

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 # 2008-12 A

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Statement of Facts

In 2005, the U.S. began a number of initiatives designed to enhance the security of its citizens. First, the Western Hemisphere Travel Initiative (“WHTI”) requires all persons traveling to the U.S. from any point in the Western Hemisphere to carry a valid passport.¹ Second, the Animal Quarantine and Inspection (“AQI”) user fee, established by the U.S. Animal and Plant Inspection Service (“APHIS”), proposed an interim rule that removed an exception that applied to Canada regarding inspection fees for commercial vehicles and aircraft entering the U.S..² In removing this exception, Canada was treated the same as any other nation doing business with the U.S..³ Canada, in response to the passage of these national security measures, took measures contrary to its statement issues in with other leaders of North America at the Montebello Leaders Summit in August 2007.⁴ The Canadian government initiated a Fuel Export Charge to penalize the U.S. for requesting Canada adopt measures to correct its lax border Security.⁵

The WHTI is the result of a joint initiative between the U.S. Department of State (“DOS”) and the U.S. Department of Homeland Security (“DHS”).⁶ The Intelligence Reform and Terrorist Prevention Act of 2004 (“IRTPA”) provides that upon full implementation, U.S. citizens and certain classes or non-immigrant aliens may enter the U.S. only with passports or such alternative as the Secretary of the DHS determines are satisfactory for establishing and identifying citizenship.⁷

¹ Western Hemisphere Travel Initiative. http://travel.state.gov/travel/cbpmc/cbpmc_2223.html.

² Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320 (August 25, 2006).

³ *Id.*

⁴ 2007 Montebello Joint Statement

⁵ Statement of the Prime Minister of Canada, September 11, 2007.

⁶ Western Hemisphere Travel Initiative. http://travel.state.gov/travel/cbpmc/cbpmc_2223.html.

⁷ *Id.*

The implementation of the plans of the DOH and the DHS occurred in two stages, announced in September of 2005.⁸ The first, proposed in a Notice of Proposed Rule-Making (NPRM) on August 11, 2006, required those traveling by air from within the Western Hemisphere to the U.S. to carry a valid passport.⁹ In general, under federal law, it was unlawful for any citizens of the U.S. to depart from or enter the U.S. without a valid passport.¹⁰ The first phase of the rule merely enforced existing Federal law, and became effective in January of 2007.¹¹ The second phase, similarly announced in a NPRM on June 26, 2007, addressed all other modes of transportation.¹² This phase, known specifically as the WHTI, will require travelers to present passports or other acceptable documents that establishes identity and citizenship deemed sufficient when entering the U.S. from any location.¹³ Those entering or re-entering the U.S. will be required to have 1) a U.S. passport; 2) a U.S. passport card; 3) a trusted traveler card (NEXUS, FAST, or SENTRI); a valid Merchant Mariner Document ("MMD") when traveling in conjunction with maritime business; or 5) a valid U.S. Military identification card when traveling on official orders or permit.¹⁴ The time frame established to implement the WHTI is the summer of 2008.¹⁵ The U.S. has justified this measure to not only enforce already existing Federal law, but further, to curb the potential threat from persons using fraudulent documents to enter the U.S..¹⁶ The risks posed by such individuals are especially heightened in light of the September 11 terrorist attacks.¹⁷

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50323 (August 25, 2006).

¹⁷ *Id.*

The Animal Plant and Health Inspection Service (“APHIS”), a division of the U.S. Department of Agriculture (“U.S.DA”), announced an interim rule on August 25, 2006 implementing an agricultural inspection and quarantine (“AQI”) user fee on all commercial vehicles and international airline passengers entering the U.S. from Canada.¹⁸ The effect of this rule is to remove a prior exemption held by Canada, requiring, “all commercial conveyances, as well as airline passengers arriving on flights from Canada”, to be subject to an AQI user fee and inspection.¹⁹ The AQI does not establish new fees, but rather requires Canada to pay the same user fee that all other nations pay, “at ports and custom territories” within the U.S.²⁰

APHIS has identified several issues related to inspection of goods along the U.S./Canadian border. First, “prohibited materials”, goods that originate in nations other than Canada and are relabeled as Canadian products for export to the U.S, are increasingly entering the U.S.²¹ Prior to the NAFTA, inspection guidelines along the U.S./Canadian border were more lenient because Canadian labeled exports to the U.S. did in fact originate in Canada.²² Accordingly, in most cases, these Canadian products did not pose a sanitary, phytosanitary or national security threat to the U.S..²³ After the NAFTA, trade between the U.S. and Canada increased, and an increase in Canadian diversity as its population grew created a greater demand for exotic imports into Canada.²⁴ Because Canada imposes fewer sanitary and phytosanitary requirements than the U.S, there exists the possibility that parties may export goods to Canada to exploit their inspection regime, and then move goods into the U.S. through the porous U.S./

¹⁸ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320 (August 25, 2006).

¹⁹ *Id.*

²⁰ *Id.* at 50323.

²¹ *Id.* at 50321

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 50321.

Canada border.²⁵ Thus, according to APHIS, this rule has a three-fold purpose: (1) closing the inspection exemption loophole for fruits and vegetables entering into the U.S. from Canada; (2) recovering the costs of AQI services the U.S. is already providing at the U.S./ Canada border, and (3) recognizing the costs of new, expanded AQI services at the U.S./ Canada border.²⁶

According to the AQI, the user fees vary based on the mode of transportation used to cross the U.S./ Canada border.²⁷ First, AQI user fees for passengers traveling by air are \$5.00 U.S.D per passenger and are included in the price of airline tickets, and \$70.25 U.S.D per aircraft.²⁸ Second, commercial trucks are assessed an AQI user fee of \$5.25 U.S.D per crossing, or an annual fee of \$105 U.S.D, and commercial rail cars are assessed a user fee of \$7.50 U.S.D per crossing.²⁹ Finally, all commercial vessels (ships) are assessed an AQI user fee of \$490.00 U.S.D.³⁰

The U.S.'s concern for border safety has increased since the terrorist attacks of September 11, 2001. The U.S. is particularly concerned that a heightened risk of bioterrorist attacks resulting from inadequate border measures can harm citizens of the U.S. The U.S. Canadian border is the longest undefended border in the world, stretching 3,985 miles from the Atlantic to the Pacific Ocean.³¹ Concerns about a potential bioterrorist attack due to lack of inspection can harm not only the citizens of the U.S., but also, "reduce confidence in the safety of the [ir] U.S. food system and have a devastating impact on U.S. agriculture".³²

²⁵ *Id.* at 50323.

²⁶ *Id.*

²⁷ *Id.* at 50325.

²⁸ *Id.* at 50323.

²⁹ *Id.* at 50325.

³⁰ *Id.*

³¹ *Id.* at 50322

³² *Id.*

Because the U.S. has not collected AQI user fees on both commercial vehicles and international airline passengers arriving from Canada³³, the measures required to adequately secure the border and properly maintain inspection efforts are impeded by a lack of funding.³⁴ The U.S. is not recovering costs on inspections conducted to protect the U.S. along with U.S./Canada border.³⁵ Removing the exemption on collection of these fees will not only allow for recovery of the costs of current inspections, but also allow Customs and Border Protection to expand current inspection measures along the border.³⁶ This interim rule has been determined by the U.S., “to be necessary on an emergency basis” to, “prevent the introduction of plant pests and animal disease via conventional pathways or through bioterrorism.”³⁷ Thus, AQI is required to continue and expand inspection at points along the U.S./Canada border to alleviate sanitary and phytosanitary concerns, and to protect the security of the U.S. from disease, pests, and danger from terrorist attacks.

In August of 2007, President Bush, Canadian Prime Minister Harper, and Mexico’s President Calderon participated in the 2007 Montebello North American Leaders Summit.³⁸ On August 21, at the conclusion of the Summit, the leaders issued a statement describing their five priorities for the next year.³⁹ Among these priorities was the creation of “Smart and Secure Borders”.⁴⁰ The statements specifically addressed the need to create borders that are both, “efficient and secure”, so as to, “minimize risk, while facilitating the efficient and safe movement of goods, services and people, as trade and cross-border travel increase in North

³³ *Id.* at 50323

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 50324

³⁸ www.whitehouse.gov/news/releases/2007/08/20070821-2.html

³⁹ www.whitehouse.gov/news/releases/2007/08/20070821-2.html

⁴⁰ *Id.*

America”.⁴¹ The leaders determined that a number of measures were required to fulfill this initiative, including cooperation among law enforcement of the three nations, pursuing new technology to screen travelers, and general cooperation to streamline the flow of goods, services and tourism across borders that are porous, and at the same time efficient and safe.⁴²

After the issuance of the joint press release by the Leaders Summit participants, a number of statements by U.S. Presidential candidates intensified the negotiations between Canada and the U.S. in implementing the Smart and Secured Borders Initiative. The statements by the candidates alleged the hijackers of the planes used in the September 11, 2001 terrorist attacks on the U.S. entered the U.S. from Canada.⁴³ Following the statements, U.S. Vice-President Dick Cheney, U.S. Secretary of Homeland Security Michael Chertoff and Canada’s Minister of Public Safety Stockwell Day met with a goal of announcing on September 11, 2007 plans to implement the security related points outlined in the Montebello Joint Statement.⁴⁴ The negotiations were contentious, but ultimately Canada agreed to implement a number of “thick border” initiatives.⁴⁵ On September 11, 2007, the Canadian and U.S. Government issued a joint statement detailing how Canada would spend 1 billion dollars implementing border security measures.⁴⁶ Among the initiatives agreed to by the Canadian government were the development of screening facilities at least one kilometer from the border crossing stations at a number of points along the U.S.-Canada border, placement of ground sensor towers along the border, and implementation of advanced radiological detection technology at all ports.⁴⁷

⁴¹ *Id.*

⁴² *Id.*

⁴³ Compromis at 4.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Joint Statement of Canada and US, September 11, 2007

⁴⁷ *Id.*

On the same day, the Canadian Prime Minister announced an export tax on fuel transported by pipeline equal to \$ 25 dollars Canadian per barrel. The Prime Minister, while reaffirming Canada was not a threat to the national security of the U.S., indicated that Canada was willing to play a part in protecting North America.⁴⁸ In order to fulfill its obligations as negotiated with America, the Prime Minister stated the export charge was necessary to secure North America, and, “to ensure that those who benefit most from the actions being promised are the one’s paying for the benefits.”⁴⁹

The U.S. government reacted with anger at the prospect of Canada charging a fuel export tax after careful negotiations to implement “thick border” initiatives. President Bush asked Secretary Chertoff to discuss the matter with Canadian Ambassador Michael Wilson, who was informed by the Canadian Government that the Fuel Export Charge would remain in effect.⁵⁰

On September 23, 2007, the U.S. filed a dispute with the International Court of Justice (ICJ) with respect to the Fuel Export Charge. It is the position of the U.S. that the export tax is contrary to the North American Free Trade Agreement (“NAFTA”) Articles 309, 314, 315, and Chapter 6. In addition, the Fuel Export Charge cannot be justified by exceptions in NAFTA Articles 607, 2101 and 2102. Finally, the U.S. took the position that the Fuel Export Charge could not be justified by the General Agreements on Tariffs and Trade (GATT) Articles XX or XXI or GATS.

The Canadian Government responded on October 23, 2007 by filing a dispute with the ICJ with respect to the WHTI requirement that all American and Canadian citizens over 18 be required to provide a passport as identification to border and immigration officials. The Canadian Government also filed a dispute with the ICJ regarding the APHIS fees.

⁴⁸ Statement of the Office of the Prime Minister of Canada, September 11, 2007

⁴⁹ *Id.*

⁵⁰ *Compromis* at 5.

Both the U.S. and the Canadian Government have agreed to refer their disputes to the ICJ rather than another dispute resolution body of the World Trade Organization (WTO) or a Chapter 20 NAFTA panel.⁵¹ Both parties have consented to the jurisdiction of the ICJ.⁵² Mexico has been notified of the decision of both the U.S. and Canada to remove the proceedings from a NAFTA body, and has not contested loss of its right to appear.⁵³ The two disputes have been joined on November 23, 2007, and the case is proceeding in the ICJ as *U.S. of American v. Canada*.

Questions Presented

1. Under NAFTA, GATT, and concepts of free trade, does Canada have the authority to implement a Fuel Export Charge only on pipeline oil shipped to the United States.
2. Under NAFTA, GATT, and GATS, does the United States have the authority to enact and enforce the Western Hemisphere Travel Initiative as a measure to strengthen border security by the requirement of a passport to efficiently and reliably identify travelers.
3. Whether the United States has violated its obligations under NAFTA, GATT and GATS when the AQI is primarily an economic measure and not one protecting essential security interests.

⁵¹ *Compromis* at pg. 6.

⁵² *Compromis* at pg. 6.

⁵³ *Compromis* at pg. 6.

Jurisdictional Statement

The parties, through special agreement, submit this dispute to the International Court of Justice for a binding declaratory judgment pursuant to arts. 40(1) and 36(1) of the *Statute of the International Court of Justice*.⁵⁴ Art. 36(1) confers on the Court jurisdiction to resolve those issues set out in the *Compromis*.

⁵⁴ 26 June 1945, T.S. No. 933, 59 Stat. 1055.

Summary of the Argument

Canada's Fuel Export Charge, as applied only to oil shipped to the U.S., violates the limitation on tariffs found in NAFTA and GATT. The WHTI passport requirements will create a border where travelers may be efficiently and reliably identified. Further, WHTI only minimally impacts trade and is consistent with accepted principles of international law. The AQI provides equal treatment among all U.S. trade partners. This equal treatment adheres to U.S. treaty commitments in NAFTA and the WTO.

Argument

Both Canada and the United States are parties to the Charter of the United Nations, where Chapter XIV establishes the International Court of Justice ("ICJ").⁵⁵ Art 93 establishes that all parties to the United Nations Charter are, "*ipso facto* parties to the Statute of the International Court of Justice".⁵⁶ The ICJ decides matters in accordance with sources of international law provided in Art 38 of the Statute of the International Court of Justice (the "Statute").⁵⁷ International conventions, such as NAFTA, GATT and GATS are among the sources that the ICJ may draw upon to base its decision.⁵⁸ The Vienna Convention on the Law of Treaties (the "Vienna Convention") provides a treaty be interpreted in good faith according to the ordinary terms of the agreement, taking into account the context, in light of the treaty's objective and purpose.⁵⁹ Accordingly, in defining the obligations of the U. S. and Canada under NAFTA, GATT and GATS, the ICJ will consider the language of the treaties, as instructed by the Vienna Convention.

⁵⁵ U.N. ChArt..er Art... 92.

⁵⁶ U.N. ChArt..er, Art... 93, para. 1.

⁵⁷ Cite to Statute of the International Court of Justice, Art.. 38.

⁵⁸ Cite to Statute of International Court of Justice, Art.. 38.

⁵⁹ Vienna Convention, *infra* note 70, Art.. 31.

I. CANADA'S FUEL EXPORT CHARGE RUNS CONTRARY TO THE CONCEPTS OF FREE TRADE ESTABLISHED IN THE NAFTA AND GATT TREATIES

A. Canada and the United States entered into NAFTA and GATT to reduce export charges and promote free trade.

The U.S. and Canada have entered into treaties such NAFTA and GATT with the expressed purpose of implementing free trade in the new marketplace of globalization.⁶⁰ The concept of free trade is premised on reducing trade restrictions when crossing national borders through the elimination of import/export regulations and tariffs. Although NAFTA and GATT do not completely forbid the implementation of an export charge, any such tax must meet certain criteria in order to be implemented in accordance with the treaties. Finally, NAFTA and GATT will be interpreted in accordance with the ordinary meaning of the language in the context of reducing the barriers to trade.⁶¹

i. Canada's Fuel Export Charge is a breach of NAFTA Art. 314 because the tax applies only to fuel imported by the U.S..

The plain language of Art. 314 restricts any NAFTA member from instituting an export tax on a good for domestic consumption if the tax would apply only to one other member country.⁶² This measure ensures no NAFTA member puts another at a strategic disadvantage by singling out only one member for a tariff. Concededly, the U.S. has attempted to do this in the past by using its considerable position in the marketplace to engage in unilaterally imposed tariffs, such as in the Softwood Lumber import fees.⁶³ However, the Softwood litigation is a good example of where the U.S. action was chastised and ruled against as a violation of U.S.

⁶⁰ U.S. President Bill Clinton, State of the Union Address (January 25, 2004).

⁶¹ Vienna Convention on the Law of Treaties, open for signature May 23, 1943, 1155 UNTS 332 (hereinafter Vienna Convention); *Pushpanathan v. Canada*, 226 N.R. 201, 160 D.L.R. (4th) 193 (1998).

⁶² North American Free Trade Agreement, U.S.-Mex.-Can., December 1992, 32 I.L.M. 605,(state source) (hereinafter NAFTA) Art. 314.

⁶³ Binkley, Clark and Daowei Zhang, *The Softwood Lumber War: Politics, Economics, and the Long U.S. Canadian Trade Dispute*. RFF Press. 2007.

treaty obligations.⁶⁴ This same standard should apply to Canada when the Fuel Export Charge applies exclusively to the U.S..

Oil shipped through the Canadian pipeline is exported only to the U.S. because the pipeline runs exclusively between Canada and the U.S.. Further, as Canada is the largest supplier of U.S. petroleum, any oil shipped through the pipeline is for U.S. domestic consumption.⁶⁵ Further, any Canadian oil sent to Mexico, the third NAFTA member, must be placed on tanker ships as no Canadian/Mexican pipeline exists. Therefore, pipeline exports of Canadian petroleum to the U.S. would be assessed the Fuel Service Charge while exports via tanker ship to Mexico would be exempt from the fee. Thus, because Canada's Fuel Export Charge applies solely to the U.S. on a good for domestic consumption, this fee violates NAFTA Art. 314.

ii. By implementing a Fuel Export Charge, Canada is using its position within the market to unfairly limit access to a natural resource, which is an infringement of NAFTA Art. 315.

The NAFTA framers saw the disadvantage of allowing one party to the treaty to use its position within the market to charge member nations for goods at prices higher than that party charges for the same good domestically. Accordingly, NAFTA Art. 315 was drafted to give Canadian and Mexican consumers assurance that the U.S. would not exploit the dominant American manufacturing industry by charging Canadian and Mexican consumers prices far above that charged domestically within the U.S.. Art. 315 thus fosters continental unity through free trade and the prevention unfair use of the market. Additionally, the plain language of Art. 315 is not limiting to manufactured goods and also includes exported natural resources.

Canada's Fuel Export Charge would cause American consumers pay a higher price for oil than Canadians pay domestically. The Canadians maintain the goal of the Fuel Export Charge is

⁶⁴ *Id.*

⁶⁵ Government of the United States, Energy Information Agency, http://www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/import.html.

to ensure that improvements to Canada's border security are paid for by the U.S..⁶⁶ Although tax implications could differ depending on whether the fuel is sold in the U.S. or Canada, the Fuel Export Charge is contrary to the purpose and ordinary meaning of Art. 315. By instituting an export tariff so fuel sold in the U.S. will pay for improvements in Canada that would otherwise be paid through a tax on Canadian citizens, the Fuel Export Charge charges a higher price for an export good than that charged domestically, a breach of the NAFTA Art. 315 language.

iii. Canada's Fuel Export Charge violates NAFTA Arts 604 and 605 by threatening the strategic access of the U.S. to petroleum, a concern of national security.

Adopting language virtually identical to NAFTA Arts. 314 and 315, Arts. 604 and 605 extend the same limitations on export charges to petroleum sales due to the critical nature of such products to national security. As a matter of public policy, the NAFTA signers understood the strategic importance of a nation's access to oil. Unrest in the oil-rich Arabian Peninsula and within the greater Middle-East led to the U.S. invasion of Iraq in the early 1990s. As when written and ratified, NAFTA guaranteed access to North American oil, a matter of critical importance to the signing parties.

Canada is the largest exporter of oil to the U.S., the nation that consumes the most oil.⁶⁷ Further, alternate suppliers of oil from the middle-east and South America pose a strategic risk to U.S. national security as wars in Iraq and Afghanistan are ongoing and the president of Venezuela openly threatens the U.S..⁶⁸ NAFTA Arts 604, like Art 314, restricts any NAFTA member from taxing the exportation of oil to one member while exempting another member from the same tax. As in Art. 314, Art. 604 is violated because the Fuel Export Charge applies only to pipeline oil shipped to the U.S., not to any oil which might be exported to Mexico.

⁶⁶ Canadian Prime Minister Harper, Statement (September 11, 2007).

⁶⁷ Government of the United States, Energy Information Agency, http://www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/import.html.

⁶⁸ The Associated Press, *Venezuela: Tension Over Oil is Growing*, N.Y. Times, February 13, 2008, Section C.

Additionally, Art. 605, like Art. 315, is violated because Canadian oil subject to the Fuel Export Charge will be exported at a price higher than that charged domestically. With the stated purpose of the Fuel Export Charge as taxing Americans in place of Canadian consumers, a violation of Art. 605 is apparent. With language identical to Arts. 314 and 315, Art. 604 and 605 place restrictions on strategic access to petroleum. The Fuel Export Charge, therefore, breaches the ordinary meaning of these restrictions.

iv. The Fuel Export Charge is contrary to the Most-Favored-Nation Treatment identified in GATT Art. I.

The most-favored-nation (“MFN”) treatment outlined in GATT Art I requires countries to mutually extend trade benefits that minimize tariffs and limit trade restrictions. The U.S. and Canada have a mutually recognized MFN, a good faith agreement with Canada that U.S. goods will be exported to Canada with no tariff or a preferential tariff rate, Canada is to extend the same treatment to the U.S.. However, Canada’s decision to implement the Fuel Export Charge is a breach of the agreement and MFN recognition between the two countries. Just as the U.S. is unable to arbitrarily institute a tariff on exported goods to Canada, the Fuel Export Charge is contrary to MFN status.

v. The Fuel Export Charge is contrary to GATT Art VIII.

Art. VIII of GATT prohibits export charges that “represent an indirect protection to domestic products” or taxation for “fiscal purposes.”⁶⁹ The ordinary meaning of these restrictions foster free trade by restricting tariffs implemented to regulate trade or to raise money for domestic projects.

Here, Canada implements the Fuel Export Charge for the expressed purpose of raising revenue. The Canadian Prime Minister stated that the money raised from the export tax will pay

⁶⁹ General Agreement on Tariffs and Trade 1947, April 15, 1947, 33 I.L.M. 1154 (hereinafter GATT), Art. VIII(1).

for Canadian border security measures and save Canadians from paying for domestic improvements, saying, “those who benefit most from the actions being promised are the one’s paying for the benefits.”⁷⁰ Using an export tax to raise money for domestic improvements is precisely the kind of use for “fiscal purposes” forbidden in GATT Art VIII and the general policy of promoting free trade.

vi. GATT Art XI fosters free trade by limiting restrictions, such as the Fuel Export Charge.

GATT Art. XI fosters free trade by limiting prohibitions or restrictions on trade, other than taxes, duties, or charges. The Fuel Export Charge, in addition to raising money for Canadian border security, will place a restriction on petroleum trade between the U.S. and Canada. This charge would restrict trade through the pipeline and cause importers to seek tanker trucks or tanker ships as alternative means to importing the petroleum. This restriction is in violation of the ordinary meaning of GATT Art. XI.

B. The Fuel Export Charge does not fall within the national security or general exceptions to NAFTA or GATT.

i. The Fuel Export Charge cannot be justified under the national security exceptions found in NAFTA Art. 607, NAFTA Art. 2102 and GATT Art. XXI.

NAFTA Art. 607 forbids any “measure restricting”⁷¹ the exportation or importation of a petroleum product, unless the policy meets an exception such as supplying a military establishment or responding to a situation of armed conflict involving the member country. Art 607 is important because the strategic nature of petroleum demands that access be limited only in critical national emergencies. The Fuel Export Charge would constitute a “measure restricting” the importation of petroleum products because fewer American companies would be willing to buy Canadian oil or invest in the Canadian/U.S. fuel pipeline. Further, the Fuel Export Charge is

⁷⁰Canadian Prime Minister Harper, Statement (September 11, 2007).

⁷¹ NAFTA, *supra* note 62, art. 607.

being implemented to fund border security, not to supply a military establishment or respond to a situation of armed conflict involving Canada. The U.S. and Canada are not at war and the Canadian Prime Minister admits the purpose of the Fuel Export Charge is to ensure “Canada will not be perceived in the future as a source of any threat to the security of our friends.”⁷² Thus, the Fuel Export Charge is not justified under NAFTA Art. 607.

NAFTA Art. 2102 and GATT Art. XXI allow exceptions for export tariffs where a member is taking action considered necessary for the “. . . protection of its essential security interests taken in time of war or other emergency in international relations”⁷³ Here, Canada has not identified any essential security interest relating to a time of war or international emergency justifying implementation of the Fuel Export Tax. Rather, Canada has called for improved border security measures to improve its image in the U.S. after false stories identified the Canadian border as the entry point for the 9-11 hijackers. Canada’s Fuel Export Tax, therefore, is inapplicable under an exception in NAFTA or GATT for action taken in a time of war or international crisis.

ii. The Fuel Export Charge does not satisfy the general exceptions in NAFTA Art 2101 and GATT Art XX because the tax is arbitrary and unjustifiably discriminatory against the U.S..

NAFTA Art. 2101 and GATT Art. XX provide general exceptions for countries seeking to implement tariffs, unless the tariff constitutes a “means of arbitrary or unjustifiable discrimination.”⁷⁴ This discrimination can take many forms and occurs when a tariff unfairly singles out another country. In this case, the Fuel Export Charge constitutes discrimination by levying a tax on the U.S. for improvements in security that will benefit Canada and all of North America. On August 21, 2007, the Montebello Leaders conference ended with a joint statement

⁷² Canadian Prime Minister Harper, Statement (September 11, 2007).

⁷³ NAFTA *supra* note 62, art. 2102(b)(2); GATT, *supra* note 69, art. XXI(b)(3).

⁷⁴ NAFTA *supra* note 62, art. 2101; GATT *supra* note 69, art. XX.

issued by the participants highlighting the need for border security improvements.⁷⁵ However, less than a month later, the Canadian Prime Minister explained the Fuel Export Charge, paid by the U.S., would fund the implementation of Canada's border security measures.⁷⁶ For Canada to now insist that the U.S., alone, pay for Canada's border security commitments is both arbitrary and unjustified discrimination.

II. THE WESTERN HEMISPHERE TRAVEL INITIATIVE IS NOT CONTRARY TO CHAPTERS 12 AND 16 OF THE NORTH AMERICAN FREE TRADE AGREEMENT OR THE GENERAL AGREEMENT IN TRADE SERVICES.

The WHTI is not contrary to Chapters 12 and 16 of NAFTA or GATS. The goals behind WHTI- facilitating the travel of low-risk, legitimate, trusted travelers, and preventing high-risk travelers from taking advantage of existing opportunities for cross-border movement- are not contrary to the purposes behind and the embodying language of NAFTA and GATS.⁷⁷ Even though prior to the enactment of the WHTI travelers could prove their identity with various other documents, including a combination of a driver's license and a birth certificate, passports cover a wider range of people than driver's licenses, such as children. Also, new passports include biometric information.⁷⁸ Once the WHTI is completely implemented, it will apply in equal force and measure to all persons entering or re-entering the United States from within the Western Hemisphere.⁷⁹

i. Chapter 12 does not prohibit the WHTI.

Chapter 12 does not apply in the context of the WHTI. Art 1607, "Relation to Other Chapters," states that except for this chapter [chapter 16], "no provision of this Agreement shall

⁷⁵ Prime Minister Harper, President Bush, and President Calderon, Joint Statement of the 2007 Montebello North American Leader' Summit (August 21, 2007).

⁷⁶Canadian Prime Minister Harper, Statement (September 11, 2007).

⁷⁷ Dunniela Kaufman, *Does Security Trump Trade?* 13 L. & Bus. Rev. Am. 619, 629 (2007).

⁷⁸ Jessica Shook, *Developments in the Executive Branch*, 21 Geo. Immigr. L.J. 325 (2007).

⁷⁹ *Id.*

impose any obligation on a Party regarding its immigration measures."⁸⁰ Five other chapters are listed in the exception, but Chapter 12 is not included in that list. Accordingly, the WHTI expressly concerns immigration matters; as such, no obligation may be imposed upon the United States to alter its current law.⁸¹

Even if this Court determines that the measures of the WHTI relate to and affect cross-border trade in services, the regulatory purview of the law is centered around passport and other satisfactory identification which will be sufficient to permit entry or re-entry into the United States. As required by Art. 1202, National Treatment, and Art. 1203 Most-Favored-Nation treatment, all parties, national and international, affected by the WHTI are treated equally, which is the spirit and purpose of the NAFTA. All persons seeking to enter or re-enter the United States must present approved identification from the same list of choices.⁸²

Even if this Court determines that the measures of the WHTI are non-conforming, as reserved under Art. 1206, any existing non-conforming measure that is maintained by a party at the federal level is not subject to the provisions of Arts. 1202, 1203, and 1205, which maximize equal treatment among all parties.⁸³ The WHTI has the force of federal law in the United States and serves to regulate a matter with national sovereignty implications, immigration and passport control.

ii. Chapter 16 does not prohibit the WHTI.

NAFTA also recognizes the importance of trade liberalization and border security in the context of the movement of people. Art. 1601, which sets out the general principles for the

⁸⁰ NAFTA, *supra* note 62, Chapter 16, art. 1607.

⁸¹ NAFTA, *supra* note 62, Chapter 16, art. 1607.

⁸² Western Hemisphere Travel Initiative. http://travel.state.gov/travel/cbpmc/cbpmc_2223.html, 71 FR 41655 (August 11, 2006).

⁸³ NAFTA, *supra* note 71, Chapter 12, art. 1206.

chapter on the temporary entry of business persons, reflects the need to ensure border security.⁸⁴ Art. 1603 requires each party to the NAFTA to grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security.⁸⁵ NAFTA, however, stops short of defining these applicable measures that relate to public health and safety and national security. The terminology employed refers to the general category of a business person- "a citizen of a party country who is engaged in trade in goods, the provisions of services, or the conduct of investment activities."⁸⁶ The requirement of a passport for entry, therefore, is not rendered invalid by the language which governs the temporary entry of business persons. As such, the measures of the WHTI do not fit within the framework of the NAFTA and must be resolved outside of its parameters.

iii. General Agreement on Trade in Services does not prohibit the WHTI.

In fulfilling the obligations and commitments under the General Agreement in Trade Services,⁸⁷ "services supplied in the exercise of governmental authority"⁸⁸ are excepted from the reasonable measures to be taken by a Member to ensure the observance of the Agreement by regional and local governments and authorities [...] within its territory. These "services supplied in the exercise of governmental authority" are services which are supplied neither on a commercial basis nor in competition with one or more service suppliers.⁸⁹ The passport services of the United States are not supplied on either a commercial basis or in competition with Canadian passport services. Additionally, the WHTI was published and carried out in a transparent manner as requirement by Art. III.⁹⁰ Nor are the measures authorized by the WHTI

⁸⁴ NAFTA, *supra* note 62, Chapter 16, Art. 1601.

⁸⁵ NAFTA, *supra* note 62, Chapter 16, Art. 1603.

⁸⁶ Dunniela Kaufman, *supra* note 77, at 619.

⁸⁷ GATT, *supra* note 69, at Annex 1B, General Agreement on Trade in Services, 33 ILM 1125, 1168 (1994).

⁸⁸ *Id.* at art. I, Para. 3(b).

⁸⁹ *Id.* at art. I, Para. 3(c).

⁹⁰ *Id.* at Part II, Art. III, Para. (1).

discriminatory, but these identification measures apply equally to all persons entering the United States from the Western Hemisphere.⁹¹ Further, as required by the Agreement, the WHTI ensures that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner.⁹²

The GATS references services within a country, and the effect of the passport services of the United States is tangentially related to Canada. These services are not performed within the borders of Canada and are services for which Canadian citizens are not eligible. The passport services of the United States are regulated first and foremost by federal law. In general, under federal law it is "unlawful for any citizen of the United States to depart from or enter * * * the United States unless he bears a valid United States passport."⁹³ The passport requirement as a possible restriction on trade, trade services, or the free flow of people across the border, therefore, would only counter GATS if trade liberalization were actually deterred. In the reality of the new world after September 11, 2001, record numbers of Americans are obtaining passports. To meet this increased demand, the State Department began preparation for an increase in applications when Congress passed the legislative mandate for the WHTI in December 2004. For example, the Department of State hired more than 330 additional passport adjudicators by the end of 2007.⁹⁴ The National Passport Center has also been operating twenty-four hours per day and operating houses have also increased at the other sixteen passport agencies."⁹⁵

Beyond the actions of the United States government to ensure the WHTI became reality; travelers have responded well to the new passport requirements and are obtaining passports in

⁹¹ *Id.* at Part II, art. II.

⁹² *Id.* at Part II, art. VI, Para. 1.

⁹³ 8 U.S.C. 1185(b). Section 215(b). Immigration and Nationality Act ("INA").

⁹⁴ Dunniela Kaufman, *supra* note 77, at 629.

⁹⁵ Jessica Shook, *Developments in the Executive Branch*, 21 *Geo. Immigr. L.J.* 325, 326 (2007).

record numbers.⁹⁶ When the new identification rule was announced in November 2006, 1.1 million citizens applied for passports.⁹⁷ This represented a 67 percent increase from the previous year.⁹⁸ The week before WHTI went into effect, America had a passport compliance rate of 94 percent, and on the second day after implementation, nearly 99 percent of Americans complied with the new rules.⁹⁹ Citizens of other countries have also responded. Ninety-seven percent of Canadians and nearly all Mexicans traveling to the United States now carry passports.¹⁰⁰

III. THE WHTI IS JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA, GATT, AND GATS.

The WHTI is justified pursuant to the national security exception and general exceptions to the NAFTA, GATT or the GATS. National security concerns have reshaped the enforcement of U.S. immigration policy, since the terrorist attacks of 9/11.¹⁰¹ The transfer of the Department of Justice (“DOJ”) to the Department of Homeland Security (“DHS”) was the beginning of a great re-conceptualization of immigration and border security in the wake of September 11, 2007.¹⁰² The new requirements of the WHTI have been imposed to strengthen border security and prevent the use of fraudulent documents to gain admission.

i. The national security exception under NAFTA, GATT, and GATS provides authority for the enactment and enforcement of the WHTI.

Cross-border travel is a subset of border security,¹⁰³ and border security is necessary to ensure United States security and on a larger scale North American security¹⁰⁴. Security concerns

⁹⁶ N.C. Aizenman, *Travel Security Rules Take Effect Smoothly; Fliers Ready for Passport Requirement*, WASH. POST, Jan. 24, 2007 at A3.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Bureau of Consular Affairs, Department of State, Fact Sheet, *Changes to U.S. Passport Requirement Western Hemisphere Travel Initiative (WHTI)* (Feb. 2007), http://travel.state.gov/pdf/whiti_fact4.pdf.

¹⁰⁰ Aizenman, *supra* note 96, at A4.

¹⁰¹ Gwendolyn M. Robosson, *Securing the Homeland: Does Immigration Law Make Us More Secure?*, 248-OCTN.J.Law. 14 (2007).

¹⁰² *Id.*

¹⁰³ Dunniela Kaufman, *supra* note 71, at 619.

have always been recognized as a legitimate area in which sovereign states may either unilaterally or in concert with other states adopt measures that run counter to trade liberalization. In regards to the intersection of security and trade, for better or for worse the events of September 11 prompted a paradigm shift in the intersection of trade, security, and immigration concerns.¹⁰⁵

The Agreements view national security as an exception to their regulatory scope.¹⁰⁶ Per the explicit language of the Agreements, nothing, absolutely nothing, in any of the three agreements is to be construed "to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests."¹⁰⁷ The securing of the shared border and the ability to efficiently and reliably identify persons entering the United States is an essential security interest. Trade issues are important but in order to have good trade we must share safe borders. Once these policy changes are fully implemented, regulatory compatibility will lead to safer and faster trade. The changed border strategy will result in the efficient and secure movement of low-risk trade and travelers to and within North America.¹⁰⁸

ii. The general exception under NAFTA, GATT, and GATS provides authority for the enactment and enforcement of the WHTI.

The explicit language of both the NAFTA and the GATT provides for the availability of trade-restrictive government measures imposed on security grounds. Under both treaties, states are permitted to adopt or enforce measures to protect human, animal or plant life or health.¹⁰⁹ The purpose of the WHTI is to accomplish what is permitted- the protection of human life and

¹⁰⁴ Sara Duggan, *North American Trade Summit Update*, 13 L. & Bus. Rev. Am. 1009 (2007).

¹⁰⁵ Dunniela Kaufman, *supra* note 71, at 620.

¹⁰⁶ *Id.*

¹⁰⁷ GATS. Part. II. Art.. XIV *bis*. Para (b).

¹⁰⁸ *Id.* Press Release, Leaders' Joint Statement (Mar. 31, 2006) ([http:// www.pm.gc.ca/eng/media.asp?id=1085](http://www.pm.gc.ca/eng/media.asp?id=1085)).

¹⁰⁹ Dunniela Kaufman, *supra* note 86, at 619; *see* GATT, *supra* note 69; NAFTA, *supra* note 62.

health- by implementation of passport requirements that reliably and efficiently identify individuals coming into the United States.

Further, as is required by the Agreements, these measures of identification do not constitute a means of arbitrary or unjustifiable between countries or a disguised restriction on trade.¹¹⁰ The requirements of the WHTI will apply to all those who enter the United States from within the Western Hemisphere. The United States' government recognizes that the economies of the United States and Canada both benefit from open trade and the free-flow of persons. Once the WHTI is fully implemented, the new passport requirements will result in more reliable identification of travelers, safer boarders, and strengthened more efficient trade.

IV. THE APHS AQI U.S.ER FEE FOR ALL COMMERCIAL VEHICLES ENTERING THE UNITED STATES FROM CANADA DOES NOT VIOLATE INTERNATIONAL AGREEMENTS.

A. The AQI is not contrary to the United States' obligations under NAFTA Art. 310 and GATT Arts. I and VIII.

i. The AQI does not violate NAFTA Art. 310.

The AQI complies with Art 310 of NAFTA.¹¹¹ Chapter 3 provides one of the key principles to NAFTA, the elimination of tariffs on "originating goods" traded among the parties.¹¹² The language of Art 310 provides, "[n]o party may adopt any *customs user fee* of the type referred to in Annex 310.1 for originating goods."¹¹³ Annex 310.1 names merchandise processing fees as a valid user fee, provided the fees are not increased, and are subject to elimination according to Art 403 of the Canada-United States Free Trade Agreement

¹¹⁰ NAFTA, *supra* note 62, art.2101.

¹¹¹ NAFTA, *supra* note 62, art. 310

¹¹² Dallas Addison, NAFTA: Law and Business Review of the Americas 92 (1995).

¹¹³ NAFTA, *supra* note 62, art.. 310.

“CFTA”).¹¹⁴ Looking at the ordinary meaning of the language provided in Art 310 (1) of NAFTA, the parties to the treaty may not adopt a user fee of the type mentioned in Annex 310.1.

Here, the United States has not ‘adopted’ the type of user fee prohibited by both Art 310 and Annex 310.1, nor has the United States ‘introduced’ a customs user fee as prohibited by CFTA.¹¹⁵ Giving plain meaning to the terms of all three agreements, the AQI complies with each treaty because, as the interim rule states, the U.S. is, ‘amending’ an existing rule and removing an exemption for Canada.¹¹⁶ The U.S. has not created a new rule, but updated an existing rule eliminating an exception from which Canada has benefited.¹¹⁷ Accordingly, the AQI complies with Art. 310 because the U.S. has not ‘adopted’ a new measure, but removed an exemption to a pre-existing rule.

Ambiguity exists with respect to the terms used in the AQI, CFTA, and NAFTA.¹¹⁸ NAFTA uses the terms ‘custom user fee’ and ‘merchandising fee’ as prohibited, CFTA uses ‘custom user fee’ as a prohibited charge.¹¹⁹ The plain meaning of each treaty read separately indicates custom user fees and merchandising fees are prohibited. Without specific definitions, the ICJ has little more to aid it in its interpretation other than the preambles of these agreements or publicists.¹²⁰ The AQI user fee is described as neither a customs user fee nor a merchandising fee.¹²¹ The ICJ may thus determine the AQI is neither a customs user fee nor a merchandising

¹¹⁴ NAFTA, *supra* note, Annex 310.1.

¹¹⁵ NAFTA, *supra* note, 62. art. 310, Annex 310.1, CFTA art. 403

¹¹⁶ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 1 and 50323 (August 25, 2006).

¹¹⁷ *Id.*

¹¹⁸ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50323 (August 25, 2006).

¹¹⁹ NAFTA, *supra* note 62. art. 310 and Annex 310.1

¹²⁰ NAFTA, *supra* note 62. art.. 310, Annex 310.1, CFTA Art.. 402, Statute of Court of ICJ, and Vienna Convention

¹²¹ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50323 (August 25, 2006).

fee, and therefore further complies with NAFTA Art 310.¹²² The U. S. does not violate its obligations under NAFTA.

ii. The AQI does not violate the language of Art. I and Art. VIII of the GATT.

The AQI does not violate either Art I or VIII of GATT.¹²³ An analysis of the plain meaning of the language of the treaties demonstrates that the AQI is compliant with both arts, affording most favored nation treatment to Canada as required, and as a fee proportional to the cost of inspection at the U.S./Canada border.¹²⁴

The AQI on Canadian imports and international travelers to the U.S. complies with the language of Art I of GATT by amending U.S. practices and no longer granting Canada an exemption from AQI fees in compliance with General Most Favored-Nation Treatment.¹²⁵ Prior to the interim rule promulgated by APHIS, Canada was exempt from AQI user fees unlike other countries.¹²⁶ This treatment was due in part to the verifiability of Canadian products, limited ‘re-exported’ products from Canada, and limited risk of terrorist attacks.¹²⁷ After the passage of NAFTA, trade from Canada increased; after the terrorist attacks of September 11, 2001, the U.S. became more aware of the risk of potential terrorist attacks, along the largest unprotected border in the world.¹²⁸ The AQI user fees are not the application of new fees, but rather, the application of the same fee that every other nation is subject to, “when arriving in ports and customs

¹²² NAFTA, *supra* note 71, Art.. 310.

¹²³ GATT, *supra* note 69, art. I and VIII

¹²⁴ GATT, *supra* note 69 art. I, VIII

¹²⁵ GATT, *supra* note 69 art. 1(1)

¹²⁶ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165, 50321-22 (August 25, 2006).

¹²⁷ *Id.*

¹²⁸ *Id.*

territories of the United States.”¹²⁹ Accordingly, the AQI assures Canada is treated the same as all parties to GATT.

The AQI complies with Art VIII of GATT because it is approximate to the cost of border inspection services and is not an indirect protection to domestic products or a tax.¹³⁰ The AQI was implemented because the U.S. was not recovering its costs associated with current inspection activities along the U.S./Canadian border.¹³¹ Increased border inspections were required because of increased trade with Canada as a result of NAFTA, increased risk of “re-exporting”¹³², and finally an increase in potential terrorist treats in the wake of September 11.¹³³ While the AQI falls within the ambit of Art. VIII (4)(h),¹³⁴ the specific language of the AQI demonstrates the purpose of the rule is to collect fees to recoup costs of inspection, and is an approximation of the cost of services rendered.¹³⁵ As estimated by the rule, the total estimated costs of the AQI for fiscal year 2007 are \$74 million U.S.D and projected revenue associated with the AQI is \$78 million U.S.D.¹³⁶ Any excess, estimated in 2007 to comprise 3 million U.S.D, would be put to further AQI expenses as needed. The costs of services approximate the revenue generated from the AQI. As such, the AQI complies with Art. VIII of GATT.

B. The AHPIS AQI user fee is justified under the general and national security exceptions of NAFTA, GATT and GATS.

¹²⁹ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50323 (August 25, 2006).

¹³⁰ GATT, *supra* note 69, art. VIII (1)(a).

¹³¹ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320 (August 25, 2006); GATT, *supra* note 69, art. VIII (1)(a).

¹³² Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50323 (August 25, 2006).

¹³³ *Id.*

¹³⁴ GATT, *supra* note 69, art. VIII(4)(h).

¹³⁵ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50323 (August 25, 2006).

¹³⁶ *Id.* at 50326-27.

Under NAFTA, GATT, and the GATS there are exceptions to excuse noncompliance.¹³⁷ Each treaty contains general exceptions excusing violations by members to protect the health and safety of each member's citizens.¹³⁸ In addition, each treaty contains national security exemptions allowing a member's derivation from treaty obligations to protect, "its essential security interests".¹³⁹ These provisions are purposely ambiguous to encompass a variety of situations that may require noncompliance.¹⁴⁰ The ambiguity and auto interpretive nature of these provisions may have been a condition of compliance with other aspects of NAFTA, GATT and GATS.¹⁴¹ In particular, respect for the sovereignty of each member nation in the decision when to defend itself may have motivated the inclusion of these exceptions.¹⁴² While there is no consensus as to why the provisions were placed into these three agreements, there is some agreement that the provisions are subject to auto interpretation by the parties to each treaty.¹⁴³

i. The AQI complies with the general exceptions to NAFTA, GATT and GATS.

The AQI complies with the general exceptions under NAFTA, GATT and GATS because it is not applied in an arbitrary or unjustifiable manner and is justified as a means to protect the health and safety of the citizens of the U.S.¹⁴⁴ The general exception language of all three treaties provide that derivation from other provisions is excused in limited circumstances subject to a threshold issue: the contemplated action is not applied, "in a manner which would constitute a

¹³⁷ NAFTA Chapter 21, GATT Arts. XX and XI, GATS Arts. XIV and XIV(*bis*); Peter Lindsey, The Ambiguity of GATT Art.. XXI: Subtle Success or Rampant Failure?, 52 Duke L.J. 1277 (April 2003)

¹³⁸ NAFTA, *supra* note 62, art.. 2101, GATT, *supra* note 69, art.. XX and GATS Art.. XIV

¹³⁹ NAFTA, *supra* note 62, art. 2102, GATT, *supra* note 69, art.. XXI and GATS Art.. XIV (*bis*)

¹⁴⁰ Peter Lindsey, The Ambiguity of GATT Art.. XXI: Subtle Success or Rampant Failure?, 52 Duke L.J. 1277 (April 2003); Wesley A. Cann, Jr., Creating Standards and Accountability for the use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism, 26 Yale J. Int'l L. 413 (Summer 2001); Raj Bhala, National Security and International Trade Law: What the GATT Says, and What the United States Does, 19 U. Pa. J. Int'l Econ. L. 263 (Summer 1998); Dapo Akande and Sope Williams, International Adjudication on National Security Issues: What Role for the WTO?, 43 Va. J. Int'l L. 365 (Winter 2003); Phillip M. Nichols, GATT DOCTRINE, 36 Va. J. Int'l L. 379 (Winter 1996)

¹⁴¹ See *supra* note 149.

¹⁴² See *supra* note 149.

¹⁴³ See *supra* note 149.

¹⁴⁴ NAFTA, *supra* note 62, art.. 2101, GATT, *supra* note 69, art.. XX and GATS Art.. XVI.

means of arbitrary or unjustifiable discrimination”.¹⁴⁵ The language of the AQI confirms there are no new charges levied on Canada, rather, the U. S. has placed Canada on equal footing with other nations doing business with the United States.¹⁴⁶ Any measure, therefore, applied to all nations is not arbitrary. The AQI is further justified in light of the concerns of the U. S. in protecting the health and safety of its citizens.¹⁴⁷

The AQI also is justified as a measure necessary to protect human animal or plant health.¹⁴⁸ The nonspecific language of the general exceptions provide that any measure may be taken to protect human, animal, and plant life or health.¹⁴⁹ The measures undertaken by the AQI in increasing inspection at the U.S./ Canada border will have an effect on preventing prohibited plant and animal materials from entering the U.S, that can harm plant, animal, and human life by introducing parasites and disease into the U.S.¹⁵⁰ Thus, the AQI complies with the general language of these exceptions because it protects human, animal and plant life.

ii. The AQI is justified under the national security exceptions of NAFTA, GATT and GATS.

The national security exceptions to NAFTA, GATT, and GATS allow a party to these agreements to take any action that is necessary for the protection of its security interests.¹⁵¹ The language of the national security exceptions share with the general exceptions a tendency

¹⁴⁵ NAFTA Art.. 2101, GATT Art.. XX and GATS Art.. XVI, Peter Lindsey, *The Ambiguity of GATT Art.. XXI: Subtle Success or Rampant Failure*, 52 Duke L.J. 1277 (April 2003)

¹⁴⁶ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50323 (August 25, 2006).

¹⁴⁷ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50321 (August 25, 2006).

¹⁴⁸ NAFTA, *supra* note 62, art.. 2101(2), GATT, *supra* note 69, art.. XX (b) and GATS Art.. XVI (b).

¹⁴⁹ NAFTA, *supra* note 62, art.. 2101(2), GATT, *supra* note 69, art.. XX(b) and GATS Art.. XVI(b).

¹⁵⁰ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50321 (August 25, 2006).

¹⁵¹ NAFTA, *supra* note 62, art.. 2102(b); GATT, *supra* note 69, art.. XXI; GATS Art.. XIV (*bis*), 52 Duke L.J. 1277, 1278 (April 2003)

towards auto-interpretation regarding where and when the exceptions may be invoked.¹⁵² The ICJ again may consult publicists to determine the U.S. has complied with these exceptions under NAFTA, GATT, or GATS.

Each party to these treaties is allowed to determine when a national security risk exists and when to exercise this right under these exceptions.¹⁵³ The language of the exceptions is ambiguous, allowing for each party to determine when in fact a legitimate risk to national security exists.¹⁵⁴ The terrorist attacks of September 11 were an event that prompted many future actions by the U.S. under the auspices of national security, including the wars in Afghanistan and Iraq. The AQI measure is designed to minimize the risk of future attacks. Because the U.S. perceives a heightened risk of attack along the U.S. / Canada border, the U.S. is justified under these international agreements to take measure necessary to ensure its national security. The ICJ is thus warranted in finding the AQI is a measure that fulfills the national security exemption of NAFTA, GATT, and GATS.

Conclusion

For these reasons, the Government of the United States of America respectfully request that this Honorable Court adjudge and declare: (1) that the Canadian Fuel Export Charge violates the free trade provisions of NAFTA and GATT by applying exclusively to exports to the US and funding domestic infrastructure projects which Canada has internationally committed to complete; (2) that the U.S. WHTI passport requirement is consistent with principles of NAFTA and the WTO that allow for protection of the health and safety of a country's citizens; (3) that the U.S. AQI trade limitations allow for the equal and consistent treatment of U.S. trade partners, a requirement of NAFTA and the WTO.

¹⁵² Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50321 (August 25, 2006). AQI quote, 52 Duke L.J. 1277-1283 (April 2003)

¹⁵³ See *supra* note 149.

¹⁵⁴ See *supra* note 149.