position is that as a services-related measure it raises no issues under the GATT.[43] Code 9958 and section 19 of the *Income Tax Act* were conceived to deal with the problem of split-runs with inserted Canadian advertising. The idea was that the income tax provision would cover magazines printed in Canada and the border measure would cover magazines printed outside the country. The effectiveness of the non-deductibility provision standing by itself would obviously be very limited. The problem is that of foreign companies that sell into the Canadian market but are not subject to Canadian income tax. This would be more than a loophole, given the open nature of the Canadian economy and the degree of import penetration. It would largely destroy the effectiveness of the income tax measures.

55. Each term of Article XX(d), including the preamble, should be given consideration when examining whether Code 9958 can be justified as a necessary measure within the meaning of the treaty. Since Code 9958 is a "measure" directed against imports from all foreign countries, it "is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", as stated in the preamble to Article XX. Similarly, having regard to the application of Code 9958 since its adoption, it cannot be claimed that it has been "applied in a manner which would constitute ... a disguised restriction on international trade".[44]

56. GATT practice has introduced very stringent tests for the application of Article XX(d). Canada's First Submission[45] drew attention to the *EEC Parts and Components* Panel,[46] which interpreted Article XX(d) in terms of enforceability as opposed to measures designed to ensure that the objectives of another measure are not undermined. Canada is not challenging the latter decision or its reasoning. It makes sense in the context of regulatory statutes with prohibitions or even tax statutes that are designed to raise revenue and prevent tax evasion. But in the case of a fiscal incentive whose sole purpose is to influence business decisions in a certain direction, compliance has to be judged in terms of effectiveness.

57. Another aspect of the test was elaborated in *United States - Section 337 of the Tariff Act 1930*[47] where the Panel held that the term "necessary" requires the use of the least trade-restrictive measure available. As noted at the hearing, Canada submits that there are no other measures, less restrictive or otherwise, that will accomplish the objective. If split-runs could be imported, with Canadian advertisements often placed by businesses for which

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[43] This passage addresses issues raised by the Panel in Question 13.

[44] This paragraph addresses issues raised by the Panel in Question 12.

[45] Paras. 101 and 102.

[46] *EEC - Regulation on Imports of Parts and Components* (Report of the Panel adopted on 16 May 1990), GATT Doc. L/6657, BISD 37S/132.

[47] Report of the Panel adopted on 7 November 1989, GATT Doc. L/6439, BISD 36S/345 at 392, paras. 5.25-5.27.