long standing in GATT jurisprudence.[12] To date the United States has made no effort to discharge this burden. Instead, it has relied upon general allegations and assertions such as the following one which was made during the U.S. Oral Statement:

> "there is no identifiable difference between split-run magazines, on the one hand, and magazines without a companion edition, on the other hand, in terms of their physical characteristics, appearance, uses, tariff classifications, or even editorial content."

Such statements do not constitute the empirical evidence required to both substantiate the claim made by the United States that all magazines are the same or that magazines based on local content are the same as magazines replicating foreign content; and to fulfil the burden of proof borne by the United States.

16. The United States submits that the only distinctive aspect of a split-run magazine is whether a similar edition with different advertising is sold abroad, drawing the conclusion that because the definition is based on an external factor, and not an inherent property of the product itself, it cannot serve as the basis of a distinction between "like" and "unlike" products. This contention ignores the fact that, even on the face of the legislation, the critical factor is not the mere existence of a companion edition in another country but the presence of replicated or reproduced content with domestic advertising in the split-run as marketed in Canada. The idea that content developed for the Canadian market is the same as recycled content is simply not tenable. As both common sense and the examples to be examined below confirm, a magazine replicating foreign content is markedly different from one originally created to serve the Canadian market.[13]

17. The U.S. argument also fails to respect the principle of narrow construction in its reliance on the Canadian tariff classification in heading 49.02. If the United States were correct, this would have the effect of sweeping not only all periodicals, but newspapers as well into a single very comprehensive classification. The inappropriateness of this kind of result was pointed out by the Appellate Body in its recent decision on *Japanese Liquor Taxes*, when it said that "tariff bindings that include a wide range of products are not a reliable criterion for determining or confirming product 'likeness' under Article III:2".[14] The use of tariff classifications in this case is especially inappropriate. Code 9958 of the *Customs Tariff* has effectively carved split-runs out of the general tariff classification; it has been in effect for over 30 years, through several GATT rounds, including the most recent Uruguay

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[12] See *Japan - Taxes on Alcoholic Beverages* (Report of the Panel, 11 July 1996), WTO Doc. WT/DS8/R, WT/DS10/R and WT/DS11/R at para. 6.14 [hereinafter *Japanese Liquor Tax II*]. That complainants have the burden of proof to show that products are like is an aspect of the report that was not appealed.

[13] This paragraph addresses issues raised by the Panel in Questions 3 and 7.

[14] *Japanese Liquor Tax Appeal*, *supra* note 11 at 22.