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**To: Film and Trade Action Committee**  
**From: Alan M. Dunn**  
**William A. Fennell**  
**Date: March 11, 2005**  
**Subject: Rebuttal to Arguments Against Adoption of Proposed Resolution**

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The arguments taken from the email you sent us last Friday and rebuttal points are set forth below.

- *Film production is up in California and the nation.*

**Response:** This is a legitimate concern about the strength of any WTO action but the necessary showing of injury for subsidies complaints is low and very fact specific. Moreover, the WTO panels are not sympathetic to distortive subsidies, especially when provided by industrialized first world countries such as Canada.

WTO members are entitled to relief from actionable subsidies if the subsidy causes “**adverse effects.**” Under the WTO Agreement on Subsidies and Countervailing Measures (SCMA), “[n]o member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, **adverse effects** to the interests of other Members.”<sup>1</sup> “Adverse effects” can mean injury to the industry of another Member country, nullification or impairment of WTO benefits to other Member countries or serious prejudice to the interests of another Member country.

The combination of losses in film production expenses and in labor expenditures, as well as the losses to local tourism, constitute a significant injury to the film industry. As a result of Canadian film and TV production subsidies the U.S. has seen its share of such productions shrink. The analysis of the flow of production work will have to be updated before an action can be undertaken with the U.S. Government but the recent fact situation offers strong support for a finding of “adverse effects.”

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<sup>1</sup> Agreement on Subsidies and Countervailing Measures, Dec. 15, 1993, Agreement Establishing the Multilateral Trade Organization, Annex 1A (emphasis added).



Under Section 301(A) of the U.S. trade law, the United States Trade Representative would determine if the rights of the United States under any trade agreement are being denied or an act policy or practice of a foreign country --

- (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
- (ii) **is unjustifiable and burdens or restricts United States commerce.**

Again, this is a very low threshold of injury and one that the recent fact situation with film production flows between the U.S. and Canada appears to meet.

- *There is no need for a 301 (a) petition because there is a significant increase in out-of-state incentives which match other countries' incentives.*

**Response:** Foreign governments have responded to U.S. incentives by raising their tax credits and other incentives. For example, the Canadian government raised its incentives by 4% effective in 2004 and the three major provincial governments where films are located (British Columbia,<sup>2</sup> Ontario<sup>3</sup> and Quebec<sup>4</sup>) have all also raised their incentive rates effective this year by between 7-9%.

Moreover, additional countries are introducing similar incentive programs, each of which further distorts the film and TV production market.

Unless the WTO rules that such subsidies are inconsistent with obligations under the Subsidies and Countervailing Measures Agreement, competition for film and TV productions will devolve into a "subsidies war" in which the nation with the most generous subsidies during any given month or year captures the film and TV productions. In essence, national, state and local governments are pitted against each other in a bankrupting competition. Moreover, the businesses that provide services for film and TV production cannot invest due to the uncertainty of whether productions will be coming to their market.

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<sup>2</sup> Tax credits for films produced by foreign production companies rose to 18%. British Columbia Film Commission, Tax Credits: Explanation Sheet found at <http://www.bcfilmcommission.com/finance/>.

<sup>3</sup> Tax credits for films produced by foreign production companies rose from 11% to 18%. Government of Ontario, Ministry of Finance, "McGuinty Government moves to support FILM and TV Industry with Tax Credit increase", Press Release, Dec. 21, 2004.

<sup>4</sup> Tax credits for films produced by foreign production companies rose from 11% to 20%. Variety Magazine, Jan. 2, 2005.

- *The Film and Television Action Committee petition would hurt the United States filmed entertainment exports, since over 40 percent of the revenues earned by the filmed entertainment industry are earned in markets outside the United States.*

**Response:** There is no evidence that foreign audiences choose what films to see based on the tax incentive packages provided to production companies. Moreover, under this rationale, U.S. revenues earned by the filmed entertainment industry would already be down due to filming in foreign locations. The purpose of eliminating the subsidies is to level the playing field for competition based on cost effectiveness and skill in film productions.

- *Film production incentives do not violate trade agreements, so it would be difficult to come up with a substantive basis for a 301 (a) petition. The Motion Picture Association of America feels it would be difficult to accuse other countries of violating trade agreements since the United States employs similar incentive practices (such as H. R. 4520 which authorizes Federal film production incentives).*

**Response:** Our analysis strongly suggests that film production incentives are direct violations of the WTO obligations under the Subsidies and Countervailing Measures Agreement and, as noted above, may be actionable because these subsidies cause harm that meets the levels of injury required to be granted relief under the Agreement. Assertions that film production incentives do not violate the WTO agreements are contradicted by a reasoned reading of the Agreement and the findings of WTO panels in numerous actions brought by the U.S. and other WTO members.

U.S. state and/or federal incentives are no bar to bringing a WTO complaint against Canadian or other countries' incentives. Nations that offer similar or even identical subsidies are in no way disqualified from seeking relief from foreign subsidies before WTO dispute settlement panels. (*See e.g.*, the Brazil and Canada cases against each other on aircraft subsidies, in which both countries' subsidies were held WTO inconsistent) Moreover, U.S. law does not prevent or discourage the bringing of anti-subsidy actions based on whether the U.S. government offers subsidies of a similar kind or nature. In fact, some of the largest U.S. subsidies (*e.g.*, agricultural export subsidies) are offered in order to pressure foreign governments to reduce their subsidies in the context of ongoing WTO negotiations.

- *There is a major difference between the Film and Television Action Committee 301 (a) petition and a “Special 301” petition which the Motion Picture Association of America filed to address intellectual property issues abroad (copyright protection). This “Special 301” petition has a high level of international consensus as it benefits the United States and foreign cultural industries.*
- *A “Special 301” petition does not contain the same possible perception of a direct threat of unilateral or multilateral sanctions as does a 301(a) case. Opening a Section 301 (a) investigation against foreign film production subsidies would ignite cultural sensitivities and affect ongoing negotiations.*

**Response:** The Section 301 provisions of the Trade Act constitute the principal U.S. law for addressing foreign unfair practices affecting U.S. exports of both goods and services. While Special 301 is focused on intellectual property rights, it is merely one type of section 301 action. The WTO Secretariat’s Trade Policy Review of the United States noted that fellow WTO Members question the validity of all Section 301 proceedings, “notably [those] under the Special 301 provisions regarding intellectual property protection”<sup>5</sup>. Thus, the WTO Secretariat identified the “Special 301” procedure as the most controversial of all section 301 actions from the view of other WTO Member states.

What makes any section 301 action controversial is the possibility of “unilateral” trade sanctions – *i.e.*, trade sanctions imposed without first securing the determination of a WTO dispute settlement panel. FTAC has made it clear that it is specifically asking the U.S. government to initiate a WTO action (*i.e.*, a non-unilateral panel proceeding under the WTO dispute settlement mechanism) to determine that the Canadian subsidies are WTO inconsistent. Section 301 is merely the vehicle by which a U.S. petitioner seeks such action by the USG before the WTO.

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<sup>5</sup> WTO Secretariat, Trade Policy Review of the United States of America, p.72-73 WT/TPR/S/126 (Dec. 17, 2003). See for example the written questions by Japan and India in the context of the 2001 Trade Policy Review of the United States, in WTO document WT/TPR/M/88/Add.1, 8 January 2002.