STATEMENT

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TOPIC: "DOES THE LEGAL SYSTEM ESTABLISHED BY THE U.S. LEGISLATURE PROVIDE AN OPPORUTNITY TO ENSURE THAT THE INTERESTS OF EUROPE ARE PROTECTED."

The question which I am to talk about today is whether the U.S. legal system for trade is responsive to the legitimate interests of the E.C.

If I had to answer this question in one word, I would have to say: yes. By and large, U.S. trade legislation does provide an opportunity to ensure that the interests of Europe are protected. And yet, the fear persists that the rather perfectionist legalistic approach traditionally adopted in this country when dealing with trade policy problems might not always generate the greater degree of legal certainty and protection it is supposed to create - it might even sometimes act as a technical obstacle to trade. I said: the fear persists, and I have to qualify this since the Community did accept the results of the Tokyo Round in December 1979, and thereby recognized - with some qualifications as to its actual interpretation - that U.S. trade legislation is consistent with the newly worded GATT provisions. I should add that during 1980 - a period marked by a rapidly growing European trade deficit with the U.S. - the Community had little if anything, to complain about the way in which the new trade laws were implemented by the U.S. authorities. However, the massive antidumping complaints brought against European steel producers, their possible affect on U.S.-E.C. trade and the way they were

resolved are indicative of the limits of a wholly legalistic approach. I might come back to this case if time allows. The same is true for the recent automobile case where the courageous no-injury finding by the ITC has not put an end to the discussion on possible trade restrictions.

Before doing so, I should like to make some comments on U.S. trade laws as they are now worded as a result of the successful conclusion of the MTN.

I think that the results of the Tokyo Round will improve opportunities for both the E.C. and the U.S. to protect their trading interests in each other's market. These results are well known. They led to new antidumping and subsidy codes which - inter alia - establish (or confirm) the requirement of an injury test in cases of subsidization as well as dumping; lay down more realistic rules on causality by abandoning the principal cause criterion; and give more detailed rules on subsidization. The Codes also provide for more transparent procedures to be applied, and lay down more detailed rules on price undertakings, thereby increasing their importance as antidumping or countervailing measures.

In contrast to what happened after the Kennedy Round, the material injury criterion has now been introduced into U.S. antidumping and countervailing duty legislation. Furthermore, with respect to customs valuation, the E.C. obtained the elimination of the ASP, and a general improvement of customs valuation principles, an equilibrium of rights and obligations

for all signatories thus being established. The Community undertook to rewrite its own rules on protection against dumping or subsidization which, like the U.S. TAA of 1979 are based on the new GATT Codes. Moreover, when drafting these instruments the opportunity was taken to lay down more precise rules in those areas where previous experiences had shown this to be desirable. This has resulted in a greater degree of correlation between U.S. and European legislation, both in terms of procedure and on matters of substance.

Some important differences remain though, and any comments on U.S. trade legislation may best be made by dwelling shortly on these differences. These tend to show that the U.S. system is more rigid - for better or worse - than its European counterpart.

Perhaps the most basic difference now existing between Community and the U.S. law in this area is that Community law is more discretionary.

This discretion stems from two requirements: the need to take account of the public interest when deciding whether antidumping or countervailing action should be taken, and the need to limit the amount of any duty imposed to that required to remedy the injury caused. In contrast, U.S. law is mandatory in these respects and, providing that dumping or subsidization together with injury have been determined, then

the U.S. Administration must impose a duty corresponding to the margin of dumping or subsidization found.

The requirement of a public interest test is not purely nominal, but of a highly practical and political nature. It reflects the fact that antidumping and countervailing measures are regarded as important instruments of policy and not as a means to protect an industry whose monopolistic or cartel situation is endangered by low priced imports, or whose collective output is insufficient to supply the full Community market, or whose prices are not competitive.

The need to limit the amount of the duty to that required to remedy injury reflects the Community view that no European industry should be over protected.

Another difference exists with respect to the calculation of dumping margins.

When constructing a normal value the minimum rates to be applied under U.S. law are 10% for general expenses and 8% for profits. European law, on the other hand, follows the GATT view that the margin for overheads must be reasonable and the allowance for profit should not exceed the rate normally realized in the exporting country. As the normal rate of profit varies from country to country and from product to product, as well as with the general economic climate, the application

of mandatory minimum rates could lead to arbitrary and inequitable results.

Detailed rules are set out in the Subsidy Code on the procedures to be applied when dealing with subsidization, and the methods by which the amount of the subsidy should be calculated. The Community, like the U.S., has incorporated these rules into its legislation, along with the illustrative list of export subsidies, ensuring a certain degree of consistency between the U.S. and the E.C.

There are grounds, however, for fearing that there may be a difference in the method of calculating the net amount of domestic subsidies. It will be recalled that, since the Michelin case, the U.S. Treasury has consistently held the view that domestic subsidies are countervailable only if either a preponderance of the merchandise receiving benefits from the program is exported, or the ad valorem amount of the benefit is large. For the purpose of establishing the amount of the net subsidy, dislocation and other costs incurred in order to qualify for the subsidy were conducted from the aid given.

There is no express provision for the deduction of dislocation and other costs in the 1979 Trade Agreements Act, which gives a relatively broad and extensive definition of domestic subsidy.

Only time will tell whether in U.S. law those factors having no distorting effects on trade, and designed only to compensate firms for certain disadvantages endured, will be deductible from the gross amount of the subsidy. Under European law, however, all costs necessarily incurred in order to qualify for the domestic subsidy (including the costs of the disadvantages) are deductible.

The new GATT Codes provide for a mandatory material injury test to be applied both for dumping and subsidization. They also contain realistic rules on causality, on the definition of injury and on the criteria to be applied when establishing injury. Most of these provisions have been incorporated into the U.S. law and regulations and into Community law.

There is, however, one nuance of interpretation concerning the definition of "material". Whereas the Community has always applied a positive material injury test and considers that injury should be "important", the 1979 Trade Agreement Act defines material injury as harm which is not inconsequential, immaterial or unimportant. It is to be hoped that the differnce between a positive and a negative test will cause no major problems in the future.