CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, August 14, 1998

File Nos.: PR-98-005, PR-98-006 and PR-98-009

IN THE MATTER OF complaints filed by Lotus Development Canada Limited, Novell Canada, Ltd. and Netscape Communications Canada Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF the Tribunal's jurisdiction to continue inquiries into these complaints.

DECISION OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby concludes that it does not have jurisdiction to continue its inquiries in File Nos. PR-98-005, PR-98-006 and PR-98-009. Consequently, the complaints are dismissed.

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
Michel P. Granger
Secretary

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Date of Determination:	August 14, 1998
Tribunal Member:	Richard Lafontaine
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Hugh J. Cheetham
Complainants:	Lotus Development Canada Limited, Novell Canada, Ltd. and Netscape Communications Canada Inc.
Counsel for the Complainants:	Terrance A. Sweeney, Garri B. Hendell and Kevin F. Fritz, for Lotus Development Canada Limited Ronald D. Lunau, for Netscape Communications Canada Inc.
Government Institution:	Department of Public Works and Government Services

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AND IN THE MATTER OF the Tribunal's jurisdiction to continue inquiries into these complaints.

REASONS FOR DECISION

BACKGROUND

On May 25, 1998, Lotus Development Canada Limited (Lotus) filed a complaint (File No. PR-98-005) with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (the Act) concerning the acquisition by the Department of Public Works and Government Services (PWGSC), on a sole source basis from Microsoft Corporation, of a Microsoft NT server, a backoffice server and backoffice client access licences for the Department of Foreign Affairs and International Trade (DFAIT) to provide for the continued functionality into the year 2000 of DFAIT's Secure Integrated Global Network (Solicitation No. 08324-8-0060/A).

In a facsimile to Lotus dated May 15, 1998, PWGSC stated that, "due to the urgency of this requirement for national security reasons, it is proposed to proceed with the procurement on a sole source bases [sic] as indicated in the … [Advance Contract Award Notice (ACAN)[2]]." The ACAN itself, after declaring that this procurement would be removed from open tendering, states: "Article 1018(1) [of the *North American Free Trade Agreement*[3] (NAFTA)] is applicable because DFAIT considers the procurement of the subject messaging system on an urgent basis necessary and indispensable for national security reasons.… Article 1804(b) [of the *Agreement on Internal Trade*[4] (the AIT)] and … Article XXIII(1) [of the World Trade Organization (WTO) *Agreement on Government Procurement*[5] (the AGP)] also apply.[6]" On May 26, 1998, Novell Canada, Ltd. (Novell) filed a complaint (File No. PR-98-006) under subsection 30.11(1) of the Act with respect to the same solicitation.

1. R.S.C. 1985, c. 47 (4th Supp.).
2. An ACAN is a notice of intent to solicit a bid and negotiate with only one firm. It is not a competitive solicitation notice. Suppliers, however, on or before the date indicated in the notice, may identify their interest and demonstrate their ability to perform the contract.
3. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
4. As signed at Ottawa, Ontario, on July 18, 1994.
5. As signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).
6. See attachments to Lotus's complaint. See also Exhibit A to Netscape's complaint.

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By letter dated May 28, 1998, the Tribunal informed PWGSC, Lotus and Novell that, pursuant to subsection 30.13(1) of the Act and section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[7] (the Regulations), the Tribunal had decided to conduct an inquiry into each complaint. The Tribunal also raised with the parties the issue of its jurisdiction to inquire into the complaints. It informed PWGSC, Lotus and Novell that it was requesting comments from the parties on the applicability and effects of Article 1018(1) of NAFTA, Article 1804 of the AIT and Article XXIII of the AGP (collectively referred to as the trade agreements). More specifically, the Tribunal asked the parties to address the following issues:

a) the meaning of "national security" in these agreements and whether the Tribunal may inquire into the particulars of a "national security" claim;

b) the meaning of "Party" in Articles 1018:1 of NAFTA and XXIII of the AGP and "Federal Government" in Article 1804 of the AIT, and who may invoke the national security exception. In other words, can the national security exception be invoked by a government official or is some other mechanism envisaged and/or required to claim an exception under the said articles;

c) whether claiming an exception under the said articles prevents the Tribunal from conducting an inquiry, or whether, the exception simply allows for a procurement to be conducted in a manner that may be contrary to the procedural requirements of the agreements but necessary for the protection of essential interests relating to national security; and

d) any other related issue that may have a bearing on the application of the said articles.

On June 1, 1998, the Tribunal received a third complaint with respect to Solicitation No. 08324-8-0060/A from Netscape Communications Canada Inc. (Netscape) (File No. PR-98-009). On June 5, 1998, the Tribunal advised PWGSCand Netscape that it had decided to conduct an inquiry into the complaint. The Tribunal also requested comments from PWGSC and Netscape on the same issues as those raised in File Nos. PR-98-005 and PR-98-006.

Following receipt of the submissions from Lotus, Novell and Netscape, the Tribunal asked PWGSC to respond to these submissions and requested that PWGSC explain to the Tribunal the process by which the decision to invoke the national security exception claimed in the ACAN was made and the authority under which this was done. Subsequently, by letter dated July 29, 1998, the Tribunal requested that PWGSC indicate the general or specific authority under which the government officials, identified as having invoked the national security exceptions in these cases, acted and, if that authority was a delegated authority, that PWGSC provide copies of the delegation instrument.

The national security exceptions in the trade agreements are as follows:

NAFTA

Article 1018: Exceptions

1. Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.

7. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

The AGP

Article XXIII

Exceptions to the Agreement

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.

The AIT

Article 1804: National Security

Nothing in this Agreement shall be construed to:

(a) require the Federal Government to provide, or allow access to, information the disclosure of which it determines to be contrary to national security; or

(b) prevent the Federal Government from taking any action that it considers necessary to protect national security interests or, pursuant to its international obligations, for the maintenance of international peace and security.

POSITION OF THE PARTIES

PWGSC submitted that the Tribunal's jurisdiction is limited to the procurement review procedure as prescribed by section 30.11 of the Act, the Regulations and the related trade agreements. The obligations under these agreements apply to "covered" government entities of each party in respect of procurement of "covered" goods and services above the monetary thresholds set out in the agreements. The trade agreements also require each signatory to adopt and maintain bid challenge procedures for "covered" procurements (see Article 1017(1) of NAFTA, Article XX of the AGP and Article 514(2) of the AIT). Pursuant to section 11 of the Regulations, the Tribunal's mandate in procurement review is to "determine whether the procurement was conducted in accordance with the requirements set out in whichever one of [the trade agreements] applies." PWGSC submitted that, by the wording of the relevant exceptions, neither the open tendering rules of the trade agreements nor the bid challenge procedures implemented into domestic law apply in respect of a procurement for which the national security exceptions have been invoked. Consequently, PWGSC submitted, the Tribunal does not have jurisdiction with respect to a procurement process which is not subject to the tendering rules of the trade agreements, i.e. a procurement that is not "covered."

PWGSC also submitted that the powers of this domestic statutory tribunal do not include the authority to review the decision of the Government of Canada to apply the national security exception. The specific wording of the exceptions provides the Government of Canada with discretion with respect to their application. The use of the words "Nothing in this Chapter shall be construed to prevent a Party from taking any action … which it considers necessary" in Article 1018(1) of NAFTA expresses the intent and agreement of the Parties that the use of the exception lies within the subjective determination of the Party and, when invoked, is not reviewable through the domestic bid challenge procedures mandated by Article 1017 of NAFTA. PWGSC contrasts this with matters such as the limited tendering procedures under Article 1016 of NAFTA or the classification of a procurement within an excluded class of services set out in Annex 1001.1b-2 of NAFTA. These provisions are subject to objective tests and are reviewable by the Tribunal. PWGSC submitted that no similar subjective tests are incorporated in the national security exceptions in the AGP and the AIT.

With respect to the meaning of "national security," PWGSC noted that this term is not defined in any of the trade agreements and submitted that, in such circumstances, there is a presumption that the ordinary meaning of the term should be used. PWGSC offered various dictionary definitions of the words "security" and "national" and concluded that concern about "national security" is concern about the safety or protection of the country or nation as a whole from international threat or resolution of a state of crisis or emergency pertinent to the nation as a whole.

Turning to the question of how a national security exception may be invoked under the trade agreements, PWGSC submitted that the Crown is indivisible and that each Party, in respect of NAFTA and the AGP, and the Federal Government, in respect of the AIT, may determine the manner in which, and at what level of authority, it will invoke the exception. As no other mechanism has been agreed to or provided for in the trade agreements, there is no basis for review by the Tribunal of the internal mechanism used by the federal government in the application of the exception.

Novell submitted that the national security exceptions are meant to provide the federal government with the flexibility to procure goods and services under highly unusual emergency situations where military action may be required or human life is at risk and not, as in this case, where PWGSC is attempting to purchase a replacement system for DFAIT's administrative messaging system. Novell notes that DFAIT has a second highly secure messaging system which is used to communicate sensitive and classified messages. Novell stated that the Tribunal should satisfy itself that the national security exception has been correctly applied with respect to this procurement. Novell also submitted that a national security exception would have to be invoked by Parliament, not a government official, due to the extreme nature of this type of claim and the potential ramifications of the claim to Canada's trading partners. Furthermore, the trade agreements do not specifically exclude the Tribunal from conducting an inquiry when the exception is claimed.

Counsel for Netscape submitted that, under subsection 30.11(1) of the Act, potential suppliers have very broad rights to request an inquiry by the Tribunal into any aspect of the procurement process and that this subsection confers the broadest possible jurisdiction on the Tribunal to conduct an inquiry. The purpose of conferring such broad rights is to ensure public confidence in the fairness, openness and impartiality of procurement procedures that are set out in the trade agreements. He submitted that PWGSC's position is that potential suppliers have no right to complain about a government decision that entirely exempts a procurement from open tendering. He submitted that the Tribunal should not accede to an argument that would defeat the fundamental objectives of the trade agreements. Furthermore, no limiting words can be found in subsection 30.11(1) which restrict, in any way, the right of a potential supplier to complain about "any aspect" of a procurement. Thus, the effect of PWGSC's position would be to add a restriction to the subsection which does not exist in the legislation.

Counsel for Netscape also referred the Tribunal to subsection 3(1) of the Regulations, which relates to the definition of a "designated contract" and submitted that nothing in this provision, and subsection 30.11(1) of the Act, prevents a potential supplier from complaining about an unjustifiable use of the national security exceptions to exclude a "designated contract" from the procurement process.

Counsel for Netscape submitted that there is no authoritative definition of the term "national security." He also submitted that national security exceptions are only intended to cover measures that are necessary purely for security reasons and are without a commercial purpose. In this regard, he referred to dictionary definitions of the word "security," the definition of the phrase "threats to the security of Canada" in the *Canadian Security Intelligence Service Act*[8] and the use of the word "security" in PWGSC's *Supply Manual*.[9]

8. R.S.C. 1985, c. C-23.
9. August 1994, as amended.

Counsel for Netscape further submitted that the national security or essential security exceptions found in the trade agreements have not been authoritatively interpreted by a court or a dispute settlement panel. He submitted that guidance in interpreting these provisions could, however, be obtained from the *Vienna Convention on the Law of Treaties*[10] (the Vienna Convention) and from disputes involving the essential security exception in Article XXI of the *General Agreement on Tariffs and Trade*[11] (GATT). With respect to the Vienna Convention, he stated that the Appellate Body of the WTO has held that the rules of treaty interpretation set out in the Vienna Convention must be respected and applied in interpreting the WTO *Agreement on Trade-Related Aspects of Intellectual Property Rights*.[12] He suggested that the same principle would be applicable to the interpretation of the AGP and NAFTA and referred the Tribunal to the following passage from a recent Appellate Body decision:

> The duty of a treaty interpreter is to examine the words of the treaty to determine the intention of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require or condone the imputation into the treaty of words that are not there or the importation into a treaty of concepts that were not intended.[13]

After reviewing the commentary regarding Article XXI of GATT in *Analytical Index - Guide to GATT Law and Practice*[14] and related commentaries, counsel for Netscape submitted that the exceptions at issue cannot be interpreted too broadly and must cover only threats that are real and that truly relate to security, i.e. protection from threats or danger. Any broader interpretation threatens to undermine the basic objectives of the trade agreements. In accordance with the principles of interpretation set out in the Vienna Convention, a national security exception cannot be interpreted to allow Canada to avoid its trade obligations by permitting "anything under the sun" to fall within these exceptions.

With respect to the meaning of "Party" and "Federal Government," counsel for Netscape submitted that the Government of Canada constitutes a "Party" in Article 1018(1) of NAFTA and Article XXIII(1) of the AGP and the "Federal Government" in Article 1804 of the AIT.

Turning to the issue of who may invoke a national security exception, counsel for Netscape submitted that, under the trade agreements, only the Government of Canada can take such action. He submitted that the Government of Canada acts through Orders in Council, legislation and regulations. In this case, none of these authorities has been produced by which the Government of Canada authorized an exception to be made to the open tendering procedures of the trade agreements. Counsel submitted that PWGSC's reliance on the principle that the Crown is indivisible is inappropriate because it simply means that there is only one individual at any time who is the Crown. The dictum has no relevance to the issue of whether public servants are authorized to undertake certain actions on behalf of the Government of Canada. Furthermore, counsel submitted that PWGSC's position appears to be that all public servants, of whatever rank or capacity, have an inherent authority to exercise all the powers of the Crown or the Government of Canada. This, he stated, is manifestly absurd and legally incorrect and referred to the following passage from *Principles of Administrative Law*:

> In particular, members of the executive (whether the cabinet, the "government" or civil servants) do not possess any inherent power due to their position or office.[15]

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10. UN Treaty Series, 1980, No. 37. Done at Vienna on May 23, 1969.
11. Geneva, March 1969, GATT BISD, Vol. IV.
12. As signed at Marrakesh on April 15, 1994.
13. *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products (AB-1997-5)* (WT/DS50/AB/R), December 19, 1997, at 17-18.
14. World Trade Organization, Geneva, 1995 at 600-610.
15. D.P. Jones and A.S. de Villars, 2nd ed. (Scarborough: Thomson Canada, 1994) at 24.

Counsel for Lotus submitted that once, as in this case, a procurement inquiry has been initiated, section 11 of the Regulations requires the Tribunal to "determine whether the procurement was conducted in accordance with the requirements set out in whichever one of NAFTA, the [AIT] or the [AGP] applies." Pursuant to this provision, the applicable legislation expressly grants the Tribunal the jurisdiction to interpret and enforce each and every provision of the trade agreements dealing with government procurement, including the national security exceptions. Counsel noted that PWGSC asserts that the bid challenge procedures of the trade agreements do not apply once the government has invoked the national security exceptions. Counsel submitted that there is nothing in the language of the trade agreements to suggest that disputes concerning the application of the exceptions are outside the scope of the bid challenge procedures. By their terms, the bid challenge procedures apply to "any aspect" of the procurement process.

Counsel for Lotus submitted that the application of the exceptions to a given procurement does not operate by altering the scope of the bid challenge procedure or to alter the scope of the trade agreements, nor does it purport to operate in this manner. Rather, the trade agreements merely seek to allow, in certain limited circumstances, a procurement to be conducted in a manner that would otherwise be contrary to the procedural requirements of the trade agreements. A contract does not lose its status as a "designated contract" when the exceptions are invoked, and the scope of the bid challenge procedure is not narrowed in such circumstances. Therefore, the Tribunal's jurisdiction to inquire into the matter remains intact.

Counsel for Lotus argued that PWGSC, in taking the position that the federal government has unlimited and absolute discretion to except itself from the trade agreements by deeming a procurement to be "indispensable for national security," is relying on an outdated concept of administrative law. In modern administrative law, even a broad delegation of power by Parliament is subject to adjudicative control. As Jones and de Villars state:

> unlimited discretion cannot exist. The courts have continuously asserted their right to review a delegate's exercise of discretion for a wide range of abuses.[16]

Any exercise of procurement authority by PWGSC cannot be exercised abusively; abuse may be remedied by the Tribunal, and through the Tribunal by the Federal Court, pursuant to the authority granted by statute.

Counsel for Lotus also submitted that PWGSC's position is contrary to the position previously adopted by Canada in respect of the provision in the Tokyo Round *Agreement on Government Procurement*[17] (the Procurement Code), the precursor to the AGP, whose national security provision is identical in its terms to Article XXIII(1) of the AGP. In discussing certain comments of the GATT panel in *United States - Trade Measures Affecting Nicaragua*,[18] PWGSC of External Affairs, in a commentary on the case, stated the following:

> Given this line of reasoning, and in a case where a Panel's terms of reference included reviewing a Party's claim that its actions were necessary under Article VIII.1 of the Code, that Party's invocation of "national security interests" could be subject to the Panel's scrutiny.[19]

Counsel for Lotus submitted that it was illogical and undesirable for Canada to determine that such jurisdiction is possessed by international tribunals, while, at the same time, asserting that the Tribunal possesses no such jurisdiction.

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16. *Ibid*. at 146.
17. *The Texts of the Tokyo Round Agreements*, Geneva, August 1986.
18. L/6053, dated 13 October 1986 (unadopted), paras. 5.1-5.3.
19. *The Canadian Yearbook of International Law*, Vol. XXXI (Vancouver: UBC Press, 1993) at 351.

Turning to the issue of who may invoke a national security exception, counsel for Lotus submitted that this issue is not specifically addressed in the trade agreements or the Act, as amended. Therefore, the Tribunal must endeavour to ascertain the intention of Parliament in this regard. Counsel referenced a number of pieces of federal legislation where Parliament has expressly delegated national security determinations to the government and submitted that, where this has been done, the delegation has been to the very highest levels of government, i.e. to the Governor in Council, a Minister or the head of a government institution,[20] and, in two situations, to a lesser official.[21] Counsel urged the Tribunal to accept an interpretation of "Party" and "Federal Government" which restricts the invocation of a national security exception to senior officials.

In reply to Novell's submission that only Parliament has authority to invoke a national security exception, PWGSC submitted that decisions about the application of the exceptions to a particular procurement are necessarily the responsibility of government officials and not properly the subject of parliamentary debate. There is no basis in the trade agreements for the view that invocation of the exceptions must be made by Parliament. Furthermore, the legislation by which Parliament implemented the bid challenge provisions of the trade agreements does not designate any official as responsible for invoking the exceptions or provide for regulatory authority for such designation. It also does not include, in the Tribunal's mandate, jurisdiction over the decision to invoke the exceptions.

In reply to Netscape's submission that the Tribunal's jurisdiction in this matter flows from subsection 30.11(1) of the Act and subsection 3(1) of the Regulations, PWGSC submitted that this is incorrect, as the Tribunal's jurisdiction in the context of procurement inquiries is solely to determine whether the subject procurement was conducted in accordance with the requirements of the trade agreements.[22] The Tribunal has no jurisdiction to apply the procurement rules to a process which, pursuant to the national security exceptions, has been exempted from the application of the trade agreements.

With respect to references to the WTO Appellate Body and Article XXI of GATT, PWGSC submitted that these references have no relevance to the issue at hand, as the Tribunal's jurisdiction stems solely from domestic legislation and regulations. PWGSC also rejected the argument that the Tribunal's jurisdiction necessarily includes the power to review a decision to invoke the national security exceptions in order to protect against abuse of the exceptions. PWGSC stated that Netscape presented no evidence establishing that the exceptions have been invoked to avoid the obligations provided for under the trade agreements. Furthermore, as the Tribunal's jurisdiction in procurement review stems solely from, and is necessarily limited to, procurements covered by the trade agreements, it makes no sense to suggest that the Tribunal should review procurements which the Parties to the trade agreements intended to exempt from the disciplines of those agreements.

In reply to Lotus's submission that the application of a national security exception to a given procurement does not alter the scope of the bid challenge procedure under the trade agreements, PWGSC again submitted that the Tribunal's jurisdiction, in the context of procurement inquiries, is solely to determine whether the subject procurement was conducted in accordance with the requirements of the trade agreements. Hence, it makes no sense to suggest that the Tribunal has jurisdiction to review procurements which have been exempted from application of the rules set out in the trade agreements.

In response to the argument that, based on principles of administrative law, the Tribunal has authority to review the government's use of the exceptions, PWGSC submitted that this is not relevant to the domestic procurement review jurisdiction of a statutory tribunal, i.e. the Tribunal. With respect to Lotus's

20. Submission of Lotus Development Canada Limited, June 23, 1998, at 9.
21. *Ibid.*
22. See section 11 of the Regulations.

position that the terms "Party" and "Federal Government" should be interpreted in a manner which restricts the invocation of the exceptions to senior officials in government in order to "minimize trade friction between Canada and its international trading partners," PWGSC submitted that it is for the Parties or signatory countries to determine how best to meet their obligations under the trade agreements. Furthermore, each agreement contains dispute settlement mechanisms for the resolution of disputes relating to the interpretation of a Party's obligations under the relevant agreement.

In response to the Tribunal's request for an explanation of the process by which the decision to invoke the exceptions claimed in the subject ACAN was made and the authority under which this was done, PWGSC provided an explanation of the process by which the decision was made in this case. This explanation included copies of the final correspondence between officials of DFAIT and PWGSC at the Assistant Deputy Minister (ADM) level. In doing so, PWGSC reiterated its position that the Tribunal had no jurisdiction to review the Crown's exercise of its discretion in this regard.

In response to the Tribunal's subsequent request that PWGSC indicate the general or specific authority under which the government officials, identified as having invoked the national security exceptions in this case, acted, PWGSC submitted that, under section 6 of PWGSC *of Public Works and Government Services Act*[23] (the Public Works Act), the Minister of Public Works and Government Services (the Minister) has authority on behalf of the Government of Canada for government procurement generally and for the specific procurement at issue. That authority is exercised in accordance with relevant Treasury Board regulations and the procurement rules of the trade agreements.

PWGSC submitted that the Minister's authority to perform administrative duties under the Public Works Act may be exercised by appropriate officials within the Minister's department. In this regard, PWGSC submitted that the ADM of PWGSC's Supply Operations Services Branch was a person within the meaning of paragraph 24(2)(*d*) of the *Interpretation Act*,[24] which states, in part, that "[w]ords directing or empowering a minister of the Crown to do an act or thing ... include ... a person appointed to serve, in PWGSC ... over which the minister presides, in a capacity appropriate to the doing of the act or thing." In making the decision to invoke the national security exceptions in this case, the ADM was exercising the Minister's authority under the Public Works Act which gives the Minister responsibility for the acquisition of goods and services for other departments. PWGSC also filed a copy of the position description for the ADM, Supply Operational Service.

PWGSC also submitted that the authority at issue is not delegated authority, but rather ministerial authority which may be exercised by appropriate officials.[25]

TRIBUNAL'S ANALYSIS

The Tribunal finds it helpful to begin a discussion of its jurisdiction in this matter by discussing, in general, how the bid challenge procedures provided for in the trade agreements function. This entails setting out the Tribunal's role in the bid challenge system and how the Tribunal is directed to consider a complaint made under the Act.

Under Article 1017(1)(a) of NAFTA, the Government of Canada is obligated to allow suppliers to submit bid challenges concerning any aspect of the procurement process. Pursuant to Article 1017(1)(g), the Government of Canada is obligated to establish or designate a reviewing authority to receive bid challenges

23. S.C. 1996, c. 16.
24. R.S.C. 1985, c. I-21, as amended by S.C. 1992, c. 1, subs. 89(3).
25. Citing *Carltona Ltd.* v. *Commissioners of Works* (1943), 2 All E.R. 560 (C.A.) at 563.

and make recommendations concerning them. The Tribunal is the Canadian authority designated to receive bid challenges. Therefore, the Tribunal is empowered to review bid challenges and determine if a covered procurement has been conducted in a manner consistent with the obligations set out in Chapter Ten. In a similar fashion, the Tribunal is the independent review authority for purposes of Article XX of the AGP and the review authority for purposes of Article 514 of the AIT.

As noted by the parties, subsection 30.11(1) of the Act provides that:

> 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.

While this provision indicates that a complaint may concern any aspect of the procurement process, it does not set out what specifically the Tribunal may inquire into, if a complaint is properly filed. To answer this question, one must first turn to subsection 30.13(1) of the Act, which states:

> Subject to the regulations, after the Tribunal determines that a complaint complies with subsection 30.11(2) [i.e. is properly filed], it shall decide whether to conduct an inquiry into the complaint, which inquiry may include a hearing.

Section 7 of the Regulations, in turn, provides that the Tribunal must determine whether three conditions have been met before it can accept a complaint for inquiry. These conditions are:

> (*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 whichever one of Chapter Ten of NAFTA, Chapter Five of the [AIT] or the [AGP] applies.

To commence an inquiry, therefore, the Tribunal must determine that each of these conditions is met. The inquiry does not necessarily deal with all matters raised by the complaint, if the Tribunal, after consideration of the Regulations, comes to the view that some or all of the matters raised in the complaint are not the proper subject of an inquiry. In this case, there is no dispute that Lotus, Novell and Netscape are all "potential suppliers" and that the contract in question is, but for the invocation of the national security exceptions, a "designated contract." The issue is whether the information before the Tribunal discloses a reasonable indication of a breach of one or more of the trade agreements. The invocation of the national security exceptions of the trade agreements, as reflected in the ACAN, requires the Tribunal to consider the effect of the national security exceptions in the trade agreements on its jurisdiction.

The question that the Tribunal must answer is whether this procurement has been effectively exempted from the application of the bid challenge procedures in each of the trade agreements. This raises the issue of how the national security exceptions operate in relation to the bid challenge procedures of the trade agreements. The Tribunal finds it helpful to first discuss this question in the context of NAFTA. In doing so, the Tribunal agrees with the parties that the Government of Canada constitutes a "Party" in Articles 1018(1) of NAFTA and XXIII(1) of the AGP and the "Federal Government" in Article 1804 of the AIT. The Tribunal also notes that the parties have not directed the Tribunal to, nor is the Tribunal aware of, any interpretation of these exceptions by other reviewing authorities under the trade agreements.

By its wording, Article 1018(1) of NAFTA indicates that there are matters which the relevant Party, the Government of Canada in this case, can determine to be indispensable for national security and, having

done that, take any action or choose not to disclose any information relating to the matter. In other words, the Government of Canada has a discretion to declare the subject matter of a particular procurement as relating to national security and, in so doing, may remove that matter from the obligations of the bid challenge process provided for in the relevant trade agreements. In this case, the decision to invoke the national security exceptions of the trade agreements was notified in the ACAN.

The Canadian Statement on Implementation accompanying the *North American Free Trade Agreement Implementation Act*[26] states the following about Article 1018:

> Article 1018 provides general exceptions to chapter ten. In fulfilling its obligations under the chapter, no Party will be required to compromise its essential security interests.… This article largely incorporates the general exceptions set out in article VIII of the GATT Procurement Agreement [now Article XXIII of the AGP].[27]

This statement indicates that it is a "Party" that determines when its essential security interests might be compromised, but does not outline a process by which an exception is to be invoked. In addition to the government's own statement, many commentators have discussed the purpose of Article 1018(1) of NAFTA. The following statement is illustrative of such commentaries:

> The NAFTA procurement obligations do not apply to procurements for arms, ammunition, weapons and other national security procurements.[28]

This suggests to the Tribunal that the purpose of the national security exception is to remove the subject matter of the exception from the procurement obligations of Chapter Ten of NAFTA.

Turning to the AGP, successor to the Procurement Code, Professors Jackson, Davey and Sykes, speaking about security exceptions generally, state that they represent "a classic exception to liberal trade policies and rules" and note that the problem that they present in international agreements is that it is virtually impossible to define their limits.[29] This difficulty is reflected in the history of GATT's general security exception, found in Article XXI, which is the model for the security exceptions in the Procurement Code, the AGP and NAFTA. The history of this provision is summarized in *Analytical Index - Guide to GATT Law and Practice*. In brief, this history suggests that there is no restriction on when such exceptions can be invoked, other than the recognition by each Party to a particular agreement that frequent resort to the exception will bring the effectiveness of the relevant agreement into question. As is reflected in the discussion of the GATT cases generally, once invoked, the GATT security exception appears to take the matter outside the scope of that agreement. Having said this, it is generally recognized that a broad application of security exceptions could threaten the effectiveness of trade agreements. Furthermore, with respect to how such exceptions can be invoked, GATT did decide in 1982 to require a Member invoking Article XXI to notify GATT, in certain circumstances, of measures taken under the exception.[30]

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26. S.C. 1993, c. 44.
27. January 1, 1994, *Canada Gazette* Part I, Vol. 128, No. 1 at 145.
28. B. Appleton, *Navigating NAFTA* (Scarborough: Thomson Publishing, 1994) at 69. See also Baker & McKenzie, *NAFTA Handbook* (Chicago: CCH, 1994) at 121; and R.G. Lipsey, D. Schwanen and R.J. Wonnacott, *The NAFTA* (Toronto: C.D. Howe) at 87.
29. J.H. Jackson, W.J. Davey and A.O. Sykes, Jr., *Legal Problems of International Economic Relations*, 3rd ed. (St. Paul: West Publishing, 1995) at 983. See also *Analytical Index - Guide to GATT Law and Practice*, World Trade Organization, Geneva, 1995 at 600-610.
30. *Supra* note 14 at 605-606.

With respect to Article 1804 of the AIT, the Tribunal is of the view that the language of this provision is broader than the language of NAFTA and the AGP and, thus, arguably the discretion that it provides is also broader.

In the Tribunal's view, the above discussion pertaining to Article 1018(1) of NAFTA, Article XXIII(1) of the AGP and Article 1804 of the AIT suggests that the Tribunal does not have any jurisdiction with respect to the government's determination that a particular matter relates to national security. In this regard, the Tribunal agrees with PWGSC that, if a complainant has concerns with respect to the use of the discretion exercised by the Government of Canada in invoking the national security exceptions, then it may seek recourse in other forums, such as the Federal Court of Canada. Also, the trade agreements themselves have dispute resolution mechanisms relating to the interpretation of a Party's obligations under each agreement.

However, this does not mean that the Tribunal has no reviewing authority in respect of the national security exceptions of the trade agreements. As noted at the beginning of this analysis, the Tribunal is empowered to review bid challenges to determine if a covered procurement has been conducted in a manner consistent with the procurement obligations of the trade agreements. To fulfil its mandate as a reviewing body, the Tribunal must, therefore, interpret and apply those provisions, i.e. construe them, to determine if a procurement has been conducted in a manner consistent with them. In the Tribunal's view, this includes determining whether the national security exceptions have been invoked in the context of a particular complaint.

The Tribunal, as the bid challenge authority under the trade agreements, must be satisfied that a national security exception has actually been invoked and that it has been invoked by a Party, for purposes of NAFTA and the AGP, and the Federal Government, for purposes of the AIT. If these conditions have not been satisfied, then the Tribunal would not be fulfilling its responsibility, under the trade agreements, of ensuring that government procurement subject to the agreements is carried out in a manner consistent with the provisions of those agreements. Furthermore, the Tribunal must also consider whether a national security exception has been fully invoked. In certain circumstances, the action taken or information not disclosed by the government may be such that the exception has been invoked in respect of only certain aspects of a particular procurement. In these circumstances, the Tribunal may retain jurisdiction in respect of that part of the procurement not subject to the exception. In the Tribunal's view, given their exceptional nature, these matters should only be determined on a case-by-case basis.

Turning to the information before the Tribunal in this case, as noted above, the decision to invoke the national security exceptions of the trade agreements was reflected in the ACAN. The Tribunal is, therefore, satisfied that the national security exceptions of the trade agreements have been invoked in this case. The Tribunal is also satisfied that the action taken in this case is intended to apply to the entire solicitation.

Next, the Tribunal must determine whether the national security exceptions have been invoked by a Party, for purposes of NAFTA and the AGP, and the Federal Government, for purposes of the AIT. The Tribunal agrees that the legislation by which the trade agreements were implemented into Canadian law does not designate any official as responsible for invoking the exceptions, nor does it provide for regulatory authority for such designation. The Tribunal is also of the view that to remove a particular procurement from the procurement rules of the trade agreements and review by the Tribunal, it is not sufficient to simply assert that, in invoking the national security exceptions, the Crown's discretion is being exercised.

The information before the Tribunal in this case indicates that it was the ADM, Supply Operational Service, who actually invoked the national security exceptions in this matter and that he did so on the basis of the authority given to the Minister under section 6 of the Public Works Act, in conjunction with

paragraph 24(2)(*d*) of the *Interpretation Act*. The information also indicates that, in these circumstances, PWGSC is acting as a common service agency for the Government of Canada, for the purpose of acquiring the software products set out in the ACAN.[31] Furthermore, the position description of the ADM, Supply Operational Service, describes the holder of this position as "the most senior level of substantive policy formulation and advice to the department on all supply operations activities in Canada and abroad.[32]" In the Tribunal's view, this information establishes, in a reasonable manner, that the ADM, Supply Operational Service, serves in a capacity appropriate to invoking the national security exceptions of the trade agreements. Thus, the Tribunal is satisfied that the national security exceptions have been invoked by a Party, for purposes of NAFTA and the AGP, and the Federal Government, for purposes of the AIT.

For these reasons, the Tribunal is persuaded that the information before it establishes that, with respect to Solicitation No. 08324-8-0060/A, the national security exceptions of NAFTA and the AGP have been invoked by a Party to those agreements, namely, the Government of Canada, and that the national security exception of the AIT has been invoked by the Federal Government. Therefore, the Tribunal is of the view that it does not have jurisdiction to continue its inquiries in File Nos. PR-98-005, PR-98-006 and PR-98-009. Consequently, the complaints are dismissed.

Richard Lafontaine
Richard Lafontaine
Member

31. See ss. 5 and 6 of the Public Works Act.
32. See Attachment 2 to PWGSC's letter dated July 30, 1998.

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, October 8, 1998

File Nos.: PR-98-005, PR-98-006 and PR-98-009

IN THE MATTER OF complaints filed by Lotus Development Canada Limited, Novell Canada, Ltd. and Netscape Communications Canada Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF the Tribunal's jurisdiction to continue inquiries into these complaints.

CORRIGENDUM

The last sentence of the last paragraph on page 3 of the Reasons for Decision should read as follows:

PWGSC submitted that similar subjective tests are incorporated in the national security exceptions in the AGP and the AIT.

This corrigendum pertains only to the English version of the Reasons for Decision as the French version will incorporate this change when published.

By order of the Tribunal,

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Secretary

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