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 # 2008-11A

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QUESTIONS PRESENTED

The Applicant and the Respondent submit six questions to the International Court of Justice:

1) Whether the Western Hemisphere Travel Initiative is amenable to NAFTA Chapters 12 and 16 or the GATS.

2) Whether the Western Hemisphere Travel Initiative is justified pursuant to a general or national security exception in NAFTA or GATT, in any event.

3) Whether the Fuel Export Charge is contrary to NAFTA Articles 314,315,604 or 605, or GATT Articles I, VIII, and XI.

4) Whether the Fuel Export Charge is not justified pursuant to a general or national security exception in NAFTA or GATT, in any event.

5) Whether the APHIS user fees are amenable to NAFTA Article 310 and GATT Articles I and VIII.

6) Whether the APHIS user fees are justified pursuant to a general or national security exception in NAFTA or GATT or GATS.

JURISDICTIONAL STATEMENT

The Applicant and the Respondent, by special agreement and pursuant to Articles 40(1) and 36(1) of the *Statute of the International Court of Justice*, submit this dispute to a Chamber of the Court composed of three judges.

STATEMENT OF FACTS

On June 26, 2007, the Department of Homeland Security and Department of State jointly announced the implementation of the second phase of the United States of America's Western Hemisphere Travel Initiative (WHTI). The Notice of Proposed Rulemaking announced that United States (U.S.) citizens and non-resident aliens from the Western Hemisphere, including Canada, must provide a valid passport or certain other prescribed identification when entering the U.S.[1] This new requirement on Canada removes the existing exemption allowing citizens of either country to simply provide any valid photo identification and birth certificate to cross the border.

Prime Minister Harper, President Bush, and President Caldéron issued a Joint Statement at the Conclusion of the 2007 Montebello North American Leaders' Summit. The Statement included a priority known as "Smart and Secure Borders," in which the leaders agreed that, "Our borders must be both efficient and secure if we are to continue to enhance prosperity, security and quality of life in North America."[2] Numerous action points were listed as necessary to achieving their goals, including the use of new technology and coordination of border crossing infrastructure to balance efficiency with security. On September 11, 2007, Canada and the U.S. issued a Joint Statement that Canada would spend $1 billion to effectuate various border measures, including new screening facilities, erecting new ground sensor towers, and installing advanced radiological detection technology.[3]

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[1] Documents Required For Travelers Departing From or Arriving in United States, 71 Fed. Reg. 226 (Nov 24, 2006) (to be codified at 7 C.F.R. pts. 41, 53).
[2] Press Release, Prime Minister Harper and President Bush, Joint Statement at the Conclusion of Montebello Summit of 2007 (Aug. 21, 2007).
[3] Press Release, Prime Minister Harper and President Bush, Joint Statement Concerning Thick Border Initiatives (Sept. 11, 2007).

On that same day, Prime Minister Harper announced an export tax on fuel transported by way of pipeline in the amount of CDN $25/barrel.[4] He justified his decision because, "Canadian taxpayers want lower taxes." He also stated, "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."[5] The Fuel Export Charge legislation used the *Softwood Lumber Export Charge Act of 2006* to justify the tax. All exporters of fuel by way of pipeline are required to apply for export permits as well.

On August 25, 2006, the U.S. Department of Agriculture announced an interim rule, beginning on November 24, 2006, to impose agricultural quarantine and inspection user fees for all commercial shipments and air passengers entering the U.S. from Canada.[6] Canada had been exempted from the user fees previous to this announcement. The exemption was actually lifted for air travel on January 1, 2007, requiring each passenger to pay $USD 5.00 and each aircraft to pay $USD 70.50. On March 1, 2007, the U.S. Animal and Plant Health Inspection Service (APHIS) removed the exemption for ships, requiring them to pay $USD 490.00 per entry. On June 1, 2007, a user fee of $USD 7.75 was imposed on each rail car coming into the U.S. from Canada, and $USD 10.75 for each truck. Trucks have the option of paying $USD 205.00 annually in lieu of the per-crossing fee. All of these fees must be paid regardless of the cargo carried by each person or vehicle.

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[4] Fuel Export Charge Act SOR/2007-000 (Can).
[5] Press Release, Prime Minister Harper, Announcement of Fuel Export Charge (Sept. 11, 2007).
[6] Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165 (Aug. 25, 2006) (to be codified at 7 C.F.R. pts. 319, 354 (2006).

SUMMARY OF THE ARGUMENT

The United States' Western Hemisphere Travel Initiative (WHTI) is a security measure marking the end of dangerous border-crossing practices between the U.S. and Canada. The former use of any photographic identification and a birth certificate to cross borders allowing those who seek to do harm on U.S. soil to easily enter the U.S. with a fraudulent identification. The WHTI replaces this faulty system with a universally accepted form of identification at borders around the world – passports. Recognizing its duty to balance its security interests with its economic duties to its close neighbors, the United States' WHTI also allows for certain prescribed identification documents, other than a passport.

The Fuel Export Charge (FEC) violates NAFTA and GATT because it is a prohibited export tax that singles out the U.S., giving all other nations a favored status. To be consistent with other parts of the treaties, the good being taxed should be considered "oil" and not "oil transported by pipeline." In that regard, it also violates the requirements that an export tax be levied on all exports and domestic consumption of that good. Finally, requiring licenses be purchased by companies that are using pipelines to export oil into the U.S. is an express violation of NAFTA Articles 314 and 605.

There are no justifications for the FEC, either in the general or the national security exceptions. The export tax has been levied specifically for financial purposes, as Prime Minister Harper explained, and may not be justified by the specific standards set out by NAFTA or GATT. While the tax may fund more security measures at the Canadian border, the financial burden is unjustifiably placed upon the U.S. There can be no doubt that such increased security measures will be greatly benefit Canadian citizens and residents, as well as all guests traveling to Canada.

The United States' imposition of Agricultural and Plant Health Inspection Service (APHIS) user fees for all commercial shipments and air passengers entering the U.S. from Canada is justified by the national security exceptions granted in NAFTA, GATT, and GATS. Pursuant to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the U.S. determined it must impose user fees to take necessary sanitary and phytosanitary measures to ensure the welfare of U.S. human, animal, and plant life. The U.S. took such precautionary measures upon careful consideration of scientific evidence indicating the alarmingly high number of attempts to carry prohibited goods into the U.S. from Canada. The user fees are not fiscally motivated; rather they are the least trade- and travel-restrictive means of protecting the U.S. from purposeful or unintended agricultural devastation.

ARGUMENT

I. The Western Hemisphere Travel Initiative is amenable to NAFTA Chapters 12 and 16 and the GATS.

The United States' security measure, the Western Hemisphere Travel Initiative (WHTI), secures U.S. borders against new and creative terrorist threats intended to harm residents of the U.S.[7] The lack of a required secure and uniform identification has allowed advanced fraud capabilities to compromise the flawed identification procedure previously in place between Canada and the U.S. Although the U.S. wishes to exercise its right to require a passport at its border for security reasons like many other sovereign nations, the U.S. also recognizes the special economic relationship between itself and its neighbors. In addition to resolving the security problem by requiring a passport from all persons entering the U.S. from the western hemisphere, the WHTI also allows for certain other prescribed forms of identification to expedite

[7] 7 C.F.R. pts. 41, 53 (2006).

the identification process. The use of such qualified programs reduces any indirect negative effects on the flow of travel into the U.S. while maintaining the necessary level of security.

The WHTI's requirement that a passport be presented before gaining entry into the U.S. in no way violates Chapters Twelve or Sixteen of NAFTA.[8] Canada's claim that the new requirements would force those Americans who do not already have passports to take the extra steps in order to secure one before leaving the country is correct. However, the indirect effect on cross-border trade and services are unintended, and apply equally to every individual who tries to enter the U.S. The WHTI has also made the process of entering the U.S. from any other country uniform and predictable. American citizens and non-resident aliens alike are subject to the WHTI, and no country is receiving any treatment more favorable than is Canada. In fact, Canadian residents are still exempt from showing visas when entering the U.S., and are still able to take advantage of any qualified program that will make cross-border travel more efficient. In sum, the U.S. is cognizant of the special economic relationship it shares with Canada, and has remained sensitive to it when balancing security with the least restrictive cross-border travel.

II. The Western Hemisphere Travel Initiative is justified pursuant to a general or national security exception in NAFTA or GATT, in any event.

However, the U.S. must not forgo its highest obligation to keep U.S. residents and citizens safe and free from foreign attacks. The General Exceptions of NAFTA Article 2101 and Article XX of GATT, which is incorporated into NAFTA by Article 2101, justify the WHTI. The chapeau of Article XX requires that any policy justified by one of the listed exceptions is not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international

[8] *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

trade."[9] The US-Shrimp Appellate Body detailed the difficult struggle facing countries like the U.S.: "[A] balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members."[10] The requirement of more credible and secure identification documents is essential to the effectiveness of intelligence gathered about those who are motivated to harm the U.S. and Canada. The Canadian Senate Committee on National Security and Defence recognized in 2005 that more security at the border should be Canada's top priority, placed even above the economic impact it may have. The Committee focused on improvements of personnel, operation and infrastructure because just one attack at a major border crossing could cost both countries tens of billions of dollars.[11] The U.S. fears that the relaxed requirements will not only entice terrorists to cross from Canada, but will jeopardize the effectiveness of counterintelligence gathered about specific individuals. In recognition of its duty to encourage equal and efficient cross-border travel for trade and services, the U.S. still allows the use of certain prescribed identification documents in lieu of a passport. Therefore, the U.S. has, through good faith implementation of a reasonable security initiative, preserved the rights of Canada under NAFTA and GATT while addressing its own security needs.

The WHTI is justified under GATT Article XX(b), as a measure "necessary to protect human . . . life." A member meets the "necessary: requirement "if an alternative measure which [a Member] could reasonably be expected to employ and which is not inconsistent with other

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[9] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

[10] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 156, WT/DS58/AB/R (Oct. 12, 1998).

[11] *Borderline Insecure*, 38th Parliament 1st Session (June 2005) (An interim report by the Senate Committee on National Security and Defence).

GATT provisions is available to it."[12] There are no other border security measures available to the U.S. that would have a less direct effect on cross-border trade and services. The main purpose of the WHTI is to accurately identify each person who is crossing the border to link intelligence already gathered with the persons who represent a potential threat to the U.S. Any measure that improves identification measures will inherently make it more difficult to cross into the U.S., but the resulting benefits of reliability and predictability cannot be ignored. Furthermore, the WHTI's acceptance of other trusted sources of identification is an effort to comply with other GATT and NAFTA provisions, including Chapters Twelve and Sixteen. Overall, this measure is the best balance of improved security and the least restrictive border-crossing policy.

The WHTI is also justified under both NAFTA Article 2101 and GATT Article XXI as a national security measure, which the U.S. considered "necessary for the protection of its essential security interests taken in time of war or other emergency in international relations." Using a similar definition of the term "necessary" that was discussed in the general exception of the GATT, the U.S. maintains that the WHTI is the most balanced measure between security needs and the least restrictive border-crossing policy as possible. Identification of persons being the most important security goal, there is no better policy than requiring a universally accepted credible and reliable source of identification like a passport. The threat of terrorist attacks in many countries, especially in the U.S., has been an issue of emergency in the international community. The need for stricter measures in many middle-eastern states to deter the growth of terrorist groups, stricter policies controlling nuclear proliferation in unstable countries, and stricter identification requirements are all a part of a greater attempt to control and avoid the

[12] Report of the Panel, *United States – Section 337 of the Tariff Act of 1930*, L/6439 (Jan. 16, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1990).

consequences of this new type of warfare. The enemy cannot be defined by borders, nationality, race, or ethnicity. Allowing just one terrorist to enter the country unidentified could result in the death of thousands if he or she were to succeed. The only effective means of stopping terrorism is having the ability to identify terrorists before they reach their target. Therefore, the WHTI is a justified national security measure.

III. The Fuel Export Charge is contrary to NAFTA Articles 314, 315, 604 or 605, or GATT Articles I, VIII, and XI.

The Fuel Export Charge (FEC) is contrary to GATT Article I because Canada treats the U.S. less favorably than other parties receiving oil exports from Canada. The $25/barrel export charge on oil transported by pipeline to the U.S. is applied *de facto* only against the U.S. because there are no destinations for Canadian pipelines other than the U.S. Canada can only claim that it is technically not violating Article I by defining the product as "oil transported by pipeline" rather than just "oil." The accepted definition of products, however, reflects the latter label. The Appellate Body states, "The non-discrimination provisions apply to *all* imports . . . irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons."[13] The practical effect of such a narrow definition is that the U.S. is forced to find an alternative - and less efficient - method of transporting what amounts to 33% of all non-OPEC imported oil into the country to avoid the export charge.[14]

The FEC levied by Canada upon all oil transported by pipeline is a violation of NAFTA Article 314, and more specifically Article 604. In order to place a legitimate export tax on oil, Canada must also implement that tax on *all* exported oil and oil consumed domestically. To

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[13] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 190, WT/DS27/AR/4 (Sept. 9, 1997).
[14] Energy Information Association, U.S. Imports By Country of Origin, http://tonto.eia.doe.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbbl_m.htm (last visited Feb. 18, 2008).

avoid this, Canada may claim that the "good" is more specifically defined as oil transported by pipeline. However, various parts of NAFTA do not agree with such a narrow classification. Annex 314 provides examples of goods Mexico may place export taxes on, none of which are defined by the means which they are transported. Furthermore, Article 604 replaces the term "any good" with "any energy or basic petrochemical good," thereby making it clear that any and all oil products must be taxed equally when consumed domestically or by another party.

Even if Canada were allowed to define the good as oil transported by pipeline, Canada's exporting pipelines only supply the U.S.[15] The effect is a *de facto* export tax on the majority of oil supplied by Canada to the U.S. with no extra tax on other parties, either domestic or foreign. Targeting of the U.S. through this export tax is further evidenced by Prime Minister Harper's statement in reference to financing new border security measures that, "Canada . . . is ensuring that those who benefit most from the actions being promised are the one's paying for the benefits." Therefore, the FEC does not meet the requirements of either Article 314 or 604 for acceptable export taxes, and the intent of implementing the FEC conflicts with the spirit and goals of NAFTA.

The FEC also violates NAFTA Articles 315, and more specifically Article 605. There is no indication of a shortage of fuel supply, nor has Canada taken action to hasten the use of fuel domestically. The government also has given no indication that this tax is a part of a fuel stabilization plan, or that Canadian fuel is in short supply. In fact, Prime Minister Harper assured the Canadian fuel producers that "Canada's oil producing provinces will not be harmed by this export tax because the need continues to exist for Canadian fuel." Because Canada does

[15] National Energy Board, Canada's Oil Sands - Opportunities and Challenges to 2015: An Update Questions and Answers, http://www.neb-one.gc.ca/clf-nsi/rnrgynfmtn/nrgyrprt/lsnd/pprtntsndchllngs20152006/qapprtntsndchllngs20152006-eng.html (last visited February 18, 2007).

cannot justify the FEC under GATT Articles XI(2)(a), XX(g), XX(i), or XX(j), the FEC restriction is contrary to NAFTA Articles 315 and 605. Even if one of the exceptions is met, subsection (b) of both Articles 315 and 605 forbid the taxation of exported goods to make it more expensive than "the price charged for such good when consumed domestically." Oil consumed in Canada has no such tax upon it.

The FEC is also plainly contrary to GATT Article VIII because it was instituted for fiscal purposes, and does not reflect the cost of transporting a barrel of fuel through a pipeline into the neighboring U.S. Article VIII of GATT expressly prohibits the levying of fees for fiscal purposes.[16] As Prime Minister Harper stated, "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." This is because, "Canadian taxpayers want lower taxes." Canada is also violating Article VIII because "a measure for fiscal purposes will normally lead to a situation where the tax results in charges being levied in excess of the approximate costs of the statistical services rendered."[17]

The FEC violates GATT Article XI as well. Article XI declares, "No prohibitions or restrictions . . . whether made effective . . . export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." The licensing requirement the FEC places upon Canadian oil exporters who transport oil by pipeline without taxing other exported oil is in direct contravention of the General Elimination of Quantitative Restrictions provision of the GATT.

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[16] Appellate Body Report, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, ¶ 25, WT/DS56/AB/R (Mar. 27, 1998).
[17] Id.

IV. The Fuel Export Charge is not justified pursuant to a general or national security exception in NAFTA or GATT, in any event.

The FEC is not justified under the national security exceptions of NAFTA or the GATT. NAFTA Article 607 precludes the use of Article 2102 or GATT Article XX to justify a restriction measure on basic petrochemical goods. The FEC must fit within one of the four exceptions of Article 607 to be a national security justification. It does not meet any of them. Prime Minister Harper has openly stated that the FEC is for fiscal purposes, and is a policy that targets the U.S. and no other member of the international community.[18] It is not a national security initiative, and is only indirectly related to national security because the funds raised are intended to be used for the purchase of new border-securing technology.

The general exceptions of the GATT Article XX, also recognized and adopted by NAFTA Article 2101, do not provide justification for the FEC. Article XX requires that any measure taken under it not be an unjustifiable discrimination on another country. The FEC on fuel transported by pipeline is a means to require that the U.S. pay for the new security measures taken by Canada at its land borders, as well as in its customs checkpoints. While the U.S. will benefit from the extra security measures taken by a close neighbor, there is no doubt that Canadian residents and visitors also benefit from the measures.

Article XX(b) adds a requirement that the measure be "necessary" to the protection of human, animal or plant life or health. The FEC is only indirectly related to the protection of human life, and the real purpose of the FEC is to fund new border security initiatives. It is illogical to extend the argument that a fuel tax levied only on exports to the U.S. properly balances the rights of Canada with its duties to the U.S. under NAFTA and the GATT. If any fee is justified, it should be spread equally among all of those who actually benefit from added

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[18] Press Release, Prime Minister Harper, Announcement of Fuel Export Charge (Sept. 11, 2007).

security. For instance, customs fees may be implemented upon those who pass through customs or whose objects are searched by customs officials.

Finally, the *Softwood Lumber Product Export Charge Act, 2006* (the Act) is not a valid precedent for the FEC. The Act was a bilateral agreement between the U.S. and Canada, agreed to and ratified by both parties before it was enacted. The Act was also a legal remedy for the subsidy given to lumber producing provinces that was deemed illegal. The FEC is a unilateral measure taken by Canada without authority from either the GATT or NAFTA, or any other superseding agreement with the U.S. like the one formed by the Act. The FEC is contrary to NAFTA and the GATT in all ways mentioned above, both in its formulation and in the implementation of such an export charge.

V. The APHIS user fees do not comply with NAFTA Article 310.

Until 2006, Canada had been exempt from Animal and Plant Health Inspection Service (APHIS) user fees because products from Canada were produced in Canada and did not harbor plant pests or animal diseases harmful to the United States' agriculture or life.[19] When NAFTA was adopted, the U.S. determined Canada's importation requirements were sufficient to ensure that goods from other countries presenting plant or animal pest or disease risks would not be subsequently exported from Canada into the U.S. The U.S. exempted commercial conveyances and passengers from Canada from agriculture and quarantine inspection (AQI) fees because such conveyances and passengers posed little risk of introducing pests or diseases into the U.S.

The 2006 imposition of user fees was in response to extensive data showing an alarmingly high number of interceptions at the U.S./Canada border of prohibited material, often originating in regions other than Canada and presenting a high risk of plant pests or animal

[19] 7 C.F.R. pts. 319, 354 (2006).

disease. The U.S. lifted the Canadian exemption from paying user fees to expand and strengthen its pest exclusion and smuggling interdiction efforts at the border.[20] The U.S. has determined collecting user fees for inspection of commercial conveyances and international air passengers entering the U.S. from Canada is the least restrictive means to protecting the U.S./Canada border.

The U.S. amended its federal rule 319.56-2(c), which provides that with the exception of potatoes from specified areas in Canada, fruit and vegetables grown in Canada may be imported without restriction.[21] With the U.S. amendments, such fruits and vegetables will be subject to the requirements in 319.56-6 for inspection at the port of first arrival. Similarly, the U.S. removed the exemptions from AQI user fees in 354.3 for commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international air passengers entering the U.S. from Canada.[22] The U.S. did not establish any new user fees. Rather, the same AQI user fees that apply to commercial vessels, trucks, railroad cars, aircraft, and international air passengers entering the U.S. from every other nation now apply to Canada as well.

Admittedly, the United States' imposition of user fees is contrary to NAFTA Article 310, which prohibits either party from introducing "customs user fees with respect to goods originating in the territory of the other Party." However, the user fees are necessary for national security and, accordingly, are justified by the NAFTA, GATT, and GATS exceptions.

VI. The APHIS user fees are amenable to GATT Articles I and VIII, and are justified pursuant to a general or national security exception in NAFTA or GATT or GATS.

NAFTA Article 2102(1)(b)(ii) states that "nothing on this agreement shall be construed to prevent any party from taking any actions that it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations."

[20] 7 C.F.R. pts. 319, 354 (2006).
[21] Id.
[22] Id.

The GATT provides a further exception in Article XX(b): "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human, animal or plant life or health." Similarly, Article XIV(1)(b) of GATS states, "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures necessary to protect human, animal or plant life or health."

Since the September 11, 2001 terrorist attacks and the U.S./Iraq war, bioterrorism has become a much greater source of concern to the U.S. than it was in the past. The 3,985 mile U.S./Canada border is the longest undefended border in the world.[23] Ineffective customs inspections could potentially leave the U.S. vulnerable to bioterrorism. A successful bioterrorist attack could devastate the nation's health and agriculture. NAFTA Article 2102(1)(b)(ii), GATT Article XX(b), and GATS Article XIV(1)(b) provide the U.S. with the necessary national security exceptions to implement measures to protect its essential security interests during this insecure and unpredictable time in international relations and terrorism.

Lifting the Canadian exemption on user fees would not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. U.S. imposes user fees on every other country. Applying user fees to Canada would not constitute a means of arbitrary or unjustifiable discrimination because the user fees are for agriculture and quality inspection of goods coming from Canada or of air passengers flying from Canada into the U.S. for the sole purpose of determining whether any traveler or conveyance is carrying pests or diseases harmful to the U.S. human and plant or animal population. Nor are the imposition of user fees a disguised restriction on international trade. The user fees do not restrict trade; they are merely in force to ensure the safe trade of goods.

[23] 7 C.F.R. pts. 319, 354 (2006).

Article 2 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), which entered into force with the establishment of the WTO in 1995, also carves out rules for adopting measures necessary for the protection of human, animal or plant life or health, namely, "parties must ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence." The user fees are used only for expenses associated with AQI services aimed at protecting human, animal or plant life or health.

In addition to Article 2's limit, Article 5(6) requires members to ensure that the sanitary and phytosanitary measures they adopt "are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection." Lifting the Canadian user fee exemption is the least restrictive means of achieving the U.S. aim of safe importation and cross-border travel. The alternatives to implementing the user fees would greatly hamper the U.S.'s need to protect human and animal or plant life from the threat of a bioterrorist attack or the inadvertent destruction of U.S. agriculture. One alternative to the AQI user fees would be to keep the Canadian exemption. However, the data showing an increasing number of interceptions on the U.S./Canada border of prohibited goods indicate that increased pest exclusion efforts are needed at the border to prevent the introduction of plant pests and animal diseases via unauthorized importations into the U.S. through Canada.[24]

Another alternative to the user fees would be to limit user fees to commercial vehicles, commercial trucks, commercial railroad cars, and commercial aircraft, and to exclude international air passengers entering the U.S. from Canada. However, data from the Canadian airports' preclearance inspections reveal that air passengers attempt to carry prohibited goods

[24] 7 C.F.R. pts. 319, 354 (2006).

from Canadian markets into the U.S.[25] Moreover, such an alternative would not adequately address the threat of a non-commercial vehicle, railroad car, or aircraft passenger from intentionally importing a good dangerous to the U.S. agriculture. A third alternative would be to charge AQI user fees for only inspections of commercial conveyances transporting agriculture goods. However, both the conveyance and the packing material they carry are potential pest pathways the U.S. must avoid.[26] Limiting inspection to cover only commercial conveyances transporting agricultural goods would allow commercial conveyances transporting non-agricultural goods but using packing material carrying potential pathways to enter the U.S. undetected. The final alternative would be to charge a separate, lower AQI user fee for inspections of air passengers and commercial conveyances from Canada.[27] However, such specialized user fees would be discriminatory to all other countries and would fly in the face of GATT Article I. Furthermore, such specific user fees would undoubtedly confuse the public and commercial carriers.

The crux of Article 2(2) lies in finding a balance "between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings."[28] In striking this balance, the appellate body noted, "responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned."[29] The U.S. acted like any responsible government, finding the pressing need to protect animal, plant, and human life to be paramount.

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[25] Id.
[26] Id.
[27] Id.
[28] Appellate Body Report, *EC Measures Concerning Meat and Mead Products (Hormones)*, para. 124, WT/DS26/AB/R (Jan. 16, 1998).
[29] Id. at para. 214.

Determining the necessity of a SPS measure remains a rather subjective science. In *Japan - Agricultural Products II* the Appellate Body found that Article 2.2 requires "a rational or objective relationship between the SPS measure and the scientific evidence," which is determined on "a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence."[30] The reliable scientific evidence on which the U.S. government based its decision to impose Canadian user fees extends over several years. The U.S. APHIS' Plant Protection and Quarantine (PPQ) program gathered extensive data from various border spots.[31] Although, according to Article 5(7), the U.S. would have been justified in implementing provisional "sanitary or phytosanitary measures on the basis of available pertinent information" even "where relevant scientific evidence is insufficient." Thus, the legality of the U.S.'s adoption of provisional sanitary or phytosanitary measures for the health and safety of U.S. human, animal, and plant life is a non-issue.

The heightened need for national security led the U.S. to reexamine its AQI inspection methods at the U.S./Canada border. Canada imposes fewer phytosanitary requirements on imports of plant products from countries where tropical or subtropical pests exist because Canada, unlike the U.S., is situated almost entirely in a cold ego-region. Most commodities refused entry into the U.S. may be easily imported into Canada, free of any sanitary or phytosanitary requirements. The U.S.'s lack of routine inspection of agricultural products labeled as products of Canada and of international air passengers at the Canada/U.S. border creates an incentive for people to carry U.S.-prohibited agricultural goods from Canada into the

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[30] Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, para. 84, WT/DS76/AB/R (Feb. 22, 1999).
[31] 7 C.F.R. pts. 319, 354 (2006).

U.S. Commercial importers circumvent U.S. phytosanitary regulations by shipping agricultural commodities to Canada, labeling the products as Canadian, and then shipping the uninspected goods to the U.S.[32]

In compliance with SPS Article 5(1), the U.S. conducted three extensive inspections operations along the U.S./Canada border, resulting in numerous interceptions of unauthorized goods produced in countries other than the U.S. and Canada. Additional APHIS interception records detailed several potential risk factors associated with imports of agricultural products from Canada: for instance, conveyances and air passengers often attempt to bring prohibited goods with the potential for carrying foot and mouth disease (FMD) from Canada and 70% of all rail containers are made of wood packing material, a common pathway for pests and diseases.[33] The U.S. views these potential disease and pest pathways as a much more significant risk than it did when it first established AQI user fees.

Results from Canadian airports' AQI pre-clearance activities demonstrated that air passengers represent another pest pathway. The number of air passengers entering the U.S. from Canada has increased 70% in the last 14 years. The U.S. first implemented AQI monitoring of air passengers in 1996. The U.S. documented the approach rates of preclearance passengers, which is the percentage of passengers carrying prohibited agricultural goods into the U.S. from 2001 to 2004 at four Canadian airport locations where the U.S. had an AQI presence. In 2001, the approach rate was 6.6% of preclearance passengers. In just three years, the approach rate jumped to an all-time high of nearly 8%. The average yearly approach rate between 2001 and 2004 was 6.2%; meaning, each year air passengers attempt to carry approximately 620,000 prohibited agricultural commodities from Canada into the U.S. It takes only one passenger

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[32] 7 C.F.R. pts. 319, 354 (2006).
[33] Id.

carrying a prohibited good to unleash widespread agricultural devastation. Clearly, the U.S. must implement better policing methods for goods and conveyances from Canada.[34]

In keeping with Article 2(3), the APHIS user fees do not arbitrarily or unjustifiably discriminate against Canada. The U.S. has the same measures in place for every other nation which imports goods into the U.S. or from which air passengers enter the U.S. Article 2(3) also prohibits sanitary and phytosanitary measures from being "applied in a manner which would constitute a disguised restriction on international trade." Three elements are necessary to find a violation of the article: "(1) the measure discriminates between … territories … ; (2) the discrimination is arbitrary or unjustifiable; and (3) identical or similar conditions prevail in the territory of the Members compared."[35] The user fees do not meet any of the three required elements for a violation: the user fees do not discriminate between the territories of members other than the U.S. because now all countries are subject to user fees, and, as the data illustrates, the imposition of user fees is not arbitrary or unjustifiable. The user fees are necessary for the U.S. to administer inspections on Canadian imported goods and conveyances to protect U.S. life and health. Canada was the only country who enjoyed a user fee exemption. The new rule merely subjects Canada to the same treatment as all other countries.

The U.S. user fees also follow Article 5(5), which prohibits arbitrary or unjustifiable distinctions in sanitary or phytosanitary measures, "if such distinctions result in discrimination or a disguised restriction on international trade." The Appellate Body considered the three elements of Article 5.5 to be cumulative in nature. "The first element is that the Member imposing the measure … has adopted its own appropriate levels of sanitary protection … The second element

[34] 7 C.F.R. pts. 319, 354 (2006).
[35] Report of the Panel, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, para. 7.111, WT/DS18/RW (June 18, 2000).

… is that those *levels of protection* exhibit arbitrary or unjustifiable differences in their treatment of different situations. The last element requires that the arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade."[36] All three elements must be demonstrated to establish an Article 5.5 violation. The U.S. meets the first prong of the three-prong test. The U.S. has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations. The U.S. has recently augmented its inspection activities at the U.S./Canada borders. The Bureau of Customs and Border Protection (CBP) of the U.S. Department of Homeland Security, which now conducts agricultural inspections pursuant to APHIS' regulations, currently has agricultural inspector positions along the U.S./Canadian border.[37] In recent years, agricultural inspectors have been assigned to ports that previously did not have coverage for agricultural products. Additionally, the U.S. has employed CBP agricultural inspectors at Canadian airport pre-clearance stations. The U.S. does not, however, meet the second prong and, consequently, fails the third prong of the three-prong test. The U.S.'s newly adopted levels of sanitary and phytosanitary protection do not exhibit arbitrary or unjustifiable differences. All other countries' imports and conveyances entering the U.S. are charged user fees.

Thus, the United States' user fees are not contrary to GATT Article I, which requires equal treatment of countries importing goods "with respect to customs duties and charges" on like goods destined for contracting parties. In imposing AQI user fees on goods from Canada entering the U.S., The U.S. is not favoring any one nation over another. In fact, arguably, the exemption which had previously existed between the U.S. and Canada until the imposition of

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[36] Appellate Body Report, *EC Measures Concerning Meat and Mead Products (Hormones)*, para. 214, WT/DS26/AB/R (Jan. 16, 1998).
[37] 7 C.F.R. pts. 319, 354 (2006).

user fees in 2006 was a GATT Article I violation, because Canada was exempted from AQI user fees that the U.S. imposed upon every other nation. In lifting the Canadian exemption to the AQI user fees, the U.S. has not favored any one nation over another; instead, it strives to equalize the conditions surrounding importation of specified goods for all contracting countries.

The U.S. user fees also comply with Article VIII(1)(a) of GATT, which calls for all importation fees and charges to be limited in amount to the appropriate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes." All revenues from the AQI user fees are directly related to the costs of rendering such AQI services. The U.S. develops user fees by formulaic calculations. The fees do not vary from port to port or from season to season. Furthermore, the AQI user fees are spent on AQI-related activities only, establishing a U.S./Canadian border workforce that is sufficient to implement and maintain an inspection program on that border. The revenues from AQI user fees collected from international air passengers are used only for expenses associated with providing AQI services for those passengers and the revenues from AQI fees for each type of conveyance are used only for expenses associated with providing AQI services for that type of conveyance. Excess collections will be used to rebuild the AQI reserve balances, which are extremely important to the survival of AQI services.[38] Consider, for instance, the devastating impact the September 11, 2001 terrorist attacks had upon the airline industry. Airline business came to a screeching halt immediately after the attacks and to this day it continues to lag far behind pre-9/11 business levels. The airline industry hardly had enough incoming revenue to pay for AQI services. Without the reserve, AQI operations would have been severely disrupted.

[38] 7 C.F.R. pts. 319, 354 (2006).

The U.S. imposed user fees do not represent an indirect protection to domestic products or a taxation of imports for fiscal purposes. The user fees are not intended to inhibit the importation of Canadian products that are *safe* for humans and animal and plant life in the U.S. Nor are the user fees intended to provide an economic advantage for "homegrown" products. The U.S. must protect its borders from the introduction of diseases harmful to humans and animal and plant life within its territories. The user fees will simply cover the costs of doing so.

In sum, the U.S. did not violate GATT Articles I or VIII in lifting the Canadian exemption on user fees. In fact, the user fees are justified by the national security exception in NAFTA Article 2102 and the GATT Article XX(b) and GATS Article XIV(1)(b) exceptions for measures necessary to protect human, animal, and plant health or life. Furthermore, the user fees are in keeping with the SPS provisions requiring the sanitary and phytosanitary measures be the least trade-restrictive, not arbitrarily or unjustifiably discriminate, or be applied as a disguised restriction on international trade. Thus, the user fees do not violate international law.

CONCLUSION

Wherefore, the United States of America requests that this honorable court declare and adjudge that

1) The Western Hemisphere Travel Initiative is amenable to NAFTA and GATT, and justified pursuant to a general or national security exception in any event; and
2) The Fuel Export Charge is contrary to both NAFTA and GATT, and is not justified pursuant to any general or national security exceptions; and
3) The APHIS user fees are amenable to NAFTA and GATT, and are justified pursuant to a general or national security exception in any event.