The New Zealand-Australia Free Trade Agreement of 1965

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It is true that bilateral treaties or agreements do not as a general rule bear on international law, except to the extent that they are links in a chain of developments constituting a customary rule or customary rules, or except in so far as, in their provisions, they reflect or affirm international legal principles.

Nevertheless a bilateral arrangement will sometimes concern international lawyers, either because the arrangement provides some indications of emergent tendencies in the evolution of new rules of international law or, because the arrangement has to be related back to some multilateral "framework" law-making Convention, the provisions of which, it in some degree, represents a "bilateralisation". Then there is the aspect that light may be cast on the attitudes of the two contracting States towards certain "growth" points of international law, which may be still in the balance, not yet having reached the final stage either of formulation in a law-making Convention or of general recognition as established customary rules.

Such are in fact the considerations that give point to a discussion of the provisions of the New Zealand-Australia Free Trade Agreement, signed at Wellington on 31 August 1965,[1] which is the subject of examination and analysis in the present article and which will be referred to below. Thus the Agreement is confirmative of certain broad trends in the currently evolving principles of international economic law; e.g. as to the purpose and structure of free-trade areas, as to the avoidance of dumping practices, as to the prohibition of quantitative export and import restrictions, and as to the reduction or simplification of customs formalities and administrative barriers to trade. At the same time, the Agreement is one within and subject to the limitations of the General Agreement on Tariffs and Trade of 30 October 1947 (GATT Agreement), and represents in a number of its provisions a bilateral projection in the Tasman Area of certain GATT principles. The views of both contracting countries regarding the swiftly-developing field of international planning and development are also illuminated.

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1 The text of the Agreement, and of certain related documents, will be found in *New Zealand-Australia Free Trade Agreement*, published by Government Printer, Canberra 1965 (No. 10062/65). See also *Australian Treaty Series* 1966, No. 1, and New Zealand Statutes 1965, vol. 1, pp. 425-513.

Apart from these general considerations, there is the somewhat narrower point that the negotiation, publication, and drafting of the terms of the Agreement involved a number of technical aspects, mainly of interest from the standpoint of treaty-making law and practice; certain of these will be referred to in the course of the article.

The political and economic setting in which the Agreement was concluded is naturally of some importance, but reference will be made to this background primarily for the purpose of guidance in regard to the meaning and effect of the Agreement. So far as possible, therefore, attention will be concentrated on the international legal aspects.

Preparatory work and negotiation

A first point is that the Free Trade Agreement has to be related back to earlier treaties and agreements between the two countries. It would be wrong to consider the Agreement in isolation from earlier trans-Tasman commercial and other arrangements. This may be illustrated from express terms of the Agreement; e.g. under article 3, par. 2, the provisions of the Australia-New Zealand Trade Agreement of 5 September 1933, as amended, are to be read subject to the Free Trade Agreement, "but, except as superseded or modified, shall continue in force, be deemed to form part of, and have the same effect" as the Free Trade Agreement. This earlier 1933 Agreement provided a basis of trade represented by the mutual concession of special rates of duty or (as the case might be) the application of British preferential tariff rates, with an exemption extended to New Zealand exports from Australian primage duty.[2] The 1933 Agreement did not stand alone, but had to be read in the light of the GATT Agreement of 1947, with its impact on preferential tariff margins.[3] As amended and adjusted *de facto* from time to time, the 1933 Agreement provided a continuing frame of consultation and contacts between the Ministers, representatives, and officials of the two countries in the domain of trans-Tasman trade. Without the support of this foundation, the negotiation and conclusion of the Free Trade Agreement would doubtless have not been possible.

Of some importance also was the Australian-New Zealand Agreement of 21 January 1944[4] (the so-called "Anzac Pact"), a significance expressly reflected, as in the case of the 1933 Agreement, in the text of the Free Trade Agreement, for the very first recital of the preamble reads:—

> "The Government of the Commonwealth of Australia and the Government of New Zealand,
> "Recalling the Australian-New Zealand Agreement 1944 in which they agreed to facilitate the development of commerce between New Zealand and Australia, ..."

By article 35 (c) and (d) of this 1944 Agreement, the two Governments had agreed, *inter alia,* that the development of commerce

2 See D. F. Nicholson, *Australia's Trade Relations* (Melbourne, 1955), pp. 41-5.

3 D. F. Nicholson, *Australia's Trade Relations* (Melbourne, 1955), p. 44.

4 Text of this Agreement in H. V. Evatt, *Foreign Policy of Australia* (Sydney, 1945), pp. 179-88.

between Australia and New Zealand and their industrial development should be pursued by consultation and, in agreed cases, by joint planning, and that there should be co-operation in achieving full employment. These provisions, even if not implemented over the ensuing two decades to the full extent of original expectations, had remained as an expression of principles approved by both Governments, to be invoked from time to time when moves were initiated for closer trade links. It has become fashionable to decry the 1944 Agreement, yet where else is there to be found so comprehensive an enunciation of a programme for the integration of Australia and New Zealand?

But the more immediate influences in point of time which led to the conclusion of the Free Trade Agreement were, on the one hand, the example of the relatively successful development in the 1950's and early 1960's of regional economic organizations in Europe, such as the European Economic Community (EEC, the Common Market), and the European Free Trade Association (EFTA), and, on the other hand, the growth of fears in certain Australian and New Zealand quarters that unless there was some progress towards integration, Antipodean exporters to overseas countries would face a reduction in trade and would be at a disadvantage *vis-à-vis* those operating under the umbrella of the machinery of regional economic blocs.[5] There were particularly impelling motives in the case of New Zealand, so small in population, that only by becoming, in effect, a component of a larger market-economy could its producers become more efficient and the country overcome its long-standing balance of payments difficulties and economic vulnerability due to a hazardous reliance on the export of a few limited categories of primary products. The subject of a Tasman free-trade area appears to have been first mooted during a visit to New Zealand in 1960 by the Australian Minister for Trade and Industry, Mr. McEwen, and although this may have been followed by informal exchanges between the trade officials of the two countries, the nettle was not firmly grasped on the highest governmental level until 1963, following another visit by Mr. McEwen to New Zealand. A Joint Australia-New Zealand Consultative Committee on Trade earlier established for the purpose of study, discussion, and report on the project, and to facilitate Ministerial talks and departmental negotiations co-operated with a Joint Standing Committee.

The Joint Standing Committee's report on the advantages and disadvantages of the proposal was presented in April 1964,[6] and subject to qualifications, was favourable. However, the Committee did not go to the length of supporting an area of total and absolute free trans-Tasman trade. The goal was to be a limited free-trade area, in conjunction with certain tariff reductions for the non-free trade, and with transitional "phasing-out" of duties on specific items.

Nevertheless, a period of about 15 months was to elapse before the terms of the Free Trade Agreement were in fact hammered out. This

5 Cf. as to this point, see speech by Mr. Turner in Australian House of Representatives, *Hansard*, 13 May 1965, p. 1470.

6 *Hansard*, 13 May 1965, p. 1475.

may seem a long time for the negotiation of an arrangement between two closely situated English-speaking members of the Commonwealth, but it was felt necessary to proceed cautiously out of regard for Australian dairying interests and for New Zealand manufacturing industries, which were expected to be touchy and sensitive over the establishment of free trade conditions across the Tasman. The pace was leisurely only in appearance, for there were continual consultations throughout the period, by telephone, by representations through or participation in discussions by the respective High Commissioners, and by exchanges between the trade officials of the two countries.[7] Another factor was the interruption at one stage in the progress of negotiations, through the illness of Mr. Marshall, the New Zealand Minister of Overseas Trade.[8]

On 13 May 1965, when the culmination of these consultations and exchanges was in sight, a motion by Mr. Turner in the Australian House of Representatives that the Government should explore the practicability of establishing a common market with New Zealand was debated, and affirmed.[9] Members of the House were perhaps thinking not so much of a common market *stricto sensu*, with the two countries maintaining a common external tariff, but rather of a free-trade area. Be that as it may, the debate was important as revealing a receptive atmosphere in Australia towards a limited free-trade agreement, while giving Mr. McEwen an opportunity to clarify what progress was being made in this direction, and to affirm the value of a Tasman free-trade area, even of a limited nature.[10]

> "I believe . . . that there is a harvest of improved relationships to be reaped from a successful venture of this kind, and that in the long term this may be far more valuable to both nations than the benefits derived from trade itself."

On 19 July 1965, there was a preliminary joint meeting of trade officials of the two countries, by way of prelude to the final Ministerial negotiations which were to take place about three weeks later. The McEwen-Marshall discussions were held at Canberra from 10 August to 13 August 1965, when agreement was reached on terms which were not then made public.[11] The two Ministers confined themselves to issuing a joint statement in Canberra on 13 August, expressed for the most part in general terms, disclosing few details and declaring *inter alia* that the immediate results of their Agreement would not be dramatic, but that over the longer term, the results would be of real significance to the development of both countries.[12]

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7 *Hansard*, 13 May 1965, p. 1479 (speech by Mr. McEwen).

8 *Hansard*, 13 May, pp. 1478-9.

9 *Hansard*, 13 May 1965, pp. 1468-81.

10 *Hansard*, 13 May, p. 1480. The New Zealand Department of Industries and Commerce had itself consulted a very large number of trade organizations, individual manufacturers, and producers, in order to be sure that there was favourable ground in New Zealand; see *Hansard* (*N.Z.*), 22 September 1965, p. 2869.

11 Melbourne *Age*, 14 August 1965.

12 Melbourne *Age*, 14 August 1965.

Fuller official elaboration followed four days later, on 17 August.[13] A Ministerial statement on that date by Mr. McEwen in the House of Representatives, for example, contained quite an ample, if broadly expressed, analysis of the principles embodied in the Agreement reached on 13 August. The statement opened with a passage to the effect that this Agreement on the formation of a free-trade area between Australia and New Zealand had "now" been *"confirmed"* by the two Governments.[14] Yet if confirmed, the Agreement was not even then expressed in a formal, final text. As Mr. McEwen pointed out[15]:—

> "Time has not yet permitted the Agreement reached between the two Governments to be translated into a formal document. It is still necessary to finalize the legal drafting of the Articles of the Agreement and to ensure that the commodities in Schedule A are defined accurately in terms of the tariff classifications of both countries. The Agreement will then be printed. When this is done, it will be signed. These processes will be completed with a minimum of delay and I would expect that the Agreement will be printed and ready for signature within a few weeks."

A further Ministerial statement was issued by Mr. McEwen on 26 August, dealing with certain matters of detail arising under the Agreement.[16]

Leaving aside the engrossment of the formal text of the Agreement, there is the point that the Agreement did not itself really become complete until the date of its signature on 31 August 1965, when there were additionally three exchanges of letters between the Australian High Commissioner and Mr. Marshall, containing a record of supplemental understandings, and of confirmations of interpretations of the provisions of the Agreement.

It can be seen that, in the result, the two Governments followed, between the conclusion of the McEwen-Marshall negotiations at Canberra, on the one hand, and the signature of the formal text on 31 August, on the other hand, a procedure of partial or gradual disclosure of the terms agreed between them. Presumably, this was to avoid strong reactions from producers and manufacturers who might be affected, and to pave the way for a more comprehensive publication of the Agreement. This is a technique not usually adopted in the treaty-making domain. More often, parties prefer to publish a text when it has been finally authenticated and signed, or in special cases, in order to afford a maximum opportunity of study of the terms of the treaty and to reassure the public, to publish immediately an authenticated text and postpone the formal signature thereof (e.g. as in the case of the North Atlantic Security Treaty of 4 April 1949, and the ANZUS Security Treaty of 1 September 1951).

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13 Melbourne *Age*, 18 August 1965.

14 *Hansard*, 17 August 1965, p. 11.

15 *Hansard*, 17 August 1965, p. 14.

16 This had been preceded by observations to much the same effect in the House of Representatives on 25 August; see *Hansard*, 25 August 1965, pp. 463-4.

At all events, the Agreement was formally signed at Wellington by Mr. Cameron, the Australian High Commissioner, and Mr. Marshall, the date of signature being, as already mentioned, 31 August 1965. On the same day it was presented by Mr. McEwen in the Australian House of Representatives. After exchange of ratifications in accordance with article 17, the Agreement entered into force on 1 January 1966.

General nature and effect of Free Trade Agreement

Before proceeding to deal in detail with particular provisions, it would be helpful to study the general scheme and structure of the Agreement, an Agreement which Mr. McEwen has described as "a highly technical one".[17]

First, although article 1, par. 1, proclaims that "a Free Trade Area ... is hereby established", the Agreement neither creates nor even purports to create *immediately* and concretely by force of its provisions a Tasman free-trade area, nor indeed is any fixed or determinate time-scale laid down for the future establishment of such a free-trade area.[18] As Mr. McEwen pointed out in his Ministerial statement to the Australian House of Representatives on 17 August 1965,[19] the expression "free-trade area" has a technical connotation, being "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[20] on imports from countries outside the arrangement", thus contrasting with a customs union "which requires the Members to introduce a common external tariff against imports from other countries". Judged in the light of this definition, the New Zealand-Australia Free Trade Agreement provides only the framework for a Tasman free-trade area, regarded notionally as a future target, goal, or objective, and, to a large extent optionally to be achieved under the machinery laid down in the Agreement.

This is not necessarily a sceptical view of the Agreement. The critical consideration in any arrangement said to create a free-trade

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17 *Hansard*, 17 August 1965, p. 14.

18 See par. 8 of Opening Statement for the parties to the Agreement, made to the GATT Working Party, called upon to report on the Agreement; this Opening Statement is annexed to the Report of the Working Party adopted on 5 April 1966 (document L/2628).

19 *Hansard*, 17 August 1965, p. 11.

20 It would probably be more accurate to say that the distinction is that 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 own 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. Cf. H. G. Darwin in *British Year Book of International Law*, 1960, p. 355, and in *International Law and Comparative Law Quarterly*, Supplementary Publication No. 1 (1961), p. 99; and Alexandrowicz, *World Economic Agencies, Law and Practice* (1962), p. 224 n. 17.

area is the extent to which the primary barriers to trade are removed.

It is common ground that the Agreement does not apply to all goods, but extends to no more than 60 per cent of the total Australia-New Zealand trade, and this does not mean 60 per cent of the trade of each country.[21] The operative free-trade provisions apply only to those products listed in Schedule A, and the bulk of these items were already being currently traded on a duty-free basis. The balance of dutiable items enumerated in Schedule A are to be liberated by a "phasing-out" process extending over eight years, the lower duty goods being first to move into the category of duty-free goods, with progressive reductions for other goods until these become subject to complete exoneration from duty. Nevertheless, a significant number of products, in particular agricultural products, are from the inception of the Agreement to remain outside the Schedule.

Second, provision is made for regular reviews of trade for the purpose of adding, from time to time, items to the list in Schedule A (article 3, paras. 3 and 4). The intention, although not stated in express terms in the Agreement, is to continue the process of addition of goods until at least substantially all the trade of the two countries is covered.[22] While on the one hand there is no general agreement between the parties prohibiting the addition of items to Schedule A, on the other hand, there are no provisions for the elimination of duties on items not contained in the Schedule.[23] The parties must presumably go through the motions of adding items to Schedule A, before any process of duty-liberation on non-schedule items can be initiated.

Third, it is contemplated that an area, possibly substantial, of trade not free from duty shall continue, or be extended, as the case may be. As Mr. McEwen stated, it was recognized by both Governments "that there are some items which may not be included in the duty free list. Where serious harm, or serious unemployment would result from competition by the other country the items concerned will never be traded duty free".[24] Moreover, where items of trade included in Schedule A are not being produced by one party, the provisions of the Agreement permit that party, at a later date when production commences, temporarily to effect a withdrawal of an item from the Schedule and to introduce protective duties, and should the establishment of or encouragement of the expansion of an industry become essential for economic development, the corresponding item may after consultation be withdrawn permanently from Schedule A (cf. article 8). Indeed, it may be decided in the progressive reviews referred to *ante* that to add certain goods may be seriously detrimental to an industry in either country or contrary to the national interest, in which event the

21 Ministerial statement by Mr. McEwen, *Hansard,* 17 August 1965, pp. 11-14.

22 Cf. Report of GATT Working Party, referred to *ante,* par. 7.

23 Report of GATT Working Party, par. 9.

24 Ministerial statement by Mr. McEwen, *Hansard,* 17 August 1965, p. 12. This passage purports to summarize the effect of article 3, par. 5, which refers also to the following factors: profit levels, employment, capital investment, and prices.

goods will remain non-scheduled (article 3, par. 3). One article, article 7,[25] deals with the deflection of trade which may arise if the producers in one country have access to raw materials or machinery at significantly lower prices than producers in the other country or have other similar advantages; in such event, the latter country following consultations, is, subject to certain conditions, to be at liberty to take corrective action to protect its affected producers. Then again either party may, following a consultative procedure, suspend temporarily its obligations in respect of products which are being imported in such increased quantities and under such conditions as to cause or threaten serious injury to its producers (cf. article 9).

Fourth, the Agreement contains a general obligation on each party not to maintain quantitative import restrictions on imports from the other, unless it is at the same time applying such restrictions to imports of a third country. This is subject to a qualification which was stated by Mr. McEwen in the following terms[26]:—

> "Australia undertook not to impose quantitative import restrictions, introduced for balance of payments reasons, on imports from New Zealand. Because of its continuing and serious balance of payments position, New Zealand was not able to give a similar undertaking, but has indicated that it will provide for special arrangements in respect of some imports from Australia. Quantitative import restrictions will be removed on certain products from Australia including timber plywood and veneers from the date of entry into force of the Agreement."

Under article 5, par. 2, both countries retain a certain liberty, in harmony with the provisions of the GATT Agreement, to impose quantitative import restrictions for balance of payments reasons; the significance of Mr. McEwen's statement, just quoted, was that it amounted to a waiver by Australia of reliance upon such liberty, out of due deference for New Zealand's precarious balance of payments situation.

Fifth, there is a qualified[27] obligation binding each country, in regard to quantitative export restrictions, not to impose new prohibitions or restrictions, or intensify existing prohibitions or restrictions, on exports to the other.

Sixth, the Agreement enumerates (in article 12) 13 categories of unobjectionable measures which each contracting country is at liberty to take or enforce, e.g. measures necessary for the protection of essential security interests, measures necessary to protect public morals, etc., subject to the proviso that such measures are not used as a means of arbitrary or unjustifiable discrimination or of disguised

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25 Cf. article 5 of the Stockholm Convention of 4 January 1960, establishing the European Free Trade Association (EFTA).

26 *Hansard*, 17 August 1965, p. 13.

27 The qualification being that each party may take such measures as may be necessary to prevent evasion, by means of export, of restrictions which it applies in respect of exports to countries outside the Tasman area (see article 11, par. 2).

restriction on the trade between the two countries.[28] This certainly qualifies the operation of Schedule A.

Seventh, there are a number of special obligations related to joint planning and development, which will be considered *post*, including provision (not in the Agreement itself, but in an exchange of letters dated 31 August 1965) to establish a Joint Consultative Council on Forest Industries, comprising representatives of both parties to advise them on the steps necessary to develop and co-ordinate all phases of the industry in the two countries to achieve the best use of their forest resources.

It may be said therefore that it is a rather limited and circumscribed free-trade area, which is provided for under the Agreement, one which does not cover all sectors of trade, and which is hedged with safeguards, overriden with options, and subject to qualifications or amendments that may be made in the future in the course of the regular reviews, or in the course of the *ad hoc* processes of consultation. Whether such an agreement is an "interim agreement leading to the formation of a free-trade area" within the meaning of article 24, pars. 7 and 8 of the GATT Agreement will be considered below.

Certain special provisions of the Free Trade Agreement will now be dealt with.

Definition and scope of the "Free Trade Area"

The "Free Trade Area" established by article 1 of the Agreement is defined as consisting of New Zealand and Australia, "New Zealand" meaning the metropolitan territory to the exclusion of the Cook Islands, Niue and the Tokelau Islands, and "Australia" meaning the territory of the States and of the mainland territories of the Commonwealth of Australia. This definition has to be considered in conjunction with the potential scope of the "Free Trade Area" under the operation of article 13 (extension of the Agreement to territories, for the international relations of which a contracting party is responsible), and of article 14 (association of third States with the Free Trade Agreement).

It is of interest to observe that New Zealand and Australia are not referred to in the provisions of the Agreement as "parties" or as "contracting parties", but as "Member States", a phrase which is suggestive of a grouping or association constituted under the Agreement.

Under article 13, the parties may agree that any territory for the international relations of which a party is responsible, e.g. a trust territory, may become associated with the Free Trade Agreement for the purpose of promoting the economic and social development of the territory and to permit closer economic relations between the territory and the parties to the Agreement. The parties are to agree upon the terms of the association of such territory.

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28 The drafting of this article was largely based on that of article 12 of the Stockholm Convention of 4 January 1960, establishing EFTA; thus, the measures (a), (b), (d), (f), (k), and (m) in the former article are expressed identically with, or similarly to the measures (a), (b), (h), (c), (e), and (g) respectively, set out in the latter article.

Of wider effect is article 14, providing that the "Member States may agree to the association of any other State" with the Agreement. Such association may be in respect of the metropolitan territory of another State, or in respect of a territory for the international relations of which that other State is responsible. The terms of such association are to be negotiated between the "Member States" and such other State. This opens the way in the future for constructing a free-trade area extending beyond the Tasman, to embrace in associated membership countries or territories in the region or sub-region to which New Zealand and Australia belong. But the article contemplates only an associate membership akin to that under article 238 of the Treaty of Rome of 25 March 1957, establishing the European Economic Community, and under article 41, par. 2, of the Stockholm Convention of 4 January 1960, establishing the European Free Trade Association,[29] and not plenary membership of a status equal to that of Australia and New Zealand. This is implicit in the facts that an agreement of association is to be negotiated, and that the expression "Member States" in article 1 is not defined so as to include associate members. A point of difference from the above-mentioned Treaty of Rome and Stockholm Convention is that it is not provided that such an agreement of association may be with a union or group of outside States or with an international organization, but only with another State or a territory of that State for whose international relations it is responsible.

Objectives of the Free Trade Agreement

These objectives are set out in article 2. They serve to show that the title "Free Trade Agreement" is not to be regarded as a complete description of the purposes of the contracting countries. Indeed, development seems to be the primary goal. Thus the first-stated objective (a), is:—

> "(a) to further the *development* of the Area and the *use of the resources* of the Area by promoting a sustained and mutually beneficial expansion of trade",

and this must of course be related to the second recital of the preamble which refers to the desire of the two Governments "of strengthening economic relations between their two countries." As mentioned above, the Agreement reflects the attitudes of the two countries towards this new field of economic development which has come within the province of international law. This objective (a) may be compared with objective (a), set out in article 2 of the Stockholm Convention of 4 January 1960, establishing the European Free Trade Association:—

> "(a) to promote in the area of the Association and in each Member State a sustained expansion of economic activity, full employment, increased productivity, and the rational use of resources, financial stability and continuous improvement in living standards."

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29 For a note on the agreement of association between Finland and the European Free Trade Association, concluded in May 1961, see *International and Comparative Law Quarterly* (1961), vol. 10, pp. 619-20.

Objective (b) in article 2 of the Free Trade Agreement is expressed as:—

> "(b) to ensure as far as possible that trade within the Area takes place under conditions of fair competition",

and is in very much the same terms as objective (b) in article 2 of the Stockholm Convention, while objective (c):—

> "(c) to contribute to the harmonious development and expansion of world trade and to the progressive removal of barriers thereto"

is in almost identical terms with the corresponding objective (d) in article 2 of the Stockholm Convention and is intended similarly to evidence the fact that the Agreement is consistent with the parties' obligations under the GATT Agreement. The latter point is already expressed in the last recital of the preamble: "Recognising the obligations assumed by them under the General Agreement on Tariffs and Trade."

Inasmuch as the terms of the objectives (a), (b) and (c) are to such an extent so similar or identical with the objectives (a), (b) and (d) expressed in the Stockholm Convention, it is material that objective (c) under the latter Convention:—

> "(c) to avoid significant disparity between Member States in the conditions of supply of raw materials produced within the area of the Association"

has not been reproduced in article 2 of the Tasman Free Trade Agreement. The maxim *expressio unius, exclusio alterius* would seem to apply. Either it was felt that there was no significant disparity in the conditions of supply of raw materials produced in the two countries, or that elimination of any such disparity was not a practicable purpose for the two Governments to pursue.

The definition in article 2 of "objectives" is important for the application of article 16, referred to *post*, providing for consultations when, *inter alia*, the "objectives" of the Agreement have not been achieved, and for periodical review-consultations raising matters of mutual interest not provided for in the Agreement, but related to its "objectives".

Processes of review and consultation: Consultative Committee under article 16

A special feature of the Free Trade Agreement lies in the number of provisions for processes of review and consultation:—

(1) Reviews of trade to add further items to Schedule A (article 3): After the first review, to take place not later than 2 years after entry into force of the Agreement—this first review was in fact conducted from 25 February to 3 March 1967—the reviews are to occur annually. Total trade is to be reviewed, for the purpose of determining what additions are to be made to potentially free-trade items in Schedule A, and with due regard to the effect of such additions on the economies of the two countries. Detriment to industry, inconsistency with national interest, and consonance with commodity arrangements binding both countries are some of the considerations to enter into account.

(2) Consultation as to "phasing-out" of import duties (article 4):

Where Schedule A goods are subject to variable duties, the parties are under an obligation to consult for the purpose of determining how the reduction and elimination of duty are to be effected in the "phasing-out" process (article 4, par. 4). In this connexion, there can be non-mandatory consultation on the matter of the length of the "phasing-out" period, inasmuch as the parties "may agree" that duties on Schedule A goods are to be reduced or eliminated over a longer period than laid down (article 4, par. 7).

(3) Consultation regarding quantitative import restrictions (article 5): Assuming that there has been reduction or elimination of quantitative import restrictions, it is open to one party to consult the other and after such consultation to reimpose or introduce new such restrictions on trade in Schedule A goods, where, in the absence of this action, there might be serious prejudice to the effectiveness of quantitative import restrictions which that party is applying for balance of payments reasons, consistently with GATT and other international obligations, on imports from non-party countries (article 5, par. 3). Moreover, one party may request that consultations be held regarding the application and effect of quantitative import restrictions, reduced or eliminated, or reimposed or newly introduced; and if these are interfering unduly or seem likely to interfere unduly with conditions of fair competition within the Tasman Free Trade Area, appropriate remedies for the situation are to be considered in the consultations.

(4) Consultations on deflection in trade (article 7):[30] Such consultations are to take place before any suspensory action is taken by one party, as mentioned earlier. If in the opinion of one party the import of Schedule A goods from the other may operate injuriously and adversely to the competitive position of producers of like or directly competitive goods for reasons specified (including lower duties or taxes), and that other party is deriving advantage from the circumstances, the former party shall, if it considers action is necessary to offset the advantage, make a written request to the latter party for consultations with it on the situation.

(5) Consultations arising out of the development of new industries or the expansion of established industries (article 8): One party, after consultation with the other, may for the purpose of encouraging new productive activities contributing to economic development, suspend the elimination or reduction of duties on the import of Schedule A goods from the other, being goods similar to or competing with the goods produced by the new activities. This suspensory action is subject to several conditions, one of which is that after the consultation, duties are not to be levied at a rate higher than the lowest rate applied to imports of similar goods from a third country (article 8, pars. 1 and 2). In "exceptional circumstances", and for the purpose of establishing industries or encouraging the expansion of established industries, one party may after consultation with the other, withdraw items from Schedule A (article 8, par. 3).

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30 Cf. the provisions as to deflection of trade in article 5 of the Stockholm Convention of 4 January 1960, establishing EFTA.

(6) Consultations in connexion with temporary suspension of obligations (article 9): If because of the operation of article 4 (elimination or reduction of duty on Schedule A goods), article 5 (abstention from quantitative import restrictions), and article 6 (limit on revenue duties or taxes), Schedule A goods are in the opinion of one party being imported by it so as to cause or threaten injury to producers of like or directly competitive products, that party may make a written request to consult with the other on measures to prevent future injury and shall consider measures proposed by that other party. If the consultations prove abortive, the former party may take suspensory action in respect of the application of all or any of the provisions of articles 4, 5 and 6.

(7) Consultation regarding dumping, and regarding subsidised imports (article 10): If one party gives written notice to the other that, in its opinion, goods imported into its territory from that other are within the meaning of its laws being dumped, or are being subsidised by that other, and the importation of the goods is causing or may cause material injury to its producers of like or directly competitive products, or may hinder the establishment of an industry to produce or manufacture these, the two parties must "thereupon" consult together immediately to consider measures necessary to prevent future injury. If the consultations prove abortive after a period defined in article 10, the party into whose territory the goods are being imported may levy dumping or countervailing duties on the imported goods.

(8) Consultation and review generally, and the Consultative Committee (article 16): In addition to the above-mentioned provisions for consultation, it is laid down in article 16 that consultations are to take place if one party is of the opinion that any benefits conferred on it by the Agreement, or any of the "objectives" of the Agreement (this can only refer to the objectives specified in article 2) are not being achieved, and it makes a written request for such consultations to take place. The consultations are to take place as soon as practicable, and the parties are to consider appropriate measures to remedy the situation giving rise to the request (article 16, par. 1). Moreover, separate periodical consultations are mandatorily to take place for the purpose of reviewing the Agreement; reviews, that is, distinct from the periodical reviews of total trade, provided for under article 3. None the less, the two reviews may take place concurrently or successively, as happened when they were inaugurated at Wellington, 25 February-3 March 1967.[31] Subsequent review-consultations are to take place annually. In these review-consultations, one party is entitled to raise any matters of mutual interest which are not provided for in the Agreement, but are related to its objectives (article 16, par. 2). It is also provided that these consultations under article 16 are to take place through a Consultative Committee, or such other bodies as may be established by arrangement (article 16, par. 3).

31 See *Current Notes on International Affairs* vol. 38 (1967), No. 2, pp. 68-9, noting section 2 of the joint press statement there reproduced.

This summarizes the effect of article 16, and at the above-mentioned meeting at Wellington in February-March 1967 its provisions were implemented as follows:[32] The Consultative Committee was formally established and its inaugural meeting held. The Ministers agreed that the Committee should consist of ministerial representatives of the two countries, and that it would be responsible for carrying out the consultations and reviews under the Agreement, and for the operation and administration of the Agreement generally. It was to meet at least once a year, desirably at ministerial level to carry out the annual review-consultations provided for by article 16, par. 3, but having regard to the need to meet more frequently than annually in the early years of the Agreement, was to meet at the official level, as the need arose, between the annual meetings. Thus the Consultative Committee would be in a position to examine any emergency situation as the need arose, e.g. the situation which might result from the admission of the United Kingdom to the European Economic Community.

(9) Consultations regarding the termination of the Agreement (article 17): While the Agreement is expressed to remain in force for 10 years, it is to continue in force thereafter unless terminated after written notice by one party and the holding of consultations between the parties as soon as practicable. After a prescribed period (90 days), if the party concerned maintains its wish to terminate the Agreement, it may give written notice again, and the Agreement is to cease to have effect after another prescribed period (180 days) from the date of the second notice.

The number and variety of the consultations that may take place pursuant to the provisions of the Agreement reflect recognition within its narrow framework of an emergent principle of international economic law that there is a duty incumbent on States to consult with each other, with a view to the freeing of trade and the removal of discriminations, and to be accessible for the receipt of representations in this connexion.

Perhaps, in the future, there may be established other joint consultative machinery, not wholly at the official level, and representative of manufacturing, producing, exporting and importing interests.

Administrative co-operation

Under article 15, the parties are, having regard to the desirability of reducing as far as practicable the formalities required in connexion with trade within their Free Trade Area, to take appropriate measures, including arrangements relating to administrative co-operation, to promote the effective and harmonious application of the provisions of the Agreement. The setting up of the Consultative Committee, mentioned above, including the arrangements for future meetings, was in part intended to give effect to this article.[33] Here again there is recognition of an evolving principle of international economic law, namely, that in matters not materially involving the revenue or balance

32 *Current Notes on International Affairs,* vol. 38 (1967), No. 2, pp. 68-9.

33 *Current Notes on International Affairs,* vol. 38 (1967), No. 2, p. 68.

of payments issues, customs and other formalities should be simplified and administrative restrictions on, or barriers to trade minimized. The parties have, in effect, also thereby reaffirmed their obligations under the GATT Treaty in that regard.

International planning and development

Throughout the Agreement, there is recognition also of an international economic doctrine, which may yet be translated into some kind of ruling principles of international law, imposing obligations on States to co-operate in the field of planning and development. This receives special expression in section C, par. 4, of the first exchange of letters of 31 August 1965, dealing with the creation of a Joint Consultative Council on Forest Industries. This Council was to be established so that in respect of forest products generally the two parties should "co-operate with a view to achieving a harmonious and mutually beneficial extension of trade between them and to promoting the most efficient use of the combined resources" of both countries. At the Wellington review and consultation meeting, 25 February-3 March 1967, the Ministers agreed that the Council was to be set up "as soon as possible", and it was stated that both Governments had under study the terms of reference and membership of that body.[34]

Under article 3, par. 7, also, the parties may agree on, and implement special measures beneficial to the trade and development of each country with regard to non-scheduled goods; proposals pursuant to this provision, including a project for the supply of New Zealand-made components to Australian motor vehicle manufacturers, were discussed by the Ministers at the Wellington meeting.

To this extent, the Free Trade Agreement provides a basis for initiating moves for planning and development, and such moves may indeed be by way of performance of more general obligations laid down in multilateral Conventions. The period of duration of the Agreement, namely 10 years, is sufficiently long to provide a foundation of experience, impelling the parties to a higher degree of economic rationalization than is explicitly referred to in the Agreement.

Consistency of Agreement with obligations of parties under GATT Agreement

It is now time to pause and consider whether the Free Trade Agreement, as portrayed above, meets the standards and requirements of article 24 of the GATT Agreement, dealing with permissible customs unions or free-trade areas and with interim agreements leading to the formation of such unions or areas, allowed by way of exception to the GATT principles of most-favoured-nation treatment and of non-discrimination. Paragraph 7 of article 24 sets out a procedure of notification to GATT, and of consideration by GATT of any plan or project in this connexion, and under par. 8 (b) a "free-trade area" within the meaning of the GATT Agreement is defined as meaning:—

34 *Current Notes on International affairs*, vol. 38 (1967), No. 2, p. 68.

> "a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under articles 11, 12, 13, 14, 15 and 20) are eliminated on *substantially all the trade between* the constituent territories in products originating in such territories."

Pursuant to par. 7 (a) the two parties notified the GATT Contracting Parties of their conclusion of the Free Trade Agreement as being "an interim agreement leading to the formation of a free-trade area", and supplied appropriate information. A GATT Working Party was appointed to examine the Agreement, and to report to the GATT Contracting Parties at their 23rd Session in 1966.

Having regard to the general nature and effect of the Free Trade Agreement, as earlier explained, members of the Working Party found some difficulty in squaring the provisions of the Agreement, as such, with the mandatory requirement under par. 5, proviso (c) of article 24 that the exempt interim agreement is to "include a plan and Schedule for the formation of ... such a free-trade area within a reasonable length of time", meaning thereby a plan and Schedule relating to "substantially all the trade" of the countries concerned. Article 4 of the Free Trade Agreement in conjunction with Schedule A, being limited in their range, hardly satisfied these necessary conditions, and although the parties to the Agreement could urge that it was their intention to review and to supplement the items in Schedule A, no precise plan and Schedule existed to give effect to any such progressive intention.[35] The deficiency lay in the absence of concrete measures for the full extension of free-trading between the parties.

The hesitations of the Working Party can be understood. However, as against its reluctance to approve, the following points could be, or were, made: (1) The parties to the Free Trade Agreement had expressed a firm resolve to develop a free-trade area consistent with the provisions of article 24, and the Agreement by its terms looked to a progressive extension of the items to be free-traded. (2) It was literally impossible for any group of countries to submit a perfect interim free-trade area agreement harmonizing with GATT objectives, and the matter should not be approached by reference to the norm of a theoretically perfect interim agreement. Besides there were no strict rules as to what constituted "substantially all trade". (3) There was no doubt that the interest of both countries lay in the direction of forming a free-trade area as quickly as possible. (4) The parties were willing to report further on the development of the projected Tasman free-trade area, and it would thus be possible for the GATT Contracting Parties to judge the Free Trade Agreement on performance, as distinct from promise. (5) The bona fides of the parties was proved by the 10-year period for the duration of the Agreement—a period sufficiently long to allow construction of a truly integrated free-trade area.

In the result, on the basis of the Working Party's Report, the relevant conclusions adopted by the GATT Contracting Parties on 5 April 1966, were as follows:—

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35 See report of GATT Working Party, adopted 5 April 1966, par. 15.

"... ;

"(c) the CONTRACTING PARTIES, whilst appreciating the circumstances which render it difficult for the two Governments to agree immediately upon a sufficiently comprehensive plan and schedule, invite them to give serious consideration to doing so as soon as possible;

"(d) the CONTRACTING PARTIES note the intention of the Governments of New Zealand and the Commonwealth of Australia to report to the CONTRACTING PARTIES further on this point and more generally on the formation of the free-trade area."

These conclusions are, in the circumstances, to be regarded as no more than a nominal, qualified approval by the GATT Contracting Parties of the Free Trade Agreement, and with the express reservation that Australia and New Zealand were, in effect, called upon to extend the area of free trans-Tasman trade as soon as possible to cover substantially all trade. The question of definitive approval was left open for reconsideration, being dependent on whether, in the future, Australia and New Zealand should succeed in a measurable period of time in the task of constructing a free-trade area of the standard and dimensions required by the GATT Agreement.

Undoubtedly, and to some extent out of realistic consideration for New Zealand's position, some latitude was reflected in the approach adopted by the GATT Contracting Parties. On the other hand the stringency of GATT obligations, formulated in 1947, weighs heavily on countries like New Zealand with economies that have become more vulnerable under the pressure of recent political and economic developments. As at the date of writing, there was a substantial shortfall in New Zealand's export earnings for the year ended 31 March 1967, due partly to a decline in prices for primary products.[36] Nor are there good auguries for improvement. Article 24 of the GATT Agreement does not, in its present form, provide sufficient flexibility for the situation of countries which are so reliant on non-industrial exports.

Limited integrating operation of Free Trade Agreement

That after such lengthy negotiations so limited a free-trading arrangement was concluded, and one so closely tailored to meet the almost humdrum difficulties of trans-Tasman trade (e.g. concerning such items as frozen peas and beans), sufficiently illustrates the fact that the parties' ambitions in the direction of economic integration were not pitched very high. Comparison of the Free Trade Agreement with the provisions of the Treaty of Rome of 25 March 1957, establishing the European Economic Community, and with the provisions of the Stockholm Convention of 4 January 1960, creating the European Free Trade Association, confirms the point. The Free Trade Agreement does not purport to deal explicitly or comprehensively with practices that may constitute quasi-barriers to trade, nor does it contain undertakings that the economic and financial structures of the two countries will be harmonized or co-ordinated. Inasmuch as there is no provision for the integration of executive and legislative measures,

36 *International Financial News Survey*, vol. XIX (1967), p. 141.

even by a series of transitional stages, a trans-Tasman common market would appear as a remote prospect, uncontemplated and unattainable. Indeed, in some of the articles of the Agreement, the approach is rather to the effect that there should be no impairment of the special economic fabric of each country, nor any disturbance of essential interests. The elimination of barriers to trade, the development of rationalization of production, and safeguards ensuring the absence of unfair trading competition are the three main pillars supporting the Agreement.

Yet the Agreement is a necessary starting point. As Mr. McEwen said: "Although its immediate results in new trade will not be spectacular", it is "expected to have far-reaching long-term effects on the welfare, development, and growth of our two countries".[37] The association of the two Antipodean nations will, too, give added strength in negotiations in an international forum, as has already been proved when the parties were jointly able to substantiate the validity of the Agreement before the GATT Contracting Parties. At least, there is a groundwork now for future cohesion, which is surely better than the continued maintenance by each country, *vis-à-vis* its neighbour, of an old-type siege economy.

37 *Hansard*, 17 August 1965, p. 14.