BYU Law Review

Volume 1989 | Issue 2 Article 12

5-1-1989

# The 1988 Trade Act-Refinement or Major Change to U.S. Trade Laws? A View from the European Community

Richard Wright

# The 1988 Trade Act—Refinement or Major Change to U.S. Trade Laws? A View from the European Community

*Richard Wright**

## I. INTRODUCTION

At the conference organized by Brigham Young University (BYU) on January 13-14, 1989, a number of views were advanced about the content and significance of the 1988 Omnibus Trade and Competitiveness Act which was signed into law by President Reagan on August 23, 1988.[1] The following non-attributable edited quotations extracted from various speakers' comments at the conference demonstrate the diversity of views:

> "The trade agreements negotiating authority is the cornerstone of the bill."
> "The bill is about (changes to) section 301."
> "The bill is not protectionist."
> "The bill is not a substitute for a coordinated and balanced trade policy."
> "The Super-301 provisions violate the idea that section 301 of U.S. trade law opens markets on an MFN basis; super-301 represents the low water-mark of U.S. trade policy."

Aside from the evident differences in perception regarding the key components of the Act which emerged during the conference, other views have also been expressed. One view is that the Act is a continuation of U.S. legislative activity in the trade area[2] rather than a new direction, and that changes in key statutes (*e.g.* section 301) are cosmetic rather than substantive. According to this line of argument, the "offensive" non-GATT

---

* The author is First Secretary for Trade and Commercial Affairs at the Delegation of the Commission of the European Communities to the U.S. in Washington, D.C. While the views expressed here are those of the author alone they do reflect to a large degree those officially held by the european communities.

1. Pub. L. No. 100-418, 102 Stat. 1107 (1988).

2. Ambassador A. Holmer and General Counsel Judy Bello of the U.S. Trade Representative (USTR) have suggested this in their unpublished article, "The 1988 Trade Bill: Is it Protectionist?"

(General Agreement on Trade and Tariffs) compatible provisions were gutted from the bill in the House-Senate conference process and what remained were refinements rather than wholesale modifications to U.S. trade laws.

Conversely, it is interesting to contrast the views of the key proponents of the Bill on Capitol Hill. Such proponents clearly *believed* they were effecting a major change on U.S. trade law. To reiterate the point, Senator Bentsen, Chairman of the Senate Finance Committee, indicated the importance attached to the Bill and its implementation by Congress at an oversight hearing in the Senate.[3] Similar views have been expressed by many other senators and congressmen.

So how significant a change to U.S. trade laws has been brought about by the U.S. Trade Act? Were the amendments to existing laws and the innovations necessary and desirable? What effects will the Act have on the U.S.' trading partners and will it promote or hinder multilateral trade liberalization efforts? Will the Act contribute to opening world markets as its proponents claim, or will it simply force closure of the U.S. market to trading nations deemed by the U.S. to be engaged in unfair trading practices? More broadly, what signal is the U.S. giving to its trading partners through passage of the Act?

These questions will be addressed in this paper, with particular focus being placed on the implications of the Act for the European Community (EC) and its trade relations with the U.S. At the time of writing (early 1989) it was too early to assess how the Act would be implemented in practice by the new administration and to analyze its impact on the EC. A key point in this regard will be the extent to which the EC or its member states will be the target of investigations and trade measures under the Act. The EC has already been designated as a "priority country" under the telecommunications provisions of the Act.[4] It remains to be seen whether the "Super-301" provisions will also be invoked against the EC or some of its member states.[5]

Overall, it seems certain that the first six months of 1989 will be crucial in the development of U.S. trade policy[6] with de-

---

3. Opening remarks by Senator Bentsen at the hearing on oversight of the Trade Act of 1988.

4. Section 1374 of the Trade Act, 19 U.S.C. § 3103.

5. Section 1302 of the Trade Act, "Identification of Trade Liberalization Priorities."

6. To illustrate this point, consider the following decisions which must be taken before the end of June 1989. By June 21, the USTR must have self-initiated 'Super-301'

cisions taken during this period setting the tone for the remaining period of the Bush administration.

### A. *The Multilateral Trade Context*

The EC, the United States and Japan bear a special responsibility for the preservation of the liberal world trading system and the benefits it brings to all nations. Trade between these three principal industrialized partners accounts for nearly sixty percent of total trade between OECD countries and thirty percent of total world trade. EC-U.S. trade in goods alone amounted to $145 billion in 1987, and is estimated to reach more than $160 billion in 1988.[7] When investment in each other's economies is added into the picture—U.S. direct investment in the EC had a book value of $122 billion in 1987, whereas investment in the U.S. by the four largest EC investors (UK, Netherlands, Germany, and France) is estimated in 1987 at $155 billion—the true extent of the transatlantic trade and investment relationship comes into sharper focus.

Given the size of trade and investment flows between the EC and the U.S., it follows that any measures which jeopardize these flows will have serious consequences for the multilateral trading system, which has been one of the foundations of the postwar development of the world economy and the unprecedented increase in prosperity that has resulted from it.

With this in mind, the EC and the U.S.' other trading partners closely watched the seemingly interminable debate in the United States on the role and future of U.S. trade policy.[8] After more than three years of legislative effort, the debate between House and Senate, Congress and the administration, and lobby-

---

investigations against 'priority countries' and 'priority' unfair trading practices. The Trade Negotiations Committee, the steering committee for the Uruguay Round multilateral negotiations will meet April 9 with a view to completing the work of the Mid-Term Review which ended with only partial success in Montreal in December. By the end of June, the administration is also likely to have staked out its precise negotiating goals regarding the renewal of steel VRAs, which are due to expire at the end of September 1989.

7. Goods and services trade between the EC and U.S. exceeded $200 billion in 1987.

8. As the discussions and negotiations continued foreign governments put their points of view to the U.S. administration and Congress. The European Commission, on behalf of the Community as a whole, did not hesitate to point out the GATT - inconsistency of provisions passed by the Senate and the House. The Japanese "lobbying effort," in the opinion of many observers, went beyond the boundary lines separating the furtherance of a point of view from interference in U.S. domestic political affairs and by so doing created a backlash on Capitol Hill.

ists both foreign and domestic with all branches of the U.S. government, culminated in the voluminous "Omnibus Trade and Competitiveness Act of 1988." What are the objectives of the Act as seen from the EC's perspective?

### B. *Aims of the Trade Act*

In a nutshell, the aims of the Act are to prise open foreign markets,[9] to ensure a level playing field when it comes to trade opportunities and to increase the competitiveness of U.S. business. These objectives are to be achieved, *inter alia*, by attacking more vigorously unfair trade practices perpetrated by the U.S.' foreign trading partners. The clear sense of the Congress throughout the debate on the bill was that the U.S. government and business community was being outgunned and outmaneuvered by cunning foreigners. The U.S., in other words, was the "patsy of international trade"; it was time to get tough and reassert U.S. rights, using, where necessary, access to the U.S. market as negotiating leverage.

Before turning to these aims, and the EC's reaction to them, it is worth observing that the Act also included provisions on "Technology" (Title VB) and "Education and Training for American Competitiveness" (Title VI). This suggests that, in contradiction with the aims referred to above, there was some Congressional recognition that not all the U.S.' trade problems could be attributed to foreigners allegedly engaged in unfair trading practices. Other more fundamental factors connected with U.S. competitiveness in the world market place also play their role. This having been said, it is not these provisions nor the more balanced appreciation of U.S. trade problems implied by them which predominate in discussions of the Act.

## II. EC's View of the Trade Act

### A. *What the EC Wanted to Emerge from the Act*

The EC "wish list" consisted of three simple items; first, the need for the U.S. administration to have formal negotiating authority to enter into the Uruguay Round of multilateral trade

9. To illustrate this point, USTR nominee Carla Hills, at her confirmation hearing before the Senate Finance Committee on January 27th , stated that she wanted to be viewed as "the USTR with a crowbar." Markets could, however, also be opened with a hand-shake, she added later!

negotiations; second, the authority for the U.S. to adopt the harmonized system of tariff nomenclature; third, various ad hoc tariff reductions, notably those relating to the citrus and pasta agreements concluded between the U.S. and the EC. All three of these items were included in the Trade Act.

Of these items, the most significant was the renewal of the Executive's authority to enter into multilateral trade negotiations coupled with the accompanying "fast track" provisions for approval of non-tariff agreements by Congress.[10] Although such provisions were not formally necessary to enable U.S. participation in the Round (indeed the U.S. had participated actively in discussions in the various negotiating groups in Geneva prior to the adoption of the Trade Act) their adoption is of more than symbolic importance because in principle the results of multilateral trade negotiations will be presented for an up or down vote in Congress.

If the Trade Act had consisted principally of these three items, the U.S. authorities would not have heard much from the EC. Unfortunately the legislators saw fit to make wholesale changes to U.S. trade laws which, even prior to the amendments, constituted the most far-reaching trade laws in the possession of any western nation. It is these changes which are of concern to the EC.

### B. *The Underlying Philosophy of the Trade Act—The EC Perspective*

The aim of prising open foreign markets, which lies at the core of the Trade Act, is not an objectionable one *per se*. Stated in the broadest terms, this objective is shared by the EC. Indeed as the largest trading entity in the western world, the EC has everything to gain from open markets. Opening markets and trade liberalization are also the key themes of the Uruguay Round trade negotiations.

Improving market access and reducing impediments to trade are also the *raisons d'etre* of the EC's program to com-

---

10. The Trade Act also included the so-called reverse fast track provisions under which, through passage of disapproval resolutions in both Houses of Congress, fast track procedures will not apply to trade agreements. This mechanism is only likely to be invoked if the administration fails to adequately consult Congress on the progress of the Uruguay Round. At USTR nominee Carla Hills' nomination hearing under the auspices of the Senate Finance Committee, Ms. Hills pledged to do just this. Senator Bentsen said he would personally introduce a reverse fast track resolution if this did not happen.

plete its single market by 1992.[11] The objective of the 1992 effort is to sweep away non-tariff barriers to trade[12] within the EC which have impeded the free movement of goods, services, people and capital, basic principles of the Treaty of Rome.[13] The underlying aim of this deregulation effort in Europe is precisely the same as that of the U.S. Trade Act—increased competitiveness of business resulting from increased competition in the market.

It is not, therefore, the aims of the Trade Act which the EC finds objectionable. Rather, the EC's concerns are with the methods of achieving these objectives—the "means" rather than the "ends." It is here that the EC parts company with the U.S. on the 1988 Trade Act.

The key issue is whether the opening of markets will be achieved through multilateral or bilateral trade negotiations (by "handshake") or by the threat of or use of unilateral action employed at the whim of the United States (the "crowbar" approach) with access to the U.S. market being used as leverage. The former approach has been mandated in the GATT and the objectives agreed to multinationally while the latter approach has no basis in the GATT at all. Indeed, it is the antithesis of the GATT system which is founded on the principle that retaliatory trade actions can only be taken if sanctioned by the contracting parties.[14] It is also in contradiction with the Punta del Este Declaration on standstill and rollback.

The Trade Act of 1988 significantly increases the likelihood of the U.S. resorting to unilateral trade action to enforce U.S. "rights" under trade agreements or to combat allegedly unfair trading practices of the U.S.' trading partners. By so doing the Act makes it much more likely that U.S. standards of what is fair trade will be enforced, to the detriment of international understanding reached through the multilateral dispute settlement procedures. We all agree that trade should be conducted in a fair and reasonable manner. No trading partners of the U.S. can ac-

---

11. *See, e.g.*, the White paper "Completing the Internal Market, 1985," produced by the Commission of the European Communities under the guidance of the then Commissioner responsible for the internal market, Lord Cockfield.

12. These barriers take the form of physical, fiscal and technical barriers to trade. *See* the White paper, *supra* note 11.

13. In the revisions to the Treaty of Rome in the Single European Act (1987), Article 8A states that free movement of these factors will be achieved by 1992.

14. Autonomous discriminatory action in the GATT can only be taken under the limited exemption of Article VI (imposition of anti-dumping or countervailing duties).

cept, however, that the U.S. acts as judge and jury as to what is fair trade. Nor can they accept that the U.S. has the latitude to revoke longstanding GATT obligations when it perceives that its rights have been affected or some foreign government has perpetrated an allegedly unfair misdemeanor. In this context, let us look at four areas where the likelihood of unilateral trade actions has been enhanced under section 301 of the Trade Act.

### C. *Section 301*

Section 301 of the Trade Act of 1974[15] authorizes action to enforce its rights under international trade agreements and to combat discriminatory or unreasonable foreign governmental practices which burden or restrict U.S. commerce. The statute was discretionary in nature, which resulted in its use being very spasmodic. In the early years of the Reagan administration a hands-off approach to trade policy meant that section 301 was employed infrequently. Since 1985, section 301 has been used more aggressively by the U.S. administration against alleged unfair trading practices of U.S.' partners, with some cases being self-initiated.

From its inception in 1974, section 301 has been shrouded in controversy. The EC has always had fundamental problems with section 301 since it permits, in GATT covered areas, unilateral action to be taken by the U.S. against its trading partners, without the prior authorization of the contracting parties. Such unilateral action, the EC has always maintained, is not in conformity with the multilateral dispute settlement process of the GATT which stipulates that retaliatory measures can only be taken if sanctioned by the contracting parties.[16]

The reform of section 301[17] was a major area of conflict in the drafting of the 1988 Trade Act, with Congress pushing for quasi-automatic trade sanctions against unfair trade practices, and the administration holding out for discretion and flexibility. This negotiation between Congress and the administration went down to the wire with a final compromise being struck only late

---

15. Section 301 of the 1974 Trade Act, 19 U.S.C. § 2411; Pub. L. No. 93-618 as amended by Pub. L. No. 96-39 and Pub. L. No. 98-573 has been substantially modified under the U.S. Trade Act of 1988 (sections 1301-1303).

16. *See supra* note 14.

17. *See* Ms. A. PORGES' CONTRIBUTION TO THIS COMPENDIUM OF PAPERS FOR A DETAILED DISCUSSION ON THE CHANGES TO SECTION 301 IN THE TRADE ACT.

in the day. This compromise contains two features which are of major concern to the EC:

(1) The Act sets strict time limits for completing the section 301 process, and in cases of alleged trade agreement violations, or cases where a foreign nation's policy or practice is "unjustifiable" and burdens or restricts U.S. commerce, the Act makes retaliation *mandatory* rather than discretionary.

(2) The Act envisages that, on the basis of the National Trade Estimates report (to be drawn up this year by the end of April 1989), the USTR, in consultation with the House Ways and Means Committee and Senate Finance Committee, will select 'priority' unfair trade practices from 'priority' countries, and self-initiate section 301 cases against them, with a view to their reduction and eventual elimination over a three year period. These provisions are known as the "Super-301' provisions.

Of far less significance to the EC is a third important change, reflecting Congress' desire that the USTR role on trade matters be elevated above that of other agencies, under which the USTR rather than the President will make the decision on what action needs to be taken in section 301 cases. The administration fought tooth and nail against this change in negotiations with Congress. It remains to be seen, however, whether the change will have any impact on the way the Statute is administered.

It is clear that in trade agreement violation cases, the discretion available to the administration *not* to take action has narrowed considerably. There are five "waivers" to the taking of mandatory action, notably when action would cause serious harm to national security or in extraordinary cases, where "the taking of action . . . would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action taking into account the impact of not taking such action on the credibility of [section 301]." This has led many observers to conclude that the mandatory retaliation provisions should be viewed as "mandatory but not compulsory." What is certain, however, is that except in "unreasonable" and "discrimination" cases, where the USTR retains wide discretion as to whether to take action, the flexibility available to USTR in other cases has substantially narrowed. For the EC these changes are

unwelcome and potentially confrontational since they make a trade policy tool which was of doubtful GATT legality at the outset, even more so now. Increasing the likelihood of unilateral trade action at a time when multilateral efforts are being made to liberalize world markets represents, in the author's view, an incoherent policy and is generally unhelpful to the GATT process.

The clear message from Congress to the administration emanating from the debate on the Trade Act is that the U.S. is to implement a "get tough" trade policy and use section 301 aggressively to attack foreign unfair trade practices. These sentiments were expressed recently by Senator Bentsen, Chairman of the Senate Finance Committee and by other Senators at the confirmation hearing for USTR nominee Carla Hills on January 27, 1988. Ms. Hills, for her part, pledged on more than one occasion at the hearing, that the USTR under her stewardship would not hesitate to act unilaterally against trade agreement violators or perpetrators of unfair trade practices.

Several questions come to mind when reflecting on the changes to section 301. First, will the changes to section 301 achieve their aim? Second, what will be the reaction of the U.S.' trading partners to the amendments to section 301 and the new "Super-301" provisions?

By limiting the discretion available to the administration under section 301 and increasing the likelihood of retaliatory action, Congress evidently believed that it was enacting measures which would facilitate the resolution of trade disputes and grievances to the U.S.' satisfaction. Let us examine this presumption. It implies that the U.S.' trading partners will be more amenable to the resolution of disputes because of fixed deadlines and the threat of mandatory action set under U.S. law. This assumption may have some credibility with respect to smaller, less economically powerful countries who do not possess a viable counter-retaliatory threat, but is it valid with respect to the U.S.' main trading partners such as the EC or Japan? The EC, as has been demonstrated in the past and most recently in the case of the hormones dispute, will not back off from taking measures which it considers legitimate and justifiable nor will it be cowered into submission by the threat of U.S. sanctions under section 301. In addition, the EC stands ready, where necessary, to counter-retal-

iate to defend its interests.[18] Thus, far from facilitating the resolution of trade disputes, the changes made to section 301 may make confrontation and conflict more likely with the U.S.' large trade partners. In addition, the potentially "positive" impact that such cases could have on the far more pressing problem of the U.S. trade deficit is probably minuscule.

A second issue relates to the use of the "Super 301" provisions. For these provisions to have credibility—and it is important in this context to remember that they are the creation of the Senate Finance Committee, in particular the Chairman and Senator Danforth—self-initiated section 301 cases must be opened against some of the U.S.' principal trading partners. Obvious candidates are the EC, Japan, Korea and Brazil, to name just a few. It is fair to assume that some of these cases would not necessarily have been opened absent the Super-301 provisions. Will they make their mark? Will the U.S.' trading partners be prepared to negotiate under pressure of the strictures and deadlines of U.S. law on issues covered in the Uruguay Round?

The changes to section 301, far from facilitating the resolution of trade disputes, will instead increase the likelihood of confrontation between the EC and the U.S. Indeed, it is incomprehensible why changes had to be made to the statute when, as one distinguished participant in the BYU conference stated, "no other instrument has been as effective as section 301 in opening markets." If this is so, why change it? Evidently Congress did not share this assessment.

Finally, even if we were to accept the premises of section 301 as an instrument for opening markets, can we be sure that world trade overall will expand? This has been questioned by a group of leading economists chaired by Professor Bhagwaiti of Columbia University suggested in April 1989 that Super 301, far from expanding trade, could lead to trade diversion by replacing a country's trading partner with the United States.

In conclusion, it is evident that contrary to the opinions of some commentators the changes made to section 301 are not of limited significance. Compared to earlier versions of the Act, the final result was a vast improvement; however, key changes in discretion and implementation of the Act were made. Although it remains to be seen how the changed statute will be applied in

---

18. In the pasta and citrus "war", for example, there was a series of retaliations and counter-retaliations between the E.C. and the U.S..

practice, close Congressional oversight and the desire of Congress in general that the U.S. should get tough with foreigners engaged in allegedly unfair trading practices suggest that real flexibility available to the administration is limited.

### D. *Telecommunications Trade Act of 1988*

The telecommunications provisions of the Trade Act[19] are aimed at providing mutually advantageous market opportunities to U.S. firms in priority third country markets. The underlying assumption of the Act is that, whereas the U.S. market is open following the ATT divestiture and the break up of the Bell system in 1984, certain foreign markets are relatively closed thereby denying business opportunities to U.S. firms in a sector where the U.S. is internationally competitive.

To achieve U.S. aims, the Act requires the USTR to identify "priority" countries which, in essence, deny mutually advantageous market opportunities to U.S. firms. On the basis of a report identifying priority countries, the President[20] is required to enter into negotiations with a view to concluding a bilateral or multilateral trade agreement designed to satisfy the general negotiating objectives of the Act as described by specific negotiating objectives.[21] Negotiations are to be completed within eighteen months of the passage of the Trade Act, although the period for negotiation can be prolonged for up to two one year terms if sufficient progress is being made in the negotiations.

If no satisfactory agreement is reached in the negotiations, or if an agreement is violated, the President is authorized to take whatever actions under the Act which are appropriate in the circumstances and likely to achieve the general negotiating objectives. Among the options open to the President are actions to eliminate federal procurement of telecommunications products from the third country concerned; the termination, withdrawal or suspension of any trade agreement giving benefits to a foreign country in the form of tariff or other concessions; or any action permitted under section 301 of the 1974 Trade Act as amended. Many of the types of remedies foreseen under the Act

---

19. Sections 1371-1382 of the Act.

20. By Presidential Executive Order No. 12661, of 27 December 1988, this authority is transferred to the USTR.

21. There are twelve specific objectives and three general ones in the Act.

would effectively close the U.S. market to foreign telecommunications exports.

The EC has been designated a priority country under the Telecommunications provisions of the Trade Act, an action which the EC and its member states find irksome. At a time when a major liberalization effort in the telecommunications area is being undertaken in the EC in the context of the 1992 exercise[22] when multilateral negotiations in the GATT are being conducted on extending the government procurement Code to cover telecommunications, and when efforts in the GATT are being made to reach an agreement covering services, it is difficult to comprehend what additional benefits the U.S. hopes to achieve from designating the EC as a priority "country."[23]

Aside from this aspect, the EC objects to the unilateral nature of the telecommunications provisions and the fact that they are premised on the concept of sectoral reciprocity. It is not up to the U.S. to unilaterally determine what is a barrier nor to decide when mutually advantageous market opportunities or a sectoral balance in market access exists. The opening up of world trade in telecommunications products and services is being dealt with in the Uruguay Round of the GATT. The threat of unilateral U.S. retaliation reflects a lack of confidence in the Uruguay Round and, simply put, is not an action which will facilitate the successful outcome of these multilateral negotiations.

### E. *Buy America*[24]

Under the Act, the U.S. has also reserved for itself the possibility of taking unilateral action, in the field of government procurement. Reflecting congressional sentiment that the U.S. has opened its public procurement markets while foreigners have not, the Act stipulates, *inter alia*, that U.S. procurement of goods shall be banned from signatories to the GATT Procurement Code that are "not in good standing" with the Code. Pro-

---

22. Five major pieces of legislation are: the directive to liberalize the terminal equipment market; a proposal for a Council directive to liberalize all public procurement in the telecommunications area; a forthcoming Commission directive to liberalize the value added services market; a proposal for a Council directive on Open Network Provision (i.e. conditions of access by service providers to the networks); and a Council directive on standardization and testing of terminal equipment.

23. The E.C. believes that the markets of certain E.C. countries have been targeted by the USTR.

24. Sections 7001-7005 of the Trade Act.

hibition on procurement is also mandated against any country that discriminates against U.S. suppliers in its procurement of goods or services where such discrimination constitutes a "significant and persistent pattern or practice" and results in identifiable harm to U.S. businesses. The latter case covers even non-Code covered areas, e.g., water, electricity, transport equipment and telecommunications, although the latter sector is covered also by the special telecommunications provisions in the Act. The procurement bans can be waived on public interest grounds, or to avoid the creation of a monopoly, or in cases where there would be insufficient competition to ensure the procurement of products of an appropriate quality at competitive prices.

As in the case of the changes to section 301 and the Telecommunications provisions of the Act, the "Buy America" provisions require, subject to certain limited waivers, the U.S. to take unilateral action against alleged government procurement Code violators[25] or procurement discriminators by banning procurement of services and reinstituting traditional "Buy American" preferences. These remedies apply even when, in the context of the GATT Code, dispute settlement procedures have not run their course. Such unilateral action would be clearly illegal under the GATT, since measures can only be authorized by the relevant Code committee. Again, the spirit of these provisions is in contradiction with the multilateral negotiating process under way in GATT. As before, the EC reserves its GATT rights in case of action by the U.S. under this statute.

### F. *Export Controls*

As a final illustration of the pervasive presence of unilateralism under the Act, it is worth noting that in the context of the changes made to the Export Administration Act,[26] mandatory sanctions—analogous to those implemented against Toshiba and Kongsberg—will be applied against future export control viola-

---

25. Countries "not in good standing" under the Code and countries discriminating against U.S. suppliers will be identified in reports submitted by the President to Congress, the first one of which is due by April 30, 1990. The criteria for identification will be those countries which engage in a "significant and persistent pattern or practice" of discrimination. Alleged Code violators will have sixty days to reform the alleged Code violating practice or be subject to dispute settlement procedures. If the dispute settlement mechanism does not succeed within a year, the president unilaterally must revoke existing "Buy America" waivers.

26. 50 U.S.C § 2403 as modified by Sections 2411-2431 and 2444-2446 of the 1988 Trade Act.

tors, even if non-U.S. products are involved and the violation occurs outside the U.S. These actions, will take place where the violation results in "substantial enhancement of Soviet and East bloc capabilities" which have a "serious impact on the strategic balance of forces."

The EC and its member states have long since objected to the extraterritorial reach of U.S. law in the export control area. The changes to the Export Administration Act permitting the U.S. to act against export control violations in third countries are unnecessary and indeed in contradiction with the professed aim of strengthening export controls in third countries. Consequently, the EC objects strongly to them.

## III. CONCLUSION

Two eminent insiders who played a significant role in the negotiations leading up to the final form of the Trade Act[27] advanced two arguments in defense of the Act. The first argument is that the Trade Act should be viewed as a refinement and continuation of previous trade law. Is this interpretation fair, and if so, should the U.S.' trading partners be reassured?

From the perspective of the U.S.' foreign trading partners, the overall changes made to U.S. trade law do not appear to be mere refinements. While in the field of anti-dumping and countervailing duties the changes made in the Trade Act were not of major consequence, at least as far as the EC is concerned,[28] in the areas cited above, most notably section 301 and telecommunications, the changes were significant. If section 301 has been as successful in opening markets as some suggest, why change it? The fact remains that the discretion available to the USTR not to take measures in certain cases has narrowed considerably. As argued above, it is scarcely conceivable that this change will be ineffectual from the point of view of the way in which the Act is administered. Therefore, even if one were to accept the hypothesis that the changes in this and other areas formed part of a pattern of amendments to U.S. trade law over a number of years, there is little comfort to be derived from this supposition.

---

27. *See* Bello & Holmer, *supra* note 2.

28. The House and Senate Bills contained provisions clearly not in conformity with the GATT (e.g. new rules on the countervailability of certain domestic subsidies; input dumping provisions). These were removed from the final version of the Bill.

The second argument is that foreigners should be satisfied that a number of provisions which previously had a protectionist bent were recast into acceptable remedies to enable judicious trade liberalizing use of those provisions. The EC is the first to acknowledge that sterling work was done by the administration and in particular the USTR to cleanse the Trade Bill of some of its most objectionable non-GATT conforming elements, notably the Gephardt amendment, which would have mandated action against trade surplus countries. However, given the political realities surrounding the trade debate on Capitol Hill, and Congressional desire to toughen U.S. trade policy and reduce discretion in implementing that policy, it was inevitable that the administration could not win all bets. The USTR fought, in particular, against a transfer of authority from the President to the Trade Representative and against narrowing discretion under section 301 but did not succeed in making all the changes it desired. This was hardly surprising given the major pruning in other areas of the bill, even where both the House and Senate had agreed in their separate versions on a certain provision. So it would be erroneous, in this author's view, to assume that the Administrations's view will prevail over that of Congress. Although there were changes, the Act nonetheless bears the stamp of a Congress impatient with past policy.

What does the final report card show? Essentially, it shows positive features, from the EC's standpoint, such as trade negotiating authority and implementation of the harmonized tariff nomenclature system, counterbalanced by a series of amendments to U.S. trade laws which are both unnecessary and untimely. The panoply of prior U.S. trade laws were already the most extensive and far reaching of any western nation; the changes have made the laws even tougher.

The EC, and the U.S.' other trading partners, will have to watch closely to see how the new Administration will interpret and apply the new trade laws. The omen so far for the EC, namely its inclusion on the list of priority countries under the Telecommunications provisions, is not a good one. Perhaps this is the year for "Euro-bashing" as a recent Business Week survey reported.[29]

In the hands of an Administration dedicated to open multilateral trade, the Trade Act, despite its bad features, needs not

29. Business Week, 19 January 1989.

force a protectionist approach. But the flexibility and discretion available to the administration has narrowed considerably. The EC will remain vigilant and stands ready to defend its legitimate trade interests.