

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

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

Londres, 1969

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

Mr. Martins

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INTERNATIONAL COFFEE ORGANIZATION
Arbitration Panel on the dispute between
Brazil and the United States of America
under Article 44 of the Agreement
London, England

Records/20
28 February 1969

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Members of the Panel: Mr. Bengt Odevall (Chairman)
Mr. David Herwitz
Mr. Paulo Egydio Martins

Mr. Loudon

Gentlemen, I think it will be clear to you why the method of requesting the members of the Panel to read the findings to you was adopted, since this was the only way of conveying to you forthwith these findings, in view of the fact that they are written in two of the languages in which we are working. Unfortunately, though we hope that the English text - the complete English text - of these findings will be available this evening, the complete Portuguese text will unfortunately not be available until early next week. We can give you further copies of the English text if you so desire, but equally we can arrange to forward to your respective embassies as many copies of both texts as you may indicate you need. Perhaps you could later on tell us your requirements in that respect.

The second point I would like to put to you is that the members of the Panel have agreed, if you so desire, that they will answer any questions which you might wish to ask purely in relation to clarifications of points in the text. This does not in any way imply any re-opening on a matter of

substance - it is purely a matter of clarifying any point of the texts on which there may be, at this stage, any doubt.

Mr. Maciel:

Thank you, Mr. Chairman. In view of what Mr. Loudon has just said, Mr. Chairman, I must confess that I am not quite clear in one or two points. I would like to understand the situation as it is now, and I might like to ask you one or two questions. Before doing so, however, would it be possible, Mr. Chairman, to have a brief recess, so that I can find out whether I have really understood the situation. Would that be in order, Sir?

Mr. Odevall:

That would be in order. We'll sit here and wait till the recess is over.

Mr. Maciel:

All right, thank you.

Mr. Odevall:

We are in recess now.

Mr. Maciel:

We are in recess now? Thank you.

Mr. Chairman, what I am going to say is only to clarify the situation in my own mind. And I hope, Mr. Chairman, that you will not interpret my questions in any way as raising procedural obstacles on account of the form of this award, to

use the words in your own opinion. I have a real doubt - of course, we shall have to study very carefully all these three opinions, as we have not a unified award - but at the moment I have perhaps two questions that I would like to put to you by way of clarifying my own mind. It is my opinion that this is something that we can do now before having had sufficient time to study more carefully what has been said by the three members of the Arbitration Panel. Before putting my question to you, Sir, I would like to explain what I mean - I would like to give an explanation so that you could properly understand my question, and the context in which I put my question.

In my mind, Mr. Chairman, the Panel had, as terms of reference, so to speak, to examine the situation that had been brought to its judgment under paragraph 1 of Article 44, and then had to determine whether there were discriminatory measures, and if so what was the extent of the discriminatory treatment. The action, or the no-action, that the parties had to take or would have to take, or not to take, would have to be based on the award, on the conclusions of the Panel. You have chosen to give the conclusions in this form that has been given, and I am not raising a procedural question or criticising this effect.

In my mind, if the Panel found that there was no discrimination and could not therefore determine the extent of the discrimination, Brazil in that case would not be required to take any

action, and the United States would not be permitted to take any counter-measures. The consequence would be, of course, then, in this hypothesis, no action.

But on the other hand, if the Panel finds that there is discrimination, therefore we would have, according to the terms of reference, to expect the extent of the discrimination to be determined, so that Brazil would be required to take measures or action to correct that situation; and that if we did not take these measures within 30 days the United States would be entitled, then, to take counter-measures. This is therefore the consequence if a panel of this kind under 44 finds that there is discrimination. In other words, the action that Brazil would have to take would be based on the award. That is, what the Panel indicated as the extent of discrimination would be the situation which the Government of Brazil would have to take minimum measures to correct. That would be the minimum. If we failed to take this action within 30 days after that period, then the United States could take counter-measures to the extent indicated by the Panel. That would be the maximum of counter-measures that the United States could take. We find, therefore, that the award - or the conclusions if you might like to call it this way - is a basic element for either compelling Brazil into action, or, if it fails, to authorise action by the United States within the limits of the award.

But after having read once each of these opinions and having heard them read to us, the situation is not very clear

to me. Apparently - and again, I'm not raising a procedural obstacle - we have no award in the sense that this word, I think, conveys. We have, apparently, three different opinions. We might take, of course, the conclusion that there is no award, and therefore that no action is required by Brazil under 44 and that no action is authorized by the United States under 44. But again, Mr. Chairman, a conclusion could be derived from an analysis of the three different opinions that have been presented to us, and I think probably this is the intention of the Panel. They have decided to present it in this form of three opinions and not a unified opinion, even if by two members of the Panel. And this is the situation that is not very clear to me, and, as I said, we shall have to study these papers very carefully.

But something is right now missing for me to start this examination, which is this that Professor Herwitz's opinion and Mr. Martins' opinion are clear, but they are also clearly divergent, in the sense that Professor Herwitz finds that there is discriminatory treatment, and he goes on also to indicate what would be the outside limit, and Mr. Martins arrives at the conclusion that there is no discrimination and therefore no action is required. This makes your own opinion, Mr. Chairman, quite important, but I find myself not very clear on what some points mean. What I am driving

at is this, that I wish to have some clarification from you, Mr. Chairman, about the sense, or the meaning rather, of your own opinion. And my first question to you, Mr. Chairman, is this. You say, in your opinion, that there is an undesirable situation under Article 44. Well, we all agree with you that this situation is undesirable. But according to the terms of reference, or under the terms of reference, it is not clearly indicated, in your own opinion, whether there is discriminatory treatment, and if so, to what extent. What would be the minimum for Brazil and what would be the maximum for the United States, that is, the limits within which Brazil would be required to take action and the United States would be required to comply with, if they had to take action under this, after 30 days, in the case that Brazil had not taken any action. And my precise question to you, Mr. Chairman, Mr. Odevall, is this. Do you find, in your opinion, that there is discriminatory treatment? And if you do, what is the extent of this? I ask this because this is not clearly indicated in your written opinion, and it might help us in understanding the present position. I might have another question afterwards, Mr. Chairman, but would you be kind enough, perhaps, to reply to this first? Thank you.

Mr. Odevall:

It is true, as my two colleagues know, that I have not been able to find whether there is discrimination or not.

That I regard more as, perhaps, in the context, a procedural point. My mind is absolutely dominated by the unfortunate situation which has arisen between the two countries. And I equally clearly see that this situation requires action, and as we have met under the terms of Article 44, I have spelt out my conclusion, namely that I find that the United States is entitled to take such action, with due regard to paragraphs 3 and 4 of Article 44. I also, as you will see from page 4, invite the Brazilian Government to look at the opportunity of taking care of the situation themselves. For me, in other words, the absolutely dominating thing is that action is required, and that it must be taken to remedy this situation.

Mr. Maciel:

Thank you very much, Mr. Chairman. I note, then, that under Article 44 in your opinion there is no discrimination, and perhaps because of this you have not determined what the extent of the discrimination is, I mean, if you find that there is no discrimination, of course, it would be impossible to determine the extent of the discrimination. That helps me very much in understanding what is the conclusion of the Panel as such.

The second question, Mr. Chairman, that I would like to ask you, is this. In your written opinion on page 3 you suggest, or recommend, two actions, two kinds of actions.

One is a kind of export quota and the other is taking this outside the Coffee Agreement and perhaps treating it under GATT. And then you go on to say what you think the parties should do under 44 to remedy this undesirable situation.

Do I understand correctly, Mr. Chairman, that you are saying that these actions might be either one, or perhaps something else also; but either one of the two that you have indicated in page 3? Thank you very much, Sir.

Mr. Odevall:

May I first come back to your first question? I said that I haven't been able to find discrimination, and I also said that I have not been able either to find that there is not discrimination. Did you imply by your second question that you wanted to know if I favoured these solutions? Or what was the GATT and the quota solution?

Mr. Maciel:

My question was, Mr. Chairman, whether, when on page 4 you say that the United States and also Brazil, should take some action to remedy this situation, to take care of this situation, whether, among these measures, you envisage as possible the two that you have mentioned on page 3 - specifically a kind of an export limitation or export quota - and second, alternatively perhaps, taking it to GATT, for instance.

Mr. Odevall:

I found, after much deliberation and after much consultation, that these two solutions - the quota solution and the

GATT solution - went so much astray from the thoughts in Article 44 that unfortunately, in my own thinking, I had just to indicate them as, to my mind, the best solution under these circumstances. But the answer to your question is that, as we had to come to a solution under the terms of Article 44, I had to limit myself to the two suggestions on page 4. So therefore page 3 is just a background and, as I hope, a suggestion for the future.

Mr. Maciel:

Thank you, Mr. Chairman, for your clarifications that the two suggestions on page 3 are suggestions, and that because you had to give an opinion under 44 you wrote what is on page 4 of your opinion. And thank you also for your reply to my first question, and I take good note that you have said that in your opinion you have not been able to find that there is discrimination and you have not been able to find that there is not discrimination. Thank you very much, Sir.

Mr. Loudon:

Are there any other points of clarification, gentlemen, which you wish to put to the members of the Panel? Please,
Mr. Frank.

Mr. Frank:

Thank you Mr. Loudon. I have no questions. To be sure it's on a first reading, but we find the decision quite clear, and see that two of these decisions authorize action under Article 44. As we are ending this arbitration I wish, on behalf of my Government, to express its deep appreciation

to each member of this Panel: to you, Mr. Chairman, to you, Mr. Martins, and to you, Professor Herwitz, for your willingness to assist the Governments of Brazil and the United States in this arbitration, and for your efforts during this arbitration. Thank you.

Mr. Loudon: Mr. Maciel?

Mr. Maciel:

Thank you very much, Sir. Mr. Chairman, I think we are really ending this. As I said, we will study very carefully these three opinions which have been given to us, and see whether we can derive any conclusion, as the conclusion by the Panel - a point which is not clear to me in view of these three opinions in writing and the answer that you have given to my questions. Finally, Mr. Chairman, I want to associate myself with Mr. Frank in thanking the three members of the Panel for all their work and the patience they have shown. And I hope, Mr. Chairman, as has previously happened in Coffee, that I have made three new friends. You are already an old friend, Mr. Odevall, but I hope that I would be counting Professor Herwitz and Mr. Martins and Mr. Frank as such. This has been a very constant feature in my participation at least in the coffee discussions, that even my opponents have always turned in the end to become my friends. Mr. Loudon here is a living example. And to this history unfortunately there is only one exception, but I am sure that there will be no two exceptions. Thank you very much, Sir.

Mr. Loudon:

Thank you very much, Mr. Maciel. Well, gentlemen - oh, I'm sorry, Mr. Chairman, I believe you....

Mr. Odevall:

I would like to say, on behalf of my two colleagues, that we expected this to be a thankless job. We proved wrong on that score, and I would like to say that it was heart-warming to have this tribute paid to us by the two agents. The experience has been an enriching one, and I can assure you that three men have struggled not only with themselves but very much with their consciences.

While I have the floor, Mr. Loudon, may I, as I have been part of those who have caused so much trouble to the Organisation, thank you and your colleagues, the Secretary (today Mr. Peter Knox) for the facilities you have so generously given to us, not only in the form of manpower but in the form of overtime and kindness. We are especially grateful perhaps, I would say, to the interpreters, the translators and the stenographers, who have done so much for us to have access to the important words that have been spoken here, and afterwards reprinted and read, by us all, with the greatest care, and pondered. I thank you all.

Mr. Loudon:

Thank you very much, Mr. Odevall, it's most kind of you, and I appreciate very much your very kind remarks. I would like to say, I think, on behalf of the Organization, if you

will allow me to do so, that not only was it a great pleasure to give whatever help we could give, but we also do appreciate the tremendous amount of work which everybody who has been involved in this matter has put into the case. This is not by any manner of means confined to members of the staff of the International Coffee Organization - hard though they have undoubtedly worked - we appreciate equally how hard members of the Panel have worked. I happen to know some of the hours they have kept, and I'm sure the work done by the two delegations must have been equally hard. But at least, as Mr. Maciel says, one of the greatest satisfactions in matters of this nature to the Organization is that these controversial issues can be dealt with in a spirit of amity even if not to the entire satisfaction of either party.

Before we conclude our meeting there is one point which concerns the two delegations and the Secretariat and, perhaps, the members of the Panel as well. And that is, how we are now going to proceed over one rather important matter of detail. We propose to inform the members of the Council - unless anybody here feels that this is an undesirable method of doing so - by circulating the texts, translated into the various languages of the Organization, to the Members under cover of a very brief Executive Director's document. Our feeling is that it would be of doubtful wisdom to try to make a précis of these findings, or try, in any way to interpret them. This is not our function, and we might cause much more harm than good if we endeavoured to do so. But it will be impossible to put that course of action

into effect until the course of next week - the latter part of next week in all probability, by the time we finish all translations required. The English is already ready as I told you earlier, the Portuguese will be ready fairly soon next week, but of course we still have to think in respect of both French and Spanish so this will take some time and I don't envisage the possibility of circulating these findings in all the languages, much before the end of next week for those reasons. In the meanwhile however, we know - and we've had some evidence of the interest - that there is a great deal of interest in the outcome of the work of the Panel. Now the question arises, what communication, if any, does the Secretariat issue to the Press? And if anything is issued what form should it take. We would very much appreciate your advice, the advice of all members, all those who are here present, members of the Panel and two delegations, on this point which could become quite a difficult one for all of us if we fail to handle it with reasonable tact.

Mr. Odevall:

You have invited all of us to try and answer your question. I don't think really, that I should try and answer it on behalf of the Panel, not even on behalf of myself as, technically, we are now out of the question. We have delivered our opinions to you and we perhaps think that we have done our part by that, and I don't think that anyone of us has the intention of doing anything else but defer to you for further clarification. Now,

apart from this, it is an old experience that you had better tell the Press as soon as possible or else you only get distorted versions. Thank you.

Mr. Loudon:

Thank you Mr. Odevall. Your advice - advice which, as a matter of fact, we very much agree with - and it's because we agree with the need to, or the desirability, at least, of saying something very quickly, that we thought it desirable to have some slight consultation with all those who are involved in this matter before we all break up. If we're going to say something to the Press quickly, there are two possibilities. We can provide the Press with the English texts, either late tonight, but not later than tomorrow. That's one possibility. Then they will have the whole story, though it may not be as readily acceptable throughout the world, in English alone, as it would if we had it translated into all the relevant languages. Alternatively, we could consider some form of Press Communiqué, which, if we were to consider, I think we'd like the assistance of the two delegations in drafting because this will affect both of them very much indeed. Those appear to be the two possibilities open to us for a quick method of informing the Press, which we have reason to suppose is very anxious indeed to have some information about the outcome of the Panel's work.

Mr. Frank:

Thank you Mr. Loudon. We would not disagree with what the

Chairman, or should I say ex-Chairman, Mr. Odevall, has said. That is, that it is perhaps best to give the Press the real story, rather than subject all of us to the possibility of distorted stories. I suggest that a Press Release will either be a summary of the decision, in which case we will involve ourselves in the interpretation of it again, or it will not contain substance, in which case we'll be back with the problem of the Press being even more inquisitive because it will know that something has happened, but not what. Therefore, I think we would subscribe, subject to what else is said here, to your first proposal, that is, the release of the opinions of the Panel in English, and as soon as the Portuguese is available, the Portuguese and as soon as the other languages are available, the other languages.

Mr. Odevall:

Thank you very much Mr. Frank. Mr. Maciel.

Mr. Maciel:

I feel, I think I feel, the same way, Mr. Chairman. If we had to write a Press Communiqué saying what the decision is, perhaps we'd be starting this all over again, because I'm not clear what the decision is. I have tried some clarification - to ask you, Mr. Odevall, for some clarification - and these clarifications you have given me are very useful and they confirm the impression that I had, that this will be subject to a lot of interpreting. Therefore, it would be very difficult to give to the Press, to tell the Press what the decision was, because we don't know yet what the decision was. Therefore,

it appears to me that either you give a very short Press Release saying that the Board, the Panel, has concluded its work and that's that, or you give them the text of the three opinions. It would be very difficult, not to say impossible, to have a Press Communique saying what the decision was, because we are not sure what the decision

Thank you.

Mr. Odevall:

Thank you very much Mr. Maciel.

Mr. Loudon:

Could I know what the members of the Panel feel about this, if they have any views? We had one difficulty here, and that is that - paragraph (g) is it? - sub-paragraph (g) of paragraph 2 of Article 44, not only requires us to notify the Members concerned forthwith, but also the Council - and here is where we all too often run into difficulties - sometimes the Members, the other Members, the Council itself, incline to resent the fact that they get the information about important matters via the Press, long before we can give them the information ourselves and this, I think in view of the advice we have had is a risk we must run. But I hope that if there were any criticisms expressed of this method of doing the work, we should have the support of the Brazilian and the United State's Delegations in the forthcoming Council meeting. I think, what we'll do, is issue something this evening, very briefly to the effect that the Panel has completed its work

and made its findings and that the text of the findings will be available in English on Monday, by which time we may have been able to start sending some of the text out. Unless there is any other advice to be given on this point, we'll follow those lines, since the dangers of silence are even greater than the dangers of indiscreet speed. We'll make a very brief statement tonight to the Press, if they are still about, that the Panel has completed its work; that its findings have been presented to the Executive Director and that the findings will be available in English in the course of Monday next. That's alright with everybody, and in the meanwhile, I would hope - I'm sure I can say so in every confidence - nothing will be said to the Press other than that, until they receive the texts on Monday. Well, thank you very much, Gentlemen, and thank you Mr. Cdevall, Mr. Martins and Professor Herwitz. Thank you all very much for all you have done and the two Delegations and, as I have said before, it has been a pleasure to be able to help you in this rather arduous task. Thank you very much indeed.