

SORBITOL FROM FRANCE

**Determination of the Commission in
Investigation No. 731-TA-44
(Final--Court Remand)
Under the Tariff Act of 1930**

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UNITED STATES INTERNATIONAL TRADE COMMISSION

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Note.--Footnote citations to the "Report" refer to the confidential staff report submitted to the Commission on October 3, 1983.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Investigation No. 731-TA-44 (Final---Court Remand)

SORBITOL FROM FRANCE

Determination

In response to an order of the Court of International Trade in the case of Roquette Freres v. United States (Court No. 82-5-00636, Slip Op. 83-71, entered July 18, 1983), and on the basis of the records 1/ developed in investigations Nos. 731-TA-44 (Final) and 731-TA-44 (Final---Court Remand), the Commission determines that as of the date of the Commission's determination in investigation No. 731-TA-44 (Final), an industry in the United States was materially injured by reason of imports from France of crystalline sorbitol which had been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV), but that an industry in the United States was not materially injured or threatened with material injury, and the establishment of an industry in the United States was not materially retarded, by reason of LTFV imports from France of liquid sorbitol. 2/ 3/ 4/

1/ The "record" is defined in sec. 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(i)).

2/ Sorbitol is provided for in item 493.68 of the Tariff Schedules of the United States.

3/ Chairman Eckes did not make separate determinations regarding crystalline and liquid sorbitol, instead determining that an industry in the United States was materially injured or threatened with material injury by reason of LTFV imports of sorbitol from France. Therefore, Chairman Eckes dissents with respect to the Commission's negative determination on liquid sorbitol.

4/ Commissioner Stern also determines that a clarification of her determination as of the date of the Commission's determination, rather than a new determination based on new data, results in a reaffirmation of her original determination, i.e., that an industry in the United States was materially injured by reason of LTFV imports of sorbitol from France.

Background

On March 29, 1982, the Commission notified the Secretary of Commerce of its determination that, based on the record developed during the course of investigation No. 731-TA-44 (Final), an industry in the United States was materially injured by reason of imports of sorbitol from France which had been found by the Department of Commerce to be sold in the United States at LTFV.

The Commission's determination was subsequently challenged in the Court of International Trade by Roquette Freres, the French producer and exporter of sorbitol. On June 21, 1983, the Department of Justice, representing the United States, entered a motion to suspend all further proceedings in the court action pending a determination by the Commission on remand. The basis for the request centered around discrepancies in the administrative record of investigation. On July 18, 1983, the Court ordered the Commission to issue a determination on remand regarding sorbitol from France within 60 days of the order, or by September 19, 1983. Because of a later request for a public hearing in connection with the investigation, the Commission requested, and the Court granted, a 30-day extension in the investigation, until October 17, 1983.

Notice of the institution of the remand investigation was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, D.C., and by publishing the notice in the Federal Register on August 3, 1983 (48 F.R. 35186). Notice of the hearing to be held in connection with the investigation was published in the Federal Register on August 29, 1983 (48 F.R. 39165). The hearing was held in Washington, D.C. on September 19, 1983, and all persons who requested the opportunity were permitted to appear in person or by counsel.

VIEWS OF COMMISSIONERS PAULA STERN, VERONICA A. HAGGART,
AND SEELEY G. LODWICK

Introduction

These views are submitted in response to the July 18, 1983, order of the Court of International Trade ^{1/} remanding investigation No. 731-TA-44 (Final), Sorbitol From France. In that investigation, the Commission was unanimous in finding injury by reason of imports of crystalline sorbitol from France, but was divided by a vote of 2-2 in finding injury by reason of imports of liquid sorbitol from France. ^{2/ 3/} In remanding the case to the Commission, the Court of International Trade instructed the Commission to consider in full all relevant information in its possession or subsequently submitted to it and to make an injury determination. ^{4/}

On the basis of the record ^{5/} developed in this remand investigation, which incorporates the record in investigation No. 731-TA-44 (Final), we have

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- ^{1/} Roquette Freres v. United States, Ct. No. 82-5-00636, Slip Op. 83-71, 17 Cust. B. & Dec. 55 (1983).
 - ^{2/} Under section 771(11), 19 U.S.C. 1677(11), an evenly divided determination by the Commission is deemed an affirmative determination.
 - ^{3/} Former Chairman Alberger and former Vice Chairman Calhoun determined that there were two domestic industries composed of the producers of liquid and crystalline sorbitol, and that the domestic crystalline sorbitol industry was materially injured, but the liquid sorbitol industry was not. Commissioners Eckes and Stern determined that there was only one sorbitol industry and that it was materially injured by reason of the imports from France. Commissioner Haggart was sworn in on March 23, 1982, and did not participate in the vote, which was made on the same day.
 - ^{4/} Roquette Freres v. United States, supra, at 55-56.
 - ^{5/} Under Commission Rule § 207.2(i), the record includes all information presented to or obtained by the Commission during the course of a proceeding and is not limited to the staff report.

determined that an industry in the United States is materially injured by reason of imports of crystalline sorbitol from France sold at less than fair value (LTFV), but that an industry in the United States is not materially injured, or threatened with material injury, by reason of imports of liquid sorbitol from France sold at less than fair value. 6/ 7/ 8/

For purposes of analysis, reliable data on profitability, capacity, capacity utilization, employment, and exports were not available to the Commission at the time it made its original determination. In this remand investigation, the Commission has obtained separate and reliable information on profitability, capacity, capacity utilization, employment, and exports for liquid and crystalline sorbitol. On the basis of the data obtained in the present remand investigation, as well as the data obtained in the previous investigation, we concur generally with the analysis and conclusions reached by former Chairman Alberger and former Vice Chairman Calhoun with respect to two like products, the definition of the two domestic industries, and the injury or lack thereof to the domestic industries by reason of LTFV imports.

Liquid and crystalline sorbitol are produced through separate and distinct processes and sold to separate and distinct markets. Liquid sorbitol

6/ Commissioners Haggart and Lodwick did not participate in the original determination. In accordance with the court's order, we have made a new determination based on the information in the record as it existed at the time of the original determination, as well as the information gathered during the present remand investigation.

7/ See Commissioner Stern's additional views at pp. 11-13.

8/ Material retardation is not an issue in this case and will not be discussed.

is primarily used in toothpastes, cosmetics, foods, and pharmaceuticals. Domestic demand for liquid sorbitol remained fairly stable during 1978-80, then rose sharply in January-November 1981. ^{8/} Domestic producers experienced substantial difficulties competing in foreign markets, but their domestic shipments closely followed shifts in demand. ^{9/} In contrast, demand for crystalline sorbitol, used primarily in sugarless gums, mints, and other confections, fluctuated much more sharply and steadily declined from 1979 through November 1981. ^{10/} Domestic producers of crystalline sorbitol participated in foreign markets to a very limited degree and experienced constant erosion of their domestic market share as imports rose and consumption declined. ^{11/} ^{12/}

Crystalline sorbitol

We conclude that the declines in domestic crystalline sorbitol production, and the substantial declines in commercial shipments and market

^{8/} Report at A-31.

^{9/} Id. A-22-28.

^{10/} Id. at A-31.

^{11/} Id. at A-22-A-28.

^{12/} Commissioner Haggart notes that any assessment of the impact of LTFV imports should be made with regard to the particular conditions of trade, competition, and development of the relevant industry. See S. Rep. No. 96-249, 96th Cong., 1st Sess. 57, 88 (1979); H. Rep. No. 96-317, 96th Cong., 1st Sess. 46 (1979). The data on the volume of imports, prices, and lost sales should be considered in light of the economic condition of the industry at the time the imports are a factor in the market. See the Additional Views of Commissioner Haggart in Certain Carbon Steel Products From Spain, Inv. Nos. 701-TA-155, 157-160, 162, USITC Pub. 1331 at pp. 37-39. In making my determinations in this investigation, I have considered the economic conditions of the liquid and crystalline sorbitol industries and have found that the economic performance of each differs substantially. This factor is crucial in establishing the framework for my analysis of the impact of LTFV imports of liquid and crystalline sorbitol from France on the two industries. The robust performance of the liquid sorbitol industry compared with the performance of the crystalline sorbitol industry is an important factor in my determinations.

share, evidence material injury to the domestic crystalline sorbitol industry. ^{13/} ^{14/} The data obtained during the present remand investigation on capacity, capacity utilization, employment, and profitability further support this finding. The capacity of the domestic crystalline sorbitol industry increased from 1978 to 1980, and then remained stable in January-November 1981. ^{15/} Capacity utilization, however, declined sharply from 1978 to 1980 and declined even further in January-November 1981. ^{16/} Employment in the crystalline sorbitol industry also declined steadily from 1978 to 1980 and then dropped again in January-November 1981. ^{17/} The most significant indicator of the depressed state of the crystalline sorbitol industry is the domestic producers' financial condition during the period of investigation. U.S. producers' net operating profit on crystalline sorbitol operations declined to a minimal level in 1979, and then further deteriorated in 1980. During January-November 1981, the industry continued to experience financial difficulties. ^{18/}

^{13/} This conclusion parallels the conclusion reached by former Chairman Alberger and former Vice Chairman Calhoun. See Sorbitol From France, Inv. No. 731-TA-44, USITC Pub. 1233 (1982) at 5-7.

^{14/} Data for crystalline sorbitol are confidential. Therefore, no actual figures have been used in the opinion.

^{15/} Report at A-21.

^{16/} Id.

^{17/} Id. at A-33.

^{18/} Id. at A-44.

We conclude that imports of LTFV crystalline sorbitol from France caused material injury to the domestic industry. ^{19/} This causal connection is supported by increasing imports of crystalline sorbitol from France, both absolutely and relative to domestic consumption, from 1978 through the first 11 months of 1981, significant margins of underselling during 1978-80, and lost sales information which indicates that the vast proportion of all reported and verified lost sales were of crystalline sorbitol. ^{20/}

Liquid sorbitol

We conclude that increased production and commercial shipments of liquid sorbitol in the first 11 months of 1981 indicate that the domestic liquid sorbitol industry is returning to a healthy state. ^{21/} The information gathered in the present remand investigation on capacity utilization and profitability further support this finding. Capacity to produce liquid sorbitol increased from 1978 to 1980 and then declined in January-November 1981. ^{22/} Capacity utilization declined steadily from 1978 to 1980, but then increased in January-November 1981. ^{23/} Employment declined steadily from 1978 to 1980 and then declined slightly in January-November 1981 as compared with that in January-November 1980. However, the decline in 1981 was

^{19/} See footnote 13, supra. Sorbitol From France, supra, at 6-7.

^{20/} Report at A-52, A-54, and A-64-A-68.

^{21/} See footnote 13, supra. Sorbitol From France, supra, at 7-8.

^{22/} Report at A-21.

^{23/} Id. The increase in capacity utilization was not totally accounted for by the decrease in capacity in 1981.

offset by a sharp increase in productivity. ^{24/} More important, the profitability data strongly suggest that the liquid sorbitol industry is becoming healthy. The ratio of profits to net sales for the liquid sorbitol industry increased from 1978 to 1979, and then declined in 1980. In January-November 1981, however, net operating profit as a percent of net sales increased significantly as compared with profitability in January-November 1980. ^{25/} During the period 1978 to 1980, when U.S. producers' commercial shipments of liquid sorbitol steadily declined, the decline in the volume of exports accounted for virtually all of the drop. ^{26/} Domestic shipments actually increased 6 percent from 1978 to 1979, and then in 1980 returned to their 1978 level, paralleling the change in apparent consumption. In 1981, domestic shipments continued their upward trend. ^{27/}

Finally, we conclude that imports of liquid sorbitol from France did not cause, or threaten to cause, material injury to the domestic industry. ^{28/} Import levels remained virtually unchanged from 1978 to 1979, and then increased both absolutely and as a share of domestic consumption in 1980. However, imports declined sharply during the first 11 months of 1981. ^{29/} Imports in 1981, as a share of domestic consumption, were only slightly

^{24/} Report at A-33-A-34.

^{25/} Id. at A-42.

^{26/} Id. at A-22-27.

^{27/} Id. Domestic shipments are equivalent to commercial shipments minus exports.

^{28/} See footnote 13, supra. Sorbitol From France, supra, at 7-8.

^{29/} Report at A-52.

higher than in 1978 and 1979, when the industry reported very high profit levels. 30/ The imported products were consistently priced higher than domestic liquid sorbitol during the first 11 months of 1981. As noted previously, the vast proportion of all confirmed lost sales were of crystalline sorbitol.

30/ Report at A-57.

Views of Chairman Eckes

In this remand investigation regarding Sorbitol from France, I have determined that as of March 29, 1982, the date of the Commission's earlier determination, an industry in the United States was materially injured by reason of imports of sorbitol from France, sold, or likely to be sold at less than fair value. This determination is based on the record consisting of additional information developed during this remand as well as the record in the initial investigation.

The basis for this determination is that the appropriate "like product" in this investigation consists of all sorbitol, and that the domestic industry consists of all the producers of sorbitol. Accordingly, I have assessed the impact of imports of all sorbitol on the corresponding domestic industry and have found that the domestic industry was being materially injured.

Consistent with the court's desire for a clarification of the Commission's earlier determination, I have reviewed my earlier views and now reaffirm my discussion of "like product" and domestic industry, as well as the analysis of the condition of the domestic industry and the impact of LTFV imports. Based upon my assessment of the record in this remand, which includes additional information developed since the Commission's initial consideration, I find nothing which requires further clarification of my earlier views or otherwise alters my earlier analysis. Therefore, my views as set forth in the initial consideration of this investigation serve as my statement of reasons in support of my determination in this remand investigation. 1/

1/ See in relevant part "Views of Commissioners Paula Stern and Alfred E. Eckes," pp. 9, 12-15, and "Views of Commissioner Eckes," pp. 10-11, Sorbitol from France, Inv. No. 731-TA-44 (Final), USITC Pub. No. 1233, Mar. 1982.

ADDITIONAL VIEWS OF COMMISSIONER PAULA STERN

I have participated in the majority opinion based on a reading of the remand which asks for a new determination on the basis of a new record. However, the remand language could as easily be read to have requested a clarification of the prior determination based on new information and argumentation developed from the record as it existed at the time of the prior determination.

If the court was seeking only the clarification, I reach the same determination I made on March 23, 1982. Absent the new data in our new record, the available disaggregated data are not sufficient to make a separate assessment of material injury by reason of LTFV imports on domestic production of liquid and crystalline sorbitol.

Whether it is a new determination or a clarification sought by the court in this investigation, the remand appears to be based on a misunderstanding originating with the memorandum submitted in support of defendant's request for a remand. It is not the case that substantial, relevant and material information contained in questionnaires was not included in the Commission staff report nor in any manner presented to the Commission.

In all Title VII investigations, I base my determination on the entire record before me and certainly not solely on the aggregates and summaries contained in the staff report. It is beyond doubt that any Commissioner would know what was available for use and why it was or was not available on such important factors as capacity, capacity utilization, and employment. Given the time constraints, I found the Commission, in this instance, had met its obligation to conduct a thorough investigation. Had this not been the case, I would have so stated at the time.

In my original views, I stated:

Separate data on liquid and crystalline sorbitol are available on production levels, shipments, pricing, consumption and imports, but not on profitability ^{2/}, capacity, capacity utilization, employment, and exports.

^{2/} Separate data on profitability were supplied by domestic producers, but the Commission's staff recommends against using these data which are based on standard cost allocations. See Report at A-20.

This statement was intended to explain that for purposes of my analysis the data were or were not available. It was not meant to contradict the fact that there were separate data on the record for individual factors. However, these data exhibited considerable variations in completeness and reliability.

I intend to continue to encourage efforts to improve staff's ability to conduct even more detailed and revealing investigations. And in the context of our current capabilities, I will not hesitate to state when an investigation is insufficient. Furthermore, I will continue to stress and ask for my colleagues' support in ensuring more complete staff reports in order to avoid just the sort of confusion we face in this situation.

