

NAFTA, TRUMP and the US CONGRESS

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Rolling Rocks Uphill

Describing it a “disaster” and the “worst trade deal ever”, Donald Trump has made the NAFTA a top news item, putting it at the centre of his administration’s trade and economic policy agenda.

Previous Canada-US negotiations – the original FTA in the 1980s and the subsequent NAFTA talks – were sleepy exercises by comparison. This time, the NAFTA is front page news and the progress (or lack thereof) is a major topic on Canadian (and some American) talk shows.

Round three of the talks has just been completed in Ottawa. The joint communiqué (September 27th) contains some surprisingly upbeat references to “significant progress” and “meaningful advances” in a few of the relatively uncontroversial parts of the NAFTA modernization agenda.

Epic challenges remain in highly contentious subjects yet to be addressed, however, such as demands from the Trump team to increase US content in motor vehicles, increasing scope of Buy America preferences, eliminating a host of investment restrictions in Canada and Mexico, re-balancing trade deficits to US benefit and eliminating the binational panel review system, all of which fit into Trump’s negative view of the NAFTA and his aggressive “America First” policy.

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There are reports of dissent in US ranks (*Inside US Trade*, September 27), with Congressional leaders disagreeing with positions advanced by Trade Representative Lighthizer in this latest round.

Added to this is the highly negative impact in the Boeing-Bombardier aircraft dispute and the 220 percent countervailing duties announced by the Commerce Department on September 26th, ratcheting up the tensions around the negotiating table.

All of this means getting consensus on a revised NAFTA package is very much up in the air. The number and scope of difficult yet largely untouched issues is daunting.

Even in things turn around and three-party agreement emerges in early 2018 (an uncertain prospect at best), it would be just the start of a long and tortuous journey to get the deal approved in the US Congress, a result of the complex interaction between the Executive and Legislative Branches under the US system.

With the toxic political atmosphere in Washington, it is, frankly speaking, hard to see a revised NAFTA getting Congressional approval, now or in the reasonable future. The Republicans are deeply divided on trade policy matters and Washington insiders say few if any Democrats would ever vote for a NAFTA 2.0, whatever its terms.

And even if a re-negotiated NAFTA package was approved by the Congress, it could be approved with conditions in one form or another that impact on the balance of concessions made by Canada or Mexico to secure agreement in the first place.

This doesn't deny the importance of the effort, recalling the well-worn phrase that diplomacy, including trade diplomacy, is the art of the possible. But it is equally important to be realistic as we prepared for NAFTA Round Four and the ensuing negotiations over the next weeks.

Congress' Constitutional Authority

Under the US system, the President's authority over international trade agreements is constrained, a reflection of the checks-and-balances embedded in the US Constitution. While the President can negotiate trade agreements under executive authority, the Commerce Clause of the Constitution gives Congress the exclusive power "To regulate Commerce with foreign Nations".

The result is that no trade agreement signed by the President can enter into force without Congress doing two things: first, giving its approval to the final deal and authorizing it to be ratified and, second, passing the necessary implementing legislation to give the deal full effect under US law.

Well in advance of any deal being struck, Congress has been deeply involved in these negotiations from the outset. There are at least two key Congressional committees that by law have to be kept involved – the House Ways and Means Committee and the Senate Finance Committee, both of whom are closely consulted by USTR as the re-negotiations proceed.

Other key Congressional committees have the right to be informed and consulted as well. At least six different organs in each house are listed by the Congressional Research Service (2016), designed to ensure "ongoing, close engagement" to ensure the administration is aware of the views of these bodies while it negotiates.

The current angry mood in the Congress, with Republicans as well as Democrats alienated from much of the President's policies, means that these consultations are in for a rough ride. That has come out in Round Three as noted, with reports out of Washington that the USTR and Congressional leadership are at serious loggerheads.

Congressional involvement is therefore a serious complicating factor in these talks. While Congress' involvement can be used to moderate some of the more extreme positions advanced by the White House (including tweets by the President), it also means that Canada and Mexico will not only be negotiating with USTR but will have to look over their shoulders to take the mood of Congress over the next weeks and months.

Origins and Evolution of Fast Track

The constitutional power of the Congress is behind the so-called Trade Promotion Authority or "Fast-Track", as it is commonly called, which confers authority on the President to negotiate trade deals based on a set of objectives presented to Congress before the talks start.

Fast-Track (referred to as "trade promotion authority") originated in the *Trade Act of 1974*, enacted at the time of the Tokyo Round being held under the *General Agreement on Tariffs and Trade* (GATT).

Because trading partners, Canada included, would not engage in negotiations with the US without assurances that a negotiated deal would not be taken apart with changes being insisted on by Congressional committees to secure their approval, Congress agreed to confer negotiating authority on the President and limit its own powers to approve or disapprove the final outcome by an up-or-down vote. It can't insist on re-negotiating aspects of the deal once it's presented by the President.

Originally limited to five years, Fast-Track authority has been progressively extended to allow the president to negotiate the *Canada-US Trade Agreement* (1988), the *Uruguay Round Agreement* creating the WTO (1994) and a series of other US trade agreements, including the NAFTA (1994). The current Fast-Track extension is contained in the

Bipartisan Congressional Trade Priorities and Accountability Act of 2015, (BCTPAA) commonly referred to as TPA-15.

Fast-Track and the NAFTA

There is a general view that these re-negotiations have to be concluded before the end of 2017 or very early in 2018. If they drag on much beyond that, the concern is they'll get caught up in the politics surrounding the Mexican presidential election and the Congressional mid-term elections later in the year.

As well, by April 2018 Trump has to seek renewal of Fast-Track authority under TPA-15. Extension which can be rejected by either chamber. While normally extension might seem automatic, in these chaotic times in Washington, who knows what can happen. Lack of extended authority would be a serious, if not a fatal, stumbling block if the NAFTA exercise hasn't been completed by then.

While it is important to set an end-of-year deadline to keep negotiators on their toes and focused on the closing window of opportunity, with the number of currently unresolved matters and the political controversies surrounding the difficult "red-line" issues such as the binational panel system, getting the whole NAFTA package done in this short a time-frame is highly optimistic.

Even if a new NAFTA materializes in early 2018, it will trigger a series of procedures that the US will have to follow under the Fast-Track process in TPA-15 to secure approval by the Congress. These are administratively complex and cumbersome and, as with the consultative requirements mentioned above, reflect the extent to which the Congress pulls the strings in international trade:

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- First, Trump has to give Congress and the US International Trade Commission **90-days advance notice** before he can even sign an amended NAFTA. Congress can, and will, express its own views on the deal during this notification period. For example, some committees could decide that the deal Trump intends to sign is contrary to US interests in a variety of ways, complicating matters even under the Fast-Track process.
- After signing NAFTA 2.0 following that 90-day period, Trump has to submit the text plus draft implementing legislation to Congress. But before he can do that, he has to supply Congress **30 days** in advance with the final text of the agreement and a statement of administrative action outlining implementation plans.
- At the same time as all of this is going on, the International Trade Commission has to complete an independent assessment of the new NAFTA, which can take a maximum of **105 days** after the agreement is signed.
- TPA-15 also requires Trump give advance notice to the revenue Committees of the House and the Senate **180 days** before signing the NAFTA of any proposals that might require changes to US trade remedy laws. Interestingly, Lighthizer already sent such a notice to the Congress on 22 September, well ahead of the end of the negotiations (an effort to shorten some of these deadlines).
- Leaving out the 180-day notice just referred to, it could take as long as **225 days** before the draft bill is sent to Congress after negotiations end (assuming here is a deal).
- Once the bill is sent to Congress, the Senate and the House each have **90 “sessional” days** to consider the draft bill plus treaty and to either approve or reject the package. Sessional days mean when each house is sitting, not calendar days. If

Congress adjourns for mid-term elections next summer, the 90-day period has to be re-started with the newly elected Congress, taking us into 2019.

Experience with Other Fast-Track Agreements

With the unrelenting political pressure to complete the NAFTA exercise in the next few months, it is instructive to see what occurred in other US trade negotiations subject to the Fast-Track process. What is revealed is that, even with a concluded agreement, the progress of approval can take several years, whatever Fast-Track might provide.

As examples, the US and Colombia began trade negotiations in 2004. An agreement was signed in 2006. It wasn't approved by the US Congress until 2012, eight years after the negotiations began. In the case of the US-South Korea free trade agreement, negotiations began in 2006 and concluded in 2007 but the FTA wasn't approved by the US Congress until 2011, five years after the talks started. In both cases, changes were made to the signed deal in order to secure Congressional assent.

Where Does All This Lead?

It leads to uncertainty. Even if a deal is done and signed, a vote to approve NAFTA 2.0, to allow ratification and to pass the necessary legislation can't realistically happen before Congress adjourns next summer. That would be after the Mexican elections in any case, which in itself could alter the political landscape significantly.

During this time, any signed agreement will be held in abeyance, hostage to shifting political tides in Washington, notwithstanding the Fast-Track process.

In sending the amended NAFTA forward, the White House could set out conditions in its statement of administrative action that alter or qualify US obligations in a way that is not in

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accord with treaty obligations. In taking up the package, Congress could let it be known that its up-or-down approval would be contingent on changes or additions that require more concessions from Canada and Mexico.

Much of this is speculative of course. We don't know where the NAFTA negotiations will come out. What it does show, however, is that even with a concluded agreement, there can be long delay and substantial uncertainty in getting the agreement approved and the enacting bill through the Congress.

The fact that any NAFTA deal will amount to an entirely new treaty and not a few tweaks and the evolving political situation in Mexico and the US raises the level of uncertainty even higher.

None of this gainsays the importance to Canada (and indeed to the other two countries) of diligently continuing with these negotiations to the end. There seems to have been progress in some of the modernization aspects, noted above. Trade negotiations are dynamic and fluid exercises and with diligence and good will on the part of all three teams, even accepting the challenges in the road ahead, the process may prove ultimately successful.

However, the long and tortuous path to getting any new deal over the mountain and through the US legislative system, viewed from the current vantage, seems a truly Sisyphean challenge.

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