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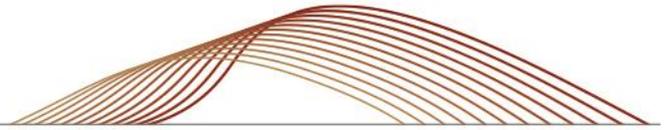
Can the U.S.-Mexico Trade Agreement Replace NAFTA?

By [Scott M. Flicker](#), [Charles A. Patrizia](#) & [Talya R. Hutchison](#)

Well over a year ago, President Trump notified Congress that he intended to begin negotiations to amend the North American Free Trade Agreement (“NAFTA”). This notification was not simply a courtesy. As he seeks to conclude a new trade deal with Mexico—with or without Canada—the President could find that his authority is severely curtailed by something called “trade promotion authority” or “TPA.” Unless the negotiation and the approval process follows the strict procedures established under TPA, the resulting agreement could be held up or even defeated by Congress. This puts additional pressure on the White House to conclude negotiations quickly and bring an agreement to Capitol Hill for a vote before a new Congress is seated following the 2018 midterm elections.

TPA, also known as fast-track authority, provides an expedited procedure by which Congress can consider certain international trade agreements. The current authority was established under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (“Trade Act of 2015”).¹ Pursuant to this arrangement, after the conclusion of negotiations, the President must submit to Congress the text of the agreement along with draft implementing legislation.² The key is that under TPA, the President can call for a simple “up or down” vote; Congress is prohibited from adding amendments or reservations.³ This structure enables Congress to retain its constitutional power to regulate foreign commerce while allowing for the President to act pursuant to the Executive’s constitutional power to negotiate international agreements.

In recognition that Congress is ceding power to the President to negotiate trade agreements, the scope of authority granted under TPA is carefully circumscribed. In other words, details matter. Although President Trump notified Congress of his intent to *renegotiate NAFTA*, he did not notify Congress of his intent to *supplant NAFTA* with a bilateral trade agreement concluded with Mexico alone. This possible defect in notification might run afoul of TPA, which might cost the President the ability to have a bilateral agreement receive a “fast track” vote in the current Republican-controlled Congress. The power to determine whether or not the President complied with TPA lies with Congress, and current Congressional leadership has declined to make an initial call on the application of TPA until the details of the bilateral trade agreement with Mexico are released. President Trump, for his part, has asserted that Congress should not “interfere” with the negotiations, and he has threatened in that case simply to unilaterally withdraw from NAFTA.



The Trade Promotion Authority – How it Works

Article I of the U.S. Constitution confers on Congress the authority to “regulate commerce with foreign nations.”⁴ However, Article II also grants the President exclusive authority to negotiate treaties and international agreements.⁵ To address questions of competing authority that can arise in the field of tariffs, trade, and trade negotiations, legislation was developed to share the power between Congress and the President.

TPA has been renewed four times after its initial appearance in the Trade Act of 1974.⁶ Fast-track authority provided President Jimmy Carter with the means to participate in the Tokyo Round negotiations under the General Agreement on Tariffs and Trade. Following the extension of TPA through 1994, which included implementation of NAFTA, the authorization went into lapse. It wasn’t renewed until 2002. With a new grant of trade promotion authority, in the ensuing five years the U.S. entered into nearly 10 bilateral free trade agreements. That authority expired again in July 2007, and was not renewed until the Trade Act of 2015.

To take advantage of fast-track authority, the President must comply with specific notification and consultation procedures.⁷ Among these, the President must notify Congress of his intent to initiate negotiations 90 days in advance. Additionally, the President must provide 60 days before signing an agreement, a description of what changes in U.S. law would be required for implementation.

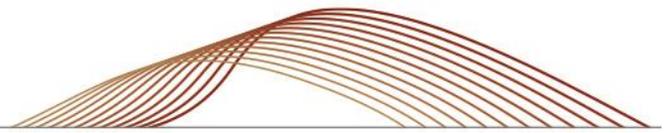
If the President complies with the notification and consultation requirements, then Congress must adhere to certain expedited procedures for consideration of legislation to approve and implement the agreement, including mandatory presentation of legislation in both houses of Congress, automatic discharge from the respective House and Senate committees, limited floor debate, and no opportunity for amendment. These procedures effectively prohibit filibustering and provide for a clear, concise path from committee to the floor for a full vote.

However, if either chamber of Congress determines that the negotiated trade agreement does not comport to the requirements of the Trade Act of 2015, the fast-track procedures can be derailed by several means. First, the Trade Act of 2015 provides for a “procedural disapproval resolution” (“PDR”), which can be adopted by either house upon determination that the President has not complied with the requisite notification or consultation procedures or the agreement fails to make progress towards the negotiation objectives provided at the outset.⁸ If the other chamber of Congress adopts the PDR within 60 days, neither body may use the expedited legislative procedures to consider the proposed trade agreement.

In addition, either house may unilaterally decide that the bill does not qualify for fast-track procedures and, through the use of a “Consultation and Compliance Resolution” (“CCR”), render it ineligible for expedited consideration.⁹ Either a PDR or a CCR can be passed by a simple majority vote. If fast-track procedures are deemed unavailable, a trade agreement must survive the traditional legislative processes, including scheduling, full debate and rights of amendment.

NAFTA Negotiations: What Comes Next?

After President Trump notified Congress that he intended to renegotiate NAFTA, the U.S. Trade Representative (“USTR”) received public comments and held hearings throughout June 2017. Those hearings were billed as pertaining to the “upcoming negotiations of the North American Free Trade Agreement.”¹⁰ In July 2017, USTR released a set of objectives for the renegotiation of NAFTA and announced that the first round of talks would occur in August 2017. This initial round concluded with a



trilateral statement, issued by USTR Robert Lighthizer, Canadian Foreign Affairs Minister Chrystia Freeland, and Mexican Secretary of the Economy Ildefonso Guajardo.

Three-way negotiations continued for months. However, in June of this year, the United States began negotiating bilaterally with Mexico, and the two countries reached an agreement on August 27 that did not include Canada. In the ensuing days, the United States and Canada began negotiations to attempt to finalize the terms of a three-way deal by August 31, 2018. TPA played a key role in that target date: On December 1, 2018, a new president takes office in Mexico. Under TPA, the Trump Administration needed to give Congress 90 days' notice of the intent to sign the agreement with Mexico's outgoing president before he left office. So far, talks with Canada have failed to yield an agreement.

The tactic of seeking to conclude a bilateral agreement with Mexico in order to, in the words of Debra Steger, "bring Canada along"¹¹ was met with opposition, including the argument that the President exceeded his fast-track authority. President Trump has asserted that there is "no political necessity to keep Canada in the new NAFTA deal."¹² But an agreement without Canada is not the agreement that the President notified Congress he would be negotiating back in May 2017.

For his part, USTR Lighthizer (a recognized technical trade law expert) has asserted that the agreement reached with Mexico will qualify for TPA procedures. However, if either house of Congress disagrees, then any consideration or approval of that agreement on the Hill might be significantly delayed, certainly beyond the term of the current Mexican president. And the next president of Mexico might not be willing to sign a deal negotiated by his predecessor.

Trade promotion authority is extraordinary—it gives the President a pathway to negotiate an international trade agreement without substantive input from Congress or the risk that the resulting deal will be held up by legislative machination. If either house determines that President Trump failed to comply with the procedural notification requirements of TPA in connection with the U.S.-Mexico Trade Agreement, he could lose the ability to consummate a deal at all, much less on the expedited timeline he seeks.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

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- ¹ Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 19 U.S.C. §§ 4201-4210 (2012 & Supp. III 2015).
 - ² *Id.* § 4205.
 - ³ *Id.* § 4202.
 - ⁴ U.S. CONST. art. I, § 8, cl. 3.
 - ⁵ U.S. CONST. art. II, § 2.
 - ⁶ Trade Act of 1974, 19 U.S.C. §§ 2101-2497 (2012).
 - ⁷ Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 19 U.S.C. § 4204 (2012 & Supp. III 2015).
 - ⁸ *Id.* § 4205.
 - ⁹ *Id.*
 - ¹⁰ Press Release, Public Hearings on the Renegotiation of NAFTA, Office of the U.S. Trade Representative (June 27, 2017) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/june/public-hearing-nafta-renegotiation>.
 - ¹¹ Don Pittis, *A Deadline Could Be Good for Trade Talks, but Trump's Isn't Firm*, Don Pittis, CBC News, Aug. 29, 2018, <https://www.cbc.ca/news/business/trade-nafta-1.4801599>. Debra Steger, currently a professor of international trade, was part of the Canadian team that negotiated the Uruguay Round resulting in the World Trade Organization.
 - ¹² Donald Trump (@realDonaldTrump), Twitter (Sept. 1, 2018, 8:03 AM), <https://twitter.com/realDonaldTrump/status/1035905988682018816>.

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