

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 # 2008-14R

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QUESTIONS PRESENTED

- I. Whether the United States violated the North American Free Trade Agreement and the General Agreement on Trade in Services by imposing the Western Hemisphere Travel initiative, when it results in fewer Americans taking advantage of Canadian services and bars the entry of individuals and business persons who may not obtain a passport?
- II. Whether the Western Hemisphere Travel Initiative is justified by a general or national security exception when there are many less restrictive alternatives and the measure itself may not effectively increase the security of American citizens?
- III. Whether the United States violated the General Agreement on Tariffs and Trade and the North American Free Trade Agreement by imposing the Animal Plant Health Inspection Service user fees when it results in more fees for Canadian importers than other countries, causes American products to be cheaper than Canadian goods, is a brand new fee imposed on a NAFTA member, and compels a charge that disregards the service provided to individual exporters?
- IV. Whether the Animal and Plant Health Inspection Service user fees are justified by a general or national security exception when there are many less restrictive alternatives and the fees themselves may not effectively increase American health safety?
- V. Is Canada's Fuel Export Charge, enacted to fund the border security initiatives to combat terrorism, authorized by the GATT and NAFTA when both treaties explicitly authorize a nation to take (1) any measures it deems necessary to protect essential national security interests, and (2) any measures necessary to maintain international peace and security in accordance with international law?

JURISDICTIONAL STATEMENT

Canada and the United States, the Parties in this dispute, seek resolution before this Court under Article 36(1) of the Statute of the International Court of Justice.¹ The Parties have agreed to submit to the jurisdiction of this Court under Article 40(1).² The Parties have met all the requirements enumerated in those Articles. Mexico waives its right to appear.

¹ Statute of the International Court of Justice, art. 36(1), June 26, 1945, 59 Stat. 1055.

² *Id.* at art. 40(1).

STATEMENT OF THE FACTS

1. The Western Hemisphere Travel Initiative

On June 26, 2006 the United States ("U.S.") Department of State and the U.S. Department of Homeland Security published the Western Hemisphere Travel Initiative ("WHTI"), a rule rescinding Canada's privilege of entering the United States without a passport.³ The rule also mandates that American citizens must present passports upon entry into the country.⁴ Prior to the implementation of this rule Canadian and American citizens could cross the U.S.-Canada border with a valid driver's license and a birth certificate.⁵ The U.S. anticipates that specific foreign regions, including Canada, are "most likely to experience adverse impacts as a result of this rule."⁶ The U.S. also acknowledges that some travelers may decide not to obtain passports due to cost or inconvenience, that this would result in cost to industries that support the traveling public, and that foreign businesses who provide services mainly outside the United States "will primarily be impacted."⁷ One of the anticipated benefits of the rule is enhanced security afforded by more secure documents.⁸

2. The 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.⁹ Previously

³ The Western Hemisphere Travel Initiative, 71 Fed. Reg. 68412, 68413 (Nov. 24, 2006).

⁴ *Id.* at 68414.

⁵ *Id.* at 68413.

⁶ *Id.* at 68421.

⁷ *Id.* at 68423.

⁸ *Id.*

⁹ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 50320 (Aug. 25, 2006).

Canada had been exempted from the user fees.¹⁰ The fees will be used to cover the cost of inspection programs, and to generate excess revenue for reserve.¹¹ The amount of the user fees is determined by calculating the total annual costs of each program and dividing by the estimated number of passengers and conveyances in that program.¹² Although the inspection processes and times needed by each conveyance or passenger vary, the fees do not.¹³ The stated objective of the user fees is to prevent prohibited material that poses a high risk of bringing in animal diseases or plant pests into the U.S.¹⁴

3. The Fuel Export Charge

As Canada and the U.S. share a 5,525 mile border,¹⁵ their respective leaders pledged to collaborate “to enhance prosperity, security and quality of life in North America” by “facilitating the efficient and safe movement of goods, services and people” across the border.¹⁶ Known as the Joint Statement on Smart and Secure Borders, issued on August 21, 2007, the agreement recognizes that “the best time to screen travelers and commerce is before they enter North America.”¹⁷ This agreement is one of many in which Canada has pledged to strengthen its border security, both for its own benefit and the benefit of the U.S., including the Canada-U.S. Smart Border Declaration,¹⁸ the North American Security and Prosperity Partnership of 2005,¹⁹

¹⁰ *Id.* at 50321.

¹¹ *Id.* at 50323.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 50320.

¹⁵ International Boundary Commission Act, R.S.C. 1985, ch. I 16 (1993) (Can.).

¹⁶ Joint Statement on Smart and Secure Borders, U.S.-Can., Aug. 21, 2007 [hereinafter Joint Statement].

¹⁷ *Id.*

¹⁸ Canada-U.S. Smart Border Declaration, U.S.-Can., Dec. 12, 2001 [hereinafter Declaration].

¹⁹ Security and Prosperity Partnership of North America, U.S.-Can.-Mex., Mar. 23, 2005 [hereinafter Partnership].

and Shared Border Accord.²⁰ Also, in 2001 Canada invested \$7.7 billion in national security measures as part of a five-year plan that included considerable investments in border security.²¹

Nonetheless, immediately following the issuance of the Smart and Secure Borders Accord, high-profile politicians in the U.S. made false statements about the September 11, 2001, hijackers entering the U.S. through the Canadian border.²² Canada was very displeased about the misstatements, as well as the ensuing pressure placed on it by the U.S. to develop further border measures, known as the “thick border” initiatives (“TBI”).²³ These measures, totaling a \$1 billion investment, include multiple screening facilities and ground sensor towers at the border, and advanced radiological detection technology at all ports.²⁴

In order to pay for the TBI, given that the U.S. will “benefit most from the actions being promised,” Canada also announced the implementation of a Fuel Export Charge (“FEC”) of \$CDN 25/barrel to raise the funds needed.²⁵ Canada based the FEC on the U.S.-approved *Softwood Lumber Product Export Charge Act of 2006*.²⁶ The FEC thus requires exporters of fuel by the pipeline to register, file monthly returns and pay monthly taxes based on the number of barrels exported by pipeline.²⁷ No other export methods are implicated.²⁸ The effect of the FEC is also dependent on the demand for fuel.²⁹ In implementing the FEC, “Canada recognizes the

²⁰ Shared Border Accord, U.S.-Can., Feb. 25, 1995 [hereinafter Accord].

²¹ CAN. DEP’T OF FIN., SECURING PROGRESS IN AN UNCERTAIN WORLD: BUDGET 2001; ENHANCING SECURITY FOR CANADIANS, 4 (2001) [hereinafter Budget 2001].

²² See, e.g., U.S. Senator Jerry Stanton, *Interview* (CNN television interview Aug. 30, 2007).

²³ See, e.g., Joe Canadian, *P.M. Harper Tries to Subdue Popular Outcry After U.S. Blames Canada for 9/11*, Can. Daily, Sept. 2, 2007, at A1.

²⁴ Joint Statement on Thick Border Initiatives, U.S.-Can., Sept. 11, 2007.

²⁵ Announcement by Prime Minister Harper on the Fuel Export Charge, Sept. 11, 2007 [hereinafter Announcement].

²⁶ Softwood Lumber Product Export Charge Act, 2006 S.C., ch. 13 (Can.).

²⁷ Fuel Export Charge Act, 2007 S.C. ch. 22 (Can.).

²⁸ *Id.*

²⁹ Announcement, *supra* note 25.

importance of North American security and is willing to take the steps requested by its closest trading partner, the United States.”³⁰

The U.S. argues the FEC is contrary to Canada’s international trade obligations, but Canada intends to keep the measure in force, because “the security of North America depends upon Canada playing its part.”³¹

4. Procedural Posture

The U.S., the Applicant in this dispute, filed suit with the International Court of Justice (“ICJ”) on September 23, 2007, asserting that Canada’s FEC violated the General Agreement on Tariffs and Trade (“GATT”) Articles I, VIII and XI, and the North American Free Trade Agreement (“NAFTA”) Articles 314, 315, 604 and 605. Canada, the Respondent in this dispute, filed a dispute with the ICJ on October 23, 2007, challenging the imposition of the WHTI and APHIS programs by the U.S. as violations of the General Agreement on Trade in Services (“GATS”), GATT, and NAFTA Chapter 12 and 16. The two disputes were joined on November 23, 2007. Mexico waived its right of appearance.

³⁰ *Id.*

³¹ *Id.*

SUMMARY OF THE ARGUMENT

The U.S. violated NAFTA and GATS when it imposed the WHTI because the measure contradicts the treaties' stated aim of liberalizing trade in service by making the provision of services and the movement of people contingent upon the acquisition of a passport. The measure also fails to afford national treatment to Canada by ensuring that U.S. service providers have more market access than Canadian ones, and hinders the cross-border movement of individuals and business persons who do not attain a passport.

The U.S. violated GATT by imposing APHIS and causing higher discrimination against Canadian goods than the goods of other nations, and by guaranteeing that U.S. goods will be cheaper than Canadian products, since the cost of the user fees will be incorporated into the price of the goods. The U.S. violated NAFTA by imposing a brand new fee on Canada. The U.S. further offended its obligations under GATT by charging a fee that is not approximate to the services offered since exporters who will be subject to different inspection times and efforts are charged the same rate, and by taxing for the fiscal purpose of raising excess revenue.

Neither measure is justified under a general exception or a national security exception because the existence of many alternative measures, and the weight of the high restriction on trade combined with the ineffectiveness of the measures render them unnecessary.

Conversely, the U.S.' challenge to the FEC must fail because, unlike APHIS, the FEC is necessary under GATT and NAFTA for Canada to protect its national security by funding the TBI. The measure is necessary because it is the only action reasonably available to Canada that would accomplish this critical national security goal, and there are no reasonable alternative measures less in violation of GATT and NAFTA. Further, the FEC is important for Canada to maintain international peace and security, as mandated by the United Nations ("U.N.") Charter.

Lastly, the U.S. is acting in bad faith and is violating the international relations principle of comity by pressuring Canada to institute both infrastructure developments and domestic taxes to pay for them. Thus, the U.S.' position derogates Canadian sovereignty, and also attempts to impose conflicting definitions of the GATT and NAFTA on its own actions and Canadian actions, respectively. The U.S. thus undermines the international system, and violates the customary international laws governing treaty interpretation by challenging the FEC.

ARGUMENT

I. THE WHTI VIOLATES THE U.S.' OBLIGATIONS UNDER NAFTA AND GATS BECAUSE IT FAVORS DOMESTIC SERVICE PROVIDERS AND CONTRADICTS THE GOAL OF TRADE LIBERALIZATION.

The U.S. and Canada have a long history of cooperation and shared culture, to such an extent that it is illegal in Canada to conspire to break American law.³² Consequently, Canadian and American citizens have, until the implementation of the WHTI, been able to move across their shared border without presenting passports. The imposition of a passport requirement upon entry into the U.S. will damage trade between the two nations in many ways, and will thus contradict the trade liberalization aims of NAFTA and GATS. The first listed objective of NAFTA is to "eliminate barriers to trade in, and facilitate the cross border movement of, goods and services between the territories of the Parties."³³ Likewise, the preamble to GATS cites the desire to progressively liberalize and expand trade in services, in light of "the importance of trade services for the growth and development of the world economy."³⁴

³² Martha Cottam, *Border Management in NAFTA*, in *BORDERS AND SECURITY GOVERNANCE: MANAGING BORDERS IN A GLOBALISED WORLD* 271, 281 (Marina Caparini & Otwin Marenin eds., 2006).

³³ The North American Free Trade Agreement, U.S.-Can.-Mex., art. 102(1), Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

³⁴ General Agreement on Trade In Services, pmbl., Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS].

The enforcement of the passport requirement will doubtlessly hinder trade due to border delays. Passports are expensive and may be burdensome to obtain,³⁵ consequently many people may choose to simply forgo travel.³⁶ The U.S. admits that it will impose costs on service provider areas, including tourism, hired transportation, arts, entertainment, and recreation.³⁷ The measures may also cripple the economies of border communities that depend on both spontaneous and planned short-excursion travel. The passport requirement is thus extremely trade restrictive. As NAFTA mandates that the provisions of the Agreement should be interpreted and applied in light of its objectives,³⁸ this Court should find that the WHTI violates the U.S. treaty obligations.

A. The WHTI Does Not Afford National Treatment to Canada.

The WHTI violates NAFTA Chapter 12 and GATS Article XVII because it ensures that U.S. service providers have more favorable conditions than those of Canada. Chapter 12 of NAFTA, and GATS Article XVII mandate that each party must accord national treatment to the service providers of other parties in like circumstances.³⁹ Even identical treatment will be considered less favorable if it "modifies the conditions of competition in favor of a Member."⁴⁰

Here, the imposition of a passport requirement obviously works to favor U.S. service providers. The U.S. clearly admits that "foreign businesses whose services are consumed largely outside of the U.S. will be primarily impacted," and that substitution of domestic travel in place of international travel may result in gains for domestic industries.⁴¹ Canadian industries will be

³⁵ Western Hemisphere Travel Initiative, 71 Fed. Reg. at 68415, 68418.

³⁶ *Id.* at 68420.

³⁷ *Id.* at 68423.

³⁸ NAFTA, *supra* note 33, art. 102, para. 2.

³⁹ NAFTA, *supra* note 33, art. 1202, GATS, *supra* note 34, art. XVIII, para. 1.

⁴⁰ GATS, *supra* note 34, XVII, para. 3.

⁴¹ Western Hemisphere Travel Initiative, 71 Fed. Reg. at 68423.

more impacted than U.S. service providers because fewer Americans have valid passports.⁴² Americans who do not obtain a passport will be unable to use Canadian tourist, busing, trucking and railroad services. Meanwhile, the U.S. counterparts of these service providers will still be able to service U.S. citizens. Statistics Canada reports that Canadian overnight travel to the U.S. has increased recently, while American travel to Canada has decreased.⁴³

Although the U.S. may argue that these service providers are not situated in like circumstances, Canadian providers offer essentially the same services as American ones. Further, NAFTA panels have held that the "like circumstances" phrase should not be applied to permit the preservation of a significant trade barrier, and that if regulatory systems in two countries had to be identical before national treatment was granted, few service providers would actually qualify.⁴⁴

B. The WHTI Will Impede the Movement of Natural Persons and Prevent the Temporary Entry of Business Persons.

The WHTI also violates NAFTA Chapter 16 and the GATS Annex on the Movement of Natural Persons. Chapter 16 of NAFTA mandates that each member grant temporary entry to qualified business persons.⁴⁵ The passport requirement will prevent qualified Canadian businessmen who lack passports from entering the U.S. Although the Annex to 1603 says that a member country can require a "visa or its equivalent" for entry, the article also says that before imposing the requirement a party must consult with the affected member to "try to avoid

⁴² Foreign Affairs and International Trade Canada, Official Comment of the Government of Canada: Notice of Proposed Rulemaking for the Implementation of the Western Hemisphere Travel Initiative at Land and Sea Ports of Entry, http://geo.international.gc.ca/can-am/main/right_nav/comment_08_29-en.asp.

⁴³ Statistics Canada, Travel Between Canada and Other Countries, <http://www.statcan.ca/Daily/English/080118/d080118b.htm>.

⁴⁴ Panel Report, *In the Matter of Cross Border Trucking Services*, Secretariat File No. USA-MEX-98-2008-01 (Feb. 6, 2001).

⁴⁵ NAFTA, *supra* note 33, art. 1603.

imposition of the requirement."⁴⁶ The Chapter also states that the parties should try to negotiate the removal of existing visa requirements.⁴⁷ The U.S. is explicitly contradicting the stated objective of eradicating visa-like requirements for business visitors. GATS also allows for the regulation of entry, however, the measures must not be applied in a way that impairs the terms of a specific commitment.⁴⁸ The U.S. has committed to national treatment for tourism and travel related services,⁴⁹ and is impairing the benefits under that commitment by completely preventing the entry of businessmen who do not have passports.

II. THE APHIS USER FEES OFFEND THE U.S.' RESPONSIBILITIES UNDER NAFTA AND GATT BECAUSE THEY WILL DISPROPORTIONATELY AFFECT CANADA, ARE AN IMPERMISSIBLE NEW FEE, AND ARE NOT LIMITED TO THE APPROXIMATE COST OF SERVICES RENDERED.

The APHIS user fees will injure trade between the U.S. and Canada, the world's largest bilateral trading relationship, with goods and services crossing the border every day at a total of more than \$1.2 billion.⁵⁰ They will cause border delays, harm small businessmen and individuals who cannot afford to pay the fees, and increase the prices of Canadian goods entering the U.S., as exporters will have to incorporate the user fees into the price of their goods. Furthermore, the fees do not afford most favored nation status to Canada, nor do they adhere to the national treatment obligation under GATT. They also violate NAFTA because they are new fees adopted for goods originating in a member country, and they violate the GATT requirement

⁴⁶ NAFTA, *supra* note 33, Annex 1603, sec. a, para. 5.

⁴⁷ *Id.*

⁴⁸ GATS, *supra* note 34, Annex on Movement of Natural Persons, para. 4.

⁴⁹ GATS, *supra* note 34, United States Schedule of Commitments.

⁵⁰ Council of State Governments' Eastern Regional Conference, A Resolution Urging the Animal and Plant Health Inspection Service of the US Department of Agriculture to Withdraw the Rule Requiring Agricultural Inspections of all Commercial Conveyances Entering the US from Canada and the Imposition of AQI User Fees Along the US/Canada Border, <http://www.csgeast.org/content.asp?pageID=173>.

of being tied to the approximate cost of the service rendered.

A. The APHIS Fees Do Not Afford Most Favored Nation or National Treatment Status to Canada Because They Discriminate Unequally Against Canadian Goods While Protecting American Products.

The most favored nation clause of Article I of GATT provides that customs duties imposed by one party on another must be equally applied to the like products of all other parties.⁵¹ Article I includes both *de jure* and *de facto* discrimination, since the object of the article is to prohibit discrimination among like products.⁵²

Here, even if the goods at issue are identical the fees will be charged--so like products are being afforded different treatment. Canada is being subjected to *de facto* discrimination because, in practice, it will incur more of the fees than most other countries. Canada consistently acts as one of the largest suppliers of imports to the United States, so more goods shipped to the U.S. from Canada will incur the costs. Canada is also closer in location to the United States than most other nations, so goods may travel back and forth across the border during processing and manufacturing, and thus be subject to multiple taxation.

Article III of GATT mandates that products from any party will be accorded the same treatment as goods of national origin.⁵³ APHIS affords less favorable treatment to foreign exporters because they are subject to a fee that they will have to incorporate into the price of their products, making identical goods from the U.S. cheaper.

B. The APHIS user fees violate NAFTA article 310 and GATT article VIII.

Article 310 of the NAFTA prohibits the adoption of new customs and merchandise

⁵¹ General Agreement on Tariffs and Trade, art. 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 187 [hereinafter GATT].

⁵² Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶ 78, WT/DS139/AB/R, WT/DS143/AB/R (May 31, 2000).

⁵³ GATT, *supra* note 51, art. III., para. 4.

processing fees for goods that originate in NAFTA member countries.⁵⁴ The APHIS user fees are new with respect to Canada, so they violate this provision.

Article VIII of GATT requires that any fee or charge imposed in connection with importation must be limited to the approximate cost of services rendered, and must not represent an indirect protection to domestic products or taxation for fiscal purposes.⁵⁵ The provisions of the Article extend to customs fees executed in connection with analysis and inspection.⁵⁶ The cost should reflect the service rendered to each individual importer.⁵⁷ The APHIS fees are calculated by determining the costs for each program, along with "an amount to maintain a reasonable balance in the reserve," and dividing by the amount of estimated passengers and commercial conveyances in that program.⁵⁸

The APHIS user fees, since they are flat rates based on the type of conveyance, do not correlate to the services offered each individual importer. The same fees are charged regardless of the size of the vessel, the size of the shipment, and the type of goods, with no consideration paid to whether the inspections take more time and effort for some shipments, or whether they are needed at all for a particular shipment. Since the fees are not actually closely linked to the inspections, they represent an indirect protection to domestic industries, as they will ensure that the price of identical goods is lower if the products originate in the U.S. Furthermore, as one of the stated goals of the fee program is to obtain money for the reserve, in excess of the actual costs of the service, they are an impermissible taxation for fiscal purposes.

III. NEITHER THE WHTI NOR THE APHIS FEES ARE JUSTIFIED UNDER EITHER A GENERAL EXCEPTION OR A NATIONAL SECURITY

⁵⁴ NAFTA, *supra* note 33, art. 310, Annex 310.1.

⁵⁵ GATT, *supra* note 51, art. 8, para. 1.

⁵⁶ *Id.* art. 8, para. 4g.

⁵⁷ Panel Report, *United States Customs User Fee*, L/6264-35S/245 (Feb. 2, 1988).

⁵⁸ Agricultural Inspection User Fees Along the U.S./Canada Border, 71 Fed. Reg. at 50323.

EXCEPTION BECAUSE THEY ARE PROTECTIONIST MEASURES FOR WHICH ALTERNATIVES EXIST.

GATT, NAFTA, and GATS all contain general exceptions with almost identical wording, stating that the parties may adopt measures "necessary to protect human, animal or plant life or health."⁵⁹ However, each treaty specifies that the application of these measures must not constitute a means of arbitrary or unjustifiable discrimination, and they must not be disguised restrictions on international trade.⁶⁰ NAFTA and GATT panels have held that GATT jurisprudence determines the meaning of these requirements.⁶¹

A measure is deemed "necessary" if there are no alternative measures less inconsistent with other provisions in a treaty.⁶² GATT panels have held that the evaluation of "necessity" under a general exception, in appropriate cases, should involve a weighing of the importance of the interests the regulation seeks to protect, how effective the regulation will be at achieving that end, and the restrictive effect the measure may have on trade.⁶³ In assessing whether a measure is unjustifiably discriminatory, whether the party imposing it engaged in multilateral negotiations with the affected parties bears heavily on the analysis.⁶⁴

A. Neither the WHTI nor the APHIS User Fees Qualify for a General Exception.

⁵⁹ GATT, *supra* note 51, art. XX.b, GATS, *supra* note 34, art. XIV.b, NAFTA, *supra* note 33, art. 2101.1.

⁶⁰ GATT, *supra* note 51, art. XX, pmbl., NAFTA, *supra* note 34, art. 2101.2, GATS, *supra* note 34, art. XIV, pmbl.

⁶¹ Panel Report, *In the Matter of Cross Border Trucking Services*, Secretariat File No. USA-MEX-98-2008-01 (Feb. 6, 2001), Panel Report, *United States—Measures Affecting Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

⁶² Panel Report, *United States—Section 337 of the Tariff Act of 1930*, L/6439-36S/345 (Nov. 7, 1989) [hereinafter US—Section 337], Panel Report, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R (Oct. 5, 1990) [hereinafter Thailand—Cigarettes].

⁶³ Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 162-63, WT/DS161/AB/R (Dec. 11, 1990).

⁶⁴ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 166, WT/DS58/AB/R (Oct. 12, 1998).

The U.S. has exhibited virtually no effort to engage in multilateral negotiations with regard to the WHTI and the APHIS user fees. With the user fees, the U.S. did not even publish a notice of proposed rulemaking, allowing interested parties to comment on the matter, but instead simply issued the interim rule.⁶⁵ Each measure also discriminates against Canada while benefiting U.S. industry. Consequently, this Court should find that the measures constitute unjustifiable discrimination. Furthermore, since many alternatives exist to both measures, neither measure qualifies as necessary.

3. There are many alternatives to the WHTI, it may be an ineffective measure, and it will have a negative impact on trade.

The U.S. could work more closely with NAFTA members to establish harmonization of entry procedures, and strive to follow the example of the European Union in creating a common external perimeter. The U.S. could also accept enhanced driver's licenses, or border identification cards that provide proof of citizenship but will still be cheaper and easier to obtain. Licenses, along with birth certificates, might also be recognized, and although that might not provide proof of citizenship for children of foreign diplomats,⁶⁶ it would definitively identify the citizenship of the vast majority of individuals.

In applying the balancing test, the interest that the U.S. seeks to protect, human life, is highly important. However, analysis of the other two factors weighs against finding that the WHTI is necessary. First, requiring a passport may not be effective in achieving a higher degree of safety. Even with the issuance of new passports, older versions that will be valid until 2011 are still vulnerable to fraud and tampering, and there are more than twenty million of these

⁶⁵ Agricultural Inspection User Fees Along the U.S./Canada Border, 71 Fed. Reg. at 50324.

⁶⁶ *Id.* at 68424.

passports in circulation.⁶⁷ Second, the requirement will have a strong impact on trade,⁶⁸ discouraging many forms of tourism and damaging transport and entertainment service providers.

4. There are many alternatives to the APHIS user fees, they may not be effective, and they are trade restrictive.

The U.S. could employ many measures more compatible with its treaty obligations. The U.S. could pay for its own customs costs, accepting safety expenses as the cost of doing business internationally. Greater efforts toward enhancing communication with other nations to identify risks before they are at the border could also be made. Further, the U.S. could demand stricter, nondiscriminatory labeling requirements to identify high-risk goods and suppliers immediately.

If the Court finds that some fee is necessary, the fees could still be narrower. The U.S. could target high risk goods instead of forcing all commercial shippers to pay an inspection fee for a "service" that might not actually be rendered them. The fees could also be more reflective of the services rendered each individual shipper by taking into account the size of each shipment, and the estimated time it would take to inspect that particular kind of good.

The balance of the security and trade interests also weights against the U.S. for the APHIS fees. Although the security of the nation is an important aim, the U.S. Government Accountability Office stated that management problems and lack of information sharing between agencies leave the U.S. extremely vulnerable to foreign pests and disease, suggesting that the mere increase of fees and personnel will not accomplish the goal of greater food safety.⁶⁹ Furthermore, this will definitely affect trade, as it greatly increases the cost, by possible loss of

⁶⁷ GOV.'T ACCT. OFF., Border Security: Security of New Passports and Visas Enhanced, but More Needs to Be Done to Prevent Their Fraudulent Use, GAO-07-1006 (2007).

⁶⁸ See *supra* Argument Sec. I.

⁶⁹ GOV.'T ACCT. OFF., Homeland Security: Management and Coordination Problems Increase the Vulnerability of U.S. Agriculture to Foreign Pests and Disease, GAO-06-644 (2006).

trade to cheaper goods providers, of exporting to the United States.

B. Neither the WHTI nor the APHIS User Fees Qualify for a National Security Exception.

GATT, GATS and NAFTA all provide exceptions to treaty obligations for measures "necessary for the protection of essential security interests."⁷⁰ Although the national security exception has been interpreted broadly, the application of the exception is still limited in scope. One of the drafters of the provision stated the exception could not be made "so broad that, under the guise of security, countries will put on measures, which really have a commercial purpose."⁷¹ The inclusion of the word "necessary" also indicates a limit to the scope of the exception, and this Court has held that invocation of a national security exception will only be recognized if the measure is the only means necessary to safeguard the essential security interests of the nation.⁷²

The holding that the measure must be the only means necessary to guard the interest means that there are no alternative measures that can be taken. As discussed in the previous section, there are a plethora of alternative measures for both the WHTI and the APHIS user fees. Consequently, neither measure qualifies for a national security exception.

IV. THE FUEL EXPORT CHARGE IS AUTHORIZED BY THE NATIONAL SECURITY EXCEPTIONS IN GATT AND NAFTA BECAUSE IT IS A NECESSARY MEASURE FOR PROTECTING CANADA'S SECURITY INTERESTS AND MAINTAINING INTERNATIONAL PEACE AND SECURITY.

The FEC is necessary for Canada's national security and for maintenance of international peace and security. Thus, it is authorized by the national security exceptions in GATT Article XXI and NAFTA Article 2102, though it may not accord with other provisions. As such,

⁷⁰ GATT, *supra* note 51, art. XXI, GATS, *supra* note 34, art. XIV bis, NAFTA, *supra* note 33, art. 2102.

⁷¹ Quoted in GATT, *Analytical Index: Guide to GATT Law and Practice*, 6th ed. (1994), 554.

⁷² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (Jul. 2004) [hereinafter *Israeli Wall*].

because the free trade provisions in both treaties are subordinate to their respective security exceptions, Canada is not in violation of either agreement. Importantly, because the security exceptions in GATT and NAFTA are effectively identical, and NAFTA Article 607 is not applicable here, this Court need only find the FEC authorized by one exception to uphold it. Further, if this Court finds the APHIS fees to be necessary for U.S. national security, then it should also find the FEC to be so justified, because the FEC is less in violation of GATT and NAFTA than APHIS. However, if APHIS is not necessary for U.S. security, within the meaning of GATT and NAFTA, it may still find the FEC to be necessary, because the FEC is less in violation of GATT and NAFTA.

A. The FEC is authorized under Article XXI(b)(iii) of the GATT.

Enacted to be “mutually advantageous,” GATT mandates that nations reduce or eliminate most trade barriers except when an exception applies.⁷³ Article XXI(b)(iii), the national security exception, provides: “[T]his Agreement shall [not] 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”⁷⁴

This Court has recognized that “essential security interests certainly extend[] beyond the concept of armed attack, and ha[ve] been subject to very broad interpretations.”⁷⁵ The language of GATT Article XXI(b)—“it considers necessary”—must be interpreted according to its ordinary meaning, which renders the provision self-defining.⁷⁶ However, a court may “assess whether . . . the ‘essential security interests’ [are] reasonable,” and whether measures taken “to protect these

⁷³ GATT, *supra* note 51, pmbl.

⁷⁴ GATT, *supra* note 51, art. XXI (emphasis added).

⁷⁵ *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14, 98 ¶ 224 (Jun. 27, 1986).

⁷⁶ Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 155 U.N.T.S. 331 [hereinafter Vienna Convention].

interests are . . . ‘necessary.’”⁷⁷ To be reasonable, a measure must be proportional to the security ends sought, and to be necessary, it must be the least “intrusive” of the reasonably available means of achieving those ends.⁷⁸ In the context of trade, GATT panels have held an action to be “necessary” if there is no alternative a party “could reasonably be expected to employ that complies with other GATT provisions.”⁷⁹ If no effective action is reasonably available that does not violate GATT, the acting party must use the measure least inconsistent with GATT.⁸⁰ The burden of proving an action is necessary rests on the party invoking Article XXI(b).⁸¹

Applying the ‘least inconsistent means’ test to analyze “necessity,” this Court found Israel’s wall, built in the occupied Palestinian territory, was not necessary to protect its essential security interests.⁸² Recognizing that Israel has the right to protect its national security, this Court nonetheless determined that the wall violated numerous Palestinian rights and effectively annexed 16.6% of the West Bank.⁸³ Because even a small change in the planned route of the wall would be both reasonable and would intrude less on Palestinian rights and land, the wall was not necessary to protect Israeli’s security interests.⁸⁴ Similarly, a GATT panel rejected Thailand’s prohibition of cigarette imports, intended to combat smoking, because domestic anti-smoking measures would achieve the same results without violating any GATT provisions.⁸⁵

The reasonableness of a measure taken under GATT Article XXI(b) is the proportionality of that measure to the threat faced. In the *Case Concerning Oil Platforms*, this Court held the

⁷⁷ *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14, 98 ¶ 224 (Jun. 27, 1986).

⁷⁸ *Israeli Wall*, *supra* note 72, at ¶ 136.

⁷⁹ U.S. – Section 337, *supra* note 62, at ¶ 5.26.

⁸⁰ *Id.*

⁸¹ *See Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 90, ¶ 71 (Nov. 6 2003).

⁸² *Israeli Wall*, *supra* note 72, at ¶ 137.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Thailand–Cigarettes*, *supra* note 62, at ¶ 81.

U.S. acted unreasonably when it bombed two Iranian oil installations, because there was insufficient evidence Iran was responsible for the ship bombing to which the U.S. was reacting.⁸⁶ Without such evidence, the U.S. response could not be proportional to the threat, and even were Iran responsible, the magnitude of the U.S.'s entire operation, including destroying two oil platforms, two Iranian fighter jets, and "other naval vessels and aircraft," was disproportionate.⁸⁷

Here, the FEC is a necessary measure for protection of Canada's national security interests under Article XXI(b)(iii) of GATT. First, enhancing border security to prevent terrorist attacks is an essential security interest recognized by this Court⁸⁸ and the U.S.⁸⁹ Canada is also a party in the so-called "War on Terror," with troops in the armed conflict in Afghanistan, and therefore finds itself "in time of war or other emergency in international relations."⁹⁰

Second, the FEC is reasonable because it is narrowly tailored to raise only the revenue needed for development of the TBI. It is thus calculably proportional to the ends sought. Unlike in *Oil Platforms*, Canada's means and ends are correlated and easily measured. Also unlike the U.S. response in that case, the FEC is not part of an extensive operation vastly exceeding the scope of the interest pursued.

Third, the FEC is also necessary because there is no alternative measure less inconsistent with GATT that Canada could reasonably be expected to take, and that would achieve its national security interests. For example, a toll charge on travelers crossing the border with the U.S. would have a broader impact, and would violate GATT Article V, which provides:

[T]raffic . . . shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges

⁸⁶ *Oil Platforms* 2003 I.C.J. at ¶ 77.

⁸⁷ *Id.*

⁸⁸ Israeli Wall, *supra* note 72, at ¶ 141.

⁸⁹ *See, e.g.*, Joint Statement, *supra* note 16.

⁹⁰ GATT, *supra* note 51, art. XXI(b)(iii).

imposed in respect of transit, except . . . expenses entailed by transit or with the cost of services rendered [and] . . . [a]ll charges . . . imposed . . . on traffic in transit . . . shall be reasonable, having regard to the conditions of the traffic.⁹¹

As the TBI include installation of radiological detection technology at all Canadian ports, charging travelers crossing the border would be neither in regard to traffic conditions nor commensurate with the cost of services, and would be administratively complicated. Similarly, a general tax on Canadians would be unreasonable, both politically and administratively, because of the Canadian public's resentment about U.S. pressure and meddling.⁹² Further, such a general tax would indirectly impact all industries, rather than one portion of one industry, which would decrease the revenue available to Canada for other national security expenditures.

Furthermore, the burden of the FEC will in fact be borne by Canadian exporters as well as U.S. importers, because it only applies to fuel export supplied by pipeline and U.S. importers will likely shift some of their demand to other methods of export.⁹³ This is consistent with basic principles of supply and demand, whereby an increase in the cost of a good will cause buyers to move to cheaper options.⁹⁴ In effect, the FEC is thus a tax on both beneficiaries of the TBI.

Lastly, the FEC is less inconsistent with GATT than the Softwood Lumber Products Export Charge Act of 2006 ("Act"), an agreement between Canada and the U.S. that is not challenged as a violation of GATT.⁹⁵ With few exceptions, the Act applies charges up to 15%

⁹¹ GATT, *supra* note 51, art. V(3)-(4).

⁹² See, e.g., Mary-Liz Shaw, *U.S. and Canada: Holding the Line; Two Nations Try to Raise Defenses While Staying Friends*, J. SENTINEL, March 10, 2002.

⁹³ See, e.g., Council Regulation 393/98 of 16 February 1998, Imposing a Definitive Antidumping Duty on Imports of Stainless Steel Fasteners Originating in the People's Republic of China, India, Korea, Malaysia, Taiwan, Thailand, 1998 O.J. (L 50) 1, 11 (EC).

⁹⁴ See, e.g., Arlene Wilson, *NAFTA: Economic Effects on the United States After Three Years*, CONG. RES. SERV. REP. FOR CONG., 97-612E, June 13, 1997.

⁹⁵ Softwood Lumber Product Export Charge Act, 2006 S.C., ch. 13 (Can.).

on exports of softwood lumber exclusively to the U.S., and for all methods of export.⁹⁶ The Act thus violates Article I of GATT because it is a tariff that applies only to one country.

Conversely, the FEC applies to all exporters using the pipelines. Certainly, if an industry-wide charge on all exports exclusively to the U.S. is not sufficiently in violation of GATT to be challenged by the U.S., the FEC, which affects only one method of export, is not overly broad.

Thus, there are no alternative measures Canada could reasonably take to fund the TBI that would accomplish its essential national security goals. Therefore the FEC is necessary and reasonable for Canada's security and is thus authorized under Article XXI(b)(iii) of GATT.

B. The FEC is authorized under Article 2102(1)(b)(ii) of NAFTA.

NAFTA incorporates GATT, and the security exception in Article 2102(1)(b) is in effect identical to Article XXI(b) of GATT.⁹⁷ Thus, this Court need only find the FEC to be authorized under the GATT for it not to violate Canada's obligations under both agreements.

NAFTA's security exception is identical to GATT's, but Article 607 limits the scope of Article 2102 for measures relating to oil and petrochemicals.⁹⁸ Article 607 provides:

[N]o Party may adopt . . . a measure restricting . . . exports of an energy or basic petrochemical good . . . under Article XXI of the GATT or under Article 2102 . . . except to the extent necessary to (a) . . . enable fulfillment of a critical defense contract . . . [or] (b) respond to a situation of armed conflict involving th[at] Party.

Article 609 defines "restriction" as "any limitation, whether made effective through quotas, licenses, permits, minimum or maximum price requirements or any other means."

Customary international law requires that a treaty term be interpreted in good faith and according to its ordinary meaning in the context of the treaty.⁹⁹ Under the principle of *ut res magis valeat*

⁹⁶ *Id.* at c. 11.

⁹⁷ NAFTA, *supra* note 33, art. 2102(b)(iii).

⁹⁸ NAFTA, *supra* note 33, art. 2102(1)(b)(iii).

⁹⁹ Vienna Convention *supra* note 76. *See* NAFTA, *supra* note 33, art. 102(2).

quam pereat, each term enumerated must have a meaning different from other terms, because it cannot be presumed that the drafters included meaningless words, and a list of related terms implies all included terms are of a similar nature.¹⁰⁰ Also, the various provisions and sections of a treaty must be read so as to be in harmony, not in conflict.¹⁰¹ Last, the essential canon of treaty interpretation of *in dubio mitius*, favors deference to the sovereignty of the acting nation.¹⁰²

NAFTA's language, read according to these canons of statutory interpretation, does not include export charges within the scope of "restrictions." Article 603 prohibits "Import and Export Restrictions" on oil and petrochemicals, while Article 604 proscribes adoption of a "duty, tax or other charge." Thus, duties, taxes and other charges are not "restrictions," or the separate provision would be an impermissible redundancy. Further, Article 609 lists four types of limitations that are all of a quantitative nature, not fiscal. Consequently, the "other means" included are also quantitative restrictions, rather than taxes, charges or duties. Had the drafters of NAFTA intended these fiscal measures to be included in "restrictions," they would be enumerated in the definition in Article 609.

Therefore, the FEC, which is a fiscal measure – an export tax or charge – is not included within the "restrictions" prohibited by Article 607 of NAFTA. This also accords with the principle *in dubio mitius*, because a narrow reading of "restriction" in Article 607 least impinges upon Canada's sovereignty. Thus, the FEC need only meet the broader requirements of Article 2102 to be authorized under NAFTA. For the same reasons discussed in Section I.A regarding Article XXI(b)(iii) of GATT, the FEC falls squarely within the scope of Article 2102.

However, even if the FEC is a restriction under Article 607, it is necessary for the

¹⁰⁰ Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, p. 20, WT/DS8/AB/R (Oct. 4, 1996).

¹⁰¹ *Id.*

¹⁰² Panel Report, *EC – Hormones*, para. 165, n.154, WT/DS26/AB/R (MAY 18, 1999).

fulfillment of a critical defense contract, namely Canada's agreement with the U.S. to build the TBI, as well as many other agreements with the U.S. regarding border security.¹⁰³

C. The FEC is authorized under Article XXI(c) of GATT and Article 2102(1)(c) of NAFTA because it is an action taken to maintain international peace and security.

Even if the FEC is not necessary to protect Canada's essential security interests in a time of war or other emergency in international relations, it is "in pursuance of Canada's obligations under the U.N. Charter for the maintenance of international peace and security."¹⁰⁴ Therefore, the FEC is authorized by Article XXI(c) of GATT and Article 2102(c) of NAFTA.

The U.N. Charter requires parties "maintain international peace and security" by taking "measures for the prevention and removal of threats to the peace."¹⁰⁵ The Security Council affirms "the imperative to combat terrorism . . . by all means, in accordance with the [U.N.] Charter," and recognizes "the need to take all necessary and appropriate measures"¹⁰⁶

The FEC will fund \$1 billion of border security infrastructure developments, for the benefit of Canada, the U.S. and the global effort against terrorism. As Canada must preserve international security by all means consistent with international law, the FEC is authorized under Article XXI(c) and 2102(c) in GATT and NAFTA, respectively.

V. THE U.S. VIOLATES THE INTERNATIONAL LAW PRINCIPLES OF GOOD FAITH AND INTERNATIONAL COMITY BY ARGUING THE FUEL EXPORT CHARGE IS NOT NECESSARY FOR CANADA'S SECURITY INTERESTS.

A. It is bad faith treaty interpretation for the U.S. to apply a different definition of "necessary" to its own actions than the definition it applies to Canadian actions.

The U.S. interprets the national security exceptions in GATT and NAFTA in bad faith by denying that the FEC is necessary for Canadian national security while pressuring Canada to

¹⁰³ *E.g.*, Partnership, *supra* note 19; Declaration, *supra* note 18; Accord, *supra* note 20.

¹⁰⁴ NAFTA, *supra* note 33, art. 2102(1)(c); GATT, *supra* note 51, art. XXI(c).

¹⁰⁵ U.N. Charter art. 1, para. 1.

¹⁰⁶ S.C. Res. 1624, ¶ 3, U.N. Doc. S/RES/1624 (Sept. 14, 2005).

invest billions of dollars in border security, on the grounds that terrorism is a critical threat to their joint and respective national security. Customary international law mandates that “[a] treaty shall be interpreted in good faith,”¹⁰⁷ a requirement that has existed since the dawn of the law between nations.¹⁰⁸ While “good faith” is hard to define, it cannot permit conflicting definitions of the same treaty term to be applied to different countries.

Here, the U.S. argues APHIS, which is so broad even persons not carrying plant material are charged, is necessary to prevent terrorism.¹⁰⁹ Yet the U.S. also argues that the FEC, which applies to one export method in one industry to raise a known amount of money exclusively for funding the TBI, is not necessary to protect against the same threats. The U.S. is not interpreting GATT and NAFTA in good faith, and thus violates customary international law.

B. Because Canada is developing the TBI at the behest of the U.S., the U.S. violates the principle of international comity when it challenges the Fuel Export Charge.

The principle of comity in international relations is not binding law, but it is a principle of reciprocal respect for the sovereignty of other nations—respect for a country’s sovereignty to govern within its territory.¹¹⁰ President Bush himself recognized the importance of comity in declaring the U.S. would adhere to an ICJ decision contrary to that of U.S. domestic courts.¹¹¹

Here, though Canada’s own security interests are real, the TBI will be instituted at least in part for the benefit of, and certainly at the behest of the U.S.¹¹² Canada has already invested

¹⁰⁷ Vienna Convention, *supra* note 76.

¹⁰⁸ HUGO DE GROOT (GROTIUS), *DE JURE BELLI AC PACIS* (1625).

¹⁰⁹ Brief of the Applicant at 8.

¹¹⁰ *See, e.g.*, T.S. Woolsey, *The Comity of Nations*, 17 AM. J. INT’L L. 95, 96-97 (1923).

¹¹¹ George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), (discussing *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. No. 128 (Mar. 31, 2004)).

¹¹² Michael Chertoff, U.S. Department of Homeland Security, Declaration of Urgent Need for Canadian Border Security Development (Sept. 5, 2007).

\$7.7 billion to strengthen national security since 2001,¹¹³ and perception of persistent inadequacy in border security belongs primarily to the U.S.¹¹⁴ Canada is acting graciously for the benefit of the U.S. and North America, consistent with the goals articulated in the Smart and Secure Borders Declaration, because “[o]ur borders must be both efficient and secure if we are to continue to enhance prosperity, security and quality of life in North America,” and “[i]t is sometimes best to screen goods and travellers prior to entry into North America.”¹¹⁵ In this situation, it is discourteous for the U.S. to attempt to enforce a tax on the Canadian people to fund initiatives that benefit all parties, and that are being developed at the insistence of the U.S. Such an effort amounts to the U.S. attempting to dictate the fiscal policy of a sister nation by – in effect if not intent – demanding both that the TBI be built and that the Canadian citizens foot the bill. This does not accord with the international relations principle of comity.

CONCLUSION

For the foregoing reasons the U.S. has violated GATS, GATT and NAFTA by instituting the WHTI and APHIS and this Court should find them to be unlawful. Conversely, the FEC is both a necessary and reasonable measure under GATT and NAFTA. As such, this Court should uphold the FEC as consistent with Canada’s free trade obligations.

¹¹³ Budget 2001, *supra* note 21.

¹¹⁴ *See, e.g.,* Les Blumenthal, *Canadian Border is Security Concern; The Nation's Open Immigration Policy has Given Terrorists Chance to Establish Cells*, HOUS. CHRON., Nov. 25, 2007, at A17.

¹¹⁵ Joint Statement, *supra* note 16.