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CUSLI EXPERT ROUNDTABLE REPORT: CETA, TPP, TTIP, AND THE CANADA-U.S. TRADE RELATIONSHIP¹

The following is a report of the Canada-U.S. Law Institute's Feb. 2014 Expert Roundtable held in Washington, D.C. The Roundtable focused on recent international trade liberalization initiatives as they relate to the Canada-U.S. trade relationship.

I. INTRODUCTION

On February 19, 2014 the Canada-United States Law Institute (CUSLI)² hosted an expert roundtable discussion at the Public International Law and Policy Group offices in Washington, D.C. The purpose of the roundtable was to discuss Canada-U.S. trade issues in the context of emerging international trade deals. While there is typically very little friction between Canada and the U.S., there are differences between the two countries related to investment policy. Thus, participants sought to identify commonalities and divergences between Canadian and U.S. views as well as suggest how these divergences may be bridged or lead to different solutions.

The roundtable featured a number of distinguished experts in international trade, economics, and the Canada-U.S. relationship. The discussion focused on three multilateral trade agreements that are currently in the negotiation and ratification process and how these treaties may affect the Canada-US relationship and the broader global trade outlook. Roundtable participants discussed the Comprehensive Economic and Trade Agreement (CETA)³ between Canada and the European Union (EU), the Trans-Pacific Partnership (TPP)⁴ between the

¹ This report was prepared by Kelly Brouse, Vy Nguyen, and Sarah Lohschelder. Ms. Brouse is a Law Fellow with the Public International Law and Policy Group (PILPG). Ms. Nguyen is a Senior Research Associate with PILPG. Ms. Lohschelder is a Research Associate with PILPG. Abigail Avoryie, Law Fellow with PILPG, provided editing assistance.

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.

³ See Foreign Affairs, Trade and Development Canada, Canada-European Union: Comprehensive Economic and Trade Agreement (CETA), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng>.

⁴ See Office of the United States Trade Representative, Trans-Pacific Partnership (TPP) Free Trade Negotiations, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-tpf/index.aspx?lang=eng>.

U.S., Canada, and a number of Asia-Pacific states, and the Transatlantic Trade and Investment Partnership (TTIP)⁵ between the U.S. and the EU.

Several important themes emerged from the roundtable discussion. First, participants examined the likelihood of all necessary parties ratifying each agreement. This discussion touched on the important role of Canada's provinces in the negotiation and implementation process and the special difficulties posed by the EU. Second, participants noted the importance of regulatory harmonization in both the negotiation and implementation phases of the agreements. Third, participants debated the role of public procurement in the negotiation and implementation of Canada-U.S. agreements. Fourth, participants considered the challenges posed by dispute mechanisms incorporated in the agreements, including problems related to the jurisdiction of these mechanisms and problems specific to investor state dispute settlement (ISDS) provisions. Fifth, participants discussed how developing states view, and are impacted by, multilateral agreements involving the U.S. and Canada. Finally, participants examined how the ratification and implementation of these agreements may eventually lead to the re-examination of the World Trade Organization (WTO) and its governing instruments.

II. LIKELIHOOD OF RATIFICATION AND ADOPTION

The roundtable began with a nod towards the positive momentum currently fueling progress in transatlantic and transpacific trade agreements despite skepticism expressed by critics. Participants generally agreed that the U.S. was likely to sign the TTIP and the TPP before U.S. President Barack Obama leaves office. Participants thought that the TTIP faced more opposition in the EU than in the U.S., but noted that currently the U.S. is more focused on the TPP. Participants explained that the TTP and TTIP must overcome the general skepticism toward free trade agreements that many U.S. citizens hold, particularly in the fringes of the Republican and Democratic parties, and among environmental and labor groups. On the far right, Tea Party opposition to free trade agreements stems from a desire to not concede anything to President Obama. Conversely, the far left opposes free trade agreements more generally because it views the agreements under discussion to be inherently unfair. Furthermore, environmental groups and labor groups both oppose these agreements and the general trade promotion authority (TPA) granted to the U.S. president by Congress. Participants noted that labor groups oppose the North American Free Trade Agreement (NAFTA) because it has become associated with job losses in the U.S., and that while environmental groups may choose to be neutral on these agreements, they are unlikely to fully support them. The participants further opined that President Obama wants these trade agreements to be bipartisan efforts in Congress and that, in general, U.S. Republicans are more willing to compromise and concede on trade agreements than on other issues.

⁵ See Office of the United States Trade Representative, Transatlantic Trade and Investment Partnership (TTIP), <https://ustr.gov/ttip>.

Participants also agreed that CETA was likely to be signed and ratified by both the EU and Canada. However, participants noted that movement toward the signing and ratification of this agreement has been slow, especially on the part of the EU. The participants pointed to the lengthy and non-transparent EU ratification process as one hurdle to the implementation of CETA. The EU ratification process requires that the agreement be translated into each member state's official language, a total of 26 languages, and ratified by each individual member state. Participants did not know how long this process would take but said that negotiators estimated the agreement would enter into force in 2016 or 2017, four years after completion of the text. Participants noted that this long delay between agreement and implementation could negatively affect U.S. negotiations with the EU for TTIP to the extent that it offers a glimpse of what the U.S. could expect from the ratification and implementation process of any agreement with the EU.

Participants noted that CETA was likely to be successfully signed and ratified by Canada. Participants pointed to general support of the agreement from the current Conservative government, as well as a lack of opposition from the Liberal party. Furthermore, participants explained that, surprisingly, all the Canadian provinces had agreed to sign on to CETA, although with reservations.

III. REGULATORY HARMONIZATION

The roundtable participants agreed that the issue of regulatory harmonization continues to be an important aspect of the CETA, TPP, and TTIP negotiations. The issues faced by negotiating states include to what extent regulatory harmonization is needed and whether it is even practicable.

Currently, regulatory requirements in the U.S., Canada and EU cost companies money because these companies must use different safety tests depending on the location of sale. The participants noted that for many industries different regulations do not affect the ultimate safety of the product. Participants pointed to regulations requiring automobile manufacturers in the U.S. to use different crash test dummies than those used by automobile manufacturers in the EU as an example of the types of regulatory differences that cost companies money but don't improve safety. Furthermore, the participants explained that the automobile manufacturing industry is conducting a study to show that U.S. and EU safety standards are equally safe, suggesting that the different regulatory standards are unnecessary.

However, other participants pointed to the growth of multinational companies as further evidence of the need for regulatory harmonization across countries. There has been some progress toward regulatory harmonization in CETA with Canada and the EU having come to an agreement on the regulatory standards for six industries. Participants seemed to suggest that an agreement encouraging regulatory harmonization for future regulations was forthcoming. As for negotiations between the US and the EU, participants explained that TTIP negotiations currently involve deep discussions on regulatory standards. Notably, TTIP has more ambitious goals with regard to regulatory harmonization than CETA or TTP.

IV. PUBLIC PROCUREMENT

Participants noted that the public procurement arrangement in CETA stood out as a major departure from previous policy and may have a big effect on the future of Canada-EU trade relations and for the final negotiations on TTIP. CETA opens public procurement bidding in Canada to EU companies, even at a provincial and local level, and vice versa. This agreement goes beyond the commitments required under the WTO's Agreement on Government Procurement. Participants explained that this constituted unexpected progress because the Canadian provinces were not expected to sign on to this provision. However, one participant did note that the Canadian provinces had only agreed to extend the government procurement portion of CETA to those countries that have extended government procurement to Canada. Participants further noted that this portion in CETA does not allow the U.S. to claim most favored nation status, limiting access to public procurement bidding in Canada to the EU. Discussing the broader effects of CETA's public procurement provisions, participants thought that the CETA provisions might entice Canada and the U.S. to seek an update of the public procurement provisions in NAFTA.

V. DISPUTE RESOLUTION MECHANISMS AND INVESTOR STATE DISPUTE SETTLEMENT

Participants discussed the potential challenges posed by dispute resolution in trade agreements, looking especially at investor state dispute settlement (ISDS). One participant noted that the jurisdictions of dispute resolution mechanisms have become confusing, sometimes resulting in claims arising under one treaty being heard by a different treaty body. This confusion carries over to the jurisdictional lines between treaty bodies and mediation mechanisms and domestic courts because companies and states are unsure which cases should be heard by domestic courts and which by treaty bodies. As such, procedural issues related to *forum non conveniens* are certain to arise. Other participants pointed to the line between private and public action as contributing to challenges in dispute resolution.

Participants pointed to ISDS as a flash point for opposition to TTIP from some EU member states. These states believe that ISDS interferes with a state's ability to implement legitimate governmental policies. To help to minimize opposition, Canada and the EU negotiators have carefully defined what amounts to an indirect expropriation under CETA. CETA also includes an intermediate step that allows states to move that a particular investment claim is "manifestly without merit" and hence has the possibility of being dropped before mediation. Participants differed on how big of an obstacle the ISDS provisions were to EU ratification. One participant opined that the EU made concessions on this issue in the hopes of gaining greater concessions in the TTIP. Another participant argued that the ISDS provisions in CETA were a convenient red herring for the ratification process, noting that the ISDS provisions could be easily dropped to appease public concern without affecting the overall impact of the agreement.

VI. VIEW FROM DEVELOPING COUNTRIES

In directing the discussion toward the viewpoints of developing countries, one participant explained that many developing countries have concerns about the proliferation of regional multilateral trade agreements. These developing countries believe that negotiations for regional multilateral trade agreements between developed countries are a means for these countries to work around the Doha Development Agenda. This participant further explained that rules negotiated in these multilateral agreements are different from the rules negotiated in the Doha Development Agenda, but because these rules cover such a large percentage of the world's economic power, they will eventually become the rules of trade for everyone. This potential shift in the rules of trade is dangerous to developing countries because these rules only represent the views of developed countries and do not account for the views of countries that see trade as a tool of development rather than see development as a result of increased trade. Furthermore, the negotiations and discussions around these multilateral treaties leave out issues of importance to developing countries, such as the elimination of agricultural subsidies.

VII. REEXAMINATION OF THE WORLD TRADE ORGANIZATION

Participants opined that the proliferation of regional multilateral trade agreements could eventually lead to a reexamination of the WTO Agreement. Participants argued that one purpose of these agreements was to find a way around the cumbersome WTO consensus requirement. However, some participants stipulated that any reevaluation of the WTO Agreement would be over the objections of many developing countries.

Participants believed the multilateral trade agreements currently being negotiated could lead to an eventual reevaluation of the WTO Agreement because if all these multilateral agreements enter into force, the agreements will account for a majority of international trade value. One participant pointed out that between TPP, TTIP, and the EU and U.S.'s parallel free trade agreements, countries within this trade web comprise of over 70% of the world economy. This participant further pointed out that while the U.S. may not agree with China's trade policies, they are ultimately rational policies. Currently, China's trade policy is shifting and it is likely that China will eventually join these agreements because it will be unable to put together a deal this large itself. This participant foresees that China's entry into regional multilateral trade agreements will cause the formation of two leadership rings in international trade resulting in the US, the EU, and China in the inner ring and Canada, Japan, and others in the outer ring. This participant finally speculated that India will be forced to join on this regional multilateral trade agreement regime. Once India joins, the discussion could return to the WTO because there is no use in having regional multilateral agreements when everyone is party to these agreements.

VIII. CONCLUSION

The CUSLI's expert roundtable discussion touched on a number of themes related to the negotiation and implementation process of CETA, TTIP, and TTP. First, roundtable participants discussed the likelihood and challenges facing the adoption of these agreements. Second, participants addressed the importance of regulatory harmonization for the successful implementation of these agreements. Third, participants noted the developments made on public procurement in CETA and reflected on how those developments might lead to further discussion of that issue in negotiations between the U.S. and Canada and the U.S. and EU. Fourth, participants considered the challenges of dispute settlement in trade agreements, specifically examining the opposition to investor state dispute settlement mechanisms in the EU. Fifth, participants examined the views of developing countries toward regional multilateral trade agreements. Finally, participants discussed how the prevalence of regional multilateral trade agreements might lead to reexamination of the WTO Agreement.