

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- 03A

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QUESTIONS PRESENTED

1. Whether Canada's Fuel Export Charge is contrary to the obligations set forth by the North American Free Trade Agreement (NAFTA) Articles 314, 315, 604, and 605 or the General Agreement on Tariffs and Trade (GATT) Articles I, VIII, and XI and falls outside the general and national security exceptions under NAFTA and GATT.
2. Whether the Animal and Plant Health Inspection Service (APHIS) user fees comply with NAFTA Article 310 and GATT Articles I and VIII and falls within a national security or general exception under NAFTA, GATT, or the General Agreement in Trade in Services (GATS).
3. Whether the Western Hemisphere Travel Initiative (WHTI) complies with NAFTA Chapters 12 and 16 and GATS or falls within a national security or general exception under NAFTA, GATT, or GATS.

JURISDICTIONAL STATEMENT

The parties to this matter, Canada and the United States of America, hereby submit this dispute to a Chamber of the International Court of Justice pursuant to Articles 40(1) and 36(1) of the *Statute of the International Court of Justice*.¹ Both Parties have agreed to immediately bring their actions and positions into conformity with the legal conclusions of this Court.²

¹ Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055.

² *Compromis*, p.6.

STATEMENT OF FACTS

On August 25, 2006, the United States (U.S.) Animal Plant and Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) announced an interim rule to impose Agricultural Quarantine and Inspection (AQI) user fees on all commercial shipments entering the U.S. from Canada beginning on November 24, 2006.³ Canada was exempted from the user fees because, at the time the policy was implemented, products from Canada were produced in Canada and, in most cases, did not harbor plant pests or animal diseases of concern to the U.S.⁴ However; this exemption was removed when inspections at the U.S./Canada border resulted in increasing numbers of interceptions of prohibited materials.⁵ Starting January 1, 2007, air passengers arriving in the U.S. from Canada began paying user fees.⁶ The amount of the user fee for air passengers is \$USD 5.00 per passenger and \$USD 70.50 per aircraft entering the U.S. from Canada. These fees are incorporated into the price of airline tickets.⁷

Beginning March 1, 2007, APHIS eliminated the inspection exemption for all commercial vessels (ships) entering the U.S. from Canada.⁸ The amount of the user fee for each ship is \$USD 490.00 per entry and is imposed irrespective of its cargo due to the sanitary and phytosanitary risks that cargo containers pose.⁹ Furthermore, as of June 1, 2007, a user fee of \$USD 7.75 is imposed on each rail car moving from Canada to the U.S. and \$USD 10.75 on each

³ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 50320 (Aug. 25, 2006) (to be codified at 7 C.F.R. pt. 319 and 354) [hereinafter Federal Register – User Fees].

⁴ *See Id.*

⁵ *See Id.*

⁶ *See Id.*

⁷ *See Id.*

⁸ *See Id.*

⁹ *See Id.*

truck moving from Canada to the U.S.¹⁰ This interim rule establishes that the same AQI user fees that apply to conveyances from every other nation arriving at the ports in the customs territory of the U.S. will now apply to Canada as well.¹¹ However, Canada's Department of Foreign Affairs and International Trade (DFAIT) conveyed to its counterparts at The Department of Homeland Security (DHS) and the U.S. Trade Representative its view that the APHIS user fees are contrary to NAFTA and GATT.

On June 26, 2007, the U.S. Department of Defense (DOS) and the DHS jointly published a Notice of Proposed Rulemaking to implement the second phase of the Western Hemisphere Travel Initiative (WHTI).¹² The WHTI, which was proposed by the DOS and DHS in 2005, requires all travelers, including Canadian and U.S., to carry a valid passport or other appropriate secure documentation when traveling to the U.S. from within the Western Hemisphere.¹³ More specifically, the second phase of WHTI requires U.S. citizens and non-resident aliens from the Western Hemisphere, including Canada, to possess and provide at the time of entry in the U.S. a valid passport or certain prescribed identification.¹⁴ The U.S. justified the WHTI requirement by asserting that it is a national security-related measure.¹⁵

On August 21, 2007, Canada's Prime Minister Harper, U.S. President Bush, and Mexico's President Calderon issued a Joint Statement at the conclusion of the 2007 Montebello

¹⁰ *See Id.*

¹¹ *See Id.*

¹² *See* The Western Hemisphere Travel Initiative, 72 Fed. Reg. 74169 (Dec. 31, 2007) (to be codified at 22 C.F.R. pt. 22 and 51) [hereinafter WHTI].

¹³ *See Id.*

¹⁴ *See Id.*

¹⁵ *See Id.*

North American Leaders' Summit.¹⁶ In the Joint Statement, the leaders asked their Ministers to focus their collaboration on five priority areas for the next year. The priority area that is relevant to the current dispute before the Court is "Smart and Secure Borders," which calls for effective border strategies that minimize security risks, while facilitating the efficient and safe movement of goods, services and people, as trade and cross-border travel increase in North America.¹⁷ Subsequently, U.S. Secretary of Homeland Security Chertoff, U.S. Vice President Cheney, and Canada's Prime Minister of Public Safety Day began negotiations regarding the security-related action points espoused in the Joint Summit with the view to make an announcement on September 11, 2007.

On September 11, 2007, the U.S. and Canada issued a Joint Statement asserting that Canada would spend one billion U.S. dollars to implement a variety of border initiatives.¹⁸ These initiatives include building screening facilities, erecting ground sensor towers, and installing advanced radiological detection technology at all its ports.¹⁹ In addition to announcing these agreed-upon initiatives, Canada's Prime Minister's Office declared that it will implement an export tax of twenty-five Canadian dollars per barrel on fuel transported via pipeline.²⁰

During the announcement of the export tax, Canada's Prime Minister Harper explained that Canada is implementing the fuel export tax to generate revenues by "ensuring that those who benefit most from the actions being promised are the one's paying for the benefits."²¹ Prime Minister Harper stated that Canada is imposing this export tax on fuel to raise money to pay for

¹⁶ Prime Minister Harper, President Bush, and President Calderón, Joint Statement, Montebello North American Leaders' Summit (Aug. 21, 2007) [hereinafter Montebello Summit Joint Statement], <http://www.montebello2007.gc.ca/statement-declaration-eng.html>.

¹⁷ *See Id.*

¹⁸ Joint Statement, Can. and U.S. (Sept. 11, 2007).

¹⁹ *See Id.*

²⁰ Stephen Harper, Can. Prime Minister Statement (Sept. 11, 2007).

²¹ *See Id.*

the variety of border initiatives it agreed to.²² Due to the fact that the Canadian government promised its taxpayers that it will lower taxes, it sought alternate means by which it would be able to shift its cost burden while fulfilling its obligations under the Joint Statement.²³

In order to support the Fuel Export Charge legislation, Canada relied on the *Softwood Lumber Product Export Charge Act, 2006* as precedent.²⁴ The Fuel Export Charge requires all exporters of fuel by pipeline to register for export tax purposes, file monthly returns, and remit the export taxes on a monthly basis according to the barrels of fuel put into the pipeline for export.²⁵ These exporters are also required to apply for export permits for each transaction involving such an export of fuel and provide prescribed information.²⁶ Although the U.S deems the export tax to be evidently contrary to Canada's obligations under NAFTA and GATT, Canadian Ambassador Wilson reiterated that the Fuel Export Charge would remain in effect.²⁷

On September 23, 2007, the U.S. filed a dispute with this Court with respect to the Fuel Charge. In response to this, Canada filed a disputed with this Court on October 23, 2007 concerning the WHTI requirement as well as the APHIS user fees.

²² *See Id.*

²³ *See Id.*

²⁴ *See Id.*

²⁵ *See Id.*

²⁶ *See Id.*

²⁷ *See Id.*

SUMMARY OF ARGUMENT

Canada violated its obligations under NAFTA, GATT, and GATS when it implemented the Fuel Export Charge in retaliation for the justified removal of its exemption under the U.S. APHIS user fee requirement. Additionally, the U.S. complied with its respective obligations set forth in NAFTA, GATT and GATS when it implemented the WHTI requirements on all those traveling into the U.S.

ARGUMENT

I. CANADA’S FUEL EXPORT CHARGE VIOLATES NAFTA AND GATT AND IS NOT JUSTIFIED BY THE SOFTWOOD LUMBER ACT OR ANY EXCEPTIONS SET FORTH IN THE TRADE AGREEMENTS.

The interpretation of NAFTA and GATT, like all other treaties, is governed first and foremost by their express provisions. However, tribunals also look to the international law principles set forth in the *Vienna Convention on the Law of Treaties* (Vienna Convention).²⁸ Thus, the performance of trade obligations must comply with the principles of *pact sunt servanda*, declaring that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”²⁹ Treaties must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms ...in their context and in the light of its object and purpose,”³⁰ Additionally, courts may look to the preamble to determine the intent of the

²⁸ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 26 [hereinafter Vienna Convention].

²⁹ *Id.*; see also *Edye v. Robertson*, 5 S. Ct. 247 (1884); *Moises Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).

³⁰ Vienna Convention, *supra* note 3, art. 31(1); see also *SGS Societe Generale de Surveillance SA v. Islamic Republic of Pakistan*, 18 ICSID 301, No. ARB/01/13 (2003); see also *Application of Convention of 1902 Governing Guardianship of Infants* (Neth. v. Swed.), 1958 I.C.J. 55, at 67 (Nov. 28); see also *Legality of Use of Force*, (Serb. and Mont. v. Italy), 2004 I.C.J. 865 (Dec. 15); see also *LaGrand*, (Germ. v. U.S.), 2001 I.C.J. 466 (June 27).

parties to the treaty.³¹ Therefore, NAFTA, GATT and GATS should be interpreted according to the principles of international law.³²

Canada violated its trade obligations when it implemented the Fuel Export Charge. First, Canada dishonored the national treatment principles because the export charge affects the U.S. less favorably than it affects Canada. Second, the export charge is not justified by the Softwood Lumber Products Act because the Act solely applied to softwood lumber products. Finally, the export charge is not justified by a general or national security exception under NAFTA or GATT. Thus, this Court is urged to declare the export charge as contrary to NAFTA and GATT.

A. Canada Violated National Treatment Principles Pursuant to NAFTA When It Implemented An Export Charge That Did Not Apply to Its Domestic Consumption.

NAFTA requires that each Party accord “national treatment” to the goods of other Parties, which dictates that a Party will treat imported products no less favorably than it treats its own.³³ In an effort to sustain and liberalize cross-border trade in services and enhance the trade in energy, NAFTA prohibits the imposition of an export charge on energy and basic petrochemical goods unless, *inter alia*, that charge is concurrently imposed on those goods destined for domestic consumption.³⁴

³¹ See *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No.10, 17 (Sept. 7); *Free Zones of Upper Savoy and District of Gex*, Judgment, 1929 P.C.I.J. (ser. A) No. 22, at 12 (June 7); *Asylum (Colom./Perú)*, 1950 I.C.J. 266 at 276, 282 (Nov. 20); *Rights of U.S. Nationals in Morocco* (Fr. v. U.S.), 1950 I.C.J. 176 (Aug. 27); D.P. O’Connell, *International Law* 260 (2d ed. 1970).

³² North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA], art. 102(2).

³³ See NAFTA, *supra* at note 32, Art. 301; see also NAFTA – Market Access, http://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/NAFTA_chapter3.asp.

³⁴ NAFTA, *supra* at note 32, art. 604; see also Michael Holden, *Canadian Oil Exports to the United States Under NAFTA*, Parliamentary Information and Research Service Library of Parliament, PRB 06-33E (Nov. 16, 2006), available at <http://www.parl.gc.ca/information/library/PRBpubs/prb0633-e.pdf>

Canada's implementation of the Fuel Export Charge constitutes a *de jure* violation of the national treatment principles of NAFTA. The export charge violates not only the general national treatment principles with respect to all goods, but also violates specific national treatment principles that prohibit placing export charges on basic petrochemical goods. Because Canada's export charge applies solely to *exports* by way of pipeline,³⁵ this charge is not imposed on Canada's domestic market and, thus, favors its own citizens. Therefore, under the good faith principles espoused in NAFTA and GATT, the export charge is a clear violation of Canada's national treatment obligation and is a prohibited restriction on energy trade.

B. The Fuel Export Charge Does Not Fall Within The Purview Of The Softwood Lumber Act Because the Provisions Of The Act apply Solely To The Export of Softwood Lumber Products.

The *Softwood Lumber Products Export Charge Act, 2006* (SLA) settled the twenty-year dispute regarding Canadian exports of lumber to the U.S.³⁶ The export of softwood lumber is a significant part of the trade relationship between the U.S. and Canada, which is the largest trading relationship in the world.³⁷ As a resolution, the U.S. and Canada entered into a bilateral agreement requiring exporters of softwood lumber to the U.S. to pay an export charge.³⁸ The SLA expressly applies to only the export of softwood lumber products.³⁹

³⁵ Stephen Harper, *supra* at note 20.

³⁶ Ross Gorte & Jeanne Grimmett, *Softwood Lumber Imports from Canada: Issues and Events*, CRS Report, RL33752, p.1 (May 9, 2006), available at <http://www.earth-news.org/NLE/CRSreports/07Jan/RL33752.pdf>.

³⁷ U.S. Imports from Canada: 2005-2006, available at <http://www.census.gov/foreigntrade/statistics/product/endues/imports/c1220.html>.

³⁸ Bill C-24: Softwood Lumber Products Export Charge Act, 2006 [hereinafter Bill C-24], available at http://www.parl.gc.ca/common/bills_1asp?lang=E&1s=c24&source=library_prb&Parl=39&Ses=1.

³⁹ Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, U.S.-Can., May 29, 1996, 1996 Can. T.S. No. 16, 35 I.L.M.1195 [hereinafter SLA.].

Despite Canada's assertion to the contrary, the SLA does not encompass Canada's Fuel Export Charge because the subject-matter of the fuel export charge falls outside the purview of the SLA. The terms of the SLA explicitly limit its application to "softwood lumber products for which the final destination of export is the U.S."⁴⁰ As a result, Canada cannot rely on the SLA as a means to justify its blatant violation of its NAFTA obligations.

C. Canada Violated GATT When It Applied The Export Charge For Fiscal Purposes.

NAFTA parties are bound to their GATT obligations,⁴¹ which oblige parties to abide by the principles of the most-favored nation (MFN) treatment and accord equally favorable treatment to the other two parties as they accord to any other contracting party.⁴² Furthermore, GATT prohibits the imposition of an export charge for fiscal purposes,⁴³ and the restriction on the exportation of a product "...destined for the territory of any other contracting party."⁴⁴

Canada's export charge blatantly violates GATT for three reasons. First, the export charge violates MFN obligations because the U.S. receives Canadian fuel via pipeline and domestic consumers are not subject to a similar charge. Second, the charge violates the GATT prohibition on the imposition of export charges for fiscal purposes because Canada's Prime Minister explicitly stated that the export charge was imposed to generate revenues to pay for the agreed-upon border initiatives.⁴⁵ Third, Canada violates the prohibition on restrictions of exportation of a product destined for the territory of another contracting party because the fuel is destined for the U.S., a contracting party. Canada itself recognizes that, "Under NAFTA,

⁴⁰ Bill C-24, *supra* note 38, clause 9.

⁴¹ NAFTA, *supra* note 32, art. 301.

⁴² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], art. I.

⁴³ *Id.* at art. VIII(1)(a)

⁴⁴ *Id.* at art. XI (1); NAFTA, *supra* note 32, art. 604.

⁴⁵ Stephen Harper, *supra* note 20.

levying a retaliatory tax on exports of oil and gas to the U.S. would be illegal – unless an identical tax was imposed on Canadian sales.”⁴⁶ Therefore, Canada’s fuel export charge is contrary to the principles of *pacta sunt servanda* and should be declared invalid.

D. The Fuel Export Charge Is Not Justified By The National Security Or General Exceptions In NAFTA Or GATT.

Both NAFTA and GATT permit Parties to infringe upon trade obligations where certain extenuating circumstances exist. However, such infringements must fall within the scope of a general exception,⁴⁷ a national security-related exception,⁴⁸ or a narrower class of exceptions relating to energy exports⁴⁹ contained within the trade agreements. Canada’s Fuel Export Charge cannot be justified by any of these exceptions.

1. The Fuel Export Charge cannot be justified by any of the general exceptions contained within GATT or NAFTA.

GATT Article XX, incorporated by NAFTA Article 2101, provides broad authority for parties to act in a manner that might otherwise violate GATT principles when the act is necessary to protect morals, health, conservation and other similar interests.⁵⁰ However, GATT Article XX provides that “such measures are not [to be] 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.”⁵¹ Interpreting Article XX, “it is important to underscore that the purpose and object of the introductory clauses of Article XX is generally the

⁴⁶ Mel Clark, *Clearing the Air on a Major Trade Dispute: Nine Seldom Heard Facts About Our Softwood Lumber Exports*. Canadian Centre for Policy Alternatives (Mar. 1, 2006), available at www.policyalternatives.ca/MonitorIssues/2006/03/Monitor_Issue1317/.

⁴⁷ NAFTA, *supra* note 32, art. 2101; GATT, *supra* note 42, art. XX(a)-(j).

⁴⁸ NAFTA, *supra* note 32, art. 2102; GATT, *supra* note 42, art. XXI.

⁴⁹ NAFTA, *supra* note 32, art.607.

⁵⁰ GATT, *supra* note 42, art. XX(a)-(j).

⁵¹ *Id.*

prevention of ‘abuse of the exceptions of [Article XX].’⁵² Exercising the right to invoke an exception, if abused or misused, will nullify the substantive treaty rights.⁵³ Thus, a Tribunal must balance the right of a Party to invoke an exception with that Party’s duty to respect the treaty rights of all other Parties.⁵⁴ Even if one of the GATT XX exceptions is applicable to the measure, the chapeau of GATT XX requires that the measure refrain from application that results either in “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or a “disguised restriction on international trade.”⁵⁵

In view of the chapeau, the export charge violates Article XX because it is arbitrary and acts as an unjustifiable discrimination disguised as a trade restriction. The export charge discriminates against the U.S. because the U.S. is the only country to receive fuel by pipeline. Further, the export charge is unjustifiable and a disguised trade restriction because Canada’s purpose for imposing the charge is to retaliate against the costly border initiatives it hesitantly agreed to. Thus, the export charge does not pass muster under the chapeau of GATT Article XX.

Even if this Court determines that the export charge passes the threshold requirements of the chapeau of Article XX, the export charge nonetheless violates GATT because none of the general exceptions enumerated within GATT apply.⁵⁶ Canada is implementing the fuel charge in an effort to generate revenues by taxing its trading partners, not to further moral, health,

⁵² Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *U.S. – Shrimp*], citing Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (May 20, 1996) [hereinafter *United States – Gasoline*].

⁵³ *U.S. – Shrimp*, *supra* note 28.

⁵⁴ *Id.*

⁵⁵ GATT, *supra* note 42, art. XX; *U.S. – Shrimp*, *supra* note 52.

⁵⁶ See Appellate Body Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198-29S/91 (Feb. 22, 1982) [hereinafter *U.S. – Tuna*]; see also *U.S. – Gasoline* *supra* note 28; see also *U.S. – Shrimp*, *supra* note 28; see also Appellate Body Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-37S/200 (Nov. 7, 1990) [hereinafter *Thailand – Cigarettes*].

conservation or other similar policies within the meaning of the trade agreements. Therefore, the export charge is not justified by any general exception under NAFTA and GATT.

2. The export charge cannot be justified based on a national security exception.

NAFTA and GATT provide exceptions to trade obligations for the purposes of national security.⁵⁷ Specifically, these agreements prohibit any statutory interpretation that compels a Party's to divulge confidential, national security-related information; that prevents the parties from taking action relating to traffic in arms and other related goods; that prevents actions taken in times of emergency international relations and war; and that affects the implementation of policies related to the non-proliferation of nuclear weapons.⁵⁸ Additionally, these agreements require Parties to abide by the obligations set forth under the United Nations Charter⁵⁹

The Tribunal in *Lotus Development* interpreted the meaning of "national security" by using the *Vienna Convention* and by interpreting the security exception in GATT Article XXI.⁶⁰ The Tribunal also referenced the *Analytical Index- Guide to GATT Law and Practice*⁶¹ (GATT Analytical Index) while interpreting the national security exception.⁶² NAFTA proscribes export charges on energy products unless four specific national security-related scenarios are present.⁶³ First, the export charge is necessary to fulfill the critical defense contract of a party. Second, the charge is a response to a situation of armed conflict. Third, it implements national policies or

⁵⁷ NAFTA, *supra* note 32, arts. 2102 and 607; GATT, *supra* note 42, art. XXI.

⁵⁸ NAFTA, *supra* note 32, art. 2102; GATT, *supra* note 42, art. XXI.

⁵⁹ NAFTA, *supra* note 32, art. 2102(1)(c); GATT, *supra* note 42, art. XXI(c).

⁶⁰ *Lotus Development Canada Limited, Novell Canada, Ltd., and Netscape Communications Canada Inc.*, File Nos.: PR-98-005, PR-98-006 and PR-98-009, at 10, Canadian International Trade Tribunal (1998) [hereinafter *Lotus Development*].

⁶¹ World Trade Organization, *Analytical Index: Guide to GATT Law and Practice*, 600-610 (6th ed. 1995) [hereinafter *GATT Analytical Guide*].

⁶² *Lotus Development*, *supra* note 60.

⁶³ NAFTA, *supra* note 32, art. 607.

international agreements relating to the non-proliferation of nuclear weapons. Fourth, the charge is a response to direct threats of disruption in the supply of nuclear materials for defense purposes.⁶⁴ Here, Canada's export charge on pipeline fuel violates NAFTA because it does not fall within any of the four excused situations.

Since it was implemented in retaliation for the U.S. border security initiatives, Canada's export charge falls outside of the situations in which national security exceptions apply. Canada seeks to force U.S. consumers to bear higher fuel prices to allow Canada to fulfill its obligations to build various border security facilities. Canada admitted that its motivation for the export charge was fiscal.⁶⁵ Accordingly, the purpose of the export charge does not fall within the ambit of any national security exception entertained within the trade agreements. Therefore, the export charge should be declared invalid as a violation of NAFTA and GATT obligations.

II. THE UNITED STATES DID NOT VIOLATE ITS OBLIGATIONS UNDER NAFTA OR GATT WHEN IT IMPLEMENTED THE APHIS USER FEES TO FURTHER ITS NATIONAL SECURITY AND SANITARY AND PHYTOSANITARY INTERESTS.

The U.S. Department of Agriculture created APHIS to monitor the health of animals presented at the border, to regulate the import and export of animals, animal products, and plants.⁶⁶ Fees on all commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international air passengers entering the U.S. fund these services.⁶⁷ Canada is no longer exempt from such fees due to the data revealing an alarming increase in the amount of illicit materials intercepted at the U.S./Canada border entering the U.S. from countries

⁶⁴ *Id.*

⁶⁵ Stephen Harper, *supra* note 20.

⁶⁶ International Services, 7 C.F.R. § 371.8 (2008).

⁶⁷ Federal Register – User Fees, *supra* note 3.

other than Canada.⁶⁸ Since Canada's standards do not adequately echo those of the U.S., there must exist a staffed inspection service at the U.S./Canada border to avoid the introduction of destructive foreign diseases and pests.

A. The APHIS User Fees Are Not Contrary to the Obligations Set Forth in NAFTA Article 310 and GATT Articles I and VIII.

Uniformity and neutrality are the principles upon which the rules of the international trading system are founded. Treaties are solemn engagements entered into between independent nations for the advancement of common interests.⁶⁹ As a general rule, the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties.⁷⁰ With cooperation at their root, treaties on trade ensure that national policies do not unjustly discriminate between foreign and domestic products.

On the international stage, cooperation oftentimes takes the form of a treaty. A treaty is primarily a compact between independent nations.⁷¹ It depends on the enforcement of its provisions in the interest and honor of the governments which are parties to it.⁷² NAFTA acknowledges the significance of fair trade policies and practices in Article 310, which prohibits members from applying tariffs on goods based solely on their countries of origin.⁷³ The same APHIS user fees that apply to commercial vessels, trucks, railroad cars and aircraft, and international air passengers from every other nation arriving at ports in the customs territory of the U.S. will now apply to Canada as well.⁷⁴ Thus, APHIS user fees are neutral and universal.

⁶⁸ *Id.* at 50322.

⁶⁹ *Tucker v. Alexandroff*, 22 S. Ct. 195, 200 (1902).

⁷⁰ *Valentine v. U.S.*, 57 S. Ct. 100, 103 (1936).

⁷¹ *Edye v. Robertson*, 5 S. Ct. 247, 254 (1884).

⁷² *Id.*

⁷³ NAFTA, *supra* note 32, art. 310, annex 310.1.

⁷⁴ Federal Register – User Fees, *supra* note 3, at.50323.

Similarly, GATT Article I provides that a member of the World Trade Organization (WTO) cannot treat a product of another country more favorably than that of WTO members.⁷⁵ Thus, if a member imposes risk and service-based user fees on commercial shipments from one trading partner, then it must impose the same fees on all other trading partners. Thus far, Canada has been treated more leniently than other countries because, at the time the policy was initially executed, goods from Canada were produced in Canada and did not contain plant pests or animal diseases of concern to the U.S.⁷⁶ However, the rapid expansion of the world market resulted in large amounts of foreign products entering Canada. Thereafter, those Canadian imports are repacked, relabeled, and transported into the U.S. under the guise of Canadian products.⁷⁷

By their very nature, sanitary and phytosanitary (SPS) measures may result in restrictions on trade.⁷⁸ Nevertheless, the Agreement on Sanitary and Phytosanitary Measures recognizes the need for SPS measures, but stipulates that they must be based on a risk assessment; should not create unnecessary obstacles to trade; and should not arbitrarily or unjustifiably discriminate between members where similar conditions prevail.⁷⁹ APHIS user fees are based on the costs of services and the assessed risks posed by goods imported from foreign countries.⁸⁰

⁷⁵ GATT, *supra* note 42, art. I.

⁷⁶ Federal Register – User Fees, *supra* note 3, at 50321.

⁷⁷ *Id.*

⁷⁸ *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, World Trade Organization (May 1998), http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm.

⁷⁹ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade, art. I(2), Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1125, 1867 U.N.T.S. 493 (1994) [hereinafter SPS].

⁸⁰ *See generally*, Geoffrey S. Becker, *Sanitary and Phytosanitary (SPS) Concerns in Agricultural Trade*, CRS Report, RL33472 (Jun. 15, 2006), available at www.nationalaglawcenter.org/assets/crs/RL33472.pdf.

GATT prohibits the imposition of all charges levied at the border of a member country unless they satisfy the three main criteria listed in Article VIII.⁸¹ First, the charge must be limited in amount to the estimated cost of the services provided. Second, it cannot indirectly protect domestic products. Third, the fee cannot tax imports for fiscal purposes.⁸² The APHIS charges comply with the first requisite of Article VIII because they are transparent⁸³ and limited in amount to the approximate cost of the services rendered.

These user fees directly correlate to the services provided for in preventing the entrance of prohibited animals, plants, and diseases. Article VIII of the GATT requires that the amount of user fees approximate the cost of the services rendered.⁸⁴ Although user fees based upon the total value of the goods are not inherently inconsistent with GATT, such *ad valorem* charges contradict Article VIII when they lack a maximum limitation.⁸⁵ In short, GATT requires that there exist a nexus between the amount charged and the cost of the services rendered. APHIS fees are based on the cost of inspection services and announced to foreign exporters.⁸⁶

Furthermore, APHIS user fees do not represent an indirect protection to domestic products. The U.S. is not applying the APHIS user fees in an attempt to exclude foreign goods or discourage importers from trading with the U.S. Rather, these charges are required to implement the inspection services necessary to ensure the health and security of domestic agriculture by preventing the introduction of destructive pests such as the longhorn beetle and

⁸¹ Panel Report, *United States – Customs User Fee*, BISD 35S/245, p.19 (Feb 2, 1988) [hereinafter *U.S. – Customs User Fee*].

⁸² GATT, *supra* note 18, art. VIII:1(a).

⁸³ Becker, *supra* note 80, at 9.

⁸⁴ GATT, *supra* note 42, art. VIII.

⁸⁵ *U.S. – Customs User Fee*, *supra* note 81.

⁸⁶ *Federal User Fees: Key Aspects of International Air Passenger Inspection Fees Should be Addressed Regardless of Whether Fees Are Consolidated*, Report, GAO-07-1131, at 10 (Sept. 2007).

diseases such as foot and mouth disease.⁸⁷ The importance of the open-market in the current global economy cannot be ignored, but it is outweighed by the stability of domestic agriculture.⁸⁸

Lastly, APHIS charges do not tax products imported into the U.S. for fiscal purposes. Unlike the *ad valorem* structure of the customs fee addressed by the WTO Panel in 1988,⁸⁹ the user fees here do not take into account the value of products being imported. Instead, they are based on the cost of the services addressing the risks that accompany those products. These fees, thus, do not tax products from WTO members, but fund their safe conveyance into the U.S.

The APHIS user fees are transparent, based on the cost of services, and not aimed at taxing imported goods. Therefore, these fees comply with NAFTA and GATT because they satisfy the aforementioned criteria.

B. Alternatively, If the APHIS User Fees are Found to be Prohibited Under the General Provisions of NAFTA or GATT, They are Nonetheless Justified Under the General and National Security Exceptions Set Forth in NAFTA, GATT, or GATS.

Although international trade requires the fair and neutral application of regulations and policies regarding customs fees and inspection requirements, the needs for national security and agricultural health are not ignored by the international agreements, which address the specific instances in which a member may deviate from the general provisions to ensure the security within their national borders. Clearly, the introduction of pests and diseases poses a serious threat to the environment and economy of any nation. In the most extreme situation, destructive pests or diseases would be used in biological warfare by being dispersed against U.S. agriculture.

⁸⁷ Federal Register – User Fees, *supra* note 81, at 50321.

⁸⁸ Lawrence J. Dyckman, *Bioterrorism: A threat to Agriculture and the Food Supply*, Testimony, U.S. General Accounting Office, GAO-04-259, at 7 (Nov. 19, 2003).

⁸⁹ GATT, *supra* note 42.

NAFTA,⁹⁰ GATT,⁹¹ and GATS⁹² include exceptions to their general provisions. There are two specific instances in which WTO members may be exempt from GATT rules. First, a member's policy is exempt from the general GATT requirements when it protects human, animal or plant life.⁹³ Second, a policy is exempt when it relates to the conservation of exhaustible natural resources.⁹⁴ The APHIS user fees fall within the first set of circumstances in which, if they are found to contradict the general principles of GATT, they are exempt from compliance. Additionally, the GATT provision is incorporated into NAFTA Article 2102 and GATS Article XIV.⁹⁵ Thus, because the APHIS user fees fall within the GATT exception, they are also exempt from the general provisions under NAFTA and GATS.⁹⁶

U.S. agriculture is at risk for a bioterrorist attack because Canada imposes fewer SPS requirements than does the U.S.⁹⁷ Commercial importers identified this inconsistency and circumvent U.S. SPS requirements by arranging for their goods to be shipped to Canada, relabeled as Canadian products, and ultimately shipped to the U.S. without the necessary inspection.⁹⁸ Data disclosing an ever-increasing number of interceptions at the U.S./Canada border of prohibited material that originated in regions other than Canada indicate the need for heightened pest exclusion efforts to prevent the introduction of plant pests and animal diseases via unauthorized importations into the U.S. through Canada.⁹⁹

⁹⁰ NAFTA, *supra* note 32, arts. 607, 1018, and 2102.

⁹¹ GATT, *supra* note 42, arts. XX and XXI.

⁹² General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1125, 1869 U.N.T.S. 183 [hereinafter GATS], art. XIV.

⁹³ GATT, *supra* note 42, art. XX(b).

⁹⁴ GATT, *supra* note 42, art. XX(g).

⁹⁵ NAFTA, *supra* note 32, art. 2102.

⁹⁶ GATS, *supra* note 92, art. XIV.

⁹⁷ Federal Register, *supra* note 81, at 50321 and 50324.

⁹⁸ *Id.* at 50321.

⁹⁹ *Id.* at 50326.

These findings, along with the increased concerns about the threat of bioterrorism after the September 11th terrorist attacks, require the U.S. to strengthen its pest exclusion efforts at the U.S./Canada border. This necessitates that all shipments, both agricultural and non-agricultural, must be inspected for evidence of pests and diseases, which may be transported in the packaging materials of goods.¹⁰⁰ Thus, inspection services must be aimed at *all commercial conveyances* in order to fully address the increasing threat of bioterrorism.

III. THE WHTI DOES NOT VIOLATE NAFTA AND GATS OR IS JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA, GATT AND GATS.

A. The WHTI Does Not Violate Obligations Pertaining To The National Treatment Or Most-Favored Nation Treatment Principles Regarding Cross-Border Services.

1. The WHTI does not violate the NAFTA national treatment obligations.

NAFTA and GATS require Parties to accord national treatment for cross-border trade in services.¹⁰¹ Specifically, these treaties require each Party to treat another Party's service providers as favorably as it treats its own, in like circumstances.¹⁰² In relation to cross-border services, the national treatment obligation requires that any "differential treatment be no greater than necessary for legitimate regulatory reasons such as safety..." and that such treatment "...be equivalent to the treatment accorded to domestic service providers."¹⁰³ Furthermore, when

¹⁰⁰ *Id.* at 50327.

¹⁰¹ NAFTA, *supra* note 32, art.1202; GATS, *supra* note 92, art. II; *see also* Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 155, WT/DS139/AB/R, WT/DS142/AB/R (Jun. 19, 2000) [hereinafter *Canada – Autos*]; Appellate Body Report, *European Communities – Regime for Importation, Sale and Distribution of Bananas*, ¶ 220, WT/DS27/AB/R (Sept. 25, 1997) [hereinafter *EC - Bananas III*].

¹⁰² NAFTA, *supra* note 32, art. 1202.

¹⁰³ Final Report, *In the Matter of Cross-Border Trucking Services*, No. USA-Mex-98-2008-01, ¶ 258 (Feb. 6, 2001) [hereinafter *Cross-Border Trucking Services*].

interpreting these principles of international law in light of the facts, "...a litigant seeking to establish the existence of a fact bears the burden of proving it."¹⁰⁴

On a prima facie level, the U.S. has not violated the national treatment requisite in relation to cross-border services. While Canada asserts that the WHTI disproportionately affects Canada, Canada has not proven this fact. Certainly, by the terms of the WHTI, any adverse effects will bear upon the U.S., as well. The WHTI requires *all adult travelers* to present passports or certain prescribed identification; it does not differentiate between U.S. and Canadian travelers.¹⁰⁵ Furthermore, to the extent that any differential treatment results from the WHTI, the treatment is no greater than necessary to ensure the safety of the population. As such, the WHTI does not violate national treatment obligations.

2. The WHTI does not violate most favored-nation obligations.

Parties under NAFTA and GATS are bound by MFN principles, which require Parties to treat each other's service providers no less favorably than they treat service providers of any other country, in like circumstances.¹⁰⁶ The U.S. complies with its MFN obligations because each Party affected by the WHTI is in like circumstances because of the common interest in North American border security. Prior to WHTI, Canadian citizens, to the exclusion of citizens from any other country, enjoyed the benefit of moving across the border without presenting a passport. Now, due to increasing security concerns, Canada is on equal footing with every other country. In fact, the U.S. clearly recognized that border vulnerabilities exist with regards to the

¹⁰⁴ *Avena and Other Mexican Nationals*, (Mex. v. U.S.), 2004 I.C.J. 12, at 41 (Mar. 31).

¹⁰⁵ See Western Hemisphere Travel Initiative, *supra* note 12.

¹⁰⁵ See *Id.*

¹⁰⁶ NAFTA, *supra* note 32, art. 1203; GATS, *supra* note 92, art. XVII.

Mexican border as well, which contributed to the implementation of WHTI.¹⁰⁷ Thus, the U.S. has not violated MFN obligations by implementing the WHTI.

B. The WHTI Does Not Violate NAFTA Obligations With Respect To The Entry Of Business Persons Because The WHTI Balances The Need To Ensure Border Security By Establishing Transparent Criteria Regarding The Measure.

NAFTA acknowledges the need to balance border security with the need to create transparent criteria to facilitate reciprocal temporary entry for business persons.¹⁰⁸ NAFTA requires parties to grant temporary entry to business persons only if these persons are “...otherwise qualified for entry under applicable [national security measures].”¹⁰⁹ While the liberalization of the trade in services is the overarching rationale behind NAFTA, NAFTA is cognizant of the significance of border security with regards to the movement of people¹¹⁰ and requires the expeditious facilitation of temporary entry *in conjunction with* ensuring border and national security.¹¹¹

The WHTI does not violate trade obligations relating to the entry of business persons because it does not ban their entrance, but merely requires that they present valid documentation in order to ensure border security. Insisting on the presentation of valid documentation by all travelers crossing U.S. borders in a day and age when terrorism is a reality, serves only to ensure the safety of the general population as well as the safety of Canadian business persons.

As of January 31, 2008, the WHTI requires *all non-immigrant adult travelers* to present documentation from a specified list of acceptable documents, in order to prove citizenship, and

¹⁰⁷ Card Format Passport; Changes to Passport Fee Schedule Proposed Rule, 71 Fed. Reg. 60928 (proposed Oct. 17, 2006).

¹⁰⁸ NAFTA, *supra* note 32, arts. 1601 and 1602,

¹⁰⁹ NAFTA, *supra* note 32, art. 1603.

¹¹⁰ Dunniela Kauffman, *Does Security Trump Trade*, 13 Law & Bus. Rev. Am. 619, 629 (2007).

¹¹¹ NAFTA, *supra* note 32, art. 1601.

therefore gain entry into the U.S. at land and sea ports.¹¹² WHTI is reciprocal because it requires both Canadian and U.S. business persons to provide proper documents. This reciprocity is also apparent where the U.S. requires certain documentation from all travelers entering the U.S.

Furthermore, the WHTI has met the “transparent” requirement for entry procedures. The U.S. publicized the new entry protocol of WHTI in a variety of media sources.¹¹³ Since June 26, 2007, Department of Homeland Security (DHS) conducted a variety of media interviews¹¹⁴ and published the *WHTI Land/Sea Notice of Proposed Rulemaking* as part of the outreach.¹¹⁵ The U.S. government provided ample notice for all travelers to meet the WHTI requirements, even allotting for a grace period to further facilitate the smooth transition.¹¹⁶ Accordingly, the WHTI does not violate NAFTA obligations with respect to the entry of business persons.

C. Even If This Tribunal Finds That The WHTI Violates Trade Obligations, The WHTI Is Justified Pursuant To The National Security And General Exceptions Of The NAFTA, GATT And GATS.

1. WHTI falls within the ambit of the national security exceptions.

NAFTA, GATT and GATS cannot be construed “...to prevent any Party taking any actions that it considers necessary for the protection of its essential security interests,” *inter alia*, “taken in time of war or other emergency in international relations...”¹¹⁷ In *Lotus Development*, Canada argued that the term “national security” with respect to trade agreements should be defined as the “concern about the safety or protection of the country or nation as a whole from

¹¹² WHTI, *supra* note 12 at 35093.

¹¹³ New Border Crossing Procedures Beginning January 31, 2008, <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C24345>.

¹¹⁴ *See e.g.*, Press Release, Department of Homeland Security, Travelers Reminded of New Document Requirements Beginning January 31, 2008 (Dec. 3, 2007).

¹¹⁵ WHTI, *supra* note 12.

¹¹⁶ Press Release, Department of Homeland Security, Frequently Asked Questions: New Border Crossing Procedures Beginning January 31, 2008 (Jan. 18, 2008)[hereinafter FAQ], http://www.dhs.gov/xnews/releases/pr_1200677666905.shtm.

¹¹⁷ *Id.*

international threat or resolution of a state of crisis...”¹¹⁸ Canada further contended that each Party may “determine the manner in which, and at what level of authority, it will invoke the exception.”¹¹⁹ According to scholars, national security exceptions represent “a classic exception to liberal trade policies and rules.”¹²⁰ Notably, the history of the national security provision of GATT Article XXI indicates no restrictions on the invocation of the exception.¹²¹

Assuming, *arguendo*, that the Court finds that WHTI violates relevant provisions of the trade agreements, the WHTI nevertheless falls within the ambit of the national security exceptions. The U.S. is acting, through the WHTI, for the “...protection of its essential security interests...” within the meaning of the trade agreements.¹²² The exclusive reason for the implementation of WHTI is to ensure border security.¹²³ In fact, the 9/11 Commission considered the Canadian border as a security threat.¹²⁴ This observation is highlighted by the fact that within a three-month period, Customs and Border Patrol officers cited 1, 517 cases of individuals falsely claiming U.S. citizenship, one of whom was homicide fugitive.¹²⁵ In light of its recent arguments in *Lotus Developments*, Canada should concede that the national security exception may be invoked to guarantee the safety and security of a country.

Although liberal trade policies may be restricted on account of national security concerns, here, the U.S. does not seek to restrict the liberal trade policies. Rather, the U.S. is working diligently to increase the security of the border without causing backups which may result in a

¹¹⁸ *Lotus Development*, *supra* note 60, at 4.

¹¹⁹ *Id.*

¹²⁰ W.J. Davey, J.H. Jackson & A. O. Sykes, Jr., *Legal Problems of International Economic Relations*, 983 (3d ed., West Publishing 1995); *GATT Analytical Index*, *supra* note 61.

¹²¹ *Lotus Development*, *supra* note 60, at 10.

¹²² GATT, *supra* note 42, art. XXI.

¹²³ Montebello Summit Joint Statement], *supra* note 16.

¹²⁴ *Id.*

¹²⁵ FAQ, *supra* note 116.

restriction on trade. For instance, DHS and the Department of Security (DOS) continue to utilize radio frequency identification (RFID) technology to differentiate between criminals and legitimate travelers in an effort to expedite border processing.¹²⁶ Moreover, it should be noted that compliance with the first phase is nearly 100 percent, indicating that the second phase will be successful as well.¹²⁷ Even if WHTI is found to be in violation of NAFTA, GATT or GATS, it is justified by the national security exceptions because it seeks to protect essential security interests at border crossings by requiring all travelers to present valid identification.

2. WHTI falls within the general exceptions of NAFTA, GATT and GATS.

NAFTA, GATT, and GATS allow for the adoption of a measure that is necessary to protect, *inter alia*, human health.¹²⁸ However, as previously noted, even when the measure falls within one of the general exceptions, it must still meet a three-part test to determine whether it is “applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination...or a disguised restriction on trade.”¹²⁹ The WHTI falls within the general exception allowing for a trade-restrictive measure because it is necessary to protect human health. Indeed, the attacks of September 11th are a stark reminder of the need to strictly regulate U.S. borders for the protection of both U.S. citizens and foreign nationals visiting the U.S. Since WHTI seeks to guard human health, it is warranted by the national security exceptions.

Likewise, WHTI satisfies the first element because it is not applied in a manner that constitutes arbitrary or unjustifiable discrimination within the purview of *U.S. – Shrimp*. As

¹²⁶ FAQ, *supra* note 116.

¹²⁷ *Id.*

¹²⁸ GATT, *supra* note 42, art. XX(b); GATS, *supra* note 92, art. XIV; NAFTA, *supra* note 32, art. 2101.

¹²⁹ NAFTA, *supra* note 32, art. 2101(2); *see also* Appellate Body Report, *United States – Section 337 of the Tariff Act of 1930*, BISD/34S (Nov. 7, 1989); *see also* U.S – *Shrimp*, *supra* note 52 .

previously explained, WHTI applies to all travelers, including Canada and U.S citizens. Since the three-part test is conjunctive, the WHTI does not constitute arbitrary or unjustifiable discrimination because it is not discriminatory in nature.

Furthermore, the WHTI is not a disguised restriction on trade. To the extent that the measure negatively affects Canada's tourism industry, Canada must recognize that the effects are reciprocal because the U.S.'s tourism industry will likewise suffer. However, any negative economic effects suffered by the U.S. and Canada on account of WHTI are outweighed by the necessity to secure borders. As travelers adapt to the new measure, the negative economic effects will decrease and international travel will stabilize. Consequently, WHTI is not a hidden constraint on trade, but an attempt to secure U.S. borders and avert future terrorist attacks.

CONCLUSION

FOR THE AFOREMENTIONED REASONS, the Government of the United States of America respectfully requests this honorable Court to find:

- a. That the Fuel Export Charge violates Canada's obligations under NAFTA and GATT because the charge is imposed on fuel exported via pipeline without being concurrently implemented on the domestic consumption of pipeline fuel;
- b. That the U.S. APHIS user fees comply with the obligations set forth under NAFTA and GATT because they are based on actual risks, apply to all exports into the U.S., and are directed towards funding inspection services at U.S. borders; and
- c. That the U.S. WHTI requirements comply with NAFTA and GATS because they are applied evenly on all travelers entering the U.S.