

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 # 2008-06R

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STATEMENT OF FACTS

Western Hemisphere Travel Initiative (WHTI):

In April 2005 U.S. Department of State and the U.S. Department of Homeland Security proposed WHTI. This initiative requires all travellers to carry a valid passport or other secure documentation when travelling to the U.S. from within the Western Hemisphere. WHTI currently applies to air travellers, but the second phase expects to be implemented for all other modes of travel by summer of 2008. Previously, Canadian and American citizens have been able to cross the border into the other territory with valid photo identification and a birth certificate.

Animal and Plant Health Inspection Service (APHIS):

On Aug 25, 2006 APHIS announced an interim rule that removed Canada's exemption from agricultural quarantine and inspection user fees on commercial shipments entering the U.S. On January 1, 2007 air passengers arriving in the U.S. from Canada each began paying \$USD 5 regardless of whether they are travelling with agricultural products or whether they were processed through customs and immigration at a Canadian airport. An additional \$USD 70.50 is also charged per aircraft. Both fees are incorporated into the price of the air ticket. The final phase took effect on June 1, 2007, after which time each rail car was charged \$USD 7.75 and each truck charged \$USD 10.75 or an annual user fee of \$USD 205 for entering the U.S.

Fuel Export Tax:

As part of the Security and Prosperity Partnership of North America, Prime Minister Harper (Canada), President Bush (U.S.) and President Calderón (Mexico) issued a Joint Statement at the conclusion of the 2007 Montebello North American Leaders' Summit. The leaders mutually agreed that the "Smart and Secure Borders" (SSB) initiative was a priority area for the next year. SSB promotes North American cooperation to ensure effective border strategies that minimize security risks, while facilitating the efficient and safe movement of goods, services and people.

Following the Joint Statement, a number of the candidates seeking Republican and Democratic Party nominations for U.S. President made verbal statements in the media that Canada must take security of North America seriously and made false statements that the September 11, 2001 (9/11) hijackers had entered the U.S. from Canada. Immediately, there was a firestorm of news reports on the issue. U.S. Secretary of Homeland Security, Michael Chertoff, U.S. Vice-President, Dick Cheney and Canada's Minister of Public Safety, Stockwell Day immediately started discussions with a view to making an announcement that plans had been developed to meet the security-related action points in the Montebello Summit Joint Statement. The *in camera* negotiations were said to be hot and newspaper articles reported 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 U.S. issued a Joint Statement that Canada would spend \$1 billion towards a variety of these border initiatives, including building screening facilities at least 1 km from various border crossings, erecting ground sensor towers along the border, and installing advanced radiological detection technology at all its ports. That same day, the Prime Minister's Office announced an export tax on fuel transported by way of pipeline to

raise money for the infrastructure projects and technology purchases that it had agreed to make. The announcement rejected allegations of Canada as a source of any known threat to the U.S. and said Canada was taking steps to ensure that it will not be perceived in the future as a source of any threat to the security of its friends. The tax was imposed so Canada could fulfill its obligations while ensuring that those who benefit most from the promised actions (i.e. the U.S.) pay for the benefit. The Fuel Export Charge legislation used the *Softwood Lumber Product Export Charge Act, 2006* as a precedent, and requires exporters of fuel by pipeline to register for tax purposes, file monthly returns, remit export taxes on a monthly basis, and apply for export permits for each transaction.

QUESTIONS PRESENTED

Claims Against the United States -- WHTI & APHIS:

1. Whether the implementation of WHTI by the United States is contrary to NAFTA Chapters 12 and 16 and GATS Article XVII?
2. Whether the implementation of the APHIS user fees by the United States contravenes NAFTA Article 310 and GATT Articles I and VIII?
3. Whether the United States can justify WHTI pursuant to the general exception or national security exception in NAFTA or GATT or GATS?
4. Whether the United States can justify APHIS user fees pursuant to the general exception or national security exception in NAFTA or GATT or GATS?

Claims Against Canada -- Fuel Export Charge:

1. Whether the implementation of the Fuel Export Charge by Canada is contrary to NAFTA Articles 314, 315, 604 and 605 or GATT Articles I, VIII and XI?
2. Whether Canada can justify the Fuel Export Charge pursuant to the general exception or national security exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI?

JURISDICTIONAL STATEMENT

The Parties to this dispute, Canada and the U.S., submit to the jurisdiction of the International Court of Justice (ICJ), composed of a Chamber of three judges, pursuant to Articles 40(1) and 36(1) of the *Statute of the International Court of Justice*.¹

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

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SUMMARY OF ARGUMENT

WHTI

Imposing passport requirements for Canadian and not U.S. domestic service providers violates the national treatment principle contained in NAFTA Article 1202 and GATS Article XVII. WHTI also violates NAFTA Articles 1601, 1602 and 1603 as it will restrict the movement of people and trade. The reduced number of cross-border visits into Canada are due to the costs associated with obtaining a passport and border delays. Thus, the decreased travel into Canada will disproportionately affect Canadian industries.

APHIS

The rule removing Canada's exemption from APHIS user fees violates NAFTA Article 310 as it constitutes a customs user fee on Canadian originating goods. Re-exported goods from Canada pose a minimal threat to U.S. agrosecurity as they make up a small amount of U.S. agricultural imports. Furthermore, the fees are too broad as they apply to all commercial vehicles and airline passengers, regardless of whether they are travelling with agricultural products or being processed by customs at a Canadian airport. NAFTA Article 712 is also breached by APHIS user fees as the measure cannot be argued as "necessary" without a formal scientific assessment of ecological or biological threats.

APHIS user fees do not correspond with the services rendered, breaching GATT Article VIII(1). Absent any assessment of program performance or expenses for which these fees claim

to be collected, APHIS user fees artificially inflate the prices of Canadian goods compared to local producers, constituting an indirect protection of U.S. commercial products.

WHTI and APHIS are Not Justified under the General and National Security Exceptions:

WHTI and APHIS cannot be justified under a general exception as there are more effective and less restrictive means available to maintain a balance between facilitating trade and ensuring safe borders. Similarly, WHTI & APHIS cannot be justified pursuant to the national security exception because the U.S. is not presently at “war”, or facing an emergency in international relations, despite the U.S.’ preoccupation with heightened security since the attacks of 9/11. An objective approach should be taken to prevent abuse of this exception to bar states from easily circumventing the purpose and objectives of NAFTA, GATT and GATS.

Fuel Export Charge (FEC)

The FEC breaches NAFTA Articles 314 and 604 and GATT Articles I and VIII, but is upheld under the national security exemption and NAFTA Article 607. False allegations made publicly against Canada by U.S. Presidential candidates created an emergency that required Canada to immediately engage in “hot” negotiations with the U.S. This subsequently triggered Canada’s essential security interests under NAFTA Article 2102 by threatening its relationship with its strongest trading partner. Canada was forced to implement the FEC to pay for a critical defence contract as part of the Smart and Secure Borders initiative. Imposing the FEC is reasonable, and thus necessary to protect these security interests, given that Canadian tax payers should not be expected to fund initiatives that solely benefit U.S. interests.

ARGUMENT

A. WHTI BREACHES THE NATIONAL TREATMENT PRINCIPLE

NAFTA Article 1202² and GATS Article XVII³ require Members to treat service providers from other Parties no less favourably than it treats its own. WHTI requires all travellers to present a passport or other accepted document(s) when entering or re-entering the U.S. WHTI violates these provisions by requiring passports for Canadian service providers to provide their services in the U.S., while U.S. service providers would need passports to provide their services in the U.S. This additional requirement constitutes differential treatment creating a barrier for Canadian service providers in accessing the U.S. market. The second phase of WHTI will therefore unfairly advantage U.S. service providers contrary to the national treatment principle.

B. WHTI BREACHES NAFTA ARTICLES 1601, 1602 AND 1603

WHTI is contrary to Articles 1601, 1602 and 1603 as it unduly impairs or delays trade in goods or services. The increased cost to travellers, both in terms of time and money, associated with obtaining or renewing passports may discourage cross border travel.⁴ Border communities

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

³ *General Agreement on Trade in Services*, 15 April 1994, being Annex 1B to the *Marrakesh Agreement on Trade in Services* 1869 U.N.T.S. 183, 33 I.L.M. 1167 [GATS].

⁴ Library of Parliament, *The Western Hemisphere Travel Initiative: Balancing Security and Economic Interests* by Sheena Starky (Economics Division) (Ottawa: Parliamentary Information and Research Service, 23 May 2006).

and the tourism industry will be most impacted due to a reduction in the number of spontaneous, short-term, cross border visits.⁵

The reluctance of Americans to obtain the required documentation to return to the U.S. disproportionately impacts Canadian industries because these Americans will no longer be travelling to Canada and be purchasing Canadian services. For example, 34.5% of American non-passport holders are less likely to cross the border if a passport or other secure documentation is required compared to 29.2% of Canadian non-passport holders; and 68% of Americans indicated they were unlikely to purchase border ID cards required for entry compared to 54% Canadians.⁶ This is estimated to cause a loss of 14.1 million inbound trips from the U.S. between 2005 and 2010. During this period, Canada's tourism industry could lose an estimated \$3.2 billion in revenue caused by a loss of 14.1 million inbound trips from the U.S.⁷ Because WHTI limits the free movement of persons, it will have negative economic impacts for Canada.

WHTI may also create border congestion, increased border wait time and additional costs.⁸ Given that the U.S. market constitutes more than 78% of Canada's exports, Canadian industries are most vulnerable to the negative impacts of WHTI.⁹ Increased operational costs for

⁵ Donald E. Abelson and Duncan Wood, "People, Security and Borders: The Impact of the WHTI on North America" (Foundation for Educational Exchange between Canada and the United States of America and Accenture, 2007), at 18, online: Woodrow Wilson International Centre for Scholars <www.nnasc-renac.ca>.

⁶ *Ibid.* at 15.

⁷ Industry Canada, *An Update On the Potential Impact of the Western Hemisphere Travel Initiative on Canada's Tourism Industry* by the Conference Board of Canada (Ottawa: Industry Canada, 2006) at 4.

⁸ Government of Canada, "Official Comment of the Government of Canada: Advance Notice of Proposed Rulemaking Western Hemisphere Travel Initiative" (31 October 2005), online: Foreign Affairs and International Trade Canada <http://www.geo.international.gc.ca/can-am/main/right_nav/whti_comment-en.asp>.

⁹ Richard G. Harris, "The Economic Impact of the Canada-U.S. FTA and NAFTA Agreements for Canada: A Review of the Evidence" in John M. Curtis and Aaron Sydor, ed., *NAFTA @ 10*, (Ottawa: Minister of Public Works and Government Services, 2006) at 10.

compliance and accommodating delay could be passed along to both U.S. and Canadian consumers and result in both countries' being less competitive with other economies. Thus, the delay and cost associated with WHTI could lead to decreased investment in both countries.¹⁰

Consequently, WHTI poses a barrier to free trade and impairs conditions of fair competition in the U.S. market. This creates unfavourable economic repercussions for Canadian industries and is inconsistent with the purpose and objectives of NAFTA under Articles 102 and 1601.

C. APHIS USER FEES VIOLATE NAFTA ARTICLE 310

NAFTA Article 310 prohibits the adoption of custom user fees for originating goods. An “originating good” is as a good which is wholly obtained, produced, or manufactured with materials of one or more of the Parties.¹¹ Since Annex 310.1 expressly prohibits increases in U.S. ‘merchandise processing fees’ on goods qualified to be marked as Canadian, any unjustifiable imposition or increase in fees is tantamount to a breach.¹²

APHIS user fees breach NAFTA Article 310 as they apply to all agricultural products regardless of their origin. While APHIS says the removal of Canada’s exemption is in response to increased re-exportation of fruits and vegetables to the U.S from third Parties via Canada, this increase constitutes less than 0.1% of all produce exported to the US from Canada.¹³ Thus, the 99.9% of Canadian agricultural exports to the U.S. pose little threat to U.S. agrosecurity, but are still charged APHIS user fees. This charge constitutes an unjustifiable merchandise processing fee, which contravenes NAFTA Article 310.

¹⁰ *Supra* note 7.

¹¹ *NAFTA* Article 401.

¹² *NAFTA*, Annex 310.1, Section B(1).

¹³ Department of Agriculture, “Agricultural Inspection and AQI User Fees Along the U.S./Canada Border,” *Federal Register*: August 25, 2006 (Volume 71, Number 165) at 50321.

The rule further violates Article 310 by charging all commercial vehicles regardless of whether they are travelling with agricultural products. Canada's trade with the U.S. is mostly via commercial truck shipments¹⁴, the vast majority of which transport non-agricultural goods.¹⁵ Accordingly, imposing these fees on all commercial shipments constitutes a general merchandise processing fee levied on Canadian exports to the U.S, violating this provision.

D. APHIS USER FEES ARE CONSISTENT WITH GATT ARTICLE I BUT VIOLATE GATT ARTICLE VIII

The removal of Canada's exemption is consistent with the most favoured nation principle contained in GATT Article I¹⁶ in that Canada is treated the same as other GATT members. However, the removal of this exemption violates GATT Article VIII(1)(a) by charging export fees that are unassociated with the approximate cost of services rendered. This represents an indirect protection to domestic products unlikely to improve U.S. agrosecurity.

APHIS User Fees Do Not Correlate with the Expense for the Services Provided

New policy which removed Canada's exemption from the APHIS user fees was alleged to be in response to "three extensive inspection operations" along the Canada-U.S.¹⁷ However, the U.S. has failed to identify an immediate risk or emergency situation involving high-consequence

¹⁴ The Embassy of the United States of America (Ottawa), "Canada-United States Relations: Introduction," online:

<http://canada.usembassy.gov/content/content.asp?section=can_usa&document=canusarelatios>.

¹⁵ Glen Hodgson, "At a Tipping Point? Post-9/11 Border Security and Canada's Trade and Investment" (2007 Public-Private Sector Summit on National Security: Stronger Borders, Better Trade) The Conference Board of Canada, (June 2007).

¹⁶ *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947, No. 27 (entered into force 1 January 1948) [GATT].

¹⁷ *Supra* note 13 at 50321.

diseases or bioterrorism threats.¹⁸ Specifically, APHIS has failed to provide numerical data on how many prohibited goods were detained, the number of goods intercepted, or how many confiscated items were carrying foreign insects or pathogens. The only data provided was on a sample of preclearance passengers at Canadian airports, where a mere 6.2% were found to have prohibited agricultural items.¹⁹ Even if this number could justify APHIS fees imposed on airline passengers, it does not justify imposing APHIS fees on all commercial vehicles.

APHIS User Fees Represent an Indirect Protection of U.S. Commercial Goods

APHIS user fees will put an additional burden on Canadian suppliers to recover the increased cost of shipping goods to the U.S. This will increase consumer prices for Canadian goods in the U.S., making them less competitive with domestic products. Therefore, the user fees have the effect of indirectly protecting U.S. commercial goods in violation of GATT Article VIII(1).

E. APHIS USER FEES VIOLATE NAFTA ARTICLE 712 AND THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES

Under NAFTA, a Party has the right to impose any sanitary or phytosanitary measure in its territory that is necessary for the protection of human, animal or plant life or health.²⁰ Pursuant to NAFTA Article 712(3), these measures can only be justified if based on science and in response to a risk assessment. Articles 712(5) and (6) allow necessary measures to achieve a Party's appropriate level of protection unless they create a disguised trade restriction. These

¹⁸ Letter from Kendell W. Keith, Gary C. Martin, Thomas A. Hammer and Duane Ekedahl to Alan S. Green (22 November 2006), online: National Oilseed Processors Association <http://www.nopa.org/content/newsroom/2006/nov/joint_statement_to_aphis_on_proposed_aqi_user_fees.pdf>.

¹⁹ *Supra* note 13 at 50322.

²⁰ *NAFTA*, Article 712(1).

provisions are echoed in Article 2 of the *WTO Agreement on Sanitary and Phytosanitary Measures*.²¹ Without a risk assessment or emergency situation that this rule responds to, APHIS user fees create an arbitrary increase in transportation costs for Canadian producers, effectively lowering comparative prices of U.S. producers. This creates an unnecessary restriction on trade in the guise of a public and environmental health concern that violates Article 712.

F. WHTI CANNOT BE JUSTIFIED UNDER THE GENERAL EXCEPTION

WHTI Has a Marginal Impact on Border Security and Terrorist Attacks

Following the recommendations of the 9/11 Commission, the U.S. adopted WHTI to target terrorist travel by identifying and intercepting future terrorists.²² WHTI is unlikely to achieve this goal, however, because there is a weak correlation between authentic documentation and preventing a terrorist attack.²³ More focused documentation will not prevent the most sophisticated fraud or terrorism.²⁴ As Bernard Herdan, the Chief Executive of the U.K. Passport Service stated, “while tighter passport standards ‘will make a huge difference’ in combating organized and illegal immigration...when you get into the domain of terrorism and really sophisticated fraud...it is less evident that tougher passport standards are going to prevent terrorism.”²⁵ Hence, WHTI is an ineffective measure to combat against a terrorist attack.

²¹ *Agreement on the Application of Sanitary and Phytosanitary Measures* being Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

²² *Supra* note 5 at 10.

²³ Peter Macdonald, “Anti-Terrorism and the Western Hemisphere Travel Initiative” *Customs and Trade Bulletin*, Miller Thomson LLP (6 October 2005), online: Miller Thomson LLP <www.millerthomson.com>.

²⁴ *Ibid.*

²⁵ *Ibid.*

WHTI is an Unnecessary Measure

WHTI is not necessary as there are other measures available that ensure secure borders while not impeding the movement of trade between Parties. The U.S. could adopt a model similar to the European *Schengen Agreements*²⁶, which differentiates between European Community nationals and “aliens” rather than the nationals of Schengen and non Schengen countries.²⁷ This model transfers border controls to the external borders of the Schengen territory to benefit the free movement of persons and goods”.²⁸

The U.S. could also maintain the status quo exempting Canada from the second phase of WHTI. If WHTI’s goal is to mitigate the susceptibility of external threats and to enhance homeland security, the Security & Prosperity Partnership (SPP) initiative already addresses such security issues. As part of its strategy to ensure more secured borders, a wide range of coordinated measures are being adopted, including: the development and implementation of equivalent biometric standards to enhance security for border documents, the development of compatible immigration security measures, and the provision of shared data on high-risk travellers destined to or transiting North America.²⁹ Given that SPP works towards enhancing the security and screening of travellers, it is unnecessary to have the second phase of WHTI duplicate such initiatives.

²⁶ *Agreement for the Execution of the Agreement Concerning the Gradual Abolition of Controls at the Common Borders Concluded Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic at Schengen*, 14 June 1985, Tractatenblad [Netherland Treaty Series] 1985, No. 102.

²⁷ J.D.M. Steenbergen, “Schengen and the movement of persons” in *Schengen: Internationalisation of central chapters of the law on aliens, refugees, security and the police* at 61 (Utrecht, the Netherlands: W.E.J. Tjeenk Willink – Kluwer Law and Taxation Publishers, 1991) 57 at 61.

²⁸ *Ibid.* at 57.

²⁹ Government of Canada, “Ensuring Smart, Secure Borders,” *Security and Prosperity Partnership of North America*, online: Government of Canada <<http://spp-psp.gc.ca>>.

WHTI Constitutes Unjustifiable Discrimination.

The shared border makes Canada and the U.S. susceptible to many of the same risks from external threats. The Government of Canada acknowledges that, "...the threats to security and public safety are not just the problems that other nations face. [Canada] too [is] touched by, and face, similar challenges."³⁰ If Canada is no less susceptible to such external threats then WHTI constitutes unjustifiable discrimination by imposing a passport requirement on Canadian travellers when Canada does not have a reciprocal policy. WHTI's minimal impact on safety and existing cooperation through SPP, make WHTI arbitrary, unjustifiably discriminatory and inconsistent with NAFTA Article 2101(2).

G. APHIS USER FEES ARE NOT JUSTIFIED UNDER THE GENERAL EXCEPTION

The general exception under NAFTA Article 2101(1) considers those exceptions under Article XX of GATT. The U.S. is most likely to ask that APHIS user fees be exempt under GATT Article XX(b) regarding human, animal or plant life or health. To satisfy this provision, the Party invoking the exemption must demonstrate that the:

- (1) policy falls within a range designed to protect human, animal or plant life or health;
- (2) inconsistent measure was *necessary* to fulfill the policy objective; and
- (3) measures were applied in conformity with the requirements of the introductory clause of Article XX.³¹

The U.S. has not satisfied the second step of this test and, therefore, cannot justify APHIS user fees under GATT Article XX(b) or NAFTA Article 2101.

³⁰ Public Safety Canada, "Securing an Open Society: Canada's National Security Policy", online: Public Safety Canada, <<http://www.publicsafety.gc.ca/pol/ns/secpol04-eng.aspx>>.

³¹ *United States – Standards for Reformulated and Conventional Gasoline* (1996), WTO Doc. WT/DS2/AB/R (Appellate Body Report), at 2-3, online: European Journal of International Law <<http://www.ejil.org/journal/Vol10/No1/sr4.rtf>>.

In the context of GATT Article XX (b), a measure is “necessary” only if there are no alternative measures that are consistent or less inconsistent with the Agreement that can reasonably be expected to achieve the policy objectives.³² APHIS user fees are not necessary as there are other options that would effectively protect U.S. security interests without contravening NAFTA and GATT. For example, the user fees could have been charged only on the transportation of agricultural goods rather than applying it to all commercial shipments; or funding for additional inspectors could have been paid for by U.S. taxpayers APHIS only benefits Americans. These alternatives would be more effective and more reasonable in improving U.S. agrosecurity than removing Canada’s exemption. Therefore in applying the test, APHIS user fees are not necessary and cannot be justified under the general exception.

H. WHTI & APHIS ARE NOT JUSTIFIED BY THE NATIONAL SECURITY EXCEPTION

The U.S. is likely to invoke NAFTA Articles 2102(1)(b)(i) or (ii), GATT Articles XXI (b)(ii) or (iii) and GATS Articles XIV (1)(b)(ii) or (iii) to justify WHTI and APHIS. These self-judging provisions contain parallel provisions allowing a Party to take action it considers necessary to protect its essential security interests for the purpose of supplying a military or security establishment, or taken in a time of war or other emergency in international relations.³³

Based on its ordinary meaning, the national security exception is subjective in that the Party invoking the exception evaluates whether the measure is necessary to protect essential security

³² *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, (1990), WTO Doc. DS10/R - 37S/200 (Appellate Body Report) at para 23, online: World Trade Institute <<http://www.worldtradelaw.net/reports/gattpanels/thaicigarettes.pdf> >.

³³ Jon R. Johnson, *International Trade Law* (Concord: Irwin Law, 1998) at 262.

interests. Adopting this interpretation however, has the potential for abuse.³⁴ To prevent the misuse of this exception, an objective approach should be taken to limit the self-judging language.³⁵ The test for the national security exception should instead be an objective one, namely whether a “reasonable” government faced with the same circumstances would invoke the exception.³⁶ Using an objective standard would ensure a justified use of this exception by providing some measure by which to evaluate allegedly necessary state action.

The U.S. Measures Are Not Necessary for the Protection of Essential Security Interests

In assessing whether a measure is necessary under the national security exception, one has to consider whether a state has exhausted its options for negotiation and consultation; and whether the measures represent the least restrictive means for achieving their desired results.³⁷ As previously argued, there are more effective options available to achieve WHTI and APHIS’ policy objectives that are less restricting on trade. These measures thus cannot be justified as necessary under this exception.

An essential security interest implies that there is a credible threat faced by the invoking party.³⁸ As one of the original drafters of GATT stated,

“It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for

³⁴ John Jackson, *The World Trading System: law and policy of economic relations*, 2nd ed. (Cambridge: MIT Press, 1997) at 229.

³⁵ Peter Lindsay, “The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?” (2003) 52 *Duke L.J.* 1277 at 1286 (WL).

³⁶ Raj Bhala, “National Security and International Trade Law: What the GATT Says and What the United States Does” (1998) 19 *U. Pa. J. Int’l Econ. L.* 263 at 275 (WL).

³⁷ Wesley A. Cann, Jr., “Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance between Sovereignty and Multilateralism”, 26 *Yale J. Int’l L.* 413 at 444 (WL).

³⁸ *Ibid.* at 275.

security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.”³⁹

This balance can be achieved by interpreting this exception according to Article 31 of the *Vienna Convention on Treaty Interpretation*⁴⁰ in light of the purposes of NAFTA, GATT and GATS.⁴¹

APHIS user fees generate income for the U.S. that is not associated with services rendered. By charging all commercial shipments and airline passengers regardless of whether they are carrying agricultural products instead of targeting high-risk commercial carriers, the user fees have a general commercial purpose that is outside the scope of the exception. Thus, the U.S. cannot claim that APHIS user fees are “necessary” for the protection of their essential security interests.

APHIS and WHTI Are Not Being Used for the Purpose of Supplying a Military or Security Establishment Pursuant to NAFTA Article 2102(1)(b)(i)

WHTI has passport requirements and therefore is about documentation and does not supply a security establishment. Even if APHIS is considered a security establishment, the program is not “necessary” for the purposes of protecting essential security interests. Consequently, the U.S. cannot claim the fees satisfy Article 2102(1)(b)(i) of NAFTA.

The U.S. is Not Engaged in a Time of “War” Pursuant to NAFTA Article 2102(1)(b)(ii)

“War” is a contention between at least two nation states that involves the employment of armed forces with an intention to overwhelm.⁴² War is a military success, not to be mistaken

³⁹ *Ibid* at 274.

⁴⁰ *Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations* 1986 ILM (1986) at 543.

⁴¹ *Supra* note 37 at 1276.

⁴² CDR Brian J. Bill, GAGC, USN, ed., *Law of War Workshop Deskbook* (Charlottesville: International and Operational Law Department, The Judge Advocate General’s School, U.S. Army, June 2000) at 1.

with the foreign policy objective of establishing a functioning democracy. “[I]f building and maintaining a peaceful democracy is considered a war, then all the enemy has to do to win is maintain enough sporadic violence to get on the evening news.”⁴³

The “wars” in Iraq and Afghanistan were to oust the existing governments in power⁴⁴ and ended on May 1, 2003 & December 22, 2001 respectively, after which new national governments were implemented⁴⁵. The continued hostilities in Iraq and Afghanistan are not wars, but are part of the nation building process outside the scope of this exception.

The continued presence of U.S. troops in Iraq and Afghanistan is not demonstrative that the U.S. is in a state of “war”. For example, today U.S. troops remain stationed in Germany though no one would contend the U.S. is at “war” with Germany. Thus, the U.S. cannot rely on the continued military presence in Iraq and Afghanistan to satisfy the national security exception.

The U.S. rhetoric of the “war on terror” is outside the scope of the national security exception because, “[t]errorism is a tactic, not an identifiable enemy.”⁴⁶ The definition of “war” requires that the conflict be between two or more nation states⁴⁷, however “terror” is a combative tactic

⁴³ Todd Keister, “When is a War Not a War? Defining & Achieving Victory in Iraq,” online: American diplomacy <http://www.unc.edu/depts/diplomat/item/2008/0103/keis/keister_whenis.html>.

⁴⁴ *Ibid.*

⁴⁵ George W. Bush, “Mission Accomplished”, Speech, 1 May 2003, USS Abraham Lincoln and United Nations Assistance Mission in Afghanistan, “General Backgrounder: From the Bonn Agreement to the 2005 *Wolesi Jirga* and Provincial Council Elections,” online: United Nations <http://www.unama-afg.org/news/_parelection/_factsheets/_english/JEMBS%20PO%20BG%20General%20BG%20final%202005-4-1%20eng.pdf>.

⁴⁶ *Supra* note 43.

⁴⁷ CDR Brian J. Bill, GAGC, USN, ed., *Law of War Workshop Deskbook* (Charlottesville: International and Operational Law Department, The Judge Advocate General’s School, U.S. Army, June 2000) at 1.

and not a state.⁴⁸ Therefore, the U.S. cannot claim it is in a time of war and WHTI and APHIS cannot be justified using the national security exception.

The U.S. is Not Experiencing an “Emergency” in International Relations

An “emergency” is “a crisis situation affecting the population as a whole and constituting a threat to the organised existence of the community which forms the basis of the State.”⁴⁹ Emergencies are temporal in nature, requiring immediate and extraordinary measures for a specific period of time. For a state of emergency to be valid a government must establish an exceptional threat to the security of the state or its people, and that the measures employed to deal with the emergency is proportional to the threat.⁵⁰

WHTI and APHIS cannot be justified as measures necessary during an emergency in international relations for three reasons. First, WHTI and APHIS were not implemented immediately following the 9/11 attacks but several years after. Second, the U.S. is not in a state of crisis as there has not been a terrorist attack in the U.S. since 9/11. Third, the “war on terror” an emergency situation as it is not temporal in nature. Terrorism has been used as a tactic long before the “war on terror” was declared and will likely continue long past the time when the U.S. has moved on to other foreign policy objectives. Thus, the U.S. cannot claim an emergency in international relations to justify APHIS and WHTI under NAFTA Article 2102(1)(b)(ii).

⁴⁸ Marcel Berlins, “Defining War,” *The Guardian Online* (18 September 2001) online: The Guardian Online <<http://www.guardian.co.uk/world/2001/sep/18/law.socialsciences>>.

⁴⁹ N. Questiaux, *Study of the Implications for Human Rights of Recent Developments concerning Situations known as States of Siege or Emergency*, UN Doc. E /CN.4 /Sub.2 /1982 /15 at 8.

⁵⁰ Venkat Iyer, “States of Emergency – Moderating their Effects on Human Rights,” (Fall, 1999) 22 *Dalhousie L.J.* 125 (QL).

I. THE FUEL EXPORT CHARGE DOES NOT VIOLATE NAFTA ARTICLES 315 AND 605 OR GATT ARTICLE XI

The Fuel Export Charge (“FEC”) is a tax and therefore does not violate NAFTA Articles 315 and 605, nor GATT Article XI. The NAFTA provisions only apply to quantitative restrictions and GATT Article XI expressly excludes taxes. Because the tax does not directly limit the quantity of fuel exports, it does not violate these provisions.

J. CANADA BREACHES NAFTA ARTICLES 314, 604 & GATT ARTICLE I, VIII BUT ARE UPHOLD UNDER THE NATIONAL SECURITY EXCEPTION

Canada’s Essential Security Interest is Inextricably Linked to its Economic Interests

Although the FEC breaches NAFTA Articles 314 and 604, it is justified as an “essential security interest” under the national security exception. The national security exception must not be abused for commercial gain, however “there are cases in which commercial and national security interests are so intertwined that a bright line between the two interests cannot be drawn.”⁵¹ Both Canada and the U.S. include not only the protection against terrorist attacks, but also national economic stability in their National Security Policies.⁵² Therefore, reading in large-scale national economic interests can be read into this exception.

⁵¹ *Supra* note 36 at 273.

⁵² The Honourable Anne McLellan, Canadian Minister of Public Safety and Emergency Preparedness, “News Conference Announcing the Release of ‘Securing an Open Society: Building a National Security Policy for Canada.’” Notes for a Statement at a News Conference, online: Public Safety Canada <http://ww2.ps-sp.gc.ca/publications/speeches/20040427_e.asp> and The White House, “The National Security Strategy of the United States of America”, online: The White House, <<http://www.whitehouse.gov/nsc/nss.html>>.

The U.S. Embassy describes its relationship with Canada as “the world’s largest and most comprehensive.”⁵³ The entire structure and organization of Canada’s economy is crucially dependent on trade and on its integration with the U.S.⁵⁴ With Canada-U.S. trade constituting over 78% of Canada’s exports⁵⁵, \$1.5 billion a day in goods and 300,000 people crossing the shared border each day⁵⁶, access to the American market has become necessary to maintain Canadian employment and living standards.⁵⁷ This is more than a mere commercial interest. These interests fall within the scope of national security as the Canadian economy is so deeply integrated with the U.S. economy that a disruption of this relationship would have detrimental effects on Canadians.

The Fuel Export Charge is Justified under NAFTA Article 2102(1)(b)(i)

The FEC is justified as it is used for the purpose of supplying a security establishment. Canada is accommodating American ambitions to build a safe and secure border by erecting the necessary infrastructure for this establishment. The FEC are not arbitrary because these taxes are being used to fund these initiatives and to ensure that the U.S. pays for the benefits that it will primarily gain. Because the FEC are being used to supply a security establishment, Canada can invoke the national security exception.

⁵³ The Embassy of the United States of America (Ottawa), “United States-Canada Relations: Trade,” online:

<http://canada.usembassy.gov/content/content.asp?section=can_usa&document=trade>.

⁵⁴ *Supra* note 9.

⁵⁵ *Ibid.* at 10-12.

⁵⁶ Bureau of Western Hemisphere Affairs, “Background Note: Canada”, online: U.S. Department of State <<http://www.state.gov/r/pa/ei/bgn/2089.htm#econ>>.

⁵⁷ *Supra* note 9 at 37.

Canada Is Imposing the Fuel Export Charges in a Time of Emergency in International Relations

The FEC is also justified pursuant to NAFTA Article 2102(1)(b)(ii). Canada acted immediately following the false allegations made by presidential candidates that Canada did not take security seriously. The sensationalization of these statements in the media could potentially taint American's view of Canada and its commitment to North American Security. Thus, Canada was left in a position to act immediately, otherwise this bad press would discourage Americans from travelling to, buying and importing from, or investing in Canada.

Given that Canada is heavily reliant on the U.S. economy, a reasonable government would have no other practicable choice but to adopt the "thick border initiatives" that the U.S. adamantly pushed for Canada to adopt. A failure to comply with U.S. demands would jeopardize Canada's relationship with its strongest trading partner.

The reporting of the misrepresentations, combined with the pressure exerted by the U.S. government, created an environment which required that Canada make a clear commitment to the SSB initiative in order to protect its national economical security interests. In other words, Canadian economic security has been assured through the support of security standards requested by the U.S.⁵⁸ In order to protect these essential security interests, Canada is imposing the fuel export tax satisfying the requirements under NAFTA Article 2102(1)(b)(ii).

⁵⁸ Reg Wtaker, "Keeping up with the Neighbours? Canada's Response to 9/11 in Historical and Comparative Context" (2003) 41 Osgoode Hall L.J. 241 at 10 (QL).

K. THE FUEL EXPORT CHARGE IS JUSTIFIED TO FULFILL A CRITICAL DEFENCE CONTRACT UNDER NAFTA ARTICLE 607

The border initiatives that Canada has agreed to undertake constitute a defence contract under NAFTA Article 607. The provision allows a Party to implement measures “necessary” to fulfill a critical defence contract. These infrastructure projects and technology purchases primarily benefit the U.S. because they screen for radiological and other similar threats before they enter U.S. territory. This same technology however is not being used to screen travellers entering Canada. Consequently, Canada is left vulnerable to these threats. In order to fulfill this contract, Canada has to impose the FEC since it is not reasonable for the Canadian government to expect its citizens to pay for security measures that solely benefit the U.S. Thus, the FEC is not arbitrary and justified under NAFTA Article 607(a).

CONCLUSION

The Applicant requests this Court to declare that:

(1) WHTI breaches NAFTA Chapters 12 and 16 and GATS Article XVII as it unduly impairs trade and results in discriminatory treatment in favour of U.S. service providers.

(2) APHIS violates NAFTA Article 310 and GATT Article VIII as it constitutes an increase in merchandise processing fees against Canadian originating goods that cannot be tied to the services rendered by the program.

(3) WHTI and APHIS cannot be justified under the general or national security exceptions of NAFTA, GATT or GATS.

(4) The FEC does not violate NAFTA Articles 315 and 605 or GATT Article XI.

(5) Though the FEC does violate NAFTA Articles 314 and 604 and GATT Articles I and VIII, this measure is upheld under the national security exception under NAFTA Articles 2102(1)(b)(i) and (ii).