

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 # 2008-16 R

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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

Canada respectfully requests that the ICJ determine that:

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

STATEMENT OF FACTS

The North American Free Trade Agreement (“NAFTA”), a 1992 agreement made between Canada, Mexico, and the U.S., purports to eliminate barriers to trade among the three parties to the agreement.¹ Canada and the U.S. are parties to the General Agreement on Tariffs and Trade (“GATT”), which was entered into on January 1, 1948.² 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.”³ The General Agreement on Trade in Services (“GATS”),⁴ agreed upon in January 1995, after the Uruguay Round of negotiations, was created to provide a multilateral trading system for services and “seeks to eliminate unnecessary or burdensome barriers to trade in services.”⁵ Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁶

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”).⁷ The initiative requires all travelers to the U.S. from within the Western Hemisphere to carry a

¹ The North American Free Trade Agreement art. 1202, Dec. 17, 1992 [hereinafter NAFTA]; NAFTA Panel Decision, In the Matter of Cross Border Trucking Servs., Secretariat File No. USA-MEX-98-2008-01 (Feb. 6, 2001).

² The General Agreement on Trades and Tariffs, Oct. 30, 1947 [hereinafter GATT].

³ Id.

⁴ General Agreement on Trade in Services, Apr. 15, 1994 [hereinafter GATS].

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 Mark W. Janis, An Introduction to International Law 27 (3rd ed. 1999) (citing U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 336, art. 26 (The Vienna Convention on the Law of Treaties signed at Vienna May 23, 1969; became in force January 27, 1980; not officially adopted by the U.S.)).

⁷ 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).

valid passport or certain prescribed identification. Implementation of the WHTI began on January 23, 2007 with air travelers only. As of January 31, 2008, U.S. and Canadian citizens at least nineteen years old are no longer allowed to use an oral declaration to cross the border and must present acceptable documentation, including birth certificates and driver's licenses.⁸ Full implementation of the WHTI is set to occur in June 2009, where driver's licenses and birth certificates will no longer be sufficient.⁹ At that time, land and sea travelers will also need passports or similar documentation.¹⁰

Canada objects to the WHTI because of its potential negative affects on its tourism industry.¹¹ The WHTI has the "potential to inflict a new burden on travelers, especially casual travelers across the U.S. and Canadian borders, and could put tourist dollars, at risk. Border region retail sales and tourism stand to suffer if visitors are not in possession of proper proof of citizenship."¹² The U.S. justified the initiative under both general and national security related exceptions.¹³ The U.S.'s adoption of the WHTI violates its duties under NAFTA, GATT, and GATS.

Additionally, the U.S. Animal and Plant Health Inspection Service ("APHIS") announced an interim rule to remove Canada's exception to the agricultural quarantine and inspection user

⁸ 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).

⁹ Id.

¹⁰ Press Release, Dept. of Homeland Security, WHTI Land and Seat Notice of Proposed Rulemaking Published, supra note 7; Press Release, Office of the Secretary, DHS Ends Oral Declarations at Borders, supra note 8.

¹¹ Richard Hanners, Canadians concerned about border issues WHITEFISH PILOT, Sept. 20, 2007, available at <http://canada-land.info/?p=1159>.

¹² Proposed Western Hemisphere Passport Rules: Impact on Trade and Tourism, Comm. on the Judiciary, 109th Cong. (2005), available at http://judiciary.senate.gov/testimony.cfm?id=1714&wit_id=4869 (statement of Pete Sepulveda, Jr., Chair, Border Trade Alliance).

¹³ 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).

fees on all commercial shipments entering the U.S.¹⁴ The announcement was made on August 25, 2006, and the fee was scheduled to become active on November 24, 2006.¹⁵

After the announcement, the implementation dates changed. On January 1, 2007, all air passengers from Canada to the U.S. began paying \$USD 5.00 per passenger and \$USD 70.50 per aircraft.¹⁶ The fees were charged regardless of whether the passengers were carrying fruits or vegetables or processed through customs and immigration at a Canadian airport.¹⁷

On March 1, 2007, APHIS also removed the inspection exemption for all commercial vessels entering the U.S. from Canada. Each ship was charged \$USD 490.00 per entry.¹⁸ Again, the cargo of the ship was not determinative of the amount of the fee.¹⁹ Additionally, APHIS user fees were applied to railcars and trucks entering the U.S. from Canada.²⁰ Each railcar was assessed a \$USD 7.75 fee, while each truck was charged \$USD 10.75.²¹

Like WHTI, the U.S. tried to justify the APHIS user fees under general and national security exceptions.²²

In August of 2007, Canada's Prime Minister Harper, U.S. President Bush, and Mexico's President Calderon met together at the Montebello North American Leaders' Summit. At the

¹⁴ 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).

¹⁵ Id.

¹⁶ 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>.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Animal and Plant Health Inspection Service, <http://www.thefederalregister.com/d.p/2006-08-25-E6-14128>.

conclusion of the summit, the leaders issued a Joint Statement encouraging collaboration on five priority areas for the next year.²³

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 goals.²⁴

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 flight in North America, increasing protection of citizens from criminal or terrorist threats, improving radio communications for border security agencies, and enhancing trusted traveler programs.²⁵

Later, amidst a public controversy resulting from false statements made by U.S. presidential candidates that the September 11, 2001 hijackers had entered the U.S. from Canada, 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 in the Montebello Summit Joint Statement. Reportedly, the negotiations were contentious, with the U.S. applying unwanted pressure on Canada to fund expensive border initiatives. The negotiations resulted in an announcement on September 11, 2007 of the construction of a series of border-crossing, screening facilities and ground sensor towers.²⁶

²³ 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.

²⁴ Id.

²⁵ Id.

²⁶ Joint Statement by Canada and U.S, Sept. 11, 2007.

Canada also was to implement advanced radiological detection technology at all its ports.²⁷

Canada was responsible for the entirety of the \$1 billion price tag.²⁸

On the same day, Canada announced a new \$CDN 25 per barrel export tax on fuel transported by way of pipeline. In the announcement, Prime Minister Harper stated that the fuel export tax would help pay for the mutually beneficial infrastructure projects and technology purchases that Canada was going to make.²⁹

The U.S. complained to Canada's Ambassador to the U.S., Michael Wilson, that the fuel export tax violated provisions of both NAFTA and GATT. Ambassador Wilson assured the U.S. that the export tax would remain in effect. 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.

²⁷ Id.

²⁸ Id.

²⁹ Statement by Canada's Prime Minister Harper, Sept, 11, 2007.

SUMMARY OF ARGUMENT

The U.S.'s adoption of the WHTI, which imposes stringent identification requirements at the U.S. borders, violates NAFTA and GATS. The land transportation portion of the WHTI violates NAFTA Chapter 12 by impacting the delivery, distribution, systems used to provide services, and the presence of Canadian service providers within U.S. territory. NAFTA Chapter 16 was adopted by the parties to promote free movement within the region, and the WHTI limits this movement. Finally, under GATS, the WHTI treats Canadian service suppliers less favorably than its own.

The APHIS user fees also violate NAFTA and GATT. The APHIS user fees impose customs user fees on airline passengers and commercial shipments entering the U.S, in violation of NAFTA Article 310. Further, the U.S. charges exporters the fee even if their shipments or passengers are not inspected; this charge without rendering a service violates GATT.

The U.S. may not successfully use a NAFTA, GATT, or GATS national security exception or general exception to justify the WHTI. Canada recognizes the security interest of the U.S., but increased security measures can be adopted in a manner that does not interrupt trade to the level that the WHTI does. Because the WHTI is inconsistent with NAFTA and is applied in an unjustifiable manner it violates NAFTA, making the general exceptions unavailable. As the U.S. has not provided enough alternative options for travelers to the U.S. and the WHTI is not the least restrictive means to protect U.S.'s interests, the NAFTA, GATS and GATT exceptions do not apply.

Neither can the APHIS user fees be justified by a general or national security exception in NAFTA or GATT. The U.S. can not justify the APHIS user fees for the following reasons: their adoption is unnecessary to fulfill the U.S.'s purpose of safeguarding American animals and

agriculture; it will have an unnecessary and great restrictive impact upon Canadian commercial exports into the U.S.; and the U.S. has an alternative option to improve its inspection efforts. Further, the APHIS user fees are not justified under a national security exception, because the U.S. has failed to provide a specific explanation for why it is necessary due to a security concern.

The fuel export charge is not contrary to NAFTA or GATT. It does not violate GATT Article I because it does not provide Canada or any other party a trade advantage and it applies to all countries equally. The evidence of an Article XI violation in this case is circumstantial, and it is unlikely that the export license requirement will have a chilling effect on the fuel trade between an oil dependent country, such as the U.S, and its number one importer, Canada.

The fuel export charge is justified pursuant to NAFTA and GATT general and national security exceptions. The fuel export charge is necessary to protect human, animal, or plant life or health under GATT because it helps to increase security along the U.S. and Canadian border and is not a disguised restriction on international trade. Also, Canada views the fuel export charge as necessary to fund an important national security action and to combat the threat of terrorism, and NAFTA and GATT allow Canada to take measures it considers necessary to protect its essential security interests in time of war or other emergency in international relations.

ARGUMENT

I. THE WHTI IS CONTRARY TO NAFTA CHAPTERS 12 AND 16 AND GATS.

The U.S.'s adoption of the WHTI violates multiple provisions 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."³⁰ While Canada recognizes that air transportation is exempt under Chapter 12,³¹ the WHTI land and sea provisions would impact cross-border trade in services, in violation of NAFTA, by requiring Canadian services providers to hold passports or other qualifying documents to visit the U.S. for meetings or negotiations or to provide on-site services within the U.S. borders. U.S. citizen service providers would not be required to do so to engage in the same actions.

Article 1201: Scope and Coverage states that Chapter 12 "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: (a) the production, distribution, marketing, sale and *delivery* of a service."³² It further applies to "(c) the access to and use of distribution and transportation systems in connection with the provision of a service," and "(d) the presence in its territory of a service provider of another Party."³³ The passport requirement directly impacts service delivery, distribution, and sale, transportation systems used to provide services, and most clearly the presence of Canadian service providers within U.S. territory, in violation of NAFTA.

³⁰ NAFTA, *supra* note 1, at art. 1202.

³¹ *Id.* at art. 1201(2)(b).

³² *Id.* at art. 1201(1)(a) (emphasis added).

³³ *Id.* at art. 1201(1)(c), (d).

The U.S. adoption of the WHTI also violates NAFTA Chapter 16. NAFTA Chapter 16 was adopted to promote free movement within the region of business persons, and Article 1601 indicates the “desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry.”³⁴ Article 1602(1) requires that “[e]ach Party shall apply its measures relating to the provisions of this Chapter in accordance with Article 1601 and, in particular, shall apply expeditiously those measures so as to avoid unduly impairing or delaying trade in goods or services or conduct of investment activities under this Agreement.”³⁵ Furthermore, “[e]ach Party shall limit any fees for processing applications for temporary entry of business persons to the approximate cost of services rendered.”³⁶

While NAFTA allows a Party to require a visa or similar documents from business visitors, professionals, and intra-company transferees, it requires a Party to “consult . . . with a view to avoiding the imposition of the requirement.”³⁷ The U.S. has not sufficiently consulted with Canada to avoid the heavy imposition of the WHTI and has not provided enough less costly, time-consuming, and imposing requirements. The U.S. should further consider allowing less burdensome documents, such as drivers’ licenses and birth certificates.³⁸ The U.S. failed to fully assess the negative impact on cross-border trade in goods and services. This Court should conclude that the U.S. has violated NAFTA Chapter 16 in its adoption of the WHTI.

The WHTI identification requirements speak directly to GATS Article XVII, regarding national treatment, which states, in part, that “each Member shall accord to services suppliers of

³⁴ Id. at art. 1601.

³⁵ Id. at art. 1602(1).

³⁶ Id. at art. 1603(4).

³⁷ Id. at annex 1603, Sec. A, para. 5, Sec. C, para. 3; Sec. D, para. 3.

³⁸ ATHANA MENTZELOPOULOS, DEPUTY MINISTER, INTERGOVERNMENTAL RELATIONS, OFFICE OF THE PREMIER, GOVERNMENT OF BRITISH COLUMBIA, COMMENT SUBMITTED BY THE GOVERNMENT OF BRITISH COLUMBIA 7 (2005), available at http://www.gov.bc.ca/igrs/down/bc_submission.pdf.

any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.”³⁹ As was stated with NAFTA Chapter 12, the WHTI negatively impacts Canadian service providers by requiring them to have passports, or similar identification, to do business within the U.S., while not requiring U.S. citizen service providers to do so. The Notice of Proposed Rulemaking⁴⁰ would rescind a provision of the U.S. statute which did not require a U.S. citizen to have a valid passport to enter or depart the U.S. when traveling within North America and instead require passports for travel by U.S. and Canadian citizens within the Western Hemisphere.⁴¹ This treatment is “less favourable” because it “modifies the condition of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.”⁴² Therefore, this Court should rule that the WHTI violates GATS.

II. THE APHIS USER FEES ARE CONTRARY TO NAFTA ARTICLE 310 AND GATT ARTICLES I AND VIII.

The APHIS user fees are contrary to articles in both NAFTA and GATT. Under NAFTA Article 310, no party “may adopt any customs user fee of the type referred to in Annex 310.1 for originating goods.”⁴³ Annex 310.1 states that the U.S. “shall not increase its merchandise processing fee and shall eliminate such fee according to the schedule set out in Article 403 of the Canada – United States Free Trade Agreement on originating goods.”⁴⁴ Pursuant to Article 403 of the Canada – U.S. Free Trade Agreement, on or after January 1, 1994, there shall be no

³⁹ GATS, *supra* note 4, at art. XVII(1).

⁴⁰ Notice of Proposed Rulemaking, The Western Hemisphere Travel Initiative Implemented in the Air and Sea Environments, 71 Fed. Reg. 46155-46174 (Lib. Cong. Aug. 11, 2006) (with associated Regulatory Assessment).

⁴¹ 22 C.F.R. § 53.2(b) (2003).

⁴² GATS, *supra* note 4, at art. XVII(3).

⁴³ NAFTA, *supra* note 1, at art. 310.

⁴⁴ *Id.* at annex 310.1.

customs user fees on goods originating from Canada.⁴⁵ Foreign goods that are imported into Canada and then exported to the U.S. are subject to the same customs duties of goods that originate in Canada.⁴⁶ APHIS user fees are imposed on commercial shipments and airline passengers entering the U.S. from Canada and therefore violate NAFTA Article 310.

Under GATT 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.⁴⁷ Article I has a large scope that applies to any product and advantage.⁴⁸ 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. And finally, the advantage must be applied unconditionally.⁴⁹

The APHIS user fees violate GATT Article I, because they have a disproportionate impact on Canadian commercial shipments compared to other WTO members’ commercial shipments. The APHIS user fees apply to all commercial shipments entering the U.S. by way of commercial trucks, vessels, and aircrafts, loaded commercial railroad cars, and international passengers.⁵⁰ Since Canada and Mexico are the only countries by which commercial trucks and railroad cars can enter into the U.S., other WTO members are afforded an advantage exporting their goods into the U.S. Moreover, with the APHIS user fees, Canada can pay an annual USD \$205 fee to export goods into the U.S. by commercial truck; however, other WTO members are

⁴⁵ Canada – United States Free Trade Agreement art. 403, Jan. 2, 1998.

⁴⁶ Id. at art. 404.

⁴⁷ GATT, supra note 2, at art. I(1).

⁴⁸ Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139, 142/AB/R (May 31, 2000).

⁴⁹ Panel Report, Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54,55,59,64/R, ¶ 14.138 (July 2, 1998).

⁵⁰ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, supra note 14.

not afforded the option of an annual fee for using commercial vessels or aircraft.⁵¹ Therefore, this Court should find that the APHIS user fee violates GATT Article I.

GATT Article VIII states that “[a]ll 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”⁵² The provisions of Article VIII extend to fees related to quarantine.⁵³ 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.’”⁵⁴

Here, an inspection of commercial shipments to uncover potentially hazardous goods constitutes the “service rendered.” However, not all of the commercial shipments or airline passengers entering the U.S. from Canada are inspected. Airline passengers entering the U.S. from Canada are charged a five-dollar APHIS user fee, regardless of whether they are traveling with fruits or vegetables or are processed through customs and immigration at a Canadian airport.⁵⁵ Since all commercial shipments and airline passengers entering the U.S. from Canada are charged the APHIS user fees regardless of whether they are inspected, then those exporters whose commercial shipments are not inspected pay for a service that is not rendered. Therefore, this Court should find that the APHIS user fee violates GATT Article VIII.

⁵¹ Inspection and User Fee Requirements for Commercial Trucks, Railroad Cars Entering the United States from Canada, supra note 16.

⁵² GATT, supra note 2, at art. VIII.

⁵³ Id. at art. VIII (c)(4)(h).

⁵⁴ Report by the Panel, United States Customs Users Fee, ¶ 69, L/6264 (February 2, 1998) (quoting GATT, supra note 2, at art. VIII).

⁵⁵ Inspection and User Fee Requirements for Commercial Trucks, supra note 16.

III. THE WHTI IS NOT JUSTIFIED PURSUANT TO A NATIONAL SECURITY EXCEPTION OR GENERAL EXCEPTION IN NAFTA, GATT, OR GATS.

a. The WHTI does not fall under National Security Exceptions in NAFTA Article 2102, GATT Article XXI, or GATS Article XIV bis.

NAFTA Article 2102 permits a Party to take steps necessary to protect “essential security interests” that are “taken in time of war or other emergency in international relations.”⁵⁶ GATS Article XIV bis contains parallel language for members.⁵⁷ GATT Article XXI states, “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.”⁵⁸ Canada recognizes that increased security needs have been established since the September 2001 terrorist attacks, as evidenced by Canada’s investment of more than \$10 billion on security measures.⁵⁹ But, what is needed is a “smart border, not a thick border.”⁶⁰ Increased security measures “can and must be implemented in a manner which does not needlessly disrupt legitimate tourism and travel, or undermine the historic and unique economic and social relationships between our two countries.”⁶¹ To qualify as a security exception, the WHTI should provide for alternative secure documents and proof. While authorities have adopted programs for low-risk travelers, such as FAST, NEXUS, and a pilot program for enhanced drivers’ licenses, these programs need to

⁵⁶ GATS, supra note 4, at art. XXI.

⁵⁷ Id. at art. XIV bis(1)(b)(iii).

⁵⁸ GATT, supra note 2, at art. XXI(1)(b)(iii).

⁵⁹ Lynn Shotwell, Return to the Virtual Border: Update from the Department of State and the Department of Homeland Security, 1566 P.L.I./CORP. 91, 93 (2006).

⁶⁰ PUBLIC POLICY FORUM, POLICY CHOICES: IMPROVING OUR RELATIONS WITH THE UNITED STATES 17 (2006), available at http://www.ppforum.com/common/assets/publications/en/canada_us_relations.pdf (citing Canada’s current ambassador to the U.S., Michael Wilson).

⁶¹ Shotwell, supra note 59.

expanded and encouraged and a renewal and appeals process needs to be provided.⁶² Moreover, the application of GATT Article XXI, “may have extremely serious consequences for international trade and severely affect benefits accruing to contracting parties under the General Agreement,”⁶³ the exception has rarely been used,⁶⁴ and the use of any of the exceptions should be done with extreme care to prevent the halting of trade. Therefore, this Court should hold that a national security exception does not protect the WHTI.

b. The WHTI does not fall under General Exceptions in NAFTA Article 2101, GATT Article XX, or GATS Article XIV bis.

The WHTI can not be saved under NAFTA, GATT, or GATS general exceptions. Under NAFTA Article 2101, nothing within Chapter 12 “shall be construed to prevent the adoption or enforcement by any part of measures necessary to secure compliance with laws ore regulations that are not inconsistent with the provisions of this Agreement.”⁶⁵ Here, the WHTI is inconsistent with the provisions of Chapter 12 and Chapter 16 of NAFTA. The WHTI is “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.”⁶⁶ In a NAFTA panel decision, the panel decided that the U.S.’s continuation of a trucking moratorium as part of the Federal Motor Carrier Safety Regulations violated this provision and that the U.S. “failed to demonstrate that there were no alternative means of

⁶² CANADIAN CHAMBER OF COMMERCE, WHTI NOTICE OF PROPOSED RULE MAKING SUBMISSION, 4-5 (2007) (Docket Number: USCBP-2007-0061).

⁶³ Communication from Nicaragua, Uruguay Round, Multilateral Trade Restricted Negotiations, MTN.GNG/NG7/W/34 (Nov. 12, 1987).

⁶⁴ JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 204-05 (1989).

⁶⁵ NAFTA, supra note 1, at art. 1201(2).

⁶⁶ Id.

achieving its safety objective that are more constituent with NAFTA.”⁶⁷ Here again, less intrusive means are available and should be used in order to be the least trade-restrictive measure.

NAFTA Article 2101 incorporates GATT Article XX into the agreement.⁶⁸ Although the U.S. has not set out the WHTI as an exception, one exception within GATT Article XX and GATS Article XIV allows for what is “(b) necessary to protect human . . . life or health.”⁶⁹ A scholar noted:

GATT practice is to interpret exceptions narrowly, with the burden on the member to show that the exception fits within Article XX. This approach has evolved into a requirement that a challenged measure be “reasonably calculated to achieve objective stated in the Article XX exception; and (2) the measure selected must be the least trade restrictive of all the measures reasonably available that would be available that would be as effective.”⁷⁰

Further, a GATT Panel Report stated that “a contracting party cannot justify a measure inconsistent with other GATT provisions as ‘necessary’ in terms of Article XX(d) if an alternative measure which it could reasonable be expected to employ and which is not inconsistent with other GATT provisions is available to it.”⁷¹ In an earlier decision, The Panel decided there was no reason to treat paragraph (b) differently from paragraph (d).⁷²

Here, the means used by WHTI to protect human life from terrorist attacks are not “the least trade restrictive,” in that less intrusive means are available to allow spontaneous same-day

⁶⁷ Cross Border Trucking Servs., Secretariat File No. USA-MEX-98-2008-01 ¶ 269.

⁶⁸ NAFTA, supra note 1, at art. 1201(1).

⁶⁹ GATT, supra note 2, at art. XX(b); GATS, supra note 4, at art. XIV(b).

⁷⁰ David A. Gantz, Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA’s Chapter 11, 33 GEO. WASH. INT’L L. REV. 651, 734 (2001) (quoting Raj Bhala & Kevin Kennedy, World Trade Law (Lexis, 1998) at 143-44, 148-49).

⁷¹ Panel Report, United-States – Section 337 of the Tariff Act of 1930, ¶ 5.26, WT/L/6439 (Nov. 7, 1989).

⁷² Panel Report, Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, 124, DS10/R (Nov. 10, 1987).

visits and other trade activity.⁷³ The Canadian Tourism Commission estimated that “the WHTI will result in a loss of 7.7 million inbound trips to Canada and a subsequent shortfall of \$1.7 billion in international travel receipts.”⁷⁴ The WHTI has not provided sufficient notification to the public of the proposed rules and the full implementation of alternatives to passports has not been completed.

The U.S. has not fully coordinated with Canada, which would be helpful “to eliminate long delays, confusion and not to imperil the positive cross-border law enforcement relationships we have developed.”⁷⁵ Because the U.S. has provided for more widely available and less restrictive means of identification, such as enhanced drivers’ licenses,⁷⁶ this Court should conclude that the WHTI is contrary to NAFTA, GATS, and GATT and their general exceptions do not apply.

IV. THE APHIS USER FEES ARE NOT JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA OR GATT OR GATS.

As indicated above, the APHIS user fees violate NAFTA Article 310 and GATT Article VIII. The U.S. cannot justify the APHIS user fees by using either the general or national security exceptions in NAFTA or GATT.

⁷³ CANADIAN CHAMBER OF COMMERCE, *supra* note 62.

⁷⁴ Hanners, *supra* note 11.

⁷⁵ Letter from Windsor & Dist. Chamber of Commerce, to U.S. Customs and Border Prot., Aug. 24, 2007 (on file with author).

⁷⁶ CANADIAN CHAMBER OF COMMERCE, *supra* note 62.

a. The APHIS user fees do not fall under General Exceptions in GATT Article XX(b), NAFTA Article 2101, or GATS Article XVI.

GATT Article XX(b) excepts measures that violate the treaty and are “necessary to protect human, animal or plant life or health.”⁷⁷ NAFTA Article 2101 expressly adopts GATT Article XX, and GATS Article XVI contains the same clause as GATT Article XX(b).⁷⁸

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.⁷⁹ The U.S. must prove two things. One, “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.” Two, “the inconsistent measure for which the exception is invoked is *necessary* to fulfill the policy objective.”⁸⁰

In order 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.⁸¹ Here, the U.S. has documented that agricultural products have approached the U.S. and Canadian border from Canada that present a risk of introducing plant pests or animal diseases into the U.S.⁸² The APHIS user fee’s objective, as reported by the U.S. Department of Agriculture, is to recoup the costs of inspecting commercial shipments from Canada and to help implement expanded agricultural quarantine inspection services at the border.⁸³ Thus, the U.S. has met the first requirement for a GATT Article XX(b) exception.

⁷⁷ GATT, supra note 2, at art. XX(b).

⁷⁸ NAFTA, supra note 1, at art. 2101; GATS, supra note 4, at art. XVI.

⁷⁹ 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).

⁸⁰ Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R (December 17, 2007) (emphasis added).

⁸¹ Id.

⁸² Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, supra note 14.

⁸³ Inspection and User Fee Requirements for Commercial Trucks, supra note 16.

However, this Court should find that the APHIS user fee does not qualify for exception under GATT Article XX(b) because the U.S. cannot prevail under the second required element. In order to determine whether an exception under 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.”⁸⁴ After the WTO weighs these three factors, the panel then compares the challenged measure to alternative measures.⁸⁵

Here, the APHIS user fees will be greatly restrictive upon Canadian commercial shipments into the U.S. Even though the U.S. has an important objective in protecting American animal and plant life or health, and the APHIS user fees could conceivably contribute to achieving that objective, those factors are outweighed by the APHIS user fees restrictive impact on international commerce.

Since Canadian exporters will now have to pay APHIS user fees for exporting these commercial shipments into the U.S., Canadian exporters will be forced to raise the price of its exports in order to cover the APHIS user fees. Since American importers are interested in receiving the lowest export price possible, it will reduce the available market that Canadian commercial shipments had enjoyed in the U.S.

This Court should find that there is an alternative measure for the U.S. to improve its inspection efforts at the U.S. and Canadian border without imposing the APHIS user fees. The U.S. could allot more money in its federal budget to the U.S. Department of Agriculture (USDA) and the Department of Homeland Security, which conducts the agricultural inspections pursuant

⁸⁴ Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R.

⁸⁵ Id.

to APHIS requirements.⁸⁶ An increased budget would enable the USDA achieve its objective of protecting American animal and plant life or health, without negatively impacting Canadian commercial shipments. Therefore, this Court should find that the APHIS user fees are not justified pursuant to a general exception in NAFTA, GATT, or GATS.

b. The APHIS user fees do not fall under National Security Exceptions in NAFTA 2102, GATT Article XXI, or GATS Article XIV.

Canada recognizes that, under both NAFTA Article 2102 and GATT Article XXI, the U.S. shall not be prevented from taking action that it considers necessary during a time of war.⁸⁷ The U.S. seeks to justify its implementation of APHIS user fees as a means to fund inspections conducted by the U.S. Department of Homeland Security, which the U.S. claims will protect the U.S. from bioterrorism.⁸⁸ However, members of the WTO should provide “careful explanations as to why their national security measures fit within the WTO national security exception,” because “otherwise the WTO framework may become less relevant in international law.”⁸⁹

Here, the U.S. has not provided any explanation for why the APHIS user fees are necessary in light of its war in the Middle East. Rather, the U.S. simply attempts to justify the fees by broadly using the phrase “bioterrorist threat.”⁹⁰ This Court should not allow the U.S. to justify its measure against Canadian commercial shipments under a national security exception without specifically relating it to its war in the Middle East. Therefore, this Court should find that the APHIS user fees are not justified under a NAFTA or GATT national security exception.

⁸⁶ Animal and Plant Health Inspection Service, *supra* note 22.

⁸⁷ NAFTA, *supra* note 1, at art. 2102; GATT, *supra* note 2, at art. XXI.

⁸⁸ Animal and Plant Health Inspection Service, *supra* note 22.

⁸⁹ 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).

⁹⁰ Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, *supra* note 14.

V. THE FUEL EXPORT CHARGE IS NOT CONTRARY TO NAFTA ARTICLES 314, 315, 604 OR 605 OR GATT ARTICLES I, VIII OR XI.

The fuel export charge does not violate 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.⁹¹ Article I has a large scope that applies to any product and any advantage.⁹² 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. And finally, the advantage must be applied unconditionally.⁹³

Traditional Article I violations result from a party protecting their own domestic industry or providing an advantage to the imports of another country over other party members. Canada previously violated Article I when it maintained an import duty tax exemption for automobile manufactures that met specific production standards while it did not provide the tax exemption to manufactures that met those standards after 1989.⁹⁴ Similarly, Indonesia also violated GATT Article I when it instituted a luxury tax exemption for automobiles with a certain percentage of components produced in Indonesia or by Indonesia nationals.⁹⁵

An Article I violation occurred in these two cases because the tax exemptions created an advantage to only some members. The fuel export charge, however, does not provide Canada, nor any other party, a trade advantage. Canada is simply adding a tax to fuel exported from its country by way of pipeline. This measure applies to any and all countries receiving the pipelined fuel. The only potential effects on international trade would be negative ones to Canada’s own

⁹¹ GATT, *supra* note 2, at art. I(1).

⁹² Canada – Certain Measures Affecting the Automotive Industry, WT/DS139, 142/AB/R.

⁹³ Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54,55,59,64/R, ¶ 14.138.

⁹⁴ Canada – Certain Measures Affecting the Automotive Industry, WT/DS139, 142/AB/R.

⁹⁵ Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54,55,59,64/R at ¶ 14.138.

industry. The higher prices of the exported fuel could have a potential chilling effect on the demand for the pipelined fuel. This kind of regulation of a country's own exports is not the protectionist and preferential treatment that Article I has protected against in the past. Therefore, this Court should not find the fuel export charge in violation of Article I.

The fuel export charge is allowed under GATT Article XI, which prohibits restrictions created through import and export licenses.⁹⁶ Under an Article XI claim, the objecting party must prove a direct link between the export restrictions and the measure in question.⁹⁷

A WTO panel failed to find an Article XI violation where Argentina required all exports of rawhides to be inspected by a member of the Argentinean Chamber for the Tanning Industry. The European Community ("EC") claimed the requirement chilled exports because the customs officials intentionally delayed and prevented shipments under pressure from domestic tanneries.⁹⁸ The EC cited the low levels of exports of bovine hides from Argentina and the low prices of hides in Argentina's domestic market as evidence of the restrictive nature of the requirement.⁹⁹ The EC's claim was rejected because the circumstantial evidence was not demonstrated clearly and convincingly enough to succeed on a claim.¹⁰⁰

The evidence of an Article XI violation in this case is even more circumstantial than in the Argentinean case. Even though the Fuel Export Charge Legislation requires licenses on exports of fuel by way of pipeline, it is unlikely that the presence of export licenses will have a chilling effect on fuel trade between an oil dependent county, like the U.S., and its number one

⁹⁶ GATT, *supra* note 2, at art. XI(1).

⁹⁷ Panel Report, Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/R, ¶¶ 11.49-55, (Nov. 17, 2000).

⁹⁸ *Id.* at ¶ 11.28.

⁹⁹ *Id.* at ¶ 11.22.

¹⁰⁰ *Id.* at ¶11.28.

oil importer, Canada.¹⁰¹ Furthermore, any such trade restrictions resulting from the export licenses would merely be speculative. If the EC did not produce enough evidence to show trade restrictions on Argentinean rawhides, then the future speculation of the impacts of a license on fuel exports cannot constitute an article XI violation. Based on these reasons, the Court should hold that the fuel export charge does not violate GATT or NAFTA.

VI. THE FUEL EXPORT CHARGE IS JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTIONS AND GENERAL EXCEPTIONS IN NAFTA ARTICLES 607, 2101, 2102 AND GATT ARTICLES XX AND XXI.

Even if the fuel charge violates one or more articles, it is justified by the general exceptions of the treaties. Both NAFTA and GATT have explicit exceptions to trade restrictions that would otherwise violate the treaties. A two-tiered analysis is required to determine whether a measure is justified under GATT Article XX. First, the measure must first fall within the scope of one of the recognized exceptions set out in paragraphs (a) – (j) of article XX. Second, the measure must also meet the requirements of the introductory provision.¹⁰²

The fuel export tax is justified under GATT Article XX(b) because it is necessary to protect human life and health. The purpose of the export charge is to fund a large series of projects that will increase security along the U.S. and Canadian border.¹⁰³ As the leaders of the parties claimed in the Joint Statement, secure borders are required to continue to enhance

¹⁰¹ Energy Information Administration, Crude Oil and Total Petroleum Imports Top 15 Countries, www.eia.doe.gov/pub/oil_gas/petroleum

¹⁰² Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/R at ¶¶ 11.28, 11.29.

¹⁰³ Joint Statement by Canada’s Prime Minister Harper, U.S. President Bush and Mexico’s President Calderon following the Montebello North American Leaders’ Summit, August 21, 2007.

prosperity, security, and quality of life in North America.¹⁰⁴ This enhancement of prosperity and security is directly related to the protection of human life and health.

The fuel export charge satisfies the second tier of the test as well because it is consistent with the provisional paragraph of Article XX. Specifically, the export charge is not a disguised restriction on international trade. Canada is not using the export charge as a tool to protect domestic industries or provide preferential treatment for another country. Canada, as the number one oil importer to the U.S., has no desire to limit or restrict the cross border trade of fuel.

In addition to the general exceptions, the agreements also contain exceptions based on national security. Both Article XXI of GATT and 2102 of NAFTA allow a party to take action contrary to the agreement when it considers action necessary for the protection of its essential security interests in time of war or other emergencies in international relations.¹⁰⁵ The “it considers necessary” language creates a subjective standard that allows each party the ability to make their own decisions regarding their national security interests.

In contrast to the self-defining language of the GATT and NAFTA exception, a 1956 treaty between the U.S. and Nicaragua allowed either party to take action “necessary to protect security interests.”¹⁰⁶ Because the action had to actually be necessary and not just considered necessary by the party taking the action, the ICJ reviewed the action under an objective standard.¹⁰⁷

More recent treaties have also highlighted the importance of the subjective language in treaty exceptions. The Agreement on Trade-Related Aspects of Intellectual Property Rights was

¹⁰⁴ Id.

¹⁰⁵ NAFTA, supra note 1, at art. 2102; GATT, supra note 2, at art. XXI.

¹⁰⁶ Military and Paramilitary Activities (Nicar. v. U.S.). 1986 I.C.J. 14 (June 27) (separate opinion of President Negendra Singh).

¹⁰⁷ Peter Lindsay, The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?, 52 DUKE L.J. 1277 (2003).

designed to protect the copyrights of individuals in WTO member states. WTO members, however, can violate protected copyrights in cases of emergency.¹⁰⁸ The language of the exception has been interpreted to mean that each member has the right to determine what constitutes national emergency or other circumstances of extreme urgency.¹⁰⁹

Because of the self-defining language in both NAFTA and GATT, Canada can take any measures “it considers necessary” for the protection of its essential security interests taken in time of war or other emergency in international relations.¹¹⁰ The Smart and Secure Borders priority, outlined in the Joint Statement by the three NAFTA party leaders illustrates the importance of secure borders to the health and welfare of all citizens of North America.¹¹¹ Moreover, the agreement of Canada to spend \$ 1 billion to ensure the security of the border is evidence of the importance of the projects. Because Canada felt the fuel export charge was necessary to fund such an important national security action, the measure is justified under NAFTA and GATT.

Additionally, the constant threat of terrorism to western countries qualifies as an emergency in international relations. The events of September 11, 2001 highlight the ever-present potential for destruction, even when a country is not engaged in an official war with a nation state. Because Canada took actions that it subjectively considered necessary for national security interests in a time of international emergency, the fuel export charge is justified under GATT article XXI and NAFTA article 2102.

¹⁰⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Preface, Apr. 15, 1994.

¹⁰⁹ Ministerial Conference, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01).DEC/2, (Nov. 20, 2001); Lindsay, *supra* note 107.

¹¹⁰ GATT, *supra* note 2, at art. XXI(b)(iii).

¹¹¹ Joint Statement by Canada’s Prime Minister Harper, U.S. President Bush and Mexico’s President Calderon following the Montebello North American Leaders’ Summit, August 21, 2007.

CONCLUSION

For the foregoing reasons, Canada respectfully requests this Court to hold the following: the WHTI is contrary to NAFTA Chapters 12 and 16 and GATS; the APHIS user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII; the WHTI does not fall under the national security exceptions in NAFTA Article 2102, GATT Article XXI, or GATS Article XIV, and does not fall under the general exceptions in NAFTA Article 2101, GATT Article XX, or GATS Article XIV; the APHIS user fee does not fall under the general exceptions in GATT Article XX(b), NAFTA Article 2101, or GATS Article XVI, and does not fall under the national security exceptions in NAFTA Article 2102, GATT Article XXI, or GATS Article XIV; the fuel export charge is not contrary to NAFTA Articles 314, 315, 604 or 605 or GATT Articles I, VIII or XI; and, the fuel export charge is justified pursuant to the national security exception and general exceptions in NAFTA Articles 607, 2101, 2102 and GATT Articles XX and XXI.