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Sheryl Powers*

INTRODUCTION

United States trade policy is at a cross-roads. Since World War II, the United States has encouraged expansion of trade through multilateral negotiations. Designed to provide each participant with benefits that in the aggregate correspond to each party’s concessions, these negotiations led to the General Agreement on Tariffs and Trade (GATT) and produced an unprecedented era of prosperous international trade.

Recent complaints about restricted foreign markets, however, have caused some legislators to question whether the United States has given away more than it has received. In the 97th Congress, over 250 bills were introduced which required or authorized the United States to demand “reciprocity” from its trading partners. Most bills defined reciprocity as “equivalent commercial opportunities,” which on its face seems a fair request to make of other nations. But many bills required the United States to retaliate against non-reciprocating nations by erecting trade barriers in the United States similar to those in uncooperative nations. This approach represents a break with traditional United States policy and has created a continuing controversy in Congress.

To those advocating its use, reciprocity legislation is especially appropriate for the telecommunications industry. Only 5 percent of telecommunications equipment manufactured in the United States is exported for sale in other nations. Trade barriers, loyalty to domestic manufacturers and the importance of telecommunications to national defense systems have combined to restrict access to foreign markets in the telecommunications sector. To persuade other nations to increase market access in telecommunications, United States legislators added a requirement of reciprocity to two proposed bills, S.898 and H.R.5158. This note will

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examine these two bills, concluding that reciprocity is an inappropriate solution to United States concerns about foreign trade restrictions.

**Background of Reciprocity**

Reciprocity is not a new concept. Between the two world wars, the United States applied reciprocity bilaterally, attempting to balance trade with each nation. The results were disastrous and led to retaliatory trade practices. Against this background, the GATT was formed in 1947 by the United States and its major trading partners to "maintain a general level of reciprocal and mutually advantageous concessions." This principle is known as "global reciprocity." In the Trade Act of 1974, Congress included the idea of reciprocity as a negotiating objective.

Much of the recent controversy over reciprocity has focused on its value as a formal requirement in United States law versus its value as an informal objective in trade negotiations. Advocates of reciprocity believe that currently the United States lacks leverage in negotiations because it has already conceded as much as it can; a threat that United States markets will close is necessary to persuade other nations to open theirs. Reciprocity legislation would provide negotiators with a bottom line. As a mere informal objective, reciprocity gives negotiators neither sanctions nor incentives to induce countries to open their markets. Thus, to provide leverage to open foreign telecommunications markets, reciprocity and the authority to retaliate were added to S.898 and H.R.5158.

**S.898 § 238 AND H.R.5158 § 267, THE RECIPROCITY PROVISIONS**

Both S.898 and H.R 5158 are concerned primarily with deregulation in the United States telecommunications industry. Reciprocity was added to these bills partly from a concern that deregulation would result in greater numbers of foreign firms entering the United States market, especially since Western Europe and Japan have targeted the telecommunications industry for major expansion. Protecting United States domestic markets from foreign expansion may receive support because the telecommunications industry is seen as vital to national security and United States technological competitiveness. The industry is also valuable in purely monetary terms, as the United States market for telecommunications equipment alone is worth an estimated $15 billion.

Another reason for the addition of reciprocity provisions was the desire to open foreign markets to United States telecommunications firms. An estimated 96 percent of foreign telephone operating companies are government owned and purchase their equipment and services by law, regula-
tion, or custom from local companies. The loyalty to local industry results from a desire “to safeguard a continuing supply of equipment for a vital, critical industry, . . . to add to the country’s knowledge of technology, and to provide jobs.” In the Tokyo Round of GATT negotiations, the United States attempted to include government-owned telecommunications entities in the Government Procurement Code which forbids discrimination on the basis of national origin in government purchasing. Unfortunately, this attempt failed, hardening the United States’ conviction that new leverage was needed to persuade other nations to open their markets to American telecommunications equipment and services.

In addition to government procurement policies, other trade barriers hamper American exports of telecommunications equipment and services. For example, many countries allow a foreign firm to establish a local subsidiary only if the subsidiary is primarily owned by a local partner. American firms consider such an arrangement disadvantageous because it entails a loss of control over operations and technology often developed at great expense. Since the sale of telecommunications equipment and services often requires the establishment of a local subsidiary, American firms reluctant to lose control may be precluded from trade with nations requiring major local ownership. Other countries have prescribed standards for telecommunications services and equipment which, by design or administration, exclude foreign vendors. The United States Trade Representative’s list of barriers to telecommunications, data and information services illustrates the pervasiveness of foreign trade restrictions in this industry.

S.898 § 238 and H.R.5158 § 267 authorize the Federal Communications Commission (FCC) to apply to foreign telecommunications firms in the United States the same terms and conditions applied to United States firms in the foreign firms’ “home” nations. Both sections provide that a foreign country cannot prevent the application of restrictions against its firms by merely concluding an agreement on telecommunications equipment procurement with the United States. The country must actually ensure that American firms are granted “reciprocal rights.” Reciprocal rights are defined as the rights granted United States telecommunications facilities in foreign markets which are reasonably equivalent to those granted foreign enterprises in the United States itself.

Both sections authorize the Secretary of Commerce to monitor the implementation of reciprocity in consultation with the FCC and the Office of the United States Trade Representative (USTR). The USTR is required to compile a list of countries that are non-reciprocating. This list will be used to deny certain telecommunications equipment certification or interconnection rights when more than one-half its total value has been added in a “nonreciprocating” country on the list.
Although the provisions of the bills are similar, they scrutinize different aspects of the treatment United States firms receive in foreign countries. Section 267 imposes on foreign firms the conditions of operation applied to United States firms abroad while § 238 imposes the conditions of entry applied to United States firms abroad. Conditions of entry are the restrictions facing firms entering a foreign market for the first time; for example, obtaining a license to do business in the foreign country. Conditions of operation are the restrictions facing firms already in the foreign country; for instance, meeting an additional standard on telecommunications equipment required only of foreign firms. Obviously, there is some overlap in these two concepts. It is unclear whether in application either would result in a noticeable difference from the other.

These sections differ in scope in two additional ways. First, although both sections 238 and 267 apply the conditions of the foreign nation in which the foreign telecommunications firm is based, section 267 broadens its application to the conditions of the nation under whose law the foreign firm's transmissions or services originate, terminate or are regulated. Section 238 contains only the addition of the nation under whose law the foreign firm was established. Second, section 238 applies to "telecommunications or information services, facilities or equipment," while section 267 is limited to "telecommunications services or facilities." Thus, although section 238 is broader in its coverage of equipment, section 267 is broader in its coverage of the foreign nations under scrutiny.

Section 238 includes a provision omitted from section 267. The President is authorized to veto FCC decisions for foreign policy reasons after consulting with Commerce, USTR, and State. Section 267, however, exempts "services and facilities offered on the effective date of this section," while section 238 contains no "grandfather" provision.

Reciprocity Under Fire
Reciprocity has generated many heated controversies since its introduction in the 97th Congress. Critics have maintained that reciprocity is unsound economically, is infeasible administratively, and is inconsistent with United States international obligations. Each of these areas will be analyzed below.

Economic Disadvantages
In §§ 238 and 267, reciprocity is measured on both a bilateral (nation-to-nation) and sectoral (market sector-to-market sector) basis. For example, §§ 238 and 267 would compare Japan's treatment of United States telecommunications facilities with the treatment of Japan's telecommunications
facilities by the United States, a market sector and nation to nation comparison. Ambassador Brock, the United States Trade Representative, has opposed bilateral reciprocity because it undermines the multilateral approach to trade inherent in the GATT which is responsible for the current low level of tariffs on trade.  

Brock and others have also opposed sectoral reciprocity because it ignores comparative economic advantages between nations. Nations are not equally efficient at producing every good or service. Therefore, they have an incentive to export products they produce relatively efficiently and import products they produce relatively inefficiently. Some critics fear that sectoral reciprocity may be used to equalize trade between nations in each product line, thereby impairing the incentive to trade. Without this incentive, the United States could lose leverage in trade negotiations. Sections 238 and 267, however, require only equivalent treatment, not equal levels of trade in the telecommunications sector. It is unclear whether these sections would be interpreted as mandating an equal balance in telecommunications trade.

Many commentators have expressed their concern that nations subject to United States reciprocity restrictions will retaliate. Opponents of reciprocity in the telecommunications sector have emphasized that the United States has a trading advantage in this area. As a result, other countries may be entirely willing to adopt a protectionist approach in the telecommunications field in response to American restrictions. In addition, those with whom the United States maintains a positive balance of trade, such as the European Communities, may be quick to adopt reciprocity as their standard to equalize their balance of trade with the United States. If American reciprocity leads to wide-spread adoption of trade restrictions, the United States would have much to lose as imports and exports account for approximately one-fifth of the United States gross national product.

As critics of reciprocity have noted, the United States has many trade barriers of its own. An example in the telecommunications field is the United States ban on foreign ownership of television and radio licenses. If the United States were to adopt reciprocity, its own trade barriers would give other nations reason to demand reciprocity or to retaliate themselves.

Nations have traditionally been concerned about their relative balances of trade. Reciprocity proponents have become alarmed at recent United States deficits and have urged that the United States take serious action to offset them. In 1981, the United States trade deficit was approximately $28 billion. The deficit with Japan alone was in the order of $16 billion. Those who advocate reciprocity apparently assume this deficit is due primarily to open markets in the United States and closed markets abroad. But several commentators assert that market factors such as interest rates,
availability of capital, lack of skilled manpower, and research and development opportunities are the predominant reasons for poor United States trade performance. \textsuperscript{63} The United States has recently had high interest rates which resulted in an influx of foreign investment. \textsuperscript{64} In turn, the dollar has been strengthened \textit{vis-a-vis} other currencies, making imports relatively inexpensive in the United States and United States goods relatively expensive abroad. \textsuperscript{65} For example, the dollar is at least 25 percent overvalued in relation to the Japanese yen. \textsuperscript{66} As a result, United States goods are at a competitive disadvantage in Japan quite apart from the market restrictions commonly attributed to the Japanese. \textsuperscript{67} To state that our $16 billion trade deficit with Japan is the result of Japanese trade restrictions on United States imports underestimates the effect of current exchange rates. A United States trade policy of retaliation against foreign trade restrictions would be ineffective partly because it ignores the impact of interest and exchange rates as well as other economic factors on United States trade performance.

Moreover, the United States trade deficit in itself is a misleading indication of overall American competitiveness. For example, trade deficit figures include only trade in merchandise. When services and investment are also counted, the 1981 deficit was more than offset, resulting in a surplus of $4.5 billion. \textsuperscript{68} Furthermore, the trade deficit reports the overall balance of trade, not the balance within a particular industry. \textsuperscript{69} In the telecommunications equipment industry, the United States has a trade surplus,\textsuperscript{70} with imports accounting for only 4 percent of American consumption of telecommunications equipment. \textsuperscript{71} Nevertheless, a positive current account “is not a measure of whether a given American corporation is able to compete because of the presence of equitable rules.” \textsuperscript{72} Despite the positive numbers, many American business people object to the formal trade barriers in foreign countries, especially when firms in those countries have access to markets in the United States. It is, perhaps, this sense of unfairness, that the United States has maintained free access to its markets while its trading partners have not, however accurate the perception may or may not be, that motivates those demanding reciprocity.

Whether all participants maintain equally open markets or not, international trade has many benefits, even on a unilateral basis. Competition from imports results in lower prices for United States consumers and may reduce overall inflation rates. \textsuperscript{73} Imports give United States firms access to foreign technological advances and, according to some United States firms, push technological development as United States firms strive to compete with advanced imports. \textsuperscript{74} Although banning a foreign product or service may provide protection for United States companies in the same line, it may also result in higher prices for domestic companies that use the pro-
duct or service. Reciprocity may shelter United States firms now competing with imports only at the cost of United States exporting firms losing markets abroad if other nations retaliate. Furthermore:

Restrictions on imports reduce other countries' exports and hence the foreign exchange available to them for importing. Reduced imports mean that someone else's exports eventually will decline. Arguably, in the long run, jobs can be saved in import competing industries only at the expense of jobs "lost" in export-competing industries. 75

Reciprocity may carry hidden costs to the entire United States economy.

DISADVANTAGES OF RECIPROCITY PROVISIONS IN S.898 AND H.R.5158

Broad Powers Granted the FCC

The main provisions of §§ 238 and 267 appear to grant the FCC the power to replicate any foreign government law or practice which affects the entry or operation of United States telecommunications companies abroad. 76 This open-ended mandate could include application of foreign antitrust, tax, environmental, employment, securities, land use, and health and safety laws and regulations. 77 If so applied, §§ 238 and 267 would result in numerous and possibly contradictory FCC rules mirroring the trade restrictions of other nations. Each foreign nation and each foreign product and service might require different treatment, depending on the treatment given United States products and services abroad. Administration of such a system would be fraught with difficulties and would give the FCC powers not usually accorded regulatory agencies.

Objections have been voiced on the authority granted the FCC in §§ 238 and 267. In each provision, the FCC is given the power to determine the conditions under which "foreign" telecommunications firms may operate in the United States. 78 The FCC has indicated that it already has the authority to scrutinize "foreign carrier reciprocal practices" when reviewing carrier tariffs 79 and determining whether they are in the public interest under §§ 208, 209, and 210 of the 1934 Communications Act. 80 Part of the FCC's scrutiny includes consideration of terms applied to United States firms abroad when deciding whether to permit a foreign carrier to enter the United States market or establish facilities. 81 The FCC, however, welcomed § 238 because the 1934 Act does not explicitly provide for reciprocity authority and the FCC's use of that authority had never been tested in court. 82 Consequently, the FCC indicated it has exercised its authority with caution. 83
Commentators almost universally criticized the amount of discretion given the FCC by §§ 238 and 267. The major fear was that this provision would result in an uncoordinated trade policy, as the FCC is an independent regulatory agency and therefore not directly subject to Executive Branch control.

Sections 238 and 267 do, however, impose some limits on the FCC’s powers. The Secretary of Commerce would monitor the FCC’s implementation of its power, in consultation with the FCC and the USTR, but without a voice in the FCC’s decisions. Section 267(e) requires the FCC to consult with Commerce, the USTR, State and any other federal officer designated by the President. Nevertheless, the FCC alone decides whether to impose trade restrictions. Although § 238(d) does grant the President 45 days to veto FCC decisions, § 267 does not contain a veto provision. Many critics thought § 267 would interfere with the President’s power to conduct foreign relations “with a unified voice” and to negotiate reductions in foreign trade barriers in the telecommunications sector.

Some commentators questioned the constitutionality of § 267 because it allows the FCC to encroach upon the President’s exclusive right to conduct foreign relations.

Other critics questioned the ability and resources of the FCC to handle the complicated determinations required by §§ 238 and 267, such as discerning the origin of products and services. Finally, one critic noted the potential conflict with the USTR which was established to coordinate trade policy. In sum, the consensus was against granting the FCC, an independent regulatory agency, the power to make decisions pregnant with international policy implications.

Over-inclusiveness

A major problem with S.898 and H.R.5158 lies in their definitions of a “foreign” entity. The broad language would capture what many believe are United States firms. S.898 § 103(15) stipulates that an “enterprise” or “entity” is foreign when at least 20 percent of the firm is owned or controlled by a foreign person. Thus, a firm that was 80 percent American owned would be categorized as foreign. H.R.5158 § 301(36) follows the 20 percent restriction of S.898 § 103(15). Aside from discouraging joint ventures which provide a means to exploit foreign technology under at least partial American control, this definition could impose economically costly restrictions on companies primarily owned by United States citizens, whether the firms are located abroad or in the United States. Since the definitions do not exclude “foreign-owned” firms based in the United States, §§ 267 and 238 may jeopardize the jobs of United States citizens.
employed by those companies. The costs of implementing §§ 238 and 267 may thus be inadvertently borne by United States citizens.

In addition to catching "innocent" American firms in its net, § 267 ensnares foreign firms from "innocent" nations. In § 267(a)(2), a foreign firm is granted reciprocity on the terms and conditions United States firms face not only in the foreign company's home nation, but also in any nation which receives the foreign company's transmissions. Therefore, a foreign company could confront restrictions based on the trade barriers of a nation merely receiving its transmissions even though its own home nation granted United States firms full market access. Not only does this seem likely to offend nations willing to reduce their trade barriers, but also it appears to be an ineffective tool against nations receiving transmissions. If a nation is not seeking access to the United States market, any restriction the United States places on its neighbors is unlikely to affect its practices. If it is seeking access, the United States can judge that nation according to its own barriers without unnecessarily penalizing its cooperative neighbors.

Section 267 and § 238 also demand that foreign nations refrain from "encouraging" or "condoning" practices of domestic manufacturers inhibiting the sales of United States telecommunications facilities. Although a nation may grant United States firms market access, this provision may require it to impose a regulatory scheme on private companies to avoid "condoning" practices which adversely affect United States firms. It is one thing to request a nation to implement nondiscrimination in government procurement but quite another to insist it become the watchdog of private firms over whom the government may have little legal control. It seems unlikely such a "request" will obtain the cooperation of foreign nations which have refrained from imposing regulatory restraints on their telecommunications industries.

A third difficulty occurs in the application of restrictions to "foreign" firms currently in the United States. Section 267(h) exempts "services and facilities offered on the effective date of this section" but § 238 does not contain a similar "grandfather" clause. Thus, under § 238, the FCC could impose restrictions on foreign firms which entered the United States market without prior notice of a reciprocity law. One critic questioned whether the imposition of restraints on such firms would be a taking of property without just compensation in violation of the Fifth Amendment. Even if the imposition of a new reciprocity law does not rise to the level of a taking, it does present difficulties for foreign firms already established in the United States which would not have entered with prior notice of the law. These difficulties will probably become the subject of complaints against the United States by the home countries of those firms.
Value-added Provisions

The "value-added" provisions of H.R. 5158 and S.898, which allow the FCC to place restrictions on certain equipment if more than one-half of its value was added in a "non-reciprocating" nation, have been heavily criticized.\textsuperscript{104} Which nations are considered non-reciprocating is subject to change\textsuperscript{105} leaving United States firms with uncertainty as to what equipment is safe to order in advance. Equipment without restrictions one month may carry restraints the next, too late for American companies to cancel their orders or to use the equipment in the United States as planned. Furthermore, determining the ultimate source of components, as these provisions require, may prove administratively difficult and time-consuming. Tracing the origin of equipment probably would entail the cooperation of exporting nations reluctant to aid a process which may label their equipment as unmarketable in the United States.

In addition, these provisions would allow restrictions to be placed on products manufactured and sold by wholly-owned United States companies if over half the total value of the products were attributable to components from non-reciprocating nations.\textsuperscript{106} Although aimed at foreign nations, these provisions may injure United States firms unaware that certain components carry an automatic penalty. Further, they present severe administrative problems and introduce uncertainties in the international telecommunications market.

Inconsistency with United States International Obligations

Reciprocity as embodied in §§ 238 and 267 ignores several United States international obligations. The United States, like most of its trading partners, is a member of the GATT. The GATT contains an unconditional "most favored nation" principle ("MFN") which requires its members to grant each other treatment equal to that accorded any other trading partner.\textsuperscript{107} If the FCC, for example, were to restrict telecommunications imports from Japan, without applying those restrictions against all other GATT signatories, the United States would be violating its MFN obligation toward Japan. Under the GATT, Japan may be entitled to compensation for the United States violation.\textsuperscript{108}

Second, the GATT forbids its signatories to impose restrictions on the internal sale, distribution and use of imported goods which are not also imposed on domestic goods, a concept known as the national treatment principle.\textsuperscript{109} Yet §§ 238 and 267 violate this principle by authorizing the FCC to apply internal restrictions solely on imported goods, such as the denial of interconnection rights.

Furthermore, GATT requires certain objective standards\textsuperscript{110} or interna-
tional procedures to be followed before a member can retaliate against or remove a concession from another GATT member. Under §§ 238 and 267, the FCC is allowed to take unilateral action against GATT signatories without regard to GATT procedures and standards. The United States may anticipate difficulties in convincing its trading partners to comply with the GATT if it ignores GATT principles in a new reciprocity law.

In addition to ignoring GATT obligations, §§ 238 and 267 explicitly require the FCC to disregard existing or prospective agreements on telecommunications equipment procurement if, in the FCC's judgment, the other nation is not in full compliance with the agreement, it allows United States firms access under conditions which distort "research and development, investment, sales or marketing," or it condones domestic manufacturer practices which inhibit sales of United States telecommunications facilities. Under §§ 238 and 267, the FCC may effectively repudiate United States treaties and agreements such as the Nippon Telegraph and Telephone Agreement with Japan. In this agreement, Japan promised to provide United States telecommunications firms with competitive opportunities in its procurement procedures. Unilateral FCC action could ironically result in closing the markets of foreign nations now pledged to provide United States firms with access.

CONCLUSION

From a pragmatic as well as a legal viewpoint, §§ 238 and 267 appear faulty and unworkable. Although definitional problems such as applying restrictions to firms 80 percent owned by United States citizens can be cured by redrafting, major difficulties, such as provoking world-wide retaliation, may prove insurmountable in any legislation requiring reciprocity from United States trading partners. But with growing unemployment and a deepening recession, pressure on Congress to act is likely to continue. Therefore, alternatives to reciprocity and to the threat of retaliation must be considered.

GATT Article XXIII Proceedings

Article XXIII of GATT provides for compensatory measures when a nation's benefits under GATT are "nullified and impaired." The Consumers for World Trade have urged the United States to initiate GATT Article XXIII proceedings instead of legislating reciprocity. GATT, however, only applies to merchandise; neither investment nor services are explicitly covered. Since investment and services are crucial to the telecommunications industry, GATT as it now stands may provide little aid to United
States telecommunications firms. Secretary of Commerce Malcolm Baldrige and United States Trade Representative William Brock have advised Congress to provide the President with authority to negotiate in the areas of services and investments. With this authority, Brock hopes the United States can persuade its trading partners to extend the coverage of GATT and other international agreements to services and investments as a means of reducing trade barriers in those areas.

**Internal Procedures of Other Nations**

An alternative more likely to provide access to foreign markets than the threat of retaliation is the use of a foreign nation's own laws. Geza Feketekuty, Assistant United States Trade Representative for Policy Development, recently recounted one successful use of this strategy. Germany had established a telecommunications data information system for air reservations which excluded all airlines except Lufthansa or those with whom Lufthansa had a pooling arrangement. Since the United States antitrust laws prohibited pooling arrangements with foreign airlines, United States firms were automatically excluded. When this practice was brought before the German Cartel Office, the Office declared it invalid and required the reservations system to include other airlines. Mr. Feketekuty testified that the strategy of using the internal procedures and laws of other nations has proved successful in other cases, and urged United States telecommunications firms to use this avenue for relief more vigorously.

**Improve United States Economic Conditions**

High interest rates in the United States have strengthened the dollar and increased the relative prices of United States goods and services abroad. If interest rates were lowered, United States products would be more competitive with those of other nations and its trade deficit would probably decrease. This solution is limited, however, since it focuses on the trade deficit and does not remove trade barriers within other nations.

**Bilateral Agreements**

United States Trade Representative Brock has expressed his hope that the United States will conclude bilateral agreements with other nations similar to the NTT agreement with Japan. Under the NTT agreement Japan promised to bring the procurement procedures of Nippon Telegraph and Telephone Company into conformity with the provisions of the Government Procurement Code. After lengthy negotiations, Japan placed $8 billion of its government telecommunications procurement under the
Code. Another $1.8 billion of NTT's telecommunications procurement was placed under the NTT agreement.\textsuperscript{126} Under that agreement Japan must allow United States firms to bid on contracts to furnish telecommunications equipment, and all bids must be considered on a nondiscriminatory basis.

Similarly, the United States could offer to include more American entities in the Government Procurement Code as leverage in bilateral negotiations with other nations.\textsuperscript{127} Such negotiations are consistent with GATT obligations and with the United States policy of trade on a mutually beneficial basis. In the long run, contracting with other nations to reduce their barriers in exchange for a reduction of barriers in the United States is more likely to produce continued and amicable trade relations in the telecommunications industry than are threats and retaliatory actions.

NOTES

1 See Trade Reciprocity: Hearing on S.2067, S.2071 and S.2094 Before the Subcomm. on International Trade of the Senate Comm. on Finance, 97th Cong., 2d Sess. 44 (1982) (statement of Malcolm Baldrige, Secretary of Commerce) [hereinafter cited as Trade Reciprocity Hearing; full title of each person testifying will only be cited once].

2 See id. at 34 (statement of Ambassador William E. Brock, United States Trade Representative).


4 Brock, Trade Reciprocity Hearing, supra note 1, at 56.


8 STAFF OF SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 97TH CONG., 1ST SESS., TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 175 (Comm. Print 1981) [hereinafter cited as TELECOMMUNICATIONS IN TRANSITION, HOUSE COMM. PRINT].

of Colorado) [hereinafter cited as H.R.5158 Hearings], without hearings or debate, id. at 839 (statement of Matthew Nimetz, partner, Paul, Weiss, Rifkind, Wharton & Garrison). The bill was passed by the Senate in October, 1981 and referred to the House Energy and Commerce Committee, where it died.


11 See, e.g., Trezise, Let’s Not Play the Bully in World Trade, Wash. Post, Feb. 11, 1982, at—("The international trading system gave bilateral balancing an extended trial during the 1930s. Through quotas, exchange controls and outright barter [states] tried to avoid having deficits with anyone. That disastrous experience was the background for the post-World War II return to the multilateral idea, embodied in the General Agreement on Tariffs and Trade.") see also, Brock, Trade Reciprocity Hearing, supra note 1, at 29.


13 Brock, Trade Reciprocity Hearing, supra note 1, at 24.

14 See, e.g., Trade Act of 1974 § 104, 19 U.S.C. § 2114(a) (1976) ("A principle United States negotiating objective . . . shall be to obtain . . . competitive opportunities for United States exports . . . equivalent to the competitive opportunities afforded in United States markets [to foreign importers].")

15 See, e.g., H.R.5158 Hearings, supra note 8, at 688 (Brock would seek reciprocity through negotiation, not legislation); Trade Reciprocity Hearing, supra note 1, at 60 (statement of Senator Bill Bradley of New Jersey).

16 Trade Reciprocity II: Hearing on S.2094 Before the Subcomm. on International Trade of the Senate Comm. on Finance, 97th Cong., 2d Sess. 168 (1982) (statement of Howard Samuel, President of Industrial Union Department, AFL-CIO; and Claude Hobbs, Vice President, Government Relations, Westinghouse Electric Corporation, on behalf of the Labor-Industry Coalition for International Trade) (hereinafter cited as S.2094 Hearing).

17 Trade Reciprocity Hearing, supra note 1 at 3 (statement of Senator John Heinz of Pennsylvania).

18 See Boren, id. at 5.


20 Wirth, H.R.5158 Hearings, supra note 9, at 683. Domestic firms were already concerned about foreign competition in the U.S. telecommunications market. According to an AT & T spokesman, direct foreign investment in the telecommunications business almost doubled from 1978 to 1979—to $1.6 billion. See S.898 Hearings, supra note 19, at 388 (statement of William P. Stritzler, Assistant Vice President of AT & T). Sixteen of the world’s top twenty-five telecommunications equipment suppliers are foreign-owned. H.R.5158 Hearings, supra note 9, at 750 (statement of Robert E. Sageman, President of AT & T International).

21 See Baldridge, S.898 Hearings, supra note 19, at 123 and 127; Brock, id. at 641.

22 Baldridge, id. at 127.

23 Sageman, H.R.5158 Hearings, supra note 9, at 744.

24 Telecommunications and Information Products and Services in International Trade: Hearing Before the

25 H.R.5158 Hearings, supra note 9, at 727 (statement of Edmund Fitzgerald, President of Northern Telecom, Inc.).

26 Id. at 736 (statement of Robert J. Gressens, President of GTE International).

27 Id.

28 See Telecommunications Hearings, supra note 24, at 106 (statement of Geza Feketekuty, Assistant United States Trade Representative).


30 See Brock, S.898 Hearings, supra note 19, at 641 ("We currently have very little negotiating leverage in the field of telecommunications services which can be used to obtain greater access to foreign communications markets ... the President has no power to retaliate against a foreign telecommunications barrier or deny access to the U.S. market."); see also Feketekuty, Telecommunications Hearings, supra note 24, at 106-107.

31 S.2094 Hearings, supra note 16, at 117 (statement of Edson de Castro, President of Data General Corp.).

32 See id. at 116-17 (Local subsidiaries are often needed to service complicated equipment, train purchasers in the use of the equipment and provide continuous information services).

33 See Feketekuty, Telecommunications Hearings, supra note 24, at 61-62; see also id. at 102 (statement of Donald Lehrman, President of General Datacom Industries) (Japan requires that foreign suppliers must provide a protective box with their modems before connection with a telephone line is allowed; thus, customers buying from foreign companies in Japan must pick up the extra cost of the protective box and are less likely to buy from non-domestic companies).

34 See Telecommunications Hearings, supra note 24, at 86-98.

35 E.g., administrative policies which prohibit leasing of private telecommunications circuits in order to increase the use of government-owned public circuits; restrictive government approval for international links for teleprocessing systems; and laws requiring local processing of data prior to its transmission outside the country.

36 See supra note 9. The main reciprocity provision of S.898, § 238, reads as follows:

For the purpose of ensuring fair and equitable treatment of United States telecommunications enterprises seeking access to foreign markets, the Federal Communications Commission shall have the authority to conduct inquiries and establish policies, rules, regulations and requirements applicable to the entry of foreign persons supplying telecommunications or information service, facilities, or equipment into domestic United States communications markets upon terms and conditions under which United States persons are permitted entry into:

(1) the foreign nation in which the operations of such foreign persons offering telecommunications or information services, facilities or equipment is based; and

(2) the foreign nation under the laws of which such foreign telecommunications or information services facilities or equipment operations are established. (emphasis added.)

37 See supra note 10. The main reciprocity provision, § 267, reads as follows:

For the purpose of ensuring fair and equitable treatment of United States persons seeking access to foreign markets, the [Federal Communications] Commission shall establish policies, rules, regulations, and requirements prescribing terms and condi-
tions for foreign enterprises supplying telecommunications services or facilities in the United States markets which are reciprocal with the terms and conditions under which United States persons are permitted to operate in:

(1) the foreign nation in which the operations of such foreign enterprise offering telecommunications services or facilities is based; and

(2) the foreign nation under the laws of which international transmissions or enhanced services offered by such foreign enterprise originate, terminate, or are regulated. (emphasis added.)

38 The relevant language, contained in section 238(c)(1)(B), reads as follows:

Notwithstanding any existing or prospective agreement on telecommunications equipment procurement with a foreign country, such country shall not been [sic] deemed to provide reciprocity in access to markets, operations, and rights of ownership unless it is in compliance with such agreement, provides full access to United States telecommunications equipment manufacturers under terms and conditions which do not distort research and development, investment, sales or marketing, and does not encourage or condone practices by its domestic manufacturers or government officials, the effect of which would be to inhibit the sales of United States telecommunications equipment in such country.

Section 267(c) is virtually identical.

39 H.R.5158 § 301(46) defines reciprocal rights as follows: "Reciprocal rights' means those rights, terms, and conditions established for United States telecommunications and information services, facilities, or equipment in foreign markets which are reasonably equivalent to those established for foreign enterprises in United States markets, including access to and establishment in such markets." S.898 § 103(32) defines reciprocal rights in much the same way.

40 See S.898 § 238(c)(3); H.R.5158 § 267(g).

41 S.898 § 238(c)(1)(A); H.R.5158 § 267(b). Both subsections also provide for revision of the list when relevant foreign laws or practices change.

42 See S.898 § 232(c)(4) (authorizes the FCC to deny certification of any customer-premises equipment in the appropriate circumstances).

43 See H.R.5158 § 267(d) (authorizes the FCC to deny interconnection rights to terminal equipment in the appropriate circumstances).

44 See supra notes 36 and 37.

45 See id.

46 See supra note 37.

47 See supra note 36.

48 See supra notes 36 and 37.

49 See S.898 § 238(d), which states:

The President may, within 45 days after approval or disapproval by the Commission of an application by a foreign telecommunications carrier or information supplier, veto such decision for foreign policy reasons if, after consultation with the Secretary of Commerce, the Office of the United States Trade Representative, and the Secretary of State, the President determines that such action is contrary to the national interests of the United States.

Section 238 contains another unique provision. It encourages "the procurement of foreign telecommunications equipment . . . from foreign manufacturers located in countries which extend reciprocity to U.S. telecommunications equipment manufacturers." See S.898 § 238(c)(2).

50 See H.R.5158 § 267(h).

51 See Brock, Trade Reciprocity Hearing, supra note 1, at 38; Samuel and Hobbs, S.2094 Hearing, supra note 16, at 168.
52 See, e.g., Brock, H.R.5158 Hearings, supra note 9, at 686 ("It is a basic fact of life that national economies differ. Countries do not produce or necessarily have the capability to produce everything. . . . We knew that we could not negotiate access to the Japanese market for U.S. wheat producers by offering access to our market for wheat to the Japanese. They are in no position to export wheat to us and would understandably be reluctant to accept such a deal."); id. at 707-708 (statement of Ernest Johnston, Jr., Deputy Assistant Secretary of State); S.2094 Hearing, supra note 16, at 337 (statement of American International Automobile Dealers Association) ("Product or sectoral equivalence in bilateral trade relations is infeasible because it ignores the principle of comparative advantage, i.e., all countries export products they produce relatively efficiently and import products they produce relatively inefficiently; product or sectoral imbalances are therefore inevitable among countries.").


54 Johnston, H.R.5158 Hearings, supra note 9, at 709; id. at 823 (statement of Stanton D. Anderson on behalf of Communications Industries Association of Japan); see also Brock, Trade Reciprocity Hearing, supra note 1, at 28; Hay & Sulzenko, supra note 5 (Canadian view of reciprocity and retaliation).

55 See Nimetz, H.R.5158 Hearings, supra note 9, at 838 and 841; id. at 718 (statements of Johnston and Congressman Edward J. Markey of Massachusetts).

56 See Brock, Trade Reciprocity Hearing, supra note 1, at 39.

57 See S.2094 Hearing, supra note 16, at 239 (statement of Howard Weisberg, Director of International Trade Policy, United States Chamber of Commerce).

58 See, e.g., American International Automobile Dealers Association, id. at 335; Johnston, H.R.5158 Hearings, supra note 9, at 706.

59 See S. Rep. on 898, supra note 9, at 159 (statement of Senator Ernest F. Hollings of South Carolina). The United States also maintains restrictions on imports of cheese, cotton, sugar, and dairy products, see 7 C.F.R. § 6 (1982), as well as other items. See Johnston, H.R.5158 Hearings, supra note 9, at 706; American International Automobile Dealers Association, S.2094 Hearings, supra note 16, at 335.


61 See, e.g., Trezise, supra note 11.

62 Telephone interview with staff of the Bureau of Economic Analysis, Department of Commerce (February 21, 1983) [hereinafter cited as Bureau of Economic Analysis].


65 Id. at 46; see also Doan, A Global Trade War on the Way? U.S. News & World Report, March 1, 1982, at 58.


67 See, e.g., Samuel and Hobbs, S.2094 Hearing, supra note 16, at 175.

68 Bureau of Economic Analysis, supra note 62.

69 See, e.g., Brock, H.R.5158 Hearings, supra note 9, at 690 (Roughly 50 percent of the United States trade deficit with Japan results from automobile imports from Japan); id. at 700 (oil imports are by far the largest contributor to the deficit).

70 The telecommunications equipment trade surplus in 1980 was approximately $836 million. Anderson, id. at 806, and Nimetz, id. at 838.
See Telecommunications in Transition, House Comm. Print, supra note 8, at 175.


See Joint Economic Comm. Rep., supra note 64, at 55.

H.R. 5158 Hearings, supra note 9, at 773 (statement of Henry Marcheschi, Chairman and Chief Executive Officer of American Telecom, Inc.).

See supra notes 36-37.

See supra note 36.

See supra note 37.

See supra note 38.

See supra note 39.

See supra text accompanying note 49.

See supra text accompanying notes 42-43.
See supra note 41; see also Nimetz, H.R. 5158 Hearings, supra note 9, at 848.

See supra notes 42-43 and accompanying text; see also, Paul, Weiss, H.R. 5158 Hearings, supra note 9, at 866.

See supra note 12, at art. I(1).

Id. at art. XXIII.

Id. at art. III.

Id. at art. XIX, which requires that imports be a cause of serious injury to a domestic industry before they may be restricted.

Id. at arts. XXII (requires parties to resolve disputes through conciliation) and XXIII (requires that benefits be nullified and impaired before a country can take action against another).

See supra note 38.


See supra note 12, at art. XXIII.

Trade Reciprocity Hearing, supra note 1, at 71-72 (statement of Consumers for World Trade).

See supra note 12, at arts. I-XXXVIII; see also Baldrige, Trade Reciprocity Hearing, supra note 1, at 42; Note, Liberalization of International Trade in the Service Sector: Threshold Problems and a Proposed Framework Under the GATT, 5 Fordham Int'l L.J. 371 (1982) (analysis of the difficulties of extending the GATT to cover services).

Baldrige, Trade Reciprocity Hearing, supra note 1, at 47.

Brock, id. at 50.

See Brock, H.R. 5158 Hearings, supra note 9, at 685.

Feketekuty, Telecommunications Hearings, supra note 24, at 107.

Id. at 107-08.

See supra text accompanying notes 63-66.

See Brock, S. 898 Hearings, supra note 19, at 641; see also Brock, H.R. 5158 Hearings, supra note 9, at 689 (Brock, however, has also expressed skepticism whether the NTT Agreement has resulted in much business for American firms). For a critique of bilateral sectoral agreements, see Hay & Sulzenko, supra note 5, at 477.

See supra note 114.

Id.

See Brock, S. 898 Hearings, supra note 19, at 641.