Annual Survey of International & Comparative Law

Volume 1 | Issue 1 Article 6

1994

The Role of Antitrust Policy in the Development of Australian-New Zealand Free Trade

Rex J. Ahdar

THE ROLE OF ANTITRUST POLICY IN THE DEVELOPMENT OF AUSTRALIAN-NEW ZEALAND FREE TRADE*

REX J. AHDAR**

I. INTRODUCTION

To antitrust devotees, 1990 was the centenary of the US *Sherman Act*. To the New Zealand public it marked 150 years of nationhood. But more significantly, for present purposes, it witnessed the achievement of free trade between two South Pacific neighbors, Australia and New Zealand. With justifiable pride, one Australian legal official could boast:

> [This] achieve[s] an international first in free trade in goods between two countries. Free trade will not be accomplished in Europe until 1992 or some time later under the U.S.-Canada Free Trade Agreement.[1]

This paper examines some antitrust aspects of the Australia-New Zealand free trade accord. The first section will trace the development of trans-Tasman[2] free trade. Efforts to liberalize trade between the two countries have a long history. The next part analyzes the role antitrust law played in the movement

---

* Edited by David A. Stradley & Jeff Voight. The author prepared this article in 1992.

** LL.B. (Hons.), LL.M. (Cantaur). Lecturer, Faculty of Law, University of Otago, Dunedin, New Zealand. Fulbright Scholar, Boalt Hall School of Law, University of California, Berkeley, 1991.

1. Pat Brazil, *The Developing Closer Economic Relationship between Australia and New Zealand*, in FIFTEENTH INTERNATIONAL TRADE LAW CONFERENCE (CANBERRA 4-6 NOVEMBER 1988) PAPERS 309, 313 (Australian Government Publishing Service, 1980).

2. The term "trans-Tasman" is shorthand for matters pertaining to both Australia and New Zealand. The Tasman Sea is the body of water separating the two countries. A synonymous term I will also use is "Australasia", *i.e.*, Australia plus New Zealand.

to free trade. The final two sections raise a number of outstanding issues and problems yet to be resolved by Australian and New Zealand policy makers.

II. THE EMERGENCE OF TRANS-TASMAN FREE TRADE

That a free trade agreement should be struck between two neighbors sharing such common ancestry, language and culture is hardly surprising. To most outsiders, Australians and New Zealanders seem identical. Indeed, until 1841, New Zealand was a dependency of New South Wales, Australia's most populous state. Perhaps only the surprising thing is that bilateral free trade should have taken so long. It has not been for want of trying.[3]

The first formal trans-Tasman trade agreement dates to 1922. This provided for preferential tariff treatment on some 129 items. In 1933, all tariff rates between the two countries were brought into line with British rates. As a measure of wartime solidarity the *Australian-New Zealand Agreement* was signed in 1944 to solidify cooperation between the two nations in respect of their developing economies. Both shortly thereafter became members of GATT in 1947.

Trade relations were further formalized in the mid-1960's when the Governments signed the *New Zealand-Australia Free Trade Agreement Treaty* (NAFTA), which came into force in 1966. Despite its title NAFTA never achieved full free trade. Although from its inception a substantial proportion of tariffs on trans-Tasman trade were removed, and bilateral trade soared some 800 percent in the next 14 years, its limits eventually became apparent. Principally, NAFTA suffered from the inability of negotiators to move goods not originally exempted into the free trade area of Schedule A.[4]

Commencing with a joint communique in March 1980 by

3. The brief historical treatment in the text is drawn from Brazil, *supra* note 1, at 310-313 and TRANS-TASMAN TRADE AND INVESTMENT. RESEARCH MONOGRAPH 1 (Alan Bollard & Moira Thompson eds., N.Z. Institute of Economic Research and Institute of Policy Studies, 1987).

4. Bollard & Thompson, *supra* note 3.

the Prime Ministers of each country, momentum gathered to form some sort of closer economic relationship, one which would benefit each in the face of an increasing hostile world economy. Such a relationship would build upon earlier legislative efforts while implicitly presuming the continuance of the special kinsman-like friendship between the two countries. The result of all this was the *Australia-New Zealand Closer Economic Relations Trade Agreement* (ANZCERTA or simply CER), which came into force on January 1, 1983. The objectives of the CER treaty were to:

> a) strengthen the broader relationship between Australia and New Zealand;
>
> b) develop closer economic relations between the Member States through a mutually beneficial expansion of free trade between New Zealand and Australia;
>
> c) eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable; and
>
> d) develop trade between New Zealand and Australia under conditions of fair competition.[5]

More specifically the treaty articulated the need for progressive reduction and elimination of tariffs,[6] quantitative import restrictions,[7] revenue duties,[8] export subsidies and incentives,[9] and preferential treatment for domestic suppliers on government purchasing.[10]

On the legal side, it was thought that existing business laws were sufficiently dissimilar that freer trade might well be hindered, thus Member States should:

> examine the scope for taking action to harmonize requirements relating to matters such as stan-

---

5. *See* J. Farmer, *Towards a Single Trans Tasman Market: A Lawyer's Perspective*, 33 WORLD COMPETITION L. & ECON. REV. 39, 40 (1988).

6. Australia-New Zealand Closer Economic Relations Trade Agreement, art. 4, §3 (1983).

7. *Id.* art. 5(3).

8. *Id.* art. 7(2).

9. *Id.* art. 9(1).

10. *Id.* art. 11(1).

> dards, technical specifications and testing procedures, domestic labelling and restrictive trade practices.[11]

I shall return to harmonization of trans-Tasman commercial laws in the next section.

The treaty, despite a relatively lukewarm reception at the time, nonetheless saw a significant expansion in trade, with trade doubling between the two nations in the next five years.[12] At the end of that period the treaty itself provided for a review of its operation. Dellow and Feil, in an excellent discussion of this entire topic, comment:

> It is in part a testament to the success of the relationship that by the time this review was required the immediate objective of the treaty had been largely implemented, with tariffs on nearly all items traded between the two countries reduced to nil. New Zealand Import licensing and Australian quota requirements had also been largely removed in relation to trans-Tasma trade.[13]

Since the treaty had already exceeded expectations, the Prime Minister of each country, Mr. Hawke (Australia) and Mr. Lange (New Zealand), resolved, following their meeting in November 1987, that further acceleration was warranted. They set three goals for the 1988 CER Review:

> a) to bring forward the removal of tariffs and quantitative restrictions on goods from June 30, 1995 to the early 1990's;
>
> b) to examine the Australian and New Zealand business environments to identify those laws, regulations or other government interventions that constitute impediments to free trade, and examine ways of moving such impediments through harmonizing approaches to these areas; and

---

11. *Id.* art. 12(1).

12. Jeff Waincymer, *Developments in the Closer Economic Relationship between Australia and New Zealand*, 18 AUST. BUS. L. REV. 167, 167 (1990).

13. T. Dellow & J. Feil, *Competition Law and Trans-Tasman Trade*, in COMPETITION LAW AND POLICY IN NEW ZEALAND (Rex Ahdar ed., Law Book Co., 1991).

> c) to consider expanding the scope of ANZCERTA to cover trade in services.[14]

The Review was completed in August 1988 resulting in the *Protocol on Acceleration of Free Trade in Goods* signed August 18, 1988. The middle of 1990, specifically July 1, 1990, was fixed as the date for full free trade in goods, thereby hastening the process by five years. The Protocol addressed such matters as extension of the treaty to trade in services and the harmonization of quarantine and customs procedures. In respect of anti-dumping, the Protocol urged a bold departure from tradition.

While anti-dumping action by the respective Member States was not absolutely prohibited under the 1983 treaty, the original Agreement did obligate each country to exchange information and consult prior to the imposition of dumping duties. Further, the treaty had stated that dumping was "inconsistent with the objectives of this agreement."[15] The 1988 Protocol in its preamble now suggested:

> that the maintenance of anti-dumping provisions in respect of goods originating in other Member States ceases to be appropriate as the Member States move towards the achievement of full free trade in goods between them and a more integrated market.

Reservations that some might feel that complete abolition of anti-dumping would go too far were answered in the following way. Unfair international trading would now be addressed by domestic competition law suitably modified to proscribe predatory conduct by overseas corporations affecting trans-Tasman trade. The date for both abolition of anti-dumping and extension of existing Australasian competition laws would be the same—July 1, 1990. The precise mechanics of these changes are set forth in the next part.

One final aspect of the 1988 Review is worth brief mention. The two governments entered into a *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Harmonization of Business Law.* This once more urged careful consideration of laws which might

14. *Id.* at 26.
15. ANZCERTA, *supra* note 6, art. 15(1).

impede trade and recommended yet further harmonization.

The Review's extension of the treaty to services and coverage of such matters as quarantine restrictions was welcomed. However, there are still some outstanding matters. Dellow and Feil point to perhaps the most important gap:

> [T]he two governments could not agree on a free investment regime. While the operation of overseas investment rules create few problems at present, in the past they have been a significant impediment to trans-Tasman investment. The absence of an agreement securing a free investment regime is a significant potential cause of tension in the closer economic relationship. It results in the curious situation that the developing group of trans-Tasman enterprises that have substantial shareholdings and operations on both sides of the Tasman, may, for the purposes of the respective foreign investment regulation regimes, be treated as foreign companies in both countries.[16]

Hopefully the next review of the treaty, set down for 1992, will address this.

III. ANTITRUST LAWS: THEIR ROLE IN THE FURTHERANCE OF FREE TRADE

Recall that a concern of the promulgators of the 1983 treaty was that differences in the respective laws of the Member States might impede their closer economic relationship. Major changes to the competition laws of New Zealand and, to a lesser extent, Australia, henceforth ensued. These can be analyzed as two distinct phases.

A. Phase One: Harmonization of Trans-Tasman Competition Law

Article 12(1) of the CER Agreement obliged the two nations to "examine the scope for taking action to harmonize requirements relating to . . . restrictive trade practices." As things stood

16. *See* Dellow & Feil, *supra* note 13, at 27.

in 1983, Australia and New Zealand had markedly different antitrust regimes.[17] From 1974 when it enacted the *Trade Practices Act*, Australia had an avowedly pro-competition policy. The courts were the principal form for enforcing the law, and private individuals or firms could seek redress. In short, the Australians endeavored to reproduce the American antitrust laws in an Australian social and economic setting.

By contrast, antitrust in New Zealand was still modelled on the cumbersome United Kingdom model with its unwieldy administrative machinery and absence of private enforcement. Moreover, the objective of the legislation was not competition as such, but a diverse range of "public interest" goals, such as industrial development, export trade and employment enhancement. New Zealand antitrust was in the doldrums.

Harmonization does not necessarily mean replication,[18] yet in the context of trans-Tasman trade this is what largely occurred. Comparisons of each country's systems yielded the inescapable conclusion that New Zealand should adopt the Australian system and not vice versa. Thus the New Zealand parliament passed the *Commerce Act* 1986, which came into force on May 1, 1986. The New Zealand legislation adopts in large measure the antitrust provisions of the Australian *Trade Practices Act* 1974. A companion New Zealand statute, the *Fair Trading Act* 1986, likewise adopted the Australian Federal consumer protection laws.

B. Phase Two: Extraterritorial Extension of Domestic Competition Laws

The movement to abolish anti-dumping laws in respect of goods originating from each other's country by July 1, 1990 did not stand alone. It was felt that some controls over unfair international trade practices were still required. The rather doctrinaire view that removal of trade barriers would eliminate the incentive or scope for dumping was rejected. Accordingly, policy makers seized upon existing domestic competition laws. With

17. *See* Farmer, *supra* note 5, at 39 for a brief summary.

18. *See* John Farrar, *Harmonization of Business Law between Australia and New Zealand*, 19 V.U.W.L. Rev. 435, 445-447 (1989).

minor amendments, domestic antitrust could address problems of trans-Tasman predation.

The principal focus of any change would be the monopolization provisions: section 46 of the *Trade Practices Act* 1974 (Australia) and section 36 of the *Commerce Act* 1986 (New Zealand). The New Zealand provision reads:

> 36(1) No person who has a dominant position in a market shall use that position for the purpose of -
>
> (a) Restricting the entry of any person into that or any other market; or
>
> (b) Preventing or deterring any person from engaging in competitive conduct in that or any other market; or
>
> (c) Eliminating any person from that or any other market.

Section 46 of the *Australian Trade Practices Act* is substantially similar. One difference, however, is the threshold standard for illegality. Section 46 speaks of the firm having a "substantial degree of power in a market" instead of having a "dominant position."

Given harmonization of the respective monopolization prohibitions already, modification to meet problems of trans-Tasman misconduct by powerful enterprises was quite straightforward. The antitrust laws would apply to firms having dominance not just in (say) the New Zealand market, but also persons possessing a dominant position in an Australian market or a combined trans-Tasman market. Thus, on the same day (July 1, 1990) anti-dumping legislation in New Zealand was amended to abolish measures in respect of goods of Australian origin,[19] the *Commerce Amendment Act* 1990 came into force. Specifically, a new section 36A became operational. This provision, entitled "Use of dominant position in trans-Tasman markets" reads:

> 36A(1) No person who has -

19. The DUMPING AND COUNTERVAILING DUTIES ACT 1988 was amended by the DUMPING AND COUNTERVAILING DUTIES AMENDMENT ACT 1990.

> (a) A dominant position in a market; or
>
> (b) A dominant position in a market in Australia; or
>
> (c) A dominant position in a market in New Zealand and Australia —
>
> shall use that person's dominant position for the purpose of —
>
> (d) Restricting the entry of any person into any market, not being a market exclusively for services; or
>
> (e) Preventing or deterring any person from engaging in competitive conduct in any market, not being a market exclusively for services; or
>
> (f) Eliminating any person from any market, not being exclusively for services.

Australia likewise introduced a new section 46A when it passed the *Trade Practices (Misuse of Trans-Tasman Market Power) Act* 1990, after which Australian anti-dumping measures ceased in respect of New Zealand goods.[20]

There was still one more important amendment remaining. Each country's antitrust statute contained a provision purporting to give the legislation some extraterritorial effect. Both were similarly worded. To take New Zealand's again,[21] section 4(1) of the *Commerce Act* stated:

> This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.

The requirement that persons had to be resident or carrying on business in New Zealand obviously did not sit well with the

---

20. The Australian anti-dumping statutes amended were the CUSTOMS TARIFF (ANTI-DUMPING) ACT 1975, the CUSTOMS ACT 1901 and the ANTI-DUMPING AUTHORITY ACT 1988. *See* Waincymer, *supra* note 12, at 270, for a discussion of what Australia deems to be goods produced or manufactured in New Zealand.

21. Australia's provision is section 5 of the TRADE PRACTICES ACT 1974.

new section 36A proscribing misconduct by persons dominant in Australian markets. Accordingly, the extraterritorial sections of each nation's Acts were amended. Thus, the *Commerce Amendment Act* 1990 added section 4(2):

> Without limiting subsection (1) of this section, section 36A of this Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in Australia to the extent that such conduct affects a market, not being a market exclusively for services, in New Zealand.

Finally, to ensure the extended jurisdiction would operate smoothly in practice, ancillary amendments were made both to the antitrust legislation as well as to other statutes, dealing with evidence, procedure and enforcement of judgments. In New Zealand, the *Law Reform (Miscellaneous Provisions) Act* 1990 made amendments to the *Judicature Act* 1908, the *Reciprocal Enforcement of Judgments Act* 1934 and the *Evidence Act* 1908. Parallel changes also occurred in Australia.[22] Some highlights are, from a New Zealand perspective, provisions for:

> The New Zealand High Court to sit in Australia in appropriate circumstances;
>
> Judicial notice to be given to seals and signatures of the Australian Trade Practices Commission and Australian Federal Courts;
>
> The Trade Practices Commission to act as a "conduit" for transmission of information and documents required by the New Zealand Commerce Commission in any section 36A investigation; and
>
> The New Zealand justice system to support sittings of the Australian Federal Court in New Zealand including punishing for contempt of the Federal Court while it is sitting in New Zealand.[23]

It should be added that the enforcement agencies of both sides of the Tasman, the Trade Practices Commission (Austra-

22. The TRADE PRACTICES (MISUSE OF TRANS-TASMAN MARKET POWER) ACT 1990 amended the FEDERAL COURT OF AUSTRALIA ACT 1976 and the EVIDENCE ACT 1905.

23. Dellow & Feil, *supra* note 13, at 41-42.

lia) and the Commerce Commission (New Zealand) have for several years maintained a close working relationship.[24] In the wake of the new trans-Tasman monopolization provisions, the Commissions recently issued a joint statement.[25] Reflecting the closer "enforcement" relationship, the statement explains that each Commission will (resources permitting), on behalf of the other Commission, undertake any "preliminary investigations of fact" necessary to determine if a potential defendant has the threshold market power in its home country to warrant contravention proceedings. For example, the Trade Practices Commission would, at the request of the Commerce Commission, investigate an Australian corporation alleged to have breached section 36A to see if it has a dominant position in an Australian market.

IV. COMPARING ANTITRUST TO ANTI-DUMPING POLICY

> There is a clear difference in policy between competition law and anti-dumping law. Anti-dumping laws aim to protect *competitors*. Antitrust laws aim to protect *competition*. The latter are only interested in effects on individuals if those effects can be related to competition *per se*. On the other hand anti-dumping laws are not interested in whether conduct is competitive or not, in the wider sense, but merely whether there is material injury to a domestic industry or the threat of such injury arising out of dumping.[26]

It is commonplace to allude to the different goals of antitrust and anti-dumping law. Indeed, to the extent that a domestic monopolist or oligopolist invokes trade relief or countervailing duties against a more efficient foreign competitor, trade policy might be a vehicle to undermine competition policy. The point should not be pushed too far, however. As the quotation above recognizes, even antitrust law is prepared to protect an individual enterprise if this is necessary to stimulate competition in the market as a whole.[27] In certain carefully circum-

---

24. *Id.* at 27. The authors go on to discuss the future use of cross-membership to enhance cooperation between the two agencies.

25. *Enforcement of new trans-Tasman competition laws* reproduced as Appendix 6 in the TRADE PRACTICES COMMISSION, ANNUAL REPORT at 117-120 (1989-1990).

26. Waincymer, *supra* note 12, at 271.

27. *See* Union Shipping New Zealand Ltd. v. Port Nelson Ltd., 3 N.Z.B.L.C. 618,

scribed situations, it (antitrust) *is* prepared to protect the weak from the strong, to entertain notions of fairness.[28] Thus, like all generalizations, caution is required.

Accepting, nonetheless, that the two may have conflicting goals, there is no dispute that the institutional framework and remedies are different.[29] Enforcement is now in the hands of the respective antitrust Commissioners rather than customs officials. The remedies also differ. Instead of the imposition of additional duties up to the level of the "dumping margin," antitrust law sees a broader range of remedies available, viz. damages, injunctions and pecuniary penalties. A central question is this: Is antitrust law, suitably modified, able to catch the kind of unfair international trading conduct which the anti-dumping laws addressed? There are strong grounds for thinking otherwise.[30]

Antitrust law, of course, knows nothing of dumping. However, it is accustomed to combatting the evils of so-called "predatory pricing." This refers to the use of short-run price-cutting at a loss in the hope of driving out rivals and raising prices again in the long run. Judge Breyer in a helpful U.S. decision explains:

> a profit maximizing firm might sometimes find it rational to engage in predatory pricing; it might do so if it knows (1) that it can cut prices deeply enough to outlast and drive away all competitors, and (2) that it can then raise prices high enough to recoup lost profits (and then some) before new competitors again enter the market.[31]

Dumping could be seen as a kind of "international" monopolization by means of predatory pricing. There should be no reason then, at least in theory, why the monopolization provisions of current antitrust legislation designed to combat predatory

---

640 (1990) where J. McGechan observed: "such provisions [as section 36 of the COMMERCE ACT 1986] are directed at protection of the concept of competition as such. They are not directed at the protection of individual competitors, except insofar as the latter may promote the former."

28. For example, much group boycott and resale price maintenance law is explicable only in these terms.

29. *See* Dellow & Feil, *supra* note 13, at 39-40.

30. *See* Waincymer, *supra* note 12, at 271: "[I]t can be stated with assurance that it will be much more difficult to attack transactions under competition law than was the case under anti-dumping laws."

31. Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 231 (1st Cir. 1983).

pricing could not be modified to combat dumping. This, as we have seen already, is what the Australian and New Zealand policy makers did. Section 46 of the Australian Act and section 36 of the New Zealand Act were given extraterritorial effect.

Is the analogy a sound one however? Is dumping simply "international" predatory pricing? An examination of the two immediately reveals some key differences. First, predatory pricing, at least in American antitrust jurisprudence, requires the notion of "below cost" sales. Price must be below cost, although there is a great debate on which cost (marginal? average variable?) and how it can be measured.[32] However, as Applebaum points out:

> [T]here is no requirement that dumping or subsidies involve below cost sales. Indeed, the more routine, garden variety dumping case is a price-to-price comparison between the foreign market and the United States market that does not consider cost at all.[33]

Secondly, the defendant in monopolization proceedings must possess substantial market power (Australia) or a dominant market position (New Zealand).[34] This is not a prerequisite for anti-dumping law. Thirdly, anti-dumping concentrates on the *effects* of the defendant's conduct—are prices abroad lower than those at home and is material injury suffered by local producers. By contrast, sections 36A and 46A are drafted in terms of *purpose*. Dominant firms are caught if they use their economic strength "for the purpose of" eliminating rivals, deterring entry, etc. The central inquiry is the defendant's purpose, which may however be established by inferences from conduct.[35] Nonetheless, whether the intended effects did (or did not) eventuate

---

32. *See* Vijaya Nagarajan, *The Regulation of Predatory Pricing within § 46 of the Trade Practices Act 1974*, 18 AUSTRALIAN BUS. L. REV. 293 (1990), for a recent summary of the voluminous literature.

33. Harvey Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, 56 ANTITRUST L.J. 409, 412 (1987).

34. For a discussion of this threshold requirement and, in particular, whether the Australian threshold represents a lower standard than New Zealand's *see* Lloyd Hampton, *Section 36(1) of the Commerce Act 1986: An Analysis of its Constituent Elements*, in COMPETITION LAW AND POLICY IN NEW ZEALAND, *supra* note 13, at 186-189. It should be noted that both §36A and §46A apply to *single* enterprises which possess significant market power. The predatory actions of a group of competitors possessing collective market power would appear to be beyond the reach of the Act. *See* Dellow & Feil, *supra* note 13, at 36.

35. *See further* Hampton, *supra* note 34, at 204-212.

is not strictly relevant. Thus the elements to success in monopolization proceedings are quite different and by no means easy to satisfy.

That predatory pricing is a difficult allegation to sustain in antitrust litigation is borne out by recent events both in Australia and the United States. In America, the Supreme Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[36] was skeptical of the entire doctrine. Influenced by Chicago School thinking, the Court commented that "predatory pricing schemes are rarely tried and even more rarely successful."[37] There is an understandable reluctance of courts to condemn pricing behavior of large firms as "predatory" when it may be no more than healthy price competition.[38] In Australia and New Zealand predatory pricing cases have been rare.[39] New Zealand has had none, while Australia has seen only two: one an interim injunction application where the issue was canvassed very briefly,[40] and the other where a plausible situation of predatory pricing was rejected by the Federal Court. The latter decision, *Trade Practices Commission v. C.S.B.P. & Farmers Ltd.*,[41] provoked dismay among enforcement officials and eventually led to an amendment to section 46 to ease the evidential burden upon plaintiffs.[42]

Prevention of predatory pricing in antitrust law in recent times has a decidedly poor track record. There seems no reason why it should be proscribed any more easily and frequently in the international context. Quite the opposite. Claims of price predation where defendant and victim are geographically distant, where variables such as exchange rate fluctuations impinge and where potential entrants may spring from third countries to thwart recoupment by the defendant,[43] suggest predatory pric-

36. 475 U.S. 574 (1986).

37. *Id.* at 589.

38. *See id.* at 585: "But cutting price in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect."

39. *See* Nagarajan, *supra* note 32, at 320-324.

40. Victorian Egg Mktg. Bd. v. Parkwood Eggs Pty. Ltd., 33 F.L.R. 294 (1978).

41. 53 F.L.R. 135 (1980).

42. *See* Hampton, *supra* note 34, at 209.

43. Wyincymer, *supra* note 12, at 271-272: "In the global market, without an oligopolist or monopolist position, a predator who ultimately increases price after smashing a local competitor, will simply see importers change their source of supply."

ing is even more implausible in an international as opposed to domestic setting.

One illustration seems particularly apposite here.[44] Again, it is the *Matsushita* case. American television manufacturers foundered under the *Sherman Act* in their claim that Japanese manufacturers had conspired to predatorially price TV sets in the American market. Yet, earlier in 1971, U.S. manufacturers had successfully sued Japanese TV producers under U.S. anti-dumping law.[45] The clear implication is that it may be more difficult to combat unfair trading under antitrust law than under anti-dumping law.

If antitrust law is a weaker weapon than anti-dumping, does it really matter? There are two arguments here that suggest this loosening of control over unfair international trade is acceptable. The first is theoretical. A free trade market is simply one not conducive to dumping:

> Removal of trade barriers will . . . render dumping largely redundant as the scope for price discrimination between the domestic and export markets (a precondition for dumping) is reduced. In essence, the establishment of a free trade area under ANZCERTA will substantially reduce the incentives and ability by exporters to dump because of the risk of retaliation by competitors including the possibility of arbitrage.[46]

The second argument emphasizes the recent history of trans-Tasman dumping cases. The anti-dumping laws themselves were not proscribing much dumping since the CER Agreement came into force.[47] New Zealand, for example, saw some 39 dumping complaints lodged between 1983 and 1988 against Australian firms. Only two of these resulted in a finding of dumping.

---

44. Douglas Rosenthal, *Antitrust Implications of the Canada-U.S. Free Trade Agreement*, 12 WORLD COMPETITION L. & ECON. REV. 83, 85 (1989).

45. COLOR PICTURE TUBES FROM JAPAN U.S.I.T.C. Pub. 367, Inv. No. 731 TA #67-370 (1971).

46. Brazil, *supra* note 1, at 315. *See also* Dellow & Feil, *supra* note 13, at 36. For a contrasting view however *see* P. Nicolaides, *Does the International Trade System Need Anti-Dumping Rules?*, 14 WORLD COMPETITION L.& ECON. REV. 102, 105 (1990) (asserting that dumping and free trade have no direct or necessary connection).

47. H. Keyte & Sandra Rennie, *Changes in Anti-Dumping Laws*, NEW ZEALAND TRADE DEVELOPMENT BOARD NEWS, Feb. 1991, at 21.

Australian statistics are similar.[48] The anti-dumping laws had become largely redundant even before full free trade materialized. Their abolition and replacement with a weaker form of control (antitrust) thus represents little change.

V. THE RELATIONSHIP BETWEEN THE TRANS-TASMAN NATIONS AND THIRD COUNTRIES

It is the early days for trans-Tasman free trade and it will be interesting to see the effects within the Australasian market. Equally interesting, however, and possibly more problematic, are the problems and issues arising with respect to third countries. I shall briefly sketch four areas worth further consideration.

A. Third Country Dumping

The anti-dumping regimes of each Member State remain in place to counter dumping from third nations. A number of distortions and complications could ensue. Speaking from an Australian perspective, Waincymer comments:

> The potential for dumping duties remains on all other third party imports into Australia. The changes will simply mean that those countries who face trans-Tasman competition have had their levels of effective protection reduced compared to other Australian industries. That is an undesirable feature of the change.[49]

He goes on to suggest:

> To remove anti-dumping duties from one source can only lead to inefficient resource allocation if importers of products sensitive to anti-dumping complaints shift their sources of supply from efficient third country suppliers to less efficient New Zealand suppliers.[50]

The ultimate solution to such problems is of course the universal abolition of all anti-dumping regimes and replacement with extraterritorial antitrust law by all nations. As Waincymer

48. *See id.* Of 34 cases from 1982-1988 only three resulted in anti-dumping duty being imposed.

49. Waincymer, *supra* note 12, at 272.

50. *Id.*

recognizes,[51] and he is surely correct, such a multilateral accord seems a long way off if attainable at all.

B. Exemptions for Pure Export Cartels

A blind spot in the antitrust regimes of many nations, even the United States,[52] is the immunity granted to pure export cartels—arrangements between local firms to restrict competition between them but which affect *foreign* buyers and consumers not domestic consumers. This "nationalistic" approach to antitrust enforcement has received criticism recently. Moschel has put the case nicely:

> What is clear from the international practice of exempting pure export cartels from the application of domestic competition law is essentially a traditional 'beggar my neighbor' policy. It leads to a paradoxical situation: if you stand up in the movies, you have a better view; if everyone does it, nobody is better off.[53]

Neither Australia nor New Zealand is blameless in this regard. Each has an identical export cartel immunity.[54] So, for example, section 44(1)(g) of the *Commerce Act* exempts contracts containing provisions that relate "exclusively to the export of goods from New Zealand or exclusively to the supply of services wholly outside New Zealand" if various procedural steps are observed.

These export-directed exemptions have been overlooked in the recent legislative amendments. Certainly an exemption for export cartels seems just as inconsistent with the objective of free trans-Tasman trade as do anti-dumping laws, at least where the goods and services are bound for the other Member States' shores. Moreover, if *single firm* anti-competitive conduct can now be caught, notwithstanding its impact occurring overseas, why should concerned behavior not likewise be proscribed by Australasian antitrust law?[55] Even if this apparent anomaly

---

51. *Id.* at 273.

52. *See* the Webb-Pomerene Act 1918 and the Export Trading Company Act 1982.

53. Wernhard Moschel, *International Restraints of Competition: A Regulatory Outline*, 10 New J. Int'l L. & Bus. 76, 83 (1989).

54. The Australian Provision is section 51(2)(g) of the *Trade Practices Act* 1974.

55. Remember that both sections 46A and 36A are directed at a corporation or a

were to be addressed within the trans-Tasman context, the issue still remains with respect to third nations. New Zealand might still, for example, exempt export cartels where a nation *other than* Australia was involved. Furthermore, even if both Australia and New Zealand were to entirely abolish their respective export arrangement exemptions, they would face a world where these stubbornly persist. Again, the only solution seems to be some form of concerted multilateral agreement that such immunities from domestic antitrust are beyond the pale.[56]

C. Other Problems with the Extraterritorial Operation of Antitrust Laws

Policy makers in Australia and New Zealand have made it clear that each country's extended antitrust legislation applies to the Crown and Crown Corporations. Thus New Zealand, for instance, inserted two express provisions into the *Commerce Act* in 1990:[57] section 6A, which states that section 36A applies to Australian Crown corporations (and the Crown itself); and section 6B, which eradicates any immunity for the New Zealand Crown and Crown bodies corporate in respect of section 46A of the Australian Act. Hence, doctrines of sovereign immunity have been explicitly rejected in the trans-Tasman context.

What about the extraterritorial application of third countries' antitrust laws to Australia or New Zealand, in particular American antitrust? This has, of course, been a very hot topic for some time. As one American commentator laconically observed recently:

> For most of the past century, the United States was the Lone Ranger of international antitrust with application of US law outside the territory of the United States often very unappreciated by foreign governments.[58]

---

person, not corporations or persons, who use market power for predatory purposes.

56. Professor Hawk suggests that "consumers worldwide would be better served by all countries applying antitrust laws rather than selectively applying them to promote each country's perceived 'net national welfare.'" *See* Barry Hawk, *The International Application of the Sherman Act in its Second Century*, 59 Antitrust L.J. 161, 166 (1990).

57. Commerce Amendment Act 1990, § 6.

58. Hawk, *supra* note 56, at 161.

That comment is an understatement when one considers the Australian experience with American antitrust in the late 1970's. The full saga is a long and interesting one but is unfortunately beyond the scope of this paper.[59] In brief, the American firm, Westinghouse, commenced proceedings in the United States against some 29 foreign uranium producers, including four Australian companies, alleging various cartel behavior in contravention of the *Sherman Act*. Under the so-called "effects doctrine" promulgated by Judge Learned Hand in *Alcoa*,[60] the *Sherman Act* was seen to apply to foreign behavior having direct and substantial effects on U.S. import, export or domestic commerce. The Westinghouse claim as for treble damages totalling around 6 billion dollars! A special Australian Parliamentary Committee established in 1983 to consider the problem of the extraterritorial operation of American laws summarized the ensuing developments:

> Despite firm Australian representation to the US Administration opposing US attempts to regulate the legitimate activities of Australian companies, the US Administration and courts showed no serious concern for Australia's expressed interests. It was not until the *Foreign Antitrust Judgments (Restriction of Enforcement) Act* was enacted in 1979 that the Westinghouse case was settled out-of-court, even though involving over $11,000,000 payable by the Australian defendants (together with their extremely high legal costs).[61]

To smooth relations in this area, the United States, as it had done with other countries,[62] entered into a cooperation agreement with Australia. On June 29, 1982, the two governments signed the *Agreement between the Governments of Australia and the United States of America Relating to Cooperation on Antitrust Matters*. However, this provision for intergovernment consultation was still felt inadequate to assuage lingering Australian concerns that its national interests were not

---

59. For an excellent account and one I have drawn from in this paper *see* REPORT FROM THE JOINT COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE. AUSTRALIAN-UNITED STATES' RELATIONS: THE EXTRATERRITORIAL APPLICATION OF UNITED STATES LAWS (Aust. Govt. Pub. Service, November 1983) ch. 3 [hereinafter Joint Committee].

60. United States v. Alcoa Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

61. Joint Committee, *supra* note 59, at 27.

62. Namely Canada and West Germany.

being sufficiently protected.[63] Two years later saw a revised version of its 1979 "blocking legislation"[64] including the introduction of so-called "clawback" provisions, designed to enable Australian defendants to recover the non-compensatory portion of multiple damages awarded to foreign plaintiffs.

Although New Zealand has not had a *Westinghouse* type claim, it too followed suit and enacted blocking legislation in 1980.[65] Unlike Australia, however, neither a cooperation treaty with America, nor the passing of clawback provisions has so far resulted.

Certainly in respect of each other, Australia and New Zealand have ensured their blocking statutes will have no effect after July 1, 1990 in relation to proceedings under sections 36A and 46A.[66] There has been no alteration of the blocking legislation in respect to third nations however. In view of the *Westinghouse* saga there would seem little reason to abandon it, especially in light of the European Court of Justice's recent decision[67] to similarly adopt an effects doctrine in respect of the European Community.

To complete this present discussion, it should be noted that both Australian and New Zealand antitrust statutes purport to have extraterritorial effect. The reach of the statute, however, is limited to situations where the corporation is resident or carrying on business in New Zealand or Australia as the case may be.[68] Hence overseas firms with no direct business connection to the nation in which their anti-competitive actions are felt are beyond reach.

New Zealand and Australia have yet, to my knowledge, to

---

63. Joint Committee, *supra* note 59, at 65.

64. FOREIGN PROCEEDINGS (EXCESS OF JURISDICTION) ACT of 1984.

65. EVIDENCE AMENDMENT ACT 1980 which enables the Attorney General to intervene and restrict the production of evidence for use by foreign authorities where this would be prejudicial to the sovereignty of New Zealand or prejudice her trading, commercial or economic interests.

66. *See for example*, section 6C of the COMMERCE ACT (inserted by the 1990 amendments).

67. The *Wood Pulp* case (A. Ahlstrom Osakeyhitio v. Commission) 4 C.M.R. (CCH) § 14, 491 (Sept. 27, 1988).

68. *See* § 4 COMMERCE ACT 1986 (Austl.) and § 5 TRADE PRACTICES ACT 1974 (N.Z.).

flex their extraterritorial antitrust muscle. This is hardly surprising in a world in which it faces much larger, more powerful nations and indeed, in the case of New Zealand at least, foreign corporations with assets in excess of the New Zealand GDP.

D. What are the Implications for Pacific Rim Trade?

The CER agreement has been successful in stimulating greater trans-Tasman trade. However, a quick survey of 1990 *Direction of Trade Statistics* indicates neither nation has an exclusive preoccupation with each other. Indeed, the figures for June 1990 show New Zealand ranked only fourth as an export market for Australian produce, taking only a fifth as much (in dollar terms) as Japan, Australia's most popular foreign market.[69] As an importer to Australia, New Zealand similarly ranked well down behind the United States, Japan, the United Kingdom and Germany.

The same June 1990 figures show that from New Zealand's perspective, Australia looms much larger as both an export market and an importer. This is understandable as New Zealand seizes its opportunities to free trade with its much larger, more populous neighbor.

The relatively small size, in global terms, of the combined Australasian market means that neither nation can afford to become too introspective. Each needs to continue to trade heavily with third countries. Currently, the bulk of Australia's and New Zealand's trade is with the Pacific Rim—principally the United States, Japan, Korea, China and Singapore. I see nothing in the emergence of trans-Tasman free trade to curtail this.

VI. CONCLUSION

Quietly, but surely, Australia and New Zealand have set about developing bilateral free trade, an objective achieved in July 1990. Protectionist barriers and anti-dumping controls in relation to trans-Tasman trade are gone. Antitrust law, often

---

69. The five largest export markets for Australia in June 1990 were in U.S. dollars (in millions): Japan 829.2; United States 366.9; Korea 205.5; New Zealand 176.6; and Singapore 123.3.

seen as being at odds with trade policy, has been relied upon as a back-up mechanism to ensure that the goals of free trade are not undermined by international predatory conduct. Only time will reveal whether this imaginative Australasian experiment in international trade will prove successful. For those who aspire to freer trade on a global basis, one hopes the South Pacific experience will not let them down.