

## NUTS DOWN UNDER

## 1. TARIFF STRUCTURE CHANGE

The US can complain to New Zealand that the classification changes affecting the tariffs on nuts in the HATS violate Article I:1. This complaint would be similar to that brought by Brazil against Spain in *Spain-Unroasted Coffee* and by Canada against Japan in *SPF-Lumber*.

Under the revised classification system, tree nuts other than macadamia nuts and peanuts retained a tariff of 6%, while the tariff on macadamia nuts and peanuts increases. In addition, macadamia paste and peanut paste, which were undifferentiated under the old classification scheme, are now subject to different tariff rates. The US can claim that because the nuts are “like products,” Article I:1 requires that the tariff treatment granted to countries exporting tree nuts “shall be accorded immediately and unconditionally to the like product originating in...the territories of all other contracting parties.” (¶4.4 *Spain-Coffee*).

The US can rely on the case made by Brazil regarding the tariff differentiations on coffee imposed by Spain to argue that the lack of any differentiation between macadamia and tree nuts under the old classification system supports a finding of likeness. If the US can further show that it is not common practice among other contracting parties to differentiate between types of nuts in their customs classification systems, this would support the conclusion that tree nuts, including macadamia nuts, and peanuts are considered “like products” (See *id.* at ¶ 3.2).

The US is unlikely to prevail in its “nuts are nuts” argument, as this claim is weaker than the “coffee is coffee” argument raised by Brazil in *Spain-Coffee*. Here, the distinction between nuts is similar to that between different species of lumber in *SPF Lumber*, in which it was held that differences in consumers’ tastes are a determining factor of product “likeness.” Macadamia nuts and tree nuts can be distinguished based on their properties and characteristics, and this is likely reflected in price differentiations between the two products, detracting from an argument that they are “like products.” The WTO is more likely to give credence to a claim of organoleptic distinctions among nuts, as the differences in taste are easily detectable by average consumers. Furthermore, it is

unknown whether this tariff will discriminate solely against the US and Canada, and a violation of I:1 cannot result from product discrimination alone: The US would need to prove that the discrimination against peanuts and macadamia nuts leads to *de facto* discrimination among countries. (See *SPF* ¶3.56).

## 2. AUSTRALIAN CUSTOMS RULING ON UR NUTS PRODUCTS

A. The US can allege that under the “last substantial transformation” test, the US is the country of origin of the peanuts and thus the nuts are deserving of preferential treatment under the Australian-US FTA. Under rule 6 of the Kyoto Convention, “operations which do not contribute or which contribute to only a small extent to the essential characteristics or properties of the goods...shall not be regarded as constituting substantial manufacturing...” (*Brother International* ¶16). Article 6 then specifies that “simple assembly operations” are not a process that would generally confer origin on a product. It cannot be said that the shelling of the nuts in Vancouver constitutes anything more than a simple assembly operation, as that term is defined as an operation which does not “require staff with special qualifications...” Furthermore, the shelling of the nuts does not bestow upon the peanuts their “essential characteristics,” as essential characteristic is the nut itself, which originates in the US (See *Brother International* ¶17).

B. However, it will be harder to argue that the manufacturing process that transforms the peanuts into peanut butter in Canada does not result in substantial transformation: The product enters as shelled peanuts and exits as peanut butter. Thus, the manufacturing in Canada represents the decisive stage of production at which the product is given its essential characteristic. However, if the manufacturing process in Canada adds no more than a 10% increase in value to the product, American origin can be conferred on the peanut butter (See *id.*).

## 3. SPECIAL RULES FOR AMERICAN PEANUT BUTTER

Australia will invoke XX(b) to justify the inspection measure as a necessary exception to Article XI, to protect human life and safety. Furthermore, Australia’s measure conforms to the requirements under the SPS Agreement. Thus, the inspection of the peanut products at Australia’s port of entry constitutes a permissible sanitary measure

to protect human health from risks arising from “toxins or disease causing organisms in foods.” (SPS Agreement), and the US will have a hard time asserting a valid complaint that the measure violates the WTO.

If there is an international standard in place to regulate salmonella testing, Article 3.1 of the SPS Agreement requires that Australia base its measure on that standard. Even if the Australian measure exceeds an existing international standard, because the inspection stems from conclusions reached by the FDA, the measure is justified by scientific evidence rather than mere precaution and will likely be upheld. Although the US can argue that the measure is more trade restrictive than necessary to achieve the appropriate level of protection, this argument lacks strength. Since the measure merely requires an inspection, upon which the products are allowed entry, rather than instituting a complete import prohibition, it will be viewed as proportionate to the threat.

In addition, if the US asserts that the nuts are a product of Canada for purposes of avoiding the import licenses, this could detract from its claim that the peanuts are products of the US for FTA purposes. (See *SPF-Lumber*, ¶3.52, in which it was noted that Canada had previously espoused the position that different species of lumber were “objectively different.”)

Although the US might protest the fact that UR incurs the costs of inspection, by availing itself of the Australian market, it bears the burden of ensuring that its products meet the specifications required under Australian law. (See *Hans Sommer*).

#### 4. THE "TRAIL MIX TO BETTER HEALTH" PROGRAM

The Australian government’s allocation of a 50% premium to states requiring snack packs to contain exclusively domestically produced nuts violates Article III:4. This measure accords less favorable treatment to imported nuts than that accorded to like products of national origin, and affords protection to domestic producers by giving them a competitive advantage (See *Italian-Agricultural Machinery*). Furthermore, the funding cannot be considered a permissible subsidy under III:8(b), because the funds are transferred between government entities, rather than provided directly to the domestic producers. In *Canada-Periodicals*, the WTO Appellate Body found that a similar transfer

of funds between government agencies was not a type of subsidy exempted from Article III:4 by Article III:8(b).

The US can also assert a claim that the state of Western Australia's plan to exclude non-Australian companies from bidding on its school snack program does not comply with its obligations under the WTO Government Procurement Agreement. The bidding to supply the nuts for the snack packs falls within the scope of the GPA, because the amount in question exceeds the required threshold of SDR 200,000 for local government transactions. Article III:1(a) of the GPA requires that government procurement contracts comply with National Treatment obligations, and by excluding foreign companies from bidding, the state of Western Australia contravenes its WTO obligations.

1,194 words

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