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Memorandum of the Commission of the European Communities
Concerning the Petition Received by the United States Department of Commerce Seeking the Imposition of Duties on Imports of Ordinary Table Wine from the Federal Republic of Germany, France and Italy

The Commission of the European Communities has examined the above-mentioned countervailing duty petition and has reached the conclusion that it does not comply with the basic requirements of the GATT Code on Subsidies and Countervailing Duties with regard to the evidence which must be submitted pursuant to Article 2(1) of the Code. The Commission also notes that the petition fails to provide the information that is required by U.S. law, to which the Commission refers throughout this memorandum without prejudice to the question of the compatibility of this legislation with the obligations of the U.S. under the Code on Subsidies and Countervailing Duties. Consequently, the Commission requests the Department of Commerce to dismiss the petition.

The Commission also wishes to emphasize that Section 612(a)(1) of the Trade and Tariff Act of 1984, the amendment to the municipal law of the U.S. on the basis

of which petitioners claim standing to file a petition, is not in conformity with the requirements of Article 6 of the Code. The Community has raised the issue of the compatibility of U.S. law with the international obligations of the U.S. under the Code at the GATT Committee on Subsidies and Countervailing Duties which has decided in turn to establish a panel. The Commission reminds the Department of Commerce that Article 1 of the Code requires signatories of the Code to take all necessary steps to ensure that countervailing duties are imposed on the products of other signatories only in accordance with the provisions of the Code. Any countervailing duty imposed upon ordinary table wines from the Federal Republic of Germany, France and Italy as a result of a proceeding introduced in response to this petition would therefore be in direct violation of the obligations of the U.S. as a signatory to the Code. In this regard the Community expressly reserves all the rights accruing to it under the General Agreement on Tariffs and Trade.'

Standing of Petitioners

Under Article 2(1) of the Code on Subsidies and Countervailing Duties, the United States may normally only initiate a countervailing duty investigation following a written request by or on behalf of an industry, which Article

6(5) of the Code defines as those producers that account for a major proportion of the domestic production of the like product, i.e., ordinary table wine.

As the criterion set forth in footnote 18 to the Code determines the like product in this case to be ordinary table wine, grape growers do not qualify as producers of the like product. The petition contains no evidence that it is supported by producers accounting for a major proportion of U.S. domestic production of ordinary table wine. Accordingly, petitioners have no standing pursuant to the Code on Subsidies and Countervailing Duties to request the initiation of an investigation.

The Commission further notes that the petition is deficient under U.S. law, to which the Commission refers without prejudice to the question of its compatibility with the obligations of the U.S. under the Code on Subsidies and Countervailing Duties. By omitting any evidence of the proportion of domestic production of wine and grapes for winemaking that is accounted for by its alleged supporters, the petition fails to comply with the requirements of the U.S. statute, even as amended in GATT-illegal form in 1984.

Subsidy Allegations

The petition is deficient also with regard to the allegations of subsidies as the attached appendix sets out in detail. In general terms the petition ignores the fact that the sole objective of Community assistance in the ordinary table wine sector is to reduce production and increase prices. The petition consequently erroneously assumes that all assistance measures constitute subsidies attributable to wine producers. In addition the petition claims that European Community assistance programmes that are generally available to the agricultural sector constitute subsidies.

The petition advances the claim rejected by the Department last year that export refunds for sales of wine in other export markets confer subsidies on exports to the United States. It incorrectly alleges that support to processors of grape must constitute subsidies to wine producers. Leaving aside the fact that the sums disbursed are minimal, the petition attacks research and development grants as countervailable subsidies even though their purpose is to find uses for grape products other than in the production of wine. The petition alleges that assistance for the marketing and processing of agricultural products constitutes a subsidy which is countervailable even though

such assistance covers products comprising virtually all the Community's agricultural production. The petition seeks to penalize incentives to wine producers to cease production and to convert vineyards to other uses but overlooks the fact that these incentives in no way assist the production or export of ordinary table wine. The petition erroneously alleges that distillation aids constitute a subsidy on wine even though assistance under the program is paid only on the production of alcohol. The petition seeks the imposition of countervailing duties with respect to wine storage programmes that are generally available for a wide range of products and tend to increase the price of Community exports to the U.S. In a similar vein the petition seeks to countervail assistance to mountain and hill farming areas which benefits a wide range of agricultural activities.

Finally, it should be noted that a number of essentially similar measures have been implemented by the U.S. Government at considerable budgetary cost and that the Department's position with respect to the above-mentioned Community programs will have a major effect on the way in which other countries will view analogous U.S. programmes.

Injury

The petition contains no information concerning any financial harm that may have been suffered by U.S. producers of the like product. It does not therefore meet the standard for initiation set forth in Article 2(1) of the Code on Subsidies and Countervailing Duties, which requires sufficient evidence of injury as defined in Article 6, including, inter alia, declines in profits, productivity, return on investments and utilization of capacity, negative effects on cash flow, employment, wages, growth and ability to raise capital or investment and an increased burden on government support programmes. In its allegations of injury the petition fails to take any account whatsoever of the impact of changes in exchange rates on the price and volume of Community exports of ordinary table wine to the U.S. In consequence the petition fails to establish sufficient evidence on the causal links between the allegedly subsidized imports and the injury that Article 2(1)(c) of the Code on Subsidies and Countervailing Duties requires.

Conclusion

The Commission requests the Department of Commerce to act in accordance with both the international obligations of the U.S. and U.S. law and to dismiss the petition.

APPENDIX

A. Petitioners Lack Standing Under Both the General Agreement on Tariffs and Trade and the Applicable U.S. Statute

1. Standing Under The GATT

Petitioners have no standing to bring this action under the GATT Code on Subsidies and Countervailing Duties. Article 2(1) of the Code provides that an investigation into alleged subsidies may be initiated only in response to a written request "by or on behalf of the industry affected." The Subsidies Code defines "domestic industry" as "the domestic producers as a whole of the like products or . . . those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." Id. at Article 6(5) (emphasis added).

The GATT Code on Subsidies and Countervailing Duties interprets "like product" as "a product which is identical, i.e. alike in all respects to the product under consideration." Id. at n.18 (emphasis added). Ordinary table wine, the product that is the subject of the petition, therefore constitutes the like product in this case. Grape growers, who produce grapes rather than ordinary table wine, have no standing to file this petition under the Code.

The petition contains no evidence that it is supported by producers accounting for a major proportion of U.S. production of the like product, which is ordinary table wine. Indeed, the list of petitioners includes only three producers of wine. Petition at A-7. The petition also includes no information on the amount of production that these three companies represent. Although the petition claims that a majority of the members of one petitioner, the American Grape Growers Alliance for Fair Trade (the "Alliance"), produce the like product under investigation, Petition at 18, it contains no list of the members of the Alliance, or of the proportion of U.S. production of ordinary table wine that they represent. The petition lists a number of wine producers that are members of the Association of American Vintners, which is a member of the Alliance. Petition at A-10 - A-12. However, it contains no evidence that these producers support the petition and no information concerning the amount of production they represent. A number of producers of table wine are also listed as having contributed financial support to the petition, Petition at A-7 - A-10, but the petition contains no information concerning the amount of domestic production of table wine that they represent. The U.S. therefore has no evidence that petitioners have standing under the Code to file a countervailing duty action.

2. Standing Under U.S. Law

Petitioners also lack standing to file a countervailing duty action under U.S. law, to which the Commission refers throughout this memorandum without prejudice to the question of the compatibility of 19 U.S.C. § 1677(4)(A), as amended, with the international obligations of the United States. The U.S. statute requires that a petition shall be filed "on behalf of an industry." 19 U.S.C. § 1671a(b)(1). The Court of International Trade has emphasized that this requirement means that a petitioner "must . . . show that a majority of that industry backs its petition." Gilmore Steel Corp. v. United States, 5 I.T.R.D. 2143, 2149 (Ct. Int'l Trade 1984) (emphasis added). An industry is defined as "those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." 19 U.S.C. § 1677(4)(A). However, "in the case of wine and grape products subject to investigation under this title, the term also means the domestic producers of the principal raw agricultural product (determined on either a volume or value basis) which is included in the like domestic product, if those producers allege material injury, or threat of material injury, as a result of imports of such wine and grape products." 19 U.S.C.A. § 1677(4)(A) (West Supp. 1985).

The Congressional intent in amending the definition of "industry" for the purpose of such an investigation was to include only the producers of grapes grown for winemaking, rather than those to be used as table grapes or raisins. 130 CONG. REC. H. 11,658 (daily ed. Oct. 9, 1984) (Statement of Rep. Frenzel) (House intent was to include "only those whose grape production went primarily into the production of wine. The definition would not include grape production not associated with wine, such as table grapes and raisins." (emphasis added)); id. at S.13,972 (Statement of Sen. Danforth). The petition itself emphasizes that Thompson Seedless grapes are used primarily for purposes other than wine: "Traditionally, approximately one-third of Thompson grapes have been crushed for the production of ordinary table wine with sixty percent consumed in raisin production and ten percent used as tablestock." Petition at 6.

Under U.S. law, petitioners must therefore show that their petition is supported by producers accounting for a major proportion of U.S. production of table wine, grapes grown for winemaking, or of both products. Although the petition alleges that it enjoys such support, Petition at 19, it contains no supporting information. As noted above, the petition contains no information concerning the amount of production of ordinary table wine that is accounted for by petitioners. The list of petitioners includes several grape growers and grape grower trade associations, but the petition

also lacks any information concerning the proportion of U.S. production of grapes grown for winemaking that is accounted for by these grape growers or by the membership of these trade associations. It also fails to include any information concerning the identity of the membership of these trade associations or any evidence that their membership supports the petition.

In addition, the petition makes no showing that the Alliance constitutes an interested party under the statute, which provides that a trade association may be an interested party only when a majority of its members manufacture, produce or wholesale a like product in the United States, or when a majority of its members are interested parties. 19 U.S.C.A. §§ 1677(9)(E), 1677(9)(F) (West Supp. 1985). As already noted, the like product for this investigation is ordinary table wine. Although the petition claims that a majority of the members of the Alliance produce the like product, Petition at 18, it includes no membership list and no other information that would support this assertion. Under U.S. law, the Alliance therefore has no standing to file the petition. 19 U.S.C. § 1671a(b)(1).

A further deficiency in the petition is that it neither lists the names and addresses of the other enterprises in the United States engaged in the production or sale

of ordinary table wine, nor alleges that the production of such a list is not required on the grounds that all such enterprises account for less than 2 percent of domestic production, as the Department's regulations require. 19 C.F.R. § 355.26(a)(11). In fact, it is estimated that the ten largest wine producers account for about 70 percent of U.S. production. Certain Table Wine from France and Italy, Inv. No. 701-TA-210 and 211 (preliminary), USITC Pub. 1502 (1984).*

B. The Petition's Allegations Concerning Many Subsidies Are Deficient Under the GATT and U.S. Law

The petition contains many allegations of subsidies from European Community programmes to ordinary table wine in the Federal Republic of Germany, France and Italy that are deficient under the GATT and U.S. law. Accordingly, these allegations should be dismissed.

1. Refunds Granted on Exports to Countries Other Than the U.S. Are Not Countervailable.

The petition alleges that French, Italian and German wine producers receive export refunds for sales in

* The Department may take account of this government document in assessing the sufficiency of the petition. United States v. Roses, Inc., 706 F.2d 1563, 1568-69 (C.A.F.C. 1983).

certain export markets, such as Africa, Eastern Europe and the Soviet Union. Petition at 42-43. However, the petition makes no allegation and contains no information indicating that export refunds are payable on ordinary table wine exports from the Community to the United States. Indeed, the Department refused to initiate an investigation on the similar claim that was contained in the prior petition on the grounds that the petition itself stated that export refunds were not available on wines sold to the United States and that export subsidies on sales to other countries did not confer subsidies on exports to the U.S. Certain Table Wine from Italy, 49 Fed. Reg. 6778, 6779 (1984); Certain Table Wine from France, 49 Fed. Reg. 6779, 6780 (1984). Furthermore it would be quite clearly inconsistent with the Code on Subsidies and Countervailing Duties and incompatible with U.S. obligations under the GATT to accept a countervailing duty petition based on allegations of subsidies granted to a non-complainant third country. For these reasons the petition's allegation that export refunds constitute subsidies on sales of wine to the United States should again be dismissed.

2. Support to Processors of Grape Must is Not
Countervailable As To Wine

The petition contends that European Community programmes established, inter alia, under Commission Regulation 2033/84 to provide assistance to processors using grape must in the production of grape juice constitute subsidies to wine producers. Petition at 32-34. However, the petition does not allege that wine producers receive any payments under these programmes. Id.

In connection with Commission Regulation 2033/84 it alleges that assistance is provided to grape juice processors on the manufacture of grape juice. Id. Consequently, any subsidy provided by this programme is bestowed upon the producers of grape juice. As assistance under this programme is not paid on the manufacture, production or export of wine and does not assume a cost or expense of the manufacture, production or distribution of wine, it does not constitute a subsidy on wine. 19 U.S.C § 1677(5).

Furthermore, publicly available documents that are judicially noticeable under U.S. law* show that all

* Accordingly, the Department may take account of these documents in assessing the sufficiency of the petition. United States v. Roses, Inc., 706 F.2d at 1568-69.

assistance provided under Commission Regulation 2034/84 is limited to grape must used by manufacturers of wine-like products in Ireland and the United Kingdom, and to the production of such products marketed in these countries. Commission Regulation 2034/84, 27 O.J. EUR. COMM. (No. L. 189) 9 (1984) (copy attached). The petition's allegations concerning these programmes should therefore be dismissed.

3. Research and Development Grants Are Not Countervailable

The petition alleges that European Community expenditures on research and development work to expand markets for grape products are countervailable. Petition at 34. These expenditures, which are limited to a mere ECU 500,000 (U.S. \$390,000), are aimed at facilitating the search for alternative uses for grapes other than in the production of wine. Consequently their impact is to reduce the production and marketing of ordinary table wine. Furthermore the Department has established that research programmes constitute subsidies only when their results are not made publicly available. Certain Carbon Steel Products from Sweden, 50 Fed. Reg. 33,375, 33,378-79 (1985); Subsidies Appendix, 47 Fed. Reg. 39,315, 39,319 (1982). As the petition does not allege that the results of these research and development programmes are not publicly available, provides no information to this effect and contains no description of reasonable

efforts made by petitioners to obtain such information, its allegations that these grants constitute subsidies must be dismissed. See Glass Lined Steel Storage Tanks, Pressure-Vessels and Parts Thereof From France, 45 Fed. Reg. 67,404 (1980), cited with approval in G.B. KAPLAN, Processing Antidumping and Countervailing Duty Investigations in THE COMMERCE DEPARTMENT SPEAKS ON IMPORT ADMINISTRATION AND EXPORT ADMINISTRATION 23 (1984).

4. European Community Assistance for the Processing and Marketing of Agricultural Products is Not Countervailable

The petition alleges that European Community assistance for the marketing and processing of agricultural products constitutes a subsidy as it is provided to a specific industry or group of industries. Petition at 36. In fact, such assistance is available for the marketing of milk and milk products, meat, wine, fruit and vegetables, flowers and plants, fish, cereals, animal feed, seeds, eggs and poultry, olive oil, tobacco and other products. See COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTEENTH FINANCIAL REPORT OF THE EUROPEAN AGRICULTURAL GUIDANCE AND GUARANTEE FUND, 1984, GUIDANCE SECTION (1985) at Annexes 8 & 9 (copy attached). These products comprise almost 90 percent of the agricultural production of the member countries of the European Community. See COMMISSION OF THE EUROPEAN COMMUNITIES, THE AGRICULTURAL

SITUATION IN THE COMMUNITY, 1983 REPORT 190-91 (1984) (copy attached). Assistance that is made generally available in the agricultural sector does not constitute a subsidy. See Fresh Asparagus From Mexico, 48 Fed. Reg. 21,618, 21,621 (1983). Furthermore, under Council Regulation 355/77, 20 O.J. EUR. COMM. (No. L 51) 1 (1977) (copy attached), agricultural marketing and processing assistance is made available under common criteria. Assistance that is made available under this programme is not therefore countervailable.

5. European Community Payments for the Abandonment of Vineyard Cultivation and Their Conversion to Other Uses Are Not Countervailable

The petition contends that payments under European Community programmes encouraging the abandonment of the cultivation of vineyards and their conversion to other uses constitute subsidies. Petition at 37 - 42. The Department has previously held that industrial conversion assistance is countervailable only to the extent that such assistance is provided for the production of the merchandise that is subject to investigation. Subsidies Appendix, 47 Fed. Reg. at 39,323. It follows that the payment of costs associated with transforming vineyards into producing products other than ordinary table wine cannot constitute a subsidy on ordinary table wine exported to the U.S.

The programmes established by Council Regulation No. 1163/76 and Council Directive 79/359 grant premiums to wine growers in return for the conversion of vineyards to other uses. See Council Regulation No. 1163/76, 19 O.J. EUR. COMM. (No. L 135) 35 (1976) (copy attached); Council Directive No. 79/359, 22 O.J. EUR. COMM. (No. L 85) 34 (1979) (copy attached). Council Regulation No. 456/80 provides incentives to wine growers for the temporary (eight years minimum) and permanent abandonment of vineyard cultivation. See Council Regulation No. 456/80, 23 O.J. EUR. COMM. (No. L 57) 16 (1980) (copy attached). The payments under these programmes are granted primarily to cover the cost of grubbing-up (uprooting) vines. Such activities are not part of the normal process of grape production. A grape grower would not normally uproot vines, which usually produce grapes for between forty and forty-five years. A. LICHINE, WINES OF FRANCE 73 (5th ed. 1969) (copy attached). These payments do not therefore relieve the recipients of costs associated with manufacturing and producing wine. The global effect of these measures is to reduce the production and marketing of wine. Accordingly, they are not countervailable under U.S. law. E.g., Stainless Steel Sheet Strip and Plate from the United Kingdom, 48 Fed. Reg. 19,048, 19,052-53 (1983).

6. European Community Assistance for the Distillation of Table Wine Does Not Constitute a Subsidy on Wine

The petition alleges that European Community support for the distillation of table wine into alcohol is countervailable. Petition at 23. The petition also notes that the assistance under this programme is provided to private distillers, rather than wine producers. Id. Any subsidy provided under this programme is therefore paid on the production of alcohol, not wine. Furthermore, this programme cannot constitute a subsidy as it supports the destruction rather than the production of wine. 19 U.S.C. § 1677(5)(B). In consequence, such assistance is not countervailable.

In any event, far from functioning as a subsidy, distillation measures reduce the available supply of ordinary table wine and have an effect equivalent to an export tax on Community sales to third countries.

7. European Community Assistance For Storage Aids Are Not Countervailable

Storage assistance is not restricted to the wine sector, but is generally available for a wide range of products that lend themselves to storage in the agriculture sector.

Consequently, this assistance does not constitute an aid which is countervailable.

In any event, storage aids have the same effect on the wine market as distillation measures by reducing surplus output and avoiding cut price sales.

8. European Community Assistance for Mountain and Hill Farming Is Not Countervailable

The European Community programme providing assistance to mountain and hill farming areas is alleged to be countervailable as it benefits a specific industry or group of industries. Petition at 44-45. In fact, this programme is provided to all agriculture under objectively identifiable criteria based upon altitudes, population statistics, crop yields and environmental protection factors. See Council Directive 75/268 at Article 3, 18 O.J. EUR. COMM. (No. L 128) 3 (1975) (copy attached). Accordingly, payments made under this programme do not constitute subsidies. E.g., Certain Softwood Products from Canada, 48 Fed. Reg. 24,159, 24,183 (1983).

C. The Petition's Allegations Concerning Injury Are Deficient

The information on injury contained in the petition does not meet the standard required under the international

obligations of the United States. Article 1 of the GATT Code on Subsidies and Countervailing Duties states that a request to initiate proceedings shall include sufficient evidence of the alleged injury. Injury under the Code is defined as material injury or threat thereof to a domestic industry. Id. at note 6. As already noted, the Code defines "domestic industry" as "the domestic producers as a whole of the like products." Id. at Article 6(5). Under the definition contained in footnote 18 to the Code, the like product in this case is ordinary table wine. In order to comply with the Code, the petition must therefore contain sufficient evidence of material injury to U.S. producers of ordinary table wine. The injury to U.S. grape growers that is alleged by the petition does not constitute such a showing.

A determination of injury under the Code involves an examination of the impact of imports on domestic producers of like products. Id. at Article 6(1). Such an examination "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability

to raise capital or investment and in the case of agriculture whether there has been an increased burden on government support programmes." Id. at Article 6(3).

The petition contains no information concerning any financial difficulties the producers of the like product (i.e. ordinary table wine) may be suffering. It neither alleges nor puts forward any information indicating that U.S. producers of ordinary table wine have experienced or are likely to experience reductions in profits, productivity, returns on investments or utilization of capacity as a result of allegedly subsidized imports. Nor is any injury alleged as regards actual or potential negative effects on cash flow, employment, wages, growth, ability to raise capital or investment or an increased burden on U.S. government support programmes. Information concerning these direct indicators of injury should be readily available to those few wine producers that are included among petitioners.

The petitioners' allegations of injury caused to producers of ordinary table wine furthermore ignore the significant movements and fluctuations in exchange rates that have taken place in recent years. According to data provided but not used by the petitioners, between 1979 and 1984 the value of the dollar more than doubled against the French franc and Italian lira and rose by over 50 percent against the German mark. The extent to which the price of European

Community wine exports to the U.S. have been influenced by the effects of this exceptional dollar revaluation are not assessed in the petition. No account is taken of the fact that although export prices have slightly decreased in dollar terms over recent years, they have increased by nearly the whole amount of the depreciation in terms of their own currencies. Similarly, no assessment is made of the impact of these exchange rate changes on the volume of European Community ordinary table wine exports to the U.S.

Under Article 6(4) of the Code on Subsidies and Countervailing Duties, material injury must be caused "through the effects of the subsidy" and not from other causes. Consequently the petition lacks sufficient evidence of the causal link between the allegedly subsidized imports and the alleged injury that Article 2(1) of the Code on Subsidies and Countervailing Duties requires.

D. Conclusion

The petition does not meet the standards for initiation under the GATT Code on Subsidies and Countervailing Duties or under U.S. law and should be dismissed.