

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 #2008-15R

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Statement of the Facts

Canada brings a claim before this Court disputing the legality of the United States' (U.S.) Western Hemisphere Travel Initiative ("WHTI") and the Agricultural Quarantine and Inspection user fees ("AQI") of the United States' Animal and Plant Health Inspection Service ("APHIS") pursuant to North American Free Trade Agreement ("NAFTA") and the WTO Agreements. Both the U.S. and Canada are members of the WTO and signatories to NAFTA. In April 2005, the U.S. implemented the first phase of the WHTI requiring all travelers between the U.S. and Canada to carry valid passports. Although initially applying only to air travel, the program's second phase places the same restriction on travelers by land and sea barring nearly 60% of Americans without passports from crossing the border. Until WHTI's implementation, the U.S. and Canada enjoyed porous borders which promoted the free flow of people, goods and services.

The next U.S. encroachment on North American trade came on November 24, 2006, when APHIS began implementing agricultural quarantine and inspection AQI user fees. On January 1, 2007, AQI user fees began with surcharges on all airline tickets of passengers arriving in the U.S. from Canada. These fees, though supposedly intended to reduce the threat of unsafe agricultural product entering the U.S., applied to all passengers regardless of whether they were carrying any food-product. By March 1, 2007, the fees extended to include all commercial shipments from Canada to the U.S. irrespective of cargo. On June 1, 2007, shipments by rail and roadway met the same trade-stifling fate.

As the relationship between Canada and the U.S. began to mend in August, 2007, the two countries issued a Joint Statement pursuant to the Smart and Secure Borders

Initiative (“SSBI”) asking their ministers to establish “effective border strategies to minimize risks, while facilitating the efficient and safe movement of people.” On September 11, 2007, following additional negotiations, Canada agreed to spend \$1 billion dollars in the construction of nineteen screening facilities, the erection of ground sensor towers, and the installation of advanced radiological technology straddling the U.S.-Canada border. The improvements would benefit all of North America but Canada is alone in bearing the costs. To offset the hefty price tag without raising her citizens’ taxes, Canada passed legislation authorizing a Fuel Export Charge (“FEC”). The FEC applies to all exporters transporting fuel by way of the pipeline and was a small price to pay for the security of North America.

Questions Presented

- 1) Whether agricultural quarantine and inspection user fees on all commercial shipments to the U.S. from Canada violate NAFTA Chapter 3 and GATT Art.s I and VIII where the fees did not pre-date the agreement, the fees exceed the actual cost of services rendered, the fees are unnecessary, and the fees are not justified pursuant to a national security or general exception.

- 2) Whether WHTI is contrary to NAFTA Chapters 12 & 16, GATT and the General Agreement on Trade in Services (GATS) by disproportionately effecting trade and limiting the free movement of persons, goods, and services across the border.

- 3) Whether the FEC is contrary to NAFTA and the WTO Agreements where: (a) the tax or charge is adopted on all pipeline oil exports, (b) the measure is no more restrictive than pre-existing measures; and (c) the measure is necessary to comply agree with a national security initiative.

Jurisdictional Statement

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

Index of Authorities

Treaties

Canada-US Free Trade Agreement, U.S.-Can., Jan. 2, 1988, Canada E3-1989/3.

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.

General Agreement on Trades in Services, Jan. 1, 1995, 1869 U.N.T.S. 183.

Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.S.T. 331.

WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Jan. 1, 1995, 1867 U.N.T.S. 493.

Art.s

Christopher Sands & Greg Anderson, *Negotiating North America: The Security and Prosperity Partnership*, Hudson Institute, Summer 2007, 6.
http://hudson.org/files/pdf_upload/HudsonNegotiatingNorthAmericaadvanceproof2.pdf

Edward A. Evans, *Understanding the WTO Sanitary and Phytosanitary Agreement*, Department of Food and Resource Economics, Florida Cooperative Extension Service, Aug. 2004, <http://edis.ifas.ufl.edu/FE492>.

Raj Bhala, Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach: National Security and International Trade Law: What GATT Says, and What the United States Does*, 19 U. Pa. J. Int'l Econ. L. 263, 279 Summer (1998).

Appellate Body and Panel Reports

Final Report of the Panel, *Cross-Border Trucking Services*, Secretariat File No. USA-MEX-98-2008-01, at 59 (2001).

Final Report of the Panel, *In the matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, Secretariat File No. CDA-95-2008-01 at 33-34 (1996).

GATT Panel Report, *Panel on United States Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, SCM/83, 3 June 1987, unadopted, BISD 40S/358.

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

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

Report of the Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (2000).

Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, at 22 (1996).

Report of the GATT Panel, *Thailand – Restrictions on Importations of and Internal Taxes on Cigarettes*, BISD, 37th Supp. 200 (1990).

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

Report of the Appellate Body, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, AB-2001-4 (2001).

Statutes and Miscellaneous Statements

Canadian Food Inspection Agency, *Canada's Proposed Alternative to the United States Department of Agriculture's Rule on Border Inspection Fees*, June 1, 2007, <http://www.inspection.gc.ca/english/corpaffr/publications/borfrae.shtml>.

Communication from the Chairman of the Panel, *United States – Cuban Liberty and Democratic Solidarity Act*, WT/DS38/5 (1997).

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

Government of Mexico. North American Transportation Statistics Database., <http://nats.sct.gob.mx>.

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.

Softwood Lumber Export Charges Act, Bill C-24, LSE-538 (2006).

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

SUMMARY OF ARGUMENT

The U.S.'s implementation of WHTI and charge of AQI user fees to travellers crossing U.S.-Canada border are contrary to NAFTA and the WTO Agreements. WHTI and AQI user fees are not justified under the national security or any general exception of NAFTA and the WTO Agreements. In contrast, the FEC is justified pursuant to the national security and general exceptions of NAFTA and the WTO Agreements.

AQI user fees are contrary to NAFTA Article (Art.) 310 and fail to fall under any of the permissible exceptions. Moreover, AQI user fees violate GATT Art. VIII, as there is no evidence the fees are equal to the cost of services rendered. The preferential regional economic relationship between the parties renders AQI user fees unnecessary because a trade benefit already exists. AQI user fees are not "necessary", but are an arbitrary and unjustifiable discrimination against Canadian travellers and businesses. Similarly, AQI user fees are not necessary to avoid national security threats, as neither the U.S. nor Canada are in a state of international emergency. The U.S. cannot justify the fees under the Sanitary and Phytosanitary Agreement ("SPS Agreement") because of a lack of cooperation and justification for action. In sum, AQI user fees are contrary to the U.S. obligations under NAFTA and the WTO Agreements.

WHTI contradicts NAFTA and the WTO Agreements because is a barrier to U.S.-Canada trade. Specifically, WHTI violates NAFTA Chapter 12 impeding the free flow of people, goods, and services. WHTI also runs afoul of NAFTA Chapter 16 which provides for a preferential trade relationship that includes stream-lined reciprocal practices for the temporary entry of businesspersons into member states. Rather than develop a common criteria for entry agreeable to all parties, WHTI arbitrarily excludes Canada from the policy-making process. WHTI protects

the American tourist industry and not human life. Such protectionism coupled with the fact that neither the U.S. nor Canada are presently in a war or state of international emergency with each other, negates the application any general exceptions. The long-standing tradition of allowing Canadian and American citizens to cross the border with a drivers' license and birth certificate is not contrary to MFN treatment. The regional trade agreement creates a preferential trade relationship outside the scope of MFN obligations.

The FEC, implemented by Canada to pay for security measures pursuant to the SSBI, is not a violation of NAFTA or the WTO agreements because the tax applies universally to all oil exported via pipelines regardless of destination. Moreover, the FEC does not constitute a quantitative restriction on trade because the U.S. cannot demonstrate that the tax presents a material and imminent threat to domestic industry. The FEC is a tax and as such is not subject the requirements of NAFTA Articles (Arts.) 315 and 605 regarding other export measures that require the proponent of to demonstrate that there is no effect on tax or supply. The FEC is justifiable pursuant to NAFTA's general and security exceptions because it is necessary and is the least restrictive measure available to protect the security interests of North America.

ARGUMENT

I. AQI USER FEES VIOLATE NAFTA AND THE WTO AGREEMENTS

a. AQI user fees are custom fees prohibited by NAFTA Art. 310.

Art. 310.1 of NAFTA states that “no Party may adopt any custom user fees of the type referred to in Annex 310.1 for originating goods.”¹ Additionally, Art. 310.2 states “the Parties specified in Annex 310.1 may maintain such fees in accordance with that Annex.”² AQI user fees apply to all commercial shipments from Canada to the U.S. Prior to 2006, AQI user fees did

¹ NAFTA art. 310(1).

² NAFTA art. 310(2).

not apply to Canadian shipments. AQI user fees increase costs for Canadian manufacturers, suppliers, and exporters hindering free trade in direct opposition to Art. 310 of NAFTA.

The U.S. claims that AQI user fees are not new fees but the removal of Canada's exemption from these fees. Although Art. 310.2 allows for maintenance of existing customer user fees, Art. 310.2 explicitly states that such fees must be maintained in limited instances in accordance with Annex 310.1. Annex 310.1 lists all custom user fees that are exempt from Art. 310 of NAFTA but does not include any references to AQI user fees. Even if AQI user fees are not new, the removal of the exemption and maintenance of these fees is a violation of NAFTA Art. 310.

b. AQI user fees violate GATT Art. VIII, as there is no evidence that the fees are equal to the cost of services rendered.

The U.S. is violating GATT Art. VIII:1(a), which requires that any fee or charge “imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered.”³ In *U.S. Customs*, the WTO Panel found a dual requirement for any importation or exportation fee or charge to be permissible under GATT Art. VIII, namely: 1) the charge must be associated with the cost of a ‘service’; and 2) the charge must be limited to the cost of the services rendered to the individual importer in question, and not to the cost of the services generally.⁴ GATT Art. VIII: 1(a) further states that the fee “shall not represent an indirect protection to domestic products . . .” AQI user fees indirectly protect on domestic products by raising the cost of goods imported from Canada.

Although the U.S. claims that AQI user fees are directly associated with the accompanying cost of increased plant inspections, there is no evidence to show that there are

³ GATT art. VIII:1(a).

⁴ Report by the Panel Body, *United States Customs User Fee*, L/6264 – 35S/245, at 5 (1988).

greater expenditures being spent on additional inspections. At the very least, an accounting of the fees collected from Canadian commercial shipments should be provided to indicate that the fees do not exceed the costs of the additional services. Even if additional costs are incurred, alternative measures exist that would better fit with NAFTA obligations than AQI user fees, such as the alternate proposal forwarded by the Canadian Food Inspection Agency (“CFIA”).⁵ If AQI user fees are found to be directly associated with improved inspection requirements, the U.S. still has obligations under NAFTA Art. 310, which prohibit the addition of custom user fees.

c. MFN Treatment does not apply to AQI user fees because AQI user fees are a new fee.

AQI user fees are a new fee charged on all Canadian commercial shipments, which do not reflect the unique trading relationship between Canada and the U.S. The U.S. argues the elimination of Canada’s exemption is to make trade consistent with GATT Art. I, the MFN Treatment clause. GATT Art. I requires that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”⁶ However, AQI user fees apply to several means of transportation such as trucks and trains that are not applicable to other countries, with the exception of Mexico. Canada’s trading relationship with the U.S. is distinguishable from Mexico’s because the GATT exceptions allow for derogations from MFN treatment in regional trade agreements (RTAs).⁷ The trading relationship between Canada and the US is a unique RTA, as evidenced by the longer free trade relationship, dating back to the 1988 Canada-US Free

⁵ Canadian Food Inspection Agency, *Canada’s Proposed Alternative to the United States Department of Agriculture’s Rule on Border Inspection Fees*, June 1, 2007, <http://www.inspection.gc.ca/english/corpaffr/publications/borfrae.shtml>.

⁶ GATT art. I :1.

⁷ GATT art. XXIV & GATS art. V.

Trade Agreement.⁸ Canada's relationship with the U.S. does not require AQI user fees be applied to all commercial shipments to the U.S. for the sake of being consistent with MFN Treatment.

d. AQI User Fees are not “necessary” as required under Art. XX (b).

The General Exceptions provide a framework for what is permitted, even if the measure violates other Art.s of NAFTA or the WTO Agreements. Decisions of GATT panels have made it clear that Art. XX analysis is two-tiered. Specifically, in *U.S. – Conventional Gasoline*, the Appellate Body stated that the challenged measure must fit an Art. XX exception in compliance with the Art. XX chapeau.⁹ Specifically, the U.S. may claim that AQI user fees fund inspections and are exempt under Art. XX(b) as “necessary to protect human or plant life or health.”¹⁰

The term ‘necessary’ has been highly scrutinized in the context of WTO agreements. In *Restrictions on Cigarettes*, the WTO Panel stated that ‘necessary’ refers to the minimum derogation principle.¹¹ Under the principle, if there are alternative measures reasonably available that would be as effective as the one adopted that are less trade restrictive than the measure adopted, then the measure is not necessary.¹² As the WTO Panel discussed in *Korea-Beef*, the test for whether a WTO-consistent alternative measure is reasonably available is the extent to which the alternative measure contributes to the ends.¹³ Even if the U.S. argues that AQI user fees were necessary, there are less restrictive alternatives.

⁸ Canada-US Free Trade Agreement, U.S.-Can., Jan. 2, 1988, Canada E3-1989/3.

⁹ Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, at 22 (1996).

¹⁰ GATT art. XX(b).

¹¹ Report of the GATT Panel, *Thailand – Restrictions on Importations of and Internal Taxes on Cigarettes*, BISD, 37th Supp. 200 (1990).

¹² *Id.*

¹³ Report of the Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (2000).

The CFIA has proposed a less restrictive alternative to AQI user fees.¹⁴ The CFIA's alternative proposal addresses the concerns that the U.S. has in controlling pest and disease concerns from products produced by third countries. The proposal consists of four elements aimed at identifying third country high-risk commodities, ensuring product safety and combating fraud.¹⁵ The Canadian alternative emphasizes a shared approach to risk management relating to border concerns. The shared approach is consistent "existing collaborative initiatives, including the Security and Prosperity Partnership of North America, the Canada-U.S. Smart Border Declaration, and the U.S.-Canada Free and Secure Trade initiatives."¹⁶ The CFIA plan is not the only alternative to AQI user fees available and the least restrictive measure must prevail.

e. AQI user fees are not within the general exceptions of NAFTA and the WTO Agreements because the fees arbitrarily and unjustifiably discriminate against Canada and the U.S.

In the second tier of a General Exception analysis, the U.S. again runs into difficulties. GATT's Art. XX chapeau requires that "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries . . . , or a disguised restriction on international trade..."¹⁷ AQI user fees fail under the Art. XX chapeau analysis. The U.S. has refused to communicate with Canada on the issue in direct contradiction of the 'Smart and Secure Borders' joint statement, which "ask[s] ... ministers to develop mutually acceptable inspection protocols to detect threats to... security." In the *Shrimp-Turtle* dispute, the WTO panel required that to overcome the presumption of unjustifiable and arbitrary

¹⁴ Canadian Food Inspection Agency, *Canada's Proposed Alternative to the United States Department of Agriculture's Rule on Border Inspection Fees*, June 1, 2007, <http://www.inspection.gc.ca/english/corpaffr/publications/borfrae.shtml>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ GATT art. XX.

discrimination, there must at the least be an attempt to reach a mutual agreement and an opportunity for the affected party to be heard.¹⁸ Neither occurred in relation to the AQI fees.

Another justification mentioned by U.S. representatives was that the fee would help improve inspection of fruits and vegetables; however, AQI user fees are apply to all commercial shipments, regardless of shipment's contents. Hence, AQI user fees are excessively broad. Additional fees being allocated to commercial shipments are not mutually acceptable because of the harm it does to Canadian exports. Absent a clear rationale from the U.S., AQI user fees are a violation of the General Exception chapeau test, as an arbitrary and unjustifiable discrimination against Canada.

f. AQI User Fees are not justifiable pursuant to the SPS Agreement.

The Sanitary and Phytosanitary Agreement ("SPS Agreement"), to which the U.S. and Canada are both parties, addresses human and animal safety.¹⁹ The U.S. may argue that AQI user fees are necessary and consistent with the goals and substantive provision of the SPS Agreement. However, the SPS Agreement does have limits that balance the take into consideration trade practices as well as protecting human and animal life.

Many substantive provisions limit the SPS Agreement and demonstrate that AQI user fees are not within the scope of the SPS Agreement. Art. 5.1 "requires members (when possible and appropriate) to base their SPS measures on risk assessment methodologies developed under the auspices of the appropriate relevant organization."²⁰ AQI user fees violate Art. 5.1 because there is no indication that AQI user fees are based on risk assessment methodologies produced

¹⁸ Report of the Appellate Body, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, AB-2001-4 (2001).

¹⁹ Edward A. Evans, *Understanding the WTO Sanitary and Phytosanitary Agreement*, Department of Food and Resource Economics, Florida Cooperative Extension Service, Aug. 2004, <http://edis.ifas.ufl.edu/FE492>.

²⁰ *Id.*

by any organization. Art. 6 requires that “import protocols be based on risk assessments that evaluate the claims by exporting countries that certain regions are free of quarantine diseases or pests, or that the prevalence of quarantine pests and disease is low.”²¹ The U.S. has presented no risk assessments showing any problems with Canadian imports. AQI user fees are not justified to the standard required by Art. 5.1 and 6 of the SPS Agreement.

Art. 5.5 of the SPS Agreement prohibits “arbitrary or unjustifiable distinctions in the levels of protection [each nation] considers to be appropriate [if these distinctions would result in disguised restrictions on international trade] to achieve the objective of consistency in the application of SPS measures.”²² There is no evidence to suggest that AQI user fees are anything but arbitrary restrictions on international trade. “Art. 5.2 stipulates that countries should consider direct risk-related costs.”²³ There is no indication that the U.S. is incurring greater direct risk-related costs. In *European-Communities – Asbestos*, the WTO Panel found that “it is undisputed that WTO members have the right to determine the level of protection of health that they consider appropriate in a given situation.”²⁴ However, there is no scientific evidence, that AQI user fees increase protection of health in this situation or further SPS Agreement objectives.

g. AQI user fees are not necessary to avoid national security threats for the U.S. under GATT XXI(b)(iii).

Under GATT XXI(b)(iii), the National Security Exception states that nothing in GATT shall be construed “to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ... taken in time of war or other

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001).

emergency in international affairs.”²⁵ Following the tragedies of September 11, 2001, the U.S. may claim that the current situation is a time of war or emergency in international affairs and, even if it did, AQI user fees are not necessary to prevent the threat of bioterrorism.

Although national security issues are normally under sovereign jurisdiction, AQI user fees are distinguished from other applications of the national security exception. Raj Bhala of George Washington University College of Law states “it is likely that a WTO panel... would interpret its terms of reference narrowly to exclude a ruling on substantive Art. XXI arguments,”²⁶ there is little evidence to support this since panels have avoided ruling on this issue. In *Nicaragua Sugar*, based on a 1985 U.S. trade embargo against Nicaragua, the panel had terms of reference, which “precluded the panel from judging the validity or motivation for the invocation of Art. XXI(b)(iii).”²⁷ In 1996, the U.S. signed the Cuban Liberty and Democratic Solidarity Act, which was designed to tighten the U.S. trade embargo on Cuba.²⁸ Several countries and the European Union (“EU”) objected, although the EU’s WTO complaint was suspended following negotiations with the U.S., and the expected national security defense was not litigated.²⁹

The current situation is more compelling than prior WTO panel decisions because Canada and the U.S. are not in a state of conflict. The only disputes that exist between Canada and the U.S. are trade related. With the consent of both parties to this panel’s decision, this panel is empowered to rule on AQI user fees as an inappropriate application of Art. XXI(b)(iii)

²⁵ GATT art. XXI(b)(iii).

²⁶ Raj Bhala, Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach: National Security and International Trade Law: What GATT Says, and What the United States Does*, 19 U. Pa. J. Int’l Econ. L. 263, 279 Summer (1998).

²⁷ Report of the Panel, *United States – Imports of Sugar from Nicaragua*, L/5607 – 31S/67, at 1 (1984).

²⁸ Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 100 Stat. 785, codified at 22 U.S.C. 6021.

²⁹ Communication from the Chairman of the Panel, *United States – Cuban Liberty and Democratic Solidarity Act*, WT/DS38/5 (1997).

exception. This action is different because the Nicaragua and Cuba trade embargos were more volatile and indicative of an emergency in international affairs, with violence prevalent in both nations. AQI user fees do not fit within the exception of GATT Art. XXI(b)(iii).

II. THE WESTERN HEMISPHERE TRAVEL INITIATIVE VIOLATES NAFTA AND THE WTO AGREEMENTS

a. WHTI is a violation of NAFTA Chapter 12 disrupting cross-border trade in services between Canada and the U.S.

WHTI is a change from the long-standing practice of allowing Canadian and American citizens to cross into the U.S. with only a birth certificate and driver's license. Because WHTI violates adversely affects trade between the U.S. and Canada and does not fit into any exception, the initiative violates NAFTA and the WTO Agreements. Ultimately causes harm to Canadian businesses and the Canadian tourist industry by promoting domestic travel for U.S. citizens and increasing barriers for U.S. citizens who wish to travel to Canada. In 2005 alone, over 14 million Americans visited Canada.³⁰

WHTI is within the scope of protection of cross-border trade in services as defined in NAFTA Chapter 12. Art. 1201 states that NAFTA "applies to measures adopted or maintained by a Party relating to cross-border trade in services by service providers of another Party."³¹ The free flow of citizens between Canada and the U.S. has benefited cross-border trade in services for both nations. Canadian and American citizens have been allowed to pass between the countries with a driver's license and birth certificate since prior to the adoption of NAFTA. Art. 1201 further clarifies its scope in : 1(c) stating that any measures that relate to cross-border trade include "the access to and use of distribution and transportation systems in connection with the

³⁰ Government of Mexico. North American Transportation Statistics Database., <http://nats.sct.gob.mx>.

³¹ NAFTA art. 1201.

provision of a service.”³² Crossing the border is an essential part of the transportation system for business dealing between the U.S. and Canada, in particular the tourist industry.

The practice of allowing citizens to cross the border with a birth certificate and driver’s license has been a longstanding practice between Canada and the U.S. international law requires that the context and prior longstanding agreements be considered when interpreting treaties. Art. 31 of the Vienna Convention states “interpretation of a treaty shall comprise, in addition to the text, including preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; [and] (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”³³ In *Cross-Border Trucking Services*, both Canada and the U.S. agreed that the 1969 Vienna Convention on the Law of Treaties governed, since it had governed NAFTA parties in the past.³⁴ In *U.S.-Origin Agricultural Products*, the NAFTA Panel found that interpreting treaties must:

[C]ommence with the identification of the plain and ordinary meaning of the words used. In doing so, the Panel will take into consideration the meaning actually attributed to words and phrases looking at the text as a whole, examining the context in which the words appear and considering them in light of the object and purpose of the treaty.³⁵

Art. 102(1) of NAFTA states that NAFTA’s objectives, “including national treatment, most-favored-nation treatment and transparency, are to: (a) eliminate barriers to trade in, and facilitate the cross-border movement of goods and services between the territories of the Parties.”³⁶ WHTI alters a pre-existing agreement between the U.S. and Canada and is inconsistent with the

³² NAFTA art. 1201(1)(c).

³³ *Vienna Convention on the Law of Treaties* art. 31, May 23, 1969, 1155 U.S.T. 331.

³⁴ Final Report of the NAFTA Panel, *Cross-Border Trucking Services*, Secretariat File No. USA-MEX-98-2008-01, at 59 (2001).

³⁵ Final Report of the Panel, *In the matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, Secretariat File No. CDA-95-2008-01 at 33-34 (1996).

³⁶ NAFTA art. 102(1)(a).

objectives of NAFTA. The pre-existing agreements between the U.S. and Canada are influential in determining the context of their relationship under international law.

Although Mexican citizens are required to have passports to cross into the U.S, the relationship between Canada and the U.S. is distinguished. The U.S. may argue WHTI is necessary under to the NAFTA Model Rules 33 and 34 which state:

33. 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.

34. A Party asserting that a measure is subject to an exception under the Agreement shall have the burden of establishing that the exception applies.³⁷

Although Canada does have the burden of showing inconsistencies with NAFTA, WHTI is inconsistent with NAFTA providing additional trade barriers to the Canadian tourist industry.

Requiring passports to enter the U.S. for all citizens with have an adverse affect on the tourist industry of cross border cities as well as creating another barrier for the travel of business professionals. With only 40 percent of Americans having passports, American tourists would be more likely to pick a destination within the U.S. that would not require a passport. Businesses may similarly choose to trade with a more convenient domestic entity. Although entering Canada would still not be an issue, the WHTI requirement would impede American citizens on their return trip would thus deter tourism from Canadian border cities and negatively impact business, in direct contradiction with NAFTA and the WTO Agreements' statements of purpose. Thirty – seven states count Canada as its largest foreign trade partner.³⁸ The negative impact that WHTI would have on the tourist industry and on business in Canada violates NAFTA Art. 1201.

³⁷ *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.

³⁸ Christopher Sands & Greg Anderson, *Negotiating North America: The Security and Prosperity Partnership*, Hudson Institute, Summer 2007, 6, http://hudson.org/files/pdf_upload/HudsonNegotiatingNorthAmericaadvanceproof2.pdf.

b. National Treatment does not apply to WHTI because of WHTI's protectionist purpose

Art. 1201(c) of NAFTA defines the scope of Chapter 12 on Cross-Border Trade in Services, stating that “this Chapter applies to measures adopted or maintained by a Party relating to cross-border trade in services by service providers of another party including measures respecting: (c) the access to and use of distribution and transportation systems in connection with the provision of a service.”³⁹ Allowing both Canadian and American citizens to cross the border with a driver’s license and birth certificate is essential in maintaining a free flow of tourists. NAFTA Art. 1202 requires that “each party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers.”⁴⁰ The U.S. may argue that they require passports of their own citizens, just as they require of Canadian citizens under WHTI. This argument neglects the requirement of maintaining measures related to cross border trade. A National Treatment argument also ignores the protectionist nature of WHTI, which promotes the U.S. tourist industry by creating barriers for the American tourists to attend Canadian tourist destinations.

GATS clarifies National Treatment requiring that a Member may meet their obligations for National Treatment with “either formally identical treatment or formally different treatment that it accords to its own services and service suppliers.”⁴¹ GATS Art. XVII(3) states that “formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Members compared to like services of service suppliers of any other Member.”⁴² According to the GATS

³⁹ NAFTA art. 1201(c).

⁴⁰ NAFTA art. 1202 .

⁴¹ GATS art. XVII(2).

⁴² GATS art. XVII(3).

definition of National Treatment, WHTI puts the Canadian tourist industry in a less favourable condition than that of the U.S. tourist industry, where American citizens would become more likely to travel domestically. WHTI does not put nations other than Canada in a less favourable condition; therefore, National Treatment is not applicable to WHTI.

c. Permitting Citizens to Cross the U.S.-Canada Border with a Birth Certificate and Driver's License is not a violation of The Most-Favoured-Nations Treatment

Any justification of WHTI under MFN treatment neglects the objectives of NAFTA, articulated in Art. 102, which are to eliminate trade barriers and encourage cross-border movement. The U.S. may argue that WHTI is justified under Art. 1203 of NAFTA concerning Most-Favored-Nation Treatment. Art. 1203 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.”⁴³ By not requiring passports of Canadian citizens and requiring passports of other nations including Mexico, the U.S. could argue that they were remedying their MFN obligation to Mexico. The present case is distinguished because the relationship that the U.S. has with Mexico is not a “like circumstance” that is parallel to the relationship between the U.S. and Canada. Canada and the U.S. have a longstanding history of positive cross-border relations. There are also not the same immigration concerns for the U.S. that exist with the U.S. Since these two relationships are so different, the Most-Favoured-Nations Treatment clause does not apply in the present case.

d. WHTI violates Chapter 16 of NAFTA, which requires a preferential trading relationship regarding Temporary Entry for Business Persons between Canada and the U.S.

Chapter 16 of NAFTA “reflects the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing

⁴³ NAFTA art. 1203.

transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories.”⁴⁴ There is a requirement under NAFTA for a preferential trading relationship. NAFTA Art. 1602 states “[t]he Parties shall endeavor to develop and adopt common criteria, definitions and interpretations for the implementation of this Chapter.”⁴⁵ WHTI does not adopt common criteria in regards to policy related to cross-border travel. WHTI actually removes a preferential treatment that already exists that helps foster more convenient business relationships between the U.S. and Canada. WHTI hinders the purpose of Chapter 16 of NAFTA.

e. WHTI does not fit into any general or national security exceptions of the WTO Agreements.

A common misnomer in international trade law is that Art. XXI of GATT permits governments to define their security interests and to protect domestic industry by couching restrictive trade measures in these terms. GATT Art. XXI provides:

Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials . . . (ii) relating to the traffic in arms . . . and to such traffic in other goods and materials; (iii) taken in time of war or other emergency in international relations . . .⁴⁶

The U.S. cannot justify WHTI pursuant to this exception because while protection of the North American border is a valid security interest, the measure does not relate to fissionable materials, arms or ammunition trafficking and is not being undertaken in a time of war or national emergency. The inclusion of sections (i) – (iii) by the drafters evidences an intention to limit the circumstances under which a country may ignore treaty obligations in the interest of national security.

⁴⁴ NAFTA art. 1601.

⁴⁵ NAFTA art. 1602.

⁴⁶ GATT art. XXI (b), (i),(ii),(iii).

As discussed in the preceding section, the U.S. may counter that the attacks of 9/11 and the subsequent “war on terror” satisfy GATT Art. XXI (iii). While there is a palpable international effort underway to thwart terrorism, it is hardly the “war” contemplated by the drafters of the WTO Agreements. Unlike a declared war against a known adversary, the war on terror has no determinative end. Allowing the war on terror to satisfy the GATT Art. XXI (iii) obligation, would permit parties to indefinitely circumvent the agreement.

Moreover, WHTI does not fit within any GATT Art. XX General Exceptions. Art. XX provides exceptions for measures necessary to protect human life.⁴⁷ For an Art. XX exception to apply, the measure must not only meet the criterion of a specific exception which arguably WHTI does, but the measure must also comply with the Art. XX Chapeau which states:

[M]easures are not applied 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 . . .⁴⁸

In claiming an exception to the WTO Agreements, the U.S. must establish that the measure is not applied in a discriminatory manner to similarly situated countries and that the measure does not equate to a protectionist restriction on trade in favor of a domestic industry. The U.S. claims that the invocation of WHTI simply brings Canada in line with what is required of all other parties to the WTO Agreements and as such it eliminates existing discrimination in favor of Canada. As already discussed, the primary goal of a regional trade agreement is to afford preferential treatment to member countries.⁴⁹

With regard to the second prong, WHTI most definitely has the affect of protecting the domestic tourist industry. According to the U.S. Embassy Canada fact sheet, fewer than half of

⁴⁷ GATT art. XX (b).

⁴⁸ GATT art. XX.

⁴⁹ NAFTA art. 102.

Americans have valid passports.⁵⁰ This means that half the population of America will have to exclude Canada as a potential tourist destination when but-for WHTI they could freely travel across the border as easily as traveling to another state. In addition, WHTI hinders the free movement of goods and services by making domestic suppliers more attractive than Canadian suppliers with whom doing business requires jumping more administrative hurdles.

Even if the U.S. is found to satisfy the two prongs laid out by the Art. XX Chapeau, the U.S. has the burden of proving that WHTI is necessary within the meaning of the Agreement. The term “necessary” must be evidenced by showing that an alternative measure that is less restrictive on trade than the challenged measure could not accomplish the same result.⁵¹ In this case, the less restrictive available measure is that which existed prior to WHTI. There is nothing in the record to suggest that the previous requirement of a drivers’ license and birth certificate was any less effective at securing the border than WHTI. The U.S. is bound when invoking an Art. XX general exception to use the measure reasonably available to it that is the least inconsistent with other GATT provisions.⁵²

III. CANADA’S FEC DOES NOT VIOLATE NAFTA OR THE WTO AGREEMENTS

a. The FEC is not contrary to international trade law because the measure applies uniformly to all exports of oil transported by pipeline.

NAFTA Chapter 3 specifically prohibits export taxes unless those taxes are universally applied to non-discriminatorily to all importers and to those same goods for domestic consumption. NAFTA Art. 314 reads in relevant part:

⁵⁰ U.S. Embassy in Canada, *Did You Know?*, http://canada.usembassy.gov/content/can_usa/didyouknow.pdf.

⁵¹ Report of the GATT Panel, *Thailand – Restrictions on Importations of and Internal Taxes on Cigarettes*, BISD, 37th Supp. 200 (1990).

⁵² *Id.*

[N]o party may adopt or maintain any duty, tax or other charge on the export of any good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on: a) exports of any such good to the territory of all other Parties; and b) any such good when destined for domestic consumption.⁵³

In the instant case, Canada is applying the charge to all other parties including domestic consumers who receive oil via the pipeline. Art. 314 does not require that the effect of the measure be the same on all parties but simply that the application is consistent. Whether the U.S. may be the largest importer of Canadian oil by way of the pipeline and stands to be impacted the most by the measure is irrelevant so long as the same charge applies to all oil exported in a similar fashion. Art. 604 mimics the conditions set forth in Art. 314 and applies directly to the export of energy or basic petrol goods.⁵⁴ If the tax is not contrary to Art. 314 it cannot be found contrary to Art. 604.

NAFTA Chapter 3 distinguishes between export taxes subject to Art. 314 and other export measures subject to Art. 315. By Canada's admission, the FEC is a tax. Other export measures, seeming to exclude export taxes, are justifiable under Art.s XI: 2(a) or XX (g), (i) or (j) of the GATT where supply and price are not effected.⁵⁵ Because the FEC is a tax, an effect on price or supply does not negate the applicability of the GATT exceptions. If, however, the U.S. argues that the tax more resembles an "other export measure" under Art.s 315 and 605, then the FEC does not violate NAFTA or the WTO Agreements.

NAFTA Art. 315 and 605 both require that a party demonstrate that a measure does not affect price or supply before the proponent can justify the measure with national security or general exceptions. Admittedly, the FEC impacts the price of exported goods while not having the same effect on oil for domestic consumption. However, in the *Softwood Lumber* dispute, a

⁵³ GATT art. 314(a)-(b).

⁵⁴ NAFTA art. 604 (a)-(b).

⁵⁵ NAFTA art. 315.

WTO panel held that a countervailing duty on Canadian lumber was permissible even where the price of exports exceeded the price of lumber for domestic consumption.⁵⁶ In that case, Canada cited to U.S. trade law that requires that for a duty to be countervailable, it must apply to a single industry. Canada defended by arguing that the timber was provided to so many industries that it is not countervailing; the same argument applies to the facts before this Court. Moreover, the manner of application of the FEC so far as requiring the filing of monthly tax returns, and establishment of a licensing protocol is similar to the procedural requirements agreed to by the U.S. in *Softwood Lumber*.⁵⁷

In the alternative, the U.S. may argue that the FEC is a quantitative restriction on trade prohibited by GATT Art. XI. However, in order for a quantitative restriction to apply there must be (1) reasonable grounds to believe that sufficient incentives or disincentives exist for observing non-mandatory measures, (2) government interaction necessary to restrict imports or exports once certain triggering events take place. Unlike NAFTA Arts 314 and 604, the affects and not the application of a measure matter in GATT Art. XI. While the U.S. need not demonstrate actual trade effects of the tax, it must show a material and imminent threat to the domestic industry.⁵⁸ Not only does the FEC not threaten U.S. domestic oil producers, it raises the price of Canadian oil thereby creating an incentive to buy local. In *Softwood Lumber*, a WTO panel upheld a similar tax on Canadian softwood lumber exports to the U.S.⁵⁹

⁵⁶ GATT Panel Report, *Panel on United States Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, SCM/83. 3 June 1987, unadopted, BISD 40S/358.

⁵⁷ Softwood Lumber Export Charges Act, Bill C-24, LSE-538 (2006).

⁵⁸ See supra n. 56.

⁵⁹ Id.

b. The FEC is justifiable pursuant to NAFTA Art. 607, GATT Art. XXI (b) and GATT Art. XX(b) & (d).

The purpose of the WTO Agreements to eliminate barriers to trade does not come without exception. Both GATT & NAFTA allow for measures that may frustrate the intent of the agreements where there is a competing national security interest. NAFTA Art. 607 states:

[N]o Party may adopt or maintain a measure restricting imports of an energy or basic petrochemical good from, or exports of an energy or basic petrochemical good to, another Party under . . . (National Security), except to the extent necessary to: a) . . . enable fulfillment of a critical defense contract of a Party; b) respond to a situation of armed conflict involving the Party taking the measure.⁶⁰

Canada negotiated with the U.S. to defend the borders of North America and the fulfillment of their obligations depends upon the revenue from the FEC. The U.S. concedes that border measures are necessary to protect human life in both countries. FEC is the least restrictive measure Canada can implement to finance the necessary border initiatives. Further, the measure in no way restricts trade to the U.S. because the Canadian exporters bear the burden of the tax. If there is any negative consequence to trade, the harm would be to the Canadian exporters who may be have to raise their prices to compensate for the tax thereby making their product more expensive than a domestic like-product.

CONCLUSION

Therefore, Canada respectfully requests that this Honorable Court adjudge and declare that:

- 1) WHTI violates NAFTA and the WTO Agreements.
- 2) AQI user fees violate NAFTA and the WTO Agreements.
- 3) The FEC does not violate NAFTA and the WTO Agreements.

⁶⁰ NAFTA art. 607.