

2007-2008

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 RESPONDENT

TEAM # 2008-04R

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ISSUES FOR THE INTERNATIONAL COURT OF JUSTICE

1. Canada requests that the International Court of Justice determine if:
 - A. The *WHTI* is contrary to *NAFTA* Chapters 12 and 16 and *GATS*
 - B. The *APHIS* user fees are contrary to *NAFTA* Article 310 and *GATT* Articles I and VIII
 - C. The *WHTI* is not justified pursuant to the national security exception or a general exception in *NAFTA* or *GATT* or *GAT*.
 - D. The *APHIS* user fees are not justified pursuant to the national security exception or the general exception in *NAFTA* or *GATT* or *GATS*
 - E. The fuel export charge is not contrary to *NAFTA* Articles 314, 315, 604 and 605 or *GATT* Articles I, VIII and XXI
 - F. The Fuel Export Charge is justified pursuant to the national security exception or a general exception in *NAFTA* Articles 607, 2101, 2102 or *GATT* Articles XX and XXI

JURISDICTION

The parties, through special agreement, submit this dispute to the International Court of Justice for a binding declaratory judgment pursuant to Articles 36(1) and 40(1) of the *Statute of the International Court of Justice*. Article 36(1) confers upon the Court the jurisdiction to resolve these specific issues as described in the compromise. Article 40(1) permits the case to be brought before the Court by the notification of the Special Agreement.

STATEMENT OF FACTS

The September 11, 2001 attacks on the World Trade Centre in New York City changed the security and free trade dynamics between the United States (U.S.) and Canada. Both nations adopted a harmonized approach to protect the Canadian and American (Can-American) border. Despite both countries' coordinated security efforts, U.S. policy was affected by the political rhetoric of an election year in which security issues were distorted by candidates. In the charged election environment, politicians argued for more stringent documentation requirements at the Can-American border. In 2005 the U.S. announced *The Western Hemisphere Travel Initiative* (WHTI); it stipulated that all travelers entering into the U.S. from within the Western Hemisphere would be required to present a passport. This requirement included both Canadians and Americans alike. *WHTI* adopted a phased approach; the first stage implemented in 2007 requiring air travel passengers to present passports. The second phase, being implemented in 2008, requires travelers arriving by all other modes of transportation to present their passports.

The U.S. also initiated a restrictive border policy by removing an inspection exemption previously granted to Canada while implementing an *Animal and Plant Health Inspection Service* (APHIS) custom fee with an unclear security/phytosanitary purpose. In order to pay for this broad security expense the U.S. began to impose agricultural quarantine and inspection (AQI) fees on air passengers entering the U.S. from Canada. The inspection fees on originating goods are imposed regardless if passengers/plains/vessels are actually carrying agriculture across the border.

In 2007, Canadian government officials participated in a series of border security consultations with members of the U.S. Executive Branch. As part of the Can-American coordinated security border measures, the Canadian government announced a package of border

security enhancements with a cost of \$1 billion. These security steps against the present threat of terrorism in the Can-American territory are necessary, especially considering the Canadian role in the armed conflict in Afghanistan and its indirect support of the U.S. in the Iraq conflict. The Canadian government announced the immediate implementation of a *Fuel Export Charge* consisting of \$25 per barrel tax on oil transported through its fuel pipelines leading south of the border to pay for this security initiative.

SUMMARY OF ARGUMENT

Despite the real security issues apprehended by the United States (U.S.) from outside enemies, political discourse within the U.S. erroneously focused on the Can-American border as a security risk. Politicians wrongly asserted that Canada was a port of entry for a terrorist who attacked the U.S. and shifted the discussion from their own internal security errors to the fiction of a terrorist entering the U.S. through Canada. The *WHTI* directly violates section 12 and 16 of *NAFTA* by unduly and arbitrarily impairing the movement of goods, services, consumers and business people across the Can-American Border. Additionally, the unnecessary cost and inconvenience the *WHTI* will create is not justified by the general and security exception found in the *GATT* and *NAFTA* because they do not adhere to the objectives and principles that underline the discretion placed upon their use.

The planned implementation of the *APHIS* custom fees on originating fruit, imported into the U.S. from Canada, is a direct violation of Article 310 of the *NAFTA* as well as Article I and VIII of the *GATT* and cannot be justified by either the general or security exceptions found in these treaties. This custom fee discriminates against originating fruit importers as well as unwitting vessels and passengers who pose no health or safety risk to the U.S. The cost of this planned health and security measure is certain to result in a surplus of funds and be disproportional to the fiscal needs of such an initiative.

The Canadian Government's decision to impose an export tax on fuel transported by the pipeline does not breach the *NAFTA* or the *GATT*. The tax is within the guidelines stipulated by both agreements with regards to the taxing of exports, and furthermore it falls within the exceptions for national security as defined by the agreements.

ARGUMENTS

A. THE WHTI IS DIRECTLY CONTRARY TO NAFTA CHAPTERS 12 AND 16 AND GATS

I. In light of NAFTA's section 102's purpose, context and objective the planned WHTI implementation directly violates Section 12 of NAFTA

Being that *NAFTA* is a treaty, Article 31(1) of the *Vienna Convention on the Law of Treaties*¹ establishes the applicable rules of interpretation. Specifically, “*That a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*”.²

It must be recognized contextually that the *NAFTA*'s mandate has been significantly altered by the terrorist attacks of September 11, 2001. Despite the real apprehension of future attacks on North American soil our governments must develop new and cooperative approaches to meet the challenges inherent in creating a safe and manageable border.

Article 102(2) of *NAFTA* states “that all parties shall interpret and apply the provisions of this Agreement in the light of its objectives in Paragraph 1 and in accordance with applicable rules of international law.”³ The primary objective of *NAFTA*'s section 12, read in the required light of 102(1)(a), is to eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the respective parties.⁴ Section 12's purpose must be read with a vision not only to cross border business trade but also to the liberalized movement of North American citizens across our mutual borders. These traveling consumers access

¹ *Vienna Convention on the Law of Treaties*, 22 May 1969, 8 I.L.M. 679 at Art. 31.

² *Ibid.* at Art. 31(1).

³ 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) at Art. 102(2).

⁴ *Ibid.* at Art. 102(1)(a).

services available in their neighbouring country and provide a necessary influx of commerce to local economies.

Article 1201(1) states that the “chapter applies to measures adopted or maintained by a Party relating to cross border trade in services by service providers of another Party”.⁵ Article 1201(1)(a) includes in these measures the production, distribution, marketing, sale and delivery of a service.⁶ Service providers, selling a given service, require customers to access that service.

In 2005, approximately 23% of U.S. citizens and 35% of Canadian citizens held passports.⁷ Current analysis suggests that *WHTI* will result in a cumulative loss of 14.1 million inbound trips from the U.S. to Canada a year.⁸ The estimate shortfall in Canadian tourism receipts is expected to reach nearly \$3.7 billion.⁹ Even when domestic substitution is taken into account, the net effect on Canadian tourism is estimated at 3.2 billion from 2005 to 2010.¹⁰

The *WHTI* initiative directly violates section 12 of *NAFTA* by unduly impairing the access, scope and coverage of these trade services. Acquiring a passport is not simply a matter of inconvenience; citizens residing in both countries cannot afford a passport or a PASS-card and would thereby be prevented from traveling due to economic status. The *WHTI* is a direct affront to *NAFTA*'s objectives to facilitate and maintain a flow of legitimate people, consumerism and goods across a shared liberalized border.

II. The WHTI is directly contrary to NAFTA chapter 16.

⁵ *Ibid.* at Art. 1201(1).

⁶ *Ibid.* at Art. 1201(1)(a).

⁷ Canadian Chamber of Commerce Response to the Advance Notice of Proposed Rule Making on the Western Hemisphere Travel Initiative, The Voice of Canadian Business, Regulatory Information, 31 October 2005, No. 1651-AA66 (Docket No. USCBP-2005-0005) at 1.

⁸ The Conference Board of Canada, an Update on the Potential Impact of the Western Hemisphere Travel Initiative on Canadian Tourism Industry, Ottawa: The Conference Board of Canada for Industry Canada, August 2006 at 3.

⁹ *Ibid.*

¹⁰ *Ibid.*

Chapter 16 of *NAFTA* contains the mutual commitments of the U.S. and Canada to facilitate the reciprocal temporary entry of business persons.¹¹ Vital to Section 16 of *NAFTA* is the objective values found in Section 102(c). This provision reflects the importance of one of the fundamental principles of the agreement; “to increase substantial investment opportunities in the territories of the parties”.¹²

The U.S. and Canada have the largest trade relationship of any two countries in the world.¹³ Approximately 1.8 billion U.S. dollars a day, 75 million dollars an hour, crosses the U.S.-Canada border.¹⁴ Canada is the single largest trading partner of 37 states and the Windsor-Detroit border handles more than any other border crossing in the world.¹⁵

Chapter 1601 reflects both the preferential trading relationship between the Parties and the need to ensure border security and protect the domestic labour force.¹⁶ Although there is a realistic potentiality that these objectives may at times fall into conflict Article 1602(1) maintains that each party shall ensure that measures affecting Chapter 1601 are done so expeditiously so as not to impair or delay unduly the rights conferred upon business people.¹⁷

The bottleneck congestion and subsequent delays at our mutual border, as well as the time and costs associated with business citizens obtaining the proper documentation, will certainly cost both countries irrevocable economic loss. Additionally, the financial burden will

¹¹ Ellen G. Jost, Human Resources in the Canada/U.S. Context and in the Changing World: The Impact of NAFTA on Human Resources: Article: NAFTA-Temporary Entry Provisions-Immigration Dimensions at page 3.

¹² *Supra* note 3 at Art. 102(c).

¹³ Robert Hage, Proceedings of the Canada-United States Law Institute Conference on the North American Context: The New Realities in the Canada/U.S. Relations: Reconciling Security and Economic Interests and the Smart Border Declaration, (2003), 29 Can.-U.S. L.J. 21. at page 2.

¹⁴ *Supra* note 7 at page 1.

¹⁵ *Ibid.*

¹⁶ *Supra* note 3 at Art. 1601.

¹⁷ *Supra* note 3 at Art. 1602(1).

act as a disincentive for a small business to invest multi-nationally.

Annex 1603 section A-Business Visitors, mandates the required documentation for entrance at the U.S.- Canada border. It states that either country shall grant temporary entrance to a business person seeking to enter provided;

1. They present proof of citizenship,
2. Documentation demonstrating that the business person will be so engaged and describing the purpose of entry and;
3. Provide evidence demonstrating that the proposed business activity is international in scope and that the business person is not seeking to enter the local labour market¹⁸

As set out in 1603.A.1, a business person is afforded a substantially less restricted entrance to the other party's territory. This mutual act of leniency was agreed upon in *NAFTA* to increase trade, competitiveness and economic investment opportunities within North America.

III. The *WHTI* is directly contrary to *GATS* and *GATT*

The *GATS* was inspired by essentially the same objectives as its counterpart *GATT* agreement. Creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants, stimulating economic growth through guaranteed policy and promoting trade and development through progressive liberalization.

The *GATS Annex on the Movement of Natural Persons* directly applies to measures affecting service suppliers, natural persons and those employed by service suppliers of a member's territory.¹⁹ This Annex stipulates that the agreement shall not prevent a Member from applying measures to regulate the entry of natural persons provided that "such measures are not applied in a manner as to nullify or impair the benefits accruing to any member under the terms of a specific commitment". Additionally, Article V subsection 3 of *GATT* states that traffic

¹⁸ *Supra* note 3 at Annex 1603 section A-Business Visitors.

¹⁹ *General Agreement on Trades and Services*, 15 April 1984, (entered into force 1 January 1985) at the Annex on Movement of Natural Persons.

coming from or going to the territory of another contracting party shall not be subject to unnecessary delays or restrictions.²⁰

Requiring that all natural citizens and business persons obtain a passport in order to cross the Can-American border will certainly create bottleneck delays and in some circumstances the outright elimination of services, trade and civilian movement to those members who cannot afford documentation. The objectives of *NAFTA* did not just envision the movement of service providers who fit into a desired socioeconomic class but all natural citizens.

B. THE APHIS INITIATIVES ARE CONTRARY TO NAFTA ARTICLES 310 AND GATT ARTICLES I AND VIII

I. The APHIS is Contrary to NAFTA article 310

Article 310 of *NAFTA* states that “no party may adopt any custom user fees of the type referred to in Annex 310.1 for originating goods.”²¹ The implementation of custom fees for fruits and vegetables, wholly obtained and produced within the territory of Canada, pursuant to article 410(a) and (c) of *NAFTA*,²² is by the very words of the agreement forbidden.

It is Canada’s position that this custom fee unfairly discriminates against those who grow and import originating goods into the U.S. There is no evidence that Canada produces fruits or vegetables outside its territory, nor do they plant or harvest with materials originating outside of Canada. No exception is created within the text of *NAFTA* section 310; implicitly inferring that Parties cannot escape from this provisions imposition.

The previous exemption on custom fees is an example of the U.S. recognition that originated fruits create absolutely no risk. The U.S. has always acknowledged the trusted relationship and

²⁰ *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948) at Art. V(3).

²¹ *Supra* note 3 at Art. 310.

²² *Supra* note 3 at Art. 410(a) and (c).

commitment to health that has prevailed between our countries.

II. The APHIS custom fees are contrary to *GATT* article I

Article I of the *General Agreement on Tariffs and Trade 1994* specifically 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.²³

The U.S. claims that the custom service fee on all fruits and vegetables is being implemented to fund and staff an inspection program at the U.S.-Canada border.²⁴ Imposing a custom service fee on all originating goods, and removing the advantage, favour and privileged afforded to Canada for years previous, unfairly discriminates against parties to whom these security measures do not apply.

The respondent submits that the U.S. has for years recognized that the cold temperatures in our territory act as a killing agent against pests and disease found in agriculture. Therefore, charging agriculture carriers a custom fee for importing originating goods, to pay for an initiative that detects pests from animals and plants originating outside of Canada, is an attempt to justify a violation of *GATT* Article I with an overly inclusive “agricultural” clause.

III. The APHIS Initiatives are contrary to *GATT* Articles VIII

The rule in Article VIII(1) prohibits all custom charges unless they satisfy the following three criteria:

- a. The charges must be “limited in amount to the approximate cost of service rendered”;
- b. It must not “represent an indirect protection to domestic products” and

²³ *Supra* note 20 at Art. I.

²⁴ Department of Agriculture Animal and Plant Health Inspection Service, Agricultural Inspection and AQI User Fees Along the U.S. / Canada Border, Federal Register: 25 August 2006, Volume 71, No. 165. at 7.

c. It must not “represent a ...taxation of imports....for fiscal purposes”²⁵

Article VIII(1)(a) is relevant because it is designed to ensure that service fees are levied proportionately to the cost of service. The charging of a custom service fee to all Canadian plains, cars and vessels, regardless if they are actually importing agriculture into the U.S., is not proportional to the projected costs associated with the APHIS initiative. No service is being rendered to the carriers of originating fruit because the security initiative these fees are paying for are wholly out of proximity to the low risk these imported products present.

The U.S.’ Department of Agriculture and the APHIS determined the threat of pests and disease by sampling a modest 11,900 passengers.²⁶ They determined that every 6.2 passenger approached carried quarantined material. They then extrapolated an accurate mathematical yet extremely scientifically unreliably figure; stating that 620,000 passengers out of 10,000,000 will possess quarantined material every year.²⁷ This exaggerated figure, fuelled by an inadequate sample and claims of a bioterrorism “emergency”, was used to justify an unnecessary custom fee which has the effect of only taxing vessels and travelers who have nothing to do with the import of agriculture.

C. THE WHTI IS NOT JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA AND GATT

I. The WHTI is not justified pursuant to the national security exception.

The *GATT* Article XXI²⁸ and *NAFTA* 2102²⁹ provide a method by which contracting parties may justify a breach of the *GATT* and *NAFTA*, provided their actions are necessary to achieve national security objectives.

²⁵ *Ibid.*

²⁶ *Ibid* at 5.

²⁷ *Ibid.*

²⁸ *Supra* note 20 at Art. XXI.

According to *GATT* Article XXI(b)(iii), the U.S. may take any action which they consider necessary for the protection of its essential security interests...taken in time of war and other emergencies in international relations.³⁰ Further, pursuant to Article XXI(a) they may implement these necessary security measures without furnishing any information, the disclosure of which it considers contrary to its essential security interests.³¹ It is the U.S. position that they have been in a state of war and emergency since 2005 and that the *WHTI* will prevent terrorists from entering their territory.

The U.S. argues that it is outside the International Court of Justice's jurisdiction to determine what constitutes "national security". The U.S. claims that they do not have to justify any action taken and all that is required is a claim of self security. However, at the 1994 *Uruguay Round* the WTO began to have discussions concerning how certain sections of *GATT* should be interpreted, including XX and XXI, in cases of conflict.³² Moreover, they contemplated whether the *WTO* has jurisdiction pursuant to article XX:III to resolve these disputes or if the final word on national security, no matter how ambiguous, was that of the contracting party.³³

A broader contextual reading of *GATT* Article XXI suggests that the *WTO* panel is able to limit the effect of the discretionary language in the exception; possible using the interpretive principles of the *Vienna Convention on the Law of Treaties* to allow the party injured by the exception to seek a form of redress under Articles XXIII(2) of *GATT*.³⁴

The DSU was fashioned with the purpose of interpreting *GATT's* provisions impartially.

²⁹ *Supra* note 3 at Art. 2102.

³⁰ *Supra* note 20 at Art. XXI(b)(iii).

³¹ *Ibid.* at XXI(a).

³² Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure*, (2003), 52 *Duke L.J.* 1277.

³³ *Ibid.*

³⁴ *Ibid.*

The dispute resolution process brought into question whether parties to the *GATT* should be permitted to self define “national security”.

It is the Canadian position that a party may define, and even fail to disclose, what security measures they are planning to employ. Yet, for the sake of accountability, when and how they may employ such measures should be adjudicated objectively. The simple claim of “essential national security interests” should no longer be accepted uncontested. Rather, a detailed analysis of what security needs are actually being met and how they are ultimately detrimental to the trade relationship between the U.S. and Canada should now be required and scrutinized.

II. The WHTI is not justified pursuant to the general exception in *NAFTA* and *GATT*.

GATT Article XX and *NAFTA* 2101 set out several exceptions that a party to its terms can invoke to justify a breach of the agreement. According to *GATT* XX(b) and (d), incorporated into *NAFTA* 2102, the U.S. may invoke an exception if they believe the adoption or enforcement of a measure is necessary to protect human life and secure compliance with laws and regulations which are not inconsistent with the *GATT*.³⁵

In *United States – Import Prohibition of Certain Shrimp and Shrimp Products* a *GATT* panel recognized the U.S. has the authority to exercise the general exceptions found in XX of *GATT* provided they observed the requirements set out in the chapeau to Article XX of *GATT*. This obliges the contracting party not to employ any of the exceptions in an arbitrary, unjustifiable or discriminate manner.³⁶ The chapeau of Article XX is, in fact, “but one expression of good faith”, a general principle of international law and a controlling mechanism on the rights of states.³⁷

The task of interpreting and applying the chapeau is essentially one of locating and

³⁵ *Supra* note 20 at Art. XX(b), (d).

³⁶ WTO, *United States – Import Prohibition of Certain Shrimps and Shrimp Products*, [1998] AB, WT/DS58 at 61.

³⁷ *Ibid.*

marking a line of balance between the Member who wants to invoke the exception in *GATT XX* and the Party whose rights will be directly affected.³⁸ When analyzing the issue of whether a measure is arbitrary or unjustifiable the Appellate Body for the *Brazil Tyre Retread* case explained that this usually involves an examination that relates primarily to the cause of the discrimination and the rationale to explain its existence.³⁹

The *WHTI* is arbitrary and unjustified because no threat of terrorism actually exists from Canada. There is no evidence that any terrorist entered the U.S. through Canada or that Canada's security at our mutual border has ever been compromised.

Additionally, the word *necessary* in provisions *XX(b)* and *(d)*, rather than the word *related* as found in *GATT XX(c)*, imports an underlying duty to ensure that those provisions are exercised only in the rarest of circumstances.⁴⁰ In *Brazil- Measures Affecting Imports of Retreaded Tyres* the Appellate Body of the WTO reported on how a dispute body should determine if a given measure is necessary. The panel body observed that in order to ensure this task is undertaken effectively they must assess all relevant factors, particularly the extent of the contribution to the achievement of a measures objective and its trade restrictiveness, in light of the interests or values at stake.⁴¹

Canada concedes to the interests and values the U.S. are attempting to protect with the implementation of *WHTI*. Yet when considering the necessity of such an extreme security measure possible alternatives must be considered. A combination of valid identification would have the same security outcome as a passport. Moreover, the Canadian government, in response

³⁸ *Ibid* at page 62.

³⁹ WTO, *Brazil – Measures Affecting Imports Of Retreaded Tyres*, [2007] AB, WT/DS332 at para. 242.

⁴⁰ *Supra* note 20 at Art. *XX(b),(d), (c)*.

⁴¹ *Supra* note 36.

to September 11, took the initiative and created the *Smart Borders Declaration*.⁴² We signed a Safe Third Agreement⁴³ to address the issue of refugees in Canada as well as opening NEXUS lanes at six border crossings. Canada has spent over \$7 billion to ensure that our shared border is harmonized and secure from outside threats.⁴⁴

D. THE APHIS USER FEE ARE NOT JUSTIFIED PURSUANT TO THE GENERAL OR SECURITY EXEMPTIONS IN NAFTA, GATT OR GATS

It is the U.S. position, pursuant to article XX(b) of *GATT*, that the APHIS custom service fee is “necessary to protect human, animal or plant life or health”.⁴⁵ Again, the Appellate Body Panel of the WTO recognizes that the contracting party must not employ any of the exceptions in an arbitrary, unjustifiable or discriminate manner.⁴⁶

Canada concedes the fact that the U. S. is justified in implementing the APHIS custom fees, there is definitely a need to ensure quarantined material does not find its way over the U.S. – Canada border. However, the *APHIS* custom fees are arbitrary because originating fruit pose no risk of pest infestation or disease. To levy a custom fee on all fruits in order to pay for an overbroad health inspection initiative unfairly discriminates against a sector of importers that neither creates the problem targeted nor benefit from its objectives.

This *APHIS* custom fee should not be considered a measure essential for national security. The U.S. has wavered back and forth regarding their intended purpose in implementing the *APHIS*. If *GATT* Article XXI is going to be invoked a clear cut security interest needs to be established.

⁴² Research Institute Centre for Canadian-American Studies Centre for International Business, A Symposium at Washington University, Summary Proceedings Bellington Washington, 26 April 2005.

⁴³ *Ibid.* at 4.

⁴⁴ *Ibid.*

⁴⁵ *Supra* note 20 at Art. XX(b).

⁴⁶ *Supra* note 36.

To allow the U.S. to rely on both the general and security exception would permit the reliance on a flawed loophole, wherein a contracting party can fail to meet the grounds necessary to determine a general exception and by default fall back on the security exception. The U.S. finds favour in this tactic because they are acutely aware of the non-disclosure and self defining aspects inherent in the XXI and 2102 of the *GATT* and *NAFTA* respectively. This evasive manoeuvre would seriously weaken the WTO's role in interpreting *NAFTA* and *GATT* provisions and would inevitably attack the very fibre of the multilateral commitments born in the *GATT* and *NAFTA*.

E. CANADA'S DECISION TO IMPOSE AN EXPORT TAX ON FUEL TRANSPORTED BY PIPELINES LEADING SOUTH OF THE CANADIAN BORDER IS NOT CONTRARY TO THE *NAFTA* ARTICLES 314, 315, 604 AND 605, OR *GATT* ARTICLES I, VIII AND XI.

The purpose of the *GATT*, as stated in the preamble was to regulate trade by reducing tariffs and other trade barriers, and eliminate preferences, on a reciprocal and mutually advantageous basis.⁴⁷ The *GATT* attempts to contribute to trade expansion by creating transparency in the trading process. It promotes growth and development while also considering the financial needs of member countries, especially those in a position of economic disadvantage.⁴⁸

The *NAFTA* also seeks to encourage trade by eliminating tariffs on most goods originating in and traded between its member countries, facilitating cross-border movement of goods and services, increasing investment opportunities, and promoting fair competition.⁴⁹ However, the *NAFTA* also considers/respects the sovereignty of nations, and this is expressed in

⁴⁷ *Supra* note 20.

⁴⁸ *Ibid.*

⁴⁹ *Supra* note 3.

its approach to issues of finance, cultural independence, and nation's ability to self govern.⁵⁰

I. The taxation of fuel exported through pipelines does not treat the US in an inequitable manner as compared to other member nations, nor is it restrictive.

GATT's Article I refers to treatment of most favoured nations, and it states that all most favoured nations must be treated in an equitable manner⁵¹. In the context of the fuel pipelines, the *GATT* requires that all relevant nations that import fuel by means of the Canadian pipeline be affected by the export tax in a similar fashion. Similarly, *NAFTA*'s Articles 314 (a)⁵² and 604 (a)⁵³ allow for taxation of exports if it is equally applied to other importing nations (314 (b) and 604(b) are dealt with in section "E(IV)" of the memorial). The tax levied to exporters using the pipeline applies to all importers of fuel, thus it is in accordance with the *GATT*, and the U.S. is not being treated inequitably.

NAFTA's Articles 315⁵⁴ and 605⁵⁵ refer to restrictions being applied to an exported good or energy. The Canadian government has publicly stated their expectation that the U.S. will not reduce its barrel purchase level of Canadian fuel (and the U.S. government has not suggested otherwise) because of the implemented export tax; hence the tax does not function as a restriction from the perspective of importation capacity/limit.

II. The taxation of fuel exported through pipelines is consistent with prior export agreements between Canada and the U.S. within the current *NAFTA* and *GATT* environment.

The tax approach being implemented by the Canadian government conforms to the

⁵⁰ *Supra* note 3.

⁵¹ *Supra* note 20 at Art. I.

⁵² *Supra* note 3 at Art 314(a).

⁵³ *Ibid* at Art. 604(a).

⁵⁴ *Ibid.* at Art. 315.

⁵⁵ *Ibid.* at Art. 604.

already agreed upon model developed for the Softwood Lumber Agreement⁵⁶ between Canada and the U.S., and applied through the *Softwood Lumber Export Charge Act*.⁵⁷

The U.S. agreement with Canada requires exporters of softwood lumber to the US to pay an export tax on shipments made on or after October 12 2006.⁵⁸ This tax is being levied on a product that the *NAFTA* dispute resolution panel already decided was priced in accordance with *NAFTA* regulatory requirements.⁵⁹

III. Canada's taxation process meets the requirements of Articles VIII and XI of the GATT and Articles 314 (b) and 604(b) of the NAFTA.

The pipeline in question, only serves to transport fuel for exportation (only the pipelines for exportation are being taxed). Articles VIII and XI require that domestic users of the pipeline pay for the same charges as nations that import the fuel through the pipeline.⁶⁰ However, only customers outside of Canada receive fuel from the pipeline being taxed (the pipelines exiting the country), thus all users of said pipeline are taxed. Domestic users are not treated preferentially since they do not receive fuel from the exiting pipelines. That is, the means of transportation is where the tax is being levied, not the product.

Further, the *Fuel Export Charge* tax serves to harmonize the costs businesses and consumers incur in both nations in a similar vein to the surcharge placed on exported softwood lumber. The U.S. challenged the pricing model for softwood lumber stumps used in some provinces in Canada (i.e. a set fee) because they believed the stumpage fees paid in the U.S. (i.e. auctions) placed U.S. loggers at a competitive disadvantage. Canadian businesses and consumers

⁵⁶ *The Softwood Lumber Agreement between Canada and the U.S.*, October 12, 2006 <<http://www.for.gov.bc.ca/het/softwood>>.

⁵⁷ *Softwood Lumber Export Charge Act*, S.C. 2006, c. 13.

⁵⁸ *Ibid.*

⁵⁹ Daniel Bodansky, *International Decisions*, (2006), 100 Am. J. Int'l L. 664.

⁶⁰ *Supra* note 3 at Arts. VIII, XI.

pay taxes for fuel that importing nations do not incur (16% Federal, on average 35% total), placing them at an economic disadvantage in relation to their counterparts in importing countries.⁶¹ The tax on exported fuel only partially equalizes the tax experienced by Canadian businesses and consumers as end-users, since \$25 roughly equals a 15% tax in the final cost of gasoline to consumers (comparing gas cost changes⁶² in relation to oil cost changes⁶³).

IV. According to general principles of international law relating to sovereignty, States have the right to regulate taxes within their jurisdiction.

The purpose of the *GATT* and *NAFTA* is to facilitate trade and reduce restrictions, but not at the expense of sovereign nations right to self determination, nor was their intent to frustrate the fiscal autonomy of member nations. Accordingly, the U.S. cannot determine/define how Canada chooses to levy its fuel taxes on its residents.

V. Canada's fuel export charge is in accordance with the *GATT* respecting exportation fees and formalities set out in *GATT 1994* article VIII

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.”*⁶⁴

⁶¹ Petro-Canada, *Gasoline Prices across Canada* <<http://www.petro-canada.ca/en/media/2128.aspx>>

⁶² Energy Information Administration, *US Retail Gasoline Prices* <http://www.eia.doe.gov/oil_gas/petroleum/data_publications/wrgp/mogas_home_page.html>

⁶³ Illinois Oil and Gas Association, *History of Illinois Basin Posted Crude Oil Prices* <http://www.ioga.com/Special/crudeoil_Hist.htm>

⁶⁴ *Supra* note 20 at Art.VIII.

Although the security measures being placed address security issues within Canadian soil, their need is being imposed by the U.S.’ requirement for coordinated security measures across the Can-American border. Accordingly, the border security measures represent services being provided to the U.S. and their cost can legitimately be placed on the U.S., thus the Canadian government can levy a tax on exports to the U.S. to address the latter’s security needs. Moreover, terrorist activity within Canada would seek to cause the greatest harm to the U.S., and the security protection measures serve to protect critical American needs, such as the fuel export pipeline, which provides the U.S. with its vital fuel requirements.

F. CANADIAN TAXING OF FUEL EXPORTED BY PIPELINES MEETS THE EXCLUSION CRITERIA ESTABLISHED BY THE *NAFTA* AND *GATT*, IN CASES PERTAINING TO NATIONAL SECURITY

I. Violent action by terrorists groups have now reached global proportions and threaten Canada’s national security.

The terrorist events of September 11 dramatically changed the landscape of war, and the requirements needed to address national security. Continental U.S. soil became a clear target for terrorism, and its nation allies have become potential targets.⁶⁵

Canada’s close economic ties and proximity to the U.S., and its military action supporting the U.S. in Afghanistan, make Canada a desirable and potential target for terrorists.⁶⁶ In coordination with the U.S.’ security needs, Canada added \$1 billion to its border security measures to improve screening facilities at particular border crossings, to add ground sensor towers in the Can-American border, and install radiological detection technology in its ports.

II. The Canadian measure meets the criteria for national security exceptions in the *GATT* and *NAFTA*.

⁶⁵ Canadian Security Intelligence Service, *Terrorism* < <http://www.csis-scrs.gc.ca/en/priorities/terrorism.asp>>.

⁶⁶ *Ibid.*

The GATT Article XXI (b) stipulates that nothing in the *GATT* agreement can be construed to prevent any contracting party, in this case Canada, “from taking any action which it considers necessary for the protection of its essential security interests”. Subsection iii states these actions can be “taken in time of war, or other emergency in international relations”.⁶⁷

Canada’s assertion of the national security exception can be justified under the new *GATT* resolution process. The *DSU* requires a reasoned interpretation of the security exception language.⁶⁸ A panel’s interpretation of essential security interests and what measures are necessary to protect it, must also recognize the sovereign nature of the asserting party. That is, the *GATT* was negotiated for the purpose of facilitating trade, and its purpose was not to infringe on member nations’ ability to address their national security needs.⁶⁹

In *obiter*, the International Court Justice interpreted *GATT* Article XXI (b) in *Nicaragua v. U.S.A.*, and concluded that the invocation of the national security exception would remove the question “whether measures taken by one of the parties fall within such an exception” from the Court’s jurisdiction.

In its assessment of the U.S. *Helms-Burton Act* and the *Iran-Libya Sanctions Act*, the EU ambassador to the US (H. Paemen) questioned whether the WTO can review a nation’s invocation of *GATT* Article XXI unless the assertion exemplifies a flagrant and egregious abuse of the exception.⁷⁰

Canada’s present involvement in armed conflict threatens its national security and

⁶⁷ *Supra* at note 20 at Art. XXI.

⁶⁸ Dapo Akande & Sope Williams, International Adjudication n National Security Issues: What Role for the WTO? (2002), 43 Va. J. Int’l L. 379.

⁶⁹ *Supra* note 20.

⁷⁰ David T. Shapiro, *Be Careful What You Wish For: U.S. Politics and the Future of the National Security Exception to the GATT*, (1997), 31 Geo. Wash. L.J., Int’l L. & Econ. 110.

exposes it to potential terrorist action within its soil. The measures being implemented, are coordinated with the U.S. security needs, and help protect Canada and the U.S. against this potential terrorist violence.

The armed conflict clearly falls within the category of “time of war or other emergency in international relations”.⁷¹ Accordingly, Canada can adopt security measures it considers necessary to protect its security interests in accordance with *GATT* Article XXI (b), and that includes the manner in which it wishes to finance the costs incurred to protect said interests.⁷²

Canada’s measures are consistent with the *NAFTA* Articles 607 and 2102. Although the *NAFTA* Article explicitly excludes the language used in the *GATT* exception, Article 607 (b) allows for the exception in times of armed conflict, which is applicable in Canada’s case.⁷³ Moreover, the *NAFTA* Article 607(b) allows for an exception to implement national policies relating to non-proliferation of nuclear weapons and nuclear explosive devices, which is pertinent to the security measures being implemented by the Canadian government, and the export fuel tax being proposed.⁷⁴

The court’s assessment of the measure proposed by Canada under Articles of *GATT* and *NAFTA* must consider not only whether the measure on its own affects in a limited fashion the multilateral trading system implemented through *GATT* and *NAFTA*, but also how the courts decision may help or serve to undermine member nations’ autonomy in addressing their national security needs, and their rights as sovereign nations for economic self-determination.

⁷¹ *Supra* note 20 at Art. XXI.

⁷² *Ibid.*

⁷³ *Supra* note 3 at Art. 607.

⁷⁴ *Ibid.*

CONCLUSION

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

- i. The *WHTI* is contrary to *NAFTA* Chapters 12 and 16 and *GATS*.
- ii. The *APHIS* user fees are contrary to *NAFTA* Article 310 and *GATT* Articles I and VIII.
- iii. The *WHTI* is not justified pursuant to the national security exception or a general exception in *NAFTA* or *GATT* or *GATT*.
- iv. The *APHIS* user fees are not justified pursuant to the national security exception or the general exception in *NAFTA* or *GATT* or *GATS*.
- v. The fuel export charge is not contrary to *NAFTA* Articles 314, 315, 604 and 605 or *GATT* Articles I, VIII and XXI.
- vi. The Fuel Export Charge is justified pursuant to the national security exception or a general exception in *NAFTA* Articles 607, 2101, 2102 or *GATT* Articles XX and XXI.