Ministry of Economic Development
Manatū Ōhanga

Non-Confidential
Final Report

Canned Peaches from the EU

Dumping and Countervailing Duties Act 1988
Subsidy "Sunset" Review

Ministry of Economic Development

July 2009

Trade Rules, Remedies and Tariffs Group
Ministry of Economic Development

HTML: 978-0-478-33660-3
PDF: 978-0-478-33659-7

Table of Contents

Trade Rules, Remedies and Tariffs Group
Ministry of Economic Development

HTML: 978-0-478-33660-3
PDF: 978-0-478-33659-7

Abbreviations

The following abbreviations are used in this Report:

Act (the)	Dumping and Countervailing Duties Act 1988
SCM Agreement	WTO Agreement on Subsidies and Countervailing Measures
Chief Executive	Chief Executive of the Ministry of Economic Development
CAP	Common Agriculture Policy
CMO	Common market organisation
The EC	The European Commission
The European Union	The Member states of the European Union
GUR	Good Under Review
HW	Heinz Wattie's Limited
LDC	Less Developed Countries
LLDC	Least Developed Countries
Ministry (the)	Ministry of Economic Development
NZCS	New Zealand Customs Service
POR(S)	Period of Review (Subsidisation)
POR(I)	Period of Review (Injury)
PO	Producer Organisations
SPS	Single Payment Scheme
SFP	Single Farm Payment
WTO	World Trade Organisation

1. Executive Summary

Introduction

1. A review of the countervailing duties that currently apply against imports of canned peaches from the European Union (EU) was initiated by the Ministry of Economic Development (the Ministry) on 14 December 2008. The review was initiated, based on an application from Heinz Watties Limited (HW), the only New Zealand producer of canned peaches. The countervailing duties have been in place since January 1998 and would have expired on 15 December 2008 if a review had not been initiated. HW claimed that the expiry of the duties would lead to a continuation or recurrence of subsidisation and material injury to the industry.

2. This report considers the likelihood of a continuation or recurrence of subsidisation, leading to a recurrence of material injury to the domestic industry if the countervailing duties are removed.

Goods Subject to the Investigation

3. The goods subject to this review, imported from the EU, are described as follows:

Canned peaches (halves, slices and pieces) packed in retail sized cans.

Subsidisation

4. Based on the information gathered during the review, the Ministry has concluded that the subject goods imported into New Zealand are no longer subsidised. The Ministry has further concluded there is not likely to be a recurrence of subsidisation in the foreseeable future, should the current countervailing duties be removed.

Material Injury

5. Because the subject goods are no longer subsidised and there is not likely to be a recurrence of subsidisation in the foreseeable future, should the current duties be removed, there cannot be any injury or recurrence of injury as a result of subsidised imports.

Conclusions

6. This report concludes that if the current countervailing duties are removed there is not a likelihood of a continuation or recurrence of subsidisation causing material injury to the New Zealand industry, in the foreseeable future.

Recommendations

7. This report recommends that the Chief Executive of the Ministry determine pursuant to section 14(8) of the Act that, if countervailing duties were to be removed there is not a likelihood of a continuation or recurrence of subsidisation and by reason thereof there cannot be any material injury to the New Zealand industry or recurrence of injury as a result of subsidised imports.

2. Proceedings

2.1 Introduction

8. On 9 January 1998, the Minister of Commerce first imposed countervailing duties on canned peaches from the EU imported into New Zealand, because an investigation had established that the goods were being subsidised and by reason thereof causing material injury to the New Zealand industry.

9. A review of the continued need for the imposition of the countervailing duties, pursuant to section 14(8) of the Dumping and Countervailing Duties Act 1988 (the Act), was completed in July 2003 and concluded that it would be likely that both subsidisation and injury would recur if the countervailing duties were removed. Immediately following the review, a reassessment was initiated. The reassessment was completed in December 2003 and new rates of countervailing duty were set.

10. The present review of the continued need for the countervailing duties was initiated by the Ministry of Economic Development on 14 December 2008, based on an application from Heinz Wattie's Limited (HW), the New Zealand producer of canned peaches.

11. In accordance with Article 21 of the World Trade Organisation (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement), the purpose of the Ministry's review is to examine whether the expiry of the duties would be likely to lead to a continuation or recurrence of subsidisation and injury. The purpose of this report is to provide a summary of the matters established by the Ministry as a basis for a determination to be made under section 14(8) of the Act as to whether the expiry of the current countervailing duties would be likely to lead to the continuation or recurrence of subsidisation and injury.

12. On 2 June 2009 an Interim Report for this review was provided to all interested parties being written advice of the essential facts and conclusions that would likely form the basis for any final determination to be made. All interested parties were given until 16 June 2009 to make submissions on the Interim Report. The Ministry has taken all submissions received by the Ministry after the release of the Interim Report into account in the preparation of this Final Report.

13. This Final Report includes the conclusions reached by the Ministry. It should be noted that the report provides a summary only of the information, analysis and conclusions relevant to this investigation, and should not be accorded any status beyond that.

2.2 Reviews

14. In the absence of a review, the countervailing duties would have ceased to apply from 15 December 2008 because duties applying to any goods cease to be payable on those goods from five years after the date of any reassessment of duty following

a review which established that the reassessment was necessary.[1] The existing duties will continue to apply pending the outcome of this review and any reassessment that may follow.

15. The Ministry has set the period of review of subsidisation (POR(S)) from 1 December 2007 to 30 November 2008. The Ministry set the period of review of injury (POR(I)) from 1 May 2005 to 30 April 2009 (HW's financial years 2005/6, 2006/7, 2007/8 and the first half of its 2008/09 financial year). The Ministry also examined forecast data provided by HW on the impact of the removal of the duties. Because this review has concluded the goods are no longer subsidised and there is not likely to be a recurrence of subsidisation should the duties be removed, the results of the Ministry's analysis of injury is not included in this report.

16. Interested parties to the "sunset" review were advised of the initiation of this review in writing and provided with the opportunity to provide information to assist the Ministry in reaching its conclusions and to also make written submissions to the Ministry.

2.3 Subsidisation and Injury for the Purposes of a Review

Ministry's Approach to Sunset Reviews

17. The Ministry carries out sunset reviews on the basis of section 14 of the Act and Article 21 of the SCM Agreement. In interpreting Article 21 of the SCM Agreement, the Ministry takes guidance from New Zealand legal reports, WTO Panel and Appellate Body reports and approaches taken by other WTO member countries.

18. Article 21.3 infers a necessity to clearly demonstrate that, "…the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury" *[emphasis added]*. Some guidance regarding the interpretation of the phrase "would be likely" has been provided by the New Zealand Court of Appeal which interpreted the phrase to mean 'a real and substantial risk…, a risk that might well eventuate" *(Commissioner of Police Vs Ombudsman [1988] 1 NZLR 385*).

19. For further guidance on the level of evidence that is required to meet the "would be likely" criteria of Article 21.3, the Ministry also referred to the findings of the WTO Panel and Appellate Body reports concerning *United States Anti-Dumping Duty on Dynamic Random Access Memory Semi Conductors (DRAMS) from Korea*[2], and *United States – Sunset Reviews of Anti-dumping Measures on Oil Country Tubular*

[1] Dumping and Countervailing Duties Act 1988, s14(9) and s14(9A).

[2] Report of the Panel – United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea - WT/DS99/R – Adopted 19 March, 1999.

Goods from Argentina[3], and to the approaches taken by the EU, US, Canada and Australia to sunset reviews.

20. The Ministry notes that the consideration of whether duties should be removed does not exist in isolation but is dependent on whether the evidence shows that the expiry of duty would be likely to lead to a continuation or recurrence of subsidisation and injury. In determining "likelihood", it is considered that regard should be had to the timeframe within which an event may occur. Article 21.3 of the SCM Agreement makes no express reference to the length of time within which a continuation or recurrence of injury has to take place.

21. Mindful of the different factors involved in each case, and taking guidance from the sources referred to above, the Ministry approaches all investigations and reviews on a case-by-case basis. Based on its interpretation of the SCM Agreement and the Act, the Ministry adopts the following general principles in considering injury and subsidisation in sunset reviews:

- The Ministry is required to establish whether the expiry of the countervailing duty would be likely to lead to a continuation or recurrence of subsidisation and injury;

- The test to be applied in respect of the likelihood of a continuation or recurrence of subsidisation and material injury is a positive one, i.e., the Ministry needs to be satisfied, based on positive evidence, that certain events are likely to occur, and that those events will cause subsidisation and material injury to the industry to continue or recur in the absence of countervailing duties;

- Interpretation of the phrase "would be likely" is guided by a court judgement referring to "a real and substantial risk…, a risk that might well eventuate";

- In considering the likelihood of injury, the Ministry may refer for guidance to provisions in the SCM Agreement that may be helpful in assessing that likelihood and those provisions may include, if appropriate, the factors used in Article 15.7 in assessing a threat of injury. The test to be applied, however, is not that for establishing whether there is a threat of injury;

- In considering whether removal of the duty would be likely to lead to a recurrence of subsidisation and injury, the Ministry considers what is likely to happen in the foreseeable future. The extent to which the Ministry is able to make judgements on the likelihood of events occurring in the foreseeable future will depend on the circumstances of each case and, therefore, the foreseeable future will range from the imminent to timeframes longer than imminent.

[3] Report of the Panel – United States – Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina - WT/DS268/R – Circulated 16 July, 2004. Report of the Appellate Body - WT/DS268/AB/R – Adopted 17 December, 2004.

2.4 Grounds for the Review

22. HW provided positive evidence to support its claim that imports of the subject goods will continue to be subsidised with the removal of countervailing duties and that the subsidised goods would cause a recurrence of material injury to the industry through:

- A significant increase in import volumes, price undercutting, price suppression and depression,

resulting in:

- a decline in output and sales,
- a decline in market share,
- a decline in profits and return on investments,
- a decline in utilisation of production capacity,
- adverse effects upon cash flow, inventories, employment and growth.

Reassessment of Countervailing Duties

23. If this review indicates that countervailing duties should continue to be applied, then the rate or amount of duty may be reassessed in accordance with section 14(6) of the Act.

2.5 Imported Goods

24. The goods from the EU which are subject to the countervailing duties are referred to as the "subject goods", and are described as:

Peaches (halves, slices or pieces) packed in retail size cans

The subject goods enter New Zealand under tariff Item 2008.70.09 and statistical key 00L. Imports of subject goods are currently subject to the normal tariff of 5 percent.

2.6 Interested Parties

New Zealand Industry

25. HW is the sole New Zealand producer of canned peaches, and therefore constitutes the New Zealand industry.

Exporters and Importers

Exporters

26. The New Zealand Customs Service (NZCS) data identified AL.M.ME (Greece), Halcon Foods (Spain) and Alcurnia Alimentacion S.L., (Spain) as exporting

shipments of the subject goods to New Zealand, during the POR(S). AL.M.ME was identified as exporting to New Zealand in the original investigation. All three producers/exporters were sent a Foreign Manufacturers Questionnaire to complete but none of the companies provided the Ministry with a response to the questionnaire.

Importers

27. NZCS data identified two importers of canned peaches from the EU during the POR(S). These importers were [redacted] and Mediterranean Group Limited. [redacted] responded to the Ministry's Importers' Questionnaire by providing details of its shipments, however, no response was received from Mediterranean Group Limited.

Foreign Governments

28. The European Commission and the governments of Greece and Spain are also interested parties to the review. They were provided with subsidy questionnaires to complete and all provided responses. The EC was requested to provide further information throughout the investigation which it duly did.

2.7 Provision of Information

29. Article 12.3 of the SCM Agreement provides that the authorities shall provide timely opportunities for all interested members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information. In order to conform with this requirement, the Ministry makes available all non-confidential information to any interested party through its public file system.

30. In respect of the provision of information by interested parties, Article 12.7 of the SCM Agreement provides as follows:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

31. Section 6 of the Act states that:

> (1) Where the [Chief Executive] is satisfied that sufficient information has not been furnished or is not available to enable the export price of goods to be ascertained under section 4 of this Act, or the normal value of goods to be ascertained under section 5 of this Act, the normal value or export price, as the case may be, shall be such amount as is determined by the [Chief Executive] having regard to all available information.

32. As noted above, information concerning exports of the subject goods over the POR(S) was requested but not received from the foreign exporters. In view of the failure to provide information, where necessary, decisions regarding these exporters have been made having regard to all available information, in accordance with section 6 of the Act and Article 12.7 of the SCM Agreement.

3. New Zealand Industry

33. Section 3A of the Act provides the definition of "industry":

> **3A. Meaning of "industry"—**For the purposes of this Act, the term "industry", in relation to any goods, means—
>
> (a) The New Zealand producers of like goods; or
>
> (b) Such New Zealand producers of like goods whose collective output constitutes a major proportion of the New Zealand production of like goods.

3.1 Like Goods

34. In order to establish the existence and extent of the New Zealand industry for the purposes of an investigation into injury, and having identified the subject goods, it is necessary to determine whether there are New Zealand producers of goods which are like those goods in all respects, and if not, whether there are New Zealand producers of other goods which have characteristics closely resembling the subject goods[4]. The subject goods are described in section 2.5.

35. HW produces, *inter alia*, a range of styles of canned peaches (currently halves and slices), packed in various concentrations of sugar syrup, "lite" media (artificial sweetener in water) and fruit juice, and in various can sizes. HW currently produces these canned peaches under its branded lines of "Wattie's", "Oak", and "Weight Watchers".

36. In the original investigation, the Ministry reached the conclusion that the canned peaches produced by HW in syrup and juice, while not alike in all respects because of differences in can sizes, varieties of peaches used, the use of juice and variations in concentrations of sugar syrup, had characteristics closely resembling the imported canned peaches and were therefore like goods to the subject goods.

37. The Weight Watchers brand and "Wattie's" canned peaches in "lite" media were not produced by HW at the time of the original investigation but were produced by HW at the time of the 2002 sunset review into dumped imports from South Africa. That 2002 sunset review and consequently the 2003 sunset review into subsidised imports from the EU found that the "Wattie's" canned peaches in "lite" media were like goods, but that the "Weight Watchers" canned peaches were not like goods to the subject goods.

38. The Ministry has reviewed whether there has been a change since the original investigation and the 2003 sunset review, which would lead to a change in the conclusions reached in those investigations, regarding its like goods analysis. The Ministry has been provided with no information which would have it conclude that its

[4] Dumping and Countervailing Duties Act 1988, s3(1).

like goods analysis should be changed. On this basis the Ministry concludes that HW is still producing like goods to the subject goods imported from the EU.

3.2 Imports of Canned Peaches

39. The subject goods are not separately identified in the Tariff of New Zealand. In compiling import volume figures, the Ministry has used the import volumes of canned peaches into New Zealand for the 2006 and 2007 April years which have been taken from the 2007 review of canned peaches South Africa. These figures also related to retail size canned peaches (the subject goods). The import volumes of canned peaches for the 2008 April year and the six month period to October 2008 have been complied by checking the general description and tariff concession information of the imported goods from the NZCS data. The Ministry has removed products which are not retail size canned peaches from the import figures.

40. The Ministry has also removed HW's imports of canned peaches from the import figures to avoid double counting as both HW's imported and domestically produced canned peaches are recognised as New Zealand industry sales of canned peaches in the Ministry's injury analysis.

41. The table below shows the estimated import volumes of canned peaches into New Zealand from 2006 to October 2008.

Table 3.4: Imports of Canned Peaches (kg)
(Years ended April)

	2006	2007	2008	Oct-08 (6 months)
Imports from EU *	222,170	118,703	17,546	-
Imports from Australia *	2,996,911	2,561,545	2,324,172	1,112,704
Other Imports *	787,482	1,127,025	1,651,968	1,310,768
Total Imports	4,006,563	3,807,273	3,993,687	2,423,472

* Excludes HW's imports.

42. The figures in the table show that import volumes from the EU have been decreasing since 2006 and there are now minimal imports of the subject goods from this source. This is not surprising in view of the fact that there are currently countervailing duties imposed on these goods.

3.3 New Zealand Market

43. The following table shows the New Zealand market for canned peaches from the 2006 April year to October 2008. Import figures used in this table are as per table 3.4 above, and the domestic sales figures have been provided by HW.

Table 3:5: New Zealand Market for Canned Peaches (kg)
(Years ended April)

	2006	2007	2008	Oct-08 (6 months)
Imports from EU *	222,170	118,703	17,546	-
Other Imports *	3,784,393	3,688,570	3,976,140	2,423,472
Domestic Sales **	[redacted]	[redacted]	[redacted]	[redacted]
Total NZ Market	[redacted]	[redacted]	[redacted]	[redacted]

* excludes HW's imports
** includes HW's imports

44. The above table shows that the New Zealand market for canned peaches has remained reasonably static since 2006.

4. Subsidisation

45. Section 3(1) of the Act provides the definition of subsidised goods and subsidy as follows:

> "Specific subsidy" means a subsidy that is specific to an enterprise or industry, or a group of enterprises or industries, within the jurisdiction of a foreign government:
>
> "Subsidised goods" means goods in respect of the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export, or import of which a specific subsidy has been or will be paid, granted, authorised, or otherwise provided, directly or indirectly, by a foreign government:
>
> "Subsidy" includes any financial or other commercial benefit that has accrued or will accrue, directly or indirectly, to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export, or import of goods, as a result of any scheme, programme, practice, or thing done, provided, or implemented by a foreign government; but does not include the amount of any duty or internal tax imposed on goods by the Government of the country of origin or country of export from which the goods, because of their exportation from the country of export or country of origin, have been exempted or have been or will be relieved by means of refund or drawback:

46. Section 3 of the Act provides the following definition of “foreign government”:

> "Foreign government" means—
>
> (a) The Government of a foreign country:
>
> (b) A provincial, State, municipal, local, or regional Government or authority of a foreign country:
>
> (c) A body that exercises authority for an association of foreign countries:
>
> (d) A person, agency, or institution acting for, or on behalf of, a Government or body referred to in paragraph (a) or paragraph (b) or paragraph (c) of this definition:

47. Section 7 of the Act provides the definition of the “amount of subsidy” as follows:

> **7. Amount of subsidy** (1) In this Act, the expression 'amount of the subsidy', in relation to any subsidised goods, means the amount determined by the [Chief Executive] as being the benefit conferred on the recipient of the subsidy.
>
> (2) For the purposes of subsection (1) of this section,-
>
> (a) The provision of equity capital by a foreign government shall not be regarded as conferring a benefit, unless the investment decision in relation to the provision of that equity capital can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of the exporting country:

(b) The provision of a loan by a foreign government shall not be regarded as conferring a benefit, unless the amount that the recipient of the loan pays under the loan is less than the amount that the recipient would pay under a comparable commercial loan that the recipient could obtain on the market, in which case, the benefit to the recipient shall be deemed to be the difference between those amounts:

(c) The provision of a loan guarantee by a foreign government shall not be regarded as conferring a benefit, unless the amount that the recipient of the loan pays under the government guaranteed loan is less than the amount that the recipient would pay under a comparable commercial loan that was not so guaranteed, in which case, the benefit to the recipient shall be deemed to be the difference between those amounts:

(d) The provision of goods or services, or the purchase of goods, by a foreign government shall not be regarded as conferring a benefit, unless the goods or services are provided for less than adequate remuneration within the meaning of subsection (4) of this section, or the goods are purchased for more than adequate remuneration, as the case may be.

(3) For the purposes of subsection (1) of this section, the following amounts shall not be included in the amount of the subsidy:

(a) Any application fee or other fees or costs necessarily incurred in order to qualify for, or to receive the benefit of, the subsidy:

(b) Any export taxes, duties, or other charges levied on the export of the goods to New Zealand that are specifically intended to offset the subsidy.

48. Further guidance on the definition of a “subsidy” is provided in Article 1 of the SCM Agreement, which provides as follows:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[1]

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

49. Article XVI:1 of the GATT (1994) refers to ". . . any form of income or price support which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory. . .".

4.1 Purpose of Review of Subsidy

50. The Ministry's sunset reviews are conducted in accordance with Article 21.3 of the SCM Agreement. The review is intended to determine whether the expiry of the existing countervailing duties after five years would be likely to lead to a continuation or recurrence of subsidisation and injury and therefore whether there is a continued need for the imposition of countervailing duties. Questions to be asked in relation to subsidisation are:

- Whether the subject goods continue to be subsidised and, if so, the extent of that subsidy;
- Where imports of the goods subject to countervailing duty are still being subsidised, the likelihood of a continuation of any such subsidy should the countervailing duties be removed;
- Where imports of the goods subject to countervailing duty have ceased or are no longer subsidised, the likelihood of a recurrence of subsidisation should the countervailing duties be removed.

51. In respect of the present review, the Ministry has examined the totality of the information sourced during the review in relation to the above questions. Sections 4.4 and 4.5 below describe how the Ministry came to the conclusions reached as a result of its analysis of the information gathered.

4.2 Findings of the Original Investigation

52. The original investigation established subsidy amounts in relation to exports from Greece and Spain as well as an EU average figure. The subsidy amounts were established for each of the programmes from which the manufacturers of canned peaches received a subsidy.

4.3 Findings of the 2003 Review

53. The 2003 review found that the subject goods were continuing to be subsidised and that there would be a continuation of subsidisation resulting in injury to the domestic industry, if the countervailing duties were removed. The review re-calculated subsidy amounts in relation to exports from Greece and Spain as well as an EU average figure. As in the original investigation, these subsidy amounts were

established for each of the programmes from which the manufacturers of canned peaches received a subsidy.

4.4 Subsidy Programmes

54. In the present review, the Ministry has reviewed the subsidy programmes identified in the original investigation and the 2003 review and any other relevant subsidy programmes which may be conferring a benefit on exports of the subject goods over the POR(S). The details of the subsidy programmes examined are discussed below under separate headings.

Aid to Growers of Peaches

Operation of the Programme

Introduction

55. Historically, the EC Directorate General of Agriculture has been responsible for this programme, which is funded through the European Agriculture Guidance and Guarantees Fund (EAGGF). The payment of the aid to growers is administered by the relevant authorities in each member state.

56. At the time of the original investigation (in 1998), aid was provided to the manufacturers of canned peaches (hereinafter referred to as "processors")[5]. In late 2000, the EC revised the subsidy arrangements to apply to the fruit and vegetable common market organisation (CMO), including changes to the subsidy arrangements for canned peaches. The changed programme took effect from the 2000/01 marketing year whereby aid was then provided directly to the growers of raw peaches via Producer Organisations (POs) which are groupings of individual growers. This change in the programme was implemented through EC Regulation 2699/2000. EC regulation 2200/96 is the overriding regulation that deals with the common organisation of the markets in processed fruit and vegetables. EC regulation 449/2001 is the implementing regulation that details the processes for administering the aid.

57. Under the old scheme the processor, in return for the aid, had to pay a minimum price to the grower. The minimum price was re-calculated every year based on the difference between EU and world prices. According to the EC, at the time of the 2003 review, the new system removed this complication by paying the aid directly to the growers, which promoted greater certainty and minimised fraudulent claims. The EC also said under the new system there was greater transparency and less incentive for fraud as the activities were centralised in the hands of the POs. The EC stated that the POs were established to help producers improve the structure and functioning of their farms. Under the new scheme, POs negotiated a raw peach selling price with processors on behalf of their grower members. The purpose of the

[5] In this report, the Ministry has referred to this aid programme as the EU processing aid. After the change in scheme, the Ministry refers to the scheme as the Aid to Growers.

aid was still to compensate for the difference between the EU and world price of peaches.

The Process of Obtaining Aid

58. Under the new scheme, the amount of the aid was published in May of each year and consequently the POs knew the aid amount before they negotiated a price with the processors. The aid was only granted to peaches destined for the processing market and not to raw peaches destined for the fresh fruit market. In order to obtain aid, the POs lodged applications for aid with the relevant administering agency of the member state, along with a copy of the contract(s) it had signed with the processor for supply of raw peaches. Growers only received aid for the quantity of raw peaches delivered for processing in terms of the contract between their PO and the processors. The national authorities verified the application before paying the aid to the POs, who then paid the individual growers.

59. The new scheme involved processing thresholds for different member states as well as a total EU threshold. According to the EC, the purpose of establishing thresholds was to avoid over production, which it considered the granting of aid could lead to. These thresholds were published in EC Regulations. The rate of aid paid was reduced if the threshold was exceeded, in proportion to the extent by which the threshold was exceeded. If a member state did not process to its allowable threshold, the remainder was distributed to other member states.

Amount of Aid

60. At the time of the 2003 review, the amount of aid to producers was set at €47.70/tonne, which was published in the EC Regulation No 892/2002 in May 2002. The aid rate of €47.70/tonne was set at a level equivalent to the aid given under the last year of the old scheme.

61. The rate of aid had decreased from the original investigation in 1998 to the 2003 review. At the time of the 2003 review, the EC said the rate had been reduced over the last few years because of its commitment to bring prices into some sort of equilibrium with the world price and because of its WTO commitments to reduce the levels of aid provided.

Existence of Subsidy

62. In the 2003 review, the Ministry concluded that this programme clearly involves a financial contribution by a government to the growers of peaches used in the manufacture of the subject goods that are exported to New Zealand. There was, however, an issue of whether this financial contribution conferred a benefit on the processors who exported the subject goods to New Zealand, and therefore whether a subsidy existed in terms of section 3(1) of the Act and Article 1 of the SCM Agreement. After examining submissions on this issue from the EC, the governments of Spain and Greece, Venus Growers (the Greek exporter to New Zealand at the time), and HW, the Ministry concluded that the processors of canned peaches received an indirect benefit through price reductions for the raw peaches used in the manufacture of the subject goods processed and exported to New

Zealand over the POR(S). It was therefore concluded, at the time, that a subsidy existed.

Specificity

63. In the 2003 review, the Ministry concluded that the assistance was specific in that it was provided to certain enterprises, namely growers of raw peaches for processing purposes only.

Amount of Subsidy

64. In the 2003 review, the Ministry calculated specific subsidy amounts for each of the Greek producers that were exporting to New Zealand. The amount of aid per kg of raw peaches was calculated and expressed as a percentage of each producers' VFD during the POR(S). This amount was calculated on the basis of the current amount of aid given to the producers of raw peaches being set at €47.70 per tonne of raw peaches and the amount of raw peaches needed to fill a tin of canned peaches. A countervailing duty rate was set based on this subsidy amount.

The Current Review

65. In the current review, the EC and the Governments of Spain and Greece were requested to provide the Ministry with updated information on the aid to growers (EU processing aid scheme) via a Subsidy Questionnaire. They provided the review team with a response to the Questionnaire with the EC also providing further information and clarification at various stages of the review. Details of the information provided by these interested parties is summarised below.

The Legal Source of the Abolition of the EU Processing Aid Scheme

66. The EC stated, in its response to the Ministry's Subsidy Questionnaire, that the processing aid scheme was abolished as from the marketing year 2008/09[6] and that no specific aid is granted to the product under investigation. The EC stated that the processing aid scheme set out in Regulation (EC) No. 2201/96, to which the New Zealand industry referred to in its application for a review, was abolished under the reform of the common organisation of agricultural markets (CMO) in fruit and vegetables. In October 2007 the rules contained in the different Regulations concerning the specific CMOs were amalgamated into a single legal framework and replaced by one single Regulation (Council Regulation (EC) No. 1234/2007). Council Regulation (EC) No. 1234/2007 (22 October 2007) is the EC Regulation which established a common organisation of agricultural markets and specific provisions for certain agricultural products (*Single CMO Regulation*).

67. The EC also stated that, in particular, despite the fact that a transition period for implementation was foreseen, the coupled support for canned peaches production had already been abolished both in Greece and in Spain from the marketing year 2008/2009, which is the first marketing year of implementation under the new reform

[6] For products processed from peaches, the marketing year runs from 15 June to 14 June the following year.

provisions. In light of the above, the EC stated that there is no evidence of a likelihood of a recurrence of subsidisation of imports of canned peaches from the EU to New Zealand.

68. In a letter dated 16 March 2009, the Ministry requested further information regarding the abolishment of the EU Processing Aid scheme including the legal source for abolishing the scheme from the 2008/9 marketing year. In a letter dated 31 March 2009, the EC referred the Ministry to Council Regulation (EC) No. 1182/2007 (26 September 2007) laying down specific rules as regards the fruit and vegetable sector, and amending a number of related EC Directives and Regulations, including (EC) No. 2201/96 (the overriding regulation that deals with the common organisation of the markets in processed fruit and vegetables) and (EC) No. 318/2006. The EC stated that Regulation (EC) No. 1182/2007 abolished the aid schemes set out in Regulation (EC) No. 2200/96 and (EC) No. 2201/96 by deleting almost all provisions including those relating to the EU processing aid scheme. The EC stated that both Regulations were deprived of their content but were formally repealed only thereafter by Art. 3(1) (titled "Repeals") of Council Regulation (EC) No. 361/2008. Council Regulation (EC) No. 361/2008 (14 April 2008) amends Regulation (EC) No. 1234/2007. However, according to the EC, this Regulation at that time did not include most parts of the fruit and vegetable sectors since these were subject to policy reform. Therefore, the relevant provisions contained in Regulation (EC) No. 2200/96 and (EC) No. 2201/96 were incorporated into the Regulation (EC) No. 1234/2007 only to the extent that they were not subject to any policy reform.

69. The EC stated that in April 2008, Regulation (EC) No. 361/2008 finally included in the Single CMO, the provisions on the specific CMOs of fruit and vegetables and processed fruit and vegetable products, by amending Regulation (EC) No. 1234/2007 and by repealing Regulations (EC) No. 2200/96, (EC) No. 2201/96 and 1182/2007 (Art. 3(1)), including those articles that were incorporated into the Single CMO Regulation (this is the meaning of the reference to Annex XXII in Art. 3(1) of Regulation (EC) No. 361/2008). Consequently, the transitional provisions of Regulation (EC) No. 1182/2007 (Art. 55(1)) state that the aid schemes set out in Regulation (EC) No. 2201/96 and abolished by this Regulation (Regulation (EC) No. 1182/2007) shall remain applicable for each of the products concerned for the marketing year of that product, ending in 2008. The EC stated that this article further confirms the abolishment of EU processing aid scheme.

Conclusion

70. On the basis of the information provided by the EC and the Greek and Spanish governments and an analysis of the legal sources (EC Regulations) referred to by the EC, the Ministry concludes that the EC processing aid scheme has been abolished from the marketing year 2008/9. As such, the subject goods are no longer subsidised through this scheme. However, where imports of the goods subject to countervailing duty have ceased or are no longer subsidised, the likelihood of a recurrence of subsidisation should the countervailing duties be removed will need to be examined. This analysis in respect of the processing aid scheme is conducted in section 4.5 below.

Export Refunds on Sugar

Operation of the Programme

Introduction

71. The common market organisation (CMO) in the sugar sector was set up in 1968 aiming to ensure a fair income to EC producers and self-supply of the EU market. Since then it has received very few modifications and it is the only sector that has so far stayed out of the 1992 Common Agriculture Policy (CAP) reform process, which essentially involves increasing competitiveness by compensating institutional price cuts with direct income payments.

72. Until recently, the CMO for the market of sugar was governed by Council Regulation (EC) No. 318/2006. This regulation introduced a substantial reform of the CMO in the sugar sector, which was previously governed by Council Regulation (EC) No. 1260/2001. This CMO of the sugar market provides for intervention in the internal market, including price arrangements (the fixing of reference prices), production quotas, certain support arrangements for European products when traded on the international market and self-financing. From 1 October 2008, products falling within the scope of Regulation No. 318/2006 have been covered by the common organisation of agricultural markets (Regulated by Council Regulation (EC) No. 1234/2007).

Provisions Applicable to Exports

73. The price of sugar in the EU is higher than the world price. The export refund scheme is designed to compensate exporters of processed fruit and vegetables containing sugar for the price difference between sugar prices on the world market and sugar prices in the Community.

74. At the time of the 2003 review, Articles 16 and 18 of EC Regulation 2201/96 dealt with the process of sugar refunds. During that review, the EC stated that the refund process had not changed since the original investigation and that the sugar refund is based on the amount of sugar used in the canned peaches that are exported and there are no refunds for canned peaches sold in the domestic market or for canned peaches that are produced using sugar imported from outside of the EU. At that time, a management committee based in the EC calculated the export sugar refund amount on a weekly basis, taking into account the frequent changes in the world sugar prices which was then notified to all member states.

75. To take advantage of the scheme, the exporters of canned peaches submitted their application with information on the quantity of sugar used, the refund amount claimed and Customs Service documentation, to confirm the volume of canned peaches exported. The relevant agency in each member state carried out the required checks and made payment to the exporters.

Existence of Subsidy

76. In the 2003 review, the Ministry concluded that the programme involved the payment by a foreign government that provided a direct benefit to the manufacturer

of a product containing sugar which is exported outside of the EU and that therefore a subsidy existed in terms of section 3(1) of the Act and Article 1.1 of the SCM Agreement.

Specificity

77. In the 2003 review, the Ministry also concluded that the subsidy is contingent on the goods containing the sugar being exported. By virtue of Article 3.1 of the SCM Agreement the subsidy was consequently considered specific.

Amount of Subsidy

78. During the 2003 review, the EC provided the review team with the average refund amounts paid on sugar used in processed vegetables and fruits exported from the EU. This information was provided for each year ended September from 1998 to 2002. The review team used the year ending September 2002 refund amount of €[redacted]/tonne of sugar to calculate the subsidy amount, as this period was closest to the POR(S).

79. At the time of the 2003 review, Venus was the only exporter of subject goods from Greece over the POR(S) and used sugar [redacted] for the production of its canned products, including canned peaches. It had therefore not claimed any rebates on its exports of canned peaches to New Zealand. The Greek Government confirmed that no sugar refunds were paid to Venus over the POS(R). The review team was satisfied that no payments under this scheme were made to Venus.

80. The only exporter from Spain over the POR(S), in the 2003 review, was MG Campoy. This company stated in its response to the Ministry's Exporters Questionnaire that it does not receive any subsidy or any other assistance from the EU in relation to its exports of canned peaches to New Zealand. The Spanish Government confirmed that no sugar export refunds were paid to MG Campoy over the POR(S).

81. From the information on refunds provided by the EC, the Ministry calculated that the exporters would have received the following amount of refunds for their total exports over the POR(S) had they used EU sugar in their production and claimed rebates.

Venus €[redacted] or €[redacted]/kg of canned peaches.

MG Campoy €[redacted] or €[redacted]/kg of canned peaches.

82. Using the same exchange rate over the POS(R) as that used for the calculation of amount of aid to the growers, the Ministry calculated that the sugar refund subsidy would equate to $NZ[redacted] per kilogram of canned peaches for both Venus and MG Campoy. As a percentage of VFD, this equated to [redacted] and [redacted] percent for Venus and MG Campoy respectively. The review team concluded that a subsidy existed which was is specific in terms of Article 3.1 of the SCM Agreement but the exporters to New Zealand had not benefited from this scheme over the POR(S). The Ministry

established a residual rate of countervailing duty for all other EU exporters of EUR ▒▒▒ per kilogram.

The Current Review

83. In the current review, the EC and the Governments of Spain and Greece provided the review team with updated information via a Subsidy Questionnaire, on the EU sugar export refund scheme. The EC also provided further information and clarification at various stages of the review. Details of the information provided by these interested parties is summarised below.

The Legal Source of the Suspension of the Sugar Export Refund Scheme

84. In its reply to the Ministry's Subsidy Questionnaire, the EC stated that Council Regulation (EC) No. 1234/2007 (the Single CMO Regulation establishing a common organisation of agricultural markets) provides the legal basis to pay export refunds. According to the EC, this Regulation had the effect of decreasing the sugar price in the EC but that in view of the current market situation in the sugar sector and future prospects as regards availability and demand in the Community market, export refunds for sugar under CN code 1701 99 10 (which includes beet sugar) have been suspended for the 2008/9 marketing year, since 26 September 2008. The suspension of export refunds is provided for in Commission Regulation (EC) No. 947/2008 (25 September 2008) which suspends the export refunds on white and raw sugar exported without further processing. The EC also said this Regulation has replaced Commission Regulation (EC) No. 1554/2002.

85. The EC also stated that Council Regulation (EC) No. 1234/2007 provides the legal basis to pay export refunds to products under CN code ex 2008, which includes canned peaches in syrup, under Article 162(1)(b). Since in accordance with Article 162(2) of Council Regulation (EC) No. 1234/2007, the refund amount for products where sugar has been exported in an altered state cannot be greater than that for sugar exported in its natural state, export refunds for the sugar contained in canned peaches in syrup have also been suspended since September 2008.

86. In its letter dated 16 March 2009, the Ministry requested further information and clarification regarding the suspension of the sugar export refund scheme including the legal source for suspending the scheme from September 2008. In its letter dated 31 March 2009, the EC again referred the Ministry to Council Regulation (EC) No. 947/2008 as being the legal basis for suspending the sugar export refund. The EC stated that this Regulation still makes reference to Regulation (EC) No. 318/2006 (20 February 2006) on the common organisation for the markets in the sugar sector, but only because this Regulation was explicitly repealed in October 2008 while the suspension was decided in September 2008. Therefore, what is suspended now is the application of the specific provisions of Regulation (EC) No. 1234/2007 which replace Regulation (EC) No. 318/2006. Thus, Regulation (EC) No. 318/2006 is not in force any longer while Regulation (EC) No. 1234/2007 applies now. Then, on 25 September 2008, the sugar export refund was suspended by Regulation (EC) No. 947/2008. In the Regulation suspending the export refund, reference is still made to Regulation (EC) No. 318/2006 because this Regulation was repealed in October 2008 while the suspension was decided in September 2008. What is suspended now

is the application of the (specific) provisions of Regulation (EC) No. 1234/2007 that replace Regulation (EC) No. 318/2006.

87. In respect of export refunds for raw sugar exported *after further processing*, (i.e. canned peaches in particular), the EC stated that the rationale behind Article 162(2) of Regulation (EC) No. 1234/2007 is the WTO agreed provision that export refunds for products incorporated in other products may not be higher than the export refunds for the product itself. Article 11 of the WTO Agreement on Agriculture states that "In no case may the per-unit subsidy paid on an incorporated agricultural primary product exceed the per-unit export subsidy that would be payable on exports of the primary product as such". In effect, this means that export refunds used for primary products (such as sugar) incorporated in processed products, may not be higher than those applied on exports of the primary products themselves. Suspension of refunds of sugar, therefore, suspends the granting of export refunds for processed fruit and vegetables (such as canned fruit, including peaches) which incorporate sugar. The EC referred the Ministry to a further Regulation (EC) No. 1568/2007, which describes the link between export refunds granted for raw sugar and export refunds granted for further processed products which use raw sugar. Community Regulation (EC) No. 1568/2007 (21 December 2007) concerns export refunds on certain sugars used in certain products processed from fruit and vegetables (e.g. canned peaches) and states (at Art. 1.1 adding Art. 4a 1-2) that an export refund may be granted in respect of sugar used for the manufacture of processed fruit products and that the amount of the refund shall equal the amount of the export refund for sugar products exported without any processing.

Conclusion

88. On the basis of the information provided by the EC and the Greek and Spanish governments, and an analysis of the legal sources (EC Regulations) referred to by the EC, the Ministry concludes that the sugar export refund scheme has been suspended as from 25 September 2008. As such, the subject goods are no longer subsidised through this scheme. However, where imports of the goods subject to countervailing duty have ceased or are no longer subsidised, the likelihood of a recurrence of subsidisation should the countervailing duties be removed will need to be examined. This analysis in respect of the sugar export refund scheme is conducted in section 4.5 below.

4.5 Likelihood of continuation or recurrence of subsidisation

Introduction

89. The Ministry's approach to sunset reviews is recorded in section 2.3 above. In considering the likelihood of a continuation or recurrence of subsidisation, the Ministry has applied the general principles set out in that section of the report, including a necessity to clearly demonstrate that, "…the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury" *[emphasis added]*. This section of the report outlines the basis on which a conclusion has been reached regarding the likelihood of a continuation or recurrence of subsidisation, should the countervailing duties expire.

Likelihood of continuation of subsidisation

90. The Ministry has analysed the information provided by the EC on the abolishment and suspension of the two subsidy programs in question. On the basis of the information provided, including a description of the legal sources (EC Regulations) referred to by the EC, the Ministry concluded above that the subject goods are no longer subsidised. Where goods are no longer subsidised, there can be no likelihood of a continuation of subsidisation under these two programs, if the countervailing duties are removed, and therefore any analysis must turn to the likelihood of a recurrence of subsidisation should countervailing duties be removed. The Ministry has, however, examined whether there is likely to be a continuation of subsidisation under other subsidy programs, below under various sections of this report.

Likelihood of continuation or recurrence of subsidisation

Introduction

91. As discussed in section 2.3 above, guidance on the level of evidence that is required to meet the "would be likely" criteria of Article 21.3 of the SCM Agreement, is provided in the findings of the WTO Panel and Appellate Body reports, *United States Anti-Dumping Duty on Dynamic Random Access Memory Semi Conductors (DRAMS) from Korea* and *United States - Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina.* It was determined in the *US – Anti-Dumping Measures on DRAMS from Korea* case that the test to be applied is a positive one, based on positive evidence that certain events are likely to occur, which will cause a continuation or recurrence of dumping and material injury to the industry, in the absence of anti-dumping duties. In the *US – Sunset Reviews of Anti-Dumping Measures on Tubular Goods from Argentina* case, the Appellate Body reaffirmed its own determination in *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*[7] that an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be *probable* if the duty were terminated - and not simply if the evidence suggests that such a result might be possible or plausible. The Ministry also noted in section 2.3 above that regard should be had to the timeframe within which an event may occur, and that in determining "likelihood", the Ministry considers what is likely to happen in the *foreseeable* future which in itself will depend on the circumstances of each case.

92. While the cases referred to above refer to the likelihood of a continuation or recurrence of *dumping* and injury, should anti-dumping duties be removed, the Ministry considers that the same principles apply to any analysis it undertakes on the likelihood of a continuation or recurrence of *subsidisation*, should countervailing duties be removed.

[7] Appellate Body Report - United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan – WT/DS244/AB/R – Adopted 9 January, 2004.

93. The Ministry considers that the nature of making a determination as to the likelihood of an event occurring in the foreseeable future, makes it an inherently uncertain exercise. The Panel in *US – Anti-dumping Measures on DRAMS from Korea* noted that the necessity requirement involved in the analysis " … is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process". The Panel also noted that "Mathematical certainty is not required, but the conclusions should be demonstrable on the basis of the evidence adduced. This is as much applicable to a case relating to the prospect of recurrence of dumping as to one of present dumping." This statement, however, should be balanced by the Appellate Body's determination in *US - Corrosion-Resistant Steel Flat Products from Japan* that an affirmative likelihood determination may only be made if the evidence demonstrates that dumping would be probable if the duty were terminated.

94. Following the initiation of the review, the EC was requested by the Ministry to provide further information on the EC's future intention regarding the two subsidy schemes in question in view of the fact that the EC had claimed that the processing aid scheme had been abolished and the sugar export refund scheme had been suspended. This information was requested by the Ministry in order to assist it in making a determination on the likelihood of a recurrence of subsidisation, should the current countervailing duties expire. The extent of the information provided by the EC and the conclusions reached by the Ministry in making this determination are outlined below.

The Future of the EU Processing Aid Scheme

95. In a letter dated 16 March 2009, the Ministry requested further information from the EC on the reasons behind the abolishment of the EU Processing Aid scheme from the 2008/9 marketing year and its future intentions regarding the scheme. This included whether the scheme has been permanently abolished or if there is an intention to re-introduce the scheme sometime in the future, with an identical or similar scheme which aims to achieve the same purpose as the existing scheme.

96. The EC replied, in a letter of 31 March 2009, that the EU processing aid has been completely abolished as part of the EC CAP reform which is aimed at bringing EC rules into compliance with commitments undertaken in the WTO Doha Development Round negotiations[8] to reduce trade distorting domestic support in the agricultural sector. Regarding the likelihood of reintroducing or replacing the scheme with an identical or similar scheme in the future, the EC stated that the political or economic landscape at the time played no part in the decision to abolish the scheme nor is the current political and economic landscape likely to persuade the EC to reintroduce the scheme (or a similar scheme) in the future. The EC stated that its decision to repeal the aid scheme was not a one-off measure but rather the result of the complex and long process of reform of the EC CAP and that there is no intention to replace or reintroduce the scheme in the foreseeable future.

[8] The WTO Doha Development Round is the current round of WTO multilateral negotiations. The round was initiated by the Doha WTO Ministerial Declaration, of 14 November 2001, and is referred to as the Doha Development Round because of its emphasis on improving market access conditions for developing and least-developed members. The round is on-going.

The Future of the Sugar Export Refund Scheme

97. In its letter dated 16 March 2009, the Ministry also requested further information from the EC on the reasons behind the suspension of the sugar export refund scheme from 25 September 2008 and its future intentions regarding the scheme, including the extent to which the suspension was linked to a reform of the sugar sector and whether there is an intention to discontinue the suspension and reintroduce the export subsidies, sometime in the foreseeable future.

98. The EC replied, in its letter of 31 March 2009, that the suspension of the scheme was in line with the EC's 2005 decision to reform the sugar market. The new Regulations were in line with the 2005 reform and cut the price of EU sugar, which was too high in comparison to the world market level, in order to ensure a sustainable market balance and enhance competitiveness and market orientation in the sector. The EC stated that the suspension of this scheme as from September 2008 was decided because of the decrease in the demand for export quota, the increase in imports from LDCs (Least Developed Countries) and ACP (African Caribbean and Pacific) partner countries and because the budget was shifted to farmers. Furthermore, according to the EC, the indirect suspension of the refund for processed fruit and vegetables, which incorporate raw sugar, reflects WTO rules. The EC stated that there is no intention to discontinue the suspension of this subsidy in the foreseeable future.

99. The EC also noted that in the marketing year 2007/08, the level of export refunds has been decreasing as compared to previous years following the sugar reform agreed to by the EC in November 2005 which limits quotas for sugar production in the EU and increases imports, in line with the international agreements fully liberalising imports from LDC and ACP countries into the EU. The EC stated that this reform is now in its implementation phase and constitutes a major change in the EU policy.

100. The EC stated that it had suspended the export refund scheme rather than decrease the export refund under the scheme in line with previous decreases because one of the key elements of the 2005 sugar reform is budget neutrality and the 2008 and 2009 EU budget does not allocate funds for export refunds. In addition, for the marketing year 2008/09, almost 6 million tonnes worth of quotas has been renounced by sugar producers and therefore, the EU market balance did not show the need for quota sugar to be exported. Thus, according to the EC, the decision was made to directly suspend this subsidy rather than continue to decrease it.

101. In support of its claims, the EC provided an EC Press Release (IP/05/1473, dated 24 November 2005)[9], which provided some useful information on the EC's reform of the CMO for the sugar market. In the press release, the EC claimed the reforms were "wide-ranging" and would " … enhance the competitiveness and market-orientation of the EU sugar sector, guarantee it a viable long-term future and strengthen the EU's negotiating position in the current round of world trade talks".

[9] http://europa.eu/rapid/pressReleasesAction.do (Reference IP/05/1473).

The EC also stated in the press release that, under the sugar reform, the sugar sector will come into line with the CAP reforms of 2003 and 2004 and from 2009, the world's poorest countries will have completely free access to the EU market.

102. In another EC Press Release (IP/06/194, dated 20 February 2006)[10], the EC stated that "[T]he key to the reform is a 36 percent cut in the guaranteed minimum sugar price, generous compensation for farmers and, crucially, a Restructuring Fund as a carrot to encourage uncompetitive sugar producers to leave the industry". The EC also stated in this press release that the previous regime had become untenable because the sugar price was three times world market levels and the export system had been ruled contrary to international trade rules. As a result of the reforms, EU production was expected to fall by between 6 and 7 million tonnes which will bring it down to a sustainable level – at a sustainable price – allowing domestic needs to be met from European production and imports from the EU's ACP partner countries and also from LDCs. In the press release, the EC projected that EU exports would also fall dramatically, allowing the EU to respect its WTO commitments. According to the EC, sugar will continue to be produced where it makes the most sense and in the less competitive areas, there will be a financial incentive to close down sugar factories, convert them to other uses and retrain workers. Farmers will be able to diversify to other products. For those who struggle in the new environment, financial assistance will be available to help them modernise, adjust or diversify.

103. In researching the EC's 2005 sugar reform, the Ministry sourced a recent United Kingdom article in a publication called the "The Sugar Situation"[11] which stated that "The EU continues its transition from net exporter to importer with limited impact on the world market from either activity". The article also noted that "Despite the EC beet crop finishing well above expectations for most producers, export activity for over-quota sugar has been subdued largely due to the diversion of beets to ethanol production in key producing countries such as France and Germany." The content of this article appears to support the EC's comments concerning the sugar sector reform and in particular, its statement in response to the Ministry's Subsidy Questionnaire, that " … in the marketing year 2007/2008 the level of export refund has been decreasing compared with previous years following the sugar reform agreed by the Council of the EU in November 2005 that limits quotas for sugar production in the EC and increases imports from LDC/ACP countries into the EU".

104. In its letter of 31 March 2009, the EC also stated that the current economic crisis has not affected the EC's decision to suspend the export refund scheme. One of the key elements of the sugar reform is its budget neutrality and the 2008 and 2009 EU budget does not allocate funds for export refunds. In addition, for the marketing year 2008/09, almost 6 million tonnes worth of quotas has been renounced by sugar producers, therefore, the EU market balance did not show the need for quota sugar to be exported. The EC stated that, in the same manner, the forecast EU balance between supply and outlets for sugar for the 2009/2010 marketing year does not identify the need for any export quota sugar to be exported

[10] http://europa.eu/rapid/pressReleasesAction.do (Reference IP/06/194).

[11] http://www.illovosugar.com/worldofsugar/EDF_Man_Sugar_Situtaion_No.651.pdf

and therefore there is no need to reintroduce sugar export refunds in the foreseeable future. The EC stated that considering the renunciations of quotas and an increase of the sugar imports from LCD and ACP countries but at a slower rate than the expected, the EU sugar market is now balanced, therefore, there is no intention to discontinue the suspension.

Submission by the New Zealand Industry on the Likelihood of the EC Reintroducing the Subsidy Schemes in Question

105. During a domestic industry verification visit to HW, on 16 April 2009, HW made a number of representations concerning the EC's response, of 31 March 2009, to the Ministry's request for further information on the subsidy programs in question. HW stated that in its opinion the wording of the EC's response suggested there was still a great deal of uncertainty surrounding the EC's future intentions regarding both subsidy programs in question. In respect of the sugar export refunds, HW noted that the EC claims it has no intention to discontinue the suspension of this subsidy in the foreseeable future. However, according to HW, the use of the term "foreseeable future" indicates that the EC suspension is not intended to be long-term. HW referred the Ministry to the fact that the EC had recently re-introduced export refunds in respect of dairy products. HW claimed that the re-introduction of the dairy export refunds was linked to the global economic crisis and had been reintroduced as a form of protectionism no doubt due to the huge political pressure that certain industries are still able to assert over the EC. According to HW, the fact that the EC recently re-introduced the dairy export subsidies is an illustration that it can be heavily influenced by a particular EC industry (in this case the sugar industry) to reintroduce export subsidies and also that it is able to act quickly to do so. HW proposed that rather than have the countervailing duties expire, the Ministry set a zero duty rate which would allow the Ministry to re-set the rates at an appropriate level, if the EC reintroduced its sugar export refunds at a later date.

106. In its submission on the Ministry's Interim Report, and at a meeting held with Ministry officials on 23 June 2009, HW provided further representations on the likelihood test (in relation to a continuation or recurrence of subsidisation) which the Ministry had used in its Interim Report. These representations are addressed below under "The standard of proof required to conclude that the subsidies will be reintroduced."

Ministry's Analysis of the Information Gathered During the Review

107. The Ministry has examined the totality of the information gathered during the review concerning the likelihood of a recurrence of subsidisation in relation to the two EU subsidy schemes in question and notes the following:

Processing Aid

- The processing aid scheme has been abolished from the 2008/09 marketing year. The EC stated that this is because it was no longer in line with CAP reform, it has not been replaced and there is no intention to replace it with an identical or similar scheme in the foreseeable future.

Sugar Export Refunds

- The sugar export refund scheme was suspended from September 2008. The EC stated that this is because of the decrease in the demand for export quota, the increase in imports from LDC and ACP countries and because the EU budget does not now allocate funds to export refunds. The EC contends that new Regulations regarding the sugar sector have been enacted, which include regulations suspending sugar export refunds. According to the EC, these provisions are in line with the 2005 sugar sector reform and have brought about a cut in the price of EC sugar, which was too high in comparison to the world price and was needed in order to ensure a sustainable market balance and enhance competitiveness and market orientation in the sugar sector. The EC stated that it has no intention to discontinue the suspension of the sugar export refunds in the foreseeable future.

- It can be concluded that the suspension of sugar export refunds and the abolishment of the processing aid are related to the 2005 sugar sector reform and the 2007 CAP reform, respectively. More specifically, these initiatives appear to be related to the EC's intention to bring the market price of EU sugar in line with world prices in order to enhance competitiveness and also to reduce the EU producers' reliance on trade-distorting domestic support programs, which is in line with the EC's WTO commitments. This is confirmed somewhat by a recent article in a UK publication called the "The Sugar Situation" which noted that "The EU continues its transition from net exporter to importer with limited impact on the world market from either activity". The Ministry also notes that the latest Trade Policy Review (TPR) of the European Communities[12] (dated 2 March 2009) notes that "Since the last TPR of the EC, reforms of its CAP have continued to enhance the market orientation and competitiveness of the *sugar, fruit and vegetables* [emphasis added], and wine subsectors".

- It is acknowledged that the EC recently re-introduced export refunds in respect of dairy products.[13] As mentioned in paragraph 105 above, HW claims that the re-introduction of the dairy export refunds is linked to the current global economic crisis and illustrates that the EC can also re-introduce the sugar export subsidies at short notice and is likely to do so in view of the global economic crisis.

- Whether or not the EC is able to reactivate the sugar export refunds at short notice is not at issue. The fact that the EC was quickly able to reactivate the dairy export subsides clearly shows that it has the ability to do so. In fact, it could be said that one feature of the export refund mechanism is to provide

[12] WTO Trade Policy Review, Report by the Secretariat, European Communities - WT/TPR/S/214 - at page ix.

[13] WTO Trade Policy Review, Report by the Secretariat, European Communities - WT/TPR/S/214 - at page 96 (para 2). Export subsidies for dairy products were reinstated in January 2009.

for a quick reintroduction of the export refunds at any time. What is at issue, however, is the likelihood that the EC would choose to reactive this instrument and re-introduce sugar export refunds, in the foreseeable future.

- In order to make such a determination the Ministry needs to examine and compare firstly, the underlying reasons why the two sets of export subsidies (the sugar export refunds and the dairy export refunds) were suspended in the first place and secondly, the reasons why the dairy export refunds were re-introduced at a later date. This is because the situation which exists in the dairy industry and which resulted in the dairy export refunds being suspended in the first place and then re-introduced at a later date, may be totally different from that which resulted in the suspension of the sugar export refunds. Such an examination should provide a good indication of whether or not the sugar export refunds are likely to be re-introduced in the foreseeable future, in the same manner as were the dairy export refunds.

- The Ministry sourced some information regarding the EC's original suspension of the dairy export refunds as well as the re-introduction of the dairy export refunds, in early 2009. EC Press Release IP/09/57[14] (dated 15 January 2009) states that dairy export subsidies were originally suspended "[F]ollowing the unprecedented price rise for milk and dairy products in 2007 and the beginning of 2008" and that "[A] sustained period of high prices on the world market led us to suspend export refunds ever since June 2007." In respect of the re-introduction of the dairy export refunds, the press release then states that "[T]he situation on the dairy market has now been completely reversed. With increased supplies on the world market and reduced demand on the internal market, market prices for dairy products have been forced down to close to or even below intervention levels. Obviously, the price paid to milk producers follows the same route with substantial price decreases already recorded and with further falls likely.", The press release then states that "[I]t is now time to reactivate this instrument. … [W]ith world prices on the world market now below EC intervention and market prices, our exporters are no longer able to compete". The press release also states that the export subsidies were re-introduced to stabilise the depressed market and give the dairy sector an important boost by allowing its exporters to compete globally and that the situation is aggravated by the already existing difficulties for EC exporters as a result of the financial/credit crisis.

- Regarding the underlying reasons for the suspension of the sugar export refunds, from the information sourced by the EC, it appears that the decision to suspend the sugar export refunds from September 2008 is part of an ongoing reform of the sugar sector (the details of which have been described above). One of the key elements of the sugar reform is budget neutrality which the EC has been aiming to achieve through the non-allocation of funds for export refunds. This fact and also the fact that a large number of export quotas (almost 6 million tonnes) have been renounced by the sugar

[14] http://europa.eu/rapid/pressReleasesAction.do (Reference IP/09/57).

producers for the 2008/9 marketing year, has eliminated the need for quota sugar to be exported, thereby allowing sugar export refunds to be suspended. On this basis, the Ministry considers it unlikely that the suspension of the sugar export refunds was linked to an isolated event such as a sustained period of high prices on the world market, in the same manner which necessitated the suspension of the dairy export refunds, in June 2007. Rather, the suspension of the sugar export refunds was linked to the EC's broader decision in 2005 to significantly reform the sugar sector in order to ensure a sustainable market balance and enhance competitiveness in the sector.

- Regarding how any decision to re-introduce sugar export refunds is likely to be affected by the current global economic crisis, in the same way that the economic crisis played a role in the re-introduction of the dairy export refunds, the Ministry notes that the decision to suspend sugar export refunds was enacted towards the end of September 2008. At that stage the global financial crisis was well under way and in fact the EC made its decision to re-introduce dairy export refunds only a few months later, in January 2009. If the current global financial crisis is considered a reason for reintroducing the sugar export refunds, then the Ministry considers that the EC would likely have decided to delay suspending the export refunds in September 2008, when the crisis was well under way. The fact that the EC made its decision to suspend export refunds during the midst of the global financial crisis indicates to the Ministry that the global financial crisis did not influence the EC's decision to suspend the sugar export refunds in the first place, nor is it likely to influence its decision to re-introduce the export refunds in the foreseeable future.

- In summary, while the global economic downturn contributed to the re-introduction of the EC dairy export subsidies, the main reason for their re-introduction was the large drop in world prices for dairy products which in turn prevented the EC dairy exporters from competing internationally. The fact that the EC has recently re-introduced export dairy subsidies on the back of these world price decreases and to a lesser extent due to the global financial crisis, is not considered by the Ministry to be positive evidence that the EC will do the same for sugar export refunds, in the foreseeable future. The situation which exists in the dairy industry and which resulted in firstly the suspension of the dairy export refunds and then the reintroduction of the export refunds is considerably different from that which resulted in the suspension of the sugar export subsidies.

The Standard of Proof Required to Conclude that the Subsidies will be Reintroduced

108. It was determined in *US – Anti-dumping Measures on DRAMS from Korea* that when analysing the likelihood of a continuation or recurrence of dumping, the test to be applied is a positive one, based on positive evidence that certain events are likely to occur, which will cause a continuation or recurrence of dumping and material injury to the industry, in the absence of anti-dumping duties.

109. The Panel in that case also stated that that "…the references in Article 11.2 to "the need for the continued imposition of the duty" and "whether the continued imposition of the duty is necessary to offset dumping" can only be understood in a meaningful manner when read in conjunction with the obligation in Article 11.1, whereby:

> "An anti-dumping duty shall remain in force *only as long as and to the extent necessary* [emphasis added] to counteract dumping which is causing injury""

110. In the *US – Sunset Reviews of Anti-dumping Measures on Tubular Goods from Argentina* case, the Appellate Body reaffirmed its own determination in *US – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Products from Japan*[15] that " … an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be *probable* if the duty were terminated - and not simply if the evidence suggests that such a result might be possible or plausible". In the same case, the Appellate Body also noted that the use of the words 'review' and 'determine' suggest that authorities conducting a sunset review " … must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination." The Ministry also considers that regard should be had to the timeframe within which an event may occur, and that in determining "likelihood", what is likely to happen in the *foreseeable* future needs to be considered, which in itself will depend on the circumstances of each case.

111. The Ministry has analysed the information gathered during the review on the EC's suspension of the sugar export refunds in relation to the tests set out in the WTO cases referred to above. While these cases refer to the likelihood of a continuation or recurrence of *dumping* and injury, should anti-dumping duties be removed, the Ministry considers that the same principles apply to any analysis it undertakes on the likelihood of a continuation or recurrence of *subsidisation* as the relevant provisions in the SCM Agreement closely follow those in the Anti-dumping Agreement. The results of the Ministry's analysis are set out below.

Processing Aid

112. The EC has provided the Ministry with evidence to indicate that the processing aid scheme was abolished because it was no longer in line with CAP reform. The Ministry considers that the evidence and information provided by the EC also indicates that the scheme has not been replaced and also indicates strongly that there is no intention to replace it with an identical or similar scheme in the foreseeable future. Any intention to reintroduce this scheme or a similar one in the future, is likely to run against the policies that led to the abolishment of the scheme in the first place. While it could be claimed that the scheme is still running in the guise of the transitional coupled payments referred to later in this report, the Ministry notes that the transitional payments are optional for EU member states, they are planned to decrease over time and that the two EU members who are the largest EU peach

[15] Appellate Body Report - United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan – WT/DS244/AB/R – Adopted 9 January, 2004.

growers and who made shipments to New Zealand during the review period, Spain and Greece, shifted to the single payment scheme (SPS) in 1 January 2008.

Sugar Export Refunds

113. The EC has provided the Ministry with strong evidence to indicate that the sugar export refund scheme was suspended from September 2008 in line with its budget neutrality approach which it is aiming to achieve through the non-allocation of funds for export refunds which is consistent with its ongoing reform of the sugar sector. The Ministry considers that the evidence and information provided by the EC also indicates strongly that the sugar export refunds are unlikely to be reintroduced in the foreseeable future because a reintroduction of the export refunds would run counter to its long term goals of reforming the sugar sector in order to maintain lower EC sugar prices. These prices have historically been higher than world prices and reform was needed in order to ensure a sustainable market balance and enhance competitiveness in the sugar sector.

114. In its submission on the Ministry's Interim Report, and in a meeting held with Ministry officials on 23 June 2009, HW stated that the Ministry's interpretation of HW's submission regarding the reintroduction of dairy subsidies and parallels with the sugar industry has been misinterpreted. According to HW, dairy export refunds were suspended and then reintroduced due to the forces of supply and demand. HW said the reasons behind the changes in supply and demand are irrelevant and there is no reason why export refunds for sugar would not also be reintroduced should demand for sugar in the EU decrease, or supply increase. HW claim that the fact that export refunds have been suspended and not abolished shows intent on the part of the EC that they will reintroduce the refunds, if necessary. Such grounds for their reintroduction may include food security, a dramatic shift in world sugar prices, or political pressure exerted on the EC from the sugar sector lobby. HW stated that the Ministry should take into account the fact that in the last six months sugar prices have surged 40 percent and that dairy prices were also at historic highs before prices collapsed and the EU reintroduced export refunds at the beginning of 2009. HW claims that the suspension of the sugar export refunds sets a precedent and that the New Zealand industry should be protected if export refunds on sugar recommence. A zero countervailing duty rate should be set in this instance.

115. HW also considered that the test used by the Ministry to determine a likelihood of recurrence of subsidisation is erroneous due to the different nature of each event, dumping or subsidisation. In this respect, HW stated that dumping occurs based on a commercial decision by a business, normally in response to an oversupply of goods or contraction in demand in their local market. It is an independent decision made by a single entity. Subsidisation, on the other hand, is a scheme put into force by a government in order to ensure the industry remains viable, perhaps as a result of pressure by the industry. Dumping, according to HW, is likely to occur if a business has surplus capacity, excess supply or reduced demand, whereas subsidisation will occur if an industry brings pressure to bear on a government for assistance in order to ensure its survival. Governments will also elect to subsidise an industry where it is in the national good. HW stated that the reasons behind both dumping and subsidisation occurring are different and as such, the conditions for undertaking the likelihood test need to be different as well.

116. In an email dated 24 June 2009, HW provided the Ministry with further information including articles and extracts from articles on the EC's sugar regime, in support of its submissions on the likelihood test and in particular its view that canned peaches will likely be subsidised in the foreseeable future. HW claim that countervailing duties should continue to be put in place in the event of the subsidy schemes changing. HW referred to Council Regulation (EC) 73/2009 noting in particular that this regulation provides income support to growers of "sugar beet, cane" and "producers of certain fruit and vegetables"[16]. The company considered that this is a subsidy to the producers of canned fruit, is similar to an export subsidy and effectively confers a benefit to canned peach producers. HW also noted that one of the articles notes that a lot of the EU sugar reforms end in July 2009, indicating to HW there is the potential for other instruments to be used to subsidise sugar.

117. In response to HW's concerns about Regulation (EC) 73/2009 and the income support to growers of sugar beet, cane and certain fruit and vegetables, the Ministry has addressed the income support schemes under this EC regulation under its analysis of the compensation scheme and other support schemes in the Sugar Sector below. In respect of the potential for other instruments to be used to subsidise sugar, the Ministry has also addressed this issue below, under the section titled "The possibility of setting of a zero countervailing duty rate".

118. In an email dated 15 June 2009, HW referred the Ministry to the Appellate Body decision in *US – Carbon Steel*[17] in support of its submissions on the likelihood test. In particular this email focused on HW's view that peaches will likely be subsidised in the foreseeable future, and therefore, countervailing duties should be continue to be put in place in the event of the schemes changing. In the US-Carbon Steel case, the Appellate Body concurred with the Panel's decision and specifically referred to a statement by the Panel at paragraph 8.96 of the Panel report. HW referred the Ministry, in particular, to the last sentence of that paragraph:

> Thus, in assessing the likelihood of subsidization in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, inter alia, the original level of subsidization, any changes in the original subsidy programmes, any new subsidy programmes introduced after the imposition of the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances.

119. In conducting this review, the Ministry has not simply considered whether the goods are currently being subsidised and whether this subsidisation is occurring due to the original subsidy programs. Rather, it has attempted to gather information from a number of sources on any new subsidy programs, any changes to the original EC subsidy programs, including the extent to which a subsidy is granted under these programs, and if there are any intended changes to the schemes. If the schemes have been either abolished or suspended, the Ministry has also attempted to gather information on whether it is likely that they will be reintroduced in the foreseeable future in a similar or identical format. In order to conduct this exercise the Ministry

[16] See paragraph 47 of the Introductory Paragraphs to Council Regulation (EC) 73/2009.

[17] Appellate Body Report - United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany – WT/DS213/AB/R – Adopted 19 December, 2002.

has gathered information on and analysed the extent to which any changes in EC policy, along with relevant economic and political circumstances, are likely to have affected the EC's decision to either suspend or abolish the subsidy programs in question and the extent to which they are likely to be reintroduced.

120. The Ministry also notes that the Panel in *US – Carbon Steel* when considering what it means to "determine that subsidisation is likely to continue or recur", stated, at paragraph 8.92 that "In our opinion, although there is no specific language in the SCM Agreement to that effect, it goes without saying that any determination made by investigating authorities under the SCM Agreement must be properly substantiated in order for that determination to be legally justified". The Panel then referred specifically to the decision of the Appellate Body in the *US – Lamb*[18] safeguards case. In this regard, the Appellate Body stated in *US – Lamb*:

> [C]ompetent authorities must have a sufficient factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the domestic industry.

121. The Panel in *US – Carbon Steel* saw no reason to distinguish between injury determinations in a safeguard investigation and a determination of the likelihood of continuation or recurrence of subsidisation in a countervailing duty review. The Panel in *US – Carbon Steel* also noted the decision in *US - Anti-dumping Measures on DRAMS from Korea* where the Panel stated:[19]

> [S]uch continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.

122. The Ministry is not convinced that the information it has sourced on the EC's suspension of the sugar export refunds, including the information and argumentation submitted by HW, is *positive evidence* indicating that it is *probable* that these particular refunds will be re-introduced in the foreseeable future. While HW has provided information to show that the EC recently reintroduced dairy export subsidies, this information was provided as an illustration only and in support of its contention that, according to HW, the EC can be heavily influenced, is able to reintroduce export subsidies in respect of sugar at short notice and is likely to do so in the foreseeable future. However, an analysis of the reasons behind the suspension of the dairy export refunds shows that they were by and large suspended as a result of a significant rise in prices for milk and dairy products in 2007 and then re-introduced on the back of a just as severe drop in milk and dairy prices two years later. While HW has referred to the fact that sugar prices have also increased sharply over the last six months as a likely indicator that they will crash (just as the world dairy prices did) necessitating the reintroduction of the sugar export refunds, the Ministry has concluded above that the sugar export refunds, unlike the dairy

[18] Appellate Body Report - United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia – WT/DS178/AB/R – Adopted 16 May, 2001.

[19] Report of the Panel – United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea - WT/DS99/R – Adopted 19 March, 1999, para. 6.42.

export refunds, were suspended not as a result of a one-off event, such as a large price increase, but as a result of a complex and long reform of the sugar sector and the EC CAP. Furthermore, while HW considers that the "likelihood" test should differ for a subsidy investigation/review from that for a dumping investigation/review, the Panel in *US – Carbon Steel* made it clear that no matter what type of investigation the authorities are conducting, the issue at stake is that the continued imposition of duties must be dependent on a foundation of positive evidence.

123. In summary, the information gathered on the suspension of the sugar export refunds does not lead the Ministry believe that is it probable that the refunds will be reintroduced in the foreseeable future and on this basis the Ministry does not consider that the information available is positive evidence that it is probable there will be a re-introduction of the export refunds in the foreseeable future.

Conclusion

124. On the basis of the information gathered during the review, the Ministry concludes that the processing aid scheme has been abolished as part of the lengthy and complex process of reform of the EC CAP and furthermore, that there is no intention to replace or reintroduce the scheme with an identical or a similar scheme in the foreseeable future.

125. The Ministry concludes that the sugar export refund scheme has been suspended as part of the EC's broader 2005 decision to significantly reform the sugar sector in order to achieve sustainable market balance and enhanced competitiveness in the sector. The Ministry does not consider it likely that the EC will re-introduce the sugar export refunds in the foreseeable future.

126. In conclusion, in relation to the processing aid and sugar export refund schemes, the Ministry is not satisfied that on the totality of the information gathered during the review, the expiry of the present countervailing duties would be likely to lead to continuation or recurrence of subsidisation, in accordance with Article 21.3 of the SCM Agreement. In accordance with the Appellate Body in *US – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Products from Japan* the Ministry considers it has used an appropriate degree of diligence and arrived at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.

The setting of a zero countervailing duty rate

127. HW has proposed that rather than allowing the countervailing duty applying to sugar export refunds to expire, the Ministry should set a zero duty rate which would allow the Ministry to re-set the rate at an appropriate level if the EC reintroduced its sugar export refunds at a later date. According to HW this course of action is necessary in view of the need for the Ministry to be cautious about not putting the New Zealand industry at a disadvantage by removing the countervailing duties entirely. If the countervailing duties are removed, the New Zealand industry would need to submit an entirely new Application for Countervailing Measures, if the EC decided to reintroduce the sugar export refunds at a later date.

128. In its submission on the Ministry's Interim Report, and in a meeting held with Ministry officials on 23 June 2009, HW claimed that the fact that sugar export refunds have been suspended and not abolished shows intent on the part of the EC that they will reintroduce the refunds, if necessary. HW claims that this suspension of the sugar export refunds sets a precedent and that the New Zealand industry should be protected. In a further email, dated 24 June 2009, HW provided the Ministry with a number of articles relating to the EU sugar regime noting in particular that a lot of the EU sugar reforms end in July 2009. This indicated to HW that there is the potential for other instruments to be used to subsidise sugar. HW claim that the uncertainty and difficulty of observing the potential effects of the EU programs reinforces the fact that a zero rate of countervailing duty should be considered by the Ministry in this instance.

129. The Ministry considers it important that any decision to set a zero rate of duty is consistent with WTO Dispute Settlement Body (DSB) jurisprudence. While any WTO Panel and Appellate Body decision is binding only on the parties to whom the dispute relates, if the decision is relevant to the case at hand, then the Ministry should use it as guidance in any decision it makes.

130. In *Mexico – Definitive Anti-dumping Measures on Beef and Rice*[20], it was alleged by the United States that Mexico had breached Article 5.8 of the Anti-dumping Agreement by not terminating an investigation in respect of two US exporters whose dumping margins were below *de minimis*. While Mexico found in its investigation that the two US exporters had not been dumping during the period of investigation, it had still assigned them each a zero anti-dumping duty rate. This was so they would both remain subject to subsequent reviews, and the possible application of anti-dumping duties in the future.

131. Both the Panel and the Appellate Body in *Mexico – Rice* found in favour of the United States by determining that Mexico had acted inconsistently with Article 5.8 of the Anti-dumping Agreement. More specifically, the Panel and the Appellate Body determined that Mexico had breached Article 5.8 because it did not terminate immediately the investigation in respect of the two US exporters that were not dumping and thereby exclude them from the application of definitive anti-dumping measures.

132. The Ministry can see certain parallels in the facts of *Mexico –Rice* and the present situation. In *Mexico – Rice,* Mexico set a zero anti-dumping duty when the goods were not being dumped but did so as a precaution for the future pricing behaviour of the two US exporters concerned. In other words, Mexico wanted the ability to set new anti-dumping duty rates for these exporters, if it decided to undertake a review of the two US exporters' export prices to Mexico at a later date and found that they were dumping into Mexico. In the present case, the goods being exported to New Zealand from the EU are not being subsidised because the EC has suspended the sugar export refunds. However, HW considers that setting a zero

[20] Report of the Panel – Mexico – Definitive Anti-dumping Measures on Beef and Rice - WT/DS295/R – Circulated 6 June, 2005. Report of the Appellate Body - WT/DS295/AB/R – Adopted 20 December 2005.

duty rate will allow the Ministry to take a precautionary approach in the event that the EC re-introduces its sugar export refunds in the future.

133. Both the Panel and the Appellate Body struck down Mexico's approach in setting a zero duty rate as being inconsistent with the requirement under Article 5.8 of the Anti-dumping Agreement to terminate cases where the individual margin of dumping is *de minimis*. In the present case, the Ministry is under a similar obligation, under Article 21.3 of the SCM Agreement (the "sunset" review provision), to terminate a countervailing duty after five years, unless as a result of a review of those duties, it determines that the expiry of the duty would likely lead to a continuation or recurrence of subsidisation and injury. The Ministry, in its analysis above, was not satisfied that the expiry of the present countervailing duties would likely lead to continuation or recurrence of subsidisation in relation to the processing aid and sugar export refund schemes, as is required under Article 21.3 of the SCM Agreement in order to maintain the duties.

134. Under Article 21.1 of the SCM Agreement, the Ministry is also under an obligation to ensure that "[A] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidisation which is causing injury". Clearly, because the goods exported from the EU are no longer subsidised through the sugar export refund scheme, there is no subsidisation to counteract by the imposition of countervailing duties. Furthermore, the unsubsidised goods can not be causing injury to the domestic industry. Therefore, on the basis of the decision in *Mexico – Rice* and its interpretation of the provisions of Article 21 of the SCM Agreement, the Ministry considers that there are insufficient grounds for applying a zero countervailing duty rate for future imports of canned peaches into New Zealand from the EU.

Compensation to sugar beet growers as part of the EC 2005 sugar reform

135. In its response of 31 March 2009 to the Ministry's request for further information on the subsidy programs in question, the EC stated that its decision to suspend sugar export refunds was based on the decision in 2005 to reform the sugar market. According to Press Release IP/06/194 (20 February 2006) the key to the reform of the Common Market Organisation (CMO) for sugar, is a 36 percent cut in the guaranteed minimum sugar price; *generous compensation for farmers*; and, crucially, a Restructuring Fund as a carrot to encourage uncompetitive sugar producers to leave the industry.

136. The EC's Press Release IP/05/1473 (24 November 2005) also makes reference to the key aspects of the 2005 reform. In the preamble, it states (in respect of compensation) that "… farmers will be compensated for, on average, 64.2 percent of the price cut through a decoupled payment – which will be linked to the respect of environmental and land management standards and added to the Single Farm Payment (SFP); countries which give up more than half of their production quota will be entitled to pay an additional coupled payment of 30 percent of the income loss for a temporary period of five years."

137. During the domestic industry verification visit to HW, on 16 April 2009, HW stated that it had concerns that the compensation scheme for sugar beet growers

described in the two press releases attached to the EC's response of 31 March 2009 and forming part of the EC's 2005 sugar reform could in itself amount to an actionable subsidy under the WTO SCM Agreement. HW had concerns that the funds assigned to the previous schemes are now being used to support EC sugar producers either in the form of the compensation scheme described above, or through the Restructuring Fund (which was mentioned as a key aspect of the 2005 reform).

138. On 22 April 2009, the Ministry wrote to the EC regarding the compensation scheme for sugar beet growers described in the above two press releases and forming part of the EC's 2005 sugar reform in view of the fact that the compensation scheme could in itself amount to an actionable subsidy under the SCM Agreement. The Ministry requested that the EC provide further information about the scheme and clarification of the information it had already provided. In light of the Ministry's concerns, the EC was asked to provide comments on whether or not it considered the compensation scheme in question actionable or non-actionable and therefore, countervailable or non-countervailable under either the WTO Agricultural Agreement or the SCM Agreement. The EC was asked to provide argumentation to substantiate any claim it made in this respect.

139. On 6 May 2009, the EC provided a response to the Ministry's letter of 22 April 2009. In respect of the compensation scheme the EC stated that while the Ministry has queried the relationship between the compensation scheme and the Single Payment Scheme (SPS), in fact there is no SPS for the sugar sector. In respect of the SPS, the EC stated that the SPS is a decoupled payment in the sense of paragraph 6 of Annex 2[21] of the WTO Agreement on Agriculture and that it has notified the SPS as compliant with the criteria of paragraph 6 of Annex 2 of the WTO Agriculture Agreement. In this respect, the EC stated that it disagrees with the Ministry's observation that the SPS does not respect paragraph 1(b) of Annex 2.[22] According to the EC, in no way does the SPS, as a decoupled payment by definition, have the effect of providing price support to producers.

140. In respect of the Sugar Restructuring Fund, the EC stated that this fund was created through Council Regulation (EC) No. 320/2006 with the declared objective of bringing the Community system of sugar production and trading in line with international requirements. To ensure its competitiveness in the future, it was necessary to launch a profound restructuring process leading to a significant reduction of unprofitable production capacity in the Community. The EC stated that

[21] Annex 2 of the Agreement on Agriculture is titled "Domestic Support: The Basis for Exemption from the Reduction Commitments". Paragraph 6 lists Decoupled Income Support as an example of a Government Service Program under which an exemption from a Member's domestic support reduction commitments can be claimed. Paragraph 6 provides the policy-specific criteria and conditions which the domestic support measure must conform with in order to be exempted from a Member's domestic support reduction commitments.

[22] Paragraph 1(b) of Annex 2 of the Agreement on Agriculture states that "[T]he support in question shall not have the effect of providing price support to producers". This is a condition which the domestic support measure must conform with in order to be exempted from a Member's domestic support reduction commitments.

neither the SPS scheme nor the Sugar Restructuring Fund confers a benefit to processors in terms of Article 1.1(b) of the SCM Agreement.

141. In an email dated 24 June 2009, HW referred the Ministry to Council Regulation (EC) 73/2009 ("The Health Check") and specifically to paragraph 47 of the introductory paragraphs noting in particular that this regulation provides income support to growers of "sugar beet, cane" and "producers of certain fruit and vegetables". HW considered that this is a subsidy to the producers of canned fruit, is similar to an export subsidy and effectively confers a benefit to canned peach producers.

Ministry's Position on the Compensation scheme and other support schemes in the Sugar Sector

142. The EC has been undertaking a significant reform of the sugar sector since 2005 which is illustrated in the information provided by the EC and gathered from other sources. There is no doubt, however, that the EU sugar sector is still being subsidised through various programs, although the issue is the extent to which there is a "pass-through" benefit under these sugar sector programs to the processors of canned peaches exported to New Zealand. In its analysis of the SPS program below in relation to the fruit and vegetable sector, the Ministry examined the extent to which de-coupled payments granted to the EU peach growers under the SPS are likely to confer a "pass-through" benefit to processors of canned peaches. The Ministry concluded that it was unable to make a positive determination that peach processors in the EU are likely to be receiving a "pass-through" benefit in respect of the subsidies paid to peach growers under the SPS. Decoupled payments are structured in such a way to ensure a minimal trade-distorting affect on production and prices rather than be linked to production volume, as is the case with coupled payments.

143. The Ministry notes that the compensation scheme referred by the EC as part of its 2005 sugar sector reform will result in sugar beet growers being compensated for, on average, 64.2 percent of the price cut, through a decoupled payment. The decoupled payment will itself be included in the Single Farm Payment (SFP) and linked to environmental and land management standards. While there also appears to be provisions for coupled payments under the compensation scheme, these payments are only available to certain countries and for a temporary period of no more than five years. Because the sugar sector compensation scheme consists mainly of decoupled payments in the same manner as under the SPS, the Ministry is for the same reasons for its conclusion about the SPS, unable to make a positive determination that the peach processors in the EU are likely to be receiving a "pass-through" benefit in respect of the payments paid to sugar beet growers under the sugar sector compensation scheme (SFP).

144. Furthermore, in considering whether there is a "pass-through" benefit, the Ministry will examine the transactions that take place between the producers of the input product on which the subsidy is paid and the producers of the final exported product. In the present situation there are likely to be a number of transactions before the raw sugar is finally used in the production of canned peaches. For instance, while the sugar beet growers are receiving decoupled and coupled payments for their sugar beet production, before this input is used in the production

of the canned peaches, it will be sold to sugar refineries and possibly undergo further processing before it reaches the canned peach processors as the ingredient used in the production of canned peaches. It is for this reason that the Ministry is even more convinced that there is likely to be no "pass-through" benefit conferred on the peach processors from the payments afforded to the sugar beet growers under the SFP and the Restructuring Fund.

145. In relation to HW's claim that Council Regulation (EC) 73/2009 grants income support to "growers of sugar beet, [and] cane" (as noted in paragraph 47 of the introductory paragraphs to this Regulation), which HW considered is a subsidy conferring a benefit to the producers of canned fruit, the Ministry is unsure the extent to which this income support is linked to the compensation scheme (SFP) and the Restructuring Fund referred to above. In any event, the Ministry is unable to conclude that there is a "pass-through" benefit conferred on peach processors for the same reasons as noted above. This income support is clearly granted to growers of sugar beet and cane, and because there is likely to be a number of transactions and manufacturing processes before the raw sugar is finally used in the production of canned peaches, the Ministry considers it very unlikely that a "pass-through" benefit will be conferred on the canned peaches exported to New Zealand. On this basis, the Ministry is unable to make a positive determination that the peach processors in the EU are likely to be receiving a "pass-through" benefit in respect of the income support granted to sugar beet growers under the relevant provisions of Council Regulation (EC) 73/2009.

Conclusion

146. For the reasons outlined above and on the basis of its analysis of the information collected in the review, the Ministry is unable to make a positive determination that peach processors in the EU are likely to be receiving a "pass-through" benefit in respect of the decoupled and coupled payments under the 2005 sugar sector reform compensation scheme (SFP), the Sugar Restructuring Fund, and under the income support granted to sugar beet growers under the relevant provisions of Council Regulation (EC) 73/2009. On this basis the Ministry is unable to conclude that the revocation of the countervailing duty would be likely to lead to a continuation or recurrence of subsidisation through these schemes.

EC Policies on Selected Product Groups

147. In an email dated 7 May 2009, HW provided exerts from the latest WTO Trade Policy Review (TPR) on the European Community, noting in particular that the TPR states that "coupled payments (no longer linked to production but to the cultivated area) are granted … on an optional basis … for … peaches … ."[23]

148. The Ministry examined the context under which the passage highlighted by HW was presented in the TPR. The passage highlighted by HW was positioned under

[23] WTO Trade Policy Review, Report by the Secretariat, European Communities - WT/TPR/S/214, at page 110 (para 47).

the heading "Fruits and Vegetables" and listed under a section outlining the EC's Common Agricultural Policy (CAP). The full paragraph reads as follows:

> The CMO for fruit and vegetables was reformed on 1 January 2008 with the aim of, inter alia, integrating the subsector into the reformed 2003 CAP[49]. Land cultivated with fruit and vegetables is eligible for direct payments under the Single Payment Scheme. [50] For a transition period of five years, in some Member States, coupled payments (no longer linked to production but to the cultivated area) are granted for strawberries and raspberries for processing and, on an optional basis, for fresh figs, citrus fruit, table grapes, pears, peaches, nectarines, and certain types of plums. [51]
>
> [49] The Single CMO Regulation was amended by Council Regulation (EC) No. 361/2008, OJL 121, 7 May 2008, in effect from 1 July 2008, to incorporate the reforms for fruit and vegetables.
>
> [50] The total amount transferred to the Single Payment Scheme is around €800 million.
>
> [51]Council Regulation (EC) No. 1182/2007, 26 September 2007.

149. In its Interim Report, the Ministry noted the following in terms of the coupled payments provided to the fruit and vegetable subsector and referred to in paragraph 47 of the TPR for the EC:

- The coupled payments (termed "additional payments") are temporary in nature (lasting for 5 years and only until 31 December 2010).

- The coupled payments may be granted to farmers producing certain fruit and vegetable products supplied for processing but are no longer linked to production (but rather to the cultivated area) suggesting to the Ministry that they were formally part of the EU processing aid scheme.

- The coupled payments may be granted in respect of all the fruits listed, including peaches. However, they are only offered in some EC member states and on an optional basis only (with the exception of strawberries and raspberries for which payments are mandatory), and those Member states which have chosen to offer them must have notified the Commission of their decision to offer the payments and the amount, by 1 November 2007.

- The EC stated in its reply to the Ministry's Subsidy Questionnaire, that the processing aid for peaches has been completely abolished as part of the CAP reform, and furthermore that there is no intention to replace or reintroduce the scheme with an identical or similar one. The EC also stated that despite the fact that a transition period for implementation was foreseen, the coupled support for canned peaches production has already been abolished both in Greece and in Spain from the marketing year 2008/2009, which is the first marketing year of implementation under the new reform provisions.

- Both the Greek and Spanish governments in their replies to the Ministry's Subsidy Questionnaire stated that the EU processing aid scheme has been abolished (the last season during which the aid was applied being 2007/8) and that no other form of assistance to the producers or exporters

of the subject goods is given by their respective countries. The Greek Canners Association also noted that since January 2008, the Greek farmers producing cling peaches are not receiving any aid from the EU or the Greek government.

- The payments are made under the SPS, which the EC claims it has notified as compliant with the criteria of Annex 2 of the Agriculture Agreement and which, according to the EC, in no way confers a benefit to processors in terms of Article 1.1(b) of the SCM Agreement.

- The Ministry determined in its main analysis that the subsidy schemes in question have either been abolished or suspended, and therefore the Ministry is under an obligation to remove the countervailing duties presently in place. In order to continue to maintain the countervailing duties to account for the possibility that exports to New Zealand may be accruing a benefit under the transitional payment scheme, the Ministry would need to have positive evidence that subsidised imports would likely cause material injury to the domestic industry during the remainder of the transitional period. The transitional payments expire in 2010 after which time the Ministry would, in any event, be under an obligation to terminate the countervailing duties.

- Even if a specific subsidy exists, which confers a benefit, in view of the above, the Ministry considers that it would be very unlikely that the domestic industry would suffer material injury from the time the current countervailing duties are removed to the date when it would be under an obligation to remove them. If the Minister of Commerce makes a final decision to terminate the countervailing duties, as a result of this review, it is likely the duties will be removed some time after 3 July 2009. A one and half year period will exist between this time and the date the Ministry would be under an obligation to terminate any duties (upon the expiry of the EU transitional period). In order to suffer material injury during this period, the domestic industry would need to be adversely affected by competition with importers wishing to seize the opportunity to import EU canned peaches upon the expiry of the current duty at export prices which they considered were being subsidised by the EU's transitional payments.

- The Ministry considers that potential importers of EU canned peaches would be hampered in their ability to take advantage of the duty removal due to the time needed to order and introduce canned peaches from Greece, Spain or the other EU countries into the New Zealand market. This in itself would affect their ability to import EU canned peaches in significant volumes. For instance, it is likely that the major players in the canned peach market will have existing supply contracts with their distributors and importers which will need to be honoured. It will also take time for distributors and potential importers of EU canned peaches to negotiate supply contracts with EU suppliers, if they wanted to import EC canned peaches. On this basis, even if a countervailable subsidy exists, the Ministry considers it unlikely that the domestic industry would suffer material injury in the interim period from when the current countervailing

duties are removed to the time the EC's transitional coupled payments expire (at which time the Ministry would be under an obligation to terminate the duties).

150. On the basis of the above analysis, including the EC's statement that coupled support for canned peaches production has been abolished both in Greece and in Spain from the marketing year 2008/2009, the Ministry concluded in the Interim Report that the transitional coupled payments for peaches, noted in paragraph 47 of the latest TPR for the EC, did not confer a "benefit" under Article 1.1(b) of the SCM Agreement, to the Greek and Spanish processors in terms of setting their export prices to New Zealand. Furthermore, in view of the fact that the payments are transitional in nature and will expire in December 2010, the Ministry considered that even if a countervailable subsidy exists and the Spanish and Greek producers (and indeed other EU producers) were taking advantage of the coupled payments, the New Zealand industry is unlikely to suffer material injury if exports of canned peaches to New Zealand from these sources were not countervailed

Further Information Obtained on the Transitional Payments and the SPS after the Release of the Interim Report

Introduction

151. After the release of the Interim Report, HW made a number of submissions on the transitional coupled payments and in particular referred the Ministry to Council Regulation EC 73/2009 which the EC mentioned in its letter of 6 May 2009. In that letter the EC had referred the Ministry to EC 73/2009 ("The Health Check") for the most recent reforms in relation to the direct support schemes under the Single Common Market Organisation (CMO).

152. HW's main argument is that Council Regulation (EC) 73/2009 entitles growers of peaches supplied for processing, to support measures (including direct payments) which constitute a subsidy under the SCM Agreement and which are countervailable. HW claimed, in particular, that the transitional fruit and vegetable payments provided by the EC will become part of the Single Payment Scheme (SPS) and hence the SPS replaces the transitional payments which in turn replaced the processing aid which was countervailed and which the EC has previously stated was abolished from the 2008/9 marketing year.

153. In order to substantiate its claim, HW pointed to a number of provisions in EC 73/2009 which it considered were relevant in the context of the current review. In particular, HW claimed that under EC 73/2009 the EU peach growers are entitled to aid under the transitional coupled payments which will eventually become part of the SPS and hence the SPS replaces the transitional fruit and vegetable payments which in turn replaced the processing aid which was countervailed.

154. On 19 June 2009, the Ministry wrote to the EC requesting further information and clarification on the extent to which the support schemes referred to in EC 73/2009 build on or replace the aid schemes listed in EC 361/2008 (which amends EC 1234/2007 by including a new section titled "Aid in the Fruit and Vegetable Sector"). The Ministry also sought further information about the transitional coupled

payments in respect of the fruit and vegetable sector (as outlined in EC 1182/2007) which the Ministry referred to and commented on in its Interim Report.

155. More specifically, the Ministry requested from the EC, information on whether Spain and Greece and indeed any other EC peach growing member had excluded all or part of the fruit and vegetable payment from the SPS scheme pursuant to Art. 68b of EC 1782/2007 and if they have indicated to the EC that they intend (by *1 August 2009)*, to integrate the fruit and vegetable payments excluded from the SPS, into the SPS (under art. 51(1)(b) of EC 73/2009). [In its original subsidy questionnaire response the EC stated that despite the fact that a transition period for implementation was foreseen, the coupled support for canned peaches production has already been abolished both in Greece and Spain from the marketing year 2008/09.] The Ministry then requested from the EC confirmation that if these EC states had excluded fruit and vegetable payments from the SPS scheme, that the peach growers in these EU states would be eligible to receive the transitional coupled payments.

156. In a letter dated 26 June 2009, the EC informed the Ministry that Spain and Greece did exclude some fruit and vegetable payments from the SPS but that they did not exclude peaches, for which the direct payments take the form of support under the SPS, from 1 January 2008. The EC also confirmed in its letter of 26 June 2009 that there are no more transitional coupled payments for peaches in Spain or Greece. In this respect, the Ministry notes that this statement appears to be consistent with the EC's original subsidy questionnaire response where it stated that the coupled support for canned peaches production has already been abolished both in Greece and Spain from the marketing year 2008/09.

157. The EC also confirmed that Regulation (EC) 361/2008 integrates Regulation (EC) 1182/2007 into Regulation (EC) 1234/2007 (the Single CMO). According to the EC, Regulation (EC) 73/2009 is related to Regulation (EC) 1782/2003 on SPS and while the first one (EC 361/2008) relates to the organisation of the Single CMO, the second one (EC 73/2009) relates only to SPS, thus the two regulations are not linked. The EC also stated that, in particular, articles 103a and 103d of Regulation (EC) 361/2008 are general provisions for all sectors aimed at encouraging farmers to create producer groups and have no relevance with the present investigation.

158. In its letter of 19 June 2009, the Ministry also requested information from the EC on the extent to which the support schemes for farmers (including peach growers) under the SPS, as outlined in EC 73/2009, conferred a benefit to the peach processors and would therefore constitute a subsidy under the SCM Agreement. The Ministry queried whether the payment entitlements under the SPS would flow through to the EC canned peach processors who will be in a position to take advantage of these support schemes in pricing their exported products to New Zealand and therefore whether there is a "benefit" conferred on the processors. The Ministry also referred the EC to its letter of 6 May 2009 where the EC stated that the SPS has been notified as compliant with the criteria of paragraph 6 of Annex 2 of the WTO Agreement on Agriculture and that in no way does the SPS, as a decoupled payment by definition, have the effect of providing price support to producers.

159. In its letter of 26 June 2009, the EC again informed the Ministry that the SPS is not relevant to this review because it is a decoupled payment in the sense of

paragraph 6 of Annex 2 of the WTO Agreement on Agriculture and that it confers no benefit to the processors of canned peaches. More specifically, the EC stated that peaches purchased from growers by the peach processors are at market prices. Therefore, the EC said the peach processors do not take advantage of the payment entitlements to the peach growers under the SPS and consequently no pass-through benefit is transferred to them. The EC stated that, as a WTO green box measure, the SPS has no impact on production or trade. The SPS is an income support to peach farmers, totally decoupled from what the farmer is producing. It does not, therefore, confer a benefit to processors of canned peaches, and consequently, it has no effect on prices. The EC underlined that in its opinion, in the absence of reasoning and positive evidence explaining how a support provided to the farmers irrespective of their production (in terms of both quantity and of type of product) has conferred a benefit to the processors of canned peaches, no pass-through benefit can be found. According to the EC, it can not be asked to rebut mere allegations, as this would lead to a reversal of the burden of proof.

HW's Position on the SPS and the Decoupled payments under the SPS

160. In an email dated 30 June 2009, HW made a number of submissions on the contents of the EC's letter of 26 June 2009 and in particular on the fact that the EC had shifted from granting coupled payments under the fruit and vegetable sector to granting decoupled payments under the SPS. HW noted in particular that " … whether or not a payment is coupled or decoupled is irrelevant. What is relevant is whether or not it falls within the definition of subsidy in New Zealand's legislation". HW also considered the question of "pass-through" of the subsidy from the peach growers to the peach processors to be irrelevant because, according to HW, the Ministry has already found in previous investigations and reviews that there is a "pass-through" element. HW stated that the SPS gives similar benefits to growers and processors to the previous scheme and it is naive to expect that there are no price related benefits to processors under the present SPS. According to HW, the fact that support is paid to farmers irrespective of their production is also irrelevant because the issue is about peach growers receiving support and that support is little different from the production aid received in previous years.

161. In support of its claims, HW referred the Ministry to a report on the CAP Health Check website where research conducted by the Teagasc Rural Economy Research Centre is reported as follows:

> However, the SFP has only been in force since 2005 at the earliest. To date, we can only make inferences about the production effects of the SFP based on survey data, where farmers were asked about their production plans post-decoupling. These surveys (see Hennessy & Thorne, 2005 : Coleman & Harvey, 2004) showed that a significant number of farmers plan to use their decoupled payments to continue or expand non-viable production. … [T]heir conclusion is that the single farm payment maintains a strong effect on farm behaviour, even if lower than previous coupled direct payments. [SFP = Single Farm Payment]*
>
> * According to the EC's website, the SPS is sometimes referred to as the Single Farm Payment.

162. HW stated that the peach farmers can pass on the benefits of the subsidy to its customers through price related benefits. HW stated that because the SPS is an income support to farmers then presumably in the absence of this income support,

the farmer would have to raise additional revenue (through higher prices). Obviously, according to HW, the income support allows the farmer to sell peaches at a price which in turn then allows the processor to purchase the subsidised raw material in order to manufacture canned peaches at a price which is competitive with other manufacturers of canned peaches in the (world) market. Without the aid, processed peaches from the EU would not be able to compete on the world market and the industry would not be viable. HW concluded its email by noting that there is not enough evidence in the information supplied by the EC in its letter of 26 June 2009 to exclude the fact that the Common Market Organisation allows additional benefits to be paid to growers of peaches.

Existence of a Subsidy

163. The Ministry agrees with HW in that the issue at stake is whether or not a payment granted falls within the definition of a subsidy as defined under the New Zealand legislation. In this case, the New Zealand legislation is the Dumping and Countervailing Duties Act 1988. The relevant section of the Act (including a definition of the word 'subsidy') is noted at the beginning of section 4 of this report. However, in order to constitute a 'subsidy' within the meaning of the Act, and also in within the terms of the SCM Agreement, the Ministry considers that the program or subsidy payment must confer a benefit on the subject goods exported to New Zealand.

Up-steam ("Pass-through") subsidies

164. Articles 10 and 32 of the SCM Agreement refer to Article VI of GATT 1994, which provides:

> No countervailing duty shall be levied on any product of the territory of a Member imported into the territory of another Member in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production, or export of such a product in the country of origin or exportation … . The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export or any merchandise.

165. Subsidies bestowed indirectly, as referred to in Article VI of the GATT 1994 implies that financial contributions by the government to the production of *inputs* used in the manufacture of products subject to an investigation are not excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the processed products.

166. An "upstream" (or "pass-through") subsidy refers to a subsidy (non-export) paid in respect of an input product used in the production of the goods in question. Countervailing action may be taken where the benefit received by the upstream recipient of the subsidy passed through, in whole or in part, to the downstream purchaser. Where it is established that the price of the input product reflects the benefit of the subsidy, in whole or in part, received by the upstream supplier, then the downstream purchaser is taken to have received a benefit from the subsidy. In this respect, it cannot be assumed that the whole of the benefit of the subsidy received by the input supplier always equates with the benefit that is received by the purchaser, being the producer of the final goods that are the subject of the

countervailing application. The exception to this is related party dealings. Where the inputs are purchased from a related upstream supplier, the Ministry will likely infer that the whole of the input subsidy has been "passed through" to the related downstream purchasers.

The determination of a "pass-through" benefit in the 2003 Review

167. As mentioned in paragraph 56 above, at the time of the original investigation, aid was provided to the manufacturers (or processors) of canned peaches. The programme was changed in 2000 whereby aid was provided directly to the growers of raw peaches via Producer Organisations (POs), which are groupings of individual growers. In the 2003 subsidy review, the Ministry concluded that while the aid was provided directly to the growers, rather than the processors, the new programme clearly involved a financial contribution by a government to the growers of peaches used in the manufacture of the subject goods that are exported to New Zealand. The issue, however, was whether this financial contribution conferred a benefit on the processors who exported the subject goods to New Zealand, and therefore whether a subsidy existed in terms of section 3(1) of the Act and Article 1 of the SCM Agreement. The review team concluded that the programme did confer an indirect benefit on the processors who exported the subject goods to New Zealand. This indirect benefit occurred through price reductions for the raw peaches used in the manufacture of the subject goods processed and exported to New Zealand. This conclusion was based on the following reasons:

- A comparison of the price of raw peaches before and after the new scheme was introduced in 2001/2 showed that there was no real increase in prices which suggested that there was still a benefit conferred on processors from the aid scheme (if there was no longer any benefit conferred on processors by the aid now paid to growers, a comparison of prices should have shown a rise in the price paid by processors under the new scheme approximately equal to the amount of the aid);

- The Australian Customs Service (ACS) had recently conducted a review of the countervailing duties imposed on canned peaches from Greece which concluded that under the new scheme a countervailing subsidy continued to be provided by the EC, albeit indirectly, for the processing of peaches even though the subsidy was paid to the peach growers;

- The subsidy is targeted at fruit destined for processing but not at peaches grown for the fresh fruit market suggesting that the subsidy is intended to aid not only the growers but also down-stream processors.

"Pass-through" Analysis in Recent WTO Jurisprudence

168. In the 2008 case *Mexico – Olive Oil from the EC*[24], the Panel examined the history of "pass-through" analysis in WTO law. According to the Panel, the *US* –

[24] Report of the Panel –- Mexico – Definitive countervailing Measures on Olive Oil from the European Communities - WT/DS341/R – Adopted 21 October, 2008.

Canadian Pork[25] (determined under the GATT 1947) and *US – Softwood Lumber IV*[26] (determined under the WTO dispute settlement mechanism) cases have established that a pass-through analysis is required in circumstances in which both of the following conditions are present: (i) a subsidy is provided in respect of a product that is an input in the processed, imported product that is the subject of the countervailing investigation and (ii) the producer of the input product and the producer of the imported product subject to the countervail investigation are unrelated.

169. The Panel in *Mexico – Olive Oil from the EC* considered that the legal basis for conducting a "pass-through" test is found in Art. VI:3 of the GATT 1994 and Art. 10 of the SCM Agreement. As the Appellate Body stated in *US – Softwood Lumber IV* , "because Article VI:3 permits *offsetting*, through countervailing duties, no more than the subsidy determined to have been granted, … on the manufacture or production .. of such product, it follows that Members must not impose duties to offset an amount of the input subsidy that has not passed through to the countervailed processed products."

The determination of a "pass-through" benefit in the current Review

170. The demonstration of the "pass-through" is normally undertaken by examining the price of the input product between the vendor and purchaser. To determine whether the input has been purchased on terms that are more favourable than those available in the market, a comparison of the purchase price of the subsidised input should be made with the price of a comparable, unsubsidised input product. This usually provides a good indication of whether there has been any "pass-through" benefit to the final exported product as a result of the subsidy being granted on the input product and if so, its extent.

171. In the present review, there was a lack of cooperation from the Spanish and Greek manufacturers of canned peaches in response to the Ministry's Foreign Manufacturers Questionnaire. No indication was provided by these exporters about why they chose not to co-operate. As a result, the Ministry was unable to obtain information from these producers on their selling prices of canned peaches and also the costs of their inputs (including raw peaches). Access to this information may have enabled the Ministry to conduct a "pass-through" analysis on the basis of a comparison of the price these producers are paying for their raw peaches (supplied

[25] United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada – GATT BISD (38th Supp) (1991) – 11 July, 1991.

[26] Report of the Panel – United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada: Recourse by Canada to Article 21.5 - WT/DS257/RW – Circulated 1 August, 2005. Report of the Appellate Body - WT/DS257/AB/RW – Adopted 20 December 2005. The Panel and the Appellate Body both found that Art. 10 (footnote 36) of the SCM Agreement contained the requirement for investigating authorities to conduct a "pass-through" analysis. The Appellate Body emphasised that in the absence of a pass-through analysis, it could not be shown that the essential elements of the subsidy definition in Article 1 of the SCM Agreement are present in respect of the *processed product*, such that the right to impose a countervailing duty on the processed product for the purpose of offsetting an input subsidy … would not have been established in accordance with Article VI:3 of the GATT 1947, and consequently, would also not have been in accordance with Articles 10 and 32.1 of the SCM Agreement.

by peach growers who are granted the decoupled payments under the SPS) with the price of a comparable, unsubsidised input product. However, even if access to this information was possible, it is likely the Ministry would have experienced a number of problems in conducting a "pass-through" analysis on the basis of such a price comparison. Such problems would likely have included:

- It is questionable whether any decrease in the subsidy paid to the peach growers as a result of shifting to the SPS scheme would have had time to "pass-though" to the prices paid by the peach processors, from the date the Spanish and Greek peach growers first started receiving the decoupled payments under the SPS. The EC claim that peach growers in both Spain and Greece began receiving direct payment support under the SPS from 1 January 2008, therefore, there may not have been enough time for the decrease in the subsidy payment to show up in the prices paid by the processors even if the Ministry was able to source evidence of prices paid by the processors since 1 January 2008;

- It is doubtful the Ministry would have obtained any reliable and useful pricing information on a comparable, unsubsidised product (i.e. where subsidies under the SPS have not been paid on the input). This is because it is very likely that most, if not all growers in Greece and Spain would be taking advantage of the decoupled payments when selling their peaches to the peach processors, making it difficult to obtain a comparable, unsubsidised price. This also raises the issue of how it could be determined conclusively that such a sale, if obtained, was of an unsubsidised product;

- In establishing an unsubsidised price, it would likely have been necessary to make certain adjustments to the unsubsidised price to account for any differences affecting the comparison with the subsidised input price. Such differences would normally include sales occurring at different times, physical characteristics of the goods being compared, delivery terms and taxes. Again, it is doubtful that the Ministry would have obtained such information and been in a position to verify with certainly that such adjustments were appropriate;

- The Ministry would have needed to ensure that neither the subsidised input nor the unsubsidised input was purchased from related upstream suppliers. If the comparison took place using non arms-length transactions, this would cast doubt on whether the price paid was of fair market value. Again, it is doubtful that if the Ministry did obtain comparative pricing information it would be in a position to verify with certainty that the prices were arms-length transactions.

172. As an alternative, in the absence of comparable unsubsidised transactions, the prices paid by producers for the input can be compared before and after there has been a change in the subsidy regime. As referred to above, this exercise was undertaken in the 2003 review as part of the Ministry's analysis of whether there was an indirect benefit conferred on peach processors under the scheme that was operating at the time. A comparison of the price of raw peaches before and after the new scheme was introduced in 2001 showed that there was no real increase in

prices which suggested that there was still an indirect benefit conferred from the aid scheme, on processors.

173. In the present review, the Ministry would ideally have liked to have conducted the same exercise by comparing the prices of raw peaches paid by the processors before and after Greece and Spain transitioned to the SPS scheme in 1 January 2008. However, it is likely the Ministry would have faced many of the same problems collecting and analysing the information on which to base this comparison, as are noted in paragraph 171 above. Again, the lack of cooperation from the Greek and Spanish exporters also prevented the Ministry from obtaining some useful information on any change in raw peach prices paid by these firms both before and after shifting to the SPS and whether they were incorporating these price changes into their domestic and export selling prices. The Ministry would have also faced the additional problem that comparing prices over time does not allow for any change in the supply and demand of raw peaches that is likely to have affected prices. In order for the price exercise comparison to be meaningful, the Ministry would have needed to analyse the extent to which the supply and demand for raw peaches and processed peaches may have affected the prices.

174. The Ministry also has doubts that the pricing information necessary for the Ministry to make its comparison analysis would have been available, in any event. In the 2003 review, Producer Organisations (POs), which are groupings of individual growers, were responsible for negotiating a raw peach selling price with their grower members. The PO's lodge applications for aid with the relevant administering agency of the EC member state, along with a copy of the contract(s) it has signed with the processor for supply of raw peaches. The contract stipulated the details of the sale including the purchase price of peaches. Under the SPS, the Ministry doubts that the member states would have a need to collect such information. Because the decoupled aid payments under the SPS operate on a different basis to the aid payments under the former aid scheme, it is likely that an administering agency of the EC member state would have no need to collect this information from the POs.

175. In order to attempt to gauge the extent of any price increase in raw peaches produced in the EU, both before and after the shift to the SPS, the Ministry sourced export statistics for preserved peaches from the Trade Map database, which is operated by the International Trade Centre.[27] While the database includes export price statistics from all countries (including EU member countries), the current information available from the website includes information until the end of 2007 only. As the shift to the SPS was on 1 January 2008, the information sourced from this database was of no use in gauging price changes since 1 January 2008.

176. The Ministry also examined shipments of EC peaches from Spain to New Zealand since the beginning of 2006 in order to gauge the extent, if any, there had been a price increase per unit in the FOB value of the goods, especially since 1

[27] www.trademap.org. Trademap covers trade flows for 224 countries for the last 6 years including 2007. In relation to preserved peaches, the database provides export information at the six digit level of the international harmonized system, with values at the FOB level.

January 2008. The Ministry chose Spain because the vast majority of shipments entering New Zealand over the last three years from the EU were from Spain which enabled the Ministry to conduct a reliable trend analysis using these shipments. The Ministry considered that in the absence of information on EU peach prices sold within the EU or exported to all countries, the information on export prices to New Zealand could provide a useful indication of whether the prices have been affected by the shift to the SPS program and more specifically whether there had been a "pass-through" of the decoupled payments under the SPS to the finished products exported to New Zealand.

177. The results of the analysis showed that there was a large increase in the average per unit price of Spanish canned peaches exported to New Zealand from the first half of 2007 to the first half of 2008, representing a 15 cent (EUR) increase per kilogram over this one year period. However, the Ministry considers that caution is required in drawing conclusions from this price comparison exercise. The EC informed the Ministry that Greece and Spain shifted to the decoupled payments under the SPS scheme from 1 January 2008. With the northern hemisphere peach harvesting and canning season being in the second half of the year, it is unlikely that any reduction in subsidy payment under the new scheme to the growers would be reflected in higher selling prices of canned peaches until the 2008 harvest and canning season has been completed. The large increase in the average per kilogram selling price of canned peach exported from Spain, from the first half of 2007 to the first half of 2008, could be due to a number of other factors including an increase in the price of the raw materials (other than raw peaches) which make up the total cost of canned peaches.

178. What is of particular interest to the Ministry, however, is the further significant average per unit price increase in canned peaches exported from Spain to New Zealand, between the first half of 2008 and the second half of 2008. The export data shows that there was a further 8 cent (EUR) increase per kilogram over this period. While the Ministry must be cautious in drawing conclusions regarding the reason for this large price increase, it is likely that any reduction in subsidy payment to the EU peach growers as a result of shifting to the SPS scheme in January 2008 would be reflected in the selling prices of canned peaches in the second half of 2008. The second large increase in the price of canned peaches exported from Spain to New Zealand coincides with the time lag that would be expected from the time of the shift to the SPS to when any reduction in subsidy payment is likely to be reflected in the price of processed peaches. Also of note is that the shipments of canned peaches from Spain which the Ministry used to analyse any price increases were imported towards the end of 2008 giving further credence to the possibility that the average price increase is due to the reduction in subsidy payments as a result of the peach growers shifting to the SPS scheme.

179. WTO case law shows that a "pass-through" analysis is required in circumstances where a subsidy is provided in respect of a product that is an input in the processed, imported product that is the subject of the countervailing investigation and where the producer of the input product and the producer of the imported product subject to the countervail investigation, are unrelated. Unless such an analysis is undertaken, it can not be shown that the essential elements of the subsidy definition in Article 1 of the SCM Agreement are present in respect of the

processed product. In this situation the right to impose a countervailing duty on the processed product for the purpose of offsetting an input subsidy can not be established under the SCM Agreement.

180. The Ministry would normally conduct a "pass-through" analysis on the basis of a comparison of the purchase price of the subsidised input with the price of a comparable, unsubsidised input product. This is in order to determine whether or not, and the extent of any "pass-through" benefit to the final exported product as a result of the subsidy being granted on the input product. In the present case, for the reasons outlined above, the Ministry is not satisfied that such a "pass-through" analysis would have been possible or if it had been possible that it would have provided a reliable and accurate picture of whether there has been any "pass-through" benefit in the sale of the input product between the vendor and purchaser and eventually the export sale of the processed product to New Zealand. Therefore, in order to make a judgment on the whether there is a "pass-through" benefit, the relevant EC regulation (including the specific subsidy schemes) will need to be analysed in more detail.

The EC Regulations in question

181. In its letter of 6 May 2009, the EC noted that Council Regulation (EC) 73/2009 provides the most recent reforms in relation to the direct support schemes available under the Single CMO (Common Market Organisation). Council Regulation (EC) 73/2009 is also known as "The Health Check" and it establishes common rules for direct support schemes for farmers under the common agricultural policy (CAP) and establishing certain support schemes for farmers. EC 73/2009 repeals Council Regulation (EC) 1782/2003 (the former regulation establishing common rules for direct support schemes for farmers under the CAP). According to the introductory notes to EC 73/2009, EC1782/2003 needed to be repealed in order to adjust certain elements of the support mechanisms under the SPS, in particular the decoupling of direct support which was extended and simplified.

182. The EC claim that the SPS is the new cornerstone of support for agriculture in the EU. According to the preamble notes to EC 73/2009, the decoupling of direct support and the introduction of the single payment scheme (SPS) were essential elements of the process of reforming the CAP. The EC said that experience gained through the application of 1782/2003 together with the evolution of the market situation indicates that schemes which were kept outside the SPS in 2003 can now be integrated into that scheme to promote more market-orientated and sustainable agriculture.

183. Under EC 73/2009, Greece and Spain (as confirmed by the EC) have moved from administering a coupled payment system to administering a decoupled system of subsidies under the SPS. The EC informed the Ministry that in respect of the fruit and vegetable sector, Spain and Greece did exclude some fruit and vegetable payment from the SPS, however, they did not exclude peaches, for which the direct payment takes the form of support under the SPS. While there was the option for Member states to transition certain of their fruit and vegetable sectors to the SPS gradually (through transitional payments), in respect of peaches, both countries moved to the SPS as from 1 January 2008.

De-coupling of subsidy payments

184. There has been much written about the "decoupling" of subsidy payments over recent years and the effect these payments have had on production volume and prices. Both the United States (through its 2002 Farm Bill) and the EC (through its CAP reforms) have looked to decouple the subsidy payments to much of their agricultural sectors over recent years.

185. Decoupling can be described as the severing of ties between the provision of support measures and production. Therefore, rather than providing subsidy payments on the basis of production volume (as is the situation with coupled payments), subsidy payments are provided, for example, on the basis of hectares used to cultivate the particular agricultural product. Therefore, there is a shift in support from production and prices to direct income support measures.

186. The intention of the WTO drafters was to allow decoupled support because it severed the link between production and support. Decoupled income support (or decoupling) is addressed in Annex 2 of the Agreement on Agriculture and is designated as one of a number of policy specific domestic support programs that are not subject to the domestic support reduction commitments set out in each Member's Schedule. The Agreement on Agriculture permits decoupling income support programs that have no or, at most, minimal trade-distorting effects and no effect on production. Thus, the WTO implicitly recognises that it is possible to introduce or maintain non-trade or production distorting decoupled support programs or, at least, to implement programs that have, at most, minimal trade or production-distorting effects.

187. The US and the EC have taken the position that their decoupling programs do not affect either trade or production because they de-link support from market decisions, i.e. their producers are exposed to market conditions and will make production decisions to respond to the market rather than respond to the support program. Furthermore, under the Doha Round of WTO trade negotiations both countries were under pressure to reform their agricultural policies and the way they operate their subsidy schemes (including the amount of subsidies offered). By decoupling their payment schemes, these countries would effectively be shifting much of their subsidy payments from the more trade distorting subsidy-type scheme (or 'amber box'), which is subject to reduction commitments under each Member's schedule, into 'blue box' and 'green box' programs, primarily to avoid reductions. In return for reducing their support reduction commitments, both countries are seeking concessions on market access and in other aspects of the negotiations from other participants.

188. Annex 2(6) of the Agreement on Agriculture provides that to be deemed a 'green box' and therefore be exempt from reduction commitments, decoupled support must meet the conditions stipulated. Such stipulations include, for example, that the amount of such payments "shall not be related to, or based on, the type or volume of production undertaken by the producer in any year after the base period…" and "shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period". Both the US and the EC claim that the introduction of the SPS and decoupling were made in order to de-link production from support so that farmers

would be free to make production decisions that respond to the market. In this respect, the Ministry notes that the EC stated in its letter to the Ministry of 26 June 2009, that "SPS is decoupled and therefore not linked with production. Under SPS, farmers can choose their agricultural activity and would even be entitled to SPS for only maintaining land in good condition without any production; SPS does not, therefore encourage the production of peaches and it is therefore non-trade distorting."

189. A selection of the literature examined by the Ministry has revealed the following further information about "decoupling" support schemes:

- The economic theory on decoupled payments is that the total acreage of major crops is expected to fall in response to a decline in the prices of all major crops, in addition to observing changes in the crop mix if the prices of some crops change more than others. Hence, supply of the major crops should be more responsive to changes in market-driven price levels when payments are decoupled.

- With respect to *policy design*, "only subsidies that do not depend on current prices, factor use, or production can be considered fully decoupled from farm production decisions" (Burfisher and Hopkins, 2003);

- With reference to *payment impact*, "A policy is fully decoupled if it 'does not influence production decisions of farmers receiving payments, and if it permits free market determination of prices.'" (OECD, 2000, quoting Cahill, 1997);

- It is considered that de-coupling support measures allows authorities to manage more effectively their budget rendering expenditure on agricultural support more transparent. Furthermore, fully decoupled policies may be friendlier to the environment not only because they are directly linked to environmental standards but also because reduced agricultural prices facilitate a less intensive use of non-renewable resources.

- The WTO negotiators believe that support programs that de-link production decisions from support through decoupling would not influence producer decisions on production and marketing of agricultural products. The WTO website notes that "The Green box also provides for the use of direct payments to producers which are not linked to production decisions. i.e. although the farmer receives a payment from the government, this payment does not influence the type or volume of agricultural production ("decoupling"). Thus the WTO rules are clear. Only those decoupled income support programs which do not distort trade, or at most have minimal trade distorting effects; and which do not affect production, are not subject to support reduction commitments under the Agreement on Agriculture if they fail to meet these tests.

- The EC has stated that it has notified the SPS as compliant with the criteria of paragraph 6 of Annex 2 of the WTO Agriculture Agreement, thereby exempting it from its reduction commitments, and also that it conforms to paragraph 1(b) of

Annex 2[28]. The EC's notification to the WTO in terms of Annex 2 of the Agreement on Agriculture itself implies that the decoupled payments under the SPS have been structured to have no or, at most, minimal trade-distorting effects and no effect on production.

- Certain WTO members and commentators from academic and non-governmental organisations have been questioning the "greenness" (less trade-distorting) of US and EC programs, and "decoupling" overall for several years. Critics of the programs consider that decoupled income support programs are simply one more form of support to ongoing production. Since money is fungible, any support provided to producers will be used to support production. The effect will be to create a guaranteed income base to improve cash flows, to reduce risk and insurance costs, to offset the cost of marketing and to offset the cost of inputs (seeds, water etc) with the net result of all these programs being to support agricultural production. Such critics claim that the only way to effectively achieve the objective of severing the link between production and support is to require that producers who accept decoupled support be required to cease or abandon production and be precluded from selling or renting their land for agricultural production. This would reduce production and help to increase prices and would make market access negotiations more meaningful.

Conclusion

190. In order for the Ministry to offset a benefit incurred by a subsidy program by imposing countervailing duties, any benefit incurred must be linked to the product which is exported to New Zealand and therefore subject to the countervailing duties. In the case of an up-stream (or "pass-through") subsidy, WTO case law stipulates clearly that when an up-steam producer receives a subsidy, it can not simply be assumed that the whole or even part of the benefit of that subsidy received by that producer is passed through to the down-stream purchaser (being the producer of the final product that is the subject of the countervailing duty). In the present case, the issue is whether benefits to the EU peach growers resulting from the 'decoupled' payments provided to the growers under the SPS scheme are likely to be "passed on" to the peach processors.

191. The Ministry experienced a number of difficulties in attempting to conduct a "pass-through" analysis in the present case. The lack of cooperation from the Greek and Spanish producers of canned peaches to New Zealand meant that there was a lack of pricing information on which it could base its findings. While no explanation was provided by these exporters about why they choose not to cooperate in the review, one reason may be that they were under the impression that because Spain and Greece had shifted to the SPS, the peach growers in these countries were no longer receiving the Aid to Growers (which they were entitled to under the old scheme) and that the decoupled payments the growers were entitled to under the

[28] Paragraph 1(b) of Annex 2 of the Agreement on Agriculture states that "[T]he support in question shall not have the effect of providing price support to producers". This is a condition which the domestic support measure must conform to in order to be exempted from a Member's domestic support reduction commitments. According to the EC, the SPS as a decoupled payment by definition, does not have the effect of providing price support to producers.

SPS conferred no benefit to the processors. Therefore, these exporters may have been under the impression that there was no issue at stake and therefore no need to reply to the Ministry's questionnaire. In this respect, the Ministry notes that in a letter to the Ministry dated 10 February 2009, the Greek Canners Association stated that since 2001, Greek factories are not receiving any kind of production aid and that since January 1 2008, even the farmers (that are producing cling peaches) are not receiving any aid from the EU or the Greek State).

192. In any event, it is doubtful that even if the Ministry was provided with pricing information from the Greek and Spanish exporters to New Zealand, the Ministry would have been in a position to draw any meaningful conclusions from it. The reasons for this are outlined in paragraph 171 above. Most importantly, the Ministry considers it likely that most, if not all growers in Greece and Spain would be taking advantage of the decoupled payments when selling their peaches to the peach processors. This would make it difficult to obtain an unsubsidised price which could be used to compare with the subsidised price for the purpose of determining the extent of any "pass-through" benefit. The pricing information the Ministry was able to obtain in the review showed that the average export price of canned peaches exported from Spain to New Zealand since the Spanish peach growers moved to the SPS has increased sharply. While the Ministry must be cautious in linking the removal of the coupled subsidy payments under the former Aid to Growers scheme to the increase in export prices to New Zealand, an upwards price movement would be expected if there was no benefit pass-through of the subsidy payments received by the Spanish peach growers under the SPS scheme to the peach processors.

193. An analysis of the relevant EC regulations, the information supplied by the EC on the relevant EC regulations and programs and the literature does suggest that the SPS scheme, including the decoupled payments, has been inherently structured in a way so that the payments under the scheme do not influence production decisions of farmers receiving payments, and to permit a free market determination of prices. There is some literature on the decoupling of subsidy payments which is sceptical about the extent to which decoupled payments are neutral in relation to trade distorting effects on production and prices. The decoupled subsidy payments under the SPS do appear, however, to have been structured with the aim of promoting more market orientated and sustainable agriculture and to have either no or at most minimal trade distorting effects and minimal effects on production and prices.

194. The current subsidy scheme is certainly much less trade distorting than the coupled payments under the old scheme which were granted on the basis of production volume and which the Ministry considered conferred an indirect benefit enabling the Spanish and Greek canned peach producers to lower their export prices to New Zealand. The extent to which there has been a change in the design of a subsidy scheme alone is an indication of whether or not a "pass-through" benefit has been conferred in terms of Article 1.1(b) of the SCM Agreement to the Greek and Spanish processors. In this respect, the Ministry notes a particular quote from a 'Foodnews' article titled 'Spanish and Greek peach harvest complete'.[29] 'Foodnews' sourced its information from the EKE Greek Canners Association. In the article Mr

[29] http://royalfoodimport.blogspot.com/2008/09/spanish-and-greek-peach-harvest.html.

Costas Apostolou of the Greek Canning Association (EKE) stated that "[T]he decoupling system has caused some concern to the Greek canning industry, as growers walk away from peach cultivation, presumably choosing more lucrative crops as is so prevalent in many countries these days." The statement suggests that peach growers under the SPS scheme now have to produce to market demand, indicating that it is less likely that any benefits they are receiving under the SPS are being "passed-on" to the processors.

195. The Ministry also notes that all peach growers (rather than only those growers that supply their peaches for processing) appear to be eligible for the decoupled payments under the SPS. The requirement to supply their peaches for processing was an important requirement of the former Aid to Growers scheme when that scheme replaced the original EU processing aid scheme in 2000. The fact that an important requirement of the Aid to Growers scheme was that the peaches had to be supplied for processing was taken into account by the Ministry in its determination that there was an indirect benefit to the peach processors resulting from that scheme. Under the SPS there is no such requirement, which provides a useful indication that the purpose of the SPS and the decoupled payments under the scheme is not to favour processors and therefore there is less likely to be a "pass-through" benefit to the processors.

196. In making its conclusion on whether the program and payments in question are likely conferring a "pass-through" benefit to processors in the pricing of their exports of canned peaches to New Zealand, the Ministry notes the WTO decision in *US – Carbon Steel.* In particular, the Ministry notes the Appellate Body's comments relating to Article 21.3 of the SCM Agreement where it stated:

> [T]ermination of a countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would "be likely to lead to continuation or recurrence of subsidisation and injury"

197. For the reasons outlined above and on the basis of its analysis of the information collected in the review, the Ministry is unable to make a positive determination that peach processors in the EU are likely to be receiving a "pass-through" benefit in respect of the subsidies paid to growers under the SPS. While the Ministry's analyse has concentrated on the peach industries in Spain and Greece (by far the most significant peach growing EU member states), there remains the possibility of other EU states having not transitioned to the SPS. In this case, the peach growers in these states are likely to still be entitled to coupled payments under the transitional payment scheme. However, the transitional payments are designed to be phased out over time and the Ministry also notes that there have been no imports of canned peaches into New Zealand over recent years from any EU member state other than Greece and Spain. On this basis, the Ministry doubts that imports from EU countries other than Spain and Greece will commence even if the current countervailing duties were removed, as Spain and Greece will likely remain the two most price-competitive EU producers of canned peaches. On the basis of the totality of the information gathered during the review, the Ministry is unable to conclude that the revocation of the countervailing duty on imports of canned peaches from the EU would be likely to lead to a continuation or recurrence of subsidisation through the schemes examined in this review.

4.6 Conclusions relating to subsidisation

198. The Ministry concludes that the subject goods imported into New Zealand are no longer subsidised and there is not likely to be recurrence of subsidisation in the foreseeable future, should the duties be removed.

5. Material Injury

5.1 Injury in a Review

199. The basis for considering material injury is set out in section 8(1) of the Act. The Ministry interprets section 8 to mean that injury is to be considered in the context of the impact on the industry arising from the volume of the subsidised goods and their effect on prices.

200. In considering injury in a subsidy “sunset” review, where the subject goods are currently being subsidised, the Ministry examines whether the removal of the countervailing duty would be likely to lead to a recurrence of injury. In section 4 above, it was concluded that the subject goods imported into New Zealand are no longer subsidised and that there is not likely to be a recurrence of subsidisation in the foreseeable future, should the duties be removed. On the basis that there is not likely to be a recurrence of subsidisation, if the duties are removed, the Ministry considers that any injury or likely recurrence of injury can not be attributable to subsidised subject goods.

5.2 Conclusions Relating to Injury

201. Because the subject goods are no longer subsidised and the Ministry has found that there is unlikely to be a recurrence of subsidisation in the foreseeable future, should the current duties be removed, there cannot be any injury or recurrence of injury as a result of subsidised imports. Consequently, the Ministry considers that there is no need to analyse the likelihood of a recurrence of injury.

6. Conclusions

202. On the basis of the information available, the Ministry concludes that if the current countervailing duties are removed there is not a likelihood of a continuation or recurrence of subsidisation causing material injury to the New Zealand industry, in the foreseeable future.

7. Recommendations

203. It is recommended on the basis of the information obtained during the course of the review that:

1. The Chief Executive of the Ministry determine pursuant to section 14(8) of the Act that, in relation to the importation or intended importation of canned peaches of the type under review from the EU into New Zealand, if countervailing duties were to be removed:

   (a) there is not a likelihood of a continuation or recurrence of subsidisation; and

   (b) by reason thereof there cannot be any material injury to an industry or recurrence of injury as a result of subsidised imports.

2. The Chief Executive of the Ministry sign the attached Gazette notice publicly notifying the completion of this review.

……..

……..

Review Team
Trade Rules, Remedies and Tariffs Group
Ministry of Economic Development

Recommendation Accepted/ Not Accepted

…….

Robin Hill
Chief Advisor, Trade Rules, Remedies and Tariffs Group (*Acting under delegated authority from the Chief Executive of the Ministry of Economic Development)*

Ministry of Economic Development.

Appendix One

204. A full copy of the WTO Subsidy and Countervailing Agreement can be found at:

http://www.wto.org/english/docs_e/legal_e/24-scm.pdf

205. A full copy of the Dumping and Countervailing Duties Act 1988 can be found at:

http://www.legislation.govt.nz/act/public/1988/0158/latest/DLM137948.html?search=ts_act_Dumping_resel&sr=1