COMMISSION

COMMISSION DECISION

of 5 April 2000

under the provisions of Council Regulation (EC) No 3286/94 concerning the Chilean prohibition on unloading of swordfish catches in Chilean ports

(notified under document number C(2000) 926)

(2000/296/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 [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 26 May 1998 the Commission received a complaint pursuant to Articles 3 and 4 of Council Regulation (EC) No 3286/94 (hereafter the 'Regulation'). The complaint was lodged by ANAPA (Asociación Nacional de Armadores de Buques Palangreros de Altura — Spanish national association of owners of deepsea longliners).

(2) The complainant alleged that Chile maintained a prohibition on transhipment and transit of swordfish catches in Chilean ports and a requirement of a zoo-sanitary certificate for fishing products which enter the Chilean territory, whatever their way of entry or their final destination, which are respectively inconsistent with Article V of GATT 1994 and Articles 2(3), 5(4) and (6) of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. On that basis, the complainant asked the Commission to take the necessary actions to convince Chile to repeal these measures.

(3) The complaint contained sufficient evidence to justify the initiation of a Community examination procedure pursuant to Article 8 of the Regulation. Consequently, such procedure was initiated on 10 July 1998 [3].

(4) Following the initiation of the examination procedure the Commission carried out an investigation, which has led to the conclusions indicated below.

B. **FINDINGS REGARDING THE EXISTENCE OF AN OBSTACLE TO TRADE**

(5) The relevant Chilean legislation concerning the prohibition on unloading of swordfish catches in Chilean ports is established on the basis of Article 165 of the Chilean Fishery Law (Ley General de Pesca y Acuicultura), as consolidated by the Supreme Decree 430 of 28 September 1991.

(6) The investigation revealed that the Chilean legislation imposes a ban on landing and transit of highly migratory species (such as swordfish) caught inside or outside the Chilean exclusive economic zone, when these catches are made in contravention of conservation rules unilaterally imposed by Chile. These rules apply to swordfish catches made in inland waters, the territorial sea or the exclusive economic zone (EEZ) and in the areas bordering the EEZ. Consequently, the prohibition applies to swordfish catches made in the bordering areas to the exclusive economic zone, i.e. outside the exclusive economic zone.

[1] OJ L 349, 31.12.1994, p. 71.
[2] OJ L 41, 23.2.1995, p. 3.

[3] Notice of initiation of an examination procedure concerning an obstacle to trade, within the meaning of Council Regulation (EC) No 3286/94, consisting of trade practices maintained by Chile in relation to the transit and transhipment of swordfish in Chilean ports (OJ C 215, 10.7.1998, p. 2).

(7) While the Commission shares the general aim of conserving swordfish resources, it considers that any measures to this end must be taken in a way which least distorts trade and must not amount to arbitrary or unjustifiable discrimination.

(8) The relevant Chilean legislation was adopted and the import prohibition enforced without Chile having entered into any serious negotiations involving the Community with the objective of concluding bilateral or multilateral agreements. In fact, Chile has been negotiating since 1997 an agreement on the conservation of the living resources in the South Pacific within the framework of a regional organisation but has not pursued the possibility of entering into cooperative arrangements with the Community.

(9) The requirement that WTO members should engage in serious efforts to negotiate consensual means of protection and conservation of living marine resources with all interested members, rather than resorting to unilateral and discriminatory measures was set out in 'United States import prohibition of certain shrimp and shrimp products' [4]. As a consequence of Chile's failure to comply with this requirement and its arbitrary application of its unilateral measures, the investigation concluded that the application of the Chilean measures amounts to an unjustifiable and arbitrary discrimination.

(10) The investigation established that the Chilean legislation prohibits Community fishing vessels from unloading their swordfish catches in Chilean ports either for the purpose of landing them for warehousing or for transhipment onto other vessels. This prohibition also applies in the Chilean territorial sea and exclusive economic zone and violates the principle of freedom of transit, established by Article V of GATT 1994.

(11) In addition, by making unloading in Chilean ports impossible for swordfish catches made by Community vessels, the Chilean measures render also impossible the importation of the affected catches into Chile, which is contrary to Article XI of GATT 1994.

(12) As regards the requirement for a zoo-sanitary certificate, the investigation stated that the Chilean authorities declared that the legislation that introduced the requirement in question (Oficio Circular nº 240) was repealed in November 1991. In consideration of the factual rectification given by the Chilean authorities, the Commission services did not carry out a more detailed analysis of the obstacle to trade.

(13) Under these circumstances the Commission considers that the complainant's allegation on prohibition of unloading is well-founded and that the Chilean practices constitute an obstacle to trade within the meaning of Article 2(1) of the Regulation, as they are contrary to Article V and Article XI of GATT 1994.

(14) The Commission none-the-less 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 INJURY**

(15) The investigation showed that that the Chilean ports are the most convenient for transhipment of swordfish catches made by Community vessels in the South-East Pacific because of their geographical position, their well-developed infrastructure and their commercial facilities. As a consequence, the Chilean prohibition on the transhipment of swordfish obliges the Community vessels to land or tranship their catches in the ports of other third countries in the region, which necessitates at least a six-day trip and cause them injury consisting of:

— costs incurred owing to the deficiencies of other third country ports compared to Chilean ones,

— additional operational costs for the trip to other third country ports,

— potential loss of catches during the additional trip period to other third country ports.

(16) The Commission concluded that the abovementioned effects constitute injury within the meaning of Article 2(3) of the Regulation.

D. **FINDINGS REGARDING ADVERSE TRADE EFFECTS**

(17) The investigation confirmed that the challenged Chilean practices prevent the Community fishing vessels to access third country markets. In particular, Chilean ports are essential bases for exporting especially fresh swordfish, to the United States of America because of the close commercial relationship in this field between Chile and the USA.

(18) The prohibition to land the catches and consequently to use the adjacent airports, prevent the Community producers from exporting on the US market, which is one of the largest market for swordfish in the world, thus creating adverse trade effects for the Community producers.

(19) In addition, there are also potential adverse trade effects to be taken into consideration. In the perspective of future international cooperation in the South-East Pacific as provided by the Law of the Seas Convention, the position of the Community will be weakened by the limited presence of Community vessels in the area. As a consequence, it is clearly foreseeable that the impossibility for Community vessels to accede to Chilean ports is likely to develop into further adverse effects for the Community.

[4] The Appellate Body report 'United States — import prohibition of certain shrimp and shrimp products' (WT/DS58/AB/R) was adopted on 12 October 1998, paragraphs 171 and 172.

(20) Therefore, the Commission concluded that the above-mentioned effects cause and threaten to cause adverse trade effects within the meaning of Article 2(4) of the Regulation.

E. **COMMUNITY INTEREST**

(21) It is essential for Community vessels to have access to international fishing areas and for freedom of transit to be guaranteed by international rules.

(22) It is in the Community interest that solutions to disputes involving environmental issues be found via multilaterally negotiated measures, which are supportive of both trade and sustainable development.

(23) Moreover, it is not acceptable that Chile imposes a measure which impedes the access of Community vessels to its ports unless such vessels comply with conservation rules imposed unilaterally. As stated by the Appellate Body report in 'United States — Gasoline' ([5]) and further confirmed by the Appellate Body report in 'United States — import prohibition of certain shrimp and shrimp products' ([6]), WTO members are free to adopt their own policies aimed at protecting the environment as long as, in doing so, they fulfil their obligations and respect the rights of other Members under the WTO agreements. Chile has not done this in the present case.

(24) 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. It is fundamental for the good functioning of a multilateral trade system to consistently tackle all allegedly WTO incompatible practices.

F. **CONCLUSIONS AND MEASURES TO BE TAKEN**

(25) Meetings have been held with the relevant Chilean authorities to discuss this matter aimed at finding an amicable solution but the Chilean authorities have not forwarded any proposal which could have formed the basis of such a solution.

(26) In addition, Chile adopted a new decree (Decree 598 of 15 October 1999) that expressly extends the rules in question to swordfish catches made in the high sea. Consequently, the prohibition on unloading in Chilean ports, which previously applied to swordfish catches made in the exclusive economic zone and in its bordering areas, now also applies to catches made anywhere on the high sea.

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

HAS DECIDED AS FOLLOWS:

Article 1

1. The Chilean prohibition on unloading of swordfish catches in Chilean ports 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(1) of Regulation (EC) No 3286/94.

2. The Community will initiate dispute settlement proceedings against Chile 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.

Article 2

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

Done at Brussels, 5 April 2000.

For the Commission

Pascal LAMY

Member of the Commission

([5]) The Appellate Body report 'United States — standards for reformulated and conventional gasoline' (WT/DS2/AB/R) was adopted on 20 May 1996.

([6]) See paragraph 186 of the Appellate Body report, referred to in footnote 4.