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CUSLI Experts' Roundtable Report on "Canada-United States Relations – Looking Forward"

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CUSLI EXPERTS' ROUNDTABLE REPORT ON "CANADA-UNITED STATES RELATIONS – LOOKING FORWARD"

Gabriella Marki & Jenna Russo[†]

ABSTRACT: On November 14, 2018, the Canada-United States Law Institute (CUSLI) hosted an expert panel discussion on the subject of "Canada-United States Relations – Looking Forward" at the offices of Steptoe & Johnson PLLC in Washington, D.C.. The purpose of the meeting was to discuss the United States-Mexico-Canada Agreement (USMCA) that is projected to replace the North American Free Trade Agreement (NAFTA). The panelists examined the negotiations leading up to USMCA and evaluated its similarities and differences vis-à-vis NAFTA.¹

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I. INTRODUCTION

On January 1, 1994, the North American Free Trade Agreement (NAFTA) created a free trade zone between the United States, Mexico, and Canada. NAFTA reduced import tariffs for many eligible manufactured goods in conjunction with reductions accorded to other countries when the United States entered the World Trade Organization (WTO) in 1995. At the time of its conclusion, NAFTA applied to more than \$1.2 trillion worth in trade between the three partner countries. However, as time went on, the United States perceived that it was being treated unfairly under NAFTA in certain respects and sought to create a new trade agreement between the North American countries. Thus, negotiations for a replacement to NAFTA began and eventually culminated in conclusion and

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¹ All information from this Meeting is up-to-date as of November, 2018.

signature of the United States-Mexico-Canada Agreement (USMCA) in November 2018.

The panelists characterized the new agreement's negotiations as a balance involving strong national interests with a mutual commitment to modernize NAFTA and rectify its shortcomings in an era of intensive globalization. While the United States, Canada, and Mexico entered the negotiations with different points of view, they all shared a commitment to modernize and improve the post-NAFTA agreement and to ensure that the result benefited all parties involved. Prior to this, leaders in all three countries held the common understanding that NAFTA would not be reopened due to its sensitive nature. Instead, modernization of trading arrangements in North America would be pursued through negotiations for a Trans-Pacific Partnership (TPP) which the United States withdrew from in 2017. U.S. withdrawal from the TPP necessitated a return to a more limited trilateral negotiation between the three countries in 2017-2018.

Canada approached the negotiations over a replacement to NAFTA with the desire to maintain the benefits of the NAFTA, modernize it, increase efficiency and ensure that the benefits of the new trade agreement would be felt and be widely available to the broadest communities in the country. In particular, Canada entered the negotiations assuming that NAFTA and North American competition were crucial to Canadian competition on the world stage, with a desire to retain those benefits while modernizing NAFTA as necessary. In Canada's view, numerical balances only constituted one of the several important indicators in assessing the health of a trading relationship.² Likewise, any changes to NAFTA should increase predictability, stability, enforceability, and inclusivity.

While Canada maintained that the NAFTA represented its values well and was generally beneficial, opinion in the United States was not the same. In contrast to the Canadian perspective, the United States used trade balances as the measurement of health and success of the trade relationship. The United States' "America First" agenda notably made negotiations comparatively difficult from the original trade agreements and previous NAFTA negotiations. The United States viewed itself in a key moment of competitive disadvantage and concluded that the then-rules-based system contained in the original NAFTA text did not address lingering economic problems and inclusivity issues.

Accordingly, the United States sought to "rebalance" the agreement, modernize the trade relationships, and "rollback" any features of instability. The United States also sought to expand North American cooperation, trade, and economic success. The United States participated in the re-negotiation of NAFTA firmly believing that the same standards should exist for developed and developing countries and that international bureaucracies should not coddle countries in a

² Canada's federal government noted that governments often evaluate the quality of a trade agreement by percentages and amounts of tariffs cut, increased market access and the potential to increase GDP generated by new relationships. However, in the case of NAFTA, these measures were not applicable to the creation of the new agreement due to the fact that trade between the United States, Canada and Mexico have been tariff-free for the past twenty-four years.

manner that prevented robust United States counteraction or endorses excessive state involvement.

The overall goals of the re-negotiation that each country shared were to create an agreement that stimulated job creation and higher wages, increase trade accessibility to more participants, guarantee inclusivity, and generate a more forward-thinking, modern approach to future trade success while at the same time effectively representing national values.

II. SIMILARITIES & DIFFERENCES

Though the USMCA is considered to update its predecessor, the new agreement maintains NAFTA's tariff-free trade in most goods. In addition, one panelist characterized the USMCA as possessing ten key strengths absent in NAFTA: (1) modernized chapters in new and emerging areas focused on increasing North American competitive space; (2) reduced "red tape"; (3) updated procedures on subjects such as electronic measures; (4) elimination of minute differences in the three countries' regulatory environments; (5) increased benefits to enterprises; (6) heightened transparency and discussion of each countries' regulatory environments; (7) updated automotive rules of origin with an increase in Canadian competitive advantage; (8) increased agricultural market access for Canada; (9) enforceable dispute settlement for labor and environmental matters; and (10) increased accessibility for women, indigenous populations and other minorities.

However, these similarities are coupled with key differences laid out in specific provisions. In particular, the panelists conceded that while their initial reactions to the USMCA were varied and leaned more towards moderate achievement than grand success, a deeper analysis of the agreement revealed a more important, nuanced set of differences. The panelists identified these differences as being in the auto sector rules of origin provision, section 232 national security tariffs, non-market economy trade, and trilateral institutions.

Auto Sector Rules of Origin

Rules of origin determine what permitted percentage of imported inputs for goods can be made within a region to ensure qualifications for a zero tariff. Adding an increase of 12.5 percent from NAFTA's automotive rule of origin, the USMCA requires 75 percent of automotive content to be made in North America for automobiles to receive duty-free treatment. In addition, 40 to 45 percent of the automotive content must be made by North American workers who will earn at least \$16 per hour. As noted by the panel, this wage increase is likely to correspondingly increase production within the United States and Canada.

Section 232 National Security Tariffs

The USMCA ensures the United States' right to impose emergency tariffs of up to 25 percent on automobiles and automotive content under national security concerns. However, a side letter to the agreement protects Canada and Mexico from these tariffs on cars that might be imposed by the United States. Compared to the NAFTA, the national security provision in the USMCA broadens the scope

of national security measures and does not contain the important qualifications enshrined in previous agreements. The panel noted that this provision enshrines Canadian acceptance that unilateral surcharges can be used under the guise of national security interests. However, the agreement does not resolve United States' surcharges on imports of steel and aluminum. While there have been some movement to resolve these issues (i.e. the U.S. steel and aluminum surcharges), they are not definitively resolved in the new agreement.

Non-Market Economy

The panel questioned the feasibility and applicability of the non-market economy provision. Specifically, the panel noted the requirement in USMCA Art. 32.10(2) that "a Party shall inform the other Parties of its intention to commence free trade agreement negotiations with a non-market country" with three months notice. It also noted the companion provision in USMCA Art. 32.10(5) that if a USMCA country agrees on a trade deal, the remaining countries are allowed to terminate the USMCA with six months' notice. The panelists remarked that this was not necessarily an egregious provision. In their view it was somewhat benign, yet cautioned about the future of North American competitiveness in this regard.

Trilateral Institutions

As noted by the panel, the USMCA enshrines an array of trilateral institutions arguably more extensive than NAFTA, with a particularized focus on the trilateral approach to North American economic cooperation than initially understood. In particular, the USMCA includes a Free Trade Commission, identified in Article 30.1 that may create subsidiary bodies, compose trade facilitation committees, be led by an Agreement coordinator, and includes a USMCA Secretariat. In addition, the Agreement provides for trilateral committees on: rules of origin; trade in goods; financial services; transportation; government procurement; North American competitiveness; duty-evasion (anti-dumping provisions); duty evasion and trans-shipment issues. While NAFTA included some of these committees, the USMCA created more of them and endows them with more substantive functions.

Unique to the USMCA is Article 33.6, which establishes a macroeconomic dispute settlement mechanism for exchange rates. One panelist noted that while exchange rate issues between countries are rather infrequent, the mechanism is nonetheless the "first of its kind." The Macroeconomic Committee promotes mutual cooperation, good faith, and trustworthiness and respect among the countries. Hence, it belies the notion that the USMCA is just a moderate tweaking of NAFTA or somehow a direct reflection of the current United States administration's trade agenda.

III. CONCLUSION

The CUSLI Experts' Meeting touched on a number of important issues related to the pending USMCA Agreement and its similarities and differences to NAFTA. Panelists generally had a positive reaction to USMCA. One panelist characterized USMCA as an "excellent trade agreement" for its greater inclusivity and potential to increase the competitiveness of North America as a trading bloc. Another

panelist applauded its greater enshrinement of trilateral institutions relative to NAFTA. While the panelists also expressed some concerns about the USMCA, they all agreed that different systems cannot exist without specific rules that bridge differences between the countries, especially when they all aim to increase North America's economic competitiveness.