COMMISSION DECISION

of 16 April 1998

under the provisions of Council Regulation (EC) No 3286/94 of 22 December 1994 concerning the failure of the United States of America to repeal its Antidumping Act of 1916

(98/277/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 right under international trade rules, in particular those established under the auspices of the World Trade Organisation [1], as amended by Regulation (EC) No 356/95 [2], and in particular Articles 13 and 14 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

(1) On 10 January 1997 the Commission received a complaint pursuant to Article 4 of Regulation (EC) No 3286/94 (hereafter the 'Regulation'). The complaint was lodged by Eurofer, the European Confederation of Iron and Steel Industries, on behalf of its members.

(2) The complainant alleged that the so-called US Antidumping Act of 1916 [3] (hereafter the '1916 Act') is inconsistent with several provisions of the Agreement establishing the World Trade Organisation (hereafter 'WTO Agreement') and its annexes and that the United States' failure to repeal this legislation is causing adverse trade effects to its member companies and threatening further adverse trade effects. On that basis the complainant asked the Commission to take the necessary actions to convince the Untied States to repeal the 1916 Act.

(3) The complaint contained sufficient *prima facie* evidence to justify the initiation of a Community examination procedure pursuant to Article 8 of the Regulation. Consequently, an examination procedure was initiated on 25 February 1997 [4].

(4) Following the initiation of the Community examination procedure the Commission conducted an in-depth legal and factual investigation. Based on the findings of this investigation the Commission reached the conclusions which are indicated below.

B. FINDINGS REGARDING THE EXISTENCE OF AN OBSTACLE TO TRADE

(5) The US Antidumping Act of 1916 is still in force and is applicable to the import and internal sale of any foreign product irrespective of its origin, including products originating in countries which are WTO members. The 1916 Act exists in the US statute books in parallel with the Tariff Act of 1930 which includes the US implementing legislation of multilateral antidumping provisions.

(6) The 1916 Act prohibits both the importation of goods and their sale in the US market when the price is lower than the one in the country of origin or in other foreign countries where the goods are exported. The wording of the Act is as follows: 'It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: provided, that such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolising any part of trade and commerce in such articles in the United States.' Any violation of the law leads to the granting of treble damages, upon application of an injured party, as well as to the imposition of criminal sanctions (fines and/or imprisonment) on the responsible persons.

[1] OJ L 349, 31. 12. 1994, p. 71.
[2] OJ L 41, 23. 2. 1995, p. 3.
[3] 'Act of September 8, 1996, 39 Stat. 756'. Title VIII of that Act is codified at United States Code 71-74.
[4] OJ C 58, 25. 2. 1997, p. 14.

(7) The practice regulated by the 1916 Act corresponds to that described in Article VI of the General Agreement on Tariffs and Trade (hereafter 'GATT 1994') and in the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereafter 'WTO Antidumping Agreement').

(8) Several aspects of the US Antidumping Act of 1916 cannot be reconciled with multilateral trade rules.

(9) With relation to Article VI of GATT 1994 and the WTO Antidumping Agreement the Commission considers that there exist in particular infringements related, but not limited, to the following provisions:

— Article V(1)(a) and (b) of GATT 1994 and Articles 2.1 and 2.2 of the WTO Antidumping Agreement insofar as they set the actual price in the exporting country as the first and privileged criterion for the calculation of the normal value whereas the criteria mentioned in the 1916 Act are fully interchangeable,

— Article VI(1) of GATT 1994 and Article 2(1) of the WTO Antidumping Agreement insofar as they require the introduction of products into the commerce of another country as a prerequisite for dumping to take place whereas under the 1916 Act actual sales on the US market are not necessary and a simple quotation from a foreign company is considered to be sufficient,

— Article VI(2) of GATT 1994 specifying that antidumping duties are the only possible remedy to dumping whereas the 1916 Act is having recourse to treble damages and fines and/or imprisonment,

— Article I of the WTO Antidumping Agreement requiring the carrying-out of an investigation (which has to respect a set of procedural rules) prior to the imposition of any duty whereas under the 1916 Act measures are applied immediately with no investigation taking place,

— Article VI of GATT 1994 and Article 3 of the WTO Antidumping Agreement insofar as they specifically define and qualify the concept of 'material injury' whereas the 1916 Act merely refers to an unqualified injury criterion,

— Article VI of GATT 1994 and Article 4 of the WTO Antidumping Agreement insofar as they impose standing requirements with relation to the complaining domestic industry whereas an action under the 1916 Act can be brought by any private party.

(10) The continuing effect of the 1916 Act, even following the implementation of the results of the Uruguay Round in domestic US law, through the Uruguay Round Agreement Act, and following the entry into force of the WTO Agreement and its annexes is violating Article XVI(4) of the WTO Agreement whereby 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'.

(11) The violations mentioned above read in conjunction with Article XVI(4) of the WTO Agreement as well as the Community's potential export interest in respect of the product at stake confer *locus standi* to the European Community.

(12) In addition, the 1916 Act, insofar as it leads to applying stricter disciplines to the sale of imported products at low prices than for the sale of domestic products, could also be challenged on the basis of other WTO provisions such as Article III:4 of GATT 1994.

(13) The simultaneous existence and applicability of the 1916 Act and of the US Tariff Act of 1930 containing the conventional US Antidumping legislation confers a supplementary protection to the US industry which goes beyond the degree of protection authorised by WTO rules.

(14) Under these circumstances the Commission considers that the complainant's allegations are well-founded and that the United States' failure to repeal its Antidumping Act of 1916 constitutes an obstacle to trade within the meaning of Article 2(1) of the Regulation, that is 'a practice adopted or maintained by a third country in respect of which international trade rules establish a right of action'.

(15) The Commission nonetheless considers that reference to the above legal bases does not rule out recourse to any other pertinent provision of the WTO Agreement and of the Agreements annexed to it, which could be of use in procedures before the WTO.

C. FINDINGS REGARDING ADVERSE TRADE EFFECTS

(16) Eurofer mentioned in its complaint the fact that a Court proceedings initiated in the United States, under the 1916 Act, by a local steel producer is pending against the US affiliate company of one of its member companies which imported allegedly dumped products from countries other than the Member States of the European Community.

(17) The Court action currently pending in the United States, which is still at a very early stage of the procedure, has already resulted in important legal costs for the defendant company and is disrupting this company's distribution activities in the United States. Such costs will inevitably increase throughout the procedure.

(18) Should the defendant company be found liable under the 1916 Act, then it would have to pay damages which would impair its entire viability. At present, the damages claimed amount to USD 90 000 000 and the plaintiff US company has still the option to increase its claim by adding the amount of imports which occurred after the filing of the case. Further to the legal costs, the pending Court action is therefore causing another actual and direct adverse trade effect impeding the present business of the defendant company.

(19) There are substantiated indications that further Court actions under the 1916 Act could be brought against several steel importers, including at the occasion of imports of EC products. This would render distribution of Community products in the US very difficult.

(20) In addition, the 1916 Act is not limited to steel products. US producers of any product can therefore decide to resort to it with potentially unlimited impact on the economy of the Community.

(21) Under these circumstances the Commission considers that the complainant's allegations are well-founded and that the United States' failure to repeal its Antidumping Act of 1916 is causing adverse trade effects within the meaning of Article 2(4) of the Regulation.

D. COMMUNITY INTEREST

(22) Ensuring that WTO partners fully comply with their obligations is of the utmost importance for the Community which has committed itself to the same obligations.

(23) More particularly the continuing effect of the 1916 Act raises the issue of one of the most important horizontal disciplines introduced by the WTO namely the members' obligation to bring their legislation into conformity with their multilateral commitments.

(24) The very broad scope of the 1916 Act and its clearly protectionist nature, which results in granting to the domestic US industry a degree of protection going beyond that authorised by WTO rules, further justify a Community action with a view to avoiding the risk that other US industrial sectors decide to take advantage of the existence of the 1916 Act, which could put at risk the export interests of the Community industry at large.

E. CONCLUSIONS AND MEASURES TO BE TAKEN

(25) The investigation has established that no remedy other than the repeal of the 1916 Act appears possible in order to eliminate the actual and potential adverse trade effects caused by its continuing effect.

(26) The WTO Agreement and its annexes were implemented in the US through the adoption of the Uruguay Round Agreement Act (URAA) of 1994. This latter statute, which constitues the exclusive instrument through which the WTO Agreement is given effect in the United States, does not refer to the 1916 Act. In addition, the URAA specifically provides that US law prevails over WTO provisions. There is therefore no means, including private litigation, by which the US can ensure the respect of its WTO commitments relating to dumping where the 1916 Act is conflicting with them.

(27) In these circumstances, it appears that the interests of the Community call for initiation of WTO dispute settlement proceedings.

HAS DECIDED:

Article 1

1. The continued existence of the Antidumping Act of 1916 of the United States of America [1] appears to be inconsistent with the obligations of that country under the Marrakesh Agreement Establishing the World Trade Organisation and constitutes an 'obstacle to trade' within the meaning of Article 2 of Regulation (EC) No 3286/94.

2. The Community will commence action against the United States of America under the Understanding on the Rules and Procedures for the Settlement of Disputes and other relevant WTO provisions with a view to securing removal of the obstacle to trade.

[1] 'Act of September 8, 1996, 39 Stat. 756'. Title VIII of that Act is codified at United States Code 71-74.

Article 2

This Decision shall apply from the date of its publication in the Official Journal of the European Communities.

Done at Brussels, 16 April 1998.

For the Commission
Leon BRITTAN
Vice-President