

108TH CONGRESS  
1ST SESSION

# H. R. 2737

To amend the Trade Act of 1974 and the Sherman Act to address foreign private and joint public-private market access barriers that harm United States trade, and to amend the Trade Act of 1974 to address the failure of foreign governments to cooperate in the provision of information relating to certain investigations.

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## IN THE HOUSE OF REPRESENTATIVES

JULY 15, 2003

Mr. LEVIN introduced the following bill; which was referred to the Committee on Ways and Means, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To amend the Trade Act of 1974 and the Sherman Act to address foreign private and joint public-private market access barriers that harm United States trade, and to amend the Trade Act of 1974 to address the failure of foreign governments to cooperate in the provision of information relating to certain investigations.

1        *Be it enacted by the Senate and House of Representa-*  
2        *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Trade Enhancement  
3 Act of 2003”.

4 **SEC. 2. FINDINGS.**

5 The Congress makes the following findings:

6 (1) Recent financial crises affecting key trading  
7 partners show that the health of the international  
8 economic system depends on open, competitive mar-  
9 kets.

10 (2) Resolution of these financial crises, which  
11 tend to arise in relatively closed markets, depends on  
12 structural reform.

13 (3) Restrictive foreign government policies, pri-  
14 vate restraints, and collaborative public-private bar-  
15 riers perpetuate an unacceptably large United States  
16 trade deficit which is now once again growing sharp-  
17 ly.

18 (4) More broadly, import barriers in major for-  
19 eign markets injure United States industries by re-  
20 stricting United States exports, by creating profit  
21 sanctuaries which serve as platforms for injurious  
22 dumping, and by causing shipments from third  
23 countries to be diverted to the United States market.

24 (5) The agreements adopted by the World  
25 Trade Organization do not currently provide a basis  
26 to address sophisticated methods of blocking market

1 access and effective competition in a foreign market,  
2 particularly the growing number of joint public-pri-  
3 vate market access barriers, including nontrans-  
4 parent forms of regulation, which impose a substan-  
5 tial burden on United States and world commerce.

6 (6) Partially as a result of changes effected by  
7 the agreements adopted by the World Trade Organi-  
8 zation, section 301 of the Trade Act of 1974 does  
9 not currently address private and joint public-private  
10 market access barriers as effectively as it should.

11 (7)(A) The limitations of the investigative abili-  
12 ties of the United States Trade Representative were  
13 highlighted in the investigation conducted under sec-  
14 tion 301 of the Trade Act of 1974 of the wheat  
15 trade practices of the Canadian Wheat Board.

16 (B) In the case referred to in subparagraph  
17 (A), the Trade Representative concluded that not  
18 only did Canada grant the Canadian Wheat Board  
19 (CWB) “special monopoly rights and privileges  
20 which disadvantage United States wheat farmers”,  
21 but the CWB also “refused to provide USTR certain  
22 necessary information” for the section 301 investiga-  
23 tion.

1 **TITLE I—FOREIGN PRIVATE AND**  
2 **PUBLIC-PRIVATE MARKET AC-**  
3 **CESS BARRIERS**

4 **SEC. 101. AMENDMENTS TO SECTION 301(d) OF THE TRADE**  
5 **ACT OF 1974.**

6 (a) UNJUSTIFIABLE ACTS, POLICIES, AND PRAC-  
7 TICES.—Section 301(d)(4)(A) of the Trade Act of 1974  
8 (19 U.S.C. 2411(d)(4)(A)) is amended to read as follows:

9 “(4)(A) An act, policy, or practice is unjustifi-  
10 able if the act, policy, or practice—

11 “(i) is in violation of, or inconsistent with,  
12 the international legal rights of the United  
13 States; or

14 “(ii) constitutes fostering by a foreign gov-  
15 ernment of systematic anticompetitive activities  
16 by persons or among persons in one or more  
17 foreign countries that have the effect of re-  
18 stricting, on a basis that is inconsistent with  
19 commercial considerations, access of United  
20 States goods or services to a foreign market or  
21 diverting foreign goods or services toward the  
22 United States market.”.

23 (b) UNREASONABLE ACTS, POLICIES, AND PRAC-  
24 TICES.—Section 301(d)(3)(B)(i)(IV) of the Trade Act of

1 1974 (19 U.S.C. 2411(d)(3)(B)(i)(IV)) is amended to  
2 read as follows:

3 “(IV) market opportunities, including  
4 the toleration by a foreign government of  
5 systematic anticompetitive activities by  
6 persons or among persons in one or more  
7 foreign countries that have the effect of re-  
8 stricting, on a basis that is inconsistent  
9 with commercial considerations, access of  
10 United States goods or services to a for-  
11 eign market or diverting foreign goods or  
12 services toward the United States mar-  
13 ket.”.

14 **SEC. 102. AMENDMENTS TO SECTION 304 OF THE TRADE**  
15 **ACT OF 1974.**

16 (a) DETERMINATION REGARDING PRIVATE ANTI-  
17 COMPETITIVE CONDUCT.—Section 304(a)(1) of the Trade  
18 Act of 1974 (19 U.S.C. 2414(a)(1)) is amended by strik-  
19 ing subparagraph (B) and inserting the following:

20 “(B) if the determination made under sub-  
21 paragraph (A) is affirmative—

22 “(i) determine what action, if any, the  
23 Trade Representative should take under  
24 subsection (a) or (b) of section 301; and

1                   “(ii) further determine whether there  
2                   is reason to believe that the conduct of the  
3                   foreign country that is the subject of the  
4                   determination under subparagraph (A) in-  
5                   volves anticompetitive conduct engaged in  
6                   by any natural or corporate person or per-  
7                   sons.”.

8           (b) REFERRAL TO ATTORNEY GENERAL.—Section  
9 304 of the Trade Act of 1974 is amended by redesignating  
10 subsection (c) as subsection (d) and inserting after sub-  
11 section (b) the following:

12           “(c) REFERRAL TO ATTORNEY GENERAL.—If the de-  
13 termination under subsection (a)(1)(B)(ii) is affirmative,  
14 the Trade Representative shall refer the matter to the At-  
15 torney General for investigation into whether the practices  
16 at issue constitute violations of the Sherman Act (15  
17 U.S.C. 1–7).”.

18 **SEC. 103. TRANSITION RULE; OUTSTANDING DETERMINA-**  
19 **TIONS BY TRADE REPRESENTATIVE.**

20           (a) TREATMENT OF PREEXISTING DETERMINA-  
21 TIONS.—The United States Trade Representative shall  
22 have the authority to determine, with respect to any af-  
23 firmative determination made before the enactment of this  
24 Act by the Trade Representative under section 304 of the  
25 Trade Act of 1974 (19 U.S.C. 2414)—

1           (1) whether the determination identifies a bur-  
2           den or restriction on United States commerce that  
3           has not been eliminated; and

4           (2) whether the determination identifies acts,  
5           policies, or practices that are still in existence and  
6           that involve anticompetitive conduct engaged in by  
7           any natural or corporate person or persons.

8           (b) TIMING.—The Trade Representative shall make  
9           the determinations described in subsection (a) not later  
10          than 120 days after—

11          (1) a request therefor is made by the original  
12          petitioner or its legal successor-in-interest; or

13          (2) publication in the Federal Register of a no-  
14          tice announcing the Trade Representative’s intent to  
15          review a prior determination on the Trade Rep-  
16          resentative’s own initiative, during which time the  
17          Trade Representative shall—

18                  (A) give interested parties an opportunity  
19                  to comment on all matters to be covered by the  
20                  determinations; and

21                  (B) if the Trade Representative has reason  
22                  to believe that the original determination identi-  
23                  fies acts, policies, or practices that are still in  
24                  existence and that involve anticompetitive con-  
25                  duct engaged in by any natural or corporate

1 person or persons, refer the matter to the At-  
2 torney General pursuant to section 304(c) of  
3 the Trade Act of 1974, as amended by this Act.

4 **SEC. 104. AMENDMENTS TO THE SHERMAN ACT.**

5 The Sherman Act (15 U.S.C. 1–7) is amended by in-  
6 serting after section 7 the following:

7 **“SEC. 7A. PROCEDURES FOLLOWING REFERRAL FROM**  
8 **TRADE REPRESENTATIVE.**

9 “(a) INVESTIGATION BY ATTORNEY GENERAL.—  
10 Upon referral of a matter from the United States Trade  
11 Representative under section 304(c) of the Trade Act of  
12 1974, the Attorney General shall commence an investiga-  
13 tion into whether the matter involves a violation of this  
14 Act.

15 “(b) ACTION FOLLOWING INVESTIGATION.—

16 “(1) DETERMINATION BY ATTORNEY GEN-  
17 ERAL.—At the conclusion of the investigation re-  
18 quired by subsection (a), the Attorney General shall  
19 determine whether there is reason to believe that a  
20 person or persons have violated or are violating any  
21 of the provisions of this Act.

22 “(2) TIMING OF DETERMINATION.—(A) Subject  
23 to subparagraph (B), the Attorney General shall  
24 make the determination required under paragraph  
25 (1) on or before the date that is 180 days after the

1 date on which the matter was referred by the Trade  
2 Representative to the Attorney General.

3 “(B) If the Attorney General determines that  
4 complex or complicated issues are involved in the in-  
5 vestigation that require additional time, the Attorney  
6 General shall publish in the Federal Register notice  
7 of such determination and shall make the determina-  
8 tion required under paragraph (1) with respect to  
9 such investigation by no later than the date that is  
10 270 days after the date on which the matter was re-  
11 ferred by the Trade Representative to the Attorney  
12 General.

13 “(3) ACTION IF DETERMINATION AFFIRMA-  
14 TIVE.—If the determination under paragraph (1) is  
15 affirmative, the Attorney General shall—

16 “(A) commence an action in a district  
17 court of the United States seeking injunctive  
18 relief and any other relief that a court may  
19 deem just against the person or persons be-  
20 lieved to have violated or be violating any of the  
21 provisions of this Act, by issuing a complaint  
22 and causing it to be served upon such person or  
23 persons; or

24 “(B) submit a report to the Committees on  
25 Ways and Means and on the Judiciary of the

1 House of Representatives and the Committees  
2 on Finance and on the Judiciary of the Senate,  
3 setting forth reasons for declining to commence  
4 an action against the person or persons who the  
5 Attorney General has reason to believe have vio-  
6 lated or are violating any of the provisions of  
7 this Act. Reasons for declining to commence an  
8 action may include—

9 “(i) such person or persons have  
10 ceased the conduct believed to have vio-  
11 lated any of the provisions of this Act and  
12 have entered into an agreement with the  
13 Attorney General whereby they commit to  
14 refrain from such conduct in the future;

15 “(ii) the foreign country or countries  
16 in which such person or persons reside  
17 have undertaken enforcement action which,  
18 in the judgment of the Attorney General,  
19 is likely to lead to cessation of the conduct  
20 believed to have violated any of the provi-  
21 sions of this Act;

22 “(iii) it is impossible to obtain per-  
23 sonal jurisdiction over such person or per-  
24 sons consistent with the requirement of

1 due process under the United States Con-  
2 stitution; or

3 “(iv) in the interests of comity, such  
4 action should not be commenced, taking  
5 into account—

6 “(I) the relative significance to  
7 the alleged violation of conduct within  
8 the United States, as compared to  
9 conduct abroad;

10 “(II) the nationality of the per-  
11 sons involved in or affected by the  
12 conduct;

13 “(III) the presence or absence of  
14 a purpose to affect United States con-  
15 sumers, markets, or exporters;

16 “(IV) the relative significance  
17 and foreseeability of the effects of the  
18 conduct on the United States as com-  
19 pared to the effects abroad;

20 “(V) the existence of reasonable  
21 expectations that would be furthered  
22 or defeated by the action;

23 “(VI) the degree of conflict with  
24 foreign law or articulated foreign eco-  
25 nomic policies;

1                   “(VII) the extent to which the  
2                   enforcement activities of another  
3                   country with respect to the same per-  
4                   sons, including remedies resulting  
5                   from those activities, may be affected;  
6                   and

7                   “(VIII) the effectiveness of en-  
8                   forcement by foreign countries as  
9                   compared to enforcement action by  
10                  the United States.

11                The Attorney General shall submit the report under  
12                subparagraph (B) referred to no later than the date  
13                that is 30 days after the date on which the Attorney  
14                General makes the determination required under  
15                paragraph (1).

16                “(4) ACTION IF DETERMINATION NEGATIVE.—  
17                If the determination under paragraph (1) is nega-  
18                tive, the Attorney General shall submit a report to  
19                the Committees on Ways and Means and on the Ju-  
20                diciary of the House of Representatives and the  
21                Committees on Finance and on the Judiciary of the  
22                Senate explaining why the Attorney General reached  
23                that determination. The report referred to in the  
24                preceding sentence shall be submitted no later than  
25                the date that is 30 days after the date on which the

1 Attorney General makes the determination required  
2 under paragraph (1).”.

3 **TITLE II—ADVERSE INFERENCES**  
4 **BY TRADE REPRESENTATIVE**

5 **SEC. 201. ADVERSE INFERENCE WARRANTED.**

6 (a) IN GENERAL.—Chapter 1 of title III of the Trade  
7 Act of 1974 is amended by adding at the end the fol-  
8 lowing:

9 **“SEC. 311. ADVERSE INFERENCES.**

10 “(a) DETERMINATIONS UNDER SECTION 304.—In  
11 making a determination under section 304, if the Trade  
12 Representative determines that the foreign government  
13 has failed to cooperate by not acting to the best of its  
14 ability to—

15 “(1) comply with a reasonable request for infor-  
16 mation, or

17 “(2) require a party within its jurisdiction to  
18 comply with a reasonable request for information,

19 then, in reaching the applicable determination, the Trade  
20 Representative may use an inference that is adverse to the  
21 interests of the foreign government, if there is a reason-  
22 able basis for the inference. Such adverse inference may  
23 include reliance on information from other United States  
24 Government agencies and departments, and from inter-  
25 ested persons.

1       “(b)       DETERMINATIONS       UNDER       SECTION  
2 304(a)(1)(B)(ii).—In making a determination under sec-  
3 tion 304(a)(1)(B)(ii), if the Trade Representative deter-  
4 mines that a foreign person has failed to cooperate by not  
5 acting to the best of its ability to comply with a reasonable  
6 request for information, then, in reaching the applicable  
7 determination, the Trade Representative may use an infer-  
8 ence that is adverse to the interests of the foreign person,  
9 if there is a reasonable basis for the inference. Such ad-  
10 verse inference may include reliance on information from  
11 other United States Government agencies and depart-  
12 ments, and from interested persons.”.

13       (b) CONFORMING AMENDMENT.—The table of con-  
14 tents for the Trade Act of 1974 is amended by adding  
15 after the item relating to section 310 the following new  
16 item:

“Sec. 311. Adverse inferences.”.

○