

**2007-08
NIAGARA INTERNATIONAL MOOT COURT COMPETITION**

**A Dispute Arising Under
The Statute of the International Court of Justice
March 2008**

**THE GOVERNMENT OF
THE UNITED STATES OF AMERICA
(Applicant)**

v.

**THE GOVERNMENT OF
CANADA
(Respondent)**

**MEMORIAL OF THE APPLICANT
TEAM # 2008-01 A**

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JURISDICTIONAL STATEMENT

The Government of the United States of America, together with the Government of Canada, hereby submits the following dispute to the International Court of Justice by special agreement for resolution pursuant to Articles 36(1) and 40(1) of the Statute of the International Court of Justice.

QUESTIONS PRESENTED

- I. DOES CANADA'S DISCRIMINATORY EXPORT TAX VIOLATE NAFTA AND GATT?
 - A. Does Canada's tax violate GATT Articles I, VII and XI and NAFTA Chapters 3 and 6 when it discriminates against American consumers, was imposed for fiscal purposes, and creates unnecessary regulatory impediments to trade?
 - B. Is Canada's tax justified by a general exception in GATT Article XX and NAFTA Article 2101 when it is unnecessary and was imposed merely as a cost-shifting mechanism?
 - C. Is Canada's tax justified by a national security exception in GATT Article XXI and NAFTA Articles 607 and 2102 when it unnecessarily discriminates against American consumers?

- II. DO THE UNITED STATES' ORIGIN-NEUTRAL APHIS FEES VIOLATE NAFTA AND GATT?
 - A. Do the APHIS fees violate GATT Articles I and VIII when they are nondiscriminatory and are approximately limited to the cost of inspection services?
 - B. Are the APHIS fees justified by the general exception in GATT, NAFTA, and GATS when they are necessary to protect plant, animal, and human life, and were imposed in good faith?
 - C. Are the APHIS fees justified by the national security exception in GATT, NAFTA, and GATS when The United States considers them necessary to protect its essential security interests?

- III. DO THE UNITED STATES' ORIGIN-NEUTRAL WHTI REQUIREMENTS VIOLATE NAFTA OR GATS?
 - A. Does WHTI violate NAFTA Chapters 12 and 16 when it is non-discriminatory and related to enforcing the customs laws of the United States?
 - B. Is WHTI justified by the general exception in GATT, NAFTA, and GATS when they are necessary to protect human life and to ensure enforcement of appropriate laws?
 - C. Is WHTI justified by the national security exception in GATT, NAFTA, and GATS when the United States considers it necessary to protect its essential security interests?

STATEMENT OF THE FACTS

In the wake of the September 11, 2001 attacks on New York and Washington D.C. the governments of Canada and the United States began to implement a series of security measures aimed at minimizing the risk of another catastrophic terrorist attack within the Western Hemisphere. As a part of these efforts, the United States Government, through the State Department and Department of Homeland Security, implemented the Western Hemisphere Travel Initiative (“WHTI”). First proposed in April of 2005, WHTI requires all travelers—including Canadian *and* American citizens—to carry a passport when entering the United States.¹ WHTI is scheduled to enter into effect in two phases. The first phase became effective on January 23, 2007, and applies to air travel.² The second phase is scheduled to become effective during the summer of 2008 and will apply to all other modes of travel.³ After phase two becomes effective, anyone entering or re-entering the United States will need a valid passport, regardless of citizenship or national origin.⁴ WHTI requires a valid passport in lieu of a driver’s license *and* birth certificate, which were accepted prior to WHTI’s implementation.⁵

In conjunction with WHTI, the United States Department of Agriculture announced new interim inspection rules on August 25, 2006.⁶ Under the new rules, the United States Animal and Plant Health Inspection Service (“APHIS”) began charging agricultural quarantine and inspection fees on all commercial shipments entering the United States.⁷ The APHIS fees were implemented to cover the cost of inspections aimed at discovering agricultural and security

¹ R. at 1.

² R. at 1.

³ R. at 1.

⁴ R. at 1.

⁵ R. at 1.

⁶ R. at 2.

⁷ R. at 2.

threats at the United States-Canada border.⁸ The APHIS fees now apply to all commercial traffic entering the United States—including traffic from Canada, which had been exempt from the fees.⁹

The APHIS fees include a \$5 per passenger and \$75.50 per aircraft charge for traffic entering the United States by air, beginning January 1, 2007.¹⁰ The fees apply regardless of whether a passenger is carrying fruits or vegetables, or whether they were processed through Canadian customs.¹¹ The APHIS fees also apply to ships entering the United States from Canada.¹² Since March 1, 2007, each vessel is charged \$490 per entry, irrespective of cargo.¹³ Similarly, since June 1, 2007, the APHIS fees apply to all rail and truck shipments entering the United States.¹⁴ Each rail car entering the United States from Canada is subject to a \$7.75 APHIS fee.¹⁵ Trucks must pay \$10.75--\$5.50 for Customs and Border Protection and \$5.25 for APHIS.¹⁶ Trucks also have the option of paying an annual fee of \$205, which includes \$100 for Customs and Border Protection and \$105 for APHIS.¹⁷

In addition to the measures pursued by the United States, the governments of Canada, Mexico, and the United States announced a series of joint security initiatives on August 21, 2007.¹⁸ The most prominent of these initiatives is known as “Smart and Secure Borders”

⁸ R. at 2.

⁹ R. at 2.

¹⁰ R. at 2.

¹¹ R. at 2.

¹² R. at 2.

¹³ R. at 2.

¹⁴ R. at 2.

¹⁵ R. at 2.

¹⁶ R. at 2.

¹⁷ R. at 2.

¹⁸ R. at 2.

(“SSB”).¹⁹ SSB is a joint effort to promote efficiency and security in North America.²⁰ SSB’s ultimate goal is to move screening of goods and travelers away from North America and to develop “mutually acceptable inspection protocols to detect [security] threats.”²¹ This includes working towards common screening measures for radiological devices, screening people during a pandemic, increasing security and infrastructure at the borders, and working to facilitate the flow of trade in North America.²²

In addition to SSB, Canada and the United States announced a series of “Thick Border Initiatives” (“TBI”) on September 11, 2007.²³ The joint statement announced that Canada would spend \$1 billion to increase its security infrastructure, including advanced screening facilities one kilometer from various high-volume border crossings, erecting ground sensors along the border, and advanced installing radiological detection technology.²⁴

After announcing the TBI, Canada’s Prime Minister Harper announced a \$25 a barrel export tax on all fuel exported from Canada by pipeline.²⁵ All exporters of fuel by pipeline must register with the government, file monthly returns, pay monthly taxes, and apply for an export permit *for every transaction*.²⁶ These requirements apply only to exported fuel and exempt all fuel destined for domestic consumption.²⁷ The tax is intended to generate sufficient revenue to fund Canada’s TBI obligations while allowing Canada to pursue its fiscal policy of maintaining

¹⁹ R. at 3.

²⁰ R. at 3.

²¹ R. at 3.

²² R. at 4.

²³ R. at 4.

²⁴ R. at 5.

²⁵ R. at 5.

²⁶ R. at 5.

²⁷ R. at 5.

low taxes.²⁸ Canada's tax shifts the burden of paying for its security infrastructure to foreign consumers on the theory that "those who benefit most . . . are the one's [sic] paying for the benefits."²⁹ Despite significant concerns voiced by the United States that the tax violates NAFTA and GATT, Canada has been clear that the tax will remain in effect.³⁰

On September 23, 2007, the United States challenged Canada's tax by filing a dispute with this Court.³¹ On October 23, 2007, Canada retaliated with a suit of its own.³² Both parties agreed to submit the dispute to this Court and gave Mexico the appropriate notice.³³ On November 23, 2007, the disputes were consolidated under the name *United States of America v. Canada*.³⁴

²⁸ R. at 5.

²⁹ R. at 5.

³⁰ R. at 5.

³¹ R. at 6.

³² R. at 6.

³³ R. at 6.

³⁴ R. at 6.

SUMMARY OF THE ARGUMENT

Canada's fuel export charge represents an unlawful restriction on international trade and is contrary to GATT and NAFTA. Specifically, the tax violates GATT Articles I, VIII and XI and NAFTA Articles 314, 315, 604 and 605 because it is discriminatory, represents a taxation of exports for fiscal purposes, and creates a quantitative restriction on trade. Canada cannot meet its burden of showing that the tax is justified by an exception in those agreements. The tax is unnecessary since Canada could easily impose a modest tax on *all* Canadian fuel regardless of where it is consumed. The tax is also unrelated to Canada's essential security interests and cannot be justified under the national security exceptions in GATT and NAFTA.

Unlike the Canadian fuel tax, the United States' APHIS user fees and WHTI do not violate NAFTA or GATT. Although the United States has no initial burden to justify the measures, they are both non-discriminatory on their face and in practice. Furthermore, even if Canada can meet its burden of establishing that the APHIS fees and WHTI violate GATT or NAFTA, the measures are justified by an exception. Both measures are necessary and good-faith efforts to protect plant animal and human life and are therefore justified by the general exceptions in GATT, NAFTA and GATS. The measures are also justified under the national security exception in these agreements since the United States considers them to be necessary to protect its essential security interests. Unlike Canada, which must justify its tax under the narrower national security exception in NAFTA Article 607, the United States need not explain or justify its national security policies to other member states since members generally have complete discretion when identifying and addressing national security concerns.

ARGUMENT

I. Canada's Fuel Export Tax Is an Unlawful Restriction on International Trade and is Contrary to GATT and NAFTA.

A. Canada's Discriminatory Tax Violates GATT Article I.

Canada's discriminatory tax unlawfully violates the Most Favored Nation Treatment ("MFN") obligation embodied in Article I of the General Agreement on Tariffs and Trade.³⁵ In effect, Article I mandates equal treatment of all goods regardless of where products are coming from or destined to.³⁶ Article I "[recognizes MFN as a] grand time-honoured principle at the core of multilateral trade liberalization. Without it, the world is the antediluvian one of bilateral trade agreements and regional trade fortresses."³⁷

If GATT's trade liberalizing objectives are to be realized, Article I must be broadly construed and vigorously enforced.³⁸ Accordingly, courts and scholars have recognized that Article I reaches *de jure* as well as *de facto* discrimination.³⁹ In considering whether a measure violates Article I, the WTO applies a four-prong test derived from the plain meaning of the text.⁴⁰ First, the measure must create an advantage. Second, the products affected by the measure must be *like products*. Third, the measure must be of the type regulated by Article I.

³⁵ General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 at art. I (1) [hereinafter GATT].

³⁶ Gerhard Loibl, *International Economic Law*, in INTERNATIONAL LAW 689, 700 (Malcolm D. Evans ed., 2003); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 157 (2d. ed. 1997).

³⁷ RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 49 (2005).

³⁸ *See id.* at 58.

³⁹ *Id.* at 58, 86-94; *See also* Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R at ¶ 78 (May 31, 2000) (holding that affording duty-free treatment to cars manufactured by American companies but not Japanese or European companies violated Article I).

⁴⁰ Bhala, *supra* note 37, at 70; Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R at ¶¶ 14.137-138 (Oct. 27, 1998) [hereinafter *Indonesia Auto*].

Finally, the resulting advantage must be conditional. Canada's discriminatory tax satisfies all four prongs and violates Article I.⁴¹

The tax clearly benefits Canadian consumers. A vast majority of Canadian fuel exported via pipeline is exported to the United States.⁴² Accordingly, an export tax on fuel "transported by way of pipeline" is a *de facto* tax on fuel destined for the United States. Through its exemption for domestically consumed fuel, Canada's tax creates an advantage for Canadian consumers in the form of lower prices tied to a reduced tax rate. The net result, therefore, is to do indirectly what Canada could not do directly, namely impose a consumption tax on American consumers. Since Canadian consumers are unaffected they have an advantage.

It is beyond dispute that fuel consumed in Canada and that exported to the United States is a "like product" under Article I. The tax therefore satisfies *Indonesia Auto*'s second prong. Although GATT does not define "likeness," any "likeness" determination must focus on the nature of the products themselves rather than the country of origin or final destination.⁴³ Physical characteristics, end uses, and consumer preferences have all been deemed appropriate for this purpose.⁴⁴ The only difference in this case between the fuel subject to the tax and tax-exempt fuel is the final destination.

The tax also satisfies the third and fourth *Indonesia Auto* prongs. Export taxes are within the scope of Article I since Article I explicitly applies to "charges of *any kind* imposed on or in

⁴¹ Bhala, *supra* note 37, at 70.

⁴² See STATISTICS CANADA, PIPELINE TRANSPORTATION OF CRUDE OIL AND REFINED PETROLEUM PRODUCTS 5 (2001), available at <http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/55-001-XIB/55-001-XIB-e.html>.

⁴³ Bhala, *supra* note 37, at 15.

⁴⁴ See, e.g., Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT DS10/AB/R, and WT/DS11/AB/R (Oct. 4, 1996).

connection with exportation.”⁴⁵ Moreover, the advantage created by the tax is conditioned on the destination of the goods. The tax constitutes *de facto* discrimination against United States consumers and blatant market manipulation—precisely the sort of evil that Article I condemns.

B. Canada’s Export Tax Represents Taxation of Exports for Fiscal Purposes and Violates GATT Article VIII.

GATT Article VIII advances GATT’s general trade-liberalizing policies by recognizing the need to make exporting and importing products as efficient and cost-effective as possible.⁴⁶ In light of that goal, Article VIII limits fees connected with exports in three important ways. First, it applies broadly to “fees and charges of *whatever kind*.” Second, the fees and charges must be imposed in connection with “services rendered” and limited to the cost of those services. The fees and charges must be in “sufficient proximity to the normal process of customs clearance [in order] to be considered a ‘service’ rendered to the [exporter].”⁴⁷ Finally, and most importantly, the fees may not constitute taxation of exports “for fiscal purposes.”

Canada’s tax runs afoul of these limitations. Both the plain meaning of the text and GATT precedent make clear that any charges on exports must be connected to the approximate cost of *services* and not the volume or value of the *product*.⁴⁸ The Canadian government does not render any service to fuel exporters; it merely collects a tax in exchange for the privilege of exporting fuel outside Canada. Even if there were some service connected with exporting fuel,

⁴⁵ GATT, *supra* note 35, art. I(1) (emphasis added); *See also Indonesia Auto*, WT/DS54/R at ¶ 14.139.

⁴⁶ *See* GATT, *supra* note 35, art. VIII 1(b).

⁴⁷ Report of the Panel, *United States—Customs User Fee*, L/6264-35S/245 at ¶ 102 (Nov. 25, 1987) [hereinafter *Customs User*].

⁴⁸ Bhala, *supra* note 37, at 527; *See* Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R (April 20, 1998).

the tax is not tied to the cost of that service but to the volume of product exported by pipeline “to a location outside Canada.”⁴⁹

More significantly, Canada’s tax was unabashedly imposed for fiscal purposes. Prime Minister Harper’s comments on September 11, 2007 make it clear that the export tax is intended to “raise the money to pay for [] infrastructure projects and technology.”⁵⁰ The tax shifts the financial burden of building and maintaining Canada’s infrastructure to American consumers. The tax makes international trade less efficient and artificially increases the price of exporting goods to the United States and other member states. This sort of artificial constraint on trade should not be permitted.

C. Canada’s Burdensome Licensing Requirements Represent Quantitative Restrictions on Trade in Violation of GATT Article XI.

Recognizing that taxes and fees are not the only potential limitation on international trade, GATT Article XI seeks to eliminate quotas and other regulatory impediments to the free flow of goods in the international market.⁵¹ Given the use of the term “no prohibitions or restrictions,” Article XI should be read broadly as an effective ban on non-tariff restrictions on trade.⁵² A broad reading makes sense, given the potential for delay and undue expense resulting from licensing and other non-tariff requirements.⁵³

Canada’s requirement that exporters apply for an export permit constitutes a flagrant violation of Article XI. The requirement is particularly troubling because it imposes a per-transaction requirement adding to the already significant burden that licenses and permits impose

⁴⁹ R. at 5.

⁵⁰ R. at 5.

⁵¹ See Bhala, *supra* note 37, at 343 (citing JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* at 306-307 (1969)).

⁵² *Id.* at 358.

⁵³ See *id.* at 358 (citing Report of the Panel, *Japan—Trade in Semiconductors* (March 24, 1988) GATT B.I.S.D. (35th Supp.) 116, 162 at ¶¶ 118, 132 (1989) (holding that information monitoring and permit requirements violate Article XI)).

on trade.⁵⁴ Canada also requires exporters to collect detailed information and provide it to the government on a monthly basis. These burdensome restrictions impede the free and competitive flow of goods in the international market and are illegitimate under Article XI.

D. Canada's Discriminatory Tax Violates NAFTA Chapters 3 and 6.

NAFTA⁵⁵ shares GATT's general goal of promoting trade liberalization and expressly incorporates GATT's obligations.⁵⁶ Under NAFTA Article 314, export taxes are illegal unless they apply to all parties to the agreement *and* apply to the same good when "destined for domestic consumption."⁵⁷ Article 604 echoes this prohibition with respect to "the export of any energy or basic petrochemical good."⁵⁸ Since Canada's tax applies to exported fuel but does not apply to fuel destined for domestic consumption, the measure constitutes a clear violation of Articles 314 and 604.

The tax also violates Articles 315 and 605, which apply to non-tax measures relating to exports. Most specifically, the export tax and licensing requirements violate Articles 315(b) and 605(b), which prohibit a party from "impos[ing] a higher price for exports . . . than the price charged for such good when consumed domestically, by means of any measure such as *licenses, fees, [or] taxation.*"⁵⁹ Canada's tax and licensing requirements directly violate Articles 315 and 605 since the costs associated with the export tax and licensing requirements will be passed on to American consumers. The tax artificially distorts prices and raises unnecessary and impermissible barriers to trade.

⁵⁴ *Id.* at 367 n. 23 (citing Report of the Panel, *EEC—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* (Dec. 14, 1989), GATT B.I.S.D. (37th Supp.) at 86, 130 ¶ 150 (1990)).

⁵⁵ North American Free Trade Agreement, December 17, 1992, 32 I.L.M. 605 [hereinafter NAFTA].

⁵⁶ NAFTA, *supra* note 55, art. 103(1).

⁵⁷ NAFTA, *supra* note 55, art. 314.

⁵⁸ NAFTA, *supra* note 55, art. 604.

⁵⁹ NAFTA, *supra* note 55, art. 315 1(b) & art. 605(b) (emphasis added).

II. Canada's Tax is Not Justified By An Exception in GATT or NAFTA.

A. Canada's Tax is Arbitrary and Unjustifiable Discrimination Beyond the Scope of the General Exceptions in GATT Article XX and NAFTA Article 2101.

Once a violation of one of the substantive provisions of NAFTA and GATT is shown, the invoking party bears the burden of showing that an exception applies.⁶⁰ Canada therefore must demonstrate that its tax is justified under the general exceptions in NAFTA and GATT.⁶¹ Since NAFTA expressly incorporates GATT's general exception the analysis is the same for both provisions.⁶² Evaluating a GATT Article XX defense requires a two-part inquiry. First, the disputed measure must satisfy one of the itemized exceptions in Article XX(a)-(j).⁶³ If the measure does not satisfy one of these exceptions, it is not justified and violates GATT.⁶⁴ If the measure falls within an itemized exception, the inquiry shifts to Article XX's introductory *chapeau*.⁶⁵ If the measure does not meet the *chapeau*'s requirements it is unlawful.

1. Canada's Tax Does Not Fall Within an Itemized Exception.

⁶⁰ See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, pt. IV (April 29, 1996) [hereinafter *Reformulated Gas*].

⁶¹ See NAFTA, *supra* note 55, art. 2101; GATT, *supra* note 35, art. XX.

⁶² See Vienna Convention on the Law of Treaties, May 22, 1969, art. 30(2), 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁶³ *Reformulated Gas*, WT/DS2AB/R at pt. III.C; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R at ¶ 157 (Oct. 12, 1998) [hereinafter *Shrimp Products*].

⁶⁴ Bhala, *supra* note 37, at 633.

⁶⁵ *Reformulated Gas*, WT/DS2AB/R at pt. III.C; *Shrimp Products*, WT/DS58/AB/R at ¶ 148. The *chapeau* provides:

Subject to the requirement 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 of or enforcement by any contracting party of measures . . .

GATT, *supra* note 35, art. XX.

Canada cannot meet the first *Reformulated Gas* prong since the measure does not fall within one of Article XX's itemized exceptions. Canada has not publicly justified the export tax on moral grounds or on the grounds that there is a fuel shortage. Accordingly, Article XX(a) and (g)-(j) do not apply. Similarly, sections (c) (gold and silver), (e) (prison labor), and (f) (archeological treasures) do not apply. Thus, Canada must show that section (b) or section (d) applies. Both claims are tenuous at best.

The most obvious hurdle in both of these provisions is the requirement that the measure be "necessary."⁶⁶ A measure is not necessary "if an alternative measure which [a Party] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."⁶⁷ If there are no reasonable alternatives consistent with GATT, the Party must use the least trade-restrictive measure available.⁶⁸ Canada's tax is unnecessary since Canada could easily impose a modest tax on *all* Canadian fuel regardless of where it is consumed. This sort of tax would not violate GATT and would allow Canada to fund improvements to its security infrastructure. It is precisely the sort of reasonable alternative that sections (b) and (d) demand.

2. Canada's Tax Fails to Satisfy the *Chapeau* Requirements.

Even if Canada's tax fell within one of the itemized exceptions, it fails to satisfy the *chapeau*'s requirements. "The fundamental theme [in applying the *chapeau*] is . . . avoiding

⁶⁶ GATT, *supra* note 35, art. XX(b)& (d).

⁶⁷ Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶ 171 (March 12, 2001) [hereinafter *European Asbestos*]; See also Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (Dec. 11, 2000); *Reformulated Gas*, WT/DS2/AB/R at pt. III.B; Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes* (Oct. 5, 1990), GATT B.I.S.D. (36th Supp.) at 200 (1990) [hereinafter *Thai Cigarettes*]; *Reformulated Gas*, WT/DS2/AB/R at pt. III.B.

⁶⁸ *European Asbestos*, WT/DS135/AB/R at ¶ 171; See also *Thai Cigarettes*, GATT B.I.S.D. (36th Supp.) at; *Reformulated Gas*, WT/DS2/AB/R at pt. III.B.

abuse or illegitimate use of the exceptions to substantive rules available in Article XX.”⁶⁹ Accordingly, the second prong of the *Reformulated Gas* test is more stringent than the first.⁷⁰ At a minimum, the *chapeau* requires the invoking party to demonstrate good faith.⁷¹ Under *Reformulated Gas*, a party must show that the measure is not arbitrary, that the measure does not unjustly discriminate among countries where the same conditions prevail, and that the measure is not merely a disguised restriction on international trade.⁷² Canada’s tax was not imposed in good faith. It is merely an attempt to shift the burden of paying for Canada’s security to American taxpayers. The measure also unjustly discriminates between two countries where the same conditions apply. Canada’s attempt to utilize Article XX’s exceptions is therefore illegitimate and should be rejected.

B. Canada’s Tax is Unrelated to its Essential Security Interests and is not Justified Under the Narrow Exception in NAFTA Articles 607.

Likewise, Canada cannot seek shelter in the national security exceptions in GATT and NAFTA. Although NAFTA Article 2102 and GATT Article XXI embody the generally applicable national security exceptions, NAFTA Article 607 is controlling when a measure related to energy exports—such as Canada’s tax—is involved. If an energy-related measure does not satisfy the requirements of Article 607 it cannot be justified under Article 2102 or GATT Article XXI. Article 607 provides that:

[N]o party may adopt or maintain a measure restricting . . . 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:*

⁶⁹ *Reformulated Gas*, WT/DS2/AB/R at pt. IV; *See also Shrimp Products* WT/DS58/AB/R at ¶ 148.

⁷⁰ *See Reformulated Gas*, WT/DS2/AB/R at pt. IV.

⁷¹ *See Shrimp Products*, WT/DS58/AB/R at ¶¶ 158-159; *See also* Vienna Convention, *supra* note 62, art. 26(1) (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

⁷² *Reformulated Gas*, WT/DS2/AB/R at pt. IV.

a) . . . enable fulfillment of a critical defense contract of a Party;

* * *

c) implement national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices . . .⁷³

Canada's export tax cannot satisfy Article 607 because it is unnecessary. Canada could easily fulfill the obligations it chose to incur at the Montebello Summit by imposing a modest tax on *all* Canadian fuel transported by pipeline, regardless of its destination. Rather than adopting this reasonable alternative, Canada has elected to shift the burden of paying for its "thick border" initiatives to the United States.⁷⁴ This sort of blatantly commercial purpose should be viewed skeptically. To allow Canada to use Article 607 as a cost-shifting mechanism would seriously undermine the trade-liberalizing policies behind NAFTA and GATT as well as upset the critical balance between trade and security embodied in Article 607 and the other national security provisions at issue in this case.

III. The United States' APHIS User Fees do Not Violate NAFTA or GATT.

A. The APHIS Fees are Non-discriminatory and do Not Violate GATT Article I.

The APHIS fees are the type of origin-neutral regulatory measure permitted by both NAFTA and GATT and should be upheld. GATT and NAFTA are aimed at trade *liberalization* not trade *integration*.⁷⁵ Although both agreements strive to increase the volume and efficiency of international trade, they do not require that parties abdicate their regulatory authority. The focus when considering whether a measure violates an international obligation should accordingly be on *non-discrimination* and not on *deregulation*.⁷⁶ Indeed, "once an international

⁷³ NAFTA, *supra* note 55, art. 607 (emphasis added).

⁷⁴ *See* R. at 5.

⁷⁵ GAETAN VERHOOSSEL, NATIONAL TREATMENT AND WTO DISPUTE SETTLEMENT: ADJUDICATING THE BOUNDARIES OF REGULATORY AUTONOMY 7 (2002).

⁷⁶ *Id.* at 7.

framework is no longer permissive of non-discriminatory regulation . . . it [ceases to pursue trade liberalization] and embark[s] on deep market integration.”⁷⁷ Origin-neutral regulatory measures like the APHIS fees should be permitted unless they are obviously protectionist or place an undue burden on global trade.

The APHIS fees are not protectionist and do not unduly burden international trade. They are merely an origin-neutral regulation well within the United States’ sovereign authority. The APHIS fees do not create any advantage to like products from one country or another since they apply to all commercial traffic regardless of where that traffic originates.⁷⁸ In fact, the fees would violate Article I if they did *not* apply to Canada since that would discriminate against other GATT parties. Because the fees are non-discriminatory, they fulfill the requirements laid out in *Indonesia Auto*⁷⁹ and Canada cannot meet its burden of showing that they violate Article I.

B. The APHIS Fees are Limited to the Approximate Cost of Services Rendered and do not Violate GATT Article VIII.

Canada cannot meet its burden of showing that the fees violate Article VIII. In marked contrast to Canada’s tax, the APHIS fees are precisely the type of measure contemplated—and permitted—by Article VIII. Contracting parties may impose certain customs fees to recoup expenses incurred in the course of inspection or documentation of goods.⁸⁰ These fees must be imposed in connection with “services rendered” and must be limited to the approximate cost of those services.⁸¹ Services, as described in Article VIII, can generally be defined as those that are

⁷⁷ *Id.*

⁷⁸ UNITED STATES DEPARTMENT OF AGRICULTURE, QUESTIONS AND ANSWERS: AGRICULTURE INSPECTION AND AGRICULTURAL QUARANTINE INSPECTION USER FEE REQUIREMENTS FOR CANADA (Mar. 2007), available at www.aphis.usda.gov/publications.

⁷⁹ *Indonesia Auto*, WT/DS54/R ¶¶ 14.137-138.

⁸⁰ See Bhala, *supra* note 37, at 523-28.

⁸¹ GATT, *supra* note 35, art. VIII 1(a).

proximately related to the normal process of customs clearance.⁸² Notably, a particular exporter or importer need not be directly affected by the service for it to qualify as a service under Article VIII, so long as there are reasonable caps on fees.⁸³ If the revenue generated by the fees approximates the aggregate cost of providing services, Article VIII has not been violated.

Unlike the Canadian tax, the APHIS fees are proximately related to the usual process of customs clearance (i.e. inspections) and are directly tied to the cost of *services* rather than the value or volume of cargo. Larger vehicles, such as massive container ships, require more time and effort to adequately inspect than it takes to inspect a truck and the fees accurately reflect this difference. The revenue generated by the APHIS fees is also limited to the approximate aggregate cost of providing inspection services: the fees were imposed to “recover the full costs of all AQI services the [United States] incurs to provide inspection and related service to [commercial traffic] entering the United States.”⁸⁴ Furthermore, there is no evidence that the APHIS fees represent “an indirect protection to domestic products” or that the fees constitute “taxation of imports [] for fiscal purposes.”⁸⁵ The fees are a lawful customs regulation and should be upheld.

IV. Even if the APHIS Fees Would Otherwise Violate GATT or NAFTA, They Are Justified by an Exception.

A. The APHIS Fees are Justified Pursuant to the General Exception in GATT, NAFTA, and GATS.

Even if Canada can meet its burden of establishing that the APHIS fees violate a substantive provision in GATT or NAFTA—which the United States does not concede—the fees

⁸² *Customs User*, L/6264-35S/245 at ¶ 102.

⁸³ *See id.* at ¶¶ 78, 103-104 (noting that ad valorem fees without caps violate Article VIII).

⁸⁴ United States Department of Agriculture, *supra* note 78.

⁸⁵ *See GATT*, *supra* note 35, art. VIII 1(a).

satisfy the general exception established in GATT and re-iterated in NAFTA and GATS.⁸⁶ Unlike Canada's tax, the APHIS fees can be located in an itemized exception and satisfy the *chapeau*'s requirements. The fees are necessary to guard against sanitary, phytosanitary, and national security threats⁸⁷ and can properly be located in Article XX(b). There are no other alternatives available since charging only for shipments that are actually inspected would not generate sufficient funds to allow the inspections.⁸⁸ Similarly, the fees satisfy the *chapeau* requirements: they are rational, are justifiably tied to legitimate national security and environmental concerns, and are not a disguised attempt to discriminate against international trade. In sum, the APHIS fees are part of a good faith effort to protect human, animal, and plant life, which is permissible under Article XX and the corresponding provisions in NAFTA and GATS.

B. The APHIS Fees Are Justified Pursuant to the National Security Exception in GATT, NAFTA, and GATS.

The APHIS fees are also justified under the national security exceptions in GATT, NAFTA, and GATS. Unlike Canada's tax, the APHIS fees are not subject to the limitations in NAFTA Article 607. The United States needs only to show that the fees are justified under GATT Article XXI and NAFTA Article 2102. Since the language of the two provisions is nearly identical, the analysis is the same.⁸⁹ The effect of putting the national security exception into a separate article within GATT was to eliminate the limiting influence of the initial clause of

⁸⁶ Compare GATT, *supra* note 35, art. XX with NAFTA, *supra* note 55, art. 2101 and General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 art. XIV [hereinafter GATS].

⁸⁷ See United States Department of Agriculture, *supra* note 78.

⁸⁸ *Id.*

⁸⁹ Compare GATT, *supra* note 35, art. XXI with NAFTA, *supra* note 55, art. 2102 and GATS, *supra* note 86 art. XIV *bis*.

Article XX.⁹⁰ Article XXI is therefore broader than Article XX and recognizes that in most cases, where the two conflict, national security trumps trade.⁹¹ Article XXI’s plain language makes it clear that Article XXI is an all embracing exception: “*Nothing* in this Agreement shall be construed . . . to prevent any contracting party from taking any action which *it* considers necessary for the protection of its essential security interests . . .”⁹² In other words, nothing in GATT trumps a state’s national security needs—whether real or perceived. This judgment is not for another party to define or for an international tribunal to review; a “member need not justify its determination to the WTO or its Members.”⁹³ If a Party considers a challenged measure necessary to protect national security, the inquiry is concluded.

The United States considers the APHIS fees, and the inspections they enable, essential to the national security of the United States in the post-9/11 world. “One of the most significant potential terrorist threats to the Nation is the vast number of shipping containers that flow through [American] borders each year.”⁹⁴ Although radiological and other automated detection devices are important components of the United States’ response to these potential threats, physical inspections continue to be integral in protecting America from another catastrophic attack.⁹⁵ The APHIS fees are therefore justified under the national security exceptions in GATT and NAFTA.

⁹⁰ JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 741 (1969).

⁹¹ Bhala, *supra* note 37, at 557.

⁹² GATT, *supra* note 35, art. XXI (b) (emphasis added).

⁹³ Bhala, *supra* note 37, at 558.

⁹⁴ *Fiscal Year 2008 Budget Overview: Hearing Before the H. Committee on Homeland Sec.* 110th Cong (2007) (testimony by Undersecretary Jay M. Cohen), *available at* www.dhs.gov/xnews/testimony/gc_1172010065657.shtm.

⁹⁵ See GOVERNMENT ACCOUNTABILITY OFFICE, *COMBATING NUCLEAR SMUGGLING: EFFORTS TO DEPLOY RADIATION DETECTION EQUIPMENT IN THE UNITED STATES AND IN OTHER COUNTRIES* (June 21, 2005), *available at* www.GAO.gov/new.items/d5840t.pdf.

V. The United States' WHTI Constitutes a Lawful Sovereign Action and Does Not Violate NAFTA or GATS.

A. WHTI is Non-discriminatory and Does Not Violate NAFTA Chapter 12 or NAFTA Chapter 16.

WHTI is a non-discriminatory effort to ensure the border security of the United States and does not violate NAFTA Chapters 12 or 16. Chapter 12 deals with cross-border trade in services and incorporates the basic MFN principle of non-discrimination embodied in other provisions of the Agreement.⁹⁶ However, Article 1201 states: “[N]othing in [Chapter 12] shall be construed to . . . prevent a party from providing a service or performing a function *such as law enforcement* . . . in a manner that is *not inconsistent* with this Chapter.”⁹⁷ So long as the United States’ actions are consistent with the chapter objectives (i.e. are non-discriminatory), they do not violate NAFTA Chapter 12. The burden is on Canada to show that WHTI will limit the free movement of services in a discriminatory manner.

The burden is also on Canada to show that WHTI violates the basic objectives of Chapter 16 by “unduly impairing or delaying trade in goods or services.”⁹⁸ Chapter 16 deals with temporary entry for business persons. Article 1601 provides: “[T]his chapter reflects the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis . . . *and the need to ensure border security.*”⁹⁹ Annex 1603 plainly states that upon granting a business person temporary entry a Party may require proof of citizenship.¹⁰⁰

⁹⁶ See NAFTA, *supra* note 55, art. 1203.

⁹⁷ NAFTA, *supra* note 55, art 1201 3(b) (emphasis added).

⁹⁸ NAFTA, *supra* note 55, art. 1602.

⁹⁹ NAFTA, *supra* note 55, art. 1601 (emphasis added).

¹⁰⁰ NAFTA, *supra* note 55, annex 1603 (1)(a).

WHTI does not violate any obligations under Chapters 12 or 16 and is necessary for performing the function of law enforcement. Requiring all travelers to present a passport is not a violation of the plain language of Chapters 12 or 16.¹⁰¹ The WHTI is applied equally to all travelers entering the country—including United States citizens. The United States is simply exercising its right to enforce its laws and ensure its security by requiring proof of citizenship from all travelers entering the country. There is no violation of the requirements within Chapters 12 and 16 and Canada cannot demonstrate otherwise.

VI. Even if WHTI Would Otherwise Violate NAFTA, GATT or GATS, it is Justified by an Exception.

A. WHTI is Necessary to Protect Human Life and To Ensure Enforcement of Domestic Laws and is Justified By the General Exception in GATT, NAFTA and GATS.

Even if Canada can meet its burden of establishing that the WHTI violates a substantive provision in GATS or NAFTA—which the U.S. does not concede—the initiative satisfies the general exception established in GATT and re-iterated in NAFTA and GATS.¹⁰² The WHTI is proper under both prongs of the *Reformulated Gas* test because it falls under the Article XX exceptions in sections (b) and (d) and satisfies the requirements of the *chapeau*.

WHTI is necessary, as required by sections (b) and (d), since there are no reasonable and less restrictive alternatives. The United States has researched alternative forms of citizenship and ID verification including but not limited to a new driver's license that could be equipped to verify one's citizenship along with a host of other information.¹⁰³ The proposed Driver's

¹⁰¹ See Vienna Convention art, *supra* note 62, art. 31(1) (noting that treaties are to be interpreted according to the ordinary meaning of the terms they use).

¹⁰² Compare GATT, *supra* note 35, art. XX with NAFTA, *supra* note 55, art. 2101 and GATS, *supra* note 86, art. XIV.

¹⁰³ Mark B. Salter, *Passports, Mobility, and Security: How Smart Can the Border Be?* 5 INT. STUDIES PERSPECTIVES 1 at 71–91 (Feb. 2004).

License Modernization Act of 2002 (DLA) would have harmonized the form and security features of all state drivers' licenses (House Resolution 4633).¹⁰⁴ The proposal generated an extreme amount of resistance: "The question is not whether such a system will be successful, but rather what kind of society this creates. Commentators have suggested that the DLA is incompatible with a free society, and that the TIPS system [new driver's license] replicates the informer dynamic found in Communist East Germany."¹⁰⁵

In light of the plausible alternative avenues in tracking an individual's citizenship, the passport is the best method because it is universal to all citizens of all nations. Implementing a universal passport or identification card would require all United States citizens to acquire new documentation thus exacerbating the restrictions on trade that WHTI is argued to cause in the first place. The U.S. Government Accountability Office (GAO) found that "Alternative programs or documents, such as frequent traveler programs and driver's licenses with enhanced security features, have their own set of challenges, and using them in lieu of a passport will not easily resolve the management issues faced by DHS [Department of Homeland Security] and State [Department of State]."¹⁰⁶ The GAO concluded that "the passport is the primary document by which mobile individuals are identified, tracked, and regulated. The passport is intended to uniquely identify each individual traveler, indicate his point of origin, and the state to which he can be deported."¹⁰⁷ WHTI is necessary and any alternative methods to increasing customs enforcement would be less desirable and have the potential to restrict trade even further.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ GOVERNMENT ACCOUNTABILITY OFFICE, OBSERVATIONS ON EFFORTS TO IMPLEMENT THE WESTERN HEMISPHERE TRAVEL INITIATIVE ON THE U.S. BORDER WITH CANADA (May 25, 2006), available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:d06741R.pdf>.

¹⁰⁷ Salter, *supra* note 103, at 72.

The current change in travel document requirements is the result of recommendations made by the 9/11 Commission, which Congress subsequently passed into law in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTP).¹⁰⁸ Without WHTI the Act would have been ineffectual. The IRTP and WHTI do not violate the obligations of GATT. There is no data to suggest that WHTI will present any long term trade restrictions upon cross-border trade in services. Although, currently, only 40% of Americans have valid passports,¹⁰⁹ logic dictates that once WHTI goes into affect, those people wishing to do business or travel between the United States and Canada will simply apply for and acquire a passport. Additionally, there is no indication that the purpose behind WHTI has been anything other than increased customs enforcement in response to national security threats.

Most significantly, WHTI was adopted in good faith. In an attempt to maintain the level of tourism and cross-border trade in services, “The United States and Canada operate two frequent traveler programs: NEXUS and FAST. NEXUS is for commuters who live in border communities who frequently travel back and forth across the border. FAST is for truck companies and their drivers who transport goods across the border.”¹¹⁰ The United States, with its frequent traveler program, has done its best in a good faith effort to expedite the transition into a less open border. The WHTI is necessary to address customs concern on the northern border between the United States and Canada. As such, the WHITI justified under GATT, NAFTA and GATS.

B. WHTI is Essential to the National Security of the United States and is Justified Under GATT Article XXI, NAFTA Article 2102 and GATS.

¹⁰⁸ 2004 Pub. L. No 108-458.

¹⁰⁹ R. at 1.

¹¹⁰ See Government Accountability Office, *supra* note 106.

The effect of putting the national security exception into a separate article within GATT was to remove those exceptions from the application of the initial clause of Article XX.¹¹¹ Therefore, applying an Article XXI exception merely requires the measure to satisfy a substantive requirement under Article XXI sections (b)(i)-(iii). The Article XXI exception is an all embracing exception.¹¹² “Nothing in this Agreement [GATT] shall be construed... (b) to prevent any contracting party from taking any action which it considers *necessary* for the *protection* of its essential security interests... (iii) taken in time of war or *other emergency in international relations*.”¹¹³ The plain language of GATT Article XXI states that *nothing* within the objectives of GATT trumps a State’s interest in national security.

In the wake of September 11th, 2001 the U.S. has been forced to rethink notions of national security. As a result of increased threats of terrorists crossing the border from Canada into the U.S, the United States has altered their customs enforcement. As noted by Loretta Sanchez during a report issued by the House of Representative Subcommittee on Homeland Security, “we have previously reported that documents like driver’s licenses and birth certificates can easily be obtained, altered, or counterfeited and used by terrorists to travel into and out of the country.”¹¹⁴ The White House reports that “each year, more than 500 million people are admitted into the United States, of which 330 million are non-citizens.”¹¹⁵ The United States department of homeland security has determined that strengthening customs enforcement for the northern border is essential to national security.

¹¹¹Jackson, *supra* note 90, at 741.

¹¹²Bhala, *supra* note 37, at 557.

¹¹³GATT, *supra* note 35, art. XXI (d) (emphasis added).

¹¹⁴Government Accountability Office, *supra* note 106, at 1.

¹¹⁵Salter, *supra* note 103, at 75.

The implementation of WHTI is essential to the national security of the United States. There is no activity more central to the question of security than customs enforcement. It is well established that a “sanctioning member need not justify its determination to the WTO or its Members.”¹¹⁶ The U.S. does not have to justify any possible effect that WHTI has on trade because its national security has been placed in jeopardy and it has invoked its Member rights to exercise GATT Article XXI. The U.S. position stated at a June 1982 GATT council meeting regarding trade restrictions on imports from Argentina has not changed: “The General Agreement left to *each contracting Party* the judgment as to what *it* considered to be necessary to protect its security interests. The Contracting Parties had *no power* to question that judgment.”¹¹⁷

CONCLUSION

For the foregoing reasons, the Applicant, the United States of America, respectfully requests this Court to:

1. **DECLARE** that Canada’s fuel export tax violates GATT and NAFTA and is not justified by the general or national security exceptions in those agreements.
2. **DECLARE** that the United States’ APHIS fees do not violate GATT, NAFTA or GATS or are otherwise justified by the general or national security exceptions in those agreements.
3. **DECLARE** that the United States’ WHTI does not violate GATT, NAFTA or GATS or is otherwise justified by the general or national security exceptions in those agreements.

¹¹⁶ Bhala, *supra* note 37, at 558.

¹¹⁷ *Id* (emphasis added).