

**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 APPLICANT**  
**TEAM # 2008-05A**

## QUESTIONS PRESENTED

1. Is the Fuel Export Charge contrary to the North American Free Trade Agreement (“NAFTA”) Articles 314, 315, 604, or General Agreement on Tariffs and Trade (“GATT”) Articles I, VIII, and XI?
2. Is the Fuel Export Charge unjustified pursuant to the national security exceptions or general exceptions in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI?
3. Is the Western Hemisphere Travel Initiative (“WHTI”) consistent with NAFTA Chapters 12 and 16 or the General Agreement on Trade Services (“GATS”)?
4. Is the WHTI justified by the national security exception or a general exception in NAFTA or GATT or GATS?
5. Are the United States Animal and Plant Health Inspection Service (“APHIS”) user fees consistent with NAFTA Article 310 and GATT Articles I and VIII?
6. Are the APHIS user fees justified by the national security exception or a general exception in NAFTA or GATT or GATS?

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## **JURISDICTION**

The Governments of the United States of America (“United States”) and Canada have agreed to refer their disputes to the International Court of Justice (“ICJ”). Further, both parties have agreed that the ICJ has jurisdiction to consider the issues set forth below.

## STATEMENT OF FACTS

In April 2005, the United States Department of State and the United States Department of Homeland Security proposed the Western Hemisphere Travel Initiative. Historically, citizens could cross the border between the U.S. and Canada with only a birth certificate and photo identification. In the wake of concerns over vulnerability at its borders, however, the U.S. decided to ensure security by requiring that anyone, even American citizens, traveling into the U.S. from the Western Hemisphere carry a valid passport or other appropriate secure documentation. The U.S. already implemented the first phase of WHTI, affecting air travelers, and will implement subsequent phases for land and sea travelers beginning in the summer of 2008. Canada opposes WHTI because it fears that a passport requirement will negatively impact travel and have a deleterious effect on sectors of the economy, specifically tourism, reliant on movement between the two nations. The U.S., however, justifies WHTI as a necessary national security-related measure whose negative impact is minimal at best.

Like the formerly lax travel documentation requirements, the U.S. had previously exempted Canada from the agricultural quarantine and inspection (AQI) fees required by the Animal and Plant Inspection Service of the United States Department of Agriculture (APHIS). After becoming aware of a potential threat of foreign pests and diseases entering undetected across the U.S.-Canadian border, the U.S. decided to implement stricter inspection methods. On August 25, 2006, as a result of the need for these inspections and the increase in costs to fund them, the U.S. announced that Canada would no longer be entitled to the exemption. These fees are now applied to all persons traveling into the U.S. by air, as well as boats and rail cars. Canada believes that the user fees are not contrary to NAFTA and GATT and are not justified under international law.

Pursuant to the Joint Statement of President George W. Bush, Prime Minister Stephen Harper, and President Felipe Calderón from the North American Summit at Montebello, on 11 September 2007 Canada announced a series of essential border security measures aimed at enhancing the security of North America. These measures flow from the Smart and Secure Borders section of the Joint Statement. On that same day Canada also stated that it would levy a \$CDN 25 per barrel export tax on all oil bound for the United States. It justified this tax by invoking a desire not to raise taxes on Canadian citizens and the precedent of a longstanding dispute between the two nations over the export of softwood lumber. The United States vehemently opposes this export tax that would result in significantly higher prices at the pump for U.S. Consumers.

Because of these issues the United States and Canada have brought their grievances before the International Court of Justice. They pray that the court grant them relief under the customs of international law.

## **SUMMARY OF THE ARGUMENT**

The Fuel Export Charge Canada has levied against oil transported via pipeline to the United States violates the free trade provisions of the North American Free Trade Agreement and General Agreement on Tariffs and Trade. The charge operates as an expressly prohibited export tax under NAFTA and GATT. Further, it acts as an improper export measure under NAFTA and GATT and violates NAFTA provisions relating to petrochemical goods. Likewise, the charge does not qualify for any exception, security or otherwise, contained within either treaty. Finally, the export charge is not justified by the Softwood Lumber Product Export Charge Act, 2006, because the factual and substantive applications in that situation are distinguishable from the present case.

The WHTI complies with NAFTA and GATS because the initiative satisfies the requirement to accord no less favorable treatment to service providers. Further, the initiative relates to regulatory measures maintained through law enforcement, which both NAFTA and GATS authorize. Finally, even if WHTI were contrary to NAFTA or GATS, it is justified pursuant to national security and general exceptions under those treaties, as well as GATT, because the United States has taken steps it deems necessary to protect its citizens and essential interests. Such necessary steps do not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade. Therefore, the initiative is justified under the available exceptions.

The APHIS user fees are consistent with NAFTA and GATT because the fees are necessary to protect the United States from exposure to unwanted and potentially dangerous pests and diseases entering from the U.S.-Canadian border. Although implementing the APHIS fees requires the United States to remove a formerly recognized exemption, the fees do not impose discriminatory concessions. Although the United States recognizes that the fees may

seem contrary to NAFTA Article 310, they are ultimately justified pursuant to the general and national security exceptions available under NAFTA, GATT, and GATS.

Therefore, this court should find that Canada's Fuel Export Charge violates NAFTA and GATT, and is neither justified under any exceptions under these treaties nor by the Softwood Lumber Product Export Charge Act. Further, this court should find that the WHTI complies with the provisions under NAFTA and GATS and that the APHIS user fees are not contrary to GATS. In the alternative, this court should find that the WHTI and APHIS user fees are justified by both general and national security exceptions available under NAFTA, GATT, and GATS.

## ARGUMENT

### **I. THE COURT SHOULD HOLD THAT CANADA'S FUEL EXPORT CHARGE; (1) VIOLATES THE FREE TRADE PROVISIONS OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE; (2) DOES NOT FALL UNDER ANY EXCEPTION, INCLUDING THOSE RELATED TO NATIONAL SECURITY, CONTAINED WITHIN EITHER TREATY; (3) IS NOT JUSTIFIED BY THE SOFTWOOD LUMBER PRODUCT EXPORT CHARGE ACT, 2006.**

The International Court of Justice, hereinafter "ICJ", should hold that the Fuel Export Charge, hereinafter "FEC", violates both the North American Free Trade Agreement and the General Agreement on Tariffs and Trade, hereinafter "NAFTA" and "GATT." The Vienna Convention on the Law of Treaties, hereinafter "VCLT", is the lens through which international law is viewed.<sup>1</sup> The United States has not ratified the convention, but Canada ratified it in 1966.<sup>2</sup> Further, it is considered to be the reflection of customary international law.<sup>3</sup> Analysis of the

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<sup>1</sup> International Law Commission of the United Nations, Vienna Convention on the Law of Treaties, May 23, 1969, 1555, U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

<sup>2</sup> Foreign Affairs and International Trade Canada, Vienna Convention on Diplomatic Relations, [http://www.international.gc.ca/about-a\\_propos/protocol-protocole/vienna-vienne/index.aspx](http://www.international.gc.ca/about-a_propos/protocol-protocole/vienna-vienne/index.aspx) (last visited Feb. 19, 2008).

<sup>3</sup> SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 66 (2006).

Articles of the VCLT will result in the court holding that the FEC is contrary to both NAFTA and GATT, and further, that no exception applies.

Other sources of international law will provide further justification for the court holding that the FEC violates both NAFTA and GATT. Decisions by both a Chapter 20 NAFTA Panel and the Dispute Settlement Body of the World Trade Organization will further illuminate the reasons for the finding of a violation.<sup>45</sup> Specifically, the court will see how the precedent set by the Softwood Lumber Product Export Charge Act, 2006, hereinafter “SLA”, does not set a precedent that justifies the FEC.<sup>6</sup>

**A. The Fuel Export Charge Canada has levied against oil transported via pipeline to the United States violates the free trade provisions of the North American Free Trade Agreement and General Agreement on Tariffs and Trade.**

**1. The fuel charge operates as the type of export tax expressly prohibited in the Article 314 and Article 604 of the NAFTA treaty of the General Agreement on Tariffs and Trade.**

The Vienna Convention favors a good faith plain meaning interpretation of the treaties in dispute.<sup>7</sup> NAFTA states that no member state may impose an export tax on any good bound for another member state unless they impose that same tax on all members of the nation and themselves.<sup>8</sup> Thus, under a VCLT plain meaning interpretation, an investor-state that charges an export tax on fuel to another investor-state without charging the same tax on itself and other states has violated NAFTA Article 314. For similar reasons, and because the subject matter of

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<sup>4</sup> In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination (NAFTA Ch. 19 Panel Rev. June 7, 2004).

<sup>5</sup> Appellate Body Report, United States -- Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 31, 2004).

<sup>6</sup> Softwood Lumber Product Export Charge, 2006 S.C., ch. 13 (Can.).

<sup>7</sup> VCLT, supra note 1, arts. 31 and 32.

<sup>8</sup> North American Free Trade Agreement art. 314, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, (1993) [hereinafter NAFTA].

this contestation relates to oil, a petrochemical good, the Fuel Charge Export violates Article 604.<sup>9</sup>

Article I of the General Agreement on Tariffs and Trade forbids Most-Favored-Nation states, a group of which United States and Canada are signers, from imposing tariffs on goods that target specific fellow states.<sup>10</sup> As oil is priced similarly no matter the how it is delivered, thus an argument alleging the tax is relative to the delivery method, here pipeline, would be inaccurate. As virtually all of Canada's oil is exported to the United States, the Fuel Export Charge creates a de facto violation of GATT.<sup>11</sup>

Canada has not imposed any taxation on pipeline fuel destined for domestic consumption. Further, the FEC has no practical effect on the third investor-state, Mexico, because that state does not have the infrastructure necessary to receive Canadian fuel via pipeline. If this court should fail to find for the applicant, Canada, in violating NAFTA and GATT, will create a substantial spike in U.S. fuel prices. At the close of the New York Mercantile Exchange on 15 February 2008 the future price of crude oil for delivery was \$USD 95.50.<sup>12</sup> Using this price and an assumption that parity between the U.S. and Canadian dollar will continue, the FEC can be expected to create a 26.2 percent increase in the price U.S. consumers will pay for oil.

The Fuel Export Tax is in complete violation of NAFTA 314 because it creates an export tax of the variety expressly forbid by the treaty and fails to impose the tax equally on all investor-states.

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<sup>9</sup> NAFTA, supra note 8, art. 604.

<sup>10</sup> General Agreement on Tariffs and Trade art. I, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947) [hereinafter GATT].

<sup>11</sup> U.S. Energy Information Administration, Crude Oil and Total Petroleum Imports Top 15 Countries, [http://www.eia.doe.gov/pub/oil\\_gas/petroleum/data\\_publications/company\\_level\\_imports/current/import.html](http://www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/import.html) (last visited Feb. 19, 2008).

<sup>12</sup> Bloomberg.com, Energy Prices, <http://www.bloomberg.com/energy/> (last visited Feb. 15, 2008).

**2. The Fuel Export Charge is an improper export measure under NAFTA Article 315 and GATT Articles VIII and XI, and further, violates NAFTA Article 605's provisions regarding petrochemical goods.**

Article 315 incorporates portions of GATT into NAFTA, including, GATT Article XI, which forbids investor-states from imposing export taxes.<sup>13</sup> Article 315 makes an exception to the GATT rule, so long as the state imposes similar pricing on domestic consumption.<sup>14</sup> Canada's FEC imposes prices 26.2 percent higher on the U.S., a fellow investor-state. Therefore, using the interpretative methods advocated by the Vienna Convention, it is evident that the Fuel Export Charge violates both NAFTA Article 315 and GATT Article XI.

Article VIII(1)(a) of the General Agreement on Tariffs and Trade disallows export fees in excess of the real cost of importing the taxed good.<sup>15</sup> The FEC, an excise tax solely on fuel headed to the U.S., violates the article. Further, the FEC is in violation of NAFTA Article 605, which is a restatement of these other rules, but specifically regarding petrochemicals.<sup>16</sup>

The respondent has little or no factual basis to counter these arguments. The Prime Minister's office stated that "Canadian taxpayers want lower taxes and it has been the promise of this Government to lower taxes, not raise them." Steven Hunter did not raise taxes on Canadians; he raised taxes on his North American neighbors. This is a clear violation of not only multiple sections of both the General Agreement on Tariffs and Trade and the North American Free Trade Agreement, but also the free trade spirit that drives both treaties.

**B. The Fuel Export Charge legislation is not justified by either the security related or general exceptions contained within the North American Free Trade Agreement or the General Agreement on Tariffs and Trade.**

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<sup>13</sup> NAFTA, supra note 8, art. 315.

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

<sup>15</sup> GATT, supra note 10, art. VIII.

<sup>16</sup> NAFTA, supra note 8, art. 605.

**1. The fuel charge does not fall under the GATT Article XX or Article s 605 and 2101 General Exceptions.**

GATT Article XXI paragraphs (b), regarding national security and emergencies related to international relations, and (c), regarding maintenance of peace and security, are not applicable to the facts of this before this body.<sup>17</sup> Canada has made no mention of the FEC relating to military operations, and, while matters have become testy between the U.S. and Canada, the row over the misstatements made by members of the U.S. political establishment does not constitute a breach of international peace and security.

NAFTA Article 2102 is styled similarly to the GATT articles regarding national security.<sup>18</sup> Article 2102 paragraph (b) states that the treaty cannot prevent a party from taking actions necessary to its essential security.<sup>19</sup> The applicant admits that in the modern international relations border issues are intrinsically connected to national security issues. Despite this reality, Article 2102 is inapplicable to the Fuel Export Charge.

The Fuel Export Charge cannot find shelter in NAFTA article 2102 because the revenues it will generate are disproportionate to the stated costs. Further, any argument to the contrary should be viewed as being made in bad faith under the Vienna Convention.<sup>20</sup> Enbridge, the Canadian pipeline giant with gross profits of nearly \$CDN 3 Billion last year, sends over 1.7 million barrels of oil to the U.S. via pipeline every year.<sup>21 22</sup> If the FEC is implemented, the Canadian government will have annual revenues of \$CDN 15.5 billion solely from Enbridge pipelines; that dwarfs the \$USD 1 billion dollars announced cost for the border security

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<sup>17</sup> GATT, supra 10, art. XXI.

<sup>18</sup> NAFTA, supra 8, art. 2102.

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

<sup>20</sup> VCLT, supra note 1, art. 26.

<sup>21</sup> Google Finance, Enbridge Inc., <http://finance.google.com/finance?q=TSE%3AENB> (last visited Feb. 19, 2008).

<sup>22</sup> John Wilen, *Oil Futures See Slight Rebound*, Newark Stare Ledger, Nov. 30, 2007 at 52.

measures.<sup>23</sup> The Vienna Convention requires that parties to treaties act in good faith.<sup>24</sup> If Canada maintains a position that the Fuel Export Charge bears any relation to the “essential security” of NAFTA Article 2102 it will be acting in bad faith.

**2. The fuel charge does not qualify for the national security exceptions made available under the Article 607 and 2102 of NAFTA and Article XXI of GATT.**

The exceptions contained within GATT Article XX and NAFTA Article 2101 are broad and could seemingly be applied to any situation, but both articles have caveats.<sup>25</sup> Specifically, both articles disallow the implication of trade measures “which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”<sup>26</sup> Because Canada is only imposing a tax on fuel bound for the United States they do not qualify for the numerous exceptions allowed under GATT and NAFTA.

**3. The Joint Statements at the Conclusion of the 2007 Montebello North American Leader’s Summit and on September 11, 2007 did not provide justification for the imposition of the Fuel Export Charge.**

At the Montebello Summit North America’s national leaders discussed further coordination to ensure greater coordination and efficiency across the continent.<sup>27</sup> Further, the leaders asked their respective ministers to strive towards certain goals relating to “Smart and Secure Borders.”<sup>28</sup> The leader’s statement specifically discussed goals related to radiological screening and the implementation of border crossing infrastructure in the Detroit-Windsor

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<sup>23</sup> John Wilen, *Oil Futures See Slight Rebound*, NEWARK STAR LEDGER, Nov. 30, 2007 at 52.

<sup>24</sup> VCLT, *supra* 1, art. 26.

<sup>25</sup> GATT, *supra* 10, art. XX.; NAFTA, *supra* 8, art. 2101.

<sup>26</sup> *Id.*

<sup>27</sup> *Diverted by Jelly-Beans; Canada, the United States and Mexico*, THE ECONOMIST, Aug. 25, 2007.

<sup>28</sup> Joint Statement by Prime Minister Harper, President Bush, and President Calderón on the Montebello Summit (Aug. 21, 2007) (on file with the Office of the Press Secretary of the White House).

region.<sup>29</sup> National Public Radio reported that the Canadian government was concerned with its ability to continue to effectively administer border duties in busy crossings in places like Windsor/Detroit and Erie/Buffalo.<sup>30</sup> Canada's agreement to spend \$USD 1 billion on border improvements is a direct continuation of its stated goals and concerns.

There is nothing to indicate a quid pro quo arrangement regarding these new border measures and the imposition of the Fuel Export Charge. The grave differences in the revenues and actual costs further discourage this type of interpretation. Canada's attempt to tax another investor-state to satisfy measures related to international agreements violates both the North American Free Trade Agreement and the General Agreement on Tariffs and Trade and must not be tolerated.

**C. The Softwood Lumber Product Export Charge Act covers subject matter so unrelated to the Fuel Export Charge that its precedential value will not support the imposition of the tax.**

**1. The United States acceptance of the Softwood Lumber Product Export Charge Act has unique factual circumstances that differentiate it from this contentious case.**

The Chapter 19 NAFTA Panel and the World Trade Organization Dispute Settlement Body reports on the ongoing lumber dispute between the U.S. and Canada do not discuss the applicable sections of respective empowering treaties under discussion in regards Softwood Lumber Product Export Charge Act.<sup>31</sup> These decisions instead focus on issues surrounding the

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<sup>29</sup> Joint Statement by Prime Minister Harper, President Bush, and President Calderón on the Montebello Summit (Aug. 21, 2007) (on file with the Office of the Press Secretary of the White House).

<sup>30</sup> *Morning Edition* (National Public Radio broadcast Aug. 21, 2007).

<sup>31</sup> In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination (NAFTA Ch. 19 Panel Rev. June 7, 2004).; Appellate Body Report, United States -- Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 31, 2004).

anti-dumping provisions of each treaty. The Los Angeles Times summarized the WTO decision in saying:

The two countries have been trying unsuccessfully for years to reach a deal that could replace the duties with a quota on Canadian wood for a limited time. Washington says that the duties are needed to compensate for Canadian state aid. Canada denies there is any subsidy and asked the WTO to declare the U.S. duties a violation of international trade laws.<sup>32</sup>

The court denied Canada's claims and focused its decision on whether dumping had occurred, and specific issues related to "adequate remuneration" and the exact percentages of subsidies provided to Canadian timber producers by provincial governments.<sup>33</sup> There is no such minutia to delve into today, and there are no dumping complaints. If Canada has any more oil it would like to make available for export, U.S. consumers are patiently waiting to slurp it up.

The US agreed to the Softwood Lumber Product Export Charge Act in hopes of resolving the ongoing issues of softwood exportation.<sup>34</sup> Discussions over this issue have been ongoing for decades and are memorialized in the agreements commonly known as Lumber I-IV.<sup>35</sup> The act itself has nothing to do with oil, and the export taxes it levies are structured to combat incentives provided to timber companies by provincial government.<sup>36</sup> The United States' agreement to the the Softwood Lumber Product Export Charge Act involves significantly different legal issues and the court should be cautious in assigning the it any precedential value.

**2. The Softwood Lumber Product Export Charge Act, 2006, relates specifically to the anti-dumping measures contained with both NAFTA and GATT.**

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<sup>32</sup> *Split Trade Ruling on Wood*, L.A. TIMES, Nov. 30, 2007, at C3.

<sup>33</sup> Appellate Body Report, United States -- Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 31, 2004).

<sup>34</sup> Softwood Lumber Agreement 2006, U.S.-Can., Sept. 12, 2006 (2006).

<sup>35</sup> CBC Online, Softwood Lumber Dispute, [http://www.cbc.ca/news/background/softwood\\_lumber](http://www.cbc.ca/news/background/softwood_lumber) (last visited Feb. 19, 2007).

<sup>36</sup> Softwood Lumber Product Export Charge, 2006 S.C., ch. 13, art. 10 (Can.).

The Vienna Convention on the Law of Treaties holds that in disputes between conflicting treaties, here NAFTA and the SLA, the more recent treaty receives the preferential reading.<sup>37</sup> This fact is not disputed. But the “subject-matter” of the SLA is softwood, specifically.<sup>38</sup> This treaty should not influence the interpretation of the North America Free Trade Agreement because Article 30 of the VCLT states that the section is only applicable when making determinations regarding treaties covering the same “subject-matter.” To allow this agreement, which deals with a specific subject matter, to dictate interpretation of the overarching North American Free Trade Agreement would be contrary to the nature of NAFTA. Enabling the Softwood Lumber Product Export Charge Act, 2006 to be used as precedent would send international law down a rabbit’s hole; whereby, lesser trade agreements over specific issues could be used to significantly alter the world’s most important trade agreements.

Because the Softwood Lumber Product Export Charge Act does not provide a precedent for this case, the court should revert to the plain meaning interpretative rules outlined by Article 31 of the Vienna Convention.<sup>39</sup> The circumstances of this case clearly justify the court adhering to the principle of, *lex specialis derogat legi generali*, or, the specific law is favored over the general law. The free trade provisions of NAFTA and GATT are clear and unambiguous; this should lead the court to find that the Fuel Export Charge is violates both of these landmark treaties.

**II. THE WHTI IS NOT CONTRARY TO NAFTA CHAPTERS 12 AND 16 OR GATS BECAUSE THE PASSPORT REQUIREMENT DOES NOT ACCORD CANADA OR ITS CITIZENS ANY LESS FAVORABLE TREATMENT THAN IT DOES OTHER MEMBER’S CITIZENS, THE REQUIREMENT REFLECTS REGULATIONS FOR SERVICE PROVIDERS THAT BOTH NAFTA AND GATS AUTHORIZE, AND IT IS JUSTIFIED PURSUANT TO**

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<sup>37</sup> VCLT, *supra* 1, art. 30.

<sup>38</sup> The Softwood Lumber Agreement 2006, U.S.-Can., Sept. 12, 2006 (2006).

<sup>39</sup> VCLT, *supra* 1, art. 31.

**THE NATIONAL SECURITY AND GENERAL EXCEPTIONS IN NAFTA, GATT, AND GATS.**

This Court should find that the WHTI is not contrary to NAFTA Chapter 12 or GATS because requiring a passport for all persons traveling in the Western Hemisphere, including Americans, does not treat one Member's citizens any less favorably than any other Member's citizens. Further, the passport requirement is a reasonable, objective and impartial measure to ensure national security through border regulation, and both NAFTA and GATS recognize the importance allowing Members to ensure border security. Finally, the passport requirement is justified pursuant to both general and national security exceptions under NAFTA, GATT, and GATS.

Therefore, because the passport requirement does not accord less favorable treatment to other members, reflects regulations NAFTA and GATS already authorize, and is justified pursuant to several exceptions, this Court should determine that the requirements in WHTI are valid.

**A. WHTI is not contrary to NAFTA Chapters 12 and 16 or GATS.**

As far as it NAFTA Chapter 12 is applicable, the WHTI is not contrary because it requires similar documentation from Canadian as well as American citizens. Further, the regulations WHIT implements reflect those already accepted measures under NAFTA Chapter 16 and GATS.

**1. WHTI, as it relates to air travel, is outside of the scope of NAFTA Chapter 12 and GATS.**

NAFTA art. 1201 states that it applies to cross-border services, but it explicitly does not apply to "air services, including domestic and international air transportation, whether scheduled

or non-scheduled, and related activities in support of air services . . .”<sup>40</sup> GATS also contains a similar provision exempting air traffic rights and directly related services from its coverage.<sup>41</sup> Accordingly, WHTI, as it relates to air travel, is not contrary to NAFTA Chapter 12 or GATS because the regulation concerning air travel is outside of the scope of the two documents.

**2. WHTI complies with the requirement to accord no less favorable treatment to service providers.**

Both NAFTA Chapter 12 and GATS have provisions that require each Party “to accord to service providers of another Party treatment no less favorable that it accords, in like circumstances, to its own service providers”<sup>42</sup> or those of another Party or a non-Party,<sup>43</sup> whichever treatment is better.<sup>44</sup> In the instant case, the “like circumstances” NAFTA refers to involve crossing the border into the United States from within the Western Hemisphere. WHTI, however, requires that all travelers, Canadians and Americans alike, carry a valid passport or other appropriate secure documentation. Such a requirement does not treat Canadian service providers any less favorably than it does other Parties, including the United States.

Further, Canada’s concern that the WHTI will reduce travel because only 40% of American citizens have valid passports is speculative at best. In December 2007, the United States Department of State addressed Canada’s concerns regarding an expected drop in the tourism rate.<sup>45</sup> The Department of State indicated that it has made efforts to educate the public

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<sup>40</sup> NAFTA, *supra* 8, art. 1201(2)(c).

<sup>41</sup> General Agreement on Trade in Services, Annex on Air Transport Services, Dec. 15, 1993, 33 I.L.M. 44 [hereinafter GATS].

<sup>42</sup> NAFTA, *supra* 8, art. 1202

<sup>43</sup> NAFTA, *supra* 8, art. 1203

<sup>44</sup> NAFTA, *supra* 8, art. 1204; GATS, *supra* 43, pt. II, art. II.

<sup>45</sup> Card Format Passport; Changes to Passport Fee Schedule, 72 Fed. Reg. 74,169, 74,172 (Dec. 31, 2007) (to be codified at 22 C.F.R. pts. 22 and 51).

on WHTI requirements, which has resulted in a surge of passport applications as of May 2007.<sup>46</sup> Additionally, the United States has proposed creating a passport card available to any United States citizen upon application and a fee.<sup>47</sup> This card is designed to facilitate travel for United States citizens who live close to the Canadian border by expediting the transfer of necessary information to border patrol about the traveler.<sup>48</sup> Not only would such an expedited process promote travel by American tourists as well as service providers, it would also satisfy the NAFTA and GATS “no less favorable treatment” provision because it would still require all travelers, Canadian and American, to file for supplemental identifying documentation.

**3. NAFTA Chapter 12 does not prevent the United States from performing law enforcement functions.**

Although NAFTA imposes specific restrictions on Parties, Chapter 12 specifically states that such provisions shall not be construed to “prevent a Party from providing a service or performing a function, such as law enforcement . . .”<sup>49</sup> Since WHTI falls into the category of a national security-related measure, it follows that it also qualifies as a form of law enforcement, which NAFTA recognizes as an important and necessary element for Parties to maintain. Therefore, despite the restrictive nature of certain provisions under NAFTA, Chapter 12 does not prevent the United States from implementing WHTI as an authorized law enforcement measure.

**4. NAFTA Chapter 16 and GATS already authorize regulatory measures similar to the WHTI requirement.**

The “General Principles” under NAFTA Chapter 16 explicitly recognize the need to ensure border security,<sup>50</sup> which WHTI intends to do. Further, Chapter 16 contains a provision

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

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> NAFTA, *supra* 8, art. 1201(3)(d)

<sup>50</sup> NAFTA, *supra* 8, art. 1601

that requires presentation of proof of citizenship as a prerequisite for a Party seeking temporary entrance for business purposes.<sup>51</sup> Chapter 16 also authorizes Parties to require a businessperson to obtain a visa or its equivalent prior to entry.<sup>52</sup> Therefore, WHTI is not contrary to NAFTA Chapter 16 because a passport constitutes a form of proof of citizenship that is similar to a visa, and NAFTA already authorizes such a requirement.

Likewise, GATS recognizes that measures affecting trade in services must be reasonable, objective, and impartial.<sup>53</sup> The passport requirement under WHTI, like the visa requirement under NAFTA, is a reasonable manner in which to regulate borders because it is a form of proof of identification and citizenship used for security purposes. Further, WHTI is both objective and impartial because it does not apply any sort of quantitative or qualitative standard (such as licensing)<sup>54</sup>, but rather it implements a procedural requirement to all travelers to ensure border safety.

**B. WHTI is justified pursuant to national security and general exceptions in NAFTA, GATT, and GATS.**

**1. WHTI requirement does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade.**

NAFTA Article 2101 does not prevent a Party from applying measures necessary to protect human life or health as long as such measures are not applied in an arbitrary or unjustifiably discriminatory way.<sup>55</sup> Further, allowable measures must not constitute a disguised restriction on any form of trade.<sup>56</sup> Both GATT and GATS have similar provisions allowing a

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<sup>51</sup> NAFTA, *supra* 8, ANNEX 1603, § 1

<sup>52</sup> NAFTA, *supra* 8, ANNEX 1603, § B(3)

<sup>53</sup> GATS, *supra* 43, art. VI.

<sup>54</sup> GATS, *supra* 43, pt. III, art. XIV.

<sup>55</sup> NAFTA, *supra* 8, art. 2101(3)(b).

<sup>56</sup> NAFTA, *supra* 8, art. 2101(3).

Party to protect its citizens within these parameters.<sup>57</sup> The WHTI is a reasonable and justifiable response to the concerns the United States has relating to its national security. The passport requirement is not arbitrary because it is a logical means to achieving the U.S. goal of increased border security through a more uniform system.

Further, the WHTI is not discriminatory because it applies to any person traveling into the United States from the Western Hemisphere, including United States citizens. Although Canada fears that the WHTI will discourage Americans from traveling to Canada, restricting tourism and trade, these fears are based largely on speculation. The United States responded to Canada's anxiety over the WHTI by exploring alternative measures, such as passport cards, to facilitate travel for American citizens and alleviate any concern over negative economic impact.

Therefore, because the WHTI is a legitimate security measure that is not arbitrary, unjustifiably discriminatory or a disguised restriction on trade, it is justified under the general exceptions under NAFTA, GATT, and GATS.

## **2. WHTI allows the United States to take necessary steps to protect its citizens and essential interests.**

NAFTA Article 2102 authorizes Parties to use measures necessary to enforce laws and regulations relating to safety that are not inconsistent with provisions of the Agreement.<sup>58</sup> Further, NAFTA, GATT, and GATS allow Parties to take actions it considers necessary to protect its essential security interests.<sup>59</sup> The United States determined that it needed to increase security at its borders to protect its citizens more effectively. The requirements under the WHTI represent an essential step toward implementing those security measures. Further, the regulations relate to safety in a way that is not inconsistent with NAFTA, GATT or GATS

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<sup>57</sup> GATT, *supra* 10, art. XX; GATS, *supra* 43, art. XIV.

<sup>58</sup> NAFTA, *supra* 8, art. 2101(2).

<sup>59</sup> NAFTA, *supra* 8, art. 2102.; GATT, *supra* 10, art. XXI; GATS, *supra* 43, art. XIV (bis).

because they require travelers to carry documentation similar to those documents that the Treaties already recognize as acceptable. Therefore, the WHTI, as it relates to ensuring safety, is justified under the security exceptions of NAFTA, GATT, and GATS.

**III. THE APHIS USER FEES ARE NOT CONTRARY TO GATT BECAUSE THEY REFLECT THE COSTS NECESSARY TO PROTECT THE UNITED STATES FROM ACQUIRING UNWANTED PESTS AND DISEASES BUT DO NOT IMPOSE DISCRIMINATORY CONCESSIONS, AND ALTHOUGH THE FEES MAY SEEM CONTRARY TO NAFTA ARTICLE 310, THEY ARE JUSTIFIED PURSUANT TO NATIONAL SECURITY AND GENERAL EXCEPTIONS.**

The United States recognized the trend in rising costs to implement a better inspection process and decided to fund such inspections through the APHIS user fees. Such fees are not contrary to GATT, and although they appear to contradict NAFTA Article 310, they are justified under both general and national security exceptions.

**A. APHIS user fees are not contrary to GATT because they reflect the costs necessary to ensure that products containing pests and diseases do not enter the United States.**

The United States has determined that continued, rigorous inspection measures are necessary to prevent prohibited and potentially harmful pests and diseases from entering at the border between the United States and Canada. For the United States to ensure it can implement these inspections effectively, it must have adequate funding. In light of the necessity of the rigorous inspection procedures and the growing trend of increasing costs to implement them, the APHIS user fees are not contrary to GATT because they proportionally reflect such necessary increases in funding and procedures.

**1. Increased inspection measures are necessary to protect the United States from acquisition of and exposure to harmful pests and diseases.**

According to a press release in May of 2007 from the United States Customs and Border Patrol (hereinafter "CBP"), recent inspections at the border between the United States and

Canada intercepted numerous prohibited fruits and vegetables that came from areas other than Canada.<sup>60</sup> The United States expressed its concern not only that such items may pose a devastating risk by introducing pests to its national crop supply, but that products entering the country from Canada may inadvertently act as hosts for such pests and diseases.<sup>61</sup> In light of this recent discovery and the impending nature of the risk therefrom, the United States determined it was necessary to increase its inspection methods at the border and imposed APHIS fees to fund the increase in costs associated with these inspections.

## **2. The fees reflect the overall trend of increasing costs for the APHIS.**

The overall cost to fund APHIS functions has increased dramatically over the past ten years.<sup>62</sup> Even more specifically, the expenditures to maintain exclusion, monitoring, and management measures alone has doubled.<sup>63</sup> As a result of this dramatic increase in costs, it is necessary for the government to increase proportionally the fees associated with maintaining APHIS. Further, the gradual increase in costs to fund APHIS functions over the years occurred before the recent decision to implement more thorough and rigorous inspection procedures. Therefore, it would naturally follow that the fees are necessary to compensate those performing the inspections as well as the departments in charge of maintaining the program.

## **B. APHIS fees are justified pursuant to national security and general exceptions.**

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<sup>60</sup> Press Release, U.S. Customs and Border Protection, Agric. Inspection, User Fee Requirements Begin June 1 for Commercial Trucks, Railroad Cars Entering U.S. from Can. (May 30, 2007) (on file with author).

<sup>61</sup> *Id.*

<sup>62</sup> Economic Brief, Invasive Species Management: Programs, Policies, and Inst. for Preventing and Managing Invasive Agric. Pests (Sept. 27, 2007) (on file with the U.S. Department of Agric. Econ. Research Serv.).

<sup>63</sup> *Id.*

Although the APHIS user fees facially appear to breach NAFTA Article 310, which restricts and seeks to phase out customs user fees,<sup>64</sup> the fees are justified pursuant to exceptions under NAFTA, GATT, and GATTS.

**1. APHIS fee requirement does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade.**

Nothing in NAFTA Article 2101 prevents a Party from applying measures necessary to protect human life or health as long as such measures are not applied in an arbitrary or unjustifiably discriminatory way.<sup>65</sup> Such measures, however, must not constitute a disguised restriction on any form of trade.<sup>66</sup> Both GATT and GATS have similar provisions allowing a Party to protect its citizens within these parameters.<sup>67</sup> The APHIS fees are justified under the general exceptions to NAFTA, GATT, and GATS because the fees are narrowly tailored to reflect the increase in costs to maintain its inspections.

The United States determined that these inspections were necessary to protect its citizens and agriculture from potentially harmful pests and diseases entering across the U.S.-Canadian border. The fees are uniform depending on the method of travel and do not discriminate among individuals entering the United States through Canada. Likewise, they do not constitute a disguised means of restricting trade. Rather, they are a logical and justifiable solution to the problem of increased costs associated with inspections that are necessary to protect the life and health of United States citizens. Therefore, they are justified under the general exceptions to the Treaties.

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<sup>64</sup> NAFTA, *supra* 8, art. 310.; Canada-United States Free Trade Agreement, art. 403, U.S.-Can., Jan. 2, 1998, 27 I.L.M. 281.

<sup>65</sup> NAFTA, *supra* 8, art. 2101(3)(b)

<sup>66</sup> NAFTA, *supra* 8, art. 2101(3)

<sup>67</sup> GATT, *supra*. 10, art. XX; GATS, *supra* 43, art. XIV.

**2. APHIS fees allow the United States to take necessary steps to protect its citizens and essential interests.**

NAFTA Article 2101 authorizes Parties to use measures necessary to enforce laws and regulations relating to safety that are not inconsistent with provisions of the Agreement.<sup>68</sup> NAFTA, GATT, and GATS also allow Parties to take actions it considers necessary to protect its essential security interests.<sup>69</sup> Although the measures for increased inspections may seem excessive, they are necessary to ensure that potentially prohibited hosts carrying harmful pests and disease do not slip across the border undetected. The United States wants to ensure and maintain the safety of its citizens as well as its agriculture. It also recognizes that such safety assurances come with costs necessary to enforce them. As a result, imposing the fees is a necessary step for the United States to achieve its goal of protecting its citizens and essential interests, which NAFTA, GATT, and GATS value. Therefore, the APHIS fees are justified pursuant to the security exceptions to the Treaties.

**CONCLUSION**

By implementing the Fuel Export Charge, Canada violated provisions of NAFTA and GATT, and the charge is not justified pursuant to the national security and general exceptions of NAFTA and GATT. Furthermore, the WHTI, and APHIS fees are not contrary to NAFTA, GATT or GATS and, alternatively, are justified under the national security and general exceptions under NAFTA, GATT, and GATS.

Respectfully submitted,  
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Date

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<sup>68</sup> NAFTA, *supra* 8, art. 2101(2)

<sup>69</sup> NAFTA, *supra* 8, art. 2102.; GATT, *supra* 10, art. XXI; GATS, *supra* 43, art. XIV (bis).