To: The WTO Class at XXX

From: JHH Weiler

My dear students

I would like to explain the process by which I graded the exam. This is important since I know that many people put a lot of effort into the course and some, perhaps, might be unhappy with their result. In the American system that is almost inevitable. NYU like most of its peers, requires us to "rank and curve." It has a quasi-mandatory curve, i.e. we must respect the distribution of grades within the class. We may give the following grades: A+ 0-2% of the class; A 7-13%; A minus 16-24%; B+ 22-30%; B minus 4-11%; C/D/F 0-5%. The remainder must be Bs. This year it translated into 5 A grades, 9 A--, 13 B+, 3 B—and the remainder B grades.

This system is virtually unknown outside the United States and many remonstrate and find it unjust: 'If there were, "objectively", 12 papers which merited an A, why not award them? And why is it that you *have* to give so many B minus grades? (Nobody likes to get a B minus). But the system has, too, many virtues. It prevents grade inflation which would devalue the value of your degree. It ensures, *inter alia*, that grading habits of the Professor will not overly influence choice of courses and instructors, i.e. that people choose professors not because they think they want to take the course but because it is known that in that class one can get an easy A or A minus. It introduces a measure of realism to grades (i.e. combatting grade inflation); it provides an incentive for more careful grading by professors – it is much easier to give everyone an A-. It requires very careful reading to differentiate between an A- and a B +. Think, too, about that the question – if there were 12 As why only be allowed to give 9, might also work for Cs and Ds. Maybe without the curve your B might have been a B- ? Finally, when the Law Firms come to the Law School to interview for jobs it gives them a meaningful comparison as regards GPAs.

Be that as it may, this is the system which operates one way or another in most American Law Schools.

If you did not receive the grade you were hoping for, remember that it is not an absolute evaluation, but a relative evaluation. No more than 31% of the exams may receive an A+, an A or an A minus. You may have written a very fine exam, but you got a B+ because 31% of your class colleagues wrote an even better one. You may have been the next in line.

Here is the very time consuming process by which I grade exams.

I try to grade the exams carefully and conscientiously. I start off by reading a random sample of exams without grading them. What one searches for in a "rank and curve" grading system is for "differentiating factors" -- factors that will allow a meaningful ranking of the bluebooks (the old name for exams which traditionally used to be written in a blue copy book). There might have been something extremely smart to have thought and said about the problem. But if most people made that same point, it ceases to be an effective differentiating factor. An 'easy' exam produces weak differentiating factors – trivial issues which determine the difference between an A exam and a B exam. A 'tough' exam does not affect the ranking of the class, but produces meaningful differentiating factors – i.e. something of importance explains the difference between the As and the Bs.

I then grade the exams: I first grade the first question. From time to time I take an exam already graded earlier and re-read it to check that my standards are not shifting in the process. Then, going backwards, from the bottom of the pile, I grade the second question. Etc. I do this to combat examining fatigue.

I reserve a few bonus points to overall effectiveness in the writing, and I deduct points for egregious errors.

After ranking and curving I re-read all the exams which received a B- or below. (This year there was one C).

I hope that if you read this memo carefully – any questions you may about the exam and your grade will be resolved.

The Exam this Year

All questions this year produced important differentiating factors as you will see with the discussion of each question.

Question 1

There were two overriding issues here.

First quite a number of students fell, more or less heavily, into advocacy mode, instead of giving careful dispassionate advice before Canada engaged in litigation. The result was a plethora of exams predicting good chance for "victory" at least on III(4) GATT. After you finish reading the memo you will see why I think this would have been a very difficult case to win and much more prudent advice would have been in order.

Second, many, far too many I must confess, fell into the Doctrine Trap – allowing the well tried template of discrimination analysis to condition the way they read the facts and thus forcing them into a false analytical framework. You just "followed the book" instead of thinking critically how the fact patter here falls outside the well trodden schemes.

A large number of students answered this question in, more or less the following way: The two Canadian products are "like" their American counterparts in the sense of Article III(4). Although the ban on advertising is an origin neutral measure it produces a disparate impact: The well established domestic products are well known to the consumer and, thus, do not need as much advertising for, say, brand recognition, whereas the ban on advertising would be commercially lethal for the new comers. This was the conclusion of this simple – or rather simplistic -- market analysis. It is a correct analysis if one sees the issues in this way. The legal conclusion was that the measure in question afforded protection to domestic production and thus violated Article III(4). The only question now was whether there was a justification under Article XX – calling, perhaps, for different conclusions as regards the sugar (Article XX(b) – clear health issue) and toys (Article XX(a) – not wanting to turn kids into consumers – and maybe even XX (b) mental health.

If your answer followed, more or less, this scheme you will have lost a huge amount of points for this question. Why, you might have asked yourself, having warned you, *ad nauseam and ad tedium,* that in my exam I will always ask you something that we did not study in class, would I ask a question of such simplicity? What would I be testing? That you can count in trade law from 1 to10?

Below the surface, the question raises, instead, deep and delicate questions as regards the relationship between advertising and trade.

Note, first, that many countries, including the State of New York, are combatting excessive consumption of sugar and likewise have bans on advertising directed at children is quite common and in any event not an unreasonable public policy objective. Would it not be a strange outcome of WTO compliance if State A would adopt such legislation with no interference but State B could not adopt such legislation because a foreign company decided that they wanted to penetrate the home market? The fact that a vote-catching politician converted a legitimate concern into foreigner bashing rhetoric and some local companies who stood to profit and thus lobbied for the legislation would not defeat the legislation even under Aims and Effects. We explained in class, in talking about the appeal of the USA in Japan Alcoholic Beverages that the quest is not after a smoking gun of intention but the failure to have a rational explanation for origin neutral legislation which produces disparate impact. The Italian government may have decided (to return to an example we discussed in class) to raise the tax bar on diesel cars when they did in order to help Fiat but this would not necessarily render the resulting legislation violative or defeat an Article XX defense. All of the above is meant to produce caution in treating the fact pattern as an easy case of smoking gun violation of national treatment.

Be that as it may, the most egregious error into which many of you fell was a failure to notice that the principal effect of the advertising ban is to favor *established products (regardless of their origin) vis-à-vis new products (regardless of their origin).* The Canadian company facing the advertising ban in relation to the two products is in exactly the same position as an American company who would want to challenge the dominance of the two established products. Imagine that in addition to Giant Maple, two American companies had decided that they wanted to enter the maple syrup market. They would be in exactly the same position as their Canadian counterpart. Where is the violation of National Treatment? The law treats all new entrants in the same way, whether domestic or foreign. This does not

surely exhaust the analysis but failure to see the problem and deal with it was just that – a very serious failure of analysis.

At a certain point many countries banned advertising cigarettes on TV. Would a new importer of cigarettes be able to claim violation of GATT III(4) and potentially impede the state from enacting such a ban? Even though it does produce a disparate impact on foreign new entrants? And I mean this at the Article III stage, not the Article XX stage.

This point can be driven further by considering the Toy market. The fact pattern did not mention the nationality of MOTO Co. But the name of the product suggests, perhaps, a non American company and a non American product. Even without such a cultural pointer, what kind of lawyering is it to assume the domestic market is dominated by an American company in today's global world. MOTO might well be, like Giant Maple a foreign corporation. Where is the violation of National Treatment here? For all we know MOTO could be a Canadian company…

I gave extra points to those students who not only addressed this point but also raised the possibility of a violation of MFN (Article I GATT).

And here is further food for thought: Consider the possible legal difference between the case of American Maple syrup and the Toys. In the case of the toys, the fact that the advertising ban could perhaps favor an American producer, is contingent. The dominant and established producer and marketer of toys might be an import, and the ban might hit a local upstart. By contrast, in the case of maple syrup, that is a market place and product type, where the established old product is inherently (not always) a local product, so that in that case, the disparate impact created by the advertising ban between old and new products would, s t r u c t u r a l l y benefit domestic production. Only a handful of students noticed this potential difference. (Otherwise, 'why would he give the same problem with two different products,' questions of justification apart).

I will give you another example. Remember we talked in class about the Bavarian ban on additives to beer. There the disparate impact would also structurally benefit the local, because it would favor close breweries who did not need to use conservation chemicals in their beer.

So maybe we need to introduce another analytic tool into our discussion of national treatment: Disparate impact where the benefit to the domestic product is structural and where it is contingent.

I was dubious by those who tried to force the fact pattern into TBT. TBT relates to product characteristics. It was a stretch – though not impossible – to construe the advertising ban as a TBT measure with this limitation. You only lost points if you employed TBT blithely without serious doubts.

The main errors in dealing with the justification were the following.

A general tendency to minimize the American possible justification – being carried away by the interests of your client. It may have worked well at the trial stage but not in the preliminary legal assessment stage. The Americans would have very solid public policy grounds to justify the legislation.

A failure to deal with Toys under XX(d) – which, as in Korea Beef can be instrumentalized to deal with policies which do not fall squarely within the Article XX exceptions. A measure (ban on advertising) designed to enforce a more general policy or law. Not without difficulties but not impossible.
Whereas sugar clearly has a health dimension, Article XX(b) would sit easily. As regards toys, it would be a classic case where the US could call again for an Aims (and effects) test or an alternative comparator.

Question 2.

What I wanted to see here was that students had familiarity with the actual TBT and SPS agreements and not only the parts we discussed in class and with cases which we did not analyze in class but which were assigned.

The comparisons between the two Agreements were erratic and it was noticeable who had not actually read the Agreements beforehand as I had exhorted many times and who read it perhaps just in cramming for the exam.

As regards the cases, students who addressed this question with reference only to Hormones and, say, Sardines but omitted Seals (which we did discuss) but mostly Tuna Dolphin II lost a lot of points. If you read TDII you will see why many WTO commentators suggest that the AB was moving away from the Obstacles test to a

discrimination test and raising the evidentiary bar to prove a non discriminatory case.

The systemic effect of this trend in the jurisprudence should raise alarm if it dilutes the obstacle based TBT in favor of returning to a discrimination basis.

Question 3

In this question I wanted to test skill of reading a judgment critically and having the confidence to suggest that the Panel got it wrong. It is true that there can be more than one way in which a State can bring itself into compliance with an established infraction as was the case of the USA in Gambling. It is also true that it is not for the Compensation Panel to decide which option such a State would adopt. But it is nonsense for the sanctions panel to say that it is not for them to decide whether a counterfactual proposed would bring the State into compliance. If the counterfactual does not bring them into compliance it cannot be used as a counterfactual!

Thus, the strongest argument on appeal would be very simple: Allowing Antigua to offer internet gambling services of horse racing would not bring the United States into compliance and therefore cannot serve as a counterfactual. It would not bring the US into compliance because if a service provider wanted to offer internet gambling in respect of, say, dog racing rather than horse racing, what possible ground could the United States offer for a ban on dog racing internet gambling as distinct from horse racing which would not amount to arbitrary and unjustified discrimination?

This is quite apart from the factual finding of the Compliance Panel as regards the reality of internet gambling in the USA.

The counterfactual is designed to help calculate how much money a state was losing as a result of the ongoing violation. To answer that you have to ask how much money would they be making if there were no violation. That is what the counterfactual does. That is why it is a c o u n t e r factual. Now we should certainly allow the violative State to offer a counterfactual which would minimize its exposure to sanctions. But not a counterfactual which does not replicate a compliance situation, otherwise how could we know what the level of trade would be if the State had not elected to persist in its violation and suffer sanctions.

In relation to this question you not only lost points – almost all of them, if you did not raise this issue, but you lost points, too, if you raised it in an oblique, roundabout, unclear manner. I applied the Hamlet/Ophelia test in relation to this question in addition to the substantive issue.

The question asked to present your Strongest arguments. Some students raised a long list of possibilities some of them patently weak – hedging their bets so to speak. (excuse the awful pun). I penalized for lack of judgment.