PACIFIC PARTNERSHIP: THE NEW ZEALAND-AUSTRALIA FREE TRADE AGREEMENT

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I

'For my own part, as you well know, I do not think we ought to enter the [Australian] Federation though I do think we ought to make a working agreement with Australia on such matters as defence, customs, tariff, etc.'[1] Sixty-five years after William Pember Reeves wrote these words to the then New Zealand Prime Minister, Richard John Seddon, Australia and New Zealand executed the New Zealand-Australia Free Trade Agreement (NAFTA),[2] thus effectively creating the 'working agreement' on 'customs, tariff, etc.' to which Reeves referred.

Reeves was not the first man to foresee some form of economic or trade arrangement between the two countries. As early as 1783 James Maria Matra, midshipman on Captain Cook's *Endeavour*, while pressing for colonization of New South Wales, drew attention to the gains the proposed colony would receive from trade with New Zealand, particularly the flax trade, which did develop and prosper after establishment of the colony.[3]

Trade between the two countries continued to expand and diversify during the first half of the nineteenth century. However, with the advent of steam driven ships during the latter part of the century, and later, refrigeration, New Zealand became more capable of exporting to Great Britain, and therefore less reliant on trade with Australia. In 1858 Britain had displaced the Australian colonies as principal outlet for New Zealand's exports, and by the middle of the next decade Britain was supplying most of New Zealand's import requirements as well.[4] A further decline in Australia-New Zealand trade relations occurred after the turn of the century.

From soon after establishment of the Australian Commonwealth until 1922, Australia regarded New Zealand as a foreign country for tariff purposes; while Australia conferred preferences to some areas of the British Empire, it did not extend this treatment to New Zealand. In a move 'explicitly directed to bringing about some form of acceptable reciprocal

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[1] Quoted in Sinclair, *William Pember Reeves: New Zealand Fabian* (1965) 292.

[2] For the complete text of the Agreement see *Australian Treaty Series* (1966) No. 1; or *New Zealand Statutes* (1965) i, 425-513; or Commonwealth of Australia, Cmnd Paper No. 200, 31 August 1965. (Hereinafter cited 'NAFTA'.) The acronym 'NAFTA' is in common usage in Australia and New Zealand, and in this article it should not be confused with a proposed North Atlantic Free Trade Area between the U.S., U.K., Canada and others, which has sometimes been referred to as NAFTA.

[3] 'Australia/New Zealand Relations' (1968) 18 *External Affairs Review No. 2* 2, 5. This review is published by the New Zealand Department of External Affairs.

[4] *New Zealand's Trade with Australia* (1965) 3. Presented to the New Zealand House of Representatives by leave.

arrangement with Australia',[5] New Zealand withdrew preferential treatment from Australian exports in 1921, and made them subject to the higher General Rate of duty. This was the first time New Zealand had deprived a country of the Empire of preferential tariff treatment.[6] Reaction was prompt: in 1922 the first trade agreement between the two countries was signed. It was a particularly important event for Australia inasmuch as this was its first trade agreement with an overseas country.[7] The new agreement provided for application of the British Preferential tariff rates to 129 items of trade interest.[8]

Despite this agreement, trade failed to improve, and in some respects, it deteriorated.[9] Both countries soon saw the need for some formal alteration in the existing arrangement, and a new trade agreement was executed in 1933.[10] The purpose of this agreement was to develop trans-Tasman trade to the mutual advantage of both countries. To effectuate this goal, the 1933 Trade Agreement contained concessions including some extension of the British Preferential rates, duty free privileges in certain cases, exemption of New Zealand goods from Australian primage duties, and an agreed limitation of New Zealand's primage duty on Australian exports to levels set by New Zealand on British products. Most important, perhaps, the 1933 Agreement set special rates of duty on specified goods of Australian or New Zealand origin. In ascertaining the origin of goods for the purpose of the Agreement, the two countries agreed that provided the New Zealand and/or Australian content in labour and/or materials was at least 50 *per cent* by value, they would be treated as goods originating in either of the two countries,[11] and therefore entitled to the special rates of duty. In 1953 an alternate provision was added whereby goods failing to meet the test of 50 *per cent* Australian or New Zealand content might nevertheless qualify provided 75 *per cent* of the value represented a combination of Australian, New Zealand and/or British content in labour and/or materials.[12]

[5] 'Australia/New Zealand Relations' (1968) 18 *External Affairs Review No. 2*, 2, 9.

[6] *Ibid.*; *New Zealand's Trade with Australia* (1965) 3. Presented to the New Zealand House of Representatives by leave.

[7] Johnson, *Australia/New Zealand Trade Relations: The Role of Government* (1967) 6. An address delivered at Sydney University symposium on 'Australia/New Zealand Trade Relations'. G. F. Johnson is Assistant Secretary, Department of Trade and Industry (Australia).

[8] *Ibid.*; New Zealand did not agree to full British preferential treatment for 54 of these products, while Australia accepted such treatment for all but one product, hops.

[9] *New Zealand's Trade with Australia* (1965) 3, presented to the New Zealand House of Representatives by leave. 'Australia/New Zealand Relations' 18 *External Affairs Review No. 2* 2, 7; Johnson, *Australia/New Zealand Trade Relations: The Role of Government* (1967) 6. Increases in Australia's rate of duty on butter in 1928 effectively removed New Zealand from the Australian butter market. Four years later New Zealand found it necessary to impose a quarantine embargo on vegetables, citrus and other fruits from Australia, blaming the need for this restriction on the Mediterranean fruit fly.

[10] Trade Agreement Between the Commonwealth of Australia and the Dominion of New Zealand of 5 September 1933. Reproduced as the First Schedule to the Customs Tariff (New Zealand Preference) Agreement Act 1933 (Cth).

[11] Trade Agreement Between the Commonwealth of Australia and the Dominion of New Zealand 1933, Article X.

[12] Customs Tariff (New Zealand Preference) Act 1933-53 (Cth), s.11 (2) (b) (ii). This provision was added by the Custome Tariff (New Zealand) Act 1953 (Cth).

The 1933 Agreement is still in effect. The 1965 Free Trade Agreement states that 'except as . . . superseded or modified [the Trade Agreement of the 5 September 1933 between Australia and New Zealand] shall continue in force, be deemed to form part of, and have the same duration as' the 1965 Agreement.[13] Furthermore, the rule of origin tests, laid down in the 1933 Agreement, as amended in 1953, will remain in force for the purposes of the 1965 Agreement until it has been determined whether an alternate criterion is desirable.[14]

Trans-Tasman trade expanded under the 1933 Agreement, but the balance of trade continued to favour Australia by an increasing margin. This was due in large measure to Australia's earlier and more diverse industrial development, a result of its more varied natural resources and larger domestic market. New Zealand was at a disadvantage in that its exports were limited to specified agricultural products, most of which Australia also produced. Furthermore, the 1933 Agreement contained no commitment to maintain the margin (or extent) of the preferences granted to New Zealand. While duties to which New Zealand goods were subject were not often increased, the margin was narrowed when Australia in later years reduced the British Preferential rates of duty on the same products.[15] Nor could New Zealand renegotiate the margins of preference on products included in the Agreement without violating the terms of the General Agreement on Tariffs and Trade (GATT). The GATT specifically provides that Australian margins of preference cannot be increased above levels existing on 15 October 1946.[16]

In addition, in the years following 1933, Australia took action (permitted under the 1933 Agreement) to shield specified domestic industries from foreign competition, including New Zealand. During this period New Zealand also added new restrictions, in particular its system of import licensing, adopted for balance of payments reasons.

While New Zealand imported from Australia approximately twice what it sold to Australia in 1933, by 1939 the balance of New Zealand's trans-Tasman imports to exports grew to three to one. Between 1950 and 1960 the ratio expanded to four to one.[17]

[13] NAFTA, Article 3, Paragraph 2.

[14] NAFTA, Supplemental Exchange of Letters between Honourable J. R. Marshall, New Zealand Minister of Overseas Trade, and Donald A. Cameron, Australian High Commissioner in New Zealand, both dated 31 August 1965, Paragraph A, subparagraph 1. Paragraph A, subparagraph 2 provides for a joint review of the existing rules of origin to begin in 1968. As of the date this article is written, the review has begun, but no decisions have been reached.

[15] 'Australia/New Zealand Relations' (1968) 18 *External Affairs Review No. 2* 2, 11; *New Zealand's Trade with Australia.* Presented to the New Zealand House of Representatives by leave.

[16] General Agreement on Tariffs and Trade (hereinafter cited as GATT), Article 1, Paragraph 4, and GATT, Annex G. The text of this agreement is reproduced in (1949) 27 *United Nations Treaty Series* 19. Both Australia and New Zealand are charter members of the multilateral trade agreement executed in 1949.

[17] 'Australia/New Zealand Relations' (1968) 18 *External Affairs Review No. 2* (1965) 7, 2, 11; *New Zealand's Trade with Australia.* Presented to the New Zealand House of Representatives by leave.

In the years between 1933 and 1965 one final agreement deserves mention, the Australian-New Zealand Agreement 1944 known informally as the 'Canberra Pact' or the 'Anzac Pact'.[18] This agreement covered a broad spectrum of relations between the two countries and provided machinery for co-operation in defence, political and economic matters. The Pact provided that 'the development of commerce between Australia and New Zealand and their industrial development should be pursued by consultation, and in agreed cases, by joint planning'.[19] It called for twice yearly conferences of Ministers of State, held alternatively in Canberra and Wellington. The agreement also envisaged conferences of departmental officials and technical experts, and meetings of standing inter-governmental committees on subjects to be agreed to by both governments.[20]

The provisions of the Anzac Pact relating to close consultation were never actually implemented, due perhaps less to a lack of interest than to a reluctance on the part of officials in both governments to rely on formal machinery when established satisfactory informal contacts between personnel of the two governments seemed to be providing an effective exchange of information, consultation and problem resolution. The success of these informal relationships can be attributed to the common geographical location, the shared language and heritage of the two countries, and a history of joint military undertakings, all of which have contributed to close personal ties between Australians and New Zealanders.

Despite the general nature of the economic consultative provisions of the 1944 Agreement, and their lack of implementation, the preamble to the 1965 Free Trade Agreement, by expressly recalling the goals of the earlier Pact, bears witness to the fact that these provisions were not forgotten.[21]

Final impetus toward the 1965 Free Trade Agreement developed in the early 1960s. Both Australia and New Zealand had witnessed the successful development of regional associations elsewhere, particularly those of the European Economic Community (EEC) and the European Free Trade Association (EFTA). The establishment of these two groupings also brought to New Zealand and Australian exporters an awareness of the need for greater trans-Tasman economic integration to minimize disadvantages both Pacific countries would face in relation to exporters of similar products in countries which were members of either of the European associations. This awareness was heightened by the United Kingdom's announced intention to join the EEC. It was anticipated that Britain's entry into the EEC

[18] Australia-New Zealand Agreement 1944, signed at Canberra 21 July 1944. The text of the agreement is reproduced in (1948) 18 *United Nations Treaty Series* 358.

[19] Australia-New Zealand Agreement 1944, Article 35(c).

[20] Australia-New Zealand Agreement 1944, Article 37(a), (b) and (c).

[21] NAFTA, Preamble, which reads in part as follows: 'Recalling the Australian-New Zealand Agreement 1944 in which they [the governments of Australia and New Zealand] agreed to facilitate the development of commerce between New Zealand and Australia . . .'

would soon be followed by other EFTA members; the products of present EEC members and Scandinavian primary producers would then compete directly with New Zealand and Australian exports to the United Kingdom.

The impact of British membership in the EEC was expected to be felt most acutely in New Zealand inasmuch as the majority of its exports were shipments of primary products to Britain. Consequently, it was thought particularly necessary that New Zealand become part of a more broadly based market to provide greater opportunity for diversification of economic production. Initial failure of Britain and other EFTA members to secure EEC membership has not wholly dissipated the fears of New Zealand or Australia as renewed applications indicate continued British determination to press for EEC membership. It is assumed by the two Pacific countries that Britain's application for membership will eventually be approved.

During the post World War II years New Zealand also felt the need for some special trade arrangement in order to correct its increasingly unfavourable balance of trade with Australia. At the same time New Zealand's forest-based industries were growing rapidly, especially as its North Island pine forests, planted during the depression of the 1930s, matured. Simultaneously, Australia's demands for both paper and pulp (particularly the latter) were increasing to such an extent that it was feared Australia might no longer be able to supply its needs. The forest industries eventually provided the impetus which led directly to the 1965 Agreement; New Zealand initially sought a free trade agreement with Australia limited primarily to forest products.[22]

Discussions concerning improved trade co-operation between the two countries were first initiated during a visit by the Australian Minister for Trade and Industry, John McEwen, to New Zealand in 1960. Acting together with his New Zealand counterpart, J. R. Marshall, the Minister of Overseas Trade, the two Ministers agreed on behalf of their governments to establish an Australia-New Zealand Consultative Committee on Trade to be comprised of senior officials from both countries. These representatives were directed to make detailed studies of international trade matters in which both countries had a major interest, and also to conduct an examination of opportunities for mutual trade expansion. At a subsequent officials' meeting it was agreed in addition to hold ministerial meetings at least annually, with at least twice yearly meetings of sub-ministerial officers, and a further exchange of visits by officials to discuss specific issues which might develop from time to time.[23] 'These arrangements, in fact, were almost exactly the same as those which had been agreed to at Canberra in 1944.'[24]

[22] 'Australia/New Zealand Relations' (1968) 18 *External Affairs Review No. 2* 2, 19.

[23] *New Zealand's Trade with Australia* (1965) 11. Presented to the New Zealand House of Representatives by leave.

[24] Australia/New Zealand Relations' (1968) 18 *External Affairs Review No. 2* 2, 20.

After the first ministerial meeting of the Consultative Committee in Canberra in February 1961, a study group was set up to examine in detail the prospects which existed for mutual trade expansion and to study the development of forest product industries in both countries. At a ministerial meeting in April 1963 discussions were initiated concerning establishment of a free trade arrangement in forest-based products between the two countries. Mr McEwen indicated at this time that any free area limited only to forest products would be unacceptable to Australia. He proposed instead a broader arrangement to include not only forest products, but also items already on the duty free list, and specified other products on which mutual agreement could be reached. As a result the two countries established a Joint Standing Committee of officials with terms of reference including that of reviewing and studying

> the trade between the two countries with a view to submitting . . . proposals for consideration by governments for a free trade area in forest products and other items suitable for inclusion in a free trade agreement either from the outset or subsequently.

Excluded from the study at New Zealand's request were products of some industries with which New Zealand felt it could not compete against more advanced Australian equivalents, and at Australia's request, specified commodities such as dairy products, particularly butter.[25] The Committee's report was presented to the two governments in April 1964: it favoured the establishment of a free trade area between the two countries and included a recommendation that certain tariff reductions be made for non-free traded items, and that there be a transitional phasing out of duties on specified products.[26]

Beginning in April 1964, the governments of both countries held consultations with producers and trade organizations in order to obtain their views regarding items initially or subsequently to be included in the agreement, and to persuade these groups of the overall merit of the plan. On 13 May 1965, Mr Turner started discussion in the Australian House of Representatives of a limited free trade area with New Zealand. He sought support for the following motion:

> That in the opinion of this House the Government should seriously and urgently explore the practicability of establishing a Common Market with New Zealand, having regard to the long term overall advantages and disadvantages (if any) likely to accrue to each country, the desirable transitional steps and appropriate timetable and the arrangements that the government may be able to make to ease any problems of transition.[27]

[25] *New Zealand's Trade with Australia* (1965) 11-12. Presented to the New Zealand House of Representatives by leave.

[26] Starke 'The Trade Policies of Australia and New Zealand: Recent Legal Developments (1968) 2 *Journal of World Trade Law* 375, 379.

[27] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 May 1965, 1468.

Discussing this motion, Mr Turner cited the need for such a common market (the informal name for what GATT refers to as a 'customs union') in view of the GATT rule permitting such a union while prohibiting new preference schemes.[28] Mr McEwen eventually pointed out that what the two governments had in mind was 'a limited free trade area', and not a customs union.[29] After Mr McEwen's remarks, Mr Crean requested and received assent that the words 'common market' in the motion would be understood to mean a limited free trade area.[30] The motion was then affirmed with general agreement[31] including that of the Deputy Leader of the Opposition, Mr Whitlam.[32] Three months after this discussion in the House of Representatives, Messrs McEwen and Marshall held ministerial talks in Canberra. The formal agreement was signed at Wellington, 31 August 1965, and came into force on 1 January 1966.

[28] *Ibid.*

[29] *Ibid* 1478.

[30] *Ibid.* 1481. At least one doubt apparently lingered in Parliament as to the desirability of the changed language. In March 1966, Mr Gray spoke out saying that he was 'certain that if the government were to propose something in the nature of a common market in this part of the world, it would receive a great deal more support . . .' Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 15 March 1966, 215.

[31] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 May 1965, 1481. While a consensus was obtained on the broad question of the limited free trade area, it did not extend to the details of the arrangement. In August 1965 Mr McEwen indicated that the House of Representatives would not have access to relevant documents until the agreement was signed. *Ibid.* 17 August 1965, 14. Mr McEwen also stated that the government did not consider it necessary to submit the agreement to Parliament for ratification. *Ibid.* 25 August 1965, 393. Objections to the items proposed for inclusion in the Agreement now grew, coming from both the dairy industry and the pea and bean industry. By the end of November, when the agreement was signed but not yet in force, Mr McEwen accused the Labour Party of inciting the dairy industry to oppose the agreement. *Ibid.* 26 November 1965, 3264. A month later Dr Cairns stated: 'Whilst the Opposition welcomes the agreement we do not welcome the way in which it has been introduced; nor do we welcome the absence of any sign on the part of the government that it would be prepared to compensate injured sections'. *Ibid.* 10 December 1965, 3956. Although the Agreement entered into force 1 January 1966, opposition to its terms continued, since parliamentary assent was necessary for the planned tariff changes to take effect. In March 1966, the Labour Party sought approval of an amendment requesting 'Parliament to express the view that the New Zealand-Australia Free Trade Agreement will be detrimental to the interests of Australian primary producers'. *Ibid.* 15 March 1966, 232. This proposed amendment was rejected by a vote of 47-66. *Ibid.* 15 March 1966, 238. A month later Customs Tariff Bill (No. 2) (Cth), incorporating the tariff changes under the Agreement was presented to the House of Representatives. Dr Cairns signalled that the Opposition was opposed to the reductions in the case of pig meats (bacon and ham), cheddar cheese, peas and beans. *Ibid.* 27 April 1966, 1205. These changes in the tariff were nevertheless enacted (together with other unopposed items), pig meats and cheeses by votes of 57-42, and vegetables (despite an attempt from the Senate to soften the impact on dried vegetables) by a vote of 62-40. *Ibid.* 26 April 1966, 1252, 1265; 12 May 1966, 1765. In New Zealand the climate for the new Agreement was also not completely receptive. The Opposition in New Zealand Parliament was said to be 'strongly opposed to the trade treaty because it believes that the inflow of manufactured goods from Australia will restrict the operations of existing New Zealand manufacturers and will prevent the promotion and development of new secondary industry'. *Ibid.* 15 March 1966, 233-4.

[32] For Mr Whitlam's statement, Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 May 1965, 14-77.

II

General Nature of the New Zealand-Australia Free Trade Area and its Status under GATT

> Let us have a document: look at it if you want to, but do not pull our legs that you can ever build satisfactory trading relationships on a document. It is but a starting place for the relationship upon which we must work.[33]

The New Zealand-Australia Free Trade Agreement of 1965, the 'document' referred to, is precisely what Australia's Minister for Trade and Industry called it—a starting place. It is not, as its title suggests, a true free trade agreement, and despite the language of Article 1 of the Agreement,[34] it does not establish a free trade area.

A 'free trade area' is not easily defined. It was virtually unknown in international economics or international law as a term of art prior to its inclusion in Article 44 of the abortive Havana Charter, intended in 1947 to establish an International Trade Organization as a specialized agency of the United Nations. Mention of a free trade area was included in the Charter only at the last moment in order to provide an alternative to the more established concept of a customs union, both to serve as permitted exceptions to the Most Favoured Nation (or equal treatment to all imports, regardless of origin) rule.[35]

While the Havana Charter failed to come into force, the term 'free trade area' became established as a legal and economic concept through inclusion in the GATT where it was once again used as an alternative exception to the Most Favoured Nation rule.[36] As defined by the GATT, a free trade area is

> a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories.[37]

[33] John McEwen, Australian Deputy Prime Minister and Minister for Trade and Industry, Address at the Parliamentary Luncheon in Wellington, New Zealand, 1 March 1967, 5.

[34] NAFTA, Article I, Paragraph 1 states: 'A Free Trade Area (in this Agreement called 'the Area') is hereby established'.

[35] Lambrinidis, *The Structure, Function, and Law of a Free Trade Area: the European Free Trade Association* (1965) 4. Prior to the Havana Charter, if a 'free trade area' concept existed at all, it was considered an incomplete or partial customs union. NAFTA, Article 1, Paragraph 1; Trade Agreement Between the Commonwealth of Australia and the Dominion of New Zealand of 5 September 1933. Reproduced as the First Schedule to the Customs Tariff (New Zealand Preference) Agreement Act 1933 (Cth).

[36] GATT, Article XXIV.

[37] GATT, Article XXIV, Paragraph 8(b). The foreshortened definition omits reference to specified and very limited exceptions to the elimination of duties requirement, such as the application of quantitative restrictions for balance of payments reasons, and the application of specific general exceptions normally recognized as serving other legitimate non-trade functions of a state, such as protection of public morals, health, safety, use of prison labour, and the like.

GATT, Article XXIV, Paragraph 2 defines a 'customs territory' as 'any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories'. Australia and New Zealand would each constitute a separate 'customs territory'.

Mr McEwen has defined a 'free trade area' as

> an arrangement between two or more countries which provides for the goods included in it to be traded free of duty between them, but allowing each country to maintain separate tariffs on imports from countries outside the arrangement.[38]

He distinguished it from a customs union in that the latter 'requires the Members to introduce a common external tariff against imports from other countries'.[39] Mr J. G. Starke, commenting on Mr McEwen's definition, states that

> it is more accurate to say that the distinction between a free trade area arrangement and a customs union is that the member countries of a free trade area may, in relation to countries outside the area, act separately by individual control over the levels of their respective customs duties, or by maintaining such trade barriers as they consider necessary for their own purposes (subject to international obligations); whereas in relation to outside nations, the members of a customs union act in a unitary manner.[40]

Without attempting further to isolate a more precise definition of a free trade area, it is clear that the New Zealand-Australia Free Trade Agreement falls short of the 'free trade area' concept currently recognized in international law. The Agreement does not apply to all or substantially all goods traded between Australia and New Zealand, but rather is limited to a specified list of products which together account for approximately 60 *per cent* of the total trade covered by the two countries. Many of these products were already traded duty free before the 1965 Agreement came into force; as to the remainder, many duties are not eliminated immediately but rather are gradually staged out over a period of up to eight years. While it is true that the Agreement contemplates the inclusion of additional items in future years (and a number of items have already been added in the two years since the Agreement began operation[41]) it was intended by the two governments that a significant number of products would never be included. Futhermore, the Agreement provides that under stated circumstances, not recognized as exceptions under GATT, items included in the Agreement can be removed, either temporarily or permanently.

As GATT members, Australia and New Zealand were obliged to comply with Article XXIV of GATT which governs free trade areas and interim agreements leading to the formation of free trade areas as permitted exceptions to the Most Favoured Nation rule.[42] Article XXIV requires of free trade areas that duties and other trade restrictions be eliminated on 'sub-

[38] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 17 August 1965, 11.
[39] *Ibid.*
[40] Starke, 'The Trade Policies of Australia and New Zealand: Recent Legal Developments' (1968) 2 *Journal of World Tade Law* 375, 380-1.
[41] NAFTA, Additions to Schedule A effective 1 January 1968, and Additions to Schedule A effective 1 January 1969.
[42] GATT, Article I, Paragraph 1.

stantially all the trade' of the members.[43] Any countries intending to form such an area must submit to the GATT Contracting Parties a 'plan and schedule' which will lead to the formation of a free trade area 'within a reasonable length of time'.[44] While there is no precise definition of the phrase, 'substantially all the trade', it seemed clear to the GATT Working Party appointed to study the New Zealand-Australia Free Trade Agreement that its scheme was something less than 'substantial'.[45] Furthermore, Australia and New Zealand had no detailed 'plan and schedule' for ultimately including 'substantially all' their trade.[46] Nor, as they themselves acknowledged, did the Agreement contain any fixed time scale for ultimate achievement of this end.[47] Additionally, the Agreement is of uncertain duration in that it will be in force for a period of ten years[48] after which it will continue in force subject to termination by either party upon specified conditions.[49]

Australia and New Zealand recognized that their Agreement was 'imperfect' but felt that it represented a realistic approach by two relatively small countries with specialized trade problems. Both countries also gave assurances to the Contracting Parties that it was their clear and honest intention to establish a free trade area fully consistent with GATT. In connection with these assurances they agreed to report periodically to the Contracting Parties on the progress of the Agreement.[50]

Sympathetic to the position of Australia and New Zealand, the Contracting Parties neither disapproved, nor approved, the Agreement. Instead they invited the two countries to give serious consideration to a 'sufficiently comprehensive plan and schedule' and noted the intention of the two parties to report further on the matter.[51]

Australia and New Zealand submitted their first report on the Agreement to the Contracting Parties on 12 November 1968.[52] In it they related the progress made toward implementation of the Agreement, stating that

[43] GATT, Article XXIV, Paragraphs 5 and 8(b).

[44] GATT, Article XXIV, Paragraph 5(c). A GATT member or signatory is also called a 'Contracting Party'.

[45] *Report of GATT Working Party* (adopted 5 April 1966) Paragraph 15. (Document L/2628). *Ibid.* Paragraphs 5 and 6.

[46] *Report of GATT Working Party* (adopted 5 April 1966) Paragraph 9. *Ibid.* Paragraph 15.

[47] 'Opening Statement by Spokesman for the Parties to the Agreement', *Report of GATT Working Party* (adopted 5 April 1966) Annex, 121.

[48] NAFTA, Article 17, Paragraph 2.

[49] NAFTA, Article 17, Paragraph 3. Either country desiring to terminate must give written notice to that effect and hold consultations with the other country. After 90 days a second written notice must be given and the Agreement will terminate 180 days thereafter.

[50] *Report of GATT Working Party* (adopted 5 April 1966) Paragraph 17.

[51] 'Conclusions of Contracting Parties' (adopted 5 April 1966). See in particular Paragraphs (c) and (d). For a more complete discussion concerning the consistency of the New Zealand-Australia Free Trade Agreement with GATT obligations see Starke, 'The Trade Policies of Australia and New Zealand: Recent Legal Developments' (1968) 2 *Journal of World Trade Law* 375, 389-91.

[52] *New Zealand-Australia Free Trade Agreement: Information Furnished to GATT by the Member States at the twenty-fifth session of the Contracting Parties, November 12-29 1968* (12 November 1968). (Document No. L/3104).

it was their 'mutual desire and intention . . . to continuously expand the product coverage of the Agreement and to lay a sound foundation for further progress in the future'.[53] They repeated their view of two years earlier that 'the problems associated with the different stages of industrialization in the two countries prevent the immediate attainment of a full free-trade area' but again gave an undertaking to 'accept the obligation to so apply and develop the Agreement as to achieve a free-trade area'.[54]

If the New Zealand-Australia Free Trade Agreement is still an 'imperfect' document it is nonetheless an avowed beginning toward what may eventually be a true trans-Tasman free trade area. As such, its provisions warrant close examination.

Membership in the Free Trade Area

Article 1, Paragraph 2 of the New Zealand-Australia Free Trade Agreement defines the Free Trade Area (the 'Area') as metropolitan New Zealand (specifically excluding the Cook Islands, Niue and the Tokelau Islands), and the six states and the 'mainland territories' of Australia (the latter being the Australian Capital Territory and the Northern Territory). A later provision states that the two countries may agree to associate with the Agreement any territory the international relations for which either is responsible.[55] The purposes of such an association are stated to be promotion of 'the economic and social development of the territory' and the permitting of 'closer economic relations between the territory and the Member States'.[56]

It is also possible to associate independent third countries with the Free Trade Area[57] although there is no provision for full co-equal membership. The association may relate only to the metropolitan territory of a third country, or may also include any territory the international relations for which the third country is responsible.[58] In either event the terms of association are to be negotiated between the Member States and 'the other state'.[59]

The Agreement does not provide for any form of association with any union or group of outside states, such as another free trade area or customs union consisting of third countries. Presumably, in order to effectuate association with such a group, separate negotiations would be required with each of its members.

While no associations have been formed since the Agreement came into force, and no country or territory is specifically excluded from association, the two Members apparently contemplate such association only with the

[53] *Ibid.* Paragraph 12.
[54] *Ibid.* Paragraph 13.
[55] NAFTA, Article 13, Paragraph 1.
[56] NAFTA, Article 13, Paragraph 2.
[57] NAFTA, Article 14, Paragraph 1.
[58] NAFTA, Article 14, Paragraph 2.
[59] NAFTA, Article 14, Paragraph 3. The terms of association for dependent territories of Australia and New Zealand 'shall be agreed upon by the Member States' Article 13, Paragraph 3.

present and future dependent and independent island states of the South Pacific. Nothing indicates that the parties foresee the Agreement evolving into a Pacific Area Free Trade Association, that is, a broader association of Australia, New Zealand, Japan, Canada and the United States.[60]

Substantive Provisions Relating to Trade Liberalization

The New Zealand-Australia Free Trade Agreement states three objectives: to further the development of the Free Trade Area and the use of its resources by promoting a 'sustained and mutually beneficial expansion of trade';[61] to ensure that intra-Area trade takes place 'under conditions of fair competition';[62] and to 'contribute to the harmonious development and expansion of world trade and to the progressive removal of barriers thereto'.[63] If these objectives appear laudable but imprecise, they are nonetheless of some consequence. If either country, in its judgment, believes that any of the objectives 'are not being achieved' it can insist on consultations with the co-Member 'as soon as practicable' to 'consider appropriate measures to remedy the situation . . .'.[64] The unspecified measures and remedies, like the objectives themselves, may gain some measure of clarity from an examination of the substantive provisions of the Agreement.

The Agreement purports to apply to "all goods traded within the Area'.[65] However, a proviso clause is included which effectively limits the operative free trade provisions to those goods listed in Schedule A of the Agreement.[66] At the time the Agreement was executed Schedule A items accounted for about 60 *per cent* of all trade between the two countries and in the more than two years since it came into operation the Schedule A list has been expanded[67] with about an additional 100 items to be included by 1 July 1969.[68] Together these items account for approximately 60 *per cent* of the total trade between the two countries.

[60] Certain economists are already thinking in terms of a broader grouping. *E.g.* Drysdale, 'Pacific Economic Integration: An Australian View' (1968) *Pacific Trade & Development, Papers and Proceedings of a Conference held by the Japan Economic Research Centre* 194-223. Kojima, 'A Pacific Free Trade Area' (1968) 8 *Intereconomics* 75-9.

[61] NAFTA, Article 2, Paragraph 1.

[62] NAFTA, Article 2, Paragraph 2.

[63] NAFTA, Article 2, Paragraph 3. Free trade areas and customs unions theoretically contribute to world trade expansion, and inclusion of this objective is therefore a recognition of Australia and New Zealand's obligations under GATT to the Contracting Parties.

[64] NAFTA, Article 16, Paragraph 1.

[65] NAFTA, Article 3, Paragraph 2.

[66] *Ibid.* Article 3, Paragraph 2 states: '*Subject to the provisions of paragraph 1 of this Article*, this Agreement applies to all goods traded within the Area.' Author's italics. Article 3, Paragraph 1 provides that the operative provisions shall apply to 'scheduled goods', those listed in Schedule A.

[67] NAFTA, Schedule A and Additions to Schedule A effective 1 January 1968, and Additions to Schedule A effective 1 January 1969.

[68] 'New Zealand-Australia Free Trade Agreement: Items Proposed in Addition to Schedule A on 1st July 1969', as appended to press release of statement by Mr John McEwen, Australian Deputy Prime Minister and Minister for Trade and Industry, 18 December 1968. (The precise number of items added is unascertainable because of differences in the Australian and New Zealand schedules.)

Elimination of duties

Inclusion in Schedule A normally means that all duties upon the goods listed either are or will be eliminated. If at the time an item is included in the Schedule it is already duty free or carries a duty of five *per cent* or less, it falls in categories (a) and (b) respectively of Article 4, Paragraph 2 of NAFTA and shall remain, or immediately become, duty free. If at the time of inclusion the item is subject to a duty of more than five *per cent* but not exceeding 10 *per cent,* it falls in category (c) and the duty is first cut in half, then eliminated two years later.[69] In the case of any item with a duty of more than 10 *per cent* on the date of inclusion (those items in category (d)) the duty is immediately cut by one fifth, and thereafter each second year by an additional fifth of the original rate until the duty is eliminated at the end of eight years.[70]

For products classified in categories (c) and (d), those which require staged or gradual reduction, each country unilaterally may accelerate its own duty reduction and elimination.[71] If deceleration is desired, mutual agreement is required.[72]

In the case of duties expressed in specific rather than in *ad valorem* (or percentage) terms, the *ad valorem* equivalent must be ascertained. For example, if a product carries a specific duty of eight cents *per* item, and the item in question is valued at one dollar, the *ad valorem* equivalent is eight *per cent.* Such an item would fall in category (c) and the duty would therefore immediately be cut to four cents *per* item and eliminated two years later.[73]

Items included in Schedule A (or any components or ingredients of Schedule A items) may not be subject to any higher non-tariff revenue duties or taxes (such as sales or excise taxes) than the equivalent internal revenue duties or taxes levied on such items (or their ingredients or components) if they had been produced in the importing Member state.[74] In

[69] NAFTA, Article 4, Paragraph 2(c).
[70] NAFTA, Article 4, Paragraph 2(d).
[71] NAFTA, Article 4, Paragraph 6.
[72] NAFTA, Article 4, Paragraph 7.
[73] An interesting question might develop if, within the two year period the price of the item dropped, for example to 25 cents. Thus the *ad valorem* equivalent of a four cent *per* item duty would rise to 16 *per cent.* Would this therefore cause the item to be reclassified under Article 4, Paragraph 2(d) as an item having a duty in excess of 10 *per cent* and consequently subject to more gradual elimination staged over eight years? The Agreement is silent on the question of the consequences of an alteration in the rate of an *ad valorem* equivalent, and no such case has yet arisen. It would appear from both a careful reading of the Agreement and a desire to avoid administrative chaos that the category initially assigned would control throughout the period of time permitted to elapse prior to duty elimination. Article 4, Paragraph 3 provides a formula for initial assignment to a category: Total duties collected on an item over the most recent year for which statistics are available are divided into the total value of the imported goods. There are no words limiting or qualifying the formula, and it therefore seems fair to conclude that no alternate or later valuation method is available for the purposes of category assignment. See also the operative language for all categories which refers only to 'the day immediately preceding the day on which' the product is included in Schedule A. NAFTA, Article 4, Paragraph 2.
[74] NAFTA, Article 6, Paragraph 1.

the event such a tax is being imposed on any item at the time it is added to Schedule A, then any difference between the higher tax on the imported item and the equivalent tax on a domestically produced counterpart will be treated as a tariff duty and must be reduced and eliminated accordingly.

An interesting question of interpretation could arise with respect to the appropriate category assignment of a product. Assume that Item 'X' is subject to a sales tax of 10 *per cent*. The Australian produced counterpart to Item 'X' pays a sales tax of only eight *per cent*. According to Article 6, Paragraph 2, the two *per cent* excess tax to which the import is subject must be treated as a tariff and eliminated. Should this two *per cent* then also be added to the regular tariff of four *per cent* for *classification* purposes, thus giving a total tariff of six *per cent*? If so, then Item 'X' would be assigned to category (c) providing for gradual duty elimination over a two year period.

Certainly, in such a case New Zealand would argue that the language of Article 6, Paragraph 2 was included only to remove a non-tariff restriction to trade, and not to cover an Article 4 category assignment. Furthermore, the language of Article 4, Paragraph 2 is clear in stating that category assignment is determined only by current 'import duties', and a sales tax is not an 'import duty'. Hence, the four *per cent* import duty places Item 'X' in category (b) and the duty, plus two *per cent* excess sales tax must be eliminated immediately.

Australia, on the other hand, might argue that the total effective level of protection was six *per cent*, and Article 4, Paragraph 2 is intended to spell out the formula for the elimination of total levels of protection and not merely import duties. Thus, the general words 'import duties' in Article 4, Paragraph 2, are supplemented by the specific direction in Article 6, Paragraph 2 that such excess taxes be treated as 'import duties'. This specific language modifies the more general wording of Article 4. Inasmuch as the effective protection on Item 'X' is six *per cent*, it is the clear purpose of the Agreement that this higher level be phased out gradually, over the two year period specified for category (c) products.

It would appear that the drafters of Article 6, Paragraph 2 had not foreseen the possible effect of the chosen language in Article 4, Paragraph 2. While no case such as this hypothetical case has yet arisen, the possibility of controversy between Australia and New Zealand on this point remains.

Prohibition of Quantitative Restrictions

Neither Australia nor New Zealand may maintain or introduce quantitative import restrictions (also known as import quotas) on *any* trade within the Area unless at the same time (and consistently with its international obligations) it is also applying such restrictions to trade with third countries, or unless such restrictions form part of any commodity

arrangement to which both Australia and New Zealand are parties.[75] In the event of quantitative restrictions being applied in accordance with the foregoing, the country applying them is obliged to eliminate the restrictions *on Schedule A goods only* as soon as practicable,[76] and may not thereafter re-impose such restrictions or introduce similar new restrictions on Schedule A goods except under stated circumstances and then only after consultation with its NAFTA partner.[77] It is interesting to note that, collateral to the NAFTA Agreement, Australia gave New Zealand an undertaking that it would not impose quantitative restrictions for balance of payments reasons only against New Zealand products; New Zealand was not able to give Australia a similar undertaking.[78]

Furthermore, as a general rule, neither country is permitted to impose new or to intensify existing quantitative restrictions or prohibitions on exports.[79] Exception is made for the case where either of the two NAFTA Members applies quantitative export controls in respect of exports to third countries, and it becomes necessary to apply such restrictions to the other Member in order to avoid evasion of its controls by means of re-export to the third country from the other Member.[80] Although not expressly stated, it would appear that either country could also impose quantitative export restrictions when necessary to prevent or relieve critical shortages of foodstuffs or other essential goods[81] or to conserve limited natural resources,[82] provided such export quotas are imposed for such purposes and not as a disguised restriction to trade.[83]

[75] NAFTA, Article 5, Paragraph 1. However quantitative restrictions by Australia against entry of New Zealand cheddar cheese were agreed to by both countries at the time of signing of the Agreement. NAFTA, Supplemental Exchange of Letters between the Honourable J. R. Marshall, New Zealand Minister of Overseas Trade, and Donald A. Cameron, Australian High Commissioner in New Zealand, both dated 31 August 1965, Paragraph F, subparagraph II. See also the use of quantitative restrictions in connection with NAFTA, Article 3, Paragraph 7, 'Arrangements', discussed *infra*.

[76] NAFTA, Article 5, Paragraph 2. The obligation is to 'reduce and eliminate those restrictions at the earliest practical date, taking into account the [applying country's] balance of payments and the desirability of avoiding any undue diversion of trade'. Reference to the balance of payments justification and inhibition of undue trade diversion are consistent with the GATT obligations of both countries. GATT permits quantitative restrictions as a necessary measure to correct an unfavourable balance of payments but obliges its signatories to avoid such restrictions so that there is no undue trade diversion. GATT, Article XII.

[77] Article 5, Paragraphs 2 and 3 are confined only to Schedule A goods. See NAFTA, Article 3, Paragraph 1. Note that the country desiring to impose such a restriction must show that its entire quantitative import restriction programme, imposed for balance of payments reasons, would be seriously prejudiced without the inclusion of the requested restriction on the Schedule A item in question. NAFTA, Article 5, Paragraph 3.

[78] Johnson, *Australia/New Zealand Trade Relations: The Role of Government* (1967) 17; Starke, 'The Trade Policies of Australia and New Zealand: Recent Legal Developments' (1968) 2 *Journal of World Trade Law* 375, 383.

[79] NAFTA, Article 11, Paragraph 1.

[80] NAFTA, Article 11, Paragraph 2.

[81] NAFTA, Article 12 (i).

[82] NAFTA, Article 12 (j).

[83] NAFTA, Article 12. While Article 11, Paragraph 1 would appear to prohibit all uses of quantitative export controls except exclusively for the reason listed in Article 11, Paragraph 2, such an interpretation would render meaningless the language of Article 12 (i) and (j). Furthermore, the language of Article 12 is sufficiently broad to encompass the use of quantitative export restrictions for such purposes. It

To date there has been little attempt to co-ordinate related groups of products for inclusion in Schedule A. The list was, and continues to be assembled on an item-by-item basis without reference to sectoral integration or industry rationalization.

Article 3, Paragraph 7, Special Measures

If the administrators of the Agreement have found sectoral integration politically difficult to achieve by means of Schedule A, they have met with greater success through use of another provision of the Agreement. Article 3, Paragraph 7 states:

> In relation to goods not at the time listed in Schedule A to this Agreement, the Member States may agree on and implement special measures beneficial to the trade and development of each Member State and designed to further the objectives of this Agreement. Such measures may include the remission or reduction of duties on agreed goods or classes of goods in part or in whole.

The language of the paragraph is intentionally broad and allows maximum flexibility to initiate and implement what are called 'Special Trade Arrangements', 'Industry Co-operating Arrangements', or simply 'Article 3/7 Arrangements'.

According to the two governments, consideration will be given to proposals from manufacturers provided they would serve the basic objective of the Free Trade Agreement ('the development of the Area and its resources by a mutually beneficial expansion of trade') and encourage manufacture, and provided that the imports would not cause material damage or domestic injury in either country.[84] No limit is imposed on the types of goods which might be considered the subject of an arrangement or the number of companies which might be involved. Arrangements could range from ones dealing with raw materials to others covering finished products. While the mechanism is most useful for bringing about sectoral rationalization, it is not necessary that the plans cover products in related fields.[85]

If, for example, a New Zealand company were more efficient at producing certain components for an Australian product, Item 'Y', than its Australian manufacturer, the latter might prefer to purchase these parts at less cost from the New Zealand company rather than to produce them itself, provided it could then take advantage of an expanded Australia-New Zealand market

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provides that '. . .[N]othing in this Agreement shall prevent the adoption or enforcement by a Member State of measures . . . necessary to prevent or relieve critical shortages of foodstuffs or other essential goods; . . . [or measures] relating to the conservation of limited natural resources; . . .'.

[84] *Opportunities for Special Trade Arrangements: New Zealand/Australia Free Trade Agreement*, 7. This publication was prepared jointly by the Department of Trade and Industry, Canberra, and the Department of Industries and Commerce, Wellington. While much could be written as to what constitutes 'material injury', few guidelines have been set. The phrase is intentionally broad to give government officials maximum flexibility in making the requisite determination.

[85] *Ibid.*

for sale of the finished Items 'Y', thereby achieving greater economies of scale. Such an arrangement, by offering a much larger market for the parts produced, would also benefit the New Zealand company. Consumers in both countries could also benefit from the cost savings made possible by the arrangement.

Under Article 3/7 procedures, the company in each country would submit a proposal to its trade department[86] and the two departments would then examine the plan to determine its feasibility, assess possible injury to domestic producers, and determine the extent of trade liberalization necessary to implement it. The two governments would then make the necessary alterations to existing trade regulations. In the example above, this might include admission of the parts into Australia duty free under by-law,[87] and liberalization of licensing arrangements by New Zealand for the finished product, Item 'Y'.

Normally, approved arrangements have quantitative limits, that is, a quota (expressed either in terms of quantity or value) on New Zealand products admitted duty free under by-law to the designated manufacturer in Australia, and similar limits (expressed in value terms) on additional import licences New Zealand will grant such specified products from Australia. These additional licences usually are limited to 80 *per cent* of the value of the New Zealand content of the goods initially exported to Australia.[88] Thus, in some of the earliest arrangements between each of the major Australian automobile producers and New Zealand automotive parts suppliers, the parts are admitted into Australia free of duty under by-law to the designated auto manufacturer, and additional special NAFTA import licences are granted for the import to New Zealand of Australian automobiles (in knocked down form, for assembly in New Zealand) to the extent of 80 *per cent* of the value of New Zealand content of the exported parts.[89]

As of 1 January 1969, 124 separate proposals had been submitted by manufacturers to their respective trade departments. Of these, 52 had been approved and are now in effect, and 23 had been rejected; five were volun-

[86] The Department of Trade and Industry in Australia, and the Department of Industries and Commerce in New Zealand.

[87] Admission under 'by-law' is a waiver of the normally applicable rate of duty on the product in question. The rate of duty is not changed; rather, the specified importer is exempted from paying the import duty.

[88] *Opportunities for Special Trade Arrangements: New Zealand/Australia Free Trade Agreement*, 8. This publication was prepared jointly by the Department of Trade and Industry, Canberra, and the Department of Industries and Commerce, Wellington.

[89] For example, assume that New Zealand imports the requisite textile yarns from world markets. The yarns are then used in the manufacture of headliners; the value of these yarns represents 40 *per cent* of the value of the finished headliners, and New Zealand content in the form of labour and other materials is therefore 60 *per cent*. Assume that under the arrangement that New Zealand exports headliners to General Motors Holden Pty Ltd in Australia for a price of $200,000. Australia admits the headliners duty free, and in turn New Zealand issues additional licences for the importation of Australian Holdens (in 'knocked down' form ready for assembly) having a value of $96,000. (80 *per cent* of $120,000, and $120,000 in turn represents 60 *per cent* (New Zealand content) of $200,000.)

tarily withdrawn by the private manufacturers after submission, and 44 are under study.[90] Manufacturers in both countries apparently now see advantages in use of Article 3/7 Arrangements; certainly the provision is being used far more widely than anticipated at the time the Agreement was signed. In 1965 producers in both countries were sceptical of the benefits of such arrangements. This was particularly true in New Zealand which felt it had little competitive advantage in manufactures. However, when the New Zealand dollar was devalued in 1967 to a level equal to the Australian dollar, new trade awareness of the expanded market made available by the 1965 Agreement has resulted in significantly increased interest in Article 3/7 Arrangements. The language of Article 3, Paragraph 7 is unique; no counterpart is found in other free trade agreements. The Arrangements offer an unusual opportunity to particular industries in the two countries for integration and rationalization of production and marketing; however, to the extent that duty free treatment in Australia is under the by-law system and is therefore confined to importation by a designated manufacturer, and to the extent that New Zealand maintains its licensing system with designated quotas measured in terms of specific New Zealand exports (and at that limited only to the value added in New Zealand), such Arrangements inhibit growth. Nevertheless, it is hoped (and it is apparently the intention of the two governments) that eventually items covered by Article 3/7 Special Arrangements will be included in Schedule A so that duties and quantitative restrictions presently applicable to such items will be eliminated.[91]

Protective Features of the Agreement

> We reached the understanding that we were going to build our trade *without harming each other.* That says the whole thing in that sentence—to plan to build our trade, each watching carefully that it didn't harm the other. This is what was done, and this is the kind of thing that I hope we can do as between Australia and New Zealand.[92]

There appears to be little question that the speaker of these words, Australia's Minister of Trade and Industry John McEwen, and his New Zealand counterpart succeeded in their objective of developing trade without harm to domestic industries.[93] The 1965 Agreement includes numerous

[90] Figures supplied by the Australian Department of Trade and Industry.

[91] Johnson, *Australia/New Zealand Trade Relations: The Role of Government* (1967) 15. See also explanations of Australia and New Zealand to GATT Contracting Parties in *Report of GATT Working Party* (adopted 5 April 1966) Paragraph 8, where Article 3, Paragraph 7 'Arrangements' were viewed 'as a means of easing transition to full free trade treatment'. (Document L/2628).

[92] John McEwen, Australian Deputy Prime Minister and Minister for Trade and Industry, Address at the Parliamentary Luncheon in Wellington, New Zealand, 1 March 1967, 4-5. Author's italics.

[93] As early as October 1966, Mr McEwen denied that NAFTA had caused any dislocation to Australian industry, in particular to the dairy, pig meat, pea and bean industries. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 3 April 1968, 707. Recent discussion in the House of Representatives has shown that while concern is still expressed with respect to the Australian pea and

provisions intended to protect domestic industries in both countries. These provisions in certain respects run counter to the underlying objectives of a free trade area. Many of the safeguards were included to make the Agreement more palatable to producers in both countries, particularly to New Zealanders who feared being overwhelmed by their larger and better developed Australian cousins. Consequently, measures necessary to ensure New Zealand's continued industrial development were added.[94]

A number of products, both manufactured and agricultural, were omitted from Schedule A. Furthermore, while the Agreement calls for annual reviews for the purpose of progressively including additional items in Schedule A,[95] it is contemplated that there will always be certain products, specifically

> those goods the inclusion of which would be seriously detrimental to an industry in the territory of either Member State, or would be contrary to the national interest of either Member State . . .[96]

which will not be subject to Schedule A or other liberalized treatment. In order to determine if inclusion of particular goods in Schedule A would be 'seriously detrimental', each party is to consider whether the addition of any such product

> would cause or threaten to cause material injury to its producers of like or directly competitive goods or would or might hinder the establishment of an industry to produce or manufacture like or directly competitive goods.[97]

More particularly, each country must take into regard the effect which the addition of any item to Schedule A would have on 'profit levels, employment, capital investment and prices'.[98]

Each country may therefore protect inefficient industries and permanently exclude their products from the operation of the Agreement. This notion runs directly counter to the major objective of a free trade area: elimination of inefficient production through allocation of the development of resources according to comparative advantage.

While the various provisions of Article 3 may prevent a particular product from being included in Schedule A, the Agreement also provides that

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bean industry (*ibid.* 22 October 1968, 2154; *ibid.* 7 November 1968, 2574; *ibid.* 13 November 1968, 2766), douglas fir and, most recently, lamb appear to be matters of increasing concern. (*Ibid.* 13 September 1966, 759; *ibid.* 4 October 1967, 1654; *ibid.* 15 May 1968, 1433; *ibid.* 4 June 1968, 1889-90; *ibid.* 6 June 1968, 2101; *ibid.* 13 August 1968, 11-12; *ibid.* 28 November 1968, 3394).

[94] Starke, 'The Trade Policies of Australia and New Zealand: Recent Legal Developments' (1968) 2 *Journal of World Trade Law* 375, 381.

[95] NAFTA, Article 3, Paragraph 4.

[96] NAFTA, Article 3, Paragraph 3. 'National Interest' is a flexible phrase susceptible of many interpretations. Without defining the term, NAFTA states that either country may take into account its trade with third countries. NAFTA, Article 3, Paragraph 6.

[97] NAFTA, Article 3, Paragraph 5.

[98] *Ibid.*

products already in the Schedule may be removed from it either temporarily or on a permanent basis. In exceptional circumstances (not further defined under the Agreement and therefore subject to flexible interpretation) after consultation with the other country, either Member of the Agreement may withdraw any product fom Schedule A in order to establish a new industry or encourage the expansion of an existing one.[99] In addition a duty of up to 10 *per cent* may also be established on any particular Schedule A item for the purpose of encouraging new 'productive activities which contribute to economic development', although under such circumstances the duty must be gradually removed in five equal instalments over an eight year period beginning four years after the duty was re-established.[1]

Another article in the Agreement provides that either country unilaterally may suspend the application of Schedule A treatment to any product for as long as it is considered necessary if the product is being imported in such conditions 'as to cause or threaten serious injury' to domestic producers of like or directly competitive products.[2] This article is very similar to Article XIX of GATT and was obviously based on it.[3] GATT, however, is not a free trade area agreement, and if the provision had little justification in the multilateral trade arrangement it has even less justification in the New Zealand-Australia Free Trade Agreement which should allow economic forces to inhibit wasteful resource allocation by discouraging inefficient production. If either Australia or New Zealand should take such action, then, as in GATT,[4] the other country may unilaterally retaliate by suspending the application of Schedule A to selected products of an equivalent value which are imported from the first country.[5]

In addition to the foregoing protective measures, each country unilater-

[99] NAFTA, Article 8, Paragraph 3.

[1] Prior consultation is required. NAFTA, Article 8, Paragraph 1. Such encouragement may include the establishment of a new industry or the extension of the range of products produced by an existing industry. *Ibid.* It is based on the economic 'infant industry' argument that in the early stages of production an industry is bound to be inefficient and therefore needs temporary protection until it becomes sufficiently strong The inevitable additional costs of initially developing an industry, however, are normally considered part of the normal predictable costs of doing business. Whatever the merits of the 'infant industry' argument, it has less application in the case of new products of an already established industry. Under such circumstances, the industry or company as a whole may be quite successful although the profits of the new product will be (predictably) lower in the first years of production until markets are established and economies of scale are obtained. Such extra costs or lower profits are considerd the normal cost of investment in order to expand product lines. So long as the industry or company as a whole is healthy it would seem no such protection should be afforded the new product.

[2] NAFTA, Article 9. Before either country may take such action it must first consult with its partner in order to reach a mutually satisfactory solution within 60 days; in the event that agreement is not reached, the country wishing to suspend Schedule A treatment for the product in question may do so after first giving notice to that effect in writing.

[3] Article XIX runs counter to the overall trade liberalization policy of GATT but was reluctantly included to reduce the fears that many trading countries had of overwhelming imports eliminating essential domestic industries and consequently harming domestic economies when the Agreement was signed in 1947.

[4] GATT, Article XIX, Paragraph 3 (a).

[5] NAFTA, Article 9, Paragraph 2.

ally may suspend Schedule A treatment to particular products on stated conditions without the other NAFTA member having a right of retaliation when trade is deflected for specified reasons.[6] For example, if both Australia and New Zealand produce a particular item from raw materials which must be imported from a third country, one NAFTA Member may have a competitive advantage because its duty on the entry of the raw material is significantly lower than the other Member's equivalent duty, thereby reducing manufacturers' costs accordingly. Such a problem is confined to a free trade area since each of its Members may maintain separate (and often quite different) tariff rates on imports from outside the area; in a customs union the problem does not exist because there is a common tariff wall against products of non-members. Accordingly, this provision of the Agreement, while containing an element of protection, is considered a necessity and is characteristic of all free trade area agreements.[7]

If, under any article of NAFTA, Schedule A treatment is removed or suspended on any item, the re-imposed tariff rate in no event may be 'higher than the lowest rate applicable to imports of similar goods from any third country'.[8] This limitation raises interesting questions because of the multiplicity of duty rates which might be applicable, particularly in Australia. Would the 'lowest rate . . from any third country' be the General (or Most Favoured Nation) Rate applicable to most third countries, the lower British Preferential Rate available to many British Commonwealth countries or the even lower rate applicable to specified products from the more than 130 countries eligible for preferences in Australia as developing countries,[9] or perhaps some other rate?

Australia also maintains special preferential rates for a limited number of products from specified countries as well as New Zealand.[10] The text of the Agreement does not purport to answer the question posed, but it seems clear that the parties had in mind the British Preferential Rate, which for all practical purposes would be the 'lowest rate'. It might be argued that the rate under the Developing Countries Preferential System should apply but almost all items included in this schedule are subject to

[6] NAFTA, Article 7, Paragraph 1. The conditions include the following: the imports in question must cause or threaten 'extreme injury to, and adversely affect the competitive position of' domestic producers of like or directly competitive products because of lower duties or taxes on the raw materials included in the product in question, the raw materials are dumped or subsidized, or there is some form of remission of import duties on the raw materials. Advantage must be derived from these circumstances. Before either country may take action under Article 7, it must first hold consultations with its NAFTA partner. Article 7, Paragraph 2.

[7] *E.g.* Article 5 of the European Free Trade Association Convention (EFTA) which was executed on 20 November 1959, and entered into force on 3 May 1960.

[8] NAFTA, Article 7, Paragraph 2; Article 8, Paragraph 2; Article 9, Paragraph 3.

[9] This is a system of reduced or preferential rates of duty applicable to imports of specified products which are produced in designated developing countries. In most cases Australia imposes a quota on the quantity or value of products which can be shipped at the special reduced rates, and any products shipped in excess of these quantities would thereafter be subject to the higher British Preferential or General Rate, whichever would be applicable.

[10] Customs Tariffs 1966 (Cth), s.33A (3)(a); United Kingdom, Canada, Ireland, the Territory of Papua and the Territory of New Guinea.

quantitative tariff restrictions and shipments in excess of this limitation are subject to the higher British Preferential or General Rate depending on the country of origin. It would be more reasonable to interpret 'lowest rate' to mean the lowest rate at which the item in question could be imported in unlimited quantities. In effect, this would be the British Preferential Rate.

One final provision deserves mention in this section. Although protective in effect, Article 12 of NAFTA is not protective in purpose. It provides that nothing in the Agreement shall prevent either country from adopting or enforcing any measures necessary to protect local health, safety or morals, as well as national security interests, national treasures, local flora and fauna, natural resources and the like.[11] Apparently, there is no limitation on the type of such restrictions which each country may employ, provided they are essentially non-discriminatory, and are neither arbitrary nor disguised methods designed to restrict trade.[12] Many of the listed reasons are natural concomitants of nationality such as national security or conservation. Others are inevitable results of diverse cultures in the world. (What may be considered immoral and therefore embargoed from Cambodia may be acceptable in Canada). Consequently and not unexpectedly, similar provisions are found in such multilateral instruments as GATT.[13] However, with two societies as similar as Australia and New Zealand it would be hoped that agreement could be reached on common standards for matters such as health, morals and safety and that the right to maintain restrictions for such reasons would then become unnecessary.

Administration of the Agreement

The Australia-New Zealand Free Trade Agreement provides minimal procedures or machinery and relies primarily, as does GATT,[14] on relatively informal joint consultation. Such consultation may take place at various levels and may be specific or general in nature. Certain occasions for consultation have already been mentioned, such as the requirement of consultation before certain protective measures can be taken under Articles 7 to 10 of the Agreement[15] or before quantitative restrictions may be reimposed[16] or in connection with the establishment of Article 3/7 Arrangements.[17]

Perhaps the most important consultative provisions are those of Article 16 of the Agreement. In addition to very general language providing for consultation whenever, in the view of either country, any benefits conferred by the Agreement, or any of its objectives, are not being achieved,[18]

[11] For a complete list of justifications, see NAFTA, Article 12, sections (a) to (m) inclusive.
[12] NAFTA, Article 12.
[13] GATT, Article XX.
[14] *E.g.* GATT, Article XXII.
[15] *Supra* pp. 84-88.
[16] *Supra* pp. 80-82.
[17] *Supra* pp. 82-84.
[18] NAFTA, Article 16, Paragraph 1.

Article 16 establishes annual consultations for the purpose of reviewing the operation of the Agreement and gives each country an opportunity to 'raise any matters of mutual interest which are not provided for in . . . the Agreement but are related to its objectives'.[19] Article 16 states that all consultations are to take place through a Consultative Committee or through such other body as the Members may establish.[20]

In practice, not only have annual meetings been held, but a Joint Consultative Committee has also been established.[21] This Committee meets three times a year, once on the ministerial level[22] and the remaining two times at the senior trade department level, usually between First Assistant Secretaries. Meetings are held alternatively in Canberra and Wellington. The Joint Consultative Committee has no specific terms of reference and no designated offices are represented on the Committee. The Committee may deal with any problems which have arisen since its last meeting, negotiate and agree to a list of products to be added to Schedule A, discuss and approve further Article 3/7 Arrangements, or deal with specific industry problems.[23] Draft agendas for the meetings are prepared by the trade departments in the two countries, and these are exchanged before final agreement on an agenda is sought. There is a NAFTA Joint Secretariat consisting of one man in each country.[24] Formal Joint Consultative Committee decisions are the subject of exchanges of letters between the two members of the Joint Secretariat, who also initiate agenda items, prepare minutes of Committee meetings, and the like.

The informal structure of the Committee may contrast sharply with the more institutionalized machinery normal to free trade areas and customs unions. Indeed, this aspect of NAFTA was a subject of criticism by the GATT Working Party which regretted that the Agreement 'provided only a legal framework and incorporated few concrete measures'.[25] Neverthe-

[19] NAFTA, Article 16, Paragraph 2

[20] NAFTA, Article 16, Paragraph 3.

[21] NAFTA, Article 16 was implemented at the ministerial meeting held in Wellington on 28 February-1 March 1967, when the two countries formally established the Consultative Committee which then held its first meeting. The Australian and New Zealand ministers agreed that meetings should be held at least once a year at the ministerial level, that the Committee would be responsible for carrying out the consultations and reviews to be held under the Agreement as well as the operation and administration of the Agreement generally. They also agreed that more frequent meetings, at least twice a year, would be held on the official level. 'Joint Ministerial Statement' (1967) 38 *Current Notes on International Affairs* (1967) 68-9.

[22] That is, each delegation will be headed by the Australian Minister of the Department of Trade and Industry and the New Zealand Minister of the Department of Industries and Commerce.

[23] *E.g.* Starke, 'The Trade Policies of Australia and New Zealand: Recent Legal Developments' 1968 2 *Journal of World Trade Law* 375, 387, n. 14 with reference to the solution of certain pulp and paper industry problems amicably reached at the 3-4 April 1968, ministerial meeting in Canberra.

[24] Present members of the Secretariat are J. W. H. Clark, Director of Trade Relations, Economics Division of the Department of Industries and Commerce for New Zealand, and J. V. Quinn, Director of Africa Pacific Branch, International Trade Relations Division of the Department of Trade and Industry for Australia.

[25] *Report of GATT Working Party* (adopted 5 April 1966), Paragraph 16. (Document L/2628).

less, the intention of the parties was to create administrative machinery only when and as the need arose, rather than to create elaborate institutional structures in advance of need.[26]

To date the Joint Consultative Committee has established one standing committee to deal with a specific industry, the Joint Consultative Council on Forest Industries.[27] Its general terms of reference call for both countries to co-operate 'with a view to achieving a harmonious and mutually beneficial expansion of trade between them and to promoting the most efficient use of the combined resources of both Member States'.[28] Most forest products are already included in Schedule A. Consequently, these general terms are intended primarily to point the way for future investment in both Australia and New Zealand with a view to rationalizing the production and distribution of forest products. The Council has also been given specific terms of reference for a first inquiry and statistical study into the patterns of production and consumption of forest products in both countries, including projections to the year 2000.

The Joint Consultative Council on Forest Industries includes six persons, three appointed by each country. While New Zealand preferred Council membership to be open to persons from industry as well as government, Australia insisted that membership be confined to government or public officials.[29] Australia did agree, however, to allow individuals from outside the government, including persons affiliated with industries and universities, to participate in the Council's work on an *ad hoc* basis.

In addition to meetings of the Joint Consultative Committee held at least annually, the Agreement provides that the two countries 'from time to time' shall jointly review their trade in non-Schedule A goods with the objective of including additional items in the Schedule.[30] In fact such reviews have been held, generally more often than once a year, at meetings of the Joint Consultative Committee, and there have been even more frequent informal consultations between representatives of the two governments. The following procedures are employed for adding items to Schedule A.

In Australia, the Department of Trade and Industry puts together a list

[26] NAFTA, Article 15 states: 'The Member States shall, having regard to the desirability of reducing as far as practicable the formalities required in connection with trade within the Area, take appropriate measures, including arrangements relating to administrative co-operation, to promote the effective and harmonious application of the provisions of this Agreement.'

[27] NAFTA, Supplemental Exchange of Letters between the Honourable J. R. Marshall, New Zealand Minister of Overseas Trade, and Donald A. Cameron, Australian High Commissioner in New Zealand, both dated 31 August 1965, Paragraph 4, Section C. The Council, which is required by this Exchange of Letters to meet at least annually, was formally established on 7 November 1967, and held its first meeting in June 1968.

[28] *Ibid.*

[29] Such officials need not be employees of the national or federal government. One of Australia's three members presently serving on the Council is an official of the State government of New South Wales.

[30] NAFTA, Article 3, Paragraph 3. The paragraph provides for progressive additions to Schedule A subject, however, to specified limitations. *Supra* p. 85.

of products for consideration. The Department may assemble this list from suggestions made to it by private industry, and from studies which it undertakes. It applies no hard and fast rules applicable to all products, but generally such studies include consideration of three factors: (1) whether there is a genuine possibility of trade expansion in the products under study;[31] (2) a realistic appraisal of whether inclusion of the products in question would be acceptable to New Zealand; and (3) an estimate of whether such action would be 'seriously detrimental' to an Australian industry, in conformity with the specific limitation of NAFTA, Article 3, Paragraph 3. While the phrase 'seriously detrimental' admittedly is broad and therefore subject to definitional difficulties, Australia normally is willing to include products in Schedule A which might create strong competition for Australian producers. However, it will not agree to inclusion in the Schedule if to do so could lead to the closing of an Australian company, or to the possible termination of Australian manufacture of the product.

In New Zealand, in contrast to Australian procedures, the government publicly invites industry to nominate products for inclusion in Schedule A. The review that follows is then similar to that held in Australia.

Following these separate reviews, Australia and New Zealand seek agreement on a joint list of products, usually at a meeting of the Joint Consultative Committee, or through informal consultation. The list finally agreed to is considered tentative and public announcement of it will refer to products 'intended' to be included in Schedule A. In each country the public is then invited to express views to its respective trade department. In Australia, if the Department believes that there is a legitimate basis for objection by any party to inclusion of a specified product, it will make a reference to the Tariff Board seeking the Board's recommendation as to whether the addition of the product to Schedule A would be 'seriously detrimental' to Australian industry. After holding public hearings, the Tariff Board prepares its findings and recommendations, and reports back to the Department. New Zealand follows a similar procedure with reference of such products to the Tariff and Development Board, which holds public hearings and then offers a report and recommendation. Based on the report of the two Boards, the respective trade departments then take the final list of products to their governments for formal approval.

Normally this is a two step procedure with formal assembling and public announcement of a tentative list made annually, followed by final inclusion in Schedule A approximately one year later. In the past, the two countries took action on 1 January of each year. Inasmuch as each government operates on a fiscal year beginning 1 July, starting 1 July 1969, the annual announcement and inclusions in Schedule A will be made on that date. Furthermore, products on the tentative list for which no objection to in-

[31] There is little desire to include products in Schedule A merely to add items to the Schedule when there is little likelihood of trade growth.

clusion is made within either country may be added to Schedule A at the end of six months rather than a year.

In addition to the formal machinery established between the two governments, less formal or *de facto* arrangements involving industry representatives have been developed. For example, a meeting was held in Wellington on 7 November 1967, between representatives of the Associated Chambers of Manufacturers of Australia and the New Zealand Manufacturers' Federation, two private business associations, together with officials of the two governments. This highly successful meeting opened a new avenue of mixed industry-government consultation, when the parties agreed to meet annually.[32]

Special Duty Treatment for Specified Products of New Zealand

One final and very curious aspect of Australia-New Zealand trade relations remains to be discussed, namely, that which deals with duty free or special lower duty treatment for specified products of New Zealand origin. Special treatment is given to certain products notwithstanding the fact that they are not included in Schedule A, and are not the subject of special arrangements under Article 3, Paragraph 7. This treatment cannot be justified by reference to the original 1933 Agreement, portions of which are still in force and now part of the 1965 Agreement.

These special duties or preferences have been accorded to New Zealand products in the following manner: from time to time, following appropriate reference to the Australian Tariff Board, Australia has increased both British Preferential and General Tariff rates on specified products in order to prevent undue injury to domestic producers of the same products. This procedure is entirely in accord with the provisions of Article XIX of GATT,[33] even if the products in question are bound into the GATT.[34] The Australian action becomes unique only when it excepts products of New Zealand origin from the new increased rates of duty, thereby creating a special preference for New Zealand.

For example, the 'basket' or 'other' category of non-handmade knotted carpets was recently the subject of Tariff Board investigations and subsequent duty increases.[35] Prior to 1968 the duty on such products was $27\frac{1}{2}$ *per cent* General Rate and $12\frac{1}{2}$ *per cent* British Preferential Rate.[36] In 1968,

[32] *Joint Communique: New Zealand-Australia Free Trade Agreement: Combined Manufacturers/Officials Meeting*, held in Wellington, N.Z., 7 November 1967.

[33] Article XIX runs counter to the overall trade liberalization policy of GATT but was reluctantly included to reduce the fears that many trading countries had of overwhelming imports eliminating essential domestic industries and consequently harming domestic economics when the agreement was signed in 1947.

[34] The duty on any particular product is 'bound into GATT' when a Contracting Party includes the product and its duty (whether or not reduced) in the GATT Schedules as the result of a GATT sponsored trade renegotiation. The stated duty on the products is consequently the subject of an international agreement, and the Contracting Party is therefore obligated under the agreement not to increase the duty above the stated levels.

[35] Australian Tariff item no. 58.01.9. Customs Tariff Act 1968 (Cth).

[36] Customs Tariff (No. 4) 1967 (Cth) First Schedule, Part II, Paragraph 281.

following a Tariff Board investigation, the General and Preferential rates were increased to 30 *per cent* and 15 *per cent* respectively.[37] Nevertheless, the duty for New Zealand was not increased and remains 12½ *per cent.*

Tableware and chinaware are another example of special treatment.[39] The rates of duty on these items were increased in 1968 to 30 *per cent* General Rate and 20 *per cent* British Preferential Rate.[40] For the same products coming from New Zealand, however, the applicable rate is 10 *per cent* for the first three items listed *supra* footnote 39 page 93, and 17½ *per cent* for the last three items so listed.[41] It is interesting to note that the Tariff Board's report on these products acknowledged some New Zealand competition, but dismissed it as too inconsequential to cause injury to the Australian manufacturer,[42] however, the Board did not publicly recommend special rates of duty for products coming from New Zealand.[43] Therefore, the inclusion of special lower rates for New Zealand products must have originated in the Australian Department of Trade and Industry and the government, which are finally responsible for tariff rate alterations.

The most recent example at the time of writing deals with specified types of X-ray apparatus and accessories.[44] The General and British Preferential rates of duty of this item were proposed for increase in 1969 to 25 *per cent* and 15 *per cent* respectively. At the same time, it was proposed to make articles of this description originating in New Zealand duty free.[45]

Special treatment is not limited to a few examples but is now a common occurrence and appears to be a continuing policy. Further cases indicating lower duty treatment for New Zealand may readily be found.[46]

It is not difficult to guess how this special treatment developed. Aside from the obviously close relationship of the two countries, at the conclusion of the 7 November 1967, combined Manufacturers Government

[37] Customs Tariff Act 1968 (Cth), Amendments to Part II of the Eighth Schedule to Part II, Paragraph 24.

[38] Customs Tariff Act 1968 (Cth), Eighth Schedule, Amendments of Part V of the Fifth Schedule, Paragraph 19.

[39] Australian Tariff items no. 69.11.100, 69.11.200, 69.11.900, 69.12.100, 69.12.200, 69.12.900.

[40] Customs Tariff (No. 2) 1968 (Cth), First Schedule.

[41] Customs Tariff (No. 2) 1968 (Cth), Fifth Schedule. Customs Tariff (No. 2) 1968 (Cth), Amendments to Part V, Fifth Schedule.

[42] The Report stated: 'Prior to the devaluation of New Zealand's currency Johnson [an Australian manufacturer of china products] was at little or no price disadvantage against domestic tableware imported from that country. Following devaluation, the New Zealand manufacturer's ability to compete in the Australian market has increased somewhat, but in view of the extent of the disadvantage apparent to the Board and as the New Zealand products presently provide limited competition only for a narrow range of Johnson's products, this change does not appear likely to significantly affect Johnson's operations'. *Tariff Board Report, Tariff Revision, Ceramic Tableware Etc.*, Commonwealth of Australia, *1968 Parliamentary Paper No. 23*, 12 February 1968, 9.

[43] *Ibid.* 14. The Board merely recommended that the General and British Preferential rates be increased to 30 *per cent* and 20 *per cent* respectively.

[44] Customs Act 1901-1968 (Cth). Notice of Intention to Propose Customs Tariff Alteration, Notice No. 1 (1969), tariff item 90.20.1.

[45] *Ibid.* 1-3.

[46] *E.g.* Tariff item 92.10.7 'Necks and bodies for instruments falling within sub item 92.02.01 or paragraph 92.07.11' Customs Act 1901-1968 (Cth), Notice of Intention to Propose Customs Tariff Alteration, Notice No. I (1969).

Officials Meeting in Wellington,[47] Australia gave New Zealand an undertaking that it would not, 'without prior consultation', increase duties which would adversely affect New Zealand exports.[48] Consequently, New Zealand is placed in a position of advantage over any other country by being entitled to prior consultation before any duties are increased on products of export interest to it. But prior right to consultation does not explain why special lower duties should now be assigned only to products of New Zealand origin.

Special treatment to New Zealand products raises an important question: what is Australia's legal justification for discrimination in favour of New Zealand in light of Australia's international obligations under GATT? The most important principle of GATT is the Most Favoured Nation rule. Only reluctantly, as an exception to this rule did GATT recognize the preference systems existing in the world at the time GATT was executed in 1947. However, in order to insure that such systems would not proliferate, GATT provided that no new preference systems may be introduced,[49] and margins of preference in already existing preferential systems could not be widened or increased above levels existing on a specified date,[50] in Australia's case, 15 October 1946.[51] Thus, after that date Australia could not grant any new preferences on any product to any country, including New Zealand. Nor, with respect to its already existing preferences could Australia take any of the following actions: increase its General Rate of duty on any particular product while leaving the British Preferential Rate as it was in 1946, or reduce the British Preferential Rate without similarly reducing the General Rate, for in either of these situations the margin of preference would be widened. On the other hand, Australia could reduce its General Rate of duty on a specified product without reducing the British Preferential Rate, or it could reduce both rates provided the difference of percentage points between the two would be no greater than it was in 1946, or it could increase the British Preferential Rate without increasing the General Rate, for in none of these cases would the margin of preference be widened.

With respect to the relatively few special preferences in effect for New Zealand on or before 15 October 1946, the same rules were to apply.[52] The margin and existence of preference would be limited to the levels and on the products existing on that date; in practical terms, the preference would be confined to those products included in the 1933 Trade Agreement as amended to 15 October 1946. In addition, Australia is permitted to grant what are in effect preferences to those New Zealand products

[47] *Supra* p. 92.

[48] *Joint Communique: New Zealand-Australia Free Trade Agreement: Combined Manufacturers/Officials Meeting* held in Wellington, N.Z., 7 November 1967.

[49] GATT, Article 1.

[50] GATT, Article 1, Paragraph 4.

[51] GATT, Annex G.

[52] The bulk of Australia's imports from New Zealand were entitled to British Preferential Rates, and relatively few were accorded lower, special rates applicable only to New Zealand.

specifically included in the 1965 Trade Agreement. The justification for this, however, lies in the fact that the two countries are either operating or intend to operate under an interim agreement leading to the formation of a free trade area, within the meaning of Article XXIV of GATT.

The products mentioned above are *not* included in the New Zealand-Australia Free Trade Agreement for they are not included in Schedule A, nor are they the subject of any special arrangement permitted under Article 3, Paragraph 7. Furthermore, they are not included under the 1933 Trade agreement and no special preferences to New Zealand were in effect for them on 15 October 1946. The fact that the two countries have an interim agreement, recognized under GATT, leading to a free trade area, does not legally justify the granting of preferences on any product traded between the two countries, but only on those products specifically included in, and therefore under the control of, such an agreement.

It appears, consequently, that by failing to increase the duties applicable to such products from New Zealand to a level at least equal to the increased British Preferential rates, Australia is in violation of its GATT obligations under GATT, Article I.

The consequences for Australia of this violation would depend upon a GATT Contracting Party filing a protest, because (1) a GATT violation confers certain rights only on those Contracting Parties which have suffered trade damage by reason of such violation, and not on all the Contracting Parties generally;[53] and (2) at least with respect to some of the products mentioned, the number of percentage points between the New Zealand rate and the General Rate is still less than the number of percentage points separating the original British Preferential Rate in effect in 1946. The second reason might protect Australia from protests lodged against it only from Contracting Parties whose imports are subject to the General Rate of duty, such as Norway or Japan. It would not protect Australia against protests filed by any Contracting Party entitled to have its imports enter Australia under the British Preferential Rate, such as the United Kingdom, or Canada; the imports from such Contracting Parties are entitled to the same tariff treatment as imports from New Zealand.[54]

[53] GATT contains no enforcement or punitive measures applicable to any Contracting Party violating its provisions. Rather, GATT confers on those countries whose exports to the violating Contracting Party have been impaired (or injured) because of the violation, certain rights to withdraw tariff concessions of export interest to such Party, to the extent and of a value equal to the value of the trade loss it suffered. See *e.g.* GATT Article XIX, Paragraph 3 (b); GATT Article XXIII, Paragraph 2; GATT, Article XXVIII, Paragraph 3 (a) and (b).

[54] The phrase 'imports from New Zealand' as used in this sentence only means imports from New Zealand not entitled to special preferential treatment under the New Zealand-Australia Free Trade Agreement or the 1933 Trade Agreement as amended up to 1946.

In its defence, Australia might argue that GATT, Article 1, Paragraphs 1 and 2, provisions relating to equal treatment, apply only to countries entitled to the Most Favoured Nation or General Rate of duty, and that there is no equivalent 'equal treatment' concept for countries within a GATT recognized preference system. Hence, Australia could discriminate in favour of New Zealand against other countries entitled to the British Preferential Rate on the ground all preferential rates are essentially 'unclean' and no country entitled to preferences could complain of an

Why does Australia confer special preferences on New Zealand in violation of GATT? No existing public document answers this question. What is clear from public records is that the preferences exist, and they certainly did not exist before the end of 1967, approximately the same time as Australia gave its public undertaking to consult with New Zealand before increasing duties which would adversely affect New Zealand exports. In this connection it would seem that Australia chose to go beyond mere consultation and decided not to increase duties on New Zealand products when duties were increased in order to prevent injury to Australian manufacturers (unless, of course, imports from New Zealand were the cause of injury to the Australian producers).

Whatever the reason, the preferences serve a sound trade purpose. While they violate GATT, Article I, and a system of multiple tariff rates ought not be encouraged, in the special case of Australia and New Zealand the preferences serve the spirit of GATT, Article XXIV which encourages the establishment of free trade areas. The principal criticism voiced by the GATT Working Party of the New Zealand-Australia Free Trade Agreement was its failure to create a true free trade area. The two countries explained that because of the peculiarities of their economies, size and location, they could not immediately form such an area but assured the Working Party that they intended to do so ultimately and agreed in the meantime to work progressively toward that goal. In the more than two years since the Agreement has been in effect they have honoured their words and widened the scope of the Agreement by a variety of means. While technically a GATT violation, the preferences for New Zealand in the relatively few products involved in the Australian tariff schedule provide another means of, at the most, implementing the clear intent of the Agreement, and at the least, avoiding injury to it.[55] As with other products not presently included in Schedule A, it is hoped that these products ultimately will be added to it. In the meantime, special treatment for New Zealand products may be considered another example of Australia-New Zealand co-operation toward a trans-Tasman free trade area.

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even greater preference conferred on a third country. Unless the difference between the New Zealand Rate and the General (or Most Favoured Nation) Rate exceeds the difference between the old British Preferential Rate and General Rate existing in 1946 Australia is not in violation of the specific language of GATT, Article I, Paragraph 4 dealing with margins of preference. While the argument might be interesting, the compounding of preferences within preferences would appear to fly in the face of the clear intention of GATT to establish a single 'equal treatment' system of duty rates; if GATT accepted certain preference systems as a political reality, it felt that a system of dual rates, while worse than a single rate, was certainly better than the kind of multiple rates possible under the above argument.

[55] British Preferential and General tariff rates were increased because imports from certain third countries had caused injury to Australian producers of like or directly competitive products. If New Zealand imports were not the cause of the injury to Australia, it would appear that any rule forcing Australia to increase the duty on imports from New Zealand as well as all other countries, would unnecessarily inhibit trans-Tasman trade and retard the carefully nurtured co-operation between the two countries which is the basis of the free trade area to come.