Lang Michener LLP
Lawyers – Patent & Trade Mark Agents

International Trade Brief

Spring 2009

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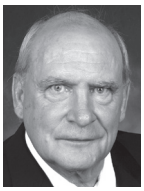
In this issue, we address the much debated "Buy American" provision of the U.S. stimulus package. This issue will also inform readers on current Hot Topics in international trade law, such as:

- Recently introduced trade related legislation;
- New international trade agreements on the horizon;
- Tariff reductions resulting from the 2009 Budget; and
- Upcoming changes to export control compliance requirements.

Buy American or What?



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The *American Recovery and Reinvestment Act*, commonly referred to as the "stimulus package", became law in the United States on February 17, 2009. This legislation included the much discussed "Buy American" policy for funds disbursed under the stimulus package. The "Buy-American" clause will require all public works projects funded by the stimulus package to use only U.S.-made steel, iron and manufactured goods. The question now is how does the "Buy-American" clause affect you as foreign suppliers to, or foreign investors in, the U.S.? The answer may be surprising to many. The "Buy-American" clause is not, as originally feared, an impenetrable door being shut on foreign goods and services.

To the extent that a "Buy American" policy causes damage to foreign entities with investments in the United States, these investors may bring claims against the U.S. Government pursuant to the investment provisions in (1) *NAFTA* (with respect to Canadian and Mexican investors), (2) other free trade agreements to which the home country of the investor and the U.S. are parties (with the exception of the U.S. - Australia FTA, which does not have an investor-to-state dispute settlement mechanism or even an investment chapter), or (3) a bilateral investment treaty to which the home country of the investor and the U.S. are parties. The rules and requirements differ slightly among the various agreements, but the following three principles generally apply to all.

First, investors may have the right to file a claim in order to start an investment arbitration against the United States through the United Nations Commission on International Trade Law ("UNCITRAL"), or through the International Centre for Settlement of Investment Disputes ("ICSID"), depending upon the specific terms of the treaty, including *NAFTA* Chapter 11. Who satisfies the definition of the term "investor" will depend on the definition in the applicable international treaty. If you are a Canadian investor, you would look to the definition of the term "investor" in *NAFTA*.

Second, assuming that there is an investor, there must be an "investment". Some provisions in the treaties establish a requirement that the investment be in the territory of the United States, but others, such as the one in *NAFTA*, are not clear on this location requirement.

Finally, there must be a breach of a substantive provision of the international treaty. For example, there must be a taking or expropriation of a right — such as the right to participate in government contracts without discrimination. The "Buy American" provisions may indeed breach such substantive rights, such as the "national

treatment" obligation found in international trade and investment agreements. Under *NAFTA* and other trade and investment agreements, countries are not permitted to discriminate against goods and services from other countries, in accordance with the principle referred to as "national treatment". By requiring preference to be accorded to local suppliers and manufacturers, the "Buy-American" provisions may lead to challenges against the U.S. Government regarding the direct or indirect denial of the substantive rights (i.e. national treatment) of foreign suppliers/ investors.

Foreign companies that have incorporated in the United States as importers of steel, machinery and other products, and foreign companies who have established subsidiaries in the United States in order to bid on U.S. Government contracts, may be able to argue that the U.S. Government has changed the rules of the trade game if the "Buy American" provisions negatively affect their business. Many of these companies have spent hundreds of thousands (if not millions) of dollars on security measures and compliance with U.S. laws. The "Buy-American" clause may prevent foreign investors from benefitting from their efforts if domestic goods and services are being favoured.

As stated above, *NAFTA* and other trade and investment agreements may provide *individual rights* to investors to sue the U.S. Government for actions taken which are harmful to those investors. However, the rules relating to government procurement are rather complex and may impact the potential for an investor to bring forward a claim against the U.S. Government. For example, there are monetary thresholds with respect to the value of contracts for goods and services, and higher thresholds relating to the provision of construction services. In addition, using *NAFTA* as an example, there are a number of market sectors excluded from the government procurement provisions of the agreement, such as U.S. defence procurement. Similar complications may be present within the text of other treaties. Investors must be aware of these potential complications and should seek legal advice before making a decision as to whether or not to pursue an arbitral remedy.

In addition to the individual investor-oriented remedies, *NAFTA* and other trade and investment treaties provide for government-to-government consultations and dispute resolution mechanisms. For example, *NAFTA* provides for a panel system to rule on disputes in a manner that allows the withdrawal of commensurate concessions (i.e. permitting reasonable retaliation). As a result, in addition to pursuing some of the investor-State remedies outlined above, a Canadian investor affected by the "Buy American" provision may wish to consider joining the lobbying efforts already under way to have the Canadian government engage in these government-to-government mechanisms.

The U.S. Government will likely have to defend numerous claims against it by foreign governments and investors as a result of the "Buy-American" clause. These may result in the U.S. Government having to pay significant compensation should arbitral panels make awards in favour of foreign investors. The re-direction of "stimulus package" funds from the hands of U.S. manufacturers to the hands of foreign investors in the form of arbitral awards could make the "Buy American" clause of the stimulus package less than stimulating for the U.S. economy.

Should you have any questions about the rights of your company in the face of the "Buy American" provisions, please contact a member of the International Trade Group at 613-232-7171.

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Hot Topics in International Trade Law


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Proposed Canadian Legislation Update

The following bills, with implications for international trade, have been tabled recently before the Canadian Parliament:

- Bill C-2: An Act to Implement the **Free Trade Agreement** between Canada and the States of the European Free Trade Association (**Iceland, Liechtenstein, Norway, Switzerland**), known as the *Canada-EFTA Free Trade Agreement Implementation Act*.
- Bill C-6: An Act respecting the **safety of consumer products** (*Canada Consumer Product Safety Act)*. The amendments include new prohibitions, such as the importation of consumer products posing a danger to human health or safety, measures facilitating the identification of such products, as well as new enforcement mechanisms.

- Bills C-306 and C-312: An Act respecting the use of government contracts to promote economic development (***Canadian Products Promotion Act***) and An Act respecting the use of government procurements and transfers to promote economic development (***Made in Canada Act***).

New Trade Agreements to Watch For

Canada's Minister of International Trade surprised attendees at a Toronto Board of Trade meeting, stating that Canadian officials had recently been to **South Korea** to further free trade agreement discussions. He did mention that there were a few "issues", but it appears the agreement will not be on hold despite the problems being experienced by the North American auto industry. At that same meeting, he also hinted that the final details of the **Canada-Panama** free trade agreement were being worked out and negotiations should soon conclude. Additionally, Canada announced on March 5, 2009 that it will move forward in its discussions with the **European Union** for an economic partnership agreement.

Tariff Rates Reduced to Zero

Effective January 28, 2009, the tariff classifications for a number of items have changed, many being eliminated entirely. The affected products are classified under Section XVI of Canadian *Customs Tariff* relating to **Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers, and Parts and Accessories of Such Articles**.

The range of products that fall within Section XVI is very broad. Some examples include: machinery for heating, sterilizing, cooling, drying, cooking; dishwashing machines; weighing machinery; fork-lift trucks; printing machinery; moulding machinery for disc brake pads; and machinery for filling, closing, sealing or labelling bottles, cans, boxes, bags or other containers.

Importers of products classified within Section XVI of the Customs Tariff should review the full list of changes and contact legal counsel to ensure they are up-to-date.

"Export Controls" are Canada's New Watch Words

A recent internal evaluation report of the Canada Border Services Agency (the "CBSA") identified limitations in Canada's export reporting and highlighted concerns with **export controls compliance**. The report suggested that the CBSA had been deficient in ensuring compliance with export control requirements and had allowed strategic nuclear and military equipment to leave Canada without verifying the identities of the buyers. Major issues emphasized in the report stem from the report's finding that exporters of controlled goods often file the mandatory export documentation with the CBSA in paper form, as opposed to electronically. ("Controlled Goods" refer to goods listed on Canada's export control list which require permits for items having potential military and strategic uses).

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While most exporters in Canada file their declarations electronically ahead of shipping, allowing the CBSA to better manage inspections and to red-flag suspicious cargo, approximately 15% of all exports from Canada are reported in paper form. Additionally, many exporters are filing the paper documentation after-hours which, according to the report, means that inspections do not occur. Even when documents were deposited during operational hours, the report found that some border officers face significant time limitations, which obstruct their ability to adequately conduct inspections.

The report recommends that the CBSA develop a plan for implementing mandatory pre-departure electronic reporting of exports and calls for an end to antiquated paper forms. Paper forms have been eliminated for import declarations in Canada since 2004. These recommendations, if followed, would bring Canada in line with the policies of the United States and the European Union, where electronic filing in advance of shipping is mandatory. The report calls for the new CBSA processes to be developed by October 2009.

Canadian exporters should conduct internal audits to ensure they are following the proper policies and procedures to identify and communicate exports of both standard and controlled goods. If internal policies and procedures are not in place, they should be developed as soon as possible with the assistance of persons knowledgeable in the area of Canada's export and customs laws.

If you would like additional information on any of the above Hot Topics, and their implications for you and your business, please contact any member of the Lang Michener LLP International Trade Group.

For updates on the above Hot Topics and current international trade law news, please visit www.tradelawyersblog.com.

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News

Lang Michener Lawyers Recognized as Best Lawyers in Canada 2009

C. J. Michael Flavell, Q.C. and Geoffrey C. Kubrick are among the 19 lawyers from the firm who were recognized by their peers in the *Best Lawyers in Canada* 2009 edition. Michael and Geoffrey were both recognized for their work in International Trade and Finance Law.

Cyndee Todgham Cherniak Elected to the Canada China Business Council Board of Directors

We are pleased to congratulate Cyndee Todgham Cherniak on being elected to the Canada China Business Council Board of Directors.

The 2009 Lexpert/ALM Guide to the Leading 500 Lawyers in Canada Recognizes Lang Michener Leading Lawyers

C. J. Michael Flavell, Q.C. is among the three lawyers from the firm who have been recognized as leading practitioners in the *2009 Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*, an annual publication reporting on Canadian legal matters. Michael is listed as a Leading Lawyer in International Trade Litigation. Michael, Geoffrey C. Kubrick, Cyndee Todgham Cherniak, Martin Masse and Corinne Brûlé also supplied an article to the publication titled *International Trade Regulation: Recent Developments of Importance*.

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