

**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 # 2008-13R

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QUESTIONS PRESENTED

- 1) Whether the WHTI is contrary to NAFTA Chapters 12 and 16 and GATS when the measure hinders rather than facilitates the entry of business persons and imposes barriers on cross border trade in services?
- 2) Whether the WHTI is justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS when (1) many business people will either be delayed or barred from entering and re-entering the U.S., (2) many implementation problems exist, and (3) only a limited number of documents are accepted?
- 3) Whether the APHIS user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII when it imposes a user fee on the importation of agricultural products in addition to the tariff on these products?
- 4) Whether the APHIS user fees are justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS when its purpose is to generate revenue through the regulation of border controls, reasonable alternatives exist, and no nexus exists between the regulation of the importation of plant and animal matter, and military or otherwise implied security-related threats?
- 5) Whether the Fuel Export Charge is contrary to NAFTA Article 314, 315, 604, and 605 or GATT Articles I, VIII, and XI when Canada's national population will not be affected by the tax, but the U.S. requested that the measure be taken?
- 6) Whether the Fuel Export Charge is justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102, or GATT Articles XX and XXI when it combats an international threat to the peace and security of Canada?

JURISDICTIONAL STATEMENT

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 articles, and by a Special Agreement have agreed to submit this dispute to a Chamber of the International Court of Justice composed of three judges. The propriety of the Court's jurisdiction, issues of standing, ripeness, exhaustion, and the admissibility of the case are stipulated by the Parties in the *Compromis*.²

¹ Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1005.

² *Compromis*, p.6.

STATEMENT OF FACTS

On September 23, 2008, the United States filed a dispute with the International Court of Justice (ICJ) with respect to a Fuel Export Charge imposed by Canada. On October 23, 2007, Canada responded by filing a dispute with the ICJ with respect to the Western Hemisphere Travel Initiative (WHTI) and the APHIS fee.

The WHTI requires all travelers, including Canadians and Americans, to carry a valid passport or other appropriate secure documentation when traveling to the United States from within the Western Hemisphere.³ DHS has specified that other appropriate secure documentation is limited to an Alien Registration Card (Form I-551), a Merchant Mariner Document (MMD), a NEXUS Air Card, or U.S. Military traveling on orders.⁴ Many Border States are developing enhanced driver's licenses which provide proof of identity and not all persons are qualified for the NEXUS card; in fact, one must meet many qualifications simply to apply.⁵ Regular, state issued driver's licenses will not suffice as proper documentation, even when accompanied by a birth certificate.⁶ The United States Department of State (DOS) and the United States Department of Homeland Security (DHS) proposed this initiative in April 2005.⁷ The first phase, which applied to all travelers arriving the United States from within the Western

³ Dep't of Homeland Sec. and Dep't of State, *Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere*, 72 Fed. Reg. 35091 (June 26, 2007).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Notice of Proposed Rulemaking, 71 Fed. Reg. 60128 (October 2006).

Hemisphere by air, was implemented as of January 23, 2007.⁸ This means that all citizens of the United States, Canada, Mexico, and Bermuda are now required to present a valid passport when entering the U.S. at any airport.⁹ This includes children of any age, including children of Legal Permanent Residents who are United States citizens and Mexican citizens who have a Border Crossing Card (BCC) when entering the U.S. by air.¹⁰

On June 26, 2007, the DOS and the DHS jointly published a Notice of Proposed Rulemaking to implement the second phase of the WHTI, which has been announced but is not yet in effect.¹¹ The time frame for implementation was to be the summer of 2008; this has been delayed until June 1, 2009.¹² The second phase applies to all other modes of travel, including by land and by sea.¹³ This will require U.S. citizens and non-resident aliens from the Western Hemisphere, including Canada, to possess and provide at the time of entry not the United States a valid passport or certain prescribed identification.¹⁴ This means that both U.S. and Canadian citizens who are 19 and older must provide a government issued photo I.D. and proof of citizenship.¹⁵ Beginning January 31, 2008, the Department plans to move towards WHTI implementation at land and sea ports of entry by ending the routine practice of accepting oral declarations of citizenship alone.¹⁶

⁸ *See supra*, note 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See supra*, note 4.

¹⁶ *Id.*

Prior to the initiative, Canadian and American citizens have been able to cross the border into the other territory by air with valid photo identification (a driver's license) and a birth certificate. Only 40% of American citizens have valid passports. The reduced travel of American citizens will have a negative effect of the tourism industry in border cities and popular tourist destinations in Canada. The extent to which the free movement of persons limits the free movement of goods and services disproportionately affects Canada. Canada has informed the United States government of this. The United States has justified the WHTI as a national security-related measure.

On August 25, 2006, the United States Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture announced an interim rule to impose agricultural quarantine and inspection user fees on all commercial shipments entering the United States from Canada beginning on November 24, 2006.¹⁷ Canada had been exempted from the user fees. After the announcement of the removal of the exemption of Canada, the implementation dates changed. Since January 1, 2007, regardless of (i) whether they were travelling with fruits or vegetables, or (ii) whether they were processed through customs and immigration at a Canadian airport, air passengers arriving in the U.S. from Canada began paying user fees.¹⁸ Air passengers pay \$USD 5.00 per passenger and each aircraft entering the U.S. from Canada pays \$USD 70.50.¹⁹ These fees are incorporated into the price of air tickets, and

¹⁷ 71 Fed. Reg. 165.

¹⁸ *Id.*

¹⁹ *Id.*

are reflected by the ticket prices.²⁰ On March 1, 2007, APHIS removed the inspection exception for all commercial vessels entering the U.S. from Canada.²¹ Irrespective of the cargo it is carrying, each maritime vessel pays \$USD 490.00 per entry.²² Since June 1, 2007, each rail car moving from Canada to the U.S. must pay a user fee of \$USD 7.75.²³ Each truck moving from Canada to the U.S. must pay \$USD 10.75, \$USD 5.50 of which goes to Customs and Border protection and an additional \$USD 5.25 of which goes to APHIS.²⁴ Alternatively, each truck can pay an annual user fee in the amount of \$USD 205, \$USD 100 of which goes to Customs and Border protection and an additional \$USD 105 of which goes to APHIS.²⁵

Canada's Department of Foreign Affairs and International Trade (DFAIT) communicated with its counterparts at DHS and the United States Trade Representative, stating that APHIS customs user fees are contrary to NAFTA and GATT. Governmental authorities in the United States have made various statements, including some with a national security angle.

On August 21, 2007, Prime Minister Harper, President Bush and President Calderon issued a joint statement calling for smart and secure borders. The statement also called for extensive investment in the security and infrastructure of the Canadian-U.S. border.

On September 11, 2007, Canada and the United States issued a Joint Statement that Canada would spend \$1 billion to implement a series of additional border security measures. Prime Minister Harper announced the Fuel Export Charge, and in an accompanying statement

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

explained that the purpose of the charge was to pay for the enhanced security initiative undertaken by Canada. The Fuel Export Charge imposes a tax on fuel transported by way of pipeline. All exporters of fuel by pipeline are required to register for export tax purposes and to file monthly returns and remit the export taxes on a monthly basis according to the barrels of fuel put into the pipeline for export to a location outside Canada. The exporters are required to apply for export permits for each transaction and to provide prescribed information.

President Bush, unhappy with the tax, brought the matter to Canada's Ambassador to the U.S., Michael Wilson. The U.S. feels the tax is contrary to NAFTA and GATT and cannot be justified by NAFTA or GATT general or national security exceptions. Ambassador Wilson made clear that the Charge would remain in effect.

²⁵ *Id.*

SUMMARY OF THE ARGUMENT

The Western Hemisphere Travel Initiative (WHTI) is contrary to NAFTA Chapters 12 and 16 and GATS because the measure hinders rather than facilitates the entry of business persons and imposes barriers on cross border trade in services. The WHTI is not justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS because: (1) the interference with trade is significant, (2) the measure has limited effectiveness, and (3) less restrictive means are available.

In addition, the APHIS user fee is contrary to NAFTA Article 310 and GATT Articles I and VIII because the measure is a new user fee which imposes a duty that is not imposed on like domestic products. The APHIS user fee is not justified pursuant to a general exception in NAFTA or GATT or GATS because its purpose is to generate revenue through the regulation of border controls and reasonable alternatives exist. The APHIS user fees are not justified pursuant to the national security exception in NAFTA or GATT or GATS because the U.S. does not claim that a nexus exists between the regulation of the importation of plant and animal matter, and military or otherwise implied security-related threats, and no such nexus exists.

The Fuel Export Charge is contrary to NAFTA Article 314, 315, 604, and 605 or GATT Articles I, VIII, and XI because, as applied, it discriminates in favor of Canada's national population. However, the U.S. is estopped from bringing this claim because the U.S. requested that Canada heighten its border security measures. The Fuel Export Charge is justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102, or GATT Articles XX and XXI because it is aimed at combating an international threat to the peace

and security of the Canadian population.

ARGUMENT

I. THE WHTI VIOLATES EXPRESS INTERNATIONAL LAW AND CANNOT BE JUSTIFIED BY A NATIONAL SECURITY EXCEPTION.

In 2002, roughly one million pedestrians crossed legally from Canada to the United States; in 2000, Canadians made 14 million overnight visits to the United States, and 42 million Americans visited Canada.²⁶ Considering 90% of all Canadians live within 100 miles of the border, it is hardly surprising that local businesses depend heavily on cross-border customers.²⁷ For example, “just-in-time-manufacturing” (JIT manufacturing) treats border crossings as a stop in an assembly line that moves parts quickly between Canada and the U.S.²⁸ Every hour of plant disruption results in an estimated \$ 60,000 in lost earnings.²⁹

A. The U.S. violated NAFTA Chapters 12 and 16 by enacting and implementing the WHTI because it has the effect of denying people otherwise admissible under NAFTA, which is contrary to the express goals of the treaty.

The US violated NAFTA Chapters 12 and 16 by enacting and implementing WHTI because it has the effect of denying people otherwise admissible under NAFTA, which is contrary to the express goals of the treaty. The object and purpose of NAFTA Chapters 12 and 16 and GATS is to eliminate restrictions on travel.³⁰ The Vienna Convention on treaty

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ North Atlantic Free Trade Agreement, U.S.-Can.-Mex., art. 102(1)(a), (c), Dec. 17, 1992, 32 I.L.M. 296 (1993) [*hereinafter* NAFTA].

interpretation states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.³¹ Chapter 12 prohibits travel quotas and calls for effective nondiscrimination measures in cross-border movement of people and goods.³² Chapter 16 calls for the facilitation of temporary entry on a reciprocal basis and the establishment of transparent criteria and procedures for temporary entry.³³ Article 1603 creates an exception for business people who do not meet health or national security standards.³⁴

The language of both chapters indicates that a new measure requiring persons to procure and provide passports and visas constitutes a restriction on travel. Only 40% of U.S. citizens have passports.³⁵ Thus, 60% of U.S. citizens will either have to apply for a passport and wait to receive it or not go into Canada at all. These measures, then, delay or even prohibit people from entering Canada. Among these people are both those engaging in cross border trade in services and business people. Therefore, the measures restrain rather than promote cross border travel, in violation of the mandates of Chapters 12 and 16.

A similar provision, the Democratic Solidarity Act, is widely recognized as violative of NAFTA Chapters 12 and 16. Commonly referred to as the Helms-Burton Act, Title III contains measures designed to protect American property rights abroad.³⁶ It includes a provision in which

³¹ Vienna Convention on the Law of Treaties art. 31(1), Jan. 27, 1980, 1155 U.N.T.S. 1133 [*hereinafter* Vienna Convention].

³² NAFTA art. 1201.

³³ NAFTA art. 1601.

³⁴ NAFTA art. 1603.

³⁵ *Compromis*, p. 1.

³⁶ Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110

aliens who traffic in property that the Cuban Government has confiscated from United States citizens and corporations are denied entry into the United States.³⁷ Scholars agree that Helms-Burton violates NAFTA by denying Canadian and Mexican businessmen and their families rights accorded to them under Chapters 12 and 16, but the issue has never been adjudicated for political reasons.³⁸

The WHTI affects *every* business person entering the U.S. who is a U.S. citizen or non-resident alien from the Western Hemisphere. Thus, the reach of the WHTI extends even beyond that of the Helms-Burton Act. Further, Chapter 16 provides that restraints on travel which serve as barriers to trade and investment are to be lessened.³⁹ The WHTI does not fall into the limited exceptions to this rule, as argued *infra*. A view towards transparency, then, cannot encompass any measure not express in the text which restricts travel.

The language of Article 1603 makes clear that there are specific allowances on restrictions on travel agreed to by the NAFTA members.⁴⁰ *Only* if a business person does not meet health and safety or national security standards, that person may be denied entry.⁴¹ The

Stat. 785 (codified at 22 U.S.C.A. §§6021-6091 (West Supp. 1999)), *reprinted in* 35 ILM 357 (1996).

³⁷ *Id.*

³⁸ See David Gantz, *Dispute Settlement Under The NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 Am. U. Int'l L. Rev. 1025 (1999), Lucien J. Dhooze: *Article: Fiddling with Fidel: an Analysis of the Cuban Liberty and Democratic Solidarity Act of 1996*, 14 Ariz. J. Int'l & Comp. Law 575 (1997), Jack I. Garvey, *Regional Free Trade Dispute Resolution as Means for Securing the Middle East Peace Process*, 47 Am. J. Comp. L. 147 (1999).

³⁹ NAFTA art. 1601.

⁴⁰ *Id.*

⁴¹ *Id.*

word “shall” indicates that all business persons meeting these qualifications *must* be granted entry. The WHTI denies entry to business persons without visas or passports. It cannot be said that a person lacking these documents automatically falls within the health and safety or national security exceptions. The WHTI violates Article 1603 because its restrictions are not among those expressed in NAFTA.

The restrictions the WHTI imposes are contrary to NAFTA chapter 16's goal of avoiding measures which unduly impair or delay trade in goods, services, or investment activities in member countries and violate NAFTA Chapter 12's goal of encouraging and eliminating restrictions on cross-border trade in services because these measures hinder rather than facilitate the entry of business persons and impose barriers on cross border trade in services.

B. No national security exception applies to justify application of the WHTI because: (1) the interference with trade is significant, (2) the measure has limited effectiveness, and (3) less restrictive means are available.

The WHTI cannot be justified by NAFTA's national security exception because: (1) the interference with trade is significant, (2) the measure has limited effectiveness, and (3) less restrictive means are available.

Under GATT Article XXI and NAFTA Article 2102, a state may derogate from its obligations where it is necessary to protect an essential security interest.⁴² NAFTA Article 103(2) provides, “In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided by this Agreement.”⁴³ While GATT-WTO is binding and informing, specific NAFTA

⁴² NAFTA art. 2102.

⁴³ NAFTA art. 103(2).

provisions should be read as creating a *lex specialis* between the parties and is controlling.⁴⁴ The issue of national security has never been adjudicated before a competent tribunal and, as such, is a case of first impression. In light of this gap in interpretation, guidance can be found in the similar requirements of GATT art. XX, which allows certain exceptions where they are “necessary.”⁴⁵

There are a number of WTO disputes addressing necessity under Article XX.⁴⁶ One of the most recent and clearest is the Cigarette Tax Case.⁴⁷ The Cigarette Tax case dealt with an exception under XX(d), which requires that a measure be necessary. Other art. XX exceptions have a lower standard and would not be as relevant for this interpretive purpose.⁴⁸ The Appellate Body first pointed out that the analysis was two-tiered, the first being that the measure fall under one of the subparagraphs (a) to (j). Second, the measure must be “necessary” to secure compliance. To determine whether a measure is “necessary,” several factors must be weighed and balanced: the trade impact of the measure, the importance of the interests protected by the

⁴⁴ Joost Pauwelyn, *Conflict of Norms in Public International Law: How the WTO relates to Other Rules of International Law*, 385-415 (2003).

⁴⁵ Statute of the International Court of Justice art. 38(1)(a) (1945). Vienna Convention, art. 31(3)(b) (1980).

⁴⁶ Raj Bhala and David Gantz, *WTO Review: WTO Case Review 2005*, 23 *Ariz. J. Int'l & Comp. Law* 107 (2006). See also Appellate Body Report, *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (Oct. 20, 2004) [hereinafter *Cigarettes Appellate Body Report*], Appellate Body Report *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS162/AB/R, P 157 (adopted Jan. 10, 2001)), Appellate Body Report *European Communities -- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, P 161 (adopted Apr. 5, 2001)).

⁴⁷ *Dominican Republic*.

⁴⁸ General Agreement on Tariffs and Trade, art. XX, Oct 30, 1947 [*hereinafter* GATT].

measure, and the extent that the measure contributes to these interests.⁴⁹

In the Cigarette Tax Case, the panel found, and the Appellate Body affirmed, that based on the interest in preventing forgery, smuggling, and tax evasion asserted, the contribution of the tax to achieving this interest, and the impact of the tax on trade, the cigarette tax was not “necessary” because alternative WTO-consistent measures were available.⁵⁰

Here, the U.S. seeks to invoke the national security exception in order to justify the WHTI by using NAFTA Article 2102(b)(ii), which allows a Party to take actions necessary for the protection of its national security interests taken in a time of war or other international emergency. Just as the word “necessary” appears in the language of GATT Article XX(d), the word “necessary” appears in the NAFTA Article 2102 national security exception. Thus, the U.S. can only prevail on this claim if requiring passports is necessary, and because of its consistent interpretation of the word, “necessary” should be interpreted in light of GATT-WTO rulings on Article XX exceptions.

First, the effect of the WHTI on trade is significant and damaging. As detailed above, millions of Canadians and Americans cross the border, and many local businesses depend on these cross-border customers. In addition, manufacturing plants have come to rely on JIT manufacturing and lose significant amounts of money by the hour as a result of border delays. Thus, the effect on trade is clearly significant.

As discussed *supra*, the contribution of requiring visas and passports to prevent foreign invasion is tenuous and clearly does not meet the standard of necessary. What’s more, the ineffectiveness of the WHTI is evidenced by a host of implementation problems, to the extent

⁴⁹ *Id.*

that the implementation date had to be pushed back for a minimum of one year. Of the many that exist, the major problems are the lack of time to implement alternative documentation prior to implementation, lack of sufficient infrastructure to implement rules, no appeals board for the NEXUS card alternative, lack of streamlined mechanism for renewing passport, no discussion of the impacts of the increase in the number of lost and stolen passports and other documents, and no plan to address the enormous increase in wait times that the WHTI will create.⁵¹ These issues exacerbate the delays that people attempting to cross the border already face, making the WHTI ineffective.

Notwithstanding the argument above, less restrictive means are available. The Tourism Industry Association of Canada (“TIAC”) has prepared a submission to the U.S. Department of State (DOS) and Department of Homeland Security (DHS) in response to their latest Notice of Proposed Rulemaking (NPRM) for the Implementation of the WHTI.⁵² The TIAC continues to seek accessible and affordable passport substitutes such as REAL ID driver’s licenses that also include proof of citizenship and the expansion of the NEXUS and FAST passport substitute programs.⁵³ Thus, alternatives exist which are less restrictive than requiring passports.⁵⁴

While Canada does not dispute the U.S.’s interest in protecting its borders, the other factors clearly weigh against the means chosen to secure this end. Canada’s Prime Minister

⁵⁰ *Id.*

⁵¹ Business for Economic Security, Trade, and Tourism Coalition of the U.S. and Canada, July 12, 2007, (visited January 7, 2008), http://www.besttcoalition.com/files/2007_NPRM_Response_FINAL.pdf.

⁵² Tourism Industry Association of Canada, Western Hemisphere Travel Initiative, <http://www.tiac-aitc.ca/english/whti.asp>.

⁵³ *Id.*

⁵⁴ *Id.*

Harper has stated, “Canada recognizes the importance of North American security and is willingly taking the steps requested by its closest trading partner, the United States.”⁵⁵

The WHTI cannot be justified by NAFTA’s national security exception because: (1) the trade is significant, (2) the measure has limited effectiveness, and (3) less restrictive means are available. Whether this situation is one of war or international emergency need not be considered because of the above argument.

C. Alternatively, if a national security exception does exist, this Court should not allow an exception because it would swallow the rule and set an inexpedient precedent for NAFTA members to follow.

Even if the national security exception can apply, this Court should not allow the exception because it will swallow the rule and set an inexpedient precedent for NAFTA members to follow. The U.S. may not wish to establish as a precedent the use of national security as a defense for any action under NAFTA because of the fear that other nations will follow, basing every decision on considerations of national security.⁵⁶

II. THE APHIS MEASURE VIOLATES EXPRESS INTERNATIONAL LAW AND CANNOT BE JUSTIFIED BY A GENERAL OR NATIONAL SECURITY EXCEPTION.

A. The APHIS measure is a new impermissible user fee because it imposes a duty that is not imposed on like domestic products.

The APHIS measure imposing new agricultural quarantine and inspection user fees upon vessels and passengers entering the United States from Canada violates NAFTA, SPS, and

⁵⁵ *Compromis*, p. 5.

⁵⁶ Lowell R. Fleischer, *NAFTA Round-Up*, Latin Am. L. & Bus. Rep. (Aug. 31, 1996), available in LEXIS, Newsletter Library, CURNWS File. *See also* Robert Hudec, *Book Review and Note: The Role of Government in International Trade: Essays Over Three Decades. By Andreas F. Lowenfield*, 95 A.J.I.L. 466 (2001), John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 204 (1989).

GATT.⁵⁷ NAFTA article 310 prohibits the adoption of new user fees for originating goods.⁵⁸ Existing user fees, however, are permitted by this article.⁵⁹

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) also requires that the fees imposed for the procedures on imported products are equitable in relation 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 the service.⁶⁰ This extends the national treatment doctrine of GATT article III to the application and imposition of service fees, such as the customs user fees at dispute here.⁶¹

The GATT appellate body considered a measure that violated the National Treatment principle by imposing a tax in the *Japan-Taxes on Alcoholic Beverages* case.⁶² In that case, a Japanese measure imposed an additional duty beyond the tariff on all imported alcoholic beverages.⁶³ Here, the APHIS measure imposes a user fee on the importation of agricultural products in addition to the tariff. The additional economic impact that results provides the kind of advantage to domestic producers anticipated by Article III and the *Alcoholic Beverages* case. Just as the measure in that case violated the National Treatment principle, so does APHIS.

The APHIS regulation imposes a new impermissible user fee on customs users travelling into the United States from Canada; it is not a modification to an existing permissible user fee,

⁵⁷ 71 Fed. Reg. 165.

⁵⁸ North Atlantic Free Trade Agreement, U.S.-Can.-Mex., art. 310(1). Dec. 17, 1992, 32 I.L.M. 289 (1993) [*hereinafter* NAFTA].

⁵⁹ *Id.* art. 310(2).

⁶⁰ Agreement on the Application of Sanitary and Phytosanitary Measures, Annex C(1)(f).

⁶¹ GATT Article III(4).

⁶² *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, 4 October, 1996.

but an indirect disguised discriminatory measure.

B. The APHIS measure does not attract any general exceptions because its purpose is to generate revenue through the regulation of border controls and reasonable alternatives exist.

GATT article XX articulates a specific and narrow set of measures that are not prohibited by GATT, so long as they are not disguised restrictions on trade.⁶⁴ These exceptions permit otherwise prohibited measures that relate to morals, conservation, precious metals, antitrust regulations, cultural treasures, and other similar measures.⁶⁵ This article partner provision in the NAFTA agreement, art. 2101, should apply the same standard for the general exceptions to NAFTA, as this article incorporates GATT article XX by reference.⁶⁶ Article 2101 goes beyond the limited text of the GATT general exceptions, however, and explicitly articulates the intended targets of several exceptions.⁶⁷ Relevant to this issue is the declaration that the Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health.⁶⁸ This language indicates an intent to limit the applicability of the treaty exception to domestic environmental regulations.

One of the most persuasive applications of GATT XX(b) is that set forth by the Panel in *United States-Restrictions on Imports of Tuna*.⁶⁹ There, the Panel articulated a three-step analysis for determining whether the exception should apply. First, the policy considerations that the measure sought to pursue are considered. Second, it is determined whether the measure

⁶³ *Id.*, at 22.

⁶⁴ GATT, art XX.

⁶⁵ GATT art XX(a-j).

⁶⁶ NAFTA art. 2101.

⁶⁷ NAFTA art 2101(1).

⁶⁸ NAFTA art. 2101(1).

is *necessary* to protect human, animal or plant life or health. Third, it is determined whether the measure was set out in a way consistent with the preamble of article XX, insofar as it is not a means of unjustifiable or arbitrary discrimination between countries.⁷⁰

As to the first step, the panel in the *Tuna* case agreed with both parties that the purpose of the measure was to protect human, animal or plant life or health.⁷¹ Noteworthy among the characteristics that contribute to such a finding is the nexus between the benefit sought and the means of restriction. It follows that a measure with vague or non-specific policy considerations and no nexus between the restrictive means of the measure and the benefit sought would fail the first step of this analysis.

In applying the second step of its analysis, the *Tuna* panel interpreted “necessary” as meaning that no alternative existed.⁷² In its reasoning, the panel drew heavily on the reasoning in the panel report of *United States-Section 337 of the Tariff Act of 1930*.⁷³ In that case, the panel wrote that in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.⁷⁴ The *Tuna* Panel determined that the measure was not necessary and, therefore, did not reach the third step.

⁶⁹ *United States-Restrictions on Imports of Tuna*, DS29/R, 16 June 1994.

⁷⁰ *Tuna*, at 55.

⁷¹ *Tuna*, at 55-56.

⁷² *Tuna* at 56; *but see CMS vs. Argentine Republic*, ICSID Case No. ARB/01/8, 25 September, 2007.

⁷³ *United States-Section 337 of the Tariff Act of 1930*, L/6439, 7 November 1989.

⁷⁴ *United States-Section 337 of the Tariff Act of 1930*, 7 November 1989, L/6439, 36S/345, 392, par. 5.26.

Here, the measure fails the first step. The APHIS measure does not present any nexus between the restrictive burden imposed and any specific or general protection of human, animal or plant life. Instead, the measure's purpose is to generate revenue through the regulation of border controls.

If the measure is of the type intended to be covered by the exception under the first step of the analysis, the measure nevertheless fails the second step because it is not the only means of funding the border inspections. There are reasonable alternatives to this measure, such as domestic taxation, and it does not use the least inconsistent means of obtaining the desired result.

The APHIS measure is a regulatory fee implemented to generate revenue to fund customs screening. There is no distinguishable link between the generation of revenue and the protection or preservation of any plant, animal or human life as contemplated by the exception.

C. The APHIS measure does not attract the national security exception because the U.S. does not claim that a nexus exists between the regulation of the importation of plant and animal matter, and military or otherwise implied security-related threats, and no such nexus does exist.

When a measure is considered necessary for the national security of a Contracting State, the GATT Article XXI and NAFTA article 2102 national security exceptions provide a less restrictive means of attracting a GATT exception than the general exceptions when a measure is considered necessary for the national security of a Contracting State.⁷⁵ The contemplated nature of measures that would attract an article XXI exception are matters of a nuclear or military

⁷⁵ GATT, art. XXI, NAFTA art. 2102.

nature, or actions taken in the furtherance or preservation of international peace and security.⁷⁶

GATT Article XXI provides in relevant part that nothing in that agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.⁷⁷ The scope of the specific language in Article XXI, however, is conspicuously vague.⁷⁸ Because the determining terms are not defined, the scope of these important terms has been left to the invoking party to decide.⁷⁹

This is not, however, to imply that the drafters of the GATT charter intended a vague and open-ended exception that could be applied at will. Rather, one of the drafters of the GATT suggested in 1947 that there was a “great danger of having too wide an exception . . . that would permit anything under the sun”.⁸⁰ Another early interpreter of Article XXI wrote that “every country must have the last resort on questions relating to its own security”.⁸¹ This language indicates an intent to include a catchall exception as a means of allowing countries to take necessary, defensive, measures that may be contrary to the requirements of the GATT when no alternative remains.

The structure Article XXI, which consists subparagraphs (a) and (b) has been

⁷⁶ GATT, art. XXI(b)(i-iii).

⁷⁷ GATT, art. XXI(b)(iii).

⁷⁸ Lindsay, Peter, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 *DUKELJ* 1277 (April 2003).

⁷⁹ *Id.* at 1278.

⁸⁰ Report of the Preparatory Committee of the U.N. Conference on Trade and Employment, U.N. ESCOR, 2d Sess., 33rd mtg. at 20, 21, Corr. 3 U.N. Doc. E/PC/T/A/PV/33 (1947).

⁸¹ *Request of the Government of Czechoslovakia for a Decision under Article XXIII*, GATT/CP.3/SR.22 (8 June, 1949).

interpreted to provide a carefully drafted system of exceptions related to certain aspects of security.⁸² The careful articulation of such specific contemplated exceptions, and the inclusion of so few specific exceptions, suggests that the drafters intended section (b) (iii) to be equally narrow to its counterparts, if not in scope, then in application.

Directly to this end, Article XXI is one of the most rarely invoked sections of the GATT.⁸³ The United States has only invoked Article XXI twice, the first time in 1949 as the basis for its discriminatory licensing regime concerning the importation of war materials and the second in 1985, to justify a total embargo against Nicaragua.⁸⁴ Other nations have invoked Article XXI to take protective measures against situations such as a critical threat to the emergency planning of . . . economic defense.⁸⁵ A look at the scope and severity of the emergency that prompted the invocation of Article XXI in each of these instances may suggest a threshold of necessity that has become a point of customary law through practice and implicit understanding among the Contracting Parties.⁸⁶

In this case, any emergency that the United States may rely on to justify their claim is amorphous and abstract. The APHIS measure that may claim the exception relates to the importation of plant and animal matter, and the quarantine and inspection thereof. The standards

⁸² Schloemann, Hannes L., *Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AMJIL 424,431 (April, 1999).

⁸³ GATT, Analytical Index: Guide to GATT Law and Practice 599-610 (updated 6th ed. 1995).

⁸⁴ Request of the Government of Czechoslovakia for a Decision Under Article XXIII, GATT Doc. CP.3/SR 22 (June 8, 1949); United States--Trade Measures Affecting Nicaragua, GATT Doc. L/5803, at 2 (May 9, 1985).

⁸⁵ Wesley A. Cann, *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YJIL 413, 424 (Summer, 2001).

⁸⁶ *Fisheries Jurisdiction Case (United Kingdom v. Iceland)* [1973] ICJ; *North Sea Continental*

set forth in the previous invocations of Article XXI, however, involve war materials⁸⁷ critical threats to . . . economic defense⁸⁸ and an unusual and extraordinary threat to the national security and foreign policy of the United States.⁸⁹ Canada concedes that if a nexus existed between the regulation of the importation of plant and animal matter, and military or otherwise implied security-related threats, the Article may be applicable. However, the United States claims no such nexus and none exists.

III. THE FUEL EXPORT CHARGE VIOLATES ARTICLE 314 OF NAFTA, BUT THE U.S. IS ESTOPPED FROM BRINGING THIS CLAIM BECAUSE THE U.S. REQUESTED THAT CANADA HEIGHTEN ITS BORDER SECURITY MEASURES.

A. The Fuel Export Charge violates Article 314 of NAFTA because, as applied, it discriminates in favor of Canada's national population.

The Fuel Export Charge violates Article 314 of NAFTA, but equity bars the U.S. from pleading this because the U.S. requested that Canada heighten its border security measures.

Article 314 of NAFTA states that a party cannot impose export charges that discriminate in favor of its national population. Canada imposed the Fuel Export Charge because, in order to ensure a safe and secure North America, Canada must put into effect a variety of border initiatives. Canada is imposing the Charge to raise the \$1 billion that is needed. On its face, the fuel export charge treats all users alike, charging everyone at the end of the pipeline. However, because Canada's users will never be on the end of the pipeline, they will never pay the charge. Thus, as applied, the charge does discriminate in favor of Canada's

Shelf Cases (1969); Francesco Parisi, *The Formation of Customary Law*, (2000).

⁸⁷ *Czechoslovakia*

⁸⁸ Sweden--Import Restrictions on Certain Footwear, GATT Doc. L/4250 (Nov. 17, 1975).

national population.

B. However, the U.S. is estopped from bringing this claim because the U.S. requested that Canada heighten its border security measures.

However, the U.S. is estopped from bringing this claim. The doctrine of estoppel lies in equity, which dictates fairness. Estoppel is a principle well recognized by this Court.⁹⁰ In the *Temple of Preah Vihear* case, Thailand disputed the Cambodian ownership of a temple located close to the border between the two.⁹¹ The court found that for 50 years, Cambodia had relied on Thailand's acceptance of a map which indicated Cambodian ownership of the temple, and Thailand had benefitted from the stable frontier based on the treaty. Thus, Thailand was estopped from asserting that it had not accepted Cambodian ownership of the temple.

Here, the U.S. not only accepted the measures being taken but *requested* that Canada undertake these measures. The U.S., concerned about its national safety, asked Canada to instill measures were primarily for its own benefit. After Canada fulfilled its obligation to undertake these measures and the U.S. reaped the benefits of the increased border security, the U.S. challenged Canada's proposal that it pay for these benefits. The U.S., then, requested measures, approved these measures, and benefitted from these measures, but challenged the idea that it pay for these benefits. The principles of equity dictate against this.

Further, the Fuel Charge used the *Softwood Lumber Product Export Charge Act, 2006* as precedent.⁹² The Softwoods dispute began because the U.S. alleged that Canada was charging below market stumping fees, which were a disguised subsidy and thus, resulted in unfair

⁸⁹ United States--Trade Measures Affecting Nicaragua, GATT Doc. L/5803, at 2 (May 9, 1985).

⁹⁰ *Temple of Preah Vihear (Thailand v. Cambodia)* [1962] ICJ Rep 6, *Serbian Loans* [1929] PCIJ (ser A) Nos 20/21, 5, *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116.

⁹¹ *Temple of Preah Vihear*, *supra* note 18.

competition.⁹³ After years of dispute, the U.S. and Canada settled on agreement in which the U.S. would pay back \$4 billion of the approximate \$5.3 billion it took from Canada by imposing a counter-vailing duty tariff.⁹⁴ The agreement demonstrates that the party who is the ultimate beneficiary must pay for the costs. The Vienna Convention on treaty interpretation states that any relevant rules of international law applicable in the relations between the parties will be taken into account when interpreting a treaty.⁹⁵ As discussed *supra*, Canada took initiative, even before 9/11, and instituted measures which protect the U.S./Canada border. It did not impose a charge on the U.S. for these measures. However, the U.S. has asked Canada to go further and heighten border security. Therefore, just as Canada bore the cost of the benefit it received, the U.S. should bear the cost of this added benefit.

The Fuel Export Charge does violate Article 314 of NAFTA, but the U.S. is estopped from bringing this claim because it requested that Canada heighten its border security measures.

VI. IF THE CANADIAN FUEL TAX IS NOT FACIALLY PERMISSIBLE UNDER THE NAFTA AND GATT AGREEMENTS, IT IS COVERED BY AN EXCEPTION PURSUANT TO THE NATIONAL SECURITY EXCEPTIONS RELEVANT TO EACH AGREEMENT BECAUSE IT IS AIMED AT COMBATING AN INTERNATIONAL THREAT TO THE PEACE AND SECURITY OF THE CANADIAN POPULATION.

GATT Article XXI provides in relevant part that nothing in that agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in

⁹² Softwood Lumber Products Export Charge Act, 2006 S.C., ch. 13 (Can.)

⁹³ See John Jackson, William Davey & Alan O. Sykes, *Legal Problems of International Economic Relations* 767-68 (4th ed., West 2002).

⁹⁴ See *supra*, note 52.

⁹⁵ Vienna Convention, art. 31(3)(c) (1980).

international relations.⁹⁶

In the context of the Global War on Terror the Canadian Fuel tax is an unfortunate but necessary exception to the ordinary rules regulating the imposition of tariffs. More specifically, the international threat to the peace and security of the Canadian people satisfies the requirements of GATT art. XXI(b)(iii) and justifies the violation of GATT rules regulating measures of this kind in this narrow instance, if such a violation occurred.

NAFTA art. 2102(b)(ii) provides a substantively identical exception to that provided under GATT article XXI.⁹⁷ NAFTA art. 607, however, restricts the permissible justifications for the invocation of the national security exception for the NAFTA member states.⁹⁸ This article states that measures concerning the exportation or importation of energy and fuel products are only exempt from the NAFTA requirements when they fall into four general categories relating to military contracts, responses to an armed conflict, the implementation of national policy or international agreements concerning the non-proliferation of nuclear weapons; and direct threats of disruption in the supply of nuclear materials for defense purposes.⁹⁹ The effect of this article is to narrowly define the scope of genuine national security emergencies when the trade of energy supplies is at issue.

Within the narrower scope of national security controls over energy and petroleum products among NAFTA parties, the Global War on Terror satisfies the requirements of the national security exception. The continuing threat of international terrorism places the United

⁹⁶ *Id.* art. XXI(b)(iii).

⁹⁷ NAFTA art. 2102(b)(ii).

⁹⁸ NAFTA art. 607.

⁹⁹ NAFTA art. 607.

States and her Allies under constant risk of attack. Specifically, some terrorists have been suspected of attempting to obtain fissile material in order to launch a nuclear attack against North America.¹⁰⁰ The funding of Canada joint border security program is an integral and necessary component of Canada efforts to prevent the proliferation and use of nuclear weapons, in accordance with NAFTA article 607(c).

CONCLUSION

For these reasons, the Government of Canada respectfully requests this Court find that the WHTI is contrary to NAFTA Chapters 12 and 16 and GATS when the measure restricts the entry of business persons and imposes barriers on cross border trade in services. That the APHIS user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII when it imposes a duty that is not imposed on like domestic products. That the WHTI is not justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS when (1) the interference with trade is significant, (2) the measure has limited effectiveness, and (3) less restrictive means are available. That the APHIS user fees are justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS when its purpose is to generate revenue through the regulation of border controls, reasonable alternatives exist, and no nexus exists between the regulation of the importation of plant and animal matter, and military or otherwise implied security-related threats. That the Fuel Export Charge is justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102, or GATT Articles XX and XXI when it is aimed at combating an international threat to the peace and security of the Canadian population.

¹⁰⁰ *U.S. v. Padilla*, WL 1079090 (S.D. Fla., 2007).