regarding trade, which have been concluded and promulgated under the constitution, and generally approved international laws," and "in case of restriction provisions on international trade in treaties relating to trade regulations concluded and promulgated under the Constitution or other related laws, in generally approved international laws, or in other international agreements, the Government should apply in practice these provisions within the minimum scope necessary to obtain the object of the restriction provisions." Amended Foreign Trade Act, *supra* note 11, art. 2.

the Foreign Trade Act of 1986 are to remain in effect only for a limited period of time, and the Foreign Trade Act of 1986 will be applied as the legal framework to back up international business transactions.

## *2. The Import and Export License System*

In the Foreign Trade Act of 1986 and the Trade Transaction Act of 1967, trade was administered by the government on two levels. First, particular types of import and export goods were regulated. Second, the importers and exporters themselves were regulated through the administration of trader's qualifications.

During the modification and enactment processes of the Trade Transaction Act of 1967 and the Foreign Trade Act of 1986, the government debated whether or not to retain the import and export license system. They concluded that the license system should be retained on the basis that domestic traders would otherwise bring about destructive competition among themselves due to their insufficient experience in conducting business with foreign countries.<sup>87</sup>

There has been much debate over whether the Korean government, when considering trade license applications, used discretion in their decisions to grant the licenses, or whether they strictly adhered to the rules. In reality, for companies that met the required qualifications, the license system was operated fairly with respect to domestic residents.<sup>88</sup> However, the licensing system may have operated unfairly with respect to foreigners, because the Minister of Trade and Industry had discretionary power to examine various factors relating to foreign trade and the effects on domestic industry.<sup>89</sup>

Through modifications of the Foreign Trade Act of 1986 contained within the 1996 amendments<sup>90</sup> the import and export license system was developed into a simple notification system that clarifies the qualifications of importers and exporters.

## *3. Import and Export Approval*

The Foreign Trade Act of 1986 preserved the import and export approval system,<sup>91</sup> which was allied to the trade of particular goods. Since the regulation of imports and exports was changed from a positive list system to a negative list system in 1967, the convenience and autonomy in importation and exportation has somewhat

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87. In October, 1994, the Korean Chamber of Commerce and Industry suggested that in order to strengthen the competitive power of Korean businesses, the government should repeal provisions of the Foreign Trade Act relating to the export and import license system and the import and export approval system. *See KOREA ECONOMIES DAILY*, Oct. 8, 1994, at 2. This suggestion by the Korean Chamber of Commerce followed similar suggestions by the other private institutions.

88. Amended Foreign Trade Act, *supra* note 11, art. 7(1).

89. *Id.* art. 7(2).

90. *Id.* art. 10(1).

91. Amended Foreign Trade Act, *supra* note 11, art. 19.

increased. Periodic Public Notice was changed into Public Notice which has no periodical limitation under the Foreign Trade Act of 1986.<sup>92</sup>

Public Notices on imports and exports under stipulation of the Foreign Trade Act of 1986 were divided into three groups: (1) Public Notice, (2) Integrated Public Notice, and (3) Special Public Notice. Public Notice was made regularly under the Act. With Integrated Public Notice, the Minister of Trade and Industry integrated all outlines and procedures for importing and exporting which were performed according to special laws other than the Foreign Trade Act. Special Public Notice was used for the importation or exportation of plants, strategic materials or raw materials necessary for the defense industry, industrial equipment, airplanes and parts, and similar materials which were traded separately from the regulations imposed by the Foreign Trade Act.<sup>93</sup>

The Notices contained: (1) specific restrictions on restricted approval items (*viz*, quantity, amount, standard, and area); (2) procedures required to be followed for the importation or exportation of goods, according to the regulations applied to the restricted approval items; and (3) classifications of automatic approval items, restricted items, and prohibited items.<sup>94</sup> As Korea adopted a negative list system, items which were not on the lists of restricted approval or prohibited items became automatically approved. Since 1977, all import and export items classified as prohibited have not been listed in the Notices.<sup>95</sup>

92. Periodical Public Notice was made irrevocably effective within six months after it was given, so within the term of availability, there was no possibility for modification. Public Notice, however, has no time limitation for enforcement or modification, so its contents can be modified at any time according to changing economic conditions or policy. Amended Foreign Trade Act, *supra* note 11, art. 18(1).

93. *Id.* art. 18(3).

94. *Id.* art. 18(1).

95.

Import Liberalization of Korea

Year	Total Items of Imports	Prohibited Import Items	Restricted Import Items	Automatic Import Items	Ratio of Import Liberalization (%)
1967	1,312	118	402	792	60.4
1970	1,312	73	546	693	52.8
1975	1,312	66	602	644	50.6
1975	1,312	64	579	699	52.0
1977	1,312		621	691	52.7
1980	1,010		327	693	68.6
1985	7,915		970	6,945	87.7
1990	10,241		376	9,898	96.3
1991	10,241		283	9,991	97.2
1992	10,241		240	10,034	97.7

The standards to classify total items of imports are as follow.

1977: SITC 1,312 items

1978: CCCN Heading (4 units) 1,097 items

1979-1980: CCCN Heading (4 units) 1,010 items

1981: CCCN Heading (8 units) 7,465 items

1982-1983: CCCN Heading (8 units) 7,560 items

1984: CCCN Heading (8 units) 7,915 items

As discussed above, measures to restrict the import or export of goods under Public Notices were either procedural or qualification regulations.<sup>96</sup> These restrictions were regarded by the Korean government to be in harmony with the exception clauses; Article XX<sup>97</sup> (General Exceptions), XXI<sup>98</sup> (Security Exceptions), XVII<sup>99</sup> (State Trading Enterprises) or XI(2)<sup>100</sup> (General Elimination of Quantitative Restrictions) of GATT.<sup>101</sup> However, there is still controversy concerning whether or not regulations for the protection of domestic infant industries and for the increase of profits for public corporate monopolies are justified under Article XI(2) or XVII of GATT<sup>102</sup> and under the WTO.<sup>103</sup> The Public Notices system was modified when the Foreign Trade Act was amended in 1996.<sup>104</sup>

#### 4. Special Measures to Restrict Imports and Exports

The Minister of Trade and Industry may take special measures to restrict imports or exports when Korea faces an emergency situation such as war, a civil disturbance, a natural disaster, when Korea's rights and interests are violated, or when Korea believes they are being treated unfairly by counterpart countries with respect to international transactions.<sup>105</sup> This provision for special measures was adopted for the first time under the Foreign Trade Act in 1986 and it is similar to Section 301 of the United States Trade Act of 1974.

Even if this provision was not enacted, the Minister of Trade and Industry is presumed to have the authority to take these special measures in case of necessity by virtue of his office.<sup>106</sup> The special emergency measures were provided in order to give the Minister power to quickly take necessary action and minimize industrial injury. This provision was carried over into the modification of the Foreign Trade Act in 1996.<sup>107</sup>

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1989: HS (10 units) 10,241 items

Source: Materials of the Ministry of Trade and Industry, 1992.

96. Eun Sup Lee, *supra* note 1, at 145.

97. This provision lists general exceptions to the application of GATT, such as necessary measures to protect the health and public morals, of humans, animals or plant life.

98. In this provision, security exceptions relating to member countries' security interests are listed.

99. This provision requires that all the member countries act in a manner consistent with the general principles of non-discriminatory treatment prescribed in GATT.

100. Here GATT provides that the general elimination of quantitative restrictions shall not applied to import restrictions in any agricultural or fisheries product, imported in any form, necessary to the enforcement of certain governmental measures, like the restriction of quantities of the like domestic product permitted to be marketed or produced.

101. Trade Policy Research Group in the Ministry of Trade and Industry, *supra* note 15, at 52.

102. *Id.*

103. Eun Sup Lee, *supra* note 1, at 145.

104. Amended Foreign Trade Act, *supra* note 11, arts. 14-15.

105. *Id.* art. 4.

106. Foreign Trade Act, *supra* note 1, art. 3.

107. Amended Foreign Trade Act, *supra* note 11, art. 5.

### 5. Other Provisions

The Act introduced a system to maintain order in imports and exports by adopting provisions to prohibit unfair import and export trade, to prohibit any unreasonable delay in the settlement of trade disputes with counterparts, and to provide for conditions and procedures to conclude agreements for reciprocal fair trade with foreign companies. Also in the Act were provisions for the establishment of importer's and exporter's Trade Associations.<sup>108</sup> The trade business and trade agent business were differentiated according to their qualifications to perform transactions, characteristics of their businesses, and administration.<sup>109</sup> This particular provision was repealed in the modification of the Foreign Trade act in 1996.<sup>110</sup>

Additionally, the Act introduced a new kind of import relief system. The government established a system to investigate injury to the domestic industry by excessive imports. This investigation was performed by a Trade Commission.<sup>111</sup> Further, the Act introduced new mechanisms to protect the industrial design of export goods, to enhance the added value of export goods, and to improve the external appearance of export goods.<sup>112</sup>

Finally, the Act adopted the provision to establish a Trade Link Promotion Commission which promoted trade activity such as barter trade, compensation trade, counter purchase and industrial cooperation.<sup>113</sup> The Trade Link Promotion Commission also had the power to approve special imports or exports, which would otherwise be prohibited by other provisions of the Foreign Trade Act, when it was necessary for promotion of the trade links.<sup>114</sup> This provision was repealed in the modification of the Foreign Trade Act in 1996.

## V. PERIOD OF FOREIGN TRADE ACT OF 1986

### A. Enforcement of Foreign Trade Act of 1986

In 1988 Korea recorded 100 billion in foreign trade with a trade surplus for the first time in Korean history and in 1990 ranked twelfth largest country in trade volume and accounted to two percent of the total amount of world trade.<sup>115</sup> Since the 1950s, Korea's bilateral trade with the United States recorded perennial deficits until the early 1980s. It was in 1982 that Korea's trade with the United States recorded a

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108. Foreign Trade Act, *supra* note 1, arts. 44-48, 55-57.

109. *Id.* arts. 7-13.

110. Amended Foreign Trade Act, *supra* note 11, art. 10.

111. Foreign Trade Act, *supra* note 1, arts. 32-36.

112. *Id.* arts. 49-54.

113. Ordinance to Administer Foreign Trade, *supra* note 81, art. 4-0-1 (1).

114. *Id.* art. 4-0-3.

115. HYUNG JONG SHIN, KOREA'S FOREIGN TRADE (in Korean) 87-89 (1992). Korea ranked as the 38th largest country in trade volume in 1971, thirtieth in 1975, 28th in 1980 and 20th in 1987. *Id.* at 88-89.

surplus for the first time. The trade surplus continued for the next seven years until 1989, reaching a peak of US\$9.6 billion in 1987.<sup>116</sup> Since Korea's reversion into deficit trade with the United States in 1990,<sup>117</sup> the bilateral trade deficits have increased.

During this period, the system to regulate and administer foreign trade in Korea was influenced mainly by trade friction with and pressure from partner countries like the United States. Trade friction with the United States, which was the largest export market of Korea, has been one of the most serious problems for the government of Korea to deal with in their attempt to expand foreign trade. This friction between the two countries, which began in 1971, has intensified through the progression of four stages: (1) the beginning period (1971-1982); (2) the deepening period (1983-1985); the period of intensification (1986-1990); and (3) the period of adjustment (1990-present).<sup>118</sup>

During this period of intensification, from 1971 to 1990,<sup>119</sup> the United States approved safeguard provisions<sup>120</sup> (e.g., import duties, tariff quotas, antidumping duties, countervailing duties, and patent protection provisions) to restrict imports from Korea<sup>121</sup> and applied pressure on Korea to make macroeconomic adjustments such as the appreciation of the won.<sup>122</sup> In addition to these measures, the United States imposed other constraints such as import restrictions on specified items or on items in bulk. Further, Korea was compelled to open their markets to agricultural products and services, to protect intellectual property rights, and to increase the United States market share in Korea.<sup>123</sup> Since 1987, negotiations have been conducted concerning

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116. Ministry of Trade and Industry, *supra* note 25, at 586-87. Overall, Korea's trade surplus in 1989 was US\$6.3 billion dollars. In that year, Korea's bilateral trade surplus with the United States was the fifth largest among trading partners of the United States, placed just after Japan, Taiwan, West Germany and Canada. The increase in the surplus with the United States was caused mainly by the rapid depreciation of the Japanese yen and other major currencies against the dollar after the Group Five (G-5) agreement in September, 1985, and the relatively small appreciation of the Korean won against the United States dollar during the 1980s. See Cho Soon, *supra* note 31, at 152.

117. The reason behind this restoration from trade surplus to deficits with the United States was assessed to the market-opening and trade liberalization in Korea, increase in consumption in the Korean private sector, and the application of protective measures by the United States. See Eun Sup Lee, *supra* note 1, at 159, n.141.

118. The trade friction between the United States and Korea can be discussed in terms of four stages, like beginning period (1971-1982), deepening period (1983-1985), period of intensification (1986-1990), and adjusting period (since 1990), according to outstanding matters and intensity. See Eun Sup Lee *supra* note 1, at 156-59.

119. *Id.* at 156-57.

120. *Id.*

121. Anti dumping charges were the protectionist measures most frequently used against Korean exports during the 1980s. There were 63 initiations of protectionist measures other than voluntary export restraints against Korean exports from 1980 to 1989, and 25 out of the 63 cases were antidumping charges. Initiations under Section 337 of the Tariff Act of 1930 were also used frequently in relation to infringement of intellectual property rights, particularly in the second half of the 1980s. See IL SAGONG, *supra* note 18, at 131.

122. *Id.* at 157. Korea's currency is the won. See *supra* note 116.

123. SHIN, *supra* note 115, at 902, cited in Eun Sup Lee, *supra* note 1, at 158.



national treatment of foreign banks,<sup>124</sup> protection of intellectual property rights, and opening of the insurance,<sup>125</sup> motion picture, and advertising markets. Korea and the United States have reached agreement on most of these issues.<sup>126</sup> In addition, under pressure from the United States, Korea revalued its currency by about 8.7 percent in 1987 and 15.8 percent in 1988.<sup>127</sup>

Since 1990, during the period of adjustment, the fractious trade relations between the United States and Korea developed into a relatively peaceful co-existence. As a result, Korea's trade balance with the United States changed from surplus to deficit. In the beginning of 1990s, pressure from the United States required Korea to phase out restrictions on agricultural products, protect intellectual property rights, and open their service industries.<sup>128</sup> To encourage accession, the United States adopted various means to restrict Korean imports into the United States,<sup>129</sup> including the invocation of the Super 301 provisions of the 1988 Omnibus Trade and Competition Act.<sup>130</sup>

Corresponding to the pressure, the Korean government made a great effort to protect intellectual property rights, liberalize its rigid import regime, especially for agricultural products,<sup>131</sup> and liberalize restrictions on foreign investment by lowering

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124. In 1987, United States banks were granted national treatment by allowing them access to rediscounts from the Bank of Korea (Korean central bank) and the privilege of issuing certificates of deposits. Cho Soon, *supra* note 31, at 169, *cited in* Eun Sup Lee, *supra* note 1, at 158.

125. Since 1986, United States insurance firms have been permitted to operate in the Korean market with few restrictions. See Cho Soon, *supra* note 31, at 169. These restrictions, which are not significant to foreign firms who do business in Korea, can be summarized as follows. First, a foreign insurer shall report to the Minister of Finance and Economy all matters relating to any one of the following: a) when the representative in Korea is changed; b) when the concerned insurer has discontinued or dissolved the insurance business in his home country; c) when the insurer discontinues insurance business in Korea; and d) when any of its insurance business in Korea is abolished. Second, a foreign insurer shall hold assets in Korea equivalent to the liability reserve and contingency reserve set aside in accordance with the provisions of Article 98 of the Insurance Business Law, Law No. 973 (1962) (Setting Aside of Liability), amended by Law No. 4865 (1995). Third, a foreign insurer shall annually submit the balance sheet, business report and profit and loss statements that are drawn up in his head office to the Minister of Finance and Economy. Fourth, in the case where the head office of a foreign insurer has discontinued its business, has been dissolved or has discontinued its business in Korea, the Minister of Finance and Economy may, if necessary, appoint or dismiss the person who shall conduct the remaining business. Fifth, when a foreign mutual company applies for registration, a representative of the company shall give the location of its main office in Korea, the name and address of its representative and all relevant documents. Insurance Business Law, *Id.* art. 5.

126. Cho Soon, *supra* note 31, at 169, *cited in* Eun Sup Lee, *supra* note 1, at 158.

127. *Id.*

128. *Id.*

129. Besides the invocation of the Super 301 provisions, the United States applied Title VII of the Tariff Act of 1930 (Antidumping Laws) against dumped goods that were exported to the United States, Section 337 of the Tariff Act of 1930 against unfair methods of competition from Korean companies trading in the United States, and Special 301 provisions of the Omnibus Trade and Competition Act of 1988 against infringement of intellectual property rights. KI SUNG KWON, A STUDY ON THE BACKGROUND & REAL SITUATION OF ECONOMIC FRICTIONS BETWEEN KOREA AND U.S.A. (in Korean) 42-49 (1994), KYUNG YONG JUNG, A STUDY ON THE TRADE POLICY TRENDS OF CLINTON ADMINISTRATION (in Korean) 34-36 (1994).

130. Cho Soon, *supra* note 31, at 166-69.

131. Until 1993, almost all Koreans expected the government to protect the domestic beef and rice markets, because they were the country's staple food items and the products of small sized domestic farms. In the 1992 presidential election campaign, President Yong Sam Kim (1992-1997) expressly promised to protect the domestic

the tariff rate.<sup>132</sup> In 1990, a market average rate system was introduced to enhance the market mechanism's ability to determine the exchange rate.<sup>133</sup>

The motive behind these policies have been not only to improve economic relations with the United States and other trading partners but also to achieve a fundamental structural transformation of the economy. The United States Trade Representative Office was very sympathetic to the efforts exerted by the Korean government and helped avert an invocation of Super 301.<sup>134</sup>

Yet the United States identified Korea as a priority watch list country in 1992 and 1993, reflecting the views of American intellectual property rights owners that the Korean government did not efficiently implement Intellectual Property Rights (IPR) laws.<sup>135</sup> The United States often likes to point out that, in the spirit of free trade, Korea must pursue an open market policy not with their words, but with their deeds.<sup>136</sup> Granting deference to this counsel, Korea has continuously tried to open their domestic markets in pursuit for free trade,<sup>137</sup> while, at the same time, pursuing the main objective of Korean foreign trade policy, protecting domestic markets and promoting exports.

Apart from the pressure of the United States to completely open Korean markets, there were other reasons to substantially modify the Foreign Trade Act of 1986. First, the departure of the WTO in 1995 and the affiliation with the OECD in 1996 required Korea to change the orientation of their trade policy away from protectionism and towards complete unrestraint. These changes facilitated survival of Korea's

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beef and rice markets. However, beginning in 1993, his government advanced a trade policy that has opened the Korean market to foreign imports of these staple foods, causing great shock to the Korean people.

132. The average tariff rate of Korea has been lowered from 20.9% in 1980, to 11.4% in 1991, and to 7.9% in 1994. DAE KEUN LEE, *INTERNATIONAL TRADE OF KOREA* (in Korean) 353, 355 (1996).

133. This exchange rate system is a floating system in which the exchange rate is set by the interbank rate among domestic foreign exchange banks and the range of daily fluctuation is limited to within 10% up and down. This system was introduced to enhance the automatic adjustment function of the market and to minimize government intervention in determining exchange rates. Since the adoption of this new system, the Korean Won has tended to depreciate drastically, according to current account deficits by the second half of 1997.

134. During this period, there were some strong anti-American feelings in Korea with regard to the requirements of the United States Trade Representative Office. For example, in a letter dated July 27, 1994, from the United States Trade Representative Office to the Korean Government, the President of the United States Trade Representative Office was reported to ask Korea to establish a Consumers' Benefit Counseling Section in the Ministry of the Trade and Industry and a Special Committee about the automobile for providing reasonable information to the consumers about imported automobiles. The letter also asked the Korean Government or quasi-Government institutions to buy United States automobiles for their own use. This letter was disseminated among the Korean people and viewed as an instance where the United States was intervening in the domestic affairs of a smaller country, Korea. *KOREA ECONOMIES DAILY*, Aug. 19, 1994, at 3. According to the Korean daily newspapers of August 19, 1994, the Korean Government did not open the contents of the letter for some time, however, when the contents were revealed to the public, the Korean Government was roundly criticized for their willingness to open domestic markets when the slightest pressure was applied by the United States. It is true that all Presidents since 1981, Doowhan Jun, Taewoo No, and most recently, Young Sam Kim, have met with strong emotional opposition from the Korean people in the process of carrying forward trade liberalization.

135. Soon, *supra* note 31, at 171.

136. Eun Sup Lee, *supra* note 1, at 159.

137. *Id.*

foreign trade program under the WTO system and harmonization with OECD provisions. This was especially true about specific provisions of the Foreign Trade Act of 1986, such as the license and registration system for foreign import and export businesses and the import and export approval system<sup>138</sup> which could easily have been misconstrued as regulating access to trade businesses and regulating the quantity of imports.

Second, as Korean foreign trade increased from 88 billion in 1987 to 280 billion in 1996,<sup>139</sup> and with the diversification of trade practices, the Korean government recognized that the former *ex ante* regulations were too inefficient to cope with these new trends. Korea needed an efficient system to manage foreign trade. Finally, as Korea's business enterprises increased to secure larger international markets and advanced techniques, the provisions of the Foreign Trade Act of 1986 needed to be modified to more effectively support those activities.

#### B. The Foreign Trade Act of 1986 as Amended in 1996

The Foreign Trade Act of 1986, amended in 1996, is composed of 60 articles and nine additional rules. The main contents of the amended act include the following:

(1) The Minister of Trade and Industry can investigate practices relating to foreign trade and the difficulties encountered in overseas markets by Korean enterprises seeking the basic materials needed to establish the foreign trade promotion policy.<sup>140</sup> This provision enables the government to indirectly support the overseas businesses of Korean enterprises by investigating unfair matters that arise from provisions of the trade related law, system, and other practices in partner countries. The investigation under this provision would be similar to the ITC's annual report in the United States.

(2) The Minister can support foreign trade related associations when they promote cooperative efforts with foreign and local governments, institutions, or other associations relating to matters of foreign trade, industry, technique or energy.<sup>141</sup> Until recently, foreign trade has developed in Korea exclusively through negotiations and cooperative activities led by the government. However, activities initiated by private institutions or associations have recently been recognized as more desirable for the efficient promotion of foreign trade under these liberalized circumstances. This provision was made to support activities advanced by the private sector.

(3) A further provision<sup>142</sup> was introduced declaring that import and export of goods and the incident receipt and payment should be made without any restrictions as long as these activities are consistent with the objectives of the Foreign Trade Act

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138. Foreign Trade Act, *supra* note 1, art. 7-8.

139. OFFICE OF STATISTICS OF KOREA, MONTHLY STATISTICS OF KOREA (in Korean) 205 (March 1997).

140. Amended Foreign Trade Act, *supra* note 11, art. 8 (3).

141. *Id.* art. 9.

142. *Id.* art. 13.

(i.e., to contribute to the development of a strong national economy through expansion of international trade).<sup>143</sup> The provision<sup>144</sup> also declares that importers and exporters should implement foreign transactions in order to secure a good reputation from overseas markets and to maintain the order of free trade under their own liabilities. The principles of free trade and deregulation are the basis on which the construction and operation of additional provisions of related laws and regulations can further develop. In addition, 'by promoting free trade in the import and export of goods and emphasizing a party's freedoms and liabilities, this provision suggests the future direction subsequent trade related rules will follow.

(4) The system to regulate the qualifications of foreign traders, that is, the import and export license and registration mechanism,<sup>145</sup> was repealed and replaced with a simple notification system. Those who trade in foreign goods now should simply notify the Minister of Trade and Industry.<sup>146</sup> The former import-export registration system became useless because foreign trade expanded dramatically after 1977, and was misunderstood by partner countries as a barrier to foreign trade in Korea.

(5) The positive system of approval in advance for particular import or export goods<sup>147</sup> was substantially relaxed into a negative system<sup>148</sup> whereby approval was granted with restrictions or conditions on just a few special items. Specifically, those items include the restricted approval or prohibited items listed under the Public Notice system, the restricted approval items listed under the Special Public Notice system, and the items subject to the provisions for diversification of importing countries.<sup>149</sup> This negative system to approve importation or exportation as well as the notification system of the foreign trade business can be construed to be major practical example of the principle of free trade and deregulation provided for in the Foreign Trade Act.

## VI. THE CURRENT FOREIGN TRADE REGULATION

### A. *Investigation of Industrial Injury from Imports*

The Foreign Trade Act of 1986 introduced a new kind of import relief mechanism, the investigation of industrial injury from imports, which was included in the 1996 modification.<sup>150</sup> Before the adoption of this mechanism the Korean

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143. *Id.* art. 1.

144. *Id.* art. 13.

145. Foreign Trade Act, *supra* note 1, arts. 7-16.

146. *Id.* art. 10

147. Foreign Trade Act, *supra* note 1, art. 19.

148. Amended Foreign Trade Act, *supra* note 11, art. 13.

149. *Id.* art. 14.

150. Foreign Trade Act, *supra* note 1, arts. 32-36, Amended Foreign Trade Act, *supra* note 11, arts.1, 28-33, Eun Sup Lee, *supra* note 1, at 146. Korea did not have an emergency import relief mechanism before 1986, because, as a developing country, Korea could protect domestic industries under Article XVIII(b) of GATT. *Id.*

government had used tariff and non-tariff measures, including a system to diversify importing countries or to supervise importation from particular countries.<sup>151</sup> The tariff measures included anti-dumping duties, countervailing duties,<sup>152</sup> retaliatory duties,<sup>153</sup> emergency duties,<sup>154</sup> adjustment duties,<sup>155</sup> a tariff quota system,<sup>156</sup> seasonal tariffs,<sup>157</sup> and a special emergency tariff on agricultural and livestock products.<sup>158</sup> However, there had been problems in implementing these tariff measures for import relief with the exception of the anti-dumping duties.<sup>159</sup>

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151. Korea has an excessive deficit in bilateral trade balance with particular counterpart countries like Japan. For example, the amount of trade balance deficit with Japan was US\$8,451 million in 1993 and US\$7,858 million in 1992, total deficits being US\$1,784 million and US\$5,143 million respectively. Since 1978, Korea has adopted a trade policy advocating the diversification of importing countries as a means of regulating imports from countries with which Korea has an excessive trade deficit, like Japan, and to expand importing countries such as to the United States or the European Union (EU). However, it may be against the principle of non-discrimination under the WTO system. This provision is expected to be repealed in the near future, especially under the WTO system. The number of items having been subject to the regulation [Enforcement Decree of the Foreign Trade Act, *supra* note 80, art. 25 (3), (4)] by this policy since 1981 are shown in the following table.

Items subject to the provisions for diversification of importing countries

Year	1981	1985	1990	1991	1992	1993	1994
Items	208	160	268	258	258	258	230

For the standards to clarify total items, see *supra* note 95.

Source: Korea's Trade Association, Trade Year Book 606 (1992), 78 (1996).

152. Customs Act, Law No. 1976, art. 10-11 (1967), amended by Customs Act, Law No. 5194 (1996). As Korea has subscribed to the Antidumping Code of the Tokyo Round Multinational Trade Negotiations in 1986, the requirements for imposing antidumping duties under Korea's Customs Act are the same as those of the Code. The procedures and methods of investigation are almost the same as with the investigation of industrial injury from imports under the Foreign Trade Act, but in some cases, like imports of dumped or subsidized goods, the subject of investigation is whether or not there is unfair competition. The criterion for this decision is more relaxed compared with that of the investigation of industrial injury from imports according to the provisions of the Foreign Trade Act. When an investigation by the Trade Commission uncovers clear evidence that there are industrial injuries due to dumped or subsidized imports, the Minister of Finance and Economy shall impose antidumping duties or countervailing duties through deliberation with the Tariff Commission. The Tariff Commission, composed of 20 or more low-level officials of the administrative agencies concerned (the head of which is the vice-Minister of Finance and Economy), is in charge of deliberation concerning the enforcement of the flexible tariff system according to Article 10-16 of the Customs Act. Customs Act, *id.*

153. Customs Act, *supra* note 152, art. 11. The Minister of Finance and Economy can lay retaliatory duties on goods imported from any country which discriminates against goods imported from Korea or against Korean vessels or aircraft. These duties have never yet been applied.

154. Customs Act, *supra* note 152, art. 12. Emergency duties may be levied when there is an urgent need to protect a staple industry so as to restrict the importation of specified goods and to improve an imbalance in tariff rates owing to changes in the industrial structure.

155. Customs Act, *supra* note 152, art. 12(2). In order to protect the related industries, adjustment duties may be levied when, as a result of the promotion of the import liberalization policy, there is an increased importation of goods newly classified as automatic approval (liberalized) items. When adjustment duties are decided to be applied, these duties include basic duties that can be imposed for up to 100% of the dutiable value of the goods.

156. Customs Act, *supra* note 152, art. 16. Tariff quota system allows the Minister of Finance and Economy to increase the tariff rate when the quantity of import of specified goods exceeds a certain level.

157. Customs Act, *supra* note 152, art. 15(2).

158. Customs Act, *supra* note 152, art. 12(3).

159. See Eun Sup Lee, *supra* note 1, at 147.

Considering these problems, Korea has adopted explicit provisions for petitions for investigation, investigation procedures and remedy enforcement.<sup>160</sup> The import relief provision under the Foreign Trade Act was adopted for *ex post facto* protection of the domestic industry, with a view towards trade liberalization, rather than protection of infant industries in accord with the Safeguard Agreements of the WTO.<sup>161</sup> The Trade Commission in charge of the investigation was introduced by the Foreign Trade Act of 1986. The Commission consists of a chairman and six members, only one of whom is a permanent member. The members are appointed by the President on the recommendation of the Minister of Trade and Industry and are chosen because of their particular knowledge and experience in the fields of industry and trade.<sup>162</sup> Upon investigation into the effects of foreign imports on domestic industry, the Commission's decisions are considered binding on the minister in charge of the affected industry.<sup>163</sup>

The Trade Commission's functions relating to the investigation of industrial injury is similar to that of the United States International Trade Commission (United States ITC).<sup>164</sup> However, since the Commission is not a quasi-judicial agency, it is not as independent and powerful as the United States ITC.<sup>165</sup> Once the Korean

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160. *Id.*

161. *Id.*

162. Amended Foreign Trade Act, *supra* note 11, arts. 34-41.

163. There is no provision about the binding power of the Trade Commission. However, it was made clear from the process of interpolation and reply in the 131st session of the National Assembly in 1986, that the decisions of the Trade Commission were meant to have a binding effect. Also, this binding power is confirmed by the general construction of the provisions relating to the Foreign Trade Act. Foreign Trade Act, *supra* note 1, arts. 26-38, Amended Foreign Trade Act, *supra* note 11, arts. 28-41.

164. United States International Trade Commission [hereinafter United States ITC].

165. Comparison of Trade Commission with United States ITC is as follows:

**United States ITC**

- |                |                                                                                                                                                                                                                                                                                |
|----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. Character   | • independent, bipartisan, and quasi-judicial agency with broad powers                                                                                                                                                                                                         |
| 2. Composition | • 6 Commissioners                                                                                                                                                                                                                                                              |
| 3. Designation | • President (subject to Senate confirmation)                                                                                                                                                                                                                                   |
| 4. Terms       | • 9 year (not renewable)                                                                                                                                                                                                                                                       |
| 5. Function    | • assistance to the President, United States Congress, and United State Trade Representative regarding United States foreign trade and its effect on industries and labor                                                                                                      |
|                | • advice to the President regarding the economic effect of the modification, extension or withdrawal of Generalized System of Preference                                                                                                                                       |
|                | • investigation regarding unfair import practices                                                                                                                                                                                                                              |
|                | • "escape clause industry" investigation, determination and recommendation of relief to the President, and                                                                                                                                                                     |
|                | • "escape clause review" investigation to make advice to the President                                                                                                                                                                                                         |
|                | • investigation of the industrial injury due to dumping and determination                                                                                                                                                                                                      |
|                | • submission of the East-West Trade Reports, an annual report on the operation of the trade agreements program, current tariff schedules, and an enumeration of imported articles for statistical purposes with the Department of Commerce and the Department of the Treasury. |

government gives the Commission authority to resolve trade disputes, it may quickly develop into an independent and quasi-judicial agency.<sup>166</sup>

While an investigation can be launched without a petition in the case of necessity,<sup>167</sup> private and public parties have the right to request an investigation.<sup>168</sup> The petition for investigation may be granted under conditions where domestic industry would otherwise be harmed or threatened with material injury, by either the rapid increase of imports, foreign supply of trade and distribution services, or unfair import transactions.<sup>169</sup> After the Trade Commission investigates and determines the effect of imports on domestic industry-and the injury-the Commission then decides what necessary measures should be taken, and makes a recommendation to the Minister of Trade and Industry.<sup>170</sup>

The remedy measure may be one of the following: (a) restricting imports in terms of quantity or quality, like voluntary export restraints, orderly marketing agreements, or global and auctioned quotas; (b) adjusting tariff rates; (c) various assistance measures for improving technology and productivity, such as assistance with taxes

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Investigation of all factors relating to the effect of United States foreign trade on domestic production, employment and consumption upon the request from the President, the United States Congress or on the virtue of its office

**Korea Trade Commission**

1. Character • agency for the deliberation and decision in the Ministry of Trade and Industry
2. Composition • 9 commissioners
3. Designation • President at the proposal of the Minister of Trade and Industry
4. Terms • 3 year (renewable)
5. Function • investigation, determination and recommendation of relief actions as to the injury to the domestic industry
  - annual review and recommendation of an extension of the relief action on the modification and the lifting of the relief action
  - investigations regarding the breach of order in export and import
  - investigation of the industrial injury from imports dumped or subsidized
  - research and studies on law and regulation, systems, and cases of dispute concerning international trade
  - investigation and recommendation with respect to other matters deemed necessary such as the promotion of fair trade.

166. During the process of the modification of the Foreign Trade Act in 1996, there were many discussions about methods to strengthen the Trade Commission. The function of the Commission has been enlarged to include the recommendation to the Minister of Finance and Economy to impose antidumping and countervailing duties as well as the investigation on the imports dumped and subsidized.

167. Amended Foreign Trade Act, *supra* note 11, art. 37(8).

168. Foreign Trade Act, *supra* note 1, art. 26, Amended Foreign Trade Act, *supra* note 11, art. 28; Eun Sup Lee, *supra* note 1, at 148. This corresponds to Section 202 (b)(1)(A) of the United States Trade Act of 1974 and GATT Article XIX (1)(a).

169. "Unfair import transactions" include (a) the importation of goods which infringe upon the patent, the new design for practical use, the copyright in registered designs, the trademark right, the copyright, etc. protected under laws and regulations in counterpart countries, (b) the importation of goods whose origins are misrepresented, or (c) the importation in breach of the fair and reasonable usage in trade, such as false or excess advertisement. See Foreign Trade Act, *supra* note 1, art. 39(1); Amended Foreign Trade Act, *supra* note 11, art. 420.

170. Foreign Trade Act, *supra* note 1, art. 28; Amended Foreign Trade Act, *supra* note 11, art. 30; Eun Sup Lee, *supra* note 1, at 149-50.

or financing; (d) designating the industry under investigation as an industry for rationalization under the Industry Development Act; (e) suspending or prohibiting the import of goods from certain traders; or (f) any other action prescribed by a Presidential Decree for relief of domestic industry.<sup>171</sup>

The Minister of Trade and Industry reports to the Trade Commission when deciding to enforce remedial measures.<sup>172</sup> The remedial measures should be enforced only within a specified period,<sup>173</sup> and during this period domestic industry is to take actions that establish competitiveness, like adjustment of their industrial structure.

### *B. System to Maintain Order in Import and Export*

The primary goals of the system to maintain order in import and export in Korea are the eradication of unfair trade practices,<sup>174</sup> the prevention of excess competition among exporters, and providing remedy for industrial injury. However, the central objective to the policy has always been the efficient restraint of excess competition among exporters after enactment of the Foreign Trade Act of 1957.<sup>175</sup>

Since the Foreign Trade Act of 1986, Korea has responded to the changing circumstances in international trade by adopting provisions to tighten regulation of unfair trade from domestic exporters. The contents of these provisions indicate that maintenance of the export order is the core purpose of foreign trade policy in Korea. These provisions are as follows.

1. It is prohibited to undertake unfair import and export practices,<sup>176</sup> and the violators of this regulation may be ordered to correct the unfairness or to pay the penalty.<sup>177</sup>

2. Importers or exporters should not manipulate the import or export prices for the purpose of the diversion of foreign currency.<sup>178</sup> These provisions were made to prohibit the diversion of foreign currency like United States dollars, which have been a significant problem.<sup>179</sup> In Korea, foreign exchange control has traditionally been very strict compared with other countries<sup>180</sup> because Korea has been distressed since

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171. Amended Foreign Trade Act, *supra* note 11, art. 30.

172. *Id.*

173. Enforcement Decree of the Foreign Trade Act, *supra* note 80, art. 72(4). Specifically, no measure shall be applied for a period in excess of five years.

174. The unfair trade practices specified herein include the import and export of counterfeit goods, currency, and commodity shunting to avoid the tariff and non-tariff barriers from import countries.

175. Eun Sup Lee, *supra* note 1, at 151.

176. Amended Foreign Trade Act, *supra* note 11, art. 42(1).

177. *Id.* art. 42(3).

178. *Id.* art. 43.

179. One of the non-economic factors that makes the diversion problem so serious compared with other countries is the unstable political situation Korea faces in the confrontation with North Korea.

180. As Korea's current account balance has been improved to surplus from deficit, in 1988, Korea became subject to application of Article VIII of the International Monetary Fund (IMF) which mandates foreign exchange liberalization.



the beginning of its modern economic development in the 1950s, with the serious problem of a shortage of foreign exchange.<sup>181</sup>

3. The Minister of Trade and Industry may request that Korean exporters in trade disputes with foreign importers present the Minister with the terms of the settlement to the claim or, in cases of necessity, to present the relevant documents so that the Minister may investigate the dispute himself.<sup>182</sup> The Minister may also recommend that exporters conclude arbitration agreements for reasonable settlements with foreign importers.<sup>183</sup> The purpose of these provisions is to maintain the commercial credibility of Korean businesses in foreign markets.

4. In addition to multilateral and bilateral commercial agreements with foreign governments, domestic exporters or importers may voluntarily conclude agreements among themselves as to transaction conditions.<sup>184</sup> However, there is a risk of the extraterritorial application of foreign antitrust laws to these activities among Korean exporters.<sup>185</sup> To reduce this risk, lessen the chance of trade disputes with counterpart countries, and prevent disorder in imports and exports, the Foreign Trade Act empowers the Minister of Trade and Industry to order an adjustment in the transaction like the price, quantity, quality or other condition.<sup>186</sup> If the Minister of Trade and Industry exercises this adjusting authority wisely to foster orderly import and export marketing practices, then this will help to promote free and fair trade in the future.<sup>187</sup>

5. The protection system for designs of export goods was adopted in the Foreign Trade Act to encourage design development and to supplement the current design registration system under the provisions of laws and regulations relating to design rights.<sup>188</sup> Because of the great time involved in registering designs for protection under the relevant laws and regulations, these procedures do not protect design products that have a comparatively short life span, like fiber goods or general goods.

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181. For trade deficits from 1946 to 1967, see *supra* notes 18 and 25.

182. Amended Foreign Trade Act, *supra* note 11, arts. 41-42.

183. *Id.* art. 41(4).

184. *Id.* arts. 45-46.

185. Sang Don Lee, *supra* note 3, at 14, cited in Eun Sup Lee, *supra* note 1, at 153, n.105.

186. Amended Foreign Trade Act, *supra* note 11, art. 43. The acts to conclude agreements among exporters adjusted by the order from the Minister of Trade and Industry are not subject to provisions of other laws relating to the regulation of monopolies and fair transactions like the Monopoly Regulation Act, Law No. 4198. (1990), amended by Law No. 4790 (1994); Amended Foreign Trade Act, *supra* note 11, art. 45(1). When the contents of the adjustment by the order are likely to restrict free competition among business people in domestic markets, the Minister of Trade and Industry should make agreements in advance with the Fair Trade Commission under the Minister of Finance and Economy for the exercise of such adjusting authority. Amended Foreign Trade Act, *supra* note 11, art. 45(2). Agreements among exporters or importers in Korea dealing in competition-restrictive areas are still troublesome. In those cases, if the counterpart trading nation arises an antitrust suit against the exporter or importer, a question could arise as to whether the adjustment ordered by the Minister of Trade and Industry could block the extraterritorial reach of a foreign competition law. Eun Sup Lee, *supra* note 1, at 153, n.106.

187. *Id.* at 153-54.

188. See Design Act, Law No. 2507 (1973), amended by Law No. 5082 (1995); Patent Act, Law No. 4207 (1990), amended by Law No. 5080 (1995).

The Foreign Trade Act protects the design of exported goods, by preventing imitations of new designs irrespective of registration.<sup>189</sup>

### *C. Other Laws to Regulate Foreign Trade*

Most countries have established laws which govern and support their international trade, but methods of management differ from one another. Reflecting Korea's industrial infancy from the early period of development and other government policy motives, Korea used to impose various restrictions and prohibitions on international trade as previously discussed. Apart from the Foreign Trade Act, there are two other main laws which govern international trade of Korea, they are the Customs Act and the Foreign Exchange Control Act.<sup>190</sup>

#### *1. The Customs Act*

The Customs Act<sup>191</sup> seeks to secure revenue from customs through the imposition and collection of reasonable customs taxes, and proper clearance of imported and exported goods.<sup>192</sup> The Minister of Finance and Economy is in charge of customs administration. The Minister's authority extends to the imposition and collection of customs, clearance through customs, and contraband control, but the exercise of this authority is delegated to the Office of Customs Administration.<sup>193</sup> Besides these two central organizations, there are three kinds of local administrative organs, a customhouse, a customhouse branch, and a customs monitor station.<sup>194</sup> The Customs Act can

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189. Amended Foreign Trade Act, *supra* note 11, art. 47.

190. There are other laws related to international trade in Korea such as the Export Inspection Act, Law No. 1164 (1962), amended by Law No. 2541 (1973); the Export Insurance Act, Law No. 2063 (1968), amended by Law No. 4776 (1994); the Foreign Capital Inducement Act, Law No. 1802 (1983), amended by Law No. 4814 (1994); the Free Trade Zone Establishment Act, Law No. 2180 (1970), amended (1994) [This act allowed the establishment of such zones in Masan in 1970 and in Iri in 1973, giving incentives to foreign direct investors including tax holidays, investment protection and guaranteeing remittance of profit and principal. Also, the act prevented labor union activities in foreign-invested firms.]; the Industrial Complex Administration Act, Law No. 2843 (1975), amended by Law No. 3065 (1977); the Temporary Measure for Promotion of Providing Supplies for the Military Act, Law No. 979 (1962); the Design & Package Promotion Act, Law No. 3070 (1977); the Agricultural and Aquatic Products Export Promotion Act, Law No. 2289 (1971); the Special Treatment of Duties Refinement for Raw Material Imported for Export Goods Act, Law No. 2675 (1974), modified by Law No. 3747 (1984); the Rules of Export Financing (1972), amended (1980); and the Rules of Commercial Arbitration, approved by the Supreme Court (1973).

191. Customs Act, *supra* note 152.

192. *Id.* art. 1.

193. National Government Organization Act, Law No. 2437, art. 32 (1973), amended by Law No. 3220 (1979).

194. Presidential Decree No. 10955, art. 29 (1980), Presidential Decree No. 9905, art. 5-5-1 (1980), Decree of the Office of the Customs Administration, art. 84-285 (1984). There are 6 head offices of customhouses located in Seoul, Pusan, Dae Gu, etc., 30 customhouses, 11 branches of the customhouse and 12 customs monitor stations in Korea. These local administrative organs, through delegation from their respective department heads in Customs Administration, are in charge of practical matters relating to the imposition and collection of customs, reduction

be classified as a substantive tax law that regulates imposition, reduction and exemption of customs duties, as well as a procedural law which regulates process.<sup>195</sup>

## 2. *The Foreign Exchange Control Act*<sup>196</sup>

The Foreign Exchange Control Act, the major piece of legislation regulating foreign exchange, purports to control foreign exchange and other transactions with foreign countries by attaining an equilibrium in international balance of payments and by stabilizing the value of domestic currency.<sup>197</sup> Under these controls, the Korean government has the power not only to establish foreign exchange rates<sup>198</sup> and license foreign exchange banks,<sup>199</sup> but also to approve and control virtually all foreign exchange transactions between domestic residents and foreigners.<sup>200</sup>

Under the Foreign Exchange Control Act, the Minister of Finance and Economy is in charge of foreign exchange control.<sup>201</sup> The Minister's power to control foreign exchange is divided between the president of the Bank of Korea, as the government's agent (who also heads the foreign exchange bank, the customhouse, and the post and telegraphic offices), and the governors of the Bank Supervisory Board, the Stock Supervisory Board and the Insurance Supervisory Board.<sup>202</sup>

Korea is expected to limit the required restrictions on foreign exchange transactions to a necessary minimum in accordance with the provisions of IMF arrangements, and eventually to abandon willful administration and restrictions in accordance with the provisions of the WTO and of the OECD.

## VII. CONCLUSION

The laws to regulate foreign trade in Korea have not been effectively and timely enacted or modified to cope with frequent fluctuations of internal and external circumstances relating to foreign trade. Many of Korea's foreign trade laws have been

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of and exemption from customs, clearance through customs, and contraband control. However, the scope of the delegated authority varies among them. Eun Sup Lee, *supra* note 1, at 140.

195. Eun Sup Lee, *supra* note 1, at 140, n.32.

196. Foreign Exchange Control Act, *supra* note 19, art. 1.

197. *Id.* art. 1.

198. *Id.* art. 4.

199. *Id.* art. 7.

200. Noncompliance with the Korean Foreign Exchange Control Act has two consequences. The first consequence affects the commercial transaction and the parties' ability to enforce their legal rights under the transaction. The Supreme Court of Korea has held that noncompliance with the foreign exchange controls did not *per se* invalidate the commercial agreement between the parties. *R. H. Macy and Co., Inc. v. Samsung Industrial Co., Ltd.*, 72 c 2161 Supreme Court (1975). The second effect is the imposition of civil and criminal sanctions. Tae Hee Lee & William H. Gallaway, Jr., *Foreign Exchange Controls in Korea and Their Impact upon International Commercial Transactions*, in *BUSINESS LAWS IN KOREA*, 270 (Chan Jin Kim ed., 1982), *cited in* Eun Sup Lee, *supra* note 1, at 141, n.48.

201. Foreign Exchange Control Act, *supra* note 19, arts. 11, 26.

202. *Id.* art. 29.

enacted and modified passively under the expressed or implied pressure from trading partners like the United States or the requirements of international organizations like GATT, and not because of the government's voluntary response to internal public and private sector concerns. The modifications may have occurred in this manner because Korea's rapid economic growth and development during the last thirty years was influenced by the government's strong export-driven policy, and the Korean economy depended heavily on foreign trade.

The Foreign Trade Act of 1986, amended in 1996, includes both modifications that address frequent fluctuations in the international economic order, and the requirement to pursue fair trade from trading partner nations like the United States and international organizations like the WTO and OECD. The Act includes provisions that meet conditions of the current international economic climate, which relate directly to the interests of other partner countries, while concurrently secures effective and reasonable measures to protect and encourage domestic import industries. Certain provisions, such as the adoption of the negative system for approval of imports and exports and the notification system of foreign trade business irrespective of their qualification, can be regarded as cornerstones of the development of Korea's trade administration system towards liberalization.

There is still one matter that needs to be resolved with future modifications to the Foreign Trade Act regarding the character of the Trade Commission, which deliberates cases of industrial injury and unfair trade practices, and makes recommendations to the Minister of Trade and Industry. The Commission is considered in Korea to be an independent agency in composition and method of operation, even though it belongs to the Ministry of Trade and Industry. However, in view of possible criticism from trading partner countries about the commission's independence and the fairness of their decisions, it would be desirable to make the commission a completely independent and quasi-judicial agency with broad powers like the United States ITC. Concerns about the function and authority of the Trade Commission have already been raised since enactment of the Foreign Trade Act in 1986, and the government seems prepared to make further modifications to the Act to address these questions at some future time.

