

98. Part V.1 of the *Excise Tax Act* was not adopted in violation of the principles contained in Article III:1 of the GATT 1994. Furthermore, it is not being applied "so as to afford protection to domestic production" of periodicals.

B. Justification of Code 9958 of the *Customs Tariff* under Article XX(d) of the GATT 1994

99. Code 9958 is a measure intended to secure the attainment of the objectives of section 19 of the *Income Tax Act*. Code 9958 and section 19 of the *Income Tax Act* were adopted during the same period to implement the recommendations of the Royal Commission on Publications relating to Canada's cultural policy in the area of periodicals. Since 1965, the two measures have been in force for the purpose of assisting the Canadian periodicals industry in raising revenues from advertising. Code 9958 prohibits the importation of split-run editions and section 19 of the *Income Tax Act* allows for the deduction of expenses for advertising directed to the Canadian market on condition that the advertisements appear in Canadian editions of Canadian periodicals.

100. Code 9958 and section 19 of the *Income Tax Act* were always linked, and form a single package of complementary measures. In 1961, the Report of the Royal Commission on Publications made two main recommendations: (1) that the deduction from income by a taxpayer of expenditures incurred for advertising directed at the Canadian market in a foreign periodical wherever printed be disallowed; and (2) that the entry into Canada from abroad of a periodical containing Canadian domestic advertising be excluded under the *Customs Tariff*. In arriving at its recommendations, the Commission concluded that the simplest and most direct method of dealing with the diversion of Canadian domestic advertising to foreign periodicals printed in Canada was to deny the taxpayer the deduction as a business expense.⁷⁰

101. The issue is whether Code 9958 can be justified as a necessary measure within the meaning of Article XX(d). Because it forms an integral part of a package of measures with a single objective, it can be so justified on a natural and reasonable reading of the treaty language. The 1990 Panel decision on *EEC Parts and Components*⁷¹ introduced a very stringent test for the application of Article XX(d), under which the non-conforming measures must be necessary for the enforcement of another law, and not merely in order to ensure that the objectives of that law be fulfilled. This test is entirely appropriate where the issue is the enforcement of regulatory statutes and ordinary fiscal measures designed to raise revenue, where compliance with the statute is virtually synonymous with the attainment of its objects. If, for example, an environmental measure is complied with, its objective is *ipso facto* attained. It is doubtful, on the other hand, that an enforceability test is meaningful in the case of a fiscal or other economic incentive where formal compliance is not the real object,

70. O'Leary Report, *supra* note 1 at 78-79.

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