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 # 2008-10 A

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STATEMENT OF FACTS

The disputes between Canada and the U.S. all seem to have been triggered in some way by the joint "Smart and Secure Borders" initiative, a product of the 2007 Montebello North American Leaders' Summit between Canadian Prime Minister Harper, U.S. President Bush, and Mexico's President Calderón. The leaders agreed on the need for borders that are both efficient and secure and directed their ministers to "develop mutually acceptable inspection protocols and detect threats to our security." A statement issued by the leaders directed that "Canada and the United States will maintain high priority on the development of enhanced capacity of the border crossing infrastructure in the Detroit-Windsor region, the world's busiest land crossing."

Following the Montebello Summit, U.S. and Canadian officials announced that they had agreed upon a range of "thick border" initiatives. A joint statement issued on September 11, 2007 indicated an agreement that Canada would spend $USD 1 billion to building screening facilities at least 1 kilometer from crossings at eighteen points along the Canada-U.S. border, erecting ground sensor towers, and installing advanced radiological detection technology at its ports.

On the same day, the office of the Canadian Prime Minister announced an export tax on fuel transported via a pipeline running between the U.S. and Canada at a rate of $CDN 25 per barrel. The tax requires fuel exporters to register and file monthly returns and then to pay the export taxes each month based on the number of barrels of fuel exported to a location outside of Canada through the pipeline. Although the legislation applies to any fuel taken outside of Canada via this pipeline, the practical result is a tax only upon exports to the U.S., because Mexico has not requested delivery of fuel from the pipeline.

Prime Minister Harper publicly justified the fuel tax as a way to raise revenue to offset expenses Canada has incurred making national security improvements, stating:

> Canada is imposing an export tax on fuel transported by way of pipeline because the security of North America depends upon Canada playing its part. Canada recognizes the importance of North American security and is willingly taking the steps requested by its closest trading partner, the United States. Let there be no misunderstanding, Canada has not been the source of any known threat to the United States and Canada is taking steps to ensure that Canada will not be perceived in the future as a source of any threat to the security of our friends.
>
> However, Canadian taxpayers want lower taxes and it has been the promise of this Government to lower taxes, not to raise them. Canada is fulfilling its obligations to build a safe and secure North America and is ensuring that those who benefit most from the actions being promises are the one's paying for the benefits. Canada is imposing an export tax on fuel transported by way of pipeline to raise the money to pay for the infrastructure projects and technology purchases that is has agreed to make. Canada's oil producing provinces will not be harmed by this export tax because the need continues to exist for Canadian fuel.

Despite protests from U.S. President Bush through Secretary Chertoff that the tax violates trade agreements between the two nations, Canadian Ambassador Wilson made it clear that the Fuel Export Charge is not something Canada will negotiate. The U.S. filed a formal dispute against the Canadian fuel tax with this Court on September 23, 2007.

After the U.S. filed its dispute with this Court, Canada responded by filing a dispute against the U.S. with respect to two actions taken by the U.S. – the Western Hemisphere Travel Initiative ("WHTI") and user fees imposed by the U.S. Animal and Plant and Health Inspection Service ("APHIS").

WHTI was proposed in April 2005 by the U.S. Departments of State and Homeland Security. It requires all travelers – Canadian, American, and others – to carry a valid passport or other secure documents when traveling to the United States from anywhere in the Western Hemisphere. The first phase applying to air travelers was implemented on January 23, 2007. A

second phase applying the requirement to all other forms of transportation will likely be implemented in Summer of 2008. [1]

WHTI's passport requirements represent a change from the status quo which permitted Canadians and Americans to cross the border with only photo identification and a birth certificate.

The APHIS user fees for agricultural quarantine and inspection ("AQI") were first announced on August 25, 2006[2] and took effect on November 24, 2006. Beginning on January 1, 2007, air passengers arriving in the U.S. from Canada were charged $USD 5.00 and each aircraft was charged a fee of $USD of 70.50, both of which were incorporated into the price of the flight ticket. In March 1, 2007, the fees were applied to ships entering the U.S. from Canada in the amount of $USD 490.00 per ship. In June 1, 2007, the fees were applied to train by imposing a fee of $USD 7.75 upon each rail car and moving from Canada into the United States. On the same date, $USD 10.75, consisting of APHIS fees and a fee for Customs and Border Protection, was applied to trucks moving from Canada to the United States. There was also an alternative offered for trucks to pay an annual fee of $USD 205, comprised of $USD 100 for Customs and Border Protection and $USD 105 for APHIS. These fees mark a shift from the exemptions Canada had been enjoying prior to their implementation.

[1] Notice of Proposed Rulemaking issued jointly by the U.S. Department of State and Department of Homeland Security on June 26, 2007.
[2] Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320-50328 (Aug. 25, 2006) (to be effective Nov. 24, 2006).

QUESTIONS PRESENTED

1. Whether Canada's Fuel Export Charge violates NAFTA Articles 314, 315, 604 and 605 and GATT Articles I, VIII and XI.
2. Whether Canada's Fuel Export Charge is unjustified as a general exception or a national security exception under NAFTA Articles 607, 2101, 2102 and GATT Articles XX and XXI.
3. Whether the United States' Western Hemisphere Travel Initiative is permissible under NAFTA Chapters 12 and 16 and GATS.
4. Whether the United States' Western Hemisphere Travel Initiative is justified as a general exception and national security exception under NAFTA, GATT, and GATS.
5. Whether the United States' Animal and Plant Health Inspection Service user fees are permissible under NAFTA Article 310 and GATT Articles I and VIII.
6. Whether the United States' Animal Plant Health Inspection Service user fees are justified as a general exception and a national security exception under NAFTA, GATT, and GATS.

JURISDICTIONAL STATEMENT

Article 35 of the Statute of the International Court of Justice provides States access to the Court based on consent of the States.[3] Article 93 of the U.N. Charter provides that all U.N. Member States are automatically parties to the Statute.[4] Therefore, as U.N. Members, both Canada and the U.S. have consented to the jurisdiction of this Honorable Court.

Both the U.S. and Canada have agreed to refer these disputes to this Honorable Court, rather than the Dispute Settlement Body of the World Trade Organization. Mexico was notified and had no objection to this case's removal from the context of a typical dispute under the North American Free Trade Agreement.

For these reasons, the International Court of Justice has contentious jurisdiction over the disputes between the U.S. and Canada.

[3] Statute for the International Court of Justice art. 35, June 26, 1945, 59 Stat. 1055.
[4] U.N. Charter art. 93.

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Michael Chertoff, U.S. Sec'y of Homeland Sec., Press Conference on WHTI Notice of Proposed Rule Making, (June 20, 2007). 7, 8, 12

Notice of Proposed Rulemaking issued jointly by the U.S. Department of State and Department of Homeland Security on June 26, 2007. iv

Press Release, Dep't of Homeland Sec., Western Hemisphere Travel Initiative Passport Card (Oct. 17, 2006), *available at* http://www.dhs.gov/xnews/releases/pr_1161115330477.shtm. 8

SUMMARY OF ARGUMENT

Canada's Fuel Export Charge violates provisions of the North American Free Trade Agreement ("NAFTA") and the General Agreement on Tariffs and Trade ("GATT"), which forbid export charges on goods that do not also apply to all other parties and the same goods reserved for domestic consumption. It cannot be justified as a general exception to the treaties, because the Fuel Export Charge is not being used for any of the purposes explicitly excepted by the treaties. Nor may the Fuel Export Charge be justified by national security because there is an insufficient connection between the fuel and Canada's national security.

WHTI and the APHIS user fees imposed by the U.S. advance the goals of NAFTA, as well as the General Agreement on Trade in Services ("GATS"), and fall in line with treaty requirements because they improve border efficiency and security to encourage liberalized trade across borders.

Because APHIS user fees are imposed for agricultural inspection and quarantine, they are not regulated by NAFTA. However, they meet the requirements of GATT because the fees are closely tailored to accomplish a permissible purpose.

Both WHTI and the APHIS user fees are justified by general exceptions carved out in the trade agreements, because they are reasonably related to the justifications in the texts of the treaties, they are necessary to achieve the purposes of those exceptions, and they are not imposed arbitrarily or discriminatorily.

Both WHTI and the APHIS user fees are justified under GATT, GATS, and NAFTA, because all three treaties provide for parties to deviate from trade obligations when they determine it necessary to protect their national security and these measures were taken by the U.S. for precisely that reason.

ARGUMENT

A. CANADA'S FUEL EXPORT CHARGE VIOLATES NAFTA ARTICLES 314, 315, 604 AND 605, AND GATT ARTICLES I, VIII, AND XI.

Canada has announced that it will place an export tax of $CDN 25 per barrel on fuel transported via pipeline between our two nations ("Fuel Export Charge"). The Canadian Prime Minister has publicly justified this move as necessary to offset Canada's security expenses put in place as part of the "thick border" initiatives. Canada is barred from adopting this tax, however, by both NAFTA and GATT.

NAFTA Article 314 prohibits parties from adopting or maintaining export charges on goods exported to another party if that charge is not also passed on equally to all other parties and applied to those goods that are reserved for domestic consumption.[5] NAFTA Article 315 prohibits trade restrictions that would reduce the proportion of exported goods, including those that would impose a higher price on exported goods than that charged domestically.[6] NAFTA Articles 604 and 605 apply the same rules specifically for petrochemical goods.[7]

Similarly, GATT Article I requires that a party apply any trade benefits on imports and exports equally to all parties.[8] GATT Article VIII limits charges on imports and exports to the approximate cost of the services rendered. It expressly precludes parties from using charges as a "taxation of imports or exports for fiscal purposes."[9] GATT Article XI bars use of restrictions

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[5] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, art. 314, 32 I.L.M. 289 (1993) [hereinafter NAFTA].
[6] *Id.*, art. 315.
[7] *Id.*, arts. 604 and 605.
[8] General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1947) [hereinafter GATT].
[9] *Id.*, art. VIII.

through quotas or licenses, except where necessary to prevent food shortages, apply grading or classification to goods, or protect agricultural and fisheries products.[10]

Both NAFTA and GATT embody the mutual goals of Canada and the U.S. to maintain free trade across its borders and obligate them to break down barriers to trade. The Fuel Export Charge is in direct conflict with these goals. It is not passed equally to other parties; it is applied directly to the U.S. The price of the fuel running through the pipeline will be higher than the price on the same fuel reserved for use in Canada, because the same tax presumably will not be applied to the fuel Canada keeps for domestic consumption. The Fuel Export Charge is not a tax representing services rendered for production or transportation of the fuel, but is used to offset unrelated Canadian expenses. There is no reason to think that the Fuel Export Charge is necessary to prevent food shortages, establish a grading system for the fuel, or protect agricultural products.

Because the Fuel Export Charge violates Canada's obligations under NAFTA and GATT by establishing a higher price for an exported good to only the U.S., Canada should be prevented for adopting or maintaining it.

B. CANADA'S FUEL EXPORT CHARGE IS UNJUSTIFIED AS A GENERAL EXCEPTION OR A NATIONAL SECURITY EXCPETIO UNDER NAFTA ARTICLES 607, 2101, 2102, AND GATT ARTICLES XX AND XXI.

NAFTA and GATT provide some general exceptions to free trade obligations. The U.S. also acknowledges that parties should be granted exceptions when national security is at stake. But neither the national security exceptions, nor the general exceptions found in the treaties are applicable to Canada's Fuel Export Charge.

[10] *Id.*, art. XI.

NAFTA Article 607 prohibits restrictions on exports of petrochemical goods, except as needed to supply a party's military or fulfill a defense contract, respond to situations of armed conflict, implement nuclear non-proliferation agreements, or respond to direct threats to disrupt the supply of nuclear materials for defense purposes.[11] NAFTA Article 2101 permits exceptions when they are necessary to protect public morality, public health, intellectual property, or conserve natural resources.[12] Such exceptions may not be applied in an arbitrary or unjustifiably discriminatory way.[13] Nor may they constitute a disguised restriction on NAFTA trade.[14] NAFTA Article 2102 also expressly provides an exception to NAFTA obligations when such obligations would prevent the party from taking actions it considers necessary to protect its security related to traffic of those goods that supply a military, or taken in times of war or international emergency, or related to nuclear non-proliferation agreement.[15] NAFTA obligations may not be used to prevent a party from fulfilling what the United Nations might require for maintenance of international peace and security.[16] GATT Articles XX and XXI are analogous to those exceptions in NAFTA.[17]

Canada makes no claims that the Fuel Export Charge is justified by public health exceptions, nor has it been enacted to preserve Canadian natural resources. Rather, Canada has tried to justify the Fuel Export Charge as an offset of the cost maintaining security measures related to "thick border" initiatives. Canada's use of the Fuel Export Charge, however, is not to make more fuel available to its military. Rather, it is being used to generate additional revenue

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[11] NAFTA, *supra* note 5, art. 607.
[12] *Id.*, art. 2101.
[13] *Id.*
[14] *Id.*
[15] *Id.*, art. 2102.
[16] *Id.*
[17] GATT, *supra* note 8, arts. XX and XXI.

to offset the cost of setting up domestic security programs designed to prevent terrorism. The relationship between the Fuel Export Charge and these securities measures is so remote that it is beyond the scope of the national security exceptions embodied in NAFTA and GATT. Neither agreement contemplates use of export charges to offset costs that would otherwise be borne by a party's taxpayers.

The Fuel Export Charge would apply only to the U.S., while Canada's upgraded security measures benefits its own citizens and the rest of the international community. It is, therefore, an arbitrary tax on an export and it is being used to unjustifiably discriminate against the U.S. Because the NAFTA and GATT general exceptions and national security exceptions are not applicable to the Fuel Export Charge, Canada should not be permitted to adopt or maintain it.

C. IMPLEMENTATION OF WHTI ADVANCES OVERALL PURPOSES AND GOALS OF NAFTA, AND MEETS THE REQUIREMENTS OF NAFTA CHAPTER 12 AND 16 AND GATS.

NAFTA Chapters 12 and 16 and GATS seek to encourage transparent criteria[18] used to promote the liberalization of transportation and advance cross-border trade in services.[19] Recognition of changing circumstances[20] and insurance of border security,[21] however, are central to parties' commitment under both treaties.

The GATS preamble recognizes the need of trade in services in order to ensure the "growth and development of a world economy," and encourages progression towards this overarching goal. GATS requirements revolve around a principle of immediate equal treatment

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[18] NAFTA, *supra* note 5, arts. 1207 and 1210; General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].
[19] NAFTA, *supra* note 5, preamble, arts. 1208 and 1210; GATS, *supra* note 18, preamble, arts. III,VIII.
[20] NAFTA, *supra* note 5, arts. 1201, 1602, 2101; GATS, *supra* note 18, arts. III, VIII, XX.
[21] NAFTA, *supra* note 5, preamble, arts. 1208, 1602; GATS, *supra* note 18, preamble, arts. III,VIII.

between trade with all other countries and trade with a "most favored nation," which is embodied in Article I. Transparency and cooperation are the means by which this new world economy will evolve by promoting fairness and stability. Articles III and VII provide, however, that notice and cooperation requirements will be relaxed in times of emergency.

GATS exempts adjacent countries from most favored nation requirements in Article II(3) and out of this exemption arises the preferential trade embodied in NAFTA. NAFTA in many ways mirrors GATS. Chapters 12 and 16 require most favored nation treatment, transparency and notice, liberalization of non-discriminatory measures, and encourages cooperation between parties. They also specify, however, that border security is necessary[22] and that no rule should "prevent a party from providing a service or performing a function such as law enforcement."[23]

In the past, Canadian citizens have been exempt from passport requirements when traveling to the U.S. and vice versa. Mexico and Canada are the United States' largest trading partners, however, so it can only be to their benefit that their borders are secure, as well as their economies. Further, more efficient borders will eventually advance the trading interests of all involved - a goal stated in NAFTA 1601 and recently reaffirmed by President Bush, Prime Minister Harper and President Calderon in their joint statement following the Montebello Summit. Barriers to trade, such as terrorism and inefficient borders, will be remedied by WHTI's implementation.

Between January 2005 and June 2007, more than 90,000 fraudulent documents were intercepted at the Canadian border and more than 60,000 travelers fraudulently claimed

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[22] NAFTA, *supra* note 5, art. 1601.
[23] *Id.*, art. 1201(3)(b).

citizenship.[24] Although the 9/11 hijackers did not come through the American land borders, the millennium bomber, Ahmed Rassem, did.[25] A terrorist cell discovered in Toronto in 2006 regularly crossed the borders without hassle.[26]

Even American attorney, Drew Speaker, chose to fly into Canada before attempting to cross into the U.S. He avoided the border because "the world knows that America's land borders are vulnerable."[27] After successfully arriving in the U.S., the entire nation was threatened by the vaccine-resistant strain of tuberculosis that he carried.

These are just some of the examples that illustrate the vulnerability of the American borders. By seeking to ensure the security of its people and borders, the U.S. is simultaneously furthering the global liberalization of trade, which grows stagnant when people do not feel safe to travel.

Moreover, the U.S. did not proceed with WHTI until providing notice in April 2005, almost two years before air traveler restrictions were implemented and more than three years before the restrictions are scheduled to be implemented regarding other modes of transportation during the summer of 2008. The U.S. also met with its NAFTA partners at the Montebello Summit a year before the scheduled implementation of the WHTI phase II. Only a few months later, leaders of Canada and the U.S. again met to discuss border security. Through participation in both meetings, the U.S. demonstrated intent to fulfill obligations of cooperation and negotiation under GATS and NAFTA.

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[24] Michael Chertoff, U.S. Sec'y of Homeland Sec., Press Conference on WHTI Notice of Proposed Rule Making, (June 20, 2007) [hereinafter Chertoff Press Conference].
[25] *Id.*
[26] *Id.*
[27] *Id.*

In accordance with the most favored nation requirements of GATS, the U.S. has extended passport regulations to the only country previously exempted. It has also, however, managed to fulfill its special obligations to Mexico and Canada through proposition of the PASS card that will make travel between the U.S., Canada, and Mexico easier than for those subject to standard passport requirements. The PASS card is obtained through the same process as a passport, however, it costs only $45, compared to the passport price of $100.[28] The PASS card also uses radio frequency technology, allowing border personnel to begin the identification process before a traveler reaches the actual border, advancing the interests of efficiency.[29] Further, multiple passengers can be cleared at one time. Rather than harming NAFTA members, the PASS card will supplement existing border measures such as NEXUS by ensuring that frequent travelers will be able to quickly and easily cross borders.

Finally, a key obligation under both GATS and NAFTA is the liberalization of trade measures. WHTI allows a streamlining of the borders and security levels that have never existed by eliminating eight thousand different forms of identification, sometimes easily forged, that once daunted border personnel.[30] Rather than restricting the free movement of goods and services, as Canada claims, WHTI will actually serve to enhance their movement, as well as secure it.

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[28] Dep't of State, Travel Documents for U.S. Citizens (2007), http://www.travel.state.gov/pdf/ppt_pptCard.pdf.

[29] Press Release, Dep't of Homeland Sec., Western Hemisphere Travel Initiative Passport Card (Oct. 17, 2006), *available at* http://www.dhs.gov/xnews/releases/pr_1161115330477.shtm.

[30] Chertoff Press Conference, *supra* note 24.

D. THE APHIS USER FEES MEET THE REQUIREMENTS OF GATT ARTICLES I AND VIII, AND ARE NOT SUBJECT TO THE REQUIREMENTS OF NAFTA ARTICLE 310 BECAUSE THEY ARE AQI USER FEES.

The APHIS user fees are non-discriminatory, self-supporting measures that enhance border inspection and quarantine services and promote certain sanitation and phyto-sanitation trade standards. Non-discriminatory user fees are permissible under GATT.[31] In determining whether a measure constitutes a permissible user fee, the proponent must show that the fee is related to the purpose for which it is enacted and corresponds to the cost of the services.[32] NAFTA Article 310 applies only to customs user fees, not to those fees used to fund agricultural quarantine and inspection services.

In *United States – Customs User Fee,*[33] Canada and the European Economic Communities challenged an American merchandise-processing fee that was applied *ad valorem* to all imports. The panel noted that, under GATT Articles I and VIII, user fees must be applied according to "the cost of services rendered," not the value of the particular product. The panel said that a flat fee may be appropriate where a centralized system of services has replaced the "hands on" process. In responding to India's third-party concern regarding most favored nation treatment requirements, the panel ruled that the U.S. violated the obligations of GATT Article I by exempting certain members from the fees.

The APHIS user fees were implemented in support of improved and increased agricultural inspection and quarantine services. The panel in *United States – Customs User Fees* deferred to the U.S.'s arguments that its customs services were now a centralized system – not one that is hands-on and individualized. Similarly, the APHIS inspection and quarantine system

[31] GATT, *supra* note 6, art. VIII.
[32] Panel Report, *United States – Customs User Fee,* L/6264 - 35S/245 (Nov. 25, 1987).
[33] *Id*.

now in place in the U.S. is nationally coordinated and centralized to ensure the highest level of conformity and security. A flat fee used to support inspection and quarantine services would, therefore, meet the requirements of GATT Articles II and Article VIII.

Additionally, the prior exemption Canada received from these user fees was in violation of the most favored nation treatment requirements embodied in GATT Article I. As the panel in *United States – Customs User Fees* determined, it is contrary to a party's obligation under Article I for certain countries to be exempt from user fees. By lifting Canada's exemption, the U.S. is now in conformity with that requirement.

Since NAFTA was implemented, the U.S.-Canada border has seen a 75% increase in travel and a 252% increase in trade.[34] The number of border inspectors decreased from 900 in 1987 to 700 in 2006.[35] By implementing the user fees, the U.S. has sought to pay for needed personnel and infrastructure improvements directly related to the inspection and quarantine services importers receive at the border.

NAFTA Article 310 requires that parties phase out *customs* user fees applied between them. The U.S. has not violated this mandate and has implemented an agricultural inspection and quarantine fee directly related to providing the inspection and quarantine services. The fees contemplated in the article are those that address the customs system generally. The APHIS fees, by contrast, address a specific inspection and quarantine deficiency.

[34] Animal and Plant Health Inspection Serv., U.S. Dep't of Agric., Docket No. 06-096-1, Preliminary Economic Analysis for Significant Rulemaking and Initial Regulatory Flexibility Analysis (2006) [hereinafter APHIS Economic Analysis].
[35] *Id.*

According to the Vienna Convention, the overall purpose of a treaty should be considered in order to resolve ambiguities in its language.[36] The overall purpose of NAFTA was to liberalize trade across North American borders. Borders that readily permit products of third-party origin and products infested with scales and fruit flies[37] do nothing to advance liberalization of trade.

E. BOTH WHTI AND THE APHIS USER FEES ARE JUSIFIED BY THE GENERAL EXCEPTIONS OF GATT, NAFTA, AND GATS.

The general exceptions included within GATS Article XIV and NAFTA Article 2101 correspond with GATT Article XX and all three have been interpreted as if one article.[38] In order to legitimately invoke a general exception under any of the above treaties, a member State must show that the measures taken are reasonably related to the purpose of the general exceptions enumerated, necessary to achieve that legitimate purpose, and are not arbitrary or unjustifiably discriminatory according to the chapeau of Article XX.[39]

1. WHTI and APHIS user fees are reasonably related to several general exceptions.

WHTI provides law enforcement with an efficient way of monitoring those entering the country and helps the country protect its citizens. The APHIS user fees provide funds to support the examination and certification of products and persons entering the U.S.

Protection of human and plant life, securing compliance with laws and regulations relating to customs, and safety are legitimate exceptions to a party's obligations under GATS,

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[36] Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].
[37] *Id*.
[38] Cross Border Trucking Services, ¶260, USA-Mex-98-2008-01 (2001).
[39] Appellate Body Report, *United States – Import Prohibition of Shrimp and Certain Shrimp Products,* WT/DS58/AB/R (Oct. 12, 1998); Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* **WT/DS285/AB/R (Apr. 20, 2005).**

NAFTA, and GATT.[40] The means used must be reasonably related to the purpose of the exception invoked.[41]

United States – Import Prohibition of Shrimp and Certain Shrimp Products[42] involved a U.S. law requiring shrimp trawlers to use certain technology to protect sea turtles endangered by common shrimp harvesting techniques. The court found that the measure was reasonably related to the purpose of protecting natural resources and animal life. The new technology did in fact lessen the potential harm to sea turtles and was, therefore, not overbroad. Instead of banning imported shrimp altogether, the U.S. restricted only the actual techniques that endangered sea turtles.

By contrast, in *EC Measures Concerning Meat and Meat Products*,[43] the European Union claimed an exception to trade obligations due to risks associated with hormone-treated beef. Expert testimony submitted to the panel contradicted the European Union's assertions that the ban would serve the legitimate interest in protecting its citizens from the specific cancer risks created by hormone-treated beef. The court found that the ban could not be supported by any of the exceptions under GATT Article XX. It did, however, note that the level of the health protection is a discretionary, sovereign decision.[44]

WHTI seeks to eliminate thousands of different documents that were previously accepted at border crossings. To achieve efficiency, the U.S. has implemented an alternative requirement that all travelers crossing the border must present a passport or PASS card. The PASS card uses

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[40] GATT, *supra* note 8, art. XX(b, d).
[41] *United States – Import Prohibition of Shrimp and Certain Shrimp Products*, *supra* note 39, ¶115.
[42] *Id*.
[43] Appellate Body Report, *EC Measures Concerning Meat and Meat Products,* WT/DS26/AB/R (Jan. 16, 1998).
[44] *Id*. at ¶122.

radio frequency technology that allows border personnel to efficiently and effectively screen those passing through the borders. Terrorists have readily crossed the borders at will; even a traveler carrying a life-threatening strain of tuberculosis passed through the borders without difficulty.[45] Unlike the European Union ban on beef products, streamlined identification requirements will improve safety conditions for U.S. citizens, as well as economic stability. Therefore, WHTI is sufficiently related to these important purposes, as required by the treaties.

The APHIS user fees serve a similar purpose by providing the funds for inspection procedures that have become necessary since the onslaught of global terrorism threats and an exponential increase in trade. The current infrastructure is insufficient and incapable of handling a 252% increase in trade since 1992 with 200 fewer inspectors at the borders.[46]

Also, phyto-sanitary concerns are implicated by plant diseases transported across borders. Three inspection operations were conducted by APHIS in 2003 at U.S.-Canada border crossings in New York and Washington.[47] These inspections revealed that many products crossing the border were of third party origin and thus were in violation of NAFTA, posing certain sanitation risks.[48] Scales, fruit flies, and mealy bugs are just a few examples of the pests that were discovered.[49] Because these fees will aid programs directed at eliminating these health risks, they are reasonably related for Article XX purposes.

2. WHTI and APHIS user fees are necessary to achieve the purposes of the exceptions.

WHTI and the APHIS user fees help protect the populace from terrorism, disease, and other risks; directly aid officials in identifying and preventing these risks from entering the

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[45] Chertoff Press Conference, *supra* note 24.
[46] *Id.*
[47] APHIS Economic Analysis, *supra* note 34.
[48] *Id.*
[49] *Id.*

country; and are customary fees applied to help maintain the economy and conduits of trade. The relative importance of the interests sought to be advanced, the measure's contribution to achieving those interests, and the restrictive impact of the measure on international commerce should be considered in determining whether a measure is necessary.[50]

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services[51] involved Antigua's challenge to a U.S. ban on cross-border gambling. The U.S. asserted that the ban enforced public morals and order and that it therefore qualified as an exception to GATS. In determining that the measure was not necessary, the appellate body observed that U.S. citizens could still gamble in other ways. Other, less restrictive measures were available that could regulate gambling. The fact that the interest to be advanced was not solely caused by cross-border gambling diminished the interest.

Border security, the interest in keeping out dangerous persons, chemicals, and diseases, is a concern that can only be remedied by measures *taken at the borders.* In contrast to *Cross Border Gambling*, where the U.S. could have chosen less restrictive measures, this scenario involves measures that cannot be effective if made less restrictive. Streamlining border documentation and fees to pay for heightened security and inspection services are those "reasonably expected" under the current global circumstances. As outlined above, these measures improve border efficiency and secure international conduits of trade, not restrict them. They are, therefore, permissible under the trade agreements between the U.S. and Canada.

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[50] *United States - Measures Affecting the Cross-Border Supply of Gambling, supra* note 39.
[51] *Id*.

3. WHTI and the APHIS user fees are not arbitrary or unjustifiably discriminatory to parties in the same condition.

The standards under the chapeau of Article XX are determined on a case-by-case basis.[52] In order to meet the "arbitrary" and "discriminatory" standards of the chapeau, a member must show that it has struck a balance between its right to invoke the general exception and the treaty rights of other parties.[53] Whether a unilateral approach to implementation is justified depends on the nature of the interest.[54]

In *United States – Import Prohibition of Shrimp and Certain Shrimp Products*,[55] a U.S. law required shrimp trawlers to use certain technology in order to protect sea turtles endangered by previous harvesting techniques. The law was applied evenly to domestic and foreign producers. Although the regulation was justified as a general exception under GATT Article XX (protection or preservation animal life), it did not meet the requirements of Article XX's chapeau because it was discriminatory and violated the transparency and procedural fairness requirements of Article X.

Malaysia sought to enforce the dispute settlement body's (DSB) decision based on the findings of the appellate body mentioned above in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*.[56] The panel noted that the highly migratory nature of sea turtles, as well as the effectiveness of global cooperation on

[52] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, ¶5.51, WT/DS58/RW (June 15, 2001).
[53] *United States – Import Prohibition of Shrimp and Certain Shrimp Products, supra* note 39, ¶156.
[54] *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, *supra* note 52, ¶5.47.
[55] *United States – Import Prohibition of Shrimp and Certain Shrimp Products, supra* note 39.
[56] *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, *supra* note 52.

environmental issues, made the case well-suited to a multilateral approach. The body invoked a case-by-case determination.

Here, rather than an outright ban on certain imports, the U.S. has imposed restrictions that pale in comparison to the interests in security and efficiency it seeks to advance. Where U.S. failure to negotiate and cooperate with other countries confirmed its law's arbitrariness and discrimination in implementing an environmental measure above, such a failure would be immaterial to this body's decision.

The duty to act multilaterally depends on the interest; it is not a prerequisite under GATT. Even though terrorists may be as "highly migratory" as sea turtles, this nature justifies a unilateral approach in this case. The U.S. has sought, however, to include its NAFTA partners in negotiations. It also provided notice of its plans two years before implementing the first phase of WHTI and imposing the APHIS user fees. Although it originally acted unilaterally, it has since sought multilateral cooperation.

The *Shrimp* appellate body invoked the doctrine of *abus de droit*[57] in explaining why the U.S. shrimping law was both discriminatory and arbitrary. Under the doctrine, to ensure that all treaty parties abide by that treaty, each party must respect the rights of other parties. The U.S. has not imposed on the rights of others under any of the treaties. Whereas shrimp and sea turtles are international concerns, border security is a sovereign consideration. Therefore, WHTI and the APHIS user fees are not a violation of U.S. treaty obligations.

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[57] *United States – Import Prohibition of Shrimp and Certain Shrimp Products, supra* note 39, ¶158.

F. WHTI AND THE APHIS USER FEES ARE JUSTIFIED PURSUANT TO NATIONAL SECURITY EXCEPTIONS IN GATT, GATS, AND NAFTA.

In interpreting a treaty, a court need look only to a treaty's unambiguous language.[58] The exceptions' plain language permits parties to protect "essential security interests."[59] A unilateral determination is appropriate under such circumstances.[60]

In *United States – Trade Measures Affecting Nicaragua,*[61] the U.S. cut sugar quotas while performing covert military operation within Nicaragua. The U.S. and Canada submitted arguments insisting there was "no basis for GATT Contracting Parties to question, approve, or disapprove the judgment of each Contracting Party as to what is necessary to protect its national security interests."[62] The panel expressed reservations, however, stating that some showing should be required in order to prevent parties from arbitrarily invoking the exception. Both the U.S. and Nicaragua rejected the panel's findings and refused to adopt them.

The terms of the national security exception were purposely left broad to permit each sovereign State to be the judge of what is required in times of war and emergency. The panel's concerns, however, are not implicated here where an on-going threat of global terrorism pressed the U.S. to action. Once a showing of a time of war or emergency has been made, parties are given great discretion in the means used to remedy the situation.

NAFTA broadens and clarifies this discretionary grant. Although NAFTA explicitly defers to GATT Article XX, it also includes a separate, parallel section to Article XXI. Six years after Canada joined the U.S. in the Nicaragua case to argue that Article XXI was self-judging,

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[58] Vienna Convention, *supra* note 36, art. 31.
[59] GATT, *supra* note 6, art. XXI; NAFTA, *supra* note 8, art. 2102.
[60] GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, unadopted (Oct. 13, 1986).
[61] *Id*.
[62] *Id*. at ¶43.

NAFTA was implemented. The national security exception is thus removed from any binding effect of the Article XX chapeau, as well previous international precedents.

The plain language of the national security exceptions in all three treaties states: "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 interest."[63] The unambiguous language of a treaty is binding.[64] Accordingly there is no need to look beyond the words, "which it considers necessary." The U.S. reacted to a national security threat in a situation of emergency and determined that implementation of WHTI and the APHIS user fees was appropriate and necessary to respond to the threat. In the past, Canada has joined the U.S. to assert that other countries cannot judge the actions taken by a sovereign in a time of war. Therefore, the U.S. has not violated trade obligations through WHTI and the APHIS user fees.

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[63] NAFTA, *supra* note 5, art. 2102; GATT, *supra* note 8, art. XXI; GATs, *supra* note 18, art. XIV (italics added).
[64] Vienna Convention, *supra* note 36, art. 31(1).

CONCLUSION

Canada's Fuel Export Charge violates NAFTA and GATT, because it applies only to the U.S. and is not also applied to fuel reserved for consumption in Canada. It cannot be justified as a general exception, because it is not being used for any of the purposes explicitly excepted by the treaties. Nor may the Fuel Export Charge be justified by national security because there is an insufficient connection between the fuel and Canada's national security. Therefore, the United States respectfully requests this Honorable Court to rule that Canada's Fuel Export Charge violates its trade agreements with the U.S.

WHTI and the APHIS user fees imposed by the U.S. advance the goals of NAFTA, as well as the General Agreement on Trade in Services ("GATS"). Moreover, APHIS user fees are not regulated by NAFTA because they are imposed for permissible agricultural inspection and quarantine. They meet the requirements of GATT, because they are closely tailored to accomplish a permissible purpose. Additionally, both WHTI and the APHIS user fees are justified by general exceptions carved out in the trade agreements. They are also justified as national security exceptions because NAFTA, GATT, and GATS all allow member States to determine for themselves when national security requires deviation from trade obligations. Therefore, the United States respectfully request that this Honorable Court hold that WHTI and the APHIS user fees do not violate trade agreements with Canada.