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Aspects of the Legal, Political and Policy Issues that will Confront the U.S.-Japan Trading Community During the Remainder of the 1980's

by *William L. Dickey**

I. INTRODUCTION

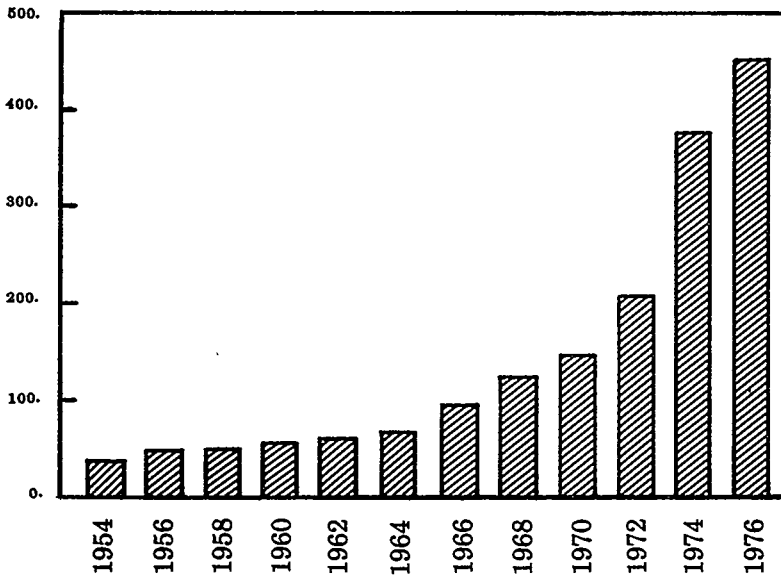
The purpose of this article is to explore aspects of the legal, political and policy issues that will confront U.S.-Japan trade relations during the remainder of the 1980's. Virtually all trading partners have differences over trade policies and practices, and U.S.-Japan trade history has been no exception. This, however, is a natural consequence of two highly competitive trading nations seeking commercial advantages in the same dynamic markets.

II. RETROSPECT: JAPANESE IMPORTS AND ANTIDUMPING

Before considering the prospective legal, political and policy issues which face U.S.-Japan trade relations, it will be advantageous to review the trends of the last several years. During the late 1960's general imports into the United States escalated dramatically and became a substantial competitive factor in the U.S. market for the first time. Table I illustrates the increases in the value of imports. The impact is evident.

* Partner, Dickey & Moore, Washington, D.C.; J.D., George Washington University School of Law, 1962; Professor of Law, University of South Dakota, 1962-63; Minority Counsel, Senate Subcommittee on Intergovernmental Relations, 1963-64; Deputy Assistant Secretary, U.S. Department of the Treasury, 1969-72. The author has focused on the SIA semiconductor petition as presenting an excellent case study for purposes of both defining and focusing on the issues presented under the general label of "industrial targeting."

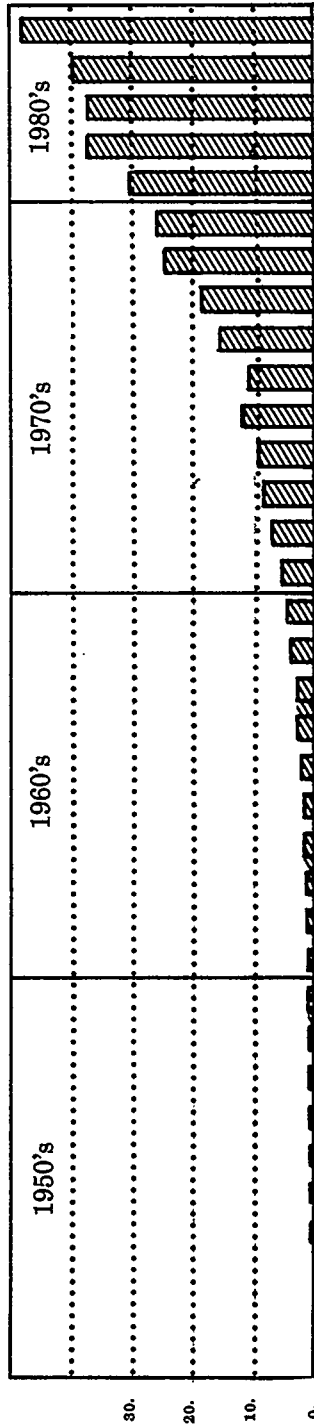
Table I

Indexed Value of General Imports

Source: U.S. Dep't of Commerce, Bureau of Economic Analysis, 1977 Bus. Statistics, The Biennial Supplement to the Survey of Current Business (21st Biennial ed. Mar. 1978).

Japanese imports into the United States followed this same pattern of dramatic escalation. (See Table II.)

Table II
Value of General Imports from Japan: 1950-1984 (84 estimated)

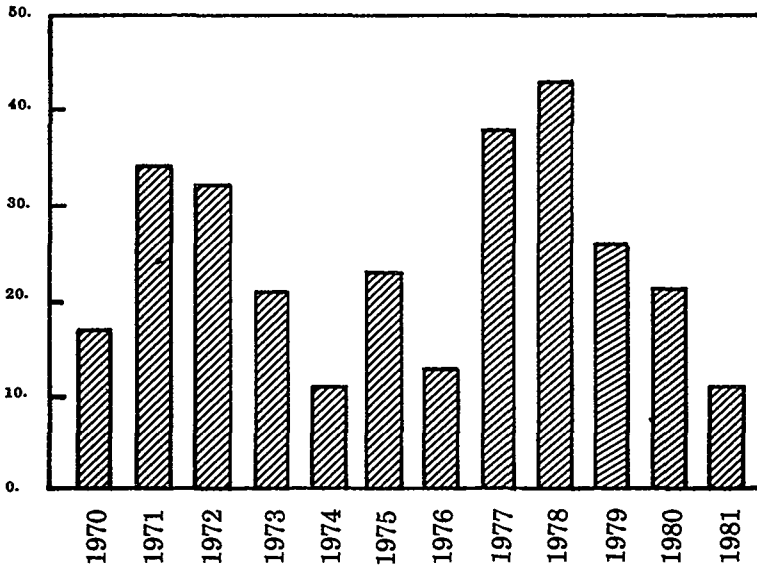


Source: U.S. Dep't of Commerce, Overseas Bus. Reports. In Billions of U.S. Dollars.

As a reaction to the price competition that imports generated, antidumping proceedings became a popular remedy. Numerous imported products were confronted with antidumping investigations, especially during the 1971-72 and 1977-78 economic cycles. (See Table III.)

Table III

New Antidumping Investigations Commenced by Year

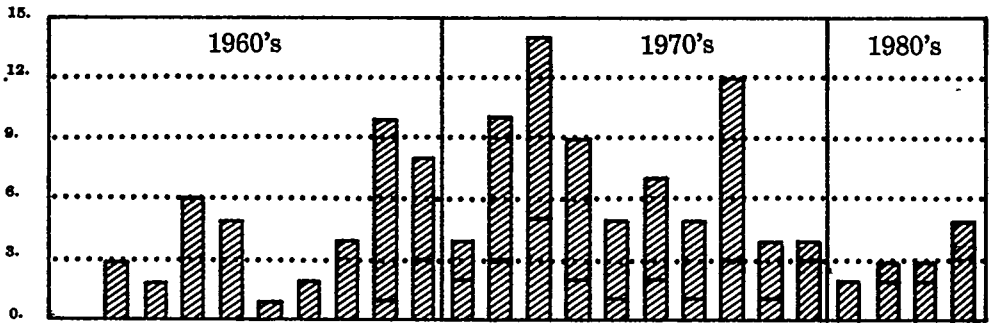


Source: U.S. Dep't of Commerce, Office of Investigations, International Trade Administration.

Specifically, an antidumping remedy was often sought by U.S. companies that were hurt by Japanese competition. (See Table IV.) A major factor in the frequency of these investigations was the exchange value of the U.S. dollar in the Japanese and other foreign markets.¹

¹ It should be noted that the United States entered negative trade balance cycles in its merchandise account for both the 1971-72 and 1977-78 cycles. The merchandise trade balance upswing occurred during the 1973-76 period. Trade balances began a slide into an approximate \$32 billion deficit during 1977. Correspondingly, the weighted-average index of the exchange value of the U.S. dollar dropped remarkably fast along with the trade balance figures. The weighted-average index started down from 120.23 in April of 1971 to a low of 92.7 in July of 1973. The dollar then increased in relative value. It began a slow, steady decline from 104.4 in June of 1977 to 94.74 in June of 1978 to 89.5 in June of 1979. During 1980, the dollar remained at a relatively constant low level, but started up again at the end of 1981 and has since remained strong. The conventional wisdom of the 1970's seemed to have been that the strength of the dollar would move in a pattern with trade balance performance, i.e., trade deficits would weaken and surpluses would strengthen the relative value of the dollar. However, during the 1980-82 period two factors seem to have diminished the relative importance of the trade deficit factor on the relative exchange value of the dollar.

Table IV
New Antidumping Investigations Commenced Concerning Commodities
from Japan



Sources: Records of United States Customs Service; Federal Register; Fed - Track Guide to Antidumping Findings and Orders.

While some antidumping activity continues,² it has significantly diminished as a factor in U.S.-Japan trade. At this time, only eight commodities (three from 1982 and five from 1983) from Japan are the subject of new investigations.³ However, considerable compliance activity contin-

First, interest rates in the United States were abnormally high. Second, the belief among investors that, given widespread political, financial or military instability in other nations of the world, the United States provided the most secure haven for investment. It might be fair to speculate that a weak dollar will generate more dumping activity, but given the economic anomalies of the last few years, it is difficult to speculate about what would cause the dollar to drop precipitously causing widespread dumping problems between the United States and several of its trading partners. A somewhat similar pattern occurred in the 1977-78 period.

² Table IV shows two things: Investigations commenced and actual dumping findings as the darker subset within the respective columns. It should be noted that although a few investigations had been initiated prior to 1968, there had been no findings of dumping until the television case determination of June 18, 1968. In retrospect, that determination seems to constitute some kind of a milestone or turning point in U.S.-Japanese trade relations and introduced an entire new sphere of consideration for Japanese manufacturers and importers. The "action/reaction" dynamics then took hold as companies learned how to deal with and avoid antidumping consequences, and that, coupled with the strength of the dollar, has resulted in a great diminution of new dumping investigations after 1977. What should also be noted is that the 1982 and 1983 proceedings related to relatively minor trade commodities compared to those of the 1970's. It should also be noted that imports from Japan in 1983 will approximate \$40 billion, compared to imports from Japan approximating \$5.9 billion in 1970. For a review of the pattern of antidumping investigations since 1960, see the Appendix to this article.

³ 1982: High Capacity Paging and Alerting Devices from Japan, 47 Fed. Reg. 37,312

ues vis-à-vis dumping findings that have been in place for up to several years.⁴

The decline in antidumping activity has occurred for several reasons. Firstly, the value of the dollar (as of this writing) is relatively strong against the yen, and a strong dollar tends to erase dumping margins. During weak dollar periods especially when the dollar declines precipitously, dumping margins appear.⁵ Secondly, the Japanese have moved the production of many import sensitive commodities into the United States. This was done specifically to avoid customs entry problems, such as antidumping investigations or orders.⁶ Thirdly, Japanese and U.S. industries seem to be entering into more joint ventures, supply agreements and other arrangements which preclude or discourage the filing of complaints. Further, because many complaints are brought through trade associations, association members with joint venture interests often veto association action adverse to the interests of their Japanese partners.⁷ Fourthly, there has been a tremendous increase in the up-front costs that must be incurred by the complaining U.S. industry to convince the International Trade Association (ITA) and the International Trade Commission (ITC) that there is sufficient merit to a complaint to warrant initiation of a formal investigation.⁸ Because of the sophisticated procedures introduced by the Trade Agreement Act of 1979, the investigation process demands more day-by-day participation of counsel for the complaining industry.⁹ The aggregate effect of these changes is high and unavoidable costs for a domestic industry in prosecuting a complaint clearly a substantial inhib-

(1982); Portland Hydraulic Cement from Japan, 47 Fed. Reg. 4417 (1982); Steel Pipes and Tubes from Japan, No. 731-TA-87, Jan. 28, 1982;

1983: Cyanauric Acid and its Chlorinated Derivatives from Japan, 48 Fed. Reg. 27,453 (1983); Lightweight Polyester Filament Fabric from Japan, 48 Fed. Reg. 1359 (1983); and Tapered Roller Bearings and Components from Japan, 48 Fed. Reg. 4743 (1983); Steel Valves and Parts from Japan, 48 Fed. Reg. 45,319 (1983); Spindle Belting from Japan, 48 Fed. Reg. 36,677 (1983). See FED-TRACK PUBLICATIONS, FED-TRACK GUIDE TO ANTIDUMPING FINDINGS AND ORDERS. (As of Oct. 31, 1983).

⁴ Approximately 33 dumping findings against specific commodities from Japan remain under some phase of compliance activity by the International Trade Administration. Such compliance work relates to findings in place as far back as 1968. Fed-Track Guide, *supra* note 3.

⁵ Dickey, *Antidumping: Currency Fluctuations as a Cause of Dumping Margins*, 7 INT'L TRADE L.J. 67 (1982).

⁶ For example, such companies as Hitachi, Sharp, Sanyo, Mitsubishi and NEC, manufacturers of a host of electronics-related commodities, in recent years, have moved production facilities into this country.

⁷ This observation is based upon the author's personal experience; however, because of confidences, etc., the author does not feel free to disclose particulars.

⁸ Pryor, *Litigation Cost One Cause of Shifting Trade Practice*, Legal Times, Oct. 5, 1981, at 1.

⁹ Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979).

iting factor. In order to avoid antidumping consequences, foreign producers and importers have been forced to study, understand and take preventive planning to deal with antidumping laws and their implications. This allows for preventive planning by importers/exporters. It is, therefore, much more difficult for companies to engage in dumping.¹⁰

The consequence of these developments is the shift from resolving U.S.-Japan trade conflicts at the specific product level before U.S. regulatory agencies to resolving them at the governmental level with the negotiations carrying broader industrial impact. For example, the U.S. resolved the "television wars" with a series of orderly marketing agreements.¹¹ Steel products,¹² automobiles¹³ and textiles¹⁴ also have been the subject of negotiations and, in some instances, marketing agreements and quotas. These matters generally have been resolved by high-ranking governmental negotiators rather than administrative agencies or courts. Further, a concentrated effort by U.S. negotiators to decrease competition in certain areas (and open Japanese markets) is underway.¹⁵ Bargaining points for the U.S. negotiators include threats of local content legislation,¹⁶ denial of investment tax credits for products imported from countries engaged in

¹⁰ Before 1968, little information on dumping was available because of the low incidence of dumping activity and because instances of dumping could be settled by a simple letter of assurance. Dumping was not a significant practical problem in the international trade community. Little was written on the subject and few people had any experience at all with the subject. The subject was not taught in the schools. In general, it was not a problem contemplated by international traders. After 1968, the U.S. Department of Treasury stopped accepting letter assurances that prices would be maintained above dumping levels. Instead, it initiated investigations to determine whether there had, in fact, been dumping. New regulations were prepared and published and an entire body of law on the subject emerged. Almost all of that law developed after 1970. It took considerable time for the legal concepts to emerge and be generally understood by both the legal and trading communities.

¹¹ These agreements are coterminous with an earlier OMA with Japan in effect since July 1977. TWENTY-FOURTH ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 107 (1979).

¹² TWENTY-SIXTH ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 114 (1981-82). Ambassador Brock stated on November 1, 1983:

The Government of Japan has decided to restrain exports of passenger vehicles to the United States at a level of 1.85 million units for the year beginning April 1, 1984. The United States has expressed its appreciation to Japan for making such a difficult decision. I would particularly like to thank MITI Minister Uno for his tireless efforts to resolve this most troublesome issue.

Transcript of a press conference given by Ambassador William Brock (Nov. 1, 1983).

¹³ TWENTY-SIXTH ANNUAL REPORT, *supra* note 12, at 115.

¹⁴ *Id.* at 118.

¹⁵ Furakawa, *Urge Japan to Further Open Markets to U.S. Imports*, ELECTRONICS NEWS, Jan. 3, 1983, at 1, col. 2.

¹⁶ H.R. 5133, 97th Cong., 1st Sess. (1981).

unfair trade practices¹⁷ and reciprocity legislation.¹⁸

A large measure of the shift in emphasis from corporate funded administrative proceedings on specific commodities to governmental negotiations is attributable to the extremely high cost of pursuing antidumping and related actions. It takes an enormous trade volume and substantial injury to justify the high expense of pursuing such private remedies. Several actions have demonstrated the nearly prohibitive costs of this course.¹⁹ In some instances, even if the domestic industry is successful in the litigation, the penalties can be circumvented by moving all or simply a portion of the manufacturing process to a location within the customs territory of the United States. The domestic industry will have won the battle but lost the war. With capital intensive, high plant investment industries which are not easily portable, domestic industries can get greater satisfaction from their legal investment because if they are successful in their antidumping suit enough uncertainty is created in the market to close out the foreign competition.

III. PROSPECT: COMPETITION IN HIGH TECHNOLOGY

During the next several years, the greatest number of novel, interesting and challenging issues in U.S.-Japan trade relations will be generated by competition in high technology areas. Perhaps anticipating this development, the Cabinet Council on Commerce and Trade released *An Assessment of U.S. Competitiveness in High Technology Industries* in late 1982.²⁰ In its analysis the study concluded:

The United States occupies a unique leadership position in the world political and economic structure—a leadership role underwritten by its preeminence in advanced technology. The possible erosion of this

¹⁷ Houdaille Industries, Inc., Petition to the President of the United States through the Office of the United States Representative for the Exercise of Presidential Discretion Authorized by Section 103 of the Revenue Act of 1971 (May 3, 1982).

¹⁸ By voice vote on April 21, 1983, the United States Senate passed S. 144, a "reciprocity" measure, however the matter was dropped in conference. It has been attached to H.R. 3398 which is currently pending in the Congress. It passed the House (amended) by Ye-Nay Vote: 368-43 (Record Vote No. 225, H4569), was referred to the Senate Committee on Finance on June 29, 1983, (S9483) and was reported to the Senate (amended) by the Senate Committee on Finance. Finally, it was placed on the Senate Legislative Calendar. It should be noted that there has been a "seemingly constant series of missions by U.S. trade negotiators to Tokyo, who pressed the Japanese to open up their markets to goods from the United States." See 15 NAT'L J. 2162 (1983). With the economic recovery, it would seem that the protectionist trend has not developed to the extent feared.

¹⁹ For example, those actions involving televisions, automobiles and steel, *supra* notes 12-14 and accompanying text.

²⁰ WHITE HOUSE CABINET COUNCIL ON COMMERCE AND TRADE, AN ASSESSMENT OF U.S. COMPETITIVENESS IN HIGH TECHNOLOGY INDUSTRIES (Dec. 1982) [hereinafter cited as STUDY].

preeminence could have far-reaching economic, political and national security consequences for the United States. . . . As the high-technology industries of other countries have emerged as strong international competitors, U.S. high-technology industries are facing a significantly altered competitive environment. In the new environment, the United States faces a major challenge to maintain its broad technological preeminence. . . . Over the last twelve years, there has been a decline in the international market position of U.S. high technology industries from a position of dominance to one of being strongly challenged. *Market share* for the high-technology group—and for nearly all individual industries—*has fallen*. Foreign competition in high technology has increased dramatically, with developments in selected new areas indicating that technological advantages have shifted overseas.

An array of factors influence U.S. versus foreign advances in technology. The most important of these across all industries are:

- the overall state of domestic economy,
- cost and supply of capital,
- relative R&D efforts,
- the transfer of technology,
- availability of scientists and technicians, and
- explicit industrial policies toward technology-intensive sectors.²¹

President Reagan, in his State of the Union Address delivered in early January 1983 stated:

But, as surely as America's pioneer spirit made us the industrial giant of the 20th century, the same pioneer spirit today is opening up another vast front of opportunity—the frontier of high technology. In conquering the frontier we cannot write off our traditional industries, but we must develop the skills and industries that will make us a pioneer of tomorrow. This Administration is committed to keeping America the technological leader of the world now and into the 21st century.²²

These statements manifest the concern expressed by our political leaders that the United States maintain an independent leadership position in the high-technology area. Similarly, Japan is striving to achieve dominance in this area. With its special emphasis upon commercial development of computer and semiconductor technology, Japan is far and away the United States' most dynamic world competitor in the high-technology area. It is this direct competition that will generate the trade law issues of the 1980's.

²¹ *Id.* at Executive Summary.

²² President's State of the Union Address, 19 WEEKLY COMP. PRES. DOC. 102 (Jan. 25, 1983).

IV. CASE STUDY: THE SEMICONDUCTOR INDUSTRY

In January of 1983, the Semiconductor Industry Association (SIA) published *The Effect of Government Targeting on World Semiconductor Competition, a Case History of Japanese Industrial Strategy, and Its Costs for America*.²³ This comprehensive document begins as follows:

The purpose of this paper is to describe the decade or more of coordinated effort by the Japanese government to put the Japanese semiconductor producers in a dominant world-wide position in key product lines. The Japanese government has worked closely with private Japanese firms to reorganize the industry; rationalize production; protect its home market; subsidize research, development, and production; and in a number of ways to promote its industry's bid for a commanding world market position.²⁴

The SIA document goes on to describe what it perceives as a number of actions taken by the government of Japan to support "target" commercial development of the semiconductor industry. Specifically, the SIA document provides credible support for allegations that the Japanese government:

1. Orchestrated a formal industry-government consultative process that operated to establish industry-wide goals and specific company assignments for development of different aspects for semiconductor production, which consultation and assignment process continues today on an on-going basis.²⁵
2. Relaxed anti-monopoly and related legal constraints in order to permit information sharing, joint activities, mergers of competing companies, elimination of price competition, market allocations, etc., among the companies selected to perform specific functions. SIA alleges such activity normally would be considered violative of Japan's antitrust and other unfair trade practice legislation.²⁶
3. Subsidized research and development through direct grants.²⁷
4. Directly and indirectly arranged for soft, low-interest loan packages, some of which required no payback unless and until the relevant project turned an adequate profit.²⁸
5. Provided discriminatory favorable tax treatment by way of special depreciation and other tax benefits.²⁹

²³ SEMICONDUCTOR INDUSTRY ASSOCIATION, *THE EFFECT OF GOVERNMENT TARGETING ON WORLD SEMICONDUCTOR COMPETITION, A CASE HISTORY OF JAPANESE INDUSTRIAL STRATEGY, AND ITS COSTS FOR AMERICA* (Jan. 1982) [hereinafter cited as SIA PAPER].

²⁴ *Id.* at V.

²⁵ *Id.* at 17.

²⁶ *Id.* at 3, Figure A and App. A.

²⁷ *Id.* at 3 and App. B.

²⁸ *Id.*

²⁹ *Id.* at 3 and Figure A.

6. Preserved home markets by restricting all government procurement to Japanese production, and by urging Japanese firms to "buy Japan" through "administrative guidance."³⁰
7. Preserved the private sector market for selected Japanese producers and eliminated price competition by setting up exclusive and special lease-financing arrangements.³¹
8. Restricted access to foreign imports and Japanese partners.³²

The SIA document also indicates a significant loss of markets by U.S. companies to Japanese competition in this area. Further, other nations—France, Germany, Taiwan, Korea—are now beginning to emulate Japan and are implementing their own government-backed versions of the Japanese targeting program to promote the growth of their high-technology industries.³³

For the narrow purposes of this article, the writer, though not necessarily in agreement, will proceed under the assumption that a sufficient factual basis exists to support the assertions of the SIA. Again, the objective of this article is to examine the legal and policy consequences that potentially follow from the alleged factual pattern.

The SIA seeks the following remedy:

1. An announced U.S. policy "that foreign industrial targeting practices will not be allowed to undermine U.S. technological and economic leadership in this critical industrial sector."
2. A program to identify, analyze and counter the distorting effects of foreign industrial targeting practices in the United States.
3. An insistence by the U.S. government that U.S. firms receive commercial opportunities in Japan equal to those enjoyed by Japanese firms in the U.S. market, i.e.: that Japan abandon its "buy Japan" policies, that U.S. subsidiaries in Japan enjoy equal access to local Japanese capital markets on the same terms as those enjoyed by MITI-favored Japanese firms, that U.S. companies in Japan should be permitted to establish and develop manufacturing and research facilities in Japan, and to participate on the same basis as MITI-favored firms and that Japanese firms should demonstrate no sales are below cost.
4. U.S. governmental enforcement of Japan's obligations in multilateral forums, i.e. GATT and the MTN Subsidies Code.
5. A model, formed of such policies, for dealing with targeted industry practices in other countries.
6. Federal statutes conferring "the authority and means necessary to ensure that the U.S. Government can carry out the policies and mea-

³⁰ *Id.* at 69.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 111.

asures outlined above effectively."³⁴

The foregoing sets up some frustrating dilemmas for the United States. It is obvious and well-recognized by U.S. government officials that U.S. supremacy in the high-technology area is critical to its long-term economic and military security. It is also apparent that the semiconductor industry is one of the basic staples of the future of high-technology development. Semiconductors are very likely to determine the level of a country's computer, telecommunications, robotics, aerospace and other high-technology industries in the future. The reason is that microchips now constitute the core components of highly sophisticated products. Some consider semiconductors "the crude oil of the 1980's."³⁵

The SIA seems to have made its case that it is rapidly losing its leadership in this critical area to the Japanese. It seems to be generally perceived that control over product development is essential to produce competitiveness.³⁶ A very interesting observation was recently reported in *The Washington Post*, in an interview with C. J. Van der Klugt, vice-president and vice-chairman for consumer products of Philips, n.v., a Dutch firm. The report states:

Van der Klugt . . . believes that U.S. companies lost out to the Japanese because of American management's "strictly black-and-white, bottom line approach."

The downhill slide began some years ago in the radio business When U.S. companies discovered that the Japanese could make radios more cheaply than they could, they either gave up trying to compete or subcontracted with them, first for components, then for the whole radio. The result was that the American lead was gradually frittered away.

The same thing happened in the electronics field, according to [Wisse Dekker, President of Philips]. When U.S. companies began contracting out to the Japanese, they lost the control over product development, which Philips considers vital to competitiveness.³⁷

Upon this basis, the assumption follows that the vital interests of the United States are in fact being threatened by Japanese competition in the "targeted" semiconductor industry. At this point, the issue becomes how the United States should respond legally. It was reported in *The Washington Post* on February 11, 1983, that:

The United States and Japan have agreed to open Japan's markets and its government-sponsored research to American companies in the in-

³⁴ *Id.* at 104.

³⁵ JAPAN ECON. J. 7 (June 29, 1982).

³⁶ SIA PAPER, *supra* note 23, at 1.

³⁷ Vandervort, *Dutch Firm Set to Challenge the Japanese*, *Washington Post*, Feb. 13, 1982, at G3, col. 1.

creasingly important field of high technology. . . . The agreement, approved by the Japanese and U.S. cabinets, attacks what many experts consider an area of world trade where American dominance is being threatened by policies of the Japanese government, which selected high technology as an industry for special support. The agreement does not have the force of a treaty, however, and requires voluntary compliance by both governments.³⁸

While it appears that some progress has been made through negotiations in response to the complaints voiced by the SIA, it also appears that the core problems remain.

However, based upon generally available information and reinforced by the study, *An Assessment of U.S. Competitiveness in High Technology Industries*,³⁹ the problems about which U.S. industries like the semiconductor industry complain have little relationship to controversial Japanese practices. U.S. industry must be careful not to blame domestic problems on "foreign devils," thereby denying the United States' own deficiencies.⁴⁰

The following are some fundamental questions concerning the general pattern of the SIA complaints and pleas for governmental action:

1. To what extent are these industrial problems the result of the United States' endemic economic problems of an overvalued dollar, high U.S. interest rates, restrictions resulting from our own export control program, lack of export financing, and other basic comparative advantage

³⁸ Auerbach, *Japan to Ease Curbs on U.S.*, Washington Post, Feb. 11, 1983, at D8, col. 3.

³⁹ Study, *supra* note 20.

⁴⁰ Other problems are hurting our international competitive posture, specifically, wage disparities, productivity growth, and the focus on short term profits:

Hourly compensation in the 1970's increased at an average 9.1% clip, more than double the average gain in the 1960's. In Japan, the rate of gain actually slowed, and in Germany it moved up only modestly. The average hourly wage in the U.S. auto industry in 1982 was \$19.43, as opposed to \$7.22 in Japan and \$12.94 in Germany. U.S. Steelmakers earned an average of \$22.74 per hour, while their Japanese and German counterparts make \$10.18 and \$11.51, respectively.

From the 1960's to the 1970's, productivity growth in the U.S. slowed sharply. Although growth in output per man-hour also decreased in other countries, it still continued to show healthy gains. As a result, U.S. unit labor costs have been growing faster than in any other major industrialized country except Britain for the past 10 years, helping to undermine international competitiveness.

For its part, management continues to focus on short-term profits rather than building and maintaining market shares both at home and abroad. "If an industry goes down, the first thing they cut is export promotion efforts," says the Chamber of Commerce's Brennan. Such cutbacks by U.S. companies contrast with the high export priority of European and Japanese competitors, who cling tenaciously to market footholds even during business slumps.

America's Hidden Problem, Bus. Wk. 66 (Aug. 29, 1983).

factors such as wage rates, production efficiencies, relatively fewer scientists and engineers, etc.?

2. Is it not true that many United States practices, such as government-funded research and development, joint ventures among competing firms and "Buy American" practices, parallel the criticized Japanese practices?

3. Are there not adequate remedies on the books to counter, in proper measure, the effects of the alleged subsidy and sales below-cost-factors?

V. U.S. PROBLEMS ENDEMIC TO ALL U.S. TRADE

A. *Overvalued Dollar*

In a study released by the National Association of Manufacturers, it is reported that the United States is losing ground in trade in almost every kind of manufactured goods and that overvaluation of the dollar is the "most important single factor." The dollar might be overvalued by as much as 25%.⁴¹ One distinguished commentator stated that the dollar is "now more overvalued than at any time since 1971," and the current exchange rates are "totally out of line with the better performance Japan and Germany have demonstrated in improving their productivity, holding down inflation and increasing exports of manufactured goods."⁴² As a result, Japanese and German manufacturers have a built-in price advantage in world markets, making it "extremely difficult" to reverse the steady decline in our overall trade competitiveness.⁴³

B. *High Interest Rates*

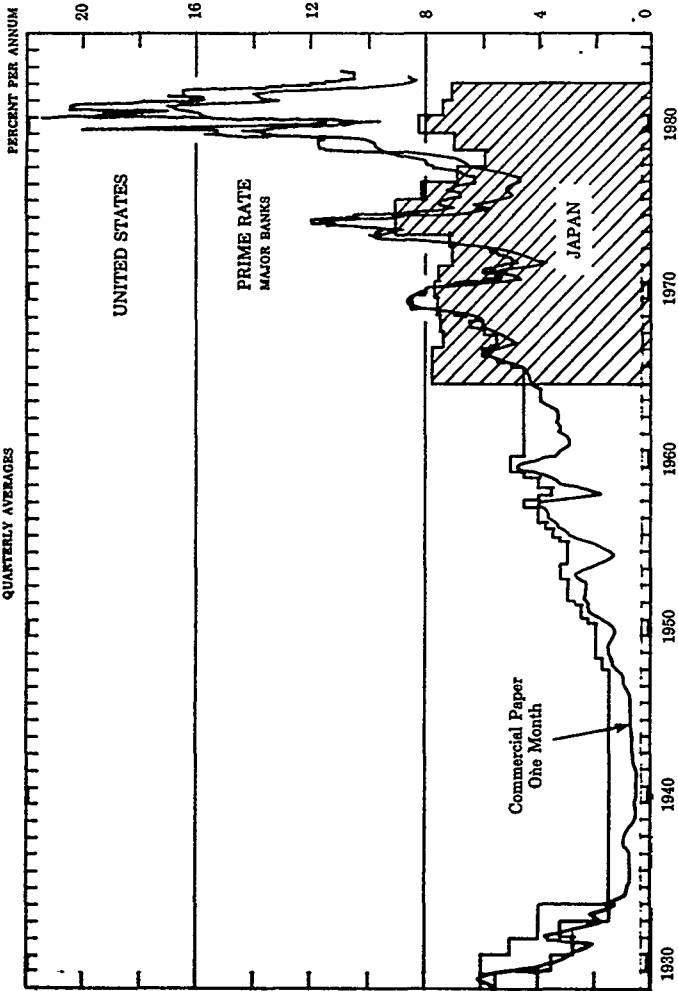
A comparison of interest rates between Japan and the United States reflects great disparities during much of the relevant period. (See Table V.)

⁴¹ Lippman, *Manufacturers Pessimistic*, Washington Post, Feb. 11, 1983, at D8, col. 2.

⁴² *Id.*

⁴³ *Id.*

Table V
Comparison of United States and Japanese Rates of Interest
SHORT-TERM INTEREST RATES
BUSINESS BORROWING
PRIME RATE, EFFECTIVE DATE OF CHANGE; COMMERCIAL PAPER,
QUARTERLY AVERAGES



Source: Board of Governors of the Federal Reserve System, Federal Reserve Chart Book (1983) with an overlay of the Japanese interest rates from Nippon, A charted Survey of Japan 228, 284, 284 (Tsuneda Yano Memorial Society ed. 28th ed. 1983).

Undoubtedly, the high interest rates experienced in the United States over much of the relevant period have suppressed capital investment in the United States. SIA has alleged "disinvestment" in the semiconductor industry by virtue of Japanese trade practices which the SIA claims to be "unfair."⁴⁴ In lieu of the interest rate disparity, however, it is not easy to sort out the relative proportion of the decreased capital investment in the United States attributable to the relatively higher cost of capital from that attributable to any specific practice.

C. *Export Controls and Financing*

Some U.S. company presidents are complaining of the impact of export controls on foreign sales. For example, at a recent conference one participant complained, "I see too many instances where the U.S. is shriveling in high technology as a result of foolish export control procedures"⁴⁵ Another stated, "All of we [sic] companies have had the experience of failing to get an export license, only to have a Japanese or European company ship an identical product or technology. . . ."⁴⁶ A responsible assistant secretary of commerce stated, "[T]here may be some inhibition of competition," but these "are essential because of the extensive diversion of U.S. high technology to the Soviet Union from Western Europe."⁴⁷ While it is difficult to assess the true extent of the impact of this inhibition, it remains a factor, having negative impact on the ability of U.S. companies to reach foreign markets, that has nothing to do with the criticized Japanese practices.⁴⁸

⁴⁴ SIA PAPER, *supra* note 23, at 58.

⁴⁵ Robertson, *Call for National High Tech Policy to Meet Foreign Threats*, ELECTRONIC NEWS, Feb. 7, 1982, at 4, col. 1.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ In a speech before the National Press Club on September 29, 1983, Philip Caldwell, Chairman of the Board, Ford Motor Co., is reported to have said that the United States cannot compete on equal terms against "imports at home or in markets abroad" because its tax structure is not as well designed to serve international trade as that of most exporting countries. "The Japanese with their commodity tax, and most other industrial nations with their value-added taxes, have discovered how to make their tax systems competitive in world trade. The U.S.A. has not," he said. To illustrate his point, Caldwell noted that U.S. made goods shipped to Japan "carry a full load of taxes when they leave our shores, and then Japan often adds a sizeable commodity, or consumption-type tax, when they get there." Conversely, he went on, "when a Japanese car is exported to the United States, Japan doesn't levy the consumption tax . . . and there is no commensurate tax collected in this country. That's worth something like \$600 a car to the Japanese," the Chairman explained. If, on the other hand, the United States could solve the dollar-yen and tax problems, the trade imbalance would disappear and effective pressure for protectionism would cease, Caldwell maintained. "If this were to occur, you would never hear another word from me about import restraint," he said. 9 U.S. IMPORT WEEKLY 26 (Oct. 5, 1983).

Similarly, the United States, in recent years, has curtailed the Export-Import Bank's capability to provide financial assistance for exports, which has had an undetermined impact on the ability of U.S. firms to reach some foreign markets.⁴⁹

VI. U.S. PRACTICES SIMILAR TO THOSE OF THE JAPANESE

Another issue to consider before declaring "targeting" to be "unfair" is whether the United States, itself, engages in similar practices. Reviewing the specifics of the SIA complaint reveals many parallel U.S. policies. The difference seems to be that U.S. policies are not as narrowly focused on a specific commodity, such as semiconductors.⁵⁰

A. Cartels

The SIA document alludes to price floors and market allocations in the U.S. market. It points specifically to government sponsored and subsidized joint research ventures.⁵¹ For example, the United States licenses export cartels pursuant to the Webb-Pomerene Act⁵² and also participates in research joint ventures, specifically dealing with this area.⁵³

How should the United States react to a foreign government's support for its commercial sector or to its relaxation of antimonopoly laws to encourage cooperation among competing private-sector entities? Is it appropriate to characterize such actions as "unfair"? U.S. antimonopoly laws are predicated largely upon populist concepts that only the fullest measure of competition will produce the most goods at the best price for the consumer, and these concepts have served well for many decades. Antimonopoly laws not only work, but also they are vital to commerce in general. However, there may be specialized areas where it would be in the national interest to advance the frontiers of knowledge through joint gov-

Also commenting on U.S. tax policy, Lawrence A. Fox, Vice President for International Affairs at the National Association of Manufacturers, claims:

It is badly out of tune with our trading partners. The American system, which relies mainly on direct taxes, "rewards imports and penalizes exports." By contrast, European-style value-added taxes and their equivalents—such as Canada's excise tax on manufacturers and Japan's commodity tax—are rebated to exporters but are slapped onto imports from the U.S. and other suppliers.

America's Hidden Problem, Bus. Wk. 66 (Aug. 29, 1983).

⁴⁹ Robertson, *supra* note 45.

⁵⁰ This discussion includes only some aspects of parallel policy. Other aspects in which foreign competition is frozen-out of the U.S. market is not discussed.

⁵¹ SIA PAPER, *supra* note 23, at App. B.

⁵² REPORT OF THE COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, EXPORT CARTELS 1974.

⁵³ U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (Nov. 1980).

ernment/industry projects and through selected relaxation of antitrust laws to achieve specific goals. According to the assertions of the SIA, the cooperative approach utilized by the Japanese promotes product development and production economies to the point where the parallel U.S. industry, operating in a competitive environment, cannot compete.⁵⁴ If the United States admits that the Japanese manner of organizing commerce is more efficient in the high technology area, it should be imitated, not attacked. Given the high cost of research and development, the high levels of capital required for production facilities, and the vital national interest in securing the highest level and fastest pace of advances in this area, the high-technology area may call for a restructuring of our antimonopoly and private enterprise system for that special sector. The United States could create a two, three, or four-tiered structuring of its antimonopoly concepts, depending upon the character of the industry.

B. Government Subsidized Research and Development

Certainly there is nothing unusual about government-financed research and development (R&D). Virtually all industrial nations fund R&D for three basic purposes: 1) to meet government needs, such as defense; 2) to enhance the science and technology infrastructure; and 3) to stimulate the development of the commercial and technological infrastructure.⁵⁵ A government study concluded:

[I]n 1981 the U.S. government sponsored almost half of all R&D conducted in the United States, about \$32.9 billion and real growth of approximately 4 percent is estimated for 1982. Of this amount, 52 percent went for national defense, 14 percent for space, 11 percent for health and 10 percent for energy. The scale and relative support for military R&D is unique. Outlays for R&D by our major trading partners tend to focus on projects with significant payoffs in the commercial sphere. . . .⁵⁶ In 1980, the last year for which international data are available, the U.S. government expenditures for R&D, \$29.6 billion, were a third greater than those for Japan, West Germany, and France combined (\$22.2 billion). The Japanese government sponsored 25 percent of all R&D conducted in Japan in 1980, about \$5.7 billion; the West German government sponsored 48 percent, about \$9.1 billion; and the French government sponsored 62 percent, about \$7.4 billion.⁵⁷

⁵⁴ SIA PAPER, *supra* note 23, at 103.

⁵⁵ STUDY, *supra* note 20, at 26. In the United States, the major beneficiaries of this type of research support have been agriculture and energy.

⁵⁶ *Id.*

⁵⁷ *Id.*

C. Buy American

The United States follows a wide-spread and increasing pattern of "Buy American" policies providing 6%, 12% and 50% preferences for domestic commodities or, in some cases, providing for total domestic procurement set-asides.⁵⁸ Two recent examples of such set-asides are the 100% domestic procurement policies set forth for hand tools⁵⁹ and the "Buy American" provisions of the Surface Transportation Assistance Act of 1982.⁶⁰ This Act provided, in a \$52.85 billion procurement, that steel, cement and manufactured products would be of a domestic source unless use of such domestic material "will increase the cost of *the overall project* by more than 10 per centum in the case of projects for the acquisition of rolling rock, and 25 per centum in the case of all other projects."⁶¹

VII. UTILIZATION OF AVAILABLE REMEDIES

Questions of subsidization seldom lend themselves to easy analysis, but the United States does have on its books both antidumping⁶² and countervailing duty laws⁶³ designed to meet any unfair advantage that the Japanese might have secured by industrial subsidies or sales below fair value. It would appear that the industry is not pursuing such remedies for some or all of the reasons previously discussed. Even if the U.S. industry were to be successful in making its case, "proper measure" remedies⁶⁴ would be insufficient to provide relief because they would not significantly affect the aggregate problem.

VIII. CONCLUSION

The purpose of this article was not to arrive at any definitive conclusions concerning these complex issues. Rather, the purpose was to focus introspectively on some considerations faced by the U.S. policy makers.

⁵⁸ The following are samples of typical "Buy American Act" regulatory provisions: Principles Governing Reciprocal Defense Cooperation, 32 C.F.R. § 6.104 (1983); Federal Procurement Regulations, Buy American Act—Supply and Service Contracts, 41 C.F.R. § 1-6.1 (1983).

⁵⁹ Pub. L. No. 97-377, 96 Stat. 1830 (1982).

⁶⁰ Surface Transportation Assistance Act of 1982. Pub. L. No. 97-424, § 169, 96 Stat. 2097 (1982).

⁶¹ *Id.*

⁶² Imposition of antidumping duties, 19 U.S.C. § 1673 (1982).

⁶³ Countervailing duties imposed, 19 U.S.C. § 1671 (1982).

⁶⁴ The relevant laws were carefully constructed to measure out a response to subsidies or sales below fair value exactly to compensate at the border for the level of the complained-of activity, i.e., special antidumping duties are set precisely at the level of determined percentage that the relevant sales were below fair value, and special countervailing duties are set at the percentage level determined to be the subsidy level.

From the foregoing analysis, it seems that the United States is seized by some endemic problems that must be addressed. Examination of the internal policies of U.S. trading partners serves many useful purposes and might assist in seeking broader solutions to some of the U.S. core problems. The United States now seems to be inclined to adopt many of the practices of which it has been highly critical. Some of these contradictions will greet each other in the context of high-technology competition.

It has only been recently that the United States has had to struggle because imports were impacting substantially upon its domestic economy. A review of the pattern of the U.S. reaction reflects dramatic change and uncertainty in its approach. The United States has never really established what might be called a foreign trade policy, nor has it had to focus much upon the international competitive consequences of its domestic policies. The trade shocks of the 1970's are forcing ever increasing recognition by U.S. political leaders of the need for coordinated foreign trade policies and for sensitivity to the fact that the United States cannot formulate its domestic policies without giving weighty consideration as to how those policies will posture the United States in the increasingly competitive world markets. Many of these fundamental questions will be debated during the years ahead in the context of high tech competition between the United States and Japan.

*Appendix***Antidumping Investigations From Japan Since 1960***

1960	No proceedings	
1961	Rayon Garment Labels	No sales at less than fair value (NSLFV).
	Portland Cement	NSLFV
	Electrolytic Manganese	NSLFV
1962	Steel Wire Rods	NSLFV
	Welded steel pipe	NSLFV
1963	Titanium Dioxide	SLFV - No Injury
	Hot-rolled steel sheet, plate, skelp and strip	NSLFV
	White Portland Cement	SLFV - No Injury
	Halibut	NSLFV
	Cold-Rolled steel sheet and plate	NSLFV
	Plastic Baby Carriers	SLFV - No Injury
1964	Wire Strand	NSLFV
	Dinitrosopenta- methylenetetramine	NSLFV
	Asobisformamide	SLFV - No Injury
	Butane gas-fueled cigar and cigarette lighters	NSLFV
	Titanium Dioxide	SLFV - No Injury
1965	Ceramic Tile	NSLFV
1966	Ice Skate Blades	NSLFV
	Thiourea	NSLFV
1967	Twist Drills	NSLFV
	Electronic Receiving Tubes	NSLFV
	Fixed Resistors	NSLFV
	Beta-oxy-Naphthoic acid	NSLFV
1968	Aminoacetic acid	NSLFV
	Television Sets	SLFV (12/5/70) Injury (3/9/71)
	Loudspeakers	NSLFV
	Transformers	NSLFV

* For more information on antidumping investigations, see footnote 2 and accompanying text.

Capacitors	SLFV - No Injury
Tuners	NSLFV
Ferrite Cores	NSLFV
Insulators	NSLFV
Dichlorobenzidine- dihydrochloride	NSLFV
Barbers' Chairs	NSLFV
1969 Cast or Rolled Glass	NSLFV
Microanalyzers, electron probe	Discontinued
Polypropolene Film	NSLFV
Glass Sheet	SLFV (1/9/71) Injury (4/17/71)
Ball Bearings	Discontinued
Plate and float glass	SLFV (1/9/71) Injury (4/17/71)
Tempered Sheet Glass	SLFV (5/5/71) Injury (8/7/71)
Tapered Roller Bearings	NSLFV
1970 Bicycle Tires & Inner Tubes	Discontinued
Large Power Transformers	SLFV (1/21/72) Injury (4/25/72)
Door Latches	NSLFV
Fish nets and netting	SLFV (1/19/72) Injury (4/22/72)
1971 Asbestos Cement Pipe	SLFV (11/2/71) Injury (1/26/72)
Cadium	SLFV (3/24/72) Injury (6/23/72)
Stainless Steel Sheet	Discontinued
Pentaerythritol	SLFV - No Injury
Wool Worsted Fabrics	SLFV - No Injury
Perchlorethylene	SLFV - No Injury
Bicycle Speedometers	SLFV (6/24/72) Injury (9/22/72)
Butylated Hydroxy toluene	Discontinued
TV Tubes - Color	SLFV - No Injury
Deflection Yokes	Discontinued
1972 Pipe and Tubing	Discontinued
Roller Chain, Other than Bicycle	SLFV (12/5/72) Injury (3/1/73)
Neopentyl Glycol	SLFV - No Injury
Baby Strollers, collapsible	SLFV - No Injury
Slide Fasteners	NSLFV
Permanent Magnets	NSLFV
Electronic ceramic packages	Discontinued
Impression Fabric	SLFV - No Injury
Wire Rope	SLFV (6/7/73) Injury (9/7/73)
Synthetic methioine	SLFV (2/15/73) Injury (5/15/73)
Microwave Ovens	NSLFV
Germanium Diodes	SLFV - No Injury

Calcium Pantothenate	SLFV (9/10/73) Injury (12/10/73)
Polychloroprene rubber	SLFV (8/2/73) Injury (11/6/73)
1973 Polypropolene Strapping	NSL FV SLFV
ABS Plastics	SLFV - No Injury
Expanded metal of base metal	SLFV (9/5/73) Injury (12/7/73)
Metal Punching Machines	SLFV - No Injury
Liquid Sprayers	NSL FV
Mandelic Acid	Discontinued
Upholstery Spring Wire	Discontinued
Nonpowered Handtools	SLFV - No Injury
Tapered Roller Bearings	SLFV (9/6/74) Injury (1/23/75)
1974 Portable Electric Typewriters	SLFV - No Injury
Nonpowered Mechanics Tools	SLFV - No Injury
Radial Ball Bearings	NSL FV
3-ply birch doorskins	SLFV (10/14/75) Injury (1/2/76)
Rechargeable Nickel Cadium Batteries	NSL FV
1975 Butadiene acrylonitrile rubber	SLFV - No Injury
Polymethyl Methacrylate polymers	SLFV - No Injury
Acrylic Sheet	SLFV (4/27/76) Injury (8/2/76)
Automobiles	Discontinued
AC adapters	NSL FV
Tantalum electrolytic fixed capacitors	SLFV - No Injury
Melamine in crystal form	SLFV (9/23/76) Injury (12/20/76)
1976 Automobile Body Dies	Discontinued
Digital Computer Scales	NSL FV
Metal-walled swimming pools	SLFV (4/11/77) Injury (6/29/77)
Round-head Steel Drum Plugs	SLFV - No Injury
Saccharin	SLFV - No Injury
1977 Impression Fabric	SLFV (12/30/77) Injury (5/25/78)
Carbon Steel Plate	SLFV (1/13/78) Injury (4/24/78)
Welded Stainless Steel Pipe and Tubing	SLFV - No Injury
Motorcycles	SLFV - No Injury
Sorbic Acid and Potassium	SLFV - No Injury

Steel Sheets	Terminated (March 1, 1978)
Steel Plate	Terminated (March 1, 1978)
Steel Structural	Terminated (March 1, 1978)
Steel Pipe	Terminated (March 1, 1978)
Steel Strand for Pre-stressed Concrete	SLFV (8/28/78) Injury (11/29/78)
Audible Signal Alarms	NSLFV
Pneumatic Marine Fenders	NSLFV
1978 Nylon Yarn	Terminated (5/25/78)
Color Photographic Paper	Terminated (6/23/78)
Stainless Steel Round Wire	Terminated (5/3/79)
Spun Acrylic Yarn	SLFV (10/25/70) Injury (3/26/ 80)
1979 Portable Electric Typewriters	SLFV (3/21/80) Injury (5/7/80)
Pipe and Tube	Terminated
Microwave Ovens	SLFV (7/15/80) Injury (2/21/80)
Electric Motors	SLFV (11/6/80) Injury (12/14/ 80)
1980 Menthol	No Injury
Pipe and Tube	Reopened but no injury
1981 Amplifier Assemblies	SLFV (5/21/82) Injury (7/8/82)
Stainless Clad Steel Plate	SLFV (6/24/82) Injury (7/29/82)
Steel Wire Nails	Terminated
1982 High Capacity Paging and Alerting Devices	SLFV (6/23/83) Injury (8/10/83)
Portland Hydraulic Cement	SLFV (9/13/83) Injury (Pending)
Steel Pipes and Tubes	Pending
1983 Lightweight Polyester Filament	Pending
Tapered Roller Bearings and Components	Pending
Spindle Belting	Pending
Steel Valves and Parts	Pending
Cyanauric Acid	Pending