

**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 # 2008-04A**

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## **Facts**

The September 11 attacks led many states to take significant steps to improve their border security measures. These measures cover a diverse array of issues, from enhanced identification of individuals crossing borders to more thorough inspection of goods. The United States has improved its Animal and Plant Health Inspection Service (“APHIS”) by removing an inspection exemption previously granted to Canada. The fees for this change were imposed in phases. On January 1, 2007, the United States began to impose agricultural quarantine and inspection (“AQI”) fees on air passengers entering the United States from Canada. On March 1, 2007 the fee was extended to ships and on June 1, 2007 it was expanded to rail and road travel.

The United States has also enhanced border security by implementing higher requirements for the identification of travelers. The Western Hemisphere Travel Initiative (“WHTI”) was announced in April 2005. It stipulated that, through a phase-by-phase process, all travelers entering the United States from within the Western Hemisphere would be required to present a passport. This requirement included both Canadians and Americans. As of January 23, 2007, all air passengers were required to present passports. The second phase of WHTI implementation will extend this requirement to travelers arriving by all other modes of transportation; it is scheduled to be applied in the summer of 2008.

Both Canada and the United States are obliged to and committed to improving their own border security. On August 21, 2007 the three North American leaders met and issued the Smart and Secure Borders Statement. All three leaders recognized the need for borders that are both secure and promote efficient trade in goods and services. All three

recognized then need to streamline border-screening procedures to better detect threats and remove inefficiencies.

In 2007, Canadian government officials participated in a series of border security consultations with members of the American Executive branch. Then, on September 11, 2007, the Canadian government announced a package of border security enhancements with a cost of \$1 billion. To pay for these domestic security measures, the Canadian government announced that it would immediately implement a Fuel Export Charge, consisting of a \$25/barrel tax on oil exported to the United States. Prime Minister Harper admitted that he had decided to impose the tax in order to allow his government to cut Canadian domestic taxes. He also said that the United States is the beneficiary of Canadian border security, and should therefore pay the cost of its enhancement. The Fuel Export Charge requires that all fuel exporters register for tax purposes and apply for permits covering each transaction in order that the tax may be remitted to the Canadian Government.

## **Questions Presented**

1. Whether Canada's Fuel Export Charge is contrary to NAFTA Articles 314, 315, 604 and 605 or GATT Articles I, VIII and XI.
2. Whether Canada's Fuel Export Charge is not justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI.
3. Whether the WHTI is not contrary to NAFTA Chapters 12 and 16 or GATS.
4. Whether the WHTI is justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.
5. Whether the APHIS user fees are not contrary to NAFTA Article 310 and GATT Articles I and VIII.
6. Whether the APHIS user fees are justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.

## **Jurisdiction**

The applicant agrees to waive the dispute resolution mechanisms stipulated by NAFTA and GATT. Both parties have consented that the International Court of Justice shall have full jurisdiction to consider the issues set out in this matter. The applicant's consent solely applies to this application and these specific questions.

## Summary of Argument

The imposition of a 25% tariff on fuel exports from Canada to the United States is in direct conflict with the North American Free Trade Agreement (“NAFTA”) and the General Agreement on Tariffs and Trade 1994 (“GATT”). NAFTA Articles 314 and 604 and GATT Article I specifically prohibits the imposition of export taxes of this type. The tax violates the agreements respecting quantitative limitation and licensing requirements set out in GATT Articles VIII and XI.

Canada bears the burden of demonstrating that its measures are required. Canada cannot meet this burden. Nor may Canada rely on the National Security exceptions contained in NAFTA and GATT. The United States does not challenge the determination that the national security exceptions are self-judging. However, NAFTA Article 607 specifically restricts the use of either national security exception in relation to energy goods, and the tax does not satisfy the requirements of NAFTA Article 607.

WHTI does not prevent any person from entering Canada, nor does it prevent services from being rendered. Canada alleges discriminatory measures even though all other travelers to the United States must provide secure documentation upon entry.

The removal of the APHIS exception is not contrary to NAFTA or the General Agreement on Trade in Services (“GATS”). Inspection services at the border must be expanded. Funding for these necessary inspections may be justified under GATT Article VIII. GATT Article VIII mandates that there be a balance between fees levied and services provided. The United States has issued statements stating that income generated from Canadian APHIS fee payment will only be used to fund the inspection program at the Canada-United States border. Under Article XX(b) of GATT and article XIV of GATS the agreement may not be construed in

such a way as to prevent a country from acting in a way necessary to protect human, animal or plant life and health. As noted above, the inspection services provided are necessary. Those at risk for introducing potentially harmful agents to the United States must bear the costs of preventing such an entry.

With regards to the terror threat, the GATT and GATS and NAFTA all protect actions taken in time of war or emergency in international relations. With reference to both the WHTI and the APHIS fees, there exists such a time today.

### Argument

#### **I. CANADA’S FUEL EXPORT CHARGE BREACHES THE AGREEMENT RESPECTING EXPORTATION CHARGES SET OUT IN NAFTA ARTICLES 314 and 604**

[1] Article 314 of the North American Free Trade Agreement<sup>1</sup> (NAFTA) provides that a NAFTA party may not “adopt or maintain any duty, tax or other charge on the export of any good to the territory of another Party” unless the tax is imposed on the good when it is exported to all other Parties countries and when it is destined for domestic consumption.<sup>2</sup> NAFTA Article 604 reiterates the same requirements as Article 314, specifically in relation to the export of petrochemical goods.<sup>3</sup>

[2] The language used in these Articles is unambiguous: a charge on exports must also be applied domestically. There can be no doubt that the Fuel Export Charge is in violation of the Articles’ proscriptions. Canada is imposing a charge on every barrel of oil exported to the United

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<sup>1</sup> *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA].

<sup>2</sup> *Ibid.* at Art. 314.

<sup>3</sup> *Ibid.* at Art. 604.

States, but it does not impose the charge on domestic consumers of the same good. Therefore Canada is clearly in breach of both NAFTA Article 314 and Article 604.

## **II. CANADA'S FUEL EXPORT CHARGE BREACHES THE AGREEMENT RESPECTING EXPORTATION CHARGES SET OUT IN GATT ARTICLE I**

[3] Article I of the *General Agreement on Tariffs and Trade 1994*<sup>4</sup> (GATT) prohibits any contracting party from employing “customs, duties, and charges of any kind” in order to confer any “advantage, favour, privilege, or immunity” on another country without extending it to all GATT contracting parties. Article I requires that a contracting party grant the most favourable charges it confers on exports to any other country to similar exports destined for contracting party countries. GATT panels have defined “advantage” broadly.<sup>5</sup>

[4] The Fuel Export Charge constitutes the type of advantage described in Article I. The flat \$25 fee imposed on every barrel of oil exported from Canada constitutes a charge imposed “in connection with... exportation.”

[5] The charge is a restriction imposed solely on the United States. Over 99% of Canadian oil exports are destined for the United States.<sup>6</sup> To approve this charge is, in effect, to confer a disadvantage solely on the United States. Canada recognizes that the charge specifically targets the United States; Prime Minister Harper admitted that the purpose of the charge is to

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<sup>4</sup> *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, 33 I.L.M. 1153 (1994) at Art. I [GATT].

<sup>5</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (1997), WT/DS27/AB/R, (Appellate Body Report) [*Bananas*].

<sup>6</sup> *October 2007 Import Highlights*. online: Energy Information Administration of the U.S. Department of Energy < <http://www.eia.doe.gov> > (retrieved on 2007-10-07).

transfer the cost of Canadian security measures to American taxpayers. Consequently, the effect of the Fuel Export Charge is to put American importers of Canadian oil at a unique disadvantage.

### **III. CANADA’S FUEL EXPORT CHARGE BREACHES THE AGREEMENT RESPECTING EXPORTATION FEES AND FORMALITIES SET OUT IN GATT ARTICLE VIII**

[6] GATT Article VIII is designed to prevent contracting parties from imposing tariffs under the guise of service fees, and to ensure that service fees are levied proportionately to the cost of service. Article VIII states that,

“all fees and charges of whatever character... imposed by contracting parties on or in connection with... exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of... exports for fiscal purposes.”<sup>7</sup>

[7] The Fuel Export Charge is grossly disproportionate to the cost of services rendered. In *United States – Customs User Fee*, the Panel found that the “cost of services rendered” in Article VIII(1)(a) refers to the cost of the customs processing for the individual entry, and not a broader economic sense.<sup>8</sup> The Panel also notes that the party imposing the fee bears the burden of justifying the necessity and cost of any government activity rendered.<sup>9</sup> Therefore Canada bears the burden of demonstrating that their border security upgrades qualify as services rendered under Article VIII(1)(a), and not a tax for fiscal purposes.

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<sup>7</sup> GATT, *supra* note 4 at Art. VIII(1).

<sup>8</sup> *United States - Customs User Fee*, GATT Doc. L/6264, 35th Supp. B.I.S.D. (1989) 245 at para. 86.

<sup>9</sup> *Ibid.* 283-286.

[8] The Fuel Export Charge constitutes taxation of oil exports for fiscal purposes. A \$1 billion investment in infrastructure upgrades is far removed from the cost of processing individual entrants to qualify under the definition of “services rendered.” The Article refers to services more closely tied to the import and export of goods, such as inspection and sanitation activities in relation to hazardous goods. Prime Minister Harper recognized that his political promise to lower taxes was the driving force behind the Fuel Export Charge. This is an admission that the Fuel Export Charge is a fiscal measure designed to recoup the cost incurred by the Canadian government in upgrading their border security measures. While the United States respects the Canadian efforts to patch the gaps in its borders, it is neither willing nor obliged to bear the cost.

#### **IV. CANADA’S FUEL EXPORT CHARGE BREACHES THE AGREEMENT RESPECTING THE GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS SET OUT IN GATT ARTICLE XI**

[9] GATT Article XI(1)<sup>10</sup> prohibits restrictions on trade brought about by means other than duties, taxes and other charges. In particular, it cites quantitative and administrative restrictions such as quotas or license requirements. Canada’s requirements that all oil exporters register for tax purposes and apply for export permits for each transaction are too onerous and constitute a barrier to trade. Article XI(2)(a) makes an exception for temporary restrictions employed to prevent domestic shortages of scarce products.<sup>11</sup> However, the facts indicate that Canada’s goal in imposing the Fuel Export Charge is purely financial, and does not relate to conservation.

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<sup>10</sup> GATT, *supra* note 4 at Art. XI(1).

<sup>11</sup> *Ibid.* at Art. XI(2)(a).

[10] Should the Fuel Export Charge be found to fall under the exception in Article XI(2)(a), NAFTA Articles 315 and 605 require that Canada not impose a higher price on oil exported to America than oil consumed domestically.<sup>12</sup> It is apparent that Canada would be imposing a higher price on oil exported to America than would be paid by domestic consumers of the same good. Consequently, if the Fuel Export Charge were able to survive scrutiny under GATT Article XI, it would not satisfy NAFTA.

**V. CANADA'S FUEL EXPORT CHARGE CANNOT BE SAVED BY THE GENERAL EXCEPTIONS SET OUT IN GATT ARTICLE XX OR NAFTA ARTICLE 2101**

[11] GATT Article XX provides several exceptions that a party in breach of the terms of preceding Articles may invoke to save its trade barriers.<sup>13</sup> NAFTA incorporates these exceptions in Article 2101.<sup>14</sup> The party invoking the exception bears the burden of demonstrating that its measures are required.<sup>15</sup> In addition to demonstrating the necessity of the particular exception, the party must show that it complies with the preamble to Article XX, which requires that the measures employed not be employed in an arbitrary manner or discriminate between countries where the same conditions prevail. Finally, the Article's preamble states that the measures may not be a disguised restriction on trade.<sup>16</sup>

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<sup>12</sup> NAFTA, *supra* note 1 at Art. 315(b), 605(b).

<sup>13</sup> GATT, *supra* note 4 at Art. XX.

<sup>14</sup> NAFTA, *supra* note 1 at Art. 2101.

<sup>15</sup> *Canada – Administration of the Foreign Investment Review Act* (1984), GATT Doc. L/5504, 30th Supp. B.I.S.D. (1984) 140.

<sup>16</sup> GATT, *supra* note 4 at Art. XX.

[12] Canada may invoke several of the exceptions. It is most likely to argue for Article XX(b) and (g). Canada will be unable to establish a compelling case for either of these exceptions.

[13] Article XX(b) allows an exception for measures necessary to protect human life. Canada may argue that, since it is using the revenue from the Fuel Charge to support its border security upgrades and may foil terror plots as a result, its is aimed at protecting human life.

[14] There are two problems inherent to Canada forming an Article XX(b) argument. First, Review Panels have found a measure to be “necessary” only when, objectively, no alternative measure exists by which the same result could be achieved without impinging upon GATT provisions.<sup>17</sup> The Fuel Export Charge is not “necessary,” by this definition. Canada could raise revenue for its security upgrades in the traditional domestic fashion, rather than imposing the costs on a segment of U.S. industry. Second, it is the measure itself that must be aimed at protecting human life. The mere fact that revenue obtained by the offending measure may be used to protect life does not mean that the measure itself is primarily aimed at protecting life.

[15] Article XX(g) allows restrictive measures to be taken if they are “related to the conservation of exhaustible natural resources,” and they are “made in conjunction with restrictions on domestic... consumption.” The phrase “related to” has been defined as “primarily aimed at.”<sup>18</sup>

[16] To receive the Article XX(g) exception, the Fuel Export Charge must be primarily aimed at the conservation of oil, and it must include commensurate restrictions on domestic

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<sup>17</sup> *United States – Section 337 of the Tariff Act of 1930* (1989), GATT Doc. L/6439, 36th Supp. B.I.S.D. (1989) 345, para. 5.26. [*Tariff Act*]

<sup>18</sup> *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* (1988), GATT Doc. L/6268, 35th Supp. B.I.S.D. (1989) 98, at 113-115.

production or consumption. Prime Minister Harper's statement makes it clear that the primary aim of the measure is to finance border security upgrades, and not the conservation of oil. There has been no evidence adduced that suggests the measure is commensurate with any domestic restrictions. It is clear that the measure does not qualify for the Article XX(g) exception.

[17] Should the Fuel Export Charge be found to fall under the Article XX(g) exception, NAFTA Articles 315 and 605 further require that Canada not impose a higher price on oil exported to the United States than on oil consumed domestically.<sup>19</sup> It is apparent that Canada would be imposing a higher price on exported oil than would be paid by domestic consumers of the same good. Consequently, if the Fuel Export Charge were able to survive scrutiny under GATT Article XX(g), it would not satisfy NAFTA Articles 315 and 605.

**VI. CANADA'S FUEL EXPORT CHARGE CANNOT BE SAVED BY THE NATIONAL SECURITY EXCEPTIONS IN GATT ARTICLE XXI or NAFTA ARTICLE 2102**

[18] GATT Article XXI provides a method by which contracting parties may excuse restrictive measures that are necessary to achieve certain national security objectives. NAFTA incorporates these exceptions in Article 2102. Canada may argue that the Fuel Export Charge falls under the sections that permit a party to take "any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations."<sup>20</sup> The ICJ has found similarly worded security exceptions to be self-

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<sup>19</sup> GATT, *supra* note 1 at Art. 315(b), 605(b).

<sup>20</sup> GATT, *supra* note 1 at Art. 2102(1)(b)(ii).

judging,<sup>21</sup> largely due to the phrase “any action which it considers necessary.” This interpretation allows a state to determine subjectively what actions are necessary to protect its own essential security interests in times of war or other emergency.

[19] The United States does not challenge the determination that the national security exceptions are self-judging. However, NAFTA imposes further restrictions on the use of national security exceptions to limit the export of petrochemical goods. NAFTA Article 103 specifies that when NAFTA and another agreement are in conflict, NAFTA shall prevail to the extent of the conflict.<sup>22</sup> Therefore the restrictions set out in NAFTA Article 607 prevail over the broader national security exceptions set out in NAFTA Article 2102 and GATT Article XXI.

[20] Article 607 specifically restricts the use of either national security exception in relation to energy or petrochemical goods.<sup>23</sup> Article 607 specifies that the national security exceptions may only be invoked to restrict exports of petrochemical goods “to the extent necessary” to “supply a military establishment of a Party or enable fulfillment of a critical defense contract of a Party” or “respond to a situation of armed conflict involving the Party taking the measure.”

[21] The exceptions provided by Article 607 should be judged objectively; they contain none of the self-judging language of the broader national security exceptions. The term “necessary” should therefore be interpreted consistently with the same word in other Articles, to mean that no alternative measure exists by which the same result could be achieved without

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<sup>21</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, “Preliminary Objections” (12 December 1996), [1996] I.C.J. Rep. 802. [*Oil Platforms*].

<sup>22</sup> NAFTA, *supra* note 1 at Art. 103.

<sup>23</sup> *Ibid.* at Art. 607.

impinging upon other GATT provisions.<sup>24</sup> Since neither “situation of armed conflict” nor “critical defence contract” are defined by either agreement, they must be interpreted in accordance with their ordinary meaning in their context and in light of the treaties’ objects and purposes.<sup>25</sup> And, as with other exceptions, the burden of proving the restriction is necessary falls on the party seeking to rely on the exception.

[22] The Canadian border security upgrades, while commendable, constitute neither a “critical defense contract.”<sup>26</sup> Exerting effective control over one’s borders is an obligation incumbent upon all sovereign states and managed in Canada by a dedicated agency that is distinct from the military. The term is better understood as referring to the work done by defence contractors, such as military industrial manufacturers.

[23] The threat posed by terrorism does not constitute a “[response] to a situation of armed conflict.”<sup>27</sup> To include terrorism under the umbrella of the armed conflict is to nullify Article 607; so long as terrorists exist, any Party would have carte blanche to restrict exports of petrochemicals. The threat of international terrorism significantly predates the creation of NAFTA. To allow Article 607 to nullify itself in this manner would be logically absurd, and not in keeping with the term’s meaning in light of its context and the purpose of the agreement. The term is better understood to refer to specific incidents of inter-state military conflict. The conflict in Afghanistan does not satisfy this requirement; while it may be a situation of armed conflict, there is no logical way to conceive of the Fuel Export Charge as a “response” to that conflict.

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<sup>24</sup> Tariff Act, *supra* note 17.

<sup>25</sup> *Vienna Convention on the Law of Treaties*, 22 May 1969, 8 I.L.M. 679 at Art. 31. [*Vienna Convention*]

<sup>26</sup> NAFTA, *supra* note 1 at Art. 607(a).

<sup>27</sup> NAFTA, *supra* note 1 at Art. 607(b).

[24] Should the court find that the Canadian restrictions fit within the exceptions set out in Article 607, Canada will be unable to demonstrate that its measures are objectively “necessary” to meet these objectives. As discussed, there are measures Canada could employ to achieve the same objectives that would less impair the GATT and NAFTA. Specifically, it could use domestic revenue to cover the cost of its security upgrades, as the United States has.

## **VII. THE WHTI IS NOT CONTRARY TO CHAPTERS 12 AND 16 OF NAFTA OR THE GATT**

[25] Article V of GATT deals with freedom of transit into and through member nations.<sup>28</sup> Specifically, Article V(3) provides that traffic not be subject to unnecessary delays or restrictions. Further, Article V(4) provides that regulations imposed by contracting parties be reasonable, having regard to the conditions of the traffic.

[26] Requiring that parties entering the country present a secure document upon entry is wholly reasonable. Given the climate vis-à-vis security threats to United States soil, the position that it is unreasonable to require more secure documentation than required at present is untenable.

[27] The 9/11 commission, in its report, made several recommendations regarding the Canada – U.S. border. An upgrade in border security measures regarding passports was noted as a “fundamental goal” for protecting against any terror threat.<sup>29</sup> It is the necessity alluded to by the 9/11 commission that makes these measures reasonable.

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<sup>28</sup> GATT, *supra* note 4 at Art. V.

<sup>29</sup> U.S. National Commission of Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington D.C.: United States Government Printing Office, 2004 at 389. [9/11 Report]

[28] Chapter 12 of NAFTA deals with cross border trade and services.<sup>30</sup> Canada contends that as the WHTI may significantly disrupt the free flow of people across the border, it unjustifiably impedes the free movement of goods and services. This, Canada alleges, is contrary to Articles 1202 and 1203 of NAFTA.

[29] According to the Vienna Convention treaties must be interpreted in light of their objectives.<sup>31</sup> The objectives of NAFTA are ones of balance, with member countries pledging, inter alia, to preserve each nation's flexibility to safeguard public welfare as well as to facilitate cross border trade. The WHTI and its implementation scheme appropriately reflect this balance.

[30] In *The Matter of Cross-Border Trucking Services*, The United States was found to have acted contrary to the above mentioned articles when they failed to remove a moratorium on the free movement of trucks from Mexico to the United States.<sup>32</sup> In that case, the United States was in error in enforcing a blanket refusal to Mexican land transport entities when it regulated its own entities and entities from Canada on an individual basis.

[31] Here, there are no restrictions placed on Canadian land transport service providers vis-à-vis WHTI. The WHTI merely creates a situation where border crossings may initially slow for those service providers who are not participating in trusted traveler programs (e.g. NEXUS). The matter is therefore distinguishable from the above case.

[32] The United States has a responsibility to its public to ensure the American-Canadian border is secure. The WHTI furthers the pursuit of this goal without preventing service providers from entering the United States. It does not, therefore, constitute a contravention of Chapter 12.

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<sup>30</sup> NAFTA, *supra* note 1 at Ch. 12.

<sup>31</sup> Vienna Convention, *supra* note 25.

<sup>32</sup> *The Matter of Cross-Border Trucking Services (United States v. Mexico) (2001)* FTAPD Lexis 2.

[33] In *Trucking Services* the United States directly impeded the free flow of services from Mexico.<sup>33</sup> Any potential impediments in this case, however, are: indirect, as it only results from predicted slower border traffic; temporary, as once the public adjusts to new requirements border traffic will return to prior efficiency; and remediable, as trusted traveler programs are accessible to land transporters. Both Canada and the United States are committed to expanding and streamlining the ways in which these programs may be utilized.<sup>34</sup>

[34] Chapter 16 of NAFTA allows for the temporary entry of businesspeople into the party countries.<sup>35</sup> Canada may claim that denying access to a businessperson who does not present appropriate documentation is a violation of Annex 1603. The section allows businesspersons to travel upon presentation of, among other things, proof of citizenship. The WHTI merely requires that that proof of citizenship be a secure one.

[35] The text of NAFTA makes no mention as to what constitutes “proof of citizenship” and, until now, easily forgeable documents such as birth certificates and citizenship cards have been acceptable.<sup>36</sup>

[36] Annex 1603 must be read in light, however, of Article 1601 which states: “[...]this Chapter reflects[...]the need to ensure border security.”<sup>37</sup>

[37] Once the interpretation of a provision of the Chapter becomes incommensurate with the stated objectives of the chapter it must be re-interpreted to come in line with the objective. To

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<sup>33</sup> *Ibid.*

<sup>34</sup> North American Leaders’ Summit, *Joint Statement: Smart and Secure Borders*. August 21, 2007.

<sup>35</sup> NAFTA, *supra* note 1 at Ch. 16.

<sup>36</sup> U.S., Department of Homeland Security, *Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry From Within the Western Hemisphere* 71 FR 46155.

<sup>37</sup> NAFTA, *supra* note 1 at Art. 1601.

allow easily forged documents to stand as proof of citizenship is not commensurate with the stated objectives of the need to ensure border security. An internal inconsistency results.

[38] A more precise interpretation of these provisions will eliminate the current internal inconsistency.

### **VIII. THE WHTI IS JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION WITHIN NAFTA OR GATT OR GATS**

[39] The National Security exception in NAFTA and GATS ensures that nothing in the agreements shall abrogate from any party's right to take actions it considers necessary for the protection of its security interests during "time of war or other emergency in international relations".<sup>38</sup>

[40] The current situation in the United States is one of emergency. The United States is under constant and real threat of terror attack. The fact that no terrorist attacks of consequence have occurred since September 11<sup>th</sup>, 2001 is not evidence that the threat has disappeared but rather that the continued vigilance of the United States and its allies has been effective.

[41] In light of Article 2101(2) of NAFTA and Article XIV of GATS, the United States may not use the National Security Exception to disguise unjustified restrictions on trade.<sup>39</sup> The United States gains no economic advantage from the implementation of the WHTI. Land transport from Canada is a major source of American commerce; the argument that there are ulterior, non-security related motives for the implementation of this measure is wholly untenable.

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<sup>38</sup> NAFTA, *supra* note 1 at Art. 2102.

<sup>39</sup> NAFTA, *supra* note 1 at Art. 2102(2); *General Agreement on Trade in Services 1994*, Apr. 15, 1994, 33 I.L.M. 1173 (1994) at Art. XIV. [GATS].

[42] Under both NAFTA and GATT the party invoking the article is the final arbiter as to its necessity.<sup>40</sup> NAFTA attempts to strike a balance between carte blanche decision-making power for member parties and allowing countries to act in the best interests of its people. Despite claims by Canada that the WHTI is not necessary or overly onerous; the United States has determined that it is necessary. The fact that some state governments have spoken against the implementation of this measure because of its possible economic impact<sup>41</sup> is further evidence that there are no other motives other than security for the implementation of this measure. The International Court of Justice has no jurisdiction with regards to the necessity of this action.

[43] If the court should determine that the question of necessity falls within its jurisdiction, any reasonable standard of “necessity” will, after consideration of the above arguments, support the implementation of the WHTI.

[44] The argument is the same when considering Article XX(b) of the GATT, which allows for necessary measures taken to preserve human health and safety to be exempted from GATT provisions.

## **VI. THE REMOVAL OF THE APHIS FEE EXCEPTION IS NOT CONTRARY TO NAFTA ARTICLE 310 OR GATT ARTICLE I OR VIII**

[45] GATT Article VIII stipulates that any fees levied in connection to importation or exportation must be limited to the approximate costs of services rendered.<sup>42</sup> The stated goals of the removal of the APHIS exemption for Canada is threefold: i) Close the inspection loophole for fruits and vegetables entering the United States from Canada; ii) Recovering the costs of AQI

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<sup>40</sup> Oil Platforms, *supra* note 21.

<sup>41</sup> U.S. *Statement of Senator Bernie Sanders (I- Vt)*, January 24, 2008.

<sup>42</sup> GATT, *supra* note 4 at Art. VII.1(a)

services already provided and iii) Recovering costs of new expanded AQI services at the border.<sup>43</sup>

[46] Inspection services at the border must be expanded. Between 1995 and 2005 Canadian exports to the United States increased by 80 percent. Further, re-exports to the United States increased by 336 percent.

[47] Of the 402 pest species regulated by the United States in 2001, only 53 were regulated by Canada.<sup>44</sup> As many products can enter Canada that cannot enter the United States, there is an incentive for individuals to falsely mark commodities as ‘Product of Canada’ and thereby circumvent inspection by United States authorities.<sup>45</sup>

[48] Further, bioterrorism is a much greater threat to the United States than when GATT or NAFTA were implemented.<sup>46</sup> To have an entire class of goods exempt from inspection would leave the United States unjustifiably vulnerable. Removing the inspection exemption from Canada is not only legal, but justified.

[49] The United States has issued statements stating that income generated from Canadian APHIS fee payment will only be used to fund the inspection program at the Canada-United States border.<sup>47</sup>

[50] Visitors to the United States by land will pay no fee. The fee is levied all Canadian commercial entries into the United States as well as air travelers. This is wholly justifiable in that

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<sup>43</sup> U.S., Department of Agriculture. Animal and Plant Inspection Service, *Agricultural Inspection and AQI User Fees Along the U.S./Canada Border* 71 FR 50320 at 50323.

<sup>44</sup> *Ibid* at 50321.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* at 50322.

<sup>47</sup> *Ibid* at 50324

the inspection scheme is slated to cover commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft and international air passengers.<sup>48</sup>

[51] All of the above mentioned methods have to potential to introduce harmful insect species, bio-terror materials or disease.

**X. THE REMOVAL OF THE APHIS FEE EXCEPTION IS JUSTIFIED USING THE GENERAL AND NATIONAL SECURITY EXCEPTIONS IN NAFTA, GATT AND GATS**

[52] If the court finds that the removal of the Canadian exemption is contrary to NAFTA or the GATT. The exception clauses found in both treaties will serve to justify the removal of the exemption.

[53] Under Article XX(b) of GATT (incorporated via Article 2101 into NAFTA) and article XIV(b) of GATS the agreement may not be construed in such a way as to prevent a country from acting in a way necessary to protect human, animal or plant life and health.<sup>49</sup> As noted above, the inspection services provided are necessary. Those at risk for introducing potentially harmful agents to the United States must bear the costs of preventing such an entry. Passengers and vessels from all other nations already pay the APHIS fee. To date, none of these countries have claimed that the United States has acted in contravention of its international agreements.

[54] With regards to the terror threat, the position of the United States is, as argued, that the final arbiter as to the necessity of any of the National Security Exceptions is the country

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<sup>48</sup> *Ibid* at 50325.

<sup>49</sup> GATT, *supra* note 4 at Art. XX(b); *Supra* note 39 at Art. XIV(b).

wishing to invoke the exception. Even if, however, the United States is required to justify its invocation of the exception, necessity is easily proven.

[55] The GATT and GATS protect actions taken in time of war or emergency in international relations.<sup>50</sup> Similarly, Article 2102 of NAFTA protects action that it considers necessary for the protection of its essential security interests during time of war or other emergency in international relations.<sup>51</sup>

[56] The United States is officially in a state of emergency as per Presidential Proclamation 7463.<sup>52</sup> The United States is also at war, both in the country of Iraq and with a global network of terrorist cells. The “time of war or other emergency” component of the provisions is thereby met.

[57] As mentioned, the United States relies on the findings of the 9/11 commission to illustrate the necessity of these measures. In the preface to the 9/11 Report the commission noted:

“We need to design a balanced strategy for the long haul, to attack terrorists and prevent their ranks from swelling while at the same time protecting our country against future attacks.”<sup>53</sup>

[58] The current threat to the safety of the United States public clearly brings any action designed to combat this threat to safety within the parameters of national security exceptions in the GATT, GATS and NAFTA.

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<sup>50</sup> GATT, *supra* note 4 at Art. XXI(b)(iii); *Supra* note 39 at Art. XIV bis.

<sup>51</sup> NAFTA, *supra* note 1 at Art. 2102.

<sup>52</sup> U.S. *Presidential Proclamation 7463*, September 14, 2001.

<sup>53</sup> 9/11 report, *supra* note 29 at xvi.



## Conclusion

THEREFORE, the Applicant respectfully submits that this Honourable Court adjudge and declare that:

- i) The imposition of the 25% fuel tariff on fuel exports from Canada to the United States is contrary NAFTA Articles 314 and 605 and GATT Articles I, VIII and XI.
- ii) The imposition is saved neither by application of the General Exceptions set out in GATT Article XX or NAFTA Article 2101 nor the National Security Exceptions set out in GATT Article XXI or NAFTA Article 2102.
- iii) The WHTI is neither contrary to Chapters 12 or 16 of NAFTA, nor is it contrary to GATT.
- iv) In the alternative, the WHTI may be saved by application of the General or National Security Exceptions set out in NAFTA Article 2101 and 2102 and GATT Article XX or XXI.
- v) The removal of the Canadian APHIS fee exemption is neither contrary to NAFTA Article 310, nor GATT Articles I or VII.
- vi) In the alternative, the removal of the exemption may be saved by application of the General or National Security Exceptions set out in NAFTA Article 2101 and 2102 and GATT Article XX or XXI.