

2007-08
NIAGARA INTERNATIONAL MOOT COURT COMPETITION

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

THE GOVERNMENT OF
THE UNITED STATES OF AMERICA
(Applicant)

v.

THE GOVERNMENT OF
CANADA
(Respondent)

MEMORIAL OF THE APPLICANT

TEAM # 2008-14A

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QUESTIONS PRESENTED

- I. Whether the fuel export charge is inconsistent with Canada's obligations under NAFTA Chapters 3 and 6 and GATT Articles I, VIII, and XI, when the charge is not applied to domestic consumption of fuel or fuel delivered to other contracting parties, and is imposed in order to raise revenue for a project unrelated to fuel transportation?
- II. Whether Canada can justify the fuel export charge under the general exceptions or national security exception of NAFTA Chapter 21 or GATT Articles XX or XXI, when there is a reasonable alternative measure available to Canada that is consistent with Canada's obligations under NAFTA and GATT?
- III. Whether the Animal and Plant Health Inspection Service user fees are consistent with the United States' obligations under NAFTA Article 310 and GATT Articles I and VIII, when the user fees are uniformly applied to all contracting parties, are limited to the approximate cost of services rendered, and are further justified by the general exceptions or national security exceptions of NAFTA and GATT because they are necessary to protect animal and plant life from foreign pests and diseases, as well as to protect the national security interests of the United States from bioterrorism?
- IV. Whether the Western Hemisphere Travel Initiative is consistent with the United States' obligations under GATS and Chapters 12 and 16 of NAFTA, where the passport requirement is uniformly applied to citizens of all countries, including American citizens, and where it is further justified by the national security exception under NAFTA and GATS?

JURISDICTIONAL STATEMENT

The United States and Canada, the Parties to the dispute, appear 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 Articles 40(1) and 36(1), and by Special Agreement have agreed to submit their dispute to the International Court of Justice. The Parties have stipulated to the Court's jurisdiction and the admissibility of this case. Mexico was notified of the decision by Canada and the United States to bring this case before the International Court of Justice, lifting it out of the North American Free Trade Agreement context, and had no objection to its loss of right to appear.

¹ Statute of the International Court of Justice, arts. 40, 36, June 26, 1945, 59 Stat. 1055.

STATEMENT OF THE CASE

1. The Western Hemisphere Travel Initiative

The Western Hemisphere Travel Initiative (“WHTI”), which was announced by the United States’ Department of Homeland Security on November 24, 2006, requires all travelers entering the United States to carry a valid passport or other appropriate secure documentation when entering the United States.² The WHTI applies to all travelers, regardless of nationality, including Canadian and American citizens.³ Prior to the implementation of the WHTI, Canada had been exempted from these requirements and Canadian and American citizens could cross the U.S. – Canada border with only a valid photo identification (driver’s license) and a birth certificate.⁴ The WHTI also applies to Mexico and Bermuda which had also previously been excepted from this requirement.⁵

2. Animal and Plant Health Inspection Services User Fees

On August 25, 2006, the United States Animal and Plant Health Inspection Services (“APHIS”) announced the introduction of agricultural quarantine and inspection user fees on all commercial shipments and passengers entering the United States from Canada.⁶ Canada was previously exempted from the user fees.⁷ The exemption was lifted due to the need to expand border inspection efforts to combat the rising number of prohibited items crossing the border into

² The Western Hemisphere Travel Initiative, 71 Fed. Reg. 68412, 68412 (Nov. 24, 2006).

³ *Id.* at 68412-13.

⁴ *Id.* at 68413.

⁵ *Id.* at 68423.

⁶ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 50320, 50320 (Aug. 25, 2006).

⁷ *Id.* at 50321.

the United States.⁸ Most of these prohibited materials originate from outside of Canada and present a high risk of carrying plant pests and animal diseases into the United States.⁹ The exemption was lifted in order to recover the cost of the United States' current inspection activities at the border and to expand inspections in order to keep pace with the increase in traffic coming across the border.¹⁰

APHIS sets the price of the user fees by calculating the annual cost of the agricultural inspection program for each mode of transportation and then dividing that amount by the estimated number of air passengers for the given mode of transportation to determine the individual user fee for each mode of transportation.¹¹ APHIS user fees are only spent on agricultural quarantine and inspections activities.¹²

The cost of the user fee for each mode of transportation is listed in the table below.

APHIS User Fees

Air Passengers	\$USD 5.00
Aircrafts	\$USD 70.50
Commercial Vessels	\$USD 490.00
Rail Cars	\$USD 7.75
Trucks	\$USD 10.75 or \$USD 205.00 annually

⁸ *Id.* at 50320.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 50323.

¹² *Id.* at 50324.

3. “Smart and Secure Borders”

On August 21, 2007, U.S. President Bush, Canada’s Prime Minister Harper, and Mexico’s President Calderon, issued a Joint Statement asking their Ministers to focus on five priority areas for the next year, including a “Smart and Secure Borders” initiative.¹³ The leaders of the three countries recognized their long cooperative history of border management and committed themselves to facilitating the safe and secure movement of trade and travelers across their borders.¹⁴

On September 11, 2007, Canada and the United States issued a Joint Statement that Canada would spend \$1 billion on a variety of border initiatives, including building screening facilities and erecting ground sensor towers along the U.S. – Canada border.¹⁵

4. The Fuel Export Charge

On September 11, 2007, Prime Minister Harper’s Office announced the implementation of a fuel export charge for all fuel transported by way of pipeline of \$CDN 25/barrel.¹⁶ The Fuel Export Charge legislation requires all exporters of fuel by pipeline to register for export tax purposes, to file monthly returns, and remit the export tax on a monthly basis according to the barrels of fuel put into the pipeline for export to a location outside of Canada. It also requires all

¹³ Montebello North American Leaders’ Summit, Joint Statement of Aug. 21, 2007.

¹⁴ *Id.*

¹⁵ Press Release, Office of Prime Minister Harper, Joint Statement of the United States and Canada (Sep. 11, 2007).

¹⁶ Press Release, Office of Prime Minister Harper, Statement of the Prime Minister (Sep. 11, 2007).

fuel exporters to apply for export permits for each transaction involving an export of fuel by way of pipeline and to provide prescribed information.¹⁷

Canadian Prime Minister Harper stated that Canada is imposing the fuel export charge because “the security of North America depends upon Canada playing its part” and Canada is “willingly taking the steps requested by its closest trading partner, the United States.”¹⁸ Prime Minister Harper added that his government recognized its obligation to ensure a secure North America as well its obligation to its citizens to lower taxes instead of raising them. To that end, Harper stated that Canada is imposing the export charge on fuel transported by pipeline “to raise the money to pay for the infrastructure projects and technology purchases that it has agreed to make.”¹⁹

5. Procedural Posture

On September 23, 2007, the United States filed a dispute with the International Court of Justice (ICJ) regarding the fuel export charge.²⁰ On October 23, 2007, Canada responded by filing a dispute with the ICJ regarding the WHTI and the APHIS user fees.²¹ Both governments agreed to refer their disputes to the ICJ rather than the Dispute Settlement Body of the World Trade Organization (WTO), a Chapter 20 North American Free Trade Agreement (NAFTA)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Press Release Concerning *The Government of the United States of America v. The Government of Canada*, I.C.J. (Sep. 23, 2007).

²¹ *Id.*

panel or any other body. Both governments also agreed that the ICJ would have jurisdiction to consider the issues set out below.²²

Regarding the fuel export charge, the United States takes the position that it is contrary to NAFTA Articles 309, 314, 315, 604, and 605 and General Agreement on Tariffs and Trade (GATT) Articles I, VIII, and XI and not justified under with the general or national security exceptions of NAFTA or GATT. Canada takes the position that the fuel export charge is consistent with its obligations under NAFTA and GATT or that it is justified under the general or national security exceptions of each agreement.²³

Additionally, Canada takes the position that the APHIS user fees are contrary to NAFTA Article 310 and GATT Article I and VIII, and that the user fees are not justified under either the general or national security exceptions of NAFTA and GATT.²⁴ The United States argues that the APHIS user fees are consistent with its obligations under NAFTA and GATT or in the alternative, that the user fees are justified under either the general or national security exceptions of NAFTA and GATT.²⁵

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

SUMMARY OF THE ARGUMENT

The fuel export charge is not consistent with Canada's obligations under GATT Articles I and XI and NAFTA Chapters 3 and 6 because it is not imposed on domestic consumption, or on fuel exports not transported by way of pipeline, and fails to grant the United States most favored nation status. In addition, the charge violates GATT Article VIII, because Canada is imposing the charge for a fiscal purpose and raising revenue for a project unrelated to the transportation of fuel. Further, the fuel export charge cannot be justified by either the general or national security exceptions under NAFTA or GATT because it is not "necessary" to the essential security interests of Canada.

Additionally, the APHIS user fees are consistent with the United States' most favored nation obligations under GATT Articles I because the user fees are applied consistently to all contracting parties. Furthermore, the APHIS user fees are consistent with the United States' obligations under GATT Article VIII because the user fees are limited to the approximate cost of inspection services rendered and do not serve a fiscal purpose. Moreover, even if the user fees are not consistent with the United States' obligations under NAFTA Article 310 or GATT Articles I and VIII, the user fees are nonetheless justified under the general exceptions or the national security exception of NAFTA and GATT because the user fees are necessary to protect animal and plant life from foreign pests and diseases, as well as to protect the national security interests of the United States from bioterrorism.

Furthermore, the WHTI is consistent with the United States' obligations under GATS and NAFTA Chapters 12 because the passport requirement is uniformly applied to all travelers entering the United States, including American citizens. Additionally, the WHTI is consistent

with the United States' obligations under NAFTA Chapter 16 because it does not place any further restrictions on business travelers. Further, even if the WHTI is not consistent with the United States' obligations under NAFTA or GATS, it is justified under the national security exception of NAFTA and GATS because it is necessary to prevent terrorists from fraudulently entering the United States.

ARGUMENT

I. CANADA'S FUEL EXPORT CHARGE VIOLATES EIGHT PROVISIONS OF NAFTA AND GATT BECAUSE IT DOES NOT IMPOSE THE CHARGE ON DOMESTIC CONSUMPTION OR LIKE PRODUCTS DESTINED FOR OTHER COUNTRIES AND IT CONSTITUTES A TAXATION OF EXPORTS FOR FISCAL PURPOSES.

This Court should find that the fuel export charge is inconsistent with Canada's obligations under NAFTA and GATT. NAFTA Chapters 3 and 6 and GATT Article XI obligate each contracting party to impose any charge on exports to domestic consumption of the same product. GATT Article I requires that any advantage, favour, privilege or immunity granted to one contracting party in connection with importation or exportation must be extended to all other contracting parties. Additionally, GATT Article VIII prohibits taxation of exports for a fiscal purpose. Canada did not impose the charge on domestic consumption of fuel. It also did not impose the charge on fuel delivered by means other than pipeline. Therefore, Canada is granting a privilege to other contracting parties that it is not granting to the United States because other parties that do not accept fuel delivered by pipeline do not have to pay the charge. Additionally, the charge is a taxation for a fiscal purpose because Canada imposed it in order to raise revenue to fund a project unrelated to transporting fuel.

A. The fuel export charge is contrary to NAFTA Chapters 3 and 6 and GATT

Article XI because the fuel charge is not imposed on domestic consumption of fuel.

Canada's fuel export charge is contrary to NAFTA Article 309(1) and GATT Article XI. GATT Article XI, which is incorporated into NAFTA under Article 309(1), states that, "[n]o prohibitions or restrictions other than duties, taxes or other charges...shall be instituted or maintained by any contracting party on the...exportation or sale for export of any product destined for the territory of any other contracting party."²⁶ Where the primary effect of a measure is the regulation of export transactions, the measure is considered a restriction if it imposes a materially greater commercial burden on exports than it does on domestic sales.²⁷ In other words, a restriction alters the competitive relationship between foreign and domestic buyers.²⁸ The primary effect of the export charge is to regulate the price of fuel transported by pipeline and in doing so, the charge alters the competitive relationship between domestic Canadian buyers and potential United States purchasers. \$CDN 25 per barrel is a materially greater commercial burden on export sales than on domestic sales.

Furthermore, the fuel export charge is contrary to NAFTA Chapters 3 and 6 because the charge is not imposed on domestic fuel consumption. Article 314 provides that a party cannot adopt or maintain a charge on exports to another country unless the charge is also adopted or maintained on "exports of any such good to the territory of all other Parties and any such good

²⁶ North American Free Trade Agreement, U.S.-Can.-Mex., art. 309(1), Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]; General Agreement on Tariffs and Trade, art. XI, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

²⁷ *In the matter of: Canada's Landing Requirement for Pacific Coast Salmon and Herring*, ¶ 6.09, United States-Canada Free Trade Agreement Binational Panel Review, Panel No. CDA-89-1807-01 (Oct. 16, 1989).

²⁸ *Id.*

when destined for domestic consumption.”²⁹ Article 315 states that, a Party may adopt or maintain a restriction only if, among other things,

(a) the restriction does not reduce the proportion of the total export shipments of the specific good...relative to the total supply of that good of the Party maintaining the restriction as compared to the proportion prevailing in the most recent 36-month period for which data are available prior to the imposition of the measure...and (b) the Party does not impose a higher price for exports of a good to that other Party than the price charged for such good when consumed domestically....³⁰

Articles 604 and 605 are identical to 314 and 315 respectively, but apply specifically to energy or basic petrochemical goods.³¹ The charge violates all four articles because the charge is not imposed on domestic consumption and thus establishes a higher price on the export of fuel than on its domestic consumption.

B. The fuel export charge violates GATT Article I because it fails to grant most favored nation status to the United States by not imposing the charge on oil exported to all other contracting parties.

The fuel export charge is not consistent with Canada’s most favored nation obligations under GATT Article I, which states that,

any advantage, favour, privilege or immunity granted by any contracting party to any product...destined for any other country shall be accorded immediately and unconditionally to the like product...destined for the territories of all other contracting parties.³²

²⁹ NAFTA, *supra note 25*, art. 314.

³⁰ *Id.* at art. 315.

³¹ *Id.* at Chapter 6.

³² GATT, *supra note 25*, art. I.

What is considered a “like product” is determined on a case-by-case basis.³³ However, the Panel Report on *Border Tax Adjustments* has suggested criteria for determining whether a product is “similar”: “the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; and the product’s properties, nature and quality.”³⁴ Applying these criteria to the instant case, any fuel exported from Canada is considered a “like product” regardless of whether the fuel is transported by pipeline or other means.

Canada is only imposing a charge on fuel delivered by pipeline. Fuel delivered by other means, such as truck, ship, or plane, is not charged a higher price. The United States is the only country that receives fuel from Canada by means of pipeline and thus the only country that pays the charge. The charge violates Canada’s most favored nation obligations under GATT Article I by affording a privilege to countries that accept fuel exports by any means other than pipeline.

C. The fuel export charge violates GATT Article VIII because it is a taxation of an export for a fiscal purpose.

Additionally, the fuel export tax is contrary to GATT Article VIII, which states that all fees and charges on exports “shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of...exports for fiscal purposes.”³⁵ To be consistent with Article VIII, the fuel charge would have to be equal to the approximate cost of the border services rendered to the given purchaser of

³³ See Report of the Working Party, *Border Tax Adjustments*, ¶ 18, L/3464, (Dec. 2, 1970) GATT B.I.S.D. 18S/97 (1970) [hereinafter *Border Tax*]; see also Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, p. 20, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter *Japan*].

³⁴ See *Border Tax* ¶ 18; see also *Japan* p. 20.

³⁵ GATT, *supra* note 25, art. VIII.

fuel.³⁶ Canada has failed to demonstrate that the charge is limited to the costs of any supposed services rendered to United States fuel purchasers.

Additionally, the charge is imposed for “fiscal purposes” because the total revenues exceed the total attributable costs. Here, attributable costs can only be considered costs incurred in the process of transporting the fuel by pipeline. The revenue collected from the fuel charge will far exceed Canada’s attributable costs because Canada does not attempt to attribute the charge to the costs of exporting the fuel. By its own admission, it is imposing the fuel export charge for fiscal purposes. Canadian Prime Minister Harper announced that Canada intended the charge “to raise the money to pay for the infrastructure projects and technology purchases that it has agreed to make.”³⁷

Canada’s fuel export charge violates eight NAFTA and GATT provisions. Furthermore, the charge cannot be justified under any of the NAFTA or GATT exceptions.

II. THE FUEL EXPORT CHARGE IS NOT JUSTIFIED BY EITHER THE GENERAL OR NATIONAL SECURITY EXCEPTIONS UNDER NAFTA OR GATT BECAUSE IT IS NOT “NECESSARY” TO CANADA’S ESSENTIAL SECURITY INTERESTS.

Canada’s fuel export charge is not justified under the general exceptions of NAFTA Article 2101 or GATT Article XX. NAFTA Article 2101 incorporates Article XX of GATT, which allows the adoption of measures necessary to secure compliance with laws or regulations, including those relating to safety, but only when they are not applied in a manner “that would constitute a means of arbitrary or unjustifiable discrimination...or a disguised restriction on

³⁶ See Report by the Panel, *United States Customs User Fees*, ¶ 86, L/6264-35S/245, (Feb. 2, 1988).

³⁷ Press Release, Office of Prime Minister Harper, Statement of the Prime Minister, (Sep. 11, 2007).

trade.”³⁸ Article XX however, lists exceptions that a party may adopt, so long as they do not constitute “a means of arbitrary or unjustifiable discrimination.”³⁹ These include measures:

(b) necessary to protect human, animal, or plant life...(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement...(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.⁴⁰

Under XX(b) and (d), a measure is necessary only when there is no other alternative measure which it could reasonably be expected to employ and which is not inconsistent with any other GATT provision.⁴¹ In other words, if a party could reasonably secure enforcement in a manner that is consistent with other GATT provisions, it is required to do so.⁴² If a measure consistent with GATT is not reasonably available, the party is bound to pursue the measure that is least inconsistent with other GATT provisions.⁴³

Canada may claim that the charge is necessary to comply with the border initiatives, which are in place to protect human life through the reinforcement of security measures. The fuel export charge however, is not necessary to the border initiatives because Canada can raise the money for the security efforts through means that do not restrict trade. For example, Canada could raise the money by taxing its citizens, a reasonable revenue-raising method commonly

³⁸ NAFTA, *supra* note 25, art. 2101.

³⁹ GATT, *supra* note 25, art. XX.

⁴⁰ *Id.*

⁴¹ See Report of the Panel, *United States – Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/3469, (Nov. 7, 1989) GATT B.I.S.D. 36S/345 (1989) [hereinafter *Section 337*]; see also Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* ¶ 74, DS10/R – 37S/200, (Nov. 7, 1990) [hereinafter *Thailand – Cigarettes*].

⁴² See *Section 337* ¶ 5.26; see also *Thailand – Cigarettes* ¶ 74.

⁴³ See *Section 337* ¶ 5.26.

used in countries all over the world. Canada acknowledged this possibility, but dismissed it simply because it would rather lower taxes than raise them. Furthermore, Canada cannot sustain an argument under XX(g) because the charge is not made in conjunction with restrictions on domestic production or consumption and Canada has made no argument that the fuel charge is made in an effort to conserve a natural resource.

Similarly, Canada's fuel export charge cannot be justified under the national security exceptions of NAFTA Articles 607 and 2102 or GATT Article XXI. Article 607 provides that no party shall maintain a measure restricting exports except to the extent necessary to "respond to a situation of armed conflict involving the Party taking the measure."⁴⁴ NAFTA Article 2102 and GATT Article XXI are identical in their language and provide that nothing in either agreement shall be construed "to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests."⁴⁵ The essential security interests include those "(c) taken in time of war or other emergency in international relations."⁴⁶ The Panel in *Thailand Cigarettes* adopted the same definition of "necessary" for the national security exceptions as that applied for the general exceptions.⁴⁷

Though Canada may claim that the fuel export charge is necessary to raise money for the security of its borders through the border security initiatives, the charge does not meet the Panel's accepted definition of "necessary." The charge is not necessary because there are less restrictive reasonable alternative measures available to Canada that are not inconsistent with

⁴⁴ NAFTA, *supra* note 25, art. 607.

⁴⁵ NAFTA, *supra* note 25, art. 2102; GATT, *supra* note 25, art. XXI.

⁴⁶ NAFTA, *supra* note 25, art. 2102; GATT, *supra* note 25, art. XXI.

⁴⁷ See *Thailand –Cigarettes* ¶ 74.

GATT. Specifically, Canada can raise the money for the Smart and Secure Borders initiatives by taxing its citizens.⁴⁸ Thus, with a reasonable and less inconsistent alternative available, Canada cannot justify the fuel export charge under either the general exceptions or national security exceptions of NAFTA or GATT.

III. THE APHIS USER FEES ARE CONSISTENT WITH THE UNITED STATES' OBLIGATIONS UNDER GATT ARTICLES I AND VIII BECAUSE THEY ARE APPLIED UNIFORMLY TO ALL CONTRACTING PARTIES AND ARE LIMITED TO THE APPROXIMATE COST OF SERVICES RENDERED.

This Court⁴⁸ should find that the APHIS user fees are consistent with the United States' obligations under GATT Articles I and VII because they are applied uniformly to all contracting parties and are limited to the approximate cost of services rendered. The APHIS user fees are applied to all people and imports coming into the United States regardless of country of origin and therefore satisfy the United States' most favored nation obligations under GATT Article I. Furthermore, the user fees are limited to the average cost of an inspection for each mode of transportation and the user fees, as a matter of United States law, can only be spent on the inspection program for each separate mode of transportation. Thus, the APHIS user fees are consistent with GATT Article VIII because they are limited to the approximate cost of services rendered and do not serve a fiscal purpose.

Further, even if the APHIS user fees violate GATT Articles I or VIII or NAFTA Article 310, the user fees are justified pursuant to the general exceptions or the national security exceptions of GATT and NAFTA. The APHIS user fees are necessary to protect plant and

⁴⁸ *Id.*

animal life from pests and diseases and are therefore justified under GATT Article XX(b), which is incorporated into NAFTA under Article 2101. Additionally, the APHIS user fees are necessary to protect the essential security interests of the United States from bioterrorism while the United States is engaged in the war against terror and therefore are justified under GATT Article XXI, which is incorporated into NAFTA under Article 2102.

A. The APHIS user fees are consistent with the United States’ most favored nation obligations under GATT Article I because the user fees are uniformly applied to all imports and people entering the United States.

The APHIS user fees are consistent with the United States’ most favored nation obligations under GATT Article I because they are uniformly applied to all people and imports coming into the United States, regardless of country of origin. Previously Canada had been granted an exemption from the APHIS user fees. However, this exemption amounted to a “privilege or immunity” not “accorded . . . to . . . all other contracting parties”⁴⁹ and therefore was inconsistent with GATT Article I.⁵⁰ The United States’ most favored nation obligations require that Canada be treated in the same manner as all other contracting parties and therefore must be subject to the APHIS user fees.

The APHIS user fees apply uniformly to all people and imports entering the United States and no country is granted any privilege or immunity not also accorded to Canada.⁵¹ Therefore, the APHIS user fees are consistent with GATT Article I.

B. The APHIS user fees are consistent with the United States’ obligations under GATT Article VIII because they are limited to the approximate cost of services

⁴⁹ GATT, *supra* note 25, art. I:1.

⁵⁰ See Report of the Panel, *United States – Customs User Fee*, ¶¶122-23, L/6264-35S/245 (Nov. 25, 1987) B.I.S.D. 35S/245 (1988) [hereinafter *Customs User Fee*].

⁵¹ See *Agricultural Inspection User Fees Along the U.S./Canada Border*, 71 Fed. Reg. at 50321.

rendered, do not represent an indirect protection of domestic products, and do not have a fiscal purpose.

The APHIS user fees are consistent with the United States obligations under GATT Article VIII because they are “limited to the approximate cost of services rendered” and do “not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.”⁵² GATT Article VIII states that:

All fees and charges of whatever character . . . imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.⁵³

The APHIS user fees are limited to the average cost of the agricultural quarantine and inspection activities for each separate mode of transportation, thus limiting the fees to the approximate cost of services rendered.⁵⁴ The “approximate cost” does not mean the exact or precise cost of services rendered. The cost of any single inspection is difficult to calculate and is a function of the time and thoroughness spent on a given inspection. By charging the average cost of a given type of inspection, the user fees are limited as closely as is practicable to the approximate cost of services rendered.

Furthermore, the APHIS user fees are not an *ad valorem* user fee with no set maximum such as the one that was found to be inconsistent with Article VIII by the World Trade Organization (“WTO”) Panel in *Argentina – Measures Affecting Imports of Footwear, Textiles,*

⁵² GATT, *supra* note 25, art. VIII:1(a).

⁵³ *Id.*

⁵⁴ Agricultural Inspection User Fees Along the U.S./Canada Border, 71 Fed. Reg. at 50323-24.

Apparel and Other Items.⁵⁵ An *ad valorem* user fee is calculated based upon the appraised value of the merchandise being imported. The Panel stated that “[a]n ad valorem duty with no fixed maximum fee, by its very nature, is not ‘limited in amount to the approximate cost of services rendered.’”⁵⁶

However, unlike in *Argentina*, the APHIS user fees are not potentially unlimited in nature. Where the user fees in *Argentina* were calculated based upon the value of the imports, which has no relation to the actual cost of the inspection services, the APHIS user fees are limited to the average cost of the inspection services for the applicable mode of transportation. Whereas the *ad valorem* user fees in *Argentina* were not consistent with Article VIII because they were not limited to the cost of services rendered, the APHIS user fees are consistent with Article VIII because they are limited to the approximate cost of services rendered.

C. Even if the APHIS user fees are contrary to NAFTA or GATT, the APHIS user fees are nonetheless justified under the general exceptions or the national security exception of NAFTA and GATT.

While the APHIS user fees may violate NAFTA Article 310, and even if this Court were to find that the user fees violate GATT Article I or VIII, the APHIS user fees are nonetheless justified under the general exceptions or the national security exceptions of GATT and NAFTA.

- i. The APHIS user fees are justified under the general exceptions of NAFTA Article 2101 and GATT Article XX(b) because they are consistent with the Agreement on the Application of Sanitary and Phytosanitary Measures.

As is reflected in Article 2.1 of the Agreement on the Application of Sanitary and

⁵⁵ Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R (Nov. 25, 1997) [hereinafter *Argentina*]; See generally *Customs User Fee*.

⁵⁶ *Argentina* ¶ 6.75.

Phytosanitary Measures (“SPS Agreement”), Article XX(b) of GATT, and Article 2101 of NAFTA, the United States has the right to take measures necessary to protect the health and life of its people, its food supply, and its agricultural industry. Article XX of GATT, which is incorporated into NAFTA under Article 2101, states that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health.”⁵⁷ Similarly, Article 2.1 of the SPS Agreement states that, “[m]embers have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health . . .”⁵⁸

“Sanitary or phytosanitary measures which conform” with the SPS Agreement are “presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 . . . Article XX(b).”⁵⁹ Therefore, as long as the APHIS user fees are consistent with the SPS Agreement, they are also consistent with NAFTA Article 2101, which incorporates GATT Article XX(b).

The SPS Agreement requires that sanitary or phytosanitary measures only be applied “to the extent necessary to protect human, animal or plant life or health” and that such measures be based upon “scientific principles” and “do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail” or “constitute a disguised restriction on international trade.”⁶⁰ The APHIS user fees are consistent with these obligations because: 1) they relate to the enforcement of already existing and accepted phytosanitary standards; 2) they

⁵⁷ GATT, *supra* note 25, art. XX.

⁵⁸ Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

⁵⁹ SPS Agreement, *supra* note 56, art. 2.1.

⁶⁰ *Id.* at art. 2.

are applied uniformly to all imports and people entering the United States, regardless of national origin; and 3) inspections are the least trade restrictive means of enforcing the United States' phytosanitary requirements.

First, people and imports entering the United States are already subject to inspection.⁶¹ The APHIS user fees merely allow for inspection efforts to be expanded.⁶² While prior to the imposition of the APHIS user fees, inspections of certain imports were infrequent, the user fees do not bring with them any further requirements or prohibitions regarding the importation of goods or the entry of people into the United States.⁶³

Furthermore, pre-existing phytosanitary requirements are supported by "scientific evidence" as is required by Article 2.1 of the SPS Agreement.⁶⁴ In *Japan – Agricultural Products*, the WTO Appellate Body held that there must "be a rational or objective relationship between the SPS measure and the scientific evidence" for the measure to be consistent with Article 2.2 of the SPS Agreement.⁶⁵ The United States' phytosanitary requirements are consistent with prevailing international standards and restrict the means of importation for goods that pose a risk of carrying foot-and-mouth disease, fruit flies, and a host of other exotic pests and diseases.⁶⁶

Smuggling from Canada is a particular risk to the United States because unlike the United

⁶¹ See *Agricultural Inspection User Fees Along the U.S./Canada Border*, 71 Fed. Reg. at 50323.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ SPS Agreement, *supra* note 56, art. 2.2.

⁶⁵ Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, ¶ 84, WT/DS76/AB/R (Feb. 22, 1999) (*adopted* Mar. 19, 1999).

⁶⁶ See *Agricultural Inspection User Fees Along the U.S./Canada Border*, 71 Fed. Reg. at 50321.

States, the Canadian territories all possess cool or cold climates.⁶⁷ As a result, Canada imposes fewer phytosanitary requirements than the United States on the imports of plant products from countries where tropical or subtropical pests may be present.⁶⁸ For example, “[o]f the 402 species on the U.S. regulated plant pest list . . . 349, or 87 percent, we not regulated pests in Canada.”⁶⁹ Imports that would normally be refused entry or subjected to strict phytosanitary requirements before being allowed to enter into the United States can be imported into Canada without any such impediments.⁷⁰ Products that would be denied entry into the United States can bypass the United States’ stricter phytosanitary requirements by first being brought into Canada and then being re-exported into the United States.⁷¹ Border inspections are needed to prevent the smuggling of agricultural products that can harbor plant pests and diseases. The APHIS user fees are necessary to fund the border inspections and thus bear a rational relationship to preventing the smuggling of dangerous plant pests and diseases.

Second, the APHIS user fees do not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade and therefore comply with Article 2.3 of the SPS Agreement. The APHIS user fees are applied uniformly to all imports and people entering the United States.⁷² No country is exempted from the APHIS user fees.⁷³ Further, as was previously noted, exempting Canada from the APHIS user fees would be inconsistent with both the SPS Agreement and

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

GATT.

Lastly, border inspections fees amounting to approximately the costs of services rendered presents the least restrictive means of ensuring compliance with United States' phytosanitary requirements. The relationship between the APHIS user fees and the prevention of the introduction of pests and diseases in the United States is an observably close one. Inspections are the least intrusive and most effective means of ensuring that prohibited materials are not smuggled into the United States via the U.S. – Canada border.

- ii. The APHIS user fees are justified under the national security exception of NAFTA Article 2102 and GATT Article XXI because they are necessary to protect the essential security interests of the United States from bioterrorism.

The APHIS user fees are justified under the national security exception of NAFTA Article 2102 and GATT Article XXI because they are necessary to protect the United States from bioterrorism while the United States is engaged in the war against terror. NAFTA Article 2102 and GATT Article XXI, state that “[n]othing in this Agreement shall be construed . . . to prevent any . . . 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 . . .”⁷⁴ Additionally, the United States has fulfilled its obligation to notify the contracting parties of its invocation of XXI(b)(iii) by announcing the introduction of the APHIS user fees in the U.S. Federal Register on August 25, 2006,⁷⁵ as is required by the “Decision Concerning Article XXI of the General Agreement.”⁷⁶

⁷⁴ GATT, *supra* note 25, art. XXI(b); NAFTA, *supra* note 25, art. 2101:1(b).

⁷⁵ Agricultural Inspection User Fees Along the U.S./Canada Border, 71 Fed. Reg. at 50320.

⁷⁶ *Decision Concerning Article XXI of the General Agreement*, L/5426 (Nov. 30, 1982) GATT B.I.S.D. (29th Supp.) at 23 (1983) [hereinafter *Decision Concerning Article XXI*].

Since September 11, 2001 ushered the United States into the ongoing war against terror, awareness of America's vulnerability to a bioterrorist attack has greatly risen.⁷⁷ The World Health Organization has recognized that "malicious contamination of food for terrorist purposes is a real and current threat" and that "[t]he key to preventing food terrorism is [the] establishment and enhancement of existing food safety management programmes and implementation of reasonable security measures."⁷⁸

The U.S. - Canada border is the longest undefended border in the world.⁷⁹ Without the proper inspection network in place, the United States is left vulnerable to terrorists exploiting this fact and mounting a successful bioterrorist attack which could devastate U.S. agriculture and lead to widespread illness and death.⁸⁰ Maintaining a strong inspection program at the border is necessary to protect the national security interests of the United States from bioterrorism and therefore the APHIS user fees are justified under the security exception of NAFTA and GATT.

IV. THE WHTI IS CONSISTENT WITH THE UNITED STATES OBLIGATIONS UNDER NAFTA AND GATS BECAUSE IT IS APPLIED UNIFORMLY TO ALL PEOPLE ENTERING THE UNITED STATES, INCLUDING AMERICAN CITIZENS, AND IT PLACES NO RESTRICTIONS ON BUSINESS TRAVELERS ENTERING THE UNITED STATES.

A. The WHTI is consistent with the United States' most favored nation and national treatment obligations under NAFTA Chapter 12 and GATS Articles II and XVII because the passport requirement is applied uniformly to the citizens of all contracting parties and American citizens.

⁷⁷ See Agricultural Inspection User Fees Along the U.S./Canada Border, 71 Fed. Reg. at 50321.

⁷⁸ WORLD HEALTH ORGANIZATION, EXECUTIVE SUMMARY ON TERRORIST THREATS TO FOOD - GUIDELINES FOR ESTABLISHING AND STRENGTHENING PREVENTION AND RESPONSE SYSTEMS 1 (2002).

⁷⁹ See Agricultural Inspection User Fees Along the U.S./Canada Border, 71 Fed. Reg. at 50322.

⁸⁰ *Id.*

The WHTI applies equally to the citizens of all countries, including American citizens, thus satisfying the United States' most favored nation and national treatment obligations under NAFTA and GATS. NAFTA Article 1202 and 1203 and GATS Articles II and XVII require that each contracting party accord most favored nation treatment and national treatment to the service providers of all contracting parties.⁸¹

No country is granted preferable treatment to Canada under the WHTI and furthermore, since United States' citizens are also subject to the WHTI, Canada is afforded national treatment thus satisfying the United States' obligations under Chapter 12 of NAFTA and Articles II and XVII of GATT. The WHTI removes all previous exceptions to the passport requirement granted to various countries, including Canada, Mexico and Bermuda,⁸² and in doing so brings the United States into compliance with NAFTA Chapter 12 and GATS Articles II and XVII.

B. The WHTI is consistent with the United States' obligations under NAFTA Chapter 16 because requiring a universally accepted secure form of identification at the border does not restrict the entry of business persons into the United States.

The WHTI is not contrary to Chapter 16 of NAFTA because it does not place any restrictions on business persons entering the United States and in fact, furthers the principles of Chapter 16 by facilitating entry through the use of passports which are a more efficient and secure form of identification.

Annex 1603 details what requirements may and may not be imposed on business persons

⁸¹ NAFTA, *supra* note 25, art. 1202, 1203; General Agreement on Trade in Services, arts. II:1, XVII:1 Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS].

⁸² The Western Hemisphere Travel Initiative, 71 Fed. Reg. at 68423.

wishing to enter the United States.⁸³ Section A: Business Visitors states that

[e]ach Party shall grant temporary entry to a business person . . . on presentation of: 1) proof of citizenship of a Party; 2) documentation . . . describing the purpose of entry; and 3) evidence demonstrating that . . . the business person is not seeking to enter the local labor market.⁸⁴

The United States, under Chapter 16, is allowed to require proof of citizenship, and by extension identity. The WHTI merely requires that a passport, which is a secure and widely used form of identification be used at the border.

Additionally, Annex 1603 states that, “[n]o Party may: 1) as a condition for temporary entry . . . require prior approval procedures, petitions, labor certification tests or other procedures of similar effect; or 2) impose or maintain any numerical restriction . . .”⁸⁵ The WHTI does not have any of these restrictions. Furthermore, “a Party may require a business person . . . to obtain a visa . . . prior to entry.”⁸⁶ Under Annex 1603, the United States has the right to impose a visa requirement on all business persons entering the United States; however the United States has opted to impose a less burdensome requirement than is even permissible under Chapter 16.

Moreover, requiring passports speeds up the customs process at the border because passports can be scanned instead of being entered manually into the computer system and agents at the border do not have to contend with deciphering the authenticity of birth certificates and drivers licenses from numerous states and provinces.⁸⁷ Thus, the WHTI furthers the principles of

⁸³ NAFTA, *supra* note 25, annex 1603.

⁸⁴ *Id.* at annex 1603, sec. A(1).

⁸⁵ *Id.* at annex 1603, sec. A(4).

⁸⁶ *Id.* at annex 1603, sec. A(5).

⁸⁷ The Western Hemisphere Travel Initiative, 71 Fed. Reg. at 68413.

Chapter 16 by better “facilitating temporary entry . . . establishing transparent criteria,⁸⁸ [and] expeditiously” applying such measures so “as to avoid unduly impairing or delaying [the] trade in goods or services”⁸⁹ and does so without imposing any restrictions on business travelers that are prohibited under Chapter 16.

C. Even if the WHTI is contrary to NAFTA or GATS, the WHTI is justified under the national security exceptions of NAFTA Article 2102 and GATS Article XIV because it is necessary to prevent terrorists from fraudulently entering the United States.

The WHTI is justified under NAFTA Article 2101 and GATS Article XIV, even if *arguendo*, it is contrary to NAFTA or GATS, because it is “necessary for the protection of [the United States’] essential security interests” and is “taken in . . . [an] emergency in international relations.”⁹⁰ Furthermore, the United States has fulfilled its obligation to notify the contracting parties of its invocation of XXI(b)(iii) by announcing the lifting of the exception in the U.S. Federal Register on November 24, 2006⁹¹, as is required by the “Decision Concerning Article XXI of the General Agreement.”⁹²

The WHTI allows for “increased security in the air environment provided by more secure documents and facilitation of inspections” and it “addresses a vulnerability of the United States to entry by terrorists or other person by false documents or fraud under current documentary exemptions . . .”⁹³ As was previously stated, the United States is currently engaged in the war against terror. Therefore, under NAFTA Article 2101 and GATS Article XIV, the APHS user

⁸⁸ NAFTA, *supra* note 25, art. 1601.

⁸⁹ *Id.* at art. 1602.

⁹⁰ GATS, *supra* note 79, art. XIV(b).

⁹¹ The Western Hemisphere Travel Initiative, 71 Fed. Reg. at 68412.

⁹² *Decision Concerning Article XXI* at 23.

⁹³ The Western Hemisphere Travel Initiative, 71 Fed. Reg. at 68423.

fees are justified because they are necessary to protect the security interests of the United States by preventing people from fraudulently entering the United States.

CONCLUSION

For these reasons, the Government of the United States of America respectfully requests this Court find: a) that Canada's imposition of the Fuel Export Charge is not consistent with NAFTA Chapters 3 and 6 and GATT Articles I, VIII, and XI and is not justified under the national security exception or general exception of NAFTA Chapters 6 and 21 or GATT Articles XX and XXI; 2) that the APHIS user fees are consistent with the United States' obligations under NAFTA Article 310 and GATT Article I and VIII or are justified pursuant to the national security exception or the general exceptions of NAFTA and GATT; and 3) that the WHTI is consistent with the United States' obligations under NAFTA Chapters 12 and 16 and GATS or is justified pursuant to the national security exception of NAFTA and GATS.