

JAPAN - TRADE IN SEMI-CONDUCTORS

*Report of the Panel adopted on 4 May 1988
(L/6309 - 35S/116)*

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(C/M/208).¹ The Council took note of this statement

6. The representatives of Argentina, Australia, Austria, Brazil, Canada, Hong Kong, Republic of Korea, Malaysia, Mexico, Singapore, Sweden for the Nordic countries, Switzerland and Thailand reserved their rights to make submissions to the Panel (C/M/207 and C/M/208).

7. The composition of the Panel was announced in document C/149, dated 24 June 1987, as follows:

Chairman: H.E. Mr. J. Lacarte-Muró
Members: Mr. C. Falconer
Mr. J. Greenwald

8. The Panel met five times, on 16-17 September, 5-6 November, 26-27 November 1987, 4-5 February and 19-20 February 1988.

¹Panel report on th

9. Information and arguments submitted by the two parties to the dispute, their replies to questions and requests put by the Panel, information and arguments submitted by the United States and by other interested parties, as well as relevant GATT and other documentation, served as the basis for the Panel's examination of the matter.

II. BACKGROUND

A. Developments leading to the Japan/US Arrangement in Semi-conductor trade

10. The United States and Japan are the largest producers and exporters of semi-conductors. The United States was the largest

and that both

Relevant governmental departments also made similar requests to users' associations and individual companies. In addition, surveys of the procurement situation of foreign-based semi-conductors were carried out regularly by MITI.

18. The International Semi-conductor Co-operation Centre, an organization to promote the sales of foreign semi-conductors, was established in March 1987. The activities of the Centre were open to all foreign companies. The Centre held exhibitions, conducted survey, offered sales-related information and organized other activities helpful to the promotion of sales of foreign semi-conductors. The Centre's first exhibition was held on 13 to 16 April 1987. A symposium was held on 6 October 1987.

(b) Monitoring

19. The third Country Market Monitoring measures could be discussed under two headings: (i) requests by Government to producers and exporters; (ii) export approval and monitoring costs and export prices.

(i) Requests by Government to producers and exporters

20. The Director-General of the Machinery and Information Industries Bureau and the Minister of MITI organized meetings with producers and exporters (in September 1986, March and May 1987) to request that dumping should be avoided. These requests were general appeal, not legally

24. The existence or non-existence of injury in foreign importing countries was not taken into consideration by MITI when watching costs and export prices.

25. Effective from 10 November 1987, the revised Foreign Exchange and Foreign Trade Control Laws to strengthen the regulations on reporting COCOM-related commodities had separated export approval from monitoring as far as semi-conductors were concerned. Under the new system, the licensing procedure was separated from the monitoring procedure. Exporters could either apply for licences and report on price information to MITI simultaneously or separately, but in any case prior to customs clearance. On receipt of a licence application and a report (in two separate

Arrangement, pricing was affected by

and exporters of semi-conductors would, in the absence of such measures, remain exposed to reported Japanese dumping in markets other than the United States. In the Japanese Position Paper presented to the United States in the second week of April 1987, it was stated that "... Japan has taken appropriate action to ensure that Japanese semi-conductors are being sold at not less than their cost in third country markets." The EEC rejected the justification given during Article XXII consultations that the monitoring of cost and export prices on products exported by Japanese semi-conductor firms was "the need to prevent dumping in accordance with the relevant provisions of the GATT" (sub-paragraph 1 of sub-section 3 of the Arrangement). The EEC also rejected the explanation given by the United States that the provision on Third Country Market Monitoring was necessary in order to avoid circumvention of the suspension agreement by exports from Japan to the United States through third country markets. This argument would imply that all contracting parties could apply export controls in

Japanese statement seemed to recognize that anti-dumping action by exporting countries was incompatible with Article VI if it contravened any other provisions of the GATT. Since the anti-dumping action adopted under the Third Country Market Monitoring System was, in the Community's view, incompatible with Articles XI, I and XVII of the General Agreement, it followed logically that such measures were also incompatible with Article VI. As for the statement that when dumping occurred despite the measures to prevent dumping, importing countries were free to take anti-dumping actions, it was only formally correct. An importing country could, in theory, still take anti-dumping actions even if it had been pre-empted in doing so by the exporting country, but this would expose its users and consumers to the risk of incurring a multiple penalty created by the combined effect of the price increase imposed by Japan and the eventual anti-dumping duty collected by the importing country. It could also provide producers in the importing country with an excessive degree of protection.

48. Japan stressed that measures taken by the Japanese Government were intended to prevent "dumping to be condemned" as stipulated in Article VI, and were permitted as long as they did not violate any provision of the General Agreement, including Article XI. Japan considered that such measures should not be merely judged in relation with Article XI. Rather, it should be taken into account that the measures were employed in line with the spirit of Article VI. What Article VI stipulated was that importing countries were entitled to decide whether or not to levy anti-dumping duties when dumping occurred.



was also contrary to the facts to say that export restrictions, production controls or artificial price increases existed. Through monitoring, Japanese companies were encouraged to prevent dumping, but this would only happen through a voluntary decision of the company concerned. The encouragement by the Japanese

would consider it essential to adopt binding measures if non-binding measures proved ineffective.
If it were accepted that non-legally binding measures could never infringe

(e) Article XVII:1(c)

58. The EEC also shared Canada's view (see paragraphs 32 and 88) that the actions taken by the Japanese Go

had become a member of this organization from the outset when no US company had joined. Semi-conductors of eight EEC companies out of 32 foreign companies were on display at the exhibition held on 13 April 1987 by the Centre. Furthermore, figures showed that the sales of non-US foreign semi-conductors were steadily expanding as well as those of US semi-conductors. The market share of foreign non-US semi-conductors in foreign semi-conductors had increased from 2.8 per cent in the first half of fiscal year 1986 to 4.2 per cent in the first quarter of 1987. With regard to the statements by the US Semi-Conductor Industry Association, its reference to "US" instead of "foreign" semi-conductors was simply because the Association was a US industry association, indifferent to non-US matters.

63. The EEC was not convinced that the terms "foreign-based -

of concentration of production of essential products. Export controls had, in the industrial field, so far largely been adopted either in concert with the importing country, or for reasons of national security. This was not the case for the Third Country Market Monitoring system applied by Japan to semi-conductors. This system was contrary to the basic philosophy and objectives of the General Agreement. It could not be the intention of the General Agreement to condone unilateral measures which, applied to the advantage of one or two contracting parties, led to the manipulation of supply of a key component of modern technology, to the detriment of other contracting parties. Nor could it be condoned that such action was taken bilaterally, in

... of any measure" not conflicting with the provisions of the General Agreement in the Article XXIII:1(b), or "the existence of any other situation", indicated in the Article XXIII:1(c), it was not right to conclude that "any benefit ... is being nullified or impaired". If such an argument were to be accepted, corporate marketing strategies, including their pricing policies, would have to be regarded as being within the mandate of the GATT. From this viewpoint, the General Agreement required discretion in the application of the Article XXIII in relation to the matter pertaining to (b) or (c) of the same Article. This was clearly indicated in paragraph 5 of "Agreed Description of the GATT in the Field of Dispute Settlement (Article XXIII:2)" which stated that if a contracting party bringing an Article XXIII case claimed that measures which did not conflict with the provisions of the General Agreement had nullified or impaired benefits accruing to it under the

capacity investments at a time when the semi-conductor industry had been experiencing a recession and operating unprofitably. This had resulted in further over-capacity, providing an added incentive for predatory below-cost pricing.

73. The United States believed the Arrangement constituted a major step forward in the conduct of high technology trade. It did not, as the European Communities and some others feared, promote US interests at the expense of third countries. To the extent its objectives were met and free trade in semi-conductors was enhanced, all benefited.

A. Access to the Japanese Market

74. There was no truth to the belief that the US had sought, expected or was receiving preferential access to the Japanese market. The Arrangement uniformly spoke of enhanced access for "foreign-based semi-conductors". There were no secret understandings on preferential access for US companies and that subject had never been discussed during the negotiations. It was true that the US industry had expressed on many occasions its expectations of a share of the Japanese market. However, statements of expectations, be they written or otherwise, simply reflected the expectations of those making the statements and certainly were not a commitment by governments. It was expected that US companies would benefit from the increased access opportunities, but equally it was expected that other foreign-based companies would benefit as well. The United States wanted semi-conductor producers from other countries to have improved access to the Japanese market as well. From a practical standpoint, improved broad-based access by non-US producers would provide indirect benefits to the US industry, as Japanese consumers of semi-conductors became accustomed to purchasing from non-Japanese producers generally. Statistics showed that there had been no growth in the US position in the Japanese market at the expense of other non-Japanese suppliers. EEC's allegation of preferential access in contravention of Article I was not established.

B. The Third Country Market Monitoring

(a) Article VI

75. EEC's claim that the monitoring measures were incompatible with Article VI had no foundation in fact or law. There was no foundation in fact because, on the one hand, the EEC complained about the alleged artificial increase in prices within the Community because of these measures. On the other hand, however, the EEC had recently initiated anti-dumping investigations against Japanese exports of two major semi-conductor products (DRAMs and EPROMs), complaining about low semi-conductor prices within the Community, based upon sales prices up to 30 per cent below the Japanese companies' cost of production. Artificially inflated prices and prices significantly below costs of production obviously could not co-exist. Assuming that EEC's initiation of anti-dumping investigations was warranted by credible evidence, the allegation of a supposed "spillover effect" and increase in prices was unsupportable and inconsistent. Legally speaking, the Third Country Market Monitoring provisions

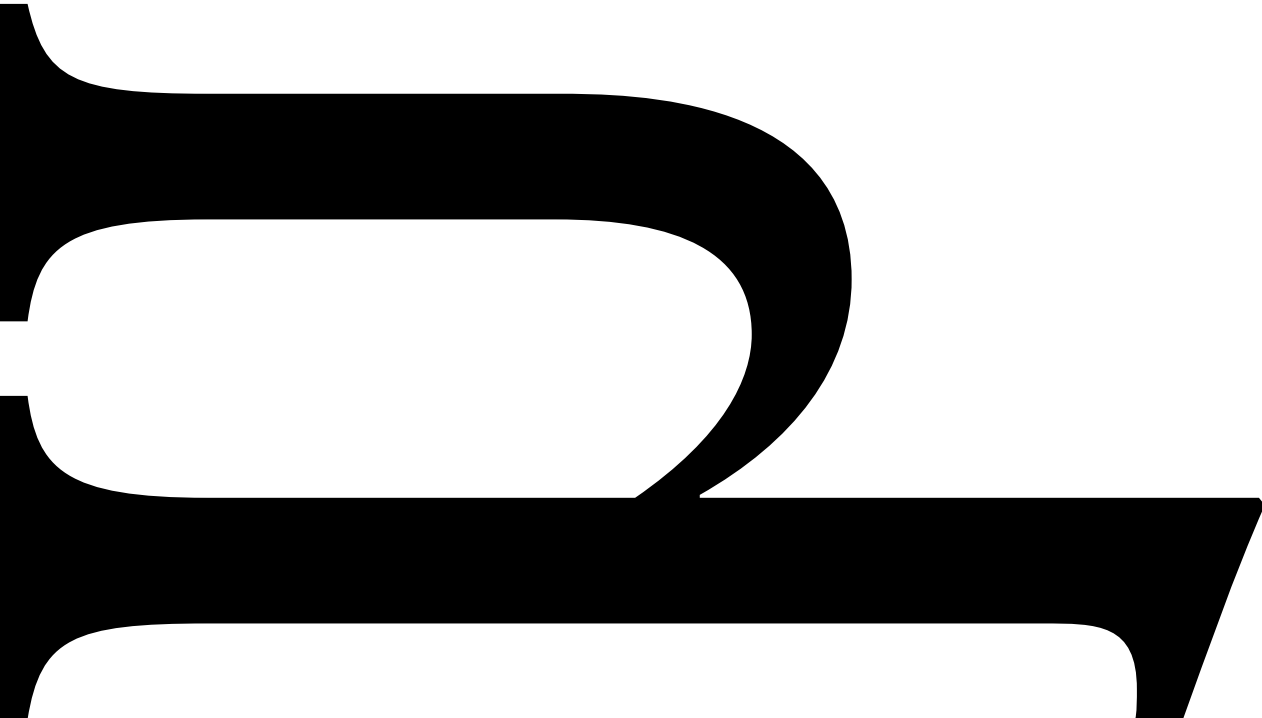
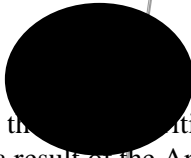
practice and the EEC argument effectively stood the underlying principle of the General Agreement on its head.

76. The United States questioned the accuracy of the graphic depiction of pricing data supplied by the EEC (Appendix I). The price breakpoints in the graphs did not consistently correspond to the

sub-paragraph 1(c). There was no indication that the drafters had intended to use this Article as a vehicle for creating new disciplines with respect to private enterprises. An assessment of the scope

exports at prices that would have been expected, nor on what basis the parties assumed that US firms would obtain a 20 per cent share of the Japanese market as a result of the Arrangement.

85. The Arrangement also constituted an assumption of a right of the US Government to exercise remedies against alleged dumping in third countries which pre-empted the rights of other GATT members. It had the intention and the effect of raising prices for semi-conductors sold in third country markets on a basis based on US prices which might not necessarily reflect normal market conditions in those markets. Complaints had been received by the Australian Authorities on the price rise of certain important components. Prices for certain key components were also likely to be increased. This mechanism of fixing prices for semi-conductors in specific markets could be used for cross-subsidization and to create an artificial advantage for finished products incorporating semi-conductors by differential pricing to the detriment of other producers so as to favour the products of the cartel. The anti-dumping provisions of the Arrangement were potentially detrimental to the development of indigenous capacity in high technology in countries such as Australia which were heavily dependent on imported semi-conductors since such countries could have their access to state-of-the-art chip technology inhibited as a result of extension of the effects of the cartel. In October 1981 the Australian Computer Equipment Manufacturers Association complained that the prices of memory chips produced by Australian firms had risen by 16-20 per cent over the past few months. This price increase exceeded any adjustment that had been made in the past six months on chips other than memories. The supply of 256K DRAM chips was small and it was difficult to obtain. One Australian company had reported that leading edge memory products, such



created the danger that others, faced with similar protectionist pressures, might see no option but to emulate such behaviour.

88. Canada believed that the unilateral determination by the United States which underpinned the Arrangement that semi-conductor products were being dumped in third country markets was contrary to Article VI of the General Agreement. Article VI and the Anti-dumping Code were quite precise regarding the circumstances under which contracting parties could take action against dumping, a matter of concern only where material injury occurred or was threatened. Neither the GATT nor the Code envisaged unilateral or bilateral action to counteract the effects of dumping in third markets which was precisely what the Arrangement was directed at. Canada also considered that the provisions in the Arrangement whereby Japan agreed to monitor, as

90. Hong Kong said that it traditionally sourced about 30 per cent of its integrated micro-circuits from Japan and had in value terms imported between 8 and 10 per cent of total Japanese semi-conductor exports over the past four years. These integrated micro-circuits were used as components in electronic products for export to world markets. The Japan/US Arrangement on Semi-conductors had no basis either under Article VI of the GATT or the Anti-Dumping code, which were the relevant provisions of the GATT on anti-dumping. The Arrangement was not a price undertaking authorized under Article 7 of the Anti-Dumping Code, nor could it be construed as any of the anti-dumping actions envisaged under Article VI of the GATT or the Anti-Dumping Code. Article VI:6(b) of the GATT and Article 12 of the Anti-Dumping Code provided for anti-dumping actions on behalf of a third country but these provisions had not been invoked. Since the entry into force of the Arrangement, there had been reports of major manufacturers of semi-conductors in Japan being encouraged or directed by the Government of Japan to cut production of particular semi-conductor products, in order to achieve price increases. Clause II:3(2) of the Arrangement stated that "... the Government of Japan will monitor, as appropriate, cost and export prices on the products exported by Japanese semi-conductor firms fr

which was of strategic importance to the future development of Singapore's economy. The immediate impact of the Arrangement on Singapore's electronics industry was the difficulty in the sourcing of wafers and other chips from Japan. Both multinational and local companies had complained that the lead time had increased from the normal 4-6 weeks to as long as three months for obtaining supplies. Deliveries had also become uncertain. The situation was expected to become w

- the measures applied to exports of semi-conductors to third country markets and the

at prices below company-specific costs through measures other than duties, taxes or charges within the meaning of Article XI:1. Japan contended that there were no governmental measures limiting the right of Japanese producers and exporters to export semi-conductors at any price they wished. The Government's measures to avoid sales at dumping prices were not legally binding and therefore did not fall under Article XI:1. Exports were limited by private enterprises in their own self-interest and such private action was outside the purview of Article XI:1.

103. As for the export

governments and/or farmers' organizations" and that "such centralised and mutually collaborative structure of policy implementation was the crux of government enforcement in Japan" (L/6253, paragraph 29). The Panel which examined that case had noted that "the practice of 'administrative guidance' played an important rôle" in the enforcement of the Japanese supply restrictions, that this practice was "a traditional tool of Japanese government policy based on consensus and peer pressure" and that administrative guidance in the special circumstances prevailing in Japan could therefore be regarded as a governmental measure enforcing supply restrictions. The Panel recognized the differences between Article XI:1 and Article XI:2(c) and the fact that the previous case was not the same in all respects as the case before it, but noted that the earlier case supported its finding that it was not necessarily the legal status of the measure which was decisive in determining whether or not it fell under Article XI:1.

108. The Panel recognized that not all non-mandatory requests could be regarded as measures within the meaning of Article XI:1. Government-industry relations varied from country to country, from industry to industry, and from case to case and were influenced by many factors. There was thus a wide spectrum of government involvement ranging from, for instance, direct government orders to occasional government consultations with advisory committees. The task of the Panel was to determine whether the measures taken in this case would be such as to constitute a contravention of Article XI.

109. In order to determine this, the Panel considered that it needed to be satisfied on two essential criteria. First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention. The Panel considered each of these two criteria in turn. The Panel considered that if these two criteria were met, the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance, and that there could be therefore no doubt that they fell within the range of measures covered by Article XI.1.

110. On the first criterion, the Panel considered the background against which the measures operated. The Panel noted that the Government of Japan had formally concluded in September 1986 an Arrangement with the Government of the United States, one of the main provisions of which was for the Japanese Government to monitor costs and export prices to third country markets in order to prevent dumping. Following bilateral consultations, the Government of Japan assured the United States in April 1987 that it had taken "appropriate action to ensure that Japanese semi-conductor exports are being sold at not less than their costs in third country markets". In the light of this, the Panel considered that at least by April 1987, there would certainly have been no doubt in the minds of relevant Japanese producers and exporters that the Japanese Government had made an undertaking to the United States to ensure that a certain class of sales

represented a neutral and objective figure

120. The Panel then considered Article VI and arguments advanced by the two parties concerning that Article. Having found Japan to have acted inconsistently with Article XI:1, the Panel examined Japan's contention that its measures, being designed to prevent dumping, were justified by the spirit of Article VI, which condemned ~~dumping~~ dumping. The Panel noted that Article

concluded that nothing in it would prevent Japan from implementing its market opening provisions on a most-favoured-nation basis. The Panel also examined the contents of the MITI "guidance" to users and importers in this regard and could not detect any evidence of preferences accorded to United States products. Import statistics supplied by Japan showed that the growth of sales of semi-conductors in Japan from sources other than the United States had been higher than that of the sales originating in the United States. It also noted the announcement by the United States' authorities on the retention of sanctions against certain Japanese goods on the grounds that United States' sales in the Japanese market had not increased as expected.

126. The Panel noted the EEC's argument that, unless preferential treatment was involved, there was no need for two governments to enter into a formal bilateral arrangement. The Panel considered this argument not valid as there were bilateral agreements which provided for non-discriminatory treatment. The Panel noted that the EEC had also argued that Japan's commitment under the Arrangement with the United States to take measures in respect of "foreign

the meaning of Article XXIII. -25jhrdng

APPENDIX I

256K DRAMS

Dollars
Europe
US
Japan

1987 J F M A M J J A S

APPENDIX I (Cont'd)

256 K EPROMS

Dollars
Europe
US
Japan

1987 J F M A M J J A S

APPENDIX I (Cont'd)

128 K EPROMS

Dollars
Europe
US
Japan

1987 J F M A M J J A S

APPENDIX I (Cont'd)

PRICES OF CERTAIN SEMI-CONDUCTORS (1984 PRICE = 100)

The open columns for the three years 1984-1986 show the average price levels in Europe for each year. For 1987 the open column is the price level forecast by Dataquest early in 1987. This open column plus the black column superimposed shows the actual price at July 1987. Thus the black column is the anomalous price increase, which could be explained by MITI production and price control activity.

256 KDRAMS				256 K EPROMS				128 K EPROMS			
1984	1985	1986	1987	1984	1985	1986	1987	1984	1985	1986	1987

APPENDIX II

EXPORT PRICE (EUROPE)

256K DRAM (yen)

	Sept. 1986	Oct.	Nov	Dec	Jan 1987	Feb.	Mar	Apr.	May	Jun	Jul	Aug
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Export Price (Europe)	285,7	290,2	330,1	285,7	307,3	301,5	279,5	299,3	257,4	279,4	244,5	297,
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256 K EPROM (yen)

	Sept. 1986	Oct.	Nov	Dec	Jan 1987	Feb	Mar	Apr.	May	Jun	Jul	Aug
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Export Price (Europe)	473,8	465,7	463,0	462,4	437,8	428,1	476,2	432,5	398,8	380,8	419,6	488,9
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Note: These are the export prices of representative products selected from many kinds of products categorized as 256K DRAMs and 256K EPROMs. Since they are export prices, they do not include freight, insurance and local selling expenses. Sale prices may show different trend.

APPENDIX II (Cont' d)

EXPORT PRICE (EUROPE)

YEN

Sept. 1986	Oct.	Nov	Dec	Jan 1987	Feb	Mar	Apr.	May	Jun	Jul	Aug
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*** 256 K DRAM

APPENDIX II (Cont' d)

EXPORT PRICE

APPENDIX III

European Pricing Data
(US dollars)*

<u>Date</u>	<u>DRAMs</u>			<u>EPROMs</u>	
	<u>64K</u>	<u>256K</u>	<u>1Mb</u>	<u>128K</u>	<u>256K</u>
29/8/86	1,00	2,50	n.c.	2,90	4,50
15/9	1,00	2,50	n.c.	2,90	4,50
30/9	0,87	1,88	n.c.	n.c.	n.c.
24/10	0,80	2,10	n.c.	2,55	3,75
8/12	0,80	1,75	n.c.	2,55	3,75
22/12	0,90	2,30	n.c.	2,55	3,75
12/1/87	0,90	2,30	n.c.	2,55	3,75
26/1	0,90	2,30	n.c.	2,55	3,75
9/2	0,90	1,90	n.c.	2,55	3,75
23/2	0,90	1,90	n.c.	2,55	3,75
9/3	0,90	1,90	n.c.	2,55	3,75
23/3	0,90	1,90	n.c.	2,55	3,75
6/4	0,90	1,90	n.c.	2,55	3,75
20/4	0,90	2,15	n.c.	2,55	3,75
4/5	n.c.	2,15	16,00	2,55	3,75
18/5	n.c.	2,15	16,00	3,51	5,00
1/6	n.c.	2,35	16,00	3,51	5,00
15/6	n.c.	2,50	16,00	3,75	5,10
29/6	n.c.	2,50	16,00	3,75	5,10
*					
27/7	n.c.	2,50	16,00	3,75	5,10
10/8	n.c.	2,50	16,00	3,75	5,10
24/8	n.c.	2,50	16,00	3,75	5,10
7/9	n.c.	2,70	16,00	3,75	5,10
21/9	n.c.	2,50	16,00	3,75	5,10
5/10	n.c.	2,75	17,60	3,75	5,10

<u>Date</u>	<u>SRAM</u>			<u>MICROPROCESSORS</u>		
	<u>64k</u>	<u>256k</u>	<u>68000</u>	<u>8086</u>	<u>8051</u>	<u>Z80</u>
8/12/86	n.c.	n.c.	7,80	7,50	3,20	0,90
22/12	n.c.	n.c.	7,80	7,50	3,20	0,90
12/1/87	n.c.	n.c.	7,80	7,50	3,20	0,90
26/1	n.c.	n.c.	7,80	7,50	3,20	0,90
9/2	n.c.	n.c.	7,80	7,50	3,20	0,90
23/2	n.c.	n.c.	7,80	7,50	3,20	0,90
9/3	n.c.	n.c.	7,80	7,50	3,20	0,90
23/3	n.c.	n.c.	7,80	7,50	3,20	0,90
6/4	n.c.	n.c.	7,80	7,50	3,20	0,90
20/4	n.c.	n.c.	0,80	7,50	3,20	0,90
4/5	n.c.	10,00	7,80	7,50	3,20	0,90
18/5	n.c.	10,00	7,80	7,50	3,20	0,90
1/6	n.c.	10,00	7,80	7,50	3,20	0,90
15/6	n.c.	10,00	7,80	7,50	3,20	0,90
29/6	n.c.	n.c.	7,80	7,50	3,20	0,90
*						
27/7	n.c.	n.c.	7,80	7,50	3,20	0,90
10/8	2,25	8,50	7,80	7,50	3,20	0,90
24/8	2,25	8,50	7,80	7,50	3,20	0,90
7/9	2,25	8,50	7,80	7,50	3,20	0,90
21/9	2,25	8,50	7,80	7,50	3,20	0,90
5/10	2,25	8,50	7,80	7,50	3,20	0,90

*DQ Monday Report - Regional Historical Contract Prices; DATAQUEST