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The Intersection of Border Security and Free Trade Agreements

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THE INTERSECTION OF BORDER SECURITY AND FREE TRADE AGREEMENTS

Session Chair – Maureen Irish
Canadian Speaker – Greg Kanargelidis
United States Speaker – David R. Hamill
Canadian Speaker – Cyndee Todgham Cherniak

INTRODUCTION

Maureen Irish

MS. IRISH: I am Maureen Irish from the University of Windsor.[1] I am pleased to welcome everyone back to the final panel of this afternoon in what has been an extremely interesting conference. Since the biographical information of our three speakers today is in your materials, I am not going to go through it. I just will mention to you that these are three very experienced and extremely knowledgeable trade lawyers. Our first speaker will be Greg Kanargelidis from Blakes in Toronto[2] who will be speaking on Canada's Partners in Protection program, WTO, and NAFTA consistency. Our second speaker is David R. Hamill from Arent Fox in Washington.[3] He will be speaking on cross border fees. And our third speaker is Cyndee Todgham Cherniak from Lang Michener in Toronto[4] who will be speaking on ITAR's International Traffic in Arms Regulations.

So I will ask Greg to start.

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[1] *See* Maureen Irish, http://www.uwindsor.ca/law/irish (last visited Sept. 26, 2008).

[2] *See* Greg Kanargelidis, http://www.blakes.com/english/people/lawyers2.asp?LAS=GK (last visited Sept. 26, 2008).

[3] *See* David R. Hamill, http://www.arentfox.com/people/index.cfm?fa=profile&id=118 (last visited Sept. 26, 2008).

[4] *See* Cyndee Todgham Cherniak, http://www.langmichener.ca/index.cfm?fuseaction=people.personDetail&id=9939 (last visited Sept. 26, 2008).

CANADIAN SPEAKER

Greg Kanargelidis[*]

MR. KANARGELIDIS: Thanks very much for that introduction, and thank you to the Canada-U.S. Law Institute for inviting me. It is a great pleasure to be able to participate in this last panel of the Canada-U.S. Law Institute annual conference. Over the last two days we heard repeatedly from speakers about the security programs of both Canada and the United States and about the impact that these security programs have on businesses that rely on cross border trade. It seems pretty clear that these security programs are here to stay. They are permanent fixtures of the business landscape, and participation in the voluntarily programs is likely to grow.[5]

The topic we have not discussed so far at this conference and that we are dealing with in this panel is consideration of whether these security programs are consistent with Canada's trade obligations. As a Canadian customs and trade lawyer, I will focus on Canadian security programs and given the limited time available, I have chosen to focus my presentation on Canada's *Partnership in Protection* initiative. This is an appropriate time to consider *Partners in Protection* because it is being overhauled as we speak.[6] A new and improved PIP is expected to be announced by the end of June of this year.[7]

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[*] Greg Kanargelidis is a Partner practicing in the International Trade Group and the Commodity Tax and Customs Group. His practice involves all areas of international trade, customs and commodity tax. Greg's international trade law practice involves representing clients with respect to cross-border trade issues arising from the Canada – U.S. Free Trade Agreement, the North American Free Trade Agreement, the World Trade Organization and its various agreements, and other bilateral and regional trade agreements. He has considerable experience in representing Canadian and foreign clients in trade remedy matters, such as anti-dumping and subsidy investigations as well as advising clients on the consistency of existing or planned measures with international trade rules. In the area of customs law, he has extensive experience advising Canadian and foreign companies on such matters as: tariff classification; customs valuation; rules of origin; export and import controls; marking rules; seizures and ascertained forfeitures; administrative monetary penalties; and voluntary disclosures. Greg also assists clients with respect to planning, compliance and appeals involving commodity taxes such as the goods and services tax, the harmonized sales tax, the Quebec sales tax, the provincial sales tax, and commodity-specific excise taxes and excise duties.

[5] *See* Julie Kuzelijevich, *Border Breakthrough?* CANADIAN TRANSPORTATION & LOGISTICS, May 2008, at 34 (outlining the changes implemented to deal with expected growth of the programs).

[6] *See* Laurie Turnbull, *The New PIP*, CANADIAN TRANSPORTATION & LOGISTICS, Mar. 2008, at 38 (discussing changes being made to Partners in Protection).

[7] *See id.*

I am presently sitting on a working group formed by the Canadian Association of Importers and Exporters, and we are currently consulting with the Canada Border Services Agency on their plans for this new and improved PIP program.[8]

In my presentation I will briefly describe what PIP is and its intended benefits. Then I will consider Canada's international trade obligations under the WTO/GATT and NAFTA. It seems that some characteristics of PIP are potentially vulnerable to challenge under these trade agreements. Today, we will comment on these possible inconsistencies. The conclusion I will make is that, on balance, PIP is likely consistent with the GATT and the NAFTA. Moreover, even if PIP were inconsistent with international obligations, it seems that there is a potential justification for any discriminatory effects under the national security exception that is found under both agreements.

OVERVIEW OF THE PIP PROGRAM

So what is PIP? The objective of *Partners in Protection* is to strengthen the security of supply chains and to engage the private sector in a proactive approach to assist with the detection and prevention of terrorism.[9] It is a voluntary program.[10] It is the equivalent of C-TPAT. It is clear that it is necessary to have a presence in Canada in order for an entity to register for PIP, [11] but what is not clear is, what sort of presence? What minimum presence is necessary? That has not yet been addressed by the CBSA, and that, in fact, is the essence of the potential violation with the trade agreements.

Under the PIP, very similar to C-TPAT I understand, applicants are required to complete a Memorandum of Understanding with the CBSA. They fill out a security questionnaire that discusses physical security, personnel security, and security of service providers, and then a joint plan of action is put together with the CBSA to which the applicant is expected to adhere to ensure that the trade chain is secure.[12]

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[8] *See* Kanargelidis, *supra* note 2; *see also* Proposed PIP Process Documentation, *available at* http://www.caie.ca/assoc_news/08/LTR_StDenis_05_06_08.pdf (May 6, 2006) (commenting on PIP Process Documentation and suggesting modification).

[9] Joseph L. Parks, *The United States-Canada Smart Border Action Plan: Life in the Fast Lane*, 10 L. & BUS. REV. AM. 395, 407 (2004).

[10] *See* 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, 113 (2007) (stating that Partners in Protection is strictly a voluntary program).

[11] *See generally* Special ABA Committee Report, *The Canada-U.S. Border: Balancing Trade, Security and Migrant Rights in the Post-9/11 Era*, 11 GEO. IMMIGR. L.J. 199, 241 (2005) (commenting that programs like the PIP takes a "trust, but verify" approach to address concerns).

[12] *See* Parks, *supra* note 9, at 407 (outlining the steps that applicants must take to gain

BENEFITS OF PIP MEMBERSHIP

What are the benefits of PIP? When I speak with some of my clients, they will say they see nothing yet out of PIP, so why bother? And in fact, it is quite difficult for many of my clients to get upper management to even agree to spend the money that is required to meet all of the criteria for security and so forth. But these are the advertised benefits if you will. The applicants are identified as trusted traders to Customs inspectors.[13] Theoretically, there are fewer examinations because they are given a lower risk score being in the PIP program.[14] There is also front of the line privileges when selected for examination.[15] Also if the border happens to be shut down in case of a security threat, then theoretically again PIP registrants will be able to continue to import their goods under the business resumption plan.[16] Finally, PIP is also a prerequisite for participation in the *Free and Secure Trade* (FAST) program, although not the only prerequisite. Another prerequisite for FAST is participation in *Customs Self Assessment* or CSA. FAST is again, theoretically, a beneficial program to be in and therefore that is an attraction for membership as well.[17]

CHANGES TO THE PIP PROGRAM

Now, I mentioned that PIP is in the midst of being changed. And what the CBSA is planning -- and really the reason for the change is PIP is intended to now become more consistent with the C-TPAT,[18] so many changes are planned. All registrants must reapply after June 30th of this year.[19] There is a transition period but this will expire at the end of December.[20] None of the existing registrants will be grandfathered into the new program. All

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membership to Partners in Protection).

[13] *See id.* (explaining that entering the PIP is a declaration that the carrier or importer is acting as a partner to protect Canadian society and to facilitate trade).

[14] *See* Kuzelijevich, *supra* note 5, at 34 (discussing the advantage of lower risk scores for PIP members).

[15] *See* Turnbull, *supra* note 6, at 38 (stating membership in PIP will result in fewer shipment inspections and delays).

[16] *See* The Honourable Stockwell Day, Minister of Public Safety, Remarks at the Security and Prosperity Initiatives for Smart, Secure Borders (Jan. 12, 2007) (transcript at http://www.publicsafety.gc.ca/media/sp/2007/sp20070112-eng.aspx) (discussing the results of a border shutdown for members of PIP).

[17] *See* Lobsinger, *supra* note 10, at 113 (commenting that membership in the PIP is required for inclusion in the FAST program).

[18] *See* Turnbull, *supra* note 6, at 38 (stating the presence of a transition period for PIP).

[19] *See Canada, U.S. Sign Mutual Recognition Agreement*, WORLD TRADE, Aug. 2008, at 12.

[20] *See* Turnbull, *supra* note 6, at 38.

participants must reapply as if they are applying for the first time. There will be stricter minimum security criteria that have to be met.[21] There will be introduction of site visits and a new form of MOU,[22] - that is what we are essentially consulting with the CBSA about right now.[23]

CANADA'S INTERNATIONAL TRADE OBLIGATIONS

Given the perceived benefits of participation in PIP and the money that potential participants in the program and the government spends on the program, any non-compliance with international obligations that may lead to the program being challenged or terminated is a significant cause for concern.[24] This is the issue that we are dealing with today. Now, let us turn to Canada's principle trade obligations and talk about whether the PIP is consistent with those obligations. The obligations are, as it is apparent on the slide, reflected in the General Agreement on Tariffs and Trade, in the North American Free Trade Agreement, and in interpretation of those agreements.

The key issues that I will consider in my presentation are whether the PIP and FAST are consistent with the most favored nation obligations, with the national treatment obligations and with the investment rules under Chapter 11 of the NAFTA.

There are number of concerns related to the PIP program. One aspect of PIP that is a particular concern is the restriction on participation in it. As I mentioned earlier, in order to participate in PIP, entities must generally have a presence in Canada.[25] This means that nonresident importers are not able to register for PIP.[26] And, again, because PIP is a requirement to participate in FAST,[27] nonresidents are also excluded from FAST participation. Similarly, *Customs Self Assessment* is something that is not available to nonresidents.[28]

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[21] *See* Kuzelijevich, *supra* note 5, at 34 (explaining recommendations will make up new security measures that must be met).

[22] *See* Canada Border Services Agency, *Partners in Protection Application*, http://www.cbsa-asfc.gc.ca/security-securite/pip-pep/app-demande-eng.html.

[23] *See* Proposed PIP Process Documentation, *supra* note 8.

[24] *See generally* Parks, *supra* note 9, at 412 (explaining causes of concern for the program as fear of bureaucratic application, costs involved, and compatibility of technology).

[25] *See* Partners in Protection Eligibility Requirements, http://www.cbsa-asfc.gc.ca/security-securite/pip-pep/app-demande-eng.html (last visited Sept. 26, 2008) (stating PIP members must "own or operate facilities in Canada that are directly involved in the importation and exportation of commercial goods or the applicant is a U.S. highway carrier company applying for a FAST (Canada) membership").

[26] *See id.*

[27] *See id.*

[28] *See* Canada Border Service Agency, The Customs Self Assessment Program, http://cbsa asfc.gc.ca/ publications/dm-md/d17/d17-1-7-eng.html (last visited Sept. 26, 2008).

The bottom line is no matter how secure their supply chain, nonresident importers simply cannot attain the basket of benefits of PIP participation currently. With this state of affairs, one might argue that, on the face of it, the fact that nonresidents cannot benefit from PIP membership denies them a trade benefit that they are entitled to under the free trade agreement whether it be WTO or the NAFTA.

In the balance of the presentation, we will take a closer look at compliance with these obligations. Let us turn first to the Most Favored Nation (MFN) principle that is reflected in GATT Article I.[29] I will just read the relevant parts. GATT Article I applies in addition to tariffs and so forth. It applies to all rules and formalities in connection with importation and exportation[30] and to any advantage, favor, privilege, or immunity granted by any contracting party to any product originating in any other country. Any such rule or advantage is required to be accorded immediately and unconditionally to the like product originating in territories of all other contracted parties.[31] To demonstrate an MFN violation under GATT, three elements must be satisfied. First, a member country must provide an advantage of a type covered by Article I.[32] Second, the advantage must be one that is not extended to the like product of all WTO members.[33] Third, that advantage must not be granted to members immediately and unconditionally.[34]

MFN VIOLATION – "ADVANTAGE"

In the WTO context, the term "advantage" is broadly defined.[35] Here the advantage that is associated with PIP is the expectation that shipments will not be stopped or unduly delayed at the border. Also, if the border is shut down, that the PIP registrants will continue to be able to import their goods into Canada.[36] You might say that PIP registration provides a competitive advantage over those entities that are not registered.[37]

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[29] *See* The General Agreement on Tariffs and Trade, art. 1, Apr. 1994, 61 Stat. A3, 55 U.N.T.S. 308.

[30] *See id.*

[31] *See id.*

[32] *See* Won-Mog Choi, *Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States*, 8 J. INT'L ECON. L. 825, 830-831 (2005) (commenting on the first element that must be satisfied under GATT).

[33] *See id.*

[34] *See id.*

[35] *See* Marjorie Florestal, *Terror on the High Seas: The Trade and Development Implications of U.S. National Security Measures*, 72 Brook. L. Rev. 385, 401 (2007) (commenting on the differing definition of "advantage" in the WTO).

[36] *See* Day, *supra* note 16.

[37] *See* Canada Border Services Agency, http://www.cbsa-asfc.gc.ca/security-securite/pip-

The GATT panel decision in *Belgian Family Allowances* may be relevant to the issue of whether the PIP program represents a violation of GATT Article I.[38] That decision has been interpreted to stand for the principle that treatment can be different if the characteristics of the goods themselves are different.[39] But there is no justification for different treatment if based on differences in the characteristics of the exporting country rather than the goods.[40] In that case, Belgium imposed a tax on certain imports in order to support its family allowances program, and exempted from the tax goods from countries that offered a similar family allowances program.[41] Denmark and Norway sought an exemption because they felt that they had such a program and were entitled to the exemption.[42] It was found that that kind of scheme is not one that is permissible under the GATT.[43] The principles of that decision might be applicable here because PIP is really something that is more relational than simply being a set of rules applicable to imported goods.

MFN VIOLATION – "LIKE PRODUCT"

The second element required to establish an MFN violation is the failure of an advantage to be accorded to "like product" of all WTO members. Let us look at an example of a potential violation, using two identical goods. Where two identical goods – say, tomatoes – are shipped across the Canada-U.S. border, one by an entity that is PIP registered and one by the kind of entity that cannot be registered – say, a supplier in Mexico that has no presence in Canada - the goods of the registered entity will, of course, benefit from PIP from the lack of delays at the border or from market access in the case of a border shutdown. But the tomatoes from Mexico will not have the

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pep/ben-avan-eng.html (last visited Sept. 25, 2008) (listing several benefits to PIP members who "can gain a competitive advantage").

[38] *See* Report of the Panel, *Belgian Family Allowances*, G/32 (Nov. 7, 1952), GATT 1S/59 (stating that a country could not impose discriminatory internal taxes), *available at* http://www.worldtradelaw.net/reports/gattpanels/belgianfamilyallowances.pdf.

[39] *See* M. J. Trebilcock & Robert Howse, THE REGULATION OF INTERNATIONAL TRADE 60 (3d ed. 2005) ("[T]reatment can differ if the characteristics of goods themselves are different.").

[40] *See id.* ("[D]ifferences in treatment of imports cannot be based on differences in characteristics of the exporting country that do not result in differences in the goods themselves.").

[41] *See* Robert Howse & Petrus van Bork, THE WORLD TRADING SYSTEM 27 (1998) ("The law contained a further provision which declared that products from certain countries would be exempt from the tax if employers in that country paid a family allowances tax similar to the local Belgian tax.").

[42] *See id.* at 28 (stating that Norway and Denmark submitted memoranda to the GATT Contracting Parties arguing that they were entitled to the exemption under the Belgian law).

[43] *See* Trebilcock & Howse, *supra* note 41, at 59 ("The panel ruled that Article I:1 prohibits the imposition of discriminatory internal taxes.").

same benefit. So, there is an indication of differential treatment in the case of like goods that would be a violation of Article I.

Notwithstanding the foregoing, it does not necessarily follow in my view that there is a clear violation of GATT Article I. That is because PIP is available to any applicant "in similar circumstances", namely, so long as they have a presence in Canada. Furthermore it is not clear that there is a clear discrimination against "goods" of another country. The discrimination, if it occurs, results from voluntarily actions by the importer in Canada who decides whether or not to voluntarily participate in the PIP program and whether or not its suppliers in the foreign country will participate also in the program.

There is a potential argument that GATT Article III:4 might be violated even though this is the provision that tends to deal with post importation taxes and duties, based on certain GATT jurisprudence that the words "treatment no less favorable" require there be "effective equality of opportunities" in respect of laws, regulations, and requirements. If there is no equality of opportunities, this provision might also apply. There is also an equivalent NAFTA provision.

NAFTA CHAPTER 11

Now, I want to quickly address NAFTA Chapter 11. I think there is a potential argument to be made that there could be a claim under NAFTA Chapter 11 in very specific circumstances. For example, a U.S. company may incorporate a subsidiary in Canada but not establish any physical presence and conduct its business with Canada by importing goods into a public warehouse until they are sold. If such an investor is not allowed to register for PIP because it has no presence in Canada or an insufficient degree of presence, then perhaps that might be a basis to argue there has been a violation of NAFTA Chapter 11.

INVOKING THE NATIONAL SECURITY EXCEPTION

Turning to the final portion of my presentation, I will address whether any violation of a free trade agreement by PIP is nevertheless immune from challenge on the basis of the "national security" exception provision found in both the GATT and NAFTA. The provisions of GATT Article XXI are quite broad, and provide in part that

> Nothing in this Agreement shall be construed ... to prevent any contracting party from taking any action which it considers necessary

for the protection of its essential security interest ... taken in time of war or other emergency in international relations ...[44]

Sometimes GATT Article XXI(c) is relied upon, namely, that nothing can prevent the contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of the international peace and security.[45]

There have been several cases where member countries have relied on GATT Article XXI. Unfortunately, none of the GATT panel decisions provide any useful guidance on how to interpret Article XXI, but what the practice and the existing jurisprudence suggests is that this is a self-judging provision, so countries who decide to rely on Article XXI have the right to rely on it, and the GATT panels cannot really make a decision for those countries on whether it was valid or not.

And therefore, I think that is really the bottom line here; that any violations - alleged violations- in the PIP program can be justified under GATT Article XXI or under the equivalent NAFTA provision.

UNITED STATES SPEAKER

David R. Hamill[†]

MR. HAMILL: Just a couple of observations before I start. When I was in the airport this morning looking at my presentation, I realized that I forgot when the agriculture quarantine inspection fee exemption was removed for Canada in 2007,[46] so I did what any good lawyer would do, I Googled and

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[44] *See* General Agreement on Tariffs and Trade art. 21, 1947 (stating that the Agreement does not prevent any party from taking actions necessary to protect essential security interests), *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm.

[45] *See id.*

[†] Dave Hamill focuses on international, customs trade policy and disputes, and export controls and sanctions issues. Dave has represented Fortune 500 companies whose imports and exports are regulated by the Department of Homeland Security (DHS) and the Bureau of Customs and Border Protection (CBP). His experience includes assisting companies with customs audits, including focused assessments, importer self-assessments and NAFTA verifications. His client work covers the wide range of commercial enforcement laws and policies that DHS ad CBP administer, which include the following: duty preference programs such as NAFTA; tariff classification; valuation; entry procedures; custom brokerage; country of origin marking; bind rulings; anti-terrorism and border protection (e.g. the Customs- Trade Partnership Against Terrorism (C-TPAT), the Bioterrorism Act (BTA) regulations, and the new advance manifest requirements); export controls and sanctions; voluntary disclosures; seizures and forfeitures, fraud and strategic investigations; and civil and criminal penalties.

[46] *See Agriculture Inspection, User Fee Requirements Begin June 1 for Commercial*

found that answer out. But also what I found out was that the CUSLI moot court that had actually addressed the legality of removing that exemption I believe in 2007, and I did not have enough time to look at it, but just for folks who are interested, you know, these talks about this topic is very timely in terms of your involvement.

The other thing I thought I would mention, too, I am glad that we did not go into a long exhaustive discussion of our backgrounds, but I did work at the U.S. Department of the Treasury for ten years and had worked on a lot of these fee issues, merchandise processing fee extensions, the U.S. Supreme Court constitutional case involving harbor maintenance fees,[47] and now I have been in the private sector, so hopefully I bring a balance to this, and I like to think I see both sides although the government side is becoming a little more faded as I move along. Anyway let us start.

Basically I am going to talk about U.S. cross-border fees from a Canadian perspective. And what was surprising to me -- and I guess to start off, and I did talk with Bridget Matthiesen who was here earlier in this session is that our firm was commissioned to do a study on these border fees by the Embassy of Canada. And I felt, boy that is going to be pretty easy. We just have to call up the government agencies and get this data, and it was anything but. Not the agency's fault, but it is the laws that are on our books that require agencies to collect and in certain cases not mandate collections.[48]

So the analysis that we did which I will present summarily later on in this presentation makes certain assumptions, and some of those assumptions could be criticized or could be faulted, but we tried to do the best we could to try to get the magnitude of how these fees affect Canada vis-a-vis other countries because as I will explain, these fees are not organized and collected by country in a lot of situations. And then lastly we will talk about a recent government accounting office study that looked at air and sea fees and how that might relate to land fees[49] and some other recommendations I have on this topic.

Trucks, Railroad Cars Entering U.S. From Canada, http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2007_news_releases/052007/05302007.xml (last visited Sept. 25, 2008) ("Effective March 1 [2007], APHIS removed the inspection exemption for Canadian-grown fruits and vegetables . . . .").

[47] *See* U.S. v. U.S. Shoe Corp., 523 U.S. 360 (1998).

[48] *See, e.g.,* 13 U.S.C.A. §301 (West 2008) (collection and publication of foreign commerce and trade statistics).

[49] *See generally* U.S. GEN. ACCOUNTING OFFICE, U.S. CUSTOMS SERVICE: REASONABLENESS OF COSTS FOR PROCESSING AIR AND SEA PASSENGERS CANNOT BE DETERMINED (Feb. 29, 2000) (discussing air and sea fees), *available at* http://archive.gao.gov/f0302/163356.pdf.

I presented to you here in one page the fees that we looked at. The COBRA fee which is essentially a conveyance fee,[50] the merchandise processing fee which is essentially a fee assessed on importations[51], and the importer of record pays for that.[52] And from a GATT/WTO perspective, there was a 1987 case which the U.S. was challenged on this,[53] and as a result we had to -- or our solution was to cap that fee at $485 per entry,[54] and that has not been challenged yet. The harbor maintenance fee which now is only paid by the importer, not the exporter, and that funds harbor dredging,[55] and the AQI fee, the agricultural quarantine inspection fee which is administered by APHIS which that part of APHIS is now part of the Customs and Border Protection Agency.[56] And then some special agriculture fees which I am not going to mention here, but know that there are a lot of them, and they can really nickel and dime you.

You know, I am here because it is the CUSLI, and how do these fees affect Canada? And you know, historically I think there has been a special relationship between Canada and the U.S., and this has extended to fees. Article 310 of the NAFTA says no increases in Customs users' fees.[57] Canadian shipments are exempt from merchandise processing fees in certain cases, and Canada historically had been exempt from the APHIS fees,[58] but it is not as good or as easy as it sounds.

In order for Canadian merchandise to be exempt from the merchandise processing fee, you have actually got to claim NAFTA on your entry summary form.[59] And even in cases where the duty would be zero, and as

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[50] *See id.* (stating that COBRA authorizes Customs to charge user fees for conveyances).

[51] *See generally* 19 C.F.R. § 191 (2008) (explaining that merchandise processing fees are fees on imports), *available at* http://edocket.access.gpo.gov/2004/04-22599.htm.

[52] *See id.* (stating that merchandise processing fees are paid by the importer of record).

[53] *See* Report of the Panel, *U.S. Customs User Fee*, *L/6264* (Feb. 2, 1988), GATT *35S/245* (GATT panel challenging U.S. Customs User Fee), *available at* http://www.worldtradelaw.net/reports/gattpanels/uscususerfee.pdf.

[54] *See* EUROPEAN COMMISSION, U.S. BARRIERS TO TRADE AND INV. 22 (Apr. 2008) (stating that the U.S. capped its merchandise processing fee at $485 following a 1987 GATT Panel decision), *available at* http://trade.ec.europa.eu/doclib/docs/2008/april/tradoc_138559.pdf.pdf.

[55] *See* U.S. Shoe Corp. v. U.S. 114 F.3d 1564, 1567 (1997) ("The [harbor maintenance] fees were designed to finance the cost of harbor dredging.").

[56] *See Agriculture Inspection, supra* note 46 (stating that Customs and Border Protection conducts all inspections on the U.S.-Canada border).

[57] *See* North American Free Trade Agreement, art. 310, Dec. 17, 1992 (discussing limitations on the use of customs user fees), *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm.

[58] *See Agriculture Inspection, supra* note 46 (explaining that Canada was previously exempt from APHIS fees).

[59] *See* 19 C.F.R. §181.21 (2008) ("[F]or the exemption from the merchandise processing fee, for a good under the NAFTA, the U.S. importer must make a formal declaration that the good qualifies for such treatment. The declaration may be made by including on the entry

many folks here I am sure are familiar with NAFTA and the paperwork associated with that. From a business standpoint, some companies just do not feel that it makes some business sense to make that claim because of all the paperwork and the potential audits that may be associated with it. So we have determined that in about 45 percent of the shipments from Canada it is not claimed.[60] That is pretty high, and that in essence guts a lot of the NAFTA exemption if you will for Canada. The APHIS exemption for Canada was removed in 2007. My Google research said that it was June 1, 2007. There was some phase-out in March 1, but the final removal was in 2007.[61] And then based on our studies, we determined that Canada pays a disproportionate amount of COBRA in harbor maintenance fees,[62] so much for that special trading status.

I want to talk a little bit about what we found when we tackled this. As I mentioned before, I thought that this was going to be a pretty easy assignment, maybe the embassy knew better than we did when they asked us to do this. First of all, the U.S. law does not require Customs and census to maintain data on user fees by specific country,[63] which just astounded me. But the law does not require that, so as a former government employee, do not do anything that you are not told to or not required to do. Customs is not required to maintain information regarding the number of border crossings by transportation mode.[64] In the panel before us, we saw how the mode of transportation is quite important to some of these decisions, and to not have that data I think is problematic in terms of figuring out how these fees impact stakeholders. However, census which is under the Department of Commerce -- and I think I read somewhere someone from the Department of Commerce was here, I do not know whether they are from census or not -- but anyway, they maintain import values for Canada for air and vessel conveyances, but not for truck and not for rail,[65] and that is obviously what we were interested

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summary, or equivalent documentation . . . .").

[60] *See* ROBERT KUNIMOTO & GARY SAWCHUK, NAFTA RULES OF ORIGIN 19 (2005), http://www.policyresearch.gc.ca/doclib/DP_NAL_NAFTA_200506_e.pdf ("From 1998 to 2003, approximately [only] 54% of all imports into the United States from Canada used NAFTA status.").

[61] *See Agriculture Inspection, supra* note 46 (stating that as of June 1, 2007, APHIS would remove the inspection exemption).

[62] *See* KUNIMOTO & SAWCHUK, *supra* note 60 (finding that Canada only used NAFTA status 54% of the time, meaning they paid more fees than necessary).

[63] *See generally* 19 C.F.R. § 163 (2008) (record keeping requirements).

[64] *See id.* (record keeping requirements).

[65] *See* North American Transportation Statistics Database, http://nats.sct.gob.mx/nats/sys/techdoc.jsp?i=3&id=19 (last visited Sept. 25, 2008) (stating that the U.S. Department of Commerce handles statistics for air and vessel, while the U.S. Department of Transportation handles statistics for truck and rail).

in. And that was -- that is the last point. So you can see that collecting this data in and of itself was problematic.

These next few slides are some of the figures that we determined based on some assumptions that we thought how Canada played with respect to other countries including China. First of all, with respect to harbor maintenance fee, there is a $3.3 billion surplus.[66] The Army Corps of Engineers is the agency that is responsible for spending that money. So right now, HMF is being collected and it is going into this till, but it offsets our budget deficit, so there are some politics I believe that are involved in that. But as that gentleman is laughing, I guess he agrees with me. But harbor maintenance fee is just essentially going into a big pot, and we could have a whole session on that.

Again, these will be in your materials, but these are some of the determinations that we made based on essentially getting data from sort off isolated source from Customs, from census, again, making some assumptions, and our general finding was that we thought Canada was paying a disproportionate amount of these fees, which anecdotally I think it was. We thought it was the case, but at least our study suggested this. And it is interesting. I gave a presentation on this at the embassy, and there was somebody I believe from the Department of Transportation there who did not like my presentation. And essentially what I told him was, you know, this could be flawed, but, you know, we would like you to do a study to sort of challenge this. And you know that is one of our recommendations is either through what we call a section 332 investigation or getting some sort of law changed where they would have to collect this information.

The GAO study was the first part of it, but it only covered air and sea, but interestingly when I got to the end, some of their recommendations and findings I think dovetailed with some of the findings that we made here. Again COBRA fees. Surprise, surprise. They went it by 10 percent.[67] That is another point, too. Some of these fees are statutory; some of these fees are regulatory. The statutory fee, sometimes they prescribe a specific fee.[68] Sometimes the statute says that the agency has the discretion.[69] And in this

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[66] *See* Ambassador Wilson, *The Canada-U.S. Border: Free Trade in a time of Enhanced Security* (Mar. 29, 2007), http://geo.international.gc.ca/can-am/washington/ambassador/070329-en.asp (last visited Sept. 25, 2008) (stating that the Harbor Maintenance Fee fund has a $3.3 billion surplus).

[67] *See* U.S. GEN. ACCOUNTING OFFICE, CUSTOMS SERVICE: INFORMATION ON USER FEES (June 1994) ("[I]ncreased the air and sea passenger processing user fee from $5.00 to $6.50 . . . ."), *available at* http://archive.gao.gov/t2pbat3/152022.pdf.

[68] *See id.* (discussing the NAFTA Implementation Act of 1993 which prescribed a specific COBRA user fee).

[69] *See, e.g.,* QUESTIONS AND ANSWERS: AGRICULTURE INSPECTION AND AGRICULTURAL QUARANTINE INSPECTION USER FEE REQUIREMENTS FOR CANADA (2007)

case, Customs exercised that discretion. APHIS fees are what we call agriculture quarantine inspection fees.[70] They are the most controversial I believe right now as many of you may have read or feel, and food security, import safety is a growing issue within U.S. Customs. There is a lot of pressure on Customs inspectors to keep out tainted food. And one of the areas where the U.S. government has been focusing on is transshipments through Canada. And I do not even know if it actually talked about it in the notice of proposed rule making on these fees. But there was a sense that some of the agricultural food was being transshipped from Asia to Canada to the United States, and that was a justification for removing the exemption for Canada.[71] And there was a big lobbying effort frankly to keep that exemption and a lot of people worked very, very hard to try to keep that from happening, and the U.S. government still removed the exemption.[72] So just shows you how important fees are for the government.

And I think I probably should have said this in the beginning when we talk about certain challenges to the fee. You know, a user fee is a cost that is assessed for a service, and the legal test is it has got to be a fair approximation.[73] It has got to cover the fair approximation of that cost. That is why the MPF was challenged in the GATT because it was an ad valorem fee and the commensurate cost associated with that fee was not necessarily related to value, and that is why it was capped.[74] So there are ways to challenge these fees, but they are very, very popular within the U.S. government because within the U.S. government a fee is not a tax,[75] and that is really, really important.

These are some other findings. I think we covered these first four. Let us see if anything else here -- this second bullet is very, very important, and it relates to the findings, is that fees go in like the merchandise processing fee,

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http://www.aphis.usda.gov/publications/plant_health/content/printable_version/faq_canadian_user_fees.pdf ("The Food, Agriculture, Conservation, and Trade Act of 1990, authorizes the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) to collect agricultural quarantine inspection (AQI) user fees.").

[70] *See id.* (stating that APHIS collects Agricultural Quarantine Inspection (AQI) fees).

[71] *See Agriculture Inspection, supra* note 46 ("Recent inspections . . . resulted in numerous interceptions of prohibited fruits and vegetables, originating from regions other than Canada.").

[72] *See id.* (discussing the removal of the exemption).

[73] *See* Bolt v. City of Lansing, 459 Mich. 152, 162 (1998) ("Such a measure will be upheld by the courts when . . . the revenue derived there from is not disproportionate to the cost of issuing the license . . . .").

[74] *See* EUROPEAN COMMISSION, *supra* note 54 ("The Panel ruled that customs user fees should reflect the approximate cost of customs processing for the individual entry in question. This principle was not met by an ad valorem system such as that used by the U.S.").

[75] *See U.S. Shoe Corp.*, 523 U.S. at 361 ("Although the Export Clause categorically bars Congress from imposing any tax on exports . . . it does not rule out a 'user fee' . . . .").

the COBRA fee, and there is no way that Customs can measure at this point whether that fee is going for payments for services that that fee was intended.[76] The GAO study noted this too, and you know, that was our view when we were looking at this. And how you can measure whether a fee can go up or down, or in all cases it is either going to be frozen or gone up, go up. Unless you can measure what it is being used for, and I think there really has to be some further work done in terms of providing Customs the legal authority, and providing census legal authority. I am not here to criticize the agencies. In fact I am probably here criticizing the way the law is structured, and think the agencies if they are given the tools to do this can better measure how these fees are being used.

And then this last point, too. Congress again, some of these fees have to be authorized by Congress even though they are sitting in a pool ready to go.

My last point -- and I think I am on time here which is great and amazing -- is that as I mentioned before, the GAO study only covered air and sea Customs fees. There is still no comprehensive study on land border crossing fees. I believe it is essential, there is so much trade going on between Canada and the U.S. by rail and by truck that I think that has to be studied. That can either be done through what we call the section 332 investigation conducted by the International Trade Commission[77] or any sort of special study that is authorized by Congress. Point that I just made that U.S. Customs cannot fully account for the fees. Reinvigoration of a user fee advisory committee. There was a user fee advisory committee. I cannot remember whether it was restricted to air fees or air processing fees or whether it was more comprehensive, but knowing a couple people that were on the committee, it was a little bit of a rubber stamp. There is some advisory committees in Washington that are very effective such as Co-Op and some other committees, and this committee I think whether they did not know their mandate or whether there was not really high traction in Customs, but I think something needs -- I think that would be a good recommendation.

And the last point is, you know, without reviews we are not going to know how these fees are going to affect the payers of the fees and the projects for which they are supposed to fund. So that is my concluding comment, and I turn it over to Cyndee.

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[76] *See generally* U.S. GEN. ACCOUNTING OFFICE, FEDERAL USER FEES: SUBSTANTIVE REVIEWS NEEDED TO ALIGN PORT-RELATED FEES WITH THE PROGRAMS THEY SUPPORT 24 (Feb. 2008) ("All of the fees we reviewed suffer from some misalignment—although the nature of that misalignment varies—which affects how the fees are used."), *available at* http://www.gao.gov/new.items/d08321.pdf.

[77] *See* 19 U.S.C.A. §1677 (West 2008) (authorizing investigation by the International Trade Commission).

CANADIAN SPEAKER

Cyndee Todgham Cherniak[‡]

MS. CHERNIAK: Thank you very much, David.

And I have kind of changed the focus of my presentation having spoken about ITARs earlier today. And as you are aware, it has been mentioned twice over the course of the weekend. I was the author of the Niagara International Moot bench brief,[78] and one of the issues in that bench brief was the national security exception.

The other thing that I have done over the last year was looking at the 100 free trade agreements, so I am going to focus in on the national security exception and give some -- my points of view from looking at 100 free trade agreements, what can be done on a going-forward basis.

And while I usually agree with everything Greg says, in the course of my research into the national security exception, I did come across a case that I brought to the attention of all of the judges in the moot. It is a concerning military and paramilitary activities in and against Nicaragua, and it is an ICJ report, 1986, and I focused in on paragraphs 221 to 224.[79] So you can look at it at your own leisure. But in this case, the ICJ basically said we look at to see whether or not there has been a breach, and then we can look to see whether or not a national security exception applies.[80] They were looking at a treaty that was long before NAFTA and long before some of the more recent GATT jurisprudence, but that particular treaty has similar language to what we are using today. And in paragraph 225, they said since the national security exception contains a power for each of the parties to derogate from

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78 *See* CYNDEE TODGHAM CHERNIAK, 2007-08 NIAGARA INTERNATIONAL MOOT COURT COMPETITION: BENCH BRIEF 1 (2007), http://cusli.org/niagara/documents/2008%20Niagara%20Bench%20Brief%20Final.pdf.

79 *See* Military and Paramilitary Activities (Nicar. v. U.S.). 1986 I.C.J. 14, 115-17 (June 27), *available at* http://www.icj-cij.org/docket/files/70/6503.pdf.

80 *See id.* at 136 ("The Court will first proceed to examine [the breach] . . . and then determine whether they are nevertheless justifiable by reference to Article XXI [security exceptions].")

the other provisions of the treaty,[81] the possibility of invoking the clauses of that article must be considered once it is apparent that certain forms of conduct by the United States in this particular case would otherwise be in conflict with the relevant provisions of the treaty. The appraisal of the conduct of the United States in light of these relevant provisions of the treaty pertains to the application of the law rather than to its interpretation. And the court will therefore undertake this in the general context of its general evaluation of the facts established in relation to the applicable law.

So in my point of view and what I have put out in the bench brief is it is not that self-determining by a country. They cannot just go ahead and invoke the national security exception. It is possible for a dispute settlement body at a later point in time to come and assess whether or not they were using their power appropriately. Another thing that I would like to give to you from the bench brief is I looked at a couple definitions for the term of national security and some of them struck me, and this is why I am sharing it with you today, is because it left a lasting impression in my mind, some of these statements. The statements I am going to read for you are from a book called "The Law in Times of Crisis: Emergency Powers in Theory, in Practice." And I am picking two of many definitions. One is national security is an inherently vague concept that is hard to define. Existing definitions include many variables, vague terms, uncertainty, greater leeway for discretion, and flexibility of interpretation. So this is on one side of the equation. On the same side of the equation, we have got national security is not a term apart with precise analytic meaning. At its core, the phrase refers to the government's capacity to defend itself from violent overthrow by domestic subversion or external aggression. But it also encompasses the ability of the government to function effectively so as to serve our interests at home and abroad. Virtually any government program from military procurement to highway construction and education can be justified in part as protecting the national security.

So that is on one side of the equation. Where I send up the warning side is the other side, and it is the us versus them mentality that can be created as a result of looking at national security interests or phrasing something in terms of national security interests. And the quote that I have given you also comes from that same book. In times of crisis when emotions run high, the dialectic of us versus them serves several functions. It allows the people to vent fear and anger in the face of actual or perceived danger and direct negative emotional energies towards groups of individuals clearly identified as different. This same theme also accounts for the greater willingness to confer emergency powers of the government when the other is defined and clearly

[81] *See id.* at 117 ("Article XXI of the 1956 Treaty contains a power for each of the parties to derogate from the other provisions of the Treaty.").

separable from the members of the community. The clearer the distinction between us and them and the greater the threat they pose to us, the greater the scope the powers assumed by the government and are tolerated by the public become. And I want to avoid the 'us' versus 'them' mentality.

And when I look at that Canada-U.S. relationship, we are friends. We are neighbors. We are brothers and sisters. You know, we were often described as being family, and so it should not be an us versus them mentality. When I look at the words of the national security exceptions, I see a requirement that we be at war or have an international problem with each other. We do not. Nothing is so serious in our relationship with each other in my opinion to allow the national security exception to override provisions agreed upon in the NAFTA or at a multilateral level in the WTO.

Maybe, you know, United States versus Iraq right now, you would be able to invoke the national security exception, but not in respect of the relationship between Canada and the United States. So in my view -- and I believe that we have to exercise caution not only in you invoking the national security exception or suggesting that something may be justified, but even when I look at the most recent discussion in the Canadian newspapers about the MDA Aliant deal, there, you know, was a question raised by the NDP party in Canada whether or not this was against Canada's national security interest.[82] In my personal view, we just should not throw around the word "national security" as if it has no meaning. We have to use the phrase very cautiously, especially when we are talking about our closest trading partner, the United States.

So that is the mentality that I come from and the position that I come from. And I believe that if you use the national security exception too often or in the wrong circumstances, it gives to ability to water down the obligations under the NAFTA, so we have agreed not to impose new Customs user fees in the NAFTA. If you can say, oh, we will we are going to oppose the APHIS fee, but it is on the basis of national security, well, the bargain has just been ripped up with respect to that particular right that has been provided.

Also when you look at PIP -- now, you know, I am not as concerned with the PIP program, but if it turns out that it does violate, you know, the GATT or the national security -- I mean national treatment or MFN, then, you know, just saying, well, it is okay because it is national security, well, then everything -- and, you know, if it is a government gets to decide what is in the name of national security and does not have to justify it, then every single

[82] *See Generally Prentice Defends Decision to Block MDA Sale*, CTV.CA NEWS, Apr. 10, 2008 (discussing the pros and cons of the MDA Alliant deal), available at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080410/radarsat_sale_080410?s_name=&no_ads=.

obligation that you have agreed to can just be watered down and no longer exist. I do think that in free trade agreements on a going-forward basis, we have to consider this more. And I was heartened yesterday to hear that there is actually a negotiation going on between Canada-United States on national security principles and maybe even a side agreement is being negotiated at this point in time.[83] And there is a question, do you enter into a free trade agreement and include the national security provisions if the free trade agreement, or would it be better to have it in a side agreement so that it can evolve?

We all learned a valuable lesson from 9/11, many, many valuable lessons, but one of the valuable lessons is sometimes things evolve you did not foresee something to happen, and you need to be able to adjust behavior, you need to be able to sit down and discuss things as trading partners and evolve your trading relationship and your trading agreement with each other. So maybe, you know, it would be better to have this in a side agreement as opposed to in the body of a free trade agreement so you do not have to reopen the free trade agreement in order to further discuss and evolve one's thinking on certain measures that have a national security aspect to them.

But I do have a couple provisions that I am sharing with everyone who has come, so if you do not have this paper, there are a few more here. But I have attached at the back of my provisions from my matrix a provision from the closer economic partnership agreement between Thailand and New Zealand.[84] This is one of the few examples that is out there where two trading partners during the course of their negotiations thought about this issue, and they included an article 311, a provision on security.[85] It is not quite as evolved as where I think we should be if Canada is going to add this to some new free trade agreements, and if United States gets back in the free trade agreement game, I am not really sure whether or not it is stalled right now. But in the future, I think that this sort of provision may start as a basis for a side agreement. It says in the event either party desires to adopt procedures to ensure the security of trade and goods and/or the movement of craft between the parties, the Customs administration shall consult with a view to agreeing to procedures to secure such trade and/or such movement of craft.[86] And I am

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[83] *See* SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA: KEY ACCOMPLISHMENTS SINCE AUGUST 2007 (Apr. 22, 2008), http://www.spp.gov/pdf/key_accomplishments_since_august_2007.pdf (discussing collaboration between the United States and Canada for smart and secure borders).

[84] *See generally* Thailand-New Zealand Closer Economic Partnership Agreement, Apr. 19, 2005 (economic agreement between Thailand and New Zealand), *available at* http://www.mfat.govt.nz/downloads/trade-agreement/thailand/thainzcep-december2004.pdf.

[85] *See id.* at art. 3.11 (detailing an agreement on the security of trade and repression of terrorist activity).

[86] *Id.*

amazed. This is one of the few places that I have actually seen a provision on security like this.

In 3.12 of the same Thailand-New Zealand Closer Economic Partnership Agreement, they got provisions on paperless trading and the use of automated systems.[87] This sort of clause is also showing up in the more recent U.S. free trade agreements, but right now is not in the Canada agreement, so that is why I am going to raise it with the audience today is this provision says the Customs administrations of both parties in implementing initiatives that provide for the use of paperless trading shall take into account certain methods of APEC and the world Customs organization.[88] There is also a provision that says that the parties shall adopt electronic procedures and reporting requirements.[89] There is also another provision on risk management, that they will cooperate with each other to develop risk management techniques in the performance of their Customs procedures.[90]

And so these are nice precedents that exist currently within free trade agreements that Canada and the U.S. can look at for their future discussions, but also future discussions with other countries, especially developing countries where we might have a greater concern about some security issues, and maybe in the future will want to evolve that.

In the United States-Australia free trade agreement, there are provisions on anti-corruption[91] and a few free trade agreements outside the U.S. free trade agreements also deal with this particular issue.[92] Canada's free trade agreements do not at this point in time, but I believe that corruption is an issue that actually should be within the free trade agreements in some shape or form, and the reason for this is when you are dealing with the developing countries, there is a degree of poverty and there is a degree of underpayment of the public officials. And corruption is a problem in a number of

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[87] *See id.* at art. 3.12 (detailing an agreement on paperless trading and the use of automated systems).

[88] *Id.*

[89] *See id.* ("The customs administrations of the Parties shall, as soon as practicable, adopt electronic procedures for all reporting requirements, consistent with the provisions of Chapter 10 of this Agreement.").

[90] *See id.* at art. 3.13 (detailing an agreement on risk management).

[91] *See* U.S. – Australia Free Trade Agreement, art. 22.5, May 18, 2004 (detailing an agreement for cooperation on anti-corruption efforts), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file148_5168.pdf.

[92] *See, e.g.,* APEC.org, *Anti-Corruption and Transparency Experts Task Force*, http://www.apec.org/apec/apec_groups/som_committee_on_economic/som_special_task_groups/anti-corruption.html (last visited Sept. 25, 2008) (describing the Asia-Pacific Economic Cooperation task force committed to fighting corruption).

jurisdictions where we want to trade. And so I see a potential breach to security is the whole corruption issue.

And also if we want to communicate clearly that Canadian companies or American companies will not do business with people and will not engage in such behavior, having it in the free trade agreements I think is a great please to put it as well as having it at the multilateral level of the OECD. But in article 22.5 of the U.S.-Australia free trade agreement, it says the parties shall cooperate in seeking to eliminate bribery and corruption, and to promote transparency in international trade.[93] They are committed to seeking avenues in relevant international fora to address bribery, corruption, and transparency, and to build on anti-corruption efforts in these fora.

In the United States-Singapore free trade agreement – and I will not go through the provisions -- but article 5 .2 deals with anti-circumvention.[94] Article 5.3 deals with monitoring and other such issues.[95] And these sorts of ideals can also be included in Canada's free trade agreements on a going forward basis. In the EU-Morocco Euro-Mediterranean agreement, there is a very interesting provision on cooperation in Customs matters,[96] but it is similar but different to what you see in the NAFTA and some of the U.S. agreements. They also have provisions, article 61, on money laundering[97] and article 62 on combating drug use and trafficking,[98] which we do not see in North American free trade agreements at this point in time. So some real great precedents are out there.

And the last precedent that I would like to bring to everyone's attention is in the Japan -- all of Japan's free trade agreements, but the example that I have given to you is from the Japan-Indonesia economic partnership agreement, which is one of the most recent agreements, and in that agreement I am focusing in on certificates of origin at this point in time. And the involvement of the exporting government in the issuance of certificates of origin, but I also say, you know, in the whole compliance in where we get into PIP and C-TPAT in this whole process of verifying before the goods leave the country, and right now it is the importer that is responsible for communicating in Canada and in the United States with respect to any

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[93] U.S. – Australia Free Trade Agreement, *supra* note 97.

[94] *See* U.S. – Singapore Free Trade Agreement, art. 5.2, May 6, 2003 (detailing agreement on anti-circumvention), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

[95] *See id.* at art. 5.3 (detailing an agreement on monitoring).

[96] *See EURO MEDITERRANEAN AGREEMENT,* OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, Mar. 18, 2000 at 15 (detailing an agreement on cooperation in customs matters), *available at* http://www.maec.gov.ma/en/accord_en.pdf.

[97] *See id.* (detailing an agreement to cooperate in the prevention of money laundering).

[98] *See id.* (detailing an agreement to combat drug use and trafficking).

importations. And if there is a problem with the certificate of origin, generally speaking it is the importer that is on the hook.

The system that Japan has in place is that the exporter goes to the Japanese government or Indonesia goes to the Indonesian government and says "please certify that these goods are originating for the purposes of our free trade agreement."[99] And they get a certificate that is issued by the government or by a chamber, and then they are able to issue certificates of origin, but it is all pre-cleared by the exporting government and the exporting government has a role to play in the compliance with respect to are these goods originating and entitled to preferential treatment.[100] I think that we can go beyond this and use these provisions as a precedent for some of the security measures that we have talked about earlier today.

So I will wrap up and just say that we do have precedents. We are seeing things evolved. We have more evolution that can take place, but I see it as a positive future as opposed to negative one.

Thank you.

MS. IRISH: Okay. Before I open the floor for questions, I am going to ask our two previous speakers if they wish to comment and reply or add anything to Cyndee's comments. Greg first.

MR. KANARGELIDIS: I can make a few brief comments in response to the points Cyndee has raised. It is not always an "us versus them" situation as Cyndee describes it. The U.S. trade embargo against Nicaragua was clearly "us versus them",[101] but PIP is not of this type, it is really more of an "us versus the rest of the world" issue. So in that sense, if there is discrimination at all, it is against the world at large ensuring that the goods - wherever they are - are secured. So I would say in response to Cyndee that her argument should not be applicable to PIP since PIP cannot be characterized as an "us versus them" measure.

The experience that we have seen in GATT is that there is strong pressure to exclude from a panel's terms of reference the question whether there was justification for relying on Article XXI, with the result that a panel has no jurisdiction to come to any conclusion one way or the other on whether the GATT contracting party had violated the GATT. In other words, at least as far as GATT jurisprudence is concerned, GATT panels will not make a

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[99] *See* Agreement between the Republic of Indonesia and Japan for an Economic Partnership, Part 2, Sec. 1, Aug. 20, 2007, http://www.mofa.go.jp/region/asia-paci/indonesia/agree0807.pdf (describing the process for acquiring a certificate of origin).

[100] *See id.*

[101] *See Generally* U.S. Extends Embargo On Nicaraguan Trade, NY TIMES, Apr. 26, 1988 (discussing the trade embargo against Nicaragua), *available at* http://query.nytimes.com/gst/fullpage.html?res=940DE2DD113DF935A15757C0A96E948260.

determination on this point at all. They will leave it to the government in question that imposed the measure.

On a related point, there is a question of whether national security provisions should be included in trade agreements at all, on the basis that "national security" is the inherent right of a contracting party, and that this is reflected in the text of Article XXI. In other words, the argument goes, even if Article XXI did not exist a contracting party would still have an inherent right to do what is necessary for the national security. These GATT members argue that Article XXI is superfluous.

MR. HAMILL: Yeah. I am going to comment on the last portion of Cyndee's presentation which resonated with me in that I think historically we have looked to the importer or the importing country for a lot of these obligations, you know, whether it is regulatory compliance or providing data which was the focus on my presentation. And I think you see in free trade agreements, but in other proposals as well that we are trying to get information from the exporting country or from the carrier before it hits the border so that, you know, not only are we getting true and accurate information, but security-related decisions can be made with respect to inspections and the like. I am sure everyone may be aware of the 10+2 proposal which is geared towards getting this information from the carrier in most cases prior to arrival.[102] So I think that is a common theme that extends to a lot of other areas in addition to free trade agreements.

MS. IRISH: And now I will open the floor to questions.

DISCUSSION FOLLOWING THE REMARKS OF GREG KANARGELIDIS, DAVID R. HAMILL AND CYNDEE TODGHAM CHERNIAK

MR. VANDEVERT: On the last point about getting export certification, I make a connection with the prior comment that we had with the panel on the border crossings, and instances where it appears that CBP -- and it is not to single out CBP, but that a Customs authority sort of questioning the validity of a passport issue by another country.

I have had direct experience with export certificates in the Oseon AFTA provisions,[103] and it is a big problem. It sounds like a great idea, well, the

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[102] *See CBP Issues Proposed Rule Requiring Additional Cargo Information*, Jan. 2, 2008, http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2008_news_releases/jan_2008/01022008.xml (last visited Sept. 25, 2008) ("The Security Filing, also known as '10+2,' is another step in the Department of Homeland Security's (DHS) strategy to better assess and identify high-risk shipments to prevent terrorist weapons and materials from entering the United States.").

[103] *See generally* Association of Southeast Nations Free Trade Area, 1992 (discussing certificates of origin under the AFTA agreement), *available at*

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government certified this qualified that this good qualifies. Even with those government certifications, the Customs authorities on the importing countries continually doubt validity of the certificate of origin. And they have an instinctive either request or concern, we need to see more, we need to understand and validate this. We are not going to take just the declaration of an exporter or even if certified by the exporter's government.

MS. CHERNIAK: You are absolutely right. It is just another method to be put into place, but I mean the importing country always will have the right to question whatever information that they are being given. These are just precedents for how they can evolve relationships at this point in time. And I found this to be a very interested idea looking at Japan when I am used to the North American experience.

MR. HAMILL: I also think part of the issue is that origin can mean different things depending on the law. I mean, something that is NAFTA originating does not necessarily extend to what is considered origin for other purposes. So, you know, does the foreign government really understand or the exporting government really understands what that definition is? And I think as, you know, if I were a CBP officer, unless it was like wholly originating, I might question it myself. But I agree with Cyndee, it is sort of a step one to maybe further steps.

MS. IRISH: I have two questioners. First Michael.

MR. ROBINSON: Michael Robinson. There have been some recent cases, arbitral decisions on the self-assessing thing that are quite important that bear on this whole idea of whether a country can decide what is its national security interest. And they arose out of the case against Argentina at ICSID, International Center for the Settlement of Investment Disputes.[104] There is the CMS case, the Azerex case, the Genavaldesol.[105] I have to read all these things because I teach in this area of investment law. They are all found in a wonderful service called Transnational Dispute Management which is expensive. But fortunately my library pays for it at the law firm. And it was very clear there that the panel said, I am sorry, Argentina, you cannot decide what is a national emergency; we will decide. And they looked towards the opinion of the international law commission of the United Nations that spells out quite clearly in what circumstances there is a national emergency which I think is directly comparable to the national security exemptions, so I think all these cases will bear on -- you do not have to go

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http://www.aseansec.org/10148.htm.

[104] *See* Jürgen T. Kurtz, *ICSID Annulment Comm. Rules on the Relationship between Customary and Treaty Exceptions on Necessity in Situations of Financial Crisis*, ASIL INSIGHTS, Dec. 20, 2007, http://www.asil.org/insights071220.cfm (discussing Argentina's use of the national security exception).

[105] *See id.* (discussing CMS Gas Transmission Co. v Argentina).

back to when the U.S. -- that Nicaragua case at the ICJK -- very current stuff now coming out of ICSID.

MS. CHERNIAK: Well, I agree, Michael. The reason why we have the ICJK send the bench brief was because the ICJ was the one who was judging the Niagara international moot, so that is why I had that particular paragraph that I was able to read out to everybody today.

MS. IRISH: Questioner here at the front.

MR. PIERSON: I got to work on your problem.

MS. CHERNIAK: Now you know some of the answers.

MR. PIERSON: I do something about this, and I would just note that the Nicaragua panel at the end had sounded all the fire alarms for the back of the national security, et cetera, to swallow up the entire treaty by calling something national security and basically having this subjective analysis on that country's view of it. My analysis, I actually avoided the time of emergency and looked more so to the subjective -- or impugning an objective necessity analysis within the national security exception even though the plain text reading of the section is subjective. And I was wondering if there is anything to that I guess if the argument went okay at the moot, but I did not know if having a group of trade lawyers, that they could see a reading that would incorporate some level of objectivity and whether the measure is necessary to enhance security.

MS. CHERNIAK: A number of people took that position and took that read, and from my own purposes, I believe that that is the correct interpretation. As I said, I believe the national security exception should be used cautiously and in the rarest of circumstances, so that is my personal point of view with respect to the national security exception. I am sure the Canadian government will take a different position than that if it served their interest at a particular point in time.

MS. IRISH: One question in the back row, and then Henry.

MS. O'NEAL: The question's for Greg.

You mentioned about -- you talked about PIP being against international trade obligations. If PIP is the same as C-TPAT, is therefore C-TPAT also against international trade obligations?

MR. KANARGELIDIS: My ultimate conclusion is that the PIP likely is not in violation of the GATT and/or NAFTA. I did raise some characteristics that suggest one could make the argument for a violation of GATT or NAFTA. On balance, however, I do not think there is a violation in fact. To respond to your question, if we make the assumption that PIP violates the GATT and NAFTA, then I would agree that it is arguable C-TPAT would also be in violation of the GATT and NAFTA also.

MS. IRISH: Now Henry.

DR. KING: Well, I am going to adjourn the conference. If there are any other questions, they have priority.

MS. IRISH: Henry, you have priority. There are no further questions.

DR. KING: Well, thank you very much for a wonderful panel.

And I am not going to take a lot of time. I am just going to thank Dan Ujczo and Deborah Turner for all the work they did on the panel.

(Applause.)

DR. KING: They deserve every clap that you gave them. And so I believe we should stand adjourned except that if anybody has any suggestions for a topic next year, we certainly consider them. I have certain ideas and others that I have heard over the week.

MR. CRANE: Well, do you think Obama and Hillary will give us an opening?

(Laughter.)

DR. KING: Oh, boy. Well, we are looking for your input in the Toronto Star, David. And, you know, you are a great writer and a good listener, too, and I am sure you heard every token, every special word that was uttered here today. So thank you very much, and I want to adjourn the conference on a happy note. I think it is been one of our best or perhaps the best with attendance at a very high level and also with great participation by the group. The questions were wonderful. I did not prod as much this year as I do. Usually I did not have to because the moderators and the participants in the audience were very great in bringing out points.

So thank you, and let us end on a happy note. There is dinner tonight, at least I am told of that, so let us engage in some conversation between us which is one of the objectives of the Institute.

Thank you very much!

(Session concluded.)

(Conference adjourned.)