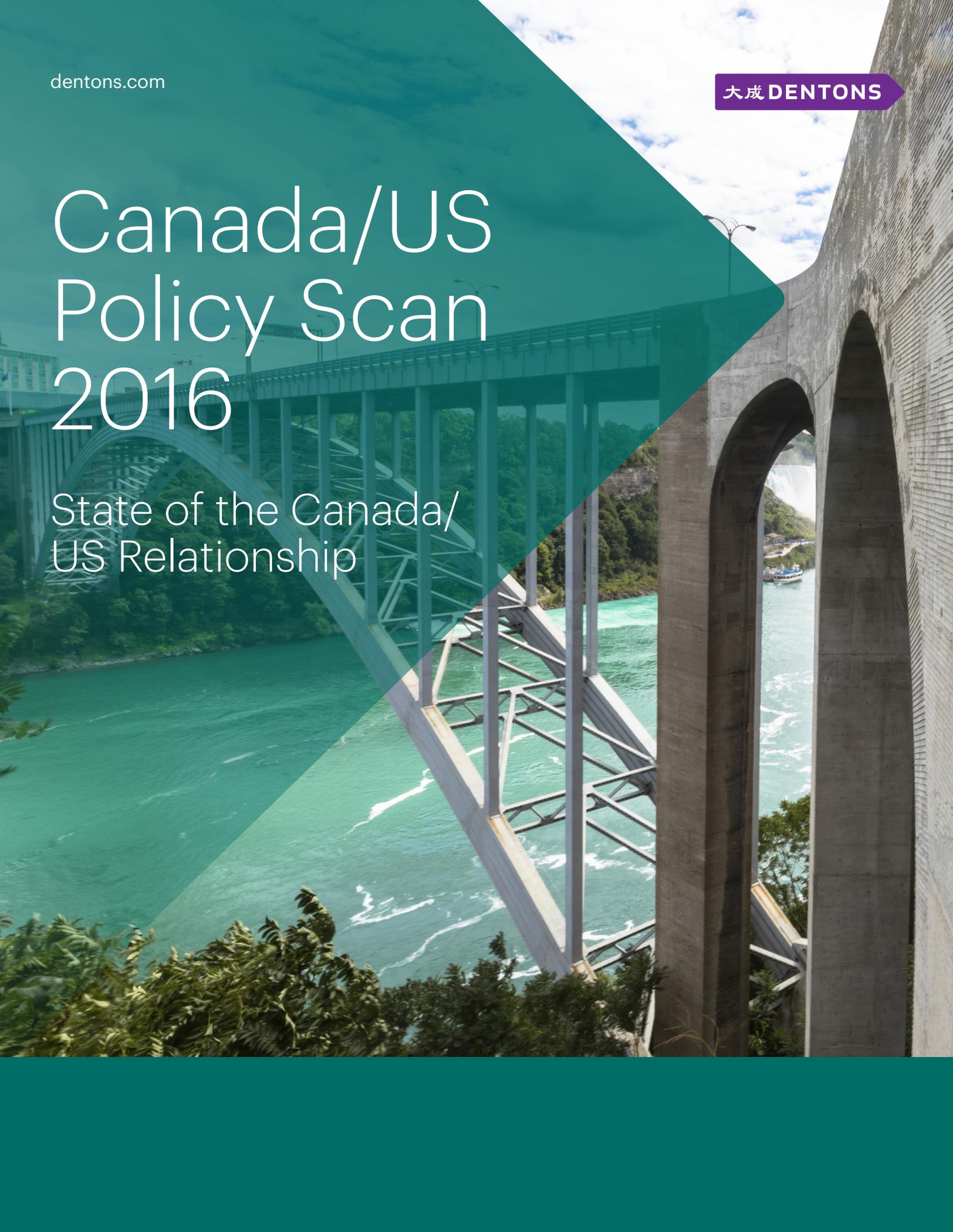


# Canada/US Policy Scan 2016

State of the Canada/  
US Relationship



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# Introduction

Earlier this Spring, the President of the United States welcomed the Prime Minister of Canada and his delegation for the first official visit by a Canadian Prime Minister to the US in nearly two decades. By mid-summer of this year, the two leaders will meet in person at least twice more, building on the policy agenda they set forth in their joint meeting and maximizing the opportunity to collaborate before President Obama leaves office in January 2017.

In the pages that follow, we provide an overview of the issues that were raised in the Canadian official visit as well as a context for the overall state of the Canada/US relationship. This overview is the product of collaborations between professionals

in the Dentons firm from both sides of the 49th parallel. Our team of experts includes key thought leaders who have served in various offices, multiple political parties and at various levels of municipal, state, provincial and federal governments in Canada and

the US. We welcome your feedback on the analysis provided below and look forward to providing updates on issues important to our clients and to the Canada/US relationship itself in the weeks and months ahead.



# Overview of the Canada/US relationship

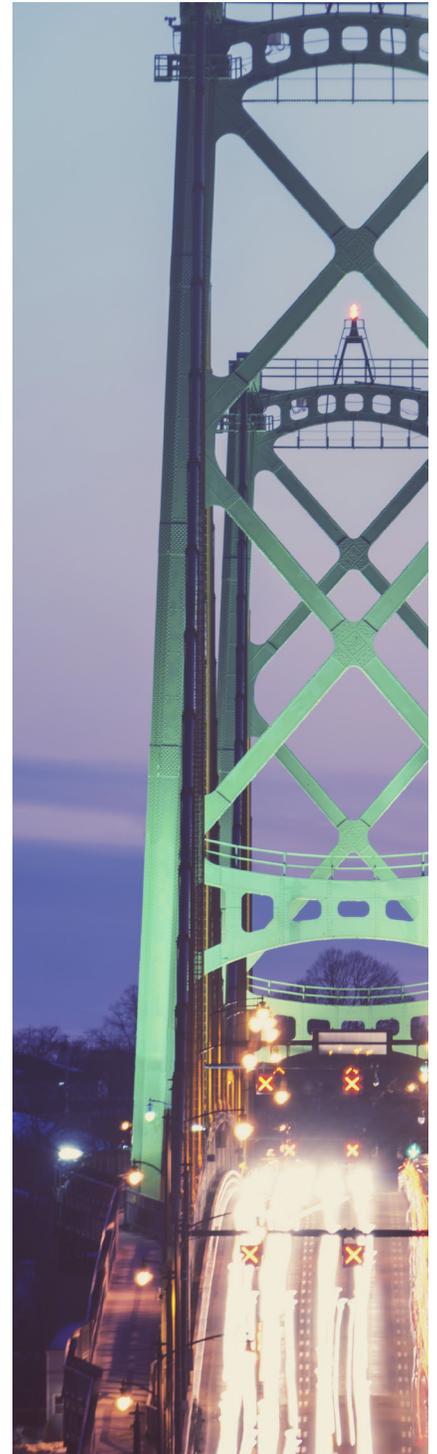
The two countries enjoy a US\$1.4 trillion bilateral trade and investment relationship with two-way trade in goods and services valued at US\$759 billion in 2014. From a defense and security perspective, the US/Canada relationship is essential through cooperation in the bi-national North American Aerospace Defense Command (NORAD), the North Atlantic Treaty Organization (NATO), and in hot

spots across the world. Further, each day more than 400,000 people cross the US-Canada border, and government officials work together to expedite lawful travel and address security threats. Canada is the largest exporter to the US of crude oil, natural gas and electricity, and both countries are increasingly working together to address climate change and promote renewable energy.

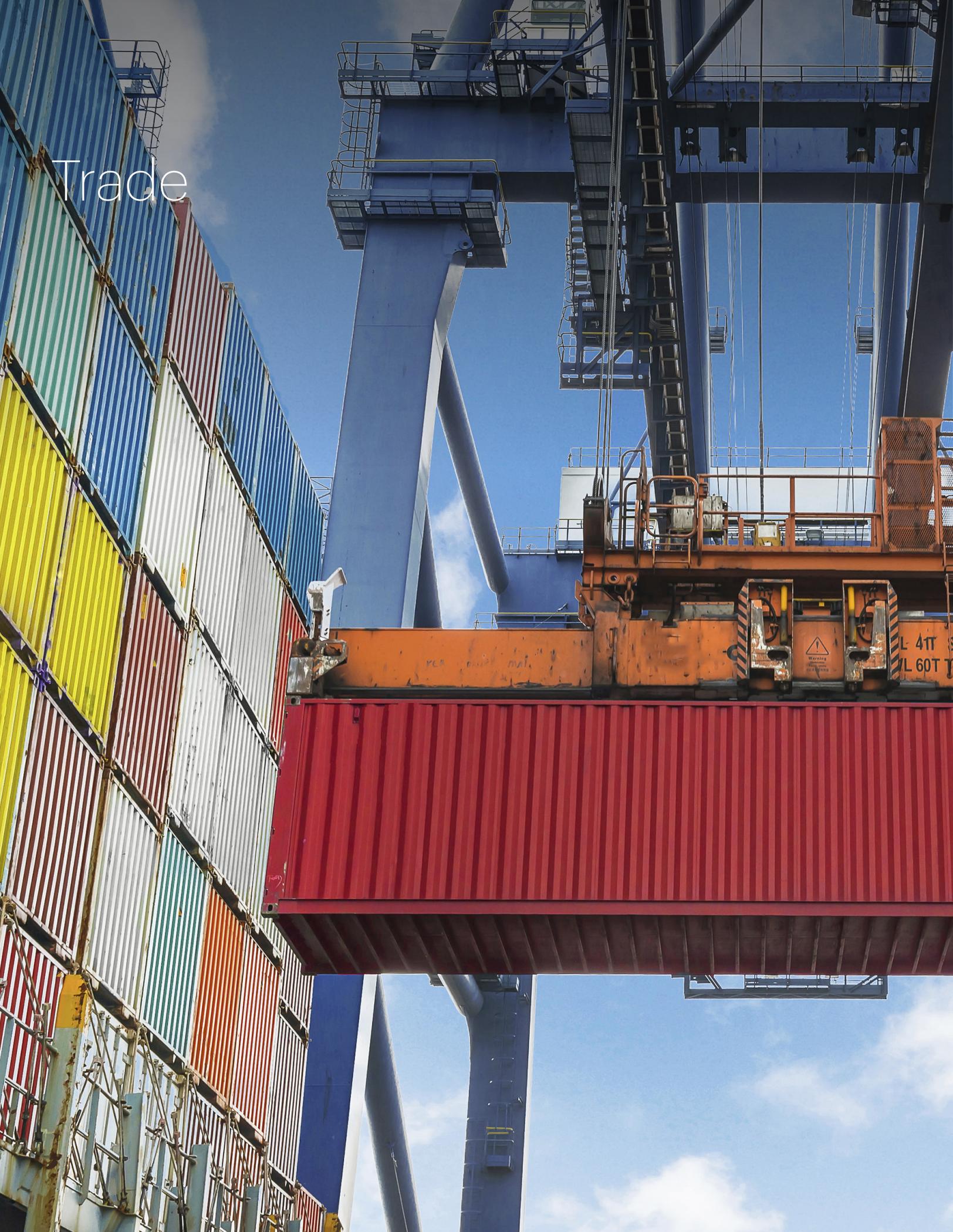
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We're woven together so deeply – as societies, as economies – that it's sometimes easy to forget how truly remarkable our relationship is.

President Barack Obama 03.10.16



Trade



## From potential ratification of the Trans-Pacific Partnership (TPP) to simmering trade disputes, 2016 could see increased debates about the merits, impacts and challenges associated with trade between the US and Canada.

In 2015, Canada and the US reached an agreement (yet to be ratified) with 10 other Pacific Rim countries on TPP, an historic accord representing the largest regional trade deal in history. In the North American context, TPP offers the opportunity to modernize and update the trade relationship among the US, Canada and Mexico. In particular, TPP would prohibit countries from blocking cross-border data flows over the internet, an issue that was not addressed by NAFTA. In addition, the US, Canada and Mexico pledged in TPP to harmonize the tendering procedures and procurement thresholds in NAFTA.

TPP, however, faces significant US domestic political opposition, including from Republican Presidential frontrunner Donald Trump and Secretary Hillary Clinton.. In addition, key Senate Republicans, including Senate Majority Leader Mitch McConnell (R-KY) and Senate Finance Committee Chair Orrin Hatch (R-UT), have expressed concern about specific provisions in TPP. Consequently, lawmakers are unlikely to consider legislation ratifying TPP until at least a lame duck session after the November elections, but before the new Congress takes office. TPP ratification is a top priority for President Obama before his term ends. Prime Minister Trudeau, who, during the campaign criticized the Harper Government for its secrecy related to TPP negotiations, may wait

on ratification until the outlook is clearer in the US on whether Congress will ratify the trade pact. During the official visit, the two governments released a statement “recognizing that the Trans Pacific Partnership, which links together countries that represent nearly 40 percent of global Gross Domestic Product, would advance these objectives, Canada and the US are working to complete their respective domestic processes.”

[Canada and the US are continuing negotiations on an extension of the Softwood Lumber Agreement \(SLA\), but failure to reach a deal between the two countries could lead to renewed litigation over whether Canadian lumber is unfairly subsidized.](#) Through a series of SLAs, the Canadian federal government imposed export taxes and quotas rather than facing US import restrictions. The last SLA, however, expired on October 12, 2015, and US domestic industry may bring trade cases against their Canadian counterparts beginning on October 12, 2016. During the official visit, the US and Canada failed to reach an agreement on an extension but the two governments did release a statement that they “agreed that their Ministers will intensively explore all options and report back within 100 days on the key features that would address this issue.” During the joint press conference, President Obama stated that the “issue of softwood lumber will get resolved in some

fashion,” though he said that any compromise could leave some parties dissatisfied. Prime Minister Trudeau also stated that he is “totally confident that we are on the right track towards toward a solution in the next weeks and months to come.”

While not addressed during the official visit, there are other trade issues that could arise over the next year between Canada and the US. For instance, the US could add items to the list of restricted or prohibited items under the Lacey Act, which makes it illegal to import, export, sell, acquire or purchase fish, wildlife or plants in 1) violation of US or Native American law or 2) in interstate or foreign commerce involving any fish, wildlife, or plants taken, possessed or sold in violation of state or foreign law. The US could also institute new sanitary/phyto-sanitary restrictions on imports in response to a crisis.

# Border Issues



## In 2016, US policymakers will continue to face the challenges of balancing counter-terrorism and counter-narcotics risks at the US-Canada borders with the desire to expedite the lawful flow of goods, services and people through ports of entry.

This balance will be particularly difficult in the context of a Presidential campaign in which border security has become one of the top tier issues. Notwithstanding these political challenges, the US-Canada official visit saw action on a number of important issues.

During the official visit, President Obama and Prime Minister Trudeau affirmed their commitment to ratifying the Canada-US Agreement on Land, Rail, Marine, and Air Transport Preclearance. The Agreement must still be ratified by the US Congress and the Canadian Parliament, but both legislative bodies are hoping to move forward with legislation later this year. The Canadian and US governments also agreed to expand preclearance to Billy Bishop Toronto City Airport, Quebec City's Jean Lesage International Airport, and rail service in Montreal and Vancouver.

Canada and the US also agreed to other measures to facilitate lawful trade and travel while addressing security risks at the border. The two countries announced that they are establishing a Canada-US Redress Working Group "to facilitate cross-border, aviation-related redress, increase transparency, expedite processing of any complaints, and streamline security list removal procedures." In addition, Canada and the US will develop a system

to exchange biographic entry information at the land border.

Outside of the deliverables from the official visit, there will be additional focus in Congress on the US-Canadian border. For instance, [Congress may consider the Northern Border Security Review Act](#), bipartisan legislation that would require that the Department of Homeland Security (DHS) conduct a threat analysis of current and potential threats at the US-Canadian border. As part of this analysis, DHS would examine whether risks could be mitigated by: improvements at and in between ports of entry along the northern border; addressing gaps in law, policy and governmental cooperation on counter-terrorism and counter-narcotics efforts; and adding additional preclearance and pre-inspection operations at ports of entry. Last October, the House passed the Northern Border Security Review Act on a voice vote. The Senate Homeland Security and Governmental Affairs Committee passed companion legislation, introduced by Senator Heidi Heitkamp (D-ND), last October.

Earlier this year, Congress passed and the President signed into law the Trade Enforcement Act, legislation that would formally establish the US Customs and Border Protection (CBP) in statute and set forth provisions to facilitate trade and improve trade enforcement. As part of this

legislation, DHS is directed to report to Congress on CBP's Business Transformation Initiative and a port-of-entry infrastructure needs assessment. In addition, the legislation authorizes CBP to operate preclearance locations in foreign countries provided an aviation security preclearance agreement is in effect. The legislation also codifies and expands the role of the Commercial Customs Advisory Committee, which consists of 20 members from the trade community and provides recommendations to CBP on modernizing and streamlining cargo processing.

In a tight fiscal climate, there is also increased desire among policymakers to pursue public-private partnerships to facilitate the flow of goods and people through ports of entry. In the FY 2016 Omnibus Appropriations Act, Congress authorized CBP to pursue 10 public-private partnership pilot programs, an increase of five over current law, for services at ports of entry. In addition, around 20 ports of entry have entered into reimbursable service agreements with CBP that fund additional officer hours at ports of entry. Next year, the House Homeland Security Committee and Senate Homeland Security and Governmental Affairs Committee could hold oversight hearings on CBP's public-private partnership program.

America's worsening opioid addiction has begun to strain relations between it and its northern neighbor, as elected and regulatory officials south of the shared border increasingly point to Canada's policy on generic controlled-release oxycodone as a direct driver of the crisis. The US Food & Drug Administration began requiring American drug makers in 2010 to adopt abuse-deterrent technology for the powerful pain-reliever, but Health Canada six years later still allows the generic, non-abuse deterrent formulation to be manufactured and sold. Now, policymakers are blaming cross-border diversion of Canadian drugs for enabling oxycodone addiction and overdoses in the United States.

Prime Minister Trudeau also campaigned on legalizing marijuana,

but the timing and the regulatory regime related to the cultivation, sales and enforcement associated with legislation remain to be seen. Marijuana legalization in Canada could lead to increased cross-border trafficking in marijuana, and how Canada and the US work together to address this risk will be an important issue as the two governments aim to enhance security while not imposing additional impediments to cross-border travel. In addition, any regime related to the lawful cultivation and distribution at the federal level in Canada may require some degree of consultation and coordination with Washington State, whose voters legalized marijuana in 2014.

That said, Canada has been at the forefront of regulating medical marijuana, and its policies as well as

its ability to attract global investment in this cutting edge sector could serve as a model for the world. Two challenges that Canada and the US face together as the world continues to move towards ending prohibition, is the global trade in safe, legally produced product as well as research and development. Most of the domestic and global rules governing the sector are outdated relative to ballot initiatives and advancement in providing marijuana for medical use and recreational use to adults. Governments around the world are recognizing the benefits of moving marijuana out of the shadows of criminal enterprises and into the mainstream of the modern economy, much like alcohol in the early 20th century.

# Transportation and Infrastructure



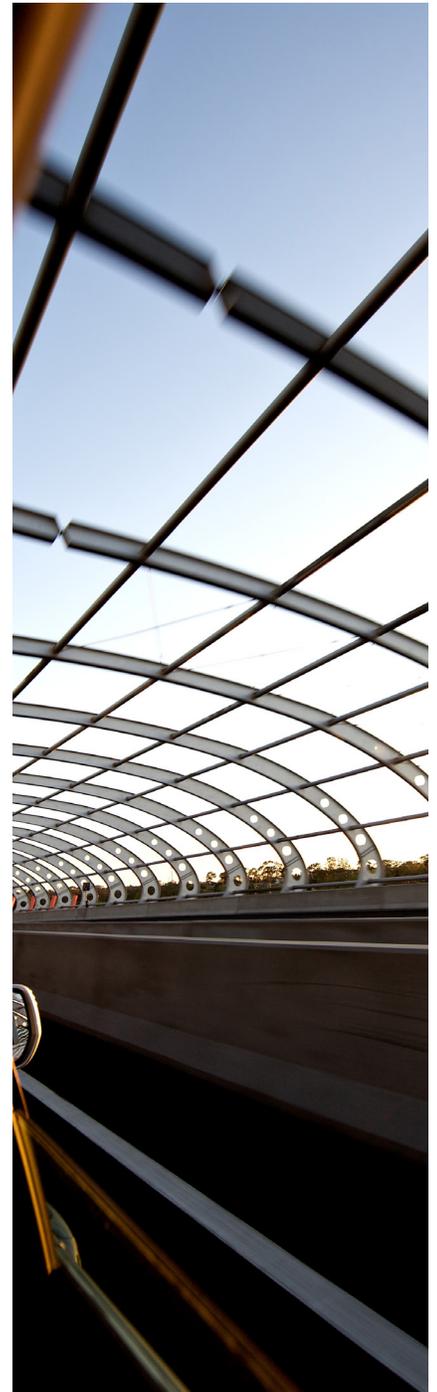
# A 21st Century transportation system is increasingly essential to economic competitiveness, and policymakers are examining policies that enable the efficient and secure movement of goods, people and services.

With the pending expansion of the Panama Canal and increased international trade, there is increasing competition between North American ports for containerized cargo. Senators Patty Murray (D-WA) and Maria Cantwell (D-WA) have repeatedly advocated for legislation to address alleged cargo diversion from US West Coast ports to Canadian West Coast ports due to US ports being subject to the Harbor Maintenance Tax (HMT). In mid-March, Murray and Cantwell introduced new legislation that would authorize US ports to offer rebates on tolls and other charges to encourage shippers to route their cargo through US ports and not Canadian ports. With Congress likely to consider a reauthorization of the Water Resources Development Act, there may be a renewed effort by Senators Murray and Cantwell to reform the HMT in order to address alleged cargo diversion.

In addition, the General Accountability Office (GAO), at the request of Senator Deb Fisher (R-NE), is scheduled to release a study examining the impacts associated with the 2014-2015 US West Coast ports labor dispute. One of the issues the GAO is studying is the costs and impacts of regional changes in freight movements due to the US West Coast ports slowdown, including

shifts to southern or eastern US ports and Canadian and Mexican ports. [A finding by the GAO that the US West Coast ports labor slowdown resulted in cargo diversion to Canadian West Coast ports could result in increased focus on protectionist measures.](#)

Finally, the Windsor Detroit Bridge Authority (WDBA) is moving forward with public meetings and the procurement process on the new "Gordie Howe International Bridge." The Ambassador Bridge, which connects Detroit and Windsor, is the busiest crossing between the two countries, but the bridge is in need of significant renovations, and Canada and the US have been in discussions for years on the construction of a new international crossing. The negotiations, however, were at an impasse over how to finance the construction of a new bridge until the Canadian and Ontario governments agreed to pay for the direct highway construction costs associated with the project. The WDBA will also construct a customs and immigration plaza on both countries. In February, WDBA announced that it will proceed with the Request for Proposals stage of the competitive public-private partnership and the WDBA narrowed the potential private partners to three teams.



Defense and security



The US and Canada share a deep history of defense cooperation and partnership. Formed through collaboration between the countries' respective armed forces during World War II, this defense and security alliance is perhaps unparalleled by any other two nations in the world.

With a shared 5,500-mile border and mutual global security interests as two of the founding members of NATO, together with cultural and ideological similarities, the US and Canada tend to be in close alignment on defense and foreign policy matters. The two longest standing exemplars of this defense and security partnership are the Permanent Joint Board on Defense (PJBD), which was established in 1940, and the North American Aerospace Defense Command (NORAD), which was established in 1958. PJBD is a bilateral advisory board focused on defense and security policy issues. NORAD, formed by the only agreement of its kind, is a bi-national organization tasked with the mission of aerospace warning, aerospace control, and maritime warning in the defense of North America. NORAD's commander reports to both the US President and Canadian Prime Minister.

Additionally, through the Defense Production Sharing Agreement (DPSA), Defense Development Sharing Agreement (DDSA), and North American Free Trade Agreement (NAFTA), the US and Canada each enjoy unique defense trade status with the other. With limited exception, DPSA allows Canadian suppliers to compete for US government defense contracts under the same terms applied to US suppliers. DDSA is a collaborative

program focused on research related to, and the development of, Canadian technology to meet US defense requirements. Additionally, under the "Canadian Exemption" to the US International Traffic in Arms Regulations (ITAR), US suppliers can export unclassified defense articles and services to Canada without a license from the US Department of State's Directorate of Defense Trade Controls (DDTC). Similarly, the Canadian government does not typically require Canadian suppliers to obtain an export license for defense goods provided to the US Department of Defense.

Washington and Ottawa's historic partnership has grown stronger in the face of 21st Century threats. The two countries cooperate extensively in cybersecurity initiatives, and in the wake of the September 11, 2001 attacks, the US and Canada have engaged in a variety of joint efforts to combat international terrorism. These efforts include improved intelligence sharing, law enforcement initiatives to strengthen border security, and counterterrorism operations. Created in 2005, Integrated Cross-Border Maritime Law Enforcement Operations, aka Shiprider, is a bilateral security initiative in which the US Coast Guard and Royal Canadian Mounted Police have partnered to conduct cross-border law enforcement operations

in shared waterways. The bi-national Civil Assistance Plan, first signed by the commanding generals of US Northern Command and Canada Command in 2008, is another recent example of the cooperation between the two nations. Under the agreement, the military forces of each nation are authorized to support one another during domestic civil emergencies, such as terrorist attacks.

In addition to its role in the Global War on Terrorism, particularly in Afghanistan, Canada has made substantial contributions to US-led coalition efforts to counter the Islamic State of Iraq and Syria (ISIS). In February 2016, Prime Minister Justin Trudeau announced that Canada would increase its non-combat role in the campaign against ISIS, including its "training and assisting" mission, and aerial refueling and surveillance operations. This increase in its non-combat role marked an end to Canada's combat role.

Fulfilling a campaign promise, the Trudeau government has withdrawn Canadian fighter jets from US-led airstrikes against ISIS. The Prime Minister also campaigned on withdrawal from the Pentagon's F-35 (aka Joint Strike Fighter) program. However, since taking office, the new government has announced that

it will pay a US \$33 million annual contribution in 2016 to remain part of the Joint Strike Fighter program. Continued membership in the program allows Canada to procure F-35s at a discounted price and permits Canadian companies to bid on new supply contracts for the aircraft. Canadian Defense Minister Harjit Sajjan has indicated that the government continues to assess how to replace the military's CF-18 fleet. Many believe that Prime Minister Trudeau's decision to withdraw Canadian fighter jets from airstrikes

against ISIS, and his campaign pledge to withdraw from the F-35 program, reflect the new government's strategic shift toward an even greater focus on homeland security over foreign military intervention.

Despite their differences in force posture, the US and Canada together play a lead role in the strengthening of global nuclear security as well. In late March 2016, President Obama, Prime Minister Trudeau, and more than 50 additional world leaders will meet in Washington, DC, for the fourth and final

Nuclear Security Summit (NSS). First convened in 2010, NSS is a multilateral, cooperative international effort to address the threat of nuclear terrorism.

The unique defense alliance between the US and Canada, anchored by the common border, common history, common values, and common interests of the two nations, will ensure Washington and Ottawa's continued collaborative pursuit of shared defense and security objectives to address present and future threats.

Energy and climate



## President Obama and Prime Minister Trudeau share a deep personal commitment to combatting climate change. Canada/US cooperation on climate issues, which began in earnest during the Kyoto talks in the 1990s, stalled in the 2000s and is now front and center for the countries coming out of the Paris COP-21 agreement last December.

A major focus of the official visit between President Obama and Prime Minister Trudeau included the unveiling of a US-Canada climate agreement that builds upon recent cooperation between the two countries on climate change, such as recognition by the EPA's Clean Power Plan of Canadian renewable imports.

The centerpiece of the US-Canada climate change agreement is a commitment by both the US and Canada to reduce methane emissions from the oil and gas sector 40-45% below 2012 levels by 2025. As part of the arrangement, EPA will begin immediately developing Clean Air Act regulations on methane emissions from existing oil and gas sources, a sharp break from the agency's previous plan of merely pursuing voluntary incentives to reduce methane emissions from existing sources. Environment and Climate Change Canada will also develop regulations on new and existing oil and gas sources with the goal of issuing a draft rule in early 2017. These regulations will be developed in collaboration with provinces/territories, indigenous peoples and other stakeholders.

Methane regulations in both countries face an uncertain path. With less than 10 months left in office, it is unlikely

that the Obama Administration can finalize methane regulations for existing oil and gas sources, so the job will be left to his successor. As to the next Administration, both Secretary Hillary Clinton and Senator Bernie Sanders would likely finalize these regulations, but a Republican President would be expected to abandon this rulemaking. The oil and gas industry has also signaled that it will sue EPA over methane regulations, which could potentially tie the rule up in litigation for years. Environment and Climate Change Canada will also have to work to coordinate the federal rules with Alberta's recently announced intentions to develop methane reduction regulations for the oil and gas sector.

Canada and the US also committed to take additional domestic actions on climate change. The two countries pledged to continue collaboration on post-2018 model year greenhouse gas (GHG) standards on heavy-duty vehicles and to update their respective public procurement processes to reduce use of hydrofluorocarbons (HFCs). The agreement also calls for "an alignment of analytical methods for assessing and communicating the impact of direct and indirect GHG emissions of major projects." This provision follows a recent briefing paper by the Sierra Club, National

Resources Defense Council and Pembina Institute in which they urged Canada and the US to adopt a "credible, robust climate test" in assessing the impacts associated with potential energy projects. The US-Canada climate agreement could lead to further refinement of environmental review processes to analyze projects' direct and indirect climate impacts, including cross-border energy projects. While not addressed specifically in the US-Canada climate change agreement, the refinement of environmental review processes by both countries could impact cross-border energy infrastructure projects, including both electric transmission lines and cross-border oil and natural gas pipelines, as government agencies analyze the direct and indirect GHG impacts of such projects. Access to US markets for Canadian crude oil producers, particularly with the depressed global oil market, is an important priority, but cross-border oil pipelines are likely to continue to face persistent opposition from environmental organizations.

On the international front, the US-Canada climate change agreement pledged the following actions: adoption of a Montreal Protocol HFC phasedown amendment in 2016, and upon adoption, provide increased financial support to the Protocol's

Multilateral Fund to help developing countries implement a phase-down; working with the International Civil Aviation Organization to promulgate a new CO2 standard for airplanes; and encouraging G-20 commitments to reducing emissions from heavy-duty vehicles and the oil and gas sector.

Finally, the US-Canada climate change agreement states that two federal governments “will encourage” collaboration between sub-national governments on best practices for carbon markets. Going forward, the federal governments could serve to convene state and provincial officials in order to further integration of North American carbon markets. Notably, California and Quebec already share a common carbon market, and Ontario and Manitoba are set to join this market in the coming years. In addition, New York Governor Andrew Cuomo (D) has directed state officials to study options for the Regional Greenhouse Gas Initiative to link up with California and Quebec’s carbon market.

While not mentioned in the US-Canada climate change agreement, discussions are likely to continue this year on how the US EPA’s Clean Power Plan will account for Canadian renewables. In the final Clean Power

Plan rule, EPA enables an important step in cross-border collaboration by allowing states to credit Canadian renewable energy imports toward meeting their compliance obligations. While the US Supreme Court has issued a stay on the Clean Power Plan, EPA is expected to continue engaging with states, industry and other stakeholders on compliance strategies for the rule. With respect to Canadian renewable imports, EPA may provide further clarification on how states can account for Canadian renewable energy imports under the Clean Power Plan if they pursue a rate-based standard.

In building upon the action from the official visit, there may also be additional progress in building upon the Memorandum of Understanding (MOU) reached by US Secretary of Energy Ernie Moniz, Canadian Natural Resources Minister Jim Carr and Mexican Secretary of Energy Pedro Joaquin Coldwell at the recent North American Energy Ministers Meeting. Under the MOU, the energy ministers pledged to focus on the following six areas:

- Identifying trilateral activities to further climate change adaptation and resilience;

- Sharing best practices and seeking methods to reduce emissions from the oil and gas sector, including methane and black carbon;
- Sharing experience and knowledge in the development of reliable, resilient and low-carbon electricity grids;
- Modeling, deploying and accelerating innovation of clean energy technologies, including renewables;
- Exchanging information in order to improve energy efficiency for equipment, appliances, industries and buildings, including energy management systems; and
- Exchanging information and promoting joint action to advance the deployment of carbon capture, use and storage.

The “Tres Amigos” North American Leader Summit in June could provide agreement on additional energy and climate change coordination between the US, Canada and Mexico.

# Chemical safety regulations



The US Congress is in the final stages of reforming US laws governing the safety of industrial chemicals. The Toxic Substances Control Act became law in 1976, but has never functioned effectively. The proposed updates to the law will require EPA to conduct a safety review of all chemicals used in products that are sold in the United States, including imported products.

Canadian firms selling into the United States would have to comply with any restrictions on products or raw materials issued by EPA. Raw chemicals will clearly be subject to the new law, but a wide range of finished goods that contain chemicals could be affected by regulations issued

in the future under the new law. Building materials, paints, coatings, adhesives, consumer products, and industrial cleaning supplies are just a few examples of the types of products that could be restricted if chemicals in the products fail to meet the safety standard in the new law. Pharmaceutical products

and pesticides are not subject to regulation under the Toxic Substances Control Act.

The new law will likely go into effect later this year and EPA could begin issuing restrictions on products by 2017.



# Regulatory Cooperation



## In February 2011, President Obama and former Prime Minister Harper announced the establishment of the US-Canada Regulatory Cooperation Council (RCC) to enhance regulatory transparency and coordination between the two countries.

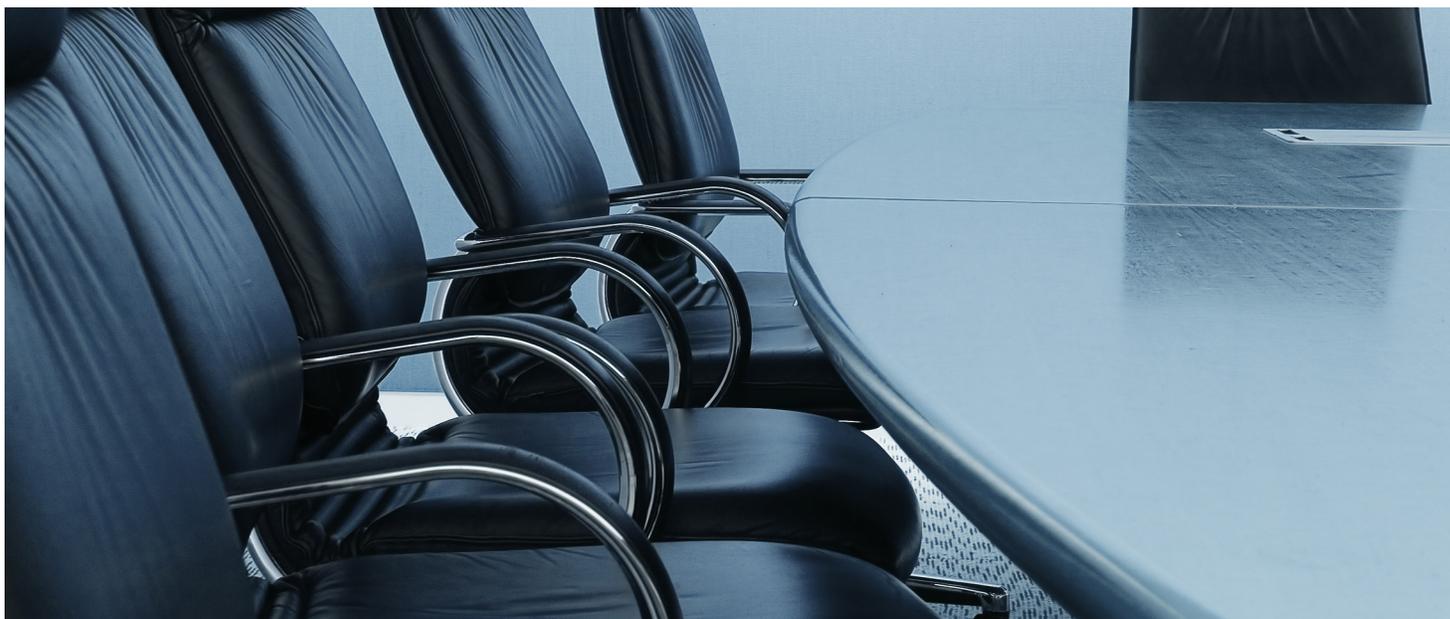
In light of the integrated supply chains between the US and Canada, RCC was viewed as a means to bolster the economic competitiveness of both countries by coordinating regulations where possible, while also ensuring that regulations are achieving their aims of protecting workers' safety, public health and the environment, among other goals. Since its inception, the RCC has produced some tangible results, including: allowing industry to submit electronic applications to both Health Canada and US Food and Drug Administration; the adoption by the US Department of Agriculture and the Canadian Food Inspection Agency of mutual recognition of animal disease zoning

decisions; and alignment by Canada's Pest Management Regulatory Agency and the US Environmental Protection Agency on product reviews and risk assessment methodologies.

The meeting between President Obama and Prime Minister Trudeau secured commitments for additional regulatory alignment between Canada and the US. Specifically, President Obama and Prime Minister Trudeau agreed to the following measures:

- The formation of a joint Canada-US group of senior officials who will generate and implement regulatory cooperation initiatives between the two countries on an ongoing basis.

- The convening of a business, consumer and expert group on regulatory cooperation to ensure an ongoing focus on consumer and industry benefits stemming from international regulatory cooperation.
- The generation of short- and medium-term initiatives by departments and agencies by early summer that outline comprehensive and ambitious regulatory alignment commitments and work plans.



# Intellectual Property Protection



The United States and Canada share a strong interest in the protection of intellectual property (IP). They cooperate on IP enforcement against counterfeits, as both are negotiating parties to the Anti-Counterfeiting Trade Agreement (ACTA – not yet in force), as well as active in the WTO Trade-Related Property (TRIPs) Agreement. In addition, both are parties to the newly negotiated, but not yet ratified, Trans Pacific Partnership Agreement, which has additional obligations to protect IP.

There are nevertheless some areas of concern:

- Canada is the location, as are a number of other countries, of online piracy websites that violate IP regularly.
- Canada has negotiated a Comprehensive Economic and Trade Agreement (CETA) with the EU that recognizes a number of geographical indications of European origin that will disadvantage US products.
- Canada does not seize counterfeit goods in transit, although it does actively enforce laws with respect to imports of counterfeit goods.
- Canada's federal courts made a radical change in Canadian patent protection starting 10 years ago, that has had a dramatic negative impact on intellectual property protection, particularly for pharmaceuticals. This was the creation of a new interpretation of patent utility (a product must be useful to warrant the issuance of a patent), called less formally, the

“promise doctrine.” This involves a Canadian court finding an implied promise that a product would perform in a certain way sometime in the future. This is not the way that an effective patent regime can operate in the area of pharmaceuticals, for example. In order for there to be reasonable protection of intellectual property, once a drug is discovered, it must be patented. But at this early stage, the uses and side effects of the drug cannot be known. A court coming in years after a patented drug has been in use, successfully in thousands if not hundreds of thousands of cases, and then invalidating the patent on the basis of the insufficiency of the claims made at the time of patenting is worse than highly disruptive, it must be judged to impair the willingness of companies to invest in R&D in Canada.

Since 2005, Canadian courts have invalidated 20 patents on the grounds that they lack utility. The adverse impact of the Canadian court-created law can be demonstrated by the

fact that patents issued elsewhere in the world are rendered invalid in Canada. Multiple jurisdictions that do apply the concept of showing utility simply do not produce the same repeated adverse results. The patent promise/utility doctrine has implications for industries outside the pharmaceuticals sector, but it is the pharmaceutical industry that has borne the brunt of invalidations under the promise doctrine.



# Conclusion



As closely integrated as the Canadian and US economies and societies are, there are still a number of areas, particularly with respect to business issues that continue to require attention and diligence. Dentons is uniquely positioned as the go-to law firm in North America, immersed in Canada-US relations, with deeply vested interests in promoting an effective bilateral relationship.

In addition to the former Ambassador to Canada, the former Chief of Staff to the Ambassador, and Canadian nationals, our team includes a number of professionals who have held positions in the US Department of Commerce, the Overseas Private Investment Corporation, and Congress. Our collective experience brings the ever-shifting political landscape of both countries into better focus, as we engage deeply beyond the headlines to anticipate how emerging issues may affect our clients. Our distinctive viewpoint

allows us to identify and capitalize on opportunities, navigate pitfalls and build winning coalitions.

We are trusted advisors to governments and businesses on both sides of the border on all matters pertaining to Canada-US commerce, complex border management issues, and a myriad of security issues that may impact supply chains, logistics and the bilateral public policy agenda. Our team draws on legal, government and industry experience throughout the firm to provide our clients with strategies

that are effective in both the legal and political arenas.

Whether you are the government or whether you are partnering with a government body entering a market or navigating reform, Dentons can provide strategic counsel and advice to materialize your goals, understand legislative frameworks and regulatory conundrums, and help you meet, adapt and comply with the continuously changing landscape regardless of your industry sector or enterprise size.

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