Regulation and Liberalization of Imports and Foreign Investment and the Role of Trade Actions in the Republic of Korea

David A. Laverty
Marks, Murase & White, New York

Follow this and additional works at: https://repository.law.umich.edu/mjil
Part of the International Trade Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjil/vol11/iss2/10
REGULATION AND LIBERALIZATION OF IMPORTS AND FOREIGN INVESTMENT AND THE ROLE OF TRADE ACTIONS IN THE REPUBLIC OF KOREA

David A. Laverty*

I. INTRODUCTION

The Republic of Korea is well-known for its exceptionally successful export-driven economy and for the role of the Korean government in actively pursuing policies which have fostered the growth of Korean industry and the penetration of Korean products in the international marketplace. This rapid penetration of Korean products has been a source of tension among Korea's trading partners as they have sought to respond to calls from their domestic-industry constituencies for protection from the increased importation of Korean products. However, less well-known and of increasing significance to Korea itself and to the international community is not the outflow of Korean products but the dramatic shift in the flow of goods into Korea. This increase in imports into Korea is the result of major structural shifts in the Korean economy and a greatly strengthened domestic appetite for foreign raw materials, capital goods, and consumer goods. Coupled with this increase in import activity have been broad changes in the level and nature of direct foreign investment activity in Korea, in part suggesting an increase in activity in service sectors such as insurance and advertising.

The liberalization of Korea's regulation of imports and investment has been a central factor behind the recent trends in import and foreign investment activity and has come about for a number of reasons, including the desire to reduce market-distorting effects of import and investment restrictions on the allocation of resources and the need to expose protected industries to international competition. In addition, the process has been accelerated in response to pressure from Korea's trading partners, particularly the United States.

* Attorney, Marks Murase & White, New York; J.D. University of Michigan, 1984. The author recently returned from Seoul, Korea, where he was affiliated with the law firm of Lee & Ko for three years. The author is indebted to numerous Korean attorneys for their advice and research assistance and wishes to thank, in particular, Messrs. Kim, Kie Chang and Kang, Jae Hoon.
This liberalization process of both imports and investment deserves parallel examination since the liberalization of each will affect the other and since the two regimes share similar characteristics. Changes in the legal regime governing imports will affect the flow of foreign investment into Korea just as surely as changes in the regulation of foreign investment will affect the quantity and character of imports coming to Korea. Furthermore, the regimes governing both imports and foreign investment, particularly their approval processes, together reveal the Korean government’s active role in regulating the economy.

Finally, the liberalization of the import regime will continue to be resisted by various sectors in Korea which believe that their interests are threatened by the greater competition from foreign products. One of the possible responses of affected domestic industries and other groups is to make greater use of Korea’s unfair trade practice laws and safeguard-type actions. Thus, both because these laws may begin to play a greater role in Korea and because of the international community’s concern with the proliferation and development of individual-country laws that may affect the free flow of goods and even services, the role of Korea’s principal trade actions deserves some attention.

Given this background, the modest goal of this article is to broadly capture the current state of Korea’s rapidly developing legal system governing imports and foreign investment and to introduce Korea’s developing trade actions. Section II of this article will describe the overall structure of Korea’s regulation of imports and foreign investment, provide historical background on the liberalization of both regimes, and discuss certain recent liberalization developments. Section III will then analyze the contours of Korea’s more important unfair trade practice and safeguard laws, with some emphasis on the principal differences between the antidumping laws of Korea and the United States.

II. THE REGULATION AND LIBERALIZATION OF IMPORTS AND FOREIGN INVESTMENT

A. Regulation of Imports and Liberalization Measures

The increase in the import of goods has been evident over the last several years, particularly since the early 1980’s. This trend has been visible both in Korea’s overall trade balance and in Korea’s trade balance with the United States. Korea’s overall import growth over the last years has been steady, increasing from US$22.3 billion in 1980 to US$31.1 billion in 1985, and particularly strong very recently, rising from US$31.6 billion in 1986 to US$41.0 billion in 1987 and then to
US$51.8 billion in 1988, when imports increased by 26.3 percent over 1987.¹ Imports during the first ten months of 1989 amounted to US$50.4 billion, representing a 19.0 percent increase over the same period of 1988. Imports from the United States, after increasing to US$4.9 billion in 1980, expanded to approximately US$6.5 billion in both 1985 and 1986, then rose to US$8.8 billion in 1987 and US$12.8 billion in 1988, an increase of 45.7 percent over the previous year. Imports from the United States during the first ten months of 1989 stood at US$13.0 billion, a 26.2 percent increase over the same period of 1988.²

While many factors contributed to this trend, Korea’s liberalization of restrictions on the import of goods has been indispensable. The object of this section of the article is to analyze the legal regime by which Korea controls the importation of goods, provide some historical perspective to Korea’s liberalization of this regime and note certain areas that may be further liberalized.

1. The Foreign Trade Act and the Regulation of Imports

The Foreign Trade Act³ sets forth the legal structure which underlies Korea’s system of import control. Unless an import transaction is eligible for a special exemption, it generally requires an import license. The basic authority for this requirement is found at article 19(1) of the Foreign Trade Act which provides that: “[a]ny person who desires to export or import goods shall obtain the approval of the Minister of Trade and Industry with respect to goods concerned, form of transaction, method of settlement in price, etc. under the conditions as prescribed by the Presidential Decree.”⁴ The Enforcement Decree of the Foreign Trade Act (“FTA Decree”)⁵ identifies the various limited exemptions to the approval otherwise required by article 19(1) of the Act which may apply, for example, to specified goods that are imported gratuitously.⁶

Goods not exempted from approval are either “negative-list” items that are restricted or prohibited or goods eligible for the “automatic approval” of an import license (“AA items”). While the restricted

---

¹ The author has compiled these statistics from reports of the Rep. of Korea, Ministry of Trade and Industry.
² Id.
⁴ Id. art. 19(1).
⁵ Enforcement Decree of the Foreign Trade Act, Presidential Decree No. 12,191 (June 30, 1987), amended by Presidential Decree No. 12,590 (Dec. 31, 1988) [hereinafter FTA Decree].
⁶ Id. art. 33.
items from the negative list may be approved on a case-by-case basis, all other non-prohibited goods are AA items. The Minister of Trade and Industry must designate such restricted, prohibited and AA classifications in an export and import public notice ("General Export and Import Notice").\(^7\) This General Export and Import Notice must specify which restrictions apply to restricted items, such as in connection with quantity, standards and geographical area. The Notice must also set forth the procedure for the recommendation and confirmation of the export or import of such restricted items.

Pursuant to this regulatory framework, the importer is required to fill out an application for an import license for each import transaction and submit it together with a contract or evidence of a firm offer to a foreign exchange bank, which will actually issue a license for most import items in accordance with its approval authority delegated by the Minister of Trade and Industry. If the item is an AA item, the license will be issued without any specific formality. For restricted items, the importer usually must obtain a recommendation from the relevant ministry or the endorsement of a specialized association before applying for the import license.

In addition to the basic distinction between negative list and AA items specified in the General Export and Import Notice, imports may be subject to certain other restrictions, the most significant of which are set forth in three separate public notices. First, a "consolidated public notice" ("Consolidated Notice") consolidates export and import requirements that have been set forth by laws and regulations outside of the Foreign Trade Act.\(^8\) The Consolidated Notice covers a wide range of restrictions pertaining to concerns such as the maintenance of quality and the protection of public health and safety which may apply to imports of designated medicaments, medical equipment, food products and additives, fertilizer, livestock, electric appliances, and several other categories of goods.

Second, a separate public notice on imports and exports ("Separate Notice") contains several provisions pertaining to the export and import of goods.\(^9\) Chapter I of the Separate Notice, for example, includes regulations that restrict the export and import of used goods, allowing the import of used goods only in certain very limited circum-

---

7. Foreign Trade Act, art. 18. A recent version of this notice is Ministry of Trade and Industry Notification No. 89-40 (Dec. 9, 1989).
9. FTA Decree, art. 35. A recent such notice is Ministry of Finance Notification No. 89-33 (Oct. 10, 1989).
stances, such as if machinery or equipment has been previously used by a company in overseas construction. The Separate Notice also specifically restricts the import of raw materials, machinery and other goods to be used in the defense industry (Chapter VI) and the import of aircraft and parts thereof (Chapter VII), pursuant to article 35 of the FTA Decree, subparagraphs 3 and 4, respectively.

Third, a public notice on the diversification of import countries ("Diversification Notice")\textsuperscript{10} restricts the import of certain items if they are imported from a country with which Korea has an unfavorable and long-standing trade imbalance. Authority for such restrictions is found in article 35(5) of the FTA Decree which authorizes the establishment of conditions to the "[i]import of goods in order to maintain a balance between export and import for each country." The resultant Diversification Notice which establishes such conditions states that restrictions apply to imports from the country with which Korea has the largest trade deficit during the preceding five-year period. At present, this country is Japan. In order to receive import licenses for goods to which this Diversification Notice applies and which are not specially exempted, importers need the recommendation of the Association of Foreign Trading Agents of Korea, a private industry association in Korea.

The purpose of such a restriction on the import of certain goods from a trade-imbalance country is to diversify Korea’s sources of imports. It has been noted that the United States and other countries which do not have a large bilateral trade surplus with Korea are actually beneficiaries of this system, since traders from these countries are not subject to restrictions which may face their competitors from Japan.\textsuperscript{11}

In practice, the tariff schedules of the Republic of Korea list all categories of goods according to their harmonized commodity description and coding system designations ("H.S. Numbers"). The tariff schedules set forth tariff rates, indicate for each ten-digit H.S. Number whether the item is on the negative list as restricted or prohibited, and note whether any other restrictions may apply to the import of the item, such as the restrictions described in the Consolidated, Separate or Diversification Notices.

\textsuperscript{10} A recent such notice is Ministry of Trade and Industry Notification No. 89-6 (Mar. 24, 1989).

\textsuperscript{11} See Operation of the Trade Agreements Program, USITC Pub. 1720 (July 1989).
2. Liberalization of Import Regulations

The negative list system of import licensing was adopted by Korea in 1967 shortly after Korea became a signatory of the General Agreement on Tariffs and Trade ("GATT"). Prior to July, 1967, Korea followed a positive list system, originally adopted in 1955, under which only those items specifically listed could be automatically approved. While Korea experimented with import liberalization in the late 1970's when the economy began to improve, the liberalization was suspended due to Korea's deteriorating balance of payments resulting from the oil crises and an industrial policy that emphasized import substitution. As its trade deficit shrank and industries strengthened, Korea seriously began to dismantle the import-licensing process and further liberalize the importation of goods in the early 1980's. At the end of 1984, the 1982-86 five-year economic and social development plan was revised and a strategy was adopted to liberalize the economy both internally and externally and to introduce greater competition in all sectors by relying more heavily on the market mechanism. At that time, the government adopted a program of accelerated import and foreign investment liberalization and tariff reduction, in part to expose protected domestic industries to external competition, thereby forcing them to improve their efficiency and product quality. The government announced that the import liberalization ratio would be gradually increased and specified the details of this liberalization to allow domestic and foreign firms time to prepare themselves for the scheduled market opening. This general import liberalization process was accelerated in 1986, the year of Korea's first trade surplus.

The process of liberalization was continued with the adoption on December 31, 1986 of the Foreign Trade Act, which took effect on July 1, 1987. The Foreign Trade Act replaced the Trade Transactions Act of 1967 as the basic governing law on trade matters. While the Foreign Trade Act continues the former Act's practice of requiring approval for each import transaction, the Foreign Trade Act was intended to phase out restrictions on imports and exports, to establish an

15. Id.
16. Id.
institutional framework to cope with possible temporary increases in imports, and to simplify certain aspects of the trade system.

Yet another important regulatory change affecting the import of goods took place on January 1, 1989, when the Import Surveillance System was abolished. In the process of liberalizing the import of goods, Korea had instituted certain procedures designed to soften the impact of newly liberalized AA items. Chief among these procedures was the Import Surveillance System, adopted in 1977, under which newly liberalized AA items were kept under surveillance to determine their impact on the domestic market. The import of these items required the prior confirmation by the Association of Foreign Trading Agents of Korea before the items could receive an import license. Items on the surveillance list were eventually to be given full automatic approval status or returned to the restricted list. The involvement of an industry association in confirming the goods before import licenses would be granted ensured the likelihood that imports of products under surveillance would not increase. In part due to outside pressure on Korea to mitigate the effects of the Import Surveillance System, the Korean government reduced the number of items under surveillance during the 1980's and abolished the System on January 1, 1989.

As a result of this liberalization process, the percentage of import items subject to "automatic approval" has greatly increased. The number of items subject to negative list prohibitions or restrictions, as categorized by the 10-digit H.S. Numbers, was 465 as of July, 1989. Thus, since there are a total of 10,241 categories of goods, the so-called import liberalization ratio — the percentage of categories of goods which have been liberalized — is 95.5 percent. This ratio has steadily increased from 68.6 percent in 1980 to 80.4 percent in 1983 and 91.5 percent in 1986. The remaining import-restricted products subject to case-by-case approval are primarily agricultural products. Even more impressively, among the 8,456 categories of manufactured goods, only 39 items are restricted, for an import liberalization ratio of 99.6 percent. The Korean government has indicated that it will liberalize further during the 1989-91 period, removing restrictions on all but ten of the manufactured products and raising the agricultural lib-

18. These statistics are the author's compilations from various Ministry of Trade and Industry sources.
19. Id.
20. Id.
eralization ratio to 85% by January 1, 1991.21

Apart from the relatively few products which are still subject to negative-list restrictions, some of Korea's trading partners have argued that other aspects of Korea's regulatory system may have the effect of hindering imports. For example, certain trading partners have raised exception to pre-import reporting and notification requirements found in several individual laws, under which an importer is required to report or notify its intent to import particular items to a ministry or an industry association and may also be required to file background documents. The United States took issue with such requirements in the recent "Super 301" negotiations with the Korean government that resulted in a May 19, 1989 exchange of letters between the governments of Korea and the United States.22 While these letter agreements have no specific effect until their provisions are implemented, the Super 301 Import Agreement states in part that Korea will implement a plan to reduce or eliminate pre-import reporting or notification requirements, phase out participation of industry associations in the pre-import system,23 and simplify documentation requirements to assure that pre-import approval is issued expeditiously.24

Some trading partners have also argued that aspects of Korea's system of special laws regulating the import of various goods for the maintenance of quality or the protection of public health and safety or national security, as reflected in the Consolidated Notice, may also have the effect of hindering imports. Though these laws include internationally accepted standards for health and safety, the Korean government has announced that aspects of the provisions which have been allegedly used to restrict imports are under review and have been liberalized.25 The United States raised the issue of these trade-related standards and technical regulations in the Super 301 negotiations, and the Korean government agreed in part to notify GATT of any trade-related standards and technical regulations which are not based on well-

21. Id.
24. Id. para. A(10).
25. FREE AND FAIR TRADE, supra note 17, at 22-23.
recognized international standards or which deviate from those standards.\textsuperscript{26}

B. Regulation of Foreign Investment and Liberalization Measures

Korea's regulation of foreign investment has also been greatly liberalized in parallel with the liberalization of restrictions on the importation of goods. As with the liberalization of the import of goods, much of the change in foreign investment regulation has been self-initiated by Korea as the domestic economy has strengthened and become internationalized. However, as with the process for the liberalization of goods, pressure from the international community has also been a factor behind the recent changes. In part due to the fact that patterns of trade in goods are significantly affected by national laws and regulations governing direct foreign investment, and in part due to the independent importance of direct investment to the world economy, advanced developed countries have taken an interest in attempting to open the world to the relatively unrestrained access to equity investment in local markets.

As with the prior section of this article on the regulation of the import of goods, the object of this section is to analyze the legal underpinnings of Korea's regulation of direct foreign investment, to provide some historical perspective on the liberalization of this regulation and to suggest the direction of future liberalization efforts.

1. The Foreign Capital Inducement Act and the Regulation of Foreign Investment

Korea is certainly not unique in controlling foreign investment. National laws on foreign investment are very diverse, ranging from countries which are almost entirely closed to equity investment by foreign investors to countries which give special incentives to foreign investors not otherwise available to local investors.\textsuperscript{27} Many countries have special legislation governing the entry and operation of foreign investment in their territories which typically provides for the types of investment projects permitted, systems for administering the approval of permitted projects, performance requirements and other applicable controls, as well as incentives for desired foreign investment. While such legislation is less common in advanced industrial countries, even

\textsuperscript{26} Super 301 Import Agreement, supra note 22, para. B(1).

\textsuperscript{27} See 4 W. STRENG & J. SALACUSE, INTERNATIONAL BUSINESS PLANNING § 19.05 (1983).
countries such as the United States have certain restrictions on sectors in which foreign investment is not desired, such as in national security areas, and impose certain reporting obligations for significant investments.

Korea's system for regulating foreign investment is governed by the Foreign Capital Inducement Act ("FCIA"). Though approval of some types of foreign investment in Korea, such as the acquisition of existing shares by a foreign party, is theoretically available pursuant to the Foreign Exchange Control Act, foreign direct equity investment is approved pursuant to the FCIA. The FCIA in principle permits foreign investment in all industries except those identified on a negative list as prohibited or restricted and those specially designated as reserved for "small and medium-sized" enterprises. In cases of restricted projects or those reserved for smaller enterprises, foreign investment may be permitted subject to special criteria.

All projects which are not prohibited are subject to one of two approval tracks: "automatic approval" ("AA") through the Bank of Korea ("BOK") for projects with a foreign investment ratio of less than fifty percent and meeting certain other requirements, and a more detailed and time consuming approval through the Ministry of Finance ("MOF") for projects which do not qualify for AA approval by the BOK. The MOF approval process includes the participation of additional concerned ministries which will be consulted and which will conduct economic and feasibility studies of the project. The MOF will also request the Economic Planning Board to determine whether the application, particularly the joint venture agreement if the investment is in the form of a joint venture, contains any unjust or unfair provisions according to the Monopoly Regulation and Fair Trade Act. Unfair trade provisions in joint venture agreements are set forth in Economic Planning Board Public Notice No. 89-5, Scope and Criteria of Unfair Trade Practices in International Agreements ("EPB Unfair Trade Criteria"). If the agreement is found to violate

---

32. Scope and Criteria of Unfair Trade Practices in International Agreements, Economic Planning Board Public Notice No. 89-5 (Sept. 29, 1989) (unofficial translation) [hereinafter referred to as EPB Unfair Trade Criteria]. Article 4 of the EPB Unfair Trade Criteria provides that the following shall constitute unfair trade practices if found in joint venture agreements: (1) if the raw materials, components, equipment, related products, etc. of the proposed investment project are unreasonably required to be purchased from the foreign investor or from a person...
the EPB Unfair Trade Criteria, such as if raw materials, components, equipment, and other items are unreasonably required to be purchased from the foreign investor or its designee, then removal or modification of the provision may be required. A proposed investment of over US$5 million further requires approval by the Foreign Capital Project Review Committee. Upon review of the opinions of the concerned ministries and the EPB, the MOF will issue its approval and, in doing so, has discretion to set forth conditions to the approval.

In this outline sketch of the foreign investment approval process, three basic features of Korea's regulation of foreign investment emerge. First, as with the regulation of imports under the Foreign Trade Act, the regulation of foreign investment under the FCIA employs a negative list system which restricts or prohibits investment in designated sectors. The FCIA and the Enforcement Decree of the FCIA ("FCIA Decree")\(^3\) set forth the basic framework for restricted and prohibited projects and provide broad criteria for such projects. The FCIA provides that the Minister of Finance shall approve foreign investment without delay unless it falls under certain designated categories, including an investment made in a restricted project.\(^4\) The FCIA Decree defines in general terms such restricted projects as those: (1) "specially supported by the government," (2) "with a high consumption level of energy and a high ratio of imported raw materials," (3) "resulting in heavy pollution," (4) "considered extravagant or resulting in non-productive consumption," (5) "affecting the subsistence of farmers and fishermen" and (6) "other projects whose industry is in the initial development stage and for which protection is deemed necessary for a certain period under industrial strategy."\(^5\) Similarly, the FCIA itself generally defines prohibited investment projects, which include projects reserved for the public sector, those which cause harm designated by the foreign investor; (2) if the export of the products manufactured by the joint venture company to territories other than those wherein the foreign investor is itself engaging in ordinary sales activities or wherein a third party is given an exclusive right of distribution, is prohibited or requires a prior approval; (3) if the products manufactured by the joint venture company are required to be exported only through the foreign investor or through a person designated by the foreign investor; provided, however, that this will not be deemed to be a prohibited unfair trade practice if the foreign investor or the person designated by the foreign investor is obligated to accept such products only at appropriate times and at prices and conditions which are internationally reasonable; and (4) if the terms of the agreement are, in light of the customary practices in international contracts, unreasonably against the interest of the domestic investor.

33. Enforcement Decree of the Foreign Capital Inducement Act, Presidential Decree No. 11,460 (June 30, 1984), amended by Presidential Decree No. 12,861 (Dec. 27, 1989), [hereinafter FCIA Decree].

34. FCIA, art. 7(2) Law No. 1802 (1966), amended by Law No. 3691 (1983).

35. FCIA Decree, supra note 33, art. 9.
to health and sanitation, and those which violate public policy.  

The specific industry sectors which comprise these generally-defined restricted and prohibited projects are set forth in the MOF's Guidelines for Foreign Investment, the most recent edition of which was published in December, 1989 ("FCIA Guidelines"). The 999 industry sectors which are covered by the FCIA Guidelines have been classified according to the Korean Standard Industrial Classification. The prohibited and restricted sectors among these are set forth in attachments to the FCIA Guidelines. The restricted projects will not be approved by the Minister of Finance unless the Minister has previously set criteria for the approval of investment in the specific sector. Such "Criteria for Permitting Foreign Investment in Restricted Industries" is set forth in Attachment IV to the FCIA Guidelines and includes criteria for investment in restricted sectors such as general foreign trade, life insurance, and advertising agencies. For example, while the advertising agency industry is presently restricted, the criteria for approval provide that approval may be granted if the foreign equity ratio is less than fifty percent and certain other conditions are met. As of January, 1990, the foreign equity ratio in the advertising agency industry will no longer be restricted.

Second, sectors which are not on the foreign investment negative list are not necessarily eligible for the AA process. This AA process is only one of the two foreign investment approval tracks open to projects which are not prohibited; the other is a full MOF review and approval. By authority which has been delegated by the MOF, the BOK grants "automatic approval" to foreign investment projects which meet the following criteria:

1. The ratio of shares to be subscribed for by the foreign investor is less than fifty percent;
2. The total amount of foreign capital to be induced is less than US$100,000,000;
3. The investment is to be made in a manufacturing project;
4. No tax benefits are sought; and
5. The investment is to be made in a project which is not on the

---

38. Id., art. 1.
39. Article 4 of the FCIA Guidelines provides that "Prohibited Projects" are set forth in Attachment I of the Guidelines, and Article 5 indicates that the "Restricted Projects" are set forth in Attachment II. Id., arts. 4, 5.
40. Id., art. 5.
41. FCIA Decree, supra note 33, art. 46(2)(1).
negative list.\textsuperscript{42}

Thus, pursuant to item 5 of the criteria, the BOK AA process is not available for investment projects which are on the negative list. However, even projects which are not on the negative list are eligible for BOK approval only if the project also satisfies items 1 through 4 of the criteria.

While eligible investments are approved by the BOK within ten days, all other investments must receive full MOF approval which typically takes from thirty to sixty days and includes the participation of other concerned ministries. Although the approval process undertaken by the BOK is not truly "automatic," the BOK's review is more limited than the MOF process both in theory and in practice. For example, as noted in the foregoing, the MOF must consult with the EPB regarding potentially discriminatory provisions in joint venture agreements pursuant to the EPB Unfair Trade Criteria.\textsuperscript{43} On the other hand, pursuant to BOK review, the EPB is not consulted in connection with the EPB Unfair Trade Criteria. Moreover, in part because of time constraints, the BOK does not perform as rigorous a review of the EPB Unfair Trade Criteria. Furthermore, even though in theory the BOK, through authority delegated by the MOF, is required to review the terms and conditions of the contract, the size and contents of required foreign capital, and the production and sales plans,\textsuperscript{44} in practice, projects which are eligible for AA are seldom interfered with in the BOK approval process. Thus, for the foreign investor the AA track is an efficient alternative that entails less risk that the Korean government will seek to modify the investment plans.

Third, other requirements may apply to investment projects. For example, foreign investment in three sectors — construction, non-life insurance, and certain alcohol production — must take the form of a joint venture with an existing company authorized or licensed for that area of business, and in a limited number of other sectors must take the form of a joint venture undertaken only with an existing company engaged in the same business.\textsuperscript{45} As another example, local equity participation requirements are found in certain individual laws, such as the Petroleum Refining Law, Mining Law, Fisheries Law and the Phonogram and Videotape Manufacturing Law.

However, some of the more significant additional restrictions

\textsuperscript{42} See FCIA, art. 7(2), Law No. 1802 (1966), amended by Law No. 3691 (1983); FCIA Decree, supra note 33, art. 8(2).

\textsuperscript{43} FCIA Guidelines, supra note 37, art. 12(3).

\textsuperscript{44} See FCIA Decree, supra note 33, art. 7.

\textsuperscript{45} FCIA Guidelines, supra note 37, art. 7.
which may apply to foreign and domestic investors alike are the investment permission requirements which apply to "small and medium-sized" enterprises. The MOF may approve foreign investment in either of the two "small and medium-sized" enterprise categories — one applying to "projects inherent to small and medium-sized enterprises" ("Inherent Sectors") and the other to "small and medium-sized systematized items" ("Systematized Items") — only if the investment meets certain requirements.46

Inherent Sectors have been reserved to smaller enterprises in an effort to promote their development in an economy known for the dominance of very large companies. Generally, a "large" foreign company, as defined on the basis of total employees and assets,47 may form a joint venture with or make a capital investment in an existing domestic "small and medium-sized" enterprise as long as the foreign-invested equity ratio in the domestic enterprise is less than fifty percent after the joint venture and does not exceed fifty percent after the capital investment.48 However, if the foreign company is itself considered to be a "small and medium-sized" enterprise, it may generally invest in a "small and medium-sized" domestic company, regardless of whether the investment results in the creation of a joint venture or a subsidiary.49

Systematized Items also promote smaller enterprises by requiring that designated parts and components within certain industries generally be produced by "small and medium-sized" enterprises. Foreign investment in projects to manufacture such designated Systematized Items may be permitted by a foreign company of any size if the foreign-invested company is a "small and medium-sized" enterprise.50 However, even if the foreign-invested company desiring to manufacture a Systematized Item is a large enterprise, government approval may be obtained if the project is a joint venture with a Korean company specially designated to produce the Systematized Item.51 A wholly-owned subsidiary may even be approved if such a specially designated Korean company is unable to manufacture the Systematized

46. FCIA Guidelines, supra note 37, art. 8.
47. The standards distinguishing a "small and medium-sized enterprise" from a "large enterprise" are provided under the Small and Medium Industry Basic Act, Law No. 1840, amended by Law No. 3650 (1982) and its Enforcement Decree. Generally, a manufacturing business can be classified as a small and medium-sized enterprise if the number of employees is not more than 300 to 700 and the total assets is not more than 8 to 12 billion Korean won, depending on the respective nature of each manufacturing business.
48. See FCIA Guidelines, supra note 37, at Attachment III, § 1.
49. Id.
50. Id. § 2.
51. Id.
2. Liberalization of Foreign Investment Regulation

The negative list system is a relatively recent feature of Korea's foreign investment law and was incorporated into the FCIA when the Act was totally revised on December 31, 1983, taking effect on July 1, 1984. Before this revision, the Act used a "positive system," which allowed foreign investment only in specifically designated industrial sectors. The AA approval track is also quite new. Although the outline of the AA system was first set forth as part of the amended FCIA effective July 1, 1984, its present structure was adopted only when authority for its implementation was delegated to the BOK on July 1, 1987.

In the early years of the post-Korean-war regulation of foreign investment, beginning as early as January, 1960 with the Foreign Investment Encouragement Act, the Korean government actively sought foreign capital to begin to rebuild the economy. For instance, it was lenient to foreign investors even if equivalent local industry capabilities were already in existence. However, after 1973 as the economy strengthened and the Korean government gained bargaining power over foreign investors, the government began to enact restrictions, including sectoral preferences, limits on equity holdings and the incorporation of minimum investment amounts. This trend began to be reversed in 1980, in part due to difficulties in the economy, and new guidelines marked the beginning of a foreign investment liberalization program.

Although a liberalization process had already begun, the adoption of the negative list system in 1984 was the initial major revision toward the current relatively liberalized state of foreign investment. The negative list has since been gradually shortened, with the result that very few sectors are currently restricted or prohibited. The "liberalization ratio" of foreign investment, which reflects the percentage of industries as defined by the Korean Standard Industrial Classification not on the negative list, increased from 60 percent in 1983 to 76.3 percent in 1985 and 78.9 percent in 1987, remaining approximately the

---

52. Id.
55. Kim, supra note 53, at 192-93.
same in 1989.56 The liberalization ratio for manufacturing industries alone for the same years was 66.8 percent in 1983, 92.5 percent in 1985, and about 97.5 percent in 1987 and 1989.57

As previously noted, the liberalization of foreign investment in service sectors has been a particularly noteworthy development. Among the recent changes affecting service sectors are a reduction in restrictions on the participation of foreign-invested firms in trading activities, the issuance of guidelines for licensing joint ventures in life insurance, the gradual liberalization of foreign investment by advertising agencies, and the opening of movie production and distribution to foreign investment.58

Some specific examples of continued progress include the liberalization of the wholesaling of pharmaceutical products as of July 1, 1989, the manufacture of medicaments as of January 1, 1990, and the scheduled liberalization of the wholesaling of cosmetics and toiletries as of July 1, 1990.59 These liberalization measures were anticipated earlier in Paragraph D(8) of the Super 301 Investment Agreement, in which Korea also agreed to remove travel agency services from the negative list by January 1, 1991,60 as well as further liberalize advertising agency investment requirements and eventually remove this sector from the negative list, also by January 1, 1991.61 The Super 301 Investment Agreement further provides that the Korean government will neither add sectors to the negative list nor move sectors from the restricted list onto the prohibited list.62

Eligibility for the BOK's AA process is also being expanded to a broader range of investment projects. Effective January 1, 1990, the prior maximum of US$3 million eligible for AA was increased to US$100 million for investments otherwise satisfying the AA requirements.63

If the provisions of the Super 301 Investment Agreement are implemented,64 after January 1, 1993, Korea will shift to a notification system allowing foreign investors in both manufacturing and service sectors to proceed with their investments within sixty days of notifica-

56. The author has compiled these statistics from various Ministry of Finance reports.
57. Id.
59. Id.
60. Super 301 Investment Agreement, supra note 22, para. D(5).
61. Id. para. D(7).
62. Id. para. B(1).
63. FCIA Decree, supra note 33, amendment No. 12,861 (Dec. 27, 1989).
tion to the Korean government unless the project falls into one of three categories: (1) it is on the negative list, in which case the MOF may impose conditions on approval, (2) the project is disapproved by the Korean government for reasons of national security, public order, health, morality or safety, international peace and security obligations, monopolistic and predatory practices or violations of the Monopoly Regulation and Fair Trade Act, or (3) the project is subject to certain defined "performance requirements" which will continue to be applicable to foreign investment. Among the performance requirements which will continue to be applicable are the requirements, as previously discussed, that a foreign investor may participate in certain limited sectors only through a joint venture, that certain foreign investor equity limitations may be imposed by various individual laws, and that certain "small and medium-sized" enterprise restrictions may apply to certain sectors.

The Super 301 Investment Agreement defines performance requirements in broad terms to include the acceptance or achievement of a given level or percentage of local equity, the export of goods or services, the transfer of technology and requirements for the use of Korean products or services. The Super 301 Investment Agreement also indicates that, apart from specified exceptions, the Korean government as of July 1, 1989 will no longer impose performance requirements on a foreign investor as a condition for permitting an investment or receiving any incentive.

III. THE ROLE OF KOREA'S TRADE ACTIONS

Now that Korea has greatly liberalized its regulation of imports and the flow of imports into Korea has been accelerating, a broader range of domestic interests may claim they are being harmed by this increase in import penetration, including penetration due to unfair trade practices of foreign producers and exporting countries. Although they have not been actively used thus far, many laws and regulations have been adopted which are designed to provide remedies for domestic interests faced with unfairly imported goods or harmed in

65. Paragraph A(4) of the Super 301 Investment Agreement provides as follows:
Performance requirements are requirements to: a) export goods or services; b) substitute goods or services from Korea for imported goods or services or accord preference to goods or services produced in Korea; c) use local contents; d) accept or achieve a given level or percentage of local equity; e) transfer or license technology; f) restrict remittances related to investment; g) limit manufacturing to prescribed product lines; h) manufacture in Korea; or i) shift production, distribution or marketing facilities or techniques to Korean nationals through government-imposed measures.

66. Id. para. A(1).
other ways by the imported goods. These laws and regulations most prominently include antidumping and countervailing duty laws and other legislation providing for temporary import restrictions under various circumstances.

The object of this section of the article is to introduce Korea's principal unfair trade practice actions, its antidumping and countervailing duty laws (with particular emphasis on the main features of the antidumping law), and to compare these actions and laws with those in the United States. Next, this section will introduce Korea's principal safeguard actions. These are designed not to respond to unfair trade actions, but to temporarily restrict imports to allow domestic interests time to adjust to competition from these imports.

A. Antidumping Law

Korea first adopted some form of an antidumping law in 1963 as part of the Customs Act. Major sets of statutory revisions occurred in 1969 and 1983, the Customs Act's Presidential Decree was significantly revised in 1986, in part to conform the law to Korea's obligations under article VI of GATT, which Korea joined in 1967, and the GATT Antidumping Code, which Korea signed in 1986. Article 10 of the current Customs Act sets forth the basic substance of Korea's antidumping law:

In cases where the importation of foreign goods for sale at a price lower than the normal value causes or threatens to cause material injury to a domestic industry or materially retards the establishment of a domestic industry (hereinafter in this Article referred to as "material injury, etc."), if deemed necessary to protect the domestic industry concerned, a duty may be imposed (hereinafter referred to as "antidumping duty") in addition to the customs duty charged pursuant to the dutiable value of the goods concerned, in an amount equal to or less than the difference between the normal value and the dumping price (hereinafter referred to as "margin of dumping") of such goods, by specifying the goods, exporter or exporting country of such goods prescribed by the Presidential Decree.

While the basic elements of this antidumping provision are broadly similar to those found in the antidumping laws of other jurisdictions, such as the United States, administering authorities in Korea retain a relatively high degree of discretion in imposing antidumping duties. For example, under United States law, administrative discretion in im-


posing antidumping duties has been limited. If foreign goods are being sold in the United States at less than fair value, and if the import or sale of the foreign goods materially causes or threatens to cause material injury to an industry in the United States or materially retards the establishment of an industry, "there shall be imposed" an antidumping duty in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.\(^\text{70}\) By contrast, according to article 10(1) of the Korean Customs Act, under similar circumstances, a duty "may be imposed." Thus this imposition is not mandatory. Article 10(1) has taken into account article 8(a) of the GATT Antidumping Code which states that it is desirable that the imposition of duties be permissive.

It should further be noted that Korea has adopted the so-called "lesser duty" rule,\(^\text{71}\) which provides that the full margin of dumping need not be imposed, but may be "in an amount equal to or less than the difference between the normal value and the dumping price . . . ." In contrast, U.S. law does not offer the option of imposing a duty amount less than the full margin of dumping. Korea shares the adoption of this "lesser duty" rule with jurisdictions such as the EEC.\(^\text{72}\) Here again the basic discretion remains in the hands of the Minister of Finance and also reflects article 8(a) of the GATT Antidumping Code, which states that it is desirable that a duty less than the margin should be imposed if such lesser duty would be adequate to remove the injury of the domestic industry.

1. **Substantive Requirements for Antidumping Duties**

Apart from the relatively high degree of discretion granted to administering authorities in imposing antidumping duties in Korea, Korea's basic substantive determination of the two main factors of dumping and injury to a domestic industry is quite similar to the substantive law of the United States. Korea, however, adds the third requirement that the duty may be imposed "if deemed necessary to protect the domestic industry concerned."\(^\text{73}\)

In the dumping determination, in which the "normal value" of the goods must be compared to their "dumping price," the Enforcement

---


\(^{71}\) See Customs Act, art. 10, para. 1.


\(^{73}\) Customs Act, art. 10(1).
Decree of the Customs Act (hereinafter “Customs Decree”) provides for three alternative methods of deriving “normal value.” Similar to U.S. law, if the ordinary price of identical or similar goods cannot be determined due to the absence of trade in the goods in the home country or if the ordinary price cannot otherwise be applied, then the price at which the goods are exported to a third country, or a “component price” of the goods, shall be used. While under U.S. law, foreign market value based on sales to a third country is generally preferred to that which is based on constructed value (known as “component price” in U.S. law), if adequate information is available and can be verified, Korean law does not specify a preference between third country sales and component price.

As for the injury determination, Korean law, like U.S. law and consistent with GATT, provides that the injury must be “material.” Although this term is not defined, certain managerial regulations promulgated under the Customs Act provide that the injury must be “clearly anticipated” and “urgent.” This material injury must harm a “domestic industry,” defined as “the whole domestic producers of goods identical, homogeneous or similar to the imported goods concerned or a group of domestic producers occupying a considerable portion of the gross domestic output . . . .” United States law similarly provides that the injury may be to either “domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product . . . ,” and also specifically provides conditions under which a product market may be subdivided into two or more markets. Under prior law in Korea, an injury determination was based upon the total domestic production of a product.

Apart from the dumping and injury determinations, Korean law adds a third element which must be satisfied before a duty may be imposed: the duty must be “deemed necessary to protect the domestic industry concerned.” If the Minister of Finance determines that the

74. Enforcement Decree of the Customs Act, Presidential Decree No. 4449 (Dec. 10, 1969), amended by Presidential Decree No. 12,572 (Dec. 31, 1988) [hereinafter Customs Decree].
75. Customs Act, arts. 4-2.
76. Managerial Regulations on Antidumping Duties and Countervailing Duties, Notification No. 89-6, Ministry of Finance (Feb. 15, 1989) [hereinafter Managerial Regulations] (unofficial translation).
77. Id. art. 17(3).
78. Customs Decree, supra note 74, art. 4-4(1).
80. Former article 4-2(5) of the Customs Decree, supra note 74. See Lee, The Korean Anti-Dumping Law, supra note 67, at 153-54.
domestic industry need not be protected, he may decide not to initiate an investigation or impose antidumping duties. While the Customs Act and the Customs Decree did not for some time set forth criteria to determine whether the domestic industry needed protection, article 18 of the current version of the Managerial Regulations specifies that the following factors shall be taken into account in considering the necessity for protecting a domestic industry: whether the duties will remove the injury, the impact on domestic prices, the impact on exports and on relevant industries, the comparison of the efficiency of protecting the domestic industry with other industrial and trade policy means, whether the merchandise is in a category of favored items under industry support and promotion-oriented acts, and other public policy grounds.

2. Other Procedural Features

In addition to the Minister of Finance's relatively high degree of discretion in imposing antidumping duties, the other procedural requirements of Korean antidumping law generally are also discretionary. However, recent amendments have indicated some movement toward limiting the Minister's discretion in deciding whether to initiate an investigation and have imposed certain investigatory time deadlines.

An antidumping investigation may be requested by an affected private party or by a ministry with jurisdiction over the concerned industry, or it may be self-initiated by the Minister of Finance.\(^8\) Even with sufficient evidence detailing the importation of dumped goods, material injury, and other elements of dumping, the Customs Act apparently contemplates that the initiation of an investigation still remains in the Minister's discretion.\(^8\) However, the Customs Decree was amended on December 31, 1988 to provide that the Minister shall have the Customs Deliberation Committee begin deliberations on whether to initiate an investigation within three months of receiving a request for duty imposition.\(^3\) The Managerial Regulations further provide that the Minister shall in principle commence an investigation unless there is insufficient evidence of dumping and injury; an insignificant dumping margin, level of imports or degree of injury; or if other satisfactory measures have been taken prior to the initiation of the investigation.\(^4\) The Customs Decree amendment and the Managerial

\(^8\) Customs Act, arts. 10(2), (3).
\(^8\) Customs Act, art. 10(3).
\(^3\) Customs Decree, supra note 74, art. 4-5(1).
\(^4\) See Managerial Regulations, supra note 76, arts. 6(3), (4).
Regulations emphasize the need for the Minister to give all new actions to the Customs Deliberation Committee for review and to dismiss an action prior to full investigation only under certain specified circumstances.

Korea provides for the formation of investigation teams for the dumping and injury determinations, similar to the approach under U.S. law and in contrast to the single investigation team approach under EEC law. Until very recently, if the Minister decided to initiate an investigation, the Customs Deliberation Committee would form two investigation teams—one consisting of MOF officials to investigate dumping, and one composed of Korean Trade Commission ("KTC") members or officials of the ministry in charge of the merchandise under investigation to investigate injury. However, a December 21, 1989 amendment to the Foreign Trade Act, to be discussed below, provides at article 40 that a newly strengthened Korean Trade Commission in the Ministry of Trade and Industry (MTI) will conduct an investigation as to material injury in antidumping and countervailing duty actions if the investigation is requested by the Minister of Finance upon the recommendation of the Customs Deliberation Committee. The full effect of this change will not be known until the FTA Decree and other provisions are amended to offer further explanation.

Until recently, the only time limitation imposed upon the investigations was that they shall terminate within one year of inception unless special reasons call for an extension. While the Korean Trade Commission's new ability to conduct injury investigations calls into question the applicability of current investigatory deadlines under the Customs Act, Customs Decree amendments effective as of December 31, 1988 provide for intermediate deadlines and indicate a trend toward greater formality in conducting investigations. First, upon receiving a request to impose duties, the Minister of Finance shall, within three months of receiving the request, have the Customs Deliberation Committee deliberate on whether it is necessary to begin an investigation. Second, the investigation shall be closed within six months after initiation and a report submitted to the Customs Deliberation Committee, unless the Committee otherwise determines to extend the investigation. Third, within one month after the

85. Id. art. 7.
86. Law No. 4145 (Dec. 21, 1989).
87. Customs Act, art. 10(6).
88. Customs Decree, supra note 74, art. 4-5(1).
89. Id. arts. 4-5(12).
investigation is suspended or closed, the Customs Deliberation Committee shall determine whether it is necessary to take an antidumping measure pursuant to the investigation’s finding and submit its determination to the Minister of Finance.\(^9\) Thus, while the time limitations do not begin to approach the complexity and formality of U.S. antidumping law, these amendments impose some intermediate time restrictions.

3. Investigations to Date

The real test of the Korean antidumping law will of course rest with its application. To date, however, only six investigations have been initiated, including a second investigation of the first antidumping action brought in April, 1986, and none have resulted in the imposition of duties. Chart No. 1 indicates the date of these investigations, the product, claimant, respondent and the result.

Based on these few investigations, some tentative observations can be made. Thus far, the Korean government has not initiated antidumping investigations — the initiators have been private companies and, in one case, an industry association. Second, no duties have yet been imposed. The MOF has indicated that this result is not coincidental but stems from an emphasis on obtaining undertakings from the parties suspected of dumping.\(^9\) Such undertakings, as authorized by article 10(8) of the Customs Act, may take the form of a revision in price to eliminate the injury resulting from dumping or a promise to cease export of the goods. This policy appears to be in part an outgrowth of Korea’s perceived vulnerability as a relatively small country which is highly dependent on exporting its own products. While the imposition of dumping duties could potentially invite retaliation from other countries against Korean exports, undertakings may be perceived to be less disruptive to Korea’s relations with other countries.\(^9\)

B. Important Features of Other Trade Actions

1. Countervailing Duty Law

The Korean countervailing duty law is very similar to the antidumping law apart from the requirements governing the imposition of subsidies or bounties. The Customs Act sets forth the basic countervailing duty requirements:

In a case where the importation of goods on which any subsidies or

\(^9\) Id. art. 4-5(13).

\(^9\)1. Conversations with Ministry of Finance officials.

\(^9\)2. Id.
bounties (hereinafter referred to as "subsidies, etc.") are granted directly or indirectly by any foreign country upon their manufacture, production or export causes or threatens to cause material injury to a domestic industry or materially retards the establishment of a domestic industry (hereinafter in this article referred to as "material injury, etc."), and where it is deemed necessary to protect the domestic industry concerned, a duty may be imposed in addition to the customs duty charged on the basis of the dutiable value, in an amount equal to or less than the amount of the subsidies (hereinafter referred to as "countervailing duty"), by specifying the goods and exporter or exporting country of such goods, as prescribed by the Presidential Decree.93

In contrast to the countervailing duty law of the United States, the Minister of Finance retains discretion in initiating an investigation even if subsidies or bounties are found which cause material injury. Furthermore, a duty is imposed only when it is deemed necessary to protect the domestic industry, and the amount of the duty may be less than the amount of the subsidy. In the United States, it is mandatory for the administering authority to assess a duty if the requisite elements of a countervailable duty are found to exist. It should also be noted that a "material injury" requirement applies in Korean countervailing duty law. To date, there have been no countervailing duty investigations in Korea.

2. Safeguard Actions Under the Foreign Trade Act and the Customs Act

Among Korea's safeguard measures are those administered by the Minister of Finance pursuant to the Customs Act, including a tariff quota system provided for under article 16 and two other provisions which will be focused on below: an emergency duty provision under article 12 and an adjustment duty under article 12-2. An additional safeguard-type provision is administered by the MTI under the Foreign Trade Act and the FTA Decree. While the Customs Act emergency duty and adjustment duty provisions employ broadly-defined criteria for taking action against imports and include a weak or even no injury requirement, the provisions of the Foreign Trade Act action have recently been significantly amended, in part providing for a material injury standard.

a. Customs Act Safeguard Actions

Of particular breadth and lacking an apparent injury component, article 12 of the Customs Act permits the imposition of an "emergency duty" of up to an additional forty percent over the stated customs

93. Customs Act, art. 13(1) (emphasis added).
duty in three separate cases: (1) if there is "an urgent need to protect a domestic industry which is important in relation to the national economy," (2) if there is "an urgent need to discourage the importation of particular goods," or (3) if there is "a need to modify the imbalance in tariff rates among goods due to a change in the industrial structure."\(^9\)

While the second Customs Act safeguard measure, the article 12-2 "adjustment duty," is also very broadly worded, this provision is at least limited to goods which have been newly designated in Korea as items whose import is "automatically approved."\(^9\) Thus, this provision is specifically designed to provide relief from the rapid liberalization of the automatic approval items as referred to earlier in this article. A customs duty of up to a total of 100 percent may be imposed "if it is necessary to curb the import" of goods in such newly designated automatic approval items. Even higher duties may be imposed on the import of such newly designated automatic approval goods which "impair or threaten to impair domestic industry by being imported at a price remarkably lower than identical or similar goods."\(^9\) Such impairment is not defined, nor is guidance given on the meaning of a "remarkably lower" price. In any event, an adjustment duty may be applied only within three years from the date of liberalization of the item in question.

No new adjustment duty cases have been initiated since the first half of 1987.\(^7\) The standards governing such adjustment duties are very broad and their application to items liberalized as automatic approval items has created a good deal of friction with Korea's trade partners such as the United States, particularly in view of the abolition in January 1989 of the similarly restrictive provisions of the Import Surveillance System. Out of apparent concern over the trade friction created by these adjustment duties, the MOF has been reluctant to conduct new adjustment duty investigations.\(^8\)

b. *The Foreign Trade Act Action*

Until recently, a safeguard action provided for in the Foreign Trade Act shared with the Customs Act safeguard provisions the features of a broad injury standard and a high degree of discretion left in the hands of administering authorities, whom in the case of the Foreign Trade Act action is the Minister of Trade and Industry, not the

---

94. Id. art. 12.
95. Customs Act, art. 12-2(1).
96. Id. art. 12-2(2).
97. Conversations with officials of the Customs Bureau, Ministry of Finance.
98. Id.
Minister of Finance. However, on December 21, 1989, the provisions of the Foreign Trade Act governing this safeguard action were significantly amended to provide for a material injury standard and to expand the powers of the KTC.

Under former article 32 of the Foreign Trade Act, certain defined interested parties were entitled to request the Minister of Trade and Industry to investigate the effect of imported goods on a domestic industry producing goods of the same kind or competitive goods if the development of the domestic industry "is or may be impeded by a rapid increase in the import or excess import of such specified goods...." While guidelines issued pursuant to the Foreign Trade Act made some attempt to define when a domestic industry has or may be "impeded," the amendment to article 32 now clearly specifies that the domestic industry must be "materially injured" or threatened with material injury. Legislative statements accompanying the proposal for reform indicate that the amendments were in part motivated by the standards imposed by GATT, which specifies at article XIX that emergency action against imports may be taken if the imports cause or threaten "serious injury" to domestic producers. Article 32 has also been expanded to cover injury not only due to a rapid increase in imported goods but also due to a rapid increase in foreign services or intellectual property infringements of the imported goods.

Also under the former provisions, the Minister of Trade had discretion over whether to initiate an investigation and whether it was necessary to form a committee to assist with the investigation. Upon the close of this investigation, the Minister of Trade and Industry was to refer to the KTC the question of whether it was necessary to take measures and the determination of the contents of such measures.

The amendments, however, provide the basis for a more active KTC. The amended Foreign Trade Act provides that it is the KTC, not the Minister, which shall determine whether to initiate an investigation. The KTC itself will both conduct the investigation and determine the nature and scope of measures to be taken. While the

100. Foreign Trade Act, art. 32, Law No. 4145 (1989).
102. FTA Decree, supra note 5, art. 67(2), (4).
103. Id. art. 69(1).
104. Foreign Trade Act, art. 33.
105. Id.
106. Id. art. 34.
former article 34 provided that the measures which could be taken include import restrictions, "assistance for an improvement of technology and productivity," or "designation of categories of industry for rationalization," the amendments add other possible measures. Most significantly, article 34 now provides that the KTC may recommend an increase in tariffs, a form of relief which could previously be granted by the MOF under the Customs Act safeguard measures but not by the MTI under the Foreign Trade Act.  

Lastly, the amendments to the Foreign Trade Act significantly expand the matters which are subject to the deliberation and decision of the KTC. While the KTC was basically limited to deliberating relief measures to be taken and other matters which might be referred to it by the Minister of Trade and Industry, the strengthened KTC is now empowered to deliberate and decide upon several other matters, including, as noted above, whether to initiate and conduct investigations. A new power of particular note, as referred to in the earlier section of this article on antidumping duties, is the KTC's ability to conduct a material injury investigation in connection with articles 10 and 13 of the Customs Act, respectively governing antidumping and countervailing duties, upon the request of the Minister of Finance pursuant to the Customs Deliberation Committee's recommendation.

In recognition of the overlap of the provisions under the Foreign Trade Act and the Customs Act, the amended article 63 of the Foreign Trade Act continues to provide that the provisions of articles 32 to 43 governing the safeguard investigations "shall not be applicable to" matters relating to the provisions of articles 10 to 16.2 of the Customs Act, which govern antidumping and countervailing duty investigations as well as emergency duty and adjustment duty provisions. However, due to the KTC's new ability to conduct antidumping and countervailing duty material injury investigations upon the request of the MOF, the amended article 63 provides that the Foreign Trade Act is now applicable to matters relating to the material injury investigations in connection with such Customs Act actions.

IV. CONCLUSION

Clearly, Korea's liberalization of restrictions on imports and foreign investment has been far-reaching in scope and has contributed to

107. Id.
108. Id. art. 40.
109. According to MTI officials, five Foreign Trade Act investigations were completed as of December, 1989 involving ceramics for burners, angora rabbit fur, tiny salted shrimp, red pepper paste and canned pork. An additional five investigations were pending.
major structural changes in the Korean economy. The Korean government appears to be no less committed to moving forward with the opening of the economy and the implementation of previously announced policies and agreements with its trading partners, such as the Super 301 Import and Investment Agreements.

Yet the Korean government's ability to persevere with its market-opening efforts surely has its limits. While the liberalization measures are undoubtedly making a strong, albeit difficult to measure contribution toward the vigor of the economy, Korea's GNP and export growth have slowed, in part due to increased wage costs and an appreciation of the Korean won. Such a slowdown has prompted calls from some sectors to halt the progress of liberalization. Some such pressure emanates from within the bureaucracy itself, and those advocates of market-opening who have often been charged with setting policy and negotiating trade agreements are not necessarily the same individuals who are charged with implementation. Furthermore, the Korean government now operates in an environment of heightened competition among affected interest groups in a society in the midst of a transition toward a more open and democratic political system. Those who face potential harm from the market-opening measures may not only resist further progress but, as suggested in the foregoing, may resort to Korea's various forms of trade actions in their search for some relief. Despite this new environment, however, Korea's legal system stands as strong evidence of a commitment to opening the economy.
<table>
<thead>
<tr>
<th>Date of Initiation</th>
<th>Product</th>
<th>Claimant</th>
<th>Respondent(s)</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. April, 1986</td>
<td>Dicumyl Peroxide</td>
<td>Due Hwa June, Mill</td>
<td>Nippon Oil &amp; Fats Co., Ltd. (Japan)</td>
<td>Undertaking pursuant to article 10(8), (9), and (13) of the Customs Act.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Concord Chemical Industrial Co., Ltd. (Taiwan)</td>
<td>Mitsui agreed to cease exporting after June, 1986.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Coin Chemical Industrial Co., Ltd. (Taiwan)</td>
<td>The other three offered to revise their prices after January, 1987.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Mitsui Petrochemical Industries, Ltd. (Japan)</td>
<td>The MOF accepted the offers and suspended the investigation as of December 18, 1986.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Same respondents except Mitsui</td>
<td>Dumping margins found as follows:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1. Nippon 24.5%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2. Concord 12.5%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3. Coin 13.6%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>In December, 1988, undertaking extended until December 31, 1989.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>If the undertaking is breached, the MOF will impose provisional antidumping duties and resume the investigation.</td>
</tr>
<tr>
<td>2. April, 1986</td>
<td>Acet Aldehyde</td>
<td>Hansin Co.</td>
<td>Showa Denko Co. (Japan)</td>
<td>The MOF terminated the investigation under article 10(5) of the Customs Act because injury to a domestic industry was insignificant even though a dumping margin of 54.4% was found.</td>
</tr>
<tr>
<td>3. October, 1986</td>
<td>Slide Hwasma</td>
<td>Dae Han Hwasma</td>
<td>Yoshida Industry Co. (Japan)</td>
<td>The MOF terminated the investigation under article 10(5) of the Customs Act because injury to a domestic industry was insignificant even though a dumping margin of 19.76% was found.</td>
</tr>
<tr>
<td>4. September, 1988</td>
<td>Alumina Cement</td>
<td>Union Co.</td>
<td>Lafarge Fondu Internationale (France)</td>
<td>In a preliminary investigation, the MOF recognized a probability of dumping in the range of 61.5% to 96.6% and injury to a domestic industry and launched a formal investigation.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>SNF Floegel (France)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Stock Hausen (West Germany)</td>
<td></td>
</tr>
</tbody>
</table>

Source: Ministry of Finance