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The Clandestine Negotiation of Voluntary Restraints on Shoes from Italy: An Augury of Future Negotiations under the Trade Reform Act of 1973?

RALPH OMAN*

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On April 10, 1973, the Nixon Administration and the House Committee on Ways and Means under Chairman Mills unveiled the long-awaited Trade Reform Act of 1973. Among its most controversial aspects is a predilection for deference to the President's discretion. The normal safe-
guards on which the public relies to restrain executive whim or bad judgment—open hearings and congressional debate—have atrophied under the proposed legislation. Sections 112(a) and (b) of the Trade Reform Act\(^8\) provide for diverse inputs as an aid to the executive prior to the negotiation of new trade agreements,\(^4\) but the legislation specifically states that meetings with “selected industry, labor and agricultural groups” be exempt “from the requirements relating to open meetings and public participation ... of the Federal Advisory Committee Act.”\(^5\) The official explanation, released by the Committee on Ways and Means, maintained that “[o]pen meetings and public participation would compromise the U.S. negotiating posture with foreign countries and inhibit the flow of information from the advisory groups to the President.”\(^6\)

Doubtless, such disadvantages would flow from frank and open public debate. Disadvantages, however, also attend secret negotiations, as witnessed by the Administration’s unhappy experience with the sale of wheat to the Soviet Union.\(^7\) This episode might serve to sour the Administration’s taste for secret negotiations and lead to an acknowledgement that

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4. These include the Departments of Agriculture, Commerce, Defense, Interior, Labor, State, Treasury, and the Special Representative for Trade Negotiations. In addition, the President and the federal agencies are authorized to seek the advice of “selected industry, labor, and agricultural groups.” Id. § 112(a) and (b).
5. Id. § 112(b). The Federal Advisory Committee Act was passed on Oct. 6, 1972, in an attempt to streamline the control and usefulness of the: numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government ... that ... are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.
shared responsibility has its merits. When presented with a \textit{fait accompli}, Congress has a tendency to fault the achievement. If, on the other hand, Congress and the public were involved in a meaningful way in the negotiations the prospects of widespread support would be brighter.

Thus, in its deliberations on the Trade Reform Act of 1973, Congress must weigh these considerations and must ask whether untidy public discussions would be too costly a luxury in future negotiations with U.S. trading partners. The subsequent discussion of the secret negotiations on Italian shoe export limitations illuminates the problem and suggests an answer to the dilemma posed by some aspects of the Trade Reform Act of 1973.

\section*{I \hspace{1em} BACKGROUND}

In 1971, the United States suffered its first trade deficit since 1888,\footnote{Wall St. Journal, Jan. 26, 1972, at 5, col. 2; Address by President Nixon, Nationwide Radio and Television, Aug. 15, 1971, in \textit{65 DEP'T STATE BULL.} 253 (1971). In 1964, the trade surplus totalled \$7 billion; in 1971, the deficit totalled \$2 billion. \textit{Hearings on H.R. 1498 Before a Subcomm. on Departments of State, Justice, and Commerce, the Judiciary and Related Agencies of the House Comm. on Appropriations, 92d Cong., 2d Sess., pt. 3, at 359 (1973) (Statement of Harold B. Scott, Assistant Secretary of Commerce for Domestic and International Business).} and this dramatized the protectionist cries that had issued from many segments of the economy.\footnote{The Trade Act of 1970, H.R. 18970, 91st Cong., 1st Sess. (1970) [hereinafter cited as \textit{Trade Act of 1970}], was one of the most significant manifestations of the growing protectionist sentiment. The Act is popularly known as the Mills Bill, despite disclaimers from its namesake.} The U.S. footwear industry was among the most outspoken in calling for government intervention—in the form of higher tariffs and quota restrictions—to protect the industry from rising imports,\footnote{Wall St. Journal, July 7, 1971, at 12, col. 2; Journal of Commerce, Jan. 31, 1972, at 9, col. 4.} particularly imports of nonrubber footwear from Italy.

In June of 1971, presumably in response to these domestic pressures, President Richard Nixon dispatched Ambassador David Kennedy, the former Secretary of the Treasury, to Europe to seek a means of correcting the mounting U.S. international trade imbalance.\footnote{Journal of Commerce, July 9, 1971, at 1, col. 6.} On the question of footwear, the Ambassador had available for use two powerful tactical weapons—the temporarily stalled Trade Act of 1970\footnote{The Trade Act of 1970, \textit{supra} note 9. It was narrowly defeated in 1970 and reintroduced in the second session as H.R. 20, 92d Cong., 2d Sess. (1971).} and a Tariff Co-
mission finding that gave the President broad powers to increase duties on imported footwear.\textsuperscript{18}

On August 21, 1970, the House Committee on Ways and Means issued its report\textsuperscript{14} accompanying the Trade Act of 1970, and urged the imposition of quantitative restrictions, or quotas, on all imports of nonrubber footwear.\textsuperscript{16} The import limitations were to take effect in 1971, and were to be equal to the average quantity imported annually during the three calendar years 1967 through 1969.\textsuperscript{16} For each of the subsequent five years, the bill would limit increases in the total imports to five percent of the total quantity permitted in the preceding year.\textsuperscript{27}

An important adjunct to this limitation was a provision authorizing the President to negotiate agreements with foreign countries.\textsuperscript{18} This statutory provision was aimed at the regulation of the offending imports.\textsuperscript{29} Once an agreement on limitations was reached, the quotas imposed by the bill would be lifted.\textsuperscript{20} Apparently encouraged by the success of the “voluntary” export quotas arranged with foreign steel manufacturers,\textsuperscript{21} the authors of the Trade Act of 1970 felt that:

> these provisions are designed to provide a mechanism for establishing a reason-
> able and effective limitation on United States imports on . . . non-rubber 
> footwear products . . . . It is intended that, insofar as may be possible, the 
> limitation of these imports will be accomplished through the negotiation of 
> . . . such agreements . . . .\textsuperscript{22}

Thus the President was given substantial discretion to negotiate either formal agreements or informal arrangements\textsuperscript{23} “regulating by category the quantities of . . . articles which may be exported to the United States.”\textsuperscript{24} The bill appeared designed to prod the foreign governments into adopting export controls similar to those arranged for steel.

During the period that the House Ways and Means Committee was drafting its bill, the President, under the authority vested in him by sec-

\begin{itemize}
\item \textsuperscript{13} U.S. Tariff Comm’N, Pub. No. 359, Nonrubber Footwear (1971) [hereinafter cited as Nonrubber Footwear].
\item \textsuperscript{14} H.R. REP. No. 1435, 91st Cong., 2d Sess. (1970) (accompanying H.R. 18970) [hereinafter cited as H.R. REP. No. 1435].
\item \textsuperscript{15} Id. at 5.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id. at 35.
\item \textsuperscript{19} Id. at 36.
\item \textsuperscript{20} Id. at 35.
\item \textsuperscript{21} Letter from Secretary of State Dean Rusk to Wilbur Mills, Jan. 14, 1969, in 60 Dep’t State Bull. 93 (1969).
\item \textsuperscript{22} H.R. REP. No. 1435, supra note 14, at 36.
\item \textsuperscript{23} Id. at 40.
\item \textsuperscript{24} Trade Act of 1970, supra note 9, § 202(a).
\end{itemize}
tion 301(b)(1) of the Trade Expansion Act of 1962, had requested the Tariff Commission to "make an investigation to determine whether, as a result in major part of concessions granted under trade agreements, increased imports were causing or threatening to cause serious injury to the U.S. industry producing men's and women's leather footwear."  

The Tariff Commission reported to the President on January 15, 1971. The investigation had resulted in an evenly divided Commission. For a variety of reasons not material to the study, Commissioners Clubb and Moore had found that the increased imports had resulted in major part from the trade concessions and that these imports were a major factor in causing or threatening to cause serious injury to the domestic shoe industry. In consequence, they recommended an increase in the rate of duty on imported footwear ranging from 10 to 18 percent. On the other hand, both Presiding Commissioner Sutton and Commissioner Leonard found in the negative. An equally divided Commission finding is the equivalent of no finding, and under section 330 of the Tariff Act of 1930, the President is free to choose either as the finding of the Commission.  

Thus armed with two powerful "persuaders," Ambassador Kennedy discussed with the Spanish and Italian governments the possibility of self-limiting arrangements that would avoid the need for restrictive measures by the United States. With him on the trip were Theodore Gates, Assistant Special Trade Representative, who dealt with the Spanish authorities, and Donald Webster, an aide to the then White House Foreign Economic Advisor, Peter G. Peterson, who talked with Italian authorities.

27. NONRUBBER FOOTWEAR, supra note 13, at 1.  
28. Id. at 3.  
29. Id. at 22-23.  
30. Id. at 24a.  
31. Id. at 25-47.  
33. Id.; NONRUBBER FOOTWEAR, supra note 13, at 3. See note 150 infra and accompanying text.  
34. Journal of Commerce, July 9, 1971, at 1, col. 6, and at 17, col. 8. Spain refused to restrain exports and pointed to its trade deficit with the United States. The United States was not inclined to press the issue, since renegotiation of the military base agreements for Torrejón and Rota was imminent. Telephone Conversation with Donald Webster of U.S. Dep't of the Treasury in Washington, D.C., Jan. 10, 1973 [hereinafter cited as Webster].  
II

THE AGREEMENT

On July 2, 1971, shortly after the negotiators returned to the United States, the Italian Ministry of Foreign Trade disseminated a circular to the local Chambers of Commerce (which are roughly equivalent to the U.S. Department of Commerce Field Offices) that required Italian shippers of nonrubber footwear to the United States to provide the Italian government with statistical data on total 1970 and 1971 exports. Once this information was provided, the shippers would qualify for a “visa,” issued by the local Chamber of Commerce, permitting further exports. The text of the circular, in the unofficial translation of the U.S. Embassy in Rome, read as follows:

As is known, the United States Government has for some time been studying the possibility of adopting restrictive measures on imports of non-rubber footwear into the United States at the request of the US industry.

Considering the grave consequences which such measures could have on our exports of shoes, Italy being the most important supplier of the US market, and the need to obtain as soon as possible information to prepare in advance appropriate instruments to avoid the possibility of unilateral restrictive measures by the competent US authorities, this ministry has decided as of July 10, 1971, to make exports of non-rubber footwear to the United States subject to the presentation to Customs of the Foreign Exchange Certificate (Export Form A) and invoices, accompanied by a “visa” from the Chamber of Commerce, Industry, Handicraft and Agriculture having jurisdiction for the area of the shipper.

On the basis of an understanding with the Ministry of Industry, the Chambers of Commerce will provide these visas, at the request of the interested shipper, and after affixing the appropriate “visa” on the requested documents, will retain one copy of the vised invoice.

The issuance of these visas is subject to presentation of documentation showing the firm’s shipments in 1970 and in 1971 up until the time of the first request for the new statistical visa. Such documentation need be submitted to the Chamber of Commerce only at the time of the first request for a visa and must be supported by invoices certified by Customs covering these past shipments. At the end of each month all Chambers of Commerce will transmit to the Ministry of Foreign Trade, Director General of Trade Agreements, a report on all visas issued for the related period, providing the names of firms, their type of activity—whether industrial or commercial—with the number of pairs of shoes shipped, showing unit and total value as stated on the documentation.

The Chambers will also transmit to the Ministry all data as reported for 1970 and 1971 exports to the US which have been submitted by these firms in connection with the first application for a visa.

The response to the Italian action was swift, but fraught with misconceptions that went uncorrected for various domestic political reasons. In the United States it was initially believed that the circular had covered

36. Telegram from Graham Martin, United States Ambassador to Italy, to Secretary of State William Rogers, July 2, 1971.
37. Id.
both shoes and textiles;\textsuperscript{38} indeed, not until ten days after the circular was released, did the \textit{New York Times} correct its error.\textsuperscript{39} U.S. officials released the news of the arrangement informally through selected reporters.\textsuperscript{40} The impression these officials sought to give was that Italy had undertaken this step unilaterally.\textsuperscript{41} Had the arrangement been construed as a bilateral one certain legal consequences would have followed that the U.S. officials were anxious to avoid.

The gravest U.S. public misconception concerning the arrangement centered on what precisely the Italian government had agreed to do. One commentator declared that "Italy has decided to limit its exports of textiles and footwear to the United States in answer to alleged threats from Washington of unilateral restrictive measures."\textsuperscript{42} This comment also alleged that the statistical visas would be authorized only if exports were held within five percent of the amount exported to the United States in 1970.\textsuperscript{43} This of course was precisely the level the Mills Bill deemed acceptable.

President Nixon and Representative Wilbur D. Mills, Chairman of the House Ways and Means Committee, publicly stated that Italy indeed had agreed to limit exports. The President was reported to believe "that [the] Italian Government decision to restrict shoe exports to the United States may have solved a problem for the American shoe industry and relieved some of the pressure for Congress to impose limitations."\textsuperscript{44} Furthermore, White House officials said that "Mr. Nixon was delighted with the Italian decision to hold shoe shipments this year to about their level of last year."\textsuperscript{45}

Similarly, at an AFL-CIO conference on jobs, Chairman Mills claimed that he was responsible in part for "the Italian decision to limit shoe exports to the United States."\textsuperscript{46} He said that at the request of the U.S.

\textsuperscript{38} N.Y. Times, July 5, 1971, at 31, col. 6. Perhaps the arrangement would have included textiles had Italian exports been growing at a rate in excess of five percent annually, which they were not. E(uropean) E(conomic) C(ommunity) Press Release No. 843 (new series), July 6, 1971. Conceivably, the Italian authorities had told Ambassador Kennedy that textiles would also be monitored, but reconsidered in light of the anticipated domestic outcry. To do so would have been an unnecessary and politically foolhardy act, since the rate of expansion was already within acceptable limits. \textit{Id.}

\textsuperscript{39} N.Y. Times, July 12, 1971, at 15, col. 1.

\textsuperscript{40} Gates, supra note 35.


\textsuperscript{42} N.Y. Times, July 5, 1971, at 31, col. 6.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} N.Y. Times, July 12, 1971, at 15, col. 1.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} N.Y. Times, July 13, 1971, at 16, col. 4.
shoe industry he had discussed the possibility of restraints with Italian officials, and "informed the Administration that a voluntary restraint program might be possible." 47

In light of what followed, it is important to note that neither the President nor Chairman Mills were precise in their announcements. Both spoke in terms of "limiting shoe exports" without specifying what in fact would be limited—the number of pairs shipped or their dollar value. Subsequently, this distinction would prove decisive. 48

These public assertions left the Italian Government in a difficult position.49 On the face of the circular's contents the Italian Government had only to admit that it was requiring the "statistical visa" to collect data "to prepare in advance appropriate instruments to avoid the possibility of unilateral restrictive measures." 50 A public admission of anything more would have had two serious consequences. First, it would have elicited a strongly negative domestic response,61 and, second, it would have constituted a breach of Italy's obligations under the Treaty of Rome.62 Thus, to avoid the former, Italy repeatedly denied that it had agreed to limit shoe exports.63 The government reportedly criticized the Italian press for picking up the "voluntary restraints" terminology used by the U.S. newspapers.64 Efforts to defuse domestic reaction were aided by the fortuitous timing of the announcement—at the height of the Italian vacation period when many critics were out of the capital.65

To forestall the latter reaction—from the European Economic Community (EEC)—the Italian Ministry for External Trade assured an EEC official in Rome that the statistical visa was merely part of a data collecting procedure, and, furthermore, that the visas would be issued "without limitation."66 In addition, the Italian representative to the EEC in Brussels discussed the matter with other member states and claimed "that [the Italians] are only giving statistical visas for the shoes and it is not technically a self-limitation."67 Whatever the nature of the arrangement, said

47. Id.
48. See notes 86-96 infra and accompanying text.
49. Webster, supra note 34. "Our problem was trying to get credit on the home front for something that Italy was unwilling to admit publicly." Id.
50. See note 36 supra and accompanying text.
51. Id.
52. See notes 109-19 infra and accompanying text.
54. Gates, supra note 35.
55. Id.
57. EEC Telegram, supra note 47. The official Italian explanation to the EEC Com-
the EEC officials, "the Italian restraint commitment toward the United States so far is a moral rather than a binding one ...."\textsuperscript{58}

Despite these assurances, the EEC authorities charged with the Community's common commercial policy\textsuperscript{59} decided "to watch and wait. .... It has to be seen in experience how the statistical visas will work and what measures, if any, the Community will then have to take."\textsuperscript{60} The Italian position before the Community suffered a setback with reports from Rome that "the Ministry for External Trade [had] 'recommended' footwear exporters to set a 5 percent limit on annual growth in exports to the American market."\textsuperscript{61} The report continued:

Technical circles consider that these various elements confirm that in principle, the Italian authorities have decided to keep the average increase of exports to the United States as far as textiles and footwear are concerned within a limit of 5%. At the American internal level, the administrative departments involved have been asked to draw up monthly reports on the evolution of imports in these sectors, so that if they exceed the percentage which is considered acceptable, restrictive measures can rapidly be taken. Thus the Italian statistical measures aim at obtaining the data needed for a possible response to American threats: this assuming of course that the 5% rate of increase is not exceeded ....\textsuperscript{62}

Because of these contradictory and vague governmental assertions, proof of the existence and meaning of an arrangement or agreement must be sought elsewhere. Two sources of information are available—expert opinions of those who dealt with the matter or who have a continuing interest in the matter, and official import statistics of the U.S. Department of Commerce.

III

THE OPINIONS OF THE EXPERTS

Italian commentators claimed that at the time the statistical visa requirement was imposed, exports to the United States had peaked.\textsuperscript{63} They attributed this occurrence to a sharp rise in manufacturing costs, due largely to wage increases.\textsuperscript{64} Therefore the fact that the rate of increase of shoe exports tapered off could be unrelated to the alleged restraints.

Several U.S. commentators share this view and state that Italy, aware

\textsuperscript{58} Journal of Commerce, July 8, 1971, at 3, col. 2.
\textsuperscript{59} See note 114 infra and accompanying text.
\textsuperscript{60} EEC Telegram, supra note 47.
\textsuperscript{62} Id.
\textsuperscript{63} Journal of Commerce, July 9, 1971, at 1, 17, col. 8.
\textsuperscript{64} Id.; Gates, supra note 55; Webster, supra note 34.
of the changed circumstances of the market, had devised a means of "papering over the domestic politics of both nations." According to Donald de Kieffer, the Italians, for a variety of reasons besides labor costs, foresew the peaking out of exports to the United States. First, they were aware of a general deterioration of the Italian economy, plagued with strikes and antiquated corporate management techniques. Second, they noted the increased competition from Spain and Brazil. And third, they had to contend with the greatly increased cost of leather—as much as a 250% increase. These facts all tend to support the conclusion that the subsequent stable level of exports to the United States was not the result of any agreement to restrain shoe exports.

This conclusion is confirmed by the retrospective observations of Donald Webster, who accompanied Ambassador Kennedy during the Italian negotiations. He declares forthrightly that the Italian Government "verbally promised to hold increases in the volume of their shoe exports to 5 percent." He notes, however, that Italy knew it was "a hollow promise" at the time, since their shoe industry had encountered serious difficulties. Nonetheless, Mr. Webster asserts that the agreement was valuable to the United States for domestic political reasons, since it placated those on Capitol Hill who were calling for quantitative restrictions.

Similarly, the Information Expert of the EEC's Washington headquarters, Barbara Sloan, also asserts that the EEC initially suspected a meaningful arrangement with the United States, but that this suspicion later proved unfounded. As proof of this assertion, Mrs. Sloan pointed to the Commission's decision to drop proceedings against Italy for violating the common commercial policy of the Treaty of Rome.

65. Gates, supra note 35.
67. According to Mr. de Kieffer, this increase in the cost of leather was caused by Argentine tax policies that contributed to the decimation of the Argentine herds. Id.
68. Webster, supra note 34.
69. Id.
70. Id.
71. Id.
73. Id. The Italian Embassy in Washington, D.C., proved a less satisfactory source of information. On December 28, 1972, when this author inquired of the Embassy's
Thus, the opinions of the experts suggest that the Italian Government perceptively gauged future market trends and offered a meaningless concession to satisfy U.S. officials.\textsuperscript{74}

IV
AN EXAMINATION OF THE STATISTICS

Notwithstanding these opinions, figures compiled by the Department of Commerce suggest the existence of a meaningful agreement. The volume of shoe exports from Italy changed drastically after the imposition of the statistical visa procedures. From this quantitative reduction one might infer the existence of an arrangement.

In the first six months of 1971, prior to the arrangement, Italy had exported 52,866,000 pairs of shoes to the United States.\textsuperscript{75} In the last six months of 1971, exports amounted to only 24,913,000 pairs.\textsuperscript{76} As a result of this precipitous drop, the total quantity of exports \textit{declined} by more than 2,570,000 pair—or 3.2 percent—from the 1970 level.\textsuperscript{77} This decline followed six years of rapid and substantial expansion.\textsuperscript{78} Subsequently, in 1972, the increase in the quantity exported was modest—2.5 percent greater than in 1971, well within the Mills Bill guidelines.\textsuperscript{79}

\textsuperscript{74} It should be noted, however, that none of these commentators suspected that U.S. officials knew that the concession was empty at the time but encouraged the fiction to reap political rewards from the American footwear lobby.

\textsuperscript{75} U.S. Dep’t of Commerce: Industrial Products Division of the Office of Import Programs, United States Imports of Nonrubber Footwear by Selected Countries 1971, Dec. 27, 1972 (one of two printed fact sheets containing official statistics for 1971 and 1972) [hereinafter cited as \textit{Official Figures 197}_...].

\textsuperscript{76} \textit{Id.} The arrangement alone would not account for this drop. In the late summer and fall, exports are, in large measure, dress boots and heavier shoes, which are more expensive and are sold in smaller quantities. In the spring, however, exports are primarily sandals and other lightweight summer footwear, which are sold in greater quantity and are less expensive. This pattern repeated itself in 1972. \textit{Id.} But in 1970, before imposition of the monitoring procedure, this seasonal export pattern was noticeably less pronounced. \textit{Id.}

\textsuperscript{77} \textit{Id.}


\textsuperscript{79} \textit{Official Figures 1972, supra note 75.}
Furthermore, an examination of the *monthly* figures might cause one to suspect concerted action by Italian manufacturers. Following the curtailed exports in late 1971, the first three months of 1972 witnessed a dramatic jump to pre-arrangement levels. Thereafter, however, the quantity of exports dropped off sharply and remained low until December. In that month, exports rallied, as if to fill the remaining allotment under an invisible quota, and ended the year with an increase of 2.5 percent above 1971 totals. The figures for January 1973, indicate that the cycle has recurred—exports have again jumped sharply with the new year.

The peculiar pattern of Italian shoe exports is not duplicated by the export pattern of any other nation. Exports of nonrubber footwear from Spain remain relatively constant throughout the year, as do those of Brazil and Taiwan. Therefore the cyclical pattern of Italian exports cannot be credited to the forces of market demand peculiar to the footwear industry.

In light of these observations, it is not unreasonable to conclude that the quantity of shoes exported from Italy to the United States was in fact and by design kept below the five percent growth level. Arguably, this limitation could have resulted either from government pressure, direct or indirect, or from spontaneous action by the manufacturers, who realized that their self-interest dictated adherence to the Mills Bill guideline. Whatever the reasons, the export patterns suggest the existence of some form of arrangement.

V

THE SOLUTION—ITALIAN STYLE

It appears, therefore, that Italy was honoring its "moral obligation" to restrict exports of nonrubber footwear to the United States. This conclu-

80. *Id.*
81. *Id.*
82. *Id.*
83. See note 76 *supra.*
84. Italian Government involvement in the nation's industrial management is extensive and has been described as "incestuous"—the relationship lacks the adversary quality of United States practice. With such a hand-in-glove relationship, it would be an easy matter for the Italian Government to inform the corporate boards what precisely it wanted done, and the industry would then comply. Interview with M. Vokopola, an Italian law expert with the European Law Division, Library of Congress, in Washington, D.C., Jan. 4, 1973.
sion, however, proves too pat, for the exact nature of the arrangement cannot be determined, owing to its confidential nature and conflicting public explanations. 68 Neither Chairman Mills nor the President specified what, in fact, Italy had agreed to limit—the quantity of exports actually shipped, or the dollar value of the exports. 67 As it turned out, while quantitative increases were curtailed, the dollar value continued to climb at its pre-arrangement rate. 68 In 1970, the total value of nonrubber footwear exports totaled $263,880,000; in 1971, it totalled $285,152,000; and in 1972, it totalled $337,273,000, an increase of 18.2 percent over 1971. 69

On the one hand, these figures might indicate that Italian manufacturers, while continuing to ship the same product mix of footwear they had exported previously, had raised their prices in response to rising costs. On the other hand, the figures might indicate that Italian manufacturers had changed the type of shoe they were exporting so as to compete in the quality market, relying on superior style and workmanship to retain their dollar share of the U.S. trade. The latter appears to be the case.

Spain and Brazil, both of which had been competing with Italy prior to the arrangement, maintained a more or less direct correlation between percentage increases in quantity and percentage increases in dollar value. 60 For the first eleven months of 1972, exports from Spain increased 30.2 percent in quantity and 41.5 percent in dollar value. During the same period, exports from Brazil increased 44.7 percent in quantity and 48.2 percent in dollar value. The vast discrepancies in the figures from Italy—a 3.0 percent increase in quantity as opposed to a 20.3 percent increase in dollar value—would indicate that more than higher costs and dollar devaluation (both of which also affected Spain and Brazil) were at play.

The irony of this development is that Italian shoes became more directly competitive with U.S. shoes in the quality market, a market that U.S. manufacturers had previously dominated. 61 In 1970, 60 percent of

86. See notes 38-39 supra and accompanying text.
87. Donald Webster, who conducted the negotiations, maintains that the negotiators were talking only in terms of quantitative restraints, not dollar value. Webster, supra note 34.
88. Official Figures (1971 & 1972), supra note 75. This development might explain why the Italian Government went to such great lengths to stress skyrocketing costs. See note 58 supra and accompanying text.
90. Id.
the Italian exports were of the inexpensive variety;\textsuperscript{92} in 1972, 96 percent of the imports were of the high-priced type.\textsuperscript{93} In 1970, the average F.O.B. Port of Entry price per imported pair of Italian footwear was $3.28; in 1972, the price had jumped to $4.23, an increase of 29.0 percent.\textsuperscript{94} During the same period, the worldwide average price per pair increased by only 21.1 percent.\textsuperscript{95} This would indicate that the composition of Italian footwear exports had experienced a qualitative transformation.

Thus, by switching in a limited way to the quality line, Italy was able to substantially increase its dollar sales in the U.S. market while honoring its moral commitment to the United States to keep quantity in check. Moreover, by revamping its product mix, Italian industry has reduced its vulnerability to the quantitative restrictions called for in the Mills Bill. The feeling that Italy subverted the agreement to its advantage underlies the renewed calls by American manufacturers for protective legislation.\textsuperscript{96}

VI
THE LEGAL CONSEQUENCES OF THE AGREEMENT

The fact that an agreement can only be inferred from the export practices of the Italian manufacturers subsequent to the implementation of the statistical visa procedure does not fatally impair its legal significance. Arguably, the agreement is vulnerable on several counts: (A) it violates the antitrust provisions of the Treaty of Rome; (B) it runs counter to the common commercial policy of the EEC; and (C) it violates U.S. antitrust law. Owing to the nature of the agreement and its susceptibility to varying interpretations, however, attacks on it under any of the preceding theories will encounter difficulties.

A. THE ANTITRUST LAW OF THE EEC

Article 85 of the Treaty of Rome deems incompatible with the Common Market and thus prohibits:

\textsuperscript{92} Id. at 6.
\textsuperscript{94} Official Figures 1972 supra note 75.
\textsuperscript{95} Id.
\textsuperscript{96} Journal of Commerce, Dec. 18, 1972, at 1, col. 5. Of course, imports from nations other than Italy have continued to mount quantitatively as well as in dollar value. Id.
all agreements between undertakings, all decisions by associations of undertakings and all concerned practices which are liable to affect trade between Member States and which are designed to prevent, restrict or distort competition within the Common Market or which have this effect. Particularly prohibited are those consisting in: ... (b) ... the limitation or control of production [and] ... (c) ... market sharing.97

In order to prove that the Italian agreement to limit the export of non-rubber footwear to the United States constitutes a violation of Article 85, it would have to be shown that the agreement “affects trade between Member States.” 98

On its face, the agreement appears to affect only trade between Italy and the United States, and, therefore, to fall outside the Article 85 prohibition. It could reasonably be argued, however, that the agreement in a limited way does affect the footwear trade between Member States. The United States represents a steadily increasing market for footwear, and the EEC footwear manufacturers compete for portions of that market.99 Thus, by agreeing to severely limit their shares of the increasing market, the Italian manufacturers in effect present the other EEC manufacturers with a windfall—the possibility of increasing their shares free of the normal forces of Community competition. By thus affording their EEC competitors easier access to the U.S. market and to greater profits there, the Italian manufacturers permit their competitors to reduce the price of footwear in the EEC. In consequence, those non-Italian manufacturers would become more competitive in the EEC and would win part of the previously Italian share of the EEC market. In this way, arguably, the Italian agreement to limit exports “affects trade between Member States.”100

Once this interstate effect is established, the Italian manufacturers could be prosecuted under Article 85. The agreement would constitute

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98. Id. art. 85, para. 1.
99. In 1971, the American nonrubber footwear market was divided as follows, in total pairs:

<table>
<thead>
<tr>
<th>Country</th>
<th>Pairs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>77,849,000</td>
</tr>
<tr>
<td>France</td>
<td>2,883,000</td>
</tr>
<tr>
<td>Germany</td>
<td>2,453,000</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>2,327,000</td>
</tr>
<tr>
<td>Belgium</td>
<td>181,000</td>
</tr>
</tbody>
</table>

a concerted practice to limit production and to allocate markets among the manufacturers. Were there no concerted action, nothing would prevent one Italian manufacturer from exporting more than its allotted share early in the year; its competitors would then be left with a reduced share to divide among themselves. As with the agreement itself, a concerted practice can be inferred by observing the behavior of the actors.  

The Commission of the EEC has recently indicated its intention to subject to close scrutiny measures relating to the limitation of EEC imports from Japan.  

As the Commission stated:

Lately and increasingly more frequently, cases have been observed where Japanese industries are preparing measures, partly in an independent capacity, and partly after concertation with the corresponding European industries, which are intended to limit imports of Japanese products into the Community or to regulate them in another way, whether from the point of view of quantities, prices, qualities or in any other respect.  

The Commission considers it necessary to draw the attention of those concerned to the fact that by virtue of article 85 paragraph 1 of the Treaty instituting the European Economic Community, all agreement between firms, all decisions on associations of firms and all concerted practices capable of affecting the trade between Member States and which are aimed at, or have the effect of preventing, restricting or distorting the free workings of competition within the common market, are incompatible with the common market and prohibited.

These "orderly marketing agreements," as the Japanese call them, bear a close resemblance to the arrangements undertaken by the Italian manufacturers.

Especially since Chairman Mills claimed to be acting on behalf of the U.S. footwear manufacturers, the parallels between the two practices appear that much more striking. As is the case with the division of the U.S. market by the Italian shoe manufacturers, the Japanese orderly marketing policy is effected by self-limitation of the exports by the manufacturers or by sectoral agreements between the Japanese firms and their EEC competitors. In the opinion of the European Commission, "sectoral agreements could be transformed into real market sharing understandings, contrary to the rules of competition." Similarly, the agreements

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101. Presumably, in light of the official denials issued by the Italian Government, see note 57 supra, the defense of governmental involvement in the restraints would be unavailable to the Italian manufacturers. See note 107 infra and accompanying text.  
103. Id.  
105. See note 46 supra and accompanying text.  
between the Italian manufacturers to divide up among themselves the existing U.S. market could be construed as market sharing and therefore contrary to Article 85.

Another consideration affecting an antitrust action is governmental enforcement of the agreement. The Italian manufacturers could claim that governmental pressure required them to limit their exports or risk punitive countermeasures, such as denial of export visas. If such countermeasures existed, they would serve as a defense in an antitrust action brought under Article 85. In light of both the Italian government's denial of their existence and the fact that they have never been used (since exports have been kept within the prescribed limits), proof of their existence would be difficult and the defense would not be available.

If, however, governmental involvement were shown to exist, or if its existence were inferred by the apparent compliance of the manufacturers, the antitrust action would fail. The agreement could in the alternative, still be attacked on the basis of the EEC common commercial policy.

B. THE COMMON COMMERCIAL POLICY OF THE EEC

In addition to their anticompetitive impact, the above limitations on Japanese imports also "concealed serious dangers for the trade autonomy of the Community; in fact it goes completely beyond the community institutions and makes an important aspect of the import system depend on autonomous decisions by a third country (or on decisions between firms)."

The trade autonomy referred to above is the objective of the common commercial policy embodied in Article 113 of the Treaty of Rome. Under Article 113, the commercial policies of the member states are to be systematically harmonized until all fundamental aspects of trade between the EEC and third countries are regulated by the European Commission. This power relates to negotiations of treaties, negotiations under GATT, and regulation of common tariffs and export controls.

107. See note 101 supra.
109. See notes 102-106 supra and accompanying text.
111. Art. 113, 1 CCH COMM. MKT. REP. ¶ 3882 (1973).
113. See Kim, Developments in the Commercial Policy of the European Economic Community, 8 COMM. MKT. L. REV. 148, 149 (1971).
Article 113 had been in force since January 1, 1970, i.e., since prior to the Italian decision to monitor shoe exports. Under Article 113, "the Community is to replace the member states in their commercial relations." To implement Article 113, the Council adopted a regulation that established the procedures for controlling exports to non-member countries. The regulation states that EEC exports to third countries cannot be subject to quantitative restrictions. The only exceptions to this principle were noted in a "negative list," which included a limited number of scarce or strategic commodities. The regulation also established the procedures for allowing exceptions to the rule when a Member State deems immediate action necessary to protect the well-being of its citizens, but such emergency action must be taken with the consent of the Commission. If undertaken on an emergency basis, the approval of the Commission must be sought immediately thereafter.

Clearly, the Italian agreement to restrict exports of nonrubber footwear to the United States appears to be a violation of the common commercial policy, since Commission approval was not sought. Indeed, if it had been sought, it most certainly would have been denied. Moreover, Italy violated the common commercial policy at the outset by merely undertaking negotiations with the United States without notifying the Commission. In light of these facts, it is understandable why Italy went to such great lengths to deny before the Commission that any agreement had been concluded. Even if the Commission determined that the Italian government had not involved itself in the arrangement, either in its negotiation or its enforcement, the Commission could nonetheless infer a voluntary agreement on the part of the Italian manufacturers and utilize Article 113 to attack it. That the Italian manufacturers' agreement standing alone, without government involvement, would be violative of the common commercial policy finds support in a recent Commission decision regarding voluntary limitations on steel exports.

The Commission is of the opinion that measures of this kind are part of the commercial policy and that they constitute a field which must continue to be reserved for the public authorities. The latter have undertaken at the international level to eliminate trade barriers. It is therefore not desirable for the private sector, which is not bound by these undertakings, to take measures...
reserved for the public authorities. Furthermore, before they made their undertaking, the Commission informed the European steel producers of its position in this affair.

In the Commission's opinion, measures of this kind should, in the future, be replaced with the appropriate commercial policy measures.\textsuperscript{119}

On this basis, the Commission could attack the arrangement under Article 113 as violative of the commercial policy, even if the Italian government convinced the Commission of its lack of involvement.

\section*{C. The Antitrust Law of the United States}

An alternate theory on which the arrangement might be attacked would be under U.S. antitrust laws.\textsuperscript{120} Since the export restraints are intended to have an effect on U.S. commerce, U.S. courts would have jurisdiction over the subject matter.\textsuperscript{121} Moreover, the fact that many of the participating Italian firms are U.S. subsidiaries or derive a large proportion of capital investment from large, vertically integrated U.S. corporations\textsuperscript{122} would give U.S. courts in personam jurisdiction.

\subsection*{1. General Observations}

Such an action could be brought privately by an injured U.S. importer or U.S. consumer.\textsuperscript{123} The Clayton Act of 1914\textsuperscript{124} states that "any person who shall be injured in his business or property by reason of anything..."

\begin{itemize}
\item \textsuperscript{119} EEC Press Release No. 1167 (new series), Nov. 23, 1972.
\item \textsuperscript{120} See Comment, \textit{Executive Authority and Antitrust Considerations in “Voluntary” Limits on Steel Imports}, 118 U. PA. L. REV. 105 (1969) (hereinafter cited as \textit{Executive Authority}).
\item \textsuperscript{121} United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945).
\item \textsuperscript{122} In 1969, about one-third of the 180 million pairs of imported shoes that entered the United States were manufactured by foreign companies started or backed by American producers. These American concerns, such as the Melville Shoe Corporation, sought to increase their investments abroad as a protective measure. N.Y. Times, July 3, 1969, at 39, 44, col. 6. The vertically integrated, United States-based footwear corporations are therefore rather ambivalent toward the demands of the small manufacturers for protectionist legislation. \textit{Id.}
\item The possible involvement of the American parent with its Italian subsidiary in the market allocation and production limiting scheme would raise the same problem of intra-enterprise conspiracy raised in \textit{Timken Roller Bearing Co. v. United States}, 341 U.S. 593 (1951). In the \textit{Incandescent Lamp} case, several European manufacturers, including several United States subsidiaries, divided markets and established quotas. Even though American firms did not participate directly, they were aware of the agreement and indirectly participated in it through their foreign subsidiaries. United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949).
\item \textsuperscript{123} See \textit{Executive Authority}, supra note 120. Consumers Union, recently active in public interest litigation, would seem a likely plaintiff in such a suit.
\end{itemize}
forbidden in the antitrust laws may sue therefor . . .” including, of course, the prohibitions specified in the Sherman Anti-Trust Act of 1890. Section 1 of the Sherman Act declares illegal “every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States, or with foreign nations . . . .”

As noted earlier, the courts would have to infer the existence of the arrangement among the Italian manufacturers by observation of their behavior and an examination of the export statistics. This would not be an insurmountable hurdle. In Eastern States Retail Lumber Dealers’ Ass’n v. United States, the Supreme Court observed that “It is elementary . . . that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done . . . .” The fact that the quantity of Italian exports to the United States became relatively static subsequent to the alleged agreement, after an extended period of rapid expansion, would seemingly constitute sufficiently convincing circumstantial evidence that concerted action had been undertaken.

Similarly, in personam jurisdiction would not pose a serious problem. The fact that the manufacturers sell shoes in the United States satisfies the minimal contacts requirement of International Shoe and enables the courts to subject the Italian manufacturers to an effective court decree.

2. The Government Action Defense

A more serious hurdle to overcome, however, is the extent of either government’s involvement in the arrangement. U.S. courts, using the Noerr-Pennington doctrine, have exempted from the operation of the antitrust laws arrangements undertaken at the behest of government officials. The availability of this defense in an antitrust action brought by U.S. importers or consumers would depend on the party or parties against whom the suit was brought.

126. Id.
127. 234 U.S. 600 (1914).
128. Id. at 612.
Conceivably, the action could be brought against the U.S. corporations that encouraged Chairman Mills to undertake his ex officio negotiations with the Italian authorities. These corporations, however, seem to fall within the category exempted from antitrust suits by the Noerr-Pennington doctrine. "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." Absent a showing of "further participation [by the U.S. corporations] in the implementation or enforcement of the action . . . conduct beyond mere solicitation," the doctrine would shield the U.S. corporations. None of the officials or experts mentioned above suggested that the U.S. corporations sought in any way to pressure the government to enforce the arrangement. However, since the Italian manufacturers remained within the arrangement guidelines, this is not significant.

If, however, the suit were brought against the Italian corporations and the U.S. corporations whose subsidiaries or branches participated in the "voluntary" export restraint, exemption under the Noerr-Pennington defense would be less certain. Availability of the defense would turn on the nature and extent of U.S. Government and Italian Government involvement in the arrangement. Arguably, the Noerr-Pennington defense extends to all arrangements in which government officials take an active part.

a. The Role of the U.S. Government

Since both President Nixon and Chairman Mills actively sought the voluntary restraints, and since both claimed credit for their imposition subsequent to the Italian Government's promulgation of the statistical visa procedures, establishing government action should not prove difficult. However, as in the case of the voluntary restraints on steel imports, unless the governmental action is valid it will not serve as a Noerr-Pennington shield in an antitrust action.

131. See note 47 supra and accompanying text.
133. Steel Imports, supra note 130, at 123.
134. The subsequent discussion concerning United States governmental action as an antitrust defense relies heavily on the reasoning of Steel Imports, supra note 130.
136. See notes 44-47 supra and accompanying text.
137. See Steel Imports, supra note 130, at 123. "[T]he instant case involve[s] state
In examining the validity of the arrangement, U.S. courts would focus on whether or not:

the President had the actual authority under the Constitution to conclude such an agreement. The courts realize that to give effect to an agreement concluded pursuant to the President's apparent authority, rather than his actual authority, would completely remove the conduct of foreign affairs from the constitutional safeguard of a system of checks and balances and would jeopardize constitutional guarantees of rights and liberties . . . . Clandestine executive action in this area should not lightly be allowed to replace the public scrutiny of congressional deliberation or the procedural safeguards of administrative hearings. 138

Congressional involvement in the Italian arrangement in the person of Chairman Mills would not mitigate the threat to the constitutional scheme of checks and balances posed by the arrangement. Mere participation by a lone, albeit powerful, congressman cannot constitute participation by the entire body. The only public aspects of the episode were the Tariff Commission hearings and the hearings on the Trade Act of 1970, which established the fact that increased imports had injured the U.S. footwear industry. 139 All other aspects were surrounded by secrecy; even the result was never announced forthrightly. Those who would suffer as a result of the arrangement—importers and consumers—had no chance to mount an attack on it or to influence the outcome. 140

Had the Mills Bill been enacted into law, arguably such a congressional approval of the agreement's terms would have constituted prior congressional authorization for presidential action, as required in B. Altman & Co. v. United States. 141 This is especially true since the bill had authorized the President to negotiate arrangements aimed at self-limitation of exports and had specified five percent as the desirable maximum rise in export levels. 142 Such a safeguard against executive caprice, however, is lacking in the Italian footwear arrangement, since Congress never passed such legislation to indicate its intent. Thus it can neither be argued that the President acted pursuant to real authority delegated to him by Congress, nor that he subsequently attempted to secure congressional approval of the arrangement.

139. See notes 12-31 supra and accompanying text.
140. For an analysis of the substantive and procedural components of actual authority to conclude such an arrangement, see Steel Imports, supra note 130, at 125.
141. 224 U.S. 588 (1912).
142. See notes 17-20 supra and accompanying text.
Since the President acted without such delegation from Congress, he must have relied on his inherent foreign affairs powers to justify his recourse to such an extraordinary remedy. It has been pointed out, however, that "with regard to the validity of action based solely on the President's powers, the courts have inquired into whether the Constitution also grants Congress power over the particular subject and, if so, whether Congress has exercised this power." \(^1\)

The Court of Appeals for the Fourth Circuit made that inquiry in *United States v. Guy W. Capps, Inc.*\(^4\) and found both the constitutional grant of the power to Congress\(^4\) and incidences of its exercise.\(^1\) The court determined that "the executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related."\(^4\)

Therefore, if such a statute could be shown to exist it would follow that the agreement was void and the *Noerr-Pennington* defense of government participation unavailable to the participating firms. Clearly, the Italian arrangement involved foreign commerce, the regulation of which the Constitution grants to Congress.\(^1\) Moreover, Congress on numerous occasions had exercised this authority, most recently in the Trade Expansion Act of 1962.\(^4\) In that legislation, Congress explicitly established the procedure the President was to follow when U.S. industry complains of injury from increased imports.\(^1\) He can, among other

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143. *Steel Imports*, supra note 130, at 182-83.
144. 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955).
147. 204 F.2d at 659. The court continued:

We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The executive may not bypass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports. Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by congressional action, it is the latter which must be accepted as the expression of national policy.

things, act pursuant to an affirmative finding by the Tariff Commission of import related injury and impose higher duties, or he can negotiate a limitation agreement with the country whose imports are alleged to be injuring the U.S. industry.

Before taking such action, however, the President must comply with elaborate procedural safeguards to assure that all interested parties have the opportunity to make known their views. Even though the President complied with the procedures in requesting the Tariff Commission investigation, and was free to negotiate an agreement with Italy as a result of the equally divided Commission, he failed to publicly declare his intention, failed to act within the statutorily required sixty days, and failed to explain his inaction to Congress. Although it is clear that he did negotiate and did in fact coordinate his actions with Congress through Chairman Mills, such action was taken sub rosa, rendering meaningless the explicit procedural protection against executive whim.

Thus failing to adhere to the statutory requirements, the President, acting through his special ambassador, acted ultra vires, and the agreement is invalid. Therefore, as far as U.S. governmental action is concerned, the Noerr-Pennington defense is unavailable to either the Italian companies or the U.S. corporations whose subsidiaries or branches participated in the market sharing arrangement.

b. The Role of the Italian Government

The nature and extent of Italian Government involvement, however, casts the private U.S. antitrust action against the Italian corporations and the U.S. subsidiaries in an entirely different light. U.S. antitrust law permits several absolute defenses to charges of anticompetitive restrictions in foreign commerce. For example, it has been suggested that firms may engage in such practices if required to do so by "foreign law and governmental regulation."

151. See notes 29-30 supra and accompanying text.
153. See Steel Imports, supra note 130, at notes 172-84 and accompanying text.
154. See note 26 supra.
156. See note 28 supra and accompanying text.
158. Id.
159. See generally S. OPPENHEIM & G. NESTOR, FEDERAL ANTITRUST LAW 777 (1968).
160. Id.
In *American Banana Co. v. United Fruit Co.*, the Supreme Court noted that the acts complained of included anticompetitive interference by the Costa Rican government, but held that the Sherman Act did not reach restraints legal in the country where they were committed, particularly when required by the host government. Although this holding was later narrowed, the portion that exempts from the reach of the Sherman Act those restraints imposed at the insistence of the host government remains intact, even when those acts have an effect on U.S. commerce. Thus, if it were shown or if it were inferred that the participating firms acted pursuant to an Italian Government directive, U.S. antitrust laws would not reach the firms or the restrictive acts. Were it otherwise, U.S. antitrust laws could prevent trade with all state-trading nations, an effect Congress certainly cannot have intended in enacting the antitrust laws.

Presumably, U.S. courts could inquire into the validity of the Italian directive, under Italian and EEC law, just as they could examine the validity of the Presidential negotiation under U.S. law. As shown above, the Italian authorities violated the laws of the EEC and could therefore be shown to have acted *ultra vires*, voiding the *Noerr-Pennington* defense. The extension of this inquiry to foreign acts of state seems unlikely, however, given the traditional adherence of U.S. courts to the act of state doctrine. Hence, the *Noerr-Pennington* defense of governmental action will survive this attack.

On the other hand, absent a showing of Italian Government participation by fact or inference, the government action defense could not avail the Italian corporations and the U.S. subsidiaries that participated in the self-limiting arrangement. These firms would be subject to prosecution, since the arrangement affected U.S. commerce. On its face, a successful

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162. 213 U.S. at 357.
163. United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).
164. S. OPPENHEIM & G. NESTOR, supra note 159. See also W. FUGATE, FOREIGN COMMERCE AND ANTITRUST LAWS 29-52 (1958); Opinion re Potash Mined in Germany, 31 Op. ATTY. GEN. 545 (1916-1919). A German law had required anticompetitive conduct, and conduct pursuant to the law was beyond the reach of U.S. antitrust laws. Id. at 553.
165. See note 138 supra and accompanying text.
167. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). The court found the Sherman Act applicable to an agreement setting export quotas negotiated in
prosecution appears possible. "[C]ertain conduct may, in foreign as in
domestic commerce, be more quickly adjudged illegal. Agreements among
competitors to . . . control production are conclusively presumed to be
illegal." 168

CONCLUSION

The President and Congress must finally acknowledge that the short
term gains achieved by clandestine negotiations—the avoidance of both
divisive political debate and possibly retrogressive legislation—will prove
fleeting, and the long term losses dear. Such arrangements serve as a source
of resentment to the "self-limiting" nation that could poison the spirit
of cooperation and goodwill that has marked postwar trade negotiations.
Furthermore, they subvert constitutionally and legislatively established
procedures and foster government by dispensation rather than by law.
The courts, to safeguard the substantive and procedural rights of U.S.
consumers, importers, and retailers, must void such secret agreements and
force public debate and forthright public resolution. 169 Moreover, Congress,
in redrafting the Trade Reform Act of 1973, must endeavor to
bridle executive discretion by expressly prohibiting deceptive negotiations
of the variety that produced the limitation on Italian shoe exports. As
Justice Brandeis observed, "Sunshine is said to be the best of disinfec-
tants." 170

Switzerland by foreign corporations. "[A]ny state may impose liabilities, even upon per-
sons not within its allegiance, for conduct outside its borders that has consequences
within its borders which the state reprehends . . ." (citations omitted). Id. at 445. From
the import figures referred to in notes 75-76 supra, it can be inferred that the arrange-
ment substantially affected U.S. imports. This finding would satisfy subject matter juris-
diction requirements.

168. S. ÖFFENHEIM & G. NESTOR, supra note 159, at 777, quoting the Report of the
Attorney General's Antitrust Committee 80-81, 83 (1955).
169. Consumers Union has recently brought suit under the Freedom of Information
Act, 5 U.S.C. § 552 (1970), and Executive Order 11,671, 3 C.F.R. 187 (Supp. 3A 1972), and
the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972), to require
the Department of Commerce to make available information relating to the secretly
negotiated textile agreements. See Brief for Plaintiff at 1-2, Consumers Union of United
170. L. BRANDEIS, OTHER PEOPLE'S MONEY ch. 5 (1914), quoted in L. LOSS, SECURITIES
REGULATION 77 (1951).