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Alan S. Gutterman

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Japan and Korea: Contrasts and Comparisons in Regulatory Policies of Cooperative Growth Economies

by
Alan S. Gutterman*

I. INTRODUCTION

The economic development and regulatory policies of Japan and the Republic of Korea ("Korea") have provided the United States and its business firms with a number of complex political and commercial challenges in recent years. The economic success attained by Japan and Korea is impressive and well-publicized. Moreover, the two countries share several common ideological traits, and each appears to have adopted a unique set of policies to facilitate the export of goods and services by their domestic firms into the United States, as well as into export markets where American products have been losing their historical competitiveness. This article explores certain aspects of Japanese and Korean regulatory policies that have contributed to the rapid economic growth in both nations since the 1950s.

The economic growth in each nation since the end of their respective post-war periods has been staggering. Japan's gross national product ("GNP") rose, on average, at a rate of 10.5% per annum from 1950-73, 3.3% per annum from 1973-78,1 and 4.1% per annum from 1978-87.2 Further, the Japanese economy grew at its fastest annual rate in fifteen years in 1988, with real GNP increasing by 5.7% as opposed to 4.5% in 1987.3 As a result,

* Of Counsel, Pettit & Martin, San Francisco, California; J.D. Boalt Hall School of Law, University of California at Berkeley, 1981. Mr. Gutterman serves as the Chairman of the Subcommittee on Intellectual Property of the International Law Committee of the ABA's Section of Business Law and as the Chairman of the Subcommittee on Emerging Capital Markets in Developing Countries of the International Investment and Development Committee of the ABA's Section of International Law and Practice. He is also a Contributing Editor for the ABA's proposed periodical on Asia-Pacific law and business matters.

Mr. Gutterman is an experienced practitioner who has worked extensively with issues involving Japan and Korea. This perspective is largely based on his own experiences and constitutes original material. Because Japan and Korea play an important role in the area of international business, ITBL is publishing this perspective for its value as background material.

2. Id. at 138. Japan's gross domestic product ("GDP") showed similar vigor during most of this period and, from 1976 to 1986, grew at an average annual rate of 4.1%. Id.
3. San Francisco Chron. March 18, 1989, at B2, col. 1. The increase was attributed to the growth in domestic demand, spurred by large wage increases and bonuses.
Japan's per capita GNP surpassed that of the United States in 1987. Although the rate of real economic growth in Japan has slowed somewhat in 1989 and 1990, and predictions for future growth have been reduced from prior estimates, it is still expected that by the year 2000 the nation will complete the most dramatic transition of economic development in modern times, moving from labor-intensive activities, through raw-material and energy-intensive sectors, to its present expertise in manufacturing and high technology goods. Moreover, Japan should achieve the highest levels of output and income per capita in the world, further solidifying its position as a major source of capital and technology to developing and developed nations.

Korea's real post-war economic growth did not begin until the early 1960s. Yet, by 1985, the nation tripled its per capita GNP, rising to twenty-first among the nations with respect to GNP, at $83.1 billion, and to fortieth in per capita GNP, at $1,976. Real GNP growth in Korea averaged ten percent per year from 1965 until 1979. While growth was negative in 1980, from 1981 through 1985 growth averaged 6.8% per annum. In 1986, the nation's performance was even more impressive. GNP grew by 12.2% to approximately $94 billion. Korea's per capita GNP of $2,370 as of the end of 1986 meant that the average annual growth rate of GNP per capita from 1965 to 1986 was 6.7%, comparing favorably to 4.3% and 1.6% for Japan and the United States, respectively, during that period.

Korea's Five-Year Plan for the years 1987-91 indicated a target GNP of $175 billion, or $4,000 per capita, in 1991, with the overall annual rate of increase in GNP running at 7.0 to 7.5%.

4. At an exchange rate of 125 yen per dollar, Japan's GNP per capita of $23,765 in 1987 ran 25% ahead of the United States level of $19,050. However, after taking into account variations in the level of consumption spending and prices, consumption per capita in Japan was only 63% as high as in the United States in that year. STAFF OF JOINT ECON. COMM., 99TH CONG., 2D Sess., RESTORING INTERNATIONAL BALANCE: JAPAN'S TRADE AND INVESTMENT PATTERNS, (Comm. Print 1988) [hereinafter RESTORING INTERNATIONAL BALANCE].


6. Japan became the world's richest nation on paper for the first time in 1987, surpassing the United States with $43.7 trillion in national assets. National assets are the total value of financial assets, such as stocks, deposits, and insurance, and actual assets, such as production facilities, housing, land, and inventories. According to the United States Federal Reserve Board figures, the value of national assets in the United States in 1987 was $36.2 trillion.


8. Id.

9. Id.

10. Id. at 188.

11. Id.


13. This goal was actually achieved by 1988, when per capita GNP reached $4,000. PRICE WATERHOUSE, DOING BUSINESS IN KOREA INFORMATION GUIDE 3 (Supp. 1989).

intent to follow Japan along the path of continuously developing and exporting more complex, technology-driven products, relying on its ability to compete effectively with firms from the United States, Europe, and Japan. If successful, Korea’s economic achievements will be as extraordinary as Japan’s and will serve as a model for many of the other developing nations in the Pacific Rim trading area.

American policy makers and managers have traditionally concerned themselves only with the competitive practices of other domestic firms and thus have had difficulty understanding Japan’s and Korea’s economic success. However, it is now apparent that when an American firm competes with a Japanese or Korean counterpart, it is dealing not only with the management skills, human resources, and capital assets of that firm, but it is also confronting a competitor that operates with a materially different understanding of the process of defining and utilizing its competitive advantages. The objectives of the foreign firm are defined and reinforced by the practices within its own domestic marketplace and the regulatory policies of its own government, each of which are a function of the distinct historical experiences and system of values, or ideology of the nation.

Therefore, this article begins by examining certain aspects of Japanese and Korean history, describing the various economic and political challenges and experiences that have been most important in determining ideological and social priorities within each nation. After examining these national priorities, the article analyzes the structure and purposes of relevant Japanese and Korean institutions, public and private. The article also discusses related social and regulatory frameworks. Finally, this article identifies each nation’s

15. “Competitive advantage” is often referred to as “comparative advantage.” American managers, schooled in traditional economic theory, are usually taught that firms and nations seek to compete in an environment of free trade in which the “winners” are those entities which seek, establish, and maintain an advantage in one or more fundamental competitive factors: capital, labor, technology, or natural resources. However, “communitarian” nations, like Japan and Korea, have arguably “created” their own new form of comparative advantage by abandoning traditional free trade and “managing,” with the apparent consent or at least tolerance of workers, managers, and consumers, their domestic marketplaces in a manner designed to facilitate the efficient pursuit of overall objectives in an increasingly global market. See J. Zysman & L. Tyson, American Industry in International Competition (1983).

16. As used herein, “ideology” is defined as “the collection of ideas that a community uses to make values explicit in some relevant context.” An excellent study of the role of ideology in national economic policies has been published in G. Lodge & E. Vogel, IDEOLOGY AND NATIONAL COMPETITIVENESS: AN ANALYSIS OF NINE COUNTRIES (1987) (see chapters 6 and 8 on Japan and Korea, respectively). Lodge and Vogel introduce two contrasting ideological paradigms concerning the role of government within a nation or society. The first, “individualism,” stresses the rights of the individual rather than the community. The second, “communitarianism,” focuses upon the duties of the individual to the greater community and the need to subordinate individual rights and desires to the greater needs of the entire society. Both Japan and Korea have been called communitarian societies, while the United States often is named as the model of the individualistic nation. The nation’s ideology tends to define the various regulatory forces and institutions within which governmental and commercial activities are performed and also determines to some extent the success of public and private economic policies.
overriding strategy, the manner in which each institution articulates and implements that strategy through its laws and administrative procedures, and the effect that the existence of these strategies might have upon the American manager's ability to assess the aptitudes and market-based actions of his Japanese and Korean competitors.

This article is intended to leave the reader with several impressions. First and foremost, the regulatory infrastructure that exists in Japan and Korea, as well as the various non-legal practices associated with the implementation of the formal laws and policies, can only be appreciated within the broader context of the national strategic priority of rapid economic development that was established by government and private industry leaders. Second, for all of the apparent similarities, the experiences of Japan and Korea have been, and will remain, quite distinct, and any differences must be clearly appreciated in establishing competitive strategy. Finally, the lessons of development in Japan and Korea, referred to generically as "cooperative growth economies" may, in some cases, be of great value in forging a coherent future industrial policy in the United States.

II. HISTORICAL AND IDEOLOGICAL BACKGROUND: THE CONTEXT FOR DEVELOPMENT POLICY

A. Introduction

The historical evolution of Japan and Korea is often striking in its similarity. Both nations have experienced a number of internal and external challenges in recent times. From the essentially isolated positions within the world that they occupied just a century ago, Japan and Korea have each been exposed to the threat of foreign domination, rapid industrial modernization, broad transformation of their social class system, Western influence, military aggression and occupation, and finally, dynamic and explosive economic growth. The manner in which each nation has adapted to these changes in environment can be defined, in part, by the shared commitment to a communitarian ideology that is deeply rooted in each nation's history and culture.

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17. As noted elsewhere, nations such as Japan and Korea have been described in various ways—"export-driven" growth economies, "developmental" states, and "communitarian" societies. Given the ideological tenor that exists in the United States, the two elements of Japanese and Korean economic policies that seem to be most "portable" are cooperation and the emphasis on expansion of opportunities through growth in the overall economy and the policies necessary to support it, such as education and investment. Accordingly, the term "cooperative growth economy" is used in this article simply as a point of reference. See G. LODGE & E. VOGEL, supra note 16.
B. The Historical Development of Japan and Korea

1. Japan

Modern Japan covers an area approximately the size of California. Slightly more than half of its population is located along a 375-mile strip between Tokyo and Osaka. Although influenced by their geographical proximity to China and Korea, the Japanese have occupied their island nation as a relatively unified and homogenous group for over 1,500 years and, as a result, have developed their own culture, governmental institutions, and sense of moral behavior. Literature, art, and the basic social systems developed in Japan through the end of the 10th century. Then came five centuries of upheaval caused by the struggles within the military class, culminating in the ascendancy of the Tokugawa shogunate at the beginning of the 17th century.

The Tokugawa Period in Japan lasted from 1600 to 1868, and attitudes that arose during that time have served as a basis for structuring the nation's political, social, and economic institutions up to the present day. During the Tokugawa Period, the ruling elite imposed a strict hierarchy throughout the nation and instilled within each social class a common understanding of loyalty and service to the state. The Tokugawa leaders built on elements of ancient Japanese cultural and religious values to create this ideology emphasizing loyalty, service, responsibility, and a respect for a stable political order. There was little room in such a social structure for democratic institutions and little regard for individual rights.

The power in Tokugawa Japan was originally sufficient to maintain the social order and prevent the infiltration of Western influence that might upset the national consensus that issues of individual morality must be subordinated to the greater needs of the state. After two centuries of Tokugawa rule, however, conflict erupted between the impoverished samurai class and the ambitious shogun families. In addition, foreign pressures for opening Japanese trading markets grew, appealing to the nation's developing merchant class and leading to further turmoil over the nation's isolationist policies. Accordingly, in 1868, just fourteen years after Matthew Perry's arrival in Japan with demands for foreign trade, the Tokugawa clan gave way to a group of young samurai who were dedicated to achieving national unity, resisting the direct influence of the foreigners, and establishing a modern and independent industrial state under the young Emperor Meiji.

In contrast to the strict social order that existed during most of the Tokugawa Period, the early Meiji Period was characterized by a more open class system emphasizing greater social mobility. A new generic loyalty to

18. Three-quarters of the land is taken up by mountains and forest and two-thirds of the remaining land is farmed. In 1985, 60.6% of the population lived in a densely inhabited district (i.e., areas where population density exceeds 5,000 persons per square kilometer) of Japan. OECD, supra note 1, at 7.
Japan as a unified nation-state was stressed, replacing old loyalties to a ruling clan or family, a phenomenon that had logically followed the nation’s Confucian emphasis on familial relationships extending to the emperor. Despite these developments, the society remained strictly hierarchical, and individual citizens were given few rights by the Meiji to offset their duties to the state.

The long-term influence of the Meiji on modern Japanese industrial and regulatory policies is noteworthy in at least two respects. First, the leaders of the Meiji government sought to place atop the social hierarchy a small group of elite officials, selected on the basis of strict competitive examinations, who were totally dedicated to the pursuit of the national interest rather than the interests of any individual or group. Second, the national interest was quickly defined to be Japan’s ability to withstand the intrusions of foreigners through the achievement of a modern industrial state characterized by rapid economic and military growth, an objective that suited both the central government and private business interests.

The meritocracy of the Meiji Period was rarely subject to criticism, even from members of the traditional samurai elite who gradually lost their status within the social hierarchy. The Meiji sought to insulate the chosen bureaucrats from the influences of those who might be unconcerned or unknowledgeable about the greater national interests. As a result, an attitude developed among citizens and bureaucrats alike that one should approach government officials as subjects, rather than as citizens demanding individual rights. The role and prestige of the non-elected officials survived the turbulence of the first half of the 20th century and emerged as one of the building blocks of modern Japanese industrial policy after World War II.

Under Meiji rule, Japan was transformed into a modern industrial state and a regional military power. Earlier Japanese regimes had been unable to combine the nation’s entrepreneurial spirit with the capital and property necessary for the development of modern business enterprises. Commerce, with its creative merchants and its emphasis on the satisfaction of individual consumer demands, did not command the same communal respect as the nation’s mining and public works for the nation. However, in the 1870s, government-supported regional banks began making loans to those industrial sectors considered to be important for national development, and those funds were used to acquire technology from abroad, a strategy that also played a significant role in development almost a century later.

Thus, the first large Japanese corporations were originally developed by the government. Later, corporations were sold in 1881 at relatively low prices to private companies, many of which were controlled by former members of the samurai class who shared the values and educational background of the bureaucrats. This process of privatization and the program of government loans to key industrial sectors was based on the belief that certain industries might require assistance from the state, but were better operated by the private sector. Owners of the new corporations recognized that although
they were free to pursue profits in the same manner as their counterparts in the West, they also owed part of their success to the government and, thus, appreciated their broader responsibilities to the national interest.  

Japan's rapid industrial progress during the late 19th and early 20th centuries required the development of a special relationship between the central government's bureaucracy on the one hand and the managers within the private business sector on the other. This understanding continues to exist today. Not only did the meritocracy and fledgling merchant class share social, educational, and ethnic affinities, but government intervention in industrial restructuring was perceived to be legitimate given the initial privatization policies and the state's role in establishing the banking system that provided initial capital for corporate growth.

The preference of Japan's businesses for debt capitalization, as well as the oligopolistic organization of Japanese businesses, began during the Meiji Period and laid the groundwork for many aspects of the modern Japanese economy that are most puzzling to observers in the United States. The use of debt made the government's macroeconomic policies regarding monetary matters and interest rates much more important in guiding the private sector. It also allowed corporate managers to minimize concerns of short-term financial performance and to concentrate on the development of long-term items, such as market share, capital formation, research and development, full employment, cost reduction, and enhancements to productivity, all of which would contribute to the national objectives of social stability and economic independence.

Complementing the long-term orientation of the corporate capital structure and the high degree of industry concentration under the Meiji, was the formation of the great merchant houses, the so-called "zaibatsu," that worked with the government in developing and implementing the nation's economic strategies. The breadth of the activities by the various merchant networks went far beyond the bounds of Western antitrust concepts. Three types of zaibatsu could be identified: "conglomerates," with capital holdings in banking and insurance as well as industrial and commercial sectors; "financial," with holdings in banking as well as investment banking activities; and "industrialists."

19. See Ezra Vogel's description of the ideological underpinnings for the nature of business and the corporation in Japan in G. Lodge & E. Vogel, supra note 16. Also, in G. Lodge, Roles and Relationships of Business and Government 28 (1988), a thoughtful survey on the role of government with respect to facilitating the activities of the commercial sector (the "Harvard Survey"), George Lodge makes note of the definition of "purpose" for Mitsui, one of Japan's industrial giants, as follows in this order: (1) to contribute to Japanese society, to serve the greater glory of Japan; (2) to realize profit for the company so as to promote the welfare and happiness of its employees; and (3) to foster and strengthen the spirit of Mitsui for the future. The satisfaction of shareholders, Lodge notes, was but a means to achieving the greater social goals of the corporation. See also J. Hirschmier & T. Yui, The Development of Japanese Business, 1600-1980 (2d ed. 1981).

Thus, by the beginning of the 20th century, Japan had developed a form of capitalism that integrated the nation's traditional beliefs regarding the proper roles of the state and its citizens with a reverence for the benevolent acts on the part of the central government. The meritocracy, with its close bonds with leaders of the business community, suited the society's desire for a hierarchical structure. Industrial organization had taken a form which fit with the nation's collective orientation while facilitating aggressive competition among firms to the great benefit of the nation as a whole. Most significantly for those in the West, Japan had explicitly rejected the concept that the state and the individual were adversaries.

In fact, any subordination of individual rights during the Meiji Period was supported by the consensus regarding the nation's overall economic and military objectives for the period. Government, business, and labor united around the common interest in rapid industrial development, which was seen as the means for retaining independence from foreign demands for trade and entry into domestic markets. Moreover, national pride and the desire for geopolitical sovereignty exhibited itself through the development of imperialist ambitions in Asia. Japan became embroiled in war with Russia at the turn of the century, but nonetheless continued expansion into Korea and Manchuria. Japanese imperialism finally culminated in World War II, less than seventy-five years after the new forces of growth and expansion had been unleashed within Japanese society.

While the Meiji Period established many of the basic characteristics by which the Japanese continue to organize their social and economic infrastructure, by 1930 it was becoming clear that the specific policies of the government, as well as the flow of global political and economic events, were leading to a number of problems. Rising unemployment, worldwide depression, continued pressures from foreign influence, political unrest, and the escalating need to provide resources to the military effort eventually led to a more authoritarian state where individual rights were further subordinated to unilateral state ambitions for empire and power. Ultimately, the entire industrial effort of the nation was devoted to the war effort, and World War II brought devastation to much of Japan's physical and human capital.

The end of the war brought the Japanese seven years of occupation by the United States and the realization that their nation had little land, few natural resources, a large population and an overriding need to rebuild the country, and, once again, to achieve independence from what the Japanese perceived to be the threat of long-term foreign political and economic intervention. The United States attempted to impose a number of democratic measures on Japan, particularly in the efforts to deconcentrate industry, strengthen labor unions, and decentralize the powers of government and the bureaucracy. However, these reform efforts made little progress in the face of
the nation’s strong sense of loyalty to family, firm, community, and the nation. The strict social hierarchy of the Meiji Period survived to guide the direction of the nation.

The character of post-war Japanese society and government combines a variety of the essential cultural and institutional elements of the nation’s history, that can be summarized as follows:

*Role of the State.* Depression, war, and the threat of foreign intervention facilitated the mobilization of a large majority of the population to support and legitimize the role of the state in setting economic objectives for the nation during World War II and continued to define the needs of the community thereafter. The role of the state was further supported by Japan’s dominant social ideology, which focused on the desirability of working together for national purposes. No legitimate basis existed for resisting the group, and the individualistic attitudes of the United States never took hold, other than in the context of limited and controlled competition among firms designed to achieve higher overall prosperity for the nation as a whole. Meritocracy survived the war as well, providing the nation with an accepted means of choosing the elite that would guide its future economic fortunes.

*Partnership of Government and Business.* While one of the aims of the American occupation was to dismantle the complex network of relationships among the bureaucrats, managers, and bankers, policy makers in each area quickly moved to consolidate the cooperative atmosphere that had existed during the Meiji Period. The government established a complicated system of economic management through bureaucratic controls, which was strongly influenced by the remnants of the wartime controlled economy. Moreover, bureaucrats developed a number of policy instruments, described below, which reinforced the need for private firms (the progeny of the “zaibatsu”) and the financial communities to cooperate with governmental planning efforts.

*Economic Objectives.* The devastation of war and the fear of foreign intervention made it quite easy for the bureaucrats to establish the nation’s economic objectives. A consensus quickly emerged, as it did during the Meiji Period, that Japan needed to rapidly develop its domestic industries and achieve international competitiveness for its products in order to minimize its dependence upon foreign capital and technology. Accordingly, like many developing nations, Japan was driven to a strategy of growth through export and industrialization. This strategy was supported by high rates of domestic savings to fund investment and by tolerance of relatively high domestic prices in order to appease farmers and to insulate developing domestic firms from foreign competition.

While Japan’s own ideological and institutional strengths were of paramount importance to its rapid political development, Japan also benefitted from massive amounts of aid and assistance, both financial and technical, from the United States. Moreover, Japan was provided with a number of
market opportunities for their determined efforts to achieve industrial independence. Consequently, the nation quickly became a major global participant in the iron, steel, merchant marine, and shipbuilding industries. Japan was also able to maintain a steady supply of critical raw materials at low, stable prices, thereby facilitating the construction of an infrastructure of roads and ports which assisted the development of the export industries.

2. Korea

The Korean Peninsula, which contains both Korea and North Korea, extends for nearly 600 miles south of Manchuria and separates the Sea of Japan from the Yellow Sea. Korea occupies 38,000 square miles of the southern portion of the Korean Peninsula, compared to the 47,300 square miles occupied by North Korea in the north. Only about one-fifth of the land, primarily the rice-growing river valleys and coastal river basins, is arable and the entire Peninsula is quite mountainous. Korea's relative lack of natural resources, as well as its close proximity to China—Beijing is 500 miles to the west—and Japan, which lies 150 miles to the southeast, has had a significant effect upon the social and economic development of the nation, particularly during the last two centuries.

For nearly a thousand years before its partition after World War II, the Korean Peninsula was an autonomous ethnic, cultural, linguistic, and political entity. Like its neighbors, China and Japan, Korea preferred isolation from outside influences and did not establish formal relations with any country, other than China, until the last quarter of the 19th century. The last Korean dynasty, the Yi, ruled from 1392 until 1910, when the monarchy was abolished and the country annexed and colonized by the imperialistic Japanese.

Korea's dominant ideological tradition in this pre-colonial period emphasized the subordination of individual interests to those of the group. Social status and power depended upon one's place within a rigid hierarchical structure. However, in contrast to other Confucian-based societies, Koreans did not necessarily assign a priority to the demands of the state over individual moral imperatives, particularly the family. An individual's duty to the state or to his superiors was to provide loyal and faithful service; however, these duties were conditioned upon the fair and benevolent actions of the state or superior.

22. Id.
23. Id.
24. Id.
25. Id.
26. Id.
27. Even today, differences in rank and prestige are constantly emphasized through language and behavior and are reinforced through the internal structures of the family, schools, firms, and even social or sports clubs. See Lodge & Vogel, supra note 16.
Like their Japanese counterparts, traditional Koreans placed little value on industry and commerce, preferring instead the more "worthy" human pursuits of agriculture, education, and civil service. 28 Korean manufacturing activities in this period concentrated on the production of simple cloth, furniture, and paper items, each of which were produced by artisans of low social status in a few major population centers. 29 While wealthy merchants did exist, they did not develop the financial and cultural institutions of their Japanese and Chinese counterparts. 30 Moreover, while an aristocratic class of landowners arose, 31 their wealth was not devoted to industrial development until the 20th century. 32

Korea's relatively quiet existence was shattered by political and economic events of the 20th century. First, in 1910, Japan annexed Korea into its growing colonial empire. Although Korea's own natural resources were hardly abundant, the lack of such resources in Japan made Korea a prime candidate for the production of crude and semi-processed agricultural and mineral products for exports within the empire. To implement their imperial design, the Japanese put into place a system of hierarchically ordered authoritarianism, supported in part by Korea's own traditional values. The Japanese conquerors also built an economic infrastructure of roads, railroads, and public works, expanded primary school education and enrollment, and imposed a radically different curriculum. 33 Thus, the Japanese generally focused capital and human resources on the industrialization of the Korean economy in order to benefit the empire.

Clearly, a large number of Koreans also benefitted from the exposure to new technologies which occurred during the Japanese occupation. However, on balance, the opportunities for Koreans were strictly limited within the Japanese institutions and the economic and social welfare of the vast majority of Koreans showed little net improvement during the period. 34

When the American occupation began, following the end of World War II, Korea suffered from tensions created by wartime displacements. This tension resulted in the partition of the Peninsula as well as a shortage of usable natural resources, heavy industry, and electrical power generation facilities. 35 Moreover, the population grew by twenty percent in the five years following the end of the War as about four million people either returned from Japan or fled from the north. 36 Korean desperation, coupled with inept economic advice from American advisors, led to hoarding, speculation, food shortages,
and rampant inflation. Economic distress was alleviated by almost $400 million in emergency relief, the vast portion of which was in the form of food, clothing, fuel, fertilizer, and other consumer commodities.  

Largely as a result of American assistance, Korea emerged as a new republic in 1948 with a balanced budget and a treasury reserve. The nation's requirement of military service for virtually all members of the male labor force facilitated skill formation and general experience in an organization having many of the characteristics of modern industry. United States military programs contributed to economic development by providing financial assistance and program aid. For example, industrial technology improved with the influx of American technical advisors and capital through the local procurement programs of the United States military. The United States prodded local authorities to begin a number of reforms aimed at maintaining and improving the use of existing agricultural resources.

The early years of the new republic saw the implementation of the nation's first economic policies. Industrial production rose by fifty percent in 1949-50 and the emphasis on coal, electric power, and fertilizer production was beginning to produce similar enhancements in output. However, the Korean war put an end to the economic optimism that had developed in those years. Millions of people on both sides were killed or injured and the economic and physical loss in Korea itself was estimated at levels nearly equivalent to its entire GNP for 1953. Massive amounts of foreign aid, approaching ten percent of the nation's GNP on an annual basis, were required to support existing subsistence levels through the balance of the decade. Despite the aid and training offered by the United States, Korea was still one of the poorest nations in Asia in 1960. It was perceived to be incapable of self-sustaining economic growth.

37. Id. at 183-84.
38. Id. at 184.
39. Significantly, the United States facilitated the distribution of all Japanese-owned farmland (about 25% of the overall amount of land) to the actual tillers, to be paid for over 15 years at a rate of 1.5 times the annual crop. In this manner, most of Korea's farmland was eventually redistributed by the end of the Korean war. Id.
40. Id. at 185. See also P. Kuznets, Economic Growth and Structure in the Republic of Korea (1977).
41. Id.
42. D. Macdonald, supra note 7, at 185.
43. In the aftermath of the Korean war, the United States committed $1 billion in aid over three years for Korea, and the United Nations Korea Reconstruction Agency supplied an additional $600 million in assistance. Total external concessionary aid to Korea from 1953 to the mid-1970s, when the United States ended its economic grants, amounted to about $6 billion, excluding an additional $7 billion in military aid. Id.
44. An annual population growth rate of 3% during the 1950s caused the rate of annual growth in per capita GNP to stagnate at a meager 1.5%. Foreign aid financed a balance-of-payments position in which exports (88% of which were raw materials) were less than one-fifth of imports. Moreover, unemployment was widespread and domestic savings were negligible. Krueger, The Experience and Lessons of Asia's Super Exporters, in Export-Oriented Development Strategies: The Success of Five Newly Industrializing Countries 191 (1985) [hereinafter Export-Oriented Development Strategies].
The Korean government's economic policies after the Korean war were naive and unproductive and reflected many of the characteristics of the inward-oriented economies: emphasis was placed on maximizing foreign aid, currency was overvalued, monetary policy consisted of expanding the money supply to meet the government's deficit, interest rates were artificially depressed, and import substitution dominated development plans. What remained of the Japanese industrial plant was turned over to unqualified political loyalists. In addition, dependence upon American aid and general pessimism destroyed any incentive for savings and investment. Finally, internal tensions resulting in massive political upheavals occurred during 1960-61, culminating in the ascension to power of General Park Chung Hee after a military coup.

The Korean economy that Park inherited at the beginning of the 1960s stood in stark contrast to the situation in Japan in 1952. The traditional affiliations of a rural society had been forever upset by the ravages of occupation, civil war, and general mismanagement. In the span of just two decades, the entire society had been transformed by the migration of more than a third of the population from the farms to the urban areas. Moreover, compare the following:

Role of the State. While Korea shared the Japanese appreciation for the role of the state and the respect for civil service, the nation had no experience with the benevolent rule required by its ideological tradition. Korea had only brief exposure to the concept of centralized planning during the Japanese occupation and had yet to develop the institutional and regulatory infrastructure that the Japanese had nurtured through World War II and the decade thereafter. Moreover, after the Korean war, the government initiated policies without regard to any long-term development plans for the nation.

45. D. MACDONALD, supra note 7, at 186.
46. Id. at 187.
47. The Korean economy grew by approximately 4.0% per annum in real terms during the period from 1953 to 1962, compared to 5.4 and 7.0% during the same period in the Philippines and Taiwan, respectively. However, population growth of nearly three percent a year absorbed most of the growth that did occur.
48. The urban migration was to continue throughout the period of initial economic growth. By early 1987, the population of Korea stood at approximately 41 million, with over 40% of the citizens living in or near the four major cities and nearly 10 million living in Seoul alone, as compared to only 10% of the population in 1960. PRICE WATERHOUSE, supra note 13, at 2. The Korea Development Institute has predicted that Korea will experience net population growth of approximately 1.1% per annum, down from the recent rate of 1.5% per annum, through the year 2000, at which time the population will reach approximately 49.4 million. D. MACDONALD, supra note 7, at 208. The sheer concentration of business and government in the capital city of Seoul has prompted the government to pursue plans to construct satellite cities outside Seoul in order to take some of the pressure off the capital's infrastructure. In addition, plans are proceeding for new highways and for high-speed rail service as well as for other infrastructure projects.
49. While the United States provided significant levels of financial and technical assistance, American advisers exercised their own biases by discouraging any form of national economic planning. D. MACDONALD, supra note 7, at 186.
Government-Business Relations. Neither the Japanese occupation nor the events following World War II facilitated the development in Korea of the massive and complex network of relationships between government and business, which had existed in Japan for over half a century before its post-war economic programs commenced. Korea's experience with self-governance had lasted for less than a decade and business leaders had no experience in operating within an autonomous economic system. Moreover, the industries that had been established were perceived to be spoils of the political system rather than the fruits of entrepreneurial mercantilism.

Economic Objectives. Park realized that Korea needed to pursue a developmental strategy, which emphasized defense, economic growth, and political stability. However, in its efforts to define such a strategy, the Park regime quickly found itself intimately involved in a number of matters which, in Japan, had been delegated to private enterprise. Initially, Korea continued to focus on import substitution and improvement of the domestic infrastructure. Military standards of discipline and achievement were transferred to the new bureaucracy, while firms and commercial banks were nationalized in order to effect the government's plans. In reality, it was not until the mid-1960s that Korean economic planning clearly turned toward export-oriented industrialization.

The events between the end of World War II and the mid-1960s would prove to be very telling with respect to comparing the development policies of, and results achieved by, Japan and Korea. While Korea was embroiled in a disastrous civil war and reconstruction, Japan was able to utilize massive amounts of foreign assistance, as well as its own well-established set of economic and legal institutions, to move quickly and quietly toward industrialization. As a result, Korea's later attempts to enter complex markets and industries were to be met not only by competition from the West, but also by the strengths and strategies of the Japanese and their modern industrial policies, which the Koreans, in turn, sought to emulate.  

C. Cultural Differences between Japan and Korea

Even though Japan and Korea both reside in the same geographic and cultural region and share many similar elements of history, it would be imprudent to ignore the cultural differences which exist between the two nations. Korea is not simply "the second Japan." Fundamental differences exist in the values, ethics, traditions, and behavior patterns of the two nations.

50. For example, Japanese firms are now strategically utilizing foreign marketing and manufacturing activities, sometimes in Korea, to supplement their own continuing product development. As a result, Korean firms are being forced to compete with the Japanese for labor and resources in the domestic market, although the Japanese firms do provide a good source of new and advanced technologies needed by the Koreans to support the development of new industries.

These differences influence the manner in which relevant Japanese and Korean institutions are structured and the way in which rewards and responsibilities are allocated within each society. Therefore, while Korea appears to have consciously attempted to emulate Japanese economic strategies, the process has been diluted by a number of factors, which include the following:

Temperament. Both nations have shown an almost miraculous ability to exercise patience and endurance in the face of severe climatic, geographic, and political conditions. These conditions have strengthened the will and resolve of each nation, particularly when confronted by military and economic threats from the West. Nevertheless, the Koreans are more likely than the Japanese to resort to aggressive and confrontational behavior once their patience is exhausted. This trait becomes apparent when one considers the political and social unrest which has often accompanied Korea's modern economic development.

On the other hand, it would be wrong to assume that either Japan or Korea established its economic policies in the absence of dissent or debate, since each nation has evidenced itself to be extremely competitive. Even in Japan, various industries and related networks of firms and policy makers compete for resources in the form of capital and subsidies. However, in Korea, the patience of many segments of the nation has been further tested by the government's tendency to defer any attempt to address important social issues. As such, central planning is often undertaken in an environment which has proven to be much more fluid and volatile than that which has existed in modern Japan.52

Authority and the State. Both Japan and Korea have interpreted and adapted traditional Confucianism to suit their own culture and circumstances. In Japan, obedience to the state was historically stressed through the virtue of "loyalty to the king and nation." In Korea, loyalty was not perceived to be a perfect virtue unless accompanied by "social justice." Thus, the Korean state was not able to command the respect of its citizens unless it also acted in a manner that was seen as benevolent. Moreover, the rapid urbanization of the Korean populace has built a spirit of self-reliance and individualism that has served as a valuable complement to communitarianism.

Issues of social justice in Korea have long been a threat to the nation's delicate path to economic success and prosperity. In 1987 and 1988, Korea held presidential and parliamentary elections which resulted in a coalition government and multi-party national political system.53 The state authority,

52. This is not to say that social unrest and impatience does not exist in Japan, particularly with regard to providing alternative career paths, easing the amounts of hours devoted to the firm, and generally allowing the populace to enjoy some of the fruits of their economic successes, perhaps in the form of access to imported luxury goods. Nonetheless, the overall level of income in Japan has been, and is expected to remain, higher than that in Korea.

53. However, on January 22, 1990, the leaders of three of the nation's four major political parties announced their intention to merge into a new party tentatively named the Democratic
whatever form it may take in the future, will be forced to address a number of perceived inequities between the rich and the poor, between business and labor, and between large and small businesses. Additionally, the state will need to face a number of challenged practices which, in the name of "national security," have been used to quell dissent. 54

Formality and Planning. As noted below, a key characteristic of economic growth in Japan and Korea has been their ability to develop a central economic planning mechanism. However, the Japanese appear to seek natural order and tranquility through formal rules and symbols, whereas the Koreans seek only to preserve nature. As such, Korean social planning exhibits fewer restrictions and rules and less attention to detail than would be the case in Japan.

Furthermore, chronic poverty and the substantial gap between the upper class and the impoverished farmers in Korea created little need or incentive to make plans for the future, to save or invest in anticipation of long-term benefit, or to otherwise take any action that tended to upset the existing social structure. 55 Planning thus has less of a history of acceptance in Korea. This historical ambivalence with respect to planning, added to the concerns regarding the legitimate role of the government and the streak of individualism in Korean society, have made the efforts of the Korean government more difficult.

In summary, temperament, deference, and formality are all elements of distinction between the Confucian-based societies of Japan and Korea. These cultural differences, as well as the vagaries of history and geography, have influenced the manner in which each nation has adapted to its environmental challenges. As has been the case in the United States, culture, ideology, and history have shaped the formal structure of the Korean and Japanese economic institutions, including both the regulatory framework and the practices of firms, managers, workers, and consumers at the industry or microeconomic level. Consequently, we now turn to the institutional frameworks upon which the growth and development of these cooperative growth economies have been based.

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Liberal Party. Leaders of the new party included President Roh Tae Woo, of the former ruling Democratic Justice Party, Kim Young Sam, of the former opposition Reunification Democratic Party, and Kim Jong Pil, leader of the far-right New Democratic Republican Party. Remaining outside the alliance is Kim Dae Jung, a long-time opposition leader, and his Party for Peace and Democracy.

54. The new leaders promised to revise the National Security Law, which currently allows police to arrest or detain any Korean at will on suspicion of threatening "national security." The leaders also stated their intention to initiate land-reform legislation and upgrade the nation's welfare system.

55. D. Macdonald, supra note 7, at 180.
III.
INDUSTRIAL POLICY IN JAPAN AND KOREA

A. The Classical Model for Economic Development

In classical economic theory, every nation seeks to enhance the overall welfare of its citizens through the pursuit of appropriate policies to achieve economic development and steady growth of output and income. However, the actual policies to be followed by any specific nation depend, in large part, upon its historical and ideological background. Moreover, immediate economic goals and objectives are established by analyzing the internal and external challenges facing the nation and, not unimportantly, by referring to the national consensus regarding the appropriate and legitimate role of the governmental and regulatory framework in setting and implementing the policies necessary to achieve those national objectives.

The similarities between Japan's and Korea's economic policies, which are most interesting to their competitors in the West, arise from each nation's decision to pursue the creation of what has been referred to as a "developmental state," one which focuses the use of the nation's scarce resources on economic development activities while deferring consideration of welfare or egalitarian concerns within the society. In order to understand the significance of this choice and the very real differences that exist between the two nations, it is necessary to examine two fundamental concepts: "export-oriented" development and "industrial policy."

In order for a developing nation to achieve economic progress, it must be able to acquire technology, capital, and related resources from developed nations, either by using foreign currency obtained through participation in international trading activities or by outright grants and technology transfers from developed nations. For those nations that seek independence from developed nations, one alternative has been the "export-oriented" development strategy: a strategy in which the economic and trade practices of the developing nation do not discriminate between production for the domestic market and exports, nor between purchases of domestic and foreign goods. The classical model assumes that the developing nation will adopt a free trade policy and that government involvement will be limited to across-the-board incentives and subsidies to exporting firms and to actions calculated to insure that the exchange rate with major trading partners remains realistic. Domestic firms compete in the international markets in industries that are usually relatively labor-intensive in the early years of development, thereby giving the developing nations a comparative advantage. Such competition facilitates the movement of domestic labor and capital to the most efficient firms. Little or no effort need be made toward unprofitable production in industries where goods could be more efficiently imported and financed from the nation's growing export revenues.
Economists advocating classical free trade practices would discourage developing nations from the practice of "import substitution," a term which loosely refers to the attempt to undertake domestic production of goods in an industry in which the nation does not have a comparative advantage. In such cases, imports of the goods would be heavily restricted to protect the domestic industry from competition, and firms often operate at substantial losses because of their inability to obtain the requisite technology. In addition, the decision to divert resources away from export industries may create trade imbalances and may ultimately lead to restrictive monetary and fiscal policies calculated to address mounting levels of foreign indebtedness.

In its purest case, a successful "export-oriented" development strategy requires the creation and maintenance of a number of conditions: a strong government commitment toward export promotion and away from import substitution; a realistic exchange rate level and policies that assure exporters that adjustments will be made in accordance with differentials in inflation rates with major trading partners; removal of quantitative trade restrictions; access by exporters to international markets for raw materials and other factor inputs; a highly developed infrastructure; liberalized policies with respect to capital, labor, and domestic product markets; competition between domestic and international firms both at home and abroad, causing a shift in the nation's resources to more efficient producers; and broad support for all export activities, rather than selective policies focusing on specific commodity areas.

In contrast, a nation might choose to pursue various commercial, industrial, and exchange rate policies which, taken collectively, have been identified as "inward-oriented." In those cases, policy makers utilize direct controls, such as: import licensing and quantitative restrictions, rather than tariffs; hidden import duties, such as stamp taxes; advance deposit requirements; and a number of other quasi-tariff measures. In addition, inward-oriented regimes are generally characterized by high levels of protection for manufacturing, direct controls on imports and investments, overvalued exchange rates, and fiscal policies which provide production subsidies, credit subsidies, wage subsidies, and tax holidays of various kinds.

With regard to the definition and description of "export-oriented" development strategies, EXPORT-ORIENTED DEVELOPMENT STRATEGIES, supra note 44.

Many of the nations which practice "inward-oriented" policies are attempting to export primary commodities while simultaneously building domestic industries through import substitution policies. Arguments against export-oriented policies cite "export pessimism," the belief that the markets for primary and semi-finished exports are decreasing and that "infant industries" need to be protected. However, it is not clear that the market for primary commodities is declining at the rate cited by proponents of the "export pessimism" argument. Even in those cases where a valid reason exists for some form of government assistance to developing industries, it is believed that a policy of subsidies and incentives to the industrial sector is to be preferred to the costs of protecting an entire industry from import competition. Conversely, observers such as Peter Drucker have speculated that due to an apparent overabundance of raw materials in the world marketplace, it is no longer possible for developing nations to follow the path to economic growth suggested through the "export-driven" growth model.
B. The "Cooperative Growth" Economy: New Approaches to Economic Growth and Export-Oriented Strategies

The implicit differences between the classical definitions of "export-oriented" and "inward-oriented" policies lie in the role which government plays within industry and trade. Traditionally, a government limits its involvement in export-driven growth to macroeconomic matters: providing the infrastructure necessary to accommodate economic growth, promoting market efficiency, maintaining stable fiscal and monetary policies and, in some cases, stimulating the economy through special tax measures and government procurement policies. However, while both Japan and Korea saw the pursuit of exports as an appropriate national objective, they rejected the limited role of the state, in favor of a series of microeconomic or industrial policies, each of which was supported by history and ideology. These policies led to governmental intervention at the level of firm or industry to achieve specific strategic objectives.

Recent Japanese and Korean developmental strategies have often appeared to contradict the accepted model for export-oriented growth and, in many instances, have adopted one or more inward-oriented policies. However, the apparent successes of Japanese and Korean industrial policies have demonstrated that governments directly concerned with influencing the outcomes of the trading system, not just adhering to the rules of trade of the classical models, can facilitate the allocation of resources within the nation toward growing industries. Moreover, these industries can be successful in world markets despite the lack of certain advantageous resources thought to be necessary.

A great deal of debate within the United States concerns the propriety of government intervention at the "micro" level. To some extent, every government takes actions which directly impact the actions of its firms and industries. For example, fiscal and monetary policies, such as the rate of tax established for corporations and investors, are macroeconomic actions which directly influence business activities. However, nations such as Japan and

59. In the Harvard Survey, Lodge identified four areas where the government can influence the effect of business upon the needs of the community: promotion of marketplace competition; regulation of competition; establishment of a partnership with business; and regulation of the grant and maintenance of the corporate or business license. The first and third methods have proven, in Lodge's estimation, to be the most important in Japan. See also G. LODGE, THE AMERICAN DISEASE (1984).
Korea have, in stark contrast to the United States, based many aspects of their legal and regulatory framework on the pursuit of strategic industrial objectives. Accordingly, the following elements are essential to analyze specific legal and regulatory regimes in those nations:

**Structure of Governmental Institutions.** The ability of any nation to formulate and implement specific industrial policies greatly depends on the structure of its government institutions. Since Korea appears to have consciously borrowed many of the regulatory and social tools of the Japanese, it is not surprising that the governmental and political structures in each nation are characterized by the presence of a talented and elite bureaucracy with broad discretion regarding overall economic policy, an executive branch with only limited political opposition, an ineffectual legislative branch, a central economic planning function, and the integrated regulation of monetary, fiscal, credit, and foreign investment policies through the finance and trade ministries.

In Japan, administrative powers are vested in the Cabinet, consisting of the Prime Minister and the ministers of state. The Prime Minister is chief executive of the nation and is usually the leader of the country's majority party, which has been the Liberal Democratic Party ("LDP") for over three decades. The Prime Minister has the power to appoint and dismiss ministers of state in the twelve ministries: Justice, Foreign Affairs, Finance, Education, Health and Welfare, Agriculture, Forestry and Fisheries, International Trade and Industry, Transport, Posts and Telecommunications, Labor, Construction and Home Affairs. The Cabinet is collectively responsible to the Diet, Japan's elected parliament.

The Japanese state bureaucracy also plays a major role in the nation's government. These civil servants remain responsible for the origination of virtually all national policies and control three unconsolidated national budgets. Although the other ministries certainly have significant amounts of influence and power in particular areas, it has been the Japanese Ministry of International Trade and Industry (JMITI) which has taken the lead in formulating and executing Japanese industrial and trade policies since the establishment of modern governmental structures. Japan also has an Economic

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62. On paper, the "highest organ of state power" in Japan is the Diet, or national parliament, consisting of elected representatives of the people. A bicameral body with a House of Representatives and a House of Councilors, the Diet is responsible for making laws, appointing the Prime Minister, approving the national budget, approving treaties, and has the power to impeach judges and amend the nation's Constitution. In actual fact, the Diet has been, until only recently, one of the weakest legislative bodies among the advanced industrial democracies and had effectively ceded control of industrial policies to the bureaucracy, as had been the case since the Meiji Period.
63. See generally C. JOHNSON, supra note 58.
64. On page 6 of the Harvard Survey, Myohei Shinohara, an architect of Japan's post-war economic development, is quoted as saying that "[J]MITI's industrial policies were expected to
Planning Agency (EPA) that assists JMITI in establishing the nation's economic and industrial development priorities.

The Japanese Ministry of Finance (JMOF) governs the monetary and fiscal policies of Japan and supervises the operations of Japan's central bank, the Bank of Japan (BOJ). In turn, the JMOF and the BOJ jointly oversee the financial institutions of Japan, many of which are managed by former JMOF officials. The JMOF and JMITI administer the nation's import and foreign investment policies, although the Japanese Fair Trade Commission (JFTC) can request modifications to the terms of certain specified international agreements between domestic and foreign parties. The JFTC also administers the nation's laws relating to antitrust and unfair business practices.

Whereas the institutional structure of governance in Korea is quite similar to that of Japan, a number of practical differences arising from Korea's unique political situation make it difficult to draw other than the most general analogies between the processes of industrial policy in Japan and Korea. Executive authority in Korea is vested in the President, who serves as the chief of state and head of government and is elected to a single five-year term of office. However, for most of its period of rapid economic growth, Korea was ruled by a succession of three dictators who served without any mandate from direct Presidential elections.

The President serves as the chairman of the State Council, which consists of the Prime Minister and heads of the various executive ministries. The Prime Minister is responsible for the overall coordination of the ministries and agencies, the most important of which are: the Economic Planning Board ("EPB"), which is responsible for developing the nation's Five-Year Plans. June 1987 touched off mass demonstrations that abated only when Roh made a surprise capitulation to opposition demands for the first direct Presidential elections in 16 years. The conduct and outcome of the election, which Roh won with 37% of the vote over divided opposition, was thought to be the beginning of a new era of political discourse within Korea; however, as noted above, a great deal of turmoil continues to exist with respect to the right to rule in Korea.
Economic Development Plan,\textsuperscript{69} formulating the national budget, and carrying out major economic policies;\textsuperscript{70} the Ministry of Finance (KMOF), which is responsible for the nation's financial affairs, fiscal policies, foreign exchange policies, and through its control over the Monetary Board, the nation's monetary and credit policies;\textsuperscript{71} the Bank of Korea (BOK), Korea's central bank which carries out the monetary and credit policies formulated by the Monetary Board;\textsuperscript{72} and the Ministry of International Trade and Industry (KMITI), which is responsible for regulating all matters relating to foreign trade.\textsuperscript{73}

As in Japan, the plenary powers and duties vested in the Korean bureaucracy actually dominates Korean industrial policies. Ministries and agencies of the central government have been granted the power and authority to establish prices, regulate competitive practices, restrict the situs and relocation of businesses, penalize underutilization of land and natural resources, control the allocation of capital and credit, and take a number of other microeconomic actions perceived to be necessary for the achievement of specified economic objectives. Like JMITI, Korea's EPB and other planning groups have benefitted from the traditional and cultural respect for public service within the nation, thereby attracting persons of high intellectual ability and competence.\textsuperscript{74}

\textit{Protectionism and Target Industries.} The cooperative growth economies of Japan and Korea regularly targeted those industries which they believed essential to their national economic security.\textsuperscript{75} Having identified those industries, a series of tariff and non-tariff barriers were established to "protect" the domestic industries from foreign firms. Even more importantly, domestic firms chosen to be active in target industries were beneficiaries of a wide variety of additional policy measures implemented to provide, without substantial

\textsuperscript{69} PRICE WATERHOUSE, supra note 13, at 6. The first five "Five-Year Plans" began in each of 1962, 1967, 1972, 1977, and 1982, respectively, and undertook the following major economic objectives: import substitution and creation of infrastructure (1962-66); export industries (1967-71); export industries and self-sufficiency in food production (1972-76); heavy industries and technology-intensive industries (1977-81); and social welfare and information-based industries (1982-86). During each period, a growth target for per annum GNP was established at between 7% and 8%. With the exception of 1977-81, the target was exceeded during each period.

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.} The Ministry of Foreign Affairs handles negotiations with foreign countries on trade and other economic matters. \textit{Id.}

\textsuperscript{74} The EPB is also supported by the Korean Development Institute, a government-funded research organization with a good deal of autonomy. D. MACDONALD, supra note 7, at 5.

\textsuperscript{75} As noted above, a number of books have been written on Japan's industrial policies, with a consistent focus upon Japan's concentration of export activities in a few specific industries, which have also traditionally been protected from domestic competition and from foreign imports. \textit{See RESTORING INTERNATIONAL BALANCE, supra note 4, at 24 n.1.}
direct governmental subsidies, a number of competitors with the capital, technology, and training necessary for rapid development of the capacity to satisfy domestic demand and gain entry into the global marketplace.

At least in Japan, the objective criterion for support of a new industry has been that it experienced rapid increases in productivity and produced goods with a high income elasticity of demand, even though industries satisfying this criterion might experience growth without special promotion by the government. However, in reality, both Japan and Korea have focused their industrial policy efforts on developing those industries that government officials, with the backing of the public, felt that the nation should have. These industries, symbolic of industrial strength, tend to be those already pursued by more advanced countries and of a size sufficient to garner the attention and support of the nation.

Because of their strategic geographic and political locations, both Japan and Korea had the benefit of massive amounts of economic and military assistance from the United States and other Western countries. Moreover, Japan later provided direct assistance to Korea. As a result, each nation had access to basic technologies and raw materials at crucial periods during the development process. This enabled each nation to move quickly toward industrialization without devoting resources to other labor-intensive industries normally allocated to developing nations by the classical model of trade and development.

However, once again, the relative timing of the growth and development of the two nations has created a disadvantage for Korea. Korea has not developed a comparable level of experience with non-tariff barriers as that in Japan, and any attempt to use such a strategy in the future has been made more difficult by rising foreign pressures for liberalization of Korea's domestic market, the difficulties of achieving economies of scale in the relatively small Korean market, the influx of manufacturing activities from Japan, and growing desires of consumers for access to foreign luxury goods. Accordingly, protectionism of any type may not be a viable strategy in the future for Korea, thereby presenting a number of problems regarding the nation's ability to acquire or develop new technologies.

*Strategic Planning and Administrative Guidance.* The industrial policy of any nation consists of the microeconomic actions taken by the government for the purpose of achieving a specific strategic economic objective. For many years, the hallmark of industrial policy in Japan and Korea has been the presence of a dedicated bureaucratic elite, an apolitical group empowered to establish broad goals for the economy and entrusted with a myriad of tools which could be used to encourage the appropriate actions at the firm and

76. Industrial policy does not necessarily imply state ownership of significant industries within the nation. In fact, with the exception of the railroads and the postal system, most of the infrastructure industries within Japan, including telecommunications, electricity, gas, oil production, coal, steel, and shipbuilding, were privatized during the period of rapid economic growth.
industry level. It is impossible to understand the regulatory framework of either nation without appreciating the planning and administrative process and the deference shown by politicians, banks, managers, employees, and consumers.

In each nation, a central planning agency establishes annual, medium, and long-term overall goals and forecasts that guide and influence all of the major economic variables, including investment, savings, consumption, government spending, growth of the money supply, aggregate output and supply, and imports and exports, as well as the expected resource allocation within various sectors and industries. Once established, these guidelines provide the framework for the administrative guidance supplied to private industry by the various ministries within the government as well as for the interpretation of the regulations which are applicable to economic activities. Moreover, announcements from the planning agency can identify target industry strategies, as Japan emphasized building heavy and chemical industries and improving the industrial structure during the 1960s and early 1970s. 7

Policy makers in each nation are given broad discretion to change, without legislative approval, taxes, tariffs, interest rates, subsidies, controlled prices of selected goods, and other matters. In addition, rather than attempt to regulate the economy through a mass of detailed and universally applicable rules, bureaucrats can target certain industries for development through their control and leverage regarding the access of firms to credit and low-interest loans, imported raw materials, foreign investment, currency for foreign exchange purposes, and business licenses. Finally, central planners can reward firms for outstanding performance and can actively participate in the ultimate decisions regarding who will produce what, how much will be produced, and the fate of recalcitrant or inefficient firms within the nation.

While administrative guidance and an appropriate level of government intervention may be necessary to achieve industrial policy objectives, attention must be given to the long-term effects that such policies might have on the maturation of the nation’s firms, banks, local governments, and labor unions. For example, the involvement of the Korean central government in the nation’s banking and credit systems has been pervasive at times and, as a result, the nation’s private financial institutions have matured and developed

77. “Administrative guidance” has been called “a traditional tool of Japanese government policy based on consensus and peer pressure.” RESTORING INTERNATIONAL BALANCE, supra note 4, at 26.

78. JMITI regularly publishes “visions” of developments for specific industries which, while they do not have the force of law, form the basis for developing the spirit of “consensus” and “peer pressure” which is such an important part of Japanese industrial policies. It has been noted that failure to comply with governmental “suggestions” in Japan places a firm at a tremendous disadvantage, while cooperation with government has led to the widespread practice of firms hiring former JMITI and JMOF officials in order to maintain appropriate contacts within the government. Id. at 25-26.
in a manner that has been markedly different from their counterparts in Japan and in other developing nations.\footnote{See Fry, Financial Structure, Monetary Policy, and Economic Growth in Hong Kong, Singapore, Taiwan, and South Korea, 1960-1982, in Export-Oriented Development Strategies, supra note 44, at 275.}

\textbf{Consultation.} Consensus-building plays an important part in the implementation of Japanese and Korean industrial policies. As such, each nation has developed a number of mechanisms for involving the various governmental ministries, industry groups, and others in formulating positions with respect to major economic policy matters. The experience of Japan is most instructive and illustrates the manner in which the planning framework has been able to evolve from the focus on industry-specific issues, which occupied the preeminent role through the end of the 1960s, to the current emphasis on horizontal issues such as trade friction, pollution, energy problems, industrial restructuring, small and medium-sized businesses, and research and development.

As a result of Japan’s initial focus upon specified target industries for economic development, there arose within JMITI a number of internal and external (“genkyoku”) bureaus which focused upon the fundamentals of creating a competitive advantage for their designated industry sectors. With the help of the relevant ministry, major industry associations and policy councils\footnote{The members of these councils were formally nominated by JMITI. While these councils were criticized as being captive to JMITI, in practice they proved to be a valuable forum for the expression of industry views and, more importantly, for the exchange of information in order to obtain a consensus on policy matters. In the Harvard Survey, Lodge reported that in 1987 there were 213 councils, 20 of which were sponsored by JMITI, 14 by the JMOF, with others directed by other ministries as well as the Prime Minister’s office itself. Perhaps the most celebrated of these efforts was the Maekawa Commission, which recommended in April 1987 a series of reforms aimed at “international coordination” and “enhancing the quality of the nation’s standard of living.” Included among the specific recommendations were a number of measures, including programs to actually “open” domestic markets, which struck at the very core of Japanese trade and economic policies over the last four decades. Councils tend to meet about a dozen times a year, for a period of less than half a day, and the actual drafting activities of the councils are undertaken by subcommittees which meet more frequently. Most councils expire after a couple of years, although some have continued for many years, leading to criticism on the ground of “stagnation.” As mentioned in the text, the purpose of the councils is to achieve some form of “consensus” between government and business, with the assistance of such interested third parties as scholars and union officials. G. Lodge, supra note 19, at 34.} that included industry leaders, former bureaucrats, academics, and journalists, the industry bureaus drafted comprehensive proposals\footnote{Each genkyoku had responsibility for drafting and implementing various industry laws, formulating proposals for tax incentives, changing tariff rates, devising measures to free up imports, and determining how and when to permit direct investment in the industry by foreign firms by virtue of their authority to approve joint ventures and technology transfer agreements.} which were considered and coordinated with other policies at the relevant ministry and then passed on to the JMOF, which had overall responsibility for coordinating policy, although the JMOF rarely attempted to modify any proposal which had been formally approved by another ministry.
In the early 1970s, Japan's economic success began to create a number of additional problems that dictated a change in emphasis in the planning issues that needed to be addressed by JMITI and the other ministries. Moreover, as individual firms and industries improved their own competitive and technological capabilities, they began to take their own initiative in the policy making process and began looking to the industry bureaus as an advocate of the industry's policy desires before the various other ministries. Finally, the policy councils and legislators, comprising bureaucrats who were therefore knowledgeable about the industrial planning process, began to increase their role, leading to a further democratization of the planning process at the expense of the former autonomy of the ministries.

Japan's planning process continues to respect consensus and consultation. Inevitable changes have occurred as firms have developed individual capacities to compete. The firms thereby decreased their dependence upon the policy tools of bureaucrats, which were often employed as leverage to insure cooperation among private firms. In addition, the liberalization of trade and capital movements have influenced the central government. However, historical and ideological factors still constrain individual firms from taking actions that do not, in the long run, coincide with the objectives of each significant participant in the planning process.

The consensus process in Japan benefits from a cultural attention to detail. In contrast, while Korea has attempted to establish similar institutions, the ability of Korean policy makers to provide effective consultation and assistance to the private sector lags far behind that of their Japanese counterparts. Once the national economic objectives are announced, Korean industrialists are often provided with little guidance as to how the goals are to be attained, even though in many cases they must continue to rely upon government assistance in the form of capital or other related policies.

The ability to build a consensus and cooperative effort in Korea is made more difficult by wide dispersions in the level of income and welfare in the nation. Unlike Japan, Korea has had difficulty in controlling the growing affluence of the upper class. As a result, threats of massive strikes and revolts by members of the working class often make it difficult to form a national consensus regarding economic and social objectives. Korea's ability to maintain its pace of development will depend, in large part, on the manner in which the duties and rewards are allocated among workers and managers.

Capital Allocation. A key component of Japanese and Korean industrial policy has been the government's ability to ensure that domestic firms obtain capital necessary to fund the acquisition of new technologies and the rapid expansion of facilities and human resources. Capital allocation in both nations has included direct subsidies, tax incentives, and low-interest loans provided by "semi-governmental" banks. However, the central government's
most potent policy tool has been its influence over the banking system, whereby commercial banks coordinate their lending efforts with those of the government, fostering cooperative relationships between firms and their banks, particularly since debt remains the preferred financing vehicle in both nations.

Whereas each nation understands the importance of capital for its domestic firms, key differences have arisen between Japan and Korea. Japan has been able to construct a well-developed governmental and commercial banking and financial system, available to Japanese firms domestically and wherever they wish to venture around the world. Moreover, the yen has become a currency of world trade rivaling the dollar in its integrity and commercial value. Korea, on the other hand, has been unable to achieve the same level of maturity for its own commercial banking system, which has been the subject of close control by the central government since the development effort began in the early 1960s. As a result, the government functions as a "risk-partner" with private enterprise, instead of permitting the private banking system to assume that role.

Competition and Cooperation. Perhaps one of the United States' most tenacious debates about industrial policy concerns antitrust prohibitions on cooperative efforts among firms involved in the same industry. In Japan and Korea, however, competition and cooperation are key aspects of the industrial structure. While protection from foreign competition remains a fundamental concern of Japan's major trading companies, cooperative research and development projects regarding technology in target industries are encouraged and supported by the government as well as by the firms themselves, provided that each firm is left free to compete on its own terms with the resultant technology. Moreover, various organizations, including the ministerial policy councils, facilitate the broad dissemination of competitive information throughout the domestic industry.

Industrial Restructuring. While the United States seems to have had a great deal of difficulty in intelligently addressing the issues that arise when a major firm or industry is no longer able to compete in domestic and world markets, aid to these declining or depressed industries, in the form of so-called "industrial restructuring," has been a key objective of industrial policy in Japan and Korea. In Japan, adjustments in, and assistance to, those industries that had lost their comparative advantage due to the oil crisis, or because of competition from newly developed countries, became one of the major industrial policy goals after 1970 and, since that time, still concerns Japan as the nation moves into new areas of future growth.

In Japan, an industry with severe excess capacity, where a significant number of firms have experienced long-term dire financial conditions, can be
designated by JMITI as a depressed industry.\textsuperscript{83} Such a designation permits industry participants to utilize an exemption from the antitrust laws for negotiating a joint capacity reduction plan and for coordinating production and sales activities. While government financing to depressed industries is usually limited to sharing in any costs of scrapping production or purchasing excess capacity, firms may be eligible for low-interest loans for modernization and improvement, grants for research and development spending, loan guarantees, and additional minor tax benefits.

While JMITI remains closely involved in forecasting future market factors for the depressed industry and in the allocation of reductions in production among firms within the industry, long-term prospects for recovery depend upon the close relationships of the firms to their lenders, many of which may be otherwise affiliated with the firm through Japan’s networking system. There is little question that, in some cases, direct interventions in the form of recession cartels have brought on a number of economic distortions in Japan. However, various measures for reallocating labor from depressed industries, when coupled with Japanese employment practices, have been considered quite effective.

In contrast, Korea has not yet achieved the success of the Japanese in industrial restructuring and retraining. Like Japan, Korea has implemented a number of policies for helping depressed industries. However, these efforts have often been chaotic and have failed to achieve the smooth movement of capital and labor into new sectors and industries. Moreover, labor relations have not matured to the level enjoyed by Japanese firms engaged in rapid internal and market changes. As such, control over economic renewal in Korea has largely been ceded to the large private conglomerates, a trend that continues to inhibit government encouragement of newer and smaller businesses.

\textbf{C. The Cooperative Growth Economy}

Obviously, Japan and Korea have achieved significantly different results through use of the described industrial policies. However, one can still construct a general model for the institutions of a cooperative growth economy and, importantly, one can also see a common regulatory framework used to implement such industrial policies:

1. The industrial policies of cooperative growth economies cannot properly be characterized as either “export-oriented” or “inward-oriented,” since they have freely borrowed from the practices of both models. They do share a common interest in rapid growth in the economy, which necessarily depends upon an ability to produce and sell more and more goods into the domestic and

\textsuperscript{83} As of 1987, 22 “depressed industries,” including aluminum, ammonium, cement, cotton spinning, ferroalloys, nylon staple, paper, petrochemicals, phosphoric acid, polyester filament, polyester staple, shipbuilding, soda ash, steel, sugar, urea, and wool yarn, had been protected under the 1983 extension of the 1978 Temporary Measures Law for the Stabilization of Specific Industries. \textit{RESTORING INTERNATIONAL BALANCE, supra} note 4, at 26-27.
export markets. As such, competitiveness becomes the overriding policy objective, leading to social practices, such as high savings and investment, which tend to improve productivity while deferring consumption. This national ideological characteristic drives regulatory policies with respect to taxation, banking and credit, labor and trade, and foreign investment.

2. While each nation has established a number of formal governmental and political institutions, central planning authority remains vested in the ministries and in the bureaucratic infrastructures. As such, consensus regarding the nation's economic goals and objectives is achieved outside of the democratic process in a manner consistent with the traditional hierarchical social structures of each nation.

3. The selection of target industries by each nation focuses overall industrial planning and dictates the use of regulatory tools in the areas of trade, foreign investment, banking and credit, and antitrust.

4. The administration of each nation's regulatory framework is accompanied by consultation between the government and industry as well as other forms of administrative guidance. The effect of these practices is to build a sense of cooperation among all relevant sectors of the economy.

5. The financial ministries and central banking authorities in each nation have taken active roles in the allocation of capital among the industries targeted in the economic planning process.

6. The regulation of competition in each nation is conducted in a manner that suits the nation's overall economic objectives, rather than the needs of a particular firm. Highly-concentrated levels of industry activity, cooperative research and development, and managed industry "restructuring" are all characteristics of microeconomic activity in the cooperative growth economies and are supported by regulatory practices concerning trade, antitrust, foreign investment, and research and development.

Each of the characteristics of the cooperative growth economies reflects a focused concentration of resources upon growth in targeted industries through the rapid and proper allocation of capital, technology, and human resources. Central planning occurs largely outside of the democratic legislative process and all economic matters regarding trade, foreign investment, and capital are subject to some sort of review by the finance and trade bureaucracies. It is against this background that American firms must approach the regulatory framework that exists in both Japan and Korea.

IV. ANALYSIS OF SPECIFIC INDUSTRIAL POLICIES

There are a number of approaches for analyzing the industrial policies of cooperative growth economies such as Japan and Korea. In this section, we identify and analyze five broad categories of industrial policy concerns: trade policies; inbound and outbound investment policies; capital management policies; industry structure and competition policies; and, finally, human resources policies. Obviously, a good deal of overlap exists between each of these subject areas, particularly since each nation is distinguished by its efforts to build a coherent set of economic policies that are consistently instilled in specific sets of laws and regulations.
Within each section an attempt has been made to follow a uniform system of organization. At the outset, an introductory paragraph defines the specific policy area. This is followed by a more detailed discussion of the actual policies enacted by Japan and Korea (the Japanese experience is presented first due to the lengthier period of time Japan has had to develop its economic practices and the fact that Korea has often made a conscientious effort to follow the direction of the Japanese). At the end of each section, some thoughts are provided concerning issues that arise for each of the cooperative growth economies and lessons that the United States might learn.

A. Trade Policies

1. Introduction

The first and most important goal of each of the cooperative growth economies has been to develop a coherent and strategic trade policy relating all aspects of export and import activities. Although the policies adopted include traditional regulatory elements such as tariffs, import quotas, standards certification, import licensing, export subsidies, and foreign exchange controls, many of the trade objectives of Japan and Korea have also resulted from a number of non-regulatory policies and social practices, often deeply rooted in the institutional traditions of each nation. These include the domestic distribution system, the assistance provided to depressed industries, the behavior of domestic capital markets, and the attitudes of the citizenry toward savings and consumption.

2. Japanese Trade Policies

After World War II, Japan set out to achieve economic independence by concentrating on such export products as steel, electronics, automobiles, cameras, and chemicals while abandoning traditional industries such as textiles and silk weaving. The availability of large amounts of foreign aid and assistance after the War enabled Japanese industrial planners to incorporate modern methods and equipment into their new plants while competitors in other nations worked to update their existing and outmoded facilities. Within a few years, Japanese products began to shed their initial image of "poor quality" and soon set international standards for workmanship, reliability, and service.

By 1951, Japan had built its total trade figure to $3.3 billion, a level exceeding the highest volume attained in any year prior to the War. Although exports still consisted mainly of textiles and light industry goods, the nation was beginning to develop its heavy and chemical industries, a trend that accelerated from the procurement needs of the United States during the Korean war. By 1961, total trade exceeded $10 billion; by 1967, exports alone totalled that amount. During the 1970s Japan's exports appreciated
more rapidly than imports, particularly in manufactured goods and machinery.

By 1983, Japan's share of total world trade reached almost nine percent.

In 1979, Japan had an $8.7 billion trade deficit, a figure that amounted to one percent of GNP. However, Japanese exports grew at an average annual rate of 6.5% during the first five years of the 1980s while imports actually declined at an average annual rate of 1.4% during the same period. By 1985, exports and imports, computed as a percentage of GDP, equaled 14.1 and 10.5%, respectively, and the nation's current account balance surplus reached $49.3 billion. By 1988, exports totaled $259.6 billion, a 15.6% increase from 1987. Imports for that year totaled $164.8 billion, also a record and a 28.5% increase from 1987. The resultant trade surplus of $94.8 billion constituted a decrease of 1.7% from 1987, and just over one-half of the trade surplus ($47.8 billion) came at the expense of the United States.

Although manufactured exports appreciated by seventy-three percent during the first five years of the 1980s, manufactured imports increased by only a third. Since manufactured exports made up roughly ninety-eight percent of Japan's total exports at that time and almost three-quarters of the nation's imports consisted of non-manufactured goods, the trade surpluses that began to rise during the 1980s can be attributed to Japan's manufacturing-related industrial policies. While the volume of manufactured goods as a percentage of imports in Japan increased to forty-four percent by 1987, Japan's export prowess continued to exacerbate trade tensions.

To some extent, Japan's growing trade surplus can be attributed to its willingness to suppress domestic demand and consumption in favor of higher levels of savings and investment that could be channeled into the development of new export products. Private consumption, which had risen at an average annual rate of 6.2% from 1965-80, rose just 2.9% from 1980-86. Total domestic demand dropped from 9.4% during 1967-73 to 3.1% for the

84. OECD ECON. SURVS., JAPAN, July 1980. The World Bank has reported that Japanese exports increased at an average annual rate of 11.5% during the period from 1965 to 1980, while imports increased only 5.4% during that same period.

85. However, the current balance had been rising rapidly in prior years and had exceeded $16.5 billion by 1978. Id.

86. RESTORING INTERNATIONAL BALANCE, supra note 4, at 5.

87. As reported by the BOJ and included in statistics appearing in OECD, supra note 1, at 133. From 1979 to 1985, exports rose 65% in volume terms, while import volume rose only 4%.

88. Id. supra note 4, at 5.

90. With respect to such raw materials and resources as aluminum, nickel, wool, raw cotton, corn, oil, soybeans, and coal, Japan's import dependency as of the mid-1980s ranged from 80% to 100% of the nation's requirements and purchases of raw materials amounted to approximately 25% of the world's total exports of those products. See National Policies and Agricultural Trade: Country Study Japan (1987).

91. OECD, supra note 1, at 27.

92. Manufacturing output as a share of real GNP expanded from 28% in 1979 to 35% in 1985, an increase of 25%. RESTORING INTERNATIONAL BALANCE, supra note 4, at 18.
1978-85 period. In 1984, Japan's gross savings ratio, as a percentage of GDP, stood at a spectacular 30.6%, as compared to 17.0% in the United States and 21.6% in West Germany.

With a population and GNP approximately half that of the United States, Japan today has emerged as the world's second largest economy and presents an attractive potential market for foreign goods and services. However, foreigner exporters have been largely unsuccessful in attempting to penetrate the Japanese domestic market in the areas of high technology, consumer products, basic materials, and pharmaceuticals. The reasons can be traced to both specific government regulatory policies and institutional practices which the government has encouraged through non-intervention.

Tariffs and Import Quotas. Formal import controls are regulated by the Foreign Exchange and Foreign Trade Control Law (FEFTCL) and the Import Trade Control Order. Although today most goods automatically qualify for free export into Japan, certain non-liberalized goods remain subject to import quotas and other special restrictions and approval procedures. Until the early 1980s tariffs and quotas were powerful protectionist tools in Japan. For example, prior to negotiations in 1982, tariffs significantly inhibited imports of citrus fruits, related agricultural products, tobacco, and at least

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94. Restoring International Balance, supra note 4, at 1.
95. It is believed that the best prospects for United States exports into Japan include medical and dental equipment and supplies, analytical instrumentation, telecommunications equipment, CAD/CAM/CAE systems, semiconductor chips, service industry, automotive parts, agrochemicals, jewelry, carpets and rugs, and fish products. However, a survey of more than 750 United States electronics company chief executive officers revealed that while 78% of the companies sold overseas, 31% of the companies were unsuccessful in attempting to establish a presence in Japan. This failure rate compares to comparable rates of 17% for the rest of the Pacific Rim countries and 11% for both Western Europe and Canada. These executives look to the United States government to negotiate more favorable terms of trade on their behalf with respect to opening Japan's markets and they anticipate the increased popularity of joint marketing, research and development, technology transfer, and manufacturing agreements with domestic and foreign partners. They also expect a good deal of consolidation within the United States industry in the years to come due, in part, to the heightened competitive pressures created by the emergence of Japanese and Korean firms. Eckhouse, CEOs See U.S. Losing Its Edge in Technology, San Francisco Chron., Mar. 15, 1990, at C1, col. 5. Moreover, Japanese firms themselves can be expected to compete aggressively to take advantage of the growing consumer demand in their domestic market, where the wealth of the average household in 1989 was 7.2 times net income, as compared to a ratio of 4.2 in North America. Berger, Japan Turns Up Competitive Heat, San Francisco Chron., Feb. 12, 1990, at C1, col. 1.
96. See Restoring International Balance, supra note 4, at 27-34.
97. Imports are further regulated by the nation's Customs Duty Law, Customs Tariff Law, and Customs Duty Temporary Measures Law, as well as certain excise and commodity taxes.
98. Import licenses from JMITI are required for the import of products falling into four broad areas: (i) certain articles listed with GATT for the protection of national security, public health, and morals, including meat, milk products, citrus fruits, and flour (the "negative list"); (ii) imports from certain countries; (iii) imports designated as "restricted" by JMITI; and (iv) imports involving unusual settlement terms. Imports of items on the negative list are allocated by quotas and JMITI periodically publishes an "Import Notice" listing all the items that are subject to quota restrictions and require its prior approval.
102 industrial items. Indeed, during the 1960s quota restrictions covered 490 product categories, effectively precluding market entry into Japanese markets by foreign firms and products.

In response to the concerns and objections of its trading partners in the West, in 1982, Japan agreed to reduce its tariffs by about thirty-five percent on 1,635 items. In 1985, the government introduced its "Outline of the Action Programme for Improved Market Access" and established a special committee headed by the Chief Cabinet Secretary to implement it. The Action Programme targeted 1,850 industrial and agricultural items for tariff reduction or elimination, with thirty-six items scheduled for tariff elimination. A twenty percent reduction was also proposed for 1,670 industrial and mining products, to be phased in over the period of the Action Programme. From such actions, Japan indicated its desire to reduce or abolish tariffs on foreign manufactured goods.

Tariff reforms have been accompanied by changes in quota restrictions. By 1982, Japan had quota protection for only twenty-seven items, of which twenty-two were agricultural and fishery products. These included four leather products, for which quotas have subsequently been removed. As of July 1989, twenty-one products were still subject to quantitative restrictions, of which twenty were agricultural and fishery commodities. Further reductions in the remaining restrictions depends upon diffusing domestic political pressure and changing consumer tolerances and tastes within Japan. In any event, quotas do not present a significant barrier to the non-agricultural

99. MCKINSEY & COMPANY, INC., JAPAN BUSINESS: OBSTACLES AND OPPORTUNITIES 19 (1983) [hereinafter "MCKINSEY"]. Among the industrial items indicated were computers and peripherals, plywood and veneer products, heavy electrical machinery, medical and diagnostic instruments, automotive tires, steel, cosmetics, drugs and televisions.

100. Id. at 17.

101. Id. at 19. As a result of the reductions, the average tariff rate on all industrial products other than oil was lowered to 3.27%, a figure that compared favorably to 3.90% for both the United States and the European Economic Community at that time.


103. MASWOOD, supra note 102, at 98.

104. MCKINSEY, supra note 99, at 17.

105. MASWOOD, supra note 102, at 96-97.

106. Agriculture and farming have long been a symbol of national identity in Japan, and the food scarcities of World War II contributed to the post-war protectionist attitudes with respect to rice production and other products. As a result, the rice farmer lobby has come to enjoy significant political influence in Japan, even though the danger of future food shortages has abated and the number of farmers in Japan was reduced by 42% between 1965 and 1987. See U.S. Rice Farmers Pressing Again for Entry Into the Japanese Market, N.Y. Times, Mar. 25, 1989, at 35 (final ed.); OECD, supra note 1, at 41. Rice farmers continue to receive subsidies, although the levels thereof were reduced by 5.9% in 1987 and 4.6% in 1988, and taxes on farmed land continue to be drastically lower than the amounts paid on residential land. RESTORING INTERNATIONAL BALANCE, supra note 4, at 28. Interestingly, Japan's policies regarding taxation of land use and transfers, as well as the amount of land which remains devoted to farming production, have contributed to the relatively high cost of housing which exists in the nation, still another example of the "costs" borne by consumers for the nation's agricultural institutions. See also OECD, supra note 1, at 75-78 (regarding land and housing issues in Japan).
products\textsuperscript{108} of foreign firms in Japan at present, particularly when compared to import restrictions which exist in such Western nations as West Germany and France.\textsuperscript{109}

**Domestic Distribution System.** The product distribution system in Japan has been criticized by both domestic and foreign companies for its economic inefficiencies, particularly in industries which contain multilayered and interdependent distributors and sales representatives. The incorporation of multiple middlemen in the distribution system, each aligned with one or more different manufacturers in the industry, "is largely a financing operation in disguise, one in which large wholesalers give smaller wholesalers . . . longer payment terms."\textsuperscript{110} Traditional customer relationships abound in most industries and it is not uncommon to see the absence of written contracts and the delayed settlement of accounts.

The inefficiencies of the distribution system in Japan are exacerbated by laws\textsuperscript{111} which tend to protect small scale retailers. For example, the opening of any large store, such as a supermarket or department store, requires approval by both JMITI and local councils dominated by owners of small shops in the area.\textsuperscript{112} Moreover, because the typical Japanese retailer operates

\textsuperscript{107} Due to the success of the agricultural lobby, Japanese farmers continue to receive a guaranteed price per ton on rice, and, as result, consumers continue to pay prices that greatly exceed the world market rate for rice and similar commodities, a fact that may ultimately lead to increased demand for freer trade in that area. OECD, *supra* note 1, at 28, 34. Moreover, food consumption patterns are changing drastically, with annual rice consumption per person declining by 36\% from 1965 to 1987 while meat consumption rose by 400\% during that period. In addition, Japanese consumers are eating a higher percentage of table beef and relatively less of the Kobe beef which is the specialty of Japanese producers. Frazier, *The United States—Japanese Trade Accords and the Outlook for Pacific Northwest Beef Producers*, *PAC. NORTHWEST EXECUTIVE*, Apr. 1989, at 20.

\textsuperscript{108} Japan has agreed to eliminate the import quotas on beef and citrus by March 31, 1991, as well as the quotas on many processed foods. However, even when the quotas are removed or drastically reduced, producers in the United States would confront significant competition from competitors in other nations, such as Australia, where prices remain significantly less than those being offered by American producers.

\textsuperscript{109} As early as 1982, Japan’s five restricted non-agricultural products compared favorably with West Germany’s 11 products and France’s 27 products. See McKinsey, *supra* note 99, at 18, 21.

\textsuperscript{110} *Id.* at 29.

\textsuperscript{111} The Law Concerning Adjustment of Retail Business in the Style of Large Scale Retail Shops was passed in 1974 to limit the growth of large outlets ("Retail Business Law").

\textsuperscript{112} A retail shop with a floor area of 500 square meters (5,382 square feet) or more is governed by the Law on Large Scale Retail Shops, which requires submission to the local prefectural government of a notice to utilize a designated building as a retail shop. OECD, *supra* note 1, at 78-79. If the proposed site is 1,500 square meters (16,146 square feet) or more (in designed large cities, 3,000 square meters (32,292 square feet) or more), the notice must also be submitted to JMITI. Upon receipt of the notice, JMITI or the prefectural government must make a public announcement containing details of the proposed development and investigate the notices, including consultation with the local retailers’ association if it is felt that the proposed development could adversely affect existing retailers. JMITI or the prefectural government may order the postponement of the anticipated opening date or the reduction in floor area. See E. Lincoln, *Japan: Facing Economic Maturity* 275-76 (1988).
on a small scale\textsuperscript{113} and is dependent upon the credit practices of the wholesalers,\textsuperscript{114} imported goods have difficulty penetrating the domestic market. Changing the way the Japanese distribution system operates will be difficult and time-consuming due to the considerable political influence that small retailers wield in Japan\textsuperscript{115} and because the government position on the issue is itself somewhat uncertain.\textsuperscript{116} Nevertheless, some foreign firms have surmounted this problem by either establishing their own distribution networks or entering into agreements with well-connected Japanese firms.\textsuperscript{117}

\textit{Standards Certification.} In addition to customs barriers, goods imported into Japan must also survive extensive pre-clearance procedures for government testing and approval before sale of the good in Japan is allowed. In contrast to the system in the United States, which requires only post-production analysis of performance, a product in Japan must meet detailed specifications for its design. Moreover, even when a product receives governmental approval, it faces "voluntary" standards imposed by trade associations, which, while neither legal nor compulsory, are often required by wholesale and retail purchasers in Japan.

Although Japan made significant revisions to its system of certification in 1983,\textsuperscript{118} a number of detailed regulations remain in effect today.\textsuperscript{119} For example, "type" approval, which eliminates the need for inspecting each shipment of a particular type of imported good once that good has been initially

\begin{itemize}
\item \textsuperscript{113} OECD, supra note 1, at 80. In 1982, the share of Japanese retail sales in stores with more than 50 employees stood at just about 20\%, an actual decline of one percent over the level in 1974, when the Law on Large Scale Retail Shops was implemented. E. LINCOLN, supra note 112, at 276.
\item \textsuperscript{114} RESTORING INTERNATIONAL BALANCE, supra note 4, at 31-32.
\item \textsuperscript{115} It has been noted that "after the farmers, shopkeepers are Japan’s most entrenched conservative lobby with supporters in the highest ranks of the ruling Liberal Democratic Party .... Together with their families they account for some 20 m[illion] votes, most of them cast for the LDP .... Especially in urban areas, where it is weakest, the LDP relies on retailers to canvass support at election time." Wagstyl, Elusive Key to Japan’s Closed Shop, Fin. Times, Feb. 27, 1989, at 17, col. 2.
\item \textsuperscript{116} For example, it has been noted that the “opening” of the Japanese telecommunications market precipitated “bloody turf wars” between officials at JMITI and the Ministry of Posts and Telegraph. Perry, International Telecommunications 14: Open Approach to Tackle Unresolved Trade Imbalance, Fin. Times, July 19, 1989 at XIV, col. 3.
\item \textsuperscript{117} MCKINSEY, supra note 99, at 86-96.
\item \textsuperscript{118} Prior to 1983, certification of foreign products could only be obtained by a Japanese company, typically the importing agent for the product. Accordingly, the foreign firm would have a great deal of difficulty in replacing the importing agent, since imports would be suspended until a new importing agent was found and the agent applied for and received a new certification. However, in 1983, foreign companies were given the right to hold certification on their own, thereby alleviating some of the concerns surrounding any change in the importing agent. See MASWOOD, supra note 102, at 105.
\item \textsuperscript{119} The Gotoda Commission was appointed to review some of the forty laws related to standards certification and to revise import procedures for 16 items. It was intended that the revision of the laws was “to ensure legal non-discrimination between nationals and non-nationals in certification systems; to ensure transparency of standards; to promote internationalization of standards; to promote the acceptance of foreign test data; and to simplify and speed up certification procedures.” Ultimately, the Commission recommended the revision of only 17 of the laws, stating that “equal treatment” could be achieved under existing laws. Id. at 104.
\end{itemize}
inspected and approved, was finally made available to foreign manufacturers,
but only on the condition that a thorough inspection by an approved foreign
testing agency or an inspector from Japan take place. In addition,
although foreign test data may now be submitted for certain goods, such test
data has to be generated by foreign laboratories inspected and approved by
Japanese authorities. Generally, any effort to develop products for the
Japanese market should not be undertaken until relevant certification stan-
dards have been reviewed.

Tariffs and quotas, the distribution system, and the certification stan-
dards are just a few of the regulatory and economic factors that have charac-
terized Japan's import policies in recent years. Other Japanese practices that
have emerged to protect domestic firms from foreign competition include the
following:

Capital Restrictions. As noted below, the government placed restrictions
on foreign exchange, which lasted until the mid-1960s, and on foreign invest-
ment, which lasted until 1976. The effect of such measures was to restrict
both the import of foreign goods into Japan and the ability of foreign firms to
establish a local presence in the Japanese market.

Informal Bidding Practices. Foreign firms have often been denied access
to the informal bidding practices which govern participation in construction
and infrastructure projects in Japan. For example, the so-called “dango”
system, rather than competitive bidding, has been used to determine the allo-
cation of work on construction projects. Under this system, all potential Jap-
anese competitors meet on a regular basis to discuss upcoming projects and to
build a consensus regarding the allocation of the work. In addition to Japa-
nese construction firms, the “dango” system also benefits Japanese suppliers
since foreign construction firms might import a greater share of their raw
materials for a given project than domestic firms.

Restructuring Policies. In theory, Japanese policies regarding the “re-
structuring” of “depressed industries” are designed to assist in the steady re-
duction of capacity in those sectors no longer competitive in world markets. Presumably, domestic demand for such products would be satisfied through
increased imports, as classical theories of trade would suggest. However, in
many cases, imports in depressed industries have remained at low levels and
prices have fallen only gradually, leading to charges that the government has

\[120. \textit{Id. at 105-06.}\]
\[121. \textit{Id. at 103-04.}\]
\[122. \textit{See Edelman, Japanese Product Standards as Non-tariff Trade Barriers: When Regula-
tory Policy Becomes a Trade Issue, 24 STAN. J. INT'L L. 389 (1988).}\]
\[123. \textit{RESTORING INTERNATIONAL BALANCE, supra note 4, at 34.}\]
\[124. \text{A United States trade group estimates that United States companies performed just $65 million of}
\text{construction work in Japan in 1989, compared with $2.6 billion of work done in the}
used administrative guidance to restrict the purchase of imported goods by domestic firms.

Atttitudes of Domestic Capital Markets. Under classical theories of trade, a nation will only produce those goods which provide a suitable rate of return on invested capital. However, Japan's strategies of targeting specific industries for entry and growth, as well as a number of specific institutional features of the Japanese economy, have led to the development of industries without regard to traditional requirements of investment return. For example, firms have received the benefit of financing at rates below the levels available to foreign competitors and have shared information, consumers have tolerated higher domestic prices (due to the lack of foreign competition and high "start-up" costs), and lenders, shareholders, employees, and managers have been willing to measure investment performance in the form of market share.

Characteristics of Imported Goods. In order to succeed in the Japanese market, foreign firms need to develop a better understanding of the requirements of the Japanese consumer. For example, in many cases, the ability of the firm to properly position the product to take into account the rigid vertical and hierarchical systems of Japan is often more important than the actual quality or utility of the product. On the other hand, product strength and performance is far more important than marketing in the case of production materials, high technology, and capital goods. As is the case with standard certification procedures, foreign firms must carefully develop their marketing

125. JMITI's own analysis has indicated that domestic prices rose more than domestic input prices from 1985 to 1988, while export prices fell by more than ten percent relative to domestic input prices during that same period. Japanese manufacturers have not been passing on import cost savings fully to Japanese consumers. Also, export prices and domestic wholesale prices have diverged significantly throughout Japan's economic development, with Japanese consumers bearing the effect of the differentials. RESTORING INTERNATIONAL BALANCE, supra note 4, at 60.

126. The Japanese have shown an ability to upgrade their export portfolio toward high technology areas at an unprecedented speed. For example, the ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 1984-85 47 (1986) indicated that between 1970 and 1983, Japan's export market share of high technology products increased dramatically. In telecommunications, market share rose from 11.9% to 30.7%, in electronic equipment from 5.7% to 26.3%, and in computers from 11.1% to 20.2%. Japanese firms aggressively pursued market share on the experience gained by large-volume production and through pricing practices referred to as "predatory", acquisition of technologies through internal research and development or licensing from competitors, and widespread sharing of competitive information on a scale unparalleled by the nation's major industrial competitors. In addition, the Japanese were often able to target markets, such as consumer electronics and portions of heavy industry, that were being abandoned by foreign competitors and presented the opportunity for the Japanese to quickly gain access to technology and markets. Ultimately, the Japanese were able to move beyond mere adaptation of technology to innovative research and product development. The Japanese also appear to have used various policy tools to protect domestic market share. A private study conducted for the American Electronics Association indicated that the share of the United States for Japanese semiconductor sales could jump to 32% from the current 12% level if all barriers to competition in Japan were removed. Eckhouse, Suspicion, Fear In U.S. as Japan Trade Talks Start, San Francisco Chron., Apr. 2, 1990, at A1, col 1.
programs and product characteristics to take account of the unique needs of the market.\textsuperscript{127}

\textit{Competitive Imbalances.} Prospects for decreasing the trade deficit between Japan and the United States are also hampered by significant competitive imbalances. It has been reported that more than sixty percent of the United States' 1988 estimated trade deficit of $47.6 billion occurred in categories in which American companies are either no longer competitive or in which American products no longer exist. Japan imported almost $42 billion of United States products and raw materials in 1988, an increase of one-third over the previous year. However, the inability of American firms to compete in such areas as industrial electronics (which accounted for almost one-quarter of the trade deficit), autos (which accounted for another one-third of the deficit), and consumer electronics (which accounted for still another quarter of the imbalance) makes it unlikely that future improvements in bilateral trade figures will come from increased exports by the United States to Japan.

3. \textit{Korean Trade Policies}

For centuries prior to the Korean war, agriculture was the foundation of Korea's national economy and continued to represent up to fifty percent of the nation's GDP during the mid-1950s.\textsuperscript{128} However, with Park's assumption of power at the beginning of the 1960s, Korea's economy began to emphasize growth through industrialization. As a result, the industrial sector's share of GDP rose from eleven percent in the mid-1950s to almost thirty-five percent in the early 1970s, while agriculture's share in the same period dropped to thirty percent.\textsuperscript{129} During the 1970s, the structure of production continued to shift from agriculture to manufacturing, with manufacturing employment in that period expanding at an average annual rate exceeding ten percent. Nevertheless, as late as the early 1980s, over a quarter of the nation's work force remained in agriculture.

From 1960 to 1975, Korean exports expanded rapidly as a percentage of GNP, rising from less than one percent to slightly over twenty-eight percent. By 1986, exports constituted nearly thirty-seven percent of GNP.\textsuperscript{130} During this initial period, Korea capitalized on its low real wage rate by exporting

\begin{itemize}
  \item \textsuperscript{127} Interestingly, lifestyles and living standards also present difficult non-tariff barriers with respect to Japan's trade surplus situation. For example, while most daily necessities in Tokyo cost 40% more than in New York, only 42% of Japanese adults were aware of such discrepancies. Also, Japanese workers spend 219 more hours a year on the job than American workers. It has been estimated that if the average Japanese worker would put in 100 fewer hours a year, the resulting lower production and higher consumption would cut Japan's trade surplus by 44%. Eckhouse, Plenty of Deficit-Cutting Suggestions, No Quick Fixes, San Francisco Chron., Apr. 3, 1990, at A7, col. 1.
  \item \textsuperscript{128} D. MACDONALD, supra note 7, at 188.
  \item \textsuperscript{129} P. KUZNETS, supra note 40, at 50.
  \item \textsuperscript{130} PRICE WATERHOUSE, supra note 13, at 8.
\end{itemize}
goods and commodities which required neither highly skilled labor nor massive capital investment. However, by the late 1960s, as the labor force became increasingly skilled and utilized, real wage rates rose and higher capital formation rates meant that there was more capital available per worker. As a result, Korean exports began shifting their production to such capital-intensive industries as shipbuilding, electrical equipment, chemicals, primary metals, transport equipment, and machinery. By the end of 1975, almost two-thirds of the nation’s exports consisted of manufactured goods, compared to just twelve percent in 1960.

Korea’s growth through the 1970s was not simply an export-based boom. The economy experienced a broad structural transformation in which all segments of economic activity became connected to the larger global economy and to world markets. For example, imports, which had constituted only 12.3% of GNP in 1960, expanded to over 53% of GNP by 1978. The actual dollar volume of imports, which was only $344 million in 1960, had risen to almost $15 billion by 1979. The 1980s saw a continuation of the impressive levels of economic growth, particularly in exports, which rose to a 1988 level of $60 billion, as compared to $33 million in 1960 and just $17.2 billion as recently as 1980.

As a result of these structural changes, Korea’s overall international trade position has improved significantly in recent years. In 1980, Korea had a current account balance deficit of $5.3 billion and a merchandise trade deficit of $4.4 billion. However, by 1986, the nation had achieved, for the first time since the Korean war, a significant current account balance surplus of $4.6 billion. This facilitated a reduction in the nation’s foreign debt to approximately $45 billion and a trade surplus of approximately $3.1 billion. The current Five-Year Plan calls for a current account balance surplus of $5 billion by 1991 while exports have already exceeded the $55.8 billion expected for 1991.

Although this article focuses primarily on the means by which Korea achieved rapid growth into the mid-1980s, recent economic difficulties have been so substantial that they cannot be ignored. For example, export growth in 1989, which played such an important role in the overall development of the Korean economy, rose only two percent, to $61 billion. As a result, the confidence of investors in the economy has ebbed and the government has...
been forced to significantly lower its own expectations regarding Korea's ability to continue lowering its level of foreign debt. Furthermore, wage pressures and the need for massive capital investment have generated considerable concern with respect to increased inflation in the Korean economy.

Although there are numerous similarities between the post-war economic development efforts of Japan and Korea, several broad policy factors distinguish the experience of these nations. These include the use of such regulatory tools as licensing regulations, tariffs, export subsidies and incentives, and foreign exchange allocations in Korea, as well as the size of the domestic market and the time period in which the transition was made to manufacturing goods.

**Licensing Regulations.** Like Japan at the beginning of its development period, Korea imposed a number of regulations in the form of licensing requirements on importers and exporters in Korea. Under Korea’s Trade Transaction Law (TTL)\(^{140}\) and accompanying Implementation Decree (“TTL Decree”),\(^{141}\) all importers are required to apply for a trader’s license from KMITI in order to engage in any export-import trading business.\(^{142}\) Once issued, however, the license can be cancelled under certain circumstances.\(^{143}\) In addition, any person who intends to export or import goods is required to obtain a permit or approval from KMITI.\(^{144}\)

The TTL provides for the classification of export-import goods into three categories: approval items; restricted items; and banned items.\(^{145}\) In addition, the government establishes quotas and can impose other restrictions, such as specifications and trading areas. Classifications are to be set forth in a periodic announcement which is to be made on a semiannual basis,\(^{146}\)

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140. Law No. 1878, Enacted January 16, 1967.
141. Presidential Decree No. 2979, Enacted April 4, 1967. The TTL Decree has been amended a number of times since its enactment in 1967.
142. Article 3 of the TTL sets forth the requirements with respect to a trader’s license. The qualifications for a trader’s license are set forth in Article 1 of the TTL Decree and additional requirements for operating as an importer are set forth in Article 3 of the TTL Decree. Importers must satisfy certain minimum export requirements. Favorable treatment with respect to the volume of permitted imports is granted to those firms which have achieved certain levels of success in their export activities. In some cases, imports of such things as raw materials and machinery may be permitted without regard to the general requirements for qualification as an importer if the imported goods are to be used to satisfy specified strategic objectives set forth in paragraph 2 of Article 3 of the TTL Decree. Internally, import licenses are actually issued by the provincial governors or the mayors of the four major cities upon recommendation and approval of the relevant governmental agencies, including the Korea Exchange Bank (KEB) or any other “Class A” foreign exchange bank. PRICE WATERHOUSE, *supra* note 13, at 17.
143. Article 4 of the TTL Decree. Among other things, a license may be cancelled if the holder fails to earn a certain specified minimum amount from exports in a given semi-annual period.
144. Article 6 of the TTL. Certain matters relating to the grant and scope of a permit or approval are set forth in Chapter II of the TTL Decree.
146. Chapter III of the TTL Decree sets forth the procedure with respect to the periodic announcement. The chiefs of governmental agencies are to notify KMITI of any data necessary
although the government has the power to make amendments at such times as it sees fit. Import licenses for approval items are automatically approved, and applications for licenses for the import of items in the “permitted” category are approved on a case-by-case basis after screening by the government agencies concerned or by the relevant manufacturers’ association.147

The TTL permits the government to intervene at the microeconomic level by controlling both the degree of competition from imported goods and the allocation among the Korean-based firms (both domestic and foreign)148 of imported parts and other commodities used in the manufacture and production of finished products. The government’s policy has been to provide protection to local industries by restricting imports as soon as local producers are able to meet or exceed the quality of the imported goods. However, the government has not typically restricted the importation of goods when local manufacturers have not been able to meet the quality standards required by the local market. Indeed, imported goods have, when combined with other regulations with respect to the license of “know-how,” provided a good source of technology for local producers.

The use of import licenses and quotas at any given time is a function of the contemporary concerns and objectives regarding the nation’s overall balance of trade and competition among firms in the domestic market. For example, in the late 1970s concerns over the degree of the government’s control over the economy led to a gradual liberalization of import policies,149 with the objective that ninety to ninety-five percent of all product categories will eventually fall into the approval category. In 1984, the government began to

for formulating the periodic announcement and the EPB will also provide information concerning the allocation of funds and the introduction of commodities in kind through assistance from foreign countries. Finally, the KMOF supplies KMITI with a detailed description of the government’s foreign currency position and expenditure plans. KMITI promulgates each periodic announcement in consultation with the Foreign Trade Committee (FTC) established within KMITI. The FTC is to be chaired by the Vice Minister of KMITI. The FTC is also empowered to consider any other important matters concerning foreign trade policies.


148. The TTL governs imports by foreign-invested companies (“FICs”) as well as by domestic firms. Until recently, if an FIC met the appropriate requirements for a trader’s license but had no manufacturing facilities in Korea, it could only import raw materials, machinery, and equipment that were manufactured by the FIC’s parent or affiliated companies. However, if the FIC had manufacturing facilities in Korea, it could, in addition to the items mentioned above for non-manufacturing FICs, import raw materials and manufacturing equipment necessary for the production of the goods that it manufactured. Recently, these types of distinctions were abandoned in connection with the general liberalization of the criteria for granting a foreign trade business license. In addition, exports of goods by holders of a trading license are much more liberal, with an FIC holding a trading license being allowed to export all of its manufactured products. Foreign investors can usually import whatever they need to set up a manufacturing plant under an approved foreign investment, particularly if the plant is devoted to export activities. An alternative method for participating in sales activity in Korea is for the FIC to act as an offer-agent, thereby soliciting orders on behalf of the principal. In any event, sellers of products in Korea should be cognizant of the nation’s extensive antidumping and countervailing duties legislation, which was implemented in 1984.

149. D. Macdonald, supra note 7, at 204.
implement a pre-announcement system, whereby items to be liberalized for import would be designated several years before in order to allow local firms to prepare for competition.

Tariffs and Other Duties. In addition to the restrictions imposed by import licensing regulations, Korea maintains a three-column import tariff schedule comprised of general rates, temporary rates, and GATT rates. There is also a set of concessional tariff rates which is used separately in trade negotiations among developing countries. The government has used a flexible rate tariff system under which rates may be varied by as much as fifty percent above or below a fixed rate without legislative approval. Import duties are not assessed on capital goods and raw materials imported in connection with certain approved foreign investment activities, raw materials used in the production of export goods, and certain machinery, materials, and parts used in designated industries.

In connection with the aforementioned liberalization of practices regarding import licenses, the government implemented a "pre-announcement" system with respect to the changes in tariff rates that were to occur during the 1984 to 1988 period. While tariff rates for over forty percent of the then-listed items were to be reduced, selective import controls remain significant in light of the government's ability to impose surcharges to stabilize prices or discourage imports of certain goods. In addition, certain imported items are subject to additional taxation under such laws as the National Defense Tax Law, which applies primarily to imports of luxury consumer goods and services, and the nation's "value added" and consumption taxes. As a result, significant overall duties and taxes apply to imported consumer products in Korea.

Export Subsidies and Incentives. Since the mid-1960s, the cornerstone of Korea's development plan was to encourage exports. However, the government has never fully abandoned selective import substitution policies or tight controls over the level and nature of imported goods and materials. The

151. Id.
152. The intent was to lower the average rate from 22.6% in 1983 to 16.9% by 1988. In addition, the wide differentials in average tariff rates which existed between industries were to be gradually reduced from the range of 18.8% to 48.5% that existed in 1983 to a range of 14.7% to 20.0% by 1988. Differentials in tariff rates in specific commodity categories were also to be reduced so that the average for raw materials would be in the five to ten percent range, for capital goods in the twenty percent range, and for consumer goods in the twenty to thirty percent range. As a result of these "reforms," the average tariff rate was actually reduced to 18.1% by 1988 and further reductions are expected in future years.
153. For example, Article 10 of the TTL provides for the government's authority to set and announce base prices or the maximum and minimum prices for certain export and import goods when it is deemed to be necessary. Transactions in such goods must be carried out at such prices unless approval is obtained from the government. Chapter VIII of the TTL Decree sets forth the procedures relating to the establishment of such standard prices of export-import commodities. Chapter IX of the TTL Decree sets forth a number of exceptions to export and import regulations.
TTL provides for the payment of export subsidies and the TTL Decree sets forth a number of procedures with respect to the role of the government in the promotion of exports. This includes the right to grant exporters certain exclusive rights and the right to treat exporters differently based on their export fulfillment status, export financing repayment results, and certain other factors. In addition, a number of tax-related incentives have been made available to encourage activities in certain export-related industries.

Further, the government has periodically attempted to facilitate export growth through such devices as free-trade zones for export activities, export promotion loans at below market interest rates through commercial banks (many of which were effectively controlled by the government), and the Export-Import Bank of Korea, which insures that inputs for export goods are available to domestic firms at competitive prices. The government established export targets for each Korean firm during the early periods of economic development, with significant rewards and bonuses for successfully achieving the specified goals. Successful exporters received presidential medals, and monthly trade promotion meetings were attended by all of the top government and private enterprise leaders.

The intent of the export incentives and subsidies was to build the sort of export psychology that was necessary to legitimize the numerous controls.

154. Article 6 of the TTL provides that a person who intends to export goods must obtain the appropriate permit or approval from the government.

155. Article 16 of the TTL provides that the government “may pay export subsidies, as is prescribed by a Presidential Decree, within the available government budget, to those who exported goods, which require special encouragement for export.”

156. Article 24 of the TTL Decree provides that the government may, in order to maintain the balance of exports and imports within specific areas, allow exports and imports within such areas. Accordingly, the government is given a good deal of latitude to develop industrial policies which address overall trade and balance of payments issues.

157. Article 22 of the TTL Decree provides that the government may cause specific exporters to exclusively export to fixed areas during fixed periods. Article 23 of the TTL Decree permits the government to cause an exporter of specific commodities to import specified commodities within the scope of his amount exported.

158. See Article 25 of the TTL Decree. Specific actions may be taken at the time the government grants a permit or approval to engage in the export business.

159. A number of tax incentives are available to domestic enterprises and FICs under the Korean Tax Exemption and Reduction Control Law, including incentives for the organization of small and medium enterprises, development of technology and manpower, businesses earning foreign currency, balanced development of urban and rural areas, encouragement of investment, and certain other specified matters.

160. The government has designated several free export zones for the bonded manufacture, assemblage, or processing of export products using freely imported, tax-free raw materials or semi-finished goods, and has constructed plant sites and factory buildings for sale or lease in the zones. The Masan Free Export Zone, established in 1971, is located near Pusan at the southern end of the country. The Iri Free Export Zone, opened in 1978, is located near Gunsan on the western coast of Korea. Bonded storage facilities, many of which are privately owned and operated, exist in Korea and are regulated by the Collector of Customs. PRICE WATERHOUSE, supra note 13, at 19.

161. Id. at 8 (Supp.).
that the government imposed in an attempt to influence price levels, competition, capital markets, or labor movements within Korea. The public promotion of export success was quite effective. The ability of government policy makers to exercise the broad degree of discretion over the implementation of trade policies built and promoted, even if somewhat artificially, the continuous, close cooperation and collaboration between the government and leaders of private industry.

**Agricultural Supports.** Like Japan, agriculture has a long tradition in Korea and agricultural policies have played a significant role in the development of Korea's overall economic and trade objectives. Although Korea would like to decrease its dependence on foreign foodstuffs, it has not come close to meeting its own agricultural requirements. Indeed, in recent years, almost half of the nation's wheat and animal feed corn was imported. For years the government provided huge farm subsidies as well as low-interest loans, debt relief, and subsidies for the purchase of seed and chemicals to appease those farmers who had provided significant political support to the ruling party. In addition, an effort has been made to improve farm mechanization and cultivation techniques so as to enhance overall productivity.

**Foreign Exchange Controls.** Like Japan, during the 1960s, Korea used its foreign exchange controls as a means of further controlling import and export transactions. Although Japan abandoned its foreign exchange controls many years ago, the KMOF and to some degree the BOK continue to supervise such regulation. The Korean “won” remains a managed currency, subject to BOK monetary policy. It is convertible at rates determined by the

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162. In Whitehill, supra note 132, Dr. Soo noted that Korean industrial policy in the early 1970s focused upon the development of heavy and chemical industries. As a result, the government established programs to provide low-cost loans to producers, maintained protective barriers for “infant” industries until they became competitive, and permitted monopolistic production in a number of industries. While this strategy was generally successful and the nation quickly achieved success and worldwide competitiveness in iron and steel products, ships, automobiles, machine tools, industrial machinery and equipment, cement, petrochemicals, and petroleum products, it also resulted in both excess capacity and low utilization in a number of industries due to the interventions in the effect of market forces. Chapter 7 of the Whitehill book contains a useful explanation of some of the changes that occurred in the composition of Korea's imports and exports from the early 1970s to 1983.

163. For example, the National Agricultural Cooperative Federation was created to make commercial banking facilities available to farmers.

164. For a comparison of the agricultural situation in Korea to that in Japan, see San Francisco Chron., Mar. 17, 1989, at C6, noting that Japan and Korea were the two largest single country purchasers of American agricultural products in 1988. As is the case in Japan, countervailing pressures exist with respect to the demands of foreign trading partners to import goods into the Korean market and the desire of consumers to purchase imported agricultural products at prices which do not reflect the subsidies granted to domestic farmers.

165. Agricultural productivity has often been hindered by a number of structural factors within the economy. For example, the historical practice of dividing farmland into small plots has made it difficult to achieve efficient mechanization of the farming process, as has the reduction in the stock of land caused by urban growth. Labor costs have risen with the urban migration and the rise of education levels, and the overall cost of production and farm household indebtedness has increased due to purchases of durable goods and machinery, leading to the recent policies of debt relief. D. MACDONALD, supra note 7, at 199.
BOK which reflect a market base of currencies of Korea's major trading partners. Foreign exchange controls are implemented pursuant to Korea's Foreign Exchange Control Act and regulations regarding approval of foreign exchange transactions and related matters are promulgated as part of the Foreign Exchange Control Regulations (FECR).

The KEB and certain other foreign exchange banks, financial and credit organizations, and branch offices of foreign banks are authorized to handle foreign exchange transactions. However, the KEB is the only commercial Korean bank specializing in foreign exchange transactions. The authority of the KEB and the other foreign exchange banks with respect to exchange control coincide with their authority to approve or disapprove import license applications. After a license is obtained under the FECR, the receipt of foreign currencies from external sources is freely permitted, but payments to foreign firms are strictly limited. All foreign currency received as export proceeds or from other external transactions must be surrendered in return for won, although there is an exception for firms that use foreign exchange accounts for holding foreign receipts.

Through the use of these various industrial policies, the government was able to assist Korean firms in successfully achieving worldwide competitiveness in iron and steel products, ships, automobiles, machine tools, industrial machinery and equipment, cement, petrochemicals, and petroleum products. Although the recessionary environment of the early 1980s hindered the growth of a number of these industries and the export markets for the nation's products, other areas, such as the Korean automobile industry, have continued to achieve acceptance in the global marketplace in the face of acute competition from domestic and other foreign suppliers in those markets.

Trade issues have remained of paramount importance to Korea during the last decade and the government has been actively involved in the workings of the economy. In the early 1980s, the government moved to address concerns regarding the nation's large foreign debt and balance of payment deficits (as well as the vulnerability of the nation's economy to external events such as the then-current global recession) by implementing a number of programs aimed at promoting energy conservation, encouraging selective import substitution of semi-finished and capital goods, controlling the level of foreign debt, encouraging domestic savings (by refraining from purchasing foreign goods), and supporting efforts to achieve self-sufficiency in rice and other grains.

As a result of these policies, as well as the skills and dedication of the nation's work force, Korea has set and achieved economic goals and objectives which have been as impressive as those of the Japanese. However, a number of significant differences between the trade-related industrial policies of the two nations are worth noting:

**Regulatory Influences.** In contrast to the extensive non-tariff barriers utilized by the Japanese, Korea continues to rely heavily on strict regulatory
controls over all aspects of the import and export activities of its domestic firms, including foreign exchange and the import and allocation of raw materials. As noted below, similar restrictions exist with respect to the introduction and use of foreign technologies. Tariffs continue to be significantly higher in Korea, despite recent efforts to effect a broad reduction of the scope and amount of restrictions. Moreover, the most stringent controls are reserved for consumer goods, a tactic which promises to create significant internal tensions in light of the rising standard of income in Korea.

**Domestic Market Factors.** Although Korea has maintained a complex set of controls regarding imports of foreign goods and raw materials, it has not relied on protection of its domestic markets as an element of its trade policy in the same manner as the Japanese. While Japanese firms have used their domestic markets to develop the requisite economies of scale and level of experience necessary to compete in world markets, the size of Korea’s market, the relative price and wage levels within the nation, and the product mix of its own production activities have made it impractical for Korean firms to replicate the Japanese experience.

Since Korean firms have not used their home markets in the same manner as Japanese firms, competition from foreign firms has not posed significant difficulties in Korea, particularly since the relative lack of sophistication of the nation’s import needs has prevented direct competition from Japanese exports. However, in the future, Japan will be looking to other Asian nations, including Korea, to supplement its own domestic policies of industrial restructuring. The penetration of Japanese firms, as well as their labor and manufacturing practices, into Korea can be expected to have a significant impact on Korea’s trading patterns and its ability to achieve its future technological and export objectives.\(^{166}\)

**Sophistication of Exports.** In the future, Korea will seek to continue its export-driven growth by expanding its competitive capabilities into such high technology areas as electronics and semiconductors. However, in order to do so, the government must make a number of decisions regarding the manner and amount of assistance to be given to those domestic firms that would be best situated to undertake and complete the acquisition and development of the requisite technologies in these new areas. For example, Korea must decide upon the proper balance of domestic research and development, foreign investment, and foreign technology licensing, while, at the same time, tending

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\(^{166}\) Japan’s economic influence throughout Asia is widely acknowledged, particularly with respect to trade matters. Japan takes 25%, the largest share, of ASEAN’s exports, principally oil and gas and raw materials, and Japan’s imports from throughout Asia grew by 20% in 1989. Japan is the largest provider of foreign capital to the region, with direct investments of $5.6 billion in Asia through the year to March 1989. Roughly comparable figures for the United States indicated investment of $2.3 billion. Japan seeks to take advantage of lower wages in countries such as Thailand, Singapore, and Indonesia and can be expected to continue the movement toward overseas production. See Wagstyl, *Japan: “The Real Power in Asia”*, San Francisco Examiner, Mar. 4, 1990, at D1.
4. Conclusion

The cooperative growth economies of Korea and Japan share a broad emphasis on adopting and using regulatory and non-regulatory policies that enhance the ability of their domestic firms to build the capacity and economies of scale necessary to achieve significant market shares in global markets. In large part, this has meant that firms in Japan and Korea have been insulated from competition due to closed domestic markets or, in the case of the Koreans, their ability to select industries that have been abandoned by more mature foreign competitors. Today, regulatory tools play a relatively limited role in Japan's trade policies, although they remain very much evident in Korea. This is not surprising given the inability of Korean firms to utilize their domestic markets in the same manner as Japanese firms have done.

The future regulatory and institutional practices of the Japanese with respect to exports, imports, and trade matters generally will depend upon the combined effect of foreign and domestic pressures. Foreign firms will persist in their demands that the Japanese government take affirmative action at the microeconomic or industrial policy level to open the home market to foreign imports. Or, alternatively, foreign firms will address what appear to be deficiencies in current marketing strategies that impede penetration of Japanese markets for reasons unrelated to law or regulation. For their part, Japanese firms will continue, without prodding from the government, to search for new markets and factors of production for their products.

Domestically, the rising standard of living among large groups of consumers in Japan will make it difficult for the government to maintain the aura of sacrifice that was so readily accepted by an earlier generation. The eradication of pressures for more affordable housing and foods, as well as access to imported luxury goods, will require a good deal of adjustment in a political system that has traditionally favored land owners and farmers at the expense of the growing urban population. Moreover, the government's macroeconomic policies have created severe fiscal pressures which are likely to trigger significant policy debates regarding the funding of structural improvements, privatization of more public corporations, and a national pension or social security system.

From the perspective of trade, Korea enters the 1990s with significant ambitions. However, Korea has not matched the success of the Japanese in creating a strong and independent private enterprise system. Government controls, while largely successful, have impeded the nation's ability to build an economic system that rapidly diverts resources into new areas. In many ways, Korea's trade policies have taken on many of the characteristics of the "inward-oriented" economies of classical economic theory, yet success has been achieved through hard work and determination, the ability to move
quickly into large markets with low-cost and high quality goods, and, as was the case in Japan, a national consensus regarding the need to achieve growth through export development.

The trade policies of the cooperative growth economies appear to provide little guidance for future strategies in the United States. While the United States has, in some instances, attempted to impose regulatory import restrictions in the form of import quotas, it is unlikely that broad-based protectionist practices will be a viable alternative in the United States. Moreover, the nature of the trade imbalances between the United States and Japan, for example, make it unlikely that efforts to penetrate the Japanese market will significantly reduce the overall competitiveness of Japanese firms, while the size of the Korean market, although growing, remains relatively small. Accordingly, we must look beyond trade policies to other elements of Japanese and Korean industrial policies to find viable lessons for the United States.

B. Inbound and Outbound Investment Policies: Introduction

Foreign investment regulation encompasses an important component of any nation's industrial policies. Under the classical model of free trade, developing nations would allow and actively cultivate direct investment by foreign firms in order to provide the nation with access to foreign capital, new technologies, and new products for the domestic market. In addition, the presence of foreign firms would provide domestic firms with the competition necessary to ensure that the nation's own financial and human resources were devoted to the most productive areas. However, Japan and, to a lesser extent, Korea, have not always granted foreign firms free access to their domestic markets, preferring instead to establish a regulatory system that provided the government with a great deal of discretion to review and modify the terms of a broad range of transactions that might, if consummated, create a foreign presence.

1. Japanese Inbound and Outbound Investment Policies

With its long tradition of suspicion of foreigners and its wish to be free from dependence upon the resources of any external party, Japan can be described, at best, as a reluctant host for foreign investment activities. Clearly, the Japanese have recognized the need to import raw materials and technology in order to meet their own economic and industrial policy objectives. Accordingly, existing government regulations regarding foreign investment have been "liberalized" throughout the last decade. However, many of the above-cited informal barriers to penetration of the Japanese market by imported goods continue to inhibit the efforts of foreign firms to locate within Japan.

Large-scale foreign participation in the Japanese economy actually began in the oil sector in the years immediately following the end of World War II.
Other early foreign investors included chemical companies from the United States and Europe, who introduced new technologies and provided financing for new factories to replace those lost in the War. Japan has also relied on foreign capital and expertise in electrical machinery and more recently, in pharmaceuticals, cosmetics, and various high technology industries. By the early 1980s, some 120 of the largest 200 companies in the United States had developed business ties to Japan. Moreover, figures for 1986 and 1987 indicated a decided increase in the level of direct foreign investment in Japan, even though the sales of foreign-related companies as a percentage of total sales in Japan had not grown significantly since the mid-1960s.

During the period from 1952 to 1964, all flows of foreign goods, capital, and technology to Japan, even to existing ventures, were subject to specific approvals. During this period, investors had the choice of investing in so-called “yen companies,” which were established with converted foreign funds. These companies were subject to few restrictions on the sector of investment and no restrictions on the percentage of ownership. However, profits from these entities could not be repatriated until the yen became convertible. Alternatively, application for approval of direct investment was possible when accompanied by a guarantee of repatriation. However, strict conditions were attached to such approvals and only investments seen as meeting Japan’s national interests were permitted. Even then, these investments were limited to no more than fifty percent ownership of strictly new companies.

With yen convertibility in 1964, the “yen company” route for direct investment was closed, and all direct investment required specific government screening and approval. By 1967, the process of liberalizing the government’s procedures with respect to direct foreign investment had begun and by May 1, 1973, the principle of 100% direct foreign investment in new or existing Japanese companies was put into effect. Today, regulation of foreign investment is controlled by administrative guidelines issued by the JMOF and JMITI under the FEFTCL, which went into effect on December 1, 1980 and require that prior notice of acquisition transactions be filed with the BOJ. The notice is then forwarded to the JMOF and other ministries and becomes subject to official recommendations or directives to either alter the particulars or suspend the execution of the investment contract.

167. In fiscal year 1986, there were 760,000 new foreign direct investments in Japan valued at $3.045 billion. However, in fiscal year 1987, the number of direct foreign investments almost doubled to 1,453,000, while the value increased to $3.912 billion. Foreign direct investment in Japan as of March 31, 1988 totaled approximately $8.46 billion, with investment by the United States comprising 47% of that total.

168. The prior Law Concerning Foreign Investment was abolished on November 30, 1980 and replaced by amendments to the FEFTCL. Day-to-day administration of the foreign investment policy is undertaken by the Foreign Investment Section of the International Finance Division of the JMOF and the Foreign Affairs Bureau of the BOJ.

169. FEFTCL, Article 29.
Under the FEFTCL, foreign investors can, in theory: establish a representative office; set up a branch office, factory, or retail store of a foreign corporation; acquire stock of a domestic corporation, including the establishment of a new wholly-owned subsidiary corporation, establishment of a joint venture company with a Japanese partner, acquisition of an existing domestic corporation with one hundred percent or majority interest therein, or acquisition of a minority interest in an existing domestic corporation; or conclude a license agreement with a domestic licensee. In addition, foreign investors can bring capital into Japan and repatriate the principal and any associated profits without any restrictions.

The prior notice procedures of the FEFTCL generally require that the foreign investor, or the licensor and licensee in the case of a filing in connection with a license agreement, make an appropriate filing through the BOJ with the JMOF and the competent ministries within a specified period of time prior to the expected consummation of the transaction which is the subject of the filing. Each notice is closely scrutinized during the processing period and,  

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170. Under the FEFTCL, a "foreign investor" is defined as any of the following: (i) an individual who is a non-resident in Japan; (ii) a foreign corporation, including the Japanese branch of a foreign corporation and the Japanese office of a foreign government agency; (iii) a Japanese domestic corporation with foreign ownership of over 50%; or (iv) a Japanese domestic corporation having a majority of directors who satisfy the definition of (i) above. A "resident foreign national" is not considered to be a foreign investor; however, when the "foreign national" transfers stock acquired as a resident in Japan to a foreign investor after he becomes a non-resident, the foreign investor (i.e., the buyer) must file a report with the JMOF and the competent ministries through the BOJ prior to performing such a transaction.

171. A foreign investor can establish a representative office in Japan with no restrictions and without filing any report with government agencies. Such an office is not a legal entity and is not allowed to perform any business transactions, including taking orders, importing, selling, shipping, invoicing, and making collections. The primary functions of a representative office are to collect market information and to act as a liaison and coordinator between the home office and Japanese companies on a non-commercial basis. As such, all operating expenses of a representative office are usually paid by the home office.

172. Under the FEFTCL, the following forms of doing business are defined as "inward direct foreign investment" in Japan: (i) acquisition of stock of a publicly-held Japanese domestic corporation whose stock is listed on local exchanges or the over-the-counter market ("listed company") in a quantity equaling or exceeding 10% of the total stock issue of the listed company, although there are no restrictions on the total foreign ownership ratio by multiple foreign investors other than in the case of certain designated listed companies; (ii) acquisition of stock or equity of a non-listed Japanese domestic corporation, including an existing or newly established company, either as a wholly-owned subsidiary or a joint venture company with a Japanese partner(s); (iii) establishment of a branch office, a factory, or a retail store of a foreign corporation; or (iv) conclusion of a licensing agreement with a Japanese licensee(s). The types of licensing agreements to which the FEFTCL applies include: (i) the transfer of industrial property rights and other technology and the establishment of the right to the use of the same from a foreign licensor to a Japanese licensee; and (ii) an offer of technical guidance relating to management "know-how." Generally, industrial property rights include patent rights, utility model rights, design rights, and trademark rights. Other technology rights include technical "know-how," drawings, blueprints, specifications, and other technical information and data which are not protected by patent rights. Licensing agreements are seen as being equivalent to direct investments since the licensor will be entitled to royalties from the licensee.

173. The filing party receives a copy of the application for approval, which is marked "received" by the BOJ and constitutes a legal document necessary for the remission of foreign currencies from Japan with respect to transactions under the agreement. FEFTCL, Articles 47-55.
in many instances, extensive talks and negotiations will be conducted among the government, the foreign investor, and any prospective Japanese party to the transaction. In addition, since many joint ventures will depend upon the ability of the Japanese party to receive financial support through the BOJ, the BOJ and the relevant ministry can exercise a good deal of discretion over the ultimate success of any approved joint venture or other foreign direct investment.\textsuperscript{174}

While the government has followed a pattern of official announcements regarding policy changes in the area of direct foreign investment, the legal and regulatory framework has remained largely unchanged. The government maintains the ability to disqualify a proposed investment or joint venture when it believes that the prospective Japanese partner has no experience in the business of the proposed venture, if the foreign investor expects the Japanese partner to transfer valued physical assets for manufacturing or warehousing facilities to the proposed venture, or when the government finds, for whatever reason, that the venture may have specified adverse consequences.\textsuperscript{175} Accordingly, governmental control not only affects the act of direct foreign investment, but also impacts those domestic firms that may benefit from such investment.

In addition to the FEFTCL, joint venture and licensing agreements are subject to review under the Japanese Antimonopoly Law by the JFTC and must be filed with the JFTC\textsuperscript{176} within thirty days following execution of the agreement.\textsuperscript{177} The JFTC has broad authority and discretion to review the validity of joint venture and licensing agreements.\textsuperscript{178} If the JFTC determines

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\textsuperscript{174} Japanese national and local government entities as well as various financial organizations do make available a number of non-tax investment incentives to foreign investors. For example, technical research and development grants are available to entities of a specified size in designated industries. Also, insurance and leasing programs are available, as well as loan programs for equipment modernization, residential housing financing, exports and imports, and other specified areas. Finally, industrial sites have been developed and sold on a long-term installment basis.

\textsuperscript{175} Among the factors taken into consideration are adverse consequences with respect to national security, the maintenance of public order, and the safety of the general public or certain existing industries. The controls on direct foreign investment are referred to as the government's "peacetime and emergency" controls and permit the government to preclude investment in key economic industries or in industries in which there is a lack of reciprocity in the investor's country with respect to Japanese investments. "Peacetime controls" focus on individual transactions, while "emergency controls" relate to restrictions on investments which may affect the country's international balance of payments, the yen foreign exchange rate or the financial and capital markets of Japan.

\textsuperscript{176} A party to such an agreement who is a resident of Japan, including a foreign corporation's branch office or subsidiary in Japan, has a duty to notify the JFTC with respect to the contents of the agreement. Such a duty applies not only to an original contract, but to any renewal or modification of the agreement.

\textsuperscript{177} Antimonopoly Law, Article 6.

\textsuperscript{178} The JFTC issued in 1968, and modified in 1989, the Antimonopoly Act Guidelines for International Licensing Agreements. Under these Guidelines, restrictions in a patent or know-how licensing section of a distributorship agreement are generally considered to be a prohibited unfair business practice if they: (i) restrict the sale or resale prices of patented or licensed goods; (ii) prohibit the licensee from handling competing goods or employing competing technology
that a provision in an agreement constitutes a "private monopoly," "unreasonable restraint," or "unfair trade practice" under the Antimonopoly Law, the JFTC will request the voluntary deletion of the provision or make an official recommendation that the Japanese party to the agreement do so. If the parties refuse to accede to the recommendation, the JFTC may commence formal enforcement proceedings.179

It is worth noting that within Japan, the Antimonopoly Law also applies to the terms of any international distribution agreement relating to the distribution of imported goods by a Japanese firm.180 The Antimonopoly Law generally prohibits the acquisition of a dominant market position through the terms of any such agreement. In its "General Designation" of unfair practices, the JFTC maintains that the following practices are illegal: unduly exclusive dealing; resale price maintenance; and customer and territorial restrictions employed as a tool of resale price maintenance. In addition, the JFTC has published special guidelines with respect to antimonopoly standards for distributors handling well-known brands of imported goods.181

Control over the degree of foreign participation in the domestic market, be it through direct investment, licensing, or a distribution arrangement, has been an important regulatory focus of Japan's industrial policies given the strong desire of policy makers to regulate the degree of competition and the terms of any transfer of technology or capital from abroad. Moreover, after the expiration or termination of the license agreement; (iii) restrict the use of licensed technology or require the licensee to pay a royalty for such use after the expiration of a licensed patent or after licensed "know-how" becomes public; (iv) restrict research and development activities by the licensee; and (v) obligate the licensee to assign to the licensor the rights to any improvements on the licensed technology or to grant the licensor an exclusive license with respect to an improvement.


180. As noted above, the Japanese distribution system has traditionally been an important non-tariff barrier to entry into the domestic market by foreign firms. As such, the ability to build a distribution alliance with one of the larger Japanese firms or an aggressive independent distributor may be an effective means of gaining access to the complex domestic distribution system. See 4 Kitigawa, Doing Business in Japan, on the general subject of distribution arrangements.

181. See the Antimonopoly Guideline for Sole Import Distributorship Etc. Agreements, which was published in 1972. Generally, the Guideline provides that if a Japanese party would, by reason of its entering into an agreement pursuant to which it would become a distributor of imported goods, acquire a market share of 25% or more, such an agreement is likely to constitute an unfair business practice. The Guideline also notes that the following practices may be deemed to be "unfair": (i) restricting the resale prices of the goods covered by an agreement; (ii) restricting the person to whom the goods covered by an agreement are resold; (iii) imposing the obligation to purchase parts, etc., for the goods covered by an agreement from the foreign party or a person designated by such foreign party; (iv) unduly hindering parallel importation of the goods covered by the agreement; and (v) imposing an unduly disadvantageous condition for the termination of the agreement. See 5 Kitigawa, Doing Business in Japan, pt. IX, sec. 7.03.

182. It has been estimated that Japanese entities made 32,000 contracts to obtain foreign technology from 1950 to 1978 at a cost of approximately $9 billion, thereby permitting Japan to close the technology gap between itself and the West at a fraction of the annual United States expenditures on science and technology. Restoring International Balance, supra note 4, at 31.
many of the non-tariff barriers cited above with respect to imports also impact the ability of foreign firms to achieve any degree of successful penetration into Japan.\textsuperscript{183} However, pressures to open the domestic market, as well as the willingness of some foreign firms to adapt their management and marketing strategies to Japanese culture, have resulted in some degree of acceptance for foreign investment activities.\textsuperscript{184} Nonetheless, the influence of foreign investment within the overall economy remains minimal.

Like the United States and other nations that have built their success on the ability to export goods and services into the global marketplace, Japan has recently been able to convert its export surpluses into unprecedented purchases of financial assets abroad. While foreign firms have been working to penetrate the world’s second-largest market for goods and services, Japanese firms have been moving to establish foreign manufacturing and distribution facilities in order to increase their penetration into overseas markets, even if sales from these efforts are not directly reflected in the nation’s current account balances. Moreover, Japanese banks and financial institutions have followed the non-financial firms into foreign markets, in effect replicating many of the conditions that formed the basis for the nation’s original successes.

At the end of 1980, following the latest major changes to Japan’s laws regarding direct foreign investment,\textsuperscript{185} Japanese investors held $12 billion more in assets abroad than foreigners held in Japan.\textsuperscript{186} However, by the end of 1987, Japan had a net foreign asset surplus position of $241 billion, far exceeding the record of $141 billion previously set by the United States in 1981.\textsuperscript{187} By the end of March 1988, Japan had direct investments officially

\textsuperscript{183} Direct foreign investments appear to be most successful when accompanied by an effective and distinguishable entry strategy, such as resource-driven products, new technologies, “new-to-Japan” concepts, and differentiated market strategies aimed at specific niches.

\textsuperscript{184} The use of a wholly-owned foreign subsidiary was a popular means of entering the Japanese market during the early 1980s, accounting for seventy-eight percent of foreign investment in newly established firms during that period. However, others have argued that in the future, acquisitions of a domestic company with an existing management pool, customers, and sales force may be the most effective means of penetrating the Japanese market, provided that attention is paid to various cultural requirements, such as a gradual acquisition of the firm, security and employment agreements for top management, and a willingness to delegate control of the firm’s budget and strategic objectives to local management.

\textsuperscript{185} RESTORING INTERNATIONAL BALANCE, supra note 4, at 20. Prior to 1978, Japan’s major financial investors, such as insurance companies and pension funds, were effectively prohibited from acquiring foreign securities. However, 1980 amendments to the FEFTCL allowed financial institutions to begin to acquire foreign securities at a controlled pace.

\textsuperscript{186} Id. at 7.

\textsuperscript{187} Id. Japan maintained its position as the world’s largest creditor nation for the fourth consecutive year, piling up an extra $51 billion in net foreign assets in 1988. Japan’s net overseas holdings, the balance between assets and debts held abroad, reached a record $291.7 billion in assets at the end of 1988 from the previous year’s record of $240.7 billion. Japan Remains Largest Creditor, San Francisco Chron., May 27, 1989, at B2, col. 2. Japanese companies now hold 10% of United States banking assets, control 25% of the primary dealers in United States Treasury bills, and finance a third of United States government debt. Eckhouse, Suspicion, Fear In U.S. as Japan Trade Talks Start, San Francisco Chron., Apr. 2, 1990, at A6, col. 1.
measured at $139 billion, of which $50 billion was invested in the United States.\(^{188}\) Increases in foreign financial holdings have been attributed to a number of factors, including macroeconomic conditions, foreign exchange rates, and the desire of Japanese firms to circumvent the threat of protectionism by establishing local subsidiaries in order to maintain better customer contact\(^{189}\) and tighter control over distribution and service in significant markets.\(^{190}\)

Japanese direct investment in the United States has been primarily technology- and market-driven. In spite of some of the problems associated with replicating the Japanese manufacturing model, many firms have been successful in establishing market positions and distribution and financing infrastructures in the United States. However, it has been suggested that future growth will depend on the ability of the Japanese to develop the skills and expertise necessary to make strategic foreign acquisitions (a skill that has not yet been highly developed in the domestic market),\(^{191}\) as well as adaptation of Japanese management practices to the particular characteristics of the local work

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\(^{188}\) Japanese data on foreign direct investment came from an analysis of plans to transfer funds abroad for the purpose of foreign investment. This data was included in RESTORING INTERNATIONAL BALANCE, supra note 4, at 12.

\(^{189}\) Trade disputes arising because of export imbalances in various products have led to Japanese efforts to move production directly into overseas markets in the United States and Europe. As a result, it is often possible to redeploy a portion of Japan’s own domestic work force into new areas. See OECD, supra note 1, at 66-67. While foreign operations devoted to distribution and service have long been part of the Japanese export strategies, the level of investment in overseas manufacturing and production by Japanese multinational manufacturers remains modest in comparison to the domestic market. In fiscal 1986, investment in overseas operations was only five percent of domestic investment and output by foreign affiliates was only 3% of parent firm production. RESTORING INTERNATIONAL BALANCE, supra note 4, at 13. The reliance of Japanese firms on economies of scale and the unavailability of reliable and cost-effective supplier relationships of the type that exist in Japan may make it difficult for Japanese firms to achieve the same sorts of production cost and product quality advantages that are available from domestic production.

\(^{190}\) However, Japanese foreign investment, at least in the United States, does complement the extensive network that has long been established for collecting information and monitoring American economic policies and political sentiments. The Japanese have also been willing to engage retired American government officials to assist in lobbying efforts on behalf of Japanese businesses and trade interests. However, Japanese foreign investment has not always required commensurate support from Japanese producers. For example, Japanese auto manufacturers in the United States buy only 38% of their components domestically, compared to 88% for American-owned companies, according to the General Accounting Office. Eckhouse, Suspicion, Fear In U.S. as Japan Trade Talks Start, San Francisco Chron., Apr. 2, 1990, at A1, col. 2.

\(^{191}\) With respect to Japanese attitudes toward mergers and acquisitions, See Shapiro, Issac, Crabb & Janow, European Firms Lead Japanese in U.S. Takeovers, NAT’L L.J., Feb. 20, 1989, at 57, 59. The authors report that direct Japanese investment in the United States has focused upon the areas of real estate, service industries (such as hotels), and finance. The article points out that Japanese acquisition activity in the United States in the areas of manufacturing and technology has been hampered by the relative inability of Japanese firms to move “quickly” and their desire to achieve relationships with American target companies that are “synergistic,” rather than “antagonistic.” However, it is expected that Japanese acquisition activity in the United States will increase in the future, both for the strategic reasons cited above as well as by virtue of the continuing maturation and growth of Japanese-owned financial institutions into world markets.
Moreover, political sentiments regarding Japanese foreign investment are intense on both sides, given concerns in the host country regarding the impact of such investment on domestic firms and the belief in some parts of the Japanese bureaucracy that specialized skills are being lost from the Japanese market.

2. Korean Inbound and Outbound Investment Policies

One can expect that the Japanese will continue to increase the level of direct foreign investment in neighboring Asian countries, including Korea. Already, sixty percent of Japan's foreign manufacturing investments are located in Asia, utilizing the local labor force and attaining levels of profitability that have not been achieved by direct foreign investment activities in North America and Europe. Japan's industrial policies, with regard to activities in many of these developing nations, reflect its role as a developed nation within the classical economic and trade model. These industrial policies include: the transfer to the developing nations of those industries that are no longer appropriate for Japan's level of technology and labor cost; the sale of the finished goods back into Japan; and, finally, the transfer of capital to the developing nations in order to allow them to purchase Japan's more sophisticated export products. These policies, however, raise concerns in several countries. American and European suppliers fear that the Japanese will effectively foreclose their efforts to penetrate the domestic markets of the developing Asian nations. Asian countries are weary of the increasing dependence of the Asian economies on the Japanese, particularly given the historical and cultural antipathy that exists in that region regarding the Japanese. Historical fear and loathing of Japanese influence, in spite of the importance of Japanese markets for Korean products, has led some Koreans to suggest that reunification with the North is a necessary step to combating Japan's reemergence as an economic superpower capable of exercising undue influence over political and economic affairs in its Asian "sphere of influence." These historical fears may forecast heightened tensions between Japan and Korea in the years to come.

Direct foreign investment in Korea dates back to the Japanese occupation period, although the end of the colonial occupation by Japan severed all ties with Japanese firms until the early 1960s. After World War II, Korea's principal foreign economic objective was to maximize the inflow of economic

192. Japanese foreign investment activity has not been limited solely to acquisitions. For example, the cost of capital advantages has led many American electronics companies to seek funds from Japanese partners. In the last four years, it is estimated that 85 United States electronics companies have received capital from Japanese firms, providing the American companies with funds for research and development in exchange for the rights to manufacture and sell the finished products outside the United States. Most importantly, Japanese companies are typically willing to take a smaller share of equity per given investment than are American venture capitalists, thereby lowering the effective cost of capital to the entrepreneurs. See Eckhouse, Major Investment in Silicon Valley, San Francisco Chron., Apr. 2, 1990, at A7, col. 1.
and military aid from public sources. Korea discouraged private foreign investment until the early 1960s, when it became clear that Korea's economic growth potential depended upon access to foreign capital and technology to create new opportunities for investment and industry. The government then began to adopt a number of incentives for investments by foreign nationals, establish administrative procedures for receiving and reviewing proposed investment projects, and provide guarantees for the repatriation of principal and profits from foreign investments.

A company can have a foreign presence in Korea by opening a branch office, establishing a new corporation, or establishing a joint venture. Additionally, a foreign company may decide to enter the Korean market through a sales or distribution agreement with a local company or agent. A company may open a branch office by making a report to the BOK as a repatriating or nonrepatriating entity. If the office wishes to repatriate or remits its earnings or profits in the form of foreign exchange overseas, it must be authorized to do so by the BOK pursuant to the Foreign Exchange Control Act ("FECA"). To repatriate profits, all forms of business must remit through the approval process of designated Class A Foreign Exchange Banks. Accordingly, in contrast to Japan, foreign exchange concerns still

193. "Foreign national" is defined in Article 2 of the Foreign Capital Inducement Act ("FCIA") to include an individual of foreign nationality or a legal entity organized under the laws of a foreign country.

194. FCIA, Article 4. The overseas remittance of dividends of profit accruing from the stock or shares acquired by a foreign investor, sales proceeds of the stock or shares, principal, interest and fees to be paid under a loan contract or a public loan agreement, and royalties to be paid under a technology inducement contract shall be guaranteed in accordance with the contents of the approval of the report or the agreement as of the remittance. Article 6 of the FCIA also provides for the guarantee of property rights of foreign investors and a foreign invested enterprise.


196. Id. at 107.

197. Id. at 32.

198. Id. at 33-34. In somewhat of a contrast to Japan, Korea has established a number of organizations that might be of assistance to foreign investors in establishing a relationship with an export or import entity within Korea. For example, the Korea Chamber of Commerce and Industry, other foreign chambers of commerce, the Federation of Korean Industries, the Korea Traders' Association, the Korea Federation of Small Business, foreign banks, merchant banks, and large Korean commercial banks are major information sources. Outside of Korea, branches of the Korea Trade Promotion Corporation ("KOTRA") may be a useful initial contact. In addition to the larger trading companies, a number of small exporters and importers are available and can be located through the Korea Export Buying Offices Association. Only these local agents are allowed to issue selling orders or quotations that are recognized by the government and by banks authorized to deal in foreign exchange. Selling agents function as distributors with their own inventories or can act as straight agents selling on a commission basis. Id. at 34. Personal relationships are quite important in Korea, both in finding an appropriate agent and in the agency relationship itself.

199. Id. at 5 (Supp.).

200. Id. at 4 (Supp.).

201. Id. at 5 (Supp.). Recent amendments to the FECA allow foreign exchange banks and the KMOF to accept non-denominated trade business documents, whereas previously only such designated currencies as dollars were permitted.
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dominate Korean policies regarding various forms of foreign participation in the domestic markets.

Government control of direct foreign investment in Korea also remains an important industrial policy tool, even though the government announced a number of measures in recent years designed to liberalize the procedures for foreign investment. A foreign company that decides to establish a Korean corporation can do so under either the FECA or the FCIA, its related Enforcement Decree, and any Guidelines issued by the KMOF. Typically, most investors will form a stock corporation and make the investment under the procedures established by the FCIA that offer tax benefits, guaranteed repatriation of profits, and other incentives.

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202. Id. at 13.

203. The KMOF has recently promulgated the "Guidelines for Government Approval of Foreign Investment." The Foreign Investment Guidelines set forth a number of matters relative to foreign investment, including the establishment of a detailed classification of industries according to the Korean Standard Industrial Classification. The projects selected for classification include 999 items, excluding 49 items such as government institutions and religious and political organizations. PRICE WATERHOUSE, supra note 13, at 13. Generally, businesses falling within the following categories are permissible areas of investment in Korea: (i) large-scale, capital intensive facilities that cannot be built/managed/operated independently by domestic enterprises alone and industries for production of electric/electronic products and chemical products; (ii) energy-related industries; (iii) export-oriented projects for which overseas markets cannot be effectively exploited independently by domestic enterprises; (iv) projects contributing to the development/utilization of domestic resources; (v) projects for the manufacture of foodstuffs and pharmaceutical products; (vi) commodity distribution (wholesale and retail industries) and selected service industries; and (vii) other projects deemed necessary by the KMOF. "Prohibited projects" are those in which foreign investment is prohibited, including public projects to be carried out by the nation or public organizations (e.g., water works and supply, postal services, telephone and telegraph services, railway transport, manufacture of steamed and dried ginseng, and manufacture of tobacco products), projects that cause harm to the health and sanitation of the nation or inhibit maintenance of the environment, projects that are greatly in violation of public policy (e.g., gambling), and any other project prescribed by Presidential Decree (e.g., publishing newspapers, radio broadcasting, and manufacturing grain mill products). Id. at 13-14. It is anticipated that the list of prohibited products will be updated periodically. The government has announced a plan to open by 1992 the majority of the sectors where foreign investment is presently prohibited. Id. at 6 (Supp.).

204. Direct investment may be made by subscribing to a new issuance of stock of an existing corporation, and capital for subscription may be in the form of cash "in-kind," industrial property rights, technology related to industrial property rights, and rights to the use of such technology. There are actually four types of companies recognized under Korean law as constituting separate legal entities: the partnership; the limited partnership; the stock company; and the limited liability company. Id. at 26. By far the largest number of Korean companies are stock companies, which must be capitalized and are similar in form to corporations in the United States. This article is not intended to provide detailed information regarding the form or structure of the business entity in Korea. However, two introductory summaries that would be useful in connection with forming a joint stock company for investment in Korea are contained in Whitehill, supra note 132, in the chapter on "Laws Governing Business" by Lee Tae Hee. As noted in the text, the actual rules governing the establishment of a Korean joint stock company are provided for in the Korean Commercial Code as well as in the rules and regulations of the FCIA.

205. PRICE WATERHOUSE, supra note 13, at 12-13.
With the exception of investment in designated free export zones, foreign direct investments, technology inducement contracts and loan contracts, are regulated by the FCIA. The purpose of the FCIA is: 1) to induce and protect foreign capital conducive to the sound development of the national economy and improvement of the international balance of payments; and 2) to properly manage such capital. The FCIA provides for a Foreign Capital Inducement Deliberation Committee (FCIDC) under the KMOF to deliberate important matters relating to foreign capital inducement. Except as otherwise provided in the FCIA, matters regarding foreign exchange and transactions shall be subject to the provisions of the FECA. Approvals granted under the FCIA are deemed to be an import license under the TTL.

When a foreign national seeks authorization of a foreign investment project, an application must be submitted for advance authorization of the investment to the KMOF or to the BOK. The foreign investment will generally be approved without delay unless it falls under one of the following items:

- The foreign investment ratio is fifty percent or more;
- The foreign investment amount in a manufacturing business is $3 million or more ($100,000 in 1985).

In the event that a foreign national intends to subscribe for the stock or own the shares of a juridical person of the Republic of Korea (including a juridical person under incorporation) or an enterprise carried out by a national of the Republic of Korea (hereinafter referred to as 'foreign investment'), an approval of the Minister of Finance shall be obtained in advance.” The Foreign Investment Guidelines provided that the minimum allowable amount of foreign investment would be the equivalent of $100,000, provided that the minimum allowable amount of foreign investment may be the equivalent of $50,000 when the foreign investor introduces technology and enters into a joint venture agreement with a domestic small- or medium-sized company to form a small- or medium-sized enterprise. There is no minimum amount for an additional investment. Investment by foreigners in stock exchange-listed companies remains restricted, although an effort is being made to liberalize those restrictions during the early part of this decade. Presently, the form of investment in the Korean Stock Exchange ("KSE") is severely limited and foreign participation in the KSE has come primarily through indirect investments in trust funds.

Article 2 of the FCIA defines a technology inducement contract as "a contract in which a national or juridical person of the Republic of Korea purchases industrial property rights or any other technology from a foreign national, or induces the right to use thereof and which falls within the scope as prescribed by the Presidential Decree." Article 2 of the FCIA defines a loan contract as "a contract in which a national or juridical person of the Republic of Korea or a juridical person of the Republic of Korea either borrows a foreign means of payment or induces capital goods or raw materials in the form of a long-term settlement from a foreign national (excluding an economic cooperation organization) and which falls within the scope of such agreement as prescribed by Presidential Decree." Presently, the "scope of agreement" prescription requires that the repayment or settlement of the contract shall exceed three years and that the amount or value thereof shall be $1 million or more.

In 1985, the government adopted a Negative List System for government approvals, whereby all areas are "open" to investment except those on the List. Previously, a Positive List System had been used which simply set forth the sectors in which investment was permitted. D. Macdonald, supra note 7, at 204. It is generally believed that the adoption of the Negative List System signalled the beginning of an overall expansion of the percentage of industries which became eligible for foreign investment.
the case of an investment in a non-manufacturing business); 3) certain tax benefits are requested; or 4) the investment is to be made in a project where foreign investment is restricted or prohibited under the FCIA. If the proposed investment qualifies for the so-called “automatic approval,” the BOK may approve the project without the need to solicit the opinions of various concerned ministries, including the KMOF and the Foreign Capital Project Review Committee (FCPRC).

If automatic approval is not available, the KMOF or the BOK will review the proposed project and consult with the relevant ministry or ministries regarding the technical and economic feasibility of the project. The relevant ministries are required to submit their opinions to the KMOF within twenty

213. Article 14 of the FCIA provides for specified exemptions from income tax, corporation tax, acquisition tax, and property tax with respect to a foreign investment if specified standards set forth in the Presidential Decree are satisfied. Article 13 of the Presidential Decree permits exemptions in the contemplated business falls within one of the following items: certain businesses accompanied by “high technology” used in the domestic manufacturing process; a business located in a “Free Export Zone” in accordance with the Free Export Zone Establishment Law; and any other business designated by the FCIDC as a business for which tax reduction or exemption is inevitable for the diversification of sources of foreign investment or for increased employment. In certain cases, Article 14 of the FCIA itself will provide for exemptive relief if the project makes a significant contribution to the improvement of the international balance of payments. Recently, there has been a trend toward reducing the tax advantages to be made available to foreign investors, particularly in such areas as import substitution projects, large capital investment projects, and non-manufacturing projects. The government has announced that “[i]nvestment incentives including tax exemptions have been virtually eliminated except for high technology investments.” Price Waterhouse, supra note 13, at 6 (Supp.).

214. See Attachment II to the Foreign Investment Guidelines for a list of those projects in which foreign investment is “restricted.” Restricted projects refer to projects in which foreign investment is currently restricted but will be gradually opened upon further developments in the national economy. Presently, foreign investment is restricted in the following cases: projects specifically supported by the government; projects with a high consumption level of energy and a high portion of imported raw materials; projects resulting in heavy pollution; projects considered extravagant or resulting in non-productive consumption; projects affecting the subsistence of farmers and fishermen; and, most importantly, other projects whose industry is in the initial development stage and for which protection is deemed necessary under industrial strategy. Article 5 of the Foreign Investment Guidelines provides that the KMOF can approve foreign investment in “restricted projects” only in the following cases: when a foreign-invested enterprise already approved by the KMOF increases its capital for the same approved purpose; when a foreign-invested enterprise exports one hundred percent of its products; for complex leisure industries which satisfy the construction standard of the Tourism Industry Law; and when the KMOF sets certain general criteria for the approval of foreign investment in specific industry sectors following consultation with the relevant ministry.

215. The BOK may still impose conditions on the proposed project and will review the terms and conditions of the proposed contract, the size and composition of the foreign capital required (with “in-kind” contributions being encouraged), the schedule of production and sales, and the possible effect of the investment on the Korean industry to ascertain whether any conditions are appropriate. See Article 10 of the Foreign Investment Guidelines. In addition, even these investments are subject to review under a “fairness” standard promulgated under the EPB’s Guideline on the Scope and Standards of Unfair Trade Practices.

216. Article 13 of the Foreign Investment Guidelines states that foreign investment falling under either of the following cases shall not be subject to review by the FCPRC: in the case of new foreign investments where the investment amount is equivalent to $3 million or less; or in the case of additional foreign investment (to the same approved business) equivalent to $5 million or less.
days. When the amount of investment is $1 million or less, the opinions are to be received within ten days. Once received, the KMOF submits the opinions and other details to the FCPRC for final approval, although in some cases the project will be subject to further review by the Minister of the EPB.\textsuperscript{217} Once the investment is approved, a report regarding the actual introduction of the capital should be made with the agency that provided the original approval\textsuperscript{218} and the new foreign-invested entity should be registered with the appropriate agency.\textsuperscript{219} Thereafter, any changes in the post-investment management of the entity would be subject to further review.

On balance, the KMOF retains a great deal of control and discretion over the nature of direct foreign investment projects in Korea. The KMOF will closely assess the contribution which the investment will make to Korea’s overall trade position and the development of those industries targeted by the central economic planning process. The KMOF also may impose requirements with respect to export quotas and domestic purchasing requirements. Moreover, the KMOF will use the procedures regarding foreign investment to direct capital and technology to specified firms which either are already involved in the business or, as is the case with small- and medium-sized firms, have been singled out for development by the government. Obviously, practices of this type will have a direct effect upon the nature of competition among domestic firms.

As is the case in Japan, direct foreign investment transactions in Korea are also subject to review under the Antimonopoly Regulation and Fair Trade Act (the “Antimonopoly Act”). Specifically, the Antimonopoly Act prohibits Korean firms or trade associations from entering into specified forms of agreements\textsuperscript{220} which contain practices “constituting undue collaborated activities or unfair trade practices.” Each agreement which is subject to the restrictions set forth in the Antimonopoly Act must be filed with the EPB within thirty days after execution, provided that joint venture agreements may not be executed prior to filing with and review by the EPB. The EPB has published Guidelines delineating certain provisions of such agreements.

\textsuperscript{217} Article 12 of the Foreign Investment Guidelines makes it clear that the KMOF should consult with the Minister of the EPB in the case of approval of a foreign investment which exceeds $10 million. In addition, as noted below, the EPB becomes involved in the review of any trade clauses in joint venture agreements that may be considered to be discriminatory according to the Antimonopoly Regulation and Fair Trade Law.

\textsuperscript{218} The letter of confirmation received by the investor from the appropriate agency can be used for submission to the customs office for clearance, while another copy can be used to open letters of credit. After customs clearance has been obtained, a report must be filed, together with an Import Permit, with the KMOF.

\textsuperscript{219} An application for incorporation and registration must actually be submitted to a district court. After registration and payment of the registration tax, the enterprise is permitted to begin operations.

\textsuperscript{220} Article 23(1) of the Antimonopoly Act lists those agreements to be: (i) foreign loan agreements; (ii) joint venture agreements; (iii) technology inducement agreements; (iv) copyright inducement agreements; (v) import agent agreements; and (vi) long-term import agreements.
which will be considered *per se* illegal as an impermissible restraint of trade.\(^{221}\)

Should the EPB determine that an agreement "violates or is likely to violate" the restrictions on unfair trade practices, it may order the Korean party to conclude, cancel, or amend the terms of the agreement or to take other necessary measures to correct the agreement. Accordingly, the EPB is able to exercise a great deal of discretion over the terms and conditions of foreign technology and resource transfers to Korean firms and actually has the ability to determine whether or not a particular domestic firm is able to gain a competitive advantage over other firms by virtue of its access to foreign licenses, know-how, and management resources.

Korea's policies regarding tax incentives and other subsidies relating to foreign investment have often been regarded as being among the most generous in Asia. Despite this reputation, Korea experienced a low level of foreign equity investment until 1980, due to its ability to obtain needed financing without absorbing high levels of foreign investment. This ability developed during the late 1960s and throughout the 1970s when foreign assistance took

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\(^{221}\) In relevant part, the EPB Guidelines provide as follows: "(A) With regard to joint ventures agreements it is illegal to have: a choice of law clause in the joint venture agreement which states that the laws of the foreign investor's country of origin will govern disputes and contract interpretation; a clause stating that arbitration or other mediation will be handled by an agency considered to be unfavorable to the Korean joint venturer(s); a clause allowing the foreign investor to appoint board members in a proportion greater than its equity stake in the joint venture; a clause stating that in case of a 50/50 joint venture, a foreign investor-appointed board member may cast a tie-breaking vote in the case of a stalemate on the Board of Directors; or a clause stating that the export of the joint venture's products must be handled by, or that the joint venture purchase raw materials and/or components from, an enterprise owned or controlled by the foreign investor (this restriction may be waived if there are no unacceptable restrictions placed on the exportation of the subject products); (B) With regard to technology licensing agreements it is illegal to have: a clause requiring a licensee to purchase basic raw materials or components from the licensor or an enterprise which it controls; a clause imposing territorial restrictions on products produced using the licensed technology which are not based upon the licensor's patent position in the excluded territory, the grant of exclusive sales rights to a third party in the excluded territory, or the existence of preexisting substantial sales activity by the licensor in the excluded territory; a clause prohibiting the licensee from using competitive technology or from commercializing competitive products concurrently with the licensed technology; a clause restricting or forbidding the use of the licensed technology after the expiration of the license agreement; a clause requiring the licensee to grant to the licensor a license to use improvements to the licensed technology without the same requirements being placed on the licensor; or a clause restricting the volume of production and/or sale of licensed products, the prices the licensee may charge, or the number of sales agents which a licensee may use, unless the restrictions are part of a grant to commercialize licensed products in a territory which the licensor has the legal right to control because of its patent rights, third party contracts, or its preexisting sales activity; (C) With regard to loan agreements it is illegal to have: a clause permitting a demand for early repayment which may be triggered by events which have no bearing on the borrower's repayment obligations; a clause giving the lender the right to stipulate the currency of each repayment; or a clause requiring a borrower to purchase materials from a particular supplier in the absence of a reasonable commercial or technical reason to do so; and, (D) With regard to long-term import contracts and import agents contracts it is illegal to have: a clause prohibiting the agent or the importer from handling products which are competitive with those under contract; a clause prohibiting the purchase by the import agent of products other than from designated sources; or a clause restricting selection of resale agents, resale price, or territory."
the form of easily obtained grants and credits from foreign governments\textsuperscript{222} and international financing institutions,\textsuperscript{223} and as the rapid growth of the nation's exports increased the creditworthiness of Korean firms, making possible private loans from commercial banks. Accordingly, equity investment represented only a small portion of the inflow of capital into Korea during the period up to the beginning of the 1980s, particularly when compared with such other developing nations as Brazil, Mexico, and Taiwan.

As a result of this ability to obtain needed financing without absorbing excessive levels of foreign investment, Korea's strategy of export-led industrialization has been overwhelmingly directed and controlled by nationals. The purchase of technology through licensing has been of modest importance as the initial source of process technology; machinery imports and turnkey plant construction have been of much greater consequence in the transfer of technology. Moreover, a tremendous amount of knowledge has entered the country with Koreans returning from study or work abroad. Based largely on these domestic talents and resources, the products of Korea's labor-intensive light industries, such as textiles, clothing, shoes, plywood, and, later, electronics, have proven to be extremely competitive in world markets.

In the future, one can expect that Korea's growing economic power and importance will attract foreign investors\textsuperscript{224} and traders in increasingly large numbers, as well as increase pressure on the government to open up various sectors of the economy to foreign entrants.\textsuperscript{225} Already foreign banks have gradually become competitive with domestic banks, even though they are subject to the same rigid controls imposed by the government.\textsuperscript{226} In addition, large firms such as General Motors, Ford, DuPont, and IBM are establishing equity relationships in Korea, either as joint ventures or through wholly-owned subsidiaries which take advantage of local entrepreneurial talents.\textsuperscript{227}

In turn, Korean firms, like their Japanese counterparts, are attempting to invest overseas by establishing local manufacturing facilities in the United

\textsuperscript{222} In particular, the normalization of relations with Japan in 1965 brought an assistance package of $800 million in various forms of grants and credits. D. MACDONALD, supra note 7, at 188.

\textsuperscript{223} While direct grants and aid diminished sharply during the 1960s and finally ceased, the government was able to borrow from such international finance organizations as the World Bank, the International Bank for Reconstruction and Development, and the Asia Development Bank, as well as from foreign governmental agencies motivated as much by their own trade promotion activities as well as by the needs of Korea.

\textsuperscript{224} However, general labor activism caused labor relations with foreign investors to worsen in recent years and several foreign firms have withdrawn in light of strikes and wage settlements reportedly averaging as high as 20\% to 25\%. PRICE WATERHOUSE, supra note 13, at 4.

\textsuperscript{225} In order to avoid designation as a Priority Foreign Country under the Super 301 Clause of the 1988 Omnibus Trade Act, Korean policy makers made a number of concessions to the United States, including an agreement to liberalize foreign investment, abolish restrictive regulations on certain imports, and discuss further concessions with regard to opening the Korean agricultural market to such items as oranges, grapes, poultry, and beef offal. Leyden, \textit{How South Korea Avoided U.S.'s Trade Hit List,} San Francisco Chron., May 27, 1989, at B2.

\textsuperscript{226} D. MACDONALD, supra note 7, at 204.

\textsuperscript{227} Id.
States and in other parts of Asia. Recently, the Korean government announced plans to ease restrictions on foreign investment by Koreans overseas in an attempt to ease trade pressures caused by the nation's $8.5 billion 1988 trade surplus with the United States. Under the revised provisions, KMOF approval would only be required for investments exceeding $2 million, and the investment in business-related real estate, private residences, and forest lands would be permitted. In 1988, it was reported that Koreans made 698 overseas investments valued at $1.29 billion.

3. Conclusion

While the classical model of free trade calls for regulatory policies that encourage, rather than impede, direct foreign investment activities, the ability to control the presence of foreign firms in the domestic marketplace, as well as the terms of technology and capital transfers, have been a most important part of the overall industrial policies of both Japan and Korea. The policies in each nation have focused on detailed involvement by regulators in every aspect of foreign investment, including acquisitions, joint ventures, and license agreements, as well as indirect penetration of foreign goods through sales and distribution arrangements.

The overall success of Japan's trade policies has provided the nation with abundant financial resources for the development of new products and future markets. Non-tariff and cultural barriers have largely replaced regulatory impediments to direct foreign investment in Japan, although it can be expected that consumers will want to expend their increasing levels of disposable income on imported goods. Japan's immediate problem in this area is effectively managing the use of its vast financial capital and international political influence. As such, policy makers will face difficult choices between domestic spending issues, demands to make the opening of domestic markets a priority of future industrial policies, and the expectations imposed upon a world economic leader to assume its "responsibilities" with respect to national security and aid to developing nations.

The effect of foreign investment and participation in Korea's domestic economy can be described as mixed. Future pressures for trade liberalization from the United States and Japan will surely include demands for increased access to domestic markets, particularly in the service industries, through deregulation of direct foreign investment. At the same time, given its continued dependence on foreign trade to finance continued growth and past borrowings, Korea must carefully monitor the level of its foreign indebtedness. Finally, direct foreign investment may negatively impact the nation's own efforts to revitalize its small and medium-sized firms. However, it might also permit the labor force to have access to the needed skills of foreign firms that can assist in reeducating the work force to perform in newer and higher areas of technology.
The majority of trade and foreign investment policies of the regulated growth economies provide little guidance for the United States. It is interesting to note that pressures continue to build in the United States regarding the effect of direct foreign investment on industry and the real estate and banking markets. However, any attempt to regulate such activities would be unlikely to lead to the results achieved in Japan, unless such protectionism was accompanied by efforts to buoy the competitiveness of American firms to permit them to compete in world markets with the Japanese. To the extent that foreign investment restrictions are utilized strictly to facilitate non-competitive activities in the domestic market, they will be unproductive.

C. Capital Management Policies

1. Introduction

This article began with an acknowledgment that many of the unique aspects of Japanese and Korean economic policies could be identified within government intervention in the microeconomic arena, at the firm and industry level. However, these industrial policies have been supplemented by macroeconomic institutional structures that differ, to a large degree, from those that exist and operate in the United States. This section examines the manner in which Japan and Korea have conducted their fiscal and monetary policies as well as the role that the central planning effort has played in the development of such capital-facilitating institutions as banks, both public and private, and equity markets. The sum of these matters is referred to as each nation's "capital management policy."


Since the end of World War II, Japan's macroeconomic policies, as well as the organization and regulation of the nation's financial and credit institutions at the microeconomic level, have been dedicated to achieving growth in specific target industries. The underlying theory of these policies was that growth could be accomplished by ensuring that firms had access to reliable sources of funds at interest rate costs below those being borne by their international competitors. In order to achieve these objectives, the government has taken an active role in not only the regulation, but also the operation of the nation's banking institutions. Moreover, in recent years, an effort has been made to develop the nation's capital markets and to provide other outlets for the funds accumulated through the propensity of the citizenry and its businesses to save and invest.

The overall framework for fiscal policy in Japan is established by consultation between the ruling political party, the LDP, and the various ministries. Consistent with the key role played by the bureaucracy, with respect to overall economic planning, the budget resulting from the aforementioned process is normally approved by the Diet without any significant changes. The BOJ,
which acts as Japan's central bank, establishes the monetary policies and controls the extent to which the central government can influence the lending activities of domestic commercial banks. In addition, the BOJ regulates the supply of credit through discount rates, reserve requirements, penalties for borrowing in excess of certain limit, and fund position guidance. Despite this large degree of control, fiscal and monetary policies are still coordinated through the JMOF, which directs the actions of the BOJ.

Macroeconomic Policies. Fiscal and monetary policies in Japan, as in the United States, have focused on the proper management of interest rates, the money supply, and central government debt. During the 1960s and early 1970s, a key objective of Japanese industrial policy was to keep interest rates relatively low by promoting high levels of domestic savings and investment and imposing strict controls on the level of inflation. These goals were achieved, in almost spectacular fashion, due to various factors, including: programs which permitted earnings from savings deposits to accrue tax-free; a cultural based conservative attitude on spending; the need for citizens to self-finance a major portion of retirement income needs due to then inadequate public social security benefits; the earnings reinvestment policies of firms; and, finally, the lack of any incentive for individual borrowing to finance consumption.

Monetary policies during this early period complemented the overall interest rate objectives and the desire to maintain control over inflationary pressures. However, in recent years, the emergence of the yen as an international currency and the attendant pressures created by trade imbalances have caused great difficulties in the monetary sector. Since 1985, the government significantly eased restrictions on the growth of the money supply, and, as a result, monetary growth substantially exceeded the rate of increase in

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228. Recently, from 1984 through mid-1988, long-term bond yields in Japan were significantly lower than those in the United States, with a differential that sometimes exceeded 5%. Short-term real interest rates during that period varied a good deal more yet also reflected a 5% differential in July 1988. See SWISS BANK CORP., ECONOMIC AND FINANCIAL PROSPECTS No. 6, at 10 (1988) [hereinafter SWISS BANK CORP., PROSPECTS]. The World Bank has reported that from 1965 to 1986, the level of gross domestic investment and gross domestic savings as a percentage of GDP in Japan has remained at or slightly above thirty percent. The comparable levels in the United States during that same period were gross domestic investment levels of between eighteen and twenty percent and gross domestic savings of twenty-one percent in 1965, decreasing to fifteen percent by 1986. Inflation, as measured by Japan's GNP price deflator statistics from 1978 to 1985, declined from 4.8% in 1976 to -0.2% in 1985, one of the lowest levels in the world and well below the level in any of the other industrial market economies during that period, and averaged 2.2% per annum during that entire period. Inflation was approximately 1.4% in Japan in 1988.

229. Freed of the need to make current payments of profits to shareholders in the form of dividends, firms were able to reinvest any profits in expanding the business operations, subject to any required payments to banks and other financial institutions with respect to outstanding loans. Such a strategy, while highly leveraged, is consistent with building economies of scale and pursuing of cash flow and market share objectives.

230. Japan's real money supply rose at a rate of 3.1, 6.5 and 10.4% per annum during 1985, 1986, and 1987, respectively, and was expected to rise at the rates of 7.6 and 5.2% per annum during 1988 and 1989, respectively. See SWISS BANK CORP., PROSPECTS, supra note 228, at 13.
nominal income, raising concerns regarding the possibility of creating undue inflationary pressures within the economy. Although the feared levels of inflation did not materialize, it is clear that future monetary policies will need to balance inflationary concerns, management of the level of domestic demand, and the position of the yen in international capital markets.

The effect of the government’s objectives regarding interest rates and money supply growth was to mandate significant involvement by the central bank in the activities of the nation’s commercial banking system. The ability of the government to control its financial markets was a key element of the nation’s industrial policies for targeting growth and development in specific industrial sectors. Moreover, the policies of the central government with regard to operating various key industry sectors, many of which have recently been privatized, and providing its own loans and credits through government-operated banks, led to high levels of government indebtedness which had to be funded through the nation’s credit markets.

For example, the Japan Development Bank, wholly-owned and operated by the government, has always been an important source of public funds, particularly for large firms. The Export-Import Bank of Japan provides medium and long-term credit to exporters and a number of other public financial institutions have been created in order to provide funds for specialized public and private purposes, such as housing and small and medium-sized businesses. As a result of these programs, the budget of the central government ran significant deficits through the end of the 1970s, causing the government to undertake a number of bond issues to fund the deficit, as well as the debt service on previously issued deficit-reduction bonds.

Since 1979, each central government budget followed a course of fiscal austerity, which the government has termed “financial reconstruction.” Budgets during the last decade reflected continuous decreases in real spending and the deficit of the central government was reduced from 6.1% of GNP in 1979 to 3.3% in 1986, while the combined deficit for all levels of government was reduced from 4.7 to 0.6% during that same period. However, the government remains concerned that debt service on outstanding bonds

231. RESTORING INTERNATIONAL BALANCE, supra note 4, at 14.
232. Id. at 14. See also OECD, supra note 1, at 29-35, for a detailed description of recent Japanese fiscal policies.
233. RESTORING INTERNATIONAL BALANCE, supra note 4, at 41.
234. Id. In 1987, the government reaffirmed its goal of eliminating the deficit of the central government’s general account by fiscal 1990, ending March 1991. At that point, the general account, which includes most of the budget except major construction and investment programs, still ran a deficit of about 2% of GNP. Id. at 42.
235. The central government’s net borrowing, which had peaked at 5.5% of nominal GNP in 1978, was reduced to 1.4% of GNP in 1985. However, the central government’s gross debt reached almost 70% of GNP in 1983, the highest among major industrialized countries except Italy, and interest on such debt took about 26% of the central government’s total revenue in that year. OECD, supra note 1, at 35.
as well as deficits from the operation of various state-run enterprises is being paid out of what is currently a surplus in the nation’s social security account. It also realizes that efforts to control internal deficits are at variance with the demands of its trading partners to stimulate domestic demand for imported goods through fiscal policies.

In the future, Japanese fiscal and monetary policies will need to deal with a number of issues that have been deferred during the years of economic growth and development. The ability of the government to use its control over the financial system has decreased as Japanese firms have gained access to their own internal funds and funds available in world capital markets. Fiscal policies will be influenced by the difficult political decisions regarding subsidies to farmers, continued funding of the nation’s social security system, servicing pre-existing debt from prior government deficits, and allocating future loans and concessions to consumptive activities, such as housing and infrastructure, rather than channeling funds toward industrial growth. Finally, the desire to increase the level of government receipts, when the level of taxation in Japan has historically been quite low, will exacerbate political tensions.

Commercial Banking. Both Japan and Korea share a reliance upon the availability of low-cost debt financing. In both nations, financing of this type has been made available through public financial institutions, funded in part

236. For many years, the government ran such key infrastructure industries as telecommunications, railways, and airlines. Recently, many of these companies have been privatized, creating significant “one-time” inflows of cash to the government and also providing new competitive opportunities for domestic and foreign firms. Id. at 82-93. However, as noted above, the effect of turning significant industry sectors over to private firms has been to minimize some of the controls previously exercised by various ministries within the government. The government has made it clear that it intends to continue this process of privatization.

237. The structure of the Japanese economy, both public and private, puts high premium on avoiding recessions. RESTORING INTERNATIONAL BALANCE, supra note 4, at 43. The domestic economy has experienced relatively slow growth over the last few years. Unemployment rates grew appreciably during the first half of 1987 and it became apparent that excess capacity existed within the economy. While this situation alleviated any concerns that the then-growing money supply would create inflationary pressures, it did cause the government to adopt supplementary budget measures in order to avoid the possibility of a recession. Funds were made available for public works projects, investment in housing, and new construction, and various other areas where the United States had urged the Japanese government to provide assistance; however, the overall effect of these increases did little to bolster domestic demand and the International Monetary Fund (“IMF”) again characterized the budget for 1988 as “contractionary.” Id. at 15, 44. See also INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK 3 (April 1988); Id. at 15, 44. However, in spite of the announced intent of conclaves such as the Louvre Accord in 1987, which called upon nations with large external balances to take internal measures to stimulate domestic consumption, the Japanese still appear to be unwilling to compromise long-held domestic political objectives in order to appease foreign concerns about trade imbalances.

238. The present tax system in Japan has been characterized as unbalanced and inequitable, with a relatively heavy burden on wage earners and the existence of significant exemptions for unearned income. Direct taxes as a percentage of household income averaged 7.1% per annum from 1978-87. See OECD, supra note 1, at 100, 138.
by government allocations, and through the nation's network of private commercial banks. In Japan, commercial banks have typically provided the major source of short-term credit, usually running from 60 to 180 days; however, in reality, such loans are often extended for many years, becoming, in effect, long-term debt obligations of the firm. As a result, over time, Japanese banks have supplied between sixty to ninety percent of the capital needs of Japanese firms and, on average, carry more than eighty percent of the nation's total corporate loan burden.

Commercial banks have played a significant role in the unique system of consultation and risk-sharing amongst industry, government, and finance in Japan. Japanese private financial institutions are substantial holders of equity in Japanese firms. As such, their relationship with financially troubled firms is much more patient than might exist in the United States, particularly in those cases where the firm is in a distressed industry. In addition, Japanese banks have purchased government bonds at artificially low rates in order to assist in underwriting the central government's deficits. In turn, the government has worked to minimize the effect of domestic competition from branches of foreign banks, ensuring that control of the nation's credit system remains with the traditional institutional forces that have controlled financial policies since the end of the World War II.

Despite the important role of the commercial banking system in the development of industry since the early 1960s, relationships among these banks and their clients promise to change. The growing independent creditworthiness and financial resources of many of the large Japanese firms, as well as the willingness of those firms to tap international capital markets for their financing needs, are but some of the factors giving rise to this new relationship. Moreover, institutional investors are also seeking the higher returns offered by foreign capital markets. As a result, Japan has been forced to liberalize its own capital markets. In addition, Japanese banks are moving quickly to expand into those areas where they can more readily assist in the development of overseas investments and market penetration strategies of Japanese industrial firms, thereby creating significant management challenges for the Japanese banker of the 1990s.

239. Restrictions on foreign investments were eased throughout the 1980s, allowing Japan's major insurance and pension funds to diversify their assets away from the yen. Japanese securities firms also expanded rapidly during the early 1980s in an attempt to attract foreign and domestic customers and, by 1987, Japanese firms were the lead manager for 39% of Eurobond issuances, in contrast to only 12% in 1985. RESTORING INTERNATIONAL BALANCE, supra note 4, at 9.

240. See OECD, supra note 1, at 94, for a summary of the main measures of financial market liberalization from June 1986 in Japan. Regulatory liberalizations in Japan have only recently begun to permit the development of domestic money markets. However, according to the Bank of Tokyo, the total size of Japan's money markets had risen 82.7 trillion yen at the end of June 1989, equivalent to 21.7% of the country's total annual economic output. Ten years earlier, at the end of 1979, the market amounted to only 15.6 trillion yen, or about 7.1% of output.
Equity Markets. The pattern of financing for Japanese firms has been such that equity has been a relatively unpopular and unattractive means of financing and investment during the period of rapid development.\textsuperscript{241} Japanese firms have tended to focus upon such long-term objectives as market share and reliable cash flow for new investment, rather than the value of share prices. Thus, the ability of firms to deliver attractive returns to their investors has been of relatively minor concern until recent years.\textsuperscript{242} Nonetheless, formal equity markets have been in place in Japan for a number of years\textsuperscript{243} and shareholders have often been able to achieve quite attractive returns,\textsuperscript{244} particularly in securities issued by the leading competitors in major industries. Domestic stock offerings\textsuperscript{245} are regulated by the JMOF; however,

\begin{itemize}
\item \textsuperscript{241} During the fiscal year ended March 1981, listed corporations were financed through the following sources: sales of equity (7.8\%), sales of bonds (4.2\%), borrowing from private financial institutions (35.6\%), borrowing from public financial institutions (37.7\%), and other financing (government and otherwise) (14.7\%).
\item \textsuperscript{242} As noted above, Japanese banks and other financial institutions are substantial holders of equity in Japanese firms. Moreover, Japanese investment banking firms, many of which are members of the same "corporate family" of the firms and their banks and have risen to world prominence as a result of their own participation in world capital markets, are clearly in a position to exercise significant influence over trading volume and pricing trends in the Japanese equity markets. Accordingly, Japanese equity markets have yet to play a significant financing role with respect to domestic firms, particularly since the more successful firms are also able to reinvest their own financial resources or obtain capital throughout the world.
\item \textsuperscript{243} As of 1979, there were eight stock exchanges in Japan, the main ones being in Tokyo and Osaka. In 1979, 85\% of the traded shares were traded on the Tokyo Stock Exchange, which consisted of two domestic sections and a foreign section. Companies could be listed on more than one exchange, yet in 1979 more than 80\% of the listed companies were traded on the Tokyo exchange. Tokyo was also the location of slightly more than half of the nation's 256 securities companies in that year. Price Waterhouse, supra, note 13, at 34.
\item \textsuperscript{244} It has been noted that a substantial amount of the stock of a company listed on the Tokyo Stock Exchange is never traded due to the fact that it is held by "keiretsu" affiliates of the listed company. It has been posited that these holdings, which arose in response to concerns regarding possible foreign takeovers, provide a network of mutual support for stock market prices in Japan that minimize the effects of downturns in world equity market values. Restoring International Balance, supra note 4, at 30. The Nikkei Stock Average (May 16, 1949 = 100) rose from an average of 10,561 in 1984 to an average of 27,420 in October 1988. See Swiss Bank Corp., Prospects, supra note 228, at 11.
\item \textsuperscript{245} See Emmons, Going Public in Japan: United States and Japanese Tax Consequences, 6 INT'L TAX & BUS. LAW. 308-27 (1988), for a good general description of the process for listing of securities in Japan. Generally, public offerings of securities must comply with certain procedures set forth in the Securities and Exchange Law and the Ministerial Ordinance Concerning Public Offerings of Securities. With certain specified exceptions applicable to national and local governmental bonds and other limited forms of securities, offerings of securities having a total subscription value in excess of one million yen are subject to the notification or registration requirements specified under the laws referred to above. Registration, as opposed to simply notification, is required for an offering to the "public," that is, an offering involving at least 50 subscribers of securities having a total value equal to or in excess of 10 million yen. Registration and reporting requirements are somewhat similar to those imposed in the United States and each stock exchange has its own requirements with respect to listing of securities for trading. A recent published report indicated a significant increase in the projected number of initial public offerings in Japan in 1988 (100) as opposed to the previous record year in 1987 (62). Gross new issues of shares rose significantly in 1987 (6.145 billion yen) as compared to 1986 (2.508 billion yen). See Swiss Bank Corp., Prospects, supra note 228, at 13.
\end{itemize}
listing requirements and market regulation remain immature in relation to the United States and other Western capital markets.

On balance, Japan's capital market strategies have been extremely successful in facilitating the economic growth of the nation and its firms. Firms have been provided with access to low-cost capital. Monetary policies and domestic savings and investment habits have produced a consistently low and steady rate of inflation. Government funds have been made available to develop new industries, creating deficits funded by purchases of bonds by the banks. Banks, through their substantial debt and equity holdings in firms, have become co-partners with industry and government in achieving industrial policy objectives. Ultimately, many of the banks have emerged, along with their clients, as global leaders in commercial and investment banking services.

The content of the Japanese capital management strategy is consistent with its overall "developmental" focus, which places economic growth and development before concerns regarding welfare and income distribution. The future challenges to this strategy will come from the financial demands created by the necessary development of welfare programs, housing loans, vocational training, and domestic demand. One can expect that the answer to those challenges will come, once again, from the cooperative triumvirate of government, industry, and banking. However, how the burdens will be borne remains to be seen, as will the effect that pressure from abroad will have upon the process of developing new strategies to manage the riches of export-driven success.


Korea shares with Japan many institutional structures for managing its capital policies. In many respects, Korea has attempted to replicate the efforts of the Japanese to provide focused assistance to the nation's firms in order to enhance their competitiveness in world markets. However, Korean capital management policies have been made much more difficult by virtue of the inability to build the type of banking and financial infrastructure that has proven to be so valuable for Japanese development. Moreover, in many respects, Korea remains a decade behind the Japanese in the development of their industries and the financial framework necessary to support continued growth and to fund badly needed internal projects.

Macroeconomic Policies. Korean macroeconomic policies are determined by the EPB, which exercises control over governmental budgetary and planning matters, and by the KMOF, which regulates monetary as well as banking and exchange rate policies through its management of the

246. Major monetary and banking policies are formulated by the Monetary Board, which is also responsible for supervising and regulating the banking industry and bank lending programs. The KMOF chairs the Monetary Board and effectively controls the BOK, whose Board of Directors is appointed by the government, and most of the other elements of the banking system, with
Fiscal policies had a significant role in "opening up" the economy in the late 1960s and through most of the 1970s. Investment was made in infrastructure of all kinds—electricity, transport facilities, roads, railroads, ports, and communications—in order to ensure that a network existed to support anticipated increases in production and exports. The selection of the type and location of the infrastructure projects generally reflected the government's preferences regarding the utilization of capital and human resources.

Monetary and interest rate policies during the 1960s and 1970s were undertaken against a background of habitual inflation, which averaged over eighteen percent per annum until 1982. While the government maintained the power to set price ceilings on most domestic goods and services and could effectively control the prices of imported goods through the import licensing framework, inflation continued during the period for a number of reasons: 1) simple expectations as a result of rapid price movements since the end of World War II; 2) dependence upon foreign oil and other natural resources; 3) domestic pressures for higher wages; 4) the rise in international interest rates; and 5) the inevitable overheating of the economy due to the many years of steady and rapid growth in production.

As in Japan, early monetary policies focused upon increasing the level of domestic savings in order to provide funds for investment in domestic export enterprises. The government permitted real interest rates to rise, thereby increasing the cost of domestic borrowing. However, as noted above, firms were able to obtain funds for capital investment at world market rates, although eventually the nation's level of foreign indebtedness, exacerbated by increases in oil prices during the 1970s, rose rapidly to about $21 billion in 1979 and to over $37 billion by the end of 1982. Moreover, the continued high levels of inflation that existed became a prime concern of policy makers as the nation entered the 1980s.

As the time approached for developing Korea’s Fifth Five-Year Economic Plan for 1982 to 1986, it was apparent that the nation's external debt position and inflation rate had to be addressed without jeopardizing the continued reasonable rates of increase in GNP. As a result, Korea elected to pursue its economic objectives during this period by adopting a tight fiscal policy, not simply through balanced budgets, but also by keeping a constant ratio between the level of government expenditures and GNP. Tight anti-
Inflation policies were adopted by the government, with strong pressures being applied to wage and price levels, and the won was steadily depreciated to enhance the nation's balance of payments.

Administration of the economic policies of the early 1980s was made all the more difficult by the government's decision to simultaneously introduce a number of measures directed at rejuvenating domestic savings, liberalizing the nation's trade policies and financial markets, and stimulating the development of small and medium-sized industry. As a result, the prospects for the success of Korea's policies were linked to external developments, such as the decline in oil prices and other commodities, and the economic recovery in the major developed countries that served as the primary markets for Korea's exports and its source for new technologies and foreign investment opportunities.

Despite the dimensions of the tasks specified in the 1982-86 Plan, Korea was largely successful in attaining its objectives. It reversed its balance-of-payments situation and greatly reduced its level of foreign indebtedness. Although Korea still carries one of the world's highest levels of foreign debt, the growth of its exports has kept the nation's debt-service ratio at a manageable level. Prior to Korea's current economic difficulties, it was expected that the level of total foreign debt would be further reduced to $28.5 billion by the end of 1989. Further, by 1984, private savings equaled 13.8% of income and total domestic savings was over twenty percent, accounting for over two-thirds of overall investment. Even more impressive, inflation has been substantially reduced and public sector finances have achieved a balanced position. However, inflationary pressures began to build once again in 1988, and it still remains unclear whether or not the efforts to liberalize the domestic banking and capital markets will be successful.

Public and Commercial Banking Systems. As has been the case in Japan, Korean firms have thrived on the use of debt financing and, in spite of recent attempts at developing the nation's equity markets, these firms continue to have very high ratios of debt to equity. As a result, Korean firms remain vulnerable to changes in the cost and availability of credit, a problem which has influenced government monetary policy. For example, while the government successfully controlled inflation during the 1980s with stringent monetary policies, it greatly reduced the amount and increased the cost of local credit facilities. Consequently, Korean firms began to turn to other

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251. D. Macdonald, supra note 7, at 192-93.
252. Id. at 200.
253. According to the BOK, the inflation rate in Korea, as measured by the consumer price index, dropped from almost 30% in 1980 to less than 4% annually from 1983 to 1987. Price Waterhouse, supra note 13, at 2 (Supp.).
254. Inflation had reached 7% per annum in 1988. Id.
255. With respect to those policies relating to Korea's restrictive monetary policies and the resultant increase in real interest rates during the early 1980s, see II The World Bank, Korea: Managing the Industrial Transition 49; I The World Bank, Korea: Managing the Industrial Transition 81.
sources for financing, many of which were only indirectly subject to historical governmental control over financial instruments.

The government’s presence in the nation’s financial markets comes from its control and operation of various public-sector banking and lending institutions as well as the control exercised by the KMOF over the activities of the BOK and other aspects of Korea’s central banking system. Although a number of demands have been made to revise the Korean banking system so as to upgrade the activities of the BOK to a level equal to that of the Federal Reserve Bank in the United States, the KMOF continues to regulate bank deposit rates, bank reserve ratios, the rediscount rate, and other key monetary benchmarks. As noted below, the role of the KMOF in the future development of the nation’s financial markets will be a key issue for Korea in the coming decade.

The KEB, as well as certain other banks, financial and credit organizations, and branch offices of foreign banks, have assumed most of the foreign exchange functions previously performed by the BOK. The KEB, which receives most of its funds from international lending institutions, acts as an intermediary for channeling those funds to large and medium-sized firms, primarily in the manufacturing and electric power sectors. It also provides one of the few sources of medium and long-term credit within Korea. However, the government has also established the Korea Long-term Credit Bank, modeled after its counterpart in Japan, to finance private companies which are considered to be properly organized and managed. In addition, the Integrated Financial Company Law enables merchant banks to engage in syndications, lending, and equipment refinancing, and also allows the issuance of corporate bonds and certain underwriting and securities activities.

The Medium Industry Bank (“MIB”), the Citizens National Bank (“CNB”), the Korea Housing Bank (“KHB”), and the Export-Import Bank of Korea are also government-controlled banks designed to meet the needs of certain sectors of the economy. The MIB is engaged in short-term operation financing and long-term capital lending to small and medium-sized industries. The CNB specializes in extending loans and accepting mutual installment deposits and ordinary deposits. The KHB was established in 1957 to make home building loans available to middle-income families. Finally, like its counterpart in the United States, the Export-Import Bank provides support for Korean export industries.

256. The government also controls the activities of the Office of Bank Supervision and Examination. PRICE WATERHOUSE, supra note 13, at 9 (Supp.).
257. Id. at 4 (Supp.).
258. Id. at 22.
259. Id.
260. Id.
261. Id.
262. Id.
Until very recently, the government held substantial equity positions in several of the nation’s commercial banks. Although most of those holdings have been divested, it still retains substantial control over interest rates and other matters relating to the banking system. In addition to the BOK and the specialized banks operated by the government, there are seventeen domestic commercial banks, seven of which operate nationwide. These banks provide conventional banking and credit facilities and are authorized to transact with international correspondent banks. In addition, there are over fifty branches, as well as several representative offices, of foreign banks in Korea. Moreover, a good deal of financing is accomplished through borrowing on the informal "curb market" of private lenders, a phenomenon which tends to mitigate governmental controls over interest rates.

During the next decade, Korea will need to resolve the inherent conflicts arising from the competing objectives of reducing the government’s control over the bank and credit system on the one hand, and ensuring that financing is available to enhance the nation's total factor productivity while acquiring the new technologies and plant and equipment factors necessary for expansion into new markets and industries on the other. It can be expected that policy makers will be reluctant to permit the BOK to assume a more independent control over the monetary and credit sectors of the economy. This is particularly true given the central government’s need to address the demands from various sectors within the economy for financing of consumer needs and to ensure that funds are available to finance non-competitive

263. See D. Macdonald, supra note 7, at 200.

264. The KMOF has recently indicated that it plans to implement a number of changes designed to upgrade and liberalize the nation's financial markets. For example, it intends to reduce the BOK's involvement in the management of commercial banks and to broaden competition in the financial sector by permitting participation of firms with primary activities outside of the financial sector. In addition, effective December 1988, the KMOF has attempted to partially deregulate bank lending rates, although the BOK still establishes upper and lower limits on such rates. BOK control is deemed necessary in order to minimize competition for deposits between banking and nonbanking sectors. In addition, a prime rate system was to be adopted. See Price Waterhouse, supra note 13, at 9 (Supp.).


266. In addition, the government is making an effort to reduce its overall involvement in the private sector, with the intent that private firms be able to obtain and utilize financial and other resources in global capital markets without direct assistance from the government.

267. Both the ability to enhance total factor productivity through new production technologies and movement toward more capital-intensive industries are necessary due to the fact that future high rates of increase in factor productivity may be constrained by limitations on further increases in the domestic savings rate, the natural limits on labor growth, and the rapid movement toward full utilization of existing facilities.

268. New financing must either come from the government or through private funding obtained from the international capital markets, domestic savings, or borrowing from foreign banks located in Korea. The failure of firms to attract outside financing will continue to place the government in the position of becoming a "risk-partner" with domestic firms, thereby diverting fiscal resources from welfare and infrastructure projects.
Finally, excessive liquidity has recently raised additional concerns in Korea regarding a new round of inflationary pressures.

**Equity Markets.** The KSE has been in existence since 1956 and is principally governed by the Securities and Exchange Control Act of 1962, as amended, and rules promulgated by the Securities and Exchange Commission ("SEC"), the Securities Supervisory Board, and the KSE itself. During the late 1960s, the government promulgated various tax and financing incentives to encourage qualified companies to list their shares on the KSE. In addition, the government published an annual list of companies that were encouraged to go public. Nonetheless, companies remained reluctant due to the disclosure requirements of the SEC and concerns about the loss of management control, as well as fear regarding the current practice of promising investors an annual dividend equal to time deposit yields.

In spite of many of the institutional impediments to the development of the Korean equity markets, investors have been able to enjoy significant appreciation of their invested capital in recent years while the number of listed companies has also expanded. For example, the won value of new stock issuances in 1988 increased 309 percent over 1987. At the end of 1988, 502 firms. Finally, excessive liquidity has recently raised additional concerns in Korea regarding a new round of inflationary pressures.

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269. D. MACDONALD, supra note 7, at 200-01. Not only has the government often compelled commercial banks to make loans to firms that were to become "non-competitive" in their industries, but the KMOF has also been accused of excessively prodding the BOK to provide further capital to those commercial banks that were suffering under the burden of these misdirected loan policies.


271. Id.

272. The SEC generally recommends that a firm go public once it meets the following criteria: (i) continuous operation for three or more years; (ii) paid-in capital and reserves of more than 2.4 billion won; (iii) sales turnover of over 12 billion won (40 billion won for wholesale businesses); (iv) a ratio of profit to paid-in capital of at least the prevailing rate of interest for one-year time deposits; (v) no net loss in the most recent year; (vi) a debt-to-equity ratio less than 1.5 times the average ratio of other listed corporations in the same industry (not applicable to banking, insurance, or leasing companies); and (vii) conformity with other SEC listing requirements. Id. at 16.

273. Listed firms must submit an annual report to the SEC, together with an independent auditor's opinion, no later than 60 days after year end. Unaudited interim financial statements for the first six months of the company's fiscal year must also be filed with the SEC within 45 days following the end of the period. The listing fee is approximately three percent of the total amount issued. Id. at 17.

274. Id. at 9 (Supp.). The government's policies aimed at forcing privately held properties to go public has contributed to a steady expansion in domestic capital markets. During 1988, a record 113 companies went public and another 80 companies were expected to go public by the end of 1989. By mid-1989, the overall capitalization of the Korean stock market stood at $110 billion, ranking only behind Tokyo and Taiwan, and well ahead of both Hong Kong and Singapore in the Asian region. By the latter half of 1988, individual holdings of stock accounted for 68% of the total on issue, up from 52% in 1986. In part, this reflects the comparative immaturity of Korea's capital markets, especially since it is only in the past few years that the assets of the bigger institutional investors, such as life insurance companies, have begun to grow. At the moment, financial institutions hold less than 5% of all shares on issue, a figure that will certainly rise as the Korean economy begins to mature over the next decade.
companies were listed on the KSE with a total market value of 64.5 trillion won,²⁷⁵ representing an increase of approximately 38.4 trillion won over the end of 1987.²⁷⁶ Moreover, the government has announced plans to liberalize the market in order to permit direct foreign investment by 1992. The intent is for new foreign capital to assist in financing the needs of domestic firms in expanding and acquiring new technologies.²⁷⁷

Once again, the key macroeconomic issues confronting the Koreans in the next decade will relate to building the type of independent financial structure which has arisen in Japan while still permitting the central government to make the types of fiscal and monetary decisions that are necessary to avoid inflationary pressures and fund domestic infrastructure projects. The availability of funds from direct foreign investment, either through the equity markets in Korea or otherwise, will be an important part of Korea's future growth strategies. Accordingly, Korea's efforts to liberalize its import restrictions and direct foreign investment regulations come at an opportune time. However, Korea must also develop the managerial expertise necessary to support independent competitive efforts in higher technologies, particularly when large amounts of foreign capital are to be used in the development projects.

4. Conclusion

Perhaps the most striking characteristic of the capital management policies of Japan and Korea is the level of collaboration among the government, the financial system, and those firms and industries seeking capital to support their export-driven growth strategies. These nations' fiscal and monetary policies are coordinated in a manner that is unfamiliar to observers in the United States. Particularly in Korea, there is a significant degree of direct government intervention in the domestic financial market. Moreover, a chief function of government has been to ensure that capital flows to important domestic industrial sectors, either through direct loans from the government and its controlled banks or by influencing the credit policies of the nation's commercial banks.

Linkages between the financial system and the various firms in Japan and Korea are quite different from those in the United States. As noted above, Japanese banks extend what often amounts to "perpetual" lines of credit to industrial clients and are one of the largest providers of equity capital. Bankers also assist the government in "guiding" policies of various firms.
and industries (although this practice has been impeded in Korea due to the government’s continued heavy involvement in the management of the banks themselves). In summary, the unique alliances between these three institutions in both Japan and Korea have formed the foundation of the new growth models in those nations.

The United States can learn valuable lessons from the collaborative capital management policies of Japan and Korea. In particular, coordinated planning with respect to the nation’s fiscal, monetary, and credit allocation policies can have quite positive effects upon the overall use of financial resources. Moreover, banks and savings institutions in the United States can, and should, develop the managerial expertise to provide consultation to their lendees. Finally, steps must be taken to encourage savings and investment and to ensure that funds are effectively channeled into productive areas.

D. Industrial Organization and Competition Strategy

1. Introduction

Japanese and Korean policies toward industrial organization and competition are quite distinctive. They have broken new ground with respect to antitrust and competition, the interests of the various stakeholders in individual firms, and the funding and use of research and development projects. In each case, the policies reflect agreement among government, business, and labor to advance national interests at the expense of individual firms, along with the realization that those interests can only be best advanced through the successes of those firms.

2. Japanese Industrial Organization

After World War II, the U.S. Occupation Administration made a concerted effort to disband the large, traditional business groups, such as Mitsubishi, Mitsui, and Sumitomo, which had dominated the Japanese economy during the rapid industrial growth of the first part of the 20th century. However, while Americans were attempting to impose upon the Japanese their own regulatory framework regarding antitrust and domestic competition, domestic business leaders were working quickly and quietly with the burgeoning industrial policy ministries to prevent foreign control over the economy and to build a concentration of capital, resources, and technology in those areas where it was felt that export-driven growth could be achieved.
As discussed above, major industrial sectors began to develop complex networks of government officials, both from JMITI and the relevant ministries, business leaders, labor, bankers, academics, and journalists. From these networks arose a tradition of consultation and cooperative planning, as well as the rapid diffusion of competitive information among industry participants. Moreover, industry-wide strategies could be developed to ensure that new technologies were made available to enhance productivity, that low-cost capital was available to firms, that guaranteed domestic markets could be found for new products, that excess competition was eliminated, and that distribution and supply channels were formed to support the manufacturing efforts of the various firms.

The industry-level practices of the Japanese were, and continue to be, at odds with antitrust and competition policies as they are understood in the United States. In 1947, under pressure from the United States, the Diet passed the Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade ("Antimonopoly Law"), which was to be administered by the JFTC. The law regulates private monopolies, unfair business practices, and unreasonable restraints on trade. The law also regulates international agreements, prohibits activities of trade associations, provides common controls of competitive corporations, and regulates mergers and acquisitions. The law is modeled after the laws of the United States and has a number of exceptions, although unfair business practices are still regulated even in those areas where little or no restrictions are imposed on competition.

Post-war industrial policies and competitive practices in Japan have led to a decided decline in the influence of the traditional conglomerates and to the success of a number of newer companies in various industries. However, the Japanese economy has remained very much dependent upon the existence of integrated trading companies, often supported by their own bank affiliates, which import most of Japan's raw materials for manufacturing purposes, establish joint venture relationships with foreign firms, finance manufacturing operations, export goods, and maintain their own complex distribution and marketing networks. For example, in 1985, twelve Japanese companies were included in a listing of the world's twenty largest companies outside of the United States. These companies were reported to have aggregate revenues amounting to more than thirty percent of Japan's GNP in that year.

279. However, such practices were consistent with the nation's own traditional emphasis on the status quo and the harmony of Confucian order, which presumably led to an emphasis and appreciation of cooperation among firms in a particular industry. As such, modern antitrust policies in Japan have been used as a tool to achieve the desired level of competition and cooperation among firms, as determined by the higher national interest, rather than as an end in itself, as is often the case in the United States.

280. The ranking appeared in FORBES, which listed 137 Japanese companies among the world's 500 largest corporations outside of the United States. The nine major trading companies, as well as Toyota and Nissan, were among the 12 companies noted in the main text. The trend continued in 1986, as 152 Japanese companies were on the list of the 500 largest industrial corporations outside of the United States. FORTUNE, Aug. 3, 1987, at 214.
While companies affiliated with one of the large trading companies are clearly well-positioned to take advantage of the resources available through these corporate networks, all successful Japanese companies appear to have prospered as a result of the unique manner in which Japanese firms compete, both domestically and in international markets. As noted earlier, the government quickly adopted a number of policies designed to insulate domestic firms from competition from large foreign firms in the domestic market. However, within the domestic market, Japanese firms appear to have sought and achieved comparative advantages in a manner that reflects traditional Japanese values, yet differs substantially from business practices in the United States.

Japanese industrial policies have consistently focused on the government assisting its firms in rapidly developing new and successively more complex products for sale, at scales that permit efficiencies in production, into domestic and foreign markets. As a result, firms have needed to adapt to rapid changes, both from market conditions and from the need to digest new technologies. In order to do so, a number of operational practices have developed at both the industry and the firm level. These practices have provided insight into the manner of competition in Japan and the impact that the regulatory framework has thus made.

Industry Structure. Clearly, one of the strengths of Japanese industrial policy has been the active involvement of the central government in the planning process. However, economic planning in Japan has become essentially tri-cameral among the "keiretsu," the various industry trade associations that developed under the aegis of the government, and the "umbrella" institutions such as the Keidanren. This planning structure provides a mechanism for joint planning and cooperation between business and government. While such planning organizations are also popular in Europe, in Japan they have tended to arise in order to temper the bureaucrats' authority in overall economic planning.

Financing and Stakeholder Expectations. The financing and employment practices of Japanese firms have enabled the firms to concentrate on such long-term objectives as increasing productivity, reducing costs, acquiring and adapting new foreign technologies, and, ultimately, developing their own state-of-the-art technologies through internal research and development.

281. The "keiretsu" are the modern groups of affiliated trade companies that succeeded the zaibatsu and often bear the same name (e.g., Mitsubishi, Mitsui, Sumitomo). Each keiretsu usually includes a major bank, a "sogo soshia," which is a trading company dedicated to handling most of the imports and exports of the keiretsu's affiliates, and noncompeting industrial firms in steel, electronics, appliances, components, machinery, and similar industries. Although keiretsu members are expected to conduct business with various affiliates and to avoid doing business with competitors, recent competitive pressures have led to breakdowns in this cooperative system. RESTORING INTERNATIONAL BALANCE, supra note 4, at 30.

282. In some European nations, government and business have operated without any attempt to integrate fully their planning and resources. In such cases, planning organizations have arisen to enhance, rather than to temper, bureaucratic authority.
Many of these characteristics developed without regard to any particular regulatory structure imposed by the state; however, the nation’s use of its existing legal framework with respect to various aspects of competition tended to complement, rather than contradict, the practices of the individual firms.

Primary objectives of Japanese executives have included attaining market share, increasing return on invested capital, and improving the firm’s ability to rapidly develop new products. Share price increases and improvement of the firm’s image and working conditions are not generally considered to be integral parts of management strategy. As a result, Japanese firms focus on growth, preferring aggressive pricing, high levels of retained earnings, low dividends, and debt rather than equity financing.

The focus of industrial policy has evolved from relatively labor-intensive, low-wage products to higher levels of capital- and technology-intensive manufactured goods. This transition has often placed a good deal of strain upon the work force, given their need to adapt to rapid changes in technology and their roles within the production process. In response, Japanese firms have developed a number of employment practices dedicated to meeting the needs of the work force: career employment security; seniority-based pay and promotion; and enterprise union systems that include all employees without differentiation by job skills. In each case, an effort has been made to reinforce the powerful communitarian values of Japanese culture and the firm has become, for many workers, the day-to-day embodiment of service to the overall good of the nation.

Regulation of Competition. As noted above, Japan’s Antimonopoly Law, originally modeled after the antitrust laws of the United States, states its purpose as the prevention of “excessive concentration of economic power” and the promotion of free and fair competition. However, the most important characteristic of the Japanese law of competition has been the set of exemptions provided under the Antimonopoly Law, which includes depression and rationalization cartels, industrial property rights, designated cooperatives, regulated industries, “natural monopolies,” and legitimate acts under legislation adopted with respect to the development of specific industries. Moreover, from time to time, additional exemptions have been made available that complement overall industrial policies designed to focus upon specific industries.

283. While in the United States a good deal of emphasis is placed upon compensation through appreciation in share value, as is the case with such equity-based compensation programs as stock option plans, Japanese employees appear to enjoy the benefits of a compensation system based on bonuses tied to the firm’s attainment of specified revenue, cost, and production goals. As such, Japanese managers have a good deal more flexibility in structuring compensation incentives for employees and, in turn, the work force has a good deal more control over attainment of those objectives, as opposed to a share value measure, which may be influenced by environmental factors which are unrelated to the actual performance of the work force.

284. For example, in the early 1970s, exemptions were in place covering export trade, land transportation, shipping conferences, and insurance, as well as in particular industries such as coal, machinery, fertilizers, nonferrous metals, and textiles. According to the annual report of
The effect of these exemptions has often been to promote, rather than deter, industry concentration at levels far in excess of those that might be tolerated in nations such as the United States. Yet, the JFTC has pursued prevention of acts that would constitute "unfair business practices." As a result, a system of vigorous competition has developed among firms in Japan. It is, however, quite clear that potential new entrants have a great deal of difficulty in penetrating industries and markets in which the existing competitors have already developed the "firm-level" practices necessary for effective competition. Moreover, as the economy has developed, antitrust relief to various industries has been gradually abandoned or successfully challenged and an effort has been made to concentrate the influence of regulation upon those firms and industries that have become uncompetitive.

Research and Development. Technological progress has played an important role in the rapid growth and structural change of the Japanese economy. Some of the nation's most important industrial and regulatory policies relate to the development and ownership of technology. Strategies formulated with respect to the acquisition of new technologies are affected by the nation's policies regarding public and private financing of research and development and by the use of technology inducement and licensing agreements. Once the technology is identified, attention turns to those regulatory policies, which usually take the form of intellectual property rights, which affect not only the ownership and right to use the various technology rights, but also the willingness of foreign firms to make inbound technology transfers.

the JFTC, cartels are legally sanctioned in dozens of industries. Moreover, cartel-like behavior has been noted in a number of additional industry sectors. RESTORING INTERNATIONAL BALANCE, supra note 4, at 27.

285. The mandate of the JFTC is noteworthy in this respect, since it has been noted that the JFTC "presides over retail price maintenance arrangements and works with manufacturers to establish 'fair competition codes' whose practical effect is to reduce the competitive threat posed by newcomers to the market." Id. at 33.

286. As noted above, both Japan and Korea have evolved from economies in which the government played a large role in the support, financial and otherwise, of key industries to more market-driven economies. In the early 1970s, the largest 100 companies accounted for 33% of the total capital employed by all companies in Japan. Eight companies accounted for 79% of the important iron and steel industry, 13 companies accounted for 69% of the transportation equipment, and 12 companies accounted for over 90% of the government-regulated electricity and gas industries. Export cartels were also an important element of industrial policy during that period and approved cartels were exempted from the effect of the Antimonopoly Law.

287. For example, in the early 1980s, JMITI's "administrative guidance" with respect to the oil industry was challenged and reversed in the courts, suggesting that the JFTC may be gaining greater latitude in seeking to limit JMITI's future discretion with respect to the structuring of domestic markets. Such a trend would be consistent with the overall shift in economic planning initiatives from the government to industry.

288. Ownership of technology and innovation in a society reflects traditional values regarding the rights of the individual inventor on the one hand, and the right of the state to require that the innovation be available for use for the broader good of the state on the other. Ownership rights also effect the degree of cooperation that may exist between firms as well as the importance of technology in determining competitive factors within the industry.
Technology has always been considered to be a "productivity tool" for the Japanese, as well as an area of potential commercial expansion. As the nation began to work its way through such heavy industries as steel, shipbuilding, and heavy machinery and began to encounter real competition in world markets with respect to its traditional textile industries, the national economic planning effort began to focus its attention on penetration of specified technology-driven industries, including computers, robotics, optics, and biotechnology, as a viable strategy for continuing the post-war export-driven growth. Expertise in these new areas was seen as a way of addressing the nation's own domestic needs with respect to improvement of agricultural methods and relieving dependence upon imported energy and raw materials.

The Japanese government plays a key role in the development of new technologies through JMITI's Agency of Industrial Science and Technology (AIST), which employs a number of consultants and scientists and operates national laboratories doing research in areas ranging from advanced materials to production engineering and electronics.

AIST has initiated and provided loans and grants to a number of crucial national technology research projects conducted by groups of private corporations under the Mining and Industry Technological Research Act of 1961 (the "MITR Act"). Over seventy collaborative efforts have been undertaken under the MITR Act within the microelectronics and related industries alone, including the VLSI Technology Research Association. MITR Act projects receive accelerated tax benefits but are not permitted to make any dividend payments to members of the group. After completion of the collaboration, group members hold limited monopoly rights and are expected to become vigorous competitors in the use and exploitation of the technology developed during the course of the project.

While the government has supported the development of new technologies in Japan, the regulatory framework with respect to protecting innovation, such as patents, copyrights, and trade secrets, reflects the nation's attitude of collaborative usage, particularly when support has been given by the state. Lacking the tradition of individual property rights which exist in the United States, the government has retained the right to grant compulsory patent licenses if considered to be in the national interest. Moreover, the nation's patent procedures have been unable to keep up with the rapid changes in technology, making Japanese patent protection of limited value, and the tradition of information-sharing amongst industry groups has impeded the development of significant trade secret protection.

289. As noted above, the government also maintains a significant amount of discretion over the contents of technology licenses from foreign firms under the nation's regulation of direct foreign investment and unfair trade practices.

290. Although the nation's economic objectives focus upon the development of new technologies, the products of those efforts are seen largely as "tools" to be exploited by a number of firms as part of a national effort to obtain market share. Accordingly, competition in Japan is not based on the ability to build legal walls around technology, but rather on the firm's ability to
Japanese firms are also increasing their own research and development expenditures, particularly compared to similar-sized United States firms. While it is certainly true that the amount expended on technology is not necessarily an appropriate indicator of the utility of the research conducted, the compound growth rate of issued patents in the United States for the period from 1960 to 1982 for such large Japanese companies as Hitachi and Toshiba greatly exceeds the rate of growth achieved by General Electric and IBM during that period. Accordingly, Japan has been able to move beyond merely adapting and improving foreign technologies to become a net exporter of technology through license agreements, and Japanese companies have become world leaders in innovative technologies.

3. Korean Industrial Organization

While Korea has tried to emulate the successful Japanese alliance between government and industry, it has been hampered by a number of historical and cultural differences. Until the middle of this century, mercantilism had not achieved nearly the degree of status and acceptance in Korea as had existed in Japan since the beginning of the Meiji Period. While Japan was moving toward rapid industrialization at the end of the 19th century and the beginning of the 20th century, Korea retained its largely agrarian character. Although the Koreans were introduced to the tools of modern manufacturing to decrease costs, expand distribution, and properly utilize its labor and capital resources. Japan has no specific statutory right in trade secrets, though various institutions have urged, from time to time, that there be such a right. In the absence of a statutory right, Japanese courts have been unwilling to grant substantial relief to bar third parties from making use of misappropriated trade secrets. While the Japanese Civil Code provides that “a person who intentionally or negligently violates the rights of another person is obligated to compensate for damages arising therefrom,” (Japanese Civil Code, Article 709) case law in this area is scant. While damages have been awarded, it is not clear whether the court relied on tort law arguments or the Unfair Competition Prevention Act. In Japan, directors, managers, and commercial agents are statutorily forbidden to engage in competition with the businesses of their employers; other employees, however, are not so restricted.

291. See ABEGLLEN, supra note 5, at 124-25. In addition, universities and research institutes have provided sources for independent development of new technologies and products. Japanese capital and technical investment continues to expand. For example, in the fiscal year ended March 31, 1990, Japan was expected to spend 22.5% of GNP, or about $3.15 trillion, on capital investments, an amount which is three times the total in the United States, measured on a per capita basis. In addition to the amounts expended on capital investment, 2.9% of GNP will be spent on research and development and 3.0% on education. As a result, American firms are being forced to divest assets and businesses in order to maintain pace with the Japanese in their core businesses and, if possible, are seeking to establish their own research and development capabilities in Japan. Berger, Japan Turns Up Competitive Heat, San Francisco Chron., Feb. 12, 1990, Cl, col. 2.

292. Information from the United States Patent Office with respect to the number of patents registered in the United States in 1966, 1976, and 1987 provides interesting evidence with respect to Japan’s growing innovative prowess. In 1966, a little less than two percent of the patents registered in the United States were awarded to Japanese nationals. However, that figure increased to around 10% by 1976 and to 21% by 1988. Id. Interestingly, the number of patents that were not awarded to foreign nationals decreased as a percentage of the total and in absolute terms over that period as well. For example, Americans were issued 54,684 patents in 1966. By 1987, American inventors were issued 47,553 patents. The trend has continued in recent years.
and production during the Japanese occupation, they were given little opportunity to develop their own firms and business organizations. As such, the Korean firms that have developed within the last three decades share little of the long and rich history of their Japanese counterparts.

Many of the modern Korean conglomerates, the "chaebols," were originally the beneficiaries of assets and properties distributed as political spoils by the government during the late 1950s. However, during the rapid economic development of the 1960s and 1970s, a spirit of cooperation developed between the government and these firms, facilitated by a system in which compliant businesses were rewarded with tax credits, subsidies, loans, access to raw materials and imports, and other advantages necessary for achieving competitiveness.

Like the Japanese, the Koreans did not have an aversion to concentrating industrial resources in a handful of firms that were capable of engaging in a diverse set of activities within and across various industry sectors. As such, the chaebols began to take the form of the Japanese trading companies and became networks of commonly owned and managed companies engaged in manufacturing, transportation, mining, construction, consumer goods, services, and agriculture. They did not own banks, although they held substantial equity interests in banks and operated investment services. Chaebol leaders shared close personal ties with bureaucrats and other government leaders. While managers were dedicated to maximizing profits and often resented interference from the government, they also respected the dominant role of the government and realized the utility of the chaebol-government relationship to the future success of their firms.

By the early 1980s, it was clear that the chaebols were about to become global leaders in a number of industries and that much of the nation's economic success and prosperity could be attributed to their efforts. However, grave concerns had arisen throughout the nation regarding the propriety of much of the government's involvement in the economy and the

293. In 1977, 36% of the industrial goods produced in Korea were manufactured by monopolists or dominant firms, which are defined as those who alone occupy not less than 70% of the market; 15% of those were manufactured by duopolists, which are defined as those two who together occupy not less than 50% of the market. Accordingly, only 14% of the industrial goods were manufactured by the "competitors" who were not monopolists, duopolists or oligopolists. In 1979, the ratio of monopoly and oligopoly-type goods increased to 89%, while that of competition-type goods decreased to 11%. It was against this background that the government considered the regulatory framework regarding antitrust and competition described below.


295. Fortune reported that 10 Korean firms were to be included in its listing of the 500 largest international corporations according to gross sales in 1985. Aug. 4, 1986, at 180-197. Among the top 100 were Samsung (23rd), Hyundai (25th), Lucky-Goldstar (43rd), Daewoo (49th), and Sunkyong (67th). Eleven firms appeared in the survey for 1986; only seven countries had more. According to information reported by Fortune, Aug. 22, 1983, even in 1982, nine Korean firms ranked among the 250 largest industrial corporations outside of the United States. Of these nine firms, only one was not privately held. The firms listed included Hyundai, which ranked first among Korean firms and forty-first overall with sales in excess of $8 billion and
conduct of the chaebols themselves. As a result, the government announced its intention to decrease its intervention in the decision-making processes at the firm level and to increase reliance on market mechanisms to regulate all areas of the economy.

The changes generally paralleled the government’s policies directed at liberalizing the nation’s trade and direct foreign investment policies. The state relinquished most of its equity in the major commercial banks, reduced or eliminated price controls and other restrictions, permitted real interest rates to rise in order to facilitate domestic savings, and generally attempted to increase the degree of integration between the domestic economy and international financial and factor markets. In spite of these policies, a number of serious economic and social issues remain unresolved.

**Industry Structure.** Korea has attempted to forge an integrated system of cooperation and consultation between government and industry. However, Korea’s experience with government intervention has tended to create concerns regarding the ability of the major firms to compete in global markets without major assistance from the government. Just as importantly, concern has arisen because the major conglomerates continue to dominate the control and use of the nation’s technologies, financial capital, and human resources.

Like their counterparts in Japan, the chaebols were thinly capitalized yet engaged in vigorous competition. Although the Korean firms competed under the financial protection of the government, they lacked the focus and direction provided by the consultative processes of the Japanese government. Firms often found themselves with excess capacity and were forced to take drastic price reduction measures, which reduced the overall return on investment. Moreover, the large Korean firms were unable to shift human and financial resources from declining industries to new growth sectors. This did little to calm social and political concerns regarding income distribution in Korea.

To confront these problems, the Korean government attempted, in the mid-1980s, to mitigate the oligopolistic market structure by withdrawing many of the special incentives and subsidies previously granted to the chaebols. The government also tried to promote competition and innovation by supporting small- and medium-sized businesses through the use of MIB loans, allocations of credit from commercial banks, and tax incentives. In addition, the government induced changes in the overall focus of Korean industry by removing incentives in areas in which firms have shown an inability to avoid overcapacities. These areas of industry have included shipbuilding, textiles, and electronics.

employment of over 137,000, Sunkyong, and Samsung. Most of the firms on the list also represented the leading trading companies within Korea, an indication of the size and diversification which they had achieved.

296. D. MACDONALD, supra note 7, at 194.
The new policies were very difficult for policy makers to support, much less implement. For one thing, any deregulation would undermine the authority of the ruling elite to continue their political control over the nation, particularly in light of the undercurrent for popular and democratic elections. As a result, reforms have been slow or non-existent and the large firms have continued to attract more highly qualified personnel, acquire more advanced technology, and build larger modern plants and facilities. Moreover, the past successes of the chaebols have given them the financial resources to act independently of the government, thereby further inhibiting the viability of the new policies.

The nation’s future economic goals and objectives also make it unlikely that the oligopolistic market structure will be seriously threatened. Korean firms are finding that they are no longer able to compete solely on the availability of low cost labor. Accordingly, Korea’s industrial focus will follow the Japanese up the technology ladder. This will lead either to large-scale and expensive research and development projects or to the need to form strategic alliances with large foreign concerns that can be induced to invest in Korea. In each case, it is the chaebol which will offer the most attractive vehicle for meeting these ambitious objectives. As such, the nation’s smaller firms will continue to suffer from the lack of expert management, highly skilled technicians, or sufficient financial capital and will remain, at least in the near term, highly dependent upon their relationships with the chaebol.

Financing and Stakeholder Expectations. For years, the Korean government exercised control over the access to credit through its ownership of the private banking system and the use of public financing. The intent of these policies was, in part, to create the same sort of environment for Korean firms that existed in Japan: cooperation among the government, business, and the banks; and the freedom to focus on long-term objectives. However, in Korea, the effect of the government’s intervention in the banking and credit system has been a distortion of the risks as perceived by individual firms, leading to counterproductive business decisions, poor development of equity markets, high industrial concentration, and slow development of the nation’s private financial institutions.

Unlike the Japanese corporation, the Korean corporation has been forced to develop quite rapidly, without the benefit of several generations of sustained refinement of managerial practices relating to training, safety, productivity, and maintenance. Although Korean firms have attempted to provide their employees with many of the same paternalistic benefits supplied by Japanese firms to their employees, the overall results have been somewhat

297. "Industry restructuring" issues are also of concern for the government. Policies will need to be developed to smoothly redeploy resources from those firms and industries that are no longer competitive to the new targeted sectors. As such, it will be difficult for the government not to intervene once again in the private sector to ensure that such policies are formulated and implemented.
uneven. As a result, Korean firms have been unable to develop the strict allegiances between labor and management that exist in Japan and, in many instances, the attitude of the nation toward the chaebol is ambivalent—recognizing their great economic successes on behalf of the nation while, at the same time, questioning the legitimacy of their role within the society.

Basic and fundamental cultural and ideological concerns exist in Korea with respect to the formation and conduct of the chaebol. While it is recognized that the decision to pursue the export-driven growth strategy requires the creation of large firms capable of achieving high productivity and economies of scale, many Koreans believe that the existing firms, many of which began as "agents" of the government in the years following the Korean war, have not developed the sense of duty to the good of the nation that exists in Japan. Given Korea's tradition of conditioning loyalty on the benevolence and virtue of the leader, these ideological concerns can be quite troubling. Moreover, Korea has not developed the tradition of meritocracy and "pre-qualification," which has existed in Japan since the Meiji Period, and which has served to legitimize the role of the bureaucracy.

Korean firms face distinct external and internal tasks in the years to come. The need to obtain financing in order to develop new technologies is extremely important. However, firms must also take steps to repair their relationships with their employees and the smaller firms who look to them as an outlet for their products. It is perceived that the chaebols have used their market positions to exploit the working class, reducing wage rates and worker benefits in the face of higher fixed costs caused by recessionary pressures, and have impeded the progress of smaller firms through intense lobbying, slow payment policies, and the ability to force smaller firms to use more expensive raw materials, often resulting in takeovers by the larger firms at near-liquidation prices.

Regulation of Competition. Korea's ambivalence regarding the role of the chaebol and industry concentration permeated its efforts to establish a national regulatory policy regarding competition and antitrust. Although an effort was first made to adopt antitrust legislation in 1964, and the government actually adopted price control legislation in the mid-1970s, it was not until the beginning of the 1980s that the Monopoly Regulation and Fair Trade Act ("Monopoly Act") went into effect. The Minister of Economic Planning is responsible for the enforcement of the Monopoly Act and the

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298. The role of the chaebol has been intertwined with the national debates over income distribution and labor rights. Chaebol leaders have demanded that the government take appropriate action to limit wage increases and have threatened to take jobs offshore to Thailand and China. In turn, government leaders have attempted to limit the cross-holdings of the various large industrial groups and to prevent the chaebols from entering certain new lines of business.

299. In 1964, the EPB formulated a draft of a "Fair Trade Law." However, heavy opposition from the business sector made passage of such a law impossible. Similar efforts were made to propose a form of competition law in subsequent sessions, but in each case the legislation was abandoned.
FTC deliberates on important matters relating to violations and interpretations of the law.

Korea's antitrust policies are quite similar to those adopted in Japan. The Monopoly Act applies to certain acts of entrepreneurs and trade associations in specified industries and addresses a number of elements including the regulation of collaborative activities, trade association activities, the abuse of market-dominating position, mergers, resale price maintenance, unfair business practices, and international agreements. However, the Monopoly Act also specifically permits some types of cartels, resale price maintenance, and mergers which, by their nature, are anticompetitive.

Article 11 of the Monopoly Act regulates a number of collaborative activities, including price fixing and maintenance, production restrictions, trade territory or customer restrictions, and the new establishment or expansion of facilities. Activities of this type must be registered to be valid and the application is subject to review by the EPB, which may deny the registration or request changes in the activities if it is found that the collaboration is contrary to the public interest or leads to a "substantial restriction of competition in the particular field of trade." Substantial fines and even imprisonment can be imposed for a violation of Article 11.

Given the high concentration that exists in various industrial sectors in Korea, the effect of the Monopoly Act's prohibitions on specific types of abusive practices by market-dominating firms is extremely important, although the presence of such restrictions does very little to alleviate concerns regarding the overall influence of the chaebol. The Monopoly Act seeks to prevent market-dominating firms from unreasonably determining or maintaining prices, from unreasonably controlling the sale of any commodities, from establishing or expanding facilities for the purpose of hindering the entry of new competitors or eliminating existing competitors, and from taking any other abusive act that would substantially restrict competition or damage the interest of consumers.

As noted above, unfair business practices are also regulated under the Monopoly Act. However, in spite of the recognition given to the importance of encouraging "fair and free competition" in Korea and promoting "a balanced development of the national economy," industrial organization within Korea has undergone few changes as a result of the promulgation of the new antitrust laws. Market-dominating firms, which existed prior to the enactment of the Monopoly Act, can continue to exploit their greater resources and their existing competitive strengths within the economy, subject only to the government's ability to restrict unfair business practices. Moreover, the Monopoly Act contemplates the notion of "cartel," which promises to remain an important part of the nation's export-driven growth objectives.

300. The FTC and the Office of Fair Trade are charged with the investigation of antitrust violations and proceedings for corrective measures.
Research and Development. As had been the case in a number of areas, Korea has looked to Japan as a model for the successful development of new technologies. However, Korea has not had anywhere near the experience of the Japanese with respect to large-scale cooperative research and development projects and until recently, the level of expenditures in the private sector on new technologies has lagged far behind those of comparable firms in Japan. While there appears to be little question regarding the ability of Koreans to adapt rapidly to advanced technologies, the nation continues to lack the focus and institutional structures relating to technologies which have been so important in Japan.

With the exception of the electronics and chemicals sectors, Korea has been able to acquire and develop advanced technologies without excessive dependence upon direct foreign investment. Moreover, the technologies used by the Koreans in many areas were neither "new" nor "proprietary," and Korean firms essentially competed on the basis of lower wages, gains in productivity, and their ability to enter markets which were being abandoned by larger foreign competitors. While development of this type did not provide the nation with the capability for independent development of new technologies, it did build the entrepreneurial base necessary for potential future development of new technologies. Koreans also learned a great deal from their contact with foreign firms in the course of licensing and export activities.

The Korean government has attempted to provide budgetary support for public research projects in the electronics field and has promoted allied science and education activities for many years. Scientists and engineers have been sent abroad for training, and expatriates who had been living abroad have been induced, with relatively high salaries, to return to specialized research institutes in Korea. The Special Industrial Technology Research Financing Program was initiated in 1982 to promote the acquisition of technology needed by government-funded institutes to undertake research and development projects. While the amount of money devoted to these projects has been impressive, Korea has not been able to transfer technologies from these projects to the private sector, nor has the government been able to provide the sort of consultation available in Japan.

Recent trends in Korea appear to reflect a recognition that private industry will need to bear most of the responsibility for achieving the nation's goals with respect to the development of new technology industries. Investment in research and development has increased significantly during the last few years, rising to two percent of GNP by 1986, nearly two-thirds of which was contributed by private industry. As noted above, Korean policy makers

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301. Total investment in this area increased from $30 million in 1972, most of which was contributed by the government, to $580 million by 1982, an amount equal to about 1% of the nation's GNP in that year. See G. LODGE & E. VOGEL, supra note 16, at 235.
302. Id. Bus. Wk., Sept. 5, 1988, reported that Korean automakers plan to double production by 1993, that Korean companies invested $2.5 billion in semiconductors in 1987 and 1988 alone, and that the nation is considering entering such new technology-driven areas as aircraft
have announced their intention to liberalize broad segments of the nation's economy, looking to market forces to shape future competition and reducing controls over the nation's banks and direct foreign investment. As such, any broad capital-based assistance to firms for the development of new technologies would run counter to these policy objectives and would cause potential fiscal instabilities.

The government can be expected to continue to influence the development of the nation's technology, however, through its control and review of technology inducement agreements and other forms of direct foreign investment. However, recognizing that acquiring foreign technologies may be the only way to avoid undertaking the costly self-development projects that characterized Korea's own automobile industry, Korea may be forced to grant significant concessions to various trading partners, such as Japan and the United States, who have long looked to Korea as a potential market for their products and have also been forced to compete with Korean firms and products in a number of areas. In addition, Korean firms will need to support the new technologies by developing the sophisticated network of overseas dealers and service facilities which must accompany these new products.

Interestingly, the United States has taken particular issue with Korean practices relating to protection of domestic and foreign technology and intellectual property rights. Korea does not have a history of individual rights with respect to ideas and innovation, and the technology that has been utilized by Korean firms can best be characterized as immature. Accordingly, Korea's laws regarding patents, copyrights, and trade secrets are quite primitive in form and operation. It will be difficult for Korean firms to introduce sophisticated technology into Korea without adequate assurances from the government that the intellectual property rights of a foreign transferor will be honored and protected.

and robotics in the future. Although the amount of spending on research and development, expressed as a percentage of GNP, is approaching that of Japan, Japan's absolute level of expenditures far exceeds that in Korea.

303. Among other things, the United States has raised its concerns regarding the scope of protection available under Korea's copyright laws for works of foreign authors, process patents for pharmaceutical products, the protection of computer software, and Korean practices regarding trademark licensing. In response, the government has taken a number of measures, such as establishing a process whereby Korean book publishers who have licenses from United States publishers may apply for local copyright protection, broadening the protection for computer software under the Korean Patent Law for Computer Software and Korean copyright laws, and liberalizing procedures regarding the approval of trademark licenses, which formerly included stringent requirements with respect to transfer of the technology underlying the trademark as well as the royalty payments and pricing of the underlying goods.

304. Patents and trademarks in Korea fall under the jurisdiction of KMITI and, more specifically, the Commissioner of the Korea Industrial Property Office. Korea has acceded to the Paris Union International Industrial Property Convention and has enacted its own patent, trademark, and copyright laws; however, it is not a signatory of any major international treaty for the protection of copyrights. Korean law does not specifically recognize the law of trade secrets, although it does indirectly protect industrial "know-how" under contract, tort, and criminal law if the "know-how" is novel, secret, and valuable.
4. Conclusion

Regulatory policies and historical factors have led to significant levels of industry concentration in both Japan and Korea. In addition, each nation has adopted financing strategies which emphasize the use of debt instruments and necessarily involve significant intervention by the government in credit allocation. Finally, research and development funding and the operation of direct investment policies are designed to facilitate the broadest distribution of new technologies among domestic firms for the purpose of competing in world markets. In each case, the practices of Japan and Korea stand in stark contrast to those in the United States.

Cooperative industry planning, financing strategies, pragmatic antitrust policies, and a coherent program of public and private research and development have all contributed to Japan's successful entry into such advanced technology industries as semiconductors, computers, telecommunications, robotics, optics, aerospace, and biotechnology. In many cases, the nation's global market share is overwhelming and has made major foreign competitors dependent upon Japanese products for use in their own products. In the future, the key issues revolve around the delicate balance between the perceived objectives of the government on the one hand, and the actual market-driven decisions of the increasingly independent firms on the other.

Industrial organization in Korea, while similar in form to the institutions that have served well for the Japanese, continues to reflect the relative immaturity of the nation's economic and business practices. In particular, Korea has yet to achieve the degree of overall industrial planning, particularly with respect to the massive research projects that must be undertaken. Moreover, significant reservations remain within the country regarding the proper role of the government and the chaebol, a situation that is exacerbated by the lack of an experienced financial and managerial elite in Korea. As such, future growth will depend as much on the resolution of various social issues as it will upon any particular set of industrial or regulatory policies.

It is no secret that the successes of the Japanese have caused American policy makers to reconsider the framework of regulation of competition among firms in the United States. Moreover, the criticism of the American manager's short-term focus is also well known, as is the need to concentrate

305. "High technology" has now surpassed "rapid growth" as the driving force behind future Japanese economic development efforts.

306. The utility of major collaborative research projects may ultimately become a function of the subject matter of the collaboration. For example, recent efforts in the chemical area have narrowed down to interaction between a single large firm and a particular research department at a university, rather than the broad-based learning effort contemplated by the research framework. Moreover, to the extent that the project involves the development of software products, rather than manufactured goods and products, it may be necessary to develop a meritocracy and task-oriented organization, rather than the group consensus approach and hierarchical organization that was so successful in other areas.
capital on the development of new technologies. Individualism and competition have long been a part of the dominant ideology in the United States and represent significant hurdles to the adoption of any policies which might permit cooperation among firms on the levels practiced by the cooperative growth economies. However, consideration must be given to regulatory reforms that will permit efforts such as cooperative research and development projects. More importantly, consideration must also be given to ideological revisionism that could permit firms to avail themselves of such projects.

E. Human Resources

1. Introduction

A nation's labor force, including the skills and traits of its workers and managers, is an important element of production. In order to strengthen the nation's overall economic performance, each worker must be motivated, through compensation or social values, to contribute to the success of the individual firm. In turn, each firm has certain duties and responsibilities with respect to the treatment of its workers and the conduct of the workplace. Accordingly, the care and nurturing of the workforce becomes a key strategic and competitive factor, both for the firm and the nation as a whole. Within Japanese and Korean firms, marked differences have emerged regarding management's attitudes toward workers as well as the worker's own vision of his responsibility to the firm.

2. Japanese Human Resources Policies

The relationship between worker and manager in Japan has been feudal in nature. The manager and the enterprise assume responsibilities for the welfare and security of the worker as he remains with the enterprise. In turn, the worker grants broad authority to his manager with respect to the operation of the business. The attitude of the Japanese worker toward the firm resembles his relationship with the state: loyalty above all and a willingness to subordinate individual concerns to the greater needs of the enterprise. As a result, the modern Japanese worker is able to contribute to the overall success of Japan's economic development efforts through a commitment to long hours, low absenteeism, and other personal sacrifices in the form of lower consumption and higher savings rates.

The Japanese government's role in developing its workforce began long before the rapid post-war growth. As the push toward modern industrialism began, a firm and rigid educational system was established with a view toward creating universal literacy and preserving the hierarchical social structure. With the military buildup during the first half of the 20th century and the massive upheaval of workers to industrial plants throughout the empire, an authoritarian sense of duty to the firm and to the nation was instilled upon the workers of Japan. Although dissatisfaction over long hours, low pay, and
unemployment created unrest during this period, attempts to develop the labor movement were nevertheless effectively suppressed by the government.

Post-war policy makers realized that attaining the nation's ambitious economic objectives would require cooperation from labor. As a result, whereas the American occupiers were attempting, unsuccessfully, to broaden the powers of enterprise unions, Japanese business leaders moved to elicit the trust of labor at both the national and firm levels. National organizations were created to develop a common understanding between business and labor regarding the nation's economic objectives and the programs necessary to achieve future competitiveness. In addition, organizations such as the Japan Productivity Center were established to provide a neutral forum where business leaders, labor leaders, government officials, and academics could work together on strategies to enhance productivity while striving to maintain low unemployment.

Total employment in Japan from 1960-73\textsuperscript{307} rose at an average annual rate of 1.3%; although there was a sharp decrease in primary sector employment, there was an increase in the manufacturing sector.\textsuperscript{308} Although the average annual rate of increase in total employment slowed to 0.8% from 1973-87,\textsuperscript{309} which was due in part to a levelling off of growth in manufacturing, employment in wholesale and retail trade and services continued to expand.\textsuperscript{310} However, while the amount of new human resources devoted to manufacturing began to decline in the mid-1970s, productivity in manufacturing rose at an average annual rate of six percent from 1975-84, compared to 2.2% in the United States and 2.4% in Germany during the same period. In the future, employment in the manufacturing sector is expected to decrease while service and finance-related employment increases.

By the end of 1987, Japan's labor force contained 59 million workers,\textsuperscript{311} sixty percent of whom were male.\textsuperscript{312} Most of the labor force was employed in the manufacturing industry, followed by wholesale and retail, services, agriculture, and construction.\textsuperscript{313} The unemployment rate stood at less than three percent of the total work force, as it had since the beginning of the decade.\textsuperscript{314} The work force is aging rapidly, with the percentage of new hires in manufacturing falling below the level of those presently in their mid-30s and early-40s\textsuperscript{315} as new graduates are attracted to the emerging high technology sectors.

\textsuperscript{307} OECD, \textit{supra} note 1, at 19.
\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{310} Id.
\textsuperscript{311} Id.
\textsuperscript{312} Id.
\textsuperscript{313} Id.
\textsuperscript{314} Unemployment in Japan, as a percentage of the labor force, was 2.6% in 1985 and 2.8% in 1986 and 1987. \textit{See} SWISS BANK CORP., PROSPECTS, \textit{supra} note 228, at 14.
\textsuperscript{315} This demographic trend could pose significant problems due to declining contributions from younger workers to pension funds in traditional manufacturing industries. Pressure may
Training and developing the nation's work force has always been a key aspect of Japanese life, consistent with the traditional value placed upon education. Although the present educational system, that was established in 1947, mandates attendance only through junior high school, by the 1980s, nearly forty percent of the entrants to the work force had attended higher education institutions, with only six percent terminating their education after junior high school. As a result, the Japanese work force is probably as well-educated, and at least as well-prepared, for dealing with complex technologies as any work force in the world. In particular, Japan has succeeded in training vast numbers of engineers and has achieved a level of average education exceeding that of competing nations in such crucial fields as mathematics and science. Such educational advantages permit rapid retraining and redeployment of human resources within the firm.

The cultural and social foundations of the employment relationship are supported by three basic laws governing labor conditions and labor relations in Japan: the Labor Standards Law; the Labor Relations Adjustment Law; and the Labor Union Law. The Labor Standards Law seeks to regulate labor contracts, wages, working hours, holidays, safety and sanitation, vacations, employment of women and minors, and accident compensation. The other two laws regulate union organization, labor agreements, labor practice, the method of arbitration, and restrictions on strikes. In addition, the Minimum Wage Law provides the Ministry of Labor with the authority to establish minimum wages for certain workers.

These laws set forth certain standards concerning wages and compensation. However, as with many aspects of Japanese industry, regulation is supplemented by custom. By and large, compensation in most Japanese firms is based on seniority and position, although there is a growing tendency to consider merit for a certain portion of overall compensation. In addition to any base salary, seasonal bonuses are an important part of overall compensation, often running from one-quarter to one-third of annual base salary levels.

build within the aging work force to expand the government's social welfare and pension systems, which currently are running a surplus.

316. The percentage of Japanese obtaining secondary education rose from 82% in 1965 to 96% in 1985. The World Bank, World Development Report 1988 281 (1988). There are 5,500 high schools in Japan, including 1,300 private institutions, but only about 100 are considered top quality. High schools are in session 240 days a year and teachers are paid very well. Japanese schools conform to a national curriculum consisting entirely of such solid academic subjects as mathematics, biology, foreign languages, and world history. Tokyo University, or “Todai,” is generally considered Japan’s most prestigious university, and indeed, while Todai accounts for only three percent of Japan’s university graduates, about a quarter of the presidents of major corporations and most of the leaders of the Foreign Ministry are alumni.

317. Monthly base salaries are supplemented by allowances such as family allowances. Firms also pay commuting costs, provide a free or subsidized meal at lunch, lease housing facilities at nominal rents or make housing loans at low rates of interests, and provide sports clubs and savings plans.
Retirement and severance payments, which usually occur at the time an employee becomes eligible for a state pension, typically involve a one-time payment of approximately forty times the worker's monthly base salary at the time of retirement.

Japan's early success in manufacturing can be attributed, at least in part, to labor costs that were lower than its competitors abroad. For example, in 1960, when Japanese technology and productivity lagged far behind that of the United States and Europe, hourly labor costs in Japan were only ten percent of those in the United States. Although Japanese hourly labor costs had risen to eighty-four percent of United States labor costs by 1987, unit labor costs, which take into account enhancements in productivity, increased at very low rates during the early 1980s. At the end of 1987, Japan's manufacturing costs were actually more competitive than they were in late 1978. Thus, Japanese workers not only work long hours, they also work productively, which can be attributed to the quality of the labor force and the training that they receive.

Management compensation in Japan, as well as that of employees, is similarly tied to the overall performance of the business enterprise. The spread between the average salaries of the highest paid executives and new recruits, particularly when measured in terms of after-tax disposable income, has been steadily decreasing over the years. Moreover, the disposable incomes of workers and managers compare quite favorably with their peers around the world, although relative purchasing power is skewed somewhat by the higher costs of such basic domestic products as food and energy. Therefore, the Japanese compensation system tends to reinforce the cooperative atmosphere between labor and management and provides a common incentive for improving the financial performance of the firm.

The Japanese employment system seeks to build long-term relationships between the worker and his firm. Employees at all levels are encouraged to

318. Restoring International Balance, supra note 4, at 22.
319. Id.
320. Unit labor costs rose at rates significantly below those in the United States in 1985 and 1987. They actually decreased by 0.1% in 1985, and rose at a rate of 2.6 and 0.6% per annum in 1986 and 1987, respectively. See Swiss Bank Corp., Prospects, supra note 228, at 14.
321. Restoring International Balance, supra note 4, at 23.
322. An average Japanese factory worker puts in 43.7 hours per week; his American and West German counterparts work 38.4 and 35.6 hours per week, respectively. In contrast, the average number of work hours of Korean industrial workers was 48 hours per week in 1988, which actually reflected a decrease from prior years. Price Waterhouse, supra note 13.
323. However, traditional worker-manager relations must be evaluated in light of the fact that class consciousness is rising in Japan. While more than 90% of Japanese responding in an opinion poll in 1988 still considered themselves to be in the middle class, 29.2% of those responding, the highest amount in 20 years, called themselves lower middle class. Japanese government statistics, moreover, show that in 1987 the landholdings of the richest fifth of the Japanese population were worth 10 times as much as those of the middle fifth. As recently as 1985, however, the gap was only 5.5 times.
find ways to assist the firm in raising productivity and to share new information with others. In turn, the firm rewards hard work by assisting the employee in his growth and development. Indeed, in many ways the purpose of the firm is to serve the interests of its employees rather than its shareholders. In general, the mutual obligations of workers and managers remain a matter of social, rather than legal, contract and have come to be supported by a loose regulatory framework relating to such things as social security, welfare rights, and certain other specified working conditions.

3. Korean Human Resources Policies

As mentioned elsewhere, the tradition of the modern firm and business enterprise is much less developed in Korea than it is in Japan. As such, many of the institutional anchors that are present in the Japanese employment system are either nonexistent or somewhat naively positioned in the Korean counterpart. In particular, the contrasts can be identified in the manner in which excess labor is handled in Korea, the fairly rapid turnover and movement between firms in Korea, the confrontational relationship that exists between the firms and the government on the one-hand and Korea's labor unions on the other, and the relatively wide dispersion of relative income levels between managers and employees. Each of the foregoing reveals an economy that has grown and matured at a pace that often exceeds its ability to address the long-term needs of its work force.

Given the labor-intensive nature of Korea's initial export efforts and the lack of significant levels of direct foreign investment, the nation has been particularly dependent upon the skills and enterprise of its own people. According to government statistics, in 1988, Korea had an economically active population of over 16 million people and officially registered unemployment of about 2.5%. Approximately 300,000 young people are expected to enter the labor force each year through the mid-1990s. They will be joined by an increasing number of women who are not presently working or looking for work.

324. Social security programs include health insurance, welfare pension insurance, employment insurance, and workmen's accident compensation insurance. The amount of social security benefits, as a percentage of national income, rose from 6.1% in 1965 to 14.0% in 1985. This amount is expected to increase to between 24% and 27% by 2010, when the elderly are expected to comprise about 20% of the population, as opposed to only 10.3% in 1983. OECD, supra note 1, at 132.

325. PRICE WATERHOUSE, supra note 13, at 3. The figure was computed according to International Labor Organization standards, which classifies as "employed" a person who works one hour or more per week. This figure is not fully comparable with unemployment statistics in the United States or Japan, which are based on a broader definition, nor does it reflect either the perceived underemployment in agriculture or the effect of high turnover among small- and medium-sized businesses in Korea. D. MACDONALD, supra note 7, at 201. Unemployment is expected to remain around 3.6 to 3.7% during the current Five-Year Plan.

326. D. MACDONALD, supra note 7, at 201.

327. Id.
By the mid-1980s, the largest component of the nation's total domestic product was services (approximately 56.0%), followed by manufacturing (approximately 30.0%), and agriculture and fisheries (approximately 13.5%).

The largest category of Korea's service sector was retail trade, which continued to consist mainly of small merchants throughout the country. At the end of the decade, the structure of the nation's economy was shifting dramatically away from the agricultural sector to the manufacturing sector. Within the manufacturing sector, further shifts will increase the share of employment in machinery, electronics, automobiles, and industrial chemicals, while significantly reducing employment in such traditional areas as textiles. A fairly steady increase in services is expected to continue.

As in Japan, the Korean population is among the world's most highly literate, with a literacy rate of over ninety percent. The school system is modeled after that of the United States; six years of elementary education are free and compulsory. Subsequent levels include three-year middle schools and three-year high schools. Currently, there are about ninety universities in Korea, and many students attend universities in the United States. There is also an extensive vocational training school system. The almost universal availability of elementary and secondary education has meant that a majority of the new entrants to the manufacturing sector have at least a middle school education.

The Labor Standards Law, Trade Union Law, Labor Disputes Mediation Law, and the Labor Committee Law constitute most of the nation's labor laws, although they have been supplemented recently by new legislation regarding employment opportunities and pensions. As administered by

328. Id. at 190.
329. Id. at 199.
330. PRICE WATERHOUSE, supra note 13, at 3.
331. Id.
332. Id. In a recent study, Japanese and Korean schoolchildren in grades four and five had the highest level of achievement among the 15 major countries surveyed. In grades eight and nine, the Japanese and Koreans ranked second and sixth, respectively. While rankings were unavailable for Korean science students in grade 12, Japanese students ranked fourth in chemistry and physics and tenth in biology. In the same survey, United States students failed to achieve higher than a ranking of eighth in any given category.
333. Id. at 35.
334. An equal opportunity law applicable to all employers with five or more employees went into effect on April 1, 1988. The law requires that covered employers provide equal opportunity in recruitment, employment, education, assignment, promotion, retirement, and termination. The law also provides that marriage, pregnancy, and childbirth are not valid grounds for dismissal.
335. Effective January 1, 1988, a National Pension System was enacted under the National Pension Law covering residents aged 18 to 59 in Korea. The program is financed by monthly subscription fees paid by the employees and their employers. By 1998, it is expected that a total premium of nine percent of employee gross wages will accrue to the employees' account, shared equally by the employer, the employee, and the fund itself. Although severance pay and certain other specific benefits are available, employers are not required to provide unemployment, disability, retirement, or death benefits. Normal retirement age is 55, but exceptions are common
the government, these laws have been construed to restrict the rights of workers and the activities of labor unions. A national labor federation, the Federation of Korean Trade Unions, and sixteen national industrial federations existed in Korea in 1987. However, unions are forbidden from undertaking specific negotiations without government approval and remain subject to other restrictions.

The Labor Standards Law is the basic legislation governing working conditions in Korea. Although mandatory benefits are basically limited to severance pay and certain medical insurance, there is a wide range of non-mandatory but common fringe benefits supplied by Korean firms to their employees. Fringe benefits comprise fifty to sixty percent of a wage-earner's salary and bonuses of one month's salary or higher are paid several times a year. A Minimum Wage Law, applicable to all manufacturers who employ ten or more persons, was enacted on December 31, 1986 and became effective on July 1, 1987.

Wage levels rose, in both real and nominal terms, from the early 1960s to the early 1980s. In fact, high inflation during the latter part of that period caused hourly compensation for manufacturing workers to rise faster than productivity. Fearing a threat to Korea's competitiveness in world markets, the government sought to reduce inflation through reductions in the rate of growth of public sector wages, administrative wage and price controls, and

with respect to civil servants and senior executives, as well as in the case of family-owned businesses.

D. MACDONALD, supra note 7, at 202.

Labor unions at individual plants can bargain collectively and their members have the right to strike; however, the use of violence in labor disputes is prohibited. Labor-management councils, separate from the unions, exist at each plant to deal with day-to-day matters such as training and working conditions. Id.

As well as forbidding arbitrary dismissals, the law prescribes minimum working conditions. Employees are entitled to one paid vacation day per month; these days may be accumulated. An employee is entitled to eight days vacation with pay after one full year with perfect attendance. PRICE WATERHOUSE, supra note 13, at 38. There are also 18 statutory holidays.

In addition, many companies provide lunches for employees, commuter services, housing allowances, housing loans, and cash gifts at weddings and funerals. Some larger firms provide uniforms, recreational facilities, and educational subsidies. For a job-related injury, industrial accident compensation generally provides that the employer pay medical costs and sixty percent of the employee's ordinary wages during the period the employee is out of work. In case of death, 1,000 days of wages and funeral expenses must be furnished to the employee's family. For firms employing five or more workers, industrial accident compensation insurance is mandatory. Working hours differ from industry to industry; however, in manufacturing industries, the general average is eight hours a day, six days a week. Koreans work an average of 2,700 hours per year, 40% and 25% more than Americans and Japanese, respectively. Korea: Pre-Olympic Hoopla and Miraculous Economic Growth Mask Deep Social and Political Problems that Must Soon Be Faced, BUS. WK., Sept. 5, 1988, at 46.

PRICE WATERHOUSE, supra note 13. The minimum wage is determined by the Minimum Wage Deliberation Committee prior to November 30 of each year. The minimum wage for 1988 ranged from 111,000 won to 117,000 won per month. By January 1, 1993, the minimum wage system is to be expanded to cover all business with five or more employees.

D. MACDONALD, supra note 7, at 201.

Id.
moral suasion in private sector wage settlements. As a result of these efforts, real wage increases for production workers during the mid-1980s were marginal. Indeed, Korea's absolute wage levels actually trailed those of other developing countries such as Brazil and Mexico.

A large schism remains with respect to the relative levels of education, salaries, and status between blue-collar workers on the one hand and clerical workers, engineers, and other highly trained technicians and management on the other. Salary ranges for executives and professionals vary widely, depending upon the industry, the firm, and the seniority and position of the individual. Generally, however, managers in a typical manufacturing company receive 1 million to 1.2 million won per month, with an annual bonus equal to another four months salary. Senior management's base compensation can equal four times that of mid-management's, and they also enjoy a number of other benefits, including cars and drivers, club memberships, confidential expense accounts, housing subsidies, and loans.

In contrast, the average worker's wage was 269,000 won per month in 1985, with the highest wages paid in construction and the lowest in wearing apparel. However, at the end of 1985, 8.9% of manufacturing workers received less than 100,000 won per month, and almost a third of them were in the textile industry, a traditional employer of young and unmarried women who are not primarily responsible for family income. Industry-wide, three to five hundred thousand workers, most of them women, earned no more than 100,000 won per month.

Steady, albeit slow, growth of wages and benefits, together with government controls, were sufficient to avoid massive labor unrest through the mid-1980s, except during such periods as the oil shock year of 1979 and again in 1987. Tensions regarding the repression of labor and the low wage levels for blue-collar workers boiled to the surface in the summer of 1987, as strikes, sit-ins, and over 3,000 labor actions erupted throughout the country. The unrest was also due to unsafe working conditions repeatedly ignored or inadequately controlled by overworked government inspectors. The labor strife

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344. Price Waterhouse, supra note 13, at 12.
345. Id. at 36.
346. D. Macdonald, supra note 7, at 201.
347. Id.
348. Id.
349. Id.
350. While there were just 276 labor actions in Korea during 1986, there were an unprecedented 3,529 actions in 1987. The level of distrust between management and labor continues to grow since both sides have reneged on agreements. Foreign companies have been the targets of recent labor disputes, with demand being made for the introduction of Korean-style management practices, increasing the equity investment commitment to Korea, reinvestment of all profits in Korea, and the "Koreanization" of business strategies and marketing plans. The EPB estimated that work stoppages and other labor disruptions in the first five months of 1989 cost the nation about $2.3 billion in direct and indirect export losses.
of 1987 led, in part, to significant increases in workers' wages, particularly in the manufacturing sector.\footnote{352}

For all of the hierarchical inequities regarding wages among workers and managers in Korea, efforts to build the nation's labor union movement have historically proven quite ineffective. Organized labor activity has been severely circumscribed by government and business leaders, both for alleged security reasons\footnote{353} and in order to allow the government to retain control over any increase in price levels that might adversely affect Korea's competitive cost advantages with respect to export products.\footnote{354} Although less than seven percent of the labor force were members of any union in 1987,\footnote{355} since that time labor strife has contributed to a rapid increase in the number of labor unions. Moreover, the unions themselves have become much more organized.\footnote{356}

The resultant hostility between worker and manager, reflected in the high turnover rate experienced by small- and medium-sized businesses, has created tremendous domestic social pressures and impeded the nation's ability to build the sense of family between the worker and the firm that has evolved in Japan. Korean firms do not provide their employees with Japanese style lifetime employment, and, until recently, neither the government nor individual firms had paid any attention to issues of retention, unemployment, disability, retirement, and death benefits.\footnote{357} Such practices have exacerbated the worker's fundamental ideological distrust of the present political and industrial elite and have deprived policy makers of the planning flexibility that would accompany the support of a talented pool of labor.

\footnote{352}{The labor-management disputes in the manufacturing sector and the nation's brisk economic activity during 1988 led to a 62.5% increase in wages between September 1987 and May 1989. From 1980 to 1988, the average yearly wage per employee paid by companies employing over ten people in Korea increased from less than $4,000 to about $7,500. \textit{Price Waterhouse, supra} note 13, at 3. The government announced policy guidelines which would restrict subsequent wage increases to no more than ten percent, but even the most optimistic government planners are doubtful that the ceiling will be in effect soon. Berger, \textit{Economic Crunch Hits South Korea}, The San Francisco Chron., July 11, 1989, at C1, col. 1.}

\footnote{353}{Repression of the labor movement has driven many labor leaders to uneasy alliances with other domestic groups, including university students, that have been involved in violent demonstrations in an effort to obtain basic political and social reforms within Korea.}

\footnote{354}{D. Macdonald, \textit{supra} note 7, at 202. The inability of the government to effect further restraints on the rate of wage increases is expected to cause Korean firms to attempt to shift production activities which are no longer competitive to overseas markets while keeping value-added product lines at home, introduce more automation to cut production costs, and invest in new technology to add value to existing products. Each of these strategies, which were successful in Japan, will be far more difficult in the less mature and smaller Korean market.}

\footnote{355}{\textit{Price Waterhouse, supra} note 13, at 36.}

\footnote{356}{\textit{Id.} at 12.}

\footnote{357}{The Labor Standards Act was amended in 1989 to reduce the number of standard work hours, extend vacations, make layoffs more difficult, and change provisions regarding overtime work payment. These changes are believed to add considerable costs to employers. \textit{Id.} at 13.}
4. Conclusion

In Japan and Korea the relationship between worker and manager, as well as the role of the firm and the educational system, are deeply rooted in historical and ideological tradition. In both nations the employment relationship is based on a mixture of regulation and custom, with hierarchy and seniority playing a significant part in defining the respective roles of each employee. Until recently, worker compensation has been based on the overall performance of the firm, rather than any particular merit-based scale. However, for Korea, wages remain a key competitive factor, and as such are subject to reduction in many instances when external pressures cause managers to search for cost-reduction alternatives.

Several issues will confront the traditional system of Japanese employment in the years to come, some of which are attributable to the rapidly changing character of the nation's economic activities as well as to the demographics of the work force itself. Commentators anticipate a number of changes in traditional Japanese management practices, including a deemphasis of seniority and bonus-based compensation and a corresponding movement toward performance-based evaluation. Moreover, firms will need to develop new methods for designing the relationship between older workers and the enterprise, including the training required to redeploy resources from manufacturing into high technology or service-based businesses. Changes of this type may well influence the cost structure of Japanese businesses, as well as the spirit of cooperation, rather than competition, that existed within the firm.

In the future, the Korean government and the nation's firms must simultaneously balance costly development projects in the area of new technology with the need to reduce the tensions between labor and management through appropriate wage increases, training programs, and redistribution of profits from business activities. Such changes appear to be necessary in order to establish long-term order between the government, the workers, and the firms. It must be done in a manner, however, which does not materially impede the nation's remaining labor cost advantage, at least until technology is available to achieve the requisite levels of productivity in the new industrial

358. Japan has a relatively low proportion of its population over the age of 65, but that is expected to change rapidly in the next 20 years. RESTORING INTERNATIONAL BALANCE, supra note 4, at 50.

359. Income distribution in Korea is a volatile issue. The top 10% of all households accounted for 29.5% of national income in 1980 and only slightly less, 28.3%, in 1985. BUS. WK., Sept. 5, 1988. The bottom 10% earned only 1.6% in 1980, and the increase in that figure to 2.1% by 1985 was hardly considered to be acceptable. In addition to income differentials, regional development has also been uneven, with 70% of the nation's wealth concentrated in Seoul, which contains just one quarter of the nation's population. Certain regions are considered to be at least a decade behind Seoul in terms of development, at least as measured by public works projects, railroads and ports, industrial complexes, and educational facilities. See generally BUS. WK., supra note 340.
sectors. Moreover, workers in Korea's own declining industries will either need to be retrained or encouraged to retire.

Education is an important value in both Japan and Korea. It remains a path to success in both Japan and Korea and the pursuit of the best education continues to dominate the lives of children and their families. As such, governments in both nations have attempted to remove inequities between children of different social classes so that all students may pursue both a university education and the civil service and management careers that lie beyond graduation.

Several lessons are available to the United States from the human resources practices in Japan and, to a lesser extent, Korea. Most importantly, Japanese firms have attempted to instill a sense of cooperation, loyalty, and security into the employment relationship, narrowing the spread between worker and manager compensation and inducing workers to participate in cooperative efforts to enhance the overall productivity of the firm. In addition, although the actual policies in each nation differ substantially, much can be learned from the efforts in Japan and Korea in effectively redeploying human resources into areas that offer more competitive opportunities for the nation's economy as a whole.

V. CONCLUSION

The lessons of Japanese and Korean industrial policies, as well as the regulatory framework constructed in each nation to support those policies, are relevant to American businesspersons in a number of contexts. In particular, a business relationship or strategy that involves a Japanese or Korean firm, or that promises to elicit a competitive response from a Japanese or Korean firm, can benefit from an analysis of one or more of the following issues.

1. Ideology. Before undertaking any particular competitive action, be it a direct investment or a technology licensing arrangement, care must be taken to develop an understanding of how that particular transaction fits into the overall system of economic and social values of the nation within which the firm must operate. For example, in transactions involving the transfer and use of significant competitive information, Japanese and Korean attitudes regarding the rights of the individual to effectively utilize such information to the exclusion of others, must be kept in mind. This is important because ideological factors may lead to a different result concerning the regulatory framework governing intellectual property matters.

2. Government Policies. The actions of domestic firms in Japan and Korea will be undertaken in a manner that is consistent with the nation's industrial policies. A review should be made, therefore, of the regulatory and non-regulatory factors within each industry that might be affected by the competitive act: financing practices of the domestic firms; export and import
regulations, as well as non-tariff barriers and distribution strategies, which affect the operation and performance of the domestic firms; the impact of inbound and outbound investment policies and practices on the performance and strategies of domestic firms; the regulation of competition and cooperative practices in that industry; and, finally, the role that the industry is playing in the nation's overall economic strategies.

3. **Financing and Stakeholder Interests.** The financing of Japanese and Korean firms, and the motives of their various stakeholders, differs substantially from those of their counterparts in the United States and Europe. Factors that should be considered in determining how Japanese and Korean firms are financed include: the interests of the government, as evidenced by lending from government-controlled banks or special grants from the government budget; the interests of commercial banks and the underlying regulatory policies that affect the allocation of credit; and the interests of shareholders, including the ratio of equity to debt financing and the characteristics of the shareholder group.

4. **Locus of Competition.** Finance and industrial policies are designed to permit domestic firms to compete in global markets; indeed, the key competitive factor for a domestic firm may be derived simply from one or more of the practices referred to above. Nonetheless, it is also important to understand the key locus of competition, as perceived by the domestic firms. For example, they may seek an advantage from low-cost production and manufacturing or economies of scale from increasing market share, or instead attempt to capitalize on new technology, marketing and distribution strategies, product quality, or service. Once the locus of competition has been identified, it is then necessary to understand the strategies to be used in those areas and the financial and social costs of those strategies to the firm and the nation.

5. **Macroeconomic Strategies.** Each of the industrial policies followed in Japan and Korea, as well as a substantial amount of the financing activity engaged in by particular firms, must be undertaken in light of the broader fiscal and monetary policies of each nation. Accordingly, consideration should be given to policies regarding inflation and prices, the level of domestic demand, infrastructure planning, internal and external deficits, and the government's ability to provide future direct financial assistance to firms in a particular industry.

The examination of the cooperative growth economies also provides a framework for analyzing how a nation, as opposed to individual firms and industries, might decide to organize its regulatory framework and establish its overall economic objectives. Accordingly, policy makers in any nation could consider the following issues.

1. **Ideology.** Once again, ideology is the driving force behind the various policies with the best chance of success. The economic prospects of any nation are obviously not completely a function of its ideology. However, the
ability of a nation to adopt new attitudes may be a powerful factor in its ability to make fundamental changes in its economic and political system.

2. The Role of the State. In the cooperative growth economies, the state acts as the catalyst for many of the actions of private industry. It attempts to provide consultation and administrative guidance and is actively involved in the allocation of capital and technology among private firms through direct loans and subsidies, research and development funding, and the manner in which it administers the nation's regulatory policy in imports, exports, and direct foreign investment.

3. The Role of Business. Private industry in the cooperative growth economies often acts as the agents of the state in pursuing the national interest. Firms in both Japan and Korea have been held to quite high standards regarding their performance and the role they play in assuring the individual welfare of their employees. In turn, the government has allowed such firms to grow without significant challenge from domestic antitrust concerns and, particularly in the case of Japan, without significant challenges in the home market from foreign competitors.

4. The Role of the Worker. There is no common thread between the experiences of Japan and Korea regarding the use and management of the nation's human resources. While Japan has been successful in managing the needs of its work force through such practices as lifetime employment, performance-based bonuses, and worker participation, trends toward merit-based compensation and a desire for alternative employment paths bring uncertainty to Japan's future human resources policies. Korea's human resource situation has been, and will remain, unsettled and leaves little to recommend in the way of policy.

5. Trade Policies. Indeed, Japan and Korea have both used international trade as a means of growth and development, and every decision regarding the import of goods, technology, or capital from abroad has been made in the context of an overriding, strategic objective regarding the role of trade for the nation.

6. Competition Policies. For Japan and Korea, the objective of competition is to assure the largest market share for the nation in the domestic and export markets. Accordingly, antitrust policies focus not on industry concentration because of the importance of economies of scale, but rather on unfair business practices. Moreover, particularly in Japan, competition has been affected by a series of nonregulatory barriers with respect to such things as the distribution and bidding systems in various markets.

7. The Management of Innovation. In a marketplace where the development and commercialization of innovation has become a key element, a nation's policies regarding the development and use of technology are extremely important. Particularly in Japan, cooperative research and development projects, jointly funded and supported by government and industry, have been used successfully to develop new technologies. Correspondingly,
the intellectual property laws of Japan and Korea, designed to protect the rights of individual firms and inventors, have been criticized by the United States and Europe as insufficient.

8. *The Role of Education and Training*. Historically, both Japan and Korea have placed great value on the role of education and training. In each case, the nation's citizens have exhibited talents in key areas which are easily adaptable to its commercial goals and objectives. However, Japan and Korea must continue to assess the linkages between the content of their educational systems and the needs of the marketplace. This is necessary not only to ensure that new entrants have viable employment opportunities, but also to maintain the flexibility of the work force to quickly adapt to changes in the global marketplace.

The economic successes of Japan and Korea have resulted, to some extent, from the ability of each nation to set and maintain a number of economic goals and objectives, and to achieve a consensus regarding the manner in which they would be pursued and attained. Although the history and ideology of each nation contributed to its ability to reach the necessary decisions, the process is not necessarily unique to Japan and Korea. Moreover, there is no particular guarantee that policies of the past will continue to provide the answers in the future. However, the opportunity to analyze a different perspective can provide managers and policy makers in other nations with a framework for making many of their own decisions.