Date: 20080522

Docket: A-310-07

Citation: 2008 FCA 187

CORAM: **LÉTOURNEAU J.A.**
SEXTON J.A.
RYER J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

NORTHROP GRUMMAN OVERSEAS SERVICES CORPORATION and LOCKHEED MARTIN CORPORATION

Respondents

Heard at Ottawa, Ontario, on February 5, 2008.

Judgment delivered at Ottawa, Ontario, on May 22, 2008.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: SEXTON J.A.

DISSENTING REASONS BY: LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT

RYER J.A.

INTRODUCTION

[1] This is an application for judicial review of a decision of the Canadian International Trade Tribunal ("the CITT") (File No. PR 2007-08), upholding, in part, a complaint of an alleged breach of Article 506(6) of the Agreement on Internal Trade (the "AIT") made by Northrop Grumman Overseas Corporation ("Northrop Overseas"), pursuant to subsection 30.11(1) of the *Canadian International Trade Act*, R.S.C. 1985 (4th Supp.), c. 47 (the "Act") and the applicable provisions of

the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602 (the "Regulations"). The complaint relates to a Department of National Defence ("DND") requisitioned procurement that was issued by the Department of Public Works and Government Services Canada ("PWGSC") under a request for proposal under Solicitation No. W8475-02BA1/C and File No. 230bb.W8475-02BA1 (the "RFP"). Unless otherwise indicated, all references to an Article in these reasons shall be to the corresponding provision of the AIT.

[2] The application before this Court deals only with the issue of whether the CITT had jurisdiction to hear the complaint.

[3] PWGSC contends that Northrop Overseas has no standing to make the complaint because Northrop Overseas is not a Canadian supplier, within the meaning of Article 518 (a "Canadian supplier"). As a result, PWGSC argues that the CITT has no jurisdiction to hear the complaint. In response, Northrop Overseas submits that Canadian supplier status is not a precondition to the jurisdiction of the CITT to hear a complaint with respect to an alleged breach of the AIT. In any event, Northrop Overseas contends that it does have the status of a Canadian supplier.

BACKGROUND

[4] Northrop Grumman Corporation ("Northrop Parent") is a U.S. corporation, incorporated in the State of Delaware. It provides a wide range of services, including information and technology services, electronics, aerospace systems and marine systems. It operates through a number of divisions and related corporate entities.

[5] Northrop Overseas is a Delaware incorporated corporation that is a wholly-owned subsidiary of Northrop Parent.

[6] Northrop Grumman Canada (2004) Inc. ("Northrop Canada") is a Canadian incorporated corporation that is a subsidiary of Northrop Parent and a sister corporation to Northrop Overseas. Northrop Canada also operates, when appropriate, as a Canadian business for the delivery of products and services in co-ordination with Northrop Overseas. In relation to Contract W8482-071072/001/QC, dated December 20, 2006, between PWGSC and Northrop Overseas, Northrop Canada and Northrop Overseas entered into an agreement which provided that marine navigation equipment, the subject of that contract, could be delivered to the Government of Canada through the auspices of Northrop Canada. The record before the Court does not contain any reference to any similar type of agreement between Northrop Overseas and Northrop Canada in relation to the provision of the goods and services that are the subject of the RFP.

[7] The procurement described in the RFP was for 36 Advanced Multi-role Infrared Sensor (AMIRS) targeting pods, including spares, equipment and training for use with the Canadian Forces fleet of CF-18 aircraft.

[8] In response to the RFP, bids were submitted by Northrop Overseas, Lockheed Martin Corporation ("Lockheed") and Raytheon Corporation ("Raytheon").

[9] PWGSC awarded the contract to Lockheed on March 22, 2007. Under the contract, Lockheed is to be paid US$89,487,521 for the AMIRS targeting pods and US$50,357,649 in respect of in-service support.

[10] On April 17, 2007, Northrop Overseas filed a complaint with the CITT stating that PWGSC had failed to evaluate the bids in accordance with the evaluation plan (the “Evaluation Plan”) included in the RFP. Consequently, Northrop Overseas alleged that PWGSC had violated Article 506(6).

[11] On April 25, 2007, the CITT notified PWGSC and Northrop Overseas that the complaint had been accepted for inquiry in accordance with subsection 30.13(1) of the Act and subsection 7(1) of the Regulations. However, prior to hearing the merits of the complaint, the CITT requested PWGSC to provide its position with respect to whether Northrop Overseas has standing to make the complaint.

[12] In response to the CITT’s notification, on May 2, 2007, PWGSC applied to the CITT for an order dismissing the complaint on the basis that Northrop Overseas does not have standing to file a complaint in respect of an alleged breach of a provision of the AIT because Northrop Overseas is not a Canadian supplier. In that correspondence, PWGSC noted that the Letter of Interest that it published on MERX, an electronic-tendering service, referred to the AIT but not to either of the other two trade agreements in relation to which the CITT has jurisdiction to hear complaints, namely, NAFTA and the Agreement on Government Procurement, as defined in section 2 of the

Regulations. In particular, at page 2 of that correspondence, PWGSC explained why NAFTA and the Agreement on Government Procurement were specifically inapplicable to the procurement embodied in the RFP, stating:

> 2. This requirement [the RFP] falls under Federal Supply Classification (FSC) Group 12, Fire Control Equipment, subcategory 1230 – "Fire Control Systems" and is subject to the Agreement on Internal Trade (AIT). Pursuant to paragraph 2 of the North American Free Trade Agreement (NAFTA) Annex 1001.1b-1, Section A, for procurement on behalf of DND, only the goods listed in Section B of the Annex are included in coverage. Also, pursuant to paragraph 1 of the Notes under NAFTA Annex 1001.1b-2, all services, with reference to goods purchased by DND that are not identified as subject to coverage under Annex 1001.1b-1, are also excluded from coverage. FSC Group 12 is not included under NAFTA Annex 1001.1b-1, Section B. Consequently, this requirement is excluded from coverage under the NAFTA. A similar exclusion applies under the World Trade Organization Agreement on Government Procurement, Canada Index. It is also noted that as the requirement is for armaments, it is also subject to the International Trade in Arms Regulations (ITARs).

Thus, this correspondence postulates that the goods and services contemplated in the RFP were specifically excluded from the scope of NAFTA and the Agreement on Government Procurement but were not excluded from the scope of the AIT. However, as will be seen later in these reasons, this correspondence does not indicate that all of the entities that submitted bids pursuant to the RFP would, by virtue of having submitted bids, necessarily have the requisite standing to file complaints in respect of alleged breaches of the provisions of Chapter Five of the AIT. Moreover, a review of the RFP that was included in the record reveals that the RFP, itself, makes no reference to the AIT.

THE DECISION OF THE CITT

[13] The CITT granted Lockheed and Raytheon intervener status in the proceedings, which dealt with both the jurisdictional issue and the merits of the complaint.

[14] On June 8, 2007, the CITT held that it had jurisdiction to conduct an inquiry with respect to the complaint. In its reasons for this decision, which were issued on September 12, 2007, the CITT stated that its jurisdiction to hear procurement complaints is based upon the provisions of sections 30.1 to 30.19 of the Act. These provisions create a dispute resolution mechanism in respect of the procurement provisions of trade agreements, including the AIT. The CITT referred specifically to subsection 30.11(1) of the Act, which reads as follows:

30.11(1) Subject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.	30.11(1) Tout fournisseur potentiel peut, sous réserve des règlements, déposer une plainte auprès du Tribunal concernant la procédure des marchés publics suivie relativement à un contrat spécifique et lui demander d'enquêter sur cette plainte.

[15] The CITT held that the term "potential supplier" identifies the person who has standing to initiate a complaint under subsection 30.11(1) of the Act and that the term "designated contract" identifies the subject matter of the complaint. Those definitions, in section 30.1 of the Act, were reproduced by the CITT and read as follows:

"potential supplier" means, subject to any regulations made under paragraph 40(*f*.1), a bidder or prospective bidder on a designated contract.	«fournisseur potentiel » Sous réserve des règlements pris en vertu de l'alinéa 40*f*.1), tout soumissionnaire — même potentiel — d'un contrat spécifique.
"designated contract" means a contract for the supply of goods or services that has been or is	«contrat spécifique » Contrat relatif à un marché de fournitures ou services qui a

proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations	été accordé par une institution fédérale — ou pourrait l'être — , et qui soit est précisé par règlement, soit fait partie d'une catégorie réglementaire.

[16] The CITT stated that subsections 3(1) and 7(1) of the Regulations set more precise parameters for the exercise of the CITT's jurisdiction to hear procurement complaints. The CITT referred to subsection 3(1) of the Regulations and reproduced it, in a partially redacted form, to reflect the inapplicability of NAFTA and the Agreement on Government Procurement, as follows:

3(1) For the purposes of the definition "designated contract" in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in … Article 502 of the Agreement on Internal Trade, … is a designated contract…	3(1) Pour l'application de la définition de «contrat spécifique» à l'article 30.1 de la Loi, est un contrat spécifique tout contrat relatif à un marché de fournitures ou services ou de toute combinaison de ceux-ci, accordé par une institution fédérale — ou qui pourrait l'être — et visé, … à l'article 502 de l'Accord sur le commerce intérieur…

[17] The CITT noted the reference in subsection 3(1) of the Regulations to Article 502 but did not reproduce that Article. Instead, at paragraph 19 of its reasons, the CITT stated:

> 19. Article 502 of the *AIT* essentially limits the coverage of the procurement chapter of the *AIT* to procurement over specified dollar values and excludes certain procuring entities from coverage.

As will be seen later in these reasons, the CITT failed to consider an important component of Article 502. The relevant portion of that provision is as follows:

Article 502: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to procurement within Canada by any of its entities listed in Annex 502.1A, where the procurement value is:

(a) $25,000 or greater, in cases where the largest portion of the procurement is for goods;

[Emphasis added.]

The decision of the CITT discloses no indication that the CITT considered the underlined portion of that Article.

[18] The CITT stated that subsection 7(1) of the Regulations further delineates the jurisdiction of the CITT by specifying three conditions that must be met before a complaint can be accepted. The CITT reproduced subsection 7(1) of the Regulations, which reads as follows:

7(1) The Tribunal shall, within five working days after the day on which a complaint is filed, determine whether the following conditions are met in respect of the complaint:	7(1) Dans les cinq jours ouvrables suivant la date du dépôt d'une plainte, le Tribunal détermine si les conditions suivantes sont remplies :
(*a*) the complainant is a potential supplier; (*b*) the complaint is in respect of a designated contract; and (*c*) the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been carried out in accordance with … Chapter	*a*) le plaignant est un fournisseur potentiel; *b*) la plainte porte sur un contrat spécifique; *c*) les renseignements fournis par le plaignant et les autres renseignements examinés par le Tribunal relativement à la plainte démontrent, dans une mesure raisonnable, que la procédure du marché public n'a pas été suivie

Five of the Agreement on Internal Trade…	conformément … au chapitre cinq de l'Accord sur le commerce intérieur…

[19] The CITT held that because Northrop Overseas made a bid in response to the RFP and because the contract related to a procurement of the type contemplated by Article 502, there was a designated contract. It followed that the conditions in paragraphs 7(1)(*a*) and (*b*) of the Regulations had been satisfied. The CITT further held that nothing in the definition of "potential supplier" or "designated contract" imposes a nationality requirement on a complainant.

[20] As subsection 7(1)(*c*) of the Regulations requires a reasonable indication that there has been a violation of a provision of Chapter Five of the AIT, the CITT held that if the particular provision of that Chapter that has allegedly been violated imposed a nationality requirement on the complainant, the CITT would not have jurisdiction to hear the complaint, unless such a requirement had been met.

[21] The CITT rejected PWGSC's argument that, since the definition of designated contract in subsection 3(1) of the Regulations refers to a contract described in Article 502, the CITT only has jurisdiction to hear a complaint in respect of such a contract if it is made by a Canadian supplier, having regard to the stated purpose of Chapter Five of the AIT, in Article 501, and the overall context of the AIT itself, as evidenced by Article 101(3). In doing so, the CITT held that Articles 101(3) and 501 were not substantive provisions. In addition, the CITT held that nothing in those provisions expressly imposed the Canadian supplier limitation that was argued by PWGSC and that

the absence of such a limitation would not prevent the achievement of the stated goal, in Article 501, of equal access for all Canadian suppliers in procurements conducted by the parties to the AIT.

[22] The CITT observed that Article 504(6) indicates that the parties to the AIT did not intend to limit the rights resulting from Chapter Five of the AIT only to Canadian suppliers. The CITT reasoned that if Chapter Five of the AIT was intended to offer protection only to Canadian suppliers, rather than to all suppliers, there would be no need for Article 504(6), which provides circumstances in which a procuring party may limit tendering to Canadian goods and suppliers.

[23] The CITT concluded that the fact that the AIT provided definitions of both supplier and Canadian supplier served as an indication that each term was to be given a distinct meaning, with each being ascribed different treatment in a number of provisions in Chapter Five of the AIT, citing Sullivan and Driedger on the *Construction of Statutes* as authority for that conclusion. Accordingly, the CITT rejected the contention that both terms essentially meant Canadian suppliers.

[24] Ultimately, the CITT concluded that Article 506(6), the specific provision that was alleged to have been breached, did not contain anything that indicated that it was to be applicable only in respect of bids made by Canadian suppliers. That being the case, Northrop Overseas did not need to be a Canadian supplier in order for the CITT to have jurisdiction to hear its complaint that PWGSC had breached Article 506(6) in relation to the RFP. In so concluding, the CITT noted that its decision was contrary to its earlier decisions. The CITT cited five such inconsistent decisions and

observed that the submissions that it heard appeared to be more detailed than those that were made in the prior inconsistent decisions.

PROCEDURAL HISTORY

[25] After hearing this application on February 5, 2008, the Court issued a direction on February 26, 2008, requesting that the parties address the following question:

> If Northrop Overseas Grumman Overseas Corporation is not a Canadian supplier as defined in Article 518 of the AIT, can it be said that Article 101(1) of the AIT renders the AIT inapplicable to Northrop Overseas on the basis that a sale of goods by Northrop Overseas to the Department of National Defence could not constitute "trade within Canada"?

ISSUE

[26] The issue in this application is whether the CITT has jurisdiction to hear the complaint of Northrop Overseas that, in relation to the bid that it submitted in response to the RFP, there has been a breach of Article 506(6).

ANALYSIS

Standard of Review

[27] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada stated that a two step process is to be followed in determining the applicable standard of review in relation to the decision of a tribunal. At paragraph 62, Bastarache and LeBel JJ. stated:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where

> the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[28] In my view, the prior jurisprudence of this Court has satisfactorily determined that a determination of the jurisdiction of the CITT is a question of law in respect of which the standard of review is correctness (see *Canada (Attorney General v. Symtron Systems Inc.*, [1999] 2 F.C. 514 at paragraph 45 (C.A.), and *E.H. Industries Ltd. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 48 at paragraph 5).

Legislative Framework

[29] The Federal Government is a party to the AIT, NAFTA and the Agreement on Government Procurement. Each of these trade agreements obligates the Federal Government to establish an independent complaint procedure that can be utilized by complainants with the requisite standing who allege that Federal Government procurements have not been conducted in accordance with the applicable provisions of the trade agreement or agreements that relate to such procurements.

[30] Pursuant to the provisions of its enabling statute, the CITT is the body that undertakes this oversight. To this end, subsection 30.11(1) of the Act provides for the making of complaints to the CITT concerning Federal Government procurements under each of these trade agreements. The complainant must meet the definition of potential supplier, an actual or potential bidder on a designated contract, and the procurement in respect of which the complaint is made must relate to a designated contract. The designated contract requirement is the basis upon which the applicable trade agreement is determined.

[31] Subsection 30.11(1) of the Act also refers to the Regulations. Subsection 3(1) of the Regulations embellishes upon the definition of designated contract in the Act and provides the linkage between the complaint and the particular trade agreement. Subsection 7(1) of the Regulations precludes the CITT from hearing a complaint unless three conditions are present. The complaint must be made by a prospective bidder and must relate to a designated contract. In a sense, these two conditions merely repeat the corresponding requirements of subsection 30.11(1) of the Act. The third condition in paragraph 7(1)(*c*) of the Regulations obligates the CITT to determine, based upon the information that is available to it, that there is a reasonable indication that a procurement has not been conducted in accordance with the provisions of the applicable trade agreement. This requirement obligates a complainant to provide a reasonable indication that there has been a breach of a provision of one of the three trade agreements. To do so, the complainant must establish that the provisions of an agreement apply to both the subject matter of the procurement and the circumstances of that complainant.

[32] The procuring party is likely to specify the trade agreement or agreements that it believes to be applicable to the subject matter of the procurement, such as was done by PWGSC in the instant circumstances when it referred to the AIT in the Letter of Interest published on MERX. In some instances, the subject matter of the procurement may be within the scope of all three of the trade agreements. In those circumstances, can any aggrieved bidder claim a breach of the provisions of whichever of those trade agreements that such bidder may prefer? In my view, the answer is no. To enable itself to complain of a breach of a trade agreement and thereby obtain the benefits provided

under such agreement, the complainant must show not only that the subject matter of the procurement is contemplated by the particular agreement but also that the trading activities that would be undertaken by the complainant if it were the successful bidder in the procurement process are of the type that the parties to the particular trade agreement intended to include within the scope of that agreement. In my view, it is not enough for an aggrieved bidder to demonstrate that it has made a bid in response to a procurement in respect of which it was permitted to bid.

The AIT -- General

[33] It is common ground that neither NAFTA nor the Agreement on Government Procurement has application with respect to the procurement that was undertaken by the issuance of the RFP. These two agreements are inapplicable because the subject matter of the RFP is specifically excluded from the scope of those agreements. This was explained in the excerpt from the correspondence of PWGSC to the CITT that was reproduced in paragraph 12 of these reasons. Accordingly, the AIT is the only trade agreement that could be applicable in relation to the procurement under consideration.

[34] In relation to the interpretation of the provisions of the AIT, it is noteworthy that the AIT is an agreement – not a statute – that has been entered into, according to its Preamble, by the Government of Canada and its provinces and territories, for the purposes specified in those provisions.

[35] The website of the Internal Trade Secretariat (online: Agreement on Internal Trade <http://www.ait-aci.ca>), which administers the AIT, informs that the focus of the AIT is on the reduction of domestic trade barriers within eleven specific sectors: procurement, investment, labour mobility, consumer-related measures and standards, agricultural and food products, alcoholic beverages, natural resource processing, energy, communications, transportation and environmental protection.

[36] Chapter One of the AIT is entitled Operating Principles. In it, the parties stated their objective in entering into the AIT and a number of principles in relation to its intended operation. Two important provisions of Chapter One of the AIT are Articles 100 and 101, which read as follows:

> **Article 100: Objective**
>
> It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.
>
> **Article 101: Mutually Agreed Principles**
>
> 1. This Agreement applies to trade within Canada in accordance with the chapters of this Agreement.
>
> 2. This Agreement represents a reciprocally and mutually agreed balance of rights and obligations of the Parties.
>
> 3. In the application of this Agreement, the Parties shall be guided by the following principles:

(a) Parties will not establish new barriers to internal trade and will facilitate the cross-boundary movement of persons, goods, services and investments within Canada;

(b) Parties will treat persons, goods, services and investments equally, irrespective of where they originate in Canada;

(c) Parties will reconcile relevant standards and regulatory measures to provide for the free movement of persons, goods, services and investments within Canada; and

(d) Parties will ensure that their administrative policies operate to provide for the free movement of persons, goods, services and investments within Canada.

4. In applying the principles set out in paragraph 3, the Parties recognize:

(a) the need for full disclosure of information, legislation, regulations, policies and practices that have the potential to impede an open, efficient and stable domestic market;

(b) the need for exceptions and transition periods;

(c) the need for exceptions required to meet regional development objectives in Canada;

(d) the need for supporting administrative, dispute settlement and compliance mechanisms that are accessible, timely, credible and effective; and

(e) the need to take into account the importance of environmental objectives, consumer protection and labour standards.

[Emphasis added.]

[37] Article 100 states that the purpose of the AIT is the reduction and elimination, to the extent possible, of barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market, i.e. a market within Canada.

The stated purpose of the parties to the AIT is clearly relevant to the interpretation of the provisions of the AIT.

[38] Article 101(1) specifies that the AIT applies to trade within Canada in accordance with the Chapters of the AIT. In so specifying, Article 101(1) delineates the scope of the AIT, limiting its application to trade within Canada.

[39] The specific and limited focus of the AIT on domestic Canadian trade, as evidenced by Articles 100 and 101(1), is paralleled in Article 102(1)(a) of NAFTA, in which the specific and limited focus of that agreement on cross-border trade is evident. That provision reads as follows:

> **Article 102: Objectives**
>
> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
>
> (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;

[40] The interpretation of the provisions of the various Chapters of the AIT, including Chapter Five, entitled Procurement, is informed and circumscribed by the provisions of Chapter One of the AIT. Thus, having regard to Article 101(1), an activity that does not constitute trade within Canada will not be within the scope of the AIT. It follows, in my view, that a bidder must demonstrate that its prospective or actual trade activities in respect of a particular procurement constitute trade within Canada before that bidder will be entitled to claim any of the benefits of the AIT in relation

to such procurement. The numerous references in Article 101(3) to the phrase "within Canada" also reinforce the domestic flavour of the AIT.

The AIT - Procurements

[41] Chapter Five of the AIT deals with government procurements, one of the eleven specific sectors referred to above, in respect of which domestic trade barriers are to be reduced or eliminated. The purpose of Chapter Five is stated in Article 501, which reads as follows:

> **Article 501: Purpose**
>
> Consistent with the principles set out in Article 101(3) (Mutually Agreed Principles) and the statement of their application set out in Article 101(4), the purpose of this Chapter is <u>to establish a framework that will ensure equal access to procurement for all Canadian suppliers</u> in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency.
>
> [Emphasis added.]

[42] Article 502 deals with the scope and coverage of Chapter Five of the AIT. The relevant portions of that Article, which are short and bear repetition, are as follows:

> **Article 502: Scope and Coverage**
>
> 1. This Chapter applies to measures adopted or maintained by a Party relating to <u>procurement within Canada</u> by any of its entities listed in Annex 502.1A, where the procurement value is:
>
> (a) $25,000 or greater, in cases where the largest portion of the procurement is for goods;
>
> [Emphasis added.]

[43] In accordance with Article 502(1), before Chapter Five can be applicable, three conditions must be met. First, the procurement must have been undertaken by the Federal Government, a provincial Government or an entity listed in Annex 502.1A of the AIT. Secondly, the particular government entity must have been engaged in a procurement within Canada. Finally, the value of the procurement must meet or exceed specified monetary thresholds.

[44] Article 504 provides for reciprocal non-discrimination by the Parties to the AIT in respect of the goods and services and the suppliers of a particular province or region. Not all discrimination is prohibited. Articles 504(5) and (6) permit a Party to accord a preference for Canadian value-added and may limit its tendering to Canadian goods or suppliers in specifically described circumstances.

[45] Article 506 specifies a number of procedural rules that are to be applied in the conduct of procurements that are covered by Chapter Five, that is to say procurements that fall within the purview of Article 502, which applies to procurements within Canada.

[46] Articles 513 and 514 provide for bid protest procedures with respect to procurement complaints. Federal Government procurements are covered by Article 514. The CITT is mandated to consider complaints in relation to Federal Government procurements that are covered by Chapter Five of the AIT.

[47] Article 518 defines Canadian supplier and place of business as follows:

> Canadian supplier means a supplier that has a place of business in Canada

> place of business means an establishment where a supplier conducts activities on a permanent basis that is clearly identified by name and accessible during working hours.

The alleged breach of a Provision of Chapter Five of the AIT

[48] In the circumstances under consideration, Northrop Overseas has complained that in the procurement initiated by the RFP, PWGSC failed to evaluate the bids in accordance with the Evaluation Plan, and thereby committed a breach of Article 506(6). That provision reads as follows:

> **Article 506: Procedures for Procurement**
>
> (6) In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

The CITT's Jurisdiction to hear the Complaint

[49] As previously noted, subsection 30.11(1) permits a potential supplier, within the meaning of section 30.1 of the Act (a "potential supplier"), to file a complaint concerning any aspect of a procurement process that relates to a designated contract, within the meaning of section 30.1 of the Act and subsection 3(1) of the Regulations (a "designated contract"). To demonstrate that it has the status of a potential supplier, a complainant must show that it is an actual or prospective bidder on a designated contract. It is not enough to demonstrate that a bid will be, or has been, made in response to a government call for tenders. It must also be shown that the bid will be, or has been, made on a designated contract.

[50] The challenge facing Northrop Overseas, in my view, relates to the definition of designated contract. If Northrop Overseas cannot demonstrate that it bid on a designated contract, then it will not be a potential supplier since potential supplier is defined to mean a bidder or potential bidder on a designated contract. In the present circumstances, in order to fall within the definition of designated contract, the contract in question must be shown to be a "…contract…concerning a procurement of goods or services…as described in Article 502 of …" the AIT. To meet this requirement, Northrop Overseas must demonstrate that the contract that it seeks as a result of participating in the procurement process is, or would be, a contract described in Article 502. In my view, this means that a contract cannot be a designated contract unless it meets the three conditions that are described in Article 502(1). To reiterate, those conditions are as follows:

(a) the procurement must be undertaken by a government entity, that is to say the contract that is to be undertaken must have a government entity as one of its parties;

(b) the procurement must be within Canada; and

(c) the value of the subject matter of the procurement must exceed a minimum threshold.

[51] In the circumstances under consideration, I am of the view that the problem lies within the second of these three conditions. To meet that condition, the complainant must demonstrate that the contract that it would obtain, if it were the successful bidder in the procurement, is one that provides for a procurement within Canada. Otherwise, that contract cannot satisfy the portion of the definition of designated contract in subsection 3(1) of the Regulations that stipulates that the particular contract must be one described in Article 502.

[52] The Court requested submissions from the parties as to whether the supply of the goods and services contemplated by the RFP would constitute trade within Canada, as contemplated by Article 101(1). In response, Northrop Overseas contended that the more precise question is whether such a supply would constitute a procurement within Canada, as stipulated in Article 502(1). In my view, this more precise focus is useful. However, I am satisfied that “trade within Canada” is at least as broad a concept as “procurement within Canada”, and it is reasonable to conclude that, for the purposes of the circumstances under consideration, the only difference between the two phrases is that in the phrase used in Article 502(1) – procurement within Canada – one of the parties to the potential transaction is identified as a government or a government entity. Apart from that distinction, both phrases require that the particular activity (an activity that constitutes trade) must be “within Canada”. While “within” is not defined, in my view, it means “inside”.

[53] Thus, before a contract can be said to be one described in Article 502, and therefore, a designated contract, in my view, the potential complainant must demonstrate that, having regard to its particular circumstances, it has met the “within Canada” requirement. It will not be sufficient for a potential complainant to demonstrate that some other potential complainant has met the “within Canada” requirement so as to establish that in the circumstances of that other potential complainant, the designated contract requirement has been met.

[54] Northrop Overseas argues that this requirement is met because the goods and services contemplated by the RFP are to be delivered to DND inside Canada. In my view, this argument

cannot be accepted. Indeed, if it were, a government entity could avoid the application of the AIT simply by specifying a non-Canadian delivery point for the goods that it wishes to acquire.

[55] PWGSC and Lockheed argue that if the contract were to be awarded to Northrop Overseas, the fulfillment of that contract would entail a movement of the goods in question across the Canada-U.S. border, which would fail to meet the “within Canada” requirement. In my view, that assertion has merit and the resulting transaction would more properly constitute “international” trade, and not “internal” Canadian trade or trade inside Canada.

[56] The “within Canada” requirement in Articles 101(1) and 502(1) is consistent with one of the general objectives of the AIT stated in Article 100, (i.e. to reduce or eliminate, to the extent possible the free movement of persons, goods, services and investment within Canada) and with the stated purpose of Chapter Five of the AIT, in Article 501 (i.e. to establish a framework that will ensure equal access to procurement for all Canadian suppliers). In my view, that requirement contemplates that the parties to the trade or the procurement are situated within Canada to the extent necessary to effectuate the particular transaction inside Canada. Clearly, the governmental party to the contract is situated in Canada. It follows that the “within Canada” requirement will be met if the non-governmental party has a sufficient presence in Canada to enable it to effectuate its obligations under the procurement contract from inside Canada.

[57] In dissenting reasons, my colleague Létourneau J.A. has raised the issue of whether the phrase “marchés publics suivants, passés au Canada”, which appears in the French version of

Article 502(1), has a meaning that is different from the meaning that I have ascribed to the phrase "procurement within Canada" in the English version of Article 502(1), even though no argument to that effect was raised by any of the parties in this appeal and the record before the Court does not contain the French version of that provision. The English and French versions of Article 502(1) read as follows:

Article 502: Scope and Coverage	**Article 502 : Portée et champ d'application**
1. This Chapter applies to measures adopted or maintained by a Party relating to <u>procurement within Canada</u> by any of its entities listed in Annex 502.1A, where the procurement value is:	1. Le présent chapitre s'applique aux mesures adoptées ou maintenues par une Partie relativement aux <u>marchés publics suivants, passés au Canada</u> par une de ses entités énumérées à l'annexe 502.1A:
(a) $25,000 or greater, in cases where the largest portion of the procurement is for goods;	a) les marchés d'une valeur d'au moins 25 000 $ et portant principalement sur des produits:
[Emphasis added.]	[Je souligne.]

[58] As I have indicated, the English version of the phrase should be interpreted as having essentially the same meaning as the phrase "trade within Canada", as used in Article 101(1) and as I have interpreted above, with the exception that one of the parties to the trade activity – the procuring party – is a government entity. Since the existence of a potential difference between the English and French versions of Article 502(1) was not argued by any party in the appeal, I will not undertake a consideration of the issue of the existence, if any, of such a difference and impact of

any such demonstrated difference upon my interpretation of the phrases “procurement within Canada”, in Article 502(1), and “trade within Canada”, in Article 101(1).

[59] What then is the relationship between the requirements of the definition of Canadian supplier and the “within Canada” requirement in Articles 502(1) and 101(1), insofar as the non-governmental party to a procurement is concerned? Nothing in those Articles imposes any requirement that the goods that are the subject of the procurement must originate in Canada, although other provisions of Chapter Five of the AIT (such as Article 504(6)) can, in prescribed circumstances, operate to permit such a requirement. Imported goods are often contemplated by procuring governmental agencies. Indeed, Article 9 of the Model Acquisition Contract, which forms a part of the RFP (a CD Rom of which was a part of the record before the Court), indicates that the purchase price of the procured goods that are the subject of such contract will be inclusive of any import duties, as well as GST and other similar taxes.

[60] Moreover, the definition of Canadian supplier does not contain any nationality requirement in the sense of requiring any degree of ownership or control of the entity by Canadians. In this context, I note that Northrop Canada, as a wholly-owned subsidiary of Northrop Parent, would seemingly lack any degree of Canadian ownership or control, but any such deficiency in those respects would not be sufficient to establish the absence of Canadian supplier status on the part of Northrop Canada. Indeed, the contract between Northrop Canada and Northrop Overseas, which is described in paragraph 6 of these reasons, may have been an illustration of a type of arrangement

that could be put in place to ensure that participation in a government procurement was undertaken by a subsidiary of Northrop Parent that has the status of a Canadian supplier.

[61] The essential element of the definition of Canadian supplier is, in my view, a geographical requirement in respect of the business activities of the entity in question, namely, a place of business in Canada. This essential element is very similar to the concept of a "permanent establishment" as it is used in Canada's income tax legislation and treaties. That concept connotes a fixed place of business in the jurisdiction in question. To borrow that term from the income tax area, a Canadian supplier may be said to be an entity with a permanent establishment in Canada. Thus, both a Canadian incorporated corporation, which is wholly-owned by non-residents, and a Canadian *situs* branch operation of a non-resident corporation are within the contemplation of the definition of Canadian supplier. In both of these examples, the requirements of that definition will be met if the "permanent establishment" requirement can be established.

[62] In my view, an entity that wishes to establish that it meets the "within Canada" requirement in Articles 502(1) and 101(1) will have to basically demonstrate that it meets the same "permanent establishment" requirement that is the essence of the definition of Canadian supplier. Without such a "permanent establishment", it is difficult for me to conceive that the entity in question would be able to effectuate its obligations under the procurement contract inside Canada. Accordingly, for all practical purposes, the "within Canada" requirement in Article 502 will be met by any entity that meets the requirements of the definition of Canadian supplier. It follows that a contract described in

Article 502 must be one that has been, or will be, entered into between a governmental entity and an entity having the status of a Canadian supplier.

[63] It is apparent that Northrop Overseas may have been able to use an arrangement similar to that contemplated by the contract that is referred to in paragraph 6 of these reasons to bring its participation in the procurement process under consideration within the scope of the AIT, by having Northrop Canada as the bidder. Of course, Northrop Canada would have had to acquire the AMIRS targeting pods from Northrop Overseas so that those goods could thereafter be supplied to PWGSC by an entity with apparent Canadian supplier status.

[64] Northrop Overseas chose not to structure its affairs in this fashion on this occasion, as was its right. One possible reason for this decision may have been the potential exposure to Canadian income tax on any profit that Northrop Canada may have recognized on the sale of the goods in question if it had been the successful bidder. In contrast, under the direct bid approach that Northrop Overseas actually employed, any profit realized by Northrop Overseas from the sale of the goods, if it had been the successful bidder, may have been outside the reach of the Canadian income tax authorities. Of course, these hypothetical income tax motivations on the part of Northrop Overseas would be completely proper. However, one might speculate that by requiring a party to have a "permanent establishment" in Canada (which, in my view, would be the logical consequence of having Canadian supplier status) as a precondition to obtaining the benefits of the AIT, the parties to the AIT may have intended those benefits to come at the cost of an exposure to Canadian federal and provincial income tax as a result of being selected as the successful bidder on a Canadian

Federal or Provincial government procurement. Any entity with Canadian supplier status would have such an exposure.

[65] Northrop Overseas argues that because the procurement was open to all bidders and, according to Northrop, the Federal Government stated that the AIT was the applicable trade agreement, the provisions of the AIT must be available to all bidders who participate in the procurement. It should then follow, so the argument goes, that all bidders are entitled to complain to the CITT in respect of alleged breaches of the AIT. In my view, this argument is overly broad and cannot be accepted.

[66] The question of whether any or all of the three trade agreements is applicable to any particular bidder in respect of a procurement should be answered, in my view, by reference to the subject matter of the procurement and the circumstances of the bidder. The question cannot be answered solely from the perspective of the procuring party, since it will always be the Government of Canada or one of the provinces, or an entity under the control of such a government.

[67] The starting point would be to identify the subject matter of the procurement and to determine whether that subject matter is excluded from the ambit of any or all of the trade agreements. In the present circumstances, the items contemplated by the procurement – the AMIRS targeting pods and related services – are specifically excluded from the scope of NAFTA and the Agreement on Government Procurement, for the reasons previously mentioned. However,

nothing in the AIT specifically excludes those goods and services. Consistent with this determination, the Letter of Interest published on MERX refers only to the AIT and not to NAFTA and the Agreement on Government Procurement.

[68] In my view, that reference means nothing more than that of the three trade agreements, two of them are inapplicable and the third, the AIT, has potential application in relation to the subject matter of the procurement. That reference does not have the effect of a government concession or promise that the AIT will necessarily have application to all bidders.

[69] It is important to note that nowhere in the RFP is there any reference to the AIT, much less a promise that the provisions of the AIT will be extended by the Government of Canada to cover any entity that makes a bid in response to the RFP. The only reference to the AIT appears in the Letter of Interest, which also contains the following provision:

> The issuance of this LOI is not to be considered in any way as a commitment by the Government of Canada or as authority to companies to undertake any work which could be charged to Canada; nor is this LOI to be considered a commitment to issue RFPs or award a contract for the ***AMIRS*** project. [Emphasis added.]

[70] In my view, nothing in the Letter of Interest or the RFP can be construed as a promise or a commitment on the part of PWGSC or the Federal Government that the provisions of the AIT would extend to all entities who submit bids in relation to the procurement contemplated by the RFP. The reference to the AIT in the Letter of Interest, at most, can be taken as an indication that the goods and services that are the subject matter of the procurement are within the scope of the AIT, and not within the scope of the other two trade agreements. As previously indicated, an entity

that wishes to avail itself of the benefits of the provisions of the AIT must demonstrate that its circumstances are such as to bring it within the scope of the AIT. In the situation under consideration in this appeal, this would require that entity to demonstrate that it meets the "within Canada" requirements in Articles 101(1) and 502(1).

[71] This point may be illustrated if one assumes that a procurement relates to a type of goods that is within the ambit of all three of the trade agreements. In those circumstances, the Letter of Interest published on MERX would presumably list all three trade agreements as having potential application to this hypothetical procurement. If an unsuccessful bidder wishes to make a complaint, to which agreement does that bidder refer in its complaint? Surely, it cannot be said that simply because the goods in question are not excluded from the scope of any of those agreements, the potential complainant has a choice of which of the three agreements it can rely upon. If a prospective complainant's only place of business is in the United States and the goods in question would be shipped from that place of business to a Canadian point of delivery specified in the procurement, it seems clear to me that the procurement would be more properly construed as a cross-border movement of those goods and not a movement of them "within Canada". As such, the prospective complainant would be expected to refer to NAFTA to ascertain whether there was a breach of its provisions in relation to the procurement. To further illustrate the point, suppose one of the unsuccessful bidders in this hypothetical procurement was a Chinese corporation and the goods in question that it hoped to provide were to be manufactured in and shipped from China. Surely, it could not be the case that such an aggrieved Chinese bidder would be permitted to make a complaint based upon an alleged breach of NAFTA when neither that bidder nor its goods had

any connection with the United States or Mexico, simply because it was permitted to participate in the procurement process and the goods in question (i.e. the subject matter of the procurement) were within the scope of NAFTA.

[72] In my view, these illustrations demonstrate that the provisions of the three trade agreements are not applicable to an aggrieved participant in a procurement simply because that procurement is open to all bidders and because the subject matter of the procurement is not specifically excluded from the ambit of any of those agreements. Instead, the aggrieved bidder must demonstrate that its circumstances are such as to bring it within the scope of the particular trade agreement that it alleges to have been breached.

Article 504(6)

[73] Northrop Overseas argues that Article 504(6) would be “meaningless if the AIT ceases to apply to a procurement when a non-Canadian supplier bids on it". I do not agree.

[74] Article 504(6) is included in Article 504, which is entitled “Reciprocal Non-Discrimination”. That provision reads as follows:

> 504(6) Except as otherwise required to comply with international obligations, a Party may limit its tendering to Canadian goods or suppliers, subject to the following conditions:
>
> (a) the procuring Party must be satisfied that there is sufficient competition among Canadian suppliers;
>
> (b) all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable to determine Canadian content; and

> (c) the requirement for Canadian content must be no greater than necessary to qualify the procured goods as a Canadian good.

[75] In my view, the assertion that the AIT can be rendered inapplicable to a procurement simply because one bidder does not have the status of a Canadian supplier is misguided. The applicability of the AIT is to be determined both at the procurement level and at the level of each participant in it. Once it is determined that the subject matter of the procurement – the goods and/or services in issue – are not precluded from the application of the AIT, the particular circumstances of a bidder must then be considered.

[76] The fact that by meeting certain criteria specified in Article 504(6), a procuring party can limit its tendering to Canadian goods or suppliers does not, in any way, suggest that where such party does not choose to so restrict its tendering, those who would not otherwise be subject to the AIT, having regard to their particular circumstances, should suddenly become entitled to claim that they are subject to the AIT.

[77] While the correct interpretation of Article 504(6) is not obvious, the provision specifies that a procuring party may only limit its tendering to Canadian goods or suppliers in the limited circumstances described in paragraphs (6)(a), (b) and (c) of that Article. Thus, procurements that are open to both Canadian and non-Canadian suppliers may have been intended by the parties to be the norm. However, such an intention does not support an argument that the parties to the AIT must have also intended to provide non-Canadian suppliers with the rights that the AIT confers on those who have the status of Canadian suppliers. Instead, the intention to normally include non-Canadian

suppliers as bidders in procurements can reasonably be considered to be a means of limiting indirect discrimination by procuring parties.

[78] The issue of indirect discrimination may be illustrated by an example. Suppose that the government of province A wishes to tender for widgets and that there are two Canadian suppliers of widgets. Supplier One, a resident of province A, manufactures the widgets in that province, while Supplier Two, a resident of another province, imports its widgets. By specifying that the widgets that are to be procured must be Canadian goods, as contemplated by Article 504(6)(c), the government of province A would, in effect, ensure that its local bidder, Supplier One, would receive the contract. Thus, province A may have unfairly discriminated against Supplier Two. However, such a procurement would likely offend the condition in Article 504(6)(a), which requires that there must be a sufficient level of competition among Canadian suppliers. As a result, this hypothetical procurement would likely have to be open to non-Canadian suppliers, so as to ensure that there was sufficient competition to prevent Supplier One from being the beneficiary of discrimination from its provincial government. The requirement to include non-Canadian suppliers in these hypothetical circumstances illustrates that the intention of Article 504(6) is to prohibit procuring parties from engaging in indirect discrimination and not to confer the benefits of the AIT on non-Canadian suppliers.

Application

[79] In its reasons, the CITT correctly determined that a designated contract has to be a contract described in Article 502. However, in my view, the CITT erred in its interpretation of that Article by

failing to consider the “within Canada” requirement, which requires the circumstances of the particular bidder to be considered. The only consideration of Article 502 appears in paragraph 19 which states:

> 19. Article 502 of the *AIT* essentially limits the coverage of the procurement chapter of the *AIT* to procurement over specified dollar values and excludes certain procuring entities from coverage.

Clearly, that paragraph contains no analysis or discussion of the “within Canada” requirement. In my view, this error is a sufficient basis upon which to set aside the decision of the CITT.

[80] The CITT did not consider whether Northrop Overseas met the definition of Canadian supplier so that the “within Canada” requirement in Article 502(1) could be met and the record before us is, in my view, insufficient for such a determination to be made by this Court. Such a determination would be best undertaken by the CITT.

[81] In the event that the CITT should determine that Northrop Overseas does not meet the definition of Canadian supplier, Northrop Overseas would not be able to meet the “within Canada” requirement in Articles 502(1) and 101(1). Consequently, Northrop Overseas would not be able to demonstrate that, in its circumstances, the designated contract requirement is met. It would follow that Northrop Overseas would not meet the definition of potential supplier, since that definition contemplates an actual or prospective bid on a designated contract. As a result, the CITT would be without jurisdiction to hear Northrop Overseas’ complaint. While such a conclusion is premature, it is also noted that such a conclusion would not leave Northrop Overseas bereft of any potential

remedy. Indeed, Northrop Overseas has already commenced an application in the Federal Court for judicial review of the decision of PWGSC to award the contract under consideration to Lockheed.

[82] As pointed out by my colleague Létourneau J.A., the prospect of a procurement process giving rise to complaint proceedings before both the CITT and the Federal Court, by way of a judicial review, is unappealing. Duplicative proceedings are often inefficient and costly. However, nothing in the AIT, the Act or the Regulations indicates that all complaints in relation to procurements within the scope of the AIT must be brought before the CITT. Indeed, Northrop Overseas has proved that point by undertaking action before the Federal Court, as well as before the CITT.

[83] If the decision in this appeal were to be that Northrop Overseas has the ability to proceed with its complaint before the CITT, such a decision would not have the effect of denying the jurisdiction of the Federal Court to hear an application for judicial review. Thus, the prospect of inefficient and costly duplicative proceedings would still be with us, although in this case, Northrop Overseas would be free to choose which of the two procedures it wishes to follow. Nothing in such a decision would prevent an aggrieved Canadian supplier in a future procurement from commencing judicial review proceedings in respect of its complaint in relation to that procurement if, for some reason, that Canadian supplier chose to proceed in that fashion.

[84] It is apparent to me that a solution to the potential problem of duplicative proceedings lies elsewhere – with the parties to the AIT or possibly with Parliament. I would only observe that the

remedies available to a complainant, in respect of a procurement, who is obliged to proceed by way of judicial review are likely to be less comprehensive than those that are within the power of the CITT. Otherwise, one would assume that complainants would avail themselves of the judicial review option more frequently than appears to be the case. In my view, this underscores the potential benefits that a complainant, in respect of a procurement, may derive if it is able to bring itself under the provisions of Chapter Five of the AIT. However, as previously discussed, such a complainant must first be able to demonstrate that its activities in relation to the procurement are of the type contemplated by Article 502.

Conclusion

[85] The three trade agreements may be regarded as “doors” into the jurisdiction of the CITT. A potential complainant in respect of a procurement may pass through a “door” and thereby gain access to the CITT complaint procedure, by demonstrating that the subject matter of the procurement is within the scope of one of the trade agreements and that the activity contemplated by that potential complainant is covered by, or within the scope of, that agreement. In the present circumstances, the NAFTA and the Agreement on Government Procurement “doors” are closed because the subject matter of the procurement is specifically excluded from the scope of those agreements. The AIT, the only remaining “door”, will only be open to Northrop Overseas if it can demonstrate that it is a Canadian supplier that would be engaged in a procurement within Canada, as required by Article 502(1), if it were to be awarded the contract contemplated by the RFP.

DISPOSITION

[86] I would allow the application for judicial review, with costs payable by the respondent Northrop Overseas, set aside the decision of the CITT and refer the matter back to the CITT to determine whether Northrop Overseas is a Canadian supplier.

"C. Michael Ryer"
J.A.

"I agree
J. Edgar Sexton J.A."

<u>LÉTOURNEAU J.A.</u> (Dissenting)

[86] I have had the benefit of reading the reasons prepared by my colleague Ryer J.A. in which he accepts the submissions made by the Attorney General and Lockheed Martin Corporation (Lockheed). I think these submissions have the effect of amending the provisions conferring jurisdiction upon the Canadian International Trade Tribunal (Tribunal). In fact, they read in requirements and restrictions which do not appear in these provisions and were not intended to appear therein.

[87] The relevant provisions are article 502 of the *Agreement on Internal Trade* implemented by the *Agreement on Internal Trade Implementation Act*, S.C. 1996, c. 17, sections 30.1 and 30.11 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) (CITT Act) and subsection 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602 (CITTPI Regulations).

[88] These provisions read:

Article 502: Scope and Coverage	**Article 502 : Portée et champ d'application**
1. This Chapter applies to measures adopted or maintained by a Party relating to <u>procurement within Canada by any of its entities listed in Annex 502.1A</u>, where the procurement value is:	1. Le présent chapitre s'applique aux mesures adoptées ou maintenues par une Partie relativement <u>aux marchés publics suivants, passés au Canada par une de ses entités énumérées à l'annexe 502.1A</u> :
(a) $25,000 or greater, in cases where the largest portion of the procurement is for goods;	a) les marchés d'une valeur d'au moins 25 000 $ et portant principalement sur des produits :

(b) $100,000 or greater, in cases where the largest portion of the procurement is for services, except those services excluded by Annex 502.1B; or	b) les marchés d'une valeur d'au moins 100 000 $ et portant principalement sur des services, sauf ceux précisés à l'annexe 502.1B;
(c) $100,000 or greater, in the case of construction.	c) les marchés d'une valeur d'au moins 100 000 $ et portant sur des travaux de construction.
2. Subject to paragraphs 3 and 4 and Article 517(3), entities listed in Annexes 502.2A and 502.2B are excluded from this Chapter.	2. Sous réserve des paragraphes 3 et 4 et du paragraphe 517(3), les entités énumérées aux annexes 502.2A et 502.2B sont exclues du champ d'application du présent chapitre.
3. The entities listed in Annex 502.2B shall be free to pursue commercial procurement practices that may otherwise not comply with this Chapter. Nevertheless, the Parties shall not direct those entities to discriminate against the goods, services or suppliers of goods or services of any Party, including those related to construction.	3. Les entités énumérées à l'annexe 502.2B sont libres d'appliquer, en matière de marchés publics, des pratiques commerciales par ailleurs non conformes avec le présent chapitre. Néanmoins, les Parties ne peuvent ordonner à ces entités d'exercer de la discrimination à l'égard des produits, des services ou des fournisseurs de produits ou services d'une Partie, y compris en matière de travaux de construction.
4. The Provinces, pursuant to negotiations under Article 517(1), agree to extend coverage of this Chapter to municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities no later than June 30, 1996.	4. Au moyen des négociations prévues au paragraphe 517(1), les provinces conviennent d'étendre, au plus tard le 30 juin 1996, le champ d'application du présent chapitre aux municipalités, aux organismes municipaux, aux conseils et commissions scolaires ainsi qu'aux entités d'enseignement supérieur, de services de santé ou de services sociaux financés par l'État.
5. Each Party shall communicate any modification to its lists of entities set out in the Annexes to this Article to all other Parties in writing without delay.	5. Chaque Partie communique sans délai et par écrit à toutes les autres Parties les modifications apportées à ses listes d'entités figurant aux annexes du présent article.

[Emphasis added]

COMPLAINTS BY POTENTIAL SUPPLIERS

Definitions

30.1 In this section and in sections 30.11 to 30.19,

"complaint" «plainte »
"complaint" means a complaint filed with the Tribunal under subsection 30.11(1);

"designated contract" «contrat spécifique »
"designated contract" means a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations;

"government institution" «institution fédérale »
"government institution" means any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations;

"interested party" «intéressée »
"interested party" means a potential supplier or any person who has a material and direct interest in any matter that is the subject of a complaint;

"potential supplier" «fournisseur potentiel »
"potential supplier" means, subject to any regulations made under paragraph 40(f.1), a bidder or prospective bidder on a designated contract.

PLAINTES DES FOURNISSEURS POTENTIELS

Définitions

30.1 Les définitions qui suivent s'appliquent au présent article et aux articles 30.11 à 30.19.

«contrat spécifique » "designated contract"
«contrat spécifique » Contrat relatif à un marché de fournitures ou services qui a été accordé par une institution fédérale — ou pourrait l'être — , et qui soit est précisé par règlement, soit fait partie d'une catégorie réglementaire.

«fournisseur potentiel » "potential supplier"
«fournisseur potentiel » Sous réserve des règlements pris en vertu de l'alinéa 40f.1), tout soumissionnaire — même potentiel — d'un contrat spécifique.

«institution fédérale » "government institution"
«institution fédérale » Ministère ou département d'État fédéral, ainsi que tout autre organisme, désigné par règlement.

«intéressée » "interested party"
«intéressée » S'appliquant à « partie », le terme vise tout fournisseur potentiel ou toute personne ayant un intérêt économique direct dans l'affaire en cause dans une plainte.

«plainte »
"complaint"
«plainte » Plainte déposée auprès du Tribunal en vertu du paragraphe 30.11(1).

[Emphasis added]

Filing of complaint

30.11 (1) Subject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.

Dépôt des plaintes

30.11 (1) Tout fournisseur potentiel peut, sous réserve des règlements, déposer une plainte auprès du Tribunal concernant la procédure des marchés publics suivie relativement à un contrat spécifique et lui demander d'enquêter sur cette plainte.

Contents of complaint

(2) A complaint must

(*a*) be in writing;

(*b*) identify the complainant, the designated contract concerned and the government institution that awarded or proposed to award the contract;

(*c*) contain a clear and detailed statement of the substantive and factual grounds of the complaint;

(*d*) state the form of relief requested;

(*e*) set out the address of the complainant to which notices and other communications respecting the complaint may be sent;

(*f*) include all information and documents relevant to the complaint that are in the complainant's possession;

(*g*) be accompanied by any additional information and documents required by the rules; and

(*h*) be accompanied by the fees required by the regulations.

Forme et teneur

(2) Pour être conforme, la plainte doit remplir les conditions suivantes :

a) être formulée par écrit;

b) préciser le contrat spécifique visé, le nom du plaignant et celui de l'institution fédérale chargée de l'adjudication du contrat;

c) exposer de façon claire et détaillée ses motifs et les faits à l'appui;

d) préciser la nature de la réparation demandée;

e) préciser l'adresse du plaignant où peuvent être envoyées les notifications et autres communications relatives à la plainte;

f) fournir tous les renseignements et documents pertinents que le plaignant a en sa possession;

g) fournir tous renseignements et documents supplémentaires exigés par les règles;

h) comporter le paiement des droits réglementaires.

Chairperson may assign member

(3) The Chairperson may assign one

Désignation de membre

(3) Le président peut désigner un membre

member of the Tribunal to deal with a complaint and a member so assigned has and may exercise all of the Tribunal's powers, and has and may perform all of the Tribunal's duties and functions, in relation to the complaint.

du Tribunal pour l'instruction de la plainte. Celui-ci exerce dès lors les pouvoirs et fonctions du Tribunal.

[Emphasis added]

DESIGNATIONS

3. (1) For the purposes of the definition "designated contract" in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade or in Article I of the Agreement on Government Procurement, by a government institution, is a designated contract.

DÉSIGNATIONS

3. (1) Pour l'application de la définition de «contrat spécifique» à l'article 30.1 de la Loi, est un contrat spécifique tout contrat relatif à un marché de fournitures ou services ou de toute combinaison de ceux-ci, accordé par une institution fédérale — ou qui pourrait l'être — et visé, individuellement ou au titre de son appartenance à une catérogie, à l'article 1001 de l'ALÉNA, à l'article 502 de l'Accord sur le commerce intérieur ou à l'article premier de l'Accord sur les marchés publics.

[Emphasis added]

[89] A reading of these interrelated provisions indicates that the Tribunal possesses the necessary jurisdiction to hear a complaint from a potential supplier which bids on a "designated contract designated by the regulations", in the present circumstances a contract as described in Article 502 of the *Agreement on Internal Trade* (AIT).

[90] It cannot be disputed that a designated contract, i.e. a "contract concerning a procurement of goods or services as described in Article 502" of the AIT, was issued by the Government of Canada and that the Government of Canada is one of the entities listed in Annex 502.1A (emphasis added).

The underlined words are those of the definition of "designated contract" found in subsection 3(1) of the CITTPI Regulations.

[91] Indeed, the Letter of Interest sent to potential suppliers clearly identifies the contract as a designated contract. It indicates that all interested suppliers may submit a bid and that the trade agreement which applies is the AIT: see the Letter of Interest at Tab A, page 000046 of the applicant's Application Record.

[92] It is not disputed that the monetary threshold imposed by article 502 is met. Finally, nobody disagrees that the respondent, Northrop Grumman Overseas Services Corporation (Northrop), is a potential supplier. It did make a bid on the contract and its bid was evaluated with the bids of the other potential suppliers.

[93] However, both the applicant and the respondent Lockheed originally submitted that Northrop cannot lodge a complaint before the Tribunal for two reasons: first, because the contract is not a designated contract for Northrop and second, because Northrop is not a Canadian supplier. This appears abundantly clear from paragraphs 22 to 76 and 13 to 65 of their respective Memorandum of Fact and Law. It also appears from paragraphs 1 to 3, 11 to 13 of the Attorney General's Supplementary Submissions and 10 to 14 of his Reply as well as paragraphs 11 to 17 and 4 to 12 of Lockheed's Supplementary Submissions and Reply.

Whether the contract is a designated contract

[94] As I understand the situation with respect to the notion of designated contract, the argument has evolved to focus on the words "procurement within Canada" found in article 502 of the AIT and on the definition of potential supplier in section 30.1 of the CITT Act. The contract, it is alleged, is not a designated contract for Northrop because Northrop is not a Canadian supplier and, therefore, the procurement by Northrop is not a procurement within Canada. Thus, the contract not being a designated contract, Northrop does not meet the definition of potential supplier and, consequently, is not a potential supplier.

[95] Starting first with the words "procurement within Canada" in article 502 of the AIT, I believe these words have been given an interpretation that they cannot reasonably bear.

[96] "Procurement within Canada" refers in French to "marchés publics passés au Canada". There is no doubt that what is involved here is a procurement, i.e. a "marché public". The French words "passés au Canada" simply mean done (fait) or concluded (conclu) in Canada. To put it plainly and simply, they refer to a public deal or contract done in Canada which involves the Canadian Government in this case. There is in these terms no requirement of a Canadian nationality for a potential supplier or that a potential supplier possesses a place of business in Canada.

[97] I agree with counsel for Northrop that "there is nothing in either the AIT or in the CITT Act to indicate that a procurement by the Federal Government ceases to be within Canada merely

because a bidder may be located outside of Canada”: see Northrop’s supplementary submissions at paragraph 8.

[98] Indeed, the entity issuing the procurement contemplated that the fulfillment of the acquisition contract would entail importing in Canada the needed supplies, even by Canadian suppliers. One purpose of the Letter of Interest, found at page 000047 of the Applicant’s Application Record, was to:

> - advise prospective suppliers that they will be required to comply with the International Traffic in arms Regulations (ITARs), and will be responsible for obtaining any necessary Government export licenses, and any other required licenses and Technical Assistance Agreements; and …

[Emphasis added]

[99] In the same vein, article 9.2 of the proposed Model Contract stipulates that the contractor is responsible for export and import licenses and duties. It reads:

> “[t]he Contract Price includes the total cost to Canada for the Work including all export and import licenses, insurance, permits, all sales, use, excise and other or similar taxes levied, assessed or imposed under any legal jurisdiction in respect of anything required to be furnished, sold or delivered by the Contractor pursuant to the Contract. The deliverables at paragraph 9.1 are to be Delivered Duty Unpaid (DDU) (Incoterm 2000). The estimated price excludes Canadian Customs duties that are intended to be accounted for under Article 12.”

[Emphasis added]

Article 17.1 of the said Contract required that the proposed AMIRS targeting pods “be delivered by the Contractor to Canada” on or before specified dates. This certainly envisages goods and supplies being fabricated outside Canada and imported in Canada by the potential supplier.

[100] In my respectful view, there is to be found in the terms “marchés public passés au Canada” (procurement within Canada) no requirement whatsoever that the proposed goods originate from within Canada. In any event, if the words “procurement within Canada” refer to the place where the goods and the services are procured rather than the place where the contract is concluded as the French text of the provision indicates, all the supplies in this case and the subsequent maintenance activities are to be procured to Canadian military bases across Canada. If this is not procurement within Canada at its simplest expression, one is then left to wonder what it is.

[101] This now brings me to the argument based on the definition of potential supplier. As the applicant’s argument now goes in its circularity, a potential supplier, according to section 30.1 of the CITT Act, is “a bidder or prospective bidder on a designated contract”. And a designated contract is one that takes into account particular circumstances or characteristics of the potential supplier. In other words, a potential supplier is defined by the designated contract and a designated contract is defined by the potential supplier. This is the reasoning that allows the applicant and Lockheed to contend that the contract is a designated contract for the other bidders, but not for Northrop.

[102] I should say that there is nothing in the definitions of potential supplier and designated contract in section 30.1 of the CITT Act and subsection 3(1) of the CITTPI Regulations which either authorizes or requires that particular characteristics or circumstances of a bidder be taken into account in the determination of the nature of the contract. Unlike a chameleon which changes color

according to circumstances, the designated contract is not a contract whose legal nature changes according to the status or the circumstances of the bidder. I fail to see how a designated contract for the procurement of goods or services as described in Article 502 of the AIT, issued by the Federal Government, is a designated contract for some bidders but ceases to be one for some other bidders on the same contract.

Whether the jurisdiction of the CITT is conditional on Northrop being a Canadian supplier

[103] With due respect, I see nothing in the definition of "potential supplier" in section 30.1 and the use of that definition in subsection 30.11(1) which requires that the potential supplier be a Canadian supplier in order to have the capacity to file a complaint and the Tribunal to hear it.

[104] The applicant's argument, supported by the respondent Lockheed, is that "potential supplier" in the CITT Act should read "Canadian supplier" because the designated contract is issued pursuant to the AIT which is an agreement which applies to trade within Canada. Indeed, I see nothing in the Letter of Interest and the Proposal Requirements in the Request for Proposal which requires that the potential supplier be a Canadian supplier: *ibidem*, at pages 000046, 000057 and 000108. On the contrary, as previously mentioned, the procurement was offered and open to "all interested suppliers" because there were not enough Canadian suppliers.

[105] The applicant's contention was rejected by the Tribunal pursuant to a thorough analysis of the relevant legislative provisions. The three members of the Tribunal did not limit their analysis of

the jurisdictional question to a literal interpretation of the provisions conferring jurisdiction upon the Tribunal. They also looked at other provisions to see if there are any which impose a nationality requirement on a complainant (i.e. to be a Canadian supplier), either directly or implicitly, in light of the context, object and purpose of the legislation: *ibidem* at paragraph 22.

[106] The members of the Tribunal made a comprehensive and convincing review of the provisions of the CITT Act, the AIT and the CITTPI Regulations which led them to conclude that it was not the intention of the parties to the AIT to limit the rights and obligations of the AIT to Canadian suppliers. At paragraph 42 of their reasons in answer to an argument of the applicant, they write:

> It is a well-known rule of interpretation that, when different words are used by the drafters, they are intended to mean different things. In the Tribunal's view, the use of two distinct terms in Chapter Five of the AIT indicates that the parties intended to make a distinction between "Canadian suppliers" and all "suppliers", rather than reading in "Canadian" wherever the term "supplier" appears.

I agree.

[107] As clearly demonstrated by the decision of the Tribunal, the fact is that the AIT refers sometimes to suppliers and sometimes to Canadian suppliers when it is intended that some provisions apply only to Canadian suppliers. "Canadian suppliers" is defined in article 518 of the AIT as a supplier that has a place of business in Canada. I agree with the Tribunal that Chapter Five of the AIT, which contains articles 502 and 518, makes it clear that the parties to the AIT did not intend to limit its coverage to Canadian suppliers, "given that certain substantive provisions of

Chapter Five clearly intend rights to apply to non-Canadian suppliers: see paragraph 31 of the reasons for the Tribunal's decision.

[108] It may be that, under the present designated contract, a supplier which is not a Canadian supplier is not entitled to be awarded the contract. However, this is for me a question which goes to the merit of the awarding of the contract, not the jurisdiction of the Tribunal. It may make a valid ground of complaint to the Tribunal, not one of complaint against the Tribunal for exercising its jurisdiction over the merit of the complaint.

[109] Finally, this matter involves an issue of fairness, efficiency and costs. On this procurement, the Federal Government invited bids from outside Canada because it felt it could not obtain the products and services locally. The position taken by the applicant with respect to the jurisdiction of the Tribunal creates two different categories of bidders: those who can complain to the Tribunal and Northrop who cannot.

[110] While Northrop can intervene as an interested party in proceedings before the Tribunal to support another bidder in its complaint, it cannot raise before the Tribunal grounds of complaint of its own as a result of the position taken by the applicant. It has to seek judicial review in the Federal Court where the review is more limited in scope than before the Tribunal. This is unfair and also inefficient.

[111] As a matter of fact, the complaint process is split into two processes following parallel but different tracks. This bifurcation in relation to the same procurement and contract carries with it the potential for conflicting decisions. The Federal Court may find that the procedure for awarding the contract was unfair or unfairly applied while the Tribunal finds the opposite, or *vice versa*.

[112] In addition, the review of either the Tribunal's or the Federal Court's decision takes place before this Court. What is the point of having two different complaint processes in relation to the same procurement ending before this Court on the same or similar issues? I cannot believe that Parliament intended this bizarre, inefficient and costly result. As I have already mentioned, this result is not supported by the provisions of the CITT Act, the CITTPI Regulations and the AIT. Indeed, to achieve this result, one has to ignore the unambiguous text of the provisions of the CITT Act and CITTPI Regulations and also put a strained interpretation on those of the AIT.

[113] The bifurcation is also creative of inefficient delays and undue costs as the two review processes do not operate at the same pace. It delays the end of the procurement process and maintains a lingering doubt over its legitimacy until the two different complaint processes are completed. Costs are unnecessarily generated for the public because the Government has to defend its procurement process in two different settings while the litigation in respect of the same contract could all be dealt with by the Tribunal which has been established for that very purpose and possesses the relevant expertise.

[114] Finally, in order for a complaint procedure to be efficient, the decision resulting from that procedure must be enforceable within a reasonable period of time. Where another complaint remains pending in another process, doubt is cast on the finality and enforceability of the decision already rendered. This is most undesirable for a sound and proper administration of justice. I am certainly not inclined to condone or foster such a result unless it clearly appears that this is what Parliament intends. Like the Tribunal, it is in vain that I have searched for an intent from Parliament to produce the result advocated by the applicant and respondent Lockheed.

[115] The decision of three members of the Tribunal is a carefully reasoned decision supported both by a literal and purposive interpretation of the provisions at play. I cannot say that that decision is erroneous or unreasonable.

Conclusion

[116] In the present instance, the legal regime chosen was the AIT. The designated contract was open to all interested suppliers and not limited to Canadian suppliers.

[117] However, the AIT ensured that Canadian suppliers which bid on the designated contract would enjoy the protection against discrimination that the parties to the AIT have agreed to provide to each other.

[118] All bidders, irrespective of their nationality, characteristics or circumstances, were bound by the terms of the contract and all the bids were subject to the same evaluation process. I do not think that the designated contract ceased to be a designated contract for Northrop because it allegedly did not have a place of business in Canada and, therefore, was not a potential supplier because it was not a Canadian supplier. I do not think that the jurisdiction of the CITT to hear Northrop's complaint about the evaluation process of the bids turns on a requirement that the complainant be a Canadian supplier.

[119] I would dismiss the application for judicial review with costs payable to the respondent Northrop.

"Gilles Létourneau"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-310-07

(APPLICATION FOR JUDICIAL REVIEW OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL'S DETERMINATION AND REASONS DATED SEPTEMBER 12, 2008, IN CITT FILE NUMBER PR-2007-008)

STYLE OF CAUSE:	Attorney General of Canada Applicant and Northrop Grumman Overseas Services Corporation and Lockheed Martin Corporation Respondents
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 5, 2008
REASONS FOR JUDGMENT BY:	Ryer J.A.
CONCURRED IN BY:	Sexton J.A.
DISSENTING REASONS BY:	Létourneau J.A.
DATED:	May 22, 2008

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