

**Junta Arbitral na OIC – Organização
Internacional do Café**

**Contencioso Estados Unidos X Brasil
referente ao Café Solúvel**

Londres, 1969

**Elementos do Processo de
Arbitragem do Café Solúvel**

ARBITRATION PANEL

convened under

Article 44 of the International Coffee Agreement, 1968

OPINIONS OF THE PANEL

Mr. Odevall, Chairman:

Coffee is the economic life-blood of many developing countries which produce this commodity in Latin America, Africa and Asia. It gives them an annual yield of some 2,000 million U.S.dollars in foreign exchange from the developed countries.

This stability of foreign exchange earnings is brought about by the International Coffee Agreement which President Johnson in a message to the United States Senate has called "one of the most important economic agreements of our time". It was created in 1962 and though it covers all forms of coffee, whether parchment, green or roasted and includes ground, decaffeinated, liquid and soluble coffee, the coffee world regarded the International Coffee Agreement at this time as primarily the framework for the export of a primary commodity, green coffee, from the tropics to the industrialised countries and the Agreement was drafted accordingly.

In the process of economic development, Brazil, the biggest seller of green coffee on the world's markets, began to manufacture soluble coffee. When in 1964 and 1965 this Brazilian industrial product, derived from the primary commodity, green coffee, was exported to the United States,

the biggest buyer of coffee in the world, and rapidly gained ground there, the United States Government in 1966 drew the attention of the Brazilian Government to the fact that in their view Brazilian regulations favoured Brazilian manufacturers. After prolonged, but unsuccessful, negotiations between the two Governments, the United States Government suggested that provisions covering processed coffee be included in the International Coffee Agreement 1968 which was the outcome of the renegotiations of the International Coffee Agreement 1962. This was accepted by the Member countries and the 1968 Agreement, which entered into force on 1 October 1968, contains a chapter (Article 44) on processed coffee. Article 44 is a compromise between the Brazilian and the United States Governments. Its purpose in a wider sense is to incorporate rules on industrial products, manufactured from green coffee or its derivatives, into the rules governing exports of this primary commodity. In a narrower sense it is designed to solve the dilemma, which has arisen between the United States and Brazilian Governments.

If a Member considers that the provisions of paragraph (1) of Article 44 have not been complied with, it may bring a complaint to the Organization. For dealing with such a complaint the Article provides, among other things, that an Arbitration Panel shall be appointed and shall reach a determination on the matter at issue. The United States Government presented such a case against Brazil relating to soluble coffee. A Panel consisting of Mr. Bengt Odevall, Chairman, Mr. David R. Herwitz and Mr. Paulo Egidio Martins was accordingly established and met in London between February 14 and 28, 1969.

Representatives of the United States and Brazilian Governments appeared before the Panel and greatly facilitated its work. They have made available all relevant information. During the meetings with the Panel, they have been careful not to do anything to harm the good relations between the two countries in general. They have underlined the importance of a continued successful operation of the International Coffee Agreement. In the dispute on the Brazilian soluble coffee exports to the United States they have, however, taken absolutely irreconcilable standpoints.

The situation must nevertheless be remedied. Both sides have an interest in an orderly development of their coffee industries and as Article 44 has been designed to resolve this dispute, it is for the Panel to reach conclusions on how to correct the situation.

An orderly development could in my view best be achieved under a plan whereby the Brazilian industry knows how much soluble coffee it can export to the United States and the United States industry knows the volume of imports of soluble it can expect from Brazil during each quarter of the coffee year during the life of the International Coffee Agreement 1968. I was at one stage prepared to submit such a plan, which would have had the advantage of being consistent with the general provisions of the International Coffee Agreement with respect to coffee exports. It would have given Brazil a scheme of planned expansion of its soluble coffee exports to the United States market, which in its turn would then also have had the assurance of supplies within such limits, subject to contracts being concluded.

An even better solution to the dilemma which an industrial product manufactured from a primary commodity under an international commodity agreement may pose to world trade, would probably be to take it out of the

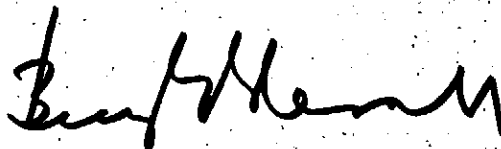
Agreement and treat it under the GATT rules as any other industrial product.

However, the provisions of Article 44 require the Panel to come to some conclusions under its terms. These conclusions must in my view be the basis for actions which can remedy the unfortunate situation which has arisen between these two great trading partners.

As the history of this case clearly shows a need to have a remedy applied to the situation, I would take it that appropriate action by the United States Government would be a natural course to follow; therefore, in the context in which this case has arisen I find that the United States is entitled to take such action pursuant to paragraph 3 of Article 44, while having due regard for the provisions of paragraph 4 of this Article. I agree with my United States colleague that it would not be constructive to raise procedural obstacles on account of the form of this award.

On the other hand, Article 44 (3) gives Brazil an opportunity to take care of the situation. As this has been contemplated on previous occasions by the Brazilian Government, the existing unfortunate situation between the two Governments in the field of soluble coffee would perhaps be best corrected if the Brazilian Government took it upon themselves to deal with it.

In my view, some action as outlined must be taken by one of the two Governments, and the sooner the better. This situation will not remedy itself.



(Bengt Odevall)

In London, February 28, 1969

Mr. Herwitz:

I certainly share the Chairman's view that the situation which has arisen between Brazil and the United States with respect to soluble coffee is an undesirable one which could adversely affect relations between the two countries. I also fully agree that the present situation calls for a remedy. I am satisfied that authorizing the United States to take appropriate measures to remedy the situation under Article 44 (3) unless Brazil does so itself represents a satisfactory remedy in the circumstances. However, it seems appropriate that I should separately state the reasons that have led me to this conclusion.

This arbitration arises under Article 44 of the International Coffee Agreement. Paragraph (1) of that Article provides as follows:

"No Member shall apply governmental measures affecting its exports and re-exports of coffee to another Member which, when taken as a whole in relation to that other Member, amount to discriminatory treatment in favour of processed coffee as compared with green coffee."

The United States has made a complaint against Brazil under Article 44, and upon the failure of the parties to reach a mutually satisfactory solution of the problem, this arbitration panel was convened pursuant to the provisions of the Article. The task of the arbitrators as described in paragraph 2 (f) of Article 44 is to determine "whether, and if so to what extent, there exists discriminatory treatment".

For me, therefore, the starting point is the question of whether "discriminatory treatment" within the meaning of Article 44 has been shown, and for reasons that I shall set out below, I have no doubt that such a showing has been made. However,

I have much greater difficulty with the question of the "extent" of such treatment which, as previously noted, the arbitrators are also called upon to determine. There is, of course, force in the suggestion that a contribution quota equivalent to that imposed upon exports of green coffee should be applicable to soluble coffee, either directly (on the basis of the amount of green coffee involved in each pound of soluble coffee) or indirectly, as by way of imposing the contribution quota on the sale of green coffee to soluble coffee producers in Brazil. But notice that these two approaches are themselves by no means fully comparable; and there is also much in the notion that a governmental measure addressed to the special problems of a primary commodity such as green coffee cannot simply be picked up and applied as such to an industrial product like soluble coffee. With the help of the very able and knowledgeable Agents for the respective sides we have had access to all manner of tables, charts and statistics of varying kinds bearing on prices, costs, profits and other factors. But from this bewildering array of figures it has proved very difficult, to say the least, to pinpoint some precise amount, per pound or otherwise, as the measure of the discriminatory treatment present here.

No doubt some figure could eventually be arrived at, just as triers of fact have traditionally resolved the imponderables in determining the amount of damages to which an injured plaintiff may be entitled. But as neither of the other arbitrators could be persuaded to follow this line in any event, there is little advantage in pressing it further here.

I might also observe that the difficulties alluded to above lead me to share to some extent the doubts of my colleagues as to whether the

precise framework of Article 44 provides the soundest basis for resolving this situation anyway. For one thing, the structure of Article 44 is such that, at least in the first instance, once a justified complaint has been made by one party the other party is supposed to take some corrective action. This is, of course, hardly a novel approach in the solution of disputes (and there is reason to think that it was included in Article 44 upon the initiative, or at least in the interest, of countries on the exporting side of this dispute); but in the course of these proceedings I have had increasing reason to wonder whether it is a useful technique for adjusting differences between sovereign governments. This is particularly so, perhaps, in a case like this, where the effort to resolve the soluble coffee problem represented by Article 44 has been incorporated in a commodity agreement, whose basic focus is on the primary product, green coffee. To be sure, the relationship between soluble coffee and green coffee is so immediate and direct that it is perfectly understandable why the effort might be made to solve problems relating to the one in the context of the basic agreement governing the other. But I think it quite likely that, rightly or wrongly, one of the aggravating circumstances in this situation is the fact that the soluble coffee problem has been injected directly into the basic commodity agreement, with all that that means to the members concerned. In the light of hindsight, perhaps the present soluble coffee problem should have been addressed separately, but of course with full recognition of the special interest and concern which importing countries have with regard to soluble coffee precisely because it does have the special character of being an industrial product which is intimately associated

with and directly affected by a basic commodity agreement.

Laying to one side these perhaps naive observations, there is the happy fact that Article 44 itself recognizes the uncertainty of relying upon the complained-of country to act in situations like this, and accordingly paragraph 3 (b), as qualified by paragraph 4, spells out the right of the complaining country to take appropriate steps itself to remedy the situation. This seems to me to offer the prospect of a sound resolution of the current problem, particularly in view of the repeated assurances on the part of the very able United States Agent that in the event of action under paragraph 3 (b) of Article 44, the United States would take very seriously its obligations under paragraph 4. These provisions of Article 44 may well embody ultimate wisdom in this area, since they enable the "aggrieved" country to adopt a very flexible response to the difficulty, including what seems to me the very wise course, often suggested by the United States in this very situation, of imposing a relatively modest tariff on soluble coffee imported from Brazil, studying its impact on the situation, and increasing or even decreasing the tariff as experience with it (or developments in Brazil) may warrant. And there is no spectre of "unilateralism" here, for the United States will be acting only after, and in accordance with, this decision of an independent arbitral tribunal.

I recognize that as a technical matter action by the United States under paragraph 3 (b) should be conditioned upon a finding both as to the existence of "discriminatory treatment" within the meaning of paragraph 1 of Article 44 and the extent thereof. However, I do not believe it would be constructive for either the arbitrators or the

parties to indulge in extensive debate about whether the arbitrators, or at least a majority of them, have made the precise findings apparently called for or have otherwise perfectly complied with the procedural framework of Article 44. These technical questions, while perhaps not unimportant, seem to me to fade into insignificance beside the critical facts that (1) at least two of the arbitrators agree that an undesirable situation of the type contemplated by Article 44 has arisen, (2) two of the arbitrators have found that a remedy under Article 44 is called for, and (3) two of the arbitrators have concluded that action by the United States under Article 44 (3) is the best remedy for this type of situation in these circumstances. Hence, I regard it as clear that as a result of the decision of this arbitration panel, the United States is authorized, in accordance with paragraph 3 (b) of Article 44, as qualified by paragraph 4, to take appropriate counter measures to remedy the situation; any appropriate limits on the response of the United States to this situation will come not from what would have been at best a speculative effort by the panel to measure discriminatory treatment (as concededly does seem to be contemplated by Article 44) but rather from such sensible sources as the good will of the United States and the opinion of the international trading community. (If an outer limit for United States counter measures in this situation is called for, in order to avoid any technical impediments, I would be inclined to fix the outer limit, in tariff terms, at 46 cents per soluble pound of coffee, which figure is the approximate product of the current contribution quota of about 17 cents per pound of green coffee and 2.7, the extraction rate used more often by the parties than any other. However, I see no reason to dwell

in detail on this matter, as, for example, to try to take account of the fact that less expensive types of green coffee are available in Brazil, because we have good reason to believe that the figure the United States is likely to adopt would be far less than this.)

In the same vein, another minor problem with the approach taken is that Brazil is not given a chance to "correct the situation" before the United States takes counter measures, again as contemplated by Article 44. Here, however, the difficulty is even more clearly only apparent rather than real. Under paragraph 3 (b) the United States is bound on a continuing basis to take account of any steps which Brazil may take to correct (or equally, one supposes, to improve) the situation (thus again precluding any element of unilateralism); and as to any objection that Brazil should have the right to move on its own before the United States takes any action as a result of this arbitration proceeding, I can only encourage Brazil to do so, and express my complete confidence that the United States would be more than willing to reduce or forego its counter measures to the extent that Brazil takes steps to remedy the situation.

There remains the matter of expressing the reasons that lead me to conclude that a case of discriminatory treatment under Article 44 has been established. In the light of what has gone before, I am not sure whether any useful purpose is served by expounding at length on this issue, but for the sake of completeness I believe I should record my views.

To recapitulate, using the terms of Article 44, which is the controlling standard here: On the basis of all the material submitted to the panel, including the initial statements, briefs and counter-briefs of the two parties, the very able oral presentations to the panel by the

Agents for the respective sides, and the many documents and other items of evidence introduced, I find that Brazil is applying governmental measures affecting its exports of coffee to the United States which, when taken as a whole in relation to the United States, amount to discriminatory treatment in favour of processed coffee as compared with green coffee.

First, I take it there is no real disagreement between the parties that both the "contribution quota" applicable to Brazilian exports of green coffee, and the absolute prohibition against the export of certain lower grade, less expensive types of green coffee from Brazil, constitute governmental measures affecting exports within the meaning of paragraph 1 of Article 44. Second, I see no escape from the conclusion that the result of these governmental measures, when taken in conjunction with the overall quota limitations of the International Coffee Agreement, is that Brazilian producers of soluble coffee can acquire their raw material supply of green coffee in Brazil at a price substantially below the price available to producers in the United States. That is, Brazilian producers of soluble coffee have the twin advantages of access to less expensive types of coffee which are not available to United States producers and the ability to purchase green coffee which is not subject to the financial burden of the contribution quota applicable to all purchases of Brazilian green coffee by United States producers. I believe that these significant differences in the price at which raw materials are available represent an unanticipated and unwelcome by-product of a commodity agreement like the International Coffee Agreement, and that they seriously disrupt the justifiable expectations of an importing country like the United States in this situation.

It is not necessary to attempt to judge whether importing or exporting countries have the greater share of benefits from a commodity agreement to decide that an importing country cannot be expected to permit the commodity agreement to be used in aid of a system which results in processors of the commodity in the exporting country having an advantage over the processors in the importing country. It is precisely for this reason, I believe, that the addition of Article 44 to the International Coffee Agreement was sought when the agreement was renewed in 1968; and while the language of Article 44 leaves room for varying interpretations, as is typically true when a provision is the product of negotiation and compromise, I think the Article clearly was intended to and does reach the situation presented here.

In these circumstances, I do not think it would be useful to review extensively the various contentions and counter-contentions of the parties on such matters as how much, if at all, the contribution quota resembles a tax, or whether there are sound domestic reasons for prohibiting exports of inferior types of green coffee, or the relevance of differences between the soluble coffee industry and the green coffee business. For however these issues be viewed, the one inescapable fact in the situation is that as a result of the overall "system" stemming from the existence of the International Coffee Agreement and the governmental measures in Brazil previously referred to, the Brazilian producers of soluble coffee have an advantage in the acquisition of their raw material supply that is not available to producers of soluble coffee in the United States..

Perhaps a brief example will serve to illustrate the point. Suppose Brazil imposed a contribution quota on all sales of green coffee within Brazil as well as those for export. Suppose further that for appropriate reasons of domestic policy, as, for example, to encourage industrial development, the Government of Brazil in such circumstances decided to subsidise the soluble coffee industry by paying out of general governmental revenues, on behalf of all Brazilian producers of soluble coffee, the contribution quota due on their purchases of green coffee. Surely this would have the result, if not the purpose, of enabling such producers to export their finished product of soluble coffee at a lower price than would otherwise be the case. Could anyone doubt that this would constitute a governmental measure amounting to "discriminatory treatment in favour of processed coffee as compared with green coffee", within the meaning of paragraph (1) of Article 44? Yet it seems to me that from the point of view of the United States soluble producers there is no real difference between the case just put and the actual circumstances presented here, wherein Brazilian producers have access to green coffee without the burden of a contribution quota (to say nothing of access to less expensive types of green coffee) while United States producers do not.

It has been earnestly argued by Brazil that since soluble coffee is an industrial product it is illogical and unfair to expect soluble coffee to be subjected to the same types of governmental measures as those designed to apply to a primary commodity like green coffee. Taken in the abstract, there is much force in this proposition; and I have little doubt, as I noted earlier in a different context, that a great

deal of the difficulty in this very troublesome situation springs from the fact that the problem presented, and Article 44 itself, involve the attempt to relate an industrial product to a system based upon an agreement controlling a primary commodity. Nevertheless, on the issue of whether there is discriminatory treatment within the meaning of Article 44 I regard this argument as beside the point. For the complaint of the United States is based, as I understand it, not upon imports of soluble coffee as such, but rather upon the relative access of United States producers of soluble coffee to the raw material supply of green coffee vis a vis Brazilian producers; and this is a matter which clearly is affected directly by the combination of the commodity agreement and the governmental measures applicable to that commodity.

Again, perhaps, a brief example can help to illuminate. Suppose that Brazil decided to expand its roasting capacity for the purpose of exporting roasted coffee in the international market, and specifically to the United States. Suppose further that no contribution quota was applicable either to the green coffee purchased by Brazilian exporters of roasted coffee or the roasted coffee itself when exported. Can anyone doubt what the effect of this would be upon United States roasters, whose raw material supply of green coffee would of course still be subject to such governmental measures as the contribution quota - or, I might add, what the effect of such a situation would be upon the International Coffee Agreement? But, it may be said, this situation can not arise, because under the applicable Brazilian regulations exports of roasted coffee are in fact subject to the contribution quota. Yet this is precisely the point, and for me the clearest evidence that

the situation presented here calls for relief under Article 44. For every argument presented by Brazil to justify the present imbalance between Brazilian soluble coffee producers and those in the United States with regard to the price at which green coffee is available would apply with more or less equal force in the case of Brazilian roasters for export. Indeed, I understood the distinguished Agent of Brazil to say as much in his oral presentation of the case before the panel, in response to a hypothetical question. I agree with what I believe to have been his view, that roasted coffee would constitute an industrial product and would hence be akin to soluble coffee so far as the International Coffee Agreement is concerned. But as we have learned Brazil itself insists that roasted coffee be subjected to the same system of governmental measures as is applicable to green coffee. I can find no distinction for the case of soluble coffee, and accordingly I conclude that the situation falls within Article 44 and a remedy under that Article is called for.

One final point which may deserve brief mention is the question of "harm" or "injury" on which the parties have divided, with Brazil insisting that a complainant under Article 44 must show some harm to legitimate interests within the importing country, and the United States contending that no such showing is required. I need not attempt to resolve that question, since it seems clear to me that when as a result of governmental measures Brazilian producers of soluble coffee can obtain their raw material supplies of green coffee at prices substantially below those available to United States producers, a situation calling for a remedy under Article 44 is obviously presented.

In London, February 28, 1969



David R. Herwitz

EQUITY

-Justificação de sua aplicação, no direito internacional:

"The conception of equity must therefore be understood in a very broad sense, in order to justify the necessity for deciding political disputes between States. All the more strongly must the tendency to widen and thus to weaken the conception of equity be opposed, that is to identify it merely with fairness, with impartiality. In the settlement of political disputes impartiality is, of course, necessary and inevitable, but it is not enough. The man who is simply impartial, the "honest broker" as Bismarck calls him, sees only the individual interests of the disputant States, and not the general interests of the common good of the international community. He may arrive at a compromise between the disputant States, but not at that justice which is superior to both. Compromise, the centre line in the parallelogram of strength, tends to favour the more important party. The judge who stands simply as an impartial arbitrator between two parties, will inevitably, by the laws of mechanics, be drawn on to the side of the stronger and more unscrupulous. Only the judge who stands above the disputants, the judge who considers the question from the superior standpoint of the international common good, is capable of a true decision in equity".

(GUSTAV RADBRUCH, "Justice and equity in international relation" - in - "Justice and Equity", London, Constable & Co. Ltd., 1936, págs.12-13).