

# INTERNATIONAL TRADE

SPRING 2005

Cardozo School of Law

LAW 7562A

## Take Home Examination

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### INTRODUCTION

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

Once you have picked up 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. You are not permitted to collaborate on the examination.

You have 24 hours from the time you receive this examination to return it to the 5<sup>th</sup> floor at the Law School .

**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 for open-book, take home examinations.

By turning in your answers you certify 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 Cardozo School of Law rules.

Part I is a set of twenty-two (22) true/false questions. Part I counts for 40 points.

Part II consists of two essays. All students must do **Essay A**. The answer to Essay A should be no more than 1800 words. **Essay A** counts for 40 points.

For **Essay B**, students have a choice between topic B1 and topic B2. The answer for Essay B should be no more than 750 words. **You may include an outline to each essay, which will not count against the word limit.**

Please make sure that the answers to each essay so that each essay begins on a separate page or in a SEPARATE Bluebook.

**IF YOU ARE TYPING, PLEASE TURN IN TWO (2) COPIES OF YOUR ANSWERS.**

GOOD LUCK

*A great summer to everyone. And best wishes for those graduating.*

**PART I. TRUE/FALSE QUESTIONS**

*This part of the exam is worth 40 points. Each answer is worth 2 points. Note that there are 22 questions, so in the same spirit as the LSAT, you can get 2 wrong and still get a maximum score on this section. **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 FALSE

- |       |       |    |  |
|-------|-------|----|--|
| _____ | _____ | 1. | The Tokyo Round marked a shift in multilateral trade negotiations from tariffs to inclusion of “non-tariff barriers” and, reflecting that, the Tokyo Round produced, in addition to tariff reduction protocols, a series of special (or “side) agreements and “understandings” dealing with a variety of subjects. |
| _____ | _____ | 2. | Under the Vienna Convention on the Law of Treaties a country’s internal or domestic law <b>never</b> excuses that country’s failure to comply with international treaty obligations.   |
| _____ | _____ | 3. | Mineral deposits and tropical climates suitable for certain foods and plants are exogenous advantages in the theory of comparative advantage, while education levels in the population are not exogenous.  |
| _____ | _____ | 4. | Within the EU system of governance, the European Parliament most directly expresses the interests of individual governments of the EU Member States.   |

- \_\_\_\_\_ 5. From 1947 until the establishment of the WTO, the GATT applied *provisionally* through a “Protocol of Provisional Application” signed by 85 countries in 1947.
- \_\_\_\_\_ 6. Under GATT Article IX, “interpretations” are made the WTO Ministerial Conference or WTO General Council and require an affirmative vote of  $\frac{3}{4}$  of the overall WTO membership.
- \_\_\_\_\_ 7. In *United States v. Curtis-Wright Export Co.*, Justice Sutherland made what can be called a “combinational” argument for the President’s power to act with both “authority vested in the President by an exercise of legislative powers” and with the “delicate, plenary, and exclusive power of the President” in conducting the foreign affairs of the US.
- \_\_\_\_\_ 8. Article 1116 of NAFTA [at p. 191] continues the long tradition in public international law of giving individuals standing to bring international claims.
- \_\_\_\_\_ 9. Tariffs and quotas produce largely similar economic effects on the country that imposes them, except that with a quota what would be government revenue under a tariff is captured by foreign sellers as a kind of monopoly profit.
- \_\_\_\_\_ 10. In terms of bilateral international commercial agreements, the predecessors to our current “Friendship, Commerce, and Navigation” [FCN] treaties were called “Bilateral Investment Treaties” or BITs.
- \_\_\_\_\_ 11. The “infant industry” argument is that when a country is building domestic capacity in a new product area, tariffs in that area should be eliminated quickly so the new industry develops lean and fiercely competitive.
- \_\_\_\_\_ 12. In the pre-WTO GATT system, a single country or a few countries could prevent a GATT panel decision from becoming binding.

- \_\_\_\_\_ 13. Under the system established in the Reciprocal Trade Agreements Act of 1934, Congress granted the President the power negotiate trade deals and then “proclaim” attendant changes in tariff and import restrictions.
- \_\_\_\_\_ 14. In the *International Fruit v. Produktschap* case (1972), a GATT provision was found **not** to have direct effect in the European Communities [or Union]. One of the Court of Justice’s reasons for this conclusion was that if implementation “devolve[d] directly on the Community judicature” that would deprive the EC executive and legislation of some “scope for maneuver” in implementation that is enjoyed by many of the EC’s trading partners.
- \_\_\_\_\_ 15. Pursuant to the WTO’s “Dispute Settlement Understanding,” a country has the option to request voluntary “consultations” before calling for the establishment of a panel to hear the trade dispute.
- \_\_\_\_\_ 16. In the American Constitutional scheme, principal authority to regulate international trade lies with Congress pursuant to Article 1, section 8 of the U.S. Constitution.
- \_\_\_\_\_ 17. In the 2000 *Canada- Certain Measures Affecting the Automobile* Industry panel decision, Canada’s “Motor Vehicle Tariff Order 1988” was found compatible with Canada’s GATT obligations because it allowed any automobile maker to qualify for the tariff reduction in the future by producing a certain amount of cars locally.
- \_\_\_\_\_ 18. If a panel decision is appealed to the WTO “Appellate Body,” the appeal is heard by 3 members of the Appellate Body and the Appellate Body decision is adopted by the WTO unless there is “reverse consensus.”

- \_\_\_\_\_ 19. Under the General Rules of Interpretation applicable to the Harmonized Tariff Schedule of the United States, if a tariff classification refers to a particular material (like steel or wool), that classification includes only pure materials and not mixtures of the material.
- \_\_\_\_\_ 20. Within the EU system, “Directives” have direct application to citizens of EU Member States while “Regulations” must be implemented by EU Member States through national legislation.
- \_\_\_\_\_ 21. In the mid-1970s, Congress gave the President authority to negotiate trade deals, but with a new « fast track » procedure that presents the finalized trade deal [and implementing legislation] to Congress for an up or down vote without possibility of amendment.
- \_\_\_\_\_ 22. Under the General Rules of Interpretation applicable to the Harmonized Tariff Schedule of the United States, Rule 3(a) provides that when a product comes under more than one heading “the heading which provides the most specific description shall be preferred to headings providing a more general description.”

## COMMENTS

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**PART II – ESSAY QUESTIONS**

In this part of the Examination, all students must do **Essay A**. The answer to Essay A should be no more than 1800 words. Essay A counts for 40 points. For **Essay B**, students have a choice between topic B1 and topic B2. Essay B counts for 20 points. The answer for Essay B should be no more than 750 words. I take on no obligation to read beyond these word limits, but I'll read further if you're saying interesting stuff.

**ESSAY A [40 points]****KRYPTONITE PRODUCTS**

To the surprise of everyone, a few years ago the Republic of Ruritania discovered a rich mineral reserve of “kryptonite,” a substance thought not to exist indigenously on Earth. Ruritania is now using the kryptonite to make extra strong, extra light, extra durable kryptonite alloy widgets, car parts, outdoor furniture, street lamp posts, and outdoor siding for residential and commercial buildings.

Because these products are quite strong and light, they are starting to become popular with consumers and commercial uses. For example, the “Wal-Mart” and “K-Mart” store chains have started carrying Ruritanian kryptonite alloy outdoor furniture and car parts. The “Pep Boys” store chain has also started carrying kryptonite alloy car parts.

Several trade publications have reported that kryptonite alloy outdoor furniture is likely to displace a substantial portion of steel and aluminum outdoor furniture sales.

Kryptonite poses no known health risk to most humans, but studies have unequivocally shown that it can be lethal to a small group of residents in American cities commonly called “super heroes.” These “super heroes” are often quite active in community affairs, particularly crime prevention and suppression. [For questions about kryptonite's toxicity to super heroes, see, for fun, the attachment, or.0 <http://theages.superman.ws/Encyclopaedia/kryptonite.php>]

The United States both manufactures and imports street lamp posts as well as outdoor siding for residential and commercial buildings. None of the US manufactures use kryptonite alloy.

The United States manufactures most of its outdoor furniture consumption [85% total], although it does import a substantial amount of wood outdoor furniture from Canada [40% of total US consumption]. None of the US manufactures of outdoor furniture use kryptonite alloy.

The United States imports, but does not manufacture widgets. The United States has been imposing a 0% tariff on widgets, although under the present GATT tariff bindings, the US is committed to a 5% tariff on widgets.

Recently, Congress passed the “Superhero Protection Act” (SPA) which delegated authority to the President – and directed the President – “to take whatever measures are necessary to ensure that super heroes can continue their community service without fear of hazardous or dangerous materials in the environment.” Pursuant to his authority under the SPA and his general authority to establish tariffs, the President has taken the following steps:

- + All imports of kryptonite alloy street lamp posts and outdoor siding for residential and commercial buildings are banned;
- + Kryptonite car parts may no longer be sold in retail stores, but kryptonite car parts may be sold by retail establishments through special online services. To meet this requirements of the executive order, Wal-Mart, Pep Boys, and independent retailers will have to establish separate “Kryptonite product sales” websites. The US government justifies this on the grounds that it will be easier to track kryptonite car part distribution because all Internet sales have detailed sales transaction records, something not true of retail store sales;
- + Previously the US tariff schedule had one classification for “outdoor furniture” subject to a 10% tariff. By executive order, that classification is now broken into three categories:
  1. outdoor furniture made of wood and wood products;
  2. outdoor furniture made principally of iron and steel;
  3. outdoor furniture made principally from light metal materials, including aluminum and kryptonite.Tariffs on #1 and #2 remain at 10%; tariffs on #3 will rise to 40%.
- + Tariffs on all widgets are raised to 5%.

Assume no other WTO member has kryptonite resources or produces kryptonite alloy products.

What are Ruritania’s arguments against the US actions? What are the likely counter-arguments from the US? What additional information would you want to know?

**ESSAY B [20 points]**

Choose one of the following two topics:

**ESSAY B.1.****NORMAL PRESIDENTIAL NEGOTIATION  
OR SIDELINING CONGRESS?**

One of the most vexing problems for American policy in international trade is figuring out the proper relationship between Congress' power to regulate international commerce and the President's power to conduct international affairs on behalf of the US. The two cases on pages 69-72, the *United States v. Capps* and *Consumer Union v. Kissinger*, exemplify that tension and difficulty.

In *United States v. Capps*, there was an agreement between Canada and the US administration that Canada would limit its potato imports to the US. A 4<sup>th</sup> Circuit court determined that the administration had acted improperly because "President had not followed the statutory provisions established by Congress for imposing limits on agricultural imports." In contrast, in *Consumer Union v. Kissinger*, after extended – sometimes fierce – negotiations with the US administration, Japan and the European Union presented "letters" saying that they would voluntarily limit their steel shipments to the US for the years 1969, 1970, and 1971. The question arose whether these "voluntary" offers amounted to steel quotas that the President was imposing without Congressional authorization. The D.C. Court of Appeals concluded that the administration had done nothing wrong because the President's powers to conduct foreign affairs includes the ability to "admonish an industry with the express or implicit warning that action . . . will be taken if a desired course of action is not followed voluntarily."

Which case makes the better argument? If *Consumer Union v. Kissinger* is taken to its logical outcome, can the President bully foreign trading partners to adopt all kinds of "voluntary" measures that do not reflect Congressional intent as to international trade? Or perhaps not? Where and how would you draw the line of 'informal' deals made by the President, manifested by unilateral "letters" from trading partners?

**ESSAY B.2****GLOBALIZATION IS NOT A SPECTATOR SPORT**

One of the most intriguing readings in our case book was an excerpt from Dani Rodick's "Has Globalization Gone Too Far?" [at 32] in which Rodick points out that globalization means we are all increasingly "substitutable" Rodick focuses on the distributive consequences of free trade and points to northern European countries as having done the most to adopt redistribu-

tive policies to make the benefits of free trade felt more evenly. The alternative, she implicitly argues, is tension and tearing of the social fabric. And, in her words, “[s]ocial disintegration is not a spectator sport – those on the sidelines also get splashed with mud from the field.”

Do you agree or disagree with Rodick that redistributive social policies need to go hand-in-hand (in developed countries) with increasingly free trade? Why? If you agree, how would you implement that view – particularly in countries like the United States that are politically less prone to redistributive policies? If you disagree with Rodick, do you have any prescription for the “losers” from free trade – the people whose jobs are lost from increasing global competition?

*End of examination – except for fun attachment*  
*Thanks for seeing me through this first time effort*  
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