

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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SPAIN - TARIFF TREATMENT OF UNROASTED COFFEE

Report of the Panel

I. Introduction

1.1 In a communication dated 13 September 1979 and circulated to contracting parties, Brazil informed that a new Spanish law had introduced certain modifications in the tariff treatment applied to imports of unroasted coffee, according to which imports into Spain of unroasted non-decaffeinated "unwashed Arabica" and Robusta coffees (tariff No. 09.01A) were now subject to a tariff treatment less favourable than that accorded to "mild" coffee. Prior to this new law there had been no differentiation in the tariff treatment applied by Spain to imports of unroasted coffee. As a main supplier of coffee to Spain, Brazil was concerned with the discriminatory character of the new tariff rates and had requested Article XXII:1 consultations with Spain (L/4832).

1.2 At the meeting of the Council on 26 March 1980, the representative of Brazil informed the Council of Brazil's request to hold Article XXIII:1 consultations with Spain on this matter (L/4954). At the same meeting, the Council noted that consultations between the two contracting parties were getting under way (C/M/139).

1.3 At its meeting on 18 June 1980, the Council was informed that these consultations had not resulted in a satisfactory adjustment between the parties and that Brazil invoked the procedures of Article XXIII:2 requesting the examination of this matter by a panel (L/4974).

1.4 The Council agreed to establish a panel with the following terms of reference:

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Brazil, relating to the tariff treatment of imports of unroasted coffee into Spain (L/4974), and to make such findings as will assist the CONTRACTING PARTIES in making recommendations or rulings as provided in Article XXIII."

1.5 At the same meeting, the Council authorized the Chairman of the Council to nominate the Chairman and members of the panel in consultation with the parties (C/M/141). Accordingly, the Chairman of the Council informed the Council, at its

meeting of 9 October 1980 (C/M/143), of the following composition of the Panel:

Chairman: H.E. Ambassador H.V. Ewerlöf (Sweden)

Members: Mr. R. Daniel (Poland)
Mr. U. Herrmann (Switzerland)

1.6 The Panel held meetings on 30 September 1980, 29 October 1980, 1 December 1980, 19 December 1980, 16 January 1981, 28 January 1981, 4 February 1981, 6 February 1981, 13 February 1981, and 16 February 1981.

1.7 In the course of its work the Panel heard statements by representatives of Brazil and Spain. Background documents and relevant information submitted by both parties, their replies to the questions put by the Panel as well as other information available to the Panel served as a basis for the examination of the matter subject to dispute.

II. Factual aspects

2.1 The following is a brief description of factual aspects of the matter under dispute as the Panel understood them.

2.2 On 8 July 1979, the Spanish authorities enacted the Royal Decree No. 1764/79 (B.O.E. of 20 July) by which the tariff treatment and the sub-tariff classification applied to imports of unroasted, non-decaffeinated coffee (ex. CCCN 09.01) were modified and amended, effective by 1 March 1980. Imports of unroasted coffee, which prior to this last date entered Spain's customs territory under one and the same designation, was sub-divided into five tariff lines to which duty rates applied as follows:

Table 1

Spain's present tariff treatment for unroasted, non-decaffeinated coffee beans (Royal Decree 1764/79 - Tariff No. 09.01. A.1a)

Product description	Duty rate
1. Colombian mild	Free
2. Other mild	Free
3. Unwashed Arabica	7 per cent ad. val.
4. Robusta	7 per cent ad. val.
5. Other	7 per cent ad. val.

2.3 Prior to the Royal Decree 1764/79, imports of unroasted coffee into Spain were subject to a customs duty of 25 per cent ad valorem¹, which was subsequently reduced to 22.5 per cent. In 1975, by Decree-Law 13/75 of 17 November of that year, Spain exempted imports of certain food products, including unroasted coffee, from customs duties when they were imported under the State-trading system.

2.4 Ever since Spain acceded to GATT, customs duties on raw coffee were never bound, and, therefore, not included in Schedule XLV of Spanish concessions in GATT.

2.5 On the same date, 8 July 1979, the Spanish authorities also published the Royal Decree 1765/79 which provided that as from 1 March 1980 imports of unroasted coffee would cease to be under State-trading and would begin to be marketed by private entities. Prior to that, imports of unroasted coffee into Spain were the monopoly of the Office of the General Commissioner for Supply and Transport (CAT) which also had exclusive responsibility for domestic supply.

2.6 Under the State-trading régime and intervention in the domestic market, the use of blends was prohibited in Spain and coffee was obligatorily marketed under the designations Superior, Regular, and Popular, which largely corresponded to the types "mild", "unwashed Arabica", and Robusta, respectively. The CAT also maintained a system of maximum authorized prices for each of these types of coffee.

2.7 On 30 November 1979, a Ministerial Order (Ministry of Trade and Tourism) did away with the requirement to market coffee under the designations Superior, Regular, and Popular. Confirming this removal of obligatory designations, the Resolution of the same Ministry's General Directorate of Domestic Trade, of 8 February 1980, indicated a single maximum price for the domestic sale of these products without distinction as to type.

2.8 This latter resolution having also been superseded, the Panel further understood that, at the present time, domestic coffee prices were free in the Spanish market.

2.9 Spain's imports of raw coffee clearly showed a rising trend over the period 1967-1979 having increased two-fold by volume, and ten-fold by value.

¹ Decree 999/60 of 30 May 1960.

Table 2

Spain's Imports of Raw Coffee

(Tariff No. 09.01.A.1 and Statistical No. 09.01.01)

Year	Metric tons	Million pts.	Main suppliers
1967	42,215	2,378	Colombia, <u>Brazil</u> , Mexico, Angola
1968	49,075	2,997	Colombia, <u>Brazil</u> , Angola, Mexico
1969	61,877	3,767	Colombia, <u>Brazil</u> , Angola, Mexico
1970	78,963	5,747	Colombia, <u>Brazil</u> , Angola, Uganda
1971	66,353	4,916	Colombia, <u>Brazil</u> , Angola, Mexico
1972	80,239	5,786	Colombia, <u>Brazil</u> , Angola, Equatorial Guinea
1973	73,464	5,789	<u>Brazil</u> , Colombia, Angola, Mexico
1974	84,898	7,215	Colombia, <u>Brazil</u> , Angola, Mexico
1975	75,788	6,325	Colombia, Angola, Ivory Coast, <u>Brazil</u>
1976	91,698	13,765	<u>Brazil</u> , Ivory Coast, Uganda, Colombia
1977	77,479	31,693	<u>Brazil</u> , Ivory Coast, Colombia, Uganda
1978	83,226	24,452	Colombia, <u>Brazil</u> , El Salvador, Ivory Coast
1979	99,621	22,291	Colombia, Uganda, <u>Brazil</u> , Ivory Coast

Source: Foreign Trade Statistics of Spain - General Directorate of Customs.

Note: The above figures cover only imports into the Peninsula and the Balearic Islands and exclude imports into Free Zones.

2.10 The increases in value and volume were not parallel, owing not only to international market fluctuations but also to differences in the composition of the Spanish imports, in terms of types of coffee. While varying, the main suppliers always included both Brazil and Colombia, although neither was always the principal supplier.

2.11 Spain's imports of unroasted coffee from Brazil were constituted of almost entirely "unwashed Arabica", and they evolved in most recent times as shown by Table 3.

Table 3
Spain's Imports of Raw Coffee (metric tons)

	1976	1977	1978	1979	March-September 1980
Total	91,698	77,749	83,226	99,621	74,668
of which from: Brazil	40,672	24,946	18,137	18,573	21,004
% of total	44.35	32.08	21.69	18.64	28.13

Source: see Table 2.

III. Main arguments

Article I: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 régime was discriminatory against Brazil, which exports mainly "unwashed Arabica", but also Robusta coffee, and therefore was in violation of Article I: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 connexion, he noted that, as did Spain herself under her previous tariff régime, no other contracting party discriminated in its customs tariff as between "types" or as 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 is 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.¹ 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 I: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 pretermission 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 I: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 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 bean was morphologically different from the Arabica coffee bean, having a different 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.

¹In 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 I: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 Mams, 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 this 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 régime 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 régime 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 sub-positions as appropriate.^{1/} 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 listed in the Royal Decree 1764/79 should be regarded as "like products" within the meaning of Article I: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 I:1^{2/}, the Panel noted that neither the General Agreement nor the settlement of previous cases gave any definition of such concept.

^{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).

^{2/} BISD Vol. II/188; BISD S1/53; BISD S25/49; L/5047.

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 régime 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.1a, as amended by the Royal Decree 1764/79, should be considered as "like products" within the meaning of Article I: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 régime 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 régime for unroasted coffee introduced by Spain through the Royal Decree 1764/79 not to be in conformity with the provision of Article I: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.

4.12 In the light of the above, the Panel suggest that the CONTRACTING PARTIES request Spain to take the necessary measures in order to make its tariff régime for unroasted coffee conform to Article I:1.