



OSLER

TRADE

Trade regulation in 2021: A year of evolution



In many ways, maintaining the status quo was the defining feature of the 2021 trade landscape. There was a Canadian federal election, but very little changed, with the Liberal Party maintaining its minority government. Further, despite the significant impact of COVID-19 on individuals, supply chains and businesses worldwide, the Canadian government has indicated no intention to deviate from its existing trade policy goals as a result of the pandemic. Clear signals regarding trade policy in the post-pandemic “new normal” indicate that the government intends to continue implementing and expanding existing trade agreements, negotiating new agreements and expanding sanctions and human rights rules.

As the COVID-19 pandemic continued into its second year, businesses and governments became increasingly adept at navigating its challenges. Businesses should expect to continue adapting to these shifts in 2022, even as we begin to emerge from the pandemic.

CUSMA – One year on

Now that the Canada-U.S.-Mexico Free Trade Agreement (CUSMA) has been in force for over a year, the “ordinary course of business” under the agreement has begun to emerge. Our 2020 [Legal Year in Review](#) noted that the stability many had hoped CUSMA would bring to Canada-U.S. trade was short-lived. The Biden administration has maintained a measure of the protectionist rhetoric that was the hallmark of the prior regime, including

- the President’s commitment to “buy American,” which has been formalized with an [Executive Order](#), dated January 25, 2021
- the U.S. House panel’s proposed legislation to boost electric vehicle credits up to US\$12,500 per vehicle, including additional credits of US\$4,500 for union-made vehicles produced in the U.S. and US\$500 for batteries made in the U.S.; starting in 2027, vehicles would need to be assembled in the U.S. to qualify for these tax credits
- the President’s pledge that he will maintain the tariff protections for the steel and aluminum industries imposed by the Trump administration

In the face of these initiatives, the Canadian and U.S. governments have discussed exemptions to certain of the measures which would allow Canadian companies to retain access to U.S. government contracts.

As is the case with any new trade agreement, a detailed understanding of how it will be implemented is still developing. For example, Canada has joined Mexico in seeking formal consultation with the U.S. with regard to the interpretation of content rules for automobiles set out in the agreement. Further clarity regarding the practical impacts of CUSMA’s implementation should come over the course of 2022. In the interim, statements from U.S. officials continue to signal a protectionist approach in the near term.

Trade disputes

The most significant change between CUSMA and the North American Free Trade Agreement (NAFTA) (its predecessor agreement) is the abolishment of the dispute provisions under NAFTA’s Chapter 11. As a result, private citizens and businesses will soon no longer have standing to bring claims under the treaty.¹ Private investors can bring NAFTA legacy disputes for a three-year period, which began to run when CUSMA came into force on July 1, 2020.

Legacy disputes under NAFTA (including Chapter 11 disputes and other state-to-state disputes) remain ongoing. Notably – consistent with the protectionist rhetoric mentioned above – 2021 saw a new chapter in the decades-old softwood lumber dispute between Canada and the U.S. As discussed by Minister Ng in her [statement](#), the U.S. Department of Commerce concluded the second administrative review of its anti-dumping and countervailing duty orders on certain softwood lumber products from Canada in May 2021. As a result of this review, the U.S. doubled tariffs on Canadian softwood lumber imports.

Further clarity regarding the practical impacts of CUSMA’s implementation should come over the course of 2022. In the interim, statements from U.S. officials continue to signal a protectionist approach in the near term.

¹ Private citizens continue to have rights under foreign investment treaties and private contracts (i.e., arbitration clauses).

Only state-to-state disputes are permitted under CUSMA. In May 2021, the U.S. advanced the first such state-to-state dispute when it called for the establishment of a dispute panel to review measures announced by the Canadian government in June and October 2020 and May 2021 that allegedly undermined the ability of American dairy exporters to sell a range of products to Canadian consumers. Specifically, the U.S. is challenging the allocation of dairy tariff-rate-quotas (TRQs) and in particular the setting aside of a percentage of each dairy TRQ exclusively for Canadian processors. As the first dispute advanced under the new agreement, this matter may provide important insight into what investors can expect from the dispute resolution process under CUSMA going forward.

Canadian courts remain stalwart in their deferential approach to the review of decisions of trade tribunals constituted under free trade agreements. As we wrote earlier this year in our blog post on [osler.com](#), [United Mexican States v. Burr reinforces hesitance of Canadian courts to overturn decisions of international tribunals](#), the Ontario Superior Court's July 20, 2020 decision in *Mexico v. Burr* affirmed that Canadian courts will be loath to overturn the decisions of such trade tribunals. In this case, a number of U.S. investors brought a claim against the Mexican government in response to its decision to shut down their casinos in Mexico. The International Centre for Settlement of Investment Disputes tribunal dismissed the Mexican government's jurisdictional challenges and issued a partial award in favour of the investors. Whether constituted under the former NAFTA or another trade agreement, domestic review of decisions of international tribunals remains subject to a highly deferential standard of review. Canadian investors should consider such barriers when determining whether and how to appeal such decisions.

Sanctions and human rights: An evolving framework

Numerous developments in Canadian sanctions and human rights law occurred in 2021. Expansions in both spaces appear to be part of a broader trend to support internationally responsible conduct on the part of businesses. Individuals and entities doing business in Canada and Canadian entities doing business abroad should be mindful of the ever-evolving sanctions framework, particularly the government's increased focus on human rights and ethical business practices.

The Canadian government has both imposed new sanctions and expanded existing frameworks. Specifically, in 2021, Canada took the significant step of imposing new sanctions against China for human rights violations committed in the Xinjiang region. The sanctions, implemented under the *Special Economic Measures Act's* new [China Regulations](#), prohibit dealings in the property owned, held or controlled by the four designated individuals and one designated entity. Every person has an obligation to report to Canadian law enforcement if they have reason to believe that they have such property in their possession or control. As the U.S. has now dropped the charges against Huawei CFO Meng Wanzhou, and Canadians Michael Kovrig and Michael Spavor have been released from Chinese detention, it remains to be seen what 2022 holds for Sino-Canadian relations. The Canadian government has not yet made a decision about whether Huawei will be permitted to sell 5G equipment in Canada. Canada's allies (the U.S., Australia and the UK) have all banned such sales.

The Canadian government also expanded the scope of existing sanctions against Crimea, Russia, Belarus and Myanmar, designating additional individuals and entities under existing regulations. For more information on certain of these sanctions, please see our blog posts on [osler.com](#), [Canada's expanded, sector-specific sanctions on Belarus](#) and [Canada joins the U.S., E.U. and U.K. in sanctioning Chinese officials over the treatment of Uyghur Muslims](#).

Further, there have been clear signals that the government expects that Canadian businesses will operate ethically abroad. As we wrote in our blog post on [osler.com](#), [New Canadian foreign investment promotion and protection model expands responsible business conduct provisions](#), the Canadian government has released a new [model Foreign Investment Promotion and Protection Agreement](#) (FIPA) intended to serve as a basis for future investment negotiations with foreign counterparties. The model FIPA expands provisions encouraging parties to comply with domestic and international human rights and responsible business conduct standards. The Canadian government has also proposed modern anti-slavery legislation ([Bill S-216](#)) that would impose reporting requirements on various entities involved in the manufacture of goods in Canada or elsewhere, or in the importation of goods into Canada. These reporting requirements relate to the steps that the entity has taken to prevent and reduce the risk that child labour or forced labour has been used at any stage of the production of goods in Canada or elsewhere, or of goods imported into Canada.

These developments are part of a clear trend towards encouraging businesses operating in Canada and Canadian businesses operating abroad to conform with international and domestic human rights rules and norms.

Another Trudeau term: A new era of trade agreements?

Now that CUSMA, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) are in force and are being implemented, the frameworks for Canada's trade relationships with its largest partners have become increasingly entrenched. The global movement toward increasingly formalized trade relationships with larger trading blocs through agreements that are broader in scope than the WTO agreements continues. Among other developments along these lines, both the U.K. and China have applied to join the CPTPP. In addition, the Canadian government has made the pursuit of bilateral trade agreements with Asia-Pacific and South American nations (particularly the Mercosur group) a key goal of its international trade agenda. The government has also announced plans to create a federal "hub" so businesses can benefit from international trade agreements. With the current Liberal government having been re-elected with another minority government in September, these policies are likely to continue in the near term.

These developments are part of a clear trend towards encouraging businesses operating in Canada and Canadian businesses operating abroad to conform with international and domestic human rights rules and norms.

Businesses should expect to continue to operate within these formalized agreements and to monitor their implementation and interpretation, which should clarify the “rules of the game.” Individuals or entities with specific interests should consider whether and how best to communicate concerns to government to ensure their interests are considered as new agreements are negotiated and implemented.

As businesses and governments continue to adapt and learn to operate as we emerge from the pandemic, trade law will necessarily evolve. Businesses have faced a range of challenges in the past year, particularly as supply chains remain disrupted. Government policy goals – particularly, in 2021, the promotion of free trade, human rights and sanctions enforcement – will only increase the compliance burden for businesses operating internationally as we move into 2022. It will therefore be important to obtain expert advice on how best to navigate the challenges presented by this evolving landscape.

AUTHORS

**Alan Kenigsberg**

Partner, Tax

akenigsberg@osler.com

416.862.6659

**Malcolm Aboud**

Associate, Litigation

maboud@osler.com

416.862.4207

**Gajan Sathananthan**Associate, Competition/
Antitrust and Foreign
Investment**gsathananthan@osler.com**

416.862.4287

**Chelsea Rubin**Associate, Competition/
Antitrust & Foreign
Investment**crubin@osler.com**

416.862.4852

**Sarah Firestone**

Associate, Litigation

sfirestone@osler.com

416.862.4727