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CUSLI Expert Roundtable Report on "Is There a Path Forward for North American Trade?"

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CUSLI EXPERT ROUNDTABLE REPORT ON “IS THERE A PATH FORWARD FOR NORTH AMERICAN TRADE?”

Sophie E. Bones and Dena Shayne[†]

ABSTRACT: The following is a report of the Canada-United States Law Institute’s November 2017 Experts Meeting held at the offices of Steptoe & Johnson LLP in Washington, D.C. The Meeting focused on the current state and future of the North American Free Trade Agreement.¹

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I. INTRODUCTION

On November 2, 2017, the Canada-United States Law Institute (“CUSLI”)² hosted an expert panel discussion at Steptoe & Johnson LLP’s Washington, D.C. offices. The discussion was titled “Is There a Path Forward for North American Trade?” and its purpose was to discuss the range of issues concerning the current NAFTA negotiations. Expert participants sought to discuss the future of current trade topics and their immediate impact on North American economic interests.

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¹ All information from this meeting was up-to-date as of November 2017.

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 United States, Canada, and Mexico are in the midst of renegotiating the nearly 24-year-old North American Free Trade Agreement (“NAFTA” or the “Agreement”). NAFTA has been considered a model Free Trade Agreement (“FTA”), and while understanding that it has indeed had much success, it is by no means perfect. The current U.S. Administration (the Trump Administration) has repeatedly targeted the Agreement, specifically on structural grounds, and is aiming to rectify the perceived disparities by employing an aggressive negotiating stance.

The Expert panel was broken down into two parts. The first part was a discussion by the experts on specific topics of interest, including: the current state of negotiations; forecasts for the next rounds of negotiation; law and policy implications of a new deal or no deal at all; implications of possible U.S. withdrawal from NAFTA; and responses to possible attempted terminations of NAFTA. The second part of the panel was devoted to a question and answer session.

The meeting featured distinguished experts from both the public and private spheres in Canada and the United States, who attempted to answer the elusive questions of “will there be a new agreement; will each side achieve its goals, and if so, at what cost to the current regime; and what effects will this process have, both in the short and long term?”

It was through an intensive discussion of these questions that three important themes emerged from the expert panel, which this paper will discuss in order: (1) the current political climate in the United States and its impact on the negotiations; (2) the U.S. usage of poison pills within the negotiations; and (3) the consequences of withdrawal from NAFTA.

II. CURRENT POLITICAL CLIMATE

The CUSLI Expert’s meeting was timely, as Canada, Mexico, and the United States are currently renegotiating the North American Free Trade Agreement (NAFTA). The renegotiation itself is causing some defensiveness from Mexico and Canada, with the current U.S. administration fighting for arguably unreasonable structural changes. When President Trump was inaugurated, one potential concern was that he would sign an executive order giving notice of the United States withdrawal from NAFTA. This withdrawal would have wide-ranging consequences.

The withdrawal concern is a real fear impacting the negotiations, not least because President Trump won the election in large part based off of his attacks on both NAFTA and illegal immigration across the U.S.-Mexico border. While most polling data shows that Americans by and large favor FTAs, President Trump’s conviction that his campaign promise to withdraw from NAFTA won him the election has immediately placed both Canada and Mexico on the defensive in the current negotiations. Currently, the United States Trade Representative’s Office (“USTR”) is leading the negotiations but is doing so without Congressional input. As a result, a great portion of North American

business, including the agricultural sector and the U.S. Congressional committees with jurisdiction, oppose their proposals. These proposals come in the form of several "poison pills" that will be discussed in more detail below.

The current relationship between the U.S. and Canada governments is arguably strained. Canada is two years into its largely socially progressive government that was elected to build the middle class, work on climate change, and broaden its multilateral relations by pushing for a more active role on the world stage. Canada has seen many successes in achieving a greater international role, most prominently through its refugee program; over 50,000 refugees have been welcomed into the country, and half have entered through private sponsorship, which encourages social cohesion and community integration. Additionally, Prime Minister Justin Trudeau's government has shone a spotlight on the middle class with the aim of combatting the obstacles facing it. Thus, the Canadian government has showed little interest in renegotiating NAFTA and has been ready and willing to sign off on the Canada-EU Trade Agreement. The previous Trudeau government showed some trepidation in the face of FTAs; under Justin Trudeau's father — Prime Minister Pierre Trudeau — in 1988, the Canadian government was strongly against a Canada-United States free-trade agreement and there is some of that sentiment lingering within the Liberal Party.

Since President Trump's election to office in 2016, the current Prime Minister Trudeau has sought to reorganize his government and prioritize the Canada-United States relationship. Over the last six months, there has been a major effort directed through the Canadian Embassy in Washington, D.C., to reach out and remind Americans how much Canada still matters to them. This effort at outreach is considered to be a direct response to threats made by the Trump campaign during the 2016 election to rescind NAFTA. For example, 9 million jobs in the United States depend on an ability to trade with Canada. There is a history of reciprocal trade relations between US Governors and Canadian Premiers, both of whom are heavily invested in seeing a NAFTA deal happen and have been making efforts to reach out to U.S. federal counterparts.

The Panelists urged that it is finally time to start treating Canada with the proper respect as an equal trade partner. A Heinz Ketchup operation has locations in both Pennsylvania and Canada. One example given by the Panelists to highlight the importance of the trade relationship with Canada is the import of Heinz ketchup from the United States into Canada. The Canadian factory imports a large amount of ketchup from the U.S. factory in Pennsylvania. At the current NAFTA rate, the import tariff is 2.5-4%. However, if NAFTA is rescinded the tariff will increase to around 8-9%. Such a change could lead Canada to import from elsewhere that has a more favorable tariff, for example Britain via the Canada-EU FTA.

With threats to terminate NAFTA on the table, Canada has been placed in a position where it has had to consider counterweights. Canada recently hosted a negotiation session for Trans-Pacific Partnership 11, which is looking to be a potential replacement to NAFTA, especially as the agreement is fueled by Japan's enthusiasm to push forward. At the same time, Canada is still holding out for an agreement on NAFTA's renegotiation. Around 75% of Canadian exports

go to the United States; that holds the same for Mexico. Around 18% of United States exports go to Canada and 16.5% go to Mexico. In fact, the United States exports more to Mexico than it does to the eight most populous countries in the world. Therefore, this deal is very important for the Canadians, and as Canada and Mexico comprise its two biggest trading partners, it should be for the United States as well

While NAFTA is important to Canadians, it is also important with regards to the U.S. trade deficit because a complete withdrawal from the Agreement could have a disastrous impact on the deficit. As of now, U.S. manufacturing output continues to steadily rise. The United States is manufacturing more, but employment in these industry areas is decreasing. The Trump administration has argued that the deficits are due to Mexico and Canada taking advantage of the United States and has argued that employing restrictions on imports through quotas and tariffs are the only way to return jobs to the United States and reduce the shortfall. However, FTAs are easy scapegoats and have essentially become the piñata for what ails the United States. The likely cause of industry-employment rates dropping are mechanization and automation, not FTAs or countries taking advantage of the United States. Thus, it is the macro-economic policies of the current U.S. administration that is driving the trade deficit up.

When considering the trade deficit between the United States and Canada, the Panelists urged that it is important to take a step back and consider all of the facts. News agencies and the media tend to take the current administration at face value when it reports that the United States has a trade deficit with Canada, but this is not the case. When looking purely at goods, one could argue there is a deficit, but when services are rightly included in that calculation, the United States actually has a trade surplus with Canada.

In addition to issues with the trade deficit, there are other reasons withdrawal would hurt the current administration. The automobile industry, which is in large part based in Michigan, a state Donald Trump won by 10,000 votes, wants NAFTA renewed. Automotive employment was down long before NAFTA was signed, possibly as a result of an increase in Japanese imports. This will be a large hurdle that Trump will have to overcome if there are any major changes.

Therefore, it appears unlikely that President Trump will give a notice of withdrawal from NAFTA, let alone withdraw completely. The potential for Canada/United States/Mexico relations to sour is a compelling reason for the President not to withdraw, as he will not want to risk having that blame on his shoulders. He has little Congressional support, finding it instead in the heads of unions. The threats appear to be an attempt to intimidate the other NAFTA parties into renegotiating a bad deal, and it does not look like he is going to be successful in that. The Panelists believe that the reasoning behind the threats to withdraw are to provide more traction on certain “poison pills” – that is, contentious issues the Trump administration wants to see introduced in any renegotiation in order to give the United States a pretext to withdraw from NAFTA. However, as long as NAFTA persists in its current form, Canada and Mexico are not going to take the poison pills.

III. POISON PILLS

USTR has proposed several poison pills into the negotiation. These poison pills include: (1) a five-year sunset clause; (2) removal of investor-state dispute settlement; (3) changing rules of origin to 85%; (4) government procurement; and (5) reforming supply management. It is unlikely that the administration will willingly give up any of these poison pills, with the possible exception of the sunset clause.

A. *Five-year sunset clause*

The proposed sunset clause essentially calls for any renewed NAFTA agreement to have a lifespan of five years.³ The administration argues that requiring NAFTA to expire every five years unless all three countries agree to its continuation is necessary for the agreement to remain up to date.⁴ This is unreasonable and is not viewed as a serious position as it would amount to a persistent threat to the agreement.

B. *Investor-State Dispute Settlement*

More serious are the proposals to change the dispute resolution system. There are three NAFTA provisions that are targeted with this move – Chapter 11, Chapter 19, and Chapter 20.

Chapter 20 concerns general state-state dispute settlement. Arguably, the dispute resolution system in Chapter 20 could be removed, but it is as much in the United States' interests as it is in Canada's and Mexico's to keep it. For example, in terms of agriculture, there are laws and regulations that the NAFTA governments use for the protection of animals, plants, and humans from disease, toxins, etc.⁵ These are collectively called sanitary and phytosanitary measures ("SPS") and can be used in multilateral trade agreements, as long as they have a legitimate purpose.⁶ For actors in the agricultural industry, ensuring that system is subject to binding dispute settlement is important; without binding dispute settlement the SPS provisions of NAFTA would merely constitute protective measures that cannot be enforced or challenged.

Chapter 11 is the investor-state dispute settlement ("ISDS") provision. There are many technical problems with investor-state disputes in general. The Trump administration has proposed omitting Chapter 11 from any renegotiated agreement. Administration officials have defended this proposal, claiming that ISDS is not necessary since an investor can obtain political risk insurance. Further, the Fifth Amendment of the United States Constitution provides the exact same guarantee of investor rights. However, so far the United States has not lost any investor-state cases against it, mostly because foreign investors are

³ Dave Graham and David Lawder, *U.S. hikes tensions in NAFTA talks with call for 'sunset clause'*, REUTERS (Oct. 12, 2017), <https://www.reuters.com/article/us-trade-nafta/u-s-hikes-tensions-in-nafta-talks-with-call-for-sunset-clause-idUSKBN1CH2EO>.

⁴ *Id.*

⁵ GEOFFREY S. BECKER, CONG. RESEARCH SERV., RL33472, SANITARY AND PHYTOSANITARY CONCERNS IN AGRICULTURAL TRADE 11 (2006).

⁶ *Id.*

not worried about expropriation due to constitutional and federal protection. Removing Chapter 11 only disadvantages U.S. investors in Mexico and Canada who would be without protection if ISDS were not included in a renegotiated agreement.

Chapter 19 has been more contentious. Chapter 19 focuses on antidumping and countervailing duties and is seen as an assault on U.S. sovereignty. The Trump administration maintains that the United States should get to decide what antidumping and countervailing duties to impose. The corollary is that Mexico and Canada get to choose what protective measures they wish to impose. Interestingly, U.S. agricultural groups have won Chapter 19 cases in Mexico, defending billions of dollars a year of U.S. exports of beef, pork, chicken, rice, apples, corn syrup, etc.; this protection is therefore a big deal for U.S. agriculture. Thus, the idea of removing Chapter 19 because the United States might lose a handful of cases is not something that will be taken lightly by the U.S. agricultural industry. Arguably, there are technical fixes that could be addressed. For example, the process usually takes too long and costs too much. However, getting rid of it altogether is unlikely to be considered an acceptable alternative.

It is likely that Chapter 19 is being used to set up a bigger fight to get rid of binding dispute resolution. The Panelists argued that the evidence is in the statistics: 80% of Chapter 19 decisions are unanimous. This means that in cases where the United States lost, 2/3 of the 5 panelists that voted against the United States were American, suggesting that these were reliable decisions in the eyes of considered opinion. In general, because deference is given to local laws, Canada wins its Chapter 19 cases when it is a defendant, the United States wins some and loses some, and Mexico loses all of them. The benefit Chapter 19 has for U.S. exporters greatly outweighs any harm caused to U.S. importers. Thus, it is unlikely that the U.S. will fight to get rid of Chapter 19 and will instead use the point as leverage to abolish binding dispute resolution elsewhere in the agreement.

C. Rules of Origin

Rules of origin determine which products are given preferential tariff treatment based on their percentage of North American content. The administration has proposed a change to the rules pertaining to automotive products, to increase the percentage from 62.5% content to 85% with a minimum 50% U.S. content. The Panelists argued that not only is this proposal unworkable, it is also potentially illegal under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). If this proposal is accepted, the likely result will be that factories will move overseas or risk losing out to overseas competitors because they are paying too much in order to qualify for the NAFTA rule.

D. Government Procurement

During his campaign, Trump employed a “Buy American” rhetoric to support his pro-American business agenda. One way this rhetoric has realized itself is through the government procurement poison pill. Canada and Mexico had shown interest in having more opportunity to bid on U.S. government contracts, but this proposal seeks to decrease those opportunities. Needless to say, U.S. businesses oppose this proposal. Canada is somewhat protected through special arrangements pertaining to sectors like defense production, which is separate from NAFTA. Further, Canada and the United States have been successful a few times with procurement deals. For example, in 2010, a number of states and provinces were facing tough budget problems and a contingent of Canadian provincial premiers travelled to the United States to meet with their United States counterparts at the state level. The idea was to buy from one another on a reciprocal basis. The eventual agreement that came out of those talks lasted for five years. This situation could easily be replicated.

E. Supply Management

The United States has taken a particularly strong stance over the current supply management system in Canada. The Panelists were somewhat in favor of reform of the system and Canada appears to be willing to negotiate on this point. However, like with any deal, agreement is unlikely without compensation. One potential negotiating tactic that could be used by Canada is targeting the Jones Act – a piece of legislation that, among other things, restricts the carrying of goods and persons between American ports to U.S. ships only. A compromise could be reached by allowing Canadian-made ships to transport goods between points in the United States.

IV. WITHDRAWAL CONSEQUENCES

If the current U.S. administration withdraws from NAFTA, there will be a number of consequences. During the Expert Meeting, the panel focused on potential court challenges and the likelihood of being able to trade with third markets as an alternative. The Panelists unanimously agreed that it is unlikely President Trump will withdraw from NAFTA. In order for President Trump to begin withdrawal proceedings, he would need to sign an executive order giving notice of withdrawal. Arguably, he would do this in the hopes of scaring Canada and Mexico into agreement rather than losing the existing one. Further, there has already been a public blowback from Republican groups, such that it is beginning to look like withdrawal may not happen.

A. Court Challenges

If the Trump administration signs a notice of withdrawal, it is likely that there will be multiple court challenges from interested groups. In fact, many are gearing up for such challenges in advance. The main challenge itself will probably focus on the issue of whether the President can unilaterally sign a notice of withdrawal without involving Congress. The question comes down to

whether any such notice falls under the President's foreign affairs powers. One presumes that the courts would defer to the President's foreign affairs power when dealing with an agreement like NAFTA.⁷ However, recent scholarship indicates this is not true where Congress is involved. If Congress is involved, there must be joint Congressional and executive decisions.⁸

Justice Jackson, in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, created a tripartite framework when dealing with the President's power. The President's "powers are not fixed, but fluctuate depending upon their disjunction or conjunction with those of Congress."⁹ The first category is when the President's authority is at its maximum.¹⁰ In this instance, the President is acting pursuant to an express or implied authorization by Congress.¹¹ Thus, if the act is deemed to be unconstitutional, it is because the federal government as a whole lacks the power to perform it.¹² The second category is if Congress has neither granted nor denied the President's powers.¹³ The President can therefore only rely on his own independent power. However, there is a grey area in which he and Congress may have concurrent authority, or in which its distribution is uncertain.¹⁴ Thus, Congressional inertia, indifference or acquiescence may sometimes invite independent presidential action.¹⁵ Finally, the third category in this framework – which is where the opponents of potential withdrawal from NATA must argue the President's action falls – is if the President acts incompatibly with the expressed or implied will of Congress.¹⁶ Here, the President's power is at its lowest ebb and he can only rely on his own constitutional powers.¹⁷ Thus, the President can only prevail if the act – in this instance, withdrawal from NAFTA – is one in which the President has exclusive and preclusive power.¹⁸

NAFTA, owing to the fact that it is implemented in U.S. law by a joint Congressional-executive agreement that is a statute and is not a "treaty", would likely fall under the third category of this framework. Therefore, because NAFTA was created through a joint endeavor, it is likely that the courts will not uphold a unilateral withdrawal by the executive branch without Congressional support.

⁷ See *Goldwater v. Carter*, 444 U.S. 996 (1979) (affirming the power of President to unilaterally terminate a treaty consistently with a termination provision in the treaty itself).

⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

A second school of thought attacks the withdrawal on statutory grounds. The current administration relies on the Trade Act of 1974 §125, which gives the president termination and withdrawal authority. However, NAFTA was negotiated under the Omnibus Trade and Tariff Act of 1988. As this scholarship is yet to be published, it is unclear how the Omnibus Trade and Tariff Act would make a difference in a withdrawal process. If it does impact the process, the proposed move begs the question of whether the President can rely on the 1974 Act instead of following the statutory interpretation doctrine of last in time. Looking to recent "travel ban" jurisprudence as an indicator, the Court seems to be unwilling to give such authority to the President. Further, the President has greater authority in immigration than in trade, yet this line of argument only works if there is a conflict between the 1974 and 1988 Acts.

B. Contingency Plans

If President Trump actually signed the notice of withdrawal, those in affected United States industries would start implementing contingency plans due to the uncertainty of what will transpire. While President Trump may be in a position to sign the withdrawal notice as a political move with the future intent of revoking, industries such as agriculture and automotive would have to make plans to deal with that revocation rather than being able to wait and see. For example, farmers have to decide what to plant and ranchers have to decide how many calves they want – these are big money decisions in an industry where bankruptcy is never too far away. If farmers plant the wrong things or have too many crops or steers in the following year, then they are risking bankruptcy. There is no room to wait and see what the President does in six months' time. Further, car companies plan their production five years in advance and similarly do not have the flexibility to change their planning schedules in accordance with the administration's negotiating strategy. The administration has argued that everything is a fungible commodity so that if manufacturers cannot sell within NAFTA (which is the number one market for most things in the United States), they can sell it anywhere else; yet, anywhere else has to be of a considerable size to replace the number one market. There are also other FTAs to contend with that give favorable conditions to those who are party to them. For example, under the TPP Australian exports of beef to Japan would attract a 23% tariff, but United States beef exports would face a 50% tariff because President Trump has withdrawn the United States from the TPP. If TPP11 happens, which could well happen next month, then Canada, New Zealand, etc. will be selling to Japan with substantial tariff advantage, and not just with respect to beef. Selling in Europe poses the same problem. The United States will need a big market to replace NAFTA, which potentially leaves it dependent upon China.

Another contingency plan might involve the temporary laying off of workers with the intent to wait and see what transpires with NAFTA. For this to happen, employers need to send out what is known as a Warn Notice, which gives a 60-day notice to the recipient that they will be laid off. Once such Warn Notices go out there will likely be considerable political kickback, and this is before anyone has been formally laid off yet. Congress under the Constitution clearly has full

authority regarding trade. The President's only authority under trade is to negotiate with foreign countries. Congress could legislate NAFTA word for word as domestic law, with the only threat being that the President attempts to veto the legislation. Thus, one needs to consider the likelihood of a two-thirds majority in Congress to override that veto power. As of right now, the likelihood is low. However, if Congress starts getting complaints about Warn Notices and Bankruptcy Notices, there may be enough votes to get to two-thirds of Congresspersons to override the President's veto power. As a final note on this issue, earlier this year Congress passed a Russian sanction bill 98-2 in the Senate containing a provision that the President cannot revoke. Whilst this action is not conclusive proof that Congress is comfortable pushing against the President's powers, it does suggest that one cannot be wholly sure of a particular outcome as previously might have been expected.

V. CONCLUSION

The CUSLI Experts' Meeting touched on a number of important issues related to renegotiating NAFTA. The hot-button topic was the current political climate and anti-globalization movement in the United States. The Panelists began by describing how the political climate affects NAFTA and what they perceive the outcome will be: i.e., whether or not the United States will withdraw from NAFTA. Having candidly discussed the poison pills the United States has brought to the negotiations, Panelists seemed to agree that there will be no moving forward unless the United States reverses on those issues. There appeared to be a consensus that a United States withdrawal would result in domestic political consequences, and neither Mexico nor Canada would wait for the United States to realize its mistake; rather, they would seek out other trading partners under alternative FTAs. The questions that were taken at the end touched on all aspects of the previously discussed conversation and complemented the Panelists statements. Encouragingly, while it is impossible to say what the future holds for NAFTA, the Panelists were all in agreement that it would be highly unlikely for the Trump administration to withdraw the United States from NAFTA.