



The West Front of the United States Capitol, with the U.S. Senate and House of Representatives. As Sarah Goldfeder writes: “Although the president has the authority under NAFTA to remove the United States from the agreement, the implementation legislation for the agreement remains in place until Congress legislates something different.” *Wikimedia photo*

Getting to Yes: Why Fast Track Matters

Sarah Goldfeder

Multilateral trade negotiations are like a game of Jenga whereby the usual caution of “Nothing is decided until everything’s decided” is compounded by what can happen to a deal after it’s actually agreed, with the Trans-Pacific Partnership being the most vivid example. Which is why Trade Promotion Authority, or “fast track”, as expedited congressional approval is known, is so crucial.

As the NAFTA negotiations began in Washington DC in mid-August, members of Congress and Senators were back in their home districts, listening to constituents. Many heard messages of concern for the economic uncertainty that has accompanied the renegotiation of an agreement that facilitates significant portions of the American economy. While Congress may not be the lead on the process of negotiating trade deals, it has a significant role to play in the ultimate approval of any agreement. Without Congress on board, there is no deal. Without the support of their constituents, members

of Congress won't play. This is particularly true on the eve of a mid-term election, which can be a game-changer for any administration.

From the U.S. perspective, the talks are being conducted under the Trade Promotion Authority enacted by Congress in 2015. In 2014, President Obama was in the heat of negotiations for the Trans-Pacific Partnership (TPP) and looking forward to the eventual negotiation of the Transatlantic Trade and Investment Partnership (T-TIP) with the European Union. That January, in his State of the Union address, he called for Congress to grant him bipartisan trade promotion authority (also known as TPA or fast track). He said, "We need to work together on tools like bipartisan trade promotion authority to protect our workers, protect our environment, and open new markets to new goods stamped 'Made in the USA.' China and Europe aren't standing on the sidelines. Neither should we."

He was asking for this authority to give his negotiators credibility at the table in the ongoing talks on TPP, where they were feeling pressure. Even here in Canada, Stephen Harper expended little political capital on the agreement until TPA passed Congress. Ironically, despite President Trump's almost immediate rejection of TPP, it is this TPA that the Trump administration is relying on to get through the renegotiation of the North American Free Trade Agreement (NAFTA). For this reason, it is worth recalling the fight for the TPA of 2015.

During the first three weeks of June 2015, an epic partisan battle on free trade was waged on Capitol Hill. The Democrats were opposed to granting the President, a Democrat, authority to negotiate three specific multilateral trade agreements under fast track provisions (the TPP, the T-TIP, and the Trade in Services Agreement or TISA). Fast track authority is a renewable mechanism by which trade deals can be approved or denied by Congress on an up-or-down vote, cannot be amended or filibustered.

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the enabling legislation, sponsored by Republicans Orrin Hatch in the Senate and Paul Ryan in the House, were Senate Majority Leader Mitch McConnell and House Speaker John Boehner. In 11th-hour negotiations, in which the Obama White House partnered with the leadership of the Republican Party, the Bipartisan Comprehensive Trade Promotion Authority of 2015 passed both houses along largely partisan lines.

Why does this matter? The U.S. executive branch must have the ability to negotiate a trade agreement without the threat of effective re-negotiation within its legislative branch before the agreement can come into force. It is absolutely necessary that they have this authority in order for the U.S. negotiating team to have any credibility with international counterparts who are well aware of the potential for congressional gridlock without fast track.

The principles laid out in the TPA of 2015 were based on decades of legislation allowing for credible trade negotiation by the USTR. In addition, in 2007, the May 10 Bipartisan Compact on Free Trade Agreements itemizing certain priorities was struck between Congressional Democrats and the Bush administration, leading into a series of bilateral trade agreements. The principles for labour and environment outlined in that memo remained in the 2015 legislation and are reflected in the July 17 document on priorities for the NAFTA negotiations. In fact, most of the language in the July 17th document originated in texts designed to facilitate the negotiation of other agreements—trade priorities that have been agreed upon by Congress over time.

Without TPA 2015, any agreement negotiated by the USTR team would be subject to full legislative oversight. In the world we live in now, that would mean a line-by-line assessment of the final text and likely include substantial amendments that would speak to the constituencies of members of Congress. In other words, it would be a mess.

What does TPA mean for the NAFTA negotiations? In a nutshell: Congress may not be driving the bus, but it owns the bus and can take the keys back at any point in time.

TPA 2015 mandates a specific process for the negotiation, approval and implementation of trade agreements in the United States. It requires that Congress be involved from the beginning, consulted throughout, and notified of any changes in trade remedy laws in advance of the implementation legislation. It also requires that Congress receive specific reports that detail the overall impact of the proposed agreement on the economic interests of the United States as well as impact reviews for the environment, employment, labour and an implementation and enforcement plan.

Further complicating matters, the TPA contains provisions for Congress to retract Trade Promotion Authority through a procedure called the Extension Disapproval Resolution. This provision may be in play in these NAFTA negotiations should the negotiations not be concluded by July 1, 2018. Another option, the Procedural Disapproval Resolution, allows Congress to retract TPA for any specific trade agreement. Additionally, there is yet a further procedure should Congress find that necessary changes in trade remedy

laws are inconsistent with the negotiating objectives, in which case, Congress can choose not to accept those and kill the deal. The fourth procedure that could come into play is a “Consultation and Compliance Resolution” that can be used to deny TPA for any specific piece of implementation legislation. Finally, as if there weren’t enough checks to TPA, each house can always override TPA and consider an implementation bill under its general rules.

It is also important to note that although the president has the authority under NAFTA to remove the United States from the agreement, the implementation legislation for that agreement remains in place until Congress legislates something different. Likewise, the implementation legislation for NAFTA subsumed and in part, nullified, the prior agreement between Canada and the United States. Without legislative action, which requires Congress, nothing effectively changes.

Which brings us to today. President Trump has consistently used strong rhetoric against NAFTA (and against all existing trade deals) as a rallying cry. That rhetoric may make the negotiations more stressful for the teams of negotiators, but it has little effect on the mechanisms of the United States government. The mechanisms that address the system of checks and balances that both frustrate and protect Americans are particularly resilient. Trade negotiations are one of those, and the process is designed to be, to the extent possible, nonpartisan, with the overarching goal of protecting and advancing the national interest of the United States.

And then, there’s politics. There are a few ways for a president to alienate members of Congress. One guaranteed to work is to act in ways that express a conviction that Congress works “for” the president. Members of Congress are the first line of the American democracy. They take the concerns of their neighbours back to Washington. They may express sup-

port for a president because their constituency supports that President, but that goodwill only goes so far. As this president humiliates, goads, and harasses Republican leadership via his Twitter feed, he runs the risk of losing them on legislative priorities like trade. Especially when trade agreements are responsible for the sales of commodities that put food on the tables of American families. Congress is also beholden to corporate interests—especially corporations that employ voters in their districts, but also those that contribute to fundraising efforts in advance of an election year. While the discussion of trade deals that make life better for American workers is good rhetoric, the reality is that trade deals that facilitate business are what the corporate world and its K-street lobbyists are fighting for.

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This is not to say that the one set of goals is wholly inconsistent with the other. But it is important to remember that trade is not a function of government, it is a function of business. Trade deals are not effective at forcing the will of a political ideology; that is a function of domestic reforms. Trade deals are most effective at establishing markets and relationships between nations. Those networks are the best way of ensuring a relatively stable global economy where participants play by a certain

set of predictable rules.

The Republican party of the 21st century has found new strength in the “fly-over” states—states whose economies are driven by agriculture and manufacturing. The constituencies in these states may have conflicting views on specific trade agreements (farmers liked TPP for example, but skilled workers did not), but access to foreign markets is important to all. As this process unfolds, members of congress from agriculture-based states will be looking to preserve the agreement.

The bigger challenge in the United States is determining exactly how much Americans care about NAFTA. The coverage of these negotiations in the U.S. is infinitesimal compared to the daily digest available in Canada. The constituencies that have more at stake are paying more attention, the economies of Texas and New Mexico, for example, are largely driven by trade with Mexico, and have more front-page coverage of NAFTA in their local papers.

How all this plays in the American realpolitik is what will be, in the end, the most telling. The reality is that the path not taken—a world without NAFTA—would likely include a less wealthy and secure North America. NAFTA brought Mexico into the already stable relationship between Canada and the United States. It helped to sustain a continent of prosperity and resilient democracy. There is still work to be done. The American workforce is struggling to pay its bills, while Mexican civil society is (arguably) still nascent. Both countries look to Canada as an example on many fronts, but mostly as a country that has threaded the needle and found success by sustaining a healthy, vibrant economy based on trade, and supported by a nation grounded by its middle-class. **P**

Sarah Goldfeder, a principal of Earncliffe Strategy Group, is a former U.S. diplomat who served as special assistant to two U.S. ambassadors in Ottawa, as well as three years in the U.S. Mission in Mexico.
sgoldfeder@earncliffe.ca