

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

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**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 # 2008-02R**

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## **STATEMENT OF FACTS**

Until now, Canadian and American citizens have been able to cross the border into their neighbouring country simply by presenting a valid photo identification card and a birth certificate. This long-established practice will soon end, due to the creation of the Western Hemisphere Travel Initiative (WHTI) by the United States. As of summer 2008, anyone entering the United States, regardless of method of entry, will have to present a valid passport or prescribed identification. The Canadian government is concerned with the disproportionate effects of the WHTI on Canada because the limit of free movement to people will affect the free movement of goods and services.

In addition, 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. Air passengers arriving into the United States are now required to pay \$USD 5.00 regardless of whether or not they are carrying fruit and vegetables. The agricultural quarantine and inspection fee is payable even if the passenger has come through customs and immigration at a Canadian airport. As well, aircraft arriving into the United States must pay a \$USD 70.50 user fee.

For maritime vessels, a fee of \$USD 490.00 is imposed irrespective of the cargo, while for each rail car, the fee is \$USD 7.75 for each entry into the United States. Trucks entering the United States are subject to an APHIS user fee of \$USD 5.25, which is on top of the \$USD 5.50 charged for an existing Customs and Border Protection fee. Alternatively, trucks can pay an annual user fee of \$USD 205.00, which covers both the APHIS fee and Customs and Border Protection fee.

Canada's Department of Foreign Affairs and International Trade (DFAIT) has expressed its opinion to the US Department of Homeland Security and the United States Trade Representative that the APHIS fees are customs user fees which violate NAFTA and GATT.

At the conclusion of the August 2007 Montebello North American Leaders' Summit, Prime Minister Harper, President Bush, and President Calderon issued a statement regarding "Smart and Secure Borders." The leaders stressed the importance of facilitating the efficient and safe movement of goods, services and people, as trade continues to increase in North America. The leaders recognized the importance of developing mutually acceptable inspection protocols and screening goods prior to their entry into North America. The leaders agreed to ensure that ministers from their respective countries cooperate in law enforcement and work towards facilitating legitimate trade and travel. The ministers were to report on their progress one year later.

The leaders listed a number of priorities to help all three nations prosper and operate borders efficiently and effectively in all circumstances, including screening travelers and goods before they enter North America. A number of other issues which were stressed was the development of comparable protocols and procedures to prevent "duplicate screening" for baggage on connecting flights within North America, and pursue models which "promote seamless operations at the border" to better protect against terrorist threats.

After the release of the 2007 Montebello summit statement, a number of candidates in United States' Party Nominations falsely declared that a number of the terrorists involved in the 9/11 attacks entered the United States through Canada. As a direct consequence to these false allegations and in the face of heavy media scrutiny, Canada's Minister of Public Safety, Stockwell Day, United States Secretary of Homeland Security Michael Chertoff and United

States' Vice-President Dick Cheney immediately commenced negotiations concerning the implementation of security action points outlined at the Montebello Summit. It was reported by various media sources that the negotiations were tumultuous and that Canadian representatives were pressured into agreeing to "thick border" initiatives. On September 11<sup>th</sup> 2007, Canada and the U.S. issued a joint statement that Canada would spend 1 billion dollars in order to implement the border improvements.

That same day, the office of Prime Minister Harper announced the implementation of a new export tax of \$CDN 25.00 per barrel of fuel on all fuel delivered by way of pipeline. Using the previously established softwood lumber export tax as precedent for such a policy, Prime Minister Harper stated that the money collected from the export tax would be used as funding for the new thick border initiatives. The Prime Minister placed emphasis on the government's obligation to fulfill promises not to raise the taxes of its citizens. Therefore, Canada was opting to fund the new border project by implementing an export tax on a good whose demand would not be harmed by the measure. The United States enjoy the majority of the national defense benefits arising from the new border security strategies.

## **QUESTIONS PRESENTED**

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

1. Whether the APHIS user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII.
2. Whether the APHIS user fees are justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.
3. Whether the WHTI is contrary to international customary law, 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 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.

## **STATEMENT OF JURISDICTION**

The United States and Canada, by Special Agreement, hereby submit this dispute to a Chamber of the International Court of Justice composed of three judges, 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 APHIS user fees being applied to all commercial shipments entering the United States from Canada is contrary to GATT Article VIII, NAFTA 310, and the SPS Agreements under GATT. The broadly applied APHIS fees are another incremental step that is thickening the border. They are not necessary and can not be justified under the General and National Security Exceptions in GATT, NAFTA, and GATS.

The WHTI has violated an international customary law on easy border access which applies to between Canada and the United States. The WHTI is also contrary to NAFTA Chapters 12 and 16 and GATS. WHTI final implementation will give the U.S. full power in determining what Canadians can use as a passport alternative; this is not necessary and cannot be justified under the General and National Security Exceptions in NAFTA, and GATS.

The export tax on pipeline fuel will provide funding for the border initiatives which Canada only agreed to under duress. The fuel tax finds justification through the national security exception provided in GATT and NAFTA, as an imperative protection of Canadian sovereignty. Further, the export measure is also justified through the general exception provided in GATT and NAFTA.

## ARGUMENT

### **I. APHIS USER FEES ARE CONTRARY TO GATT ARTICLE VIII AND NAFTA ARTICLE 310.**

#### **A. APHIS user fees are contrary to 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, and (ii) fees cannot constitute a taxation

on imports for fiscal purposes.<sup>1</sup> The flat rate user fees applied to commercial vehicles crossing the Canada/US border violate both of these conditions.

i) APHIS user fees are in excess of the approximate cost of service.

Fees charged on importation must not exceed the approximate cost of the individual entry in question.<sup>2</sup> APHIS user fees violate this requirement because a flat rate fee is being charged regardless of whether an inspection takes place. For example, at the Buffalo border crossing site, only 0.5% of vehicles are inspected.<sup>3</sup> Consequently, the majority of people and goods crossing the border are being charged an APHIS user fee even though no search costs are incurred.

ii) APHIS user fees are a taxation on imports for fiscal purposes.

APHIS acknowledges that the fees will allow for increased hiring and border security enhancements.<sup>4</sup> This is being done by creating a fee that is higher than necessary, which is inconsistent with the principle of fairness.<sup>5</sup> It also comes at a time where the American economy is struggling. The user fee was designed by the US Government to create jobs in struggling states such as Michigan, which lost 46 000 jobs from April 2006 to April 2007.<sup>6</sup> In addition, the fees

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<sup>1</sup> *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27 at Article VIII:1(a) [*GATT*].

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

<sup>3</sup> 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 at 27.

<sup>4</sup> 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 [APHIS].

<sup>5</sup> United States Chamber of Commerce & Canadian Council of Chief Executives, “Re: Interim rule to Impose Agriculture Inspection and User Fees Along The United States-Canada Border” *US Chamber of Commerce* (17 November 2006), online: <[http://www.uschamber.com/NR/rdonlyres/emr5e4zlp3qprcajebkx27mnysejl3ddqtapyms3iprpelsjxpy46sky35rcz7deehozlth2vzfmyzxe44dvsce/061117\\_aphis\\_letter.pdf](http://www.uschamber.com/NR/rdonlyres/emr5e4zlp3qprcajebkx27mnysejl3ddqtapyms3iprpelsjxpy46sky35rcz7deehozlth2vzfmyzxe44dvsce/061117_aphis_letter.pdf)> [*US Commerce*].

<sup>6</sup> Louis Aguilar, *Worst yet to come for Michigan economy*, online: The Detroit News <<http://www.detroitnews.com/apps/pbcs.dll/article?aid=/20070613/biz/706130416/1001>>.

are also being used to maintain a reserve fund.<sup>7</sup> The revenues, in later years, could far exceed the cost of services rendered, allowing the reserve fund to become a vehicle to hide surpluses and facilitate abuse. Any fee in excess of the cost of services rendered is a violation of Article VIII.<sup>8</sup>

NAFTA was created to lower the costs of imports and exports. While it has resulted in reduced tariffs, the advantage of NAFTA is being eroded by an ever-increasing set of fees created under the guise of border security. Exporters and importers are already faced with Merchandise Processing Fees, COBRA fees, and Harbor Maintenance Fees.<sup>9</sup> The benefit of these many fees in funding security improvements is outweighed by the damage done to international commerce.

**B. APHIS user fees are considered to be a “customs user fee” under NAFTA Article 310.**

Under Article 310, the US is prohibited from increasing its customs user fees as set out in Article 403 of the Canada-US Free Trade Agreement. Article 403 states, “neither party shall introduce customs user fees with respect to goods originating in the territory of the other party.”<sup>10</sup> APHIS fees are clearly customs user fees being introduced to goods originating in Canada, thus violating NAFTA Article 310.

**C. APHIS user fees violate the SPS Agreement as the US has not provided “sufficient evidence” to show that fees are “necessary”.**

Article 2.2 of the SPS Agreement requires sanitary or phytosanitary measures to be applied only when it is “necessary to protect human, animal, or plant life or health” and when it

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<sup>7</sup> APHIS, *supra* note 4.

<sup>8</sup> *US Customs*, *supra* note 2 at para 86.

<sup>9</sup> Michael Wilson. (2007, March). *The Canada-U.S Border: Free Trade in a time of Enhanced Security*. Speech presented at American Society of International Law Annual Meeting, Washington D.C.

<sup>10</sup> *Canada – United States Free Trade Agreement*, 1 January 1989, at Article 403(1) online: <<http://wehner.tamu.edu/mgmt.www/NAFTA/fta/>>.

is “based on scientific principles.”<sup>11</sup> The United States has failed to show evidence that the measures taken will satisfy its objectives. In addition, many US agricultural groups are not aware of the risks mentioned by APHIS and are concerned with the lack of scientific risk assessment.<sup>12</sup> The statistics quoted in the APHIS report are from a time period before many other recent security initiatives were put in place. Therefore, new statistics must be used to take the current security initiatives into consideration.

The US has not shown that the fee is necessary in protecting human life and health. It has arbitrarily and unjustifiably implemented measures which act as trade barriers, violating Article 5.5 of the SPS Agreement.<sup>13</sup> The APHIS interim rule does not identify any immediate risk or emergency situation that would justify an excessive precautionary measure.<sup>14</sup> There must be a risk assessment which shows actual risk before the US can justify a fee to every commercial conveyance and international air passenger.<sup>15</sup>

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<sup>11</sup> *Agreement on Sanitary and Phytosanitary Measures*, 15 April 1994, 1867 U.N.T.S. 493 at Article 2.2 [*SPS*].

<sup>12</sup> Kendell W. Keith et al., “Re: Docket No. APHIS-2006-0096 – Agricultural Inspection and AQI User Fees Along U.S.-Canada Border” *National Oilseed Processors Association* (22 November 2006), online: NOPA < [http://www.nopa.org/content/newsroom/2006/nov/joint\\_statement\\_to\\_aphis\\_on\\_proposed\\_aqi\\_user\\_fees.pdf](http://www.nopa.org/content/newsroom/2006/nov/joint_statement_to_aphis_on_proposed_aqi_user_fees.pdf) > [*NOPA*].

<sup>13</sup> *SPS*, *supra* note 11 at Article 5.5.

<sup>14</sup> *NOPA*, *supra* note 12.

<sup>15</sup> Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, adopted 13 February 1998, DSR 1998:III at para 186 [*EC Hormones*].

## **II. APHIS CUSTOMS USER FEES ARE NOT JUSTIFIED PURUSANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA, GATT, OR GATS.**

### **A. APHIS customs user fees are not justified under NAFTA Article 2101: General Exceptions and GATT Article XX: General Exceptions.**

#### i) APHIS customs user fees cannot be justified under GATT Article XX.

To be justified under the general exceptions of the GATT, 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.”<sup>16</sup>

#### ii) APHIS customs user fees are not necessary under GATT Article XX(b).

The United States suggests that the rationale for APHIS inspections is that there is a risk that the goods crossing the Canada/US border carry plant pests or animal diseases. Canada concedes that this policy objective falls “within the range of policies designed to protect human life or health”<sup>17</sup> as required under Article XX(b).

However, Article XX(b) also requires that the measure be “necessary” in fulfillment of the policy objectives. 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.”<sup>18</sup>

APHIS has not exhausted less trade-restrictive alternatives that achieve the objectives of the interim rule.<sup>19</sup> A bilateral group between the US and Canada has proposed a promising alternative approach to preventing pests from entering the US. The approach emphasizes risk

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<sup>16</sup> *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*].

<sup>17</sup> *Ibid.*, at para. 6.20.

<sup>18</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2001), WTO Doc. WT/DS135/R at 198-199 (Panel Report) [*EC Asbestos*].

<sup>19</sup> *NOPA*, *supra* note 12.

management at points of origin instead of creating additional costs at the border.<sup>20</sup> This is consistent with the Canada-US “Smart and Secure Border” declarations, which state the importance of “moving inspection and screening away from the border.”<sup>21</sup> In addition, this proposed approach will target high risk products, and enhance fraud reduction activities.<sup>22</sup> The higher standards for transporting products will fulfill APHIS’ objectives and prevent delays at the border.

In the alternative, if the US insists on conducting APHIS border inspections, it should recover its costs by fining those who violate the APHIS regulations.<sup>23</sup>

The United States can also fine tune security initiatives such as the Automated Targeting System. The system works to identify and inspect high-risk passengers and cargo for terrorist links, and facilitate clearance for low-risk passengers and cargo. Further expanding a system already in place is less trade restrictive and more efficient.<sup>24</sup>

iii) APHIS customs user fees do not satisfy the Chapeau of Article XX.

The Chapeau in Article XX requires that a measure not constitute a means of “arbitrary or unjustifiable discrimination,” or “disguised restriction on international trade.”<sup>25</sup> Canada submits that APHIS customs user fees constitute a disguised restriction on international trade.

The protective nature of a measure can be revealed from “its design, architecture and revealing structure.”<sup>26</sup> The objectives announced by APHIS disguise a trade-restrictive objective

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<sup>20</sup> Canadian Food Inspection Agency, “Canada’s Proposed Alternative to the United States Department of Agriculture’s Rule on Border Inspections and Fees” (1 June 2007), online: <<http://www.inspection.gc.ca/english/cor/paffr/publications/borfrae.shtml>> [CFIA].

<sup>21</sup> Prime Minister Haper et al. (2007, August). *Smart and Secure Borders*. Speech presented at North American Leaders’ Summit, Montebello, Canada.

<sup>22</sup> CFIA, *supra* note 20.

<sup>23</sup> US Commerce, *supra* note 5.

<sup>24</sup> NOPA, *supra* note 12.

<sup>25</sup> GATT, *supra* note 1 at Article 1.

because of its broad application to all those who enter the United States regardless of their risk levels. The increased border costs will encourage American corporations using Canadian subsidiaries or suppliers to switch to local partners in an attempt to minimize border costs and delays.<sup>27</sup>

**B. APHIS customs user fees are not justified pursuant to the national security exception in NAFTA, GATT or GATS.**

NAFTA Article 2102(1)(b)(i) and GATT Article XXI (b)(iii) use the same language and thus only GATT Article XXI (b)(iii) will be referred to for simplicity.

i) APHIS Custom User Fees are not “necessary” in the protection of its essential security interests.

The term “necessary” in GATT Article XXI (b) is qualified by “it considers”, but that should not mean that a nation can deem whatever it wants as “necessary.”<sup>28</sup> 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.<sup>29</sup> The objective of NAFTA and GATT is to foster trade and open up the borders. As a result, the national security exception should only be used when there is a reasonable connection between measure imposed and its objective.

The border is already thickening and the APHIS fees do not provide advantages distinct from the other security initiatives. For example, food approaching the border must be already be

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<sup>26</sup> *EC Asbestos*, *supra* note 18 at para. 8.236.

<sup>27</sup> Alan D. MacPherson *et al.*, “Impact of U.S. government antiterrorism policies on Canada-U.S. Cross-Border Commerce” (2006) 58 No 3 *The Professional Geographer* 266 at 275 [MacPherson].

<sup>28</sup> Michael J. Hahn, “Vital Interests and the Law of GATT: An Analysis of GATT’s security exception” (1991) 12 *Mich. J. Int’l L.* 558 at 583 [Vital].

<sup>29</sup> *Vienna Convention on the Law of Treatise*, 23 May 1969, 1155 UNTS 331, at Article 31.

registered prior to approaching the border for review.<sup>30</sup> Measures are also in place to target high-risk cargo such as: the Automated Manifest System, Customs' Automated Targeting System, and the Customs-Trade Partnership Against Terrorism.<sup>31</sup> Security initiatives are already in place and there is no reasonable justification for another measure to be implemented before current initiatives are properly evaluated.

### **III. THE WESTERN HEMISPHERE TRAVEL INITIATIVE IS CONTRARY TO INTERNATIONAL CUSTOMARY LAW, NAFTA CHAPTERS 12 AND 16, AND GATS**

#### **A. The United States' WHTI is contrary to International Customary Law**

Canada and the United States are bound by their established international customary law with respect to travel documents required for border access. This customary law was acknowledged by Slade Gorton, "the justified expectation of both Americans and Canadians that the historic policy of easy access to one another's countries is too dear to all of us to be abandoned."<sup>32</sup> The WHTI measure has forced a passport requirement on Canadians entering the US, while offering Canada no opportunity to present reasonable alternatives.

The established travel document practices satisfy the state practice requirement of customary international law. Americans who have understood this longstanding bilateral tradition have been alarmed by this unilateral change. The opposition of American Government officials to WHTI is illustrated through a bill to repeal the legislation. The bill vocalized the opinion that simple travel documents were an obligated and settled practice, satisfying the *opinion juris*.<sup>33</sup>

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<sup>30</sup> Bill Goodman, "U.S. Food and Drug Administration (FDA) Bioterrorism Act of 2002" *Market Access United States* (27 November 2003), online: Agriculture and Agri-Food Canada <[http://www.ats.agr.gc.ca/us/bioterrorism002\\_e.htm](http://www.ats.agr.gc.ca/us/bioterrorism002_e.htm)>.

<sup>31</sup> MacPherson, *supra* note 27 at 267.

<sup>32</sup> U.S., *The Regional Impact of the Western Hemisphere Travel Initiative: Hearing Before the Senate Subcommittee on International Operations and Terrorism*, 109<sup>th</sup> Cong. (2006) at 2 (Slade Gorton).

<sup>33</sup> *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. The Netherlands)*, [1969] I.C.J. Rep. 3.

Canada submits that the WHTI is in violation of the international customary law of easy border established at the border between Canada/U.S.

**B. The WHTI provides treatment that is contrary to Articles 1202:National Treatment, GATT: National Treatment, GATS Article XVII: National Treatment.**

Canada submits that the WHTI's final phase is being implemented without sufficient bilateral discussion or substantial exploration of reasonable alternatives.

i) The WHTI is contrary to Article 1202: National Treatment.

While Canada recognizes that the WHTI's passport requirement is only one change to border practices, the requirement will have significant impact on the Canadian economy. Further, the allowance of such a requirement could open the door to more border policy changes and consequently, drastic economic downfall. Canadian service providers to the US for example, will be disadvantaged by the passport requirement when compared to US domestic service providers. The primary purpose of NAFTA is the creation of free and easily accessible border crossings, and it is apparent through the consequences suffered by Canadian service providers that such purposes have been undermined.

ii) No equivalent to the passport card has been created for Canadians.

The WHTI requires all travelers entering the United States to carry a valid passport, or "other secure document" deemed by the Secretary of Homeland Security to be sufficient.<sup>34</sup> The United States will provide passport cards for its citizens which will act as a valid passport under

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<sup>34</sup> Department of Homeland Security, Press releases, "Fact Sheet: Strengthening Border Security and Facilitating Entry into the United States" (20 June 2007), online: <[http://www.dhs.gov/xnews/releases/pr\\_1182351923729.shtm](http://www.dhs.gov/xnews/releases/pr_1182351923729.shtm)>.

the WHTI. These cards will be available to U.S. citizens only for a fee of \$10 per child and \$20 per adult.<sup>35</sup>

Other cards available to Canadians, such as NEXUS, have strict eligibility requirements and an essential interview process. In addition, the costs associated with these options are higher than for American passport cards and disallow their use as a viable alternative for the general public.<sup>36</sup> As such, there is no equivalent alternative to the passport card, available to Canadians and consequently they are in a less favorable situation as compared to American service providers.

iii) The differential treatment is greater than necessary.

It is apparent that Canadian and American services are in like circumstances. Although differential treatment for parties “like circumstances” can be justified, such treatment “should be no greater than necessary for legitimate regulatory reasons.”<sup>37</sup> American service providers will maintain their status quo access to US domestic companies while Canadians are forced to incur the additional passport costs demanded by WHTI. Thus, in contrast, Canada’s ability to provide services within the US is undermined.

Trade in services between Canada and the US totaled \$84.6 billion in 2005.<sup>38</sup> Premature implementation of the final phase of WHTI could, “severely impair the economies of both sides

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<sup>35</sup> U.S. Department of State, “U.S. Passport Card” (12 February 2008), online: <[http://travel.state.gov/passport/ppt\\_card/ppt\\_card\\_3926.html](http://travel.state.gov/passport/ppt_card/ppt_card_3926.html)>.

<sup>36</sup> Nexus, “Information and Application Form” (25 January 2008), online: Canada Border Services Agency <<http://www.cbsa-asfc.gc.ca/publications/pub/rc4209-eng.pdf>>.

<sup>37</sup> *Re Cross-Border Trucking Services (United States v. Mexico)* (2001), USA-MEX-98-2008-01 (Ch. 20 Panel) at para 258 [*Trucking Services*].

<sup>38</sup> Office of the Chief Economist, “Canada’s International Trade in Services” *Foreign Affairs and International Trade Canada* (September 2007), online: <[http://www.dfait-maeci.gc.ca/eet/pdf/Pfact\\_Services\\_sep\\_2007a-en.pdf](http://www.dfait-maeci.gc.ca/eet/pdf/Pfact_Services_sep_2007a-en.pdf)> [*OCE*].

of the border.”<sup>39</sup> Implementing the WHTI before the completion of pilot projects and bilateral work groups, constitutes differential treatment that is greater than necessary and contrary to NAFTA Article 1202.

iv) The WHTI is a measure affecting trade in services under GATS Article I:1.

The WHTI measures hamper the economic relationship and affect “trade in services” as defined Article I:2 of the GATS.<sup>40</sup> Canada exported \$37.5 billion in services to the United States in 2005, over 50% of Canada’s total service exports.<sup>41</sup> Companies who rely on easy border access for facilitated service trade will be negatively affected by the WHTI.

v) The WHTI is contrary to GATS Article XVII: National Treatment.

According to Article XVII, “different treatment shall be considered to be less favorable if it modifies the conditions of competition,”<sup>42</sup> in favour of its own service providers. Requiring Canadian service providers to satisfy the new security policy will affect the amount of Canadians who can continue providing services and competing in the United States. Canada submits that this “modifying of conditions” is contrary to GATS Article XVII.

**C. The WHTI is contrary to NAFTA Article 16: Temporary Entry for Business People.**

i) The WHTI violates NAFTA Article 1602: General Obligations.

While Article 1603 allows for the application of national security measures to business people, these measures must fall within the general obligations provision set forth in Article 1602. Canada submits that the WHTI is contrary to Article 1602 because it is “unduly impairing”

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<sup>39</sup> CTV, “Ridge: passport requirement could hurt economies” *Politics* (4 October 2006), online: CTV News <[http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061004/tom\\_ridge\\_061004?s\\_name=&no\\_ads=>](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061004/tom_ridge_061004?s_name=&no_ads=>)>.

<sup>40</sup> *General Agreements on Trade in Services*, 30 November 1997, 1869 U.N.T.S. 183 at Article 1 [GATS]

<sup>41</sup> *OCE*, *supra* note 38.

<sup>42</sup> *GATS*, *supra* note 40 at Article XVII.

and “delaying trade in goods or services or conduct of investment activities under this Agreement.”<sup>43</sup>

ii) The WHTI unduly impairs and delays the trade in goods and services.

Since the implementation of the WHTI, wait times for Canadian passports have increased from 10 business days to as many as 30 business days.<sup>44</sup> According to Congress, the estimated cost of delays and compliance requirements at the border because of the WHTI could range from \$7.5 billion to \$13.2 billion annually.<sup>45</sup> Canada’s estimated portion of costs could be up to \$8.1 billion.<sup>46</sup> This would represent over 20% of the total service export to the US.<sup>47</sup> Canada submits that the costs related to WHTI implementation have “unduly impaired” the trade of services.

**IV. THE WHTI IS NOT JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA OR GATT OR GATS.**

**A. The WHTI is not justified under the General Exceptions of NAFTA 2101, GATS Article XIV, or GATT Article XX.**

i) WHTI is not necessary under NAFTA Article 2101(2)(c), GATT Article XX(b)(d) or GATS XIV (b)(d).

The U.S. suggests that the new travel document requirement will provide the “additional safeguards” needed to ensure that terrorists cannot enter the United States. Canada concedes that this policy objective falls, “within the range of policies designed to protect human life or

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<sup>43</sup> *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, at Article 1602 [NAFTA].

<sup>44</sup> CBC News, “Passport delays to worsen as U.S. rules come in” (23 January 2007), online: <<http://www.cbc.ca/canada/new-brunswick/story/2007/01/23/nb-usspassport.html>>.

<sup>45</sup> U.S., Bill H.R. 4186, To repeal the Western Hemisphere Travel Initiative, 110<sup>th</sup> Cong., 2007 at para 4.

<sup>46</sup> Ontario Chamber of Commerce, “Cost of border delays to Ontario” (May 2004) online: <<http://occ.on.ca/Policy/Reports/121>> at 8.

<sup>47</sup> *OCE*, *supra* note 38.

health”<sup>48</sup> as required in Article XX(b). Canada concedes that the WHTI was “designed to secure compliance with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994.”<sup>49</sup>

However, these measures must be “necessary” in fulfilling policy objectives and securing compliance with laws. Canada submits that the WHTI measures are not necessary to fulfill the policy objectives of the WHTI and are not “necessary to secure compliance” with national laws.

ii) Alternative methods to satisfy WHTI objectives

Canada currently has a contractually agreed upon alternative available to the passport requirement. Discussions between Canada and the US have resulted in the development of an enhanced driver’s license which will be tested at the Canada/U.S. border in Washington State.<sup>50</sup> This alternative is less trade restrictive and will allow for compliance with national laws.

Bilateral discussion groups are attempting to create other alternatives to minimize trade impacts, but these groups need to be given enough time to research and develop new strategies. Secretary Chertoff and Minister Day have already agreed on a structure to set up guidelines for important border security issues that need to be examined.<sup>51</sup> Canada submits that viable alternative methods are available and must be properly evaluated before implementing the final phase of the WHTI.

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<sup>48</sup> *US Gasoline*, *supra* note 16 at para. 6.20.

<sup>49</sup> *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. 157 (Appellate Body Report) [*Korea Beef*].

<sup>50</sup> Melisa Leclerc, “Minister Day announces progress on WHTI with the United States and increased security cooperation with Mexico” *2007 News Releases* (23 February 2007) online: Public Safety Canada <<http://www.ps-sp.gc.ca/media/nr/2007/nr20070223-1-en.asp>>. [PSC]

<sup>51</sup> *Ibid.*

iii) WHTI does not satisfy the Chapeau of Article XX.

The WHTI measure constitutes a disguised restriction on international trade under the opening clause of Article XX. The WHTI's final phase will force Canadian service providers to carry valid passports, which will deter some from entering the US. This measure is conveniently implemented alongside a slowing American economy . American domestic service providers who will benefit from the new policy's negative effects on Canadian competition, are currently experiencing an unemployment rate of 7%.<sup>52</sup> The effects of the new passport policy reveal a disguised restriction on trade, thus the WHTI fails to meet the requirements of Article XX.

**B. The WHTI is not justified pursuant to the national security exception in NAFTA or GATS or GATT.**

The US will likely try to justify the WHTI based on the national security exceptions under NAFTA Article 2102 (1)(b)(ii), GATS Article XIV bis (2)(b)(3), or GATT Article XXI(b)(iii)

i) The WHTI is not “necessary” in the protection of its essential security interests.

The passport requirement is not “necessary” in fulfilling WHTI's objective of preventing dangerous persons from entering the US. Firstly, according to the 9/11 commission report, terrorists involved in the attacks came from outside North America, therefore the US focus on Canadian borders is unjustified. Secondly, Canada points out that passports do not differentiate between low risk travelers and high risk travelers, and as such could prove to be relatively ineffective in protecting the US from terrorist attacks.

The United States already has a number of border security measures in place. Combined with the WHTI, the collective effect of these initiatives could begin to act as a non-tariff trade

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<sup>52</sup> U.S. Department of Labor, “Employed and unemployed persons by occupation, not seasonally adjusted” *Bureau of Labor Statistics* (1 February 2008), online: <<http://www.bls.gov/news.release/empst.t10.htm>>.

barrier.<sup>53</sup> A strict passport requirement is not reasonably necessary to fulfill the WHTI's objective. The need for further discussion surrounding the WHTI has been illustrated the delay of final implementation until 2009. However even this delay does not constitute an adequate period of time for discussion, nor an effective exploration of possible alternatives. The expedient implementation of WHTI's final phase before the creation of a contractually agreed upon alternative is unreasonable. The WHTI as it stands cannot be reasonably justified under the national security because of the economic ramifications at stake. The world is moving towards fewer barriers, we should not take a step back.

**V. 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.**

Although Canada concedes that the export tax on pipeline fuel violates Article VIII and XI of the GATT as well as Articles 314 and 604 of NAFTA, the tax finds legitimacy under the national security exemption provided under GATT Article XXI and NAFTA Article 607.

**A. The fuel export charge is justified pursuant to the national security exception in NAFTA or GATT.**

**i) The US threat to Canada's sovereignty is a threat to national security.**

Tensions between the US and Canada have been growing consistently in the face of the challenges posed in a post 9/11 world. Canada's refusal to participate in the war in Iraq caused significant damage to the relationship.<sup>54</sup> After having repeatedly failed to support US initiatives in the name of heightened security, such as star wars, inaction on the part of Canada with regards

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<sup>53</sup> Danielle Goldfarb & William B.P. Robson, "Risky Business: U.S. Border Security and the Threat to Canadian Exports" (2003) No. 177 C.D. Howe at 1.

<sup>54</sup> Stephen Clarkson, "The Inconsistent Neighbour: Canadian Resistance and Support for the Bush Foreign Policy Counter-Revolution" *University of Toronto*, online: Computing in the Humanities and Social Sciences <<http://www.chass.utoronto.ca/~clarkson/publications>> [Inconsistent].

to the ‘thick border’ initiatives could surely end in severe repercussions for an already strained relationship, both within the realm of economic security and national defense.<sup>55</sup> Canada only agreed to make the proposed border improvements under duress, as a consequence to American pressure.

One of the pillars of the GATT Articles XX and XXI is the protection of state sovereignty.<sup>56</sup> While provisional protections for third world countries were included in the document, the vulnerability of a country such as Canada whose state sovereignty is threatened by the disproportionate power held by its neighbor, the United States, has been overlooked.<sup>57</sup> Given the power imbalance inherent to these two nations and the applied pressure through which the largely one-sided border security policies were reached, it is difficult to justify a financial burden on Canadians for changes that were demanded by the US and are for their benefit. While the responding export tax on pipeline fuel is not a measure typical of qualification within the national security exception, a broad interpretation of Section XXI is required in order to maintain the GATT’s ability to be an effective guardian of state sovereignty.

The national security exception was drafted as a catch all exemption to GATT provisions. Narrowing the ambit of the exemption could lead to the downfall of the GATT, as many nations considered the ambiguous provision pivotal to its signing.<sup>58</sup> The provision has historically been considered broad enough to encompass threats of competition in Sweden’s shoe market.<sup>59</sup> It is

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<sup>55</sup> *Ibid.*

<sup>56</sup> Vital, *supra* note 28 at 558.

<sup>57</sup> Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (New York: Cambridge University Press, 2005) at 549, 586, 694.

<sup>58</sup> Peter Lindsay, “The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure” (2003) April Duke L. J. 1278 at 1298 [Ambiguity].

<sup>59</sup> *Sweden-Import Restrictions on Certain Footwear* (1975), GATT Doc. L/4250.

therefore reasonable that a threat to state sovereignty is within the ambit of the provision as sovereignty was the very reason for the provision.

ii) The war on terror is an emergency in international relations.

GATT Article XXI (b)(iii)/ NAFTA Article 2102 (b)(ii) requires an emergency in international relations. The tensions explained above, surrounding US-Canada relations in a post 9/11 context, constitute such an emergency.

iii) The export tax is a necessary measure.

In the Helms-Burton dispute, the US argued for a self-determinative and broad interpretation of article XXI.<sup>60</sup> It stated that the article was self-judging and could not be scrutinized by the ICJ. If that approach were to be taken, Canada's export tax on fuel would not be an issue. Canada recognizes that such a radical interpretation of the provision is unrealistic. Canada adopts the approach that while a party may decide what measure to adopt, the decision of when a party may take that measure is subjected to an objective standard.<sup>61</sup> Canada contends that it is reasonable to adopt the export tax as a necessary measure within the current circumstances.

Canada does not want to back out of making the border changes requested by the US, however it is largely the US who will benefit from these improvements, and as such, it is them who should pay the costs. An export tax on fuel is an effective means of ensuring that they bear such costs. Pipeline fuel is delivered solely to the US, ensuring the tax will apply to them exclusively, as opposed to innocent third parties. Further, taxing such a vital commodity will guarantee that the funds required are actually received. Taxing a less vital export could simply cause a lowering in the demand for that product.

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<sup>60</sup> Ambiguity, *supra* note 58 at 1308.

<sup>61</sup> Ambiguity, *supra* note 58 at 1287.

## **B. NAFTA Article 607 is not applicable.**

NAFTA Article 607 narrows the national security exception with respect to any measure which restricts the exportation of a petrochemical good. Article 607 was intended to ensure that the US received its established quantity of Canadian fuel despite the application of Article XXI.<sup>62</sup> Keeping this purposive analysis in mind, an export tax on fuel is not limited by Article 607 because it does not restrict the quantity of fuel being delivered to the US. According to Prime Minister Harper, the Canadian oil producers will not be harmed by this export tax. His statement shows that the amount of fuel sold will be unaffected and the spirit of the NAFTA fuel provisions are not violated by the measure Canada has chosen.

In NAFTA Articles 314 and 315, and Articles 604 and 605, a distinction is made between export taxes and other export measures; it is only in the latter that the term restriction is used. This distinction indicates that export taxes are qualified differently within the document than restrictions, and thus, an export tax cannot be considered within the ambit of measure considered by Article 607's reference to restrictions. As a result, Article 607 is not applicable.

### i) In the alternative, the tax is necessary to fulfill a critical defense contract.

In the alternative, if the export tax does constitute a restriction, the agreement for the common defense of the borders constitutes a critical defense contract within the meaning of Article 607. The agreement is critical to improve relations with the US and it is a defence contract because it stipulates border improvements for US national security. As such, the tax fulfills the requirements of Article 607, and thus can be justified under the national security exception.

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<sup>62</sup> Ernest Smith & David Cluchey, "GATT, NAFTA and the Trade in Energy: A US Perspective" (1994) 12 J. Energy Nat. Resources L. 27.

### **C. The fuel export charge is justified pursuant to the general security exception in NAFTA or GATT.**

The first step for Article XX requires that the export tax on pipeline fuel be necessary for the protection of human life. The goal of the export tax is to provide funding for the proposed border initiatives, to protect US citizens from terrorism threats. While the Canadian measure is being justified for the protection of foreign citizens, such a collective definition of human life falls within the ambit of the provision.

GATT drafters could have included the phrase “to protect its human, animal or plant life or health”. The omission of the word “its” within category b) of Article XX is indicative of the drafters’ intent to recognize the value of life beyond artificial border distinctions.

In *US- Shrimp*, the Appellate Body of the WTO left open the possibility of a unilateral decision for the protection of another country’s life or resources.<sup>63</sup> The case illustrated a US decision to place conditions on other member states’ access to domestic markets to enforce its marine life protection policies on foreign territory.<sup>64</sup> The court stated that such a measure was within the scope of one or another of the exceptions listed within Article XX.<sup>65</sup> If Article XX can encompass the protection of non-indigenous marine life, then its applicability to human life, the foremost of priorities within protectionism policy, is indisputable. The export tax would be even more likely to pass within the ambit of the provision, because unlike in *US-Shrimp*, the security goals underlying the tax were demanded by the US themselves.

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<sup>63</sup> *United States-Import Prohibition on Certain Shrimp and Shrimp Products* (1998), WT/DS58/AB/R (Appellate Body Report), online: WTO <[http://www.worldtradelaw.net/reports/wtoab/us-shrimp\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-shrimp(ab).pdf)>.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Shrimp*, *supra* note 63 at para. 121.

i) No reasonable alternative to the fuel export tax exists.

Domestic funding for the project may be consistent with GATT, but it would result in undermining political obligations to Canadians; and therefore could not reasonably be adopted.

As stated in the ‘necessary’ analysis, other measures, while possibly less inconsistent with GATT, would not avoid burdening third parties and could not guarantee the required funding be received, thus could not reasonably be adopted.

**CONCLUSION**

THEREFORE, Canada respectfully submits that this Honourable Court declares that:

1. APHIS user fees violate NAFTA Article 310 and GATT Articles I and VIII;
2. APHIS user fees are not justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS;
3. WHTI violates international customary law, NAFTA Chapters 12 and 16, and GATS;
4. WHTI is not justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS; and
5. 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.