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BACKGROUNDER

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Next Steps for the USMCA: Congress Should Have Its Say to Ensure Free Trade

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KEY TAKEAWAYS

Consideration of any trade agreement, including the United States–Mexico–Canada Agreement (USMCA), should allow Members of Congress to voice their opinions.

Congress should be allowed to push for changes to the implementing legislation to ensure that the agreement will, in fact, promote free trade.

If Congress decides to consider the USMCA through Trade Promotion Authority, it is unclear how many positive changes could be made.

The United States–Mexico–Canada Agreement (USMCA), a proposed new trade agreement for North America, was signed on November 30, 2018. The White House submitted a draft Statement of Administrative Action (SAA) to Congress in late May 2019, the next step required for Congress to begin considering the agreement. Now the Administration must develop implementing legislation for the USMCA. As this process moves forward, Members of Congress have some ability to influence the legislation.

In a recent report, analysts from The Heritage Foundation concluded that there are several weaknesses in the USMCA that should be addressed and that the forthcoming implementing legislation is a possible tool for addressing them.[1] Additional side letters to the USMCA could also be used to address concerns—but the use of these mechanisms to worsen the agreement is unacceptable.

Trade agreements are typically considered under special rules dictated by Congress through Trade Promotion Authority (TPA). This allows a trade agreement to bypass processes in the House and Senate that may result in delays, including the amendment process. TPA is a useful tool, but it is not the only way to consider trade agreements; consideration through the normal rules of Congress is also possible.

There are pros and cons to each process, but in the end, consideration of any trade agreement, including the USMCA, should allow Members of Congress to voice their opinions and to push for positive changes to the implementing legislation to ensure that it promotes free trade.

The Origins of Congressional Trade Authority

Under Article 1, Section 8 of the Constitution, Congress has the authority "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[2] In an effort to ease the process for negotiating trade agreements, Congress allows the President to negotiate on behalf of the United States, with strings attached. This process is manifested in TPA, previously called "fast track authority," which was enacted in the Trade Act of 1974 and renewed four times.[3] It was last renewed in 2015 and will expire on July 1, 2021. The TPA process was used to negotiate the USMCA.

On the other hand, Article 2, Section 2 of the Constitution gives the President the power "to make treaties, provided two thirds of the Senators present concur."[4] The President also "exercises broad authority over the conduct of the nation's foreign affairs."[5] Each branch has a role in relations with foreign nations, but trade agreement powers are clearly derived from Article 1. Over time, aspects of this power have been delegated to the President, such as with TPA. Under TPA, Congress grants authority to the President for limited periods of time "to enable legislation to approve and implement certain international trade agreements to be considered under expedited legislative procedures."[6]

Trade agreements often require changes in U.S. law, which can only be implemented by legislation enacted by Congress.[7] Congress adopted TPA to stop implementing legislation from being delayed or obstructed by congressional procedures, such as filibusters or the Speaker not bringing the implementing legislation to the floor for a vote.[8] Essentially, it expedites the congressional procedures required to implement a trade agreement. However, to ensure that Congress retains its constitutional authority, TPA contains strict rules for the President to follow. If Congress determines that these rules were not followed, certain processes

(explained later in this *Backgrounder*) exist to disapprove of proposed implementing legislation.

The Basics of Trade Promotion Authority

The purpose of TPA is to

> (1) define trade policy priorities by specifying negotiating objectives; (2) ensure that the executive branch advances these objectives by requiring notification and consultation with Congress; (3) define the terms, conditions, and procedures under which the President may enter into trade agreements and to determine which implementing bills may be approved under expedited authority; and (4) reaffirm the constitutional authority of Congress over trade policy by placing limitations on the use of TPA.[9]

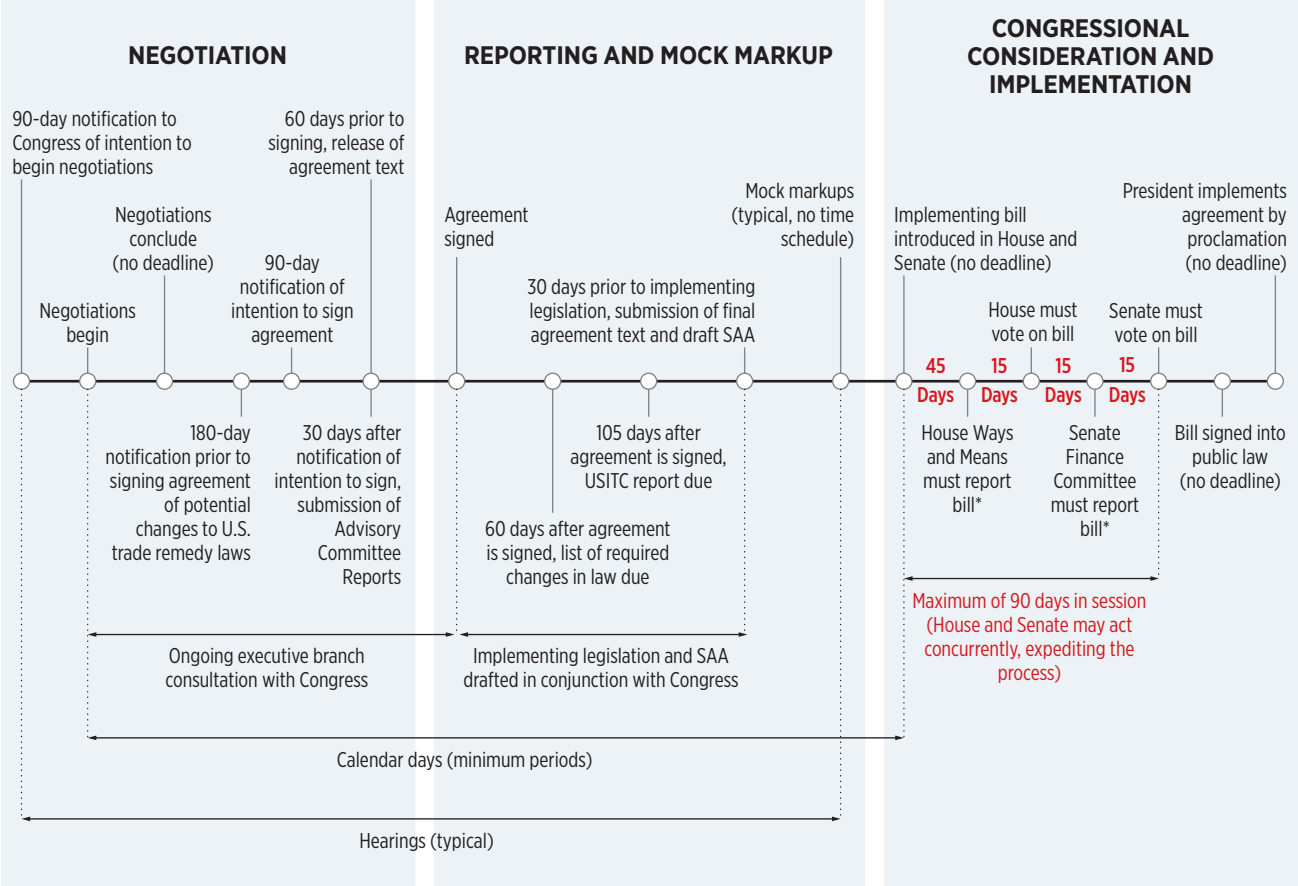
The steps for negotiating and presenting a trade agreement under TPA are illustrated in Figure 1 (see page 4).

After a trade agreement has been negotiated and signed by all countries, Congress must receive a list of required changes to U.S. law within 60 days. The International Trade Commission (ITC) is also tasked with completing a report within 105 days that models the effect of the new trade agreement on the economy as a whole, as well as on individual sectors. At least 30 days before implementing legislation for a trade agreement can be introduced in Congress, the Administration must submit the finalized agreement text and a draft SAA.

The SAA should contain the Administration's views of the purpose of the agreement for domestic law and how it will meet U.S. international obligations.[10] It should describe which administrative actions will be taken[11] to implement the trade agreement, which will be supported by an explanation of the implementing bill and how U.S. law will be altered. There must also be a statement supporting the implementing bill that explains how the legislation "meets the requirement that its provisions altering existing law are 'strictly necessary or appropriate.'"[12] The supporting statement should also illustrate how the new agreement achieves the objectives of TPA, whether the agreement changes one previously negotiated, and how the new agreement serves American commerce.

FIGURE 1

Trade Promotion Authority: Requirements and Timeline



* Or bill is automatically discharged.
NOTES: Time periods are not to scale. USITC: United States International Trade Commission; SAA: Statement of Administrative Action
SOURCE: Congressional Research Service, "Trade Promotion Authority (TPA)," September 4, 2018, https://fas.org/sgp/crs/misc/IF10038.pdf (accessed March 18, 2019).

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During the 30 or more days between these actions by the Administration and when legislation can be formally introduced, the Senate Finance Committee and the House Committee on Ways and Means can hold hearings and mock markups on the agreement. These steps are beneficial, as they increase transparency and allow Congress to give nonbinding feedback to the President. However, the President is not required to implement the feedback from Congress.

Following the receipt of the implementing legislation, the TPA process allows a maximum total of 90 session days for the consideration of a trade

agreement in the House and Senate. Implementing legislation for a trade agreement cannot be amended at this stage, and there is an expedited process for consideration given this limitation. Within 45 session days of being introduced, the House Committee on Ways and Means must report the bill to the House floor. Once it has been brought to the floor, only 15 legislative days are permitted for debate. The legislation must then receive an "up or down" simple-majority vote, meaning the implementing legislation cannot be amended.[13] The Senate can consider a trade agreement at the same time as the House, but if that does not occur, a maximum of 30 remaining session days are allotted for the legislation to be reported by the Senate Finance Committee and for a vote on the Senate floor.

Although Congress has the constitutional authority to shape trade policy, it has gradually delegated that authority to the President. Congress has done this because the executive branch is better suited to negotiate increasingly complex agreements without having to weigh them down with the special interests of individual members.

Considering the USMCA Under TPA Rules

In its simplest form, TPA is a list of rules for considering trade agreements. That list of rules is determined and administered by Congress. While it is clear that amendments cannot be made to the USMCA implementing legislation once it is introduced, there is some debate regarding the type of changes that can be made prior to introduction. Technical changes to ensure that the implementing legislation is consistent with the agreement are permitted, and minor changes that affect only the United States could be considered. This process would typically occur during the mock markup phase, but Members can also express their concerns before the Administration has draft implementing legislation. Any substantive changes would likely require a re-opening of negotiations or additional side letters between the parties to a free trade agreement.

Efforts to change draft implementing legislation, or even implemented trade agreements, are not unprecedented. In 2006, Senator Kent Conrad (D–ND) attempted to amend the U.S.–Oman Free Trade Agreement to address concerns over the alleged use of slave labor and human trafficking in Oman. The amendment was approved during the Finance Committee mock markup, but the change was rejected by the George W. Bush Administration.[14] The Obama Administration quarterbacked changes to the U.S.–Korea Free Trade Agreement (KORUS) in 2010, which resulted in a "supplementary agreement" to update KORUS on several issues, including

the automotive sector.[15] These changes were achieved through side letters and various minutes between the U.S. and South Korea.[16]

Consideration Under the Normal Rules of Congress

There are essentially four ways for Congress to change how a trade agreement, or in this case the USMCA, is considered. Effectively, these options allow Congress to consider a trade agreement under a new set of rules, which could allow amendments and other procedures afforded under the normal rules of Congress. Congress could seek more substantial changes to the USMCA in this circumstance, but that would also mean that all areas of concern could be on the table.

The first mechanism is a procedural disapproval resolution (PDR). A PDR is like any other resolution in Congress, but is viable under TPA if Congress believes "that the President has not adequately notified or consulted Congress...[or if] the agreement 'fails to make progress in achieving the purposes, policies, priorities, and objectives'" laid out in TPA.[17] A PDR can be introduced by any Member, but must be reported to the floor by the House Committee on Ways and Means and the Senate Finance Committee and approved by both houses. If the PDR is approved by both houses, "neither can use the expedited procedure to consider that implementing bill."[18]

Another procedural resolution allows for Congress to claim "that changes to U.S. trade remedy laws provided for in a trade agreement implementing bill submitted by the President are inconsistent with statutory negotiating objectives on that subject."[19] This resolution can also be introduced by any Member, but must be reported by a committee of jurisdiction. Approval from both chambers is not required, but "it is not clear that adoption of a resolution of this kind would prevent either chamber from considering the implementing bill under its expedited procedure."[20]

A consultation and compliance resolution (CCR) is like a PDR, but it "permits either house, by its own action, to make a given implementing bill ineligible for expedited consideration in that chamber."[21] The argument made by a CCR is also related to a claim that the President did not properly consult with Congress. The consideration of a CCR has different procedural rules in the House and the Senate, but both houses require for the resolution to stem from the committees of jurisdiction in direct relation to consideration of the respective implementing bill. In the House, the Ways and Means Committee must report the bill "with other than a favorable recommendation," and then any member of the House can submit a CCR.[22]

TPA "does not specify how such a resolution would then reach the floor," but it would likely occur through the Committee on Rules.[23] In the Senate, the procedures for a CCR are complex, but a resolution of this kind would likely be subject to a cloture vote (a vote to end debate). Cloture in the Senate requires 60 votes and it "does not occur until two days after the cloture motion is offered."[24] In short, it could take a significant amount of time for a CCR to be approved by the Senate.

Because TPA is only a set of procedural rules, Congress "retains full authority, under the Constitution, to change or override them at any point."[25] For example, "the House could adopt a special rule permitting amendments... [or] a resolution prohibiting consideration of an implementing bill."[26] The Senate could also set new rules for considering an implementing bill by unanimous consent.

In 2008, House Speaker Nancy Pelosi (D–CA) held a vote to change the House rules pertaining to the consideration of the implementing legislation for the U.S.–Colombia Trade Promotion Agreement.[27] A rule under the TPA process at that time required Congress to vote on such legislation within 60 legislative days from when the President sent the legislation to Congress. Some lawmakers argued that rather than consulting Congress, President George W. Bush tried to force the hand of Congress. This move also affected the pending agreements with Panama and South Korea, delaying the votes of all three agreements for roughly three years.[28]

Suspending TPA rules, through any of the aforementioned means, requires a weighing of the benefits and consequences. The agreement could be opened up for more free trade–oriented changes to the text, but opponents of free trade would also have the ability to seek amendments to impose further restrictions on trade. Similar to seeking changes to a trade agreement before the implementing legislation is introduced, considering an agreement under different House and Senate rules could require further negotiation between the parties or side agreements.

Conclusion

If Congress decides to consider the USMCA through TPA, it is unclear how many changes could be made to address the concerns identified in The Heritage Foundation's recent report on the agreement.[29] It is likely that very few changes would be made, and those that are made would be primarily technical changes. The TPA process, however, is not the only way. Considering the USMCA through the normal rules of Congress could allow for conservatives to address more of the shortfalls in the agreement. This

path is not without its problems, as the USMCA could be subject to the amendment process for all Members, as well as filibuster and other delay tactics. In the end, consideration of the USMCA should allow Members to voice their opinions and allow the possibility of changes to the agreement to ensure it promotes free trade.

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Endnotes

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3. Ian F. Fergusson, "Trade Promotion Authority (TPA)," Congressional Research Service *Report for Congress*, September 4, 2018, https://fas.org/sgp/crs/misc/IF10038.pdf (accessed February 28, 2019).
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6. Ibid.
7. Ibid.
8. Fergusson, "Trade Promotion Authority (TPA)."
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11. The body that carries out the administrative actions will depend on what is contained in the SAA, and any laws that must be altered will be changed by Congress.
12. Ibid.
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