

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 # 2008-10 R

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STATEMENT OF FACTS

Having a valid passport is quickly becoming a mandatory concomitant of traversing the US-Canada Border. This stems from an act, the Western Hemisphere Travel Initiative (“WHTI”), which modified the traditional mode of access, a birth certificate and photo ID (a driver’s license), to a passport. The first phase of this program was implemented on air travel on January 23, 2007 and is set to go into effect for other modes of travel in the summer of 2008.

The Canadian government has expressed its concern about this initiative to the United States (“US”). Passport ownership is about 40% for Americans, whereas birth certificates and photo IDs are commonly held. This barrier to access to Canada is expected to have a negative effect on the tourism industries of both countries.

Documentation requirements are not the only way the US is hindering trade between our two countries. On August 25, 2005 the US Animal and Plant Health Inspection Service (“APHIS”) announced that it will impose its scheme of user fees on all commercial shipments entering the US from Canada. Citing variably national security or sanitary and phytosanitary concerns, this program went into effect for air passengers on January 1, 2007 and commercial vessels, rail cars, and trucks on June 1, 2007.

For air passengers, the fee applies regardless of whether they are traveling with fruits or vegetables, or whether they were processed through customs. The fee for air passengers is \$USD 5.00 per passenger, and \$USD 70.50 per aircraft.

For vessels, rail cars, and trucks the fees vary, but are imposed irrespective of the cargo. For vessels the fee runs \$USD 490, for rail cars \$USD 7.75, and \$USD 10.75 for trucks moving from the Canada to the US. However, trucks can pay a discounted fee of \$USD 205 each year.

Canada has also expressed concern to the US over these new fees as being contrary to NAFTA and GATT.

Finally, in the “age of terror” governments have been pressured to thicken their borders. Squarely present here are the false accusations by U.S. Presidential candidates that the 9/11 terrorists entered the US from Canada. In response to the firestorm of news reports, officials from the US and Canada commenced discussions on how to thicken North American borders. The result was the September 11, 2007 Joint Statement, when Canada committed itself to \$1 billion worth of border initiatives, including screening facilities, sensor towers, and advanced radiological detection technology.

In order to bear the costs of these initiatives, Canada sought to recover some of the expense by imposing a nominal \$CDN 25/barrel export tax on fuel transported by way of pipeline. The US has expressed concern over this fee as being contrary to NAFTA and GATT. However, Canada’s Prime Minister has stated the tax is only for recovering its security costs:

“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 promised 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 it has agreed to make.”

QUESTIONS PRESENTED

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

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.¹ Article 93 of the United Nations (UN) Charter provides that all UN Member States are automatically parties to the Statute.² Therefore, as UN Members, both Canada and the US have consented to the jurisdiction of this Honourable Court.

Both the U.S. and Canada have agreed to refer these disputes to this Honourable 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 US and Canada.

¹ Statute for the International Court of Justice art. 35, June 26, 1945, 59 Stat. 1055.

² U.N. Charter art. 93.

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SUMMARY OF ARGUMENT

This case largely concerns unnecessary trade barriers via rash security measures. A worthy sacrifice, but in order to preserve the values we seek to protect, the law demands a showing of necessity to justify the intrusion.

The US has failed to meet this necessity requirement with respect to both its security measures. The first initiative, the WHTI, violates the trade agreements by (1) creating disparate treatment between its own national service providers and that of its competitors; and (2) failing to create transparent criteria and procedures for implementation. The second initiative, APHIS's user fees, also violates the trade agreements because (1) the fees are not limited to the costs of services rendered, (2) such fees are categorically prohibited by NAFTA on goods originating in Canada, and (3) they constitute a de facto violation of the US's Most Favored Nation obligations to Canada. Finally, neither is justified under an exception in the agreements.

Canada, on the other hand, has sought reasonable means to fund its security obligations to the US. Canada's fuel export charge does not violate the trade agreements because it is justified under an exception for health as well as national security.

ARGUMENT

I. THE PROPOSED WESTERN HEMISPHERE TRAVEL INITIATIVE ("WHTI") VIOLATES BOTH GATS AND NAFTA.

A. WHTI IS WITHIN THE SCOPE OF GATS.

WHTI falls within the scope of Article I of GATS because it is a measure that affects trade in services. WTO Panels have called the question of whether a measure is within the scope of the agreement a threshold issue.³ The GATS' scope is laid out in Article I:1, which states in part

³ See Appellate Body Report, *Canada – Certain measures affecting the automotive industry*, ¶ 152, WT/DS139/AB/R (May 31, 2000).

that, “this agreement applies to measures by Members affecting trade in services.”⁴ Article I:2 then goes on to embellish certain categories that are considered “trade in services.”⁵

WTO panels have stated that two essential elements must be met under Article I for the GATS to apply: “first the party must establish that there is ‘trade in services’ in the sense of Article I:2; and, second, whether the measure in issue ‘affects’ such trade in services within the meaning of Article I:1.”⁶

Tourism is clearly a trade in services. First, tourism by its very nature falls under subsection (b) of Article I:2 which states “supply of a service . . . in the territory of one Member to the service consumer of any other Member.”⁷ Further, a quick glance of the GATS trade schedules exhibits the drafters’ separate treatment of tourism as a service.⁸

It is equally clear that WHTI will affect tourism. Panels have noted that the focus here is on how the measure affects the supply of the service or the service suppliers involved. Here the latter effect is felt. WHTI proposes to delay or deter travelers from using the applicant’s tourist services by reducing visits. For instance, in 2008 the Ontario Area alone will feel a 13.6%⁹ reduction in tourism causing a loss in tourism revenue of nearly \$3.2 billion countrywide.¹⁰

⁴ General Agreement on Tariffs and Trade, Oct. 30, 1947, app. 1b., art. I, para. 1, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1947) [hereinafter GATS].

⁵ GATS, *supra* note 2, art. I, para. 2.

⁶ Appellate Body Report, *Canada – Certain measures affecting the automotive industry*, ¶ 155, WT/DS139/AB/R (May 31, 2000).

⁷ GATS, *supra* note 2, art. I(b), para. 2.

⁸ See GATS Trade Schedules, at

[http://tsdb.wto.org/wto/public.nsf/0/75709812d4421603c1256fca007a878a/\\$FILE/P_PREDIF.PDF](http://tsdb.wto.org/wto/public.nsf/0/75709812d4421603c1256fca007a878a/$FILE/P_PREDIF.PDF).

⁹ *The Impact of the Western Hemisphere Travel Initiative on Travel to/from Ontario*, Tourism Research Unit (Ontario Ministry of Tourism, Toronto, Canada) Oct. 2005, at ii.

¹⁰ *An Update on the Potential Impact of the Western Hemisphere Travel Initiative on Canada’s Tourism Industry*, WHTI Update (The Conference Board of Canada, Ottawa, ON Canada) Aug. 2006, at 3.

Chapter 12 of NAFTA has a similar provision that limits its application, but here too it is apparent that the effects of WHTI fall within its scope. Article 1201 limits coverage to measures “adopted or maintained by a Party relating to cross-border trade in service providers of another Party.”¹¹ 1201 then goes on to give examples of effects that would fall under its scope.

NAFTA Panel decisions have not delved into this Article like they have for the GATS, but Panels have articulated general rules of interpretation. First, Panels have refused to look at the motivation for the measure; rather they have focused on the consistency or inconsistency of the measure with NAFTA.¹² Secondly, the scope should be read broadly when the measure affects the objective of the treaty: “[to] eliminate barriers to trade among the three contracting Parties.”¹³

With these interpretive principles in mind, Article 1201 encompasses WHTI’s effect on tourism. First, WHTI relates to cross-border trade by imposing a passport requirement on all persons traversing the border. Secondly, it is a measure that respects subsection (c) by prohibiting access to and use of distribution and transportation systems in connection with the provision of a service.¹⁴

B. WHTI HAS A DISPARATE EFFECT ON CANADIAN TOURISM IN VIOLATION OF ARTICLE XVII OF GATS AND ARTICLE 1203 OF NAFTA.

WHTI has a disparate impact on Canadian Tourism by stifling visits from US citizens to Canadian service providers. This effect violates the US’s obligation under Article XVII (National Treatment) of GATS and its counterpart, Article 1202 of NAFTA.

¹¹ North American Free Trade Agreement, art. 1201, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993). [hereinafter NAFTA]

¹² Binational Panel Report, *In the matter of cross-border trucking services*, ¶ 214, USA-MEX-98-2008-01 (February 6, 2001).

¹³ Binational Panel Report, *In the matter of cross-border trucking services*, ¶ 219, USA-MEX-98-2008-01 (February 6, 2001). See also Vienna Convention on the Law of Treaties, Article 31(1), May 23, 1969, U.N. Doc. A/CONF. 39/27.

¹⁴ NAFTA, *supra* note 10, art. 1201, sec. (1), subsec. (c).

In almost identical language the two treaties set out the principle that “each Member shall 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.”¹⁵ Thus, a measure that “modifies the conditions of competition” in favor of domestic services or service suppliers violates the treaties.¹⁶ Further, this applies to measures that create de facto discrimination as well as de jure discrimination.¹⁷

The GATS allows each Party to make reservations to its trade commitments.¹⁸ The US took minimal reservations relating to tourism, none of which allows the present discriminatory impact.¹⁹ Therefore, because the US undertook a “national treatment commitment, it must not apply any measure that would be inconsistent with the provisions of those articles.”²⁰

It is clear that implementation of WHTI has caused and will cause dissimilar treatment between Canadian and US service providers. Requiring passports at border crossings creates de facto dissimilar treatment by forcing Americans to have passports in order to access Canadian services, but not US services. While it is true that such action is also imposed on Canadians entering the US -- thus affecting US tourism industry as well -- the impact on Canada is proportionally more than the US. This constitutes de facto discrimination.

The latter assertion is founded on the disparate effect WHTI has because (1) more Canadians than Americans have passports and (2) Canadian tourism will experience a higher monetary

¹⁵ GATS *supra* note 2, art. XVII(1). See also NAFTA, *supra* note 10, art. 1202(2).

¹⁶ See GATS, *supra* note 2, art. XVII (3).

¹⁷ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 6.95, WT/DS27/RW/ECU, (April 12, 1999).

¹⁸ See generally GATS, *supra* note 2, Part III, art. XVI.

¹⁹ See GATS Trade Schedules, at

[http://tsdb.wto.org/wto/public.nsf/0/75709812d4421603c1256fca007a878a/\\$FILE/P_PREDIF.PDF](http://tsdb.wto.org/wto/public.nsf/0/75709812d4421603c1256fca007a878a/$FILE/P_PREDIF.PDF).

²⁰ Panel Report, *USUS – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶6.311, WT/DS285/R, (November 10, 2004).

impact from WHTI. Countrywide passport ownership is disproportionate between our two countries, with 12% fewer Americans owning passports than Canadians.²¹ Therefore, more Canadians will have access to the US's tourism services than Americans to Canadian tourism services. Second, WHTI will cause a discriminatory loss of tourism revenue. Thanks to WHTI, the Ontario area alone is expected to experience as much as a \$CDN500 million deficit. Canada's countrywide loss is expected to be \$CDN1.2 billion dollars greater than the US's.²²

These figures show the different treatment caused by WHTI. Such treatment will give favor to the US's tourism industry by creating a system that allows more access to services by Canadians than Americans. Second, WHTI will have a disparate impact on Canada's tourism compared with the US's. Such action violates both Article 1202 of NAFTA and Article XVII of the GATS.

C. WHTI VIOLATES NAFTA BECAUSE IT IS NOT TRANSPARENT.

The US fails to adhere to the spirit and letter of Article 1602 of NAFTA, which states,

“Each Party shall apply its measures relating to the provisions of this Chapter in accordance with Article 1601 and, in particular, shall apply expeditiously those measures so as to avoid unduly impairing or delaying trade in goods or services or conduct of investment activities under this Agreement.”²³

Among other provisions articulated in 1601 is “the desirability of ...establishing transparent criteria and procedures for temporary entry.”²⁴

The US has failed to maintain transparent criteria and procedures for temporary entry.

Before the US Congress, 9/11 Commission Member Slade Gorton testified, “87% of

²¹ See *An Update on the Potential Impact of the Western Hemisphere Travel Initiative on Canada's Tourism Industry*, WHTI Update (The Conference Board of Canada, Ottawa, ON Canada) Aug. 2006, at 3.

²² See *An Update on the Potential Impact of the Western Hemisphere Travel Initiative on Canada's Tourism Industry*, WHTI Update (The Conference Board of Canada, Ottawa, ON Canada) Aug. 2006, at 3. Figures in American Dollars.

²³ NAFTA, *supra* note 10, art. 1602.

²⁴ NAFTA, *supra* note 10, Article 1601.

Americans and 83% of Canadians have little-to-no idea about new documentation requirements.”²⁵ Specifically, the Canadian Chamber of Commerce indicted the initiative, saying that, “WHTI has led to serious misunderstanding by many citizens today . . . [contributing] to a 4.6% drop in U.S. cross border visits to [British Columbia] so far in 2005.”²⁶

D. WHTI IS NOT JUSTIFIED UNDER A GENERAL EXCEPTION IN GATS OR NAFTA.

WHTI does not meet the requirements of Article XIV of GATS or Article 2101 of NAFTA because it (1) fails to meet the requirements of necessity under the general exceptions and (2) it defies the chapeaus by creating a disguised restriction on trade.

An initial matter is whether to read GATS Article XIV and NAFTA Article 2101 as the same. The Binational Panel *In the Matter of Cross-Border Trucking Services* liberally drew from GATT/WTO history in interpreting Article 2101, including drawing the contours of its “necessity” analysis from GATT/WTO jurisprudence.²⁷ Thus, Respondent submits it is consonant to interpret an exception under Article XIV as an exception under Article 2101.

WTO Panels have given guidance to courts as to what qualifies as a general exception. For example, in *US-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* the Appellate Body stated to qualify for an exception the measure must (1) fall within the scope of Article XIV, and (2) meet the requirements of the chapeau of Article XIV.²⁸

²⁵ *Western Hemisphere Travel Initiative: Hearing Before the Subcomm. on International Operations and Terrorism*, 109th Cong. (2006) (testimony of Slade Gorton, Member 9/11 Commission).

²⁶ Canadian Chamber of Commerce, 66, (2006), at <http://www.chamber.ca/cmslib/general/Proposed%20English%202006%20FINAL.pdf>.

²⁷ *Cross Border Trucking*, *supra* note 12, at ¶ 260.

²⁸ Appellate Body Report, *USUS – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 292, WT/DS285/AB/R, (April 7, 2005).

Looking to the first criterion, WHTI is held out as a necessary safety measure, seemingly qualifying as an exception under Article XIV(c)(iii) of GATS and Article 2101:2(d) of NAFTA. However, in determining what is “necessary,” the WTO Appellate Body has applied an objective test that considers two factors: (1) “the ‘relative importance’ of the interests...furthered by the challenged measure”, and (2) “whether a less WTO-inconsistent measure is ‘reasonably available.’”²⁹

The Respondents console and agree with the broad “relative importance” of WHTI. The attacks on September the 11th and other subsequent attempts within *both* of our territories have raised the specter of vigilance needed at our border crossings. However, in assessing relative importance it should be recalled that all 9/11 terrorists possessed a passport, as did the would-be millennium-bomber caught at the Washington-British Columbia border crossing.³⁰ Thus, WHTI is largely reduced to form over substance because evidence that passport requirements deter terrorists is thin.³¹ This raises question as to relative importance of WHTI.

Secondly, more reasonable means exists to achieve the same ends. It is true WHTI allows for some alternative documentation, but these “do little to diminish the negative economic impact that would be associated with a passport requirement . . . [because they] are significantly more difficult to obtain.”³² Representative Slaughter of New York has stated that that Americans

²⁹ *Id.* at ¶¶ 305-306

³⁰ *Western Hemisphere Travel Initiative: Hearing Before the Subcomm. on International Operations and Terrorism*, 109th Cong. (2006) (testimony of Slade Gorton, Member 9/11 Commission).

³¹ *Potential Economic Consequences, on both sides of the border, of the Western Hemisphere Travel Initiative: Before the Standing Senate Committee on Banking, Trade, and Commerce*, 39th Parliament 1st Sess., 35 (2006) (statement of Rep. Louise McIntosh Slaughter (New York), USUS House of Representatives).

³² *Id.*

will not travel if there is high administrative burden or cost associated with travel.³³ Currently, the cheapest of these alternative documents is \$50.³⁴

The more *reasonable* alternative is a license. First, the integrity of a passport is not significantly greater than a license because “both the DHS and State acknowledge that a birth certificate and a driver’s license are sufficient to establish nationality and identity for the purpose of obtaining a passport.”³⁵ Furthermore, authorities in the US and Canada are already placing heightened safeguards on licenses. Notable is the REAL ID Act, which creates minimum uniform standards for these forms of documentation..³⁶ These programs demonstrate that a more reasonable means, and one that reduces the impact on trade in services, is to bolster the integrity of documents currently in use, rather than adopting new cards or a blanket passport requirement.

Respondent submits that 1) the relative importance of WHTI is mitigated by a lack of evidence that passport requirements hinder terrorism; and 2) less restrictive alternatives achieve the same ends. Thus, the US fails to meet the necessity requirement under the agreements.

WHTI further fails to meet the requirements of the chapeau. The WTO Appellate Body has stated that the “chapeau serves to ensure that Members rights to avail themselves of exceptions are exercised reasonably.”³⁷ Respondent demonstrated WHTI’s disparate effect in Part B, *supra*. Further, WHTI is arbitrary, because passport requirements do not reduce terrorist threats. These facts show that the US has unreasonably frustrated the rights of Canada under the trade treaties.

³³ *Id.* at 31.

³⁴ See *Western Hemisphere Travel Initiative: Hearing Before the Subcomm. on International Operations and Terrorism*, 109th Cong. (2006) (testimony of Slade Gorton, Member 9/11 Commission).

³⁵ See Letter from Randel K. Jonson, Vice President, USUS Chamber of Commerce and Angelo I. Amador, Director of Immigration Policy, USUS Chamber of Commerce, to Commissioner Bonner, Bureau of Customs and Border Protection (October 31, 2005) (on file with author).

³⁶ See *Id.*

³⁷ *Cross-Border Gambling*, *supra* note 32, at ¶ 339.

E. WHTI DOES NOT MEET THE NATIONAL SECURITY EXCEPTION.

WHTI does not meet the National Security Exception because it fails to meet the necessity requirement. This is a matter of first impression before this Court with only dicta given in *US – Trade Measures Affecting Nicaragua*. Thus, consideration must first be given to the text, but then also to broad principles underlying the treaty.

The National Security Exception, which is identical in NAFTA, GATT, and GATS, states in Section 1(b):

“1. Nothing in this Agreement shall be construed . . . (b) to prevent any Member from taking any action, which it considers necessary for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations.”³⁸

An initial question then is how to read “necessary.” The text seems to suggest a subjective approach because the language reads, “which it considers necessary.” However the principles underlying WTO and NAFTA Panels, and concerns raised by them³⁹, side with an objective view, justifying a minimal departure from the text.

First, Panels have avoided examining a Party’s motivation for invoking measures. Rather, Panels have sought only to assess the consistency or inconsistency of a measure with the trade agreement. Reasons for this approach are “the subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters.”⁴⁰ The Panel in *Measures Affecting Nicaragua* spoke, with some alarm, of the consequences of allowing unfettered Article XXI discretion: “If . . . interpretation of

³⁸ GATS, *supra* note 2, art. XIV bis(1)(a)(iii).

³⁹ See Panel Report, *USUS – Trade Measures Affecting Nicaragua*, L/6053 (October 13, 1986).

⁴⁰ See *Cross-Border Trucking Services*, *supra* note 12, ¶ 193 (quoting Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, (October 4, 1996)).

[GATT] Article XXI was reserved entirely to the contracting party invoking it, how could the contracting parties ensure that . . . [it] is not invoked excessively?”⁴¹

Second, the Vienna Convention on the Law of Treaties justifies departures from the ordinary meaning when it contradicts the object and purpose of the treaty.⁴² Reading this Article XXI subjectively would severely hamper the object of the treaty. The object of the agreements is to liberalize trade. It is well-recognized that border security “threatens to become the greatest non-tariff barrier the world has ever seen.”⁴³ Thus, to read this section subjectively would allow Parties to *ad libertas* impose barriers to trade when *they* feel it is necessary to security.

Finally, this problem is further exacerbated by the wide scope wartime has taken. The US Supreme Court recognized this in *Hamdi v. Rumsfeld* noting that this is a different type of conflict the US and others are engaged in.⁴⁴ Such an ongoing conflict calls for a different approach to the National Security Exception. This approach should put measures hampering trade under the scrutiny of an objective necessity analysis.

However, while encouraging this Court to adopt an objective necessity analysis Canada is also cognizant of state sovereignty and its imperative for taking protective measures. Therefore, Canada submits that a reviewing court should adopt a deferential necessity analysis. In other words, a reviewing court should only inquire whether the measure is the least restrictive measure on trade, thus, leaving relative importance to the purview of the claimant to the exception. This approach serves two goals. First, it recognizes the intent of the text to give a personal ability to the state’s policy determination. At the same time, it would ensure that those policy decisions

⁴¹ See *Measures Affecting Nicaragua*, *supra* note 49, at ¶ 5.17.

⁴² See Vienna Convention, *supra* note 12, Article 31(1).

⁴³ Coalition for Secure and Trade-Efficient Borders, “*Rethinking Our Borders: A New North American Partnership*,” (2005), http://www.cme-mec.ca/pdf/Coalition_Report0705_Final.pdf.

⁴⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

are taken in a way that is least restrictive on trade. This balance gives justice to the plain meaning of the text while preserving the underlying intent of the drafters.

Applying this standard to the facts here, the WHTI still fails. As was noted the US has ignored reasonable alternatives – that being a strengthened license – that would achieve its ends. Therefore, the US cannot claim an exception for national security.

II. THE AGRICULTURE QUARANTINE AND INSPECTION FEES IMPOSED BY THE U.S. ANIMAL AND PLANT HEALTH INSPECTION SERVICE VIOLATE GATT AND NAFTA.

With the imposition of its agriculture and quarantine inspection (AQI) fees on conveyances from Canada, the US has taken action that violates its obligations under the GATT and NAFTA. The fees are within the purview of the agreements because both expressly deal with customs user fees.⁴⁵ First, the fees are not limited to the cost of services rendered. Second, they are imposed on goods that are eligible to be marked as originating goods from Canada. Third, they are inconsistent with the US's obligation of most favored nation treatment toward Canada. Finally, given these violations, the fees are not justified pursuant to a general exception or the National Security Exception in the agreements.

A. THE AQI FEES VIOLATE GATT ARTICLE VIII BECAUSE THEY ARE NOT LIMITED TO THE COST OF SERVICES RENDERED.

Article VIII of GATT requires that all fees on imports be limited to the approximate “cost of services rendered.”⁴⁶ The Article goes on to explain that charges for inspection and quarantine services are among the measures which it specifically covers.⁴⁷ The US has not shown that the payment structure it imposes on imports and passengers is limited to the cost of services rendered. APHIS's Interim Rule provides no rationale for the per-unit fee scheme, simply saying

⁴⁵ See e.g. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, II, III, VII, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1947) [hereinafter GATT]; NAFTA, *supra* note 10, art. 310.

⁴⁶ GATT, *supra* note 55, art. VIII(1)(a)

⁴⁷ GATT, *supra* note 55, art. VIII(4)(g)-(h)

that the purpose of the fees is to fund inspections.⁴⁸ This scheme ignores the fact that the cost of inspection at each instance will not depend solely on the number of rail cars or trucks, etc., but also on the degree of technical difficulty involved. This method has no connection whatever to the content of the shipments. In its report on a former US customs user fee, the WTO Panel invalidated an ad valorem scheme for these reasons, saying that the “cost of services rendered” must be interpreted to refer to the cost of processing for the “individual entry” in question.⁴⁹ The imposition of the same per-unit rate, regardless of other factors, appears to have even less of a relation to the individual entry than the ad valorem fee the Panel struck down.

B. THE AQI FEES VIOLATE NAFTA ARTICLE 310 BECAUSE THEY ARE IMPOSED ON GOODS THAT ARE ELIGIBLE TO BE MARKED AS ORIGINATING GOODS FROM CANADA.

NAFTA Article 310 prohibits any Party from imposing any customs user fees on goods originating in the territory of another Party.⁵⁰ While APHIS has labeled this charge an “inspection fee,” because it applies to all commercial vessels, regardless of content,⁵¹ it is more appropriate to label it a user fee. As such, it is a violation for the US to impose it on goods originating from Canada. Because it applies to all commercial vessels from Canada, it will necessarily be applied to originating goods. This is a direct violation of Article 310.

C. THE AQI FEES VIOLATE GATT ARTICLE I’S REQUIREMENT THAT THE US AFFORD CANADA MOST FAVORED NATION STATUS WITH RESPECT TO TRADE.

The US’s action has taken the form of a revocation of Canada’s exemption from the AQI fees, so at first glance it seems to result in equal treatment of all Contracting Parties under GATT.

However, because Canada is one of only two countries who may convey goods to the US via

⁴⁸ Animal and Plant Health Inspection Service, *Agricultural Inspection and AQI User Fees Along the U.S./Canada Border*, 7 C.F.R. § 319 (2006), at 50321.

⁴⁹ Report by the Panel, *USUS –United States Customs User fee*, ¶ 27, L/6264-35S/245, (November 23, 2007).

⁵⁰ NAFTA, *supra* note 10, art. 310.

⁵¹ APHIS Rule, *supra* note 58, at 50323.

ground transport, the fees attached to loaded rail cars and trucks are applicable only to Canada and Mexico. This essentially immunizes all other Contracting Parties from these fees, and confers on them a favor or advantage not available to Canada or Mexico. When considering most favored nation treatment, WTO Panels have said that “the ordinary meaning of this provision does not exclude *de facto* discrimination.”⁵² It is consistent with this view for this Court to recognize the US’s *de facto* violation of Article I in the instant case.

D. THE AQI FEES ARE NOT JUSTIFIED PURSUANT TO A GENERAL EXCEPTION OR THE NATIONAL SECURITY EXCEPTION IN GATT AND NAFTA.

Given that the AQI fees violate provisions in both GATT and NAFTA, they may only be permissible if they fall under an exception. The US wishes to implement these fees under the GATT Article XX(b) general exception for impositions that are “necessary to protect human, animal, or plant life or health.”⁵³ However, as discussed above, the claim that such measures are “necessary” demands objective review of (1) “the ‘relative importance’ of the interests or values furthered by the challenged measure”, and (2) “whether a less WTO-inconsistent measure is ‘reasonably available.’”⁵⁴ While Canada fully recognizes the relative importance of preventing pests and diseases from entering the US via imported goods, imposing this fee scheme on Canada is by no means the least trade-restrictive means of achieving that goal.

The Interim Rule cites the US’s need to protect itself from diseases and pests from beyond its borders as an impetus for lifting Canada’s exemption from the AQI fees.⁵⁵ The WTO Panel has stated that the term “necessary” in Article XX(b) is to mean that no alternative measures

⁵² Appellate Body Report, *EC-Bananas III*, ¶¶ 233-234, WT/DS27/AB/R, (April 12, 1999).

⁵³ GATT, *supra* note 55, art. XX(b).

⁵⁴ *Cross-Border Gambling*, *supra* note 19, at ¶6.311

⁵⁵ APHIS Rule, *supra* note 58, at 50323.

consistent with the GATT could reasonably be expected to achieve the desired health policies.⁵⁶ Imposing a blanket inspection charge on all fruits, vegetables and commercial conveyances that cross the US's border creates a barrier to trade. Since implementation of the APHIS rule, the US and Canada created a bilateral working group to determine if there are less restrictive means that would address the US's concerns.⁵⁷ As a result, the Canadian Food Inspection Agency has submitted that a more effective and less restrictive model would manage risks at their points of origin, rather than their points of entry.⁵⁸ Experience has shown that this sort of approach is more successful at mitigating risk, and does not disrupt operations at the border. The focus is primarily on more rigorous identification and management of commodities originating in third-party countries. Furthermore, the bilateral work group developed plans to address our shared phytosanitary problems cooperatively. This approach increases sharing of plant pest risk assessments and data, and collaborative prevention measures.⁵⁹ The Canadian approach is consistent with our countries' goals, articulated in the Smart Borders Initiative, of enhancing border security and efficiency by moving inspection operations away from the border.⁶⁰ Furthermore, the Canadian approach allows each country to handle its own risk management responsibilities, thereby eliminating the US's need to impose WTO- and NAFTA-inconsistent customs user fees to fund the efforts.

⁵⁶ See Report by the Panel, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 23, (November 7, 1990).

⁵⁷ Canada's Proposed Alternative to the United States Department of Agriculture's Rule on Border Inspections and Fees, Statement of Ministers Strahl and Emerson on U.S. Agricultural Border Inspections Fees, (2007), <http://www.inspection.gc.ca/english/corpaffr/publications/borfrae.shtml>

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Problem*, pp. 3

Canada's proposed alternative to the APHIS fees demonstrates that the US has not met the general exception's necessity requirement because less onerous – and more effective – means are reasonably available to achieve the same ends. However, even if this Court found that the necessity requirements were met, the US's claim would still fail. This is because any exception to GATT under Article XX must meet the chapeau requirements of that section.⁶¹ The chapeau ensures that Article XX is not used as “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,”⁶² The US's lack of scientific support for the APHIS fee scheme renders the action sufficiently arbitrary, discriminatory and unjustified as applied to Canada to violate these requirements. The action is arbitrary, because, as discussed above, the Canadian government has proposed measures that would address the US's concerns more effectively. It is unjustified because the scientific data cited in the APHIS Interim Rule, which purports to demonstrate an increased risk of pests and diseases crossing the border, is merely anecdotal.⁶³ Furthermore, the Rule does not articulate its rationale for the fee scheme it has chosen, and the US Government Accountability Office has suggested that the scheme may actually “increase vulnerability of US agriculture to foreign pests.”⁶⁴ The fees are discriminatory because Canada currently imposes no user fees comparable to these for non-agricultural goods, only fees on actually inspected conveyances, conducted at the goods' end destination.⁶⁵ This is both consistent with the

⁶¹ GATT, *supra* note 55, art. XX

⁶² *Id.*

⁶³ APHIS, *supra* note 58, at 50323.

⁶⁴ *Agriculture Quarantine Inspection Services: Management Problems May Increase Vulnerability of U.S. Agriculture to Foreign Pests*, Government Accountability Office Report, Testimony before Subcomm. On Horticulture and Organic Agriculture, Committee on Agriculture, House of Representatives, Statement of Lisa Shames, Director Natural Resources and Environment, (October 3, 2007), at 1.

⁶⁵ Canada Food Inspection Service, *supra* note 68.

requirement that user fees be assessed individually, and takes into account the risk that increased inspections at the limited number of checkpoints along the US-Canada border could cause massive traffic problems. The US has not sufficiently considered these factors, rendering their action discriminatory to Canada, as well as arbitrary and scientifically unjustified.

The parallel general exception in NAFTA Article 2101 tracks the GATT exception, with the addition that no country is to be prevented from implementing laws related to health and safety which are not inconsistent with the agreements.⁶⁶ This addition, however, does not render the AQI fees permissible, because, as the Respondent has demonstrated, they violate provisions of both NAFTA and GATT.

The APHIS user fees are furthermore not justified pursuant to the National Security Exception in Article XXI of GATT and 2101 of NAFTA. As discussed above, analysis of a national security defense is not identical to analysis of a defense under the general exceptions. Respondent has submitted that it would be consistent with the objectives of the treaties, and a minimal departure from the text – as permitted by the Vienna Convention on the Law of Treaties⁶⁷ – to construe the term “necessary” in the National Security Exception with both subjective and objective standards. Because national security is so fundamental to sovereignty, nations should be able to subjectively determine what their national security goals are. What this Court should objectively review is whether the means are sufficiently tailored to those ends.

The US cites concerns about bioterrorism as one of the reasons for lifting Canada’s exemption from the APHIS user fees.⁶⁸ Consistent with the above proposed approach, Respondent recognizes and supports the US’s goals of preventing such threats. However, the AQI fees are

⁶⁶ NAFTA, *supra* note 10, art. 2101.

⁶⁷ See Vienna Convention, *supra* note 12, Article 31(1).

⁶⁸ APHIS Rule, *supra* note 58 at 50323.

not valid as a means. As discussed above, Canada has proposed a package of initiatives which are more closely tailored to the problems articulated by the US in the Interim Rule.⁶⁹ This Court should take this opportunity to vindicate the concerns expressed in *US Trade Measures Affecting Nicaragua* and demonstrate that the National Security Exception was designed to afford the Contracting Parties a great deal of discretion, but that discretion is not so broad as to render the agreements meaningless.

III. CANADA’S FUEL EXPORT CHARGE DOES NOT VIOLATE GATT OR NAFTA, BECAUSE IT IS JUSTIFIED PURSUANT TO A GENERAL EXCEPTION AND THE NATIONAL SECURITY EXCEPTION IN THE AGREEMENTS. IT FURTHER HAS PRECEDENT IN THE SOFTWOOD LUMBER PRODUCT EXPORT CHARGE ACT OF 2006.

Canada has made a commitment to the US to ensure the security of Canadian borders. This commitment is expensive, and the Respondent has chosen a \$25 per barrel charge for all fuel exported via its pipeline.⁷⁰ NAFTA Article 309 incorporates a total prohibition on “export price requirements” into the NAFTA members’ understanding of GATT Article XI.⁷¹ The Respondent therefore concedes that its fuel export charge technically violates the text of the agreements. However, the export charge is justified pursuant to a general exception and the National Security Exception in the agreements. Additionally, the Respondent’s action is supported by the Softwood Lumber Product Export Charge Act of 2006, which serves as a precedent for Canada utilizing an export charge to enable it to comply with the terms of its agreement with the US.

A. THE FUEL EXPORT CHARGE IS JUSTIFIED PURSUANT TO A GENERAL EXCEPTION IN THE AGREEMENTS.

As Prime Minister Harper explained in his September 11, 2007 announcement, Canada is imposing an export charge on fuel for the purpose of enabling it to comply with the terms of its

⁶⁹ Canada Food Inspection Service, *supra* note 68.

⁷⁰ *Problem*, pp. 4-5.

⁷¹ NAFTA, *supra* note 10, art. 309(2).

agreement with the US to fortify North American borders.⁷² As such, this action falls within the GATT Article XX(b) general exception for measures that are “necessary to protect human, animal or plant life .”⁷³ The Respondent’s claim under this exception stands up to scrutiny. First, the US may not seriously dispute the relative importance of the ends Canada seeks in employing this charge. The proposed screening facilities and ground sensor towers will detect and facilitate the capture of dangerous persons attempting to traverse the border. By installing radiological detection technology at all its ports, Canada can virtually guarantee that it will not be the source of any radiological threat to North America. The “value pursued is both vital and important in the highest degree.” Therefore, “the remaining question...is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade.”⁷⁴ The fuel export charge meets this test because there is little or no reason to believe that the fee will have a significant impact on the volume of fuel imported to the US. Demand for fuel is virtually inelastic; it has consistently withstood – and grown – in the face of significant price increases.⁷⁵ Funding is necessary to implement these border initiatives, and a charge on fuel is a sure way to raise those funds while causing negligible disruption to the flow of goods between our countries.

B. CANADA’S FUEL EXPORT CHARGE IS JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION IN GATT AND NAFTA.

Respondent’s fuel export charge is permissible under the National Security Exception in GATT Article XXI(b). As previously discussed, national security measures demand deference, but that discretion should not be limitless. As the Panel stated in *Trade Measures Affecting Nicaragua*, the motivation behind the measure should not be reviewed. Therefore, the fact that

⁷² *Problem*, pp. 5.

⁷³ GATT, *supra* note 58, art. XX(b).

⁷⁴ See Report of the Appellate Body, *European Communities – Measure Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, (March 12, 2001).

⁷⁵ See e.g. Energy Information Administration, Official Energy Statistics from the U.S. Government, at <http://www.eia.doe.gov>.

the fuel export charge has been implemented for the purpose of funding national security measures should be held valid absolutely. The Respondent submits that this Court may review whether or not less trade restrictive means are reasonably available. Because the export charge is unlikely to hinder the flow of fuel from Canada to the US, it stands up to scrutiny under this test.

NAFTA places further requirements on claims under the National Security Exception. NAFTA Article 607 says that if a Party places a restriction on the export of energy or petrochemical goods, then claims an exception under GATT Article XXI, the action also must meet one of the purposes enumerated in that section. Those purposes include, inter alia, “enabl[ing] fulfillment of a critical defense contract of a Party.”⁷⁶ Because the purpose of the fuel export charge is to supply the Respondent with sufficient funds that will enable it to fulfill its obligations under its security agreement with the US, it is consistent with NAFTA’s requirement.

C. THE SOFTWOOD LUMBER PRODUCT EXPORT CHARGE ACT OF 2006 IS PRECEDENT THAT SUPPORTS THE VALIDITY OF THE FUEL EXPORT CHARGE.

The validity of Canada’s fuel export charge is supported by precedent, set by the Softwood Lumber Product Export Charge Act of 2006. Under this Act, Canada imposed charges on its softwood lumber exports in order to comply with its agreement with the US.⁷⁷ Similarly, the Respondent’s fuel export charge enables it to honor its agreement with the US regarding border security initiatives.

⁷⁶ NAFTA, *supra* note 10, art. 607.

⁷⁷ Softwood Lumber Product Export Charge Act, Bill C-24, First Session, Thirty-ninth Parliament, 55 Elizabeth II, 2006.

CONCLUSION

The Respondent respectfully submits that this Honourable Court adjudge and declare that: (1) The US's Western Hemisphere Travel Initiative violates the GATS and NAFTA, and is not justified pursuant to a general exception or the National Security Exception in the agreements; (2) The US violated GATT and NAFTA by imposing agricultural and quarantine inspection fees on all commercial conveyances from Canada, and those fees are not justified under a general exception or the National Security Exception in the agreements; and (3) While Canada's fuel export charge concededly technically violates the agreements, it is justified under both a general exception and the National Security Exception in GATT and NAFTA.