

Letter of 18 February 1981, from the Attorney General.

Honourable William E. Brock
United States Trade Representative
Washington, D.C. 20506

Dear Mr. Ambassador:

This is in reply to your letter of February 6 seeking confirmation or clarification of past advice and opinions expressed by this Department on the President's authority to negotiate or otherwise seek restraints on imports of automobiles. In addition, you ask our advice on how best to avoid difficulties with United States law in this context.

Antitrust is an important concern when contemplating import restraints. Generally speaking, an agreement among foreign private companies to reduce the numbers of automobiles they export to this country would most likely violate United States antitrust law. However, we believe that if such an agreement were formally mandated by a foreign government, the formal mandate would provide a defense to any subsequent antitrust challenge. In such litigation, the degree of foreign governmental involvement would be a key issue. Thus, if the foreign government should compel the precise agreement through the use of appropriate legal powers, i.e., by the imposition of export controls or other binding measures, a strong "governmental action" defense would be available.*

* In some circumstances, antitrust immunity for voluntary, private action restraining exports to the United States arguably may be implied when the President is authorized under Section 201 of the Trade Act of 1974 to negotiate "orderly marketing agreements" with foreign governments. No such authority currently exists with respect to automobiles; thus Section 201 provides no basis for such an argument at the present time. Moreover, this "implied immunity" argument is not settled law and proceeding under it would thus entail risk in any event.

The antitrust risks that would be raised by concerted, voluntary, private behavior by foreign producers have led us to conclude that in any negotiations between our government and a foreign government in which our government seeks a reduction in imports from that country, United States negotiators should emphasize the need for the foreign government to provide protection to its companies from actions under United States antitrust laws by ordering, directing, or compelling any agreement restraining exports to the United States in terms as specific as possible.*

* It should be emphasized that while antitrust prosecution by the United States itself of import restraints achieved through government-to-government negotiation is unlikely, private antitrust actions could nonetheless be instituted.