

The U.S. - Japan Semiconductor Dispute: Implications for U.S. Trade Policy

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ARTICLES

SYMPOSIUM: RECENT DEVELOPMENTS IN THE UNITED STATES TRADE DEFICIT AND FREE TRADE

THE U.S.-JAPAN SEMICONDUCTOR DISPUTE: IMPLICATIONS FOR U.S. TRADE POLICY

WILLIAM J. LONG*

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I. INTRODUCTION: THE CONTEMPORARY SETTING FOR U.S. TRADE POLICY

In an innovative approach to discerning the governing norms of international law, W. Michael Reisman proposes the use of international incidents as epistemic units.¹ He defines “incidents” as “an overt conflict between two or more actors in the international system.”² The resolution of incidents “may be a more reliable indicator of international law than are codes or case law.”³ This analysis of the U.S.-Japan semiconductor dispute can be seen as consistent with this approach.

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1. Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, in *INTERNATIONAL INCIDENTS* 15 (Reisman & Willard eds. 1988).

2. *Id.*

3. *Id.* at 16.

However, as a political scientist equally accustomed to viewing international law not only as a subfield of law, but as a subfield of the wider discipline of international relations, this author considers the notion of using case studies of particular incidents or issues rather than cases to discern elite norms, such as those relied upon by Mr. Reisman, as less than a revolutionary methodology. Case studies or issue-oriented approaches to understanding international political events have enjoyed a long and generally successful history.⁴

By drawing from the discipline of international relations, this paper offers two potential methodological refinements to the international incidents approach to international law. First, it offers a means for determining which incidents are important. Reisman notes that the formulation of criteria by which incidents are selected is a formidable challenge, yet he offers no method for meeting this challenge. This paper maintains that, at least in matters of international trade, issues can be characterized in terms of their importance, what one writer terms their "valuation intensity,"⁵ by considering their interconnectedness to actors in the system, such as powerful states, and their generality, defined in terms of the degree of abstraction, in defining the issue and its ability to generate secondary and tertiary issues.⁶

Second, the method for defining the scope of incidents⁷ can be more precisely delineated than Reisman suggests. Issues or incidents move through definitive stages: origination, crises, resolution or dormancy, and in this case, a denouement.⁸

4. See, e.g., ROBERT RANDLE, *ISSUES IN THE HISTORY OF INTERNATIONAL RELATIONS* (1987); Vasquez & Mansbach, *The Issue Cycle: Conceptualizing Long-term Global Political Change*, 37 *INT'L ORGANIZATION*, Spring 1983, at 257-79; Rosenau, *Theorizing Across Systems: Linkage Politics Revisited*, in *CONFLICT BEHAVIOR AND LINKAGE POLITICS* (J. Wilkenfeld ed. 1973).

An incident approach is also not without its inherent problems; however, Theodore Lowi noted the limitations that often attend case studies: "It seems to me that the reason for the lack of interesting and non-obvious generalizations from cases and other specific empirical studies is clearly that the broad-gauge theories of politics are not related, and perhaps not relatable to observable cases." Lowi, *American Business, Public Policy, Case Studies and Political Theory*, 16 *WORLD POLITICS* 686-87 (1964).

5. This term is taken from the typology developed by Robert Randle in his recent work; see RANDLE, *supra* note 4, at 2. Randle defines valuation intensity as "the extent to which (but principally, the intensity with which) peoples and their leaders value an issue and its subject matter." *Id.*

6. *Id.* at 5.

7. See Reisman, *supra* note 1, at 21.

8. Vasquez and Mansbach have developed a typology for the stages of issues: genesis, crisis, ritualization, and resolution and dormancy. Vasquez & Mansbach, *supra* note 4, at 257-79.

This article begins by considering the contemporary and historic setting for the U.S.-Japan semiconductor dispute. This normative baseline is revisited at the end of the article when assessing the impact of the semiconductor incident for the U.S. and the international trading systems. The article also assesses the importance of the semiconductor incident and traces the evolution of this issue from the United States' perspective.

As reflected in recent U.S. bilateral and multilateral trade initiatives undertaken by the executive branch and the omnibus trade and competitiveness bill recently passed by Congress, the norms and institutional arrangements of U.S. trade policy could be changing rapidly. In large measure, the potential changes in American trade law and policy come in response to challenges posed by alterations in the global trading, production, and financial systems. Foremost perhaps is the decline in American hegemony and the emergence of a more pluralist international order characterized by the rise of Japan, the European Community, and several of the newly-industrializing countries as global trading powers. Relatedly, the nature of production has changed. Production of goods has become increasingly internationalized and trade patterns and technology transfers have altered accordingly. Firms now invest both in extraction and manufacturing on a global scale wherever factor prices or other inducements, often government-inspired, suggest the greatest profitability. Financially, the size and speed of currency exchanges dwarf the flow of goods and services. As a result, exchange rates set in global currency markets now drive trade patterns rather than the converse. These and other dramatic changes in the international economic system have created uncertainty as actors seek a means of accommodating such changes on both domestic and international planes.

Although many of these changes are not new and the process of change is ineluctable, the impact of these changes on the United States was not fully appreciated until recently, when, coupled with huge fiscal imbalances and tight monetary policy, the United States found itself with high interest rates and an overvalued dollar leading to overpriced exports and unprecedented trade and payments deficits. This national crisis for the United States, coupled with the perception of executive branch inaction on trade in the early 1980's, set in motion important domestic responses, first in Congress, then in the Executive.

Domestically, the resolution of the current trade crisis could lead to a realignment among domestic actors in the area of U.S. trade policy and impair the tacit understanding between Congress and the Executive that insured a general commitment to an open trading system. For example, diminution in the Executive's initiative and authority in shaping trade policy as a consequence of trade law reform could dimin-

ish America's commitment to liberal trade and the GATT system.

The immediate American foreign policy responses to its trade problems have included efforts to revitalize and expand the scope of the GATT negotiating process and initiate bilateral trade negotiations addressing several of these issues with Japan and other nations. The most significant recent examples of bilateral accords include the recently concluded U.S.-Canada Free Trade Agreement, the U.S.-Japan trade agreement on semiconductors, and a host of market-opening sector-selective ("MOSS") negotiations with Japan in varying stages of completion.⁹

Against this backdrop of change, if not crisis, in U.S. trade policy, this article will examine the recent, albeit not fully resolved, issue of import pricing of Japanese semiconductors¹⁰ and foreign market access for U.S. semiconductors in Japan as a case study of an important trade issue whose resolution may be significant in understanding the future course of both U.S. trade politics and policy and the U.S. role in the international trading regime. The immediacy of this issue means that any conclusions drawn from it are somewhat tenuous. Nonetheless, consideration of recent developments in the dispute may serve to demonstrate potential changes in domestic political processes and international trade politics and offer insights into interpreting near-term trends in these political systems.

Before turning to the issue, however, it is necessary to describe briefly the history of U.S. trade policy to provide a benchmark by which to assess the impact of the semiconductor dispute.

II. U.S. TRADE POLICY IN HISTORICAL PERSPECTIVE

Since World War II, U.S. trade policy has been characterized by four major themes. First, American economic interests have become

9. The U.S. and Japan have produced MOSS agreements in sectors such as telecommunications, medical equipment/pharmaceuticals, electronics, forestry products and transportation machinery. See UNITED STATES GENERAL ACCOUNTING OFFICE, U.S.-JAPAN TRADE: TRADE DATA AND INDUSTRY VIEWS ON MOSS AGREEMENTS (Feb.1988); UNITED STATES GENERAL ACCOUNTING OFFICE, U.S.-JAPAN TRADE: EVALUATION OF THE MARKET-ORIENTED SECTOR-SELECTIVE TALKS (July 1988).

10. Generically, semiconductors are any material with properties of both a conductor and an insulator, often enclosed in silicon. The specific trade dispute between the United States and Japan centered on EPROM and DRAM semiconductor chips. EPROM, Erasable Programmable Read Only Memory, chips permit the storage of frequently used information that the user may erase and replace with new information when necessary. DRAM, Dynamic Random Access Memory, chips store digital information that can be changed by the user and constitute the basic storage element in a computer.

linked gradually, but increasingly, to the international trading system. In aggregate terms, U.S. export dependence has grown from about five percent in the late 1950's to twenty percent in 1980. United States import dependence has followed a similar course.¹¹

Second, trade policymaking in Congress and the Executive has become increasingly democratized and linked more closely with domestic constituencies. Historically, trade policymaking in Congress has been the virtually exclusive province of the Senate Finance and House Ways and Means Committees and, more particularly, their powerful chairmen. Recently, however, the proliferation of trade policy issues and the diffusion of jurisdiction over such issues have reached unprecedented proportions. During the 100th Congress, more than a dozen committees shared jurisdiction over trade and competitiveness legislation in the Senate and a similar number of committees shared jurisdiction in the House.¹² The current trade bill has required a conference committee composed of nearly 200 members of Congress.¹³ In the executive branch, trade policymaking is also decentralized. Although the actual players vary with the issue, the key executive players often include the Treasury, Commerce, State, Agriculture, and Labor Departments, the Office of the U.S. Trade Representative, and the Council of Economic Advisors.¹⁴

Third, since the mid-1930's, executive department strength and initiative in conducting U.S. trade policy has grown steadily and has constituted a bulwark for free trade norms. As discussed with great subtlety in the works of I.M. Destler¹⁵ and Robert Pastor,¹⁶ the executive branch has successfully held at bay repeated congressional attempts to fashion protectionist legislation in response to the demands of particu-

11. Export dependence measures industrial exports as a percentage of total domestic industrial production. Import dependence measures industrial imports as a percentage of total domestic consumption. 1 REPORT OF THE PRESIDENT'S COMMISSION ON INDUSTRIAL COMPETITIVENESS, GLOBAL COMPETITION 36 (1985).

12. See, e.g., Pub. L. No. 100-48, 101 Stat. 931 (1987).

13. *Id.*

14. In addition to these agencies and departments, the Reagan Administration's cabinet-level Trade Policy Committee which coordinates interagency policy-making in international trade matters includes the Defense, Interior, Transportation, and Energy Departments, the Attorney General's Office, the Office of Management and Budget, the National Security Council and the International Development Cooperation Agency.

15. See AMERICAN TRADE POLICY UNDER STRESS (Institute for International Economics 1986); MAKING FOREIGN ECONOMIC POLICY (Brookings Institution 1980).

16. See *The Cry-and-Sigh Syndrome: Congress and Trade Policy*, in Making Economic Policy in Congress (A. Schick ed. 1983); CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY 1929-1976 (1980).

lar industrial sectors and labor groups hard hit by foreign competition. The domestic politics of trade is characterized by Destler as "protection for Congress." By this characterization, Destler means a tacit understanding between the branches whereby the Executive or executive agencies respond to and abate congressional demands for protection for politically important groups by fashioning partial relief from fairly or unfairly traded imports in exchange for a congressional delegation of authority and support for American-sponsored and Executive-negotiated international free trade. In short, Congress makes noise, the Executive accepts the political heat; a special deal is struck for special cases when necessary, most often through relatively depoliticized administrative remedies;¹⁷ and the specter of congressional protectionism recedes.

Finally, American trade policy has reflected a movement away from high tariff protection embodied in the Smoot-Hawley tariff of 1930 to a liberal trading system based on diffuse reciprocity and multi-lateral mechanisms embodied in the GATT and its institutions.¹⁸ A belief in the advantages of liberal free trade was the hard-won lesson of the Smoot-Hawley tariff.¹⁹ The first significant domestic manifestation of liberal free trade ideology was a series of bilateral initiatives carried out under the Reciprocal Trade Agreements Act of 1934 (the "1934 Act").²⁰ The 1934 Act set the course for modern trade policymaking. It provided a delegation of constitutional authority from the Congress to the President to declare reductions in U.S. tariffs by as much as fifty percent in return for equivalent concessions from other governments;²¹ it did so, however, on a very short string of three years. Presidential tariff reduction authority has been periodically renewed by Congress

17. U.S. trade law offers a host of remedies to import impacted domestic industries, *if* certain conditions are met. The focus of the statutes vary as does the standard of injury that must be proven and the nature and certainty of relief. Regarding the politicization of administrative trade remedies, compare Ehrenhaft, *The Judicialization of Trade Law*, 56 THE NOTRE DAME LAWYER, Apr. 1981, at 595. with Finger, Hall & Nelson, *The Political Economy of Administered Protection*, 72 AM. ECON. REV. 452 (1982).

18. KENNETH W. DAM, *THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION* 10-11 (1970).

19. Judith Goldstein in a recent article noted how prevailing U.S. free-trade institutions can be traced to the experience of the Great Depression. Goldstein, *The Political Economy of Trade: Institutions of Protection*, 80 AM. POLI. SC. R. 161 (1986).

20. See IM DESTLER, *AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS* 1 (1986).

21. In the 11 years following enactment of the Reciprocal Trade Agreements Act of 1934, a series of bilateral negotiations with major U.S. trading partners succeeded in reducing the average Smoot-Hawley tariff by about one-third. CONGRESSIONAL BUDGET OFFICE, *THE GATT NEGOTIATIONS AND U.S. TRADE POLICY* 27 (1987).

since that time, usually for three to five years, sometimes for shorter periods.²²

Following World War II, multilateralism also became a cornerstone of U.S. trade policy. In 1947, the United States and twenty-two other nations signed the GATT, an agreement consisting of a code of tariff practices together with schedules of tariff concessions on more than 45,000 items accounting for more than one-half of world trade.²³ In replacing bilateral trade negotiations, the GATT institutionalized on a multilateral basis the principle of nondiscrimination in trade barrier reductions on a most-favored-nation ("MFN") basis.²⁴ MFN obliges each member of the GATT to treat other GATT members at least as well as it treats any other country with regard to imports and exports.²⁵ In the early years of the GATT, the United States tolerated discrimination against the access of U.S. products to the Japanese and fledgling European Community markets on grounds of aiding their rapid post-war recovery and the political advantages of an integrated Europe and a Western-leaning Japan.²⁶

Equally essential to the operation of the multilateral trading system is the GATT principle of reciprocity. Although not defined in the GATT, reciprocity ensures that the outcome of negotiations leads to roughly equivalent benefits in any final agreement concluded under GATT auspices.²⁷ The other key principles that underlie the GATT include resolution of trade disputes through open and transparent consultations, general elimination of quantitative restrictions, national treatment (treating imported products of a member country the same as domestic products with regard to internal taxation and regulation), and giving compensation to affected countries for rescission of a previously granted tariff concession.²⁸ United States import and trade policy has generally followed this institutional framework and GATT rules ever since.²⁹

22. *Id.*

23. ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 45 (1975).

24. *Id.* at 17.

25. DAM, *supra* note 18, at 18-19.

26. For a discussion of concessions made by hegemonic economic powers see Stein, *The Hegemon's Dilemma: Great Britain, the United States, and the International Economic Order*, 38 INT'L ORGANIZATION, Spring 1984, at 355.

27. *Id.* at 17.

28. *Id.* at 17-22.

29. This statement is not meant to imply that certain U.S. trade policies have not departed from GATT norms; most notable in this regard are the Multifiber Agreement governing trade in textiles and apparel and voluntary export restraints, such as the

III. ISSUE IMPORTANCE

How important an issue is the U.S. - Japan semiconductor dispute? Why does this issue merit investigation? Any answer to these questions is, admittedly, heuristic, rather than conclusive. Nonetheless, one way of assessing an issue's importance is its interconnectedness to actor states within the international system, particularly actors of consequence to the system.³⁰ In the case of semiconductors, the issue linked the trading system's two preeminent economic powers.³¹ Also implicated in the dispute were the European Community ("EC"), a major consumer and a minor manufacturer; Korea, a consumer, emerging manufacturer, and assembler; and several nations in Latin America and Asia that perform a variety of assembly operations.³²

A second indication of importance of the dispute is the intensity and degree of generality and abstraction with which key actors frame the issue.³³ In the United States, semiconductor manufacturing capability and competitiveness have become synonymous with U.S. industrial health. The Congressional Office of Technology Assessment has stated that "it is probably not an exaggeration to say that the semiconductor industry and particularly the application of a semiconductor manufacturing technology, are now the future of an advanced industrial economy."³⁴ This assertion is, in considerable measure, based in fact. Semiconductors are integral to the electronics industry which accounted for \$250 billion in 1986 or fifteen percent of U.S. industrial output.³⁵ Some estimate that by the year 2000, the semiconductor-dependent sector of the U.S. economy will account for twenty-five percent of gross national product.³⁶

Competitiveness in this sector is also viewed as integral to U.S.

U.S. - Japan agreement on automobile imports from Japan.

30. Robert Randle has identified this connectivity factor as one indicia of issue importance. See RANDLE, *supra* note 4, at 2.

31. TIMOTHY J.C. O'SHEA, THE U.S.-JAPAN SEMICONDUCTOR PROBLEM 22 (1988).

32. Borrus, Millstein & Zysman, *Trade and Development in the Semiconductor Industry: Japanese Challenge and American Response*, in AMERICAN INDUSTRY IN INTERNATIONAL COMPETITION 174 (J. Zysman & L. Tyson eds. 1983).

33. *Id.* at 3.

34. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, U.S. INDUSTRIAL COMPETITIVENESS: A COMPARISON OF STEEL, ELECTRONICS AND AUTOMOBILES 103-04 (July 1981); U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGY AND THE AMERICAN ECONOMIC TRANSITION: CHOICE FOR THE FUTURE (May 1987). See also Borrus, Millstein & Zysman, *supra* note 32, at 143, 149.

35. Dallmeyer, *National Security and the Semiconductor Industry*, TECHNOLOGY R., Nov.-Dec. 1987, at 48.

36. See *id.* at 55.

national security. In a cost-benefit analysis of federally funding a semiconductor research consortium, the Congressional Budget Office summarized the national security implications of semiconductor manufacturing competitiveness as follows:

U.S. military strategy relies on having fewer, but technologically more advanced, weapons than the Soviet Union. The concern of military planners is that deterioration of U.S. semiconductor producers could soon lead either to dependence on foreign sources for components for sophisticated weapons systems, or to a decline in the technological base needed to develop and use these components.³⁷

Perhaps the most telling example of this national security concern was the interest the U.S. government took in the announcement by Fujitsu, the Japanese multinational corporation, of an "agreement in principle" with Fairchild Semiconductor, an American company owned by a French parent, to merge Fujitsu's U.S. and European semiconductor operations with Fairchild's.³⁸ The proposal raised immediate concerns among industry officials, Congress, and the Executive.³⁹ The proposal prompted a review by the interagency Committee of Foreign Investment in the United States ("CFIUS").⁴⁰ Neither CFIUS, nor the President pursuant to its recommendation, has legal authority to bar takeovers, but a negative recommendation usually acts to discourage a proposed takeover.⁴¹ When it became clear that Secretary of Commerce Malcolm Baldrige and Secretary of Defense Casper Weinberger would oppose the deal, Fujitsu withdrew its offer.⁴² Six months later, National Semiconductor, an American firm, purchased Fairchild for \$122 million.⁴³

Another indication of the perceived industrial and strategic importance of the semiconductor industry was the formation of a joint government-industry semiconductor manufacturing consortium.⁴⁴ At the end of 1986, the Semiconductor Industry Association ("SIA") released

37. U.S. CONGRESS, CONGRESSIONAL BUDGET OFFICE, THE BENEFITS AND RISKS OF FEDERAL FUNDING FOR SEMATECH (Sept. 1987).

38. Daily Tax Rep. (BNA) L-3 (Jan. 22, 1987).

39. *Id.*

40. Wall St. J., Dec. 29, 1986, at 4.

41. Wash. Post, Nov. 20, 1986, at E1 col. 1.

42. Wall St. J., Mar. 18, 1987, at 3.

43. Dallmeyer, *supra* note 35, at 48.

44. Wash. Post, Mar. 5, 1987, at E1.

word that it was developing a plan for the creation of a semiconductor manufacturing consortium to promote the competitiveness of the U.S. industry.⁴⁵ The SIA consortium, code-named "Sematech," would be partially funded by government agencies.⁴⁶ In January, 1987, the President announced a budget proposal to fund Sematech.⁴⁷ The President's budget proposal for fiscal year ("FY") 1988 included a \$50 million request for the Defense Semiconductor Initiative, the government counterpart to Sematech.⁴⁸ The Department of Defense ("DOD") planned to call for another \$49 million to fund the proposal in FY 1989.⁴⁹ The \$50 million request was only one-fifth of the \$250 million per year recommended by the Defense Science Board ("DSB"), a task force composed of military, business, and academic representatives that evaluated the present extent and strategic implications of U.S. dependence on foreign semiconductor suppliers.⁵⁰ DOD officials reported that full funding of the DSB recommendation was impossible because of budget constraints.⁵¹

Despite the reservations of Commerce Department Secretary Malcolm Baldrige, DOD and industry representatives launched a public campaign on behalf of Sematech in 1987.⁵² By March, 1987, SIA had decided that its Sematech consortium would be a low-volume production facility dedicated primarily to the development of advanced manufacturing technologies.⁵³ Equipment and techniques developed in the facility would be transferred back to the member companies.⁵⁴ The House Energy and Commerce Committee subsequently amended the pending omnibus trade legislation to authorize \$100 million per year in government funding for Sematech over the next five years.⁵⁵

The semiconductor dispute also became the test case for the American response to the general problem of domestic economic dislocations attributable, in part, to foreign states' "export targeting" of industrial sectors.⁵⁶ "Export targeting" is a term that is applied to a host

45. Wall St. J., Mar. 5, 1987, at 9.

46. *Id.*

47. Inside U.S. Trade, Jan. 30, 1987, at 2.

48. N.Y. Times, Mar. 5, 1987, at D1 col. 1.

49. *Id.*

50. *Id.*

51. *Id.*

52. AVIATION WK. AND SPACE TECH., May 18, 1987, at 24.

53. 4 Int'l Trade Rep. (BNA), 352 (March 11, 1987).

54. *Id.*

55. Inside U.S. Trade, Apr. 3, 1987, at 8.

56. In the Trade and Tariff Act of 1984 (Section 625), Congress mandated that the Executive undertake a study of targeting. See *An Analysis of the Effects of*

of government policies and practices which have the combined effect of making an industry more competitive than it otherwise would be in the absence of such practices.⁵⁷ Targeting of the Japanese semiconductor industry is generally thought to have included 1) the closing of Japan's home market by the government to guarantee its domestic producers a significant market and premium prices; 2) resource transfers to the industry through subsidies, discriminatory government procurement, forced specialization, et cetera; and 3) encouraging export markets for growth of a maturing industry and as an outlet for domestic overproduction.⁵⁸

Furthermore, the dispute has become a harbinger of future U.S.-Japan economic relations. The dispute and the subsequent decision by the Administration to retaliate with punitive tariffs for Japan's alleged failure to comply with a pricing and market access agreement,⁵⁹ the first sanction of its kind imposed against Japan since World War II, may carry implications for the future of U.S.-Japan trade relations. Generally, the dispute served to draw down the large reservoir of friendship and goodwill which has nurtured U.S.-Japan relations in the post-War period. The dispute reflected a widespread belief held by U.S. policymakers that Japan's market is closed, not because of formal barriers, but because Japan's economic system and, indeed, its culture discriminates against imports.⁶⁰

The issue clearly contributed to a growing feeling that behind a facade of reasonableness and cooperation in multilateral and bilateral economic discussions, Japan is, in fact, embarked on an aggressive and mercantilist trade policy designed to achieve economic dominance, particularly in high technology products.⁶¹ Because its exports continue to grow while its imports stagnate, despite a long series of market-opening commitments, many U.S. officials have come to discount undertakings by the Japanese government and even to regard the Japanese as un-

Targeting on the Competitiveness of the U.S. Semiconductor Industry (Nat. Tech. Info. Serv. Doc. No. PB85-213270). The House Ways and Means Subcommittee on Trade has continued to explore this issue, holding hearings on February 19, 1987, and the pending Omnibus Trade and Competitiveness bill would amend section 301 of the trade laws to explicitly include foreign export targeting as an actionable unfair trade practice.

57. See Borrus, Millstein, & Zysman, *supra* note 32, at 181-217.

58. *Id.*

59. Daily Tax Rep. (BNA) 1-4 (Mar. 30, 1987).

60. Author's Interview Data (1988).

61. See generally Krasner, *Trade Conflicts and the Common Defense: The United States and Japan*, 101 POLI. SC. Q. 787 (1986).

trustworthy and manipulative.⁶²

It would go too far to say that the semiconductor dispute and U.S. sanctions reflect the wholesale adoption of such a viewpoint. It should be remembered that the issue came to a head at the time President Reagan was under siege over the Iran-Contra affair and when the U.S. Congress, having only recently come fully under Democratic control, was actively considering protectionist trade legislation. Under such circumstances, the President and his key advisors were faced with an extremely difficult choice. The imposition of trade sanctions against an ally may have been unpalatable to some in the Administration, but a refusal to do so in the face of the Commerce Department's well-publicized findings that the agreement had been violated, coupled with the overwhelming chorus of demands for retaliation from members of Congress, would have undercut the Administration's influence in removing or modifying protectionist provisions in the pending trade legislation. In this situation, the imposition of limited sanctions may have been viewed as a prudent, if exceptional, course of action. Nonetheless, the enormous and persistent trade deficit between the two countries continues to threaten future economic relations and will both engender U.S. suspicions of Japanese trading practices and subject future administrations to similar pressures.

As one might expect with issues of such general significance, the semiconductor dispute has spawned several other trade issues, another measure of issue importance. For example, the suspicions raised over Japanese export targeting of semiconductor manufacturing prodded the U.S. government to investigate and begin negotiations with Japan over supercomputer procurement practices.⁶³ Furthermore, the semiconductor agreement ultimately reached and the sanctions imposed by the U.S. government for Japan's alleged failure to fulfill the agreement have also created a variety of subissues.⁶⁴

62. Author's Interview Data (1988).

63. On August 7, 1987, the United States Trade Representative's Office announced that Japan will implement regulations to make it easier for U.S. supercomputer companies to bid for Japanese government contracts. The related issue of Japanese supercomputer company pricing practices remains unresolved. In a continuing resolution providing funds to operate the federal government during the fiscal year 1988, Congress, in expressing this concern, prohibited the Defense Department from purchasing foreign-made supercomputers by denying funds to an important U.S. Army water project if any Defense Department agency purchases a foreign (Japanese) supercomputer.

64. One example of a follow-on issue concerned the 1986 U.S. Customs Service reclassification of imported circuit boards with 16-bit or larger central processing units ("CPUs") and imported peripheral circuit boards with logic capability as "complete

IV. ORIGINS OF THE SEMICONDUCTOR DISPUTE

Although an American monopoly for over two decades, by the 1970's Japanese semiconductor manufacturers had emerged as strong international competitors.⁶⁵ American manufacturers alleged that the strength of the Japanese industry was the direct product of a national strategy that protected and promoted the long-term development and international competitiveness of this industry.⁶⁶ According to some analysts, Japan's state-sponsored policies controlled domestic competition among component and final systems manufacturers, thereby cushioning the Japanese producers from market forces and American competition and encouraging Japanese export penetration of the U.S. market.⁶⁷

As early as the mid 1970's, American manufacturers had leveled complaints against Japan's protected home market, its procurement practices, and its vertically integrated manufacturers.⁶⁸ These dissatisfactions peaked during the slump in the computer industry during 1984 and 1985.⁶⁹ Both domestic and foreign semiconductor manufacturers had incorrectly anticipated a boom in demand for their products. The result was an excess supply of chips and excess manufacturing capacity. Prices fell accordingly. U.S. companies lost more than \$2 billion, and 50,000 employees were laid off in the U.S. semiconductor industry as a result of the slump during 1985 and 1986.⁷⁰

V. ISSUE EVOLUTION: CRISIS

The beleaguered U.S. semiconductor industry launched a legal attack on the Japanese industry in June, 1985. In that month, the Japanese industry became the target of two unfair trade complaints brought

data processing equipment" subject to 3.9 percent and 3.7 percent tariffs, respectively. This relatively arcane and seemingly innocuous Custom ruling had the important commercial effect of subjecting CPUs from Japan, when incorporated into a stand-alone drive, to the 100 percent punitive tariff imposed on certain Japanese computers for failure to satisfy the terms of the U.S. -Japan semiconductor agreement. The decision became the subject of intense importer lobbying and inter-agency dispute.

65. Since 1978, Japan has increased its share of the global semiconductor market from 28 to 50 percent, while the U.S. share has fallen from 55 to 44 percent. The figures are even more startling in mass-produced chips. In 1975, U.S. companies controlled 90 percent of the world market for DRAM chips. By 1986, that figure had tumbled to five percent.

66. See Borrus, Millstein, & Zysman, *supra* note 32, at 146-49.

67. *Id.* at 142-50.

68. Dallmeyer, *supra* note 35, at 47.

69. *Id.*

70. *Id.* at 55.

on behalf of the U.S. industry. The first was filed with the Office of the U.S. Trade Representative ("USTR") by the SIA under section 301 of the Trade Act of 1974.⁷¹ The second was an antidumping action filed with the Commerce Department and the International Trade Commission ("ITC") one week later by Micron Technology.⁷²

The SIA petition asserted that a number of structural elements in the Japanese semiconductor market, taken together, operate as "unreasonable" barriers to U.S. sales, and these elements have resulted from policies of the Japanese government.⁷³ The petition also asserted that the Japanese market barriers are inconsistent with U.S. rights under the GATT and with Japanese commitments made in 1983 to promote enhanced sales opportunities for U.S. companies in Japan.⁷⁴

The petition pointed to two sets of trade figures that, in combination with Japan's "protectionist heritage in micro-electronics," allegedly reveal the closed nature of the Japanese market. The first set of figures involved the U.S. percentage of the Japanese market, which varied little between 1973 at nine percent and 1984 at 11.4 percent, despite the phasing out of quotas, prior approval requirements, and most other formal restrictions between 1970 and 1975.⁷⁵ The second set of figures involved the respective market shares for U.S. and Japanese manufacturers in various parts of the world, which reveal that, although Japanese companies outsell U.S. producers by a nine to one margin in Japan, the relationship is largely reversed in "neutral" third country markets where U.S. and Japanese firms compete.⁷⁶

The petition used these two sets of figures along with suggestions

71. 2 Int'l Trade Rep. (BNA) 807 (June 19, 1985). Chapter 19 U.S.C. § 2411 (1982 & Supp. IV 1986), gives the President broad authority to impose trade restrictions in response to "unjustifiable, unreasonable, or discriminatory" practices by foreign governments that burden or restrict the international commerce of the United States.

72. The antidumping law, 19 U.S.C. § 1673 (1982 & Supp. IV 1986), affords a domestic industry compensatory tariff relief from injurious imports sold in the U.S. market either below their home market price or below the cost of production.

73. The petition identified the following structural elements as Japanese barriers to U.S. semiconductor sales: 1) the domination of most major semiconductor end use markets by Japanese companies; 2) the domination by these same companies of Japanese semiconductor production; 3) the procurement of semiconductors by these Japanese producer-consumers primarily from each other; 4) the linkage of these Japanese producer-consumers by multiple horizontal ties (particularly in research and development); and 5) the "Buy Japan" attitude characterizing these Japanese producer-consumers.

74. SIA press conference, June 14, 1985.

75. *Id.*

76. *Id.*

that U.S. manufacturers have made major sales efforts in Japan to argue that the Japanese government essentially replaced formal trade barriers with a strategy of more subtle barriers in the 1970's; there "liberalization countermeasures" have served to relegate U.S. producers to the role of residual suppliers.⁷⁷ The petition argued that this alleged fostering by the Japanese government of a large, protected Japanese market has provided Japanese producers with a secure demand base and contributed to an intensive expansion of production capacity with little reference to market conditions, a phenomenon that has allegedly culminated in repeated surges of low-priced Japanese semiconductors onto the world market at times of excess production.⁷⁸

Despite these assertions of "unjustifiable, unreasonable, or discriminatory" Japanese practices and the broad powers given to the President under section 301, the petition did not request import restrictions against Japanese products. Rather, it requested negotiations with the Japanese government aimed at two main goals: 1) a dramatic improvement in U.S. sales in Japan "within a short time, commensurate with the demonstrated competitiveness of U.S. products in other world markets," with an interim goal of equating the U.S. share of the Japanese market with the Japanese share of the U.S. market by 1986;⁷⁹ and 2) prevention of "potential Japanese dumping" of semiconductors in the U.S. market.⁸⁰

U.S. Trade Representative Clayton Yeutter announced on July 11, 1985, that he had decided to initiate an investigation into Japanese "market barriers" in the industry in response to the SIA petition. Under the Trade Act of 1974, the USTR had a year from the date the investigation was formally initiated, July 11, to recommend to the President what action he should take.⁸¹ After the President received USTR's recommendation, he had twenty-one days in which to determine what action he would take under section 301.⁸²

When SIA filed its petition, spokesmen for SIA noted that its members were considering antidumping petitions against the Japanese industry, particularly given the alleged prevalence of below-cost sales

77. 2 Int'l Trade Rep., *supra* note 71, at 807-08. SIA charged that the Japanese firms bought chips primarily from one another, thus relegating U.S. firms to secondary or residual suppliers.

78. *Id.*

79. *Id.*

80. *Id.*

81. 2 Int'l Trade Rep. (BNA) 921 (July 17, 1985).

82. *Id.*

by Japanese companies in the current market.⁸³ SIA was preempted, however, when Micron Technology filed an antidumping petition covering 64K DRAMs on June 21, 1985.⁸⁴ The petition alleged that, since October, 1984, Japanese manufacturers of 64K DRAMs dropped their prices for sales both in Japan and in the United States to a point where they were well below cost of production.⁸⁵ Based on constructed costs for Japanese manufacturers and a statutory minimum profit of eight percent, the petition alleged a dumping margin of ninety-four percent on Japanese "less-than-fair-value" sales in the United States.⁸⁶

The petition also asserted that, as a result of Japanese practices, market prices had been severely depressed for 64K DRAMs, and the U.S. industry had suffered substantial layoffs, loss of profits, and other material injury.⁸⁷ According to the petition, absent relief, such injury would continue, and Japanese manufacturers would obtain substantial technological advantages from their production experience, ultimately capturing up to ninety percent of the DRAM market.⁸⁸

The Commerce Department announced on July 15, 1985, that it was initiating an investigation of possible "less-than-fair-value sales" of 64K DRAMs in response to Micron Technology's petition, setting the stage for a preliminary determination on August 8, 1985, by the ITC as to whether or not imports of Japanese 64K DRAMs were causing material injury to a U.S. industry.⁸⁹

Before administrative findings on either the dumping or section 301 investigation, Congress lent its wholehearted support to the domestic industry's cause. On July 30, the Senate Banking Subcommittee on International Finance and Monetary Policy held a hearing to examine industry complaints of restricted market access in Japan and allegations of predatory Japanese marketing practices.⁹⁰ The remarks of the subcommittee members revealed a consensus opinion that American manufacturers face unfair and perhaps illegal competition from Japan, and that "time is running out" and the U.S. must take swift and effec-

83. SIA press conference, June 14, 1985.

84. 2 Int'l Trade Rep. (BNA) 865 (July 3, 1985).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. 2 Int'l Trade Rep. (BNA) 960 (July 24, 1985).

90. See *Semiconductor Trade and Japanese Targeting, Hearing before the Senate Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, 99th Congress., 1st Sess. 99-309 (July 30, 1985).*

tive action to counter it.⁹¹ Several senators described Japanese practices in harsh terms and closed the hearing by agreeing that the U.S. industry was in need of timely protection.⁹² Senator Reigle (D-Michigan) noted that "the performance of the U.S. semiconductor industry will profoundly affect the ability of all U.S. industries and workers to regain and maintain their competitive edge."⁹³ The administration adopted a less belligerent line at the hearing, but one sympathetic to the domestic industry.⁹⁴

U.S. manufacturers launched another round of trade complaints on September 30, 1985. InterCorporation, AMD, and National Semiconductor Corporation filed an antidumping complaint alleging injury and loss of market share by virtue of below cost sales of EPROM chips by Japanese manufacturers.⁹⁵ The complaint alleged that Japanese EPROMs which sold for \$17 in January 1985 were being sold for \$4 in August 1985, despite a production cost estimated at \$6.34 per chip.⁹⁶

On December 6, the Reagan Administration initiated its own antidumping case against Japanese manufacturers following a recommendation from the cabinet-level "strike force" on trade.⁹⁷ The action was nominally directed at Japanese 256K DRAMs, but U.S. officials stated that a finding of dumping by the Commerce Department could lead to duties on future generations of Japanese chips as well.⁹⁸ The launching of the investigation resulted from continuing pressure by the U.S. merchant industry.⁹⁹

The virtually unprecedented self-initiation of an antidumping proceeding by the Commerce Department drew a sharply negative response from the Japanese government and industry. The Administration move was termed "very regrettable" by Taizo Yokoyama, Commercial Minister at the Japanese Embassy in Washington.¹⁰⁰ In addition, the U.S. action reportedly drew strong criticism regarding its handling from then U.S. Ambassador to Japan, Michael Mansfield,

91. *Id.* at 165.

92. *Id.* See statements by Senator Heinze, *id.* at 1-2; Senator Proxmire, at 2-7; Senator Cranston, at 9-10; and Senator Reigle, at 99-103.

93. *Id.* at 99.

94. *Id.* See, for example, the testimony of James M. Murphy, Assistant United States Trade Representative, and Clyde V. Prestowitz, Counselor to the Secretary of Commerce for Japan Affairs. *Id.* at 96-98.

95. 2 Int'l Trade Rep. (BNA) 1233 (Oct. 2, 1985).

96. *Id.*

97. *Id.* at 1544 (Dec. 11, 1985).

98. *Id.*

99. *Id.*

100. Inside U.S. Trade, Dec. 13, 1985, at 10.

and produced a strong lobbying effort against the inclusion of future generation chips by representatives of Japanese interests, although other quarters of the American government voiced little public opposition.

On December 13, apparently in reaction to this pressure, a White House aide made the unusual announcement that Commerce Secretary Malcolm Baldrige had exceeded the authority given to him by the President to initiate the investigation, by including in the investigation not only 256K DRAMs, but future generation chips also.¹⁰¹ The White House staff subsequently dropped its objections; however, at a December 16 meeting Baldrige strongly defended his legal authority to include future generation chips within the scope of the investigation.¹⁰²

The U.S. merchant industry clearly and correctly viewed the Administration move as a useful step in increasing pressure on the Japanese to reach an acceptable accommodation. Alan Wolff, Washington counsel for the SIA, welcomed the Commerce Department's "vigorous action" against the alleged Japanese dumping of 256K DRAMs and praised the Administration's emphasis on taking "preventative steps" as well as remedying injuries. However, the Administration's move drew a less positive response from U.S. captive producers and U.S. consuming interests, such as the computer industry.¹⁰³

In the following weeks, the U.S. industry expanded its attack against Japanese manufacturers and threatened still further legal proceedings if an "acceptable" resolution to the dispute was not reached between the United States and Japanese governments.¹⁰⁴ Following this warning, the Administration indicated the possibility of other administrative proceedings against the Japanese industry. Commerce Department Assistant Secretary for Trade Administration Paul Freedenberg mentioned that there had been some industry interest in filing a petition for import relief on national security grounds under section 232 of the Trade Expansion Act of 1962.¹⁰⁵

The SIA had set out the basis for a possible section 232 action in a paper on government procurement that highlighted the negative national security consequences of the declining U.S. manufacturing base. In addition, the Defense Department publicly expressed growing con-

101. Wash. Post, Dec. 14, 1985, at B1 col. 1.

102. *Id.* Dec. 17, 1985, at E5 col. 1.

103. Inside U.S. Trade, Dec. 13, 1985, at 10.

104. *See, e.g., id.* Feb. 14, 1986, at 4.

105. The President is empowered, after an investigation by the Commerce Department, to restrict the import of any items that "threaten to impair the national security." *See* 19 U.S.C. § 1332 (1982 & Supp. IV 1986).

cern over increased U.S. dependency on Japanese suppliers for semiconductor products, which play a key role in many defense systems.¹⁰⁶ As a result, the DSB began its evaluation of the national security implications of a deterioration in domestic manufacturing, and the National Security Council continued a parallel investigation.¹⁰⁷

At the same time, the three antidumping proceedings against the Japanese industry moved forward, and discussions continued between the U.S. and Japanese governments regarding the SIA-generated section 301 proceeding. By this time it was clear that the U.S. merchant industry would not accept any settlement of the section 301 proceeding that did not encompass Japanese worldwide pricing practices.¹⁰⁸ In this regard, the USTR began considering a plan for extensive monitoring of the pricing practices and costs of production of Japanese companies, including the stationing in Japan of U.S. government industrial experts trained in financial accounting, semiconductor manufacturing practices, and the conduct of antidumping investigations.¹⁰⁹

By the end of March, 1986, government-to-government talks had broken down, in large part over the question of greater access to the Japanese market. Disagreements persisted on a pricing mechanism to prevent Japanese dumping and on the pricing rules that would apply to Japanese sales in third-country markets.¹¹⁰ U.S. government negotiators, while hesitant in principle to insist that the Japanese side guarantee a specific market share and saddled with a potentially burdensome pricing mechanism, basically supported the U.S. industry position.¹¹¹ This stance was not wholly surprising, given congressional pressures,¹¹² the political realities of an election year, and the requirement for U.S. industry cooperation in any termination of the legal proceedings.¹¹³

In what can only be viewed as an extraordinary occurrence, the Commerce Department accelerated its preliminary finding of dumping

106. Inside U.S. Trade, Nov. 29, 1985, at 5.

107. *Id.* Nov. 28, 1986, at 1.

108. 3 Int'l Trade Rep. (BNA) 310-11 (Mar. 5, 1986).

109. *Id.*

110. *Id.* at 427-28 (Apr. 2, 1986).

111. *Id.* at 428.

112. In this regard, it is interesting to note the March 27, 1986, letter from 53 Senators advising President Reagan of the widespread belief in Congress that Japan is unwilling to assume the responsibilities of a world class economic power, and that any trade bill emerging from Congress this year would be influenced by the state of U.S. - Japan trade relations. The letter was signed by then Majority Leader Robert Dole (R-Kansas) and then Trade Subcommittee Chairman John Danforth (R-Missouri).

113. Letter from Sens. R. Dole & J. Danforth to Pres. R. Reagan (Mar. 27, 1986) (discussing U.S. - Japan Trade relations).

to increase pressure for a rapid settlement of the dispute.¹¹⁴ The Commerce Department announced preliminary dumping margins ranging from 19.8 percent to 108.72 percent for DRAMs of 256K or above.¹¹⁵ In personally announcing the preliminary decision, Commerce Secretary Malcolm Baldrige described the production and employment losses in the U.S. industry and referred to the need to stop unfair trade practices of the type encompassed in the proceeding.¹¹⁶

Pressure on Japanese and American negotiators for a resolution of the dispute continued to increase in the Spring of 1986. In addition to the 256K ruling in March, Commerce announced preliminary dumping margins on EPROMs ranging from 21.7 percent to 188 percent.¹¹⁷ On April 24, the Commerce Department announced its final determination that 64K DRAMs were being dumped with margins ranging from 11.87 percent to 35.34 percent.¹¹⁸ Final dumping determinations in the EPROM and 256K DRAM proceedings were set for July 30, 1986, and August 1, 1986, respectively, to coincide with the President's decision in the section 301 investigation.¹¹⁹

VI. ISSUE EVOLUTION: RESOLUTION

The United States and Japan reached agreement in principle on a "broad accord" for resolving the semiconductor trade issue in May 1986.¹²⁰ The agreement was announced shortly after a fourteen hour negotiation session on May 28 between U.S. Trade Representative Clayton Yuetter and Minister of International Trade and Industry Michio Watanabe.¹²¹ In a May 29 speech to the National Association of Manufacturers, President Reagan hailed the agreement as one that would "open Japanese markets to U.S. computer chips."¹²² It was clear, however, that Yuetter and Watanabe had agreed only on the broad outlines of a resolution to the dispute, and SIA, the American Electronic Association, and the Electronics Industries Association declined formal comment on the "framework" agreement until the implementing details were worked out.¹²³

114. 3 Int'l Trade Rep. (BNA) 372 (Mar. 19, 1986).

115. *Id.*

116. *Id.*

117. Wall St. J., Oct. 28, 1986, at 27.

118. 3 Int'l Trade Rep. (BNA) 577 (Apr. 30, 1986).

119. *Id.*

120. *Id.* at 735 (June 4, 1986).

121. *Id.*

122. *Id.*

123. Asian Wall St. Wkly, June 2, 1986, at 2.

Under the Yuetter-Watanabe understanding, the Japanese government reportedly committed itself to use its "best efforts" to achieve a doubling by 1990 of U.S. sales in Japan, an estimated U.S. share in the Japanese market of eighteen to twenty percent by 1990.¹²⁴ The mechanics of a purchase commitment were left to the follow-up negotiations on "details." As for pricing, the Japanese government agreed to a monitoring system that would determine and compare the costs of production by Japanese semiconductor manufacturers and Japanese selling prices.¹²⁵ The system would be administered by the Commerce Department in cooperation with the Japanese government.¹²⁶

In exchange for the Japanese commitments, the U.S. government agreed that it would end the section 301 proceeding, suspend the 256K DRAM antidumping proceeding, and seek the petitioners' agreement to a suspension of the EPROM and antidumping proceeding.¹²⁷ Separate U.S. floor prices would be negotiated with each of the Japanese manufacturers, who would have to supply production costs and other information to the Commerce Department.¹²⁸

Time pressures for final resolution continued to build, however, since final Commerce Department dumping determinations were due in the EPROM and 256K, DRAM proceeding on July 30 and August 1, respectively, and a USTR ruling in the section 301 proceeding was due by July 11, with a presidential response by August 1.¹²⁹ In June, 1986, U.S. and Japanese negotiators failed to wrap up all of the details that were left unresolved by the "framework" agreement.¹³⁰ Nonetheless, both sides agreed that substantial progress had been made, and the Commerce Department initiated suspension agreements with Japanese exporters in the EPROM and 256K DRAM antidumping proceedings.¹³¹

Members of Congress and U.S. industry representatives sought to maintain pressure on Japanese negotiators in the weeks immediately before the July 31 deadline. Several key trade players on Capitol Hill, including House Ways and Means Trade Subcommittee Chairman Sam Gibbons (D-Florida) and Finance Committee Chairman Robert Packwood (R-Oregon), issued press statements threatening congres-

124. 3 Int'l Trade Rep. (BNA) 735 (June 4, 1986).

125. J. OF COMMERCE, Jan. 29, 1987, at 6A.

126. *Id.*

127. J. OF COMMERCE, Jan. 22, 1987, at 8A.

128. *Id.*

129. 3 Int'l Trade Rep. (BNA) 887 (July 9, 1986).

130. *Id.*

131. *Id.*

sional action against Japan if the dispute was not resolved to U.S. satisfaction. Industry representatives combined statements of cautious optimism with threats of retaliation if necessary. A spokesman for SIA indicated that they had accepted the suspension agreements as "an act of good faith," but warned that SIA had not seen a draft text of the overall accord and would pursue all available remedies if Japanese negotiators were not forthcoming on the unresolved issues.¹³²

Extended negotiations between the United States and Japan finally produced an agreement on July 31.¹³³ The agreement came only minutes before the Commerce Department's deadline for imposing dumping duties of up to 100 percent on Japanese imports.¹³⁴ As described by U.S. spokesmen at the time, the pact would take effect in August, 1986, and run through July 31, 1991.¹³⁵ It focused primarily on (1) increased access to the Japanese market for U.S. companies, and (2) prevention of alleged Japanese dumping in the U.S. and third-country markets.¹³⁶

On the U.S. market access issue, the agreement was left deliberately vague and envisioned only a "steady increase" in the U.S. share of Japan's market over the five-year period.¹³⁷ The Reagan Administration, which widely advertised its free trade principles, felt that specifying a particular market share for U.S. companies would contradict those principles, while also raising sensitive antitrust concerns.¹³⁸ Both sides, however, reached a clear understanding that the U.S. target was twenty percent of the Japanese market by 1991.¹³⁹ This figure would represent more than double the eight and one-half percent market share held by U.S. firms in 1986 and would raise the dollar value of U.S. sales in Japan by \$2 billion.¹⁴⁰

132. Daily Tax Rep. (BNA) 16 (Nov. 24, 1986).

133. Int'l Trade Rep. (BNA) 994 (Aug. 6, 1986).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 995.

139. Inside U.S. Trade, Oct. 5, 1986, at 5.

140. The Japanese government agreed to "encourage" Japanese producers and users to purchase more American products by establishing an organization to assist foreign producers by providing quality assessments, seminars, exhibitions, and the like. The Japanese government agreed to foster long-term relationships between Japanese semiconductor purchasers and U.S. manufacturers by promoting joint product development efforts. According to press reports, Tokyo also agreed to offer the Japanese-based facilities of U.S. semiconductor manufacturers all of the benefits traditionally provided Japanese producers, such as government R&D grants, tax breaks, and subsidies.

With regard to Japanese penetration of the U.S. market, the two sides agreed on the following measures to prevent dumping. The Department of Commerce would monitor cost and price data on imported Japanese 256K DRAMs and EPROMs although the dumping investigations into these chips were suspended.¹⁴¹ Japan's Ministry of International Trade and Industry ("MITI") would monitor cost and price data for other semiconductor exports to the United States and to third-country markets using company and product-specific information supplied by Japanese producers.¹⁴²

The issue of Japanese dumping in third countries was not resolved until late in the negotiations. U.S. negotiators insisted on provisions covering Japan's third-country pricing practices, fearing that absent such protection, efforts to prevent dumping in U.S. markets could easily be circumvented.¹⁴³ Although the agreement did not provide a detailed solution, it contained a commitment by the Japanese government to monitor the pricing of products exported to third countries.¹⁴⁴

In return for these promised Japanese actions, the United States agreed to suspend all three on-going cases: the 256K DRAM and EPROM antidumping cases and the section 301 proceeding.¹⁴⁵ The U.S. government reserved the right, however, to reinstate the two antidumping proceeding if Japanese companies violate the agreement.¹⁴⁶ In a practical sense, since all prior phases of the two antidumping proceedings had been completed, the U.S. could rapidly impose duty deposit requirements on 256K DRAM and EPROM chips at any time it concluded that dumping had occurred.¹⁴⁷

The Administration effusively praised the pact. President Reagan called it "a landmark pact,"¹⁴⁸ and Commerce Secretary Baldrige said, "[t]his has far-reaching consequences both for U.S. jobs and U.S. technology."¹⁴⁹ Although pleased with the agreement, the U.S. industry offered more restrained praise than did Administration spokesmen. The SIA complimented the pact as opening the right path to a competitive market, but cautioned that the agreement constituted "a point of de-

141. 3 Int'l Trade Rep., *supra* note 129, at 995.

142. *Id.*

143. Inside U.S. Trade, Nov. 14, 1986, at 8.

144. *Id.*

145. 3 Int'l Trade Rep., *supra* note 129, at 995.

146. *Id.*

147. *Id.*

148. Wall St. J., Feb. 16, 1987, at 1.

149. *Id.*

parture rather than a destination."¹⁵⁰ Members of Congress also applauded the pact, but Senate Finance Committee Chairman Bob Packwood (R-Oregon) warned that he intended to hold hearings within six months to ensure that Japan was abiding by its terms.¹⁵¹

U.S. negotiators were concerned that the Europeans might balk at a bilateral pact on an item as important to worldwide industry and commerce as the semiconductor.¹⁵² To minimize such fears, the agreement expressly provided that Japan's market-opening measures would assist European, as well as American, producers.¹⁵³ However, these steps were not enough to satisfy the EC. EC External Affairs Commissioner Willy de Clercq and Industrial Affairs Commissioner Karl-Heinz Narjes criticized the agreement as likely to cause "considerable" repercussions on chip prices and on the entire EC industrial structure.¹⁵⁴ They stated, "The commission cannot accept that Japan and the U.S. determine prices on the basis of a bilateral understanding."¹⁵⁵ Press reports indicated that they were also concerned about discriminatory market access in Japan, even though the Japanese market-opening measures nominally would help Europeans as well as Americans.¹⁵⁶

VII. ISSUE EVOLUTION: DENOUEMENT

The agreement between the United States and Japan on semiconductor trade immediately created a major controversy both in the United States and abroad. Japanese producers expressed concern that the Commerce Department's high fair market value calculations would exclude them from the American market.¹⁵⁷ U.S. purchasers announced alarm about much higher chip prices;¹⁵⁸ and American producers complained that the Japanese continued to dump chips in third countries.¹⁵⁹

The immediate result of the agreement was the establishment of

150. 3 Int'l Trade Rep., *supra* note 129, at 994.

151. *Id.*

152. N.Y. Times, Oct. 9, 1986, at D9, col. 1.

153. *Id.*

154. *Id.*

155. See COMMISSION OF THE EUROPEAN COMMUNITIES, REMARKS OF MESSRS. DE CLERCQ AND NARJES ON U.S./JAPAN AGREEMENT ON SEMICONDUCTORS (Information Release No. 1P(85) 385 Aug. 1, 1986).

156. *Id.*

157. Inside U.S. Trade, Oct. 10 1986, at 10-11.

158. *Id.*

159. *Id.*

fair market values ("FMVs") on Japanese chip imports to the U.S.¹⁶⁰ In October, the Commerce Department revised downward the FMVs in its first quarterly recalculation.¹⁶¹ Because they are proprietary, the FMVs were not publicly released by the Commerce Department, but according to press reports the revised FMVs for 256K DRAMs ranged from \$2.50 to \$5.00, with an average of about \$3.25, compared to the original FMVs of \$2.50 to \$8.70.¹⁶² Not everyone applauded the lower prices. The original FMVs had effectively priced many Japanese companies out of the U.S. market, and, despite the quarterly revisions, many Japanese companies believed the FMVs were far too high for their products to remain competitive in the U.S. market.¹⁶³

As noted, the EC's immediate reaction to the agreement was unfavorable.¹⁶⁴ The strong initial reaction did not diminish in the months following the agreement, resulting in the filing of a protest in the GATT and a request for formal consultations.¹⁶⁵ DeClercq and Narjes publicly argued that the agreement would cause "arbitrary increases" in prices in the EC market and would provide privileged access for American companies in Japan.¹⁶⁶ Formal consultations were requested to discuss claims that the agreement violated GATT rules.¹⁶⁷ Despite Japanese assurances to the contrary, the EC was concerned about possible side agreements that would increase U.S. exports to Japan at the expense of European firms.¹⁶⁸

Although the SIA expressed continued support for the agreement if it were properly enforced, computer manufacturers and other semiconductor purchasers were increasingly opposed to it.¹⁶⁹ Immediately after negotiation of the agreement, prices for some 256K DRAM chips reportedly rose to more than double the pre-agreement price.¹⁷⁰ On September 5, USTR and Commerce Department officials met with the representatives of the American Electronics Association.¹⁷¹ The meet-

160. Wall St. J., Nov. 15, 1986, at 8.

161. *Id.*

162. *Id.*

163. *Id.*

164. Inside U.S. Trade, Oct. 17, 1986, at 12.

165. *Id.* Oct. 10, 1986, at 14.

166. *Id.* Oct. 17., 1986, at 12.

167. Although the U.S. and Japan successfully blocked EC efforts to have the matter addressed at a March 4, 1987, GATT Council meeting, they were unable to keep it off the agenda for the March 15 meeting.

168. *Id.*

169. Wall St. J., Feb. 12, 1986, at 1.

170. *Id.* Sept. 8, 1986, at 1.

171. Inside U.S. Trade, Sept. 5, 1986, at 6.

ing was highly contentious, and industry spokesmen reportedly expressed "considerable pain" as a result of higher chip prices.¹⁷²

Higher prices forced purchasers to use up much of their inventory while waiting for prices to drop. It also prompted several computer manufacturers to consider moving manufacturing facilities overseas, where semiconductors would be less expensive to produce.¹⁷³ User groups asserted that if the Commerce Department did not significantly reduce Japanese FMVs in response to computer industry pressure and new Japanese cost data, U.S. computer assembly lines would migrate en masse to the Orient.¹⁷⁴ Semiconductor purchaser trade groups such as the Computer & Business Equipment Manufacturers Association ("CBEMA"), began to mobilize to lobby Congress and the Administration on this issue.¹⁷⁵

In the United States, semiconductor manufacturers' major concern had been the possibility that Japanese pricing in third markets could undercut the agreement. In an October 23 letter to Deputy U.S. Trade Representative Michael Smith, the chief U.S. negotiator on the agreement, the SIA charged that the Japanese were continuing to dump their products in third country markets.¹⁷⁶ The letter also accused the Japanese government of failing to enforce the agreement adequately.¹⁷⁷ The letter warned that if corrective action were not taken by November 15, the SIA would recommend further action by the U.S. government, including punitive duties assessed against particular manufacturers.¹⁷⁸ Neither the American nor the Japanese governments commented publicly on the charges in the letter. However, the SIA allegations were discussed in U.S.-Japan monitoring consultations.¹⁷⁹

By November, U.S. and Japanese negotiators were working feverishly to prevent the collapse of the agreement. In response to U.S. demands, the Japanese government agreed to request that Japanese manufacturers end sales at less than fair value in third-country markets.¹⁸⁰ In the United States, the Administration attempted to satisfy both producers and users. In response to user complaints, it sharply reduced the price floors for the fourth quarter of 1986. U.S. Trade Representative

172. *Id.* Sept. 19, 1986, at 1.

173. *Id.* Feb. 2, 1986, at 1.

174. *Id.*

175. ELECTRONIC NEWS, Sept. 15, 1986, at 6.

176. Inside U.S. Trade, Oct. 31, 1986, at 1.

177. *Id.*

178. *Id.* at 6.

179. N.Y. Times, Oct. 28, 1986, at D6, col. 1.

180. Daily Tax Reports (BNA) L-6 (Nov. 24, 1986).

Clayton Yeutter announced, however, that these price floors would remain above the prevailing market rates in third countries. On behalf of U.S. manufacturers, the Administration demanded that MITI begin enforcing price floors on all sales of Japanese chips.¹⁸¹ MITI responded that its authority to use export controls and administrative guidance to prevent third-country dumping was limited, and that it needed more time to improve its monitoring of chip exports.¹⁸²

U.S. negotiators agreed to give MITI until mid-December, 1986, to produce results on third-country dumping.¹⁸³ Failure by Japan to meet that deadline could be grounds for quick U.S. retaliation and possible renunciation of the entire agreement. By late November, Japanese producers had begun to respond to U.S. threats by raising their chip prices in global markets.

In early January, 1987, Commerce Department Undersecretary for International Trade, Bruce Smart, and Deputy U.S. Trade Representative, Michael Smith, travelled to Japan for bilateral talks on semiconductors.¹⁸⁴ The U.S. negotiators expressed their concern over alleged continued Japanese dumping in third countries, primarily in the Asia-Pacific market.¹⁸⁵ They reportedly presented detailed evidence that Hitachi, Fujitsu, Toshiba, and NEC chips were sold at prices up to fifty percent below the foreign market values established pursuant to the agreement.¹⁸⁶ Undersecretary Smart asserted that the Japanese had been "unwilling or unable . . . to fully implement Japan's side of the agreement."¹⁸⁷ Smart's statements were clearly at odds with Japanese comments. MITI's Vice Minister for International Affairs Mokoto Kuroda said monitoring by MITI showed no evidence of dumping, but agreed to investigate the charges further.¹⁸⁸

U.S. negotiators privately admitted that there were other concerns of equal or greater importance than third-country dumping, which had not received as much public attention.¹⁸⁹ Those concerns included the U.S. producers' constant or declining share of the Japanese market and the high volume of Japanese chips which were entering the U.S. via the "grey market" at prices well below the Commerce Department's floor

181. *Asian Wall St. J.*, Nov. 24, 1986, at 21.

182. *Id.*

183. *Wall St. J.*, Nov. 31, 1986, at 4.

184. *J. OF COMMERCE*, Nov. 29, 1987, at 34.

185. *Id.*

186. *Id.*

187. *Inside U.S. Trade*, Feb. 6, 1987, at 2.

188. *J. OF COMMERCE*, Jan. 29, 1987, at 6A.

189. *WASH. TRADE AND TARIFF LETTER*, Jan. 19, 1987, at 2.

prices.¹⁹⁰ In an effort to increase the pressure on the Japanese, Smart and Smith called for immediate resolution of these problems and threatened to retaliate if appropriate steps were not taken soon.¹⁹¹

As retaliatory measures, the SIA urged the U.S. government to consider imposing duties or even a quota on either Japanese semiconductors or Japanese computers and other products incorporating such semiconductors.¹⁹² The quota option was suggested rather quietly, however, because it was strongly opposed by semiconductor users. Officials of CBEMA said they would adamantly oppose any such quota and did not believe any responsible U.S. government official would support it.¹⁹³ In response, manufacturers focused on sanctions in the form of tariffs or quotas on consumer electronic goods produced by Japanese semiconductor manufacturers for which Korean and other low-cost substitutes were available to U.S. consumers.¹⁹⁴ A schedule was designed to increase tariffs if violations continued.¹⁹⁵

Ultimately, the Administration's Economic Policy Council, chaired by Treasury Secretary James Baker, was charged with determining what sanctions to impose if U.S. demands were not met.¹⁹⁶ Deputy USTR Michael Smith warned that penalties could be imposed as quickly as mid-March.¹⁹⁷

On March 27, the President decided to retaliate for Japan's alleged violation of the agreement by imposing tariffs valued at \$300 million on Japanese imports.¹⁹⁸ The President's action was broadly supported by members of Congress from both parties and by U.S. industry.¹⁹⁹ On the unanimous recommendation of his Economic Policy Council, the President authorized the imposition of 100 percent ad valorem duties on nineteen designated products exported by Japanese manufacturers.²⁰⁰ From this list, representing over \$1 billion in Japanese exports, USTR later selected products representing \$300 million worth of exports for actual imposition of duties.²⁰¹ The final list was announced on April 17, after a public hearing on April 13 for the pur-

190. *Id.*

191. J. OF COMMERCE, *supra* note 184.

192. Wall St. J., Feb. 10, 1987, at 2.

193. Inside U.S. Trade, Jan. 23, 1987, at 7.

194. Wall St. J., *supra* note 183.

195. 4 Int'l Trade Rep. (BNA) 191 (Feb. 11, 1987).

196. J. OF COMMERCE, Mar. 27, 1987, at 21.

197. WASH. TRADE AND TARIFF LETTER, Mar. 16, 1987, at 1.

198. Daily Tax Rep. (BNA) L-4 (Mar. 30, 1987).

199. *Id.* at L-5.

200. Wash. Post, Mar. 27, 1987, at A2, col. 1.

201. *Id.* Feb. 28, 1987, at A13, col. 1.

pose of identifying those products whose inclusion would cause the least hardship to U.S. economic interests.²⁰²

Of the \$300 million in proposed sanctions, approximately \$135 million was attributed to damage from alleged dumping by Japanese firms in third countries, with the remaining \$165 million due to unsatisfactory U.S. market access in Japan.²⁰³ Administration officials stressed that the sanctions would end only when actual sales data demonstrated that the alleged third-country dumping had ceased and that U.S. market share in Japan had begun to move upward significantly toward the twenty percent goal.²⁰⁴

President Reagan partially lifted sanctions against Japan during the Venice Economic Summit in June, 1987.²⁰⁵ He reduced sanctions by \$51 million when he lifted the 100 percent punitive tariff on twenty-inch color television sets, relying on data that third-country dumping of DRAMs had declined.²⁰⁶ SIA, while supporting the partial lifting of sanctions in June and MITI's authorization of increased DRAM production, did not support any further lifting of sanctions before several additional months of improved U.S. chip sales in Japan.²⁰⁷

The Administration was not prepared to lift another \$165 million worth of sanctions imposed in March as compensation for the continued low Japanese market share of U.S. manufacturers. Undersecretary Smart found that U.S. penetration was below expectations,²⁰⁸ while the SIA announced the U.S. share of the Japanese market had increased one-half percent to nine percent in the second quarter of 1987.²⁰⁹ SIA had expected an eleven percent market share by that time.²¹⁰

In August, the Commerce Department adopted Japan's method of calculating fair market value for the sale of semiconductors in third-country markets. Because the Japanese method examines cost of production in third countries as well as in the United States, its use re-

202. *Id.* April 18, 1987, at A12, col. 1.

203. Daily Tax Rep., *supra* note 198, at L-5.

204. *Id.* at L-8.

205. White House Press Release, Statement by the President, June 8, 1987.

206. N.Y. Times, June 9, 1987, at A1, col. 1.

207. *Id.* Because Commerce Undersecretary Bruce Smart expected the latest data to demonstrate that third-country dumping had decreased further, he was prepared at that time to recommend that the President lift some of the remaining sanctions in the near future. The U.S. Trade Representative, on the other hand, recommended that sanctions be continued to avoid difficulties with Congress during the trade bill negotiations. *Id.*

208. Inside U.S. Trade, Aug. 28, 1987, at 3.

209. *Id.* at 4.

210. *Id.*

duced, and may have in some cases entirely eliminated, dumping margins. As a result, President Reagan decreased by a commensurate amount the value of outstanding sanctions; \$84 million, related to alleged Japanese dumping in third-country markets on November 4.²¹¹ The decision was viewed in part as a demonstration of goodwill toward Japan's new Prime Minister, Noburu Takeshita. Remaining in place were duties attributed to the failure of American chip producers to increase their share of the Japanese market.²¹²

U.S. penetration of the Japanese market was estimated at nine percent for the second quarter of 1987, lower than the level in June, 1985, when the dispute began.²¹³ In early January 1988, Deputy USTR Smith informed officials of Japan's MITI that the United States considered Japanese efforts to increase the foreign share of Japan's market to be insufficient.²¹⁴ He indicated that remaining U.S. sanctions would not be lifted until the U.S. share of Japan's chip market increased in accordance with the 1986 agreement.²¹⁵

VIII. CONCLUSION AND ASSESSMENT

An assessment of any one issue, however important, does not permit one to reach conclusions with the same level of certainty that a systematic assessment of several issues might afford. Any one example could be countered or qualified by other examples while the cumulative trend of issue resolutions remains uncertain. Nonetheless, the semiconductor issue offers insights of potential importance to the future course of both U.S. trade policy and the international trading system.

A. *U.S. Trade Policy*

Some analysts have argued that in the United States, trade law *is* trade policy.²¹⁶ Although somewhat overstated, the trade laws have been used as the primary vehicle for raising and prosecuting the U.S. semiconductor industry's concerns. Before the dispute, the laws were a means of diverting political pressure for protection to technical, administrative bodies where a form of circumscribed relief might be ob-

211. 4 Int'l Trade Rep. (BNA) 1382 (Nov. 11, 1987).

212. *Id.* at 1383.

213. Inside U.S. Trade, Aug. 27, 1987, at 4.

214. *Id.* Jan. 15, 1988, at 6.

215. *Id.*

216. See Howell & Wolff, *The Role of Trade Law in the Making of Trade Policy*, in INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE §§ 3.01-.06 (J. Jackson, R. Cunningham, & C. Fontheim eds. 1985).

tained,²¹⁷ while leaving an open free trade system essentially intact.²¹⁸ Analysts of U.S. trade policy have noted that politically powerful but economically uncompetitive industries have used these laws as a means of striking special deals.²¹⁹ I.M. Destler argues that "in large cases, 'the rules' change from a means of diverting pressure to a means of asserting it. Typically, the policy result was not the remedy specified in law but new 'special case' protection for the claimants."²²⁰

In some measure, this analysis encompasses the semiconductor dispute. The dispute resulted in a special deal for a special case in much the way special forms of relief were crafted for the U.S. textile and steel industries.²²¹ In many other important respects, however, this traditional analysis fails to capture its unique and precedential aspects of the semiconductor dispute.

First, the dispute reveals much greater activism and willingness by the U.S. government (both in Congress and the Executive) to manage international trade, rather than merely to protect or assist in the adjustment of a domestic industry. The dispute is not one in which the executive branch fashioned administrative protection to placate congressional demands. The evolution of the issue reveals instead a pattern of interbranch cooperation, if not one-up-manship, in negotiating an international solution with Japan.

The form of relief fashioned for the industry was extraordinary in U.S. trade policy as well. John Zysman and Stephen S. Cohen have noted that, with regard to managing the problem of global surplus capacity, the United States and Japan historically have adopted fundamentally different approaches:

Formally, the Europeans and Japanese tend to manage excess capacity at home through cartels or cartel-like arrangements, and the Japanese are prepared to negotiate market-sharing arrangements internationally. Such arrangements are legally and politically difficult in most cases in the United States. In part as a result, American policy responds to international excess capacity through external protection.²²²

217. Ehrenhaft, *supra* note 17, at 608.

218. John Jackson wrote in 1984, "[T]he U.S. legalistic system — cumbersome, rigid, and costly as it is — in fact provides for an economy more open to imports than virtually any other major industrial economy in the world. . . ." Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1582 (1984).

219. DESTLER, *supra* note 20, at 111.

220. *Id.* at 112.

221. See the related chapter in AMERICAN INDUSTRY IN INTERNATIONAL COMPETITION, *supra* note 32, at 249-312.

Although the agreement encompassed a form of protection for U.S. producers, it marked an unusual willingness by U.S. policymakers to enter into an international cartel-like arrangement. The particular aspects of the agreement which reflect this departure include the focus on third country-market pricing²²³ and the reservation of a specific share of the Japanese market for foreign suppliers.²²⁴ The agreement reflects a greater willingness by the U.S. government to go beyond mere protection of domestic industry and reliance on the workings of a free market and organize global economic adjustment.

Generally, the semiconductor issue departs from prior U.S. trade policy in the aggressive posture that U.S. officials adopted with respect to a high-technology trade dispute with Japan. Underlying this new approach are several emerging premises. First, a belief that Japanese and other markets are closed to U.S. products so that a foreign nation can target key industries for export-led growth. Second, that strong U.S. governmental action is necessary to force reciprocal access and combat the impact of foreign export targeting. Third, that U.S. government responses to industry demands for market access should be concentrated in leading-edge technology products because they are (a) equal in price or quality to foreign-made products, (b) essential to America's future economic health, and (c) important industries to U.S. national defense.

U.S. officials may concede that, in a number of product sectors such as automobiles and consumer electronics, Japanese products enjoy such a competitive edge that U.S. firms cannot expect any significant market share in Japan. In leading-edge technologies, however, the semiconductor case reveals that American officials believe U.S. firms are equal or superior to foreign competitors. In such cases, Congress and the Administration are anxious to conclude that market barriers to U.S. products exist and that dumping and/or other unfair trade practices by Japanese firms in U.S. markets must be combatted to ensure the future competitiveness of American firms.

The tendency to be sympathetic to the demands of high-technology industries is strengthened by the belief that the future balance of U.S. trade will be determined by the outcome of competition in leading-edge technologies such as semiconductors. Since the beginning of

222. *Double or Nothing: Open Trade and Competitive Industry*, 61 FOREIGN AFFAIRS, 1124 (1983).

223. See 3 Int'l Trade Rep. (BNA) 735 (June 4, 1986).

224. *Id.*

the dispute, this attitude has surfaced in bilateral trade issues with Japan in high-speed ("super") computers, highly advanced integrated circuits, and biotechnology,²²⁵ industries on which America's competitive strength will be based in the 1990's and beyond. The words and deeds of many members of Congress and the Administration involved in the dispute suggest a belief that the United States is engaged in global struggle for economic and technological supremacy, if not survival, and that, because firms in Japan and elsewhere have the aggressive support of their governments, U.S. firms cannot prevail without substantial assistance from the U.S. government.

This departure in U.S. trade policy appears linked significantly to concerns over U.S. national security. An essential tenet of U.S. foreign policy is the notion that U.S. defense strategy relies heavily on maintaining a continued and substantial technological advantage over the Soviet Union. Until recently, the Defense Department generally opposed import restrictions because it wished to maintain the option of procuring goods and components on a worldwide market.²²⁶

This Defense Department position may be changing. The Defense Department is increasingly concerned about the extent to which the United States is becoming dependent on foreign countries, primarily Japan, for products and technologies considered critical to the U.S. defense effort and the Department is willing to take steps to assure itself of domestic supplies.²²⁷ These new attitudes were manifested in its opposition to the acquisition of Fairchild Semiconductor by Fujitsu and in its supporting and funding of research and development by U.S. manufacturers under Sematech.²²⁸ Despite the countervailing belief that Japan is an important ally, the Defense Department does not believe that

225. See Auerbach & Gladwell, *Import Ban on Genetic Item Asked*, Wash. Post, Feb. 17, 1988, at F1, col. 1.

226. See William J. Long, *Institutionalizing U.S. Strategic Trade and Investment Policy in the Department of Defense* (manuscript slated for publication 1989).

227. This changing attitude may not be limited to the Department of Defense. In April, 1988, the State Department's Office of Munitions Control ("OMC") issued revisions to the International Traffic in Arms Regulations, implementing amendments to the Arms Export Control Act enacted by Congress at the end of 1987. Under the new regulations, companies must reveal whether they are owned or controlled by foreign persons at the time they apply for registration. Registrants must also provide written notice to the OMC 60 days in advance of a sale or transfer of ownership or control to a foreign firm. The notification requirements could lead to restrictions on particular acquisitions in the high technology defense contract sector, resulting in more situations similar to the failed effort by Fujitsu to acquire Fairchild Semiconductor.

228. See *supra* notes 39-44 and accompanying text.

the United States can afford to rely on any foreign supplier for products and technologies essential to the defense effort.²²⁹ The semiconductor issue may presage a new and important Defense Department role in leading edge technology trade during an era when the U.S. remains predominant militarily, but not necessarily economically or technologically.

In addition to reflecting some new directions in U.S. trade policy generally, the prosecution and resolution of the dispute also reflects a further politicization of U.S. trade laws. As noted, the agreement was unique in its scope, focusing on dumping and pricing practices in third-country markets as well as in the U.S. market. The antidumping investigation itself was unique because it extended protection to future generation products not yet imported into the United States, such as chips with memory capacity beyond 256K; virtually unique in the Commerce Department's decision to self-initiate that investigation;²³⁰ and unprecedented in the Commerce Department's decision, announced personally by Secretary Baldrige, to accelerate its preliminary finding of dumping in that case so as to coincide with other deadlines and thereby increase pressure on the Japanese to settle the dispute. This further politicization of the trade laws enhances the likelihood that U.S. trade laws will be used as a tool for increasing political pressure, rather than as an escape valve for protectionist demands, and that the laws will lose their credibility internationally as relatively fair and impartial measures for resolving trade disputes.

The public funding of Sematech at \$100 million a year for five years is also a remarkable departure in U.S. economic policy. Inspired by the basic economic and national security concerns noted above,²³¹ Sematech, a quasi-public research, development, and manufacturing consortium dedicated to promoting the worldwide competitiveness of the U.S. industry, adopted another Japanese model for economic success.²³² At issue is the wisdom of government targeting of specific industrial sectors for support, loosely called "industrial policy," in contrast to the federal government's traditional reliance on markets to

229. See Long, *supra* note 226.

230. The Commerce Department recently compiled a list of Japanese products it believed were being dumped on the U.S. market and has actively encouraged domestic industries to seek redress from these pricing practices under U.S. dumping laws.

231. See *supra* notes 46-55 and accompanying text.

232. Richard Rosecrance has noted that, ultimately, it is not the American model that Japan will follow, but the Japanese model which America will follow. RICHARD ROSECRANCE, *THE RISE OF THE TRADING STATE* (1985).

decide how and when industries will grow and contract.²³³

B. *The International Trading System*

The EC was an uninvited guest to the dispute. It viewed the agreement as a threat to its trading interests.²³⁴ As mentioned, shortly after the conclusion of the agreement the EC requested, under Articles XXII and XXIII(2) and the GATT Antidumping Code, an investigation of the legality of the accord. The EC alleged: (1) Japan's monitoring of semiconductor prices to third-country markets violated the EC's rights under GATT's Antidumping Code;²³⁵ (2) the agreement to set aside the Japanese semiconductor market for foreign producers violated the most-favored-nation principle;²³⁶ and (3) the agreement was not transparent and ran contrary to the commitments renewed at Punta del Este, Uruguay for continued openness and multilateral solutions to trade problems.²³⁷ Under GATT dispute resolution procedures, the EC claim was referred to a dispute resolution panel.²³⁸ On March 24, the panel announced the Japanese enforcement of third-country pricing provisions of the agreement violates the GATT.²³⁹

The Japanese Government had used administrative guidance on pricing and production controls and delays of export licensing requests to raise third-country prices to the level required by the agreement.²⁴⁰ The GATT panel agreed with the EC allegations that the combined effect of these measures violated GATT's prohibition on quantitative export restrictions, constituting, in effect, export quotas.²⁴¹ The GATT panel upheld the legality of other provisions of the agreement challenged by the EC, including the Japanese commitment to increase market access for U.S. manufacturers.²⁴²

On May 4, Japan accepted the GATT panel's determination.²⁴³ The United States welcomed Japan's decision to develop an alternative

233. At the time of this writing, domestic electronic firms and SIA had also announced a nine-point agreement to increase U.S. DRAM production and to reduce dependency on Japanese suppliers. The proposal quickly won the endorsement of Secretary of Commerce William Verity and U.S. Trade Representative Clayton Yeutter.

234. *See supra* notes 154-156 and accompanying text.

235. 14 Int'l Trade Rep. (BNA) 453 (Mar. 30, 1988).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. 14 Int'l Trade Rep. (BNA) 692 (May 11, 1988).

monitoring system, rather than abandon the agreement, and has proposed negotiations to assist Japan.²⁴⁴ U.S. officials admitted that it will be difficult for Japan to balance the interests of the EC, which is calling for the exclusion of government involvement in semiconductor exports, with those of the United States, which believes government involvement is necessary to assure compliance with the agreement.²⁴⁵

Whatever the final outcome, it is fair to speculate that the dispute and agreement constitute a significant departure from the spirit of the GATT. The GATT is founded on the notion that the rules of the international trading system would be made on a multilateral basis.²⁴⁶ Further, the GATT aspires to the evenhanded application of transparent rules.²⁴⁷ Moreover, it is understood that the major economic powers, particularly the United States, have primary responsibility for policing these rules.²⁴⁸

In contrast to these fundamental principles, the agreement is directed to managing the prices of Japanese semiconductors worldwide. Despite the global scope of the agreement and its effects on prices, it is an exclusive, bilateral deal founded on confidential price and cost data. Moreover, the deal was struck between the two most powerful national actors in the GATT: the United States, which has maintained a leadership position in the GATT since its inception, and Japan, the nation most capable of assuming increasing leadership responsibility in the GATT. Needless to say, the dispute does not commend the GATT's continued effectiveness.

The dispute and its resolution also raise the broader question of the implications of America's increasing bilateralism in trade and its declining commitment to GATT's principles of diffuse reciprocity, and universal procedural rules.²⁴⁹ This involves the assumption that the cost and benefits of free trade will balance out in the long run and will be optimal for any one nation. Clearly, the semiconductor dispute, with its precise demands for market share and pricing, constitutes a further movement away from such principles and suggests that the United

244. Specific proposals Japan has discussed with the United States and the EC include imposition of an export tax, relinquishing monitoring procedures to the Japanese semiconductor industry, and cooperation among GATT members to monitor import prices of Japanese chips.

245. 14 Int'l Trade Rep., *supra* note 243.

246. The notion of multilateralism and transparency is embodied in the text of the General Agreement. See DAM, *supra* note 18, at 391-468.

247. *Id.*

248. HUDEC, *supra* note 23, at 49.

249. See STEPHEN D. KRASNER, TRADE CONFLICTS AND THE COMMON DEFENSE, 801 (1985).

States is willing to adopt the principle of specific reciprocity²⁵⁰ in sectoral negotiations with Japan. With a sectoral approach based on specific reciprocal relations comes, necessarily, complicated and discriminatory administrative mechanisms and rules and the inoperability of multilateral mechanisms such as the GATT.

250. *Id.* It secures roughly equivalent advantage for a delimited set of transactions.

