CANADIAN TRADE LAW AT A GLANCE
INTRODUCTION

Over the years, clients and friends of Cassels Brock have frequently asked us for a handy overview of Canada’s international trade law regime, with an outline of the key elements of the Canadian system. This document responds to those requests. By its nature, it is a summary only. We’ve attempted to make it as non “legalistic” as possible. Needless to say, the devil is always in the details. Should any reader be interested in more information on the items covered, we would be pleased to provide that. In the meantime, we hope this review provides some general enlightenment.

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Under the 1994 World Trade Organization Agreement ("WTO Agreement"), Canada has bound its tariff rates— that is, regular customs duties — against any increases on goods from other WTO members. However, the WTO Agreement also permits members to apply a "trade remedy" system so that any WTO member can counteract an influx of unfairly-traded (i.e., dumped or subsidized) goods by applying remedial duties to those imports. The condition for these applying such duties, however, is that it be proven that those imports cause or threaten to cause "material injury" to domestic production of the same goods. This requirement dates back to the original General Agreement on Tariffs and Trade (the "GATT") of 1947.

This GATT-based trade remedy system is applied by Canada under a statute called the Special Import Measure Act ("SIMA"). Under SIMA, two separate federal government agencies are involved:

» First, the Canada Border Services Agency ("CBSA") investigates SIMA complaints filed by Canadian manufacturers to determine if dumped or subsidized goods have been imported into Canada and to estimate the margin of dumping or amount of subsidy involved.

» Second, if the CBSA makes a positive finding of dumping or subsidizing, the Canadian International Trade Tribunal ("CITT") takes over and conducts a separate inquiry to determine whether those dumped or subsidized imports have actually caused or threaten to cause "material injury" to Canadian producers of the same goods.

The CBSA's investigation takes 90 days from initiation of its investigation (with a possible extension to 135 days) at which point the Agency issues a preliminary determination. The CITT must then hold its own inquiry and make its injury determination within 120 days thereafter. If the CITT finds injury, anti-dumping and/or countervailing duties are applied to the imports concerned. In typical case, the process takes 210 days from the time the CBSA investigation is launched until the CITT issues its injury (or "non-injury") finding.
The Tribunal’s inquiry task begins once the CBSA makes its preliminary determination. The Tribunal’s task is spelled out in greater detail under the *Special Import Measures Regulations*, which set out the factors to be applied in its inquiry. These include the volume of unfairly traded imports, their effect on the price of domestically produced “like” goods and on domestic market share, employment, capacity utilization and the resulting impact on the domestic industry.

The CITT has quasi-judicial status and is a court of record under Canadian law. Unlike the process in the US, where the International Trade Commission conducts its proceedings almost entirely on the basis of written submissions, in the Canadian system, the CITT combines written materials with an oral hearing. Witnesses are called and sworn for in-chief testimony and then cross-examined before closing oral arguments are presented by counsel for or against an injury finding.

If, after all of this, the Tribunal finds that dumped or subsidized imports have caused or are threatening to cause material injury to Canadian production (the so-called “causal link”), anti-dumping or countervailing duties are then applied for a five-year period. All goods imported below “normal values” and all goods shown to be subsidized will be subject to these duties. Increasing the export prices of these imports to eliminate the dumping margin and/or subsidy amount is the only way importers can get around having to pay these duties.

Before the expiration of the five-year term, the Tribunal will hold an expiry (or “sunset”) review to decide if these duties should be continued for another five years. The sunset review involves an examination as to whether there would be a continuation or recurrence of material injury resulting from renewed dumping or subsidizing from the named countries if the duties were to expire.

Information on the dumping and subsidization complaint process and investigation can be found at the website of the CBSA’s Trade Programs Directorate at: [www.cbsa-asfc.gc.ca](http://www.cbsa-asfc.gc.ca). Information on the CITT’s procedures and its inquiry processes can be found online at: [www.citt-tcce.gc.ca](http://www.citt-tcce.gc.ca).
EXPORTS AND IMPORT CONTROLS AND ECONOMIC SANCTIONS

EXPORT CONTROLS

Under international agreement with like-minded countries, Canada operates a system of export controls, applied under the Export and Import Permits Act (“EIPA”) and administered by the Department of Foreign Affairs and International Trade (“DFAIT”) in Ottawa. Export controls cover those goods and technologies listed on the Export Control List (“ECL”). Controlled items include military and military-related products, chemical and biological weapons, nuclear goods and technology and a range of other sensitive items such as cultural property and endangered species.

Under EIPA, no person can export an ECL item from Canada without an export permit issued by the Minister of Foreign Affairs and International Trade. In some cases, authorization for certain exports – nuclear items, hazardous wastes and cultural properties, for example – require approvals of other Federal agencies or departments. In cases involving the re-export from Canada of goods or technology of US origin, DFAIT will require the exporter to also obtain US government approval before it issues the required Canadian export permit.

EIPA also prohibits exports of all goods of any kind, whether or not on the ECL, to certain destinations listed on the Area Control List (“ACL”) – generally those States that are considered dangerous or aggressive or that fail to respect international norms of civilized behaviour and human rights. ACL-listed destinations currently are Myanmar (Burma), North Korea and Belarus.

Much of Canada’s export control regime, especially with respect to military and strategic goods, had its origin in the Second World War and the ensuing Cold War period. With the terrorist attacks on the World Trade Center, New York, on 11 September 2001 and the unfolding of subsequent events, including the wars in Iraq and Afghanistan and the emergence of anti-western governments in Iran, North Korea and other States, export controls of sensitive goods and technology takes on greater importance.

Because of the criminal penalties for failure to comply with export permit requirements, companies must be diligent and must ensure at least a basic understanding of how the system operates. Inattention to the details in EIPA and the Regulations can result in unnecessary difficulties and have commercial repercussions.

Businesses that have export control issues – such as being unsure whether a particular good or technology is a controlled item – should seek advice or contact the Export Controls Division in the Trade Controls Bureau in DFAIT. Its website is found online at: www.international.gc.ca/controls-controles.
United Nations Sanctions

Canada also imposes economic sanctions on named countries and terrorist organizations, quite apart from export controls. These sanctions are enacted to implement binding UN Security Council resolutions under Canada’s United Nations Act. The scope of the sanctions varies, depending on the content of the particular UN resolution. At present, Canada applies UN sanctions against countries such as Côte d’Ivoire, North Korea, Congo, Eritrea, Iran, Iraq, Lebanon, Liberia, Rwanda, Sierra Leone, Somalia and Sudan. Canada also applies UN sanctions against Al-Qaida and international terrorist organizations.

United Nations Act sanctions do not always follow the same pattern and their scope and targets can differ. It’s important to look carefully at the wording of each. Some, like the sanctions against Iran and North Korea, are aimed mostly at prohibiting trade in nuclear-related materials. Sanctions against Iran were extended in 2011 to cover almost all business dealings and trade. Others, like those against Côte d’Ivoire, Somalia and Sierra Leone, are aimed mostly at preventing trade in arms and munitions.

One of the notable features of these UN-mandated sanctions is that they prohibit not only trade in specific types of goods but also dealings with “designated persons,” which tracks persons (companies and individuals) black-listed by the UN Security Council. These listings change continually, placing additional burdens on anyone doing business in or with these countries. It’s important to be aware of these changes when they occur.
Together with sanctions mandated by the UN Security Council, the Federal government also applies sanctions in difficult international situations, whether or not the UN has been involved. These are applied under the Special Economic Measures Act (“SEMA”), which gives the government broad powers to implement international agreements or to act unilaterally where the Federal cabinet determines that “a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis.”

The federal cabinet has used SEMA to issue sanction prohibiting trade and business dealings with Zimbabwe, Burma, Iraq and, most recently, with Iran and Syria.

While the scope of these SEMA-based sanctions varies, they tend to be quite broad. Special care must be taken in regard to the wording. For example, in the case of Burma, the regulations prohibit any “sale,” “export,” “supply” or “shipment” of “any goods” by anyone in Canada to any person in Burma or to any person, inside or outside of Burma that facilitates any business carried on there. In the case of Syria and Iran, the regulations are cast in broader terms and prohibit “dealings” of all kinds, including provision of services and financings involving property held by or on behalf of “designated persons”. Canada expanded its sanctions against Iran in November 2011 to broadly prohibit the provision of any type of financial service to or from Iran.

The point here is that the terms used in each set of sanctions regulations may differ and this difference can be critical for Canadian exporters of goods and services to the area concerned.
ASSET FREEZES

SEMA also gives the federal cabinet virtually unrestricted authority to freeze all dealings in assets of named individuals, to order property of a foreign State seized or sequestered, to prohibit all persons inside or outside of Canada from dealing in property of that State, from shipping or supplying any kind of goods and technical data. In short, from dealing in any manner with that State and its agencies, residents or nationals. In the case of Iran and Syria, the sanctions apply to direct and indirect dealing in a wide range of property (including funds and bank accounts) and to a long list of designated persons.

Again, because sanctions under SEMA are not tied to UN resolutions, they are applied as determined by the federal government in order to respond rapidly to changing foreign situations. This is exemplified by the SEMA sanctions imposed against Syria in response to the recent human rights violations in that country.

Closely related to these is a third statute, the Freezing Assets of Corrupt Foreign Officials Act, passed in March 2011 to deal with the situation in countries like Egypt and Tunisia, where there are grounds to believe senior officials have been corrupt and have secretly taken money or property out of the country. These persons are defined as “politically exposed foreign persons.”

The statute permits the federal government to freeze the assets or restrain property of such persons at the request of a foreign government, where the cabinet has determined that there is a condition of turmoil or political uncertainty in that country and where the making of an order or regulation is in the interest of international relations.

Simultaneous to its enactment, regulations were issued freezing the Canadian-held assets and prohibiting any Canadian person anywhere from dealing with assets of any kind of former government officials in Egypt and Tunisia, including the former presidents of those countries and their extended families.
COMPLIANCE AND PENALTIES

The foregoing description shows that the present international situation is extremely fluid and Canada’s export controls and sanctions regimes are frequently modified to account for this. Because criminal penalties apply where the trade and business prohibitions are transgressed, it becomes essential for any business engaged in international dealings in troubled areas or in trade in sensitive items to be aware of the general nature of the system. Given the unsettled international situation, Canadian laws change and those changes need to be carefully watched.

From an administrative and enforcement point of view, export and import controls described above are under the purview of the Trade Controls Bureau of DFAIT, whereas economic sanctions under the United Nations Act and the Special Economic Measures Act are administered by the Department’s Economic Law Section within the Department’s Legal Bureau. Details of each can be found on the Bureau’s website.

Information on the legislation and on Canadian economic and trade sanctions generally can be found on the DFAIT website, following the appropriate link: www.international.gc.ca/sanctions/countries.
Other federal statutes controlling exports and imports come into play in certain sectors. Here are a few cases.

**NUCLEAR GOODS AND TECHNOLOGY**

Nuclear goods and technology are listed on the ECL, discussed previously, but are also subject to separate export license requirements of the Canadian Nuclear Safety Commission under the Nuclear Safety and Control Act and the Nuclear Non-Proliferation Import and Export Control Regulations. Thus, together with seeking an export permit from DFAIT, exporters in the nuclear and uranium industries must make the necessary application and provide the required documentation to the Commission.

For more information on the CNSC and nuclear-related exports, see: www.cnsc-ccsn.gc.ca/eng/lawsregs/index.cfm.

**TRADE IN ENDANGERED SPECIES**

Canada is required to regulate and prevent trade in endangered species under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”). CITES covers animals and plants that are, or may be, threatened with extinction as a result of international trade. CITES applies to both living and dead specimens, as well as their parts, listed in appendices to the Convention.

Canada’s obligations under CITES are implemented under the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act and the Wild Animal and Plant Trade Regulations. The permit granting authority resides with the Minister of the Environment.

For more information on Canada’s regulation of trade in endangered species, see: www.cites.ec.gc.ca/eng/sct0/index_e.cfm.
CULTURAL PROPERTY

Exports from Canada of “cultural property” listed on the Cultural Property Export Control List are prohibited under the Cultural Property Export and Import Act. The Control List is established by the Federal cabinet, on the recommendation of the Minister of Canadian Heritage. No person is allowed to export or attempt to export any object included on the list without an export permit issued by the Minister.

Canada also prohibits trade of stolen and illicitly-traded cultural property in accordance with the 1954 Hague Convention for the Protection of Cultural Property and its two protocols. Canadian law makes it an offense for any person to trade in and export or import cultural property covered under the Convention.

For information on controls of Canadian cultural property exports and the operations of the Canadian Cultural Property Export Review Board, see: www.pch.gc.ca/pgm/bcm-mcp/cebc-cperb/index-eng.cfm.

ENVIRONMENTALLY HARMFUL SUBSTANCES

Exports of hazardous chemicals and environmentally-harmful substances are regulated under the Canadian Environmental Protection Act, 1999 (“CEPA 1999”). These controls are implemented through several sets of subsidiary instruments administered by Environment Canada.

Details on the application of these measures for control of hazardous wastes and environmentally harmful products can be found at www.ec.gc.ca/envhome.html.
TRADE WITH CUBA – A SPECIAL CASE

While the US government continues to prohibit most kinds of trade with Cuba, there is no such prohibition in Canada. Attempts several years ago by US authorities to require Canadian-based subsidiaries of US corporations to comply with the American trade embargo led to Canada enacting the Foreign Extraterritorial Measures Act (“FEMA”). FEMA prohibits any Canadian subsidiary of a US corporation, or any director or officer of that company, from complying with the US trade embargo of Cuba. Any attempt by a US parent to force its Canadian subsidiary to refuse to export goods and services to Cuba under the US embargo is an offense and could render the Canadian subsidiary and its officers liable for substantial penalties, including criminal prosecution.

FEMA applies to ordinary trade between Canada and Cuba. However, when it comes to exports of US-origin goods from Canada there is an exception to the rule. For these US goods, Canadian authorities will defer to US export controls under the Export and Import Permits Act described above and not issue an export permit if the US has not also given the necessary clearance. This is to ensure that Canada doesn’t become a mere transit venue for circumventing US laws that prevent such exports from the United States directly. A Canadian company wishing to export US-origin products to Cuba would not be given a Canadian export permit without US authorization to export.

There has been some recent easing of the US trade embargo with Cuba. The US government has said that it will permit Cuban nationals lawfully present in the US to make increased monetary payments to Cuban nationals in Cuba. Over time, there may be additional relaxations of the US embargo which in turn will ease some of the complications for Canadian companies, including US subsidiary corporations, doing business in Cuba.

A related complication for Canadians is the US Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (the so-called “Helms-Burton Act”). This statute aims to prevent persons – including non-US residents – from dealing with “confiscated” US property in Cuba. Confiscated US property is property taken from US companies or individuals by the Castro regime after 1959 and for which no compensation has been paid. Under Helms-Burton, officers of corporations anywhere in the world deemed to have been using or developing such property can be prohibited from entry into the United States.

Separate provisions in Helms-Burton allowing US owners of this “confiscated property” to bring civil actions seeking punitive damages against persons involved in or developing such confiscated property in Cuba have been suspended since 1996 by executive order. Without this annual suspension, any foreigner in the US that is involved in Cuban business transactions involving claimed property would be exposed to serious litigation.
Canada’s Controlled Goods Program ("CGP") is a domestic security regime created under the Defence Production Act that regulates access to and use of sensitive military and strategic products and technology.

The details of operation of the CGP is set out under Controlled Goods Regulations ("CGRs") made under Act. The CGP covers the same military and strategic and dual-use goods listed on the Export Control List. Thus, there is a close relationship between the CGP and Canada’s export control regime.

Under the CGP, all corporations and other entities and all persons who deal with controlled goods and/or controlled technology are required to register with the Controlled Goods Directorate ("CGD"). Every entity registered under the CGP must also have a Designated Official that is security-cleared and a security plan filed with the CGD.

The DPA makes it an offense for any person that is not registered to knowingly examine, possess or transfer a controlled good to another person. Thus, unless registered under the Program, including having a Designated Official and an approved Security Plan, no corporation or its employees or officers can deal with controlled goods.

The CGP is designed to protect sensitive American strategic information and technology in Canada in cases where Canadian companies are jointly involved in US defence procurement projects. The Program is geared to ensuring that Canadian companies can take advantage of the exemptions for Canada under the US International Traffic In Arms Regulations ("ITARs"), which allow a US company to export sensitive goods and technology to their Canadian counterpart, provided that the Canadian company is registered under the Program.

Information on the CGP and all aspects of registration can be found online at: www.cgd.gc.ca/cgdweb/text/index_e.htm.
While Canada generally operates an open trading regime, the situation is significantly different when it comes to trade in dairy products, eggs and poultry (turkeys, chickens and hatching chicks). Imports of these commodities are under strict quota as part of Canada’s system of supply management. Supply management aims at supporting agricultural production in these five sectors through a Canada-wide system of production controls and guaranteed farm-gate prices for those commodities.

For the system to work there has to be limits on imports of supply-managed products. Thus, integral to the system are controls which prevent imports of any of these commodities over a set volume or quota. Imports above the annual quota are subject to prohibitive duties, making such imports impossible. The quota is set each year by the national and provincial marketing boards through a complex process that establishes total demand and total Canadian domestic supply, with a low, pre-determined global volume of imports to be allowed. These import quotas are then allocated to individual importers through an import permit system. No person can import these products at low rates of duty without an import quota allocation.

The administration of the import quota system is the responsibility of DFAIT under the Export and Import Permits Act and the Import Control List (“ICL”) made under that Act.

Details on the operation of Canada’s quota system for supply managed agricultural products can be found on the web-site of the Trade Controls Bureau of DFAIT at: www.international.gc.ca/controls-controles.
Successive Canadian government have followed a two-fold approach in trade policy. Under one track, Canada is strong supporter of the multilateral trading system established under the World Trade Organization. Under the second track, Canada pursues regional and bilateral agreements with its major trading partners, the most notable of these being the 1988 Canada-US Trade Agreement, followed in 1994 by the North American Free Trade Agreement (NAFTA) with the US and Mexico.

Canada appeared to lag behind other countries on the bilateral track, notably the US, that were aggressively signing bilateral pacts with various trading partners. During the initial period following the NAFTA, Canada concluded only three other bilateral agreements, with Israel (1997), Chile (1997) and Costa Rica (2002).

Canada recently moved forward under this track and has finalized trade agreements with Honduras (2011), Panama (2010), Colombia (2010), Jordan (2009), Peru (2009), the European Free Trade Association (2009). Canada is actively negotiating a number of other bilateral agreements in various stages of maturity, notably with South Korea, Singapore, the Caribbean Community (“CARICOM”), a group of four Central American States and, most importantly, with the European Union on the Comprehensive Economic and Trade Agreement (“CETA”).

In addition, the Federal Government has recently signalled an interest in joining the Trans-Pacific Trade Negotiations (“TPP”), a comprehensive set of negotiations being led by the US and including Australia, New Zealand, Singapore, Vietnam, Chile, and possibly Japan and Mexico.

Details on Canada’s existing trade agreements as well as those that Canada is currently negotiating can be found on the website of the Department of Foreign Affairs and International Trade at: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx.
FOREIGN INVESTMENT

FOREIGN INVESTMENT PROTECTION AGREEMENTS

Canada has 27 bilateral foreign investment protection agreements ("FIPAs") and has been moving ahead to conclude more such agreements, reflecting a re-energized policy of securing better investment protection for Canadian businesses operating abroad.

The Canadian FIPA program uses the template adapted from the investment protection provisions in Chapter 11 of the NAFTA, which give Canadian investors guarantees of non-discrimination, assurances of recognized standards of legal protection, application of transparent laws and procedures and access to third-party dispute settlement through binding arbitration, the latter being an important safeguard against arbitrary application of local laws.

In addition, the Canadian FIPA model contains provisions that clarify what kinds of laws or measures are – or are not – deemed to be indirect expropriation and subject to the requirement of prompt and effective compensation for the Canadian investors.

Details of Canada’s FIPA program can also be found on the DFAIT website at: www.international.gc.ca/trade-agreements-accords-commerciaux/agrar-acc/fipa-apie/fipa-fastfacts-apie-faitssaillants.aspx?lang=en.

SETTLING INVESTMENT DISPUTES

The Settlement of International Investment Disputes Act ("SIIDA") was passed in 2008, allowing Canada to become a party to the United Nations Convention on the Settlement of Investment Disputes ("ICSID"). By ratifying ICSID, Canadian investors abroad would have the benefit of the standards of protection under the Convention as well as access to the ICSID dispute settlement regime.

Since ICSID is thought to include civil matters under provincial Constitutional competence, the Federal government has not yet brought the statute into force as negotiations continue with the provinces. If federal-provincial agreement can be reached, each of the provinces would enact supporting provincial legislation implementing ICSID within its boundaries and Canada would then proceed to ratify the Convention.

Once ICSID is in force, a Canadian private investor will have the option of entering into investment contracts with host States providing that disputes will be settled by arbitration under the ICSID framework. Under the ICSID, the host State accepts that all awards are binding and readily enforceable in local courts. Other ICSID parties are bound to recognize the award and enforce it as a judgement in their own courts.
Under NAFTA Chapter 11, a private investor from one NAFTA country can bring binding arbitration against the government of another NAFTA country for failing to meet treaty obligations regarding the treatment owed to that investor and its investment. This allows investors from the US (or Mexico) to invoke these rights when Canada — including a Canadian province — is alleged to have infringed Canada’s NAFTA obligations. Canadian investors, of course, have the same rights in the US and Mexico. If successful, the claimant investor gets monetary compensation for damages suffered.

Chapter 11 requires that Parties must not discriminate against another country’s investor, must provide NAFTA investors with “fair and equitable treatment” and “full protection and security” in accordance with international law norms and, in cases of expropriation, must provide expeditious compensation based on the “fair market value” of the expropriated property.

In total, there have been 62 investment claims filed by private investors against the United States, Canada and Mexico since NAFTA’s inception: 17 against the US, 15 against Mexico and, somewhat surprisingly, 30 claims against Canada, putting Canada out in front. Why this is so is not entirely clear. These numbers have to be tempered somewhat by the fact that a majority of these 62 claims have either been withdrawn or are inactive. Relatively few Chapter 11 arbitrations have reached conclusion. Here is the tally:

» **Mexico**: Of the 15 cases initiated against the government, seven have been concluded by final awards, five are currently inactive and three cases remain active.

» **United States**: Of the 17 cases initiated, eight have been concluded (several of which have been amalgamated under the Softwood Lumber banner and are considered as one), seven are inactive or have been withdrawn and two remain active.

» **Canada**: Of the 30 cases initiated against Canada, only two have been successful amounting to awards of some $7 million, a relatively miniscule amount when compared with the hundreds of millions originally claimed.

» Of the remainder, 15 claims have been withdrawn or are inactive, 2 have been settled, 5 have been dismissed and 6 remain active in varying stages of readiness.

The cases that were dismissed include a $160 million claim by UPS against the operations of Canada Post, $100 million claim by Chemtura Corp against Canada’s ban of certain pesticides and a $350 million claim by Gallo Corporation involving a landfill site north of Toronto.

Canada has settled three investment claims, one involving Ethyl Corporation, where the settlement was for $11 million; a second involving AbitibiBowater, where the settlement was $130 million; and a third involving Dow AgroSciences where no money was involved. It would be wrong to include these settlements in totalling up successful investment claims. The $130 million AbitibiBowater settlement, for example, was for property expropriated by Newfoundland and Labrador. The fact that compensation was owed to the company was accepted from the outset.

The scorecard to date, then, is that only some $7 million NAFTA investment awards have been made against Canada by NAFTA tribunals since 1994. Three cases were settled but most have either been dismissed or are not being pursued, a far cry from the sky-is-falling type of arguments that were made when the NAFTA was concluded.

GOVERNMENT PROCUREMENT

Canada is a party to the WTO Government Procurement Agreement ("GPA"). Unlike other parts of the WTO Agreement that are multilateral and comprehensive, the GPA applies only to those procuring entities that are specifically listed by each WTO member in schedules to the Agreement and only binds the offering country to other WTO members that provide similar rights.

When Canada joined the GPA, the provinces and territories were not listed in Canada’s GPA schedule. Thus, procurement by these sub-federal entities was not subject to Canada’s GPA obligations. Only Canadian federal procurements were covered and only those departments, agencies and federal Crown corporations that were listed in Canada’s schedule.

Problems arose in 2009 under the Buy American conditions of the US stimulus measures enshrined in the American Recovery and Reinvestment Act ("ARRA"). The ARRA prevented US states and local governments from using stimulus funds to purchase iron, steel or manufactured goods from countries – such as Canada – that did not guaranty similar access to sub-national procurement projects to US suppliers under the GPA. This meant that many Canadian exporters that had been supplying American municipalities and states with goods and services would no longer be eligible when it came to stimulus-funded projects.

After considerable diplomatic pressure by Canada, a Canada-US agreement was reached in 2010 that provided a short-term solution. Canadian bidders would be allowed access to US sub-federal procurements funded under the ARRA (subject to pre-existing preferences for US small business set-asides and some other exceptions). As a quid pro quo, Canada agreed to allow US bidders access to procurements of construction services by provincial and territorial entities specifically listed in the Canadian GPA schedule. This short-term agreement expired in September 2011 when the stimulus measures in both countries had been expended.

As a longer term measure, Canada agreed to list provincial and territorial procurements under the Canada’s obligations under the GPA. That doesn’t open up these sub-federal procurements immediately. It only means Canada is prepared to negotiate with other WTO members bilaterally on access to these listed sub-federal procurements on a mutually satisfactory basis.

With respect to the US, Canada agreed to open up listed provincial procurements immediately to US bidders to balance the access that Canadian bidders would have to the 37 US state procurement projects committed by the US under the GPA. This change only provides US suppliers access to bidding opportunities: it does not guaranty a right to supply.

Finally, Canada and the US committed to consulting on a long-term Canada-US procurement agreement, which by definition would have to be mutually beneficial and self-balancing and which would extend the scope of the GPA and the NAFTA to a broader range of sub-central procurements on a long-term basis. Those negotiations will take time, however.
INTER-PROVINCIAL TRADE BARRIERS IN CANADA

The Agreement on Internal Trade ("AIT") is a 1995 agreement among the federal government and each of the provinces intended to reduce trade barriers and permit trade skill certifications to be recognized from province to province. It is generally viewed as being ineffective in achieving those goals.

In July, 2009, British Columbia and Alberta entered into the Trade, Investment and Labour Mobility Agreement (called the "TILMA"). The two provinces agreed to reconcile existing standards and regulations which operate to restrict or impair trade, investment or labour mobility. They agreed not to directly or indirectly provide business subsidies that advantage one party over the other and to provide open and non-discriminatory access to procurements of their respective governments to persons from the other province.

The TILMA provides for a dispute resolution system and for panels with powers to make awards up to $5 million in compensation. Any person may institute proceedings before the panel where the party believes that a measure by one of the provinces is inconsistent with either that Agreement or the Agreement on Internal Trade.

Building on the AIT, in 2010, BC, Saskatchewan and Alberta implemented the New West Partnership Trade Agreement. The Agreement aims to remove remaining trade barriers among the three provinces (with significant exemptions), as well as coordinating international trade and investment initiatives abroad.

For information on the above can be found at: http://www.ait-aci.ca/index_en.htm and http://www.newwestpartnershiptrade.ca/index.asp.

Ontario and Québec have recently indicated a mutual interest in discussing a possible inter-provincial trade agreement between them which would address, among other things, a long-standing conflict between construction workers in the two provinces regarding trade certification and labour mobility.

The AIT, TILMA and NWP are all attempts to breakdown trade barriers within Canada short of legislation. Many observers feel this is a modest and imperfect substitute for action by the Federal government, given its authority over Trade and Commerce and Peace Order and Good Government under section 91 of the Constitution Act 1867.
INTERNATIONAL TRADE
AT CASSELS BROCK

International trade takes businesses into foreign waters. Far beyond the usual legal protection, they need a legal partner who has navigated these waters before.

The International Trade Group at Cassels Brock has argued clients’ cases before international tribunals, represented clients at all levels of Canadian courts and tribunals, and has advised federal and provincial governments on the effects of international trade policies.

Our clients include Canadian companies, foreign companies, government departments and agencies, state-controlled corporations, international governmental and non-governmental organizations.

We provide a range of legal services related to the movement of goods, services, capital and intellectual property across international borders.

The International Trade Group provides advice in several areas, including:

INJURIOUS IMPORTS AND TRADE REMEDIES

» Acts for Canadian and foreign corporations in anti-dumping and countervailing duty cases under Canadian law – this includes dealing directly with the Canada Border Services Agency, and appearing as counsel before the Canadian International Trade Tribunal (CITT), NAFTA panels and the Federal Court of Appeal in actions under Canada’s Special Import Measures Act

TRANSACTIONAL TRADE-RELATED MATTERS

» Advises on the trade and competition law implications of transborder mergers and acquisitions, particularly on the effects of NAFTA, the WTO Agreement and other international agreements on financial and asset-based transactions

DUTIES RELIEF, CUSTOMS PROBLEMS AND TARIFF CLASSIFICATION

» Advises clients on a range of customs and tariff-related matters, including appeals on tariff classification and other matters affecting duties

SANCTIONS, BOYCOTTS AND EXPORT AND IMPORT CONTROLS

» Advises clients on compliance with both Canadian and international trade restrictions and embargoes, including export controls implemented under United Nations sanctions, Canada’s Foreign Extraterritorial Measures Act, the Export and Import Permits Act and related matters

» Advises corporations on the effects of international agreements and Canadian law relating to foreign bribery and corruption

INTERNATIONAL INVESTMENT DISPUTES

» Represents both Canadian and foreign companies under NAFTA Chapter 11 provisions, and in international arbitrations under ICSID and the UNCITRAL rules

GOVERNMENT RELATIONS COUNSEL

» Represents clients' interests at the federal and provincial levels of government on matters of international trade and competition law and policy – this includes preparation of briefs and position papers for parliamentary and legislative committees, appearing as both counsel and spokespersons on behalf of clients at hearings of such committees, and ongoing representation at various levels of federal and provincial governments

Some examples of our recent experience include:

» Representing Canadian steel producers in many major steel products cases before the CITT, including an ongoing case involving dumped steel from China, Brazil and India

» Representing a large foreign U.S.-based company in an investigation into the shipping of allegedly dumped and subsidized cooper pipe fittings into Canada

» Acted for a Canadian producer in the first successful countervailing duty (subsidies) case filed against exports from China, representing the client through the appeal process in the Federal Court of Appeal

» Acted as co-counsel for Canadian corn producers before the CITT in a major dispute involving the dumping and subsidizing of corn from the United States
Larry served in the Canadian foreign service in the 1970s in a variety of posts, at the United Nations in Geneva and in Ottawa, representing Canada in numerous international conferences and meetings, including the GATT, UNCTAD, OECD and the United Nations Conference. Prior to leaving the foreign service in 1980, Larry was the head of the Economic and Treaty Law Section in the External Affairs Department. As a private practitioner, he appeared for Canada at the International Court of Justice in 1984 in the Gulf of Maine maritime boundary dispute.

Larry's practice emphasis is on international trade and international business transactions. He has acted for corporations, governments and international agencies in the trade area, dealing particularly with the GATT/WTO, FTA and NAFTA. He regularly appears as counsel before dispute-resolution bodies under the NAFTA, as well as before the Canadian International Trade Tribunal and the courts in Canada.

Ralph was called one of Canada's “most influential” business people by the National Post newspaper.

His reputation as a trusted advisor is well known to clients ranging in size from global multinationals to entrepreneurs. As a key figure in their dealings with the municipal, provincial and federal government, clients appreciate the fact that Ralph gets the job done.

Ralph possesses the largest business card Rolodex of any lawyer at Cassels Brock and arguably in Canada. He takes pride in using his network of contacts throughout the province, Canada, and the world to bring companies together in profitable alliances that are mutually beneficial. In his own words, “This is the most rewarding part of my work with companies.”

Ralph has recently been appointed Honorary Consul for the Kingdom of Morocco in Toronto. Ralph is proud to be a Distinguished Visiting Professor at the Ted Rogers School of Management at Ryerson University. He teaches a course at the University – “Law, Business, Politics ‘The Real World.’”
Mr. Peterson is Chairman of the firm, where he practises corporate/commercial law.

Mr. Peterson is Chancellor of the University of Toronto, a director of St. Michael’s Hospital and was Chairman of the successful Toronto Bid for 2015 Pan Am Games.

He is a director of a number of public and private companies including Rogers Communications Inc., Franco-Nevada Corporation and Shoppers Drug Mart and was the Founding Chairman of the Toronto Raptors Basketball Club Inc. and Chapters Inc.

Mr. Peterson is or was director or active with a number of charitable, educational and environmental organizations including the Shaw Festival, the Ontario March of Dimes, the Ontario Canada Day Committee, Canadian Club, Cercle Canadien, Council for Canadian Unity, Young President’s Organization, World President’s Organization, the Society for Educational Visits & Exchanges in Canada, Frontier College, Peter Lougheed Medical Research Foundation, Canadian Medical Hall of Fame, Magnetic True North Theatre, West Park Health Centre and Toronto Abuse Centre as well as being on the Advisory Board of the Coady International Institute and the Steering Committee of the Toronto City Summit Alliance.

Mike Harris is a senior business advisor at Cassels Brock. As a former school board chair, MPP, and Premier of Ontario (1995-2002), Mr. Harris has unique expertise in shaping public policy and managing stakeholder issues. His background in government and business, combined with a strong network of national and international contacts, will provide our clients with senior-level advice on business strategy.

Mr. Harris sits on the boards of several Canadian corporations and acts as a consultant and advisor to numerous Canadian companies – both private and public. He is a senior advisor on several equity funds focused on infrastructure, stressed companies, and energy and environmental investments.

Mr. Harris serves as a director of the Tim Horton Children’s Foundation and the Mount Royal University Foundation, and is Honourary Chairman of fundraising initiatives for Nipissing University and Canadore College as well as the North Bay Regional Health Centre. Mr. Harris is also a senior fellow of the Fraser Institute, a leading Canadian economic, social research and education organization.

Mr. Harris’ board and advisory responsibilities take him to all parts of Canada, with some international travel to London, Europe and the U.S. on a regular basis. He is sought after for his advice on governance issues and government relations matters, particularly with the national and provincial governments in Canada.
Noble Chummar is a partner in our firm’s Business Law and Government Relations Groups. The Globe and Mail recently identified Noble as one of Bay Street’s “rising stars.” In 2008, The National Post referred to Noble as one of Toronto’s “power players” from the Indo-Canadian community. The Government of France listed him as a “2008 Person of the Future” and he was a guest of the President of France for a nation-wide official visit. Noble frequently appears on national television and radio programs on behalf of his clients and as a political commentator.

Clients from a wide range of industry sectors have retained Noble Chummar including: energy, government, education, pharmaceutical, hospitals, insurance, mining, transportation, banking, retail and real estate development. As a federal negotiator for the devolution of the management of land and resources of the Northwest Territories, Noble traveled to some of the most remote parts of Canada’s Arctic regions. Representing the Government of Canada, Noble worked closely with the Chairman of the firm, The Hon. David Peterson on constitutionally significant negotiations. The Premier of Ontario also appointed Noble as a negotiator during the tense Six Nations land dispute standoff in Caledonia.