Case Note/Study Cray-NEC

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1 Introduction[1]

Antidumping measures taken by governments against allegedly injurious dumping of product at prices below cost by foreign companies have their roots in the Steel industry. The doctrine was established in an international climate of protectionism, trade tariffs and a nationally compartmentalised economy[2].

As the dogma of free trade and open markets spread through the developed world with gusto, tariffs were increasingly dissolved as more powerful nations sought offshore target markets in developing countries[3].

The United States has maintained its protectionist methodology through and despite multilateral trade negotiations over the years, enabling protectionism to survive the progressing demise of tariffs[4] and indeed ultimately be identified as one of the few legal mechanisms available under international law to fill the void in trade policy[5].

Cases brought under the banner of antidumping and its 'Siamese twin' counter-veiling duties[6], have typically focussed on highly standard, fixed cost oriented industries, where economies of scale have driven high levels of manufacturing to raise profits margins and when market calculations were poor resulting in surplus without demand.[7]

However, the unique nature of the Cray-NEC conflict stems not only from the fact that the 'product' was supercomputers, being immeasurably more complex than the run-of-the-mill hand made lace, unshelled peanuts, and waterproof shoes[8], but also from a myriad of issues that are a direct result of the unique nature of the IT industry.

While the discussion of this case in the media focussed either on the purer commercial implications or on the procedural aspects, this paper argues that the *Cray-NEC* case shows that international trade in Information Technology Products and Services (known by the industry collectively as 'deliverables') requires unique attention and presents a challenge to even the most axiomatic assumptions of international trade theories generally, and particularly that of antidumping.

The structure of the discussion below follows a case note format, however, it draws upon the broader commercial and legal context outside the official proceedings, which in many ways represent the truer sources of legal risk, and also gives an independent summary of relevant international law.

2 Background[9]

As the *Cray-NEC* case deals primarily with supercomputers, it is worthwhile understanding the basic market situation at the time of the dispute.

Seymour Cray invented supercomputers in 1972. They are the top of the range of computer products in terms of capacity and price, designed to perform enormous computing at very high speeds. Supercomputers are found primarily in large-scale research institutions, global blue chip organisations, defence forces and governments.

In 1996, when the dispute commenced, annual worldwide supercomputer sales were between US$2 billion to US$3 billion.

Supercomputers can be classified either by how their memory is used (either shared or distributed), or by processor architecture (vector and parallel vector (PVP), massively parallel processor (MPP) and symmetric multiprocessor systems (SMP)). However, systems will often be hybrids.

Traditionally, American company Cray Research Inc ("Cray") as well as the Japanese manufacturers focused on vector machines, which were market favourites. However, roughly ten years ago, a divergence began. While Japanese manufacturers NEC and Fujitsu continued to manufacture vector machines, Cray began to focus on MPP machines, as did Hitachi.

Standardisation has occurred to some degree as operating systems sitting on the machines have become increasingly Unix-based, and interchange ability has increased dramatically, with systems sharing more common codes.

Price has not been standardised with prices ranging anywhere between US$100,000 to US$100 million, and often higher prices for more customised machines. Also, in a more customised environment, there is a greater chance of more customised support and maintenance services being required, which are typically integral to the sale.

A couple of product-specific issues to note are that supercomputers have a fairly short lifecycle, typically amortised over five years. These machines serve organisations that do not care for the risk involved in a tailor-fitted capacity, but rather prefer to ensure the constant availability of additional and scalable processing capacity. Furthermore, with technological change, the usual issues of obsolescence and constant change are also relevant.

The significant players[10] in the supercomputer market include Fujitsu, Hewlett-Packard, Hitachi, IBM, NEC, Silicon Graphics, Cray and Sun, who are all either American or Japanese. Only occasionally do European companies like Siemens feature in this market.

3 Facts

The background facts to the Cray-NEC dispute are complex. The story begins with the University Corporation for Atmospheric Research ("UCAR") attempting to procure advanced supercomputers for its national research centre, collecting bids from three manufacturers in March 1995.[11] The three manufacturers were:

- Federal Computing Corporation ("FCC");
- Cray; and
- Fujitsu Limited.

While Fujitsu and Cray offered their own products, FCC was offering NEC machines.

As UCAR is funded by the National Science Foundation ("NSF"), which is a United States Government Agency, a funding application was made for the procurement. As part of the process, the NSF required evidence that no threat of dumping existed. Accordingly, UCAR commissioned a report, which found no dumping despite not considering research and development costs.

Without any invitation to do so, the Department of Commerce (referred to in materials as "DOC" or "Commerce") initiated an independent investigation ("Initial Investigation") into the matter and analysed the bid at a preliminary level.

Within three weeks the Assistant Secretary for Import Administration of Commerce convened an interagency meeting to gather technical information and allow NSF to give a presentation with respect to the proposed transaction.

While the subsequent events and discussions are not entirely clear, it appears that NSF encouraged UCAR to consider further the risk of procuring a potentially dumped product. Nevertheless, UCAR announced its selection of the NEC product, which would cost approximately $50M a year, based on a distinct technical advantage.[12]

The same day, in what has been widely considered a protectionist move[13], Commerce notified the NSF that based on the results of standard investigations Commerce deemed the NEC product offering to constitute dumping since the estimated cost of production was substantially higher than the purchase price, resulting in a high dumping margin. Moreover, Commerce stated that it considered that such a deal would be materially injurious to the US supercomputer market and that therefore all the conditions requisite for the assessment of an antidumping duty had been fulfilled.

The preliminary assessment was a dumping margin in the order of 163% to 280%. However, this was not based on NEC pricing and cost structures but rather Government agency information and a study of NEC financial statements.

A copy of the original notice from Commerce was then made public, and also reproduced in an industry periodical. The Commerce memorandum drafted before it concluded its decision was leaked to the same publication and published several months later.

By mid 1996, Congress had become involved. The matter was discussed in the US House of Representatives, where it was still stressed that the assessments were mere estimates.

On 29 July 1996, Cray filed an antidumping petition with Commerce and the International Trade Commission ("ITC") regarding vector supercomputers from Japan and one month later Commerce commenced an investigation ("Antidumping Investigation"). NSF decided as a result to postpone approval of UCAR's transaction.

In parallel, NEC requested both an investigation into the circumstances of Commerce's Initial Investigation, which included the leakage of confidential information comprising NEC proprietary data (including leakage to Cray), and a stay of the Antidumping Investigation pending resolution. Both of NEC's requests were denied.

By 2 September 1996, the Chairman of the ITC had informed Commerce of an affirmative decision with respect to the injury requirement and on 30 September 1996 the Chairman sent antidumping questionnaires to NEC and Fujitsu.

An action before the Court of International Trade was then filed by NEC and its wholly owned subsidiary HNSX, on the grounds that Commerce had been acting as an ally of its competitor Cray, and as such Commerce had denied NEC access to due process in the course of the antidumping investigations and also denied the determination of a fair and neutral decision maker. On the same day, 15 October 1996, NEC responded to the antidumping questionnaire by stating its intention to withhold its information until an impartial and independent party was nominated to conduct the investigations.

Commerce responded with a dumping duty order of 454% against NEC on importation of supercomputers from Japan, which ultimately became the final assessment. NEC responded with another complaint to the Court of International Trade challenging the ITC's determination of material injury to a domestic industry. Cray then motioned to dismiss the complaint, based on a lack of jurisdiction and failure to state a claim. Cray argued that NEC had to wait until conclusion of the Antidumping Investigation and subsequent exhaustion of other remedies prior to addressing the Court of International Trade. At first instance this motion was denied.

Similarly, NEC's motion for a preliminary injunction was denied. NEC's motion for a permanent injunction was also denied on the grounds that there were no valid interests that were being denied by Commerce' actions and hence there had been no prejudgment contravening the Fifth Amendment as alleged.

Nonetheless, a prejudgment claim was recognised. NEC was required to show that Commerce's Initial Investigation rendered the Antidumping Investigation a 'hollow formality' such that NEC's participation in the process was futile. Given a presumption of honesty and integrity with respect to government organisations, NEC was required to satisfy a heavy burden of proof.

The burden was not discharged and judgment was entered against NEC,

driving NEC to lodge the appeal that stood before the Court of International Trade.

4 Issues

On appeal, five issues stood before the Court of International Trade:[14]

4.1 Procedural Fairness

NEC claimed it deserved constitutional due process and an unbiased decision maker in fact and appearance.

Commerce argued that a lower standard was applicable, and that only procedures and the hearing that lead to the decision were required to be fair.

4.2 Narrow factual focus

NEC appealed the narrow consideration given to the facts of the case, stating that only the interagency meeting of May 13 1996, and the letter of 20 May 1996 from Commerce in conjunction with the Predecisional Memorandum were given due consideration.

Commerce countered with support of the approach taken by the trial judge stating that no other evidence would have supported NEC's claim.

4.3 Constraints on Testimonial evidence

NEC complained that the trial court restrained NEC from obtaining the US Government testimony that it sought and thus prevented NEC from making its case.

4.4 Jurisdiction

Commerce maintained that the Court had no jurisdiction to hear the matter without the consent of the United States to a claim against it.

4.5 "Mootness"

Furthermore, as the investigation was complete at that stage, Commerce argued that the case was moot.

These issues may not seem to touch upon the core of antidumping law, however, they do directly reflect the sentiment that surrounded the series of hearings and appeals that unfolded. In essence, NEC was not convinced that it was getting a fair chance to defend its actions or even receive fair consideration.

In light of the relevant legal principles under international law and the magnitude of the duties involved, it is fascinating that the issues explored in the courts were quite so procedural. It is important to note, however, that in the IT industry, it is common place that the more complex issues are negotiated outside court if at all. Courts are often ill-equipped to deal with mammoth cases with operational and practical knowledge prerequisites that exceed the courts' resources.[15]

5 Law

To properly examine the Cray-NEC controversy it is important to understand both the substantive law affecting the antidumping claim as well as the administrative aspects, which were attacked in the appeals. While judgment in this matter may deal specifically with the administrative issues, the underlying legal concerns provided by international law provide the context, without which there would be no dispute.

5.1 Antidumping under International Law

The key piece of international law is the General Agreement on Tariffs and Trade 1994 ("GATT"), where dumping is essentially defined as the sale of products to an export market at a price below that charged for comparable goods in the exporter's home market. It is important to stress here that GATT does not prohibit such conduct, even when it is found to be injurious to the competing domestic market of the importer. However, Article VI of GATT allows Contracting Parties of GATT (now referred to as "Members"), as an exception to other GATT imposed obligations, the right to unilaterally apply antidumping measures such as counter-veiling duties to curtail such dumping, and to create a level playing field for world trade. Antidumping measures can only be applied in the circumstances outlined by GATT and pursuant to investigations conducted in accordance with GATT as required by Article I.

The GATT antidumping requirements were long considered deficient on account of vagueness, which led to the implementation of an Agreement on Implementation of Article VI of GATT ("Antidumping Agreement")[16], from where the key provisions may be drawn.

The effect is that a failure to adhere to the requirements of the Antidumping Agreement may lead to the conduct being placed in dispute and ultimately an invalidation of the antidumping measure.

As the Antidumping Agreement is substantial and comprehensive, this paper can only provide a brief overview. Nevertheless, it is important to consider the gambit of the obligations because it is under the treaty that the common rules have been established from an international business law (not to mention a public international legal) perspective.

(a) Substantive Rules[17]

Article 1 of the Antidumping Agreement establishes that in order to impose counterveiling duties, the Member must have undertaken an investigation conforming to the provisions of the agreement, and must have found that the following elements were present:

(i) dumped imports

Article 2 contains the substantive rules for the determination of dumping, which is to be calculated on a fair comparison basis between normal value (regular price of the import in the ordinary course of trade in the country of origin) and the export price (price in the country of import).

Article 2 also includes guidelines as to how this comparison is to be made fairly.

In various cases such as *Micron Technology Inc v United States (2001)*[18], the grounds of such comparisons have since been refined. In the *Micron* case a Korean company selling dynamic random access memory semiconductors (DRAMS)[19] was allegedly selling at less than fair

value. Micron, which initiated a review of the order five years after the determination, was unsatisfied by the de minimis finding and appealed Commerce' decision. Micron argued that selling expenses for example were to be deducted prior to conducting the trade comparison.[20]

It is noteworthy that courts have alluded to ambiguity within legislation, which is also mirrored in extensive and competing theories as to how price comparison should be constructed based on the varying degrees of comparability.[21] For technology products, comparison is often very difficult and legislation is not always designed to cope with the intricacies of more sophisticated sectors.

(ii) material injury (to a domestic industry)

Article 3 discusses material injury caused by dumping, which is defined as:

- material injury itself;
- threat of material injury; and/or
- material retardation of the establishment of a domestic industry.

(iii) to a domestic industry

Article 4 defines domestic industry, which for the purposes of the assessment of injury and causation means producers of a 'like product', explained in Article 2.6 to mean identical to, or in the absence of such a product, one that has characteristics closely resembling those of the imported and allegedly dumped product under consideration.

(iv) (and) a causal link between the two.

Article 3 also states that the investigation into the material injury must be done objectively in reliance upon positive evidence of the volume and price affects of dumped imports and the consequent impact on the domestic industry.

Article 3 also contains provisions describing the factors to be considered, without specifying a determinative hierarchy between the factors.

It is interesting that in *Taiwan Semiconductor Industry Association v International Trade Commission (2001)* [22], the court undertook a thorough review of market conditions to really assess the extent of injury, in contrast to pre-existing jurisprudence, which said that the threshold of the material injury factor was that the injury caused was no less than the other contributing factors. However, in this case it was discussed as harm which is not inconsequential, immaterial, or unimportant.

In *Taiwan Semiconductor*, in assessing whether the importation of static random access memory semiconductors (SRAMS) from Taiwan had been dumped such that antidumping measures were applicable, the court paid specific attention to the following factors of:

- oversupply due to incorrect forecasts that overestimated future growth;
- competition from a growing volume of non-subject imports; and
- 'learning curve' affects.

In *Taiwan Semiconductor*, the court criticised the ITC for not considering these factors in conjunction with the alleged injury caused by the dumping and queried whether the causation standard had been properly applied.

This case, like the *Micron* case, was effectively an examination under municipal law. However, in addition to the US claims that their laws were technically consistent with GATT and the relevant agreements, it is also significant as it demonstrates the practical application of conformity to the international law.

Article 3.3, a significant new provision, establishes conditions for cumulative evaluation of the affects of dumped imports for more than one country to be undertaken, in which case the investigation would be required to demonstrate that the volume of imports from each country is significant – and not negligible or de minimis, as well as showing that the cumulative assessment was appropriate amongst the various imports and the domestic product.

(b) Procedural Requirements

(i) Investigations

Article 5 of the Antidumping Agreement covers investigations, specifying that they should be at the written request of a domestic industry, with percentages delimiting the extent of support and opposition respectively required and permissible for an investigation to proceed.

Evidentiary requirements are explained in Article 5 and these requirements are particularly relevant when investigations are initiated without industry request.

Article 5.8 provides for immediate termination if it is found that the margin is de minimis (as defined), and Article 5.10 limits the duration of any investigation to 1 year and in no case more than 1.5 years.

Article 6 discusses the investigation process, the collection of evidence and sampling techniques as well as the rights of parties to partake actively in the investigation.

(ii) Provisional Measures

Article 7 enables authorities to apply provisional antidumping measures based on a preliminary affirmative determination of the elements required. Such measures can only be applied 60 days after the initiation of the investigation.

(iii) Price Undertakings

Under Article 8, an investigation may be settled by way of an

undertaking with respect to price revision or otherwise cessation of export at the dumped price, but only after a preliminary affirmative determination is finalised.

The undertaking must be voluntary and the exporter may request that the investigation continue after settlement has been reached, in which case, a finding of no dumping will cause the undertaking to automatically lapse.

(iv) Imposition and Collection of Duties

The ultimate imposition of duties must be based on actual material injury as opposed to a mere threat thereof.

Even if all the elements required for antidumping measures are established, the counter-veiling duty option remains strictly optional, and if applied, the Agreement leans towards a lesser duty principle under Article 9.

This principle says that the duty imposed should not be equal to the dumping margin but merely large enough to stop the dumping from being injurious. The underlying intention here is that antidumping provisions are not about punishment but about ensuring that the market is fair.

Article 10 requires that counterveiling duties only be imposed from the date of determination of all elements of the dumping claim.

However, in limited instances, where the exporter knowingly could have avoided the imposition of a duty, for example while aware of an ongoing investigation, duties may be applied retroactively. This option is limited by Article 10.6, which does not allow retroactive application to more than 90 days prior to the application of provision duties.

(v) Duration, termination and review of measures

Pursuant to Article 11, duration of the outcome of an investigation is limited and periodic reviews must occur with respect to duties as well as provisional measures and undertakings. The standard **sunset** required is 5 years, and the need to impose a duty may be reviewed upon inquiry by an interested third party.

(vi) Public Notice

Article 12 of the Antidumping Agreement sets out the requirements for public notice by investigating authorities at all stages.

Notice must include non-confidential information regarding:

- Parties;
- Product;
- Margins of dumping;
- Facts revealed during investigation;
- Reasons for determinations; and
- Reasons of acceptance and rejection of arguments and/or claims of parties.

In addition to transparency, the notice guidelines are also designed to ensure that determinations are based on solid facts and reasoning.

(c) Committee and Dispute Settlement

Articles 16 & 17 discuss the Committee on Antidumping Practices ("Committee"), the dispute provisions and the factual and legal deference to national authorities.

The World Trade Organisation ("WTO"), under the auspices of its dispute body in claim WT/DS99/1 formed on a complaint from Korea against the USA with respect to antidumping measures against DRAMS of one Megabit or above. Commerce refused to cancel the measures taken, despite South Korea's allegation that South Korean DRAMS producers have not dumped product for over three and half years and evidence that no more dumping will occur.

The panel established in order to review the complaint and subsequently the WTO Dispute Settlement Body found that the US antidumping measures were, in this case, contravening Article 11.2 of the Antidumping Agreement.

This particular case posed an interesting challenge of US antidumping law by Korea and is worth reviewing to better understand the international public law aspect.

(d) Final Provisions

Article 18.3 establishes the date of the Antidumping Agreement, giving the agreement prospective effect. Article 18.4 requires that Members align their national laws with the Antidumping Agreement and Article 18.5 requires that the Members notify the Committee of their national laws in relation to antidumping.[23]

This matter has now become highly contentious and the US is currently facing criticism through the WTO's Dispute Settlement Body. Claim 217 sets out the allegations against the USA, and the claim is supported by a large number of Members (including Australia). Under the leadership of US Trade Representative Robert Zoellick[24], the US has also been strategising intensely[25] as to how to manage pressure in future rounds of multilateral trade negotiations from 142 countries, which are all asking that the US drop its protectionist measures.

Particularly controversial has been the Byrd Amendment passed in the US[26], the purpose of which includes distributing counter-veiling duties to the complainants in antidumping cases. This notion has been rejected outright by the international community as a doubly protectionist measure. This is an interesting issue considering the settlement discussed below with respect to the *Cray-NEC* case.

As is apparent from its content, the Antidumping Agreement did not conclude anti-circumvention rules.

5.2 Antidumping under Domestic Law

In accordance with Article 18.4 of the Antidumping Agreement, countries

have enacted legislation over time to conform to their obligations under the treaty. Local implementation is typically embodied in competition and antitrust law, or trade and tariff laws. These local laws will often carry the sanctions that international law permits, or in addition, prescribe criminal penalties and enable private suits.[27] Domestic laws may also afford greater constitutional protection and a more thorough judicial process.

6 NEC's appeal to the Court of International Trade

The municipal laws in the *Cray-NEC* case that were emphasised more than the principles enunciated in international law were the US laws on antidumping measures and anti-trust, and US constitutional and administrative laws. The US law applied to this particular case is certainly very loosely related to antidumping. However, the case still demonstrates the legal exposures from a municipal law perspective, while tackling an antidumping measure through court.

6.1 Domestic law

The US laws emphasised in the case on the issues identified in section 4 above were:

(a) Jurisdiction

Chapter 95 of Title 28 of the US Code containing the jurisdictional grant by Congress to the Court of International Trade.

(b) "Mootness"

The issue of mootness as a doctrine was discussed at length in *CCL Service Corp & Severn Companies v USA & Che Consulting*[28], where it was described as the 'case or controversy' requirement of Article III of the US Constitution. Essentially, the key ingredient to countering mootness is a live issue. It was also said in the *CCL* case that the burden of demonstrating mootness 'is a heavy one'.

While a moot case would not be justiciable, the Court in the NEC matter noted that being moot does not necessarily automatically flow from one party considering their concerns to be satisfied, because if there are any additional consequences for which the court may fashion a remedy then the matter remains justiciable.

In this case the prospective granting of relief against an antidumping order would be such a consequence.

(c) Procedural Fairness

The Court discussed the evolution of constitutional recognition of rights from a procedural perspective, noting that the trial court refrained from immersing itself in the depths of the jurisprudence.

The Court, following the lead of the trial court, affirmed the expectation of integrity and honesty from government agencies. However, taking the matter a step further, the Court queried whether this expectation was a mere presumption or a constitutionally protected liberty.

The right to an impartial decision maker was considered unquestionably a matter of due process. The Court noted that a practical approach here was required in the context of a 'modern administrative agency' to determine who qualified to be impartial.

The Court considered various approaches and ended up concluding that neither party was correct, and that the traditional approach of the court should prevail, asking whether the decision maker's mind was 'irrevocably closed' on a disputed issue. On the evidence here it was held otherwise.

(d) Constraints on Testimonial Evidence

The Court did not find the abuse of discretion argued by NEC, as written discoveries were permitted. With respect to the testimony of the specified government officials that was not permitted, it was held that it was appropriate not to allow it, as they should not have to testify with respect to their reasons for taking official action.

6.2 Conclusion of the Courts

The Court of International Trade upheld the trial court's ruling, however, the whole decision was based on very thin ice. Before its single line conclusion, the Court delivered a series of obiter statements that demonstrated its view that NEC's appeal was justified.

The most obvious statement was that had the decision maker been the same decision maker throughout the Antidumping Investigation and not switched at the last stage, then a prejudice argument could have been more persuasive. This recognised that NEC had grounds to at the very least feel aggrieved, having entered into the transaction most probably with expectations of winning based on most superior product and effective price.

The Court also noted that NEC decided to withhold information pending the nomination of an alternative decision maker, which left it subject to the exposure of a decision based on available information. In such instances a determination may be made on whatever information Commerce is able to gather as opposed to the most accurate or reliable information.

Furthermore, the Court recognised that Commerce's decision to intervene without a formal request of industry was not the desirable method. Nonetheless, it was within Commerce's rights.

7 Managing the Duty

Facing the highest duties ever known to the US legal system for an antidumping claim, NEC continued to deal in the US market as per its existing commercial agreements, while attempting to comply with the duty orders.

7.1 Additional antidumping conflict[29]

In October 1999, NEC brought a claim against Silicon Graphics Inc ("SGI") (which owned Cray for a limited time) and Commerce, appealing a determination by Commerce that refreshing equipment for a client based on a contract signed prior to the duty order was a breach of the duty order made in *Cray-NEC*. That duty order covered:

> *All vector supercomputers, whether new or used, and whether in assembled or*

unassembled form, as well as vector supercomputer spare parts, repair parts, upgrades, and system software, shipped to fulfil the requirements of a contract entered into on or after October 16, 1997, for the sale and, if included maintenance of a vector supercomputer.

NEC's claim focussed on whether duties were payable on a project to refresh a customer's supercomputer equipment in accordance with an agreement between NEC and its customer signed in 1996.

SGI argued strongly, with the support of Commerce, that the date of the contract equated to the date of the sale on the grounds that the terms of the sale were not ascertained until that point in time in the form of an exchange of letters in 1999. The court unequivocally ruled against the argument of the defendants (SGI and Commerce), giving the following reasons:

(a) The use of the word 'contract' in the duty order had to assume its natural meaning. It was unreasonable for Commerce to expect NEC to have to speculate with respect to the intentions of Commerce in the use of that word in the order. NEC was entitled to assume that it held its natural meaning. The court then analysed in brief the formation of a contractual option under the original supply agreement between NEC and its customer and concluded that the date of contract was indeed 1996.

(b) In response to the argument that Commerce was entitled to interpret the word 'contract' as per agency practice, the court held that the skewed interpretation was hardly an issue of agency expertise or practise but merely litigious strategy.

(c) Commerce stated that the issue of options was initially left open because Commerce had sought a safeguard to deal with this issue after the original determination. However, the court rejected this argument stating that companies deserved to be able to trade with greater certainty, and that while Commerce had reserved the right to fine-tune its determination, it could not take the liberty to alter or contradict the plain words of the original determination in its duty order.

Ultimately the court held that Commerce was unlawfully expanding its duty order and that therefore the supply of refreshed equipment by NEC fell outside the scope of the duty order against vector supercomputers.

7.2 Settlement with Cray

Faced with on-going scrutiny, political challenges and costly litigation, NEC accepted a settlement with Cray in February 2001[30]("Settlement"), which arrived as a surprise, considering the corporate duo's history of dispute.

(a) Basis of Settlement

The key points of the Settlement were as follows:[31]

- For ten years, Cray was to become NEC's exclusive distributor in North America of vector supercomputers for sales, installation and support from the Tokyo-based NEC Corp, and to be a non-exclusive distributor in the rest of the world except for France;
- NEC was to invest US$25 million in Cray;
- Cray was to issue NEC with US$3.125 million of nonvoting, preferred shares in Cray, convertible into Cray common stock at a fixed conversion price of US$8 per share; and
- Cray was to petition for a revocation of the Commerce order.

Commerce indeed revoked[32] the order stating that it had had no objections to Cray's petition.[33] It is also noteworthy that in 1999, only two months before NEC and Cray went to court, a separate agreement had been signed between NEC and (effectively) SGI for a marketing deal in Japan, allowing SGI to compete with NEC with NEC's own product range.[34] It is curious that this was not seen by Commerce as an unequivocal gesture of pro-competitive corporate policy on behalf of NEC.

In contrast, the 'joint marketing' deal with Cray, looking more like a soft merger did not appear to attract any attention from a competition review perspective. Cato Directors, consulted on this,[35] consider it an anomaly and John Wecker, Senior Economist of the US State Department's Japan Desk, suggested the entire matter 'from beginning to end was devoid of logic, as a result of the compartmentalised approach taken to the whole issue.'[36]

8 Unresolved issues for information technology and antidumping

Notwithstanding the resolution of the dispute, the following concerns are still unresolved. While these concerns are particularly relevant to the IT industry, they may be relevant to other industries as well.

8.1 Goods & Services

The key difficulty in this area stems from the fact that GATT and the Antidumping Agreement focus on products, which by consensus are considered goods and not services.[37]

Interestingly, however, both in the *Cray-NEC* case, focussing on a hardware leasing and support agreement, and in the *CCL* case, which dealt with computer maintenance service contracts, the issue of services as opposed to goods received no attention at all, even though the goods were not sold, but rather provided under a service offering.

In an attempt to address the issue of trade in services, poorly distinguished under international law from goods[38], another agreement known as the General Agreement on Trade in Services 1995 (GATS[39]) has been concluded.

The key features of this agreement are that it:[40]

(a) recognises globalisation of new communication technologies;

(b) creates and defines modes of supply to include:

(i) cross border supply;

(ii) consumption abroad;

(iii) commercial presence; and

(iv) presence of natural persons;

(c) grants all members "most favoured nation" status and ensures that no service providers will be the subject of treatment less favourable in terms of competition than the same member's own service industry;

(d) implies that policy exemptions will not be on protectionist grounds; and

(e) acknowledges the importance of the telecommunications sector with respect to free access.[41]

This is an important development. While very little literature exists on its implications other than WTO explanation sheets, it seems to imply that the services equivalent of dumping claims will have to be brought on conditions no less favourable than a local "dumping" claim. It is unclear why such an argument was not raised by NEC.[42]

The relevance of this issue is that with IT deliverables, it is often difficult to separate services and product aspects of an offering.

For example, the procurement of an IT system may be done as an outright purchase, which is often the case when the customer has the capability to fully manage the system internally and when it accords with their accounting and financial strategies, or the deliverable may be acquired by way of subscription, which would be effected by a recurring charge for the benefit of installation and managed access to the system, generally backed by support and maintenance. At the end of the subscription the system is decommissioned, transferred off-site and the lease or rental is concluded.

While the latter option is also notionally akin to the procurement of a product, it is done by way of service, as no ownership in any aspect of the system is at any time transferred to the client. Many services may be provided remotely, so that not even possession is involved. However, from a competition perspective, the supply and procurement may very well have equally injurious, or beneficial implications with respect to the market, despite no sale having occurred.

8.2 Threat or Opportunity

The threat of antidumping measures can no longer be ignored. Not just because of the risks involved in a claim, but also because Cray has clearly demonstrated that dumping claim strategies can yield major contracts, foreign investment and market share, without any legitimate productive effort.

Larger IT companies dealing internationally, particularly those from emerging economies, should recognise the exposure involved and plan to either safeguard themselves or attack.[43]

8.3 Dealing with the invisible partner called Government

Throughout the *Cray-NEC* case the US Government took a very active role. This was partly the result of the following:[44]

- The investigating authority was itself another Government agency;
- More covert or indirectly protectionist methods were already in place, such as subsidies, grants and tax breaks;
- Cray lobbied politicians to initiate the preliminary review;
- The US Government maintains policies and the parliament legislates generally in support of those policies;
- The diplomatic front, divorced from the court proceedings included multilateral negotiations, trade sanctions and other larger pressures pushing the conflict in-line with national foreign trade strategies;
- The NSF senior executives were under threat of a proposed bill to suspend their salaries if they approved the funding of the NEC supercomputers; and
- As described by the courts a fundamental presumption of honesty and integrity applied with respect to government officials.

Dealing with this invisible party, who claims that its decision makers are totally impartial is virtually impossible. Antidumping laws to date have attempted to ensure transparency of the proceedings. However, as transparent as they may be this uninvited party will probably always have a significant role to play.

8.4 Zero Cost Production

There are many products in the IT industry that cost close to nothing in terms of production. These products are generally primarily intellectual property based, and once research and development costs are amortised and licences depreciated, the vendor is left with a pure money machine that requires virtually no maintenance.

Nevertheless, due to volumes and pure bargaining power, it may very well be the case that exported licences become cheaper than locally issued licenses. It is unclear what the nature of the exposure would be to a vendor exporting software products under such circumstances.

8.5 Global Deals

In IT, many of the vendors are global or multinational companies, which often contract with other top-tier service providers creating worldwide deals for product offerings or collaboration, as the case may be.

As part of a global negotiation, often the result may be a discounted deal for the purchaser who runs the risk of then on-selling products at a cheaper rate than in the exporter's home market and becoming exposed to dumping claims.

Even more common are teaming arrangements or alliances, whereby products are provided for free, internationally, for either a global revenue percentage or other benefits. In some cases this may result in the on-provision of the products for free to other markets, risking dumping claims.

8.6 Confidentiality

As part of the notification procedures attached to dumping investigations, all non-confidential materials that pertain to the findings may be disclosed.

As in the case of *Cray–NEC* where confidential materials were not only disclosed, but also leaked to a trade publication and shared with direct competition, the risks of confidentiality violations and the erosion of trade secrets are enormous.

On the other hand, refusal to cooperate with the investigation leaves the authority free to use the material available even if it is not possibly accurate let alone complete.

It appears that the risks are quite substantial either way.

9 Circumvention and Management

Circumvention has not been the subject of international consensus. It appears that, in many ways, the manner in which a municipal court will treat an act of circumvention will depend on local legislation.

If the offender's actions are sanctioned by international trade law, the offender may then attempt to appeal the municipal court's findings through the available avenues.

9.1 Planning

As has been apparent from the larger claims in the US, dealing with the issue up-front in tender documentation can be beneficial, somewhat like Foreign Investment Review Board concerns are treated in Australia.

Such an exercise may indeed be worthwhile, as it would lead to verification of cost models and possible identification of overlooked cost sources, as well as the benefit of due consideration and appropriate drafting to protect the vendor from the exposure of a claim. It may even be possible, if the risk is jointly identified, to share ensuing liabilities between the vendor and customer on a pre-apportioned basis.

If the risk is on-going, it may even be possible to set-up longer term and more elaborate contingency plans. For example, alternative agency agreements for supply through third parties subject to lower or no duties.

9.2 Claim Management

NEC and Cray fought viciously and the process was lengthy and presumably expensive. During the course of the conflict, both companies were exposed to adverse press and ultimately NEC was extracted from the market.

Perhaps a better-planned approach supported by a well-equipped team, may have had greater success.

9.3 Repackaging or altering Product Mix

There are many ways to change the classification of a product to cause it to fall outside the scope of a counter-veiling duty order. As cases have shown, inserting an additional step requiring local completion in the importing market may suffice. Or in the case of many technology deliverables, swaying the packaging of the deliverable to greater resemble a service.

This may be accepted particularly well if it involves financial investment in that market.

At some stage, NEC considered offering computing services over the internet to UCAR, however, for unidentified reasons this did not eventuate, possibly bandwidth constraints.

10 Conclusion

Antidumping is a wild card. The body of international law on this topic is still fraught with ambiguity and the more it is used as a stop gap to replace tariffs, the less certainty there is. In stark contrast, the IT industry revolves around service performance level assurances and accountability.

While neither environment developed with the other in mind, the *Cray-NEC* case demonstrates clearly that when the two clash, the result is a long and painful conflict.

It is easy to get emotional about antidumping. The notion of defending local markets is highly applicable to nationalistic calls of patriotism and 'buy home grown'. However, it is also easy to disapprove of the actions of those who benefit from the reactionary system at the expense of free-trade champions.

Having reviewed the development of the doctrine, its relationship with the traditionally public international law naive IT industry and the outcome of a full-cycle dispute, it is difficult not to be impressed by the legal and strategic prowess shown by Cray, which managed to turn a simple competition law claim into a global spring-board for the reinvention of the company.

Nevertheless, in an IT environment of competitive optimisation, where failing companies are entering liquidation or being acquired and strong companies are regrouping, it is also important to consider the potential reduction of competition, and consequently the heightened sensitivity associated with dumping claims.

So next time a client or the company you work for, sends you a contract to review and you hear the self pitying statement "oh, we won't be making any money on this one..." you may want to question that statement twice in light of the above discussion.

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