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 RESPONDENT
TEAM # 2008-01 R

TABLE OF CONTENTS

INDEX OF AUTHORITIES……………………………………………………………………..iii

JURISDICTIONAL STATEMENT…..v

QUESTIONS PRESENTED……………………………………………………………………..vi

STATEMENT OF THE FACTS………………………………………………………......…1

SUMMARY OF THE ARGUMENT…………………………………………………….......5

ARGUMENT……………………………………………………………………………...…6

I. THE UNITED STATES' APHIS FEES ARE AN UNLAWFUL RESTRICTION OF TRADE CONTRARY TO NAFTA AND GATT..6

A. The APHIS Fees Represent an Increase in The United States' Customs User Fees in Direct Violation of NAFTA Article 310...6

B. The APHIS Fees Constitute De Facto Discrimination and Violate GATT Article I...7

C. The APHIS Fees Are Unrelated to Any Service Rendered and Violate GATT Article VIII...9

II. THE UNITED STATES' APHIS FEES ARE NOT JUSTIFIED BY AN EXCEPTION IN GATT, NAFTA OR GATS...10

A. The APHIS Fees Are Arbitrary and Unjustifiable Discrimination Beyond the Scope of the General Exceptions in GATT Article XX, NAFTA Article 2101, and GATS Article XIV..10

1. The APHIS Fees Do Not Fall Within an Itemized Exception................11

2. The APHIS Fees Fail to Satisfy the Chapeau Requirements.................12

B. The APHIS Fees Are Unrelated to The United States' Essential Security Interests and Are Not Justified by the National Security Exception in GATT, NAFTA, or GATS..14

III. THE UNITED STATES' WHTI DISCRIMINATES AGAINST MEMBER STATES FOR THE DELIVERY OF SERVICES AND CONSTITUTES A CLEAR VIOLATION OF NAFTA CHAPTERS 12 AND 16 AND GATS. 15

IV. WHTI IS NOT JUSTIFIED BY AN EXCEPTION IN NAFTA, GATT OR GATS..................17

A. WHTI Is Not Justified by a General Exception in NAFTA, GATT, or GATS.....17

1. WHTI Does Not Fall Within An Itemized Exception............................17

2. WHTI Fails to Satisfy the Chapeau Requirements.................................18

B. WHTI is Unrelated to the United States' Essential Security Interests and is Not Justified Under the National Security Exception in GATT Article XXI and NAFTA Article 2102..19

V. CANADA'S FUEL EXPORT TAX DOES NOT VIOLATE GATT OR NAFTA......................20

A. Even if the Fuel Export Tax Would Otherwise Violate GATT or NAFTA, it is Justified by the General Exception in GATT Article XX and NAFTA Article 2101...20

1. The Fuel Export Tax Falls Within an Itemized Exception.....................20

2. The Fuel Export Tax Satisfies the Chapeau Requirements....................21

B. The Fuel Export Tax is Justified By the National Security Exception in GATT and NAFTA...22

CONCLUSION……………………………………………………………………………..24

INDEX OF AUTHORITIES

TREATIES

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2. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194..............*passim*

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JURISDICTIONAL STATEMENT

The Government of Canada, together with the Government of the United States of America, herby 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. DO THE UNITED STATES' DISCRIMINATORY APHIS FEES VIOLATE NAFTA AND GATT?

A. Do the APHIS fees violate GATT Articles I and VIII and NAFTA Article 310 when they constitute a discriminatory increase in customs user fees unrelated to any service rendered?

B. Are the APHIS fees justified by the general exception in GATT, NAFTA, and GATS when they are arbitrary and unjustifiable?

C. Are the APHIS fees justified by the national security exception in GATT, NAFTA, and GATS when they are unrelated to the United States' essential security interests?

II. DO THE UNITED STATES' DISCRIMINATORY WHTI REQUIREMENTS VIOLATE NAFTA OR GATS?

A. Does WHTI Violate NAFTA Chapters 12 and 16 when it unduly burdens cross-border trade in services?

B. Is WHTI justified by the general exception in GATT, NAFTA, and GATS when it is arbitrary and unjustifiable?

C. Is WHTI justified by the national security exception in GATT, NAFTA, and GATS when it is unrelated to United States essential security interests?

III. DOES CANADA'S EXPORT TAX VIOLATE NAFTA AND GATT?

A. Does Canada's tax violate GATT Articles I, VIII, and XII or NAFTA Chapters 3 and 6?

B. Is Canada's tax justified by a general exception in GATT Article XX and NAFTA Article 2101 when it is equitable and necessary to protect human life?

C. Is Canada's tax justified by a national security exception in GATT Article XXI and NAFTA Articles 607 and 2102 when it necessary for the fulfillment of a critical defense contract with the United States?

STATEMENT OF THE FACTS

In the wake of September 11, 2001, 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 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, no one will be permitted to enter the United States without a passport.[4] Prior to WHTI, persons entering the United States from Canada were permitted to show other widely available documentation.[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 from Canada.[7] The APHIS fees were supposedly implemented to cover the cost of inspections aimed at discovering agricultural and security threats at the United States-Canada border.[8] The APHIS fees removed the exception previously extended to conveyances from Canada.[9]

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[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.
[8] R. at 2.
[9] R. at 2.

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 actually 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 individually pursued by the United States, the governments of Canada, Mexico, and the United States announced a series of joint security initiatives resulting from the Montebello Summit, on August 21, 2007.[18] The most prominent of these initiatives is known as "Smart and Secure Borders."[19] Smart and Secure Borders is a joint effort to promote efficiency and security in North America.[20] Its ultimate goal is to move screening of goods and travelers away from North America and to develop "mutually acceptable inspection protocols to

[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.
[19] R. at 3.
[20] R. at 3.

detect [security] threats."[21] This includes working towards common screening measures for radiological devices, screening travelers 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 Safe and Secure Borders, Canada and the United States announced a series of "Thick Border Initiatives" on September 11, 2007.[23] The joint statement announced that Canada would invest $1 billion to increase its security infrastructure along the United States border to improve its ability to detect threats to the United States. These measures include advanced screening facilities one kilometer from various high-volume border crossings, ground sensors along the border, and advanced radiological detection technology.[24] The Canadian Government agreed to embark on this significant investment to address concerns voiced by the United States.[25]

To equitably finance the significant investment required by the thick border initiatives, Canada's Prime Minister Harper announced a $25 a barrel export tax on all fuel exported from Canada by pipeline.[26] All exporters of fuel by pipeline must register with the government, file monthly returns, pay monthly taxes, and apply for export permits.[27] These requirements apply only to exported fuel and exempts all fuel destined for domestic consumption.[28] The tax is intended to generate sufficient revenue to allow Canada to accommodate the United States requests while permitting Canada to pursue equitable domestic tax policy.[29]

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[21] R. at 3.
[22] R. at 4.
[23] R. at 4.
[24] R. at 5.
[25] R. at 4.
[26] R. at 5.
[27] R. at 5.
[28] R. at 5.
[29] R. at 5.

Both parties have filed disputes with this Court challenging the policies of the other. Both parties agreed to submit the dispute to this Court and have given Mexico the appropriate notice.[30] On November 23, 2007, the disputes were consolidated into the current dispute under the name *United States of America v. Canada.*[31]

[30] R. at 6.
[31] R. at 6.

SUMMARY OF THE ARGUMENT

The United States' APHIS user fees and WHTI violate NAFTA, GATT and GATS. Each measure constitutes *de facto* discrimination, violating the fundamental Most Favored Nations obligation mandated by those agreements. The United States cannot meet its burden of showing that the measures are justified by an exception. Since there are reasonable alternatives to both the APHIS fees and WHTI, both measures are unnecessary and arbitrary restrictions on trade. Similarly, the measures are not justified under the national security exception in these agreements since they were imposed for commercial—rather than security—purposes. There is no nexus between a legitimate security threat to the United States and either of the measures. Accordingly, neither the APHIS fees nor WHTI protect the United States' essential security interests.

Unlike the APHIS fees and WHTI, Canada's fuel export tax does not violate NAFTA or GATT. Canada has no initial obligation to justify the measure and the United States bears the burden of proving that the tax violates those agreements. Even if the United States can meet this burden, the tax is justified by an exception. There are no reasonable alternatives that would allow Canada to assist the United States in addressing its security concerns while permitting Canada to maintain an equitable tax system. The tax is part of a good-faith effort to protect plant animal and human life and is justified by the general exception in GATT and NAFTA. The tax is also justified under the national security exception in these agreements since it is necessary to fulfill Canada's critical defense contract with the United States.

ARGUMENT

I. The United States' APHIS Fees Are an Unlawful Restriction of Trade Contrary to NAFTA and GATT.

A. The APHIS Fees Represent an Increase in The United States' Customs User Fees in Direct Violation of NAFTA Article 310.

The North American Free Trade Agreement was intended to "*eliminate* barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties."[32] To facilitate this goal, Article 310 states that "[n]o party may adopt *any* customs user fee of the type referred to in Annex 310.1 for originating goods."[33] Annex 310.1 in turn states that: "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"[34] Under the Canada-United States Free Trade Agreement, all merchandise processing fees for goods originating in Canada were to be eliminated by January 1, 1994.[35]

As merchandise processing fees, the APHIS fees violate the plain language of Article 310. The fees apply to all goods entering the United States—including those from Canada.[36] However, the United States is obligated under NAFTA to eliminate all customs user fees for goods originating in Canada. It has failed or refused to do so. Consequently, the burden is on the United States to prove that one of NAFTA's exceptions applies.[37] If it fails to do so, the

[32] North American Free Trade Agreement, December 17, 1992, 32 I.L.M. 605, art. 102 1(a) (emphasis added) [hereinafter NAFTA].

[33] NAFTA, *supra* note 32, art. 310 (1) (emphasis added).

[34] NAFTA, *supra* note 32, ann. 310.1 B(1).

[35] Canada-United States Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281, art. 403 3(e).

[36] *See* 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.

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

United States must comply with its NAFTA obligations and re-instate the APHIS fee exception for Canadian goods.

B. The APHIS Fees Constitute De Facto Discrimination and Violate GATT Article I

The APHIS fees also amount to *de facto* discrimination against Canadian products in violation of the Most Favored Nation Treatment ("MFN") obligation embodied in Article I of the General Agreement on Tariffs and Trade.[38] In effect, Article I mandates equal treatment of all goods regardless of where products are coming from or destined to.[39] 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."[40]

If GATT's trade liberalizing objectives are to be realized, Article I must be broadly construed and vigorously enforced.[41] Accordingly, courts and scholars have recognized that Article I reaches *de jure* as well as *de facto* discrimination.[42] In considering whether a measure violates Article I, the WTO applies a four prong test derived from the plain meaning of the text.[43] 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. Finally, the

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

[39] 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).

[40] RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 93 (2005).

[41] *See id.* at 58.

[42] *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).

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

resulting advantage must be conditional. If the measure satisfies all four prongs it violates Article I.[44]

The APHIS fees have a disparate impact on Canadian producers relative to other producers exporting goods to the United States. The United States imports more products from Canada than any other nation.[45] This alone means that the APHIS fees have a greater impact on Canada than any other nation. In addition, a vast majority of Canadian goods—approximately 90 percent—are shipped to the United States by road and rail.[46] Most other countries rely on massive cargo ships to bring their goods to the United States. While a typical truck carries a single forty-foot trailer,[47] a typical cargo ship carries between 1,000 and 8,000 standard shipping containers of approximately the same size.[48] Although the APHIS fee for a single container ship is higher on a per-shipment basis, it would take hundreds or even thousands of trucks to move the equivalent volume of product by truck. Accordingly, goods shipped by truck (i.e. those from Canada) are charged a higher APHIS fee on a pro-rata basis than the same product shipped by other methods. This creates an advantage to producers outside North America, satisfying the first prong of the *Indonesia Auto* test.

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[44] Bhala, *supra* note 40, at 70.

[45] UNITED STATES CENSUS BUREAU, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES SUPPLEMENT 11 (2007), *available at* http://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf.

[46] *See* UNITED STATES CENSUS BUREAU, U.S. MERCHANDISE TRADE: SELECTED HIGHLIGHTS 38, *available at* http://www.census.gov/foreign-trade/Press-Release/2006pr/04/ft920/ft920.pdf; *See also* MINISTER OF TRANSPORT, TRANSPORTATION IN CANADA (2005), *available at* http://www.tc.gc.ca/pol/en/report/anre2005/tc2005ae.pdf.

[47] UNITED STATES DEPARTMENT OF TRANSPORTATION, COMMERCIAL VEHICLE SIZE AND WEIGHT PROGRAM (2003), *available at* http://ops.fhwa.dot.gov/freight/sw/overview/index.htm#2a; *See also* UNITED STATES DEPARTMENT OF TRANSPORTATION, COMPREHENSIVE TRUCK SIZE AND WEIGHT STUDY VOL. II at III-7 (2000), *available at* http://www.fhwa.dot.gov/policy/otps/truck/finalreport.html.

[48] GERMAN MARINE INSURERS, CONTAINER HANDBOOK: CARGO LOSS PREVENTION INFORMATION VOL. I (2008), *available at* www.containerhandbuch.de/chb_e/stra/index.html?/chb_e/stra/stra_01_03_01_01.html.

The APHIS fees satisfy the last three *Indonesia Auto* prongs as well. The fees are imposed "irrespective of cargo."[49] Thus, consumer electronics shipped by land from Canada would be charged a higher pro rata APHIS fee than the identical goods shipped from China by sea. The products affected by the APHIS fees can therefore be said to be "like products" and the fees satisfy the second *Indonesia Auto* prong. In addition, the APHIS fees are customs fees, which are embraced by Article I(1), satisfying the third prong.[50] Finally, the relative advantage to overseas producers is conditional since the pro rata charge for the APHIS fees depends entirely on the method of transport. Therefore, under *Indonesia Auto*, the APHIS fees violate Article I and should not be permitted.

C. The APHIS Fees Are Unrelated to Any Service Rendered and Violate 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.[51] Although Article VIII permits members to impose certain customs fees to recoup expenses incurred in the course of inspection or documentation of goods, this process can be abused.[52] Accordingly, Article VIII contains an important limitation on fees connected with exports: the charge must be "limited in amount to the approximate cost of services rendered."[53] This is actually a dual requirement because "the charge in question must first involve a 'service'

[49] R. at 2.
[50] GATT, *supra* note 38, art. I(1) ("With respect to *customs duties and charges of any kind* imposed on or in connection with importation or exportation. . .") (emphasis added).
[51] *See* GATT, *supra* note 38, art. VIII 1(b).
[52] Bhala, *supra* note 40, at 525.
[53] *See* GATT, *supra* note 38, art. VIII 1(a).

rendered, and then the level of the charge must not exceed the approximate cost of that 'service.'"[54]

The APHIS fees run afoul of these limitations since all commercial conveyances entering the United States must pay the APHIS fees, even if they are not actually inspected.[55] In *Customs User*, the WTO held that "cost of services rendered" in the context of Article VIII means the "cost of the customs processing for the *individual entry* in question."[56] The APHIS fees violate this principle since many importers are forced to pay for a service that they do not individually receive. If an individual importer does not receive the service for which the fees are purportedly charged, there has been no service and the fees violate Article VIII. The WTO expressly rejected these sorts of fees in *Customs User* and this Court should do so in this case.

II. The United States' APHIS Fees Are Not Justified by an Exception in GATT, NAFTA or GATS.

A. The APHIS Fees Are Arbitrary and Unjustifiable Discrimination Beyond the Scope of the General Exceptions in GATT Article XX, NAFTA Article 2101, and GATS Article XIV.

Once a violation of one of the substantive provisions of those agreements is shown, the invoking party bears the burden of proving that an exception applies.[57] The United States cannot meet its burden in this case. Since NAFTA expressly incorporates GATT's general exception the analysis is the same for both provisions.[58] Similarly, because GATS uses nearly identical

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[54] Report of the Panel, *United States—Customs User Fee*, L/6264-35S/245, ¶ 69 (Nov. 25, 1987) [hereinafter *Customs User*].

[55] United States Department of Agriculture, *supra* note 36.

[56] *Customs User*, L/6264-35S/245 at ¶ 86 (emphasis added); *See also* Panel Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, at ¶ 3.264 (Nov. 25, 1997).

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

[58] *See* GATT, *supra* note 38, art. XX; NAFTA, *supra* note 32, art. 2101; *See also* Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S 331, art. 30(2) [herinafter Vienna Convention].

language to extend GATT's requirements and exceptions to trade in services, the analysis is essentially identical for all three provisions.[59]

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 sections (a)-(j).[60] If the measure does not satisfy one of these exceptions it is not justified and violates GATT.[61] If the measure falls within an itemized exception, the inquiry shifts to Article XX's introductory *chapeau*.[62] If the measure does not meet the *chapeau*'s requirements it is unlawful. Because the APHIS fees do not meet either of the *Reformulated Gas* prongs they are unjustified under the general exception embodied in GATT, NAFTA and GATS.

1. The APHIS Fees Do Not Fall Within an Itemized Exception.

The United States cannot meet the first *Reformulated Gas* prong since the APHIS fees do not fall within one of Article XX's itemized exceptions. The United States has not publicly justified the fees on moral grounds or on the grounds that there is a shortage of critical supplies. Accordingly, Article XX(a) and (g)-(j) do not apply. Similarly, sections (c) (gold and silver), (e)

[59] *Compare* GATT, *supra* note 38, art. XX *with* the General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44, art. XIV; *See also* Vienna Convention, *supra* note 58, art. 31(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 the light of its object and purpose.").

[60] *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*].

[61] Bhala, *supra* note 40, at 633.

[62] *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 38, art. XX (emphasis added).

(prison labor), and (f) (archeological treasures) do not apply. The United States 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."[63] 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."[64] If there are no reasonable alternatives consistent with GATT, the Party must use the least trade-restrictive measure available.[65] The APHIS fees are unnecessary since the United States could easily collect the APHIS fees only from those conveyances that are actually inspected. Another reasonable alternative would be to reduce the pro rata rate charged to goods transported by land from Canada. Such an arrangement would not violate GATT and would allow the United States to recoup expenses for the services it *actually* renders. These are precisely the sort of reasonable alternatives that sections (b) and (d) demand.

2. The APHIS Fees Fail to Satisfy the *Chapeau* Requirements.

Even if the APHIS fees fell within one of the itemized exceptions, they fail the second prong of the *Reformulated Gas* test. "The fundamental theme [in applying the *chapeau*] is . . . avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article

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[63] GATT, *supra* note 38, art. XX (b)& (d).

[64] 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, 2001); *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.

[65] *European Asbestos*, WT/DS135/AB/R at ¶ 171; *See also Thai Cigarettes*; *Reformulated Gas*, WT/DS2/AB/R at pt. III.B.

XX."[66] Accordingly, the second prong of the *Reformulated Gas* test is more stringent than the first.[67] At a minimum, the *chapeau* requires the invoking party to demonstrate good faith.[68] The focus is on the measure's purpose and the way it is applied.[69] 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.[70]

The APHIS fees fail to satisfy the *chapeau*'s requirements because they are arbitrary and unjust. The fees are meant to finance the cost of inspecting shipments entering the United States but are often collected where no inspection has occurred. Furthermore, the fees charge a *higher* pro rata rate to inspect small shipments (i.e. trucks from Canada) that require *less* time and effort to inspect. This formula is arbitrary, given that the purported purpose of the fees is to recoup expenses. If this were the true purpose behind the fees it would make much more sense to charge a higher pro rata rate for larger and more time consuming searches—such as large container ships. The fact that the United States charges a higher pro rata fee for more frequent crossings from Canada compels the conclusion that the APHIS fees are merely a disguised vehicle for generating revenue by charging fees in excess of the true need.[71] They are effectively a bad-faith tax on foreign producers. The United States' attempt to utilize Article XX's exceptions should be rejected accordingly.

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

[67] *See Reformulated Gas*, WT/DS2/AB/R at pt. IV.

[68] *See Shrimp Products*, WT/DS58/AB/R at ¶¶ 158-159; *See also* Vienna Convention, *supra* note 58, art. 26(1) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

[69] *Reformulated Gas*, WT/DS2/AB/R at pt. IV.

[70] *Id*.

[71] *See Customs User*, L/6264-35S/245, at ¶ 71 ("[Customs] fees should be a charge, fixed in amount and not exceeding the cost of issue, rather than an additional source of revenue.").

B. The APHIS Fees Are Unrelated to The United States' Essential Security Interests and Are Not Justified by the National Security Exception in GATT, NAFTA, or GATS.

GATT, NAFTA and GATS each include similar exceptions for national security.[72] Although parties are generally given deference when invoking the national security exception, certain restrictions must be recognized to prevent the exception from swallowing the rules. Too much deference will have a corrosive effect on international trade and essentially convert the national security exception into a commercial one.[73] To prevent this, Article XXI and the corresponding provisions in NAFTA and GATS must be interpreted with an eye towards balancing security and free trade. Measures supposedly related to national security but having a clearly commercial purpose should be viewed skeptically.[74] Assuming the measure is legitimately related to national security concerns, it must meet one of the enumerated exceptions in Article XXI sections (b)(i)-(ii).[75]

Other reasonable restrictions can be found in the *chapeau* of Article XXI section (b). That provision establishes at least three trade-protecting limitations on the national security exception. First, the measure must be *necessary*, which requires that there be no reasonable less-restrictive alternatives.[76] Second, the measure must *protect* a national security interest. Naturally, a measure must be related to a national security threat if it is to protect against that threat. The term "protect" thus suggests that there must be some nexus between the perceived threat and the measure a party chooses to utilize.[77] Finally, the security interest must be *essential*. This suggests that the national security exception should be reserved for serious

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[72] *See* GATT, *supra* note 38, art. XXI; NAFTA, *supra* note 32, art. 2102; GATS, *supra* note 59, art. XIV *bis*.

[73] Bhala, *supra* note 40, at 560-561.

[74] *See id*. at 561.

[75] *See Reformulated Gas*, WT/DS2AB/R at pt. III.C.

[76] *See European Asbestos*, WT/DS135/AB/R, at ¶ 171.

[77] *See* Bhala, *supra* note 40, at 560-61.

security-related concerns rather than tangential or illusory ones; it suggests a good faith requirement for parties seeking shelter in Article XXI.[78]

Even assuming that the APHIS fees fall within one of the enumerated exceptions in Article XXI(b), they do not satisfy the *chapeau* requirements. The fees are unnecessary since the United States could reasonably charge only those vessels that are *actually* searched. Furthermore, there is no nexus between a perceived threat to American national security and the fees. Canadian goods and services were exempt without incident long after 9/11. The United States provides no evidence to support a conclusion that circumstances have changed. Rather, the fees are merely an attempt to generate significant revenue under the guise of national security. They are not actually meant to protect American security but to impose a tax on producers seeking access to American markets. This is a blatantly commercial purpose and should be viewed with severe skepticism. To allow a Party to use Article XXI as a shield to generate a windfall at the expense of foreign producers would seriously undermine the trade-liberalizing policies behind GATT, NAFTA and GATS. The APHIS fees upset the critical balance between trade and security embodied in Article XXI and the other national security provisions at issue in this case and should not be permitted.

III. The United States' WHTI Discriminates Against Member States for the Delivery of Services and Constitutes a Clear Violation of NAFTA Chapters 12 and 16 and GATS.

Chapters 12 and 16 of NAFTA apply to all measures taken by a Party involving the cross-border trade in services.[79] Chapter 12 deals with cross-border trade in services and incorporates the basic MFN principle of non-discrimination embodied in other provisions of the

[78] *See id* at 560-61; *See also* Vienna Convention, *supra* note 58, art. 31(1).
[79] NAFTA, *supra* note 32, art 2101 (1).

Agreement.[80] Under Article 1203 a measure that will limit the free movement of services in a discriminatory manner violates the Agreement. Chapter 16 establishes a right for temporary entry for business persons and provides: "[T]his chapter reflects the preferential trading relationship between the Parties, [and] the desirability of facilitating temporary entry on a reciprocal basis . . ."[81] Chapter 16 requires "[e]ach Party . . . [to] apply its measures . . . expeditiously . . . so as to avoid unduly impairing or delaying trade in goods or services."[82] Under Chapter 16, any measure that "unduly impair[s] or delay[s] trade in goods or services" will violate NAFTA.[83] Since WHTI discriminates against Canada and unduly impairs cross-border trade the measure violates Chapters 12 and 16.

WHTI is unduly burdensome since only 40% of United States citizens currently have passports.[84] Implementing this initiative will require the majority of Americans to choose between acquiring a passport and refraining from traveling outside of the United States altogether. It necessarily follows that the initiative will substantially impair and delay trade in goods and services with Canada. Even if a majority of Americans choose to acquire a passport—and there is no evidence that they will—WHTI will still pose an undue burden on trade. The U.S. government itself recognizes that its infrastructure is not currently set up to handle a large influx in citizens applying for a passport. In a July 2007 U.S. House of Representative hearing before the House Committee on Foreign Affairs, committee chairman Thomas Lantos stated, "every citizen of our Nation has the right to hold a passport, and getting one should be a matter of a few weeks' wait at most, but millions of American, our constituents,

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[80] *See* NAFTA, *supra* note 32, art. 1203.
[81] NAFTA, *supra* note 32, art. 1601 (emphasis added).
[82] NAFTA , *supra* note 32, art. 1602.
[83] NAFTA, *supra* note 32, art. 1602.
[84] R. at 1.

have been reduced to begging and pleading, waiting for months on end simply for the right to travel abroad."[85] The low number of Americans who currently have passports, coupled with the long wait to acquire a new passport, means that WHTI will inevitably impair cross-border trade. The measure is the antithesis of trade liberalization and violates the United States' obligations under NAFTA.

IV. The WHTI is Not Justified by an Exception in NAFTA, GATT or GATS.

A. WHTI Is Not Justified by a General Exception in NAFTA, GATT, or GATS.

The United States cannot meet its burden of showing that WHTI is justified under a general exception in NAFTA, GATT or GATS since WHTI does not fall within an itemized exception in GATT Article XX(a)-(j) and does not meet the requirements of the Article XX *Chapeau.*[86] It is an unjustified restriction on trade that needlessly undermines cross-border trade.

1. WHTI Does not Fall Within an Itemized Exception.

As with the APHIS fees, section (b) and section (d) are the only plausible exceptions that are applicable. Just like the APHIS fees, WHTI is unnecessary and cannot meet criteria demanded by those provisions.[87] WHTI is unnecessary because there are reasonable less-restrictive alternatives that would be equally effective.[88] Scholars largely consider the passport an outdated way to authenticate citizenship. Professor Salter from the University of Ottawa notes that the passport has three chief weaknesses:

> First, the passport may only identify the individual according to other documents, and may be forged. Second, the passport never guarantees the intentions of the bearer. Third, the global mobility regime is not uniform. Every state has slightly

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[85] *Passport Delays Affecting Security and Disrupting Free Travel and Trade: Hearing before the H. Committee on Foreign Affairs* 1, 110th Cong. (July 11, 2007) (statement by Chairman Tom Lantos), *available at* http://www.internationalrelations.house.gov/110/36725.pdf.

[86] *See Reformulated Gas*, WT/DS2AB/R at pt. IV.

[87] *See* GATT, *supra* note 38, art. XX (b) & (d).

[88] *See* Bhala, *supra* note 40, at 538.

> different intelligence capacities and conflicting foreign policies. In many ways, the American border security complex is held hostage to the least sophisticated travel document.[89]

Salter points out those travelers entering the U.S. are only required to show a valid passport. The technology associated with that passport can be at the mercy of the least developed country.[90] In other words, nothing guarantees that a passport has any connection to enhanced security.

Additionally, if the United States felt that the previous forms of authentication—birth certificates and driver's licenses—were insufficient, requiring passports does not solve that problem. "Tightening passport security measures simply shifts the target of fraud from passports toward birth certificates and driver's licenses."[91] Said differently, those wishing to falsify a birth certificate and a driver's license will not be deterred by the passport requirement because those two documents are all that are needed to apply for and receive a passport. A potent and reasonable alternative to the passport would be a national identification card that would implement biometric and "smart chip" technology.[92] A national ID card system would solve the problems associated with passports and pave the way for a uniform international ID card that could be applied world-wide and would streamline cross-border trade. Since there are reasonable alternatives that would be much more effective and less trade-restrictive, WHTI is unnecessary and fails the first *Reformulated Gas* prong.

2. WHTI Fails to Satisfy the *Chapeau* Requirements.

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[89] Mark B. Salter, *Passports, Mobility, and Security: How Smart Can the Border Be?* 5 INT. STUDIES PERSPECTIVES 1 at 86 (Feb. 2004).

[90] *Id.* at 71–91.

[91] *Id* at 87.

[92] *Id* at 86.

Because WHTI is ineffective in promoting the United States' stated goals, it constitutes an arbitrary measure that unjustly discriminates against Canada. The measure therefore fails to live up to the obligations imposed by the *chapeau*.[93] Travel to and from Canada has been exempt from passport requirements without incident for decades. Despite the need for U.S. citizens to have a passport for other international travel, a remarkably low number of Americans currently have a valid passport. There is no indication that Americans will acquire passports in higher numbers in light of WHTI. Even if Americans react to WHTI by applying for a passport, the United States Congress itself has recognized a lack of infrastructure necessary to serve such an influx of passport requests.[94] Given its ineffectiveness, the low number of Americans with passports currently, and the inability of the United States to respond to a potential increase in passport applications WHTI is arbitrary and unjustified.

B. WHTI is Unrelated to the United States' Essential Security Interests and is not Justified Under the National Security Exception in GATT Article XXI and NAFTA Article 2102.

WHTI is not justified under the national security exceptions in GATT, GATS, and NAFTA.[95] To prevent the national security exceptions from being converted into commercial exceptions, there must be some reasonable limitations. GATT Article XXI includes some of these limitations in its structure and the plain meaning of its text, discussed *supra*. WHTI does not meet the implied restrictions in Article XXI and the other security provisions since it is unnecessary: less-restrictive alternatives are available and are discussed *supra.*

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[93] *Reformulated Gas*, WT/DS2/AB/R at pt. IV.

[94] *Passport Delays Affecting Security and Disrupting Free Travel and Trade: Hearing before the H. Committee on Foreign Affairs* 1, 110th Cong. (July 11, 2007) (statement by Chairman Tom Lantos), *available at* http://www.internationalrelations.house.gov/110/36725.pdf.

[95] *Compare* GATT, *supra* note 38, art. XXI *with* NAFTA, *supra* note 32, art. 2102 *and* GATS, *supra* note 59, art. XIV *bis*.

Additionally, WHTI does not *protect* a national security interest. There is no nexus between the perceived threat of an open northern border and WHTI, given the ineffectiveness of a passport as a security-enhancing device.[96] For similar reasons, WHTI is not *essential* to national security. It does nothing to protect American security while needlessly imposing restrictions on tourism and cross-border trade in services. If this court allows the United States to hide behind the Article XXI national security exception it will weaken cross-border trade in services between the United States and Canada and undermine the objectives embodied in the multi-lateral trade agreements at issue in this case.

V. Canada's Fuel Export Tax Does Not Violate GATT or NAFTA.

Under *Reformulated Gas*, the United States bears the burden of demonstrating that the fuel export tax violates a substantive provision in GATT or NAFTA. Canada has no initial obligation to justify the tax or prove that the tax does not violate GATT or NAFTA.[97] Even if the United States can meet its burden—which Canada does not concede—Canada can show that a violation is excused pursuant to a general or national security exception embodied in those agreements.[98]

A. Even if the Fuel Export Tax Would Otherwise Violate GATT or NAFTA, it is Justified by the General Exception in GATT Article XX and NAFTA Article 2101.

1. The Fuel Export Tax Falls Within an Itemized Exception.

Unlike WHTI and the APHIS fees, Canada's fuel export tax satisfies both prongs of the *Reformulated Gas* test, discussed *supra*. The tax meets the first prong because it can properly be located in GATT Article XX (b); it is necessary to protect human life. As stated earlier, a measure is necessary "if there [are] no alternative measure[s] consistent with the General

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[96] *See* Bhala, *supra* note 40, at 560-61.
[97] *See Reformulated Gas*, WT/DS2/AB/R at pt. IV.
[98] *Id.*

Agreement, or less inconsistent with it, which [a party] could reasonably be expected to employ *to achieve its . . . objectives*."[99] The focus is not on the necessity of the policy objective but on the measures used to pursue that objective.[100]

Given the United States' insistence on the thick border initiatives and other "Smart and Secure Borders" programs, it would be odd for the United States to deny their necessity. These border security measures directly serve the interests of the United States. Canada is committed to working with the United States to address the United States' security concerns. At the same time, however, Canada has an equally strong interest in maintaining an equitable tax system based on the premise that Canadians should not be forced to subsidize measures from which they derive little or no benefit. The fuel export tax is necessary to achieve both of these objectives since there is no other reasonable alternative that would allow Canada to pursue both objectives simultaneously.

2. The Fuel Export Tax Satisfies the *Chapeau* Requirements.

The fuel export tax also satisfies Article XX's *chapeau*. The WTO has noted that the *chapeau*'s basic requirement is one of good faith.[101] Its ultimate goal is to prevent abusive use of the exceptions.[102] Accordingly, courts applying the *chapeau* should seek to balance the right of a party to invoke an exception and the rights of the other parties under the substantive provisions of GATT and other similar agreements.[103] "If [the general] exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied

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[99] *European Asbestos*, WT/DS135/AB/R at ¶ 170 (emphasis added) (citation omitted).
[100] *Reformulated Gas*, WT/DS2/AB/R at pt. III.
[101] *Shrimp Products*, WT/DS58/AB/R at ¶ 158.
[102] *Id*. at ¶ 151.
[103] *Id*. at ¶ 159.

reasonably."[104] The fact that a measure may violate one of the substantive provisions of GATT or similar agreements does not place it outside the scope of Article XX. Indeed, "[t]he enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the [same] standard used in finding that the baseline establishment rules were inconsistent with [GATT]."[105] In other words, the focus is not on *whether* a provision violates GATT but whether the alleged violation is *reasonable*.

Canada's export tax is reasonable and was imposed as part of a good faith effort to accommodate the United States' security concerns. It is not an attempt to protect Canadian producers or consumers and certainly is not a disguised attempt to restrict the United States' access to Canadian fuel. In fact, such a restriction would be contrary to Canadian economic interests since the United States is the largest market for Canadian fuel.[106] Instead, the tax is an effort to ensure that those who derive the benefits from Canada's significant investment are the ones that pay for it. The tax is therefore justified by the principles of equity embodied in Article XX.

B. The Fuel Export Tax is Justified By the National Security Exception in GATT and NAFTA.

The fuel export tax is also justified pursuant to 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 is involved:

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[104] *Id.* at ¶ 151.

[105] *Reformulated Gas*, WT/DS2/AB/R at pt. IV.

[106] *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.

> [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:
>
> 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 . . .[107]

Canada's export tax satisfies the requirements of NAFTA Article 607 and, therefore, Article 2102 and GATT Article XXI. As discussed above, Canada has a strong public policy favoring an equitable tax system. At the same time, Canada is committed to working with the United States to accommodate its security concerns. Accordingly, Canada is a partner in the "Smart and Secure Borders" program and has agreed to implement a series of thick border initiatives, most of which are designed to address American security concerns. These two programs constitute the sort of defense contract and international agreement described in NAFTA Article 607. It simply would not be possible as a political matter to fulfill Canada's obligations under these agreements if Canadians were required to bear the cost of implementing them. Because there is no reasonable alternative that would allow Canada to achieve its policy objectives, the export tax is necessary and justified under Article 607.

[107] NAFTA, *supra* note 32, art. 607 (emphasis added).

CONCLUSION

For the foregoing reasons, the Respondent, Canada, respectfully requests this Court to:

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