

intolerable unpredictability so long as "like product" determinations are to be made on a case-by-case basis, as the recent decision has reaffirmed.

30. It could also lead, paradoxically, to results that would make nonsense of the Appellate Body's assumption that excess taxation under Article III:2 automatically entails a departure from the general principles in Article III:1; and that would in fact make nonsense of the underlying purpose of Article III. It could lead to situations where fiscal classifications decisively *favouring* imported products would be considered inconsistent with the first sentence of Article III:2, so long as the tax classification attracting the higher rate contained at least *some* imported products. It makes no sense to say that Article III is automatically violated in any case where tax differences result from domestic classifications that are "origin-neutral" in form and that might even favour imported products in effect - as might well be true of the tax at issue here. A particular instance of differential taxation in such circumstances should not create a *per se* violation, absent a discriminatory effect or cause to believe such an effect to be probable.²⁴

3. Article III:2, second sentence

(a) Split-run periodicals and periodicals containing editorial material created for the Canadian market are not directly competitive or substitutable

31. The U.S. First Submission and Oral Statement provide no real evidence on the substitutability issue. The United States, in its Oral Statement, contested Canada's assertion that split-run periodicals and Canadian magazines are not competitive or substitutable as information vehicles. However, the United States offered nothing to substantiate its position. The complainant bears the burden of proof.²⁵ The United States has not demonstrated, as it is required to do, that split-runs and other magazines are competitive or substitutable.

32. As confirmed by the Appellate Body in *Japanese Liquor Tax II*²⁶, cross-price elasticity of substitution might not be the only relevant factor in determining the degree of substitutability between two products. As we explained at the hearing, substitution implies

²⁴ This reflects previous GATT panel practice. *Japanese Liquor Tax I* (*supra* note 9 at 30), for example, was quoted with approval in the passage of the recent decision of the Appellate Body (*supra* note 11) dealing with the interpretation of Article III:2, first sentence and its analysis therefore deserves some weight. The *Japanese Liquor Tax I* Panel held specifically that Article III:2, first sentence does not preclude product differentiation by Contracting Parties within "like product" categories, the unmistakable implication being that some instances of differential taxation may be permissible according to the circumstances.

²⁵ *Japanese Liquor Tax II*, *supra* note 12 at para. 6.28. The Panel's statement on the burden of proof concerning direct competitiveness or substitutability was not appealed.

²⁶ *Supra* note 11.