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The Appellate Body and Harrowsmith Country Life

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I. INTRODUCTION

1. *Background*

In its Report dated 30 June 1997 on *Canada—Certain Measures Concerning Periodicals*, the Appellate Body of the World Trade Organization (WTO) dealt with (among other issues) the findings by the Panel in that case bearing on the national treatment of imported products.[1] At issue was a key provision of the General Agreement on Tariffs and Trade (GATT) found in Paragraph 2 of Article III ("Article III:2").[2] The first sentence of Article III:2 states that the products of a WTO Member that are imported into the territory of another Member:

> "shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

A "like products" question had arisen under this provision with respect to an 80 percent Canadian excise tax that, although not applicable to domestic Canadian periodicals, did apply to the value of all advertising carried by split-run editions of magazines.[3]

A typical split-run edition is the Canadian regional edition of a magazine based in the United States if, for each issue, the magazine has both a US edition and the Canadian regional (split-run) edition. The two editions are similar in editorial content, but do not carry identical advertising (the advertising being designed for, respectively, the US market and the smaller Canadian market). Although Canada had forbidden the importation of split-run editions, US-based magazines could produce them in Canada by using content transmitted electronically from the United States.

In proceedings before the Panel (which issued its Report on 14 March 1997[4]), the

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[1] WT/DS31/AB/R (adopted 30 June 1997) <http://www.org/wto/dispute/bulletin.htm> (hereinafter AB Rep.).

[2] The GATT, 15 April 1994, Marrakesh, Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1A, 33 I.L.M. 1154 (1994) (hereinafter the GATT 1994).

[3] An Act to Amend the Excise Tax Act and the Income Tax Act, R.S., Ch.46 (1995)(Can.). See Panel Report, as note 4, below, at para. 2.6–2.9.

[4] Panel Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/R (adopted 14 March 1997) <http://www.org/wto/dispute/bulletin.htm> (hereinafter Panel Rep.).

United States argued that domestic Canadian magazines and split-run editions of US magazines are, and Canada argued that these two categories of periodical are not, "like products" within the meaning of the first sentence of Article III:2. The United States contended that, because the two categories are "like products", it was a violation of the GATT to impose a Canadian excise tax on split-run editions that was not imposed on domestic Canadian magazines.[5]

2. *The "Like Products" Arguments*

On the issue of "like products", Canada argued that Article III:2 only forbade subjecting imported products to internal taxes in excess of those imposed on like domestic products and, because split-run editions were produced in and not imported into Canada, Article III:2 was not applicable. The United States replied that, under settled GATT doctrine, Article III:2 protected the trade expectations of WTO Members, and not an actual level of trade. Thus, the United States argued, to establish an Article III:2 violation it was sufficient to show that internal Canadian taxes would be imposed on *hypothetical* or *potential* imports of split-run editions in excess of the taxes imposed on like domestic Canadian products.

Canada also argued that split-run editions and domestic Canadian magazines did not carry "like" editorial content—the former being designed for US readers and the latter for Canadian readers. The United States replied that advertisers viewed split-run editions and domestic Canadian magazines as appealing to a common readership, and that Canada's 80 percent excise tax on the advertising carried by split-run editions was adopted in response to the fact that such editions were "like" domestic Canadian magazines as an advertising medium.

Referring to two specific magazines, Canada pressed, and the United States responded to, the argument that split-run editions and domestic Canadian periodicals can be differentiated on the basis of their editorial content.

Canada referred to *Maclean's*, a domestic Canadian news magazine, and *Time Canada*, a split-run edition of the US news magazine, *Time*, that had been "grandfathered" under and exempted from the 80 percent Canadian excise tax. Canada then asserted that the Canadian editorial content of *Maclean's* was not "like" the foreign editorial content of *Time Canada*.

The United States questioned the relevance of a comparison of actual magazines, as Article III:2 protected trade expectations and forbade an internal tax which, by its terms, *may* lead to the future imposition of taxes on imported products in excess of the corresponding taxes imposed on "like domestic products". Even so, the United States referred to the "like" editorial content of two independent magazines, one a domestic US periodical called *Pulp & Paper*, the other an unconnected domestic Canadian magazine also called *Pulp & Paper*, and pointed out that were, hypothetically, the US

[5] The Canadian and US "like products" arguments are summarized in Panel Rep., at para. 3.60–3.97.

periodical to create a split-run edition in Canada, it would be subject to the 80 percent excise tax, whereas the "like" Canadian magazine would not be subject to that tax.

3. *Harrowsmith Country Life*

In an argument directed not at the question of "like products" but to the US assertion that the Canadian excise tax discriminated against "foreign-based" periodicals, Canada referred to a Canadian-owned periodical called *Harrowsmith Country Life*, which, prior to Canada's adoption of the excise tax in 1995, had produced a US edition and a Canadian edition.[6] As the Canadian edition carried editorial content similar to that of the US edition, but different advertisements from those in the US edition, the Canadian edition (under the terms of the excise tax as adopted by Canada in 1995) would have become a split-run edition subject to the excise tax. Thus, Canada said, the tax was non-discriminatory, because it would have been imposed on *Harrowsmith Country Life*, a Canadian-owned periodical, had it not ceased publication of its US edition in order to avoid the excise tax. Apparently, both the Canadian and the US editions had been printed in the United States, and the Canadian edition, having obtained an exemption from the prohibition on the importation of split-run editions produced outside Canada, had actually been imported into Canada.

II. THE PANEL REPORT

In ruling on whether split-run editions and Canadian periodicals were "like products", the Panel, citing earlier GATT cases, stated that "the comparison can be made on the basis of a hypothetical import".[7] For its hypothetical imported product, the Panel turned to *Harrowsmith Country Life* and quoted the Canadian statement concerning that magazine (summarized in the preceding paragraph).[8]

Next, the Panel hypothesized the occurrence of the following sequence of events over a short period of time:

1. Canada introduces the 80 percent excise tax.
2. *Harrowsmith Country Life* then publishes both US and Canadian editions of an issue (here called "Issue **A**"), and the Canadian edition is distributed in Canada as a split-run edition of Issue **A**.
3. *Harrowsmith Country Life* then ceases publication of its US edition.
4. It then publishes, in a single Canadian edition, a further issue (here called "Issue **B**"), which is distributed in Canada as a stand-alone, non-split-run edition of Issue **B**.

The Panel observed that the Canadian editions of Issues **A** and **B** would be "like"

[6] Panel Rep., at para. 3.99.
[7] As note 6, above, at para. 5.23.
[8] As note 6, above, at para. 5.25.

in all material respects, "and yet one [the split-run edition of Issue **A**] is subject to the Excise Tax, while the other [the non-split-run edition of Issue **B**] is not".[9]

The Panel then reached the following conclusion on "like products":

> "Thus, we conclude that imported 'split run' periodicals and domestic non 'split-run' periodicals can be like products within the meaning of Article III:2 of GATT 1994. In our view, this provides sufficient grounds to answer in the affirmative the question as to whether the two products at issue are like because, as stated earlier, the purpose of Article III is to protect the expectations of the Members as to the competitive relationship between their products and those of other Members, not to protect actual trade volumes."[10]

III. The Appellate Body Report

The Appellate Body rejected the Panel's analysis with respect to "like products". It said that the Panel had erred:

- in not considering the criteria laid down by the Appellate Body in the 1996 case, *Japan—Taxes on Alcoholic Beverages*;[11]
- in not relying on (a) the copies of *Time Canada* and *Maclean's* presented by Canada and of *Pulp & Paper* (United States and Canada) presented by the United States, and (b) a 1994 Canadian Task Force Report on the magazine industry; and
- in basing its findings "on a single hypothetical example constructed using a Canadian-owned magazine, *Harrowsmith Country Life*".

According to the Appellate Body:

> "[T]his example involves a comparison between two editions of the same magazine, both imported products, which could not have been in the Canadian market at the same time. Thus, the discussion [in] the Panel Report is inapposite, because the example is incorrect."[12]

The Appellate Body, after quoting from the Panel Report's conclusion (see above), then said:

> "It is not obvious to us how the Panel came to the conclusion that it had 'sufficient grounds' to find the two products at issue *are* like products from an examination of an incorrect example which led to a conclusion that imported split-run periodicals and domestic non-split-run periodicals *can be* 'like'. [Appellate Body's emphasis.]
>
> We therefore conclude that, as a result of the lack of proper legal reasoning based on inadequate factual analysis in ... the Panel Report, the Panel could not logically arrive at the conclusion that imported split-run periodicals and domestic non-split-run periodicals are like products."[13]

Having rejected the Panel's analysis and conclusion with respect to "like products",

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[9] As note 8, above.
[10] As note 6, above, at para. 5.26.
[11] WT/DS8, 10, 11/AB/R at 19–20 (adopted 1 November 1996) <http://www.org/wto/dispute/bulletin.htm> (hereinafter *Japan—Alcoholic Beverages*).
[12] AB Rep. at 20.
[13] As note 12, above, at 21.

the Appellate Body proceeded to conduct its own inquiry into the factual record, to make *de novo* findings, and to apply its findings to the criteria for a violation of the *second* sentence of Article III:2. This sentence relates not to tax discrimination between imported and domestic "like products", but to the dissimilar taxation of imported and domestic products that are "directly competitive or substitutable" products, "so as to afford protection to domestic production". The Appellate Body then ruled that Canada's 80 percent excise tax violated the second sentence of Article III:2.[14]

IV. Commentary

The Appellate Body's rejection of the analysis and conclusion of the Panel as to "like products" gives rise to the comments set out below on the following three propositions:

1. The Appellate Body may not have properly appreciated the Panel's analysis relating to *Harrowsmith Country Life* in the context of the Article III:2 "like products" provision and the 80 percent Canadian excise tax.
2. In making its own findings to conclude—for reasons other than those adopted by the Panel and in respect of a clause in Article III:2 other than the "like products" provision—that the 80 percent Canadian excise tax violated Article III:2, the Appellate Body was acting in part as a Panel.
3. The resulting Report of the Appellate Body seems open to question as to its possible effects on the future enforcement of Article III:2's "like products" provision.

1. *Harrowsmith Country Life*

Harrowsmith Country Life is a magazine which publishes a Canadian edition distributed in Canada and which, prior to the introduction of the 80 percent Canadian excise tax, also had a US edition. The characteristics of the two editions were such that, as long as the US edition existed, the Canadian edition was a split-run edition within the meaning of the Canadian excise tax legislation. For the purpose of analysing the Article III:2 question of "like products", the Panel reasoned in terms of the Canadian editions of two successive issues of *Harrowsmith Country Life*. The hypothesis indulged in by the Panel was that one US edition was published after the introduction of the Canadian excise tax, and that, thereafter, no further US editions were published. The Panel analysed as two "like products":

- the Canadian edition that was part of the same issue as this hypothetical final US edition; and
- the very next Canadian edition to appear after that Canadian edition.

In this manner, the Panel was able to make it obvious that the two products in

[14] As note 12, above, at 22–32.

question—the Canadian editions of two successive issues of the magazine—were generically "like products".

By referring to two successive issues of *Harrowsmith Country Life*, the Panel not only could rely on two Canadian editions that were generically "like products", but also could hypothesize a US edition of the same magazine that, until quite recently, had in fact had a US edition. Thus, on the basis of this ready example of generically "like products" and of a hypothetical that in fact was anchored in reality, the Panel was able to demonstrate—simply and briefly—that the 80 percent Canadian excise tax would apply to a split-run edition that was generically the same as a Canadian non-split-run edition to which the tax would not apply.

The Panel's demonstration lent itself to the efficient disposition of the parties' arguments over "like products". Why, then, did the Appellate Body feel constrained to re-open those arguments, and to do so in a manner that had been sought by neither Canada (which wanted the excise tax to be found compatible with Article III:2) nor the United States (which had prevailed before the Panel on the excise-tax issue and had not appealed the Panel's findings thereon)?

According to the Appellate Body, the Panel's approach was defective for five reasons:

- the Panel should have considered the criteria laid down by the Appellate Body in *Japan—Alcoholic Beverages*;
- the Panel should have based its findings not on *Harrowsmith Country Life* but on *Maclean's/Time Canada* or *Pulp & Paper* (US/Canada);
- the Panel should have referred to the 1994 Canadian Task Force Report on the magazine industry;
- the Panel's approach involved "a comparison between two editions of the same magazine, both imported products, which could not have been in the Canadian market at the same time";
- the Panel had illogically proceeded from "a conclusion that imported split-run periodicals and domestic non-split-run periodicals *can be* like ... to the conclusion that it had 'sufficient grounds' to find [that] the two products ... *are* like products" (emphasis added by the Appellate Body).

As indicated below, these assertions by the Appellate Body do not seem to constitute valid grounds for rejecting the approach taken by the Panel.

(a) *The Appellate Body's first reason*

In a 1996 case, *Japan—Alcoholic Beverages*, the Appellate Body said that the question of "like products" required a narrow, case-by-case determination based on a product's end-uses in a given market, its properties, nature and quality, and consumer tastes and habits. It should be recognized, however, that that case was rather different from the present case regarding the 80 percent Canadian excise tax. *Japan—Alcoholic Beverages*

involved six categories of beverage (two domestic and four imported) taxed by Japan at different rates; the taxes on the domestic products were approximately one-third to one-ninth of the taxes on the imported products if measured by volume, and were approximately one-half to one-sixth if measured by degree of alcohol. To resolve whether the domestic and imported beverages were "like products", the Appellate Body found it necessary to apply the criteria mentioned above—whether they had like end-uses in Japan, like properties, nature and quality, and responded to like consumer tastes and habits.

The present case was both simpler and more complex than *Japan—Alcoholic Beverages*. Here there were only two categories of product—domestic Canadian periodicals and split-run periodicals (the latter having been effectively excluded from Canada)—and only one level of tax, namely 80 percent of the total advertising value of split-run periodicals (with non-split-runs being totally exempt from tax). Each of the two categories was, however, potentially unlimited, for each could cover the full range of all conceivable types of magazine, published or to be published. As each of the two categories was potentially unlimited, it was not possible to predict the extent to which they might, in fact, be or become co-extensive as to subject-matter, readership, format, etc. At any given time, there could be actual or potential magazines in one category with actual or potential analogues in the other category.

Thus, it was not self-evident how the Panel in the present case could be guided by the quite different case of *Japan—Alcoholic Beverages*. The earlier case might have provided guidance had it involved not specific existing imported and domestic products subject to different Japanese tax rates, but instead a prohibitively high Japanese tax on *all* potential imports of alcoholic beverages that might exist at any time, and full exemption from that tax as regards *all* domestic Japanese alcoholic beverages that might exist at any time. In this event, it would have been possible to compare a hypothetical or potential imported product (e.g. a Canadian-origin beverage) with a "like" Japanese product and, on that basis, to find the Japanese tax to be in violation of the "like products" provision of Article III:2.

The parties in the present case advanced only two criteria for comparing split-run with non-split-run periodicals. Canada emphasized editorial content, the United States the function of magazines as an advertising medium. There seemed to be no serious dispute that, viewed as an advertising medium, split-run and non-split-run periodicals were "like products". Indeed, the rationale of Canada's 80 percent excise tax—imposed on split-run editions on the basis of the total value of the advertising they carried—was that they and non-split-run periodicals were "like products" when viewed as carriers of advertisements.

Thus, in the present case, the Panel was able to reduce the question of "like products" to the Canadian argument that, because non-split-run magazines contained Canadian editorial content and split-run editions foreign content, the two categories were not "like products". The Panel did not accept this argument, which was not

derived from the application of the Canadian excise tax to particular products. The tax was not applied on the basis of the presence or absence of Canadian or foreign editorial content—concepts that were neither found in the tax legislation under review nor defined in the record before the Panel. The concepts existed in non-definitional form, only in Canada's argument, which had been developed without reference to the text of the relevant tax law or the manner in which it was applied.[15] By examining that law, the Panel could see that split-run editions covering activities or opportunities in Canada, or otherwise devoted to Canadian editorial content (however defined), would nonetheless be subject to the excise tax; and that non-split-run periodicals covering topics not necessarily related to Canada, or otherwise devoid of Canadian editorial content (again, however defined), would nonetheless be exempt from the tax. It was, therefore, understandable that the Panel was not persuaded by the Canadian argument based on editorial content.

Although the Panel could, and did, refer to *Japan—Alcoholic Beverages*, it was dealing with a quite different case. As will be further discussed below, its handling of the case before it seems to have rested on sound analysis of the question of "like products".

(b) *The Appellate Body's second reason*

The Appellate Body, noting that Canada had brought *Maclean's* and *Time Canada* to the attention of the Panel, said that they would have provided a better basis for decision than the Panel's analysis of *Harrowsmith Country Life*. However, Canada had been arguing that *Maclean's* and *Time Canada* were neither "like products" within the meaning of the first sentence of Article III:2 nor, for that matter, "directly competitive or substitutable" products within the meaning of the second sentence of Article III:2. Moreover, *Time Canada* was an atypical split-run, in that it was not subject to the disputed excise tax. Thus, the Panel might reasonably have viewed *Maclean's/Time Canada* as constituting no handier a point of departure than *Harrowsmith Country Life* for the purposes of constructing a useful hypothetical.

The Appellate Body also noted that the United States had brought the US and Canadian magazines called *Pulp & Paper* to the attention of the Panel, and said that they, also, would have provided a better basis for a decision than the Panel's analysis of *Harrowsmith Country Life*. In the event, however, the United States had urged the Panel to reach a decision on the basis of the trade expectations of potential producers of split-run editions generally, and not on the limited basis of a comparison of the two magazines called *Pulp & Paper*. Moreover, the US magazine called *Pulp & Paper* had never had a split-run edition. Using it and the Canadian magazine of the same name as a basis for analysis—hypothesizing both such a split-run edition and its comparability to the Canadian magazine—would have involved the Panel in a second hypothesis (in addition to *Harrowsmith Country Life*). Thus, while the Appellate Body might have reasonably

[15] For this Canadian argument, see Panel Rep., at para. 3.69.

deemed a *Pulp & Paper*-based hypothesis to support the Panel's conclusion, it seems illogical to reason that the Panel's failure to indulge in this second hypothesis somehow weakened that conclusion.

More fundamentally, the Appellate Body's reasoning was flawed by its casting about for real-life pairings of split-run and non-split-run periodicals, rather than recognizing that the protection of trade expectations for the former should not depend on the unlikely fortuity that such real-life pairings might exist to the extent necessary for the proper enforcement of Article III:2's "like products" provision. Were that provision's enforcement to turn on the existence or non-existence of such pairings, legitimate trade expectations could easily be frustrated. As a factual matter, Canada's import prohibition on split-runs together with its 80 percent excise tax was bound to (indeed, had been designed to) deprive the market of such real-life pairings. Moreover, because neither the United States nor the Panel (ruling in favour of the United States) considered real-life pairings to be necessary to dispose of the "like products" issue posed by the Canadian excise tax, the issue of law before the Appellate Body was not the likeness or unlikeness of this or that pair of US and Canadian magazines, but the appropriateness of demonstrating, *by use of a hypothetical*, that the 80 percent Canadian excise tax was inconsistent with potential trade of the type protected by the "like products" provision of Article III:2.

(c) *The Appellate Body's third reason*

The Appellate Body faulted the Panel for not relying on a 1994 Canadian Task Force Report on the magazine industry.[16] This Task Force Report had been introduced in the Panel proceedings by the United States, and it seems safe to assume that the Panel was thoroughly familiar with the Task Force Report and found it supportive of the Panel's analysis that upheld the US position as regards the question of "like products". True, the Panel did not cite the Task Force Report in the same detail as the Appellate Body did when it found in favour of the United States on the question of "directly competitive or substitutable" products. Surely, however, the Panel was entitled to have its own analysis judged on its own merits and not on the basis of the degree of comfort that the Appellate Body, in arriving at a not dissimilar conclusion, found in the Task Force Report.

(d) *The Appellate Body's fourth reason*

It seems inaccurate to say, as the Appellate Body did, that two successive Canadian editions of *Harrowsmith Country Life* "could not have been in the Canadian market at the same time". Even if distributed at different times in Canada, two successive editions

[16] *A Question of Balance, Report of the Task Force on the Canadian Magazine Industry*, 1994. See Panel Rep., at para. 3.25–3.26, AB Rep., at 20, 26–28.

"could" (to use the Appellate Body's verb) have a substantial temporal overlap in their availability to Canadian readers—in their homes, libraries and waiting rooms, circulating within their institutions, in commercial magazine sections of their bookstores, coffee shops, etc.—so as to be "in the Canadian market at the same time".

Nor does it seem pertinent that the Panel's two hypothetical Canadian editions were "both imported products". This observation by the Appellate Body must have related to the apparent fact that *Harrowsmith Country Life* printed both its US and Canadian editions outside Canada and imported the latter into Canada for distribution. For analytical purposes, the Panel treated the first of its two hypothetical editions (the one taxable as a split-run edition) as an imported product, and treated the second (which was not so taxable) as a domestic Canadian product. This would seem to make analytical sense. The first could be treated as an imported product not because, coincidentally, it was in fact imported, but because it was subject to the excise tax and, thus, could serve as a hypothetical proxy for imported split-run periodicals. The second could be treated as a domestic Canadian product because it was a Canadian edition distributed as such by a Canadian publisher and, like domestic Canadian products, was not subject to the excise tax. For purposes of the Panel's hypothetical, it would seem irrelevant whether this domestic Canadian edition was printed within or outside Canada.

Perhaps the Appellate Body's principal concern lay elsewhere—in the fact that (in the words of the Appellate Body) the Panel had engaged in "a comparison between two editions of the same magazine". Thus, the concern may have been not so much the factors discussed in the two preceding paragraphs, but that two editions of the same magazine served as examples of *competing* imported and domestic products.

For the purposes, however, of analysing the comparative economic impact of the 80 percent excise tax, those two editions were good examples of products competing in terms of revenues net of the excise tax. The proxy for the imported product was subject to the tax, the domestic Canadian product was not. A serious competitive disadvantage had been inflicted on the former. Under the circumstances of the prior Canadian prohibition on split-run editions followed by the 80 percent excise tax specifically aimed at such editions, a clearer illustration of the competitive consequences of the tax would have been hard to fashion.

Nonetheless, inherent in the Panel's hypothetical based on *Harrowsmith Country Life* was a viable analysis of the excise tax based on the split-run and non-split-run editions of two *competing* magazines. If competing magazines had been the Appellate Body's concern, it could have been dealt with not by rejecting the Panel's hypothetical, but by extending it. For example, it could be posited (a) that *Harrowsmith Country Life*, rather than put an end to its US edition, sold it to an unrelated US publisher, which used its format as the basis for an independent magazine on country life, (b) that the US publisher then created a Canadian edition that was a split-run of the US independent magazine, and (c) that *Harrowsmith Country Life* continued its Canadian edition. This situation, derived from the Panel's hypothetical, involves not "two editions of the same

magazine", but two unrelated periodicals—one a split-run edition subject to the excise tax, the other a Canadian periodical exempt from the excise tax. It could be argued, moreover, that *Harrowsmith Country Life* might have felt secure in selling its US edition to an unrelated US publisher, knowing that if the latter were to attempt a Canadian split-run edition of the US magazine it would become subject to the very 80 percent Canadian excise tax that had prompted the sale. Thus, the extended hypothetical would have gone to the heart of the "like products" issues raised by the case.

(e) *The Appellate Body's fifth reason*

The Panel—in moving from its conclusion (based on its hypothetical) that split-run and non-split-run editions can be "like products" to its conclusion that, *for purposes of Article III:2*, they are "like products"—was clearly relying on jurisprudence to the effect that findings of "like products"do not require actual trade in the products in question, but only expectations of trade, and that such findings only need to be based on hypothetical, not actual, imports. Thus, under accepted Article III:2 jurisprudence, there is a violation if an internal tax is susceptible of being applied to hypothetical imported products but not to "like domestic products". In italicizing the Panel's use of "can be" and "are", the Appellate Body seems to have been playing with words rather than recognizing the jurisprudential basis for the Panel's findings and conclusion.

2. *The Appellate Body as a Panel*

The Appellate Body, having overturned the Panel's findings as to the *first* sentence of Article III:2 (relating to "like products") was forced to confront the fact that, as to the *second* sentence (relating to "directly competitive or substitutable" products), the Panel had not made any findings and the parties, necessarily, had not lodged any appeal. Undaunted, the Appellate Body proceeded (in its words) to "complete the analysis" by reviewing the Canadian excise tax under the second sentence on the basis of the record that had been considered by the Panel.[17] Thus the Appellate Body re-examined the original record and made *de novo* findings as though it were itself a Panel dealing with the case.

Why did the Appellate Body go to the trouble of turning itself into a Panel and abandoning the findings of the actual Panel with respect to "like products"? Was the Appellate Body influenced by Canada's argument involving Canadian editorial content and the magazines *Maclean's* and *Time Canada*? Was it prepared to give weight to those arguments, notwithstanding the fact that application of the tax did not turn on the presence or absence of Canadian editorial content (whatever that term might mean) in magazines subject to, or exempt from, the tax? If so, why?

The Appellate Body may have had some concern that, in the nature of things,

[17] See AB Rep., at 23.

domestic Canadian magazines contain a critical quantum of Canadian editorial content that is necessarily lacking in split-run editions. This, at least, is what Canada seemed to be arguing.[18] However, Canada did not attempt to prove this thesis by developing standards for identifying and measuring "Canadian editorial content". Instead it adopted the procedural posture of saying that the burden was on the United States to *disprove* the Canadian thesis.[19] Can an argument grounded in "Canadian editorial content" have meaning unless the term itself has an accepted meaning? Is a party to a dispute entitled to advance a thesis relating to, but without definitional foundation in, that party's tax legislation, and then to shift the burden to the other party to disprove the thesis?

If by "Canadian editorial content" the Appellate Body meant content that Canadian readers want to read—content identified by consumers and by the market—then the Canadian excise tax would seem to be designed not to permit, but to frustrate, consumers from indicating whether, and if so the extent to which, split-run editions carry such content. If, however, the Appellate Body used the term to mean such content as is favoured by Canadian law through exemption from the tax, then the definition is perfectly circular, and it neither permits nor requires inquiry into the substance of what different magazines may in fact publish or seek to publish from time to time. A Canadian magazine would be free to imitate a US magazine, but the US magazine would face the 80 percent excise tax if it sought to distribute a split-run edition in Canada based on the US magazine being imitated by the Canadian magazine. In this event, "content", as endorsed by the Appellate Body, would cease to mean content.

Or did the Appellate Body use "Canadian editorial content" as a surrogate term for periodicals that the Canadian government wanted to protect in the interest of fostering Canadian culture? The outcome of the appeal suggests not, as the Appellate Body, on one theory or another, found against Canada on every issue in the case (including a postal-subsidy issue with respect to which the Panel had ruled in favour of Canada.[20]). Moreover, in the context of the question of whether split-run editions and domestic Canadian periodicals were potential "like products", the objective of fostering Canadian culture did not exist in isolation. Canada was not arguing merely for the protection of Canadian culture. This objective was inextricably linked with the objective of protecting high-cost Canadian publishers against cost-efficient, mass-produced periodicals based in the United States.[21] Thus, if the Appellate Body viewed "Canadian editorial content" as a surrogate term for a Canadian policy objective of cultural protectionism, it should have recognized that that objective subsumed not only the content of the products in question *but also the process by which they were made*. Had the Appellate Body given full recognition to this objective, it would have encountered the

[18] See Panel Rep., at para. 3.69–3.71.

[19] As note 18, above, at para. 3.75–3.76.

[20] The Panel had found for Canada in respect of a postal-rate subsidy paid by the Department of Canadian Heritage to Canada Post for the benefit of certain Canadian publications (Panel Rep., at para. 5.44), but the Appellate Body reversed this finding (AB Rep., at 34).

[21] See Panel Rep., at para. 3.29–3.30.

product-process doctrine, which requires that "like products" be determined on the basis of the products themselves, and not the process used to make them.[22]

The Appellate Body is restricted to reviewing questions of law, but does not have authority to remand a case to a Panel for further proceedings.[23] For this reason as well as the desirability of making efficient use of Appellate resources, one would think that the Appellate Body would have been reluctant to act as a second trier of fact dealing with the original record, and that consequently it would have made a greater effort to understand the merits of the Panel's analysis based on *Harrowsmith Country Life*.[24] In this connection, it should be noted that the Appellate Body does more than review individual cases. It also has an institutional role in developing procedures for the implementation of the Dispute Settlement Understanding.[25] One therefore might question whether the Appellate Body gave appropriate weight to basic institutional considerations before it decided to act as if it were a Panel dealing with the question of "like products".

3. *The Case's Potential Impact on Article III Jurisprudence*

All of this, one might argue, is academic, as the Appellate Body, acting properly or not, reached the same bottom-line conclusion as the Panel: Canada's 80 percent excise tax constituted a violation of Article III:2. Unfortunately, however, in the process of reaching its conclusion the Appellate Body rejected the Panel's analysis based on "like products". The Appellate Body thus seems to have cast doubt on established GATT jurisprudence relating to, and to have created potential future problems for the enforcement of, Article III:2's "like products" provision.

The Panel (and the United States in its arguments to the Panel) relied on earlier GATT cases dealing with the Article III:2 concept of "like products". Under the doctrine of those cases, an internal tax on imported products is susceptible to challenge *even in the*

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[22] See *United States—Measures Affecting Alcoholic and Malt Beverages*, B.I.S.D. 39S/206, 276, para. 5.25 (adopted 19 June 1992).

[23] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 16, para. 6, 15 April 1994, Marrakesh, Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 2, I.L.M. 1226 (1994).

[24] The Appellate Body in its footnote 40, AB Rep., at 21, stated that "Both the United States and Canada agreed that the example of Harrowsmith Country Life was incorrect." Of course, Canada had appealed the Panel's "like products" conclusion based on *Harrowsmith Country Life*. As for the United States, the Appellate Body's footnote 40 cites para. 80 of a US submission dated 26 May 1997, which in fact reads as follows:

"80. As noted above, the Panel used the *Harrowsmith* example as an illustration of the artificial nature of the excise tax's definition of split-run periodicals, and of how the definition can place two virtually identical magazines on either side of the dividing line. While the Panel's *Harrowsmith* example did not specifically compare an imported and domestic product, one could easily modify the example so that it did."

In a footnote to this text, the United States, after summarizing the Panel's hypothetical, made the following statement:

"One could modify the hypothetical to provide that, once the US edition ceased publication, at least some copies of the magazine were printed in Canada. These Canadian-produced magazines would be *domestic non*-split-run periodicals. As in the Panel's example, though, they would presumably be very similar to the preceding issue of *Harrowsmith* magazine, which was an imported (split-run) version."

For another way in which the hypothetical based on *Harrowsmith Country Life* could have been extended, see the last paragraph of the text, above, at (d) The Appellate Body's fourth reason.

[25] As note 23, above.

absence of an actual application of that internal tax to imported products. Otherwise, the offending tax, where its mere existence serves effectively to exclude imports, could escape challenge and thus defeat GATT-protected *expectations* as to trade. Under established doctrine, as set forth, for example, in the 1987 case, *United States—Taxes on Petroleum and Certain Imported Substances*:

> "the very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence."[26]

In reliance on this doctrine, the Panel in the present case had recourse to a hypothetical import. Rather than simply use a pure hypothetical—such as "like products" **X** and **Y** in the form of imported split-run magazine **X** and domestic non-split-run magazine **Y**—the Panel constructed a hypothetical that made use of an actual periodical.

The Appellate Body's rejection of, and its reasons for rejecting, the Panel's hypothetical cast doubt on the utility of the doctrine that would prohibit—even in the absence of actual imported products—the imposition on imported products of taxes in excess of those imported on "like domestic products". The Appellate Body seems to have rejected the Panel's hypothetical, in part, because it was derived from one set of actual circumstances (*Harrowsmith Country Life*) rather than another (*Maclean's/Time Canada* or *Pulp & Paper*). However, established doctrine would not require a Panel to use *any actual* set of circumstances, only to postulate a *possible* set of circumstances.

Once the Panel had established the possibility that certain potential split-run editions could be "like" domestic magazines, it was not required to consider whether other split-run editions might not be "like products". Canada, by adopting legislation that taxed all split-run editions at a rate vastly in excess of the zero rate applicable to "like" domestic magazines, had violated Article III:2. Conceivably, a more sophisticated tax law would have distinguished between split-run editions that were and were not "like products". That, however, was not the tax law before the Appellate Body.

Canada's problem, meaning the problem of the Canadian magazine industry, was the absence of an applicable exception in the WTO agreements, especially in the GATT 1994. These agreements had come into effect almost a year before Canada's enactment of the 80 percent excise tax.[27] Perhaps Canada had tried and failed to negotiate such an exception during the Uruguay Round negotiations, or perhaps it had elected not to seek such an exception.[28] While one can appreciate that Canada does not want to be treated as an economic and cultural region of the United States, and that split-run editions are a manifestation of such treatment, the cure for this problem does not lie in the types of arguments that Canada advanced to square its excise tax with Article III:2.

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[26] *United States—Taxes on Petroleum and Certain Imported Substances*, B.I.S.D. 34S/136, 138 (adopted 17 June 1987).

[27] The GATT 1994 and the other WTO Agreements entered into force in January 1995. Canada enacted the excise tax on split-run editions (cited at note 3, above) on 15 December 1995.

[28] For the view that Canada "gave up" the attempt to obtain such an exception during the Uruguay Round negotiations, see Int'l Trade Rep. (BNA), 22 January 1997, at 105.

V. Conclusion

In dealing with the Panel's analysis of "like products" and the 80 percent Canadian excise tax on split-run periodicals, the Appellate Body seems to have failed properly to appreciate the use that the Panel had made of a hypothetical based on *Harrowsmith Country Life* and, as a result, to have involved itself unnecessarily in the role not of Appellate Body but of Panel. Worse, in rejecting the Panel's hypothetical, the Appellate Body overturned the Panel's enforcement of the "like products" provision of Article III:2. In so doing, the Appellate Body may have chilled future enforcement of that provision by seeming to depart from established doctrine that that provision protects the trade *expectations* of WTO Members, irrespective of actual levels of trade. This doctrine is important to the proper ordering of world trade, and it is to be hoped that any chilling effect caused by the Appellate Body's action will be of short duration.