THE WONDERFUL WORLD OF VRAS: FREE TRADE AND THE GOBLET OF FIRE

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I. INTRODUCTION

It has vanished into oblivion—unmourned and unloved. It was never a source of pride for those who embraced it. Instead, it lurked in the dark underground of the global trading system, far from high-minded talk of free trade, global community, and the rule of law. And yet, it had its day. It was important. High-ranking officials traveled to far-away capitals to negotiate its terms and conditions. In trade ministries around the world, experts specialized in its obscurities, knew its complexities and wrinkles. Its terms were the subject of endless haggling between powerful governments. Influential newspaper reporters speculated about its prospects and possibilities. Powerful governments and senior trade officials espoused it. But now it is gone . . . banished . . . condemned to obscurity by a faceless, all-encompassing international organization known as the "WTO." Perhaps it has disappeared forever into the emptiness of time. And yet, perhaps somewhere it survives and lurks, and, like Harry Potter's nemesis Lord Voldemort,[1] someday will reemerge . . . .

Unlike many scholarly articles, which celebrate the proud accomplishments of free trade, the World Trade Organization (WTO), and the rule of law, this is the story of a trade instrument that has been condemned to the darkness. It is the story of the Voluntary Restraint Agreement or "VRA"—also known as the Voluntary Export Restraint (VER), Orderly Marketing Agreement (OMA), Export Quota, Selective Safeguard, Gentlemen's Agreement, Bilateral

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1. *See* J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE (Scholastic 2005).

Quota, Grey Area Measure, Industrial Entente, Contingentement Aimable, and some names that cannot be printed in a reputable legal journal.[2]

One may wonder why such an ill-favored trade instrument, one which now has been banned forever by the WTO, should be the subject of a law review article. Perhaps it is a sign of something seriously amiss. Yet, the story of VRAs also illustrates some of trade law's unique charms. Unlike some other areas of law, trade is a strange brew of U.S. law, international law, economics, diplomacy, and hardball politics. It is not an area where a lawyer's work consists of looking up answers in dusty legal volumes, discerning controlling principles by minutely analyzing hundreds of cases or statutes, or devising ever more complex corporate transactions for Wall Street barons. Instead, trade's mixture of law, diplomacy, and politics leads to bizarre, one-time concoctions that cannot be easily predicted, manipulated, or controlled. That is one of its principal attractions—for those who can live with unpredictability (or do not enjoy legal research).

II. WHAT IS A VRA?

A VRA is a variation on the import quota. It is a quota that, through the dark arts of trade policymaking, has been transformed into an entirely different and complex creature.

In a normal quota, the importing country unilaterally applies and administers a quantitative limit on imported goods. A properly administered import quota thus leads to an absolute fixed limit on imports. It also confers extensive powers on government officials, who are responsible for enforcing the quota at a nation's borders and allocating the rights to import goods permitted under the quota. For these and other reasons, reputable economists are almost uniformly critical of quotas and almost always urge governments to adopt tariffs as their preferred method of restraining imports:

> Each quota has a similar effect upon the amount imported to a duty of a given height, in the sense that under given conditions it is always possible to find a duty which will curtail imports by just as much as any given quota. But a duty, so long as it is not prohibitive, does not sever all connection with the world market; it does not prevent the amount imported from varying in response to changed conditions and needs. A quota, on the other hand, cuts all links between the home price and the price on the world market . . . . The quota system, in any form, raises

2. Such a story is necessarily incomplete because governments that negotiated VRAs were often careful to hide their tracks. No doubt, there are many more VRAs hidden in obscure boxes and aging file drawers of government records.

> problems which tariffs alone do not raise. Under tariffs, the market forces of supply and demand determine who shall import, and how much. Anybody may import as much as he pleases, but, of course, he must pay the duty, just as he pays the cost of transport. But with the quota a new principle of selection is introduced which is divorced from the play of the market.[3]

In other words, the economic costs of a quota tend to be greater than those of a tariff:

> When we analyze the welfare effects of an import quota, we find that the quota is no better, and that in some cases it is worse, than a tariff for the nation as a whole . . . . The import quota looks best, or least bad, under competitive conditions which make it no better or worse than the equivalent tariff . . . . With a quota, however, the dominant firm knows that no matter how high it raises its price, competing imports cannot exceed the quota. So a quota gives a domestic firm a greater chance of facing an inelastic demand curve, and thus a better chance to reap monopoly profits with higher prices. So with the monopoly-creating quota we get even higher prices, lower output, and great[er] national losses than from a tariff that would have given us the same amount of imports.[4]

A VRA differs from a normal quota in that it is administered by the exporting country. Imports are controlled at the source as they leave the exporting country, whereas under a normal quota, imports are controlled on entry to the importing country's borders. Moreover, unlike import quotas, VRAs are almost always negotiated agreements that require the consent of the exporting country regarding the amount of exports permitted and relevant terms and conditions. Finally, VRAs are almost always "selective" or non-MFN [most-favored nation]; they apply to only a "select" group of key countries instead of covering all imports regardless of source, as required by the WTO.

Most VRAs are "voluntary" only in a broad sense. In the best of all worlds, no rational country would ever agree to limit its exports. Hence, the importing country almost always needs some form of "leverage" over the

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3. GOTTFRIED VON HABERLER, THE THEORY OF INTERNATIONAL TRADE WITH ITS APPLICATIONS TO COMMERCIAL POLICY 347-48 (Alfred W. Stonier & Frederic Benham, trans., Macmillan 1936).

4. PETER H. LINDERT & CHARLES P. KINDLEBERGER, INTERNATIONAL ECONOMICS 155-56 (7th ed. 1982).

exporting country to induce it to enter into an agreement. This leverage generally takes the form of threats of unilateral import restrictions, a potential "trade war," or other non-economic threats or inducements. This reliance on power and leverage means that VRAs are generally used by large, powerful countries against smaller, export-dependent economies, and are somewhat at odds with a rule-oriented system like the WTO/GATT.

A. VRAs – Legal Ambiguity

The heyday of VRA-type arrangements from the 1930s to the 1990s illustrates an unfair and unpleasant truth: Lawyers and legal considerations often play only a very minor role in trade policymaking.

There were many reasons countries entered into VRAs, but, as we shall see, legal considerations were not among them. Instead, the legal status of VRAs in both U.S. and international law was always highly ambiguous—so much so they were sometimes referred to as "grey area measures."

1. International Law

Like a good economist, GATT Article XI prohibits imports quotas or restrictions, subject only to limited exceptions.[5] Article XI:1 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.[6]

Article XI also can be read as a flat prohibition on VRAs by and among GATT Contracting Parties, since VRAs indirectly restrict imports and are often made effective through export licenses.

However, the GATT also contains a so-called "escape clause" in Article XIX that authorizes a contracting party to temporarily restrict imports to ease adjustment by a seriously injured domestic industry by imposing "safeguard"

5. General Agreement on Tariffs and Trade art. XI:1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

6. *Id.*

measures—protective tariffs or quotas.[7] While many VRA arrangements have been triggered by "safeguard" or "escape clause" actions under GATT Article XIX, VRAs are not a recognized remedy in a GATT safeguard action. Instead, Article XIX provides:

> 1.(a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.[8]

While Article XIX could be read to provide some leeway for VRA-type remedies in GATT safeguard actions, such measures are indirectly prohibited elsewhere in the GATT. Because Article XIX allows the suspension of any GATT obligation "in whole or in part," including the Article XI prohibition on export and import quotas, it could be read to provide an opening for VRAs, which are a form of export quota. However, GATT Article XIII makes clear that any import or export quotas adopted under the GATT also must be implemented on an MFN basis, i.e., applied equally to all imports regardless of source, as follows:

> 1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.[9]

Since almost all VRAs are "selective" and only apply to certain targeted countries, they are inconsistent with the letter and spirit of Article XIII and thus of Article XIX. As Professor John Jackson notes, it was clearly understood by the Contracting Parties that all safeguard measures would be MFN: "Although nowhere expressly mentioned in the language, the preparatory work and

7. *Id.* art. XIX.
8. *Id.* art. XIX:1(a).
9. *Id.* art. XIII:1.

subsequent GATT practice make it clear that the withdrawal or suspension shall be on a non-discriminatory MFN basis."[10]

In short, the legal status of VRAs under the GATT is uncertain at best. Perhaps the best justification for VRAs is that international law recognizes that in some circumstances, the parties to an international treaty or agreement can agree informally to waive or modify the application of its provisions between themselves. Article 39 of the Vienna Convention states: "A treaty may be amended by agreement between the parties."[11] Article 41 further explains that:

> Two or more of the parties to a multilateral treaty may conclude an agreement to <u>modify the treaty as between themselves alone if</u>:
>
> (a) the possibility of such a modification is provided for by the treaty; <u>or</u>
>
> (b) the modification in question is not prohibited by the treaty <u>and</u>:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.[12]

As a result, the best (if not only) legal justification for VRAs is that international law provides some flexibility for the parties to a multilateral agreement (like GATT) to modify the application of its provisions between themselves in a "private" arrangement. This provides a narrow legal window for VRAs, which might otherwise be prohibited by GATT Articles XI, XIII, and XIX.[13] As a practical matter, the legality of VRAs was never challenged in the GATT dispute settlement process, in part because such measures were consensual and necessarily required the agreement of both parties. If one party objected strongly, agreement on a VRA would never be reached and it would never come into existence. Conversely, signing a VRA and then challenging it in the GATT would have been viewed as extreme bad faith and might have invited unpleasant consequences by a powerful (and angry) trading partner.

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10. JOHN HOWARD JACKSON, WORLD TRADE AND THE LAW OF GATT 564 (Bobbs-Merrill 1969) (citing U.N. Docs. E/CONF.2/C.3/49; E/CONF.2/C.3/37 (1947-59)).

11. Vienna Convention on the Law of Treaties art. 39, May 23, 1969, 1155 U.N.T.S. 331.

12. *Id.* art. 41 (emphasis added).

13. *See* GATT, *supra* note 5, arts. XI, XIII, XIX.

2. U.S. Legal Status

The status of VRAs in U.S. law is equally murky. It is basic constitutional law that, under Article I, Section 8 of the U.S. Constitution, Congress has plenary power over U.S. tariffs and the regulation of foreign commerce.[14] While Congress has adopted various trade remedy procedures that delegate specific authority to the executive branch to raise tariffs or impose import quotas, such as Section 201 of the Tariff Act of 1974,[15] it has never given the President a broad grant of authority to freely negotiate VRAs. Instead, Congress hoarded such authority and provided it to the Executive Branch only on a limited and sometimes retroactive basis, frequently tied to a specific case or more broadly to an affirmative finding of "injury" by the U.S. International Trade Commission under Section 201 or some other U.S. trade remedy statute.

For example, in *United States v. Guy W. Capps*, the federal government sued a U.S. importer for allegedly purchasing and importing potatoes in violation of an agreement between the U.S. Secretary of State and Canadian Ambassador, which set a limit on the export of Canadian potatoes to the United States.[16] The VRA was adopted to protect the U.S. potato price-support program. While ostensibly purchased as seed potatoes for planting purposes, the imported Canadian potatoes allegedly were being diverted for sale in a grocery chain. As Chief Judge Parker pointed out, while the Agriculture Adjustment Act contained specific procedures for investigating and restricting imports that disrupt U.S. farm price-support programs, there was no pretense by the executive branch of seeking an investigation by the Tariff Commission or formally proclaiming a tariff increase under these procedures.[17] Instead, Canadian imports were limited through an informal arrangement negotiated by the State Department. The court concluded:

> We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The executive may not by-pass congressional limitations regulating such commerce by entering into an agreement with

14. Buttfield v. Stranahan, 192 U.S. 470, 492-93 (1904).
15. 19 U.S.C. § 2251 (2000).
16. 204 F.2d 655 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955).
17. *Id.* at 658-59.

> the foreign country that the regulation be exercised by that country through its control over exports. Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy.[18]

In short, absent a clear grant of congressional authority, the executive branch could not negotiate VRAs.

Similarly, in *Consumers Union of U.S., Inc. v. Kissinger*, the District of Columbia Circuit held that U.S. steel VRAs were unenforceable absent a direct grant of authority by Congress.[19] *Consumers Union* involved a challenge to U.S. voluntary restraint arrangements limiting European and Japanese steel. In 1968, after protectionist legislation was introduced in Congress to curb foreign steel imports, the Johnson Administration negotiated arrangements with the European and Japanese steel producer associations to limit steel shipments to the United States by aggregate tonnage and product mix. The arrangements were challenged by Consumers Union as a violation of the Sherman Antitrust Act and a violation of the congressionally mandated trade remedy procedures of the Trade Expansion Act, and thus beyond the President's constitutional authority. Shortly after filing its complaint, Consumers Union agreed to drop the antitrust claim "with prejudice." The district court upheld the President's constitutional authority to negotiate the 1968 voluntary steel restraints but went on to note that the steel arrangement violated the antitrust laws.[20]

While the District of Columbia Circuit narrowly upheld the steel arrangements (over a stinging dissent by Judge Leventhal), it did so only by finding that they were unenforceable:

> The steel import restraints do not purport to be enforceable, either as contracts or as governmental actions with the force of law; and the Executive has no sanctions to invoke in order to compel observance by foreign producers of their self-denying representations. They are a statement of intent on the part of the foreign producer associations . . . . The question of congressional preemption is simply not pertinent to executive action of this sort. Congress acts by making laws binding, if valid, on their objects and the President whose duty it is faithfully to execute the laws. From the comprehensive pattern of its legislation regulating trade and governing the

18. *Id.* at 659-60.
19. 506 F.2d 136 (D.C. Cir. 1974).
20. *Id.* at 140.

> circumstances under and procedures by which the President is authorized to act to limit imports, it appears quite likely that Congress has by statute occupied the field of enforceable import restrictions, if it did not, indeed, have possession thereof by the terms of Article I of the Constitution. There is no potential for conflict, however, between exclusive congressional regulation of foreign commerce—regulation enforced ultimately by halting violative importations at the border—and assurances of voluntary restraint given to the Executive. Nor is there any warrant for creating such a conflict by straining to endow the voluntary undertakings with legally binding effect.[21]

The court held that the antitrust claim should have been dismissed from the case and vacated the lower court's statements on the Sherman Act.[22] In short, under *Consumers Union*, the executive branch could negotiate VRAs, as long as it did not try to enforce them. *Consumers Union*, however, only underscored the highly uncertain U.S. legal status of VRAs, absent a direct statutory authorization by Congress or a valid affirmative finding under Section 201 or another U.S. trade remedy law authorizing a VRA-type remedy.

In sum, economists are almost universally critical of import quotas and VRAs, much preferring tariffs as an instrument of trade control. Given the total lack of clarity as to the legal status of VRAs under either international law or U.S. trade law, it is equally apparent that VRAs were not guided by lawyers or driven by legal considerations. How then, starting in the 1930s, did the VRA infiltrate the global trading system and, for nearly six decades, transform the benign, peaceful[23] import quota into an entirely different and more malevolent creature?

B. Why Would Any Self-Respecting Country Enter into Such a Perverse Arrangement?

1. The Role of Quota Profit

However distasteful a VRA may be for an exporting country, it offers certain practical advantages over other forms of trade restrictions. The primary incentive for a VRA is the VRA "quota rent." The effect of a quota is to create an artificial scarcity of imports and maintain prices at levels that are higher than

21. *Id.* at 143.
22. *Id.*
23. Most economists would differ with this characterization.

would otherwise prevail in the importing market.[24] The difference between the artificially inflated price level in the importing market and the cost of the imported merchandise represents the potential "quota profit" or "quota rent." The question of who administers the quota is vital, since the persons holding the right to import goods under the quota are in the best position to capture the quota profit. The advantage of an export restraint is that the administration of the quantitative restriction is in the hands of the exporting country. By issuing licenses to its exporters, this government can ensure that its firms capture the quota profit. In contrast, if the importing country administers the quota, it is likely to allocate the import licenses to its own citizens, so that these people reap the quota profits. It can also auction quota rights and capture the profit for itself. With a protective tariff, on the other hand, the difference between the domestic price and the import price goes to the government of the importing country.

2. Orderly Distribution of Quota Rights

A secondary benefit of an export restraint is that the exporting country is in a position to ensure an orderly distribution of quota shares among its firms and avoid the inequities of a rush to fill a first-come-first-served quota administered by the importing country, which may be indifferent. In contrast, in a first-come-first-served situation, exporters will often rush to fill the quota and capture the quota profit. If the quota is exceeded, some goods may end up stored in warehouses until the quota re-opens, or in a worst case scenario, may have to be re-exported or destroyed. This problem is particularly acute for goods that go rapidly in and out of fashion, such as apparel and footwear—which not coincidentally were often the subject of protectionist pressures and VRAs.

3. Opportunity to Negotiate

In weighing whether to enter into a VRA, the exporting country may also conclude that a negotiated export limit is likely to be a better option than letting the importing country unilaterally determine the amount of an import quota. Left to its own devices, the importing country likely will allow a smaller amount of imports than could be achieved through the give-and-take of a negotiated VRA. An exporting country may also conclude that negotiating a temporary export limit in order to alleviate short-term protectionist political pressures in the importing country may allow the restrictions to be removed sooner than allowing a quota to be imposed through legislation or through a formal trade remedy procedure. Such

24. HEINRICH HEUSER, CONTROL OF INTERNATIONAL TRADE 149 (G. Routledge & Sons 1939).

trade remedy measures can be difficult to remove and thus lead to long-term protection. As Professor Metzger points out: "[E]xporting countries maintain more control over 'voluntary' restraints, whose duration and severity are subject to periodic review through the negotiations process. Thus 'voluntary' restraints sometimes are considered to be a lesser evil by the importing country."[25]

4. Appeasement

Finally, if a country is dependent on a particular export market, it may decide that a temporary negotiated settlement is better than an acrimonious dispute that risks poisoning long-term commercial or security relations. As we shall see, this certainly was a major factor for Japan in the 1950s when it entered into a series of VRAs with the United States at a time when the United States was also championing Japanese membership in the GATT.

C. The Rationale for VRAs – Importing Country

The United States and Europe have used VRAs as a method of import control since the 1930s. Their use waxed and waned, but VRAs were a relatively constant feature of the trade landscape for nearly sixty years.

Importing countries have their own reasons for sometimes preferring VRAs to other forms of trade protection.

1. Politics

The course of free trade has never been smooth and has often required pragmatic political accommodations. Since the 1930s, successive U.S. administrations have pushed, with varying degrees of commitment, to liberalize international trade and build a rules-based multilateral trading system under the GATT. When surges in imports caused economic harm to a politically powerful U.S. industry, various administrations found themselves under political pressures to provide some form of import relief.

25. Stanley D. Metzger, *Injury and Market Disruption from Imports*, Williams Commission Papers I, 168-73 (1971).

2. Temporary Advantages

In seeking practical tools to address such concerns, U.S. trade negotiators sometimes found reasons to resort to VRAs as a way to balance the professed free trade policy of the United States with domestic and congressional demands for protection. VRAs provided a temporary tool to head off protectionist political pressures—and were viewed as a least worst alternative. If Congress appeared likely to pass quota legislation, VRAs became an option, since it was feared that such protectionist legislation would be difficult, if not impossible, to repeal. Similarly, if Section 201 of the Trade Act of 1974 or some other U.S. trade remedy procedure appeared likely to produce a recommendation that the President impose import quotas or tariff increases, the executive branch sometimes moved to head off a formal trade remedy recommendation, calculating that the temporary expediency of VRAs would allow the protectionist pressures to dissipate, so the import restrictions could be removed more quickly than if they were imposed through the full panoply of U.S. trade remedy procedures. As we shall see, VRAs had a tendency to linger and the idea that they could be removed as soon as the import surge had eased often proved illusory. But, rightly or wrongly, U.S. policymakers viewed a negotiated VRA as less protectionist than a unilateral quota, or at least argued this point in public.

3. The Dark Arts: Useful Obscurity

Finally, the obscurity of the VRA was sometimes helpful. As Professor Charles Kindleberger points out: "First in textile, and later in steel and other products, the U.S. government wanted to ease protectionist lobbying pressures. Yet the U.S. government wanted to avoid the embarrassment of imposing import quotas itself while still professing to be leading the world march toward free trade."[26] Hence, a VRA could avoid some of the domestic and international opprobrium attached to unilateral quotas through their obscurity, or at least provide a convenient fiction that foreign governments or producer associations had "voluntarily" chosen to limit imports into the United States without any executive branch involvement.

4. Avoiding Retaliation

Over time, an increasingly important incentive for VRAs was avoiding the risk of retaliation and/or the compensation obligations of GATT Article XIX.

26. LINDERT & KINDLEBERGER, *supra* note 4, at 157.

While any sovereign country is always free to restrict imports,[27] the flip side is that its trading partners are always equally free to retaliate by slapping similar restrictions on their exports. During the Great Depression of the 1930s, the French government's imposition of across-the-board quotas on 3000 items led to the spectacle[28] of other nations imposing punitive tariffs and quotas on French goods—a proverbial trade war:

> Italy employed quotas for retaliation purposes against the wines, liquors, perfumes, soaps, automobiles, clothing, etc., of France, and the two engaged in a quota war. France put quotas on meat, sausage, and cheese coming from Italy; and Italy cut the admission of cotton yarn, lace, tool machines, hides, and many other products from France.[29]

Such retaliation benefits no one.

While the GATT is often viewed as a high-minded, free trade treaty, the threat of trade retaliation is codified in GATT Article XIX. Article XIX allows a WTO Member to temporarily raise a tariff or impose a quota after a finding of "serious injury," but it also requires that a GATT Contracting Party/WTO Member provide appropriate compensation for a safeguard action, typically in the form of offsetting reductions in tariffs on other items.[30] If the party taking an Article XIX action fails to provide satisfactory compensation, its trading partners

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27. Such restrictions would violate international law, but as a practical matter, there is not much the GATT or WTO can do to stop a Member that is prepared to disregard its obligations. As a result, the key disincentive for such violations of international law is the risk of trade retaliation, which operates to maintain adherence to GATT rules through a combination of mutual benefit and threat of mutual destruction.

28. This spectacle was not a new phenomenon in French trade policy. As the eminent economist Adam Smith noted two and one-half centuries ago:

> The case in which it may sometimes be a matter of deliberation how far it is proper to continue the free importation of certain foreign goods is, when some foreign nation restrains by high duties or prohibitions the importation of some of our manufactures into their country. Revenge in this case naturally dictates retaliation, and we should impose like duties and prohibitions upon the importation of some or all of their manufactures in this manner. . . . The French have been particularly forward to favor their own manufactures by restraining the importation of such foreign goods as could come into competition with them."

ADAM SMITH, WEALTH OF NATIONS 409-10 (Everyman's Library 1991) (1776).

29. ASHER ISAACS, INTERNATIONAL TRADE: TARIFF AND COMMERCIAL POLICIES 637 (Irwin 1948).

30. GATT, *supra* note 5, art. XIX.

are then free to "suspend" the application of "substantially equivalent concessions or other obligations under the Agreement"[31]—a euphemism for imposing retaliatory duty increases on the same amount of products from the country taking an "escape clause" action.

The GATT compensation requirement played an increasingly important role in the proliferation of VRAs, starting in the 1960s. In the early years of GATT, when countries were just starting to phase down tariffs from Smoot-Hawley levels achieved in the 1930s, it was relatively easy to provide compensation. Since many tariffs were high, often averaging 50%-60%, a country could easily reduce high tariffs on other products as compensation to its trading partners, averting a trade war. However, by the 1960s, successive rounds of GATT tariff negotiations had sharply reduced average tariffs in most industrialized countries. The remaining tariff "peaks," moreover, tended to consist of politically powerful, import-sensitive industries, which objected strongly to being "sacrificed" to provide protection to another industry. In addition, the post-war expansion of global trade flows meant that that the amounts of trade involved in "escape clause" actions, and resulting compensation obligations, were much larger and often prohibitively expensive. As a result, GATT members struggled to provide compensation, and thus faced the risk of massive retaliation against their exports if they went ahead with protectionist import safeguard actions. This made VRAs increasingly attractive. Because VRAs are consensual, they virtually always involve an explicit or implicit waiver of GATT compensation obligations and Article XIX retaliation rights. The alternatives for an exporting country are often less attractive. While it could always retaliate under Article XIX, it achieves no real gains from such retaliation—the only real purpose of such retaliatory measures is to inflict pain and perhaps discourage future safeguard actions. In contrast, a VRA allows a country to offer some consolation to its exporters by giving them rights to the quota profits in the form of export licenses.

5. The Role of Politics

While trade policy is often analyzed from the standpoint of economics or international law, the role of politics is often incorrectly downplayed, ignored, or overlooked. Perhaps it is because politics is a grubby undertaking and does not easily lend itself to grand conclusions or academic theories. But politics has always played a key role in shaping trade policy over the centuries. The fundamental genius of GATT was that it took political considerations that

31. *Id.* art. XIX:3(a).

traditionally weighed in favor of self-serving protectionist tariffs, and harnessed them into the structure of an open, rules-based global trading system.[32]

The political dimension of trade policy is not new. In 1776, in the *Wealth of Nations,* the eminent economist Adam Smith noted that trade policy "belong[s] not so much to the science of a legislator, whose deliberations ought to be governed by principles which are always the same, as to the skill of that insidious and crafty animal, vulgarly called a statesman or politician, whose councils are directed by the momentary fluctuations of affairs . . . ."[33] As we shall see, VRAs are best explained as a mixture of law, economics, and politics, with a very heavy dose of situation-specific politics, or what Adam Smith more elegantly referred to as "the momentary fluctuation of affairs."[34]

III. THE GOBLET OF FIRE: A BRIEF HISTORY OF VRAS

A. VRAs in Inter-European Trade: 1929-1932

The VRA was first used as a tool of import control in inter-European trade after the collapse of the world trade and financial system in the Great Depression. Overproduction of agricultural products during the 1920s contributed to depressed world prices for many farm products. Tariffs were the standard instrument of trade regulation after World War I, and there was much learned discussion of "scientific" principles for determining tariff rates.[35] In 1931, however, European countries began imposing quotas to protect farm prices against cheap agricultural imports, which threatened the livelihoods of domestic farmers. After the collapse of the gold standard in 1931, countries extended the quotas to manufactured goods to protect their industries from import competition, particularly from countries with depreciated currencies. As the world monetary system fluctuated out of control, it became increasingly difficult to predict the effects of a tariff increase. Quotas provided stability against the chaos of

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32. In essence, the GATT accomplished this through a structure of reciprocal tariff concessions, the threat of offsetting renegotiation or withdrawal if a concession is withdrawn, and compensation and "rebalancing" under the most important innovation of all—the GATT dispute settlement system. In other words, each country benefits from reciprocal tariff concessions negotiated under GATT auspices, but with the ever-present threat of losing these benefits if it misbehaves. One veteran trade negotiator has analogized GATT to a "roach motel"—"it's easy to get in but you can't get out."

33. SMITH, *supra* note 28, at 410-11.

34. *Id.* at 411.

35. WILLIAM S. CULBERTSON, RECIPROCITY: A NATIONAL POLICY FOR FOREIGN TRADE 3-41 (Whittlesey House 1937).

exchange rates.[36] In 1931, France began imposing quotas on a wide range of agricultural imports. By 1936, French quotas covered more than 3000 agricultural and industrial products.

The imposition of quotas tended to provoke retaliation by other countries, who found their goods shut out of their traditional export markets. Consequently, France and other European governments turned to negotiated "bilateral quotas" or "industrial ententes" to avoid the risk of foreign retaliation.[37] Governments would encourage their industrialists to work out an acceptable quota level with their counterparts from another country. To induce foreign companies to accept quantitative restraints, European governments would agree to transfer the right to issue export licenses to the foreign manufacturers so that the manufacturers could capture the quota profits. In 1931, French and German industrialists negotiated approximately 150 "industrial ententes." The ententes had a precedent in the international cartels, which dominated European trade during the early twentieth century, and consisted of elaborate international market-sharing arrangements. These cartels were sometimes referred to as "industrial ententes" or "gentlemen's agreements."

From Europe, the "gentlemen's agreements" and "ententes" spread to the Far East. In the 1920s, Japan emerged as a strong competitor in world markets for certain low-cost manufactures. This development reflected the industrialization of Japan and the effects of World War I, which, by reducing access to Western exports, stimulated the development of domestically produced manufactured products for sale in Japan and the Far East. By the 1930s, Japan was a major exporter of cotton textiles, toys, potteries, tires, shoes, electric lamps, and canned fish. The collapse of the international monetary system provided a further impetus to Japanese exports. After Japan left the gold standard on December 17, 1931, the value of the yen declined precipitously to about 40% of its former value.[38] The depreciation of the yen meant that Japanese products sold in foreign markets at a fraction of their former prices, and Japanese textile exports flooded into Far Eastern markets. The volume of Japanese exports nearly doubled from 1930 to 1936, and their value rose from 1.435 billion yen in 1930 to 2.641 billion yen in 1936.

The export surge triggered a proliferation of trade barriers against Japanese textiles and manufactured products.[39] In response, the Japanese government armed itself with the legal authority to retaliate against foreign trade, and in 1934, retaliated against Canadian exchange compensation duties.

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36. FRANK A. HAIGHT, FRENCH IMPORT QUOTAS: A NEW INSTRUMENT OF COMMERCIAL POLICY 5-14 (P.S. King 1935).

37. *Id.* at 29-40.

38. WILLIAM W. LOCKWOOD, THE ECONOMIC DEVELOPMENT OF JAPAN: GROWTH AND STRUCTURAL CHANGE 64-65 (Princeton Univ. Press 1968).

39. TEIJIRO UEDA, THE RECENT DEVELOPMENT OF JAPANESE FOREIGN TRADE 75 (Japanese Council, Inst. of Pac. Relations 1936).

In addition, the Japanese government began negotiating "gentlemen's agreements" to forestall foreign trade restrictions. In May 1933, Great Britain approached Japan with a request for assistance in arranging meetings between British and Japanese industrialists regarding trade in Britain's colonial markets in the Far East. Subsequently, when threatened with potential imports restrictions in a foreign market, the Japanese government would dispatch trade delegations to explore the possibility of avoiding unilateral restrictions through export restraints or minimum price arrangements.[40] Many of the cartel arrangements were informally negotiated by Japanese exporter associations, which were originally organized to control production and prices, but evolved into mechanisms for negotiating and enforcing VRAs and similar cartel arrangements.

B. U.S. "Gentlemen's Agreements": 1932-1939

VRAs entered the U.S. trade repertoire in the 1930s, when the State Department negotiated a series of "gentlemen's agreements" with Japan to head off tariff increases or quotas under the National Industrial Recovery Act and Section 336 of the Tariff Act of 1930.

The gentlemen's agreements were negotiated against the backdrop of the Great Depression and a catastrophic decline in international trade. After President Roosevelt's victory in the 1932 election, the new Administration launched a vigorous program to promote a domestic recovery. The centerpieces of the program were the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act of 1933.[41] The NIRA aimed to promote an industrial recovery through "codes" of fair competition administered by the National Recovery Administration (NRA). These codes consisted of agreements by associations of producers to observe minimum wage requirements and working conditions. The idea was that responsible businessmen, through industry-wide cooperation, could agree on a reasonable profit for the industry and a fair wage for the worker, allowing U.S. industries to pay higher wages, so that the workers in turn could spend and stimulate increased domestic demand.

Since the NRA Codes were designed to promote higher prices for U.S. producers, the Roosevelt Administration and Congress were concerned that the codes could be undercut by low-priced imports. Accordingly, Section 3(e) of the NIRA authorized the President to levy extra import fees, limit the quantity of imports, or prescribe terms or conditions for the entry of imports. These powers were triggered by an affirmative finding by the U.S. Tariff Commission that imports threatened the operation of a code. The Roosevelt Administration used its

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40. *Id.*

41. ARTHUR M. SCHLESINGER, THE COMING OF THE NEW DEAL (Houghton Mifflin 1958).

authority to impose quotas or tariff increases under Section 3(e) sparingly. The bulk of the quotas covered forest and agricultural products[42] and were directed at imports from Canada.

The other major protective device in U.S. law was Section 336 of the Tariff Act of 1930. Section 336 authorized the Tariff Commission to investigate whether existing U.S. tariffs were sufficient to offset lower foreign costs of production. After receiving a report from the Tariff Commission, the President could proclaim an increase in the U.S. tariff for a product of up to 50% to equalize differences in U.S. and foreign costs of production.

In 1933 and 1934, the Roosevelt Administration was deeply divided on its international trade policy.[43] Viewing imports as a threat to the U.S. recovery and a potential threat of domestic deflation, some members of the Administration argued that the United States should seek to "manage" trade through bilateral clearing arrangements, barter, and quotas. In contrast, the Secretary of State Cordell Hull had championed the cause of multilateral liberalized trade in Congress as a congressman and senator from the Tennessee, and was a leading proponent of free and open trade.

In 1934, Hull pushed the Reciprocal Trade Agreements Act through Congress. In a sharp break with prior practice, the Act delegated to the President the authority to negotiate tariff reductions with foreign nations. During the eighteenth and nineteenth centuries, with a few minor exceptions, Congress had set U.S. tariffs through legislation.[44] This process was unwieldy, since it required Congress to determine an appropriate rate for each item in the U.S. tariff schedule. In addition, tariff legislation tended to turn into special-interest legislation through a process known as "logrolling," in which congressmen agreed to support each other's pet tariff increases.[45] The disastrous Smoot-Hawley Tariff Act of 1930 completely discredited congressional tariff-making and led Congress in the 1934 Act to delegate its tariff authority to the President.

The Reciprocal Trade Agreements Act, however, only highlighted the contradiction between the Roosevelt Administration's domestic and international policies. Imports were subject to restrictions under the NIRA and the Agricultural Adjustment Act of 1934, since low-priced imports threatened a domestic recovery. At the same time, Secretary of State Hull was urging foreign governments to recognize the vital importance of liberalized global trade and was seeking to

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42. C.R. Whittlesey, *Import Quotas in the United States*, 52 Q.J. OF ECON. 37, 38 (1937).

43. LINDERT & KINDLEBERGER, *supra* note 4, at 200.

44. F.W. TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES (A.M. Kelley 1967).

45. ROBERT PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY 77-85 (Univ. of Cal. Press 1982).

negotiate a global "tariff truce" at the London Economic Conference.[46] The initiation of a series of investigations under Section 3(e) of the NIRA brought these contradictions into sharp focus.[47] In December 1933, the President directed the Tariff Commission to initiate investigations of lead pencils, quicksilver, wool-felt hats, red cedar shingles, cotton rugs, matches, and braids and hat bodies of synthetic textile to determine whether imports were disrupting the NIRA codes for these industries. The investigations of lead pencils and cotton rugs centered on imports from Japan.

In the 1920s and 1930s, the United States and Japan had a substantial, two-way trading relationship. The United States exported large quantities of raw materials and primary products to Japan, while the United States was a major export market for Japanese manufactured goods. In 1930, the United States purchased 42% of Japan's total exports, while Japan represented the largest customer for American goods in Asia.

On January 17, 1934, the Tariff Commission recommended that the President use the American Selling Price (ASP) instead of the landed invoice price as the basis for calculating the tariff on imports of wood-cased lead pencils. This would have resulted in a virtual embargo. While the President was considering the Tariff Commission's recommendation, the Japanese government approached the State Department and expressed the hope that the lead pencils dispute and a proposed tariff increase on tuna could be resolved without a quota or a tariff increase.[48] Probably borrowing from its recent experience negotiating similar

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46. The idea was the governments would jointly commit to refrain from protectionist tariff increases. OFFICE OF THE HISTORIAN, U.S. DEP'T OF STATE, 1 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1933, at 452-62 (1950).

47. *Id.* at 689 (quoting Secretary Hull as telling the President in a transatlantic telephone conversation: "Then the question would become more or less serious as to whether you could administer the Industrial Recovery Act without violating the proposed tariff truce that would be adopted in six to twelve months.").

48. The United States already had some experience with French "industrial ententes." In 1932, France imposed quotas on U.S. radios, accessories and parts, and on lamps and tubes, provoking strong objections from the U.S. Ambassador. Eventually, the U.S. and French governments agreed that U.S. firms would be allowed to participate in French industrial ententes and given a share of the quotas, which would be administered through import licenses:

> The French Government has no objection to the institution of a satisfactory licensing system for the allocation of industrial quotas among the various importers of commodities subject to restriction, it being understood that the administration of this system will be entrusted to an organization authorized thereto by the American Government and approved by the French Government and that the latter reserves the right to resume its liberty of action should licenses

gentlemen's agreements with Great Britain, the Japanese Charge d'Affaires hinted to his State Department counterpart that the Japanese government was prepared to limit exports from Japan. According to the State Department's official report:

> He stated that he was authorized by the Foreign Office to say that if measures to place these two commodities on a quota basis or to raise the import duties thereon could be prevented or forestalled, the Japanese Government would be prepared to consider exercising a control and limitation of the exports of these commodities from Japan to the United States. He said further it was possible that the Embassy could suggest to the Japanese importers in the United States that they enter into some sort of a code binding themselves not to cut prices on tuna fish and lead pencils.[49]

In alluding to some sort of cartel arrangement, the Japanese Charge d'Affaires was building on a long tradition in Japan of using similar cartels to control exports, maintain industry standards, and prevent "market disruption."[50]

For a variety of reasons, the United States was receptive. During the London Economic Conference of 1933, Hull had argued to Roosevelt in a series of cables and a transatlantic phone call that NIRA quotas and fees would conflict with a U.S. proposal for a world "tariff truce." However, President Roosevelt had made it clear that his domestic recovery program would take priority over any moves to liberalize trade and directed the Secretary to carve out an exception in the proposed "tariff truce" for import quotas and fees under the NIRA and the Agricultural Adjustment Act of 1933. VRAs obscured some of the contradictions in U.S. policy.

The depreciation of the yen and the low prices of Japanese products were another incentive for negotiating VRAs. The fluctuations in the yen made the calculation of tariff increases, a difficult science at best, even more difficult. The logical solution was a quota, but the United States also was philosophically opposed to the use of quotas. It had strongly and publicly opposed the use of quotas at the 1927 and 1928 international conferences and had signed the resulting

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> not be allocated in such a way as to maintain channels of the trade concerned.

OFFICE OF THE HISTORIAN, U.S. DEP'T OF STATE, 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1932, at 232 (1947).

49. OFFICE OF THE HISTORIAN, U.S. DEP'T OF STATE, 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1934, at 800 (1950).

50. MITSUBISHI ECON. RESEARCH BUREAU, JAPANESE TRADE AND INDUSTRY: PRESENT AND FUTURE 114-29, 618-19 (Macmillan 1936).

International Convention on the Abolition of Import and Export Prohibitions,[51] taking the position at the World Monetary and Economic Conference of 1933 that "embargoes, import quotas, and various other arbitrary restrictions should be removed as quickly as possible."[52] Finally, Japan was a major market for U.S. exports, a fact alluded to by the Japanese during the negotiations, with the implicit threat of retaliatory measures.

Accordingly, two months later, Assistant Secretary of State Francis Sayre called the Japanese Embassy Attaché back into his office:

> Mr. Sayre then explained to Mr. Wajima that the recent increase in the domestic price of pencils due to the operation of the National Industrial Recovery Act made possible a sudden and marked increase in the importation of lead pencils from Japan . . . . The Committee on Economic Policy, of which Mr. Sayre is a member, having taken note of the statement of Mr. Taketomi, was desirous of ascertaining whether the Japanese Government would be agreeable to entering into some sort of "gentlemen's agreement" by which the increase in the tariff necessary for the protection of the Code for pencil manufacturers could be obviated.[53]

After some further back and forth, Japan agreed to limit exports of lead pencils to the United States to not more than 125,000 gross in any year, and on May 1, 1934, Assistant Secretary Sayre and the Japanese Ambassador initialed an "informal gentlemen's agreement," and the President decided to take no action against Japanese pencil exports under Section 3(e).

Lead pencils became the model for a series of U.S.-Japan gentlemen's agreements aimed at heading off import restrictions or tariff increases under the NIRA. While efforts to negotiate a tuna arrangement were unsuccessful, the United States and Japan quickly negotiated agreements on cotton rugs, Japanese textile exports to the Philippines,[54] cotton piece goods, cotton socks, cotton

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51. STUDIES IN UNITED STATES COMMERCIAL POLICY 56-63 (William B. Kelley ed., Chapel Hill 1963).

52. 14 DIGEST 799.

53. *Id.* at 802.

54. The Philippines agreement led to a series of disputes over the administration of the quota, since it failed to deal specifically with Japanese textiles that had "arrived" in the Philippines but had not yet cleared Philippine customs. Since there was a substantial backlog awaiting liquidation, the status of these shipments was of some importance. The issue was eventually resolved by excluding some of the shipments from the quota in return for an agreement by Japan to restrain additional types of textiles not covered by the original agreement.

velveteens and corduroys,[55] wool gloves,[56] matches, and fasteners.[57] U.S. private trade associations got into the act, as delegations of American cotton textile, hosiery, and fabric producers participated in the negotiation of gentlemen's agreements, sometimes traveling to Tokyo for talks aimed at facilitating gentlemen's agreements with Japanese exporter associations. The United States became increasingly sophisticated about the terms of such agreements, after acrimonious disputes over transshipments and product mixes.

As the United States began taking the initiative in proposing gentlemen's agreements and insisting on tighter controls, the negotiations became increasingly complex, requiring U.S. threats. For their part, the Japanese treated the agreements as a pragmatic solution aimed at preserving some limited access to the U.S. market and capturing the quota rents.[58] And sometimes the talks failed. In 1936, the United States asked the Japanese government to enter into a gentlemen's agreement on exports of wool gloves to resolve a cost of production investigation under Section 336 of the Tariff Act of 1930. After the negotiations foundered, Secretary Hull recommended that the President increase the U.S. duty to forty cents per pound, plus 35% *ad valorem* of the American selling price. He wrote: "The method of American valuation recommended in the report of the Tariff Commission is an extreme measure which almost amounts to an embargo with regard to the specific goods to which it is made applicable." Nevertheless, he concluded: "This unusual and extreme step may be necessary to induce Japanese industry to deal more effectively with situations such as this."

The other major target of U.S. VRAs was Canada. On March 3, 1934, on behalf of the Washington and Oregon Shingle Association, the U.S. Lumber Code Authority filed a complaint with the National Recovery Administration against imports from Canada. The President directed the Tariff Commission to conduct an investigation pursuant to Section 3(e) of the National Recovery Act. On May 22, 1934, the Tariff Commission recommended that the President impose a flexible quota limiting imports from Canada to 25% of U.S. consumption, but noted that the Canadian and American producers were already in the process of working out a market-sharing arrangement. On July 24, 1934, the Canadian producers agreed to take action with respect to the quantity, marketing, and terms

55. Metzger, *supra* note 25, at 168-73.

56. UEDA, *supra* note 39, at 110.

57. On March 23, 1934, the Tariff Commission recommended that the President adopt a combination of fees and quantitative restrictions on imported rugs, stating that in view of the low prices of Japanese rugs, the imposition of fees alone would be ineffective. Pursuant to a gentlemen's agreement, the Japanese cotton-rug exporters agreed to limit their exports of cotton rugs to the United States. On May 30, 1934, the President proclaimed the imposition of fees on imports of cotton chenille rugs, cotton imitation oriental rugs, and rugs wholly or in chief value of cotton, but excluded Japanese rugs under the gentlemen's agreement.

58. UEDA, *supra* note 39, at 81.

of sale of red cedar shingles, and as a result, the United States took no further action to restrict Canadian imports.

By the late 1930s, however, the number of gentlemen's agreements began to decline.[59] The U.S. economy was beginning to pull out of the Great Depression, and protectionist pressures were subsiding. The deterioration in overall U.S.-Japan relations led to a series of selective embargoes, reducing competitive pressures from Japanese imports. Finally, the Supreme Court's decision in *Schechter Poultry v. United States*, which struck down the NIRA, revived concern about the potential antitrust implications of gentlemen's agreements by depriving industry associations of the NIRA's antitrust exemption.[60] In 1937, the Antitrust Division warned that privately negotiated gentlemen's agreements were a potential basis for antitrust liability,[61] effectively ending privately negotiated gentlemen's agreements, or at least driving them deeper underground.

In sum, VRAs first entered the U.S. trade repertoire in the 1930s, as Secretary Hull sought to build support for the Reciprocal Trade Agreements program. In negotiating with Japan, the State Department developed increasing sophistication at negotiating VRAs and addressing technical issues such as controlling product mix and transshipments. By 1939, however, the VRA entered a period of hiatus and went back underground. Nevertheless, while VRAs vanished for a period, awareness of VRAs as a trade instrument still lurked in the bowels of trade bureaucracies around the world, awaiting another day.

C. Wartime Adjustments: 1939-1947

The outbreak of World War II led to dramatic changes in U.S. trade policy, as winning the war against Germany and Japan and expanding U.S. industrial production to supply wartime needs became overriding priorities. As the European nations shifted their economies to wartime production after the outbreak of hostilities in 1939, competitive pressures on U.S. industry decreased sharply. The disruption of shipping as a result of German U-boats cut off access

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59. The United States also obtained assurances from the Soviet Union that Soviet coal exports would not exceed 400,000 tons in return for U.S. assurances that Soviet coal would not be subject to a U.S. excise tax. This unusual agreement was embodied in an exchange of letters between U.S. Ambassador Joseph Davies and the People's Commissar for Foreign Affairs, Maxim Litvinoff. This exchange was obtained courtesy of Mr. Walter Hollis, as part of his research into the State Department's files. Mr. Hollis served with distinction in the State Department's Legal Advisor's Office and was for many years the U.S. government's preeminent GATT lawyer.

60. 295 U.S. 495 (1935).

61. JOHN LYNCH, TOWARD AN ORDERLY MARKET: AN INTENSIVE STUDY OF JAPAN'S VOLUNTARY QUOTA IN COTTON TEXTILE EXPORTS 97 (Sophia Univ. 1968).

to the U.S. market and reduced imports. The outbreak of hostilities between the United States and Japan eliminated Japanese imports as a factor in the U.S. economy. The only exceptions to the general lack of import pressures were certain agricultural products that were diverted to the United States by North and South American producers as a result of the closing of European export markets.

With increasing shortages of vital manufactures and raw materials, many existing U.S. quotas were loosened significantly, and some were eliminated altogether. As a result, the United States negotiated only a few VRAs during this period, primarily because of disruptions arising from the war.[62] In 1939, imports of fox furs from Canada surged after the war closed Canada's traditional export markets in Europe, dramatically increasing the quantity of Canadian furs available for sale in the United States. On December 30, 1940, the United States and Canada entered into a negotiated agreement limiting imports of fox fur.

In 1941, Argentina agreed to limit its seasonal export of pears to the United States during February and March to 300,000 boxes. Argentina had lost its export markets in Europe as a result of the war and had begun diverting its exportable agricultural surpluses to the United States.

Finally, in 1940, the United States made its first foray into negotiating international commodity agreements with the Inter-American Coffee Agreement, which was signed by the United States and fourteen Latin American coffee-producing countries.[63] The Coffee Agreement allocated to each country an amount of coffee for export to the United States. Each country promised to limit its shipments to the agreed amount, while the United States promised to limit its total imports to the agreed export quotas with Latin American suppliers, plus 355,000 bags from other non-covered suppliers. The agreement was aimed at maintaining coffee prices and assisting Latin American producers, whose markets in Europe had been cut off by the blockade. More importantly, from a trade policy perspective, the Inter-American Coffee Agreement was a precursor for future commodity agreements and eventually for the Multi-Fiber Arrangement.

The last bilateral agreement of this period involved watches from Switzerland and was also a result of distortions arising from the war.[64] From 1941 to 1945, the U.S. watch industry had retooled to produce watches for military use. After the war, as the U.S. watch industry prepared to resume civilian production, imports from Switzerland surged sharply. By an exchange of memoranda dated April 22, 1946, the United States and Switzerland agreed to "take such measures as may be necessary to assure that direct shipments of watches and watch movements from Switzerland to the United States during 1946 shall not exceed

62. *Extension of Reciprocal Trade Agreements Act: Hearing on H.R. 1211 Before the H. Comm. on Fin.*, 81st Cong. 898-99, 900-20 (1949).

63. ISSACS, *supra* note 29, at 641.

64. *Id.*

the amount of direct exports in 1945." Switzerland also agreed to facilitate the export of Swiss watchmaking machinery.

D. The State Department's Favored Tool: 1948-1962

While the 1940s had been characterized by solid U.S. public support for liberalized trade, this consensus began to erode in 1949-1950. Despite U.S. economic dominance, it became apparent that the 1945 extension of the Reciprocal Trade Agreements Act had been the "high water mark of liberal trade sentiment in the United States."[65] The GATT had entered into force in 1947. By 1948, in the face of increasing congressional resistance, the State Department did not even bother to submit the International Trade Organization Charter for Senate treaty approval.[66] Throughout the decade, both the Truman and Eisenhower Administrations struggled to secure trade-negotiating authority from Congress to participate in GATT Rounds and, as part of the price, had to accept amendments designed to strengthen U.S. trade remedies.

Despite highly favorable trade balances, the United States engaged in an array of import-restricting actions. Under Section 22 of the Agricultural Adjustment Act, the United States imposed fees and quotas designed to restrict imports of agricultural products, including oats, barley, rye, rye flour, and peanuts. The United States also invoked the escape clause of Article XIX of the GATT on fifteen occasions from 1950-1962 to protect U.S. industries from serious injury.[67] Finally, the United States negotiated a series of "voluntary export restraints," including a major restraint agreement on Japanese cotton textiles that was the precursor to the Multi-Fiber Arrangement (MFA).[68]

Unlike the gentlemen's agreements of the New Deal, the VRAs of the 1950s were primarily political and driven by the sharp differences between Congress and the Administration over the pace and direction of trade liberalization.[69] The Truman and Eisenhower Administrations both placed a high priority on the Trade Agreements program, recognizing that the economic reconstruction of Europe and Japan would require substantial infusions of American money and markets for the sale of European and Japanese exports. Both Administrations were "internationalist" and viewed trade as a vital

65. RICHARD N. GARDNER, STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE 373 (Columbia Univ. Press 1980).

66. PASTOR, *supra* note 45, at 97-98. By most accounts, the ITO Charter was seriously flawed.

67. STUDIES IN UNITED STATES COMMERCIAL POLICY, *supra* note 51, at 124-73.

68. *Extension of Reciprocal Trade Agreements Act: Hearing on H.R. 1211 Before the H. Comm. on Fin.*, 81st Cong. 399 (1949).

69. STUDIES IN UNITED STATES COMMERCIAL POLICY, *supra* note 51; ITHIEL POOL & LEWIS DEXTER, AMERICAN BUSINESS AND PUBLIC POLICY (Aldine Transaction 1972).

mechanism for strengthening the Western alliance during the Cold War, fearing that Europe or Asia would turn to trade with the Communist bloc if they could not find markets in the United States.

The executive branch's trade program had several components. First, it wanted authority from Congress to participate in the tariff negotiations in the GATT, which required renewal of the President's tariff-cutting authority under the Reciprocal Trade Agreements Act. Second, it wanted to increase international trade and access to the U.S. market by negotiating tariff reductions in the GATT Dillon Round and bringing Japan into the GATT as a full Contracting Party. Finally, the Administration tried to persuade its European allies to phase out balance-of-payments quotas adopted under Article XIII of the GATT, since these quotas restricted intra-European commerce and American exports, and hampered a European economic recovery.

While Congress granted the President tariff-cutting authority, it did so grudgingly and only after repeatedly exacting concessions regarding import relief procedures or protection for certain industries. After delegating tariff-cutting authority to the President in the Reciprocal Trade Agreements Act of 1934, Congress had routinely renewed the Act in 1937, 1940, 1943, 1945, and 1948. In the 1950s, however, Congress and the Administration launched a series of major battles over the Trade Agreements program, as Congress sought to tie the enactment of trade legislation to legislated quotas or expanded import relief procedures. In 1951, the Truman Administration introduced legislation to renew the Reciprocal Trade Agreements Act, which was due to expire on June 12, 1951. Much of the debate over renewal centered on appropriate safeguards for U.S. manufacturers from excessive tariff cuts.[70] Over the objections of the Administration, Congress insisted on strengthening the procedural protections available to U.S. industries. Congress wrote the "escape clause" into law and lessened the standard required for the Tariff Commission to find "serious injury." Congress also restored the "peril point," which required the Administration to submit potential tariff concessions to the Tariff Commission for a determination as to whether the concession would imperil a U.S. industry by causing or threatening serious injury.

In 1948, a group of senators and congressmen from farm states proposed strengthening Section 22 of the Agricultural Adjustment Act of 1933, which authorized the imposition of quotas or fees to limit agricultural imports, and imposed congressionally mandated quotas on imports of cheese, rice, flaxseed, and milk, setting off a storm of foreign protests.

And for the first time, the U.S. textile industry came out in force in an attempt to obtain legislated quotas or import relief. In 1955, by a vote of 206-199, the Eisenhower Administration barely beat back an attempt in the House of Representatives to restrict the President's authority to deny "escape clause" relief.

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70. *See* STUDIES IN UNITED STATES COMMERCIAL POLICY, *supra* note 51, at 124-173.

After passing the House, the bill ran into further trouble in the Senate as the Finance Committee amended the legislation to impose quotas on imported oil and a tariff increase for lead and zinc imports. This provision was eventually changed to a broad grant of authority for the President to restrict imports that were "being imported into the United States in such quantities as to threaten to impair the national security." However, to overcome congressional opposition, the Administration apparently agreed to impose indirect quotas on imported oil and to levy a tax on imports of lead and zinc.[71] In 1958, Congress renewed the Trade Agreements legislation for five years. In addition, Congress amended the escape clause again by enacting a legislative veto to permit Congress to override a decision by the President to deny import relief after an affirmative finding of serious injury by the Tariff Commission.

E. Escape Clause Battles of 1950s

During the 1950s, the principal remedy for any U.S. industry seeking import relief was the "escape clause." This provision, which is now codified as Section 201 of the Trade Act of 1974,[72] authorized the President to provide import relief if the then-U.S. Tariff Commission determined that imports were causing "serious injury" to an industry in the United States. The escape clause was based on GATT Article XIX and played a role similar to the antidumping and countervailing duty laws today.

With intensifying congressional pressure for protection, thin support for the Administration's GATT agenda, and increasing congressional concerns about the alleged ineffectiveness of U.S. trade remedies, the Truman and Eisenhower Administrations were under pressure to provide some form of import relief in escape clause cases. Failure to act could have put support for the Trade Agreements program at risk and invited further congressional limits on the President's ability to deny escape clause relief or negotiate internationally. While the Truman and Eisenhower Administrations (as is almost always the case with

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71. *See* Trade Expansion Act of 1962, H.R. 11970, 90th Cong. 1175 (1962) (statement of Rep. Mason):

> The last time it was brought up in this House we had 226 votes against continuation of the Reciprocal Trade Agreements Act. The Administration—my Administration—postponed action on that vote for nearly six weeks until they succeeded in getting some oil men from Texas with promises and some lead and zinc Members of the House from the Northwest with promises, until they had the necessary votes and then they brought it up and passed it.

72. 19 U.S.C. §§ 2251-54 (2000).

the U.S. executive branch) were much more in favor of free trade than the Congress, the stakes were even higher because they viewed trade as an important element of the broader national security imperative of strengthening the Western Alliance in the midst of the Cold War.

From 1948 to 1962, the Tariff Commission conducted 134 escape clause investigations. It recommended relief in thirty-three cases. The Commission split evenly in eight cases, which under a statutory tie vote procedure, also went forward to the President for a decision on import relief. Of the forty-one cases, Presidents Truman, Eisenhower, and Kennedy granted relief in fifteen.

However, the Administration quietly used VRAs to address domestic demands for protection.[73] By 1960, Japan was restraining exports of canned and frozen tuna, plywood, stainless steel flatware, umbrellas, silk, cotton piece goods, woolen fabrics, silk scarves, wool rugs, woolen knitted goods, and paper cups.[74] Each of these products was the subject of an escape clause investigation. While some of the restraints were imposed unilaterally by the Japanese government or exporters associations, others were negotiated by U.S. government officials.

While import quotas or tariff increases would also have satisfied Congress, the executive branch was reluctant to adopt direct restrictions. Given the paramount role of the United States in the world economy during the 1950s, the Administration was keenly aware that granting escape clause relief would be viewed abroad as proof of U.S. hypocrisy. Moreover, imposing U.S. trade restrictions would have undercut U.S. efforts to secure the elimination of European balance-of-payment quotas, since there could be no doubt it would be thrown back at U.S. trade negotiators.

Finally, the United States was reluctant to publicly single out Japanese products for formal import restrictions. With the Cold War, the executive branch's goal was to make Japan into an "outpost in the free world's efforts to stem Soviet aggression." Given Japan's lack of raw materials, it clearly needed access to the international markets for its manufactured goods and thus somehow would have to be brought back into the world trading system. Accordingly, the Eisenhower Administration strongly supported Japan's efforts to accede to the GATT and sought to dissuade its European allies from invoking the non-application clause of GATT Article XXXV. Japan managed to accede to the GATT in 1955, but a large number of countries invoked Article XXXV to deny GATT benefits by refusing to apply the agreement to Japan. One frequently expressed concern about full Japanese membership was its alleged tendency to engage in cutthroat competition. Many countries cited the 1930s, when Japanese

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73. DEP'T ST. BULL. 621 (Apr. 4, 1958).

74. List of Principal Products on Which Japan Applies Export Control, May 17, 1960, Restrictions and Other Measures Relating to the Problem of Market Disruption, Annex D, GATT Doc. L/1164 (May 17, 1960), *available at* http://www.wto.org/gatt_docs/English/SULPDF/90730079.pdf [hereinafter *Japanese Export Control*].

goods had flooded foreign markets. Imposing U.S. quotas on Japanese products could lend credence to the arguments against full Japanese GATT membership. For its part, well aware of the sensitivity of negotiations over full GATT membership and in need of U.S. support, the Japanese government was eager to avoid overt trade friction and prepared to accommodate its key trading partners by showing restraint.[75]

Accordingly, while avoiding overt quotas and tariffs, the U.S. negotiated a large number of VRAs. In 1958, a State Department official testified:

> The United States does not have in effect today a single import quota on manufactured products. We are continually using this fact in negotiations with other governments in our efforts to get them to liberalize their own trade restrictions to admit more American goods into their countries. Significant progress has been made in this direction. But the opportunity for further progress would be seriously diminished by Congressional action establishing import quotas on textiles.[76]

The State Department was careful, however, to distinguish between legislated quotas and voluntary restraints. As Secretary of State Dulles testified, there "is an extremely important difference from the standpoint of international relations between restrictions which a government imposes on its own people and those that are imposed on it from abroad." In short, by negotiating VRAs, the U.S. Administration sought to obscure the potential contradictions between professed U.S. free trade policies and the realities of congressional protectionism and U.S. safeguard actions.

F. Agricultural Restraints

The United States also negotiated a series of VRAs on agricultural imports from Canada, which arose from Section 22 of the Agricultural Adjustment Act of 1934. During the 1930s, the United States had established a system of price supports for seven basic agricultural commodities—wheat, cotton, corn, rice, tobacco, hogs, and milk—under the Agricultural Adjustment Act. Like the NIRA, U.S. farm price supports created a risk that prices could be undercut by cheaper imports. Accordingly, Congress enacted Section 22, authorizing the President to employ quotas or fees to prevent imports from interfering with price support

75. *Japanese Export Control*, *supra* note 74. This GATT document lists thirty-seven Japanese Voluntary Export Restraints (VERs) with six countries (Canada, the United States, Switzerland, Denmark, Benelux, and Australia).

76. 33 DEP'T ST. BULL. 1065 (Dec. 26, 1955).

programs operated by the U.S. Department of Agriculture (USDA). In the 1930s, the United States imposed a series of tariff increases and quotas on Canadian agricultural products under Section 22.

In the early 1940s, Congress extended the U.S. price support program to new agricultural commodities and raised the level of support. The effect of the changes was to greatly increase the number of commodities potentially subject to action under Section 22 and led to Section 22 quotas or import fees on almonds, barley, butter, certain cheeses, dried milk products, filberts, flaxseed, linseed oil, oats, peanuts, peanut oil, tung oil, and rye and rye flour, and led to a huge uproar in the GATT.[77]

From 1948 to 1953, the United States also negotiated a series of "voluntary" restraints on imported Canadian agricultural products to resolve import relief actions under Section 22.[78] For example, potatoes were added to the USDA price support program during the war. In the Agricultural Act of 1948, Congress directed the Secretary of Agriculture to support potatoes at 90% of their 1909-1914 parity price. The 1948 potato crop, however, was one of the largest ever recorded in the United States and Canada.[79] To maintain U.S. prices, the USDA agreed to purchase all potatoes that could not be sold at 90% of the parity price. As a result, U.S. potato prices were substantially higher than unsupported Canadian prices, and Canadian growers sought to take advantage by exporting potatoes to the U.S. market. This only increased the number of unsold U.S. potatoes and the costs of the USDA price support program.

The Administration chose to negotiate a VRA with Canada, as opposed to using Section 22. First, the potato surplus appeared relatively short-term, since

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77. *Renewal of Trade Agreements Act: Hearing Before H. Comm. on Ways and Means*, 85th Cong. 399 (1958). In 1955, the Eisenhower Administration struggled to obtain a long-term GATT waiver for Section 22.

> The fact that the United States asked for a waiver for Section 22 overshadowed the whole Conference [of the GATT Contracting Parties] on every major issue on which we attempted to seek a strengthening of the rules or of their enforcement, or to ask other countries to accept obligations to give more access to our goods, or to lessen discrimination against them. We were met with the simple question, "You are not willing to accept any obligation with respect to imports of agricultural products . . . Why should we?"

Winthrop G. Brown, *Draft Report by the Acting Chairman of the Delegation to the Ninth Session of the General Agreement on Tariffs and Trade*, *in* IX FOREIGN RELATIONS OF THE UNITED STATES: 1955-1957, at 97 (U.S. Gov't Printing Office 1987), *available at* http://digital.library.wisc.edu/1711.dl/FRUS.FRUS1955-57v09.

78. *See* STUDIES IN UNITED STATES COMMERCIAL POLICY, *supra* note 51.

79. *Extension of Reciprocal Trade Agreements Act: Hearing Before the S. Committee on Fin.*, 81st Cong. 898-99, 900-20 (1949).

it arose from the unusual 1948 crop. Since the problem appeared likely to disappear quickly, government policymakers wanted to avoid the formal imposition of a Section 22 quota that might be difficult to remove. Because Section 22 required an investigation by the U.S. Tariff Commission, it was judged "too slow and too complicated" to cope with the temporary problems caused by a bumper crop of a perishable commodity. Finally, the Administration was afraid that a quota would provoke retaliation by Canada against U.S. fruits and vegetables.

On November 23, 1948, the United States and Canada reached agreement that Canada would (1) withhold export permits for table potatoes, (2) institute a licensing system to assure that exports of seed potatoes would be sold exclusively to seed outlets, and (3) institute a floor price system for Canadian potatoes. For its part, the United States assured "the Canadian Government that it [would] not hereafter impose any quantitative limitation on furs or Canadian potatoes of the 1948 crop imported into the United States under the system of regulating the movements of potatoes to the United States outlined in the Canadian proposal." The United States also assured Canada that the proposed floor price system would not constitute a countervailable subsidy under Section 303 of the Tariff Act of 1930.

After a similar exchange of letters, the Canadian government agreed to limit its shipments of oats to twenty-three million bushels from December 10, 1953, to October 1, 1954, leading to a White House announcement that "[t]he President has now found that no action by the United States limiting import of oats need be taken to protect our domestic agriculture program, authorized under the Agricultural Act of 1949, against the threat of imports."[80] Other agricultural VRAs of this period involved Canadian barley, and Paraguayan and Argentinian tung oil and tung nuts.[81]

G. Textiles

The textile Voluntary Export Restraints (VERs) of the 1950s are one of the best examples of the forces that can lead to VRAs, and also illustrate the tendency of VRAs to mushroom into highly structured semi-permanent arrangements.[82] The problem originally arose from Japan's reemergence as a major textile exporter and the rise of competitive textile industries in developing countries in the early post-war period. The U.S. choice of the VRA as the tool for managing the problem reflected the intense political pressures on the

80. 30 DEP'T ST. BULL. 21 (Jan. 4, 1954).
81. 33 DEP'T ST. BULL. 792 (Nov. 14, 1955).
82. *See* LYNCH, *supra* note 61; U.S. INT'L TRADE COMM'N, HISTORY AND CURRENT STATUS OF THE MULTI-FIBER ARRANGEMENT (U.S. Int'l Trade Comm'n 1978).

Administration and a belief among U.S. policymakers that the VER was the least objectionable form of trade restraint.

The U.S. cotton textile industry was and is a potent political force. When the 1955 renewal legislation was introduced, the cotton textile industry was the largest employer in U.S. manufacturing. The industry's plants were concentrated in the South and the industrial Northeast and therefore tended to increase the industry's political power, since by virtue of the congressional seniority system, the southern states controlled a disproportionate number of important committee chairmanships.

The industry prospered after World War II, becoming a major exporter of cotton textiles in the world market and experiencing a boom in production for an expanding U.S. market. By the mid-1950s, however, it was running into difficulties and became increasingly vulnerable to import competition. First, U.S. demand for cotton textiles had remained at artificially high levels because of backlogs in consumer demand after World War II and the requirements of the Korean War, but that demand began to slump. Second, as foreign industries rebuilt from World War II and developing countries set up their own textile factories, the U.S. industry began to lose its foreign markets. Third, textile producers in Japan and certain developing countries could produce and sell textiles at significantly lower prices because of lower wage costs, and these producers were beginning to emerge as a global competitive force. As a result, Japanese exports to the United States increased dramatically.

The U.S. industry responded by introducing quota bills to limit imports of Japanese textiles, after concluding that a tariff increase alone would be ineffective. The quota bill quickly picked up sixty Senate co-sponsors. Despite the textile lobby's efforts, the Administration was able to obtain renewal of the Trade Agreements Act in 1954. With the authority provided by this Act, the United States secured Japan's accession as a full member of GATT on June 8, 1955.

Throughout this period, the United States was conducting informal discussions with the Japanese government in an attempt to defuse the textile crisis. On December 1, 1955, in a letter to Senator Margaret Chase Smith (a Republican from Maine), Secretary of State Dulles stated:

> Furthermore, I have personally advised representatives of the Japanese Government that they should exercise restraint in their exports and not attempt to capture so much the American market that an American industry will be injured.
>
> The Japanese Government and textile industry are aware of the attitude of the domestic textile industry toward increased imports of cotton textiles. They appear to be genuinely engaged in an attempt to allay the fears of our domestic producers by devising controls on exports of textiles and finished goods to the U.S. Reports from Tokyo indicate that

> apparently both quality standards and quantitative controls will be instituted. We are informed that until these controls have been worked out the Japanese Government will refuse to accept any further applications for the export of cotton textiles and finished goods to this country.[83]

On December 21, 1955, Japan announced a voluntary program of controls on exports of cotton goods to the United States.

After failing to obtain legislated quotas in 1955, the textile industry had begun to focus on a voluntary arrangement modeled on the private agreement negotiated by the American Textile Manufacturers Institute (ATMI) in 1937. The Administration was not enthusiastic and apparently claimed that it lacked the legal authority to enter into a formal agreement. To clarify the situation, Congressman Harold D. Cooley (a Democrat from North Carolina) introduced an amendment to the Agricultural Act of 1956 to authorize negotiated restraints. As enacted, Section 204 provided that:

> [T]he President may, whenever he determines such action appropriate, negotiate with representatives of foreign governments in an effort to obtain agreements limiting the export from such countries and the import into the United States of any agricultural commodity or product manufactured therefrom or textiles or textile products . . . .[84]

In 1956, the industry escalated the pressure by filing four escape clause petitions, alleging that U.S. tariff concessions on textile products had caused or threatened serious injury to the U.S. cotton textile industry. The Tariff Commission instituted an investigation of cotton velveteen fabrics on January 26, 1956, and an investigation of imported gingham on June 12, 1956. Petitions for escape clause investigations of women's and girls' cotton blouses and cotton pillowcases were dismissed.

On October 24, 1956, the Commission affirmatively recommended that the President increase U.S. duties on plain-back cotton and twill-back velveteens. But on January 7, 1957, the Departments of Agriculture, Commerce, and State jointly announced the decision of the Japanese government to restrain exports of cotton textiles. The Press Release stated: "The purpose of this program is to effect orderly marketing of Japanese cotton textiles in the United States by avoiding excessive concentration in any particular period or on any particular item, and by

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83. LYNCH, *supra* note 61, at 106.
84. 7 U.S.C. § 1854 (2000).

continued efforts to achieve broader diversification of cotton textile exports from Japan to the United States."[85]

At the time, the United States believed that the primary source of the textile problem was concentration of Japanese imports in a few product lines, so their impact was concentrated on only a few domestic firms competing with imported products. The solution adopted by the U.S. negotiators was to spread imports of Japanese textiles over a variety of product categories. The program established specific ceilings on exports of twenty-nine categories of cotton textiles and provided for annual consultations for the purpose of "arriving at such adjustments, upward or downward, on the quotas as may be warranted by changed conditions."[86] The Japanese government also agreed to take "all feasible steps" to prevent transshipments and to consult if an "excessive concentration" developed in Japanese exports of an unlisted textile item.[87] Accordingly, on January 22, 1957, President Eisenhower informed Congress that in view of Japan's decision to restrain exports of cotton textiles, he would take no action on the recommendation of the Tariff Commission in the cotton velveteens case.

The United States concluded a similar export restraint agreement with Italy on January 27, 1957, although at the request of the Italian government. It received no publicity.

The Japanese textile VRAs failed to solve the textile import problem and instead highlighted some of the limits of selective country-specific safeguards. After the 1957 Japanese textile VRA went into effect, imports from other sources, such as Hong Kong, Portugal, and Egypt, quickly surged. It was increasingly apparent that the rise of textile industries in developing countries around the world posed a serious, long-term threat to the U.S. textile industry, as foreign suppliers appeared capable of penetrating the U.S. market at will. On May 2, 1961, President Kennedy announced a seven-point program to assist the textile industry, including a commitment to negotiate multilateral voluntary export restraints on cotton textiles. At the urging of the United States, a group of countries interested in the importation and exportation of cotton textiles met in July 1961 in Geneva under the auspices of the GATT. The meeting resulted in the Short-Term Arrangements Regarding International Trade in Cotton Textiles of July 21, 1961.[88] The effect of the arrangement was to create a formalized procedure for negotiating bilateral voluntary restraint agreements.

After further negotiations during 1961-1962, the participating countries adopted the Long-Term Arrangement Regarding International Trade in Cotton Textiles on February 9, 1962.[89] Like the Short-Term Arrangement, the Long-

85. Press Release, Dep't of Agric., Dep't of Commerce, Dep't of State, Japanese Textiles (Jan. 16, 1957).

86. *Id.*

87. *Id.*

88. GATT B.I.S.D. 105 at 18 (1962).

89. GATT B.I.S.D. 115 at 25 (1963).

Term Arrangement permitted an importing country to request an exporting country to limit its exports to a specified level to avoid "market disruption."

The Arrangements satisfied the American cotton textile industry. Indeed, the American Cotton Manufacturer's Institute and the majority of the congressional textile lobby supported the Kennedy Administration's efforts to secure new trade negotiating authority.

In short, the VRAs of the 1950s grew out of the political battles between Congress and the executive branch over trade policy. The Administration used VRAs to accommodate protectionist pressures and indirectly to show that Japan was a "responsible" trading partner, which would accommodate U.S. demands. In addition, the VRAs helped to obscure the proliferation of U.S. import restrictions at a time when the Administration was seeking to persuade its European allies that Japan should be admitted to the GATT and to dissuade European countries from invoking GATT's non-application clause.

H. The United States: 1962-Present

1. The Kennedy Round, 1962-1967

The Trade Expansion Act of 1962 marked a major shift in U.S. trade policy and led to a sharp reduction in the use of VRAs. The Act provided the President with broad authority to reduce U.S. tariffs across the board to 50% of the levels in effect on July 1, 1962, opening the way for the Kennedy Round of GATT negotiations. The peril point provision was dropped entirely, giving the Administration much greater flexibility to offer tariff concessions.

The Act cut back the escape clause by requiring that imports be a "major cause" of serious injury to a domestic industry, although it also specifically authorized the President to enter into "orderly marketing agreements" as a remedy for the first time.[90] This amendment was added by Senator Muskie[91] and supported by the footwear and lumber industries, who wanted the Kennedy Administration to negotiate voluntary restraints. The Kennedy Administration, however, apparently made no promises. According to one Senator: "The President has promised to look into the lumber situation—but merely indicates 'shoes' as a future possibility."[92]

Apart from textiles, the United States engaged in relatively few voluntary restraint agreements from 1962 to 1967. The United States was running large

90. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 301(b)(1), 76 Stat. 872 (1962).

91. While the bill was before the Senate, Senator Muskie added the Orderly Marketing Act, which he had introduced a year earlier. S. 1735, 87th Cong. (1st Sess. 1961).

92. *Id.* at 1742.

trade surpluses and protectionist pressures were low. Another factor was the restrictive application of the U.S. escape clause statute by the Tariff Commission. From 1962 to 1969, after the changes to the "causation" standard in the Trade Expansion Act of 1962, the Tariff Commission conducted thirteen "escape clause" investigations. In each, the Tariff Commission found that the reduction in U.S. tariffs was *not* a major factor in causing serious injury to a U.S. industry. Closing off the escape clause drastically reduced the political pressure on the President to provide import relief via tariffs, quotas, or VRAs.

In 1959-1960, Japan had voluntary restraints in effect for twenty products.[93] Ten years later, the number was virtually unchanged. Japanese VERs were in effect for nineteen products other than textiles or steel.[94] Of these products, nine were also subject to restraint in 1959-1960: transistor radios, silk fabrics, umbrellas, umbrella parts, ceramics, wood screws, frozen swordfish, and canned tuna. These VERs presumably were in effect throughout. Of the new products on the list, four were the subject of "escape clause" investigations—umbrellas, umbrella parts, baseball gloves, and ceramics—while restraints on baseball gloves and ceramics had preceded the 1962 Trade Expansion Act.

2. The Heyday of the Big VRA: 1967-1974

In the late 1960s, the quiet period in U.S. VRA policy ended, leading to a series of major VRAs on steel, cars, footwear, and televisions that affected larger and larger amounts of trade. The VRAs of this period reflected the emergence of a different set of economic, legal, and political forces.

First, by 1967, the cost of the Vietnam War, coupled with expansionary fiscal policies, contributed to growing U.S. budget deficits. Inflation doubled from 3% in 1967 to 6% in 1969, leading to an overvalued dollar, increasing imports, and a further worsening of the U.S. balance-of-payments.

Second, the increasing globalization of the world economy meant that, for the first time, large labor-intensive (and politically powerful) U.S. manufacturing industries, such as autos, steel, textiles, footwear, and televisions were facing serious foreign competition. In part, this reflected the emergence of new Asian suppliers such as Taiwan and Korea, and Japan's ongoing transformation from producer of low-cost consumer goods, like toys and footwear, to one of the world's leading producers of advanced technologies and sophisticated manufactures. Third, successive rounds of tariff cuts in GATT negotiations meant that U.S. tariffs had been reduced to levels that made it increasingly difficult to provide compensation for safeguard actions under GATT Article XIX. After the drastic Kennedy Round tariff cuts, any easy U.S. tariff

93. *Japanese Export Control*, *supra* note 74.
94. U.S. TARIFF COMM'N, NON-TARIFF BARRIERS (PART 2) 255 (1974).

cuts had long since disappeared, and the remaining high U.S. tariffs generally protected politically powerful, import-sensitive products—e.g., textiles, footwear, certain agricultural commodities, and steel. The increasingly large volumes of trade involved in safeguard actions also made it difficult to offer compensation under GATT rules, increasing the risk of retaliation under Article XIX. While the United States used safeguard actions extensively in the 1950s, the preferred U.S. trade law remedy shifted to antidumping measures, which do not require compensation under GATT Article VI.

The size and scale of U.S. industries like steel, footwear, and televisions meant that quota bills were a serious threat and sympathetic congressmen and senators were in a position to block executive branch trade initiatives, absent some political quid pro quo. As the U.S. trade picture deteriorated, political pressures for import relief began escalating. In 1968, President Johnson's request for an extension of U.S. tariff negotiating authority[95] went nowhere. Congressional quota bills were introduced to restrict imported dairy products, textiles, and steel.[96]

In June 1968, the State Department initiated discussions with foreign steel producers aimed at halting a surge in foreign steel imports. The steel industry was a large and vital industry and a major employer. It was strategically located in highly populated northeastern industrial states. From 1958 to 1960, U.S. steel imports rose from 1.7 million tons to 18 million tons. This surge was driven by multiple factors, including (1) the emergence of modern and efficient foreign steel plants, (2) the decline of traditional U.S. integrated steel mills, and (3) increasing world steel production, which contributed to competition and widespread dumping.[97] During 1967-1968, oversupply in the world market led to a surge in imports of low-priced foreign steel into the U.S. market.

It was hoped at the time that the steel import surge might be a short-term problem and that a brief respite would suffice to put the U.S. industry back on its feet. Hence, VRAs were viewed as an appropriate remedy for the industry's problems. On January 19, 1968, the State Department announced agreements with foreign producer associations in which European and Japanese steel producers announced their intention to limit their 1969 shipments to 5.75 million tons each and to restrict the growth in their exports for a further two-year period to 5% per year.

A second major series of VRAs involved imported meat. Here the primary pressure for relief stemmed from the Meat Import Act of 1964. This Act established an annual adjusted quantitative level for imports of beef, mutton, and goat meat. Under the law, if the Secretary of Agriculture determined that imports

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95. What is known as the Trade Expansion Act of 1968.

96. PASTOR, *supra* note 45, at 122.

97. ROBERT W. CRANDALL, THE U.S. STEEL INDUSTRY IN RECURRENT CRISIS 26 (Brookings Inst. Press 1981).

would exceed the established level by 10% or more, he was required to impose quotas.

In late 1968, it became apparent that imports were likely to exceed the levels established in the Meat Import Act and lead to the imposition of quotas. However, U.S. officials were reluctant to impose import quotas, since the United States had been one of the leading international critics of agricultural quotas. Meat quotas were particularly delicate, since the United States was a major meat exporter and such measures could invite foreign retaliation. Hence, the United States negotiated VRAs with the major meat-exporting countries, persuading foreign meat exporters to restrain their shipments in order to avoid the mandatory imposition of U.S. import quotas. These agreements were renewed in 1969, 1970, 1971, 1972, 1974, 1977, and 1982.

The U.S. international economic position continued to weaken. Rising inflation resulted in an overvalued dollar, with adverse consequences for U.S. trade. Merchandise imports rose, while the U.S. trade balance fell from a surplus of $2.603 billion in 1970 to a deficit of $6.416 billion in 1972.

The deteriorating trade situation fueled demands for protection and led to even more quota bills. In 1969, President Nixon introduced legislation to restore the President's authority to negotiate tariff reductions, which had lapsed in 1967 after the Kennedy Round. The bill, however, was substantially amended by the House Ways and Means Committee, which added import quotas for footwear and textiles and a new procedure for imposing temporary quotas after an investigation by the Tariff Commission. The bill passed the House, but died in the Senate.

Finally, in the 1968 election, President Nixon had promised to expand the Long-Term Cotton Textile Agreement to cover man-made textiles. After the election, this task was assigned to Commerce Secretary Maurice Stans. Finding little enthusiasm in Europe, Secretary Stans began discussions with Japan. However, in an Aide Memoire dated March 9, 1970, the Japanese Embassy expressed Japan's strong opposition to the negotiation of a VRA absent a finding of injury on a specific product under Article XIX. The negotiations were at an impasse.

In 1971, Chairman Wilbur Mills of the House Ways and Means Committee introduced textile quota legislation to spur the Japanese government. The Administration initially went through the motions of opposing the legislation, but later expressed "reluctant" support in view of Japan's refusal to enter into a VRA.

Shocked, Japan announced a VER on March 8, 1971, in an effort to forestall the textile quota bill, but the U.S. textile industry, the textile unions, and the Administration rejected the proposed restraints as inadequate. In addition, the President informed Japan, Hong Kong, Korea, and Taiwan that the United States would unilaterally impose mandatory quotas on their textile imports unless they either entered into a VRA or were in the process of negotiating a VRA by October 15, 1971.

As the U.S. balance-of-payments situation continued to deteriorate, President Nixon, on August 15, 1971, announced the Administration's "New Economic Policy," which included a 10% surcharge on imports to compensate for the overvalued dollar. The 10% import surcharge shocked many U.S. trading partners.[98] The Japanese government quickly overrode the objections of its textile industry and entered into a VRA covering exports of man-made textiles. Korea, Taiwan, and Hong Kong also agreed to textile restraints.[99]

The proliferation of U.S. VRAs was slowed by the District of Columbia Circuit's decision in *Consumers Union v. Kissinger*.[100] While the circuit court overruled a lower court decision finding that the steel VRAs were not exempt from the Sherman Antitrust Act on the grounds that this claim had been dismissed with prejudice by *Consumers Union*, it left intact the specter of potential antitrust liability for foreign companies that agreed to limit their exports to the United States under a VRA-type arrangement. In addition, while the District of Columbia Circuit refused to strike down the steel VRAs, it did so only by finding that such arrangements were unenforceable absent a direct statutory grant of authority by Congress. Accordingly, *Consumers Union* added two major complications to future VRA arrangements. First, any U.S. administration that wanted to pursue VRAs would have to provide some form of assurance to foreign producers that they would not be subject to treble damages or criminal penalties under the U.S. antitrust laws. Second, any administration that wanted to enforce such restraints would need to rely on some form of existing legal authority from Congress—e.g., a trade remedy statute authorizing VRAs or Orderly Marketing Agreements (OMAs)—or request such authority from Congress for the specific arrangement involved. As a result, *Consumers Union* has effectively precluded informal, non-public VRA arrangements.

In 1974, Congress finally authorized the President to participate in the Tokyo Round of Multilateral Trade Negotiations. At the same time, the Trade Act of 1974 loosened the strict causation standard in the U.S. escape clause that had been adopted in the Trade Expansion Act of 1962 and had sharply reduced the number of U.S. escape clause actions. The 1974 Act redesignated the escape clause as Section 201; eliminated the requirement that serious injury be linked to tariff concessions; and most importantly, changed the causation standard from "major cause," which had been interpreted by the Tariff Commission as more important than all other causes combined, to "substantial cause." The Act further

98. 65 DEP'T ST. BULL. 477 (1971).

99. The United States also negotiated a VER with Mexico to restrain exports of frozen strawberries. During 1971, the House Ways and Means Committee had pushed a bill to impose quotas on seven products, including Mexican strawberries, which were disrupting markets on the West Coast.

100. 506 F.2d 136 (D.C. Cir. 1974).

clarified that "substantial cause" meant "important and no less than any other cause."[101] This led to a surge of escape clause cases.

In 1975, fourteen escape clause petitions were filed with the Tariff Commission, now renamed the U.S. International Trade Commission (USITC). For the nine cases in which the Commission found that imports were causing serious injury, President Ford imposed import restrictions in specialty steel, proclaiming a system of global quotas, but directing the Special Trade Representative (STR) to negotiate OMAs with countries interested in entering into voluntary restraints.[102] He also directed the STR to initiate consultations with Taiwan and Korea over VERs on imported mushrooms.

After winning the 1976 election, President Carter was hit with a series of high-profile, politically charged escape clause cases involving footwear and televisions. Footwear was regarded as a test of the new Administration's trade policy. Imported footwear, primarily from Korea and Taiwan, had captured approximately 50% of the U.S. market. Because footwear production is labor-intensive, U.S. firms, particularly the smaller American producers, were at a serious disadvantage.

Faced with a set of decidedly unattractive options, the Carter Administration tried to balance competing policy considerations. Imposing quotas or tariffs on a key developing-country export product could undercut the Administration's credibility in the Tokyo Round negotiations, and would be perceived abroad as a sign of U.S. protectionism. At the same time, the footwear industry had powerful congressional supporters and cited ambiguous commitments allegedly made by the Ford Administration during the Trade Act of 1974. Concerned that denying import relief could trigger an attempt by Congress to override the President's decision or impose a mandatory quota, President Carter directed USTR to negotiate OMAs with Korea and Taiwan, while also providing adjustment assistance to help dislocated workers. The Cabinet was split. While recognizing that the decision would be criticized by the press and domestic industry, and would invite criticism from foreign governments for being indistinguishable from the European Community's effort to manage its trade with Japan, the Administration concluded OMAs were the best of several poor options.

Shortly thereafter, the U.S. International Trade Commission forwarded another major escape clause case to the White House, this one involving televisions. After falling behind in the introduction of solid-state technology, U.S. television producers had attempted to cut costs through automation or by shifting production operations overseas. Accordingly, the Section 201 petition was filed by labor unions seeking tight limitations on imported televisions and components to stem growing imports from Japan and foreign outsourcing by U.S. manufacturers. The President again directed USTR to negotiate an orderly

101. S. REP. NO. 93-1298, at 120-21 (1974).
102. In the other five cases, President Ford provided adjustment assistance.

marketing agreement. The OMA was deliberately structured so as to encourage Japanese producers to relocate their final assembly operations in the United States and increase U.S. jobs.

Finally, in 1978, the steel industry filed a massive set of antidumping cases against the European Community, bringing the continuing difficulties of the steel industry back to the forefront of the trade agenda, and escalating the political pressure on the Carter Administration. The Administration settled the dispute by instituting the "trigger price mechanism" (TPM), consisting of minimum prices for steel based on Japanese costs of production. The TPM permitted European producers to sell into the U.S. market, as long as they sold above the "trigger price."

By 1978-1979, the footwear and television OMAs ominously began to leak, as imports from other sources surged. Other Asian countries were capable of producing footwear and televisions and quickly stepped into the gap created by the Korea and Taiwan OMAs. The Administration tried to fix the problem by negotiating additional OMAs with Korea and Taiwan and by reaching an agreement with Hong Kong to stem circumvention by requiring certificates of origin for imported footwear.

The television and footwear OMAs illustrated one of the core weaknesses of large selective safeguards in a global economy. Import restrictions that raise U.S. prices can also act as a powerful lure to new suppliers, particularly when there are low barriers to entry. As a result, import surges from new suppliers can render the benefits of the footwear and television VRAs illusory, and contribute to widespread circumvention. The VRAs can also encourage foreign producers to switch to higher value-added products in order to maximize profits, focusing the most competitive pressures on the most advanced product lines[103] and technologies, and further eroding a U.S. industry's long-term competitiveness.

3. The Decline: 1980-1994

In the 1980s, some of the key forces driving U.S. VRA policy intensified, but the size and scale of VRA arrangements began to become an impediment and their role began to decline. In part, the change reflected a dramatic shift in U.S. trade politics. While international trade became a top-tier political issue in the 1980s and drew increasing public and media scrutiny, congressional trade politics were increasingly driven by the priorities and needs of export-oriented U.S. multinational businesses and the U.S. farm community, as opposed to the traditional demands for protection from import-sensitive industries that

103. This problem can be alleviated to a degree by regulating the product mix in the VRA.

characterized many of the trade debates of the 1930s, 1950s, and 1970s. While Congress enacted a series of major trade bills, the focus of such bills shifted from protecting U.S. industries through congressionally imposed quotas or by tinkering with the U.S. trade remedy laws to pressuring foreign governments to open their markets to U.S. goods, services, agriculture, and investment. In addition, by resurrecting the threat of potential antitrust liability, *Consumers Union*, like the Supreme Court's *Schechter Poultry* decision of the 1930s, put a major damper on the "underground" VRAs that previously had been negotiated without an explicit grant of authority from the Congress.

The decade began on a bleak note when the Japanese government announced in May 1981 that it would restrict exports of Japanese cars to the U.S. to 1.68 million units for a three-year period.[104] The U.S. International Trade Commission had rejected import relief in a Section 201 case filed by the Ford Motor Company and the United Auto Workers,[105] but the Japanese government apparently nevertheless calculated that a VRA was necessary to prevent congressional quota legislation. Such quota legislation had just been narrowly defeated in the Senate Finance Committee. While the Reagan Administration did not publicly pursue the VRA, it did not object. The automobile VRA was announced shortly after a visit to Tokyo by then–U.S. Trade Representative Bill Brock, and three days before an announcement that the Japanese Prime Minister would visit the United States to meet with President Reagan. The agreement was effectively completed by a formal exchange of letters with the Japanese Ambassador, in which the U.S. Department of Justice stated: "The Department of Justice is of the view that implementation of such an export restraint by the Government of Japan . . . would not give rise to violations of United States antitrust laws," citing the foreign sovereign compulsion doctrine.[106] The Department of Justice's letter was orchestrated by the Assistant Attorney General for the Antitrust Division, William Baxter, and helped address some of the concerns of Japanese manufacturers about their potential exposure to antitrust liability under *Consumers Union*.[107]

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104. U.S. Int'l Trade Comm'n, *A Review of Recent Developments in the U.S. Automobile Industry Including an Assessment of the Japanese Voluntary Restraint Agreements*, Inv. No. 332-188, U.S.I.T.C. Pub. No. 1648, at 1-2 (1985).

105. The U.S. International Trade Commission's (USITC) finding was something of a surprise, since the Carter Administration had already announced it was prepared to grant import relief. This announcement may have backfired, however, since the Commission has always zealously protected its independence, consistent with the will of Congress.

106. Letter from Assistant Attorney General William F. Baxter.

107. *See* Mitsuo Matsushita & Lawrence Repeta, *Restricting the Supply of Japanese Automobiles: Sovereign Compulsion or Sovereign Collusion*, 14 CASE W. RES. J. INT'L L. 47 (1982). Such an exchange of letters was necessary because the restraints could not be justified under U.S. law in view of the USITC's negative injury finding in the Section 201 investigation.

In 1984, the Reagan Administration also negotiated a comprehensive set of VRAs involving imported steel. After a massive Section 201 investigation, the U.S. International Trade Commission recommended that the Administration grant import relief to U.S. steel industry. Because the Commission evaluated injury on a product-by-product basis, the case resulted in a complex mix of affirmative findings on certain products and negative findings on others. By law, the Commission's recommendations went to the President, who is responsible for the final decision as to an appropriate remedy. The Section 201 case triggered a fierce debate with the Reagan Cabinet, with some agencies favoring a quota, others opposing any relief, and the USTR urging negotiated OMAs. The President eventually directed the USTR to negotiate OMAs covering all steel products. This was a huge undertaking, since it involved negotiating individual OMAs with nineteen major supplying nations and the European Community.[108] The terms of the VRAs varied. In some cases, the VRAs specified an agreed market share as a percentage of projected U.S. consumption. Others were based on a specific quantitative limit.[109]

An important factor in the Administration's decision to negotiate VRAs was the complete impracticality of providing compensation for an across-the-board U.S. safeguard tariff or quota under GATT Article XIX. The steel decision involved a huge volume of trade from multiple suppliers. The footwear and television VRAs of the late 1970s had shown that failing to cover all key suppliers could quickly render a VRA ineffective. Since dozens of countries around the world were capable of producing steel and rapidly expanding their exports to the U.S. to fill any gap created by the VRA, the situation ideally called for an across-the-board tariff or quota covering all suppliers. However, such an approach would have required the United States to pay a horrendous compensation bill by temporarily reducing politically sensitive U.S. tariffs or allowing its trading partners to retaliate against leading U.S. exports. Such a scenario was particularly unattractive, since it meant that globally competitive U.S. industries such as high-technology and agriculture would have to be sacrificed in order to protect the steel industry. While the Reagan Administration's steel VRA program posed a major negotiating challenge for USTR, it neatly avoided the compensation problem, while at the same time providing comprehensive relief that somewhat resembled that of a traditional import quota.

108. U.S. Int'l Trade Comm'n, *The Effects of Steel Voluntary Restraint Agreements on U.S. Steel-Consuming Industries, Report to the Subcommittee on Trade of the House Ways and Means Committee*, Inv. No. 332-270, U.S.I.T.C. Pub. No. 2182 (1989).

109. In 1989, President George H.W. Bush announced a "Steel Trade Liberalization Program" that extended the VRAs for two-and-one-half years but sharply increased the limits on foreign steel as a percentage of U.S. consumption. The steel VRAs were terminated on March 31, 1992. *See* U.S. Int'l Trade Comm'n, *The Economic Effects of Significant U.S. Import Restraints*, Inv. No. 332-325, U.S.I.T.C. Pub. No. 2699 (1993).

Apart from a minor set of VRAs involving imported machine tools,[110] the automobile and steel arrangements basically ended the heyday of major U.S. VRAs. In part, this reflected a shift in U.S. trade politics. While trade was becoming an increasingly contentious national political issue, the focus of congressional trade bills had shifted to opening foreign markets under Section 301, launching a new multilateral trade round, or negotiating free trade agreements, as opposed to traditional demands for protection for import-sensitive industries.

After announcing the steel VRA program, the Reagan Administration needed an explicit grant of congressional authority for the VRAs, since otherwise the arrangements would have been unenforceable under *Consumers Union*.[111] The only legislative vehicle for securing such authority was a miscellaneous tariffs bill which had been languishing in the U.S. House of Representatives. The bill contained a host of amendments to the U.S. antidumping and countervailing duty laws and Section 201 that were strongly opposed by the Administration. However, in a brief period at the close of the congressional session, House Ways and Means Chairman Dan Rostenkowski (a Democrat from Illinois) and Senate Finance Committee Chairman Bob Dole (a Republican from Kansas) quickly negotiated a "miracle trade bill" that (1) dumped virtually all of the proposed changes to the U.S. trade remedy laws—a surprising political twist given experience with past trade bills, (2) provided authority for the Reagan Administration's steel VRA program—an important priority for the steel industry, which may explain why it backed down on many of its proposed trade law amendments, (3) extended the Administration's fast-track negotiating authority to allow the completion of free trade agreements (FTAs) with Israel and Canada, and (4) directed USTR to begin preparing a National Trade Estimates report listing foreign trade barriers. The result was a surprisingly respectable piece of trade legislation.

The shift in U.S. trade politics was confirmed in a ferocious see-saw political battle over the Omnibus Trade and Competitiveness Act of 1988. In the

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110. The final U.S. VRA program involved machine tools and arose from a Section 232 investigation into whether imports posed a threat to U.S. national security. In May 1986, President Reagan directed USTR to negotiate VRAs with the major foreign machine tool suppliers. This led to U.S. VRAs with Japan and Taiwan; U.S. requests to West Germany and Switzerland to limit their exports so as not to exceed specific levels; and U.S. warnings to seven other suppliers (Brazil, Italy, Korea, Singapore, Spain, Sweden, and the U.K.) to maintain their existing market shares. *See id.* at 22.

111. The Administration's VRA program included products for which the USITC had found injury under section 201, and for which it already had statutory authority to negotiate OMAs. However, it also included certain products for which there was no affirmative USITC injury finding. If such products had not been covered by the VRAs, it would have likely resulted in import surges in certain narrow uncovered product lines. Hence, the VRAs were comprehensive.

mid-1980s, trade became a national political issue, driven in part by escalating U.S. trade deficits, increasing competitive pressures on labor-intensive U.S. industries, and growing opposition to open trade policies, particularly from labor unions. During the 1988 Presidential primaries, Representative Richard Gephardt (a Democrat from Missouri) built his campaign around the "Gephardt Amendment," which would have required foreign countries to reduce trade imbalances with the United States or face across-the-board U.S. sanctions on imports into the United States, and was strongly supported by U.S. labor unions. The Gephardt Amendment effectively targeted Japan, which was the target of growing animosity because of escalating bilateral deficits and the threat posed by Japanese autos, semiconductors, steel, and other products. The bill was also drafted in a time of escalating congressional pressure to strengthen the antidumping and countervailing duty laws and Section 201, particularly after the U.S. steel industry filed a series of massive antidumping actions against foreign suppliers, the footwear industry lost a controversial Section 201 case before the U.S. International Trade Commission, and President Reagan rejected import relief for the U.S. copper industry. As a result, the steel industry, labor unions, and others began championing a host of protectionist amendments to the U.S. trade remedy laws, including major changes to the antidumping and countervailing duty laws and stripping the President of his longstanding authority to grant or deny import relief after an affirmative determination by the U.S. International Trade Commission under Section 201. In this unpromising atmosphere, congressional Democrats, who controlled the House and Senate, announced that they would draft a major trade bill.

While the Reagan Administration had gone along with the automobile and steel VRAs, it threw down the gauntlet by strongly opposing the Gephardt Amendment and protectionist amendments to the U.S. trade laws, launching the Uruguay Round of multilateral trade negotiations, and initiating negotiations over a major free trade agreement with Canada. This omnibus trade bill triggered a year-long political battle, including a presidential veto. Like the 1984 Act, the final provisions of the 1988 Trade Act were essentially written in a conference between House Ways and Means Chairman Rostenkowski, Senate Finance Committee Chairman Bentsen (a Democrat from Texas), U.S. Trade Representative Yeutter, and, behind the scenes, Treasury Secretary James A. Baker III.[112] The conference dropped the House-passed Gephardt Amendment and substituted for it the Senate's "Super 301" amendment, which required USTR to self-initiate Section 301 investigations of major foreign market access barriers. Thus, while the Gephardt Amendment focused on reducing the U.S. trade deficit by imposing steep surcharges on Japanese imports, Super 301 was aimed at

112. *See* SUSAN C. SCHWAB, TRADE-OFFS: NEGOTIATING THE OMNIBUS TRADE AND COMPETITIVENESS ACT (Harv. Bus. Sch. Press 1994); I.M. DESTLER, AMERICAN TRADE POLITICS (Inst. for Int'l Econ., 2d ed. 1992).

opening foreign markets. The final bill also toughened Section 301 to require the administration to impose sanctions, except in very limited circumstances, if a foreign government refused to eliminate a market access barrier under Section 301. As in 1984, virtually all of the proposed House and Senate amendments to the antidumping and countervailing duty laws and Section 201 were dropped in conference. And, as requested by the Administration, the Congress provided "fast-track" authority for the Uruguay Round and the North American Free Trade Agreement (NAFTA). The result, again, was a surprisingly respectable piece of trade legislation. The Reagan Administration swallowed hard but signed the bill into law.

The final bill was all the more surprising given the intense political pressures swirling around U.S. trade policy. And it sent an unmistakable political signal that U.S. trade policy, as drafted by a Democratic Congress and a Republican Administration, would focus on aggressively opening foreign markets through trade negotiations or, if necessary, Section 301, not protectionism. While the bill said virtually nothing about VRAs, it hinted that the era of VRAs and other protectionist tools in U.S. trade policy might be ending. Underlying the final outcome was a subtle shift in U.S. trade politics, driven in part by the U.S. multinational business community and American farm groups. U.S. multinational corporations were, for the most part, happy to support congressional and Administration efforts to increase market access abroad and aggressively challenge foreign trade barriers, since most of them operated globally and were deriving an increasing share of their sales from overseas operations. The 1988 Act's efforts to strengthen global intellectual property protections, address foreign investment barriers, and promote GATT negotiations on agriculture, intellectual property, and services were fully consistent with the objectives of powerful U.S. multinational businesses. For its part, U.S. agriculture was heavily dependent on exports and access to overseas markets, since, as was often pointed out, nearly one in three acres of U.S. farmland was planted with crops for export. In contrast, demands for protectionist trade law amendments and out-and-out protection were focused on a much narrower group of American businesses. However, the most powerful import-sensitive businesses, such as steel and lumber, were heavily focused on preserving strong U.S. antidumping and countervailing duty remedies, as opposed to old-fashioned demands for quotas or changes to Section 201. In effect, Section 201 had become too difficult and unwieldy, and its compensation requirement had become so prohibitively expensive that the attention of even the main practitioners of the U.S. trade remedy laws had shifted elsewhere. In addition, the steel industry was happy with its existing VRA arrangement and was not in a position to demand further protection.

4. Oblivion: The Uruguay Round Agreements

The final nail in the coffin for VRAs came in the Uruguay Round Agreements, which entered into force on December 31, 1994. As part of a package of agreements, the WTO adopted a Safeguards Agreement prohibiting the use of VRAs and other export restraints. The Safeguards Agreement sought to revitalize Article XIX by temporarily waiving the compensation requirement for safeguard measures in certain circumstances and clarifying and easing some of the criteria for justifying findings of serious injury. At the same time, Article 11 of the Agreement prohibited VRAs[113] and other "grey area measures":

> 1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.
>
> (b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.[114]

In a surprising step, the Uruguay Round Agreements also terminated the Multi-Fiber Arrangement, which had evolved into a complex worldwide set of export restraint arrangements on various textile products. After a ten-year phase-

113. A footnote to paragraph (b) left a limited window for VRAs: "An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member." Accordingly, if an import quota is applied as part of a legitimate, WTO-consistent safeguard action, a WTO Member can still transfer the administration of the quota (and presumably the quota profit) to the exporting country whose goods are being restricted. This can lead to an export quota arrangement that closely resembles a VRA in many respects. However, the Safeguard Agreement still requires that any Article XIX action must be taken on an MFN basis, so imports from all suppliers are subject to restrictions. Selective quotas on a few targeted suppliers, which are the essence of selective VRA arrangements, are still prohibited. Accordingly, the key element of a VRA arrangement is missing.

114. Agreement on Safeguards, art. 11(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154.

out, the MFA ended quietly on December 31, 2004. With the Uruguay Round Agreements, the era of VRAs in U.S. trade policy ended.

IV. CONCLUSION

Briefly summarized:

1. The haphazard and episodic course of VRAs in U.S. trade policy shows that U.S. policymakers have generally adopted such measures in a pragmatic effort to balance their mostly free trade long-term objectives with short-term demands for protection.

2. For the most part, VRAs have been driven by political, as opposed to economic and/or legal, considerations. While legal considerations have played a role on occasion, these have been primarily on the edges; as, for example, by deterring U.S. policymakers and industries from using VRAs because of antitrust concerns after the *Schechter Poultry* and *Consumers Union* decisions, or by forcing U.S. policymakers to seek explicit authority from the Congress for such measures after *Consumers Union*. This is reality, although it is humbling to lawyers.

3. The decline of the VRA reflects the corresponding demise of Section 201 as a major U.S. import relief remedy, and the growing difficulty for the U.S. and other GATT/WTO Members of providing compensation in escape clause actions based on GATT Article XIX. As a result, the antidumping and countervailing duty laws now reign supreme as trade remedy procedures. This is unlikely to change anytime soon. All indications are that the WTO Safeguards Agreement has done little to revive Section 201.

4. The WTO Safeguards Agreement and the accompanying demise of the VRA reflect a fortunate alignment of (1) a longstanding trade policy objective of reviving GATT Article XIX and ending “grey area” measures, (2) the shift of focus of trade remedies litigation to antidumping and countervailing duty measures, and the declining significance of safeguards and Section 201, and (3) the eroding political constituency for safeguards and VRAs, and the increasing focus of the U.S. multilateral business community and U.S. agriculture on market

access, not import protection. Correspondingly, the pressures which led to VRAs from 1930s to the 1980s reflected the overriding need for a political escape valve to address pressures from import-sensitive U.S. industries and the Congress. The most surprising aspect of the Uruguay Round Agreements was not the Safeguards Agreement, but the termination of the Multi-Fiber Arrangement. The end of the MFA represented a huge blow to textile producers in the United States and Europe, who had benefited from import protection dating back to the 1930s and 1950s.

5. The haphazard course of U.S. VRAs illustrates another element of U.S. trade policy. Despite the WTO and a plethora of U.S. free trade agreements, the course of free trade has never been steady and smooth. An open, rules-based multilateral trading system is not an inevitability; it reflects instead an ongoing series of political compromises and strong leadership from the executive branch, Congress, and the business and farm communities. If political and economic forces are in alignment, major trade achievements like the WTO Safeguards Agreement are possible. If these forces ever go out of alignment, as they have in the past, VRAs no doubt lurk deep in the bowels of trade bureaucracies around the world, waiting and hoping for a better day.