OSLER

CUSMA comes into force and Biden is elected President: Calmer seas ahead for U.S.-Canada trade?

DECEMBER 8, 2020 7 MIN READ

Related Expertise

- International Tax
- International Trade

Authors: Alan Kenigsberg, Gajan Sathananthan

Your browser doesn't support HTML5 audio. Here is a link to the audio instead.

After a rocky 2019, global trade faced another challenging year in 2020 with the COVID-19 pandemic and continued aggressive trade actions by the United States.

The largest change to Canada's global trading relationships occurred close to home, with the implementation of the Canada-U.S.-Mexico Agreement (CUSMA), the successor to the North American Free Trade Agreement (NAFTA). However, the stability many had hoped CUSMA would bring to Canada-U.S. trade was short lived. Only a few months after the implementation of CUSMA, the Trump administration levied tariffs on certain Canadian aluminum goods due to alleged surges in imports, and Canada announced potential countermeasures in retaliation. Though the United States ultimately suspended the tariffs before the application of Canadian countermeasures, there remains some risk that they could be reapplied in the wake of the U.S. election (though a Biden presidency would materially reduce this risk). With all of this happening alongside a global pandemic that disrupted supply chains and introduced new "protectionist" attitudes, 2020 proved to be an eventful year in cross-border trade.

Implementation of CUSMA

On July 1, 2020, about two and a half years after the Trump administration instigated the renegotiation of NAFTA, CUSMA came into effect, introducing several important changes. We previously reviewed a number of these changes (as well as what has not changed) in our trade brief, highlighting some of the following significant provisions:

- substantial changes to the rules-of-origin for automobiles, including a new specific content requirement whereby a certain portion of the value of the vehicle must be from parts that are produced in plants where the average hourly wage for workers is at least US$16 per hour;
- tariff-rate quotas that allow for dairy products from the United States to enter Canada duty-free at volumes equivalent to about 3.5% of the Canadian dairy market; and
- the exclusion of Canada from the chapters on investor-state dispute settlement and government procurement, which means that Canadian investors in the United States and Mexico and American and Mexican investors in Canada do not benefit from the provisions in these chapters. This change, however, does not affect the ability of the Canadian

OSLER

government to bring a state-to-state action.

One little-remarked development could present an opportunity for U.S. retailers: namely, the changes to the *de minimis* thresholds for importing goods into Canada. This is the threshold above which importers are required to pay taxes and/or customs duties on imported goods. Prior to the implementation of CUSMA, Canada's threshold was quite low, with taxes and customs duties applying to all goods with a value in excess of $20. However, as part of the negotiations for the agreement, Canada agreed to increase this threshold substantially. In relation to goods imported from the United States and Mexico, taxes are applied where the value exceeds $40, and customs duties are applied where the value exceeds $150. Goods imported from other countries are still subject to the $20 threshold. This is a comparatively sizeable jump, though the change was not as large as requested by the U.S. government. As an increasing portion of Canadian consumers purchase their goods online, this change could be advantageous to e-commerce businesses who fulfill orders from the United States or Mexico to lower the cost of their products to Canadian purchasers and thereby increase their cross-border sales.

U.S. tariffs on Canadian aluminum

Another major development in U.S.-Canada trade was the implementation by the Trump administration in August of tariffs on certain Canadian aluminum exports to the United States. These were then unilaterally suspended hours before the Canadian government formally implemented its announced countermeasures. The United States, when announcing the tariffs, claimed that Canadian exports of these goods had surged beyond historical levels which, pursuant to the Joint Statement signed by the United States and Canada in May 2019 after a year-long dispute on steel and aluminum, justified the imposition of the special tariffs.

Though the U.S. government did cease the application of the tariffs in September, the U.S. Trade Representative (USTR) indicated that they could be reapplied if Canadian monthly imports for these aluminum goods are greater than the USTR's expected volumes for that month. As we discussed in our trade brief on this development, it is highly likely that U.S. imports of these goods from Canada will exceed the USTR's estimates. At the time of writing, it is unclear whether the United States will go through with the reimplementation of the tariffs. As discussed below, with the declaration of Joe Biden as President-elect, we believe the United States is less likely to do so. Nevertheless, some risk remains, as the door for reimplementation remains open. If the United States does reapply this tariff, it is expected that Canada will respond with countermeasures, which could have an impact on Canadian businesses who import aluminum or aluminum containing goods from the United States.

Impact of the U.S. election and COVID-19

Casting a long shadow over global trade this year has been the COVID-19 pandemic and the implications of the U.S. election.

The COVID-19 pandemic strained global trade and supply chains, forcing companies to rapidly adjust to changing circumstances as the pandemic made its way across the world. It has also shone a spotlight on the global supply chains that support many of the goods that are required to combat the pandemic. The Trump administration's call for 3M to prevent the export of U.S.-made N95 masks to Canada, which the United States eventually backed away from, caused significant concern in Canada. It encouraged the Canadian government to find and support potential domestic producers of key goods, such as masks and ventilators. It seems likely that the Canadian government, and other governments around the world, are monitoring critical goods, personal protective equipment and other medical supplies. They are no doubt examining whether more domestic support may be needed to ensure that export restrictions by foreign governments do not affect Canada's ability to respond to global health crises, including the ongoing COVID-19 pandemic.

Given the aggressive actions taken by the Trump administration on international trade as part of the push to reduce U.S. trade deficits and bring some lost manufacturing jobs back to the United States, the result of the U.S. presidential election could also have an impact on the state of global trade going forward. Biden has indicated that he would not pursue the national security-based tariffs that have been a hallmark of the Trump administration and the basis for the steel and aluminum tariffs that have been applied on Canadian exports (including the ones noted above).

Biden has also previously indicated he would be open to joining the Comprehensive and Progressive Trans-Pacific Partnership (subject to it being renegotiated), which could adjust the Canada-U.S. trading framework that is currently largely based on CUSMA. Among other things, such a move could potentially reintroduce investor-state dispute settlement and enhanced government procurement obligations.

Biden has also previously expressed opposition to the Keystone XL pipeline and could revoke the presidential permit issued by President Trump for the project, jeopardizing its completion.

With respect to China, Biden seems more likely to work with traditional allies to collectively target any abusive trade practices engaged in by China, as opposed to the more unilateral action that the Trump administration has preferred.

Though it is by no means certain that a change in leadership would significantly improve trade ties, the inauguration of Joe Biden as President could usher in a return to a more stable trading relationship between Canada and its largest trading partner. A Biden administration would, however, still be likely to take a close look at the international frameworks that regulate global trade and push for changes where it feels Americans are being unfairly disadvantaged, particularly with respect to China. Given our exposure to the American market, there is little doubt that these actions will affect Canadian companies.