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Regulating Japanese Automobile Imports: Some Implications of the Voluntary Quota System

I. INTRODUCTION

On May 1, 1981, the United States and Japan reached a voluntary restraint agreement (VRA)¹ which limits the volume of Japanese automobile exports to the United States over a three year period.² This agreement was the culmination of U.S. efforts to alleviate the economic crisis which the U.S. auto industry faces.³ Implementation by the two governments of a voluntary quota to solve the auto trade problem raises several important legal issues pertaining to international trade principles and U.S. antitrust law.

Despite its utility as a means for restricting imports,⁴ the voluntary restraint

1. The United States and Japan reached the agreement after two days of intensive negotiations between William Brock, U.S. Trade Representative, and Rokusuke Tanaka, Minister of International Trade and Industry. *Japan Economic Journal*, May 5, 1981, at 1, col. 1. A voluntary restraint agreement is a negotiated limit or quota enforced by the exporting party. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. INDUSTRIAL COMPETITIVENESS: A COMPARISON OF STEEL, ELECTRONICS AND AUTOMOBILES 111 (1981) [hereinafter cited as U.S. INDUSTRIAL COMPETITIVENESS]. A voluntary export quota provides temporary relief for domestic industries injured by the influx of imports. Smith, *Voluntary Export Quotas and U.S. Trade Policy — A New Nontariff Barrier*, 5 LAW & POL'Y INT'L BUS. 10, 14 (1973) [hereinafter cited as Smith].

2. N.Y. Times, May 1, 1981, at 1, col. 3. Japan's voluntary export restraint plan limited auto shipments to the U.S. to 1.68 million units in fiscal year 1981, down 7.7% from the 1980 record level of 1.82 million units. *Japan Times Weekly*, May 9, 1981, at 2, col. 1. The first year quota of 1.68 million units is the average volume of car exports to the U.S. for fiscal years 1979 and 1980. *Japan Economic Review*, May 15, 1981, at 1, col. 1. In March 1982 the Japanese government announced its decision to extend the 1981 quota limits of 1.68 million units through fiscal year 1982. *Boston Globe*, Mar. 30, 1982, p. 56, col. 3. This decision is a modification of the terms of the original plan by which the limit for fiscal year 1982 would have been the 1981 quota of 1.68 million units plus a certain percentage of increased sales if the U.S. auto market had shown any recovery in the demand for domestic-built autos. N.Y. Times, May 1, 1981, at 1, col. 4. The Japanese government drafted the plan to reduce the severity of cutbacks for fiscal year 1982 in proportion to the expansion of the American car market. *Japan Times Weekly*, May 9, 1981, at 2, col. 3. However, Japan anticipated that the limits for fiscal year 1982 would be the same as the limits on Japanese auto exports for fiscal year 1981 because of the substantial decline in U.S. auto sales and mounting trade tension between the two countries. *Boston Globe*, Mar. 30, 1982, p. 56, col. 3. In addition, the Japanese government notes that it will continue "monitoring shipments to the U.S." in fiscal year 1983 and stresses that the restraint measures "will never be prolonged beyond March, 1984." *Japan Economic Journal*, May 5, 1981, at 1, col. 1.

3. See generally *Hearings Before the Subcomm. of International Trade of the Senate Finance Comm.* (pt. I), 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings*, (pt. I)]; *Hearings Before the Subcomm. on International Trade of the Senate Finance Comm.* (pt. II), 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings*, (pt. II)]. See also N.Y. Times, May 3, 1981, at 7, col. 3; *Japan Times Weekly*, May 16, 1981, at 9, col. 3.

4. See W. HUNSBERGER, JAPAN AND THE UNITED STATES IN WORLD TRADE 353-57 (1964) [hereinafter cited as HUNSBERGER]. See also text accompanying notes 17-25 *infra*.

agreement contravenes the United States' fundamental interest in preserving free markets⁵ and its commitment to the international trade principles of the General Agreement on Tariffs and Trade (GATT),⁶ of which the United States is a contracting party.⁷ In the interest of preserving an international trading economy based on open-market principles,⁸ GATT prohibits any member from imposing a unilateral quota on imports.⁹ Since the United States has led the movement within GATT to eliminate trade barriers,¹⁰ any breach of the GATT agreement by the United States in instituting mandatory controls inevitably compromises its commitment to these goals.¹¹ A crucial factor in connection with the auto trade dispute is, therefore, that the United States must implement a voluntary restraint agreement with Japan in order to conform to its international trade obligations under GATT.

The voluntary restraint agreement has significant implications under U.S. antitrust law. The Sherman Act, the basic tenet of U.S. antitrust law, provides that any arrangement "in restraint of trade or commerce among the several States, [and] with foreign nations" is illegal pursuant to Section One of the Act.¹² A critical question is whether the voluntary restraint agreement, which serves to insulate American producers from a major source of competition by restricting Japanese auto imports,¹³ would be subject to antitrust charges as a "restraint of

5. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958).

6. Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. See 4 GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) for the current text of this treaty and a complete table of amending protocols since 1947. GATT, a specialized agency of the United Nations, is an international organization based in Geneva. U.S. INDUSTRIAL COMPETITIVENESS, *supra* note 1, at viii. Members of GATT pledge to work together to reduce tariffs and other barriers to international trade and to eliminate discriminatory treatment in international commerce. GATT, *supra*, preamble. An important principle of GATT is that protection of domestic industries is to be accomplished strictly through the customs tariff and not through other commercial measures, such as import quotas. R. BALDWIN, NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE 175 (1970) [hereinafter cited as BALDWIN]. The only permissible exceptions to GATT rules are those dealing with balance of payments emergencies; GATT carefully supervises these exceptions. *Id.* at 31. See generally R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1975) [hereinafter cited as HUDEC].

7. GATT, GATT ACTIVITIES IN 1979 AND CONCLUSION OF THE TOKYO MULTILATERAL TRADE NEGOTIATIONS (1973-1979), at 86 (1980) [hereinafter cited as GATT ACTIVITIES]. The signatories of GATT are contracting parties. *Id.*

8. See generally J. JACKSON, WORLD TRADE AND THE LAW OF GATT 41 (1969) [hereinafter cited as JACKSON].

9. GATT, *supra* note 6, art. XIX. A contracting party may impose a quota only upon a finding of import-related injury. See § III *infra*. See also HUNSBERGER, *supra* note 4, at 354.

10. See Recent Development, *International Trade: GATT Legislation*, 20 HARV. INT'L L.J. 687 (1979).

11. See *Hearings*, (pt. II), *supra* note 3, at 44 (statement of Malcolm Baldrige, Secretary of Commerce).

12. 15 U.S.C. § 1 (1973).

13. *Hearings*, (pt. II), *supra* note 3, at 92 (statement of Robert M. McElwaine, President of the American International Automobile Dealers Association). Voluntary restraints would reduce Japan's 21.3% share of the U.S. automobile market to 11% and thereby lessen the long-range competitive stimulus of imports upon U.S. domestic industries. *Id.* In addition, the American International Auto-

trade" under the Sherman Act.¹⁴ Several factors may prevent the voluntary restraint agreement from posing an antitrust problem. The U.S. Justice Department asserts that a voluntary restraint agreement reached between the United States and Japan as a result of bilateral negotiations would be immune from antitrust liability if the foreign government effectuates the agreement through regulatory channels.¹⁵ Thus, the antitrust implications will turn on a factual determination regarding the degree of Japan's involvement in the negotiation process and in the enforcement of the quota through the Ministry of International Trade and Industry (MITI),¹⁶ the trade branch of the Japanese government.

This Comment examines the legal implications of the voluntary restraint agreement. The author investigates U.S. attempts to impose a quota through legislation and the U.S. decision to seek voluntary controls in keeping with its commitment to the free trade principles of GATT. The antitrust implications in applying the voluntary restraint agreement are another important dimension of the problem. The author briefly reviews the executive authority to negotiate such an agreement and explores the various negotiating methods that are available along with the potential antitrust difficulties that each presents. In addition, the author discusses the manner in which the implementation of the bilateral agreement virtually precludes antitrust challenges. Major emphasis is focused on the unique role of MITI in its enforcement of the quota under Japanese law. Finally, the author considers the future of voluntary restraint agreements as effective devices to deal with market disruptions created by the influx of imports.

II. THE NEED FOR VOLUNTARY CONTROLS

A voluntary restraint agreement is a negotiated limit or quota enforced by the exporting party.¹⁷ A VRA provides import relief for domestic industries for a

mobile Dealers Association (AIADA) contends that a voluntary restraint agreement would have serious effects on the American consumer and on American businessmen and their employees in the imported car sector of the domestic automobile industry. *Id.* at 99. Consumers for World Trade (CWT), a national, nonprofit membership organization established in 1978, strongly opposes quotas on the grounds that quotas narrow the consumer's choice in the marketplace and artificially increase the purchase price of the product. *Id.* at 228.

14. 15 U.S.C. § 1 (1973). For a general discussion of antitrust policy and its problems, see generally Donovan, Book Review, 4 B.C. INT'L & COMP. L. REV. 477 (1981) (reviewing B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (1979); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1976).

15. *Hearings*, (pt. 1), *supra* note 3, at 156 (official letter from Assistant Attorney General John H. Shenefield, spokesman for the U.S. Department of Justice).

16. See I. MAGAZINER & T. HOUT, JAPANESE INDUSTRIAL POLICY 38-40 (Policy Papers in International Affairs No. 15, 1980) [hereinafter cited as MAGAZINER & HOUT]. MITI is one of two major governmental agencies responsible for industrial policymaking. *Id.* For a discussion of the MITI's role in the Japanese government's regulation of exports, see § IV.C.1 *infra*.

17. U.S. INDUSTRIAL COMPETITIVENESS, *supra* note 1, at x.

limited period of time.¹⁸ Under the voluntary system, quota levels are not completely fixed.¹⁹ The exporting nation retains some control in establishing quota levels and in raising ceilings on the volume of goods imported each year.²⁰ Because of the flexible nature of the VRA, exporting parties prefer this approach to other types of restraints, such as legislated trade barriers.²¹

The voluntary restraint agreement is an established concept in the history of U.S.-Japanese trade relations.²² Since their introduction in 1956 and 1957 in the cotton textile trade between Japan and the United States,²³ governments have applied VRAs to a number of items exported from Japan to the United States²⁴ and to several products exported from Japan to other markets, especially Western Europe.²⁵ A serious decline in U.S. auto sales²⁶ and rising unemployment levels among auto workers²⁷ led to the application of a voluntary restraint agreement for automobile imports in 1981.²⁸

A. *The Automobile Industry in the Economies of the United States and Japan*

The automobile industry in the United States entered a deep recession in 1980, when U.S. automakers reported losses of more than four billion dollars.²⁹ From 1978 to 1981, the U.S. annual production decreased by thirty percent to 6.2 million vehicles.³⁰ The collapse of domestic auto sales has caused the layoff of

18. HUNSBERGER, *supra* note 4, at 360.

19. *Id.*

20. *Id.* at 355.

21. Bates, *The Voluntary Quota System for Regulating Steel Imports*, 14 VA. J. INT'L L. 101 (1973) [hereinafter cited as Bates].

22. See HUNSBERGER, *supra* note 4, at 353. See also C. KINDLEBERGER, INTERNATIONAL ECONOMICS 254 (4th ed. 1968).

23. HUNSBERGER, *supra* note 4, at 353. The concept of voluntary controls emerged from the long contest between the Japanese drive to expand sales in the American market and the efforts of American producers to limit those sales. *Id.* The United States and Japan first utilized the VRA in 1957 when Japan voluntarily limited its exports of cotton textiles. *Id.* Voluntary controls applied to a large part of world trade in cotton manufacturers as a result of the multilateral agreements in 1961 and 1962. *Id.*

24. BALDWIN, *supra* note 6, at 42. VRAs apply to such diverse products as tiles, bicycles, metal tableware, baseball gloves and mitts, and umbrellas. *Id.* The most widely reported use of VRAs is the voluntary steel quota. *Id.* In 1968, the major steel producers of Japan and the European Coal and Steel Community (ECSC), an organization of nations which have pledged to pool their coal and steel resources to provide a unified labor market, agreed to limit their exports to the United States from 1969-1971. Bates, *supra* note 21, at 101. In 1972, after additional negotiations, these steel producers extended the voluntary arrangement for an additional three years. *Id.*

25. BALDWIN, *supra* note 6, at 41-42. Import controls apply to approximately 104 items imported from Japan to Italy; 47 items imported to France; and 22 items imported to Germany. *Id.*

26. N.Y. Times, Apr. 17, 1981, at D1, col. 2. For a discussion of the economic decline in the U.S. automobile industry, see § II.A *infra*.

27. *Hearings*, (pt. I), *supra* note 3, at 26 (statement of Sen. Donald W. Riegle). See § II.A *infra*.

28. Japan Times Weekly, May 16, 1981, at 9, col. 4.

29. N.Y. Times, Apr. 17, 1981, at D1, col. 2. Sales of domestic cars were lower in 1980 than in any year since 1961. U.S. INDUSTRIAL COMPETITIVENESS, *supra* note 1, at 92.

30. Byron, *How Japan Does It*, TIME, Mar. 30, 1981, at 54 [hereinafter cited as Byron]. The U.S.

nearly one million American workers³¹ and has dangerously weakened the industry's financial structure.³²

In contrast to the domestic auto situation, imports continue to set sales records.³³ In 1981, all imports combined accounted for 28.8 percent of the U.S. passenger car market.³⁴ The Japanese auto industry is responsible for a major portion of the surge in imports.³⁵ Since 1975 the annual share of Japanese cars increased from 800,000 to almost two million.³⁶ Reports indicate that Japanese imports obtained a 23.7 percent share of the U.S. market in February 1981.³⁷ Projected at an annual rate, this share would amount to 2.2 million imported units sold in 1981, an increase of twenty percent from the 1980 record level of 1.82 million units.³⁸ Furthermore, the Japanese are expanding their production capacity to supply fifty percent of the U.S. small car market.³⁹ This Japanese production increase threatens to cause a further loss of American jobs and a continued rise in the auto trade deficit with Japan, which presently stands at ten billion dollars.⁴⁰

Rising import levels have intensified industry demands for import relief.⁴¹ Due to the U.S. auto industry's key role in the economy, the auto trade issue has national importance.⁴² Auto industry supporters have also expressed concern

automobile industry sold 9.3 million units in 1978 as compared with 6.2 million units in 1981. Henry, *Hard Times in the Heartland*, TIME, Dec. 7, 1981, at 31 [hereinafter cited as Henry]. General Motors reported that its sales for November 1981, a total of 89,707, were down 33% from the same period of the previous year. *Id.* Ford sales were down 23.6% and Chrysler's were down 24%. *Id.*

31. *Hearings*, (pt. I), *supra* note 3, at 26 (Statement of Sen. Donald W. Riegle). From 1978 to 1981, 300,000 auto jobs and 500,000 parts supplier and steelmaking jobs were lost nationwide. Henry, *supra* note 30, at 31.

32. *Hearings*, (pt. I), *supra* note 3, at 26 (statement of Sen. Donald W. Riegle).

33. *Hearings*, (pt. II), *supra* note 3, at 144 (statement of Douglas A. Fraser, President of United Autoworkers (UAW)). Car imports have substantially increased during the last four years. U.S. INDUSTRIAL COMPETITIVENESS, *supra* note 1, at 53. Imported car sales have risen by 60% from 1.5 million units in 1976 to 2.4 million units in 1980. *Id.* In 1980, imports totaled 2.4 million units and absorbed 26.7% of the U.S. auto market, up from the 17.8% they took in 1978. *Id.*

34. *Hearings*, (pt. II), *supra* note 3, at 35 (statement of Sen. Donald W. Riegle).

35. *Id.*

36. Byron, *supra* note 30, at 54.

37. *Hearings*, (pt. II), *supra* note 3, at 35. In 1980, the Japanese share represented 21.3% of the \$70 billion American car market, up from 12.2% in 1978. *Id.* at 144 (statement of Douglas A. Fraser, President of United Autoworkers (UAW)).

38. *Id.* at 35 (statement of Sen. Donald W. Riegle). In 1981, Japanese car sales in the U.S. totaled 1.9 million units. Byron, *Tempers Rising over Trade*, TIME, Feb 1, 1982, at 58. A comparison of these actual statistics and the projected figures illustrate the effectiveness of VRAs in reducing the volume of Japanese auto imports.

39. *Hearings*, (pt. I), *supra* note 3, at 26 (statement of Sen. Donald W. Riegle).

40. *Id.*

41. Schlosser, *The Making of a Trade Dispute*, JAPAN ECONOMIC INSTITUTE REPORT [J.E.I. REP.], May 1, 1981, at 3 [hereinafter cited as Schlosser].

42. Byron, *supra* note 30, at 54. The influence of the U.S. automobile industry on the American economy is due primarily to its role as a major employer. *Id.* The auto industry employs one out of every

that the United States is likely to remain the primary market of Japanese auto exports⁴³ because most major western countries have already acted to restrict the importation of Japanese automobiles.⁴⁴ U.S. automakers contend that without import restraints, Japan will divert its cars to the U.S. market in increasing numbers because the United States is the only truly open market in the world for automobiles.⁴⁵

B. U.S. Automakers' Plea for Import Relief Under the Trade Act of 1974

In an effort to adjust to Japan's rising share of the U.S. car market,⁴⁶ the U.S. automobile industry⁴⁷ has sought import relief under Section 201, the "escape clause,"⁴⁸ of the Trade Act of 1974.⁴⁹ Section 201 provides relief to domestic

five American workers either directly or indirectly in making, servicing or selling cars, and industries such as steel, glass and rubber are heavily dependent upon automobile sales to keep their plants operating. *Id.* In addition, auto industry supporters argue that Detroit, the auto capital of the United States, has a strategic significance because General Motors, Ford and Chrysler also manufacture war materials for the U.S. Defense Department. *Id.* at 55.

43. See *Hearings and Markup Before the Comm. on Foreign Affairs and its Subcomm. on Asian and Pacific Affairs and on International Economic Policy and Trade*, 96th Cong., 2d Sess. 27 (1980) [hereinafter cited as *Hearings and Markup*].

44. *Id.* Approximately thirty countries, including Australia, Brazil and Mexico protect their domestic car industry by local content requirements. *Hearings*, (pt. I), *supra* note 3, at 110-11. A local content provision requires that the exporting nation's vehicles contain a certain percentage, ranging from 13% to 96%, of domestically produced auto parts. *Id.* France has limited Japan's share of the auto market to less than 3% by informal agreements. *Id.* at 138. Great Britain has successfully maintained an 11% limit through an agreement between British and Japanese auto manufacturers. *Id.* at 51. Because Canada imposes a 14% tariff on imported cars, the Japanese share of the Canadian auto market has reached only half the level it has in the United States. *Id.* at 138. Italy limits Japanese imports to 2,500 cars per year. *Id.* at 51. Italy's import restrictions were in force before the formation of GATT and served as a means of retaliating against some Japanese restraints on Italian exports. *Id.* Therefore, in accordance with GATT, Italy may continue to maintain this restriction. *Id.* Even Germany, which industrial European nations consider the greatest proponent of free markets in Europe, has a tariff rate of 11%. *Hearings*, (pt. II), *supra* note 3, at 56. The U.S. tariff rate is only 2.9%. *Id.*

45. *Hearings and Markup*, *supra* note 43, at 27. Japan is also a very closed market. Pine, *Lawmakers Ponder "Reciprocity" in Trade*, *Wall St. J.*, Feb. 8, 1982, at 1 col. 5. Japan has begun only recently to liberalize import barriers in an effort to expand access to the Japanese market. *Hearings Before the Subcomm. on Trade of the Ways and Means Comm.*, 96th Cong., 2d Sess. 14 (1980). For example, Japan has eliminated its tariff on autos in 1978 and has agreed to eliminate tariffs on imports of almost all auto parts in 1981. *Id.* at 15.

46. *Hearings and Markup*, *supra* note 43, at 188. The U.S. automobile industry claims difficulty in competing with the rapid influx of Japanese imports while it retools as part of its conversion to produce smaller cars. *Hearings*, (pt. I), *supra* note 3, at 199. Domestic problems which the industry faces include the limited term for automobile loans and the imposition of a number of safety and emission-control regulations. *Id.*

47. Representing the U.S. automobile industry in its petition to the U.S. International Trade Commission for import relief were Ford Motor Company, Chrysler Corporation and the United Auto Workers (UAW). *Dallas Times Herald*, Nov. 12, 1980, at 1, col. 3.

48. For many years, Congress has required the inclusion of an "escape clause" in each trade agreement. S. REP. NO. 1298, 93d Cong., 2d Sess. 119, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7263. The rationale for the "escape clause" is that the lowering of international trade barriers would cause serious injury, dislocation and perhaps economic extinction among some industries and

industries injured by import competition⁵⁰ by authorizing the President to impose, or increase, duties,⁵¹ tariff-rate quotas,⁵² quantitative restrictions (quotas)⁵³ and/or orderly marketing agreements.⁵⁴ The Act also provides financial or technical adjustment assistance⁵⁵ for American workers, companies and communities injured by increased imports.⁵⁶ Furthermore, Section 203 of the Act limits each form of import relief to a duration of five years, in addition to a three-year extension.⁵⁷

Section 201 requires that parties seeking import relief submit a petition for eligibility for import relief to the U.S. International Trade Commission (ITC).⁵⁸ Upon receipt of this petition, the ITC then must investigate the matter.⁵⁹ An affirmative finding by the Commission enables the President to grant import

workers. *Id.* The "escape clause" provides temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition. *Id.*

49. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1980). The Trade Act of 1974 has replaced the Trade Expansion Act of 1962, which expired in 1967, as the statutory provision giving relief to domestic industries injured by import competition. S. REP. NO. 1298, 93d Cong., 2d Sess. 52, 61, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7196, 7205. The Act encourages open and nondiscriminatory world trade by providing safeguards for American industry and labor against injurious import competition. *Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771 (E.D.N.Y. 1978).

50. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1980). The escape clause addresses both the questions of injury and remedy. Trade Act of 1974 § 203, 19 U.S.C. § 2253 (1980).

51. Trade Act of 1974 § 203, 19 U.S.C. § 2253 (1980). This Section allows the President to "increase duties to a maximum of 50% ad valorem above any previous rate." *Id.*

52. *Id.* A tariff-rate quota differs from a quantitative restriction in that a tariff-rate quota combines the properties of a tariff and a quota in its application, whereas a quantitative restriction (quota) is a non-tariff trade barrier. *See generally* BALDWIN, *supra* note 6.

53. *See* note 52 *supra*. Under § 203 the President may "impose a quantitative restriction that is not less than the most current quantity that was allowed to be imported in a period chosen by the President. Trade Act of 1974 § 203, 19 U.S.C. § 2253 (1980).

54. Trade Act of 1974 § 203, 19 U.S.C. § 2253 (1980). This Section allows the President to "negotiate orderly marketing agreements with foreign countries limiting the export of the articles to the United States. Orderly marketing agreements (OMAs) differ from VRAs in that U.S. customs officials monitor and enforce OMAs whereas the exporting country enforces VRAs. *Hearings*, (pt. 1), *supra* note 3, at 155 (statement of Howard Samuel, President of Industrial Union, AFL-CIO).

55. Trade Act of 1974 § 203, 19 U.S.C. § 2253 (1980). Adjustment assistance provides benefits to workers displaced by increased imports. S. REP. NO. 1298, 93d Cong., 2d Sess. 61, *reprinted in* 1974 U.S. CODE & CONG. AD. NEWS 7186, 7205. Assistance includes job search, training and relocation allowances. *Id.*

56. Trade Act of 1974 § 203, 19 U.S.C. § 2253 (1980).

57. *Id.*

58. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1980). The U.S. International Trade Commission, formerly named the U.S. Tariff Commission, is an independent agency of the U.S. government charged with serving the President and Congress as an advisory, fact-finding agency on tariff, commercial policy and foreign trade problems. S. REP. NO. 1298, 93d Cong., 2d Sess. 115-16, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7259-60. The Commission not only advises on the possible effects of pending trade agreements or tariff legislation, but also investigates alleged damage to a domestic industry resulting from trade agreements in effect. *Id.* at 7263-64.

59. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1980).

relief.⁶⁰ To reach an affirmative finding, the Commission must determine that increased imports are a "substantial cause of serious injury (or threat thereof)"⁶¹ to a domestic industry producing articles similar to, or directly competitive with, the imported articles.⁶² If the Commission finds a "substantial cause of serious injury,"⁶³ it makes a recommendation to the President, who then determines if, and in what form, he will grant import relief.⁶⁴

In their petition to the U.S. International Trade Commission, U.S. auto industry representatives claimed that industry-wide record losses and high unemployment figures were due principally to the increase in imports.⁶⁵ After four days of formal hearings, the Commission decided on November 10, 1980 that the high level of imports did not constitute a substantial cause of serious injury⁶⁶ to domestic automobile manufacturers.⁶⁷ In the three-to-two decision against

60. *Id.* Section 201(b)(2) provides:

In making its determination under paragraph (1), the Commission shall take into account all economic factors which it considers relevant, including (but not limited to) — . . . (c) with respect to substantial cause, an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers.

Id.

61. *Id.* The Trade Act of 1974 applies a stricter standard than the Trade Expansion Act of 1962, which only required a showing of "serious injury" for an affirmative ITC finding. Trade Expansion Act of 1962 § 201, 19 U.S.C. § 1821 (1980).

62. Trade Act of 1974 § 201(b)(2), 19 U.S.C. § 2251 (1980). First, an increase in imports, either actual or relative to domestic production, or a decline in the proportion of the domestic market supplied by domestic producers may show substantiality. *Id.* Second, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, or significant unemployment or underemployment within the industry may demonstrate "serious injury." *Id.* Third, a decline in sales, a growing inventory, or a downward trend in production, profits, wages, or employment may show "threat of serious injury." *Id.* Fourth, "the domestic industry" may be only those subdivisions of the various manufacturers that produce the article in question, or the major geographic area in which the producers are located and in which the imports are concentrated. *Id.* The Commission may consider other factors at its discretion. *Id.* See also L. Jacobs & R. Hove, *Remedies for Unfair Import Competition in the United States*, 13 CORNELL INT'L L.J. 1 (1980).

63. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1980). For purposes of Section 201, the term "substantial cause of serious injury" means that the cause, either absolute or relative in character, must be at least equal in importance to any other cause of such injury. S. REP. NO. 1298, 93d Cong., 2d Sess. 120, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7186, 7264. See also Note, *Title II of the Trade Act of 1974: What Changes Hath Congress Wrought to Relief from Injury Caused by Import Competition*, 10 J. INT'L L. & ECON. 197, 231 (1975).

64. Trade Act of 1974 § 202, 19 U.S.C. § 2252 (1980). In arriving at his decision, the President, who may consult with cabinet officers, must consider the following:

(1) the probable effectiveness of import relief; (2) the efforts being made to adjust to import competition; (3) the effect of import relief on consumers; (4) the effect of import relief on U.S. international economic interests; (5) the geographic concentration of imported products; (6) the extent to which the U.S. is a focal point for exports of such articles; and (7) any economic and social costs to taxpayers, communities and workers.

Id.

65. See Receipt of Ford Motor Co. Petition, 45 Fed. Reg. 55, 873 (1980).

66. See Determination of No Serious Injury, 45 Fed. Reg. 85, 194 (1980).

67. *Id.*

granting import relief,⁶⁸ the Commission noted that oil prices, the economic recession and the shift in consumer demand to smaller, more fuel-efficient cars were the principal reasons for the industry's decline.⁶⁹ As ITC Commissioner Paula Stern, who voted against import relief, observed, an import quota would merely be "relief directed at one of the *symptoms* rather than at the *cause* of [our industry's] problems."⁷⁰

The failure of the escape clause proceeding to facilitate import relief on behalf of the auto industry has forced U.S. automakers to seek relief from alternative sources.⁷¹ Accordingly, the U.S. government resorted to a voluntary quota as the most effective means of providing assistance to the domestic automobile industry.⁷²

III. VOLUNTARY CONTROLS AND GATT

The U.S. International Trade Commission decision denying import relief afforded the United States only a limited set of options in dealing with Japanese car imports.⁷³ The U.S. preference for the voluntary quota approach over legislative action arose from a reluctance to contravene open-market principles of international trade.⁷⁴ U.S. participation in GATT illustrates the U.S. commitment to a policy of free trade.⁷⁵ GATT, an international organization with a membership of eighty-five countries,⁷⁶ provides the main framework for promoting international trade.⁷⁷ Members of GATT pledge to reduce both tariff and

68. *Id.* The ITC vote split along party lines, with two Republicans voting in favor of imposing trade barriers on imports and two Democrats voting against. *Id.* The swing vote was cast by an independent, Commissioner Michael Calhoun, who acknowledged that the U.S. auto industry was suffering serious injury, but said that imports were not the biggest factor. *Id.*

69. *Id.* See generally E. TODER, *TRADE POLICY AND THE U.S. AUTOMOBILE INDUSTRY* (1978).

70. *Hearings*, (pt. II), *supra* note 3, at 114 (emphasis added).

71. *Id.* The U.S. automobile industry tried its case in the legislative arena. Schlosser, *supra* note 41, at 3. Beginning in February 1980, Congress introduced a number of auto trade bills. See, e.g., H.R.J. Res. 598, 96th Cong., 2d Sess., 126 CONG. REC. H11, 560-562 (daily ed. Dec. 2, 1980). This bill dealt with mandatory quotas and executive negotiating authority to impose such limits. *Id.* Unlike the 1980 Congress, in which the House Ways and Means Trade Subcommittee took the lead on the auto issue, the Senate Finance Committee played an activist role in 1981. Schlosser, *supra* note 41, at 3. Senators John Danforth (R.-Mo.) and Lloyd Bentsen (D.-Tex.) were the principal sponsors of Senate Bill 396, which would limit auto imports from Japan to 1.6 million units annually for 1981, 1982 and 1983. *Hearings*, (pt. II), *supra* note 3, at 3-4. Ford Motor, *id.* at 170, Chrysler, *id.* at 225, and General Motors, *id.* at 240, participated in the congressional hearings on the proposed quota bill.

72. *Hearings*, (pt. II), *supra* note 3, at 78 (statement of Malcolm Baldrige, Secretary of Commerce). MacKnight, *The Auto Pact*, JAPAN INSIGHT, May 8, 1981, at 2-3.

73. Schlosser, *supra* note 41, at 3.

74. See generally HUDEC, *supra* note 6, at 213.

75. See U.S. INDUSTRIAL COMPETITIVENESS, *supra* note 1, at viii. The U.S. was most recently involved in the promotion of free trade with its participation in the 1979 Tokyo Round Negotiations to reduce trade barriers. See generally GATT ACTIVITIES, *supra* note 7.

76. GATT ACTIVITIES, *supra* note 7, at 86.

77. U.S. INDUSTRIAL COMPETITIVENESS, *supra* note 1, at viii. GATT, in U.S. law, is an executive

nontariff barriers on a worldwide basis and to eliminate discriminatory treatment in international commerce.⁷⁸ GATT rules do not readily permit the imposition of unilateral import controls to regulate foreign commerce.⁷⁹ Hence, Congress would find difficulty enacting quota legislation which would unilaterally limit Japanese auto imports without violating U.S. international trade commitments under GATT.

A legislated quota, such as the one proposed in 1981 by Senate Bill 396,⁸⁰ to restrict Japanese auto imports may violate several articles of GATT. Article I(1) of GATT enunciates the most-favored-nation principle. It provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any *advantage, favor, privilege or immunity* granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.⁸¹

A unilateral quota aimed solely at the Japanese car market would restrict imports from only one contracting member of GATT — Japan.⁸² The quota would thereby put the imports of every other nation at an advantage because these imports would not be subject to quota limits.⁸³ Under Article I(1), an “advantage, favor, privilege or immunity” must extend to all contracting parties.⁸⁴ By only limiting Japanese imports, a unilateral quota would exclude Japan from the privilege afforded other foreign auto producers, who may export automobiles to the United States without restrictions. Since the imports of all other contracting parties would have an advantage over the Japanese auto imports, such a unilateral quota would violate Article I(1). Thus the proposed quota would contravene

agreement that Congress has never ratified. Jackson, *General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250 (1967). An executive agreement means that the United States entered into an agreement not by congressional ratification but by the presidential authority under the Constitution and as delegated by Congress. *Id.*

78. Cuddington & McKinnon, *Free Trade Versus Protectionism: A Perspective*, in *TARIFFS, QUOTAS AND TRADE: THE POLITICS OF PROTECTIONISM* 21 (1979).

79. GATT, *supra* note 6, art. XI.

80. *Hearings*, (pt. II), *supra* note 3, at 3-4.

81. GATT, *supra* note 6, art. I(1) (emphasis added).

82. See GATT ACTIVITIES, *supra* note 7, at 86.

83. *Hearings*, (pt. II), *supra* note 3, at 116 (statement of Robert M. McElwaine, President of the American International Automobile Dealers Association).

84. See note 81 and accompanying text *supra*.

this provision's guarantee of non-discriminatory trade between GATT's member countries.⁸⁵

Article XI(1) would present a second problem with quota legislation. This Article, which prohibits quantitative restrictions on both imports and exports,⁸⁶ provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses, or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.⁸⁷

However, this general provision has several important exceptions.⁸⁸ Article XI(1) applies subject to several rights of members.⁸⁹ These rights include the imposition of import restraints: (1) to control imports interfering with domestic agricultural programs designed to limit production in order to prevent oversupply;⁹⁰ (2) to safeguard the external financial position and the balance-of-payments of a contracting party;⁹¹ (3) to allow a contracting party in specified situations to abide by its obligations under international commodity agreements that have been submitted to, and not disapproved by, the contracting parties;⁹² and (4) to implement "any action which [a contracting party] considers necessary for its essential security interests . . . in time of war or other emergency in international relations."⁹³

The only exemption from Article XI(1) which on its face would likely apply to the auto trade issue is the second exception.⁹⁴ If this exception were applicable to the auto import problem, Article XII(2) would require the United States to limit

85. *Hearings*, (pt. II), *supra* note 3, at 116 (statement of Robert M. McElwaine, President of the American International Automobile Dealers Association). See JACKSON, *supra* note 9, at 255.

86. GATT, *supra* note 6, art. XI(1).

87. *Id.*

88. *Id.* arts. XI(2), XII, XX(h), XXI(b)(iii).

89. *Id.*

90. *Id.* art. XI(2).

91. *Id.* art. XII.

92. *Id.* art. XX(h).

93. *Id.* art. XXI(b)(iii).

94. *Hearings*, (pt. II), *supra* note 3, at 116 (statement of Robert M. McElwaine, President of the American International Automobile Dealers Association). The first and third exceptions, which apply to domestic agricultural programs and international commodity agreements respectively, would not apply to the auto trade problem because of the specific nature of these provisions. GATT, *supra* note 6, arts. XI(2), XX(h). Similarly, the fourth exception would not apply since the auto trade issue would probably not rise to the level of "an emergency in international relations." *Id.* art. XXI(b)(iii). The ITC denial of import relief to the auto industry demonstrates the fact that even under U.S. procedures the industry failed to qualify as in an emergency situation. See § II.B *supra*. See also Smith, *supra* note 1, at 27.

a unilateral import quota to the minimum level necessary to remedy the situation⁹⁵ and to release the import controls as soon as conditions would permit.⁹⁶ Although these requirements are not necessarily egregious, they do present a third obstacle to the application of import controls. Even if quantitative restrictions on auto imports are permissible pursuant to this exception, Article XIII(1) of GATT⁹⁷ states that a contracting party may not apply these restrictions against imports from any one nation without applying restrictions on such imports to all nations.⁹⁸ A unilateral quota would restrict auto imports from Japan alone while allowing auto producers from other nations to export vehicles without restraint. Article III(1) requires that restrictions apply equally to imports from all nations. Since restrictions would apply solely to Japanese imports, the proposed unilateral quota would violate this provision.⁹⁹

The limited application of the exceptions to Article XI may lead to reliance by contracting parties on Article XIX for validation of import quotas.¹⁰⁰ Under Article XIX of GATT, import limitations "may be imposed only where products are being imported . . . in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers . . . of like or directly competitive products."¹⁰¹ The United States requires that an injured party seeking import restraints under GATT obtain an affirmative finding of import-related injury¹⁰² from the U.S. International Trade Commission in order to avoid needlessly invoking Article XIX of GATT.¹⁰³ In the case of the U.S. auto industry, the ITC has made a negative injury determination.¹⁰⁴ The ITC based its decision on the fact that oil prices, the economic recession and the demand for smaller cars among consumers were the primary reasons for the industry's situation.¹⁰⁵ Similarly, an international dispute-settlement panel

95. GATT, *supra* note 6, art. XII(2)(a). See JACKSON, *supra* note 8, at 684.

96. GATT, *supra* note 6, art. XII(2)(b). See JACKSON, *supra* note 8, at 685.

97. GATT, *supra* note 6, art. XIII(1).

98. *Id.*

99. *Hearings*, (pt. II), *supra* note 3, at 117 (statement of Robert M. McElwaine, President of the American International Automobile Dealers Association).

100. GATT, *supra* note 6, art. XIX. The parties to GATT refer to Article XIX of GATT as the "safeguard" system of GATT since Article XIX permits import restrictions in order to enable domestic industries to adjust to growing competition from foreign industries. See Note, *GATT and the Tokyo Round*, 11 CAL. W. INT'L L.J. 302, 320 (1981). Article XIX has standards of assessing import-related injury similar to those previously noted in § 201 of the Trade Act of 1974. S. REP. NO. 1298, 93d Cong., 2d Sess. 119, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7263.

101. GATT, *supra* note 6, art. XIX.

102. S. REP. NO. 1298, 93d Cong., 2d Sess. 122, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7266.

103. *Hearings*, (pt. I), *supra* note 3, at 190 (statement of Robert M. McElwaine, President of the American International Automobile Dealers Association). Throughout the 33 years of GATT's operation, the U.S. has invoked the principle in Article XIX by requiring that petitioners obtain an affirmative finding from the ITC. *Id.*

104. See § II.B *supra*.

105. *Id.*

would likely find insufficient evidence that the influx of Japanese auto imports "cause[s] or threaten[s] serious injury" and thereby determine the quota legislation to be in violation of Article XIX.¹⁰⁶

The only alternative for qualifying quota legislation under GATT rules is the waiver provision of Article XXV. Article XXV(5) provides that "in exceptional circumstances, the contracting parties may waive an obligation imposed upon a contracting party by this Agreement; . . . any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties."¹⁰⁷ Absent a waiver under Article XXV of GATT, quota legislation would have violated U.S. international trade obligations under GATT.¹⁰⁸ A GATT violation invites further retaliation by Japan: "At any time that [the United States uses] legislative force or other unilateral type of action to impair trade, there is a right, under the [articles of GATT] for the other [exporting] countries to take equivalent action against U.S. goods."¹⁰⁹ However, Japan's ability to establish grounds for retaliation against the United States under the provisions of GATT is unlikely. The United States, whose market accounts for thirty percent of Japanese exports, is Japan's largest trading partner.¹¹⁰ Japan had a twelve billion dollar trade surplus with the United States in 1980¹¹¹ and an eighteen billion dollar trade surplus in 1981.¹¹² A rise in unemployment levels might be grounds for retaliation under GATT. Nevertheless, import controls probably would not increase Japan's 1.9 percent unemployment rate since overtime work produces an estimated 1.5 million Japanese vehicles.¹¹³ These figures suggest that Japan could accommodate the limits proposed in quota legislation by merely cutting back on overtime production.¹¹⁴ Therefore, any claim by Japan as an injured party seeking retaliation under GATT would be unfounded.

The risk of a GATT violation and the threat of Japanese retaliation might compel the United States to refrain from adopting a unilateral quota position.¹¹⁵ GATT's limitations on the availability of unilateral quotas, as authorized in

106. *Hearings*, (pt. II), *supra* note 3, at 117 (statement of Robert M. McElwaine, President of the American International Automobile Dealers Association).

107. GATT, *supra* note 6, art. XXV(5).

108. *Id. Hearings*, (pt. II), *supra* note 3, at 118 (statement of Robert M. McElwaine, President of the American International Automobile Dealers Association).

109. *Hearings on Tariff and Trade Proposals Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. 455 (1970) (statement of Maurice Stans, former Secretary of Commerce).

110. *Hearings*, (pt. II), *supra* note 3, at 86 (statement of Paul J. Fannin, former U.S. Senator).

111. *Boston Globe*, Mar. 19, 1982, at 11, col. 2.

112. *Id.*

113. *Hearings and Markup*, *supra* note 43, at 57 (statement of Douglas A. Fraser, President of the United Auto Workers (UAW)).

114. *Hearings*, (pt. II), *supra* note 3, at 203 (statistic of the U.S. Department of Transportation).

115. *Hearings*, (pt. I), *supra* note 3, at 50 (statement of Ambassador Robert D. Hormats, former U.S. Trade Representative). See HUDEC, *supra* note 7, at 213.

Articles XI and XIX,¹¹⁶ might influence Congress to decide not to pass quota legislation. Absent a sufficient finding of import-related injury pursuant to U.S. procedures under the Trade Act of 1974¹¹⁷ and the international standards of injury under GATT,¹¹⁸ the imposition of a quota designed to provide import relief may have adverse trade policy implications.¹¹⁹ U.S. implementation of a quota would not only override the Section 201 proceeding, which denied import relief to the U.S. auto industry due to an insufficient showing of serious injury,¹²⁰ but would also contradict the U.S. commitment to GATT's guidelines which similarly require an affirmative finding of injury before granting import relief.¹²¹ Thus, quota legislation would undermine the ITC decision and circumvent the articles of GATT.¹²² In choosing not to pass quota legislation, the United States has avoided the consequences which a violation of GATT might bring as well as the potential international ill will which nations might associate with the imposition of import controls.

IV. THE APPLICATION OF THE VOLUNTARY RESTRAINT AGREEMENT

A. *Executive Authority to Negotiate a Voluntary Restraint Agreement*

The Reagan Administration's preference for the voluntary quota system arises from its desire to adhere to the U.S. position as a proponent of free trade and signatory to GATT.¹²³ A unilateral quota would not comply with various articles of GATT.¹²⁴ Moreover, a voluntary quota has an economic advantage over unilateral import controls from Japan's standpoint.¹²⁵ Under a voluntary system, in which quota levels are not fixed, Japanese producers retain some control in establishing the terms of the agreement¹²⁶ and in raising quota levels according to market demands.¹²⁷ Despite the seemingly overwhelming preference for a voluntary restraint agreement over a unilateral quota,¹²⁸ the United States must resolve a threshold issue before adopting a voluntary restraint agreement: This

116. See text accompanying notes 86-106 *supra*.

117. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1980).

118. GATT, *supra* note 6, art. XIX. See JACKSON, *supra* note 8, at 555.

119. *Hearings*, (pt. I), *supra* note 3, at 191.

120. See § II.B *supra*.

121. GATT, *supra* note 6, art. XIX.

122. *Hearings*, (pt. I), *supra* note 3, at 191.

123. N.Y. Times, May 1, 1981, at D2, col. 4.

124. See § III *supra*.

125. Japan Times Weekly, May 9, 1981, at 9, col. 1.

126. See HUNSBERGER, *supra* note 4, at 355. Although voluntary quotas are often agreed upon under pressure, the exporting nation has a chance to negotiate and the result includes some element of compromise. *Id.*

127. Japan Times Weekly, May 9, 1981, at 2, col. 4. Under a voluntary restraint agreement, Japan can possibly acquire a larger share of the market during the second year of the quota. *Id.*

128. N.Y. Times, May 1, 1981, at 1, col. 3.

question is the extent of the executive authority to negotiate voluntary auto restraints with Japan.

1. Explicitly Delegated Authority

The U.S. Constitution vests in Congress the power to "regulate commerce with foreign nations and among the several states."¹²⁹ In various legislative provisions, Congress has delegated this responsibility and specifically authorized the President to negotiate and implement voluntary restraint agreements.¹³⁰

Section 201 of the Trade Act of 1974 authorizes the President to provide import relief by way of import restrictions or adjustment assistance.¹³¹ This Section only applies after an "escape clause" hearing¹³² and a finding by the U.S. International Trade Commission that imports constitute a "substantial cause of serious injury"¹³³ to domestic producers of similar or directly competitive commodities.¹³⁴ The Commission's ruling in the auto case denied import relief pursuant to Section 201 of the Trade Act.¹³⁵ In light of the negative ITC decision, the general negotiating authority which Section 201 grants to the President would not be available in the auto trade case.¹³⁶ Section 201 requires a finding of import-related injury by the ITC before the President may invoke his powers to negotiate.¹³⁷

The executive authority provided in Section 201 of the Trade Act of 1974 is narrow in comparison to the wide discretion granted by Section 204 of the Agricultural Act of 1956¹³⁸ and Section 5(b) of the Trading With the Enemy Act of 1917.¹³⁹ Congress enacted the Agricultural Act to remove any doubts about the President's power to conduct negotiations with Japan regarding cotton textiles.¹⁴⁰ Having been granted adequate authority to negotiate trade restraints, the executive branch entered into discussions with Japan which eventually resulted in the implementation of voluntary quotas on Japanese cotton textiles.¹⁴¹

129. U.S. CONST. art. I, § 8, cl. 3.

130. Trade Act of 1974 § 203, 19 U.S.C. § 2253 (1980). Agricultural Act of 1956 § 204, 7 U.S.C. § 1854 (1968). Section 201 of the Trade Act of 1974 and Section 204 of the Agricultural Act of 1956 grant the President authority to negotiate and implement voluntary restraint agreements. See text accompanying notes 131-41 *infra*.

131. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1980).

132. *Id.* For a discussion of the escape clause, see § II.B *supra*.

133. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1980).

134. *Id.*

135. See text accompanying notes 65-70 *supra*.

136. Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1980).

137. *Id.*

138. Agricultural Act of 1956 § 204, 7 U.S.C. § 1854 (1968).

139. 50 U.S.C. app. §§ 1-40 (1980).

140. 7 U.S.C. § 1854 (1968).

141. HUNSBERGER, *supra* note 5, at 353. In the case of cotton textiles, the parties did not exhaust their

Similarly, Section 5(b) of the Trading With the Enemy Act of 1917 granted the Executive the discretion to negotiate import controls in situations of national emergency.¹⁴²

The failure of the "escape clause" hearing to facilitate protective action on behalf of the domestic auto industry led U.S. auto representatives to seek congressional legislation which would delineate the President's authority to proceed in negotiations with Japan.¹⁴³ In the fall of 1980, Congress came close to adopting a provision similar to the Agricultural Act of 1956.¹⁴⁴ Although the joint resolution¹⁴⁵ cleared the House of Representatives by a 317 to 57 margin, it died in the Senate.¹⁴⁶ Absent legislatively delegated authority which would clarify the President's power to negotiate a voluntary restraint agreement for auto imports with Japan,¹⁴⁷ the executive branch must rely on its inherent constitutional power to conduct foreign affairs¹⁴⁸ for its negotiating authority.

2. Inherent Constitutional Power

The Supreme Court broadly described the constitutional power of the President to conduct foreign affairs¹⁴⁹ in *United States v. Curtiss-Wright Export Corporation*¹⁵⁰: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."¹⁵¹ While the language appears to refer primarily to the executive branch in its dealings with foreign sovereigns, the President may negotiate with other non-governmental foreign parties as an incident of this power.¹⁵²

Approval by a court of a presidential exercise of inherent constitutional authority to negotiate a voluntary restraint agreement most recently appeared in

remedies under the Tariff Commission as no hearings were held on the matter. *Id.* See 7 U.S.C. § 1854 (1968).

142. 50 U.S.C. app. §§ 1-40 (1980).

143. H.R.J. Res. 598, 96th Cong., 2d Sess., 126 CONG. REC. H11, 560-562 (daily ed. Dec. 2, 1980). The principal sponsors of the bill were Representatives William Brodhead (D.-Mich.), Donald Albosta (D.-Mich.) and John Brademus (D.-Ind.). *Id.*

144. Schlosser, *supra* note 41, at 3.

145. H.R.J. Res. 598, 96th Cong., 2d Sess. 126 CONG. REC. H11, 560-562 (daily ed. Dec. 2, 1980).

146. Schlosser, *The Auto Trade Dispute*, J.E.I. REP., Jan. 9, 1981, at 2.

147. *Id.*

148. U.S. CONST. art. II, § 2.

149. *Consumers Union of U.S., Inc. v. Rogers*, 352 F. Supp. 1319 (D.D.C. 1973), *modified and aff'd sub. nom. Consumers Union v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

150. 299 U.S. 304 (1936).

151. *Id.* at 319.

152. Comment, *Executive Authority and Antitrust Considerations in "Voluntary" Limits on Steel Imports*, 118 U. PA. L. REV. 105, 126 (1969).

Consumers Union of U.S., Inc. v. Rogers.¹⁵³ The case involved the steel import quota in 1969.¹⁵⁴ After negotiations with the U.S. State Department, steel manufacturers from Japan and the European Economic Community (EEC)¹⁵⁵ agreed to voluntarily restrain steel exports from 1969 through 1971.¹⁵⁶ An extension of the three-year arrangement in 1972 led to an action by Consumers Union, a public interest group,¹⁵⁷ which raised the issue of presidential authority to negotiate these voluntary restraint agreements.¹⁵⁸ The court held that although Congress has not legislated the negotiating power, this power is an extension of the executive power to conduct foreign policy under the Constitution.¹⁵⁹ This holding supports the conclusion that the executive branch has sufficient authority under the Constitution to negotiate a voluntary restraint agreement with Japan without legislative assistance.¹⁶⁰

B. Antitrust Implications of Negotiating a Voluntary Restraint Agreement

To the extent that it controls the influx of foreign imports, the voluntary auto agreement between the United States and Japan is "in restraint of trade or commerce among the several States, [and] with foreign nations"¹⁶¹ and may be illegal within the meaning of Section One of the Sherman Act.¹⁶² The negotiation of a voluntary restraint agreement can assume one of three basic forms: industry-to-industry, government-to-industry, and government-to-government.¹⁶³ Each of the three negotiating procedures in the voluntary restraint

153. *Consumers Union*, 506 F.2d at 142-43.

154. *Id.*

155. Treaty Establishing the European Economic Community, 298 U.N.T.S. 11 (1958) [hereinafter cited as EEC Treaty]. Member countries are Belgium, Denmark, Federal Republic of Germany (West Germany), France, Great Britain, Italy, Luxembourg, the Netherlands, and the Republic of Ireland. E. NOEL, *WORKING TOGETHER: THE INSTITUTIONS OF THE EUROPEAN COMMUNITY* 3 (1979). The primary aim of the EEC is the eventual economic union of its member nations, ultimately leading to political union. EEC Treaty, *supra*, art. 2. Steps in this direction include the gradual elimination of internal tariff barriers and the establishment of a common tariff system, the free movement of labor and capital and the abolition of trusts and cartels. *Id.* arts. 85-86.

156. Bates, *supra* note 21, at 101.

157. *Id.* at 102.

158. *Consumers Union*, 506 F.2d at 140. Assuming such executive authority existed, *Consumers Union* also raised the issue of the agreements' function as a "restraint of trade" pursuant to § 1 of the Sherman Act. *Id.* at 136. This claim was dropped before a judicial determination of the issue. *Id.*

159. *Id.* at 142-43.

160. *Id.*

161. The Sherman Act, 15 U.S.C. § 1 (1973).

162. *Id.*

163. Smith, *supra* note 1, at 16-22. Two other approaches to negotiations are individual-to-exporting industry and multilateral agreements. *Id.* at 18, 21. Resort to either of these procedures is uncommon. *Id.* The only case of an individual playing a major role in trade negotiations on behalf of the U.S. government was in 1971. *Id.* at 18. Congressman Wilbur Mills, chairman of the House Ways and Means Committee and supporter of a bill to impose textile import quotas, negotiated a voluntary restraint agreement with the Japanese textile industry. *Id.* at 18. Similarly, multilateral agreements rarely occur in light of the provisions of GATT. *Id.* at 21.

context raises antitrust issues under the Sherman Act. In addition, each method involves different types of parties and, consequently, has varying potential for antitrust liability. An examination of these various negotiating procedures sheds light on the defenses which are available to lessen the risk of a violation under U.S. antitrust law.

1. Industry-to-Industry Negotiations

In industry-to-industry negotiations, producers in the exporting and importing nations directly conduct the negotiations.¹⁶⁴ Although other countries have utilized this approach effectively,¹⁶⁵ voluntary restraint agreements among U.S. and foreign producers run a substantial risk of violating U.S. antitrust law.¹⁶⁶ The most potent legal objection to negotiations at this level arises under the Sherman Act, which expressly forbids anti-competitive, private interest agreements.¹⁶⁷ The court in *United States v. Aluminum Co. of America*¹⁶⁸ held that agreements reached through industry-to-industry negotiations, which substantially affect U.S. commerce, likely fall within the ambit of the Sherman Act.¹⁶⁹

2. Government-to-Industry Negotiations

A second arrangement which can result in a voluntary restraint agreement is government-to-industry negotiations. In this arrangement, a government represents the interests of private industry in dealing with foreign producers.¹⁷⁰ A typical example of a government-to-industry agreement is the 1969 and 1972 steel import arrangements.¹⁷¹ In these two arrangements the U.S. government proceeded to negotiate with foreign producers on behalf of the domestic steel industry.¹⁷² Consumers Union challenged the VRA on imports of steel.¹⁷³ The issue in *Consumers Union of U.S., Inc. v. Rogers*¹⁷⁴ was whether private agreements,

164. *Id.* at 16. This approach requires (a) the existence of a strictly regulated industry in the exporting nation that monopolizes the exports of the product and recognizes some advantage in controlling its output in a given situation and (b) the negotiating strength of the industry in the importing nation, which must be able to offer either a quid pro quo or the threat of effective retaliation. *Id.*

165. *Id.* For example, Great Britain implemented company-to-company arrangements regarding the auto problem. *Hearings*, (pt. I), *supra* note 3, at 51 (statement of Ambassador Robert D. Hormats, former U.S. Trade Representative).

166. *Id.*

167. The Sherman Act, 15 U.S.C. § 1 (1973). *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958).

168. 148 F.2d 416 (2d Cir. 1945).

169. *Id.*

170. Smith, *supra* note 1, at 17.

171. Bates, *supra* note 21, at 101.

172. *Id.*

173. *Consumers Union*, 506 F.2d at 136.

174. *Id.*

negotiated or induced by the U.S. government but falling short of outright governmental compulsion, enjoy at least some protection from antitrust attack because of the direct involvement of governmental officials in these negotiations.¹⁷⁵

The defenses in the cases of *Eastern Railroad Presidents-Conference v. Noerr Motor Freight, Inc.*¹⁷⁶ and *United Mine Workers of America v. Pennington*¹⁷⁷ purported to grant private parties immunity from antitrust charges where a restraint upon trade or a monopolization was the result of valid governmental action, whether legislative or administrative. However, the Court in *United States v. Socony-Vacuum Oil Co.*¹⁷⁸ held that mere participation by officials of the executive branch in the negotiation of agreements in restraint of trade did not mitigate the illegality of such arrangements under the Sherman Act.¹⁷⁹ Although the executive branch has inherent constitutional authority under its foreign affairs power to negotiate voluntary restraint agreements,¹⁸⁰ the scope of its authority does not extend to the enforcement of the agreements.¹⁸¹ Absent legislation specifically authorizing the President to enforce the agreement, the President is unable to enforce a VRA domestically.¹⁸² Since the government lacks the power to enforce the agreement, the collusive conduct of domestic and foreign parties acting in accordance with the voluntary restraint agreement poses a serious antitrust problem.¹⁸³ Actions by private industry to curtail exports have a substantial effect on U.S. commerce. Because this effect can be detrimental to trade, Congress enacted the Sherman Act. Thus, application of the Act to these situations is within the purpose of the Sherman Act.¹⁸⁴

In order to forestall liability of domestic and foreign steel producers, Congress enacted Section 607 of the Trade Act of 1974.¹⁸⁵ This section provides that no

175. U.S. INDUSTRIAL COMPETITIVENESS, *supra* note 1, at 185.

176. 365 U.S. 127 (1961). The case was an action for an injunction and treble damages brought by several trucking companies against a group of railroad companies, which allegedly campaigned for laws harmful to truckers. *Id.* The Court held that an association which "persuades the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly" must also be exempt. *Id.* at 136.

177. 381 U.S. 657 (1965). In this case a union welfare and retirement fund sued a small coal company for royalty payments under a wage agreement. *Id.* The company filed a cross claim against the union alleging various antitrust violations. *Id.* The Court held that "efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.* at 670.

178. 310 U.S. 150 (1940).

179. *Id.* at 225-227.

180. *Consumers Union*, 506 F.2d at 140. *See* § IV.A *supra*.

181. *Hearings*, (pt. I), *supra* note 3, at 156 (official letter from Assistant Attorney General John H. Shenefield, spokesman for the U.S. Department of Justice).

182. *Id.* at 19. *Consumers Union*, 506 F.2d at 142.

183. *Hearings*, (pt. I), *supra* note 3, at 156 (official letter from Assistant Attorney General John H. Shenefield, spokesman for the U.S. Department of Justice).

184. *Id.*

185. Trade Act of 1974 § 607, 19 U.S.C. § 2485 (1980).

person associated with the voluntary steel arrangement should be liable for damages, penalties or other sanctions under U.S. antitrust law.¹⁸⁶ However, absent a clear antitrust exemption granted by Congress, the U.S. government's role in government-to-industry negotiations will not serve to insulate private parties who participate in subsequent voluntary restraint agreements from Sherman Act liability.¹⁸⁷ Since the executive branch lacks the authority to enforce such agreements, private parties, acting without governmental compulsion to meet the terms of the VRAS, would bear the risk of an antitrust violation.¹⁸⁸

3. Government-to-Government Negotiations

The third type of negotiations takes place on a government-to-government level. The U.S.-Japanese auto accord utilized this negotiating procedure.¹⁸⁹ In government-to-government negotiations, the governments of both the importing and exporting nations conduct negotiations on behalf of domestic industries.¹⁹⁰ This third type of agreement contrasts with both the industry-to-industry and government-to-industry agreements. These latter agreements are unilateral undertakings by the export industries and theoretically do not involve their governments.¹⁹¹ Since the exporting nation's government cannot enforce the agreement, industries participating in these arrangements are subject to antitrust charges under the Sherman Act.¹⁹² On the other hand, a voluntary restraint agreement reached through bilateral negotiations invokes the full power of the government of the exporting nation to secure enforcement.¹⁹³

The manner in which a foreign government implements a voluntary restraint agreement has implications as to its potential antitrust liability. For example, if a foreign government merely makes a recommendation or expresses approval of the agreement, foreign producers may incur antitrust charges if they voluntarily limit their exports to the U.S. market.¹⁹⁴ Regardless of the foreign government's recommendation or approval of the VRA, the exporters' actions would constitute a Sherman Act violation as a "restraint or trade."¹⁹⁵ However, if the foreign

186. S. REP. NO. 1298, 93d Cong., 2d Sess. 22, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7186, 7360.

187. See *Consumers Union*, 506 F.2d at 140-42.

188. U.S. INDUSTRIAL COMPETITIVENESS, *supra* note 1, at 185.

189. Japan Economic Journal, May 5, 1981, at 1, col. 1.

190. Smith, *supra* note 1, at 19.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

195. *Continental Ore Co v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). As a matter of international comity and fairness, the extraterritorial reach of U.S. antitrust laws is a subject about which there has been a great deal of discussion. Kinter & Hallgarten, *Application of United States Antitrust*

government officially enforces the voluntary restraint agreement, foreign producers may escape antitrust liability.¹⁹⁶

Two antitrust defenses are available when a government enforces voluntary restraint agreements: "foreign compulsion"¹⁹⁷ and the "act of state" doctrine.¹⁹⁸ "Foreign compulsion" applies when a foreign government compels private parties located within its borders to comply with inter-governmental agreements.¹⁹⁹ The court in *Interamerican Refining Corporation v. Texaco Maracaibo, Inc.*²⁰⁰ held that trade practices arising from "foreign compulsion" would most likely not be subject to Sherman Act liability.²⁰¹ The court reasoned that the Sherman Act does not confer jurisdiction on United States courts over acts of business which a nation compels.²⁰² In *Continental Ore Co. v. Union Carbide & Carbon Corporation*,²⁰³ the U.S. Supreme Court held that it is unlikely to allow the "foreign compulsion" defense absent a valid decree by a foreign government compelling compliance with the inter-governmental agreement.²⁰⁴ The case involved a corporation appointed by the Canadian government to act as the nation's exclusive metal controller, responsible for allocating strategic metals for Canadian industries during World War II.²⁰⁵ Although acting within its discretionary authority, the Canadian agent engaged in purchasing practices which discriminated against the plaintiff-U.S. competitor.²⁰⁶ The U.S. Supreme Court rejected the defense that an export restriction pursuant to governmental recommendation or request was exempt from antitrust liability.²⁰⁷ In its decision, the Court emphasized that the Canadian purchasing agent's anti-competitive activities had not been specifically

Laws to Foreign Trade and Commerce, 15 B.C. INDUS. & COMM. L. REV. 343, 356-58 (1973). Actual litigation reveals that jurisdiction is not lacking. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 498 (2d ed. 1973). Up to May 1973, the U.S. Department of Justice had filed approximately 248 foreign trade antitrust cases; not one of these cases was lost for lack of jurisdiction over the activities which allegedly violated the law. *Id.* See generally J. ATWOOD & V. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1981).

196. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

197. *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

198. *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481 (1966), *aff'd*, 375 F. 2d 1011 (2d Cir. 1967), *cert. denied*, 389 U.S. 830 (1967).

199. *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). *But see* *Linseman v. World Hockey Ass'n* 439 F. Supp. 1315 (D. Conn. 1977), where the court held that "foreign compulsion" was no defense for acts committed in the United States.

200. 307 F. Supp. 1291 (D. Del. 1970).

201. *Id.* at 1303.

202. *Id.*

203. 370 U.S. 690 (1962).

204. *Id.*

205. *Id.* at 707.

206. *Id.* at 695.

207. *Id.* at 704. To the disadvantage of the plaintiff, the Canadian purchasing agent assisted its U.S. parent company by restraining and monopolizing the vanadium industry. *Id.*

directed by the Canadian government.²⁰⁸ Mere governmental request, acquiescence or approval is, therefore, insufficient grounds for claiming the "foreign compulsion" defense.²⁰⁹

On the other hand, if a government participates in implementing an agreement to the extent that the action of the private parties are tantamount to those of the sovereign, antitrust liability will not attach because of the "act of state" doctrine.²¹⁰ The "act of state" doctrine precludes U.S. courts from inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own territory.²¹¹ *Underhill v. Hernandez*²¹² sets forth the traditional formulation of the "act of state" doctrine:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.²¹³

However, the "act of state" defense is limited in the voluntary restraint agreement context.²¹⁴ The Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*²¹⁵ distinguishes between public and governmental acts of sovereign states and private and commercial acts: "When a state enters the marketplace, it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader."²¹⁶ Because the case involved an act which is commercial and not public in nature, the Court held that the "act of state" doctrine would not apply.²¹⁷ Thus, most private actions and the commercial actions of state-owned and operated trading companies do not qualify as "acts of state."²¹⁸

Unless the defenses of "foreign compulsion" or "act of state" apply, any collusive private conduct abroad pursuant to a voluntary restraint agreement

208. *Id.* at 707.

209. *Id.* *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). *Timberlane* was a private antitrust suit in which the court found potential liability for restraints of U.S. import trade occurring in Central America. *Id.*

210. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

211. *Id.*

212. 168 U.S. 250 (1897).

213. *Id.* at 252.

214. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

215. *Id.*

216. *Id.* at 696 (quoting *Ohio v. Helvering*, 292 U.S. 360, 369 (1934)).

217. *Id.* at 697.

218. *Id.* "Because the act relied on by respondents in this case was an act arising out of the conduct by Cuba's agents in the operation of cigar businesses for profit, the act was not an act of state." *Id.* at 706.

would run the risk of an antitrust violation.²¹⁹ Governmental recommendation or request by the exporting nation is insufficient in minimizing the antitrust claim.²²⁰ In order to avoid antitrust challenges, parties to the agreement should obtain the direct, articulated commitment of the exporting government to enforce the VRA, rather than rely on informal governmental encouragement or the discretion of private industry.²²¹ Under these limited circumstances, foreign producers complying with their government's directives may avert U.S. antitrust liability.

C. *Japanese Administration of the Quota*

A key factor in evaluating the antitrust implications of Japanese auto export restraints is how the Japanese government implements the quota. As expressed by the U.S. Justice Department, "an agreement between the two governments — Japan and the United States — reached as a result of such [bilateral] negotiations would not be an antitrust violation . . . if the foreign government required through its legal process compliance by its national firms."²²² The primary branch of the Japanese government empowered to enforce the VRA on automobiles is the Ministry of International Trade and Industry. (MITI).²²³ As reported in Japan's initial announcement of the agreement,²²⁴ MITI is responsible for setting quotas for individual automakers under administrative guidance and for requiring them to report their U.S. car exports each month.²²⁵ In addition to monitoring the volume of exports, MITI will impose mandatory curbs under the Foreign Exchange and Foreign Trade Control Law (Control Law)²²⁶ if car shipments reach the assigned quota levels.²²⁷ In order to avoid an antitrust violation,²²⁸ the imposition of an export quota must qualify as a legitimate exercise of MITI's administrative and statutory power within the Japanese governmental system.²²⁹

219. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

220. *Id.*

221. *Id.*

222. *Hearings*, (pt. I), *supra* note 3, at 156 (official letter from Assistant Attorney General John H. Shenefield, spokesman for the U.S. Department of Justice).

223. *Japan Times Weekly*, May 9, 1981, at 2, col. 1.

224. *N.Y. Times*, May 1, 1981, at 1, col. 3.

225. *Japan Times Weekly*, May 9, 1981, at 2, col. 4.

226. Law No. 228 of 1949 (amended 1968) [hereinafter cited as Law No. 228]. The Control Law is the means for regulating exports from Japan. *Id.* arts. 48-51.

227. *Japan Times Weekly*, May 9, 1981, at 2, col. 4.

228. *Hearings*, (pt. I), *supra* note 3, at 156 (official letter from Assistant Attorney General John H. Shenefield, spokesman for the U. S. Department of Justice).

229. *See Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970); *Hearings*, (pt. I), *supra* note 3.

1. The Role of the Ministry of International Trade and Industry

The Ministry of International Trade and Industry is the single most important institution in Japan's industrial policy-making process.²³⁰ The Japanese government formed MITI in 1949 by combining the Ministry of Commerce and Industry and the Board of Trade.²³¹ MITI includes all but a few major industries within its jurisdiction,²³² and is notable for the variety of functions it performs. MITI is responsible for: (1) shaping the structure of industry and adjusting dislocations that arise in transition; (2) guiding the healthy development of industries and their production and distribution activities; (3) managing Japan's foreign trade and its commercial relations; (4) ensuring adequate raw materials and energy flows to industry; and (5) managing particular areas such as small business patents and industrial technology.²³³

MITI is also responsible for administering export controls, such as the voluntary automobile quota.²³⁴ Under the Law Establishing the Ministry of International Trade and Industry,²³⁵ MITI has the authority to take certain administrative measures to implement Japanese trade policy.²³⁶ In addition to the power granted by its own enabling statute, MITI assumes its authority from the broad statutory mandate of the Foreign Exchange and Foreign Trade Control Law,²³⁷ and the Export and Import Transactions Law.²³⁸ Thus, as a result of the Japanese statutory scheme, MITI is an effective arm of the Japanese government in industrial and international trade matters.²³⁹

2. Administrative Guidance

In enforcing the voluntary auto quota with the United States, MITI has chosen to use administrative guidance, supported by its official statutory and legal authority under the Foreign Exchange and Foreign Trade Control Law.²⁴⁰ Much of the leverage MITI and other agencies exert over industry in Japan results from the pervasive Japanese practice of administrative guidance.²⁴¹ Ad-

230. MAGAZINER & HOUT, *supra* note 16, at 39.

231. *Id.*

232. *Id.*

233. *Id.* at 40.

234. HUNSBERGER, *supra* note 4, at 291.

235. Law No. 275 of 1952 (amended 1977).

236. *Id.* art. 4(1). Administrative measures include the restriction or prohibition of the export or import of goods; the execution of agreements regarding international trade; the sanctioning of such agreements by exporters, importers, or manufacturers. *Id.*

237. Law No. 228, *supra* note 226, arts. 47-48. See § IV.C.3 *infra*.

238. Law No. 299 of 1952 (amended 1965).

239. See MAGAZINER & HOUT, *supra* note 16, at 39-41.

240. Japan Times Weekly, May 9, 1981, at 2, col. 4.

241. MAGAZINER & HOUT, *supra* note 16, at 41. See also J. STOCKWIN, JAPAN: DIVIDED POLITICS IN A GROWTH ECONOMY (1975).

ministrative guidance occurs when government officials direct industries and firms to achieve certain policy objectives.²⁴² This approach reflects, in part, the Japanese preference for avoiding confrontation by using informal channels rather than legislative action to deal with problems.²⁴³ Despite the informality of administrative guidance, the Japanese government has traditionally relied on this method for solving trade problems.²⁴⁴

Administrative guidance technically involves "influence, advice, and persuasion to cause firms or individuals to behave in particular ways."²⁴⁵ Ministerial officials outline the government's wishes and expectations to representatives of a firm, an industry, or an industrial association.²⁴⁶ Technically, compliance is voluntary, but government officials use their designated powers to "provide or withhold loans, grants, subsidies, licenses, tax concessions, government contracts, permissions to import, foreign exchange, approval of cartel arrangements" and other benefits to an industry to ensure cooperation.²⁴⁷ Although firms vary in their speed and spirit of compliance,²⁴⁸ all Japanese businesses regard administrative guidance as a justifiable and necessary means of maintaining economic order.²⁴⁹

Japanese case law holds that administrative guidance is a legitimate exercise of governmental power only when an agency can rely on its statutory authority to justify the practice.²⁵⁰ In *Kondoru Kōgyō K.K. v. Nihon*,²⁵¹ Japanese police directed a manufacturer to discontinue production of the toy-guns on the grounds that they were illegal under a statute prohibiting the manufacture of weapons.²⁵² The court held that administrative guidance in this case was an official government action since the police had the statutory authority to compel the manufacturer to cease production by issuing an order pursuant to a weapons-control statute.²⁵³ Accordingly, administrative guidance will qualify as a valid government action only when the ultimate source of power to compel compliance is statutory.²⁵⁴

242. MAGAZINER & HOUT, *supra* note 16, at 41. See generally Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 LAW IN JAPAN: AN ANNUAL 22 (1974).

243. MAGAZINER & HOUT, *supra* note 16, at 41.

244. Ackley & Ishi, *Fiscal, Monetary and Related Policies*, in ASIA'S NEW GIANT 237 (H. Patrick & H. Rosovsky eds. 1976) [hereinafter cited as ASIA'S NEW GIANT].

245. *Id.*

246. MAGAZINER & HOUT, *supra* note 16 at 41. The government's wishes take the form of a request, a recommendation, or occasionally, an admonition. *Id.*

247. ASIA'S NEW GIANT, *supra* note 244, at 237.

248. MAGAZINER & HOUT, *supra* note 16, at 41. Some adhere to the constitutional right to freedom of business authority provided in Article 22 of the Constitution. KENPŌ (Constitution) art. 22 (Japan). See generally Haley, *The Freedom to Choose an Occupation and the Constitutional Limits of Legislative Discretion*, 8 LAW IN JAPAN: AN ANNUAL 188 (1975).

249. MAGAZINER & HOUT, *supra* note 16, at 41.

250. *Kondoru Kōgyō K.K. v. Nihon*, 27 Kakyū minshū 499 (Tokyo District Court, Aug. 23, 1976). See also *Warabi K.K. v. Kyoto shi*, reprinted in 691 HENREI JIHO 57 (Kyoto District Court, July 14, 1972).

251. 27 Kakyū minshū 499 (Tokyo District Court, Aug. 23, 1976).

252. *Id.*

253. *Id.*

254. *Id.*

3. The Foreign Exchange and Foreign Trade Control Law

Although MITI has chosen administrative guidance as the initial means for implementing voluntary export controls, the agency has the statutory power to enforce such an agreement under the Foreign Exchange and Foreign Trade Control Law of 1949.²⁵⁵ The overall objective of the Control Law is to promote the proper development of foreign trade and to safeguard "the balance of international payments and the stability of the currency"²⁵⁶ to maintain "the rehabilitation and the expansion of the national economy."²⁵⁷

Articles 47 and 48²⁵⁸ set forth the basic principle of refraining from export restrictions and the conditions providing for approval of such restraints.²⁵⁹ Article 47 of the Control Law states, as a general principle of free trade, that the "export of goods will be permitted with such minimum restrictions thereon as are consistent with the purpose of this law."²⁶⁰ Article 48 provides the Japanese government with limited exceptions to Article 47:

[a]ny person desiring to export goods of any designated type, or goods destined for any special areas, or to export goods by means of any designated form of transaction or payment, may be required to obtain the approval of the Ministry of International Trade and Industry as provided for by Cabinet Order . . . [which approval] shall be within the limits necessary for the maintenance of the balance of international payments and the sound development of international trade or the national economy.²⁶¹

Thus, in order for MITI to enforce the auto export restrictions under the Control Law, the VRA must qualify as a limit necessary for sound international trade.

The court in 1969 *Pekin-Shanghai Nihon Kōgyō Tenranki v. Nihon* (COCOM case)²⁶² analyzed the legality of export restrictions pursuant to Article 48. In this

255. Law No. 228, *supra* note 226, art. 48.

256. *Id.* art. 1.

257. *Id.* arts. 47-48.

258. See Matsushita, *Export Control and Export Cartels in Japan*, 20 HARV. INT'L L. J. 103 (1979) [hereinafter cited as Matsushita].

259. Law No. 228, *supra* note 226, arts. 47-48.

260. *Id.* art. 47.

261. *Id.* art. 48(1)-48(2). The check price and quantitative restrictions (quotas) have been the primary modes of export restrictions which MITI has used in the exercise of its powers under Article 48 of the Control Law. *Id.* art. 48(2). The check price is a minimum export price usually invoked to prevent dumping in the importing nation. Matsushita, *supra* note 258, at 105. For a general discussion of the problem of dumping, see Recent Development, *United States Antidumping Procedures under the Trade Agreements Act of 1979: A Crack in the Dam of Nontariff Barriers*, 3 B.C. INT'L & COMP. L. REV. 223, 227 (1979). The basis for allocating quotas is past export volume, seniority or "good reputation" regarding the parties involved. Matsushita, *supra* note 258, at 106.

262. 20 Gyōsei reishū 842 (Tokyo District Court, July 8, 1969).

case, the Association for the 1969 Peking-Shanghai Japanese Industrial Exhibition challenged MITI's disapproval of the export of various goods to the People's Republic of China.²⁶³ The court held that MITI's conduct was illegal since this action was outside the scope of MITI's powers under the Control Law.²⁶⁴ The court interpreted Article 47 as expounding the principle of free trade.²⁶⁵ According to this interpretation, free trade is "a right of the people which is part of the freedom of business guaranteed to the people as a fundamental human right under Article 22 of the Constitution, although such freedom should be subject to restrictions for the public welfare."²⁶⁶ The court found that the export restriction imposed by MITI did not come under the exception of Article 48 because it was not "purely and directly necessary" for the maintenance of the balance of international payments and the sound development of international trade of the Japanese economy.²⁶⁷

The court in the COCOM case acknowledged that the Article 48 test justifies export controls in purely economic terms.²⁶⁸ The government had argued that to diverge from the COCOM agreement²⁶⁹ would disrupt amicable U.S.-Japanese relations and lead to economic retaliation by the U.S. and member nations, thereby seriously undermining the "sound development of [Japanese] international trade and national economy."²⁷⁰ To this contention, the court responded that Article 48 would not apply because Japan had entered the COCOM agreement for political rather than economic reasons,²⁷¹ despite the indirect economic effect.²⁷² Therefore, Article 48 would not encompass COCOM export restrictions. MITI's export restraints were illegal since this government action did not fall within the limited exceptions specified in Article 48.²⁷³ According to the court, only export restrictions imposed primarily for economic reasons are legally enforceable under Article 48 of the Control Law.²⁷⁴

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* See text accompanying note 261 *supra*.

268. 20 Gyōsei reishū 842 (Tokyo District Court, July 8, 1969).

269. COCOM (The Consultative Group Coordinating Committee) came into existence in 1950 to compile secret lists of items subject to strategic controls if destined for export to the European Communist bloc. McQuade, *U.S. Trade and Eastern Europe: Its Prospects and Parameters*, 3 LAW & POL'Y INT'L BUS. 42, 72 (1971) [hereinafter cited as McQuade]. The United States first officially recognized its participation in COCOM in the Mutual Defense Assistance Control Act of 1951, ch. 575, § 101, 65 Stat. 645 (1951), amended by Export Administration Act of 1979 § 5(i), 50 U.S.C. app. § 2404(i) (1980).

270. 20 Gyōsei reishū 842 (Tokyo District Court, July 8, 1969). Law No. 228 *supra* note 266, art. 48.

271. McQuade, *supra* note 269, at 72.

272. 20 Gyōsei reishū 842 (Tokyo District Court, July 8, 1969).

273. *Id.*

274. *Id.*

D. *Analysis*

Although a voluntary restraint agreement may be technically in restraint of trade and, hence, illegal under the Sherman Act,²⁷⁵ many variables surround the application of the U.S.-Japanese automobile quota which decrease the probability of this VRA violating U.S. antitrust law. U.S. courts are likely to uphold a VRA against challenges where the exporting nation compels its domestic producers to comply with the terms of the agreement.²⁷⁶ In the case of the U.S. and Japanese automobile industries' VRA, this "foreign compulsion" defense is available because of the Japanese government's direct involvement in the negotiations and enforcement of the voluntary restraint agreement.²⁷⁷

The U.S. and Japanese governments conducted negotiations for the voluntary restraint agreement on behalf of the automobile industries in both countries.²⁷⁸ The U.S. executive branch, without the legislated authority to engage in such negotiations, relied exclusively on its inherent constitutional power to conduct foreign affairs.²⁷⁹ MITI, the trade branch of the Japanese government, acted within its scope of authority in representing the interests of Japanese automakers during the course of the negotiations.²⁸⁰

The fact that the voluntary restraint agreement was the product of bilateral negotiations greatly minimizes the risk of antitrust liability as long as the Japanese government requires "through its legal process compliance by its national firms."²⁸¹ Japan has chosen to rely on administrative guidance as a method of enforcement. Although administrative guidance is "advisory,"²⁸² MITI has exercised a considerable amount of control over the application of the quota.²⁸³ MITI has determined quota limits for individual auto companies based on prior export levels and has warned that it will monitor the number of car exports to evaluate compliance with its demands.²⁸⁴ Failure to adhere to these requirements will subject Japanese producers to stricter controls and sanctions under the Control Law.²⁸⁵

The degree of control MITI has exercised in asserting its policy under ad-

275. 15 U.S.C. § 1 (1973).

276. See § IV.B.3 *supra*. See also *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

277. *Hearings*, (pt. I), *supra* note 3, at 156 (official letter from Assistant Attorney General John H. Shenefield, spokesman for the U.S. Department of Justice).

278. See § IV.B.3 *supra*. The Supreme Court decision in *Consumers Union* supports the conclusion that the executive has the necessary authority to negotiate a voluntary restraint agreement under the Constitution. 506 F.2d at 143-44.

279. U.S. CONST. art. II, § 2.

280. Law No. 228, *supra* note 226, art. 48. See § IV.C.3 *supra*.

281. *Hearings*, (pt. I), *supra* note 3, at 156.

282. *ASIA'S NEW GIANT*, *supra* note 244, at 237.

283. *Japan Times Weekly*, May 9, 1981, at 2, col. 4.

284. *Id.*

285. *Id.*

ministrative guidance seems on its face to be compulsion. Nevertheless, since administrative guidance is merely a governmental recommendation or request, administrative guidance alone would be insufficient to invoke the "foreign compulsion" defense. For enforcement of the quota to qualify as a valid governmental action, MITI must support administrative direction with its legitimate statutory power.²⁸⁶

The Foreign Exchange and Foreign Trade Control Law is MITI's primary source of power to impose export restrictions.²⁸⁷ MITI's use of administrative guidance to direct Japanese automobile firms to comply with a voluntary quota should qualify as a legitimate exercise of governmental power since the ultimate power to restrict exports vests in MITI under Article 48 of the Control Law.²⁸⁸ Thus, since MITI has support from its statutory authority, private action taken in compliance with the agreement would not constitute a collaboration of companies in "restraint of trade" but rather would be a response to a government-mandated program. Therefore, the voluntary restraint agreement on automobiles, officially enforced by the Japanese, should not be struck down on antitrust grounds.

V. CONCLUSION

This Comment has examined the use of the voluntary restraint agreement as an effective means of protecting U.S. industry from foreign imports. U.S. auto producers believed that the high level of Japanese cars exported to the United States²⁸⁹ posed a major threat to the economic recovery of the U.S. auto industry, which reported losses of more than four billion dollars in 1980.²⁹⁰ Negotia-

286. See *Konduro Kōgyō K.K. v. Nihon*, 27 *Kakyū minshū* 449 (Tokyo District Court, Aug. 23, 1976).

287. See § IV.C.3 *supra*.

288. Law No. 228, *supra* note 226, arts. 47-48. The strong limitations on executive discretion in Articles 47 and 48 of the Japanese legislation raise the question of whether application of the voluntary automobile quota is within the scope of its authority under the Control Law. *Id.* Case law suggests that this statute finds justification for export restrictions only if these restrictions avert adverse economic effects on Japan's balance of payments or development of international trade or the Japanese economy. 1969 *Pekin-Shanghai Nihon Kōgyō Tenranki v. Nihon*, 20 *Gyōsei reishū* 842 (Tokyo District Court, July 8, 1969). The argument that voluntary controls on automobile exports avoided unilateral action by the United States provides a strong practical economic reason for upholding their validity under Japanese law. Although the voluntary quota will still have an impact on the Japanese economy and international trade policy, most Japanese businessmen consider a quota as less economically threatening than the unilateral measures which the United States might have taken with the passage of quota legislation. See HUNSBERGER, *supra* note 4, at 235. The fact that Japan may relax the voluntary quota progressively each year with a view toward its expedient elimination is, in the long run, preferable to the Japanese economic and industrial policy. *Id.* at 355.

289. In 1980, the Japanese share of the American car market was 21.3%. *Hearings*, (pt. II), *supra* note 3, at 144 (statement of Douglas A. Fraser, President of United Auto Workers (UAW)).

290. *N.Y. Times*, Apr. 17, 1981, at D1, col. 2. Sales of domestic cars were lower in 1980 than in any year since 1961. U.S. INDUSTRIAL COMPETITIVENESS, *supra* note 1, at 92.

tions between the U.S. and Japanese governments led to the application of a VRA, in which Japan voluntarily agreed to enforce a quota limiting its auto exports to the United States. This approach is the best means of providing import relief to the U.S. automobile industry within the bounds of international trade rules and U.S. antitrust law.

The voluntary quota assumes an intermediate stance between the free trade position of GATT and the protectionist leanings of Congress. Because the automobile quota is technically voluntary and unilateral on the part of the Japanese, the agreement would not violate GATT rules and, hence, would not invite retaliation.

Another major consideration in regulating imports by a voluntary quota system is the antitrust implications. This Comment has illustrated the key factors which minimize the probability of an antitrust violation. The fact that the governments conducted bilateral negotiations for the voluntary restraint agreement and the MITI, the trade branch of the Japanese government, assumed responsibility for the enforcement of the quota greatly reduces the possibility of a successful antitrust challenge. MITI's advisory role in dealing with the Japanese auto industry is sufficiently supported by its statutory power to impose export restrictions. Since MITI is implementing the agreement within the scope of its statutory authority, the foreign compulsion defense would shelter private commercial conduct complying with the terms of the agreement from antitrust liability. Thus, the voluntary quota on automobiles has averted the major antitrust roadblock and emerged as a respectable substitute for unilateral controls.

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