



# 2011 TRENDS

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## INTERNATIONAL TRADE & INVESTMENT

### CANADA – U.S. RELATIONS

Trade between Canada and the United States remains a vital economic interest for both nations. The economic challenges of recent years have put pressure on this trading relationship, both through the use of protectionist measures in direct response to these challenges, and also more generally by highlighting underlying trade-restricting issues such as inefficient regulatory alignment.

To respond to those issues, the two countries have announced an intention to develop and enter into a new agreement concerning their shared border. It is anticipated that this agreement will be reached at some point in 2011. In addition to addressing shared security concerns, through increased cyber-security and information sharing, the governments have announced they will use these negotiations as an opportunity to address many of the issues that restrict the bilateral flow of trade. Such trade may be facilitated through the use of common cargo-screening mechanisms and through improvements to infrastructure. The countries are reportedly considering the creation of a new bilateral agency devoted to border infrastructure. Moreover, the agreement is expected to bring about a closer alignment of regulatory requirements in relation to product labelling and safety standards, to name but two.

These efforts could build on the successful conclusion of the “Buy America” agreement reached in 2010, in which the U.S. reduced certain stimulus-related protectionist measures in exchange for greater access to the provincial and territorial procurement markets. The Buy America Agreement was temporary in scope. It did, however, commit the parties to considering the possibility of further liberalizing trade on a more permanent basis. Canada and the U.S. are expected to discuss the possibility of entering into a new, more permanent procurement deal in 2011.

### FREE-TRADE AGREEMENTS

In the multilateral forum, 2011 could present the “make-or-break” year for the current Doha Round of trade-negotiations of the World Trade Organization (WTO). Since the negotiations were launched in 2001 they have been stalled repeatedly, most recently in 2008. This has been largely due to an inability to reach consensus on a number of key issues, including agricultural subsidies. However, there are encouraging signs that 2011 might breathe new life into the failing negotiations process. The first positive sign has been a change in the attitude among a number

of key WTO member states, who are increasingly stressing the importance of finding consensus in 2011. If 2011 negotiations do not achieve consensus, it is possible negotiations could continue into 2012 or the Doha Round could be abandoned in favour of a fresh start in multilateral negotiations. However, it is becoming progressively clear that the failure of the multilateral process to achieve results will lead key trading countries, such as Canada, to shift their focus away from the WTO to regional and bilateral trade arrangements.

With the WTO's Doha Round of trade negotiations still in flux, the Canadian government will continue to embrace a strategy of focusing on bilateral and plurilateral free-trade agreements with key strategic partners in 2011.

Negotiations will continue between Canada and the European Union (EU) towards the goal of signing a Comprehensive Economic and Trade Agreement (CETA). Inherent difficulties in the negotiation process have included the need for consensus among the Canadian provinces and the EU member states as well as the harmonization of standards. A matter of particular interest to the Canadian business community is the potential for the inclusion of an investor-state dispute settlement mechanism in the proposed CETA. Investor-state dispute mechanisms (that grant investors a right to initiate proceedings against foreign governments in their own right under international law), such as NAFTA Chapter 11, have become increasingly popular in recent years with usage continuing to rise on an annual basis.

In November 2010, the Canadian government officially launched free-trade negotiations with India with the goal of negotiating a Comprehensive Economic Partnership Agreement (CEPA). A CEPA typically covers a number of other issues beyond the traditional trade in goods, services and investment. Successful negotiation of a CEPA with India would be a key achievement under Canada's Global Commerce Strategy, which identifies India as a “priority market” for potential growth.

The Canadian government has also expressed renewed interest in joining the negotiations to expand the *Trans-Pacific Partnership Agreement* (TPP). The founding members of the economic partnership (formed in 2005) include New Zealand, Chile, Brunei and Singapore. The U.S., Australia, Malaysia, Peru and Vietnam are currently in negotiations to join. Admission would most likely obligate Canada to open aspects of its supply management systems in the dairy and poultry sectors.

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In addition, in 2011, the Canadian government will continue modernizing the Canada-Costa Rica Free Trade Agreement and the Canada-Israel Free Trade Agreement. It will also continue free-trade agreement negotiations with the Ukraine, Morocco, South Korea, the Caribbean Community, the Dominican Republic, and the Central America Four (El Salvador, Guatemala, Honduras and Nicaragua).

## INTELLECTUAL PROPERTY RIGHTS

A significant development expected for 2011 is an increase in focus on the enforcement of intellectual property rights (IPR) both within Canada and abroad.

Canada is a party to the recently finalized *Anti-Counterfeiting Trade Agreement* (ACTA). The ACTA is a plurilateral treaty that establishes international standards for IPR enforcement and assists parties in their efforts to effectively contain the proliferation of counterfeiting and piracy practices. The ACTA includes innovative provisions, including provisions addressing civil, criminal, border and digital environment enforcement measures, robust co-operation mechanisms among the ACTA parties to assist in their enforcement efforts, and the establishment of best practices for effective IPR enforcement.

As well as increasing its IPR commitments abroad, the Canadian government may achieve some significant changes at home in 2011. Bill C-32, the long awaited *Copyright Modernization Act* (CMA), is currently in the committee stage in the House of Commons. If enacted, the CMA will usher in a comprehensive set of long-awaited amendments to Canada's IPR regime, aligning it with the international standards administered through the World Intellectual Property Organization (WIPO). However, the passing of new copyright legislation has been previously halted by elections called in 2006 and 2008, and it remains to be seen if the Harper government will be able to pass the bill into law before another election is called as anticipated in 2011.

## EXPORT CONTROL LAWS

Canada, like most nations, maintains sanctions and export control laws. Certain types of goods, and goods destined for certain countries, require permits before they can be legally exported or may be blocked from export altogether. Recently, Canada has been both actively revising these laws and has been focusing its enforcement efforts. For example, Canada has been in the process of refining export control laws in respect of goods and technology employing strong cryptography. For some exporters, these amendments may eliminate the requirement for permits. However, in addition to reducing the burden for some exporters, Canadian government agencies are becoming more vigilant in enforcing export control laws, among other things, through the use of criminal charges. In 2010, for the first time in Canada, a person was convicted of a criminal offence in connection with violation of Canada's export control laws.

Canada has recently departed from its past practice of imposing international economic sanctions in keeping with those established by the United Nations (UN). In 2010, Canada unilaterally adopted sanctions against Iran in addition to those established by the UN. While this may be an isolated incident, sanctions impact exports from Canada and supply chains generally. In 2011, businesses should be aware of further changes to Canadian trade restrictions. Restrictions may not be as unified with those of other countries as they once were.

## CUSTOMS DEVELOPMENTS

In 2010, the Canadian Border Services Agency (CBSA) made a number of important changes to Canada's Administrative Monetary Penalty System (AMPS) following a Fundamental Review. The AMPS regime consists of a list of numbered "contraventions" that may be assessed against importers and exporters and, in some cases, against customs brokers, carriers, duty-free shop licensees and warehouse operators. The contraventions are treated as absolute liability offences by the CBSA and are applied at a graduated level so repeat offenders face increased penalties. Penalties are set at relatively modest levels (starting at C\$100) with a statutory cap of C\$25,000 per individual penalty assessment. However, as penalty assessments may be applied to each affected import entry, aggregate penalties can be significant.

As a result of the Fundamental Review, the CBSA reset all the penalty amounts in connection with its introduction of a risk-based penalties scheme. The CBSA developed a "penalty grid" to assess the level of harm associated with a given instance of non-compliance. The grid ranks risk by using four criteria: national security, health and safety, economic, and international commitments. Under this ranking system, more severe infractions and infractions by higher-risk persons are subject to greater penalties. The Fundamental Review also produced 10 recommendations that are expected to be implemented in three phases by 2012. Phase I, completed in April 2010, implemented a new penalty regime, whereby penalties are set at flat penalty amounts or at fixed amounts that increase for repeat offenders. It also included the introduction of a 30-day delay in the escalation of penalty levels for low- and medium-risk contraventions. Phase II, announced in November 2010, simplifies the contravention rules by eliminating 68 individual marking contraventions in favour of a single marking contravention and consolidating others. In 2011, we will see the implementation process continue through Phase III with a goal of concluding the process over the course of the next two years. Under the new regime, importers and other traders will have to adjust to increased penalty amounts in many cases, beginning with the first instance of a contravention and increasing for repeat offenders. This will put pressure on importers to step up their compliance efforts or bear increased costs of doing business.