CANADA - CERTAIN MEASURES CONCERNING PERIODICALS

FIRST SUBMISSION OF CANADA

43.278/75

September 26, 1996

TABLE OF CONTENTS

FIRST WRITTEN SUBMISSION OF CANADA SUBMITTED TO THE PANEL ESTABLISHED BY THE DISPUTE SETTLEMENT BODY (DSB) OF THE WORLD TRADE ORGANIZATION (WTO) TO EXAMINE THREE CANADIAN MEASURES CONCERNING PERIODICALS

I. INTRODUCTION

1. On June 19, 1996, the DSB agreed to establish a panel to examine the complaint filed by the United States regarding three Canadian measures concerning periodicals. The panel's terms of reference, as agreed to by the parties, are as follows:

> "To examine, in the light of the relevant provisions of the General Agreement on Tariffs and Trade of 1994 (the 1994 GATT) cited in document WT/DS31/2, the matters referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in this agreement."

II. SUMMARY

2. The specific matters before the panel concern the following measures: (1) the excise tax on advertising contained in split-run periodicals provided for by Part V.1 of the *Excise Tax Act*; (2) Code 9958 of the *Customs Tariff* barring the entry into Canada of certain periodicals; and (3) the postal subsidy and the commercial postage rates charged to Canadian publishers.

3. Article III of the GATT 1994 does not apply to Part V.1 of the *Excise Tax Act*. These statutory measures pertain to advertising services. Such measures fall under the *General Agreement on Trade in Services* ("GATS") and not under the GATT 1994. No specific GATS commitments were made by Canada concerning advertising.

4. If the Panel determines that Article III of the GATT 1994 is relevant, then Article III:2, first sentence does not apply, because split-runs and magazines with editorial content developed for the Canadian market are not "like products". Article III:2, second sentence does not apply either given that the two goods are not directly competitive or substitutable products and that Canada did not adopt the measures so as to afford protection to the Canadian production of magazines.

5. Code 9958 of the Customs Tariff is justified as a necessary measure within the meaning of Article XX(d). National treatment rules do not apply to commercial postal rates

charged by the Canada Post Corporation ("Canada Post"), which is not a government monopoly or a regulatory agency. Commercial postal rates are the result of generally accepted commercial and marketing practices. Subsidized postal rates are allowable under Article III:8(b) and not subject to the national treatment rules.

III. BACKGROUND, FACTS AND ISSUES

A. Trade and Cultural Development

6. From the time of the O'Leary Commission[1] in the early 1960s to the Task Force on the Canadian Magazine Industry in the early 1990s, successive federal governments have recognized the importance of a Canadian magazine industry. The federal government has long been committed to ensuring that Canadians have access to Canadian ideas and information through the medium of magazines. This case is about the measures Canada has taken to reconcile the objectives of trade and national identity by adopting policy instruments that have been carefully designed to comply with its commitments under the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement") while ensuring the survival of a vital cultural industry. It is also about an attempt by the United States to achieve, through dispute settlement, results that are outside the framework of the WTO Agreement and that it failed to obtain in the Uruguay Round of multilateral trade negotiations.

7. In its 1987 publication, *Vital Links: Canadian Cultural Industries*,[2] the Government of Canada analyzed its cultural industries. The implications of globalization in the culture and communications field are described as follows:

> "The concern is not with the ease of access to the products of other cultures. It is rather with the difficulty of access to our own products, a difficulty that is primarily a function of the economics of the cultural industries, which place the cheaper, mass marketed, imported products at such a distinct advantage. The effects are economic. to be sure, but our concerns are cultural – the need to sustain for Canadians an adequate choice."[3]

---

1. Canada. *Report of the Royal Commission on Publications* (Ottawa: Queen's Printer, May 1961) (Chair: G. O'Leary) [hereinafter *O'Leary Report*] (First Submission of the United States of America, Appendix A [hereinafter U.S. First Submission]).

2. Canada, Dept. of Communications, *Vital Links: Canadian Cultural Industries* (Ottawa: Minister of Supply & Services, 1987).

3. *Ibid.* at 11 (Exhibit A).

8. Canadian readers have unrestricted access to imported magazines. At the same time, Canadian readers have demonstrated that they value magazines that address their distinct interests and perspectives. However, foreign magazines dominate the Canadian market. They account for 81.4 per cent of all newsstand circulation and slightly more than half (50.4 per cent) of the entire circulation of English-language magazines destined for the general public in Canada.[4]

9. The relationship between trade and cultural values has arisen in other contexts, though the issue remains unresolved. The audiovisual goods and services trade dispute between the European Union and the United States during the last stages of the Uruguay Round of multilateral trade negotiations provided evidence of the challenges that WTO Members face when they try to strike a balance between a more globalized economy and the preservation of cultural identity. W. Ming Shao, in an attempt to propose a conceptual framework for resolving this trade dispute, presents the dilemma as follows:

> "The heart of the dispute appeared, on one level, to involve different answers to three questions seemingly unique to [audiovisual goods and services]: First, what are [audiovisual goods and services], and how are they different from other goods and services? Second, do these differences merit the exclusion of [audiovisual goods and services] from customary free trade rules? Finally, should trade in cultural goods and services be included in the GATT regime or any other multilateral trade agreement?
>
> On another level, however, these questions can be seen as part of a set of basic policy issues that strike at the core of the GATT and its successor, the World Trade Organization. This set of questions asks whether free trade principles have any desirable limit. Although economic efficiency is important enough to serve as a standard against which many trade policies should be measured, other values, such as distributive and social justice, also rightly compete for our attention. Cultural integrity could be one such value. Thus, framed in the context of the [audiovisual goods and services] dispute, these more fundamental policy questions ask whether free trade in [audiovisual goods and services] might lead to excessive social and political uniformity or somehow unduly restrict the creative freedom of societies to pursue their own goals."[5]

10. Canada submits that each of these competing values is compelling, and that the measures at issue in these proceedings represent a creative accommodation whereby neither imperative is sacrificed to the other.

---

4. *A Question of Balance: Report of the Task Force on the Canadian Magazine Industry* (Ottawa: Minister of Supply & Services Canada, 1994) at 40 (U.S. First Submission, Exhibit A) [hereinafter *Task Force Report*].

5. "*Is There No Business Like Show Business?* Free Trade and Cultural Protectionism," (1995) 20 Y.J.I.L. 105 at 107-108 (Exhibit B).

B. Distinctive Qualities of Magazines

11. Economists divide goods into two types, private and public.[6] Cultural goods such as films, television programs, music tapes, books and magazines, possess elements of both private and public goods. The content of a cultural good is a public good, but is often delivered to consumers in the form of a private good. An example would be a consumer's purchase of a video. The motion picture on a videocassette is a public good, while the videocassette itself is a private good.

12. In distinction to all other products, the intellectual content of a cultural good is its chief distinguishing characteristic.[7] The distinguishing traits of a film or a television program are found in the content and not in the physical medium in which the content is captured. The same applies to magazines: what distinguishes one magazine from another is the content, not the material form in which it is embodied.

13. Cultural goods are also distinctive in that they possess attributes of both goods and services. W. Ming Shao explains the point in terms of audiovisual media, but it is equally applicable to print media. Films and videotapes are traded much like other goods, but the reel or tape acts only as the means of delivering the information or entertainment that was originally produced as a service. The same may be said of periodicals.

14. One of the fundamental errors of the U.S. submission is that it treats magazines as if they were ordinary items of merchandise trade and it ignores their distinctive features. For example, unlike ordinary goods, they possess strong public good characteristics as well as attributes of both goods and services.[8] These distinctive features are key in the examination of the present measures.

---

6. A pure private good is a good whose production cost is directly related to the number of people who consume the good. Once consumed by one person, this good is no longer available for anyone else to consume. A sandwich is a classic example of a pure private good. In contrast, a pure public good is a good whose consumption by one person leads to no subtraction from any other individual's consumption of that good. National defence is probably the most commonly used example of a public good.

7. This is not always so to an equal degree – in the case of a work of art, or anything where aesthetic qualities are critical, the cultural good is like other goods.

8. See W. Ming Shao's article on the distinctive economic qualities of audiovisual goods and services (*supra* note [5] at 119-121). Although the distinction is established for audiovisual goods and services, the author refers to other cultural goods like books, which are more akin to magazines than audiovisual goods like videotapes. See also S.S. Wildman & S.E. Siwek, *International Trade in Films and Television Programs* (Cambridge, Mass.: Ballinger, 1988) at 1-12 (Exhibit C) and B.M. Owen, J.H. Beebe & W.G. Manning Jr., *Television Economics* (Lexington, Mass.: Lexington, 1974) at 15-16 (Exhibit D).

C. Canadian Magazine Industry[9]

15. Knowledge of the fundamentals of the magazine industry is essential to understanding the measures at issue. Magazines consist of two elements: editorial (including articles and illustrations) and advertisements. Editorial content attracts readers. Readers attract advertisers. The sale of advertising space to advertisers whereby the advertiser pays for the right to communicate with the reader is a service. Advertising revenue pays for the production of editorial content. Thus, magazines have two principal streams of revenue, circulation and advertisements.

1. Two Streams of Revenue

16. Magazines derive their revenues predominantly from the sale of advertising space and from the circulation of the magazine. Advertising revenue is by far the most important revenue stream for Canadian magazines, accounting for 60 per cent of total revenue.[10] Circulation revenue accounts for 33 per cent of total revenue, or $287 million.[11] Advertising revenue is crucial for the Canadian magazine industry, allowing the publisher to provide the magazine at an affordable cost or, in some cases, free of charge.

17. There is a direct correlation between circulation, advertising revenue and editorial content. The larger the circulation, the more advertising a magazine can attract. With greater advertising revenue, a publisher can afford more to spend on editorial content. The more a publisher spends, the more attractive the magazine is likely to be to its readers, resulting in circulation growth. Similarly, a loss of advertising revenue will produce a "downward spiral". Less advertising entails less editorial, a reduction in readership and circulation and a diminished ability to attract advertising.

18. Magazines can be sold on newsstands, or through subscriptions, or distributed at no cost to selected consumers. Canadian English-language publications face tough competition on newsstands; they account for only 18.5 per cent of English-language periodicals distributed on newsstands,[12] where space is dominated by foreign publications. Subscriptions are the main source of circulation revenue for most Canadian magazines.

---

9. The portrait of the industry as presented by the *Task Force Report* remains essentially the same as the updated (1994-95) data presented here.

10. Statistics Canada, Education, Culture & Tourism Division, Culture Statistics, *Periodical Publishing 1994-95* (Ottawa: Statistics Canada, 1996) at 1 (Exhibit E).

11. *Ibid.*

12. *Task Force Report*, *supra* note 4 at 10.

2. Cost Structure

19. The expense associated with producing a magazine can be divided into fixed costs and variable costs. Variable costs for a magazine include: advertising sales; marketing and promotion; production and printing; and distribution. Fixed costs are editorial, administration and fulfilment costs. A magazine must obtain enough advertising to maintain a healthy ratio of editorial pages to advertising pages. If the number of advertising pages increases, then the publisher is able to add more editorial pages to support it. If, on the other hand, the number of advertising pages drops, then the editorial content must be reduced to control costs. The balance between editorial and advertising content is critical for a magazine.

3. Canadian Market

20. The Canadian market is not large, particularly when compared to the U.S. market.[13] It is also highly fragmented from a language perspective. There are two official languages in Canada as well as a number of other languages. The constraints imposed by the demographics of the Canadian market have a significant impact on the ability of a magazine primarily addressed to Canadian interests to obtain the broad base of circulation that is necessary to achieve economic viability.

21. Canadian magazine publishers compete with other media for the same limited amount of advertising dollars in the Canadian market. Magazines have been losing market share to other media forms such as direct mail and television. It is unlikely that the share held by magazines will increase. The amount of money spent by advertisers to reach Canadian consumers is also not likely to grow.[14] In addition, "spillover" advertising (the ability of advertisers of internationally distributed products to reach Canadian consumers through U.S. magazines) is a further limitation on the competitive position of the Canadian industry.

22. Canadian periodical publishers face a major competitive challenge in their business environment that is not common to their counterparts in countries with a larger population to serve. The pivotal fact is the penetration of the Canadian market by foreign magazines. As noted above, foreign magazines dominate the Canadian market, accounting for over 80 per cent of newsstand sales and more than half of the circulation of English-language magazines aimed at the general public.[15]

---

13. Canada's approximate population of 30 million pales in comparison to the population of the United States which is estimated to be 266 million.

14. *Task Force Report*, *supra* note 4 at 38.

15. According to the *Task Force Report*, Canadian magazine publishers earn only 25.5 per cent of the total circulation revenue in their own domestic market: the remaining 74.5 per cent goes to foreign publications (*ibid.* at 39).

4. Split-run Editions

23. Magazines are a particularly good medium for advertisers wishing to reach a specific market defined by regional location. Both Canadian and foreign magazines currently have regional editions in their respective home markets. Publishers and advertisers recognize the importance of regional editions as an advertising vehicle. The marketing strategy behind regional editions is that they allow publishers to offer very specific advertising vehicles for advertisers interested in targeting a particular audience, hence they maximize advertising revenues.[16]

24. Some foreign publishers view Canada as a separate "region" within their own national market. The "Canadian" regional edition produced by such publishers generally contains the same editorial content as the other editions but different advertising content, reflecting the addition of advertisements from Canadian advertisers. The term "split-run" is used in Canada to refer to such a Canadian regional edition. For a foreign publisher, the incentive to produce a Canadian regional edition of its magazine containing advertising directed at Canadians is, of course, profit. A profit for the foreign publisher only requires that the incremental revenue from advertising in the regional edition exceeds the costs of producing the split-run. Since its fixed costs have already been recovered in the larger home market, this offers an inviting prospect for a foreign magazine.

D. Canadian Magazine Policy

25. Canadian public policy for the magazine industry is designed to provide Canadians with a distinctive vehicle for the expression of their own ideas and interests. Such a vehicle faces enormous competition from foreign magazines for both advertising and readership. Public policy measures aim to balance the need to establish and maintain a place for Canadian periodicals in their own domestic market while at the same time ensuring that Canadians have unrestricted access to foreign periodicals. To achieve this long-standing policy objective, government policy has focused on two areas: advertising and distribution.

26. The Government of Canada has introduced a series of measures to ensure that magazines with editorial content developed for the Canadian market can compete for the limited advertising revenues. These measures include Code 9958 of the *Customs Tariff*, sections 35-41 of the *Excise Tax Act* and section 19 of the *Income Tax Act*.

27. Public policy has also been developed in an effort to ensure that Canadians, regardless of where they live, have access on a reasonable basis to periodicals. Subsidized postal rates are provided to maximize the opportunity for distribution, particularly in light of Canada's relatively small and widely dispersed population. This measure is critical, since Canadian magazines have only limited access to newsstands and rely mainly on paid subscriptions for

---

16. L. Mogel, *The Magazine* (Englewood Cliffs, N.J.: Prentice-Hall, 1979) at 46-47 (Exhibit F).

circulation. Subsidized postal rates have enabled Canadian magazines to reach a widely dispersed readership.

28. Section 19 of the *Income Tax Act* allows a deduction for advertising directed at the Canadian market. Code 9958 of the *Customs Tariff* restricts the importation into Canada of periodicals whose advertising has been purchased especially to reach a Canadian audience. The general objective of these measures is to help the Canadian periodical industry raise advertising revenues. Code 9958 ensures the achievement of this goal, with section 19 of the *Income Tax Act*.

29. The Task Force on the Canadian Magazine Industry was established as a result of the anticipated publication of *Sports Illustrated Canada*. *Sports Illustrated Canada* was a split-run edition that was printed in Canada using text that was electronically transmitted from the United States. The editorial content of *Sports Illustrated Canada* was largely the same as the content in the American editions of *Sports Illustrated* but it contained advertisements that had been specifically purchased to reach a Canadian audience. Code 9958 of the *Customs Tariff* was not applicable to *Sports Illustrated Canada* because it was printed in Canada rather than being imported.

30. The emergence of *Sports Illustrated Canada* as a new split-run edition revealed the limitations of Canada's existing policy instruments. Accordingly, the Task Force was created to recommend ways to bring these policy instruments up to date. The Task Force's main recommendation was that an excise tax be imposed on advertising contained in split-run editions of periodicals that are distributed in Canada.

31. The object of the excise tax is not to discourage readership of foreign magazines, but to maintain an environment in which Canadian magazines can exist in Canada alongside with imported magazines. It is also intended to foster conditions in which indigenous magazines can be published, distributed and sold in Canada on a commercial basis. The tax is consistent with the broad principles of the cultural and media policies of successive federal governments.

E. Description of Canadian Measures

1. Part V.I of the *Excise Tax Act*

32. Amendments were made to the *Excise Tax Act*[17] to impose an excise tax at the rate of 80 per cent of the value of all advertisements contained in a split-run edition of a periodical. The legislation defines the term "split-run edition" and also contains a provision that sets out

17. *An Act to amend the Excise Tax Act and the Income Tax Act*, S.C. 1995, c. 46 (U.S. First Submission, Exhibit D). As in the U.S. First Submission, all further references to this Act are to sections of the *Excise Tax Act*, R.S.C. 1985, c. E-15 as amended by S.C. 1995, c. 46.

some exclusions from the definition.[18] A split-run edition is an edition of an issue of a periodical that:

(i) is distributed in Canada;

(ii) in which more than 20 per cent of the editorial material is the same or substantially the same as editorial material that appears in one or more excluded editions of one or more issues of one or more periodicals; and

(iii) contains an advertisement that does not appear in identical form in all the excluded editions.

33. The tax applies to advertising contained in a particular periodical edition only if the edition falls within the threshold definition of "split-run edition" and does not fall within one of the two exclusionary provisions.[19]

34. The combined effect of reading the definition of "split-run edition" together with the two exclusionary provisions is that three key questions need to be considered when determining whether the tax applies to advertising in a particular periodical edition:

(1) Is the particular edition primarily distributed in Canada?

(2) Is more than 20 per cent of its editorial material the same as the editorial material that appears in a periodical edition that is primarily distributed outside Canada (i.e., an excluded edition)?

(3) Does the particular edition contain at least one ad that does not appear in the excluded edition?

---

18. *Ibid.*, ss. 35(1) and 35(5). The term "periodical" means printed material that is published in a series of issues that appear not less than twice a year and not more than once a week. Where an issue of a periodical is published in several versions, each version is an edition of the issue. Each edition of the issue must be considered separately when determining whether an edition is a split-run edition. The definition of "periodical" explicitly excludes a catalogue which is substantially made up of advertisements.

19. *Ibid.*, ss. 35(5). Under the first exclusionary exception, the particular edition is not a split-run edition if it is an edition that is primarily circulated outside Canada. In effect, this is an exemption for editions that are distributed in Canada, but are mainly distributed outside Canada. Under the second exclusionary exception, a particular edition of an issue of a periodical that would otherwise be a split-run edition is not a split-run edition if all the ads in the particular edition appear in identical form in one or more editions of that issue that are primarily distributed outside Canada and that have a combined circulation outside Canada that is greater than the circulation in Canada of the particular edition. The purpose of the circulation requirement is to prevent a publisher from qualifying for this exemption by having all the ads in its Canadian split-run edition also appear in one of its excluded editions that has a very small circulation.

If the answer to all three questions is "yes", then the particular edition is subject to the tax on advertising unless it is covered by the grandfathering provision in the legislation.

35. The grandfathering provision provides limited "grandfathering" treatment to certain existing periodicals that distributed Canadian split-run editions prior to March 26, 1993. These periodicals are exempted from the tax based on the number of split-run editions that were distributed in Canada during the 12-month period ending March 26, 1993, provided that the periodicals continue to be similar in editorial direction to the split-run editions distributed before that date.[20]

36. The tax is levied on a per issue basis in an amount equal to 80 per cent *of the value of all the advertisements* in a split-run edition. Depending on the circumstances, the person responsible for paying the tax is the publisher, a person connected with the publisher,[21] the distributor, the printer or the wholesaler of the split-run edition.[22]

37. The tax is intended to discourage the funding with Canadian advertising revenue of magazines containing little, if any, editorial content developed for the Canadian market. The

---

20. *Ibid.*, s. 39. Where a particular periodical is eligible for grandfathering treatment, it is not subject to the tax on split-runs if the number of split-run editions per year does not exceed the number of split-run editions that were distributed during the 12-month period ending on March 26, 1993. If the number of split-run editions per year is increased, the tax applies to the additional split-run editions.

21. The *Excise Tax Act* stipulates that a person is considered to be connected to another person if one of them is controlled by the other or if both of them are controlled by the same person (*ibid.*, ss. 35(2)). A corporation is controlled by a particular person if 50 per cent or more of its share capital with voting rights belongs to that person or to persons with whom that person does not deal at arm's length. A partnership is controlled by a particular person if that person or persons with whom that person does not deal at arm's length is or are entitled to 50 per cent or more of the partnership's income (*ibid.*, ss. 35(3)).

22. The responsible person is the first of these persons who resides in Canada (*ibid.*, ss. 35(1)). The responsible person can be domestically or foreign-owned or controlled. In order to ensure enforcement and collection of the tax, it is important that the tax be imposed on a person who resides in Canada. The persons connected with (i.e., related to) the responsible person are jointly and severally liable for payment of the tax (*ibid.*, s. 41.1). As well, where the responsible person is a distributor, a printer or a wholesaler and there is more than one distributor, printer or wholesaler of the split-run edition, they are jointly and severally liable for payment of the tax (*ibid.*, s. 41.2). Where a person other than the publisher pays the excise tax in respect of a split-run edition, the person is deemed to have paid the tax on behalf of the publisher of the periodical. The legislation authorizes the person to recover the amount of the tax from the publisher in a court of competent jurisdiction or to deduct or withhold the amount from any amount payable by the person to the publisher or distributor of the periodical (*ibid.*, ss. 41.3(2)).

tax is non-discriminatory in its application[23] and does not require that the editorial content be produced by Canadians or in Canada.

2. Code 9958 of the *Customs Tariff*[24]

38. Code 9958 applies to regional editions produced by foreign publishers. The Code will apply if an issue of a periodical imported into Canada is a special edition, including a split-run or regional edition, that contains an advertisement that is primarily directed to a market in Canada and that does not appear in identical form in all editions of that issue of the periodical that were distributed in the periodical's country of origin.[25]

39. As described above, these types of periodicals generally contain the same editorial content as the other regional editions distributed in the publisher's domestic market but different advertising content, reflecting the addition of advertisements from Canadian advertisers. Where an issue of a periodical is found to have contravened Code 9958, the effect of the Code is to prevent the importation of up to the next four issues of the periodical.[26]

40. Code 9958 also applies where an issue of a periodical imported into Canada is an edition in which more than five per cent of the advertising content consists of advertisements directed to the Canadian market. Advertisements directed to the Canadian market include advertisements that indicate specific sources of product or service availability in Canada or

---

23. *Harrowsmith Country Life* is a Canadian-owned magazine. Before the adoption of Part V.1 of the *Excise Tax Act*, *Harrowsmith Country Life* had two editions – A Canadian edition and a U.S. edition. The Canadian and the U.S. editions had different advertisements and a certain amount of common editorial content. Because more than 20 per cent of the editorial content in the Canadian edition was the same as that in the U.S. edition, the tax would have applied to the Canadian edition (even if the editorial content was entirely produced in Canada). As a result of the excise tax, *Harrowsmith Country Life* stopped publishing its U.S. edition.

24. R.S.C. 1985, c. 41 (3rd Supp.) as amended to April 30, 1996, s. 114, Sch. VII, Item 9958 (*1996 Customs Tariff: Departmental Consolidation* (Ottawa: Minister of Supply & Services Canada, 1996) (Exhibit G).

25. When determining whether or not an advertisement is primarily directed at the Canadian market, a number of factors are taken into consideration such as whether there are enticements to the Canadian market, references to the goods and services tax, listing of Canadian addresses as opposed to foreign addresses, and specific invitations to Canadian consumers only.

26. The Code's definition of "periodical" refers to a periodical that is published at regular intervals of more than six days and less than fifteen weeks, not including special annual issues. As well, the periodical must be distributed as issues of a distinct publication or as a supplement to more than one newspaper. The definition does not include catalogues or newspapers. An exemption is also provided in the case of periodicals whose principal function is to encourage, promote or develop the fine arts, letters, scholarship or religion.

which include specific terms or conditions relating to the sale of goods or services in Canada.[27]

41. The publisher of a periodical is notified by the Department of National Revenue for Customs and Excise when a periodical is found to be in contravention of Code 9958.[28] As periodicals are generally in production a few issues ahead of their publication date, and in an attempt to achieve voluntary compliance, the publisher is often provided with a reasonable period of time during which the periodical must be brought into compliance.

42. In practice, publishers have brought their publications into compliance. The Department of National Revenue for Customs and Excise has never taken action and prohibited a periodical from being imported into Canada under the provisions of Code 9958. Should a decision to prohibit importation occur, the publisher has the right to appeal the decision under the regular provisions of the *Customs Act*.[29]

3. Subsidized and Commercial Postal Rates

(a) Canada Post Corporation

43. Canada Post became a Crown Corporation in 1981, when it was established by the Parliament of Canada pursuant to the *Canada Post Corporation Act*.[30] Crown corporations, the shares of which are owned by the Government, are created to separate the management of an activity from continuous political intervention and to provide independence from the strict financial controls applied to the government departmental structure. Crown corporations range in structure from being similar to a governmental department to the opposite end of the spectrum where they resemble a private corporation.[31]

44. Canada Post is included in the latter category of Crown corporations which operate in a competitive market, are not ordinarily dependent on an appropriation for operating purposes, earn a return on equity, and are expected to pay dividends to the shareholder. These corporations, like Canada Post, are the most independent of Crown corporations,

---

27. The Department of National Revenue for Customs and Excise has adopted and published guidelines providing details relating to the application and administration of Code 9958 of the *Customs Tariff* (Revenue Canada Memorandum D9-1-10 (May 21, 1993) (U.S. First Submission, Exhibit C)).

28. The *Importation of Periodicals Regulations* (C.R.C., c. 533 as amended to April 30, 1996 (Exhibit H)) describe the review process as carried out by an officer or the Deputy Minister of the Department of National Revenue for Customs and Excise.

29. R.S.C. 1985, c. 1 (2nd Supp.) ss. 60, 63 and 67 (Exhibit I).

30. R.S.C. 1985, c. C-10 (Exhibit J).

31. P. Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 49-60 (Exhibit K).

making their decisions primarily on normal commercial principles. Canada Post is given, by its legislative framework, a commercial mandate comparable to private sector enterprises with the legal and operational flexibility to implement this mandate.

45. The creation of Canada Post brought changes to the management of the postal service and the postal subsidy. Canada Post was given a financial self-sufficiency objective. Before this, when the postal service was still provided by a governmental department, any deficit was covered by the government's budget. The postal subsidy became a specific appropriation of the Department of Communications (now the Department of Canadian Heritage). The Department, by a negotiated agreement, provided compensation to Canada Post in return for the provision of reduced rates for eligible publications.

46. The current publications distribution services offered by Canada Post are sub-divided into two general categories: (1) subsidised (or funded) services; and (2) commercial services.

(b) Subsidized Postal Rates

47. Through the Publications Assistance Program, the Department of Canadian Heritage provides subsidized postal rates to eligible Canadian publications, including periodicals, mailed in Canada for delivery in Canada. Subsidized postal rates are available to Canadian-owned and -controlled paid circulation publications that are published and printed in Canada and meet certain editorial and advertising requirements. The Department of Canadian Heritage implements the program on behalf of the Government of Canada in partnership with Canada Post.

48. The Publications Assistance Program is implemented by a Memorandum of Agreement (MOA) between the Department of Canadian Heritage and Canada Post signed in March 1996 and covering the period from May 1, 1996 to March 31, 1999.[32] The MOA provides for subsidized postal rates through the payments of funds provided in quarterly instalments by the Department to Canada Post. The funding provided by the Department of Canadian Heritage is the result of arms length negotiations with Canada Post on issues involving publication eligibility criteria, postal rate increases over the life of the agreement, administrative requirements and each party's view as to estimated future volumes based on historical experience and agreed changes to eligibility criteria. Canada Post undertakes to

32. U.S. First Submission, Exhibit F. The authorizations for the Publications Assistance Program in the Department of Canadian Heritage's expenditure budget for the 1996-97 financial year provides for $58 million to be paid to Canada Post to compensate Canada Post for negotiated concessionary rates related to the mailing of cultural publications (Canada, *1996-97 Estimates: Part III: Expenditure Plan: Canadian Heritage* (Ottawa: Minister of Supply & Services Canada, 1996) at 3-2 (Exhibit L)). The MOA calls for $57.9 million and $47.3 million to be provided respectively in the 1997-98 and 1998-99 financial year expenditure budgets.

provide delivery services at the agreed rates and conditions to all eligible volumes in return for payment of the agreed funding.

49. In order to be eligible for subsidized postage rates, Canadian publications must generally meet the following criteria:

(1) produced by a person or company whose primary business is publishing;[33]

(2) Canadian ownership and control;

(3) published, printed and mailed in Canada;

(4) edited in Canada;[34]

(5) eligible editorial categories;[35]

(6) minimum paid circulation requirement;[36]

(7) maximum advertising allowance;[37]

---

33. Subsidized rates cannot be used to promote a specific business or a specific service. Periodicals published by organizations such as fraternal, trade or professional organizations, associations, trade unions, credit unions, co-operatives, or local church organizations are generally ineligible for subsidized postal rates. Also ineligible for these rates are periodicals published in order to help promote a business' primary activities. (This information and the information in footnotes 34 to 40 is taken from the MOA.)

34. An eligible publication must be edited by persons residing in Canada. For the purposes of the Program, editing encompasses the commissioning of editorial material and artwork, supervising writers, illustrators and photographers regarding the final format of the material, as well as laying out, copy editing and proofreading, and otherwise preparing the contents for printing.

35. All eligible publications must be published for the dissemination to the public consisting of either: news, comment and analysis of news, and articles on topics of current public interest; or articles on religion, the sciences, agriculture, forestry, the fisheries, social or literary criticism, reviews of literature or the arts, or be an academic or scholarly journal; or articles promoting public health and be published by a non-profit organization administered on a national or provincial basis.

36. No less than 50 per cent of an eligible publication's total circulation must be paid circulation. "*Paid circulation*" refers to all copies of publications that are paid for directly by a purchaser, including by subscription, sales to newsdealers or newsstand sales.

37. No more than 70 per cent of the space, including advertising inserts, in an eligible publication may be devoted to advertising.

(8) frequency;[38] and

(9) minimum price.[39]

50. The Department of Canadian Heritage is responsible for the administration of the eligibility requirements for the Program.[40] Canada Post accepts for distribution all publications that are eligible under the Program once the publication is approved by the Department. For eligible publications to receive subsidised postage rates, the publisher must first enter into a sales agreement with Canada Post prior to posting under the Program. Rates of postage for eligible publications are set out in the MOA. These rates are not subject to regulation.[41]

(c) Commercial Postal Rates

51. The commercial mail service was created as a result of decisions by the Government of Canada to de-list certain previously subsidized publications. These publications fall into two categories: Canadian publications; and non-Canadian publications. Commercial rates are designed to offer publishers of these publications more attractive postal rates and services compared to other available distribution alternatives. Canada Post does not have a monopoly over the distribution in Canada of either category of publications. The market for the distribution of domestic and foreign publications contains several competitive suppliers.

52. Standard sales agreements define the terms and conditions, including rates of postage, for distribution of: (a) Canadian publications that are ineligible for subsidised rates; and (b) non-Canadian publications. These are commercial arrangements designed to benefit Canadian and foreign publications and their subscribers by reducing mailing costs and improving delivery standards.

53. The eligibility requirements for commercial postage rates for Canadian publications are set out in Canada Post's Canadian Publications Mail Products Sales Agreement,[42] an agreement that the publisher of a Canadian publication must enter into with Canada Post in order to receive commercial postal rates and service. This service is available to publications printed, published, and mailed in Canada, that meet the following criteria:

---

38. An eligible publication must be published not less than twice a year and not more that 56 times a year.

39. An eligible publication must have a stated subscription price of $0.50 or more per copy and $6.00 or more per year.

40. This includes the receipt and evaluation of all applications from publishers, the determination of eligible publications, and the administration of an appeal mechanism.

41. All subsidised rates were removed from regulations on May 1, 1996 (SOR/96-209 (Exhibit M)).

42. Canadian Publications Mail Products Sales Agreement (March 1, 1995) (Exhibit N).

(1) published for the purpose of disseminating to the public news, articles containing comments on or analysis of the news, and articles with respect to other topics currently of interest to the general public;

(2) devoted primarily to one or more of religion, the sciences, agriculture, forestry, the fisheries, social or literary criticism or reviews of literature or the arts, or academic or scholarly writings;

(3) published at a frequency of not less than four times a year;

(4) addressed to a subscriber, non-subscriber, company or to a newsdealer in Canada;

(5) containing not more than 70 per cent of the space devoted to advertising in more than 50 per cent of the issues published during any twelve month period; and

(6) published by or at the direction of a person whose principal business is publishing.

Given sufficient volume of distribution, mail preparation options are available for Canadian publications.[43] There are currently no minimum volume requirements (per mailing or per annum) for Canadian publications.[44] The current rates for this category are set out in the Canadian Publications Mail Products Sales Agreement.

54. The eligibility requirements for commercial postage rates for foreign publications are set out in the International Publications Mail Product (Canadian Distribution) Sales Agreement.[45] Eligible publications must meet the same six criteria that a Canadian publication must satisfy to obtain commercial postage rates. As in the case of Canadian

---

43. Mail preparation discounts are made available to Canadian non-subsidized publications. The letter carrier presort rate is available for mailings sorted - usually by computer - into delivery mode code sequence within each postal delivery office and then grouped into bundles, bags or pallets. Discounts of $0.01 to $0.02 per copy are also available to these magazines if palletized. A by-pass or downstream entry discount ranging from $150.00 to $200.00 per truck load is also available. These mail preparation discounts are not available to subsidised Canadian publications nor, in general, to foreign publications mailed in Canada. However, several large foreign publishers do enjoy similar discounts through their customer-specific sales agreements (*ibid.*).

44. There is the exception of mail prepared for the "Letter Carrier Presort". This minimum volume requirement for the "Letter Carrier Presort" option is 10,000 copies per issue.

45. International Publications Mail Product (Canadian Distribution) Sales Agreement (March 1, 1994) (Exhibit O).

publications, the customer must first enter into an International Publications Mail Product (Canadian Distribution) Sales Agreement.

55. Neither Canadian nor international commercial postage rates for publications distributed in Canada are subject to regulation.[46] These rates are established and approved exclusively by Canada Post senior management on the basis of normal commercial market considerations.

56. In addition, the terms and conditions for the distribution of publications (including rates of postage) may be established by specific agreements negotiated between Canada Post and the publisher. These special agreements are designed to meet the unique needs of specific large-volume customers that are not met by the standard sales agreements. Specific agreements are available for both Canadian and non-Canadian publications. The rates of postage within a specific agreement are established on a case-by-case basis.

IV. ARGUMENTS

A. Conformity of Part V.I of the *Excise Tax Act* to the GATT 1994

1. Inapplicability of Article III of the GATT 1994 to Part V.1 of the *Excise Tax Act*

57. Part V.1 of the *Excise Tax Act* is a measure pertaining to advertising services. Multilateral trade disciplines on advertising services fall within the GATS and not the GATT 1994. Article III of the GATT 1994 does not apply to Part V.1 of the *Excise Tax Act*. However, the terms of reference direct the panel to examine only trade matters within the purview of the GATT 1994. The examination of Part V.1 of the *Excise Tax Act* in light of the GATS is not covered by the terms of reference.

(a) Duality of Magazines

58. As stated above, the first distinctive aspect of a magazine is its character as a public good which is largely defined by its content. The second distinctive feature is the magazine dual nature in that it is both a consumer good and an advertising service with two distinct revenue streams. The two separate revenue streams are circulation revenue, which is derived from the sale of a good, and advertising revenue, which is derived from the sale of a service.

---

46. Canadian commercial and international commercial rates have been established outside of regulation since March, 1994 and March, 1992, respectively (SOR/94-210 and SOR/91-641 (Exhibits P and Q)).

the two consumers are readers and advertisers.[47] All magazines exhibit this essential duality, which represents two distinct economic outputs.

(b) Provision of Advertising Services Is a GATS Issue

59. The GATT 1994 establishes the standards that govern international trade in goods. The central obligations of GATT 1994 are the tariff concessions by which WTO Members commit themselves (in Article II and the schedules) to limit the level of tariffs they will impose on imports from other Members. A second obligation is that of the most-favoured-nation ("MFN") obligation in Article I. Articles III through XVII comprise most of the other substantive obligations of GATT 1994. These obligations apply to goods only. Article III of the GATT 1994 sets out the national treatment obligation pertaining to treatment of imported goods.

60. The Uruguay Round has produced a similar framework for trade in services. The GATS contains both general obligations, some of which apply to all service sectors and some only to scheduled commitments, as well as specific commitments which are negotiated undertakings particular to each Member. Specific commitments are recorded in national schedules that are attached to, and form an integral part of, the GATS.[48]

61. Every undertaking contained in a schedule to the GATS is a binding commitment to allow the supply of the service in question on the terms and conditions specified and to not impose any new measures that would restrict entry into the market or the operation of the service. In the absence of any scheduled commitments, there are no disciplines on the introduction or the maintenance of measures of any type, even those that may be inconsistent with market access or national treatment commitments.

---

47. See "Theory of Successful Editing - Establishing a Unique Editorial Franchise" in J. Mann, *Magazine Editing - Its Art and Practice* (New Canaan, Conn.: Folio, 1985) at 92-103 (Exhibit R) and "Practice of Successful Editing - Positioning Editorial So Advertisers Will See Its Value," *ibid.* at 170-172 (Exhibit S).

48. There are three articles in Part III of the GATS on Specific Commitments, entitled Market Access, National Treatment, and Additional Commitments (Articles XVI, XVII and XVIII respectively). In general, the classification of sectors in national schedules is based on the Secretariat's Services Sectoral Classification List. This reference list of the Secretariat is based on the Central Product Classification (CPC) of the United Nations. See *Services Sectoral Classification List: Note by the Secretariat*, GATT Doc. MTN.GNS/W/120 (10 July 1991) (Exhibit T). See also *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, GATT Doc. MTN.GNS/W/164 (3 September 1993) (Exhibit U).

62. Advertising services appear on the Services Sectoral Classification List of the Secretariat under the business sector.[49] The provision of advertising services is consequently a GATS matter, not a GATT matter.

63. Canada has not undertaken any commitments in respect of the provision of advertising services in its Schedule of Specific Commitments. As observed above, in the absence of any scheduled commitments, there are *no* restrictions on Canada in respect of the introduction of measures concerning the provision of advertising services. In particular, Canada is not bound, nor in any way obliged, to provide national treatment to Members of the WTO in respect of the provision of advertising services in the Canadian market.

(c) Article III:2 of the GATT 1994 Does Not Apply to Part V.1 of the *Excise Tax Act*

64. This dispute concerns the provision of advertising services to Canadian advertisers. As noted earlier, a magazine publisher derives revenue from both the sale of the magazine to consumers and from the sale of advertising space to advertisers. The sale of the right to advertise to a magazine's audience is an advertising service. As the tax imposed by the *Excise Tax Act* is imposed on the revenues earned through the provision of advertising services by a magazine publisher,[50] it is a tax in respect of the provision of an advertising service.

65. The first submission of the United States acknowledges that this challenge is, in fact, a dispute over the provision of advertising services to Canadian advertisers. In particular, the United States states that the *Excise Tax Act* measures are the latest attempt by Canada to ensure that foreign-based periodicals "cannot compete with Canadian-produced magazines for domestic [i.e. Canadian] advertising revenues."[51] Having admitted that the measures in dispute concern the provision of advertising services, the United States cannot argue that the

---

49. United Nations, Dept. of International Economic and Social Affairs, Statistical Office of the United Nations, *Provisional Central Product Classification*, Statistical Papers, Series M No. 77, U.N. Doc. ST/ESA/STAT/SER.M/77 (New York: United Nations, 1991) at 147-148, 173 (Exhibit V). Item 8711 states: sale or leasing services of advertising space or time. Services provided in soliciting advertising space or time for newspapers, other periodicals, and television stations. Item 8712 states: planning, creating and placement services of advertising. Planning, creating and placement services of advertisements to be displayed through the advertising media. Item 8719 states: other advertising services. Other advertising services not elsewhere classified, including outdoor and aerial advertising services and delivery services of samples and other advertising material.

50. Part V.1 of the *Excise Tax Act* (*supra* note 17) imposes an excise tax on the value of advertisements contained in split-run editions of periodicals. According to the charging provision, the tax is imposed at a rate equal to 80 per cent of the total value of all advertisements appearing in the split-run edition of the periodical.

51. U.S. First Submission at 18, para. 56. See also *ibid.* at 20, para. 65.

measures fall under Article III:2 of the GATT 1994, an agreement concerned solely with trade in goods.

(d) An Indirect Attack on Advertising Services

66. This challenge in respect of the *Excise Tax Act* measures is an indirect attempt by the United States to obtain trading benefits that it has been unable to obtain directly. In the guise of a GATT goods argument, the United States now attempts to persuade the Panel to allow it to have access to a service sector to which, in full accordance with the terms of international trade law, it is presently not entitled. Should the Panel agree that a Member can obtain benefits under a covered agreement that have been expressly precluded under another covered agreement, the Panel risks introducing uncertainty in the relationship between GATS disciplines and GATT disciplines.

2. Even If Article III of the GATT 1994 Were Applicable, Part V.1 of the *Excise Tax Act* Conforms to Article III

67. There is an artificial quality to any attempt to assess how Article III applies to a tax that has never been applied to a foreign product. In fact, it was assumed that the tax would not so apply to imported products in view of the maintenance of Code 9958. Article III:2 requires a comparison of an imported and a domestic product, a comparison that must remain purely hypothetical in this case. Subject to this observation, Canada makes the following alternative arguments to be considered in the event the Panel is of the view that Part V.1 of the *Excise Tax Act* is a taxation measure that applies to magazines as "goods" and that an examination of the application of Article III of the GATT 1994 must be conducted.

(a) Article III:2, First Sentence

68. With respect to the first sentence of Article III:2 of the GATT 1994, periodicals with foreign editorial material and domestic advertising (i.e., split-runs) and periodicals with editorial content developed for the Canadian market are not "like" goods. Further, the tax does not discriminate against foreign periodicals in law or in fact: it is equally applicable to domestic and foreign periodicals. The Parliament of Canada did not adopt the measure so as to afford protection to the production of magazines *per se*, but rather to maintain fair competition in the advertising services sector of the publishing industry. Part V.1 of the *Excise Tax Act* does not violate the obligation in Article III:2, first sentence.

(i) Split-run periodicals are not "like" products to periodicals containing editorial material developed for the Canadian market

69. The United States claims that Part V.1 of the *Excise Tax Act* "... creates an artificial distinction between 'split-run' magazines and all other types of magazines...",[52] and that split-run editions "... are the same in virtually every respect as other magazines and thus qualify as 'like products'... ".[53] It further alleges that, in terms of physical characteristics and end-uses, there is no distinction between split-run periodicals and periodicals with editorial content developed for the Canadian market.[54] The U.S. position ignores a fundamental principle of the GATT practice on "like" products: that the analysis is to be conducted on a case-by-case basis in order to reflect the context, the circumstances, and the specific characteristics of each product. By treating magazines as ordinary items of merchandise trade such as oranges or automobiles, the United States disregards the distinguishing characteristics of magazines. Its approach is therefore at odds with basic principles of GATT practice.

70. The U.S. analysis is focused exclusively on the physical characteristics of periodicals. These characteristics are plainly secondary in the context of cultural products such as magazines. Such an approach is simplistic and would lead to an absurd result: the implication that all periodicals are "like". The narrow implication of the U.S. submission is, in fact, that all magazines are like all other magazines. They are all printed material. They all look broadly similar from a physical point of view and they all serve as reading and pictorial material. Paragraph 61 of the U.S. submission even implies, when it refers to Canada's tariff item 49.02, that newspapers, journals and periodicals are "like" goods.

71. Canada submits that the "like products" test requires a much more sophisticated analysis than that suggested by the United States. Periodicals with editorial content developed for the Canadian market and split-runs substantially reproducing foreign editorial content are not "like products" within the meaning of Article III:2 and are distinguishable on the basis of their content, the essential characteristic of any magazine.

72. The lack of a definition of what constitutes a "like product" was originally recognized by the *Working Party on Border Tax Adjustments*.[55] In the absence of a definition, the Working Party concluded that the determination of what constitutes "like products" must be

---

52. *Ibid.* at 18, para. 57.

53. *Ibid.* at 19, para. 59.

54. *Ibid.* at 19, para. 60.

55. *Border Tax Adjustments* (Report of the Working Party adopted on 2 December 1970), GATT Doc.L/3464, BISD 18S/97.

made on a case-by-case basis in order to allow for the consideration of the specific circumstances of each case. The report of the Working Party stated that:

> "The Working Party concluded that problems arising from the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a 'similar' product."[56]

In that context the Working Party suggested some criteria: "... the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality."[57]

73. This line of thinking evolved into an established GATT practice[58] and was recently reaffirmed by the Panel in *United States - Standards for Reformulated and Conventional Gasoline* where the Panel stated that:

> "These criteria had been applied by the Panel in the 1987 *Japan Alcohol* case in the examination under Article III:2 of internal taxation measures. That Panel had proceeded on a case-by-case basis, determining whether various alcoholic beverages were 'like' on the basis of 'their similar properties, end-uses and usually uniform classification in tariff nomenclatures.' The Panel considered that those criteria were also applicable to the examination of like products under Article III:4."[59]

74. As explained above in the section on magazines' distinctive qualities, magazines are distinct from ordinary articles of trade. Magazines are intended, by their very nature, for intellectual consumption as opposed to physical use (like a bicycle) or physical consumption (like food). It follows that the intellectual content of a cultural good such as a magazine must be considered its prime characteristic. Consequently, the "like product" analysis of

---

56. *Ibid.* at 102, para. 18.

57. *Ibid.*

58. The analytical approach suggested by the Working Party was adopted by several Panels, see in particular *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* (Report of the Panel adopted on 10 November 1987), GATT Doc. L/6216, BISD 34S/83 at 115-116, para. 5.6; see also *United States - Taxes on Petroleum and Certain Imported Substances* (Report of the Panel adopted on 17 June 1987), GATT Doc. L/6175, BISD 34S/136 at 154, para. 5.1.1 [hereinafter *U.S. Petroleum Taxes*].

59. *United States - Standards for Reformulated and Conventional Gasoline* (Report of the Panel, 29 January 1996), WTO Doc. WT/DS2/R at para. 6.8 [hereinafter *Reformulated Gasoline*]. The decision was appealed and maintained by the Appellate Body (AB-1996-1 (Report of the Appellate Body, 29 April 1996), WTO Doc. WT/DS2/AB/R) [hereinafter *Reformulated Gasoline Appeal*].

whether imported split-run magazines share the same characteristics as domestic magazines with editorial content developed for the Canadian market must be approached in terms of intellectual content as opposed to the traditional approach of examining material or physical characteristics. The periodical industry is keenly aware of the importance of editorial content. It is editorial content and its ability to attract readers that determine the ability of a periodical to attract advertising revenues to securing its financial viability.[60]

75. Periodicals with editorial content developed for the Canadian market and split-run periodicals envisaged by the legislation are distinct products on the basis of their editorial content. The definition of "split-run edition" reflects this distinction. Editorial material developed for the Canadian market reflects a Canadian perspective and contains specific information of interest to Canadians. The content is qualitatively different from editorial material copied from foreign publications.

76. What has been said of the essential properties of magazines is equally applicable to their end-use. The end-use of a magazine is not simply reading; it is the transmission and acquisition of specific information. The information in, for example, a sports magazine, cannot be considered essentially the same as that in a philosophical journal. Any attempt to characterize the "end-use" of products so broadly that they all end up in the same category would deprive this consideration of any real meaning and would run afoul of the principle that the expression "like" in this context is to be narrowly construed.[61]

77. The WTO tariff schedule is not determinative with respect to uniform tariff classification of any periodicals, whether "non split-runs" or "split-runs", in Canada. The categories of products listed under tariff item 49.02 are as diverse as periodicals and newspapers. Whether, for example, periodicals and newspapers are "like" products depends entirely on the context. Where the policy framework relates to periodicals and their intellectual *content*, the argument that the two media are "like" would be difficult to sustain. The longstanding presence of Code 9958, which has the effect of carving magazines with editorial content developed for the Canadian market out of this very broad tariff category, either deprives this criterion of any real meaning in the context of this case or else lends positive support to the Canadian position.

---

60. See J. Parker, "Neutralize Your Rate-Cutting Competitors" in *Handbook of Magazine Publishing*, 4th ed. (Stanford, Conn.: Cowles Business Media, 1996) at 284-285; J. Fry, "Regionalizing Your Editorial," in *Handbook of Magazine Publishing*, 2nd ed. (New Canaan, Conn.: FOLIO, 1983) at 496-498; "Understanding the Magazine Medium - How Editorial Works for Advertising" in Mann, *supra* note 47 at 61-67; and D. Patz, "Global Deal," FOLIO (June 15, 1994) at 40-41, 92 (Exhibit W).

61. *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. 6.21 [hereinafter *Japanese Liquor Tax II*]. This report has been appealed to the Appellate Body.

(ii) Part V.1 of the *Excise Tax Act* is not discriminatory

78. The United States acknowledges that the excise tax applies both to imported and locally-produced split-runs. The effect of the tax, according to the United States, is "... to discourage the printing and the distribution in Canada of foreign-based split-runs. However, the excise tax does apply to imported split-runs and thus is subject to scrutiny under the GATT 1994 Article III."[62] The U.S. submission also maintains that Part V.1 of the *Excise Tax Act* applies "... in a manner that inherently favours Canadian-based producers...".[63] On the evidence, these contentions are unfounded.

79. Part V.1 of the *Excise Tax Act* applies in a non-discriminatory manner to both domestic and imported products. The measure is "origin-neutral" on its face, in its practical effect and in its intended operation. The *Excise Tax Act* is entirely silent on the question of the product's nationality or the producer's nationality.

80. Moreover, the United States has not demonstrated that the tax is in practice applied in a discriminatory way to imported split-run edition periodicals. In fact, the only split-run edition periodicals which have been affected by the application of Part V.1 of the *Excise Tax Act* have been Canadian periodicals. This includes the specific case of *Sports Illustrated* that is referred to in paragraphs 16 to 35 of the U.S. submission. As mentioned in the U.S. submission, the Canadian edition of *Sports Illustrated* was printed and produced, as a good, in Canada. It was not imported into Canada in any material form. The *Sports Illustrated* scenario, therefore, does not constitute an instance of discriminatory treatment against imported magazines as portrayed by the U.S. submission.

81. The use by the United States of the ambiguous expression "foreign-based split-runs" is revealing. It demonstrates the lack of cogency in the U.S. position. Article III:2, first sentence, does not protect domestic products that replicate foreign products. According to its terms, it applies only to products "*of the territory*" of one party "imported *into the territory*" of the other party. It makes no reference to "foreign-based" domestic products, and thus it fails to support the U.S. position.

82. Subject to the decision to be rendered by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*, Canada would observe that there is no conceivable reason why a measure that is non-discriminatory both in its form and in its effect - *de jure* and *de facto* - should be considered inconsistent with Article III:2.[64] As the Appellate Body recently

---

62. U.S. First Submission at 17, para. 54, note 52.

63. *Ibid.* at 19, para. 63.

64. *Japanese Liquor Tax II, supra* note 61. The United States has argued in the pending appeal that the Panel erred in completely rejecting the aim-and-effect test for the purpose of a determination under Article III:2, first sentence. In its written submission to the Appellate Body, Canada has taken the

observed, "[i]ndeed where there is identity of treatment - constituting real, not merely formal, equality of treatment - it is difficult to see how inconsistency with Article III:4 would have arisen in the first place."[65] The same may be said of Article III:2, first sentence.

(b) Article III:2, Second Sentence

83. With respect to the second obligation set out in Article III:2, the complaining party must demonstrate (1) that the internal tax applies to imported and domestic products that are "directly competitive or substitutable"; and (2) that the tax is being applied so as to afford protection to domestic production of the goods in question.[66] Spit-run edition periodicals are not "directly competitive with or substitutable for" periodicals with editorial content developed for the Canadian market. Although they may be substitutable *advertising* vehicles, they are not competitive or substitutable information vehicles. Moreover, as mentioned above, the excise tax on advertising contained in split-run editions was not introduced so as to protect the Canadian production of periodicals and it does not have this effect. Rather, it was adopted to prevent an unfair practice in the advertising service sector.

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

84. The United States argues that the tax is being applied to imported split-run periodicals that are in direct competition with, and directly substitutable for, other magazines in such a way as to protect the Canadian production of periodicals and is, therefore, in violation of the second obligation set out in Article III:2. As in the case of the first sentence, the subject matter is a service and not "imported or domestic products," and as such it falls outside the scope of the GATT 1994. The following alternative arguments will require consideration only to the extent that the Panel concludes that, contrary to our principal submission, the subject matter of Part V.1 of the *Excise Tax Act* is "imported or domestic products".

85. Under the second sentence of Article III:2 and the Ad Article III, Paragraph 2, the complaining party must demonstrate that a tax is being applied to imported products or domestic products that are "directly competitive or substitutable" and that the tax is being applied "in such a way as to protect domestic production." The United States must therefore demonstrate that split-run edition periodicals and periodicals with editorial content developed for the Canadian market are competitive or substitutable products, and that the Parliament of

---

position that there is no requirement that consistency with Article III:2 requires a determination of *both* aim and effect.

65. *Reformulated Gasoline Appeal*, *supra* note 59 at 21.

66. *Ibid.*

Canada imposed the 80 per cent tax on split-run edition periodicals in order to protect Canadian production of periodicals which are not split-run editions.

86. As noted above, periodical publishers compete in two spheres: the advertising market and the consumer market. Split-runs and other domestic magazines may indeed compete directly in the advertising market but, as stated earlier, that market is not subject to the disciplines of the GATT 1994. The question to be decided is whether the magazines under consideration are "directly" competitive or substitutable as consumer goods - which question, in this context, requires an evaluation of their interchangeability as information vehicles. The use of the adverb "directly" to modify the terms competitive and substitutable specifically qualifies the type of competition that is required between imported products and domestic products, and the level of substitutability that must exist between these products.

87. Canadian periodical consumers have a demand for periodicals containing information that specifically addresses their interests. Canadian magazines contain information developed for and directed to the interests of Canadian consumers over a broad range of genres. Split-runs and magazines with editorial material developed for the Canadian market cannot be considered direct substitutes as information vehicles; and for the same reason they are not in *direct* competition. They are not interchangeable, and would not therefore be perceived as alternatives by consumers.

88. One of the elements of substitutability - a shared characteristic with the test for like products - is the products' end-use. As noted in the argument on the first sentence of Article III:2, consumer end-use in the context of magazines is specific to content. To the extent that Canadian consumers may choose between a split-run edition based on content developed for foreign markets and a periodical with editorial content developed for the Canadian market, they do not regard the two as interchangeable. Their content is significantly different, and they accordingly fulfil different needs and perform distinct functions. They cannot be considered substitutable in terms of end-use.

89. Therefore, contrary to the U.S. contention, the two products are not directly competitive or substitutable within the meaning of the second sentence of Article III:2, as interpreted by Ad Article III:2.

(ii) So as to afford protection to domestic production

90. Canada is not applying the excise tax to imported periodicals so as to afford protection to the Canadian production of periodicals. Part V.1 of the *Excise Tax Act* has no effect on the ability of foreign periodicals to enter Canada and to hold a very large share of the Canadian market. The *Excise Tax Act* applies to all split-run periodicals - wherever produced - in the same way. Contrary to the U.S. contention, the purpose of Part V.1 of the *Excise Tax Act* is not to protect the production of periodicals in Canada, but to prevent the diversion of advertising revenues to magazines based on content produced for foreign markets, and thus to ensure the production of editorial content for Canadians.

91. The purpose of Article III is to protect the competitive relationship between domestic and imported goods. As stated in *United States - Taxes on Petroleum and Certain Imported Substances*:

> "... The general prohibition of quantitative restrictions under Article XI ... and the national treatment obligation of Article III ... have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties."[67]

Therefore, when Article III:1 specifies that a contracting party must not adopt measures "so as to afford protection to domestic production", the object is to prevent the adoption or maintenance of measures that protect domestic products to the disadvantage of products imported from the territory of another party.

92. Part V.1 of the *Excise Tax Act* is not a protectionist measure adopted "so as to afford protection to domestic production" for the following reasons:

(a) It does not affect the competitive relationship between imported and domestically-produced periodicals.

(b) It is not based on the physical origin of periodicals, which is what is contemplated by the reference to "domestic production".

(c) Far from having a protectionist aim, it is a legitimate response to an anti-competitive abuse in the advertising field, with the ultimate object of ensuring the survival of a distinct Canadian culture.

93. Because the GATT 1994, including Article III, applies to trade in goods, the expression "domestic production" in paragraph 1 must refer to the physical production of the good. This refers to its manufacturing, cultivation, extraction, etc. Article III of the GATT 1994 cannot address the competitive relationship between service-providers such as the authors and artists contributing to the intellectual material contained in periodicals. Nor does it protect the competitive relationship between publishers in their capacity as sellers of advertising space. In terms of physical production, the sole perspective that is relevant to Article III, Part V.1 of the *Excise Tax Act* is entirely neutral. It does not have the effect of protecting the production of periodicals in Canada; indeed its principal target was the production *in Canada* of split-run magazines as defined in the Act.

---

67. *U.S. Petroleum Taxes*, *supra* note 58 at 160, para. 5.2.2.

94. The action of the Parliament of Canada was not directed against foreign periodicals. As the Task Force explained:

> "As part of their heritage, Canadians are doubly fortunate to have unparalleled access to publications from around the world. It is the Task Force's desire to maintain this freedom of choice, and the measures it is proposing do nothing to deny Canadians the right to purchase the magazines of their choice. We cannot make our borders impenetrable even if we wanted to, which we decidedly do not.
>
> The object of the Task Force recommendations is not to discourage readership of foreign magazines, but to maintain an environment in which Canadian magazines can grow and prosper in Canada alongside imported magazines."[68]

95. As has been explained on numerous occasions, the immediate objective of Parliament was directed against the aggressive marketing of advertising services in Canada by publishers who were recycling in Canada editorial material whose production costs had already been covered in a larger market. The net result of this practice was to cut into the small share of the advertising market available to Canadian publishers, who were producing editorial content specific to Canadians. Part V.1 of the *Excise Tax Act* was drafted in such a way as to curtail this advertising practice and not so as to prevent the entry into Canada of foreign periodicals or in such a way as to disadvantage foreign periodicals in the Canadian market.

96. Canada never intended to decrease the level of competition between imported and domestic magazines. On the contrary, the members of the Task Force on the Canadian Magazine Industry wrote: "We are convinced that what is being proposed interferes as little as possible with freedom of expression or choice. Indeed, in the final analysis, we are seeking to expand choice by ensuring the continued availability of magazines with original content."[69] These measures did not prevent and were not intended to prevent foreign periodicals from competing in the Canadian market on an equal footing with Canadian periodicals.

97. The Panel should note that the United States has completely misrepresented the true trade position. There is an enormous penetration of American magazines in Canada, and nothing in the Canadian tax measure would change this or is designed to change this. Nor are there any significant trade effects to the measure. This tax concerns a very narrow segment of the total number of American periodicals streaming across the border daily. This very narrow segment was affected in the same way that a narrow segment of Canadian periodicals was affected. And this narrow segment of both the Canadian and the U.S. industry was affected because the Parliament of Canada believed that a certain practice, a services practice, had to be discouraged.

---

68. *Task Force Report*, *supra* note 4 at 63.

69. *Ibid.* at 64.

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.

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.[72] 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

---

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.

the *Canada Post Corporation Act*.[73] In addition, under the *Financial Administration Act*, as a Schedule III, Part II Crown Corporation, Canada Post is expected to: operate in a competitive environment; earn a return on equity; not depend on government appropriation; and finally, provide a reasonable expectation that it will pay dividends. Both the *Canada Post Corporation Act* and the *Financial Administration Act* essentially establish a commercial mandate for Canada Post comparable to a private sector interest.

106. This legislative framework provides Canada Post with the legal and operational flexibility to implement its commercially-oriented mandate. With respect to publications, i.e., newspapers and periodicals, Canada Post is not a government monopoly and does not have the exclusive right of delivery. Canada Post does not have the power of a monopoly when it sets commercial rates for the delivery of publications.[74] It competes in an open competitive market for its share of the publications delivery market.

107. Section 14(2) of the *Canada Post Corporation Act* states that "[n]othing in this Act shall be construed as requiring any person to transmit by post any newspaper, magazine, book, catalogue or goods." Pursuant to section 2 of the *Act*, "post" means to leave in a post office or with a person authorized by the Corporation to receive mailable matter. Any publisher, foreign or domestic, is free to arrange for the delivery of his newspaper or periodical via Canada Post or with any other distributor. Foreign publishers have the additional option of mailing their copies addressed to Canadian addresses with their own postal administration at the applicable international printed matter rates.[75]

108. The principle of national treatment of Article III:4 of the GATT 1994 does not apply to the commercial postal rates charged by Canada Post. The United States contends that commercial rates set by Canada Post are "regulations" or "requirements" affecting the internal sale of imported publications. The term regulation in the context of the GATT 1994 means the rules or orders having the force of law that are issued by executive or administrative authorities of government. The rates for the delivery of letters in Canada are

---

73. Canada Post operates within the legislative framework of the *Canada Post Corporation Act* (*supra* note 30), the *Financial Administration Act*, and other relevant statutes.

74. Canada Post does have a limited exclusive privilege with respect to the collection, transmission and delivery of "letters" in Canada, including addressed advertising mail. This exclusive privilege represents in aggregate approximately 50 per cent of total corporate revenues. Canada Post has no statutory protection for the remainder of its business and must compete with existing or potential competitors, as the case may be. The Corporation's exclusive privilege is defined in Section 14 and 15 of the *Canada Post Corporation Act*.

75. Given the geographic proximity of the United States and the volume of American publications destined to Canadian subscribers, there has always been a market for direct deposit in Canada for Canadian distribution. Direct deposit generally offers improved service performance and less costly postage rates to publishers than if they chose to use the services of their domestic postal administration (i.e., United States Postal Service (USPS)).

set by regulations.[76] However, the commercial rates for publications are set by market forces and fluctuate with commercial imperatives - not to mention that in many cases they are the result of negotiations with both domestic and international large volume customers pursuant to specific agreements. The responsibility for setting those rates rests exclusively with senior management of the Corporation who exercise their discretion based on commercial principles without intervention on the part of the government.

109. The term "requirement" in the context of the GATT also implies a demand or direction proclaimed by an authority within government. Again, commercial imperatives and market forces dictate the commercial rates for publications charged by the Corporation to its customers. The government has never issued a directive to the Corporation regarding publications mail. The Corporation's prices are set to meet market demands and opportunities (as in the case of any private sector company), and are clearly not the product of "laws, regulations or requirements" of Canada.

110. It is incorrect to suggest, as does the United States, that the differential between the commercial rate provided to Canadian publishers and the commercial rate provided to non-Canadian publishers is calculated to place non-Canadian publishers at a competitive disadvantage. Canada Post has no policy of giving a competitive advantage to one segment of its customers over another, and would have no interest in pursuing any such practice. For their part, customers have access to competing delivery channels and, as in all open markets, have the ability to negotiate rates in a manner reflecting their purchasing power.

111. The international commercial rates reflect the reality that suppliers in any competitive market will attempt to obtain the best possible price. Pricing is set to maximize contribution while remaining competitive. Factors such as the availability and cost to customers of competing distribution channels, currency exchange rates, service standards, etc., are all taken into consideration by Canada Post (as would any company in a competitive market) when setting its pricing. As a Crown corporation with a commercial mandate, Canada Post operates on the same basis as a private sector interest.

112. The commercial postage rate applicable to non-Canadian publications is set on the basis of the commercial business reality that the next-best option faced by mailers of publications that are printed outside Canada is the much higher international rate charged by the postal administration in the country of publication. In the case of publications from the United States, this means a rate for deposit in Canada with Canada Post that is about half of what they would have to pay (in $Cdn equivalent) the United States Postal Service (USPS)

76. *Letter Mail Regulations*, SOR/88-430 as amended to April 30, 1996 (Exhibit X).

for delivery of the same items to Canada.[77] The commercial mandate given to Canada Post requires it to obtain the best possible rate in order to maximize its returns.

113. Almost half the direct-deposit foreign periodicals business Canada Post receives is contracted through specific agreements, negotiated on a case-by-case basis subject to customer- and market-specific needs and opportunities as opposed to generic pricing policies. Canada Post's commercial pricing policies are determined by the demands of the markets in which it operates and not by governmental directives or public policy considerations.

D. Justification of Subsidized Postal Rates under Article III:8(b) of the GATT 1994

114. The funds paid by the Department of Canadian Heritage to Canada Post to enable it to grant Canadian publishers of publications reduced postal rates are allowable subsidies under Article III:8(b). It states:

> "The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products."

Article III:8(b), which explicitly recognizes that subsidies to domestic producers are not subject to the national treatment rules of Article III, applies with respect to all provisions of Article III, including Article III:4.

115. Canada disagrees with the argument put forward by the United States that subsidies paid to a Crown corporation (Canada Post), by a government department (Canadian Heritage), cannot be considered subsidies paid exclusively to domestic producers (Canadian publishers of publications), as provided in Article III:8(b). The sole purpose and function of the reduced postal rates, effected through negotiated payments to Canada Post, is to subsidize publishers of Canadian publications. The provision of reduced postal rates is a way of paying subsidies that is compatible with the GATT 1994. The sole purpose of the government payments to Canada Post is to allow eligible Canadian publishers the benefits of reduced postal rates. These payments are made to Canada Post four times a year in return for its undertaking to deliver eligible publications at the agreed reduced rates. The benefit of the subsidies flows directly to eligible Canadian magazine publishers. The Canadian publication industry is the exclusive beneficiary of these subsidies and must qualify for this subsidized rates in accordance with criteria set by the Department of Canadian Heritage before being found to be eligible.

---

77. This "mailed-in-Canada" rate has to be low enough to compensate the foreign publisher for: additional mail preparation requirements; the transportation cost to the designated Canadian point of mailing; the cost of maintaining correct postal codes; and other additional administrative requirements (often contracted out) due to mailing in Canada as opposed to mailing with the USPS for delivery to Canada.

116. The decision of the Panel in *United States – Malt Beverages*[78] lends no support to the U.S. position. The Panel held that the expression "payment of subsidies" applies only to direct subsidies and not to other kinds of subsidies such as tax credits or tax abatements. The Panel was concerned solely with the distinction between subsidies, tax remissions and differential taxation rates, because a failure to make that distinction would destroy the effect of Article III:2. The formal distinction between taxation measures – benefits not involving direct expenditures by government – and subsidies is vital to the operation of the Article as a whole. Canada's postal subsidy meets the requirement of directness, in the sense in which that concept is used in the *U.S. Malt Beverages* decision, because a payment by government for the exclusive benefit of the producers is being made. It is only the mechanics of payment that are indirect.

117. The position held by the United States is therefore based on a difference of form, not substance. The specific form in which the subsidy is paid is irrelevant to the operation of Article III:8(b), provided that a payment is made by the government for the exclusive benefit of domestic producers.[79] Before being granted the privilege of posting using funded postal rates, a publisher must sign a service agreement with Canada Post. This simple fact is evidence that publishers are direct beneficiaries. Canada Post is an intermediary, not the beneficiary. Whether the subsidy is paid to Canada Post or paid directly to the publishers, the economic effect is the same, namely that the eligible publishers are the beneficiaries of the subsidy.

118. If an eligible Canadian publisher of a monthly magazine were to receive the payment, the advantages this publisher enjoys relative to foreign competition would be essentially unchanged. Canadian publishers would find themselves in the same position as they are in now, namely with an advantage over their foreign competitors. In practical terms, payments to individual publishers would be a cumbersome and ineffective method of delivering this subsidy. The administrative and financial burden of such a process would erode the benefits of the program. Therefore, the Department of Canadian Heritage provides Canada Post with an agreed-upon payment on a quarterly basis. The current process is far more efficient in minimizing the administrative overhead related to the program.

---

78. *United States - Measures Affecting Alcoholic and Malt Beverages* (Report of the Panel adopted on 19 June 1992), GATT Doc. DS23/R, BISD 39S/206 [hereinafter *U.S. Malt Beverages*].

79. The *U.S. Malt Beverages* Panel read subparagraph 8(b) having regard to the context of the whole of Article III but, except in the context of taxation measures, it was never stated that for every subsidy to qualify, the payment must be made directly to domestic producers. The panel simply said that the words "payment of subsidies" refer only to direct subsidies involving a payment, not to other subsidies such as tax credits or tax reductions (*ibid.* at 271, para. 5.8).

119. Based on the panel report on the *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*,[80] the United States argues that subsidies not paid directly to producers are not paid to them "exclusively" within the meaning of Article III:8(b). The word "exclusively" as used in this provision is concerned with the distinction between "domestic" as opposed to "non-domestic" producers, not whether third parties benefit from the subsidies. Whether an incidental benefit might be conferred upon Canada Post from the subsidy payment is irrelevant. Under the interpretation of this clause suggested by the United States, virtually any subsidy payment that would confer a third party benefit, however minimal, would be non-compliant. This was surely not the intended application of the exemption. Subsidies have an economic impact on third parties in almost all circumstances. The definition of the term "exclusive", proposed by the United States, would lead, in practical terms, to the nullification of the Article III:8(b) exemption.

V. CONCLUSIONS

120. On the basis of the foregoing, Canada submits and asks the Panel to find that:

1. Article III of the GATT 1994 does not apply to Part V.1 of the *Excise Tax Act*.

2. Even if the panel decides that Article III of the GATT 1994 does apply, Part V.1 of the *Excise Tax Act* does not violate Article III of the GATT 1994;

3. Code 9958 of the *Customs Tariff* is justifiable under Article XX(d) of the GATT 1994;

4. the national treatment obligation of Article III:4 of the GATT 1994 does not apply to the commercial publications postal rates charged by the Canada Post Corporation because these rates are the result of generally accepted commercial and marketing practices and are not influenced by government policy; and

5. the funds paid by the Department of Canadian Heritage to the Canada Post Corporation in order to grant Canadian publishers of periodicals reduced postal rates are allowable subsidies under Article III:8(b) of the GATT 1994.

---

80. *EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins* (Report of the Panel adopted on 25 January 1990), GATT Doc. L/6627, BISD 37S/86 at 124-125, paras. 137-141. The United States also refers to *Italian Discrimination Against Imported Agricultural Machinery* (Report of the Panel adopted on 23 October 1958), GATT Doc. L/833, BISD 7S/60 at 64, para. 14.