

## 2007-08 NIAGARA INTERNATIONAL MOOT COURT PROBLEM

### *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 travellers, including Canadian and Americans, to carry a valid passport or other appropriate secure documentation when travelling to the United States from within the Western Hemisphere. The first phase was implemented as of January 23, 2007 and applied to all travellers 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 travelling 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 phytosanitary 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 travellers 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 travellers 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 travellers 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 travellers 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 travellers 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 traveller 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 American 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:

- 1) Canada will build screening facilities at least 1 kilometer 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/Pembia, North Portal/Portal, St. Stephen/Calias, Belleville/Houlton, Stanstead/Derby Line, St. Armand/Highgate, Lacolle/Champlain, Coutts/Sweet Grass, Surrey/Blaine, and Delta/Pointe Roberts;

- 2) Canada will erect ground sensor towers along the Canada-United States border;
- 3) 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.
2. 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 focussed, concise and persuasive manner.