

Doomed after Doha? Exploring the Future of Agricultural Trade Regulation

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago, Dunedin, New Zealand.

14 October 2011

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Acknowledgements

A warm thanks is extended to my supervisor, Dr. Tracey Epps, for her assistance and support throughout the writing of this dissertation.

Also, thank you to my mother, Pam Churchman, for reading over the drafts and giving useful comments and advice.

A further thank you to both Ken Geard and Catherine Graham, for agreeing to let me interview them, and offering useful information from their personal experiences in the field of international trade.

Finally, thanks to everyone else who offered suggestions and ideas to help enhance this dissertation along the way.

Table of Abbreviations

AOA – Agreement on Agriculture

APEC – Asia-Pacific Economic Partnership

CAP – Common Agricultural Policy

DEIP – Dairy Export Incentive Program

ECG – Export Credit Group

EU – European Union

FAO – Food and Agriculture Organization

FTA – Free Trade Agreement

HS – Harmonized Commodity Description and Coding System

GATT – General Agreement on Tariffs and Trade

GDP – Gross Domestic Product

LDC – Least Developed Country

OECD – Organisation for Economic Cooperation and Development

TPA – Trade Promotion Authority

UNCTAD – United Nations Conference on Trade and Development

WTO – World Trade Organization

US – United States of America

Abstract:

The use of export subsidies in agricultural trade continues to be allowed amongst World Trade Organization (WTO) Member countries, despite being highlighted as one of the most distorting trade policies still in use today. This practice particularly harms New Zealand's trade sector for a number of reasons including the country's economic reliance on agricultural exports, the lack of support offered to agricultural producers within New Zealand, and the openness of its domestic markets. To achieve New Zealand's goals of eliminating the use of export subsidies and reducing distortion in agricultural trade in general, a number of different alternatives exist. The strongest of these are: the continued inclusion of limitations on this practice within regional and bilateral free trade agreements, continued support of the WTO's multilateral negotiating rounds, making use of the WTO Dispute Settlement Body wherever possible, and encouraging the creation of a permanent Standing Committee on Legal Affairs to enable smoother facilitation of future WTO regulatory reform.

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I. Introduction

This dissertation will explore the legal and policy issues surrounding trade distortion in agriculture, with particular reference to the use of export subsidies and how this practice has the potential to seriously harm New Zealand's trade sector. Consequently, the focus of analysis will be on what New Zealand can do to facilitate the comprehensive elimination of export subsidies within the framework of international trade law.

Part One of the dissertation will provide a contextual background to the role of international trade regulation in general, within the wider international law sphere. Part Two will go into considerable background detail both on export subsidies and also agricultural trade. It will cover what exactly export subsidies are, and who is or has been using them, before looking at the interaction between export subsidies and other distorting trade practices used in the agricultural sector. Part Three will look specifically at why the elimination of agricultural export subsidies is important for New Zealand. Part Four will look at the current international regulation of these subsidies. Finally, Part Five will outline the possible ways of strengthening and improving this regulation to the point where export subsidies are eliminated. The conclusion will outline which of the possible avenues for reform would be most beneficial to New Zealand and therefore which actions New Zealand's government and trade representatives should consider supporting in the short, medium and long term future.

II. Part One: The nature and importance of international trade regulation

This section will outline how international trade regulation compares to other areas of international law. It will comprehensively canvas the role of the World Trade Organization (WTO) within international trade regulation, and in particular it will examine its legal nature. From that starting point, this section will then highlight why international trade regulation is actually needed, especially in the field of agricultural trade.

[i] Comparing international trade regulation to other areas of international law

Before going deeper into various issues relating to international trade regulation, it is important to understand the wider context that this regulation occurs within. When one is unfamiliar with the field of international law, it is easy to fall into the trap of considering all treaties, agreements, declarations and similar documents as having the same legal effect, no matter where they originated, or which countries have signed or ratified them. In fact, the source, the number of countries party to an agreement, and also the form such an agreement takes, are all vital pieces of information, necessary to weigh up the strength and scope of application of any one document. It is true that many international bodies and organisations have very little ability to efficiently constrain the actions of the countries that make up their membership¹. Even international judicial bodies can run into difficulties regarding the legitimacy of their existence and subsequent lack of support for their activities or judgments in some instances².

In stark contrast to this, international trade regulation predominantly occurs within the strong framework of the WTO. This international organisation has a wide membership of 153 countries and a further 31 countries with observer status³. Its history in the area of trade dates back to the inception of the General Agreement on Tariffs and Trade (GATT)⁴, its predecessor, in 1947. The creation of a permanent body was anticipated right from the start, but only came about in the form of the WTO in 1995, after the conclusion of the Uruguay Round of negotiations⁵.

¹ In fact, most international bodies act on the basis of political agreements that exist without enforcement mechanisms to ensure that they are followed. See for example the workings of the United Nations at The United Nations Official Website: Home at <http://www.un.org/en/>.

² The limited powers of the International Criminal Court exemplify this. For further detail see The International Criminal Court Official Website: Home at <http://www.icc-cpi.int/Menus/ICC>.

³ For a full list of WTO Member countries see The World Trade Organization Official Website: Understanding the WTO: The Organization – Members and Observers at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁴ General Agreement on Tariffs and Trade, 1947 [hereinafter GATT].

⁵ For a complete history see The World Trade Organization Official Website: Understanding the WTO: Basics - The GATT years: from Havana to Marrakesh at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

The WTO has taken over the original role of the GATT, and continues to use the same agreement mechanism of multilateral trade negotiation rounds, which adhere to the principle of a “single undertaking”⁶. The application of this approach effectively means that WTO negotiations are not concluded until an accord has been reached on every aspect that made up part of the negotiating round⁷. These negotiating rounds facilitate agreement on a vast array of issues, including new levels of bound import tariffs and also constraints on non-tariff barriers to entry⁸. Although non-tariff barriers to entry did not feature in the initial GATT negotiations, they have become an increasingly large part of negotiations today⁹. These can be loosely explained as trade practices that hamper the entry of one country’s exports into the domestic market of another country, other than by imposing heavy import tariffs at the border¹⁰.

[iii] Is this Law or Policy?

Even once one has grasped the concept of the WTO, a further misconception often arises in that it is easy to assume that the work of this international organisation has no legal content, instead that it is all based on policy decisions reached in multilateral negotiations. In fact, the function of the WTO is much wider than this. The WTO acts not only as a facilitator of negotiations to further liberalize trade, but also as a body that creates and administers trade rules, and also as a forum for trade disputes¹¹. Its legislative functions include negotiating and drafting agreements, which then become legally binding on all WTO Member countries¹². The “legally binding” status is achieved because the WTO has also created a unique Dispute Settlement Body¹³. This body enjoys an exceptionally high rate of compliance with its rulings and is one of the strongest international judicial bodies in existence¹⁴.

⁶ For more detail on the single undertaking approach see *Understanding the WTO* (5th ed, WTO publications, Geneva, 2010) at 17.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid* at 15-21.

¹⁰ *Ibid* at 49.

¹¹ *Ibid* at 9-10.

¹² *Ibid* at 9.

¹³ *Ibid* at 10.

¹⁴ Donald McRae “Measuring the effectiveness of the WTO Dispute Settlement System” (2008) 3:1 *Asian Journal of WTO & International Health Law and Policy* 1 at 6.

When one looks in further detail into the workings of the WTO Dispute Settlement Body, it becomes clearer to what extent this is really a judicial organ, applying laws to factual situations as they arise, and determining the legality of the various parties' actions. The dispute settlement process functions in a way that if a Member country breaches one of the WTO rules or regulations, another Member country that has been adversely affected by this can bring a case to the WTO Dispute Settlement Body¹⁵. Once a case has been brought, the disputing countries must then try to agree who will make up the panel to hear the case¹⁶. If they cannot decide, the Director-General of the WTO must appoint a panel. His or her decision on the make up of the panel is final¹⁷. After the dispute has been heard, if either party is unhappy with the outcome reached by the panel, there is an appeal process¹⁸. The appeal is to the Appellate Body of the WTO, which is made up of any three members of a permanent seven-member panel selected by the WTO Dispute Settlement Body¹⁹. Once this Appellate Body reaches its decision, this is final, and the losing party must implement the decision within a reasonable time period²⁰. If they fail to do so, the parties can try and agree on compensation, or failing that, the party adversely affected can take retaliatory action²¹.

From this explanation, one can draw numerous parallels with domestic judicial systems. The WTO Dispute Settlement Body applies rules and regulations, which can be compared to domestic legislation. These rules are similarly legally binding in nature, and the effect of their application within a dispute is that the panel decides in favour of one party, and therefore upholds that party's legal rights. A decision is formally reached by the panel and reported. These reported decisions are easily accessible and are effective pronouncements of international trade law²². Whilst the drive behind concluding the initial agreements can be tied to policy and economic interests, the process of how these agreements are applied comes back to the functioning of legal institutions albeit at an international level.

¹⁵ *Understanding the WTO* above n6 at 55.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid* at 57.

¹⁹ *Ibid.*

²⁰ *Ibid* at 58.

²¹ *Ibid.* For more information regarding the WTO Dispute Settlement Procedures see *The WTO Disputes Settlement Procedures* (2nd ed, Cambridge University Press, Cambridge, 2001).

²² *Understanding the WTO* above n6 at 57.

[iii] Is international trade regulation necessary?

The GATT was originally set up to facilitate increased trade liberalization and thereby bring mutual benefits to all participating countries through the application of comparative and absolute advantages in various areas²³. A further reasoning behind its inception was to ensure that countries did not revert to the protectionist policies that exacerbated the economic difficulties of the 1930's²⁴. However, in order to achieve these results, and due to the increased interdependency of trading partners, constraints also needed to be put in place²⁵. This was necessary to avoid the proliferation of harmful domestic policies, which could undermine the whole process²⁶. Hence, various rules and an enforcement mechanism were created²⁷. Today, the creation and implementation of rules and regulations is still an essential part of the WTO's work, and continues to facilitate trade in ways that would simply not be possible without the regulatory nature of the WTO. The success of the WTO can certainly be attributed at least in part, to the strength of its rules and the ability of WTO Member countries to enforce these against each other²⁸.

If we turn our focus now to the area of agricultural trade, the need for international regulation becomes even more apparent. Agricultural trade liberalization has lagged behind all other sectors of international trade²⁹. It is the most sensitive area for a multitude of reasons including its strong links to cultural, environmental and developmental aspects of each country's domestic policies, as well as issues of food

²³ For further detail see Douglas A. Irwin "International Trade Agreements" (2008) Library of Economics and Liberty, The concise encyclopedia of Economics at www.econlib.org/library/Enc/InternationalTradeAgreements.html.

²⁴ Ibid.

²⁵ See explanation in Editorial "The WTO and Subsidies" (2011) Global Subsidies Initiative, Journalists Briefing Papers at www.globalsubsidies.org/en/media-portal/the-wto-and-subsidies.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Agricultural Trade was first addressed as part of the Uruguay Round of negotiations. For more detail on this see The World Trade Organization Official Website: Understanding the WTO: Basics – The Uruguay Round at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

and water security, and also national security for all countries³⁰. These are areas over which many governments are reluctant to relinquish decision-making power, because of their fundamental importance to the daily running of a country.³¹

However, where decisions in these areas also significantly affect agricultural trade flows, international regulation is necessary to preserve the functionality of the international trading system. Without regulation in this area, it would be much easier for countries to prefer the realization of internal domestic goals at the expense of the international community. To achieve this, they would have to breach agreements that they had signed up to. However, if the only consequence of such action was political pressure being applied towards a country by its trading partners, it is suggested that this would not act as sufficient constraint. If WTO Member countries did resort to regularly breaching their agreements in such a way, this would in turn wreak havoc on international trade flows and significantly reduce many potential mutual benefits of international trade³². It is thus precisely because of the sensitivity that surrounds agriculture, and the desire for countries to make their own domestic decisions, that strong regulation is needed here.

III. Part Two: A background to export subsidies and the distortion of agricultural trade in general

Now that the workings of the WTO are better understood, and the importance of international trade regulation has been canvassed, it is possible to examine the main policy issue to be discussed in this dissertation, namely the use of export subsidies.

This section will start by explaining exactly what export subsidies are, and how they distort trade. It will further explain who the traditional users of these subsidies have been, and why these countries have wanted to use export subsidies. It will then

³⁰ Raj Bhala “Empathizing with France and Pakistan on agricultural subsidy issues in the Doha Round” (2007) 40.4 *Vanderbilt Journal of Transnational Law* 949 at 964.

³¹ Young, Linda M. and Kathleen C. Hansen “Disconnections in US and EU Agricultural Policy and Trade Negotiations: A Transaction Cost Politics Approach” (2011) 12:1 *Estey Centre Journal of International Law and Trade policy* 12 at 13.

³² “The WTO and Subsidies” above n25.

examine the wider context of how this practice interrelates with the application of other agricultural trade policies, notably domestic support and various alternative forms of export competition. It will further analyse what form future policy decisions made by WTO Member countries in the area of agricultural trade are likely to take. In light of the findings made, this section will finish by explaining why the elimination of export subsidies is certainly a good first step, but that a broader approach needs to be taken to comprehensively reduce all distortion of international agricultural trade.

[i] What are agricultural export subsidies?

Export subsidies are essentially the conferment of a benefit from a government or other public body, upon a producer of a certain good, provided that that good is exported to another country³³. These benefits often take the form of cash refunds or payments given to exporters³⁴. This support will almost invariably be provided when it is needed to make the exportation of the good financially viable³⁵. Such a situation occurs when international market prices for a certain good are significantly lower than domestic prices for the same good.³⁶ When this occurs, if the good was sold internationally at the lower price dictated by the world markets, the exporter would potentially make a loss³⁷. Thus, to ensure that farmers within this country continue to produce whatever good the government has decided they should, even although it is not fiscally a wise decision, the government must provide further earnings for these farmers³⁸.

At first glance, continued production of agricultural goods may seem like a positive result. However, there are a number of parties that suffer when export subsidies are applied. The major problem is that depending on the quantity of good that is being subsidized, and the elasticity of demand for the good on the international market, such

³³ Article 1, Agreement on Subsidies and Countervailing Measures, 1995.

³⁴ Ibid.

³⁵ “Empathizing with France and Pakistan on agricultural subsidy issues in the Doha Round” above n30 at 965.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid at 974.

subsidies have the potential to greatly distort world market prices³⁹. With the help of the subsidy they are being granted, the exporters from the country in question are able to sell their product at a much lower cost on the international market⁴⁰. This leads to the world market prices being skewed and can often result in exporters of the same good from other countries having to sell at below production price even though they have a comparative advantage in the production of that good. Not only this, but if the world market is flooded with subsidized goods from one country, it may eventuate that all demand is satisfied before the other exporting countries have been able to sell their stock at all. This results in huge losses occurring to countries that are unable or unwilling to subsidize their own exports⁴¹.

In addition to these purely economical side-effects, export subsidies have been labelled the most distorting and harmful trade support mechanism for a number of other reasons as well. Many experts consider these subsidies to be unethical because their use essentially tips the playing field in favour of developed countries (excepting New Zealand which will be explained in further detail below)⁴². Moreover, there are potentially negative consequences affecting the environment from inefficient use of land and water resources that has been encouraged by this extra support⁴³. Finally, export subsidies are expensive and are hence considered to be an inefficient use of financial resources⁴⁴.

[iii] Who is using agricultural export subsidies and why?

Given the clear and unequivocal evidence that exists showing that export subsidies significantly distort trade, there have been numerous attempts to try and limit their use. As part of the Uruguay Round of negotiations, the members of the WTO agreed to the

³⁹ Barry K. Goodwin and Vincent H. Smith “Export Programs” (2004) Farm Foundation, Article Files www.farmfoundation.org/news/articlefiles/816-goodwin.pdf at 1.

⁴⁰ “Empathizing with France and Pakistan on agricultural subsidy issues in the Doha Round” above n30 at 965.

⁴¹ Allan N. Rae and Anna Strutt “Multilateral agricultural trade reform: Potential impacts of current negotiations on New Zealand” (2004) 38.2 *New Zealand Economic Papers* 175 at 194.

⁴² Vangelis Vitalis “Agricultural subsidy reform and its implications for sustainable development: the New Zealand experience” (2007) 4:1 *Environmental Sciences* 21 at 22.

⁴³ Ibid.

⁴⁴ Ibid.

complete elimination of these subsidies on non-agricultural goods⁴⁵. However, due to the inherent sensitivity of agricultural trade, the most WTO member countries could agree on in this area, was a mechanism to diminish their use⁴⁶. This mechanism was set up as part of the Agreement on Agriculture (AOA),⁴⁷ which formed part of the final Uruguay Round Agreement. It required all countries that were then using export subsidies, to list what products they were subsidizing in this way, and to what extent⁴⁸. This list was then included as part of their countries' schedule annexed to the AOA⁴⁹. No new export subsidies were to be allowed after the entry into force of that agreement, and entitlements as to the amount of exports that could be so subsidized were to be reduced in terms of both size and value over an implementation period, which ran until 2001 for developed countries, and 2004 for developing and least developed countries⁵⁰. Twenty-five Member countries chose to notify certain products to enable them to continue subsidizing contingent upon exports⁵¹. Each year, the 25 Member countries are required to report their usage to the WTO, so that this body can monitor whether the countries are complying with the limitations placed upon them by the AOA⁵². Positively, a number of those countries, including New Zealand, have reported nil usage since the entry into force of the AOA⁵³.

⁴⁵ Part II Prohibited Subsidies, Article 3, Agreement on Subsidies and Countervailing Measures, 1995.

⁴⁶ Article 9 Export Subsidy Commitments, Agreement on Agriculture, 1994.

⁴⁷ Agreement on Agriculture, 1994 [hereinafter Agreement on Agriculture or AOA].

⁴⁸ Susan E. Leetmaa and Karen Z. Ackerman "Export Subsidy Commitments: Few are Binding Yet, But Some Members Try to Evade Them" (1998) Economic Research Service/USDA www.ers.usda.gov/publications/wrs984/wrs984c.pdf at 23.

⁴⁹ Ibid.

⁵⁰ For further detail on implementation periods see The World Trade Organization Official Website: Understanding the Agreements – The Agricultural Agreement: New Rules and Commitments at www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm.

⁵¹ "Export Subsidy Commitments: Few are Binding Yet, But Some Members Try to Evade Them" above n48 at 23.

⁵² Ibid.

⁵³ Ralf Peters "Roadblock to reform: The persistence of agricultural export subsidies" (2006) Division on International trade in Goods and Services, and Commodities UNCTAD, policy issues in international trade and commodities study series No. 32 www.unctad.org/en/docs/itcdtab33_en.pdf at 5.

By far the greatest user of export subsidies to date has been the European Union (EU)⁵⁴. The EU has traditionally annually accounted for around 90% of all agricultural export subsidies used worldwide⁵⁵. These have been funded through the Common Agricultural Policy (CAP), which annually dedicates at least €50 Billion to agricultural development as a whole⁵⁶. Key products which the EU has traditionally subsidized contingent upon export have included sugar, rice, milk and dairy products, pig meat, eggs, poultry and bovine meat⁵⁷. The United States of America (US) has also used export subsidies to a certain extent. Whilst the predominant amount of the US's agricultural support is done through other means, such as domestic support, and export credits, the US has chosen to use export subsidies in its dairy industry. This has been facilitated by the Dairy Export Incentive Program (DEIP)⁵⁸. In fact, around 80% of the US's expenditure on export subsidies has gone to dairy products⁵⁹. Other countries that have been active users of export subsidies include Norway and Switzerland⁶⁰. Currently however, there is very low use of export subsidies worldwide⁶¹.

⁵⁴ “Multilateral agricultural trade reform: Potential impacts of current negotiations on New Zealand” above n41 at 178.

⁵⁵ Ibid.

⁵⁶ See the European Commission Official Website: CAP post-2013 - Key graphs and figures at http://ec.europa.eu/agriculture/cap-post-2013/graphs/graph1_en.pdf.

⁵⁷ “Roadblock to reform: The persistence of agricultural export subsidies” above n53 at 7.

⁵⁸ “Export Programs” above n39 at 2.

⁵⁹ “Export Subsidy Commitments: Few Are Binding Yet, But Some Members Try to Evade Them” above n48 at 21.

⁶⁰ For a more accurate breakdown of the exact amounts of export subsidies the various WTO countries have used see The World Trade Organization Official Website: Agricultural Issues Explained – WTO Agriculture Negotiations. The issues, and where we are now www.wto.org/english/tratop_e/agric_e/agnegs_bkgrnd_e.pdf at 88.

⁶¹ See for example the trend in EU subsidies explained in Editorial “The CAP in perspective: from market intervention to policy innovation” (2011) European Commission Agriculture and Rural Development at http://ec.europa.eu/agriculture/publi/app-briefs/01_en.pdf.

The figure below outlines the percentage of export subsidies each country accounted for during the period 1995-2000:

Figure 1 Use of Export Subsidies: Averages from 1995 to 2000 by Country⁶²

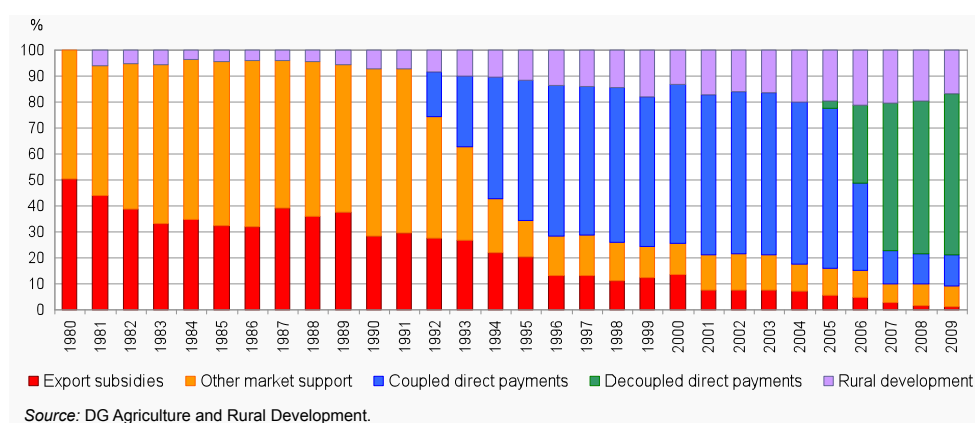
	Average 1995–2000 (Million \$)	%		Average 1995–2000 (Million \$)	%
EU	5 503.4	88.7	Israel	6.6	0.1
Switzerland	311.5	5.0	Mexico	3.8	0.1
Norway	85.7	1.4	Cyprus	2.9	0.0
USA	83.6	1.3	Australia	0.6	0.0
Canada*	54.5	0.9	Iceland	0.0	0.0
Czech Republic	37.1	0.6	New Zealand	0.0	0.0
Turkey	28.4	0.5	Romania	0.0	0.0
Poland	21.7	0.3	Bulgaria	0	0
South Africa	18.6	0.3	Brazil	0	0
Hungary	16.9	0.3	Indonesia	0	0
Colombia	12.8	0.2	Panama	0	0
Slovak Republic	10.8	0.2	Uruguay	0	0
Venezuela	7.8	0.1			
			Total	6 206.7	100

Source: UNCTAD calculation based on WTO notifications.
* See assumptions in the text.

[iii] Support via other means

There is a growing trend of supporting agricultural production via other, less conspicuous means than export subsidies, but which is having similar distortionary effects. The following chart, for example, shows the downward trend in the EU's use of export subsidies over the past 30 years:

Figure 2 The evolution of the CAP - the full picture⁶³.



⁶² “Roadblock to reform: The persistence of agricultural export subsidies” above n53 at 5.

⁶³ “The CAP in perspective: from market intervention to policy innovation” above n61 at 5.

Today, instead of explicitly using export subsidies, one can see from this graph that the EU is preferring to support agricultural production via coupled and de-coupled direct payments. The de-coupled payments, which now make up the largest portion of agricultural support under the EU's CAP, are currently classed as "green box" support⁶⁴. In addition to disciplines on export subsidies, the Agreement on Agriculture also has articles referring to a country's domestic support of its agricultural sector⁶⁵. "Domestic support" is essentially the financial support a government chooses to offer to its farmers, which unlike export subsidies, is not directly related to exporting their goods, but relates merely to production⁶⁶. A "green box" classification of a country's domestic support means it has been agreed by WTO Member countries when negotiating a trade round that this form of support is minimally-distorting, so is allowed in whatever quantities a country may choose⁶⁷.

Now however, there are many questions being asked about the EU's de-coupled support programmes, as they appear to be affecting farmers' production decisions to a considerable extent⁶⁸. Many WTO Member countries believe that the EU's expanded level of support under this heading is unfairly being provided in an effort to insulate EU farmers from the worst effects of the international economic downturn⁶⁹. They believe that this guaranteed income stream via de-coupled support programmes lowers the risks involved for the farmers, and in turn stimulates overproduction in the limited domestic markets the farmers are producing for⁷⁰. This enables the agricultural producers within the EU to sell their surplus product for a lower price internationally, than they would have been able to without the extensive support⁷¹. In turn, this has a similar flow on effect to export subsidies, namely that cheaper agricultural surplus

⁶⁴ Editorial "WTO agreement on agriculture: Implications for the ACP" (2010) CTA Agritrade, Informed Analysis, Expert Opinions <http://agritrade.cta.int/en/Resources/Agritrade-documents/Agriculture-Executive-briefs/WTO-agreement-on-agriculture-Implications-for-the-ACP> at 6.

⁶⁵ Part IV, Article 6, Domestic Support Commitments, Agreement on Agriculture, 1994.

⁶⁶ *Understanding the WTO* above n6 at 27.

⁶⁷ See discussion in "Export Programs" above n39 at 4.

⁶⁸ For further discussion see "WTO agreement on agriculture: Implications for the ACP" above n64 at 6.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ "Roadblock to reform: The persistence of agricultural export subsidies" above n53 at 1.

goods flood international markets and dislodge exports from other countries⁷². Because of this, there is now a drive to rethink the classifications, to ensure that this support is no longer categorized as green box support⁷³. Nevertheless, as the regulations currently stand, this change in support mechanism has enabled the EU to appear as if it is making positive improvements to its agricultural policy, when this may not actually be the case.

Other countries, including the US, have also opted to rely on different mechanisms of support⁷⁴. Various aspects of export competition, meaning any practice that potentially unfairly enhances the exports of one country, have been employed⁷⁵. Those that the US have used include export credits, food aid and state trading enterprises⁷⁶. Export credits come in many forms but essentially make exports from one country easier to acquire, because the buying country need not front up with the cash payment immediately⁷⁷. Instead they can take benefit of credit arrangements that are often better than the concurrent open market alternatives⁷⁸. Food aid is donated when one country has surplus stock that it cannot sell⁷⁹. This may sound like a positive alternative, but in fact it has similar potential to undercut all domestic producers of the good in question⁸⁰. This then ruins the financial viability of the recipient country to produce its own similar agricultural goods while its market is being flooded by the good at less than production price⁸¹. The use of state trading enterprises is also harmful to trade in a number of ways and is hence regulated by the WTO.

⁷² “WTO agreement on agriculture: Implications for the ACP” above n64 at 6.

⁷³ Ibid.

⁷⁴ “Export Programs” above n39 at 1.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid at 3.

⁷⁸ Ibid.

⁷⁹ The World Trade Organization Official Website: Agricultural Issues Explained – WTO Agriculture Negotiations. The issues, and where we are now www.wto.org/english/tratop_e/agric_e/agnegs_bkgrnd_e.pdf at 23.

⁸⁰ Ibid.

⁸¹ For a good explanation of the issues surrounding food aid see The World Trade Organization Official Website: Agricultural Issues Explained – WTO Agriculture Negotiations. The issues, and where we are now www.wto.org/english/tratop_e/agric_e/agnegs_bkgrnd_e.pdf at 23.

This above analysis demonstrates how interconnected the different agricultural support mechanisms are, and how the diminished use of one form of support does not necessarily mean that the problem of market distortion has been solved or even reduced. When looking at ways of facilitating agricultural trade, an optimal approach would not rely solely on fixing one area, but would analyse how each area fits together. It would scrutinize what potential there was for the increased use of another policy, to completely nullify the benefits that should have accrued from the elimination of a different distorting practice. Hence, a coordinated approach to agricultural trade policy reform that tackled not only export subsidies, but also domestic support via de-coupled direct payments for example, and other forms of export competition, would bring the most lasting benefits and stability to this traditionally volatile area.

[iv] Why the elimination of export subsidies remains a priority

In saying all of this however, it is important not to lose sight of why agricultural export subsidies in particular, have been a major focus of international trade negotiations, and whose elimination has ranked so highly on New Zealand's trade policy objectives for the last few decades⁸². Again, export subsidies are almost invariably applied when international market prices for a certain good are relatively low. Therefore, their use coincides with financially difficult times for all exporters of that good. These exporters will not be receiving the returns they had hoped for on their exports, and will then be further crippled by a country's use of export subsidies lowering the international market prices even more.

Also, whilst the use of export subsidies has diminished lately in preference for other support mechanisms, it must be reemphasized that their use is highly cyclical. When international dairy prices took a dive in 2009, both the EU and the US reverted back to

⁸² See discussion outlined on New Zealand Ministry of Foreign Affairs and Trade Official Website: Home – Media and publications – Publications – Trade matters – Agriculture at <http://www.mfat.govt.nz/Media-and-publications/Publications/Trade-matters/0-agriculture.php>.

the use of export subsidies to strengthen their exports in this industry, but managed to maintain this support within their WTO export subsidy limits⁸³.

Furthermore, the trade distortions that result from the use of export subsidies are relatively immediate and obvious in nature. Whilst ambiguity still surrounds whether a number of other trade practices are inherently bad, such as some forms of domestic support⁸⁴, all WTO Member countries accept that export subsidies are heavily distorting and unfair⁸⁵. For these reasons, any analysis of where agricultural policy reform should occur, necessarily brings one back to the issue of export subsidies as a clear starting point⁸⁶. In recognition of the fact that much more is needed by way of policy reform in the area of agricultural trade in general however, this dissertation's final analysis of a way forward will consider both what each avenue can offer in terms of resolving the issue of export subsidies, and also the wider issues of distorting export competition and domestic support as well.

IV. Part Three: Why is the elimination of agricultural export subsidies important for New Zealand in particular?

Having canvassed how and why the use of export subsidies distorts trade, this section will now consider why export subsidies have such a strong impact on New Zealand's economy. Once this is better understood, it becomes easier to determine which alternatives for further development in international trade regulation would be most beneficial to New Zealand.

⁸³ See discussion in Editorial "EU Dairy Export Subsidies Draw Fire from Cairns Group" Bridges Weekly Trade News Digest volume 13, Number 3, International Centre for Trade and Development at <http://ictsd.org/downloads/bridgesweekly/bridgesweekly13-3.pdf>.

⁸⁴ "WTO agreement on agriculture: Implications for the ACP" above n64 at 6.

⁸⁵ As pointed out "Roadblock to reform: The persistence of agricultural export subsidies" above n53 at 2.

⁸⁶ Kym Anderson and Will Martin (eds.) *Agricultural Trade Reform & the Doha Development Agenda* (Palgrave Macmillan and The World Bank, New York, 2006) at 20.

[i] The main factors

New Zealand has continuously been one of the hardest hit countries by the use of agricultural export subsidies⁸⁷. This is unsurprising given (a) our relative economic dependence on the agricultural sector, (b) the fact that we have some of the most open markets in the world, (c) the lack of diversity in our exports and (d) the fact that our largest exports happen to be made up of some of the most sensitive and closely guarded produce in agricultural trade.

(a) The agricultural sector in New Zealand makes up 16% of its Gross Domestic Product (GDP) per annum and employs at least 15% of its workforce⁸⁸. The dairy and meat industries in particular are areas where New Zealand has gained a comparative advantage due to its innovative farming practices and the large availability of land and water⁸⁹. New Zealand's national wealth as a country is noticeably affected when the agricultural sector performs poorly⁹⁰. As a developed country, this is reasonably unique, making issues surrounding agricultural trade liberation and regulation more important to New Zealand than they are to many other developed countries of similar size and wealth⁹¹.

(b) The second factor outlined above also sets New Zealand apart from most other developed countries in the world, namely the extent to which our markets are open. Not only does New Zealand have some of the lowest barriers to entry in the area of agriculture, as compared to other WTO Member countries⁹², but it also does not subsidize agricultural production at all⁹³. In 1984, the New Zealand government

⁸⁷ “Multilateral agricultural trade reform: Potential impacts of current negotiations on New Zealand” above n41 at 185.

⁸⁸ For statistics see New Zealand Ministry of Foreign Affairs and Trade Official Website: Trade and Economic Relations – NZ and the WTO at www.mfat.govt.nz/Trade-and-Economic-Relations/NZ-and-the-WTO/index.php.

⁸⁹ Editorial “New Zealand Summary” (2004) Global Trade Negotiations Home Page Center for International Development at Harvard University www.cid.harvard.edu/cidtrade/gov/newzealandgov.html at 1.

⁹⁰ Ibid.

⁹¹ For more information on the importance of agriculture to the GDP of other countries see World Bank Official Website: DATABANK – Agriculture, Value added (% of GDP) <http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS/countries>.

⁹² See “New Zealand Summary” above n89 at 1.

⁹³ Ibid at 3.

decided to abolish all agricultural subsidies that it was then providing⁹⁴. This decision was made when its economy was hampered by escalating debts and rapidly increasing costs⁹⁵. The result of this economic situation was that New Zealand simply could not afford to continue to subsidize agriculture in the way it had been, which at its highest, made up around 30% of an agricultural producers' income⁹⁶. The move to eliminate subsidies meant that some New Zealand farmers were no longer able to compete in the industry, so were forced into different jobs, whereas others focused on developing and innovating in order to remain competitive⁹⁷. New Zealand's dairy farmers are now some of the most efficient in the world, and with 95% of their produce being exported, they command 30% of the world export market in the dairy industry⁹⁸. New Zealand's beef and sheep meat exports also command large percentages of world trade in the respective markets. Their beef meat exports make up around 7.5% of the total world market, and their sheep meat exports makes up just under 50% of the total world market for this product⁹⁹.

However, the policy decision to stop supporting agricultural production also created the negative situation that now exists, where New Zealand's exports are some of the most exposed in the world. In New Zealand, because no domestic protection is in place at all, any reduction that occurs to an international market price, greatly diminishes the returns New Zealand can make on its exports¹⁰⁰. The New Zealand government no longer provides any form of a safety net for its farmers to enable their continued exportation of produce¹⁰¹. Thus, if international dairy prices go down, as a result of the use of export subsidies for example, 95% of New Zealand's dairy production will receive a lower return. This then seriously impinges on the prosperity of its farmers and the viability of being a farmer at all in New Zealand.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ For more information see Beef NZ: Home Page – Beef Statistics – Export Earnings from Beef and Lamb at <http://www.beef.org.nz/statistics/sld001.asp#an5>.

¹⁰⁰ “New Zealand Summary” above n89 at 1.

¹⁰¹ Ibid at 3.

The lack of diversity in our exports (c) and the fact that our largest exports happen to be made up of some of the most sensitive and closely guarded produce in agricultural trade (d) are largely interlinked. This is because it is only when a country's exports lack sufficient diversity, that a certain trade practice in a few industries can so significantly affect a country's potential trade gains. As explained above, New Zealand relies very heavily on the success of its exports in dairy, and also beef and sheep meat¹⁰². Dairy and meat make up around 60% of New Zealand's agricultural exports and 30% of its total merchandise exports¹⁰³. Unfortunately, these two main agricultural exporting markets have been some of the worst affected by export subsidies¹⁰⁴. They have been the subject of a large percentage of both the EU's and the US's subsidies in past years¹⁰⁵. Almost 35% of the export subsidies used worldwide have been provided to various dairy industries and around 23% have been provided to meat industries¹⁰⁶. Of those going to the meat industry, 60% are being provided to beef producers¹⁰⁷. The result has been cyclically decreased international prices for these goods, at times significantly below what a free market would produce, or even below the cost price of production¹⁰⁸.

The graph below indicates which industries received the most support through export subsidies between 1995-2000:

¹⁰² "Multilateral agricultural trade reform: Potential impacts of current negotiations on New Zealand" above n41 at 176.

¹⁰³ Ibid.

¹⁰⁴ "Roadblock to reform: The persistence of agricultural export subsidies" above n53 at 5.

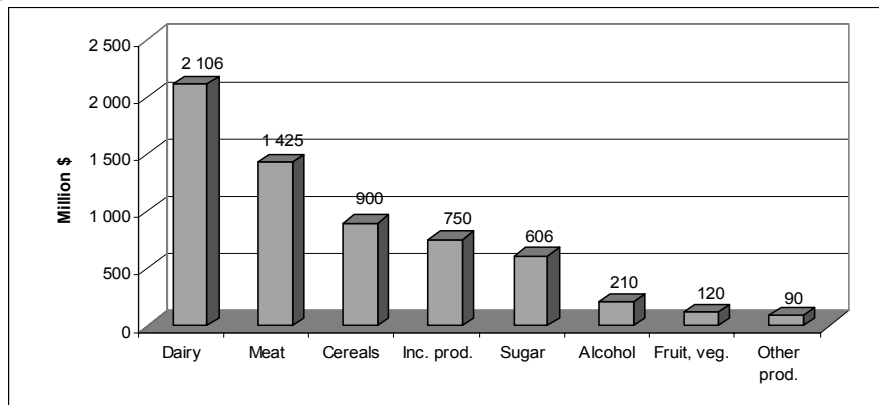
¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid at 4.

¹⁰⁸ As evidenced by the huge welfare gains New Zealand would make in these sectors if export subsidies were eliminated. This is explained in "Multilateral agricultural trade reform: Potential impacts of current negotiations on New Zealand" above n41 at 187.

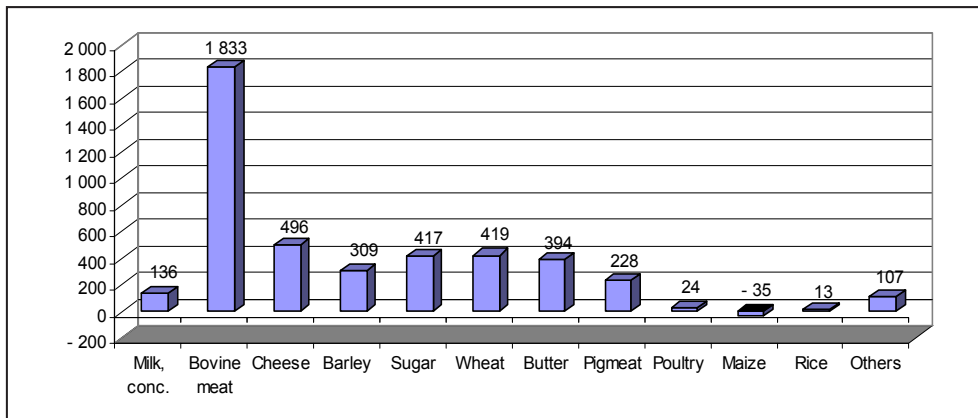
Figure 3 Export subsidy expenditure by commodity group¹⁰⁹.



Source: UNCTAD calculation based on WTO notifications, averages 1995–2000 in million \$.

A further point to note is that a number of studies have revealed that the international market for meat products would gain substantially from the elimination of export subsidies. While it is difficult to rely on economic simulation studies, especially if changes subsequently occur in international markets, the following 2006 simulation produced interesting results:

Figure 4. Additional welfare gains, by commodity¹¹⁰.



Source: ATPSM simulations.

It represents any additional welfare gains that could occur in each sector if export subsidies were eliminated. The figures are in USD and must be multiplied by one

¹⁰⁹ “Roadblock to reform: The persistence of agricultural export subsidies” above n53 at 5.

¹¹⁰ Ibid at 28.

million¹¹¹. From this study, it is very clear that bovine meat, as well as milk, cheese and butter would receive welfare gains of considerable amounts. This would have significant positive flow on effects for New Zealand's economy in terms of higher return for output, and also increased stimulation of production¹¹².

On the whole, a number of studies in this area find that net exporting countries stand to receive the greatest welfare gains if export subsidies were eliminated¹¹³. New Zealand frequently scores as one of the highest potential benefactors given its strength in dairy, and also beef and sheep meat (also termed bovine and ovine meat respectively)¹¹⁴.

Given all of these factors, which make New Zealand so vulnerable to the negative consequences of export subsidies, it is hardly surprising that the elimination of this practice has, and continues to feature, so prominently on its trade agenda¹¹⁵. The elimination of export subsidies would serve the dual purpose of minimizing any actual trade price distortions currently occurring in New Zealand's export markets, as well as ensuring that such volatility and unfair distortion could not happen in the future. New Zealand's economy could then finally reap the benefits it deserves from its trade in these sensitive industries.

¹¹¹ Ibid.

¹¹² "Multilateral agricultural trade reform: Potential impacts of current negotiations on New Zealand" above n41 at 190.

¹¹³ "Multilateral agricultural trade reform: Potential impacts of current negotiations on New Zealand" above n41; Leena Kerkela, Jyrki Niemi and Heikki Lehtonen "Trade and Welfare implications of the export subsidy abolition" (2006) Government Institute of Economic Research, University of Helsinki at www.ifama.org/events/conferences/2006/cmsdocs/1086_Paper.pdf; Xinshen Diao, Agapi Somwaru and Terry Roe "A global analysis of agricultural trade reform in WTO Member countries" (2001) Economic Development Center, University of Minnesota at <http://ideas.repec.org/p/ags/umedbu/12984.html>; "Roadblock to reform: The persistence of agricultural export subsidies" above n53.

¹¹⁴ Piero Conforti and Beatriz E. Velasquez "The Effects of Alternative Proposals for Agricultural Export Subsidies in the Current WTO Round" (2004) 5:1 *Estey Centre Journal of International Law and Trade Policy* 12 at 12.

¹¹⁵ Interview with Catherine Graham, Trade Negotiations Division, New Zealand Ministry of Foreign Affairs and Trade (Helen Churchman, 26 August, 2011).

V. Part Four: The current international trade regulation of agricultural export subsidies

Now that the earlier sections have outlined why the use of export subsidies in agricultural trade is problematic, particularly for New Zealand's economy, it is now possible to go into further depth on how these subsidies are currently being regulated under the WTO system and also to look at how and where these WTO rules need improving.

[i] The General Agreement on Tariffs and Trade (GATT)

The issue of export subsidies is certainly not new, and its current regulation is the result of much effort, negotiation and compromise, originating back to the inception of the GATT in 1947. Article XVI of the GATT first outlined a number of instances where subsidies would not be allowed in international trade. Section B of that article explicitly recognizes that

2. ...the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

Section B paragraph 3. of the GATT addresses where primary products are concerned, stating:

3. ...the subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product.

Whereas, at paragraph 4., for all other products, the parties were to

4. ...cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower

than the comparable price charged for the like product to buyers in the domestic market.

These regulations were difficult to apply in practice because of the ambiguity around whether a contracting party subsequently had “more than an equitable share of world export trade”, or whether a product was being sold for “less than its domestic price”¹¹⁶. Moreover, there was a significant lack of specificity around what would occur if these subsidies were used. This markedly deterred countries from attempting to use the dispute settlement procedure because even if countries put themselves to the cost of bringing a case, it was very unclear as to whether they would receive any benefit from a ruling in their favour¹¹⁷. Finally, this dispute settlement procedure itself, as outlined in article XXIII of the GATT, suffered from a number of inefficiencies as well¹¹⁸. It had no fixed timetable on the length of disputes, and rulings had to be adopted on a consensus basis¹¹⁹. This meant that if one member of the GATT Council did not agree with the ruling, they could block it¹²⁰. Despite these difficulties, a considerable number of rulings did get accepted, though not in the area of agricultural export subsidies, given the lack of clarity surrounding both the understanding of the rules themselves, and also the vague disciplinary approaches to be adopted¹²¹.

[ii] The Tokyo Round Agreements

The Tokyo round saw a further advancement in the regulation of export subsidies with the creation of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade or the “Subsidies Code”¹²² which entered into force at the start of 1980. This code was the first agreement to comprehensively set out when and how countervailing measures could be

¹¹⁶ Humberto N. Siuves “The expiry of the Peace Clause on Agricultural export subsidies – the outlook post-Cancun” (2004) 31.1 *Legal Issues of Economic Integration* at 27.

¹¹⁷ See Article XVI of the GATT.

¹¹⁸ *Understanding the WTO* above n6 at 55.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ For a full list of adopted panel reports within the framework of GATT see The World Trade Organization Official Website: Dispute Settlement: GATT Reports List at http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm.

¹²² Agreement on Interpretation and Application of Articles VI, XVI and XXII of the General Agreement on Tariffs and Trade, 1980 [hereinafter Subsidies Code].

undertaken¹²³. These measures are a response mechanism that can be employed where one WTO Member country has undertaken the necessary domestic investigations and determined that another WTO Member country's conduct is materially injuring its domestic interests¹²⁴. If the required standards of proof were met, the country suffering material injury could then retaliate by imposing countervailing measures of a certain description¹²⁵.

The Subsidies Code further specified at Article 9 that "Signatories shall not grant export subsidies on products other than certain primary products", but repeated the same wording of the treatment of agricultural export subsidies that had been adopted earlier by the GATT¹²⁶. In an effort to clarify the scope of that treatment, the Subsidies Code at Article 10 2. (a) stated that

"more than an equitable share of world export trade" shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets.

However, even this clarification did not materially facilitate greater ability to use these rules as a viable solution to prevent or punish the use of export subsidies¹²⁷. Nor did it solve the ambiguity around how the use of export subsidies would be punished. Thankfully, more clarity was brought to this area by the implementation of the current rules, which were a result of the Uruguay Round.

[iii] The current International Trade Regulation on export subsidies

The Uruguay Round of negotiations produced two new agreements which now apply to disputes relating to export subsidies, namely the Agreement on Subsidies and

¹²³ See part I, Article 4, Subsidies Code.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Article 10: Export subsidies on certain primary products, Subsidies Code.

¹²⁷ Marc Benitah *The Law of Subsidies under the GATT/WTO System* (Kluwer Law International, London, 2001) at 17.

Countervailing Measures or “SCM Agreement”¹²⁸, and the Agreement on Agriculture or “AOA”. The SCM Agreement covers all subsidies not relating to agriculture, whereas the AOA covers all subsidies pertaining to agricultural goods.

One of the major developments of the SCM Agreement was to outline a clear definition of a subsidy. Article 1.1 sets out that 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” and (b) “a benefit is thereby conferred”. It must also be “specific” to a certain good. Article 3.1 (a) stipulates that an export subsidy is one “contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance”. A number of illustrative examples are outlined in Article 1.1 as to ways a government may be offering a financial contribution to give further guidance to Member countries.

The AOA effectively draws on the developments made in the SCM Agreement, whilst further tailoring its Articles to fit the area of agriculture. The AOA does not repeat the SCM’s definition of a subsidy, but does effectively copy its description of an export subsidy in Article 1(e), namely, that it refers to subsidies “contingent upon export performance”. To clearly delineate the ambit of each of the two agreements, Annex 1 of the AOA comprehensively sets out its product coverage with reference to the Harmonized Commodity Description and Coding System (HS).

As with the prior agreements, the SCM Agreement explicitly prohibits export subsidies at

Part II: Prohibited subsidies

3.1 Except as provided in the Agreement on Agriculture, the following subsidies within the meaning of Article 1, shall be prohibited:

- (a) ...subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance

¹²⁸ Agreement on Subsidies and Countervailing Measures, 1994 [hereinafter "SCM Agreement"].

Conversely, as part of the AOA, some countries are still allowed to use these subsidies subject only to reduction commitments¹²⁹. This has resulted in the perpetuation of a clear inconsistency between the treatment of export subsidies when applied to agricultural products, as opposed to non-agricultural products. There is no sound basis for this inconsistency except the fact that the agricultural sector is more sensitive¹³⁰. This rationale may have been sufficient at one stage, but there is now a growing body of opinion that this inconsistency needs to be rectified as soon as possible¹³¹.

This inconsistency has moreover, been exacerbated by the ineffectiveness of the approach taken to agricultural export subsidies under the AOA¹³². A fundamental requirement of the AOA approach was the compulsory reporting scheme that obliged WTO Member countries to inform the WTO of their use of these subsidies¹³³. This has been largely unsuccessful, as countries' reporting of the frequency and amount of their use of the subsidies has been poorly conducted, with some countries sending in incomplete and inaccurate reports and others still, not reporting at all¹³⁴. Moreover, the base year period of 1986-1990, from which WTO Member countries had to reduce their use of export subsidies, was one of extremely low world prices, during which many countries heavily used these subsidies¹³⁵. In fact, the final bound levels of export subsidies agreed to as part of the Uruguay Round Agreement were often much higher than what countries were actually using at any time during the implementation phase due to higher world prices and thus less need to subsidize exports¹³⁶. The following

¹²⁹ Article 9 Export Subsidy Commitments, Agreement on Agriculture.

¹³⁰ Kym Anderson and Will Martin (eds) *Agricultural Trade Reform & the Doha Development Agenda* (Palgrave Macmillan and The World Bank, New York, 2006) at 28.

¹³¹ *Ibid.*

¹³² Bernard Hoekman and Patrick Messerlin *Removing the exception of agricultural export subsidies* in Kym Anderson and Will Martin (eds) *Agricultural Trade Reform & the Doha Development Agenda* (Palgrave Macmillan and The World Bank, New York, 2006) at 197.

¹³³ *Ibid.*

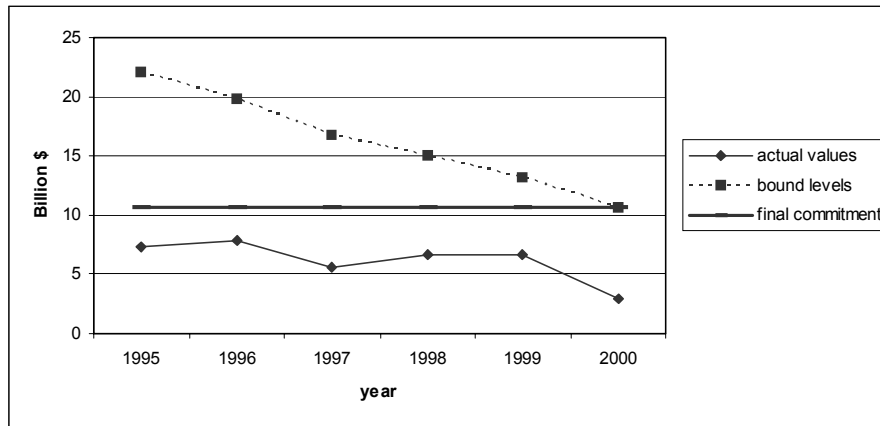
¹³⁴ *Ibid.* at 198-200.

¹³⁵ "Roadblock to reform: The persistence of agricultural export subsidies" above n53 at 6.

¹³⁶ Harry de Gorter, Merlinda Ingco and Lilian Ruiz "Export Subsidies and WTO Trade Negotiations on Agriculture: Issues and Suggestions for New Rules" (2002) ARD Agriculture and Rural Development, prepared for the World Bank's Agricultural Trade Group <http://siteresources.worldbank.org/INTARD/825826-1111129171182/20431799/ExportSubsidiesandtheWTONegotiations.pdf> at 2.

graph shows the difference between their actual use and the levels of subsidization that WTO Member countries were bound to¹³⁷:

Figure 5. Bound and actual export subsidy expenditure, all countries¹³⁸.



Source: UNCTAD calculations based on WTO notifications.

Whilst the bound commitments did constrain some WTO Member countries in certain circumstances, the lack of strength, transparency and commitment to the regime meant that the rules on agricultural export subsidies coming out of the Uruguay Round of negotiations were unfortunately not as effective as they could have been.

One point to note is that the Uruguay Round of negotiations did result in the creation of a more streamlined dispute settlement procedure¹³⁹. The procedure now has a clearer timeframe for disputes and more clearly defined stages of the process¹⁴⁰. The ability of one party to bloc decisions has also been eliminated, as now you need a consensus against the ruling to stop it¹⁴¹. The panels also finally had the concrete ability to offer meaningful compensation to successful dispute parties affected by export subsidies, through its tighter regulation. However, all of this has not been enough to strengthen regulation in the area of agricultural export subsidies given the failures of the texts themselves as outlined above.

¹³⁷ “Roadblock to reform: The persistence of agricultural export subsidies” above n53 at 6.

¹³⁸ Ibid.

¹³⁹ *Understanding the WTO* above n6 at 55-56.

¹⁴⁰ Ibid at 56.

¹⁴¹ Ibid.

[iv] The efficacy of bringing a case today

Some cases have been successfully brought under both the SCM agreement and the AOA, for example Canada - *Measures Affecting Dairy Exports*¹⁴², and the European Union export subsidies on sugar cases, European Communities - *Export Subsidies on Sugar* (Complainant: Australia)¹⁴³, European Communities - *Export Subsidies on Sugar* (Complainant: Brazil)¹⁴⁴ and European Communities - *Export Subsidies on Sugar* (Complainant: Thailand)¹⁴⁵.

Yet, the biggest problem currently faced by countries seeking to bring a case under the AOA is that significant leeway to use export subsidies in agriculture still exists for the 25 countries that have quotas of use¹⁴⁶. Despite the required reductions taking place, the levels of export subsidies that are still allowed, mean that these countries can choose to revert to using export subsidies in reasonably large amounts without breaching the current regulation¹⁴⁷. Furthermore, the lack of adequate reporting means that these countries can effectively use export subsidies in higher quantities, then not report this (however if the subsidization was to a significant enough extent to be noticed by another WTO Member country, that country could bring a case to the WTO Dispute Settlement Body).

Another factor that currently means this avenue is inappropriate to address the issue of export subsidies, is that international market prices are relatively high at the moment compared to domestic prices, in a number of New Zealand's main export industries.

¹⁴² *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WTO Doc. WT/DS103/R, adopted 27 October 1999 (Panel Report) as modified by Appellate Body Report, WTO Doc. WT/DS103/AB/R.

¹⁴³ *European Communities - Export Subsidies on Sugar - Complaint by Australia*, WTO Doc. WT/DS265/R, adopted 19 May 2005 (Panel Report) as modified by Appellate Body Report, WTO Doc. WT/DS265/AB/R.

¹⁴⁴ *European Communities - Export Subsidies on Sugar - Complaint by Brazil*, WTO Doc. WT/DS266/R, adopted 19 May 2005 (Panel Report) as modified by Appellate Body Report, WTO Doc. WT/DS266/AB/R.

¹⁴⁵ *European Communities - Export Subsidies on Sugar - Complaint by Thailand*, WTO Doc. WT/DS283/R, adopted 19 May 2005 (Panel Report) as modified by Appellate Body Report, WTO Doc. WT/DS283/AB/R.

¹⁴⁶ *Removing the exception of agricultural export subsidies* above n132 at 198.

¹⁴⁷ See Figure Five above.

This means there is no need for other countries to resort to using export subsidies to boost their agricultural exports¹⁴⁸. The EU's current use of export subsidies is near zero¹⁴⁹ and given the state of the international markets, it is unlikely that many other WTO Member countries are using these subsidies to a large extent at the moment either. This does not mean that the issue of export subsidies has disappeared. It merely means that currently there are not illegal distortions occurring as a result of breaches of the AOA. Export subsidies could be being used in allowable quantities at the moment, and could also be used again in the future, where the right market conditions of low international market prices and high domestic prices to exist¹⁵⁰. This could again result in significant and unfair market distortions affecting international trade. If that were to occur and New Zealand was adversely affected, there is definitely scope for New Zealand to bring a case to the WTO Dispute Settlement Body.

A more efficient approach to the situation however, is to completely eliminate the use of export subsidies and thereby ensure that they cannot be used in any distorting manner in the future at all. As the rules currently stand, they are hampering the potential efficacy of the WTO dispute settlement process by enabling weasel out room for 25 countries or trading blocs. This is not only unfair to the other countries that cannot use export subsidies, but it is also inconsistent with the treatment of export subsidies under the SCM Agreement and is thus a real flaw in the current WTO rules in this area.

¹⁴⁸ For more information on international dairy price trends see The Organisation for Economic Cooperation and Development Official Website: Dairy – OECD-FAO Agricultural Outlook 2011-2020 at http://www.agri-outlook.org/document/61/0,3746,en_36774715_36775671_47899453_1_1_1_1,00.html.

¹⁴⁹ Explained in Editorial “Doha Not Ready for Undertaker Just Yet” Geneva Watch, An overview of the WTO negotiations on agriculture, Vol. 11, Issue no. 20, May 27, 2011 at http://chicken.ca/upload/Documents/Geneva_Watch_May27_2011.pdf.

¹⁵⁰ “Empathizing with France and Pakistan on agricultural subsidy issues in the Doha Round” above n30 at 965.

VI. Part Five: The Way Forward

New Zealand's main objective in terms of improving international trade law is to facilitate the comprehensive elimination of agricultural export subsidies as swiftly as possible. This is desired in order to ensure that export subsidies cannot be used now, and will not be used again in the future, if or when international market prices drop. It would also be beneficial to New Zealand if the option for reform included the potential to further tighten other areas of distortionary trade practices in agricultural trade, as it comes to light that these are affecting New Zealand's exports as well. The most effective options for reform would have sufficiently wide application to cover all WTO Member countries, and would be implemented within the framework of a body that has the legitimacy and strength to take such action. New Zealand should only support such options as are politically likely to succeed, if not in the short term, at least in the medium to long term. With regard to export subsidies, the quicker they can be eliminated, the better it is for New Zealand, due to the fact outlined above that under the WTO's current regulation of this area, there is still significant scope for some of our trading partners to seriously distort the value of New Zealand's exports through this practice. In light of all this, the following section will now consider each of the available options referring back to what is best for New Zealand. The factors that will be taken into account can be summarized as:

- (1) Would this option be able to eliminate export subsidies?
- (2) Would this option be able to tackle the wider issues of trade distortion in agricultural trade?
- (3) Would this option cover all WTO Member countries?
- (4) Is this option legitimate?
- (5) What is the timeframe for implementation of this option?
- (6) Is it politically likely that this option would succeed?

[i] The Doha Proposal

To date, the main avenue for reform in international trade regulation has been as part of large multilateral agreements¹⁵¹. These are negotiated by the WTO Member countries and cover all aspects of international trade liberation and regulation¹⁵². The most recent round of trade negotiations, the Doha Development Round, began in 2001 and has still not been successfully concluded¹⁵³. Most international trade experts consider that the Doha Round has essentially been side-lined for the time being, and WTO Member countries are now discussing what can and should be done from here¹⁵⁴.

During the Doha Round of negotiations however, a number of tentative agreements were reached¹⁵⁵. Some of these had the potential to dramatically improve the regulation of agricultural trade¹⁵⁶. Unfortunately, as there is no formal agreement until all aspects of the round are concluded, these developments effectively amount to nothing except suggestions of what might be agreed on in the future. One of the most notable achievements of the negotiating round included the support it garnered for the elimination of agricultural export subsidies¹⁵⁷. In 2004, the Member countries agreed to the July 2004 Framework¹⁵⁸. Such a framework is a stipulation of what the Member countries wish to include in the negotiations, and where they see possible room for agreement once further work has been done on the actual details. This document set out

17. The Doha Ministerial Declaration calls for “reduction of, with a view to phasing out, all forms of export subsidies”. As an outcome of the

¹⁵¹ *Understanding the WTO* above n6 at 10.

¹⁵² *Ibid* at 9-10.

¹⁵³ *Ibid* at 77.

¹⁵⁴ Kleimann, David and Joe Guinan “The Doha Round: An Obituary” (2011) Global Governance Programme, Policy Brief 1 June 2011.

www.eui.eu/Projects/GGP/Documents/Publications/PolicyBriefs/PolicyBrief20111final.pdf at 1.

¹⁵⁵ See for example: Revised Draft Modalities for Agriculture TN/AG/W/4/Rev.4, 6 December 2008.

¹⁵⁶ *Ibid* at Part III Export Competition.

¹⁵⁷ “Roadblock to reform: The persistence of agricultural export subsidies” above n53 at 1.

¹⁵⁸ Draft General Council Decision JOB(04)/96, 16 July 2004.

negotiations, Members agree to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date.

18. The following will be eliminated by the end date to be agreed:

- Export subsidies as scheduled.

Following this agreement, further support for the elimination of export subsidies was reaffirmed at the Hong Kong Ministerial Conference in 2005. That conference produced a text stating¹⁵⁹:

6. We agree to ensure the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect to be completed by the end of 2013. This will be achieved in a progressive and parallel manner, to be specified in the modalities, so that a substantial part is realized by the end of the first half of the implementation period.

A number of draft modalities covering export subsidies were then outlined in 2006, 2007 and 2008¹⁶⁰. A modality is essentially a way of doing something. These documents outline how further binding agreements will be reached and cover each of the areas where there has been preliminary accord. The last of these was drafted in December 2008, and would have export subsidies dealt with in the following way¹⁶¹:

A. SCHEDULED EXPORT SUBSIDY COMMITMENTS

1. Developed country Members shall eliminate their remaining scheduled export subsidy entitlements by the end of 2013. This shall be effected on the basis of:

- (a) budgetary outlay commitments being reduced by 50 per cent by the end of 2010 in equal annual instalments from the date of entry

¹⁵⁹ Ministerial Declaration WT/MIN(05)/DEC, 22 December 2005.

¹⁶⁰ Draft Possible Modalities on Agriculture TN/AG/W/3, 12 July 2006;
Revised Draft Modalities for Agriculture TN/AG/W/4/Corr.1, 1 August 2007;

Revised Draft Modalities for Agriculture TN/AG/W/4/Rev.4, 6 December 2008.

¹⁶¹ Revised Draft Modalities for Agriculture TN/AG/W/4/Rev.4, 6 December 2008.

into force, with the remaining budgetary outlay commitments being reduced to zero in equal annual instalments so that all forms of export subsidies are eliminated by the end of 2013.

(b) quantity commitment levels being applied as a standstill from the commencement until the end of the implementation period at the actual average of quantity levels in the 2003-05 base period. Furthermore, throughout the implementation period, there shall be no export subsidies applied either to new markets or to new products.

2. Developing country Members shall eliminate their export subsidy entitlements by reducing to zero their scheduled export subsidy budgetary outlay and quantity commitment levels in equal annual instalments by the end of 2016.

3. In accordance with the Hong Kong Ministerial Declaration, developing country Members shall, furthermore, continue to benefit from the provisions of Article 9.4 of the Agreement on Agriculture until the end of 2021, i.e. five years after the end-date for elimination of all forms of export subsidies.

Whilst this looks like an exhaustive answer to the question of eliminating agricultural export subsidies, the difficulty lies in the fact that the Doha Round has not been concluded¹⁶². Nor does it look likely that this round will be concluded in the near future¹⁶³. Therefore, it is from the starting point of having a complete proposal on how to deal with agricultural export subsidies, that it is now possible to evaluate which options could best implement this proposal or one very similar to it.

[ii] Another comprehensive multilateral agreement

The most obvious avenue for future reform is to continue using the current system, and to support a reinvigoration of negotiations under the Doha Round. Alternatively, New Zealand could support the commencement of a new negotiating round in the near future, which similarly utilizes the “single undertaking” approach to multilateral

¹⁶² “The Doha Round: An Obituary” above n154 at 1.

¹⁶³ Ibid.

negotiations. Based on the six criteria outlined above, it becomes immediately clear that this approach could be very effective in the right circumstances.

(1) Such a multilateral agreement could comprehensively deal with export subsidies in the way outlined during the Doha Round of negotiations.

(2) It also presents the opportunity to address the wider issues affecting agricultural trade, namely domestic support and other forms of distortionary export competition, as part of the single undertaking. This was already being done during the Doha Round of negotiations and there is no impediment to its continuation¹⁶⁴. Importantly, more ambitious agreements can be made through this process if countries like New Zealand wish for stronger reform in some areas and are willing to compromise by making tradeoffs in other areas¹⁶⁵.

(3) Any such agreement would have a wide application, being applicable to all of the WTO Member countries.

(4) This option is also very legitimate. The WTO has been the most active international organisation in the field of international trade law. It has already facilitated the creation of innumerable rules in the area that are backed up by its dispute settlement procedure¹⁶⁶. This legitimacy is enhanced by the fact that the WTO agreements are seen as the most equitable, because they are based on the underlying concepts of Most Favoured Nation and National Treatment¹⁶⁷. The first of these principles stipulates that favourable treatment accorded to one trading partner must be accorded to all WTO Member countries (with the exception of preferential trade

¹⁶⁴ See for example Draft General Council Decision of 16 July 2004 JOB(04)/96 and the subsequent Draft Modalities for the full potential coverage of the Doha Round of Negotiations.

¹⁶⁵ Carlos Perez Del Castillo, Mike Gifford, Tim Josling, Rolf Moehler and Marcelo Regunaga “The Doha Round and Alternative Options for Creating a Fair and Market-Oriented Agricultural Trade System” (2009) International Food & Agricultural Trade Policy Council Position Paper, Trade Negotiations Policy Series, November 2009 www.agritrade.org/documents/IPC_TradeNegPaper_FINAL.pdf at 11.

¹⁶⁶ See the World Trade Organization Official Website at <http://www.wto.org/> for more information on its work to date.

¹⁶⁷ *Understanding the WTO* above n6 at 10-11.

agreements)¹⁶⁸. Application of the later principle effectively means that domestic and international goods must be treated equally once they have entered a domestic market¹⁶⁹. The combined result of these two principles is that even the smallest WTO Member countries can benefit from participation in these negotiations, despite having very little to offer by way of market access concessions or tightening domestic regulation¹⁷⁰. Furthermore, the approach of agreeing to these rules through multilateral negotiations already has significant acceptance and support from WTO Member countries, as this has been the main mechanism used to date¹⁷¹. Therefore, there is no more legitimate body to conclude such regulatory reform than the WTO, nor any more legitimate way to do so than through multilateral agreements.

(5) and (6) The major downsides of this option are apparent when we consider the last two criteria, namely the timeframe for adoption and the political likelihood of success. The initial negotiations for the Doha Round lasted a whopping 10 years before the negotiators essentially gave up for now, considering the task of consensus too difficult for the current political environment¹⁷². The reasons why the Doha Round is currently taking a backseat are numerous and complex. They range from what some negotiators have labelled “an unwillingness” on the part of other WTO Member countries to come to an agreement, to a simple inability for the diverging views on various issues to be reconciled and form the basis of any agreement¹⁷³. On the whole, the US has been supportive of an ambitious outcome, whereas China, Brazil and India have made it clear that they simply cannot agree on such an option¹⁷⁴. Without such an ambitious package, the US export interests that are necessary to the passage of any trade agreement cannot be mobilized for the essential arm-twisting and vote counting in US congress¹⁷⁵. More worryingly, the US Senate further rejected a Republican push to expand President Obama’s powers to negotiate trade deals on the 22nd of September

¹⁶⁸ Ibid at 10.

¹⁶⁹ Ibid at 11.

¹⁷⁰ For an explanation of these two concepts see “The WTO and Subsidies” above n25.

¹⁷¹ *Understanding the WTO* above n6 at 10.

¹⁷² “The Doha Round: An Obituary” above n154 at 1.

¹⁷³ Ibid at 5.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid at 4.

2011¹⁷⁶. This means Obama does not have “Trade Promotion Authority” (TPA), which is the ability to negotiate a trade deal then submit it for approval by the US congress in a straight up-or-down vote with no amendments. Obama also needs to appease anti-trade constituencies in the Democratic Party to sign a deal, and without the US support it would be impossible to conclude the round¹⁷⁷. While it is still possible that WTO Member countries will finally be able to put their differences aside and come together to reach agreement through the current WTO negotiating procedure, it is seemingly clear that this will not occur in the near future¹⁷⁸. Now, the US elections and also the changing of leadership in China, are both events that will stall forward momentum in trade negotiations for at least the next two years¹⁷⁹.

Despite this setback, many experts still believe that the WTO multilateral negotiating rounds remain one of the most successful ways of achieving comprehensive agreements in international trade regulation¹⁸⁰. They rely on the unique ability to encompass trade-offs from one area to another, and to cover such a wide range of issues in one go to support this view¹⁸¹. In light of the numerous positive aspects of this approach, the option of continued multilateral negotiations is certainly something New Zealand should continue to support, despite the lack of optimism in getting short to medium term goals achieved through this mechanism. The quality and status of the legal rules that can be achieved through this approach still tends to outweigh the lack of speed in its progression.

¹⁷⁶ Olivier Knox “US Senate defeats proposal to expand Obama trade powers” (2011) The China Post, Business at www.chinapost.com.tw/business/americas/2011/09/22/317428/US-Senate.htm.

¹⁷⁷ “The Doha Round: An Obituary” above n154 at 4.

¹⁷⁸ Ibid at 8.

¹⁷⁹ Ibid at 2.

¹⁸⁰ “The Doha Round and Alternative options for Creating a Fair and Market-Oriented Agricultural Trade System” above n165 at 11.

¹⁸¹ Ibid.

[iii] A mini-package aimed at least developed countries

Another option currently being considered by WTO Member countries is that of agreeing to a mini-package at the WTO's Eighth Ministerial Conference¹⁸². This is to be held from the 15th until the 17th of December 2011¹⁸³. Such a mini-package is mandated by paragraph 47 of the Doha Declaration¹⁸⁴. The main focus of the mini-package would be to secure benefits for the least developed countries (LDC's) that are also WTO Members¹⁸⁵. This idea has garnered support as a way forward, which holds true to the initial impetus of the Doha Round, which was to focus on Development¹⁸⁶.

The main components of such a package aimed at benefiting the LDC's have not been finalized¹⁸⁷. It seems however, that the most popular so far are: Duty-Free, Quota-Free market access for products from LDC's, the adoption of a waiver for LDC's in the services negotiations, LDC specific rules of origin, and some form of resolution on the cotton issue¹⁸⁸.

Whilst the core of the mini-package is supposed to be made up of development focused areas, many WTO Member countries have pushed for the inclusion of what have been termed "LDC-Plus" items as well¹⁸⁹. These would cover other areas of negotiations, which have reached a sufficient level of maturity to be included into an agreement¹⁹⁰. Other areas that have been suggested as ready for agreement include: Trade facilitation, export competition, fisheries subsidies and a transparency mechanism for regional trade agreements¹⁹¹. Provisions on special and differential treatment, liberalized trade in environmental goods and services, and a standstill commitment on current tariffs charged have also been suggested¹⁹².

¹⁸² Sanya Smith "Doha Round: Fight is now over early harvest contents" Third World Network www.twinside.org.sg/title2/wto.info/2011/twninfo110601.htm at 1.

¹⁸³ Ibid.

¹⁸⁴ Ministerial Declaration WT/MIN(01)/DEC/1, 20 November 2001.

¹⁸⁵ "Doha Round: Fight is now over early harvest contents" above n182 at 1.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid at 4.

¹⁹¹ Ibid.

¹⁹² Ibid.

(1) and (2) If export competition and more specifically agricultural export subsidies do not end up being included in the mini-package, then this option would fail our first evaluative criteria from the outset. However, assuming that some agreement were to be reached, then it seems likely that export subsidies would not be dealt with alone. Instead, they would come under the heading export competition¹⁹³. This would be positive, in that not only the most pressing problem of agricultural export subsidies could be resolved, but also the agreement could go some way to solving the wider issues surrounding export competition. The downside to this option is that no mention has been made of domestic support, particularly the EU's new de-coupled payment scheme. This is because domestic support is still widely considered to be too sensitive and not at all ready for a quick agreement by the end of the year¹⁹⁴.

(3) It is clear that the application of this agreement would be just as wide as with a full-blown multilateral agreement.

(4) As to legitimacy, this process of agreeing to “mini-packages” is not something that the WTO has resorted to before. However, it was outlined as a possibility in the Doha Declaration, setting out the mandate for the negotiations¹⁹⁵. Therefore, this is certainly a viable option. Moreover, given that it would be undertaken within the framework of the WTO, the legitimacy of any rules propounded via this mechanism would be just the same as if they had been part of a wider agreement. This is because the mini-package option still requires agreement by consensus, thus would need to have the backing and support of all Member countries before it was passed.

(5) In terms of timeframe, the mini-package provides a far superior option than a wider multilateral agreement, as it is hoped that the proposal will be agreed upon by the Ministerial Conference in December 2011. Therefore, this option offers the potential for a far quicker result and the coming into force of regulations on

¹⁹³ Editorial “Doha: Difficult road ahead for December mini-package” Bridges Weekly Trade News Digest volume 15 Number 23, International Centre for Trade and Development at <http://hosted-p0.vresp.com/370106/9830f085a4/ARCHIVE>.

¹⁹⁴ “WTO agreement on agriculture: Implications for the ACP” above n64 at 6.

¹⁹⁵ Ministerial Declaration WT/MIN(01)/DEC/1, 20 November 2001.

agricultural export subsidies at a date much sooner than if the new rules were left to be decided as part of a full blown multilateral agreement.

(6) However, the biggest problems with this option come under the evaluation of the last criteria, namely the political likelihood of success. As with any trade agreement, there are already a number of countries that dispute the inclusion of certain issues into the agreement¹⁹⁶. They believe instead, that much more negotiation is needed before consensus can be reached¹⁹⁷. Most importantly, the EU and Switzerland have expressed concern about the maturity of the issue of export competition, specifically agricultural export subsidies¹⁹⁸. The EU continues to argue that the elimination of export subsidies would be a major concession on its behalf¹⁹⁹. Whilst it does recognize that it earlier agreed to the elimination of agricultural export subsidies as part of the Doha Round, the EU stresses that this concession assumed a much larger deal than is now expected this year. The EU Trade Commissioner Karel De Gucht stated²⁰⁰:

“this happened in a larger framework, within a larger agreement. If you extract part of it, you cannot come to the conclusion that ‘well, you agreed to that in a larger context so you should also agree in a more limited context’”.

The US does not currently support the inclusion of export subsidies or export competition into this mini-package either²⁰¹. It is unwilling to make unilateral concessions in the area of export credits and other types of export competition it is making use of, and is thus strongly against any agreement being reached in this area in the short term²⁰².

¹⁹⁶ “Doha Not Ready for Undertaker Just Yet” above n149 at 2.

¹⁹⁷ Ibid at 3.

¹⁹⁸ Ibid.

¹⁹⁹ Doug Palmer and Doina Chiacu “Farm export subsidy cuts harder now – EU” (2011) Reuters, US Edition at www.reuters.com/article/2011/06/21/trade-eu-usa-idUSN1E75K10S20110621 at 1.

²⁰⁰ As quoted in “Farm export subsidy cuts harder now – EU” above n199 at 1.

²⁰¹ “Doha Not Ready For Undertaker Just Yet” above n149 at 3.

²⁰² Ibid.

Thus, as both the EU and the US are against the inclusion of either export subsidies alone, or the combination of looking at all issues of export competition together as part of the mini-package, it is unlikely that such an agreement will go ahead. While it may in theory be a good idea to try and get a speedy agreement on some issues that were discussed as part of the Doha Round before a complete agreement can be reached, this avenue is politically unlikely to produce results in the area of export subsidies.

[iv] A multilateral agreement on agricultural export subsidies alone

Another suggested route is to address the issue of agricultural export subsidies alone. Given the inability of the WTO Member countries to come to an agreement on its inclusion in anything other than a comprehensive multilateral agreement, where tradeoffs are available, it is unlikely that dealing with the issue separately could be at all successful²⁰³. This is due very strongly to the EU's unwillingness to come to an agreement on agricultural export subsidies without securing concessions from other trading partners in other areas of the negotiations, as already outlined. Thus, this avenue seems doomed to fail before it has even been attempted or suggested.

[v] Sectoral initiatives within the WTO framework

A further possible means of regulatory reform within the WTO framework is through sectoral initiatives. Such an initiative could either take the shape of being a forum for communication, or alternatively a body could be set up to govern a plurilateral agreement relevant to a certain sector. There has already been extensive discussion resulting in wide agreement that export subsidies are a distorting practice, and that their use should be eliminated. Therefore, a forum for communication without power to reach binding decisions could not achieve very much in this area.

The option of a plurilateral agreement monitored by a sectoral body is however, something that needs to be considered. This could involve a separate body being set up that agreed on an international agreement based largely on draft texts produced by the Doha Round, which countries could voluntarily sign up to. One such example of this

²⁰³ See for example the difficulties faced when contemplating a "mini-package" as explained in "Doha Round: Fight is now over early harvest contents" above n182 at 1.

being implemented in the past is the International Dairy Arrangement²⁰⁴. This agreement came into force on 1 January 1980, after the Tokyo Round of negotiations²⁰⁵. The International Dairy Council was created to oversee the implementation of this agreement, which set minimum export prices for international trade in certain milk products²⁰⁶. However, in 1995 the Council suspended the operation of minimum export prices because the limited membership to the agreement made the regime untenable²⁰⁷, and in 1997 the agreement was terminated²⁰⁸. This is not to say that a similar agreement relating to export subsidies could not function. However, it does highlight what the major flaw of such an agreement would be, namely limited membership.

- (1) and (2) It could cover export subsidies and also wider distortionary practices in agricultural trade.
- (3) However this option falls down immediately when we come to evaluating the scope of application. As with the International Dairy Agreement, it is likely that the biggest players, ie the EU here, would refuse to sign up to the agreement. It has been continuously stated, that the EU view such a concession as requiring reciprocal concessions from other WTO Member countries before they would consider it. Given this stance, it is very unlikely that the EU would voluntarily sign up to an agreement that required it to eliminate export subsidies without gaining anything in return.
- (4) Such a body would not lack legitimacy, as it would simply represent another aspect of the work of the WTO. However, it would not have the ability to make legally binding rules on WTO Member countries, and has thus, a more limited impact and role than some of the other suggestions.

²⁰⁴ International Dairy Arrangement, 1980.

²⁰⁵ Ibid.

²⁰⁶ The World Trade Organization Official Website: WTO News – Signatories terminate WTO plurilateral agreements on meat and dairy products at http://www.wto.org/english/news_e/pres97_e/pr78_e.htm.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

- (5) The agreement could potentially be implemented in a reasonably short timeframe.
- (6) The main concern with such an approach is that it is politically unlikely that the EU would sign up, therefore the practical result of having this body would be minimal.

This is therefore, not a very strong option and New Zealand should not realistically look at supporting such a suggested way forward on how to deal with export subsidies in agricultural trade if it arose.

[vi] A new regulatory body as part of the WTO

There is much discontent surrounding the current WTO negotiating procedures' ability to address both tariff and non-tariff barriers to entry, as well as the regulation of policy decisions²⁰⁹. Many experts now think that regulatory issues in particular are becoming far too complex and are thus ill-suited to being dealt with in a straight-forward "single undertaking" negotiation²¹⁰. These experts suggest that a completely new body ought to be set up under the WTO, to deal exclusively with the facilitation of new rules and regulations covering trade practices²¹¹.

There has, however, been much debate about exactly what form a new regulatory body would take, and what sort of powers it would have²¹². The options range from those

²⁰⁹ This view was outlined in "The Doha Round: An Obituary" above n154; Editorial "Troubled state of Doha talks causing WTO "paralysis" says Lamy; focus for December ministerial shifts" Bridges Weekly Trade News Digest volume 15 Number 28, International Centre for Trade and Development at <http://ictsd.org/i/news/bridgesweekly/111353/>; Thomas Cottier "Preparing for Structural Reform in the WTO" (2007) 10:3 *Journal of International Economic Law* 497 at 497.

²¹⁰ "Preparing for Structural Reform in the WTO" above n209 at 1.

²¹¹ Ibid.

²¹² See the different proposals and criticisms in "Preparing for Structural Reform in the WTO" above n209; Peter Sutherland (Chairman), Jagdish Bhagwati, Kwesi Botchwey, Niall Fitz Gerald, Koichi Hamada, John H. Jackson, Celso Lafer, Thierry de Montbrial "The Future of the WTO; Addressing institutional challenges in the new millennium" Report by the Consultative Board to the Director-General Supachai Panitchpakdi (World Trade Organisation, Switzerland, 2004); "The Doha Round and Alternative Options for Creating a Fair and Market-Oriented Agricultural Trade System" above n165; Martin Khor "Sutherland

that would completely redirect regulatory power from the WTO Member countries, to the members of the regulatory body itself²¹³, to an option that suggests the regulatory body should only have recommendatory powers²¹⁴. The following are essentially variations of each other, but raise very separate issues. Each variation will be evaluated with respect to the criteria set out at the beginning of this section.

1. Proposal One

Effectively, the main proposal is to introduce a Standing Committee on Legal Affairs²¹⁵. This would be a committee of legal experts, set up as part of the WTO²¹⁶. One suggestion is that this body should undertake research on international trade law issues, draft treaty texts that outline ways to deal with these issues, and ensure coherence between all draft treaty texts and the current international laws in the area²¹⁷. These drafts could then be introduced to the WTO Member countries meeting at a Ministerial Conference, to decide whether to adopt or reject the work of the standing committee²¹⁸. This would ensure that the draft treaties containing new international trade regulations, would comprehensively address all issues surrounding the area, and the creation of the text would be done in a relatively speedy manner²¹⁹. If any Member countries had problems with the drafts, they could voice their concerns at the Ministerial Conferences and negotiate changes to the original texts²²⁰. This would completely remove trade regulation from the single undertaking framework, and leave that process to run its own course focusing predominantly on market liberalization.

In terms of evaluation:

- (1) and (2) This option could address any issues regarding export subsidies or wider trade distorting conduct.

report on WTO has some controversial proposals” Third World Network at www.twinside.org.sg/title2/5721a.htm.

²¹³ “Preparing for Structural Reform in the WTO” above n209 at 510.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

- (3) Its regulations would have a wide application to all WTO Member countries.
- (4) Any rules passed in this manner would also have a high degree of legitimacy, because the final decision is still left up to the WTO Member countries themselves. Furthermore, once the rules or regulations had entered into force, they would have the backing of the WTO dispute settlement procedure.
- (5) Whilst the body itself could take some time to set up, once it is fully functional, it would speed up the time taken to create rules and regulations in the field of international trade law exponentially. These rules would no longer need to feature as part of the “single undertaking” and agreement could be done on a piecemeal basis instead, enabling huge time savings.
- (6) Looking finally at the political likelihood of success, the first point that needs to be noted is that this option is far removed from the status quo. It would involve substantial structural changes needing to occur within the WTO. Before such a body could be set up, support for it would need to be unanimous and it is likely this would take years to reach. This makes the option of a new regulatory body something that is definitely not likely to feature in the short to medium term future. In the long term however, such an option could enhance the facilitation of reform to international trade regulation. Even if the body was only used to draft minor changes to agreements ensuring that the agreements remained applicable to technical advancements for example, it could still play a significant role in streamlining reform.

However, with regard to the issue of export subsidies, it is hoped that this issue will be well and truly dealt with before such a body were to come into existence. Therefore, this is not an avenue that should be recommended to the New Zealand Government or trade officials, as one that they should invest any real amount of time and effort into as part of their goal of eliminating export subsidies. In the long term however, such a body could indeed facilitate smoother and less distorted trade in agriculture. Hence it would be a good idea for New Zealand to support any positive suggestions of such a body being implemented within the WTO in the future.

2. Proposal Two

Other slight variations of this option include the creation of rules on how and when Member countries could use their power to block the coming into force of such draft texts²²¹. Some suggestions include a country only being able to block a new trade regulation if it submits in writing, with reasons, that the matter is of vital national interest to it²²². This could make the process more streamlined and easier to pass new trade regulations. However, some WTO Member countries may see it as an affront to their sovereignty if they are only able to veto a regulation in the most extreme situations. This in turn decreases the legitimacy of the rules and regulations being drafted, because as international trade law currently stands, it is something agreed to by consensus²²³. Once WTO Member countries start being forced against their will to accept rules, there is potential for the whole system to fall apart. On all other counts of evaluation, this option is relatively similar to the first proposal.

3. Proposal Three

Another option would be to give the power of decision-making to a new ministerial committee consultative group, made up of 30 members²²⁴. Some of these members would be permanent, but the majority of them would be rotated, drawing from geographical areas or regional trading arrangements²²⁵.

- (1) and (2) In terms of scope of what such a body could address, it is similar to the first two proposals.
- (3) The width of its application would also be the same.
- (4) However, this option poses significant questions when it comes to evaluating the legitimacy of its rules and regulations. A new ministerial committee consultative group would go even further than previous proposals, against the

²²¹ Ibid at 506.

²²² Ibid.

²²³ *Understanding the WTO* above n6 at 10.

²²⁴ “Sutherland report on WTO has some controversial proposals” above n212 at 1.

²²⁵ Ibid.

idea of regulation via consensus. Most WTO Member countries would be left out of the decision completely. This can be seen as a real affront to state sovereignty and is not something that would be accepted as legitimate in most international law circumstances. Furthermore, there would likely be much debate over who should be included as permanent members, given the huge controversy that has surrounded the P-5 members of the United Nations Security Council²²⁶. The selection of permanent members could further undermine the legitimacy of the rules and regulations later created, because it is likely that some WTO Member countries would not be happy with how the countries were chosen, and not think it sufficiently representative of all trading groups.

- (5) Savings could definitely accrue in terms of the timeframe that this body would operate on when drafting and implementing rules and regulations. This would occur because agreement between fewer members is usually easier to reach, given that fewer views would have to be balanced.
- (6) The political reality of such a suggestion coming into force however is not strong. Such an option flies in the face of a fundamental aspect of international law, namely that consensus is needed for rules to be binding. It is unlikely that the political atmosphere currently present in and around the WTO, has yet warmed to the idea of such a radical change in control and decision-making processes. Therefore, the implementation of a body such as this is not foreseeable in the near or medium term future.

Given that New Zealand is unlikely to be represented on such a smaller committee, and the fact that this alternative would be met with much controversy, it is not something New Zealand should support. Of the proposals suggested for the creation of a regulatory body, this option seems weaker, and less viable than some of the others. Therefore, it should not be considered as something New Zealand wishes to see occur in the near future or even at all.

²²⁶ See for example the explanation in Jose E. Alvarez “Judging the Security Council” (1996) 90.1 *The American Journal of International Law* 1-39.

4. Proposal Four

The final proposal discussed here is that the committee itself could draft the rules and regulations and then a “GATS” approach could be followed, whereby the WTO Member countries decide at their own pace if and when to accept and implement the new regulations²²⁷. This alternative would lead to different rules applying to different Member countries, and could become wholly ineffective if countries did not decide to take up the regulation. It suffers from the same setbacks outlined with regard to sectoral initiatives that are essentially voluntary plurilateral agreements. The obvious potential for complete failure of this option from the outset makes it not a very likely candidate for a future trade regulation regime either.

It is however, a process utilized by other international organisations²²⁸, and in the event that no alternative regulatory body could be agreed upon, there is some scope for this option to be implemented, if only as a transitional body before something more permanent and with mandatory powers was set up.

While none of these options regarding a completely new body are viable in the short term to deal with export subsidies, they certainly do need to be kept in mind, as they contain real potential to return practicality and efficiency to the WTO in general. If they were successfully implemented, any of these four proposals could potentially facilitate advancements in the regulation of other areas of export competition and distortionary domestic support. If nothing is done to strengthen the creation of international trade regulation within the WTO framework in the medium to long term, it is suggested that such inaction could further promote relocation of regulation outside of the WTO framework and into regional and bilateral agreements or alternatively to other international organisations. Whether or not this is a good or viable option will be outlined below.

²²⁷ For more information about the GATS approach see Simon Tans “The GATS approach towards liberalization: The interaction between domestic regulation, market access, national treatment and scheduled commitments in the GATS” The Graduate Institute Geneva, Centre for Trade and Economic Integration, CTEI Working Paper #111 November 2009 at <http://www.iadb.org/intal/intalcdi/PE/2010/06419.pdf>.

²²⁸ For example the OECD.

[vii] Regional and Bilateral agreements

Regional and bilateral agreements have become a very important part of international trade today²²⁹. Particularly in recent years, the decision to conclude free trade agreements (FTAs) at a regional or bilateral level, as opposed to relying solely on the multilateral system has become far more widespread²³⁰. There are many different viewpoints as to whether FTAs help or hinder the multilateral system²³¹. However, regardless of what effect this is having, there are certainly opportunities to constrain distortionary international trade practices within these smaller agreements. Indeed, New Zealand has included paragraphs explicitly referring to the treatment of agricultural export subsidies in all of the FTAs it has concluded²³². The most recent example of such reference is the New Zealand – Hong Kong, China Closer Economic Partnership Agreement²³³ which entered into force at the beginning of January, 2011. It states

Article 2 Subsidies and Countervailing Measures

1. The Parties agree to prohibit export subsidies* on all goods including agricultural products.

2. The Parties maintain their rights and obligations under Article VI of GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures

3. The Parties agree not to take any trade remedy action
*”Export subsidies” means subsidies as defined by Article 3 of the WTO Agreement on Subsidies and Countervailing Measures and Article 1(e) of the WTO Agreement on Agriculture.

A number of New Zealand’s FTAs do not go as far as this one though, in that they prohibit export subsidies only on export destined to the Parties to the agreements. The

²²⁹ Shujiro Urata “Globalization and the Growth in Free Trade Agreements” 9.1 *Asia-Pacific Review* 20 at 20.

²³⁰ Ibid.

²³¹ For one view see Hiren Doshi “Multilateral vs. bilateral trade agreements” (2008) API Asia.com at

www.upiasia.com/Economics/2008/01/28/multilateral_vs_bilateral_trade_agreements/7323/.

²³² For a list of these see New Zealand Ministry of Foreign Affairs and Trade Official Website: Treaties and International Law at www.mfat.govt.nz/Treaties-and-International-Law/02-Trade-law-and-free-trade-agreements/index.php.

²³³ New Zealand – Hong Kong, China Closer Economic Partnership Agreement, 2011.

Free Trade Agreement Between The Government of New Zealand and The Government of The People's Republic of China²³⁴ includes such a reference at

Article 10 Agricultural Export Subsidies

1. For the purposes of this Article, agricultural goods means those products listed in annex 1 of the WTO Agreement on Agriculture and export subsidies shall have the meaning assigned to that term in Article 1(e) of the WTO Agreement on Agriculture, including any amendment of that article.

2. The Parties share the objective of the multilateral elimination of export subsidies for agricultural goods and shall work together toward an agreement in the WTO to eliminate those subsidies and prevent their reintroduction in any form.

3. Neither Party shall introduce or maintain any export subsidy on any agricultural good *destined for the territory of the other Party*.

(Emphasis added)

Other examples of such limited commitments on the elimination of agricultural export subsidies appear in the New Zealand – Malaysia Free Trade Agreement²³⁵, the Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area²³⁶, the Trans-Pacific Strategic Economic Partnership Agreement²³⁷ and the Thailand – New Zealand Closer Economic Partnership²³⁸. The following section will evaluate whether the approach of concluding FTAs appropriately addresses the issues surrounding export subsidies and other trade practices that distort agricultural trade flows:

- (1) Such an approach clearly meets our first evaluative criteria in that it is directly addressing export subsidies.

²³⁴ Free Trade Agreement Between The Government of New Zealand And The Government of the People's Republic of China, 2008.

²³⁵ New Zealand – Malaysia Free Trade Agreement, 2010.

²³⁶ Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area, 2010.

²³⁷ Trans-Pacific Strategic Economic Partnership Agreement, 2006.

²³⁸ Thailand – New Zealand Closer Economic Partnership Agreement, 2005.

- (2) Export competition and domestic support are not being covered to the same extent however²³⁹. This means that New Zealand is opening itself up to other countries that it trades with, diversifying their support mechanisms and essentially “hiding” their subsidies of exports in other ways, in the medium and long term future. In fact, almost no regional and bilateral agreements address the reduction of agricultural support²⁴⁰. This is unsurprising given the nature of domestic support, which cannot be granted to local producers based on their products’ possible export destination²⁴¹. However, it does raise a concern as to whether this approach is the most viable in terms of addressing these wider issues.
- (3) Moreover, when we consider the width of application that these agreements have, it becomes immediately clear that the only countries constrained by these agreements, are those that are party to them. Moreover, most of the trading partners with which we have managed to secure these articles limiting the use of export subsidies, have not been traditional users of these subsidies at all²⁴². Thus, from an analysis of the scope of application of these agreements, this option presents a fundamental weakness, namely that the biggest users of export subsidies are still able to revert to this practice whenever they want.
- (4) As to legitimacy, it can be said that as a method of regulating bilateral relations, FTAs including rules on the use of certain practices are becoming more and more common²⁴³. This method of regulation is now widespread and regarding New Zealand, it appears that the rules are being adhered to²⁴⁴. All of New Zealand’s FTAs have dispute settlement mechanisms included within the

²³⁹ To see the exact treatment, find copies of the FTAs on the New Zealand Ministry of Foreign Affairs and Trade Official Website: Treaties and International Law at www.mfat.govt.nz/Treaties-and-International-Law/02-Trade-law-and-free-trade-agreements/index.php.

²⁴⁰ L. Fulponi and M. Shearer and J. Almeida “Regional Trade Agreements – Treatment of Agriculture” (2011) OECD Food, Agriculture and Fisheries Working Papers no.44 www.oecd.org at 7.

²⁴¹ Ibid.

²⁴² See Figure One above.

²⁴³ “Regional Trade Agreements – Treatment of Agriculture” above at n240 at 7.

²⁴⁴ For more information on this process and its application see the New Zealand Ministry of Foreign Affairs Website at <http://www.mfat.govt.nz>.

agreements, however the realistic availability of using these is questionable as there has not been a dispute under any of them to date²⁴⁵. This may be because New Zealand has preferred to maintain cordial relations with its trading partners, or alternatively perhaps these agreements are simply not being broken. This potentially makes a system of regulation through FTAs less legitimate than doing so through the workings of the WTO, because the dispute settlement procedure that is part of the WTO is so well-established and relatively frequently used.

Moreover, the inclusion of rules into FTA's can and has already, led to the "spaghetti bowl" phenomenon, whereby numerous different countries are under different obligations regarding the same issue²⁴⁶. A situation prevalent in many of New Zealand's Free Trade Agreements is that different rules apply to trade between New Zealand and for example China, compared to trade between China and Australia. This could mean that China will not use export subsidies on exports going to New Zealand, but will with exports going to Australia. In such a situation, where New Zealand exports to Australia as well, our exports to the Australian market could be affected by China's export subsidies. Thus, despite a ban existing on the use of these between China and New Zealand, our economy can still be adversely affected by Chinese practices in third markets.

(5) and (6) Looking at the situation from a "timeframe" and "political likelihood of success" perspective, it is clear to see that not only New Zealand, but also many other countries have started to and indeed continue to include regulation on the use of export subsidies in this way. The US, Australia, Canada, Hong Kong and China have all included such limitations in a number of their FTAs²⁴⁷. Whilst the EU has not readily embraced this method of

²⁴⁵ Ibid.

²⁴⁶ Explained in "Multilateral vs. bilateral trade agreements" above n231.

²⁴⁷ In fact a recent study that examined a wide range of FTAs found that over 60% of the FTAs in place worldwide had prohibitions on export subsidies. 66% of the FTAs made within the Americas prohibited export subsidies and 100% of the Asia-Pacific FTAs prohibited export subsidies. More detail on this can be found at "Regional Trade Agreements – Treatment of Agriculture" above n240.

regulating the issue of export subsidies²⁴⁸, the proliferation of such regulation is a promising sign for future development in this area. If countries like New Zealand continue to include reference to export subsidies in their FTAs, it is possible that the albeit minimal influence of each individual agreement, will all add together, to finally cover a significant percentage of world trade. This could then lead to a certain degree of stability in international markets and protect New Zealand's exports from the price distortions, which flow from the use of export subsidies. However, without constraining the EU, this option will never be entirely sufficient.

Despite a number of reasons why these agreements are perhaps not the best way forward in terms of securing strong regulation of international agricultural trade, the inclusion of regulations on export subsidies in FTAs is nevertheless a good starting point for New Zealand in the short term. Whilst there may be variations on what is acceptable between different trading partners, increased regulation on this issue is better than none at all. The possibility also remains that regulations on issues surrounding agricultural trade that are included in some of these FTAs, could one day be "multilateralised"²⁴⁹. This means that all countries could come to agreement on what the regulation should be, through what has worked most efficiently in regional and bilateral agreements. These regulations could then be transposed onto the multilateral sphere by adopting that regulation into a multilateral agreement. This would then eliminate the problem of increased complexity through differing rules on the same subject matter, and further legitimize the inclusion of regulations at the narrower regional and bilateral level.

Because of these positive effects of including regulation on export subsidies in FTAs, it is suggested that New Zealand should continue to act in this way, and even push to strengthen the standards that its trading partners are willing to accept. New Zealand should also undertake continuous studies to ensure that other trade practices are not used as an alternative to export subsidies, but essentially having the same distorting

²⁴⁸ For more information on EU FTAs see European Commission Official Website: Enterprise and Industry – policies – facilitating trade – Free Trade Agreements at http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm.

²⁴⁹ For more detail on what exactly this is see "The Doha Round: An Obituary" above n154.

effects. If such practices were revealed, New Zealand would need to extend the focus of its negotiations at the regional and bilateral level to try and negotiate limitations to these further practices as well.

[viii] Regulation via other international and/or regional organisations

It may eventuate that the WTO fails to adequately address the issue of trade reform in the near to medium term future. If this occurs, and WTO Member countries consider regional and bilateral agreements also insufficient to deal with the problems international trade law faces, the question will arise as to whether other international and/or regional organisations could fill this gap.

Already today, there are scores of international and regional organisations that exist to facilitate and encourage trade. Many of these have taken on a more active role in the development of trade regulation and could continue to significantly develop these capabilities if the need arose. Some of the most active in this area and with application to New Zealand include: the Organisation for Economic Cooperation and Development (OECD) and the Food and Agriculture Organization (FAO). The following section will outline whether or not either of these organisations could pick up the job of facilitating reform surrounding the issues of export subsidies and other distortionary trade practices in agricultural trade.

1. The OECD

The OECD has a membership of 34 countries, of which New Zealand is one²⁵⁰. It has actively aimed at setting international standards in a wide range of areas from agriculture and tax to the safety of chemicals²⁵¹. This is done through the use of a number of different instruments, of which its “OECD Acts”, Decisions and International Agreements are legally binding, whereas its Recommendations, Declarations, Arrangements and Understandings are all only of persuasive

²⁵⁰ The Organisation for Economic Cooperation and Development Official Website: Home – Our Mission at www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html.

²⁵¹ Ibid.

authority²⁵². It is the organisation's governing body, the Council, that has the power to adopt the legally binding instruments²⁵³. These then become applicable to all Member countries unless they abstain at the time the instrument is adopted²⁵⁴. These instruments are the result of extensive research and discussions which predominantly take place in smaller committees set up to deal with each topic as it arises²⁵⁵. The procedure has been in existence for over 50 years now and has produced hundreds of agreements, decisions, recommendations and the like²⁵⁶.

(1) and (2) In terms of ability to address the issue of export subsidies and wider distortionary trade practices, this body has already undertaken various agreements in very similar aspects, for example its agreement on export credits²⁵⁷. Thus, there would be no difficulty involved in the OECD addressing either export subsidies directly, or the wider issues of trade distortionary conduct in agricultural trade.

(3) Whilst its membership is significantly lower than that of the WTO, it must be noted that some of its 34 Member countries have been some of the heaviest users of export subsidies and agricultural support in general²⁵⁸. Thus, whilst it is readily acknowledged that the application of any such rules would certainly not be universal, there would nevertheless be very real practical benefits accruing from the development and implementation of rules under this system. As highlighted above however, OECD Member countries can opt to abstain

²⁵² The Organisation for Economic Cooperation and Development Official Website: Legal Affairs – OECD Legal Instruments at www.oecd.org/document/46/0,3746,en_21571361_38481278_40899182_1_1_1_1,00.html.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ The Organisation for Economic Cooperation and Development Official Website: Home – Our Mission at www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html.

²⁵⁷ The Organisation for Economic Cooperation and Development Official Website: Trade and Agriculture Directorate – The Export Credit Group (EGC) at www.oecd.org/document/24/0,3746,en_2649_34169_1844760_1_1_1_1,00.html.

²⁵⁸ For a list of members see The Organisation for Economic Cooperation and Development Official Website: Home – Our Mission www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html.

from accepting the rules this body propounds. This hampers both the scope of its application and also the legitimacy and strength of its regulations.

- (4) A further factor against the legitimacy of this body lies in the fact that it lacks the same dispute settlement mechanism as the WTO to enforce its rules²⁵⁹. The OECD relies instead on political pressure to bring countries that choose to breach its rules to account²⁶⁰. In fact, the OECD has no authority to implement its legally binding instruments at all²⁶¹. Instead, it monitors the implementation done by its participating countries, and reports to the various governments if there appear to be failings or short-comings in their processes²⁶². Thus, no actual legal case can be brought against a country in breach of an OECD agreement.

Also, the rules would likely dictate more stringent limitation on the use of various trade policies. Thus, there is the potential that OECD Members may put up some resistance to such regulation due to feelings of inequality and illegitimacy in that they were being held to higher standards than all other trading countries.

- (5) The OECD would be relatively swift and efficient in its creation of standards.
- (6) However, when looking at political likelihood, the issue of the EU not wanting to be bound by such an agreement to eliminate export subsidies or constrain export competition, again arises. If the European country members of the OECD were unwilling to accept these increased constraints, and opted instead to abstain when the new rules were passed, then the practical application of these rules would be limited.

²⁵⁹ The Organisation for Economic Cooperation and Development Official Website: What we do and how at

http://www.oecd.org/pages/0,3417,en_36734052_36761681_1_1_1_1_1,00.html.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid.

The above analysis reveals two major failings that would eventuate if further reliance were to be placed on the OECD as the main body for the creation of new international trade regulation. The first of these is that no legal dispute settlement process is in place, thus any new regulations would only be the result of political agreements without actual legal backing. The second failure is that the rules and regulations themselves are not compulsory. In light of these short-comings, increased reliance on the OECD in this field is not something that New Zealand should pursue even if the WTO appears to be faced with setbacks and delays.

2. The FAO

The Food and Agriculture Organization (FAO) has also been very active in setting standards and concluding conventions and agreements in its area of expertise²⁶³. The FAO has 192 Members²⁶⁴ and is well regarded internationally. However, the scope of what is covered by this organisation remains relatively limited, in that it focuses exclusively on food and agricultural issues. Examples of agreements it has created include the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing²⁶⁵, the International Treaty on Plant Genetic Resources for Food and Agriculture²⁶⁶ and the Agreement for the Establishment of a Commission for Controlling the Desert Locust in the Western Region²⁶⁷. Unfortunately this body does not have sufficient expertise to undertake the comprehensive regulation of agricultural trade without significant assistance in terms of personnel and administration, from other international bodies²⁶⁸. Therefore, the role of this organisation does not extend far enough to encompass concrete regulation on agricultural export subsidies or other trade distorting practices being used in

²⁶³ For a list of Treaties The FAO has concluded see The Food and Agriculture Committee Official Website: Legal Office – Legal Treaties at www.fao.org/Legal/treaties/list1-e.htm.

²⁶⁴ For a list of members see The Food and Agriculture Committee Official Website: Home – Countries at <http://www.fao.org/countries/en/>.

²⁶⁵ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2009.

²⁶⁶ International Treaty on Plant Genetic Resources for Food and Agriculture, 2001.

²⁶⁷ Agreement for the Establishment of a Commission for Controlling the Desert Locust in the Western Region, 2000.

²⁶⁸ For an outline of the scope of the FAO's legal capabilities see The Food and Agriculture Committee Official Website: Legal Office at http://www.fao.org/Legal/index_en.htm.

agricultural trade. Hence, greater reliance on this organisation is not a viable alternative to a functioning system of trade regulation under the WTO.

VIII. Conclusion

This dissertation has highlighted that the issue of agricultural export subsidies still presents a problem for New Zealand's trade and will continue to do so in the future if it is not sufficiently addressed. Given the international nature of the issue however, solutions on how to remedy the situation are inevitably complex. In an effort to facilitate the provision of stronger international legal rules in this area, and therefore to achieve New Zealand's objective of the total elimination of agricultural export subsidies, the following suggestions have been made: In the short term, New Zealand should continue to include reference to the elimination of agricultural export subsidies in its FTAs. New Zealand would also benefit from undertaking continued study into whether export subsidies were effectively being substituted out in favour of other mechanisms of support being used to cause the same distortionary effects. In the medium term, the most viable option is in fact, continued support for the "single undertaking" approach to multilateral negotiations. This could one day facilitate the outright elimination of agricultural export subsidies because of the unique ability for tradeoffs to occur in other areas of negotiations to appease various trading partners' views that this elimination would be a concession on their behalf. As a more long term solution, the creation of a permanent body that addresses regulatory issues would definitely bring more certainty to this area, and also has the potential to streamline the whole regulatory process of the WTO. As part of this coordinated approach, New Zealand should not forget that if it uncovers the use of export subsidies by any a WTO Member country outside that country's subsidy reduction commitments, then the WTO Dispute Settlement Body can provide a further mechanism for bringing that country to account, and preventing its continued breach of the Agreement on Agriculture.

Each of these options has the ability to further strengthen or reinforce international trade law in distinct and separate ways. The short term option ensures that New Zealand continues to do everything it can at the regional and bilateral level to achieve

the elimination of export subsidies, at least between its trading partners. The medium term option envisages facilitation of the complete elimination of export subsidies at the international level. The suggested long-term option provides the potential for the more efficient creation and improvement of legal rules within the WTO as a whole. Finally, recourse to the WTO Dispute Settlement Body ensures that the current regulation is adhered to, and if New Zealand were to actively dispute any matter regarding export subsidies, this would further indicate to other WTO Member countries that this practice would not be tolerated. It is hoped that the culmination of these various approaches could finally strengthen international agricultural trade regulation to the point where the use of distortionary trade practices became a thing of the past.

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