

INTERNATIONAL TRADE LAW

JHH Weiler 20XX

This exam is comprised of **three (3)** questions, and xx pages including this cover page. You have eight hours to complete all three questions. Please make sure to answer each question fully and thoroughly, and make sure to stay within the required word limits.

Time-limit: eight (8) hours

Permitted Materials: This exam is “open-book.” You may make use of any materials you like, *except* you may not communicate with any living person. You may not use ChatGPT or other AI.

You may consult any materials you wish but it is possible to receive an A+ in this exam based solely on the materials assigned during the class. If you do consult other materials you must indicate such by footnote or listing such at the end of your exam.

Collaboration is strictly prohibited. You are **absolutely prohibited** from communicating about this exam with any other person, through any medium throughout the exam period. It will be considered as cheating. Apart from NYU Law disciplinary measures, cheating might be reported to prospective employers and to the Bar with potentially disastrous implications for your employability. By taking the exam you undertake on your honor to respect these rules designed in the interest of integrity and fairness.

Word Limits: Please note that each question has its own word limit, and these limits are not identical. They correspond roughly to the question’s point value. Be sure to stay within the word limits for each question – you **MUST** list the number

of words for each answer you have given. You will be penalized by grade reduction if you fail to list the word count or if you exceed the limit.

- Q #1: forty percent (33%) of the total grade. **Word limit:** 1000 words.
- Q #2: forty percent (33%) of the total grade. **Word limit:** 1000 words.
- Q #3: twenty percent (33%) of the total grade. **Word limit:** 600 words.

NOTE: all necessary facts for Question #1 are included in the problem itself.

- The facts it presents are (somewhat) fanciful, and you should consider *only* the description of the facts in the problem to be authoritative.
- *You should not spend any time doing additional factual research.*
- If you find that some fact is unclear, or if additional facts necessary, you should make a note of that and explain what would turn on the missing fact.

Question #1: Canada—Syrup (maximum 1000 words / 33% of grade)

Giant Maple is a mega-brand in Canada. It mostly operates as a holding company, having purchased and unified many successful Canadian manufacturers across a wide variety of goods – from lumber, to foodstuffs like maple syrup, jams, and the like, to mass consumer goods ranging from microwaves, to power tools, to children’s toys. They do it all.

Within Canada, Giant Maple is a staple. Its most famous product is its house brand of maple syrup: “*Mother’s Sap*.” Every bottle is adorned in red and white maple leaves, and features the slogan “*A bottle on every Canadian table / a drop in every Canadian heart.*”

Giant Maple refers to its famed syrup in every one of its advertisements, for any of its products. *Mother’s Sap* is indeed a hallmark of the brand, and the company is well known for drawing elaborate connections between its syrup and seemingly

unrelated products through cheeky TV advertisements. Every commercial Giant Maple runs – whatever the product – ends with a wholesome image of a joyous, laughing Canadian family, dousing their food in syrup at the breakfast table. A slogan inevitably fades in, tying the scene to the product in question (e.g. “*Giant Maple Lumber – if you like our sap, try the rest of the tree!*” or “*Giant Maple Microwaves: powered by love – and Mother’s Sap!*”).

Corny as it sounds, the strategy has worked brilliantly. Giant Maple has managed to connect its huge variety of products around the wholesome image of a bottle of Giant Maple’s syrup on every kitchen table – demonstrably boosting sales across all its products.

Giant Maple is now targeting two markets in the United States, where it believes it can beat the local competition with better and cheaper products. In each case, it believes that it will retain its market edge despite import costs. Because the US imposes no tariffs in these areas, such costs are basically comparable to the costs Giant Maple already incurs in shipping its products throughout Canadian territory.

Naturally, the first such market is syrup. Giant Maple wants to market Mother’s Sap in the US. It knows its product is second to none, and it believes the US is an untapped market. Everyone knows Americans love syrups as much as anyone, using it on pancakes and waffles in the North, and even on fried chicken in the South. In a widely-billed blind taste test (“*Maple-off 2016*”), Mother’s Sap was voted “*Most Delicious in the World!*” – beating out the best that brands in the USA had to offer. The challenge, for Giant Maple, is only brand development – i.e. convincing locals to make the switch when the blindfold is removed. Giant Maple has set up a new production facility North of the border, and is gearing up for one of its famous advertising blitz’s in the US.

The second market is the new “Treemagochi” toy market. MOTO co. produces the original *Treemagochi*TM, and, despite a number of knock-offs, MOTO remains the dominant player in the US market for such toys (with 80% market share). Treemagochies are small digital toys, featuring a small screen set into a plastic acorn (small enough to fit on a keychain). On the screen lives a digital seed, which children can care for, and which will, with due care, evolve: first into a sapling, and eventually into a happy talking tree. Most adults view Treemagochies as mind-numbingly stupid. Yet somehow pre-teens are obsessed with them. They often buy several, and spend hours on end nurturing their digitized arboreal pets. Giant

Maple has sensed a natural synergy between this fad and its own brand. It has figured out that it can repurpose one of its factories to produce similar toys at 20% lower costs than MOTO. Giant Maple is thus planning a huge marketing campaign to introduce its own product – *Sapemons*TM – to compete with MOTO’s Treemagochi’s. The planned tagline is “*Now you can be the Sap Mother – grow together!*”

However, Giant Maple’s plans have come under a cloud of doubt since the US election last year. In January, newly inaugurated President Drumpf successfully pushed Congress to ban Canadian services, in apparent contravention of US GATS commitments. In a signing ceremony, Drumpf declared that this ban was necessary “to punish our bad Northern neighbors for stealing American jobs.” (Canada immediately challenged this ban under the GATS agreement, and that dispute is pending before a WTO Panel as “*US—Canadian Services*”). A month later, Drumpf held a raucous rally accusing the “nasty Canadians” of perpetrating a “carnage” against the American dairy and softwood lumber industries, for which “further punishment may be necessary.” Though Giant Maple does not export any services, dairy, or lumber to the US, it has been holding off on beginning its US marketing campaigns until tempers calm.

Unfortunately for Giant Maple, their plans suffered a major blow last week, when Congress passed an omnibus ban on advertising toys for children younger than 13, and a total ban on advertising sugary products – all as part of the 2017 LITTLE HEARTS AND MINDS ACT. The alleged rationale for the bans were reducing obsessive behavior in children (in the case of toys) and reducing health issues in children and adults arising out of excessive sugar consumption. Pulitzer prize winning journalist Dave Centigholt painstakingly documented how MOTO co. and various Vermonter Maple Syrup producers were among those funding the successful lobbying campaign in support of the Bill.

Giant Maple is set to suffer a giant loss. Without considerable advertising, they’ve found that their products have no chance of dislodging the existing players in the US market.

Giant Maple turns to the Canadian Department of Foreign Affairs and International Trade for help.

You are a junior attorney in the Department. Your supervisor informs you that the higher ups are interested in bringing a claim against the USA before the WTO.

She asks you to prepare a memo assessing all available claims Canada can bring against the US, pertaining to Giant Maple's interests. She wants your best arguments, along with an assessment of their prospects and any likely counterarguments. "Direct, to the point, and no fluff!" she instructs.

NOTE: Your supervisor instructs you to ignore any GATS claims, to avoid prejudicing the ongoing US—Canadian Services dispute. She also instructs you to ignore the NAFTA, given its pending renegotiation.

Question #2 (Maximum 1000 words 33% of grade)

It is well understood that both the TBT and SPS are meant to "enhance" the prohibition and justification disciplines of the GATT. Notably, by comparison to Article III:4 GATT, TBT and SPS prohibitions go beyond non-discrimination. They apply to a broader group of regulatory measures than merely those affording protection to domestic production. Please address the following **two (2)** questions:

a. *What are the primary mechanisms by which TBT and SPS purport to "deepen" the prohibitions of the GATT? Are there any significant differences between the TBT and SPS treaties in this respect? (300 words max)*

b. *It has been said that the Appellate Body has scaled back the TBT and SPS. How far does this go? Explain how the AB has engaged with TBT and SPS, and with what results. What's dead? What lives? What is the significance of such to the overall system? This question should be based only on cases which were included in your class assignments.*

Question #3 (maximum 1000 words / 33% of grade)

Arbitration under Section 22.6 of the DSU in US—Gambling concerned *inter alia* the determination of the monetary level which Antigua would use in calculating its Suspension of concessions. Please address the following three questions.

a. *Both Antigua and the US present counterfactuals (at ¶¶ 3.1-3.18). What is the purpose of these “counterfactuals”? (150 words max)*

b. *The Arbitrators eventually adopt an “alternative” counterfactual predicated on the idea that “...the United States would provide unrestricted market access for remote gambling and betting services only in respect of horseracing gambling and betting.” (¶ 3.53). Why did the Arbitrators take this approach? (150 words max)*

c. *The Arbitrators’ decision was not appealed. But imagine you were appealing this part of the decision: what would be your strongest arguments to overturn it in favor of Antigua’s counterfactual?*