Voluntary Restraint Agreements: Effects and Implications of the Steel and Auto Cases

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COMMENT

Voluntary Restraint Agreements: Effects and Implications of the Steel and Auto Cases

"Free trade," writes George Will, "ranks just below Christianity and just above jogging on the list of things constantly praised but only sporadically practiced." Nowhere is this ambivalence towards free trade more apparent than in the increased utilization of voluntary restraint agreements.

In the years following World War II, when its economic dominance went unchallenged, the United States led the fight for freer international trade, hoping to avoid a repeat of the disastrous trade wars of the 1930s. Through the General Agreement on Tariffs and Trade, tariffs have been lowered, many restrictions have been removed, and institutions, procedures, and rules governing international trade have been established. As a proponent of free trade, the United States is committed to GATT's governing principles, including those granting most-favored nation status to all signatories and prohibiting quotas and discriminatory treatment in international commerce. U.S. law reflects GATT's authorization of import quotas only "where products are being imported . . . in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers . . . of like or directly competitive products."

Developments in recent years have come to endanger the U.S. post-war love affair with free trade. U.S. manufacturers and labor

1 Will, Great Nations Do What They Must Do, Wash. Post, Apr. 7, 1985, at F8, col. 5.
5 See GATT, supra note 3, at art. xix; Trade Act of 1974, § 201, 19 U.S.C. § 2251 (1982). Section 201 requires that parties seeking import restraints submit a petition for eligibility for import relief to the U.S. Trade Commission (ITC). The ITC then determines whether increased imports are "a substantial cause of serious injury to a domestic industry producing articles similar to or directly competitive with, the imported article." Id. "If the Commission finds a 'substantial cause of serious injury,' it makes a recommendation to the President who then determines if, and in what form, he will grant import relief." Comment, supra note 4, at 438.
unions are screaming for relief from imports, as the trade deficit has now surpassed $100 billion, the dollar has reached record-high levels, and industry profits and employment remain depressed in many sectors of the economy. The U.S. Government is torn between its policy of free trade and various political, economic, and strategic considerations which create pressure for restrictions.

The response to this dilemma, as evidenced by events of the past four years, has been a dramatic increase in the negotiation of voluntary restraint agreements. "A voluntary restraint agreement is a negotiated arrangement whereby an exporting country voluntarily agrees to limit its exports by means of legislation or other manner of enforcement within the exporting country." Through such agreements, the United States has attempted to protect industries from imports without creating the appearance of protectionism.

This comment first explains the structure and function of voluntary restraint agreements (VRAs) by comparing VRAs to quotas and other import restrictions. The comment then traces the development and use of VRAs to the present time, concentrating on two industries vital to the U.S. economy, the automobile and steel industries. Next, this comment details the effects of VRAs on protected industries, consumers, and the world trading system. The lessons of past experiences with VRAs are analyzed to determine whether VRAs are a satisfactory means of achieving U.S. industrial goals or whether they merely exacerbate existing problems. The comment concludes that VRAs are important and helpful tools in certain situations and offers a list of factors that decision makers should weigh in determining whether to employ VRAs.

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6 Industries seeking relief from foreign competition in recent years include steel (see Farnsworth, Reagan Seeks Cut in Steel Imports Through Accords, N.Y. Times, Sept. 19, 1984, at A1, col. 6) [hereinafter cited as Reagan Seeks Cuts]; automobiles (see Auerbach, Dingell Plans Bill To Limit Imports, Wash. Post, Jan. 31, 1985, at E1, col. 2); textiles (Lawrence, US Imports of Textiles Jump 32%, J. Com., Nov. 2, 1984, at 3A, col. 4); copper (Farnsworth, Reagan Denies Import Protection to Domestic Producers of Copper, N.Y. Times, Sept. 7, 1984, at A1, col. 2); machine tools (Letter to Editor from James A. Gray, Imports that Threaten a Vital Tool of National Security, N.Y. Times, Jan. 6, 1984, at A22, col. 4); television sets, footwear, beef, and pork (Munger, America's Costly Trade Barriers, N.Y. Times, Aug. 19, 1983, at A21, col. 1).


8 deKieffer, Antitrust and the Japanese Auto Quotas, 8 BROOKLYN J. INT'L L. 59, 65 n.28 (1982). A VRA "is to be distinguished from an orderly marketing agreement (OMA), whereby an agreement to limit imports is enforced through action of the importing country . . . ." Id.
I. Background

A. Comparison with Other Import Restrictions

Although VRAs are similar in effect to quotas, exporting nations, if given a choice, prefer VRAs. The voluntary system offers more flexibility than the quota system. Quota levels need not be completely fixed, because the exporting country "retains some control in establishing quota levels and in raising ceilings on the volume of goods imported each year." VRAs generally apply for a limited period of time, after which new agreements must be negotiated. VRAs reduce the net loss to the exporting nation because the exporting nation can enforce the restrictions by means of export restrictions which generate revenue that the exporting nation can channel back into its economy. A quota or tariff, on the other hand, generates revenue for the importing nation through duties or import license fees.

VRAs can also be preferable to the importing country because they lessen the danger of retaliation against U.S. exporters under worldwide trade rules.

B. Implementation: Parties and Enforcement

A voluntary restraint agreement is the product of negotiations between an exporting nation of a private exporter and the importing nation or the threatened industry. U.S. antitrust law, however, forbids anti-competitive, private-interest agreements. An agreement between a U.S. industry and a foreign exporter would run a substantial risk of violating U.S. antitrust law. Agreements between the executive branch and a foreign industry would also expose the exporter and collusive domestic parties to liability under the Sherman Act. Because the President is powerless, absent congressional authorization, to enforce a VRA domestically, such an agreement would be essentially private and thus subject to the antitrust laws.

The third type of VRA, that between the exporting and importing governments, is shielded from U.S. antitrust law by the "foreign

9 See Farnsworth, "Voluntary" Import Restraints: Effect Similar to Quotas, N.Y. Times, Sept. 20, 1984, at D1, col. 3 [hereinafter cited as Effect Similar to Quotas].
10 Comment, supra note 4, at 434.
11 Id. at 433-34.
12 See Lizondo, A Note on the Nonequivalence of Import Barriers and Voluntary Export Restraints, 16 J. INT'L ECON., Feb. 1984, at 183. Revenue is generated through the granting of export licenses or the imposition of an export tax. Id. at 184.
13 Id.
14 Effect Similar to Quotas, supra note 9, at D19, col. 1.
15 Comment, supra note 4, at 447.
16 Id. at 448. See also Lehner, How Japan Would Enact "Voluntary Quotas," Wall St. J., Mar. 15, 1985, at 24, col. 4.
17 Comment, supra note 4, at 448.
18 Id. at 449-50.
compulsion” defense or the “act of state” doctrine. An exporter may escape antitrust liability when a foreign government compels compliance with a VRA. The government must actually compel the conduct in question. Mere governmental request, acquiescence, or approval would be insufficient grounds for claiming the foreign compulsion defense.

Under the act of state doctrine, a court will not examine the validity of an act of a foreign sovereign done within the territory of the sovereign. “[I]f a government participates in implementing an agreement, to the extent that the actions of the private parties are tantamount to those of the sovereign, antitrust liability will not attach.”

Because treble damages are available under U.S. antitrust laws, parties to a VRA “should obtain the direct, articulated commitment of the exporting country to enforce the VRA, rather than rely on informal government encouragement or private discretion.”

C. Implementation: Negotiation

The term “voluntary restraint agreement” is a misnomer, for no country will ordinarily restrain its own exports voluntarily. Rather, nations restrict their exports in response to threats, implicit or explicit, that in the absence of voluntary restraints, the importing nation will enact restrictive measures on its own. Most exporting

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19 Id. at 451.
20 Id. In Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1292 (D. Del. 1970), “[t]he court reasoned that the Sherman Act does not confer jurisdiction on United States courts over acts of business which a nation compels.” Id. See also deKieffer, supra note 8, at 69.
21 Comment, supra note 4, at 451-52.
23 Comment, supra note 4, at 452; deKieffer, supra note 8, at 66.
24 Comment, supra note 4, at 453.
25 According to a representative of a foreign steel industry, this type of volunteering “is like when you hand over your wallet with a gun pointed at your head.” Effect Similar to Quotas, supra note 9, at D19, col. 1.
26 An example of an implicit threat is the Japanese decision after the VRA on autos expired to hold exports to the United States at 2.3 million units per year despite estimates that 2.7 million units could be sold. See Brown, Import Ceiling Seen “Designed to Make Everybody Mad,” Wash. Post, Mar. 28, 1985, at E1, col. 6. Japan limited exports because of fear that rapid growth in the number of automobiles it sold in the United States would heighten trade tensions and encourage protectionist members of Congress. See Burgess, Japanese Still Feel Need to Curb Car Exports to U.S., Wash. Post, Feb. 28, 1985, at A1, col. 5. Use of explicit threats to gain voluntary restrictions is demonstrated by the U.S. negotiations since September 1984 of VRAs with all the major steel exporting nations. To ensure cooperation, a twelve-page list of all the “unfair” trade practices of about every steel-producing nation was prepared. Any country that refused to “volunteer” could be penalized under U.S. unfair trade practice law by the imposition of higher tariffs on their shipments to U.S. ports. See Effect Similar to Quotas, supra note 9, at D19, col. 3. By March 1985,
countries prefer VRAs to quotas or tariffs, and are therefore willing to restrict exports voluntarily. VRAs are preferable because export restraint figures are established through negotiation rather than unilateral action of the importing nation.

II. Use of VRAs in Auto and Steel Industries

The United States has utilized voluntary restraint agreements for over thirty years in numerous industries. This comment examines VRAs with respect to two of those industries, steel and automobiles. These industries are chosen for three reasons: (1) their importance to the U.S. economy; (2) the resulting wealth of information available on the state of the steel and auto industries; and (3) the author's view that the lessons drawn from voluntary restraint agreements involving steel and autos will also apply to VRAs in other industries.

A. Auto Import Restraints

The U.S. auto industry uses a substantial percentage of the raw materials consumed domestically. Moreover, twenty percent of the total U.S. work force is directly or indirectly employed by the auto industry. Until quite recently autos kept some 30,000 suppliers healthy through $40 billion a year of purchase orders. The industry accounted for roughly eight percent of the Gross National Product and twenty-five percent of total U.S. retail sales. As the repository of immense productive capacity and extensive technological sophistication, the automobile industry remains—as it was during World War II—a prime guarantor of national security through its ability to shift to the production of military equipment. It continues in its historical role as a technological innovator. In sum, the auto industry is immensely important to the national welfare.

Prior to World War II direct international trade in autos was agreements had been reached with eight foreign suppliers of steel, and negotiations were continuing with six others. See Auerbach, Steel Imports Seen Rising Despite Plan, Wash. Post, Mar. 15, 1985, at D2, col. 1 [hereinafter cited as Steel Imports].

27 See supra notes 9-12 and accompanying text.
28 Effect Similar to Quotas, supra note 9, at D1, col. 3.
29 See infra notes 138-41 and accompanying text.
30 See Note, Escape Clause Causation After the Auto Case: 1.8 Million Japanese Imports as Less than a Substantial Cause of Injury, 16 G.W.J. or Int'l L. & Econ. 299, 299 (1982). The auto industry "uses approximately 25% of the steel, 50% of the molded iron, 33% of the zinc, 17% of the aluminum, 15% of the copper, and 60% of the synthetic rubber produced in the United States." Id.
31 Id.
32 W. ABERNATHY, K. CLARK & A. KANTROW, INDUSTRIAL RENAISSANCE 13 (1983) [hereinafter cited as INDUSTRIAL RENAISSANCE].
33 Id.
34 Id.
35 Id.
After the war, changing consumer preferences in the United States and the formation of the European Community (EC) prompted much higher levels of trade. Volkswagen established a beachhead in the U.S. market in the mid-1950s. During the 1960s trade in autos grew at a striking pace; by 1970 a full fifteen percent of domestic car sales were of foreign-produced autos. Unable to achieve sufficient economies in materials, design, or production to offer a low-priced small car that returned a decent profit, U.S. manufacturers seemed content to abandon the small car market to foreign producers.

The 1970s were marked by continued growth in auto imports, sparked by oil shocks in 1973 and 1979 and the resultant shift in demand from large cars to small, fuel-efficient models. Increasing perceptions of the superior quality of foreign autos, and a decreasing ability of U.S. auto makers to compete with more efficient foreign production methods lowered domestic auto sales. The major beneficiaries of these changed conditions were Japanese auto producers, who increased their exports to the United States fivefold between 1970 and 1980, capturing twenty-two percent of the U.S. car market in the process. This occurred at a time when domestic sales slipped from a 1977 high of 11.4 million units to 8.975 million units in 1980, a decline of twenty-one percent. Meanwhile, automobile layoffs reached 250,000 persons by August 1980. The U.S. auto industry was in deep trouble.

In the summer of 1980, the United Autoworkers of America and Ford Motor Company filed petitions with the International Trade Commission (ITC), pursuant to section 201 of the Trade Act of 1974, alleging that increased imports of automobiles from Japan were "a substantial cause of serious injury" to the U.S. auto indus-

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36 Id. at 47.
37 Id.
38 Id.
39 Id.
40 See id. at 51-56.
41 See INDUSTRIAL RENAISSANCE, supra note 32, at 63-66.
42 See id. at 57-63. Abernathy, Clark and Kantrow estimate the Japanese cost advantage to be $1,500 per car, an estimate that is generally accepted as accurate. See, e.g., Lehner, Keeping Detroit on the Road to Prosperity, Wall St. J., Sept. 19, 1984, at 30, col. 4.
43 See id. at 9.
45 See id. at 1.
46 19 U.S.C. § 2251 (1982). In order for the ITC to make an affirmative determination under section 201(b) (19 U.S.C. § 2251(b)), each of the following conditions must be met:
1. There are increased imports (either actual or relative to domestic production) of an article into the United States;
2. The domestic industry producing an article like or directly competi-
While finding that the auto industry was indeed experiencing serious injury and that auto imports had increased, the ITC concluded that the imports were not a "substantial cause" of serious injury. The Commission found the injury due predominantly to other factors, such as the shift in consumer demand to smaller cars and the decline in overall demand attributable to the recessionary economy.

An affirmative decision by the ITC would have granted the President authority to impose quotas, tariffs, or an orderly marketing agreement if, in the President's discretion, such measures would be in the economic interest of the United States. The ITC's negative finding, however, took those options away from the President. Therefore, the auto industry turned to Congress to accomplish legislatively what it could not accomplish administratively. Beginning in February 1980 a number of auto trade bills were introduced in Congress. Chief among these was the Danforth Bill, which would have limited auto imports from Japan to 1.6 million units annually for 1981-1983.

The Reagan Administration opposed legislative restrictions on auto imports, citing commitments to free trade and to the procedures outlined in section 201 of the Trade Act of 1974, as well as concern that unilateral legislative action directed at one trading partner would violate GATT. At the same time, the Administration desired to stem the flow of auto imports and the protectionist tide that the flow inspired.

The solution agreed upon was to engage in discussions with the Japanese in an effort to convince them to enact self-imposed restraints on shipments of cars to the United States. A group from the United States Trade Representative's office flew to Japan to brief

deKieffer, supra note 8, at 60 n.7.

* Id. at 59. The act defines "substantial cause" as a cause that is important and no less important than any other cause. *Id. at 60 n.5.

* Id. at 60-61.


* Comment, supra note 4, at 439 n.71; deKieffer, supra note 8, at 61.

* See deKieffer, supra note 8, at 61-62; Comment, supra note 4, at 439-44.

* deKieffer, supra note 8, at 62.

* See Note, supra note 52, at 168-69.
the Japanese on steps being taken to aid the U.S. auto industry.\footnote{See id. The Japanese believed that any effort on their part to help the U.S. auto industry had to be preceded by a strong effort by U.S. automakers toward that same end. Id. at 170.} After several days of "talks"\footnote{\textit{\textsc{Id.}} at 170.} the Japanese government announced on May 1, 1981 that it had agreed to a three-year plan limiting auto exports to the United States.\footnote{\textit{\textsc{Id.}} at 170.} Japan agreed to limit auto shipments to the United States to 1.68 million units per year for the first year, retroactive to April 1, 1981. The agreement limited exports in the second year to the first-year limit, plus 16.5\% of any increase in sales of cars made in the United States. The agreement left the third year open for renegotiation.\footnote{\textit{\textsc{Id.}} at 170.}

On March 29, 1982, following a decline in U.S. domestic car sales in 1981, Japan extended the 1.68 million unit ceiling for 1982-1983; in February 1983 Japan extended the restrictions for a third year.\footnote{\textit{\textsc{Id.}} at 170.} Following the lapse of the three-year agreement in 1984, restrictions were continued for a fourth year, but the import ceiling was raised to 1.85 million units.\footnote{\textit{\textsc{Id.}} at 170.}

By March 1985 the U.S. auto industry was far healthier than it had been in May 1981 when the voluntary restraints were implemented. Profits of the big three auto makers set records in 1984.\footnote{\textit{\textsc{Id.}} at 170.} Employment was up, although due to productivity increases it appeared unlikely to return to pre-1979 levels.\footnote{\textit{\textsc{Id.}} at 170.} Citing the recovery of the auto industry, the costs of import restrictions to consumers, and a commitment to free trade which it hoped Japan would reciprocate, the Reagan Administration announced on March 1, 1985 that it would not seek a fifth year of voluntary restraint.\footnote{\textit{\textsc{Id.}} at 170.}

The end of voluntary quotas did not mean the end of restraint. Even before the agreement expired, Japanese officials and auto executives acknowledged that their government's controls would continue.\footnote{\textit{\textsc{Id.}} at 170.} They worried that rapid growth in auto exports to the United States above 1.85 million units per year would heighten trade

\footnote{See deKieffer, supra note 8, at 62; \textit{\textsc{Note, supra note 52, at 168-70.}}}
tensions and encourage protectionist members of Congress. Their fears were well-founded, because many members of Congress opposed lifting restrictions and later reacted strongly when Japan announced it would allow an increase of twenty-five percent, or 450,000 cars, over the total of the previous year.

B. Restrictions on Imports of Steel

Like the automobile industry, steel production plays a major role in the United States. Employment in the steel industry peaked in 1974 at 609,000 people. A substantial number of workers in other manufacturing sectors are directly affected by conditions in the steel industry, whether as suppliers to steel producers or as users of steel. Consequently, the industry contributes a considerable amount to the Gross National Product.

Based on differences in product mix and technology, the U.S. steel industry is divided into three sectors: “integrated producers, specialty steel producers, and minimills.” As will be shown, each sector faces different problems with foreign competition.

In 1959 steel imports into the United States exceeded exports

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68 Id.
69 Reagan Won't Ask Japan, supra note 64, at A13, col. 6.
70 See Auerbach, Japan Raises Ceiling on Auto Shipments to U.S. by 25 Pct., Wash. Post, Mar. 26, 1985, at A1, col. 5. Within hours of the decision, the Senate, by a vote of 92-0, passed a nonbinding resolution calling for retaliation against Japanese trade practices. Six days later the House of Representatives passed a similar measure. See Auerbach, Hill Intensifies Pressure on Trade, Wash. Post, Apr. 3, 1985, at A1, col. 5 [hereinafter cited as Hill Intensifies Pressure]. A bill that would require presidential retaliation against unfavorable Japanese trade practices was approved by the Senate Finance Committee on April 2, 1985. Senate leaders threatened to bring the bill back to the Senate floor for a vote if ongoing trade talks did not bear fruit. Id.
71 CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF IMPORT QUOTAS ON THE STEEL INDUSTRY 20 (July 1984) [hereinafter cited as CBO STUDY].
72 Id. at 40.
73 In 1983 the steel industry produced 83 million tons of steel at the then-prevailing domestic price of approximately $500 per ton, meaning that gross sales for the year totaled in the neighborhood of $41.5 billion. See id. at 42.
74 Id. at 3. “Integrated producers are the traditional core of the industry. . . . They typically own raw materials properties as well as transportation networks and some manufacturing operations that use steel.” Id. Steel is produced through a process that begins with coke ovens and blast furnaces, then uses basic oxygen furnaces or open hearth furnaces, and finally rolls the steel into finished products. Id. at 3, 61-62.

“Specialty-steel producers typically melt scrap in electric furnaces to produce alloy, stainless and tool steels. These are higher-valued, technology-intensive products that are gradually increasing as a share of total U.S. steel output.” Id. at 5. The sector includes a large number of small, specialized producers, as well as most of the major integrated firms. Id.

Minimills recently have become important producers of steel. These mills melt scrap in electric furnaces to produce carbon-grade steel, typically through a technologically advanced process called continuous casting. Minimills now comprise 20% of U.S. steel production, and could grow to 35% by the year 2000. Because minimills generally produce less sophisticated products, they are not yet a substitute for the integrated sector. Techniques currently being developed, however, may allow minimills to compete directly with integrated producers. See id. at 6.
for the first time this century. By 1968 imports approached seventeen percent of the domestic market.\textsuperscript{75} In 1969 in response to industry lobbying, the Nixon Administration negotiated voluntary restraint agreements with Japan and the European Community. The VRAs were renegotiated in 1972 and lasted a total of six years.\textsuperscript{76}

Between 1975 and 1978 import pressure eased a bit. "[N]o explicit restrictions limited carbon-steel imports, although quotas for specialty-steel imports were in effect from 1976 to 1980."\textsuperscript{77} When imports rose again in 1978 to reclaim 18.1\% of the domestic market, the Carter Administration implemented the "trigger price mechanism."\textsuperscript{78} "[T]he TPM established a fair import price, based on Japanese costs plus an 8\% markup for profit."\textsuperscript{79} The TPM initially caused a reduction in imports. By 1980, however, import penetration began to increase again despite the TPM.\textsuperscript{80} Import growth was generated through a combination of factors: greater concentration on the U.S. market by foreign producers, rises in U.S. prices relative to import prices, and increasing subsidization of steel production by foreign governments.\textsuperscript{81} A greater concentration on the U.S. market by foreign producers, together with higher relative U.S. prices and the increasing use of subsidies by other nations, combined by 1980 to generate growth in import penetration despite the TPM.\textsuperscript{82}

Taking matters into its own hands, the industry began filing antidumping and countervailing duty\textsuperscript{83} cases with the ITC in March 1980. Upset by the industry’s action, the Carter Administration briefly suspended the TPM, but reinstated it in the fall of 1980. The Reagan Administration finally eliminated the TPM in early 1982.\textsuperscript{84} Meanwhile, the industry continued to file massive numbers of countervailing duty cases, particularly against the EC.\textsuperscript{85} The EC cases were dropped in the fall of 1982, when the EC agreed to voluntary

\textsuperscript{75} Id. at 7.

\textsuperscript{76} Id. In the industry’s eyes, the VRAs were ineffective. Both the EC and Japan exceeded their quotas in 1971. Moreover, foreign producers shifted to higher-valued products to recoup some of what they lost by selling lower quantities. The industry lobbied for greater restrictions until a world steel boom in 1973-1974 caused imports to fall of their own accord. Id. at 9.

\textsuperscript{77} Id. at 9.

\textsuperscript{78} Id.

\textsuperscript{79} Id. The program assumed that Japanese production costs were the lowest in the industry, and therefore, any producer selling below the TPM was of necessity “dumping” steel. See id.

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} For a detailed discussion of dumping and countervailing duty, see Ehrenhaff, Antidumping & Countervailing Duties, in ALI-ABA COMMITTEE ON PROFESSIONAL EDUCATION, INTERNATIONAL TRADE FOR THE NON-SPECIALIST 355-472 (1979).

\textsuperscript{84} See CBO STUDY, supra note 71, at 10. For a description of ITC procedures and industry remedies in unfair trade cases, see Ribicoff, supra note 51, at 7-9.

\textsuperscript{85} CBO STUDY, supra note 71, at 10.
restraints on steel exports to the United States.\textsuperscript{86} The domestic industry then focused its attention on Japan and the developing countries, filing still more unfair trade cases.\textsuperscript{87}

While the unfair trade cases languished in the ITC, steel producers turned to section 201 of the Trade Act of 1974\textsuperscript{88} as a means of gaining restrictions on imported steel.\textsuperscript{89} These efforts were largely successful. In a 1983 section 201 case initiated by specialty steel producers, the ITC ruled that imports had caused serious injury to U.S. producers.\textsuperscript{90} The Reagan Administration subsequently granted relief in the form of quotas.\textsuperscript{91}

Bethlehem Steel and the United Steelworkers of America brought an action before the ITC in January 1984, alleging serious injury by imports in the carbon-steel industry.\textsuperscript{92} "On June 12, [1984], the ITC ruled that U.S. producers had been injured by imports in five of the nine product categories (accounting for 70\% of domestic shipments) raised in the . . . case."\textsuperscript{93} In July 1984 the ITC recommended a combination of quotas and tariffs.\textsuperscript{94}

The Reagan Administration found itself in an uncomfortable position. Publicly committed to free trade, the President was confronted with a statutory requirement that he decide within sixty days either to implement the Commission's authoritative recommendations or find the recommendations not in the national interest.\textsuperscript{95} With the elections only six weeks away and considering the weight carried by the ITC's decision, the U.S. steel industry was seemingly assured of a favorable decision.

After long debate, the Administration chose what it considered a middle course. The Administration announced on September 18, 1984, that it would seek to negotiate voluntary restraint agreements with the major steel exporting nations, with the goal of holding imports of finished steel to 18.5\% of the domestic market.\textsuperscript{96} Imports had been averaging 25\% for the year.\textsuperscript{97} In return for the protection, the steel industry agreed privately to refrain from filing new suits and to withdraw its formal complaints, case by case, as foreign steel pro-

\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} See supra note 5 and accompanying text.
\textsuperscript{89} CBO Study, supra note 71, at 10.
\textsuperscript{90} See Injury Found in Some Steel Imports, N.Y. Times, Mar. 25, 1983, at D1, col. 3.
\textsuperscript{91} See CBO Study, supra note 71, at 10.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} See Reagan Seeks Cut, supra note 6, at A1, col. 6.
\textsuperscript{96} See Reagan Seeks Cut, supra note 6, at A1, col. 6; Pine, President Rejects Makers' Bid for New Quotas or Tariffs; Complaints to be Canceled, Wall St. J., Sept. 19, 1984, at 3, col. 1 [hereinafter cited as President Rejects Makers' Bid].
\textsuperscript{97} Reagan Seeks Cut, supra note 6, at A1, col. 6.
The Administration hoped to negotiate the agreements within ninety days of the announcements. Negotiations, however, lasted longer than expected. By August 18, 1985, agreements had been concluded with fourteen countries, while negotiations continued with several others.

III. Effects of Restrictions on Imported Autos and Steel


Voluntary restraints on Japanese auto exports became effective in April 1981. The U.S. auto industry was suffering from record losses and a massive decline in employment, production, and sales. At the same time, sales of Japanese cars were increasing rapidly—Japan's share of the domestic new car market growing to twenty-two percent in 1981. The principal reasons for the state of the U.S. auto industry in 1981 include an increased demand for fuel efficient foreign cars due to oil price rises in 1979-1980 and a decreased ability of U.S. auto manufacturers to compete with foreign producers in quality, methods of production and price.

By 1985 the domestic industry had vastly improved its prospects. Profits for 1984 totaled $9.8 billion, and sales and production continued to be strong through the third quarter of 1985. Employment stood at 720,000, compared to a 1982 low of 625,000. The improvement even made one U.S. auto maker consider...

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98 President Rejects Makers' Bid, supra note 96, at 3, col. 1. "The industry had threatened to file dozens, possibly even hundreds, of complaints that some feared would wreak havoc on the trading system." Id.


99 President Rejects Makers' Bid, supra note 96, at 3, col. 1.

100 Snags Cited in Quota Plan for Steel, N.Y. Times, Aug. 19, 1985, at D1, col. 3. The accords reached allow Japan a 5.8% market share; Korea, 1.9%; Brazil, 8%; Spain, .67%; South Africa, .42%; Mexico, .36%; and Austria, .18%. The 1982 pact with the EC remains in force and limits European steel to 5.4%. Canada is expected to retain its current share of 3%. U.S. Sets Pacts, supra note 98, at 31, col. 1.


102 Japan's share of sales grew from 11.9% in 1978 to 22% in 1981. Id.

103 See supra notes 41-43 and accompanying text.


105 See Guiles, Auto Makers' Net Seen Rising 8.5% for Quarter, Wall St. J., Oct. 15, 1985, at 3, col. 1; Guiles, Car Production in 2nd Quarter is Seen Rising, Wall St. J., Apr. 8, 1985, at 8, col. 4.

106 ITC Study, supra note 101, at vii.
fident enough to call for an end to voluntary restraints. In the interim, the industry drastically reduced its costs and improved quality and efficiency through capital expenditures and research and development. Since larger cars generate higher profits, producers benefitted from the increased demand for larger cars that resulted from lower oil prices. The economic recovery which began in 1982 also helped stimulate demand for U.S. autos.

The industry has also been assisted by Japan's voluntary restraints. The part that these restraints played in the industry's comeback and the economic costs imposed by the agreement are examined below.

Although the effect of the VRA was minimal in 1981, limits on Japanese imports resulted in an estimated increase of 618,000 domestic car sales by 1984. These car sales have generated greater profits for auto companies and higher employment in the industry.

The increased profits provided the auto companies with a source of capital with which to invest in modernization and pay off large debt holdings. Cost savings resulting from these expenditures have been substantial. Further, the employment gains (an estimated 44,000 jobs in auto production, many more in related industries) provide a large benefit to the economy in general.

Restraints on Japanese auto imports, however, have proven costly. Transaction prices of Japanese autos sold in the United States averaged $1,300 more per car as a result of the VRA. Prices on new U.S.-made cars were higher than they would have been without the restraints by approximately $660 in 1984. The ITC estimates total cost to consumers of the VRA from 1981 to 1984

108 ITC Study, supra note 101, at 15. Among the cost-cutting measures used were plant closings, wage and benefit concessions, and pressure on suppliers to decrease price and increase quality. Changed methods of production, such as just-in-time inventory systems, increased outside purchasing, increased productivity, and management reorganizations, have also created cost savings. See id.
109 Id. at 38.
110 Id. at 13.
111 The ITC estimates that VRAs are responsible for an extra 44,000 auto jobs. Id. at 41. This estimate does not include job gains that may have been registered in steel or other supplier industries. Id.
112 See id. at 16.
113 Id. Through major cost reductions, the big three auto producers substantially lowered their breakeven points during 1979-1984. GM's breakeven point dropped from 8.4 million units in 1980 to 5.6 million in 1984; Ford, from 3.6 million to 2.1 million; and Chrysler, from 2.3 million to 1.1 million. Id. at 14.
114 See supra note 111.
115 ITC Study, supra note 101, at vi. Part of this increase resulted from the Japanese having sold more expensive models during the VRA, and part was due to demand being greater than supply. The ITC estimates that one million more Japanese cars could have been sold in the United States in 1984 in the absence of restraints. Id. at ix.
116 Id.
at $15.7 billion.\textsuperscript{117}

Restraints had other, less noticeable, effects. The U.S. trade deficit for 1984, already at $125 billion, would have been $4 billion higher without the restraints.\textsuperscript{118} Restrictions may have kept the dollar high, making U.S. products less competitive in relation to foreign goods, therefore, indirectly causing the loss of some jobs in the United States.\textsuperscript{119}

\textbf{B. Probable Effects of VRAs on Steel Imports}

A 1984 report by the Congressional Budget Office described the state of the U.S. steel industry:

The industry is currently emerging from very depressed conditions in 1982 and 1983, the worst years of the postwar era for U.S. steel producers. In 1982, the industry operated at less than 50 percent of capacity. Shipments and production were lower than at any time since the late 1940s. These conditions precipitated substantial layoffs and industrywide operating losses of about 2.5 billion. Production increased somewhat in 1983 but not enough to offset the 1982 downturn. Financial losses continued at the 1982 pace, and roughly 10 percent of the industry’s capacity was permanently retired. During 1983, the industry employed only 60 percent of the labor force it had engaged in 1979. These conditions were exacerbated by record levels of import penetration, amounting to over 22 percent of domestic steel consumption in 1982 and over 20 percent in 1983.

The industry showed significant improvement in the first few months of 1984, and most steel firms are likely to be marginally profitable in this year. But employment has not increased greatly and imports continue to claim roughly 25 percent of the U.S. market.\textsuperscript{120}

The industry’s prospects were not, however, uniformly bleak.

[T]he brunt of the 1982-83 downturn was borne by the integrated producers, such as the United States Steel Corporation and Bethlehem Steel Corporation. Although these firms have traditionally dominated the industry, their market share has been shrinking since at least 1960. In contrast, minimills have increased their share of domestic steel production from about 3 percent in 1960 to almost 20 percent today. These firms, which use a different technology, have been highly profitable and highly competitive against both domestic integrated and foreign producers. While minimills were adversely affected by recent weak market conditions, the long term prospects for this sector are good. Minimills provide the clearest evidence that the industry is undergoing a significant restructuring rather than a uniform decline. They are particularly well adapted to the underlying forces that have shaped the U.S. steel market during the postwar period: relatively slow growth in domestic steel consumption, significant technological changes, and the gradual shift of

\textsuperscript{117} Id.
\textsuperscript{118} Id. at x.
\textsuperscript{119} Id. at ix.
\textsuperscript{120} CBO \textit{STUDY}, \textit{supra} note 71, at xv.
global steel production and consumption away from the United States.\footnote{121}

The domestic industry's current problems stem not from unfair foreign competition, but from three more fundamental trends. "First, as a mature economy, the United States has been consuming less steel per dollar of GNP than have economies that are at earlier stages of maturity."\footnote{122} Second, domestic industry lags both in the technology of production and in the implementation of more efficient production methods.\footnote{123} Finally, production and consumption are shifting to developing countries, where "low employment costs combined with advanced technology" make for tough competition.\footnote{124} The U.S. steel industry needs to adapt to these trends. Voluntary restraints should be implemented only if they can succeed in easing the transition to a leaner, more flexible, and more technologically advanced industry.

The primary effect of restrictions would be a rise in the price of both domestic and imported steel, resulting in lower consumption.\footnote{125} Because demand for steel is relatively inelastic, the increase in domestic steel employment and profits would outweigh any losses that might result from decreased consumption.\footnote{126}

Long-term effects on the steel industry depend on whether the quota-induced profits are invested in modernizing production or are channeled into other steel company investments or into wage increases. Many fear that protection will only serve to remove steel industry incentives to become more competitive. These analysts note that while the industry has promised since 1968 to use protections as a temporary shield during which modernizations will take place, capital expenditures for new plant and equipment during that period have declined.\footnote{127}

Even assuming that steel makers invested all their profits in modernizing plants and equipment, the extra profits generated by VRAs might not provide the industry with sufficient capital to meet their needs. A number of studies estimate steel industry capital

\footnote{121}{Id. at xv-xvi.}
\footnote{122}{Id. at 32. The CBO study noted three primary reasons for steel intensity declines in mature economies: (1) large investments in steel intensive infrastructure already have been made; (2) high technology material uses less steel; and (3) service industries tend to grow in relation to manufacturing industries as economies mature. Id. See also O'Boyle, Domestic Prices Seen Boosted as Some Funds Are Raised for Investments in Plants, Wall St. J., Sept. 19, 1984, at 3, col. 3.}
\footnote{123}{CBO Study, supra note 71, at 33. Minimills do not suffer from this problem. Id. at 33-34.}
\footnote{124}{Id. at 34. For example, Pohang Steel of South Korea has a $22 per ton labor cost compared to a U.S. average of $150 per ton. O'Boyle, supra note 122, at 3, cols. 5-6.}
\footnote{125}{CBO Study, supra note 71, at 39-40. Experts predict a 6-7% increase in steel prices as a result of VRAs. See O'Boyle, supra note 122, at 3, col. 4.}
\footnote{126}{CBO Study, supra note 71, at 40.}
\footnote{127}{Effect Similar to Quotas, supra note 9, at D19, col. 3.}
needs at $5.5 billion to $6.5 billion per year; industry investment has averaged only $2.2 billion since 1980.128

A Congressional Budget Office study found that a 15% quota on steel imports would add $1.5 billion to $2 billion (in 1983 dollars) yearly to the cash flow of steel manufacturers.129 The VRAs currently being negotiated, which would hold imports to 18.5% of domestic sales, would raise cash flow by an amount lower than the 15% quota. Assuming a $1.5 billion increase in cash flow, added to the $2.2 billion in investment expenditures which the industry has been averaging, the industry would still suffer a capital shortfall of $1.8 billion to $2.8 billion. What these figures suggest is that the steel industry will remain uncompetitive even after the VRA.

Import restrictions are often defended as a means of protecting domestic jobs. The effect of steel VRAs on overall U.S. employment, however, could result in a loss of jobs. Restraints could result in the eventual recall of as many as 25,000 steel workers, or one-fourth of those presently laid off.130 The higher steel prices, however, will have a negative impact on industries which consume large amounts of steel, particularly those that face stiff foreign competition.131 Estimates show that the U.S. auto industry is already at a $150 per car disadvantage to foreign auto manufacturers due to higher steel prices.132 Restraints exacerbate these cost-control problems, and could cost many more jobs than are gained, through the decrease in demand for more expensive finished products and through a shifting of production overseas.133

As noted previously, restraints on steel imports will lead to an increase in steel prices. These higher prices will come from the pockets of manufacturers who rely on steel purchases. In the short-run, the price increases will result in losses of capital to these manufacturers. The increased costs will ultimately be passed on to consumers in the form of higher prices for finished goods. Conversely, the price increases will generate a windfall to steel producers in the form of higher revenues than would be earned in the absence of restrictions.

Thus, import restrictions on steel would amount to a transfer of income from those bearing the burden of higher steel prices (manu-

128 CBO STUDY, supra note 71, at 48. Some of the studies were conducted by groups representing or favorable to the steel industry (e.g., the American Iron and Steel Institute and the Steel Tripartite Commission). Id.

129 Id. at 51.

130 O'Boyle, supra note 122, at 3, col. 4.

131 Id.


133 "Caterpillar Tractor... has said that restrictions on foreign steel might force the company to close U.S. operations in favor of plants overseas with access to cheaper steel." O'Boyle, supra note 122, at 3, col. 4.
facturers and ultimate consumers) to foreign\textsuperscript{134} and domestic producers.\textsuperscript{135} Further, voluntary restraints would impose efficiency losses on the U.S. economy, because U.S. resources would have to be diverted from other uses to produce steel that could have been purchased at lower cost from foreign producers.\textsuperscript{136} Costs to the economy from income transfers and efficiency losses would total approximately $4 billion per year.\textsuperscript{137}

IV. Voluntary Restraints: Lessons of the Steel and Auto Cases

The United States has utilized voluntary restraint agreements as a tool in foreign trade policy for over thirty years.\textsuperscript{138} In recent years VRAs have become a major, if not the predominant, form of import restriction used by the United States. Labeled the "new protectionism,"\textsuperscript{139} VRAs currently apply to a wide array of products, including tiles, bicycles, metal tableware, baseball gloves, umbrellas,\textsuperscript{140} beef, footwear, ball bearings, batteries, dairy products, mushrooms, coffee, television sets, textiles and tin.\textsuperscript{141} These import restrictions cost consumers incalculable billions of dollars each year and reduce the efficiency of the economy.\textsuperscript{142} VRAs save jobs in protected industries, but can result in increased unemployment for the nation as a whole, reduce industry incentives to become competitive, and eventually leave the protected industry less able to compete than before restrictions.\textsuperscript{143}

An example of a VRA that will likely have a negative overall impact is one in the steel industry. Profound changes are taking place in the steel industry. Demand for steel is leveling off. The traditional producer, the huge integrated manufacturer, can no longer compete economically with smaller, more flexible and technologically advanced producers, especially those with low labor costs. Instead of easing the transition to this new reality in steel production, import restrictions likely will delay the process, meanwhile costing

\textsuperscript{134} CBO STUDY, supra note 71, at 45-46.
\textsuperscript{135} CBO STUDY, supra note 71, at 44-47.
\textsuperscript{136} Income transferred to foreign producers would equal the payments made by U.S. consumers minus the price they would have paid absent restrictions. Id. at 44-45. Foreign companies also could increase profits by exporting more expensive grades of steel, a tactic used successfully by Japanese auto producers. See Effects of Cut, supra note 132, at D16, col. 3.
\textsuperscript{137} See CBO STUDY, supra note 71, at 47. This study estimated a $4.8 billion yearly cost resulting from a 15% quota. The 18.5% limit sought by the Reagan Administration would result in somewhat lower income transfers.
\textsuperscript{138} See Comment, supra note 4, at 434.
\textsuperscript{139} See Munger, supra note 6, at A21, col. 1.
\textsuperscript{140} Comment, supra note 4, at 434 n.24.
\textsuperscript{141} Munger, supra note 6, at A21, col. 1.
\textsuperscript{142} See id.
\textsuperscript{143} See id.
consumers billions of dollars and hurting the competitiveness of steel-consuming manufacturers.

The case of the auto industry, by contrast, demonstrates that VRAs can be used to restore vigor to an ailing industry. In 1980-1981 the U.S. auto industry stood at the brink of disaster. Four years of restrictions later, U.S. automakers, while not completely out of the woods, have shown an adaptability to new market conditions that few envisioned. New methods of production, higher technology, increased productivity, and a greater devotion to quality and consumer desires make the auto industry better able to compete in the domestic market. Events of the next few years will determine whether the industry can compete successfully in an open market. Without the protection provided between 1981 and 1985 by the VRA with Japan, domestic manufacturers might not have had the opportunity.

If, as experience has shown, VRAs can harm or benefit the nation depending on the circumstances, how are policymakers to decide in advance which industries to protect through VRAs and which to leave unprotected? The lessons of the auto and steel VRAs suggest a number of factors decision makers should consider.

First and foremost, policymakers should consider the likelihood that the protected industry will eventually recover to compete effectively without import restriction. If an industry needs protection indefinitely in order to survive, it makes no economic sense for consumers to subsidize an inefficient producer, and, absent good national security justifications, protection should not be undertaken. If an industry needs protection indefinitely in order to survive, it makes no economic sense for consumers to subsidize an inefficient producer, and, absent good national security justifications, protection should not be undertaken. The threshold question, then, is whether the industry, given a temporary breathing space, can compete in an open market.

The second factor for consideration, the effect of a VRA on the economy, may be divided into two parts. First, the overall effect of protection on employment or the potential impact of inaction on employment must be examined. Second, the cost of VRAs to consumers, in the form of higher prices and lost efficiency, must be estimated and balanced against the net effect on employment. A small net gain in overall employment could be outweighed by a large cost to consumers, while a large gain in employment coupled with relatively small consumer costs would militate in favor of protection.

Third, decision makers should analyze proposed VRAs for their effects on the nation or nations against which they are directed and on the world trading system generally. Where the threat of retaliation of a general trade war is high and potential negative effects on U.S. employment and production of such retaliation greater, the

144 National security should be considered, but, in the author's opinion, protection should only be undertaken to the extent necessary to preserve the productive capability required in the event of mobilization. Any amount above that which would be needed in wartime should come from the most efficient producer.
United States should be wary of negotiating voluntary restraints.\textsuperscript{145} There are times, however, when this factor will weigh in favor of VRAs: when restraints are used to break down foreign barriers to U.S. goods\textsuperscript{146} or to ward off protectionist clamoring in the Congress.\textsuperscript{147} Moreover, because VRAs are not outlawed by GATT,\textsuperscript{148} the effects of voluntary restraints on world trade relations will generally be less detrimental to trade relations than other forms of restriction.

Analyzed using these factors, restraints on Japanese auto imports were probably justified. Steel VRAs, conversely, will likely prove unjustified.

In 1981, the auto industry was wounded, but not terminally so. Possessing enormous assets and great technological capabilities, the industry did have the potential to eventually compete on an even footing with Japanese producers. The number of jobs saved by imports was relatively small,\textsuperscript{149} but the potential loss if the industry failed to survive was great indeed.\textsuperscript{150} The long-term benefit to the U.S. economy of a healthy auto industry outweighed the temporary, albeit substantial, costs of import restrictions borne by U.S. consumers. Analyzing the third factor with respect to auto restraints, the balance again favored restrictions. Japan did not retaliate against the restrictions\textsuperscript{151} and the world trading system felt no significant repercussions. Moreover, support for protectionist legislation in Congress that could have invited retaliation faded following the restraint agreement.\textsuperscript{152}

The steel industry probably cannot pass the threshold test of being able to return eventually to an unprotected market.\textsuperscript{153} Assuming that it can, quotas would likely cost more jobs to the U.S. economy than they would protect in the steel industry because so many industries depend on low steel prices to compete in the marketplace. Potential loss of employment in the absence of voluntary restrictions, could be offset by a shift in production to minimills. Finally, the re-

\textsuperscript{147} See President Rejects Makers’ Bid, supra note 96, at 26, col. 3.
\textsuperscript{148} See Munger, supra note 6, at A21, col. 1. VRAs do, however, sometimes provoke retaliation. See Auerbach, Retaliation Threatened on Steel Curb, Wash. Post, Nov. 29, 1984, at C1, col. 3.
\textsuperscript{149} Approximately 44,000 jobs were saved by voluntary restraints according to the ITC. See supra note 128. See also Pine, Quotas on Autos from Japan Said to Lift U.S. Prices, Wall St. J., Feb. 14, 1985, at 3, col. 3.
\textsuperscript{150} See Note, supra note 30, at 299.
\textsuperscript{151} This fact is not surprising, considering that Japan let in few U.S. goods to begin with. See Hill Intensifies Pressure, supra note 70.
\textsuperscript{152} See Note, supra note 52, at 171.
\textsuperscript{153} See supra notes 127-29 and accompanying text.
straints have had a negative effect on trade relations with exporting
countries. Negotiation of the limits has been marked by animosity
and threats of retaliation. Unlike the auto situation, where there
was little chance that Japan would retaliate against its most important
trading partner, trade friction will likely arise from steel restraints.

V. Conclusion

Voluntary restraint agreements have developed into the pre-
ferred form of protectionism in the United States. The trend will
likely continue, given an Administration publicly committed to free
trade but mindful of pressure from numerous manufacturing indus-
tries facing import competition.

The foregoing analysis of auto and steel VRAs indicates that the
benefits of VRAs vary among industries. Because of the potentially
great costs of VRAs to consumers and to the economy, the United
States should conduct a thorough analysis of the viability of volun-
tary restraints for each industry in which such limits are considered.
Only when the industry has a reasonable chance for a successful re-
cover should the industry receive protection. Where recovery is
possible, a cost-benefit analysis for the economy as a whole should
be undertaken and considered in conjunction with the projected im-
pact of restrictions on international trade relations. Only after a
careful weighing of these factors should the United States seek vol-
untary restraints on imports.

—Michael M. Djavaherian*

154 See supra notes 125-47 and accompanying text.
* J.D. 1986, Georgetown University Law Center.