

INTERNATIONAL TRADE

FALL 2009

Cardozo School of Law

PROF. HUGHES

Take Home Examination

Introduction

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

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 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 Cardozo School of Law rules.

You have 24 hours from the time you access this examination to submit the answers online.

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 eleven (11) true/false questions. Part I counts for 25 points. Part II consists of TWO essay questions, worth 75 points. **The essays should be no more than 1750 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

Happy Holidays to everyone

Best wishes for those graduating

*Congratulations to our SIPO students for completion
of their semester*

I. TRUE/FALSE QUESTIONS

This part of the exam is worth 25 points. Each answer is worth 2.5 points. Note that there are 11 questions, so in the same spirit as the LSAT, you can get 1 wrong and still get a maximum score on this section.

Since this exam is being administered online, please provide your answers to this section as a single column series, numbered 1 to 11, 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. Under Article 12 of the Dispute Settlement Understanding (DSU), the period for Panels to render their decisions should, as a general rule, not exceed six months and "[i]n no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months."
02. Consumer perceptions are relevant in making determinations of GATT Article I "like" products according to the decisions in *Spain – Unroasted Coffee* (1981) and *Japan – SPF Dimension Lumber* (1989).
03. When a WTO Member applies higher taxes to imported products than to "like" domestic products, GATT Article III is violated only if the higher taxation is "applied . . . so as to afford protection to domestic production."
04. In the *European Communities – Measures Concerning Meat And Meat Products* (1998) dispute, the EU, the US, and Canada all took different positions on whether the "precautionary principle" is a principle of customary international law.
05. In *Hans Sommer v. Hauptzollamt Bremen*, the European Court of Justice held that charges for inspection of Russian honey once it arrived in Germany were not part of the price of the Russian honey under EU "valuation" rules.

06. If a WTO Member prevails in a DSU action and proceeds to “retaliation” – that is, suspending concessions to the other Member as the result of the decision -- the prevailing Member may suspend concessions (of the same value as its impaired rights) under any WTO Agreement however it wants.
07. In *Italian Discrimination Against Imported Agricultural Machinery* (1958), the GATT Panel did not accept Italy's argument that Article III:4 applies only to laws, regulations, and requirements which are concerned with the actual conditions for sale, transportation, etc. of the commodity in question.
08. Based on the inherent power of the Presidency, the court in *United States v. Capps* (4th Cir, 1953) concluded that the President had the power to enter into the executive agreement with Canada despite the fact that “the executive agreement . . . contravened provisions of a statute dealing with the very matter to which it related.”
09. A series of GATT and WTO decisions (*Germany – Sardines*, *EEC – Oilseeds*, and *European Communities – Customs Classification of Certain Computer Equipment*) has made it clear that in a “non-violation” nullification and impairment case we emphasize the exporting country's reasonable expectations about the benefits it would receive from the other country's tariff concessions.
10. In *Mead Corporation v. United States* (Federal Circuit, 2002), the Court of Appeals held that the Customs Service should receive almost complete deference in the interpretation of tariff terms like “diaries” and “bound.”
11. In *Dames & Moore v. Regan* (U.S. Supreme Court, 1981), the Court concluded that the President had the power to suspend legal claims against Iran as part of the settlement of the Iran hostage crisis because, in part, “there has been a long-standing practice of settling such claims by executive agreement without the advice and consent of the Senate.”

Part II – Essay Questions
[75 points]

This section consists of two essays; one of 400-500 words and one of 1000-1250 words. There is a 1750 word limit to your essay answers together. Please indicate the total word count at the end of each 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. Please start each essay on a separate page

UP IN SMOKE
[400-500 words – 25 points]

In September 2009, the U.S. Food & Drug Administration enacted a ban on the sale of fruit-, candy-, or clove-flavored cigarettes. As reported in USA Today, here is what has happened:

* * *

Effective immediately, the Food and Drug Administration has banned the sale of candy-, fruit- and clove-flavored cigarettes. The move was authorized by the Family Smoking Prevention and Tobacco Control Act, which President Obama signed in June.

Cigarette manufacturers make sweet-flavored cigarettes to attract teens to smoking, Lawrence Deyton, director of the FDA's newly established Center for Tobacco Products, said Tuesday at a news conference.

Though Deyton did not have information about market share, he did say research has shown that 17-year-old smokers are three times more likely to use flavored cigarettes than those over 25. And, FDA Commissioner Margaret Hamburg said, nearly 90% of adults started smoking as teens.

The FDA notified manufacturers of the impending ban last week, Deyton said. Under the new smoking prevention act, he said, Tuesday was the earliest the agency could ban the flavored cigarettes. The ban, however, does not apply to flavored cigars or smokeless tobacco products.

* * *

The ban doesn't include menthol cigarettes, Deyton said. "The law specifically asks us to look at menthol separately."

Menthol cigarettes, preferred by 80% of black smokers and a quarter of white smokers, are growing increasingly popular with teen smokers, says Jonathan Foulds, director of the Tobacco Dependence Program at the University of Medicine & Dentistry of New Jersey-School of Public Health in New Brunswick.

Early this year, Foulds co-wrote a study that found menthol cigarettes are harder to quit, particularly among black and Latino smokers. The reason, he says: Menthol makes smoke less harsh, so smokers can take in more nicotine and carbon monoxide per cigarette. The new findings have been surprising, Foulds says. "We all thought until quite recently that menthol was just a neutral flavor."

But he's not surprised that the FDA's first venture into tobacco regulation does not cover menthol cigarettes, because they're far bigger sellers than candy versions. Banning them first, he says, would result in a "pretty major revolt from industry." On its website, [Philip Morris USA](http://www.philipmorrisusa.com) says it supports banning cigarette flavor varieties "other than tobacco and menthol."

http://www.usatoday.com/news/health/2009-09-22-flavored-clove-cigarettes_N.htm

* * *

Indonesia produces over 97% of the world's clove-flavored cigarettes and, until the ban, was the only exporter of clove-flavored cigarettes to the US. Indonesia has threatened to challenge the US action at the WTO.

Write a 400-600 word explanation of the problem for Canadian Minister of Health Mona Jaconde. Ms. Jaconde is also considering banning clove cigarettes in Canada, where – like the US – almost all such imports come from Indonesia. She does not understand how this might be a problem under the WTO system.

Nuts Down Under

[1000 - 1200 words – 50 points]

United Regional Nuts Company (UR NUTS) is a large, very successful California company founded by Ms. Hariko Manjitu, a

Japanese-American entrepreneur. UR Nuts prepares and distributes various kinds of packaged nuts and snack products, particularly using peanuts, pecans, almonds, and macadamia nuts grown in different parts of the United States.

A few years ago, UR Nuts also began making and marketing an award-winning peanut butter. Made from 100% Valencia peanuts grown in Georgia, the peanut butter is actually made at a UR Nuts facility in Vancouver, Canada. The Vancouver facility also takes raw peanuts and "shells" them, then packages them in as "UR NUTS Shelled Peanuts - SALTED" and "UR NUTS Shelled Peanuts - UNSALTED".

In recent years, UR Nuts has begun exporting the full range of its products to Australia, New Zealand, and Singapore. Australia and New Zealand coordinate their tariff classifications in the "Harmonized Antipodean Tariff Scheme" (HATS). Until this year, the applicable tariff categories for its exports to Australia and New Zealand under HATS were as follows:

		WTO	FTA	other
34.96.000	Nuts [tree nuts and peanuts]	6%	/0%	/25%
34.96.500	Pastes, powders, and butters made from tree nuts and peanuts	15%	/0%	/30%

The rates were well below New Zealand's 25% tariff bindings and Australia's 20% tariff bindings for these types of products.

In 2007, new left-center governments came to power in both countries and have been slowly changing government policy. Several of these policy changes seem to adversely affect UR Nuts just as it was beginning to crack the Australian and New Zealand markets. Ms. Manjitu is an influential donor to the Democratic Party and, through her connections at the White House, has scheduled a meeting with your boss, Assistant U.S. Trade Representative Mona Jaconde.

Ms. Jaconde has a meeting with Ms. Manjitu tomorrow and needs a short (1,000 – 1,250 word) memo on UR Nuts' problems down under (described below) and US options to help UR Nuts.

Remember that the US has a free trade agreement with Australia, but not New Zealand. Assume that there are no substantive rules in the

AUSFTA [Australia-US Free Trade Agreement] different from the relevant WTO rules. Assume that both the US and Australia are parties to the WTO Government Procurement Agreement. Finally, assume that no aspect of the WTO Agreement on Agriculture affects your analysis.

1. TARIFF STRUCTURE CHANGE

This summer, Customs Australia and Customs New Zealand announced hundreds of new HATS tariff classifications and sub-classifications. Effective January 1, 2010, the new HATS tariff classifications relevant to UR Nuts products are as follows:

		WTO	FTA	other
34.96.001	Tree nuts (except macadamias)	6%	/0%	/25%
34.96.002	Macadamia nuts	25%	/0%	/50%
34.96.003	Peanuts	15%	/0%	/50%
34.96.500	Pastes, powders, and butters made from tree nuts (ex. maca)	15%	/0%	/30%
34.96.501	Pastes, powders, and butters made from macadamia nuts	25%	/0%	/30%
34.96.502	Pastes, powders, and butters made from peanuts	20%	/0%	/30%

Can the US complain about these changes to New Zealand?

2. AUSTRALIAN CUSTOMS RULING ON UR NUTS PRODUCTS

a. Customs Australia has just ruled that "UR NUTS Shelled Peanuts - SALTED" and "UR NUTS Shelled Peanuts - UNSALTED" products are from Canada and, therefore, subject to a 15% tariff.

b. Customs Australia has just ruled that "UR NUTS PEANUT BUTTER" products are from Canada and subject to a 20% tariff.

Can the US complain about these changes to Australia?

3. SPECIAL RULES FOR AMERICAN PEANUT BUTTER

In the spring of 2009, the U.S. Food and Drug Administration ordered a series of recalls of products containing peanuts and peanut butter from the Peanut Corporation of America (PCA) because of the threat of salmonella. Although the contamination seemed focused on PCA – which eventually went bankrupt – hundreds of peanut and peanut

butter products were involved and subsequent hearings revealed serious questions about food safety in the U.S. peanut processing industry.

In response to the US salmonella recalls for peanut and peanut products, Australian Nicola Roxon Minister of Health has ordered that all imports of American peanut products must be subject to special import licenses that include inspection of the product at the port of entry. UR Nuts is charged all fees for the scientific analysis to determine that their products are salmonella-free; the inspection and licensing procedure typically take 3 weeks. This increases UR Nuts warehouse costs at the Australian ports and making it difficult to supply their Australian distributors. To add insult to injury, the Australian Ministry of Health has said UR Nuts Peanut Butter is an "American" product for purposes of health regulations, regardless of what Customs Australia says.

Can the US complain to Australia about these requirements?

4. THE "TRAIL MIX TO BETTER HEALTH" PROGRAM

The Federal Government of Australia has appropriated at least five million Australian dollars (approximately \$US 4,634,000) to a "Trail Mix to Better Health" program to replace sugary desserts in school lunches with fruit, nut, and granola "snack-packs." UR Nuts would like to compete vigorously for this potential business.

The money is allocated from the Australian federal government to the individual states and territories [Australia has six states and two "territories"]. The program allocates this money to the states based on population,¹ but has a special provision that reads "[w]here the state program requires manufacturers of snack-packs that contain macadamia nuts, almonds, and raisins to use only said ingredients grown in Australia, that state program will receive a 50% premium on the monies it would otherwise be allocated." In other words, if the state of New South Wales was to receive \$AU 1 million under the program and requires its school snack-pack suppliers to use only Australian raisins, almonds, and macadamias, New South Wales will receive \$AU 1.5 million.

The state of Western Australia has further announced that it will only allow Australian companies to bid on its school snack-pack pro-

1 http://en.wikipedia.org/wiki/List_of_Australian_states_and_territories_by_gross_state_

grams, for which it will spend \$AU 650,000 allocated to it from the federal government "Trail Mix to Better Health" program.

Can the US complain to Australia about any aspects of this program?

END OF EXAMINATION

#####