

Canadian tax liability is irrelevant, the program will simply no longer work.⁴⁸

58. The distinction is between formal compliance and real or substantial compliance, which in this case has nothing to do with whether deductions are properly claimed but with the policy behind this entire set of measures. Canada therefore reiterates its suggestion that the application of the exception in Article XX(d) should take account of the nature of the measures under consideration, and that the test in the *EEC Parts and Components* and the *U.S. Section 337* Panel decisions should not be rigidly applied without taking account of these circumstances. The Panel will recall that Code 9958 and the income tax provision have always been considered part of a single, indivisible package of complementary, indivisible measures and should be treated as such for the purposes of Article XX(d).

59. In its Oral Statement, the United States placed most of its emphasis on the second part of Code 9958, which places a five per cent limit on space devoted to advertising for the Canadian market in imported magazines. To the extent that the second part of Code 9958 goes beyond the coverage of section 19 of the *Income Tax Act*, and thus beyond the split-run phenomenon, the arguments made by Canada under Article XX(d) have no independent application. This assumes, however, that the Code can be broken down into independent components. In Canada's view, the Code should be regarded as an indivisible legislative prescription, all of which is closely linked in conception and application to the policy underlying the deductibility provision of section 19 of the *Income Tax Act*.

60. The United States claims that the Canadian legislation creates a "monopoly" for Canadian publishers of advertisements directed at the Canadian market. The existence of "spillover" advertising, whereby advertisements for generally-available products in wide-circulation U.S. magazines automatically reach the Canadian public, with very significant consequences for the competitiveness of the Canadian industry, suffices to cast doubt on this proposition. The "monopoly" effect complained of by the United States has nothing to do with the first part of the Code, dealing with split-runs, or with the *Excise Tax Act*. The *Pulp & Paper* magazine exhibited by the United States at the hearing is only relevant to the second part of Code 9958;⁴⁹ and is not relevant to the first part of that Code or to the *Excise Tax Act*.

⁴⁸ This paragraph addresses issues raised by the Panel in Question 9.

⁴⁹ The provisions of Part 2 of Code 9958 apply to a very limited type of advertising. Advertisements that would not be allowed would have to indicate a source of availability in Canada to be considered as "directed at Canadians", such as addresses and telephone numbers. Any other references to availability in Canada, including, for example, 1-800 numbers and web-sites, would be acceptable under the Code and would not be counted within the 5 per cent.