

Nuts Down Under – Model 1

Question 2: Nuts Down Under

Part 1: Tariff Structure Change:

First, New Zealand has not violated its binding because all their tariff rates remain at 25% or lower. Second, the US cannot complain that the new Tariff Structure would violate MFN or NT because there is no *de jure* or *de facto* discrimination of American products. The US cannot demonstrate that by raising the tariffs on macadamia nuts and peanuts (and pastes, powders and butters made from them), New Zealand is discriminating against the US.

Under Art. XXIII(b) (non-violation), the US could argue that the New Zealand tariff nullifies and impairs the US's reasonable trade expectations of the parties, similar to those considered in German – Sardines. However, more facts are needed to make that determination.

Part 2: Australian Customs Ruling on UR NUTS Products:

Rules of origin are determined by each nation's domestic law – however, most countries use the “last substantial transformation test”, based on the US and EC/EU practice.

In Koru, the court held that a “substantial transformation” occurs where products lose their identity, acquiring a new name, character, and use. UR NUTS can argue that, unlike the Hoki fish in Kuro, the shelled peanuts did not undergo a change in name (they are still peanuts) or character (though shelled, they are still essentially peanuts). However, Australia may argue that there was a substantial change in use because it became a product ready for consumption.

However, in SDI Technology, the court found that a producer/ consumer shift is not dispositive.

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Furthermore, the court found that a product that comes unassembled is still that product. UR NUTS could argue that an unshelled peanut is an unassembled peanut.

Furthermore, according to EU cases, including Brother International, no substantial transformation occurs where operations do not contribute to the essential character of the goods, including, for example, “simple assembly operations”. What takes place in Canada is a “simple assembly operation” because it involves shelling and packaging only (does not require staff with special qualifications, sophisticated tools, or special factories). Furthermore, there is no evidence of significant ad valorem percentage change. Where only two countries are concerned, the change must be appreciable (in Brother International, a 10% change did not satisfy this criteria).

In regards to the peanut butter product, a name change takes place (from “peanut” to “peanut butter”). UR NUTS will argue that the “name” element is the “weakest evidence” and should receive less weight. See Kuru. Australia will argue that, like the Hoki fish, the character of the product has changed in that it no longer “looks” the same, is marketed differently, and is sold in a different section of the supermarket. UR NUTS can argue that the essence of the product remains the same, evidencing a lack of change in character and that the use of the product (food consumption) is the same. Finally, the peanuts underwent a simple assembly operation (an operation done in Whole Food super markets across the US) and there is no evidence an ad valorem change.

Part 3: Special Rules for American Peanut Butter

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The Special Rules for American Peanut Butter clearly violate GATT Art. I and III:4 by requiring that American peanut products be subject to special import licenses. However, GATT Art. XX(b) and the SPS Agreement may permit these measures.

The SPS Agreement applies to measures seeking to protect human health from risks of disease-causing organisms in food, such a measure seeking to identify salmonella in peanut products.

The SPS requires that all WTO members base their national SPS measures on international standards, but allows measures to exceed existing international standard (if any) if such measures (1) are based on scientific evidence; (2) are not discriminatory in violation of MFN or NT principles; and (3) are justified by scientific evidence or by a risk assessment to determine the appropriate level of protection. In this case, the measure is based on the scientifically proven threat of salmonella in peanut products generally, and American peanut products in particular. Unlike in EC- Meat Case, where the panel found that the EC failed to demonstrate that the ban on hormones was sufficiently linked to the risk posed on human health, Australia can argue that the evidence (hearings in the US) revealed serious problems with food safety in the US peanut processing industry that rationally support the import license and inspection. However, under the chapeau language the US can argue that the import license is discriminatory, in that it fails to apply such measures to all peanut imports, from whatever country. Australia can argue that even if such a measure is not maintained with scientific evidence, it is justified as a precautionary method because it may harm people. However, the US can counter that there is no time limit on this measure.

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Also, the US can argue that the import license is a quantitative restriction in violation of Art. VI. However, Australia will argue that the import license is not stopping importation and that it is an “automatic license”. US should cite Japan- Semiconductors, where the court found that a five day delay constituted an automatic license, but a three-month export license was not automatic.

Part 4: The “Trail Mix for Better Health” Program

The “Trail Mix for Better Health” Program clearly violates National Treatment. As a WTO GPA signatory, Australia is not excluded under Art. III.8(a).

The measure can be categorized as a subsidy, but will not be specifically excluded under Art. III.8(b) because it is not a subsidy to a *producer*. In Italian – Agricultural Machinery, the panel held that the Art. III.8(b) exception should be read narrowly and exclude an indirect subsidy. Furthermore, Art. III.8(b) only applies to subsidies that are not in violation of SCM. (see discussion below).

In order to be a subsidy under SCM Art. I, a measure must (1) constitute a financial contribution or income support by a government when; (2) it confers a benefit; (3) to a specific recipient. The US should argue that the measure is illegal per se because it represents a subsidy under Art. 3 & 4, because it gives a significant subsidy to states and territories contingent on purchase of domestic goods over foreign goods. If Australia argues that the measure is a yellow light subsidy, the US must demonstrate that the measure seriously injures its producers. Given that there is no evidence that the measure displaces or impedes imports of American peanut products or that the subsidy is a significant price undercutting, the US would likely not prevail on a “serious

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prejudice” claim. (See Indonesia – Auto). Nonetheless, having failed to show serious prejudice, the US can make a non-violation case under nullification and impairment.