Chapter - VIII

SETTLEMENT OF COMMODITY DISPUTES
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I. INTRODUCTION

International agreements inevitably incorporate dispute settlement mechanisms which provide "a legitimate and politically acceptable way for nations to raise and attempt to resolve genuine differences while still maintaining the agreement". Economic agreements, like the commodity agreements, which seek to reconcile conflicting interests need to establish a dispute settlement machinery which is functional and pragmatic. This may necessitate a departure from the traditional conception of dispute settlement in international law which expounds the impartial judicial method for settling disputes among nations. In fact, in recent years, economic agreements have incorporated a relatively new method for settling disputes which is neither impartial or judicial but is formulated to settle disputes which are either of such a nature that they are not suited to the purely judicial method or are of a kind more amenable to less formal or quasi-judicial modes of settlement. The new method is of considerable importance

because it "contains many implications for the future role of impartial adjudication as a significant factor in international relations, and raises questions concerning its own application on a broader scale than that upon which it has hitherto been employed". \(^2\) ICAs, which represent a move away from the traditional notions of dispute settlement, are examined keeping these broader policy issues in mind.

The most significant characteristic of the dispute settlement machinery embodied in commodity agreements then is that the "mode of settlement is internal". \(^3\) An important consequence of adopting the internal mode of settlement is that the procedures are subject to the normal decision making process which uses the technique of distributed weighted voting. The trend towards excluding external, even if judicial, settlement was set as early as 1902 by the first sugar agreement. \(^1\) The authority to render opinions on disputed questions of interpretation and application of the agreement was vested exclusively in the internal administrative and political body, the international sugar

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commission. The agreements before 1953 did not possess "any facility even for an intermediate credibly impartial process to influence decisions, as was the technique under contemporary technical and financial organisations". This situation led to the questioning of the disputes settlements system on the grounds of impartiality since not only were member states arbiter in their own cause but the weighted voting procedures favoured the cause of the more powerful members.

The first attempt towards incorporating an impartial intermediary mechanism to assist internal processes was made in the second International Wheat Agreement, 1953. The concept of an 'advisory panel' was introduced as a compromise solution to accommodating the interests of both producers and consumers who in the wake of the 'carrying charges' dispute were backing the 'internal' and 'external' mode of dispute settlement respectively. The dispute, which had arisen under the International Wheat Agreement, 1949, as well as the debate it generated on the merits and problems of the 'internal' and 'external' modes of dispute

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settlement, will be considered after studying the range of mechanisms which presently find a place in ICAs and their role in settling disputes.

Thereafter, an extensive discussion is undertaken of the two known instances in which a dispute has been referred to an intermediary or outside body: the Selective Quota case which arose under the 1962 International Coffee Agreement and was referred to an advisory panel in 1965, and, the Soluble Coffee case decided by a special arbitral panel set up under the provisions of the 1968 International Coffee Agreement. These cases are analysed, inter alia, with a view to considering the viability of the internal mode of dispute settlement; the role of law and legal interpretation; and the factors to be taken into account in settling commodity disputes.

II. CATEGORIES OF DISPUTES AND INTERNAL MECHANISMS

Schematically, three categories of disputes are envisaged in commodity agreements: (i) those which arise from the failure of any member of fulfill its obligations under the agreement; (ii) disputes concerning the interpretation or application of the agreement; and (iii) disputes which may arise out of certain specific economic or other provisions.
Under the disputes settlement system generally established in commodity agreements a "complaints" procedure is provided for in the event of failure of a member to fulfill its obligations. On the other hand, where a member is contesting the interpretation or application of the agreement a "disputes" machinery is to be initiated. The differences between the two procedures will be noted presently. Some agreements incorporate a general system of "consultations" which has relevance to all categories of disputes. Others include a procedure for consultation with respect to particular matters. Finally, an agreement may also embody a special procedure to settle disputes with respect to some controversial provisions. For instance, the 1968 International Coffee Agreement included a special arbitration procedure to deal with disputes relating to processed coffee. This procedure was actually set in motion in the wake of the soluble coffee controversy which was decided by an arbitration panel.

To begin with, the present inquiry will first broadly indicate the system of consultations established by commodity agreements, followed by a discussion of the "complaints" and "disputes" procedure. The latter two, for the sake of convenience, will be dealt with together. In doing so the differences between the two procedures will be highlighted.
A. System of Consultations

The system of consultations, if incorporated at all, could vary from agreement to agreement. The differences could relate to both the procedures envisaged and the subjects on which such consultations could be held. A distinction is to be made between those procedures for consultation which anticipate an active role of the Organisation and those provisions which are concerned with promoting consultations between members. While the former procedures were dealt with while considering the enforcement system in commodity agreements, the latter are considered here. It may be recalled, for instance, that consultations on production policies requires the participation of the Council. On the other hand, consultations treated here are essentially between members of the agreement.

In the latter context, a further distinction is to be made between a general provision and a provision which is included with reference to a specific matter. The general provision in turn could differ in their scope. An example of a general provision is Article 57 of ICPA which states as follows:

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6. In view of the fact that dispute settlement mechanisms are themselves a component of the overall system of enforcement established by the agreements the present analysis is of relevance to the earlier discussion.
Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by another Member with respect to any matter relating to this Agreement. In the course of such consultation, on request by either party and with the consent of the other, the Executive Director shall establish an independent panel which shall use its good offices with a view to conciliating the parties. The costs of the panel shall not be chargeable to the Organisation. If a party does not agree to the establishment of a panel by the Executive Director, or if the Consultation does not lead to a solution, the matter may be referred to the Council in accordance with the provisions of Article 58 (i.e. "Disputes and Complaints"). If the Consultation does lead to a solution, it shall be reported to the Executive Director who shall distribute the report to all Members.

Particular features of the system of consultations that the ICFA establishes may be noted. Firstly, representations may be made by one member to another with respect to "any matter" relating to the Agreement. Secondly, the consultations are essentially a private matter between the parties. Only on the successful conclusion of the consultations is a report to be distributed to other members. A conciliation panel can be established only on the consent of the respective parties, and its costs are not chargeable to the Organisation. It is only when the consultation does not lead to a solution or a party does not consent to
to the establishment of a panel that the "complaints" or "disputes" procedure may be initiated by one of the parties.

Article 57 of the ICCA contains a similar provision, but with one notable difference. Consultations can only be held in relation to matters concerning the "interpretation and application" of the Agreement. As is evident, the scope of the procedure is narrower than the one contained in the ICFA which allows consultation on "any matter" relating to the agreement. In keeping with the relatively restrictive provision in ICCA only a "disputes" procedure can be invoked in case the consultations do not lead to a successful conclusion.

There are many advantages of the general consultations procedure established in ICFA and ICCA. Through placing an obligation on members to give sympathetic consideration to representations of any one of them it formally institutionalises a process for the amicable settlement of differences between individual members. It ensures a 'cooling-off' period and enables a quiet clarification of the issues involved before any resort is had to the "complaints" or "disputes" procedure. The possibility of establishing an independent panel to conciliate between the parties introduces the element of impartiality to the whole process. However, the fact that
any member, be it exporting or importing member, can consult the other bilaterally is perhaps against the spirit of the bipartite structure of the membership of a commodity agreement which emphasises the community of interests between the exporting and importing groups of members. Private deals are naturally opposed to the concept of collective interests of each of these groups of members.

The ICCA which includes a general system of consultations, also, for instance, establishes a procedure for consultation in relation to a specific matter i.e. the processing of cocoa. It may be recalled that Article 50 of the ICCA recognises the needs of the developing countries to broaden the base of their economies through, inter alia, industrialisation and the export of manufactured products. In this connection it states the need to avoid serious injury to the cocoa economy of importing and exporting countries. An express procedure is set up to deal with differences which arise in these respects. It provides as follows:

If any member considers that there is a danger of injury to its interest in any of the above respects, that member may consult with the other member concerned, failing which the member may report to the Council, which shall use its good offices in the matter to reach such understanding.
The procedure established consists of two steps: consultation with member concerned, failing which, on the report of the member, the use of good offices by the Council. Here as in the case of the general provision the Council steps in only at the behest of the aggrieved party after consultations have failed. The essence of the procedure is to promote consultations between members.

B. Complaints and Disputes

Both "complaints" and "disputes" are to be referred to the Council for decision. The two procedures may conveniently be considered under the following heads: parties, subject matter, initiation of proceedings, competence of the Council, decision, and sanctions.

1. Parties

A "complaint" that a member has failed to fulfill its obligations can be referred to the Council at the request of any member of the agreement. However, a "dispute" relating to the interpretation and application of the agreement can only be referred to the Council at

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7. For provisions relating to "complaints" see article 58(6) to (9) of ICFA; article 55 of INRA; article 71 of ISA; article 40(3) to (5) of IIOA; article 59 of ICCA; article 48 of IITA; article 33 of IAJJP; and article 29 of IITA.
the request of "any member party to the dispute". The only exception appears to be the ITA which permits any member, whether a party to the "dispute" or not, to refer the same to the Council for decision. The same could be said of the IAJJP and ITTA which do not, in the first place, attempt to indicate the parties which can refer a "complaint" or a "dispute" to the Council.

The expression "any member party to the dispute" generally used in the context of the "disputes" procedure can be the subject of conflicting interpretations. Does it mean any member which has an interest in the matter or can the procedure only be initiated by the member which is directly a party to the dispute. To clarify the issue, reference may be made to the provision in ICCA which states that a "dispute" can be referred to the Council "at the request of either party to the dispute". According to one observer, the expression "any member party to the dispute" gives recognition to the "common concern of the members in a dispute between two parties". In other words any member can move the "disputes" procedure in case there

8. For provisions relating to "disputes" see article 58(1) to (5) of ICPA; article 56 of INRA; article 70 of ISA; article 40(1) and (2) of IDOA; article 58 of ICCA; article 49 of ITA; article 33 of IAJJP and article 29 of ITTA.

are differences between two members of the agreement relating to the interpretation or application of the agreement. While this interpretation is in keeping with the bipartite structure of the membership of commodity agreements it is difficult to, on a mere reading of the text, to entirely endorse the view that any member can move the "disputes" procedure. This view can be supported by the fact that the ITA does not add the words "party to the dispute" after the words "any member". However, it is difficult to arrive at any firm conclusion in the absence of actual practice.

In view of the membership provisions of commodity agreements, it appears that an inter-governmental organisation which is a member of the particular agreement can also initiate the dispute settlement process. And in lieu of the fact that only members can resort to the "complaints" and "disputes" procedures, observers as well as the organs of the commodity organisation are not eligible to use the same.

10. This view is endorsed by the definition of "Member" in the various agreements. See article 3(5) of ICFA; article 2(3) of INRA; article 2(1) of ICCA; article 2 of ITA; article 2(3) of IAJUP; and article 2(3) of ITTA. The IOOA is not clear since article 3(4) leaves it to the Council and intergovernmental organisation to work out the modalities of participating in the Agreement. The ISA is also not very clear. See article 2(23), however.
Since the "complaints" procedure, as well as the "disputes" procedure in at least some cases, can be initiated by any member of the agreement, it is not necessary that the aggrieved party alone to so. This flexibility is in consonance with the bipartite character of the commodity agreement. In this regard, it has been aptly observed that

In the context of economic Agreements and, in particular, Commodity Agreements where interest groups tend to be polarised and much emphasis is placed in the settlement process on negotiation and the balancing of political influence, this flexible rule carries the advantage of enabling the disputes or complaints process to be championed by a major country or countries (although they are not directly affected by the conduct complained of) on behalf of a particular community of interests.11

In other words, "The narrow concept of 'parties' on the whole does not obtain in commodity organisations. The structured polarisation of the interests of exporters and importers tend to generalise a dispute which ostensibly has its origin in the transactions between two or more parties".12

12. Khan, n. 9, p. 375.
2. **Subject matter**

A "complaint" can be made, as noted earlier, by any member against another member if it feels that the latter has not fulfilled its obligations under the agreement. In the case of the ITA, the "complaints" procedure can be moved where a member has committed a "breach" of the Agreement. The term "breach" of the agreement is deemed to include "the breach of any condition imposed by the Council or failure to fulfill any obligation laid upon a Member in accordance with this Agreement". As the explanation clarifies, a member must fulfill both the explicit obligations undertaken in the agreement as well as abide by the decisions of the Council. In the latter instance, "once a decision has been validly taken, there is no remedy." It may also be recalled here that commodity agreements include an express provision stating that the decisions of the Council are binding on the members.

While in the absence of many precedents it is difficult to enumerate the category of obligations regarding which a "complaint" can be made, the agreements themselves do not place any qualifications. Therefore, on the face of it, the assumption is that a "complaint" can be instituted *vis-a-vis* any obligation undertaken by the members. However, recalling the discussion in the previous

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13. Article 48(1) and (4) of ITA.

14. Khan, n. 9, p. 375.
chapter, it may be reiterated that the limits of the "complaints" procedure are defined by the nature and content of the obligation at issue. Additionally, the requirement of a distributed vote in the Council ensures that the exporting or importing group of members cannot alter or modify the structure of obligations through resort to the "complaints" procedure.

Little explanation is required in so far as the subject matter of the "disputes" procedure is concerned. It can be put into motion whenever there is a conflict relating to the interpretation or application of the agreement. As will be seen at a later stage, the ambit of the "disputes" procedure is considered narrower in scope than the "complaints" procedure. The objective of the former procedure is to provide means to consider legal questions which do not involve serious policy or economic questions. It is in this limited context that resort could be had, in the case of a "disputes" procedure, to an intermediary body called the advisory panel.

3. **Initiation of proceedings**

Generally speaking, the formal procedures of disputes settlement are to be initiated only after consultations inside the Organisation have failed to resolve the matter. In relation to the "disputes" procedure there is
often an explicit mention to this effect. For instance, the ITA provides that a "dispute" can be referred to the Council only if it "is not settled by negotiation". Such a provision seeks to ensure that the more informal processes at resolving the "dispute" are not by-passed.

Where consultations and negotiations fail to resolve the issue, a request would have to be made in writing to the Council, indicating all aspects of the "complaint" or "dispute" depending on the procedure to be initiated. In the case of the ICFA, "Member may seek the prior opinion of the Executive Board in a matter of dispute or complaint before the matter is discussed by the Council".15

In so far as the mode of initiation of proceedings go, there is a considerable degree of flexibility keeping in view the fact that an important reason for adopting the internal mode of dispute settlement is to avoid the excessive formality and rigidity which characterise judicial proceedings. Therefore, a mere request in writing noting the salient facts would suffice to have the Council decide the matter.

4. Competence of the Council

The first thing to be noted with reference to the competence of the Council is that it has a compulsory

15. Article 58(9) of ICFA.
obligation to consider and decide the "complaints" or "disputes" referred to it. While the IAJJP and ITTA do not explicitly provide to this effect there cannot be any doubt that the Council will have to decide the matter referred to it.

However, it is possible that a member in a particular case may raise objection to the competence of the Council to decide a "complaint" or a "dispute". This did happen, for instance, in the "carrying charge" affair under the 1949 International Wheat Agreement (to be considered shortly in another context). In that case an objection was raised against the assumption of jurisdiction by the Council. It was argued that, by treaty terms, the dispute was one reserved for settlement between the buyer and the seller outside the framework of the Agreement. The Council, however, overruled the objection and assumed jurisdiction over the matter. In the light of the fact that international organisations have power to interpret their own constituent instruments, the decision of the Council was completely defensible. It may also be recalled in this context that commodity agreements contain an umbrella provision which confers on the Council all such powers as are necessary to carry out the express provisions of the agreement.

5. Decision

Before taking any decision the Council will necessarily debate the entire question. It is only after a full discussion in which all relevant information is taken into account, that the "complaint" or "dispute" is to be decided. In these discussions no strict rules of evidence are applied. The manner in which discussions are conducted are laid down in the rules of the concerned organisation. They normally give ample opportunity to members to present their views on the matter through oral or written means. The Executive Committee or various subsidiary bodies of the Organisation could well be requested to submit a report on the technical matters of the dispute.

In the case of a "dispute" i.e. a matter concerning the interpretation or application of the agreement the Council may be required to seek the opinion of an advisory panel. The IAJIP and the ITTA, however, do not contain any provision for the reference of "disputes" to an advisory panel. To constitute an advisory panel it is generally required that after a dispute has been referred to the Council, either a majority of the members or members holding not less than one-third of the votes ask the Council to seek the opinion of an advisory panel before giving its decision. However, the IDOA does not mention any voting requirements but leaves the Council free to consult an advisory panel whenever it deems appropriate.
The composition of the advisory panel, other than in the case of IOOA, is laid down in the agreement itself. Two members are to be selected by the exporting and importing members respectively who are to unanimously select a chairman, failing which, the chairman is to be selected by the Chairman of the Council. Unless the Council by a unanimous decision (as in the case of the ICFA; the ITA and the ICCA) or by special vote (as in the case of the INRA and the ISA) decides otherwise, of the two persons to be noted by both the exporting and the importing members one must have a wide experience in the matters of the kind in dispute and the other must have legal standing and experience. The mix is understandable in view of the fact that - a matter to be given consideration shortly - the issues involved may call for both technical and legal expertise. Nationals of both members and non-members are eligible to serve on the panel, but are required to act in their personal capacities, without any instructions from their governments. Such a requirement seeks to ensure the independence of the members of the panel. The expenses of the advisory panel are in all cases to be paid by the Organisation.

The IOOA is the only exception to the rule that no reference can be made to an advisory panel in the case of "complaints". The other agreements, as is argued presently
while considering the rationale of the internal mode of dispute settlement, would do well to follow the example:

Apart from the ISA and the INRA, it is laid down in the other agreements that the Council is to decide both "complaints" as well as "disputes" by a distributed simple majority vote. However, in the latter case the ISA and the INRA provide that the "dispute" is to be decided by a special vote. By virtue of the terms of commodity agreements, the decision of the Council is binding on the members. Finally, it may be noted that in the case of "complaints" if the Council decides that a member has violated its obligations under the agreement, it is required to specify the nature of the breach.

6. sanctions

The "disputes" procedure does not, for apparent reasons, envisage sanctions. It aims to resolve controversies between members and seeks a remedy from the member themselves. On the other hand, the "complaints" procedure, by its very nature, calls for sanctions. If a member has been found in breach of its obligations under the agreement the Council will have to take steps to rectify the breach. Commodity agreements specify the sanctions which can be resorted to in such cases. For instance, the ICFA provides that
If the Council finds that a Member is in breach of its obligations under this Agreement, it may, without prejudice to other enforcement measures provided for in other Articles of the Agreement, by a distributed two-thirds majority vote, suspend such Member's voting rights in the Council and its right to have its vote cast in the Board until it fulfills its obligations, or the Council may decide to exclude such Member from the Organisation....17

Under the ITA the Member may be deprived of its "voting and other rights". The ICCA has a similar provision. However, it mentions that other rights could include "that of being eligible for, or of holding, office in the Council or in any of its committees, until it has fulfilled its obligations". However, these agreements unlike the ICFA and the INRA do not specify exclusion from the Organisation as a sanction. The IAJJP and the ITTA do not envisage any sanctions. A possible reason is that since their objective is the long-term development of the commodity, and do not include a system of obligations as in the other agreements, they do not consider the institution of sanctions relevant. However, in so far as certain common obligations like contribution to the administrative budget go, there are particular sanctions provided for elsewhere in these agreements as in the case of all other agreements.

17. Article 59(8) of ICFA.
It goes without saying that these sanctions will not be applied lightly, a policy which is intrinsically ensured by the necessity of a special vote. As Schermers puts it, "Governments do not enjoy being singled out for disciplinary action and may react by diminishing or terminating further cooperation with the Organisation". 18 This view is also in keeping with the general perspective of the present study that too much need not be made of the lack of sanctions in international economic agreements which rely more on the principles of good faith and international cooperation for their viability and success. 19 At the same time, there is no denying, that the possibility of sanctions, whether applied in practice or not, improves the effectiveness of the agreement.

III. RATIONALE OF THE INTERNAL MODE OF DISPUTE SETTLEMENT

It is appropriate presently to consider the rationale of the internal mode of dispute settlement incorporated in commodity agreements. This is perhaps best done in the


context of the debate which finally led to the introduction of an intermediary body - the advisory panel - to resolve "disputes" in the 1953 International Wheat Agreement. Till that juncture the resolution of disputes in commodity agreements was retained solely within the Organisation. In fact, as Metzger points out,

Until the International Wheat Agreement entered into force in 1949, no other multilateral agreement negotiated since the beginning of World War II kept wholly within the institution itself the resolution of the dispute between its members concerning its application or interpretation.20

The concept of internal settlement was, however, subject to searching criticism and inquiry in the wake of the "carrying charge" dispute which arose under the 1949 Wheat Agreement.

A. The Carrying Charge Dispute Under 1949 Wheat Agreement

Briefly, the facts of the dispute were as follows:21 In June 1951 Canada announced, without consulting the consumer countries, its intention to impose a "carrying charge"


21. See Metzger, n. 2, p. 27; also Khan, n. 9, pp. 225-6.
of six cents per bushel upon all wheat sold under the Agreement. The United States and Australia endorsed the Canadian suggestion which was to go into effect from August 1951. The consumer countries, particularly the United Kingdom, protested against the proposed imposition and brought the matter before the International Wheat Council. The UK argued that the "carrying charge" violated article VI para (1) of the Agreement which stated that "The basic minimum and maximum prices and the equivalents thereof..., shall exclude such carrying charges and marketing costs as may be agreed between buyer and seller".

However, since the matter was to be decided in the Council by weighted voting, the consumer countries were frustrated in their efforts; the United Kingdom failed to muster enough votes in the debate to ensure victory. Therefore, refraining from putting the matter to vote, it requested that the question in issue be submitted to outside arbitration. The producer countries, on the other hand, pointed out that such reference was precluded by Article XIX, paragraph (1), of the Agreement which provided that the Council itself "shall make a decision on the matter". The view of the producer countries eventually prevailed, leaving the United Kingdom in particular dissatisfied with the dispute settlement provisions of the Wheat Agreement.
When the negotiation of the second post-war wheat agreement were initiated in 1953, the UK insisted that Article XIX be revised to allow the reference of disputes concerning the interpretation or application of the agreement to an outside arbitral tribunal or to the International Court of Justice. In the ensuing debate, the case for and against referral to an outside body not subject to the distributed weighted voting procedures was elaborated.

The producer countries led by the United States argued for an exclusively internal approach for the following reasons. Firstly, it was pointed out that in other financial and economic organisations set up in the post-WWII period – the International Monetary Fund and International Bank for Reconstruction and Development – no provision was made for recourse to an outside organ while the agreement were in active operation. Secondly, commodity trade involved complex economic and policy questions which were constantly undergoing change and therefore “certain wide areas of discretion in the interpretation and application of an agreement dealing with these economic forces must be accorded in order that the agreement can keep pace with these changes”. Thirdly, the disputes which arose were of a nature which required continued familiarity with the daily operation of the agreement in order to equitably accommodate the conflicting interests. Fourthly, these
disputes were not essentially "legal" or "justiciable" but turned on a bargaining process which finally led to the reconciliation of interests. Fifthly, it was erroneous to argue that the weighted voting procedures would be used to impose decisions on a minority of members for this would challenge the stability of the agreement which, it must be remembered, was to be renegotiated in short durations. And finally, recourse to outside bodies like the International Court of Justice would mean unnecessary delay and inconvenience.\textsuperscript{22} In sum, it was submitted that the existing system possessed "all the desired elements of experience, flexibility in procedures and decision-making powers for handling issues arising under the Agreements".\textsuperscript{23}

Against these contentions, the United Kingdom made the following arguments: (a) that the disputes which arose under the agreements did not necessarily involve complex economic or policy questions, and, like in the instance of the "carrying charge" problem, they could be of a legal nature which merely required the legal interpretation of the agreement to define objectively the obligations of member states; (b) that if the International Court

\textsuperscript{22} These arguments have been summarised and systematised from Metzger, ibid., pp. 28-30, and Prempeh, n.4, pp. 366-7.

\textsuperscript{23} Prempeh, n. 4, p. 367.
of Justice was conferred jurisdiction to decide the question "ex sequo et bono", it could resolve the dispute with flexibility, i.e. it could take into account the changed circumstances in order to do objective justice (moreover, in view of the fact that complex technical questions were involved, the matter could well be referred to the Court's system of "Special Chambers"); (c) that where the matter was to be referred to arbitration, it presented little difficulty because the terms of reference and the members of such tribunals were to be determined by the parties themselves; (d) that to view the agreement as a mere bargaining process was a disturbing approach, for it in effect diluted the element of finality of the legal obligations undertaken. This was particularly disturbing, when viewed against the background of weighted voting procedures which made it possible for a minority of states to impose their views on the rest of membership; and (e) that the present system of exclusively internal settlement violated the fundamental norm of dispute settlement that no one should be a judge in his own cause. 24

As can be seen, both sides rallied a number of relevant considerations in support. However, in favour of the consumer countries was the fact that it was "undeniable that Councils are likely to be impotent to resolve

24. These arguments have been summarised and systematised from Prempeh, ibid., pp.368-70, and Metzger, n. 2, p. 28.
effectively important disputes where interests clash along exporter-importer lines. Furthermore, within the framework of the weighted voting system, small states which numerically form the majority of the membership in these agreements, had genuine fears of "not being heard", nor their cause effectively being impartially assessed and judged whenever they were at loggerheads with their major and powerful partners". 25

But negotiations being what they are, a compromise solution was worked out which gave birth to an impartial outside intermediary called an 'advisory panel'; it was perhaps not thought reasonable, and would have indeed been ironic, to determine the fate of the entire wheat agreement on the question of what was the best way to settle disputes. Article XXI was duly revised and it read in the relevant part as under:

1. Any dispute concerning the interpretation or application of this Agreement, which is not settled by negotiations, shall, at the request of any country party to the dispute, be referred to the Council for decision.

2. In any case where a dispute has been referred to the Council under paragraph 1 of this Article, a majority of the countries, or any countries holding not less than one-third of the total votes, may require the Council, after full discussion, to seek the opinion of the advisory panel referred to in paragraph 3 of this Article on the issues in dispute before giving its decision.

25 Prempeh, ibid., p. 371.
3. (a) Unless the Council unanimously agrees otherwise, the panel shall consist of:

(i) two persons, one having wide experience in matters of the kind in dispute and the other having legal standing and experience, nominated by the exporting countries;

(ii) two such persons nominated by the importing countries; and

(iii) a chairman selected unanimously by the four persons nominated under (i) and (ii), or, if they fail to agree, by the Chairman of the International Wheat Council.

(b) Persons from countries whose Governments are parties to this Agreement shall be eligible to serve on the advisory panel, and persons appointed to the advisory panel shall act in their personal capacities and without instructions from any Government.

(c) The expenses of the advisory panel shall be paid by the Council.

4. The opinion of the advisory panel and the reasons thereof shall be submitted to the Council which, after considering all the relevant information, shall decide the dispute.

Two features of the compromise solution may be highlighted since they are retained in contemporary agreements. Firstly, the advisory panel can only be resorted to when there is a dispute relating to the interpretation or application of the agreement. This was provided perhaps "to ensure that only narrow questions of legal interpretation
or technical application of the Agreements should be submitted to the process". However, as one scholar points out, this distinction "recalls the traditional but theoretically discredited distinction between justiciable and non-justiciable disputes upon which reliance has so often been placed to avoid obligations of recourse to judicial settlement where international disputes concern important economic and political interests". The distinction made between the 'Complaints' and 'Disputes' is artificial for another reason as well:

Policy-making organs may be useful in providing a dynamic interpretation of the legal order of an international organisation when questions concerning the task and the activities of the organisation are involved. They are unsuitable in a conflict between the organisation and one of its Members. Whenever the interpretation concerns the question whether a Member has correctly fulfilled its obligations to the organisation, the policy-making organs may not be sufficiently impartial. Only judicial organs can properly interpret the obligations of the Members. They will offer better protection to States which find themselves in the minority and which may be outvoted in policy-making organs. 27

While referring a matter concerning the violation of obligations to an outside judicial body for final decision:

26. Ibid.
27. Schenmer, n. 18, p. 543.
may not as a rule be completely suitable, there is no reason why even in the case of 'Complaints' the dispute cannot be referred to the intermediary body of an advisory panel.

The second significant feature of the compromise provision is that the final decision-making power is retained in the Council. In other words, the mechanism of advisory panel does not replace the Council in its authority to resolve a dispute, but merely provides an opinion based upon which the Council can arrive at a decision. However, while the Council in arriving at its decision can, and perhaps will, take into account other relevant factors, there is little doubt that the panel opinion will carry great weight in the main policy making forum. In that sense, the move away from an exclusively internal settlements system, albeit a limited one, restores a semblance of impartiality to the entire process. It would have been in keeping with the logic of things if the resort to an advisory panel would have been extended to the "complaints" procedure as well.

The question yet remains whether a complete recourse to an outside body like the International Court of Justice or an independent arbitral tribunal would not have been a better option. It is difficult to give a firm answer to this query. However, a few points may be made
in this regard. First, it is important to bear in mind that the mechanics of dispute settlement incorporated in an agreement must necessarily be in consonance with the overall structure of the agreement; dispute settlement mechanisms cannot be viewed in isolation from the specific framework of cooperation that the agreement establishes. In the case of commodity agreements, the relevant factors include, *inter alia*, the conflicting nature of interests which are reconciled and accommodated in the agreement, the bipartite structure of the membership, the acceptance in principle of weighted voting procedures, the short duration of the agreements, and the host of other peculiarities to which the exporting countries had drawn attention to in the “carrying charge” dispute and during the negotiations of the 1953 Wheat Agreement. These considerations, among other things, tend to underline the fact that a rigid legal procedure and a binding legal decision may often be difficult to abide by and given effect to, without wrecking the agreement; the decision may either be out of tune with the maze of developments which characterise commodity markets or may fail to reflect sufficiently the need to accommodate the interests of the several parties involved in the dispute.

On the other hand, as has been observed earlier, the resolution of a dispute by an outside judicial body
is likely to ensure impartiality. Furthermore, and this is equally important, an outside body like the International Court of Justice will be able to locate the commodity agreement in the on-going process of international cooperation and the progressive development of international law, it will be able to construe the agreements in the light of the evolving principles of international economic law, evident in documents like the Declaration and Programme of Action for the New International Economic Order; the Charter of Economic Rights and Duties of States, and the host of resolutions passed in UNCTAD and other international fora.

Among the contemporary commodity agreements the only reference to the International Court of Justice is contained in the ICoA, and this too in respect to a specific dispute relating to the indications of source and appellations of origin of olive oil. With respect to any other matter the regular "complaints" and "disputes" procedures are incorporated. However, where a dispute concerning indications of source and appellations of origin arises a special procedure is provided for in Article 14. In such a case the Council is required to reconcile the dispute after seeking the opinion of an advisory panel and after consultation with the World Intellectual Property Organisation; the International Federation of Olive
Growers, competent professional organisation of a mainly importing member, and if necessary with the International Chamber of Commerce, and the specialised international institutions for analytical chemistry. However, if the attempt is unsuccessful, and after every means has been employed to reach agreement, the members concerned "shall have the right of recourse in the final instance to the International Court of Justice". In other words, in the last instance referral is allowed to an outside body i.e. the International Court of Justice. It is in fact that only instance in contemporary commodity agreements when a dispute can be referred to an outside body. Given the restricted context in which such a referral can be made, and also the fact that the IGO adopts as well the regular dispute settlement procedures, it is difficult to read any policy bias into the particular provision.

However, whatever be the merits and problems in the referral of disputes to an outside body, there is a need to consider all aspects of the matter in commodity negotiations. From all appearances the matter is not seriously raised at all in these negotiations. However, viewing the matter positively, the reason that the issue is not being seriously raised may perhaps be because the states participating in the various commodity agreements find the present system adequate to reconcile divergencies. At any rate the short duration of the agreement gives scope for
solutions to be found in the renegotiation of the agreement. The matter may be considered further after reviewing the Selective Quota case in which a reference was made to an advisory panel, and the Soluble Coffee case in which an outside body – an arbitration panel – decided the dispute.

B. The Selective Quota Case, 1955

The Selective Quota case is significant in several respects. Firstly, it was the only time that a reference was made to an advisory panel. Secondly, the panel consisted of some eminent jurists who made a number of general observations with regard to the interpretation of commodity agreements which need to be examined; any future panel will necessarily turn to this opinion for guidance in interpreting the provisions of a commodity agreement. Thirdly, the pragmatic manner in which the dispute was resolved in the Council in the wake of the advisory panel's opinion provides much insight into the workings of the internal mode of dispute settlement. Finally, it illustrates the difficulties in operating an export quota agreement in view of the conflicting interests of the exporting members.

1. **Facts of the case**

The genesis of the dispute over quota revision lay in the International Coffee Agreement, 1962 itself. It was, what Rangarajan has termed as a "quality and type conflict". That is, "if the number of exporters in a commodity is large, quality and type differences divide them into conflicting groups, countries producing similar types forming themselves into coalitions". 29 It was also a conflict between large and small exporters in which the former are unwilling at first to consider the interests of the small producers.

The conflict was between Brazil and other producers of unwashed Arabicas and African producers of Robustas, the two major types of coffee. 30 The African nations had been willing to join the 1962 International Coffee Agreement on the assumption that they would receive reasonably large quotas, and that the agreement would be flexible in its application, i.e., among other things there would be a pricing system based on differentiation of quota expansions by sub-market. That is to say, they sought the selective adjustment of quotas, adjusting the export quantities of


only one type of coffee, depending on its own price movement, leaving the quantities in other types unchanged, enabling them to expand their market. In the final agreement, whereas Brazil and Colombia (producer of mild Arabicas) won large basic quota shares, the Africans received smaller shares and also failed in their endeavour to incorporate an explicit selective quota expansion provisions in the the Agreement.

However, in March 1965, a resolution passed by the International Coffee Council instructed the Executive Board to continue search for a way to fit selectivity into the Agreement "if possible within the provisions of the Agreement as they exist at present but otherwise as they may subsequently be amended";31 the African and other producers of Robustas wanted increased shares in the total quota at a time when it was clear from the drop in prices that there could be no general rise in quotas. But Brazil and Colombia had little to gain from the selective system and had the votes to ensure that such a system was not introduced. At the same time, they did not seek a direct confrontation with the African countries which could undermine the Agreement through violation and non-cooperation. In this light "[a] legal challenge to the proposal for a selective system appeared safer".32 On the other hand, the


32. Ibid., p. 603.
Africans "realising that Brazil would not willingly adopt selectivity hoped to "win" through a legal panel what they had "lost" at the UNCC (i.e., United Nations Coffee Conference) and had since been unable to obtain by negotiations".

Thereafter, in the background of the fact that the Working Group set up to consider the issue of selectivity had been "deadlocked over the legality of selectivity", and in pursuance of a decision of the Council, the Executive Board established an advisory panel under Article 60 of the Agreement to consider the legality of selectivity. The Executive Board, on 12 October 1965, established an advisory panel under Article 60 of the Agreement to consider the legality of selectivity.


34. The relevant clauses of Article 61 which dealt with "Disputes and Complaints" read:

(1) Any dispute concerning the interpretation or application of the Agreement which is not settled by negotiation, shall, at the request of any Member party to the dispute, be referred to the Council for decision.

(2) In any case where a dispute has been referred to the Council under paragraph (1) of this Article, a majority of Members, or Members holding not less than one-third of the total votes, may require the Council, after discussion, to seek the opinion of the advisory panel referred to in paragraph (3) of this Article on the issues in dispute before giving its decision.

(3)(a) Unless the Council unanimously agrees otherwise, the panel shall consist of:

(1) two persons, one having wide experience in matters of the kind in dispute and the other having legal standing and experience, nominated by the exporting Members; contd..../-
appointed the following members to the advisory panel: Jose Thomas Nabuco (nominated by Brazil); N. Andre Phillip nominated by Organisation Africai et Malgache du Cafe (OAMCAF); Richard B. Bilder (nominated by the United states) and Paul de Visscher (nominated by Belgium).35

The Panel later selected Abzan Chayes (United States) as Chairman. The suggestion to appoint jurists alone as members of the Panel had come from Brazil and had been accepted. The terms of reference of the advisory panel were as follows:

"...The Advisory Panel is requested to give a legal opinion whether the adoption of a selective system of quote adjustment by means of a Resolution of the Council would be compatible with the provisions of the Agreement as it now stands.36"

A selective system was defined by the Board as being one which, as a result of relative or absolute changes in the price levels of various types of coffee, permits the upward or downward adjustment of the annual quotas of countries listed.

contd.......

(ii) two such persons nominated by the importing Members; and

(iii) a chairman selected unanimously by the four persons nominated under (i) and (ii), or, if they fail to agree, by the Chairman of the Council.


35. Fisher, ibid., p. 97.
as exporting any given one of the three types of coffee shown in Annex I of Resolution No. 67.

The Advisory Panel, it may be noted at the outset, decided against the Africans and in favour of "Brazil" i.e. against a selectivity system. The ensuing discussion will at first focus on certain general observations of the panel with regard to the interpretation of commodity agreements. It will also examine the manner in which the dispute was eventually settled in the light of the panel decision. The discussion, however, starts with a brief reference to the manner in which the panel collected the evidence.

37. Ibid. Annex I was as follows:

Annex I

Composition of Groups of Coffee

<table>
<thead>
<tr>
<th>Mild Arabicas</th>
<th>Unwashed Arabicas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burundi</td>
<td>Bolivia (Non-Member)</td>
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<tr>
<td>Colombia</td>
<td>Brazil</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>Ethiopia</td>
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<tr>
<td>Cuba</td>
<td></td>
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<tr>
<td>Dominican Republic</td>
<td>Robustas</td>
</tr>
<tr>
<td>Ecuador</td>
<td>Congo (D.R.)</td>
</tr>
<tr>
<td>El Salvador</td>
<td>Ghana</td>
</tr>
<tr>
<td>Guatemala</td>
<td>OAMCAF</td>
</tr>
<tr>
<td>Haiti (Non-Member)</td>
<td>Portugal</td>
</tr>
<tr>
<td>Honduras (Non-Member)</td>
<td>Sierra Leone</td>
</tr>
<tr>
<td>India</td>
<td>Trinidad and Tobago</td>
</tr>
<tr>
<td>Kenya (Non-Member)</td>
<td>Uganda</td>
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<tr>
<td>Mexico</td>
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<td>Nicaragua</td>
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<td>Rwanda</td>
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<td>Tanzania</td>
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<td>Venezuela</td>
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For the Annex see Chayes, Ehrlich and Lowenfield n.31, p. 601.
2. **Collection of evidence**

The question presented to the panel for decision was transmitted by a Memorandum of the Executive Director. The Memorandum invited members to present to the Secretariat written statements of their legal views. Written submissions were presented by Brazil, Uganda, the United Kingdom and the United States which were transmitted to the Panel.

However, in order to acquaint themselves with the problem, the panel at their first meeting requested the Executive Director to present an exposition of the background of the issues involved. Furthermore, the Executive Director and experts from his staff were requested to be at the disposal of the panel for consultation.

The panel also had before it the records of the negotiating conference and other relevant materials including the materials of the Working Group set up to study the selectivity system (This Working Group was composed of Australia, Belgium, Brazil, Colombia, Denmark, France, Guatemala, OAMCAF, Uganda, the United Kingdom and the United States).

3. **Opinion of the advisory panel**

The panel, to begin with, observed that the terms of reference did not request "as would be usual in the
case of a judicial or semi-judicial decision, to pass on a particular system of quota adjustment or a particular Council decision to alter quotas", 38 but agreed that "the dispute presented to it for decision is essentially one of law". 39 In their view the request involved "interpreting the Agreement according to general principles of law recognised as governing the construction and application of international agreements". 40

With respect to these observations, Chayes (who was the Chairman of the panel), Ehrlich and Lowenfield have posed the question whether the panel should have returned the case to the Council stating that the issues involved were not legal but rather political. 41 In this respect, three points may be made: firstly, the problem was more in the nature of an economic conflict which had political overtones. Secondly, the advisory panel cannot be defined as a purely 'judicial' body in the framework of commodity agreements. The terms of reference were framed by the Council which nominated the members of the panel, and retained to itself the final authority to decide the dispute. Finally, even were it to have posed the question

39. Ibid., p. 197.
40. Ibid.
whether the issue submitted for opinion was "legal", it would, in the light of judicial practice, have had to give an affirmative response. For instance, in the Certain Expenses Case the jurisdiction of the International Court of Justice was challenged on the ground that political questions were involved. The Court replied as follows:

It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially juridical task, namely, the interpretation of a treaty provision.42

The Court referred to similar pronouncements made by it in earlier cases.

In interpreting the Agreement, the panel had recourse to the negotiating history or travaux préparatoires of the Coffee Agreement which made it clear that though a selective quota system of quota adjustment had been advanced by some delegations at the United Nations Coffee Conference

it had rejected it. 43 While making use of the travaux
preparatoires, the panel observed that, "In this case,
we were untroubled by one of the issues that frequently
plagues tribunals charged with interpreting written agree-
ments, namely, the extent to which it is proper to refer to
the negotiating history or travaux preparatoires as an aid
to interpretation. In the entire record of the negotiating
Conference was before us". 44 The general understanding
reflected in this statement is perhaps in conflict with
the provisions of the Vienna Convention on the Law of
Treaties according to Article 32 of which "the prepara-
tory work of the treaty" is a "supplementary means of
interpretation", recourse to which could only be made
to confirm the meaning which resulted from the application
of the "General Rule of Interpretation" or when the latter's
application (a) leaves the meaning ambiguous or obscure;
or (b) leads to a result which is manifestly absurd or
unreasonable. The International Law Commission in its
commentary clarified that though the articles should
operate in conjunction with each other and that there was
no rigid line between 'supplementary' and other means of
interpretation, yet the distinction itself was justified
for preparatory work did not have the authentic character

44. Ibid.
of the text "however valuable it may sometimes be in throwing light on the expression of agreement in the text". Should an exception be made in the case of commodity agreement? It is submitted that there is no overwhelming reason why such an exception should be made in future, especially in view of the short duration of the Agreement, a factor which the panel itself stressed at a later stage of their opinion.

However, while the preparatory work revealed that a selectivity system had been proposed and rejected, the history of the negotiating process did not render clear as to what meaning delegations gave to any of the relevant provisions of the Agreement, that is, whether the selectivity system could yet be read into the Agreement and be compatible with it. Consequently, the panel turned to the text and proceeded to assign meaning to the words used "in the light of the structure of the Agreement, its purposes, the known characteristics of the coffee trade with which it was designed to deal, and the recognised principle that the interpretation should seek to give effect to all the provisions of the Agreement". What is worthy of note here is the explicit reference to "the known characteristics of the coffee trade", underlining

the necessity of interpreting commodity agreements, and economic agreements in general, in the background of the political economy of the trade and industry of the commodity it seeks to regulate. This is in keeping with Article 31 of the Vienna Convention entitled 'General Rule of Interpretation' para (1) of which reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

The panel, in arriving at its opinion, significantly took account of the time element of the Agreement, that is, its short duration: "the Agreement itself is of relatively brief duration. It ends after five years, unless renewed.... 47 It explained the importance of the temporal element thus:

At that time, there will be opportunity for renegotiation to cure any dissatisfaction with the pro rata system set up in the 1962 Agreement for establishing and adjusting quotas. Such a revision will reflect the political and economic strength and interests of the parties at that time, as is wholly proper. Meanwhile, the balance among such interests struck at the last Conference and embodied in the Agreement should not be altered in the guise of legal interpretation. 48

48. Ibid.
In other words, given the "relatively brief duration" of the Agreement and the fact that it would be renegotiated, the panel argued that a 'strict' interpretation should be given to the text of the Agreement. As Bilder (a member of this advisory panel) has pertinently pointed out elsewhere, nations often control their risks by reducing the time period during which they are committed to the agreement, and thereafter it is not for legal interpretation to further hedge and qualify the agreement. This is, generally speaking, again in keeping with Article 31 of the Vienna Convention quoted above.

It is in this background that the panel considered the language of Article 41 of the Agreement, which it was argued, could permit the inclusion of selectivity system. Article 41 entitled "Assurance of Supplies" read:

In addition to ensuring that the total supplies of coffee are in accordance with estimated world imports, the

49. Bilder, n.1, p. 49. According to Bilder shorter-term agreements are considered less risky because (1) as the time horizon increases, a nation's confidence in its predictions decreases and its uncertainty increases; (2) the statistical chance that something will go wrong is viewed as increasing with time; and (3) the actual and psychological costs to a nation of continued commitment to an agreement that turns out to be disadvantageous may increase in proportion to the length of time that it is held to that agreement. p. 50.
Council shall seek to ensure that supplies of the types of coffee that consumers require are available to them. To achieve this objective, the Council may, by a distributed two-thirds majority vote, decide to use whatever methods it considers practicable.

Rejecting this contention the panel observed that to construe Article 41 as vesting unlimited powers in the Council to make quota adjustments on a selective bases whenever the price situation so requires would be to invite the erosion of the pro rata system and the substitution of a selective system. To permit the exception thus to eat up the rule would be unfaithful to the security of expectations that must underlie a viable Agreement and a regime of treaty law. The principle of "effectiveness" in the interpretation of treaties, whatever its scope, cannot justify so sharp a departure from the structure established by the parties. 50

However, the Panel noted that it did not foreclose the possibility that

in certain circumstances the Council could properly decide under Article 41, on an ad hoc basis and in order to meet emergency conditions of a short term character affecting consumer needs, to alter the quota of one or more producing countries without undertaking a general quota adjustment. 51


51. Ibid.
4. **Council decision**

When the Council met immediately afterwards, it had to take into consideration not only the panel opinion but also the continuing demand of the 'small' producing countries whose economies were under severe strain, in view of their low basic quotas and the *pro rata* adjustment system in contrast to the rising stocks of coffee. While the panel had decided against the selective system the old fear remained that if equitable relief was not provided the Agreement itself could be subverted. As the delegate from Portugal pointed out:

Portugal, a major African producer, could not accept the arguments that all variation of annual quotas must be on a *pro rata* basis. This was prejudicial to the African producers.... There was at the moment a real shortage of Robusta coffees, so the government could accept an International Agreement which prevented a partial solution of a situation like this. If there continued to be a shortage on the international market very serious political problems would arise. It was therefore indispensable to establish selective quotas for all types of coffee. With this solution the problem of basic quotas itself would be very much reduced in importance.52

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In fact, the panel itself, perhaps recognising the complex structure of the Agreement, had left towards the close of its opinion the impression that if need be the Council could accommodate the interests of the countries pleading the case of selective adjustment.

Coincidentally, at this time, in accordance with Article 28, paragraph (2), of the Agreement, the basic quotas distributed in 1962 were due for review and pursuant to such review, if necessary, make adjustments to “suit general market conditions”.\(^{53}\) This chance was seized upon to press home a case for flexible consideration of the problem. The dispute was eventually settled through a series of resolutions in the Council which were not impervious to the interests of the 'small' producing countries.

The first resolution (Resolution 92) stated that “It is considered desirable to grant relief in the current coffee year to certain Exporting Members pending a

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53. Article 28(2) read: "During the last six months of the coffee year ending 30 September 1965, the Council shall review the basic export quotas specified in Annex A in order to adjust them to general market conditions. The Council may then revise such quotas by a distributed two-thirds majority vote; if not revised, the basic export quotas specified in Annex A shall remain in effect".
decision on the review of basic quotas" and granted limited
concessions to states seeking a selective adjustment of
quotas.\textsuperscript{54} It introduced, albeit for a temporary period,
a couple of relief measures pending a decision under
Article 28, paragraph (2):

1. "Special Waivers" were granted for
the export of substantial quantities
of the varieties of coffee of only
the hard pressed producing countries,
in addition to their existing basic
quotas.

2. The Council suspended "all deduc-
tions already effected or liable to
be effected in quarterly quotas
resulting from excess exports".

These palliative, given their duration (granted only for
the coffee year 1965-66) were not opposed to the panel's
opinion that the \textit{pro rata} system was the only legal method
of general adjustment of basic quotas. The "Special
Waivers" "affected not their basic quotas but the extra-
ordinary quota increases only"\textsuperscript{55} and was in keeping with
their views on Article 41. The suspension of all
deductions, while it meant a retrospective review of its
earlier decision to impose penalties on illegal exports,
was also not in any way contrary to the panel's opinion.
The objective was to take cognisance of the immediate
needs of certain exporting countries while abiding by the
opinion of the panel. This move particularly benefitted
OAMCAF which had overshipped its basic quota by 500,000

\textsuperscript{54} For the text of the Resolution see Chayes, Ehrlich
and Lowenfield, n. 31, p. 613.

\textsuperscript{55} Prempeh, n. 4, p. 350.
baga ills 1963/64. It was only in Resolution 115 passed a year and half after the panel's opinion, that the matter was finally settled. The Council put forth "an ingenious compromise formula" agreeing to establish a generally applicable selective system which did not violate the essence of the panel's legal opinion. It created a new category of export quotas termed "special export authorisation". The Council resolved

To allot under the provisions of Article 41 to each exporting Member, in addition to the annual export quotas fixed under the provisions of Article 30 of the Agreement, special export authorisations totalling 1,083,500 bags which shall be distributed pro rata to basic quotas.

While the special export authorisations were to be distributed pro rata to basic quotas - though different price ranges were established - the Council resolved through Resolution 114 that the "special export authorisations" of the 'small' producing countries were to be calculated with regard to substantial additional quotas that had

56. Fisher, n. 33, p. 100.

57. For the text of the Resolution see Chayes, Ehrlich and Lowenfield, n. 31, pp. 615-6.
again been granted to them in the 1966-67 coffee year through a "special waiver system" as had been done under Resolution 92. In other words,

It was to the supply of these specially created and named category of quotas — the Special Export Authorisations and the Special Waivers that the 'selective adjustment system' evolved under Resolution 115 was to be applied. Strictly, the still unrevised Annual Basic Quotas were not affected. Any general adjustment of them continued to be made according to the pro rata principle.58

Therefore, what finally emerged was a system which while retaining the basic annual quotas and the pro rata system of adjustment provided breathing space to those advocating the selectivity system. That is to say, having won the case in the panel the bigger producers promptly introduced measures which, while not contravening the panel's opinion, accommodated interests (a limited selectivity system) which could threaten the operation of the Agreement. The Council's decision, it has been observed, showed that

The subtle combination of non-juridical and juridical norms provides a pragmatic alternative to decisions based exclusively on arbitrary grounds of power politics or rigid legalistic construction.59

58. Prempeh, n. 4, p. 352.
59. Ibid., p. 355.
However, as Khan points out, it "is also arguable that the Coffee Council abdicated its responsibility of reconciling the conflict between the pro rata school and the 'selectivity' school and perhaps aggravated the conflict by stating the question to the panel in unduly broad terms. The question, instead of being the substitution of one system by another, could have been put in more specific terms, something, on the line of: Was the Council empowered under the Agreement to take differentials of various coffee grades into consideration in making quota adjustments?"760 In other words, the matter perhaps was not quite about achieving the correct mix of juridical and non-juridical norms as of the proper use of the former method. The terms of reference of the panel gave it no room to manoeuvre and present an equitable answer. If it had been given greater freedom of decision of considering the changing circumstances under which the selectivity system was espoused, it could well have reached a conclusion recognising the interests of the 'small' producers within the overall structure of the Agreement.

Having said this, it must be remembered that in view of the short duration of the Agreement and the fact the system of weighted voting is accepted in principle by all the members it is perhaps appropriate that the Council

760. Khan, n. 9, p. 145.
is the body in which the equities are debated. While the procedures of weighted voting favour the interests of the more powerful countries the fact that the Agreement is to be renegotiated in short periods seeks to ensure to some extent that the interests of the less important members are not altogether ignored. And as Hexner has aptly observed, "there is a strong tendency, in so far as means of their interpretation are concerned, to interpret their basic instruments very broadly and to adjust their working arrangements to practical needs without amending their basic instruments". 61

In conclusion two observations are in order. First, from the manner in which the dispute was eventually settled it can be said that "in a macro sense, the package gave a new lease on life to the ICO and to the world coffee market". 62 And, significantly, the 1969 International Coffee Agreement explicitly incorporated the

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61. Ervin P. Hexner, "Worldwide International Economic Institutions: A Factual Review", Columbia Law Review, Vol. 61, No. 3 (1961), p. 376. However, these observations cannot be taken to endorse the internal mode of dispute settlement in all economic organisations where certain special factors in play in the case of commodity agreements are not present; the ICAs are seeking to stabilise the export earnings of developing countries and help them achieve their development objectives. Therefore, institutions like the International Monetary Fund which seek to defend the exploitative world economic order are another kettle of fish.

selectivity principle and authorised the Council to "adopt a system for the adjustment of annual and quarterly quotas in relation to the movement of the prices of the principal types of coffee". In other words, the internal mode of settlement, occasionally with the help of an impartial intermediary worked fairly well. Secondly, while the system, in the final analysis, worked well better use could have been made of the advisory panel by giving it more practically relevant and pointed terms of reference. On future occasions, it would be more appropriate to give the panel greater scope for decision if the intermediary is to do full justice to the reasons for its establishment. It may not always be that the dispute has the sort of ending that the Selective Quota case had. The weighted voting procedures can lead to the unjust treatment of the plea of nations with minority voting weight.

IV. THE SOLUBLED COFFEE CASE, 1969

Sometimes, a special dispute settlement procedure may be incorporated in a commodity agreement, as is the case in IGOA, whose scope is strictly defined in relation to a controversial provision. Such a procedure - provision

63. For the text of the Agreement see ibid., p. 215. The relevant article is article 37(2).
for outside arbitration - was incorporated in the International Coffee Agreement, 1968, in relation to the provision regarding the processing of coffee. The arbitration mechanism was actually put into motion soon after the Agreement came into force. The soluble coffee dispute which was decided in 1969 by an Arbitration Panel is examined here, inter alia, with the following broad objectives: to indicate some of the variables which influence commodity disputes; to generally review the role of law and legal interpretation in such disputes, and to assess the procedure of referral to an outside body to decide a dispute.

A. Facts of the Case

The dispute in the Soluble Coffee case arose out of the incentives made available by the Brazilian Federal Government for soluble coffee production; production was subsidised in many ways, including lifting export taxes that amounted to 50 per cent for green coffee.64 The promotion of the Brazilian soluble coffee industry began from the early sixties and Brazilian soluble exports to the United States rose steeply from 1 per cent of the US solubles market in 1965 to 14 per cent of the US market in

The US National Coffee Association, the official trade organisation in the United States, condemned the Brazilian measures to boost the local solubles industry. It was supported in this by General Foods which was the largest producer of regular (29 per cent of all industry sales in the United States) and soluble coffee (53 per cent of all industry sales in the United States). The green coffee brokers also opposed the import of soluble coffee as it would reduce the imports of green coffee on which they made turnover commissions. There were, of course, others like Hill Bros. Coffee Co. which favoured the maximisation of Brazilian imports since it did not effect them negatively. But, on the whole, the American industry was opposed to the Brazilian imports. Meanwhile the International Coffee Agreement, 1962, came up for renewal negotiations. The United States made it clear that there would be no new agreement unless Brazil was willing to accept a compromise. This compromise, after hard negotiations, was finally written into article 44 of the 1968 International Coffee Agreement.

Article 44 prohibited member states from applying governmental measures affecting exports of coffee if it

66. Ibid.
67. Ibid., p. 136.
amounted to "discriminatory treatment in favour of processed coffee as compared to green coffee". If a member state concluded that this proscription was not being complied with, it could file a complaint with the Executive Director. And if no solution was found within a period of thirty days, the Executive Director had, within forty days, to establish an Arbitration Panel to determine whether there was discriminatory treatment. The Panel was to consist of "(i) one person designated by the complaining Member, (ii) one person designated by the Member against which the complaint was being made; and (iii) a chairman mutually agreed upon by the Members involved or, failing such agreement, by the two persons designated under (i) and (ii)". The decision of the Panel, to be given within three weeks, was to be made by a majority vote on questions of substance as well as procedure. If the Panel arrived at the finding that discriminatory treatment existed, the member state guilty of it was to be given thirty days to correct the situation and inform the Council of the measures it was contemplating. The complaining member retained the right to apply unilateral counter-measures if necessary action was not taken to correct the situation. In applying the counter-measures due regard was to be paid to the need and desire of the developing countries to practise policies designed to broaden the base of their economies through, inter alia, industrialisation and the export of manufactured products.
The insertion of the compromise solution did not, however, resolve the problem. Brazil did not comply with this provision to the extent desired by the United States and the latter on 2 December 1968, lodged a formal protest under Article 44 with the Executive Director of the International Coffee Organisation (ICO). It restated its complaint on the lack of comparability of export taxes in Brazil between green and soluble coffee and on the lack of access to cheap Brazilian grinders. The Executive Director eventually established an Arbitration Panel composed of the required three members: one Brazilian member (Paulo Egydio Martins), one American member (David R. Herwitz), and a Swedish Chairman (Bengt Odevall). They delivered separate findings within the stipulated period of three weeks. Two of the arbitrators - Herwitz and Odevall - upheld the American complaint while the Brazilian member dissented.68

B. Interests at Stake

A brief statement of the interests at stake of both the parties will be useful to evaluate the outcome of the

arbitration, as well as the individual opinions. The following interests of the United States were involved: firstly, there was its foreign policy interest, that is, it regarded the Agreement as an instrument to support favourable regime types in Latin American countries in order to check what it termed "Castroism". This policy was in keeping with the initiative of President Kennedy whose famous Alliance for Progress speech on 13 March 1961 has been quoted earlier. In other words, the support for the agreement was based on the fear that a sharp break in coffee prices paid to Latin American countries could prove dangerous to US security. This rationale sustained its weight in 1968 when renewal of the 1962 Agreement was sought. Secondly, as noted earlier, General Foods had its interest at stake, and, with an unambiguous interest at stake corporate action was both "decisive and effective". Thirdly, to whatever extent, the Agreement did favour the consumers in the developed countries through assuring access at stable prices. The first and third sets of interests prevailed on the United States from walking out of the Agreement while the second made it imperative that a solution be found which was acceptable to General Foods and which simultaneously saved the Agreement.

69. See Chapter IV, sub-section "Strategic-Power Relationship".
Brazil also had crucial economic interests at stake and, therefore, did not want to put the Agreement in peril. Most significantly, in the past, benefits estimated at around $500 million a year in coffee export earnings were reaped by the coffee producing countries which represented the difference between the price they got under the Agreement and the price they would have got in its absence. Being the major producing country, Brazil received a large proportion of this sum. 70 However, at the same time, as a developing country it naturally wanted to build up its soluble coffee industry in order to increase its export earnings and broaden its industrialisation base. This objective required certain positive actions in favour of the soluble coffee industry to encourage its growth.

C. Arbitration Panel's Decision

Chairman Odewall, after taking cognisance of the dispute, which he described as an "unfortunate situation", which had arisen between the two great trading partners, decided in favour of United States in a short and non-judicial opinion. 71 He underlined the need for appropriate


71. Odewall's opinion can be found on pp. 564-6, Findings of the Arbitration Panel, n. 68.
action as outlined in the Agreement by one of the two Governments since "the history of this case clearly shows a need to have a remedy applied to the situation". The situation, he suggested, would be "best corrected" if the Brazilian government "took it upon themselves to deal with it". Otherwise, "appropriate action by the United States Government would be a natural course to follow", as "this situation will not remedy itself."

Harwitz, the American member, concurred with Clevall, delivering a relatively longer, though non-legal, opinion. At the very outset, he posed the question whether or not the facts revealed "discriminatory treatment". He concluded that "for the reasons set out below, I have no doubt that such a showing has been made". However, when it came to giving reasons he said,

I recognise 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"... 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

72. Ibid., pp. 566-70.
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. 73

Yet, he proceeded (though in his opinion it would not serve any "useful purpose") to give reasons to show that discriminatory treatment had been established. His conclusion, that there was such discrimination, rested on the fact that "Brazilian producers of soluble coffee had the "twin" advantages of access to less expensive types of coffee which were not available to United States producers and the ability to purchase green coffee which was not subject to financial burdens of the contribution quota applicable to all purchases of Brazilian green coffee by United States producers." 74

The American member did not find it relevant in this context to review extensively whether "the contribution quota resembles a tax, or whether there are sound domestic reasons for prohibiting exports of inferior types of green

73. Ibid., pp. 567-8.
74. Ibid., p. 569.
coffee, or the relevance of differences between the soluble coffee industry and the green coffee business*. He also did not find enough force in the Brazilian argument that since soluble coffee was an industrial product, it was illogical and unfair to expect soluble coffee to be subjected to the same types of governmental regulation as those designed to apply to a primary commodity like green coffee. The US complaint, he observed, was based "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-à-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". He also did not think it 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".

75. Ibid.
76. Ibid., p. 570.
77. Ibid., p. 569.
Martins, the Brazilian member, considered the issues involved in the light of the principles of equity, a procedure he endorsed in all cases of dispute between states. He elucidated his perspective of 'equity' with a long quotation from Gustav Radbruch:

The conception of equity must be understood in a very broad sense, in order to justify the necessity for deciding political disputes between States. (...) 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 the side of the stronger and more unscrupulous. Only the judge who stands above the disputant, the judge who considers the question from the superior standpoint of the international common good, is capable of a true decision in equity.

78. Ibid., p. 570.
79. Ibid., p. 571. (Emphasis in original).
Martins sought to concretise this conception of equity in relation to the dispute by drawing attention to the interesting fact that the current controversy transcended the classic dispute between countries which produced raw materials and the industrialised consumer countries and involved a confrontation between the latter and a producing country which is being industrialised. The US complaint, he argued, sought "to remove from countries producing raw materials and members of agreements, any natural advantages they may possess for industrialisation; the industrialised consumer countries reserving the right to maintain the status quo". Referring to the United States memorial which stated the need of developing countries to industrialise as an "intangible" factor, he noted that the position of the United States contradicted the spirit of UNCTAD and also undermined the Coffee Agreement.

Having clarified the broader policy aspects of the dispute, Martins proceeded to the interpretation of Article 44, inclusion of which in the 1968 Agreement he assigned to the "intimidation approach" of the United States. Furthermore, the article was of marginal nature in relation

80. Ibid.
81. Ibid., p. 572.
82. Ibid., p. 573.
83. Ibid.
to the Agreement, for it was the only provision relating to processed product in an agreement essentially dealing with primary product. Secondly, it was difficult to accept that the word "discrimination" was clearly applicable to the different treatment for green and soluble coffees in Brazil. For 'discrimination' to take place, there had to be a damage or injury or loss and at best it could be said to have an ambiguous use. Thirdly, the meaning of 'discrimination' needed to be considered not in isolation from the Agreement as a whole, but in the light of its objects and purposes. Brazil had, in this context, pointed out that since the Agreement required it to limit its exports, it was obliged to apply a number of domestic measures to enable the Agreement to work and the "contribution quota" was one such measure. In other words, it was in the nature of an appropriation of resources derived from coffee to be reinvested directly and indirectly in the coffee sector itself and neither its aim nor its effect was to determine the level of world prices for Brazil.

Fourthly, even if Brazil abolished the "contribution quota" and withdrew the domestic guaranteed price system, the world continue to be guaranteed by supply controls established under the Agreement. On the other hand, domestic prices would decline allowing the Brazilian soluble coffee industry to buy its raw materials even more cheaply.
Therefore, there was neither discrimination nor special privileges for the Brazilian industry. Fifthly, the American contention referring to the high profitability of the Brazilian soluble industry was disputed by Brazil, which with facts and figures showed it to be non-existent. Moreover, the United States would not discuss the profitability of its own soluble coffee industry for purposes of comparison. Sixthly, the price of Brazilian soluble coffee on the US market was not dependent on the existence or absence of a "contribution quota" since this market was dominated by a small number of large organisations practically constituting an oligopoly. Brazil's soluble coffee was in no position to affect the end consumer, because it was merely an "intermediary" product.84

The arbitral decision was given on 28 February 1969. After some negotiations with the Brazilian representatives, the United States sent a note (30 April 1969) to the Government of Brazil stating that its understanding was that the Brazilian government had agreed to the following steps:

(a) As a first step, the Government of Brazil would impose by 1 May 1969 a tax of 13 US cents per pound on exports to the United States of soluble coffee whether such coffee was shipped directly or indirectly to the United States.
(b) Both Governments should agree to meet on or about 15 January 1970 to consult on developments in the soluble coffee markets and to seek agreement on further measures to be taken with respect to soluble coffee exports from Brazil. Such discussion was to be concluded by 1 March 1970. If no agreement was reached by the said date, the United States would take steps to ensure that a total tax burden of 30 cents per pound was levied on Brazilian soluble coffee by 1 May 1970; and

(c) The Government of Brazil would not introduce new governmental measures or alter existing measures that would offset the effects of this new tax. 85

The Brazilian reply, in response to this, accepted the terms of the US note, but refused to guarantee the proposed tax level. 86 It imposed on 1 May 1969 an export tax of 13 cents per pound on soluble coffee exports to the US. 1 May 1970 passed and Brazil refused to implement a 30 cents export tax as desired by the United States. 87 General Foods continued to demand the termination

86. Ibid., p. 580.
of the discrimination. In fact it was successfully able to hold up the Agreement's implementing legislation which was to expire on 30 September 1970.88 The US House Ways and Means Committee headed by Wilbur Mills rejected on 15 July 1970 the implementation legislation needed to continue active US participation in the Coffee Agreement.89 Finally, however, on 31 December 1970, the Senate by a voice vote extended the implementation legislation until 30 June 1971, stipulating that there would be no further implementing legislation unless the solubles controversy was settled by 1 April 1971.90 Soon after the dispute was resolved with a "victory" for United States. Brazil agreed to provide an equal price advantage to American importers by providing export-tax free the green coffee equivalent of Brazil's soluble coffee exports to the United States.91 General Foods, of course, got the biggest share of the imports of cheaper coffee.92

D. An Evaluation of the Case

The Solubles Coffee case provides considerable insight into the process of dispute settlement in economic

88. Ibid., p. 144.
89. Ibid.
90. Ibid.
91. Ibid.
92. Rangarajan, n. 29, p. 159.
agreements; the experience, while providing direct lessons in resolving disputes in commodity agreements, highlights the dynamics of settlement of economic disputes in general. At the very outset, the case brings out the multidimensional nature of economic agreements, in particular of the commodity agreement. These agreements seek to accommodate conflicting interests of member states whose stake in agreement are itself shaped by multiple variables, whether economic and political, domestic and international. In case a dispute arises, the whole range of factors which these variables imply go into play. In attempting to understand the position of the party of parties to the dispute, not only has account to be taken of these complex determinants but an identification of the more significant of the more significant variable is also called for. The Solubles Coffee case provides pointers in these contexts:

First, an important aspect brought out by the dispute was "that there is a basic identity of interests between the large publicly held corporations (such as General Foods) and large states in international economic organisations". It may be recalled, as Krasner notes,

93. Some of these variables were considered while discussing in Chapter IV the factors which unweigh in commodity negotiations.

that "when the economic interests of General Foods was unambiguously threatened, it was able to prevent the passage of implementing legislation for the Coffee Agreement until the American government found a solution that satisfied the corporation."95 In other words, there is a necessity, in the case of a dispute, to examine the domestic interests involved and their precise nature and influence. In the case of the developed countries, the role of transnational and domestic corporations must be particularly considered.

Second, though more often than not the interests of the state coincide with those of the industry, the interests of the latter may, on occasions, have to be reconciled with the larger political interests of the state. In the instance of the soluble coffee dispute, if merely the interest of the industry would have been considered, the United States would have in all likelihood opted out of the agreement. In fact the industry had been persuaded to support the agreement on the plea that it would be conducive to creating in Latin America favourable regime types. In 1968, when the "1968 Agreement was presented for renewal, the Foreign Affairs Committee of the National Coffee Association stated in a letter to the

95. Krasner, n. 64, p. 513.
Senate Foreign Relations Committee that it would go along with the Agreement only because it had consistently been informed by the government that "a Coffee Agreement is essential to the United States national interest and to the economic and political stability of the coffee-producing countries". In brief, the political stakes of the parties to the dispute also need to be considered.

Thirdly, the economic and political weight of the parties plays an important role in the outcome of the dispute. Brazil, in this case, could not afford to annoy the United States as the latter's presence was absolutely necessary to the effectiveness of the Agreement in its role as the biggest consumer of coffee. Additionally, Brazil's overall development prospects could have suffered by alienating the United States.

At another level, the Arbitration Panel's decision helps to elucidate the nature, limits and scope of legal intervention in economic disputes. Both Odell and Herwitz delivered a short and a non-judicial opinion. Trying to understand the reasons for adopting such an approach, Fawcett has pointed out that the decision of the Panel "must be set in context of how the settlement of disputes is seen in international organisations in the

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96. Cited in Krasner, n. 64, pp. 509-10.
monetary and trade fields. Settlement is regarded as essentially a matter for negotiation by the interested parties, which may comprise all members of the organisation, a process of what has been called 'organised persuasion', rather than arbitral or judicial decision'. In other words, Fawcett is trying to explain the non-judicial approach of the majority by emphasising that, perhaps, the typical judicial approach is not suited to the resolution of economic disputes. This view has also been echoed by another observer who notes that "the predominant theme in the opinions of the concurring arbitrators that matters of form and rigid technicalities must not be allowed to stand in the way of a decision which they conceived as aimed at a pragmatic solution of the dispute and restoration of the balance of economic interests reflects conceptions underlying the internal settlements function within international economic organisations". While agreeing with the thrust of the arguments in the specific context of the soluble coffee dispute it needs to be cautioned that pragmatic considerations should not be the absolute over-riding factor. A balance has to be struck between judicial and non-judicial factors.


98. Prempeh, n. 4, p. 376.
The Panel's decision, in this regard, indicated the limits of legal intervention. The limits are two-fold: (1) as was stressed by the advisory panel in the Selective Quota case, the legal process cannot attempt to radically alter the structure of obligations embodied in the agreement; and (2) it cannot ignore the complex political and economic realities which underlie the agreement, determining its effective operation. Any effort to transcend these limitations could only prove counter-productive in as much as it would tend to lose its authority and validity. Seen in this light the Panel's decision is placed in proper perspective; the total circumstances of the case can be said to "excuse" the majority opinion which did not, in contrast to the dissenting opinion of Martins, ground its verdict on a equitous reading of Article 44, and the aims and objectives of the Agreement. Yet perhaps greater consideration could have been given to devising a solution which did not entirely overlook the interests of Brazil.

Finally, was the experiment of referring a dispute to an outside body deemed a successful one. According to Khan, the experiment "did not prove very cogent" and the ICFA reverted to the normal procedures for dispute settlement. Given the peculiarities of the soluble coffee dispute it is perhaps difficult to generalise from this

99. Khan, n. 9, p. 43.
single experience. However, from the manner in which the
dispute was eventually settled, as well as the tenor of
the majority opinion, it appears that the internal mode
of dispute settlement is more appropriate in commodity
agreements.

V. APPRAISAL

The chief characteristic of the disputes settle­
ment system incorporated in commodity agreements is that
the mode of settlement is internal. This means that dis­
putes between member states are settled in the main policy
organ i.e. the Council, and are subject therefore to the
distributed weighted voting procedures used to arrive at
any decision. The reasons why international organisations
expressly charge their policy making organs with the inter­
pretation and settlement of disputes concerning their
legal order have been well enumerated by Schermers as
follows:

(a) Policy-making organs can compromise. They can look
for a solution acceptable to all parties concerned.
In court, however, the open clash of two governments
and the resulting victory of one party over another
can be harmful to the governments involved in the
dispute.
(b) Policy-making organs can solve problems by further legislation. They need neither limit themselves to the wording of a text nor to the intention of the parties, they do not have to look back, they can look forward and create a new situation, abandoning the old conflict. Policy-making organs can more easily override specific articles and give priority to the purposes of the organisation.

(c) Courts are formalistic. They often occupy an immense amount of time, forbid the states concerned to participate fully in their deliberations, use strict rules on the burden of proof and give insufficient consideration to political arguments. Policy-making organs can produce better results by mutual consultations. The parties to the dispute are present and participate fully in formulating a solution.

(d) Many international organisations are unwilling to leave decisions to outside bodies, either because these bodies are not composed of experts in the matter covered by the organisation, or because they cannot apply a weighted voting formula. 100

100. Schermer, n. 18, p. 545.
While these reasons have considerable validity, there are a number of counter-points which were detailed out in the context of the "carrying charge" dispute. A few general points may be made. Firstly, before an internal mode of settlement can be endorsed, it is important to review the structure and objectives of the agreement of which it forms an integral part. It may be that the system merely reinforces an already inequitable structure of obligations and a lopsided representation in the organisation. The commodity agreement being an instrument to further the development objectives of developing countries - while bringing unquestionable benefits to the developed countries - in which the principle of weighted voting has equal consequences for both the exporting and importing countries, and further given its short duration, the system of internal mode of settlement does not, have grave negative implications.

Secondly, it is worth reiterating that the element of impartiality may suffer in such a system and can often mean that the voice of a small minority is drowned in the voting procedure. It is in response to such criticism that the 1953 wheat Agreement, for instance, inducted an impartial outside intermediary, that is, the 'advisory panel'. However, unfortunately, this innovation has been confined to the 'disputes' procedure alone. In fact, if
anything, it is more important to introduce the mechanism of advisory panel in the "complaints" procedure. The element of impartiality is more likely to be present when the dispute relates to the violation of obligation by a member state. And anyway the final decision yet rests with the Council. The resort to an intermediary depending on the composition and general economic orientation of the body, will "in practice lend a 'quasi-judicial' element to the settlements machinery and provide a credible means of minimising the possibility of arbitrariness in Council decisions". 101

The system of internal mode of settlement seems to have worked reasonably well in practice. The Selective Quota dispute was resolved in a pragmatic manner in which the interests of the adversary parties are accommodated. In this context, it has been aptly observed that "[t]he major contribution of the settlements system here may be said to be its reinforcement of the movement towards the evolution of new, realistic and potentially more durable techniques". 102 However, as Metzger notes, and as has been repeatedly underlined, "[t]o the extent that the weighted voting is employed, the role of impartial adjudication becomes relatively less important". 103 This makes it

102. Ibid., p. 389.
103. Metzger, n. 2, p. 34.
necessary to ensure that in cases where the dispute does proceed to an 'advisory panel', it is given enough room and scope to provide an adequate legal answer which not only takes account of the peculiar characteristics of the commodity agreement but also the relevant rules of international law. The Council can always take into consideration other factors which dictate a more flexible decision.

The role of legal interpretation is, of course, limited by the economic and political realities which underlie the agreement. It is not its task, and neither is it qualified, to try and radically alter the "security of expectations" which an international treaty regime implies. Yet, perhaps paradoxically, if legal interpretation is to facilitate in the long run the resolution of economic conflicts, it must take into account the just and equitable aspirations of developing countries.