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Expert Rountable Report on International Trade and North American Infrastructre

Expert Panel

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CUSLI EXPERT ROUNDTABLE REPORT ON INTERNATIONAL TRADE AND NORTH AMERICAN INFRASTRUCTURE¹

The following is a report of the Canada-United States Law Institute’s October 2015 Experts’ Meeting held in Washington, D.C. The Meeting focused on the current state and future of North American infrastructure development and current international trade topics.

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I. INTRODUCTION

On October 29, 2015, the Canada-United States Law Institute (CUSLI)² hosted an expert panel discussion at the Steptoe & Johnson PLLC’s Washington, D.C. offices. The purpose of the meeting was to discuss infrastructure development as a driver of economic growth and current developments in Canada-United States trade issues. Expert participants sought to identify distinctions between Canadian and U.S. infrastructure development policies and practices as well as discuss the future of current trade topics and their immediate impact on North American economic interests.

The meeting featured distinguished experts from both the public and private spheres in Canada and the United States. The meeting was broken into two expert panel discussions: one focused on approaches to infrastructure development, while the other concentrated on the changing political dynamics of

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² CUSLI is a non-profit organization with the goal of establishing professional and institutional links between the legal communities in Canada and the United States. CUSLI also provides resources to members on the bilateral relationship between Canada and the United States, and helps to facilitate comparative law education and research opportunities for students and faculty at member organizations within Canada and the United States.

the Trans-Pacific Partnership (“TPP”). During the first panel, experts discussed the value of public-private partnerships in promoting economic development. In the second panel, meeting participants focused on Canadian and American attitudes toward the TPP, as well as how recent political developments would impact the ratification of the partnership between Canada, the United States, and states along the Pacific Rim.

Several important themes emerged from the expert panel discussions. Regarding infrastructure and development, participants first highlighted the successful implementation of public-private partnerships (“P3”) in Canada. Secondly, participants described the challenges to P3 in the United States, while examining how transportation agencies have engaged in these ventures. Lastly, participants discussed the future of P3 in the two countries.

Concerning trade issues, the discussion focused mainly on TPP. First, participants discussed recent political developments in Canada and the United States that may affect the ratification of TPP. Second, participants provided an overview of the creation of TPP and its relationship to the larger global trade environment. Third, participants described the stages of the ratification process and speculated about challenges at each stage. Finally, the participants turned to how TPP might affect the Canada-United States relationship.

II. INFRASTRUCTURE DEVELOPMENT PRACTICES IN CANADA

The first expert panel focused on innovative approaches to infrastructure development opportunities in Canada and the United States, namely public-private partnerships (“P3s”). Participants first analyzed the evolution of infrastructure development practices in Canada. Participants posited that until approximately twenty years ago, Canada relied on traditional practices of infrastructure funding. These traditional practices required government funding at or near the full cost of the infrastructure project through a combination of direct expenditures, bond or debt issuances, or tolls and fees. However, there were many risks associated with this traditional approach; for instance, revenue authorities were not always able to guarantee the full level of revenue over the life of project payments.

As a result, over the past twenty years, Canada has encouraged partnerships between the public and private sectors to build and maintain infrastructure projects. These P3s allow the government to shift immediate financial responsibility to construction corporations under a long-term financing plan with either the federal government or provincial governments. Corporations, in turn, finance infrastructure development projects through direct expenditures, bank loans, bonds, and guarantees of future payments. P3s allow for greater flexibility in long-term financing, as the government and corporations can work together to establish a payment system moving forward. Furthermore, corporations can provide a range of services on infrastructure development projects, from initial design and construction to maintenance and operation of the finished project. The government and corporations can also establish cost- and revenue-sharing plans under the P3 structure. By separating the initial funding of infrastructure development projects from later payments, governments can ensure a more

efficient schedule of infrastructure delivery. The P3 structure can even help to depoliticize infrastructure projects, as private corporations share a stake in the success of infrastructure development.

Investment in infrastructure development is a top priority across all levels of government in Canada. In response to a devastating infrastructure deficit, the government of Ontario committed to a long-term P3 infrastructure plan in 2003-2004 by creating a specialized technical agency, Infrastructure Ontario (“IO”). IO operates under five guiding values, which have come to inform Canadian P3 processes today: (1) public interest in infrastructure projects is paramount; (2) value for money invested in infrastructure development is demonstrable; (3) appropriate public ownership must be preserved; (4) accountability for infrastructure projects must be maintained; and (5) all P3 processes must be fair, transparent, and efficient. Today, Canada is perceived as the epicenter of P3 infrastructure projects. Current P3 infrastructure projects in Canada take into consideration increasing urbanization, deterioration of infrastructure, and environmental sustainability. Canada has completed 238 successful P3 projects thus far, at a value of over seventy billion Canadian dollars. Forty jurisdictions from around the world have consulted IO, and 100 P3 projects are currently in the pipeline for Ontario alone. Additionally, IO has strengthened partnerships with various U.S. federal departments to initiate and develop P3 programs across the Canada-United States border.

III. INFRASTRUCTURE DEVELOPMENT PRACTICES IN THE U.S.

Participants next turned to analyze the current status of P3 infrastructure development projects in the United States. Participants argued that P3 projects have not achieved the same level of success in the United States as they have in Canada for a variety of reasons. In some states and municipalities, U.S. officials cannot appropriate funds for projects beyond term limits, which affects the timeline and support of P3 infrastructure projects. Furthermore, in some U.S. states, local contractors, local engineering companies, unions, and other vested interests lobby against P3 efforts in infrastructure development, fearing further government regulations. A number of high-profile P3 infrastructure projects in the United States to date have been considered failures, such as the Chicago Skyway project, which further deters public officials from undertaking new P3 projects. Despite these obstacles to P3 infrastructure project development in the United States, participants maintained that the United States has the potential to be the largest P3 market in the world.

Successful P3 infrastructure projects in the United States have largely been credited to departments of transportation or other governmental agencies with transportation responsibility. P3 infrastructure development projects related to transportation are more attractive in the United States because they tend to be large-scale projects with high revenue, which provide greater equity interests for private partners. Furthermore, transportation agencies have a large inventory of projects, with work backlog worth billions of dollars. The sheer volume of transportation projects creates opportunities to engage in P3 initiatives. In addition, the U.S. Department of Transportation enacted the Transportation

Infrastructure Finance and Innovation Act, a loan program to create incentives, including longer-term loans, for state and local governments to get involved in P3s. Though state departments of transportation across the United States have retained a strong institutional knowledge of infrastructure development, other public agencies in the United States lack a comprehensive understanding of P3 processes, further hampering their expansion into fields such as school and public building construction.

IV. P3S AND THE FUTURE OF NORTH AMERICAN INFRASTRUCTURE DEVELOPMENT

During the experts' meeting, participants agreed on guidelines and best practices for P3 infrastructure projects in both Canada and the United States. Since P3 infrastructure projects tend to span many electoral cycles and levels of funding, participants stressed that over-arching political vision and support is essential to the success of these projects. In order to further depoliticize P3 projects, participants argued that when possible, the government should be separated from the agency working on the procurement process. In addition, procurement structures need to be predictable, reliable, and most importantly transparent. Furthermore, participants agreed that educating citizens on P3 structure and processes is essential to building support for P3 infrastructure development. Finally, it is vital for governments to ensure that proper parameters and safeguards are in place with P3 projects like internal and external oversight mechanisms. With such mechanisms established, P3 projects will be able to operate effectively across international borders, specifically strengthening bilateral approaches to infrastructure development between Canada and the United States.

V. THE TRANS-PACIFIC PARTNERSHIP

The second panel of the Experts' Meeting concerned recent developments in bilateral trade issues and the multi-lateral Trans-Pacific Partnership ("TPP"). The TPP occupied the majority of the discussion, and at the time of the Meeting, two events with implications for the future of TPP had recently occurred. So the participants strove to balance their views in light of the changing context of the bilateral trade environment. The first development was that the state parties to the TPP had only just approved the working language of the document, and their negotiators had not yet released all the details of the final agreement. However, much of the agreement was disseminated through the press and trade experts, permitting participants to discuss some of the technical details. The second was that Canada just held a general election for Parliament, and the Liberal Party under Justin Trudeau won a majority of seats after nine years of Conservative governments under Stephen Harper. As Trudeau's government had not yet been sworn in, some participants gave their opinions and predictions about Prime Minister Trudeau's attitude toward TPP under a caveat of calculated speculation. In addition, the Obama administration's decision to reject the Keystone XL

pipeline had not yet been announced, but was considered at the time to be the likely outcome.

The panel addressed the background of TPP in the context of global trade. The panelists generally agreed that TPP will likely be the model of world trade agreements in the future, and that TPP is the test case for whether a comprehensive, multilateral world trade regime can work. They discussed that TPP was born out of the collapse of the Doha Development Round of the World Trade Organization (“WTO”), which they believed failed because of a fundamental disagreement about the privileges and responsibilities of developed and developing states. The Pacific Rim states wanted to continue pursuing a comprehensive multilateral agreement, leading to TPP. Trade today, the panel determined, is no longer only about the international movement and taxation of goods, but also concerns foreign direct investment and the establishment of foreign subsidiaries of international corporations. Furthermore, parties consider the economic, taxation, and employment implications of greater openness to such activities. In light of this, some on the panel expressed concerns that the expanded scope of coverage of trade agreements may lead to a ‘balkanization’ of world trade. Additionally, participants questioned whether this expanded scope would lead to a fundamental undermining of the WTO, as differing regional agreements produce different standards for such issues as foreign direct investment and intellectual property protections, potentially leading to global wealth imbalances. As for the Doha Development Round, some participants expressed the opinion that it is functionally dead.

The panel agreed that, while the success of Pacific Rim trade negotiators in achieving a draft agreement was substantial, it is only part of the first act of a metaphorical five-act drama for this treaty. Act I includes both the draft language of the treaty and the actual legal language for negotiating states to consider. Act II will be when TPP states actually sign the agreement, which they noted has the potential to be highly political. Both the public and private sectors will look to whether President Obama signs the agreement. Under a prior arrangement with Congress, he is required to give Congress 90-days’ notice before he signs the agreement, and some on the panel believe that opponents of TPP in Congress may try to use legislative maneuvering to stall President Obama’s signature. Prime Minister Trudeau is expected to withhold his signature until he knows if President Obama will sign TPP. If President Obama does not, then the panel agreed that not only would Trudeau not sign, but the strength of the agreement would be severely reduced due to the absence of two of the largest TPP economies. Some panelists were of the opinion that TPP might itself fail if neither Canada nor the United States signed. Although signing an agreement does not bind a state to the terms of the agreement, it signals an intention to be bound, which may be too controversial for some politicians.

Act III will be the ratification process, likely to occur in the summer of 2016, which will also probably feature an Obama-Trudeau coordination. President Obama will need to present implementing legislation to Congress for consideration and approval, but if the implementing legislation as passed does not comport with TPP, then TPP’s future is uncertain. One member of the panel

noted that Senator Orrin Hatch of Utah has already stated his intention to alter the language of the implementing legislation as compared to whatever final TPP text upon which the Senate will vote. Complicating any ratification vote in the United States is the existence of side letters between United States and Japanese negotiators. Experts know the two states exchanged letters of mutual agreement concerning elements of TPP, but the contents remain unknown. Members of Congress have already demanded to know the substance of the side agreements before voting on TPP, which may further delay any ratification of the agreement. Prime Minister Trudeau will likely wait to propose the treaty for ratification in Parliament until he knows that it will be ratified in Congress. While Congress debates TPP, however, Trudeau has already stated his intent to give parliamentary committees more power to review TPP prior to any ratification vote, which some panelists noted is a significant break from traditional parliamentary practice.

Acts IV and V depend on ratification, and concern implementation and entry into force, respectively. Although the United States will use an implementing legislation approach to ratification of TPP, the concern expressed by the panel regards how agencies in TPP states will begin implementing its provisions, especially its investor-state dispute settlement provisions. Many opponents to TPP, especially in the United States, have noted with concern the potential for investor-state disputes to be settled in jurisdictions with few legal protections and known biases against foreign investors. Under the terms of TPP, most judicial decisions by TPP states on cases under its jurisdiction must be enforced in all TPP states. Some members of the panel disagreed with this concern about dispute settlement procedures in other states, believing that pressure and image concerns will ensure reliable judicial processes no matter where they are held. The final stage will be whether all TPP states implement and enforce TPP uniformly, and whether any effort at true uniformity will entice more states to join TPP. The panel opined that it is too early to speculate on that.

VI. BILATERAL ISSUES CONCERNING TRANS-PACIFIC PARTNERSHIP AND BEYOND

As between the United States and Canada in particular, the panel noted certain key areas in which bilateral relations may be affected by TPP. These areas may still need to be resolved on a bilateral basis. First, the panel generally agreed that the election of Justin Trudeau as Prime Minister will improve bilateral relations, which had soured in recent years over such issues as the Keystone XL pipeline. While they noted Trudeau's support for Keystone, they also noted that he was not likely to let a possible rejection of the application before the State Department negatively impact his relationship with President Obama. In addition, the panel agreed that Trudeau's campaign pledge to end Canadian airstrikes in Syria would be a disappointment to Washington, but that as with Keystone, it would not significantly harm bilateral relations. Second, the panel significantly noted that the softwood lumber agreement was about to expire. While this is not generally a central issue in the United States, it is a major issue for Canadian business, as softwood lumber exports are worth

approximately six billion Canadian dollars annually. While this is one of the largest sources of bilateral friction, the panel generally agreed that both Canada and the United States would likely come to an amicable solution to the problem, as the soon-to-expire agreement seemed to work well.

After considering TPP in general, the panel addressed the more intricate legal and diplomatic concerns surrounding Canada-United States relations that may change as a result of TPP. On the question of individual laws, the panel agreed that U.S. law will likely not change much, and that any changes would be technical and narrow, only altering the current language of U.S. trade laws to comply with TPP. Canada may need to perform more substantive changes to its laws regarding supply-side management of commodities under Crown corporations, such as dairy and wheat, but these will also likely be limited. The panel also generally agreed that pre-existing North American Free Trade Agreement (“NAFTA”) arrangements will not be hindered by TPP, with some participants believing that NAFTA actually may come out stronger as a result of TPP. As for new country of origin labeling laws, the United States, Canada, and Mexico will have their disagreements regarding the actual terms of the laws, but the panel believed it likely that the three states will address the dispute privately.

VII. CONCLUSION

The CUSLI experts’ meeting touched on a number of themes related to approaches to infrastructure development as a driver of economic growth, in addition to hot-button trade topics such as the TPP. Participants began by describing the different trajectories that P3 has taken regarding infrastructure development in Canada and the United States. Next, participants discussed the future of P3 in the two countries. During the second panel, the participants focused on TPP and its implementation. First, participants discussed recent political developments that may affect ratification. Second, participants described how TPP developed in the context of a failed WTO Doha round. Third, participants set a roadmap of the ratification of TPP and anticipated challenges to ratification. Finally, participants discussed how TPP might affect Canada-United States relations.