

2007-08
NIAGARA INTERNATIONAL MOOT COURT COMPETITION

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

THE GOVERNMENT OF
THE UNITED STATES OF AMERICA
(Applicant)

v.

THE GOVERNMENT OF
CANADA
(Respondent)

MEMORIAL OF THE RESPONDENT

TEAM # 2008-12 R

Table of Contents

TABLE OF AUTHORITIES.....iii

STATEMENT OF FACTS.....v

QUESTION PRESENTED.....xii

JURISDICTION.....xii

SUMMARY OF ARGUMENT.....1

ARGUMENT.....1

I. THE WESTERN HEMISPHERE TRAVEL INITIATIVE IS CONTRARY TO CHAPTERS 12 AND 16 OF THE NORTH AMERICAN FREE TRADE OR THE GENERAL AGREEMENT IN TRADE SERVICES.....2

A. Canada and the United States entered NAFTA and GAT to create a partnership to liberalize trade.....2

i. The WHTI is contrary to Chapter 12 of NAFTA.....2

ii. The WHTI is contrary to Chapter 16 of NAFTA.....3

iii. The WHTI is contrary to the General Agreement in Trade Services.....4

II. THE WESTERN HEMISPHERE TRAVEL INITIATIVE IS NOT JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA, GATT, OR GATS.....5

i. The WHTI is not authorized by the national security exceptions of NAFTA, GATT, and GATS.....5

ii. The WHTI is not authorized the general exception to the NAFTA, GATT, and GATS.....7

III. THE ESTABLISHMENT OF AQI USER FEES BY THE UNITED STATES AGAINST CANADA IS CONTRARY TO SEVERAL INTERNATIONAL AGREEMENTS AND VIOLATES INTERNATIONAL LAW.....7

A. The AQI violates the obligations of the U.S. under NAFTA Art. 310 and Arts. I and VIII of GATT.....7

i. The AQI is a custom user fee of the type established in Annex 310.1 of the NAFTA and Article 403 of the Canada-U.S. Free Trade Agreement, and thus is contrary to NAFTA Article 310.....7

ii. The AQI is contrary to both Articles I and VIII of GATS.....9

B.	The AQI violates the general and national security exceptions of NAFTA, GATT and GATS.....	12
	<i>i. The AQI violates the General Exceptions to GATT, GATS and NAFTA.....</i>	<i>13</i>
	<i>ii. The AQI is not justified under the National Security Exemptions of GATT, GATS, or NAFTA.....</i>	<i>14</i>
IV.	CANADA’S FUEL EXPORT CHARGE IS CONSISTENT WITH THE CONCEPTS OF FREE TRADE AND NATIONAL SOVEREIGNTY FOUND IN NAFTA AND GATT.....	15
A.	State sovereignty is the bedrock principle of treaties between the U.S. and Canada.....	15
	<i>i. The Fuel Export Charge is consistent with the ordinary meaning of NAFTA Art. 314 and 604 as well as the free trade and national security objectives of the articles.....</i>	<i>15</i>
	<i>ii. The Fuel Export Charge satisfies the NAFTA access requirements in Articles 315 and 605.....</i>	<i>16</i>
	<i>iii. The Fuel Export Charge is consistent with regulations placed on countries recognizing a Most Favored Nation status, as listed in GATT Article I.....</i>	<i>17</i>
	<i>iv. GATT Article VIII is not impeded by the Fuel Service Charge because the revenue will be reasonably raised to fund a specific border security project.....</i>	<i>17</i>
B.	Exceptions placed in NAFTA and GATT to ensure state sovereignty permit Canada to implement the Fuel Export Tax.....	18
	<i>i. The Fuel Service Charge is consistent with the general exceptions in NAFTA and GATT.....</i>	<i>18</i>
	<i>ii. The border security improvements, funded by the Fuel Export Charge, invokes the national security exceptions in NAFTA and GATT.....</i>	<i>19</i>
	CONCLUSION.....	20

Table of Authorities

DOMESTIC STATUTES

Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320 (August 25, 2006).....	v, vii, viii, ix, 8, 10, 11, 12, 14
Canada Fuel Export Charge.....	15, 16, 17, 18, 19, 20
Western Hemisphere Travel Initiative: http://travel.state.gov/travel/cbpmc/cbpmc_2223.html	v, vi, vii, 2, 3, 4, 5

TREATIES AND INTERNATIONAL DOCUMENTS

<i>Charter of the United Nations</i> , 26 June 1945, Can. T.S. 1945 No. 7.....	1, 14
<i>Statute of the International Court of Justice</i> , 26 June 1945, T.S. No. 933, 59 State. 1055.....	1
<i>Vienna Convention on the Law of Treaties</i> , 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980).....	1, 2, 8, 9, 10
<i>North American Free Trade Agreement</i> , U.S.-Mex.-Can., December 1992, 32 I.L.M. 605.....	3, 8, 9, 12, 13, 14, 18, 20
Compomis.....	v, vii, ix, x, xi, 5, 20

ARTICLES AND BOOKS

Dapo Akande , Scope Williams, International Adjudication on National Security Issues: What Role for the WTO?, 43 Va. J. Int'l L. 365, 367 (Winter 2003).....	13
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, Yale J. Int'l L. 413, 420.....	14
Ian F. Ferguson, United States-Canada Trade and Economic Relationship: Prospects and Challenges, CRS Reports for Congress 18 (Mar. 29, 2006).....	4
Judith Golub, Immigration Reform Post- 9/11, 13 U.S.-Mex. L.J. 9 (2005).....	5
Blayne Haggart, Government of Canada, Canada and the United States: Trade, Investment, Integration, and the Future (Apr. 2, 2001).....	4
Dunniela Kaufman, <i>Does Security Trump Trade?</i> 13 L. & Bus. Rev. Am. 619 (2007).....	5, 6

Peter Lindsay, <i>The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?</i> , 52 Duke L. J 1277 (April 2003).....	9,12,13,14
Colin Robertson, <i>Canada-United States Relationship: An Example Of and An Innovation for the World</i> , 32 Can.-U.S. L.J. 295, 298 (2006).....	2
Rachel L. Swarns, <i>Travel Industry Seeks Delay on New Passport Rules at U.S. Borders</i> , N.Y. Times, Aug. 21, 2006 at A13.....	3

WEBSITES

Canadian Council of Chief Executives: Reinventing Borders, http://64.26.159.96/en/north/reinventing.php	5
The Canada-U.S. Trade and Investment Partnership, http://geo.international.gc.ca.canam/washington/trade_and_partnership-en.asp	4
Connect2Canada, http://www.connect2canada.com.getthefactstrade	4
Enbridge Pipeline Website http://library.enbridge.com/users/folder.asp?FolderID=1667	14
Government of Canada, Canadian Trade Statistics Table, http://www40.statcan.ca/l01/cst01/gblec02a.htm	14
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	17
Press Release, Leaders' Joint Statement (Mar. 31, 2006) (http://www.pm.gc.ca/eng/media.asp?id=1085).....	18,19
U.S. Commercial Service, Canadian Marketing Regions, http://www.buyusa.gov/canada/en/canadianrefionalprofiles.html . ; U.S. Commercial Services, Canada-US Trade Relationship, http://www.buyusa.gov/harrisburgcan_ustrade.html	2

SPEECHES

Prime Minister of Canada, Statement of the Office of the Prime Minister(September 11, 2007).....	14,18,19
--	----------

Statement of Facts

In 2005, the US implemented several new measures under the guise of national security that directly impacted the Canadian Economy. First, the Western Hemisphere Travel Initiative (“WHTI”), promulgated by the US Department of State (“DOS”) and the US Department of Homeland Security (“DHS”), requires all travelers, Canadian and American, to possess a valid passport when traveling to the US.¹ This measure, however, will limit travel to Canada.² Second, the US Animal and Plant Inspection Service (“APHIS”), published an interim rule establishing Canada was no longer exempt from Agricultural Quarantine and Inspection user fees (“AQI”) on not only its fruits and vegetables, but on all commercial conveyances entering the US, along with commercial airline passengers.³ The AQI is levied against all commercial airline passengers regardless of whether passengers are actually processed through customs.⁴ Finally, after both false statements issued by US Presidential candidates and pressure exerted by the US government, Canadian government agreed to implement “thick border” initiatives, costing in excess of 1 billion dollars, to meet the security related action points outlined by the three North American leaders in attendance of the Montebello North American Leaders Summit.⁵ The Canadian government further agreed to these measures as a concession to the US despite there being no verifiable security risk posed by Canada.⁶ In order to pay for these measures, Canada instituted a Fuel Export Charge on oil exported to the US.⁷

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

² *Compromis* at 1.

³ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320 (August 25, 2006)

⁴ *Id.*

⁵ *Compromis* at pg. 4

⁶ *Compromis* at pg. 2

⁷ *Id.*

The WHTI is the result of a joint measure proposed by the US Department of State (“DOS”) and the US Department of Homeland Security (“DHS”).⁸ The Intelligence Reform and Terrorist Prevention Act of 2004 (“IRTPA”) provides that upon full implementation, US citizens and certain classes or non-immigrant aliens may enter the US only with passports or such alternative as the Secretary of the DHS determines are satisfactory for establishing and identifying citizenship.⁹

The new measure will be implemented in two stages, as announced in September of 2005.¹⁰ 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 US to carry a valid passport.¹¹ In general, under federal law, it was unlawful for any citizens of the US to depart from or enter the US without a valid passport.¹² However, only about 40% of US citizens actually carry a US passport.¹³ The second phase, similarly announced in a NPRM on June 26, 2007, addressed all other modes of transportation.¹⁴ This phase, known specifically as the WHTI, will require travelers to present passports or other acceptable documents that establish identity and citizenship deemed sufficient when entering the US from any location.¹⁵ Those entering or re-entering the US will be required to have 1) a US passport; 2) a US 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 US Military identification card when traveling on official orders or permit.¹⁶ The time frame established to implement the

⁸ Western Hemisphere Travel Initiative. http://travel.state.gov/travel/cbpmc/cbpmc_2223.html.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Western Hemisphere Travel Initiative. http://travel.state.gov/travel/cbpmc/cbpmc_2223.html.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

WHTI is the summer of 2008.¹⁷ The changes implemented by WHTI will further effect Canadian tourism, reducing the number of persons traveling to Canada. The Canadian Government has determined that their country will feel the effects of the WHTI rather than the Americans.¹⁸ The US has justified this disproportionate effect on the grounds of national security.¹⁹

APHIS 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 US from Canada.²⁰ The effect of this rule is to remove a prior exemption held by Canada, and requires Canada to pay the same user fee that all other nations pay, “at ports and custom territories” within the U.S.²¹

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.²² Prior to the NAFTA, inspection guidelines along the U.S./Canadian border were more lenient because Canadian labeled exports to the US did in fact originate in Canada.²³ Accordingly, in most cases, these Canadian products did not pose a sanitary, phytosanitary or national security threat to the US.²⁴ 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

¹⁷ *Id.*

¹⁸ Compromis at 1

¹⁹ *Id.*

²⁰ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320 (August 25, 2006)

²¹ *Id.* at 50323.

²² *Id.* at 50321

²³ *Id.*

²⁴ *Id.*

for exotic imports into Canada.²⁵ Because Canada's cold climate requires the imposition of 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./ Canada border.²⁶ Thus, according to APHIS, this rule was designed to close the loophole on inspections of fruits and vegetables crossing the US/Canadian border.²⁷ The AQI, however, goes beyond closing an exemption for fruits and vegetables, and imposes an AQI user fee on all imports, regardless of type, when crossing the US border.

According to the AQI, the user fees vary based on the mode of transportation used to cross the U.S./ Canada border, and not based on cargo.²⁸ First, AQI user fees for passengers traveling by air are \$5.00USD per passenger and are included in the price of airline tickets, and \$70.25 USD per aircraft.²⁹ Second, commercial trucks are assessed an AQI user fee of \$5.25 USD per crossing, or an annual fee of \$105USD, and commercial rail cars are assessed a user fee of \$7.50 USD per crossing.³⁰ Finally, all commercial vessels (ships) are assessed an AQI user fee of \$490.00 USD.³¹

The U.S.'s concern for border safety has arguably 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.³² Despite this, there has been no credible threat from Canada,

²⁵ *Id.* at 50321.

²⁶ *Id.* at 50323.

²⁷ *Id.*

²⁸ *Id.* at 50325.

²⁹ *Id.* at 50323.

³⁰ *Id.* at 50325.

³¹ *Id.*

³² *Id.* at 50322

either before or since September 11.³³ The US has nonetheless justified the AQI because a risk exists of a potential bioterrorist attacks due to lack of inspection along the US/Canada border, which can harm not only the citizens of the US, but also, “reduce confidence in the safety of the[ir] U.S. food system and have a devastating impact on U.S. agriculture”.³⁴

The US further justifies the AQI as a means to recover the costs of inspections along the US/Canada border.³⁵ The US states it is not recovering costs on inspections conducted to protect the US along with U.S./ Canada border.³⁶ 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.³⁷ This interim rule has been determined by the US, “to be necessary on an emergency basis” to, “prevent the introduction of plant pests and animal disease via conventional pathways or through bioterrorism.”³⁸ Thus, despite Canada posing no threat to sanitary and phytosanitary measures, the US has assessed an AQI user fee on all conveyances regardless of cargo.

In August of 2007, Canada, along with the US and Mexico, participated in the 2007 Montebello North American Leaders Summit.³⁹ At the close of the Summit, Canadian Prime Minister Harper, US President Bush, and Mexico’s President Calderon issued a Joint Statement, emphasizing five priorities for the following year, among which was a commitment to “Smart and Secure Borders”.⁴⁰ Border security was important to the leaders who attended the Summit. Outlining a goal for borders that are both safe and effective in facilitating trade, commerce and

³³ Compromis at pg. 4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 50324

³⁹ Compromis at 2.

⁴⁰ Compromis at 2.

tourism, the leaders sought to coordinate joint activities to help realize their goals.⁴¹ One such means to effectuate their goals was the recognition that any measures taken to secure borders must be undertaken far from the actual border in order to ensure safety and deter threats.⁴² A number of other means to protect borders were outlined by the leaders, including the innovative use of technology to screen travelers for radiological or other threats, and cooperation with law enforcement in their respective countries to create streamlined law enforcement procedures to promote seamless operations at the border.⁴³

After the release of the Joint Statement by the North American Leaders, candidates for the US Presidency made comments regarding the Canadian Government's need to take the security of North America seriously, and made false statements implying the September 11, 2001 hijackers had entered the US through Canada.⁴⁴ The comments created significant media attention, resulting in a meeting among U.S. Secretary of Homeland Security Michael Chertoff, US Vice-President Dick Cheney, and Canadian Minister of Public Safety Stockwell Day. The three entered into serious negotiations, where the US pressured the Canadian Government to implement certain "thick border" initiatives.

On September 11, 2007, Canada and the U.S. issued a joint statement describing the agreed upon border initiatives.⁴⁵ The Canadian Government, because of pressure from the US, agreed to construct screening facilities 1 kilometer from the border crossings at numerous points along with border, ground sensor towers along the US, Canada border, and the installation of advanced radiological detection technology at its ports.⁴⁶ The same day, the Canadian Prime

⁴¹ Compromis at 3

⁴² Compromis at 3.

⁴³ Compromis at 3.

⁴⁴ Compromis at 4.

⁴⁵ *Id.*

⁴⁶ Compromis at pg. 5.

Minister announced an export tax on fuel equal to \$25 CDN to fund the border initiatives. The Prime Minister in his announcement declared Canada in compliance with the requests of its closest trading partner, the US, and further that the Canadian Government recognizes the importance of North American Security.⁴⁷ The Prime Minister went on to explain the Export Tax is a way for the Canadian government to raise the money needed to pay for the infrastructure projects and the technology purchases it has agreed to make after negotiating with the US.⁴⁸

After the announcement by the Prime Minister, the US Ambassador to Canada, Michel Wilson was contacted by Secretary Chertoff, who informed him that President Bush was furious with the export tax announcement.⁴⁹ The US position was that the fuel charge violated several obligations of Canada under international law. Ambassador Wilson informed the US that the Fuel Export Charge would remain in effect.

On September 23, 2007, the US filed a dispute with the International Court of Justice (“ICJ”) with respect to the Fuel Export Charge. The US maintained the fuel charge violated Articles in the North American Free Trade Agreement (“NAFTA”), and further could not be justified by the general or national security exemptions found in NAFTA. In addition, the US took the position that the Fuel Export Charge could not be justified under Articles I, VIII and IX of the General Agreement on Tariffs and Trade (“GATT”) , nor the exceptions to GATT found in Articles XX and XXI.

Canada responded, and on October 23, 2007, filed a dispute with the ICJ regarding the WHTI, and the APHIS fee. Both governments have agreed to refer their disputes to the ICJ, as opposed to a Dispute Settlement Body of the World Trade Organization (WTO), a Chapter 20 body of NAFTA, or any other decisional body. Both parties have further agreed that the ICJ

⁴⁷ *Id.* at 5.

⁴⁸ *Id.*

⁴⁹ *Id.*

would have jurisdiction to consider the issues before it. Finally, Mexico was notified of the decision by Canada and the US to appear before the ICJ and have not objected to their loss of right to appear. The two disputes were joined on November 23, 2007, and the case is proceeding in the ICJ as the *US of America v. Canada*.

Questions Presented

1. Under NAFTA, GATT, and concepts of state sovereignty, does Canada have the authority to implement a Fuel Export Charge to fund improvements in Canadian border security.
2. Under NAFTA, GATT, and GATS, agreements embodying trade liberalization, does the United States have the authority enact and enforce the Western Hemisphere Travel Initiative a measure that will likely restrict trade and close the shared border.
3. Under WTO Agreements and NAFTA, does the United States have authority to enact an AQI that collects fees at a profit to the United States rather than protecting national security interests?

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*.

Summary of the Argument

The US enactment and enforcement of WHTI violates the policies of trade liberalization in NAFTA, GATT, and GATS. The potential benefits of heightened passport security measures are outweighed by the negative impact on the free flow of goods and people. The US implementation of AQI unjustly removes the Canadian exception to certain import/export regulations. AQI takes benefits from Canada that are enjoyed by other nations, a violation of the WTO and NAFTA. Canada's Fuel Export Charge is consistent with NAFTA and GATT as concepts of national sovereignty permit taxation of exported natural resources, especially when funding is necessary to quell US security concerns and ensure Canadian national security.

Argument

Chapter XIV of the Charter of the United Nations,⁵⁰ establishing the International Court of Justice ("ICJ"), dictates the ICJ shall function in accordance with the Statute of the International Court of Justice (the "Statute"). All members of the United Nations, including both the U.S. and Canada, are," *ipso facto* parties to the Statute of the International Court of Justice", which decides disputes in accordance with international law.⁵¹ Among the sources used to settle disputes are international conventions (NAFTA, GATT and GATS), international custom, and the teachings of, "most highly qualified publicists."⁵²

The Vienna Convention on the Law of Treaties (the "Vienna Convention") requires treaties to be interpreted, "in good faith, and in accordance with the ordinary meaning to be given to the terms of the treaty."⁵³ Terms are not considered in isolation, but within their context, and

⁵⁰ U.N. Charter Cite, Chapter XIV

⁵¹ U.N. Charter Cite, Chapter XIV, Art. 93 para. 1

⁵² Statue of the International Court of Justice, Article 38(1)(d)

⁵³ Vienna Convention on the Law of Treaties, Article 31(1), Peter Lindsay, The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?, 52 Duke L.J. 1277, 1281 (Spring 2003)

in light of the object and purpose of the treaty itself.⁵⁴ Context can include an analysis of the preamble and annexes to a treaty.⁵⁵ Finally, a special meaning is given to a term only if it is established by evidence that the parties intended the terms to be given a special meaning.⁵⁶

I. THE WESTERN HEMISPHERE TRAVEL INITIATIVE IS CONTRARY TO CHAPTERS 12 AND 16 OF THE NORTH AMERICAN FREE TRADE OR THE GENERAL AGREEMENT IN TRADE SERVICES.

A. Canada and the United States entered NAFTA and GAT to create a partnership to liberalize trade.

The WHTI is contrary to Chapters 12 and 16 of the NAFTA and the GATS. As co-tenants of the top half of North America, the values and interests of Canadians and Americans are shared and more closely aligned than ever before. There is much to be proud of, the world's largest undefended border,⁵⁷ the world's longest commercial relationship,⁵⁸ and extraordinary openness to people and ideas.⁵⁹ Only through a joint commitment to the rule of law and an openness to trade can these accomplishments that have stunned the world continue and be sustained.⁶⁰ In light of what we have been able to achieve in North America and around the world, a way around requiring the showing of a passport at the border can be found.⁶¹

i. The WHTI is contrary to Chapter 12 of NAFTA.

As laid out in Article 1201, NAFTA applies to measures adopted by a party relating to cross-border trade in services, including measures respecting,

- (a) the production, distribution, marketing, sale and delivery of a service;

⁵⁴ Vienna Convention on the Law of Treaties, Article 31(1), 52 Duke L.J. 1277, 1282 (Spring 2003)

⁵⁵ Vienna Convention on the Law of Treaties, Article 31(2)

⁵⁶ Vienna Convention on the Law of Treaties, Article 31(4).

⁵⁷ U.S. Commercial Service, Canadian Marketing Regions,

<http://www.buyusa.gov/canada/en/canadianrefionalprofiles.html>. ; U.S. Commercial Services, Canada-US Trade Relationship, http://www.buyusa.gov/harrisburgcan_ustrade.html.

⁵⁸ U.S. Commercial Service, Canada-US Trade Relationship, http://www.buyusa.gov/harrisburg/can_ustrade.html

⁵⁹ Colin Robertson, *Canada-United States Relationship: An Example Of and An Innovation for the World*, 32 Can.-U.S. L.J. 295, 298 (2006)

⁶⁰ *Id.*

⁶¹ *Id.*

(b) the purchase or use of, or payment for, a service;

(c) the access to and use of distribution and transportation service systems in connection with the provision of a service;⁶²

all three are affected by the WHTI and impeded in a manner contrary to the goal of trade liberalization codified in NAFTA.

At the end of January 2007, only 28 percent of Americans had passports.⁶³ As required by the WHTI, these citizens without passports will not be able to re-enter the United States. Accordingly, cross-border trade in services, such as Canadian tourism, will suffer serious economic damage. The communities that flourish along the border will be economically decimated once these stringent identification requirements succeed in deterring the casual traveler.⁶⁴ The passport requirements of the WHTI will convert a simple trip across the border into an expedition to a strange and foreign country. The huge benefits that both Canadians and Americans draw from access to each other's markets will evaporate. The open and healthy trading relationship will become closed and weak with an affect not limited to the Canadian economy or the United States economy but North American competitiveness in the global market place.

ii. The WHTI is contrary to Chapter 16 of NAFTA.

Per the general obligations, measures relating to the temporary entry of business persons are to apply "so as to avoid unduly impairing or delaying trade in goods or services [...]."⁶⁵ The WHTI is contrary to the guiding principle of NAFTA that the free-flow of business persons is

⁶² NAFTA. Article 1201, (a), (b), (c)

⁶³ Rachel L. Swarns, Travel Industry Seeks Delay on New Passport Rules at U.S. Borders, N.Y. Times, Aug. 21, 2006 at A13.

⁶⁴ Rachel L. Swarns, Travel Industry Seeks Delay on New Passport Rules at U.S. Borders, N.Y. Times, Aug. 21, 2006 at A13.

⁶⁵ NAFTA. Chapter 16. Article 1602.

necessary for trade liberalization. Nowhere in the chapter is a passport laid out as a requirement for the temporary entry of a business person. The requirement of a form of identification which is not commonly held by individuals on either side of the border will invariably affect trade and the free-flow of business persons. Greatness has resulted from the openness of the trade relationship between Canada and the United States. Today over 96 percent of commerce between Canada and the United States is back and forth without duty or tariff.⁶⁶ Most of this trade is on trucks that crisscross our borders every 45 seconds.⁶⁷ A quarter of America's exports are destined for Canada.⁶⁸ Canada is a larger market for the United States than the combined 25 countries of the European Union.⁶⁹ Put another way: Canada is the number one market for 38 American states,⁷⁰ and that trade supports over 5 million American jobs.⁷¹ Last year Canadians were the biggest single investors in America.⁷² All of these economic achievements will be affected and ultimately diminished by the measures of the WHTI.

iii. The WHTI is contrary to the General Agreement in Trade Services.

GATS applies to the current dilemma because the measures taken by the United States affect trade in services, namely the free flow of persons, tourist and temporary business persons, and services related to those persons.⁷³ Under GATS, trade in services is defined as the supply of a service, including "by a service supplier of one Member, through the presence of natural

⁶⁶ See Blayne Haggart, Government of Canada, Canada and the United States: Trade, Investment, Integration, and the Future (Apr. 2, 2001),

⁶⁷ *Contra* Ian F. Ferguson, United States-Canada Trade and Economic Relationship: Prospects and Challenges, CRS Reports for Congress 18 (Mar. 29, 2006).

⁶⁸ *See id.* at 3.

⁶⁹ The Canada-U.S. Trade and Investment Partnership, http://geo.international.gc.ca.canam/washington/trade_and_partnership-en.asp

⁷⁰ Connect2Canada, <http://www.connect2canada.com.getthefactstrade>.

⁷¹ Speaking notes for Michael Wilson, Canada and the United States: Common Values, Uncommon Partnership (May 15, 2006), <http://geo.international.gc.ca/cam-am/washington/ambassador/20060515-en.asp>.

⁷² *Contra* The Canada-U.S. Trade and Investment Partnership.

⁷³ *See generally* General Agreement on Tariffs and Trade.

persons of a Member in the territory of any other Member.⁷⁴ Further, "measures taken by Members" means measures taken "by central, regional or local governments and authorities,"⁷⁵ which would include the WHTI, a federal law affecting passport requirements. Again, nowhere in the language of GATS is there a requirement of a passport for temporary entry of persons.

II. THE WESTERN HEMISPHERE TRAVEL INITIATIVE IS NOT JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA, GATT, OR GATS.

The WHTI is not justified pursuant to the national security exception or the general exceptions to NAFTA, GATT, or GATS. By 2001, the borders between Canada and the United States had become increasingly more open. This openness, however, began to change after September 11, 2001.⁷⁶ Though none of the 9/11 hijackers entered the United States through either Canada or Mexico, the attacks caused the nation to consider whether or not a change in border policy was necessary.

i. The WHTI is not authorized by the national security exceptions of NAFTA, GATT, and GATS.

Even though trade-restrictive government measures may be imposed on national security grounds, security justifications cannot be used as a disguised restriction on international trade.⁷⁷ Contrary to public statements made by United States' presidential candidates, none of the 9/11 terrorists came from or through Canada.⁷⁸ A change based in fear is insufficient reason to alter the methods of identification that have long secured our shared border without restricting trade. The partnership between Canada and the United States is made of equal partners; accordingly, there is a need "to create a zone of cooperation encompassing the continent rather than focusing

⁷⁴ General Agreement on Trade Services: Multilateral Trade Negotiations Act Embodying the Results of the Uruguay Round Table, Annex IB, General Agreement on Trade in Services, 33 I.L.M. 1125, 1168 (1994) [hereinafter GATS].

⁷⁵ *Id.*

⁷⁶ *Id.*; Judith Golub, Immigration Reform Post- 9/11, 13 U.S.-Mex. L.J. 9 (2005).

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

⁷⁸ *Compromis* at 4.

security efforts on the line that separates us.”⁷⁹ Concerns about border security need to be dealt with within the partnership and not with unilateral measures that affect both countries equally.⁸⁰ The WHTI and its effects on trade cannot be bifurcated from the NAFTA when cloaked in concerns of national security.

Further, the explicit language of these agreements does not provide adequate authority for the measures of the WHTI. The United States measures taken in the WHTI are not sufficiently related to national security exceptions. The measures do not relate to the provisioning of a military establishment.⁸¹ Neither do they relate to fissionable and fashionable materials or the materials from which they are derived.⁸² The broadest exception is the last, actions necessary for the protection of essential security interests "taken in a time of war or other emergency in international relations.”⁸³ The United States and Canada are not at war, but share the longest undefended border in the world. Neither did any of the 9/11 terrorists enter through Canada using false identification. The former identification measures are sufficient and will continue to be sufficient for border and North American security. If reactionary measures are put into place, the exception will soon swallow the rule, the rule in contention here, trade liberalization, which the WHTI would directly retard. The measures of the WHTI may relate to customs enforcement, but are inconsistent with the provisions of these agreements because of the resulting limitation on trade liberalization⁸⁴. The likely goal of the WHTI- to make the U.S.-Canada border more difficult to cross for would-be terrorists or criminals-⁸⁵ will primarily serve to impede the free flow of trade and people across the shared border.

⁷⁹ Canadian Council of Chief Executives: Reinventing Borders, <http://64.26.159.96/en/north/reinventing.php>.

⁸⁰ Dunniela Kaufman, *Does Security Trump Trade?* 13 L. & Bus. Rev. Am. 619, 633-34 (2007).

⁸¹ GATS. *supra* note 91, Part II. Article XIV *bis*. Sub. (b)(i).

⁸² *Id.* at Sub. (b)(ii).

⁸³ *Id.* at Sub. (b)(iii).

⁸⁴ General Agreement on Tariffs and Trade 1994, April 15, 1994, 33 I.L.M. 1154, art. XX [hereinafter GATT].

⁸⁵ *Id.*

ii. The WHTI is not authorized the general exception to the NAFTA, GATT, and GATS

Language in both GATT and GATS provides that measures adopted and enforced by a contracting party are not to be applied in a manner which would "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."⁸⁶ Further, these measures cannot be "a disguised restriction on trade."⁸⁷ Yet, this is the exact effect of the WHTI. Canadians, particularly those communities along the border, will suffer a severe restriction on trade as the vast majority of American citizens who live along the border without a passport will be deterred from taking a short drive into Canada.

Further, the exception of discriminatory measures necessary "to protect public morals or to maintain public order"⁸⁸ is only to be "invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."⁸⁹ A secure border is a secure North America; however, public order is maintained without the implementation of a passport requirement. The threat of those who would exploit the Canada-U.S. border is genuine, but the prior forms of acceptable and widely held identification, such as driver's licenses and birth certificates, has done and will continue to do the job of securing the shared border without limiting the openness of trade and the free-flow of persons.

III. THE ESTABLISHMENT OF AQI USER FEES BY THE UNITED STATES AGAINST CANADA IS CONTRARY TO SEVERAL INTERNATIONAL AGREEMENTS AND VIOLATES INTERNATIONAL LAW.

A. The AQI violates the obligations of the U.S. under NAFTA Art. 310 and Arts. I and VIII of GATT.

i. The AQI is a custom user fee of the type established in Annex 310.1 of the NAFTA and Article 403 of the Canada-U.S. Free Trade Agreement, and thus is contrary to NAFTA Article 310.

⁸⁶ GATT. *Supra* note 101, art. XX.

⁸⁷ *Id.*

⁸⁸ GATS. *supra* note 91, Part II Art. XIV. Para. (b).

⁸⁹ *Id.*

Chapter 3 of NAFTA is one of the agreement's cornerstone provisions on trade in goods.⁹⁰ Article 310(1) of Chapter 3 is a prohibition on custom user fees. Annex 310.1, critical to the understanding of the workings of Article 310,⁹¹ determines the type of custom user fees prohibited by Article 310.⁹² Annex 310.1 requires the U.S. not to increase merchandise user fees and to eliminate these fees in accordance with schedules contained in the Canada-U.S. Free Trade Agreement ("CFTA").⁹³ Article 401 of CFTA prohibits all custom user fees, but reserves the right of the U.S. to raise *existing* custom user fees subject to certain exemptions.⁹⁴ Thus, the U.S. is required to reduce and eliminate all custom user fees, except those permitted by Annex 310.1, which in turn prohibits any custom user fees by reference to Article 403 of the CFTA.

The AQI is a custom user fee.⁹⁵ The AQI applies a user fee to, "commercial vehicles, commercial aircraft, and international air passengers entering the U.S. from Canada".⁹⁶ The ICJ, in looking at the language of the AQI and giving ordinary meaning to the terms, may find the AQI represents a custom user fee.⁹⁷ Article 310 of NAFTA prohibits customs user fees of the type established in Annex 310.1.⁹⁸ Both NAFTA and the CFTA prohibit custom user fees and call for their eventual elimination between the U. S. and Canada.⁹⁹ The language of either treaty is clear, evincing the intent to eliminate customs user fees among treaty members.

⁹⁰ NAFTA: Law and Business Review of the Americas (find cite on Hein Online) pg. 92 (Spring 1995)

⁹¹ NAFTA: Law and Business Review of the Americas (find cite on Hein Online) pg. 92 (Spring 1995)

⁹² NAFTA, Article 310(1); Annex 310.1

⁹³ NAFTA, Annex 310.1(1), Canada- U.S. Free Trade Agreement.

⁹⁴ Canada-U.S. Free Trade Agreement Article 401

⁹⁵ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320 (August 25, 2006)

⁹⁶ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320 (August 25, 2006)

⁹⁷ Statute of the International Court of Justice, Vienna Convention on the Law of Treaties, Article 31(1).

⁹⁸ NAFTA, Article 310, Annex 310.1

⁹⁹ NAFTA, Article 310, Canada-U.S. Free Trade Agreement

The term “custom user fee” in NAFTA Article 310 and the CFTA Article 403, and the use of the term “merchandise processing fee” in Annex 310.1 contains some ambiguity.¹⁰⁰ However, Articles 310 and Annex 310.1 of NAFTA, and Article 403 of the CFTA do not contain unique definitions sections. The ICJ may thus interpret Annex 310.1 to address the same customs user fees discussed in Article 310 and Article 403 of CFTA.¹⁰¹ There is no evidence the parties intended to give merchandise processing fee a unique meaning, where other provisions specifically define terms.¹⁰² Therefore, the action of the U.S. in the application of the AQI violates NAFTA Article 310 as a type of prohibited customs user fee.

ii. The AQI is contrary to both Articles I and VIII of GATS.

The AQI fails to comply with either Arts. I or VIII of GATS. In looking at the language of both the AQI and GATT, the AQI fails to comply with the ordinary meaning given to the terms of the treaty.¹⁰³

Article I of GATT requires most favored nation treatment of all parties to the treaty, namely, no one country should enjoy a privilege or exception regarding imports and exports another country does not enjoy, subject to certain conditions.¹⁰⁴ The exceptions include preferences falling within specified levels and already in force between neighboring sovereigns.¹⁰⁵ Because Article I (2) and (4) are joined by a conjunctive “and”, the ICJ may infer that both Article I (2) and (4) operate together.¹⁰⁶ Because the U.S. has not created a preference

¹⁰⁰ NAFTA Article 310, CFTA Article 403, NAFTA Annex 310.1

¹⁰¹ NAFTA, Article 310, Annex 310.1(1), Canada-U.S. Free Trade Agreement Article 403

¹⁰² NAFTA, Annex 311 (example of where terms are specifically defined)

¹⁰³ Statute of the International Court of Justice, Article 38 (1); Vienna Convention on the Law of Treaties Article 31(1). Duke L. J. 1277, 1281 (April 2003)

¹⁰⁴ GATT, Article 1(1), (2) and (4).

¹⁰⁵ GATT, Article 1(2) and (4).

¹⁰⁶ GATT, Article 1(2) and (4), Vienna Convention on the Law of Treaties Article 31(1).

of the kind allowed in Paragraph (2), Paragraph (4) does not apply. Accordingly, the language of Article I (1) will determine whether the U. S. has complied with Article I of GATT.¹⁰⁷

Article I (1) provides that, “any advantage, favo[u]r, privilege or immunity granted by any contracting party to any product ... shall be accorded immediately and unconditionally to the like product originating in or destined for territories of all other contracting parties.”¹⁰⁸ The U.S. had previously granted an exception to Canada with respect to an AQI on fruits and vegetables.¹⁰⁹ In removing the exception, the U. S. partially complies with the requirements of GATT Article I (1).¹¹⁰ The AQI also applies to all commercial vessels, trucks, railroad cars, and international air passengers entering the U.S. from Canada, regardless of the cargo.¹¹¹ The additional charges do not comport with the specific language of Article I (1) in providing equal treatment for *any product* entering into the U.S. from Canada.¹¹² While the U.S. has equalized its treatment of Canada with respect to an AQI on fruits and vegetables, the U.S. has exceeded its mandate under Article I (1).¹¹³ Thus, the AQI violates Article I (1) of GATT.

The context of GATT further determines that the U.S. is violating its international obligations.¹¹⁴ Context is defined by the Vienna Convention to include the preamble and annexes used to aid in good faith interpretation.¹¹⁵ The U.S. justifies the AQI as a means of recovering costs associated with border inspection. This reasoning, however, fails to comply with the

¹⁰⁷ GATT, Article 1(1), (2) and (4), Vienna Convention on the Law of Treaties Article 31(1), Statute of the International Court of Justice Article 38

¹⁰⁸ GATT Article 1(1).

¹⁰⁹ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320 (August 25, 2006)

¹¹⁰ GATT, Article I, para. 1.

¹¹¹ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 615 50323 (August 25, 2006)

¹¹² GATT Article I, para. 1

¹¹³ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50323 (August 25, 2006); GATT Article I, para 1.

¹¹⁴ Vienna Convention on the Law of Treaties, Article 31(1), (2) , Statute of the International Court of Justice, Article 38

¹¹⁵ Vienna Convention on the Law of Treaties, Article 31(2)

Preamble to GATT, which characterizes the aims of the agreement as a reduction in tariffs and other barriers to trade.¹¹⁶ The AQI is a trade barrier imposing a general customs user fee discordant with the Preamble to GATT. As such, the ICJ may find that the AQI as applied violated Art. I of GATT, as understood in the context of the Preamble.¹¹⁷

The AQI also violates Article VIII of GATT.¹¹⁸ Article VIII applies to fees and charges, including those related to quarantine, imposed by governments in connection with the export and import of goods.¹¹⁹ Article VIII (1) mandates that charges related to the export of goods, “shall be limited in amount to the approximate cost of services rendered.”¹²⁰ In order to comply with GATT, the AQI must approximate the cost of the services rendered for inspections and quarantine, and not represent, “an indirect protection to domestic products, or a taxation of imports or exports for fiscal purposes.”¹²¹ While the AQI is not levied as an indirect protection to domestic products,¹²² the AQI represents a “taxation for fiscal purposes.” The AQI, therefore, violates Article VIII (1)(a) because the fees generated by the AQI are not approximate to the services rendered.¹²³

Expected revenue from all user fees collected from Canada under the AQI for the 2007 fiscal year is approximately \$78 million USD.¹²⁴ However, the U. S. estimates total costs for both inspection and collection of user fees is approximately \$75 million USD.¹²⁵ While the AQI posits one of its purposes is to, “*recover* fees associated with the collection of AQI user fees and

¹¹⁶ GATT, Preamble

¹¹⁷ GATT, Preamble, Article 1(1).

¹¹⁸ GATT, Article VIII

¹¹⁹ GATT, Article VIII, para. 4(h).

¹²⁰ GATT, Article VIII, para. 1(a).

¹²¹ GATT, Article VIII para 1(a).

¹²² GATT, Article VIII, para 1(a).

¹²³ GATT, Article VIII, para 1(a).

¹²⁴ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50326 (August 25, 2006)

¹²⁵ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50327 (August 25, 2006);

increased border security,¹²⁶ a discrepancy of \$3 million USD is significant. The Canadian Council of Chief Executives in an open letter to the U.S. expressed concern regarding the AQI, and stated the measure, “reflects a heavy handed and disruptive approach to border management, [and] is disproportionate to the associated risks, and imposes unnecessary economic costs.”¹²⁷ The U.S. is not only covering the costs of the AQI program, but also is *profiting* as a result of the AQI. This fee, is not approximate to the cost of services rendered as classified by the U.S.¹²⁸ Accordingly, the AQI fails under Article VIII of GATT.¹²⁹

B. The AQI violates the general and national security exceptions of NAFTA, GATT and GATS.

NAFTA, GATT, and GATS contain exceptions excusing non-compliant performance in the narrowest of circumstances.¹³⁰ The ambiguous, general language of each lends to the inference each party may define the scope the exception.¹³¹ A party, however, intending to breach these treaties and utilize an exception must first meet a threshold issue: whether the actions taken would not, “[...] constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade.”¹³² The ICJ may find the AQI meets this threshold test for the use of the exceptions to NAFTA, GATT and GATS because the AQI applies to all nations, including Canada.¹³³ However, the AQI not justified under any exception to these agreements despite language tending towards auto-interpretation.

¹²⁶ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50327 (August 25, 2006);

¹²⁷ www.eugenemeehan.com/lawletters/uslawletters_pdfs/dec0106.asp

¹²⁸ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50323 (August 25, 2006); GATT Article VIII, 1 para. a

¹²⁹ GATT, Article I and Article VIII.

¹³⁰ Peter Lindsay, The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?, 52 Duke L. J 1277 (April 2003); Dapo Akande, Scope Williams, International Adjudication on National Security Issues: What Role for the WTO?, 43 Va. J. Int'l L. 365, 367 (Winter 2003)

¹³¹ 52 Duke L.J. 1277, 1282(April 2003)

¹³² NAFTA Article 2101, GATT Article XX, and GATS Article XIV.

¹³³ NAFTA Article 2101, GATT Article XX, and GATS Article XIV. Cite to AQI (applies to all)

i. The AQI violates the General Exceptions to GATT, GATS and NAFTA.

The AQI is not justified under a general exception to protect human, animal, or plant health.¹³⁴ The general exception under GATS Article XVI is similar to GATT Article XX, allowing measures necessary to protect health of human, animal, or plant life to supersede any obligations under GATS or GATT. However, the AQI is, at bottom, an economic rule, designed to recover costs and not to protect the health of plant and animal life. As such, because the AQI is an economic measure and other measures protect the health of human and plant life, the AQI is not justified under the general exceptions to GATT or GATS.

Article 2101 of NAFTA incorporates Article XX of GATT by reference. Because the AQI does not fulfill the requirements of Article XX of GATT, the AQI does not fulfill Article 2101 (1) of NAFTA. The AQI is neither related to nor protects human, animal, or plant life. The AQI is a purely economic measure designed to compensate the U.S. for other measures it takes to secure plant, animal and human life. It does not qualify under any general exceptions found in GATT, GATS, or NAFTA.

ii. The AQI is not justified under the National Security Exemptions of GATT, GATS, or NAFTA.

The AQI is not justified under the national security exceptions of NAFTA Article 2102, GATT Article XXI, or GATS Article XVI (*bis*).¹³⁵ The language of each provision is similar, excusing actions in derogation of duties under each agreement in certain circumstances to protect “essential security interests”.¹³⁶ The grant of authority under this exception is potentially broad, as critical terms are not specifically defined.¹³⁷ The ICJ must determine whether an economic

¹³⁴ NAFTA Article 2101, GATT Article XX, and GATS Article XIV.

¹³⁵ GATT Article XXI, GATS Article XVI, NAFTA Article 2102

¹³⁶ GATT Article XXI, GATS Article XVI, NAFTA Article 2102, Duke L.J. 1277, 1278 (April 2003)

¹³⁷ 52 Duke L.J. 1277, 1278 (April 2003)

measure is justified by a national security exception when only passing reference to the risk of terrorism is included in the language of the AQI itself.¹³⁸

September 11, 2001 alerted the world, and especially the U.S., to the potential vulnerability of nations to future terrorist attacks. Safety is a legitimate concern for any sovereign nation. However, a nation may not justify an economic measure designed to collect fees to recover expenses as necessary to protect its essential security interests. There are other regulations in place protecting the U.S.'s security interests. Further, there must be recognizable limits to the reach of the U.S.'s war on terror. Publicists and the ICJ have advocated the auto-interpretive nature of the national security exception as limited. Specifically, that WTO members may define what is necessary to protect security interests, but times of war or other emergencies are not subject to auto interpretation.¹³⁹ The Canadian government has stated it currently does not, and never has been, a national security threat to the U.S.¹⁴⁰ In spite of this, the Canadian government has cooperated to increase border security at a cost of over \$1 billion USD at the insistence of the U.S.¹⁴¹ These heightened security requirements and "Thick Border Initiatives"¹⁴² that the U.S. seeks to impose cannot be at the expense of the rights of sovereign nations to engage in trade.¹⁴³ Freedom of trade is the underlying principle behind NAFTA, GATS and GATT. The self-defining nature of the national security exception cannot swallow agreements liberalizing trade.¹⁴⁴ The AQI serves not to effectuate protection in the face of a legitimate security concern, but is an economic measure that cannot be justified under a national

¹³⁸ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 165, 50320, 165 50322 (August 25, 2006)

¹³⁹ 52 Duke L.J. 1277, 1287 (April 2003)

¹⁴⁰ Joint Statement of the Canadian Prime Minister and the President of the United States, September 11, 2007

¹⁴¹ Joint Statement of the Canadian Prime Minister and President of the United States, September 11, 2007

¹⁴² Joint Statement of the United States and Canada, September 11, 2007

¹⁴³ 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, *Yale J. Int'l L.* 413, 420

¹⁴⁴ 52 Duke L.J. 1277, 1295 (April 2003)

security exception. No legitimate reason exists to justify the AQI under the national security exceptions to NAFTA, GATT, or GATS.

IV. CANADA'S FUEL EXPORT CHARGE IS CONSISTENT WITH THE CONCEPTS OF FREE TRADE AND NATIONAL SOVEREIGNTY FOUND IN NAFTA AND GATT

A. State sovereignty is the bedrock principle of treaties between the U.S. and Canada.

Principles of state sovereignty are common in international law¹⁴⁵ and in the various treaties signed between the U.S. and Canada.¹⁴⁶ Although the U.S. and Canada have enjoyed a prosperous and mutually beneficial trade relationship,¹⁴⁷ public officials in both countries have insisted that exceptions be placed in any signed agreement so member countries can operate in their own best interest. Such sovereignty exceptions are found in NAFTA and GATT.

i. The Fuel Export Charge is consistent with the ordinary meaning of NAFTA Art. 314 and 604 as well as the free trade and national security objectives of the articles

Art. 314 is violated when a NAFTA signer imposes an export tax on goods for domestic consumption and does not apply the tariff to all parties to NAFTA. NAFTA Art. 604 applies the same restriction to petrochemical goods. Art. 314 was included in NAFTA to promote free and equitable trade between all NAFTA members. Further, the special exception for oil in Art. 604 was included because of the strategic importance in a country's access to petroleum.

At present, the pipelines that carry refined and unrefined oil from Canada to the U.S. do not extend to Mexico.¹⁴⁸ However, the oil sent through the pipeline could be placed on tanker ships and sent elsewhere. As some of the oil exported to the U.S. must be refined before it can be used or later exported on tanker ships, the pipeline oil might or might not be purchased by

¹⁴⁵ Charter of the United Nations Article 2(1).

¹⁴⁶ North American Free Trade Agreement; General Agreement on Tariffs and Trade.

¹⁴⁷ Government of Canada, Canadian Trade Statistics Table, <http://www40.statcan.ca/101/cst01/gblec02a.htm>.

¹⁴⁸ Enbridge Pipeline Website <http://library.enbridge.com/users/folder.asp?FolderID=1667>.

consumers within the U.S.. Using a plain meaning analysis, Art. 314 and 604 do not apply in this case because the pipeline oil is not imported to the US for domestic consumption.

ii. The Fuel Export Charge satisfies the NAFTA access requirements in Articles 315 and 605.

NAFTA Arts. 315 and 605 require parties to NAFTA maintain the proportion available to the other NAFTA members of the total exports of that product. Additionally, Arts. 315 and 605 prohibit charging a higher price for an export than that charged for the same good domestically.

Here, the Fuel Export Charge does not restrict the amount of oil available to the U.S.. The same amount of petroleum will continue to be available despite implementing the Fuel Export Charge. The U.S. might argue the new charge will cause less oil to be purchased. However, even if this were the case, Arts. 315 and 605 are satisfied because the same proportion of Canada's total exported oil will be available to the U.S..

Additionally, the Fuel Export Charge will not unfairly charge those in the U.S. at a price higher than Canadians pay domestically. Funds raised from the US through the Fuel Export Charge will be used to finance border security measures. However, Canadian citizens also pay taxes on gasoline, some of which are used to finance the remaining Canadian national security measures. Petroleum sales in Canada are charged excise taxes by the national government at 10 cents per liter and by the provinces anywhere from 6.2 cents to 21 cents per liter.¹⁴⁹ Additionally, Canadian consumers pay a 6-percent sales tax, a markup to the gas retailer, and the expense for refining the oil, all of which is unlikely to be included in oil exported through the pipeline.¹⁵⁰ There is no evidence, therefore, that the Fuel Export Charge will cause oil to be sold at a price higher than Canadian gas that is sold to Canadian consumers. As Canada has not unfairly limited U.S. access to Canadian oil, NAFTA Arts. 315 and 605 are satisfied.

¹⁴⁹ Government of Canada, Oil and Gas Prices, Taxes and Consumers, www.fin.gc.ca/toce/2006/gas_tax-e.html.

¹⁵⁰ *Id.*

iii. The Fuel Export Charge is consistent with regulations placed on countries recognizing a Most Favored Nation status, as listed in GATT Article I

The Most-Favored-Nation (“MFN”) treatment addressed in GATT Art. I requires any advantage given to a certain country to be extended to all other countries. As the U.S. and Canada have mutually extended MFN status, Canada’s pipeline exports of oil must be taxed equally, regardless of the country of destination. This is the case here. Regardless of whether oil pumped through the Canadian pipeline is headed to an American consumer or placed on a tanker and transported across the Atlantic Ocean, a Fuel Export Charge will be assessed. The U.S. will only pay a disproportionate amount of the Fuel Export Charge because the U.S. consumes more Canadian oil than any other country.¹⁵¹

Additionally, the U.S. could remove its MFN treatment toward Canada if it viewed the Fuel Export Charge as a violation of GATT Art. I. This would be an internationally accepted recourse for such a viewed violation. The U.S., however, is so dependent on Canadian natural resources that removing MFN status would detrimentally impact the U.S. economy. Instead, the U.S. is inequitably attempting to invoke GATT Art. I before the ICJ to do away with Canada’s Fuel Export Tax while also maintaining favorable treatment in other areas of trade.

iv. GATT Article VIII is not impeded by the Fuel Service Charge because the revenue will be reasonably raised to fund a specific border security project

Art. VIII of GATT prohibits export charges that “represent an indirect protection to domestic products” or taxation for “fiscal purposes.”¹⁵² Recognizing a state’s sovereignty to impose export charges, Article VIII merely sets a limit on such charges to the “appropriate cost of services rendered.”¹⁵³ The ordinary meaning of the language used in Article VIII restricts

¹⁵¹ Government of the United States, Energy Information Administration, <http://www.eia.doe.gov/pub/international/iealf/table18.xls>.

¹⁵² GATT Article VIII(1).

¹⁵³ GATT Article VIII(1).

tariffs implemented without a target project to be placed in a general fund for “fiscal purposes.” Additionally, Art. VIII prohibits an unreasonably excessive tax to build the target project.

The Fuel Export Charge is consistent with Art. VIII because the tariff is not being used to raise money for a general fund, but used for specific improvements in Canadian border security. Both the U.S. and Canada have acknowledged the importance of border security,¹⁵⁴ and funds raised through the Fuel Export Charge will be exclusively diverted to border security.¹⁵⁵ Additionally, there is no indication from the facts provided that the Fuel Export Charge is excessive or that the tariff will continue after the border security goals are met. Because money from the charge will not be raised for fiscal purposes and there has been no evidence that the tax is excessive, the Fuel Export Charge is consistent with GATT Art. VIII.

B. Exceptions placed in NAFTA and GATT to ensure state sovereignty permit Canada to implement the Fuel Export Tax

i. The Fuel Service Charge is consistent with the general exceptions in NAFTA and GATT

NAFTA Art. 2101 and GATT Art. XX forbid the implementation of trade regulations that, as applied, would “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”¹⁵⁶ The ordinary meaning of arbitrary or unjustifiable discrimination involves the treatment of like countries in different ways due to an indefensible, and often concealed, bias or disfavor. Here, the Fuel Export Charge would apply to any country receiving oil that is exported through Canadian pipeline. Therefore, if Canadian pipelines were to connect to any countries other than the U.S., or if oil sent through the pipelines were to be put on tankers and shipped to other countries, the export fee would apply regardless of the oil’s destination. Concededly, the U.S. would consume the vast majority of the pipeline

¹⁵⁴ 2007 Montebello Joint Statement.

¹⁵⁵ Statement of Prime Minister Harper.

¹⁵⁶ NAFTA Article 2101(2); GATT Article XX.

petroleum. However, charging U.S. companies and consumers a fee for Canadian natural resources shipped through Canadian pipeline is not taxation that reaches the level of arbitrary or unjustified discrimination. Rather, the U.S., as a beneficiary of Canada's resources and infrastructure investment, can reasonably be expected to pay an export fee. This is particularly true when that fee is assessed with the specific purpose of continuing to improve Canadian infrastructure along the Canada/US border.¹⁵⁷

Art. 2101 continues by saying nothing in Art. 314 and 315 shall be used to prevent compliance "with laws or regulations" of the member country. Article 2101 is a general exception provision of NAFTA because it prioritizes state sovereignty over free trade in circumstances where a nation must act in its own interest. By taking part in the 2007 Montebello Joint Statement, Canada committed to the aims of the summit, including improvements in Canadian border security.¹⁵⁸ The Fuel Export Charge will be implemented as a regulation imposed by the Canadian government with the purpose of funding Canada's commitment to improved border security. This kind of national commitment to a state interest and legislative action to fund the measure is a sovereign decision preserved in NAFTA Art. 2101.

ii. The border security improvements, funded by the Fuel Export Charge, invokes the national security exceptions in NAFTA and GATT.

NAFTA Art. 607, NAFTA Art. 2102, and GATT Article XXI provide exceptions to the regulations of their respective treaties in circumstances where national security concerns are at stake. NAFTA Art. 607(a) allows a party to restrict exports of an energy product to the extent necessary to "respond to a situation of armed conflict" involving that nation. In this case, Canada is taking action to improve border security as the US engages in an avowed "War on Terrorism." As Canada has been falsely accused as the means by which terrorist entered the US prior to the

¹⁵⁷ Statements of Canadian PM Harper.

¹⁵⁸ 2007 Montebello Joint Statement.

9-11 attacks,¹⁵⁹ Canada has taken quick action in order to avert armed conflict with the US, similar to the action taken on Iraq. The Fuel Export Charge is being instituted to fund improved Canadian border security to reassure the US, and prevent any further threats of armed conflict.

Art. 2102 of NAFTA and GATT Art. XXI protect the sovereign decision of a nation to protect itself from threats to its national security “taken in time of war or other emergency in international relations.”¹⁶⁰ Here, the Canadian government is acting in response to the impending threat from international terrorism, and a foreign relations crisis brought on by 9-11, which precipitated the U.S. invasions of Afghanistan and Iraq. International terrorism today continues to dictate U.S. international policy. The calls for improved border security stem from US/Canadian relations following the terrorist attacks of 9/11. Therefore, Canada’s imposition of the Fuel Export Charge to pay for the border improvements are a necessary measure concerning the international emergency with the U.S. concern about terrorism. A response to an international crisis, and the funding from the Fuel Export Charge, are sovereign actions taken by Canada and exempted for national security reasons under NAFTA Art. 2102 and GATT Art. XXI.

Conclusion

For these reasons, the Government of Canada respectfully request that this Honorable Court adjudge and declare:

- (1) that the US WHTI requirements are a violation of NAFTA and the WTO by unreasonably limiting the free flow of goods and people between Canada and the US.
- (2) that the US AQI fees unreasonably removes trade exceptions that are enjoyed by other countries, a violation of commitments found in NAFTA and the WTO.
- (3) that Canada’s Fuel Export Charge is consistent with NAFTA and GATT as concepts of national sovereignty permit export tariffs, especially when necessary to fund measures necessary for national security.

¹⁵⁹ *Compromis* p. 4.

¹⁶⁰ NAFTA Article 2102(b)(ii); GATT Article XXI(b)(iii).