

SAMPLE ANSWER #1, ESSAY I, INTERNATIONAL TRADE/SPRING 2005/HUGHES

I: KRYPTONITE!¹

Whether Ruritania is a WTO Member is not perfectly explicit.² Therefore, except where otherwise stated, all analysis presumes that Ruritania is a Member.

A. ANALYSIS OF INDIVIDUAL U.S. ACTIONS

Preliminary Matter Regarding Article XX Exceptions

In *US 337* (¶¶5.8-9), the Appellate Body held that §XX applies only when some other provision of GATT has been violated. Therefore, substantive §XX analysis follows inquiry into the measures themselves, except when §XX-related issues directly impact on “likeness” analysis.

1. The Ban on Kryptonite Streetlamps and Outdoor Siding

Ruritania might allege that this ban violates GATT §I:1, because other Members still may sell their streetlamps and siding in the US, and moreover that it violates III:4, since the ban accords Ruritania less favorable treatment than the US’ own domestic industry of these products.

On its MFN claim, Ruritania would argue that the ban qualifies as a “rule[]...in connection with importation...” (§I:1), and would cite *EC Bananas* for the proposition that the object of all GATT non-discrimination provisions is that like products be treated equally (¶190). Moreover, the prohibition need not be origin-specific to violate §1, but may merely have that consequence (*Canadian Cars* ¶71). Additionally, Ruritania could argue that the ban violates Article XIII:1, because the prohibition is not applied to all like products equally.

§I in fact subsumes §III:4 analysis. In that regard Ruritania would ultimately argue that the US accords less favorable treatment to its streetlamps and siding most blatantly—it bans Ruritania’s products while permitting sale of its own and those of other Members.

¹ Throughout, “§” stands for “Article”; “¶” for “paragraph”.

² “Assume no other WTO member has kryptonite resources” seemingly refers to Ruritania but could refer to the US, as in “no other member *either*”. The exam writer therefore hesitates to presume the intended antecedent.

Analysis of likeness is central to this claim—and others. In *French Asbestos*, the Appellate Body warns against deracinating likeness analysis from the context in which the word appears. This measure involves neither tax nor tariff; III:4 likeness analysis is more appropriate than that in *Japanese Alcoholic Beverages* or *Japan SPF*.

Ruritania would argue for a broad reading of “like”, pointing out that *French Asbestos* held that “like” applies to products in a competitive relationship (¶99), which these products are.

It would also note that under the sanctioned *Border Tax* factors, these products have identical end uses.

However, the US would note that the AB did not determine just how broad III:4 likeness is (bottom ¶99), and that all *Border Tax* factors must be considered (¶101). Kryptonite alloy has distinct physical features (eg: lightness) other products lack. It would especially rely on the *French Asbestos* determination that a product’s dangerousness may be considered in likeness analysis, and would argue that dangerousness is a physical attribute distinguishing kryptonite alloy. However, the US is in a weaker position with regard to consumer tastes. Unlike asbestos, kryptonite alloy poses no harm to human consumers, but only non-human superheroes. The facts are silent as to consumer preference for kryptonite outdoor siding. Ultimately, Ruritania would point out, evidence relating to health risks is “relevant to assessing the competitive relationship in the marketplace between allegedly like products. (*French Asbestos* ¶115). If the facts reveal that the health risks do not affect the competitive relationship, Ruritania might have a strong claim that these products are in fact alike. It is possible, however, that consumers will not treat siding as substitutable, if they value their potential rescue by superheroes above any inherent advantages the kryptonite siding bestows.

If WTO rules that streetlamps and siding are alike regardless of kryptonite presence, the US has probably violated §§I and XIII with regard to both products. However, since streetlamps are not generally for resale and are for governmental purposes, the US could claim a government procurement III:8a exemption against any III:4 claim. Moreover, since government is the consumer for streetlamps, the US could argue that this fact makes these products “unlike’.

Infra, tariff structure and §XX analysis.

2. Measures in Regard to Car Parts

Ruritania would argue that this provision violates national treatment regarding regulations and requirements under III:4. In regard to likeness, similar analysis as above applies. Dangerousness is a factor pertinent to both physical attribute and physical preference. The facts are silent as to consumer preference, though one may presume that demand would be high for extra-durable car parts, among both car manufacturers and consumers.

If the products are deemed alike, Ruritania will argue that this measure is analogous to *Korean Beef*. Similar to there, *competition conditions* are altered in a manner far less favorable to kryptonite car parts. This measure is even more drastic, in that the car parts must be ordered via the Internet, giving consumers no opportunity for physical inspection. Ruritania will assert that the US is foreclosed from arguing that separation has not affected the conditions of competition. Potentially, if the US can show that consumers are far more likely to order car parts via the Internet, or that physical retail locations are dying out anyway, the US might prevail on a “separate-but-equal” argument, since one Internet site is not inherently disadvantaged as compared to another. Even there, though, Ruritania can argue that there is no need for separate web pages.

Infra, tariff structure and §XX analysis.

3. Tariff Reclassification of “Outdoor Furniture”

Though the new class covers all light metals, Ruritania could still argue §1 discrimination if all products are deemed alike. The Facts state that experts expect kryptonite alloy to take a large share of the outdoor furniture market. II:1 provides for “no less favorable treatment”. Ruritania will argue that these tariffs deny that provision by protecting its domestic outdoor furniture market (which given the percentages in the Facts seems mostly to be aluminum).

While *Japanese SPF* held that claims of likeness in regard to tariff structure should be based on classifications of the importing party (here, US), *Spanish Coffee* considered one important factor whether other countries adhered to a similar tariff structure. The facts are silent on this, though it is clear that these products have identical end uses.

Though the US might distinguish these cases on the grounds that kryptonite alloyed products are new, Ruritania will argue that under *Greek Increase*, “outdoor furniture” clearly covers kryptonite furniture. Moreover, Ruritania might argue that the US should have renegotiated its bindings (Japan SPF notes in ¶5.5 that the classification had been established with negotiation), perhaps under XVIII:4 (special circumstances), regardless of whether Kryptonite alloy outdoor furniture was covered by the bindings (*Spain Coffee*, intro).

4. The Widget Tariff

The US has raised its widget tariff equally with regard to all Members, therefore there is no §I violation. Moreover, since the US has no domestic widget industry, there is no §III violation. Finally, the US merely raises its tariff level to that stated in its Schedule (5%). In general, a party is allowed to concede a tariff lower than that found in its binding, but not exact a smaller one. The question is whether there are any limits as to how and when a Member may raise a tariff to the maximum found in its binding. We do not know if the US has broken some prior, individualized arrangement with Ruritania.

B. ARTICLE XX EXCEPTIONS THAT THE UNITED STATES MIGHT ASSERT

Superheroes are neither human nor animal, but the US could argue that XX(b) applies. It would argue for an expansive interpretation of “necessary”, asserting that superheroes are a vital part of the American fabric. It would attempt to refute any distinction that the danger in *French Asbestos* was greater because more beings were affected by arguing that all life is worthy of protection, and that kryptonite is more lethal to superheroes than asbestos is to humans.

While this might work for the streetlamp/siding provision (superheroes would be unable to patrol the streets at night or enter people’s homes for rescue), Ruritania could argue that the car measure, even given the US’ specific reasons, betrays a protectionist intent. If superhero health is so important, why allow cars to be made of any kryptonite (don’t people need rescues from cars?).

Any exception defense with regard to the car measure and the tariff reclassification should therefore fail, even under a XX(d) argument, which would posit that lesser restrictions are merited for cars and outdoor furniture because the measures are all meant

to secure compliance with our criminal laws, and it is more important for superheroes to walk the street and get into houses than it is for them to rescue humans while in cars and on barcaloungers.

Public morality argument? But “necessary” under that provision might be deemed to have a narrower scope, since morality is arguably less important than life, and the measures might not be deemed necessary to protect morality.

C. POSSIBLE CLAIM RURITANIA MIGHT ASSERT UNDER ARTICLE XXIII

Even if a Panel found that the products are unlike, Ruritania could argue that the US measure impairs/nullifies Ruritania’s reasonable trade expectations (§XXIII(1)(b)). In *German Sardines*, the Panel sidestepped likeness analysis to instead inquire into whether the measure at issue (a duty adjustment) had frustrated the complainant’s reasonable expectations.

Under the factors mentioned in *German Sardines*, we need to know the binding negotiations history between Ruritania and the US. The *Sardines* panel assumed that the complainant had factored in the value of its concessions to the respondent, and that complainant would be responsible for impairment of the value of those concessions that the new measure caused. Regardless of product likeness, how directly competitive the products in question in actuality were was held to be an important factor.

Thus, it is important to know whether Ruritania had discovered its kryptonite before or after it joined the WTO and negotiated with the US. Since kryptonite was recently discovered, it is more likely than not that Ruritania was already a WTO member.

In light of that, the US would argue that Ruritania had no reasonable expectations with regard to kryptonite alloy products—those products did not exist when the bindings were negotiated. However, Ruritania could retort that its reasonable expectations should not be defined so narrowly. XXIII.1 speaks of impairment as to “any objective” of GATT. External studies show that Ruritania’s Kryptonite products will be quite competitive, thus meeting an important factor under *Sardines* analysis. If Ruritania had manufactured these products prior to discovering kryptonite, at the time the Bindings were negotiated, Ruritania should argue that it had reasonable expectations of the value of concessions

D. MISCELLANEOUS MATTERS/LINGERING QUESTIONS

Kryptonite gives Ruritania a powerful exogenous advantage, in that it exclusively harbors a valuable natural resource, and industries able to convert it into desirable products. An important but unanswered question is whether Ruritania has imposed any export restriction on Kryptonite. If it has, the US might argue that Ruritania itself is unfairly distorting free trade; US manufacturers cannot fairly compete with Ruritania's, because they lack access to Kryptonite. Though Kryptonite may kill American superheroes, US manufacturers should still enjoy the right to sell their US-made Kryptonite products abroad, where it is less-interested in superhero action. While this fact may not influence the decision of a DSB Panel on Ruritania's claims against the US, it could give the US leverage in pre-Panel consultations to work out an agreement with Ruritania.

E. CONSTITUTIONALITY OF THE PRESIDENT'S ACTIONS

Ruritania would assert that SPA is a facially-impermissible delegation of legislative powers, in that its broad grant of power ("to take whatever measures") lacks an "intelligible principle" by which executive action is to be governed. (*J.W. Hampton*), or, alternatively, that the President's action is *ultra vires* the statute (*US v. Schmidt-Pritchard*).

The US would argue that SPA does provide an intelligible principle—to protect superheroes. Similarly broad powers have been upheld even in the domestic arena (*Amalgamated Meat Cutters*). Whether these measures are foreign- or domestic-related is irrelevant—the statute implicitly authorized the President to take suitable actions. Even when the President acts within a statute's implied mandate, she acts constitutionally (*Youngstown*). Cases where courts found the President lacked authorization to change duties and tariffs (*US v Schmidt-Pritchard*) are inapplicable.

It is unclear whether Ruritania has standing to bring such a claim before either the WTO or a US court. In theory, it could do so in a US court even if not a WTO Member.