

**2007-08
NIAGARA INTERNATIONAL MOOT COURT COMPETITION**

**A Dispute Arising Under
The Statute of the International Court of Justice
March 2008**

**THE GOVERNMENT OF
THE UNITED STATES OF AMERICA
(Applicant)**

v.

**THE GOVERNMENT OF
CANADA
(Respondent)**

**MEMORIAL OF THE RESPONDENT
TEAM # 2008-09R**

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STATEMENT OF FACTS

The United States (U.S.) and Canada share a long history of economic and political alliance. With over \$500 billion of trade in 2006, the U.S. and Canada are currently the largest international trading partners. Canada and the U.S. have both especially enjoyed the benefits of their shared border in the trade and tourism sector. Canada benefited from nearly CDN \$10 billion worth of tourism receipts from overnight U.S. visitors alone in 2006; the U.S. received nearly CDN \$13 billion. The free trade between the nations has largely been facilitated by Canada's and the U.S.'s dedication to maintaining an open, yet safe, border. Containing only 82 border posts, the 3,985 mile long U.S.-Canada border is the world's longest demilitarized border.

In addition to this firm economic relationship, Canada has served as a close political ally of the U.S. Following the events of September 11, Canada joined the U.S. to combat al-Qaeda and Taliban operations within Afghanistan. Canada remains actively involved in the war against these two militant groups in Southern Afghanistan. In lieu of the U.S.'s heightened fear of terrorist attacks in the post September 11 era, Canada allocated CDN \$2.1 billion to enhance border infrastructure in 2007 with an additional CDN \$600 million for specific programs to ensure more secure borders. On September 11 2007, Canada reached an agreement with the U.S. to spend CDN \$1 billion to put into effect additional border security initiatives. Canada has committed to building screening facilities at several border crossings, erecting ground sensors along the border, and installing advanced radiological detection technology at all its border ports.

However, despite Canada's comprehensive efforts of attaining greater border security and despite the fact that the U.S. has never been subjected to a terrorist attack by way of Canada, the U.S. recently began to regulate the border through various economic encumbrances under the pretext of border security.

First, in April 2005 the U.S. announced the introduction of the Western Hemisphere Travel Initiative (WHTI), a double-phased program requiring Canadian and U.S. citizens to carry a valid passport or other appropriate secure documentation when traveling to the U.S. from Canada. The first phase, implemented in January 23 2007, applied to all travelers arriving in the U.S. from within the Western Hemisphere by air. In the short time since the imposition of the first phase of WHTI, purchase of Canadian hotel and restaurant services by U.S. residents has decreased due to a 4.5 percent decrease in U.S. air travel to Canada. The second phase, scheduled to be put into effect in the near future, will require U.S. citizens and non-resident aliens from Canada, to possess and provide at the time of entry into the U.S. a valid passport or certain prescribed identification. The U.S.'s alleged motives for implementing the WHTI were to further the U.S.'s essential security interests relating to the traffic in arms and in the time of war, and to secure compliance with U.S. immigration laws along the vast U.S.–Canada border. Correctly expecting reduced business from U.S. citizens due to the monetary cost of \$97 and temporal cost of four to six weeks in obtaining a U.S passport in accord with the WHTI, Canadian hotel and restaurant services have widely advocated against further implementation of the WHTI.

Second, in August 2006 the U.S. announced that it would begin charging an Agricultural Quarantine and Inspection user fee (AQI user fee) on all commercial shipments entering the U.S. under the Animal and Plant Health Inspection Services (APHIS). Although the U.S.'s alleged purpose for installing the AQI user fee was to further the U.S.'s security interests relating to bioterrorism and the U.S.'s interest relating to the protection of human life, the fees are imposed indiscriminately upon freight bearing no relation to these interests. First, although the U.S.

proclaims that the AQI user fee is collected to reimburse APHIS and CBP for services provided in connection with preclearance, “passengers and commercial conveyances are subject to user fees even if they aren’t actually inspected.” Second, the AQI user fee is applied even upon non-agricultural freight. The AQI is applied upon air passengers arriving from Canada regardless of whether they are traveling with fruits or vegetables. Similarly, the AQI is applied upon commercial vessels irrespective of the cargo. Such irrelevant application of the AQI is incoherent with the U.S.’s proclamation that funds accrued under the AQI user fee are utilized to provide services that make safe agricultural trade possible.

At the Montebello Summit the U.S. and Canada furthered the agenda of the Security and Prosperity Partnership (SPP) and the Smart and Secure Borders Program (SSBP). The SPP focused on the need to further secure the U.S. - Canada border while ensuring energy security, reducing barriers to free trade and barriers to free travel. Following this negotiation, Canada and the U.S. entered into a round of negotiation which culminated in an agreement that Canada would spend CDN \$1 billion to build nineteen border screening facilities, erect ground sensor towers along the border and install advanced radiological detection facilities at all Canadian ports. (including ports that do not receive international shipments.) This agreement was announced on September 11, 2007. Each border screening facility costs approximately \$50 million. Ground sensor towers for the U.S. – Canada border have been estimated at \$4 Billion.

Simultaneously with the announcement of these improvements, on September 11, 2007 the Prime Minister Harper announced the Fuel Export Charge (FEC). This charge was applied to all Canadian fuel transported by pipeline. In his announcement which was simultaneously announced with the new border initiatives, Prime Minister Harper made clear that the FEC

would be used to raise money for the projects announced on September 11, 2007, consistent with the goals of the SPP.

The U.S. filed a complaint with the International Court of Justice (ICJ) challenging the legality of the FEC on September 23, 2007. Canada filed a complaint challenging the legality of WHTI and APHIS on October 23, 2007. Canada and the U.S. agreed to remove these complaints from the World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA) dispute settlement context and grant the ICJ jurisdiction over these complaints. The cases were joined on November 23, 2007, the U.S. proceeds as Applicant, and Canada as Respondent.

QUESTIONS PRESENTED

- I. Whether the WHTI is contrary to NAFTA Chapters 12 and GATS?
- II. Whether AQI user fees are contrary to NAFTA Article 310 and GATT Article VIII?
- III. Whether the WHTI is justified pursuant to the National Security Exception or General Exception in NAFTA or GATS?
- IV. Whether the AQI user fees are justified pursuant to the National Security Exception or a General Exception in NAFTA or GATT?
- V. Whether the Fuel Export Charge is contrary to NAFTA Articles 314, 315, 604 and 605 or GATT Articles I, VIII and XI?
- VI. Whether the Fuel Export Charge is justified pursuant to the National Security Exception or a General Exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI?

STATEMENT OF JURISDICTION

Canada and the U.S. submit the present dispute to this Court by Special Agreement, dated November 23, 2007, pursuant to Article 40(1) of the Court's Statute. The parties have agreed to the contents of the Compromis submitted as part of the Special Agreement. Both State parties to this dispute have agreed to the jurisdiction of the Court in accordance with 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

The WHTI is unlawful because it violates NAFTA and GATS, treaties to which the U.S. and Canada are party. The WHTI is a measure according Canadian hotel and restaurant service suppliers less favorable treatment than to like U.S. suppliers, the WHTI violates the National Treatment provision of NAFTA Chapter 12. The WHTI violates the U.S.'s Specific Commitments of providing unlimited Market Access and National Treatment to Canadian hotel and restaurant services consumed in Canada. The WHTI is not permitted by the NAFTA/GATS Security or General Exception. WHTI provides little benefit to U.S. security interests relating to the traffic in arms or in time of war, compared to the significant harm to Canadian hotel and restaurant services, and is therefore not permitted by the Security Exception. The WHTI does not promote U.S. laws consistent with GATT and is not permitted by the General Exception.

The AQI user fee is unlawful because it violates NAFTA and GATT. Application of the AQI fee to originating goods places violates NAFTA Article 310. The AQI fee exceeds GATT Article VIII's importation fee guidelines. The WHTI is not permitted by the NAFTA/GATT Security Exception or General Exception because it does not promote U.S. security relating to bioterrorist attacks in a time of war and it is not necessary to promote human health or life.

The FEC does not violate GATT or NAFTA. Trade in energy is governed by the International Energy Program (IEP), not GATT or NAFTA. The FEC is not under the purview of NAFTA and GATT as it is an export tax upon pipeline service, permitted under both agreements. The FEC is also permitted as it is less of a burden than that imposed upon domestic consumption and is non-discriminatory in its application.

The FEC is also permitted under the GATT/NAFTA Security and General Exceptions as it is necessary and related to customs law and resources conservation and Canada has deemed it is

necessary during a crisis in international relations. The FEC is also a negotiated settlement between the U.S. and Canada, relieving Canada of its obligations under GATT and NAFTA.

ARGUMENT

I. The WHTI violates NAFTA and GATS.

The WHTI violates NAFTA¹ and GATS,² treaties to which the U.S. and Canada are party. The WHTI violates NAFTA Chapter 12's National Treatment requirement and U.S.'s GATS obligations to provide unlimited market access and national treatment.

A. The WHTI violates Chapter 12 of NAFTA.

NAFTA Chapter 12 is "extremely broad, covering all services other than financial services, energy-related services, and air transport services."³ The WHTI, a measure that affects the sale of Canadian hotel and restaurant services by U.S citizens, falls within the purview of Chapter 12.⁴ Chapter 12 imposes the obligation of national treatment upon Member States.⁵ National treatment requires a Party to accord to foreign service providers treatment "no less favorable than the most favorable treatment accorded, in like circumstances, to its own service providers."⁶ In *EC-Bananas I*,⁷ a WTO Panel held that a measure violates national treatment if it (i) affects the supply of services in the pledged sector and mode of supply, and (ii) accords to foreign suppliers treatment less favorable than that accorded to domestic suppliers.⁸

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

² General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter "GATS"].

³ NAFTA, *supra* note 1, Article 1201(2)

⁴ NAFTA, *supra* note 1, Article 1201(1)(a); NAFTA, *supra* 1201(1)(b)

⁵ NAFTA, *supra* note 1, Article 1202; NAFTA, *supra* Article 1203

⁶ NAFTA, *supra* note 1, Article 1202

⁷ *Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas ('EC – Bananas I')*, WT/DS27/R/ECU (May 22, 1997).

⁸ *Id.* at ¶7.314

1. The U.S. adopted and applied the WHTI, a measure affecting the supply of Canadian hotel and restaurant services consumed abroad.

In *EC-Bananas I*, a WTO Panel held that “the term ‘affecting’ should be interpreted broadly.”⁹ The WHTI affects the consumption of Canadian hotel and restaurant services in Canada by U.S. consumers. By requiring that U.S. citizens returning from Canada present a valid passport or other prescribed identification at time of entry to the U.S., the WHTI imposes a two-fold burden upon the sale of Canadian hotel and restaurant services. Potential travelers must wait at least four to six weeks for passports¹⁰ or passport cards¹¹ and must pay \$97 in passport fees¹² or \$45 for passport card fees.¹³ In the short time since the imposition of the first phase of WHTI, purchase of Canadian hotel and restaurant services by U.S. residents has decreased due to a 4.5 percent decrease in U.S. air travel to Canada.¹⁴ The adverse effects of the second phase of WHTI to the trade in services will be greater in both reach and magnitude than that of the first phase. Since over 83 percent of U.S. residents travel to Canada by land or sea,¹⁵ the extension of WHTI to U.S. citizens traveling by land or by sea will be particularly damaging to the sale of Canadian hotel and restaurant services. The burdens imposed by WHTI will significantly reduce the demand for Canadian hotel and restaurant services, because over 49 percent of the U.S. consumers are casual consumers who travel to Canada by automobile for a one-day trip.¹⁶

⁹ *Id.* at ¶ 7.316

¹⁰ U.S. Department of State, *How Long Will it Take to Process a Passport Application*, http://travel.state.gov/passport/get/processing/processing_1740.html (last visited Feb. 19, 2008)

¹¹ U.S. Department of State, *U.S. Passport Card Frequently Asked Questions*, http://travel.state.gov/passport/ppt_card/ppt_card_3921.html (last visited Feb. 19, 2008)

¹² U.S. Department of State, *Passport Fees*, http://travel.state.gov/passport/get/fees/fees_837.html (last visited Feb. 19, 2008).

¹³ U.S. Department of State, *U.S. Passport Card Frequently Asked Questions*, *supra* note 11.

¹⁴ Statistics Canada: International Trips to Canada, <http://www.statcan.ca/english/freepub/66-001-PIE/66-001-PIE2007011.pdf> (last visited Feb. 19, 2008).

¹⁵ *Id.*

¹⁶ *Id.*

Casual consumers have a highly price and time elastic demand, because such consumers readily find substitutes for Canadian hotel and restaurant services in less burdensome locations. Even a minor increase in the price or time required to procure Canadian hotel and restaurant services will greatly decrease the demand for these services among these casual consumers.

2. The WHTI accords Canadian tourism suppliers treatment less favorable than it accords to like U.S. suppliers.

According to a WTO Panel in *EC-Bananas III*,¹⁷ violation of national treatment requires a determination of (i) likeness of the domestic and foreign services, and (ii) less favorable treatment to foreign services than to domestic services.¹⁸

In *EC-Bananas I*, the Panel held that the nature of two wholesale service suppliers was “like” where both suppliers fell within the common classification of wholesale providers under the United Nations Provisional Central Product Classification (“UNPCPC”),¹⁹ a classification system most members have adopted through the Services Sectoral Classification List (“SSCL”) as a basis for scheduling commitments.²⁰ The Panel refused to distinguish two wholesale service suppliers who were distinct solely in the origin of the goods. Similarly, U.S. and Canadian hotel services, “lodging accommodations provided to transients,”²¹ and restaurant services, “food serving services,”²² although of distinguishable origin, share common definitions under the UNPCPC. Thus, U.S. and Canadian hotel and restaurant services are “like.”

The U.S. has accorded less favorable treatment to Canadian hotel and restaurant service

¹⁷ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador (‘EC – Bananas III’)*, WT/DS27/RW/ECU (Apr. 12, 1999).

¹⁸ *Id.* at ¶6.94

¹⁹ *EC – Bananas I*, *supra* note 7, at ¶ 7.322

²⁰ *EC – Bananas I*, *supra* note 7, at ¶ 7.289

²¹ U.N. Dept. of Intl. Econ. & Soc. Affairs, Provisional Central Product Classification, p. 206, U.N. Doc. ST/ESA/STAT/SER.M/77 (Aug. 3, 1991).

²² *Id.* at 208.

suppliers than to their U.S. counterparts. Treatment is less favorable if it modifies the conditions of competition in favor of services or service suppliers of the implementing Member compared to like services or service suppliers of any other Member.²³ The WHTI applies no secure document requirements comparable to WHTI on the sale of U.S. hotel and restaurant services to U.S. citizens,²⁴ thereby placing U.S. hotel and restaurant services and service suppliers in a favorable position compared to Canadian ones.

B. The WHTI violates the U.S.’s Specific Commitments under GATS.

GATS applies to measures that affect trade in services,²⁵ including the supply of a service in the territory of one Member to consumers of any other Member.²⁶ Since the WHTI affects the supply of hotel and restaurant services within the territory of Canada to U.S. consumers, the WHTI must pass scrutiny under GATS. To pass scrutiny under GATS, the WHTI must satisfy the U.S.’s Specific Commitments under GATS, an “integral part”²⁷ of the Agreement.²⁸

1. The WHTI violates the U.S.’s Specific Commitment to provide unlimited market access to Canadian hotel and restaurant services consumed in Canada.

Members must “accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.”²⁹ The U.S. Schedule of Commitments (“U.S. Schedule”) affirms its commitment to no limitations on market access for hotel and restaurant services consumed

²³ GATS, *supra* note 2, Article XVII(3)

²⁴ Consulate General of the U.S., *Temporary Travel Flexibility for Americans*, http://hamilton.usconsulate.gov/released_june_8/07_-_temporary_travel_flexibility_for_americans.html

²⁵ GATS, *supra* note 2, Article I(1)

²⁶ GATS, *supra* note 2, Article I(2)(b)

²⁷ GATS, *supra* note 2, Article XX(3)

²⁸ WTO, *Guide to reading the GATS schedules of specific commitments*, http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Feb. 18, 2008).

²⁹ GATS, *supra* note 2, Article XVI(1)

abroad.³⁰ Such commitment precludes measures which restrict the supply of a service.³¹ The WHTI violates the U.S.'s obligations to provide unlimited market access to foreign hotel and restaurant services consumed abroad by increasing the temporal and monetary costs of procuring Canadian hotel and restaurant services,³² thus reducing quantity supplied.

2. The WHTI violates the U.S.'s Specific Commitment to provide unlimited national treatment to Canadian hotel and restaurant services consumed in Canada.

National treatment requires that every Member “accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.”³³ Since the U.S. Schedule places no limits on national treatment of foreign hotel and restaurant services,³⁴ the U.S. may not impose less favorable measures upon foreign hotel and restaurant services than those imposed upon like U.S. services and service suppliers.³⁵ As noted above,³⁶ the WHTI fails to provide National Treatment to Canadian hotel and restaurant service providers.

II. The WHTI is not permitted by the Security or General Exceptions in NAFTA or GATS.

The WHTI is not permitted under any GATT³⁷ Security Exception or General Exception. Since the language in the corresponding exceptions in NAFTA and GATS are identical in

³⁰ U.S. INT’L TRADE COMM., U.S. SCHEDULE OF COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES, Investigation No. 332-354, 70 (Aug. 1998) [hereinafter “U.S. Schedule”].

³¹ GATS, *supra* note 2, Article XVI(2)(e)

³² *See supra* notes 10-13 and accompanied text.

³³ GATS, *supra* note 2, Article XVII(1)

³⁴ U.S. Schedule, *supra* note 30 at 70.

³⁵ GATS, *supra* note 2, Article XVII(1)

³⁶ *See supra* notes 3–24 and accompanied text.

³⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61. Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

relevant part,³⁸ the WHTI is likewise not permissible under any NAFTA or GATS exceptions.

A. The WHTI is not permitted under the GATT Security Exception.

GATT Article XXI grants a Member the power to determine what “it considers necessary for the protection of its essential security interests.”³⁹ Article 32 of the Vienna Convention on the Law of Treaties (“VCLT”)⁴⁰ permits recourse to “supplementary means of interpretation including the preparatory work of the treaty” when the plain language “leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.”⁴¹ The plain language of Article XXI suggests an unreviewable exception to the GATT, a manifestly absurd and unreasonable result. In expressly dismissing the use of an exception that reduces a “treaty obligation to a merely facultative one... [that] negates altogether the treaty rights of other Members,”⁴² the Appellate Body in *U.S. – Shrimp* concluded that unilateral unreviewable provisions are manifestly absurd and unreasonable. Although the GATT *travaux preparatoires* grants Members “some latitude”⁴³ in determining essential security interests, this latitude is limited by “the spirit in which Members of the Organization... would interpret these provisions.”⁴⁴ The Security Exceptions must be “performed... in good faith.”⁴⁵

In *U.S.-Shrimp*, the WTO Appellate Body applied the *abus de droit* doctrine to determine a

³⁸ GATT, *supra* note 37, Article XXI; GATT, *supra* note 37, Article XX; NAFTA, *supra* note 1, Article 2102; NAFTA, *supra* note 1, Article 2101; GATS, *supra* note 2, Article XIV bis; GATS, *supra* note 2, Article XIV.

³⁹ GATT, *supra* note 37, Article XXI

⁴⁰ *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”].

⁴¹ *Id.* at Article 32

⁴² Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (‘*U.S. – Shrimp*’), WT/DS58/AB/R (Oct. 12, 1998), ¶156.

⁴³ *GATT Analytical Index: Notes on the drafting, interpretation and application of the Articles*, 3d Revision, 120 (1970) [hereinafter “GATT *travaux*”].

⁴⁴ *Id.*

⁴⁵ VCLT, *supra* note 40, Article 26

breach of good faith.⁴⁶ The panel balanced “the right of a Member to invoke an exception... and the rights of the other Members under varying substantive provisions... so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed... in that Agreement.”⁴⁷ Therefore, determining a breach of the *abus de droit* doctrine distills to the question whether the measure creates a net harm. The U.S.’s self-proclaimed benefits in applying the WHTI, protection of its essential security interests relating to the traffic in arms and to a time of war, are outweighed by the harm to Canada resulting from the impairment of its hotel and restaurant services.

1. The WHTI does not contribute to protection of U.S. essential security interests relating to the traffic in arms.

When the alleged benefit the U.S. gains from the protection of its essential security interests relating to the traffic in arms is weighed against the harm done to Canada from the impairment of its hotel and restaurant services, it is apparent that the WHTI creates a net harm. Given the comprehensive set of measures employed by Canada to prevent the traffic in arms, gains to the protection of U.S. security interests from the WHTI are minimal. First, the SSBP signals Canada’s intent and ability to abolish arms trafficking. Second, Canada has committed to build screening facilities, erect ground sensors along the border, and install advanced radiological detection technology at its border ports. Third, gun control in Canada, governed by the 1998 Firearms Act⁴⁸, is stringently monitored.⁴⁹

2. The WHTI does not contribute to protection of U.S. essential security interests taken in time of war.

⁴⁶ *U.S. – Shrimp*, *supra* note 41, at ¶158.

⁴⁷ *Id.* at ¶159.

⁴⁸ Firearms Act, SOR/1998-209 (Can).

⁴⁹ Scott Medlock, *NRA = No Rational Argument? How the National Rifle Association Exploits Public Irrationality*, 11 *Tex J. on C.L. & C.R.* 39, 41 (2005).

The WHTI makes at best a token contribution to U.S. security interests relating to the global war on terror. Only one terrorist, Ahmed Ressam, has been documented attempting to cross the U.S.-Canadian border, but he was arrested before he was able to cross.⁵⁰ The SSBP commitments further undermine the effectiveness of the WHTI.

On the other hand, the harm done to Canada from the impairment of its hotel and restaurant services⁵¹ is significant. Balancing the U.S.'s minimal benefit against Canada's significant harm accordingly reflects a violation of the *abus de droit* doctrine.

B. The WHTI is not permitted under the GATT General exception because the WHTI does not promote compliance with U.S. laws consistent with GATT.

Since the U.S. only alleges to apply the WHTI to secure compliance with laws regulating the entry of persons into the U.S., the U.S.'s only claim for justifying the WHTI under the General Exception hinges on whether the WHTI prevents the U.S. from taking measures necessary to secure compliance with laws not inconsistent with GATT.

So long as they are not “arbitrary or unjustifiable discrimination between countries where the same restrictions prevail, or a disguised restriction on international trade,”⁵² GATT Article XX(d) does not prohibit measures “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.”⁵³ The Panel in *U.S. – Gasoline*⁵⁴ explained that a party invoking GATT Article XX(b) must prove, *inter alia*, that the measure secures compliance with laws or regulations themselves not inconsistent with GATT.⁵⁵

⁵⁰ BBC News, ‘Millenium Bomber’ gets 22 years, <http://news.bbc.co.uk/2/hi/americas/4722409.stm> (last visited Feb. 18, 2008).

⁵¹ See *supra* notes 10-13 and accompanied text.

⁵² GATT, *supra* note 37, Article XX

⁵³ GATT, *supra* note 37, Article XX(d)

⁵⁴ Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* (‘U.S. – Gasoline’), WT/DS2/R (May 20, 1996).

⁵⁵ *Id.* at ¶6.31.

The U.S.'s self-proclaimed motive behind the WHTI is to make entrance into the U.S. "difficult each and every time for those who want to illegally enter the United States, by falsely claiming to be a U. S. or Canadian citizen when, in fact, they are not,"⁵⁶ namely to secure compliance with its Immigration and Nationality Act.⁵⁷ However, the WHTI does not in fact contribute to U.S. border security. The 3,985 mile long U.S.-Canada border is only protected by 82 border posts.⁵⁸ Illegal entrants may easily bypass formal immigration points, and thus avoid being subjected to the U.S.'s immigration procedure altogether.

III. The AQI user fee violates NAFTA and GATT.

The AQI user fee is not permitted because the measure is in violation of NAFTA and GATT. The fee violates NAFTA Article 310's prohibition on the adoption of customs user fees and GATT Article VIII's guidelines for acceptability of fees connected with importation.

A. NAFTA Article 310 prohibits customs user fees such as AQI.

Article 310 prohibits the adoption of customs user fees of the type referred to in Annex 310.1 for originating goods.⁵⁹ Customs user fees, "an amount of money charged for processing goods through customs,"⁶⁰ includes within its scope a merchandise processing fee – "a non-refundable fee charged . . . for administrative expenses for processing an imported shipment requiring formal entry."⁶¹ Article 401 includes in its definition of "originating goods" goods (1) wholly obtained or produced in the NAFTA region, (2) meeting the Annex 401 origin rule, (3) produced

⁵⁶ U.S. Department of Homeland Security: *U.S. Land Border Crossing Procedures*, http://www.dhs.gov/xprevprot/programs/gc_1200605716403.shtm (last visited Feb. 18, 2008)

⁵⁷ Immigration and Nationality Act § 241(f) 75 Stat. 665 (1961), 8 U.S.C. §1251(f) (1964).

⁵⁸ 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).

⁵⁹ NAFTA, *supra* note 1, Article 310.

⁶⁰ U.S. Customs and Border Protection, *North American Free Trade Agreement*, http://www.cbp.gov/xp/cgov/import/international_agreements/free_trade/nafta/ (last visited Feb. 18, 2008).

⁶¹ UPS, *U.S. Customs and Border Protection and U.S. Customs Brokerage*, <http://www.ups.com/content/us/en/resources/advisor/customs/terms.html> (last visited Feb. 18, 2008).

in the NAFTA region wholly from originating materials, and (4) classified with their parts which contain a certain amount of regional “value.”⁶²

The AQI reimburses APHIS for services performed in connection with agricultural inspection at customs,⁶³ the AQI is clearly a customs user fee and merchandise processing fee within the ambit of Article 310. The U.S.’s blanket application of the AQI user fee on all commercial shipments from Canada will inevitably lead to the application of the AQI user fee upon the broad range of originating goods.

B. The AQI user fee is in excess of GATT Article VIII’s guidelines for acceptability of fees connected with importation.

Article VIII’s provisions extend to import⁶⁴ barriers – fees, charges, formalities, and requirements – relating to analysis and inspection.⁶⁵ All such charges are prohibited under Article VIII, unless they:⁶⁶ (i) are “limited in amount to the approximate cost of services rendered;”⁶⁷ (ii) do not “represent an indirect protection to domestic products;”⁶⁸ and (iii) do not “represent... a taxation of imports... for fiscal purposes.”⁶⁹

1. The AQI user fee is not limited in amount to the cost of services rendered.

The requirement that a charge must be limited in amount to the approximate cost of services rendered is “a dual requirement” that the charge in question must first involve a service rendered,

⁶² U.S. Customs and Border Protection, *Purpose* http://www.cbp.gov/xp/cgov/import/international_agreements/free_trade/nafta/customs_procedures/rules_origin/rules_purpose.xml (last visited Feb. 18, 2008).

⁶³ APHIS, *Plant Protection and Quarantine Factsheet: Questions and Answerst*, (March 2007).

⁶⁴ Article VIII(1)(a)

⁶⁵ GATT, *supra* note 37, Article VIII(4)(g)

⁶⁶ GATT Panel Report, *United States Customs User Fee* (‘U.S. – Customs User Fee’), L/6264 – 35S/245) (Feb. 2, 1988), ¶¶69.

⁶⁷ GATT, *supra* note 37, Article VIII(1)(a)

⁶⁸ *Id.*

⁶⁹ *Id.*

and second the level of the charge must not exceed the approximate cost of that service.⁷⁰ In order to be proportional to the approximate cost of services rendered, user fees must not (i) secure a total revenue that is in excess of the costs of services rendered, and (ii) apportion costs disproportionately among individual importers.⁷¹

a. The total revenue generated by the AQI user fee grossly exceeds the costs associated with the service provided under the AQI user fee.

Although “a certain degree of flexibility”⁷² is granted in the requirement that revenue from fees not exceed costs, the total revenue secured must not be in excess of the costs of services rendered beyond the degree of flexibility.⁷³ However, the AQI user fee is disproportionately higher than the cost of services rendered. The AQI user fee is estimated to generate \$78,038,314 in fiscal year 2007.⁷⁴ The total annual cost is only \$74,799,617,⁷⁵ reflecting a profit of over \$3 million. In reality, however, the U.S. government’s inflated estimate of salaries and related costs masks the significantly larger profits earned through the AQI user fee. The U.S. estimates employment costs at \$68,466,469 for 201 AQI employees;⁷⁶ each employee will earn \$340,629. However, a U.S. Customs Officer’s median salary is \$32,321.⁷⁷ Total employee-related cost will in reality only amount to \$12,829,669. Accordingly, the AQI will in reality generate a revenue 84 percent in excess of costs incurred. Consistent with the decision in *U.S.-Customs User Fee*, which held that a processing fee applied by the U.S. that generated a revenue 38 percent in excess of

⁷⁰ *U.S. – Customs User Fee*, *supra* note 66, ¶¶69.

⁷¹ *Id.* at ¶93.

⁷² *Id.* at ¶81.

⁷³ *Id.* at ¶93.

⁷⁴ APHIS Analysis, *supra* note 58, at 9.

⁷⁵ *Id.* at 11.

⁷⁶ *Id.*

⁷⁷ Salary Wizard,

http://swz.salary.com/salarywizard/layouthtmls/swzl_compresult_national_LG12000023.html
(last visited Feb. 18, 2008).

costs incurred⁷⁸ was excessive,⁷⁹ the AQI user fee is likewise excessive.

b. The AQI user fee apportions costs disproportionately among individual importers.

A user fee must be proportional to the cost of services rendered to the individual importer in question if it is not to exceed the approximate cost of a service rendered.⁸⁰ The Panel in *U.S. - Customs User Fee* found the U.S.'s *ad valorem* fee on imports to be in violation of Article VIII, because the fee imposed fees on entries exceeding the average value.⁸¹ Two characteristics of the AQI user fee create even more uneven apportionment of costs among individual importers. First, "passengers and commercial conveyances are subject to user fees even if they aren't actually inspected."⁸² Second, the *agricultural* quarantine and inspection user fee is applied even upon non-agricultural freight and upon passengers and commercial vessels arriving from Canada regardless of whether they are traveling with fruits or vegetables.

IV. AQI user fee is not permitted by Security or General Exceptions in NAFTA or GATT.

The AQI user fee is not permitted by the Security Exception or General Exception contained in GATT. Since the corresponding exceptions in NAFTA use the same language as the GATT exceptions,⁸³ the AQI is likewise not permitted under NAFTA.

A. The AQI user fee is not permitted under the GATT Security Exception because the fee does not promote U.S. security interests.

The violation of the *abus de droit* doctrine distills to an inquiry of whether the questionable

⁷⁸ *U.S. - Customs User Fee*, *supra* note 66, Annx. 2.

⁷⁹ *U.S. - Customs User Fee*, *supra* note 66, ¶93.

⁸⁰ *U.S. - Customs User Fee*, *supra* note 66, ¶80.

⁸¹ *U.S. - Customs User Fee*, *supra* note 66, ¶78 & ¶93.

⁸² APHIS, *Factsheet*, *supra* note 63.

⁸³ GATT, *supra* note 37, Article XXI; GATT, *supra* note 37, Article XX; NAFTA, *supra* note 1, Article 2102; NAFTA, *supra* note 1, Article 2101; GATS, *supra* note 2, Article XIV bis; GATS, *supra* note 2, Article XIV.

measure creates a net harm.⁸⁴ Since the AQI user fee generates at most a minimal gain to the U.S.’s security motive of preventing bioterrorism⁸⁵ while creating a significant harm to Canadian hotel and restaurant services, the AQI user fee violates the *abus de droit* doctrine.⁸⁶ Since the risk upon the U.S. of a bioterrorist attack originating from Canada is negligible,⁸⁷ the AQI user fee only provides a minimal gain to U.S. security interests. However, indiscriminate application of the AQI user fee upon uninspected passengers and commercial conveyances⁸⁸ and upon non-agricultural freight⁸⁹ imposes a significant burden upon Canadian hotel and restaurant services.

B. The AQI user fee is not permitted under the GATT General exception because the fee is not necessary to promote human health or life.

The U.S. justifies the AQI under the General Exception in that it protects human life or health. The Panel in *U.S. – Gasoline* explained that a party invoking GATT Article XX(b) must prove, *inter alia*, that the measure is necessary to fulfill the objective of protecting human life and health.⁹⁰ In *Thailand – Cigarettes*,⁹¹ the Panel interpreted the term “necessary” to mean that “no alternative measures consistent with the General Agreement, or less inconsistent with it” which the implementing Member could “reasonably be expected to employ” exist.⁹² However, such less inconsistent measures exist: the AQI user fee could be imposed, for example, only upon inspected passengers and commercial conveyances and only upon agricultural freight.

V. The FEC does not violate GATT or NAFTA.

⁸⁴ See *supra* note 47 and accompanied text.

⁸⁵ Notice of Proposed Rulemaking, 72 Fed. Reg. 35087 (June 26, 2007), at 50324.

⁸⁶ See *supra* notes 14–16 and accompanied text.

⁸⁷ See *supra* note 50 and accompanied text.

⁸⁸ APHIS, *Factsheet*, *supra* note 63.

⁸⁹ See *supra* note 82 and accompanied text.

⁹⁰ *U.S. – Gasoline*, *supra* note 54, ¶6.20.

⁹¹ Panel Report, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* (*‘Thailand – Cigarettes’*), BISD 37S/200 (Nov. 7 1990).

⁹² *Id.* at ¶75.

The Canadian FEC does not violate GATT or NAFTA because the International Energy Program (IEP) governs energy matters. If GATT and NAFTA do apply, the FEC does not violate GATT I, VII, or XI or NAFTA Articles 314, 315, 604 and 605 as the FEC is a uniformly applied export tax on services and not a quantitative restriction.

A. Energy issues are under the IEP regime, not GATT or NAFTA.

The IEP governs issues of energy and energy security, not GATT and NAFTA. The Secretariat of the WTO stated in the note on Energy Services that:

“Energy goods have been treated... as being outside the scope of reach of GATT rules, by relying on the General Exception... (Article XX:(g)) and on the National Security Exception (Article XXI). Trade in this sector has... been the object of special arrangements such as the OECD Agreement on an International Energy Programme.”⁹³

The IEP is the superior body for matters of energy regulation. Annex 608.2 of NAFTA states “In the event of any inconsistency between the IEP and this Chapter, the provisions of the IEP shall prevail to the extent of that inconsistency.”⁹⁴ The IEP dictates that member states shall “seek... opportunities and means of encouraging stable international trade in oil and of promoting secure oil supplies...”⁹⁵ If the U.S. believes the FEC violates any international obligations, it must have recourse to the Standing Group on Relations with Producer and Other Consumer Countries under Article 48 of the IEP charter.⁹⁶

B. The FEC is not contrary to NAFTA.

The FEC is not contrary to NAFTA Articles 314, 315, 604 and 605.

Article 314 states that no Party may adopt or maintain any duty, tax or other charge on export of a good unless the charge is “maintained on: (a) exports of any such good to the territory of all

⁹³ The Secretariat of the WTO, *Energy Services Background Note by the Secretariat*, ¶ 31, *delivered to the Council in Trade and Services*, U.N. Doc. S/C/W/52, (Sep. 9, 1998)

⁹⁴ NAFTA, *supra* note 1, Annex 608.2.

⁹⁵ Agreement on an International Energy Program art. 47, Nov. 18, 1974, 1040 U.N.T.S. 271.

⁹⁶ *Id.* at art. 48.

other Parties; and (b) any such good when destined for domestic consumption.”⁹⁷ The FEC applies equally to the territory of all other Parties and the same good when consumed domestically. Canada has only one neighboring state and has imposed the FEC upon an overland method of transportation. This results in one state being affected by the FEC not by discrimination, but by geography. Furthermore the FEC is applied to the same goods when destined for domestic consumption. Federal Canadian oil taxes are approximately 25% and including provincial taxes are in excess of the cost imposed by the FEC.⁹⁸

Article 315 permits restriction on the export of a good only if the restriction does not reduce the proportion of the total export shipments, there is not a higher price for exports than domestic consumption, and the restriction does not disrupt the normal channels of supply.⁹⁹ The FEC has no effect on the amount of petroleum energy that may be exported, or on the normal channels of supply. The FEC keeps prices lower for exports than for domestic consumption.¹⁰⁰

The FEC is not covered by Article 314 or 315 as the FEC is not a duty upon a good. The FEC is an export tax applied to the service of use of the pipeline. With the sole exception that the latter apply only to energy, Articles 604 and 605 are worded to mirror NAFTA Articles 314 and 315.¹⁰¹ Therefore, the analysis of Articles 314 and 315 applies to Articles 604 and 605.

C. The FEC is not contrary to GATT.

The FEC is not prohibited by GATT as it is an export tax. Specifically the FEC is not contrary to GATT Articles I, VIII, and XI.

⁹⁷ NAFTA, *supra* note 1, Article 314.

⁹⁸ Canadian Department of Finance, *Oil and Gas Prices, Taxes, and Consumers*, http://www.fin.gc.ca/toce/2006/gas_tax-e.html (last visited Feb. 18, 2008). *See Also* Angelo Toselli *et al.*, *Oil and Gas Taxation in Canada*, Canadian Energy Tax Group - Price Waterhouse Coopers, May 2004, at 2.

⁹⁹ NAFTA, *supra* note 1, Article 315.

¹⁰⁰ Canadian Department of Finance, *Supra* note 98 and accompanying text.

¹⁰¹ NAFTA, *supra* note 1, Article 604, 605.

“No provision of the GATT prohibits export taxes... Members are free to impose export taxes on products as long as they are not set at a level so as to amount to an export ban.”¹⁰²

GATT Article I does not apply because the FEC is an export tax applied equally and unconditionally. Article I requires that the application or removal of barriers be “immediately and unconditionally” applied to “territories of all other contracting parties.”¹⁰³ As discussed above the FEC has is a non discriminatory measure.¹⁰⁴

GATT Article VIII does not prohibit the FEC because export duties are exempt from Article VIII. Article VIII applies to “All fees and charges of whatever character (other than import and export duties...)”¹⁰⁵ The FEC is an export duty.

GATT Article XI prohibits “quantitative restrictions.” “Quantitative restrictions impose absolute limits on imports...”¹⁰⁶ The FEC does not limit the amount of energy that may be exported, and therefore does not violate Article XI.¹⁰⁷ Over the past decade the price of oil per barrel has tripled but demand has steadily increased.¹⁰⁸ The FEC will have little to no affect on U.S. demand for Canadian petro-energy and is not a ban.

VI. The FEC is permitted by the General and National Security Exception of GATT and NAFTA.

The FEC is a valid exercise of both GATT Article XX and XXI exceptions. Since NAFTA Articles 607, 2101 and 2102 adopt the language and interpretation of the corresponding GATT exceptions, the FEC is also a valid exercise of the NAFTA exceptions.

¹⁰² MITSUO MATSUSHITA et al., *The World Trade Organization Law, Practice and Policy* 593 (Oxford International Law Library 2006).

¹⁰³ GATT, *supra* note 37, Article I.

¹⁰⁴ Canadian Department of Finance, *Supra* note 6 and accompanying text

¹⁰⁵ GATT, *supra* note 37, Article VIII.

¹⁰⁶ Panel Report, *Turkey – Restrictions On Imports of Textile and Clothing Products*, WT/DS34/R (May 31, 1999).

¹⁰⁷ GATT, *supra* note 37, Article XI.

¹⁰⁸ Energy Information Administration, *Annual Energy Review*, <http://www.eia.doe.gov/emeu/aer/overview.html> (last visited Feb. 18, 2008).

A. The FEC is permitted by the GATT General Exceptions.

The FEC is necessary to secure compliance with customs enforcement and is critical to the conservation of exhaustible natural resources.

1. GATT Article XX(d) permits acts, such as the FEC, necessary to secure compliance with customs enforcement.

The FEC is necessary for laws or regulations relating to customs enforcement. Article XX(d) exempts measures “necessary to secure compliance with laws or regulations... including those relating to customs enforcement.”¹⁰⁹ The FEC is integral to the border and energy initiatives agreed upon at the SPP. The FEC is necessary to secure compliance with customs enforcement. In *Korea-Various Measures on Beef*,¹¹⁰ interpretation of a treaty may “take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as ‘necessary’ a measure...”¹¹¹ The protection of Canadian borders and energy interests assures the safety and prosperity North America as a whole.

2. GATT Article XX(g) permits the FEC as an act relating to the conservation of exhaustible natural resources.

The FEC helps protect and conserve exhaustible natural resources in the same manner as domestic laws applied within Canada. Article XX(g) exempts measures “relating to the conservation of exhaustible natural resources if... made effective in conjunction with restrictions on domestic production or consumption.”¹¹² In their 1996 decision in *US-Gasoline*¹¹³, the WTO Appellate Body determined that “in conjunction with” requires general even-handedness rather

¹⁰⁹ GATT, *supra* note 37, Article XX(d).

¹¹⁰ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS169/AB/R (Dec. 11, 2000).

¹¹¹ *Id.* ¶ 162.

¹¹² GATT, *supra* note 37, Article XX(g).

¹¹³ Appellate Body Report, *United States – Standards For Reformulated and Conventional Gasoline*, WT/DS2/AB/R, (Apr. 29, 1996).

than simultaneously enacted provisions.¹¹⁴ The FEC is the cost of conservation, long applied to Canadian energy, evenly applied to the consumers of Canadian energy abroad.¹¹⁵

B. The FEC is permitted under the National Security Exceptions of GATT Article XXI and NAFTA Articles 607 and 2102.

Article XXI(b) permits the FEC as action taken in an emergency in international relations.

1. The FEC is permitted by the Security Exception as it is essential activity undertaken during an emergency in international relations.

The FEC is necessary to Canadian national security interests during an emergency in international relations. Article XXI(b)(iii) recognizes a State's right to take action "necessary for the protection of its essential security interests taken in time of war or other emergency in international relations." The U.N. Security Council has determined that acts of international terrorism "constitute a threat to international peace and security."¹¹⁶ The U.S. Supreme Court has determined that the war with al-Qaeda is an international armed conflict.¹¹⁷ Over 1000 Canadian troops are stationed in volatile southern Afghanistan.¹¹⁸

2. Canada has properly determined what is necessary for the protection of its essential security interests.

Canada has properly invoked the GATT Security Exception. The FEC is not an abuse of rights because it benefits both the U.S. and Canada. In making its determination to invoke Article XXI Canada took into account U.S. and Canadian security interests. The FEC is permitted under Article XXI as it properly weighs security and commercial interests. Article XXI grants "some latitude" to determinations of national security as recognized by the *travaux*,

¹¹⁴ *Id.* p. 20, 21.

¹¹⁵ Canadian Department of Finance, *Supra* note 6 and accompanying text.

¹¹⁶ S.C. Res. 1373, Preamble, U.N. Doc. S/RES/1373 (Sep. 28, 2001).

¹¹⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) at 517.

¹¹⁸ Foreign Affairs and International Trade Canada, *Supra* note 22.

Article XXI, and the failure of any party to bring a claim under Article XXI prior to this case.¹¹⁹

C. The SPP, and the negotiated settlement announced September 11, 2007, are negotiated settlements which permit the FEC.

The FEC was part of a negotiated agreement between the U.S. and Canada announced on September 11, 2007. Bi-lateral negotiated agreements can suspend obligations under trade agreements.¹²⁰ On September 11, 2007 the U.S. and Canada announced that Canada would spend \$1 billion to put in affect border initiatives. The FEC is designed to pay for expenses in excess of the \$1 billion that Canada agreed to. Border facilities such as those agreed to have been the result of cost sharing by the U.S. and Canadian governments.¹²¹

CONCLUSION

For the foregoing reasons Canada respectfully prays this Court find;

1. WHTI violates NAFTA Chapters 12 and the U.S.'s Specific Commitments in GATS.
2. AQI fee violates NAFTA Article 310 and GATT Article VIII.
3. WHTI is impermissible by the General and National Security Exception in NAFTA/GATS.
4. AQI fee is impermissible by the General and National Security Exception in NAFTA/GATT.
5. The FEC is permitted by NAFTA Articles 314, 315, 604, and 605 and is permitted by GATT Articles I, VIII, and XI.
6. The FEC is justified by the National Security Exception and the General Exception in NAFTA Articles 607, 2101, 2102 as well as GATT Articles XX and XXI.

Respectfully Submitted,

Agent for Canada, 2006-09-R

¹¹⁹ *Travaux, supra*, note 43.

¹²⁰ Softwood Lumber Agreement, art. XI, U.S. –Can., Sept. 12, 2006, 53 Stat. 2348.

¹²¹ Government of Canada, *Official Opening of the Peace Plaza Bridge*, Canada News Center, July 16, 2007, <http://news.gc.ca/web/view/en/index.jsp?articleid=341789> (last visited Feb. 19, 2008).