

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 APPLICANT

TEAM # 2008-07A

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I. STATEMENT OF FACTS

A. REAL FACTS

The United States first proposed the Western Hemisphere Travel Initiative (“the WHTI”) in 2005 in response to the passage of Section 7209 of the Intelligence Reform and Terrorism Prevention Act.¹ On January 23, 2007, the United States implemented the first phase of the WHTI requiring all air travelers to present a passport when traveling through the United States, even travelers originating from other nations within the Western Hemisphere.² The passport requirement will extend to land and sea travel at some time after January 31, 2008.³

There has been some speculation by Canadian officials that the WHTI will detrimentally affect trade between the United States and Canada, and this fear is exacerbated by the fact that as of 2005 only 34% of United States citizens held valid passports.⁴ The United States State Department has justified the WHTI as necessary for national security writing that “the goal of the initiative is to strengthen United States border security while facilitating entry for United States citizens and legitimate foreign visitors by providing standardized documentation that enables the Department of Homeland Security to quickly and reliably identify a traveler.”⁵

Beginning in January of 2007, air travelers from Canada to the United States began paying agricultural quarantine and inspection (“AQI”) user fees regardless of whether they were

¹ Fact Sheet: Western Hemisphere Travel Initiative from the Travel Industry Association Website http://www.tia.org/govtaffairs/legislative_WHTI.html (last visited Feb. 17, 2008).

² Western Hemisphere Travel Initiative, U.S. Department of State Website, http://travel.state.gov/travel/cbpmc/cbpmc_2223.html (last visited Feb. 17, 2008).

³ *Id.*

⁴ TRADE POLICY: CANADIAN AMBASSADOR WARNS U.S. TRAVEL INITIATIVE COULD COOL TRADE, 23 I.T.R. 839 (Jun. 1, 2006); The Potential Impact of the Western Hemisphere Travel Initiative on Canada’s Tourism Industry, from the Canadian Tourism Commission, http://www.corporate.canada.travel/docs/research_and_statistics/industry_research/Impact_of_the_WHTI_eng_web.pdf (last visited Feb. 17, 2009).

⁵ Western Hemisphere Travel Initiative, *supra* note 2.

traveling with fruits or vegetables or whether they were processed through customs.⁶ Starting in the middle of 2007 the user fees were extended to all commercial vessels entering the United States from Canada.⁷ Canada expressed some doubt as to whether the user fees were valid under NAFTA and GATT, and the United States countered arguing that the user fees were justified under the national security exception to those treaties.

In August 2007, the leaders of the United States, Canada, and Mexico issued a Joint Statement pledging collaboration to achieve “Smart and Secure Borders.”⁸ The Statement focused on achieving efficient and secure borders by minimizing security risks, while facilitating the free flow of people, goods, and services.⁹ The Statement also emphasized the importance of screening travelers and goods before they enter North America.¹⁰ The Statement went on to outline specific projects to be developed in order to create a more uniform and efficient screening process to protect North American peoples from criminal threats, terrorism, and radiological threats.¹¹

B. FICTITIONAL FACTS

After false statements by politicians in the United States initiated a flood of press referencing Canada as the entry point for the September 11, 2001 attacks, United States leaders applied pressure on Canada to implement a range of “thick border” initiatives. This led to an announcement in September of 2007 that Canada would spend one billion dollars to install a

⁶ Questions and Answers: Agricultural Inspection and Agricultural Quarantine Inspection User Fee Requirements for Canada, http://www.aphis.usda.gov/publications/plant_health/content/printable_version/faq_canadian_user_fees.pdf (last visited February 17, 2008).

⁷ *Id.*

⁸ Joint Statement by Prime Minister Harper, President Bush, and President Calderón, <http://www.whitehouse.gov/news/releases/2007/08/20070821-2.html> (last visited Feb. 17, 2008).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

range of security measures along its border with the United States and advanced radiological detection technology at all its ports.

Concurrently, Canada announced a Fuel Export Charge of twenty-five Canadian dollars per barrel on fuel transported via pipeline to the United States. The Canadian Prime Minister's Office issued an accompanying statement justifying the tax as a way (i) to avoid taxing Canadian citizens and (ii) to fund the security measures while imposing the burden of payment on the nation that stands to benefit the most from their installation. The legislation enacting the export charge went on to use the *Softwood Lumber Product Export Charge Act, 2006* as precedent for its implementation. The United States took the position that the export charge violated NAFTA and GATT.

In response to the Fuel Export Charge, the United States filed a dispute with the International Court of Justice ("the ICJ"). Canada responded by filing a dispute regarding the WHTI and AQI user fees with the ICJ. Both Canada and the United States have consented to ICJ jurisdiction, and Mexico has made no objection to its loss of the right to appear from the lifting of the case out of the NAFTA context.

II. QUESTIONS PRESENTED

- A. Whether Canada's imposition of the Fuel Export Charge on pipelines entering its borders is contrary to NAFTA Articles 314, 315, 604 and 605 or GATT Articles I, VIII and XI?
- B. Whether Canada's imposition of the Fuel Export Charge on pipelines entering its borders falls outside the scope of the national security exceptions or general exceptions in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI?
- C. Whether the Western Hemisphere Travel Initiative is permissible under NAFTA Chapters 12 and 16 or GATS?
- D. Whether the Western Hemisphere Travel Initiative is justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS?
- E. Whether the United States Animal and Plant Health Inspection Service user fees are permissible under NAFTA Article 310 and GATT Articles I and VIII?
- F. Whether the United States Animal and Plant Health Inspection Service user fees are justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS?

III. JURISDICTIONAL STATEMENT

The United States and Canada, through special agreement, have agreed pursuant to Articles 36 and 40 of the International Court of Justice Statute to submit this dispute to the International Court of Justice rather than the Dispute Settlement Body of the World Trade Organization, a Chapter 20 NAFTA panel, or any other body. Mexico was notified of the decision by Canada and the USA to lift the dispute out of the NAFTA context and had no objection to its loss of right to appear. The agreement of the Parties to submit this dispute to the International Court of Justice is stated in the *Niagara Moot Problem*.

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V. SUMMARY OF ARGUMENT

Canada's export charge on fuel pumped into the United States violates various provisions of North American Free Trade Agreement ("NAFTA") and General Agreement on Tariffs and Trade ("GATT") barring export restrictions by Party nations, and the charge extends beyond the permissible limits of the "security exceptions" provided for in each treaty because it is not necessary to preserve an "essential security interest". In contrast, WHTI is in line with the treaty obligations of the United States. The WHTI does not provide a discriminatory trade barrier in contravention of Chapters Twelve and Sixteen of NAFTA. Furthermore, because it is necessary to preserve border security and health and safety within the United States, it falls within the scope of the general exceptions and the "security exception" of NAFTA and GATT. Similarly, the removal of Canada's exemption from agricultural quarantine and inspection ("AQI") user fees is not contrary to NAFTA or GATT because the fees are not custom user fees as defined in Article 318 of NAFTA and they are not arbitrary or discriminatory. Moreover, the fees fall within the scope of the general exceptions and the security exception of NAFTA and GATT as they are primarily aimed at increasing border inspection.

VI. ARGUMENT

A. THE FUEL EXPORT CHARGE IS CONTRARY TO NAFTA OR THE GATT.

NAFTA Articles 604 and 605 extend the general prohibition on export taxes contained in Articles 314 and 315 to basic oil products. Those provisions prohibit a Party from placing an export charge on any basic oil product to the territory of another Party to the treaty unless the export charge is applied to all other Parties and to any such good destined for domestic

consumption.¹² Similarly, GATT Articles One, Eight, and Eleven place a bar on preferential treatment of a Party's domestic industries through export taxes or other mechanisms.¹³

Here, Canada's attempt to implement an export charge on fuel pumped into the United States violates the premise of NAFTA Articles 604, 605, 314 and 315. An export charge on basic petrochemical products is specifically prohibited by NAFTA Articles 604 and 605, and this prohibition is supplemented by the general bar on export charges on any product in Articles 314 and 315. Further, the export tax does not meet both the exceptions necessary to validate such a restriction. The export charge does not have a parallel domestic provision for Canadian consumers of oil, and on its face, the export charge enactment evinces a purpose to avoid the taxation of Canadian citizens in direct contravention to the NAFTA and GATT provisions.

Additionally, Canada's reliance on the *Softwood Lumber Product Export Charge Act, 2006* ("the Act") does not provide a sound basis for the implementation of an export charge in this instance. The Act does not parallel the fuel export charge here in any substantial way. First, the softwood labor disputes culminated in the passage of that Act, which along with the Softwood Lumber Agreement was intended to set up a bilateral regime that would satisfy American concerns with industry subsidies in Canada and put an end to American countervailing duties and anti-dumping duties on softwood lumber imports.¹⁴ Second, the Act set up the export

¹² North American Free Trade Agreement, U.S.-Can.-Mex., art. 314, 315, 604, 605, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

¹³ General Agreement on Tariffs and Trade art. I, VIII, XI, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

¹⁴ Foreign Affairs and International Trade Canada, Export and Import Controls, Canada-U.S. Softwood Lumber Trade Relations (1982-2006), <http://www.dfait-maeci.gc.ca/eicb/softwood/chrono-en.asp> (last visited February 17, 2008).

charge as a defense mechanism that only triggered when the price of lumber dropped below a certain price in the United States.¹⁵

Conversely, the fuel export charge in this instance has no relevant connection to the discussions and conclusions reached at the Montebello Summit. The charge did not result from any consultation between the two nations, and it appears to represent an attempt by Canada to avoid any responsibility for its interest in North American security. Additionally, the fuel export charge and the accompanying statement by Canada's Prime Minister did not evince any attempt to protect the Canadian oil industry from antagonistic activities by the United States.

B. THE FUEL EXPORT CHARGE IS NOT JUSTIFIED UNDER THE NATIONAL SECURITY EXCEPTION IN EITHER NAFTA OR THE GATT.

The relevant portion of NAFTA Article 607 provides that a Party may not restrict exports of a basic petrochemical good, except when necessary to supply a military establishment, fulfill a critical defense contract, respond to a circumstance of armed conflict, prevent nuclear proliferation, or respond to direct threats of disruption of nuclear materials.¹⁶ NAFTA Articles 2101 and 2102 adopt the language of Article XX and XXI of the GATT. The relevant sections of those articles allow a Party to take a measure contrary to other NAFTA provisions when necessary to preserve public morals, health, or an essential security interest of that Party.¹⁷ The relevant "essential security interests" include actions relating to the traffic in arms or to actions taken in time of war or other emergency in international relations.¹⁸ The International Court of Justice ("the ICJ") has held that any measures taken must be "necessary" to protect an "essential

¹⁵ Softwood Lumber Products Export Charge Act, S.C. 2006, c. 13, s. 16 (2006).

¹⁶ NAFTA, *supra* note 12, art. 607.

¹⁷ NAFTA, *supra* note 12, art. 2101, 2102; GATT, *supra* note 13, art. XX, XI.

¹⁸ NAFTA, *supra* note 12, art. 2102.

security interest.”¹⁹ “Necessary” means a measure must do more than merely “tend to protect” an “essential security interest”, and the determination of whether a measure is necessary cannot be left entirely to the subjective judgment of the Party.²⁰ GATT Article XX exceptions regarding public morals and health do not apply to arbitrary or discriminatory actions by one Party against another Party or to a disguised restriction on international trade.²¹

Here, Canada’s fuel export charge goes beyond the permissible scope of the “security exception” in NAFTA and GATT. Under Canada’s view of the “security exception”, any export charge could be validated despite contravening NAFTA so long as some loose association with the funding of a security measure could be made. There is no rational connection between the export charge and the security initiatives required under the Montebello Summit Joint Statement. Allowing Canada to make this sort of subjective connection between the export charge and border security initiatives contradicts the perspective the ICJ has taken on the “security exception.” Furthermore, there is no indication that the export charge is “necessary” to provide for the security interest at stake here. Canada’s desire to avoid taxing its own citizens does not present a condition of need requiring the export charge. This interpretation, when taken to its logical end, would destroy NAFTA’s credibility and its ability to create a functional and stable trade regime in North America.

Moreover, the general exception for actions taken to ensure public morals and health does not apply here. None of the statements from Canada’s Prime Minister’s Office evinced a need for the export charge to preserve any sort of public welfare. Additionally, the limiting language of GATT Article XX specifically bars application of the general exceptions to the export charge

¹⁹ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States)*, 2003 I.C.J. 161, 183 (Nov. 6).

²⁰ *Id.*

²¹ GATT, *supra* note 13, art. XX.

here. The export charge's lack of any true association with the installation of new security measures creates a strong presumption that its imposition is really a disguised restriction on international trade. Additionally, Canada deliberately imposed the export charge on the United States to force it to fund the security measures. Despite the rubric that the United States stands to benefit the most from the security measures, Canada's actions fall squarely within the prohibited arbitrary or discriminatory actions outlined in the qualifying language of GATT Article XX.

C. THE WESTERN HEMISPHERE TRAVEL INITIATIVE IS NOT CONTRARY TO NAFTA OR GATS BECAUSE IT DOES NOT DISCRIMINATE AGAINST CANADA IN THE CROSS-BORDER TRADE OF SERVICES OR DENY TEMPORARY CROSS-BORDER TRAVEL OF BUSINESS PERSONS.

NAFTA's Chapter Twelve is intended to prevent discrimination against the trade in services between one Party and another.²² Specifically, Article 1202 provides that "each Party shall accord to service providers of another Party treatment no less favorable than that it accords in like circumstances, to its own service providers."²³ The "most favored nation" idea embodied in GATS mirrors the language of Chapter Twelve providing that each Party "shall accord immediately and unconditionally to services and service providers of any other Party, treatment no less favorable than that it accords to like services and service providers of any other country."²⁴

NAFTA's Chapter Sixteen draws on the language of Article 102(1)(a) pushing for the elimination of barriers to trade and the facilitation of cross-border movements.²⁵ Chapter Sixteen is intended to ease the flow of persons engaged in cross-border travel for temporary business

²² See NAFTA, *supra* note 12, art. 1201.

²³ NAFTA, *supra* note 12, art. 1201.

²⁴ GATT, *supra* note 13, art. II(1).

²⁵ NAFTA, *supra* note 12, art. 102(1)(a), 1601.

purposes.²⁶ In Article 1603, this temporary grant of entry hinges on the qualification of the individual under “applicable measures relating to public health and safety and national security.”²⁷ The importance of national security in this grant of temporary entry is further buttressed by the language of Article 1601, which qualifies the need for facilitation of trade with concerns of border security.²⁸

The *Cross-Border Trucking Services* dispute between Mexico and the United States demonstrates a situation of non-compliance with NAFTA’s Chapter Twelve by the United States.²⁹ In that case, Mexico argued successfully that the United States’ failure to lift restrictions on Mexican trucking companies engaged in cross-border trade violated the most-favored nation and national treatment provisions of Article 1202 and 1203.³⁰ The restrictions there were unilaterally imposed against Mexican trucking companies, while domestic trucking companies and Canadian trucking companies were absolved of any constraints.³¹

Here, the WHTI is not incompatible with NAFTA’s Chapter Twelve and Sixteen or GATS. First, WHTI applies to all nations including the United States, which makes its effects on trade non-discriminatory on its face. Any detrimental delays to trade caused by the WHTI will equally impact the United States and Canada, and there may even be a harsher effect on specific border areas in the United States. Second, the language of NAFTA Sixteen specifically affords respect to measures necessary to ensure the national and border security of each Party. The WHTI’s passport requirement does not deny temporary entry in contravention of Chapter

²⁶ *See id.* art. 1601.

²⁷ *Id.* art. 1603(1).

²⁸ *Id.* art. 1601.

²⁹ *Cross-border Trucking Services*, ¶ 2–3, (NAFTA Ch. 20 Arb. Trib. Feb. 6, 2001), at <<http://www.worldtradelaw.net/nafta20/truckingservices.pdf>>.

³⁰ *Id.* at 295.

³¹ *Id.* at 1–3.

Sixteen. Rather, it applies an additional condition to entry for security purposes as per the qualifying language of Article 1601 and 1603.

Further, the WHTI contrasts sharply with the situation facing the United States in the *Cross-Border Trucking Services* dispute. The United States has not sought to discriminatorily apply the passport restrictions only to Canada, as it did with the moratorium on cross-border trucking services in Mexico. In addition, the WHTI does not present any “national treatment” concerns, since it applies to all domestic travelers.

D. THE WHTI IS JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA OR GATT OR GATS.

Even if the WHTI is contrary to NAFTA Chapters 12 and 16 or GATS, the United States is not in violation of its international obligations because the WHTI falls within the national security exceptions and general exceptions of NAFTA, GATT, and GATS. Furthermore, under the principle of self-defense, which is an accepted customary norm of international law, the United States is justified in implementing initiatives such as the WHTI to ensure the security of its borders.

- i. The WHTI is justified because it is a measure considered by the United States to be necessary to protecting its essential security interests.*

According to the United States Department of State, the purpose of the WHTI is to, “strengthen U.S. border security while facilitating entry for U.S. citizens and legitimate foreign visitors.”³² The WHTI strives to accomplish this by requiring those traveling to the United States from the Western Hemisphere to have a valid passport or other acceptable documentation. However, this measure is no more stringent than that imposed on travelers from other nations.

³² Western Hemisphere Travel Initiative, *supra* note 2.

The WHTI does not impose greater restrictions on those traveling to and from Canada, but merely brings travel protocol to and from Canada into compliance with passenger security levels commensurate with existing standards of international travel.

The WHTI falls within the national security exceptions of NAFTA and GATT because it is directed at preventing the entry of harmful goods and materials via unauthorized and undocumented passengers. Both the NAFTA and GATT security exceptions allow parties to take any actions it considers necessary for the protection of its essential security interests.³³ The fact that these articles explicitly state that Parties may undertake measures that “it considers necessary” suggests that the exception provides for a subjective standard. To require states to adhere to an objective conception of “necessary” would defeat the purpose of including the words “it considers” in these articles. Had the drafters wanted a subjective standard, they could have easily omitted those words from this article, as it has done for the various other articles in NAFTA and GATT. Furthermore, this interpretation of the language is consistent with the principle of state sovereignty, which is an accepted norm of customary international law. States, as sovereign entities, have an inviolable right to take steps to ensure their own national security.³⁴

The security exceptions in NAFTA and GATT are subject to a number of qualifications. According to NAFTA, the measures must relate to “such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying

³³ See NAFTA, *supra* note 12, art. 2102(1); GATT, *supra* note 13, art. XXI.

³⁴ U.N. Charter Art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

a military or other security establishment.”³⁵ Similarly, according to GATT, the measures must relate to “the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.”³⁶

The WHTI satisfies these requirements because the measure relates to screening goods and materials that can be used to supply military establishments. Terrorist entities who aim to gain access to key targets within United States borders may carry with them goods and materials to be used in planned attacks as such implements of war may be difficult to obtain after entry. By preventing those without proper documentation from entering its borders, the United States is taking action necessary for the protection of its essential security interests.

Even if the WHTI does not relate to traffic in goods supplying a military establishment, it is a measure necessary for the protection of essential security interests taken in time of war or other emergency in international relations.³⁷ Protecting a nation’s borders is the first line of defense against potential terrorist attacks. A measure such as the WHTI, which requires travelers to have proper documentation, is necessary to protect the wellbeing of American citizens. Though the United States is no longer at war in Iraq, the ongoing War on Terror against terrorist and insurgent activity in Iraq and Afghanistan constitute an unusual and extraordinary threat to United States national interests. This threat thus justifies the WHTI as it is a measure considered by the United States to be necessary for the protection of its essential security interests.

³⁵ NAFTA, *supra* note 12, art. 2102(1)(b)(i).

³⁶ GATT, *supra* note 13, art. XXI.

³⁷ See NAFTA, *supra* note 12, art. 2102(1)(b)(ii). See also GATT, *supra* note 13, art. XXI(b)(iii); General Agreement on Trade in Services, art. XIV(1)(b)(iii) bis, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS].

ii. The WHTI is justified because it falls within one of the general exceptions of NAFTA, GATT, or GATS.

Even if the WHTI does not fall under security exceptions in NAFTA Article 2102 and GATT Article XXI, the WHTI is justified under one of the general exceptions found in NAFTA, GATT, or GATS. Article 2101 of NAFTA states,

Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on [international] trade between the Parties, nothing in . . . Chapter Twelve (Cross-Border Trade in Services) . . . shall be construed to prevent the adoption of enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection.³⁸

The WHTI is a regulation relating to the health and safety of American citizens, which is not inconsistent with NAFTA or GATS. Furthermore, the WHTI is not a measure constituting a means of unjustifiable or arbitrary discrimination against Canada. The requirement that all individuals traveling within the western hemisphere comports with internationally accepted standards of documentation for travelers.

Various panels and dispute resolution bodies have interpreted the language of Article 2102 narrowly to require states to make a sufficient effort to find a less trade restrictive measure.³⁹ Unlike in the NAFTA Dispute Panel's decision in *Cross-border Trucking Services*, where the United States could not invoke the Article 2102 exception for its imposition of a moratorium on accepting applications from all new Mexican trucking service providers,⁴⁰ there is no less trade restrictive measure to the WHTI that accomplishes the same ends of ensuring proper documentation of travelers.

³⁸ NAFTA, *supra* note 12, art. 2101(2).

³⁹ *See generally* Cross-border Trucking Services, *supra* note 29.

⁴⁰ *See id.*

The general exception in GATT Article XX, which is incorporated into NAFTA Article 2101(1), also applies to the WHTI. That provision states that, “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health.”⁴¹ As explained in the previous subsection, the WHTI, by increasing security at United States borders, is necessary to protect human life or health.

Likewise, GATS Article XIV states, “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . necessary to protect public morals or to maintain public order.”⁴² The preservation of national security is inextricably tied to the maintenance of public order. The potential for another terrorist attack on United States soil is a sufficiently serious threat to the fundamental interest of the United States. Therefore, under the general exceptions of NAFTA, GATT, and GATS, the WHTI is justified contrary to Canada’s assertions.

E. THE REMOVAL OF CANADA’S EXEMPTION FROM HAVING TO PAY AGRICULTURAL QUARANTINE AND INSPECTION (“AQI”) USER FEES IS NOT CONTRARY TO NAFTA OR GATT.

AQI user fees are “necessary to recover the costs of increased inspection activity and to prevent plant and animal diseases from entering the United States, as well as the growing threat of bioterrorism.”⁴³ These fees, which have generally applied to goods imported to the United States from countries other than Canada, support the operation of the United States Animal and Plant Health Inspection Service (“APHIS”) of the United States Department of Agriculture

⁴¹ GATT, *supra* note 13, art. XX(b).

⁴² GATS, *supra* note 32, art. XIV(a).

⁴³ USDA Amends User Fee Regulations for Agricultural Services, , <http://www.aphis.usda.gov/lpa/news/2004/12/aqiusers.html> (last visited Feb. 18, 2008).

(“USDA”). Therefore, the recent imposition of AQI user fees on Canada (the “APHIS fees”) is not an increase of fees on Canada, but rather the removal of a prior exemption. Because the APHIS fees are not applied arbitrarily and they are not an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes, they are in conformity with both the literal terms and purpose of the NAFTA and GATT agreements.

i. The APHIS fees are in conformity with NAFTA Article 310.

The APHIS fees are not contrary to NAFTA Article 310 because they do not constitute “customs user fees” as defined in Article 318. Under Article 310, Parties may not adopt any “customs user fee of the type referred to in Annex 310.1 for originating goods.”⁴⁴ In particular, the United States is prohibited from increasing its merchandise-processing fee.⁴⁵ Under Article 318, a customs duty “includes any customs or import duty and a charge of any kind imposed in connection with the importation of a good, including any form of surtax or surcharge in connection with such importation.”⁴⁶

The APHIS fees do not fall within this general definition of customs duty because they are commensurate with the increase in cost of services rendered by APHIS and Customs and Border Patrol (CBP). Under Article 318(c), “customs duty” does not include any “fee or other charge in connection with importation commensurate with the cost of services rendered.”⁴⁷ The APHIS fees are directly tied to the activity of APHIS and CBP officials, who inspect imported goods to ensure that they meet certain standards. Due to a recent increase in inspection standards, these user fees have had to be increased to cover the costs of providing such services. Although

⁴⁴ NAFTA, *supra* note 12, art. 310.

⁴⁵ *Id.* annex 310.1.

⁴⁶ *Id.* art. 318.

⁴⁷ *Id.* art. 318(c).

the fees are applied uniformly without regard to the type of goods being imported, they are commensurate with the overall increase in cost of services rendered by APHIS and CBP.

In addition, the APHIS fees do not constitute customs user fees because the relevant imports may be found to materially interfere with the United States Department of Agriculture's ("USDA") program of ensuring the safety of imported agricultural goods. Under Article 318(e), "custom duty" does not include any "fee applied pursuant to Section 22 of the United States *Agricultural Adjustment Act*, subject to Chapter Seven (Agriculture and Sanitary and Phytosanitary Measures)."⁴⁸ Under Section 22, the President is authorized to impose fees on imported agricultural products when such imports were found to "render to tend to render, or materially interfere with, any program or operation undertaken by the USDA."⁴⁹ The APHIS fees constitute an exercise of the executive's power to ensure that such imports do not materially interfere with the operation undertaken by the USDA to ensure the health and safety of the American public. Therefore, because the APHIS fees do not fall within the definition of customs duties specified in NAFTA Article 318, they are not contrary to NAFTA Article 310.

ii. The APHIS fees are not contrary to GATT Article I or Article VIII.

The APHIS fees are not contrary to GATT because they simply remove Canada's previous exemption instead of establishing a new custom or duty. Under GATT Article I,

With respect to . . . charges of any kind imposed on or in connection with importation or exportation . . . any advantage, favour, privilege or immunity granted by any 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.⁵⁰

⁴⁸ *Id.* art. 318(e).

⁴⁹ Agricultural Adjustment Act, 7 U.S.C. § 624 (1994).

⁵⁰ GATT, *supra* note 13, art. I.

Under this section, the United States may not impose higher importation charges on goods from Canada than that which it imposes on like goods from other countries. The APHIS fees comply with this requirement because they do not impose greater importation or exportation charges on Canada. Rather, the fees are a result of the removal of an exemption that Canada was previously allowed under the Canada-U.S. Free Trade Agreement.⁵¹ In fact, the application of APHIS fees to Canada is more in line with the purpose of GATT Article I as it removes a previously preferential trading policy.

The APHIS fees are also not contrary to GATT Article VIII because they are commensurate with the cost of services provided. Under GATT Article VIII,

All fees and charges of whatever character . . . imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.⁵²

As discussed above, the APHIS fees are directly tied to increased inspection by APHIS of imported goods. As the fees represent an approximation of the cost of inspection services rendered by APHIS and CBP officials, they do not violate the limitations imposed by GATT Article VIII. Moreover, there is no evidence that the APHIS fees represent an indirect protection to domestic products or a taxation of imports for fiscal purposes as the APHIS fees applied uniformly to imports from countries with the exception of Canada. In light of the considerable threat of bioterrorism in the United States, the increase in APHIS fees is a reasonable cost that reflects the added inspection necessary to keep the United States safe.

⁵¹ Canada-United States Free-Trade Agreement, U.S.-Can., art. 1904, 27 I.L.M 293, 387 (1988) [hereinafter CUSFTA].

⁵² GATT, *supra* note 13, art. VIII.

F. THE APHIS FEES ARE JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA OR GATT OR GATS.

The APHIS fees address the “new trade profile caused by bioterrorism and higher inspection costs due to increased interceptions of pests in tropical and other plant products at the Canadian border.”⁵³ As discussed above, the APHIS fees were recently implemented for goods traveling between Canada and the United States to recover costs associated with an increase in border inspection. The revenues derived from these fees go towards supporting the customs and inspection process. If these fees were to be removed, the United States’ ability to effectively and comprehensively monitor incoming shipments would be severely compromised.

i. The APHIS fees are justified because they relate to matters of national security.

Given the potential bioterrorist threat confronting the United States, it is paramount that border and customs officials are able to detect harmful agents at key points of exit and entry, before the threats reach United States soil. As discussed above, NAFTA, GATT, and GATS all provide national security exceptions for contracting parties. The APHIS fees fall within the security exception in GATT Article XXI because they constitute an action which the United States considers necessary for the protection of its essential security interests *relating to* the traffic in arms, ammunition and implements of war.⁵⁴ Chemical or biological weapons, if allowed to enter the United States, clearly constitute implements of war if their use results in loss of American lives. If this exception applies only to actual traffic in arms, ammunition, and implements of war, it defeats the purpose of providing for such a “national security exception” as by that time a state’s national security may already be compromised. Therefore, it is more

⁵³ Minutes of Canada-U.S. Consultative Committee on Agriculture, November 17, 2006, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/goods-produits/ccamin11.aspx?lang=en> (last visited Feb. 18. 2008).

⁵⁴ See GATT, *supra* note 13, art. XXI.

reasonable to interpret this provision to include measures designed to prevent the traffic of such goods. The APHIS fees relate to traffic in implements of war insofar as they provide the revenue necessary for the inspection of imported goods.

The APHIS fees also fall within the national security exception of NAFTA because it is an action necessary for the protection of the United States' essential security interests, *relating to* traffic in goods undertaken directly or indirectly for the purpose of supplying a military establishment.⁵⁵ The GATT secretariat panel concluded in *Restrictions on Import of Tuna* that the term "relating to" should be taken to mean "primarily aimed at."⁵⁶ While each application of APHIS fees, admittedly, does not directly stop traffic of military goods, the APHIS fees is primarily aimed at maintaining border security. In this regard, it is an action relating to the traffic of goods undertaken indirectly for the purpose of supplying a military establishment. The military establishments in this case are domestic terrorist cells that seek to effect a chemical or biological attack on United States soil.

The APHIS user fees also fall under NAFTA article 2102(1)(b)(ii) because it is a measure necessary for the protection of the United States' essential security interests which it has taken in time of war or other emergency in international relations.⁵⁷ The ongoing War on Terror, of which the United States is a part, though not a war in the traditional sense, is an emergency in international relations. Preventing a bioterrorist attack on United States soil is a major goal of United States national security policy. Therefore, because the APHIS fees allow the United States to better manage imported and exported goods, it falls within the national security exception of NAFTA.

⁵⁵ See NAFTA, *supra* note 12, art. 2102(1)(b)(i).

⁵⁶ Report of the Panel, *U.S.—Restrictions on the Import of Tuna*, ¶ 5.22, DS29/R (Jun. 16, 1994).

⁵⁷ NAFTA, *supra* note 12, art. 2102(1)(b)(ii).

ii. The APHIS fees are justified because they fall within one of the general exceptions of NAFTA, GATT, or GATS.

NAFTA provides a general exception for measures necessary to secure compliance with laws or regulations relating to health, safety, and consumer protection.⁵⁸ The APHIS is mandated to prevent the importation of plant and animal diseases into the United States. One of the ways it accomplishes this is through the agricultural quarantine inspection of goods being imported to the United States. Because the APHIS fees are a necessary component in the APHIS' effort to ensure health, safety, and consumer protection, they are justified according to the general exception of NAFTA.

Moreover, the APHIS user fees also fall under the general exception in GATT Article XX, which is incorporated into NAFTA Article 2101(1), which states, "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health."⁵⁹ The APHIS user fees are integral in restricting the importation of diseased plants and animals. Without these fees, the APHIS would not be able to effectively monitor the quality and health of goods being imported into the United States. A lack of inspection could lead to an agricultural or livestock crises, leading to potentially catastrophic economic losses as well as the potential for loss of human life. In this sense, the APHIS fees are "necessary", because among other possible alternative measures, the fees are the least inconsistent with other GATT provisions.⁶⁰ Furthermore, a GATT Panel stated in *Dispute Settlement Panel on Thai Restrictions on Importation of and*

⁵⁸ See *id.* art. 2101(2).

⁵⁹ GATT, *supra* note 13, art. XX(b).

⁶⁰ See *Dispute Settlement Panel on Thai Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 74, 30 I.L.M 1122 (1991).

Internal Taxes on Cigarettes that Article XX(b) of GATT “clearly allowed contracting parties to give priority to human health over trade liberalization.”⁶¹

VII. CONCLUSION

Canada’s export charge on fuel pumped into the United States is the only provision discussed in the preceding sections to come into direct conflict with either Party’s treaty obligations. In addition, the export charge can not be justified under any sort of general or security exception because its necessity depends solely on Canada’s subjective judgment of need. This conflicts with the ICJ’s view of a “necessary” measure to protect an “essential security interest.”

The WHTI and APHIS user fees policies of the United States do not suffer from the same defects as the Fuel Export Charge. The WHTI does not slow trade in any sort of discriminatory manner, and its delayed implementation provided Canada with adequate time to secure the required travel documents for its populace. In addition, the WHTI falls squarely within the “security exception” of NAFTA and the general exceptions of the GATT. Similarly, the APHIS fees do not place a greater burden upon imports originating in Canada than that imposed on imports originating in other countries. In that sense, they are in conformity with the nondiscrimination and most favored nation principles embodied in NAFTA and GATT.

⁶¹ *Id.* ¶ 73.