

**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 # 2008-03R

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## **QUESTIONS PRESENTED**

1. Whether the Western Hemisphere Travel Initiative (WHTI) is contrary to the North American Free Trade Agreement (NAFTA) Chapters 12 and 16 and the General Agreement on Trade in Services (GATS) and falls outside of a national security or general exception under NAFTA, the General Agreement on Tariffs and Trade (GATT), or the GATS.
2. Whether the Animal and Plant Health Inspection Service (APHIS) user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII and fall outside of a national security or general exception under NAFTA, GATT, or the GATS.
3. Whether the Fuel Export Charge violates NAFTA Articles 314, 315, 604, and 605 or GATT Articles I, VIII and XI and falls within the national security or general exceptions under NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI.

## **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*.<sup>1</sup> Both Parties have agreed to immediately bring their actions and positions into conformity with the conclusions of this Court.

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<sup>1</sup> Statute of the International Court of Justice, 26 June 1945, T.S. No. 933, 59 Stat.1055.

## STATEMENT OF FACTS

On August 25, 2006, the United States (U.S.) Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) announced in the U.S. Federal Register (Volume 71, No. 165) 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.<sup>2</sup> Canada was exempted from the user fees.<sup>3</sup> However, this exception was removed.<sup>4</sup> Starting January 1, 2007, air passengers arriving in the U.S. from Canada began paying user fees regardless of whether they were traveling with fruits or vegetables or whether they were processed through customs and immigration at a Canadian airport.<sup>5</sup> 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.<sup>6</sup>

Beginning March 1, 2007, APHIS removed the inspection exemption for all commercial vessels (ships) entering the U.S. from Canada.<sup>7</sup> The amount of the user fee for each maritime vessel is \$USD 490.00 per entry and is imposed irrespective of its cargo.<sup>8</sup> 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 truck moving from Canada to the U.S.<sup>9</sup> Canada's Department of Foreign Affairs and International Trade (DFAIT) conveyed to its counterparts at the Department

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<sup>2</sup> See Animal and Plant Health Inspection Service User Fees, 71 Fed. Reg. 50320 (Aug. 25, 2006) (to be codified at 7 C.F.R. pts. 319 and 354) [hereinafter APHIS].

<sup>3</sup> See *Id.*

<sup>4</sup> See *Id.*

<sup>5</sup> See *Id.*

<sup>6</sup> See *Id.*

<sup>7</sup> See *Id.*

<sup>8</sup> See *Id.*

<sup>9</sup> See *Id.*

of Homeland Security (DHS) and the U.S. Trade Representative its view that the APHIS user fees are customs user fees and contrary to NAFTA and GATT.

On June 26, 2007, the U.S. Department of State (D.O.S.) and the DHS jointly published a Notice of Proposed Rulemaking to implement the second phase of the Western Hemisphere Travel Initiative (WHTI).<sup>10</sup> The WHTI requires all travelers to carry a valid passport or other appropriate secure documentation when traveling to the U.S. from within the Western Hemisphere.<sup>11</sup> Specifically, this second phase 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.<sup>12</sup> Canada raised issues with the U.S. government that the WHTI disproportionately affects Canada given the extent to which the free movement of persons limits the free movement of goods and service. Nevertheless, the U.S. justified the WHTI as a national security-related measure.

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 North American Leader's Summit.<sup>13</sup> In the Joint Statement, the leaders asked their Ministers to focus their collaboration on five priority areas for the next year.<sup>14</sup> The priority that is relevant to the dispute at hand is "Smart and Secure Borders," which call for effective border strategies that

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<sup>10</sup> See The Western Hemisphere Travel Initiative, 72 Fed. Reg. 74169 (Dec. 31, 2007) (to be codified at 22 C.F.R. pts. 22 and 51) [hereinafter WHTI].

<sup>11</sup> See *Id.*

<sup>12</sup> See *Id.*

<sup>13</sup> 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>.

<sup>14</sup> *Id.*

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.<sup>15</sup>

After the release of the Joint Statement, a number of U.S. Presidential candidates made statements in the media that Canada must take the security of North America seriously. Additionally, these candidates made unsupported statements that the September 11, 2001 hijackers entered the U.S. from Canada. Thereafter, U.S. Secretary of Homeland Security Chertoff, U.S. Vice President Cheney, and Canada's Prime Minister of Public Safety Day immediately began discussions with the view to make an announcement on September 11, 2007 that plans were developed to meet the security-related action points in the Joint Statement.

On September 11, 2007, Canada and the U.S. issued a Joint Statement that Canada would spend one billion dollars to implement a variety of border initiatives.<sup>16</sup> These initiatives include building screening facilities at least one kilometer from border crossings, erecting ground sensor towers, and installing advanced radiological detection technology at all its ports.<sup>17</sup> In addition to announcing these initiatives, Canada's Prime Minister's Office also announced an export tax of twenty-five Canadian dollars per barrel on fuel transported via pipeline.<sup>18</sup>

During the announcement of the export tax, Canada's Prime Minister Harper explained that the imposition of the fuel export tax was necessary for Canada to fully partake in ensuring the security of North America.<sup>19</sup> Prime Minister Harper stated that Canada is imposing an export

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<sup>15</sup> *Id.*

<sup>16</sup> Joint Statement, Can. and U.S. (Sept. 11, 2007).

<sup>17</sup> *Id.*

<sup>18</sup> Stephen Harper, Can. Prime Minister (Sept. 11, 2007).

<sup>19</sup> *Id.*

tax on fuel to raise money to pay for the infrastructure projects and technology purchases that it agreed to make.<sup>20</sup>

In order to support the Fuel Export Charge legislation, the *Softwood Lumber Product Export Charge Act, 2006* was used as precedent. The Fuel Export Charge requires that all exporters of fuel by pipeline 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. All exporters of fuel by pipeline are required to apply for export permits for each transaction involving such an export of fuel and provide prescribed information. Opposed to Canada's imposition of the export tax on fuel, the U.S. took the position that the export tax was contrary to several NAFTA and GATT provisions. However, Canadian Ambassador Wilson reaffirmed that the Fuel Export Charge would remain in effect.

On September 23, 2007, the U.S. filed a dispute with this Court with respect to the Fuel Export Charge. Canada responded on October 23, 2007 by filing a dispute with this Court regarding the WHTI requirement that all American and Canadian citizens provide a passport as identification to border and immigration officials, as well as to the APHIS user fees.

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<sup>20</sup> *Id.*

## SUMMARY OF ARGUMENT

The Applicant violated international law by enacting the WHTI because it accords less favorable treatment to Canadian service suppliers and adversely affects trade in services. APHIS user fees also constitute customs user fees, thereby violating both NAFTA and MFN treatment. Neither the WHTI nor the APHIS user fees are justified by general or national security exceptions. Accordingly, both the WHTI and APHIS user fees are unlawful. Further, Canada's Fuel Export Charge is valid because the Softwood Lumber Agreement permits parties to implement export charges and it is justified by general and national security exceptions.

## ARGUMENT

### **I. THE WHTI IS CONTRARY TO NAFTA CHAPTERS 12 AND 16 AND THE GATS AND FALLS OUTSIDE OF A NATIONAL SECURITY OR GENERAL EXCEPTION UNDER NAFTA, GATT, OR THE GATS.**

Article 26 of the *Vienna Convention on the Law of Treaties* (VCLT) requires a party to perform its treaty obligations according to the principles of *pacta sunt servanda*, which states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>21</sup> As such, a treaty interpreter must “seek to give effect to the object and purpose”<sup>22</sup> of the treaty. As the specific nature of the treaty is so significant to its interpretation,<sup>23</sup>

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<sup>21</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 26 [hereinafter VCLT]; see generally *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006); see generally *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993).

<sup>22</sup> *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, 67 (Nov. 28).

<sup>23</sup> See *Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 91 (July 11).

international tribunals have not hesitated to resort to the preamble of a treaty in order to determine the treaty's principal object.<sup>24</sup>

All three treaties, NAFTA, GATT, and the GATS, should be interpreted pursuant to the rules of the VCLT.<sup>25</sup> Under Articles 31 and 32 of the VCLT, a treaty's terms must be interpreted according to their ordinary meaning, and if terms remain ambiguous, the *travaux préparatoires* may be consulted.<sup>26</sup> Specifically, NAFTA Article 102(2) provides a mandatory standard for the interpretation of the detailed provisions of the Agreement.<sup>27</sup> It states, “[t]he Parties shall interpret and apply the provisions of this Agreement in the light of its objectives ... and in accordance with applicable rules of international law.”<sup>28</sup> As a free trade agreement, NAFTA has “the specific objective of eliminating barriers to trade among the three contracting Parties.”<sup>29</sup> As a result, “[a]ny interpretation adopted by ... [a] Panel must, therefore, promote rather than inhibit NAFTA's objectives.”<sup>30</sup>

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<sup>24</sup> See *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No.10, at 17 (Sept. 7); see also *Free Zones of Upper Savoy and District of Gex*, Judgment, 1929 P.C.I.J. (ser. A) No. 22, at 12 (June 7); see also *Asylum (Colom./Perú)*, 1950 I.C.J. 266, 276, 282 (Nov. 20); see also *Rights of U.S. Nationals in Morocco* (Fr. v. U.S.), 1950 I.C.J. 176 (Aug. 27); see also D.P. O'Connell, *International Law* 260 (2d ed. 1970).

<sup>25</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights CPPR Commentary* 952, 953 (2d ed. 2005).

<sup>26</sup> *Lighthouse Case* (Fr. v. Greece), 1934 P.C.I.J. (ser. A/B) No. 62, at 4, 13 (Oct. 8); see also *Polish Postal Service in Danzig*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11, at 6, 39 (Dec. 15); see also *Membership in United Nations*, 1948 I.C.J. 56, 63 (May 28); see also *Competence of General Assembly for Admission of a State to United Nations*, 1950 I.C.J. 4, 8 (Mar. 3).

<sup>27</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

<sup>28</sup> *Id.*

<sup>29</sup> Final Report, *In the Matter of Tariffs Applied by Canada to Certain United States Origin Agricultural Products*, para. 122, No. CDA 95-2008-01 (Dec. 2, 1996).

<sup>30</sup> *Id.*

**A. The WHTI Accords “Less Favorable” Treatment to Canadian Service Suppliers than to American Domestic Suppliers and Obstructs the “Temporary Entry for Business Persons” Between the Countries.**

The WHTI is contrary to Articles 1202 (national treatment for cross-border services) and 1203 (most-favored-nation treatment (MFN) for cross-border services), as well as Chapter 16 (temporary entry for business persons) of NAFTA because it accords “less favorable” treatment to Canadian service suppliers than it does to American domestic suppliers,<sup>31</sup> and because it obstructs the temporary entry of otherwise qualified business persons into the U.S. and Canada.<sup>32</sup> As a result, the U.S. is violating its treaty obligations under NAFTA to accord equal treatment to Canadian service suppliers.

1. The WHTI accords “less favorable” treatment to Canada’s service providers than it does to American domestic service suppliers.

Article 1202 of NAFTA states in pertinent part that “[e]ach Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers.”<sup>33</sup> Similarly, Article 1203 states that “[e]ach Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to service providers of any other Party or of a non-Party.”<sup>34</sup>

The proper interpretation of NAFTA Article 1202 requires that any “differential treatment should be no greater than *necessary* for legitimate regulatory reasons such as safety, and that such different[ial] treatment be equivalent to the treatment accorded to domestic service providers”<sup>35</sup> (emphasis added). For instance, in *Cross-Border Trucking Services*, a NAFTA

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<sup>31</sup> NAFTA, *supra* note 27, arts. 1202(1), 1203(1).

<sup>32</sup> *Id.*, arts. 1601, 1603.

<sup>33</sup> NAFTA, *supra* note 27, art. 1202.

<sup>34</sup> *Id.*, art. 1203.

<sup>35</sup> Final Report, *In the Matter of Cross-Border Trucking Services*, No. USA-Mex-98-2008-01, at para. 258 (Feb. 6, 2001) [hereinafter *Cross-Border Trucking Services*].

Panel found that the U.S. violated Article 1202 when it failed to phase out restrictions on Mexican cross-border trucking services despite affording Canada national treatment in the industry.<sup>36</sup> Reasoning that the object of Article 1202 is to “provide no less favorable treatment to service providers,” the Panel held that, absent other justification, the U.S.’s refusal to process applications of Mexican trucking firms constituted a “*de jure* violation of the national treatment obligation in Article 1202.”<sup>37</sup>

Similar to the “less favorable” treatment in *Cross-Border Trucking Services*, the WHTI accords “less favorable” treatment to Canada’s service suppliers than it does to American suppliers.<sup>38</sup> The WHTI’s passport requirement has, and will, continue to result in many Americans changing their travel plans to avoid the hassle of obtaining a passport.<sup>39</sup> This in turn, will have a devastating effect on Canada’s economy, depriving its tourism industry of billions of dollars in expected revenue. To illustrate, a recent Canadian Tourism Commission (CTC) report estimates that the WHTI’s passport requirement will result in 14.1 million fewer trips by U.S. citizens into Canada and a \$3.6 billion<sup>40</sup> loss in revenue. As such, it is clear that the WHTI accords significantly less favorable treatment to Canadian service suppliers than to American suppliers. Thus, the U.S. is in violation of NAFTA Articles 1202 and 1203.

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<sup>36</sup> *Id.* at para. 287.

<sup>37</sup> *Id.* at para. 257.

<sup>38</sup> *Id.* at para. 257.

<sup>39</sup> Jessica Shook, *Executive Branch: New Identification Requirements for Travelers by Air*, 21 *Geo. Immigr. L.J.* 325, 327 (2007).

<sup>40</sup> Canadian Tourism Commission, *The Potential Impact of a Western Hemisphere Travel Initiative Passport Requirement on Canada’s Tourism Industry*, Research Report (2005) [hereinafter CTC Report].

2. The WHTI obstructs the “temporary entry for business persons,” and in doing so, does not promote NAFTA’s “object and purpose.”

The first of NAFTA’s listed objectives is to “eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties.”<sup>41</sup> To accomplish this goal, the people of North America require the ability to move between borders.<sup>42</sup> For this reason, Article 1603 of NAFTA states that “[e]ach Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security.”<sup>43</sup> By requiring all travelers to provide a valid passport at the time of entry into the U.S.,<sup>44</sup> the WHTI is hindering, not furthering, this objective.

Recently, the U.S. has “focused on security-based initiatives, in which trade liberalization and trade facilitation are secondary goals.”<sup>45</sup> Not surprisingly, many of the “specific features of these initiatives have the potential to impede trade.”<sup>46</sup> For example, the WHTI, while perhaps marginally improving security, has drastically reduced the amount of eligible truck driver’s crossing the US-Canada border.<sup>47</sup> In doing so, the WHTI is not hampering just any service, but rather, an essential service<sup>48</sup> critical to establishing the North American market NAFTA seeks to create. As a result, the WHTI is in conflict with NAFTA’s expressed object and purpose and should be repealed.

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<sup>41</sup> NAFTA, *supra* note 27, art. 102(1)(a).

<sup>42</sup> Dunniela Kaufman, *Does Security Trump Trade*, 13 Law & Bus. Rev. Am. 619, 628 (2007).

<sup>43</sup> NAFTA, *supra* note 27, art. 1603(1).

<sup>44</sup> See WHTI, *supra* note 10.

<sup>45</sup> Kaufman, *supra* note 42.

<sup>46</sup> *Id.*

<sup>47</sup> CTC Report, *supra* note 40.

<sup>48</sup> Jeffrey Atik, *National Treatment in the NAFTA Trucking Case*, 42 S. Tex. L. Rev. 1249 (2001).

**B. The WHTI Violates the GATS Because it Adversely “Affects Trade in Services” and Violates the Agreement’s MFN Provision.**

According to the World Trade Organization’s (WTO) Appellate Body in *Canada – Certain Measures Affecting the Automotive Industry*, determining if a measure is one affecting trade in services requires examining two key issues.<sup>49</sup> First, it must be determined whether there is “trade in services” as defined by Article I:2 of the GATS. Second, it needs to be determined whether the measure “affects” such trade in services within the meaning of Article I:1.<sup>50</sup>

1. Canada’s tourism industry constitutes trade in services.

Article I:2 of the GATS defines the concept of trade in services as the supply of a service within one of four enumerated modes of supply.<sup>51</sup> Paragraph (b) of Article I:2 – or mode 2 – describes the mode of supply known as consumption abroad.<sup>52</sup> This consumption abroad mode of supply deals with the situation where the consumer of a service travels to the territory of another member in order to consume the service.<sup>53</sup> The most common example of services provided under mode 2 is tourism services.<sup>54</sup> Canada’s tourism industry, which relies heavily on an influx of Americans to consume the country’s many services, undoubtedly is an example of trade in services as enumerated in Article I:2 of the GATS.

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<sup>49</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, para. 155, WT/DS139/AB/R, WT/DS142/AB/R (June 19, 2000) [hereinafter *Canada – Autos*].

<sup>50</sup> *Id.*

<sup>51</sup> See General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1125, 1869 U.N.T.S. 183, art. I:2 [hereinafter GATS].

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

2. The WHTI clearly affects Canada's trade in services.

The WTO's Appellate Body in *European Communities – Regime for Importation, Sale and Distribution of Bananas*, concluded that the term “affecting” in Article I:1 of the GATS required a broad interpretation.<sup>55</sup> The Appellate Body stated:

[T]he term “affecting” reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word “affecting” implies a measure that has “an effect on”, which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term “affecting” in the context of Article III of the GATT is wider in scope than such terms as “regulating” or “governing”.<sup>56</sup>

With such a broad interpretation, the WHTI is clearly affecting Canada's trade in services.<sup>57</sup> Currently, the initial cost of U.S. passports for a family of four is \$388,<sup>58</sup> while Canadian costs are comparable.<sup>59</sup> The staggeringly low percentage of Americans who possess valid passports,<sup>60</sup> coupled with the high costs associated with procuring one, undoubtedly affects Canada's tourism industry. As such, the WHTI constitutes a measure affecting trade in services under the GATS and should be remedied accordingly.

3. The WHTI violates the GATS' MFN treatment.

In addition to covering measures affecting trade in services, the GATS requires both MFN and national treatment for services and service suppliers.<sup>61</sup> Specifically, Article II of the GATS states that “each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than it accords to like

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<sup>55</sup> Appellate Body Report, *European Communities – Regime for Importation, Sale and Distribution of Bananas*, para. 220, WT/DS27/AB/R (Sept. 25, 1997) [hereinafter *EC - Bananas III*].

<sup>56</sup> *Id.*

<sup>57</sup> *See id.*

<sup>58</sup> U.S. Department of State, *Passport Fees*, [http://travel.state.gov/passport/get/fees/fees\\_837.html](http://travel.state.gov/passport/get/fees/fees_837.html) (last visited Feb. 12, 2008).

<sup>59</sup> *See, e.g.*, Passport Canada, <http://www.pptc.gc.ca/cdn/section6.aspx?lang=eng> (last visited Feb. 10, 2008).

<sup>60</sup> *See CTC Report, supra* note 40.

<sup>61</sup> GATS, *supra* note 51, art. II.

services and service suppliers of any other country.”<sup>62</sup> To determine whether services or service suppliers of one member have been treated less favorably than services or service suppliers of another nation, a court must decide whether the “measure adopted has altered, or has the potential to alter, the conditions of competition”<sup>63</sup> between the countries.

The WHTI constitutes treatment less favorable to Canada’s tourism industry and suppliers than is given to American service suppliers. The U.S. fails to recognize that the majority of people do not possess passports as demonstrated by a CTC study finding “that 41% of Canadian residents over the age of 18 have a passport, while only 34% of United States residents over the age of 18 have a passport.”<sup>64</sup> As a result, the WHTI significantly alters the conditions of competition between the countries by according significantly less favorable treatment to Canadian service suppliers than to those located in the U.S.<sup>65</sup>

**C. The WHTI is Not Justified Under a National Security or General Exception Found in NAFTA, GATT, or the GATS.**

NAFTA, GATT, and the GATS each provide for the availability of trade-restrictive measures imposed for national security reasons.<sup>66</sup> Under each agreement, states may adopt or enforce measures necessary to protect human, animal, or plant life or health.<sup>67</sup> Nevertheless, there are still limitations as to when a party may deviate from the terms of the treaties.

For example, under NAFTA Article 2101, which incorporates GATT Article XX by reference, the safety measures adopted by a party may be justified only to the extent that they are

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<sup>62</sup> *Id.*

<sup>63</sup> *EC – Bananas III*, *supra* note 55, para. 234.

<sup>64</sup> CTC Report, *supra* note 40.

<sup>65</sup> *See EC – Bananas III*, *supra* note 55.

<sup>66</sup> *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XX(b) [hereinafter GATT]; *see also* NAFTA, *supra* note 27, art. 2101(a); *see also* GATS, *supra* note 51, art. XIV bis.

<sup>67</sup> GATT, *supra*, art. XX(b); *see also* GATS, *supra* note 51, art. XIV; *see also* NAFTA, *supra* note 27, art. 2101

“necessary to secure compliance” with laws or regulations that are otherwise consistent with the Agreement.<sup>68</sup> In addition, the adopted measures must not be “applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on trade.”<sup>69</sup> Here, GATT/WTO jurisprudence helps to determine what “necessary to secure compliance” and “unjustifiable discrimination” mean.

1. The WHTI is not necessary to secure compliance with another consistent law or regulation.

The “necessary to secure compliance” language in GATT Article XX, which was expressly incorporated into NAFTA, has been interpreted strictly in several GATT/WTO decisions.<sup>70</sup> For instance, in *Canada – Certain Measures Concerning Periodicals*, Canada argued that its import ban on certain periodicals for economic reasons was justified under GATT as a measure necessary to secure compliance with other GATT-consistent regulations.<sup>71</sup> However, the WTO Panel rejected Canada’s interpretation and determined that the measure was not one that sought compliance with another law, and thus, was not justified under the GATT exception.<sup>72</sup>

Much like the government-adopted measure in *Periodicals*, the WHTI is also not necessary to secure compliance with other laws or regulations consistent with the Agreements. By contrast, the WHTI simply acts as an unnecessary barrier to trade, creating confusion, long delays, and disrupting the flow of international business. Therefore, the WHTI does not satisfy

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<sup>68</sup> NAFTA, *supra* note 27, art. 2101(2)(a).

<sup>69</sup> *Id.*; see also Appellate Body Report, *United States – Section 337 of the Tariff Act of 1930*, BISD/34S (Nov. 7, 1989) [hereinafter *Tariff Act of 1930*].

<sup>70</sup> See *Tariff Act of 1930*, *supra* note 69; see also Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R (Mar. 14, 1957) [hereinafter *Periodicals*]; see also Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (May 20, 1996) [hereinafter *Reformulated Gasoline*]; see also Appellate Body Report, *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp*].

<sup>71</sup> *Periodicals*, *supra* note 70, paras. 5.8-5.11.

<sup>72</sup> *Id.*

the first prong of invoking a national security exception under NAFTA, GATT, or the GATS.

2. The WHTI constitutes unjustifiable discrimination and a disguised restriction on international trade.

In general, security exceptions represent “a classic exception to liberal trade policies and rules.”<sup>73</sup> The problem these exceptions present in international agreements is that it is “virtually impossible to determine their limits.”<sup>74</sup> For this reason, the principle that exceptions in a treaty are to be construed narrowly is well accepted in the interpretation of GATT.<sup>75</sup> If this Court concludes otherwise, parties would be “free to circumvent virtually any provision ... on that basis, contrary to the principle of effectiveness.”<sup>76</sup>

Currently, the U.S. argues that the WHTI is justified as a national security measure. However, the WHTI’s possible security benefits are substantially outweighed by the economic burden it creates. GATT Article XX specifically requires that a party adopt measures “reasonably available to it that ... [are] the least inconsistent”<sup>77</sup> with the Agreement. The U.S. has failed to demonstrate that they have considered more acceptable, less trade restrictive alternatives than those of the WHTI in order to reach their safety goals. Accordingly, the national security and general exceptions must be construed narrowly in order to avoid undermining the fundamental objectives of the relevant Agreements.

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<sup>73</sup> See J.H. Jackson, W.J. Davey & A.O. Sykes, Jr., *Legal Problems of International Economic Relations* 983 (3d ed. 1995); see also World Trade Organization, *Analytical Index: Guide to GATT Law and Practice* 600-610 (6th ed. 1995).

<sup>74</sup> Jackson, *supra* note 73, at 983.

<sup>75</sup> See Appellate Body Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198-29S/91 (Feb. 22, 1982); see also *Reformulated Gasoline*, *supra* note 70; see also *Shrimp*, *supra* note 70; see also Appellate Body Report, *Thailand Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-37S/200 (Nov. 7, 1990).

<sup>76</sup> *Cross-Border Trucking Services*, *supra* note 35, para. 108.

<sup>77</sup> *Reformulated Gasoline*, *supra* note 70, paras. 24-28.

## **II. THE APHIS USER FEES ARE CONTRARY TO NAFTA ARTICLE 310 AND GATT ARTICLES I AND VIII AND FALL OUTSIDE OF A NATIONAL SECURITY OR GENERAL EXCEPTION UNDER NAFTA, GATT, OR THE GATS.**

### **A. The APHIS User Fees are Contrary to NAFTA Article 310.**

A domestic law can “signal a country’s nonconformance with an international treaty obligation.”<sup>78</sup> In the present case, the APHIS user fees are contrary to NAFTA Article 310, because they constitute a customs user fee for originating goods, which is strictly prohibited under NAFTA.<sup>79</sup> Specifically, Article 310 of NAFTA, discussing “Customs User Fees,” states that “[n]o Party may adopt any customs user fee ... for originating goods.”<sup>80</sup> In addition, NAFTA Annex 310.1 mandates that as of January 1, 1994, the United States is required to eliminate its merchandise-processing fee on originating goods that qualify to be marked as goods of Canada.<sup>81</sup>

Yet, by imposing inspection fees on all planes, trains, and sea vessels entering the U. S., regardless of the cargo, the APHIS user fees are effectively acting as merchandise processing or customs user fees on all originating commercial shipments entering the U.S. from Canada.<sup>82</sup> These commercial shipments will often contain considerable quantities of originating goods.<sup>83</sup> Thus, pursuant to NAFTA Article 310(1) and its corresponding Annex, commercial shipments entering the U.S. from Canada by way of plane, train, or sea vessel should not be subject to any type of user fee.<sup>84</sup>

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<sup>78</sup> Ian Brownlie, *Principles of Public International Law* 39 (6th ed. 2003); *see also Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

<sup>79</sup> NAFTA, *supra* note 27, art. 310(1).

<sup>80</sup> *Id.*

<sup>81</sup> NAFTA, *supra* note 27, Annex 310.1.

<sup>82</sup> *See APHIS*, *supra* note 2.

<sup>83</sup> NAFTA, *supra* note 27, art. 401(a).

<sup>84</sup> *Id.*, art. 310(1), Annex 310.1.

## **B. The APHIS User Fees are Contrary to GATT Articles I and VIII.**

In addition to violating NAFTA Article 310, the APHIS user fees are contrary to GATT Article I (general MFN treatment) and Article VIII (fees and formalities connected with importation and exportation).

### 1. The APHIS user fees are contrary to GATT's MFN provision.

GATT Article I states that “[w]ith respect to customs duties and charges of any kind imposed on or in connection with importation ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”<sup>85</sup> The primary purpose of this provision is to “prohibit discrimination among like products originating in or destined for different countries.”<sup>86</sup> The Appellate Body in *EC- Bananas III* confirmed that “to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all ‘like products’ of all WTO Members.”<sup>87</sup>

By imposing user fees on all commercial shipments coming from Canada, the U.S. is granting an advantage to products from some members that it has not “accorded immediately and unconditionally to like products originating in or destined for the territories of all other Members.”<sup>88</sup> Although each individual fee appears nominal, in the aggregate, the APHIS user fees constitute *de facto* discrimination against Canada’s like products and will have a devastating affect on trade. The “essence of the non-discrimination obligations is that like products should

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<sup>85</sup> GATT, *supra* note 66, art. I:1.

<sup>86</sup> *Canada – Autos*, *supra* note 49, para. 84.

<sup>87</sup> *EC – Bananas III*, *supra* note 55, para. 161.

<sup>88</sup> *See* GATT, *supra* note 66, art. I:1.

be treated equally, irrespective of their origin.”<sup>89</sup> However, the APHIS user fees do not accord such equal treatment, and therefore, are in violation of GATT’s MFN provision.

2. The APHIS user fees are contrary to GATT Article VIII because they do not represent the approximate cost of the service rendered.

Article VIII of GATT mandates that, “[a]ll fees and charges of whatever character ... imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered.”<sup>90</sup> This provision serves as a dual requirement “because the charge in question must first involve a ‘service rendered,’ and then the level of the charge must not exceed the approximate cost of that ‘service.’”<sup>91</sup> It is important to note that Article VIII’s provisions extend to all fees and charges imposed by governmental authorities relating to “inspection, quarantine, and sanitation.”<sup>92</sup> Hence, the APHIS user fees fall within the requirements of this Article.

To illustrate, in *Argentina – Textiles and Apparel*, the panel addressed an Argentine *ad velorem* tax on imports of three percent designed to cover the cost of providing a reliable database for trade operators.<sup>93</sup> However, the panel concluded that an *ad velorem* tax with no fixed minimum fee, by its very nature, is not “limited in amount to the approximate cost of the service rendered.”<sup>94</sup> The panel stated that “high price items necessarily will bear a much greater tax burden than low-price goods, yet the service accorded to both is essentially the same.”<sup>95</sup>

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<sup>89</sup> *EC – Bananas III*, *supra* note 55, para. 172.

<sup>90</sup> GATT, *supra* note 66, art. VIII.

<sup>91</sup> Panel Report, *Argentina – Textiles and Apparel*, para. 2.4, WT/DS56/R (Nov. 25, 1997) [hereinafter *Argentina Textiles*] (citing Panel Report, *United States – Customs User Fee*, para. 69, BISD 35S/245 (Feb. 2, 1988)).

<sup>92</sup> GATT, *supra* note 66, art. VIII(4)(g)-(h).

<sup>93</sup> *Argentina – Textiles*, *supra* note 91, para. 2.4.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

Similarly, in the present case, the APHIS user fees do not represent the approximate cost of the service rendered.<sup>96</sup> In particular, the APHIS user fees require passengers arriving in the U.S. from Canada to pay the inspection fees “regardless of (i) whether they [are] traveling with fruits or vegetables, or (ii) whether they [are] processed through customs and immigration at a Canadian airport.”<sup>97</sup> As a result, the U.S. is imposing user fees for a service that, in many cases, has already been rendered, as the U.S. may require passengers to be processed in both countries. In sum, the U.S. has failed to submit any evidence that the user fees represent any such approximate cost of any service.

### **C. The APHIS User Fees Fall Outside of a National Security or General Exception to NAFTA, GATT, or the GATS.**

The term “national security” has been interpreted by international tribunals to be “a concern about the safety or protection of the country or nation as a whole from international threat.”<sup>98</sup> However, with regards to international agreements, it is “virtually impossible to determine [the] limits”<sup>99</sup> of national security provisions. Accordingly, international tribunals often invoke the old legal principle, expressed in Latin as *exceptio est strictissimae applicationis*, which has been used to signify that exceptions “to treaty obligations are to be construed restrictively.”<sup>100</sup>

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<sup>96</sup> See *Argentina – Textiles*, *supra* note 91; see also Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (Dec. 11, 2000).

<sup>97</sup> See APHIS, *supra* note 2.

<sup>98</sup> *Lotus Development Canada Limited, Novell Canada, Ltd., and Netscape Communications Canada Inc.* (14 Aug. 1998), PR-98-005, PR-98-006 and PR-98-009, at 10 (CITT); see also *M.D. Charlton Co. Ltd. v. Dept. of Pub. Works and Govt. Serv.* (10 May 2001), PR-2000-075 (CITT).

<sup>99</sup> Jackson, *supra* note 73, at 983.

<sup>100</sup> See *Cross Border Trucking Services*, *supra* note 35; see also *Certain German Interests in Upper Silesia*, 1923 P.C.I.J. (ser. A) No. 7, at 56 (Aug. 25); see also *Free City of Danzig*, 1935 P.C.I.J. (ser. A/B) No. 65, at 71 (Dec. 4).

In the present case, the exceptions sought by the U.S. should also be construed restrictively. Much like the reasoning set forth with regards to the WHTI, the APHIS user fees do not fall under a national security or general exception to the Agreements because they are not necessary to secure compliance with other NAFTA or GATT consistent laws or regulations. Here, no such laws or regulations exist. Rather, the APHIS user fees are unnecessarily being applied to Canadian passengers and commercial shipments that often require no additional inspection. As such, the APHIS user fees stand in direct conflict with the second prong of invoking exceptions in that they “constitute a means of arbitrary [and] unjustifiable discrimination between the countries.”<sup>101</sup> Accordingly, we request this Court to construe the exceptions to NAFTA, GATT, and the GATS restrictively, and find that the APHIS user fees do not fall within one of the enumerated exceptions.

**III. THE FUEL EXPORT CHARGE NEITHER VIOLATES NAFTA NOR GATT, AND IN THE ALTERNATIVE, IS JUSTIFIED BY THE GENERAL AND NATIONAL SECURITY EXCEPTIONS IN THE AGREEMENTS.**

The provisions of NAFTA Articles 314, 315, 604, and 605 together prevent the adoption or maintenance of an export tax “unless such duty, tax, or charge is adopted or maintained”<sup>102</sup> on all the parties to the treaty<sup>103</sup> and on “any such good when destined for domestic consumption.”<sup>104</sup> However, parties may adopt restrictions “justified under Articles XI:2(a) or XX(g), (i), or (j) of the GATT<sup>105</sup>” only if “the restriction does not reduce the proportion of the total export shipments of the specific good made available to that other Party relative to the total

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<sup>101</sup> NAFTA, *supra* note 27, art. 2101(2).

<sup>102</sup> NAFTA, *supra* note 27, art. 314, 604.

<sup>103</sup> NAFTA, *supra* note 27, art. 314(a), 604(a).

<sup>104</sup> NAFTA, *supra* note 27, art. 314(b) and 604(b).

<sup>105</sup> NAFTA, *supra* note 27, art. 315(1)/605(1).

supply of that good of the Party maintaining the restriction;”<sup>106</sup> the Party does not impose a higher tax for exports than goods destined for domestic consumption;<sup>107</sup> and there is no disruption in the supply to the restricted colony.<sup>108</sup>

Similarly, the Fuel Export Charge implicates GATT Articles I, VIII, and XI. Article I of GATT, the MFN treatment provision, states that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting Parties.”<sup>109</sup> Article VIII states, “all fees and charges of whatever character (other than import and export duties...) shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or taxation of imports or exports for fiscal purposes.”<sup>110</sup> Finally, Article XI provides that “[n]o prohibitions or restrictions other than duties, taxes or other charges...shall be instituted or maintained by” any contracting party on the exportation or sale of goods.<sup>111</sup>

**A. The Softwood Lumber Agreement Constitutes a Revision of NAFTA and GATT Sufficient to Separate the Relevant Treaty Provisions.**

Article 44 of the VCLT permits the separability of a specific treaty provision in response to a fundamental change in circumstances.<sup>112</sup> However, to separate a provision from a treaty, a party must show: 1) the provision is in fact “separable from the remainder of the treaty;”<sup>113</sup> 2)

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<sup>106</sup> NAFTA, *supra* note 27, art. 315(1)(a)/605(1)(a).

<sup>107</sup> NAFTA, *supra* note 27, art. 315(1)(b)/605(1)(b).

<sup>108</sup> NAFTA, *supra* note 42, art. 315(1)(c)/605(1)(c).

<sup>109</sup> GATT, *supra* note 66, art. I:1.

<sup>110</sup> GATT, *supra* note 66, art. VIII:1(a).

<sup>111</sup> *See* GATT, *supra* note 66, art. XI(1).

<sup>112</sup> Matthew T. Simpson, *Note and Comment: Chopping Away At Chapter 11: The Softwood Lumber Agreement’s Effect on the NAFTA Investor-State Dispute Resolution Mechanism*, 22 *Am. U. Int’l L. Rev.* 479, 494 (2007).

<sup>113</sup> VCLT, *supra* note 21, art. 44(3)(a).

acceptance of the provision “was not an essential basis of the consent” of a party to be bound by the whole treaty;<sup>114</sup> and 3) “continued performance of the remainder of the treaty would not be unjust.”<sup>115</sup>

1. The Softwood Lumber Agreement.

The Softwood Lumber cases between the U.S. and Canada concerned a nearly twenty-five-year dispute over the harvesting and distribution of lumber.<sup>116</sup> The U.S. argued that Canadian stumpage programs constituted unfair subsidies, violating NAFTA and WTO provisions, while Canada maintained that stumpage programs included no subsidies, and were thus valid.<sup>117</sup> After both parties were dissatisfied by traditional dispute settlement mechanisms, the U.S. and Canada concluded The Softwood Lumber Agreement of 2006 (SLA), which “established a managed trade regime based on export quotas and export taxes.”<sup>118</sup>

2. The SLA separated NAFTA Articles 314, 315, 604, and 605 thereby permitting export taxes.

Article 39 of the VCLT permits parties to a treaty to amend a portion of the agreement.<sup>119</sup> However, questions arise when the parties have not officially ratified the amendments. Although revisions to an agreement must eventually be ratified by the participants, these revisions may still create obligations on the party.<sup>120</sup> For example, in the Amsterdam Conference in 1997 and the Nice Conference in 2000, European countries discussed revisions to the EU Charter that were

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<sup>114</sup> VCLT, *supra* note 21, art. 44(3)(b).

<sup>115</sup> VCLT, *supra* note 21, art. 44(3)(c).

<sup>116</sup> See Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 *Hastings L.J.* 241, 274-5 (2007).

<sup>117</sup> *Id.* at 275.

<sup>118</sup> *Id.* at 284.

<sup>119</sup> VCLT, *supra* note 21, art. 39.

<sup>120</sup> See Anne Peters, *Völkerrecht: Allgemeiner Teil* 100-101 (Schulthess 2006).

later added as amendments to the original Constitution.<sup>121</sup> Prior to their ratification, however, the revisions were still deemed to create obligations on the EU countries.<sup>122</sup>

The SLA necessitated the separation of NAFTA and GATT provisions, because these agreements specifically prohibit export taxes, a central element of the Agreement. Thus, the SLA necessitated the exercise of Article 44 of the VCLT by the U.S. and Canada. Although neither country has officially ratified the removal of these NAFTA and GATT provisions, the presence of an export tax in the SLA necessitated revisions. These revisions may be treated as creating obligations on Canada and the U.S. and prevent either country from challenging such a fuel export tax because the export tax provisions in NAFTA and GATT are effectively nonexistent.

**B. The Fuel Export Charge is Justified by General and National Security Exceptions.**

Assuming, *arguendo*, that the Fuel Export Charge is found to be inconsistent with NAFTA and GATT, the exceptions available in GATT Articles XX and XXI and its sister provision, NAFTA Article 2101, justify the charge.

1. The Fuel Export Charge is necessary to secure compliance with “thick border” initiatives.

GATT Article XX provides that “nothing in this agreement shall be construed to prevent the adoption...by any contracting party of measures” necessary for compliance with laws or regulations not inconsistent with GATT.<sup>123</sup> Unlike the ban in *Periodicals* that restricted imports on certain printed materials entering Canada, the fuel export charge does seek to secure compliance with another agreement.<sup>124</sup> The fuel export charge is in place to implement the

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<sup>121</sup> *See id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See GATT, supra note 66, art. XXI(d).*

<sup>124</sup> *See Periodicals, supra note 70, paras. 5.8-5.11.*

“thick border” initiatives and the Montebello Summit Joint Statement and is necessary because of the one billion dollar expense Canada will incur due to these agreements.<sup>125</sup>

2. The Fuel Export Charge is necessary to protect essential security interests.

GATT Article XXI states that GATT shall not be construed to prevent a state from taking measures necessary for the protection of its essential security interests “taken in a time of war or other emergency in international relations.”<sup>126</sup> The Fuel Export Charge is a direct response to the “thick border” initiatives in place to meet the security-related action points in the Montebello Summit Joint Statement.<sup>127</sup> The “thick border” initiatives are thus implemented in response to an emergency in international relations created by concerns over terrorism and border security. These concerns are demonstrated by statements of U.S. Presidential candidates that the September 11, 2001 hijackers had entered the U.S. through Canada.<sup>128</sup>

3. Invocation of exceptions for the Fuel Export Charge is consistent with the chapeau of the general exceptions in GATT.

Although the chapeau of GATT Article XX provides that measures not be applied in a manner that would result in “arbitrary or unjustifiable discrimination,” the task of interpreting the chapeau requires balancing the rights of one party to invoke the exception and the rights of the other to enforce GATT/NAFTA provisions.<sup>129</sup> This balancing must be done on a case-by-case basis by examining the surrounding circumstances, including the legal context of the dispute.<sup>130</sup> As the U.S. was willing to allow an export charge in the SLA, its rights to enforce the same provisions related to the fuel export charge should be inferior to the rights of Canada to invoke

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<sup>125</sup> Montebello Summit Joint Statement, *supra* note 13.

<sup>126</sup> GATT, *supra* note 66, art. XXI(b)(iii).

<sup>127</sup> Montebello Summit Joint Statement, *supra* note 13.

<sup>128</sup> *Id.*

<sup>129</sup> *See Shrimp*, *supra* note 70, para. 159.

<sup>130</sup> *See Reformulated Gasoline*, *supra* note 70, at 18.

the exception. Further, the dispute has arisen because of the U.S.'s desire to protect its borders at Canada's expense. Taking this into account, Canada should be allowed to invoke the exceptions in GATT and NAFTA.

### **Conclusion**

THEREFORE, we respectfully submit that this Honorable Court adjudge and declare that:

- I. The United States violated international law by enacting the WHTI because it accords less favorable treatment to Canadian service suppliers and adversely affects trade in services.
- II. The APHIS user fees constitute customs user fees, thereby violating both NAFTA and MFN treatment.
- III. Neither the WHTI nor the APHIS user fees are justified by general or national security exceptions.
- IV. Canada's Fuel Export Charge is lawful because the Softwood Lumber Agreement permits parties to implement export charges and the Fuel Export Charge is justified by general and national security exceptions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Counsel for the Respondent, the Government of Canada (Team #2008-03R).