

INTERNATIONAL TRADE

SPRING 2011

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 ___ true/false questions. Part I counts for ___ points. Part II consists of ___ essay question, worth ___ points. **The essays should be no more than _____ 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

*Best wishes for those graduating, happy summer to all,
and thanks for a fun class*

I. TRUE/FALSE QUESTIONS – 30 POINTS

This part of the exam is worth 30 points. Each answer is worth 2 points. Note that there are 17 questions, so in the same spirit as the LSAT, you can get 2 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. The court in *United States v. Capps* (4th Cir, 1953) concluded that the President’s inherent power over international relations did not extend to an executive agreement with Canada when “the executive agreement . . . contravened provisions of a statute dealing with the very matter to which it related.”
02. According to the NAFTA Agreement – as described in U.S. Department of Commerce regulations – tuna caught by boats flying the flag of Mexico that are fishing 100 miles off the coast of Peru will be considered goods wholly produced in the NAFTA region.
03. In *Brothers International v. Hauptzollamt Giessen* (1989), the European Court of Justice agreed with the European Commission that there had been a “substantial transformation” of the typewriters kits from Japan into finished typewriters in Taiwan, so that the typewriters would be considered Taiwanese for tariff purposes.
04. In *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products* (2001), the Appellate Body concluded that the Anti-Dumping Agreement does not allow a government to use “fact available” against a company as long as the company provides the “necessary information with a reasonable time” and does not “impe[s] the investigation.”

05. When a WTO Member applies higher taxes to imported products than to "like" domestic products, there is no violation of GATT Article III unless the higher taxation is "applied . . . so as to afford protection to domestic production."
06. In the *Mead Corporation v. US* litigation, the U.S. Supreme Court concluded that the Federal Circuit and other federal courts must give U.S. Customs "Chevron deference" in Customs determinations of tariff classifications because of Customs' expertise in applying the customs statute.
07. In a GATT Article III analysis, if an imported product is not "like" a domestic product, countries are completely free to apply dissimilar taxation, even if the imported and domestic product are substitutable for consumers.
08. The loan program at issue in *Italian Discrimination Against Imported Agricultural Machinery* (1958) would not be a forbidden "red light" subsidy under the SCM Agreement.
09. In *Korea – Measures Affecting Import of Fresh, Chilled, and Frozen Beef* (2000) Korea successfully established that its dual retail distribution system was "necessary" under GATT Article XX for the prevention of deceptive practices.
10. In the pre-WTO system – that is, GATT 1947 -- a single country or a few countries could prevent a GATT panel decision from becoming binding.
11. In *Canada – Import Restrictions on Ice Cream and Yoghurt* (1989), the Panel found that there was not evidence that quotas on importation of American ice cream and yoghurt were "necessary to the enforcement" of Canada's domestic supply restrictions on milk.
12. In American domestic law, principal authority to regulate international trade lies with the President pursuant to Article I of the U.S. Constitution.
13. In the 2000 *Canada- Certain Measures Affecting the Automobile Industry* panel decision, Canada's "Motor Vehicle Tariff Order 1988" was

found incompatible with Canada's GATT obligations because it allowed only specific automobile makers from specific countries to qualify for the tariff reduction in the future by producing a certain amount of cars locally.

14. If a producer or importer wants to qualify a product as NAFTA goods through the "regional value content" method, they must establish that the product contains 85% regional value content.
15. According to the reasoning in the decisions in *Spain – Unroasted Coffee* (1981) and *Japan – SPF Dimension Lumber* (1989), consumer perceptions are relevant in making determinations of GATT Article I "like" products.
16. The WTO Agreement on Government Procurement (GPA) is a "plurilateral" agreement, meaning that only some of the WTO Members are bound by it.
17. Under the General Rules of Interpretation applicable to the Harmonized Tariff Schedule of the United States, if a tariff classification names a particular material (like cotton or bronze), that classification includes only pure materials and excludes alloys and mixtures of the named material.

Part II – Essay Questions

[70 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

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.

I. 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 Austral-

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

ia, 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 programs, 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

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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."