

**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 # 2008-06A**

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## **QUESTIONS PRESENTED**

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

## **JURISDICTIONAL STATEMENT**

The Parties to this dispute, the United States and Canada, come before this Honourable Court, composed of a Chamber of three judges, pursuant to Articles 40(1) and 36(1) of the *Statute of the International Court of Justice*.<sup>1</sup> The Parties each agree to bring its actions and positions in conformity with the legal conclusions of the ICJ with respect to the questions submitted by Special Agreement between the Parties, as described in the *Compromis*.

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<sup>1</sup> *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 25 October 1945) [*ICJ Statute*].

## **STATEMENT OF FACTS**

In light of the tragic events of September 11, 2001, the United States Department of State (DOS) and the United States Department of Homeland Security (DHS) felt that it was necessary to develop and implement a plan to require all travelers, U.S. citizens and foreign nationals alike, to present a passport or other secure document or combination of documents that denote identity and citizenship when entering or re-entering the U.S. The Western Hemisphere Travel Initiative (WHTI) is the plan implemented for this purpose. This travel initiative is being implemented in two phases. The first phase was implemented as of January 23, 2007 and applied to all travellers arriving in the U.S. from within the Western Hemisphere by air. The second phase applies to all other modes of travel, including by land and by sea. As moving towards full WHTI implementation, DHS intends to end the routine practice of accepting oral declarations alone at land and sea ports of entry. By Summer 2008, U.S. and Canadian citizens will need to present a WHTI-compliant document or a government-issued photo ID, such as driver license, plus proof of citizenship, such as a birth certificate. The goal of WHTI is to strengthen border security and facilitate entry into the U.S. for U.S. citizens and legitimate international travelers. DHS and DOS are aware of Canada's concerns with regards to WHTI implementation (e.g., impact on free movement of persons, only 40% U.S. citizens are holders of passports, etc.) and they continue to work with Canadian officials to address that.

In addition, the potential for terrorist attacks against agricultural targets is increasingly recognized as a national security threat. As a preventive measure, on August 25, 2006 the United States Animal and Plant Health Inspection Service (APHIS) has re-evaluated its agricultural quarantine and inspection (AQI) activities at the U.S./Canada border. Given the increasing levels of trade between the two countries and the rising number of interceptions on the

U.S./Canada border of prohibited material, APHIS has established that Canada may no longer be exempt from paying user fees for inspections of commercial conveyances and international air passengers. This regulation is necessary to prevent the introduction of plant pests and diseases into the U.S. via conventional pathways or through bioterrorism.

As a result of joint efforts between U.S. and Canada to meet the security related action points in the Montebello Summit Joint Statement, on September 11, 2007 Canada agreed to spend \$1 billion dollars to put in effect a variety of border initiatives (i.e. screening facilities, erecting ground sensor towers along the U.S./Canada border, and install a radiological detection technology at all ports). On the same day, the Prime Minister's Office announced that an export tax will be placed on fuel transported by way of pipeline to U.S. equal to \$CND 25/barrel, in order to raise revenue to fund these border initiatives. Oil exporters are now required to register and submit monthly tax remittances, as well as apply for export permits for each transaction. Prime Minister Harper indicated that he had no intention of raising domestic taxes to pay for the costs developing its national security infrastructure and rather, stated that "those who benefit most from the actions being promised are the one's paying for the benefits." Canada inexcusably used the *Softwood Lumber Product Export Charge Act, 2006* (SLA 2006) as basis for establishing the Fuel Export Charge legislation.

## SUMMARY OF ARGUMENT

This Court should find that the Fuel Export Charge legislation imposes a tax and creates a restriction on petrochemical goods contrary to the requirements of NAFTA Chapter 6. The measure is designed exclusively to generate funds for fiscal purposes and cannot be justified under the general and national security exemptions provided by NAFTA Articles 2101 and 2102.

This Court should determine that the U.S. has not violated NAFTA Chapter 12 when it implemented the WHTI because the measure applies equally to both US and Canadian-citizen service providers and without impact on the cross-border trade services. Additionally, the WHTI measure is not contrary to NAFTA Chapter 16 because it is a necessary immigration measure intended to protect border security. In the alternative, if this Court finds the WHTI measure in violation of NAFTA, then it should conclude that the measure was proper because it was taken in a time of war and international emergency to ensure essential security interests of the U.S.

This Court should find that the U.S. APHIS is justified to remove the exemption from inspection for imported goods from Canada and collect user fees, which are not contrary to NAFTA Article 310, because many agricultural products intercepted at the U.S./Canada border are non-originating goods and they pose a high risk to the health of animals and plants in the U.S. Additionally, the APHIS user fees are not contrary to GATT Articles I and VIII because Canada is not being singled out for this and the services rendered are consistent with the fees that Canada has to pay. In the alternative, if the Court determines that APHIS user fees are in violation of NAFTA or GATT, then it should grant the national security exception or the general exception under NAFTA or GATT because the measure was necessary to protect human health and life against emerging threats such as agroterrorism.

## ARGUMENT

### **I. The Fuel Export Charge is contrary to NAFTA Articles 314, 604 and GATT Articles I and VIII.**

#### ***A. The Fuel Export Charge is contrary to NAFTA Articles 314 and 604 because it imposes an export tax on a good and specifically on a petrochemical good.***

Article 314 is incorporated into Article 604, which explicitly prohibits imposing an export tax on the sale of petrochemical goods, unless the same tax is placed on all NAFTA members, including the exporting party.<sup>2</sup> The term “petrochemical good” is classified under the Harmonized System and includes the fuel taxed under Canada’s Fuel Export Charge.<sup>3</sup>

In order to circumvent the application of Article 604, Canada must ensure that an equivalent tax is placed on fuel destined for the Canadian market.<sup>4</sup> However, when the Prime Minister’s Office announced that an export tax would be applied to fuel transported by way of pipeline, Prime Minister Harper made it clear that the government had no intention to apply an equivalent tax on fuel destined for the Canadian market. Consequently, the tax does not apply equally to all members contrary to Articles 314 and 604 of NAFTA.

#### ***B. The Fuel Export Charge violates Article VIII of GATT because the charge exceeds the cost of services rendered and Canada is prohibited from taxing exports for fiscal purposes.***

Article VIII of GATT requires that a charge imposed on exports to another party is limited in amount to the approximate cost of services rendered and does not amount to a tax on

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<sup>2</sup> *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 199, Can. T.S. 1994 No. 2, 32 I.L.M. 289, Chapter VI, Art. 604 [NAFTA].

<sup>3</sup> *Ibid.*, Art. 602(2); Statistics Canada, *Search for Commodities*, online: [http://www.statcan.ca/trade/scripts7/define\\_query\\_form.cgi/file.htm](http://www.statcan.ca/trade/scripts7/define_query_form.cgi/file.htm).

<sup>4</sup> NAFTA, Art. 604(b).

exports for fiscal purposes.<sup>5</sup> The GATT Panel in *United States-Customs User Fee* established a test for evaluating the requirements of Article VIII and held that to determine the costs of services rendered requires first, that the charge in question involve a “service rendered” and second, that the level of charge must not exceed the approximate cost of that service.<sup>6</sup> The Panel determined that “services rendered” under Article VIII:1(a) refers to “[...]government activities closely enough connected to the processes of customs entry that they might [...] be called a “service” to the importer in question.”<sup>7</sup> This requires that Canada charges the fee on the basis of the services it provides to the U.S. importers; however, no service is rendered to US importers purchasing fuel from the pipeline.

Even if the charge amounts to a service rendered within the meaning of Article VIII, it is clearly not in proportion to the cost of any service rendered. Canada intends to spend \$1 billion for the implementation of border initiatives and indicates that the export tax of \$CND 25/barrel will be imposed to support such initiative. However, Canada exports approximately 2.3 million barrels of oil to the United States per day.<sup>8</sup> The revenue generated on a daily basis amounts approximately to \$57.5 million/day and over \$20 billion/year. The difference between the \$1 billion dollars earmarked for border initiatives and the revenue generated from the tax

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<sup>5</sup> *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [*GATT 1994*]

<sup>6</sup> *United States Customs User Fee (Complaint by European Communities and Canada)*, (1988), GATT Doc. L/6264 – 35S/245, online: WTO<[http://www.wto.org/english/tratop\\_e/dispu\\_e/gt47ds\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm)>.[*United States – Customs User Fee*]

<sup>7</sup> *Ibid.*, at paras. 77 and 81.

<sup>8</sup> U.S., Energy Information Administration, *Official Energy Statistics from the U.S. Government*, Country Analysis Briefs, Canada, Oil (2007) online: <http://www.eia.doe.gov/emeu/cabs/Canada/Oil.html>.

amounts approximately to a \$19 billion dollar surplus per year. Therefore, the charge is clearly levied in excess of the approximate cost of services rendered contrary to Article VIII.

Article VIII further bars the levying of any tax or charge on the export of goods for fiscal purposes.<sup>9</sup> Tariffs and tolls imposed by Canada's energy regulatory body, the National Energy Board, already generate sufficient revenue to recover approved costs for pipeline usage, and fairly allocate charges to users in relation to the costs and benefits of different services.<sup>10</sup> Moreover, Prime Minister Harper himself declared that the Fuel Export Charge is a tax imposed for the sole purpose of raising revenue to finance border initiatives aimed at enhancing Canada's security infrastructure. Since the only purpose for collecting a tax on fuel exports is to generate revenue for fiscal purposes, the Fuel Export Charge violates Article VIII of GATT.<sup>11</sup>

***C. The Fuel Export Charge is contrary to GATT Article I because of its discriminatory effect.***

Article I of GATT applies to any charge imposed in connection with the exportation of a product and provides that any "advantage, favour, privilege or immunity granted" to one party cannot amount to more favourable treatment of that product vis a vis a like product destined for another party.<sup>12</sup> Although Canada sends over 99 percent of its oil exports to the U.S, oil is also exported by Canada to other countries.<sup>13</sup> Since Canada provides preferential exemption to all other parties, the Fuel Export Charge constitutes a breach of the obligation of non-discrimination of Article I:1.

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<sup>9</sup> *GATT 1994*, Art. VIII.

<sup>10</sup> National Energy Board. *The Regulation of Traffic, Tolls & Tariffs: Toll Design*, online: [http://www.neb.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/rgltntrffctllstrffs2007-eng.html#a\\_9](http://www.neb.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/rgltntrffctllstrffs2007-eng.html#a_9)

<sup>11</sup> Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, Report of the Panel adopted on April 22, 1998 (WR/DS56/R), at paras. 6.77-6.78

<sup>12</sup> *GATT 1994*, Art. I.

<sup>13</sup> *Supra* note 8; Statistics Canada. *Energy Statistics Handbook*, online <http://www.statcan.ca/english/freepub/57-601-XIE/57-601-XIE2007003.pdf> at p. 60.

***D. The Fuel Export Charge legislation creates export restrictions contrary to NAFTA Article 603, 309, and Article XI of GATT.***

When a restriction is maintained on a petrochemical good, Article 603 applies and NAFTA provides that this provision must be interpreted consistently with Article 309.<sup>14</sup> Article 309 is interpreted in light of GATT Article XI, which prohibits restrictions “[...] on the exportation or sale for export of any product.”<sup>15</sup> Under NAFTA Chapter 6, a “restriction” is defined as “any limitation, whether made effective through quotas, licenses, permits, minimum or maximum price requirements or any other means.”<sup>16</sup>

The export permit provisions amount to a restriction by imposing complex new rules governing the exportation to the United States of fuel accessed by way of Canada’s pipelines. The onerous administrative costs associated with implementing the tax remittance regime in accordance with the Fuel Export Charge legislation and the requirement to apply for permits for each transaction are unjustifiably onerous.

Furthermore, the SLA 2006 cannot serve as precedent for the legislation.<sup>17</sup> The SLA 2006 is a negotiated attempt between Canada and the United States to resolve a dispute involving the logging industry between the countries. The intent of the legislation is to influence the price level and impose volume restrictions on the trade of lumber when the price of the good falls below the agreed upon price level.<sup>18</sup> The history and the nature of the SLA 2006 is not analogous to the trade in fuel between the two countries. Whereas NAFTA clearly indicates that

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<sup>14</sup> *NAFTA*, Part Eight: Other Provisions, Notes at 29.

<sup>15</sup> *NAFTA*, Art. 309.

<sup>16</sup> *Ibid.*, Art. 609.

<sup>17</sup> *Softwood Lumber Export Charge Act, 2006*. S.C. 2006, c. 13.

<sup>18</sup> Canada, the Department of Foreign Affairs and International Trade, *Export and Import Controls: The Softwood Lumber Agreement – Background*, online: <http://www.international.gc.ca/eicb/softwood/SLA-background-en.asp>.

any type of export restriction on petrochemical goods is inconsistent with the agreement (subject to very narrow exceptions), restrictions on the export of lumber are provided for in NAFTA under Annex 301.3, which states that the restriction on goods does not apply to controls by Canada on the export of logs.<sup>19</sup> NAFTA prescribes unbiased and transparent administrative procedures, and prohibits the kind of restrictions imposed on petrochemical goods contemplated in the Fuel Export Charge, which are contrary to Articles 309, 603, and GATT Article XI.

**II. The Fuel Export Charge cannot be justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI and cannot be maintained under NAFTA Articles 315 and 605.**

***A. The Fuel Export Charge is contrary to NAFTA Articles 315 and 605 and cannot be justified under NAFTA Article 2102 and GATT Article XX.***

NAFTA Article 605 provides that Canada can only restrict petrochemical exports by first establishing a justification under GATT Article XX and second, if *all* the following conditions apply: (a) exports as a percentage of total Canadian supply do not fall; (b) Canada does not charge a higher price to the United States by means of taxes, licenses, minimum prices or any other regulation; and (c) normal supply channels cannot be disrupted.<sup>20</sup>

In order to rely on GATT Article XX(g) and NAFTA Article 2101, Canada must demonstrate that the Fuel Export Charge is a measure “relating to the conservation of an exhaustible natural resource.”<sup>21</sup> In *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, the Panel held that “relating to” conservation within the meaning of Article XX(g) of GATT required that the measure must be “primarily aimed” at the conservation of an

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<sup>19</sup> NAFTA, Annex 301.3.

<sup>20</sup> NAFTA, Art. 605.

<sup>21</sup> GATT 1994, Art. XX(g).

exhaustible natural resource.<sup>22</sup> While fuel may constitute an “exhaustible natural resource” within the meaning of GATT, the Fuel Export Charge is not a measure aimed at or in any way related to the conservation of fuel. Rather, Canada has explicitly stated that the tax is being applied for the sole purpose of raising revenue to fund its border security initiatives. The measure is arbitrary and discriminatory and cannot be justified under the general exceptions.

Furthermore, even if the measure can be sustained under GATT Article XX(g) or another enumerated exception, the Fuel Export Charge is inconsistent with Article 605, which provides that restrictions on exports cannot be maintained on exports through the imposition of an export price higher than the price that is charged for the good domestically.<sup>23</sup> Since the charge places higher price on fuel destined for the US market by way of taxation, regulatory measures and export permit requirements, then the restriction cannot be upheld under Article 605.

***B. The Fuel Export Charge legislation cannot be justified on the basis of national security exemption under Articles 607 and 2102 of NAFTA or Article XXI of GATT.***

Article 607 limits Canada from invoking the broad exception of Article 2101 and Article XXI of GATT as they apply to basic petrochemical goods. In order to invoke this exemption, the measures in question must be “necessary” to “fulfill a critical defence contract” or “supply a military establishment.” The term necessary has come to be interpreted as “least trade restrictive” under GATT Article XX,<sup>24</sup> although what constitutes a measure sufficient to establish it as “necessary” under the national security exemption has not been explicitly defined.

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<sup>22</sup> *U.S.-Canada Free Trade Agreement, Canada’s Landing Requirement for Pacific Coast Salmon and Herring*, CDA-89-1807-01 (Panel Report), 16 October 1989, 1989 FTAPD LEXIS 6, para. 7.16.

<sup>23</sup> *NAFTA*, Art. 605.

<sup>24</sup> *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body adopted on 10 January 2001, WT/DS161/AB/R; WT/DS169/AB/R. online: WTO [http://docs-online.wto.org/gen\\_search/asp](http://docs-online.wto.org/gen_search/asp). [Korea Beef]

Nevertheless, Canada cannot defend its measure on the basis of national security because first, the Fuel Export Charge is not necessary to fulfill Canada's customs border initiatives and second, the border initiative is not the same, by definition, or in effect, to supplying a military establishment or fulfilling a critical defence contract. Therefore, Canada's Fuel Export Charge should not be exempted under Article 607.

### **III. The WHTI is not contrary to NAFTA Chapters 12 and 16 or GATS.**

#### ***A. The WHTI is not contrary to NAFTA Chapter 12 because the measure is non-discriminatory in nature and it would not impact the cross-border trade in services.***

Chapter 12 sets out a comprehensive regime to govern trade and investment in the services sectors. Under Article 1202, NAFTA extends to service providers throughout North America the basic obligation of national treatment.<sup>25</sup> Thus, a NAFTA country must treat service suppliers of the other NAFTA countries no less favorably than it treats its own service providers in "like circumstances."<sup>26</sup> NAFTA also obligates a party to extend "most-favored-nation" treatment to North American service providers.<sup>27</sup> Under these circumstances, each NAFTA country must accord service suppliers of either of the other two countries treatment no less favorable than it accords, in like circumstances, to service providers of any country.<sup>28</sup>

In order to deal with the issue of regulatory-based differences in a "like circumstances" context, the WTO Panel accepted that differential treatment for legitimate regulatory objectives related to safety was valid.<sup>29</sup> It further provided that "such differential treatment should be no greater than necessary for legitimate regulatory reasons such as safety, and that such treatment be

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<sup>25</sup> *NAFTA*, Art. 1202.

<sup>26</sup> *Ibid.* Art. 1202(1).

<sup>27</sup> *Ibid.* Art. 1203.

<sup>28</sup> *Ibid.*

<sup>29</sup> *In The Matter of Cross-Border Trucking Services (Complaint by Mexico) (2001)*, USA-Mex-98-2008-01, (Panel Report), online: WTO <[http://docs-online.wto.org/gen\\_search/asp](http://docs-online.wto.org/gen_search/asp)>.

equivalent to the treatment accorded to domestic service providers.”<sup>30</sup> In this case the WHTI provisions are equally applicable to both US and Canadian-citizens service providers. They all have to provide the same documentation as proof of their citizenship.

Canada’s concern is that the measure would impact cross-border trade in services by requiring Canadian-citizen service providers to have passports for on-site visits, meetings, negotiations or provision of any type of on-site services in the territory of the US, while US-citizen service providers would not be required to have passports to provide such on-site services within the US.<sup>31</sup> However, this is not a valid concern because the measure is necessary to reduce security vulnerabilities at the border.<sup>32</sup> Also, while the US-citizen service providers are exempt from having passports when they are on US soil, they would be required to have passports upon return from meetings that take place outside US territory. Also, the measure will not impact the cross-border trade services because DOS and DHS plan to upgrade and bring new technology to be used with the passport card and other documents. These upgrades would help reduce waiting time at the border while providing a means to effectively verify identity and citizenship.<sup>33</sup>

***B. The WHTI is not contrary to NAFTA Chapter 16 because the measure is designed to ensure border security and it would not impact the free movement of people.***

Chapter 16 of NAFTA reflects the desire of preserving national autonomy and border

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<sup>30</sup> *Supra* note 29.

<sup>31</sup> Edward Hasbrouk, *et. al.*, *Comments on USCBP-2006-0097: Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry from Within the Western Hemisphere* (25 September 2006), online: The Identity Project <<http://hasbrouck.org/IDP/IDP-WHTI-comments.pdf>>.

<sup>32</sup> *US delays passport rules for Canadian border* (18 January 2008), online: Canada News <[http://ca.news.yahoo.com/s/afp/080118/canada/us\\_canada\\_immigration\\_travel\\_security\\_1](http://ca.news.yahoo.com/s/afp/080118/canada/us_canada_immigration_travel_security_1)>.

<sup>33</sup> Richard M. Stana, *Observations on Implementing the Western Hemisphere Travel Initiative* (20 December 2007), online: U.S. Gov. Accountability Office (GAO) <<http://www.gao.gov/new.items/d08274r.pdf>>.

security while at the same time encouraging liberalization of trade.<sup>34</sup> Article 1607 of NAFTA further provides that “[...] no provision of this Agreement shall impose any obligation on a Party regarding its immigration measures.”<sup>35</sup> The WHTI measure is to implement section 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA),<sup>36</sup> which requires travelers entering the US to present a passport, or combination of documents that are “deemed [...] to be sufficient to denote identity and citizenship.”<sup>37</sup> It is designed to crack down on illegal declarations by people who falsely claim to be citizens when they arrive at the US/Canada border, and to prevent dangerous individuals from entering the country using fraudulent identification.<sup>38</sup> This is a necessary immigration measure planned to protect border security, which is permissible under Article 1607 of NAFTA.

Canada argues that the measure is contrary to Chapter 16 of NAFTA because it restricts the free movement of people and it limits the free movement of goods and services. Requiring a valid passport upon entry to US, does not deny US-citizens or Canadian-citizens the ability to travel to and from US, but just to provide sufficient proof of identity and citizenship.<sup>39</sup> Furthermore, it is our position that NAFTA “did not seek to harmonize [the Parties’] immigration regimes or to create a common labor market or passport union such as the European

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<sup>34</sup> Melinda McGehee, *Using Immigration as a protectionist mechanism while promoting free trade*, 8 L. & BUS.REV.AM. 667 (2002).

<sup>35</sup> NAFTA, Art. 1607.

<sup>36</sup> Pub.L. 108-458, 118 Stat. 3638.

<sup>37</sup> *Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere*, 72 C.F.R. §122 (2007).

<sup>38</sup> Homeland Security, News Release, *WHTI Land and Sea Notice of Proposed Rulemaking Published*, (20 June 2007).

<sup>39</sup> *Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere – Final Rule*, 71 C.F.R. §226 (2006).

Union did.”<sup>40</sup> Chapter 16 of NAFTA was designed just to facilitate trade in goods and services, and the WHTI measure does not intend to impact that.

Canada also states that the WHTI will reduce travel of US-citizens to Canada because only 40% of American citizens have valid passports. While recognizing that this rule may have an impact on tourism, the records show that most air travelers make their plans in advance of travel date and already possess a passport.<sup>41</sup> In addition, travelers in need of passport may request an expedite processing for an additional fee or may use the other alternative documents designated in the rule by the Secretary of DHS to sufficiently establish identity and citizenship at the border.<sup>42</sup> In the event that this Court finds the WHTI measure contrary to Chapter 12 and 16, then the measure is justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.

#### **IV. The WHTI is justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.**

##### ***A. The WHTI is permissible under Article 2101 of NAFTA and Article XX of GATT because is a necessary initiative as part of tightening border security.***

Article 2101 incorporates GATT Article XX into NAFTA. GATT XX(b) justifies measures “necessary to protect human, animal or plant life or health.”<sup>43</sup> The test established in *US-Gasoline* provides that a Party invoking the exemption under Article XX(b) has the burden to prove the following elements: (1) the policy in respect of the measures falls within the range of policies designed to protect human, animal or plant life or health; (2) the inconsistent measures

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<sup>40</sup> *Supra* note 34.

<sup>41</sup> *Supra* note 39 at pg. 23.

<sup>42</sup> *Ibid.* pg. 13.

<sup>43</sup> *GATT 1994*, Art. XX(b)

for which the exception was being invoked were necessary to fulfill the policy objective; and (3) the measures were applied in conformity with the requirements of the chapeau of Article XX.<sup>44</sup>

The adoption of these measures is necessary to protect the lives of Americans. As the events of September 11, 2001 have shown, national security is more than military territorial integrity and traditional concepts of national sovereignty. It is also about threats to economic security, environmental security and human security as they become targets of terrorism. Furthermore, there are no other reasonably available alternatives to this measure.<sup>45</sup>

Canada suggests that the manner in which the program is implemented violates NAFTA and that there are other border measures and identification requirements available for the US to apply. Canada's concern is that WHTI, by requiring a passport or equivalent document of every person coming into the United States, is going to substantially impede the flow of trade and tourism across ports of entry. These concerns are based on faulty assumptions: first, passports or an approved equivalent will significantly slow down traffic at the border; second, that security is sufficiently achieved by retaining random checks of vehicles and their passengers at land and airport customs inspection. However, with the WHTI, people and goods that should make it through the system in an efficient manner are more likely to do so because it takes away from the border inspector the need to question and review in depth (and never verify) the authenticity of thousands of varieties of birth certificates (about 50,000 in the US today) and driver licenses (about 240 varieties today) down to a passport or equivalent that verifies – at a much lower rate

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<sup>44</sup> *U.S. – Standards for Reformulated and Conventional Gasoline (Complaint by Venezuela)* (1996), WT/DS2/AB/R (Appellate Body Report), online: WTO <[http://docs-online.wto.org/gen\\_search/asp](http://docs-online.wto.org/gen_search/asp)>.

<sup>45</sup> *EC – Measure Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2001), WT/DS135/AB/R (Appellate Body Report), online: WTO <[http://docs-online.wto.org/gen\\_search/asp](http://docs-online.wto.org/gen_search/asp)> at para. 170.

of fraud – citizenship and identity.<sup>46</sup> In addition, these measures do not constitute a means of arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade because the passport requirement is applied equally to both US and Canadian citizens. Therefore, the WHTI is justified under NAFTA Article 2101.

***B. The WHTI is permissible under Article 2102 of NAFTA and Article XXI of GATT because the measure is necessary for the protection of its essential security interests.***

Article 2102 of NAFTA incorporates Article XXI of GATT and provides that:

“Nothing in this Agreement shall be construed [...] (b) to prevent any contracting party from taking any action which *it considers necessary* for the protection of its essential security interests [...] (iii) taken in time of war or other emergency in international relations.”<sup>47</sup>

The WHTI is necessary for the protection of US essential security interests because the passport is the manner in which U.S. as a nation can better assure that the people who seek to come here do so for legitimate reasons. A top priority in border security must then be to assure practical security measures at our ports of entry. The objectives of NAFTA to facilitate commerce do not come at the expense of attaining border security. In fact, with efficient and streamlined security, privacy and commerce are both enhanced.

The 9/11 experience shows that terrorists study and exploit the U.S. security vulnerabilities at the border. The U.S. national security depends on the WHTI to fulfill the first and foremost requirement of border security - to provide security at our borders against terrorist

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<sup>46</sup> United States. U.S. Senate Committee on Finance. “*Border Insecurity, Take Two: Fake ID’s Foil the First Line of Defense.*” Testimony of Janice L. Kephart, August 2, 2006. online: <http://www.senate.gov/~finance/hearings/testimony/2005test/080206jk>.

<sup>47</sup> GATT 1994, Art. XXI.

entry. Therefore, WHTI is justified under the national security exception as a measure taken in a time of war and international emergency to ensure essential security interests of the U.S.

**V. The APHIS user fees are not contrary to NAFTA Article 310 and GATT Articles I and VIII.**

***A. The APHIS user fees are permissible under Article 310 of NAFTA because many agricultural products intercepted at the US/Canada border are “non originating” goods.***

Under Article 310 of NAFTA, “no Party may adopt any customs user fee [...] for originating goods.”<sup>48</sup> An “originating good” is a “good wholly obtained or produced entirely in the territory of one or more of the Parties.”<sup>49</sup> Due to the increased level of trade between US and Canada,<sup>50</sup> APHIS found it necessary to re-evaluate its AQI activities at the US/Canadian border and discovered numerous interceptions of unauthorized material produced in regions other than Canada. Some of the “non-originating” goods intercepted included: untreated Argentine citrus, tropical fruits from Asia, and other third-country origin goods such as meat, live birds, and plants in soil.<sup>51</sup> Canada is legally required to label the origin of re-exported fruits and vegetables to the US; however, occasionally these commodities are misrepresented at the US/Canada border as having a Canadian origin.<sup>52</sup> Therefore, interceptions of such commodities that may enter the US have to be done at the border. In addition, since both agricultural and non-agricultural products from third countries may easily be commingled with “originating” Canadian goods, it is necessary that user fees apply universally to all commercial shipments from Canada irrespective of the cargo.

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<sup>48</sup> NAFTA, Art. 310.

<sup>49</sup> NAFTA, Art. 401.

<sup>50</sup> U. S. Animal and Plant Health Inspection Service, *Preliminary Economic Analysis for Agricultural Inspection and AQI User Fees Along the U.S./Canada Border*, Docket No. 06-096-1, pg. 4 (10 August 2006).

<sup>51</sup> *Ibid.* at pg. 5.

<sup>52</sup> *Ibid.*

***B. The customs user fee is a permissible SPS measure under NAFTA because of the risks associated with the Canadian agricultural products imported into the US.***

A party may “adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory.”<sup>53</sup> APHIS measure complies with the U.S. Plant Protection Act<sup>54</sup> and the U.S. Animal Protection Act<sup>55</sup>, which authorize the implementation of policies designed to prevent the introduction and spread of plant pests and diseases of livestock. APHIS studies show that an increased number of prohibited materials at the US/Canada border present a high risk to the health of animals and plants.<sup>56</sup> Among these are the exports of citrus to US, which carry exotic flies that may threaten the local US farms,<sup>57</sup> as well as wood-boring insects that may affect the commercial lumber industries.<sup>58</sup>

A formal “scientific-risk assessment” justify the customs user fee under NAFTA;<sup>59</sup> however, because APHIS is attempting to promulgate a safety regulation that is less stringent than the international standards, it does not have the burden of proving that its regulation has a “scientific basis.”<sup>60</sup> Even if the Court determines that APHIS regulations are more stringent than

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<sup>53</sup> NAFTA, Art. 712.

<sup>54</sup> 7 U.S.C. §7701 (2000).

<sup>55</sup> 7 U.S.C. §8301 (2002).

<sup>56</sup> *Supra* note 50 at pg. 13.

<sup>57</sup> *USDA Announces More Inspections, User Fees for Canadian Imports* (5 September 2006), online: The American Society for Quality <[www.asq.org](http://www.asq.org)>.

<sup>58</sup> *Ibid.*

<sup>59</sup> Letter from Kendell W. Keith, et. al., (22 November 2006), *Re: Docket No. APHIS-2006-0096 – Agricultural Inspection and AQI User Fees Along U.S.-Canada Border*, online: <<http://www.regulations.gov>>.

<sup>60</sup> Richard D. White & Lloyd Harbert, *Sanitary and Phytosanitary (Food Safety and Animal/Plant Health) Provisions*, online: Public Citizen <<http://www.citizen.org/documents/issue13.pdf>>.

the international standards, it should find that the measure may be provisionally adopted until APHIS is able to complete all the necessary risk assessments.<sup>61</sup>

***C. The customs user fee is not contrary to GATT Articles I because the measure is not discriminatory in nature.***

Article I of GATT prohibit discrimination among “like products” originating in or destined from different countries.<sup>62</sup> The treatment must be no less favorable than the “most favorable treatment” accorded by such state to any like goods of the party of which it forms a part.<sup>63</sup> The essence of the non-discrimination obligations is that the “like products” should be treated equally, irrespective of their origins.<sup>64</sup> The APHIS rule does not establish any news user fees and Canada is not being singled out for this. The same user fees are already applied to commercial conveyances from every other nation (including Mexico<sup>65</sup>) arriving at US customs.<sup>66</sup> Thus, the measure is not discriminatory in nature.

***D. The customs user fee is not contrary to GATT Article VIII because the measure is limited in amount to the approximate costs of services rendered.***

Article VIII of GATT requires that the charge must first involve a ‘service’ rendered, and then the level of the charge must not exceed the approximate cost of that ‘service’.<sup>67</sup> APHIS user fees entail verification of permits and information on produce types, quantities and origins, as

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<sup>61</sup> NAFTA, Art. 715(4).

<sup>62</sup> GATT 1994, Art. I; See also, *Canada Certain Measures Affecting the Automotive Industry (Complaint by the European Communities and Japan)* (2000), WT/DS139/AB/R (Appellate Body Report) online: WTO <[http://docs-online.wto.org/gen\\_search/asp](http://docs-online.wto.org/gen_search/asp)>.

<sup>63</sup> *Ibid.*

<sup>64</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Complaint by the United States)* (1997), WT/DS27/R/USA (Panel Report), online: WTO <[http://docs-online.wto.org/gen\\_search/asp](http://docs-online.wto.org/gen_search/asp)>.

<sup>65</sup> *User Fees for certain international services*, 7 C.F.R. §354.3 (amended 2006).

<sup>66</sup> *Supra* note 50 at pg. 16.

<sup>67</sup> *Supra* note 6.

well as cargo inspections.<sup>68</sup> The projected user fee revenues for 2007 are about \$78 million.<sup>69</sup> The indirect costs associated with the rule are estimated at \$6.3 million,<sup>70</sup> and staff expenditure at \$68.5 million.<sup>71</sup> Any excess will be used to rebuild the AQI reserve balances for various services.<sup>72</sup> Thus, the services rendered would be consistent with the fees paid. Even if the APHIS user fee is contrary to NAFTA Article 310 and GATT Articles I and VIII, Articles 2101 of NAFTA and XX(b) of GATT may provide an exemption.

**VI. The APHIS user fees are justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.**

***A. The APHIS user fees is permissible under Articles 2101 of NAFTA and XX(b) of GATT because it was implemented to protect the life and health of US citizens.***

The regulation is a SPS measure intended to reduce the risks associated with introduction of pest and diseases into the US. The ultimate impact would be a lower likelihood of pest or disease introduction and establishment, and a lower likelihood of crop losses and eradication costs associated with invasive pests or diseases. Therefore, the charge is justified because is intended to protect public health from dangerous cargo and these are legitimate policy reasons.

***B. The APHIS user fees is permissible under Articles 2101 of NAFTA and XX(b) of GATT because its implementation was necessary to protect human life and health.***

The user fee falls under the protected policies of Article XX(b) if they meet the requirement of “necessity.”<sup>73</sup> The WTO Panel held that “it was not the necessity of the policy goal that was to be examined,” but rather, to examine whether the restriction itself is necessary to

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<sup>68</sup> *Supra* note 57.

<sup>69</sup> *Supra* note 50 at pg. 8.

<sup>70</sup> *Ibid.* pg. 11.

<sup>71</sup> *Ibid.* pg. 10.

<sup>72</sup> U.S. Animal and Plant Health Inspection Service, *Agricultural Inspection and AQI User Fees Along the U.S./Canada Border – Interim Rule*, Docket No. 2006-0096, pg. 7 (25 August 2006).

<sup>73</sup> *Supra* note 45.

effectuate the desired policy outcome. A restriction would be considered “necessary” when there are no alternative measures available to it.”<sup>74</sup> APHIS has identified four possible alternatives to the rule, but none of which would accomplish the objectives of the rule and reduce the risks cited.<sup>75</sup> One alternative is not to make any changes to the current regulations; however, due to increased number of interceptions of unauthorized material, this rule is necessary in order to lessen the risks of introduction of plant and animal diseases, and recover the costs of inspection. A second alternative is to limit the inspections to commercial conveyances and not to include international passengers entering the US from Canada. Inspections demonstrated that air passengers from Canada represent an important pest pathway; therefore, they have to be charged as well. A third alternative would be to only charge the user fees for inspections of commercial conveyances transporting agricultural goods; however, all conveyances need to be inspected since solid wood packing material could be a pathway to diseases, and restricted non-agricultural products from third countries may be commingled with Canadian products.<sup>76</sup> A fourth alternative would be to develop user fees specific to inspections of goods from Canada, but this would cause confusion and inconsistency with the other users. Therefore, the user fee implementation is necessary because there are no other alternatives available.

***C. The APHIS user fee is permissible under Articles 2101 of NAFTA and XX(b) of GATT because it is not an arbitrary discrimination on trade.***

The requirements of the chapeau of Article XX of GATT are that a measure should not be applied in a manner, which would constitute arbitrary or unjustifiable discrimination or a

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<sup>74</sup> *Supra* note 45.

<sup>75</sup> *Supra* note 50 at pg. 17.

<sup>76</sup> *Supra* note 50 at pg. 19.

disguised restriction on trade.<sup>77</sup> This has been interpreted to refer to due process concerns such as notice and the opportunity to be heard.<sup>78</sup> APHIS published the interim rule and allowed time for comments; therefore, all the procedural requirements were met.

***D. The customs user fee is permissible under Articles 2102 of NAFTA and XXI of GATT because the measure is necessary for the protection of its essential security interests.***

The nature of the national security exception is a subjective standard for assessing the necessity of a measure under Article XXI.<sup>79</sup> This subjective reading of Article XXI is also supported by comments made by WTO members that “every country must be the judge in the last resort on questions relating to its own security.”<sup>80</sup> The events of September 11<sup>th</sup> demonstrated that both weak states and non-state actors could pose a great danger to our national interests.<sup>81</sup> Since the war against terrorism is of uncertain duration, as a matter of common sense and self-defense, the U.S. needs to act against such emerging threats continuously and before they are fully formed.<sup>82</sup> One potential harm recognized as an essential national security threat is the terrorist attacks against agricultural targets. Agroterrorism is defined as the deliberate introduction of an animal or plant disease with the goal of generating fear, causing economic losses, and undermining social stability.<sup>83</sup> The goal of agroterrorism is not only to kill animals or plants, but also to place human health in risk through contaminated food.<sup>84</sup>

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<sup>77</sup> *Supra* note 45.

<sup>78</sup> *Supra* note 22.

<sup>79</sup> P. Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 Duke L.J. 1277 at 1285 (WL).

<sup>80</sup> *Ibid.* at 1286.

<sup>81</sup> White House, News Release, *The National Security Strategy of the United States of America* (September 2002), at pg. 4, online: <[www.whitehouse.gov/nsc/nss.html](http://www.whitehouse.gov/nsc/nss.html)>.

<sup>82</sup> *Ibid.*

<sup>83</sup> Jim Monke, *Agroterrorism: Threats and Preparedness* (12 March 2007), online: <<http://www.fas.org/sgp/crs/terror/RL32521.pdf>>.

<sup>84</sup> *Ibid.*

In the international arena, it is recognized that a state could not be obligated to make its management regime dependent on cooperation with another state and it should not have to rely on foreign officials for enforcement.<sup>85</sup> In spite of the cooperation between the two governments, the Canadian exports continue to represent a health risk to the citizens of US.<sup>86</sup> Thus, US cannot be expected to leave the national security of its citizens subject to the discretion of Canadian officials.

### **CONCLUSION**

For these reasons, the United States Government respectfully requests this Court to find:

- a) That Canada violated its treaty obligations under NAFTA or GATT by imposing the Fuel Export Charge.
- b) That the U.S. did not violate its treaty obligations under NAFTA or GATT by imposing the WHTI measures.
- c) That the U.S. did not violate its treaty obligations under NAFTA or GATT by imposing the APHIS user fees.

Submitted this 19<sup>th</sup> day of February, 2008.

\_\_\_\_\_/s/\_\_\_\_\_

Counsels for the United States  
Team 2008-06A

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<sup>85</sup> *Supra* note 78.

<sup>86</sup> *Supra* note 50 at pg. 20.