

Sample Answer #2, Essay I, International Trade/Spring 2005/Hughes

Essay A

Brief statement of arguments

Ruritania will argue the U.S. presidential steps, particularly the import ban of kryptonite alloy street lamp posts and outdoor siding and the separate “Kryptonite product sales” website mandate, violate the National Treatment Clause. Moreover, the separate website and new outdoor furniture tariff classifications violate the Most Favored Nation Clause. Ruritania might make an Article XXIII nonviolation claim regarding the raised widget tariffs.

In response, the United States will argue the products are not “like” because kryptonite and non-kryptonite products have different physical properties. Moreover, measures are not discriminatory. Finally, even if violations are found, the measures fall within the Article XX(b) exception, and are “necessary” to protect human health.

It will be necessary to know other countries’ tariff classifications and consumer behavior and perceptions in response of the U.S. measures.

i. Ban on kryptonite alloy street lamp post and outdoor siding imports

Ruritania will argue the measure banning kryptonite imports violates the Article III National Treatment Clause, specifically Art III:4 which requires products of a contracting party imported into another contracting party’s territory “shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.” According to Italian Discrimination Against Imported Agricultural Machinery, 1959, “affecting sales” is to be broadly construed. The ban harms Ruritania’s sales to protect the U.S. domestic industries for street lamp posts and outdoor siding.

The United States will respond that Article III is not triggered because the products are not “like products.” To determine whether products are like, it is necessary

to undergo the 4 part test as the Appellate Body outlined in European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, 2001. Physical properties represent the primary factor in order to reward a rational system, because if physical properties are the same then the remaining factors of end uses, consumer perceptions and tariff classifications should rationally be the same. Physical properties include composition, size, shape, texture, and possibly taste and smell. *Id.* In the instant case, compositions differ and kryptonite health risks posed to super heroes is a relevant component of physical properties. Just as the carcinogenic nature of asbestos contributed to a finding of different physical properties, the health risks unique to kryptonite should inform the analysis. Because physical properties differ, the other factors do not need to be scrutinized as strictly as they would if physical properties were the same. End uses overlap, slightly supporting Ruritania’s position. Consumer perceptions of kryptonite lamp posts and outdoor siding versus non-kryptonite products are unknown. If the risk to super heroes of lamp posts and outdoor siding affects general consumer perceptions that products differ, then this factor contributes to a finding of non-like products. However, Ruritania might argue the United States is perpetuating the irrational, variant consumer perceptions to protect the domestic industry. Finally, tariff classifications are unknown. Presumably, because kryptonite is newly discovered, the World Customs Organization has not yet proposed amendments to differentiate kryptonite and nonkryptonite products. The U.S. classification should receive deference, however, because the health risk making kryptonite compositions significant is unique to a segment of an important American population and not as applicable in other countries.

Even if the products are found to be “like” products and the ban is protectionist, the United States will argue Article XX (b) “necessary to protect human ... health” applies and constitutes a defense to the National Treatment violation. First, the measure is meant to serve the goal of protecting human health. The measure was pursuant to SPA which directs the President to take necessary measures to ensure super heroes can continue their community service without fear of hazardous or dangerous materials in the environment. Legislative history should support this purpose. Studies have

unequivocally shown that kryptonite can be lethal to the United States super hero population. Ruritania will argue that the super heroes represent a small minority and kryptonite does not pose health risks to most humans, rendering the United States measure unjustified. However, the Appellate Body has maintained that Article XX contains no risk quantification requirement. The United States should be free to protect human health to the extent it chooses. Thus, the unequivocal studies should establish a prima facie case of health risk.

The next issue is whether the measure is necessary to protect human health. The test for “necessary” is whether reasonable alternative measures exist. See Asbestos, Korean Beef, Thai Cigarettes cases. If Ruritania proposes controlled uses such as additional regulation, the U.S. will respond that controlled uses are not reasonable alternatives because they do not eliminate the health risk to the essential yet minority super hero population. As the U.S. may decide to establish a high goal for protecting health, the U.S. should be allowed to eliminate the risk through a ban of kryptonite imports.

Finally, Ruritania will argue the measure does not satisfy the chapeau language of Article XX because it is a disguised restriction of international trade, dressed up as a health measure. To support this proposition, Ruritania should cite the Korean Beef case to demonstrate that if the U.S. really sought to eliminate the health risk of kryptonite, then it should ban all kryptonite products and not just lamp posts and outdoor siding, while permitting outdoor furniture and car parts to enter the country. Similarly, if Korea really sought to address deceptive trade practices, then its measures should affect all meats, not just beef sold in stores. Targeting lamp posts and outdoor siding suggests the measure is really protectionist. The U.S. should respond that the outright ban is necessary because lamp posts and outdoor siding exist in the environment, exposing the general public specifically super heroes. In contrast, outdoor furniture is mainly used in private and thus poses less risk to super heroes.

ii. Separate website for “Kryptonite product sales.”

Ruritania will argue the separate website violates both the National Treatment Clause and Most Favored Nation Clause. Analogous to the Korean Beef case involving Korea's adoption of the dual retail system, the U.S. measure provides less favorable treatment affecting sales by encouraging an irrational perception that kryptonite car parts are harmful. Ruritania should incorporate data regarding sales of kryptonite car parts versus non-kryptonite car parts to prove the measure negatively affects Ruritania's sales. Moreover, if most consumers purchase car parts at retail stores than online, then the ban at the retail level more directly harms Ruritania's car part industry. Thus, data regarding consumer behavior and perceptions are necessary to determine whether the measure alters "conditions of competition." The United States will respond that Article III is not triggered in the first place because the products are not like. If the physical properties of kryptonite and non-kryptonite are deemed significant, then the products should not be like. Even if the products are like, then separate treatment is not necessarily discriminatory, as the 1999 Section 337 case observed. Thus, the U.S. will argue the separate treatment is neither discriminatory nor harmful. The U.S. will distinguish the case from Korean Beef and Hawaii Eggs because the asymmetrical treatment does not perpetuate irrational perceptions but serves as a necessary means of disclosure and tracking to protect super heroes from potentially lethal exposure to kryptonite.

Ruritania will further argue the measure violates the Most Favored Nation clause because advantages accorded other countries importing car parts such as ability to sell both in retail outlets and online is not offered "immediately and unconditionally to the like product" from Ruritania. The U.S. will respond that Ruritania can receive equal advantages by importing non-kryptonite parts. Ruritania will then counter that because Ruritania is the only WTO Member producing kryptonite alloy products, the measure, though facially neutral, represents de facto discrimination. Not only are Ruritania's products treated differently through the separate website requirement, the measure serves as a "condition" in violation of Article I, the condition being producing non-kryptonite car parts. According to Canada auto parts and Indonesian Auto Motives Industry cases, conditions may be imposed so long as they do not constitute de facto discrimination, and

the U.S. condition for non-kryptonite products constitutes de facto discrimination against Ruritania. It will be helpful to know which major car part producers import to the United States and thus benefit from the measure. If there is a lock down of advantage to a few producers, then that fact will support Ruritania's argument of conditional advantages.

The United States should respond that even if violations are found, the measure is "necessary" to protect human health because no reasonable alternatives are available. The U.S. will have to show that, although the separate website is inconsistent with GATT, it is the least inconsistent available alternative to protect public health and some kryptonite product sales are permitted so long as they can be tracked through online distribution. Because car parts will end up in assembled cars, tracking car part materials is necessary for car dealers to disclose to consumers, so super heroes can purchase non-kryptonite containing cars. If Ruritania can counter with expert evidence regarding ability to track and disclose content of car parts through alternative means, then Ruritania might be able to show reasonable alternatives less inconsistent with GATT exist. Ruritania should also maintain that if widgets are permitted to enter the country without tracking requirements, then the U.S. is not entirely devoted to protecting human health.

iii. New tariff classifications for outdoor furniture

Ruritania will argue the new tariff classifications violate the National Treatment and Most Favored Nation Clauses. The measure protects the United States outdoor furniture market, principally furniture made from iron, steel and aluminum. Since the U.S. manufactures 85% of its outdoor furniture consumption, the new classifications are intended to protect the domestic industries and combat likely kryptonite alloy furniture displacement.

Regarding wooden furniture, Ruritania's kryptonite outdoor furniture receives less favorable treatment than Canada, violating Article I. Just as the Korean Beef and Spanish Coffee cases involved a change from one classification to multiple classifications to disguise discrimination, Ruritania should argue the change in classification systems demonstrates de facto discrimination against Ruritania. After the Japan SPF case, it is

important to look at the United States classification system just as the Panel considered Japan's classification system for lumber. However, this factor cannot be dispositive because countries can use multiple classifications for manipulation as the EU Bananas case illustrated. Thus, it will be necessary to consider other countries' classifications. In the Spanish Coffee case, Spain implemented five classifications for coffee, and the fact that other countries did not make similar distinctions contributed to a finding that products were "like products," triggering the Most Favored Nation Clause. Ruritania should argue that all three classes of outdoor furniture have identical end uses just as the Panel found that end uses of coffee were the same. The U.S. should respond that products are not "like" because of different physical properties and that the kryptonite composition which poses health risks is important to the analysis. Even if a violation is found, Article XX(b) serves as a defense because the higher tariff is necessary to protect public health and no reasonable alternatives exist. Ruritania should counter the Art. XX defense is unavailable because the increased tariff also applies to aluminum furniture, signaling health is not the primary motive. Alternatives less GATT inconsistent are available.

iv. Widget tariff increase to 5%

The last provision regarding the tariff increase from 0% to 5% does not constitute a violation because it is within the GATT bindings and it applies to all widgets, despite geographic origin. However, Ruritania may make a nonviolation claim pursuant to Article XXIII if it maintains that although not a technical violation, the rise in tariffs counters Ruritania's reasonable expectation that widget tariffs in the United States would remain at 0%, citing the German Sardine case where new German tariff classifications violated Norway's reasonable expectations. If the United States is developing its own widget industry, the tariff rise might represent an attempt to protect its infant industry. Moreover, if most widget imports come from Ruritania the new tariff might be an attempt to pressure Ruritania not to use kryptonite in their widgets. It will be important to look at prior negotiations involving Ruritania when the GATT bindings were created. Most

likely, the nonviolation claim will not prevail. Even if Ruritania expected tariffs to remain at 0%, that expectation is probably not “reasonable” because negotiations actually resulted in GATT bindings of 5%. Finally, if the United States is protecting an infant industry, benefiting the new industry should be permissible because the tariff remains consistent with the United States GATT commitments, no new arbitrary widget subdivisions are created, and all countries’ widgets receive equal treatment.