

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
(Applicant)

v.

THE GOVERNMENT OF
CANADA
(Respondent)

MEMORIAL OF THE APPLICANT

TEAM # 2008-08A

TABLE OF CONTENTS

STATEMENT OF FACTSiii

QUESTIONS PRESENTEDvi

JURISDICTIONAL STATEMENTvii

INDEX OF AUTHORITIESviii

SUMMARY OF ARGUMENT1

ARGUMENT2

I. THE FUEL EXPORT TAX IS CONTRARY TO NAFTA ARTICLES 314, 315, 604, AND 605, AND GATT ARTICLES I, VIII AND XI2

 A. The Fuel Export Tax is Contrary to NAFTA Article 314 and Article 604.....2

 B. The Fuel Export Tax Violates NAFTA Article 315 and 605.....3

 C. The Fuel Export Tax Violates GATT Article I, VIII, or XI3

II. THE FUEL EXPORT TAX IS NOT JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA ARTICLES 607, 2101, 2102 OR GATT ARTICLES XX AND XXI5

 A. The Fuel Export Tax is Not Justified Pursuant to the General Exceptions of NAFTA Article 2101 and GATT Article XX (g) and (b)5

 B. The Fuel Export Tax is Not Justified Pursuant to the National Security Exceptions in NAFTA Article 607, Article 2102, and GATT Article XXI.....7

III. THE WHTI IS NOT CONTRARY TO NAFTA CHAPTERS 12 AND 16 OR GATS9

 A. The WHTI Supports MFN and National Treatment of NAFTA and GATS9

 B. The WHTI is Justified Under the Fundamental International Law of State Sovereignty Which NAFTA and GATS Must Recognize11

IV. THE WHTI IS JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA, GATT, OR GATS	12
V. THE APHIS USER FEES ARE NOT CONTRARY TO NAFTA ARTICLE 310 AND GATT ARTICLES I AND VIII	14
VI. THE APHIS USER FEES ARE JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA, GATT, OR GATS.....	17
A. The APHIS User Fees are Justified Pursuant to the General Exceptions under NAFTA, GATT, or GATS	17
B. The APHIS User Fees are Justified Pursuant to the National Security Exceptions under NAFTA, GATT, or GATS.....	19
CONCLUSION	20

STATEMENT OF FACTS

Pursuant to national security interests, the United States Department of State (DOS) and the United States Department of Homeland Security (DHS) proposed the Western Hemisphere Travel Initiative (WHTI) in April 2005. (Compromis 1). The WHTI requires all travelers, both Canadian and American, to carry a valid passport or other appropriate documentation when traveling to the United States (U.S.) from within the Western Hemisphere. (Compromis 1). The implementation of WHTI has been separated into two phases. (Compromis 1). Phase I affected air travel and took effect on January 23, 2007. (Compromis 1). Phase II applies to land and sea travel and has not yet taken effect but the Notice of Proposed Rulemaking was published on July 26, 2007. (Compromis 1).

In response to sanitary and phytosanitary (SPS) threats and national security threats to the U.S., an interim rule was imposed by United States Animal Plant and Health Inspection Service (APHIS). (Compromis 2). This interim rule, announced in the Federal Register (Volume 71, No. 165), imposed agricultural quarantine and inspection (AQI) user fees on all commercial shipments entering the U.S. from Canada beginning on November 24, 2006. (Compromis 2). Canada was previously exempt from these user fees and this rule simply lifted that exemption. (Compromis 2).

On August 21, 2007, Canada's Prime Minister Harper, U.S. President Bush, and Mexico's President Calderon issued a Joint Statement at the Conclusion of the 2007 Montebello North American Leaders' Summit. (Compromis 2). In the Joint Statement, the leaders agreed and asked their Ministers to focus on five priority areas for the next year including the Smart and Secure Borders, which stands to improve, expand, and create more inspection points to bring the borders to a superior screening and national security level. (Compromis 2-3).

Following reports of suspected terrorism, Canada and the United States issued a Joint Statement in which Canada agreed to improve and implement new inspection criteria, extensively over-haul sub-standard security systems, and improve the current screening and inspection systems. (Compromis 4). Canada further understood the need to do so expediently and agreed to spend \$USD 1 billion to implement the needed security measures. (Compromis 4).

After agreeing to improve Canada's sub-standard borders, Canada's Prime Minister Harper announced a Fuel Export Tax on fuel transported by way of pipeline to the U.S., which amounted to \$CDN 25/barrel. (Compromis 5). Prime Minister Harper stated that the Fuel Export Tax was implemented to assist Canadian taxpayers in lowering the taxes while at the same time bringing the borders to an acceptable level of safety. (Compromis 5). President Bush was outraged by the tax, and after discussions between the Canadian and U.S. governments, Canada's Ambassador to the U.S., Michael Wilson, made it clear that the Fuel Export Tax would remain in effect. (Compromis 5).

As a result of the above facts, the present suit has developed. The U.S. filed a dispute with the International Court of Justice (ICJ) with respect to the Fuel Export Tax on September 23, 2007. (Compromis 6). Canada responded on October 23, 2007 by filing a dispute with the ICJ with respect to the implementation of the WHTI and the lift of Canada's exemption of the APHIS user fee. (Compromis 6). On November 23, 2007 the disputes were joined and is proceeding as *United States of American v. Canada*. (Compromis 6).

All of the parties have submitted declarations accepting, without reservation, the compulsory jurisdiction of this Court. (Compromis 6). All parties have also agreed that this Court would have jurisdiction to consider the issues presented by both the United States and Canada. (Compromis 6). Mexico has been notified by the United States and Canada to lift the

dispute out of the NAFTA context and has not filed an objection to its loss of right to appear.
(Compromis 6).

QUESTIONS PRESENTED

The Government of the United States asks this Court:

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

JURISDICTIONAL STATEMENT

The Parties to this dispute, the United States and Canada, come before this Honorable Court, pursuant to Article 36(2) of Statute of the International Court of Justice.¹ The Parties each agree to bring its actions and positions in conformity with the legal conclusions of this Court with respect to the questions presented.

¹ Statute of the International Court of Justice, Art. 36(2), Dec. 10 1945, 59 Stat. 1031, T.S. 993.

INDEX OF AUTHORITIES

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SUMMARY OF ARGUMENT

Canada violated NAFTA and GATT when it imposed the Fuel Export Tax on fuel exported to the U.S. because the tax is a barrier to free trade. The tax is not applied domestically and it is an arbitrary tax that is not aimed at cost recovery. Furthermore, Canada cannot claim a general exception because the tax is not aimed at the conservation of a natural resource, nor a SPS concern. Additionally, Canada cannot claim a national security exception because it is not under a threat of armed conflict nor in a time of war.

The U.S. implementation of WHTI is in accordance with both international treaty law and customary international law. WHTI is a non-discriminatory measure that requires all people, including U.S. citizens, crossing a border into U.S. territory to provide a passport or other authorized documentation and thus promotes the MFN and National Treatment principles of both NAFTA and GATS. Furthermore, the WHTI was imposed to protect U.S. territory and citizens which the U.S. has the sovereign right to do. However, should the WHTI be found contrary to NAFTA or GATS, the WHTI is pursuant to a general or national security exception because the WHTI is necessary to protect human life and is one of many measures of which the U.S. has implemented in response to the threat of terrorism.

Removing Canada's exemption from the APHIS user fees is justified pursuant to both NAFTA and GATT because the fees will not prohibit trade between Canada and the U.S. and are being implemented to cover costs associated with increased inspection. The user fees are being implemented to provide increased screening on modes of transportation crossing the U.S./Canadian border in response to protecting against a potential SPS threat from goods being imported from Canada.

ARGUMENT

I. THE FUEL EXPORT TAX IS CONTRARY TO NAFTA ARTICLES 314, 315, 604, AND 605, OR GATT ARTICLES I, VIII AND XI.

The Fuel Export Tax that Canada is imposing upon the U.S. is contrary to NAFTA and GATT because the tax is a barrier to free trade. NAFTA was designed to eliminate tariffs between products traded among the U.S., Canada, and Mexico.² The goal of GATT is to facilitate growth in world trade by reduction of tariff and non-tariff trade barriers between all WTO nations.³

A. The Fuel Export Tax is Contrary to NAFTA Articles 314 and 604.

NAFTA Article 314 restricts parties from imposing export taxes on goods unless that party also imposes a similar charge on goods sold in its domestic market.⁴ NAFTA Article 604 places identical restrictions on forms of energy or basic petrochemicals.⁵ To properly interpret a treaty, it shall be read in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁶

The Fuel Export Tax imposed upon the U.S., is contrary to Articles 314 and 604 of NAFTA because the tax does not also apply to the Canadian domestic market. The tax of \$CDN 25/barrel does not apply to Canada, but does apply to all other NAFTA Parties,⁷ which is a direct contradiction to the language of NAFTA Articles 314 and 604. Therefore, Canada is in violation of NAFTA as it has erected a barrier to free trade.

² See United States Department of Agriculture Foreign Agricultural Service Trade Agreements <http://www.fas.usda.gov/itp/Policy/NAFTA/nafta.asp>.

³ See e.g., Melaku Geboye Desta, *The Hague: The Law of International Trade in Agricultural Products: from GATT 1947 to the WTO Agreement on Agriculture* 57-8 (2002).

⁴ Barry Appleton, *Navigating through NAFTA, A Concise User's Guide to the North American Free Trade Agreement*, 27 (1994).

⁵ North American Free Trade Agreement, U.S.-Can.-Mex., Art. 604, Dec. 17, 1992, 32 I.L.M. 605 (1993). [hereinafter NAFTA].

⁶ Vienna Convention of the Law of Treaties, Art. 31, May 23, 1969, 1115 U.N.T.S. 331, 340.

⁷ Request for Clarifications 3.

B. The Fuel Export Tax Violates NAFTA Articles 315 and 605.

The Fuel Export Tax imposed on oil exported by Canada is contrary to NAFTA Article 315 and Article 605 because the tax imposes a higher price on fuel in the U.S. as compared to the Canadian market. NAFTA Article 315(b) only allows a restriction if the party does not impose a higher price than charged domestically.⁸ NAFTA Article 605, states identical language of Article 315, but applies specifically to the export of an energy or basic petrochemical product to the territory of another party.⁹

The Fuel Export Tax is a blatant violation of NAFTA Articles 315 and 604 because the tax results in a higher price of oil in the U.S. than domestically in Canada. The implementation of the Fuel Export Tax will force U.S. oil companies to increase the domestic U.S. price per gallon, thus creating a detriment to the U.S. economy. In conclusion, the Fuel Export Tax is contrary to NAFTA Articles 315 and 605 as the tax results in a higher price paid in the U.S. than the Canadian domestic market.

C. The Fuel Export Tax Violates GATT Article I, VIII, or XI.

The Fuel Export Tax violates GATT Articles I, VIII, or XI because the arbitrary tax placed on exported fuel applies only to the U.S. and not to other WTO Countries.

GATT Article I addresses MFN treatment and states that any type of export fee, duty, or charge has to apply to all signatory nations.¹⁰ However, GATT Article VIII allows for a fee to be imposed if it is:

in connection with 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.¹¹

⁸ NAFTA, *supra* note 5, at Art. 315.

⁹ *Id.* at Art. 605.

¹⁰ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3; T.I.A.S. No. 1700, 55 U.N.T.S. 187, Art. I, [hereinafter GATT].

¹¹ *Id.* at Art. VIII.

Therefore, if a measure is implemented to cover costs it may be classified as a user fee, but if in excess of the cost, then it is classified as a tax.¹²

GATT Article XI says that a contracting party shall not place any type of prohibitions, duties, or taxes on goods destined for the export of any product for the territory of another contracting party.¹³ GATT Article XI(2) addresses the exception available “to prevent or relieve a critical shortage of other products or foodstuff”.¹⁴

Canada’s Fuel Export Tax is not applicable to other WTO Countries that consume Canadian fuel and therefore violates the MFN treatment as represented in GATT Article I. Essentially, each contracting party is to treat all other contracting parties alike as with respect to similar products.¹⁵ The tax applies to fuel exported only to the U.S. and therefore it discriminates against the U.S. market, thus violating the MFN principle.

Canada argues that the charge is a user fee enacted to recover costs incurred from the Smart Border Declaration. However, the implementation of the Fuel Export Tax violates GATT Article VIII because it is an arbitrary value enacted for fiscal purposes and has no basis for recovering costs. In application of GATT Article VIII, the value of \$CDN 25/barrel is merely an arbitrary figure that has no correlation to the costs associated with the Smart and Secure Borders (SSB). Canada has not presented the U.S. with figures or calculations to show the cost of such security measures. To fully comply with GATT Article VIII, fees must represent incurred costs. Since Canada cannot justify the costs, the Fuel Export Tax cannot be a user fee.

¹² Howard Schragin, Comment, *U.S. Shoe Corp. v. United States: A Victory for U.S. - Canada Maritime Trade*, 19 Fordham Int’l L.J. 1764, 1814-16 (1996).

¹³ GATT, *supra* note 10, at Art. XI.

¹⁴ *Id.* at Art. XI(2).

¹⁵ David S. MacDougall, Article, *Trade in Energy and Natural Resources: The Role of the GATT and Developing Countries*, 12 J. Energy Nat. Resources L. 95, 97 (1994).

GATT Article XI cannot be properly employed by Canada to justify the Fuel Export Tax because Canada is not protecting a critical shortage of fuel. GATT Article XI would allow Canada to claim that the consumption of Canadian oil by the U.S. market is creating a critical shortage of oil thus requiring a temporary export tax to decrease demand and consumption.¹⁶ Without claiming such a need to conserve Canadian oil, this exception is not allowed and thus GATT Article XI is not available for Canada to claim.

In conclusion, the Fuel Export Tax is only applied to the U.S., but not to Canada which violates the MFN principle. GATT Article VIII is violated as the fees are not associated to cover the security costs incurred by Canada in agreeing to the SSB. Lastly, pursuant to GATT Article XI, the fee is not implemented to conserve critically low levels of fuel. Therefore, Canada has violated NAFTA and GATT by implementing the Fuel Export Tax.

II. THE FUEL EXPORT TAX 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.

The invoking state bears the burden when attempting to claim exceptions under NAFTA and GATT.¹⁷ Canada has not properly met its burden and therefore the Fuel Export Tax is not justified by general or national security concerns.

A. The Fuel Export Tax is Not Justified Pursuant to the General Exceptions of NAFTA Article 2101 and GATT Article XX(g) and (b).

The Fuel Export Tax is not justified under the general exceptions of NAFTA and GATT because the measure was not primarily aimed at conservation of an exhaustible natural resource and is not necessary for the protection of human and plant life. NAFTA Article 2101 invokes the language of GATT Article XX.¹⁸ GATT Article XX reads:

¹⁶ GATT, *supra* note 10, at Art. XI.

¹⁷ See MacDougall, *supra* note 15.

¹⁸ NAFTA, *supra* note 5, at Art. 2101.

Parties may implement measures referred ...that may otherwise be inconsistent with its obligations if the controls are not imposed as in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade.¹⁹

GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.²⁰ It is well known that oil is such a resource.²¹ GATT Article XX(g) was interpreted by the WTO to mean that an exhaustible natural resource may be legally restricted if the measure is primarily aimed and in relation to the conservation of a natural resource.²² Additionally, NAFTA imposes a proportional sharing obligation when claiming an attempt to conserve exhaustible natural resources.²³ Contracting parties may only adopt measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.²⁴ GATT Article XX(b) relates to measures necessary to protect human, animal or plant life or health.²⁵ In general, since Article XX provides for limited and conditional exceptions from the substantive obligations, dispute settlement practice has determined that Article XX must be construed restrictively, and that the party invoking the Article XX bears the burden of proof.²⁶

Canada's implementation of the Fuel Export Tax cannot be justified as aimed at the conservation of oil because it was clearly enacted to decrease Canadian taxes. The purpose of the Fuel Export Tax was to assist in lowering Canadian citizens taxes as promised by Prime Minister

¹⁹ GATT, *supra* note 10, at Art. XX.

²⁰ *Id.* at Art. XX(g).

²¹ Melaku Geboye Desta, Article, *The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements*, *Journal of World Trade* 37(3), 536 (2003).

²² Report of the Panel, *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268-35S/98, (March 22, 1988), GATT B.I.S.D. (35th Supp.) at 98 (1988).

²³ NAFTA, *supra* note 5, at Art. 315.

²⁴ MacDougall, *supra* note 15, at 112.

²⁵ GATT, *supra* note 10, at Art. XX(b).

²⁶ Desta, *supra* note 21, at 537-38.

Harper. The Fuel Export Tax was not for the purpose of preserving an exhaustible natural resource as required by Article XX (g).

In application of GATT Article XX(b), the burden lies upon Canada to prove a narrow exception under GATT Article XX(b) which provides an exception for measures necessary to protect human life. Canada has failed to offer an explanation of the charges or justification that they are in relation to the SSB. GATT Article XX(b) applies to SPS concerns internally in the country claiming the exception.²⁷ In this case, Canada does not have any sanitary and phytosanitary concerns and this article does not apply.

In conclusion, the Fuel Export Tax is not justified nor recognized as a general exception under GATT XX(g) or (b), nor recognized by NAFTA Article 2101 because the measures are not primarily aimed at the conservation of oil or protection of human and plant life.

B. The Fuel Export Tax is Not Justified Pursuant to the National Security Exceptions in NAFTA Article 607, Article 2102, and GATT Article XXI.

The Fuel Export Tax is not justified under national security exceptions pursuant to NAFTA or GATT because Canada is not involved in an armed conflict or international crisis. NAFTA Article 2102 applies trade barrier exceptions to measures taken during a time of war or international crisis.²⁸ NAFTA Article 607 applies Article 2102 specifically to restrictions on energy imports and exports.²⁹ Similarly, GATT Article XXI allows national security exceptions for measures that are “essential” and necessary to preserve national security such as measures taken during a time of national security emergency.³⁰

²⁷ Welsey Cann, Jr., Article, *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, 425(2001).

²⁸ NAFTA, *supra* note 5, at Art. 2102.

²⁹ *Id.* at Art. 607.

³⁰ Cann, Jr., *supra* note 27, at 423.

NAFTA Article 607 limits the uses of which states can claim national security exceptions under Article XXI of GATT.³¹ NAFTA Article 2102 restricts imports or exports of energy goods and under the provisions, such measures are only justified in situations involving “threats to national defense, situations of war, and the implementation of policies dealing with the non-proliferation of nuclear arms.”³² The exception is sharply narrowed to situations in which a national security exception is available to a Party wishing to restrict imports or exports, but has the positive effect of minimizing the potential for threats.³³

In examining GATT Article XXI, it cannot be argued that the implementation of the Fuel Export Tax is essential and necessary for the protection of national security. It is clear that Canada is not involved in a war or armed conflict with another country, nor involved in any type of international crisis. They have not suffered a terrorist attack on their soil as did the U.S. and therefore any claimed national security exception is simply a disguised trade barrier.³⁴ States should be required to demonstrate that they acted for the protection of their essential security interests³⁵ and Canada has failed to demonstrate such a requirement.

In conclusion, the Fuel Export Tax violates NAFTA and GATT because it inhibits free trade. GATT exceptions are strictly limited by the language of NAFTA, for the express purpose of guaranteeing that normal trade in energy will continue between Canada and the U.S. even during an oil crisis.³⁶ The implementation of the Fuel Export Tax is a clear case of using

³¹ Appleton, *supra* note 4, at 42.

³² *Id.* at 61.

³³ *Id.* at 62.

³⁴ Dunniela Kaufman, Comment, *Does Security Trump Trade?*, 13 L. & Bus. Rev. Am. 619, 633 (2007).

³⁵ Cann, Jr., *supra* note 27, at 425.

³⁶ Kaufman, *supra* note 34, at 633, 34.

economic measures for political purposes, which have not only violated GATT, and NAFTA but general international law as well.³⁷

III. THE WHTI IS NOT CONTRARY TO NAFTA CHAPTERS 12 AND 16 OR GATS.

The WHTI is not contrary to NAFTA or GATS, which support nondiscriminatory trade in services, and according to the principle of state sovereignty, the U.S. has a right to govern its borders as it desires.

A. The WHTI Supports MFN and National Treatment of NAFTA and GATS.

The WHTI is a non-discriminatory measure that promotes MFN and national treatment of NAFTA and GATS as applied to trade in services between Canada and the U.S. National treatment provides that one nation shall accord no less favorable treatment than it accords to its own service providers.³⁸ Similarly, the MFN principal, provides that each state shall grant all other states treatment no less favorable than provided to any other state.³⁹ Therefore, when addressing violations to trade in services under NAFTA and GATS, the actions must not discriminate and shall promote the MFN and national treatment principles accordingly.⁴⁰

WHTI supports the obligations of national treatment and MFN, and therefore is not in violation of NAFTA or GATS. WHTI requires all travelers, even U.S. citizens, to present proof of citizenship and identification to enter U.S. territory when traveling within the Western Hemisphere. By requiring the same proof from a U.S. citizen and a foreigner, WHTI fulfills the national treatment principle. The WHTI satisfies MFN treatment because it provides similar treatment to all trade in services crossing the U.S. border. Prior to WHTI, the U.S. required

³⁷ Michael J. Hahn, Article, *Vital Interests and the Law of GATT: An Analysis of GATT'S Security Exception*, 12 Mich. J. Int'l L. 558, 597 (1990-1991).

³⁸ *Accord* NAFTA, *supra* note 5, at Art. 1202.

³⁹ *Id.* at Art. 1203.

⁴⁰ Gabriel Moens & Peter Gillies, *International Trade and Business: Law, Policy and Ethics*, 362 (2d ed. 2005).

citizens of all countries except Canada and the U.S. to present a passport when entering the U.S. from within the Western Hemisphere.⁴¹ Now, all countries including U.S. and Canada receive the same treatment as other countries. Furthermore, WHTI is not in violation of NAFTA because a member of NAFTA retains the right to set objectives deemed appropriate in pursuit of legitimate regulatory objectives towards services.⁴² With the implementation of WHTI, the U.S. is standardizing the regulations for crossing the U.S. border and therefore supports both national treatment and MFN.

As a proposed rule that is continuously evolving and progressing, the WHTI recognizes Canada's issues and addresses them accordingly.⁴³ The WHTI has currently been partially implemented with the first phase addressing identification documents for air travel.⁴⁴ The second phase regarding land and sea travel was recently delayed until June 2009.⁴⁵ Canada argues that the WHTI harms the Canadian economy along border towns by reducing the travel of the casual American tourists into Canada.⁴⁶ The U.S. has responded to this concern by implementing the passport card for U.S. citizens to use at land and sea ports-of-entry between Canada and the U.S.⁴⁷ By creating the passport card for U.S. citizens, the U.S. has addressed

⁴¹ 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 Fed. Reg. 122, 35088 at 35090 (June 26, 2007) (to be codified at 8 C.F.R. pt. 212).

⁴² North American Free Trade Agreement Bi-national Panel Review, In the Matter of Cross-Border Trucking Services, at 298, USA-Mex.-98-2008-01 (Feb. 2, 2001).

⁴³ Staff of Homeland Security Comm., Subcomm. on Border, Maritime and Global Counterterrorism, 110th Cong., Observations on Implementing the Western Hemisphere Travel Initiative, GAO-08-274R, 5 (Comm. Print 2007) [hereinafter Homeland Security Report].

⁴⁴ *Id.* at 2.

⁴⁵ Rep. Slaughter "Delays WHTI Until at Least June of 2009," http://www.louise.house.gov/index.php?option=com_content&task=view&id+889&Itemid=1.

⁴⁶ *Id.*

⁴⁷ Card Format Passport; Changes to Passport Fee Schedule Federal Register, 72 Fed. Reg. 249, 74169 (Dec. 31, 2007) (to be codified at 22 C.F.R. pt. 22).

Canada's claim of harming the economies of border communities. Therefore, the U.S. altered WHTI to decrease any threats to the Canadian economy that WHTI may represent.

The WHTI promotes the principles of MFN and national treatment, which are the basis of non-discriminatory international trade. Once fully implemented, the WHTI will create equality of documentation among all people hoping to enter the U.S. and facilitate the flow of people across the border. Therefore, the WHTI is not contrary to NAFTA or GATS.

B. The WHTI is Justified Under the Fundamental International Law of State Sovereignty Which NAFTA and GATS Must Recognize.

The U.S. can implement WHTI because a state has a fundamental international right of territorial sovereignty as one of the most basic principles in international law.⁴⁸ NAFTA and GATS cannot operate in a vacuum, and must accept that state sovereignty remains a pillar of present day international law.⁴⁹ Furthermore, the text of NAFTA and GATS each recognize the fundamental basis of state sovereignty. Under NAFTA, trade in services includes cross-border movement of a national of a party.⁵⁰ NAFTA does not address how a party is to determine if a person is a national of a party and therefore leaves to each state the sovereign right to determine. GATS more specifically addresses the situation in the Annex on Movement of National Persons Supplying Services Under the Agreement, which reads in part, "The agreement shall not prevent a Member from applying measures to regulate the entry of national persons into, or their temporary stay in, its territory." As recognized in both NAFTA and GATS, each state as a sovereign nation has the right to determine who enters its territory and who does not.

The WHTI imposes restrictions on documentation to be presented at U.S. ports of entry which is part of the U.S. sovereign right to govern who enters its' borders. Even a U.S. citizen

⁴⁸ Cecillie Schjatvet & Zakir Hafez, *ILSA Guide to International Moot Court Competition*, 44 (2004).

⁴⁹ Hahn, *supra* note 37, at 560.

⁵⁰ NAFTA, *supra* note 5, at Art. 201.

must present appropriate documentation to cross the border into the U.S. Therefore, not even a U.S. citizen has an absolute right of entry into U.S. territory. The U.S. has the right to protect its sovereignty from external threat.⁵¹ Implementation of WHTI falls under the fundamental international principal of territorial sovereignty and Canada must respect the WHTI.

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

Should the WHTI be found contrary to NAFTA or GATS, the U.S. retains the right to implement it under an exception to the agreements. The applicable GATS provision is the general exception of Article XIV(b), allowing for measures that are “necessary to protect human, animal or plant life or health.”⁵² Similar to GATT Article XX, a two-tier analysis is used to determine whether a measure qualifies under GATS Article XIV.⁵³ The two-tiers consist of whether a measure is necessary and whether it supports the chapeaus of Article XIV.⁵⁴ Further, for a measure to be necessary, there must be a nexus between the intent and means of achieving the purpose as well as an absence of any reasonable alternatives.⁵⁵

The WHTI is necessary because there is a sufficient nexus and there are no reasonable alternatives. The intent of WHTI is to simplify and facilitate the duties of Customs and Border Protection (CBP) officers at ports of entry by reducing the large number of documents that are currently presented by making them easier to verify.⁵⁶ This can be accomplished by providing more reliable evidence of identity and citizenship.⁵⁷ Prior to WHTI, documentation to prove

⁵¹ Cann, Jr., *supra* note 27, at 421.

⁵² General Agreement on Trade in Services Art. XIV(b), Jan. 1, 1995, 1869 U.N.T.S. 183.

⁵³ Appellate Body Report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, ¶147, WT/DS58/AB/R, (Oct. 12, 1994).

⁵⁴ Appellate Body Reports, *United States- Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 292, WT/DS285/AB/R (Apr. 7, 2005).

⁵⁵ *Id.* at ¶ 307.

⁵⁶ Homeland Security Report, *supra* note 42, at 11.

⁵⁷ *Id.* at 12.

citizenship and identity were minimal, and numerous forms of identification could be presented.⁵⁸ For example, a driver's license was an appropriate form of identification, and some states have up to 16 variations of valid driver's licenses.⁵⁹ This wide range of documents that are capable of being duplicated creates a vulnerable U.S. border.⁶⁰ However, under WHTI, all approved documentation incorporates greater screening and security functions than a driver's license.⁶¹ WHTI also fulfills the chapeau of Article XIV because it does not present "arbitrary or unjustifiable discrimination" against Canada and requires the same documentation from U.S. citizens.

If the WHTI is found to be in violation of NAFTA, it is internationally compliant under the national security exception of Article 2102, which is interpreted as GATT Article XXI.⁶² The absence of specificity in Article XXI leads to the belief that security interests are self-defining.⁶³ However, a security exception does have limitations as evidenced from the Helms-Burton Act, which provided that a national security exception cannot be used to disguise a foreign policy measure as a national security interest and that the threat against national security cannot be speculative.⁶⁴

The U.S. has the right to claim a national security exception for the WHTI and fits limitations that have been imposed on the exception. The WHTI is distinguishable from the Helms-Burton act because the WHTI has been proposed and partially implemented as a direct result of the September 11 terrorist attacks. Whereas the threat was speculative in the case of the

⁵⁸ *Id.* at 1.

⁵⁹ *Id.* at 2.

⁶⁰ *Id.* at 7.

⁶¹ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 72 Fed. Reg. 165, 35092-96(Aug. 25, 2006) (to be codified at 7 C.F.R. pt. 319).

⁶² Appleton, *supra* note 4, at 157.

⁶³ Cann, Jr., *supra* note 27, at 415.

⁶⁴ *Id.* at 433.

Helms-Burton act, there is substantial threat of future terrorist attacks on U.S. territory. Also, the WHTI is one measure of many that has been implemented regarding the strengthening of borders. Post September 11, the U.S. increased border security against all other nationals arriving on U.S. soil.⁶⁵ The U.S. government has been making numerous alterations in the past seven years to bolster security of the U.S. Such measures include enacting the PATRIOT Act, which tripled the number of CBP officers and immigration inspectors and increased the verification of identity for persons applying for a visa.⁶⁶ In 2002 the Enhanced Border Security and Visa Entry Reform Act was implemented which required machine readable, tamper resistant entry and exit documents, most commonly the e-Passport.⁶⁷ Overall, the U.S. has made increased security measures for citizens from all countries, including U.S. citizens, to enter U.S. territory therefore proving that it is not arbitrary or discriminatory.

In conclusion, the WHTI does not violate obligations under NAFTA and GATS but if found to be in violation of these agreements, then it qualifies for exceptions under both treaties. The WHTI promotes the non-discrimination of trade in services between Canada and the U.S. Also, the WHTI has been proposed and partially implemented under severe security threats which the U.S. has the sovereign right to protect against.

V. THE APHIS USER FEES ARE NOT CONTRARY TO NAFTA ARTICLE 310 AND GATT ARTICLES I AND VIII.

The APHIS user fees are not contrary to NAFTA and GATT because the fees will not prohibit trade between Canada and the US and are being implemented to cover costs associated with the increased inspection. Specifically, NAFTA Article 310 prohibits user fees for goods

⁶⁵ Richard A. Boswell, *Essentials of Immigration Law* 11 (2006).

⁶⁶ *Id.* at 18.

⁶⁷ U.S. Department of State, *Enhanced Border Security and Visa Entry Reform Act of 2002* http://travel.state.gov/visa/laws/telegrams/telegrams_1403.html (last visited Feb. 14, 2008).

originating in NAFTA countries,⁶⁸ which reinforces the very purpose of NAFTA, as promoting trade within North America.⁶⁹ The applicable GATT articles are I and VIII, which implement the MFN principal and allow fees if limited to cover costs for services rendered, respectively.⁷⁰

Lifting the exemption from Canadian imports does not violate NAFTA Article 310 because the interim rule is not purposefully imposing user fees against goods originating in Canada. The purpose of the user fees is to cover the costs of current inspection activities as well as future increased inspection activities.⁷¹ In order to do so user fees will be collected from all commercial conveyances and international air passengers entering the US from Canada.⁷² All commercial trucks, vessels, railroad cars and aircrafts are subject to inspection and therefore subject to fees.⁷³ The user fees are being implemented to provide for border inspection.⁷⁴ All of the transportation methods which will be subject to inspection are, in essence providing the revenue to cover the cost of the additional inspections.

The U.S. has a strong interest in protecting its territory from potential SPS threats.⁷⁵ In order to do so, the U.S. has determined that increased inspection is needed.⁷⁶ Increased inspection does have a potential for border delays,⁷⁷ but to promote free and enhanced security

⁶⁸ NAFTA, *supra* note 5, at Art. 310.

⁶⁹ *See id.*

⁷⁰ GATT, *supra* note 10 at Art. I, VIII.

⁷¹ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, *Preliminary Economic Analysis for Agricultural Inspection and AQI User Fees Along the U.S./Canada Border*, August 10, 2006, <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=09000064801be93e> (August 10, 2006), at 2. [hereinafter APHIS Preliminary Economic Analysis].

⁷² *Id.*

⁷³ *Id.* at 3.

⁷⁴ *Id.*

⁷⁵ Agreement on the Application of Sanitary and Phytosanitary Measures, Art. II, Jan. 1, 1995, GATT Doc. MTN/FA li-A1A-4, 33 I.L.M. XXX. [hereinafter SPS Agreement].

⁷⁶ APHIS Preliminary Economic Analysis, *supra* note 68, at 3.

⁷⁷ *Id.* at 8.

collectively, it is imperative that the U.S. increase its inspection points in a manner that will not hinder trade.

Lifting Canada's exemption from user fees is a non-discriminatory act that promotes the MFN principle as established in GATT Article I. The inverse of the MFN principle is also true, that no contracting party may be treated preferentially by another.⁷⁸ Prior to the implementation of the user fees, Canada was given preferential treatment by obtaining an exemption from paying the user fees and was not subject to mandatory border inspections.⁷⁹ Therefore, lifting the exemption on fees and inspections support the MFN principle because it places Canada on the same standing as other countries. Additionally, to be non-discriminatory the user fees are assessed to all modes of transportations that are subject to inspection and not to a particular group or category of people to provide preferential treatment.

The user fees are not contrary to GATT Article VIII because the fees are covering the cost involved for the services rendered by the U.S. The APHIS user fees are calculated by determining the total annual costs to administer the inspection activities for air passengers, commercial aircraft, trucks, railroad cars, and maritime vessels.⁸⁰ The costs are spread over all modes of transportation that will be subject to inspection.⁸¹ Canada argues that the fees should only be charged against modes carrying the potentially harmful products. However, if this were the case, trade of those products would be prohibited by the exorbitant cost and thus hinder the facilitation of trade as provided for under NAFTA.⁸²

The U.S. proposal to lift the user fee exemption from Canada is not contrary to NAFTA Article 310 and GATT Articles I and VIII. The U.S. has the need to protect its territory from the

⁷⁸ GATT, *supra* note 10, at Art. VIII.

⁷⁹ APHIS Preliminary Economic Analysis, *supra* note 71, at 1.

⁸⁰ *Id.* at 4.

⁸¹ *Id.*

⁸² NAFTA, *supra* note 5, at Art. 102(1)(a).

potential SPS threats posed from trade of goods and services between Canada and the U.S. Increased inspection is a means to reduce the level of threat, however, there is a large cost involved and the user fees will allow the U.S. to recover the costs associated with inspections.

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

Since the implementation of NAFTA, more goods are now being imported from Canada to the U.S. which poses a great threat to the U.S.⁸³ From 1995 to 2006, re-exports from Canada into the U.S. have increased 336%.⁸⁴ In addition the opportunity to smuggle goods across the border has increased as the volume of commercial traffic and number of air passengers have increased as well.⁸⁵ Due to the increasing levels of trade between Canada and the US, APHIS reevaluated its inspection activities at the U.S./Canadian border by performing inspection blitzes.⁸⁶ The blitzes resulted in numerous interceptions of unauthorized material produced in regions other than the U.S. and Canada.⁸⁷ Prohibited or restricted articles were found carrying various pests, such as fruit flies, scales, and several species of mealy bugs.⁸⁸ The interception of these pests reinforces the need to conduct increased border inspections between the US and Canada.

A. The APHIS User Fees are Justified Pursuant to the General Exceptions Under NAFTA, GATT, or GATS.

The APHIS user fees are justified pursuant to the general exceptions provided for under NAFTA, GATT, or GATS because the U.S. lifted the exemption from Canada in order to protect human, animal, and plant life. Ultimately, when reviewing the general exceptions of all three

⁸³ APHIS Preliminary Economic Analysis, *supra* note 71, at 5.

⁸⁴ *Id.* at 6

⁸⁵ *Id.* at 7

⁸⁶ *Id.* at 8.

⁸⁷ *Id.* at 9.

⁸⁸ *Id.*

agreements, the interpretation of GATT Article XX will control. NAFTA incorporates the list of general exceptions provided for in GATT Article XX,⁸⁹ thus providing consistency in the exceptions between GATT and NAFTA.⁹⁰ Since the lifting of Canada's exemption is pursuant to SPS measures, GATT Article XX must be looked at in conjuncture with the SPS Agreement from the Uruguay Round. The SPS Agreement provides that if a measure is in compliance with the SPS Agreement, then it automatically qualifies under GATT Article XX.⁹¹

The user fees are in accordance with the SPS Agreement and therefore are justifiable as a general exception under Article XX of GATT. The SPS Agreement contains several provisions requiring members to balance the level of protection chosen and the application of the SPS measures against negative trade consequences.⁹² According to the SPS, the sovereign nation employing the measure is to determine the level of the measure employed.⁹³ The SPS requires that the measure employed be based on risk assessment prohibiting arbitrary and unjustified distinctions.⁹⁴ The U.S. has identified the threats and potential consequences, the likelihood of entry from Canada, and the impact of the inspections on preventing the threat and therefore fulfills the risk assessment obligation under the SPS Agreement.⁹⁵ Specifically, the US lifted the exemption based on a reasonable relationship that the increased inspection paid for by the user fees will decrease the threat of potentially hazardous products being imported into the U.S.

⁸⁹ NAFTA, *supra* note 5, at Art. 2101.

⁹⁰ Appleton, *supra* note 4, at 158.

⁹¹ SPS Agreement, *supra* note 75, at Art. 2(4).

⁹² Heather D. Heavin, Article, *The Biosafety Protocol and the SPS Agreement: Conflicts and Dispute Resolution*, 12 J. Env. L. & Prac. 373, 387 (2003).

⁹³ SPS Agreement, *supra* note 75, at annex A(5).

⁹⁴ *Id.*

⁹⁵ David G. Victor, Article, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U.J. Int'l L. & Pol. 865, 906-07 (2000).

Therefore, the SPS threats posed from other countries are properly contained and the U.S. wishes to impose similar measures against Canada. The actions of the U.S. are justified under the SPS Agreement and therefore, fall under GATT Article XX general exception.

B. The APHIS User Fees are Justified Pursuant to the National Security Exceptions Under NAFTA, GATT, or GATS.

The APHIS user fees are justified pursuant to the national security exceptions in NAFTA, GATT and GATS. Article XXI of GATT essentially negates the international legal order in times of distress.⁹⁶ By invoking the need for a state's vital interest, a state is granted freedom from international legal rules and treaties when a set of circumstances potentially effects its existence.⁹⁷ Lifting the user fee exemption from Canada supports a national security interest of the U.S. because Canada maintains a lower security standard at its borders and allows many unauthorized products into the collective marketplace. Canada imposes fewer SPS requirements on imports than the U.S. requirements on imports.⁹⁸ In a recent sampling, of the 402 species on the U.S. regulated plant pest, 87% of the list were not screened nor regulated for in Canada which is a matter of grave concern for the U.S.⁹⁹

In *U.S. v. Cuba*, the U.S. emphasized that GATT left to each Contracting Party the right to judge what was necessary to protect its essential security interests in times of an international crisis.¹⁰⁰ The U.S. further argued that no country would have participated in GATT if it had to give up the possibility of using any measures other than military force to protect its own security interests.¹⁰¹ The court held that states claiming the security exception, under GATT Article XXI,

⁹⁶ Hahn, *supra* note 37, at 559.

⁹⁷ *Id.* at 562.

⁹⁸ APHIS Preliminary Economic Analysis, *supra* note 71, at 16.

⁹⁹ *Id.* at 15.

¹⁰⁰ Hahn, *supra* note 37, at 566.

¹⁰¹ *Id.*

must strike a balance between the State's broad discretion to act when they feel their security is at stake and objective prerequisites of deterring the threat.¹⁰²

In the present situation, the U.S. has weighed its options thoroughly, and in a measure to protect the citizens of the U.S., the inspection exemptions have been lifted for Canada to further protect the U.S. population from potentially grave risks to the health and economy of its' citizens. The U.S. government lifted the user fee exemptions in order to recover costs associated with the additional inspection needs.

In conclusion, the user fees are not contrary to NAFTA Article 310 and GATT Articles I and VIII. However, even if the user fees are found to be in conflict with the agreements then the US is justified under either a general exception or a national security exception of NAFTA and GATT.

CONCLUSION

THEREFORE, the Applicant respectfully requests that this Honorable Court adjudge and declare that:

- i) The Fuel Export Tax is contrary to NAFTA Articles 314, 315, 604, and 605, or GATT Articles I, VIII, and XI.
- ii) The Fuel Export Tax is not justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102, or GATT Articles XX or XXI.
- iii) The WHTI is not contrary to NAFTA Chapters 12 and 16 or GATS.
- iv) The WHTI is justified pursuant to the national security exception or a general exception in NAFTA, GATT or GATS.
- v) The APHIS user fees are not contrary to NAFTA Article 310 and GATT Articles I and VIII.
- vi) The APHIS user fees are justified pursuant to the national security exception or a general exception in NAFTA, GATT or GATS.

¹⁰² *Id.* at 569.