Case study: In 1979 Spain enacted a law regarding the collection of duties on imports of unroasted coffee (compared with roasted coffee). Defining these regulations unfair, Brazil demanded the conduct of negotiations with Spain (dispute settlement). Since these negotiations failed, a Panel had to take place. Spain argued that unroasted and roasted coffee are different products that justify a deviation from the "Most Favorable" Principle.

III. MAIN ARGUMENTS

Article 1:1

3.1 The representative of Brazil argued that by introducing a 7 per cent tariff rate on imports of unroasted, non-decaffeinated coffee of the "unwashed Arabica" and Robusta groups, while affording duty-free treatment to coffee of other groups, the new Spanish tariff regime was discriminatory against Brazil, which exports mainly "unwashed Arabica" coffee, but also Robusta coffee, and therefore was in violation of Article 1:1 of the General Agreement, according to which:

"... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in... any other country shall be accorded immediately and unconditionally to the like product originating in... the territories of all other contracting parties."

3.2 In this connection, he noted that, as did Spain herself under her previous tariff regime, no other contracting party discriminated in its customs tariff as between "types" or among "groups" of coffee.

3.3 The representative of Spain, stressed that no contracting party was obliged to retain either its tariff structure, or its duties, applicable to the importation of products which have not been bound. He recalled that the Brussels nomenclature adopted by Spain did specify tariff headings but left it to each country to establish, if it so wished, sub-headings within these headings. Accordingly, the Spanish authorities had the right to establish within a given heading the sub-divisions which were most suited to the characteristics of Spain's foreign trade, while respecting, as Spain has done on many occasions, the bound duties previously negotiated. The classification criterion adopted was based on classifications made by international organizations, specifically the International Coffee Organization (ICO).

3.4 In order to ascertain the coverage of Article 1:1 it was necessary, in the view of the Spanish representative, to consider two aspects in detail: (a) meaning of the term "like products", and (b) existence of any preference or preclusion in respect of a country as a consequence of the new structure of heading No. 09.01.A.1 of the Spanish tariff. The Spanish authorities continued to hold that, in their judgment, the provisions of the Royal Decree 1764/79 were fully compatible with the obligations assumed by Spain under the General Agreement, and in particular Article 1:1 thereof. These authorities furnished photocopies of importing licences in Spain, issued after 1 March 1980, which evidenced that the new tariff classification was applied according to the nature of the products, and completely independently of the country of origin. In particular, these licences evidenced that Brazilian "washed" coffee was imported into Spain free of duty.

"Like products"

3.5 Recalling that in some past GATT cases it had been suggested that "like products" were all the products falling within the same tariff heading, the representative of Spain did not agree with that opinion. In his view, this interpretation could lead to serious mistakes, given that products falling within one and the same tariff heading could be unlike and clearly different, as for example: (i) in the case of all the residual tariff headings ("other products not specified"), covering a large number of heterogeneous products; and (ii) headings including homogeneous products where in many instances these were not "like products" (i.e. CCCN heading No. 15.07 including all kinds of vegetable oils; CCCN heading No. 22.05 including all wines, etc.).

3.6 The Spanish representative pointed out that qualitative differences did exist between various types of coffee considering both technico-agronomic, economic and commercial criteria. He argued that Robusta coffee beans were characterized by their chemical composition and yielding a neutral beverage that was lacking in aroma and was richer in soluble solids than the beverage made from Arabica coffee.

1 In this respect, the representative of Brazil requested the Panel to take note of the oral recognition made by the Spanish representative in the course of the first hearing of the Panel that Article I of GATT applied equally to bound and unbound tariff items.
3.7 Although both "mild" and "unwashed Arabica" coffees belonged to the group of Arabica, the Spanish representative further argued that differences in quality also existed between them, as a result of climatic and growing conditions as well as methods of cultivation and above all the preparation because aroma and taste, essential features in determining trade and consumption of these products, were completely different in "washed" and "unwashed" Arabica coffees. Different quotations in international trade and commodity markets were due to these factors.

3.8 As distinctive markets existed for the various types of unroasted coffee, the Spanish representative was of the view that such various types of coffee could not be regarded as "like products". This was particularly evident in the Spanish market where, for historical reasons, consumers' preference for the various types of coffee was well established, in contrast with other markets in which the use of blends was more generalized. When referring to the increasing market share of blends outside Spain, he argued that the existence of blends proved that the various types of coffee were not the same products.

3.9 For his part, the representative of Brazil argued that coffee was one single product and that, therefore, for the purpose of Article 1:1 of the GATT, must be considered a "like product". He further argued that in the specific case of "mild" and "unwashed Arabica" coffees, both came from the same species of plant, and often from the same variety of tree. He also stated that, in such cases, the product could be extracted from the same individual tree, and the classification as "unwashed Arabica" or "mild" would depend exclusively on the treatment given to the berries.

3.10 He pointed out, therefore, that existing differences between "growths" or "groups" of coffee were essentially of an organoleptic nature (taste, aroma, body, etc.) resulting from geographical conditions and, principally, from the distinct methods of preparation of the beans.

3.11 He stated that the classification presently used by Spain for tariff purposes had been introduced by the International Coffee Organization in 1965/66, when the Council of the Organization decided to create groupings of coffee-producing countries as part of a system for the limited adjustment of export quotas in response to changes in an indicator price of "mild Arabicas", "unwashed Arabicas" and "Robustas". He further stated that the composition of each grouping depended upon political decisions taken yearly by the Council of the Organization, according to which each exporting country was placed in the group corresponding to the kind of coffee constituting the greater part of its production. He stressed that since 1972 these groupings had only served a statistical purpose.

3.12 He argued that, from the point of view of the consumer, virtually all coffee, either roasted or soluble, was sold today in the form of blends, combining in varying proportions coffee belonging to different groups. Moreover, in everyday language, the terms type, quality, and growth were used interchangeably to indicate specific grades of coffee, for instance Colombian Mums, El Salvador Central Standard, Paraná 4, Angola Ambriz 2AA, etc... In his view, this was the only characterization really meaningful for trading purposes, since no roaster did buy a "Colombian mild" or "unwashed Arabica" as such, but rather well-known grades, priced according to the beverage they could provide.

3.13 He further stated that with respect to its end use, coffee was a well-determined and one single product, generally intended for drinking as a beverage.

Differentiation made in the Spanish tariff

3.14 Explaining the economic reasons beyond the differentiation introduced in the Spanish tariff by the Royal Decree No. 1764/79, the representative of Spain said that the lower customs duty applicable to "mild" coffee imported into Spain reflected the Spanish Government's deep concern over the possible impact on prices of measures to return coffee to the private sector and afford greater trade liberalization. In connexion, he noted that coffee accounted for more than 2 per cent in the Spanish consumer price index. He also said that in the previous trade system of State-trading in which a nil tariff duty existed since 1975, nevertheless the difference between import prices and selling prices to roasters ("precios de cesión") in practice constituted an implicit tariff affecting all imports of coffee. This implicit tariff was higher than the tariff duties effectively applied since March 1980.

3.15 Having recalled that a very high proportion of "mild" coffee was consumed in the Spanish market, he noted that this very high proportion of "mild" in Spanish consumption had been maintained by keeping artificially low the retail price of "mild" coffee through the operation of the previously existing system of authorized prices.

3.16 In view of the foregoing, he indicated that his authorities had considered that the only way of reconciling consumers' preference for "mild" coffee and the transfer of the coffee trade to the private sector was to establish different rates of custom duty, with a zero duty on the most expensive coffee, i.e. "mild" coffee. In so doing, his authorities had not at any time given any thought to which countries were producing the different types of coffee. In fact, different types or groups of coffee were often grown in one and the same country and more than thirty countries were producing both Robusta and "unwashed Arabica".

3.17 Finally, the Spanish representative stressed the transitional character of the coffee import régime actually applied by his country. He said that
his authorities ultimately aimed, in the shortest possible time, at introducing in respect of coffee a system of automatic licensing and free domestic trade.

3.18 Referring to the stated anti-inflation objective of the Spanish measures, the representative of Brazil was of the view that such argument was not relevant to the case under dispute, since, whatever the motivation to introduce the new tariff regime for unroasted coffee, such motivation did not exempt Spain from complying with the provisions of Article I:1 of the GATT.

Article XXIII

3.19 The representative of Brazil argued that, by providing a discriminatory treatment for different groups of coffee, the Royal Decree 1764/79 was in violation of Article I:1 of the GATT, insofar as it constituted an infringement of the obligation to accord m.f.n. treatment to "like products" originating in the territories of all contracting parties and thus, under Article XXIII:1(a), constituted prima facie a case of nullification or impairment and impeded the attainment of the objective of non-discrimination of the General Agreement. He further noted that in paragraph 5 of the Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted by the Contracting Parties on 28 November 1979, it was, inter alia, stated that: "In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment..., and that "...there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge.".

3.20 In view of the above, the representative of Brazil felt that it was therefore not necessary, on the basis of the Brazilian complaint, to attempt to establish concrete evidence on the existence of direct injury or prejudice to Brazilian exports.

3.21 Also referring to paragraph 5 of the Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, the representative of Spain maintained that in the opinion of the Spanish authorities, as a principle, it was not enough to accuse someone of a violation to invert the evidence of the proof, but it was necessary to show that the violation was founded, and to prove its existence; what is more, it was indispensable for the Panel expressly to declare the existence of such violation for the authorities of the party in breach to assume, at a

subsequent stage of the proceedings, the burden of proving the non-existence of injury.

3.22 According to the Spanish representative, past recourses to Article XXIII implied the conjunction of two circumstances: on the one hand, infringement of an obligation assumed under the General Agreement (formal ground) and, on the other, the consequence that an economic injury derived therefrom (substantive ground). For a complaint to be soundly based, the conjoined concurrence of both grounds must be established.

3.23 Commenting on this point, the representative of Brazil noted that if, under a similar complaint dealing strictly with a violation of legal obligation under GATT, concrete evidence of injury or prejudice were to be required before a finding was made under existing procedures for dispute settlement, one would incur in the fallacious presumption that any infringement on GATT rules was licit unless and until it was proved that such action had concretely and effectively caused injury or prejudice.

IV. FINDINGS AND CONCLUSIONS

4.1 The Panel has carried out its consideration of the matter referred to it for examination in the light of its terms of reference and on the basis of various factual information which was available to it, and of arguments presented to it by the parties to the dispute.

4.2 The Panel considered that it was called upon to examine whether the Spanish tariff regime for unroasted coffee introduced by Spain through the Royal Decree 1764/79 (ref. paragraph 2.2) was consistent with Spanish obligations under the GATT, and more precisely whether it was in conformity with the most-favoured-nation provision of Article I:1.

4.3 Having noted that Spain had not bound under the GATT its tariff rate on unroasted coffee, the Panel pointed out that Article I:1 equally applied to bound and unbound tariff items.

4.4 The Panel found that there was no obligation under the GATT to follow any particular system for classifying goods, and that a contracting party had the right to introduce in its customs tariff new positions or subpositions as appropriate. The Panel considered, however, that, whatever the classification adopted, Article I:1 required that the same tariff treatment be applied to "like products".

4.5 The Panel, therefore, in accordance with its terms of reference, focused its examination on whether the various types of unroasted coffee

1 Provided that a reclassification subsequent to the making of a concession under the GATT would not be a violation of the basic commitment regarding that concession (Article II:5).
listed in the Royal Decree 1764/79 should be regarded as "like products" within the meaning of Article 1:1. Having reviewed how the concept of "like products" had been applied by the Contracting Parties in previous cases involving, inter alia, a recourse to Article 1:1, the Panel noted that neither the General Agreement nor the settlement of previous cases gave any definition of such concept.

4.6 The Panel examined all arguments that had been advanced during the proceedings for the justification of a different tariff treatment for various groups and types of unroasted coffee. It noted that these arguments mainly related to organoleptic differences resulting from geographical factors, cultivation methods, the processing of the beans, and the genetic factor. The Panel did not consider that such differences were sufficient reason to allow for a different tariff treatment. It pointed out that it was not unusual in the case of agricultural products that the taste and aroma of the end-product would differ because of one or several of the above-mentioned factors.

4.7 The Panel furthermore found relevant to its examination of the matter that unroasted coffee was mainly, if not exclusively, sold in the form of blends, combining various types of coffee, and that coffee in its end-use, was universally regarded as a well-defined and single product intended for drinking.

4.8 The Panel noted that no other contracting party applied its tariff regime in respect of unroasted, non-decaffeinated coffee in such a way that different types of coffee were subject to different tariff rates.

4.9 In the light of the foregoing, the Panel concluded that unroasted, non-decaffeinated coffee beans listed in the Spanish Customs Tariffs under CCCN 09.01.A.10, as amended by the Royal Decree 1764/79, should be considered as "like products" within the meaning of Article 1:1.

4.10 The Panel further noted that Brazil exported to Spain mainly "unwashed Arabica" and also Robusta coffee which were both presently charged with higher duties than that applied to "mild" coffee. Since these were considered to be "like products", the Panel concluded that the tariff regime as presently applied by Spain was discriminatory vis-à-vis unroasted coffee originating in Brazil.

4.11 Having recalled that it had found the tariff regime for unroasted coffee introduced by Spain through the Royal Decree 1764/79 not to be in conformity with the provision of Article 1:1, the Panel further concluded that this constituted prima facie a case of impairment of benefits accruing to Brazil within the meaning of Article XXIII.

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