

**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 # 2008-09A**

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STATEMENT OF FACTS

In 1993, an Islamic terrorist group attempted to attack the World Trade Center, the Holland Tunnel and the Lincoln Tunnel in New York City. The attack plans were frustrated when the plotters were arrested. In October 1993, the Islamic terrorist group known as al Qaeda aided Somali tribesmen in shooting down United States (“U.S.”) helicopters. In 1995, police in Manila uncovered a terrorist plot to bomb U.S. airliners flying over the Pacific. Later that year, a car bomb exploded outside of a U.S. military office in Riyadh, killing five Americans and two foreign nationals. In 1996, a truck bomb destroyed a U.S. military apartment complex, killing 19 Americans and wounding hundreds.

In February 1998, the terrorist Usama bin Laden and four others issued a fatwa against the U.S., announcing that it was every Muslim’s holy duty to kill Americans anywhere. In October of that year, bin Laden’s terrorist group, al Qaeda, carried out coordinated truck bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, killing 224 people and wounding thousands more. In 1999, Jordanian police foiled a plot to bomb hotels frequented by Americans. In December 1999, a U.S. customs official arrested Ahmed Ressam at the U.S.- Canadian border while Ressam attempted to smuggle explosives into the U.S. intended for an attack on Los Angeles International Airport. In October 2000, the U.S. destroyer *U.S.S. Cole* was bombed and nearly sunk by an al Qaeda team in Yemen. The attack killed 17 American sailors.

On September 11, 2001, al Qaeda operatives carried out the most devastating terrorist attack ever committed on U.S. soil. Two hijacked airliners were flown into the twin towers of the World Trade Center in New York while simultaneously, a third hijacked plane was flown into the Pentagon in Washington D.C. Due to the heroic efforts of passengers on board a fourth

plane, the plane crashed in a field in Pennsylvania thus preventing the terrorists from using the last aircraft as a missile. Thousands of civilians were killed in the attack. The immediate effects of the attack were catastrophic. The long-term effects on the American people, the economy, and foreign policy of the U.S. are incalculable.

Immediately after this attack and until the present time, the U.S. turned its attention to fighting terrorism. The U.S. dramatically heightened airport security measures. The U.S. led an international coalition of forces against the Taliban regime in Afghanistan, which openly harbored the al Qaeda terrorist organization. To further these efforts, the U.S. also declared war on Iraq and stationed thousands of ground troops within the country. Over 150,000 ground troops remain in Iraq. In addition, the U.S. created the 9/11 Commission, a panel of experts charged with both investigating the events that led up to the September 11 attacks and with diagnosing the structural and administrative problems which left the U.S. vulnerable to the attacks. The 9/11 Commission released its report in July 2004. The Report urged comprehensive structural changes in areas of vulnerability in national security. In support of this comprehensive approach, the Commission reasoned: "If we favor one tool [of national power] while neglecting others, we leave ourselves vulnerable and weaken our national effort." Success in anti-terrorism efforts is vital, because "an attack is probably coming; it may be more devastating still." Among the Panel's recommendations for fighting terrorism were targeting terrorist travel and creating standards for identifying and screening people, particularly at national borders, who could pose catastrophic security threats.

When the Commission released the 9/11 Report, travelers entering the U.S. from any country in the world, except Canada, were required to present passports upon entry to the U.S.. Travelers entering the U.S. from Canada were allowed to cross the border using a photo ID and

oral declaration of either Canadian or American citizenship. Using COMPEX, a screening program designed to detect inadmissible aliens, U.S. Customs and Border Protection Agency (“CBP”) officials estimated that several thousand individuals illegally entered the U.S. at its air and land ports every year. Both the 9/11 Report and a report to Congress of the Government Accountability Office’s investigation of border security weaknesses recognized the leniency of screening at the U.S.’s northern border as posing a threat to national security.

For many years, the U.S. had voluntarily granted Canada an exception to the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (“APHIS”) inspection and inspection fees which had been imposed on goods from every other country. APHIS required that all cargo entering the U.S. from foreign ports be inspected for compliance with U.S. domestic health standards and import regulations. APHIS imposed user fees estimated to directly cover the costs of these inspections. Goods entering the U.S. from Canada were exempt from inspection, consequently, goods marked as Canadian were not screened for compliance with U.S. health regulations. The exception was not a negotiated provision of the North American Free Trade Agreement (“NAFTA”), the General Agreement on Trade and Tariffs (“GATT”) or the General Agreement on Trade in Services (“GATS”).

Through random inspection of incoming shipments, the U.S. Department of Homeland Security (“DHS”), discovered a significant pattern of exploitation of the Canadian APHIS exception from these inspections and fees. In the ten years preceding the implementation of the APHIS user fees, the re-exportation of goods from Canada into the U.S. increased by over three-hundred percent (336%). In several random inspections, U.S. officials found that some of these re-exported goods were goods which had been prohibited from entry into the U.S. due to the high health risks they posed. These goods, which had entered Canada legally, were marked as

Canadian goods, and thus they were not subjected to formal inspection. How long this trend has existed and the frequency with which these shipments go undetected remains unknown. This exploitation has caused incalculable damage to the U.S.'s sovereign right to protect the health of its citizens.

To stop this pattern of exploitation in the movement of goods, the U.S. announced that APHIS user fees and border inspection requirements for cargo shipments would be extended to include Canada beginning November 24, 2006. APHIS inspections previously applied to shipments entering from the air, by rail, or by sea from countries other than Canada, and so the DHS applied the inspections and inspection fees to each of these categories. Canada did not object to this measure until nearly a year after the fee schedule was announced, and more than six months after the measures were fully implemented.

Shortly thereafter, the U.S. Departments of State and Homeland Security implemented the Western Hemisphere Travel Initiative ("WHTI") as a means to combat the security risks posed by Canada's exception from passport requirements. The WHTI has two phases. The first phase, implemented on January 23, 2007, requires that air passengers entering the U.S. from any state in the Western Hemisphere present valid passports or equivalent identification. The second phase of WHTI, which took effect on January 31, 2008, requires that all persons entering the U.S. from the Western Hemisphere by land or by sea present a passport or equivalent proof of their citizenship at the U.S. border. Travelers entering the U.S. from any country in the world, without exception, are now required to present passports. The WHTI institutes no new requirements, but simply removes Canada's exception to the requirements which previously applied to all other countries.

The U.S. anticipates that the WHTI will reduce individuals' border processing times by 15 to 25 seconds. Although the U.S. does not anticipate significant delays or inconveniences as a result of removing Canada's exceptions from passport requirements or border inspection, it has implemented several programs designed to identify low-risk frequent travelers and expedite their immigration process. In addition, the U.S. has begun work with several U.S. States to create sophisticated driver's licenses which could provide the needed proof of citizenship without any inconvenience or cost to individual travelers.

The members of NAFTA met in Montebello, Quebec, for the 2007 Montebello North American Leaders' Summit. On August 21, 2007, Canada's Prime Minister Harper, U.S. President Bush and Mexico's President Calderón issued a Joint Statement. The statement laid out five objectives for cooperative action during the next year, one of which was "Smart and Secure Borders." The leaders committed to work towards developing consistent screening procedures so as to better secure North America against terrorist threats. Canada and the U.S. committed to enhance the

On the same day that the U.S. and Canada announced the results of these negotiations, Canada announced that it would impose the Fuel Export Charge (the "FEC"). The FEC levied a CDN \$25 charge on each barrel of oil exported from Canada transported by pipeline. Canadian oil producers do not export by pipeline to any country except the U.S.. Consequently, this charge only applies to oil destined for American use. Canada offered no explanation as to how the export of fuel specifically related to Canadian national security. Instead, Canada's Prime Minister Harper made a statement indicating that the tax was implemented in order to protect Canadian citizens from tax rate increases. Prime Minister Harper also noted that the export tax would not harm Canada's oil producing provinces, because demand for Canadian fuel is high.

The U.S. filed An application with the Registrar of the International Court of Justice (“ICJ”), challenging the legality of the FEC, on September 23, 2007. Canada replied on October 23, 2007, challenging the legality of the WHTI and the APHIS fees. The two filings were joined in a single case, filed November 23, 2007 with the ICJ, in which the U.S. is applicant and Canada is the respondent.

QUESTIONS PRESENTED

- I. Whether the Fuel Export Charge is contrary to NAFTA Articles 314, 315, 604 and 605 or GATT Articles I, VIII and XI?
- II. Whether the Fuel Export Charge is not justified pursuant to the Security Exception or a General Exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI?
- III. Whether the WHTI is consistent with NAFTA Chapters 12 and 16 or GATS?
- IV. Whether the WHTI is justified pursuant to the Security Exception or a General Exception in NAFTA or GATT or GATS?
- V. Whether the APHIS user fees are consistent with NAFTA Article 310 and GATT Articles I and VIII?
- VI. Whether the APHIS user fees are justified pursuant to the Security Exception or a General Exception in NAFTA or GATT or GATS?

STATEMENT OF JURISDICTION

The U.S. and Canada submit the present dispute to this Court by Special Agreement, dated November 23, 2007, pursuant to Article 40(1) of the Court's Statute. As part of the Special Agreement, the State Parties have agreed to the contents of the *Compromis* submitted to the Court as a stipulation of facts and issues to be adjudicated by the Court under its *ad hoc* jurisdiction. The State Parties to this dispute have referred the matter to this Court pursuant to Article 36(1) of the Court's Statute. All parties shall accept the judgment of this Court as final and binding and shall execute it in good faith in its entirety.

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SUMMARY OF ARGUMENT

Canada's retaliatory application of the FEC, in response to the U.S.'s application of the WHTI and APHIS user fees violates Canada's international obligations under NAFTA and GATT. The U.S. and Canada comprehensively negotiated the trade of fuel in NAFTA Chapter 6 and agreed not to apply any export taxes on fuel destined for the other Party. Additionally, under NAFTA, Canada committed to gradually eliminate tariffs, export taxes, and service charges above the actual cost of the good or service rendered. The FEC violates each of these NAFTA obligations. The FEC also violates GATT's general objective of non-discrimination in trade and Most Favored Nation ("MFN") treatment.

Prime Minister Harper clearly specified that the FEC was applied to shift fiscal burdens onto the U.S. Subsequently, Canada retroactively attempted to justify its derogation from its international obligations by utilizing the GATT and NAFTA exceptions. Canada's attempt to disguise the FEC as a conservation measure, a customs measure, or essential for national security violates Canada's good faith obligations.

The WHTI does not violate NAFTA or GATS because it provides MFN and National Treatment, does not impose quantitative restrictions, and does not unduly impair trade in services. Even if the WHTI violates NAFTA, GATT or GATS, the Security Exceptions and the General Exceptions to each treaty permit the WHTI. The WHTI satisfies the Security Exception because it is necessary to the protection of the U.S.'s essential security interest of border control in the U.S. war with al Qaeda. Although the U.S. invoked the Security Exception in good faith, its determination should be treated with a great deal of deference. The WHTI qualifies for the General Exception because it is necessary to secure compliance with legitimate U.S. immigration laws.

The APHIS fees do not violate GATT or GATS because they are limited to the approximate costs of services rendered and because they qualify for a GATS exemption for border control measures. Even if the APHIS measures violated these provisions, they qualify for the Security Exceptions and General Exceptions in NAFTA, GATT and GATS. The APHIS measures qualify for the Security Exception for measures “taken in time of war” because the inspections help prevent bioterrorist attack in the U.S. war with al Qaeda. The General Exception for measures necessary for protection of human life and health applies to the APHIS measures because the measure prevents exploitation of Canada’s customs exemption by circumvention of U.S. health regulations.

ARGUMENT

I. THE FEC VIOLATES NAFTA AND GATT.

The retaliatory application of the FEC in response to the U.S.’s WHTI and the APHIS measures violate Canada’s obligations under NAFTA¹ and GATT,² two treaties to which both the U.S. and Canada are party.

A. The FEC is contrary to GATT’s objectives and Most-Favored Nation Treatment.

In the Preamble of GATT, member states endeavor to substantially reduce “tariffs and other barriers to trade” and eliminate “discriminatory treatment.”³ Most-Favored Nation Treatment (“MFN”) requires that each state afford all other member states equal treatment in regards to trade.⁴ Prime Minister Harper acknowledged that Canada discriminatorily applied the FEC to the U.S. such that “those who benefit most from the actions being promised are the one’s

¹ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter “NAFTA”].

² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61. Stat. A-11, 55 U.N.T.S. 194. [hereinafter “GATT”].

³³ GATT, *supra* note 2, Preamble.

⁴ MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION 202 (2nd ed. 2006).

paying.”⁵ Currently, no other country receives pipeline-delivered fuel from Canada.⁶

Consequently, the application of the FEC violates the fundamental principles of MFN and non-discrimination embodied in GATT.

GATT Article VIII clearly specifies that “[a]ll fees and charges of whatever character . . . shall be limited in amount to the approximate cost of services rendered and shall not represent . . . taxation of . . . exports for fiscal purposes.”⁷ Canada promulgated the FEC as an export tax for fiscal purposes to fund “infrastructure projects and technology purchases.”⁸ Canada’s failure to apply the FEC to domestic consumption supports a conclusion that the FEC violates Article VIII, as it does not represent the “approximate cost of services rendered.”

GATT Article XI prevents untraditional “prohibitions or restrictions” on exportation, specifically restrictions “other than duties, taxes or other charges.”⁹ Canada’s retroactive justification of the FEC through characterization of it as a service charge is also inconsistent with GATT, as the treaty prevents all restrictions on exportation whether in the form of a tax or service charge. GATT Article VIII specifies “all fees and charges of whatever character . . . shall be limited . . . to the approximate cost of services rendered.”¹⁰ The blanket application of a \$CDN 25 per barrel tax on pipeline-delivered fuel violates GATT Articles XI and VII.

B. The FEC violates NAFTA, as NAFTA specifically bans export taxes on fuel.

NAFTA Article 604 provides that no party “may adopt or maintain any duty, tax or other charge on the export of any energy or basic petrochemical good.”¹¹ Prime Minister Harper

⁵ *Compromis*.

⁶ *Compromis*, Clarifications 3.

⁷ GATT, *supra* note 2, Article VIII(1)(a).

⁸ *Compromis*.

⁹ GATT, *supra* note 2, Article XI(1).

¹⁰ *Id.* at Article VIII(1)(a).

¹¹ NAFTA, *supra* note 1, Article 604.

explicitly stated that the FEC is an “export tax on fuel.”¹² Thus, the imposition of the FEC violates Chapter 6.

The NAFTA Article 604 exception requires that any export tax apply to domestic consumption.¹³ Prime Minister Harper stated that “Canadian Taxpayers want lower taxes and it has been the promise of this Government . . . not to raise them.”¹⁴ Since the FEC only applies to domestic U.S. consumption, Canada cannot rely on the Article 604 exception.

The FEC also violates NAFTA Article 314. Article 314 also provides that “no Party may adopt or maintain any duty, tax or other charge on the export of any good.”¹⁵ Similar to Article 604, Article 314 provides an exemption if the tax on the export is applied to domestic consumption.¹⁶ The FEC does not apply to Canadian consumption, thus violating Article 314.

C. Canada’s reliance on NAFTA’s “Other Export Measures” is erroneous as the FEC discriminatorily imposes a tax on the U.S.

NAFTA Article 605 permits export restrictions on energy and petrochemical goods if the restriction is justified under GATT Article XI or Article XX and

a) the restriction does not reduce the proportion of the total export . . . , b) the Party does not impose a higher price for exports of [the] good . . . than the price charged for such good . . . domestically . . . and c) the restriction does not require the disruption of normal channels of supply¹⁷

The FEC does not apply to Canadian consumption, and thus is unjustifiable under Article 605.¹⁸

Similarly, Article 315 allows certain export taxes, but requires that a state meet the same

¹² *Compromis*.

¹³ NAFTA, *supra* note 1, Article 604.

¹⁴ *Compromis*.

¹⁵ NAFTA, *supra* note 1, Article 314.

¹⁶ *Id.*

¹⁷ *Id.* at Article 605.

¹⁸ *Id.* at Article 315.

qualifications as specified in Article 605.¹⁹ The sole difference between Article 315 and Article 605 is that Article 315 applies to all goods.²⁰ Canada's failure to apply the FEC to domestic consumption prevents Canada from justifying the FEC under Article 315.

II. THE FEC IS NOT JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR THE GENERAL EXCEPTION UNDER NAFTA OR GATT.

Canada cannot justify the FEC through the NAFTA or GATT Security Exceptions or General Exceptions, such application would be a violation of Canada's good faith obligations.

A. The NAFTA Security Exception applicable to energy and petrochemical goods does not justify the FEC.

NAFTA Article 607 permits trade restrictions only where necessary to

(a) supply a military establishment . . . or enable fulfillment of a critical defense contract . . . ; (b) respond to a situation of armed conflict . . . ; (c) implement national policies . . . relating to the non-proliferation of nuclear weapons . . . ; or (d) respond to direct threats of disruption in the supply of nuclear materials for defense purposes.²¹

Canada retroactively claims that the Montebello Joint Summit constitutes a "critical defense contract."²² The Montebello Joint Summit and subsequent Canadian-U.S. negotiations are not a contract or treaty, but rather informal negotiated plans striving to meet certain priority activities. Thus, the negotiations do not qualify as a "critical defense contract" under Article 607.

Even if the Canadian-U.S. negotiations qualify as a contract, the Chapter 6 Security Exception requires a nexus between the tax and the "critical defense contract."²³ Article 607 permits a party to implement an export tax only "to the extent necessary to" fulfill a defense contract.²⁴ Prime Minister Harper's acknowledgment that the FEC shifts fiscal burdens onto the

¹⁹ NAFTA, *supra* note 1, Article 315 and Article 605.

²⁰ *Id.*

²¹ *Id.* at Article 607.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

U.S. rebuts Canada's claim that the FEC is necessary. Such a justification confirms that alternative funding options exist. Consequently, the FEC is not justified by the NAFTA energy and petrochemical goods Security Exception.

B. The NAFTA and GATT general Security Exceptions do not justify the FEC.

NAFTA Article 2102 remains "[s]ubject to Article 607," consequently, as shown above, the Article 2102 Security Exception cannot be invoked.²⁵ Article 2102 justifies derogation from NAFTA when a Party determines the action to be necessary for its essential security interests.²⁶

The application of Article 2102 is further limited to actions:

- (i) relating to traffic in arms, ammunition and implements of war and to . . . for the purpose of supplying a military or . . . security establishment, (ii) taken in time of war or other emergency in international relations, or (iii) relating to the implementation of . . . policies . . . respecting non-proliferation of [nuclear devices]. . . .²⁷

None of these circumstances exist, as the FEC does not relate to the supplying of a military establishment, to non-proliferation, to war, or to an emergency in international relations.²⁸

The Article XXI Security Exception does not justify the FEC as Canada is not applying the FEC to protect its "essential security interests" in an "emergency of international relations." WTO scholars Hannes L. Schloemann and Stefan Ohlhoff, note that "[t]he connection to the term 'war' effected by the adjective 'other (emergency)' suggests that the situation . . . must exceed ordinary political tensions."²⁹

Canada's participation in Afghanistan does not qualify as war or an "emergency in international relations." As noted in the "Report to Parliament," Canadian forces in Afghanistan

²⁵ NAFTA, *supra* note 1, Article 2102 and Article 607.

²⁶ *Id.* at Article 2102.

²⁷ *Id.*

²⁸ See *infra* note 30 and accompanying text.

²⁹ Hannes Schloemann and Stefan Ohlhoff, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT'L. 424, 446 (Apr. 1999).

are not engaged in war or an international emergency, but rather “Canadian Forces . . . are in Afghanistan at the request . . . of Afghanistan and under a United Nations mandate.”³⁰

C. The FEC is not justified by the NAFTA or GATT General Exceptions.

Retroactive validation of the FEC through the NAFTA and GATT General Exceptions qualifies as a “disguised restriction[s] on international trade,”³¹ as the FEC was enacted solely to make the U.S. pay for border security. In its 1998 decision *U.S. – Shrimp*,³² the WTO Appellate Body required that state invocation of Article XX exceptions “be exercised *bona fide*. . . [or] reasonably.”³³ Canada’s invocation of Article XX does not meet the *U.S. – Shrimp* threshold.

The FEC is unjustifiably discriminate, as it is not primarily aimed at conservation or customs enforcement. The 1994 *U.S. – Tuna*³⁴ decision interprets the Article XX(g) phrase “relating to” to mean that a restriction must be “primarily aimed at such conservation.”³⁵ Similarly, in the 1997 *Canada – Periodicals* decision,³⁶ the WTO Panel held that “necessary” “require[s] the use of the least trade-restrictive measure available.”³⁷

Article 2101 of NAFTA notes that “GATT Article XX . . . [is] incorporated into and made part of this agreement.”³⁸ Therefore, NAFTA Article 2101 also does not justify the FEC.

D. Even though the GATT or NAFTA exceptions are determined to be self-judging, Canada is obliged to act in good faith.

³⁰ Report to Parliament, *Canada’s Mission in Afghanistan: Measuring Progress*, 7 (Feb. 2007).

³¹ GATT, *supra* note 2 Article XX.

³² Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (‘*U.S. – Shrimp*’), WT/DS58/AB/R (Oct. 12, 1998).

³³ *Id.* at para. 158.

³⁴ Panel Report, *United States – Restrictions on Imports of Tuna* (‘*U.S. – Tuna*’), WT/DS29/R (June. 16, 1994).

³⁵ *Id.* at para. 5.22.

³⁶ Panel Report, *Canada – Certain Measures Concerning Periodicals* (‘*Canada – Periodicals*’), WT/DS31/R (Mar. 14, 1997).

³⁷ *Id.* at para. 3.15.

³⁸ NAFTA, *supra* note 1, Article 2101.

GATT and NAFTA Security and General Exceptions are self-judging, but application of the exceptions is subject to an inquiry into whether the application is *bona fide* and reasonable.

1. The Security Exception must be invoked in good faith.

The customary provisions of the Vienna Convention on the Law of Treaties,³⁹ Article 26 and Article 31, demand that treaties “be performed . . . in good faith.”⁴⁰ As noted by Schloemann and Ohlhoff, analysis of “essential security interests” falls within “the definitional prerogative of the WTO member.”⁴¹ However, the WTO can review whether “war or other emergencies in international relations” exist.⁴² Thus, Canada has the discretion to determine its security interests, but this Court maintains the authority to inquire into the reasonability of Canada’s assertion. Canada did not invoke the Security Exceptions in good faith.

2. The GATT Article XX General Exceptions must be invoked in good faith.

GATT Article XX specifies that a state cannot apply the General Exceptions as “a means of arbitrary or unjustifiable discrimination . . . or [as] a disguised restriction.”⁴³ The Appellate Body in *U.S. – Shrimp* specified that the Article XX “*chapeau* . . . is . . . but one expression of the principle of good faith.”⁴⁴ The retroactive application of the Article XX General Exceptions to justify the FEC is a disguise of a restriction on trade. Consequently, Canada’s application of the General Exception fails to meet the good faith standard of reasonable and *bona fide*.

III. THE WHTI IS CONSISTENT WITH NAFTA CHAPTERS 12 AND 16 OR GATS.

The WHTI does not violate NAFTA Chapter 12, NAFTA Chapter 16, or GATS because

³⁹ *Vienna Convention on the Law of Treaties, opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980)[hereinafter “VCLT”].

⁴⁰ *Id.* at Article 26 and Article 31.

⁴¹ Schloemann and Ohlhoff, *supra* note 29, at 447.

⁴² *Id.* at 448.

⁴³ GATT, *supra* note 2, Article XX.

⁴⁴ *U.S. – Shrimp* at para. 158.

NAFTA Chapter 12 permits non-quantitative restrictions on temporary immigration, because the WHTI does not significantly impair or delay trade between the U.S. and Canada, and because the WHTI qualifies for the GATS exception for border control measures.

A. The WHTI does not violate NAFTA Chapter 12 because the Chapter permits immigration requirements, which do not impose licensing requirements or entry quotas.

The WHTI does not violate NAFTA Chapter 12 because the measures comply with MFN and National Treatment, the measures do not impose quantitative restrictions or licensing requirements on Canadian nationals, and they do not create an unnecessary burden on Canadian service providers. NAFTA Chapter 12 prohibits quantitative restrictions, which set limits on the number or licensing qualifications of service providers allowed to enter the country.⁴⁵ The WHTI does not set quantitative restrictions but merely changes the way service providers qualified for entry show that they are entitled to the free passage under that Chapter.

NAFTA Chapter 12 requires the U.S. to accord the better of MFN or National Treatment to service providers of another Party.⁴⁶ The WHTI accords both treatments to Canadian service providers. The WHTI provides National Treatment to Canadian nationals because it imposes the same identification standard on its own nationals. It provides MFN treatment because it merely removes Canada's exemption from requirements, which apply to every other State.⁴⁷

B. The WHTI does not violate NAFTA Chapter 16 because it uses transparent criteria to ensure border security.

The WHTI does not violate Chapter 16 because it does not unduly impair or delay trade in goods or services between the U.S. and Canada. NAFTA Article 1603 requires the U.S. to

⁴⁵ NAFTA, *supra* note 1, Chapter 12.

⁴⁶ NAFTA, *supra* note 1, Article 1202 *and* Article 1203.

⁴⁷ Animal and Plant Health Inspection Services, 56 Fed. Reg. 14837–14846 (1991) *and* Animal and Plant Health Inspection Services, 57 Fed. Reg. 755–773 (1993).

“grant temporary entry to business persons who are otherwise qualified for entry...⁴⁸ Measures affecting this entry must “avoid unduly impairing or delaying trade in goods or services or conduct of investment activities under this Agreement”⁴⁹ and reflect the “desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security.”⁵⁰

The identification requirement is a “transparent criteri[on],” because it provides clear guidelines for entry applicants. The measure “ensure[s] border security” because it helps detect false declarations of citizenship. The WHTI does not delay or impair the passage of goods because approved-traveler programs, which speed frequent travelers through processing, will offset border delays.⁵¹ The WHTI does not unduly impair the passage of consumers between the U.S. and Canada because the new U.S. Passport Card will facilitate to travel to Canada,⁵² and enhanced drivers’ licenses will soon be available in several states at no additional cost to tourists.⁵³ To ensure that no undue impairment occurs, the U.S. delayed the full imposition of the passport requirement until the technology could be implemented.

C. The WHTI does not violate GATS.

The U.S. concedes that the WHTI affects trade in services under GATS.⁵⁴ The Annex on the Movement of Natural Persons, however, explicitly permits border control measures, which are

⁴⁸ NAFTA, *supra* note 1, Article 1603(1).

⁴⁹ *Id.* at Article 1602(1).

⁵⁰ *Id.* at Article 1601.

⁵¹ DHS: WHTI Land and Sea Notice of Proposed Rulemaking Published, http://www.dhs.gov/xnews/releases/pr_1182350422171.shtm (last visited Feb. 19, 2008).

⁵² U.S. Department of State, *U.S. Passport Card*, http://travel.state.gov/passport/ppt_card/ppt_card_3926.html (last visited Feb. 18, 2008).

⁵³ DHS: Fact Sheet on Enhanced Drivers’ Licenses, http://www.dhs.gov/xnews/releases/pr_1196872524298.shtm (last visited Feb. 18, 2008).

⁵⁴ General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 Article 1 [hereinafter “GATS”].

not unreasonably restrictive to trade.⁵⁵ Paragraph (4) of the Annex states that

The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.⁵⁶

The WHTI protects the integrity of borders because it allows the U.S. to ensure that those natural persons crossing into U.S. territory are qualified for entry.⁵⁷ The CBP determined that the uniformity and machine-readability of WHTI-compliant documents would both streamline border processing and allow CBP officials to identify more falsified documents.⁵⁸ Without the WHTI measures, foreign nationals can enter the country freely once they gain entry to Canada. Because some Canadian nationals may present threats to U.S. security and because Canada does not screen individuals for whether they are thought to be threats to the U.S., the U.S. has implemented the WHTI to protect the integrity of its borders.⁵⁹

The WHTI measures do not nullify or impair the benefits accruing to Canada under the specific commitments of MFN Treatment or National Treatment because the U.S. does not grant nationals of any other State or even its own nationals the right to entry upon oral declarations of citizenship.

IV. THE WHTI QUALIFIES FOR THE SECURITY EXCEPTIONS AND GENERAL EXCEPTIONS IN NAFTA, GATT, AND GATS.

⁵⁵ GATS, *supra* Annex on the Movement of Natural Persons: Providing Services Under This Agreement.

⁵⁶ *Id.* at para. 4.

⁵⁷ Government Accountability Office, *Border Security: Despite Progress, Weaknesses in Traveler Inspections Exist at Our Nation's Ports of Entry*, GAO-08-219 (Nov. 5, 2007) at 32.

⁵⁸ *Id.*

⁵⁹ WHTI Fact Sheet, http://www.dhs.gov/xprevprot/programs/gc_1200605716403.shtm (last visited Feb. 18, 2008).

The WHTI qualifies for the Security Exception in each treaty because it is a measure “necessary to the protection of essential security interests” which is “taken in time of war or other crisis in international relations.” The WHTI qualifies for the General Exceptions in GATT, GATS, and NAFTA because it is necessary to secure compliance with U.S. immigration laws.

A. The WHTI qualifies for the Security Exception in NAFTA, GATT, and GATS because the U.S. has determined in good faith that the exception applies.

The WHTI protects a vital national security interest by helping U.S. officials prevent entry of persons known to be involved with terrorist organizations. The Security Exceptions in NAFTA, GATT, and GATS all state in pertinent part: “Nothing in this Agreement shall be construed...to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests...taken in time of war or other emergency in international relations.”⁶⁰ All three of these Security Exceptions⁶⁰ apply because the U.S. considers the WHTI necessary for the protection of its essential security interests, and because the WHTI has been taken in time of the U.S.’s war against al Qaeda.

The U.S. has determined that the WHTI is essential to its national security.⁶¹ Interpreting the Security Exception in light of its ordinary meaning,⁶² the U.S.’s determination that the WHTI is necessary to the protection of its essential security interests is owed a great deal of deference. Analysis of “essential security interests” falls within “the definitional prerogative of the WTO member.”⁶³ The U.S. has shown good faith in making this determination. The WHTI passport measures are narrowly tailored to address the security risks of fraud in border-crossing.

WTO Panels still have discretion to determine whether a “war or other emergenc[y] in

⁶⁰ GATT, *supra* note 2, at Article XXI(b)(iii).

⁶¹ Government Accountability Office, *Border Security*, *supra* note 57.

⁶² VCLT, *supra* note 29, Article 31.

⁶³ Schloemann and Ohlhoff, *supra* note 29, at 447.

international relations” exists.⁶⁴ The WHTI is taken in time of war because the measure is taken in the context of the U.S. war against al Qaeda. The U.S. Supreme Court has held that the U.S.’s current conflict with al Qaeda is an armed conflict.⁶⁵

B. The WHTI qualifies for the General Exceptions in GATT, NAFTA, and GATS.

The WHTI does not violate any of the treaties in question because it qualifies for each treaty’s General Exception. The WHTI qualifies for the General Exception in GATT because it is necessary to the enforcement of U.S. laws such as the Immigration and Nationality Act,⁶⁶ which regulates the entry of persons. If the WHTI qualifies for the General Exception in GATT, it also qualifies for the General Exception in NAFTA, because NAFTA Article 2102(1) explicitly adopts the General Exception language and interpretive notes of GATT,⁶⁷ and GATS Article XIV contains the same relevant language as GATT.⁶⁸

The Panel in *U.S. – Gasoline* set out the test used for GATT Article XX(d).⁶⁹ In order to invoke this exception, a party must demonstrate that the measure secures compliance with laws not inconsistent with GATT, that the measure is necessary to secure that compliance, and that the measures conform to the *chapeau* of Article XX.⁷⁰ The WHTI meets all three parts of this test.

The WHTI ensures compliance with customs and immigration laws because it prevents and helps detect false declarations of citizenship at the U.S.-Canada border.⁷¹ False declarations of citizenship, if not detected, allow persons into U.S. territory who would not be permitted

⁶⁴ Schloemann and Ohlhoff, *supra* note 29, at 446.

⁶⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) at 517.

⁶⁶ Immigration and Nationality Act § 241(f) 75 Stat. 665 (1961), 8 U.S.C. § 1251(f) (1964).

⁶⁷ NAFTA, *supra* note 1, at Article 2101 par. 1

⁶⁸ GATS, *supra* note 1, at Article XIV(c).

⁶⁹ Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* (‘U.S – Gasoline’), adopted on 20 May 1996, WT/DS2/R, para. 6.31.

⁷⁰ *Id.* at para. 6.31.

⁷¹ Notice of Proposed Rulemaking, 72 Fed. Reg. 35087 (June 26, 2007), at 35092.

under U.S. immigration laws or who would be required to undergo secondary inspection under customs laws. The WHTI requires machine-readable identification, which is not easily falsified.

The WHTI is “necessary to” enforcement of customs laws. The Panel in *U.S. – Tuna*⁷² noted that the “necessary to” standard only relieves states of their GATT obligations when the infringing measure is “unavoidable.”⁷³ The WHTI is unavoidable for customs enforcement because fraudulent declarations of citizenship cannot be detected without a requirement that identification be machine-readable. The CBP determined that any less stringent requirement would fail to address security risk, and any measure not requiring machine-readability would impose too great a burden on free trade between the U.S. and Canada.⁷⁴

The General Exception cannot be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”⁷⁵ In *U.S. – Shrimp*, the WTO Panel set a three-part test for “arbitrary or unjustifiable discrimination which requires (i) that a measure result in discrimination different from Article I discrimination, (ii) that the discrimination be arbitrary or unjustifiable in nature, and (iii) that the discrimination occur between countries where the same conditions prevail.”⁷⁶ The WHTI therefore survives the *U.S. – Shrimp* test because the measure is neither arbitrary nor unjust, and “like conditions” do not prevail in the U.S. and Canada.

The WHTI is not “arbitrary or unjust” because its requirements are closely linked to the border-crossing laws enforced. “Like conditions” do not prevail because Canada currently screens individuals according to whether a person poses a potential threat to Canadian national

⁷² *U.S. – Tuna*, *supra* note 34.

⁷³ *Id.* at para. 5.22.

⁷⁴ Notice of Proposed Rulemaking, *supra* note 71, at 35108.

⁷⁵ GATT *supra* note 2, Article XX.

⁷⁶ *U.S. – Shrimp*, *supra* note 32, at para. 150.

security.⁷⁷ This nation-specific nature of border screening leaves open the possibility that some individuals known to be security threats in the U.S. might gain entry to Canada.

V. THE APHIS USER FEES ARE CONSISTENT WITH GATT ARTICLES I AND VIII.

The APHIS measures do not violate GATT Articles I and VII because the APHIS measures apply the MFN standard for inspection to Canada, and because the APHIS measures are limited to the approximate costs of supplying inspection services. The user fees imposed by APHIS are user fees under the definition provided by Article 310. The U.S. concedes that the APHIS fees are likely contrary to NAFTA Article 310.

A. The APHIS user fees are not contrary to GATT Article I.

The APHIS user fees are not contrary to GATT Article I because the user fees provide both National and MFN treatment to Canada, and because the user fees merely remove an exemption to these treatments which Article I does not protect.

1. The user fees do not grant any state treatment more favorable than that given to Canada but merely remove an exemption carved out for Canada.

The APHIS user fees do not violate Article I as interpreted by the WTO Panel. In *Indonesia – Autos*,⁷⁸ the WTO Panel set up a test for finding a violation of Article I. This test required an advantage, of a type covered by Article I, which was not afforded unconditionally to like products of all WTO Members.⁷⁹ The APHIS user fees do not violate this test because the level of user fees has been afforded unconditionally to like products of all WTO Members. The APHIS user fees subject Canada to a standard no less favorable than that granted to any other nation. The APHIS measures apply equally to all States.

⁷⁷ Canada Border Services Agency, *Security Screening*, <http://www.cbsa-asfc.gc.ca/security-secureite/screen-verify-eng.html> (last visited Dec. 22, 2007).

⁷⁸ Panel Report, *Indonesia – Certain Measures Affecting the Auto Industry* ('*Indonesia – Autos*'), WT/DS54/R (July 2, 1998) at para. 14.138.

⁷⁹ *Id.*

2. Canada's former exemption from the APHIS fees is not protected by Article I.

GATT Article I allows for the creation of free-trade areas, in which the privileges granted to other states would not affect the MFN standard of GATT.⁸⁰ Article I does not prohibit the exemption the U.S. formerly granted to Canada from the APHIS user fees. This grant of permission, however, does not amount to a grant of protection. Therefore, the removal of Canada's exemption from the APHIS measures does not violate Article I of GATT.

B. The APHIS user fees do not violate GATT Article VIII.

The U.S. concedes that the APHIS fees qualify as fees imposed by the government with relation to importation and relating to analysis and inspection under paragraph 4(g).⁸¹ Article VIII likely applies to the APHIS user fees. The user fees do not violate Article VIII because they are limited to the costs of inspecting Canadian goods and because they streamline the inspection process rather than increasing the number and complexity of user fees.

1. The user fees are limited to the approximate costs of services rendered.

Article VIII(1)(a) requires that fees imposed in connection with importation “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.”⁸² The test for whether user fees are “limited in amount to the approximate cost of services rendered” was outlined in *U.S. – Customs User Fee*.⁸³ The Panel found that a user fee must correspond to “services rendered to the individual importer in question,” and that the term “costs of services rendered” “must be interpreted to refer to the cost of the customs processing for the individual

⁸⁰ GATT, *supra* note 2, at Article I(2).

⁸¹ *Id.* at Article VIII(4)(g).

⁸² *Id.* at VIII(1)(a).

⁸³ GATT Panel Report, *United States – Customs User Fee ('U.S. – Customs User Fee')*, L/6264, BISD (Feb. 2, 1988).

entry in question.”⁸⁴ The APHIS user fees meet the *U.S. – Customs User Fees* test.

The APHIS user fees are almost identical to the cost of services rendered. The fees will bring in an annual revenue of just over \$77 million.⁸⁵ The costs of the APHIS inspections are expected to total US\$75 million.⁸⁶ Additionally, the fee revenue not expended within a given year will be kept in a no-year account until expended on these inspection costs in subsequent years.⁸⁷

The APHIS fees are limited to the specific costs of individual entry. In order to ensure the effective implementation of the inspection procedures, the U.S. has decided to inspect all cargo holds entering its territory. Consequently, the charges do not apply beyond the scope of the inspections for which they are levied.⁸⁸ In cases where more than one importer shares a cargo hold, each importer will presumably be required to bear the proportionate share of the user fee his cargo incurred. Even though the charges are therefore broadly applied, they are neither indiscriminate nor disproportionate to the inspections which they fund.

2. The user fees do not present indirect protection to domestic services because they do not affect trade in services.

The APHIS fees do not indirectly protect domestic services because they treat Canadian goods identically to U.S. domestic goods once they clear customs. The Panel in *Korea – Beef*⁸⁹ discussed “protection of domestic production” in GATT Article III,⁹⁰ saying: “[T]he intention of

⁸⁴ *U.S. – Customs User Fee*, *supra* note 83, para. 86.

⁸⁵ APHIS, Preliminary Economic Analysis for Significant Rulemaking, http://www.aphis.usda.gov/newsroom/hot_issues/agri-inspec&user_fees/downloads/APHIS-2006-0096-0002%5B1%5D.pdf (last visited Feb. 18, 2007).

⁸⁶ *Id.* at 11.

⁸⁷ *Id.*

⁸⁸ *Id.* at 8.

⁸⁹ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (‘*Korea – Beef*’) WT/DS161/AB/R (Dec. 11, 2000).

⁹⁰ GATT, *supra* note 2, at Article III(2)(a).

the drafters of [GATT] was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.”⁹¹ This decision implies that measures, which treat foreign and domestic goods identically once they clear customs, are not protectionist.

3. The user fees do not increase the number or diversity of the charges applied to importation or exportation, but they rather simplify inspection measures.

The APHIS fees reduce the diversity of the charges applied and reduce inspection delays. The APHIS fees impose uniform charges on goods imported from any country, providing a clear and predictable measure for the cost of importation. This uniformity streamlines the importation process, because inspectors can assess fees automatically rather than expending valuable labor time investigating the nature of cargo before making a determination.

VI. THE APHIS MEASURES QUALIFY FOR THE SECURITY EXCEPTIONS AND THE GENERAL EXCEPTIONS IN NAFTA, GATT, AND GATS.

Canada’s former exemption from APHIS measures posed a grave national security risk as well as a health risk. Canada’s exemption from the user fees has led to a pattern of abusive re-exporting. Under this pattern, goods which would be subject to quarantine or prohibited from entry into U.S. territory, have been marked as Canadian goods to utilize the Canadian exemption. APHIS determined that this pattern not only circumvents U.S. health measures, but it also exposes the population of the U.S. to a grave national security risk of bioterrorist attack.⁹²

A. The APHIS fees qualify for the Security Exceptions in GATT, NAFTA, and GATS.

The APHIS fees qualify for the Security Exceptions because the U.S. determined in good faith that the user fees are necessary for the protection of its essential national security interests.

⁹¹ *Korea – Beef supra*, at para. 135.

⁹² Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 50320-50328 (Aug. 25, 2006).

APHIS stated that the U.S.’s current “dearth of inspection activity at [the U.S.-Canadian] border could potentially leave the U.S. vulnerable to bioterrorism. A successful bioterrorist attack could, in addition to causing death and illness, undermine Americans’ confidence in the safety of their food system and have a devastating impact on U.S. agriculture.”⁹³ The safety of the American food system is an essential national security interest, and APHIS explicitly cited this interest as justification for the measures.⁹⁴ The measures are taken in time of war because they protect against bioterrorist attack in the U.S. war against al Qaeda.⁹⁵

B. The APHIS inspections and fees qualify for a General Exception under NAFTA, GATT, and GATS because they conform to the SPS Agreement.

The APHIS user fees qualify for a General Exception under GATT, NAFTA, and GATS because the measures are “necessary to the protection of human life and health” as it is interpreted under each treaty. The APHIS user fees are necessary to protect human life and health because they conform to international standards for border import control measures. “Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.”⁹⁶ The APHIS measures are sanitary measures.⁹⁷

The SPS Agreement names the FAO/WHO Codex as the relevant standard-setting

⁹³ APHIS Regulation, *supra* note 91 at 50324.

⁹⁴ *Id.*

⁹⁵ *See supra* note 64 - 65 and accompanying text.

⁹⁶ Agreement on the Application of Sanitary and Phytosanitary Measures art. 3 para. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, World Trade Organization, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 59 (1999) [hereinafter the SPS Agreement]

⁹⁷ SPS Agreement, Article 1(2), Annex A(1)(a).

organization for food safety.⁹⁸ The FAO/WHO Codex allows measures, which apply differently to domestic and imported foods, if those measures are designed to ensure that the level of safety achieved in imported food equals that required of domestic production.⁹⁹ The APHIS measures ensure that foods imported from Canada comply with U.S. health requirements. Canada's exemption exposed U.S. consumers to heightened health risks from re-exportation. By exposing Canadian goods to inspection, the APHIS user fees have foreclosed the exploitation of Canada's exemption by foreign producers wishing to circumvent U.S. health codes.¹⁰⁰

PRAYER FOR RELIEF

For the foregoing reasons, the U.S. respectfully prays this Court find;

1. The Canadian FEC violates NAFTA Articles 314, 315, 604 and 605 and violates GATT Articles I, VIII, and XI.
2. The Canadian FEC does not qualify for any Security Exception or General Exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI.
3. The WHTI is consistent with NAFTA Chapters 12 or 16 or contrary to GATS.
4. The WHTI qualify for the Security and General Exceptions in NAFTA, GATT, and GATS.
5. The APHIS fees do not violate GATT Articles I or VIII.
6. The APHIS user fees qualify for the Security Exceptions and General Exceptions in NAFTA, GATT, and GATS.

Respectfully Submitted,

Agent for the United States, 2006-09A

⁹⁸ WTO: The WTO and the FAO/WHO Codex Alimentarius, http://www.wto.org/english/thewto_e/coher_e/wto_codex_e.htm, (last visited Dec. 21, 2007).

⁹⁹ FAO/WHO Codex Alimentarius, Guidelines for Food Import Control Systems, *CAC-GL 4-2003, Rev. 1-2006*, para. 15.

¹⁰⁰ APHIS Analysis, *supra* note 85, at 3.