BILL C-55 AND INTERNATIONAL TRADE LAW: A MISMATCH

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The enactment of the Foreign Publishers Advertising Services Act ("Bill C-55") caused a furor in the trade relationship between Canada and the United States. Bill C-55 effectively prohibits foreign publishers from selling advertising in Canada. In effect, Bill C-55 is enacted to curtail the proliferation of "split-run" magazines in the Canadian periodical industry.

This paper analyzes the potential difficulties Bill C-55 faces in the light of the international trade agreements. The author argues that certain provisions of Bill C-55 are not in compliance with Canadian international trade obligations. Part I of the paper outlines the background of the Canadian periodical policy. Part II presents an analysis of the legal issues discussed in the WTO Periodicals case. Part III describes the provisions of Bill C-55, the statutory mechanism through which the provisions are enforced, and the exemptions. Finally, Part IV discusses the possible difficulties faced by Bill C-55 under the GATT, the GATS, and the NAFTA.

The author contemplates the susceptibility of challenge to Bill C-55 from various avenues. It is argued that Bill C-55 violates Article III of GATT, i.e., it accords less favourable treatment to foreign publishers who "use" their

La promulgation de la Loi concernant les services publicitaires fournis par des éditeurs étrangers de périodiques (« projet de loi C-55 ») a soulevé des remous dans les relations commerciales entre le Canada et les États-Unis. Le projet de loi C-55 a pour effet d'interdire aux éditeurs étrangers de vendre de la publicité au Canada. Ce projet de loi C-55 vise précisément à freiner la prolifération des magazines à tirage dédoublé dans l'industrie canadienne des périodiques.

Cet article examine les difficultés que peut entraîner le projet de loi C-55 eu égard aux conventions commerciales internationales. L'auteur argumente que certaines dispositions du projet de loi C-55 entrent en conflit avec les obligations commerciales internationales du Canada. La première partie trace l'historique de la politique canadienne en matière de périodiques. La deuxième partie examine les conséquences juridiques à l'étude dans l'affaire des périodiques de l'OMC. La troisième partie passe en revue les dispositions du projet de loi C-55, le mécanisme de mise en oeuvre et les exemptions prévus par la loi. Enfin la quatrième partie soulève les difficultés prévisibles dans la mise en oeuvre du projet de loi C-55, eu égard au GATT, à l'AGCS et à l'ALENA.

L'auteur soulève certaines avenues possibles de contestation du projet de loi C-55. Il argumente que le projet de loi C-55 est contraire à l'article III du GATT, c.-à-d. qu'il

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magazines as a means of delivering advertising. Furthermore, the Bill contravenes Article XI of GATT by imposing a quota regime for the sell of advertising in foreign magazines. Such a regime places quantitative restrictions on the publication of foreign magazines in Canada. The author further asserts that the cultural exemption within NAFTA might not immunize Bill C-55, since there are conflicting interpretations, as the exemption relates to advertising service.

accorde un traitement moins favorable aux éditeurs étrangers qui « utilisent » leurs magazines comme moyen de publicité. En outre, le projet de loi enfreint l'article XI du GATT en imposant un régime de quota pour la vente de publicité dans les magazines étrangers. Un tel régime a pour effet de contingenter la publication des magazines étrangers au Canada. Selon l'auteur, l'exemption culturelle prévue par l'ALENA risque de ne pas mettre le projet de loi C-55 à l'abri des interprétations contradictoires, étant donné que l'exemption a trait au service de publicité.

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I. INTRODUCTION

The announcement of the *Foreign Publishers Advertising Services Act*[1] (Bill C-55) has, once again, set the stage for a dispute between Canada and the United States in the international trade arena. Bill C-55 prohibits foreign publishers from selling advertising in Canada. Why is Canada doing this? That depends on who is answering the question. Sheila Copps, Minister of Canadian Heritage, believes: "With Bill C-55, we are standing up for Canadian culture, standing up for Canada and standing up for future generations of Canadians. If we don't stand up for ourselves, who will?"[2] Charlene Barshefsky, United States Trade Representative (USTR), vehemently disagrees: "It is simply untenable for Canada to re-create another protectionist magazines regime that perpetuates Canada's longstanding anti-competitive policies, channeling magazine advertising revenues to Canadian-owned publishing companies."[3] Obviously, there is no straightforward answer.

Bill C-55 rekindles a simmering dispute between Canada and the U.S. over split-run magazines.[4] A 'split-run' magazine generally contains original editorial content of a foreign magazine, but in addition, contains advertising, aimed at a particular country's market, which does not appear in the original magazine. According to Canadian publishers, the recycled nature of the editorial content makes it profitable for the foreign publisher to sell cheap advertising.[5] However, this phenomenon raises fears for members of the Canadian periodical industry who are highly dependent on advertising revenues and whose profit margins are generally very slim.

For years, Canada has been trying to prevent U.S. publishers from selling split-run magazines north of the 49th parallel. However, in the age of economic globalization and trade liberalization, it is proving to be a difficult task for Canada. Over a year ago, the World Trade Organization (WTO) found that certain Canadian measures dealing with foreign split-run magazines were inconsistent with Canada's international trade obligations. In particular, such protectionist Canadian laws were held to discriminate against foreign publishers. In the year and a half following the WTO's decision, the Canadian government struggled to find a way to implement the decision without exposing the Canadian publishing industry to the threat posed by split-run magazines. Bill C-55 is the result of that process.

This paper analyzes the potential difficulties Bill C-55 faces in the light of the

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[1] C. Gaz. 1999.II.ch.23 [hereinafter Bill C-55].

[2] S. Copps, "Lay Off Our Culture for Crying Out Loud," *Ottawa Citizen* (16 Nov 1998) A10.

[3] Office of the United States Trade Representative, News Release, "United States to Take Trade Action if Canada Enacts Magazine Legislation" (30 October 1998) [hereinafter "U.S. to Take Trade Action"], online: <http://www.ustr.gov/releases/1998/11/98-96.pdf>.

[4] For the purposes of this paper, 'magazine' and 'periodical' will be used interchangeably.

[5] This is a hotly disputed issue. There is little evidence that split-run magazines really do undercut. In fact, *Time Canada*, a split-run magazine, claims that its advertising prices in Canada are 9% higher than the other major news magazines such as *Maclean's*, and some 30-60% higher than most other Canadian magazines. See "Brief of Time Canada Ltd. on Bill C-55" submitted to the House of Commons Standing Committee on Canadian Heritage on November 18, 1998 at 9 [hereinafter "Brief of Time Canada Ltd."].

WTO decision in *Canada - Certain Measures Concerning Periodicals*[6] (*Periodicals* case). This paper will argue that certain provisions of Bill C-55 are not in compliance with Canadian international trade obligations, regardless of the agreement signed between Canada and the U.S.(Canada-U.S. Agreement on Periodicals).[7] Part I of this paper outlines the background of the Canadian periodical policy. Part II presents an analysis of the legal issues discussed in the *Periodicals* case. Part III describes the provisions of Bill C-55, the statutory mechanism through which the provisions are enforced, and the exemptions. Finally, Part IV discusses the possible difficulties faced by Bill C-55 under the *General Agreement on Tariffs and Trade*[8] (GATT), the *General Agreement on Trade in Services*[9] (GATS), and the *North American Free Trade Agreement*[10] (NAFTA).

II. BACKGROUND

A. *Facts*

The magazine publishing industry generates considerable business between Canada and the U.S. According to the Department of Canadian Heritage (Canadian Heritage), over 80% of Canadian newsstand space is occupied by foreign magazines - the majority of which are American in origin. Moreover, foreign magazines constitute 89% of the newsstand sales in Canada. In terms of dollar value, $818 million worth of American magazines are being imported into Canada, accounting for roughly 80% of all U.S. magazine exports.[11]

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[6] *Canada - Certain Measures Concerning Periodicals (Complaint by the United States)* (1997), WTO Doc. WT/DS31/R (Panel Report) [hereinafter "Panel Report"]; *Canada-Certain Measures Concerning Periodicals* (*Complaint by Canada and the United States*) (1997), WTO Doc. WT/DS31/AB/R (Appellate Body Report) [hereinafter "Appellate Body Report"], online: WTO<http://www.wto.org>.

[7] Canada and the U.S. reached an agreement on May 25, 1999, effectively resolving the trade dispute over Bill C-55. The agreement, a result of extensive negotiations, allows U.S. publishers to access the Canadian advertising market on a limited scale. In essence, split-run magazines are permissible in Canada in accordance with the exceptions outlined in Bill C-55 (See *supra* note 1 at s.21). The agreement between Canada and the U.S., in fact, confirms the analysis undertaken in this paper *i.e.* Bill C-55 contravenes Canadian obligations under international trade law. The exchange of letters between Canada and the U.S., constituting the agreement on periodicals, can be viewed online at <www.pch.gc.ca/bin/News.dll/View?Lang=E&Code=9NR031E> [hereinafter "Canada-U.S. Agreement on Periodicals"].

[8] *General Agreement on Tariffs and Trade,* 30 October 1947, Can. T.S. 1947 No.27 (came into force 1 January 1948) [hereinafter "GATT"].

[9] *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1B, 1994, 33 I.L.M. 44 [hereinafter "GATS"].

[10] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (came into force 1 January 1994) [hereinafter "NAFTA"].

[11] These statistics are issued by the Department of Canadian Heritage. See Canada, Department of Canadian Heritage, News Release, "New Advertising Services Measure to Promote Canadian Culture" (29 July 1998), online: <www.pch.gc.ca/wn-qdn/culture/english.htm>; Canada, Department of Canadian Heritage, *Backgrounder,* "World Trade Organization (WTO) Proceedings and Their Outcome" (29 July 1998), online: <www.pch.gc.ca/wn-qdn/culture/back1.htm>.

By contrast, the combined newsstand and subscription sales of Canadian magazines is over 65%. There are 1400 Canadian titles currently being published with an annual circulation of 511 million copies.[12] Advertising produces 65% of the revenue earned by Canadian magazines,[13] and circulation generates roughly 30% of the total revenue.[14] The 1991-92 reported sales of Canadian magazines was $846.4 million in U.S. dollars.[15] Overall, the U.S. enjoys a trade surplus of $1.5 billion (U.S.) in cultural products with Canada.[16]

B. *History of Canadian Periodical Policy*

Political and policy considerations have compelled Canada to adopt measures that build a shield of protection around the domestic periodical industry. Canadian periodical policy has always had a two-pronged objective: culture and money. The connection between these two polar opposite objectives has created tenuous and, often times, protectionist Canadian laws. Over the years, Canada has developed a policy, with the aid of Royal Commissions and Task Force reports, which attempts to attain both objectives under one umbrella.

In 1951, the Royal Commission on National Development in the Arts, Letters and Sciences set out the foundation of the Canadian periodical policy. For the first time, interaction between domestic and foreign publications circulated in Canada was examined. The Commission "determined that periodicals were very influential in the development of 'national understanding.'"[17] Ten years later, in 1961, the Royal Commission on Publications, commonly known as the O'Leary Commission, examined the "position of and prospects for Canadian magazines and periodicals."[18] It concluded that, in order for the Canadian periodical industry to survive, it was essential to have a fair share of the advertising revenues. The Commission outlined a link between culture and money, stating:

> the larger a periodical's circulation the more advertising it can attract; the greater its advertising revenue, the more it can afford to spend on editorial content; the more it can spend on editorial content the better are its chances of obtaining more circulation.[19]

This link has played a central role in the development of Canadian laws dealing with

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[12] *Ibid.*

[13] "Submission of Canadian Magazine Publisher's Association (CMPA) on Bill C-55" Submitted to the House of Commons Standing Committee on Canadian Heritage on November 26, 1998.

[14] A. Scow, "The *Sports Illustrated Canada* Controversy: Canada 'Strikes Out' in Its Bid to Protect Its Periodical Industry from U.S. Split-Run Periodicals" (1998) 7 *Minnesota Journal of Global Trade* 245 at 249.

[15] *Ibid.*

[16] *Ibid.* at 254.

[17] *Ibid.* at 248.

[18] Canada, Privy Council, *Order-in-Council*, P.C. 1660-1270 cited in S. de Boer, "Trading Culture: The Canada-US Magazine Dispute" in J. Cameron and K. Campbell, eds., *Dispute Resolution in the World Trade Organisation* (London: Cameron, 1998) at 234.

[19] Canada, *Royal Commission of Publications Report* (Ottawa: Queen's Printer, 1961) at 28.

foreign periodicals. The Commission recommended a tax deduction for businesses advertising in Canadian magazines. Furthermore, it advocated an outright import ban on foreign split-run magazines.

In 1965, the Canadian government, following the recommendations of the O'Leary Commission, enacted section 19 of the *Income Tax Act*.[20] As a result, Canadian advertisers cannot deduct the costs of advertising in non-Canadian periodicals, newspapers or broadcasts that are aimed at the Canadian market. Tax deductions are only allowed for advertisements placed in Canadian periodicals. The Canadian government also enacted Tariff Code 9958,[21] which "forbade the actual importation of the hard copy of a split-run periodical into Canada."[22] However, no restriction was placed on the importation of non split-run foreign periodicals. This import ban succeeded in eliminating foreign competition for advertising revenues faced by Canadian periodical publishers.

For almost thirty years, the import ban effectively excluded all foreign split-run periodicals from the Canadian market. In 1993, Time-Warner Inc., a U.S. publisher, managed to circumvent the ban by transmitting the contents of *Sports Illustrated Canada* via satellite to a printing press in Canada. This transmission did not violate Tariff Code 9958 since no split-run magazine physically crossed the Canadian border. Once again, the Canadian periodical industry faced possible competition for advertising dollars from popular American magazines.

The Canadian government immediately appointed a task force to re-examine the Canadian periodical industry. The Task Force was mandated to propose measures that would enable the government to reinforce its policy objectives in view of technological advances.[23] The Task Force affirmed the government's policy objectives that served to protect the domestic magazine industry as a means of safeguarding Canadian culture. It concluded that since advertising revenues are critically important for the survival of the magazine industry, "split-run publications would seriously supplant this important source of revenue and put the Canadian periodical industry at risk."[24] The Task Force recommended the imposition of an excise tax on advertisements published in foreign split-run magazines. In 1995, the Canadian government imposed an 80% excise tax on the amount charged for such advertisements. The tax was payable by the publishers of all split-run magazines which contained at least 20% of re-used editorial content with advertising directed towards the Canadian audience. The tax was levied retroactively dating back to 1993, which was the initial publication date of *Sports Illustrated Canada*. This resulted in the suspension of *Sports Illustrated Canada* as it became economically unfeasible for Time-Warner Inc. to continue publishing a Canadian edition.

The U.S. government took a very strong position with respect to the retroactive excise tax. In its view, the tax was unfair, protectionist and was imposed solely to deter Time-Warner Inc. from publishing a split-run magazine in Canada. In March 1996, the U.S. decided to launch an action against Canada at the WTO.

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[20] R.S.C. 1985 (5th Supp.), c.1.

[21] *Customs Tariff*, R.S.C. 1985 (3rd Supp.), c. 41, s.114.

[22] *Supra* note 14 at 254.

[23] Canada, *A Question of Balance: Report of the Task Force on the Canadian Magazine Industry* (Ottawa: Minister of Supply and Services Canada, 1994) at 83-4.

[24] de Boer, *supra* note 18 at 237.

III. WTO DECISION IN THE PERIODICALS CASE

The U.S. challenged three Canadian laws relating to the periodical industry: (i) Tariff Code 9958; (ii) the 80% excise tax; and (iii) favourable postal rates granted to Canadian publishers.[25] The U.S. argued that Tariff Code 9958 violated Article XI of GATT, as it placed quantitative restrictions on the importation of foreign split-run magazines. It further asserted that Part V.1 of the *Excise Tax Act* contradicted Article III:2 of GATT by denying national treatment to like goods. Finally, the U.S. argued that the favourable postal rates created a disadvantage for foreign magazines and contravened Article III:4 of GATT.

In response, the Canadian government stated that Tariff Code 9958 was justifiable under Article XX(d) of GATT as it secured compliance with section 19 of the *Income Tax Act*. Canada further argued that the 80% excise tax was levied on advertising services, and thus GATS and not GATT, was applicable. Finally, the favourable postal rates were allowable subsidies under Article III:8(b) of GATT.

These issues were first adjudicated before a Panel and later by the Appellate Body of the WTO. Both decisions are important in order to completely appreciate the nature of the dispute and the application of GATT and GATS rules.

A. *Tariff Code 9958*

The U.S. argued that Tariff Code 9958, which prohibits the import of split-run periodicals, violated Article XI:1 of GATT. Article XI:1 provides that:

> No prohibitions or restrictions other than duties [. . .] made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member] [. . .].[26]

The Canadian measure placed a complete ban on the importation of any magazines which contained advertisements targeted at Canadian audiences. The U.S. took the position that Canada imposed the ban "for the specific purpose of ensuring that Canadian magazines can enjoy a monopoly on the sale of magazines containing such advertisements."[27] Thus, Canadian magazines were granted a competitive advantage over foreign-produced magazines.

Canada, in essence, conceded that the Import Ban violated Article XI:1 of GATT. However, Canada argued that the ban was justified under Article XX(d) of GATT. Article XX(d) allows the adoption or enforcement of measures which are "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [GATT]."[28] Canada took the position that Tariff Code 9958 was needed to secure compliance with the objectives of section 19 of the *Income Tax Act*.

The Panel held that "[s]ince the importation of certain foreign products into Canada is completely denied under Tariff Code 9958, it appears that this provision by

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[25] See *infra* note 56 and accompanying text.
[26] *Supra* note 8 at 30.
[27] "Panel Report", *supra* note 6 at para. 3.3.
[28] *Supra* note 8 at 62.

its terms is inconsistent with Article XI:1 of GATT 1994."[29] In order to satisfy Article XX(d), the following test must be met:

> (1) [. . .] the measures for which the exception were being invoked [. . .] *secure compliance* with laws or regulations themselves not inconsistent with the General Agreement;
> (2) [. . .] the inconsistent measures for which the exception was being invoked were *necessary* to secure compliance with those laws or regulations; and
> (3) [. . .] the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.[30] [Emphasis Added]

The Panel held that Tariff Code 9958 did not 'secure compliance' with section 19 of the *Income Tax Act*. 'Securing compliance' (with laws and regulations) means "to enforce obligations under laws and obligations" and not simply "'to ensure the attainment of the objectives of the laws and regulations."[31] Section 19 served to entice domestic advertisers to buy advertising space in domestic magazines. Tariff Code 9958, however, placed a complete ban on the importation of foreign split-run magazines. According to the Panel, the ban increased compliance with the tax measure, but this was only an incidental effect. Essentially, the ban was not necessary for the enforcement of the tax incentive. The Panel found against Canada and held that Tariff Code 9958 contravened Article XI:1 of GATT and could not be justified under Article XX(d) of GATT. Canada accepted the ruling of the Panel and did not appeal on this issue.

B. *Excise Tax*

1. *Panel*

The U.S. took the position that Part V.1 of the *Excise Tax Act* was inconsistent with Article III:2 of GATT, and thus, violated the national treatment principle. Article III:2 provides that:

> The products of the territory of any [Member] imported into the territory of any other [Member] shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied [. . .] to like domestic products. Moreover, no [Member] shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.[32]

The U.S. argued that the excise tax created an "artificial distinction between 'split-run' magazines and all other types of magazines and applie[d] the 80 per cent tax solely to split-runs."[33] The tax was discriminatory as it applied only to foreign split-run

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[29] "Panel Report", *supra* note 6 at para. 5.5.

[30] *Ibid.* at para. 5.7 (citing *United States-Standards for Reformulated and Conventional Gasoline* (1996) WTO Doc. WT/DS2/R (Panel Report), online: WTO <http://www.wto.org>.

[31] "Panel Report", *supra* note 6 at para. 5.9.

[32] *Supra* note 8 at 14.

[33] "Panel Report", *supra* note 6 at para. 3.32.

magazines and not to domestic periodicals. The U.S. further alleged that the tax was protectionist in character, as it was designed to "ensure that only Canadian magazine producers capture all of the revenues associated with advertisements directed specifically at Canadian readers."[34]

Canada took the position that Part V.1 of the *Excise Tax Act* was a tax on advertising services, and, therefore, should be governed by GATS. It advocated that "[t]he sale of the right to advertise to a magazine's audience is an advertising service."[35] Canada claimed that "revenue streams should be split into two different classifications: circulation revenue, which is derived from the sale of a good, and advertising revenue, which is derived from the sale of a service."[36] The *Excise Tax Act* imposed a tax on the revenues earned on the sale of advertising space, and not on the revenue generated by the circulation of magazines. Hence, the excise tax was on a service and should be governed by GATS rather than GATT (which specifically deals with trade in goods). Canada pointed out that it had not made any commitments in relation to 'advertising services' in its Schedule of Specific Commitments. Hence, "there are *no* restrictions on Canada in respect of the introduction of measures concerning the provision of advertising services."[37]

The Panel rejected Canada's argument that GATT has no application where measures are in relation to a particular service. In the Panel's view, the ordinary meaning of the texts of GATT 1994, GATS and Article II:2 of the WTO Agreement[38] indicates that "obligations under GATT 1994 and GATS can co-exist and that one does not override the other."[39] Furthermore, there is no stated hierarchical order between GATT and GATS. In other words, both agreements stand on an equal plane within the WTO regime. The Panel held that, in any case, the overlap between GATT and GATS is inevitable, "and will further increase with the progress of technology and the globalization of economic activities."[40] Therefore, it held that Article III of GATT is applicable to the excise tax measure.

In order to determine whether Part V.1 of the *Excise Tax Act* violated Article III:2, first sentence, the Panel asked the following: "(a) [a]re imported 'split-run' periodicals and domestic non 'split-run' periodicals like products?; and (b) [a]re imported 'split-run' periodicals subject to an internal tax in excess of that applied to domestic non 'split-run' periodicals?"[41] The definition of "like products" should be construed by considering factors such as the product's end uses, the consumer's tastes and habits, and the product's properties, nature and quality.[42] Due to the import ban, the Panel held that it was unable to compare an imported split-run magazine with a domestic non split-run magazine since there are no imported split-run magazines in Canada. Based on a complex comparison of a hypothetical import, the Panel decided that there was no difference between an imported split-run magazine and a domestic non split-run

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[34] *Ibid.* at para. 3.22.
[35] *Ibid.* at para. 3.33.
[36] Scow, *supra* note 14 at 268.
[37] "Panel Report", *supra* note 6 at para. 3.34.
[38] Article II:2 states: "The agreements and associated legal instruments included in Annexes 1, 2 and 3 [. . .] are integral parts of this Agreement, binding on all Members."
[39] "Panel Report", *supra* note 6 at para. 5.17.
[40] *Ibid.* at para. 5.18.
[41] *Ibid.* at para. 5.21.
[42] *Ibid.* at para. 5.22.

magazine, and that they were, in fact, 'like products'. Furthermore, the Panel held that the excise tax was levied 'indirectly' because it was "applied in respect of each split-run edition of a periodical on a 'per issue' basis."[43] The Panel ultimately decided that the 80% excise tax violated the first sentence of Article III:2, because it was levied exclusively on imported split-run magazines.

2. *Appellate Body*

Canada appealed the Panel's finding with respect to Part V.1 of the *Excise Tax Act*. Canada argued that the Panel misconstrued the word 'indirectly' in the first sentence of Article III:2, stressing that the word is meant to apply to 'inputs' that are used for the production or distribution of a good. Advertising services, in Canada's view, is not an input into the production of a good. Moreover, it is not, for instance, comparable to labour in the production of a car. Thus, Canada argued that the Panel erred by finding that a tax on advertising services is an indirect tax on magazines as goods.[44] In addition, Canada maintained its argument that the excise tax was a measure dealing with advertising services and should be governed by GATS not GATT. The 80% excise tax was applied to the cost of advertising, and not to the price of the magazine.[45] Canada also challenged the nature of the hypothetical analysis of like products. It argued that (i) "the Panel failed to compare an imported product with a domestic product as it compared two imported 'Canadian' editions"; and (ii) "the Panel failed to compare products which could be marketed simultaneously in the Canadian market."[46] Canada asserted that a foreign content magazine is not similar to a magazine specifically created for the Canadian audience. In essence, Canada was of the view that in a Canadian magazine "[t]he content may not be exclusively Canadian, but the balance will be recognizably and even dramatically different than that which is found in foreign publications which merely reproduce editorial content developed for and aimed at a non-Canadian market."[47]

The Appellate Body categorically rejected Canada's argument that GATT did not apply to the excise tax. The Appellate Body gave two reasons for its decision: (i) "the measure is an excise tax imposed on split-run editions of periodicals [. . .] the title to Part V.1 of the *Excise Tax Act* reads, 'TAX ON SPLIT-RUN PERIODICALS', not 'tax on advertising'"; and (ii) "a periodical is a good comprised of two components: editorial content and advertising content [. . .] they combine to form a physical product - the periodical itself."[48] Furthermore, it held that the excise tax, by its very structure and design, was a tax on goods as it was payable by the foreign publishers of the magazines, and not by the advertisers. The Appellate Body upheld the Panel ruling that GATT and GATS can overlap and co-exist, and do not override each other.

The Appellate Body, however, recognized that the Panel erred in its determination of 'like products'. The hypothetical example used by the Panel was legally and factually incorrect. The Appellate Body found that the Panel should have

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[43] *Ibid.* at para. 5.29.
[44] "Appellate Body Report", *supra* note 6 at 5.
[45] *Ibid.*
[46] *Ibid.* at 6.
[47] *Ibid.* at 7.
[48] *Ibid.* at 18.

used the magazines presented as evidence by Canada and the U.S. in determining whether the two constituted 'like products'. The Appellate Body decided that it could analyze the second sentence of Article III:2 since they are closely related and part of a 'logical continuum'.[49] The test for the second sentence of Article III:2, as enunciated in *Japan - Alcoholic Beverages*,[50] is as follows:

> 1. the imported products and the domestic products *are "directly competitive or substitutable products" which are in competition with each other*;
> 2. the directly competitive or substitutable imported and domestic products *are "not similarly taxed"*; and
> 3. the dissimilar taxation of the directly competitive or substitutable imported domestic products *is "applied . . . so as to afford protection to domestic production"*.[51] [Original emphasis.]

The Appellate Body held that imported split-run magazines and domestic non split-run magazines are 'directly competitive or substitutable products'. It agreed with the U.S. argument that the mere existence of an excise tax on imported split-run periodicals is indicative that they are in direct competition with Canadian non split-run periodicals. Furthermore, the statements made by the Canadian government were also held to be proof of competitiveness between Canadian and American magazines. The Appellate Body did not classify all kinds of periodicals as directly competitive or substitutable. It held that "[a] periodical containing mainly current news is not directly competitive or substitutable with a periodical dedicated to gardening, chess, sports, music or cuisine."[52] However, news magazines such as *Time*, *Time Canada* and *Maclean's* were held to be directly competitive or substitutable. The nationality of the content was an irrelevant factor in the Appellate Body's assessment of direct competitiveness or substitutability. In addition, the Appellate Body held that imported split-run periodicals are not 'similarly taxed' as domestic non split-run periodicals. It found the magnitude of the excise tax, in this case 80%, "sufficient to prevent the production and sale of split-run periodicals in Canada."[53] Finally, the Appellate Body asserted that the excessive nature of the excise tax was prohibitive. It was designed and structured for the purpose of affording protection to domestic periodicals.[54] As a result, the Appellate Body held that Part V.1 of the *Excise Tax Act* violated the second sentence of Article III:2.

C. *Favourable Postal Rates*

1. *Panel*

The U.S. argued that the favourable postal rates granted to Canadian periodical publishers were in contravention of Article III:4 of GATT. Article III:4 provides that:

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[49] *Ibid.* at 28.

[50] WTO Doc. WT/DS8,10,11/AB/R (1996) (Appellate Body Report), online: WTO <http://www.wto.org/wto/dispute.distab.htm>.

[51] "Appellate Body Report", *supra* note 6 at 26.

[52] *Ibid.* at 30.

[53] *Ibid.* at 31.

[54] *Ibid.* at 33.

> The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.[55]

The U.S.'s main argument was that Canada Post is an entity of the Canadian government, which in effect, charges lower postal rates to domestic magazine publishers. Canada Post charged three different rates: a funded rate, a commercial rate, and an international rate.[56] The U.S. argued that the significant difference in the postal rates resulted in less favourable treatment toward imported magazines. The discount postal rates given to domestic publishers "amount to 'regulations' or 'requirements' that affect the internal sale, transportation, or distribution of magazines in Canada."[57] The U.S. further argued that the discriminatory postal rates were not exclusively subsidizing domestic producers, and therefore were not exempt pursuant to Article III:8(b) of GATT.[58] Funding is not provided directly to domestic magazine publishers, but rather to Canada Post, which uses the funds to underwrite the lower postage rates.

Canada's position was that Canada Post is a Crown corporation independent of the Government. It has a distinct legal personality and is autonomous in its corporate decision-making. Canada argued that Canada Post is not a monopoly in the delivery market. It is up to the publishers to negotiate postal rates with Canada Post or any other postal carrier service. Canada attempted to argue that it maintains an arm's length relationship with Canada Post and its operations. With respect to the exemption under Article III:8(b) of GATT, Canada asserted that subsidies to domestic publishers via Canada Post are allowable. The funding is specifically directed for the benefit of domestic publishers, the only difference being that it is not paid directly.

The Panel held that Canada Post generally operates under the instructions of the Canadian government. It noted that the Government is authorized to instruct Canada Post to change its rates under section 22 of the *Canada Post Corporation Act*.[59] The Panel concluded that based on the control exercised by the Canadian government on the 'non-commercial' activities of Canada Post, it can reasonably be assumed that sufficient incentives existed for Canada Post to maintain the pricing policy on periodicals.[60] Furthermore, as Canada Post is generally dependent on the Government, its "pricing policy on periodicals can be regarded as governmental regulations or requirements within the meaning of Article III:4 of GATT 1994."[61] The Panel found that lower postal

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[55] "GATT", *supra* note 8 Article III:4.

[56] 'Funded rate' was the lowest rate ($0.076 per copy for the first 10,000 copies and $0.084 for any additional copies). It was subsidized by the Canadian government and only given to publishers which are wholly Canadian-owned and which produce Canadian magazines. The Department of Canadian Heritage provided Canada Post with the list of publishers eligible for the funded rate. The 'Commercial rate' was higher than the funded rate ($0.378 per copy) and it was not subsidized by the government. The 'International rate' was the highest rate ($0.436 per copy). It applied to all foreign periodicals that were mailed in Canada. See Scow, *supra* note 14 at 252-3.

[57] "Panel Report", *supra* note 6 at para. 3.146.

[58] *Ibid.* at para. 3.182.

[59] R.S.C. 1985, c. C-10.

[60] "Panel Report", *supra* note 6 at para. 5.36.

[61] *Ibid.*

rates afforded protection to the domestic periodical industry contrary to Article III:1 of GATT. However, the Panel did conclude that the postal funding by the Canadian government was a permissible subsidy under Article III:8(b) of GATT. The funding scheme 'exclusively' and 'directly' supported the domestic periodical industry; Canada Post did not retain any economic benefit from the funding. In the final analysis, the favourable postal rate scheme was deemed justified under GATT rules.

2. *Appellate Body*

The U.S. appealed the decision of the Panel and argued that the Canadian-funded postal rates schemes was not justified under Article III:8(b) of GATT, since the payment was made by one government entity to another. Article III:8(b) only applies when the payment is made 'exclusively to domestic producers'. The U.S. further asserted that the phrase 'exclusively to domestic producers' means that "the payment must actually be made to the producers, and excludes advantages provided by governments to domestic products that may provide indirect benefits to domestic producers."[62]

The Appellate Body overturned the decision of the Panel. Based on an interpretative analysis, it held that "the text, context, and object and purpose of Article III:8(b) suggests that it was intended to exempt from the obligations of Article III [of GATT] only the payment of subsidies which involves the expenditure of revenue by a government."[63] The reduced postal rates did not qualify as a subsidy since it did not involve the expenditure of government revenue. The Appellate Body, therefore, concluded that the Canadian-funded postal rates scheme was not justified under Article III:8(b) of GATT.

D. *The Outcome*

The U.S. was the clear winner in the *Periodicals* case. The WTO found that: (i) Tariff Code 9958 was contrary to Article XI:1 of GATT and unjustifiable under Article XX(d) of GATT; (ii) Part V.1 of the *Excise Tax Act* violated the second sentence of Article III:2 of GATT with no application of GATS; and (iii) the Canadian-funded postal rates scheme was inconsistent with Article III:4 of GATT and not exempt under Article III:8(b) of GATT. On October 30, 1998, Canada repealed the impugned laws, pursuant to WTO order. However, Canada did not stop there.

IV. BILL C-55

The Minister of Canadian Heritage, Sheila Copps, tabled Bill C-55 on October 8, 1998 in the House of Commons. The enactment of Bill C-55 into law makes it illegal for foreign publishers to sell advertising in Canada. According to the Department of Canadian Heritage, the law affects the advertising service and applies to the transaction of selling advertising. In essence, Bill C-55 stipulates that "[o]nly Canadian publishers

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[62] "Appellate Body Report", *supra* note 6 at 16.

[63] *Ibid.* at 37.

will be permitted to sell advertising directed at the Canadian market."[64] According to the Minister, "this law relating to services ensures that Canadian advertising services cannot be skimmed by foreign advertisers who really do not intend to include or introduce any kind of Canadian content."[65] As with the previously disputed measures, the purpose of Bill C-55 is to keep split-run magazines out of Canada.

Bill C-55, simply put, makes it "an offence for a foreign periodical publisher to supply advertising services directed at the Canadian market to Canadian advertisers."[66] The law can be divided into four parts: (i) definitions; (ii) prohibition; (iii) enforcement mechanisms; and (iv) exemptions.

A. *Definitions*

The definitions are set out in section 2 of Bill C-55. Some of the key terms include:

- "Advertising services" means the supply by a foreign publisher, for payment, of advertising space and access to a target market of consumers.
- "Canadian advertiser" is defined as a person or entity that pays, directly or indirectly, for advertising services and has a place of business, employees, and assets in Canada.
- "Canadian corporation" means a corporation that is incorporated under the laws of Canada or a province, more than half of whose directors and officers possess Canadian citizenship or permanent resident status. In the case of a 'Canadian corporation' with share capital, Canadians must beneficially own and control more than half of all the issued and outstanding voting shares representing more than half of the votes. However, in order for corporations without a share capital to qualify as a Canadian corporation, Canadians should beneficially own and control interests representing more than half of the total value of the assets.
- 'Directed at the Canadian market', in relation to advertising services, is defined as the target market related to those advertisement services primarily consisting of Canadian consumers.
- 'Foreign publisher' is simply a person who supplies advertising services by means of a periodical and is not a Canadian.
- 'Periodical' is defined as a printed publication that appears at regular intervals under a common title - basically magazines. A periodical, however, does not include a catalogue, directory, newsletter, or a newspaper.

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[64] Department of Canadian Heritage, Backgrounder, "New Advertising Services Measure" (29 July 1998), online: <http://www.pch.gc.ca/wn-qdn/culture/back2.htm>.

[65] H. Scoffield, "Copps Warns Against U.S. Challenge to Magazine Law" *The Globe and Mail* (9 October 1998) B1.

[66] "Bill C-55", *supra* note 1, Summary.

B. *Prohibition*

The key prohibitive clause in Bill C-55 is subsection 3(1), which states: "No foreign publisher shall supply advertising services directed at the Canadian market to a Canadian advertiser or a person acting on their behalf."[67] The clause bluntly denies all foreign publishers any opportunity to sell advertising in Canada. Under subsection 3(2) a licencee of a foreign publisher is deemed to be a foreign publisher.[68] Furthermore, under subsection 3(3)[69], a person supplying advertising services through a periodical that is controlled in fact by a non-Canadian person or entity is deemed to be a foreign publisher. Subsection 3(5) stipulates that an agent or representative of a Canadian advertiser or a person or entity dealing at non-arm's length with a Canadian advertiser is deemed to be acting on behalf of that Canadian advertiser.[70] Basically, a foreign publisher will be infringing subsection 3(1) if it sells advertising services to a person who has a non-arm's length relationship with a Canadian advertiser.

C. *Enforcement Mechanisms*

Every person who contravenes section 3 is 'guilty' of an offence.[71] Bill C-55 levies steep penalties for infringing section 3. The liability, on summary conviction, for the first offence is a maximum of $20,000. For a subsequent offence, the maximum fine is $50,000. The liability of a corporation, on conviction on indictment, is a maximum fine of $250,000. In the case of an individual, the liability prescribed is not more than $100,000. Section 11 of Bill C-55 implicates any officer, director or agent of the corporation if they directed, authorized, assented, acquiesced or participated in the commission of the offence. They are liable for the offence whether or not the corporation has been prosecuted. Furthermore, section 12 stipulates that it is sufficient proof to establish that the offence was committed by an employee or agent of the accused, whether or not the employee or agent has been prosecuted for the offence. The onus is on the accused to establish that the offence was committed without his or her knowledge or consent and that he or she exercised all due diligence to prevent the commission of the offence. The court has the discretion to order payment of an additional fine, pursuant to section 13, if the person acquired monetary benefits due to the commission of the offence. Section 14 gives the court the power to make an order that will ensure that the person will not continue or repeat the offence, an order awarding costs to the Minister of Canadian Heritage, and an order requiring the person to comply with any other conditions which will prevent the repetition of the offence.

An unusual provision is contained in Bill C-55. It is that which permits extraterritorial application. Subsection 15(1) stipulates that "[i]n a proceeding for a contravention of section 3, a foreign publisher who commits an act outside Canada that, if committed in Canada, would be an offence under that section is deemed to commit that act in Canada."[72] Furthermore, if the offence is deemed to be committed in Canada subsection 15(2) provides that the proceedings may be commenced in any territorial

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[67] *Ibid.* s. 3(1).
[68] *Ibid.* s. 3(2).
[69] *Ibid.* s. 3(3).
[70] *Ibid.* s. 3(5).
[71] *Ibid.* s. 10(1).
[72] *Ibid.* s. 15(1).

division in Canada, regardless of the fact that the foreign publisher is not present in Canada.[73]

Subsection 4(1) of Bill C-55 grants the Minister the power to investigate. The Minister may decide to undertake an investigation of an alleged contravention of section 3. The Minister can designate any person to be an investigator,[74] and must furnish the investigation with a certificate of designation.

Bill C-55 confers upon the investigators broad powers of search and seizure. Under subsection 5(1), an investigator can obtain a warrant under section 487 of the *Criminal Code*[75] and can "enter any place and make any investigation that [he or she] considers necessary."[76] The investigator can require any person to provide any documents, physical or electronic, that may contain relevant information to the investigation.[77] Furthermore, the investigator can inquire into any relevant negotiations, transactions, arrangements or operations that are related to the supply of advertising services to a Canadian advertiser.[78] The investigator can also administer oaths and obtain affidavits, declarations and solemn affirmations in relation to the investigation.[79]

The investigator's signed or certified report is admissible evidence without any proof of the signature or of the matters contained within it.[80] Furthermore, any copy or extract from any book, record, electronic data or document seized by the investigator is admissible evidence, and in the absence of evidence to the contrary, it has the same probative value as the original.[81] There is also a presumption, contained in section 19, that if the advertising content bears the name, trade-name, trade-mark, address or phone number of a Canadian advertiser then it is proof that advertising services were supplied by the foreign publisher in contravention of section 3. Essentially, these clauses are inserted in Bill C-55 to lessen the burden of proof for the Crown and the Attorney-General. These clauses allow them to avoid the complicated rules of evidence in order to submit evidence with relative ease. .

Subsection 7(1) gives the Minister the power to make a 'demand' if a foreign publisher has contravened section 3. This means that the Minister can demand that the foreign publisher stop supplying advertising services which are contrary to section 3 of the Act, not execute the transaction or finalize the arrangement, or show any cause why no contravention of the Act has occurred or will occur.[82] This clause provides an opportunity for the foreign publisher to present an explanation or justification for its

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[73] This appears to contradict traditional Canadian foreign policy. For example, Canada has been a staunch opponent of American extraterritorial measures, such as the *Helms-Burton Act*. The extraterritorial reach of subs. 15(1) may make Canadian criticism of extraterritorial measures less credible.

[74] "Bill C-55", *supra* note 1, s. 4(2).

[75] Canadian *Criminal Code*, R.S.C. 1985, c. C-46, s.487, as amended, allows a Justice of Peace to issue a search warrant where the Justice is satisfied by information on oath that there are reasonable grounds to believe that there is in a "building, receptacle or place" anything which "will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence...".

[76] "Bill C-55", *supra* note 1, s. 5(1).

[77] *Ibid.* s. 5(1)(a).

[78] *Ibid.* s. 5(1)(b).

[79] *Ibid.* s. 5(1)(c).

[80] *Ibid.* s. 18(1).

[81] *Ibid.* s. 18(2).

[82] *Ibid.*, s. 7(2).

action.

In a case where the foreign publisher fails to comply with the demand, the Minister can apply to a provincial superior court or the Federal Court (Trial Division) for an injunction order.[83] If the court finds that the Minister's demand was justified and that the foreign publisher has failed to comply, the court has the power to make any order, including an order to stop supplying advertising services, and an order preventing any action that might prejudice the ability of a court to issue an effective order.[84] The court also has the power to make an order on an *ex parte* application if there is an urgent situation.[85] In the case of non-compliance with a court order, the foreign publisher can be cited and punished for contempt of court.[86] Bill C-55 ensures that the parties have the right of appeal, as provided by law, in the case of any decision or order made by the court.[87] Section 9 of Bill C-55 clarifies that the Minister can bring an application for an order despite the commencement of a criminal proceeding for an offence under section 3.

D. *Exemptions*

There are three exemptions outlined in Bill C-55. Section 21 contains a "grandfathering clause" which stipulates that Bill C-55 does not apply to those foreign publishers "who lawfully supplied advertising services directed at the Canadian market by means of a periodical during the year before the day on which this Act was introduced in the House of Commons [. . .]."[88] The clause, essentially, exempts *Time Canada* from the prohibition of subsection 3(1).

The exemptions under sections 21.1 and 21.2 were incorporated in Bill C-55 pursuant to the Canada-U.S. Agreement on Periodicals. Canada and the U.S. reached the agreement in order to diffuse the eminent trade war over split-run magazines. Under the agreement, Canada agreed to amend Bill C-55 by granting wider access to foreign publishers to the Canadian advertising market. The exemption under section 21.1 states:

> This Act does not apply to a foreign publisher who supplies advertising services directed at the Canadian market by means of an issue of a periodical, if the revenues generated by the supply of advertising services directed at the Canadian market represent, in comparison to the revenues generated by the total supply of advertising services, by means of any of those issues
> (a) during the period of 18 months beginning on the day on which this Act comes into force, not more than 12 per cent;
> (b) during the period of 18 months immediately following the period referred to in paragraph (a), not more than 15 per cent; and
> (c) after the period referred to in paragraph (b), not more than 18 per cent.[89]

In effect, section 21.1 allows foreign publishers to sell limited advertising in

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[83] *Ibid.*, s. 8(1).
[84] *Ibid.*, s. 8(2).
[85] *Ibid.*, s. 8(3).
[86] *Ibid.*, s. 8(5).
[87] *Ibid.*, s. 8(6).
[88] *Ibid.*, s. 21.
[89] *Ibid.*, s. 21.1.

Canada without being subject to the penalties outlined in Bill C-55. Simply put, the market access to the Canadian advertising services will be phased in over a period of three years. Initially, foreign publishers are allowed to sell advertising to Canadians representing not more than 12 per cent of overall advertising revenues. After 18 months this level will increase to 15 per cent, eventually leading to 18 per cent in 36 months.[90] Any foreign publisher exceeding the limits set out in section 21.1 will be held in contravention of subsection 3(1) of Bill C-55.

The exemption outlined in section 21.2 deals with foreign investment in the Canadian periodical industry. Section 21.2 states:

> This Act does not apply to a foreign publisher who [. . .] makes an investment in periodical publishing that has been prescribed under paragraph 15(a) of the *Investment Canada Act* as a specific type of business activity related to Canada's cultural heritage or national identity and that has been reviewed under Part IV of that Act by the Minister responsible for it and for which that Minister is satisfied or is deemed to have been satisfied that the investment is likely to be of net benefit to Canada.[91]

Essentially, Bill C-55 does not apply to those foreign publishers whose investment is approved by the Minister of Canadian Heritage as having satisfied the "net benefit to Canada" test. In conjunction to section 21.2, the Canada-U.S. Agreement on Periodicals relaxed the Canadian provisions relating to foreign investment in the periodical industry. According to the agreement, "Canada will permit up to 51% foreign ownership in the establishment and acquisition of businesses to publish, distribute and sell periodicals except for the acquisition of Canadian-owned businesses,"[92] up from the current 25 per cent. After one year, Canada will allow foreign ownership of up to 100 per cent. However, foreign investment will only be approved by the Minister of Canadian Heritage after the net benefits review under section 38 of the *Investment Canada Act* is satisfied. Essentially, the foreign company seeking to invest in Canada may have to publish a "substantial level of original editorial content."[93] However, "substantial level" is not defined in the agreement. Canada has taken the position that substantial level means a "majority" Canadian content. The U.S. opposes such an interpretation.[94]

V. *BILL C-55 AND CANADIAN OBLIGATIONS UNDER INTERNATIONAL TRADE LAWS*

Indeed, it considers the measure a major rebuke of the WTO decision in the *Periodicals* case. In a press release, USTR Charlene Barshefsky said that "[s]ubstituting

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[90] See also: *Regulations Defining Certain Expressions for the Purpose of Section 21.1 of the Foreign Publishers Advertising Services Act*, C. Gaz., 1999.II.1899-1901.

[91] Bill C-55, *supra* note 1, s. 21.2(1). Pursuant to s. 15(a) of the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), as amended, an investment is reviewable if "it falls within a prescribed specific type of business activity that [. . .] is related to Canada's cultural heritage or national identity."

[92] Office of the United States Trade Representative, News Release 99-46, "United States and Canada Resolve 'Periodical' Differences," May 26, 1999, online: <http://www.ustr.gov/ releases/1999/05/99-46.pdf>.

[93] "U.S., Canada Settle Magazine Dispute but Leave Key Issue Unresolved" (1999) 17 *Inside U.S. Trade* 2, at 3.

[94] *Ibid.*

one form of protectionism for another ignores both the letter and the spirit of WTO rules [. . .] [w]e expect the Canadian Government to refrain from enacting this protectionist legislation."[95] In a speech at the Canadian Club of Ottawa, the U.S. Ambassador to Canada, Gordon Giffin, stressed that Canada has to abide by all the rules of free trade. He noted that Canada "cannot order the ice cream without also getting the broccoli."[96] The U.S. finds Bill C-55 to be anti-competitive, discriminatory and protectionist.[97] It strongly believes that the new law is another Canadian method to prevent split-run magazines from competing in the Canadian market.

Despite the Canada-U.S. Agreement on Periodicals, Bill C-55 is not compatible with international trade law obligations undertaken by Canada. In fact, the agreement between the two countries can be terminated on a 90-day notice, allowing the U.S. to challenge the validity of Bill C-55.[98] In such a scenario, the U.S. could choose to attack Bill C-55 from three likely avenues: (i) retaliatory measures under 'Section 301'; (ii) a challenge at the WTO; or (iii) a challenge under NAFTA.[99] Keeping aside the political rhetoric, one should consider the key legal question: Does Bill C-55 comply with GATT as well as NAFTA?[100]

A. *Section 301 Retaliation*

The possibility of economic retaliation by the U.S. against the enforcement of Bill C-55 is quite plausible. Washington had already made statements, at the time when Bill C-55 was tabled, that alluded to strong retaliatory measures. In a press release, USTR Charlene Barshefsky stated that "[i]f Bill C-55 is enacted, we are fully prepared to respond to the denial of U.S. trade benefits by withdrawing benefits of equivalent commercial

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[95] "U.S. to Take Trade Action", *supra* note 3.

[96] "Verbatim: No Dessert Without Broccoli," *Ottawa Citizen* (November 7, 1998) B7.

[97] Office of the United States Trade Representative, News Release 98-91, "USTR Criticizes Proposed Canadian Action to Continue Restrictions on Market Access for Magazines," October 9, 1998, online: <http://www.ustr.gov/releases/1998/10/98-91.pdf>.

[98] The Canada-U.S. Agreement on Periodicals stipulates that the U.S. will not challenge the validity of Bill C-55 under the WTO, NAFTA, or Section 301. However, upon termination of the agreement, the U.S. is free to launch such a challenge.

[99] "U.S. Considers Plans for Retaliation Against Canada in Magazine Fight" (1998) 16 *Inside U.S. Trade* 1, at 1 [hereinafter "U.S. Plans for Retaliation"]. It is important to note that Bill C-55 could be challenged by any WTO or NAFTA Member State, other than the U.S. The views of the U.S. are discussed due to its strong objection to Canada's laws protecting cultural industries.

[100] It is important to mention that Bill C-55 also raises issues relating to the Canadian *Charter of Rights and Freedoms* ("Charter"). The Association of Canadian Advertisers ("ACA") has vowed to challenge the constitutionality of the proposed law once it is enacted. ACA argues that the Bill denies Canadian companies the right to commercial free speech, a right guaranteed by subs. 2(b) of the Charter. ACA further asserts that Bill C-55 is tantamount to censorship. See: "Further Submissions of Association of Canadian Advertisers, Institute of Canadian Advertisers and Canadian Media Directors Council on Bill C-55," Submitted to the House of Commons Standing Committee on Canadian Heritage on November 30, 1998.
Please note that this paper will not discuss the constitutionality of Bill C-55. The constitutional status of the proposed law is outside the scope of this paper and has no relevance to the issues of international trade law.

effect."[101]

The U.S. can take retaliatory actions under "Section 301" of the *U.S. Trade Act of 1974*.[102] Section 301 authorizes the U.S. government to threaten or unilaterally take retaliatory action. Section 301 was enacted in 1975 to counteract unfair foreign practices affecting American exports of goods and services.[103] The USTR, under section 301, can take retaliatory measures on any product traded between Canada and the U.S. At the time when Canada introduced Bill C-55, it had been speculated that Canada could face direct retaliation in sensitive areas of its trade with the U.S. such as dairy, lumber, wheat, steel, hockey equipment, men's wear, and telecommunications.[104]

In the wake of such retaliatory measures, there would be very few options left for Canada. The Canadian government would certainly face extreme pressure from those domestic industries targeted by the U.S. to take action in order to alleviate the effects of the retaliation. However, depending on the nature and extent of the measures, Canada might have grounds to initiate proceedings either under the WTO or NAFTA. Such a step, though, would definitely expose Bill C-55 to WTO or NAFTA scrutiny. Ultimately, under the fire of Section 301, there remain two possible options for Canada: (i) rescind Bill C-55; or (ii) offer proof, in the appropriate forum, that Bill C-55 is in compliance with Canadian international trade obligations.

B. *WTO Challenge*

The U.S. government has two options should it decide to challenge Bill C-55 at the WTO. It could argue that the matter be heard by the original Panel of the *Periodicals* case, or it could initiate a new WTO challenge. No matter the forum - original or a new Panel - the key issue would be whether Bill C-55 is a services measure and thus governed by GATS, or whether it also affects periodicals as a product, thereby invoking the application of GATT.

The most preferable and expeditious route for the U.S. is to challenge Bill C-55 before the original Panel. Article 21:5 of Annex 2 of WTO Agreement - *Understanding on Rules and Procedures Governing the Settlement of Disputes* states:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The Panel shall circulate its report within 90 days after the date of referral of the matter to

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[101] "U.S. to Take Trade Action", *supra* note 3. See also: J. Baxter, "U.S. Gears Up for Trade War Over Magazines," *Ottawa Citizen* (December 1, 1998) B1.

[102] 19 U.S.C.S. § 2411.

[103] Section 301 should be contrasted with "Special 301" and "Super 301." Special 301 is a narrower provision that deals specifically with intellectual property. Super 301 specifically deals with services. See: J. McIlroy, "American Enforcement of Intellectual Property Rights: A Canadian Perspective" (1998) 1 *The Journal of World Intellectual Property* 445-46.

[104] "U.S. Plans for Retaliation", *supra* note 99 at 2. See also: R. Fife and I. Jack, "Copps Refuses to Water Down Magazine Bill," *National Post* (December 1, 1998) A6; I. Jack, "Magazine War Fallout May Hit Textile and Steel Producers," *National Post* (December 1, 1998) C5.

it.[105]

Article 21:5 allows the Dispute Settlement Body (DSB) to reconvene the original panel if there is disagreement among the parties as to the consistency of compliance measures with the ruling. The article allows for an expeditious process whereby the Panel must decide the issue and report the results within 90 days from the date of referral.

In order to be successful under Article 21:5, the U.S. needs to argue that Bill C-55 is not entirely a new measure, but rather a measure enacted by Canada in compliance with the *Periodicals* case decision. The U.S. must demonstrate that the effect of the new law is similar to the Import Ban and the 80% excise tax in that it discriminates against and bars split-run periodicals from entering into Canada.

Canada's position would be that Bill C-55 is a completely new measure that regulates the advertising services, not split-run periodicals. Canada would add that Bill C-55 is fully consistent with all of its international trade obligations.[106] Canada would argue that it has fully complied with the WTO rulings by rescinding the Import Ban and the 80% excise tax on October 30, 1998. Canada could further assert that Bill C-55 is distinct in its application and focus. It was even tabled in the House of Commons on a separate date, October 8, 1998.

However, there is ample evidence linking Bill C-55 with the WTO *Periodicals* case. Since the Appellate Body's decision in June, 1997, Canada has been exploring ways to substitute the impugned laws. Canada has considered different measures which are not only compliant with Canadian international obligations, but which also have the effect of barring split-run magazines from entering Canada. Such evidence could assist the DSB in finding that Bill C-55 is not a new measure; instead it could find that it is a measure taken in response to the Panel and Appellate Body decisions. It is not unreasonable to think, given the history of the case, that Bill C-55 will receive heightened scrutiny on the part of the WTO.

1. *GATT or GATS*

Canada has focused on 'advertising services' in order to ensure that a WTO Panel does not draw a link between advertising (*i.e.* services) and periodicals (*i.e.* goods). On the question of interaction between GATT and GATS, the Panel in the *Periodicals* case held that neither agreement overrides the other, rather they overlap.[107] In a subsequent case, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*[108] (Bananas case), the Appellate Body dealt with the issue of mutual exclusivity of GATS and GATT. The Appellate Body held that:

> [t]he GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. It provides, *inter alia*, for both [Most Favoured Nation]

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[105] *General Agreement on Tariffs and Trade -- Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes* (Dec. 15, 1993), (1994) 33 I.L.M. 112 at 126.

[106] "U.S. Plans for Retaliation", *supra* note 99 at 2.

[107] See *supra* notes 38-40 and accompanying text.

[108] WT/DS27/AB/R, adopted September 9, 1997 [hereinafter "*Bananas* case"].

> treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis. This was our conclusion in the Appellate Body Report in *Canada - Periodicals*. [Emphasis added][109]

Essentially, the Appellate Body in the *Bananas* case held that GATT and GATS are not mutually exclusive agreements but, in fact, their respective scope of application could overlap.[110]

The key Canadian argument, if Bill C-55 is challenged at the WTO, would be that the measure regulates advertising services only and is therefore governed by GATS. Since Canada has not committed advertising services in the GATS schedule, the agreement does not apply. Bill C-55 is designed in such a way that it purports to regulate advertising services as opposed to magazines. Bill C-55 only prohibits foreign publishers from selling advertising services in Canada. It does not impose any ban on the importation of foreign magazines into Canada. As goods, foreign magazines are free to enter Canada without any restrictions.

Canada should stress the need to avoid conflict between GATT and GATS. The application of these agreements should not have the effect of denying explicit rights and obligations provided in other agreements. Furthermore, the WTO should not apply GATT over GATS in such a manner that it would reduce the provisions of the services agreement to little or no effect. These agreements are the products of extensive negotiations between the states. The enforcement of these agreements should not be contrary to the negotiations and intent of the states. In addition, Canada has reserved the right to regulate its advertising services by not committing them in the schedule. As such, the WTO should respect Canada's reservation in its application of the respective agreements.

In response, the U.S. could argue that Bill C-55 is not exclusively a services measure. The measure clearly falls within the third category outlined earlier in the *Bananas* case. The law involves a service in relation to a particular good and a service supplied in

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[109] *Ibid.*, at para. 221.

[110] F. Weiss, "Dispute Settlement Under the General Agreement on Trade in Services," in J. Cameron & K. Campbell, eds., *Dispute Resolution in the World Trade Organisation* (London: Cameron, May, 1998) at 167.

conjunction with that particular good. The intent is to regulate advertising services in relation to foreign periodicals. The Appellate Body in the *Periodicals* case categorically held that a periodical is a physical product comprised of two components, editorial content and advertising content. Basically, a restriction on either of the components would result in a prohibition on the periodical itself.

The U.S. could strongly assert that the intent of Bill C-55 is to ensure that foreign split-run magazines are not available in Canada. The proposed measure attempts to attain the same results as the Import Ban and the 80% excise tax. The intent of the Act could be demonstrated through the statements made by officials at Canadian Heritage. In a technical briefing session to the House of Commons Standing Committee on Canadian Heritage, Mr. Michael Wernick, Assistant Deputy Minister, Cultural Development, Department of Canadian Heritage, provided an explanation of the application of Bill C-55. He stated:

> The test is whether the vehicle is aimed at the Canadian consumer as a market. If it's a general North American or worldwide campaign, if it's not clearly aimed at the Canadian consumer market, it's not affected.[111] [Emphasis added.]

Later, Mr. Allan Clarke, Director, Publishing Policy and Programs, Department of Canadian Heritage, added:

> If [a] periodical is directed at the Canadian market and if the advertising services contained in that periodical are directed primarily at the Canadian market, that would be captured by the legislation.
>
> In the case of a foreign publication that is not primarily directed at the Canadian market, Canadians can today, and will be able to tomorrow, advertise in those vehicles. *The Economist*, for example, is distributed across the world. Canadians can advertise in *The Economist*.[112]

Furthermore, when Mr. Mark Muise, Member of Parliament from West Nova, asked:

> [. . .] let's say, for example, a new fishing magazine starts up in the States. If they sell ads, as a Canadian lure producer, I can buy an ad, but it has to be an ad that's directed to the North American market - the States and Canada. If it's an ad that is only directed to Canada, am I contravening the new regulation?[113]

Mr. Wernick replied:

> [. . .] the test is, was the vehicle aimed at the Canadian consumer market? It's not the advertising. It's not the ad itself. It's whether the vehicle in which the advertising service was delivered was aimed *primarily* at the Canadian consumer market.[114] [Emphasis added.]

Mr. Muise further clarified:

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[111] Transcript of House of Commons Standing Committee on Canadian Heritage (3 November, 1998), online:<http://www.parl.gc.ca/InfoComDoc/36/1/CHER/Meetings/Evidence/CHEREV50-E.HTM>.

[112] *Ibid.*

[113] *Ibid.*

[114] *Ibid.*

> So we say the publication has to be directed to the North American market and not solely to Canada?[115]

Mr. Wernick replied again:

> Yes, that's the distinction. At the end of the day you'd look at the vehicle in which the advertising services are delivered and who was the target for that vehicle.[116]

These statements demonstrate that Canada, through Bill C-55, intends to discriminate against foreign split-run periodicals. The proposed measure only prohibits advertisement in those foreign magazines that are specifically directed towards the Canadian market. Foreign publishers of magazines aimed at a broader market are free to obtain advertisements from Canadian advertisers without any fear of prosecution. At the end of the day, the determining factor appears to be the distribution of the product (referred to as the 'vehicle') rather than the advertising service itself. Therefore, Canada's position that Bill C-55 subjects only GATS disciplines - and not GATT - appears to rest on shaky ground.

2. *Article III:4 of GATT*

The U.S. could further argue that Bill C-55 violates Article III:4[117] of GATT. The measure, despite regulating advertising services, affects foreign magazines as goods. It could be argued that Bill C-55 accords less favourable treatment[118] to foreign publishers who "use" their magazines as a means of delivering advertising. Domestic magazines are permitted to relay Canadian advertising to Canadian consumers. However, the same is not true for foreign magazines. Indeed, Canadian advertisers will be prevented from using foreign magazines in order to target advertising to Canadian consumers. The reality is that magazines have two functional uses for the consumer: editorial use and advertising use. Bill C-55 does not affect the editorial use of foreign magazines, but it definitely denies the advertising use of the foreign magazines. Thus, the U.S. could assert that Bill C-55 discriminates and contravenes the national treatment principle contained in GATT.

Canada is not without defence on this point. It could argue that consumers do not use magazines to receive advertising. Rather, consumers purchase magazines because of the editorial content. The variety of subjects in magazine titles is reflective of a product which is reliant upon the content encompassed within it. Consumers choose magazines based on their own personal preference, lifestyle, hobbies, etc. Advertising is merely a service which piggy-backs on the editorial content. The reality is that publishers use magazines as a tool for offering advertising services. Canadian consumers are not denied the use of foreign magazines; there is no such prohibition in Bill C-55. Foreign magazines in Canada are accorded the same treatment as domestic magazines in their internal sale,

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[115] *Ibid.*

[116] *Ibid.*

[117] See *supra* note 55 and accompanying text.

[118] In *U.S. - Section 337 of the Tariff Act of 1930* (*EEC v. U.S.*) (1988), GATT Doc. L/6439 "treatment no less favourable" was held to mean "effective equality of opportunities" in respect of laws and regulations referred to in Article III:4 of GATT: See J.R. Johnson, *International Trade Law* (Concord, ON: Irwin Law, 1998) at 59.

offering for sale, purchase, transportation, distribution, and use. Canada could conclude that Bill C-55 does not contravene Article III of GATT.

The nature of the argument demonstrates that the issue of national treatment, in this matter, boils down to the link between editorial and advertising content in a magazine. Legally, the U.S. has a strong argument since the WTO has held that a magazine is a combination of both components - editorial and advertising. The absence of one renders the other incomplete and impractical. However, logically there is merit in the Canadian position. Editorial and advertising content might be linked, but the former is fundamental to a magazine while the latter an ancillary service. On balance, the chances are high that a WTO Panel would follow the precedent and conclude that Bill C-55 violates Article III of GATT.

3. *Article XI:1 of GATT*

The U.S. could argue that Bill C-55 violates Article XI:1[119] of GATT in that the effect of Bill C-55 is tantamount to a prohibition on imports of foreign split-run magazines. The exemption under section 21.1, in effect, imposes a quota on the import of split-run magazines. Foreign publishers can only export those split-run magazines that contain Canadian advertising reflecting, in three years, no more than 18 per cent of overall revenue.[120] The legislation, in essence, "effectively prevent[s] the presence of 'split-run' editions of foreign magazines - that is, magazines with editorial content broadly similar to their foreign original but with advertising aimed at a Canadian audience - in the Canadian market-place."[121] The simple fact that foreign publishers would not be able to access Canadian advertisers beyond the prescribed quota means that there would be limited number of split-run magazines. Bill C-55, in effect, limits the key ingredient of a split-run magazine, that being Canadian advertisements. Section 21.1 establishes a quota regime that is contrary to Article XI:1 of GATT. Only foreign non split-run magazines would be allowed to enter freely into Canada. Such a discrimination, the U.S. could argue, constitutes a quantitative restriction and a violation of Article XI:1 of GATT.

Canada could argue that section 21.1 does not impose quota on the importation of split-run magazines. Any number of split-run magazines can be sold in Canada if they meet the revenue percentage set on advertising. In fact, the percentages outlined in section 21.1 regulate advertising services only, and do not restrict the importation of split-run magazines (*i.e.*, a good) into Canada. The Canadian reply must reflect its original position that Bill C-55 is not a measure concerning goods. The legislation does not prohibit the importation of a foreign split-run or non split-run magazines. All kinds of foreign magazines (as a "good") are allowed to enter Canada without any restrictions. The measure does not impose any conditions or tax on the importation of foreign magazines. It only applies to advertising services within Canada; a right which Canada has retained by not subjecting this service to liberalization under GATS.

The U.S., however, has a firm argument. If WTO accepts that split-run magazines are a "good" on its own, separate from non split-run magazines, then Bill C-55 is akin to a

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[119] See *supra* note 26 and accompanying text.

[120] See *supra* notes 89-90 and accompanying text.

[121] D. Schwanen, "Advertising Canada's Culture: Why the New Policy on Magazines Is Not Up to the Task," C.D. Howe Institute, Backgrounder (8 October, 1998), online: <http://www.cdhowe.org/pdf/sch-05.pdf> at 1.

quantitative restriction. The effect of such a restriction on Canadian advertisements could be construed as a denial of an essential component of a magazine. There is a good chance that the WTO would perceive the measure as a quantitative barrier to trade because it makes "non-Canadian publishers (goods producers) subject to severe penalties for distributing [. . .] magazine[s] containing Canadian advertising"[122] while the Canadian publishers can legally sell the identical goods without any restrictions or limits on advertising.

C. *NAFTA Challenge*

Bill C-55 is also vulnerable under NAFTA. Two types of actions are possible within the NAFTA framework: (i) commercial retaliation under the 'cultural exemption'; or (ii) private party suit under the 'investor-state' provisions. The U.S. might consider actions under the agreement as it appears to offer the fastest route to retaliation against Canada.[123]

1. *Cultural Exemption*

Parties to the *Canada-United States Free Trade Agreement*[124] (FTA) and NAFTA are allowed a "cultural exemption" from the provisions of these agreements. Parties can take measures in order to protect their cultural industries. However, if the adopted measures would violate the provisions of either agreement but for the exemption, then the other party has the right to retaliate. It is this right of retaliation that has created an interpretative controversy between Canada and the U.S.[125]

Article 2005 of the FTA specifically states:

> 1. Cultural industries are exempt from the provisions of this agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph four of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter.
>
> 2. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to action that would have been inconsistent with this Agreement but for paragraph 1.[126]

Article 2012 of the FTA defines five types of activities as cultural industries: printed publications, film and video, music recording, music publishing, and broadcasting.[127] NAFTA adopts the cultural exemption outlined in the FTA. In effect, NAFTA incorporates the FTA cultural exemption provision within its text. Annex 2106 of NAFTA states:

> Notwithstanding any other provision of this Agreement, as between Canada and

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[122] *Ibid.*, at 2.

[123] "U.S. Plans for Retaliation", *supra* note 99 at 2.

[124] (22 December, 1987), Can. T.S. 1989 No. 3, 27 I.L.M. 281 [hereinafter "FTA"].

[125] The author would like to thank Mr. Dennis Browne, Director, Centre of Trade Policy and Law, Carleton University, Ottawa, for highlighting the FTA-NAFTA interpretative controversy in the context of Bill C-55.

[126] "FTA", *supra* note 124, Article 2005.

[127] B. Appleton, *Navigating NAFTA: A Concise User's Guide to the North American Free Trade Agreement* (Scarborough, ON: Carswell, 1994) at 189-90.

> the United States, any measure adopted or maintained with respect to cultural industries [. . .], and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada-United States Free Trade Agreement*. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.[128] [Emphasis added.]

Essentially, the cultural exemption in NAFTA operates in relation to the provisions of the FTA. Thus, the benefits and peculiarities of the cultural exemption embodied in the FTA have been continued in NAFTA.[129]

This is an issue where Canada and the U.S. diverge in their interpretation of the provisions. Canada argues that the right of retaliation is limited to measures which contravene the FTA provisions, not those of NAFTA. In its *Statement of Government Action*, issued at the time of NAFTA's implementation, Canada stated:

> Notwithstanding any other NAFTA provision, any measure adopted or maintained with respect to the cultural industries will be governed, under NAFTA, exclusively in accordance with the provisions of the Canada-United States FTA. However, under NAFTA, each country reserves the right to take measures of equivalent commercial effect in response to any action regarding cultural industries that would have been inconsistent with the FTA but for the FTA's cultural industries' provisions. In other words, while the cultural industries' exemption has been retained and applies in respect of any Canadian cultural industry, the US right to retaliate is limited to measures inconsistent with the FTA, not the NAFTA, and therefore cannot be exercised with respect to new areas covered by the NAFTA such as intellectual property.[130]

This interpretation of Annex 2106 of NAFTA is unacceptable to the U.S. The right of retaliation, the U.S. argues, applies in all situations where the measure is inconsistent with the FTA or NAFTA. The U.S. Senate Finance Committee stated:

> Article 2106 of the NAFTA, which carries forward Article 2005 of the [FTA], makes clear that should Canada take measures to discriminate against or restrict market access to U.S. "cultural industries" (including motion picture, television, sound recordings and print publications), the United States retains the right to respond aggressively with measures of "equivalent commercial effect."[131]

In other words, the right to retaliation applies to all areas, even those which are exclusively covered by NAFTA, such as services and intellectual property. Otherwise, the U.S. argues that "[t]he Canadian interpretation creates an exception of unlimited breadth and unlimited depth, i.e. Canada could define away virtually any obligation in an enormous area"[132] without any commercial reprisals.

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[128] "NAFTA", *supra* note 10, Annex 2106.

[129] Appleton, *supra* note 127 at 190.

[130] *C. Gaz.*, 1994.I.218-19.

[131] S. Rep. No. 189, 103d Cong., 1st Sess. 58 (1993), cited in J. Ragosta, "Outline of Remarks: Having Your Cake and Eating it Too: Are There Limits on Cultural Protectionism?" (1996) *ABA Section of International Law and Practice*, Spring Meeting 1996 at 3.

[132] *Ibid.*, at 4.

The current showdown on Bill C-55 truly tests the differing interpretations with respect to the scope of retaliation. The Canadian advertising market is not subject to the FTA, meaning that Canada has no obligations towards U.S. publishers in this sector. However, under NAFTA, Canada does not have the right to exclude the advertising market. Essentially, Bill C-55 - in the absence of a cultural exemption - does not contravene the FTA, but is inconsistent with NAFTA. If the Canadian interpretation is correct, the U.S. does not have a right to retaliate under Annex 2106 of NAFTA. The U.S., however, would obviously assert that it does have a right to take measures of equivalent commercial value.

The U.S., once again, is in a secure position. In order to impose retaliatory measures, there is no need to comply with any formal process. Essentially, if the U.S. believes that Bill C-55 contravenes NAFTA, in the absence of a cultural exemption, it can take any measure of equivalent commercial effect. It will be up to Canada to challenge the retaliatory measures under the dispute settlement mechanism outlined in Chapter 20 of NAFTA.

2. *Investor-State Challenge Under Chapter 11*

Chapter 11 of NAFTA grants a possibility to an investor, such as Time-Warner Inc., to launch a suit against the Canadian government over Bill C-55. Chapter 11 provides that

> where one of the NAFTA states, Canada, the United States or Mexico, acts contrary to its obligations under NAFTA in relation to a foreign investor protected under the agreement, the investor may seek relief against the state in binding arbitration for any injury suffered.[133]

Chapter 11 allows an investor to sue a Party State if it believes that the Party State has violated its obligations under the agreement. The parties to the challenge enter into binding arbitration in accordance with the rules set out in Chapter 11.[134] The challenge provision is proving to be strong leverage in the hands of investors. The most recent success of Ethyl Corp.,[135] producers of MMT, in challenging the validity of certain Canadian legislation, demonstrates the effectiveness of Chapter 11 provisions.

Time-Warner Inc. was considering Chapter 11 proceedings against the Canadian government if it had failed to grandfather *Time Canada* in Bill C-55. The timely amendment of the grandfather clause (section 21) helped Time-Warner Inc. to change its mind.[136] Initially, the wording of section 21 was of concern to Time-Warner Inc. Section 21 of Bill C-55 was drafted in a manner that limited the advertising services of the grandfathered magazines to the amount supplied in the last year. Such a restriction implied

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[133] J.A. VanDuzer, "Investor-State Dispute Settlement Under NAFTA Chapter 11: The Shape of Things to Come?" (1997) 35 *Canadian Yearbook of International Law* 264.

[134] The binding arbitration takes place under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules), the International Centre for the Settlement of Investment Disputes Rules (ICSID Rules), or ICSID Additional Facility Rules.

[135] Ethyl Corp. challenged Canada on legislation banning MMT, a gasoline additive. The dispute never went to arbitration since Canada settled and paid $14 million to Ethyl Corp. Canada also rescinded the legislation.

[136] See "Time NAFTA Suit Averted by Commons Bill Amendment," *Globe and Mail* (2 December, 1998) B5.

that *Time Canada* would not be allowed to increase its current advertising share in the Canadian market. Time-Warner Inc. was considering a trade remedy under Article 1110 of NAFTA or Article 1605 of the FTA.[137] Time-Warner Inc.'s argument was that section 21 "amount[ed] to expropriation of a significant and substantial investment of a U.S. investor in Canada."[138] It further argued that "[t]he cultural industries exemption under NAFTA, and its predecessor the FTA, will not necessarily provide a complete defence to such expropriation [. . .]."[139] Whether there was any credence to the position of Time-Warner Inc. is arguable. However, it was in Canada's interest, amid all the other potential trade problems associated with Bill C-55, to clarify the language of the grandfather clause by removing any limits on advertising.

VI. CONCLUSION

Although Bill C-55 is the law, its fate is uncertain. There is significant doubt as to whether Bill C-55 is in conformity with Canadian international trade law obligations. By prohibiting foreign publishers from selling advertising in Canada it appears to discriminate against the foreign publishers and has the practical effect of barring the importation of split-run magazines into Canada. The U.S. could certainly challenge Bill C-55 as violating Article III:4 and XI:1 of GATT and/or impose commercial sanctions under section 301 or NAFTA. Furthermore, the Canadian position that the Bill is immune from GATT sanction by virtue of it dealing with services rather than goods remains open to serious question. The Canadian government itself has admitted and on its face the Bill makes it clear that enforcement will be based on the magazines aimed at the Canadian market not the advertising. It seems that Bill C-55 misses the mark as, yet again, Canada fails to fulfil its international trade law obligations.

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[137] Article 1110 of NAFTA and Article 1605 of FTA forbids, subject to some exceptions, Party States to nationalize or expropriate, directly or indirectly, an investment of an investor. Furthermore, the Party State is liable to pay compensation equivalent to the fair market value of the expropriated investment.

[138] "Brief of Time Canada Ltd.", *supra* note 5 at 14.

[139] *Ibid.*