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# Velvet Fist in an Iron Glove

## The Omnibus Trade and Competitiveness Act of 1988

Ronald A. Cass

**I**n August 1988, after three years of intense struggle, Congress passed and President Ronald Reagan signed into law the Omnibus Trade and Competitiveness Act of 1988. The act, successor to a bill vetoed by the president just two months before, was the fruition of considerable hard work by politicians, industry, and prominent labor representatives who were disturbed by the perceived change in competitiveness between American and foreign goods.

Beginning in the late 1970s, the U.S. balance of trade began to move rapidly from a modest surplus to a massive deficit. Lamenting this turn of events, commentators blamed excessively high foreign barriers to U.S. exports and inadequate U.S. barriers to imports. In the face of increasingly strong foreign competition, organized labor moderated its demands for higher wages and even accepted wage cuts in some important sectors. As unions called for government action, they were joined by industries suffering through the recession of the early 1980s, especially those that had been declining relative to foreign competitors over many years.

Officials of the Reagan administration along with some congressmen worked hard to soften the

proposals to erect import barriers and to regulate international business practices. By the end of the summer of 1988, congressional negotiations had produced a bill some 467 pages long, with complex and sometimes contradictory provisions. While most politicians were not overly enthusiastic about the legislation, they did not criticize it.

As with many large pieces of legislation, most of the 1988 act contained technical and definitional material that was important only at the margin and interesting only to the small group of cognoscenti already involved in the particular arena. The controversy over the 1988 omnibus trade law centered around two provisions. One, requiring employers to comply with particular rules about notice of plant closings, was ultimately stripped from the trade law and passed separately. The other, originally referred to as the "Gephardt amendment" is now known as "super 301." Along with two sibling provisions, super 301 has become the most discussed trade rule in the world.

For most commentators, super 301 is the *bête noire* of international trade negotiations and the epitome of wrong-headed economic policy. One author has referred to it as "the economic equivalent of civilian bombing." Whole sessions of the General Agreement on Tariffs and Trade (GATT) Council have been devoted to criticizing this provision of U.S.

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trade law, and nearly every conference on international trade held in the past two years has debated just how bad the new provision is. Outside the United States, opinions about super 301 range from the belief that it is merely a major impediment to liberal international trade to the contention that it is an absolute bar to new liberalization.

American politicians and businessmen generally have an equally strong, but very different, view of super 301. They have celebrated it as the one meaningful weapon in the U.S. arsenal for protecting our commercial interests from foreign attack—a “crowbar” to open foreign markets to U.S. goods and a shield against “unfair” foreign competition.

To date, neither the fears about nor the hopes for this section (or for the act in general) have been justified. Notwithstanding its potential, super 301 has not played a very important role. It does, however, embody a new political reality that may significantly change trade policy.

### The Genealogy of Super 301

Since the Tariff Act of 1922, U.S. international trade laws have contained a broad, general clause intended to protect American industries against any foreign practice American officials deemed to be unfair. Later provisions were intended to reach unfair foreign practices that escaped penalty under the U.S. antidumping regime, but almost exclusively addressed infringements of intellectual property rights through imports. Section 301 was first adopted in the 1974 revision of U.S. trade law to deal with a broad range of unspecified, unfair foreign practices.

Section 301 differs from earlier provisions in two important respects. First, it expressly focuses on foreign nations’ treatment of U.S. exports, while the older provision addressed foreign practices that affect imports into the United States. This difference, although comforting to those who worry about protectionism, is largely illusory. Second, Section 301 affords its administrators a greater degree of discretion than did the earlier provisions.

In the roughly 15 years since Section 301 was adopted, the U.S. trade representative has often invoked the provision as a backdrop to bilateral negotiations, but has been sparing in formally applying this section’s remedies. Such use was traditionally confined largely to foreign government conduct that arguably violates GATT agreements to which the foreign government is party. The U.S. trade representative rejected many requests to invoke Section 301 and rarely pushed disagreement over

specific practices to a point at which national pride or political pressure dictated imposing U.S. sanctions against imports. When sanctions were imposed under this provision (a total of only nine cases to date), they generally were narrowly tailored and short-lived.

During the 1980s, however, pressure grew to fashion a new, tougher, broader, less discretionary, general trade provision. Debate over the proposed provisions revealed deep frustration over the perceived decline in popularity and profitability of American-made products and, pointedly, over the U.S. government’s failure to redress this situation. Legislators blamed the trade policymakers in the executive branch. President Reagan and his appointees were viewed as particularly inattentive to important congressional supporters’ concerns for their own commercial success. The combination of strong foreign policy interests and strong pro-market rhetoric gave the Reagan administration the aura of committed free-traders, although from its inception the administration’s action demonstrated a willingness to protect American businesses from overly successful foreign competition. Still, policymakers on Capitol Hill saw less pragmatic political

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compromise and more resistance to trade protection than congressional consensus would have dictated.

Although the more straightforward demands for protection were not often acted on, there was considerable congressional support for arguments that American markets should not remain open to products from countries that did not play by free-trade rules. Executive officials generally counseled that infractions of the international rules were subject to adjudication within GATT. The United States had, after all, agreed as a contracting party to follow GATT rules, including the admittedly weak and frustrating dispute-resolution process. Failure to invoke that process before imposing trade sanctions risks retaliatory sanctions from other nations. Many congressmen, however, saw the administration’s references to our GATT obligations as mere

cover for resistance to mercantile protection. In fact, other nations disregarded their GATT obligations—often to our disadvantage—and GATT had shown itself to be quite toothless, especially since its sanctions depend on the transgressor's consent.

The proposed new laws therefore stressed mechanisms to force executive officials to adopt measures to protect politically important commercial interests without relying on appeals to GATT. Some proposals would have expressly linked U.S. govern-

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ment action to our merchandise trade balance. Others would have responded to specific bilateral trade balances. All the proposals substantially reduced the scope for administrative discretion. Opposition by the Reagan administration and by sympathetic congressmen blocked these proposals.

The three related provisions that did achieve the necessary consensus adopted a different approach involving three key elements. First, the new provisions are targeted against the behavior of other governments in their home markets instead of focusing on the competition provided by imports in the United States. Second, the provisions require public executive action on a specific timetable to identify the foreign miscreants ("priority" countries). Third, the provisions restrict the ambit of permissible responses but maintain a sphere for administrative discretion both in designating the priority countries and in taking actions against them.

More specifically, the U.S. trade representative must publicly identify the nations that violate our open-trade norms and, having done so, must describe the course of action being taken to redress those violations. The general provision, commonly known as super 301, is now contained in Sections 301 through 310 of the amended Tariff Act of 1930. Its two cousins, Section 182 ("special 301") and Sec-

tions 1374 through 1380 of the Omnibus Trade and Competitiveness Act of 1988, require similar action focused respectively on our trading partners' treatment of intellectual property rights and telecommunications trade. Together these super 301 provisions constitute a "sunshine act" for trade policy.

### Short-Term Effects of Super 301

The super-301 provisions have had the intended effect of forcing the U.S. trade representative to label specific trading partner nations as unfair traders and to engage in negotiations with those nations to end the identified unfair practices. As predicted by super-301 advocates, these negotiations—including the threat of being labelled as a priority country—have produced some changes in other governments' formal policies. As super-301 critics predicted, U.S. implementation of these provisions spurred nearly unanimous international condemnation and complicated negotiations in GATT's Uruguay round, but both effects have been quite modest.

The statutory deadline for the U.S. trade representative's first list of priority nations and priority practices under super 301 was May 28, 1989. In the months leading up to this date, several nations engaged in bilateral negotiations with the United States to avoid inclusion on the list. Our trading partners, most notably the Republic of Korea, agreed to a number of formal undertakings. Just before issuance of the first super-301 list, the Korean government cut its average tariff in half, liberalized import restrictions in many different sectors, and agreed to abandon a set of "localization" rules that had frustrated importers.

Many of these changes might have occurred without the prod of super 301, but clearly the super-301 "naming" process accelerated some concessions and was probably a conclusive consideration in others. Despite these concessions, our trading partners still impose both direct and indirect constraints on trade that violate international agreements or are otherwise "unfair."

As the May 1989 deadline approached, debates within the administration revealed a number of possible ways to compile the list. One was to focus on priority practices that impeded trade and to list the countries, including the United States, that engaged in these practices without targeting any nation as a priority country. Given the breadth of restrictive international practices, their widespread use, and the inclusion of nearly all major trade-restrictive practices on the agenda for multilateral

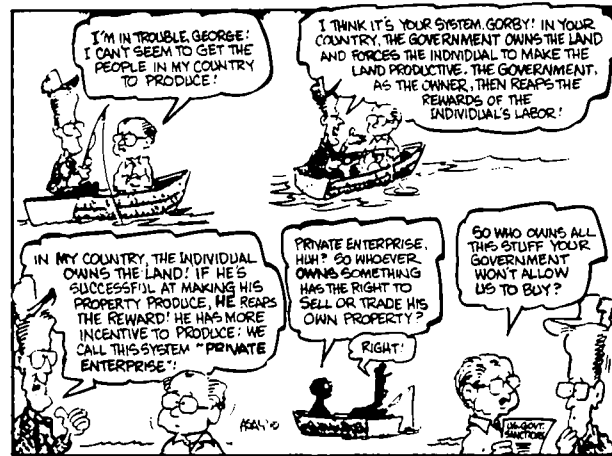
discussion in the Uruguay round, this approach would arguably have complied with the 1988 trade act without threatening the GATT talks. A second possibility was to include a very large number of priority countries on the initial list, with the expectation that progress made in the Uruguay round would allow the U.S. trade representative, in drawing up subsequent lists, to proclaim that the countries no longer deserved priority status. Other approaches were also considered.

The serious controversy centered on Japan. Several prominent U.S. officials pushed hard to keep Japan off the super-301 list. They cited the low level of formal Japanese trade barriers, the large number of trade concessions the Japanese made in recent bilateral negotiations, the anticipated sensitivity of the Japanese to being named as "unfair traders" (the Japanese explanation of priority-country status), and the special strategic relationship between Japan and the United States (including our dependence on Japanese financing to fill the gap between American savings and domestic investment). Other officials pressed equally hard to include Japan, largely on the basis of expected congressional reaction. In fact, some members of Congress publicly declared that super 301 was written with Japan in mind and would be rewritten if Japan were not listed as a priority country. Indeed, the omnibus trade act included several provisions expressing congressional concern over our long-run trade imbalance with Japan.

In the end a compromise was reached. The super-301 list designated India and Brazil as priority countries. Although it also included Japan, concern with Japanese trading policies was confined to three specific areas: telecommunications, satellites, and forest products.

Reaction to the list was predictable. Most U.S. politicians declared the list a good start on the super-301 process but noted that they would be watching carefully to assure vigorous follow-up by the U.S. trade representative. The list was seen abroad as a political statement signalling a compromise between the administration's domestic and international concerns.

India and Brazil were widely viewed as convenient political targets. They did not gain their places on the list because they interfered with U.S. exports more than other countries. Although both countries have restricted imports and given scant protection to intellectual property rights, they account for a very small fraction of world trade, and they impinge on trade far less than most of the world's



major industrialized nations. Surely, the U.S. trade representative would promote a far greater value of U.S. exports by opening markets other than those in India and Brazil, and left to its own devices, the U.S. trade representative no doubt would have wasted little effort on those countries. Both nations do, however, have substantial visible trade restraints and large enough economies that the United States does not look excessively foolish or oppressive in focusing on them. Both also have economies small enough that they cannot muster a market-closing threat sufficient to counter the threatened loss of access to U.S. markets. (This latter consideration was widely thought to explain the European Community's absence from the priority list, especially given the potential costs of irritating EC officials during the Single Market process, which offers myriad opportunities for changing trade flows.) Japan, the one important trade partner included in the priority list, was seen by others as a special case. Its imports of manufactures were extremely low relative to GNP, and our bilateral deficit with Japan

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was equal to half the U.S. trade deficit. Notably, Japan nevertheless escaped full priority status. Foreign officials thus read the list as announcing the administration's desire to buy congressional quiet-

cence while the Uruguay round progressed and at the same time flexing our economic muscles safely against weak foes—the analogue of our military action in Grenada.

Notwithstanding appreciation of the U.S. trade representative's relatively restrained course, the world's trading nations almost in unison sharply denounced the U.S. action. Japan expressed outrage that the United States would treat so close a friend as if it were a dangerous enemy, and India complained that the United States was simply acting as a bully. The trading partners expressed dismay that we would take unilateral action when important multilateral negotiations, begun at *our* behest, were under way. Critics uniformly opined that by carrying forward the super-301 process, the U.S. trade representative had jeopardized the Uruguay round.

The U.S. trade representative gamely responded that the super-301 process in no way represented unilateral action. After all, naming countries to the priority list was simply the precursor to negotiating with those countries. The countries named, however, showed little enthusiasm for negotiating at the point of the super-301 gun.

That said, the public furor over super 301 was not matched by similar difficulties at the operational level. India, in fact, refused to enter bilateral

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discussions, but it did not withdraw from the multilateral talks. The various working groups in Geneva continued to undertake their appointed Uruguay round tasks in their customary perfunctory fashion, and relations between U.S. trade officials and their counterparts from other nations proceeded on course, albeit with one new development. Brazil and the United States reached agreement on the fairly modest issue that had landed Brazil on the list, a matter that had been under discussion for some time and the disposition of which was neither clearly advanced nor retarded by super 301.

The center of action, of course, was Japan. But

here designation under super 301 brought only variations on a theme. Japan and the United States began talks labelled the "Structural Impediments Initiatives" (SII), in which each side put on the table all its basic complaints about the other. These talks addressed matters well beyond the limited super-301 complaints. Trade officials from the two countries had been engaged in an on-going series of talks for at least two decades, with the specific issues, players, and acronyms for the discussions changing but the essence of the dialogue remaining constant. The Japanese officials claimed that the SII talks had nothing to do with super 301, while the U.S. officials deemed them to be just the sort of negotiations mandated by that section. The structure of the SII negotiations, in effect, was a form of diplomatic dance that was choreographed to present a *different* perspective to the domestic audiences in the two countries. These talks concluded with agreement that Japanese officials would encourage greater domestic spending and that U.S. officials would endeavor to reduce the federal deficit. Many commentators applauded the U.S. negotiators' ability to secure promises of structural change from Japan; few expressed confidence that the agreement would change our commitment to fiscally responsible government; and fewer still noted any inconsistency in these reactions. One year after the initial listing, only India remained on the priority list.

After the initial hostile reaction, many in the academic community and free-trade-oriented policy circles have had kind words for the tougher trade law. The new, revisionist view touts super 301 as a useful adjunct to trade-liberalizing multilateral accords rather than as a threat to the multilateral process.

Strong praise for the new approach seems no better grounded than earlier fears, however. The agreements reached under the super-301 process will make foreign markets marginally more open than they had been to imports, but the rate (and value) of agreements did not change sharply after invocation of the new tool. For example, agreement with Japan on specific matters targeted in super 301 looked much like earlier accords on beef, citrus, public works, and a host of other matters.

Super 301's contribution to the lower recent U.S. merchandise trade deficit is even more doubtful. For one thing, the greater part of the decline in that deficit preceded conclusion, much less effectuation, of the agreements. Further, longer-term effects on our trade deficit cannot be expected. If we

measure the effects of opening foreign markets by accounting for secondary and tertiary effects on the movement of resources among competing uses in all of the nations affected by such actions, it is extremely unlikely that we shall find that the particular measures adopted significantly affect overall trade balances, although they may affect the composition of specific bilateral trade flows.

For the sibling provisions, special 301 and "telecom 301," the story has been much the same, although with less publicity and with more players. These provisions largely cover areas for which no trade agreement currently obligates our trading partners to behave as we would like. At the same time, technical issues covered by these provisions present greater opportunity for politically palatable compromise. Some progress in actually opening markets to telecommunications trade and in securing adequate protection of intellectual property rights is likely, but the extent to which these issues have been bound up in the GATT Uruguay round negotiations has precluded very significant movement in the 301 process to date.

#### Technical Changes in the 1988 Trade Act

The goal in crafting most of the technical changes contained in the 1988 trade act was of a piece with a design of super 301 and friends. These changes generally were intended to facilitate American industry's securing protection against foreign competitors at home and assistance in competing abroad. That evident design, like the super-301 provisions, promoted considerable criticism from other governments. Even more than in the case of the super-301 provisions, however, it is hard to view these changes as significantly altering the course of U.S. trade law or of U.S. trade.

The changes made in antidumping and countervailing duty law are representative of the broader set. Antidumping law allows the United States to impose duties on imports to offset the competitive advantage obtained by foreign firms that sell at higher prices in their home markets than in U.S. markets. Countervailing duty law allows the United States to impose duties on imports to offset subsidies from foreign governments. Both are governed by Title VII of the Tariff Act of 1930.

The 1988 trade act contains nearly 30 pages of amendments to Title VII, for the most part to allow antidumping and countervailing duties to be imposed on a broader array of goods without replicating the full Title VII process. The "anticircum-

vention" provisions, in all their various guises, can be defended as preserving the integrity of the antidumping and countervailing duty regimes by preventing evasion of the effect of duties imposed after findings of injury to domestic industry from those "unfair trade practices." Although they expand the potential range of such duties, these provisions do

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not change the underlying processes by which the Department of Commerce and the U.S. International Trade Commission (ITC) decide whether to impose duties.

What may be more important are two changes to the decisionmaking process. First, the 1988 trade act makes more information available to the parties to trade disputes, especially those involved in ITC proceedings. Before the 1988 trade act, it was not uncommon in an ITC investigation for each party to base its arguments on a different assumed set of facts. Meanwhile, the ITC based its decision on a factual record, large parts of which were never seen by, much less critiqued by, the affected parties. With the factual predicates of its decision kept secret, the ITC's proceedings were less focused and its decisions less comprehensible than they should have been. Administrative and judicial decisionmaking concerning specific identified parties almost definitionally allows opportunities for the parties to direct specific arguments to specific assertions of fact, a process thought to improve both the accuracy and the fairness of the decision. The 1988 trade act aligned Title VII much more with prevailing decisionmaking norms.

Second, the 1988 trade act commanded the ITC to explain its decisions more carefully and to articulate more fully the effect of particular considerations on its conclusion. Like the provisions respecting disclosure, this instruction should improve the accuracy and predictability of ITC Title VII decisions. Although one commissioner has opined that he need not comply with this amendment (as everyone

knows it was intended to constrain not him but one or two unnamed commissioners who frequently voted against antidumping and countervailing duty relief), it seems clear that the requirement for fuller explication is neutral with respect to whom it applies and to the outcome. Better information about the facts on which decisions are based and the way in which inferences from those facts are ordered to support the decision should increase coherence without necessarily affecting the number of affirmative or negative determinations.

### **An Evaluation of the 1988 Trade Act**

If the Omnibus Trade and Competitiveness Act of 1988 is neither the monster nor the savior depicted two years ago, what difference does it make? More

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**More than anything else, the Omnibus Trade and Competitiveness Act of 1988 signals a change in the tone of American trade law. The act does not effectively change the decisional core of trade adjudications on dumping or subsidies or escape-clause actions, but it announces congressional interest in strengthening those mechanisms to protect domestic industry.**

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than anything else, the act signals a change in the *tone* of American trade law.

Before 1988, numerous official actions, both legislative and executive, had shown our trade law to be something other than a bold commitment to free, unrestricted trade. Indeed, our history from the early days of the Republic reveals strong support both for more open rules and for tailoring trade rules to protect some American producers' interests against others and against consumers' interests.

The dominant theme of U.S. trade law over the past 50 years, however, is a commitment to open trade. Despite all the constraints imposed on agricultural trade, textiles, sugar, and steel and despite the peculiarly American reluctance to embrace strong international structures for governing trade,

the dominant emphasis was on reducing barriers to trade. Modifications of basic U.S. law during the 1950s, 1960s, and 1970s generally provided greater openness to trade, not less, with protections such as the Multifiber Arrangement or the steel "trigger-price" program being formally sanctioned, exceptional departures from the norm.

The 1988 act does not so much change the law as mark the different preference for its ultimate direction. The act does not direct the U.S. trade representative to declare any nation's actions unfair or, having done so, to respond with particular penalties, but it clearly puts on the trade representative the burden of proof that it is doing enough to combat unfair trade practices. The act does not command trade sanctions against Japan, but expresses the sense of Congress that Japan has not played fairly and that it deserves to be made to pay a price if it will not play by our rules. The act does not effectively change the decisional core of trade adjudications on dumping or subsidies or escape-clause actions, but it announces congressional interest in strengthening those mechanisms to protect domestic industry.

From one perspective, the change in tone is puzzling. Of course, the United States in 1988 (and today) continued to run large merchandise trade deficits, and several important industries were (and are) facing a long-term contraction in response to changes in international competition and consumers' tastes. But the 1988 trade act also was adopted when almost all our major trading partners were liberalizing their trade rules (making it easier to sell U.S. exports) and when U.S. productivity gains in manufacturing were running ahead of all OECD countries except Japan.

The act's tone, however, accurately reflects its time. The act does not confront a devastating event with a radical change by moving to a strongly protectionist trade law or by demanding that the world's trading nations agree on a stable set of open trade rules. Instead, the act's tone is one of apprehension for the future. It is a challenge to the executive branch and to our trading partners to satisfy the act's supporters that changes in the global economy will not harm the sectors of American enterprise most vulnerable to those changes. It is a plea presented in the garb of a gauntlet, a sheep in wolf's clothing, a velvet fist in an iron glove.