

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 RESPONDENT
TEAM # 2008-05R**

QUESTIONS PRESENTED

1. Is the Fuel Export Charge consistent with 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 justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI?
3. Is the Western Hemisphere Travel Initiative (“WHTI”) contrary to NAFTA Chapters 12 and 16 or the General Agreement on Trade Services (“GATS”)?
4. Is the WHTI unjustified 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 contrary to NAFTA Article 310 and GATT Articles I and VIII?
6. Are the APHIS user fees unjustified by the national security exception or a general exception in NAFTA or GATT or GATS?

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	iii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
JURISDICTION	1
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	5
I. The Fuel Export Charge is consistent with NAFTA Articles 314, 315, 604, and 605 of NAFTA and GATT Articles I, VIII, and XI, as it is applied only to fuel exported via particular pipeline, does not restrict the exportation of fuel via the pipelines, was not enacted for fiscal purposes, and is not a quantitative restriction.	6
A. The Fuel Export Charge is consistent with NAFTA Articles 314 and 604.	6
B. The Fuel Export Charge is consistent with NAFTA Articles 315 and 605.	7
C. The Fuel Export Charge is consistent with GATT Articles I, VIII, and XI.	8
II. The Fuel Export Charge is justified pursuant to the exceptions in NAFTA Articles 607, 2101, 2102, and GATT Articles XX and XXI, as it is crucial to the national security of Canada and is applied in a consistent and fair manner.	10
A. The Fuel Export Charge is justified pursuant to the exceptions in NAFTA Article 607..	10
1. NAFTA Article 2102 and GATT Article XXI	10
2. When applied NAFTA Article 607 justifies the Fuel Export Charge.....	11
B. The Fuel Export Charge is justified under NAFTA Article 2101	12
III. The WHTI is contrary to NAFTA Chapters 12 and 16 and GATS.	12
A. The WHTI does not accord Canadian tourism service providers the National Treatment mandated by Article 1202.....	13
B. The WHTI violates NAFTA Chapter 16 because the United States did not consult with Canada prior to its enactment with a view towards avoiding its imposition.	14

C.	The WHTI violates GATS because it fails to accord Canadian service suppliers the National Treatment mandated by Article XVII.	15
IV.	The WHTI is not justified pursuant to the national security exception or a general exception in NAFTA, GATT or GATS.	17
A.	The WHTI is not necessary for protection of the essential security interests of the United States.	17
B.	The WHTI arbitrarily discriminates against Canada and operates as a disguised restriction on international trade.	17
V.	The APHIS user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII.	18
A.	The APHIS user fees are custom user fees which violate NAFTA Article 310.	18
B.	The APHIS user fees are contrary to GATT Article I because they afford the United States an advantage not accorded to Canada.	18
C.	The APHIS user fees are contrary to GATT Article VIII because they can only be justified as an indirect protection of U.S. products and they conflict with the recognized need to reduce the number of charges.....	19
VI.	The APHIS user fees can not be justified under the national security exception or a general exception in NAFTA, GATT or GATS.	21
A.	The general exception of GATT, GATS and NAFTA does can not apply because the APHIS user fees are a disguised restriction on trade and are not a necessary sanitary measure to protect human, animal or plant health.	21
B.	The national security exception does not apply because APHIS user fees are not necessary for the protection of essential U.S. security interests.	22
	CONCLUSION.....	24

TABLE OF AUTHORITIES

Page

Treatises

General Agreement on Tariffs and Trade art. XXI, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947) 24

GATS, Annex On Movement Of Natural Persons Supplying Services Under The Agreement, 4.
 17

GATS, Article XIV 23

GATS, Article XIV bis(1)(b)(iii)..... 25

GATS, Article XVII(1)..... 17

General Agreement on Tariffs and Trade art. I, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947).. 9, 20

General Agreement on Tariffs and Trade art. VIII, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947) . 9,
 22

General Agreement on Tariffs and Trade art. XI, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947)... 10

General Agreement on Tariffs and Trade art. XX, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947) 13,
 19

General Agreement on Tariffs and Trade art. XXI, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947)11,
 25

North American Free Trade Agreement ann. 1603, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M.
 289 (1993)..... 15, 16

North American Free Trade Agreement ann. 1608, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M.
 289 (1993)..... 15

North American Free Trade Agreement art. 1201 U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289,
 (1993)..... 14, 19

North American Free Trade Agreement art. 2101, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289
 (1993)..... 13, 23

North American Free Trade Agreement art. 2102, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289
 (1993)..... 11, 18, 25

North American Free Trade Agreement art. 314, 604, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993)..... 7

North American Free Trade Agreement art. 315, 605, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993)..... 8

North American Free Trade Agreement art. 607, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993)..... 12

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 RESPONDENT

TEAM # 2008-05 R

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 (“DOS”) and the United States Department of Homeland Security (DHS) proposed the Western Hemisphere Travel Initiative (“WHTI”), which requires all travelers, including Canadian and Americans, to carry, and present a valid passport or other appropriate secure documentation when traveling to the United States from within the Western Hemisphere. The first phase of the WHTI was implemented January 23, 2007 and applied to all travelers arriving in the United States by air. The second phase has been announced, but is not yet in effect, and applies to all other modes of travel. Previously, Canadian and American citizens were able to cross the border into the other territory with valid photo identification, such as a driver’s license and birth certificate.

The WHTI will substantially reduce travel of American citizens to Canada because only 40% of American citizens have valid passports. That reduction in travel will have a negative effect on the tourism industry in border cities and popular tourist destinations in Canada. The negative effect will present in many forms, such as the loss of jobs for both Canadian and U.S. citizens and the loss of revenue for both Canadian and U.S. business entities.

On August 25, 2006, the United States Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (“USDA”) announced an interim rule to impose agricultural quarantine and inspection (AQI) user fees on all commercial shipments entering the United States from Canada beginning on November 24, 2006. Previously, Canada had been exempted from the user fees.

Air passengers arriving in the United States from Canada have begun having to pay user fees, in the amount of \$USD 5.00 per passenger and \$USD 70.50 per aircraft, regardless of (i) whether they were traveling with fruits or vegetables, or (ii) whether they were processed

through customs and immigration at a Canadian airport. APHIS also removed the inspection exemption for all commercial vessels (ships) entering the United States from Canada. The amount of the user fee for each maritime vessel is \$USD 490.00 per entry. Lastly, a user fee of \$USD 7.75 was imposed on each rail car, and \$USD 10.75 (\$USD 5.50 for Customs and Border Protection and \$USD 5.25 for APHIS) on each truck moving from Canada to the United States. Alternatively, an annual user fee for trucks could be paid in the amount of \$USD 205 (\$USD 100 for Customs and Border Protection and \$USD 105 for APHIS).

After convening the 2007 Montebello North American Leaders' Summit, Canada's Prime Minister Harper, U.S. President Bush and Mexico's President Calderón issued a Joint Statement ("Statement") asking their Ministers to focus their collaboration on certain priority areas for the next year. One of those priority areas was "Smart and Secure Borders." The Montebello Joint Statement set forth the aforementioned priority area by stating: "Our borders must be both efficient and secure if we are to continue to enhance prosperity, security and quality of life in North America . . . We ask ministers to continue to pursue measures to facilitate the safe and secure movement of trade and travelers across our borders."

Additionally, the Statement sought to focus the border security priority on the following areas: to expedite air transportation; screening for radiological and other similar threats; screening people during a pandemic; find new, innovative and interoperable law enforcement models that promote seamless operations at the border; existing radio communications available to law enforcement agencies working on border security; and identify ways to further enhance benefits of trusted traveler programs. Lastly, the Statement provided that "Canada and the United States will maintain high priority on the development of enhanced capacity of the border crossing infrastructure in the Detroit-Windsor region."

After the Summit, and in anticipation of the upcoming United States Presidential election, candidates for U.S. President made verbal statements in the media that Canada must take security of North American seriously, and made false statements that the September 11, 2001 hijackers had entered the United States from Canada. In response, U.S. Secretary of Homeland Security Michael Chertoff and U.S. Vice-President Dick Cheney and Canada's Minister of Public Safety Stockwell Day convened a meeting, with newspaper articles reporting that the Canadian negotiators were very displeased about the pressure applied on Canada to implement an extensive range of "thick border" initiatives.

On September 11, 2007, Canada and the United States issued a Joint Statement that Canada would spend \$1 billion to put in effect a variety of border initiatives, including: building screening facilities at least 1 kilometer from nineteen (19) different border crossings; erect ground sensor towers along the Canada-United States border; and install advanced radiological detection technology at all its ports.

Canada's Prime Minister's Office also announced on September 11, 2007, an export tax on fuel transported by way of pipeline equal to \$CDN/barrel. The tax was predicated on the measures Canada would be taking to fulfilling its obligations to build a safe and secure North America and is ensuring that those who benefit most from the actions being promised are the one's paying for the benefits, because the security of North America depends upon Canada playing its part.

All exporters of fuel by pipeline are required to register for export tax purposes and to file monthly returns and remit the export taxes on a monthly basis according to the barrels of fuel put into the pipeline for export to a location outside Canada. All exporters of fuel by way of pipeline are required to apply for export permits for each transaction involving an export of fuel by way

of the pipeline and provide prescribed information

The above legislation, on the part of both the United States and Canada led to various disputes between the countries. The Governments of the United States and Canada agreed to refer their disputes to the ICJ rather than the Dispute Settlement Body of the World Trade Organization, a Chapter 20 NAFTA panel or any other body. On September 23, 2007, the United States filed a dispute with respect to the Fuel Export Charge. Canada responded on October 23, 2007 by filing a dispute with the ICJ with respect to the WHTI requirement that all American and Canadian citizens over 18 be required to provide a passport as identification to border and immigration officials and the APHIS fee. The two disputes were joined on November 23, 2007.

SUMMARY OF THE ARGUMENT

This court should find the Fuel Export Charge, instituted by Canada is consistent with NAFTA and GATT as it only applies to fuel that travels via particular pipelines, thus resulting in the Fuel Export Charge being as applicable to domestic use as it is to foreign use. Further the Fuel Export Charge does not restrict the quantity of fuel being shipped from Canada to the United States, as there is no quantity component of the Fuel Export Charge. Lastly, the purpose behind the adoption of the Fuel Export Charge is the essential national security of Canada. Alternatively, if the Fuel Export Charge is found to be inconsistent with NAFTA and GATT, it meets the national security and general exceptions, as it is applied in a consistent and non-discriminatory manner, and is an essential means to achieving essential national security measures meant to protect the people of Canada and the United States.

The court should also find that the Western Hemisphere Travel Initiative violates NAFTA Chapters 12 and 16. The WHTI does not accord Canadian tourism service providers the

National Treatment mandated by Article 1202 and also violates Chapter 16 by imposing an invalid prior approval procedure on the same service providers. It fails to accord Canadian Tourism service providers the National Treatment mandated by GATS, as well. Due to the “thick border” initiatives instituted by Canada, the U.S. can not rely on the national security exceptions of NAFTA, GATT and GATS, nor can they rely on the general exceptions due to the arbitrary restrictions the WHTI imposes on international trade.

Finally, the APHIS user fees imposed by the United States should be found to violate NAFTA Article 310 and GATT Articles I and VIII. The APHIS fees are custom fees which violate Article 310, afford an advantage to the United States not accorded to Canada and fail to provide Canadian service suppliers the National Treatment required under GATT Article VIII. The APHIS user fees do not fit within any of the limited general or national security exceptions and should therefore be struck down.

ARGUMENT

I. The Fuel Export Charge is consistent with NAFTA Articles 314, 315, 604, and 605 of NAFTA and GATT Articles I, VIII, and XI, as it is applied only to fuel exported via particular pipeline, does not restrict the exportation of fuel via the pipelines, was not enacted for fiscal purposes, and is not a quantitative restriction.

A. The Fuel Export Charge is consistent with NAFTA Articles 314 and 604.

The Fuel Export Charge (“Charge”) imposed by Canada is consistent with Articles 314 and 604 of NAFTA. Article 314 addresses export taxes generally, while Article 604 addresses export taxes on energy and petrochemical goods. As the Charge is on fuel exported from Canada to the United States by way of pipeline, it falls under both Articles. Both Articles explicitly disallow Canada, the United States and Mexico (“Parties”) to adopt or maintain any duty, tax or

other charge on the exporting of goods, subject to an exception.¹ The exception is met when the duty, tax, or charge is applied to the same goods for (a) all other Parties to NAFTA, and (b) when the good is destined for domestic consumption.²

The only other party to NAFTA is Mexico, and Canada intends to charge Mexico on any fuel that is exported from Canada to Mexico via pipeline; thus, the first requirement of the exception requirement is met. In addressing the second requirement, it is of the utmost importance to determine what the “good” is. In this case, Canada has not imposed a charge on all fuel being exported (For example there is no tax on oil being exported to the United States by way of oil tanker), simply oil being exported via pipeline. Currently, there are only five (5) pipelines running out of Canada.³ Therefore, the good the charge accrues on is not fuel generally, but only fuel that is transported via one of the five (5) cross border pipelines. Further, a scenario could occur where raw crude oil is shipped from Canada to the United States, where it is refined and shipped back into Canada as gasoline. Thus, some of the fuel shipped to the United States, may at some point be shipped back into Canada for Canadian use, it would have been subject to the Charge during the initial transport to the United States.

Lastly, the United States should be estopped from arguing that all charges on exports from Canada to the United States are contrary to NAFTA, as Canada and the United States have entered into previous agreements where charges are permissible.⁴

B. The Fuel Export Charge is consistent with NAFTA Articles 315 and 605.

¹ North American Free Trade Agreement art. 314, 604, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

² *Id.*

³ North American Energy Working Group, North America: The Energy Picture, available at <http://www.eia.doe.gov/emeu/northamerica/enginfr1.htm>, last visited 02/10/08.

⁴ *See*, Softwood Lumber Agreement, Articles VI and VII.

As is the case with Articles 314 and 604, Articles 315 and 605 are linked in language and what they mandate. Article 314 applies to other export measures generally, while 605 applies to other export measures related to energy and petrochemical goods specifically. Additionally, as with Articles 314 and 604, the Charge is consistent with Articles 315 and 605. Articles 315 and 605 provide a limitation on a Party's ability to restrict the exporting of goods; while also providing a multi-part exception for when an export restriction is allowable. In order to be allowable, a restriction (a) may not reduce the proportion of total shipments of the good, (b) the Party exporting does not impose a higher price for the exports, then when the price charged domestically, and (c) the restriction does not require disruption of normal channels of supply.⁵

The specific language of Articles states "a party may adopt or maintain a restriction otherwise justified under . . . XX (g) [(conservation of natural resources)]"⁶ It is without question that fuel, more specifically oil, is a natural resource, and worthy of conservation. However, this exception need not even be applied, as the action taken by Canada, the Charge, is not a restriction on oil being shipped to the United States. There is no indication that a slight charge on the oil shipped via the pipelines will, in any way, affect the amount of oil being shipped from Canada to the United States. Thus, Articles 315 and 605 are inapplicable to this matter, as Canada is not attempting to restrict the exportation of oil.

C. The Fuel Export Charge is consistent with GATT Articles I, VIII, and XI.

GATT Article I sets forth Most-Favored-Nation treatment and status for the members of the contracting parties.⁷ Therefore, a contracting party to GATT must treat all other contracting

⁵ North American Free Trade Agreement art. 315, 605, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

⁶ *Id.*

⁷ General Agreement on Tariffs and Trade art. I, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947).

parties consistently. In this case, the Charge is on fuel shipped via pipeline, thus the only contracting party the Charge is applicable to is the United States, thus resulting in no impermissible inconsistency.

Under GATT Article VIII, the only applicable section is the taxation on exports for fiscal purposes. However, “fiscal purposes” should not be interpreted too broadly, as nearly every action between the Parties can, in some way, be related to a fiscal purpose, such as the U.S. building a physical wall along its border with Mexico would impact the economy through labor, etc. Canada’s sole purpose in enacting the Charge is for national security, not fiscal purposes.⁸ Additionally, the Charge only exists as a means of fulfilling a request made of Canada by the United States. Thus, the Charge is constructively being made by the United States, with Canada simply acting as an intermediary, both in collecting the Charge and in putting the Charge to use in meeting the United States’ requests.

Article XI, the General Elimination of Quantitative Restrictions, states “[n]o prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by any contracting party . . . on the exportation . . . of any product destined for the territory of any other contracting party.”⁹ It is most logical to read the Article in a conjunctive manner, which allows for duties, taxes, and other charges. Additionally, as duties, taxes, and other like charges are not quantitative restrictions and instead are applicable only to cost or price. Further, it makes little sense that duties would not be a quantitative restriction, while an export tax would be, they are simply two sides of the same coin, as both are attempting to curtail shipment of goods through quasi-price controls. Thus, under the most logical reading of Article XI, the Charge is permitted, as it is not a quantitative restriction.

⁸ Statement by Prime Minister Harper on the announcement of the Charge.

⁹ General Agreement on Tariffs and Trade art. XI, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947).

II. The Fuel Export Charge is justified pursuant to the exceptions in NAFTA Articles 607, 2101, 2102, and GATT Articles XX and XXI, as it is crucial to the national security of Canada and is applied in a consistent and fair manner.

A. The Fuel Export Charge is justified pursuant to the exceptions in NAFTA Article 607

Article 607 explicitly provides that a party may adopt a measure restricting exports of an energy or petrochemical good, pursuant to GATT Article XXI or NAFTA Article 2102, except to the extent necessary to (a) supply a military establishment or a Party or enable a fulfillment of a critical defense contract, (b) respond to a situation of armed conflict involving the Party taking the measure, or (c) implement national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices. Thus, Article 607 cannot be read alone, but in conjunction with NAFTA Article 2102 and GATT Article XXI.

1. NAFTA Article 2102 and GATT Article XXI

Under Article 2102 and GATT Article XXI “nothing in [the Agreement(s)] shall be construed . . . to prevent any Party from taking actions that it considers necessary for the protection of its essential security interest.”¹⁰ It is without question that the border initiatives were designed to protect the national security interests of Canada and the United States.¹¹ In order to fund the border initiatives, Canada imposed the Charge, without which Canada would be unable to meet its essential security interests, and comply with the pact reached with the U.S. Therefore, the Charge was an essential element to the protection of Canada’s essential national security.

¹⁰ North American Free Trade Agreement art. 2102, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); General Agreement on Tariffs and Trade art. XXI, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947).

¹¹ See, the Montebello Summit Joint Statement

2. When applied NAFTA Article 607 justifies the Fuel Export Charge

Thus both NAFTA Article 2102 and GATT Article XXI are applicable to these facts, as the Charge is a necessary element of an essential national security interest.¹² However, Article 607 imposes further requirements, which are met by the facts of this case.¹³ Under (a) the Charge is meant to fund the establishment of screening facilities at a number of border crossings, which may constitute military establishments, as they would likely be manned armed individuals employed by the Canadian government. Furthermore, the charge is necessary to enable Canada to fulfill its agreement with the United States, which could be construed to be a critical defense contract, as the agreement relates to the national security of both parties, and is binding.

Under subsection (b) Canada currently has troops stationed in Afghanistan.¹⁴ Evidencing Canada is in an armed conflict with radical Islamic extremists. In order to secure the borders of Canada against an attack by a radical Islamic extremist group, it is necessary to implement the boarder initiatives. The fact that there is not a “war” in the classic sense, is not pertinent, as the Article does not require war on a grand stage, only “armed conflict.”

Lastly, under subsection (c) there is ample evidence to suggest that should a radical Islamic extremist group procure a nuclear device, the group may attempt to smuggle it into North America, with a possible final destination of Canada. Thus, the border initiative is the implementation of a nation policy relating to the non-proliferation of nuclear weapons or other nuclear devices.

¹² See, Section II, A, 1

¹³ See, North American Free Trade Agreement art. 607, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

¹⁴ See, the Canadian Army website, at http://www.army.forces.gc.ca/LF/English/6_11.asp, last visited 02-10-08.

B. The Fuel Export Charge is justified under NAFTA Article 2101

Article 2101 incorporates by reference GATT Article XX, but then limits the applicability of GATT XX to situations where GATT Article XX is not applied arbitrarily or in an unjustifiably discriminatory manner.¹⁵ The only country that Canada shares a boarder with is the United States. Thus, in safeguarding the national security of Canada by securing its borders, the only country the border initiatives of Canada affect is the United States. Further, the Charge is applied to all fuel transferred via the pipelines. Therefore the Charge is not arbitrary or discriminatory, as it is applied equally to all applicable Parties.

Under GATT Article XX, the GATT “shall not be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human . . . life. . . .”¹⁶ The World Trade Organization has noted that measures would more likely be “necessary” if they were adopted with vital and important common interests in mind.¹⁷ In this case the very purpose of the Charge is to fund the border initiative, which results in greater security for both Canada and the United States. The border initiative was enacted to better secure the border between Canada and the United States from possible attacks by radical Islamic terrorist groups. Thus, the Charge is necessary to the protection of human life, both in Canada, and in the United States.

III. The WHTI is contrary to NAFTA Chapters 12 and 16 and GATS.

The Western Hemisphere Travel Initiative (“WHTI”) instituted by the United States violates its obligations under both the NAFTA and GATS agreements because it fails to accord

¹⁵ North American Free Trade Agreement art. 2101, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); General Agreement on Tariffs and Trade art. XX, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947).

¹⁶ General Agreement on Tariffs and Trade art. XX, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947).

¹⁷ Appellate Body Report, European Communities –Measures affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted April 5, 2001, para. 172.

Canada and its service providers National Treatment

A. The WHTI does not accord Canadian tourism service providers the National Treatment mandated by Article 1202.

The WHTI is contrary to NAFTA Chapter 12 because it discriminates against Canadian tourism industry service providers. Chapter 12 applies to measures adopted by the United States relating to cross-border trade in services by service providers of Canada, including “the access to and use of distribution and transportation systems in connection with the provision of a service[.]”¹⁸ For purposes of Chapter 12, “cross-border provision of a service” encompasses the provision of a service “in the territory of a Party by a person of that Party to a person of another Party[.]”¹⁹ Hence, the definition includes those tourism industry service providers in border cities and other tourist destinations in Canada that cater to American citizens.

Section 1202 of NAFTA requires the United States to accord service providers of Canada no less favorable treatment than that it accords, in like circumstances, to its own service providers.²⁰ Here, however, the WHTI violates this mandate by requiring U.S. citizens and non-resident aliens from the Western Hemisphere to present a valid passport upon entering the United States. The Canadian tourism industry falls within the ambit of Chapter 12’s definition of “cross-border provision of a service” because those individuals and businesses in the Canadian tourism industry are located in Canada and they provide the service of tourism to citizens of the United States. Since only 40% of American citizens hold valid passports, the WHTI disproportionately affects the Canadian tourism industry by limiting the number of U.S. citizens

¹⁸ North American Free Trade Agreement art. 1201(1)(c), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

¹⁹ North American Free Trade Agreement art. 1213(2)(b), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

²⁰ North American Free Trade Agreement art. 1202, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993)

able to visit Canadian tourist destinations. It thereby keeps more American tourists within the borders of the United States and consequently benefits the American tourism industry to the detriment of the Canadian tourism industry. Such action violates the mandate of Article 1202 that the United States accord the tourism service providers of Canada no less favorable treatment than it accords to its own tourism service providers.

B. The WHTI violates NAFTA Chapter 16 because the United States did not consult with Canada prior to its enactment with a view towards avoiding its imposition.

The WHTI is contrary to the principles and obligations outlined in NAFTA Chapter 16. Annex 1603 of Chapter 16 requires that the United States grant temporary entry to business visitors engaged in certain proscribed business activities, provided that such business persons comply with “existing immigration measures applicable to temporary entry” and present certain documentation not relevant here.²¹ Among other business activities, this provision applies to tourism personnel and tour bus operators who enter or participate in activities in the territory of another party.²² As between Canada and the United States, the chapter further defines “existing” measures as those measures in effect on January 1, 1989.²³

After setting the grounds under which each NAFTA Party must grant temporary entry to tourism personnel, Annex 1603 goes on to prohibit any Party from requiring, as a condition for temporary entry, “prior approval procedures, petitions, labor certification tests or other

²¹ North American Free Trade Agreement ann. 1603(1), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993)

²² See North American Free Trade Agreement app. 1603.A.1., U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993)

²³ North American Free Trade Agreement ann. 1608, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993)

procedures of similar effect[.]”²⁴ The sole exception to this provision is a requirement to obtain a visa “or its equivalent.”²⁵ Thus, if a business person such as a Canadian tourism professional satisfies the existing United States immigration measures as of January 1, 1989 and presents the documents outlined in Annex 1603, the NAFTA agreement mandates that a Party can not impose any additional prior approval procedures or petitions on tourism personnel engaged in business activities in another party’s territory.

As applied to Canadian tourism personnel, the passport requirement imposed by the U.S. through WHTI violates this mandate. By requiring Canadian tourism personnel to obtain a passport prior to entering the United States, the U.S. has effectively imposed a prior approval procedure or petition in direct conflict with the prohibition in Chapter 12. Moreover, the first phase of WHTI was enacted on January 23, 2007, which is obviously after the January 1, 1989 limitation on “existing” immigration measures that the agreement contemplates. Therefore, the court should find the passport requirement imposed by WHTI to be contrary to NAFTA Chapter 16.

C. The WHTI violates GATS because it fails to accord Canadian service suppliers the National Treatment mandated by Article XVII.

Article XVII of GATS mandates that each Member “accord to...service suppliers of any other Member...treatment no less favorable than that it accords to its own like services and service suppliers.”²⁶ Although a Member may meet this requirement by according either formally identical or formally different treatment to another Member, such treatment will still be considered less favorable “if it modifies the conditions of competition in favor of services or

²⁴ North American Free Trade Agreement ann. 1603, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993)

²⁵ *Id.*

²⁶ GATS, Article XVII(1).

service suppliers of the Member compared to like services or service suppliers of any other Member.²⁷

Here, the passport requirement imposed by WHTI does not accord Canada National Treatment with respect to its tourism service providers. Although the passport requirement may apply equally to both U.S. and Canadian tourism service providers, the impact of the requirement nonetheless modifies the conditions of competition of the tourism industry in favor of the United States. Since 60% of American citizens do not have a valid passport, the WHTI passport requirement effectively erects a barrier that keeps a substantial number of U.S. citizens from visiting Canada's border towns and tourist destinations. The restriction on travel to Canada results in a corresponding benefit to the United States in the form of increased within its borders by U.S. nationals who might otherwise have traveled to Canada. Such a disparity in treatment conflicts with both the letter and spirit of Article XVII.

The United States, however, may try to argue that the WHTI program is permitted under the Annex On Movement of Natural Persons Supplying Services Under the Agreement. This argument is without merit. Although the Annex does effectively permit a Member to apply measures "necessary to protect the integrity of, and to ensure the orderly movement of natural persons across" its borders²⁸, such measures are only permitted if they are not applied in a manner that impairs the benefits under the terms of a specific commitment.²⁹ Here, the passport requirement does impair the benefits of Canada under Article XVII by giving the United States tourism industry a competitive advantage. Accordingly, the WHTI passport program still conflicts with GATS.

²⁷ *Id.*

²⁸ GATS, Annex On Movement Of Natural Persons Supplying Services Under The Agreement, 4.

²⁹ *Id.*

IV. The WHTI is not justified pursuant to the national security exception or a general exception in NAFTA, GATT or GATS.

The United States can not justify the WHTI passport requirement under the security exception or general exception found in NAFTA, GATT or GATS. Thus, the WHTI should still be struck down.

A. The WHTI is not necessary for protection of the essential security interests of the United States.

The security exception in GATS, GATT and NAFTA provides that nothing in the respective agreements shall prevent any Party or Member any action “which it considers necessary for the protection of its essential security interests[.]”³⁰ Here, however, the “thick border” initiatives outlined in the Joint Statement on September 11, 2007 (“September 11 Statement”) demonstrate that the WHTI is no longer necessary. The Canadian government has now promised to build new screening facilities at least 1 kilometer from 19 different border crossings with the United States, significantly improving the screening capacity for nationals entering the U.S. Moreover, aside from WHTI, nationals are still required to provide valid photo identification and a birth certificate. Thus, the significant new investment in screening facilities by Canada and the existing protocols for border crossing demonstrate that the U.S. can not rely on the security exception to justify WHTI.

B. The WHTI arbitrarily discriminates against Canada and operates as a disguised restriction on international trade.

The WHTI can not be justified under the general exceptions found in NAFTA, GATT or GATS. To qualify for the general exception, a given measure must not be applied “in a manner

³⁰ North American Free Trade Agreement art. 1202, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); General Agreement on Tariffs and Trade art. XXI, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947); GATS, Article XIV *bis* (1)(b).

which would constitute a means of arbitrary or unjustifiable discrimination between countries...”³¹ Here, the WHTI arbitrarily discriminates against the Canadian tourism industry. Because 60% of American citizens do not have valid passports, the WHTI will effectively reduce travel of American citizens to Canadian border towns and tourist destinations. Correspondingly, travel by U.S. citizens to tourist destinations within the United States will likely increase due to the WHTI. Such a discriminatory effect on Canadian tourism can not be justified under any of the general exceptions.

V. The APHIS user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII.

A. The APHIS user fees are custom user fees which violate NAFTA Article 310.

NAFTA Article 310 prohibits the United States, as a party to the agreement, from adopting any customs user fee other than the then-existing custom user fees outlined in the annex to Article 310, which are not applicable here.³² The APHIS user fees did not exist at the time the NAFTA agreement was enacted. Thus, the APHIS user fees violate Article 310.

B. The APHIS user fees are contrary to GATT Article I because they afford the United States an advantage not accorded to Canada.

Article I of GATT establishes the General Most-Favored Nation treatment that all parties to the agreement, including the United States and Canada, must accord each other. It states, in pertinent part, that in regards to customs duties and charges of *any kind* imposed or in connection with importation or exportation...any advantage, favour, privilege or immunity granted by any

³¹North American Free Trade Agreement art. 1201 U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, (1993); General Agreement on Tariffs and Trade art. XX, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947); GATS, Article XIV.

³²North American Free Trade Agreement art. 310.1, ann. 310.1, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.³³

Here, however, the APHIS user fees create a clear trade advantage for the United States in contravention of Article I. Every truck, commercial ship and rail car leaving Canada and entering the United States is subject to the APHIS fees. The same fees are not levied against ship, truck or rail-born cargo leaving the United States and entering Canada. Thus, by imposing the fees, the United States effectively increases the export costs of all U.S. bound Canadian goods, while retaining an immunity from such fees for its own exports and thereby creating a trade advantage not accorded to Canada.

The broad language of Article I also refutes any argument that the APHIS fees are not contemplated by the text. The article mandates that General Most-Favored-Nation treatment must be accorded to *any* kind of customs charges, including those that are merely “in connection with” imports or exports. Such sweeping language was clearly intended to cover disparities in a wide range of fees associated with international trade.

C. The APHIS user fees are contrary to GATT Article VIII because they can only be justified as an indirect protection of U.S. products and they conflict with the recognized need to reduce the number of charges.

Article VIII prohibits parties to GATT from applying any fees or charges in connection with imports, other than import and export duties, that represent an indirect protection to domestic products or “a taxation on imports or exports for fiscal purposes.”³⁴ Here, several aspects of the APHIS user fees strongly suggest that their purpose is to indirectly protect U.S.

³³ General Agreement on Tariffs and Trade art. I, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947) (emphasis supplied).

³⁴ *Id.* at art. VIII(1)(a).

products from Canadian competition. Rather than imposing the fee on only those vessels entering the U.S. with agricultural products, the United States imposes the fee on all vessels irrespective of their cargo. Air passengers arriving in the U.S. from Canada are also charged the fee regardless of whether they are carrying fruits and vegetables or whether they were previously processed through customs in Canada. Moreover, the fee applied to trucks can be paid on an annualized basis, further indicating that the APHIS fees have no correlation to agricultural quarantine and inspection. Thus, the broad application of the fee to all Canadian commercial transports and the lack of any selective application to agricultural cargo clearly demonstrate that the purpose of the fees has little or nothing to do with agricultural quarantine and inspection.

The fees also directly conflict with the needs outlined by the parties to GATT in Article VIII. Paragraph (b) of the article recognizes “the need for reducing the number and diversity of fees and charges” contemplated by Article VIII.³⁵ The text further acknowledges “the need for minimizing the incidence and complexity of import and export formalities” between the parties.³⁶ The implementation of the APHIS user fees conflict with both of these needs. In addition to adding yet another fee to the importation of Canadian goods to the U.S., every Canadian commercial vessel now faces an additional compliance hurdle to transporting their goods into the United States.

The United States is unable to justify the APHIS user fees under the exception for import and export duties in Article VIII, either. Although the text of Article VIII expressly excepts from its prohibitions import and export duties, there is no indication here that the APHIS user fees can be classified as “import and export duties.” To the contrary, the fees specifically relate to agricultural quarantine and inspection. The text also states that the prohibition against indirect

³⁵ *Id.* at art. VIII(1)(b).

³⁶ *Id.* at art. VIII(1)(c).

protection to domestic products applies to “[a]ll fees and charges *of whatever character.*”³⁷ Such broad language clearly expresses the intent of the parties to include a wide variety of fees within the scope of the rule, while limiting the import and export duty exception.

VI. The APHIS user fees can not be justified under the national security exception or a general exception in NAFTA, GATT or GATS.

If the court finds that the APHIS user fees are contrary to GATT and NAFTA, the United States will not be able to rely on the general or national security exceptions found in GATT, GATS and NAFTA.

A. The general exception of GATT, GATS and NAFTA does can not apply because the APHIS user fees are a disguised restriction on trade and are not a necessary sanitary measure to protect human, animal or plant health.

The general exception outlined in NAFTA Article 2101 and GATS provides an exception for measures taken by parties that may otherwise violate NAFTA provisions so long as they are necessary to protect human, animal, plant life or health.³⁸ The general exception in GATT is also expressly incorporated into the NAFTA provision and includes the parties’ further acknowledgement that Article XX(b) of GATT includes “environmental measures necessary to protect human, animal and plant life...”³⁹ The NAFTA text also expressly includes in its exception those measures “relating to health and safety and consumer protection.”⁴⁰ The APHIS user fees, however, can not be justified under any of the language relating to sanitary or phytosanitary considerations. While presumably imposed as agricultural and inspection user

³⁷ General Agreement on Tariffs and Trade art. VIII, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947) (emphasis supplied).

³⁸ North American Free Trade Agreement art. 2101, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); GATS, Article XIV.

³⁹ North American Free Trade Agreement art. 2101(1), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993)

⁴⁰ *Id.* at art. 2101(2)(d).

fees, the APHIS fees have little or no correlation to the protection of human, animal or plant health. The fees are imposed on airline passengers regardless of whether they are carrying fruits or vegetables or whether they have already been screened through customs at a Canadian airport. The fees are just as arbitrarily applied to commercial vessels. Ships entering the United States from Canada are subject to the fee regardless of their cargo and trucks can pay the fee annually, which strongly suggests there is no correlation between the fee and any need to inspect certain cargo. The arbitrary and broad application of the fee belies any attempt by the United States to justify the APHIS user fees on sanitary grounds or as necessary to protect human, animal or plant life.

Even if the court finds such a justification to be valid, however, the APHIS fees fail a further limitation of the general exception that they not be “applied in such a manner that would constitute...a disguised restriction on trade between the Parties[.]”⁴¹ Here, the APHIS fees are applied in just such a manner. Rather than applying the fee to only those commercial transports carrying cargo that present a sanitary hazard, the fees are applied to all vessels and, in the case of aircraft, are applied to both the aircraft itself and its passengers. Such an expansive fee system on all goods and service providers entering the U.S. from the United States will have an oppressive effect on Canadian exports to the United States. The APHIS fees are a thinly veiled method for restricting trade with Canada, and should not be permitted shelter under the auspices of the general exception.

B. The national security exception does not apply because APHIS user fees are not necessary for the protection of essential U.S. security interests.

The APHIS user fees are not justified under the national security exceptions found in

⁴¹ *Id.*

GATT, GATS or NAFTA. The national security exception in all three agreements states that “nothing in [NAFTA, GATT or GATS] shall be construed...to prevent any party from taking any actions that it considers necessary for the protection of its essential security interests.”⁴² Although the United States has made statements regarding the APHIS user fees that indicate a national security reason for their imposition, the facts do not support such a justification. For example, the APHIS fees are imposed on each rail car and truck in addition to a previously existing fee for “Customs and Border Protection.” Thus, any alleged national security justification for the APHIS fees would make them redundant with the apparent justifications for existing Customs and Border Protection fees. The previous existence of the Customs and Border Protection fees and the purpose implied by their description contradict any claim by the United States that the APHIS fees are “necessary” for the protection of essential security interests.

Moreover, the recent statements by Canadian and U.S. leaders belie the necessity of the APHIS fees on national security protection grounds. The statement by North American leaders at the 2007 Montebello North American Leader’s Summit directed leaders of both the U.S. and Canada to “develop mutually acceptable inspection protocols” to detect security threats such as “incoming travelers during a pandemic and from radiological devices.” The leaders directed their ministers to “develop mutually acceptable approaches to screening for radiological and other similar threats” and to “develop mutually acceptable approaches to screening people during a pandemic.” In accordance with these directives, the Canadian government announced the construction of 19 screening facilities at key border crossings with the U.S. Not only is the U.S.’s unilateral application of the APHIS fees contrary to the spirit of cooperation in these joint initiatives, the existence of these measures renders the APHIS user fees superfluous for

⁴² *Id.* at art. 2102(1)(b); General Agreement on Tariffs and Trade art. XXI, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947); GATS XIV bis.

protecting U.S. security interests. The bevy of coordinated initiatives currently being undertaken between the U.S., Canada and Mexico assure that all parties' essential security interest will be protected.

Even if the APHIS user fees are found to be “necessary” for the protection of U.S. national security interests, the U.S. must still demonstrate that the fees were imposed under one of three circumstances to utilize the security exception. Accordingly, the U.S. will likely argue that the APHIS fees were “taken in time of war or other emergency in international relations[.]”⁴³ This provision is inapposite to the facts here. Yet, the inclusion of the word “other” to modify the words “emergency in international relations” indicates that the parties intended the “time of war” language to also be equivalent to an emergency in international relations. Although here the U.S. suffered a terrorist attack on September 11, 2001 and engaged in subsequent foreign combat operations, the Canadian exemption on the APHIS fees was not removed until over five years after the attack. Such a delay in applying the measure hardly equates to the urgency indicated by the “emergency in international relations” language in the security exception. Other than the false statements made by some U.S. political candidates, there is no information that any of the September 11th hijackers entered the U.S. from Canada. Thus, the situation here does not fall under the security exception for measures taken in times of war and, since neither the general exception nor the national security exemption permit the U.S. to justify its APHIS user fees, the court should find that the U.S. has breached its treaty obligations towards Canada.

CONCLUSION

The Actions of Canada, in implementing the Fuel Export Charge is consistent with

⁴³See North American Free Trade Agreement art. 2102(1)(b)(ii), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); General Agreement on Tariffs and Trade art. XXI, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1947); GATS, Article XIV bis(1)(b)(iii).

NAFTA and GATT, and alternatively, is justified pursuant to the national security and general exceptions of NAFTA and GATT. Furthermore, the actions of the United States, chiefly the WHTI, and APHIS are contrary to NAFTA and unjustified under the national security and general exceptions to NAFTA and GATT.

Respectfully submitted,

Team 2008-05

February 19, 2008