

### **FREE TRADE AGREEMENT NEGOTIATIONS: IMPLEMENTING AN AGGRESSIVE STRATEGY**

The Doha Round of trade negotiations at the World Trade Organization (WTO) will likely remain at an impasse in 2012, as global markets remain unstable and countries look inward. In spite of the WTO gridlock, we expect the Canadian government to continue to pursue an aggressive strategy of negotiating free trade agreements (FTAs). In 2011, Canada concluded FTAs with Honduras and Colombia. In 2012, Canada will forward trade negotiations with various countries, including Morocco, the Caribbean Community, Korea, Singapore and the Ukraine, and continue pursuing discussions to deepen the scope of existing agreements in force with Costa Rica and Israel.

In 2011, Canada and the European Union (EU) made significant progress in negotiating the ambitious Comprehensive Economic and Trade Agreement (CETA). The CETA, when completed, will include provisions covering country and sub-federal (i.e., provincial and EU member state) government procurement, regulatory co-operation, intellectual property, the temporary entry of business persons, competition policy, dispute settlement and the environment. It will give Canadian companies preferential access to the EU market of 500 million consumers in 27 member states. Both Canada and the EU are committed to concluding negotiations in 2012. However, with a number of contentious points outstanding, the parties will have to make tough political decisions in the coming months to make the CETA a reality.

In November 2011, Canada made a request to join the Trans-Pacific Partnership (TPP), a trade group composed of nine Asia-Pacific countries, including the United States and New Zealand. Whether Canada will be required to alter its dairy and poultry supply management system to gain admittance to the TPP will likely be a point of contention. With the addition of Canada, Japan and Mexico, the TPP would have a market of more than 775 million people with a combined GDP of C\$25.7-trillion. The parties are looking to finalize the TPP in 2012.

In 2012, we expect the Canadian government to continue implementing its India Engagement Strategy (first announced in the 2011 federal budget), by signing a bilateral investment treaty with India and continuing negotiations on a comprehensive economic partnership agreement.

In February 2011, Canada and Japan undertook a joint study to examine the potential economic impact of a bilateral economic partnership agreement. Japan is Canada's fourth-largest merchandise export market. In 2012, we expect to see the parties publish the report. We also expect Canada will hold public consultations to identify key interests and engage domestic stakeholders, including the provinces.

### **SANCTIONS: CANADA USING ECONOMIC SANCTIONS AS A FOREIGN POLICY INSTRUMENT**

The Government of Canada assertively employed sanctions in 2011 and is likely to continue to do so in 2012. Sanctions, which apply to Canadians and anyone doing business in Canada, establish trade, financing and investment restrictions on exports, imports and other business activities. The Government of Canada imposes sanctions pursuant to the *United Nations Act* to give effect to UN Security Council-mandated restrictions. In addition, Canada imposes "unilateral" sanctions under the *Special Economic Measures Act* (SEMA). In 2011, Canada enacted sanctions against Libya under the SEMA that were broader than those required by the Security Council. Canada also recently acted unilaterally in imposing sanctions against Iran and Syria. Canadian sanctions are not identical to those of other nations and may prohibit activities that seem otherwise benign. For example, Canada's SEMA sanctions against Iran include broad prohibitions against dealing with goods used in the Iranian oil and gas sector, as well as the provision of most financial services to any person in Iran. We anticipate Canada to continue to use the SEMA as an instrument of foreign policy, as evidenced by the January amendments to the Syria sanctions, which broaden their scope and application.

### **BEYOND THE BORDER INITIATIVE: MANAGING THE CRITICAL CANADA-U.S. BORDER**

In 2012, Canada and the United States will continue to seek ways to facilitate cross-border trade without compromising security. The recently issued Perimeter Security and Economic Competitiveness Action Plan (commonly called the Border Action Plan) is a blueprint for these efforts. The Border Action Plan sets a number of ambitious goals for 2012, including the implementation of a harmonized screening process through a series of pilot projects, pre-clearance for goods and travellers, streamlined and digitized document

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submission and decision-making processes, and improved and expanded “trusted traveller” and “trusted trader” programs. Canada and the U.S. will also work to harmonize their respective regulatory regimes, with a current focus on agriculture and food, environmental, health and consumer products, and transport industries.

### ANTIDUMPING CASES: INVESTIGATIONS REGARDING GOODS FROM CHINA AND ELSEWHERE

In the coming year, we expect the Canadian International Trade Tribunal (CITT) to initiate a number of antidumping duty inquiries, with several involving China. WTO members are permitted to impose antidumping duties on specific goods from specific countries if the member country is satisfied that imports of the goods are being “dumped” into the domestic market and such dumping is materially harmful to the domestic industry.

The CITT issued notice in late 2011 that it will investigate the alleged dumping of certain types of “oil country tubular goods pup-joints” originating in China. In addition, the CITT is in the process of reviewing several existing orders, including an order concerning mattress innerspring units originating in China, and antidumping duties imposed on certain copper pipe fittings originating in the U.S., South Korea and China, further to a 2007 decision of the CITT. The CITT recently concluded a similar review of antidumping duties on certain “flat hot-rolled carbon and alloy steel sheet and strip imports.”

### ARBITRATIONS AND WTO DISPUTES: THE GREEN ENERGY ACT UNDER SCRUTINY

2012 will witness the continuation of a number of high-profile WTO disputes involving Canada, in addition to continued activity under the North American Free Trade Agreement (NAFTA). We also expect Canada and Canadian companies to be involved in a heavier volume of international investment disputes on account of the Canadian government’s efforts to expand Canada’s array of bilateral investment treaties.

Two key disputes, to which Canada is a party, centre on Ontario’s *Green Energy Act, 2009* (GEA). These challenges, under the WTO and NAFTA, respectively, have the potential to alter the electricity supply and procurement market in Canada.

At the WTO, Japan and the EU are challenging the domestic content requirements in Ontario’s Feed-in Tariff Program (FIT Program), alleging that Canada is discriminating in

favour of Ontario-based “green energy” manufacturers and providing them with prohibited subsidies. The central aspect of this challenge is that to be eligible for the FIT Program’s guaranteed pricing, renewable electricity producers must employ power generation technologies that, to varying degrees depending on the power source, are manufactured in Ontario.

The GEA also faces challenges under the NAFTA framework. In *Mesa Power Group LLC v. Government of Canada*, a U.S. company is alleging a variety of NAFTA violations, citing various regulations, which include the domestic content elements of Ontario’s FIT Program.

### GOVERNMENT PROCUREMENT: OPENING PROVINCIAL AND TERRITORIAL MARKETS

In 2012, as a result of recent Canadian additions to procurement coverage under the WTO’s Agreement on Government Procurement (AGP), Canada’s provincial and territorial procurement markets will be open to suppliers from a wider range of countries. We expect the trend of including provincial and territorial procurement under the ambit of international procurement agreements to continue in 2012. We also expect that Canada will use its commitments in the AGP as a baseline commitment in future FTA negotiations involving procurement.

### ANTICORRUPTION DEVELOPMENTS: INCREASED INVESTIGATION AND ENFORCEMENT

2011 marked a significant turning point in Canada’s enforcement of the *Corruption of Foreign Public Officials Act* (CFPOA), which makes it a criminal offence for Canadian companies or individuals to engage in bribery of foreign officials.

On June 24, 2011, Niko Resources Ltd. (Niko) pleaded guilty to an offence under the CFPOA for bribing a public official in Bangladesh. This ultimately led to a fine of C\$9,499,000 and a three-year probation order with extensive monitoring conditions. The government has signalled that it is increasing its investigation and enforcement activities, which we see continuing in 2012, with Canada’s RCMP maintaining 23 active CFPOA investigations.

In the face of increased enforcement, we anticipate that Canadian companies will be committing resources to reviewing and revising their anticorruption compliance programs to ensure adequate protections are in place.