Voluntary Restraint Agreements: A Threat to Representative Democracy

Kevin C. Kennedy

Michigan State University College of Law, kenne111@law.msu.edu

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By Kevin C. Kennedy

Associate Professor of Law, Detroit College of Law. J.D. 1977, Wayne State University; LL.M. 1982, Harvard University.

I. INTRODUCTION

The bicentennial of the Constitution is a most appropriate occasion to consider the insidious effect that discretionary executive branch power has on the American democratic process. This Article examines the exercise of that power in the field of international trade. Even when the President exercises broad discretionary power in the international trade area pursuant to a broad grant of Congressional authority, a serious affront to representative democracy occurs. Representative democracy suffers even more when the Executive exercises such power without any delegation from Congress whatsoever. Such conduct is constitutionally offensive.

As this Article explores in greater depth, every time the President or his delegates negotiate a voluntary trade restraint agreement with a foreign trading partner, the executive branch acts without congressional delegation of power and thus engages in an unconstitutional act. Under these voluntary restraint agreements (VRAs), a foreign government typically agrees to orchestrate a limit on its manufacturers' exports of certain merchandise to the United States for a fixed time period.¹ The executive branch extorts these VRAs²—misnamed because they are neither volun-

¹ One of the more recent VRAs concluded by the United States in December 1986 covered machine tools. See Administration Announces Import Restraints, Other Measures to Aid Machine Tool Industry, 3 Int'l Trade Rep. (BNA) 1537 (1986). The five-year agreement was reached with Japan and Taiwan. Id. Japan agreed to roll back its share of the United States machine tool market to 1981 levels. U.S., Japan Initial Accord Limiting Tokyo's Machine Tool Exports Over Next Five Years, 3 Int'l Trade Rep. (BNA) 1421 (1986).

² Two of the most noteworthy VRAs are the agreement with Japan in 1981 to reduce its export of automobiles to the United States by 7.7%, and the agreement reached in 1969 among Japan, the European Economic Community, and the United States limiting steel exports to America. See G. Hufbauer, D. Berliner & K. Elliott, Trade Protection in the United States: 31 Case Studies 154, 249-50 (1986).
tary nor agreements—under threat of more adverse action. Furthermore, the President concludes them without a congressional delegation of authority to do so. The exercise of that power usually follows on the heels of an American industry's request for Presidential intervention after the industry has been frustrated in its attempt to obtain trade relief under the alternative statutory vehicles created by Congress. While the need for flexibility and discretion in dealing with sensitive international trade issues is understandable, that need pales in comparison to the importance of preserving representative democracy. If Congress took its constitutionally designated role as the chief architect of American foreign trade policy more seriously, a coherent policy might emerge to replace the fragmented, ad hoc policy currently in place.

For better or worse, in the field of foreign affairs the President historically has enjoyed wide latitude in dealing with international emergencies and in formulating United States foreign policy. The executive

3. The legal fiction that VRAs are in fact voluntary and unilateral in nature and, therefore, not beyond the President's power either under statute or the Constitution received a judicial imprimatur in Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), cert. denied, 421 U.S. 1004 (1975). However, as Judge Leventhal noted in a vigorous dissent, "These undertakings are bilateral, and establish obligations. Their bite persists notwithstanding the majority's effort to coat them bland vanilla." 506 F.2d at 146.

4. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936), the Supreme Court recognized the exclusive power of the President in the field of international relations. But see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring). Nevertheless, while the President may be vested with an inherent foreign affairs power that in some sense is "plenary and exclusive," no such power exists in the field of international trade. Under the commerce clause, the Constitution explicitly vests in Congress, not the President, exclusive power to regulate foreign trade. See U.S. Const. art. I, § 8, cl. 1 & 3; United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953) ("The power to regulate foreign commerce is vested in Congress, not in the executive or the courts.


branch's foreign affairs power finds its source in article II of the Constitution.\textsuperscript{7} Article II not only vests the executive power in the President,\textsuperscript{8} but also empowers the President to make treaties with the concurrence of two-thirds of the Senate, to appoint ambassadors, and to serve as Commander-in-Chief of the armed forces of the United States.\textsuperscript{9} In \textit{United States v. Curtiss-Wright Export Corp.},\textsuperscript{10} the Supreme Court acknowledged the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ."\textsuperscript{11}

While the President may be vested with an inherent foreign affairs power that in some sense is "plenary and exclusive,"\textsuperscript{12} no such power exists in the field of international trade. The Constitution explicitly vests in Congress, not the President, exclusive power to regulate foreign trade under the commerce clause.\textsuperscript{13} Congress periodically has deemed it appropriate, however, to delegate to the President certain discretionary powers to be exercised in furtherance of a legislative scheme enacted by Congress regulating international trade. This delegation of power by Congress to the President, though frequently sweeping in scope,\textsuperscript{14} is nev-

\begin{itemize}
\item \textsuperscript{7} U.S. Const. art. II.
\item \textsuperscript{8} Id. § 1.
\item \textsuperscript{9} Id. § 2.
\item \textsuperscript{10} 299 U.S. 304 (1936).
\item \textsuperscript{11} United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).
\item \textsuperscript{12} Id. But see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring). For a strong criticism of Justice Sutherland's theory of presidential power in the \textit{Curtiss-Wright} case, see Levitan, \textit{The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory}, 55 Yale L.J. 467 (1946).
\item \textsuperscript{13} U.S. Const. art. I, § 8, cl. 1 & 3. See United States v. Yoshida Int'l, Inc., 526 F.2d 560, 571 (C.C.P.A. 1975). Notwithstanding this textual commitment of the foreign trade power to Congress, "[i]t is impossible to extricate the question of distribution of powers over foreign economic affairs from the general problem of distribution of powers over foreign affairs in United States governmental and constitutional practice." J. Jackson \& W. Davey, \textit{Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations} 77 (1986). Nevertheless, "even though the conduct of general foreign policy . . . may rest largely in the Executive Branch, when it comes to economic foreign policy, Congress does not hesitate to assert itself." Id. at 105. Indeed, in the area of international economic affairs, Congress holds the trump card of implementing legislation. For while the executive branch may enter into negotiations with foreign trading partners without congressional authorization, or even in excess of such authorization, as a practical matter commitments may be made that will never come into effect because Congress will not enact the necessary implementing legislation. \textit{Id.} at 78. For a discussion of the exclusive nature of Congress's power to regulate foreign commerce, see United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), \textit{aff'd on other grounds}, 348 U.S. 296 (1955), in which the Fourth Circuit noted, "[W]hile the President has certain inherent powers under the Constitution . . . , the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress." 204 F.2d at 659.
ertheless subject to the so-called "intelligible principle" test, which obligates Congress to specify "an intelligible principle to which the [President] is directed to conform." If Congress fails to specify an intelligible principle by which the President is to be guided, vesting discretionary authority in the President represents an unconstitutional delegation of legislative power. In short, under the constitutional system, when the President exercises discretionary foreign trade power, he must do so pursuant to a proper congressional delegation. Regrettably, when negotiating VRAs, the President acts as a freelancer who lacks any congressional mandate.

This Article initially describes the discretionary powers of the executive branch under the five most frequently used United States trade laws. Through these trade laws, Congress has delegated to the President the power to grant and withhold international trade relief. The President's exercise of this power has often been the source of political friction both within and without the United States. Next, the discus-
sion turns to a consideration of VRAs, the epitome of unfettered executive branch discretion in the field of international trade. Finally, the Article examines several proposals for modifying trade relief law.

II. DISCRETIONARY POWER UNDER UNITED STATES TRADE LEGISLATION

United States laws regulating international trade are a combination that ranges from largely mechanical statutes to those bulging with discretionary power. On the mechanical end of the spectrum are the countervailing and antidumping duty laws, under which the Department of Commerce has limited discretion in determining, for example, whether a foreign government has bestowed a counteravailable subsidy upon its manufacturers or how a dumping margin is to be calculated. If it finds that either a subsidy exists or sales at less than fair value have occurred, the Commerce Department must issue an order imposing offsetting duties. 21

In the middle of the spectrum falls section 337, the unfair import practice statute, and the section 201 escape clause relief law. Under both these statutes, the International Trade Commission conducts a regularized administrative proceeding. However, at the conclusion of either proceeding the President may deny trade relief for policy reasons. On the far end of the spectrum is section 301 of the Trade Act of 1974, under which the President has virtually unfettered discretion to determine whether a foreign trade practice is unjustifiable, unreasonable, or discriminatory, whether such a practice burdens United States commerce, and, if so, whether any relief should be granted.

The following sections provide a survey of these five trade relief statutes and their discretionary features.

A. The Countervailing and Antidumping Duty Laws

By far the most widely used and most mechanical of all the trade relief statutes are the antidumping and countervailing duty laws. From

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20. "Mechanical" describes laws that provide that discretion is narrowly circumscribed and that relief is mandatory if statutory criteria for relief are met.
22. Id. § 1337.
23. Id. § 2251.
24. Id. §§ 2252(a)(1), 1337(g).
25. Id. § 2411.
26. Id. §§ 1671-1673i.
1980 through 1986, well over five hundred antidumping duty and countervailing duty petitions were filed with the Commerce Department. Under these two laws an aggrieved domestic manufacturer or producer may file a petition with the Department of Commerce and the International Trade Commission. The petition triggers a full-scale administrative investigation conducted within rigid deadlines, the results of which may ultimately be the subject of judicial review.

The history of the countervailing duty law is a microcosm of much of the history of United States trade policy in the twentieth century. The first countervailing duty law was the Tariff Act of 1890, which was little more than special interest legislation for the domestic sugar industry. Before 1922, the countervailing duty law was limited to subsidies for the exportation of merchandise, and not for the merchandise's manufacture or production. The Tariff Act of 1922 for the first time

29. Id. §§ 1671b, 1671d, 1673b, 1673d.
30. Id. § 1516a(a)(2)(B)(i), (ii), & (iii); 28 U.S.C. § 1581(c) (1982). Judicial review helps insure, inter alia, that the administrative agencies have not compromised their processes because of political considerations.

The economic theory behind the countervailing duty law was that Congress could set tariffs at a level judged to be sufficient to provide the desired effect to targeted industries. Foreign subsidies thus had to be checked because they were seen as an attempt to breach the tariff wall erected by Congress. In essence, the offending foreign subsidies effectively cancelled the tariff protection accorded the American sugar producers. Therefore, countervailing duties were designed to offset the exact amount of the foreign subsidy and thereby maintain the integrity of the tariff protection. Because the amount of the tariff was assumed to be necessary to provide the desired protection, any subsidized import was presumed to cause injury to the competing American industry. Prior to passage of the Trade Agreements Act of 1979, no injury test was required. By the same token, Congress deemed merchandise entering the United States duty-free not to be in competition with comparable merchandise produced by United States competitors. Accordingly, since American producers needed no tariff protection, they did not require protection through the countervailing duty law. However, with the Trade Act of 1974, the countervailing duty law was extended to nondutiable merchandise.
34. Id. See ASG Indus. v. United States, 467 F. Supp. 1200, 1208 (Cust. Ct. 1979) ("[T]he first countervailing duty law of general application was enacted as section 5 of the Tariff Act of 1897... [footnote omitted].").
35. 42 Stat. 858.
imposed countervailing duties on the manufacture and production of merchandise as well.\textsuperscript{36}

From 1922 to 1974 the Department of the Treasury—the agency then responsible for administering the countervailing duty law—consistently countervailed export subsidies,\textsuperscript{37} most often governing the form of bounties awarded to exporters.\textsuperscript{38} In 1923 the Treasury Department imposed the first countervailing duty on steel products from Australia to offset a domestic subsidy.\textsuperscript{39} Although no intent to increase exports of steel products by Australia was apparent, the Treasury Department nonetheless countervailed the production subsidy.\textsuperscript{40}

The end of World War II marked a dramatic shift in United States international trade policy from one of protectionism—the highwater mark of which being the 1930 Smoot-Hawley Tariff Act\textsuperscript{41}—to one of trade liberalism.\textsuperscript{42} This shift was initiated by the Truman administration's strong support for the General Agreement on Tariffs and Trade (GATT),\textsuperscript{43} and was also reflected in the Treasury Department's administration of the countervailing duty law. Administrative delay in handling countervailing duty cases was the primary instrument by which this pol-

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36. \textit{Id.} at 935-36. Countervailing duties were also imposed on subsidies given by a "person, partnership, cartel, or corporation," not just by governments. \textit{Id.}


38. \textit{See} Feller, \textit{Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law}, 1 \textit{Law \\& Pol'y in Int'l Bus.} 17 (1969) (author identifies a host of export subsidies—direct subsidy payments, excessive tax rebates, preferred income tax treatment, government price support systems, export loss indemnification, subsidies for specific production and distribution costs, currency manipulation plans, and tax remissions—that were countervailed during the period from 1922 to 1974).


42. \textit{See} J. JACKSON, \textit{supra} note 37, at 35-38.

icy was achieved, since prior to 1974 no statutory deadlines existed for disposing of countervailing duty petitions filed by adversely affected domestic industries. The Treasury Department allowed dust to gather on those petitions. Moreover, in 1964 the Treasury's position was that it would not countervail a domestic subsidy absent an export-stimulating effect.

The Trade Act of 1974 dramatically altered this situation. That act imposed specific time limits on administrative determinations and for the first time made judicial review available to domestic manufacturers. In light of these new statutory provisions, the Treasury no longer had unrestrained discretion to sidestep and delay difficult and politically sensitive countervailing decisions. The countervailing duty law was again substantially overhauled in 1979 with passage of the Trade Agreements Act of 1979. While the Trade Agreements Act of 1979 does not provide a bright-line definition of the term "subsidy," it does set out illus-

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45. Id.

46. In addition, before 1967 the Treasury was not required to give public notice of an investigation. See, e.g., Customs Duties, Countervailing Duties; Bounty or Grant Paid or Bestowed, 32 Fed. Reg. 13,276 (1967). Also, prior to 1974 only affirmative determinations were required to be published. S. REP. No. 1298, 93d Cong., 2d Sess. 183-85 (1974); Jackson, Louis & Matsushita, supra note 43, at 355-58.


49. 19 U.S.C. § 1303(a), (d), (e) (1982).


trative lists of what constitute export and domestic subsidies that may be expanded administratively, "consistent with the basic definition" of a subsidy. In effect, executive branch discretion under the countervailing duty law, already narrowly circumscribed, was reined in even tighter.

As with the countervailing duty law, the history of the antidumping duty law also provides an excellent case study of the struggle between Congress and the President over United States foreign trade policy. The first antidumping law was the Antidumping Act of 1916. That Act only prohibited predatory dumping, that is, dumping that threatened monopolization of the United States market, and was enforced only through private lawsuits. A second, parallel dumping statute enacted in 1921 vested the Treasury Department with sole responsibility for its


The term "subsidy" has the same meaning as the term "bounty" or "grant" as that term is used in section 1303 of this title [19 U.S.C. § 1303], and includes, but is not limited to, the following:

(A) Any export subsidy described in Annex A to the Agreement [the GATT Subsidies Code] (relating to illustrative list of export subsidies).

(B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

(i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

(ii) The provision of goods or services at preferential rates.

(iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(iv) The assumption of any costs or expenses of manufacture, production, or distribution.

The reference to Annex A is to the Agreement on the Interpretation and Application of articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, GATT, Basic Instruments 56 (26th Supp. 1980), commonly known as the "Subsidies Code." The detailed illustrative list at the Annex to the Subsidies Code identifies as prohibited export subsidies the provision by governments of direct subsidies to a firm contingent upon export performance, and currency retention schemes that involve a bonus on exports. Id.


56. See Barceló, Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code, 57 Cornell L. Rev. 491, 499 (1972); Note, Technical Analysis of the Antidumping Agreement and the Trade Agreements Act, 11 Law & Pol'y in Int'l Bus. 1405, 1406 (1979).

administration. In the wake of a legislative-executive branch imbroglio over the effect of the 1967 International Antidumping Code on the 1921 Antidumping Act, Congress passed the Trade Agreements Act of 1979, repealing the 1921 Act. In this Act, Congress limited executive branch discretion under the 1979 revisions to the antidumping duty law in several important respects, and introduced a material injury test that had to be met before dumping duties could be assessed. In addition to accelerating the time for reaching administrative determinations, Congress only allowed antidumping duties to be assessed in the amount by which the foreign market value of imported merchandise exceeded the United States price for that merchandise. "Foreign market value" is narrowly defined as the home market price for the merchandise under investigation or, in the absence of home market sales, the price of that merchandise when sold in third countries. If the Commerce Department determines that merchandise is being sold at less than fair value, and if the International Trade Commission (ITC or Commission) in turn finds that a domestic industry is being materially injured by reason of those imports, then a duty equal to the margin of dumping must be imposed on such merchandise.

The administrative procedures under the countervailing and antidumping duty laws are in all material respects identical. In both

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58. Id. § 201.
59. As noted in Note, supra note 56:
   Congress took umbrage at being excluded from the process of formulation of U.S. trade policy when the problem (at its conception) was essentially a matter of the domestic economic effects of "unfair trade practices." Accordingly, the Senate Finance Committee concluded that the Executive branch, acting without the Congress, lacked constitutional authority to alter the Antidumping Act of 1921. Id. at 1414-15 (footnotes omitted).
62. Id. §§ 1673b(b)-(c), 1673d(a).
63. Id. § 1673. Foreign producers and manufacturers are prohibited from selling their merchandise in the United States at a price below their home market price. See 19 U.S.C. §§ 1673-1673a (1986). In essence, the antidumping duty law prohibits price discrimination within national markets. See Barshefsky & Cunningham, supra note 5, at 308, 318-30. In the words of the statute, imports may not be sold in the U.S. at a price that is "less than its fair value." 19 U.S.C. § 1673 (1982 & Supp. III 1985). Although "fair value" is not defined in the Trade Agreements Act itself, Congress intended the concept of fair value to be an estimate of foreign market value. H.R. REP. NO. 317, 96th Cong., 1st Sess. 59 (1979).
65. Id. §§ 1673d(c)(2), 1673e(a).
66. One major difference between the two proceedings is the absence of an injury test in countervailing duty cases involving a country that has not signed the GATT Subsidies Code or entered into an equivalent commitment with the U.S. See Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade
countervailing duty and antidumping duty cases a petition is generally filed with the Commerce Department and the ITC by an aggrieved American manufacturer on behalf of an industry. Each agency in turn conducts an investigation in which the Commerce Department makes preliminary and final determinations of whether there has been dumping or subsidization. The Commission makes the same determinations for industry injury.\textsuperscript{67} If final affirmative determinations are reached by both agencies, an antidumping or countervailing duty order must be issued. The offending imports are then assessed an offsetting duty equal to the margin of dumping or the amount of the subsidy. From that determination an appeal may be taken to the Court of International Trade.\textsuperscript{68}

Despite the absence of discretionary executive branch power within the United States antidumping and countervailing duty laws, the Commerce Department may still administratively settle these cases,\textsuperscript{69} thereby bypassing the regularized administrative process. However, a case must meet specific criteria before an antidumping or countervailing duty investigation may be suspended.\textsuperscript{70} In the Trade and Tariff Act of 1984 Congress amended the termination provisions of the antidumping and countervailing duty laws by directing the Commerce Department to consider specific public interest factors\textsuperscript{71} and to consult with the potentially affected consumer, industry, and worker groups\textsuperscript{72} before suspending an antidumping or countervailing duty investigation. Moreover, even if it suspends an investigation, the Commerce Department is obligated to monitor compliance with the agreement to insure not only that dumping or unlawful subsidization is eliminated, but also that once eliminated these trade practices are not resumed.\textsuperscript{73}

Suspension agreements are difficult to obtain\textsuperscript{74} and are becoming an increasingly rare occurrence, especially in antidumping duty cases.\textsuperscript{75} The

\textsuperscript{68} Id. § 1516a. Review is on the administrative record using the substantial evidence test. Id. § 1516a(a)(2)(B)(i) & (ii).
\textsuperscript{69} Id. §§ 1671c, 1673c.
\textsuperscript{70} Id. §§ 1671c(b), 1671c(d), 1673c(b), 1673c(d).
\textsuperscript{73} Id. In addition, penalties may be imposed for intentional violations of a suspension agreement. 19 U.S.C. §§ 1671c(i), 1673c(i) (1982 & Supp. III 1985).
\textsuperscript{74} Hemmendinger & Barringer, \textit{supra} note 5, at 440.
Commerce Department clearly views them as the exception rather than the rule.\textsuperscript{76} In fact, in the first four years of the Commerce Department's administration of the countervailing and antidumping duty laws, suspension agreements were concluded in only twenty-four countervailing duty investigations and in four antidumping duty cases.\textsuperscript{77} Through all of 1986, the Commerce Department concluded only one antidumping duty\textsuperscript{78} and one countervailing duty\textsuperscript{79} suspension agreement.

Compared to the limited role executive discretion plays in the administration of the antidumping and countervailing duty laws, the role of executive branch discretion in the three other major United States trade relief laws is considerable. As with the antidumping and countervailing duty laws, section 201 escape clause relief,\textsuperscript{80} section 337 patent and trademark infringement relief,\textsuperscript{81} and section 301 unfair trade practice relief\textsuperscript{82} are ostensibly rule-based in the sense that each contain statutory criteria that must be met before relief will be granted. However, unlike the antidumping duty and countervailing duty laws, these three other statutes feature significant discretionary powers that, in the case of section 201 and section 337 relief, permit the President to deny relief to a petitioning United States industry despite the recommendation of the ITC to the contrary. In the case of section 301 relief, the President's discretion is virtually unfettered under both the substantive violation and relief provisions of that law.

\textsuperscript{76} S. REP. NO. 249, 96th Cong., 1st Sess. 54 (1979). The legislative history of the Trade Agreements Act of 1979 shows that Congress intended suspension agreements to be the exception rather than the rule:

The suspension provision is intended to permit rapid and pragmatic resolutions of countervailing duty cases. However, suspension is an unusual action which should not become the normal means of disposing of cases. The Committee intends that investigations be suspended only when that action serves the interests of the public and the domestic industry affected. For this reason, the authority to suspend investigations is narrowly circumscribed.

\textsuperscript{77} See Holmer and Bello, \textit{supra} note 75, at 694-97. A large share of the countervailing duty suspension agreements stemmed from a flood of countervailing duty petitions filed by the U.S. steel industry in 1982.

\textsuperscript{78} See U.S., Japan Reach Five-Year Deal on Chips, Administration Dropping Dumping, § 301 Cases, 3 Int'l Trade Rep. (BNA) 994 (1986).


\textsuperscript{81} Id. § 1337.

\textsuperscript{82} Id. § 2411.
B. Section 337 Unfair Import Practices

In the arsenal of trade laws available to American manufacturers to protect them from the ravages of foreign imports, one of the most potent and frequently used is section 337 of the Tariff Act of 1930. With passage of the Trade Act of 1974, the ITC for the first time was empowered to determine whether certain conduct constituted a violation of section 337, a power previously reserved to the President. Under section 337, the Commission is directed to conduct investigations involving alleged unfair import practices and is authorized to exclude offending articles from entry into the United States.


Section 337 makes illegal "unfair methods of competition or unfair acts" in the importation of merchandise into the United States, language virtually identical with section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition . . . and unfair . . . acts or practices in or affecting commerce." Despite this identity of language, however, the approaches of the ITC and the Federal Trade Commission in administering their respective statutory mandates have varied considerably. For a discussion of the different approaches of the two agencies, see Fischbach, The Need to Improve Consistency in the Application and Interpretation of Section 337 of the Tariff Act of 1930 and Section 5 of the Federal Trade Commission Act, 8 GA. J. INT'L & COMP. L. 65 (1978); Brown, Unfair Methods of Competition in Importation: The Expanded Role of the U.S. International Trade Commission Under § 337 of the Tariff Act of 1930, as Amended by the Trade Act of 1974, 31 BUS. LAW. 1627 (1976); LaRue, Section 337 of the 1930 Tariff Act and Its Section 5 FTC Act Counterpart, 43 ANTITRUST L.J. 608 (1974).

86. Section 337(a), 19 U.S.C. § 1337(a) (1982), declares unlawful the importation of articles into the United States that have the effect or tendency "to destroy or substantially injure an industry . . . in the United States." Section 337(c) directs the ITC to conduct an investigation into allegations of a section 337(a) violation. Excluded from the scope of section 337 are antidumping and countervailing duty cases. 19 U.S.C. § 1337(b)(3) (1982). See Brandt & Zeitler, Unfair Import Trade Practice Jurisdiction: The Applicability of Section 337 and the Countervailing Duty and Antidumping Laws, 12 LAW & POL'Y IN INT'L BUS. 95 (1980); Kaye & Plaia, The Relationship of Countervailing Duty and Antidumping Law to Section 337 Jurisdiction of the U.S. International Trade Commission, 2 INT'L TRADE L.J. 3 (1977).
87. If a violation is found to exist, the Commission is authorized to exclude offending articles from entry into the United States under section 337(d), 19 U.S.C. § 1337(d) (1982), as well as issue cease and desist orders under section 337(f), 19 U.S.C. § 1337(f)(1982).

A section 337 violation typically involves the importation of an article that infringes the patent rights of a U.S. patent holder, causing injury to an American manufacturer. See, e.g., Block v. United States Int'l Trade Comm'n, 777 F.2d 1568 (Fed. Cir. 1983); Massachusetts
The elements of a section 337 violation are twofold: (1) the petitioner must prove the existence of unfair methods of competition or unfair acts that (2) tend to injure or destroy a domestic industry. Included under the rubric "unfair acts" are patent infringement, trademark and trade secrets misappropriation, and palming off, among others. Remedies for a violation of section 337 include temporary exclusion orders, permanent exclusion orders, and cease and desist orders.

Proceedings before the Commission follow the procedures generally applicable in federal district courts. An investigation is commenced by

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92. See supra note 87. For other examples of unfair trade practices found to be within the scope of section 337, see Kaye & Plaia, The Filing and Defending of Section 337 Actions, 6 N.C.J. INT'L & COM. REG. 463, 467 (1981); Ablondi & Vent, supra note 87, at 37-38.


94. Id. § 1337(d).


the filing of a complaint with the Commission.97 All of the traditional
discovery devices are available.98 Protective orders may issue restricting
distribution of confidential business and technical information.99 The
Commission conducts hearings on the record100 pursuant to the Admin­
istrative Procedures Act.101 The evidentiary hearings are presided over
by an administrative law judge102 who makes a recommendation with
regard to the existence vel non of a violation and transmits it to the Com­
mission. The Commission itself determines whether a violation of sec­
tion 337 has occurred.103 If the Commission determines that a section
337 violation does exist, it must transmit a copy of its determination to
the President,104 who then has sixty days to disapprove that determina­
tion "for policy reasons."105 Although the statute does not define "pol­
icy reasons,"106 the Court of Appeals for the Federal Circuit has stated
that "policy reasons" do not include the merits of the ITC's determina­
Of the more than two hundred section 337 investigations that have
been initiated by the ITC since enactment of the Trade Act of 1974,108
the President has disapproved the Commission's final affirmative deter­
mination in only four cases.109 In the most recent section 337 determi­

97. Id. § 210.20 (1985). The complaint must, however, satisfy more than the bare notice
requirements of the Federal Rules of Civil Procedure. Id.
98. These include depositions, id. § 210.31; interrogatories, id. § 210.32; requests for pro­
duction of documents, id. § 210.33; and requests for admissions, id. § 210.34. The scope of
discovery follows that of Rule 26(b) of the Federal Rules of Civil Procedure. See id.
§ 210.30(b).
99. Id. § 210.30(d).
100. Id. § 210.41.
102. The administrative law judge allows the presentation of evidence in much the same
manner as a federal district court judge. 19 C.F.R. § 210.41(d).
104. Id. § 1337(g)(1).
105. Id. § 1337(g)(2).
107. Young Engineers, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1313
(Fed. Cir. 1983) ("The President may disapprove only 'for policy reasons,' not because of the
merits of an investigation.").
108. Ablondi & McCarthy, Impact of the United States International Trade Commission on
investigations have been instituted under section 337. See Certain Non-Contact Laser Preci­
Reg. 3861 (1986). Only three of the over 50 contested section 337 investigations have resulted
109. The most recent of the ITC determinations affected is Certain Alkaline Batteries, Inv.
tion disapproved by the President, *Certain Alkaline Batteries*, the Commission determined that the importation of certain "gray market" alkaline batteries was a violation of section 337. In order to insure a coherent policy in the area of gray market goods, the President rejected the Commission's determination for the following reasons:

The Commission's interpretation of section 42 of the Lanham Act (15 U.S.C. 1124), one of several grounds for the Commission's determination, is at odds with the longstanding regulatory interpretation by the Department of the Treasury, which is responsible for administering the provisions of that section. The Administration has advanced the Treasury Department's interpretation in a number of pending court cases. Recent decisions of the United States District Court for the District of Columbia and the Court of International Trade explicitly uphold the Treasury Department's interpretation. Allowing the Commission's determination in this case to stand could be viewed as an alteration of that interpretation. Therefore, I have decided to disapprove the Commission's determination.

Stating that the disapproval was for policy reasons, President Reagan went on to note:


113. Id.
The Departments of Treasury and Commerce, on behalf of the Cabinet Council on Commerce and Trade, have solicited data from the public concerning the issue of parallel market importation and are reviewing responses with a view toward formulating a cohesive policy in this area. Failure to disapprove the Commission's determination could be viewed as a change in the current policy prior to the completion of this process.\(^{114}\)

In a court challenge to the President's disapproval, Duracell, Inc., the American trademark holder, argued that the President's disapproval was for "legal reasons," not "policy reasons,"\(^{115}\) contrary to the statutory authorization under section 337(g)(2).\(^{116}\) In one of only two reported opinions to consider the question of judicial review of presidential disapprovals under section 337(g)(2),\(^{117}\) *Duracell, Inc. v. United States International Trade Commission*,\(^{118}\) the Court of Appeals for the Federal Circuit held that it lacked jurisdiction to review a decision of the President under 337(g)(2)\(^ {119}\) disapproving an ITC unfair trade practice determination.\(^ {120}\) As an alternative basis for its decision, the Federal Circuit further ruled that because the President had acted in full compliance with the provisions of section 337(g)(2), his decision was immune from further judicial inquiry.\(^ {121}\) The Federal Circuit disagreed with Duracell's characterization of the reasons given by the President for his disapproval, observing:


\(^{115}\) *Duracell, Inc. v. United States Int'l Trade Comm'n*, 778 F.2d 1578, 1580-81 (Fed. Cir. 1985).


\(^{117}\) *Id.* § 1337(g)(2). The other opinion to consider this issue was *Young Engineers, Inc. v. United States Int'l Trade Comm'n*, 721 F.2d 1305 (Fed. Cir. 1983). The Commission's determinations are subject to judicial review, see 19 U.S.C. § 1337(c) (Supp. III 1985), but the President's disapproval decisions are not.

\(^{118}\) 778 F.2d 1578, 1581 (Fed. Cir. 1985).

\(^{119}\) 19 U.S.C. § 1337(g)(2) (1982). That section provides in part:

If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such [ITC] determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) [19 U.S.C. § 1337(d), (e), or (f)] with respect thereto shall have no force or effect.

\(^{120}\) *Duracell*, 778 F.2d at 1580-81.

\(^{121}\) *Id.* at 1581-82.
"Policy" is a broad concept which includes, but is not limited to: impact on United States foreign relations, economic and political . . . [and] upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.122

The Federal Circuit concluded that because the President had acted in a timely fashion, had stated that he was acting for policy reasons, and had stated reasons other than the merits of whether there had been a violation of section 337,123 the court's inquiry was at an end.124

C. Section 201 Escape Clause Relief

The President's role under section 337 and section 201 is virtually identical. Under both statutes the President is empowered, in effect, to reverse or modify the ITC's affirmative determination by denying or modifying relief. However, unlike under section 337, the President has exercised this power under section 201 on many more occasions. Section 201 of the Trade Act of 1974,125 commonly referred to as the "escape clause," provides relief to an American industry suffering or threatened with serious injury caused by increased imports of competing merchandise.126

The unique feature of the escape clause is its focus on fairly traded imports that cause serious injury to an American industry. An escape clause petitioner thus is not required to show that imports are being sold at less than their fair market value,127 that they are subsidized by a for-

123. See supra note 107.
124. Duracell, 778 F.2d at 1582.
126. Id. § 2251(b)(1). The relief available under section 201 includes increased tariffs on the imported articles causing injury, quotas on the articles, orderly marketing arrangements, or any combination of these actions. Id. § 2253(a). The duration of such relief can be for up to five years. Id.
eign government, or that they infringe upon the rights of an American patent or trademark holder. In the eleven-year period from 1974 through 1986, the International Trade Commission has concluded sixty section 201 escape clause investigations. In that time the Commission has issued thirty affirmative determinations, three split decisions, and twenty-seven negative determinations. Upon making an affirmative escape clause determination, the Commission recommends to the President the relief it believes appropriate under the circumstances. In addition to increased duties, tariff rate quotas, and quotas, the ITC may also recommend to the President that trade adjustment assistance be afforded to the affected firm or organization and its workers.

Escape clause proceedings involve two steps. First, upon the filing of a petition with the ITC, the Commission determines whether serious injury or threat of serious injury exists that is attributable to an increase in imports of competing merchandise. If these determinations are affirmative, the Commission then recommends to the President the type of relief it believes necessary to remedy the injury. In determining whether to provide import relief, the President is to take into account

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129. See supra notes 89-92 and accompanying text.  
132. See supra note 126 and accompanying text.  
134. See id. §§ 2251(d)(1)(B), 2271.  
136. 19 U.S.C. § 2251(d)(1) (1982). As is true under section 337, the President is empowered to act under section 201 only when the Commission issues an affirmative determination. See id. § 2252(a). The Commission has four options respecting its relief recommendations. It may recommend increased duties, a tariff rate quota, a quota, or any combination of the foregoing. Id. § 2251(d). The Commission may also recommend that trade adjustment assistance be provided. Id.
several factors, including the following: (1) the probable effectiveness of import relief as a means to promote adjustment by the industry concerned to import competition, (2) the effect of import relief on consumers, (3) the effect of import relief on the international economic interests of the United States, and (4) the economic and social costs that would be incurred by taxpayers, communities, and workers if import relief were to be provided. The President may accept or reject in

137. Section 202(c) of the Trade Act of 1974, id. § 2252(c), lists the following nine factors the President is to consider in making his determination whether to provide escape clause relief:

(1) information and advice from the Secretary of Labor on the extent to which workers in the industry have applied for, are receiving, or are likely to receive adjustment assistance under part 2 [19 U.S.C. § 2271] or benefits from other manpower programs;
(2) information and advice from the Secretary of Commerce on the extent to which firms in the industry have applied for, are receiving, or are likely to receive adjustment assistance under parts 3 and 4 [19 U.S.C. §§ 2341 and 2371];
(3) the probable effectiveness of import relief as a means to promote adjustment, the efforts being made or to be implemented by the industry concerned to adjust to import competition, and other considerations relative to the position of the industry in the Nation's economy;
(4) the effect of import relief on consumers (including the price and availability of the imported article and the like or directly competitive article produced in the United States) and on competition in the domestic markets for such articles;
(5) the effect of import relief on the international economic interests of the United States;
(6) the impact on United States industries and firms as a consequence of any possible modification of duties or other import restrictions which may result from international obligations with respect to compensation;
(7) the geographic concentration of imported products marketed in the United States;
(8) the extent to which the United States market is the focal point for exports of such article by reason of restraints on exports of such article to, or on imports of such article into, third country markets; and
(9) the economic and social costs which would be incurred by taxpayers, communities, and workers, if import relief were or were not provided.

The foregoing list is not exhaustive. See id. § 2252(c).

138. Id. § 2252(c)(3).
139. Id. § 2252(c)(4).
140. Id. § 2252(c)(5).
141. Id. § 2252(c)(9). The following explanation for granting section 201 relief was given in the Senate Finance Committee Report to the Trade Act of 1974:

The rationale for the "escape clause" has been, and remains, that as barriers to international trade are lowered, some industries and workers inevitably face serious injury, dislocation and perhaps economic extinction. The "escape clause" is aimed at providing temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition.

whole or in part any of the ITC's relief recommendations, as well as attempt to negotiate orderly marketing arrangements with the countries or country involved. The President also has the discretion to reject relief altogether if he determines that such relief "is not in the national economic interest of the United States." As a result, the Presidential relief decision may be highly political.

Of the thirty-three affirmative and split determinations of the Commission, the President has granted some form of import relief in only twelve cases. If he decides to grant import relief, it may last for up to five years. The President may reduce or terminate such relief at any time if it is in the national interest to do so.

One of the most recent instances in which the President granted an American industry escape clause relief was in Certain Stainless Steel and Alloy Tool Steel. The Commission recommended that the President impose "quantitative restrictions"—the statutory euphemism for quotas. Stating that he had taken into consideration the nine factors...

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143. Id. § 2253(a)(4).
144. Id. § 2252(a)(1)(A). In two recent affirmative ITC escape clause determinations, President Reagan determined not to grant import relief to the copper and steel industries, respectively, concluding that to do otherwise would be inconsistent with the national economic interest. See Copper Import Relief Determination, 49 Fed. Reg. 35,609 (1984); Steel Import Relief Determination, 49 Fed. Reg. 36,813 (1984).
147. Id. § 2253(h)(4). For an example of early termination by the President of section 201 import relief, see Proclamation No. 4904, 47 Fed. Reg. 8,753 (1982) (prematurely terminating three-year import relief granted the mushroom industry in 1980 pursuant to Proclamation No. 4801, 45 Fed. Reg. 70,361 (1980)).
150. Id.
contained in section 202(c) of the Trade Act of 1974, President Reagan decided to impose additional tariffs as well as quantitative restrictions. The President also directed the United States Trade Representative (USTR) to negotiate orderly marketing arrangements with the affected countries. The Presidential proclamation offered no rationale in support of this import relief decision.

153. Id.
154. See id. Three months prior to granting import relief in the Stainless Steel case, President Reagan ordered the imposition of increased duties and a tariff-rate quota following the Commission's Heavyweight Motorcycles determination. See Certain Heavyweight Motorcycles Determination, Proclamation No. 5050, 48 Fed. Reg. 16,639 (1983). The ITC had recommended the imposition of additional duties on imports of heavyweight motorcycles over a five-year period beginning with a 45% ad valorem duty increase the first year, declining to 10% in the fifth year. See 48 Fed. Reg. 16,639. President Reagan agreed with the Commission's recommendation, "but with tariff-rate quotas to assure small volume producers which have not contributed to the threat of injury continued access to the United States market." 48 Fed. Reg. 16,639. The President further provided a tariff-rate quota for articles from Japan. Id. The provision for tariff-rate quotas is contained at 19 U.S.C. § 2253(a)(2) (1982). A tariff-rate quota is a mechanism "whereby a given amount of the product per year may enter at one tariff rate and all in excess of that amount will enter at a higher rate." J. JACKSON, supra note 37, at 202 (footnote omitted). A tariff-rate quota is subject to the limitation that the rate may not be more than 50% ad valorem above the then-existing rate. 19 U.S.C. § 2253(d)(2) (1982) provides that quotas shall "permit the importation of a quantity or value of the article which is not less than the quantity or value of such article imported into the United States during the most recent period which the President determines is representative of imports of such article."

In a third case, Mushrooms, USITC Pub. 1089, Inv. No. TA-201-43 (1980), the Commission recommended the imposition of import quotas. See 45 Fed. Reg. 16,639 (1930). In his decision to grant import relief the President opted for the imposition of increased duties, rejecting the ITC's quota recommendation. Presidential Import Relief Determination on Section 201 Case on Mushrooms, 45 Fed. Reg. 70,361 (1980), terminated by Proclamation No. 4904, 47 Fed. Reg. 8,753 (1982). In addition to granting this form of import relief, the President created a White House task force to assist the mushroom industry in adjusting to import competition. 45 Fed. Reg. 70,361 (1980). In support of his decision to provide tariff relief rather than the quota relief recommended by the Commission, the President explained:

"Increased tariffs will enable the canning industry to become more profitable. This improvement in their financial position, which is not expected to have a significant inflationary impact, will enable the industry to implement adjustment programs which they have pledged to undertake. Tariffs are also preferable in this case because, unlike quotas, they allow the natural market forces to continue to work, thus providing relatively more incentive to the industry to adjust to foreign competition. Finally, tariffs are preferred because, unlike quotas, they allow the natural market forces to continue to work, thus providing relatively more incentive to the industry to adjust to foreign competition. Finally, tariffs are preferred because of the difficulty of equitably allocating quotas among countries where there are highly competitive new suppliers entering a market dominated by traditional suppliers."
In the most recent presidential section 201 decision denying import relief, *Nonrubber Footwear Import Relief Determination*,\(^{155}\) the Commission had instituted its investigation following receipt of a resolution by the Senate Finance Committee requesting an investigation under section 201(b)(1) of the Trade Act of 1974.\(^{156}\) The President concluded that providing import relief would not be in the national economic interest,\(^{157}\) citing the following factors:

First, import relief would place a costly and unjustifiable burden on United States consumers and the United States economy . . . .

Second, import relief would result in serious damage to United States trade in two ways. If the ITC global remedy were imposed United States trade would stand to suffer as much as $2.1 billion in trade damage either through compensatory tariff reductions or retaliatory actions by foreign suppliers. This would mean a loss of United States jobs and a reduction in United States exports. United States trade would also suffer because of the adverse impact import relief would have on major foreign suppliers, such as Brazil, who are heavily indebted and highly dependent on footwear exports. Import relief would lessen the ability of these foreign footwear suppliers to import goods from the United States and thus cause an additional decline in United States exports.

Third, I do not believe that providing relief in this case would promote industry adjustment to increased import competition . . . . I believe that the industry has been and is in the process of successfully adjusting to increased import competition.\(^{158}\)

Thus, with a view to the adverse effect import relief would have on United States export performance and on other sectors of the economy, President Reagan denied relief to the domestic nonrubber footwear industry.\(^{159}\) It was a politically courageous,\(^{160}\) but equally contemptuous, act—contemptuous in that both the petitioner's section 201 rights and

*Id.* It is difficult to see any pattern emerge from these three affirmative presidential relief determinations. Each appears to be ad hoc.


156. *See* 50 Fed. Reg. 30,245 (1985). Section 201(b)(1) directs the Commission to promptly make an investigation upon request of the President or the USTR, or upon receipt of a resolution of either the House Ways and Means Committee or the Senate Finance Committee.


158. *Id.*

159. In another recent escape clause determination in which the President denied relief to the domestic industry, *Steel Import Relief Determination*, 49 Fed. Reg. 36,813 (1984), President Reagan once again concluded that import relief would not be in the national economic interest. He gave the following reasons for his conclusion:
the Commission’s section 201 affirmative determination were so lightly

1. In responding to this pressing import problem, we must do all we can to avoid protectionism, to keep our market open to free and fair competition, and to provide certainty of access for our trading partners. . . .

2. It is not in the national economic interest to take actions which put at risk thousands of jobs in steel fabricating and other consuming industries or in the other sectors of the U.S. economy that might be affected by compensation or retaliation measures to which our trading partners would be entitled.

3. This Administration has already taken many steps to deal with the steel import problem. In 1982, a comprehensive arrangement restraining steel imports from the European Community was negotiated. This Administration has also conducted an unprecedented number of antidumping and countervailing duty investigations of steel imports, in most cases resulting in the imposition of duties or a negotiated settlement. . . .

Id.

In an effort to defuse a politically explosive situation, the President noted that he had decided to establish a government policy for the steel industry to be coordinated and directed by the USTR. In this case, the President thus set his primary focus on the adverse impact import relief would have on U.S. industries and firms resulting from GATT compensation to affected countries. See 19 U.S.C. § 2251(b)(6) (1982). Under GATT, if escape clause relief is granted by the U.S. to a domestic industry, other GATT signatory countries are entitled to compensatory trade concessions if trade concessions made by them to the U.S. are nullified or impaired as a consequence of escape clause relief. General Agreement on Tariffs and Trade, Oct. 30, 1947, arts. XIX, XXIII, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 194. See J. JACKSON, supra note 37, at 553-73. Compensation in the form of substantially equivalent concessions would mean that an American industry that exports its products to foreign countries adversely affected by escape clause relief could likely find itself the target of retaliation by those foreign countries. Explicit in the second point of the President’s determination was the recognition that if the U.S. elected to restrict fairly traded steel imports, export trade in another unrelated sector of the economy would be adversely affected.

Another occasion when the President denied import relief under section 201 was in the Commission’s Unwrought Copper determination, USITC Pub. 1549, Inv. No. TA-201-52 (1984). A unanimous Commission found that imports of copper were a substantial cause of serious injury to the domestic copper mining industry. Despite this affirmative determination, President Reagan was entirely unreceptive to the Commission’s recommendation to grant import relief, finding that such relief would not be in the national economic interest. Copper Import Relief Determination, 49 Fed. Reg. 35,609 (1984). The two supporting reasons he gave for his conclusion were as follows: (1) the potentially adverse effect import relief would have on the domestic copper-fabricating industry, resulting in backlash effect on the domestic copper producers; and (2) the adverse effect import relief would have on the export earnings of foreign copper producers.

Unlike the factors relied upon in the President’s Steel Import Relief determination—factors that largely focused on compensation to and possible retaliation by adversely affected foreign countries, the factors that figured prominently in the Copper Import Relief determination were the effects on domestic fabricators of copper products and on the ability of less developed countries to meet their international debt obligations. This last factor was also one of the factors cited for denying relief in the Nonrubber Footwear Relief determination.

Not surprisingly, the President’s determination was a great disappointment to the American copper industry. See Copper Industry Case History Points Out Problems in Using Statute, Attorney Says, 3 Int’l Trade Rep. (BNA) 243-45 (1986). That disappointment was registered through a bill introduced in the Senate shortly after the President’s Unwrought Copper determination that would have eliminated the President’s discretion to withhold relief under section
disregarded.161

The escape clause does not provide for judicial review of either the ITC's or President's determinations. Nevertheless, in Maple Leaf Fish Co. v. United States,162 the Federal Circuit considered a challenge to the scope of relief following an affirmative section 201 escape clause determination.163 In upholding the scope of the President's relief determination, the Federal Circuit stated it would be improper for a court to interfere absent executive branch action beyond the President's delegated authority, observing that "[t]he President's findings of fact and the motivations for his action are not subject to review."164 In short, judicial review under section 201 is extremely limited.

D. Section 301 Retaliation Against Unfair Trade Practices

While section 337 affords American manufacturers relief from unfair import practices and section 201 protects American industries from fairly traded but highly injurious foreign import competition, section 301 of the Trade Act of 1974165 is retaliatory in nature. It furnishes Ameri-

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161. Comparing these six section 201 cases, one explanation for the different treatment each petitioner received at the hands of the President can be found in the size of the industry in question, both domestically and worldwide. The larger the industry, the more likely it is that relief will be withheld. Although this conclusion may seem counterintuitive, the larger the industry, the more substantial will be the impact of any relief accorded that industry. Given that circumstance, the more probable it is that relief will be denied because of the serious threat such relief will present to other unrelated sectors of the U.S. economy, which may be the innocent victims of retaliatory action or GATT compensation.

162. 762 F.2d 86 (Fed. Cir. 1985)
163. Maple Leaf Fish Co. v. United States, 762 F.2d 86 (Fed. Cir. 1985).
164. Id. at 89, quoting Florsheim Shoe Co. v. United States, 744 F.2d 787, 795 (Fed. Cir. 1984).
can exporters with a mechanism for redressing foreign import restrictions or trade practices that prevent or restrict sales of their products either in that country or third country markets. Section 301 is the legal vehicle by which American exporters are able to insure that foreign markets are not unfairly, unreasonably, or discriminatorily restricted or closed to them due to the action of a foreign government. To this end, the President is granted broad retaliatory authority to respond to such unfair foreign trade practices.

Section 301 differs substantially from the four other trade laws previously discussed in several material respects. Most significantly, the range of discretion given by Congress to the President under section 301 is extremely broad. There are no periodic administrative reviews as under the antidumping and countervailing duty laws and no provisions for judicial review of presidential action. Furthermore, the nature of relief under section 301 is indeterminate. Section 301 reaches not only trade in goods, as do all the other trade laws, but also trade in services and in foreign direct investment. Finally, the standard for establishing injury, that is, whether the foreign trade practice "burdens or restricts United States commerce," is far less stringent than either the serious injury standard of the escape clause or the material injury standard of the countervailing duty and antidumping duty laws.

Section 301 authorizes the President to take "all appropriate and feasible action within his power":

(A) to enforce the rights of the United States under any trade agreement; or

(B) to respond to any act, policy, or practice of a foreign country or instrumentality that

(i) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce.


168. Id.

169. See id. § 1675.

170. Id. § 2411(e)(1)(A), (B) (Supp. III 1985).

171. Id. § 2411(a)(1)(B)(ii).
Thus, four broad categories of unfair trade practices exist for which relief may be granted under section 301: those which are "inconsistent with the provisions of, or otherwise den[y] benefits to the United States under, any trade agreement,"\textsuperscript{172} those which are "unjustifiable,"\textsuperscript{173} those which are "unreasonable,"\textsuperscript{174} and those which are "discriminatory."\textsuperscript{175} In addition to showing that one of these four types of practices has occurred, a petitioner must also establish injury, that is, that the practice in question "burdens or restricts United States commerce," in the case of unjustifiable, unreasonable, or discriminatory practices.\textsuperscript{176}

The President may act on his own motion\textsuperscript{177} or when petitioned.\textsuperscript{178} Unless an investigation is self-initiated by the USTR,\textsuperscript{179} or unless the

\textsuperscript{172} Id. § 2411(a)(1)(B)(i).
\textsuperscript{173} Id. § 2411(a)(1)(B)(ii). The statute defines "unjustifiable" practices as "any act, policy, or practice which is in violation of, or inconsistent with, the international legal rights of the United States." Id. § 2411(e)(4)(A). Illustrative are practices that deny most-favored-nation treatment to the U.S. or that fail to protect intellectual property rights. Id. § 2411(e)(4)(B).
\textsuperscript{174} Id. § 2411(a)(1)(4)(B)(ii). The statute defines an "unreasonable" practice as one deemed to be "unfair and inequitable," although not necessarily in violation of the international legal rights of the United States. Id. § 2411(e)(3). Illustrative are practices that deny "fair and equitable market opportunities" or "opportunities for the establishment of an enterprise. Id. § 2411(e)(3)(A)-(B).
\textsuperscript{175} Id. § 2411(a)(1)(B)(ii). Discriminatory practices are defined to include practices which deny "national or most-favored-nation treatment to United States goods, services, or investment." Id. § 2411(e)(5). The Trade and Tariff Act of 1984 expanded section 301 to include foreign direct investment as a protected area of trade. See Pub. L. No. 98-573, § 304(f)(1), 98 Stat. 3005 (1984).
\textsuperscript{177} Id. at § 2411(d)(1).
\textsuperscript{178} Id. at §§ 2411(d)(2), 2412(a). Regulations governing the procedures for filing and processing section 301 complaints are contained in 15 C.F.R. §§ 2006.0-2006.15 (1985).

On October 16, 1985, the President directed the USTR to self-initiate two section 301 investigations. The first concerned Korean intellectual property rights protection, 2 Int'l Trade Rep. (BNA) 1289 (1985). The second was an investigation into the wheat export practices of the European Economic Community (EC). 2 Int'l Trade Rep. (BNA) 1289 (1985).
President acts on his own motion, a section 301 proceeding is usually initiated by an American industry or trade group that files a petition with the USTR, which then has forty-five days to decide whether to initiate an investigation. The statute does not provide any standards to regulate the decision to initiate. However, if the USTR decides not to initiate an investigation, it must notify the petitioner and publish the reasons in the Federal Register. If the USTR decides to initiate an investigation, it must request consultations with the foreign government involved.

The statute prescribes deadlines—from seven to twelve months after initiation of the investigation—by which the USTR must recommend what action, if any, the President should take. The President in turn has twenty-one days from receipt of the USTR’s recommendation to determine what action he will take. Before the President takes any action, the USTR is required to provide an opportunity for the expression of views on the matter. Although the petitioner has a vested interest in the outcome of the investigation and any relief that is ordered, once the investigation is initiated the Government controls the proceedings. The petitioner in effect becomes a third-party beneficiary of any relief granted under section 301.

The results under section 301 have been mixed. Generally, once a section 301 petition is filed, the USTR will initiate an investigation. In only one instance the USTR determined not to initiate an investiga-

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180. Under section 302 of the Trade Act of 1974, 19 U.S.C. § 2412 (1982), the President may take action under section 301 without a formal investigation by the USTR. In 1986 the President acted on his own motion in two cases. The first involved the entry of Spain and Portugal into the EC, see Memorandum of May 15, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 18,294 (1986). The other concerned Taiwan’s customs valuation, see Memorandum of Aug. 1, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 28,219 (1986).


185. Id. § 2411(d)(2) (Supp. III 1985).

186. Id. § 2414(b) (1982). The USTR may also seek the ITC’s advice on the probable impact on the economy of retaliatory restrictions on foreign imports. Id. § 2414(b)(3).

187. In this connection, the USTR must “seek information and advice from the petitioner (if any) and the appropriate representatives” from the private sector in preparing for consultations with the foreign government. Id. § 2413(a) (Supp. III 1985); 15 C.F.R. § 2006.5(b) (1985).
tion. The petition alleged various barriers to imports of fresh-cut roses from the United States by several countries. The USTR gave the following four reasons for not initiating an investigation:

(1) Several of the alleged unfair practices named in the petition had been terminated or were found not to exist; (2) several of the practices had already been dealt with in the context of countervailing duty investigations; (3) many of the allegations of unfair practices were not sufficiently supported by information in the petition; and (4) the petition did not, with respect to several allegations, adequately demonstrate the burden to United States commerce or the causal link between the alleged practice and effect.

Although the USTR rarely declines to initiate a section 301 investigation, it has terminated investigations for a variety of reasons. For example, on one occasion the USTR cited the fact that a countervailing duty case was pending as its reason for terminating an investigation; that is, the allegations made in the section 301 petition (a purported violation of the Subsidies Code by the Canadian Government in the subway car industry) were already being investigated by the Commerce Department in a pending countervailing duty proceeding. On the basis of the fourth factor cited in the Roses case, the USTR discontinued an investigation into allegations that the European Economic Community (EC) and Japan had engaged in an unfair trade practice by purportedly agreeing to divert Japanese steel exports to the United States. The USTR could not find sufficient substantiation for the claim that the EC-Japan agreement unfairly burdened United States commerce.

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189. Id.
190. Id. The Federal Register notice added that: "Where the decision not to initiate is based on the latter two factors, it is without prejudice to the right of the petitioner to re-file when adequate information is developed." Id.
193. Id.
195. See supra note 191 and accompanying text.
197. 43 Fed. Reg. 3,962 (1978). The foregoing reflects some of the ways section 301 petitions have been disposed of at the preliminary stages. The mere filing of the petition and initiation of an investigation have often provided the impetus for cessation of the offending foreign trade practice. See, e.g., 45 Fed. Reg. 41,558 (1980) (EC subsidies on malt exports
Although the statute directs the President to "take all appropriate and feasible action"\textsuperscript{198} to enforce United States rights or to obtain the elimination of the foreign restrictions, the President's discretion is virtually unbridled. If the President does take action, he may impose duties or other import restrictions;\textsuperscript{199} suspend, withdraw, or prevent the application of benefits of trade agreement concessions;\textsuperscript{200} and restrict service sector access authorization.\textsuperscript{201} When negotiation of a dispute has been unsuccessful, the President has ordered the imposition of retaliatory sanctions.\textsuperscript{202} Even then, because the political stakes are frequently high, the President has reconsidered such action pending further negotiations.\textsuperscript{203} With few exceptions, a section 301 petitioner has not received reduced year following filing of section 301 petition). At other times, the President has concluded that practices that are allegedly unfair or unreasonable are neither. \textit{See}, e.g., 50 Fed. Reg. 29,631 (1985) (practices of the member states of the European Space Agency not a violation of section 301). This section 301 action involved allegations of government inducements and assistance in the commercial phase of the European Space Agency (ESA). \textit{Id.} In other words, American practice with NASA was the standard against which the ESA was being measured. Typically, however, bilateral negotiations are entered into between the United States and the foreign country involved, with the offending restrictions sometimes being lifted or substantially modified. \textit{See}, e.g., 49 Fed. Reg. 10,761 (1984) (Taiwan subsidies on rice exports). In lieu of bilateral negotiations and consultations, formal consultations are sometimes held under the auspices of GATT. \textit{See}, e.g., 44 Fed. Reg. 1,504 (1979) (GATT panel report results in discontinuance by EC of minimum import price mechanism for canned fruit juices); 45 Fed. Reg. 51,169 (1980) (GATT Subsidies Code dispute settlement process pursued in connection with EC export subsidies on wheat flour).


\textsuperscript{198} 19 U.S.C. § 2411(a) (Supp. III 1985).
\textsuperscript{199} \textit{Id.} § 2411(b)(2). The President is empowered to take such action either on a nondiscriminatory basis or solely against the offending foreign government. \textit{Id.} § 2411(a)(2)(A).
\textsuperscript{200} 19 U.S.C. § 2411(b)(1).
\textsuperscript{201} \textit{Id.} § 2411(c). The access provision was added by the Trade and Tariff Act of 1984, \textit{See} Pub. L. No. 98-573, § 304(c), 98 Stat. 3002 (1984). Access to the United States service sector, such as telecommunications, is regulated by the federal government through devices such as licenses.
\textsuperscript{202} \textit{See}, e.g., Increase in the Rates of Duty for Certain Pasta Articles from the European Economic Community, 50 Fed. Reg. 26,143 (1985) (preferential EC tariffs on citrus products from the Mediterranean; United States import duties on EC pasta).
\textsuperscript{203} In connection with the dispute over Mediterranean citrus imports to the EC and the proposed duty increase on imports of EC pasta to the United States in retaliation, President Reagan suspended the effective date of the increased duties pending further negotiations. Modification of the Effective Date for Increased Rates of Duty for Certain Pasta Articles from the European Economic Community, 50 Fed. Reg. 33,711 (1985). \textit{See also} Determination...
outright rejection from the USTR. While substantial doubts linger over whether the relief received under section 301 has been satisfactory to petitioners, these doubts may soon vanish in light of the five self-initiated section 301 cases in 1985 and the two presidential section 301 actions in 1986.

It is highly debatable whether section 301 meets the "intelligible principle" standard for delegations of legislative authority to the President given the section's sweeping powers. Of course, those powers are one of the reasons why section 301 is the Reagan administration's "statute of choice."  

III. THE EROSION OF EXECUTIVE BRANCH STATUTORY DISCRETION AND THE RISE OF VRAs

Against the foregoing backdrop, three trends emerged. The first trend was Congress' attempt to limit broad executive discretion. The second consisted of resort to pressure group politics by domestic industries. The third involved the re-emergence of broad executive discretion as a result of increased use of VRAs to resolve international trade disputes.

The first trend emerged during the 1970s and 1980s when Congress trimmed back the executive branch's discretionary powers considerably by enacting the five major trade relief statutes discussed above. It is puzzling why Congress continues to give the executive branch any discretion under these five trade laws, especially given the absence of any support-

Under Section 301 of the Trade Act of 1974, 49 Fed. Reg. 45,733 (1984), in which the President postponed taking retaliatory action against Argentina for its restrictive mail courier practices pending further negotiations. A similar eleventh-hour cancellation of planned retaliatory tariffs occurred in the EC-U.S. dispute over entry of Spain and Portugal to the EC in 1986. See supra note 19.

204. See, e.g., Coffield, supra note 166, at 382-85, in which the author notes that prior to passage of the Trade Agreements Act of 1979, the majority of the section 301 cases were never satisfactorily resolved from the American point of view. The author further notes:

[No section 301 case to date has led to retaliation by the U.S. Government against the complained of act, practice, or policy of the foreign government. Nor have several of the cases been resolved successfully or even partially from the point of view of the petitioner. Many cases with a partial action on the part of the foreign government, were terminated because of the de minimis nature of the harm suffered, or were rather unsatisfactorily resolved through the GATT dispute settlement mechanism.

Id. at 399.

205. See Section 301 Discussion, Export Controls, Delegates' Trade Votes Topics of ABA Meeting, 3 Int'l Trade Rep. (BNA) 1084 (1986).
ing rationale for such discretionary power. Indeed, congressional delegation of broad discretionary power is contraindicated by the legislative history of these laws. For example, in a very telling remark, the Senate Finance Committee Report on section 301 noted that “relief ought not to be denied for reasons that have nothing whatever to do with the merits of the case as determined under United States law.”206 This statement clearly evidences a congressional desire to depoliticize the escape clause relief decision making process. The tenor of the Senate Finance Committee’s Report is that relief should ordinarily be granted following an affirmative ITC determination, with the only question being the form and amount of such import relief.207 Equally telling in this regard is the further observation by the Senate that “no United States industry which has suffered serious injury should be cut off from relief for foreign policy reasons.”208 The “for policy reasons” ground for disapproving relief under section 337209 is puzzling in light of the comments made in the legislative history to Section 201. Nevertheless, from the standpoint that the executive branch acts in the international trade field pursuant to a congressional delegation of power, these five trade laws at least cloak the executive in a constitutional mantle.

Because of the considerable amount of discretionary power still left to the executive branch under these five trade laws, a second and more serious trend has emerged. Although Congress has curbed executive branch discretion to some extent, petitioning domestic industries continue to be denied trade relief under the statutory mechanisms for securing such relief. This result has at times been attributable to the exercise of discretionary executive branch power in cases in which American producers and manufacturers had successfully established their entitlement to relief under the applicable trade statutes. At times this result was simply due to a failure of the petitioner to establish its entitlement to relief. Out of frustration with the seemingly arbitrary administrative process, or maybe out of expediency, American industries have resorted more and more to pressure-group politics within Congress, which starts the VRA cycle.

The VRA cycle begins with calls for protectionist trade legislation by one or more members of Congress who raise the overworked specter of foreign imports displacing thousands of honest, hard-working Ameri-
cans. The odds that this legislation would ever be enacted are at best remote. The White House, in seeming partnership with these protectionist elements within Congress, responds in knee-jerk fashion by negotiating a VRA in order to stem the protectionist tide. Moreover, the President could always veto such legislative developments if he was truly committed to GATT free trade principles. Instead, the White House and the minority factions on the Hill perform a VRA pas de deux that is as politically expedient as it is undemocratic.

From this second trend has emerged a third and more dangerous trend: the ever increasing resort to VRAs by the President to resolve international trade disputes, which displace the statutory vehicles set up by Congress for securing trade relief and replacing whatever statutory discretionary power the executive branch lost during the seventies and eighties.

IV. THE CASE AGAINST VRAS

As the preceding discussion has shown, the trade relief process is not only complex but unpredictable, given the inherent vagaries of executive branch discretionary power. Domestic industries perceive that the executive branch arbitrarily and capriciously administers United States trade laws whenever it exercises its prerogatives under these laws to deny trade relief. Conversely, whenever relief is granted, our foreign trading partners raise the red flags of protectionism and trade discrimination. Finally, United States citizens are left with the impression that interest group politics continue to carry the day.

Given the difficulty, uncertainty, and expense of obtaining relief under current United States trade legislation—especially under the escape clause and section 301, United States industries with political clout have resorted to pressuring Congress and the executive branch for protection outside the context of existing trade laws in the form of VRAs. President Reagan's response has been to succumb to this pressure. For example, he has negotiated restraints on exports of autos, textiles, and steel to the United States.\(^{210}\) One of the most disturbing developments is that American producers and manufacturers may be turning their backs on the statutory vehicles created by Congress for securing trade relief in preference for VRAs.\(^{211}\)

\(^{210}\) See G. Hufbauer, D. Berliner & K. Elliott, supra note 2, at 117-84, 249-62.

\(^{211}\) See, e.g., Administration to Seek VRA with Sweden, Specialty Steel Producers Withdraw Petition, 3 Int'l Trade Rep. (BNA) 403-04 (1986):

As a result of this initiative, U.S. specialty steel producers have withdrawn without prejudice their section 301 petition that charged that Stockholm was heavily sub-
One response within Congress has been the introduction of trade legislation that eliminates or substantially curtails executive branch discretion to deny trade relief under sections 201 and 301. Another response has been to introduce protectionist measures to reduce the large trade deficits the United States has with some of its major trading partners. By amending sections 201, 301, 337, and the antidumping and countervailing duty laws to eliminate or at least substantially curtail the discretionary power of the executive branch to grant or withhold relief, Congress would be taking a major step toward restoring predictability to the administrative process and bringing greater coherence to United States trade policy. The elimination of most executive branch discretionary powers contained in these laws would be in the best interests of representative democracy, for the simple reason that public confidence in them as meaningful tools for obtaining trade relief would be enhanced.

A failure by Congress to amend the trade laws to reduce executive discretion, and to resort to protectionist trade measures instead, ironically may lead to further VRAs. The mere threat of passage of such protectionist legislation will result in the negotiation of VRAs by the President with exporting countries in order to stem perceived protectionism. A classic example of just such a development is the VRA on automobiles negotiated between the United States and Japan in 1981.

On June 12, 1980, the United Automobile Workers, joined by Ford Motor Company, filed a section 201 petition with the ITC, alleging that foreign imports were seriously injuring the domestic passenger automobile and truck industry. The ITC determined by a three-to-two vote that the passenger automobile and lightweight truck industries were not being seriously injured as a result of imports. A majority of the Commission found the decline in demand for new automobiles and lightweight trucks to be attributable to general recessionary conditions in the


213. See Yeutter Opposed to Senate Omnibus Trade Bill, Offers Point-By-Point Criticism, supra note 213, at 475.


215. Id. at 34-35.
United States, as well as to a shift in consumer tastes to smaller, more fuel-efficient models.\textsuperscript{216}

Following the Commission's decision, the auto industry unsuccess­fully pressured the Carter administration for import restrictions on foreign automobiles.\textsuperscript{217} Undaunted, the automobile industry was successful in getting Senators Danforth and Bentsen to introduce legislation in February 1981 to limit auto exports from Japan to 1.6 million units per year for the three-year period beginning in 1981.\textsuperscript{218} On May 2, 1981, the Japanese Ministry of International Trade and Industry announced that it had reached a VRA with the Reagan administration under which the Japanese would reduce automobile exports to the United States for a one-year period to 1.68 million units, a reduction of 7.7 percent from the 1980 level of 1.82 million units.\textsuperscript{219} This VRA was renewed for a second, third, and fourth year (with a slight ceiling increase in the fourth year),\textsuperscript{220} in the face of threats from Congress to pass legislation limiting automobile imports.\textsuperscript{221} In March 1985, President Reagan decided not to ask the Japanese to renew the automobile VRA for a fifth year. Nevertheless, in the face of continuing pressure from Congress to enact some form of protectionist legislation, Japan announced that it would limit automobile exports to the United States to 2.3 million units in 1985.\textsuperscript{222}

As the automobile case illustrates, VRAs pose a serious threat to representative democracy. Protection was provided for the automobile industry, but not in the constitutionally prescribed manner. The appropriate vehicle for obtaining relief in the automobile case was the section 201 escape clause. When relief was not forthcoming, the petitioners' recourse at that point should have been clear: a petition to Congress for a change in the law. Instead, they petitioned the President, who was more than willing to oblige with an incredibly costly VRA. There was no public discussion within Congress of the costs of the automobile VRA, no

\begin{footnotesize}
\begin{enumerate}
\item[216.] \textit{Id.} at 35.
\item[217.] Instead, the administration authorized trade adjustment assistance benefits. \textit{See} G. HUFBAUER, D. BERLINER & K. ELLIOTT, \textit{supra} note 2, at 250.
\item[218.] S. 396, 97th Cong., 1st Sess. (1981).
\item[219.] G. HUFBAUER, D. BERLINER & K. ELLIOTT, \textit{supra} note 2, at 250.
\item[220.] \textit{Id.} at 251. The export limit was raised from 1.68 million to 1.85 million automobiles during the period from April 1, 1984, to March 31, 1985. \textit{Id.}
\item[222.] G. HUFBAUER, D. BERLINER & K. ELLIOTT, \textit{supra} note 2, at 251.
\end{enumerate}
\end{footnotesize}
majority vote on the propriety of such protectionism, and no supervision by Congress of the President in an area where Congress possesses plenary constitutional power. The automobile VRA effectively cut off all discussion of the issue.

Arguably, that is what Congress wanted. Congress in the main has abdicated responsibility for supervising the executive's conduct in the international trade field as it relates to VRAs, knowing that the institutional costs of policing the White House are high. Decisions are made expeditiously without the annoyance, and the possible embarrassment, of public debate.

By contrast, if higher tariffs had been imposed on imported automobiles, they would have been discussed, debated, and enacted by Congress—the constitutionally prescribed manner for regulating international trade. Tariffs have a high political profile. A consumer knows the effect a ten percent duty has on the price of an imported item. Tariffs also allow market forces to continue to operate, provided they are not prohibitively high, because a foreign competitor can adjust its costs in order to absorb the tariff and still penetrate the United States market.

VRAs, on the other hand, are embraced because they have such low economic visibility. Regardless of a foreign firm's efficiency, additional units of a foreign firm's product are barred from entry into the United States once the quota ceiling is reached. This artificial scarcity in turn leads to higher prices. But because the high costs of VRAs are not publicly debated or discussed within Congress, they do not have high political visibility.

This feature encourages Congress to avoid the politically painful task of enacting limits on the export of certain goods to the United States. Congress, instead, has been more than happy to let the President play the heavy, knowing full well the likely response were the average voter to learn that (1) the cost to consumers of the VRA for the domestic automobile industry was $5.8 billion in 1984 alone;223 (2) the cost to consumers of each automobile worker job saved in 1984 was $105,000 (in an industry in which the workers earn far more than the average American consumer of automobiles);224 (3) the cost to consumers of VRAs negotiated on behalf of the steel industry was $6.8 billion in 1984;225 and (4) the cost to consumers of each steelworker's job saved was $750,000 in

224. Id.
225. Id.
If Congress performed its constitutionally designated role, it would publicly air the economic costs of such protectionism and, more importantly, halt executive branch subversion of the constitutionally created process for setting trade policy. In addition, the unquestionable inconsistency of VRAs with our international obligations under the GATT would be publicly discussed. From all of this, a coherent trade policy might emerge to replace the present fragmented, ad hoc system. It would also restore Congress' power to regulate international trade, which is its exclusive constitutional preserve.

Can VRAs be outlawed? Despite disingenuous decisions such as Consumers Union of U.S., Inc. v. Kissinger, in which the District of Columbia Circuit concluded that a steel VRA between the United States and Japan was not an enforceable import restriction because it was purely “voluntary,” Congress could pursue several tacks in dealing with the VRA threat. First, in recognition of the insidious effect VRAs have on the constitutionally mandated process for regulating international trade, Congress should prohibit the President from accepting, negotiating, or concluding VRAs unless specifically authorized by statute to do so. That Congress has the political will to enact such legislation is illustrated by the Steel Stabilization Act of 1984. In 1984 the ITC reached affirmative section 201 escape clause determinations regarding some products on behalf of the domestic carbon steel industry in Carbon and Certain Alloy Steel Products. Although President Reagan formally denied the industry relief, he did promise to negotiate steel VRAs with several of the major steel-producing countries. By the end of

226. Id.
227. VRAs are a major departure from GATT's article I most-favored-nation principle, i.e., that trade restrictions apply equally to imports from whatever source. VRAs are also a direct violation of GATT's article XI prohibition against import quotas. In addition, because VRAs are purportedly voluntary, no compensation is required under GATT article XIX. See generally J. JACKSON, supra note 37, at 255, 305, 564.
230. One such statutory authorization is found in section 201, which permits the President to negotiate orderly marketing arrangements, a euphemism for VRAs. See supra note 126 and accompanying text.
1984, VRAs had been negotiated with seven countries. In an apparent fit of pique at the domestic steel industry’s seeming unwillingness to adjust, as well as anger at the steel industry’s purchase of nonsteel-related companies (such as oil companies), Congress enacted title VII of the Trade and Tariff Act of 1984. Title VII requires as a condition for retaining the authority to enforce these VRAs that the President certify annually that the domestic steel industry “taken as a whole” has reinvested “substantially all of its net cash flow” to modernize its carbon and alloy steel facilities. If Congress could act against VRAs negotiated on behalf of the steel industry, then it should be capable of taking the next step by outlawing VRAs across the board.

On a less ambitious power-of-the-purse tack, commentators have suggested that Congress withhold appropriation of all funds to the Customs Service for monitoring compliance with any VRA. It has also been proposed that the Sherman Act be amended to make it an antitrust violation for foreign producers to form a cartel in order to comply with a VRA. Even if such cartels were formed because they were mandated by the foreign producers’ government, the defense of sovereign compulsion would no longer be available to those producers under this proposal.

Perhaps the most potent reform proposal of all, but admittedly the most problematic to enact, would be the elimination of all executive branch discretion to withhold or deny trade relief under the five major trade relief laws. The benefit of such legislation vis-à-vis VRAs would be a salutary one. By insuring statutorily mandated relief to a domestic party that establishes its case for relief under these laws, the incentive to seek discretionary relief under a VRA would be diminished if not altogether eliminated. Once a petitioner has established its case for trade relief, the relief should not only be mandatory, but its form should be spelled out with specificity and entrusted to an appropriate (and in-


235. The carbon steel industry has been the beneficiary of some form of protectionism since 1969. See G. HUFBAUER, D. BERLINER & K. ELLIOTT, supra note 2, at 154-84.

236. See id. at 174.

237. See supra note 232.

238. The President is required to make this finding for each of the major American steel producers. See H.R. REP. No. 1089, 98th Cong., 2d Sess. 7 (1984).


240. Id. at 102.

241. Id.; T. TUMLIR, supra note 229, at 48-50.
dependent) administrative agency, such as the International Trade Commission, to administer. Furthermore, legislation should afford judicial review to insure that any determination or relief decision is made in a rational manner.

If domestic manufacturers were aware that their meritorious petitions would bring them the relief provided by existing United States trade legislation, the alarming trend of greater resort to VRAs might be halted. Whether the same would be true for domestic industries that were unsuccessful at the administrative level on the merits of their petitions—such as the automobile industry in its 1980 section 201 petition—would depend in part on the availability of judicial review. If an unsuccessful petitioner had recourse to the courts, this would serve to insure that the loser at the administrative level had not been the victim of arbitrary or capricious agency action. If a thorough administrative and judicial review process is afforded and American producers and manufacturers still consider themselves losers under United States trade laws, perhaps they need to rely less on waging losing legal battles and instead concentrate their energies on becoming world-class economic competitors.

Proposals for more aggressive, less discretionary trade laws may fail to take into account the long-term foreign policy fallout from such legislation. If ultimately enacted, such proposals may result in increased friction between the United States and its trading partners, possibly triggering a trade war. Must the trade-off for more representative democracy in the international trade process mean little or no executive branch discretion in that process? The answer must be an unqualified "yes" when one considers that the aftermath of VRAs has been an electorate blissfully ignorant of the insidious effect VRAs have had on the democratic political process and the United States economy. VRAs are a blatant circumvention of political discussion. VRAs are extremely expensive and represent a hidden tax on every American consumer. A coherent foreign trade policy can emerge only from broad congressional discussion. Having flexibility to resolve trade disputes is unquestionably desirable, but not in a representative democracy when the results are quantitative restraints on exports, "voluntarily" negotiated government to government in response to a hollow threat from a few within Congress to legislate higher restraint levels. A coherent foreign trade policy can take shape only when all of the constitutionally designated actors in formulating that policy—Congress and the President—have given meaningful input. The empty threats from a handful of members of Congress to push through protectionist trade legislation does not constitute a political
discussion at an appropriate level. In short, international trade policy is a zero-sum game in which increased executive branch discretion to shape and effect trade policy necessarily means a decline in representative democracy.

CONCLUSION

Economic foreign policy requires long-term consideration. The hallmarks of a sound economic foreign policy are continuity and stability, not short-term considerations of domestic expediency. Voluntary trade restraint agreements are short sighted, insidiously erode the integrity of national law in Western democracies, and permit discrete legislative minorities to obtain political results that a legislative majority is publicly unwilling to support. At least one solution to this problem is the elimination of the Executive's prerogative to enter into voluntary restraint agreements. While a reaffirmation of the GATT article I unconditional most-favored-nation principle would be a symbolic first step, the only legally effective curb to trade discrimination will be abolition of executive branch discretionary power to conclude VRAs. Threats from segments of Congress to enact protective trade legislation will not cease, but passage of such legislation will be far less frequent than VRAs. More importantly, if such protectionist trade legislation is enacted, it will at least be a reflection of democratic choice, not executive prerogative initiated by pressure group logrolling. Voluntary restraint agreements should be prohibited not only because they hinder the formulation of a coherent economic foreign policy, but also because they put representative democracy at risk.