

2007-08
NIAGARA INTERNATIONAL MOOT COURT COMPETITION

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

THE GOVERNMENT OF
THE UNITED STATES OF AMERICA
(Applicant)

v.

THE GOVERNMENT OF
CANADA
(Respondent)

MEMORIAL OF THE APPLICANT

TEAM # 2008-16 A

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JURISDICTIONAL STATEMENT

The United States (“U.S.”) and Canada are both members of the United Nations (“UN”), so under the UN Charter Article 93, the countries are therefore parties to the Statute of the International Court of Justice (“ICJ”). Both the U.S. and Canada have agreed to refer their disputes in the present case to the ICJ, pursuant to Articles 36(1) and 40(1) of the Statute of the Court. Under Article 36(1) of the Statute of the Court, this Court has jurisdiction to hear the present case.

QUESTIONS PRESENTED

The U.S. respectfully requests that the Court determine that:

1. The Fuel Export Charge is contrary to NAFTA Articles 314, 315, 604 and 605 or GATT Articles I, VIII and XI.
2. The Fuel Export Charge is not justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI.
3. The WHTI is not contrary to NAFTA Chapters 12 and 16 or GATS.
4. The WHTI is justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.
5. The APHIS user fees are not contrary to NAFTA Article 310 and GATT Articles I and VIII.
6. The APHIS user fees are justified pursuant to the national security exception or a general exception in NAFTA or GATT or GATS.

STATEMENT OF FACTS

The U.S. signed the North American Free Trade Agreement (“NAFTA”) between the U.S., Mexico, and Canada on December 17, 1992.¹ NAFTA purports to eliminate barriers to trade among the three parties to the agreement.² The U.S. and Canada are both parties to the General Agreement on Tariffs and Trade (“GATT”), which was entered into on January 1, 1948.³ Parties to GATT agree to enter into “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”⁴ The General Agreement on Trade in Services (“GATS”), entered into force in January 1995 after the Uruguay Round of negotiations, was created in order to provide a multilateral trading system for services and “seeks to eliminate unnecessary or burdensome barriers to trade in services.”⁵

In April of 2005, the U.S. Department of State (“DOS”) and the U.S. Department of Homeland Security (“DHS”) proposed the Western Hemisphere Travel Initiative (“WHTI”).⁶ The initiative required travelers to the U.S. from within the Western Hemisphere to carry a valid passport or certain prescribed identification. The WHTI is applied equally to all travelers, including Americans. Implementation of the WHTI began on January 23, 2007 with air travelers only. As of January 31, 2008, U.S. and Canadian citizens over the age of 18 must present

¹ The North American Free Trade Agreement, Dec. 17, 1992 [hereinafter NAFTA];

² NAFTA Panel Decision, In the Matter of Cross Border Trucking Servs., Secretariat File No. USA-MEX-98-2008-01, ¶ 219, (Feb. 6, 2001).

³ The General Agreement on Trades and Tariffs, Oct. 30, 1947 [hereinafter GATT].

⁴ Id.

⁵ William Thomas Worster, Conflicts Between United States Immigration Law and the General Agreement on Trade in Services: Most-Favored-Nation Obligation, 42 TEX. INT’L L.J. 55, 57 (2006).

⁶ Press Release, Dept. of Homeland Security, WHTI Land and Seat Notice of Proposed Rulemaking Published (June 20, 2007), available at http://www.dhs.gov/xnews/releases/pr_1182350422171.shtm (on file with author).

acceptable documentation, including birth certificates and driver's licenses, to cross the border.⁷ Full implementation of the WHTI is set to occur in June 2009, where a valid passport will be needed for all border crossings, including by land and sea travelers.⁸ The WHTI, however, does allow for exceptions to the passport requirement, such the new U.S. Passport Card, a NEXUS card, for pre-screened, predetermined low-risk travelers, or other alternatives for frequent travelers.⁹

Canada objected to the WHTI because of its potential negative affects on its tourism industry.¹⁰ The U.S. determined the initiative necessary for national security purposes. As a result, the U.S. argued the WHTI was justified under both the general and national security related exceptions of GATT and NAFTA.¹¹

Additionally, the U.S. Animal and Plant Health Inspection Service ("APHIS") announced an interim rule to add the agricultural quarantine and inspection user fees on all commercial shipments entering the U.S. from Canada.¹² The APHIS fees were already in place but Canada

⁷ Press Release, Office of the Secretary, DHS Ends Oral Declarations at Borders, Reminds Travelers of New Procedures on January 31 (Jan. 18, 2008) (on file with author).

⁸ Id.

⁹ Press Release, Dept. of Homeland Security, WHTI Land and Seat Notice of Proposed Rulemaking supra note 6; Press Release, Office of the Secretary, DHS Ends Oral Declarations at Borders, supra note 7.

¹⁰ Richard Hanners, Canadians Concerned about Border Issues WHITEFISH PILOT, Sept. 20, 2007, available at <http://canada-land.info/?p=1159>.

¹¹ Michael Glennon, The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, 25 Harv. J.L. & Pub. Pol'y 539, 540 (2002).

¹² Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, 71 Fed. Reg. 50320 (Aug. 25, 2006) (to be codified at 7 C.F.R.pts. 319, 354).

had been benefiting from an exception.¹³ The announcement was made on August 25, 2006, and the fee was scheduled to become active on November 24, 2006.¹⁴

After the announcement, the implementation dates changed. On January 1, 2007, air passengers from Canada to the U.S. began paying \$USD 5.00 per passenger and \$USD 70.50 per aircraft.¹⁵ On March 1, 2007, APHIS also removed the inspection exemption for all commercial vessels entering the U.S. from Canada.¹⁶ Each ship was charged \$USD 490.00 per entry.¹⁷

APHIS user fees were also applied to railcars and trucks entering the U.S. from Canada.¹⁸ Each railcar was assessed a \$USD 7.75 fee, while each truck was charged \$USD 10.75.¹⁹ In an attempt to limit the impact on trucks making frequent border crossings, a one time annual fee of \$USD 205 was made available.²⁰ The U.S. justifies the APHIS user fees under both general and national security exceptions.²¹

In August of 2007, Canada's Prime Minister Harper, U.S. President Bush, and Mexico's President Calderon met at the Montebello North American Leaders' Summit. At the conclusion of the summit, the leaders issued a Joint Statement encouraging collaboration on five priority

¹³ Questions and Answers: Agriculture Inspection and Agricultural Quarantine Inspection User Fee Requirements for Canada, http://www.aphis.usda.gov/publications/plant_health/content/printable_version/faq_canadian_user_fees.pdf

¹⁴ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, *supra* note 12.

¹⁵ Inspection and User Fee Requirements for Commercial Trucks, Railroad Cars Entering the United States from Canada Begin June 1, <http://www.aphis.usda.gov/newsroom/content/2007/05/canfee3.shtml>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Animal and Plant Health Inspection Service, <http://www.thefederalregister.com/d.p/2006-08-25-E6-14128>.

areas for the next year.²² One of the priorities was to promote smart and secure borders. The stated purpose of the smart and secure border priority was to enhance prosperity, security, and quality of life in North America. Border management, border infrastructure development, and new technologies were to be used to achieve the stated goals.²³

The Joint Statement then called on the Ministers of the countries to facilitate the safe and secure movement of trade and travelers across the borders. Specifically, the Ministers were to focus on eliminating duplicate screening for baggage on connecting flights in North America, increasing protection of citizens from criminal or terrorist threats, improving radio communications for border security agencies, and enhancing trusted traveler programs.²⁴

Later, U.S. Secretary of Homeland Security Michael Chertoff and U.S. Vice-President Dick Cheney met with Canada's Minister of Public Safety Stockwell Day to discuss plans to meet the security-related action points outlined in the Montebello Summit Joint Statement. On September 11, 2007, the two countries announced that Canada had agreed to construct a series of border-crossing screening facilities and ground sensor towers. Canada also agreed to implement advanced radiological detection technology at all its ports.²⁵

On the same day, Canada announced a unilateral decision to impose a new \$CDN 25 per barrel export tax on fuel transported by way of pipeline.²⁶ In the announcement, Prime Minister Harper stated that the fuel export tax was intended to pay for the infrastructure projects and technology purchases that Canada has agreed to make.²⁷ He also implied that the fuel export

²² Montebello North American Leader's Summit Joint Statement by Canada's Prime Minister Harpers, U.S President Bush, and Mexico's President Calderon, Aug. 21, 2007.

²³ Id.

²⁴ Id.

²⁵ Joint Statement by Canada and U.S, Sept. 11, 2007.

²⁶ Statement by Canada's Prime Minister Harper, Sept, 11, 2007.

²⁷ Id.

charge was targeted towards the U.S. by stating that the ones benefiting from the border security actions are the one's paying for the benefits.²⁸

The U.S. alerted Canada's Ambassador to the U.S., Michael Wilson, of its opinion that the fuel export tax violated provisions of both NAFTA and GATT, but Ambassador Wilson was unwilling to remove the export tax. As a result, the U.S. filed a dispute with the ICJ with respect to the fuel export charge. Canada responded by filing a separate dispute with the ICJ regarding the WHTI and the APHIS user fees. The two disputes were joined on November 23, 2007. The case is now proceeding before this Court.

²⁸ Id.

SUMMARY OF ARGUMENT

By imposing an export tax on fuel exported by way of pipeline, Canada is in violation of NAFTA and GATT. NAFTA Articles 313 and 604 forbids a party from adopting a tax on the export to the territory of another party unless it is adopted for all other parties. Further, the tax adoption violates the purpose of NAFTA to promote cross border movement of goods. GATT prevents the grant of a privilege to one party without a grant to all other members under Article I and the imposition of a tax for fiscal purposes under Article VIII. Finally, the fuel export charge violates GATT Article XI by requiring export licenses.

Canada cannot justify the fuel export charge based on national security exceptions or general exceptions within NAFTA or GATT. The export charge does not fall under any of the listed exceptions, and even if this Court decides that it does, it does not satisfy the opening provision of Article XX, which has been adopted to prevent abuse of the exceptions. Finally, because Canada is not in a time of war or emergency, the fuel export charge does not fall under the national security exceptions.

The adoption by the DOS and the DHS of the WHTI does not violate the U.S.'s duty under either NAFTA or GATS. The WHTI requires all people to carry a valid passport when entering the U.S., including U.S. citizens. Other Parties are not treated different. Further, the Parties maintain rights under their own general immigration laws to protect public health, safety, and national security. Under NAFTA, a party can require visitors to obtain a visa or its equivalent for entry. Passports or other legitimate documentation required under the WHTI are a permissible requirement for visitors. Finally, because the U.S. is not treating Canada any "less favourable," the WHTI does not violate GATS.

If this Court decides that the WHTI does violate NAFTA or GATS, the WHTI is justified pursuant to the national security and general exceptions. The U.S. is acting in a time of terrorism and war; its security interests are being threatened, and the U.S. is acting to protect its borders. Further, because the WHTI is not inconsistent with other provisions of the agreement and relates to its immigration and customs law, it is permitted under the general exceptions within NAFTA and GATT. The U.S. can apply the exception allowing for what is necessary to protect human life, due to the history and threat of terrorist attacks. Finally, the law is not applied in an arbitrary or unjustifiable manner and is the most effective and fair system available to meet the U.S.'s security needs.

The APHIS user fees do not violate NAFTA because they are customs user fees that tax commercial shipments and airline passengers entering the U.S. from Canada. The user fees do not violate GATT Article I because the U.S. imposes the same APHIS fees on Canada that are imposed on every other nation. Finally, because all commercial shipments entering the U.S. from Canada are charged the AHPIS user fees and not all airline passengers or commercial shipments are inspected, the APHIS user fees do violate GATT Article VIII.

The APHIS user fee is still justified because it qualifies for exception under GATT Article XX(b), NAFTA Article 2101, and GATS Article XVI. NAFTA Article 2101 expressly adopts GATT Article XX, and GATS Article XVI contains the same clause as GATT Article XX(b). The APHIS user fees fall under the exception for provisions designed to protect human, animal, or plant life or health, and the exception is necessary to fulfill the U.S. policy objective.

ARGUMENT

I. THE FUEL EXPORT CHARGE IS CONTRARY TO NAFTA ARTICLES 314, 315, 604 AND 605 AND GATT ARTICLES I, VIII AND XI.

The fuel export charge is in direct violation of the objectives of NAFTA and is contrary to the plain language of NAFTA Articles 314, 315, 604, and 605. A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.²⁹ The stated objectives of NAFTA include the elimination of the barriers of trade in, and facilitate the cross border movement of, goods and services between the territories of the parties.³⁰ Any interpretation should promote rather than inhibit the objectives of NAFTA.³¹

Articles 314 and 604 explicitly state that no party may adopt any duty, tax, or other charge on the export of any good to the territory of another party unless the charge is adopted on exports of any such good to the territory of all other parties *and* any such good when destined for domestic consumption.³² The fuel export charge adopted by Canada adds a \$CDN 25 per barrel tax on fuel exported by way of pipeline.³³ Because the fuel export charge does not apply to fuel consumed in Canada, the charge is in direct contradiction to the plain language of articles 314 and 604.

Furthermore, the export charge is in violation of the objectives of the NAFTA as enumerated in Article 102. Canada is the top source of U.S. oil imports at around two million

²⁹ Vienna Convention on the Law of Treaties art. 31, May 23, 1969.

³⁰ NAFTA, supra note 1, at art. 102(a).

³¹ In the Matter of Cross-Border Trucking Services, USA-MEX-98-2008-01.

³² NAFTA, supra note 1, at art. 314.

³³ Statement by Canada's Prime Minister Harper, Sept. 11, 2007.

barrels per day, most of which is by way of pipeline.³⁴ The fuel export charge would result in a daily tax of roughly \$CDN 50 million. This severe financial burden placed on the U.S. would hinder the movement of cross border fuel, which is contrary to NAFTA's stated purpose.

Moreover, the Fuel Export charge legislation is unlike the Softwood Lumber Products Export Charge Act of 2006. The Softwood Act, which places an export charge on Canadian softwood exported to the U.S., was the result of an agreement between the two governments.³⁵ The amount of the softwood charge also varies depending on the Canadian price in relation to the U.S price in an attempt to prevent the Canadian industry from benefiting from government subsidies.³⁶ In contrast, the fuel export charge was imposed unilaterally by Canada without any negotiations between the two countries. Additionally, Canada designed the fuel tax to tax the U.S. in order to pay for the border initiatives, whereas the softwood charge was implemented to facilitate cross border trade between the two countries. Because the softwood charge is intended to further the objectives of NAFTA and the fuel export charge will actually hinder them, the Softwood Act should not be used as precedent for the Fuel Export Charge legislation.

The fuel export charge is also in violation of GATT Article I. Under Article I, any advantage, favor, privilege, or immunity in regards to export charges granted to a product of one member must be granted to all members.³⁷ Article I has a large scope that applies to any product and any advantage.³⁸ There are three elements that must be met for an Article I violation. First, there must be an advantage. Second, the advantage must not be accorded to all "like" products.

³⁴ Energy Information Administration, Crude oil and total petroleum Imports Top 15 Countries, www.eia.doe.gov/pub/oil_gas/petroleum (last visited Feb. 16, 2008).

³⁵ Softwood Lumber Products Export Charge Act, Bil C-24, LS-5385E (2006).

³⁶ Id.

³⁷ GATT, supra note 3, at art. I(1).

³⁸ Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139, 142/AB/R, (May 31, 2000).

And finally, the advantage must be applied unconditionally.³⁹ Furthermore, *de facto* discrimination resulting from facially neutral restrictions is still an Article I violation.⁴⁰

Because the fuel export charge is only applied to fuel exported by way of pipeline, the charge gives all countries receiving Canadian fuel by other means an advantage not afforded to the U.S. Despite the neutral language of the export tax, it still results in *de facto* discrimination because the U.S. is the only country that receives fuel by way of pipeline from Canada. Furthermore, Canada's Prime Minister Harper indicated that the fuel tax was targeted at the U.S. when he stated that the ones benefiting from the border security initiatives would be the ones paying for them.⁴¹ Therefore, this Court should find the fuel export tax in violation of Article I.

In addition to Article I, the fuel export charge violates GATT Article VIII. Article VIII explicitly prohibits a tax on imports or exports for fiscal purposes.⁴² A World Trade Organization ("WTO") panel found Argentina in violation of article VIII for imposing a three percent statistical services tax on textile imports. The three percent tax, the panel determined, was unrelated to the costs and services of the imported textiles.⁴³

The fuel export charge, like, the Argentinean tax, is completely unrelated to the costs and services of the exported fuel. Instead, the fuel charge is an attempt to raise money for the border safety initiatives by taxing Canada's number one import to the U.S. As noted, Canada's Prime Minister Harper admitted to as much in his statement on September 11, 2007.⁴⁴ Because the fuel

³⁹ Panel Report, Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54,55,59,64/R, ¶ 14.138, (July 2, 1998).

⁴⁰ Canada – Certain Measures Affecting the Automotive Industry, WT/DS139, 142/AB/R, ¶ 65.

⁴¹ Statement by Prime Minister Harper, September 11, 2007.

⁴² GATT, supra note 3, at art. VIII(1)(a).

⁴³ Panel Report, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/R, ¶¶ 6.78-6.81, (Nov. 25, 1997).

⁴⁴ Statement by Canada's Prime Minister Harper, Sept. 11, 2007.

export charge is exclusively intended for fiscal purposes and completely unrelated to the costs and services of the export, this Court should find the tax in violation Article VIII.

Finally, the fuel export charge also violates GATT Article XI, which bans trade restrictions through quotas, import or export licenses, or other measures on products traded between member countries.⁴⁵ In addition to the \$CDN 25 per barrel, the fuel export charge legislation also requires all exporters of fuel by way of pipeline to apply for export permits for each transaction.

With two million barrels of oil imported to the U.S. daily, the export licenses would create a significant additional obligation. This added burden would have a negative effect on trade, negating the very purpose of GATT and therefore violating Article XI.

II. THE FUEL EXPORT CHARGE IS NOT JUSTIFIED PURSUANT TO A NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA ARTICLES 607, 2101, 2102 OR GATT ARTICLES XX AND XXI.

Both NAFTA and GATT have explicit exceptions to trade restrictions that would otherwise violate the agreements. Finally, NAFTA Article 2101 adopted the language of GATT XX.⁴⁶ A two-tiered analysis is required to determine whether a measure is justified under GATT Article XX. First, the measure must fall within the scope of a recognized exception set out in paragraphs (a)–(j). Second, the measure must also meet the requirements of the introductory provision.⁴⁷ The party invoking the exception has the burden of proof.⁴⁸

The fuel export tax does not meet any of the recognized provisions of GATT Article XX. Even though fossil fuels are an exhaustible resource, the fuel export charge would not satisfy

⁴⁵ GATT, *supra* note 3, at art. XI(1).

⁴⁶ NAFTA, *supra* note 1, at art. 2101.

⁴⁷ Panel Report, Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/R, ¶¶ 11.28, 11.29, (Nov. 17, 2000).

⁴⁸ Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/RW, ¶¶ 5.24, 5.26, (June 15, 2000).

GATT Article XX(g) because the restrictive measures must be made effective in conjunction with restrictions on domestic production.⁴⁹ Unlike other parties that have successfully made a XX(g) claim, Canada has not taken any domestic measures in this case to reduce domestic consumption of the affected resource.⁵⁰ Additionally, the export charge fails to meet the requirements under Article XX(a) or (b), because the purpose of the measure was to fund border security projects, not to directly protect human, animal, or plant health. All other exceptions are facially inapplicable.

However, even if the charge did fall within the terms of one of the exceptions of GATT Article XX, the fuel export charge would not satisfy the opening provision of the article. The purpose on the provision is to prevent the abuse of the exceptions.⁵¹ One common form of abuse is the imposition of restrictions without negotiating with the affected parties. WTO panels denied Article XX exceptions on two different restrictions imposed by the U.S.: one on the importation of shrimp subject to the treatment of sea turtles, and two, standards of reformulated gasoline. In both cases, the trade restrictions met one of the explicit exceptions under Article XX, but were deemed arbitrary and unjustified because the U.S. did not first try to come to an agreement with the other members before applying unilateral restrictions.⁵²

Similarly, Canada did not attempt to work with the U.S. on a bilateral agreement to deal with the cost of the security initiatives. Instead, Canada unilaterally decided to fund the obligations they agreed to by imposing an arbitrary charge on fuel destined for the U.S. As

⁴⁹ GATT, *supra* note 3, at art. XX(g).

⁵⁰ *Id.*

⁵¹ Appellate Body Report, United States – Standard for Reformulated and Conventional Gasoline, WT/DS2/AB/R, (April 29, 1996).

⁵² *Id.*; Argentina – Measures Affecting the Export of Bovine Hides and the Import Finished Leather, WT/DS155/R, at ¶¶ 11.28, 11.29.

illustrated by multiple WTO panels, this kind of unilateral action does not meet the requirements of the opening provision of GATT Article XX.

The fuel export charge also does not qualify for any of the national security exceptions under NAFTA or GATT. Both GATT Article XXI and NAFTA Article 2102 allow a party to take action contrary to the agreement when it considers it necessary for the protection of its essential security interests in time of war or other emergencies in international relations.⁵³ The U.S. recognizes the subjective standard created by the “it considers necessary” language that allows each party the ability to make their own decisions regarding their national security interests. However, international law scholars, while recognizing the ability of members to define what is “necessary” to their security interests, argue that the determination of whether “war” or “other emergencies” exist is reviewable under an objective good faith standard.⁵⁴

Canada is not in a time of war or emergency. The fuel export charge is designed to fund projects that increase the security of the U.S. and Canadian border. However, these are preventative measures. They are not designed to protect against a direct and immediate threat. Canada is merely attempting to pass the costs of its security initiatives onto the U.S. Canada’s measures are designed mainly to increase the security of the U.S., as indicated by the Prime Minister in his September 11, 2007 statement, not protect Canada’s security interests. Article 31 of the Vienna convention and NAFTA Article 102 do not allow for such broad interpretation of the plain language of the articles. This Court should not find the fuel export tax justified by the national security exceptions of NAFTA or GATT.

⁵³ NAFTA, supra note 1, at art. 2102; GATT, supra note 3, at art. XXI.

⁵⁴ Hannes L. Scholemann & Stefan Ohlhoff, Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of competence, 93 AM. J. INT’L L. 424, 431 (1999).

Furthermore, NAFTA Article 607, which specifically applies to restrictions on exports of an energy or basic petrochemical good, eliminates the subjective “it considers” language. Article 607 only allows for restrictions that are “necessary.”⁵⁵ The change in language from the other national security exceptions indicates an objective standard. Under such a standard, the fuel export charge would not qualify as an exception because Canada is not objectively using the tax to supply a military establishment, respond to a situation of armed conflict, relate to nonproliferation of nuclear weapons, or respond to direct threats of disruption in the supply of nuclear materials for defense purposes. As a result, the fuel export tax does not meet the general or national security exceptions of NAFTA or GATT.

III. THE WHTI IS CONSISTENT WITH NAFTA CHAPTERS 12 AND 16 AND GATS.

The WHTI is consistent with Chapter 12 of NAFTA. NAFTA Chapter 12, Article 1202: National Treatment states, “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.”⁵⁶ Phase 1, the air transportation provision of the WHTI, does not violate Chapter 12 because the plain language of the Chapter states that it does not apply to “air services, including domestic and international air transportation services, whether scheduled or non-scheduled, and related services in support of air services”⁵⁷

Both Phase 1 and 2 require *all* people to carry a valid passport or other appropriate secure documentation when entering the U.S., including U.S. citizens. While trade effects are possible, it does not treat other Parties different. Under Article 1203, “[e]ach Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to

⁵⁵ NAFTA, *supra* note 1, at art. 607.

⁵⁶ *Id.* at art. 1202.

⁵⁷ *Id.* at art. 1201(2)(b).

service providers of any other Party or of a non-Party.”⁵⁸ Again, WHTI is a mandate for *all* travelers. Since Canadian citizens are not being treated less favorably than Mexican citizens or any citizens from any non-Party nation, then the WHTI does not violate Chapter 12 of NAFTA.

Even if Article 1202 or 1203 is violated, under Article 1207 a Party can set out a federal “quantitative restriction” in its Schedule to Annex V so long as it notifies the other Parties and the Parties “endeavor to negotiate the liberalization or removal of the quantitative restriction” at least every two years.⁵⁹ For example, in Canada’s Schedule to Annex X, the Measure, *Ley de Vías Generales de Comunicación*, requires the Secretaría de Comunicaciones y Transportes to issue a permit for a user to provide services related to land transportation.⁶⁰ In a NAFTA panel decision, the Panel noted “that the Preamble of NAFTA reflects a recognition that the Parties intended to ‘preserve their flexibility to safeguard the public welfare.’”⁶¹ The U.S. has the right under the agreement to add the requirements of the WHTI to its Schedule to Annex V as well.

The WHTI is also appropriate under NAFTA Chapter 16. While Chapter 16 was adopted to provide for the cross-border movement of business people throughout North America, “the provisions within Chapter 16 do not alter a member country’s general immigration provisions governing public health, safety and national security.”⁶² In Annex 1603, NAFTA permits a Party to require a business person, a trader or investor, an intra-company transferee, or a professional “to obtain a visa or its equivalent prior to entry.” Traders and investors have already been

⁵⁸ *Id.* at art. 1203.

⁵⁹ *Id.* at art. 1207(1)-(4).

⁶⁰ *Id.* at Canada’s Schedule to Annex X (CMAP 973103 - Vehicle Parking Services; CMAP 973104 - Weight Scale Services for Transportation; CMAP 973105 - Towing Services for Vehicles; CMAP 973106 - Other Services Related to Land Transportation).

⁶¹ Cross Border Trucking Servs., Secretariat File No. USA-MEX-98-2008-01 ¶ 219.

⁶² NAFTA, Foreign Affairs and International Trade Canada, http://www.canadabusiness.ca/servlet/ContentServer?cid=1081944193322&pagename=CBSC_ON%2Fdisplay&lang=en&c=Regs (last visited Feb. 7, 2008).

required to present a valid passport in order to be granted an E visa; this has not violated NAFTA Chapter 16.⁶³ Further, as is required for business people, professionals, and intra-company transferees, the U.S. consulted with Canada to come up with alternatives to the passport to avoid excess burdens on eligible persons, including FAST, NEXUS, and a pilot program for enhanced drivers' licenses.⁶⁴

Finally, the WHTI is also consistent with GATS. GATS Article II states that members must accord "treatment no less favourable" compared with treatment towards other members.⁶⁵ The Annex on Movement of Natural Persons Supplying Services Under the Agreement, an Article II Exemption, indicates that a party can regulate the entry of persons into its territory so long as its application does not "nullify or impair the benefits accruing to any member under the terms of a specific commitment." And footnote 13 states, "The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment."⁶⁶

Based on this language, the WHTI travel requirements do not violate GATS. Further, under Article XVII, regarding national treatment, the WHTI does not treat U.S. service suppliers any differently than other Member service suppliers; all Member citizens must follow the travel restrictions equally when entering the U.S. For these reasons, the Court should find that the WHTI does not violate NAFTA or GATS.

⁶³ U.S. Consulate General in Vancouver, Treaty Trade and Investor Visas, <http://vancouver.usconsulate.gov/content/content.asp?section=visas&document=evisa#requirements1> (last visited Feb. 16, 2008).

⁶⁴ CANADIAN CHAMBER OF COMMERCE, WHTI NOTICE OF PROPOSED RULE MAKING SUBMISSION, 4-5 (2007) (Docket Number: USCBP-2007-0061).

⁶⁵ General Agreement on Trade in Services art. II, Apr. 15, 1994 [hereinafter GATS].

⁶⁶ *Id.* at Annex on Movement of Natural Persons Supplying Services Under the Agreement (4) and footnote 13.

IV. THE WHITI IS JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA OR GATT OR GATS.

Although the U.S. has not breached its obligation under NAFTA or GATS, if this Court finds that it has, the WHITI can still be justified by one of the national security or general exceptions under NAFTA, GATT or GATS.

a. The WHITI falls under the National Security Exceptions in NAFTA Article 2102, GATT Article XXI, and GATS Article XIV.

NAFTA, GATT, and GATS all contain national security exceptions, and the WHITI passport requirements falls under these exceptions. GATT Article 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 (iii) taken in time of war or other emergency in international relations.”⁶⁷ NAFTA Article 2102 and GATS Article XIV contain parallel language.⁶⁸ NAFTA has used GATT jurisprudence to interpret NAFTA Article 2102.⁶⁹ These provisions follow international custom, basic principles of international law, and other ICJ and United Nations’ decisions that support the right of a country to self-defense as is necessary for the protection of its security interests.⁷⁰

The WTO Dispute Settlement Body has not interpreted the national security exception within GATT Article XXI; this lack of interpretation together “with the centrality of security to the concept of national sovereignty may suggest that maritime counterterrorism measures can be

⁶⁷ GATT, *supra* note 3, at art. XXI(b)(iii).

⁶⁸ NAFTA, *supra* note 1, at art. 2102(1)(b)(ii); GATS, *supra* note 65, at art. XIV bis(1)(b)(iii).

⁶⁹ See *Cross Border Trucking Servs.*, Secretariat File No. USA-MEX-98-2008-01 ¶ 219.

⁷⁰ GATT Secretariat, *Report of the Panel, U.S. – Trade Measures Affecting Nicaragua*, L/6053 ¶ 5.2 (Oct. 13, 1986) (unadopted).

easily adopted by WTO member states without violating international trade law.”⁷¹ But, the plain language of Article XXI, “which it considers necessary,” allows a party to define threats to its own security interests; the Chairman at the Uruguay Round of negotiations agreed.⁷² GATT original drafters stated, “We cannot make [the national security exception] too tight, because we cannot prohibit measures which are needed purely for security reasons.”⁷³

The U.S.’s adoption of the WHTI is necessary to protect its national security interests. “‘For the safety of the American people, the U.S. cannot have an honor system at the border,’ said Homeland Security Secretary Michael Chertoff. ‘Requiring secure and reliable documentation at our borders will drastically reduce security vulnerabilities posed by permitting entry based on oral declarations alone.’”⁷⁴ In fact, the Canadian Chamber of Commerce expressed support for the U.S. government’s intentions to address the business community’s security needs through the WHTI.⁷⁵ The need for further protection and the denial of oral declarations is indicated by the following statistic: U.S. Customs and Border Protection “officers reported 1,517 cases of individuals falsely claiming to be U.S. citizens” from October to December 2007.⁷⁶ “[P]roponents argue for the primacy of national security interests -- particularly, efforts to combat terrorism and the proliferation of weapons of mass destruction -- even if pursuing those interests requires discarding or dismissing existing regimes of

⁷¹ Eric J. Lobsinger, Post-9/11 Security in a Post-WWII World: The Question of Compatibility of Maritime Security Efforts with Trade Rules and International Law, 32 TUL. MAR. L.J. 61, 91 (2007).

⁷² GATT Secretariat, Special Distribution Group of Negotiations on Goods, The Uruguay Round MTN.GNG/NG7/W/16, (Aug. 17, 1987).

⁷³ GATT, Guide to GATT Law and Practice: Analytical Index 554 (6th ed. 1994) (quoting EPCT/A/PV/33, at 20-21 and Corr.3).

⁷⁴ Press Release, Office of the Secretary, DHS Ends Oral Declarations at Borders, supra note 7.

⁷⁵ CANADIAN CHAMBER OF COMMERCE, supra note 64.

⁷⁶ Id.

international law.”⁷⁷ For these reasons, this Court should find that the WHTI falls within the national security exceptions of NAFTA, GATS and GATT.

b. The WHTI falls under General Security Exceptions in NAFTA Article 2101, GATT Article XX, and GATS Article XIV.

If the Court decides that the WHTI violates NAFTA or GATS, it should still be upheld under the general exceptions under NAFTA, GATT, and GATS. NAFTA Article 2101 and GATT Article XX(d) state that nothing within Chapter 12 of NAFTA or the entire GATT agreement “shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement”⁷⁸ GATT specifically lists laws “relating to customs enforcement.”⁷⁹ The WTO stated that these “laws or regulations” indicated in GATT are non-exclusive, and “are rules that are part of the domestic legal system of a WTO member.”⁸⁰ Because the WHTI is not inconsistent with Chapter 12, nor any part of GATT, it is permitted under Article 2101. Further, it is not “applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade between the Parties.”⁸¹ The U.S. is not attempting to restrict trade and has taken steps to have the smallest impact on trade possible while maintaining its security interests; the WHTI is the most effective system available to meet the security needs.

⁷⁷ Glennon, *supra* note 11.

⁷⁸ NAFTA, *supra* note 1, at art. 2101(2)(a); GATT, *supra* note 3, at art. XX(d).

⁷⁹ GATT, *supra* note 3, at art. XX(d).

⁸⁰ Appellate Body Report, Mexico--Tax Measures on Soft Drinks and Other Beverages ¶ 69, WT/DS308/AB/R, (Mar. 6, 2006) (footnote omitted).

⁸¹ NAFTA, *supra* note 1, at art. 20101(a); GATT, *supra* note 3, at art. XX.

One exception within GATT Article XX and GATS Article XIV is what is “(b) necessary to protect human . . . life or health.”⁸² As indicated by the September 2001 terrorist attack on the U.S., measures to protect U.S. citizens’ life and health are necessary. The WHTI helps to do this by preventing unauthorized persons from entering the U.S. through its Canadian borders. Therefore, the Court should find that the WHTI falls under the general exceptions with NAFTA, GATS, and GATT.

V. THE APHIS USER FEE IS NOT CONTRARY TO GATT ARTICLE I.

The APHIS user fees are not contrary to GATT Article I, because the user fees apply to all commercial shipments and airline passengers entering the U.S., regardless of their origin. Since the U.S. imposes the same APHIS user fees on Canada that it imposes on every other nation, in regards to all “commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international air passengers”⁸³ entering into the U.S., then Canada cannot prove that it is being treated less favorably than other nations, as is required in order to prove a violation of GATT Article I.⁸⁴ Therefore, this Court should find that the APHIS user fees do not violate GATT Article I.

VI. EVEN IF THIS COURT FINDS THAT THE APHIS USER FEE IS CONTRARY TO NAFTA ARTICLE 310 AND GATT ARTICLE VIII, THE APHIS USER FEE IS JUSTIFIED UNDER GENERAL AND NATIONAL SECURITY EXCEPTIONS IN GATT, NAFTA, AND GATS.

NAFTA Article 310 states that no party “may adopt any customs user fee of the type referred to in Annex 310.1 for originating goods.”⁸⁵ Under Annex 310.1, the U.S. “shall not increase its merchandise processing fee and shall eliminate such fee according to the schedule set

⁸² GATT, supra note 3, at art. XX(b); GATS, supra note 65, at art. XIV(b).

⁸³ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, supra note 12.

⁸⁴ GATT, supra note 3, at art. I.

⁸⁵ NAFTA, supra note 1, at art. 310.

out in Article 403 of the Canada – U.S. Free Trade Agreement on originating goods.”⁸⁶ Article 403, of the Canada –U.S. Free Trade Agreement, states that by January 1, 1994, there shall be no customs user fees on goods originating from Canada.⁸⁷ Foreign goods that are imported into Canada and then subsequently exported to the U.S. are subject to the customs duties of goods that originated in Canada.⁸⁸ Since APHIS user fees are customs user fees that tax commercial shipments and airline passengers entering the U.S. from Canada, then the APHIS user fees do violate Article 310 of NAFTA.

Under GATT Article VIII, “all fees and charges of whatever character...imposed by contracting parties on or in connection with importation...shall be limited in amount to the approximate cost of services rendered...”⁸⁹ The provisions of Article VIII extend to fees related to quarantine.⁹⁰ The WTO held that this provision of GATT is “a dual requirement, because the charge in question must first involve a ‘service rendered,’ and then the level of the charge must not exceed the approximate cost of that ‘service.’”⁹¹

Here, the “service” rendered from paying the APHIS user fees are an inspection of commercial shipments and airline passengers, conducted in order to discover hazardous good and products.⁹² Since all commercial shipments entering the U.S. from Canada are charged the AHPIS user fees, regardless of whether the shipments or airline passengers are actually inspected, then the APHIS user fees do violate GATT Article VIII.

⁸⁶ NAFTA, supra note 1, at annex 310.1.

⁸⁷ Canada – U.S. Free Trade Agreement art. 403, Jan. 2, 1998.

⁸⁸ Id.

⁸⁹ GATT, supra note 3, at art. VIII.

⁹⁰ Id.

⁹¹ Report by the Panel, U.S. Customs Users Fee, L/6264, ¶ 69 (February 2, 1998) (quoting GATT, supra note 3, at art. VIII).

⁹² U.S. Customs Users Fee, L/6264, ¶ 69.

a. The APHIS user fee falls under general exceptions in GATT Article XX(b), NAFTA Article 2101, and GATT Article XVI.

GATT Article XX(b) makes an exception for measures “necessary to protect human, animal or plant life or health.”⁹³ NAFTA Article 2101 expressly adopts GATT Article XX, and GATS Article XVI of GATS contains the same clause as GATT Article XX(b).⁹⁴

The U.S. has the burden of proving that the general exception in Article XX(b) of GATT is applicable to the APHIS user fees.⁹⁵ The U.S. must prove that “the policy in respect to the measures for which the provision is invoked falls within the range of policies designed to protect human, animal or plant life or health,” and “the inconsistent measure for which the exception is invoked is *necessary* to fulfill the policy objective.”⁹⁶

To determine whether the APHIS user fees fall within the range of policies designed to protect human, animal, or plant life or health, the U.S. must show that a risk exists to human or plant life, and that the APHIS user fee’s objective is to reduce that risk.⁹⁷ Canada imposes less stringent phytosanitary requirements on agricultural products than the U.S., so foreign commercial importers “circumvent[ed] U.S. phytosanitary regulations by having agricultural commodities shipped to Canada, having them relabeled there as products of Canada, and then having them shipped to the U.S.”⁹⁸ Since the U.S. had imposed less stringent standards for products that originated in Canada, the U.S. was vulnerable to receiving potentially hazardous goods.

⁹³ GATT, supra note 3, at art. XX(b).

⁹⁴ NAFTA, supra note 1, at art. 2101; GATS, supra note 65, at art. XVI.

⁹⁵ Final Report of the Panel, Matter of Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Quebec, ¶ 4.17, U.S.Can.F.T.A.Binat.Panel, (June 3, 1993).

⁹⁶ Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, (December 17, 2007).

⁹⁷ Id.

⁹⁸ Id.

Inspections of agricultural goods at the U.S. and Canadian border have uncovered prohibited plants, plant products, and animal products, which have a “high risk of introducing plant pests or animal diseases into the U.S.”⁹⁹ Moreover, materials that have the potential of carrying the footandmouth disease have been regularly found to approach the U.S. and Canadian border from Canada.¹⁰⁰ Thus, there is a great potential of risk to animal and plant life or health from uninspected commercial shipments from Canada.

The APHIS user fees, imposed on commercial shipments and airline passengers entering the U.S. from Canada, fund the agricultural quarantine inspections at the U.S. and Canadian border. The objectives are to help the U.S. recoup its current costs inspecting commercial shipments at the border and aid the U.S. implement and augment an enhanced inspection system.¹⁰¹ Since the introduction of animal and plant diseases poses a real threat to U.S. agriculture, and the APHIS user fees aim to improve inspection capabilities at the U.S. and Canadian border, then this Court should find that the APHIS user fees fall within the range of policies designed to protect animal and plant life or health.

In order to determine whether an exception under GATT Article XX(b) is “necessary” to fulfill a policy objective, the WTO weighs the following three factors: first, “the relative importance of the interests or values furthered by the challenged measure;” second, “the contribution of the measure to the realization of the ends pursued by it;” and third; “the restrictive impact of the measure on international commerce.”¹⁰² After the WTO weighs these three factors, the panel then compares the challenged measure to alternative measures.¹⁰³

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R.

¹⁰³ Id. at 8.

Here, the importance of protecting American plant and animal health or life is great, and the APHIS user fees enable the U.S. to not only recoup costs in protecting American agriculture, but also implement a stronger and more effective inspection system. Since every other nation that imports into the U.S. already pays the APHIS user fees, it is unlikely that the removal of Canada's exemption from paying the same APHIS user fees will have a detrimental impact on Canadian commercial imports.¹⁰⁴ Thus, this Court should find that the balance of the factors weighs in favor of justifying the APHIS user fees.

Finally, unless Canada imposes the same stringent phytosanitary regulations that the U.S. imposes on commercial imports, there is no feasible alternative for the U.S. to protect itself from animal and plant diseases that originate in foreign products, and are imported through Canada and into the U.S. Therefore, this Court should find that the APHIS user fees are justified under GATT Article XX(b), NAFTA Article 2101, and GATS Article XVI.

b. The APHIS user fee falls under national security exceptions in GATT Article XXI, NAFTA Article 2101, and GATT Article XIV.

The APHIS user fees are justified under national security exceptions in GATT, NAFTA and GATS. Under GATT Article XXI party may take actions that it deems necessary to protect its "essential security interests" taken in time of war. NAFTA Article 2102 and GATS Article XIV contain parallel language.¹⁰⁵

Here, the APHIS user fees fund inspections at the U.S. and Canadian border in order to discover and prevent bioterrorist threats against the U.S.¹⁰⁶ The APHIS user fees insure that the Department of Homeland Security is well funded to conduct its inspections at the U.S. and

¹⁰⁴ Animal and Plant Health Inspection Service, *supra* note 21.

¹⁰⁵ NAFTA, *supra* note 1, at art. 2102(2); GATS, *supra* note 65, at art. XIV bis 1 (b) (iii).

¹⁰⁶ Questions and Answers: Agriculture Inspection and Agricultural Quarantine Inspection User Fee Requirements for Canada, *supra* note 13.

Canadian border. Given the terrorist attack against the U.S. on September 11, 2001, Anthrax threats targeting U.S. officials in 2001 and 2002, and its current war in the Middle East, the U.S. is justified imposing APHIS user fees in order to protect its security interests. Therefore, this Court should find that the APHIS user fees are justified under the national security exceptions within GATT Article XXI, NAFTA Article 2102, and GATS Article XIV.

CONCLUSION

For the foregoing reasons, the U.S. respectfully requests that this Court hold the following: the fuel export charge is contrary to NAFTA Articles 314, 315, 604 and 605 and GATT Articles I, VIII and XI, and is not justified under a national security exception or a general exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI; the WHTI is not contrary to NAFTA Chapters 12 and 16 or GATS, the WHTI falls under the national Security Exceptions in NAFTA Article 2102, GATT Article XXI, and GATS Article XIV, and the WHTI falls under general security exceptions in NAFTA Article 2101, GATT Article XX, and GATS Article XIV; and, the APHIS user fee is not contrary to GATT Article I, the user fee is justified under general exceptions in GATT Article XX(b), NAFTA 2101, and GATS Article XVI, and under NAFTA 2101, GATT Article XXI, and GATS Article XIV.