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### Recommended Citation

Andrew L. Stoler, *The Border Broadcasting Dispute: a Unique Case Under Section 301*, 6 Md. J. Int'l L. 39 (1980).

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## THE BORDER BROADCASTING DISPUTE: A UNIQUE CASE UNDER SECTION 301

*Andrew L. Stoler\**

### I. INTRODUCTION

The economic relationship between the United States and Canada is unique in the world. For a long time, prior to the early 1970s, the bilateral exchange was termed a "special relationship," but the use of this term was abandoned in the wake of the extreme Canadian irritation in 1971 over the U.S. Government's decision to impose a temporary import surcharge and the subsequent adoption by the Canadian Government of policies designed to diversify Canada's international economic relations (the so-called "third option" policies). Nonetheless, in 1980 the bilateral relationship remains the largest and most extensive of any two countries on the globe. In 1979, U.S. merchandise trade with Canada exceeded seventy billion dollars, accounting for over eighteen percent of American world trade and more than seventy percent of Canada's total international trade.<sup>1</sup> By the end of 1979, Canada was the third largest foreign direct investor in the United States (\$6.97 billion), and the United States accounted for over eighty percent, or approximately \$32 billion, of total foreign direct investment in Canada.<sup>2</sup>

The magnitude of the economic relationship between the two countries is due to several factors: the geographic proximity of the countries, a well-developed North American transportation network, and the demographic patterns of Canada, wherein the bulk of the population lives within one hundred miles of the U.S. border. Of all of these factors, the last one is possibly the most important. Despite tariffs and other barriers to international commerce, it is frequently more advantageous to businesses and individuals in both countries to trade in a North-South, rather than an East-West, direction. The magnitude of the Canadian-American exchange guarantees that both governments will devote considerable attention to the

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\* Director for Canada, Australia and New Zealand, Office of the U.S. Trade Representative, Executive Office of the President.

1. EXPORTS BY COUNTRIES: JANUARY-DECEMBER 1979, CATALOGUE 65-003, TABLE 2, and IMPORTS BY COMMODITY: JANUARY-DECEMBER 1979, CATALOGUE 65-007, TABLE 2, MARCH 1980, STATISTICS CANADA, OTTAWA. Note: Canadian dollar statistics were converted using an exchange rate of C\$ 1.00 = US\$ 0.86.

2. SURVEY OF CURRENT BUSINESS, U.S. DEP'T OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, Table 13 and Table 15 (August 1980). These figures are in U.S. dollars and reflect the "foreign direct investment positions" of U.S. - and Canadian-owned firms.

resolution of any problems between the two countries through frequent government-to-government consultation. Meanwhile, demographic patterns in Canada and in the northern United States guarantee that there will always be much to discuss. The recent confrontation between the United States and Canada that became popularly known as the "border broadcasting dispute" represents a case in point.

## II. BACKGROUND OF THE DISPUTE

### A. *Origins of the Issue*

Canada's Prime Minister, Pierre E. Trudeau, once referred to Canada's relationship with the United States as that of a mouse sleeping in the same bed with an elephant — the obvious implication being that the mouse, being so much smaller than the elephant, should take care lest he be intentionally or unintentionally harmed. While not quite in the same proportion as the mouse to the elephant, the Canadian Gross National Product, population and domestic market are all roughly one-tenth the size of their American counterparts. Thus, it is a common practice within the trade policy community of the U.S. Government to use a ten-to-one rule of thumb in quantitative evaluations of reciprocity in the bilateral relationship. The size disparity between the two countries is important; it contributes to the Canadians' longstanding paranoia over their potential for being "swallowed" by their larger neighbor to the south. This is particularly true when viewed in light of the highly visible presence of American multinational corporations in Canada. It was this same fear of being "swallowed" (albeit in a cultural sense) that originated the border broadcasting dispute.

Normally, television and radio broadcasting stations transmit their signals in an omnidirectional pattern to an area the radius of which is determined primarily by the strength of the broadcast signal. In the United States, until very recently, the American broadcasting industry was highly concentrated in localized broadcasting of signals received on home antennae. The widespread subscription to cable television systems is a relatively recent phenomenon in the United States. In Canada, however, the situation is significantly different. In 1978, it was estimated that the level of cable penetration in major Canadian markets approximated seventy percent.<sup>3</sup> The importance of cable television in Canada is a key element in understanding the background of the border broadcasting dispute. This is because the

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3. A. DONNER AND F. LAZAR, AN EXAMINATION OF THE FINANCIAL IMPACTS OF CANADA'S 1976 AMENDMENT TO SECTION 19.1 OF THE INCOME TAX ACT (BILL C-58) ON U.S. AND CANADIAN TV BROADCASTERS, at II-2 (1979) [hereinafter cited as DONNER & LAZAR].

American broadcasting industry has become closely entwined in the Canadian cable network (54 percent of weekly prime time television in Canada consists of programming produced in the United States). Much of the programming transmitted to Canadian cable subscribers is a re-transmission of "spill-over" signals from American broadcasting stations located near the U.S.-Canadian border.

Recognizing that a large number of Canadian viewers were watching American television through their cable system hookups, Canadian advertisers actively sought advertising time on U.S. stations. The Canadian Government estimated that by 1974, Canadian advertisers were spending twenty million dollars per annum with bordering American television stations. This figure represented approximately ten percent of total television advertising revenues in Canada.<sup>4</sup> The Canadian Government considered this outflow of advertising dollars to be a serious problem. Since the early 1970s the government has viewed the increased diversion of potential income as a critical factor in the development and expansion of the country's programming industry and broadcasting system. The flow of advertising funds to the United States impeded the realization of Canadian cultural policy objectives (i.e., the production of Canadian television shows which would foster a sense of national identity in viewers). Such objectives were already being fostered in part through the imposition of "Canadian content" rules, applied to Canadian-licensed stations, which required minimum levels of Canadian-produced television programs. In an effort to counter the American threat, the Canadian Government and the Canadian Radio/Television and Telecommunications Commission (CRTC) examined a number of alternative methods of stemming the flow of revenue out of the country.

### *B. Commercial Deletion*

In 1971, the CRTC began to move toward a strategic policy of random commercial deletion which the CRTC hoped would discourage Canadian advertisers from placing TV commercials with U.S. broadcasters. A policy statement was issued suggesting that Canadian cable operators who were transmitting signals of stations not licensed in Canada (i.e., U.S. "border broadcasters") would be permitted to remove commercial advertising from those signals and substitute alternative material in those time slots. In December, 1972, the agency made mandatory commercial deletion a standard

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4. On November 24, 1978, the Canadian Embassy presented the Dept. of State with Note No. 700, which attached a statement of the Canadian Government's position on the "border broadcasters'" complaint under Section 301 of the 1974 U.S. Trade Act [hereinafter cited as Statement of the Canadian Government of Nov. 24, 1978].

element for renewal of cable broadcasting licenses. The CRTC relied on the use of its licensing authority in Canada to further implement this policy.<sup>5</sup>

By its introduction of uncertainty into a contractual relationship, the CRTC policy was designed to discourage Canadian advertising on U.S. border broadcasting stations. The advertiser could no longer be sure that his message would be viewed by its intended audience — Canadian cable subscribers. In Calgary, Montreal and Edmonton, where the policy was first implemented, there was only a marginal impact on U.S. border broadcasters, largely because the proportion of total income these stations derived from Canada was minor. However, in late 1973, the Rogers Cable Television Company in Toronto began random deletion of U.S.-origin commercial signals, substituting public service announcements in place of the deleted material. The application of commercial deletion in the Toronto, Ontario — Buffalo, New York area had an appreciable adverse economic impact on three stations in the Buffalo area. In an attempt at retaliation, the Buffalo stations applied to the Federal Communications Commission (FCC) for a license to “jam” their own signals at the border and thus prevent their receipt by Canadian cable operators. The rationale behind the “jamming” proposal was that Canadians should “pay” for the entertainment they enjoyed through permitting U.S.-origin commercial messages to be viewed in Canada. Because it was felt that the “jamming” proposal smacked of Cold War tactics inappropriate in a U.S.-Canada context, the FCC rejected the border broadcasters’ application. The U.S. Government’s involvement in the commercial deletion dispute was precipitated by these developments and by the development of the dispute into a highly visible bilateral issue.

Tension was heightened by the Canadian Government’s move to reinforce the commercial deletion policy with a tax-related measure. Through the measure, Canadian advertisers were denied business expense deductions for advertising aimed primarily at Canadian audiences but placed with foreign media. The measure, which became Bill C-58,<sup>6</sup> was later proclaimed into law on September 22, 1976. The combination of the CRTC’s commercial deletion policy and Bill C-58 incited the border broadcasters to take their case to the U.S. Administration and, more significantly, to the U.S. Congress. In response to pressure from both the broadcasters and the Congress, the Administration requested consultations with the Canadian Government and both commercial deletion and Bill C-58 were the subject of bilateral discussions in June and October of 1976. As a result of the talks with the

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5. DONNER & LAZAR, at I-5.

6. An Act to Amend the Income Tax Act (Bill C-58), § 3, presented by the Minister of Finance to the First Session of the Thirtieth Canadian Parliament, April 18, 1975.

U.S. Government, the Canadian Government in December 1976 suspended further implementation of the commercial deletion policy pending an assessment of the financial effects of Bill C-58.

*C. Bill C-58*

The key element of Canadian Government policy designed to strengthen the financial viability of the domestic programming and broadcasting industries is the tax provision found in Bill C-58, which amended Section 19.1 of the Income Tax Act of Canada. The Bill became law on September 22, 1976; however, it did not become fully effective until September 22, 1977, due to a grandfather clause in the Act designed to permit Canadian companies to honor prior existing contracts. The section of the Bill which affected U.S. border broadcasters provides:

. . . in computing income, no deduction shall be made in respect of an otherwise deductible outlay or expense of a taxpayer made or incurred after this section comes into force for an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcasting undertaking.<sup>7</sup>

The Canadian Government expected that the amendment to Section 19.1 of the Canadian Income Tax Act effected through the enactment of Bill C-58 would support Canadian broadcasting policy objectives by offering a powerful incentive to Canadian companies to use domestic, rather than foreign, broadcasters media to reach the Canadian market.<sup>8</sup> The American border broadcasters have stated that the provisions of Bill C-58 not only have caused the cost of purchasing time on U.S. stations to double for Canadian advertisers in the period immediately after September, 1977, but also have provided a tax subsidy to the Canadian television industry. By year-end 1977, the U.S. border broadcasters estimated that their advertising revenues from Canadian sources dropped by more than fifty percent.<sup>9</sup>

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7. *Id.*

8. Bill C-58 also had an adverse impact on foreign newspapers and periodicals through a provision parallel to that concerning broadcast media.

9. Petitioners' Brief Filing a Complaint Pursuant to Section 301 of the Trade Act of 1974 at 6 and 9, USTR Docket No. 301-15, (August 29, 1978).

## III. THE SECTION 301 CASE

A. *Section 301*<sup>10</sup>

Prior to the statute's amendment by the Trade Agreements Act of 1979, Section 301 of the United States Trade Act of 1974 was entitled "Responses to Certain Trade Practices of Foreign Governments." The original statutory provisions authorized the President of the United States to retaliate against unfair trade practices of other nations that restrict imports from the United States or which discriminate against or harm U.S. commerce.<sup>11</sup> Examples of "unfair" trade practices within the reach of Section 301 are import quotas, variable levies, taxes which discriminate against imports, and discriminatory unauthorized rules of origin.<sup>12</sup> As originally constituted, Section 301 extended protection primarily to goods but also to "U.S. services associated with international trade."<sup>13</sup>

The U.S. Government agency with primary responsibility for the implementation of the current Section 301 is the Office of the United States Trade Representative (USTR)<sup>14</sup> in the Executive Office of the President. USTR chairs the interagency Section 301 Committee (a formal subgroup of the interagency Trade Policy Staff Committee<sup>15</sup>). All Presidential decisions in Section 301 cases are based on the recommendations of the U.S. Trade Representative.

Under Section 301, "interested parties" who wish to avail themselves of the statutory remedies provided to counter foreign practices may file complaints with USTR.<sup>16</sup> The petition must describe the foreign practice at issue and provide information on why the practice should be actionable under

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10. 19 U.S.C. § 2411 (1979).

11. 19 U.S.C. § 2411, § 301(a)(1).

12. Rules of Origin are employed by Customs officials in determining the treatment to be afforded imported goods according to their country of origin and are generally used in the context of preferential trading arrangements, such as a customs union.

13. See Senate Finance Committee Report on the Trade Act of 1974, S. REP. No. 93-1298, 93d Cong., 2d Sess. 165 (1974).

14. The USTR was formerly the Office of the Special Representative for Trade Negotiations; the name of the agency was changed by Presidential Reorganization Plan No. 3 of 1979. The office is headed by the U.S. Trade Representative who holds Cabinet rank and the title of Ambassador.

15. The Trade Policy Staff Committee (TPSC) is comprised of representatives from USTR and the Departments of State, Treasury, Defense, Commerce, Labor, Agriculture, Interior, Transportation and Justice, as well as the National Security Council and the Council of Economic Advisors.

16. 15 C.F.R., Part 2006.

Section 301.<sup>17</sup> The exact requirements for initiating a case by petition are stipulated in the Code of Federal Regulations.<sup>18</sup>

Once a determination has been made that acceptance of a complaint under Section 301 is warranted, the Section 301 Committee is charged with determining whether the complaint is potentially actionable under the statute.<sup>19</sup> If the Committee decides in the affirmative, and both the U.S. Trade Representative and the President concur, the law requires that the President "shall take all appropriate and feasible action within his power to enforce such rights [under any trade agreement] or to obtain the elimination of such act, policy or practice"<sup>20</sup> which are the subject of the complaint. In this connection, the law envisages that the President first seek to remedy the situation through consultations and negotiations with the foreign country maintaining the policy, act, or practice. In the event that consultation and negotiation fail to resolve the matter, the President is authorized to retaliate against foreign goods or services.<sup>21</sup> Retaliation is not limited to an amount equivalent to the value of U.S. commerce harmed by the foreign action.

Section 301 was significantly amended by the Trade Agreements Act of 1979.<sup>22</sup> The border broadcasting case brought under Section 301 is unique. The case is the only one to date resolved through U.S. retaliation. The case was one of several which began under the original statute and was resolved under the amended law. In fact, the border broadcasting case was partially responsible for at least one legislated change to the original statutory provisions. The 1979 Act redefined "commerce" so that the term includes, but is not limited to, services associated with international trade, *whether or not such services are related to specific products* (emphasis added).<sup>23</sup> This change was in part designed to clarify the Congressional intent that broadcasting be considered a form of "commerce" within the ambit of the statute.<sup>24</sup>

Section 301 was further amended to include specified time limits for the resolution of cases filed with and accepted by USTR.<sup>25</sup> In the transitional border broadcasting case, the law mandated that the U.S. Trade Representative make a recommendation to the President not later than twelve

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17. *Id.*

18. *Id.*

19. This authority is delegated by the U.S. Trade Representative.

20. 19 U.S.C. 2411, § 301(a).

21. *Id.*

22. Trade Agreements Act of 1979, Pub. L. No. 96-39, Title IX, 93 Stat. 295 (codified at 19 U.S.C. § 2411 *et seq.* (1979)).

23. *Id.*, § 301(d)(1).

24. S. REP. No. 96-249, 96th Cong., 1st Sess. 237 (1979).

25. 19 U.S.C. 2414, § 304.

months after the enactment of the Trade Agreements Act (i.e., by July 26, 1980).<sup>26</sup>

Finally, Section 301 was amended by the 1979 Act to serve an additional purpose not contemplated in the 1974 Trade Act. The Section now allows private "interested parties" to petition to seek enforcement of the rights of the United States under any trade agreement.<sup>27</sup> Further, it continues to serve as the vehicle through which these "interested parties" urge the President to respond to "any act, policy or practice of a foreign country or instrumentality that — (A) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (B) is unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. Commerce."<sup>28</sup>

### B. *The "Border Broadcasters' " Petition*

Frustrated by what they viewed as ineffective bilateral Canadian — U.S. Government consultations, the "border broadcasters" decided in mid-1978 to formally seek redress for the damage alleged to have resulted from Canadian tax provisions enacted through Bill C-58. On August 29, 1978, the Chairman of the Section 301 Committee received from fifteen U.S. television licensees<sup>29</sup> a petition under Section 301 charging that Section 3 of Bill C-58<sup>30</sup> was discriminatory, unreasonable, unjustifiable and a burden or restriction on U.S. commerce within the meaning of Section 301.<sup>31</sup> In their petition, the broadcasters sought public hearings on the matter in November, 1978.

In arguing that C-58 was "discriminatory," the petitioners relied on the fact that C-58 differentiated between domestic Canadian broadcasters and

26. *Id.*, § 304(a)(1)(D).

27. This change reflects the fact that § 301 is used generally to enforce U.S. rights under the multilateral agreements negotiated during the Multilateral Trade Negotiations (MTN) concluded in 1979, as well as the General Agreement on Tariffs and Trade (GATT).

28. 19 U.S.C. 2411, § 301(a).

29. KVOS-TV (Bellingham, Washington), WIBV-TV (Buffalo, New York), WTOM-TV (Cheyboygan, Michigan), WPBN-TV (Traverse City, Michigan), WVII-TV (Bangor, Maine), WDAZ-TV (Grand Forks/Devils Lake, North Dakota), WSEE-TV (Erie, Pennsylvania), WWNY-TV (Watertown, New York), KXLY-TV (Spokane, Washington), KTHI-TV (Fargo, North Dakota), KCFW-TV (Kalispell, Montana), KFBB-TV (Great Falls, Montana), WEZF-TV (Burlington, Vermont), KXMD-TV (Williston, North Dakota), and KXMC-TV (Minot, North Dakota). WDAZ-TV later withdrew from the petition.

30. (That portion of Bill C-58 concerned with broadcasting).

31. Petitioners' Brief of August 29, 1978 at 3, USTR Docket No. 301-15. The full text of the petition was published in the *Federal Register* of Sept. 6, 1978 (43 Fed. Reg. 39,617. (1978)).

non-Canadian TV stations. The discrimination argument was based on the concept of "national treatment,"<sup>32</sup> rather than "most favored nation" (MFN)<sup>33</sup> principles. To support their contention that C-58 was "unreasonable," the petitioners stated that: (a) it was an unreasonable proposal that Canadians should not "pay" for the services they received; (b) C-58 acted as an unreasonable impediment to trade in services; (c) it was unreasonable to expect that the amount of revenue repatriated due to C-58 would be adequate to establish a domestic programming industry in Canada; and, (d) it was an unreasonable action on the part of Canada to act unilaterally (through C-58) to solve a bilateral telecommunications problem.<sup>34</sup> Finally, the petition argued that C-58 was "unjustifiable" because it could be seen as a violation of Canada's international obligations under the General Agreement on Tariffs and Trade.<sup>35</sup>

Regarding the question of burden or restriction on U.S. commerce, the petitioners relied on a demonstration of lost revenues to border broadcasters from the date of the enactment of the Canadian Bill. The petition stated that revenues from Canadian sources fell by more than fifty percent over a period of only two years.<sup>36</sup> In light of these allegations, the petitioners requested that the U.S. Government retaliate against C-58 through the imposition of duties or other import restrictions as might be deemed appropriate by the President.<sup>37</sup>

On November 29, 1978, USTR conducted a public hearing on the issues raised by the petitioners. In addition to supporting the original arguments, the November brief submitted by the petitioners reflected a change in their position regarding remedies responsive to the Bill. In this regard, the brief proposed that, in the event that Canada did not unilaterally repeal Bill C-58, the United States and Canada should first attempt negotiation of an

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32. Adherence to the principles of "national treatment" requires that foreign interests or imported goods or services be treated no less favorably than their domestic counterparts. Typically, the obligation to provide national treatment to foreigners flows from a bilateral Treaty of Friendship, Commerce and Navigation (an FCN Treaty). There is no FCN Treaty between the United States and Canada; however, Article III of the General Agreement on Tariffs and Trade obligates both countries to provide national treatment to *goods* imported from the other.

33. MFN treatment requires that a country not discriminate between foreigners entitled to MFN treatment. Article I of the GATT obligates both countries to MFN treatment to *goods* imported from the other country. C-58 would not be considered as "discriminatory" if judged in the context of MFN principles.

34. Petitioners' Brief of Aug. 29, 1978 at 6 and 7, USTR Docket No. 301-15.

35. The petitioners' claim was that (a) advertisements are "products" subject to GATT provisions; (b) C-58 violated GATT Article III; and (c) C-58 violated GATT Article IV's provisions on cinema films.

36. Petitioners' Brief of Aug. 29, 1978 at 9, USTR Docket No. 301-15.

37. *Id.*, at 10.

equitable compromise.<sup>38</sup> If this route failed, the petitioners urged U.S. retaliation in two areas: (1) restrictions on the importation of Canadian films and recordings<sup>39</sup>; and (2) U.S. modification of the bilateral Automotive Agreement.<sup>40</sup>

At the hearing, counsel for the petitioners argued that the most appropriate forum for negotiations concerning C-58 would be those in progress relating to the tax treaty between the two countries.<sup>41</sup> In this context, it was suggested that appropriate reciprocity could be found in U.S. modification of Section 602 of the Tax Reform Act of 1976.<sup>42</sup> In the event that tax negotiations did not prove feasible, the petitioners put forward two compromise proposals. In the first of these proposals, the border broadcasters offered to establish a taxable presence in Canada and subject their Canadian-origin advertising revenues to taxation by the Canadian Government.<sup>43</sup> In a second proposal — which was really a variation on the first — the petitioners offered a taxable presence in Canada in conjunction with payments to a fund that would serve to further the development of the Canadian program production industry.<sup>44</sup>

Both the Canadian Government and other "interested parties" in Canada took advantage of the hearings and the subsequent period allowed for rebuttal to register their opposition to the petitioners' contentions that C-58 was a "discriminatory," "unreasonable", or "unjustifiable" act of the Canadian Government. They did not, however, question the alleged financial impact of C-58 on the U.S. stations — the basis of the petitioners' argument that C-58

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38. Petitioners' Brief Filed in Support of a Complaint Under § 301 of the Trade Act of 1974, USTR Docket No. 301-15 (Nov. 21, 1978) [hereinafter cited as Petitioners' Brief of Nov. 21, 1978].

39. *Id.*, at 9.

40. *Id.*, at 10. Petitioners were referring to the "Agreement Concerning Automotive Products Between the Government of the United States of America and the Government of Canada" which, since 1965, has provided for qualified duty-free trade between the United States and Canada in new motor vehicles and original equipment parts. While not directly related to the border broadcasting dispute, this Agreement is very important to both countries and the petitioners hoped that threatened modification of the Agreement would pressure the Canadian Government into action on C-58.

41. Statement of Bart S. Fisher Before the § 301 Committee at 4 (Nov. 29, 1978). The linkage of U.S. action on § 602 of the Tax Reform Act of 1976 with Canadian action on C-58 originated with those Members of Congress concerned over the impact of C-58 on border broadcasters in their districts, and was never publicly condoned by the Executive Branch. § 602 severely restricted income tax deductions by U.S. taxpayers for the costs of attending conventions outside the United States, and its enactment was said to have cost Canadian businesses hundreds of millions of dollars in lost revenues.

42. *Id.*, at 4.

43. *Id.*, at 5.

44. *Id.*, at 6.

should be considered a "burden or restriction" on U.S. commerce — although an effort was made to demonstrate that broadcasting should not be considered as falling within the scope of "commerce" as defined in the original Section 301 statute.<sup>45</sup>

The Canadian Government focused its remarks upon the question of the legitimacy of the petitioners' complaint, arguing that a broadcasting outlet in the USA is licensed to serve only a U.S. market as specified by the FCC, and there is no private ownership attached to airwaves themselves.<sup>46</sup> The Canadian Government also refused to recognize three of the broadcasters' contentions: (1) that Canada discriminated against imported advertisements from the United States; (2) that broadcast signals were "products" imported into Canada; and (3) that the Canadian tax measure was in violation of Articles III and IV of the General Agreement on Tariffs and Trade.<sup>47</sup> Further, the Canadian Government argued that it had not acted in an unreasonable manner and that, on the contrary, it had been very conscious of U.S. interests in regard to the problems of trans-border broadcasting, citing the government-to-government consultations of June and October, 1976.

#### IV. RESOLUTION OF THE CASE

##### A. *Consultations with Canada*

In the aftermath of the November, 1978 hearings, the Section 301 Committee focused its attention on the points raised by the petitioners and the opposing parties in their briefs at the hearings to determine the legal status of the petition under U.S. law. The Committee considered the issue to be whether Section 301 covered the practices complained of in the case. The USTR resolved the issue in the affirmative. The decision was communicated to the Canadian Government on June 1, 1979.<sup>48</sup> In reaching this determination, USTR was aided by the clarification of the scope of Section 301 in the then "draft" Trade Agreements Act of 1979 — which some members of the Section 301 Committee had helped to write. Members of the Committee were also aware that the "draft" Act, once enacted by Congress, would impose a

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45. Rebuttal Brief Filed in the Matter of Complaint of KVOS Television Corporation, *et al.* Against Section 19.1 of the Canadian Income Tax Act (Bill C-58) at 4, filed on behalf of J. Ronald Mitchell (Moffatt Communications Ltd., Winnipeg, Manitoba), Moses Znaimer (CITY-TV, Toronto, Ontario) and Donald M. Smith (CHAN-TV, Vancouver, British Columbia) (Jan. 2, 1979).

46. Statement of the Canadian Government of Nov. 24, 1978 at 9, *supra* note 4.

47. *Id.*, at 8 and 11.

48. June 1, 1979 Letter to Canadian Ambassador Towe from Alan Wm. Wolff, Deputy Special Representative for Trade Negotiations.

time constraint on the resolution of this case. As a result, USTR's communication to the Canadian Government included a request for consultations. On July 10, 1979, the Canadian Government accepted USTR's request for consultations and a meeting was scheduled for August 15, 1979 in Ottawa.<sup>49</sup> The U.S. Government's objectives in these consultations were two-fold: (1) to maintain pressure on the Canadians to negotiate a settlement of the issue; and (2) to explore with the Canadians the means by which a settlement could be reached.

In the August 15 consultations, the Canadian delegation reiterated the basis for Canadian broadcasting policy. Further, it urged the conferees to view the question of border broadcasting as an issue unrelated to others, as opposed to being linked to such issues as the bilateral Automotive Agreement as urged by the petitioners.<sup>50</sup> The U.S. delegation reviewed American concerns about C-58 supporting Canadian broadcasting policy and its impact on the border broadcasters. The American side urged Canadians at the meeting to consider an accommodation on the issue. The two sides agreed to continue to explore the possibilities for an accommodation and suggested that representatives of the U.S. and Canadian broadcasting industries could meet in an effort to develop suggestions for consideration by the respective governments.<sup>51</sup>

The August, 1979 discussions were the last government-to-government consultations solely on the issues raised in the border broadcasting Section 301 petition. While the need to resolve the case prior to the July 26, 1980 deadline was raised by U.S. officials in subsequent meetings with Canadian officials,<sup>52</sup> it was in the form of a one-sided *démarche*. The U.S. Government elected to rely primarily on private sector initiatives — in particular, those undertaken by a Canadian broadcaster who had formerly been associated with one of the petitioners. The various private sector plans failed to result in joint U.S.-Canada industry proposals which could be suggested to the two

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49. Canadian Embassy Note No. 317 (July 10, 1979) and July 20, 1979, Letter to Canadian Ambassador Towe from Alonzo L. McDonald, Deputy Special Representative for Trade Negotiations.

50. *Supra* note 40. This would be consistent with the general conduct of U.S.-Canada relations at the time. Historically, both the U.S. and Canadian Governments have made it a policy to avoid linkages in the discussion of bilateral trade issues, as linkages tend to lead to an escalation of problems in the relationship.

51. "Notes for Use in Response to Media Enquiries," Canada/U.S. Discussions on Border Broadcasting (Aug. 15, 1979).

52. Probably the most forceful treatment of the issue took place on April 21, 1980 during meetings in Ottawa between the Canadian Minister of Industry, Trade and Commerce, Herb Gray, and Ambassador Reubin O'D. Askew, U.S. Trade Representative.

governments; such failure was due to a number of factors, the most important of which was U.S. antitrust considerations. The Canadian Government adopted a passive "wait and see" attitude toward the Section 301 case.

*B. Decision of the 301 Committee*

By late May, 1980, both the petitioners and the Section 301 Committee began to despair of any negotiated settlement of the case prior to the July 26 deadline for a recommendation to the President on the appropriate response to the Canadian tax practice. Accordingly, on June 6, 1980, the petitioners tendered a supplemental submission to the Section 301 Committee concerning appropriate retaliation in the event that the Committee deemed retaliation to be in order.<sup>53</sup> The petitioners also requested that USTR schedule public hearings on the proposed remedies for July 9, 1980.<sup>54</sup>

In their supplemental submission, the petitioners reiterated their claim that C-58 should be found to be "discriminatory," "unreasonable," "unjustifiable" and a "burden or restriction on U.S. commerce." In retaliation for this Canadian practice, the petitioners requested that the U.S. Trade Representative recommend the following actions to the President:

- (1) Imposition of special duties on all Canadian feature films and records exported to the United States;
- (2) Imposition of quantitative restrictions on Canadian feature films and records exported to the United States;
- (3) Support by the Administration of tax legislation which would disallow, for purposes of U.S. income taxes, deductions of the costs of advertising on Canadian television or radio;
- (4) Support by the Administration for the continuation of § 602 of the Tax Reform Act of 1976 which limits, for the purposes of U.S. income taxes, deductions for expenses incurred attending conventions abroad; and
- (5) Adoption of a policy which would require consideration of the unreasonable nature of the Canadian tax restriction imposed by § 19.1 of the Canadian Income Tax Act, when dealing with Canada on matters of mutual concern.<sup>55</sup>

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53. Petitioners' Supplemental Submission Pertaining to Appropriate Relief Filed in Support of Complaint Under Section 301 of the Trade Act of 1974, USTR Docket No. 301-15 (June 6, 1980) [hereinafter Petitioners' Supplemental Submission of June 6, 1980].

54. June 6, 1980 Letter to the Chairman of the § 301 Committee from Bart S. Fisher, Counsel for the Petitioners. Notice of the public hearings was published on June 23, 1980, 45 Fed. Reg. 42,107.

55. Petitioners' Supplemental Submission of June 6, 1980 at 3 and 4.

While the July 9, 1980 hearings afforded the Section 301 Committee and the various "interested parties" in the case an additional opportunity to review the points at issue in the case, little new information was revealed. Thus, the principal value in the hearings was the satisfaction of the legal requirement that public hearings be held on the subject of proposed retaliatory action before such action be recommended to the President.<sup>56</sup>

Following the hearings, the Section 301 Committee met again to consider its recommendation to Ambassador Askew, the U.S. Trade Representative. The Committee at this point needed to decide both (a) whether C-58 was "discriminatory, unreasonable, or unjustifiable and a burden or restriction on U.S. commerce," and (b) if so, the appropriate response of the President to such a practice.

The Committee rejected a characterization of C-58 as "discriminatory," primarily on grounds that such a characterization would rely on the use of national treatment, as opposed to most favored nation, criteria.<sup>57</sup> Without a Treaty of Friendship, Commerce and Navigation with Canada, this was believed to be too tenuous an argument. The characterization of C-58 as "unjustifiable" was also rejected by the Committee because it was believed that Canada would have to be shown in violation of specific international obligations<sup>58</sup> for C-58 to be "unjustifiable." The General Agreement on Tariffs and Trade was the primary basis for the petitioners' allegation of an "unjustifiable" action. The Committee did not accept the premise that broadcasting services were covered by the General Agreement on Tariffs and Trade. Thus, the petitioners' claim was rejected.

The Committee did find C-58 to be "unreasonable" because the Canadian law, in effect, placed the cost of attaining its objectives of a stronger Canadian broadcast industry on U.S. companies — to the tune of twenty to twenty-five million dollars a year in lost revenues. Thus, such an action by the Canadian Government unreasonably and unnecessarily burdened and restricted U.S. commerce.

On the question of an appropriate response to C-58, the Committee was guided by two underlying considerations. First, the response should be in proportion to the harm inflicted on U.S. commerce by the Canadian practice. Second, if possible, the U.S. response should be fully consistent with the international obligations of the United States so as to avert Canadian retaliation against U.S. interests based on the American response to Bill

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56. 19 U.S.C. 2414, § 304(b)(1).

57. *Supra* notes 32 and 33.

58. The Committee, recognizing that Canada is a sovereign country, believed that unilateral governmental action is justified so long as such action is not in violation of undertakings entered into by Canada through international agreements or treaties.

C-58. The first of these considerations led to the Committee's rejection of the fourth and fifth actions proposed by the petitioners. The second consideration led to the rejection of the petitioners' first and second proposals. The Committee reached general agreement that the third proposal of the petitioners — a U.S. statute to "mirror" C-58 — would be a satisfactory response to C-58.

The Committee also took under consideration options which were not among those suggested by the petitioners. Among these options were (a) legislation to restrict the ownership of cable TV stations in the United States by Canadians, and (b) a recommendation that the President delay his response pending an additional period for negotiations with Canada. These and other possible courses of action were eventually rejected by the Committee.

As a result of its deliberations, the Section 301 Committee made a formal recommendation to Ambassador Askew on July 21, 1980. The Committee advised Ambassador Askew to recommend to the President that he find C-58 to be unreasonable and a burden and restriction on U.S. commerce. It was suggested that, as an appropriate response to C-58, the President seek enactment in the United States of "mirror image" legislation denying the benefits of income tax deductions to U.S. taxpayers who place ads with Canadian broadcasting stations where the advertisements were aimed at the U.S. market. Ambassador Askew concurred in these decisions; on July 25, 1980, he recommended the Committee's proposed course of action to President Carter.

On July 31, 1980, the Office of the U.S. Trade Representative announced that President Carter had concurred in the recommendation of Ambassador Askew.<sup>59</sup> On September 11, 1980, President Carter, in a message to the Congress of the United States, urged the early passage of U.S. tax legislation to "mirror" C-58.<sup>60</sup>

## V. CONCLUSIONS

The Section 301 case concerned with the border broadcasting dispute is interesting in several respects. First, it demonstrates that, faced with a choice between compromising on either its economic and cultural policies or its citizens' individual economic interests, a government will typically sacrifice its citizens' economic interests in favor of policies aimed at the attainment of more political-cultural objectives. In the context of the current

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59. Press Release #328, Office of the United States Trade Representative, July 31, 1980.

60. Presidential Message to the Congress of the United States of Sept. 11, 1980.

federal/provincial constitutional crisis in Canada and the central government's drive toward Canadian unity, these cultural policies have assumed a greater significance in Canada and, over time, there may be increased friction between the U.S. and Canadian Governments as nationalist Canadian policies impact on U.S. economic interests.

Second, while the border broadcasting case may portend strains in future U.S.-Canada relations, greater significance resides in its multilateral implications and precedential value for future cases likely to be brought under Section 301. Americans, like their counterparts in Western Europe, Canada and Japan, are increasingly coming to the realization that we live in a time which has been characterized by some as the "post-industrial society." The production of goods remains an important economic activity in our society and international trade in such goods is important to our national welfare. As a result, we have been careful over the years to develop a highly structured set of international rules to govern trade in goods. However, in the post-industrial society, services and international trade in services are assuming an increasingly important role in our lives. Unfortunately, in 1980, there are still very few rules to govern international trade in services. It is in this context that we find governments restricting international trade in services to the detriment of interests in other countries. In turn, these impacted interests will seek unilateral responses to restrictions in other countries.

Section 301 is, practically speaking, the only avenue of relief open to American service industries encountering foreign government actions which discriminate against or otherwise impact their international interests. It is relatively certain that the provision will be increasingly resorted to by the U.S. services sector in the future. Already, there is a current Section 301 case concerning the restrictive practices of South Korea in the insurance sector. As the first services-related case brought to conclusion under Section 301, the border broadcasting case had an important precedential effect in this area of government policy. Hopefully, it will be possible in the future to resolve most of the services-related Section 301 complaints through negotiation and compromise in place of retaliatory action such as that called for in the border broadcasting case.