If United States negotiators urge only mandatory foreign governmental action, we believe that they would run no substantial risk of antitrust liability, even if the foreign government fails to implement a government-to-government agreement by mandatory, legally binding measures. Nevertheless, it should be noted that any private antitrust suit challenging import restraints in such circumstances might involve United States government negotiators in depositions in which the circumstances of the agreement would be examined. As with any private case, the complaint could be drafted in such fashion as to allow far-ranging discovery and might even include allegations of liability on the part of government negotiators.

In order to minimize the likelihood of such allegations, we believe that any negotiations seeking import restraints should be kept on a government-to-government level, and direct dealings with foreign manufacturers, either individually or as a group, avoided, similarly, in preparing for such discussions, United States negotiators are best advised to avoid contacts that could be characterized as facilitating or serving as a conduit for a private arrangement between American firms and their foreign competitors.

In summary, this Department believes that although the President has inherent legal authority to negotiate directly with foreign governments to seek import restraints, where such negotiations are implemented through voluntary private behavior serious antitrust risks arise. Foreign or United States governmental "approval," "urging," or "guidance" of such behavior cannot safely be relied on as a defense; if the foreign government does not provide adequate protection by mandating the restraints in a legally binding manner, private antitrust suits could jeopardize the effective implementation of any agreements that are negotiated.

I hope this letter has been helpful.

Sincerely yours,

William French Smith
Attorney General