UNITED STATES TARIFF COMMISSION

CONCORD GRAPES FROM CANADA

Determination of No Injury or Likelihood Thereof
in Investigation No. AA1921-56
under the Antidumping Act,
1921, as Amended

TC Publication 292
Washington, D.C.
August 1969

UNITED STATES TARIFF COMMISSION

Glenn W. Sutton, *Chairman*

Penelope H. Thunberg

Bruce E. Clubb

Will E. Leonard, Jr.

Herschel D. Newsom

Willard W. Kane, *Acting Secretary*

Address all communications to

United States Tariff Commission

Washington, D.C. 20436

C O N T E N T S

Page

Determination of no injury or likelihood thereof------------------ 1

Statement of reasons:

Views of Chairman Sutton and Commissioner Thunberg------------ 2

Views of Commissioner Clubb----------------------------------- 7

Views of Commissioner Leonard--------------------------------- 13

UNITED STATES TARIFF COMMISSION

[AA1921-56]

August 5, 1969

CONCORD GRAPES FROM CANADA

Determination of No Injury or Likelihood Thereof

On May 5, 1969, the Tariff Commission was advised by the Assistant Secretary of the Treasury that Concord grapes imported from Canada are being, and are likely to be, sold in the United States at less than fair value within the meaning of the Antidumping Act, 1921, as amended. In accordance with the requirements of section 201(a) of the Antidumping Act (19 U.S.C. 160(a)), the Tariff Commission instituted investigation No. AA1921-56 to determine whether an industry in the United States is being, or is likely to be, injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

A public hearing was held on June 24 and 25, 1969. Notice of the investigation and hearing was published in the Federal Register (34 F.R. 7594).

In arriving at a determination in this case, the Commission gave due consideration to all written submissions from interested parties, all testimony adduced at the hearing, and all factual information obtained by the Commission's staff from questionnaires, personal interviews, and other sources.

On the basis of the investigation, the Commission 1/ has determined that an industry in the United States is not being, and is not likely to be, injured, or prevented from being established, by reason of the importa-

1/ Commissioner Newsom did not participate in the investigation since, while he served as Master of the National Grange, that organization took a position concerning the importation of Concord grapes from Canada.

tion of Concord grapes from Canada sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended.

Statement of Reasons

Views of Chairman Sutton and Commissioner Thunberg

Canadian Concord grapes have been marketed for many years under a system which maintains relatively high price levels for that portion of the crop sold to licensed processors in Canada. The remainder of the Canadian crop is sold domestically or exported at prices which are generally lower. For many years grape processors in the United States have encouraged the Canadian growers to export Concord grapes to them for use as supplemental supplies, particularly in years of short crops. Traditionally, the grape growers in Canada and the United States have worked together and cooperated in the advancement of their horticultural and marketing practices in connection with Concord grapes. Only in the last few years have the U.S. crops reached a volume threatening to exceed normal requirements. In the key year under consideration, 1967, imports of Concord grapes from Canada equaled 2.3 percent of U.S. production of such grapes.

In 1967 the United States had the largest crop of Concord grapes in history. Concurrent with the start of the harvest of the crop, the complainant requested this dumping proceeding. As an outgrowth of that complaint, the Treasury Department advised the Tariff Commission on May 5, 1969, that Canadian Concord grapes sold at less than fair value (LTFV) were being, and were likely to be, imported into the United States. Treasury

files furnished to the Commission show that a large portion (but not all) of the 1967 imports were sold at LTFV. The amounts of the price differentials between fair value and export prices were variable, some being minor in relation to the price obtained in the United States for such grapes. No imports during 1968 were reported sold at LTFV. In the circumstances, we deemed 1967 as the year for which the question of injury was most relevant and focused our study on the impact of LTFV imports in 1967 to determine whether injury occurred within the meaning of the Antidumping Act, 1921, as amended.

Virtually all imported Concord grapes enter the United States at Buffalo, N. Y., and Detroit and Port Huron, Mich. The major Concord grape growing centers are located near the Great Lakes in the United States and Canada and in the State of Washington.

Concord grapes are virtually all consumed by wineries or by processors who make juice. A brief discussion of the systems by which each of these two categories of grape users secure grapes and of the competitive conditions under which the domestic and imported grapes were sold is pertinent to an evaluation of the effect of imports in this case.

About 7 percent of all Concord grapes are processed by wineries directly into wine. The wineries traditionally buy Concord grapes for cash from growers in the vicinity of the wineries at premium prices designed to reward the growers for planting other varieties of grapes which are commercially more essential to the wine industry. These premium prices generally exceed the average cash prices paid for Concord grapes by processors of grape juice. In 1967 these wineries obtained only 1 percent of their supplies of Concord

grapes from Canada. They paid premium prices for domestic Concords to maintain assurances of their suppliers' delivery or other grapes, but paid a much lower price for the imports. However, the price for these imports was still about $5 per ton higher than the average "cash market" price paid by juice processors for domestic Concords. 1/ As the imports sold to wineries merely supplemented supplies without adversely affecting prices of domestic Concords, no injury can be identified in connection with the sale of such imported grapes.

About 92 percent of all Concord grapes are consumed by processors who make grape juice, some of which is later made into wine, jelly, and so forth. These processors procure their grapes by one or more of the three methods described below.

Of the Concord grapes consumed by such processors, 65 percent are delivered to five cooperatives. The grapes are not "purchased" by the cooperatives. Rather, as income is realized for a particular crop, it is paid out to the grape-grower members in several incremental payments (cash and/or certificates). Several years may elapse before the last payment is made. The payments to growers are made on a pro rata basis depending on the tonnage and quality of grapes furnished. The growers' returns per ton of delivered grapes are, in effect, payments for fresh grapes plus net profits from the processing and sales operations of the cooperatives. Of the five cooperatives, two had a Canadian member from whom they accepted grapes in 1967, as in past years, on the same basis as they accepted

---

1/ For purposes of this statement, "cash market" refers to that market in which the final purchase price of Concord grapes is fixed or known prior to, or at the time of, delivery of the grapes. Actual payment is made on such grapes at the time of delivery, or within about 30 days.

domestic grapes. The two Canadian farmers received the same payments as the U.S. members. The imports from the Canadian farmers accounted for 3 percent of the total grapes processed for the two cooperatives. We could perceive no measurable effect on the financial returns of such cooperatives by reason of the imports in question.

Twenty-seven percent of the Concord grapes used for juice are processed by independent firms who purchase on an annual contract basis. The contracting farmers agree to accept payment in installments in a total amount equal to the market value for such grapes. Payments are made during a specified period, usually from October through December of the crop year. We were unable to establish a precise formula for determining such market value. Nevertheless, growers selling their crops under these circumstances generally realize a price higher than the price for grapes sold in the cash market. No Canadian grapes were sold to processors under these conditions.

Eight percent of the Concord grapes used by juice processors are purchased in the cash market. It is estimated that half of these grapes are rejected or distress grapes. These are grapes that have been refused by the processor for whom they were intended for one or more reasons. Their brix count may be too low; they may be deteriorated in quality; or they may be in excellent condition but delivered to the plant off schedule when it is overloaded and cannot accomodate them. In any event, such grapes must be sold immediately to any processor who is willing and able to handle them. The other grapes sold on the cash market are either under contract for a known price or are crops the disposal of which farmers have not

committed in advance of harvesting. In years of acute shortages uncommitted crops command good prices, but in normal years they generally bring the lowest prices. Few growers run the risk of this type of speculation. It was in this cash market that the remainder of the Canadian Concord grapes were sold in 1967. About one-third of these imports were shipped 400 miles to Michigan processors who had a short supply. The grapes were delivered about 3 days after harvesting. Their average condition was not on a par with most of the domestic grapes delivered in that cash market. The remaining two-thirds of these imports were sold in New York State, principally in the vicinity of Buffalo.

The record shows that in 1967 the Canadians first held out for a delivered price of $90 per ton, a price not generally achieved by domestic growers. Despite the generally lower quality of the Canadian grapes, they were sold in the Eastern (Michigan and New York) cash market at an average price of $85.98 per ton, whereas the domestic grapes averaged $85.66 in the same market. In the circumstances we find no deleterious effect occasioned by such sales as would constitute injury attributable to dumping within the meaning of the Antidumping Act.

Due to substantially higher returns received by Welch growers, the average price received by growers for all Concord grapes sold for juice is higher than the average price of imported grapes each year. There is, however, no measurable effect of imports on the average price received by all growers. Both domestic production and imports increased substantially between 1966 and 1967 but a noticeable reduction in average prices and aggregate returns to growers did not occur. Because the average price

remained about the same in the face of substantially larger supplies in 1967, returns to growers increased significantly in that year. We, therefore, conclude that not only is there no evidence of injury from LTFV imports in the components of the U.S. market for Concord grapes, but there is no evidence of injury to the aggregate. Canadian authorities, moreover, have demonstrated a successful, cooperative attitude toward avoiding disruptions in the U.S. Concord grape market. Canadian processors are gradually increasing their consumption of Concord grapes while Canadian growers are merely maintaining present production levels. Accordingly, we have no reason for expecting Canadian exports of Concord grapes to pose the likelihood of injury to a domestic industry.

Views of Commissioner Clubb

Although this appears to be a classic dumping situation, I am unable to find that the complaining domestic producers are either presently being injured or are likely to be injured in the future. Since this case is unique, a short comment about it appears to be in order.

In an economic sense, both the U. S. and the Canadian growers of Concord grapes engage in price discrimination. Ninety-five percent or more of the U. S. Crop is committed under contract to particular processing plants before harvest and 5 percent is uncommitted. The price determinations for nearly all of the committed grapes are made after processing, while the price for a small part of such grapes and for all of the uncommitted grapes (which constitute the cash market) is determined before processing. (The great bulk of the Canadian imports

are sold as uncommitted grapes.) Prices for the uncommitted grapes are generally lower and fluctuate more widely from year to year than the prices for grapes committed under contract before harvest.

In Canada almost the same thing is done. Pursuant to the Farm Products Marketing Act, representatives of the Canadian growers negotiate a price for the more than half the crop which is sold to processors licensed to process food for resale, and the remainder of the crop is sold in the fresh market for house use. Prices paid by the licensed processors are more stable and higher, sometimes as much as twice as high, as prices in the cash market. In a typical year licensed processors take about 65 percent of the Canadian crop, 15 percent is sold in the fresh market in Canada, and 20 percent is exported to the cash market in the United States.

It is the 20 percent of Canadian Concord production exported to the United States that has raised the problem presented by this case. In 1967 the average price of Concords sold in Canada to licensed processors was $97 (U. S. currency), while the grapes exported to the United States were sold at an average price of $51. The Treasury Department has found that these latter sales were made at less than fair value, and, accordingly, the Tariff Commission must now determine whether, as a result of such sales, a domestic industry "is being or is likely to be injured."

The domestic industry contends that the availability of Canadian grapes at less than fair value in the bumper crop year 1967 depressed prices which they received for their grapes to the extent that they were

"injured" within the meaning of the Antidumping Act. Since the grapes exported from Canada accounted for almost 50 percent of all the grapes sold for cash to the eastern United States juice processors in that year, the contention must be conceded to have some merit. Cast Iron Soil Pipe from Poland, AA1921-50, TC Publication 214; Titanium Sponge from the U. S. S. R., AA1921-51, TC Publication 255.

But the test that must be applied by the Commission under the Antidumping Act is whether a United States industry "is being injured" or "is likely to be injured" by the LTFV imports. I do not see how we can find in 1969 that the domestic producers of an annual crop are presently being injured by imports which took place almost two years ago. The crop year 1967 is already ancient history as far as the cash market is concerned. Especially is this true since everyone concedes there were no LTFV imports in the following year, 1968.

We have been instructed by our reviewing court that the Dumping Act is not a penal measure, [1/] and, accordingly, it must follow that it is not designed to punish past wrongs. Rather, it is designed to stop present violations and to prevent them in the future. Of course, time

1/ In C. J. Tower & Sons v. United States, 71 F.2d 438 (CCPA 1934), the Secretary of the Treasury had imposed a special dumping duty under the Antidumping Act of 1922, and the importer protested claiming that the Act was unconstitutional because it authorized the Secretary to impose a penalty or fine by an administrative order, thus depriving the importer of property without due process of law. The Court held, however, that the special dumping duty was a tax, not a penalty, and, therefore, it could properly be imposed by administrative order. In arriving at this conclusion the Court laid great stress on the fact that the special dumping duty was designed merely "to equalize the competitive conditions between the exporter and the American industries affected." 71 F.2d 438, 445.

must be allowed for the normal processes of industry to produce a complaint and to process it through the Treasury Department so that the present tense term "is being injured" cannot be applied in a strictly technical sense. Judgment must always be made on past events. But if the Antidumping Act is to be remedial, rather than punitive, the judgment which we make must bear some reasonable relationship to what is presently going on in the marketplace. Where an annual crop is involved, a finding of injury almost two years after the LTFV sales took place would merely punish the wrongdoer for past misdeeds, a function which we are not authorized to perform under the Antidumping Act.

This may seem a harsh result to the complainants, especially since they filed their complaint promptly in September 1967 and none of the delay appears to be attributable to them. Why it took the Treasury Department twenty months, from September 1967 to April 1969, to process the complaint is not made clear by the record, but whatever the reason, it has removed our consideration of the matter so far in time from the LTFV sales, that a finding of present injury is no longer possible.

There remains the question of whether the domestic industry is "likely to be injured" in the future, for this, too, can trigger dumping duties. On the one hand, it is argued that the Canadian producers have always sold their excess production in the United States, and that in years of abundance these sales historically have been at less than

fair value. Accordingly, it is urged that the Commission should presume that the Canadian producers will continue this process and it is only a matter of time until their LTFV sales injure the domestic industry, unless they are restrained by dumping duties. On the other hand, it is argued that the Ontario Marketing Board is discouraging the planting of Concords in favor of other varieties, and that Canadian production has leveled off. Since an increasing amount of Concords is being absorbed by Canadian processors, exports to the United States have declined in recent years. Moreover, the Canadian producers have at all times shown a great sensitivity to the problems of the United States producers, and, despite the experience of 1967, have gone to considerable lengths to avoid disrupting the United States market. Under such circumstances, the possibility that injury will be done in the future cannot be ruled out, but it does not appear to be sufficiently likely to justify a dumping finding.

Views of Commissioner Leonard

I concur with the negative determination of the other Commissioners but find myself unable to subscribe wholly to their statements of reasons for their determination. The significant points of difference are explained below.

The statement of Chairman Sutton and Commissioner Thunberg satisfies me for the most part with respect to the analytical treatment of the economic data involved in the negative determination. However, the statement fails to treat specifically with all of the pertinent terms of the Antidumping Act of 1921, as amended, and therefore is unclear in applying that data against the benchmarks of the statute.

Under the Act, the Commission must determine whether "an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such [dumped] merchandise into the United States."

The "industry in the United States" in this investigation is the Concord-grape-growing operations of the U.S. growers. Although other industries in the United States are affected one way or another by imports of fresh Concord grapes, such adverse impact as there may be from imports of such grapes would be experienced in greatest degree by the aforementioned U.S.-Concord-grape-growing industry.

The U.S. growers of Concord grapes are concentrated primarily in four separate and distinct geographical areas of the United States: (1) A portion of the State of Washington, (2) a portion of the State of Michigan, (3) contiguous portions of the States of New York, Pennsylvania, and Ohio, and (4) the Finger Lakes area of the State of New York. Due to the perishability of fresh Concord grapes and the need for prompt delivery, the wineries and processors have located their receiving plants in these growing areas. The geographical separation of the four major U.S. growth-distribution areas for fresh Concord grapes and their virtual economic isolation from each other provide a basis for regarding the fresh Concord grape operations of the U.S. growers in each of these areas as separable segments of a national industry for the purposes of the Antidumping Act.

Concord grapes are also grown in the Erie-Ontario grape-growing belt of Canada. This belt is close to, and its exported fresh Concord grapes are sold almost exclusively to, users who are also served by the U.S. growers in the aforementioned areas of Michigan, of New York, Pennsylvania, and Ohio, and of the New York Finger Lakes. The impact of imports of fresh Concord grapes--whether or not dumped--is exerted primarily and most directly on the U.S. growers of such grapes in these three growth-distribution areas, the impact on the growers in the Washington area being nil.

In my view, the facts obtained by the Commission--as largely reflected in the statements of the other Commissioners--clearly show that such adverse impact as the dumped Concord grape imports are having, or are likely to have, on any of the growth-distribution segments or areas of the U.S.-Concord-grape-growing industry is insignificant or immaterial. In addition, there is no evidence whatever before the Commission indicating that any industry in the United States is prevented from being established by reason of the dumped imports in question.

There is another aspect of this case which needs further attention and clarification. The statute, when referring to injury, speaks in terms of both the present and the future. The question is whether an industry "is being" or "is likely to be" injured by dumped imports. The case before the Commission presents a peculiar problem which apparently has not been present in earlier cases considered by the Commission. The growth and the disposition of fresh Concord grapes are seasonal matters. Not until shortly before harvesting and during the very short period of harvesting and disposition is it possible with any certainty for the growers and users to appraise fully the conditions of trade. There are no grape inventories from season to season and continuity of production is subject to variations from year to year which cannot be wholly planned for by the growers and users. In seasons when bumper crops are grown, as in 1967, the evidence before the Commission indicates that it has been the practice of Canadian exporters to sell in the U.S. markets at dumping prices.

Although it cannot be determined in advance which seasons will bring bumper crops, the past growing and pricing practices of the Canadian exporters indicate the likelihood of continued dumping in U.S. markets when bumper crops do occur. With this apparent continuity of dumping practices by the Canadian exporters, I would have no difficulty finding that the U.S.-Concord-grape-growing industry "is being or is likely to be injured" by such dumped imports if, despite the absence of dumped imports in the most recent crop year (1968), the growing and pricing practices of the Canadian exporters had already produced injury within the meaning of the Antidumping Act or were likely to do so in connection with subsequent bumper crop years. I have no alternative but to make a negative determination in this case, however, having already concluded that for the recent period--including 1967 when one of the greatest volumes of dumped imports was received--the adverse impact, if any, on each segment of the U.S.-Concord-grape-growing industry is not significant or material and, for the reasons explained in the statement of Chairman Sutton and Commissioner Thunberg, is not likely to be significant or material.

Accordingly, for the reasons indicated, I have concluded that no industry in the United States is being or is likely to be injured, or is prevented from being established.