



2007-08 NIAGARA INTERNATIONAL MOOT COURT COMPETITION

BENCH BRIEF

*****CONFIDENTIAL*****

Note to Judges: **There are three parts to this bench brief:**

Part I: The Problem, Notes to Studying and Clarifications;

Part II: Background for Judges; and

Part III: Charts with Measures, Parties, Likely Positions and Questions. (this is the Judges Cheat Sheet)

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PART I. PROBLEM, NOTES AND CLARIFICATIONS PROVIDED TO STUDENTS

I. 2007-08 NIAGARA INTERNATIONAL MOOT COURT PROBLEM PROVIDED TO STUDENTS

United States of America v. Canada

Notes by the Author:

The problem represents a hybrid of real facts and hypothetical facts. Some of the measures discussed in the problem exist or are proposed to come into existence. Some of the measures are purely hypothetical. The problem will clarify whether a measure is real or fictional.

The problem is not intended to raise issues that concern the domestic law of the NAFTA Parties - in other words, the problem does not focus on the constitutionality of the measures from a domestic perspective. The focus should be on the obligations of Canada and the United States under international law.

The problem raises issues that could arise between Canada and the United States under NAFTA the WTO Agreements, and international law. The research should focus on breaches of obligations under NAFTA and the WTO Agreements and the availability or applicability of the national security exceptions in NAFTA Article 2102, GATT Article XXI and GATS Article XIV bis or the general exceptions in NAFTA Article 2101, GATT Article XX or GATS Article XVI. However, general principles of international law that apply may also be explored.

Real Facts

In April 2005, the United States Department of State (DOS) and the United States Department of Homeland Security (DHS) proposed the Western Hemisphere Travel Initiative (WHTI), which requires all travelers, including Canadian and Americans, to carry a valid passport or other appropriate secure documentation when traveling to the United States from within the Western Hemisphere. The first phase was implemented as of January 23, 2007 and applied to all travelers arriving in the United States from within the Western Hemisphere by air. The second phase has been announced, but is not yet in effect. The second phase applies to all other modes of travel, including by land and by sea. On June 26, 2007, the DOS and the DHS jointly published a Notice of Proposed Rulemaking to implement the second phase of the WHTI. The time-frame for implementation is the Summer of 2008. This phase will require U.S. citizens and non-resident aliens from the Western Hemisphere, including Canada to possess and provide at the time of entry into the United States a valid passport or certain prescribed identification.

Canadian and American citizens have been able to cross the border into the other territory with valid photo identification (a driver's license) and a birth certificate. Canada takes the view that the WHTI will reduce travel of American citizens to Canada because only 40% of American citizens have valid passports. Reduced travel of American citizens will have a negative effect on the tourism industry in border cities and popular tourist destinations in Canada. Canada has raised issues with the government of the United States that the WHTI disproportionately affects Canada given the extent to which the free movement of persons limits the free movement of goods and services. The United States has justified the WHTI as a national security-related measure.

On August 25, 2006, the United States Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) announced in the U.S. Federal Register (Volume 71, No. 165) an interim rule to impose agricultural quarantine and inspection (AQI) user fees on all commercial shipments entering the United States from Canada beginning on November 24, 2006. Canada had been exempted from the user fees. The effect on the announcement is the removal of the exemption. After the announcement of the removal of the exemption for Canada, the implementation dates changed. Starting on January 1, 2007, air passengers arriving in the United States from Canada began paying user fees regardless of (i) whether they were traveling with fruits or vegetables, or (ii) whether they were processed through customs and immigration at a Canadian airport. The amount of the user fee for air passengers is \$USD 5.00 per passenger and \$USD 70.50 per aircraft entering the United States from Canada. The user fees are incorporated into the price of air tickets.

Starting on March 1, 2007, APHIS removed the inspection exemption for all commercial vessels (ships) entering the United States from Canada. The amount of the user fee for each maritime vessel is \$USD 490.00 per entry. The fee is imposed irrespective of the cargo.

Starting on June 1, 2007 (the implementation date was changed), a user fee of \$USD 7.75 was imposed on each rail car moving from Canada to the United States and \$USD 10.75 (\$USD 5.50 for Customs and Border Protection and \$USD 5.25 for APHIS) on each truck moving from Canada to the United States. Alternatively, an annual user fee for trucks could be paid in the amount of \$USD 205 (\$USD 100 for Customs and Border Protection and \$USD 105 for APHIS).

Canada's Department of Foreign Affairs and International Trade (DFAIT) communicated with its counterparts at DHS and the United States Trade Representative its opinion that the APHIS fees are customs user fees and contrary to NAFTA and GATT. There have been various statements made by governmental authorities in the United States about the APHIS user fees, some with a national security angle and some without a national security angle (including, but not limited to a sanitary and phyto-sanitary angle).

On August 21, 2007, Canada's Prime Minister Harper, U.S. President Bush and Mexico's President Calderón issued a Joint Statement at the Conclusion of the 2007 Montebello North American Leaders' Summit. In the Joint Statement, the leaders asked their Ministers to focus their collaboration on five priority areas for the next year. The priority that is relevant to the problem is "Smart and Secure Borders". The leaders jointly state:

"Smart and Secure Borders

Our borders must be both efficient and secure if we are to continue to enhance prosperity, security and quality of life in North America. Effective border strategies minimize security risks, while facilitating the efficient and safe movement of goods, services and people, as trade and cross-border travel increase in North America. These strategies will draw of risk-based border management, innovative use of new technologies, coordinated border infrastructure development, and by moving, where possible, inspection and screening away from the border. It is sometimes best to screen goods and travelers prior to entry into North America. We ask our ministers to develop mutually acceptable

inspection protocols to detect threats to our security, such as from incoming travelers during a pandemic and from radiological devices on general aviation. We also ask our ministers to further cooperate in law enforcement, screening and facilitation of legitimate trade and travelers across our borders.”

The leaders go on to state:

“We, the leaders of North America, have asked our ministers to pursue the following priority activities and ask them to report to us on their progress in one year:

Smart and Secure Borders

Our three countries have a long history of cooperative border management, predicated on the understanding that our prosperity and security depend on borders that operate efficiently and effectively under all circumstances. In some cases, the best time to screen travelers and commerce is before they enter North America. Coordinated, mutually acceptable procedures for detecting threats fare from our borders are a means to do this. Recognizing differences in legal frameworks and policies, and noting the positive effect on our common security of current information sharing initiatives, we will seek to enhance our cooperation in this respect.

We ask ministers to continue to pursue measures to facilitate the safe and secure movement of trade and travelers across our borders and, in particular, to:

- expedite air transportation through the development of comparable protocols and procedures to eliminate duplicate screening for baggage placed on a connecting flight in North America, and for inbound and outbound air cargo shipments;
- develop mutually acceptable approaches to screening for radiological and other similar threats, to include general aviation pathways, and to continue to undertake cooperative or joint research to manage such threats;
- develop mutually acceptable approaches to screening people during a pandemic;
- pursue, according to our respective laws, new, innovative and interoperable law enforcement models that promote seamless operations at the border, such as the Canada-US International Maritime Security Operations, to better protect our citizens from criminal or terrorist threats;
- improve and expand existing radio communications available to law enforcement agencies working on border security and cross-border law enforcement;

- work with stakeholders to identify ways to further enhance benefits of trusted traveler programs (NEXUS, FAST, and SENTRI), including through expanding and streamlining application processing, further program integration and coordinated infrastructure investments;
- alleviate bottlenecks at the U.S. - Mexico border, facilitate the legitimate flow of trade and people, and increase border security at address specific border issues related to congestion, current and future infrastructure needs, customs cooperation, stakeholder outreach and technology; and
- Canada and the United States will maintain high priority on the development of enhanced capacity of the border crossing infrastructure in the Detroit-Windsor region, the world's busiest land crossing.

Fictional Facts: After the release of the joint statement, a number of the candidates seeking the Republican and Democratic Party nomination for U.S. President made verbal statements in the media that Canada must take security of North America seriously and made false statements that the September 11, 2001 hijackers had entered the United States from Canada. Immediately, there was a firestorm of news reports on the issue. U.S. Secretary of Homeland Security Michael Chertoff and U.S. Vice-President Dick Cheney and Canada's Minister of Public Safety Stockwell Day immediately started discussions with a view to making an announcement on September 11, 2007 that plans had been developed to meet the security-related action points in the Montebello Summit Joint Statement. The negotiations, behind closed doors, were reported to be hot and newspaper articles reported that the Canadian negotiators were very displeased about the pressure applied on Canada to implement an extensive range of "thick border" initiatives. On September 11, 2007, Canada and the United States issued a Joint Statement that Canada would spend \$1 billion to put in effect a variety of border initiatives, including:

- a) Canada will build screening facilities at least 1 kilometre from the border crossings at Windsor/Detroit, Fort Erie/Buffalo, Niagara Falls, Sarnia/Port Huron, Cornwall/Rossetown, Lansdowne/Alexandria Bay, Queenston/Lewiston, Sault St. Marie, Fort Francis/International Falls, Emerson/Pembina, North Portal/Portal, St. Stephen/Caliac, Belleville/Houlton, Stanstead/Derby Line, St. Armand/Highgate, Lacolle/Champlain, Coutts/Sweet Grass, Surrey/Blaine, and Delta/Pointe Roberts;
- b) Canada will erect ground sensor towers along the Canada-United States border;
- c) Canada will install advanced radiological detection technology at all its ports (similar to those installed at Saint John, Montreal, Halifax and Deltaport);

Canada's Prime Minister's Office also announced on September 11, 2007, an export tax on fuel transported by way of pipeline equal to \$CDN 25/barrel. Canada's Prime Minister Harper stated:

"Canada is imposing an export tax on fuel transported by way of pipeline because the security of North America depends upon Canada playing its part. Canada recognizes the importance of North American security and is willingly taking the steps requested by its closest trading partner, the United States. Let there be no misunderstanding, Canada has not been the source of any known threat to the

United States and Canada is taking steps to ensure that Canada will not be perceived in the future as a source of any threat to the security of our friends.

However, Canadian taxpayers want lower taxes and it has been the promise of this Government to lower taxes, not raise them. Canada is fulfilling its obligations to build a safe and secure North America and is ensuring that those who benefit most from the actions being promised are the one's paying for the benefits. Canada is imposing an export tax on fuel transported by way of pipeline to raise the money to pay for the infrastructure projects and technology purchases that it has agreed to make. Canada's oil producing provinces will not be harmed by this export tax because the need continues to exist for Canadian fuel."

The Fuel Export Charge legislation used the Softwood Lumber Product Export Charge Act, 2006 as a precedent. All exporters of fuel by pipeline are required to register for export tax purposes and to file monthly returns and remit the export taxes on a monthly basis according to the barrels of fuel put into the pipeline for export to a location outside Canada. All exporters of fuel by way of pipeline are required to apply for export permits for each transaction involving an export of fuel by way of the pipeline and provide prescribed information.

U.S. President Bush was furious with the export tax announcement and immediately asked Secretary Chertoff to discuss the matter with Canada's Ambassador to the U.S., Michael Wilson. The United States took the position that the export tax was contrary to NAFTA Articles 309, 314 and 315 and NAFTA Chapter 6. The United States also took the position that the Fuel Export Charge could not be justified by the exceptions in NAFTA Article 607, 2101, and 2102. The United States further took the position that the Fuel Export Charge was contrary to Articles I, VIII and XI and could not be justified by GATT Article XX or XXI. Ambassador Wilson made it clear that the Fuel Export Charge would remain in effect.

On September 23, 2007, the United States filed a dispute with the International Court of Justice (ICJ) with respect to the Fuel Export Charge.

Canada responded on October 23, 2007 by filing a dispute with the ICJ with respect to the Western Hemisphere Travel Initiative requirement that all American and Canadian citizens over 18 be required to provide a passport as identification to border and immigration officials and the APHIS fee.

The Governments of the United States and Canada agreed to refer their disputes to the ICJ rather than the Dispute Settlement Body of the World Trade Organization, a Chapter 20 NAFTA panel or any other body. Both Parties have agreed that the ICJ would have jurisdiction to consider the issues set out below. Mexico was notified of the decision by Canada and the USA to lift the dispute out of the NAFTA context and had no objection to its loss of right to appear.

The two disputes were joined on November 23, 2007. The case is proceeding and the *United States of America v. Canada*. The United States is the applicant and Canada is the respondent. However, with respect to the issues raised by Canada in the dispute it filed with the ICJ, Canada must make submissions from the perspective of an applicant and the United States must provide a response to those claims from the perspective of a respondent.

Issues for the ICJ

1. The United States requests that the ICJ determine:
 - (a) The Fuel Export Charge is contrary to NAFTA Articles 314, 315, 604 and 605 or GATT Articles I, VIII and XI.
 - (b) The Fuel Export Charge is not justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI.
 - (c) The WHTI is not contrary to NAFTA Chapters 12 and 16 or GATS.
 - (d) The WHTI is justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.
 - (e) The APHIS user fees are not contrary to NAFTA Article 310 and GATT Articles I and VIII.
 - (f) The APHIS user fees are justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.

Canada requests that the ICJ determine:

- (a) The WHTI is contrary to NAFTA Chapters 12 and 16 and GATS.
- (b) The APHIS user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII.
- (c) The WHTI is not justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.
- (d) The APHIS user fees are not justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.
- (e) The Fuel Export Charge is not contrary to NAFTA Articles 314, 315, 604 and 605 or GATT Articles I, VIII and XI.
- (f) The Fuel Export Charge is justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI.

Final Notes By the Author:

1. The problem also raises other international law issues that may be incorporated by the students into their written and oral arguments. For example, it will be apparent to the students in their research that the APHIS charge raises sanitary and phytosanitary issues (e.g., for the inspection for the existence of pests in shipments of agricultural importations). The above issues for the ICJ should be the focus of the

written and oral arguments - but, the investigation of additional issues is encouraged time and space permitting.

2. Part of the exercise is for the advocates to know when to admit to a breach of an international obligation and focus their arguments on the applicability of the national security exception and general exceptions.
3. Part of the exercise is for the written memorials to be drafted in a focused, concise and persuasive manner.

II. RELEVANT CLARIFICATIONS

A. REQUEST FOR CLARIFICATIONS 1

QUERY 1:

The problem has no paragraph numbers. In what format should teams reference facts in the memorials and during oral arguments?

ANSWER:

Because the problem itself contains facts, the facts are not numbered. Facts are not cited. However, the original authorities in which facts are contained should be cited. If the fact is a hypothetical fact, it should be referenced according to its hypothetically stated authority.

QUERY 2:

The problem indicates that the initial AQI implementation was November 2006. Should it be November 2007?

ANSWER:

Since the problem was distributed prior to November 2007, the authority for the fact could not be November 2007. If there has been a subsequent development touching upon an issue in the problem that supports a particular argument, it may be referenced.

B. REQUEST FOR CLARIFICATIONS 2

QUERY 1:

When looking at the oil export tax, is it safe to assume that the United States did not agree to it as part of the Montebello Summit Joint Statement?

ANSWER:

The occurrence of the Montebello Summit is a real fact as are the agreements of Canada and the United States (and Mexico) coming out of that Summit. Please conduct thorough research to obtain your answer.

QUERY 2:

Are the APHIS user fees directly connected the paying for the Western Hemisphere Travel Initiative or are they two distinct programs? (i.e. Did the United States remove the Canadian exemption to pay for a thicker border, through the WHTI?)

ANSWER:

These two measures are real facts. Please conduct thorough research to obtain your answer.

QUERY 3:

Our team has been working on the assumption that the fuel pipeline runs only between Canada and the US, but does not implicate Mexico in any way. Can you confirm or contradict this assumption?

ANSWER:

The existence of pipelines are real facts. Please conduct thorough research to obtain your answer.

QUERY 4:

Does the reference in the 2d paragraph on page 6 to the APHIS fee refer to the entire fee schedule including all modes of transportation, customs and border fees?

ANSWER:

The question is not clear. The APHIS fee is a real measure. Canada is complaining about the measure in all its forms.

QUERY 5:

What is the predicted income for Canada for the export charges? For the US for the removal of the exemption? In other words, what is the cost-benefit?

ANSWER:

Canada expects to raise sufficient revenues to pay for the security measures requested by the United States.

QUERY 6:

Did the United States ever provide notice to the Council for Trade in Services in compliance with GATS Article 14(2)?

ANSWER:

It is fair to assume that all procedural steps have been taken so that the ICJ has jurisdiction over this matter.

QUERY 7:

The Compromis states that Canada uses the Canadian Softwood Lumber Export Charge Act of 2006 as a precedent for the Fuel Export Charge. In the following sentence the Compromis discusses some of the procedural facts regarding the Fuel Export charge. Should we assume that the precedent was for the procedural implementation or that the “precedent” spoken of was more generally regarding trade tariffs?

ANSWER:

Canada considered the United States’ recommendation and approval of the Softwood Lumber Export Charge when considering the Fuel Export Charge as an option. Canada also has followed the Softwood Lumber Export Charge Act of 2006 when drafting the legislation for the Fuel Export Charge and the administrative procedures because the model had been acceptable to the United States in the case of the Softwood Lumber Export Charge.

QUERY 8:

We were developing an argument regarding WTO Article XXIII.

We had read that Article XX and XXI disputes are typically handled through the dispute resolution mechanisms of Article XXIII. This would require that a nation with a grievance first bring their action to the attention of the violating nation, which must give some ‘sympathetic consideration’ of the matter at hand. If this fails to produce a resolution of the matter the Dispute Settlement Board makes a ruling, which must be agreed to or, the party must withdraw from the treaty.

The Compromis is rather short on the issue of referring the matter to the ICJ, however are we to assume that the ICJ still adopts the Dispute Settlement Boards standards?

- Are we to assume this matter went through the DSB?
- Do the precedents and procedures regarding the DSB have weight for the ICJ?
- Is there any relevant additional procedural history?
- Have these questions entered into the Jurisdictional area that we are supposed to avoid?

ANSWER:

There is no other procedural history. Assume that the appropriate steps were taken and both Canada and the United States have agreed to the ICJ's jurisdiction. Whether the ICJ is or is not the proper jurisdiction for this matter is not an issue for the students to argue.

C. REQUEST FOR CLARIFICATIONS 3

QUERY:

Is Canada applying the fuel export charge to Mexico? Or to any other country? And is it a temporary or permanent measure?

ANSWER:

Hypothetical fact: If Mexico obtains fuel in this manner, Mexico would pay the fuel surcharge. So far, Mexico has not requested pipeline-delivered fuel.

No other countries would receive pipeline-delivered fuel from Canada. This is a practical result.

The Fuel Export Charge has been passed without a limitation on the term of application. However, the Fuel Export Charge may be changed or reversed at the will of the House of Commons/Senate.

PART II. BENCH BRIEF

I. INTRODUCTION

This problem raises questions relating to treaty interpretation and the National Security Exception. It also raises questions about whether both Canada and the United States have breached provisions of the WTO Agreements and the North American Free Trade Agreement (NAFTA) – because it is necessary to discuss a breach of a treaty before the National Security Exception could apply.

The issues are all current problems in the media:

- 1) The United States has measures in place implementing the Western Hemisphere Travel Initiative. The issue has advanced since the preparation of the Moot Problem for the students.
- 2) The United States has measures in place charging new APHIS fees to trucks, vessels and airplanes arriving in the United States from Canada. In late February 2008, Canada called for the United States to cease charging APHIS fees in certain circumstances.
- 3) Canada has not imposed the Fuel Export Charges (this is a hypothetical fact to balance the Moot Problem). However, on February 26, 2008, Senators Clinton and Obama suggested that, if elected, they may force Canada to renegotiate NAFTA. This caused Canada's Minister of International Trade to make public comments about the energy provisions in NAFTA.
- 4) National Security is an important issue that needs to be discussed. There are few examples where Canada and the United States have disputed the application of the National Security Exception. One example, that never proceeded to a dispute settlement, panel is the Helms-Burton legislation involving Cuba.

To date none of these issues have been widely debated in trade terms. Further, there has been little international jurisprudence referring to the National Security Exception. As a result, the students will be developing nouvelle arguments.

The students are being challenged to develop coherent arguments and avoid “talking out of both sides of their mouths”. There are many situations where students can fall into traps of taking inconsistent positions when attacking their opponent's case and defending their own case. The most successful teams should appear to have developed a higher level view of the issues and placed their arguments within a logical framework. This problem is intended to challenge the students to develop a continuum for use of the National Security Exception (a sample National Security Exception continuum is attached for judges at the end of this Bench Brief). This exercise has not been undertaken in existing jurisprudence or in articles.

This Bench Brief sets out the most basic law applicable to all of the issues. It is expected that the students will have done far more extensive research in addressing the issues in their written and oral presentations. The intention of this Bench Brief is merely to enable a volunteer judge to (1) have a basic understanding of the legal issues while reading the student's written arguments, and

(2) ask questions during the course of oral arguments. This memorandum is not intended to be an exhaustive analysis of the issues.

II. SOURCES OF INTERNATIONAL LAW

The sources of international law are set out in Article 38(1) of the Statute of the ICJ:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

The WTO Agreements (GATT 1994 and GATS included) and the NAFTA are conventions within paragraph 38(1)(a) of the Statute of the ICJ. Further, the *Vienna Convention on the Law of Treaties* (discussed below in section III) is a convention that sets out international administrative laws.

Customary international law requires a constant and uniform practice by states over time, and a belief that the practice is rendered permissible or obligatory by international law (also called *opinio juris*). In the *North Sea Continental Shelf Cases*, the ICJ stated that:

“Not only must the acts concerned amount to a settled practice, but they must also be such, or carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”

(F.R.G. v. Den; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb 20)

General principles of international law may be raised. The nationality principle is that a State may regulate with respect to its nationals.

Note to Judges: Mooters may refer to decisions under the GATT, the WTO Dispute Settlement Body or Appellate Body to assist with interpretation. These decisions are not binding on the Panel in this dispute.

III. TREATY INTERPRETATION

Whether a provision of GATT, 1994, GATS or NAFTA have been breached and whether any of the National Security Exceptions applies are matters of treaty interpretation. The students will

likely have submissions to make on the principles of treaty interpretation and should, for this purpose, refer to the Vienna Convention on the Law of Treaties (VCLT).

Article 26 of the VCLT provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”

Article 31 of the VCLT sets out the rules of interpretation:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
4. A special meaning shall be given to a term if it is established that the parties so intended.

The rules relating to the use of supplementary means of interpreting treaties is set out in Article 32 of the VCLT.

Part IV (Articles 39 - 41) of the VCLT contains the rules relating to the amendment and modification of treaties. Article 39 of the VCLT provides that “[a] treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.”

Article 41 of the VCLT provides the rules for agreements between certain parties of the treaty to modify their obligations: of interpretation:

1. Two or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) the possibility of such a modification is provided for by the treaty; or

- (b) the modification in question is not prohibited by the treaty and:
 - i. does not affect the enjoyment of the other parties of their rights under the treaty or the performance of their obligations;
 - ii. does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
- 2. Unless in a case falling under paragraph 1(d) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

IV. COURT'S JURISDICTION

The two parties have agreed that the International Court of Justice (“ICJ”) has jurisdiction to decide all the issues in dispute, even though there may appear to be a more obviously appropriate forum for deciding one or more of the issues (for example, the dispute settlement mechanisms of the World Trade Organization in connection with GATT and GATS issues, or the NAFTA dispute settlement mechanisms). Article 36(1) of the Statute of the ICJ states that “[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.” In this case, Canada and the United States have agreed to refer their entire dispute to the ICJ. Consequently, it is not intended that the students need to, nor indeed should they, make any submissions concerning the jurisdiction of the ICJ to hear the case.

That being said, the students may attempt to argue that the ICJ does not have jurisdiction to apply the National Security Exception. There is more discussion about this possible line of argumentation in Section V of this Bench Brief.

V. JURISDICTION OF ICJ TO RULE ON APPLICATION OF THE NATIONAL SECURITY EXCEPTION

Students may try to argue that [United States/Canada] have sole discretion to determine what is in their national interest and that the ICJ does not have authority to consider whether the National Security Exception applies. What role is left for the dispute settlement organization, if any, when a Member invokes national security as a justification for the failure to comply with obligations under the covered agreement?

Basis in Case Law

The ICJ decision in the case of *Nicaragua v. United States* clearly indicates the ICJ has jurisdiction to consider the substantive merits of whether the National Security Exception in a treaty has been properly used. The choice of the ICJ as the forum for this dispute makes this case very relevant.

Students may go through the existing GATT cases (e.g., *United States – Imports of Sugar from Nicaragua*, March 13, 1984, GATT B.I.S.D. (31st Supp.); *United States – June 8, 1949, 2 GATT*

B.I.S.D. 28(1952); United States – *Trade Measures Affecting Nicaragua*, 13 October 1986 (unadopted), GATT Doc. (L/605 3) – but none of these cases adequately deal with the issue.

The students may indicate that the issue has not come up under the NAFTA. While there is no decided case, the issue came up in the context of the Helms-Burton anti-Cuba legislation (the *Helms-Burton Demo Critic Solidarity* (Liberated Act of 1996). The United States has avoided a NAFTA or WTO dispute by not punishing certain lawful ownership by foreign companies under Title IV.

Case: *Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), ICJ Reports 1986, paras 221-224

Relevant Treaty Provision: The ICJ was considering the application of the National Security Exception in the *1956 Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua*, Article XXI, paragraphs 1(c) and 1(d):

“the present Treaty shall not preclude the application of measures:

- (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;
- (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary security interests

ICJ Held at paragraph 222-225: return 222. An article that is a national security exception] cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court’s jurisdiction. Being itself an article of the Treaty, it is covered by the provision in Article XXIV that any dispute about the ‘interpretation or application’ of the Treaty lies within the Court’s jurisdiction. [The National Security Exception] defines the instances in which the Treaty itself provides for exceptions to the generality of the other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV. That the Court has jurisdiction to determine whether measures taken by one of the Parties falls within such exception, is also clear a contrario from the fact that the text of [the National Security Exception] of the Treaty does not employ the wording which was already to be found in Article XXI of [the GATT]. This provision of GATT, contemplating exceptions to the normal implementations of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests, in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of necessary measures, not of those considered by a party to be such”.

223. The Court will therefore determine the substantial nature of the two categories of measures contemplated by this Article and which are not barred by the Treaty. No comment is required at this stage on subparagraph 1(c) of [the National Security Exception]. As to subparagraph 1(d), clearly ‘measures...necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security’ must signify measures which the state in question

must take in performance of an international commitment of which any evasion constitutes a breach. A commitment of this kind is acceptable by Members of the United Nations Charter (Art. 25), or, for member... The Court does not believe that this provision of the 1956 Treaty can apply to the eventuality of the exercise of the right of an individual or collective self-defence.

224... The Court has therefore to assess whether the risk run by these “essential security interest” is reasonable and secondly, whether the measures presented as being designed to protect these interests are not merely useful but ‘necessary’.

225. Since [the National Security Exception] contains a power for each of the parties to derogate from the other provisions of the Treaty, the possibility of invoking the clauses of that Article must be considered once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty. The appraisal of the conduct of the United States in light of these relevant provisions of the Treaty pertains to the application of the law rather than to its interpretation, and the Court will therefore undertake this in the context of its general evaluation of the facts established in relation to the applicable law.”

Basis in Applicable Treaties:

The students may try to argue that the dispute settlement provisions within the WTO Dispute Settlement Understanding (DSU), NAFTA and ICJ Statute do not allow the Panel to consider arguments on the application of the National Security Exception. As set out below, the Panel has jurisdiction under the various dispute settlement mechanisms.

ICJ	WTO DSU	NAFTA Article 2004
<p>Article 38 of the Statute:</p> <ol style="list-style-type: none"> 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: <ol style="list-style-type: none"> a. the interpretation of a treaty; b. any question of 	<p>Article 1 of the DSU “... shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreements listed in Appendix 1” ... “subject to special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2.</p> <p>No mention is made in these Appendices to disputes concerning the national security exception.</p> <p>Therefore, the DSU is not limited by the national security exception.</p> <p>A DSU DSB could consider</p>	<p>... the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.</p> <p>NAFTA Annex 2004</p> <ol style="list-style-type: none"> 1. if any Party considers that any benefit it could reasonably have expected to accrue to it under any provision of:

ICJ	WTO DSU	NAFTA Article 2004
<p>international law;</p> <p>c. the existence of any fact, which, if established would constitute a breach of an international obligation;</p> <p>d. the nature or extent of the reparation to be made for the breach of an international obligation.</p> <p>3. ...</p> <p>4. ...</p> <p>5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdictions of the International Court of Justice for the period which they still have to reward in accordance with their terms.</p> <p>6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.</p>	<p>whether the national security exception has been properly invoked.</p> <p>If a WTO Member were able to circumvent the application of the DSU by invoking the national security exception, the WTO system could collapse.</p>	<p>(a) Part Two (Trade in Goods), except for those provisions of Annex 300-A (Automotive Sector) or Chapter Six (Energy) relating to Investment</p> <p>(b) Part Three (Technical Barriers to Trade)</p> <p>(c) Chapter Twelve (Cross Border Trade in Services), or</p> <p>(d) Part Six (Intellectual Property) is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement under this Chapter.</p> <p>2. A Party may not invoke:</p> <p>(a) paragraph 1(a) or (b) to the extent that the benefit arises from any cross-border trade in services provision of Part Two or Three, or</p> <p>(b) paragraph 1(c) or (d) with respect to any measure subject to an exception under Article 2101 (General Exceptions)</p> <p>Article 2101 relates to GATT Article XX exceptions</p>

VI. WESTERN HEMISPHERE TRAVEL INITIATIVE (“WHTI”)

A. INTRODUCTION TO ISSUE

Canada and the United States have not publicly discussed the WHTI in WTO (GATS) or NAFTA terms. However, it is important to know that as a matter of fact, many United States senators (led by Senator Leahy) and many Representatives in Congress (mainly from border states) do not support the requirement for persons travelling by car or vessel to have to present a passport or NEXUS/FAST card as the only form of recognized documentation regarding identification/nationality/citizenship.

As a result, any arguments being made by the students would be nouvelle arguments. The students may approach the issue from a variety of angles and the judges should test the arguments being made by the students.

Of the issues raised in this Moot Problem, the WHTI may be the measure that is the **most difficult to match to a particular breach of a WTO or NAFTA obligation**.

One of the better approaches to the argument would be:

- 1) **United States:** Neither the General Agreement on Trade in Services (“GATS”), nor Chapters 12 and 16 of NAFTA have been breached in any way – there are no provisions directly on point. The United States would also argue that since no provisions of the GATS or NAFTA have been breached, the National Security Exception would not need to be argued by Canada. If the United States presents its arguments as Applicant, the best approach would be to ask to use rebuttal time to reply to Canada’s arguments. **[But it is fair for judges to ask if United States has read Canada’s Memorial]**

Even if there has been a breach of a provision of GATS or NAFTA, the National Security Exception would apply. See Section IX NATIONAL SECURITY EXCEPTION.

- 2) **Canada:** The best approach to this issue is: The United States has nullified or impaired the benefits Canada was receiving and intended to receive upon offering market access in services markets relating to trade in services (e.g., tourism) and mobility of person. The measure that requires U.S. citizens to obtain passports in order to return to the United States from Canada, creates an unnecessary restriction that discourages Americans from travelling to Canada to acquire services and goods.

Some of the more problematic approaches to the issue are as follows:

- 1) **United States:** If United States presents arguments about the consistency of the WHTI with GATS and NAFTA in their Applicant’s submissions to the panel, they could be drawn a discussion and waste valuable time.

- 2) **Canada:** If Canada tries to argue that the United States was not entitled to pass laws relating to production of identification that must be shown at the border, they will have a difficult time arguing that GATS or NAFTA has been breached. If there is no breach of GATS or NAFTA, then the National Security Exception would not need to be defended.

B. WTO PROVISIONS

Canada should argue that when Canada agreed to open its own service markets, it expected to receive certain benefits (especially in border cities and towns where U.S. tourists purchase Canadian Services and where as part of daily life, natural persons buy services (e.g., haircuts, meals, auto repair, etc.). There are many cases where families in border areas live on both sides of the border and cross the border on a regular basis.

Canada's argument would be that the requirement that U.S. citizens present a particular form of identification (a passport), thereby changing a customary practice of accepting other forms of photo identification (e.g., a drivers licence) nullifies and impairs mode 2 and or mode 4 trade in services.

(i) GATS Preamble Excerpt

Members,

Recognizing the growing importance of trade in services for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

...

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right; ...

(ii) GATS Article I - Scope and Definition

GATS defines 4 modes of trade in services (also applies to NAFTA but NAFTA uses different language).

Mode 1: Cross-border trade: from the territory of one Member into the territory of any other Member (e.g., international telephone calls, internet banking, etc.)

- Mode 2: Consumption abroad: in the territory of one Member to the service consumer (e.g., tourist) of any other Member.
- Mode 3: Commercial presence: by a service provider of one Member, through a commercial presence in the territory of another Member (e.g., domestic subsidiaries of foreign insurance companies, film production, hotel chains, retail chains, etc.), and
- Mode 4: Presence of natural persons: by a service supplier (e.g., accountants, lawyers, doctors, teachers, actors, etc.) of one Member, through the presence of natural persons of a Member in the territory of another Member.

The focus should be on Mode 2. Mode 4 would also be relevant. The WHTI raises issues concerning individuals/natural persons crossing the Canada-United States border to receive and provide services.

(iii) GATS Article II - Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
2. ...
3. ...

(iv) GATS Article VI - Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
2. ...
3. ...
4. ...
5. ...
6. ...

(v) GATS Article XXIII - Dispute Settlement and Enforcement

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to

reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

2. . . .
3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

(vi) GATS ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

1. This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.
2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.
3. . . .
4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.

C. NAFTA PROVISIONS

Canada should argue that when Canada agreed to open its own service markets, it expected to receive certain benefits and has been receiving those benefits (especially in border cities and towns where U.S. tourists procure local services). Canada's argument would be that the requirement that U.S. citizens present a particular form of identification (a passport), thereby changing the customary practice of accepting other forms of photo identification, nullifies and impairs trade in services.

(i) NAFTA Article 102

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured nation treatment and transparency, are to:
 - (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
 - (b) promote conditions of fair competition in the free trade area;
 - (c) increase substantially investment opportunities in the territories or the Parties;
 - (d) . . .
 - (e) . . .
 - (f) . . .
2. The Parties shall interpret and apply the Provisions of this Agreement in light of its objectives set out in paragraph 1 and in accordance with this applicable rules of international law.

(ii) NAFTA Article 2004

Except for the matters covered in Chapter Nineteen...the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004. [Emphasis added.]

(iii) NAFTA Annex 2004 – Nullification and Impairment

1. If any Party considers that any benefit it could reasonably have expected to accrue to it under any provision of:
 - (a) Part Two (Trade in Goods), except for those provisions of Annex 300-A (Automotive Sector) or Chapter Six (Energy) relating to investment,
 - (b) . . .
 - (c) Chapter Twelve (Cross-Border Trade in Services), or
 - (d) . . .

is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement under this Chapter.

4. A Party may not invoke:
 - (a) paragraph 1(a) or (b), to the extent that the benefit arises from any cross-border trade in services provisions of Part Two or Three, or
 - (b) paragraph 1(c) or (d),with respect to any measure subject to an exception under Article 2101 (General Exceptions).

(iv) Article 1201: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to cross-border trade in services by service providers of another Party, including measures respecting:

- (a) the production, distribution, marketing, sale and delivery of a service;
- (b) the purchase or use of, or payment for, a service;
- (c) the access to and use of distribution and transportation systems in connection with the provision of a service;
- (d) the presence in its territory of a service provided of another Party; and
- (e) the provision of a bond or other form of financial security as a condition for the provision of a service.

2. This Chapter does not apply to:

- (a) financial services, as defined in Chapter Fourteen (Financial Services);
- (b) air services, including domestic and international air transportation services, whether scheduled or non-scheduled, and related services in support of air services, other than:
 - (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service, and
 - (ii) specialty air services;
- (c) procurement by a Party or a state enterprise; or
- (d) subsidies or grants provided by a Party or state enterprise, including government-support loans, guarantees and insurance.

3. Nothing in this Chapter shall be construed to:
- (a) impose any obligation on a Party with respect to a national of another Party seeking access to its employment market, or employed on a permanent basis in its territory, or to confer any right on that national with respect to that access or employment; or
 - (b) prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

(v) Article 1204: Minimum Standard of Treatment

1. Each Party shall accord to service providers of any other Party the better of the treatment required by Articles 1202 [National Treatment] and 1203 [Most Favoured National Treatment].

(vi) NAFTA Article 1206: Reservations

No reservations were taken regarding documentation at the border.

(vii) NAFTA Article 1208: Liberalization of Non Discriminatory Measures

Each Party shall set out in its Schedule to Annex VI its commitments to liberalize quantitative restrictions, licensing requirements, performance requirements or other non discriminatory measures.

(viii) Article 1601: General Principles

Further to Article 102 (Objectives), this Chapter reflects the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labour force and permanent employment in their respective territories.

(ix) Article 1602: General Obligations

1. Each Party shall apply its measures relating to the provisions of this Chapter in accordance with Article 1601 and, in particular, shall apply expeditiously those measures so as to avoid unduly impairing or delaying trade in goods or services or conduct of investment activities under this Agreement.
2. The Parties shall endeavour to develop and adopt common criteria, definitions and interpretations for the implementation of this Chapter.

(x) Article 1603: Grant of Temporary Entry

1. Each Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security, in accordance with this Chapter, including the provisions of Annex 1603.
2. A Party may refuse to issue an immigration document authorizing employment to a business person where the temporary entry of that person might affect adversely:
 - (a) the settlement of any labour dispute that is in progress at the place or intended place of employment; or
 - (b) the employment of any person who is involved in such dispute.
3. When a Party refuses pursuant to paragraph 2 to issue an immigration document authorizing employment, it shall:
 - (a) inform in writing the business person of the reasons for the refusal; and
 - (b) promptly notifying in writing the Party whose business person has been refused entry of the reasons for the refusal.
4. Each Party shall limit any fees for processing applications for temporary entry of business persons to the approximate cost of services rendered.

(xi) Article 1604: Provision of Information

1. Further to Article 1802 (Publication), each Party shall:
 - (a) provide to the other Parties such materials as will enable them to become acquainted with its measures relating to this Chapter, and
 - (b) no later than one year after the date of entry into force of this Agreement, prepare, publish and make available in its own territory, and in the territories of the other Parties, explanatory material in a consolidated document regarding the requirements for temporary entry under this Chapter in such a manner as will enable business persons of the other Parties to become acquainted with them.

VII. APHIS FEES

A. INTRODUCTION TO ISSUE

Canada and the United States have not publicly discussed the APHIS Fee in WTO (GATS) or NAFTA terms. However, on many occasions, Canada has called on the United States to remove the APHIS Fee.

As a result, any arguments being made by the students would be nouvelle arguments. The students may approach the issue from a variety of angles and the judges should test the arguments being made by the students.

Of the issues raised in this Moot Problem, the APHIS Fee is a more obvious breach of both GATT Article XI and NAFTA Article 310 - or is it?

Some of the better approaches to the argument would be:

- 1) **United States:** The best approach for the United States to strictly interpret the words of NAFTA Article 310 – “No Party may adopt any customs user fee of the type referred to in Annex 310.1 for originating goods.” A technical read of NAFTA Article 310 and Annex 310.1 may show a drafting flaw in NAFTA. The United States could argue that the APHIS fee is different from a merchandise processing fee. If the United States argues that the APHIS Fee is not a customs user fee, then it will have more difficulty justifying the fee under the National Security Exception

If the United States takes the approach that the APHIS fee is not prohibited by NAFTA, it must also discuss GATT Article VIII. Alternatively, the United States may accept the APHIS fee breaches GATT Article VIII, but may try to justify the fee under GATT Article XX(d).

The United States would also argue that Chapter 7 of NAFTA (Sanitary and Phyto-Sanitary Measures) does not prohibit the imposition of the APHIS Fee.

- 2) **Canada:** Canada would argue that the APHIS Fee is prohibited by NAFTA Article 310 and Annex 310.1. Canada would need to rely on the facts that (1) a portion of the fee goes to U.S. Customs and Border Patrol, (2) it is applied in respect of the processing of merchandize traffic, (3) it appears that agricultural related inspections are not being performed for each payment of the fee, and (4) the fee has very little to do with agricultural. Calling a fee on agriculture fee should not distract from the fact the fee is paid at the board.

In NAFTA Annex 310.1 (which cross-references Article 403 of the Canada-United States Free Trade Agreement), the United States agreed to eliminate the merchandise processing fee. In NAFTA Article 310, the United States agreed not to adopt any customs user fee.

Problem: The “merchandize processing fee” is a specific fee under U.S. law.

Alternative approach that would demonstrates Excellent Advocacy Skills: APHIS Fee is a disguised restriction on trade that is prohibited by NAFTA Article 712.6 “No Party may adopt, maintain or apply any sanitary or phyto-sanitary measure with a view to, or the effect of, creating a disguised restriction on trade between the Parties.” If Canada makes this argument, it will be more difficult for United States to justify the APHIS Fee under the National Security Exception.

Alternative Approach: Canada may argue that the APHIS Fee breaches GATT Article VIII because there is no connection between the fee and the approximate cost of the services rendered. In some cases, it does not appear any services are rendered when the APHIS fee is charged.

Some of the more problematic approaches to the issue are as follows:

- 1) United States: If United States presents in their Applicant's submissions to the judges arguments about the consistency of the APHIS Fee with NAFTA and does not also discuss GATT, they would leave themselves exposed (and vice versa).
- 2) Canada: If Canada does not argue that the APHIS Fee is a fee relating to inspections for sanitary or phyto-sanitary purposes, Canada might limit its arguments regarding the lack of application of the National Security Exception.

Canada may have difficulties because the "merchandise processing fee" is a specific fee under U.S. law. Canada may try to argue that the APHIS Fee is contrary to customary international law because Canada has been exempted. Canada may also try to argue that the NAFTA Parties negotiated on the understanding that new customs fees are prohibited. These arguments may be challenged by the panel.

If Canada argues that the APHIS Fee breaches the United States' most-favoured nation treatment obligation because it is a fee imposed disproportionately against goods from Canada, then Canada may box itself in a corner when justifying the Fuel Export Charge because the Fuel Export Charge is disproportionately imposed on fuel exported to the United States (because Canada does not use a pipeline to send fuel to many other jurisdictions).

B. WTO PROVISIONS

(i) GATT Article I

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

(ii) GATT Article VIII

1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III)

imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent and indirect protection to domestic products or a taxation of imports or exports for fiscal purposes;

- (b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a);
- (c) The contracting parties also recognize the need for minimizing the incidence and complexity of importing and exporting formalities and for decreasing and simplifying import and export documentation requirements.

2. ...

3. ...

4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those in relation to:

- (a) consider transactions such as consular invoices and certificates;
- (b) quantitative restrictions;
- (c) licensing;
- (d) exchange control;
- (e) statistical services;
- (f) documents, documentation and certifications;
- (g) analysis and inspection; and
- (h) quarantine, sanitation and fumigation;

(iii) GATT Article XX(d)

1. Subject to the requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.

- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to customs enforcement...

C. NAFTA PROVISIONS

(i) NAFTA Article 310

1. No Party may adopt any customs user fee of the type referred to in Annex 310.1 for originating goods.
2. The Parties specified in Annex 310.1 may maintain existing such fees in accordance with that Annex.

(ii) Annex 310.1

Section B – United States

1. The United States shall not increase its merchandise processing fee and shall eliminate such fee according to the Schedule set out in Article 403 of the Canada – United States Free Trade Agreement on originating goods where those goods qualify to be marked as goods of Canada pursuant to Annex 311, without regard to whether the goods are marked.
2. The United States shall not increase its merchandise processing fee and shall eliminate such fee by June 30, 1999, on originating goods where those goods qualify to be marked as goods of Mexico pursuant to Annex 311, without regard to whether the goods are marked.

(iii) Article 403 of Canada – United States Free Trade Agreement

1. Neither Party shall introduce customs user fees with respect to goods originating in the territory of another Party.
2. Subject to paragraph 3, the United States of America may change the level of existing customs user fees.
3. The United States of America shall eliminate existing customs user fees on goods originating in the territory of Canada according to the following schedule:
 - (a) with respect to goods entered or withdrawn from warehouse for consumption on or after January 1, 1990, the user fee shall be 80% of the user fee otherwise applicable on that date;
 - (b) with respect to goods entered into or withdrawn from warehouse for consumption on or after January 1, 1991, the user fee shall be 60% of the user fee otherwise applicable on that date;
 - (c) with respect to goods entered into or withdrawn from warehouse for consumption on or after January 1, 1992, the user fee shall be 40% of the user fee otherwise applicable on that date;

- (d) with respect to goods entered into or withdrawn from warehouse for consumption on or after January 1, 1993, the user fee shall be 20% of the user fee otherwise applicable on that date;
- (e) with respect to goods entered or withdrawn from warehouse for consumption on or after January 1, 1994, there shall be no customs user fee.

VIII. FUEL EXPORT CHARGE

A. INTRODUCTION TO ISSUE

The imposition by Canada of the Fuel Export Charge is a hypothetical fact inserted into this Moot Problem for balance. As a result, Canada and the United States have not publicly discussed the Fuel Export Charge in WTO or NAFTA terms. As a result, any arguments being made by the students would be nouvelle arguments. The students may approach the issue from a variety of angles and the judges should test the arguments being made by the students.

Some of the better approaches to the issue would be:

- 1) **United States:** The Fuel Charge breaches NAFTA Article 604 because it is a duty or charge that is not imposed on fuel shipped by pipeline within Canada.
- 2) **Canada:** Canada could argue that the United States waived application of NAFTA Article 314 when it required Canada to sign the Softwood Lumber Agreement. [It will be harder for Canada to argue that the United States also waived application of NAFTA Article 604]

Canada could argue that it has not breached GATT Article I because the Fuel Export Charge is applied to all exports and not just exports to the United States. Canada could argue it has not breached GATT Article VIII because there is no evidence that the fee is being imposed to protect domestic production. Canada could argue it has not breached GATT Article XI because it has not prohibited or restricted exports.

Some of the more problematic approaches to the issue are as follows:

- 1) **United States:** Any argument other than a breach of NAFTA Article 604 or 314.
- 2) **Canada:** If Canada takes too long to argue that a breach of NAFTA Article 604 or 314 has not occurred. Canada's focus should be on the application of the National Security Exception. [Discussed in National Security Exception section].

B. WTO PROVISIONS

(i) GATT Article I

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

(ii) GATT Article VIII

1.
 - (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent and indirect protection to domestic products or a taxation of imports or exports for fiscal purposes;
 - (b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a);
 - (c) The contracting parties also recognise the need for minimizing the incidence and complexity of importing and exporting formalities and for decreasing and simplifying import and export documentation requirements.

(iii) GATT Article XI

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
2. The provisions of paragraph 1 of this Article shall not extend to the following:

[none are applicable]

C. NAFTA PROVISIONS

(i) NAFTA Article 602: Scope and Coverage

1. This Chapter applies to measures relating to energy and basic petrochemical goods originating in the territories of the Parties and to measures relating to investment and to the cross-border trade in services associated with such goods, as set forth in this Chapter.
2. List-[assume within list].

(ii) NAFTA Article 604: Export Taxes

No Party may adopt or maintain any duty, tax or other charge on the export of any energy or basic petrochemical good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on:

- (a) exports of any such good to the territory of all other Party; and
- (b) any such good when destined for domestic consumption.

(iii) NAFTA Article 605: Other Export Measures

Subject to Annex 605, a Party may adopt or maintain a restriction otherwise justified under Article XI:2(a) or XX(g)(i) or (j) of GATT with respect to the export of an energy or basic petrochemical good to the territory of another Party, on if...

(iv) NAFTA Annex 605 – Relates only to Mexico

(v) NAFTA Article 314 - Export Taxes

Except as set out in Annex 314, no Party may adopt or maintain any duty, tax or other charge, on the export of any good to the territory of an other Party, unless such duty, tax or charge is adopted or maintained on:

- (a) exports of any such good to the territory of all other Parties; and
- (b) any such good when destined for domestic consumption.

(vi) Annex 314 - Relates to Mexico Only

(vii) NAFTA Article 315 – Other Export Measure

1. Except as set out in Annex 315, a Party may adopt or maintain a restriction otherwise justified under Articles XI:2(a) or XX(g),(i) or (j) of the GATT with respect to the export of a good of the Party to the territory of another Party only if:
 - (a) the restriction does not reduce the proportion of the total export shipments of the specific good made available to that other Party relative to the total

supply of that good of the Party maintaining the restriction as compared to the proportion prevailing in the most recent 36-month period for which data are available prior to the imposition of the measure, or in such other representative period on which the Parties may agree;

- (b) the Party does not impose a higher price for exports of a good to that other Party than the price charged for such good when consumed domestically, by means of any measure, such as licenses, fees, taxation and minimum price requirements. The foregoing provision does not apply to a higher price that may result from a measure taken pursuant to subparagraph (a) that only restricts the volume of exports; and
- (c) the restriction does not require the disruption of normal channels of supply to that other Party or the normal proportions among specific goods or categories of goods supplied to that other Party.

The Parties shall cooperate in the maintenance and development of effective controls on the export of each other's goods to a non-Party in implementing this Article.

(viii) NAFTA Annex 315

Article 315 shall not apply as between Mexico and the other Parties.

IX. NATIONAL SECURITY EXCEPTION

A. INTRODUCTION TO ISSUE

The key issue for the teams to cover is the application of the various forms of the National Security Exception found in the GATT, 1994, GATS and the NAFTA. There have been no cases involving Canada and the United States where the National Security Exception has been raised in argument. Further, there are few cases where the National Security Exception in a trade agreement has been fully litigated. As a result, any arguments being made by the students would be nouvelle arguments. The students may approach the issue from a variety of angles and the judges should test the arguments being made by the students.

Please refer to the charts in PART III to see questions relating to the application of the National Security Exception.

(i) WHTI

Some of the better approaches to the justification/lack of justification of the National Security Exception would be:

- 1) **United States:** It is appropriate in a time of war (and the United States is involved in a war in Iraq and against terrorists throughout the world) to pass legislation to know who is entering the country. Under customary international law, countries are allowed to impose passport/identification requirements. The United States is merely removing certain weaknesses in its existing passport rules.

- 2) **Canada:** United States cannot use the National Security Exception in order to protect itself from its own citizens. Canada's issue is the requirement that U.S. citizens must show a passport when re-entering the United States. The State driver's license should be acceptable because it is generated by State Governments. The United States is not at war with itself and cannot use the National Security Exception in this manner.

Alternative Argument: The United States is not at war with Canada (or itself). The WHTI is not "necessary for the protection of its essential security interests" as it is not at war with Canada and there is not other emergency in international relations with Canada.

Some of the more problematic approaches to the issue are as follows:

- 1) **United States:** Any approach that accuses Canada as being a haven for terrorists.
- 2) **Canada:** Any approach that suggests Canadians should not be required to show identification when entering the United States.

(ii) **APHIS Fee**

Some of the better approaches to the justification/lack of justification of the National Security Exception:

- 1) **United States:** It is appropriate in a time of war to inspect aircraft, vessels and trucks entering the United States to find items that may harm Americans.
- 2) **Canada:** The APHIS Fee cannot be justified using the National Security Exception because the fee is imposed by the United States Animal and Plant Health Inspection Service of the U.S. Department of Agriculture. It is not the responsibility of APHIS to protect national security interests.

If Canada has argued that the APHIS Fee has breached GATT Article VIII on the basis there is no connection between the fee and the approximate cost of the services rendered Canada could argue that the APHIS Fee is merely a money grab and does not protect national security interests because inspections are not undertaken. As a consequence, the requirement that the fee be "necessary" cannot be satisfied.

Some of the more problematic approaches to the issue are as follows:

- 1) **United States:** The United States is justified in imposing the APHIS Fee to pay for equipment and personnel to inspect cargo entering the United States for goods that may harm Americans. If the United States takes this approach, Canada's Fuel Export Charge may be justified on the same basis.
- 2) **Canada:** Any argument that inspections are not necessary.

If Canada argues that the imposition of a fee can never be a justified use of the National Security Exception because the imposition of fees can never be “necessary”. If Canada takes this approach, it cannot argue that the Fuel Export Charge is justified under the National Security Exception

(iii) Fuel Export Charge

Some of the better approaches to the justification/lack of justification of the National Security Exception would be:

- 1) **United States:** Best response would be the National Security Exception specific to petroleum products in NAFTA Article 607 is too restrictive in its wording and cannot be used by Canada to justify the Fuel Export Charge. The United States may argue that the wording of NAFTA Article 607 Chapeau limits the application to “measure(s) restricting imports of an energy or basic petrochemical good from, or exports of an energy or basic petrochemical good. . .”. The United States is complaining about export taxes, which cannot be justified under NAFTA Article 607 because they are not “restrictions”.

The United States would also have to argue that NAFTA Article 2102 does not apply. The United States would argue that the imposition of a fee to fund the purchase and installation of security equipment is too remote or removed from a national security purpose.

- 2) **Canada:** The Fuel Export Charge is justified under NAFTA Article 607(c) because it is a measure to implement an international agreement (between Canada and the United States) relating to the non proliferation of nuclear weapons or other explosive devices (because Canada is installing security equipment to detect nuclear weapons, materials and other explosive devices at the request of the United States.

Alternatively, if NAFTA Article 607(c) does not apply, the Fuel Export Charge is justified under NAFTA Article 2102(1)(b) because it “relates to the traffic in arms, ammunition...other goods and services...undertaken directly or indirectly for the purpose of supplying [an] ... other security establishment”. The Fuel Export Charge relates to equipment to be constructed at secured border checkpoints between Canada and the United States.

If the United States has raised GATT at any point in argument, Canada shall jump on the fact NAFTA Article 607 cannot be applicable in the context of GATT despite what it says. However, this would not help Canada respond to the stronger NAFTA Arguments made by the United States.

B. COMMENTARY

Before discussing the WTO and NAFTA Provisions, the following commentary may provide guidance as to how the concept of National Security has been or should be viewed. Judges should look for statements that resonate with them.

Meaning of the term “National Security”¹

- “National security” is an inherently vague concept that is hard to define. Existing definitions include many variables, vague terms, uncertainty, greater leeway for discretion, and flexibility of implementation.
- “National security” is linked to perceptions of threats by the citizenry and leadership of any particular nation. For their part, perceptions of threat are intertwined with perceptions of the interests that the endangered are threatened.
- “National security” is an amorphous, open-ended concept that is amenable to legal and political manipulation.
- “National security” is not a term of art, with precise, analytic meaning. At its core the phrase refers to the government’s capacity to defend itself from violent overthrow by domestic subversion or external aggression. But it also encompasses simply the ability of the government to function effectively so as to serve our interests at home and abroad. Virtually any government program, from military procurement to highway construction and education, can be justified in part as protecting the national security.²

Jackson on National Security and Free Trade

“National security considerations have carried special rights in debates concerning free trade, where the arguments for exceptions to otherwise liberal trade policies is often heard. Thus, it is argued that restrictions on imports may be required in order to protect domestic industries that are deemed important for national security. It is also the case that national security considerations are used to restrict exports of “sensitive products”, or to limit foreign investment possibilities. The economic validity of such policies set aside, it has been noted that the concept of national security has been proven highly elastic, being invoked to justify restrictions on such unlikely imports as clothes pegs from Poland on the ground that domestic productive capabilities in clothes pegs would be required in the event of hostilities with the (former) Communist Bloc Countries. National security constitutes one of the general exceptions to international trade agreements such as the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA). In both contexts, the language used has been described as “broad, self-judging, and ambiguous” – undoubtedly the result of definitional difficulties attributed to above, and the permeation of national security rhetoric and thinking in many aspects of traditionally availed activity.

(John H. Jackson, *The World Trade System: Lawyer Policy of International Economic Rotations* MIT RESS 1997 229-239)

Us vs Them Mentality

¹ See *Law in Times of Crises: Emergency Powers in Theory and Practice*.

² “The National Security Interest and Civil Liberties”, (1972) 85 *Harvard Law Review* 1130 at 1133

“In times of crisis, when emotions run high, the dialectic of “us versus them” serves several functions. It allows people to vent fear and anger in the face of actual or perceived danger, and direct negative emotional energies towards groups or individuals clearly identified as different. The same theme also accounts for the greater willingness to confer emergency powers of the government when the “other” is well defined and clearly separable from the members of the community. The clearer the distinction between “us” and “them” and the greater threat “they” pose to “us”, the greater the scope the powers assumed by government and tolerated by the public become.’

(Law in Times of Crises: Emergency Powers in Theory and Practice, pages (220-221))

“The fact that the targets of emergency and counter-terrorism measures are perceived as outsiders, frequently foreign ones, has important implications when communities set out to strike a proper balance between liberty and security in terms of a crisis. Targeting outsiders may also be seen as bearing relatively little political cost. In fact it may be considered as politically beneficial, while the benefits (perceived or real) of fighting terrorism and violence accrue to all members of a society, the costs of such actions seem to be borne by a distinct and ostensibly well-defined group of people. Moreover, in as much violent emergencies...the danger is that political leaders will tend to strike a balance disproportionately in favour of security and impose too much of a cost on a target group.

(Law in Times of Crises: Emergency Powers in Theory and Practice, pages 220-221)

C. WTO PROVISIONS

(i) GATT Article XXI: Security Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers to its essential security interest; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interest
 - (i) relating to fissionable materials or materials or materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or

- (iv) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Comment: An argument may be made that (a)(i), (b)(ii) and (c) clearly would not apply.

With respect to XXI: (b)(iii) the questions would be:

1. is the action (measure) necessary for the protection of its essential security interest?
2. is the action (measure) taken in a time of war?
3. is the action (measure) taken in a time of an other emergency in international relations?

(ii) GATS Article XIV bis - Security Exceptions

1. Nothing in this Agreement shall be construed:
 - (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
 - (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:
 - (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
 - (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
 - (iii) taken in time of war or other emergency in international relations; or
 - (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

D. NAFTA PROVISIONS

(i) NAFTA Article 2102: National Security

- 1) Subject to Articles 607 (Energy-National Security Measures) and 1018 (Governmental Procurement-Exceptions), nothing in this Agreement shall be construed:

- (a) To require any party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
 - (b) To prevent any party from taking any action that it considers necessary for the protection of its essential security interests
 - (i) taken in time of war or other emergency in international relations; or
 - (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or
 - (c) To prevent any party from taking action in pursuance of its obligations under the United National Charter for the maintenance of international peace and security.
- (ii) NAFTA Article 607**
- 1) Subject to Annex 607, no Party may adopt or maintain a measure restricting imports of an energy or basic petrochemical good from, or exports of an energy or basic petrochemical good to, another Party under Article XXI of the GATT or under Article 2102 (National Security), except to the extent necessary to
 - (a) supply a military establishment of a Party or enable fulfillment of a critical defence contract of a Party;
 - (b) respond to a structure of armed conflict involving the Party taking the measure;
 - (c) implement national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices; or
 - (d) respond to direct threats of disruption in the supply of nuclear materials for defence purposes.

E. CASES

In 1982, in response to Argentina's attempted annexation of the Falkland/Malvinas Islands, the EC, Australia and Canada imposed trade restrictions against Argentina. In discussions at the GATT Council, the EC, Australia and Canada argued that they permitted to impose the measures pursuant to the National Security Exception. The GATT Council did not accept the arguments and issued a "Decision concerning Article XXI of the General Agreement", which read in part as follows:

Considering that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved;

Noting that recourse to Article XXI could ... affect benefits accruing to contracting parties under the General Agreement;

Recognizing that ... until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its applications;

The CONTRACTING PARTIES decide that:

1. Subject to the exceptions in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.
2. **When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement [Emphasis Added].**

PART III. QUESTIONS FOR JUDGES TO ASK

I. FAIR PROCEDURAL JURISDICTIONAL QUESTIONS

JUDGES: Do not ask any questions as to why this case is at the ICJ as opposed to other forum

The following are some examples of procedural questions to test the Mooters' knowledge of procedure:

1. What are the sources the ICJ may consider in weighing the merits of this dispute?
2. If a Mooter makes arguments based on a written article, is [author] a recognized authority?
3. If a Mooter makes arguments based on "customary international law", ask for sources and explanations **[but do not belabour the point]**.
4. If a Mooter makes arguments based on international law principals, ask for sources and explanations **[but do not belabour the point]**.
5. Where is this argument located in your memorial?
6. Have you reviewed the [Respondent's] memorial? **[Ask this question if United States informs the panel it will provide its arguments in rebuttal to Canada's points on the issue]**.

II. BREACHES OF INTERNATIONAL OBLIGATIONS – UNITED STATES

Measure	Breach/No Breach	Questions from Panel
Fuel Export Charge	<i>Breach</i> – The United States would argue that Canada has breached NAFTA Article 604.	<ol style="list-style-type: none"> 1) If Canada has raised an argument that exempts exports of fuel products from GST (5%) and excise taxes, panel could ask the United States [if] Canada would be entitled to impose the Fuel Export Charge up to the amount that domestic consumers would be required to pay. 2) The United States required Canada to waive application of NAFTA Article 314- Does the waiver of Article 314 in connection with the Softwood Lumber Agreement permit Canada's imposition of the Fuel Export Charge?
Fuel Export		<ol style="list-style-type: none"> 3) Did the United States waive the prohibition on export taxes when it entered

Measure	Breach/No Breach	Questions from Panel
Charge cont.		into the Softwood Lumber Agreement with Canada, which requires an export tax. Assuming that the United States needs Canada fuel and consumption will not decrease.
		4) Is the Fuel Export Charge justified under NAFTA Article 605? [Students should take the position NAFTA Article specifically addresses Export Taxes]
APHIS Fee	<i>No Breach</i> – The United States would argue that it has not been breached. NAFTA Article 310	1) If the United States argues that the APHIS fee is not a customs user fee, the panel may ask for a definition of “customs user fee”. 2) If the United States argues that the APHIS fee is not “the merchandize processing fee”, the Panel may ask for details about the merchandise processing fee. 3) Is the APHIS fee charged for processing goods, inspecting goods? 4) Isn’t a rose by any other name still a rose? 5) If Canada argues that the APHIS fee is a disguised restriction on trade, Panel should ask the United States whether the APHIS fee artificially increases the price on manufactured goods to protect the US manufacturing jobs.
WHTI	<i>No Breach</i> – The United States would argue that there has been no breach.	1) If the United States argues that none of the NAFTA or GATS provisions have been breached, then there are no questions to ask until rebuttal, if raised.

Measure	Breach/No Breach	Questions from Panel
WHTI cont.		<p>1) If United States makes arguments concerning:</p> <ol style="list-style-type: none"> 1) precautionary principle 2) preventative action principle 3) State responsibility <p>United States may be following old bench briefs made available to them</p> <p>Judges may ask questions about these principles OR may ask whether United States should be discussing the application of the National Security Exception as justification</p> <p>Semi-final Round and Final Round judges may ask about these principles to determine whether United States correctly moves the argumentation to the National Security Exception</p>
	<i>No Breach</i> – NAFTA Chapter 12	<p>If Canada takes the position that the benefits it receives from opening its market to tourism and services Americans come to Canada to receive, the panel should ask:</p> <ol style="list-style-type: none"> 1) Does NAFTA apply to the benefits Canada expected to receive as the result of liberalizing its services markets. 2) Surely NAFTA is circumvented if one Party in realty or metaphorically by measures erects a wall around the Party and places restrictions on its natural persons going to the other Party. 3) Surely the acceptance of state governmental issued identification would be less restrictive. <p>If the Mooters respond that State drivers licenses can be duplicated and forged:</p> <ul style="list-style-type: none"> - passports can be forged?

Measure	Breach/No Breach	Questions from Panel
		<p>- What about biometric/electronic drivers licenses</p> <p>4) Is there evidence of any recent problem involving identification?</p> <p>5) Is the problem that the United States is unable to identify criminals/terrorists within the United States and the WHTI is intended to help the Department of Homeland Security when such individuals return to the United States if they go to Canada?</p> <p>6) What does this say about the U.S. internal-measures to detect threat.</p> <p>7) Is the WHTI intended to identify circumstances who return to the United States when they return from Canada or Mexico? [If the students answer yes – then this will create a problem of the National Security Exception arguments.]</p>

III. BREACHES OF INTERNATIONAL OBLIGATIONS – CANADA

Measure	Breach/No Breach	Questions from Panel
Fuel Export Charge	<i>No Breach</i> – Canada would argue that the United States waived application of NAFTA rules relating to export taxes when it negotiated and signed the Softwood Lumber Agreement.	<p>1) Does Canada impose the Fuel Export Charge on fuel sent by pipeline within Canada for domestic consumption?</p> <p>2) If Canada raises other taxes that it imposes on domestic supplies of fuel (such as federal goods and services tax, federal excise tax, provincial fuel taxes) that Canada does apply to exports then the panel should ask:</p> <p>(a) Is Canada arguing that it does impose duties, taxes, charges on domestic sales that it does not impose on export sales</p> <p>(b) whether Canada is arguing that the Fuel Export Charge is justified up to the amount of the previous exempt amounts</p> <p>(c) Would the Fuel Export Charge be</p>

Measure	Breach/No Breach	Questions from Panel
		<p>justified at the set amount of \$25/barrel instead of removing the exemptions.</p> <p>3) If Canada argues United States waived Article 314 when it required Softwood Lumber Export Charge, Panel can ask questions about the waiver</p> <ul style="list-style-type: none"> - was it a total waiver? - was it a partial waiver? - are there official documents to substantiate the claims of a waiver? - what provisions of NAFTA allows for the waiver? <p>4) Assuming Canada has waived Article 314, what about Article 604?</p>
APHIS Fee	<i>Breach</i> – Canada would argue that the United States has breached NAFTA Article 310.	<p>1) Isn't the merchandise processing fee a specific fee imposed under U.S. law?</p> <p>2) Isn't the APHIS fee an agricultural fee imposed by the Department of Agriculture and, therefore, cannot be a customs fee?</p> <p>3) If Canada refers to Article 712.6 and argues that the APHIS fee is a disguised restriction on trade, how does the fee restrict trade?</p> <p>4) What is a disguised restriction on trade?</p>
WHTI	<i>Breach</i> – Canada will argue that the United States has breached GATS and NAFTA Chapters 12 and 16.	See discussion about best and worst arguments (pages ♦ to ♦ of this Bench Brief)
		<p>GATS</p> <p>1) Did Canada agree to liberalize trade in tourism services areas in the Uruguay Round</p>
WHTI cont.		NAFTA Chapter 12

Measure	Breach/No Breach	Questions from Panel
		1) Did Canada agree to liberalize trade in tourism service areas under NAFTA 2) Which service areas did Canada expect to receive benefits as the result of liberalization?
		NAFTA Chapter 16 Does the NAFTA state anything about the identification required for temporary entry?

IV. UNITED SECURITY EXCEPTION – UNITED STATES

Measure	Justified Use/ Unjustified Use	Questions from Panel
All Combined	<i>Justified</i> – The United States could argue that it is justified whenever it claims National Security Exception.	1) Why did the United States file the case against Canada regarding the Fuel Export Charge if all you have to do is claim National Security Exception? 2) Are you familiar with the ICJ Decision in <i>Nicaragua v The United States</i> ?
WHTI	<i>No Breach</i> – The United States would argue that there has been no breach of substantive provisions, therefore, no need to argue National Security Exception.	
	<i>Justified</i> – The United States would argue justified use of National Security Exception.	To Challenge: 1) If United States raises “War on Terror”, President Bush commenced War on Terror in 2001, justify the use of the National Security exception against Canada in 2006 and 2008/2009 when no new attacks.
WHTI cont.		2) How does requiring United States citizens to show passports link to the War on

Measure	Justified Use/ Unjustified Use	Questions from Panel
		<p>Terror?</p> <p>3) Shouldn't the United States' federal government trust birth certificates and drivers' licenses and other photo identification (other than passports) issued in the United States?</p> <p>4) What is the emergency in international relations with Canada? What event has occurred?</p> <p>5) Could the WHTI be characterized as a measure demonstrating an "us" versus "them" mentality?</p>
APHIS Fee	<p><i>No Breach</i> – The United States would argue that there is no breach of substantive provisions, therefore, no need to argue National Security Exception.</p>	
	<p><i>Justified</i> – The United States would argue justified use of the National Security Exception.</p>	<p>1) How is the APHIS part of the fee related to National Security?</p> <p>2) Did United States' Officials announce the APHIS Fee was being imposed to inspect for pests and diseases?</p> <p>3) How can the APHIS Fee be related to National Security when Canadians are cleared for entry into the United States at some Canadian airports?</p> <p>4) How can the APHIS Fee be related to National Security when the majority of cars are not x-rayed or inspected?</p> <p>5) How can the charge be the same for each passenger/ car/truck/ vessel when some are searched and others are not searched or inspected?</p>

Measure	Justified Use/ Unjustified Use	Questions from Panel
APHIS Fee cont.		<p>6) Recognising that Canada had been excepted from payment of the APHIS Fee, how can the United States justify extending the requirement to Canada traffic when it is not at war with Canada and Canada is implementing measures to protect the United States.</p> <p>7) Is inspection in Canada and the United States redundant? The United States has asked and Canada has been willing to improve security measures.</p> <p>8) Canada and the United States have created Integrated Border</p> <p>9) Where joint teams of United States and Canadian officers conduct inspections, is the APHIS Inspection redundant?</p> <p>10) Canada uses radiation detection equipment, gamma-ray equipment, biometrics, cameras, x-ray equipment and other methods of detection, is the APHIS inspection redundant?</p> <p>11) The United States has approved Canada suppliers under GTOPAT, is APHIS inspection necessary for National Security</p> <p>12) How many layers of security can the United States justify on the basis of National Security?</p> <p>13) How can the United States justify using the National Security Exception when it is not at war with Canada and there has been no emergency in international relations between Canada and the United States?</p> <p>14) If the United States raises Ahmed Ressam (the “Millennium Bomber”), the judges should ask whether there have been any other reported incidents since 2000.</p>

Measure	Justified Use/ Unjustified Use	Questions from Panel
APHIS Fee cont.		<p>15) Did the United States raise in its APHIS arguments the issue of dirty bombs from Canada? If so, the Judges may ask whether Canada's Fuel Surcharge is justified under NAFTA Article 607(c)?</p> <p>16) If the United States argues that Canada is not justified in imposing the Fuel Export Charge to fund the purchase of equipment, how is that different than the APHIS Fee which, presumably, is being imposed to fund equipment purchases and labour of border officers</p>
Fuel Export Charge	<i>Not Justified</i> – The United States would argue that Canada is not justified in its use of the National Security Exception.	<p>Judges challenge by the following questions.</p> <ol style="list-style-type: none"> 1) How can the United States justify the APHIS fee (a duty or charge) under the National Security Exception but not the Fuel Export Charge? 2) Is the United States estopped from challenging the use by Canada of the National Security exception when the measures that the fee will pay for have been requested by the United States for National Security reasons? 3) Why shouldn't Canada require the United States citizens to indirectly pay for the security measures it puts in place? 4) Is the United States unable to deny the application by Canada of the National Security Exception because Canada is protecting the United States in a time of war or other emergency in international relations.

Measure	Justified Use/ Unjustified Use	Questions from Panel
Fuel Export Charge cont.		5) If the United States justifies the WHTI or APHIS fee on the basis of the National Security Exception on the grounds of the war in Iraq or war on Terror - Isn't Canada involved in a war in Afghanistan and the same war on Terror as the United States and therefore justified in invoking/relying on the National Security Exception?

V. NATIONAL SECURITY EXCEPTION - CANADA

Measure	Justified Use/ Unjustified Use	Questions from Panel
All Combined	<i>Justified</i> – Canada could argue that it is justified whenever it claims National Security Exception.	1) Why did the Canada file the countersuit and take the position that the National Security Exception would not apply? If Canada takes the position that the panel lacks jurisdiction, please refer to <i>Jurisdiction</i> section of the Bench Brief.
Fuel Export Charge	<i>Justified</i> – Canada could argue that it is justified in using of the National Security Exception because the United States has asked for the thickening of the border for its National Security	1) Is Canada arguing that the United States is precluded from challenging Canada's use of the National Security Exception based on its own positions? (Estoppel) 2) What is the connection between Fuel Export Charge and National Security? 3) Are the fees and the National Security Measures (x-ray equipment, etc.) separated from each other? 4) If the measures to be paid for using the fees are for the National Security of the United States, how can Canada invoke the National Security Exception? 5) If Canada focuses on NAFTA Article 2102, the panel should ask about the application of the more specific NAFTA Article 607 – which exception would apply?

Measure	Justified Use/ Unjustified Use	Questions from Panel
Fuel Export Charge cont.		<p>6) If Canada argues that the measure is “necessary to (i) implement . . . international agreements relating to the non-proliferation of nuclear weapons or other explosive devices, the panel should ask questions about the Canada-United States agreement coming out of Montebello relating to security</p> <p>7) How can Canada justify using the National Security Exception when it is not at war with the United States and there has been no emergency in international relations between Canada and the United States?</p> <p>8) Is Canada prevented from relying on the National Security Exception in GATT Article XXI or NAFTA Article 2102 on the basis it is protecting the National Security Interests of the United States and not its own security interests?</p> <p>9) If Canada justifies the Fuel Export Charge on the basis of the National Security Exception on the grounds of the war in Afghanistan/Iraq or war on Terror – Isn’t the United States the Party who made the declaration of war and also justified in relying on/invoking the National Security Exception?</p>
WHTI	<i>Not Justified</i> – The United States is not justified.	<p>1) All countries impose passport requirements, what is the problem?</p> <p>2) What is wrong with asking for a secure form of identification?</p>
APHIS Fee	<i>Not Justified</i> – The United States is not justified.	<p>1) Shouldn’t the United States charge for the manpower and equipment to search for terrorists and dirty bombs?</p> <p>2) If Canada has argued that the APHIS Fee is not justified, ask how can Canada argue the National Security Exception applies to the Fuel Export Charge and not the APHIS Fee? Is Canada’s position inconsistent?</p>

National Security Continuum Suggestions Only

Notes to Judges
1) Try to get students to show they have developed their own National Security Continuum

