

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 # 2008-02A

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STATEMENT OF FACTS

Due to heightened border security concerns, in April 2005, the United States Department of State (DOS) in conjunction with the United Department of Homeland Security (DHS) introduced a plan requiring all travelers, including Canadians and Americans, to present a valid passport or an equivalent form of secured identification in order to enter the United States. This proposed plan was the Western Hemisphere Travel Initiative (WHTI).

The plan was implemented in a phased approach. The first phase was implemented on January 23, 2007 and applied to all travelers entering the United States via air plan from within the Western Hemisphere. The second phase, which applies to travel by land or sea, has been announced, but is not yet in effect.

On August 25, 2006, the United States Animal and Plant Health Inspection Service (APHIS) announced that they were removing Canada's exemption from paying an agricultural quarantine and inspection user fee on all commercial shipments entering the United States. As of June 2007, air passengers arriving into the United States pay a \$USD 5.00 user fee and aircrafts arriving into the United States pay \$USD 70.50 user fee. Inspection fees are also charged for maritime vessels (\$USD 490.00), rail cars (\$USD 7.75) and trucks (\$USD 5.25/visit or \$USD 205.00 annually). According to various US governmental authorities, these user fees will help to address national security, sanitary, and phytosanitary concerns.

Securing North American borders has been a primary concern for North American Leaders. Secure and efficient borders enhance prosperity, security, and quality of life. At the Montebello Summit in 2007, Canada, Mexico, and the U.S. outlined several border security improvements they intended to pursue. After serious discussions, on September 11, 2007, the US and Canada issued a joint statement that Canada would spend \$1 billion to put in effect a variety

of border initiatives. Shortly after, Canada's Prime Minister Harper stated that his government had promised Canadians a tax decrease, and therefore Canada would be funding this billion dollar project by imposing a \$CDN 25/barrel fuel export tax on all fuel transported by way of pipeline. Canadian fuel exported by way of pipeline only goes to the US. Accordingly, the US would indirectly bear the costs of implementing border security measures Canada had already agreed to fund. Prime Minister Harper revealed that oil was chosen as the subject of the export tax because demand for Canadian oil would continue despite the price increase. The resulting Fuel Export Charge legislation used the Softwood Lumber Product Export Charge Act, 2006 as a precedent.

QUESTIONS PRESENTED

Canada and the United States refer the following six questions to the Chamber:

1. Whether the Fuel Export Charge is contrary to NAFTA Articles 314 and 604 or GATT Articles VIII and XI.
2. Whether the Fuel Export Charge is justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI.
3. Whether the WHTI is contrary to NAFTA Chapters 12 and 16 and GATS.
4. Whether the WHTI is justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.
5. Whether the APHIS user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII.
6. Whether the APHIS user fees are justified pursuant to the national security exception or a general exception in NAFTA or GATT.

STATEMENT OF JURISDICTION

The United States and Canada, by Special Agreement, hereby submit this dispute to the International Court of Justice, pursuant to Articles 40(1) and 36(1) of the *Statute of the International Court of Justice*. Both Parties have agreed to immediately bring their actions and positions into conformity with the legal conclusions of this Court.

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SUMMARY OF ARGUMENT

The Fuel Export Charge is contrary to NAFTA Articles 314 and 604, and GATT Articles VIII and XI. Furthermore, the charge cannot be justified by general exceptions in GATT or NAFTA because it does not directly protect human life or health interests, is not necessary, and constitutes a disguised restriction on trade. Canada is also precluded from relying on national security exceptions in GATT or NAFTA because any argument would rely on an unjustifiably broad and abusive interpretation of those provisions.

The WHTI does not violate Chapter 12 or 16 of NAFTA or Article XVII of the GATS. In the alternative, the WHTI is justified under the general exceptions or national security exceptions of NAFTA, GATT or GATS.

Waiving the APHIS user fees exemption for Canada does not violate Article VII or I of the GATT or Article 310 of NAFTA. In the alternative, waiving Canada's exemption from APHIS user fees is justified under the general and national security exceptions of NAFTA and GATT.

ARGUMENT

I. THE FUEL EXPORT CHARGE IS CONTRARY TO NAFTA ARTICLES 314 AND 604, AND GATT ARTICLES VIII AND XI.

A. The Fuel Export Charge violates both NAFTA¹ and GATT.²

The agreement to strengthen Canadian borders was made freely, in good faith and expected to be fulfilled accordingly. Canada is now attempting to change the terms of that agreement by imposing a Fuel Export Charge that forces Americans to fund Canada's border security initiatives.

¹ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2 [NAFTA].

² *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187 [GATT].

The Fuel Export Charge cuts at the heart of multi-lateral trade agreements. The fact that Canada has targeted fuel as a means of generating funds is not accidental, as the US relies on Canada as their largest source of imported oil.³ Accordingly, NAFTA negotiations heavily revolved around energy issues and Canada secured trade advantages on the condition of sharing energy with the US.⁴ Now, Canadian oil is increasingly becoming more valuable, and global oil supplies are becoming scarcer. Canada is particularly susceptible to an oil crisis, because it is the only industrialized nation without a strategic oil reserve.⁵ Raising oil prices will force US oil purchasers to go elsewhere, allowing Canada to build an emergency oil reserve. By breaking the agreement to strengthen the Canadian border and using fuel as a means to do it, Canada is attempting to get out of two deals at once.

There is a clear violation of NAFTA Articles 314(b) and 604(b), as pipeline fuel destined for domestic consumption is not taxed, while pipeline fuel destined for the US is taxed. The Fuel Export Charge is also contrary to GATT Article VIII because it imposes an export charge that is not limited to the approximate cost of services rendered and represents a taxation for fiscal purposes (border security). Finally, the Fuel Export Charge is contrary to GATT Article XI because it imposes a potential quantitative restriction by forcing fuel exporters to apply for fuel export permits.

³ Ernest Smith & David Cluchey, "GATT, NAFTA and the Trade in Energy: A US Perspective" (1994) 12 J. Energy & Nat. Res.L. 27.

⁴ *Ibid.*

⁵ Gordon Laxer, "Freezing in the Dark: Why Canada Needs Strategic Petroleum Reserves", online: (2008) The Parkland Institute, <<http://www.ualberta.ca/PARKLAND/research/studies/S-PR%20Report.pdf>>.

II. THE FUEL EXPORT CHARGE IS NOT JUSTIFIED PURSUANT TO A GENERAL EXCEPTION OR THE NATIONAL SECURITY EXCEPTION IN NAFTA ARTICLES 607, 2101, 2102 OR GATT ARTICLES XX AND XXI.

A. The Fuel Export Charge is not justified by the General Exception in NAFTA or GATT.

GATT Article XX and NAFTA Article 2101 (a restatement of GATT Article XX) afford general exceptions allowing members to breach trade obligations under qualifying circumstances. To rely on GATT Article XX, a measure must (1) meet the requirements of one of the particular exceptions listed in paragraphs (a) to (j) under Article XX, and (2) “satisfy the requirements imposed by the opening clauses of Article XX.”⁶

i) Canada will attempt to rely on GATT Article XX (b): necessary to protect human, animal or plant life or health.

NAFTA Article 315 and 605 serve to limit the circumstances in which certain GATT Article XX exceptions may be invoked, but they do not affect Article XX (b). Accordingly, Canada is likely to rely on Article XX (b) to make a General Exception claim.

ii) The Fuel Export Charge does not protect human life or health.

The purpose of the Fuel Export Charge is strictly to raise money. Canada may attempt to argue that these funds will protect the human life or health interests of Americans and /or Canadians by financial supporting border security initiatives. However, this tenuous link is too far removed from the requirements of Article XX (b). Article XX (b) has required that the measure itself protects human life or health; not whether in combination with another measure it potentially could.⁷ Broadening the scope of Article XX (b) to include Canada’s claim would undermine the restrictive nature of exceptions and widen the potential for misuse and abuse.

⁶ *United States – Standards for Reformulated and Conventional Gasoline (Complaint by the United States)* (1996), WTO Doc. WT/DS2/AB/R at 22 (Appellate Body Report) [*US Gasoline*].

⁷ Tatjana Eres, “The Limits of GATT Article XX: A Back Door for Human Rights?”, online: (2004) *Georgetown J. of Int’l L* <http://findarticles.com/p/articles/mi_qa4140/is_200404/ai_n9472185>.

iii) The Fuel Export Charge is not necessary.

Article XX (b) also requires that the measure being imposed is necessary to protect human, animal or plant life or health. A measure is necessary if, “there is no alternative measure consistent with the GATT, or less inconsistent with it, which could reasonably be expected to be employed to achieve the health policy objectives at issue.”⁸

The Fuel Export Charge is not necessary to protect human life or health since less trade-restrictive alternatives are available. If Canada raised the funds from its own citizens, it would not only be less trade restrictive, but it would also be consistent with Canada’s original agreement to both implement these border security measures and bear the associated costs.

Another less trade-restrictive alternative would involve implementing a measure where Canada and the US would share costs for the border security initiatives. The Fuel Export Charge does not share the costs, but unnecessarily places the burden directly and solely on Americans.

Even if Canada is vehement about raising funds from Americans only, they could do so without taxing fuel. A more reasonable alternative could include a directly related tax measure, such as a border users’ fee levied on Americans only. At the very least, such a measure would not target the sensitive Canada / US fuel relationship, and would achieve the objective of raising funds from Americans to improve Canada’s border security.

⁸ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2001), WTO Doc. WT/DS135/R at para. 8.198-199 (Panel Report) [*EC Asbestos*].

iv) Alternatively, the Fuel Export Charge pursues trade-restrictive objectives and therefore does not meet the chapeau requirements.

The purpose of the chapeau under Article XX is to prevent the possibility that provisionally justified measures could constitute a misuse or abuse of the exceptions.⁹ The chapeau requires that a measure must not be applied in a manner “which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or amount to a disguised restriction on international trade.”¹⁰

A measure constitutes “a disguised restriction on international trade” if the design or structure of that measure reveals that it does not pursue legitimate policy objective on which the provisional justification was based, but pursues trade-restrictive objectives.¹¹

Behind the rhetoric of protecting human life and health interests is a disguised agenda to restrict trade. Canada is attempting to use general exception provisions to restrict the trade of fuel, retain Canadian oil supplies, avoid specific energy negotiations from NAFTA, and force the US to pay for stronger Canadian borders.

B. The Fuel Export Charge is not justified under the National Security Exception in NAFTA Article 607(a).

NAFTA Article 607(a) allows a country to breach their obligations under NAFTA if it is “necessary to...enable the fulfillment of a critical defense contract of a Party.”¹² Canada will likely argue that securing the Canadian border is a critical defense contract and that the revenue collected from the Fuel Export Charge is necessary to fulfill that contract. However, a Fuel Export Charge is not necessary. It is of purely economic value and therefore alternatives are

⁹ *US Gasoline*, *supra* note 6.

¹⁰ *GATT*, *supra* note 2 at Article XX.

¹¹ *EC Asbestos*, *supra* note 8 at para. 8.236.

¹² *NAFTA*, *supra* note 1 at Article 607(a).

readily available. Other alternatives that are more consistent with the GATT and NAFTA or less inconsistent have already been mentioned. As well, the creation of thicker borders for individuals entering the US from Canada does not constitute a critical defense contract for Canada, because it is aimed at defending Americans and not Canadians.

C. The Fuel Export Charge is not justified by NAFTA Article 2102 or GATT Article XXI.

Even if NAFTA Article 607(a) does not preclude Canada from making an argument under NAFTA Article 2102 or GATT Article XXI, Canada still could not rely on those sections to justify its Fuel Export Charge. NAFTA Article 2102(1)(b)(ii) and GATT Article XXI(b)(iii) use the same language, allowing a party to breach trade obligations in situations that “it considers necessary for the protection of its essential security interests...taken in a time of war or other emergency in international relations.”¹³

i) The Fuel Export Charge relies on an inaccurate interpretation of GATT Article XXI.

Canada will likely argue that it considers the Fuel Export Charge necessary for the protection of its essential security interests because the funds generated will improve border security and maintain an amicable relationship with the US. They will also try to argue that the war on terror or the nature of their relationship with the US constitutes “a time of war or other emergency in international relations.” None of these arguments can be justified under a sound and reasoned interpretation of the GATT Article XXI.

ii) Canada’s reliance on “it considers necessary for the protection of essential security interests” is overbroad.

The “it considers” portion of the National Security Exception can arguably create a self-judging interpretation of “necessary”, thus allowing a member to do whatever it judges to be

¹³ *GATT*, *supra* note 2 at Article XXI (b) (iii).

“necessary for the protection of its essential security interests.”¹⁴ However, this would create an unintended non-reviewable exemption that rejects the jurisdiction of an appeals mechanism and would open an indefinitely large loophole that would seriously weaken the strength of the multilateral commitments made under the GATT and NAFTA.¹⁵

Under Article 31 of the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the objectives of the treaty.¹⁶ Since the objective of NAFTA and GATT is to foster trade and open up the borders, the National Security Exception should be read with these objectives in mind.

Furthermore, disputes under GATT XXI have been subject to redress and review under Article XXIII of the GATT. Similarly, NAFTA provides several exclusions to its arbitration provisions.¹⁷ The fact that the dispute settlement mechanism would not apply in one instance, strongly suggests that it was intended to apply in other instances. Thus, it seems logical to say that the interpretation of national security exemptions under GATT and NAFTA were never meant to be entirely self-judging, and that the dispute settlement mechanisms still apply.

The National Security Exception has typically been applied with reluctance and only in reaction to what was perceived to be an internationally wrongful act.¹⁸ Canada’s attempt will fall outside of this. Imposing a Fuel Export Charge in order to fund the border security of another

¹⁴ David T. Shapiro, “Be Careful What You Wish For: U.S. Politics and the Future of the National Security Exception to the GATT” (1997) 31,1 *The George Washington J. of Int’l L. Econ.* 97.

¹⁵ Wesley A. Cann, “Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism” (2001) 26 *Yale J. Int’l L.* 413.

¹⁶ Vienna Convention on the Law of Treatise, 23 May 1969, 1155 UNTS 331, at Article 31

¹⁷ Peter Lindsay, “The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?” (2003) 52 *Duke L. J.* 1277 [*GATT Ambiguity*].

¹⁸ Michael J. Hanh, “Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception”(1991) 12 *Mich. J. Int’l L.* 558.

nation on the basis that it is in Canada's essential security interest is overbroad. Furthermore, if Canada did take this position, then such an argument would undoubtedly call for Canada bearing the costs of their own benefits. Accordingly, Canada should not be allowed to abusively interpret Article XXI to charge Americans for something beneficial to Canadians.

iii) The Fuel Export Charge is not a measure taken "in time of war or other emergency in international relations."

Some have argued that a party should get to determine what it perceives to be "a time of war or other emergency in international relations."¹⁹ Such an unlimited interpretation of these provisions would result in an inordinate amount of discretion that would undermine the GATT and NAFTA. The only safeguard from the abuses of such provisions have been the spirit of interpretation and use.²⁰ If the ICJ is unwilling to limit the interpretation, the spirit of both the GATT and NAFTA will be broken.

Canada is not at war with the US, nor does their relationship with the US constitute an emergency in international relations. The US and Canada are currently at war together in Afghanistan. Canada has decided not to back the US in the war on Iraq, but it is unreasonable to declare this one difference to be an emergency in international relations.

Furthermore, no country should be allowed to abuse the National Security exemption in order to get out of prior obligations. It is imperative that the ICJ interprets such exemptions in a manner that places limits on their ambiguity and ensures they will be used in a manner consistent with both GATT and NAFTA.

¹⁹ *GATT Ambiguity*, *supra* note 17.

²⁰ *Ibid.*

III. WHTI DOES NOT VIOLATE NAFTA OR GATS.

A. WHTI does not violate the “national treatment” provision of NAFTA Article 1202 or GATS Article XVII.

For Canada to establish a violation of Article 1202, two requirements must be satisfied.²¹ First, there must be the existence of “like circumstances” between domestic and foreign service providers. Second, foreign service providers must receive “less favorable treatment”. Similar requirements appear in GATS Article XVII:1.

i) Canadian service providers are not in “like circumstances”.

Where service providers are not in “like circumstances,” a government may afford differential treatment for legitimate policy reasons.²² GATS Article XVII:2 explicitly provides that National Treatment can be achieved through formally different treatment.²³

Canadian service providers are not in “like circumstances” to American service providers, particularly when assessing their security risk. The US can readily ascertain the relative security risk of its own citizens and residents, while it does not have full access to the range of information about entering Canadian service providers. After Canadian service providers have met the necessary identification requirements for security purposes at the border, only then are they in “like circumstances” to American service providers.

²¹ Jeffery Atik, “National Treatment in the NAFTA Trucking Case”, (2001) 42 S. Tex. L.Rev. 1249 at 1251.

²² *In The Matter of Cross-Border Trucking Services (United States v. Mexico)*, (2001) USA-MEX-98-2008-01 (Ch.20 Panel) at para. 258 [*Trucking Services*].

²³ *General Agreement on Trade in Services*, 30 November 1997, 1869 U.N.T.S. 183 at Article XVII:2 [*GATS*].

ii) Canadian service providers have not experienced “less favorable treatment”.

At the very most, Canadian service providers receive “differential” treatment, but this is entirely consistent with National Treatment obligations. Differential treatment can be given where it is necessary for legitimate regulatory reasons, and where it is equivalent.²⁴

Canadian service providers require a passport if they are seeking entry to the US. Although this treatment is different, it is in essence equivalent. It is meant to ensure that service providers operating within the US do not pose a risk to national security. The potential security risk posed by a US service provider can be assessed using domestic mechanisms such as the information gathering measures under the Patriot Act,²⁵ negating the need for a passport.

Like Canadian service providers, US service providers must present a passport or equivalent identification upon re-entry into the US.²⁶ In this respect, both US and Canadian service providers are subject to the requirements of the WHTI.

US citizens have been given the option of a passport card which costs about half the price of a traditional passport, but Canada has canvassed similar initiatives. One government study reports that 60% of Canadians said they would be more likely to use the current form of passport when traveling to the US, even if alternative documents were available.²⁷ Both the DHS and the DOS have engaged Canada in discussion about possible alternatives.²⁸ To this point though,

²⁴ *Trucking Services*, *supra* note 22 at para. 258.

²⁵ *Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*, U.S.H.R. 3162 (2001).

²⁶ U.S., DHS and U.S. Customs. 2007. Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Points-of-Entry from within the Western Hemisphere: Notice of Proposed Rule Making. 22 CFR Parts 41 and 53 at 1 [WHTI Notice of Proposed Rule Making].

²⁷ Don Butler, “Canadians wary of high-tech passport alternatives” *The National Post* (23 January, 2008), online: National Post <<http://www.nationalpost.com/news/canada/story.html?id=258581>>.

²⁸ WHTI Notice of Proposed Rule Making, *supra* note 26 at 29.

Canada has not presented any suggestions for alternative identification.

B. WHTI does not violate NAFTA Article 1603.

Parties to NAFTA are obligated to grant temporary entry to business people who are “otherwise qualified for entry under applicable measures relating to public health and safety and national security.”²⁹ Border security is a major concern of the NAFTA Parties. For the US to preserve its security, business people seeking temporary entry from Canada must qualify and comply with US immigration laws regarding national security and exclusion.³⁰

Section 212(a)(3)(B) of the Immigration and Nationality Act (INA) provides that no individual engaged in terrorist activities will be admitted into the US.³¹ A passport is required in order to effectively assess whether a temporary business entrant falls into this category.

IV. WHTI IS JUSTIFIED UNDER THE GENERAL EXCEPTION OR THE NATIONAL SECURITY EXCEPTION OF NAFTA, GATT, AND GATS.

A. WHTI is justified pursuant to a general exception in NAFTA or GATT or GATS.

Under Articles 2101(2) of NAFTA, Article XX(d) of GATT, and XX(c) of GATS, the obligations placed on a Party shall not be construed to prevent the adoption or enforcement of measures necessary to secure compliance with laws or regulations that are not inconsistent with the Agreements. The chapeau requirements must also be met.

i) The WHTI secures compliance with the *Intelligence Reform and Terrorism Prevention Act, 2002 (IRTPA)*

The WHTI is a measure meant to enforce and secure compliance with the IRTPA. There is no indication that the IRTPA is inconsistent with the provisions of NAFTA, GATT, or GATS. The IRTPA was enacted in light of the recommendations made by the National

²⁹ *NAFTA*, *supra* note 1 at Article 1603.

³⁰ Ellen G. Yost, “NAFTA – Temporary Entry Provisions – Immigration Dimensions”, (1996) 22 *Can.-U.S. L.J.* 211 at 212.

³¹ *Immigration and Nationality Act*, 8 U.S.C. 1182 § 212(a)(3)(B) (1952).

Commission on Terrorist Attacks Upon the United States (The 9-11 Commission).³² Section 7209(b)(1) of the IRTPA required DHS to implement a plan requiring both foreign nationals and US citizens to have a passport when entering the US.³³ The goal of the initiative was to strengthen border security while at the same time quickly and reliably processing travelers.

ii) The WHTI is “necessary” to secure compliance with the IRTPA

A measure is “necessary” in the context of GATT Article XX(d) based on a weighing of i)the relative importance of the common interests the measure is intended to protect ii)the extent to which the measure contributes to securing compliance iii)and the extent to which compliance with the measure produces restrictive effects on international trade.³⁴ Considering these factors, the WHTI is the only reasonable means by which to secure compliance with the IRTPA.

Security is a prominent concern for both nations, but so is the facilitation of border crossing for legitimate travelers. Requiring some form of secure identification is the most efficient way to track citizens and visitors that enter the US.³⁵ More than 8000 different documents have been used to enter the US, including library and student cards.³⁶ Such a method of screening potential entrants is inefficient, and susceptible to fraud.

³² U.S., The National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington, D.C.: The Commission, 2004) [*9/11 Commission Report*].

³³ *Intelligence Reform and Terrorism Prevention Act of 2004*, Pub. L. No. 108-458 §7209(b)(i), 26 118 Stat. 3638 at 3823 (2004) [*IRTPA*].

³⁴ *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef (Complaint by Australia and the United States)* (2000), WTO Doc. WT/DS161/AB/R at para 164 (Appellate Body Report) [*Korea Beef*].

³⁵ Office of the Spokesman, “Rice-Chertoff Joint Vision: Secure Borders and Open Doors in the Information Age” (17 January 2006), online: DOS <<http://www.state.gov/r/pa/prs/ps/2006/59241.htm>>.

³⁶ DHS Press Office, “Fact Sheet: Strengthening Border Security and Facilitating Entry into the United States: Moving Toward WHTI Implementing for Cross-Border Travel by Land and Sea” (20 June 2007) online: DHS <http://www.dhs.gov/xnews/releases/pr_1182351923729.shtm>.

iii) Alternative forms of identification contribute to efficient border crossing.

Joint initiatives such as NEXUS and Fast & Secure Trade (FAST) are instrumental in accommodating border movement. NEXUS allows pre-screened, low risk travelers to be processed with minimal delay.³⁷ FAST is designed to provide approved drivers of commercial vehicles with access to separate FAST lanes at the border and reduced Customs information requirements.³⁸ These initiatives ensure adherence to the WHTI and IRTPA while at the same time facilitating efficient border crossing.

iv) WHTI is not arbitrary or unjustifiable or a disguised restriction on trade.

WHTI is a measure meant to facilitate trade rather than hinder it through the accelerated movement of low-risk travelers. Requiring the presentation of uniform and reliable pieces of identification is by no means an arbitrary measure to achieve this objective. Moreover, the WHTI cannot be considered a disguised restriction on trade since initiatives such as NEXUS have in fact enabled trade. More than 50,000 people are enrolled in the program and clearance through NEXUS lanes at the border is substantially faster than ordinary lanes, typically taking less than five seconds.³⁹

³⁷ Office of the Press and Secretary, “United States – Canada Nexus Program” (9 September 2002), online: The White House <<http://www.whitehouse.gov/news/releases/2002/09/20020909-1.html>>.

³⁸ U.S. Customs, “FAST: Free and Secure Trade” (8 January 2006), online: U.S. Customs <http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/fast/us_canada/us_canada_information.ctt/us_canada_information.doc>.

³⁹ Intermec Technologies, “Nexus: Life in the Fast Lane – RFID Powers Border Crossing Program” (5 May 2004), online: Association for Automatic Identification and Mobility <<http://www.aimglobal.org/members/news/templates/template.aspx?articleid=134&zoneid=12>>.

B. WHTI is justified under the “National Security Exception” Provisions of NAFTA, GATT, and GATS.

i) Lenient documentation requirements at the border pose a potential threat American national security.

The US considers WHTI necessary to protect its national security during the war on terror. The 9-11 attackers did not enter the US through Canada, but the potential for such entry still exists. According to the Canadian Security Intelligence Service (CSIS), a number of terrorist organizations are operating within Canada.⁴⁰ This is primarily because of Canada’s proximity to the United States.⁴¹

ii) The WHTI’s requirement for passports or equivalent identification is necessary.

Travel documents are as important to terrorists as weapons.⁴² According to the findings of the 9-11 Commission, the 9-11 hijackers would have been vulnerable to interception by border authorities had their documentation and travel patterns been scrutinized.⁴³ Before September 11, 2001, no government agency systemically assessed the travel patterns of terrorists.⁴⁴ New forms of analysis, coupled with advancements in passport technology have increased the likelihood of terrorist detection.

Security enhanced passports have been issued since 2001. These include features such as digital photos, digitally printed information, advanced printing techniques and ultra violet light

⁴⁰ Canadian Security Intelligence Service (CSIS), “Terrorism” (16 March 2007), online: CSIS <<http://www.csis-scrs.gc.ca/en/priorities/terrorism.asp>>.

⁴¹ *Ibid.*

⁴² *9/11 Commission Report*, *supra* note 32.

⁴³ *Ibid.*, at 384.

⁴⁴ *Ibid.*, at 384.

imagery.⁴⁵ These features ensure that the possibility of counterfeiting is extremely remote.

V. APHIS USER FEES ARE NOT CONTRARY TO GATT ARTICLES I AND VIII AND NAFTA ARTICLE 310.

A. APHIS user fees do not violate GATT Article VIII.

According to GATT Article VIII:1(a), (i) a Party cannot impose importation fees in excess of the approximate costs of the services rendered, (ii) fees cannot represent an indirect protection to domestic products, and (iii) fees cannot constitute a taxation on imports for fiscal purposes. The removal of Canada's exemption from AIQ fees does not fall within the ambit of these prohibited types of importation fees.

i) APHIS user fees approximate the cost of services rendered.

Commercial conveyances entering from Canada have been subject to inspection, but have not been required to pay AQI fees. By virtue of this, US resources have been spent without any cost recovery from those Canadians using the service. In the 2003-2005 fiscal years, APHIS program costs ran substantial deficits,⁴⁶ and the lack of funds and personnel hindered efforts to adequately perform border inspections.⁴⁷ With the removal of the exception, additional personnel can be trained to address existing risks entering from Canada, and identify novel ones.⁴⁸

In adherence with Article VIII:1(a), fees charged on importation must be not exceed the approximate cost of the individual importer in question.⁴⁹ Even though the AQI user fee is levied

⁴⁵ Frank E. Moss "How the U.S. Passport Program Enhances Border Security" *Bureau of Public Affairs* (22 June 2005), online: DOS <<http://www.state.gov/r/pa/ei/othertstmy/48733.htm>>.

⁴⁶ Government Accountability Office, *Agricultural Quarantine Inspection Program, Management Problems May Increase Vulnerability of U.S. Agriculture to Foreign Pests and Diseases* (GAO-08-96T) (Washington, DC: GAT, 2007).

⁴⁷ U.S., Animal and Plant Health Inspection Service, US Department of Agriculture. 2006. *Agricultural Inspection and AQI User Fees Along the U.S./Canada Border: Interim Rule*. Federal Register. Vol. 71, No. 165 at 50323 [*APHIS Interim Rule*].

⁴⁸ *Ibid.* at 50323.

⁴⁹ GATT Panel Report, *United States – Customs User Fee*, L/6263, adopted 2 February 1988, BISD 35S/245 at para. 86 [*US Customs*].

against all commercial conveyances, this is still directly proportional to the services being rendered. Regardless of whether or not agricultural products are being transported during a particular trip, all conveyances and packaging materials present a potential pathway for pests to enter the United States.⁵⁰ APHIS experts familiar with the Canadian border have said that there is a need to inspect everything.⁵¹ Since any commercial conveyance from Canada could potentially be subject to infestation with pests, by necessity every conveyance must potentially be subject to inspection by CPB officers. Therefore the costs of services rendered by APHIS are proportional to the AIQ user fees.

ii) APHIS user fees are not an indirect protection to domestic products.

The waiver of Canada's exemption from paying APHIS user fees was implemented for the *bona fide* purpose of protecting American animal and plant resources from agricultural pests and diseases.⁵² There is no evidence suggesting this was a measure meant to facilitate protectionist goals. Recent inspections along the U.S./Canadian border have resulted in the interception of prohibited fruits, vegetables and other products from regions other than Canada.⁵³ This reveals the need for increased inspection of conveyances entering the United States from Canada. To finance these increased inspections and related services, it is necessary to lift the exemption afforded to commercial conveyances from Canada.

iii) APHIS user fees do no amount to taxation on imports for fiscal purposes.

Under §2509(a) of the *Food, Agriculture, Conservation, and Trade Act (FACT Act)*, APHIS is authorized to set and collect user fees for AQI services rendered in connection with the

⁵⁰ *APHIS Interim Rule*, *supra* note 47 at 50327

⁵¹ *Ibid.* at 50327.

⁵² APHIS, *Factsheet* (March 2007), online: USDA <http://www.aphis.usda.gov/publications/plant_health/content/printable_version/faq_canadian_user_fees.pdf>.

⁵³ *APHIS Interim Rule*, *supra* note 47 at 50321.

arrival of international air passengers and conveyances to the United States.⁵⁴ This also includes an amount sufficient to maintain a reasonable balance in the AQI user fee account for each service category.⁵⁵ The reserves are meant to ensure that each agency has sufficient operating funds to carry on vital AQI activities in the event of occurrences such as bad debt from conveyers, carrier insolvency or drastic reductions in the border crossing volume.⁵⁶ Furthermore, internal record keeping ensures that all AQI revenues are properly recorded and utilized exclusively for AQI services.⁵⁷

B. APHIS user fees do not violate Article I of the *GATT*.

The implementation of AQI user fees along the American/Canadian border results in Canada being treated no differently than any other country. Every other international conveyance is subject to the imposition of APHIS user fees. In this regard, the United States submits that there has been no violation of the General Most-Favoured Nation Treatment in *GATT* Article I.

C. The APHIS user fee does not violate Article 310 of *NAFTA*.

According to Article 310 and Annex 310.1 of *NAFTA*, the United States cannot increase merchandise processing fees on originating goods where those goods are marked as goods of Canada. The United States submits that it is not increasing merchandise processing fees on goods originating from Canada; it is merely waiving an exception that was afforded to Canada. There has been no increase in APHIS user fees applied specific to Canadian conveyances as compared to other countries.

⁵⁴ *Food, Agriculture, Conservation and Trade Act of 1990*, Pub. L. No. 101-624, § 2509(a).

⁵⁵ Homeland Security: “Management and Coordination Problems Increase the Vulnerability of U.S. Agriculture to Foreign Pests and Disease” (GAO-06-644). Government Accountability Office. May 2006. Page 31.

⁵⁶ *Ibid.* at 31.

⁵⁷ *APHIS Interim Rule*, *supra* note 47 at 50324.

VI. THE APHIS CUSTOM USER FEES ARE JUSTIFIED PURUSANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA OR GATT

A. APHIS custom user fees are justified under NAFTA Article 2101(b) and GATT Article XX(b) General Exceptions.

i) APHIS customs user fees constitute a measure protecting human, animal, or plant life or health.

APHIS user fees are used to fund current and future border inspections that are aimed at preventing threatening microscopic plant and animal pests and diseases from entering the country. Accordingly, APHIS user fees fall within a range of policies designed to protect human, animal or plant life or health.

ii) APHIS user fees are necessary.

Canada is likely to argue that APHIS user fees are unnecessary because there are reasonably available alternatives that are less trade restrictive. These arguments will likely center on the fact that APHIS user fees are imposed regardless of whether individuals are travelling with fruits and vegetables, and regardless of whether they were processed through customs or immigration. However, this is necessary because inspecting all individuals and shipments would be unduly trade restrictive. Every minute over \$1,000,000 in goods crosses the US/Canada border.⁵⁸ Over 35 million trucks and vehicles enter the US a year.⁵⁹ To inspect every vehicle, shipment or individual crossing the border would impose border delays tantamount to an even greater trade restriction. Furthermore, it would impose greater labor and overhead costs that would likely serve to increase the current fee amount. Thus, limited inspections are the least

⁵⁸ Ontario Chamber of Commerce, “Cost of Border Delays to Ontario” (2004), online: <<http://www.chass.utoronto.ca/~clarkson/publications>>.

⁵⁹ U.S. Customs Service, “Vehicles Crossing into the United States from Canada” (2003), online: <<http://www.statcan.ca/english/research/11-621-MIE/2005028/tables/table2.htm>>.

trade restrictive option.

Moreover, it may be submitted that the current user fees also account for future contingencies by allowing for the creation of surpluses. The purpose of this reserve is to ensure access to funds for normal operating expenses, as well as ensure sufficient operating funds in cases of “bad debt, carrier insolvency, or fluctuations in activity volumes.”⁶⁰ Furthermore, these surpluses have limitations that prevent their abuse.⁶¹ For example, reserves are separated by particular service categories and not compounded. Building a reserve account has been necessary in the past and continues to be necessary. After the terrorist attacks of September 11th, 2001; airline traffic into the US dramatically decreased due to fears of other attacks. The reserve fund accounted for this decreased activity and kept the airline service portion of APHIS operating.⁶²

iii) APHIS user fees meet the chapeau requirements of GATT Article XX and do not constitute “a disguised restriction on trade.”

APHIS user fees were implemented for the bona fide purpose of protecting plant, animal or human life or health from potential agricultural threats and bioterrorism.⁶³ Therefore, APHIS user fees do not constitute a disguised restriction on trade.

B. APHIS customs user fees are justified pursuant to the National Security Exception in NAFTA Article 2102(b)(iii) and GATT Article XX1(b)(iii).

i) The US considers APHIS user fees “necessary for the protection of its essential security interests.”

APHIS user fees are necessary for the protection of essential security interests because they are a vital part of homeland security and disease control.⁶⁴ The US has been a victim of

⁶⁰ *APHIS Interim Rule*, *supra* note 47 at 50324.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

terrorist attacks in the past, and continues to be a potential target for bio-terrorism. Without APHIS user fees, funding would not exist to screen against the real threat posed by unchecked shipments and individuals crossing the border.

ii) APHIS user fees are a measure taken “in time of war or other emergency in international relations.”

It is submitted that the wars in Afghanistan and Iraq and the potential for further terrorist attacks are sufficient to constitute “a time of war or other emergency in international relations.”

CONCLUSION

THEREFORE, the United States submits that this Honorable Court declares that:

1. The Fuel Export Charge is contrary to NAFTA Articles 314, 604 or GATT Articles VIII and XI and is not justified pursuant to any national security exception or general security exception in NAFTA or GATT;
2. WHTI does not violate NAFTA Chapters 12 and 16 and GATS or, alternatively, it is justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS; and
3. APHIS user fees do not violate NAFTA Article 310 and GATT Articles I and VIII or, alternatively, they are justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.

⁶⁴ *Transferring USDA’s Animal and Plant Health Inspection Service (APHIS) to the proposed Department of Homeland Security*, U.S. House of Rep. (26 June 2002) (Meg Scott Phipps), online: <<http://www.nasda.org/joint/06-2002Phipps.htm>>.