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### Recommended Citation

Zoller, Elisabeth (1985) "Remedies for Unfair Trade: European and United States Views," *Cornell International Law Journal*: Vol. 18: Iss. 2, Article 4.  
Available at: <http://scholarship.law.cornell.edu/cilj/vol18/iss2/4>

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# REMEDIES FOR UNFAIR TRADE: EUROPEAN AND UNITED STATES VIEWS

*Elisabeth Zoller†*

On September 17, 1984, the Council of the European Communities adopted Regulation 2641/84 in order to strengthen the common commercial policy against illicit commercial practices.<sup>1</sup> This Regulation represents a counterpart to section 301 of the United States' Trade Act of 1974, which gives the President sweeping authority to retaliate against unfair trade practices of foreign governments.<sup>2</sup> Section 301 aims "to enforce" the rights of the United States under any trade agreement. The section also purports "to respond" to any action that is either inconsistent with a trade agreement or "unjustifiable, unreasonable, or discriminatory."<sup>3</sup> The European Regulation, on the other hand, seeks to "ensure full exercise of the Community's rights" and to "respond to any illicit commercial practice."<sup>4</sup> Despite their semantic differences, both texts provide unilateral remedies for unfair or illicit trade practices of foreign states. The two instruments illustrate that subjects of international law have not surrendered the power to respond unilaterally to unfair practices or to noncompliance with international rules.

The new European Regulation significantly extends the external powers of the Community.<sup>5</sup> Prior to the enactment of the Regulation, the Community had primarily developed its external competence in

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1. O.J. Eur. Comm. (No. L. 252) (1984), 1-6 [hereinafter cited as European Regulation]. See also Atwood, *The European Economic Community's New Measures Against Unfair Practices in International Trade: Implications for United States Exporters*, 19 INT'L LAW. 361 (1985).

2. Trade Act of 1974 § 301, 19 U.S.C. § 2411 (as amended 1984).

3. 19 U.S.C. § 2411(a).

4. European Regulation, *supra* note 1, at 1.

5. For a general view, see, e.g., 12 LE DROIT DE LA COMMUNAUTÉ ECONOMIQUE EUROPÉENNE: RELATIONS EXTÉRIEURES (J. Mégret, M. Waelbroeck, J.V. Louis, D. Vignes, J.L. Dewost & P. Brüuckner eds. 1980).

implementing the common commercial policy<sup>6</sup> through contractual relations.<sup>7</sup> The European Economic Community Treaty (EEC Treaty)<sup>8</sup> did not afford the Community sufficient protection.<sup>9</sup> In particular, the Treaty did not equip the Community to cope with aggressive international competition; nor did it offer an offensive scheme to deter protectionist measures by third countries. In short, the Treaty made only minimal provisions for unilateral action to counter impediments known as non-tariff barriers, which distort international trade. Unlike the United States, the Community had no remedy comparable to that of section 301 of the Trade Act.<sup>10</sup>

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6. The common commercial policy is one of the basic tenets of the Common Market. It derives from the establishment of a common customs tariff which necessarily entails a common attitude of Member States toward nonmember states. See Flory, *Commercial Policy and Development Policy*, in THIRTY YEARS OF COMMUNITY LAW, THE EUROPEAN PERSPECTIVES SERIES 375 (1981).

7. An exception exists in the imposition of economic "sanctions" against a third state in the event of serious international crises. See, e.g., Schroder, *Wirtschaftssanktionen des Europäische Gemeinschaften gegenüber Drittstaaten*, 23 GERMAN Y.B. OF INT'L L. 111 (1980); Kuyper, *Community Sanctions against Argentina: Lawfulness Under Community and International Law*, in ESSAYS IN EUROPEAN LAW AND INTEGRATION 141 (D. O'Keefe & H. Schermers eds. 1982); Stein, *European Political Cooperation (EPC) as a Component of the European Foreign Affairs System*, 43 ZEITSCHRIFT FÜR AUSLANDISCHES UND ÖFFENTLICHES RECHT UND VOLKERRECHT [Z.a.ö.R.V.] 49 (1983). In such cases the Community can implement its unilateral power even though the international offense has not affected the Community's interests.

8. Treaty Establishing the European Economic Community, done Mar. 25, 1957, 298 U.N.T.S. 3, 11 [hereinafter cited as EEC Treaty].

9. In establishing the framework for the common commercial policy, the "founding fathers" of the EEC arguably drafted the Treaty so as to make unilateral protective measures available. See EEC Treaty, *supra* note 8, art. 115 ("Commission shall authorize Member States to take the necessary protective measures" if the practices of one Member State lead to economic difficulties in another). See also Reich, *La politique commerciale commune de la C.E.E. et le contrôle de l'utilisation de la clause de sauvegarde de l'article 115 du traité C.E.E.*, 14 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN [R.T.D.E.] 33 (1978). Article 113 also lists "measures to protect trade" as one of the "uniform principles" that form the basis for the common commercial policy; collective protection of the Community under article 113, however, is clearly a matter within the exclusive competence of the Community as a whole. Although article 235 does not specifically address unilateral protective measures, it authorizes the Council to take "appropriate measures" necessary to attain Community objectives, even if the Treaty "has not provided the necessary powers."

10. The United States first invoked section 301 against the Community after the Treasury Department failed to countervail the remission of a value-added tax on Community exports of steel. See Easton & Lang, *A Comment: Kaye and Plaia on Section 337—Pricing Jurisdiction*, 3 INT'L T.L.J. 359, 377 n.53 (1978). Of the 48 complaints of the United States Trade Representative (USTR), half have been filed against the Community and/or its Member States. The disputes cover levies on egg albumin (case 301-3), surety deposit on canned fruit juices (case 301-4), prices on raisins imports (case 301-47), alleged subsidies on malt (case 301-5), wheat (case 301-16), wheat flour (case 301-6), sugar (case 301-20), poultry (case 301-23), pasta (case 301-25), canned peaches and pears (case 301-26), levies on sugars added to canned fruits (case 301-7), requirements for livestock feed (case 301-8), duties on citrus fruits (case 301-11), alleged subsidies on steel (cases 301-28, 301-29, 301-33) and satellite launching services offered by Arianespace (case 301-46). Each complaint provides an opportunity for the United States to scrutinize Community law.

Several Member States did not recognize the need for such a regulation. The main concern of these countries was to insulate the Community from protectionist trends. Other delegations, however, emphasized the importance of filling a lacuna in the common commercial policy. These delegations warned against individual actions by Member States that could dismantle the common commercial policy and jeopardize the Community's interests. Attainment of a common commercial policy was thus hindered by "the conflict arising between the establishment of a common commercial policy and national protective measures, as well as [by] the use or misuse made by Member States of escape-clauses under Article 115 of the Treaty."<sup>11</sup>

To strengthen its commercial policy, the Community had two options. First, it could have adopted a restrictive approach by identifying the specific trade practices against which it would respond. Such an enumeration would have made the instrument inefficient because an exhaustive list of illicit or unfair practices was unfeasible. A second approach was to parallel section 301 by drafting a document that would have subjected any "unjustifiable, unreasonable, or discriminatory" practice to retaliation. The Commission of the European Communities (the Commission) squarely rejected this latter approach because it was "potentially inconsistent" with provisions of the General Agreement on Tariffs and Trade (GATT).<sup>12</sup> The Commission maintained that section 301 had never generated effective trade countermeasures because of this potential inconsistency.<sup>13</sup>

Instead, the Commission claimed to have chosen a middle course which differed from that of section 301. Both the European and United States instruments, however, illustrate unilateral responses to international offenses. Both authorize a state to enforce its rights by

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The 1983 Commission's general report indicated that the EEC-U.S. trade relations "once again became severely strained as a result of United States measures against Community exports of special steels and agricultural products." Commission of the European Communities, 17 *General Report* 262 (1983) [hereinafter cited as *General Report*]. In its 1982 Report, the Commission found a "more aggressive [U.S.] attitude towards anything that is perceived as 'unfair' competition in international economic relations." 16 *General Report* 244 (1982). More specifically, the Commission viewed the Reagan administration's trade policy as "aggressive assertion of U.S. rights, as in the case of sustained pressure since summer 1981 for adjustment of certain aspects of the common agricultural policy, backed up by a number of complaints lodged by agricultural pressure groups under Section 301 of the Trade Act." 15 *General Report* 258 (1981) (emphasis added).

11. Pescatore, *External Relations in the Case-Law of the Court of Justice of the European Communities*, 16 *COMMON MKT. L. REV.* 615, 638 (1979).

12. General Agreement on Tariffs and Trade [GATT], *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. *See, e.g.*, GATT art. I(1) (most-favored nation treatment).

13. *See* Proposal from the Commission to the Council (83) 87 final, (Brussels, Feb. 28, 1983) [hereinafter cited as Proposal].

taking countermeasures against a second state which, in the first state's view, has violated an international obligation. Although the countermeasures in both texts apply only to international trade matters, they exemplify peacetime unilateral remedies for international offenses, often known as nonviolent "sanctions" in international law.<sup>14</sup>

In order to highlight some general trends of unilateral remedies, this Article compares the text of Regulation 2641/84 with that of section 301 of the Trade Act of 1974. Section one discusses the conditions justifying action. Section two focuses on the scope of permissible action. The Article concludes that despite European contentions to the contrary, the European Regulation and section 301 share important similarities.

## I. THE CONDITIONS FOR ACTION

Both section 301 and the European Regulation subject unilateral responses to definite procedural and substantive conditions. Although the procedural conditions in the European Regulation are similar to those in section 301, the substantive requirements are quite different.

### A. PROCEDURAL REQUIREMENTS

The major procedural feature shared by the European Regulation<sup>15</sup> and section 301<sup>16</sup> is a mechanism allowing private parties to file complaints against foreign states. Public parties may also file com-

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14. See E. ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES (1984) and ENFORCING INTERNATIONAL LAW THROUGH UNITED STATES LEGISLATION (1985). For an example of a case where one state took countermeasures against another state, see Case Concerning the Air Service Agreement (U.S. v. Fr.) (Decision of Dec. 9, 1978), 18 R. INT'L ARB. AWARDS 417, 443 (1978). See also Damrosch, *Retaliation or Arbitration — Or Both? The 1978 United States-France Aviation Dispute*, 74 AM. J. INT'L L. 785, 802-06 (1980); Dutheil de la Rochère, *L'interprétation de l'accord franco-américain relatif au transport aérien international—Changement d'appareils à Londres—Sentence du 9 décembre 1978*, 25 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [A.F.D.I.] 314 (1979). For further developments since the Award, see *Report on State Responsibility*, [1979] 2 Y.B. INT'L L. COMM'N 39, 39-47; *Report of the International Law Commission*, [1979] 2 Y.B. INT'L L. COMM'N 115, 115-22; Malanczuk, *Countermeasures and Self-Defense As Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility*, 43 Z.a.ö.R.V. 705, 718 (1983).

15. European Regulation, *supra* note 1, art. 3.

16. 19 U.S.C. § 2412(a)(1) (as amended 1984). The Senate Committee "felt that in order to make section 301 a truly effective tool for protecting U.S. commerce from burdensome foreign restrictions, individual parties should be able to petition the Government in order to seek recourse against specific foreign actions adversely affecting their interests. This would also expedite the process by which burdensome foreign restrictions can be brought to the attention of the relevant agencies in the U.S. Government." SENATE FINANCE COMMITTEE, REPORT ON TRADE REFORM ACT OF 1974, S. REP. NO. 1298, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7186, 7305.

plaints. For example, public party complaints may be filed by the President or Special Trade Representative of the United States under section 301 and by a Member State under the European Regulation.

Under both the European Regulation and section 301, private complaints originate in anti-dumping and countervailing duty law<sup>17</sup> authorizing an industry to initiate investigations in the United States and in the European Community. Interestingly, neither GATT (article VI) nor the Subsidies and Countervailing Duties Code formally entitles private individuals or corporations to commence a procedure against a foreign sovereign state;<sup>18</sup> under those provisions, private complaints against foreign countries remain within the sole discretion of each state. Nevertheless, such provisions actually authorize private parties to carry out legal procedures against a foreign sovereign state. The mere existence of these private-action provisions illustrates an interesting feature in the development of foreign sovereign immunity doctrine. It is not surprising that such development has taken place in the specific area of international trade because trade is the most regulated area of international intercourse.

Under the European Regulation and section 301, private complaints permit private parties to commence full-fledged legal battles against foreign states. Although the initial action is not brought in a court, the individual's right is nevertheless against a foreign sovereign.<sup>19</sup> Governmental trade regulations, no matter how unfair, are nonetheless genuine acts of state which are not comparable to commercial activities. Trade regulations are acts *jure imperii* which, in theory, should be "immune." However, neither section 301 nor the European Regulation articulates a reasonable limitation on the types of government actions that may be challenged. This ability of private parties to question the validity of certain foreign legislative acts represents an important departure from classical foreign sovereign immu-

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17. For United States law, see 19 U.S.C. § 1671a(b)(1) (1982); for Community law, see EEC Council Regulation, O.J. Eur. Comm. (No. 3017), art. 5 (20 Dec. 1979) (on protection against dumped or subsidized imports from non-Member countries). Although section 301 was enacted to combat barriers to U.S. exports, the provision may be invoked against foreign import subsidies. A claimant may not, however, file both section 301 and countervailing actions. *See, e.g.*, Petition of AFL-CIO, 47 Fed. Reg. 42,059 (1982) (investigation of alleged export credit subsidies granted by Canada was terminated because some allegations were subject to CVD investigations). Recent cases suggest that section 301 may entitle a petitioner to a broadened definition of "subsidy." *See, e.g.*, Petition of Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers, 48 Fed. Reg. 55,790 (1983) (petition withdrawn).

18. Article 2 of the GATT Subsidies and Countervailing Duties Code merely refers to "a written request by or *on behalf of* the industry affected," leaving the choice free for each contracting party.

19. *See infra* notes 20-23 and accompanying text.

nity law, under which states were only challenged by other states through diplomatic channels.

To a limited extent, these trade procedures reinforce the arguments for a more refined approach to the international personality of individuals. Both section 301 and the European Regulation authorize actions that affect not only private foreign entities but also the offending foreign state as a whole by imposing specific countermeasures.

A second feature shared by section 301 and the European Regulation is the nature of the process. In both cases, the procedure is "transparent," i.e., it is public, adversarial, and administered in conformity with due process standards. First, a hearing is held at the municipal law level and monitored by either the Office of the United States Trade Representative (USTR)<sup>20</sup> or the European Commission.<sup>21</sup> This requirement applies to both private and public investigations. The unfair trade procedures seek to ascertain sufficient evidence to justify an investigation. The debate is public; notices of investigation must be published in the Federal Register or in the Official Journal of the European Communities; the foreign country is served with notice of an investigation; all interested parties may make their views known; written briefs and rebuttals may be presented; and public hearings may be held.<sup>22</sup> While these domestic procedures are carried out, international consultations are requested with the appropriate foreign state. Under both section 301 and the European Regulation, no action may be taken before completion of the international procedures.<sup>23</sup> In effect, the Community has incorporated basic due process requirements into its law.

Because a private party may initiate an investigation, the possibility of diplomatic embarrassment exists. When Congress granted a citi-

20. Procedures for Complaints Filed Under Section 301 of the Trade Act of 1974, 15 C.F.R. § 2006 (as amended 1984).

21. European Regulation, *supra* note 1, arts. 5-9.

22. *Supra* notes 20-21.

23. 19 U.S.C. § 2413 (1982); European Regulation, *supra* note 1, art. 11(2)(a). For the purpose of international consultations, the European Regulation has formally set up an advisory committee referred to as "the Committee" which consists of representatives of each Member State and a representative of the Commission as chairman. European Regulation, *supra* note 1, art. 5(1).

With respect to U.S. provisions, section 301 does not specify which "consultations" must take place under GATT procedures. Cases may be referred to GATT working parties or panels. *See, e.g.*, Petition of Nat'l Canners Ass'n, 40 Fed. Reg. 44,635 (1975) (challenging EC's minimum import prices for canned fruit juices and vegetables). Alternatively, a case may be subject to GATT article XXII or XXIII consultations. *See, e.g.*, Petition of Florida Citrus Comm'n, 41 Fed. Reg. 52,567 (1976) (alleging that EC's preferential import duties on Mediterranean citrus adversely affect U.S. citrus products). Finally, a case may fall outside GATT resolution. *See, e.g.*, Petition of Nat'l Sugar Processors Ass'n and American Soybean Ass'n, 41 Fed. Reg. 15,384 (1975) (alleging that EC's requirement that livestock feed be mixed with domestic nonfat milk unfairly displaces U.S. protein sources such as soybeans).

zen the right to enter a complaint against a foreign trade practice pursuant to section 301, Congress created a means by which private citizens could attribute all their economic difficulties to unfair foreign trade practices. Each foreign trade partner of the United States must realize that its legislation may become subject to inquiry and close scrutiny under a section 301 challenge.

Rather than a day in court, section 301 entitles every citizen to a day in the USTR's office. Undoubtedly this private citizen's remedy has significant constitutional ramifications in the United States.<sup>24</sup> The remedy may also, however, produce negative consequences under international law. Subjects of international law are not amenable to private claims unless the claims are state-supported. Section 301, however, ignores this customary requirement. The United States government retains no control over the initiation of section 301 actions by private citizens. Although the President has authority to decide whether to take action, he remains powerless to stop the investigative procedure. Of course the stringent conditions with which a private complaint must comply in order to result in retaliatory measures counterbalance the executive's lack of control.<sup>25</sup> The USTR may reject petitions on policy grounds alone, but this practice has seldom been employed.<sup>26</sup>

In contrast, a private complaint on behalf of Community producers under the European Regulation may be rejected as a threshold matter if the complaint fails to provide sufficient evidence to justify an investigation. Furthermore, the complaint may be rejected if Community interests do not require any action to be taken. Although the Regulation does not mention possible judicial review of a rejected private-party complaint, strong reasons exist for believing that, under appropriate circumstances, the Court of Justice of the European Community will apply the *FEDIOL* rule. In *FEDIOL*,<sup>27</sup> the Court stated that a complainant could not compel the Commission to initiate an anti-subsidy proceeding as long as "the Commission has observed the procedural guarantees granted to complainants; . . . has [not] committed manifest errors in its assessment of the facts, [and] has [not] omit-

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24. United States authors have devoted scrupulous attention to the constitutional rights of citizens when foreign affairs are involved. See, e.g., Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States*, 21 BUS. LAW. 853 (1966) and 22 BUS. LAW. 3 (1966); Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation*, 17 AD. L. REV. 159 (1965).

25. See *infra* Section I B (substantive requirements for action).

26. Archibald, *Section 301 of the Trade Act of 1974*, in 8 MANUAL FOR THE PRACTICE OF INTERNATIONAL TRADE LAW VII-5 (W.K. Ince & L.A. Glick eds. 1984) [hereinafter cited as Ince & Glick].

27. Case 191/82 EEC Seed Crushers and Oil Processors' Federation (*FEDIOL*) v. Comm'n, 1983 E.C.R. 2913 (1983).



ted to take into consideration any essential matter."<sup>28</sup> The Court thus subjected the Commission's exclusive discretion in evaluating the "community interest" to the rule of law.

By establishing the *FEDIOL* criteria, the Court provided a basis for review of rejected private-party complaints. Section 301 actions are more worrisome than EEC procedures because rejected private-party complaints are not subject to judicial review at any stage of the procedure.<sup>29</sup> Nevertheless, the preliminary investigative procedures provided by section 301 play an important safeguarding role for the private claimant.

## B. SUBSTANTIVE REQUIREMENTS

The substantive requirements for action under section 301 and the European Regulation differ in two important respects. First, whereas section 301 aims to respond to "unfair" foreign trade, the European Regulation is directed against "illicit" commercial practice. This semantic difference is not just an academic point. The Commission consciously chose to use the word "illicit" rather than "unfair".<sup>30</sup> Second, section 301 does not require injury as a prerequisite for investigation. The European Regulation, in contrast, explicitly requires that a party suffer injury before bringing a claim. These important differences illustrate two distinct approaches to the new problems of international trade.

Section 301 contemplates action by the United States in two different situations. The United States may take action either "to enforce" U.S. rights or "to respond" to a foreign country's practice. Despite its different wording, the European Regulation proposes action in similar situations. The Community may act either "to respond" to a definite foreign trade practice, or "to ensure full exercise" of the Community's rights. Although there is an important difference between action "to enforce" and action "to respond", the drafters of section 301 did not focus on this distinction.<sup>31</sup> In the preliminary draft of the Regulation, the Commission stated that action "to respond" applies, for example, to export restrictions or import impediments inconsistent with GATT. On the other hand, action "to

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28. *Id.* See Bellis, *Judicial Review of EEC Anti-Dumping and Anti-Subsidy Determinations After FEDIOL: The Emergence of a New Admissibility Test*, 21 COMMON MKT. L. REV. 539 (1984).

29. A Trade Representative's refusal to act is not judicially reviewable; the USTR need only publish the basis of a decision. 19 U.S.C. § 2412(b)(1) (1984).

30. Compare Proposal, *supra* note 13, with European Regulation, *supra* note 1. See European Parliament, Report of M.E. Blumenfeld, Doc. 1-376/83, at 11 (June 1, 1983) (the term "unfair" was considered "too vague").

31. See E. ZOLLER, ENFORCING INTERNATIONAL LAW THROUGH UNITED STATES LEGISLATION 137, 144 (1985).

ensure full exercise of rights" (i.e. "to enforce") applies to settlement procedures under GATT (article XXIII or Title II of the Subsidies Code) or to compensatory measures following the application of article XIX.<sup>32</sup> In these two situations, the right to resort to countermeasures has a completely different meaning.

"Responding" to a breach of an international obligation by a foreign state is a relatively straightforward process. Responsive actions follow internationally wrongful acts and are within the scope of international responsibility.<sup>33</sup> Section 301 and the European Regulation, however, define the breach differently. Under section 301, the violation may be an act "inconsistent with" a trade agreement or an act "unjustifiable, unreasonable, or discriminatory." Under the Regulation, however, the violation must be a practice "incompatible with international law or with the generally accepted rules."

In the preliminary draft of the Regulation, the Commission asserted that the phrase "unjustifiable, unreasonable, or discriminatory" was incompatible with certain GATT provisions.<sup>34</sup> This was admittedly true until Congress enacted the Trade and Tariff Reform Act of 1984 (the 1984 Act).<sup>35</sup> The 1984 Act, which amended the Trade Act of 1974, sets forth the following definitions. First, the 1984 Act defines an "unjustifiable" act as an act inconsistent with the international legal rights of the United States. Under this definition, an "unjustifiable" act clearly constitutes a breach of an international obligation. Second, the term "discriminatory" by nature involves a wrongful international act insofar as the obligation not to discriminate against a foreign state derives from the principle of equality between states, which in turn is a rule of customary international law.<sup>36</sup> Third, under the 1984 Act, the term "unreasonable" refers to "unfair and inequitable" practices, which are connected with the principles of reasonableness and prohibition against abuse of rights.<sup>37</sup> These are admittedly international obligations based upon the principle of good

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32. Proposal, *supra* note 13, at 2.

33. See W. Riphagen, Fifth Report on the Content, Forms and Degrees of State Responsibility (Part Two of the Draft Articles), A/CN.4/380, April 4, 1984.

34. Proposal, *supra* note 13.

35. Trade Act of 1974 § 304, 19 U.S.C.A. § 2411(e)(4) (West Supp. 1985) (amending 19 U.S.C.A. § 2411 (1980)).

36. See Report of the Commission to the General Assembly, [1958] 2 Y.B. INT'L L. COMM'N 105, U.N. Doc. A/3859/1958; Report of the International Law Commission on the Work of its Thirteenth Session, [1978] 2 Y.B. INT'L L. COMM'N 11, U.N. Doc. A/33/10/1978; see also Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 192 (Judgment of Aug. 27, 1952).

37. See Concerning Certain German Interests in Polish Upper Silesia (The Merits), 1926 P.C.I.J., ser. A, No. 7, at 30 (Judgment dated May 25, 1926); Free Zones of Upper Savoy and the District of Gex (Second Phase), 1930 P.C.I.J., ser. A, No. 24, at 12 (Order of Dec. 6, 1930); Free Zones of Upper Savoy and the District of Gex, 1932 P.C.I.J., ser. A/B, No. 46, at 167 (Judgment of June 7, 1932).

faith.<sup>38</sup>

The European Community insisted that it would not employ the methods adopted by the United States in dealing with unfair trade practices. The Community, however, by defining illicit foreign commercial practices as "any international trade practices incompatible with international law or with the generally accepted rules,"<sup>39</sup> reaches the same result as the United States. The concept of "incompatibility," however, does not necessarily require that a foreign state's act be inconsistent with an international obligation. Under European law generally and under French law specifically, "incompatibility" is the loosest standard for appraising the legality of a state's act.<sup>40</sup> In effect, the definition of illicit foreign commercial practices in the European Regulation parallels the United States' prohibition of "unjustifiable, unreasonable, or discriminatory" trade practices in section 301. Although the European Commission rejected the United States' choice of language, the phrase "incompatible with" reflects a similar disregard for restrictive construction of GATT obligations. Like the word "unreasonable" in section 301, the phrase "incompatible with" in the European Regulation may refer to any policy that "while not necessarily in violation of, or inconsistent with . . . international legal rights . . . , is otherwise deemed to be unfair and inequitable."<sup>41</sup>

The comparison between section 301 and the European Regulation becomes even more complex when one examines whether a state may "respond" to a breach without having suffered an injury. Under section 301, the United States may "respond" to a breach without having suffered any injury. The European Regulation, in contrast, mandates the existence of an injury.

One should note, however, that even a material injury may not be identical to "damage" to a party. The injury required for action under the European Regulation is the same type of injury that is required for action under the European anti-dumping law.<sup>42</sup> Moreover, like section 301, the European Regulation permits retaliation where a "threat of injury" is alleged, as long as it is "clearly foreseeable that a particular situation is likely to develop into actual injury."<sup>43</sup> Thus, the requirement of an injury before commencement of action under the European Regulation is not as strict as it appears at first glance. Fur-

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38. See E. ZOLLER, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC* 109-22 (1977).

39. European Regulation, *supra* note 1, art. 2(1).

40. See I. C. EISENMANN, *COURS DE DROIT ADMINISTRATIF* 462-63 (1955); J. BOULOUIS, *DROIT INSTITUTIONNEL DES COMMUNAUTÉS EUROPÉENNES* 161 (1984).

41. 19 U.S.C. § 2411(e)(3) (as amended 1984).

42. Compare European Regulation, *supra* note 1, art. 8 with EEC Council Regulation (No. 3017), *supra* note 17, art. 4.

43. European Regulation, *supra* note 1, art. 8(2).

thermore, although section 301 does not formally require an injury for action, the United States has initiated investigations only in cases where the foreign act has burdened United States trade. For example, the United States Trade Representative does not permit the use of section 301 for "fishing expeditions."<sup>44</sup> However, the terms "burden" and "restriction" in section 301 have a much broader scope than the same terms in the European Regulation. Under section 301, a "burden" or "restriction" includes not only effects on trade but also impact on "services (including transfer of information) associated with international trade, whether or not such services are related to specific goods," or "foreign direct investment by United States persons with implications for trade in goods or services."<sup>45</sup>

Under treaty law, an injury is not required for a state to respond to a breach. Whenever a contracting party to a treaty does not abide by that international agreement, the other party is entitled to act in the same manner by virtue of the *exceptio non adimplenti contractus*. This Latin maxim means that whenever a contract is not complied with, the innocent party may avoid an obligation under the contract that is identical, similar, or equivalent to the breached obligation (*quid pro quo* obligation). This right of immediate action, which exists in both civil and common law systems, is based upon the principle of reciprocity and applies even when the innocent party has not suffered injury.

Under international law, reciprocal actions are customary entitlements.<sup>46</sup> As a result, even though the European Regulation does not formally permit action without an injury, the Regulation does not diminish the Community's customary international rights. Any response taken under the principle of *exceptio non adimplenti contractus*, however, must remain within the limits of reciprocity. In other words, responsive actions must be identical, similar, or equivalent to the breached obligation. The 1984 Trade and Tariff Reform Act amendments to section 301 authorize the President to take action on certain goods or in a specific sector "without regard to whether or not such goods or sector were involved in the action of the foreign country."<sup>47</sup> This broad authorization may open the door to reprisals that theoretically are not legitimate measures under the reciprocity principle of treaty law. Reciprocity does not authorize the responding state to take steps outside the field of the offense.

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44. Ince & Glick, *supra* note 26, at VII-5. See, e.g., Section 301 of the Trade Act of 1974 Complaint, 40 Fed. Reg. 33,749 (1975) (petitioners failed to demonstrate significant trade impact of Canadian quota on U.S. egg imports).

45. 19 U.S.C. § 2411(e)(4) (as amended 1984).

46. See E. ZOLLER, ENFORCING INTERNATIONAL LAW THROUGH UNITED STATES LEGISLATION 14-30 (1985).

47. 19 U.S.C. § 2411(a)(2)(B) (as amended 1984).

Under the law of international responsibility, the right “to respond” is closely linked to the existence of injury or damage. On its face, the European Regulation complies more with this norm of international law than does section 301. However, as mentioned, the history of section 301 demonstrates that, in practice, investigations under the section are not initiated without some type of injury. On the other hand, the European Regulation’s injury requirement does not necessarily call for damage to the Community as a whole.

Matters of “enforcing” or “ensuring full exercise” of rights, especially in the absence of a clear prior breach, present more intricate problems. Although the Community pledged not to parallel “controversial” section 301, considering the section “potentially inconsistent” with GATT,<sup>48</sup> the Community followed the same practice, although more artfully, by providing procedures “to ensure full exercise of the Community’s rights.” In contrast to section 301, the Regulation vests the right to trigger enforcement in Member States—not in Community producers. This distinction in rights derives from the fact that Community producers must always make a convincing showing of both an illicit practice and an injury.<sup>49</sup> Only a Member State may ask the Commission to initiate the procedure to ensure full exercise of the Community’s rights.<sup>50</sup> Although the phrasing of the Regulation is ambiguous, Member States apparently must supply the Commission with evidence of illegality and injury only when they allege that illicit practices have occurred.<sup>51</sup> In short, both the United States and the Community avail themselves of the opportunity to enforce their rights vis-à-vis other states regardless of the “damage” caused to their own interests.

Enforcement measures necessarily involve a coercive component. When coercion accompanies the consequences of a breach, the coercion does not possess the same legal significance as when it is completely independent from the impact of a breach. Unlike reciprocal measures, reprisals are by nature coercive devices. When reprisals follow a breach, however, the legitimacy of their coercive component derives less from the need to obtain compensation for the breach than from the need to obtain full reparation and return to the *status quo ante*.

In contrast, the exercise of coercion upon innocent foreign states is more difficult to justify. Although the principle of equality between states is one of the basic tenets of contemporary international society,

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48. Proposal, *supra* note 13, at 2; see *supra* note 12 and accompanying text.

49. European Regulation, *supra* note 1, art. 3(1)-(2).

50. *Id.* art. 4(1).

51. *Id.* art. 4(2).

the right of one state to coerce another innocent state remains doubtful. A society of equals precludes one of its members from enjoying a status superior to that of another. Equality implies respect for the legitimate rights of other subjects of the law. A state cannot infringe on the subjective rights of another state when the latter has not committed a breach.

Like section 301, the European Regulation grants the Community enforcement rights. In its preliminary draft, the European Commission raised the prospect of taking action in two situations where no breach of international obligation has occurred. The first instance concerns GATT contracting parties that exercise the right to resort to emergency action over the import of particular products.<sup>52</sup> The second instance contemplates action against a signator to the Subsidies Code that initiates an investigation into alleged Community subsidies.<sup>53</sup> In the Commission's view, however, these two situations differ from those authorized by section 301. The Community maintains that it will take only those measures "which are compatible with existing international obligations."<sup>54</sup> Taken literally, this assertion would limit Community enforcement to either retorsion or reciprocal actions. The Community's position is clearly untenable because it would, in effect, prevent the Community from successfully enforcing its own rights since neither retorsion nor reciprocity, which do not infringe foreign states subjective rights, entail the coercive component that is essential in enforcement matters.

## II. THE SCOPE OF ACTION

With respect to measures that may be taken against foreign countries, the differences between section 301 and the European Regulation appear substantial. Section 301 authorizes the President to take "all appropriate and feasible action."<sup>55</sup> The European Regulation, in contrast, only provides for measures "compatible with existing international obligations and procedures."<sup>56</sup> Although the soundness of the Community's self-restraint is questionable, the Commission wisely distinguishes obligations from procedures. The power to take unilateral action against a foreign state varies with this distinction.

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52. GATT, *supra* note 12, art. XIX.

53. Proposal, *supra* note 13, at 2.

54. European Regulation, *supra* note 1, art. 10(3).

55. 19 U.S.C. § 2411(a).

56. European Regulation, *supra* note 1, art. 10(3).

## A. INTERNATIONAL PROCEDURES

Under international law, states are not authorized to take procedural shortcuts when redressing international offenses. As a matter of law, one must distinguish reciprocal and non-reciprocal actions. If the contemplated response is solely reciprocal, i.e. identical or equivalent to the foreign state's action, the response may be implemented at once. Reciprocal actions are inherently rights of immediate action with the sole purpose of "reestablishing the symmetry of initial positions between the parties."<sup>57</sup> This concept was illustrated in the *Case Concerning the Air Service Agreement*.<sup>58</sup> In that case, the Arbitral Tribunal upheld the action of the Civil Aeronautics Board requiring French airline companies to file flight schedules. As long as France denied Pan Am the right to land aircraft in Paris, the United States was entitled to reciprocate immediately by denying the landing of Air France aircraft en route from Paris to Los Angeles. The response was equivalent to the breach.<sup>59</sup>

Trade matters operate similarly. Under GATT article XXVIII, for example, a withdrawal of trade concessions may be followed within six months by a withdrawal of "substantially equivalent concessions." Under GATT article XIX, affected contracting parties have similar withdrawal rights following emergencies. The right of immediate reciprocal action is "so just, so equitable"<sup>60</sup> that it is widely recognized by every municipal legal system under the principle *inadempti non est adimplendum*.<sup>61</sup>

Reciprocal remedies, however, are often an ineffective response to unfair or illicit trade practices and an ineffective means of enforcing international rights. Some trade practices, such as the imposition of non-tariff barriers (NTBs), may result from domestic traditions that do not exist in the injured foreign state. Moreover, even responding legislation that actually mirrors the breach may prove ineffective. Mirror legislation usually takes no account of the economic impact of the breach on the aggrieved party; nor does it consider the effect of the response upon the offender. Because mirror legislation is often blind to such considerations, its effectiveness is limited.<sup>62</sup> Finally, when "enforcing" is more important than "responding," reciprocity may

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57. *Case Concerning the Air Service Agreement*, *supra* note 14, at 445.

58. *Id.*

59. *Id.* at 443-444 (¶ 83). See E. ZOLLER, PEACETIME UNILATEAL REMEDIES, *supra* note 14, at 133-37.

60. *Diversion of Water from the Meuse (Neth. v. Belg.)*, 1937 P.C.I.J., ser. A/B, No. 70, at 7 (Judgment of June 28, 1937) (Anzilotti, J., dissenting).

61. What is not performed is not to be complied with. (Translation by Author.)

62. See E. ZOLLER, ENFORCING INTERNATIONAL LAW THROUGH UNITED STATES LEGISLATION 141-42 (1985).

become meaningless; an enforcement measure contains a coercive component which is not attached to an equalizing reciprocal move. Enforcement thus involves reprisals, which constitute measures beyond reciprocity. The Canada-United States Border Broadcast dispute<sup>63</sup> illustrates the limited effectiveness of reciprocity. After that dispute, the chances of Canada's repealing its allegedly "unfair" tax legislation diminished because the United States response under section 232 of the 1984 Act<sup>64</sup> merely mirrored Canada's unfair legislation.

Both section 301 and the European Regulation clearly allow reprisals against foreign nations. After the amendments to the 1984 Act, section 301 became even more explicit in that regard. Congress expressly granted the President the authority to take sweeping actions "with regard to any goods or sector—without regard to whether or not such goods or sector were involved"<sup>65</sup> in the foreign practice. Similarly, article 10(3) of the European Regulation authorizes the Community to resort to genuine reprisals, including raising existing customs duties or introducing quantitative restrictions.

One should note that both instruments subject enforcement actions to preliminary diplomatic steps. Section 303 of the Trade Act formally requires the Trade Representative to "request consultations with the foreign country."<sup>66</sup> It specifies that whenever a trade agreement is involved, proceedings must be requested "under the [formal dispute settlement procedures found within the] agreement."<sup>67</sup> Similarly, article 6 of the European Regulation requires the Commission not only to notify the representatives of the country concerned, but also to consult with them. In addition, article 13 precludes action until the parties have exhausted international proceedings for consultation and dispute settlement. These approaches are consistent with article 33 of the United Nations Charter,<sup>68</sup> which requires states to

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63. 45 Fed. Reg. 51,173 (1980). The dispute concerned Canadian tax regulations that denied an income tax deduction to Canadian advertisers who contracted with U.S. television and radio stations located near the U.S.-Canadian border for advertising aimed primarily at the Canadian market.

64. Trade and Tariff Act of 1974, Pub. L. No. 98-573, § 304, 98 Stat. 3002 (1984). See also 45 Fed. Reg. 51,173 (1980).

65. 19 U.S.C. § 2411(a)(2).

66. 19 U.S.C. § 2413(a).

67. *Id.*

68. U.N. CHARTER art. 33. Article 33 provides:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.



settle their disputes through peaceful means.

On its face, section 301 allows the United States to take action before exhausting international procedures. The United States, however, has never resorted to such practice. In a number of cases, the USTR made recommendations to the President before terminating international proceedings. Yet, the President has never taken effective retaliatory action at this interim stage. Instead, he has always required the USTR "to continue the dispute settlement process."<sup>69</sup>

For the most part, actions under section 301 have protected United States interests. Section 301 works as a threat, providing the United States with strong "bargaining chips," especially when the private petitioner proposes retaliatory measures early in the proceedings. The Community has not discarded the opportunity to brandish retaliatory threats during international proceedings. However, unlike practices under section 301, neither Community producers nor Member States may impose such threats during investigation. Articles 11 and 12 of the Regulation specify that the Commission is the sole competent body to propose retaliatory measures. Depending upon whether the action is a "response" or an "enforcement," the Commission makes a proposal to the Council or submits a draft to the Committee. In any event, the Commission's right of taking initiative is exclusive.

To summarize, the European Regulation grants the Commission the same power to act that is granted to the United States in section 301. Both the European Community's and United States' approaches support the legitimacy of resorting to coercive devices during international negotiations and dispute settlement procedures. These coercive devices, however, are not fully consistent with international law when used against foreign states that have not clearly breached international obligations. Nevertheless, these devices may prove efficient and better enable parties to reach mutually satisfactory solutions. In any event, the aggressive practices of the United States in international intercourse are becoming prevalent, causing one to wonder if at some point the United States will have to justify these practices. To a large extent, the need for justification will depend upon the credibility of the responsive measures actually contemplated.

## B. INTERNATIONAL OBLIGATIONS

The language of section 301 appears to afford the President more discretion than the European Regulation allows the Community. Sec-

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69. *Options to Improve the Trade Remedy Laws, 1983: Hearings Before the Subcomm. on Trade of the House Ways and Means Comm.*, 98th Cong., 1st Sess. 962 (1983) (statements of Jeanne S. Archibald, Chairman, Section 301 Committee, Office of the U.S. Trade Representative).

tion 301 authorizes the President to "take all appropriate and feasible action."<sup>70</sup> In contrast, article 10(3) of the Regulation limits the actions of the Community to "any commercial policy measures . . . which are compatible with existing international obligations." On its face, article 10(3) does not authorize the Community to infringe upon the offender's subjective rights. The Regulation thus appears to preclude actions of reprisal.

The legitimacy of reprisals was a fundamental issue when the Commission discussed the draft of the Regulation. Following the objections of certain Member States, the Commission stressed that, unlike section 301, the proposed Regulation did not authorize measures incompatible with existing international obligations of the Community.

This claim is implausible for several reasons. First, article 10(3) of the Regulation enumerates possible actions that would infringe upon the subjective rights of trade partners. Article 10(3) explicitly sanctions "suspension or withdrawal of any concession resulting from commercial policy negotiations,"<sup>71</sup> the "raising of existing customs duties or the introduction of any other charge on imports,"<sup>72</sup> and "the introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned."<sup>73</sup> The formulation "measures . . . affecting trade with the third country concerned"<sup>74</sup> approximates the "all appropriate and feasible action" language of section 301.<sup>75</sup> The only difference is that, unlike the United States, the Community does not claim the right to take measures outside the field of trade matters.

Second, a response "compatible" with an international obligation does not have to be "consistent" with the obligation. To satisfy the requirement of compatibility, the measure need only stand a test of non-contrariness. Actions are permissible if no rules prohibit them.

Finally, article 10(3) would be nonsensical if it prohibited measures incompatible with international obligations. As previously discussed, the only measures "compatible" with international obligations are either acts of retorsion or reciprocal measures. Neither acts of retorsion nor reciprocal measures, however, can ensure the full exercise of the Community's rights because they lack the element of coercion that is crucial to enforcement action.

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70. 19 U.S.C. § 2411(a).

71. European Regulation, *supra* note 1, art. 10(3)(a).

72. *Id.* art. 10(3)(b).

73. *Id.* art. 10(3)(c).

74. *Id.* art. 10(3)(c).

75. 19 U.S.C. § 2411(a)(1).

Neither section 301 nor the European Regulation contemplates judicial review of the decisions made by the President and by the Council.<sup>76</sup> The two instruments, however, differ in terms of decision-making efficiency. Under section 301, the President has exclusive authority to decide the proper response of the United States. Under the European Regulation, the decision process is more complex.

The Regulation's procedures differ in the following two situations. In the first situation, the Council formulates measures to ensure "full exercise of the Community's rights" "after the conclusion of . . . an international procedure."<sup>77</sup> In this situation, the Council must act by a qualified majority. The European experience, however, has proved that when sensitive political issues are involved, Member States act with unanimity. The majority requirement, therefore, may seldom be used in practice. In the second situation, the Council threatens to take measures during the course of an international procedure. In this situation, the Commission representative must submit a draft of the proposed decision to the Committee. The decision applies if the Council voices no formal objections within a fixed period.<sup>78</sup> The latter scheme provides greater efficiency than the former because the Council is compelled to give a ruling within a stated time. If the Council fails to reach a consensus on the Commission's proposed decision, the Commission's decision applies. Only future practice, however, will test the effectiveness of the new European Regulation.

### CONCLUSION

The comparison of the European Regulation with section 301 of the United States Trade Act of 1974 reveals that despite differences in the language of the two instruments, their procedural and substantive requirements have significant similarities. Moreover, the two instruments share a fundamental quality: each authorizes unilateral and offensive actions without a prior breach of international obligations by a foreign state. Both instruments offer more effective measures in enforcing the rights of the EEC and the United States in foreign trade.

It is doubtful, however, that international law entitles states to enter into negotiations with the strong "bargaining chips" made permissible under section 301 and the European Regulation. Peaceful settlement of disputes as required in article 33 of the United Nations

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76. Under Community law, a decision having a general character cannot be challenged by an individual unless the decision is of direct concern to that individual. *See* EEC Treaty, *supra* note 8, art. 173(2). Judicial review of presidential actions under section 301 would probably be precluded under the "political question" doctrine.

77. European Regulation, *supra* note 1, arts. 11(2)(b) and 11(3). *See also* EEC Treaty, *supra* note 8, art. 148(2).

78. European Regulation, *supra* note 1, arts. 11(2)(a) and 12.

Charter seems to direct a period of time during which no party enjoys more rights than others. Such a period of time should be of sufficient duration to allow the offending state an opportunity to correct its actions.

