Ministry of Economic Development
Manatū Ōhanga

Non-Confidential
Initiation Memorandum

Canned Peaches from South Africa

Dumping and Countervailing Duties Act 1988

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Trade Rules and Remedies

31 May 2007

TABLE OF CONTENTS

1. Application for Review

1. This report assesses an application made by Heinz Watties Ltd (HWL) on 1 May 2007 for a review of anti-dumping duties that currently apply to imports of canned peaches from South Africa.

1.1 Recommendation Summary

2. The report recommends that you should initiate a review of the anti-dumping duties that currently apply to canned peaches from South Africa.

1.2 Background

3. Anti-dumping duties were first imposed on canned peaches from South Africa in August 1996. The duties were reassessed in December 1996 and March 1998. A sunset review was completed in January 2002 that found the duties continued to be necessary to prevent a recurrence of injurious dumping. The duties were reassessed in June 2002 following the completion of a reassessment initiated immediately following the completion of the review.

4. The duties that currently apply will expire on 11 June 2007 unless a review is initiated prior to this date. Reviews that are initiated prior to an anti-dumping duty's expiry are referred to as sunset reviews. If a review is initiated the duties will remain in place pending the outcome of the review.

5. The canned peaches that would be subject to any review that is initiated are described below:

> *Canned peaches (halves, slices and pieces) packed in various concentrations of sugar syrup and in can sizes ranging from 110 grams to 3 kilograms (A10)*

6. Canned peaches imported from South Africa enter New Zealand under tariff item and statistical key 2008.70.09.00L and are subject to the standard tariff of 7 percent. The standard tariff will reduce to 5 percent in July 2008. Customs import data shows, however, that the majority of imports under this tariff item and statistical key since the last review have entered free of import duty under a tariff concession.

1.3 Legislation and Associated Jurisprudence

7. Section 14 of the Dumping and Countervailing Duties Act 1988 (the Act) deals with the imposition, application and duration of anti-dumping duties and states (in part):

> …
>
> (8) The [Chief Executive] may, on his or her own initiative, and shall, where requested to do so by an interested party that submits positive evidence justifying the need for a review, initiate a review of the imposition of anti-dumping duty…in relation to goods and shall complete that review within 180 days of its initiation.
>
> (9) Anti-dumping duty…applying to any goods shall cease to be payable on those goods from the date that is the specified period after–
>
> (a) The date of the final determination made under section 13 of this Act in relation to those goods; or

(b) The date of notice of any reassessment of duty given under subsection (6) of this section, following a review carried out under subsection (8) of this section,–

whichever is the later, unless, at that date, the goods are subject to review under subsection (8) of this section.

(9A) In subsection (9), "specified period" means,-

(a) In the case of goods of Singaporean origin, 3 years; and

(b) In the case of goods of any other origin, 5 years.

…

8. The Act requires that any interested party that requests a review submit positive evidence justifying the need for a review and that when this is provided the Chief Executive shall initiate a review. The Act is determinative in governing how anti-dumping duties should apply in New Zealand and accordingly how reviews are carried out. However where the Act is silent the Ministry turns to its international obligations, as set out in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Agreement) and the associated jurisprudence, for guidance.

9. Article 11 of the Agreement deals with the duration and review of anti-dumping duties and states in Paragraph 3 (in part):

> …any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review…if that review has covered both dumping and injury…), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to the continuation or recurrence of dumping and injury [footnote omitted.]

10. The test outlined in the Agreement is primarily whether the application for review constitutes a duly substantiated request that, without anti-dumping duties on imports of canned peaches from South Africa, there would be a continuation or recurrence of dumping and material injury. The Ministry considers that the test outlined in the Agreement is equivalent to the test set out in the Act, with an additional factor that the Agreement states should be considered, that is, whether the application was submitted a reasonable period of time prior to the expiry of the current duties.

11. The World Trade Organisation Dispute Settlement Panel (Panel) *United States – Sunset Review Of Anti-Dumping Duties On Corrosion-Resistant Carbon Steel Flat Products From Japan*[1] discussed the practice of the United States administration in relation to what is considered a reasonable period of time prior to the expiry of duties. It stated at paragraph 7.20 in regard to the initiation of reviews:

> Section 751(c)(1) of the US Statute requires that five years after the date of publication of an antidumping duty order, the administering authority and the Commission shall conduct a review to determine whether revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping and of material injury.

[1] **World Trade Organisation Dispute Settlement Panel *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* WT/DS244/R 14 August 2003.**

> Section 751(c)(2) provides: "Not later than 30 days before the fifth anniversary of the date described in paragraph (1), the administering authority shall publish in the Federal Register a notice of initiation of a review under this subsection…". Similarly, Section 351.218(a) of the Regulations provides that "…no later than once every five years, the Secretary must determine whether dumping … would be likely to continue or recur…", while section 351.218(c)(1) states that "…No later than 30 days before the fifth anniversary date of an order or suspension of an investigation…the Secretary will publish a notice of initiation of a sunset review…".

12. While the United States uses a self-initiation process for instigating sunset reviews, the Ministry considers that the timeframes it has established as being a reasonable period of time prior to the expiry of the duty would also apply to an application for a review submitted to the investigating authority. The practice of the United States in this regard does not bind the Ministry, but is illustrative of other authorities interpretation of what constitutes a reasonable period of time prior to the expiry of duties, namely 30 days.

13. In the present case the application for a review was submitted by HWL on 1 May 2007, which is 42 days prior to the expiry of the anti-dumping duties that it seeks to have considered in the review. I am satisfied that HWL's submission of a request for a sunset review was done within a reasonable period of time prior to the expiry of the duties.

1.4 Consideration of Evidence Presented

14. The Ministry interprets the requirement of subsection 14(8) of the Act for a review to be initiated when an interested party "…submits positive evidence justifying the need for a review…" as being a requirement for positive evidence of a lesser standard than that required under subsection 10(2) of the Act in respect of new investigations. This interpretation is supported by the international jurisprudence relating to the Agreement.

15. In *United States – Countervailing Duties On Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*[2], which dealt with a sunset review of countervailing duties, the Panel stated at paragraph 8.42:

> …it is clear that, in the absence of an affirmative determination by an investigating authority, [duties] may not be maintained beyond a five-year period. It is also clear that any such determination must be correctly reasoned and based on positive evidence…The initiation of a review is merely the beginning of a process leading to a determination as to whether or not subsidisation and injury are likely to continue or recur. The standards for the initiation of a review – whether on the initiative of an investigating authority or upon request by the domestic industry – in no way prejudge the standards applied by an investigating authority in reaching the substantive determination to be made in that review. In sum, it seems to us that the European Communities' argument is based upon an incorrect equation of the standards for the initiation of a review with those for the substantive determination to be made in a review.

[2] World Trade Organisation Dispute Settlement Panel United States – *Countervailing Duties On Certain Corrosion-Resistant Carbon Steel Flat Products From Germany* WT/DS213/R 3 July 2002.

16. The above excerpt illustrates that the standards an investigating authority, such as the Ministry, must apply in assessing whether a sunset review should be initiated are lesser than those which must be applied in making a substantive determination in any review undertaken. While this case related to the sunset review provisions of the WTO Agreement on Subsidies and Countervailing Measures these provisions are very closely aligned with those of the Agreement and it is reasonable to assume that the same findings would have been made had the case related to the equivalent provisions of the Agreement.

17. The issue of the requisite standard of evidence required to initiate a sunset review was also discussed in the Panel *United States – Sunset Review Of Anti-Dumping Duties On Corrosion-Resistant Carbon Steel Flat Products From Japan*[3] at paragraph 7.27:

> We also note that the text of Article 11.3 does not contain any cross-reference to the evidentiary rules relating to initiation of investigations contained in Article 5.6 of the Anti-dumping Agreement. Therefore, Article 11.3 itself does not explicitly provide that the evidentiary standard of Article 5.6 (or any other evidentiary standard) is applicable to sunset reviews. Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles in the Anti-dumping Agreement, no such cross-reference has been made in the text of Article 11 to Article 5.6. These cross-references (as well as other cross-references in the Anti-dumping Agreement, such as, for example, in Article 12.3) indicate that, when the drafters intended to make a particular provision also applicable in a different context, they did so explicitly. Therefore, their failure to include a cross-reference in the text of Article 11.3, or, for that matter, in any other paragraph of Article 11, to Article 5.6 (or vice versa) demonstrates that they did not intend to make the evidentiary standards of Article 5.6 applicable to sunset reviews. The Appellate Body, in US – Carbon Steel, drew the same conclusion from the non-existence of a cross-reference in Article 21.3 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") to Article 11.6 of that Agreement, which contains the evidentiary standard for the self-initiation of countervailing duty investigations. [footnote omitted]

18. This clearly indicates that the Panel considered the evidentiary standards required for the initiation of a new investigation (as outlined in Paragraph 6 of Article 5 of the Agreement) do not apply for the initiation of sunset reviews and the applicable standard is in fact a lesser one.

19. The Ministry considers, therefore, that while an application for the initiation of a sunset review may cover the information on the factors outlined in Paragraph 2 of Article 5 of the Agreement it is not necessary that all of these matters are addressed or addressed in full for an application to constitute “positive evidence justifying the need for a review”.

1.5 New Zealand Industry Standing

20. The Agreement states that an application for a sunset review must be made by or on behalf of a domestic industry.

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[3] World Trade Organisation Dispute Settlement Panel *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* WT/DS244/R 14 August 2003.

21. Section 3A of the Act defines “industry” as follows:

> 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.

22. “Like goods” are defined in section 3 of the Act as follows:

> Like goods, in relation to any goods, means–
> (a) Other goods that are like those goods in all respects; or
>
> (b) In the absence of goods referred to in paragraph (a) of this definition, goods which have characteristics closely resembling those goods

23. HWL has advised that it produces a range of styles of canned peaches (halves, slices and dices) packed in various media and in a range of sizes. In considering whether it produces goods that are “like” those subject to the anti-dumping duty, HWL has provided an analysis of its production of canned peaches compared with the canned peaches subject to the anti-dumping duty under the headings of physical characteristics, function and usage, pricing, marketing issues and “other” (which covered tariff classification), being the factors normally examined by the Ministry when considering like goods issues.

24. Based on this analysis HWL has submitted that the canned peaches it manufactures have the same or similar physical characteristics, method of manufacture, function, usage, pricing, marketing, and tariff classification and are therefore like goods to the goods subject to the anti-dumping duty.

25. The original investigation and the first sunset review found that HWL produced goods that were like those under investigation and subject to the anti-dumping duty respectively. The information provided by HWL indicates that this situation has not changed.

26. HWL advised in its application that it is the sole New Zealand producer of canned peaches, which was the situation at the time the current anti-dumping duties were imposed and at the time of the first sunset review. No further information has been discovered that contradicts HWL’s statement that it is the sole New Zealand producer of canned peaches.

27. I consider that the information provided as above constitutes positive evidence that there is still in place an “industry” in terms of section 3A of the Act, which consists solely of HWL, and that the request for the initiation of a review therefore constitutes an application made by the New Zealand domestic industry.

1.6 Continuation or Recurrence of Dumping

1.7 Export Price

28. HWL has noted it has not been possible to obtain actual export prices and has instead estimated an export price from Statistics Department INFOS import statistics. This price is based on the average NZD value for duty (VFD) per kilogram for the year ended March 2007 for imports under the tariff item and statistical key that covers the canned peaches subject to the anti-dumping duty. This figure has been converted to South African rand using the average NZ Customs exchange rate for the year ended December 2006. Imports from South Africa over the year ended March 2007 were made only in April, May, October and December 2006, so the use of an average exchange rate for the year ended December 2006 is reasonable.

29. A deduction has been made from this figure for inland freight in South Africa to estimate an ex-factory export price. The deduction for inland freight has been calculated as one percent of the average VFD figure. HWL has noted that it "does not have evidence of this deduction but has included a small amount as an estimate". In the last review inland freight was approximately **xxxx** percent of the FOB price indicating that HWL's estimate is too high. However, the difference between calculating inland on the basis of one percent and **xxxx** percent is negligible when estimated dumping margins are calculated so HWL's figure has been accepted for the purpose of considering whether there is positive evidence in the application that is sufficient to justify the initiation of a review.

30. HWL has compared the export price calculated as above with data provided in a GAIN (Global Agriculture Information Network) report by the US Department of Agriculture Foreign Agricultural Service. This report shows the quantity and value of South Africa's exports of canned peaches in 2005 from which HWL has calculated an average FOB price per kilogram which is close to that of the average VFD price referred to in paragraph 28 above.

1.8 Normal Value

31. HWL has provided a report from Datamonitor on the market for canned fruit in South Africa. Datamonitor is described on its web site as "the world's leading provider of online data, analytic and forecasting platforms for key vertical sectors". The report gives a summary of the market by value and volume for 2000 to 2005 and forecast market size for 2006 to 2010 and shows a steady increase in the actual and forecast size of the market for canned peaches.

32. HWL has provided receipts for 410g and 420g canned peaches purchased in two supermarkets in South Africa and from these prices has calculated an average price per kilogram. HWL has deducted from this price amounts for VAT (at 14 percent) and retail margin (at 15 percent) to estimate an ex-factory normal value. HWL has noted that the deduction for a retail margin is based on its "knowledge of the distribution of preserved peaches". It is reasonable to assume that HWL would have knowledge of retail margins that would allow it make an estimate of a retail margin that is sufficient for the purposes of a review application.

33. HWL has compared the average retail price calculated as per the paragraph above with an average price per kilogram taken from the Datamonitor report. The Datamonitor price is significantly higher than the average retail price calculated from the supermarket purchases. HWL has noted that the Datamonitor price covers all can sizes and commented that the market for the 410g can size could be more competitive than other sizes in South Africa as it is in New Zealand. HWL has also made the same deductions from the average Datamonitor price as were made from the average supermarket retail price to estimate an alternative ex-factory normal value.

1.9 Dumping Margins

34. HWL has compared the export price calculated as above with the two normal values calculated as above. The dumping margins (as a percentage of the export price) are 79 and 149 percent. HWL has noted that these are large margins and commented that "there is no evidence to believe that if South African exports to New Zealand were resumed they would not be dumped".

35. HWL has provided information on an estimated export price and a normal value and has provided other information as a check of the reasonableness of that information. The information provided indicates that canned peaches from South Africa are dumped by significant margins and I consider it constitutes positive evidence of a likely recurrence of dumping should the anti-dumping duty be removed that is sufficient to justify the initiation of a review.

1.10 Continuation or Recurrence of Material Injury

36. HWL has noted that many of the importers and exporters previously involved in exporting canned peaches from South Africa to New Zealand remain active. HWL has submitted that if anti-dumping duties are removed "it is almost without question that these parties would be able to use the unfair advantage of dumped prices to resume substantial imports of canned peaches into New Zealand".

37. HWL has provided details of the value and quantity of preserved peach imports into New Zealand by country for the year ended March 2007. This shows that only a relatively small quantity of preserved peaches were imported from South Africa, representing less than one percent of total imports. HWL has observed that anti-dumping or countervailing duties are in place for imports from China, Greece, South Africa and the European Union and that imports from other countries are at a significantly higher price and do not cause injury to the New Zealand industry.

38. HWL has pointed to the US Department of Agriculture Foreign Agricultural Service GAIN report referred to in paragraph 30 above which shows the South African canned peach industry has an annual capacity of around 100,000 tonnes and that its opening stocks in 2006 alone of nearly 20,000 tonnes are more than double the size of the New Zealand market. HWL has submitted that these surplus stocks would make it extremely easy for traders to source peaches at dumped prices and cause significant injury to the New Zealand industry.

39. HWL has calculated an into New Zealand importer's store price per kilogram based on the average export price from South Africa to all countries in 2005 taken from the US Department of Agriculture Foreign Agricultural Service GAIN report. HWL has compared this price with its average prices for 410g cans which shows significant price undercutting ranging between **xxxx** and **xxxx** percent (as a percentage of HWL's prices).

40. On the basis of its price undercutting calculations HWL has submitted that there would be significant price depression and suppression.

41. HWL has submitted that in all previous investigations the entry of dumped canned peaches at or even above the calculated injurious price has resulted in a loss of market share.

42. HWL has provided a forecast of the sales revenue it considers it would lose should dumped imports return to the New Zealand market. The forecast is based on the sales volumes of its Oak and Watties brands for the year ended March 2007 and assumes that in order to maintain these volumes prices would need to be depressed by the amount of the estimated price undercutting referred to above. This forecast shows a loss of sales revenue amounting to **xxxx** dollars.

43. HWL has not provided information on its sales revenue from canned peaches manufactured and sold in New Zealand against which the relative significance of this loss of revenue can be gauged. However, data provided by HWL in a recent dumping investigation into preserved peaches from China shows that in the year ended April 2006 sales revenue from canned peaches produced by HWL and sold in New Zealand was **xxxx** dollars. The forecast loss of revenue is significant relative to revenue of this order.

44. HWL has said that the loss of sales revenue referred to in the paragraph above will directly impact on its profit and that in addition it will need to **[text deleted due to confidentiality]** to protect its market share. HWL has submitted that a loss of sales and revenue and profits of this magnitude would result in **[Text deleted due to confidentiality]** HWL has also stated this loss of profits is understated as **[Text deleted due to confidentiality]**

45. Information on profits arising from HWL's domestic production and sale of canned peaches has not been provided. Information provided by HWL during the preserved peaches dumping investigation referred to in paragraph 43 above shows a **[Text deleted due to confidentiality]** before interest and tax for the year to April 2006 of **xxxx** dollars. If the forecast loss of revenue translated directly into a loss of profits (which would be the case if prices were depressed such as to keep sales volumes at the same level) it would be significant relative to **[Text deleted due to confidentiality]** of this magnitude.

46. HWL has submitted that the economic impacts set out above will have significant adverse flow-on effects on its return on investments, utilization of production capacity, cash flow, inventories, employment and growth. In particular HWL has

submitted that the removal of duties will leave it with a stockpile of unsold inventory which will in turn result in a reduced need to produce canned peaches in the following season.

47. HWL has noted that the original investigation established a causal link between dumped imports and material injury to the New Zealand industry and that the first sunset review found that there would likely be a recurrence of material injury if the duties were removed. HWL has submitted that with the availability of South African canned peaches for export this causal link remains in place.

48. HWL has provided reasonable evidence of the likely import price into New Zealand of canned peaches from South Africa in the absence of anti-dumping duties. HWL has also made reasonable assumptions about the flow-on effects of such price undercutting and provided estimates quantifying these flow-on effects. I consider this information constitutes positive evidence of a recurrence of material injury should anti-dumping duties be removed that is to justify the initiation of a review.

49. It is noted, however, that the forecast loss of revenue and impact on profits is based on the assumption that sales volumes would be maintained through price depression while at the same time HWL has submitted that the removal of the anti-dumping duties will cause a build of inventory through lost sales. Any review will need to obtain more detailed historical and forecast financial data as a basis for determining whether the removal of the anti-dumping duties would be likely to lead to a recurrence of material injury and consider the consistency of the forecasts on the impact of the removal of the anti-dumping duties between different economic factors.

1.11 Conclusion

50. In order for a review to be initiated the Act requires only a request by an interested party that submits positive evidence justifying the need for a review. The Agreement requires that a duly substantiated request must be made by or on behalf of the domestic industry within a reasonable period of time prior to the expiry of the anti-dumping duties that the expiry would be likely to lead to a continuation or recurrence of dumping and injury.

51. I am satisfied that an application has been made by the domestic industry within a reasonable period prior to the expiry of the duties that contains positive evidence sufficient to justify the initiation of a review.

1.12 Recommendation

52. It is recommended, in accordance with section 14(8) of the Act and acting under delegated authority that you:

a. formally initiate a review of the imposition of anti-dumping duty on canned peaches from South Africa; and
b. sign the attached notice of the initiation of the review for publication in the *Gazette*.

Robin Hill
Chief Advisor
Trade Rules & Remedies
Competition, Trade & Investment

Agreed/Not Agreed

Anne Corrigan
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