Vanderbilt Journal of Transnational Law

Volume 20
Issue 3 *August 1987*

Article 3

1987

Dialing for Foreign Telecommunications Market Access: Is The United States Getting a Busy Signal from Japan?

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I. INTRODUCTION

Telecommunications is one of the most rapidly changing high technology industries in the world today. Whereas governmental and natural monopolies once created a stable and predictable environment for this industry on both a national and international level, the telecommunications industry now has become more complex due to interlocking relationships between telecommunications firms, manufacturers and operators that have resulted from the trend to deregulate national networks. Although still in its nascent stage, United States deregulation has signaled a change in global telecommunications policies by opening its telecommunications market to foreign competitors. Naturally, the United States encourages other countries to adopt similar policies in an effort to achieve access to foreign markets for its domestic telecommunications firms.

Japan is one country that appears to be following United States policies. On April 1, 1985, the Japanese Government converted Nippon Telegraph and Telephone Public Corporation (NTT) from a government-run, publicly-held corporation into a private entity.[1] Japan adopted the Electric Telecommunication Business Act[2] in December 1984 to create an environment in which private entities can compete. The full extent to which the Japanese Government intends to open its market to non-Japanese firms remains unclear. This Note will discuss the development of Japanese telecommunications policy and the current United States telecommunications policy with respect to market access. The Note then will analyze the new Japanese legislation generally and issues relating to United States-Japan trade relations specifically. Finally, this Note will comment on United States legislative responses to the trade deficit with Japan and the future of United States-Japan telecommunications trade relations.

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1. Nippon Denshin Denwa Kabushikigaisha Hō (Nippon Telegraph and Telephone Company Act), Law No. 85 of 1984, *reprinted in* [Statute Vol. 1] DOING BUSINESS IN JAPAN App. 1A-40.2 (Kitagawa ed. 1986); *see infra* notes 91-101 and accompanying text.

2. Denki Tsūshin Jigyō Hō (Electric Telecommunication Business Act), Law No. 86 of 1985 (unofficial translation). See *infra* notes 90-155 and accompanying text for an in-depth discussion of the Electric Telecommunication Business Act.

II. TELECOMMUNICATIONS POLICIES

A. *Development in Japan*

Prior to 1952, the Japanese Government operated the country's telecommunications services[3] under a monopolistic scheme in which direct government control severely limited private sector involvement.[4] In 1952, however, the Japanese Government, concluding that an independent public corporation could more efficiently and flexibly operate the telephone and telegraph systems,[5] created the Nippon Telegraph and Telephone Public Corporation for domestic communications.[6] The Japanese Government established the Kokusai Denshin Denwa Co., Ltd. (KDD)[7] the following year and enacted major legislation[8] that would serve as the country's primary telecommunications law until the adoption of the

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3. T. Kosugi, New Developments in the Telecommunications Industry 2 (Apr. 18, 1985) (text of speech presented to the Practicing Law Institute in New York on May 24, 1985) [hereinafter Kosugi]. Japan's telegraph naturally started as a direct government enterprise by the Ministry of Technology in 1869. Ito, *Recent Trends in Telecommunications Regulations and Markets in Japan (with an Afterward)*, 25 JURIMETRICS J. 70, 72 (1984) [hereinafter *Recent Trends*]. Japanese private industries were incapable at that time of engaging in new industry. *See id.* When the telephone debuted in Japan in 1877, however, a handful of private businesses wished to enter that business field. *Id.* Although controversy over the structure of the telephone business lasted for approximately 12 years, the Japanese Government determined in 1889 that the telephone should be operated as a monopoly like the telegraph because direct government control would (1) preserve secrecy of communications and (2) avoid delays in telecommunications developments in rural areas. *Id.*

4. Kosugi, *supra* note 3, at 2. During this period of government-run monopolies, the Ministry of Communications, which took over control of the telegraph in 1885 from the Ministry of Technology, *Recent Trends, supra* note 3, at 72, required anyone wishing to construct private telecommunications lines to obtain its prior permission. R. Bruce, J. Cunard & M. Director, Telecommunications Structure Study, Country Report: Japan 10 (International Institute of Communications, London, June 12, 1985) [hereinafter Country Report].

5. *See Recent Trends, supra* note 3, at 73. Much of Japan's telecommunications industry suffered serious damage in World War II; consequently, the Japanese Government felt a need not only to rebuild but also to strengthen the country's network. *See id.*

6. NTT was created by the Nippon Telephone and Telegraph Public Corporation Act of 1952. Nippon Denshin Denwa Kosha Hō (Nippon Telegraph and Telephone Public Corporation Act), Law No. 250 of 1952; Kosugi, *supra* note 3, at 2.

7. KDD was established for international telecommunications services. *Recent Trends, supra* note 3, at 73.

8. The two 1953 laws, the Cable Telecommunications Act, Yusen Denki Tsūshin Hō, Law No. 96 of 1953, and the Public Telecommunications Act, Koshu Denki Tsūshin Hō, Law No. 97 of 1953, were designed in tandem to establish and preserve the monopolies of NTT and KDD. Country Report, *supra* note 4, at 11.

Electric Telecommunication Business Act of 1985.[9]

The laws enacted in 1952 and 1953 transferred a large part of the Ministry of Telecommunications[10] to the newly created NTT and KDD.[11] Japan's Ministry of Posts and Telecommunications (MPT),[12] an agency analogous to the Federal Communications Commission (FCC) in the United States,[13] absorbed the remaining regulatory sections of the old ministry.[14] Although structurally quite different from the prior government monopoly, this so-called public telecommunications network functioned, in effect, as an organ of the Japanese Government.[15] The

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9. Denki Tsūshin Jigyō Hō (Electric Telecommunications Business Act), Law No. 86 of 1984.

10. The Japanese Government divided the Ministry of Communications into two new ministries after World War II—the Ministry of Postal Services and the Ministry of Telecommunications. *Recent Trends, supra* note 3, at 73.

11. *Recent Trends, supra* note 3, at 73.

12. The Ministry of Posts and Telecommunications, or *Yusei shō*, evolved from the Ministry of Postal Services. *Id.* The MPT is the central regulatory agency with respect to telecommunications operations in Japan, both on a national and an international level.

13. The FCC was created by the Communications Act of 1934 as an independent regulatory agency responsible directly to Congress. 47 U.S.C. §§ 151-611 (1982 & Supp. IV 1987). The President appoints the agency's Commissioners subject to approval by the Senate; however, the FCC is not a part of the executive branch, nor does it serve as a puppet for the President. The FCC regulates both interstate and foreign commerce in the telecommunications arena for the purposes of preserving national security, ensuring the availability of safe, rapid and efficient telecommunications services and facilities to the general public, and securing uniform policies with respect to present and future goals of the nation through the central authority. *See id.* § 151. FCC activities, on the national and international level include but are not limited to: rate setting, approval of construction and operation of communications facilities, assignment of radio frequencies, tariffs, and approval of services offered. *See* SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, LONG RANGE GOALS IN INTERNATIONAL TELECOMMUNICATIONS AND INFORMATION, AN OUTLINE FOR UNITED STATES POLICY, 98th Cong., 1st Sess. 74 (Comm. Print 1983) [hereinafter LONG RANGE GOALS]. Thus, decisions and activities by the FCC directly affect international trade and foreign policy. For a detailed discussion of the structure and interaction of U.S. governmental bodies in the telecommunications area, see *id.* at 67-96.

14. *Recent Trends, supra* note 3, at 73. NTT and KDD took over much of the functions of the Ministry of Telecommunications, see *supra* note 10, after the new laws went into effect.

15. Kosugi, *supra* note 3, at 2. The Japanese Government felt that the telecommunications sector could be managed most efficiently as a monopoly due to: (1) the close relationship between telecommunications and compelling public interests, for example, the right of privacy; (2) the tendency toward a monopolistic scheme due to the inherently large capital investment requirements of the industry; and (3) the necessity of national interface standards for the country's network. NIPPON TELEGRAPH & TELEPHONE, TELECOMMUNICATIONS REFORM AND NTT PRIVATIZATION 1-2 (1985) [hereinafter

1952 and 1953 laws protected NTT and KDD[16] by giving each virtual control of their respective facilities and services.[17] Due to this control, both NTT and KDD expanded and developed their networks without the threat of competition.[18] Thus, although NTT and KDD were separate entities, the Japanese Government maintained its monopoly of the public telecommunications network.[19]

Over the past twenty years, Japan's control over its public telecommunications industry has undergone very significant and often reluctant changes.[20] During the middle 1960s, the Japanese business community exerted competitive pressures on NTT through rapid technological advancements in telecommunications media[21] and growth of the computer industry.[22] Private entities questioned the efficacy of the public monopoly's restrictive policies concerning the use of NTT's communications circuits for data transmissions and facsimile communications[23] and demanded amendment of the proscriptive laws and regulations.[24] The unavailability of communications alternatives posed an almost insurmountable obstacle to the needs of the infant information processing industry.[25]

TELECOMMUNICATIONS REFORM].

16. TELECOMMUNICATIONS REFORM, *supra* note 15, at 1-2. For a brief summary of the two 1953 telecommunications laws, see Country Report, *supra* note 4, at 11-14. *See also supra* note 5 and accompanying text.

17. Country Report, *supra* note 4, at 11.

18. *Id.* at 12. Although the Cable Telecommunications Act appeared to liberalize pre-existing policy by permitting private entrepreneurs to construct wire facilities, the MPT nevertheless retained control over the development of any such facility that might affect the public telecommunications sector. *Id.* at 13. Thus, private facilities could not effectively compete with the public network, nor could they carry third-party communications. *Id.* These limitations "guaranteed that NTT and KDD would operate as the sole public telecommunications service providers." *Id.*

19. *See* Kosugi, *supra* note 3, at 2. For example, the laws prohibited shared use of leased lines, interconnection of privately operated facilities with the government-created network, and provision by third-parties of message switching services to the public. Country Report, *supra* note 4, at 13.

20. *See Recent Trends, supra* note 3, at 74.

21. *See id.*; Country Report, *supra* note 4, at 14. Two types of new telecommunication media were data transmission and facsimile communication.

22. *Recent Trends, supra* note 3, at 74.

23. *See generally supra* notes 11-19 and accompanying text.

24. *Recent Trends, supra* note 3, at 74; *see* Country Report, *supra* note 4, at 14. The Ministry of International Trade and Industry (MITI), or *Tsūsan shō*, advocated these demands because one of its main objectives since the early 1970s was to develop and strengthen the telecommunications and information industries into Japan's primary "strategic industries." *Recent Trends, supra* note 3, at 74.

25. Country Report, *supra* note 4, at 14.

The MPT[26] responded to these needs by permitting the network to accommodate, at least to some extent, some of the new business traffic.[27] Many approval requirements, however, remained intact.[28]

During the 1980s, the Japanese telecommunications industry has witnessed its most significant advancement.[29] Shifting policy considerations,[30] a variety of market forces,[31] and the accomplishment of at least

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26. The Japanese Government amended the Public Telecommunications Act with proposals submitted by the MPT. *Id.*

27. For example, one alternative in which data were transmitted over the NTT system was through the authorized use of a private, leased line (called a "specified circuit"); the other available alternative was to transmit directly through public circuits. *See id.* The MPT permitted shared use of a specified circuit by private affiliated users when (a) the users have a "considerable" business relationship with each other, and (b) the MPT concluded that the proposed use of the circuit would not pose a threat to the NTT system. *See id.* at 15 (the MPT also permitted certain categorical arrangements with respect to specified circuits). This standard obviously compromised concerns of both NTT and private users. *Id.* at 16. Users that were closely affiliated with each other, or even intra-corporate entities, could share a specific circuit and more efficiently and economically transmit intra-corporate or industry-related data. *See id.* at 15-16. NTT was concerned about shared use arrangements because they had the potential to harm the public network by duplicating functions it carried out. "There was less concern about message-switching activities between closely-related users than between unaffiliated parties." *Id.* at 15. The close relation requirement substantially dissolved any threats of a third-party transmission service that would directly compete with NTT. *See id.*

28. The 1971 amendments did not authorize value-added services by third-parties. Users of leased circuits could not transmit third-party communications. This prevented users of the NTT network from offering their data processing capacity to other businesses or individuals. Users could only provide such services when the third-party's equipment was connected to the user's equipment through public circuits. *Id.* at 18.

29. *See generally Recent Trends, supra* note 3, at 74-77; Country Report, *supra* note 4, at 19-24; Kosugi, *supra* note 3, at 3-5.

30. *See Recent Trends, supra* note 3, at 74-77 (general analysis of Japanese policy considerations based on several telecommunications studies conducted in the 1980s by special committees); Country Report, *supra* note 4, at 19-45 (detailed overview of deregulation trends); *see generally* Kosugi, *supra* note 3, at 3-5 (capsulated summary of events affecting policy changes which lead to the new law).

31. Japanese consumers, due to rapid economic development and improved living standards, demanded a broader, more sophisticated range of products and services. TELECOMMUNICATIONS REFORM, *supra* note 15, at 2. These demands would have forced NTT to expand its range of services into new areas. One major concern of the Japanese business community was whether NTT should be allowed to operate outside the scope of its traditional transmissions services, which consisted primarily of telephone, telex, telegram and circuit leasing services. NTT had the resources and desire to engage in the potentially lucrative, new telecommunications fields, particularly the value-added service markets. But it later became apparent that NTT could not maintain a monopoly over these new areas, too. *See* Country Report, *supra* note 4, at 23-24.

two post-World War II goals of the Japanese Government[32] contributed to uncertainty for the future of Japan's telecommunications market. The most significant change in Japanese telecommunications policy concerned the MPT's and NTT's position on deregulation in the telecommunications industry.[33] In October 1980 the MPT formed a special task force, the Telecommunications Policy Council (the Council),[34] to "clarify guidelines for Japanese telecommunications policies in the 1980s."[35] The Council drafted the first report[36] to formally address Japan's deregulation policy[37] and indicated that the MPT intended to maintain the present structure of basic telecomunications services provided by the NTT and KDD monopolies. The Council made the following recommendations against deregulation:

> (1) Basic facilities such as nationwide and international communication circuits should be monopolistically provided by NTT and KDD for the most effective use of resources and prevention of investment overlap.
> (2) Basic common carrier services such as telephone and telegraph should continue to be NTT and KDD monopolies.[38]

A third major recommendation, however, indicated some support for deregulation:

> (3) However, as for enhanced services such as data communication and various forms of information services, the deregulation policy which started in 1971 should be further promoted. In these areas competition should be encouraged.[39]

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32. *See* Kosugi, *supra* note 3, at 3. The two major goals were (1) solving the problem of telephone connection delay, or "backlog" and (2) establishing a national automatic telephone dialing network.

33. *See Recent Trends, supra* note 3, at 77.

34. The Japanese Telecommunications Policy Bureau initiated the organization of the Council, which was composed of many experts in academics, business, telecommunications and mass media.

35. *Recent Trends, supra* note 3, at 75.

36. *A Vision of Telecommunications Policy in the '80s*, TELECOMMUNICATIONS POLICY COUNCIL (August 1981) (English translation published by the Research Institute of Telecommunications and Economics in August 1982), *reprinted in Recent Trends, supra* note 3, at 75.

37. *Recent Trends, supra* note 3, at 75.

38. *A Vision of Telecommunications Policy in the 80's, supra* note 36, *reprinted in Recent Trends, supra* note 3, at 75.

39. *Id.*

Although criticized for being "too general and ambiguous,"[40] the report represented the first reaction by the MPT, NTT and KDD to the increasing possibility of reformulating the existing structure of the Japanese telecommunications industry.[41]

In July 1982 both the MPT and NTT initially resisted a possible privatization or division of NTT.[42] Within two or three years, however, both organizations supported the changes.[43]

In 1982 an ad hoc advisory committee[44] established by the Government suggested the need to design some form of a competitive market structure to eliminate certain deficiencies of the current monopoly.[45] Thereafter, the Japanese Government indicated an intention to adopt the recommendation to restructure NTT. In October 1982 the MPT established a study group to address recent issues in the country's telecommunications policy. The study group concluded that the conditions which had traditionally justified the telecommunications monopoly no longer existed to the extent that they undermined the efficiency of the system.[46]

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40. *Recent Trends, supra* note 3, at 75.

41. *Id.* A major reason for the rise of such discussions in Japan was the drastic change in United States telecommunications policy, namely the divestiture of American Telephone & Telegraph Company (AT&T). *See id.*

42. *Id.* at 77. The Second Provisional Administration Investigation Committee, headed by Mr. Toshio Doko, submitted a report to the Japanese Government. Kosugi, *supra* note 3, at 3. This report recommended that NTT be privatized and that private companies be permitted to enter the telecommunications field and directly compete with NTT. *See id.* The MPT and various other groups strongly argued against these recommendations. *Id.*

43. *Recent Trends, supra* note 3, at 77.

44. The Provisional Commission for Administrative Reform was established in 1981 to investigate all government organizations and their activities in an attempt to eliminate organizational inefficiencies. *Id.* at 75.

45. *See id.* (the report was entitled *The Third Recommendation by the Provisional Commission for Administrative Reform* (July 1982)). Along with recommending the restructure of the industry with respect to NTT, the Commission further suggested:

> [1] In order to secure effective competition in the trunk circuit area, entry into new areas such as satellite communication and new communication networks by optical fiber cable should be permitted under certain conditions.
>
> [2] NTT should be divided into several "regional" joint-stock companies and a "central" joint-stock company to take over NTT's national trunk lines and research institutes. Regional monopoly is guaranteed for regional companies but monopoly is not guaranteed for the central company.

Id. at 75-76.

46. *See Recent Trends, supra* note 3, at 76. The first chapter of the *Interim Report by a Study Group for the Future of Telecommunication Systems*, entitled "Telecommunications in the Social Environment of the 2lst Century," attempted to identify Japanese social and economic situations foreseeable in the 21st Century and discussed how the

The study group firmly supported the introduction of competition as advantageous to users and to the development of the system as a whole. As that group reported:

> In order to expand users' room for choice and construct an efficient and sophisticated telecommunications system, further activation of telecommunication services is indispensable. To realize such a state, instead of sticking to the conventional way of management, i.e., monopolistic operation of public telecommunication services, we should introduce competition in all areas of telecommunication and keep the door open for the entry of multiple telecommunication enterprises. . . . [However, even if new enterprises enter this market,] it is very likely that the existing telecommunication enterprises will remain dominant over others. Therefore, it is important to make rules to secure fair competition for the benefit of users, by securing interconnections between different networks, by prohibiting cross subsidy within the existing entity, and by other necessary measures.[47]

The study group cited five reasons for the shift in Japanese telecommunications policy. First, the rapid "[d]evelopment of new communication resources such as optical fiber, cable and communication satellites [made] the theory of natural monopoly obsolete."[48] Second, the development of microelectronics solved the problem of interface between different telecommunications systems, thereby reducing the need for technical standardization of system components.[49] Third, private enterprises with large amounts of available capital were anxious to participate in the telecommunications market on a large-scale basis.[50] Fourth, the present management systems could not adapt to the constantly changing complexities of user information needs.[51] Last, a monopoly of the telecommunications field was inherently deficient.[52]

Shortly after the study group submitted its report, the Japanese Gov-

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country's present policies might be modified to better cope with these situations. *Id.*

47. *Id.* at 77.

48. *Id.* at 76.

49. *Id.*

50. *Id.*

51. *Id.* at 76-77.

52. *Id.* at 77. Monopolistic systems in areas of rapid technological advancement often are too rigid to satisfy the industry's need for growth. Further, the enterprise which operates the monopoly may have little incentive to satisfy public needs for enhanced services because it already maintains a capitive audience. The element of competition, however, compels operators of the systems or networks to keep abreast of technological advancement and adjust to the changing needs of the public in order to survive in the particular industry.

ernment decided to redraft the relevant statutes to effect this policy change.[53] The Government revised the statutes to secure the public nature of the telecommunications industry;[54] to develop a more sophisticated, comprehensive and reliable network upon which society could depend without fear of serious damage due to the network's failure to operate;[55] and to introduce market competition, thereby increasing the availability of telecommunication services while simultaneously responding to international telecommunications trends.[56] After considerable controversy,[57] the Japanese Government enacted the Electric Telecommunication Business Act (ETB Act) on December 25, 1984, representing the shift in regulatory policy.[58]

B. *The Current United States Market*

The United States telecommunications market, the largest market in the world,[59] has also undergone significant changes over the last decade.[60] The divestiture of American Telephone & Telegraph Company (AT&T) in 1984[61] significantly advanced the United States' goal of creating a more open, competitive telecommunications market designed to provide the best products and services at the lowest cost to domestic consumers. Before the break-up of the "Ma Bell"[62] monopoly, AT&T and

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53. The actual decision was made in September 1983. Kosugi, *supra* note 3, at 4.

54. *See id.* In regulating a country's communications network, a government has to preserve the system's integrity for national security and also provide maximum public access to the network to satisfy user needs. Securing the public nature of the network may conflict with national security considerations.

55. *See* Country Report, *supra* note 4, at 38.

56. *See id.* at 45; *see also* Kosugi, *supra* note 3, at 4.

57. *See* Berger, *Politics Delays NTT Privatization*, ELECTRONICS WEEK, Aug. 20, 1984, at 42.

58. Country Report, *supra* note 4, at 45.

59. U.S. INT'L TRADE COMM'N, CHANGES IN THE TELECOMMUNICATIONS INDUSTRY AND IMPACT ON U.S. TELECOMMUNICATIONS TRADE, Report to Sen. Comm. on Finance, Investigation No. 332-172 Under Section 332 of Tariff Act of 1930, USITC Publication 1542 (June 1984) at x [hereinafter USITC Pub. 1542]. In 1983, for example, the United States consumed $18.5 billion worth of telecommunications equipment, 33.9 percent of the total world consumption. *Id.* at xiii.

60. *See id.* at ix, 16-17.

61. *Cf. id.* at 17. The U.S. Department of Justice filed the antitrust suit against AT&T in 1974. AT&T and the Department of Justice entered into an antitrust consent decree in 1982. United States v. Western Elec. Co. (American Tel. & Tel. Co.), 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

62. AT&T can no longer use the Bell System logo because of the divestiture.

its subsidiaries dominated all but a few areas of the telecommunications industry.[63] AT&T dominated domestic and foreign firms by manufacturing its own equipment used in the domestic telecommunications network and by operating the largest portions of this system.[64] Neither foreign nor domestic firms could establish a solid foothold in the United States market.[65]

Although the United States deregulated the telecommunications market to some extent during the late 1960s[66] and throughout the 1970s,[67] the 1984 divestiture separated the local Bell operating companies[68] from

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63. Telecommunications equipment is usually categorized into one of the following four types: (1) transmission equipment, the primary function of which is to forward information from one point to another—i.e. cables or fibers; (2) switching apparatus, which is designed to connect terminals or groups of terminals to each other; (3) customer premises equipment (CPE), which is mainly terminal equipment such as a telephone; and (4) cable, wire, and lightguide, which is used for transmission between apparatus not linked by radio. United States firms, other than Western Electric, were able to compete with Bell-supplied equipment only in the CPE category. Several FCC decisions permitted consumers to connect non-Bell equipment to the publicly switched network. For a general outline of these decisions, see USITC Pub. 1542, *supra* note 59, at 17. After 1980, the FCC standard that "equipment which inherently [will] not harm the network must be allowed to be connected or attached regardless of source" applied to CPE directly connected to the network. *Id.* Thus, the United States firms began mass marketing such consumer-oriented products as telephone answering devices, telephone instruments, and modems. *See id.* at 24. United States firms, however, experienced more success penetrating the market with more sophisticated CPE aimed at businesses than with consumer-type equipment. *Id.* at 24-25.

64. *Id.* at 25. AT&T maintained its dominance over domestic and foreign firms at least until the FCC decisions on CPE. Western Electric, the principal United States manufacturer of telecommunications equipment, had a multi-billion dollar captive market, facing virtually no competition from other manufacturers while the Bell System was intact. *Id.* at 24. NTT, as AT&T did in the United States, monopolized the maintenance and installation of telecommunications in Japan; however, NTT did not manufacture its own equipment as AT&T did with Western Electric. Instead, NTT relied on other manufacturers for its equipment needs. Murtha, *Digital Dialing Doldrums,* DATAMATION, Dec. 15, 1985, at 48.

65. AT&T supplied telecommunications equipment to approximately 85 percent of the active subscriber lines in the United States. *See* USITC Pub. 1542, *supra* note 59, at ix, 24 (domestic firms), 25 (foreign firms).

66. The opening of the United States telecommunications market with respect to CPE began in 1968 with the FCC's Carterfone decision. *Id.* at 17.

67. In 1971 the FCC opened direct competition in the provision of common carrier services, thereby creating a market for transmission equipment. Finally, in 1980, the FCC completely deregulated CPE. *Id.* at 17.

68. *See id.* The AT&T divestiture separated 22 Bell operating companies (BOCs), such as South Central Bell, Mountain Bell, and Pacific Bell, into seven regional holding companies wholly independent of AT&T. *Id.* Prior to the divestitures, BOCs were pri-

Western Electric Company,[69] and accelerated the trend toward an open market.[70] The divestiture resulted in immediate growth of opportunities for both domestic and foreign manufacturers.[71]

AT&T still controls the largest share of the United States market,[72] but foreign and domestic competitors have been successful with respect to certain types of consumer-oriented equipment.[73] Prior to the 1984 divestiture, consumers had a limited array of telecommunications equipment and services from which to choose. Today, however, foreign competitors have an increased market share in the products and services traditionally offered by the Bell system, thereby providing consumers with a greater market choice.[74]

Although deregulation of the United States telecommunications market has produced a proliferation of foreign newcomers resulting in expansion of the United States market, it has not lead to extensive reciprocal deregulation of foreign telecommunications markets.[75] United States telecommunications firms are particularly concerned about opening the Japanese market for several reasons. First, the value of the world telecommunications products industry, currently estimated at more than $50

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mary purchasers of telecommunications equipment manufactured by Western Electric. Today, these operating companies are not required to purchase their supplies and equipment from Western Electric but are free to buy at competitive prices in the open market. *Id.*

69. *See supra* note 64.

70. SEN. COMM. ON FINANCE, PROMOTING EXPANSION OF INTERNATIONAL TRADE IN TELECOMMUNICATIONS EQUIPMENT AND SERVICES, AND FOR OTHER PURPOSES, S. REP. NO. 204, 99th Cong., 1st Sess. 3 (1985) [hereinafter S. REP. NO. 204].

71. de Jonquieres, *Era of Massive Upheavals,* BURRELLE'S, Jan. 6, 1986, at 1. In 1978, fewer than 300 firms produced telecommunications equipment in the United States; by 1983, however, this figure grew to more than 550. USITC Pub. 1542, *supra* note 59, at x. But in 1978, of the less than 300 firms competing against each other, four or less of these firms supplied 90 percent of the market. In 1983, only 10 of the more than 550 firms supplied 90 percent of the market. *See id.*

72. de Jonquieres, *supra* note 71, at 1. AT&T and its former BOCs continue to dominate traditional market areas. *Id.; see also* Guyon, *And Then There Were . . .,* Wall St. J., Feb. 24, 1986, at 7D-8D. For example, in the long-distance industry, AT&T captured 69.3 percent of the market's $52.3 billion worth of revenues in 1984 and an estimated 66.6 percent of $57.6 billion of revenues in 1985. The BOCs followed with 16.9 percent in 1984 and an estimated 17.8 percent in 1985. In comparison, MCI captured only 2.8 percent of the 1984 market and an estimated 4.7 percent in 1985. *Id.* at 7D, col. 2.

73. *See* USITC Pub. 1542, *supra* note 59, at 25 (cordless telephones).

74. *See id.* at ix-x.

75. *See Chafee Offers Bill to Halt Telecommunications Sales in U.S. Until Japanese Market is Opened,* [2 Current Reports] INT'L TRADE REP. (BNA) 449 (Mar. 27, 1985).

billion, will continue to rise—reaching a projected growth of $90 billion by 1990.[76] As the world's second largest telecommunications market,[77] the Japanese market is a fertile investment area. Japan will likely account for a substantial portion of this world growth.[78] If Japan allows full access to its telecommunications market, both foreign competitors and Japanese consumers will benefit.[79]

Second, Japan will continue to capture a large share of the United States telecommunications market by increasing its production of telecommunications equipment.[80] In 1984 the United States imported almost fifty percent of its telecommunications equipment from Japan.[81] Future Japanese imports could satisfy the increasing consumer demand in this country for telecommunications products,[82] especially for customer premises equipment (CPE)[83] and transmission equipment.[84]

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76. S. REP. NO. 204, *supra* note 70, at 3.

77. *Id.* at 4; *see also supra* note 59 and accompanying text.

78. *See* USITC Pub. 1542, *supra* note 59, at xx. "Loss of captive markets due to deregulation, the mounting costs of developing new products and the accelerating cycle of innovation are intensifying competition [among United States firms] to seek out new markets worldwide." de Jonquieres, *supra* note 71, at 1.

79. A fully competitive market theoretically provides its consumers with the best products and services available.

80. *See* USITC Pub. 1542, *supra* note 59, at xx. The United States produces nearly one-half of the world's telecommunications products but accounts for only 13 percent of global exports. S. REP. NO. 204, *supra* note 70, at 3. In 1983, the United States exported $140 million of telecommunications equipment to Japan, only 4.7 percent of the total value of equipment procured by NTT. USITC Pub. 1542, *supra* note 59, at 13. Japan, on the other hand, exports over 20 percent of the world market. S. REP. NO. 204, *supra* note 70, at 3; *see also* Sethia, The Challenge of the Japanese Telecommunciations Market 1 (Center for Telecommunciations Management, Graduate School of Business, U.S.C. 1986). More than 50 percent of these exports are targeted at the United States market. Sethia, *supra*, at 1. In 1984, Japan exported $2.3 billion worth of telecommunications equipment, $1.3 billion of it to the United States alone. *Id.*

81. *Telecommunications Trade, Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance and the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce,* 99th Cong., 1st Sess. 106 (1985) (Statement of Allen R. Frischkorn, Jr., on behalf of the Information and Telecommunications Technologies Group of the Electronic Industries Association) [hereinafter *Telecommunications Trade Hearings*].

82. USITC Pub. 1542, *supra* note 59, at xx.

83. Demand for CPE is expected to have an average annual increase of approximately 9 percent through 1993 primarily because of customer purchases of terminal equipment such as personal computers, data display monitors and telephone sets. *Id.* at xxi. Although domestically produced CPE has not been able to effectively compete with lower priced foreign products, United States firms are expected to become more competitive with the foreign manufacturers. *See id.* at xx-xxi. Furthermore, consumers likely

Third, many United States manufacturers believe their products are superior in quality to the Japanese products.[85] If Japan establishes an open, consumer-oriented market,[86] United States firms and other foreign manufacturers could successfully penetrate the Japanese market. This penetration of the Japanese market would help reduce the current United States trade deficit with Japan.

Last, exclusion from the Japanese market can inhibit the ability of United States producers to compete on both a national and an international level. Japan is a highly advanced industrial nation. Exclusion from the Japanese market means lost opportunities for profit which would typically fund research and development projects for future technology.[87] A lack of market access also results in the inability of United States firms to keep abreast of technological advancement in Japan.[88] Further, if foreign manufacturers cannot establish a presence in the Japanese marketplace, the Japanese can concentrate on the international arena because they do not face any competition in their domestic market.[89]

From the above discussion, it is clear that the United States telecommunications policy traditionally has focused on the needs of the consumer. Japan's telecommunications policy, by contrast, has focused on the needs of the Japanese Government. Examination of the new Japanese legislation should reveal whether the country has shifted the focus of its telecommunication policy to be consistent with United States policy.

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will base product evaluations more upon the quality of the equipment rather than on its price. *Id.* at xxi.

84. United States demand for transmission equipment should increase by more than 8 percent per year through 1993. *Id.* at xx.

85. *See* USITC Pub. 1542, *supra* note 59, at 26. The International Trade Commission asked domestic producers of telecommunications equipment whether they felt they had an advantage over Japanese products. The results indicated that United States firms felt that their products had the competitive advantage with respect to transmission and switching equipment. *Id.* at 26, 186 (Table K-1.—United States producers' competitive assessment of United States-made and Japanese-made products in the United States market), 193 (Table K-8.—United States producers' competitive assessment of United States-made and foreign-made products in Japanese markets).

86. Foreign firms compete best in a customer-oriented market. *Id.* at 25.

87. Borrus & Zysman, *Industrial Development Policy in Japan*, in JOINT ECONOMICS COMM., SUBCOMM. ON ECONOMIC GOALS AND INTERGOVERNMENTAL POLICY, JAPAN'S ECONOMY AND TRADE WITH THE UNITED STATES, 99th Cong., 1st Sess. 142, 157 (Joint Com. Print 1985) [hereinafter Borrus & Zysman].

88. *Id.*

89. *Id.* at 157-58.

III. Overview of the Electric Telecommunication Business Act of 1984

A. *Scope of the ETB Act*

By adopting the ETB Act[90] and the NTT Act[91] in December 1984, the Japanese Diet[92] ostensibly liberalized Japan's telecommunications market.[93] The MPT believed that extensive governmental regulation was no longer necessary "to ensure the construction and operation of simple telephone services that will interconnect the entire nation."[94] The NTT Act establishes a new corporation, Nippon Telephone and Telegraph, Ltd. (NTT).[95] The Japanese Government, previously the sole owner of NTT, will be able to sell, over time, a limited amount[96] of NTT stock to domestic investors.[97] The newly privatized NTT can compete in the domestic[98] telecommunications market against other firms

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90. Denki Tsūshin Jigyō Hō (Electric Telecommunication Business Act, Law No. 86 of 1985 (unofficial translation) [hereinafter Electric Telecommunication Business Act or ETB Act].

91. Nippon Denshin Denwa Kabushikigaisha Hō (Nippon Telegraph and Telephone Company Act), Law No. 85 of 1984, *reprinted in* [Statute Vol. 1] Doing Business in Japan App. 1A-40.2 (Kitigawa ed. 1986).

92. The principal law-making body of the Japanese Government is the Diet (*Kokkai*). The Diet is comprised of the House of Representatives and the House of Councillors. For a detailed outline of Japan's legal system, see D. Henderson & J. Haley, Law and the Legal Process in Japan 227-31 (1978), and H. Tanaka, The Japanese Legal System 37-43 (1976).

93. Country Report, *supra* note 4, at 45. "The mere fact that the new law approaches its mission as providing for 'business' legislation, rather than a 'public telecommunications law' suggests the shift in emphasis contained in the new legal framework." *Id.* at 49 (referring to the Electric Telecommunication Business Act).

94. *Id.* at 49. In fact, the ETB Act "reflects a perceived need to privatize the market to a great degree." *Id.*

95. Country Report, *supra* note 4, at 46. Note that NTT, Ltd. is not an entirely separate entity from the previously existing NTT (which was formed in 1952). The NTT Act converted NTT from a public to a private corporation. Thus, the new corporation is the NTT which existed before, except that now NTT functions and is regulated as a privately-held entity.

96. The Government can sell up to two-thirds of NTT stock. Nippon Denshin Denwa Kabushikigaisha Hō (Nippon Telegraph and Telephone Company Act), Law No. 85 of 1984, art. 4(2).

97. Foreign governments, corporations or persons may not hold NTT stock. *Id.* art. 4(1).

98. The NTT Act permits NTT to engage in only domestic telecommunications business activities. Thus, NTT and KDD effectively remain isolated from each other, with NTT in the domestic arena and KDD providing international services. There are two reasons why the activities of these entities were kept mutually exclusive: (1) the domestic

and also has the authority to expand its range of services.[99] The MPT retains substantial supervisory powers over NTT to ensure the financial stability of the corporation and to keep its activities consistent with the Government's telecommunications policy.[100] The NTT Act breaks up NTT's legal monopoly by establishing a "regulated competitive" telecommunications market.[101] The ETB Act is of particular significance to foreign suppliers of telecommunications equipment attempting to gain access to the Japanese market.[102] If the ETB Act does in fact open the Japanese telecommunications market, foreign suppliers should be able to sell much more of their equipment in Japan over the next several years.[103]

The ETB Act, which covers virtually any equipment compatible with NTT's system,[104] divides telecommunications services into two categories: Type I and Type II telecommunications.[105] The ETB Act distinguishes Type I telecommunications from Type II telecommunications based on the "establish[ment of] telecommunications circuit facilities,"[106]

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market is "fundamentally" different from the international market because treaties, conventions and other international agreements affect the international market, Kosugi, *supra* note 3, at 13; and (2) the Japanese Government could retain more control over NTT and KDD to ensure that NTT would not grow too large, that NTT would not compete directly against KDD, and that NTT and KDD could compete effectively against newcomers in their respective markets, *accord id.* at 13-14.

99. *See generally* Kosugi, *supra* note 3, at 15-17 (CPE and investment opportunities for NTT); Country Report, *supra* note 4, at 46-48.

100. Country Report, *supra* note 4, at 48.

101. Foster, *Building New Barriers? The Draft Telecommunications Act,* 6 E. ASIAN EXECUTIVE REP. 9, 9 (1984) (LEXIS, Nexus library, Bus. file).

102. *See id.*

103. *See id.* "The laws are designed to facilitate greater interconnection between computers and transmission circuits, which will encourage the increased integration of the information processing and telecommunications industries." Country Report, *supra* note 4, at 45.

104. *See* Foster, *supra* note 101, at 9. The ETC Act defines "telecommunications" as "transmitting, conveying or receiving codes, sounds or images by wire, radio or any other electromagnetic method." Electric Telecommunication Business Act, art. 2(i). The ETB Act further defines "telecommunications facilities" as "machines, apparatuses, wires and cables or any other electrical facilities for the operation of telecommunications." *Id.* art. 2(ii).

105. Electric Telecommunication Business Act, art. 6(1).

106. *Id.* art. 6(2). The ETB Act provides:

> Type I telecommunications business shall be that business which provides telecommunications service by establishing telecommunications circuit facilities (which means transmission line facilities connecting transmitting points with receiving points, switching facilities installed as inseparable units therefrom, and other facilities accessory to such facilities, the same shall apply hereinafter).

the basic network infrastructure necessary to provide essential telecommunications services.[107] Thus, Type I telecommunications businesses provide services very similar to those presently provided by NTT.[108] A Type I business generally includes any telecommunications business that *owns* transmission equipment or facilities.[109] A Type II business *leases* these basic facilities.[110] Installation of Type I facilities consequently requires a huge investment of capital.[111] Since a Type I business resembles a public welfare industry such as an electric or gas company,[112] the ETB Act requires any person who intends to operate a Type I business to obtain permission from the MPT to conduct the business.[113] By requiring MPT approval, the ETB Act ensures that Type I operators have the financial stability to continue providing the proposed services on a long term basis.[114]

Establishing a Type I operation requires a substantial investment and involves direct competition with the established NTT network. Private companies, however, may penetrate the Japanese market if they tailor

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Id.

107. Kosugi, *supra* note 3, at 5.

108. *See supra* note 31.

109. Country Report, *supra* note 4, at 54.

110. *Id.*

111. Kosugi, *supra* note 3, at 5-6. Operating a Type I business requires installing cable or microwave network or telecommunications satellites.

112. Electric Telecommunication Business Act, art. 9(1).

113. *See* Kosugi, *supra* note 3, at 6. A Type I operator can only provide services in geographical areas where it has installed the necessary equipment. *Id.* If an operator somehow becomes incapable of maintaining equipment in a particular sector, it deprives users of services. *See id.*

114. *See id.* Article 10 of the ETB Act provides:

> The Minister of Posts and Telecommunications shall grant permission [for the operation of a Type I business to a person] . . . if [the MPT] determines that an application for permission [under article 9 of the Act] conforms to each of the following items:
>
> i) Telecommunications service to be provided by a telecommunications carrier shall be appropriate in the light of the demand in the service territory.
>
> ii) The introduction of the telecommunications business shall not result in a significant excess of telecommunications circuit facilities to be used for such business in all or in any part of the territory or route to be covered by the telecommunications carrier.
>
> iii) The applicant shall have an adequate financial basis and technical capability to properly perform his or her telecommunications business.
>
> iv) The plan of the telecommunications business shall be reliable and feasible.
>
> v) In addition, the introduction of the telecommunications business shall be appropriate for the sound development of telecommunications in general.

their services to areas with expansion potential.[115] Concentration of Type I businesses in areas characterized by high user demand and on new technologies, such as value-added networks (VANs),[116] fiber optics and satellites,[117] could prove most profitable.

The ETB Act expressly prohibits a foreign entity from completely owning a Type I operation.[118] Article 11 of the ETB Act provides that the MPT shall not grant permission to establish a Type I carrier if a foreign government, corporation or organization directly or indirectly controls one-third or more of the applicant.[119] Although article 11 may be characterized as a measure to preserve national security, Japan obviously intends to insulate the NTT and KDD networks from foreign competitors capable of thriving in the Japanese market. Regardless of its policy basis, article 11 will restrict any growth in Type I telecommunication services to predominately domestic entities.

Type II businesses provide various telecommunications services through a transmission network installed by a Type I business.[120] Type II services include VAN, telephone and facsimile services.[121] The ETB Act further divides Type II services into two subcategories on a quanti-

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115. *See* Kosugi, *supra* note 3, at 7.

116. A value-added network (VAN) basically consists of a main computer at a central location, digital switches and transmission equipment to route the data to remote locations, and software to implement the system. VANs are used to provide information in business transactions. For example, a bank may use a VAN to transfer funds to one or more of its major customers. VANs transfer information regarding a credit card holder's available credit and the value of an item purchased by the cardholder between the credit card information center and the store location. VANs also link home computers to central databases providing all types of information. Innovative VANs obviously reduce operating costs for almost any business.

117. Kosugi, *supra* note 3, at 7.

118. Electric Telecommunication Business Act, art. 11(iv)-(vi). At least six applicants have sought MPT approval for Type I services primarily for the operation of satellite-based networks or territorial facilities. Daini Denden, the largest potential competitor, plans to install a microwave network. This is a joint venture composed almost completely of Japanese manufacturers, banks and trading companies. Nihon Telecom, formed by Japan National Railways, plans to operate a fiber optic network. Teleway Japan also plans to operate a fiber optic network. Ford Aerospace has agreed with Mitsubishi Corporation and Mitsubishi Electric Company to initiate a satellite operation using Ford's satellites. The other applicants, all joint ventures, include Japan Communications Satellite Company and Satellite Japan Corporation. *See generally* Country Report, *supra* note 4, at 50-52.

119. Electric Telecommunication Business Act, art. 11(vii).

120. Kosugi, *supra* note 3, at 8; *see* Country Report, *supra* note 4, at 54.

121. Kosugi, *supra* note 3, at 8.

tative basis: General and Special Type II telecommunications.[122] Special Type II businesses provide facilities that exceed a certain capacity[123] to "many and unspecific persons."[124] Because most new competitors will not have equipment exceeding the capacity limitation imposed by the MPT ordinance, the distinction between General and Specific Type II turns on the definition of "many and unspecific persons" under the ETB Act.[125]

The MPT requires businesses to satisfy the following criteria in order to meet the "many and unspecific persons" requirement necessary for classification as a Special Type II business: (1) the conditions of the business' tariffs are made public; (2) there is no variation among customers for services or rates; (3) the business must serve all users who request such service; and (4) users can access the service through the public telephone network.[126] Thus, a business ordinarily can avoid a Special Type II classification by leaving its rates open to negotiation on an individual basis[127] or by limiting its services to only a select group of users who request the service.[128]

The distinction between General and Special Type II business is important to foreign competitors. While the MPT does not restrictively regulate entry into the Japanese market by a General Type II business,[129] it must approve any entry of a Special Type II business.[130] The

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122. Electric Telecommunication Business Act, art. 21(1)-(3).

123. The MPT ordinance classifies a company which has 500 or more *lines* (calculated by 1,200 bits per second) as a Special Type II business; a company that has equipment with less capacity is considered a General Type II business. Kosugi, *supra* note 3, at 8. Originally, potential competitors thought the ordinance would base the General/Specific distinction on services to 500 *users*. Country Report, *supra* note 4, at 56.

124. Electric Telecommunication Business Act, art. 21(3).

125. *Cf.* Country Report, *supra* note 4, at 56-57.

> [T]he Ministry does not take subscriber lines into account in calculating the size of a business; only trunk lines (leased by the carrier) are counted. Since each carrier line can provide service to many users through connections to a local switch, a service with 500 access lines will be able to reach thousands of end users. Thus, this limit also poses little practical restriction on the size of a General Type II business.

Id.

126. *Id.* at 55-56.

127. *Id.* at 56. Negotiable rates would not satisfy the MPT's second criteria.

128. *Id.* Selective services would fail the MPT's third criteria.

129. Electric Telecommunication Business Act, art. 22. Foreign firms wishing to provide General Type II services must file a notification with the MPT of their plans to provide the services along with their names and addresses and a description of the services. *Id.* art. 22(1)(i)-(ii).

130. *Id.* art 24. Under the registration system, a foreign firm must submit, in addi-

ETB Act provides grounds upon which the MPT can refuse registration of a Special Type II business,[131] but the ETB Act is silent with respect to the MPT's authority to refuse a notification application from a General Type II business.[132] Three experts stated that "[i]n view of the regulatory requirements imposed on Special Type II businesses—and the ease of avoiding Special Type II classification—it is unclear why anyone would seek to register as a Special Type II business."[133] General Type II businesses ultimately will provide telecommunication services to distinctive groups of users with common capital or trade interests, such as a parent company and its subsidiaries.[134] Special Type II businesses, by contrast, will lease massive national or international networks to provide services for as many customers as possible.[135] As with its treatment of Type I services, Japan took precautions in the ETB Act to protect NTT's traditional services from the larger, more threatening, and potentially lucrative businesses.

B. *MPT Authority under the ETB Act*

The Electric Telecommunication Business Act effectively places the Ministry of Posts and Telecommunications in direct control of all aspects of Japan's telecommunications business.[136] The new law imposes only vague limitations on the MPT's discretionary power, thus rendering the MPT a powerful regulatory body in today's global telecommunications affairs.[137]

The MPT's authority covers both administrative and economic aspects of Japan's telecommunications industry. First, the MPT decides who may compete in Japan's telecommunications market.[138] Second, the

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tion to the same information required of General Type II businesses, an outline of its telecommunications facilities and a business plan. *Id.* arts. 24(2)(iii), 24(3).

131. Refusal of Special Type II registration is governed by *id.* art. 16.

132. There is no code section comparable to article 26 with respect to MPT refusal of notification for General Type II businesses.

133. Country Report, *supra* note 4, at 56.

134. *See* Kosugi, *supra* note 3, at 7-8. Other hypothetical situations include manufacturer-wholesaler relationships and groups of chain stores engaged in the same or similar businesses.

135. *See id.* at 8.

136. Foster, *supra* note 101, at 9.

137. *Id.* Foster views the ETB Act as creating an opportunity for the MPT to enhance its bureaucratic influence in both Japan and the international telecommunications arena.

138. *See generally* Electric Telecommunication Business Act, arts. 2, 6, 9-30, 94.

MPT also determines what services are necessary and available.[139] Third, the MPT controls the agencies that test and certify all equipment entering the Japanese market.[140] The MPT's discretion is most apparent with respect to Type I telecommunications. Under article 10 of the ETB Act, the MPT may exert a broad ambit of discretion in deciding whether to permit an applicant to conduct a proposed Type I service. The MPT must grant permission if it finds that the proposed operation: (1) appropriately meets the demands of users in the particular service area,[141] (2) will not result in a "significant excess" of circuit facilities in the particular service territory or route,[142] (3) is reliable and feasible, particularly with respect to the applicant's financial and technical capability to properly provide the service,[143] and (4) is "appropriate for the sound development of telecommunications in general."[144] The Ministry of Posts and Telecommunications therefore controls Japan's facilities market by determining which and how many operators of a Type I business may compete against NTT.[145] The language of article 10 provides the Ministry with ample justifications for any governmental telecommunications policy. Although the MPT has not exercised its broad discretionary authority to the detriment of foreign firms, it retains powers under article 10 to counter retaliation by foreign countries to further open the Japanese market.[146]

Fourth, the MPT also has extensive control of the business activities of Type I and Special Type II businesses. The Ministry may at its own discretion determine the period within which a Type I carrier must commence offering a particular service to its users.[147] If a Type I carrier or a Special Type II business modifies the services or equipment it offers, or the geographic service area in the case of a Type I carrier, it must immediately notify the MPT of such changes for prior approval.[148] Further, the MPT closely regulates all transfers, mergers, assignments or takeovers of Type I businesses. Thus, if a Type I business wants to entrust part of its activities to another person, the MPT must first approve the

139. Foster, *supra* note 101, at 9; *see* Electric Telecommunication Business Act, arts. 68-72; *infra* notes 165-220 and accompanying text.

140. *See generally* Electric Telecommunication Business Act, arts. 2, 6, 9-30, 94.

141. *Id.* art. 10(i).

142. *Id.* art. 10(ii).

143. *See id.* art. 10(iii)-(iv).

144. *Id.* art. 10(v).

145. *See* Country Report, *supra* note 4, at 61.

146. *See, e.g., infra* notes 263-354 and accompanying text.

147. Electric Telecommunication Business Act, art. 12(2).

148. *Id.* arts. 14, 27.

transfer.[149] The MPT also controls the setting of rates or tariffs for customers of Type I businesses by requiring them to submit an outline of rates and services to the MPT for prior approval.[150] Although there is no requirement that the MPT approve rates for General or Special Type II services, a Special Type II business must notify the MPT of the rates before enforcing them.[151]

The ETB Act further empowers the MPT to regulate contractual relations between either foreign or domestic businesses. For example, the Ministry must approve any agreement or amendment between two Type I carriers to interconnect or share their facilities.[152] Furthermore, the MPT can order Type I businesses to share or interconnect their equipment upon determining that such interaction is necessary or appropriate to further the public interest.[153]

Last, the MPT controls all interaction between Type I and Special Type II carrier businesses and foreign persons or governments by requiring prior authorization to enter into telecommunications-related agreements or contracts.[154] This provision clearly applies to agreements between foreign-owned Japanese subsidiaries and the foreign parent company, but it is not clear whether the MPT can require prior approval of contracts entered into in Japan between a Japanese entity and a foreign company doing business in Japan through one of its Japanese branches.[155]

The ETB Act ostensibly grants broad regulatory authority to the MPT; however, this authority provides the MPT with the capability to assume an interventionist rather than a regulatory role regarding the future structures and development of Japan's telecommunications networks. The ETB Act fails to provide for a truly impartial regulatory body; therefore, the MPT may favor domestic firms over foreign competitors, particularly if the foreign competitors are unable to exert external pressure on the Japanese Government.

IV. Issues Raised by the Japanese Legislation

Japan's enactment of the Electric Telecommunication Business Act of 1985 raised several concerns regarding United States access to the Japa-

149. *See id.* arts. 15-16.
150. *Id.* art. 31.
151. *See id.* art. 31(5)-(6).
152. *Id.* art. 38.
153. *Id.* art. 39(1).
154. *Id.* art. 40.
155. Foster, *supra* note 101, at 9.

nese telecommunications market and, on a larger scale, the future direction of United States-Japan trade relations.[156] The United States challenged the drafting procedures of the Japanese telecommunications equipment certification standards and approval authority, the foreign representation on Japanese advisory councils, and the trade deficit with Japan. United States and Japanese officials commenced high-level talks ("M.O.S.S.")[157] in January 1985 in an effort to resolve the issues.[158] While the parties temporarily resolved some of the issues, others still threaten the ETB Act's effectiveness in opening the Japanese telecommunications markets.

A. *Primary Objectives of the United States in Resolving the Issues*

The United States set forth the major criteria for a successful resolution of the issues raised by the new Japanese telecommunications laws:[159]

> (1) Elimination of the discretionary authority of officials who will implement the system for regulating telecommunication services and equipment.
> (2) Limitation of technical standards and requirements to those necessary for protection against harm to the network.
> (3) Guarantee against discrimination between foreign and domestic suppliers.
> (4) Assurance of the transparency, integrity and independence of procedures for registration of telecommunications services, equipment approval and appeals.[160]

United States trade officials, skeptical that any significant developments would result from the negotiations, were anxious to reach an

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156. *See U.S., Japan Open Trade Talks with Focus on Telecommunications, Car VRA Tie-In Seen,* [2 Current Reports] Int'l Trade Rep. (BNA) 173 (Jan. 30, 1985). The trade deficit with Japan may have exaggerated the problems foreseen by the United States concerning the new access to the Japanese telecommunications market; nevertheless, achieving full market access remains "one of the most challenging international trade problems facing the United States today." *Chaffee Offers Bill to Halt Telecommunication Sales in U.S. Until Japanese Market is Opened,* [2 Current Reports] Int'l Trade Rep. (BNA) 449 (Mar. 27, 1985) (comment by William Moore, chairman of American Electronics Association).

157. Market-Oriented Sector-Selective.

158. *U.S., Japan Open Trade Talks with Focus on Telecommunications, Car VRA Tie-In Seen,* [2 Current Reports] Int'l Trade Rep. (BNA) 173 (Jan. 30, 1985).

159. Kosugi, *supra* note 3, at 21-23. Deputy United States Trade Representative Michael B. Smith turned this list of criteria over to the Japanese Government on March 13, 1985.

160. *Id.* at 22-23.

agreement before the Japanese law became effective on April 1, 1985.[161] The Japanese Foreign Ministry, on the other hand, did not exhibit the same sense of urgency.[162] One United States official[163] stated that if Japan did not modify its current policy, particularly with respect to the MPT regulations[164] covering the implementation of the ETB Act, "a system [would] be put in place beginning on April 1, 1985, which seriously disadvantages foreign suppliers, does an injustice to Japanese consumers and lends fuel to an international perception that, despite political statements to the contrary, Japan remains committed to keeping its market essentially protected from foreign competition."[165]

B. *Major Telecommunications Issues Between the United States and Japan*

1. Foreign Representation on Japanese Advisory Councils

The Electric Telecommunication Business Act provides that the MPT may establish a designated approval agency (DAA) to test the technical standards of services and equipment entering the Japanese market.[166] The ETB Act requires the MPT to consult with the appropriate Japanese advisory council prior to making "major" telecommunications policy

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161. *See U.S., Japan Open Trade Talks with Focus on Telecommunications, Car VRA Tie-In Seen,* [2 Current Reports] Int'l Trade Rep. (BNA) 173 (Jan. 30, 1985).

162. *See U.S. May Retaliate If Japan Denies Access to Telecommunications Market, Officials Say,* [2 Current Reports] Int'l Trade Rep. (BNA) 225 (Feb. 13, 1985) (John Stern, the American Electronics Association's senior representative in Japan, stated that the Japanese position, specifically that of the MPT, was not "very understanding" of United States concerns).

163. Undersecretary of Commerce Lionel H. Olmer.

164. The ETB Act refers to ordinances and regulations which the Japanese Ministry of Posts and Telecommunications was to promulgate before the law took effect on April 1, 1985. *E.g.*, Electric Telecommunication Business Act, arts. 49-52; *see infra* note 193 and accompanying text. United States officials expected that the regulations would determine to what extent Japan intended to open its telecommunications market to foreign competitors.

165. Letter from Undersecretary of Commerce Lionel Olmer to Japanese Vice Minister Moriya Koyama (Mar. 5, 1985), *reprinted in* [2 Current Reports] Int'l Trade Rep. (BNA) 400 (Mar. 13, 1985) [hereinafter Olmer Letter].

166. Electric Telecommunication Business Act, art. 68(1). For example, the DAA approves all CPE for attachment to all networks. It also approves any equipment provided or sold by a Type I operator. Kosugi, *supra* note 3, at 28. Once the Ministry choses a DAA to conduct the approval process, it relinquishes all authority to conduct the process on its own. Electric Telecommunication Business Act, art. 68(3).

decisions,[167] such as amending MPT technical standards ordinances,[168] permitting a Type I operator to enter the country,[169] or modifying criteria for classification of telecommunication services.[170] The Ministry must defer to council recommendations when undertaking any major administrative action.[171] The Ministry conceivably could avoid this requirement by labelling a particular decision as "minor."[172] However, the appropriate advisory council must confirm the MPT's characterization of a decision as "minor,"[173] and it thus remains uncertain whether the MPT can develop major telecommunications policy under a "minor decision" pretense.

The ETB Act contains no language prescribing the membership of Japanese telecommunications advisory councils.[174] Potential foreign competitors worried that council members who were representatives of directly interested parties might discriminate against them.[175] Further-

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167. Electric Telecommunication Business Act, art. 94. This article provides:
The Minister of Posts and Telecommunications shall, where he intends to make administrative dispositions etc. set forth below, consult the council stipulated in the applicable cabinet ordinance (in this Article referred to as "the council") and make such administrative dispositions etc. in deference to its decisions. This shall not apply, however, to such matters as the council deems to be minor.
i) Permission for Type I telecommunications business under the provisions of Article 9 paragraph (1).
ii) Permission for changes in category of telecommunications service etc. of a Type I telecommunications carrier under the provisions of Article 14 paragraph (1).
iii) Proposal for the establishment, amendment or abolition of the applicable cabinet ordinance under the provisions of Article 21 paragraph (3).
iv) Authorization with respect to tariffs of a Type 1 telcommunications carrier under the provisions of Article 21, paragraph (3).
iv) (sic) Establishment, amendment or abolition of the applicable ordinance of the Ministry of Posts and Telecommunications with respect to the technical standards under the provisions of Article 41 paragraph (1), Article 49 paragraph (1) or Article 52 paragraph (1) item (i).

168. *Id.* art. 94(iv).

169. *Id.* art. 94(i).

170. *See id.* art. 94(ii)-(iii).

171. *Id.* art. 94.

172. *See id.*

173. *See id.*

174. Foster, *supra* note 101, at 9.

175. *Accord* SEN. COMM. ON FINANCE, REQUIRING THE PRESIDENT TO RESPOND TO UNFAIR TRADE PRACTICES OF JAPAN, S. REP. NO. 102, 99th Cong., 1st Sess. 6 (1985) [hereinafter S. REP. NO. 102]; Ahearn, *Market Access in Japan: The U.S. Experience*, in JOINT ECONOMIC COMM., SUBCOMM. ON ECONOMIC GOALS AND INTERGOVERNMENTAL POLICY, JAPAN'S ECONOMY AND TRADE WITH THE UNITED STATES, 99th Cong., 1st Sess. 41 (Joint Comm. Print 1985); *Administration, Congress Starting to*

more, Japan frequently drafts technical standards and regulations by drawing on the advice of domestic industries having an interest in excluding foreign competition.[176] This practice leaves United States exporters with little or no voice in the technical standards drafting process[177] and allows the appropriate regulatory body to skew regulation in favor of domestic industries.[178] Foreign representation on the Japanese telecommunications advisory councils can be critical in defining the scope of products and services entering the Japanese market.

The Agreement on Technical Barriers to Trade (GATT Standards Code)[179] requires Japan to provide the United States and other interested governments with an opportunity to comment upon the proposed technical standards and regulations.[180] This formal commentary period ensures a minimum level of input into the drafting process at the advisory stage. In practice, however, Japan ignored the GATT Standards Code. Although Japan promised a nine-week commentary period, it gave the United States a mere sixteen days to examine the standards and ordinances.[181] Despite the GATT Standards Code, Japan effectively denied the United States any meaningful opportunity to provide valuable input into the drafting process.

In 1985 the United States reminded Japan that it had agreed to in-

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Weigh Retaliatory Measures as Trade Talks Stall, [2 Current Reports] Int'l Trade Rep. (BNA) 374 (Mar. 13, 1985); Foster, *supra* note 101, at 9. Japan decided to compose the DAA of members of NTT, KDD and the Communications Industry Association of Japan (IAJ); no foreign members sat on the board of directors. Ahearn, *supra*, at 51.

176. S. REP. NO. 102, *supra* note 175, at 6; *see also* Ahearn, *supra* note 175, at 50-51.

177. S. REP. NO. 102, *supra* note 175, at 6.

178. Ahearn, *supra* note 175, at 51.

179. Agreement on Technical Barriers to Trade, Apr. 12, 1979, 31 U.S.T. 405, T.I.A.S. No. 9616, ____, U.N.T.S. _____ (forthcoming).

180. *Id.* art. 2.5, 31 U.S.T. at 415, T.I.A.S. No. 9616, at 3, _____ U.N.T.S. _____ (forthcoming).

181. S. REP. NO. 102, *supra* note 175, at 6; *see, e.g.*, Regulations Concerning Terminal Facilities, Etc. (Ministerial Ordinance No. 31 of 1985). The Japanese Government agreed in 1983 to provide foreigners nine weeks to comment on draft regulations, thereby increasing the 16 day obligation under the GATT Standards Code. REPORT OF THE LIAISON HEADQUARTERS ON STANDARDS AND CERTIFICATION (commonly referred to as the "Gotoda Report").

The MPT notified the GATT Secretariat of the draft regulations nine weeks in advance of the final date for offical comment, but the MPT did not make actual copies of the draft regulations available until 16 days before this deadline. Abelson, M.O.S.S. Telecommunications: (Draft) Final Report 12 (Office of the United States Trade Representative 1986). This particular problem subsequently was corrected with respect to other regulations drafted by the MPT. *Id.*

clude foreign representatives on all administrative or advisory committees which develop policy and draft standards in the high-tech field.[182] United States officials urged that the Japanese Government select Japanese nationals working for foreign-affiliated telecommunications companies to serve on telecommunications advisory councils and that this selection process be based upon the individual's work, knowledge and experience in the telecommunications field.[183]

The Japanese acceded to the United States pressure and agreed to restructure the selection process for membership on the most crucial telecommunications advisory body: the Japanese Approval Institute for Telecommunications (JATE).[184] Prior to the enactment of the Electric Telecommunication Business Act, the Japanese selected JATE as the DAA but remained silent about JATE's existence or purpose.[185] The original board of directors for JATE included representatives of parties directly interested in the role of the DAA.[186] The MPT guaranteed the independence of JATE from interested parties.[187] Members who represented directly interested parties, such as telecommunications carriers and equipment manufacturers, had to resign their positions on the committee.[188] JATE nevertheless remains only a quasi-independent body.[189] Although more neutral individuals replaced some of JATE's former members, the agency continues to be funded by private endowments,[190] thus allowing powerful Japanese telecommunications firms to influence JATE decisions. Further, former NTT employees still serve as examiners of equipment for JATE.[191]

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182. *See* Olmer Letter, *supra* note 165, at 401 (referring to the U.S.-Japan High Technology Agreement of 1983).

183. *Id.*

184. *Administration Applauds News Agreement on Telecommunications Access with Japanese,* [2 Current Reports] Int'l Trade Rep. (BNA) 474, 475 (Apr. 3, 1985). In 1984, Japan established JATE specifically in anticipation of NTT's privatization. Abelson, *supra* note 181, at 2. NTT and KDD, Japanese banks, and four Japanese companies of the telecommunications "family"—Nippon Electric (NEC), Oki, Hitachi and Fujitsu—contributed $600,000 to help found JATE. *Id.*

185. *See* Abelson, *supra* note 181, at 2.

186. *Id.* For example, NEC, Oki, Hitachi and Fujitsu each loaned an application examiner to JATE. Although these examiners were no longer with JATE after June 1985, former NTT employees still served as examiners for JATE. *Id.* at 2-3.

187. Kosugi, *supra* note 3, at 27.

188. *Id.*

189. *Administration Applauds News Agreement on Telecommunications Access with Japanese,* [2 Current Reports] Int'l Trade Rep. (BNA) 474, 475 (April 3, 1985).

190. Kosugi, *supra* note 3, at 28.

191. *Supra* note 186.

The effects of foreign representation on the Japanese telecommunications advisory councils, particularly JATE, remain unclear. Although Japan agrees to limited foreign representation on MPT's primary resource for policy decisionmaking and technical standards councils, they have not yet specified how many and under what process representatives of foreign competitors will be selected or the possible benefits for United States competitors.[192]

2. Japanese Standards for Certification and Approval of Equipment and Services

The product-testing certification and approval procedures that Japan originally adopted[193] were the most controversial aspect of the Electric Telecommunication Business Act. The United States objected vigorously to both the registration and notification requirements for firms wishing to enter the Japanese telecommunications market[194] and the certification standards for equipment manufactured by these firms.[195] In addition to concerns about the partiality of several key Japanese councils, United States officials termed the Japanese registration scheme "cumbersome and discriminatory"[196] by requiring potential submission of confidential business information[197] and labelled the equipment approval system a

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192. *See Administration Applauds News Agreement on Telecommunications Access with Japanese*, [2 Current Reports] Int'l Trade Rep. (BNA) 475 (Apr. 3, 1985).

193. *See* Regulations Concerning Terminal Facilities, Etc. (Ministerial Ordinance No. 31 of 1985). Japan originally did not adopt the FCC "harm to the network" standard, *supra* note 63, as a basis for the MPT's standards. Abelson, *supra* note 181, at 7. The Electric Telecommunication Business Act set forth this following criteria as the basis for the certification and approval standards:

> (i) The telecommunications circuit facilities [to which the equipment is be connected] shall not be damaged or impaired, nor shall functions thereof be impaired.
>
> (ii) Any nuisance shall not be caused to other users of the telecommunications circuit facilities.
>
> (iii) The demarcation of responsibility between the telecommunications circuit facilities established by a Type I telecommunications carrier and terminal facilities connected to them by a user shall be clearly stipulated.

Electric Telecommunication Business Act, art. 49(2)(i)-(iii). Although article 49 specifically applies to standards for connections of terminal facilities, these criteria basically apply to all other equipment which may be used in the telecommunications network. *See id.*, art. 52.

194. *U.S., Japan Make Some Headway in Negotiations on Telecommunications, But No Final Deal Yet*, [2 Current Reports] Int'l Trade Rep. (BNA) 408 (Mar. 20, 1985).

195. *Id.*

196. Schwartz, *Hits Japan's New Telecom Policy as Biased*, ELECTRONIC NEWS, Mar. 18, 1985, at 58 (referring to statements by Lionel Olmer).

197. *Id.*; *see* Olmer Letter, *supra* note 165, at 401.

"maze of approving authorities."[198]

The regulations presented several entry barriers to foreign firms. First, the MPT may not accept United States test data for certification in Japan.[199] In the United States, Japanese firms can self-certify telecommunications equipment entering the market according to the FCC "harm to the network" standard.[200] Apart from this relatively low certification threshold, the FCC minimizes the discretionary authority of United States personnel in the certification standards process.[201] Market forces primarily control the range of services and products entering the United States.[202] In Japan, technical standards, not Japanese consumer demands, determine what types of equipment enter the Japanese market.[203]

A second barrier to foreign entry in the Japanese market was dockside inspections of telecommunications equipment.[204] Critics argued that "Japan's restrictive standards and approval procedures [had] the effect of either [(1)] excluding foreign products from the market because of the prohibitive cost of establishing that the product meets the requirements. . . or [(2)] delaying their entry, often long enough to allow Japanese manufacturers to introduce a competitive product."[205]

United States officials further advocated the establishment by Japan of a sole approval agency with certification standards comparable, if not identical, to the standards imposed by the United States on the same products and services offered in its market by foreign firms.[206] The United States maintained that this independent approval agency should not be closely connected to NTT, or NTT would, in effect, be capable of certifying its own equipment.[207] Japan has a legitimate interest in preserving, to some degree, individual technical standards to safeguard the operation of the country's entire telecommunications system.[208] It is in-

198. Olmer Letter, *supra* note 165, at 401.
199. Murtha, *supra* note 64, at 52.
200. Schwartz, *supra* note 196, at 58. *See supra* note 63.
201. Schwartz, *supra* note 196, at 58.
202. *Id.*
203. *Id.*
204. Murtha, *supra* note 64, at 52.
205. S. REP. No. 102, *supra* note 175, at 6.
206. Olmer Letter, *supra* note 165, at 401. The United States essentially proposed to simplify the Japanese procedures to allow the swiftest market access to foreign firms. The United States also suggested that there be an appeals channel for foreign competitors to challenge decisions by the MPT and that there be periodic review by the MPT of established procedures.
207. *See id.* Before the ETB Act, NTT approved all of its own equipment.
208. *See* USITC Pub. 1542, *supra* note 59, at 12-13.

appropriate, however, to purposefully develop unique and complicated standards to discourage competitive imports.[209] United States officials and telecommunications firms obviously felt, given the growing interdependence of telecommunications markets, that Japan carried its legitimate interest too far.

Intense negotiations[210] between MPT officials and United States delegates led to an agreement to ease market entry for foreign products by reducing the number of certification standards from fifty-three to twenty.[211] The Ministry agreed to delete certain requirements that duplicated testing procedures already taken by most foreign competitors, such as speech-quality tests for voice-transmission equipment.[212]

The most important outcome of these negotiations was an agreement by the MPT to accept foreign manufacturer test data,[213] an approach similar to the FCC's streamlined certification system.[214] Imported equipment is document-checked,[215] but the MPT (through the DAA or JATE) retains the authority to test the equipment more thoroughly when unsatisfied with the document checks.[216] United States exporters,

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209. *See id.*

210. *See Administration, Congress Starting to Weigh Retaliatory Measures as Trade Talks Stall,* [2 Current Reports] Int'l Trade Rep. (BNA) 374 (Mar. 13, 1985); Berger, *U.S. Makes Progress in Japan Telecom Talks,* ELECTRONICS WEEK, Apr. 29, 1985, at 24 [hereinafter *U.S. Makes Progress*].

211. *See U.S. Makes Progress, supra* note 210, at 24. Japan initially reduced the number of standards to 30, *Telecommunications Talks Resume Next Week, NTT Accord Consultations Also to Start Then,* [2 Current Reports] Int'l Trade Rep. (BNA) 507 (Apr. 10, 1985), but further reduced this amount to 20. *Latest Move to Open Telecommunications Market Praised by U.S., Other Talks Resume,* [2 Current Reports] Int'l Trade Rep. (BNA) 564, 565 (Apr. 24, 1985).

212. *U.S. Makes Progress, supra* note 210, at 24; *see* Dentzer & Dahlby, *Getting a Foot in Japan's Door,* NEWSWEEK, Mar. 25, 1985, at 74. For example, Japan eliminated the requirement that all phones make the same buzzing sound to indicate to a caller that the telephone at the other end of the line is ringing. *Latest Move to Open Telecommunications Market Praised by U.S., Other Talks Resume,* [2 Current Reports] Int'l Trade Rep. (BNA) 564, 565 (Apr. 24, 1985). Japan also eliminated voice-quality requirements for signal-power-level tests and acoustic-coupler standards. *U.S. Makes Progress, supra* note 210, at 24.

213. *See U.S. Makes Progress, supra* note 210, at 24.

214. *See Latest Move to Open Telecommunications Market Praised by U.S., Other Talks Resume,* [2 Current Reports] Int'l Trade Rep. (BNA) 564, 565 (Apr. 24, 1985); *see also New Telecommunications Certification Plan Said to Allow Better U.S. Access To Market,* [2 Current Reports] Int'l Trade Rep. (BNA) 781, 783 (June 12, 1985).

215. *U.S. Makes Progress, supra* note 210, at 24.

216. *Id.*; *see New Telecommunications Certification Plan Said to Allow Better U.S. Access to Market,* [2 Current Reports] Int'l Trade Rep. (BNA) 781, 783 (June 12, 1985). The FCC reserves a similar right to further inspect equipment offered in the

now able to self-certify their products with documents,[217] appeared to have technical parity with other competitors in the Japanese telecommunications market.[218] However, one United States official[219] warned that although the MPT significantly modified its certification system and would codify the amended standards to achieve impartiality, United States manufacturers should wait and see how the Ministry manipulated the entire Japanese telecommunications market before assessing the competitiveness of foreign products.[220]

3. The Telecommunications Trade Deficit with Japan

One of the most difficult issues facing the United States today is how to solve the huge trade deficit with Japan.[221] In 1986 the total trade deficit with Japan was approximately $59 billion.[222] With respect to telecommunications, the 1986 trade deficit with Japan exceeded $2 billion.[223] Although the United States appears to have increased dramati-

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United States. *U.S. Makes Progress, supra* note 210, at 24.

217. Robertson, *Commerce: Japan Backs Down on Some Telecom Bars*, ELECTRONIC NEWS, Mar. 25, 1985, at 6.

218. *New Telecommunications Certification Plan Said to Allow Better U.S. Access to Market,* [2 Current Reports] Int'l Trade Rep. (BNA) 781, 782 (June 12, 1985). "No American manufacturer should have difficulty complying with the Japanese standards as they have been revised. We have achieved reciprocity of market on a technical level." *U.S. Makes Progress, supra* note 210, at 24 (statement by John T. McDonnell, Jr., group vice president for the Electronics Industries Association). This is particularly true because JATE, like the FCC, is the single body which approves all terminal equipment. NTT and the MPT, however, still establish the technical requirements subject to JATE approval. *See New Telecommunications Certification Plan Said to Allow Better U.S. Access to Market,* [2 Current Reports] Int'l Trade Rep. (BNA) 781, 782 (June 12, 1985).

219. Donald S. Abelson, Director of Technical Trade Barriers, Office of the U.S. Trade Representative.

220. *U.S. Makes Progress, supra* note 210, at 25.

221. The bilateral trade balance between 1975 and 1977 averaged $5 billion in Japan's favor. From 1978 through 1980, this figure increased to an average of $10 billion. The trade deficit with Japan further increased from 1981 to 1983 to an average of $17 billion. Ahearn, *supra* note 175, at 44.

222. *1986 Deficit Hits Record $153 Billion Even Though December Figures Showed Improvement,* [4 Current Reports] Int'l Trade Rep. (BNA) 125 (Feb. 4, 1987). In 1984, the trade deficit with Japan equalled $37 billion. Trade Balance Information Sheet, United States Trade Representative Office. The trade deficit with Japan climbed to $50 billion in 1985. *U.S., Japanese Officials Disagree on Cause of Trade Imbalance But Not on Its Effects,* [3 Current Reports] Int'l Trade Rep. (BNA) 1291 (Oct. 22, 1986).

223. *USTR Official Warns of Trade Retaliation Against West Germany in Telecommunications,* [4 Current Reports] Int'l Trade Rep. (BNA) 313 (Mar. 4, 1987). In 1984,

cally its exportation of telecommunications equipment by more than seventy-nine percent from 1978 to 1983, these exports actually accounted for less than four percent of the total foreign consumption of telecommunications products for the same period.[224] Moreover, the share of the domestic market held by United States producers decreased by almost eight percent during this period.[225]

The United States telecommunications industry incurred its first trade deficit in over ten years in 1983 as a result of FCC actions in the 1960s and 1970s and the expected divestiture of AT&T in 1984.[226] Although United States telecommunications exports to the Middle East and developing countries grew significantly, the drastic increase in United States telecommunications imports from technologically advanced nations such as Japan negated the impact of the growth in exports to these countries.[227] By 1983, Japan exported 18.7 times as much telecommunications equipment to the United States as the United States exported to Japan.[228] One major reason for the disparity in trade between the United States and these advanced countries, particularly Japan, is that most foreign markets which have their own indigenous equipment man-

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the telecommunications trade deficit with Japan approached $1.9 billion, doubling the $960 million deficit with the country in 1982. *Telecommunications Trade Hearings, supra* note 81, at 1 (statement of Rep. Timothy E. Wirth, Chairman of Subcomm. on Telecommunications, Consumer Protection, and Finance). The overall telecommunications deficit in 1984 was only $608 million, *id.* at 2, so it is obvious that the lack of market access in Japan is the major reason for this deficit. Note that the trade figures used may not be consistent with other sources because of the varying definition or scope of "telecommunications equipment." *Compare id.* at 10 (statement of Robert S. Strauss) (telecommunications trade deficit of $1.1 billion in 1984) *with Chaffee Offers Bill to Halt Telecommunication Sales in U.S. Until Japanese Market is Opened,* [2 Current Reports] Int'l Trade Rep. (BNA) 449 (Mar. 27, 1985) (telecommunications trade deficit for 1984 equalled $900 million). The Dept. of Commerce estimated the 1985 telecommunications trade deficit at $1.1 billion. *Telecommunication Trade Bill Gets Support in Two House Panels, Markups Set,* [2 Current Reports] Int'l Trade Rep. (BNA) 1229, 1230 (Oct. 2, 1985).

224. USITC Pub. 1542, *supra* note 59, at xii.

225. *Id.* at x (United States producers' share decreased from 97 percent to 89.2 percent).

226. *Telecommunications Trade Hearings, supra* note 81, at 1-2 (statement of Timothy E. Wirth) ($56 million deficit); *see supra* notes 61-71 and accompanying text.

227. *See* S. REP. NO. 204, *supra* note 70, at 2-3.

228. Japan exported $404.5 million of telecommunications equipment to the United States in fiscal 1983 while the United States exported a mere $21.6 million to Japan. Murtha, *supra* note 64, at 48 (estimate by the Electronics Industry Association of Japan).

ufacturers are closed to United States telecommunications products.[229] As one United States official argued:

> [The] growth in foreign entries . . . has not been matched by equivalent market opportunities for U.S. equipment producers abroad. Foreign markets in the industrialized nations remain largely closed to U.S. telecommunications products, reflecting factors such as the strong preference of domestic post and telecommunications authorities for domestic suppliers, buy national industrial policies, and a variety of tariff and non-tariff barriers. As a result of this lack of balance in market opportunities, the U.S. balance of trade in telecommunications equipment is deteriorating dramatically.[230]

The overall trade deficit with Japan, and the telecommunications trade balance in particular, can be attributed to factors other than Japanese manufacturers. First, Japan maintains an overall trade surplus because the value of the products it manufactures far exceeds the total consumption of the country.[231] Although Japan consistently has a negative trade balance in services and is poor in natural resources, it incurs a positive trade balance from the market success of its manufactured products.[232] Second, while exportation of manufactured products is a national priority in Japan, importation is not.[233] This policy can be interpreted to mean that Japan's top trade priority is the protection of its home market. Third, the business environment in Japan does not naturally lend itself to free interaction between domestic and foreign entities. Loyalty to long-term personal relations, lifetime employment policies, extensive government-business partnerships, tightly-knit business circles, and an overall sense of team play are commendable qualities for a national economy, but they have adverse effects in the "context of an interdependent world economy."[234]

Before the Electric Telecommunication Business Act, United States firms had difficulty penetrating the Japanese market despite Japan's lack of a central manufacturer of supplies and equipment comparable to

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229. *See* S. REP. No. 204, *supra* note 70, at 2-3.

230. *Chaffee Offers Bill to Halt Telecommunication Sales in U.S. Until Japanese Market is Opened,* [2 Current Reports] Int'l Trade Rep. (BNA) 449 (Mar. 27, 1985).

231. Ahearn, *supra* note 175, at 41.

232. *Id.* "A resource-poor country must export manufactured goods to pay for its imported oil and primary products." *Id.* at 44. Japan would still maintain a large trade surplus in manufactured goods even if its overall trade balance was zero. *Id.* at 44-45.

233. *Id.* at 43. Many Japanese believe that buying foreign products does not benefit Japan. *Id.*

234. *Id.*

Western Electric.[235] Once NTT coordinated technological development and common standards for equipment and allocated sectors of the telecommunications market among a select group of Japanese producers, these firms experienced lower overall manufacturing and marketing costs.[236] This preferred group, or telecommunications family, developed products that shared common components and production facilities, thereby substantially reducing their expenses.[237] The major Japanese firms quickly penetrated foreign telecommunications markets, particularly the United States, because they could offer products at lower prices due to NTT's procurement policies with its domestic industry.[238]

In 1980 the United States and Japan entered into the NTT Procurement Agreement[239] in an effort to open Japan's telecommunications market. NTT procurement of United States equipment increased from $17 million in 1981 to $180 million in 1984.[240] United States firms, however, failed to realize most of this growth in areas of primary concern.[241] Most of the equipment and supplies ordered by NTT were either unique or purchased only on a periodical basis.[242] NTT never purchased a substantial quantity of equipment central to the telecommunications network, which would promote the development of long-term relationships with United States firms.[243] Furthermore, NTT

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235. *See* Murtha, *supra* note 64, at 48.

236. Borrus & Zysman, *supra* note 87, at 143, 144.

237. *Id.*

238. *Id.* Japanese firms could afford to sell equipment abroad at lower prices because NTT purchased high volumes of equipment at premium prices within Japan, thereby subsidizing these "exporting expeditions." *See id.* at 144, 157.

239. Trade: Procurement in Telecommunications, Dec. 19, 1980, United States-Japan, 32 U.S.T. 4495, T.I.A.S. No. 9961. The procurement policies of NTT were a major source of friction between Japan and United States in the late 1970s. NTT traditionally awarded less than one percent of its total tenders to foreign suppliers. Ahearn, *supra* note 175, at 53. Instead, NTT awarded approximately 96 percent of its procurement to domestic suppliers. *Id.* This "family" of suppliers included NEC, Oki, Fujitsu, and Hitachi. *Id.*

240. S. REP. No. 204, *supra* note 70, at 4; ($140 million in 1983); Borrus & Zysman, *supra* note 87, at 160; Murtha, *supra* note 64, at 48.

241. Murtha, *supra* note 64, at 48; *see* S. REP. No. 204, *supra* note 70, at 4. One area in which United States manufacturers hoped NTT procurement would materialize was research and development projects. This growth never came about.

242. *See* S. REP. No. 204, *supra* note 70, at 4.

243. Ahearn, *supra* note 175, at 53. Most of the equipment which NTT procured from foreign telecommunications suppliers consisted of copier paper, telephone poles, magnetic tape, data processing components, computers and systems, peripherals, and semiconductor manufacturing and test equipment. Borrus & Zysman, *supra* note 87, at 160.

purchases only a small percentage of its total procurement from foreign entities.[244] Even the marginal importance of procurement contracts with NTT, however, will decline as NTT controls a smaller portion of the overall telecommunications market in Japan.[245] Encouraging more favorable procurement practices by NTT remains a priority goal for the United States, but competitors realize that NTT is no longer the only viable entrance into the Japanese market.

Many United States officials and telecommunications firms believe that the enactment of the Electric Telecommunication Business Act may ease a substantial portion of the trade deficit's burden on this country. Consequently, they seek to open Japan's market as soon as possible through negotiations and threatening trade bills.[246] United States officials cite the lack of market access as the principal cause of the trade deficit.[247] By imposing both visible and invisible trade barriers, Japan severely limits home market access to United States exports and alters the free flow market forces.[248] The Senate Committee on Finance reported that "[a]lthough the Japanese market might, on the surface, appear responsive to the price, quality and other competitive factors that generally govern free markets, Japanese barriers render the Japanese market much less free and transparent."[249] Studies show, however, that Japanese consumers in general do not discriminate between foreign and domestic goods.[250] That data, coupled with the conviction of United States firms

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Congress is well-aware of this practice and does not look favorably upon it.

> [T]he resistance to buying American telecommunications products has continued in spite of the "NTT agreement" under which the Japanese Government committed itself to opening up NTT's procurement practices. . . . Since the NTT agreement has been in force, no American company has sold a single piece of network switching or transmission equipment in Japan. Let me repeat that. No American company, since that first agreement, the NTT agreement, has sold a single piece of network switching or transmission equipment in Japan that I know of. These protectionist procurement policies are obviously aimed at promoting the development of domestic telecommunication industries within each of these countries. However, these policies I said directly cost us the exports, the jobs, and ultimately will cost us our competitive edge and will lead to the decline of these vital industries in which we are so far ahead today.

Telecommunications Trade Hearings, supra note 81, at 10 (statement of Robert S. Strauss).

244. S. REP. NO. 204, *supra* note 70, at 4.

245. *Id.*

246. *See generally infra* notes 263-354 and accompanying text.

247. *See infra* section V.

248. S. REP. NO. 102, *supra* note 175, at 4.

249. *Id.*

250. Schoenbaum, *Trade Friction With Japan and the American Policy Response,*

that their telecommunications equipment is superior to the Japanese products,[251] suggests that the real barrier to free trade is not the Japanese consumer but the Japanese Government.

Japan, on the other hand, pledges that its markets are open to foreign competition and that foreign firms receive the same treatment as domestic firms.[252] Japan also asserts that the overvalued dollar[253] and the lack of aggressive exportation policies of United States firms[254] significantly contributed to the United States' trade deficit.

V. THE UNITED STATES RESPONSE TO THE JAPANESE LEGISLATION AND THE TELECOMMUNICATIONS TRADE DEFICIT

The United States telecommunications firms, the Reagan Administration and Congress reacted strongly to the negative trade balance in general and to Japan and the telecommunications deficit in particular. Congress has taken a "get-tough" stance on the United States-Japan trade dispute. Both the Senate and the House of Representatives responded to the inaccessibility of the Japanese market by introducing telecommunications trade bills in 1985 and 1986.[255] All of the bills call for some form

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82 MICH. L. REV. 1647, 1660, 1660 n.39 (1984).

251. *See Chaffee Offers Bill to Halt Telecommunication Sales in U.S. Until Japanese Market is Opened,* [2 Current Reports] Int'l Trade Rep. (BNA) 449 (Mar. 27, 1985). *But see* USITC Pub. 1542, *supra* note 59, at 45.

252. *U.S. May Retaliate If Japan Denies Access to Telecommunications Market, Officials Say,* [2 Current Reports] Int'l Trade Rep. (BNA) 225 (Feb. 13, 1985).

253. *See U.S., Japan Trade Open Talks with Focus on Telecommunictions, Car VRA Tie-In Seen,* [2 Current Reports] Int'l Trade Rep. (BNA) 173, 174 (Jan. 30, 1985).

254. *Id.*

255. Senator John Chaffee (Rep.-RI), a strong opponent of protectionist measures, introduced an out-of-character bill in the Senate on March 20, 1985, "[t]o prohibit the entry [in the United States] of Japanese telecommunication products until Japanese markets are open to United States telecommunication products." S. 728, 99th Cong., 1st Sess. 1 (1985). This bill was a product of congressional frustration with Japanese bureaucrats. *See Chaffee Offers Bill to Halt Telecommunication Sales in U.S. Until Japanese Market is Opened,* [2 Current Reports] Int'l Trade Rep. (BNA) 449 (Mar. 27, 1985). It has not received much support and therefore is not considered one of the major bills addressing the telecommunications trade issue which might be enacted.

On April 17, 1985, Senator John Danforth (Rep.-MO) introduced a major telecommunications trade bill "[t]o promote expansion of international trade in telecommunications equipment and services." S. 942, 99th Cong., 1st Sess. 1 (1985). The bill is discussed in section V.A.1 of this note.

Representative Timothy Wirth (Dem.-CO) and James Florio (Dem.-NJ) introduced another major telecommunications trade bill on July 31, 1985, entitled "Telecommunications Trade Act of 1985." H.R. 3131, 99th Cong., 1st Sess. (1985). Versions of this bill

of retaliation by the United States. Congress may soon enact one of these bills.

Resolving the telecommunications trade deficit is not easy because trade with Japan is not a simple two-player game. Eliminating or reducing the trade deficit involves several considerations. First, any trade legislation that provides protection to domestic firms under the pretense of retaliatory measures may not be consistent with GATT.[256] Furthermore, this type of legislation undermines confidence in the efficacy of the free-trade ideal.[257]

Second, the United States must tailor its actions to avoid adversely affecting either domestic consumers or other countries trading with the United States.[258] Directing retaliatory measures toward Japanese exports for which there are foreign or domestic alternative sources may minimize these adverse effects.[259] Third, the United States traditionally supports free trade.[260] Any protectionist legislation or retaliatory action will appear to contradict current United States trade policy.[261] While Congress supports a restrictive trade bill, the Reagan Administration approaches the problem with the opposite strategy. The Reagan Administration believes that by applying political pressure on foreign governments to open their markets, it will avoid implementing protectionist measures in this country.[262]

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are discussed in section V.A.2 of this note.

Legislators introduced other telecommunications trade legislation in Congress in 1985 and 1986. *See, e.g.*, H.R. 3439, 99th Cong., 2d Sess. (1986); S. 1404, 99th Cong., 1st Sess. (1985) (the Packwood bill "to require the President to respond to unfair trade practices of Japan"); S. 234, 99th Cong., 1st Sess. (1985).

256. *See* Schoenbaum, *supra* note 250, at 1648.

257. *Id.* The free-trade ideal presently is under severe intellectual and political attack.

258. *See Administration, Congress Starting to Weigh Retaliatory Measures as Trade Talks Stall*, [2 Current Reports] Int'l Trade Rep. (BNA) 374 (Mar. 13, 1985); *see also* S. REP. NO. 102, *supra* note 175, at 11.

259. *See* S. REP. NO. 102, *supra* note 175, at 11.

260. *See Administration, Congress Starting to Weigh Retaliatory Measures as Trade Talks Stall*, [2 Current Reports] Int'l Trade Rep. (BNA) 374 (Mar. 13, 1985) (United States interested in lowering trade barriers).

261. The policy of retaliatory protectionism, however, is gaining political appeal in the world trade arena. *See* Schoenbaum, *supra* note 250, at 1647.

262. *See* Farnsworth, *Section 301 Is Polished As U.S. Trade Weapon*, N.Y. Times, Aug. 27, 1985, at D1, col. 1.

A. *Legislative Responses in 1985 and 1986*

1. The Danforth Bill

In 1985 Senator John Danforth[263] introduced legislation designed to stimulate expansion of international telecommunications trade.[264] The Danforth Bill calls for the "[s]ystematic use of access to the United States market as negotiating leverage and strict enforcement of existing trade agreements" to achieve a more open world trading system.[265] The Bill purportedly will promote technological growth in the United States telecommunications industry, thereby producing more domestic employment opportunities.[266] The legislation's fundamental negotiating policy is the attainment of "substantially equivalent competitive opportunities" ("SECO").[267] The United States can achieve "SECO" in foreign markets in other countries through a variety of actions.

The proposed legislation requires the United States Trade Representative (USTR)[268] to conduct an investigation within four months of the Bill's enactment to determine which countries, by their acts, policies, and practices in the international marketplace, deny "SECO" to United

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263. *See supra* note 255.

264. *See* S. 942, 99th Cong., 1st Sess. (1985); S. REP. NO. 204, *supra* note 70. Danforth introduced other legislation in 1984 that would have more than doubled tariffs on telecommunications equipment imported from countries that failed to enter into trade agreements with the United States. *Redrafted Telecommunications Bill Out Soon,* [2 Current Reports] Int'l Trade Rep. (BNA) 239 (Feb. 13, 1985). Danforth redrafted the 1984 bill into the one (S. 942) he offered in 1985. The Senate Finance Committee approved and amended S. 942 on September 17, 1985, primarily redrafting its implementation timetables. *Senate Finance Approves Bill to Improve Exports of U.S. Telecommunications Products,* [2 Current Reports] Int'l Trade Rep. (BNA) 1155 (Sept. 18, 1985).

265. S. REP. NO. 204, *supra* note 70, at 1. Danforth contended that Japan would not voluntarily open its markets. The Danforth Bill provides the United States with negotiating authority and leverage to achieve foreign market access.

266. *See id.* at 7 ("The growing imbalance of trade opportunities resulting from deregulation and divestiture in the United States market and the continuation of unfair and discriminatory practices in foreign telecommunications markets threatens the loss of jobs in the United States telecommunications industry and its ability to compete").

267. *Id.* at 7. The committee report suggests that the United States continue its open market policy even if other countries refuse to provide United States manufacturers with "SECO."

268. The United States Trade Representative is a Cabinet-level official with the rank of Ambassador. LONG RANGE GOALS, *supra* note 13, at 74. The USTR is responsible for setting and administering the country's international trade policy. He is the principal Presidential advisor on international trade policy and has "lead responsibility for the conduct of international trade negotiations." *Id.* at 75; *see generally* 15 C.F.R. § 2001.3 (1986) (functions of the USTR).

States competitors.[269] This determination depends upon a variety of factors including the actual economic benefit of open markets and present trade practices.[270] Removal of formal trade barriers alone, therefore, may not qualify the particular foreign market as providing "SECO" under the Bill.[271] As one factor in the determination, the USTR must evaluate the benefits accruing to foreign firms from the improved market access in the United States caused by the AT&T divestiture and telecommunications deregulation.[272] The Bill also focuses on invisible barriers, requiring the USTR to examine the patterns of trade that should exist without formal barriers.[273] As the Senate Report accompanying the Danforth Bill explained:

> The requirement that actual patterns of trade be taken into account in determining market openness is designed to go beyond traditional means of analysis that focus primarily on nominal or formal barriers to access. By bringing empirical data and evidence to bear in the determination, the . . . [USTR should] find evidence of trade distorting practices that are of a more informal or less visible nature.[274]

The USTR, therefore, may compare market share statistics of domestic and foreign firms in both the United States and Japan.[275] The foreign country market conditions, however, do not have to mirror market conditions in the United States market.[276] The Danforth Bill recognizes that countries with which the United States trades operate under different

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269. S. 942, 99th Cong., 1st Sess. § 101(a)(1) (1985); S. REP. No. 204, *supra* note 70, at 8.

270. S. 942, 99th Cong., 1st Sess. § 101(b)(1)(A)-(B) (1985). This section provides that:

> In conducting the analysis . . ., the United States Trade Representative shall take into account the following factors: (A) the economic benefits (actual or potential) accruing to firms in each foreign country and to their United States subsidiaries from the open access to the United States telecommunications market that has resulted from the liberalization and restructuring of such market; and (B) actual patterns trade, including sales of telecommunications products and services in foreign countries by United States firms and their subsidiaries in relation to the international competitive position and export potential of such products and services.

271. *See* S. REP. No. 204, *supra* note 70, at 8.

272. *See* S. 942, 99th Cong., 1st Sess. § 101(b)(1)(A) (1985); S. REP. No. 204, *supra* note 70, at 7.

273. S. REP. No. 204, *supra* note 70, at 8.

274. *Id.* at 9; *see* S. 942, 99th Cong., 1st Sess. § 101(b)(1)(B) (1985).

275. S. REP. No. 204, *supra* note 70, at 9. Sales by foreign-owned subsidiaries based in the United States is not a measure of the openness of United States or foreign markets. *Id.*

276. *Id.* at 7.

economic structures and that their markets consequently reflect dissimilar national objectives.[277]

Once the USTR determines that a country denies "SECO" to United States firms, then the USTR must also decide whether that country's acts, policies or practices also contravene existing trade agreements with the United States.[278] The USTR considers essentially the same criteria in evaluating the patterns of trade as those considered in its original inquiry as to whether the particular country denies "SECO" to United States firms.[279]

The USTR may conclude that a country's policy denies "SECO" to the United States but does not violate existing agreements. Upon this determination, the Danforth Bill directs the President to enter into trade agreement negotiations with that country for the purpose of attaining "SECO" in its telecommunications market.[280] The President has author-

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277. *See id.*

278. *See* S. 942, 99th Cong., 1st Sess. § 101(a)(2) (1985). This section provides that the USTR,

> for purposes of section 103, shall determine which of such acts, policies, or practices—(A) is inconsistent with the provisions of, otherwise denies benefits to the United States under, any trade agreement, (B) is unjustifiable and burdens or restricts United States commerce, or (C) otherwise has the effect of—
>
> (i) nullifying or impairing any benefit from concessions or commitments to the United States under any agreement, or
>
> (ii) impeding attainment of any objective of any agreement to which the United States is a party.

279. *See id.* § 101(b)(2). The USTR shall:

> consider as dispositive any evidence of actual patterns of trade (including sales of telecommunications products and services in a foreign country by United States firms and their subsidiaries) that do not reflect patterns of trade which would reasonably be anticipated to flow from the concessions or commitments of such country based on the international competitive position and export of such products and services.

280. *Id.* § 102(a)(1). The President is guided by general objectives in these negotiations:

> (i) to obtain multilateral or bilateral agreements (or the modification of existing agreements) that provide to the telecommunications products and services of United States firms and their subsidiaries competitive opportunities in foreign markets that are substantially equivalent to the competitive opportunities available in the United States market to such products and services of foreign firms and their United States subsidiaries;
>
> (ii) to correct the imbalance in competitive opportunities accruing from uncompensated reductions in barriers to the access of foreign firms and their subsidiaries to the United States telecommunications market; and
>
> (iii) to facilitate the increase in United States exports of telecommunications products and services to a level commensurate with the competitive position of the

ity for three years to negotiate a trade agreement. If he is not successful, however, in entering into an agreement that achieves "SECO," he must, no later than two years after the Bill's enactment, take whatever actions provided for in the Bill that are necessary to achieve "SECO."[281] The President may choose from a wide array of retaliatory measures which include:[282] (1) terminating, withdrawing or suspending provisions of trade agreements which prohibit or limit United States imposition of tariff or nontariff barriers on foreign telecommunications products;[283] (2) initiating an action under section 301(b) or (c) of the Trade Act of 1974;[284] and (3) prohibiting the purchase of foreign telecommunications

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United States telecommunications industry.

Id. § 102(a)(2)(A)(i)-(iii). The President is also guided by specific objectives, which are:

(i) national treatment for such products and services of United States firms and their subsidiaries;

(ii) most-favored-nation treatment for such products and services;

(iii) nondiscriminatory government procurement policies with respect to such products and services;

(iv) equipment standards and procedures for certification of equipment that do not exceed the minimum standards and procedures necessary to protect the telecommunications network;

(v) reduction or elimination of custom duties on telecommunications products;

(vi) elimination of subsidies, dumping, violations of intellectual property rights, and other unfair trade practices that distort international trade in telecommunications;

(vii) elimination of investment barriers that restrict the establishment of foreign-owned business entities which market telecommunications products and services; and

(viii) monitoring and dispute settlement mechanisms to facilitate compliance with telecommunications trade agreements.

Id. § 102(a)(2)(B)(i)-(viii). Congress must approve any such agreements. S. REP. No. 204, *supra* note 70, at 6.

281. S. 942, 99th Cong., 1st Sess. § 102(b)(1) (1985); *see* S. REP. No. 204, *supra* note 70, at 6. The President first must take those actions which will most directly affect telecommunications trade with the country. S. 942, 99th Cong., 1st Sess. § 102(b)(2) (1985).

282. *See* S. 942, 99th Cong., 1st Sess. § 102(b)(3)(A)-(H) (1985).

283. *Id.* § 102(b)(3)(A).

284. *Id.* § 102(b)(3)(B). Section 301 of the Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2411 (Supp. III 1985)), is the primary statute providing the President authority to retaliate against unfair trade practices of foreign countries. The President has broad discretionary authority under section 301 to implement sanctions. For a detailed discussion of section 301, see Coffield, *Using Section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why and How*, 6 N.C. J. INT'L L. & COMM. REG. 381 (1981) (this article provides a good overview of section 301 even though that section has since been amended).

imports by the United States Government.[285] Additionally, the President can compensate those countries whose exports are affected adversely by United States retaliatory actions.[286] Thus, under a flexible plan, the President can implement the most effective actions on the specific country,[287] while also minimizing the negative impact on United States consumers and nontargeted countries.[288]

The proposed act also addresses violations of existing trade agreements. The USTR, within thirty days of the determination of a violation, must take actions necessary to offset the violative policies and restore the balance of concessions between the violating country and the United States.[289] The retaliatory measures available to the USTR[290] are more limited than those available to the President.[291] The USTR may only initiate a section 301 action[292] or modify or eliminate restrictions on the United States by trade agreements between the United States and the violating country.[293]

If a country denies "SECO" and violates a trade agreement covering only a portion of its telecommunications market, the United States can attempt both retaliation and negotiation under the Danforth Bill.[294] Given present Congressional frustration with the trade deficit, it is quite possible that Japan will be the object of both types of prescribed sanctions.[295]

Although the Danforth Bill calls for mandatory retaliation by the President and the USTR for unfair trade and violations of trade agreements, it focuses on the actual source of the United States telecommunications trade deficit with Japan—the lack of market access for United States competitors. The legislation implicitly recognizes that eliminating the negative trade balance with Japan is the priority objective, but the trade deficit itself does not trigger mandatory actions or negotiations by

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285. *Id.* § 102(b)(3)(C).

286. S. REP. No. 204, *supra* note 70, at 6.

287. *Id.* at 12.

288. *See id.*

289. S. 942, 99th Cong., 1st Sess. § 103(a) (1985).

290. *See id.* § 103(c)(1).

291. *Compare id.* § 103(c)(1) *with id.* § 102(b)(3).

292. *Id.* § 103(c)(1)(B)-(C).

293. *Id.* § 103(c)(1)(A).

294. S. REP. No. 204, *supra* note 70, at 9. If a country denies "SECO" yet adheres to the terms of trade agreements, only the negotiation track would apply. *Id.*

295. *See Senators, Dissatisfied with Administration Actions, See Need For Telecommunications Legislation,* [2 Current Reports] Int'l Trade Rep. (BNA) 653, 654 (May 8, 1985).

the United States. Although Japanese success in the automobile industry, where that country has an acknowledged technological advantage, accounts for much of the trade deficit, the Danforth Bill properly focuses only on the trade deficit in the telecommunications sector. The Bill eliminates the possibility that the United States will retaliate against a foreign telecommunications industry on "nontelecommunication" grounds.[296] Moreover, the legislation restricts negotiations and retaliations by the United States to the proper target—the particular country denying telecommunications market access to United States firms.

2. The Telecommunications Trade Act of 1986

In 1986 Congress considered two versions of the Telecommunications Trade Act of 1986.[297] Both the House Committee on Energy and Commerce and the House Committee on Ways and Means reviewed and approved amended versions of the original bill.[298] The respective amendments, however, render the bills distinctive pieces of legislation for full House consideration. Both versions of the Telecommunications Trade Act of 1986 suggest directions that Congress may take concerning the United States-Japan telecommunications trade issue.

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296. Examples of "nontelecommunications" grounds include: (1) the success of a foreign country's industry (other than the telecommunications industry) in the United States; and (2) the lack of success of a United States industry (other than the telecommunications industry) in a foreign country.

297. H.R. 3131, 99th Cong., 1st Sess. (1985). The original bill was entitled the "Telecommunications Trade Act of 1985" because it was introduced in Congress in 1985. *See id.* § 1(a).

298. Telecommunications Trade Act of 1986, H.R. 3131, 99th Cong., 2d Sess. (1986), *reprinted in* TELECOMMUNICATIONS TRADE ACT OF 1986, H.R. REP. NO. 471, 99th Cong., 2d Sess., pt. 1, at 1-8 (1986) (Committee on Energy and Commerce version). This version of H.R. 3131 is almost identical to the original H.R. 3131. After Timothy E. Wirth, James J. Florio, and others introduced the Telecommunications Trade Act in Congress on July 31, 1985, the Committee on Energy and Commerce was the first group to examine and redraft the proposed legislation. *See also* Telecommunications Trade Act of 1986, H.R. 3131, 99th Cong., 2d Sess. (1986), *reprinted in* TELECOMMUNICATIONS TRADE ACT OF 1986, H.R. REP. NO. 471, 99th Cong., 2d Sess., pt. 2, at 1-8 (1986) (the Committee on Ways and Means version). Subsequent to the Committee on Energy and Commerce's examination and report, *supra*, the Committee on Ways and Means and the Subcommittee on Trade considered H.R. 3131. The Subcommittee on Trade conducted hearings in March 1986 and thereafter issued a favorable report, along with minor revisions of H.R. 3131. In April 1986, the Committee on Ways and Means likewise issued a favorable report. The Committee on Ways and Means, however, substantially amended the proposed legislation.

a. The Committee on Energy and Commerce Version of H.R. 3131

The Committee on Energy and Commerce slightly amended the original version of the Telecommunications Trade Act. The amended legislation focuses on the identification and reduction of trade barriers to United States telecommunications firms.[299] Further, the Bill emphasizes the need for the United States to negotiate for open access to foreign countries[300] while simultaneously maintaining open domestic markets.[301]

The Bill provides two types of measures capable of opening foreign markets. Measures in Title I relate to telecommunications equipment certification standards and procurement of international satellite facilities. Measures taken under Title I, unlike those under Title II, do not require an investigation by the Secretary of Commerce or a determination of harm by the President prior to their implementation.

Title I requires the FCC to perform two tasks. First, the FCC must monitor procurement practices of foreign countries with United States firms under operating agreements for international satellite facilities.[302] If the FCC finds that a country has imposed satellite procurement restrictions, it may revoke or suspend any license, permit or authority previously awarded the United States provider which allow that provider to enter into such operating agreements until the procurement restrictions are removed.[303]

Title I also requires the FCC to establish fair and effective certification standards for telecommunications equipment manufactured or as-

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299. H.R. 3131, 99th Cong., 2d Sess. § 2(b) (1986), *reprinted in* H.R. REP. NO. 471, pt. 1, *supra* note 298, at 2-3 (stated purposes of H.R. 3131). *Compare id. with* H.R. 3131, 99th Cong. 1st Sess. § 2(b) (1985).

300. Section 2(a)(6) of the Bill, which enumerates congressional findings, provides that:

> open and unrestricted access to foreign telecommunications markets by United States telecommunications suppliers is necessary and critical for the continued economic health, growth, and international competitiveness of the United States telecommunications industry and to the sustained growth and expansion of the United States economy.

H.R. 3131, 99th Cong., 2d Sess. § 2(a)(6) (1985), *reprinted in* H.R. Rep. No. 471, pt. 1, *supra* note 298, at 2.

301. Congress also found that "United States policies should be directed to opening up foreign markets and not the closing of domestic United States markets." H.R. 3131, 99th Cong., 2d Sess. § 2(a)(12) (1986), *reprinted in* H.R. REP. NO. 471, pt. 1, *supra* note 298, at 2; *see also* H.R. REP. NO. 471, pt. 1, *supra* note 298, at 9.

302. *See* H.R. 3131, 99th Cong., 2d Sess. § 101 (1986), *reprinted in* H.R. REP. NO. 471, pt. 1, *supra* note 298, at 3-4.

303. *Id.* § 101(b), *reprinted at* 4. The FCC also has the option to take other appropriate action. H.R. REP. NO. 471, pt. 1, *supra* note 298, at 23.

sembled outside the United States.[304] As part of this certification method, the FCC requires a country from which telecommunications equipment originates to accept United States equipment entering that country without additional testing or inspection.[305] If the foreign country accepts United States-tested equipment claimed to meet the country's performance and reliability standards, then the FCC will likewise accept the country's equipment in the United States without also conducting further testing. Thus, any country that trades telecommunications equipment with the United States must apply the FCC "harm to the network"[306] standard within its own borders. If a country fails to provide the reciprocal certification process and equipment standards, the FCC may restrict the importation of equipment produced by that country into the United States.[307] The FCC may design a certification program for a particular country, subject to approval by the Secretary of Commerce.[308] Although the Bill provides this procedural safeguard, the legislators possibly did not intend to enable the FCC to establish international trade restrictions that contradict administrative policy.

Negotiated access to foreign telecommunications markets is the preferred alternative. Under certain circumstances, however, the President, under Title II, must take action either through the FCC or under the Trade Act of 1974 to open foreign markets to United States suppliers. Only if negotiations fail to provide "equivalent telecommunications market access,"[309] however, will the United States take action to restrict for-

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304. H.R. 3131, 99th Cong., 2d Sess § 102(a) (1986), *reprinted in* H.R. REP. No. 471, pt. 1, *supra* note 298, at 4.

305. *Id.* § 102(b), *reprinted at* 4; *see also* H.R. REP. No. 471, pt. 1, *supra* note 298, at 24.

306. *Supra* notes 13, 63.

307. H.R. 3131, 99th Cong., 2d Sess. § 102(b)(2)-(5) (1986), *reprinted in* H.R. REP. No. 471, pt. 1, *supra* note 298, at 4-5; *see also* H.R. REP. No. 471, pt. 1, *supra* note 298, at 24-25.

308. *See* H.R. 3131, 99th Cong., 2d Sess. § 102(b)(3)-(4) (1986), *reprinted in* H.R. REP. No. 471, pt. 1, *supra* note 298, at 4-5.

309. The legislation defines this term as:

> the opportunities for the exportation from the United States of telecommunications equipment and services to a foreign country are substantially equivalent to the opportunities under which foreign suppliers of that country can compete in the provision of telecommunications equipment and services in the United States, as measured by the extent of barriers for entry and participation in the telecommunications market.

Id. § 3(3), *reprinted at* 3. The definition of "equivalent telecommunications market access" under H.R. 3131, therefore, is consistent with the conditions necessary for finding "SECO" under S. 942. H.R. REP. No. 471, pt. 1, *supra* note 298, at 9.

eign access to its markets under the proposed legislation.[310]

The Bill requires the Secretary of Commerce (the Secretary) to initiate, within thirty days of the Bill's enactment, an investigation to identify those countries which deny equivalent telecommunications market access to the United States.[311] Private parties may request that the Secretary initiate an investigation of a specific foreign country.[312] In either case, the Secretary must engage in a rather lengthy investigation period. A mandatory investigation by the Secretary may continue up to approximately eight months before the President or the FCC takes any action; an investigation by petition may take longer.[313] While the Department of Commerce conducts its investigation, the President may negotiate for open access to foreign markets.[314]

The Secretary must consider at least three factors to determine whether a foreign country is denying the United States equivalent telecommunications market access.[315] These factors are similar to those considered by the USTR under the Danforth Bill and read as follows:[316]

> (1) the competitiveness of the prices of telecommunications equipment and services sold by United States suppliers in the foreign country, and their marketing efforts in such country;
>
> (2) the success of United States suppliers in providing telecommunications equipment and services in the foreign country, measured in comparison to their relative success in competing in other foreign countries [sic]; and in the United States, for like equipment and services; and
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> (3) the impact on employment in the United States telecommunications

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310. H.R. 3131, 99th Cong., 2d Sess. § 2(a)(13) (1986), *reprinted in* H.R. REP. 471, pt. 1, *supra* note 298, at 2.

311. *Id.* § 201(a)(1), *reprinted at* 5.

312. *See id.* § 201(b)(1)(A), *reprinted at* 5. An interested party, however, may not file a petition until six months from the date of the Bill's enactment. *See id.* § 201 (b)(1)(B), *reprinted at* 5. The original H.R. 3131 set a one year lapse period for such requests.

313. *Compare id.* §§ 201(a)(1), 201(e), 202(a), 203(b) *with id.* §§ 201(b)(2), 201(e), 202(a), 202(b).

314. The Reagan Administration opposes sectoral reciprocity legislation which may tie the President's hands by requiring him to conduct telecommunications negotiations. *See Trade Policy Agenda and Outlook for 1986: Hearing Before the Subcomm. on Trade, House Comm. on Ways and Means,* 99th Cong., 2d Sess. 64 (1986) (statement of Ambassador Clayton Yeutter, United States Trade Representative).

315. *See* H.R. 3131, 99th Cong., 2d Sess. § 201(f)(1)-(3) (1986), *reprinted in* H.R. REP. NO. 471, pt. 1, *supra* note 298, at 6.

316. *Compare infra* note 317 and accompanying text *with supra* notes 271-77 and accompanying text.

industry.[317]

If the Secretary determines that a foreign country is denying substantially equivalent market access to United States suppliers, the President must determine appropriate means to achieve equivalent access. The President, however, has full discretion to choose what measures the United States should implement under the Bill. The Bill authorizes the President to take one or more of several actions under section 301(b) or (c) of the Trade Act of 1974 within sixty days of the Secretary's determination.[318] For example, the President may impose duties or import restrictions on telecommunications equipment entering the United States from that country[319] or limit or deny United States market access to telecommunications firms of that country.[320]

If the President does not take action under section 301, he must direct the FCC to take actions which he determines are necessary or appropriate.[321] The only limitation placed on these actions by the Bill is that the President must determine which of the available actions is appropriate.[322] In the future, the FCC independently may implement retaliatory actions against foreign countries. Such authority would be new to the FCC since, under the current provisions of the Communications Act,[323] the FCC does not have clear legal authority to act in ongoing trade disputes.[324] Although the FCC does not have clear legal authority to inter-

317. H.R. 3131, 99th Cong., 2d Sess. § 201(f)(1)-(3) (1986), *reprinted in* H.R. REP. NO. 471, pt. 1, *supra* note 298, at 6. H.R. 3131, as originally drafted, required consideration of an additional factor, which was eliminated by the committee: "the ability of United States suppliers to gain market access in such foreign country through joint ventures with the suppliers of such country through the establishment of manufacturing plants and facilities located in the foreign country, and the impact of such access on United States trade interests . . . ." H.R. 3131, 99th Cong., 1st Sess. § 4(f)(2)(1985).

318. *See* H.R. 3131, 99th Cong., 2d Sess. § 204 (1986), *reprinted in* H.R. REP. NO. 471, pt. 1, *supra* note 298, at 7.

319. *Id.* § 204(2), *reprinted at* 7.

320. *Id.* § 204(3)-(4), *reprinted at* 7.

321. *Id.* § 202(a), *reprinted at* 6-7.

322. *See id.* §§ 202-03, *reprinted at* 6-7.

323. Communications Act of 1934, 47 U.S.C. §§ 151-611 (1982 & Supp. III 1985).

324. *FCC Staff Study Rejects Use of Equipment Standards in Communications Trade Dispute,* [2 Current Reports] Int'l Trade Rep. (BNA) 1109 (Sept. 11, 1985). Due to the widening telecommunications trade deficit, however, the FCC adopted a notice of inquiry in December 1986, to determine whether the agency should retaliate against protectionist actions by foreign countries. The FCC sought comments from United States manufacturers and firms on the accessibility of the foreign telecomunications markets. The FCC considered limiting access to the United States for foreign firms if the foreign countries did not provide access to its markets on a reciprocal basis. *See FCC Seeking*

vene in international trade disputes, the agency may be willing to take the initiative and act if the telecommunications trade deficit continues to increase. In March 1987 the FCC threatened to deny foreign manufacturers the right to license their telecommunication equipment in the United States if the manufacturers' home countries failed to open their markets to United States telecommunications equipment.[325]

Trade legislation supporters have suggested that the FCC could impose barriers on foreign countries that deny equivalent access to United States competitors by restricting registration to foreign-made equipment.[326] Eliminating certain Japanese products from the United States marketplace could be disastrous to the Japanese telecommunications market.[327] However, the FCC may not be able to impose these barriers without a specific grant of authority[328] or an amendment of the Communications Act.[329]

The version of the Telecommunications Trade Act of 1986 issued by the Committee on Energy and Commerce grants the FCC authority to restrict or foreclose domestic market access to foreign telecommunications equipment suppliers,[330] either through procurement practices or through narrowly-tailored equipment certification and compliance standards. Generally, FCC standards relate to the compatibility of foreign telecommunications equipment with the domestic network.[331] Thus, it is inconsistent with traditional policy to use the regulations for trade dispute purposes.[332] Although the Bill requires the FCC to issue such regulations,[333] it is uncertain whether the FCC could issue the regulations, or amend its present rules and regulations, to withhold foreign certification

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Comments on Effect of Possible Telecommunciation Trade Access Retaliation, [4 Current Reports] Int'l Trade Rep. (BNA) 20 (Jan. 7, 1987).

325. *FCC May Consider Denying Equipment Licenses as Reciprocity in Trade Tool, Chairman Says*, [4 Current Reports] Int'l Trade Rep. (BNA) 352 (Mar. 11, 1987).

326. *FCC Staff Study Rejects Use of Equipment Standards in Communciations Trade Dispute*, [2 Current Reports] Int'l Trade Rep. (BNA) 1109 (Sept. 11, 1985).

327. *U.S. May Retaliate If Japan Denies Access To Telecommunications Market, Officials Say*, [2 Current Reports] Int'l Trade Rep. (BNA) 225 (Feb. 13, 1985).

328. *FCC Staff Study Rejects Use of Equipment Standards in Communications Trade Dispute*, [2 Current Reports] Int'l Trade Rep. (BNA) 1109 (Sept. 11, 1985).

329. *Id.*

330. *See* H.R. 3131, 99th Cong., 2d Sess. § 208(a) (1986), *reprinted in* H.R. REP. No. 471, pt. 1, *supra* note 298, at 8.

331. *FCC Staff Study Rejects Use of Equipment Standards in Communications Trade Dispute*, [2 Current Reports] Int'l Trade Rep. (BNA) 1109 (Sept. 11, 1985).

332. *See id.*

333. H.R. 3131, 99th Cong., 2d Sess. § 208(b) (1986), *reprinted in* H.R. REP. No. 471, pt. 1, *supra* note 298, at 8.

on lack of reciprocity grounds[334] without impermissibly conflicting with the Communications Act of 1934. If the FCC amends the rules and regulations, it will incur additional administrative costs to accommodate its expanded scope of authority. Even if the FCC designed regulations to obtain equal access in domestic markets, it would impose additional, perhaps unacceptable burdens on United States firms forced to comply with the new standards. The speculative benefits to the balance of trade from any new regulation must be weighed against these costs to United States companies.

b. The Committee on Ways and Means Version of H.R. 3131

The Committee on Ways and Means passed an amended version of the Telecommunications Trade Act that closely resembles the Danforth Bill.[335] The Committee supports vigorous efforts to achieve foreign market access without relying on multilateral trade negotiations.[336] Although multilateral trade negotiations "traditionally proceed at a relatively slow pace,"[337] negotiations allowed under the Committee on Ways and Means' Bill conceivably can last up to three and one-half years.[338]

Under the Ways and Means Bill, the USTR must identify the countries with a substantial potential market for United States telecommunications products and services that deny "fully competitive market opportunities" to United States telecommunications firms.[339] As provided in the Danforth Bill and the Energy and Commerce Committee's version of H.R. 3131, private parties can petition the USTR to conduct an investigation.[340] The USTR must complete the investigation, whether self-initiated or by petition, within six months of its commencement.[341]

The Bill provides a list of primary and secondary negotiating objectives[342] from which the USTR will establish specific objectives regarding

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334. *See FCC Staff Study Rejects Use of Equipment Standards in Communications Trade Dispute*, [2 Current Reports] Int'l Trade Rep. (BNA) 1109 (Sept. 11, 1985). *But see* H.R. 3131, 99th Cong., 2d Sess. § 208(b) (1986), *reprinted in* H.R. REP. No. 471, pt. 1, *supra* note 298, at 8.

335. *See supra* notes 263-96 and accompanying text.

336. H.R. REP. No. 471, pt. 2, *supra* note 298, at 9.

337. *Id.*

338. *See infra* notes 345-46 and accompanying text.

339. H.R. 3131, 99th Cong., 2d Sess. § 202(a)(1)(A) (1986), *reprinted in* H.R. REP. No. 471, pt. 2, *supra* note 298, at 3.

340. *Id.* § 202(b)(2), *reprinted at* 4; *see supra* note 312 and accompanying text.

341. H.R. 3131, 99th Cong., 2d Sess. § 202(a)(3), (b)(2) (1986), *reprinted in* H.R. REP. No. 471, pt. 2, *supra* note 298, at 3-4.

342. *See id.* § 201, *reprinted at* 2-3.

potential negotiations with the particular country.[343] In determining

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SEC. 201. NEGOTIATING OBJECTIVES.

(a) PRIMARY OBJECTIVES.—The primary negotiating objectives of the United States under this Act regarding telecommunications products and services are to provide for—

(1) the nondiscriminatory procurement of telecommunications products and related services by foreign entities that provide local exchange telecommunications services which are owned, regulated, or controlled by foreign governments;

(2) assurances that any requirement for the registration of telecommunications products, which are to be located on customer premises, for the purposes of—

(A) attachment to a telecommunications network in a foreign country, and

(B) the marketing of the products in a foreign county, be limited to the certification by the manufacturer that the products meet the standards established by the foreign country for preventing harm to the network personnel;

(3) transparency of, and open participation in, the standards-setting processes used in foreign countries with respect to telecommunications products;

(4) the ability to have telecommunications products which are to be located on customer premises, approved and registered by type, and, if appropriate, the establishment of procedures between the United States and foreign countries for the mutual recognition of type approvals;

(5) access to the basic telecommunications network in foreign countries on reasonable and nondiscriminatory terms and conditions (including non-discriminatory prices) for the provision of value-added services by United States suppliers; and

(6) monitoring and effective dispute settlement provisions regarding matters referred to in paragraphs (1) through (5).

(b) SECONDARY OBJECTIVES.—The secondary negotiating objectives of the United States under this Act regarding telecommunications products and services are to obtain—

(1) national treatment for telecommunications products and services that are provided by United States firms;

(2) most-favored-nation treatment for such products and services;

(3) nondiscriminatory procurement policies with respect to such products and services and the inclusion under the Agreement on Government Procurement of the procurement (by sale or lease by government-owned or controlled entities) of all telecommunications products and services;

(4) the reduction or elimination of customs duties on telecommunciations products;

(5) the elimination of subsidies, dumping, violations of intellectual property rights, and other unfair trade practices that distort international trade international trade in telecommunicataions products and services;

(6) the elimination of investment barriers that restrict the establishment of foreign-owned business entities which market such products and serivces; and

(7) monitoring and dispute settlement mechanisms to facilitate compliance with telecommunications trade agreements.

343. *Id.* § 202(a)(1)(B), *reprinted at* 3.

which objectives suit the United States trade relationship with a particular country, the USTR shall consider: "the needs of the affected [United States] industry in that country; the competitiveness of [United States] industries in domestic and world markets; the progress being made to expand market opportunities through existing agreements or ongoing negotiations; and the availability of appropriate incentives and effective remedies."[344]

After the USTR identifies the countries which deny fully competitive market opportunities to the United States and the negotiating objectives, the President must enter into negotiations with these countries.[345] The President has a minimum of one year to negotiate. Further, the President may request two one-year extensions of the negotiating period; consequently, three and one-half years may pass before he implements other actions under the Bill.[346]

If the President is unable to enter into a trade agreement that achieves the specific negotiating objectives established by the USTR with a country within eighteen months after the date of the Bill's enactment, he must resort to other means authorized under the Bill to effectuate United States objectives.[347] The President has discretion as to which actions are necessary and appropriate to accomplish the objectives. For example, the President may terminate, withdraw or suspend all or any portion of certain trade agreements.[348] The President also may initiate any action under section 301 of the Trade Act of 1974,[349] or he may restrict or prohibit United States Government procurement from the foreign country.[350] The President, however, must direct any action towards the telecommunications industry of the specific country. Thus, the Bill virtually precludes the President from taking retaliatory actions which have "across the board" effects.

The Bill also mandates that the USTR conduct annual reviews of relations with countries trading with the United States in the telecommunications sector.[351] The annual review establishes a mechanism by which the United States can enforce and effectively police trade agreements in-

344. H. R. REP. No. 471, pt. 2, *supra* note 298, at 20 (referring to § 202(a)(1)(B)(i)-(iv)).

345. H.R. 3131, 99th Cong., 2d Sess. § 203(a) (1986), *reprinted in* H.R. REP. No. 471, pt. 2, *supra* note 298, at 4.

346. *Id.* § 203(c)(2), *reprinted at* 5.

347. *Id.* § 203(b),(c)(1), *reprinted at* 4-5.

348. *Id.* § 203(b)(3)(A), *reprinted at* 4.

349. *Id.* § 203(b)(3)(B), *reprinted at* 5.

350. *Id.* § 203(b)(3)(C), *reprinted at* 5.

351. *Id.* § 204, *reprinted at* 6.

volving telecommunications products and services. The USTR must review any agreement reached by the President with a foreign country to determine whether the country is complying with the agreement or is denying fully competitive market opportunities, under the agreement, to United States firms.[352] If the USTR determines that violations of the agreement exist or that the country is denying fully competitive market opportunities to United States firms, it must take appropriate actions to offset such actions and to restore the balance in telecommunications trade concessions between the foreign country and the United States.[353] The USTR has less discretion than the President to implement retaliatory measures, but still can take actions under section 301 of the Trade Act of 1974 or terminate, withdraw or suspend trade agreements with the foreign country.[354]

The version of H.R. 3131 released by the Committee on Ways and Means clearly provides a wide variety of measures which the President or the USTR can consider. However, the Bill also requires that the President or USTR tailor its actions narrowly so as not to affect adversely either nontelecommunications industries both within and without the United States or countries that provide fully competitive market opportunities to United States firms.

B. *1987 Proposals*

Although Congress did not enact the Danforth Bill (S. 942) or the Telecommunications Trade Act (H.R. 3131) in 1986, it nevertheless strongly supports telecommunications trade legislation. In January 1987 Congress introduced an omnibus trade bill containing the Telecommunications Trade Act.[355] Also in 1987 Senator Danforth again introduced a telecommunications trade bill, one identical to S. 942.[356]

Although such proposed legislation receives strong congressional support, the Administration and the USTR oppose trade legislation requiring retaliation against United States trading partners because the Administration and the USTR believe that such mandatory language will hinder negotiation and close foreign markets further.[357] The President also opposes time restraints imposed on his ability to negotiate open ac-

352. *Id.* § 204(b).
353. *Id.* § 204(d)-(e), *reprinted at* 6-7.
354. *Id.* § 204(e).
355. H.R. 3, 100th Cong., 2d Sess. Title II (1987).
356. S. 596, 100th Cong., 2d Sess. (1987).
357. *See Administration Competitiveness Proposal Preferable to H.R. 3, Smart Tells Hearing*, [4 Current Reports] Int'l Trade Rep. (BNA) 344-45 (Mar. 11, 1987).

cess to foreign markets because the restraints may impede his ability to conclude negotiations.[358] Thus, despite lingering telecommunications trade disputes with Japan and other countries, it remains unclear as to whether and when the United States will prescribe a definitive telecommunications trade policy regarding foreign market access.

VI. CONCLUSION

Although Japan appears willing to allow full access to its telecommunications markets for foreign manufacturers, suppliers and operators, the ETB Act does not readily effectuate this policy. Under the ETB Act, the MPT has too much discretionary authority and too little incentive to open Japan's markets. Furthermore, the purpose of several critical sections of the ETB Act is clearly to preserve the NTT and KDD systems. In 1987, for example, the MPT refused to permit foreign ownership in a Japanese telecommunications business to the full extent provided by the ETB Act.[359]

Although United States telecommunications firms will be able to enter the Japanese market, that entry will be slow. The immense start-up costs for Type I or Special Type II businesses hinder many United States firms from operating these services. Only those firms that have large amounts of available capital and are willing to enter into long-term investments will be capable of operating these services. Financing, however, is not the only obstacle that the United States telecommunications companies face. Although products made in the United States may be superior in quality, NTT and the other previously existing Japanese telecommunications firms currently enjoy strong consumer relations with the Japanese community. These firms also have experience in the Japanese market that foreign firms lack. This lack of experience seriously disadvantages potential foreign Type I and Special Type II operators. The privatization of NTT allows Japanese companies to concentrate on the domestic market in addition to the traditional emphasis on exports to foreign markets such as the United States. Japanese corporations, therefore, can introduce a broader range of products and services at home.

Negotiations with Japan have been successful with respect to certification standards, but the United States will not be able to assess the full effects of these negotiations at least until actual calculation of the 1987

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358. *Id.*

359. *See Swimming Upstream: The Japanese Government Attempts to Block Foreign Competition from Entering its Telecom Market*, DATAMATION, Apr. 1, 1987, at 24; *Japan's Protected Telecoms*, ECONOMIST, Jan. 3, 1987, at 12. *See also supra* notes 118-19 and accompanying text.

trade results. Meanwhile, the trade deficit with Japan may overshadow minor successes of United States manufacturers in Japan. Congress may decide to enact the Danforth Bill or one of the House Committees' versions of the Telecommunications Trade Act by itself, or as part of the omnibus trade bill, in 1987 or 1988. On the other hand, the Reagan Administration would rather reopen GATT negotiations on telecommunications barriers with Japan. A "watered-down" trade bill, possibly without the mandatory language contained in the bills discussed above, may result as a compromise between the executive and legislative branches. Such a trade bill, however, may be ineffective without provisions for mandatory retaliation by the President, the USTR, or the FCC. Absent provision for mandatory retaliation, no definite threat of action by the United States to foreign telecommunications firms exists. Furthermore, the domestic telecommunications market is open to such an extent that the United States has little leverage with which to negotiate in new GATT talks.

There are several reasons for adopting sectional reciprocity trade legislation in the telecommunications area. First, the legislation will more clearly define the United States position concerning its telecommunications trade policy. The United States has been unable to successfully promote a more open world market in the telecommunications arena because it lacked a definitive policy on such issues. Second, the legislation will provide the United States with leverage for negotiations. While flexibility in negotiating authority should be of utmost concern, Congress, in enacting the legislation, should not dismiss retaliatory actions as a last resort policy. The proposed legislation discussed above provide the United States with negotiating leverage by their language requiring actions by the President, the USTR, or the FCC. Congressional anger with Japan in 1985 and 1986 obviously encouraged the MPT to adopt some United States telecommunications policies; future negotiations, in the shadow of a clear threat of United States retaliation should those negotiations fail, should be successful. Any telecommunications trade legislation, however, should provide the United States with ample time to achieve mutually advantageous agreements with other countries. Because the United States lacks experience negotiating in this area, it is difficult to establish the necessary time frame.

The legislation should also amend the Communications Act of 1934 to enable the FCC to promulgate new certification standards directed at foreign competitors. The FCC should implement these new standards, however, only as a temporary alternative to more restrictive retaliatory measures by the United States. Flexibility in negotiations and the threat of retaliation should provide the United States with adequate leverage to

obtain foreign market access.

Last, by enacting telecommunications trade legislation, the United States implicitly recognizes the sovereign authority and concerns of the various countries with which the United States trades. By requiring first the negotiation of open sectional reciprocity, the United States acknowledges foreign concerns while also promoting domestic telecommunications policies on an international level. Thus, any retaliatory action taken as a secondary measure would be considered more of an act of self-preservation.

In pursuing either of these measures—enacting telecommunications trade legislation or negotiating with foreign governments—the United States must be aware that any foreign telecommunications legislation attempting to introduce international competition in a foreign country's market will create conflicts with sovereign concerns of that country. Telecommunications networks are indispensable to national security. Japan, or any other country, is not going to open any floodgates to foreign competitors. Thus, the United States must gain access gradually. However, it effectively can persuade the Japanese Government through negotiations and domestic trade policies to adopt United States telecommunications policies in an effort to relieve some of the current trade deficit pressures.

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