



**LAW OFFICES
STEWART AND STEWART**

Memorandum

From: Alan M. Dunn & William A. Fennell
Date: December 29, 2003
Subject: **Questions Re: Film and Television Action Committee's
Section 301(a) Petition to the United States Trade
Representative**

1) *What is a Section 301(a) petition?*

A § 301(a) petition to the United States Trade Representative (USTR) asks him to determine whether or not Canada's subsidies to film and television production violate the United States' rights under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Duty Measures.

2) *How does it work?*

If USTR accepts a petition as making the necessary showing, then it proceeds immediately to a dispute settlement proceeding using the WTO Dispute Settlement Mechanism (DSM) aimed at eliminating the WTO inconsistent subsidy. This process would begin with mandatory consultations regarding the cessation of the subsidy practice but would move to a rapid and binding decision by an arbitral body (called a WTO panel) if the consultations were not successful within 2 to 3 months. The WTO panel would be established, would accept briefs and presentations by the governments of the U.S. and Canada, and would complete their deliberations and issue a decision quite quickly. Subsidy cases, such as the instant matter, are subject to an accelerated schedule so panels typically issue their decision within 4 to 7 months (rather than the normal 9 to 11 months).

3) *What is the intended outcome of this filing?*

Elimination of the Canadian subsidies to film and television production

4) *What is the reason for this filing?*

Section 301 is a mechanism used by the United States Trade Representative to identify unfair trade practices and to request reform -- backed by the threat of sanctions.

We believe that the subsidies provided by the Canadian federal and provincial governments for the purpose of encouraging the production of film and television projects within Canada are actionable both under the Agreement on Subsidies and Countervailing Measures (one of the sub-agreements that establishes the rights and obligations of WTO members) and under the domestic U.S. countervailing duty law. In the former case, an action would be brought using the Dispute Settlement Mechanism (DSM) of the WTO to declare the Canadian subsidies inconsistent with the WTO so that Canada would eliminate the subsidies. (Canada would have the alternative to provide compensation to the U.S. but that option is nearly universally avoided.) The DSM is the body within the WTO that settles disputes between member nations based on allegations of violations of international trade commitments.

The purpose of a § 301(a) action is to obtain compliance by a U.S. trading partner with the trade agreements to which the partner nation and the U.S. have mutually agreed. Canada's subsidies violate Article 5 of that Agreement whereby ***Canada, the U.S., and the other 143 countries that are members of the World Trade Organization (WTO) agreed not to cause adverse effects to the interests of other members through the use of a subsidy.*** Thus, the purpose of a § 301(a) action against the subsidies given by Canada to film production in Canada would be to obtain compliance by Canada with the Agreement on Subsidies and Countervailing Measures that is part of the WTO Round Agreements.

5) *What we think it will accomplish:*

Because it is backed by the threat of sanctions (i.e., forcing Canada to pay compensation to the U.S.), a § 301(a) petition would initiate an action that would force Canada to eliminate the subsidies in question.

Once the United States Trade Representative initiates a § 301(a) investigation, it will enter into negotiations with the Canadian government to remove the subsidies that harm the domestic U.S. industry. If those negotiations fail, the U.S. may request a panel proceeding under the WTO Dispute Settlement Understanding, an agreement that is part of the Uruguay Round Agreements that established the WTO. The WTO panel, after a process of briefing and hearings, will issue findings as to whether the subsidies cause adverse effects to the U.S. industry in violation of the Agreement on Subsidies and Countervailing Measures. (Note: In a typical WTO panel action, the complaint alleges violations based on all the ways that a measure is inconsistent with the WTO agreements. Thus, a single measure may violate, for example, the Agreement on Subsidies and Countervailing Measures as well as several other Agreements, all of which would be included in the complaint and addressed in the WTO panel's findings.)

Under the Agreement on Subsidies and Countervailing Measures (Article 7) the recommendation that both the panel and the Appellate Body would make would be "***to remove the adverse effects***" or "***withdraw the subsidy.***"

The panel decision may be appealed by either country to the Appellate Body of the Dispute Settlement Mechanism. If appealed, the Appellate Body also will issue findings as to whether the subsidies cause adverse effects to the U.S. industry in violation of the WTO Agreements. Despite having the option to appeal a panel decision ruling the subsidies to be inconsistent with its obligations under the WTO, Canada generally has responded to WTO panel and appellate body decisions without undue delay.

In the event that Canada does not implement a favorable finding in a timely fashion, the USTR has several options to encourage faster compliance with a WTO determination.

- A) The U.S. could suspend concessions given to the offending country (by raising tariffs) on the product area in question;
- B) The U.S. could impose duties or other import restrictions on *any* goods imported from the offending country; or
- C) The U.S. can enter into binding agreements with the offending party in order to otherwise remedy the situation.

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NOTE: Emphases added by the Film and Television Action Committee