

**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 # 2008-13A**

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TABLE OF AUTHORITIES

CASES

<i>Nuclear Tests (Austl. v. Fr.)</i> , 1974 I.C.J. 253, at 267, 269 (Dec. 20).....	3
<i>Legal Status of Eastern Greenland case (Den. v. Nor.)</i> , 1933 P.C.I.J. (ser A/B) No. 53 (Apr.5).....	3
<i>United States – Section 337 of the Tariff Act of 1930</i> , L/6439 (Jan. 16, 1989), GATT B.I.S.D. (36th Supp.) 345, at 392-93, 395-96 (1989).	13
Report of the Panel, <i>Norwegian Procurement of Toll Collection Equipment for the City of Trondheim</i> , GPR/DS2/R (May 13, 1992), GATT B.I.S.D. (40th Supp.) 319, at 336, (1992).....	13
<i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , L/5511 (June 19, 1992), GATT B.I.S.D. (69th Supp.) 206, at 282 (1993).....	13
<i>European Economic Community – Restrictions on Imports of Dessert Apples Complaint by Chile</i> , L/6491, (June 22, 1989), GATT B.I.S.D. (36th Supp.) 93, at 124 (1989).....	13
<i>Canada – Import Restrictions on Ice Cream and Yoghurt</i> , L/6568 (Dec, 5, 1989), GATT B.I.S.D. (36th Supp.) 68, at 84 (1989).....	13
<i>European Economic Community – Restrictions on Imports of Apples Complaint by the United States</i> , L/6513 (June 22, 1989), GATT B.I.S.D. (36th Supp.) 135, at 160 (1989).....	13
<i>Japan – Restrictions on Imports of Certain Agricultural Products</i> , L/6253 (March 2, 1988), GATT B.I.S.D. (35th Supp.) 163, at 226-27 (1988).....	13
<i>Canada – Administration of the Foreign Investment Review Act</i> , L/5504 (Feb. 7, 1984), GATT B.I.S.D. (30th Supp.) 140, at 164 (1984).....	13
Appellate Body Report, <i>Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R (Oct. 20, 2004).....	18
GATT Working Party, <i>Accession of the United Arab Republic</i> , at 22, L/3362 (Feb. 27, 1970)...	17
<i>Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes</i> , DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) 200. (1990).....	14, 15, 18
<i>United States-Restrictions on Imports of Tuna</i> , DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) 155 (1992) (not adopted).....	13, 15
<i>United States-Restrictions on Imports of Tuna</i> , DS29/R (June 16, 1994), 33 I.L.M. 839 (1994) (not adopted).....	15

TREATIES AND CONVENTIONS

- North Atlantic Free Trade Agreement, U.S.-Can.-Mex., art. 310, Dec. 17, 1992, 32 I.L.M. 289 (1993).....*passim*
- General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194.... *passim*
- Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493.....xiv, 10, 11, 12
- Statute of the International Court of Justice art. 38(1)(a), June 26, 1945, 59 Stat. 1055.....vii, 17
- Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (entered into force Jan. 27, 1980)..... 17
- Schengen Agreement on the gradual abolition of checks at their common borders and the convention applying the agreement, June 14, 1985, 30 I.L.M. 68 (1991).....5
- Joint Statement, 2007 Montebello North American Leaders' Summit (Aug. 21, 2007).....ix, 3

ARTICLES, BOOKS, AND TREATISES

- John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 Wash & Lee L. Rev. 1227, 1240 (1992)..... 13
- Phillip M. Nichols, *GATT Doctrine*, 36 Va. J. Int'l L. 379, 442 (1996).....13, 18
- Stephen A. Broome, Note, *Conflicting Obligations for Oil Exporting Nations?: Satisfying Membership Requirements of Both OPEC and the WTO*, 38 George Wash. Int'l L. Rev. 409, 428-30 (2006).....17
- GATT, Guide to GATT Law and Practice: Analytical Index, at 557, quoting from *Swedish footwear import tax case*), GATT Doc. L/4250, at 3 (6th ed. 1994).....17
- GATT, Guide to GATT Law and Practice: Analytical Index, at 554 (*quoting comments made by one of the drafters of the original charter*, EPCT/A/PV/33, at 20-21).....17
- Rossella Brevetti, *Canadian Ambassador Warns U.S. Travel Initiative Could Cool Trade*, 23 Int'l Trade Rep. 839 (BNA) (June 1, 2006).....7
- Rossella Brevetti, *Bush and Canada's Harper Discuss Security and Lumber Feud*, 8 Int'l Trade Rep. 1070 (BNA) (July 13, 2006).....6, 7
- Peter Lindsay, Note, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure*, 52 Duke L. J. 1277, (2003).....17

Friedl Weiss and Frank Woolridge, Free Movement of Persons within the European Community 29, Kluwer Law International (2002).....5, 8

SM Osman Rahman & Stephen Devadoss, *Economics of the US-Canada Softwood Lumber Dispute: A Historical Perspective*, The Estey Ctr. J. of Int'l L. & Trade Pol'y Vol. 3 No. 1 29, at 30 (2002).....x, 2

SECONDARY MATERIALS

APHIS Factsheet, Unite States Department of Agriculture, Animal and Plant Health Inspection Services, available at http://www.aphis.usda.gov/publications/plant_health/content/printable_version/faq_canadian_user_fees.pdf.....xiii, 9

Agricultural Inspection and AQI User Fees Along the U.S. /Canada Border, 71 Fed. Reg. 50,321 (Aug. 25, 2006).....*passim*

19 U.S.C. § 58c(a)(9)(A) (1978).....8

Legislative Summary Bill C-24: Softwood Lumber Products Export Charge Act, Elizabeth Kuruvila, Law & Government Division (Oct. 31 2006)(*revised* Sept. 25, 2007).....x, 2, 3

Food Agriculture Conservation and Trade Act of 1990 (FACTA), Pub. L. No. 101-624, 104 Stat. 3359 (1990).....9, 10

The EU at a glance: Freedom, Security and Justice, available at http://europa.eu/abc/12lessons/lesson_10/index_en.htm (last visited Jan. 21, 2008).....5

Department of Homeland Security, 71 Fed. Reg. 68,412 (Nov. 24, 2006).....xi

Department of Homeland Security, 72 Fed. Reg. 74,172, No. 249 (Dec. 31, 2007).....xii, 7

Department of Homeland Security, Fact Sheet: Strengthening Border Security and Facilitating Entry into the United States, available at http://www.dhs.gov/xnews/releases/pr_1182351923729.shtm (last visited Feb. 16 2008)...*passim*

Energy Information Administration, available at <http://tonto.eia.doe.gov/dnav/pet/hist/mgfimusca1A.htm> (last visited Jan. 20, 2008).....xv, 3

United States Department of State, Passports, available at http://travel.state.gov/passport/passport_1738.html (last visited Jan. 18, 2008).....xii

United States Department of State, U.S. Passport Card, available at http://travel.state.gov/passport/ppt_card/ppt_card_3926.html (last visited Jan. 18, 2008).....xiii, 9

Foreign Affairs and International Trade Canada, Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America – 2006, available at <http://dfait-maeci.gc.ca/eicb/softwood/SLA-main-en.asp> (last visited Feb. 7, 2008).....x

United States Department of State, Western Hemisphere Travel Initiative available at http://travel.state.gov/travel/cbpmc/cbpmc_2223.html (last visited Jan. 18, 2008).....xi, xii, 6

U.S. Customs and Border Protection, Trusted Traveler programs
http://www.cbp.gov/xp/cgov/travel/trusted_traveler/nexus_prog/nexus.xml (last visited Feb 16, 2008).....xii

Department of Homeland Security, WHTI Land and Sea Notice of Proposed Rulemaking
 Published http://www.dhs.gov/xnews/releases/pr_1182350422171.shtm (last visited Feb. 16, 2008).....xi, 7

CBC News, *North American leaders end summit with pact on import safety*,
<http://www.cbc.cs/canada/story/2007/08/21/summit-talks.html> (last visited Feb. 13, 2008).....viii, vix, 6

STATEMENT OF JURISDICTION

The Parties to this Dispute, Canada and the United States, come before this Court pursuant to Articles 40(1) and 36(1) of the Statute of the International Court of Justice.¹ The Parties have met all the requirements of those statutes and have further agreed to allow this Court to resolve the issue of compatibility of sanctions within the GATT/WTO regime.

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

STATEMENT OF FACTS

Mutual Agreements

On August 21, 2007 the North American Leaders' Summit was held in Montebello, Quebec, Canada with Canada's Prime Minister Harper, U.S.'s President Bush, and Mexico's President Calderón in attendance to discuss security and trade issues.² As part of the joint statement the leaders asked that the ministers continue to seek input on the direction and policies regarding the increase in security, prosperity and the quality of life in North America.³ As a result of the Summit, a joint statement was issued focusing on five priority areas to work on in the coming year, in particular Safe Food and Products (SFP) and Smart and Secure Borders (SSB).⁴

Under the priority area of SFP the goal is to build on the current standards and practices with in the parties and work with outside parties to stop the import of unsafe goods.⁵ Prime Minister Stephen Harper stressed this at the press conference at the close of the summit when he stated "We agreed to work together on consumer protection. We have to identify and stop unsafe goods from entering our countries, especially those designed for our children."⁶ The leaders came up with two steps to improve upon current policies to meet the objectives of SFP. First, "strengthen existing mechanisms within the region and the exchange of information on import safety issues, with the objective of enhancing the safety of food and products before they

² CBC News, *North American leaders end summit with pact on import safety*, <http://www.cbc.ca/canada/story/2007/08/21/summit-talks.html> (last visited Feb. 13, 2008) [*hereinafter* Pact on Import Safety].

³ Joint Statement, 2007 Montebello North American Leaders' Summit (Aug. 21, 2007).

⁴ *Id.*

⁵ *Id.*

⁶ Pact on Import Safety, *supra* note 2.

enter the country.”⁷ Second, ensure the quality and safety of products by securing the supply chains with shared information on the best practices used by importing companies.⁸

Within the SSB priority area the leaders agree that the borders must be both efficient and secure in order to “enhance prosperity, security and quality of life in North America.”⁹ The leaders state the objective of SSB entails a more efficient border strategy to ensure a safer movement of goods, services, and people while minimizing security risks.¹⁰ To achieve the SSB objective, leaders plan to promote eight goals this year, two of which pertain to this case. First, to promote seamless border operations through new and innovative law enforcement models to protect our citizens from criminal and terrorist attacks.¹¹ The second, to expand and streamline the trusted traveler programs already in place, NEXUS, FAST, and SENTRI, and to further integrate programs into the infrastructure.¹²

On September 11, 2007 Canada and the U.S. issued a joint statement regarding plans involving a variety of “thick border” initiatives developed to fulfill the security-related action points of the Montebello Summit.¹³ These measures state in relevant part: 1) Canada will build screening facilities at least one kilometer from nineteen of the border crossings, 2) “Canada will erect ground-sensor towers along the Canada-U.S. border”, and 3) “Canada will install advanced radiological detection at all its ports.”¹⁴ The cost to Canada to implement these measures amounts to one billion dollars.¹⁵

⁷ Joint Statement, 2007 Montebello North American Leaders’ Summit (Aug. 21, 2007).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Compromis* at 4.

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 5.

On September 12, 2006 Canada and the United States signed the *Softwood Lumber Agreement (Softwood)* that entered into force on October 12, 2006 thereby ending twenty-four years of dispute.¹⁶ Softwood industries in Canada benefit from the regional policies regarding stumpage fees as a result Canadian softwood entering the U.S. market is far cheaper the U.S. counterpart.¹⁷ The *Softwood Agreement* describes a calculation for a charge on softwood exported from Canada when the price drops below an agreed upon floor of \$355.¹⁸

Measures adopted in the United States

Prior to the Montebello Summit, the U.S. Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 requiring the Department of State (DOS) and the Department of Homeland Security (DHS) to develop and implement a program to increase security when U.S. citizens and foreign nationals enter or leave the U.S.¹⁹ The Western Hemisphere Travel Initiative (WHTI) is the program that DOS and DHS developed to meet the requirement.²⁰

The WHTI is a measure regulating American citizens, and nonimmigrant aliens in the documentation they present when leaving or re-entering the U.S. from Canada, Mexico, or Bermuda.²¹ The initiative strengthens U.S. border security while facilitating entry for U.S. citizens and legitimate foreign visitors by providing standardized documentation that enables the

¹⁶ Foreign Affairs and International Trade Canada, *Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America – 2006*, <http://dfait-maeci.gc.ca/eicb/softwood/SLA-main-en.asp> (last visited February 7, 2008).

¹⁷ SM Osman Rahman & Stephen Devadoss, *Economics of the US-Canada Softwood Lumber Dispute: A Historical Perspective*, 3 *The Estey Centre Journal of International Law and Trade Policy* Volume 3 No. 1 p. 29, 30 (2002) [*hereinafter* SW History].

¹⁸ Legislative Summary Bill C-24: Softwood Lumber Products Export Charge Act, Elizabeth Kuruvila, Law & Government Division (Oct. 31 2006) (*revised* Sept. 25, 2007) [*hereinafter* SW Leg. Summary].

¹⁹ Department of Homeland Security, Fact Sheet: Strengthening Border Security and Facilitating Entry into the United States, http://www.dhs.gov/xnews/releases/pr_1182351923729.shtm (last visited Feb. 16 2008) [*hereinafter* DHS Fact Sheet].

²⁰ *Id.*

²¹ 71 Fed. Reg. 68,412 No. 226 (November 24, 2006)[*hereinafter* WHTI Air].

DHS to quickly and reliably identify travelers.²² There are two phases for implementation of the WHTI, first in air travel implementation, and then in the land and sea provisions.²³

Implementation for travel by air was published in the Federal Register on November 24, 2006 and required that beginning January 23, 2007 all U.S. citizens and non-resident aliens must present a valid passport when entering or leaving the U.S. from Canada, Bermuda or Mexico.²⁴ As a result of the record breaking applications at the passport office, an accommodation was made to those who had applied for passports but had not received them in time for travel because of longer processing times.²⁵ Passengers with proof of application with government issued I.D. and birth certificate were permitted until full implementation of the WHTI in September 30, 2007.²⁶ Since implementation of WHTI requirements for all air travel on January 23, 2007 compliance rates in excess of ninety-nine percent since implemented.²⁷

The second phase of implementation of the WHTI is the Land and Sea provisions which go into effect January 31, 2008.²⁸ The Land and Sea provisions require a passport, other WHTI approved document when traveling within the regions of Canada, Mexico and Bermuda by land or sea.²⁹ Currently, travelers in the regions under the WHTI are providing Customs and Border Protection Officers with over 8,000 different documents.³⁰ Canada has also expressed concern for the notification of the American people to the new protocol enacted by the U.S. so the public

²² Department of State, WHTI, http://travel.state.gov/travel/cbpmc/cbpmc_2223.html (last visited Jan. 18, 2008). [hereinafter DOS WHTI], *see also* DHS Fact Sheet, *supra* note 19.

²³ DHS Fact Sheet, *supra* note 19.

²⁴ WHTI Air, *supra*, note 21. *See also*, DHS Fact Sheet, *supra* note 19.

²⁵ DHS Fact Sheet, *supra* note 19.

²⁶ *Id.*

²⁷ Department of Homeland Security, WHTI Land and Sea Notice of Proposed Rulemaking Published http://www.dhs.gov/xnews/releases/pr_1182350422171.shtm (last visited Feb. 16, 2008) [*hereinafter* DHS website].

²⁸ DHS Fact Sheet, *supra* note 19.

²⁹ DOS WHTI, *supra* note 22.

³⁰ DHS Fact Sheet, *supra* note 19.

will know to apply for the passport or the passport card.³¹ The DOS and the DHS initiated a nation-wide PSA to educate the citizens of the U.S. about the WHTI³² resulting in an increase of applications for documentation over the past year.³³

Primary documentation required by the WHTI is a valid passport which may be obtained by filling out an application, birth certificate, get a photo taken, and take it to a passport processing facility. There are over 9,000 different locations in the U.S. to drop off your passport applications³⁴ and passports arrive in the mail within four to six weeks are applying.³⁵ The process maybe expedited to even two weeks if necessary.³⁶ In addition to a passport the WHTI allows for other valid trusted traveler program card such as the NEXUS, FAST, or SENTRI card, as well as the recently developed passport card.³⁷ All three established programs facilitate expedited travel along U.S. borders, NEXUS relates to the Canadian side of the border, SENTRI to the Mexico border, and FAST relates to both.³⁸ The passport card was designed to address the concerns by Canada and border communities fearing the regulations of the WHTI interfering with cross border travel.³⁹ U.S. citizens nationwide may obtain a passport card starting February

³¹ Department of Homeland Security 72 Fed. Reg. 74172, No. 249 (December 31, 2007)[*hereinafter* WHTI L & S].

³² *Id.*

³³ *Id.*

³⁴ U.S. Department of State, Passports, http://travel.state.gov/passport/get/processing/proccing_1740.html (Jan. 21, 2008).

³⁵ *Id.*

³⁶ *Id.*

³⁷ DHS Fact Sheet, *supra* note 19.

³⁸ U.S. Customs and Border Protection, Trusted Traveler programs http://www.cbp.gov/xp/cgov/travel/trusted_traveler/nexus_prog/nexus.xml (last visited Feb 16, 2008).

³⁹ U.S. Department of State, Passport Card http://travel.state.gov/passport/ppt_card/ppt_card_3926.html (last visited Jan. 21, 2008) [*hereinafter* DOS Passport Card].

1, 2008 and will be mailed out later that spring.⁴⁰ The passport card reduces fees by half the normal cost of a traditional passport.⁴¹

APHIS' AQI user fees are collected for both APHIS and the DHS's Customs and Border Protection (CBP) for services provided in connection with pre-clearance or the port-of-entry arrival of commercial vessels, trucks, loaded railroad cars, and aircraft, as well as international passengers entering the U.S. from a foreign destination.⁴² APHIS' AQI user fees have been applied on every other nation except for Canada; the U.S. originally exempted conveyances and passengers from Canada from those AQI fees at the time of implementation of the measures, because it was the understanding of the U.S. at the time that such conveyances and passengers posed little risk of introducing plant or animal pests or diseases into the U.S., and the U.S. did not need to routinely provide AQI services for them and, therefore, could not justify imposing user fees on them.⁴³ However, the recent inspections along the U.S.-Canadian border resulted in numerous interceptions of prohibited fruits, vegetables, and other products originating in regions other than Canada, posing a risk of introducing agricultural pests or diseases into the U.S., and the more extensive inspection procedures on the border and user fees to fund such inspections were deemed necessary to protect life and health of human, animal and plant in the U.S.⁴⁴ On August 25, 2006, the U.S. Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) announced its interim rule to impose agricultural quarantine

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² United States Department of Agriculture, Animal and Plant Health Inspection Services, APHIS Fact sheet, available at http://www.aphis.usda.gov/publications/plant_health/content/printable_version/faq_canadian_user_fees.pdf [*hereinafter* APHIS Factsheet].

⁴³ Agricultural Inspection and AQI User Fees Along the U.S. /Canada Boarder, 71 Fed. Reg. 50,321 (August 25, 2006) [*hereinafter* AQI User Fees Federal Register].

⁴⁴ *Id.*

and inspection (AQI) user fees on all commercial shipments entering the U.S. from Canada, resulting in removal of Canada's exemption from AQI user fees.⁴⁵

Under this interim rule, air passengers arriving in the U.S. from Canada began paying user fees of \$USD 5.00 per passenger and \$USD 70.50 per aircraft incorporated into the price of air tickets, regardless of (i) whether they were traveling with fruits or vegetables, or (ii) whether they were processed through customs and immigration at a Canadian airport.⁴⁶ Maritime vessels now pay \$USD 490.00 per entry into the U.S. from Canada irrespective of the cargo.⁴⁷ A user fee of \$7.75 was also imposed on each rail car and \$USD 10.75 (\$USD 5.50 for Customs and Border Protection and \$USD 5.25 for APHIS) on each truck moving from Canada to the U.S. as well.⁴⁸ Alternatively, an annual user fee for trucks could be paid in the amount of \$USD 205 (\$USD 100 for Customs and Border Protection and \$USD 105 for APHIS).⁴⁹

Although Canada's Department of Foreign Affairs and International Trade (DFAIT) communicated with its counterparts at DHS and the U.S. Trade Representative its opinion that the APHIS fees are customs user fees and contrary to NAFTA and GATT, the U.S. deemed such fees in perfect conformity with these agreements, and moreover, even if such fees violate particular Articles of these agreements, such measures taken by the U.S. are legal under sanitary

⁴⁵ *Compromis* at page 2.

⁴⁶ *Compromis*, at page 2; *see also* North Atlantic Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [*hereinafter* NAFTA]; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [*hereinafter* GATT]; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 493 [*hereinafter* SPS Agreement];

⁴⁷ *Compromis*, at page 2.

⁴⁸ *Id.*

⁴⁹ *Id.*

and phytosanitary agreement (SPS Agreement) and are also excused under the general and national security exceptions under both NAFTA and GATT.⁵⁰

Measures adopted in Canada

After the joint statement of the Montebello Summit but the same day as the announcement for joint statement regarding “thicker borders”, the office of the Prime Minister of Canada announced an “export tax of fuel transported by way of pipeline equal to \$CDN 25/barrel”.⁵¹ Prime Minister Harper stated, imposing the fuel export charge (FEC) is necessary because the security of North America depends on Canada playing its part by taking steps requested of them by the U.S.⁵² Canada wants to ensure “that those who benefit most from the actions being promised are the one’s paying for the benefits.”⁵³ Canada has stated that the oil producing provinces will not be harmed by the FEC “because a need for Canadian fuel still exists.”⁵⁴ In the last three years the U.S. imported 50,558 in 2004, 55,055 in 2005, and 16,907 thousands of barrels in 2006 from Canada.⁵⁵ These imports from Canada, up until recently, has equated to about one quarter of the total usage by the U.S.⁵⁶

On September 37, 2007 the U.S. filed a dispute with the International Court of Justice (ICJ) asserting the Fuel Export Charge was a violation of the NAFTA agreement.⁵⁷ In response, on October 23, 2007, Canada filed a dispute claiming the requirements under the WHTI and the

⁵⁰ *Id.*

⁵¹ *Compromis* at 5.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Energy Information Administration, <http://tonto.eia.doe.gov/dnav/pet/hist/mgfimusca1A.htm> (last visited Jan. 20, 2008) [*hereinafter* EIA].

⁵⁶ *Id.*

⁵⁷ *Compromis* at 5.

APHIS fee were in violation of NAFTA.⁵⁸ Both countries have agreed to concede jurisdiction to this court rather than the Dispute Settlement Body of the World Trade Organization, or NAFTA panels.⁵⁹

⁵⁸ *Id.*

⁵⁹ *Id.*

QUESTIONS PRESENTED

- 1) Does Canada's export tax on fuel transported by way of pipeline, which became effective on September 11, 2007, constitute a violation of NAFTA Articles 314, 315, 604, and 605 or GATT Articles I, VIII, and XI?
- 2) Does the DHS and DOS WHTI measure requiring a passport for all American and Canadian citizens eighteen and over violate NAFTA Chapters 12 and 16 or GATS?
- 3) Is the user fee under APHIS permissible under both the general exceptions under GATT Article XX(b) and Article 2101 of NAFTA as well as the SPS Agreement?
- 4) What is the scope of the National Security Exception under NAFTA Article 2102 and the GATT Article XXI and do the measures taken by the United States under the WHTI and APHIS or Canada's fuel export tax satisfy this exemption?

SUMMARY OF THE ARGUMENT

Canada's fuel tax directly violates NAFTA on its face and cannot be excused under GATT XX general exceptions because of the binding statement by Prime Minister Harper. The GATT XXI national security exception does not justify Canada's measure either because Canada fails to address sufficient nexus between the tax and its national security interest. Furthermore, the tax is retaliatory and discriminatory because it was designed to solely affect the U.S. consumer market as they are currently the only end users of the pipeline; this is buttressed further by Canada's reliance on the *Softwood* agreement, placing the cost of SSB on the country it feels benefits from the security measures.

On the other hand, measures taken by the U.S. represent legitimate solutions to the recent concerns regarding its border security and health and safety of its citizens. NAFTA's limited language supports the assertion that the right to travel contains a more lenient balance test for the regulation of people; the WHTI is a narrowly tailored *de minimis* measure designed to heighten the border security protection by increasing the efficiency of border checks. APHIS merely removes Canada's exemption on AQI user fees in order to protect health of human, animal and plant, which is a permissible measure recognized under GATT and NAFTA as well as under the SPS Agreement. Even if WHTI and APHIS are to be found in violation of GATT and NAFTA, these measures are justified under the national security exceptions provided by these agreements.

ARGUMENT

I. CANADA'S FUEL EXPORT TAX IS, ON ITS FACE, A VIOLATION OF NAFTA AND GATT WITH NO VIABLE EXEMPTIONS.

A. The fuel tax via pipeline violates articles 314 and 604 of the NAFTA agreement because it fails to treat international fuel the same as fuel destined for domestic consumption.

NAFTA came into effect in 1994 and dispensed with a majority of tariffs and other trade barriers between the U.S., Mexico, and Canada. NAFTA has incorporated adopted the principles from the GATT treaty, demonstrated throughout the text either by name or basic principles.⁶⁰ Article 314 of NAFTA addresses export measures on general goods and states in relevant part that no party may adopt a tax that is not applicable to all parties including those goods destined for domestic consumption.⁶¹ Article 604 presents the same limitations on fees but specifically addresses issues with energy and petrochemicals.⁶²

Here the fuel export tax affects all oil transported by way of pipeline. Canadians would never be end users and therefore not be affected domestically. Mexico currently has not requested fuel via pipeline and therefore the FEC affects only the U.S.⁶³ Treating domestic fuel differently from international fuel violates of NAFTA article 314, and more specifically, 604, because fuel pertains to a petrochemical good. Since the tax violates NAFTA Canada must justify the FEC under a general or national security exception.

Canada attempts to justify the FEC based on the *Softwood* agreement settling the twenty year dispute between Canada and the U.S.⁶⁴ *Softwood* encompasses the principal that the party benefiting from a measure must bear its costs. Softwood industries in Canada benefited from the regional policies regarding stumpage fees as a result Canadian softwood entering the U.S. market is far cheaper the U.S. counterpart.⁶⁵ The *Softwood* Agreement describes a calculation for an export charge on softwood from Canada when the price drops below an agreed upon floor of

⁶⁰ See NAFTA Article 101, *supra* note 46.

⁶¹ NAFTA art. 314, *supra* note 46.

⁶² NAFTA art. 604-605, *supra* note 46.

⁶³ Clarifications 3.

⁶⁴ *Compromis* at 5.

⁶⁵ SW History, *supra* note 17.

\$355.⁶⁶ *Softwood* should be seen as a one time only solution, contrary to established NAFTA rules, to an intractable dispute that has been brought before multiple tribunals, to no avail, over the past two decades. Canada cannot apply *Softwood* as precedent because it resulted from negotiations between the parties and Canada assented to pay according to the tariff scheme. Here there have been no negotiations regarding cost of the SSB, the U.S. has not consented, and this is the first time the dispute has reached a tribunal. Furthermore, the FEC can only be seen as a retaliatory measure because Canada chose a good that they knew the U.S. is dependant on, evidenced by the prior usage in the last decade totaling one fourth the U.S. total usage,⁶⁷ and a method currently only accessed by the U.S.⁶⁸

B.No general exception is available under GATT art. XX because Canada bound itself internationally by Prime Minister Harper’s statement.

Article 2102 of NAFTA incorporates GATT Article XX general exceptions, which allow for measures otherwise contrary to GATT providing, in particular part XX(g), it relates to the “conservation of exhaustible natural resources” when those measures combine with domestic regulations on consumption.⁶⁹ Canada is estopped from this argument because Canadian Prime Minister Harper’s Office made a statement declaring the purpose of the FEC is to fund the SSB project undertaken by the U.S. and Canada. The statement represents an unilateral declaration “given to the international community as a whole” that binds Canada as possessing legal effect.⁷⁰ Assuming Canada can surpass the equity bar, they still fail to meet the domestic regulations

⁶⁶ SW Leg. Summary, *supra* note 18.

⁶⁷ EIA, *supra* note 55.

⁶⁸ Clarifications 3.

⁶⁹ GATT art. XX(g), *supra* note 46, *see also* NAFTA art. 2101, *supra* note 46.

⁷⁰ *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, at 267, 269 (Dec. 20); *see also Legal Status of Eastern Greenland case (Den. v. Nor.)*, 1933 P.C.I.J. (ser A/B) No. 53 at 3 (Apr. 5).

component the FEC should be coupled with and the exemption is likely to be pre-empted by the *lex specialis* in NAFTA chapter 6 regarding petrochemical goods.

II. THE WHTI IS NOT A VIOLATION OF THE NAFTA AGREEMENT BECAUSE THE RIGHT TO TRAVEL DOES NOT EXIST AND IF, *ARGUENDO* A RIGHT DOES EXIST; THE RESTRICTIONS ARE *DE MINIMIS*.

A. The limited language and scope of NAFTA does not grant a broad right of travel to citizens and it lacks implementation to regulate broad travel rights.

1. The limited language of chapters 12 and 16 of NAFTA does not create a broad right to travel for citizens within its regions.

The NAFTA agreement mentions no general movement of people in general. NAFTA only discusses the temporary movement of business persons, and even then the objectives in articles 1201 and 1601 suggest there are other concerns to weigh against the movement. The limitations on the classification of people and the method of entry hardly support the grant of a right of citizens in general to freely move across the borders without restriction.

Chapter 12 of NAFTA encompasses the rules for the cross-border trade in services. While it prohibits quotas for travel across the border it also expressly states in Article 1201 (3)(a) that chapter 12 in no way creates an obligation on a party with respect to another party seeking access across the border for permanent employment or confer a right to the permanent employment.⁷¹ Article 1201 (3) suggests a limited and defined scope rather than a conferral of broad rights to travel in contrast the expressed right shown in the EU model.

Chapter 16 of NAFTA provides for specific, enumerated, and limited rights to a finite classification of temporary entry of business persons but with in article 1601 establishes considerations such as ensuring border security, protecting domestic labor, and permanent

⁷¹ NAFTA art. 1201 (3)(a), *supra* note 46.

employment in the territories.⁷² Under the general obligations of the NAFTA each party can enact measures relating to Article 1601 but must act in a way so to avoid unduly impairing or delaying trade in goods or services.⁷³ The limited language provided by NAFTA in chapters 12 and 16 suggests a more lenient test for people than the broad scope explicit in the language used in the chapters regarding taxes on goods.

2. No implementation exists in NAFTA to suggest a broad free movement of persons.

An example exists in the world where the free movement of persons is expressly granted, the case of the European Union (EU). In 1985 the then members of the EU, France, Germany, and the Benelux countries, developed and signed the Schengen Agreement regarding the gradual abolition of checks at their internal borders.⁷⁴ Expressed in this agreement was the principle that free movement of people within their borders regardless of their nationality would be a pillar of the EU.⁷⁵ In addition the Schengen Implementation Agreement (SIA) of 1990 states provided for uniform visa under which was later replaced by the uniform community visa.⁷⁶

Extensive measures relating to mutual cooperation with respect to police and judicial proceedings were imperative after the SIA and the removal of border controls to protect against

⁷² NAFTA art. 1601, *supra* note 46.

⁷³ NAFTA art. 1602, *supra* note 46.

⁷⁴ Schengen Agreement on the gradual abolition of checks at their common borders and the convention applying the agreement, June 14, 1985, 30 I.L.M. 68 (1991)[*hereinafter* Schengen Agreement].

⁷⁵ The EU at a glance: Freedom, Security and Justice.

http://europa.eu/abc/12lessons/lesson_10/index_en.htm (last visited Jan. 21, 2008)[*hereinafter* EU at a glance]; *see also* Friedl Weiss and Frank Woolridge, Free Movement of Persons within the European Community 35 Kluwer Law International (2002)[*hereinafter* Weiss]; Schengen Agreement, *supra* note 74.

⁷⁶ Weiss at 29, 35, *supra* note 75. *see also* Schengen Agreement, *supra* note 74.

terrorism, illegal immigration, organized crime, drugs, and human trafficking.⁷⁷ This is the necessary precautions for creating a right to the freedom of movement of people internally.

The United States, Canada, and Mexico have nothing like the measures, or implementation strategy for a right for people to move across the borders. If NAFTA's true goal eliminates the restriction on travel between the United States and Canada, it must be so expressed either in text or implementation rules similar to the EU. Canada cannot create a right where none exists. The measures in the WHTI are reasonable limitations on the limited rights of a finite class of people delineated under chapter 16. Since the NAFTA agreement does not expressly mention the right of all citizens of the member countries to enter and leave foreign nations it cannot be assumed a right to travel exists within NAFTA.

B. Arguendo, if some right of travel exists, the WHTI does not unduly impair or delay travel because the requirement of the documentation is de minimis.

The Western Hemisphere Travel Initiative (WHTI) represents a prudent and reasonable restriction of previous lenient travel policies between Canada and the U.S. The initiative strengthens U.S. border security while facilitating entry for U.S. citizens and legitimate foreign visitors by providing standardized documentation that enables the DHS to quickly and reliably identify a traveler.⁷⁸

Prime Minister of Canada, Harper, commented that both he and Bush agreed that implementation of the WHTI should not block tourism and trade.⁷⁹ President Bush informed the DHS that he would like for there to be a lot of flexibility and simplicity in the law with respect to

⁷⁷ EU at a glance, *supra* note 75; *see also* Weiss at 29, *supra* note 75.

⁷⁸ DOS WHTI, *supra* note 22.

⁷⁹ Rossella Brevetti, *Bush and Canada's Harper Discuss Security and Lumber Feud*, 8 Int'l Trade Rep. 1070 (BNA) (July 13, 2006)[*hereinafter* Security & Lumber]; *see also* Pact on Import Safety, *supra* note 2.

the documentation acceptable at the border.⁸⁰ Currently, travelers in the regions under the WHTI are providing Customs and Border Protection Officers with over 8,000 different documents.⁸¹ Canada's Ambassador to the U.S. appeared before a panel of the House International Relations subcommittee and stated that it is in neither country's interest to have congestion at the border.⁸² The WHTI reduces the number of approved documentation from 8,000 to less than 10 thereby allowing the Custom and Border officers to quickly identify travelers allowing for a more efficient border crossing. Both Bush and Harper delegated the task of agreeing on appropriate alternative documentation "as soon as possible".⁸³ The DHS and DOS answered the Presidents with the passport card that was designed to address the concerns by Canada fearing the measures of the WHTI interfering with cross border travel.⁸⁴ Limiting and standardizing documentation approved results in a more secure and efficient border, because the officers do not have to try to authenticate one of the 8,000 documents provided prior to WHTI.⁸⁵

Canada has also expressed concern for the notification of the American people to the new protocol enacted by the U.S. so the public will know to apply for the passport or the passport card.⁸⁶ The DOS and the DHS initiated a nation-wide PSA to educate the citizens of the U.S. about the WHTI⁸⁷ resulting in an increase of applications for documentation over the past year.⁸⁸

⁸⁰ *Id.*

⁸¹ DHS Fact Sheet, *supra* note 19.

⁸² Rossella Brevetti, *Canadian Ambassador Warns U.S. Travel Initiative Could Cool Trade*, 23 Int'l Trade Rep. 839 (BNA) (June 1, 2006).

⁸³ Security & Lumber, *supra* 79.

⁸⁴ DOS Passport Card, *supra* note 39.

⁸⁵ DHS Fact Sheet, *supra* note 19.

⁸⁶ WHTI L & S, *supra* note 31.

⁸⁷ *Id.*

⁸⁸ *Id.*

Since implementation of WHTI requirements for all air travel on January 23, 2007 compliance rates in excess of ninety-nine percent since implemented.⁸⁹

The U.S. has made every effort to make sure the WHTI does not unduly impair or delay travel. Even in the EU, where the freedom of movement exists, a uniform visa and card for the community exists.⁹⁰ Passports are the norm in all countries in the world when traveling out of the country, the western hemisphere until recently has just been exempted from this requirement by the U.S.

III. The AQI user fees implemented by the U.S. APHIS do not violate Article 310 of NAFTA.

The imposition of AQI user fees on Canada through APHIS did not violate Article 310 of NAFTA, because the measure taken by APHIS merely removed Canada's exemption privilege under APHIS and such fees are recognized as legal fees under the SPS Agreement.

Under Article 310, "no Party may adopt any customs user fee of the type referred to in Annex 310.1 for originating goods."⁹¹ Annex 310.1 of NAFTA states that "the U.S. shall not increase its merchandise processing fee and shall eliminate such fee according to the schedule set out in Article 403 of the *Canada - U.S. Free Trade Agreement*."⁹² Merchandise processing fees as indicated in Annex 310.1 may be defined as "fees the Secretary of the Treasury charges and collects for the processing of merchandise that is formally entered or released into the U.S.," and they are assessed as a percentage of the value of the imported merchandise.⁹³

A. Imposition of AQI user fees on Canada removing Canada's exemption privilege did not result in imposition of new custom user fee.

⁸⁹ DHS website, *supra* note 27.

⁹⁰ Weiss at 29, *supra* note 75.

⁹¹ NAFTA, *supra* note 46, art. 310.

⁹² NAFTA, *supra* note 46, annex 310.1.

⁹³ See 19 U.S.C. § 58c(a)(9)(A) (1978).

APHIS' imposition of AQI user fees on Canada did not violate NAFTA Article 310 because such fees are not merchandising processing fees imposed on originating goods as prohibited under the Article, and it merely resulted in removal of exemption privilege previously held by Canada and did not result in an imposition of new custom user fee.

AQI user fees are collected for services provided in connection with pre-clearance or the port-of-entry arrival of commercial vessels, trucks, loaded railroad cars, and aircraft, as well as international passengers entering the U.S. from a foreign destination.⁹⁴ These fees allow APHIS to recover costs for services performed to make safe agricultural trade possible and to protect America's animal and plant resources from agricultural pests and diseases, as required by the Food, Agriculture, Conservation, and Trade Act of 1990⁹⁵; however, these AQI fees themselves are not merchandising processing fees, and they are not imposed on originating goods from Canada, as prohibited by the Article 310.⁹⁶

Furthermore, the historical development of APHIS indicates that the U.S. exempted conveyances and passengers from Canada from those AQI fees at the time of implementation of the measures, because it was the understanding of the U.S. at the time that such conveyances and passengers posed little risk of introducing plant or animal pests or diseases into the U.S., and the U.S. did not need to routinely provide AQI services for them and, therefore, could not justify imposing user fees on them.⁹⁷

All the measures undertaken by APHIS went into effect in 1991 and 1992 upon all countries except Canada; however, removing of such exemptions was deemed necessary in 2006

⁹⁴ APHIS Factsheet, *supra* note 42.

⁹⁵ *Id.*; *see also* Food Agriculture Conservation and Trade Act of 1990 (FACTA), Pub. L. No. 101-624, 104 Stat. 3359 (1990) [*hereinafter* FACTA].

⁹⁶ *See* NAFTA, *supra* note 45, art. 310 and annex 310.1.

⁹⁷ AQI User Fees Federal Register, *supra* note 43.

to prevent the introduction of plant pests and diseases into the U.S. via conventional pathways or through bioterrorism, as the recent inspections along the U.S.-Canadian border resulted in numerous interceptions of prohibited fruits, vegetables, and other products originating in regions other than Canada, posing a risk of introducing agricultural pests or diseases into the U.S.⁹⁸

However, recent trends have led the U.S. to reevaluate the AQI inspection regime at the U.S./Canada border, as NAFTA has had a significant impact on agricultural trade between the U.S. and Canada. Extensive inspection operations along the U.S./Canada border resulted in numerous interceptions of unauthorized material produced in regions other than the U.S. and Canada, and prohibited articles found during those inspections presented a high risk of introducing plant pests or animal diseases into the U.S.⁹⁹ Because the necessity in conducting extensive inspections became apparent, removal of exemption of AQI user fees previously granted to Canada also was deemed to be absolutely necessary. Additionally, these measures further the SSB objective set forth by the joint statement from the Montebello Summit.

This Court must conclude that AQI user fees imposed on Canada did not violate NAFTA Article 310, because it merely removed Canada's exemption privilege on AQI user fees, which fall outside of merchandise processing fees on originating goods from Canada as prohibited by the Article.

B. AQI user fees imposed by the U.S. in order to protect human, animal, and plant health are consistent with sanitary and phytosanitary measures permitted under SPS Agreement.

SPS Agreement grants Member States the right to “take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health.”¹⁰⁰ It further

⁹⁸ FACTA, *supra* note 95.

⁹⁹ AQI User Fees Federal Register, *supra* note 43.

¹⁰⁰ SPS Agreement, *supra* note 46, annex 1A.

provides a similar prohibition, like GATT Article XX General Exceptions, on measures that arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members, or measures that would constitute a disguised restriction on international trade.¹⁰¹ Definitions of sanitary or phytosanitary measures allowed under this agreement may include all relevant laws, decrees, regulations, requirements and procedures including testing, inspection, certification and approval procedures or quarantine treatments.¹⁰² Agreement further provides for any fees imposed for the procedures to be equitable in relations to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of service.¹⁰³

The purpose of AQI user fees imposed on Canada is to conduct agricultural quarantine inspections to protect America's animal and plant resources from agricultural pests and diseases; the same exact fees have been applied to commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international air passengers from every other nation arriving at ports in the customs territory of the U.S. for the same purpose.¹⁰⁴ The user fees imposed here are no higher than the actual cost of service and treat Canada and every other nation equally by removing the exemptions.¹⁰⁵

Furthermore, Canada's lower sanitary and phytosanitary standard on goods imported from other nations poses a high risk of goods prohibited under the U.S. standard entering from Canada into the U.S., endangering the U.S. with a potential spread of agricultural pests and

¹⁰¹ *Id.*, *supra* note 46, art. 2.

¹⁰² *See* SPS Agreement, *supra* note 46, annex A,

¹⁰³ SPS Agreement, *supra* note 46, annex C(1)(f).

¹⁰⁴ *Id.*; *see also* GATT, *supra* note 46, art. 1.

¹⁰⁵ AQI User Fees Federal Register, *supra* note 43; *see* SPS Agreement, *supra* note 46, art. 2; *see also* GATT, *supra* note 46, art. VIII.

disease.¹⁰⁶ Harmonization of imposition of fees for the necessary inspection procedures to protect human, animal and plant health allows for the overall increase in efficiency and productivity of the procedures.¹⁰⁷

C. Imposition of AQI user fees, a measure necessary to protect human, animal or plant life or health is excused by the general exceptions provided under GATT article XX(b) and article 2101 of NAFTA.

Even if AQI user fees violate the Article 310 of NAFTA, the measure taken by APHIS is excused by general exceptions provided under NAFTA Article 2101¹⁰⁸ and GATT Article XX(b)¹⁰⁹ because AQI user fees are necessary to protect America’s animal and plant resources from agricultural pests and diseases .

GATT Article XX and NAFTA Article 2101 provide excuses for otherwise unacceptable measures under NAFTA or GATT, if such measures satisfy the requirements provided under GATT Article XX (a) – (j), and do not constitute means arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or if such measures are not taken as a disguised restriction on international trade.¹¹⁰ GATT Article XX(b) further provides for general exceptions that allow for measures necessary to protect human, animal or plant life or health, taken by the Party, which would otherwise violate this agreement.¹¹¹ The “necessity” of a measure taken by the member State in violation of the agreement is first determined by the availability of less restrictive alternative means to achieve the same ends; in order for the measure taken by a member State to be excused by this general exception, such a measure must

¹⁰⁶ AQI User Fees Federal Register, *supra* note 43.

¹⁰⁷ *Id.*; see SPS Agreement, *supra* note 46, art. 3.

¹⁰⁸ See NAFTA, *supra* note 46, art. 2101.

¹⁰⁹ GATT, *supra* note 46, art. XX.

¹¹⁰ See GATT, *supra* note 46, art. XX(a)-(j); see also NAFTA, *supra* note 46, art. 2101.

¹¹¹ See GATT, *supra* note 46, art. XX(b).

be the least restrictive measure reasonably available at the time.¹¹²

1. Imposition of AQI fees on Canada as consistently applied on every other nation is neither an arbitrary or unjustifiable discrimination between member States nor a disguised restriction on international trade.

Imposition of fees on all commercial shipments entering the U.S. from Canada is not arbitrary and does not amount to discrimination between member States.

NAFTA Article 2101 and GATT Article XX permit member States to take measures that may not be on its face in conformity with the agreements, if such measures do satisfy the requirements provided under GATT Article XX (a) – (j), and do not constitute means arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or if such measures are not taken as a disguised restriction on international trade.¹¹³

Measures taken by APHIS is to enable the U.S. government to regulate all commercial shipments entering into the U.S. from Canada in order to protect the health and life of human in

¹¹² Phillip M. Nichols, *GATT Doctrine*, 36 Va. J. Int'l L. 379, 442 (1996) [*hereinafter* Nichols]; *see generally* *United States – Section 337 of the Tariff Act of 1930*, L/6439 (Jan. 16, 1989), GATT B.I.S.D. (36th Supp.) 345, at 392-93, 395-96 (1989); Report of the Panel, *Norwegian Procurement of Toll Collection Equipment for the City of Trondheim*, GPR/DS2/R (May 13, 1992), GATT B.I.S.D. (40th Supp.) 319, at 336, (1992); *United States – Measures Affecting Alcoholic and Malt Beverages*, L/5511 (June 19, 1992), GATT B.I.S.D. (69th Supp.) 206, at 282 (1993); *United States-Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) 155 (1992) (not adopted) [*hereinafter* *GATT Tuna I Report*]; *European Economic Community – Restrictions on Imports of Dessert Apples Complaint by Chile*, L/6491, (June 22, 1989), GATT B.I.S.D. (36th Supp.) 93, at 124 (1989); *Canada – Import Restrictions on Ice Cream and Yoghurt*, L/6568 (Dec. 5, 1989), GATT B.I.S.D. (36th Supp.) 68, at 84 (1989); *European Economic Community – Restrictions on Imports of Apples Complaint by the United States*, L/6513 (June 22, 1989), GATT B.I.S.D. (36th Supp.) 135, at 160 (1989); *Japan – Restrictions on Imports of Certain Agricultural Products*, L/6253 (March 2, 1988), GATT B.I.S.D. (35th Supp.) 163, at 226-27 (1988); *Canada – Administration of the Foreign Investment Review Act*, L/5504 (Feb. 7, 1984), GATT B.I.S.D. (30th Supp.) 140, at 164 (1984); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 Wash & Lee L. Rev. 1227, 1240 (1992).

¹¹³ *See* NAFTA, *supra* note 46, art. 2101; GATT, *supra* note 46, art. XX.

accordance with the GATT Article XX(b).¹¹⁴ Such user fees are not imposed for a mere national interest in its economic advantage. Although APHIS measure seems on its face to impose user fees which were prohibited under NAFTA Article 310,¹¹⁵ such measure has been legitimately applied by the U.S. upon all other GATT member States and is now merely removing an exemption privilege of such user fees previously given to Canada through the NAFTA agreement. This measure taken by APHIS treats Canada equally with other GATT member States, and therefore it is non-discriminatory and non-arbitrary, perfectly in accordance with the GATT Article I, the Most Favored Nation clause (MFN).¹¹⁶

2. Imposition of AQI user fees, a measure that is least restrictive and reasonable available at the time, was necessary to protect human, animal or plant life or health.

Generally, the existence of less-restrictive alternative measure to achieve the same ends is essential in determining whether a measure taken in violation of the agreement is in fact “necessary,” therefore excused under the Article XX general exceptions.

In GATT Thailand-Cigarettes Report, the GATT panel, in determining the scope of the word “necessity” under Article XX(b) claimed by Thailand in restricting the Cigarettes import, adopted the "least-GATT-inconsistent" test that it had previously applied to interpret the word "necessary" under Article XX(d).¹¹⁷ The panel explained this principle in the following manner: “import restrictions imposed by Thailand could be considered to be ‘necessary’ in terms of Article XX(b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve

¹¹⁴ See GATT, *supra* note 46, art. XX(b).

¹¹⁵ See NAFTA, *supra* note 46, art. 310.

¹¹⁶ See GATT, *supra* note 46, art. I.

¹¹⁷ *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) 200 (1990) [*hereinafter* GATT Thailand-Cigarettes Report].

its health policy objectives.”¹¹⁸ Thailand restricted the Cigarettes imports based on health reasons, yet continued on selling domestic Cigarettes.¹¹⁹ The panel went on to conclude that Thailand had failed to meet the least-GATT-inconsistent test because there were other measures that it could have legitimately invoked.¹²⁰

In GATT Tuna I Report, the GATT panel further held that to successfully meet its “burden of proof under Article XX (b), a party must: (1) adopt the least-GATT-inconsistent measure; (2) prove that it has exhausted all options before adoption of the measure; and (3) apply it in a manner that is least-GATT-inconsistent, meaning that the treatment of domestic and foreign parties must be identical.”¹²¹ The Panel here determined that the U.S. embargo on tuna import from Mexico did not satisfy the Article XX(b) exceptions, because the U.S. failed to prove there were no other less-restrictive means to achieve the same ends.¹²²

Here, the necessity of imposition of AQI user fees to conduct extensive border inspection is clear; the substantial increase in inspection of prohibited fruits, vegetables, and other products originating in regions other than Canada at the U.S./Canada border made the U.S./Canada border more vulnerable than ever to the agricultural pests and diseases.¹²³ Due to Canada’s fewer phytosanitary requirements compared to those of the U.S. on plant products, Canada was able to import those goods originating in other countries that would normally be refused entry into the U.S., or admitted only after certain phytosanitary requirements have been met, and such greater availability of goods gave incentives for people to bring such goods under the lower surveillance

¹¹⁸ See GATT *Thailand-Cigarettes Report*, *supra* note 117.

¹¹⁹ *Id.*

¹²⁰ *Id.*; GATT *Tuna I Report*, *supra* note 112; *United States-Restrictions on Imports of Tuna*, DS29/R (June 16, 1994), 33 I.L.M. 839 (1994) (not adopted).

¹²¹ See GATT *Tuna I Report*, *supra* note 112.

¹²² *Id.*

¹²³ AQI Fees Federal Register.

of the U.S./Canada border, and commercial importers to re-label such goods as products of Canada and ship to the U.S., taking advantage of the exemptions.¹²⁴ This situation required the U.S. to impose inspections on commercial goods entering into the U.S. from Canada without collecting user fees.¹²⁵ Contribution of the removal of the exemption of AQI user fees directly enables the U.S. to recover the both costs of the current inspection activities and the costs associated with implementing an augmented inspection regime for the conveyances and passengers as well.¹²⁶

Imposition of AQI fees at issue here is a result of the continuous U.S. effort in regulating the entrance of goods from Canada, which do not satisfy the U.S. phytosanitary standard, in the most effective and least restrictive manner. First, the same inspection procedure has been applied to all nations including Canada as a necessary and effective measure to achieve this goal. Second, the AQI fees have been recognized as legitimate means to fund these necessary inspections under the SPS agreement and have been applied to every other nation except for Canada. The recognition of AQI user fees by other nations to be a legitimate measure to fund the necessary inspections to achieve the protection of health and life of human, animal, and plant proves that such measure is reasonable and least restrictive, therefore AQI user fees are necessary measures excused under the general exceptions provided by GATT and NAFTA.

IV. National Security Exceptions under NAFTA Article 2102 and GATT Article XXI are triggered where it is necessary to protect essential national security interests.

NAFTA Article 2102 and GATT Article XXI provide exceptions for a Member States to take actions, which otherwise would violate the agreements, when it is necessary for the

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

protection of its essential security interests.¹²⁷ Such actions may be excused when taken in time of war or other emergency in international relations.¹²⁸

The scope of this “essential security” is limited to the temporary emergency situations to use economic measures to achieve political means, such as political and military threats, and exceptions do not provide for the national commercial interests to achieve a greater economic security.¹²⁹ However, although several nations have invoked GATT Article XXI in the past, the issue of national security has never been adjudicated before a competent tribunal and as such is a case of first impression.¹³⁰ In order to determine which measures are to be included as “necessary” to achieve such limited scope of interests, the similar language used in Article XX of GATT on general exceptions should be used as guidance.¹³¹

Article XX of GATT excuses actions otherwise in violation of the agreement, if such actions are deemed necessary to achieve or protect the interests provided under the Article as exceptions.¹³² Article XX further prohibits, in connection with the necessary measures, arbitral and unjustifiable discrimination between countries or a measure taken as a disguised restriction

¹²⁷ See NAFTA, *supra* note 46, art. 2102; see also GATT, *supra*, note 46, art. XXI.

¹²⁸ GATT, *supra* note 46, art. XXI (b)(iii).

¹²⁹ Stephen A. Broome, Note, *Conflicting Obligations for Oil Exporting Nations?: Satisfying Membership Requirements of Both OPEC and the WTO*, 38 *George Wash. Int'l L. Rev.* 409, 428-30 (2006) [*hereinafter* Broome]; GATT, *Guide to GATT Law and Practice: Analytical Index* 557, quoting from *Swedish footwear import tax case*, GATT Doc. L/4250, p. 3 (6th ed. 1994) [*hereinafter* Analytical Index]; Analytical Index, at 554 (*quoting comments made by one of the drafters of the original charter*, EPCT/A/PV/33, at 20-21); see also GATT Working Party, *Accession of the United Arab Republic*, at 22, L/3362 (Feb. 27, 1970).

¹³⁰ Peter Lindsay, Note, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure*, 52 *Duke L. J.* 1277, (2003).

¹³¹ Statute of the International Court of Justice art. 38(1)(a), June 26, 1945, 59 *Stat.* 1055; Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 *U.N.T.S.* 331, reprinted in 8 *I.L.M.* 679 (entered into force Jan. 27, 1980).

¹³² See GATT, *supra* note 46, art. XX.

on international trade.¹³³ If there exists any less restrictive alternative means available to achieve the same ends at the time of the imposition of a measure in question, such measures taken are not deemed “necessary.”¹³⁴ The necessity and reasonableness of the measure taken may be determined by weighing and balancing several factors of the measure taken by a member State in violation of other provisions of the agreement: the trade impact of the measure, the importance of the interests protected by the measure, and the extent that the measure contributes to these interests.¹³⁵

A. Imposition of AQI user fees on Canada, in a wake of bioterrorism threat, to fund necessary agricultural and quarantine inspections to protect the U.S.-Canada border security is excused by NAFTA Article 2102 and GATT Article XXI national security exceptions.

The bioterrorism has become a much greater source of concern to the U.S. in the wake of the terrorist attacks of September 11; the U.S./Canada border, which stretches over 3,985 miles from the Pacific to the Atlantic Ocean, is the longest undefended border in the world, and the current dearth of inspection activity at that U.S./Canada border could potentially leave the U.S. vulnerable to bioterrorism.¹³⁶ A successful bioterrorist attack could, in addition to causing death and illness, undermine Americans' confidence in the safety of their food system and have a devastating impact on U.S. agriculture.¹³⁷

Not only do the interests of the U.S. to protect its citizens' health and lives from possible attacks are extremely important, the measures taken by the U.S. are also reasonable and least intrusive, as the same measures have been consistently applied to every other nations with an

¹³³ *Id.*

¹³⁴ Nichols, *supra* note 112, at 442.

¹³⁵ Appellate Body Report, *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (Oct. 20, 2004).

¹³⁶ APHIS Federal Register.

¹³⁷ *Id.*

exception for Canada to protect the same interests, and APHIS measures also did not impose any additional restrictions on Canada, simply removing the exemption privilege.¹³⁸ The consistent applications of the same user fees on every other nation to achieve the same ends have been proved to be effective, therefore, APHIS' action in merely removing Canada's exemption privilege is reasonable and narrowly tailored to the U.S. interest in protecting the human, plant, and animal life or health. Furthermore, an elimination of exemption here is neither arbitrary nor unjustifiable, as the surplus coming from this removal of exemptions of user fees directly applies to the border security inspection activities.

B. WHTI measures requiring all travelers to carry a valid passport in order to heighten the U.S.-Canada border security due to increased threat during time of war are excused by the NAFTA Article 2102(b)(ii) and GATT Article XXI(b)(iii) national security exceptions.

Increasing the efficiency of the border security system is an imperative and necessary interest of the U.S. when the nation is facing a war against terrorism. Imposition of a passport requirement or equivalent is *de minimis* to trade between U.S. and Canada, as it merely affects non-commercial land travelers, and there exists no restrictions against any class of people to obtaining one. Critical to any attack on a country the need exists for access to it, so travel documents are as vital as the weapons to potential threats.¹³⁹ Such a passport requirement has been imposed on all travelers from every other nation into the U.S. for security purposes and has been recognized as a reasonable and necessary procedure to achieve such ends. Especially when a country faces a security threat from current conflicts, here, the U.S. war on terror, an intimate nexus between a requirement of passport and to heighten the border security.

¹³⁸ *Compromis*, at page 2; APHIS Federal Register.

¹³⁹ DHS Fact Sheet, *supra* note 19.

C. Canada's imposition of an export tax on fuel in order to fund the U.S.-Canada joint "thick border" initiative, failing to adequately establish the nexus between the means used and the ends to be achieved, is not excused by the national security exceptions provided under NAFTA Article 2102 and GATT Article XXI.

Canada claims its own national security interest as an excuse to impose an export tax on fuel transported by way of pipeline, only subjecting the U.S. for such additional fees and no one else. Canada expressly stated that its objective in imposing such tax was to fund the security measures that the U.S. requested upon Canada to protect the U.S./Canada border security. Claiming its own national security interest at the same time as asserting the responsibility of the U.S. to pertain the cost of a security measure due to the benefit that the U.S. receives is quite contradictory on its face, therefore unreasonable. Even if Canada's national security interest were to stand, an imposition of an export tax on fuel is not the least intrusive measure to protect such interest, and the nexus between the tax and the interest to be protected is tenuous at best. Therefore Canada's imposition on fuel export tax does not trigger national security exceptions provided under NAFTA or GATT.

CONCLUSION

The WHTI and APHIS measures taken by the U.S. pose no trade restrictions prohibited under either GATT or NAFTA; furthermore, these measures represent reasonable restrictions that are narrowly tailored to address the recent national security concerns at the U.S.-Canada border presented as well as furthering the objectives of the joint statement. A subsequent measure taken by Canada in imposing export tax on fuel does not only violate NAFTA on its face, but also does fail to adequately address its own national security concerns, lacking any tenable nexus between the means used and the ends to be achieved, therefore it amounts to a mere retaliation action against the legitimate measures previously implemented by the U.S.