DUMPING ON YOUR MATES
A TRANS-TASMAN EXPERIENCE

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INTRODUCTION

In 1948, the General Agreement on Tariffs and Trade ("GATT") became effective. Its purpose was to encourage states to overcome trade barriers that were detrimental to international trade and trading relationships. In 1994 the World Trade Organisation ("WTO") was established pursuant to the conclusion of the Uruguay Round of GATT negotiation in 1993. Ever since the Uruguay Round, the world has become more focused on globalisation and the lifting of trade barriers. One area where such liberalisation has not occurred is the prohibition of "dumping", which has been described as:

> the sale of imported merchandise at less than its prevailing market or wholesale price in the country of production. This definition is of importance, as there is a tendency for dumping to be confused with ordinary low price sales, price cutting and severe competition of a legitimate sort, as well as certain other trade practices which are generally considered unfairly competitive.[1]

THE AUSTRALIAN VIEW ON ANTI-DUMPING

The justification for maintaining, and increasingly, enforcing that prohibition by governments which now largely eschew protectionism, is that dumping results in unfair competition. Australia seems to conform to that model. Following a review of Australia's then anti-dumping regime, the Gruen Committee stated the following in the Summary of its 1986 Report:[2]

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[1] Mo J, International Commercial Law (1997, Butterworths, Sydney) 474.

[2] Gruen FH, Report on the Review of the Customs Tariff (Anti-Dumping) Act 1975, March 1986, Summary at iii.

> Australia is a signatory to international agreements which condemn dumping. Nothing in these agreements forces Australia to take anti-dumping action.
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> Australia makes greater use of anti-dumping action than do other comparable countries. Such extensive use of anti-dumping action has the potential to frustrate the achievement of other government objectives in the industry, trade, competition and economic policy areas.
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> The Department of Trade has drawn attention to the fact that Australian anti-dumping action is a continuing source of complaint among our trading partners and has expressed, what seems to me to be a justifiable concern that "if Australia chooses to have an anti-dumping system, which by international standards, is extremely wide-ranging and appears, from the point of view of some of our major trading partners, to be biased towards the local manufacturer, then Australian exporters may experience difficulties when they attempt to enter overseas markets."

This report was the first of several recent reviews of Australia's anti-dumping law and administration. Ten years later, the Willett Report[3] identified at least three other reviews and/or significant changes that had taken place since the publication of the Gruen Report. It may be significant that the summary of the Willett Report was less self-critical than the Gruen Report. The Willett Report began with the following words:

> It has to be acknowledged that the trade calming or disruptive effects of anti-dumping or countervailing action are such that formal inquiries should not be initiated without reasonable ground. However, manufacturers and producers, and in some cases their consultants, are overwhelmingly of the view that the arrangements demand and obtain higher levels of proof and evidence in respect of their submissions than is required from exporters and importers.

The apparent divergence of views on the efficacy or the fairness of the application of anti-dumping measures is not surprising. Anti-dumping

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[3] Willett L, Review of Australia's Anti-Dumping and Countervailing Administration, Report to the Minister responsible for Customs, September 1996 at 8.

measures are increasing in popularity as manufacturers and governments respond to slowing economic growth and increasing imports. The Willett Report further states that by world standards, Australian manufacturers and producers are very open to prevailing global trading conditions.

Australia is a comparatively small market that accounts for approximately 1%-1.5% of the world market for most goods. It is a country that is far removed from most major developed markets, geographically speaking. As a result, goods dumped on the Australian market are less likely to return to their home market in one form or another.[4] Australian manufacturers and producers have complained that anti-dumping measures were interpreted differently by the anti-dumping administration of some of their trading partners. As a consequence, they felt that they were unduly disadvantaged. As stated in the Willett Report:

> Some of the Australian manufacturers and producers in discussions contrasted their experiences as the local industry applicant with experiences as the exporter respondent to other country anti-dumping administrators. They have the view that other administrations interpret differently and to the disadvantage of exporters.[5]

Thus, although the authors of the above reports were looking at the same regime, it appears that they had drawn quite different conclusions regarding anti-dumping, its economic utility and relevance to an outward and restructured international trading society.

AUSTRALIA IS NOT ALONE

It is not surprising that there is a divergence of views regarding the efficacy or the fairness of the application of anti-dumping measures. Dumping occurs when goods are imported into a country at less than their "normal value", which is usually regarded as the price at which like goods are sold in the ordinary course of trade in the domestic market of the exporter. If

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[4] Ibid at 8.

[5] Ibid.

this cannot be determined by means of actual domestic sales, GATT-derived legislation provides for other methods to be used, such as a constructed value based on cost to production plus selling and administration costs and profits, or sales made to a third country.

The determination of whether there has been "material injury" to the relevant local industry involves an examination of the volume of the dumped imports, the effect of the dumped imports on the domestic market for like goods, and the consequent impact of the dumped imports on the local industry. Anti-dumping duties may be applied provisionally if certain conditions are met, and definitively once a final determination has been made that the dumping of goods is causing or threatening material injury to the domestic industry producing like goods.

The development and proliferation of anti-dumping rules since GATT's 1979 Anti-Dumping Code have resulted in the introduction and the codification of a range of terms and procedures in many signatory states aimed at clarifying these basic concepts. The number of signatory states is also increasing. Membership of the WTO now stands at 132 states, and approximately 30 other states are in the queue waiting to join. In fact, a steady trade has developed in the export of anti-dumping expertise to the "newcomer" states by those states with a more experienced administration.

THE DANGER ANTI-DUMPING PROTECTS AGAINST

It has been said that "[a]nti-dumping has too few enemies and too many friends". [6] Today, this has almost become a truism and there is justification for this claim.

Anti-dumping measures are usually well intended and meant to protect against the danger of dumping actually taking place. Dumping is the by-product of industrial over-capacity. High-volume production, generally achieved through the use of expensive, continuous process plant, ensures prosperity only as long as demand keeps pace with supply. Manufacturers who cannot find sufficient domestic consumers for their goods sometimes become aggressive and have to seek new overseas markets for their over-abundance of supply. To gain market share, they cut prices. On the other

[6] Finger JM, Anti-Dumping: How it Works and Who gets Hurt (1994, Michigan University Press, Michigan) 7.

hand, their gains represent losses for local industries producing equivalent goods. Because a state's citizens share a common economic fate, it does not take much more to portray the predatory foreign manufacturer as an overt aggressor, and hence a threat to the national interest.

The threat posed by dumping is not confined to home markets. By the end of the nineteenth century, most European powers had established colonies as sources of raw materials, repositories of surplus population and new markets in which to sell the surplus goods which their factories produced. Thus, tariffs and developing anti-dumping laws were extended to include the protection of these new colonial markets. This meant that consumers in colonial markets could not benefit from cheaper goods that were produced by other states. As explained by Reich:[7]

> [Colonies] existed to enrich the sovereign. They were to provide raw materials, and then purchase the finished goods from the mother country. Under no circumstances were the colonies to manufacture products of their own, or to acquire them from a third country.

THE NEW ZEALAND EXPERIENCE

Although Britain maintained a free trade stance, the fact that New Zealand began as a colony may explain why it was one of the first states to experiment with anti-dumping legislation. In 1905, manufacturers of agricultural implements in New Zealand and Britain complained about the efforts of an American harvester trust to monopolise the New Zealand market. This resulted from the manufacturers' perception of dumping and systematic price cutting by the trust to New Zealand purchasers. As a result, the (NZ) 1905 Agricultural Implement Manufacture, Importation, and Sale Act was passed, which provided for a special duty to be applied to imports if "competition on unfair lines"[8] existed.

The legislation even included an embryonic third country regime to protect the mother country's industry. Section 9 provided the following:

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[7] Reich RB, The Work of Nations (1991, Alfred A Knopf, New York) 8.

[8] Section 4.

> [I]implements of British manufacture shall be deemed to be manufactured in New Zealand, and the importers thereof shall be deemed to be manufacturers thereof in New Zealand.[9]

The (NZ) 1905 Agricultural Implement Manufacture, Importation, and Sale Act was consolidated into the (NZ) 1908 Monopoly Prevention Act, which continued in effect until 1915. The 1908 Act itself was finally repealed by the (NZ) 1975 Commerce Act. Thus, it is ironic, for reasons which appear below, that the 1905 Act is generally regarded as the origin of competition law in New Zealand.

Like elsewhere, wartime exigencies gave New Zealand experience in central planning and state intervention in the name of national interest. The first fully developed anti-dumping legislation in New Zealand appeared as section 11 of the 1921 Customs Amendment Act. This Act gave the Minister of Customs the power to impose anti-dumping duty, but with a limited requirement to carry out any sort of injury test. The law effectively remained in force until 1965 when the scope of the "prejudice or injury requirement" in section 11 was broadened.

In 1983, a review of the anti-dumping legislation was carried out. By then, New Zealand was a signatory to GATT's Subsidies Code, but not to GATT's 1979 Anti-Dumping Code. However, cracks were starting to appear within the protectionist walls of "fortress New Zealand". In 1984, the new Labour government began economic reforms. The government removed import licensing, reduced import licensing, removed other industry specific regulation and abandoned fiscal and exchange rate controls in progressive stages.

To ensure that *de facto* private regulation did not replace the government controls that were being removed, the (NZ) 1986 Commerce Act was introduced to establish a more comprehensive competition regime than that provided by the (NZ) 1975 Commerce Act. Based closely on the (Cth) 1974 Trade Practices Act, the regime assumed that competition in markets for goods and services would promote economic efficiency. It was assumed that as a result, this would lead to a level of output desired by society and appropriate prices, and that this would encourage producers to innovate and produce at the lowest cost and minimise the unproductive use of resources.

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[9] This "archaic" provision began the fiction that third country regimes still perpetuate.

However, the (NZ) 1986 Commerce Act is more efficiency focused than its Australian counterpart, with an express requirement on the competition authority, the New Zealand Commerce Commission, to have regard to efficiencies. Further, the object of the Act makes no reference to the protection of consumers. From its introduction, the New Zealand regime did not contain any specific prohibition on price discrimination. Thus, for trade in goods within New Zealand, a manufacturer or other supplier is able to charge what it likes, subject to the usual prohibitions on collusive or predatory conduct.

NEW ZEALAND ANTI-DUMPING MEASURES

In 1986, New Zealand decided to join GATT's 1979 Anti-Dumping Code and conduct a full review of New Zealand's anti-dumping legislation. This resulted in the enactment of a separate (NZ) 1988 Dumping and Countervailing Duties Act. The Act transferred the responsibility for and administration of the new legislation from the Customs Department to the newly established New Zealand Ministry of Commerce. But change did not stop here.

In 1990, anti-dumping actions were removed from trans-Tasman trade on the ground that the removal of restrictions on trade in goods (namely, import licensing and tariffs, and New Zealand's adoption of a domestic competition regime that was broadly comparable to that in Australia) meant that commerce between the two states had taken on the characteristics of domestic trade. As a result, anti-dumping measures became inappropriate. Henceforth, any attempt by an Australian or New Zealand manufacturer to monopolise a market in either country, or a trans-Tasman market, would be dealt with by the competition law regime of the state where the cause of action arose.

To this end, section 36A was added to the (NZ) 1986 Commerce Act to prohibit a person in a dominant market position for goods or services in Australia and/or New Zealand from using that dominance for any of the following purposes:

- restricting the entry of any person into a market, not being any market that is meant for services exclusively;

- preventing or deterring any person from engaging in competitive conduct in any market, not being any market that is meant for services exclusively; or

- eliminating any person from any market, not being any market that is meant for services exclusively.

Section 3A is similar in form to section 36, which imposes a prohibition on unilateral conduct by a market dominant seller or supplier for anti-competitive purpose. Like section 36A, section 36 and other restrictive trade practice prohibitions may be enforced by the New Zealand Commerce Commission or by any person who is adversely affected by the practice.

In Australia, the equivalent of section 36A is section 46A of the (Cth) 1974 Trade Practices Act. The only significant difference between these two sections is the requisite degree of market power required before the respective provisions can be invoked. The use of "dominance" to describe the threshold in the New Zealand provision is clearly higher than the use of "substantial degree of market power" in section 46A.

It appears that to date, no cases have been brought by the New Zealand Commerce Commission under section 36A, and neither have cases been brought by a private litigant. However, one possible application for section 36A would be in a situation where anti-dumping duties have been imposed and, as a result, the only local manufacturer of the relevant goods has been left largely unconstrained by imports. In such circumstances, those duties would result in the local manufacturer having a dominant position in a trans-Tasman market.

Miller makes no reference to any cases that may have been brought under section 46A.[10] Consequently, it seems that the model provided by Australia and New Zealand, on complete free trade in goods, is working. Since the same seems to apply to the substantial harmonisation of their competition laws , one may conclude that these two states are in the same position as the European Union. If so, it is time to remove all references to anti-

[10] Russell VM, Miller's Annotated Trade Practices Act (nineteenth edition, 1998, LBC Information Services, Sydney) at para 650.

dumping from the lexicon of international trade rules insofar as they apply to the trading relations between Australia and New Zealand.

THE CURRENT REVIEW

As in Australia, the New Zealand anti-dumping authorities are constantly reviewing the legislation and their own positions. In February 1998 the New Zealand Ministry of Commerce issued a discussion paper[11] following the release of a voluminous publication by the Ministry four years earlier on trade remedies and GATT.[12] The 1998 Discussion Paper contains a summary that is very similar to that of the Willett Report. It begins with the following:

> Trade remedies – anti-dumping and countervailing duties and safeguard action – are measures taken against imports which are injuring specific industries. Such action, and the mechanisms through which they are considered and applied, should be consistent with the government's objectives of encouraging economic growth through the operation of opening competitive markets. Such action must also be consistent with New Zealand's international obligations as set out in the relevant WTO Agreements...
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> New Zealand is seen as a moderate user of trade remedy actions, having conducted 70 anti-dumping investigations, 10 countervailing duty investigations and 4 safeguard inquiries since 1982. A large proportion of these cases have not resulted in a trade remedy being applied. In more recent years, New Zealand's trade remedy activity has focused more on Asian countries, reflecting the increasing share of New Zealand's trade held by these countries, which is in turn indicative of the effect of government policies to remove import licensing and reduce tariff protection, as well as the shift in world production and trade patterns.[13]

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[11] New Zealand Ministry of Commerce, Trade Remedies in New Zealand: a Discussion Paper, February 1998 ("1998 Discussion Paper").

[12] New Zealand Ministry of Commerce, Trade Remedies and the GATT: the Outcome of the Uruguay Round, March 1994.

[13] See note 11 at 1.

The statistics provided in the report belie the above claim to moderation. The figures for the number of anti-dumping investigations between 1982 and 1998 fell into two distinct periods. In the period up to and including 1990, investigations involving Australian goods dominated, accounting for 10 of the 26 investigations initiated and 6 of the 10 anti-dumping duties imposed. The remaining 50 anti-dumping investigations occurred in 1991 to 1998 after anti-dumping measures between Australia and New Zealand were dispensed with. In more than half of these cases, anti-dumping duties were imposed.

The goods which attracted the duties included hogg bristle paint brushes from China, G-clamps from the United Kingdom, sweetened condensed milk from Thailand and canned fruit from South Africa. Looking at the list, it is difficult to see that the domestic industries which produced these goods, and which were found to be injured by dumped imports, would be so critical to the well-being of New Zealand as to justify the state to state intervention which the imposition of anti-dumping duties involves. The 1998 Discussion Paper suggests that the change in attitude, away from Australian goods, reflects "increased activity involving Asian countries in recent years...as well as the shift in world production and trade patterns."[14]

The breakdown of investigations by country of origin for the years 1982-1998 indicates that with Australia removed as a target, the focus of investigation has been as follows:

- the European Union (13 investigations)
- Thailand (9 investigations)
- Korea (8 investigations)
- Indonesia and China (7 investigations each)
- Taiwan (5 investigations).

A table in the 1998 Discussion Paper shows that since the New Zealand Ministry of Commerce took over the administration of the legislation, 22 out of 56 investigations have been terminated. The reasons for these

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[14] 1998 Discussion Paper at 9.

terminations include findings of no injury in 14 cases, no dumping in five, negligible imports in two, and no like product in one case.[15]

THE PROCESS UNDER ANTI-DUMPING LEGISLATION

The bare statistics do not reflect or reveal the considerable energy and expense incurred by the New Zealand Ministry of Commerce, the exporter who is the subject of an investigation, the local importers of the relevant goods and their customers. If an investigation occurs, the process to be followed is found in the (NZ) 1988 Dumping and Countervailing Duties Act. This Act is broadly similar to that which is provided in the Australian legislation, apart from some difference in timetabling.

Briefly, an anti-dumping investigation commences with a complaint, euphemistically referred to as "an application". The application is lodged with the Trade Remedies Group ("TRG") of the New Zealand Ministry of Commerce. The TRG checks the application to ensure that the complaint is properly documented. If so, the government of the exporting country is notified. The application is checked to ensure that there is "sufficient evidence" to justify starting an investigation. It determines if there is enough support from the local industry on whose behalf the application is made. If the TRG is satisfied there is enough evidence for an investigation, notice is given in the New Zealand Gazette and to the complainant. Others who are notified are the representative from the exporting country and other known exporters and importers.

The full investigation involves an extensive gathering of industry and trade data by the TRG to ascertain whether, as a matter of fact, dumping has occurred and if the local industry is being injured as a consequence. A detailed questionnaire is then sent to exporters, importers and the domestic industry. Site verification visits are conducted to check the information that has been provided. If no information is received by the TRG, it may rely on available facts and need not investigate further. It is noteworthy that a party who is questioned cannot plead the "right to remain silent".

Within 150 days of the initiation of the investigation, the TRG must disclose the essential facts and conclusions that are likely to form the basis of its final determination. Within 180 days of the initiation of proceedings

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[15] Ibid at 8.

the New Zealand Minister of Commerce must make a final determination. If injurious dumping is found to exist, section 14 of the (NZ) 1988 Dumping and Countervailing Duties Act provides that the Minister may issue a notice imposing anti-dumping duty. However, there is a separate discretion in relation to the quantum of any such duty.

For the subject of such an investigation, there is a substantial cost in complying with the requirements of the investigators. The information which the investigators require may be voluminous, the inspectors' verification visit or visits may be disruptive; and the senior executives of those companies being investigated may become distracted from other more productive tasks. The mere fact that an investigation is being conducted and the prospect that anti-dumping duties may be imposed, may result in the generation of very negative publicity from a consumer viewpoint.

Even if it does not, detailed information about the company's operations will be placed on public record, albeit confidential information is withheld. Additionally, there is the real risk that the investigation will attract the attention of the local officials in the exporter's own state. The officials will be keen to develop their own investigative skills by exchanging notes and experiences with their visiting counterparts. This kind of attention and intrusion is not always welcomed by industry.

All this happens, at least under New Zealand law, without the need for anyone to demonstrate that the result of the investigation or the imposition of anti-dumping duties will be of net national benefit. The (NZ) 1988 Dumping and Countervailing Duties Act or at least the New Zealand Ministry of Commerce's current application of it requires the complaint to be dealt with. This involves an intrusive investigation and failure to acquiesce in the process may lead to the imposition of anti-dumping duties, all in the name of protection for the local or domestic producer from the threat of "unfair", disruptive or injurious competition from abroad.

NEED FOR A MORE SENSIBLE APPROACH

At the turn of this century, the rationale against dumping in economic literature was that dumping was a deliberate short term lowering of prices which squeezed competitors out of the market. As a result, it would enable the seller who engaged in dumping to enjoy a monopoly in that market,

overtly resulting in predation. Today, modern writings on the economics of competition and international trade have returned to an emphasis on the predatory aspects of dumping. Since experience shows that there are in fact few cases of genuine predation, it makes little sense to have detailed legislative protection from such rare events.

In New Zealand, the 1988 Dumping and Countervailing Duties Act does not have anything like a sensible approach to when trade is considered "unfair". Instead, dumping is deemed to occur every time a product is sold in New Zealand at a price lower than in the country of manufacture. In this sense, the *caveat emptor* doctrine takes on a whole new meaning. Negotiating a really good deal from an overseas supplier may well become unlawful, including being responsive to the demands of a monopscony buyer.

Business knows that apart from a few undifferentiated commodities, every sale is very likely to be different. Prices reflect volume, delivery dates, the nature of the business relationship, perceived commercial risks regarding the customer's ability to pay, service levels, reputation and, not least, the negotiating skills of the individuals involved. Anti-dumping legislation takes none of these factors into account. Theoretically, a simple comparison of invoices is sufficient for the TRG to initiate an intrusive and costly investigation, the outcome of which is by no means certain. Furthermore, the procedures under the legislation make it difficult for the investigators to avoid a finding of dumping.

Most businesses price at what they think the market will accept and pay and they control their costs by using this benchmark. However, anti-dumping laws work in reverse, by constructing a cost plus export price. Anti-dumping legislation assumes that importers still can, and indeed must, pass on costs to their customers. Today, such sentiments have been realistically relegated to the nostalgic basket. In 1994, a review by Lincoln University[16] found the following in relation to the New Zealand legislation:

> Most cases of dumping can be proven under the current rules as is evidenced by the high level of success enjoyed by anti-dumping

[16] Sheppard R and anor, Dumping, Protectionism and Free Trade (September 1994, Agribusiness and Economics Research Unit, Lincoln University, Canterbury, New Zealand) 23.

> petitions. Given the rules which govern such investigations and the ways in which dumping is defined, many cases involving imported goods will be able to be defined as dumping... [T]he result will be the imposition of an anti-dumping duty which will be to the detriment of the country as a whole and will result in an inequitable redistribution of income.

Earlier this year, Alex Sundakov, Director of the New Zealand Institute of Economic Research, observed:[17]

> Overall, the present law and its application make little economic sense. I am particularly worried by the way the Act appears to encourage anti-competitive behaviour. If I was a manufacturer unable to keep up with foreign competition, I would be tempted to put some effort into building an anti-dumping case, perhaps to the detriment of my efforts to improve quality and reduce my own output.
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> A curious feature of the law is that under the CER Agreements,[18] Australian manufacturers are treated as domestic New Zealand producers for the purposes of trade remedies. In other words, even if there is no New Zealand interest involved, an Australian manufacturer can instigate an anti-dumping investigation to the possible detriment of New Zealand consumers. The *quid pro quo* is that New Zealand producers can cause similar damage to Australian consumers.

THE PERVERSITY OF THIRD COUNTRY DUMPING

Third country dumping, in particular, is perverse and inherently contrary to the concept of national interest. It means that local consumers and local manufacturers who use imported inputs are required to subsidise the profits of foreign companies. If this continues, there will be a substantial increase in third country actions as the capital-intensive industries of South East

[17] Sundakov, "Time to review anti-dumping laws" 27 February 1998, National Business Review 15.

[18] Namely, the Australia New Zealand Closer Economic Relations Trade Agreement ("ANCERTA").

Asian states look further to the region for alternative markets during a time when consumption is depressed at home for goods that continue to come off the production line at marginal cost.

In relation to the law in New Zealand, the 1988 Dumping and Countervailing Duties Act includes a provision which allows New Zealand to take anti-dumping action on behalf of a third country. This means that anti-dumping duties may be imposed on dumped goods that injure an industry which is located in a third country and which supplies the New Zealand market. This legislation reflects the text in GATT and in ANCERTA. Article VI of GATT permits anti-dumping action to be taken in respect of injury to industries in third countries. Article XIV of the WTO Anti-dumping Agreement also provides some guidelines for investigating third country cases. Article 15.8 of ANCERTA refers to third country anti-dumping actions on behalf of Australia or New Zealand. Indeed, the New Zealand Ministry of Commerce has claimed:

> Agreement has been reached between Australia and New Zealand on the procedures to be followed in cases where anti-dumping action is sought.[19]

While there may be agreement between Australia and New Zealand that third country action may be taken, no practical guidelines exist regarding when or how such cases may be taken. More importantly, there is no mention of the consequences if there is a finding of injurious dumping in another state.[20]

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[19] New Zealand Ministry of Commerce, Final Report on Dumping Investigation in respect of Clear Float Glass from China, Indonesia and Thailand, May 1998 at para 1.2.5.

[20] In a case the writer was involved in, there was a finding of dumping and material injury against his client. However, the New Zealand Minister of Commerce decided not to impose anti-dumping duties nor seek WTO approval to do so. The Minister announced the decisions to be provisional and gave interested persons 14 days to make submissions. In this case, Australia had alleged that there was dumping by Chinese, Indonesian and Thai exporters of clear float glass to New Zealand which caused material damage to the Australian exporter, Pilkington (Australia) ("Pilkington case"). Responding to the provisional decisions, the Australian government, through its High Commissioner to New Zealand, asked the Minister to reconsider the decisions "in the spirit of co-operation on economic issues between Australia and New Zealand": refer letter dated 15 July 1998 from His Excellency Geoff Miller, Australian High Commissioner to New Zealand the New Zealand Ministry of Commerce (on public file).

The bureaucratic *post facto* rationalisation given for maintaining some form of third country dumping provision rests on the possibility that dumping can frustrate or retard product rationalisation in a free trade area, which in this case is ANCERTA. In a free trade area, although a company may produce one part of its range in Australia and another part in New Zealand, it loses its ability to combat dumping in that part of the free trade area where it does not produce goods equivalent to the goods allegedly being dumped. This suggests that in order to encourage rationalisation and specialisation among producers in a free trade area so as to obtain the efficiencies and benefits of such an agreement, it is necessary to take measures against third country dumping.

However, even the authors of the New Zealand Ministry of Commerce's 1998 Discussion Paper acknowledge the following:

> The main argument against third country dumping is that it is inconsistent with the Government's policies aimed at reducing costs in making New Zealand industry internationally competitive. It appears incongruous, at a time when border protection is being removed or reduced in New Zealand, to maintain a form of contingent protection for Australian or other foreign industries.

If the twin goal is consistency and the national interest, then the possibility of taking third country dumping actions in New Zealand should be removed.

At present, it appears that the practice in this area defies logic. For instance, in the *Pilkington case,* the complaint had been initiated by an "Australian" manufacturer, who in terms of the fiction provided by the (NZ) 1988 Dumping and Countervailing Duties Act, is part of the domestic industry of New Zealand. However, this "Australian" complainant is in fact the wholly owned subsidiary of a multinational company. Thus, to the extent that any injury to the complainant would manifested itself in the form of reduced returns to shareholders which is the ultimate test of injury, the returns would have flown out of Australia in any event.

Further, in this case, the "Australian complainant" was not only treated as part of New Zealand's domestic industry, but it comprised the whole of the New Zealand's domestic industry. The following are the facts of the case. About 10 or more years ago, the complainant's parent company decided to

close its New Zealand subsidiary, presumably as part of a rationalisation process of its regional interests, leaving only its Australian operations intact. Consequently, its Australian factories became the sole manufacturer of the relevant goods in both Australia and New Zealand, resulting in a monopoly. When this happens, the only constraint on such a monopoly supplier having, and potentially using, a substantial degree of market power or a dominant position in the trans-Tasman market, is the continued availability of imports from other countries.

Thus, third country dumping applications have the potential to take away the competition that the (NZ) 1986 Commerce Act and the (Cth) 1974 Trade Practices Act intended to protect and promote. To date, third country dumping applications between Australia and New Zealand has been mostly one way. Furthermore, it appears that so far, there has been only one case concerning a third country application by New Zealand to Australia. This case involved the aluminum tread plate industry. Even then, the case was not pursued to fruition.

In 1993, the New Zealand Ministry of Commerce received an application by Alcan New Zealand Limited that called for an investigation into alleged dumping and subsidisation of goods into Australia. It applicant claimed that the practice injured the New Zealand industry. The application was referred to the Australian authorities but was subsequently withdrawn and replaced by an amended application in 1994. The amended application was also referred to the Australian authorities but once again it was subsequently withdrawn. On neither occasion was an investigation initiated by the Australian authorities.

THE SPREAD OF THE "UNSPEAKABLE PRACTICE"

It is ironic that while increasingly stringent competition laws are being adopted and enforced by nearly all important trading nations, anti-dumping actions are on the increase. A recent article in *The Economist* refers to the imposition of anti-dumping duties on imports sold at below normal value as "the unspeakable practice".[21] The article states:

> The fact that the WTO permits anti-dumping may make it sound respectable. It very rarely is.

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[21] "The Survey on World Trade" 3 October 1998 The Economist 18.

> Its defenders say that it helps firms deal with "unfair" foreign competition, but in reality it is an arbitrary form of protection. The information from which "normal value" is calculated is often sketchy. Trade authorities listen to producers hurt by "dumping", but take no account of the views of consumers, who might well prefer cheaper goods. In a recent study of anti-dumping petitions in America, the EU and Canada in the 1980s, Robert Willig, an economist at Princeton University, set out to establish whether the practice was justified on competition policy grounds, and concluded that in more than 90% of successful petitions it was not.[22]

To illustrate the "unwelcome development" in the form of the number of dumping actions that had been initiated, the article produces the results of a survey in the form of a chart.[23] The chart traces the use of anti-dumping action by developed countries on the one hand, and by developing countries on the other. The actions by developed countries seem to be cyclic, and currently are on the increase. During the same period, the actions of developing countries are on a slight decline. However, overall, there has been a steady and pronounced increase in actions over the past decade, to the extent that the number of actions brought by developing countries today is about the same as that for developed countries.

A FAIRER METHOD

In practice, manufacturers in developing countries have learned that it is sometimes easier to compete for the attention of their bureaucrats than in the market-place, especially where the competitor is foreign. It is expected that Australian and New Zealand manufacturers will experience increased resistance abroad as both economies try to export their way to recovery. But the risk of protectionism is both apparent and real. Protectionism will delay that recovery, and it will be especially so in this part of the world. It will introduce inefficiencies that will reduce growth rates and it will depress growth in international trade. Collectively, these effects will decrease the potential wealth of those two states. Therefore, Australia and New Zealand should be setting a better example with their respective trade regimes on this front. But this will not be easy because of the present global crisis. Nor will such moves prove popular.

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[22] Ibid.

[23] Ibid.

In New Zealand, the Ministry of Commerce has reported that it has received 20 submissions on its 1998 paper, with a big majority opposed to change. The opponents read like a "who's who" of New Zealand captains of manufacturing and include the Council of Trade Unions and the Employers' and Manufacturers' Association. They claim that the current test of material injury maintains the WTO and GATT focus, has international acceptance, is similar to the regimes implemented by New Zealand's trading partners, and is "practical, certain and cost efficient in its application". [24]

The proponents of change include the New Zealand Commerce Commission, New Zealand Business Roundtable and Federated Farmers. They argue that the same competition rules should be applied to both international and domestic trade. Additionally, they advocate a net national benefit test in dumping cases. Such an approach has been adopted under the European Union's anti-dumping law.

THE EUROPEAN UNION POSITION

Although it is not the intention of this article to canvass the position in the European Union, it is worth noting its position because it is where the practice of dumping and the demand for anti-dumping measures originated. Following the Uruguay Round and at the end of 1995, Article 21 of the European Union's Basic Anti-dumping Regulation was devised. In essence, Article 21 provides that Community institutions cannot impose anti-dumping duties on imports, even if they make a finding of dumping and injury, unless it is in the "Community Interest" to do so. As expected, there is much debate at present as to what that phrase means in practice, and how Article 21 is to be applied.

In 1996, Sir Leon Brittan, as Vice-President of the European Commission, sent a letter to François Perigot, as President of UNICE. In the letter, Sir Leon referred to the complete transposition of the Uruguay Round anti-dumping law into Community law. The letter alluded to the fact that the European Commission had "added a number of provisions" to the Uruguay Round provisions and elaborated on others. In addition, he stated the following:

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[24] Refer to Summary of Submissions on the 1998 Discussion Paper in a letter dated 15 May 1998 provided by the New Zealand Ministry of Commerce to the writer.

> In particular, the implementing Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community[25] (Basic Regulation) strengthened the rules for applying the so-called Community interest test and the rights of interested parties.
>
> Article 21 of the revised Basic Regulation states that anti-dumping measures may not be applied where the authorities can clearly conclude that it is not in the Community interest to apply such measures. Such a situation would arise if there was compelling evidence that the negative effects of remedying injurious dumping would outweigh the positive effects of imposing anti-dumping measures.

Attached to this letter was an Information Note entitled "The Community Interest in Anti-Dumping Proceedings". Published by the European Commission following the Uruguay Round, the Information Note was "intended to lay down the orientations which have guided the Commission in a number of recent cases and which should also be followed in future proceedings."[26]

The Information Note explains the elements that are deemed necessary for the implementation of Article 21 and refers to the practical approach to be followed when assessing the Community interest. The Note clarifies that the European Commission will take a more pro-active and systematic approach when gathering information so that the following occurs: (a) assessments are on as broad a factual basis as possible, (b) Community policy is more predictable, and (c) there is increased legal security.[27] In addition and where necessary, it is the intention of the European Commission to "monitor the development of the various elements relevant to the Community interest assessment after the imposition of measures".[28]

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[25] OJ No L 56/1 of 6 March 1996.

[26] See Introduction.

[27] Refer to the 1996 letter.

[28] Ibid.

CONCLUSION

The discussion in this article has shown that the existing trans-Tasman laws on dumping ignore the motives of the complainant, elevate the interests of domestic industry, disregard the reality that the "domestic industry" may be a foreign supplier, and overlook the benefits of increased competition to the New Zealand or Australian consumer.

The time is therefore ripe for change, in accordance with the tenor of the negotiations at the Uruguay Round. However, any change that occurs should reflect a sense of fairness, which has been defined by the European Commission in the following terms:

> Fairness is a fundamental principle of the economic laws of both the Community and Member States. This is translated into the field of trade policy as "fair trade", which has been a cornerstone of Community trade policy since its inception.[29]

[29] Introductory paragraph of the Information Note.