

**COMMISSION DECISION**  
**of 23 January 2001**  
**terminating the examination procedure concerning measures affecting the trade of cognac in Brazil**

(notified under document number C(2001) 129)

(2001/97/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation <sup>(1)</sup>, as amended by Regulation (EC) No 356/95 <sup>(2)</sup>, and in particular Articles 11(1) thereof,

After consulting the Advisory Committee,

Whereas:

**A. PROCEDURAL BACKGROUND**

(1) On 17 February 1997 the Bureau national interprofessionnel du cognac (hereinafter BNIC) lodged a complaint under Article 4 of Council Regulation (EC) No 3286/94 (hereinafter 'the Regulation') on behalf of those of its members which export to Brazil or wish to do so.

(2) The complainant alleged that Community sales of cognac in Brazil were hindered by three obstacles to trade within the meaning of Article 2(1) of the Regulation, i.e. 'a practice adopted or maintained by a third country and in respect of which international trade rules establish a right of action'. The alleged obstacles to trade were the following.

- (i) Lack of protection of the cognac appellation of origin (AOC) and discrimination vis-à-vis other foreign and local geographical indications: the complainant alleged that the Brazilian legislation allowed Brazilian brandy and other types of spirits to be called cognac or *conhaque*, these being the terms officially and commercially used to define such spirits, regardless of their geographical origin. It was claimed that this practice was in breach of several provisions of the WTO Agreement in trade related aspects of intellectual property rights (TRIPs); of the Paris Convention for the Protection of Indus-

trial Property (Paris Convention); of the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods (Madrid Agreement) as well as of the 1992 Framework Cooperation Agreement between the Community and Brazil (Framework Agreement).

- (ii) Excessive administrative requirements for import: the complainant claimed that the requirements for the marketing of cognac in Brazil, such as the cumbersome registration procedure and the compulsory visit of a Brazilian agronomist to the production site in France at the exporter's expense are largely excessive and unique so as to constitute a disguised restriction to trade. It was claimed that these measures violate Articles III and VIII of GATT 1994 and to Articles 1 and 2 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).

- (iii) Discriminatory taxation: BNIC complained that the rate of tax on industrial products discriminates against Cognac vis-à-vis locally produced spirits. It was alleged that cognac is ex officio classified in the most heavily taxed category, while local spirits are never classified in that category. According to the complainant, this would be a breach of Article III.1 and III.2 of GATT 1994.

- (3) The complainant also claimed that these practices were causing adverse trade effects within the meaning of Article 2(4) of the Regulation and that they were in danger of being more adversely affected in the near future, as they blocked the access of cognac to the Brazilian market, which represent an important export market to an industry which is substantially export oriented.

- (4) The Commission decided therefore, after consultation of the Advisory Committee established by the Regulation, that there was sufficient evidence to justify initiating an examination procedure for the purpose of considering the legal and factual issues involved. Consequently, an examination procedure was initiated on 2 April 1997 <sup>(3)</sup>.

<sup>(1)</sup> OJ L 349, 31.12.1994, p. 71.

<sup>(2)</sup> OJ L 41, 23.2.1995, p. 3.

<sup>(3)</sup> OJ C 103, 2.4.1997, p. 3.

## B. THE FINDINGS OF THE EXAMINATION PROCEDURE

- (5) On the lack of protection of the cognac AOC, the investigation confirmed the complainant's allegation that the cognac AOC was not protected and that the term *conhaque* was used to define locally produced spirits. According to the Brazilian laws regulating the market of alcoholic drinks <sup>(1)</sup>, the term defines two kind of spirits, very different from each other: vine spirits or brandy (called *conhaque* or *conhaque fino* according to the length of the ageing process) and sugar cane spirits with different flavourings (*conhaque de...* according to the flavour added).
- (6) Consequently, the alleged violations of the Framework Agreement as well as of the Madrid Agreement to the Paris Convention were confirmed. It should be noted that, at the time the investigation was carried out, Brazil was entitled, as a developing country according to Article 65.2 of the TRIP Agreement, to delay the implementation of, *inter alia*, Articles 22 to 24 of the TRIP Agreement until 1 January 2000. The compliance of the measures under examination with these provisions was therefore not examined at that stage.
- (7) It was also confirmed that the lack of protection misleads consumers, so damaging the brand image of cognac; it therefore adversely affects trade of cognac in favour of Brazilian producers of spirits using the same name, cognac or *conhaque*.
- (8) The excessive administrative requirements and the discriminatory taxation were confirmed by the investigation, but they were not found to have a material impact on the trade of cognac; it was therefore decided not to pursue these issues.

## C. DEVELOPMENTS AFTER THE END OF THE INVESTIGATION

- (9) In view of the entry into force of the TRIPs obligation on 1 January 2000, Brazil adopted Law No 9279 of 14 May 1996, known as *Lei da propriedade industrial* or LPI, which, among other things, introduced a register of geographical indications.
- (10) Pursuant to LPI and following bilateral contacts between the Commission and the Brazilian authorities, BNIC applied for registration of the cognac geographical indication. The application was accepted and the cognac geographical indication was registered on 11 April 2000, after a delay due to the opposition of the Brazilian producers' association. The registration gave to the French producers exclusive rights to the use of the name cognac. Consequently, no registration of trade-

marks containing the word cognac is allowed and existing registered trademarks containing the word cognac will expire within five years from registration. Furthermore, the term cognac cannot be used as a generic name.

- (11) As regards the term *conhaque*, it remains, according to the Brazilian legislation on alcoholic drinks, a generic name as it was at the time of the investigation, and only as such it may be used, since, according to LPI, a generic name cannot be registered as a trademark. The geographical indication cognac will therefore have to coexist with the use of the generic term *conhaque*.
- (12) Since 1 January 2000, TRIPs has to be fully implemented by Brazil. The Commission services have therefore analysed the compliance with TRIPs of the present level of protection of the cognac AOC.
- (13) The analysis found that, being a geographical indication concerning a product of the vine, the cognac AOC, is covered by Article 23.1 TRIPs and as such has to be protected. As explained in recital 10, the registration of the cognac geographical indication entitles the A.O.C. to full protection in Brazil, and is therefore in accordance with Article 23.1.
- (14) It should be noted that the protection of Article 23.1 extends to translations of the original geographical indication; it should therefore also cover the Portuguese version of the word (*conhaque*). However, the use of the term *conhaque* is likely to be covered by the exceptions granted by Article 24.4 and 24.6 of the TRIPs Agreement. It was therefore concluded that the present level of protection accorded to the cognac AOC complies with the relevant provisions of TRIPs.
- (15) The coexistence of the protected geographical indication with the generic use of the Portuguese translation may still create some difficulties to the French exporters. However, the present Brazilian legal framework is likely to create, over time, a clear distinction in consumers' perception between cognac AOC and locally produced *conhaque*. The scope for consumers' confusion should therefore be substantially reduced, so creating a situation of fair competition on the Brazilian market and removing the adverse trade effects caused by the lack of protection.
- (16) As explained in recital 6, the investigation had found violations of the Paris Convention and of the Madrid Agreement. However, as the new situation created by the registration is expected to remove the unfair competition and the adverse trade effects, the issue will not be pursued further.

<sup>(1)</sup> Laws No 7678/88 and 8918/94.

**D. CONCLUSION AND RECOMMENDATIONS**

- (17) In view of the above analysis, it is considered that the examination procedure has led to a satisfactory situation with regard to the obstacles that faced the trade of cognac in Brazil as alleged in the complaint lodged by BNIC. The examination procedure should therefore be terminated.
- (18) Further protection of the geographical indication cognac against the generic name *conhaque* may be pursued, if appropriate, by negotiation in particular under Article 24.1 of the TRIPS Agreement,

HAS DECIDED:

*Sole Article*

The examination procedure concerning measures imposed by Brazil affecting the trade of cognac initiated on 2 April 1997 is hereby terminated.

Done at Brussels, 23 January 2001.

*For the Commission*

Pascal LAMY

*Member of the Commission*

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