

**2007-2008
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 # 2008-15A

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STATEMENT OF FACTS

The United States-Canada trade relationship is the envy of the world. Bilateral trade between the two nations over the Ambassador Bridge alone equals the value of annual U.S. exports to Japan.¹ In addition to the more than \$500 billion in annual trade between our two countries, over 300,000 visitors cross the border each day.² Even between friends, however, border security is an increasing concern in an ever globalizing world.

In order to strengthen its national security and that of all NAFTA Parties, the United States proposed in April 2005 that passports be required for all cross-border travelers. Since the U.S. proposed the Western Hemisphere Travel Initiative (“WHTI”) in 2005, and before any WHTI requirements went into place, the U.S. Department of State began issuing new passports at an unprecedented pace. In fiscal year 2006 alone, between 12.2 and 12.3 million American passports were issued.³ Today, an estimated 40 percent of Americans have valid passports.⁴

In August 2006, the U.S. removed an exemption allowing commercial shipments from Canada to the U.S. to proceed without an agricultural inspection and accompanying fee. The nominal fee covering the cost of inspections had been previously imposed on all of the U.S.’s other trade partners. The interim rule increases border security and food-system safety by allowing the U.S. to cover the increasing cost of inspecting goods originating in Canada and those originating in third countries with substandard quality-control measures.

¹ U.S. Embassy in Canada, *Canada-United States Relations*, http://canada.usembassy.gov/content/content.asp?section=can_usa&subsection1=general&document=canusarelations.

² *Id.*

³ U.S. Embassy in Canada, *Did You Know?*, http://canada.usembassy.gov/content/can_usa/didyouknow.pdf.

⁴ *Id.*

Prime Minister Harper, President Calderon, and President Bush issued a Joint Statement following their August 2007, Montebello Summit calling for “Smart and Secure Borders.” This reinforcement of the NAFTA Parties commitment to border security called on the nations’ ministers to develop “inspection protocols to detect threats to our security.” In addition, the North American Leaders called for “law enforcement models that promote seamless operations at the border...to better protect our citizens from criminal or terrorist threats.” In short, the Leaders called for strengthening border security while maintaining border crossing expediency for the public and for merchants.

Despite P.M. Harper’s public commitment to cooperative security strengthening measures, Canada balked at U.S. efforts to implement the Montebello principles in September, 2007. At the same time that the U.S. announced its intent to honor on Montebello commitments, Canada announced a tax on fuel exported by pipeline to the U.S.

This new \$CDN 25 per barrel tax is a direct response to mistaken comments of U.S. Presidential candidates that Saudi hijackers passed through Canada on their way to carrying out the September 11, 2001 attacks on the United States. P.M. Harper stated on September 11, 2007 that the new tax was a step to “ensure that Canada will not be perceived in the future as a source of any threat to the security of our friends.”

The U.S. immediately filed a dispute with the International Court of Justice with respect to the Fuel Export Charge. Canada responded on October 23, 2007, by filing a dispute with respect to the WHTI passport requirement, first announced in April 2005 and already in place for air travelers at the time of Canada’s dispute. Canada also protested the APHIS fee schedule, first announced in August 2006 and already in place at the time of Canada’s dispute.

QUESTIONS PRESENTED

- 1) Whether the Fuel Export Charge is contrary to NAFTA Articles 314, 315, 604 and 605 or GATT Articles I, VIII and XI where the charge applies exclusively to exports to the U.S.
- 2) Whether the Fuel Export Charge is justified pursuant to the national security exception where Canada has stated contrary justifications for the charge and whether a general exception in GATT or NAFTA justifies the charge where a separate NAFTA violation trumps application of the general exceptions.
- 3) Whether the WHTI is contrary to NAFTA Chapters 12 and 16 or GATS and whether the WHTI is justified pursuant to the national security, general exception, or Most Favored Nation requirement in GATT, NAFTA, or GATS, where its stated purpose is national security and the passport requirement applies to visitors entering the U.S. from all other nations.
- 4) Whether APHIS inspections and AQI user fees are contrary to NAFTA Article 310 where the measures existed previously and Canada received a special exemption; whether GATT Article VIII is violated where a flat fee proportional to services rendered is applied to all imports; and whether APHIS is justified by the general exceptions and national security exceptions in GATT and NAFTA as a protection of plant and human health and deterrent of bio-terrorism.

JURISDICTIONAL STATEMENT

The Parties to this dispute, Canada and the U.S., come before this Court pursuant to Article 40(1) of the *Statute of the International Court of Justice*. The Parties have stipulated to submit this dispute to a Chamber of the International Court of Justice for a binding declaratory judgment pursuant to Article 36(1).

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SUMMARY OF THE ARGUMENT

Canada's Fuel Export Charge violates NAFTA and GATT on its face as a "duty, tax, or other charge," which only applies against the U.S. and is not maintained on "exports of any such good to the territory of all other Parties...[and products] destined for domestic consumption."⁵ No GATT or NAFTA general exception applies to the violation and Canada cannot assert such a defense because of its violation of NAFTA Article 315, which circumscribes the applicability of GATT Article XX General Exceptions. The national security exception does not apply because Canada's stated justifications for the charge do not include national security and the charge does not advance Canadian national security.

The WHTI passport requirement complies with the Most Favored Nation ("MFN") and National Treatment Obligations found in GATT and NAFTA, respectively, by squaring requirements for travelers entering the U.S. from Canada with requirements for travelers into the U.S. from all other destinations. WHTI does not violate any portion of NAFTA or GATT and is further justified by the General Exceptions and national security exception found in each Treaty.

APHIS inspections and AQI user fees are "existing" customs user fees and do not violate NAFTA. The fees are limited in amount to the cost of the services rendered and do not violate GATT. Were the measures in violation of either Treaty, they meet the General Exceptions regarding plant health and do not violate the minimum derogation principle. APHIS and AQI are also justified by the national security exception as deterrents of bio-terror, and by the Most Favored Nation requirement in GATT prohibiting more favorable treatment of Canadian imports than imports from other U.S. trade partners.

⁵ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), art. 314, 604 [hereinafter NAFTA].

ARGUMENT

I. THE FUEL EXPORT CHARGE VIOLATES GATT AND NAFTA AND IS NOT JUSTIFIED BY ANY EXCEPTIONS TO THE TREATIES.

a. The Export Charge violates NAFTA Articles 314 and 604.

Canada's Fuel Export Charge is contrary to NAFTA Articles 314 and 604, which forbid any Party from adopting "any duty, tax or other charge" on exports unless the charge is maintained on "exports of any such good to the territory of all other Parties...[and those] destined for domestic consumption."⁶ Canada has violated these Articles on their face. The Fuel Export Charge is clearly contemplated by the plain and commonly understood meaning of the "duty, tax or other charge" language. Therefore, the Charge must apply equally to all NAFTA Parties. The Fuel Export Charge does not apply to exports to Mexico or to oil destined for domestic consumption. Canada will have to argue that an exception to this Article applies.

b. The Fuel Export Charge is not justified pursuant to NAFTA or GATT General Exceptions or National Security Exceptions.

None of the General Exceptions to either NAFTA or GATT apply to the Fuel Export Charge. NAFTA Article 2101 General Exceptions incorporate GATT XX(g) by reference, and the latter provision appears to be the only conceivably applicable General Exception. GATT Article XX(g) excepts measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." The Fuel Export Charge targets exports to the U.S. exclusively. It does not affect Canadian domestic consumption and therefore does not meet the GATT XX(g) exception.

Furthermore, Canada's violation of NAFTA Article 315 overcomes any exception Canada might claim in GATT Article XX. NAFTA Article 315 specifically covers trade in

⁶ *Id.*, art. 604(a), (b); 314(a), (b).

petrochemicals and provides that a restriction excepted by GATT Article XX may be maintained “only if” three requirements are met. Article 315(1)(b) requires that the Party seeking the restriction may not “impose a higher price for exports of a good to that other Party than the price charged for such good when consumed domestically, by means of any measure, such as licenses, fees, taxation and minimum price requirements.” Canada has not met this requirement, as the Export Charge applies only to fuel piped to the U.S. The price of domestically consumed Canadian fuel will be unaffected. Therefore, Article 315 conditions are not met and Canada may not invoke the exception. Article 315 clearly limits the applicability of GATT Article XX for NAFTA Parties. Even if a GATT Article XX(g) exception existed it would be extinguished by the NAFTA Article 315 language and by Canada’s violation of the conditions therein.

The identical national security exceptions in NAFTA Article 2101 and GATT XXI are also inapplicable. Canada has already given its reasons for the tax. They are 1) “to ensure that Canada will not be perceived as a source of any threat to the security of our friends” and 2) to pay to meet the Montebello obligations Canada agreed to well before the Fuel Export Charge was announced. P.M. Harper did not assert Canadian security as even a partial basis for the Fuel Export Charge. Any attempt by Canada to do so now is disingenuous and should be rejected by this Court. Canada is simply retaliating for the statements made by U.S. presidential candidates.

c. The Fuel Export Charge violates the Most Favored Nation principle.

Under GATT Article I, Canada cannot maintain a charge that is expressly intended to discriminate against the U.S. According to Professor John H. Jackson, the MFN principle in GATT Article I requires each party to “grant to every other contracting party the most favorable

treatment that it grants to any country with respect to imports and exports of products.”⁷ Canada must afford the same treatment of oil exports to the U.S. that it affords its other GATT trading partners.

Canada may argue that its charge is on all pipeline exports, regardless of destination and that the measure thus is not discriminatory. According to this theory, the fact that the U.S. is the only possible destination of piped Canadian oil is simply an unhappy coincidence. By this logic, land-locked Lesotho could, if it liked, impose every manner of discriminatory import and export measures against South Africa and prevail with a similar “unrelated geographical circumstance” defense. Should Canada advance such an argument, this Court should not endorse Canada’s bad faith reading of an agreement designed to promote free trade.

II. THE WHTI IS JUSTIFIED UNDER NAFTA ARTICLE 1202, 1203 AND THE WTO AGREEMENTS.

a. As the Party asserting an inconsistency, Canada bears the burden of proof.

According to the NAFTA Model Rules, in particular Rules 33 and 34, “[a] Party asserting that a measure of another Party is inconsistent with the provisions of the Agreement shall have the burden of establishing such inconsistency. . . . [and a] Party asserting that a measure is subject to an exception under the Agreement shall have the burden of establishing that the exception applies.”⁸ As such the burden of proof rests on Canada to persuade this Court that the unconditional obligations of National Treatment and MFN do not apply and that WHTI violates NAFTA and WTO agreements.

⁷ John Howard Jackson, *The World Trading System: Law and Policy of International Economic Relations* 157 (1997).

⁸ Model Rules of Procedure for Chapter Twenty of the North American Free Trade Agreement and Supplementary Procedures Pursuant to Rule 35 on the Availability of Information, July 13, 1995.

b. WHTI is justified pursuant to the Most-Favored-Nation obligation.

The NAFTA MFN obligation requires equal treatment between foreign nationals of different states.⁹ Article 1203 of NAFTA states that, “[e]ach Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to service providers of any other Party or of a non-Party.”¹⁰

As it currently stands, Mexican citizens are required to have passports to enter the U.S. The preferential treatment afforded Canada violated the MFN obligation by imposing a less favourable border requirement on Mexico. WHTI cures this deficiency by enacting a passport requirement for all entrants into the U.S. This measure is non-discriminatory consistent with the MFN obligation. Under WHTI, those entering the U.S. from Canada, Mexico, Bermuda, or the Caribbean region, will be afforded no less favorable treatment than Canadian entrants.

Although GATT Article I:1 lays out a plain rule of unconditional non-discrimination, NAFTA Article 1601 permits temporary preferential treatment. That allowance is limited, however. The clause states that “establishing transparent criteria and procedures for temporary entry, and the need to ensure border security” are necessary limitations on members.¹¹ Therefore, although there is room for preferential treatment, this treatment is only temporary and is further limited by the state’s interest in a secure border. WHTI’s elimination of this treatment conforms with Article 1601 and with the MFN obligation.

Furthermore, Canadian arguments that WHTI hinders the free movement of goods and services by making domestic suppliers more attractive than Canadian suppliers due to the increased security requirements are unsubstantiated. NEXUS, SENTRI, and FAST programs

⁹ NAFTA, *supra* note 5, art. 1203.

¹⁰ *Id.*

¹¹ *Id.*

allow travelers who frequent Canada frequently to streamline their time at the border.¹² While these programs are still relatively new, there are 380,000 active members in the trusted traveler programs.¹³ Additionally, 40 percent of U.S. travelers have passports and these numbers are increasing significantly on a yearly basis.

c. WHTI is justified pursuant to the National Treatment obligation

Article 1202 of NAFTA regarding National Treatment, the obligation that members impose equality of treatment between foreigners and their nationals, states that “[e]ach Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers” A Member may meet its National Treatment obligation with “either formally identical treatment or formally different treatment that it accords to its own services and service suppliers.”¹⁴

WHTI prescribes formally identical treatment – an across the board passport requirement for entry – that is in-line with national treatment obligations. Like all other foreign travelers, both Canadian and U.S travelers may cross the border upon presenting a valid passport. Canada may argue that providing a driver’s license and birth certificate is sufficient. However, these standards are not essential to efficient cross-border trade. Moreover, the passport requirement will streamline border efficiency and enhance border security.

Canada may argue that WHTI affords less favourable treatment to Canada than it does to other U.S. domestic tourism alternatives. This argument is without merit. The U.S. has a vital

¹² See *Id.*

¹³ *Id.*

¹⁴ General Agreement on Trades in Services, Jan. 1, 1995, 1869 U.N.T.S. 183., art. XVII(2) [hereinafter GATS].

interest in ensuring safe and secure borders,¹⁵ and the security and efficiency of the ports of entry into the U.S. does not impose a less favourable condition to Canada than that of the U.S. tourism industry. Under this logic, any country that uses passports – the current international standard for proving identification and origin – would become susceptible to NAFTA and WTO violations unless they required passports on a domestic basis for travel within domestic regions, provinces, or states. Were such an argument to prevail, any Member could circumvent another’s border regulations by alleging National Treatment obligation violations.

WHTI requires passports of U.S. citizens just as it requires passports of Canadian, Mexican, Bermudan and Caribbean residents entering the U.S. Furthermore, WHTI is not protectionist as it pursues a valid interest – border security.¹⁶

d. WHTI falls under the general exception of NAFTA and WTO agreements.

Article XX of the GATT and Article XIV of GATS, state that “nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party or measures. . . . (b) necessary to protect human. . life or health.”¹⁷ In order to qualify under the general exception of GATT XX(b), a challenged measures must satisfy a two prong test.¹⁸ First, the challenged measure must meet the minimum derogation principle, which analyzes the

¹⁵ See Joint Statement at the Conclusion of the 2007 Montebello North American Leaders’ Summit, *Compromis* 3-4, [hereinafter Montebello].

¹⁶ See *id.*, art. 1601; see Montebello.

¹⁷ General Agreement on Tariffs and Trade, Jan. 1, 1995, 1867 U.N.T.S. 187. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), art. XXI (b), (i),(ii),(iii) [hereinafter GATT].

¹⁸ Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, at 24-25 (1996).

measure in determining whether the measure is “necessary”.¹⁹ Second, the challenged measure must satisfy the requirements under the Article XX Preamble.²⁰

1. WHTI complies with the Article XX(b) minimum derogation principle.

Canada asserts that the measures implemented are not “necessary” as required by the GATT Article XX(b). It argues that the U.S. fails to meet the minimum derogation principle.²¹ This principle requires that WHTI be the least restrictive measure available.²²

Alternative measures to WHTI are not plausible or not “reasonably available.” In evaluating alternatives, the question to be asked is whether there is not an alternative that would achieve the same end as the challenged measure.²³ Further, a Member can “not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk the Decree seeks to ‘halt.’”²⁴ Canada’s proposed alternative to WHTI – a return to the past practice – would prevent the U.S. “from achieving its chosen level of health protection,”²⁵ and is wholly inconsistent with the very safety deficiency that the U.S. is attempting to halt.

Passports are used by other NAFTA and GATT Member and non-Member countries as a legitimate and universal means of regulating entrance through a country’s border. Furthermore, a passport is the least restrictive measure available because passports are readily available and easy

¹⁹ See Report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001) ¶ 175.

²⁰ *Id.*

²¹ See *Thailand – Restrictions on Importations of and Internal Taxes on Cigarettes*, BISD, 37th Supp. 200 (1990).

²² *Id.*

²³ Report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001), at ¶ 172.

²⁴ *Id.*, at ¶ 174.

²⁵ *Id.*

to issue.²⁶ Over 60 million Americans have passports and in 2004 alone roughly 8.8 million U.S. citizens were issued passports.²⁷ Additionally, there are over 6,000 passport acceptance facilities across the U.S.²⁸ Although passports are easy to obtain and readily available, alternative measures providing similarly strong security to passports are not a reasonably available option.

2. WHTI complies with Article XX Preamble Requirements.

Canada may also argue that WHTI is “adopted in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail and the measure does not amount to disguised restriction on trade. . .”²⁹ However, the measure is not “arbitrary or unjustifiable discrimination,” but a legitimate plan for border security.

WHTI will not inhibit U.S. tourism in Canada, but will facilitate heightened efficiency at U.S. ports. The passport requirement will reduce the long lines that are often encountered when entering the U.S. from Canada and will provide further incentive for U.S. tourism in Canada. According to CBP, since the implementation of the first phase of WHTI’s passport requirement on January 23, 2007, there has been a very high rate of compliance from travelers with no interruptions to air transportation.³⁰

e. WHTI is justified pursuant to the national security exception.

Under GATT and NAFTA, a Party shall not be prevented “from taking any action which it considers necessary for the protection of its essential security interests...taken in time of war

²⁶ See NAFTA, *supra* note 5.

²⁷ U.S. Department of State, *Special Briefing on WHTI* [hereinafter Special Briefing], available at <http://www.state.gov/r/pa/prs/ps/2005/44286.htm>

²⁸ *Id.*

²⁹ See *U.S. – Gasoline*, at 25.; GATT, *supra* note 19, art. XX

³⁰ Securing America’s Borders — U.S. Customs and Border Protection 2007 Fiscal Year in Review [hereinafter CBP Report], available at http://www.cbp.gov/xp/cgov/toolbox/about/accomplish/07_year_review.xml (11/06/2007).

or other emergency in international relations.”³¹ Article XIV of the GATS takes a similar view of the sovereignty of states with regard to their national security concerns.

Currently, the U.S. has 157,000 troops at war in Iraq and an additional 28,000 U.S. troops in Afghanistan. The U.S. clearly qualifies as a Party “at a time of war” for the purposes of the national security exception. Traditionally, the necessity of the national security exception has been left to the judgment of the state invoking it, as the exception has been labeled self-determinative in nature. In 1975 Sweden invoked the exception as an avenue of protecting its domestic shoe industry.³² In addition, the international consensus on the U.S.’s enactment of the Helms-Burton Act – a law that prohibited U.S. aid to countries who lent Cuba assistance – was that the U.S. would rely on the national security exception even in the face of a WTO panel decision against invocation of the exception. The U.S. again used the national security exception to justify a trade embargo on Nicaragua. The strength and auto-determinative nature of the exception can be gleaned from the GATT Panel statement in the Nicaragua case that it was not authorized to make a recommendation on the issue.³³ While what constitutes enactment of the national security exception remains a right reserved for the Members themselves, countries that specifically invoke the exception at times of war are entitled to heightened deference.³⁴ Thus, the national security exception is left to the judgment of the party invoking the exception and even greater deference is reserved for countries that invoke the exception when they are at war.

³¹ GATT, *supra* note 17, art. XXI(b)(iii); NAFTA, *supra* note 5, art. 2102(1)(a)(ii).

³² *Sweden—Import Restrictions on Certain Footwear*, L/4250 (November 17, 1975) at 3, quoted in GATT LAW AND PRACTICE, 1994 at p. 557.

³⁴ See Report of the Panel, *United States – Imports of Sugar from Nicaragua*, L/5607 – 31S/67, at 1 (1984).

Although the exception is limited by the use of the words “necessary,” “protection,” and the phrase “essential security interests,” WHTI is justified under the security exception. In particular, countries may be particularly vulnerable to attack at times of war. The border presents the last line of protection between the U.S.’s enemies and its civilians and is an essential security interest.

Empirical evidence shows that human traffic over U.S. borders can present a threat to national security. The U.S. has obtained intelligence regarding threats to the health and safety of U.S. residents and travelers posed by foreign nationals including terrorism, weapons of mass destruction and bio-terrorism.³⁵ In the fiscal year 2007 alone, the Laboratories and Scientific Services’ Weapons of Mass Destruction hotline handled and provided WMD radiation advice for 3,717 calls for assistance from U.S. border ports and from overseas mega ports.³⁶ The WHTI passport requirements will help alleviate these threats by making the identification and processing of individual entrants to the U.S. more efficient and effective.

Furthermore, the passport requirement promotes greater safety, which in turn stabilizes the American and global economies. The U.S. is the world’s largest economy. It is necessary to take precautions to avoid catastrophic injuries to the U.S. and international market that can result when security measures are overlooked. The events of 9/11 brought to light the potency of the threat of terrorism to U.S. and international markets. Using security measures to promote stable markets for the trade of goods expressly falls under the purview of NAFTA and GATS. Because the U.S. is currently at war and border security is tied to national security, WHTI is justified under the national security exception.

³⁵ President George W. Bush, President Discusses War on Terror at Fort Lesley J. McNair, March 2005.

³⁶ CBP Report.

III. APHIS USER FEES ARE PERMISSIBLE UNDER NAFTA AND GATT.

a. The measures do not violate NAFTA Article 310 or GATT VIII.

The APHIS inspections and AQI user fees implemented by the United States do not violate NAFTA Article 310.1, which prohibits the introduction of customs user fees between Parties. Instead, the measures fall under the scope of Article 310.2, allowing maintenance of existing user fees. The U.S. exempted Canada for many years from paying AQI fees, but fees have always been provided for in U.S. regulations. The fees, though previously waived, are “existing,” as contemplated by the NAFTA agreement.

Canada may argue that the existing fees are not within Article 310.2 because they are not specifically referred to in Annex 310.1, to which Article 310.2 refers. The language of Article 310.2, however, simply uses the Annex as a reference point for the type of fees contemplated, as does Article 310.1. Nothing in the language of Article 310.2 makes clear that the only permissible “existing” fees are those mentioned in the Annex. The only clear limitation is that the “Parties specified in Annex 310.1” are the only ones that may maintain existing fees. All NAFTA Parties are currently specified in the Annex.

The U.S. is also in compliance with GATT Article VIII:1(a). It requires that the charge be “limited in amount to the approximate cost of services rendered.”³⁷ In *United States – Customs User Fee*, the panel found that this was a dual requirement. The first is that the charge must be associated with the cost of a “service.”³⁸ In this case, AQI fees are directly associated with the cost of necessary increased plant inspections.

³⁷ GATT, *supra* note 17, art. VIII:1(a); art. VIII:4(g), (h).

³⁸ Report by the Panel Body, *United States Customs User Fee*, L/6264 – 35S/245, at 5 (1988).

The panel also found that the charge must be limited in amount to the cost of the services rendered to the individual importer in question, and not to the cost of the services generally.³⁹ The AQI fees are not of the type tribunals have generally invalidated under Article VIII. *Ad valorem* taxes with no maximum fee and which increase in proportion to the cost of the item being imported, rather than proportionally to the service rendered in association with that item, have been treated with suspicion.⁴⁰ The *Argentina* panel found that an uncapped *ad valorem* fee, “by its very nature, is not ‘limited in amount to the approximate cost of services rendered’” because high-price items generate more tax even though service for that item may be minimal.⁴¹

In contrast, the AQI fees are capped and apply uniformly for all entrants to the U.S. The service rendered for each entrant is approximately the same, and the fee is the same for each. Neither of the two requirements of Article VIII:1(a) is violated.

b. Even if APHIS measures are contrary to NAFTA or GATT, the General Exceptions in both agreements justify the measure.

Even if APHIS measures are found to violate NAFTA Article 310 or GATT Articles I and VIII, fall within the identical General Exceptions provisions in both Treaties. The most obviously applicable exception is in GATT Article XX(b), incorporated by reference in NAFTA Article 2101. GATT Article XX(b) excepts measures “necessary to protect, human, animal or plant life or health.”

1. Article XX(b) scope and application.

The scope of Article XX(b) is broad. It protects humans, animals, and plants and allows measures that protect not only the lives of those living things, but also their health. Tribunals

³⁹ *Id.*

⁴⁰ *Argentina--Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, AB-1998-1, WT/DS56/AB/R (98-0000), adopted by Dispute Settlement Body, 22 April 1998.

⁴¹ *Id.*

have found that the Party invoking the exception need only provide evidence tending to show that its measures protect against a health risk to humans, animals or plants.⁴² As the evidence demonstrates, the U.S. meets these requirement and its measures are permissible.

Canadian imports from third countries make up a large percentage of the goods exported from Canada to the United States, and Canada has not demonstrated sufficient safeguards at the importation stage to guarantee the quality of these goods. Recent APHIS border sweeps intercepted numerous unauthorized materials originating from third countries. Items seized included “untreated Argentine citrus, mangoes, tropical fruits from Asia, and many other commodities of third-country origin such as meat, live birds, and plants in soil. Plant pests such as fruit flies, scales, and several species of mealy bugs were also intercepted.”⁴³

Pests, untreated foods, and non-native species such as those intercepted are potentially dangerous to the U.S. food system and can seriously damage ecosystems. Canada need only look to the case of the emerald ash borer to understand the menace of such infestations. The ash borer has already killed more than 20 million American trees and cost municipalities and property owners tens of millions of dollars.⁴⁴ Toronto is the latest city hit with the infestation since the infestation spread to Ontario. Officials there estimate the cost of replacing Toronto’s street ashes alone to be \$CDN 37 million to \$40 million.⁴⁵ The ash borer almost certainly spread to Canada in cut firewood driven over a border crossing. Increased border inspections and reasonable funding measures for those inspections protect human, animal, and plant life from similar threats, both known – such as the ash borer and beef infected with mad cow disease – and unknown.

⁴² See *E.C. – Asbestos*.

⁴³ APHIS, *Preliminary Economic Analysis for Significant Rulemaking and Initial Regulatory Flexibility Analysis*, available at http://www.aphis.usda.gov/newsroom/hot_issues/agri-inspec&user_fees/downloads/APHIS-2006-0096-0002%5B1%5D.pdf.

⁴⁴ U.S. Department of Agriculture, *Emerald Ash Borer*, <http://www.emeraldashborer.info/>.

⁴⁵ Kate Harries, *Voracious Bug Threatens Toronto’s Trees*, THE GLOBE AND MAIL, Jan. 9, 2008.

2. APHIS complies with the Article XX(b) minimum derogation principle.

Canada asserts that the measures implemented are not “necessary” as required by the GATT Article XX(b). It argues that the U.S. fails to meet the minimum derogation principle found in the word “necessary” by various tribunals.⁴⁶ That principle requires that the APHIS inspections and fees be the least restrictive measure available.⁴⁷

Canada has vague plans of its own that it claims are reasonable alternatives to the U.S. measures. Canada’s alternative measures include a “point of origin” approach under which it would improve its inspections of imports that may later be re-exported to the U.S. There is no indication of what techniques would be used in this approach. These plans – nondescript as they are – do not sufficiently protect the U.S. Canada lauds its approach as “science-based,” clearly suggesting that the U.S.’s efforts to safeguard its human, animal and plant life eschew science in some way.⁴⁸ The accuracy of Canada’s generous self-appraisal would be easier to judge were there any details to this “science-based” plan.

The most recent steps taken by the Canadian government to safeguard its imports came again in the form of a press statement rather than action. On December 17, 2007, Prime Minister Harper announced plans to table new legislation concerning food product and safety. He proposed to levy fines of up to CDN \$1 million against “fly-by-night” importers in the wake of food safety scandals.⁴⁹ The Prime Minister may have soothed Canadian fears about domestic

⁴⁶ See *Thailand – Restrictions on Importations of and Internal Taxes on Cigarettes*, BISD, 37th Supp. 200 (1990).

⁴⁷ *Id.*

⁴⁸ Canadian Food Inspection Agency, *Canada’s Proposed Alternative to the US Department of Agriculture Rule on Border Inspections and Fees*, June 1, 2007. Available at <http://www.inspection.gc.ca/english/corpaffr/publications/borfrae.shtml>.

⁴⁹ Gloria Galloway, *Tories vow to hit ‘fly-by-night operators’ with \$1 million fines, mandatory recalls*, THE GLOBE AND MAIL, Dec. 18, 2007.

food safety, but he did little to illuminate the “science” involved in Canada’s proposed approach to ensuring the safety of its exports. Canada can no longer ensure that the products it exports are safe enough to warrant more lenient inspection rules.

The U.S. has used these same measures without controversy in dealing with every trade partner other than Canada and is only now removing the exemption. In addition, there are several exceptions to the inspection and fee requirements, demonstrating the flexibility of the rule⁵⁰. The AQI fees and increased APHIS inspections are necessary, sensible and fair and now uniformly enforced. Canada has presented no evidence to the contrary and no reasonable alternative plan.

3. APHIS complies with Article XX Preamble Requirements.

Canada may also argue that APHIS violates the Chapter XX preamble language barring measures “adopted in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...” The measures can in no way be described as an “arbitrary or unjustifiable discrimination” barred by the preamble.

The measures are applied to every other nation from which the U.S. imports goods in exactly the same manner, including Mexico. Canada cannot point to any evidence, therefore, that nations in which the same conditions prevail are treated more favorably by the U.S.

Similarly, the measures implemented by the U.S. are not a “disguised restriction” on trade. Canada is the U.S.’s most important trade partner, and the U.S.’s only goals in enhancing border security measures are safety and security. It has no interest in disrupting its exceptional trade relationship with Canada.

⁵⁰ APHIS, *Plant Protection and Quarantine Fact Sheet*, http://www.aphis.usda.gov/publications/plant_health/content/printable_version/faq_canadian_user_fees.pdf.

4. Sanitary and Phytosanitary Considerations.

Article 2.4 of the Sanitary and Phytosanitary Agreement (SPS Agreement), to which the U.S. and Canada are Parties, provides that if a Sanitary and Phytosanitary measure is in compliance with the SPS Agreement between WTO Members, then it will be presumed to be consistent with Article XX(b).⁵¹ The Agreement does not require that a scientific justification be given for the level of protection choice. The choice is not a scientific judgment but rather a societal value judgment. Each government may choose its levels of protections, including the “zero risk” approach chosen by the United States.

Article 3.3 of the SPS Agreement goes on to affirm the right of each government to choose measures required to implement the level of protection it has deemed to be appropriate. Further, Article 6.3 makes it clear that the burden is on the exporting nation to provide the “necessary evidence” to show that its territory is pest-free and undeserving of sanitary or phytosanitary controls.⁵² Canada has failed to meet that burden. Lastly, the U.S. has fully complied with the Article 7 transparency requirement by announcing its APHIS plans.⁵³ Therefore, the U.S.’s policy of checking every shipment is consistent with its “zero risk” approach, consistent with the SPS Agreement, and thus consistent with Article XX(b).

c. Application of APHIS measures to Canada is required by the Most Favored Nation doctrine.

As noted above, the U.S. imposes APHIS inspections and AQI fees on all of its other trade partners. GATT Article I requires that the U.S. afford the same treatment to the Canada that

⁵¹WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Jan. 1, 1995, 1867 U.N.T.S. 493, Article 2.4 [hereinafter SPS Agreement].

⁵² *Id.*, Article 6.3.

⁵³ *Id.*, Article 7.

it affords to every other of its GATT trading partners.⁵⁴ Canada may argue that the existence of a regional trade agreement allows for a special relationship between it and the U.S. However, Mexico is a part of NAFTA as well and is subject to the APHIS measures. The U.S.'s removal of the APHIS exemption for Canada levels the playing field for the U.S.'s other trading partners and is required under the Most Favored Nation doctrine.

d. The measures are justified by the NAFTA and GATT Security Exceptions.

The measures are also justified by the national security exception to the NAFTA and GATT agreements. Neither GATT nor NAFTA shall prevent a 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.”⁵⁵ As the U.S. stated in implementing the new regulations, “[r]emoving the Canadian exception from AQI user fees is necessary to recover the costs of our existing inspection activities and to implement an expanded inspection program.”⁵⁶ The record demonstrates that the U.S. action is necessary for protection of security interests and that the U.S. is entitled to heightened deference, as it is in a time of war.⁵⁷

Bioterrorism is a real threat. INTERPOL warns that “[c]riminal networks can covertly transport lethal agents across borders” and that there is an “urgent need to ensure that countries are adequately prepared for [and] protected from” bioterrorism.⁵⁸ The threat need not have already manifested itself in order for national security to be invoked. As successfully noted by

⁵⁴ GATT, *supra* note 17, art. I. See also Jackson, *supra* note 7, at 157.

⁵⁵ GATT, *supra* note 17, art. XXI(b)(iii); NAFTA, *supra* note 5, art. 2102(1)(a)(ii).

⁵⁶ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 50327 (Aug. 25, 2006) (to be codified at 7 CFR Parts 310 and 354).

⁵⁷ *U.S. – Sugar from Nicaragua*.

⁵⁸ INTERPOL, *The bioterrorism threat: strengthening law enforcement*, <http://www.interpol.int/Public/BioTerrorism/default.asp>.

Ghana in the debate over its boycott of Portuguese goods, it was “threatened by a potential as well as an actual danger.”⁵⁹

Judgments as to the necessity of implementing a measure for security purposes have traditionally been left to the state claiming the exception. For example, Sweden invoked Article XXI to protect its domestic shoe production.⁶⁰ The claim went unchallenged for two years before Sweden dropped its ban on imports. More recently, the U.S. was expected to invoke Article XXI in response to the EU’s WTO challenge to the Helms-Burton Act. The law barred U.S. aid to nations providing assistance to Cuba. The international community fully expected the U.S. to continue to conduct itself as if its national security interests were legitimately implicated even if a WTO panel found to the contrary.⁶¹ In anticipation of this claim, the EU settled its dispute with the U.S. and requested that the WTO panel proceedings be suspended.

Article XXI(b)(iii) provides a great deal of latitude for the invoking party to decide what does and does not constitute a threat to national security. As one scholar notes, the Article’s ambiguity – which allows self-determination of threat levels, as shown above – has worked.⁶² Trade liberalization continues while national sovereignty is preserved. Professor Raj Bhala argues that this balance is even necessary; stating that a sure way to “damage the WTO would be to encroach on this [sovereign] prerogative” of each Member.⁶³

As the examples above demonstrate, the national security exception may be invoked regardless of whether the invoking nation is engaged in war. However, the national security

⁵⁹ See Raj Bhala, *International Trade Law: Trade Law Theory and Practice*, 597 (2001).

⁶⁰ See Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT’L ECON. L. 263, 272

⁶¹ Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 100 Stat. 785, codified at 22 U.S.C. 6021.

⁶² Peter Lindsay, *The Ambiguity of GATT Article XI: Subtle Success or Rampant Failure?* 52 DUKE L.J. 1277.

⁶³ Bhala, *supra* note 92, at 279.

exception is entitled to an even higher level of deference when the invoking Party is at war.⁶⁴

The U.S. is currently at war in Iraq and in Afghanistan, where Canadian troops also face the shadowy threat of al-Qaeda.

The U.S.'s interest in protecting human, animal and plant life during a time of war with enemies known to resort frequently and inventively to terrorism is fully contemplated by the national security exception in NAFTA, GATT, and GATS. The measures implemented are not burdensome and have been in place as to every other of the U.S.'s trade partners. Canada's sensitivity and stubbornness should not be rewarded, and the U.S.'s sovereign right to invoke the security exception with respect to APHIS and WHTI measures should be recognized.

CONCLUSION

Therefore, the United States respectfully asks that this Court adjudge and declare that:

- 1) The Fuel Export Charge violates NAFTA and GATT.
- 2) The WHTI does not violate NAFTA or GATT.
- 3) APHIS inspections and AQI user fees do not violate NAFTA or GATT.

⁶⁴ *U.S. – Sugar from Nicaragua.*