

and *substantial* compliance cannot be separated from the underlying social and economic objectives the measure is designed to secure.

102. Canada suggests, therefore, 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* Panel decision 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).

103. Code 9958 meets the other criteria laid down in GATT practice with respect to Article XX(d). It is directed against imports from all foreign countries, not only the United States.<sup>72</sup> Code 9958 therefore is not "applied in such a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Code 9958 is not applied in such a way as to constitute a restriction on international trade; as the evidence so strongly demonstrates, nor does it prohibit the importation of foreign periodicals into Canada or threaten their dominant position in the English-Canadian market place.

#### C. Non-application of Article III of the GATT 1994 to Commercial Postal Rates

104. It is important to underscore at the outset the distinction between: the subsidized rates, those rates available as a result of a subsidy granted exclusively to domestic publishers by the Department of Canadian Heritage; and commercial publications rates, those rates available to all publishers (Canadian or otherwise) that do not qualify for the subsidy granted by the Department of Canadian Heritage. Whereas the subsidized rates are the result of an expressed intention on the part of the Government to assist domestic publishers (as specifically permitted by Article III:8(b)), the commercial publications rates are the result of generally accepted commercial and marketing practices and are not influenced by government policy. Unfortunately, the United States has failed to make this important distinction in its first written submission to the panel.

105. It is important not to lose sight of the fact that Canada Post is a corporation in its own right, with a legal personality distinct from that of the Government, and considerable autonomy in the conduct of its operation – far more than would ever be accorded to a government department. Canada Post is a Crown Corporation and its objects are set out in

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72. The measures must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. For a summary of the conditions as formulated in the GATT 1994 recent practice, see *Reformulated Gasoline*, *supra* note 59.