Canadian Law

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This article is divided into two parts. The first part discusses legal developments in Canada. The second part discusses legal developments in the United States affecting Canada, particularly with regard to cross-border trade disputes.

I. Canadian Legal Developments

A. Canadian Antitrust

1. *Merger Review*

The staff of the Competition Bureau Mergers Branch had another busy year as merger activity remained high, resulting in a number of complex and/or problematic merger cases. While the bureau's merger review process is conducted in private, the results of its work became known in a number of cases.

The first high-profile case of 1998 was a proposed gasoline refining and marketing joint venture between Petro-Canada and Ultramar Diamond Shamrock. The transaction, which was announced on January 6, 1998, was ultimately abandoned by the parties in June after the Competition Bureau concluded that the transaction would likely cause a substantial lessening or prevention of competition in the wholesale and retail petroleum markets in Quebec and Atlantic Canada.

Petro-Canada had another controversial transaction on its hands later in the year when it agreed to sell its shares of wholly-owned subsidiary ICG Propane Inc. to Superior Propane Inc. The bureau found that this transaction would leave only one national propane

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company with a propane market share of seventy-three percent including monopolies in many local and remote markets across Canada as well as the market for national accounts. The parties elected to complete the transaction, notwithstanding the bureau's concerns and on December 1, 1998, the Director of Investigation and Research sought an interim injunction to prevent the closing for twenty-one days. The Competition Tribunal denied the director's application, finding that he had failed to demonstrate that the proposed merger was "reasonably likely to prevent or lessen competition substantially." The tribunal's conclusions were based largely on its view that the director had not provided sufficient evidence to establish that the relevant product market was propane as opposed to a broader market of all energy sources (in which the merged entity's share would be about two percent). This case is the first one decided by the tribunal under the interim injunction provisions of the Competition Act and the tribunal's reasons create relatively onerous evidentiary burdens for the director, especially given the short time frame under which these injunctions are likely to be brought. The director has since filed an application before the tribunal to dissolve the merger and has negotiated a consent hold-separate arrangement with Superior Propane to preserve ICG as an independent competitor pending completion of the tribunal proceedings.

2. *Record Conspiracy Fines for International Cartels*

In May, the Competition Bureau announced that Archer Daniels Midland Company had pleaded guilty to participating in international price-fixing and market sharing conspiracies in the lysine and citric acid industries and would pay fines totaling C$16 million, the largest fine ever imposed under the Competition Act. (The prior record fine was $2.5 million paid by Canada Pipe Company Ltd. in a case involving ductile iron pipe.) The record fines were imposed notwithstanding the accused's agreement to cooperate with the bureau's ongoing investigation into the actions of other parties, all of whom are located outside of Canada. In July, the bureau announced that there had been convictions of other participants in this conspiracy, resulting in fines of C$3.5 million from Ajinomoto Co. Inc. of Japan and C$70,000 from an affiliate of Sewon Company Ltd. of Korea. Importantly, a third Japanese company, Kyowa Hakko Kogyo Company, Ltd., was granted immunity by the Attorney General for having been the first company to provide evidence to the Competition Bureau. The Competition Bureau also noted that the lower fine paid by Sewon was due, in part, to its early cooperation with the investigation.

In October, two more foreign firms were hit with large fines related to the citric acid aspect of this case. This time it was Jungbunzlaur International A.G. of Switzerland and Haarmann & Reimer Corporation, a U.S. affiliate of Bayer Corporation, who pled guilty and were fined C$2 million and C$4.7 million, respectively.

3. *Other Significant Events*

a. Legislative Amendments

Industry Canada, the ministry responsible for the Competition Bureau, spent much of 1998 attempting to have a package of amendments to the Competition Act enacted into law.[1] These amendments were contained in Bill C-20 and would, among other things,

1. *See generally* Selma Lussenburg, *Canadian Law: Canadian Legal Developments*, 31 INT'L LAW. 483 (1997) (discussing the amendments more fully).

double the pre-merger waiting periods to fourteen and forty-two days (depending on whether a long-form or short-form filing was used), create a new criminal offense of deceptive telemarketing, impose disclosure requirements on telemarketers, and permit the Competition Bureau to apply for judicial authorization to intercept private communications without consent (i.e., wiretap) in cases involving deceptive telemarketing, bid rigging and certain types of price fixing and market sharing. In December, Industry Canada was surprised when the Canadian Senate refused to pass Bill C-20 in the form passed by the House of Commons, preferring instead a bill that does not include the new "whistle blower" protection. Industry Canada could seek to reintroduce the bill or have it passed by the House of Commons as amended, but either will result in implementation being delayed to sometime in 1999.

b. No Compulsory Licensing

In late 1997, the director made an application to the Competition Tribunal under the refusal to deal provisions of the Competition Act seeking an order to compel Warner Music to license certain Warner-owned copyright materials to BMG Direct (which is part of the Bertelsmann Group). Shortly thereafter, the Competition Tribunal dismissed the action on the basis that the tribunal has no jurisdiction to order compulsory licensing of intellectual property under the refusal to deal provision of the Competition Act. The tribunal agreed that licenses are not a "product" as the term used in the section and, thus, that the section is inapplicable to legal rights over intellectual property. The decision makes clear that intellectual property rights by their nature are exclusive, and their use by third parties cannot be compelled by the Competition Tribunal unless a specific authority to do so is provided by Parliament.

B. Canadian Income Tax Law

A number of amendments to the Income Tax Act[2] were released in October 1998, which impact persons who are not residents of Canada.

1. *Corporate Loan to Non-Resident*

The Tax Act currently includes a provision that deems a corporation resident in Canada to have earned a prescribed rate of interest on loans that it makes to a non-resident if the loans are outstanding for more than one year and less than a reasonable rate of interest is charged. This notional interest is included in the corporation's income on the last day of each taxation year during which the loans remain outstanding. This anti-avoidance rule does not apply if either Canadian withholding tax has been paid on the amount of the loan, or the non-resident uses the money to earn business income and is a controlled subsidiary of the Canadian resident corporation.

The draft amendments expand the scope of this provision to include any amount owing by a non-resident to a Canadian corporation, not just loans. In addition, the exception from the deeming rule for controlled subsidiaries has been restricted to circumstances in which the amounts owing to the Canadian resident corporation arose in the course of carrying on an active business. An active business does not include an investment business. Further,

2. *See* R.S.C. 1985, c. 1 (5th Supp.), as amended [hereinafter Tax Act].

a number of anti-avoidance rules are proposed that deal with amounts loaned to a non-resident indirectly through an intermediary.

2. *Corporate Immigration*

A number of the draft amendments deal with issues arising when a non-resident corporation becomes a resident of Canada. At present, whenever a non-resident immigrates to Canada there is a deemed disposition and reacquisition of all property owned by the taxpayer at fair market value. However, there is an exception for property that is already subject to Canadian tax (e.g., taxable Canadian property, inventory and eligible capital property related to a Canadian business and certain employee stock options). The draft amendments provide that this exception will apply only to individuals and not to corporations. As a result, immigrating corporations will be forced to recognize any accrued gains or losses related to properties that are taxable in Canada in the taxation year ending immediately prior to the time of immigration, subject to any relevant tax treaty. After immigration, the cost of each of the corporation's properties for Canadian tax purposes will be adjusted to the fair market value thereof at the time of immigration.

If the immigrating corporation owns shares of a Canadian resident corporation, the Canadian resident corporation will be deemed to have paid a dividend to the immigrating corporation immediately before the deemed disposition. The deemed dividend is stated to be equal to the fair market value of the shares held by the immigrating corporation less the paid-up capital of those shares. As the dividend is deemed to have been paid before immigration, it is subject to Canadian withholding tax unless the two corporations deal with each other at arm's length. An exception is provided where the shares of the Canadian resident corporation are taxable Canadian property and Canada's right to tax any gain on the shares realized by the immigrating corporation is not overridden by treaty. In these circumstances, the notional dividend is reduced by the amount of any capital gain realized by the immigrating corporation on the deemed disposition of the shares of the Canadian resident corporation.

At the time of immigration, the paid-up capital of the immigrating corporation will be adjusted. If the amount of the adjustment is positive, the corporation may elect to increase the paid-up capital of its shares. This will result in a deemed dividend to its shareholders prior to the time of immigration equal to the amount of the increase.

The method of determining the cost of shares of an immigrating corporation to a non-resident taxpayer will be amended. Under the draft amendment, the cost of the shares to the non-resident will be the fair market value at the time of immigration.

3. *Branch Tax*

An amendment to the Income Tax Regulations will cause an immigrating corporation to be liable to pay branch tax (twenty-five percent, subject to reduction under a relevant tax treaty) on any unremitted profits of a Canadian branch arising in the year or deferred in respect of previous years. All of these new rules dealing with corporate immigration will apply to corporations that become resident in Canada after February 23, 1998.

C. Environmental Law

There were only a few significant environmental developments in the year 1998, both at the federal and provincial level. As an area of overlapping jurisdiction between the federal and provincial governments, with the provinces taking the primary role, the federal government has the delicate task of regulating environmental issues within its limited jurisdiction, while attempting to "harmonize" with different provincial approaches to environmental regulation. This attempt to "harmonize" environmental laws culminated in early 1998 with an agreement between the federal government and provincial governments which, according to most commentators, did little more than describe the "status quo." The other major federal initiative was the delivery of a new Canadian Environmental Protection Act that, despite its lofty title, is primarily legislation that regulates toxic substances. It will likely be proclaimed in mid-1999. In addition, the federal government continued to support the climate change goals agreed to in Kyoto, but organizational and advisory initiatives have been the only result. The most controversial issue was the North American Free Trade Agreement (NAFTA), particularly chapter 11 governing investor disputes. The federal government backed down from its attempt to regulate MMT, a fuel additive, and compensated Ethyl Corporation for the company's damages. In several other cases, with more to come, where government has attempted to regulate and has caused a significant economic impact on a U.S. or Mexican company, challenges under chapter 11 are increasingly likely.

In the provinces, 1998 was a year with relatively few environmental initiatives. In Quebec, new contaminated sites guidelines were put forward. In Ontario, the reform initiatives announced with great fanfare over two years ago have led to only a few new regulations, primarily in approvals. New enforcement provisions will double fine levels in Ontario, although the level of enforcement has fallen under the current government.

D. Canadian Communications Law

The year 1998 featured a number of developments in Canadian communications law. The field of telecommunications was particularly active this year, with various new legislation coming into force.

In telecommunications, the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) on Basic Telecommunication, which was concluded on February 15, 1997, came into force on February 5, 1998. In this agreement Canada and seventy-one other WTO member governments made specific commitments to open their domestic markets to foreign companies. As part of the GATS, Canada agreed to end Teleglobe Canada's monopoly on overseas traffic and to end Teleglobe's special ownership restrictions that prohibit investment by foreign telecommunications carriers. Canada will also allow 100 percent foreign ownership and control on the resale sector and in the sector of international submarine cable landings in Canada, and remove all restrictions on the use of foreign-owned and controlled global mobile satellites that provide services to Canadians. Furthermore, Canada committed to end Telesat's monopoly on fixed satellite services and allow the use of any foreign satellite to provide services, other than DTH/DBS, to Canadians. Finally, Canada committed to maintain its open, competitive market and existing transparent regulatory regime.

On October 1, 1998, the Canadian Radio-television and Telecommunications Commission (CRTC) announced Telecom Decision CRTC 98–17. The decision established a framework and new licensing regime for a new competitive market in Canada for international services. The licensing regime, which came into effect January 1, 1999, will ensure that foreign monopolies cannot use their dominance in their home markets to gain an unfair competitive advantage in the Canadian market, and will minimize barriers to entry for new service providers. As a condition of licensing, international service providers must not engage in anti-competitive conduct in relation to providing international service. Furthermore, to detect anti-competitive conduct, the CRTC requires those licensees that operate facilities used to transport basic international telecommunications services to file traffic information with the commission, and inform the commission of agreements they may enter into with foreign telecommunications service providers for interconnection or the exchange or termination of traffic. A notable aspect of Telecom Decision CRTC 98-17 was the elimination of all routing restrictions for Canadian traffic, allowing carriers to route calls through the United States for Canada-Canada calls and Canada-overseas calls. Finally, the decision also partially deregulates Teleglobe Canada Inc. This means that the CRTC will no longer require Teleglobe to obtain approval for rates charged for long distance services it might wish to offer within Canada and between locations in Canada and the United States. However, prior approval will be required for rates charged for overseas services.

Another component of the GATS on Basic Telecommunication was announced on December 15, 1998. The Minister of Industry announced Canada's new fixed satellite policy, which sets the stage for the gradual liberalization of Canada's fixed satellite market to be completed by March 1, 2000. The new policy provides for the immediate use of foreign satellites for Canadian overseas telecommunications and for access to Intelsat satellites to accommodate Canadian international service providers and users. Furthermore, the policy will allow new Canadian satellite carriers and all foreign satellites to access the Canadian domestic and Canada-U.S. satellite markets on March 1, 2000, thus signaling the end of Telesat Canada's monopoly for fixed satellite facilities for domestic and Canada-U.S. traffic. Industry Canada will now move to fully liberalize its licensing of transmit and receive-only earth stations to permit service providers and users to operate their own stations on all approved fixed satellites as of March 1, 2000.

In a policy document released on April 30, 1998, the CRTC announced a number of changes to its commercial radio policy. These included higher levels of Canadian music, better distribution of Canadian selections, and an opening of the two-station-per-market ownership limit. This policy was intended to reflect a balance between a financially stronger radio industry, access by Canadians to quality Canadian programming, and increased exposure to Canadian musical artists. The proposed amendments to the Radio Regulations would see the level of Canadian content for popular music selections played every week on Canadian radio stations rise from the current thirty percent to thirty-five percent. Furthermore, this level of Canadian content would have to be maintained during the daytime period (6:00 a.m. to 6:00 p.m.) weekdays, and selections would have to be played in their entirety to qualify. Other amendments would target better funding for the production of Canadian musical material, promotion of closer ties between Canadian Association of Broadcasters and the music industry, continued support of French-language broadcasting, as well as new ownership rules.

E. Financial Services

Developments in 1998 have set the stage for important changes to the Canadian financial services sector. These developments are described below.

1. *Bank Merger Proposals*

Early in 1998, the four largest Canadian banks announced plans to merge Royal Bank of Canada with Bank of Montreal and Canadian Imperial Bank of Commerce with Toronto Dominion Bank. In December, after extensive public debate and following the receipt of advice from the Competition Bureau and the Office of the Superintendent of Financial

Institutions (OSFI), the Minister of Finance (Canada) announced that he would not consent to either transaction. He indicated that no merger of major Canadian banks would be permitted until an appropriate Canadian financial sector policy framework for the twenty-first century had been established.

2. *MacKay Task Force*

The second most important development in 1998 was the publication of the report of the Task Force on the Future of the Canadian Financial Services Sector (Task Force). The Task Force was chaired by Regina, Saskatchewan lawyer Harold MacKay. The Task Force Report and its nineteen background reports constitute the most important review of the Canadian financial sector in over thirty years. The Task Force made 124 recommendations that are aimed at making the Canadian financial sector more competitive and customer oriented. Key recommendations to enhance competition and competitiveness include proposals to facilitate the establishment of new domestic financial institutions and to permit foreign banks to establish direct branches in Canada. A new federal Financial Holding Companies Act is proposed. To empower consumers, the Task Force recommended a comprehensive privacy regime applicable to all commercial enterprises, including financial institutions, and the creation of a financial sector ombudsman. To improve the regulatory framework, the Task Force recommended that OSFI be merged with Canada Deposit Insurance Corporation. Further, the Task Force recommended clarification of the rules with respect to the cross-border delivery of financial services and facilitation of cross-border lending activities. The government of Canada is studying the final report of the Task Force, and the government is expected to respond legislatively in the later part of 1999.

3. *Insurance Company Demutualization*

Amendments to the Insurance Companies Act (Canada) and its regulations permit life insurance companies with assets in excess of Cdn. $7.5 billion to convert from mutual to stock form. Four of the largest Canadian insurance companies organized in mutual form have indicated their intention to convert to stock form(The Mutual Life Assurance Company of Canada, The Manufacturers Life Insurance Company, Sun Life Assurance Company, and The Canadian Life Assurance Company). The new demutualization regime provides that the entire value of the converting company is to be allocated to voting policyholders. Directors, officers and employees of a converting company are prohibited from receiving any benefits related to the company's conversion. The conversion process will be subject to OSFI review and approval of the Minister of Finance (Canada). Finally, after demutualization, voting policyholders will continue to have a right to vote and make proposals at meetings of shareholders and policyholders.

4. *Enhanced Tied Selling Restrictions*

Amendments to section 459.1 of the Bank Act (Canada) were proclaimed, which make more rigorous the existing prohibition against coercive tied selling activities by Canadian banks. Pursuant to subsection 459.1(1), a bank may not impose undue pressure on or coerce a person to obtain a product or service from a particular person. However, pursuant to subsection 459.1(2) a bank may offer to make a loan to a person on more favorable terms or conditions than the bank would otherwise offer to a borrower, where such terms and conditions are offered on the condition that the person obtain another product or service from any particular person. Further, pursuant to subsection 459.1(3), a bank or one of its affiliates may offer a product or service to a person on more favorable terms and conditions than the bank or affiliate would offer otherwise, where such terms and conditions are offered on the condition that the person obtain a loan from the bank.

F. Canadian Trade Law

1. *Trade Law vs. Competition Law*

In 1998, the two U.S. baby food manufacturers, Gerber and H. J. Heinz, engaged in a strange battle before the Canadian International Trade Tribunal (CITT) and the Canadian Bureau of Competition Policy. Heinz, operating from a Canadian-based manufacturing facility, had sought an antidumping ruling from the CITT with respect to baby food imported to Canada from the United States by Gerber. In April, the CITT ruled that Gerber was selling U.S.-made baby food in Canada at prices lower than the selling price of the same product in the United States. The CITT imposed provisional antidumping duties of sixty percent in December 1997; and in March 1998, following investigations, confirmed the dumping and continued the provisional antidumping duty.

In August, the Canadian Bureau of Competition Policy joined Gerber to attack the CITT decision upon grounds that the imposition of antidumping duties on imported jarred baby food, and the consequential price increase, would effectively eliminate competition in the marketplace and could adversely affect Canadian infants and young children. The Bureau, together with Gerber, appealed the CITT decision to a dispute settlement panel under NAFTA. By November Gerber had withdrawn from the Canadian jarred baby food market, alleging that the antidumping duties had made their product noncompetitive with the Heinz product. In early December 1998, the CITT, having concluded public hearings in the matter, changed its decision, concluding that continued imposition of the antidumping duties in the full amount was not in the public interest. The duties were reduced by two-thirds, with the proposal that a price floor be set for jarred baby food.

This is the first time that the public interest protected by the CITT has been challenged by the Competition Bureau on grounds that the CITT decision was contrary to the public interest protected by the Bureau.

2. *Environment—Exportation of Polychlorinated Biphenyls (PCBs):*

In October 1998, a U.S.-based toxic waste treatment company announced its intention to seek ten million dollars in compensation from the Government of Canada because of a Canadian export ban on PCBs, the ban allegedly being contrary to Canada's obligations under NAFTA. The case involves Canada's fifteen-month PCB export prohibition during a period when there was a hiatus in the U.S. import prohibition of the same commodities. Until March 1996, there had been a long-standing U.S. EPA prohibition against the importation of PCBs to the United States. In March 1996, as reported here last year, that ruling was reversed. Coincidentally, in November 1995, Canada imposed an export ban on PCBs; and that prohibition remained in place until it was removed in February 1997. In July 1997, the U.S. Court of Appeals reimposed the prohibition against importation of PCBs into the United States, a decision that has not been appealed.

The action by the U.S.-based company is premised upon an allegation that the Canadian ban of export of PCBs deprived the company of earnings it would have had from contracts signed with Canadian exporters. The claim is being defended by Canada. There is no indication as to whether or not the claimant will pursue an action against the U.S. government upon the premise that its prohibition of the importation of PCBs was similarly in breach of the U.S. obligations under NAFTA, and accordingly would be equally actionable.

II. U.S. Legal Developments Affecting Canada

A. Agriculture Trade

In September 1998, the farm trade dispute intensified after South Dakota Governor Janklow imposed new restrictions on Canadian livestock and grain. The restrictions required that Canadian truckers provide proof that livestock is free of six specific drugs and that wheat is free of Karnal bunt and wild oats.[3] The governors of Minnesota, Montana, Idaho, and North Dakota also increased their inspections of Canadian trucks and groups of U.S. farmers participated in protests. By late September, the disruptions effectively had become a blockade of Canadian products and Canada filed a complaint with the WTO and NAFTA dispute settlement bodies.[4]

In addition, midwestern farmers had complained about a Canadian regulation that required U.S. hogs to undergo a thirty-day quarantine for pseudorabies before they could be slaughtered in Canada even though many states had eradicated the disease. Under WTO rules, a region of a country can be declared disease-free and eligible for export even if a disease is present in other parts of the country.[5] Also, U.S. cattle producers wishing to ship feeder cattle to Canada were required to meet what they believed to be onerous animal health requirements. The potential trade conflict was averted in early October when Canada and the United States agreed to launch intensive negotiations. An agreement was reached in December resolving these issues for the time being.

1. *Cattle*

In November 1998, the Ranchers-Cattlemen Action Legal Foundation (R-CALF), a coalition of ranchers and cattle producers, filed a petition with the U.S. Department of Commerce (DOC) requesting that the DOC initiate an antidumping case against live cattle from Canada (a separate case was also initiated against Mexico). R-CALF also filed a countervailing duty (CVD) case against Canadian live cattle, seeking an investigation of thirty-four Canadian federal and provincial government programs.[6]

On November 12, the International Trade Commission (ITC) instituted an investigation into whether imports were causing injury to the U.S. industry. Subsequently, the ITC voted 4–2 to continue the case against Canada and dismissed the case against Mexico. Commissioners voting in the majority found that there was a reasonable indication that the industry had been materially injured by reason of imports of live cattle from Canada.[7] At the DOC, R-CALF's initial petition was withdrawn, due to questions about the petition's standing to represent the industry, and later was refiled. On December 30, the DOC accepted the petition and initiated an investigation.[8]

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3. *See Agriculture: Canadian Grains and Livestock Target of Midwest States Inspection Program*, 15 Int'l Trade Rep. (BNA) 35, at 1603 (Sept. 23, 1998).

4. *See* William Claiborne, *Blockades Challenge Trade with Canada; U.S. Farmers Protest Entry of Cheap Grain*, Wash. Post, Sept. 25, 1998, at A3.

5. *See Agreement on the Application of Sanitary and Phytosanitary Measures, Article 6* (visited June 2, 1999) <http://www.geocities.com/TheTropics/Resort/1207/sps.html>.

6. *See Cattlemen's Group Rejects Offer to Join Disputes Against Canada, Mexico*, Inside U.S. Trade, Oct. 16, 1998.

7. *See Live Cattle from Canada and Mexico*, USITC Pub. 3155 Inv. Nos. 701-TA-386 and 731-TA-812–813 (Feb. 1999) (visited May 31, 1999) <http://www.usitc.gov/wais/reports/arc/w3155.htm>.

2. *Wheat*

U.S.-Canadian grain trade has been a difficult issue between the two countries in recent years as Canadian wheat exports to the United States have increased. Despite the U.S.-Canada Free Trade Agreement commitment to gradually eliminate all duties between Canada and the United States by 1998, some barriers continue to impede trade, such as the Karnal bunt regulation discussed above. The USTR has expressed concerns over the benefits available to Canadian grain producers, including the pricing and policies of the Canadian Wheat Board (CWB). The CWB is accused of subsidizing Canadian grain exports and secret-selling to foreign countries.[9] A U.S. General Accounting Office (GAO) report published in October 1998 found that the CWB operates as a state-sanctioned monopoly and receives Canadian government support in a number of ways such as initial payments to farmers, financing of overseas credit sales and research and development funding. However, the GAO admitted that it was unable to develop a full report on wheat export pricing because information on CWB sales transactions is limited.[10]

Canada maintains that there are no restrictions on the volume of U.S. wheat exports to Canada and that periodic investigations of the CSB by U.S. agencies have failed to find any basis for allegations of impropriety concerning the CWB's pricing behavior. Canadian officials assert that Canada is in full compliance with all its international trade obligations including those under NAFTA and the WTO.[11]

3. *Softwood Lumber*

In June, the province of British Columbia reduced the stumpage fees it charges to harvest timber on public land. Subsequently, the United States and Canada established an arbitration panel under the 1996 U.S.-Canada Softwood Lumber Agreement (the Agreement) to determine whether Canada violated that Agreement as a result of the fee reduction. The Agreement had been reached in settlement of a CVD case against Canadian exports.[12] The United States has taken the position that the fee reduction circumvents the Agreement by effectively cancelling the fees imposed by the Canadian Government on lumber exports to the United States above established quotas.[13] In August, the United States formally requested an arbitrator to settle the dispute. The United States submitted its brief to the panel on December 30, 1998, stating that the fee reduction resulted in a windfall of millions of dollars for lumber producers in British Columbia, which offset the expense of paying export fees and therefore undermined the balance established by the Agreement. Canada argues that the reduction in stumpage fees is required for the survival of the struggling British Columbia lumber industry and does not constitute a subsidy.[14] Subject to any delay

8. *See* Initiation of Antidumping Duty Investigations: Live Cattle from Canada and Mexico, 63 Fed. Reg. 71,886 (1998).

9. *See* Courtney Tower, *U.S., Canada Exchange Protests Over Farm, Ranch Subsidies, Aid*, J. Com., Oct. 8, 1998, at 14A.

10. *See U.S. Agricultural Trade: Canadian Wheat Issues*, GAO Report, Oct. 16, 1998, GAO/NSIAD-99-21.

11. *See Canada-U.S. Wheat Trade: The Facts* (July 1998) (visited May 31, 1999) <http://www.canadianembassy.org/agricultural/facts.html>.

12. *See* W. George Grandison & Peter Lichtenbaum, *Trade Update: Softwood Lumber Case Ends*, Canadian L. Newsl., Winter 1995.

13. *See U.S. Justifies Complaint in First Round of Lumber Arbitration Case*, Inside U.S. Trade, Jan. 15, 1999.

14. *See* Justine Hunter, *Clark Plans to Defend Stumpage Cuts*, Vancouver Sun, July 7, 1998, at A3.

that may be caused by a public hearing, the final decision of the arbitration panel is expected in February 1999.

Separately, on December 16, 1998, the U.S. Court of International Trade (CIT) upheld a U.S. Customs Service (Customs) decision regarding the classification of pre-drilled lumber studs. The court held that Customs acted reasonably when it reclassified pre-drilled lumber studs under subheading 4407 of the Harmonized Tariff System of the United States (HTSUS), which is covered by the Agreement. Customs previously had classified the lumber under a HTSUS heading that put it outside the Agreement. The Agreement places export fees on lumber shipments from Canada above 14.7 billion board feet. The CIT ruled that the reclassification was justified although Customs was required to give a sixty-day period to all importers to prepare for the change.[15] At year's end it was unclear as to whether the decision would be appealed to the Court of Appeals for the Federal Circuit in Washington, D.C. or alternatively, made the subject of an arbitration request by Canada under the Agreement.

B. Magazines

In response to two U.S. victories in WTO dispute settlement rulings issued in 1997, effective October 30, 1998, Canada repealed its ban on imports of "split-run" magazines, discontinued the excise tax, eliminated discrimination in its postal rates and modified the postal subsidy program for magazines. The Canadian government claims the conflict has both economic and cultural consequences, as allowing American magazines unrestricted access would put most Canadian magazines out of business and reduce the Canadian news coverage available to readers.[16]

In July, Canadian Heritage Minister Sheila Copps announced the outline of a different policy intended to achieve the same end. In October, Copps introduced Bill C-55, which would impose criminal fines (up to $250,000) on U.S. and other non-Canadian publishing companies that use magazines to advertise directly to Canadian readers. The restriction struck down by the WTO had placed an eighty percent tax on magazines carrying these types of advertisements, and the new bill essentially proposes to ban these advertisements altogether.[17] The focus of the draft legislation is the foreign publisher who offers to supply advertising services to a Canadian advertiser; and the Canadian government takes the position that, as the legislation deals with a "service," the restriction is not prohibited under trade rules used by the WTO to strike down the earlier Canadian legislation.

On October 30, USTR Charlene Barshefsky announced that if Canada enacts legislation similar to its past policies, the United States would respond by denying trade benefits to Canada.[18] Among the retaliatory measures under consideration was the imposition of a tariff

15. *See* American Bayridge Corp. v. United States, No. 98-166, 35 F. Supp.2d 922, 1998 Ct. Int'l Trade, LEXIS 169, (Dec. 16, 1998).

16. *See United States to Take Trade Action If Canada Enacts Magazine Legislation, USTR Press Release 98-96*, (Oct. 30, 1998) (visited Mar. 5, 1999) <http://www.ustr.gov/releases/1998/11/98-96.pdf> [hereinafter *United States to Take Trade Action*]. Canadian magazines generally operate on low profit margins and most of their revenue comes from advertisements. In 1998, a Toronto consulting firm estimated that without protection, as many as eighty American magazines would enter the Canadian market with new split-run editions. Because they would not have to pay for much editorial content, these magazines could undercut Canadian competitors by selling ads at an extremely low rate. Moreover the Canadian government complains that most of the American "Canadian edition" magazines have little to do with Canada.

17. *See id.*

as high as 100 percent on selected Canadian agricultural products. The Canadian government is now considering a referral of the proposed legislation to the WTO for an expedited review. By the end of 1998, the U.S. government had not decided which options it would pursue in response to the Canadian bill. Though a vote on the legislation was postponed to make way for negotiations, a senior Canadian official expected the bill to be passed and fully enacted in March 1999.[19]

C. Salmon

Pacific salmon continued to be a difficult issue between the United States and Canada during 1998. The core of the dispute stems from the practice of fishers catching salmon where they find them, regardless of the river where the fish originate. Regulating these interceptions was a task assigned to the Pacific Salmon Commission, established by the Pacific Salmon Treaty signed in 1985.[20] As the treaty's annexes establishing the fish allocation have expired, the two countries have failed to agree how the fish should be shared. Moreover, the United States and Canada do not agree on the meaning of article III of the treaty.[21]

In a joint report submitted to President Clinton and Canadian Prime Minister Chrétien on January 12, 1998, the Special Representatives for the Pacific Salmon Stakeholders Process recommended that the two sides attempt to agree on interim fishery agreements for up to two years, and that they recommit to developing a practical framework for implementing article III of the Pacific Salmon Treaty.[22] By July, both sides cited substantial progress, but were not able to conclude a comprehensive interim agreement on Pacific salmon fisheries for the 1998 summer fishing season in the Alaska/British Columbia area. Nonetheless, agreements were reached on fisheries in the southern area encompassing the coasts of Washington, Oregon and southern British Columbia. The state of Washington was also able to reach a related agreement with Canada.[23]

D. NAFTA Investment Disputes

In July, Ethyl Corporation agreed to withdraw the $250 million lawsuit it had filed against the Canadian ban on the gasoline additive MMT in exchange for an immediate end to the ban and payment by the Canadian government of compensation totaling $13 million. The

18. *See United States to Take Trade Action*, *supra* note 16.

19. *See Canada Delays New Magazine Law, Provides Chance to Resolve Issue*, Inside U.S. Trade, Dec. 11, 1998, at 5. This issue has been developing rapidly in 1999. The United States threatened to retaliate against hundreds of millions of Canadian exports including steel, plastics, apparel, wood, and paper. At the time of this writing, the United States and Canada were preparing to meet in Ottawa to discuss the Canadian magazine bill. Similarly, the Canadians were considering initiating a WTO dispute against the United States on beer if the United States were to retaliate on the magazine issue.

20. *See* Fisheries Pacific Salmon Treaty Between the United States of America and Canada, Jan. 28, 1985, U.S.-Can., T.I.A.S. No. 11091.

21. *See* David W. Strangway & William D. Ruckelshaus, *Pacific Salmon Report to the Prime Minister of Canada and the President of the United States* (Jan. 12, 1998) <http://www.usembassycanada.gov/pdq4.htm>.

22. *See id.*

23. *See* James P. Rubin, *U.S.-Canada Fail To Reach Interim Agreement on Northern Pacific Salmon Fisheries*, U.S. Dep't of State Press Statement (July 9, 1998) (visited Mar. 5, 1999) <http://secretary.state.gov/www/briefings/statements/1998/ps980709b.html>.

suit brought by Ethyl was the first filed under NAFTA's chapter 11 investor-state provisions. It alleged that the Canadian ban represented an expropriation without compensation of the company's Canadian assets.[24] Another U.S.-based company has filed a "notice of intent" under provisions of chapter 11 to seek compensation from the Canadian government for its ban on PCB exports imposed in November 1995.

Last fall, a Canadian funeral home company that lost a $500 million verdict over fraudulent business practices filed an international arbitration claim against the U.S. government. Loewen Group, Inc. claims the Mississippi jury verdict against it was an "uncompensated expropriation" of its property because it violated provisions in NAFTA promising fair treatment to foreign investors. Loewen claims the verdict against it was out of proportion to losses the plaintiff suffered and that it was disadvantaged by Mississippi's appeals law. The case will be heard by the International Center for Settlement of Investment Disputes.[25]

E. Environment

The progress report on the U.S.-Canada Air Quality agreement was released in October and stated that by April 1999, the Joint Boundary Commission expects a joint work plan on transboundary fine particulates. It also announced that a bilateral committee will recommend in April whether the United States and Canada should negotiate a pact on jointly controlling ground-level ozone. The report describes the work the two countries have done to reduce acid rain deposition, calling this work "a considerable success."[26]

F. Immigration

In September 1996, Congress enacted the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA).[27] Section 110 of the IIRIRA required that by September 1998, the Attorney General would establish an automated entry and exit control system that would automatically gather entry and exit data at all land, sea and air ports-of-entry in the United States. However, the Immigration and Naturalization Service expressed concerns about the administrability of these controls and informed Congress that it is testing new technologies in a laboratory environment and expanding its use of computer simulation to model the entry and exit control process.[28] In October, congressional leaders reached an agreement to delay the implementation of section 110 for an additional two years.[29]

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24. *See* Peter Menyasz, *Canada Gasoline Additive Lawsuit Called Poor Test of NAFTA Environmental Impact*, 21 Int'l Env't Rep. (BNA) 20, at 946 (Sept. 30, 1998).

25. *See* William Glaberson, *NAFTA Invoked to Challenge Court Award*, N.Y. Times, Jan. 28, 1999, at C4.

26. *Recommendations Expected in April on U.S.-Canada Pact to Control Ozone*, 21 Int'l Env't Rep. (BNA) 22, at 1073 (Oct. 28, 1998).

27. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No.104–208, 110 Stat. 3009 (1996).

28. *See No Change in INS Inspection Procedures on October 1, 1998* (visited Jan. 26, 1999) <http://www.dfait-maeci.gc.ca/geo/usa/ins-e.htm>.

29. *See Section 110 Postponed (Again)* (Oct. 9, 1998) (visited Jan. 27, 1999) <http://www.usvisanews.com/memo266.html>.