

# INTERNATIONAL TRADE

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SPRING 2014

LOYOLA LAW SCHOOL

PROF. HUGHES

## Take Home Examination

### Introduction

This is an twenty-four (24) hour, take-home examination.

You are to access this exam via TWEN download and to upload this finished exam (again to TWEN) within the 24 hour period.

Once you have accessed this examination, you may not discuss it with anyone prior to turning in your answers. Nor may you discuss the examination at ANY time with any student in the class who has not taken it or *is taking it*. Nor may you collaborate on the exam.

By turning in your answers you certify to all of the above and that you did not gain advance knowledge of the contents of the examination, that the answers are entirely your own work, and that you have complied with all relevant Loyola Law School rules.

This is an open book, take home examination. Professor Hughes permits you to use any and all inanimate resources (that is, NOT your fellow students or outside counsel). The only limitations on outside materials are those established by the law school.

Part I is a set of true/false questions. Part II is one essay question; the essay should be no more than 2000 words total. Professor Hughes takes on no responsibility to read beyond this word limit. Please start the essays on a separate page from the T/F answers.

### GOOD LUCK

*Best wishes for those graduating and thanks for a fun class  
-- eat plenty of bananas, yogurt, and sardines this summer*

## I. TRUE/FALSE QUESTIONS -- 30 POINTS

This part of the exam is worth 30 points. Each answer is worth 2 points. Note that there are 17 questions, so in the same spirit as the LSAT, you can get 2 wrong and still get a maximum score on this section.

Please provide your answers to this section as a single column series, numbered 1 to 17, with “T” or “F” besides each number.

If you are concerned about a question, you may write a note at the end concerning that question, but only do so if you believe that there is a fundamental ambiguity in the question.

TRUE OR FALSE

01. In *Brothers International v. Hauptzollamt Giessen* (1989), the European Court of Justice concluded that there had been a “substantial transformation” of the typewriters kits from Japan into finished typewriters in Taiwan, so that the typewriters would be considered Taiwanese for tariff purposes.
02. In *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products* (2001), the Appellate Body concluded that under Article 6.1.1 of the Anti-Dumping Agreement as long as a country establishes reasonable time limits for questionnaire responses, it never has to grant extensions for completion of the questionnaires.
03. According to the analysis in *Crosby v. National Foreign Trade Council* (2000) even where a state law affecting international trade does not directly conflict with federal law, the state law can be preempted by federal law if the state law stands as an obstacle to the “accomplishment and execution of the full purposes and objectives of Congress.”
04. In a GATT Article III analysis, if an imported product is not “like” a domestic product, a country is completely free to apply dissimilar taxes and internal charges to the domestic and imported products, even where the products are substitutable for consumers.

05. In *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, both the Panel and the Appellate Body found that clove cigarettes and menthol cigarettes are “like” products.
06. The *Spain – Unroasted Coffee* (1981) and *Japan – SPF Dimension Lumber* (1989) decisions conclude that consumer perceptions are generally irrelevant in making GATT Article I determinations of “like” products and that consumer perceptions are always less important than customs classifications in the respondent country.
07. The loan program at issue in *Italian Discrimination Against Imported Agricultural Machinery* (1958) would be a forbidden “red light” subsidy under the SCM Agreement.
08. The U.S. Supreme Court’s holding that the President had the power to suspend claims against Iran in U.S. courts in order to settle the Iranian hostage crisis (1979-1980) was based on “a longstanding practice of settling such claims by executive agreement” and the Court’s “conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.”
09. Generally speaking, in a “customs union” under GATT Article XXIV each country in the customs union retains its own tariff structure.
10. When a WTO Member applies internal charges to imported products that it does not apply to “like” domestic products, there is no violation of GATT Article III unless the internal charges are “applied . . . so as to afford protection to domestic production.”
11. Under NAFTA Article 401 (“Originating Goods”) if a ton of scrap metal comes from crushing used German cars found at a county dump, that ton of scrap metal will be considered a product of Germany.
12. Under the WTO ANTI-DUMPING AGREEMENT permissible responses to dumping are limited to anti-dumping duties, provisional measures, and price undertakings (in which the importer agrees not to import below a certain price).

13. In *Argentina – Measures Affecting Imports of Footwear*, the Appellate Body held that where a WTO Member has tariff bindings based on an *ad valorem* duty rate, the Member may nonetheless adopt a minimum specific import duty as long as that minimum specific duty produces no greater *average* tariffs rates during a twelve (12) month period than its “bound” *ad valorem* duty rate.
14. In *Cummins, Inc. v. United States*, the products imported into the United States from Mexico (crankshafts) were found to have not undergone a tariff shift during the industrial processes in Mexico after the goods had arrived there from Brazil.
15. In interpreting tariff terms, the Federal Circuit construes such terms according to their common and commercial meanings.
16. In *European Communities – Trade Description of Sardines* (2002), the Appellate Body concluded that the Codex Alimentarius was not a relevant international standard for naming food products because the Codex had not been approved by consensus of the countries involved.
17. Under the General Rules for Interpretation used in the European Union, generally speaking, if a tariff classification refers to a particular material (like cotton), that classification includes mixtures or combinations of that material with other materials (like a cotton blend with some polyester).

## Part II – Essay Question -- 70 points

*There is a 2000 word limit to your essay answer. Please indicate the total word count at the end of the essay. Please make sure that you use 1.5 line or double line spacing and include a header or footer that has the page number and the exam number on each page. Assume the facts you are told here are true – do not do your own research on the products in question (as fun as that might be).*

### CHICKEN SATAY

Your boss Monda Jaconde is the Deputy United States Trade Representative (“DUSTR”). DUSTR Jaconde expects to meet her

Malaysian counterpart, Deputy Minister Tun Hamid, on the margins of the next WTO Ministerial next week.

DUSTR Jaconde just received a delegation from the U.S. poultry industry who came to complain about a comprehensive chicken production bill being considered in the Malaysian parliament.

Although the Jaconde-Hamid meeting will not be a full-blown discussion of Malaysia-US trade issues, DUSTR wants – by tomorrow – a concise (up to 2000 word) briefing memo on the new regime for chicken production and consumption being proposed in Malaysia.

As you know, Malaysia and the United States are among the countries negotiating the “Trans-Pacific Partnership,” so it is important that all interaction at the WTO Ministerial be cordial, but it is also important to signal U.S. concerns as soon as possible.

For now, information about the Malaysian legislation is limited to what Jaconde was told at the meeting (later USTR will get details from the US Embassy in Kuala Lumpur). In your briefing memo be sure to describe additional information that would be critical to a more complete analysis of the Malaysian legislation in relation to Malaysia’s WTO obligations.

Here is what Jaconde can tell you from her notes from the meeting with U.S. chicken industrialists:

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In the past 20 years, chicken replaced beef and pork as the most popular meat in the United States; today the average American consumes almost 84 pounds of chicken each year. This demand has triggered a dramatic increase in U.S. chicken production. In 2007, 8.9 billion chickens were raised and sold as food in the United States – a 1,400% increase in poultry production since 1950. Yet in the same period, the number of individual American farms raising chickens for food plummeted by 98%. This concentration (or industrialization) of chicken farming means that the average U.S. chicken producer now produces 605,000 birds annually. In rural parts of the U.S. focused on chicken production (eastern Texas through Maryland), living chickens outnumber living humans 400 to 1.

Not only have small producers been replaced by large industrial concerns, but production techniques have also dramatically increased pollution problems. As a 2011 report from the Pew Charitable Trusts states, “[t]he waste produced by these concentrated poultry operations raises serious concerns about treatment and disposal.” <http://www.pewenvironment.org/news-room/reports/big-chicken-pollution-and-industrial-poultry-production-in-america-85899361375>.

Malaysia is one of the few countries where chicken consumption is even higher than in the US: the average Malaysian eats over 40 kilos (88 pounds) of chicken each year. One reason for the popularity is Malaysia’s ethnic mix: while the Chinese population (22%+ of total) can eat everything, the Malays (60+% ) do not eat pork and the Indians (7%+ of the population) do not eat beef. Everyone can eat chicken.

Although Malaysian chicken production is not as industrialized as in the United States, there has been a rash of news stories in Malaysia about pollution from chicken farms/factories. In addition to its own production, Malaysia meets its consumer demand by importing chicken (everything from live chicks to frozen chicken feet) from China, Thailand, the United States, Denmark, and the Netherlands. Because of the distances involved, chicken products from the United States, Denmark, and the Netherlands are usually frozen, while a substantial percentage of imported chicken from nearby Thailand is fresh (refrigerated).

Malays – who are Muslim -- are required by their religion to eat only chicken slaughtered under appropriate, humane conditions (halal). For a description of halal chicken production from a Canadian company see <http://www.zabihahalal.com/process.php> [but WARNING, it is not for the squimish]. Malaysia’s ethnic Chinese and Indian populations freely eat non-halal chicken. All Malaysian chicken producers claim to follow halal procedures, as do Thai and Chinese chicken producers [because of substantial muslim populations in each country].

Malaysia made no commitment during the Uruguay Round on tariffs for any type of chicken or chicken meat imports; in other words, it has no tariff “bindings” on chicken or chicken meat imports at the WTO.

## CURRENT MALAYSIAN LAWS ON CHICKEN

Currently, Malaysia uses the following tariff structure for the importation of chicken and chicken meat:

		WTO	FTA	other
34.96.200	Live chickens	10%	/0%	/20%
34.96.500	Refrigerated chicken meat, whole bird, pieces, and filets	15%	/0%	/30%
34.96.600	Frozen chicken meat, whole bird, pieces, and filets	10%	/0%	/20%

Although there are currently no customs regulations addressing halal requirements, Malaysian consumer protection laws include the following provision:

Section 35.284 All slaughtered chicken and chicken meat shall be accompanied by information indicating whether the product meets halal production requirements [*cross-reference to statutory definition of 'halal'*]. This information shall be included prominently in or on product containers, packaging, advertising, bills of lading, and invoicing. This information must accompany the product through all stages of distribution, from production or importation to final, retail distribution to the consumer, whether as a product for home preparation or immediate consumption.

No further details about Malaysian domestic regulation of chicken are available at this time.

SIHAT AYAM NEGARA (*HEALTHY NATIONAL CHICKEN*) (SAN) BILL

The current version of the “Sihat Ayam Negara” (healthy national chicken) bill being debated in parliament includes the following components:

## I. Importation ban

The bill includes a strict importation ban on non-halal chicken products. One parliamentary staff person says that this part of the bill is intended to respond to reports of non-halal chicken being sold as halal by unscrupulous butchers to Malay restaurateurs. It is unclear to what

degree this aspect of the bill is a concession to gain support from religious conservatives in the Malaysian parliament.

## 2. Tariff reclassification

The bill requires standards for “free range” chicken production to be established within twelve months after the bill’s passage into law by the Malaysian Ministry of Agriculture. The standards so developed will be applied uniformly to both customs determinations and domestic programs described in (3) below. With these new standards in place, Malaysian Customs shall no later than 18 months after the bill’s passage into law, implement the following new tariff classifications:

		WTO	FTA	other
34.96.100	Live biddies (baby chickens)	0%	/ 0%	/0%
34.96.200	Live broilers (7-12 week old chicken)	10%	/ 0%	/20%
34.96.300	Refrigerated, non-free range halal chicken meat, whole bird, pieces, and filets	25%	/0%	/50%
34.96.400	Frozen, non-free range halal chicken meat, whole bird, pieces, and filets	30%	/0%	/60%
34.96.500	Refrigerated, free range halal chicken meat, whole bird, pieces, and filets	05%	/0%	/30%
34.96.600	Frozen, free range halal chicken meat, whole bird, pieces, and filets	10%	/0%	/20%

An importer wishing to take advantage of the substantial tariff benefits for “free range” chicken must apply for an importation license from Malaysian Customs. The bill provides that these licenses will be issued as a matter of course by Malaysian Customs, upon application accompanied by a affidavit filed under penalty of perjury that the imported chicken were raised in free-range conditions that meet the standards established by the Malaysian Ministry of Agriculture.

## 3. “happy” chicken production program

To promote the “deindustrialization” of Malaysia’s domestic chicken production while *increasing* overall production, the bill provides



for a series of measures to encourage [a] free-range chicken farming, [b] small scale chicken production, and [c] chicken and chicken meat exports.

(For example, the new 0% tariff from “biddies” – baby chicks – is intended to make it easy for chicken farmers to get ‘starter’ herds.)

The bill requires the Malaysian Ministry of Agriculture to establish a program for licensed producers of free-range chickens to be called “Ayam Negara Berjalan Gembira” (ANBG) (*national chicken walking happy*): these producers will meet the standards for raising free range chicken mentioned in (2) above. Licensed ANBG producers will be eligible for the following:

[A] Leases on previously unavailable land suitable for chicken foraging. The bill reclassifies up to 2 million acres of nationally held land (previously classified as “park” and “nature preserve”) to be leased at 10 Malaysia ringgit (\$US 3.10) per 2,000 acres to ANBG producers.

Where the ANBG producer certifies that the chickens it produces are intended for exportation, the 10 ringgit lease fee will be waived.

Where the ANBG producer certifies that its annual production is less than 10,000 chickens, the 10 ringgit lease fee will also be waived.

[B] Because free-range chickens must be protected from predators, it is common to use electric fencing to ensure that coyotes, wolves, dogs, and other carnivores stay out of the chicken foraging area. Malaysia currently imposes a 20% duty on importation of electric fencing, such as the “Electronet” brand of electric fencing. See, e.g. <http://www.themodernhomestead.us/article/Electronet-1.html>. ANBG producers who qualify for a waiver under “A” above, also qualify for a complete rebate of the 20% tariff.

The bill further requires that once the new tariff classification comes into effect all imported, non-free range chicken products will be labelled “INDUSTRIAL CHICKEN” when the chicken is sold as a product for home

preparation; this new labeling provision does not apply when the product is intended for immediate consumption (as would be the case in a restaurant or fast food shop).

*The DISTR is counting on you – and just 2000 words.*

END OF WRITTEN EXAMINATION

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