CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, April 19, 1999

File Nos.: PR-98-034 and PR-98-035

IN THE MATTER OF two complaints filed by Keystone Supplies Company 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 decisions to conduct inquiries into the two complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the two complaints are not valid.

Anita Szlazak
Anita Szlazak
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Raynald Guay
Raynald Guay
Member

Michel P. Granger
Michel P. Granger
Secretary

The reasons for the Tribunal's determination will be issued at a later date.

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Date of Determination:	April 19, 1999
Date of Reasons:	July 8, 1999
Tribunal Members:	Anita Szlazak, Presiding Member Pierre Gosselin, Member Raynald Guay, Member
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Gerry Stobo Tamra Alexander
Complainant:	Keystone Supplies Company
Government Institution:	Department of Public Works and Government Services

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STATEMENT OF REASONS

INTRODUCTION

On December 4, 1998, Keystone Supplies Company (Keystone) of Richmond, British Columbia, filed two complaints with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (the CITT Act) concerning the procurement (Solicitation No. FP802-8-0361/A) of shackles and swivels (File No. PR-98-034) and the procurement (Solicitation No. FP802-8-0362/A) of chain (File No. PR-98-035) by the Department of Public Works and Government Services (the Department) for the Canadian Coast Guard of the Department of Fisheries and Oceans (the CCG/DFO).

Keystone alleged that the solicitations at issue discriminate against offshore manufacturers by means of testing requirements, specifically by requiring that testing occur at the Canadian port of entry and that all testing occur at one port, and this under extremely short delivery time frames. This, Keystone alleged, is contrary to several provisions of the *North American Free Trade Agreement*[2] (NAFTA), the *Agreement on Government Procurement*[3] (the AGP) and the *Agreement on Internal Trade*[4] (the AIT).

Keystone requested, as a remedy, that the references in the solicitations to offshore inspection be removed, as well as the requirement that testing occur at only one port in Canada. Keystone also requested that an alternative to government testing, as referenced in section 1.5.6 of CCG specification MA2080-B, be permitted. The costs of such testing would be borne by the contractor. Keystone finally requested that the delivery dates be extended.

Pursuant to subsection 30.11(3) of the CITT Act, the Chairman of the Tribunal assigned one member to deal with the complaints. On December 9, 1998, the Tribunal informed the parties that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[5] (the Regulations) had been met in respect of both complaints and that, pursuant to

1. R.S.C. 1985, c. 47 (4th Supp.).
2. 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).
3. As signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).
4. As signed at Ottawa, Ontario, on July 18, 1994.
5. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

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section 30.13 of the CITT Act, it had decided to conduct inquiries into the complaints. That same day, the Tribunal issued orders postponing the award of any contract in relation to the solicitations in dispute until the Tribunal determined the validity of the complaints. On December 17, 1998, the Department wrote to the Tribunal certifying that the acquisition of the chain, shackles and swivels, to which the two solicitations related, was urgent and that a delay in awarding the contracts would be contrary to the public interest. Accordingly, on December 21, 1998, the Tribunal rescinded its postponement of award orders of December 9, 1998.

On January 11, 1999, the Department filed with the Tribunal a motion in each case for orders dismissing both complaints for lack of jurisdiction and, in the interim, for orders extending the time period for the filing of the Government Institution Reports (GIRs) in the matters. On February 9, 1999, Keystone filed comments on the Department's motions of January 11, 1999. On March 2, 1999, the Tribunal issued a request for additional information from Keystone in respect of the motions. On March 5, 1999, Keystone filed additional information with the Tribunal. On March 8, 1999, the Department filed its comments on Keystone's additional information with the Tribunal. Keystone responded on the same day with additional comments. On March 11, 1999, the Tribunal dismissed the Department's motions, with reasons to follow.

On March 11, 1999, at the request of the member dealing with the complaints, the Chairman of the Tribunal assigned two additional members to deal with the complaints pursuant to paragraph 7(*a*) of the CITT Act. The member requested that a panel of three members deal with the complaints due to the significant issues which the complaints raised.

On March 22, 1999, the Department filed the GIRs with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[6] On March 31, 1999, Keystone filed its comments on the GIRs with the Tribunal.

Given that there was sufficient information on the record to determine the validity of the complaints, the Tribunal decided that a hearing was not required and disposed of the complaints on the basis of the information on the record.

PROCUREMENT PROCESS

On September 16, 1998, the Department received requisitions from the CCG/DFO for the provision of chain, shackles and swivels for delivery to various CCG/DFO locations across Canada. These items are used in the mooring of navigational buoys on inland shipping lanes and offshore waters off each coast.

On November 6, 1998, the Department posted two Notices of Proposed Procurement on Canada's Electronic Tendering Service and in *Government Business Opportunities* for the requirements. The requirements were detailed in two Requests for Proposal (RFPs) with closing dates of December 4, 1998.

On November 13, 1998, Keystone submitted a letter to the Department outlining its objections to both the delivery schedule and the requirement for final testing at the Canadian port of entry.

On November 25, 1998, the Department transmitted its response to Keystone's objections, stating that it would not change the requirements and giving reasons therefor.

6. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

On December 4, 1998, Keystone filed its complaints with the Tribunal and the solicitations closed. A total of 11 bids were received in response to the two RFPs, including one from Keystone for each RFP. On December 22, 1998, Keystone was awarded two contracts, one for all of the shackle and swivel requirements and one for 12 of the 15 chain requirements.

MOTIONS BY THE DEPARTMENT

On January 11, 1999, the Department filed with the Tribunal a motion in each case (the motions) for orders dismissing both complaints for lack of jurisdiction and, in the interim, for orders extending the time period for the filing of the GIRs. The Department submitted that the Tribunal was without jurisdiction to hear a complaint from Keystone, as it was offering to supply goods originating in a country that was not a Party to any of the applicable agreements, NAFTA, the AGP and the AIT. In support of its submission, the Department cited parts of the Tribunal's publication entitled *Procurement Review Process - A Descriptive Guide* (the Guide) and referenced certain paragraphs in each of the trade agreements.

On February 9, 1999, Keystone filed comments on the Department's motions of January 11, 1999, essentially submitting that the motions were unfounded and not supported by the *post facto* evidence submitted by the Department.

In response to a request on March 2, 1999, by the Tribunal, Keystone submitted confidential information on March 5, 1999, pertaining to the origin of the goods that it was offering and how these goods were purchased, shipped and handled prior to being delivered to the CCG/DFO. The Department submitted additional comments on March 8, 1999, to which Keystone replied on March 8, 1999.

TRIBUNAL'S DECISION ON THE MOTIONS

The following are the Tribunal's reasons for its decision dated March 11, 1999, dismissing the motions of the Department. In the Tribunal's view, the motions raise three issues. First, does a supplier of goods which are not goods of a Party to one of the trade agreements have standing to file a complaint with the Tribunal? Second, if the supplier does have standing to file a complaint, are the conditions set out in subsection 7(1) of the Regulations met where the supplier supplies goods which are not goods of a Party to one of the agreements? In particular, could the complaint disclose a reasonable indication that the procurement was not carried out in accordance with the agreements? Third, if the answer to either of the foregoing questions is "no", are the goods which Keystone proposed to supply goods of a Party to one of the agreements?

Standing

As a preliminary matter, the Tribunal notes that the authority on which the Department relies for making the motion for dismissal are the statements made in the Guide. The Guide is simply a descriptive document with no authoritative value. The Guide does not define the Tribunal's jurisdiction, and its statements are not binding on the Tribunal.

In order to determine the Tribunal's jurisdiction to entertain these complaints, the Tribunal must look to the terms of the CITT Act and the Regulations. Section 30.11 of the CITT Act sets out the conditions under which a complaint may be made. It provides that:

> (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. [Emphasis added]

Section 30.1 of the CITT Act defines a "potential supplier" as:

> a bidder or prospective bidder on a designated contract.

There is no requirement in section 30.1 of the CITT Act that the potential supplier be a supplier of goods of a Party to one of the trade agreements. Further, the definition of "designated contract" does not require that the contract be subject to a bid by a supplier of goods of a Party to one of the agreements. A "designated contract" is defined in the CITT Act as:

> 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.

This definition is supplemented by the Regulations, which provide in subsection 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 [AIT] or in Article I of the [AGP], by a government institution, is a designated contract.

The procurement described in Article 1001 of NAFTA, Article 502 of the AIT and Article I of the AGP is, for the most part, all procurement by a listed government entity or all procurement of specific goods or services by a listed entity. There are certain provisions which exclude from the application of the agreements certain procurement on the basis of the source of the goods or services. For example, the AGP excludes services with respect to a Party to the extent that such Party has not provided reciprocal access to those services and excludes certain procurement with respect to the European Union until such time as reciprocal access is provided.[7] However, these are limited exclusions, none of which applies to the complaints at issue.[8]

In view of the foregoing, the CITT Act and the Regulations indicate that only the following is required for Keystone to have standing to file a complaint:

(1) there must be a government institution which is a "listed entity" under the AGP, NAFTA or the AIT;

(2) this government institution must have awarded or proposed to award a contract described in the AGP, NAFTA or the AIT;[9] and

(3) Keystone must have been a bidder or prospective bidder on that contract.

In the present circumstances, there is no requirement that Keystone supply goods of a Party to one of the trade agreements in order to have standing to file a complaint. Therefore, the Tribunal found that Keystone had standing to file the complaints.

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7. See the AGP, Canada, General Notes, ss. 4 and 8.
8. In the complaints at issue, the provision of shackles and chain, Federal Supply Classification Group 40, to the CCG/DFO is covered by each of the trade agreements, without an exception based on the source of the supply.
9. Subject to the limited specific exclusions of goods or services on the basis of their source which are set out explicitly in the trade agreements, contracts are not described in terms of the origin of the goods or services being procured.

Conditions of Subsection 7(1) of the Regulations

Subsection 7(1) of the Regulations sets out the conditions which the Tribunal must determine are met in respect of a complaint. Those 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.

The Tribunal found that the complaints met all three conditions.

The evidence before the Tribunal was that Keystone, at the time of filing the complaints, intended to submit proposals for the solicitations. The Tribunal notes that Keystone did, in fact, submit proposals for the solicitations and was awarded the contract for 100 percent of the requirement in respect of Solicitation No. FP-802-8-0361/A and a contract for 12 items in respect of Solicitation No. FP-802-8-0362/A. Being a prospective bidder, the Tribunal found that Keystone was a "potential supplier", as defined in the CITT Act.

In order for the contracts to be "designated contracts", they must be in respect of procurement by an entity designated under the AGP, NAFTA and/or the AIT; they must be in respect of the procurement of goods which are not excluded under the agreements; and the value of the contracts must exceed the monetary thresholds set out in the AGP, NAFTA and/or the AIT. The evidence before the Tribunal was that the two contracts in question were for shackles, swivels and chain (Federal Supply Classification Group 40) to be procured for the CCG/DFO. The procurement of these goods for the CCG/DFO is covered by the AGP, NAFTA and the AIT.[10] The evidence before the Tribunal was that the estimated value of the contracts was above the monetary thresholds set out in the AGP, NAFTA and the AIT.[11] Therefore, the Tribunal found that the contracts were "designated contracts". In fact, the Department identified both RFPs as being covered by the AGP, NAFTA and the AIT.

Finally, there must be a "reasonable indication" that the procurement has not been carried out in accordance with the trade agreements. The Tribunal found that the complaints revealed a reasonable indication that the final testing procedures set out in the RFPs created an unnecessary obstacle to international trade. Therefore, the Tribunal had to determine whether this resulted in a reasonable indication that the procurement were not carried out in accordance with the agreements.

For the purpose of this preliminary determination, the Tribunal focused on the AGP.[12] Article I sets out the scope and coverage provisions of the AGP. Article I.1 of the AGP provides that it applies to "any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement". Article I.4 provides that the AGP applies to any procurement contract of a value that meets or exceeds certain monetary thresholds. Therefore, on its face, it would appear that the AGP could apply to procurement

10. See the AGP, Canada, Annex 1; NAFTA, Annex 1001.1a-1, Schedule of Canada; the AIT, Annex 502.1A.
11. See the AGP, Canada, Annex 1; NAFTA, Article 1001(1); the AIT, Article 502(1).
12. Since the Tribunal found that there was a reasonable indication that the procurement was not carried out in accordance with the AGP, it did not address the application of each agreement at this stage. See below for the Tribunal's treatment of each of the agreements.

by an entity covered by the AGP, provided the procurement meets the monetary threshold, regardless of whether the procurement is of goods of a Party to the AGP. As the procurement in question were by a government entity covered by the AGP and met the monetary threshold set out in the AGP, the Tribunal found that there was a reasonable indication that the AGP applied.

Article VI of the AGP, "Technical Specifications", provides that:

> 1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. [Emphasis added]

This provision, read in conjunction with the scope and coverage provision of the AGP, on its face requires all procurement by a government entity covered by the AGP which meets the monetary threshold set out in the AGP not to include technical specifications that were prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade, regardless of whether the procurement is of goods of a Party to the AGP. As the Tribunal found that the complaints revealed a reasonable indication that the final testing procedures set out in the RFPs created an unnecessary obstacle to international trade, the Tribunal found that there was a reasonable indication that the procurement were not carried out in accordance with Article VI of the AGP. Therefore, the last condition set out in subsection 7(1) of the Regulations was met.

Given this possible reading of the AGP, which established a reasonable indication that the procurement had not been carried out in accordance with Article VI of the AGP, the Tribunal determined that an inquiry should be conducted. The Tribunal found that issues as to the proper interpretation of the AGP, NAFTA and the AIT, as opposed to possible interpretations, and the effect of that interpretation on the complaints at issue were better determined after a full and proper factual basis had been laid.[13]

Origin of the Goods

Given the Tribunal's determinations in respect of the first two questions, it was not necessary for the Tribunal to determine the origin of the goods which Keystone proposed to supply, at this stage of the inquiries.

For these reasons, the motions of the Department were dismissed by the Tribunal on March 11, 1999, and the Tribunal decided to continue its inquiries into both complaints.

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13. The Tribunal notes the statements of the Supreme Court of Canada in *Dumont* v. *Canada (Attorney General)* (1990), 67 D.L.R. (4th) 159 at 160, which confirm the principle that statutes should not be interpreted in the abstract:

> Issues as to the proper interpretation of the relevant provisions of the *Manitoba Act, 1870,* S.C. 1870, c. 3, and the *Constitution Act, 1871* and the effect of the impugned ancillary legislation upon them would appear to be better determined at trial where a proper factual base can be laid.

VALIDITY OF COMPLAINTS

Department's Position

In the GIRs, the Department reiterates its position that the Tribunal has no jurisdiction to entertain the complaints on the grounds that Keystone is a supplier of goods originating in a country that is not a Party to one of the trade agreements. In support of its submission, the Department cited parts of the Guide and referenced certain paragraphs in each of the agreements.

With respect to the merits of the complaints, the Department submits that nothing in the trade agreements obligates it to structure its solicitation so as to eliminate the effect of geographical differences and make the costs of supply equal for all potential suppliers regardless of the origin of the goods. The Department submits that the agreements require it to treat all suppliers equally and that the requirement of inspection and testing at a single point in Canada constitutes equal treatment. The Department also submits that such testing is a reasonable requirement to ensure the quality of product delivered, so as to protect the safety of vessels and to minimize the potential for environmental damage due to shipping accidents.

The Department submits that an extension to the current delivery periods would create serious safety and environmental risks, since large stores of these products are not kept and delivery time is a critical issue for the CCG/DFO.

Finally, the Department submits that the bid challenge procedures under the trade agreements are designed to provide potentially unsuccessful bidders with an opportunity to challenge the procurement process, not to give successful bidders an opportunity to recover costs or change the terms or provisions of the contracts into which they have entered. As such, Keystone has lost the right to maintain a bid challenge under the agreements for those items for which it has been awarded a contract.

Keystone's Position

Keystone designated its comments on the GIRs as confidential.

TRIBUNAL'S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in whichever of the AGP, NAFTA or the AIT applies. As the matter has been raised by the Department, the Tribunal must determine if the AGP, NAFTA and/or the AIT apply to the procurement at issue.

Preliminary Issue

With the benefit of a full evidentiary record on which to base its determination, the Tribunal is able to determine the proper interpretation, as it relates to these complaints, of the AGP, NAFTA and the AIT, in particular, whether a complainant supplying goods which are not goods of a Party to one of the agreements can claim that the procurement in respect of those goods has not been carried out in accordance with the

provisions of the agreements. The Tribunal finds that the AGP, NAFTA and the relevant provisions of the AIT do not apply to the procurement of goods which are not goods of a Party to the agreements. Therefore, Keystone must supply goods of a Party to the agreements in order to maintain its complaints that the procurement in question was not carried out in accordance with the agreements. The Tribunal makes this finding based on its interpretation of the purpose and provisions of each of the agreements.

The AGP

It is clear that the AGP is an agreement among the "Parties".[14] The preamble states that "*Parties to this Agreement* … [h]ereby *agree* as follows". Further, the preamble provides that the AGP was established because the Parties desired "to broaden and improve the [AGP] on the basis of mutual reciprocity" [emphasis added]. The preamble also indicates that the AGP was crafted with the intent of encouraging acceptance of and accession to the AGP by governments not party to it. In the Tribunal's opinion, these provisions make it clear that the AGP is meant to confer benefits and obligations only on Parties. It is the Tribunal's opinion that very clear language would be required in the AGP to indicate that benefits were meant to be conferred on non-Parties (or their goods) before there could be a finding that such non-reciprocal benefits existed.[15]

In initiating the inquiries into these complaints, the Tribunal concluded that it appears that by reading Article VI of the AGP in conjunction with the scope and coverage provision, on its face, the AGP prohibits all procurement — by a government entity covered by the AGP, which meets the monetary threshold set out in the AGP — from including technical specifications that were prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade, regardless of whether the procurement is of goods of a Party to the AGP. The Tribunal notes that it reached this conclusion on the basis of its preliminary review of the above-mentioned provisions of the AGP. However, in the Tribunal's view, the individual provisions of the AGP must be read having regard to the purpose and context of the AGP as a whole. In the Tribunal's view, to read the AGP in a manner which confers benefits thereunder to non-Parties would fly in the face of the principle of "mutual reciprocity" which underpins the AGP and it would discourage, rather than encourage, non-Parties from acceding to the AGP, as non-Parties would have less to gain by accession if some benefits were already conferred upon them by the terms of the AGP. For this reason, the Tribunal finds that the AGP applies only to Parties (and their goods), as is consistent with its stated purpose.

The Tribunal is supported in its interpretation of the application of the AGP by an analysis of the absurdity which would result if it were suggested that a supplier of goods of a non-Party had the benefit of certain provisions of the AGP (like those relating to technical specifications). Generally, while the application of the AGP is defined in relation to procurement by listed entities, certain goods from certain Parties are specifically excluded from the AGP. For example, even though all procurement by the Department of Agriculture appears to be covered by the AGP, in respect of the European Union, the procurement of office machines (FSC 74) has been specifically excluded from the AGP.[16] Therefore, a supplier of EU office

14. The Parties to the AGP are Austria, Belgium, Canada, Denmark, European Community, Finland, France, Germany, Greece, Hong Kong, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom and the United States.
15. For example, there are explicit provisions in the AGP which provide for certain limited benefits to be conferred upon developing countries that are not party to the AGP. See Article V.
16. See the AGP, Canada, Annex 1, List of Entities and General Notes, s. 8.

machines clearly does not have the benefit of any of the provisions of the AGP. However, if a supplier of goods of a non-Party had the benefit of certain provisions of the AGP, that supplier could provide office machines to the Department of Agriculture, subject to those benefits. The result would be that the AGP provides greater benefits to goods of a non-Party than to certain goods of the European Union, a Party. This example bolsters the Tribunal's view that the AGP was not meant to confer benefits on goods of a non-Party.

Therefore, the Tribunal determines that the AGP does not apply to the procurement of goods which are not goods of a Party to the AGP.

NAFTA

It is clear that NAFTA is also an agreement among its "Parties".[17] The preamble states that "The Government of Canada, the Government of the United Mexican States and the Government of the United States of America … HAVE AGREED as follows". Further, the preamble provides that NAFTA was established to "STRENGTHEN the special bonds of friendship and cooperation among their nations"; to expand and secure markets for "the goods and services produced in their territories"; to establish rules "governing their trade" and to enhance the competitiveness of "their firms" [emphasis added]. In the Tribunal's opinion, these provisions make it clear that NAFTA is meant to confer benefits and obligations only on Parties. It is the Tribunal's opinion that very clear language would be required in NAFTA to indicate that benefits were meant to be conferred upon non-Parties (or their goods) before there could be a finding that such benefits existed.

The Tribunal notes that, similarly to the AGP, there are certain provisions of Chapter Ten of NAFTA which appear, on their face, to prohibit all procurement, by a government entity covered by NAFTA, which meets the monetary threshold set out in NAFTA from including technical specifications that were prepared, adopted or applied with the purpose or the effect of creating unnecessary obstacles to trade, regardless of whether the procurement is of goods of a Party to NAFTA.[18] It is the Tribunal's view that the individual provisions of NAFTA should not be read in isolation and must be read having regard to the purpose and context of NAFTA as a whole. The Tribunal finds that NAFTA applies only to Parties (and their goods), as is consistent with its stated purpose set out above.

The Tribunal finds support for its interpretation of the scope of application of NAFTA in Article 1005 of NAFTA which provides that a Party may deny the benefits of Chapter Ten to service suppliers of another Party where it can be established that the services are being provided by an enterprise that is owned or controlled by persons of a non-Party that has no substantial business activities in the territory of any Party. This article demonstrates the Parties' intent to limit the application of Chapter Ten to the procurement of services which are truly services of a Party. Likewise, the Tribunal finds that Chapter Ten is limited in application to the procurement of goods of a Party.

Therefore, the Tribunal determines that NAFTA does not apply to the procurement of goods which are not goods of a Party to NAFTA.

17. The Parties to NAFTA are Canada, Mexico and the United States.
18. See Article 1001 (Scope and Coverage) and Article 1007 (Technical Specifications).

The AIT

The provisions of the AIT which address the biasing of technical specifications in favour of, or against, particular goods or services are drafted differently from the related provisions in the AGP and NAFTA. Article 504(2) of the AIT provides that the Federal Government shall not discriminate:

> between the goods or services of a particular Province or region, including those goods and services included in construction contracts, and those of any other Province or region.

It is clear that this provision prohibits discrimination only in respect of goods of a Party-Province or a region within a province.

Article 504(3) of the AIT then provides, in part, that measures that are inconsistent with Article 504(2):

> include, but are not limited to, the following:
>
> the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter.
>
> the specification of quantities and delivery schedules of a scale and frequency that may reasonably be judged as deliberately designed to prevent suppliers from meeting the requirements of the procurement.

Thus, the provisions of the AIT on which Keystone relies are set out as examples of the general non-discrimination provision contained in Article 504(2), which is specifically limited in application to discrimination between goods of a Party-Province.

Therefore, the Tribunal determines that, in order for Keystone to establish that the procurement were not carried out in accordance with these provisions of the AIT, Keystone must demonstrate that it proposed to supply goods of a Party-Province.

Origin of the Goods

Given the foregoing determinations of the Tribunal, the Tribunal must consider whether the goods which Keystone proposed to supply are goods of a Party to the trade agreements.

The AGP

Article IV of the AGP provides that a Party shall not apply rules of origin to goods covered by the AGP "which are different from the rules of origin applied in the normal course of trade and at the time of the transaction in question to imports or supplies of the same products … from the same Parties". As all Parties to the AGP are Parties to the *General Agreement on Tariffs and Trade 1994*[19] (GATT 1994), the rules of origin applied pursuant to GATT 1994 are applied in respect of the AGP. Therefore, the Tribunal must look to the *Most-Favoured-Nation Tariff Rules of Origin Regulations*[20] to determine whether the goods proposed to be supplied by Keystone are goods of a Party to the AGP.

19. Signed at Marrakesh on April 15, 1994.
20. SOR/98-33, December 29, 1997, *Canada Gazette* Part II, Vol. 132, No. 2 at 154.

Section 1 of the *Most-Favoured-Nation Tariff Rules of Origin Regulations* provides that goods originate in a country that is a beneficiary of the Most-Favoured-Nation Tariff if:

> (*a*) not less than 50 per cent of the cost of production of the goods is incurred by the industry of one or more countries that are beneficiaries of the Most-Favoured-Nation Tariff, or by the industry of Canada; and
>
> (*b*) the goods were finished in a country that is a beneficiary of the Most-Favoured-Nation Tariff in the form in which they are imported into Canada.

Thus, in order to determine where the goods originate, it must be determined where at least 50 per cent of the cost of production of the goods was incurred and where the goods were finished.

In its confidential submission, the Department indicated that the goods in question were manufactured in a named country which is not a Party to the AGP. Keystone acknowledges that it sourced the goods from this country. Based on the evidence on the record, the Tribunal finds that the goods originated in the named country for the purposes of the AGP.

As the named country is not a Party to the AGP, the Tribunal finds that the AGP does not apply to the procurement of the goods proposed to be supplied by Keystone.

NAFTA

Similarly to the AGP, Article 1004 of NAFTA provides that a Party shall not apply rules of origin to goods imported by another Party for the purposes of government procurement covered by Chapter Ten of NAFTA that are different from or inconsistent with the rules of origin that the Party applies in the normal course of trade. Therefore, the rules of origin set out in NAFTA are to be applied. The Tribunal must look to the *NAFTA Rules of Origin Regulations*[21] to determine whether the goods proposed to be supplied by Keystone are goods of a Party to NAFTA.

Essentially, section 4 of the *NAFTA Rules of Origin Regulations* provides that goods originate in the territory of a NAFTA country where they are wholly obtained or produced entirely in the territory of one or more NAFTA countries, undergo a required tariff classification change in the territory of one of the NAFTA countries or meet the regional value content requirement. As noted above, the confidential evidence indicates that the goods were manufactured in a named country. This named country is not a Party to NAFTA. Therefore, the Tribunal finds that the goods did not originate in a NAFTA Party for the purposes of Chapter Ten of NAFTA.

As the goods did not originate in a NAFTA Party, the Tribunal finds that Chapter Ten of NAFTA does not apply to the procurement of the goods proposed to be supplied by Keystone.

The AIT

The AIT contains its own definition of "good of a Party" in Article 200, which provides:

> good of a Party means a good that is produced, manufactured, grown or obtained in, used for a commercial purpose in, or distributed from, the territory of a Party.

21. SOR/94-14, December 29, 1993, *Canada Gazette* Part II, Vol. 128, No. 1 at 60.

As noted above, the evidence is that the goods were manufactured in a named country other than Canada. The confidential evidence of Keystone is that the goods are shipped from this country to the port of inspection in British Columbia. The Tribunal finds that the operations conducted in Canada to permit inspection do not constitute "use" by Keystone, for commercial purposes or otherwise, of the goods in the territory of a Party. Therefore, the remaining question is whether this constitutes a "distribution from" the territory of a Party.

In the Tribunal's view, there are three prongs to the test as to whether or not the goods in question are "distributed from, the territory of a Party". First, are the goods "distributed" by a supplier? Second and third, are the goods distributed from a territory which is the territory of a Party? As British Columbia is a territory of a Party, if it can be shown that the goods were distributed and that they were distributed from British Columbia, it would appear that the goods would be goods of a Party.

The evidence is that Keystone proposed to sell the goods in question to the Department if Keystone was awarded the contracts. A review of relevant jurisprudence reveals that a sale can be a "distribution"; a sale is only one of a number of means by which goods can be distributed.[22] However, it also reveals that not all sales constitute distributions. For example, where a single book is sold to a single individual, this would not appear to constitute a "distribution".

The Oxford English Dictionary[23] defines "distribute" as:

> To deal out or bestow in portions or shares among a number of recipients; to allot or apportion as his share to each person of a number.[24] [Emphasis added]

This definition makes it clear that, at a minimum, in order to distribute goods, the goods must be dealt out, bestowed, allotted or apportioned to a number of recipients.[25] Applied to the cases at hand, the Tribunal finds that this would require Keystone to sell the shackles and chain in question to more than one customer in order for the goods to be "distributed". This interpretation is consistent with the Supreme Court of Canada's statement in *R.* v. *Marino*,[26] wherein Anglin C.J.C. stated:

> How could distribution be shown unless more than one sale was proved? A single sale probably does not amount to "distribution" within the meaning of that word, as used in the Criminal Code.[27]

The confidential evidence before the Tribunal is that the proposed sale of the goods in question does not meet the requirements of "distribution", "distribute" or "distributed" as set out above. Therefore, the Tribunal finds that the goods are not "distributed" by Keystone. Given this determination, it is not necessary for the Tribunal to consider whether the goods are distributed "from the territory of a Party".

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22. *R.* v. *Fraser* (1965), 51 D.L.R. (2d) 408 (B.C.C.A.), aff'd [1967] S.C.R. 38. At the Court of Appeal, Bull, J.A. in dissent, suggested that "distribution" connoted the wholesale supplying of things for ultimate retail sale and that, therefore, the actual retailer did not "distribute" his wares but "sold" them. The majority found that a retail sale could be a distribution. The Supreme Court of Canada agreed with the majority position.
23. Second ed. (Oxford: Clarendon Press, 1989).
24. *Ibid.* at 867.
25. In *R.* v. *McNiven* (1943), 81 C.C.C. 166 (Sask. Q.B.), the Court noted that "the verb distribute comes from the Latin word *distribuere*. *Dis* means in various directions, and *tribuere* means to *assign, grant, deliver*. In this case the delivery of the handbill was made to one person only. The word distribute connotes the delivery of something to several persons".
26. [1931] S.C.R. 482.
27. *Ibid.* at 483.

Therefore, the Tribunal finds that the goods proposed to be supplied by Keystone are not goods of a Party to the AIT and that the provisions of the AIT on which Keystone relies do not apply to the procurement of the goods.

DETERMINATION OF THE TRIBUNAL

As the AGP, NAFTA and the provisions of the AIT on which Keystone relies do not apply to the procurement of the goods proposed to be supplied by Keystone, the Tribunal finds that the procurement of these goods cannot be found to have been conducted contrary to the requirements set out in the trade agreements. Therefore, the Tribunal finds that the complaints are not valid.

The Department has requested, in the GIRs, the opportunity to make further submissions with respect to the award of costs in this matter. The Tribunal has determined that the circumstances of these cases do not warrant costs against Keystone. While the complaints are not valid, they were not without merit.[28]

Anita Szlazak
Anita Szlazak
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Raynald Guay
Raynald Guay
Member

28. Canadian International Trade Tribunal, *Flolite Industries*, File No. PR-97-045, *Addendum*, August 7, 1998.