SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 17 | Issue 1 Article 27

January 1991

Discussion after the Speeches of Deborah K. Owen and Derek Ireland

Discussion

Discussion After the Speeches of Deborah K. Owen and Derek Ireland

ROBERT F. MATHIESON: Are there questions now for Deborah or Derek?

BARRY D. SOLARZ: It does not surprise me that antitrust policy in the United States or Canada is the general proposition because I think that both countries are generally against anti-dumping law. The assumption behind this conference is, in fact, that by virtue of the FTA a substitute regime would involve replacing anti-dumping laws with antitrust laws growing out of this agreement.

It is my understanding that the two sides have basically agreed to disagree and to study the matter for another five to seven years, and consider a number of options. Does this group have any other options beside replacement of anti-dumping laws by antitrust laws?

ROBERT F. MATHIESON: I can address your question as one of the four members of the research team that considered this issue. The replacement option was discussed at a number of different conferences but was not stated as a particular objective. The charge given to this research team was essentially to look at the feasibility and desirability from an economic and equity standpoint of using government competition laws as a replacement for an anti-dumping regime.

The team did not look in depth at any other alternatives. By implication, the FTA does make a difference. Instead of asking, if the FTA is working, why fix it, we should be compelled not to leave the agreement half completed. If we are moving into a globally competitive environment, then the FTA has to make a difference. If, in fact, we are trying to enlarge the competitive domain for industries in both Canada and the United States, then the extent to which we can cross the border from a commercial standpoint would make a difference to the extent that we can add to commercial productivity. So investment decisions are not merely made on getting around anti-dumping laws, but also on the basis of economic efficiency.

JONATHAN FRIED: The text of Article 1906 itself did not say that the two governments agreed to disagree. It says the parties shall establish a working group and use their best efforts to develop a substitute system. This is not to say that the working group must implement a substantially different system, but it does mean that the current system is not necessarily adequate, and that the two parties are to work towards something better than the status quo. It is more than merely a mutual agreement to disagree; it has some direction. So, I would not want to

leave the impression that it is purely neutral regarding the possibility of substitution and it is not just an implication, it is explicit in the text.

DOUGLAS E. ROSENTHAL: Ms. Owen, is it likely that the Federal Trade Commission will be consulted and play a role in the decision-making process of formulating a U.S. policy position regarding the direction of the Free Trade Agreement?

DEBORAH K. OWEN: I would hope so. We have some valuable input that could be contributed throughout this process. As I mentioned, those who ultimately make these decisions are going to hear a variety of views, but if this particular consideration is serious enough to gather an entire conference, it would most likely provoke some inquiries from the people who will ultimately be making the decisions.

DOUGLAS E. ROSENTHAL: Is this issue currently on the agenda of the OEC competition committee?

DEBORAH K. OWEN: I am not sure.

KEITH MARTIN: How will Mexico affect this issue in the event of trilateral agreement? How would this be handled versus competition law?

DEREK IRELAND: Mexico does not have antitrust statutes at the present time. They are planning to develop one, and there are many countries showing an interest, including Eastern Europe and third world countries, but the effects that would have on these negotiations is open-ended.

DEBORAH K. OWEN: We have a Federal Trade Commission delegation concerning Mexico. This delegation has discussed how we should implement such a law, but I still see the need for protection.

WILLIAM G. DEEKS: One thing that has changed in the twenty-five years that I have been involved with trade issues is that such issues had a domestic focus years ago. Today, they have become a more externally oriented. One of the benefits of trade liberalization is that it removes a crutch for those businesses that want to use it to protect themselves in circumstances where they really are competitive. The competitive force is global, and within the industries I represent there are new initiatives outside of environmental technology and global communication. The discussions we have been having here provide a model to enact better competitive conditions for business, and uses of resources in foreign productivity.

ROBERT F. MATHIESON: We are indeed indebted to both Deborah and Derek for making the commitment to share their personal and insightful comments.

The Removal of Trade Remedy Law in Trans-Tasman Commerce

*Graeme Thomson and Christopher Langman**

An innovative commitment to free trade is taking shape in the Southern Hemisphere. The free trade agreement between Australia and New Zealand is, in key aspects, the most comprehensive such arrangement between two sovereign nations to date. Particularly in relation to free trade in goods and services and to the elimination of trade remedy law, it has gone further and faster than any other free trade agreement. In the context of debate on how best to implement Chapter Nineteen of the Canada-United States Free Trade Agreement, it could well be of interest to understand how and why Australia and New Zealand decided to dispense with anti-dumping measures for goods originating in the free trade area and traded between their two countries.

Australia and New Zealand have substantial common interests. They have been brought together by their geographical proximity and sense of isolation, as well as by similar legal and political systems. At the same time, both countries are major exporters of agricultural products and share a crucial interest in the liberalization of the world market for these products. Both countries are in the process of significantly liberalizing their own economies in an effort to make them more internationally competitive.

Australia and New Zealand have sought to enhance economic cooperation through a series of bilateral trade agreements dating from 1922. The most ambitious of these agreements is the Australia-New Zealand Closer Economic Relations Trade Agreement (CERTA), which came into force in 1983. CERTA's initial aims included the elimination of tariffs by January 1988 and all quantitative restrictions by July 1995.

Considerable progress was made towards the reduction of barriers to trade and investment flows between the two countries in the first five years of CERTA, including the elimination of nearly all tariffs and all direct export subsidies and incentives by the due dates in 1988. Bilateral trade grew rapidly as barriers were reduced and the two governments agreed to undertake an ambitious program to accelerate progress toward

* The authors are respectively the Minister (Commercial) and First Secretary (Commercial) at the Australian Embassy in Washington, D.C. The views expressed in this paper are those of the authors and do not necessarily reflect those of the governments of Australia or New Zealand. It draws on a range of sources including John Broome's paper, "Recent Developments in Trans-Tasman Business Law," delivered at the Seventeenth International Trade Law Conference, September 1990. Ian Govey at the Australian Embassy in Washington, D.C. provided helpful comments on a draft.

a single market at the review of the Agreement in 1988. In making this decision, Australia and New Zealand were mindful not only of the trade creating effects of reduced protection, but also that CERTA was an important policy tool to facilitate and accelerate the process of structural reform aimed to enhance international competitiveness, already underway in both countries.

At the 1988 Review, the two countries signed a number of additional instruments designed to accelerate the movement towards a single trans-Tasman market. These included protocols to achieve free trade in goods without exception and replace dumping law with competition law, to liberalize trade in services through an innovative "negative list" approach (free trade is established for all services unless the service is inscribed in the Agreement) and to harmonize quarantine procedures so that animal and plant quarantine administration does not include unjustifiable barriers to trade. Understandings were also reached on the harmonization of business law and on ways to deal with any problems arising from differing technical standards. It was also agreed that export incentives and production bounties on goods which are exported to the other country would be eliminated, and that other support measures which might distort competition between industries would be avoided.

Under the 1988 Protocol on the Acceleration of Free Trade in Goods, Australia and New Zealand agree to eliminate the few remaining tariffs, quantitative import restrictions and tariff quotas on goods from the other country by July 1, 1990. Article 4 of the Protocol provides that neither country will take anti-dumping action against goods from the other country after the achievement of full free trade in goods. Rather, anti-competitive conduct is to be subject to the two countries' competition (that is, anti-trust) laws.

In deciding to abolish dumping, the two countries recognized that its retention would be anomalous in the context of their efforts to achieve a single market. In an open trans-Tasman market, the different thresholds for anti-dumping and competition laws would have led to the protection of relatively inefficient industries in the trans-Tasman context and hence would have hampered the efficient allocation of resources between the two countries. Moreover, it was felt that the removal of trade barriers would make dumping increasingly redundant as the scope for price discrimination between the domestic and export markets is reduced, and the risk of retaliation by competitors increases, with the possible occurrence of arbitrage. Continuation of the anti-dumping remedy would also have enhanced the possibilities for prolonged disputation at an official level—a problem that has periodically characterized Australia/New Zealand trade relations—to the detriment of what is beneficial in the commercial relationship. As with other areas of CERTA, the two Governments were concerned to establish provisions which did not entail bureaucratic regulation and enforcement, but, rather, enabled enforcement action by commercial parties directly affected.

In developing the elements of this package, the Australian Attorney General's Department and the New Zealand Justice and Commerce Ministries had a series of discussions during a period of over one year. There was already a significant degree of compatibility between the competition laws of New Zealand and Australia because the competition law provisions of the *New Zealand Commerce Act 1986* were closely modeled on those of Part IV of the Australian *Trade Practices Act 1974*. Nevertheless, differences in constitutional frameworks, drafting style and policy objectives contributed to some differences between the two pieces of legislation. There were also extensive consultations with representatives of business and professional organizations, as well as with Federal and High Court judges from both countries about jurisdictional aspects. Although some in the Australian and New Zealand agricultural and manufacturing sectors expressed concern about the removal of anti-dumping procedures, overall there was a significant level of industry and business support for the Governments' goals.

It is worth noting, in this context, that Australia, at least, has used trade remedy procedures to a considerable extent in the past to prevent harm to domestic industries and that this has included actions against imports from New Zealand. Between 1985 and 1988 some thirty-one anti-dumping or countervailing cases against New Zealand were accepted in Australia for formal investigation. Of these, three resulted in anti-dumping duties being imposed and eight were resolved by undertakings.

In order to implement Article 4 of the Protocol, the two Governments agreed to extend the prohibitions on the anti-competitive use of market power in Section 36 of the New Zealand Commerce Act and Section 46 of the Australian Trade Practices Act to cover the use of market power within the combined trans-Tasman markets. This was accomplished in Australia by the insertion of a new provision, S.46A into the Trade Practices Act, which is modelled on S.46. A corresponding provision, S.36A, was inserted into the New Zealand legislation. (The specific legislation in Australia is the *Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990* and in New Zealand, the *Commerce Law Reform Act 1990* and the *Law Reform (Miscellaneous Provisions) Act 1990*).

The legislation extends competition law provisions to trans-Tasman trade in goods, and goods and services, but not trade exclusively in services. S.36A of the New *Zealand Commerce Act*, prohibits any persons with a dominant position in a market in Australia and/or New Zealand from using that position to restrict entry into, or to deter competition in, or to eliminate a person from, a market in New Zealand. S.46A of the *Australian Trade Practices* Act provides that a corporation with a "substantial degree of market power in a trans-Tasman market" must not seek to eliminate or substantially damage a competitor, or prevent the entry of a person, or deter competition, in a market in Australia. The

only exception to these laws is where the market in Australia or New Zealand is exclusively for services.

A number of further changes were made to the *Trade Practices Act*, the *Federal Court of Australia Act* and the *Evidence Act*, along with reciprocal measures by New Zealand, to enable the new provisions to operate effectively. These amendments provide for innovative procedures to ensure that trans-Tasman competition law proceedings are hampered as little as possible by national boundaries. It was agreed, for example, that the Australian Trade Practices Commission and the New Zealand Commerce Commission would be given new investigatory powers to obtain evidence in the other country for the purpose of enforcing the new trans-Tasman prohibitions on the anti-competitive use of market power. Thus, the New Zealand Commerce Commission is empowered to issue a notice requiring an Australian company to supply information and documents needed for it to investigate a complaint. Failure to comply is an offence under the *Australian Trade Practices Act*. In addition, the relevant courts of each country will be able to sit in the other country or to take evidence and submissions by means of video-link or telephone. Judgements and orders, including injunctions, made by each court in trans-Tasman market proceedings will be readily enforceable by registration in the corresponding court in the other country.

Both Commissions have stressed their willingness to assist businesses in interpreting the new legislation. They have also announced their intention to keep each other informed and to cooperate in the administration and enforcement of the legislation. Consistent with this approach, the Commissions have issued a joint statement concerning their enforcement priorities and intentions. It is envisaged that in appropriate circumstances, one Commission will undertake preliminary investigations of facts on behalf of the other and also that joint investigations may be carried out.

We can obtain some idea of how the new arrangements will function by noting that S.46A closely parallels that existing provisions in S.46 aimed at preventing abuses of market power and that the Australian Trade Practices Commission has indicated that it will adopt a broadly similar approach in dealing with cases under S.46A as it has with those under S.46. The Trade Practices Commission's guidelines on S.46 categorizes conduct into that which it believes does not generally restrict competition, that which may and that which does. In considering complaints under S.46 (and S.46A) that the Trade Practices Commission will take into account whether the conduct in question adversely affects the competitive process in a market; adversely affects consumers in terms of price, quality, availability, choice and/or convenience; raises the costs of entry to a market or prevents or hinders potential competitors from entering the market; and whether the conduct is justified in terms of efficiency or the desire to engage in genuine competitive rivalry.

The New Zealand Commerce Commission has indicated that it will

give priority to enforcing the law against conduct which is seen as having a widely detrimental effect on competition in the market. New Zealand's approach focuses firstly on the concentration of market power in the market in question. The Commerce Commission would then move on to examine the relevant practice in terms of the wording of the legislation. The emphasis does not range from one list of practices to another (as in the case of the Australian legislation) but, *rather*, from lower to higher concentrations of market power. The Commerce Commission seeks to avoid making any *a priori* judgements about particular practices. It is, of course, too early to make a full assessment of the implications of the decision to abolish anti-dumping provisions for trans-Tasman trade. To date, no case has been initiated under the new legislation. However, the general view is that the removal of anti-dumping measures has been an important element in opening up the trans-Tasman market to complete free trade in goods and to securing the maximum economic efficiency and welfare gains from the operation of a single market. The challenges for the future include the complete incorporation of trade in services into the CERTA regime.