

INTERNATIONAL TRADE

THE TIMING AND TEMPO OF “NAFTA NEXT” *Protecting And Promoting Your Interests During The NAFTA Renegotiation* by Daniel D. Ujcz

The United States Government (USG) likely will launch formal renegotiations of the North American Free Trade Agreement (NAFTA) by the end of March 2017. In a process fittingly described by the former real estate mogul turned President of the United States (POTUS) as a NAFTA “renovation”, the coming months will require significant decisions as to which sections require just a fresh coat of paint; which walls will require knocking down or building up; and which areas require the construction of a new addition. In light of the stakes at hand, companies would be well advised to immediately participate in the process on all side of the border.

The President and Congress

The threshold considerations for all companies are the timing and tempo of the processes that will be deployed by the Trump Administration and, perhaps of greater importance, the U.S. Congress. Indeed, the NAFTA provided the first post-inaugural example where President Trump expressed his customary desire to move rapidly to fulfill a campaign promise, yet explicitly recognized that the Congress may have a say. Specifically, during his meeting with the leadership of the key congressional trade committees (U.S. Senate Finance and U.S. House Ways and Means) on February 2, 2017, POTUS repeated his familiar campaign regarding the need to make NAFTA “fair to the American worker” and added that “we need to speed up” the NAFTA renovation. However, pointing to the U.S. Senators present at the meeting, POTUS commented, “You’re the folks that can do it.” Subsequent to those meetings, the new U.S. Secretary of Commerce Wilbur Ross began expressly advising that any renovation of the NAFTA would require extensive consultations with Congress, including providing ninety (90) day notice prior to entering into any NAFTA discussions. The new Administration seemingly recognized the delicate balance enshrined in U.S. law and customary practice since the 1930s that provides overlapping roles to the Executive Branch and Congress over trade matters. The key inquiry for the North American business community, therefore, is how to best utilize these two avenues to shape a next generation NAFTA (NAFTA NEXT).

Practical Politics

Unfortunately, there is no well-prescribed roadmap for “renovating” an agreement as longstanding and far-reaching as the NAFTA. Further complicating the issue is that the Trump Administration remains unclear as to whether it will pursue a trilateral strategy, have separate bilateral discussions with Canada and Mexico, or pursue a hybrid approach to the renegotiation. Moreover, the Administration is missing several key players. The Administration’s nominee for United

States Trade Representative (USTR), Robert Lighthizer, likely will not be confirmed until late-March (or later, as and several Senators have expressed concerns with Mr. Lighthizer’s past involvements with foreign governments when he was engaged in the practice of law). Similarly, other key political appointments remain vacant such as those for Western Hemisphere matters at the National Security Council and U.S. Department of State. The Administration has sought to address the vacancies, in part, by appointing Steven Vaughn as acting USTR and General Counsel in an apparent effort to advance its trade initiatives. And, of course, Congress has to confirm a Justice of the United States Supreme Court, address health care, and begin tax and regulatory reform discussions.

Modifying or Amending the NAFTA

Beyond these practical timing issues, there is the pressing need to develop a transparent legal and consultative process for the NAFTA renegotiation. For example, the Trump Administration will likely utilize Article 2202 of the NAFTA (which Congress approved as part of the *NAFTA Implementation Act*) that provides for “a modification or addition to the Agreement” when “approved in accordance with the legal procedures of each Party.” However, it remains unclear whether “the legal procedures of each Party” requires that Congress approve any modification or addition. This analysis may depend on the specific modification or addition. For example, it is likely that the Trump Administration could address issues such as Rules of Origin (ROO) without Congressional authorization; however, larger issues such as dispute settlement procedures and new negotiating areas likely would require Congressional approval. Consequently, cross-border businesses need to follow developments and pursue consultation strategies on an issue-by-issue basis.

Fast Track or the Scenic Route?

The NAFTA renegotiation also will be the true first use of the extensive consultation procedures provided in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, otherwise known as Trade Promotion Authority (TPA) or “fast-track”. The Obama Administration requested this TPA authority to close the Trans-Pacific Partnership (TPP) negotiations, from which the Trump Administration has now withdrawn. The full scope of these robust consultation processes is largely untraveled in practice as most of the TPP was “grandfathered-in.” Nevertheless, the legislation is directly relevant to the NAFTA discussion as its sets forth Congress’s guidelines for any current trade measure and outlines the legislative branch’s detailed expectations for consultations.

By its terms, the legislation requires the afore-referenced 90 days consultation period with Congress *prior* to entering into any trade discussions. The USTR must publish its negotiating objectives at the 30 day mark. The legislation also requires the creation of separate House and Senate Advisory Groups to oversee ongoing negotiations. Further, any member of Congress may meet with USTR to raise issues

during the negotiations. USTR also must establish procedures for public consultations (which USTR did for TPP), that will further add to the timing and tempo of this process.

As negotiations draw to a close, USTR must meet with the Congressional advisory groups and all relevant Congressional committees impacted by negotiations; submit reports to the Senate Finance Committee 180 days before entering the agreement; and publish the proposed text 60 days before the agreement is reached. Then, once the Agreement is reached, the legislation provides multiple notice and consultations provisions prior to any approval by Congress. These, at a minimum, require a 105 day waiting period prior to submission to Congress, and a 75-90 day period once the agreement is presented to Congress for approval. In summary, sprinters need not apply; this “fast-track” requires a marathoner.

Canada and Mexico Approaches

Mexico has launched formal consultations and expects those to be completed by June 2017. On the Canadian side, companies are anxiously awaiting for the formal initiation of consultations by the Government of Canada, which is likely to occur immediately after a formal request by the USG. However, it is critical that affected companies prepare now to engage to promote and protect their interests in the renegotiation process.

2018?

Under the speediest scenarios regarding the timing and tempo, the formal NAFTA negotiations and passage, if any, by the respective legislatures would not be completed until mid-2018. This puts the NAFTA squarely in the range of the U.S. Midterm elections and the Presidential elections in Mexico. Additionally, a number of relevant issues such as the Softwood Lumber proceedings, immigration issues, and tax and regulatory reform will all likely impact the timing and tempo of the NAFTA renegotiation.

What Should We Do Now

Against this backdrop, companies must avoid the temptation to “duck and cover” or “wait and see.” Companies must monitor developments in an ever-evolving trade environment; particularly, one governed by uncharted processes that place primacy on consultation with the private sector. Key recommendations include:

- Preparing any “case study” or “real world” examples of areas that the NAFTA renovation could address to promote expansion and job creation within your company for submission to the respective governments
- Detailing changes to NAFTA’s Rules of Origin that may benefit your company
- Identifying topics that should be included in a new NAFTA that

were not included in the original agreement

- Monitoring developments and calls for submission by USTR, other Executive agencies, Congressional committees and the Government of Canada
- Participating in Industry or Stakeholder Consultations such as the U.S. International Trade Advisory Committees (ITACs)
- Engaging key congressional committees and the Senate and House Trade Advisory Groups and Canadian Parliamentary Committees

Dickinson Wright has significant trade experience. It is actively promoting and protecting its clients’ interests in the upcoming NAFTA renegotiation. It also leads key Canada-U.S. business groups that provide recommendations to the respective governments. More information is available at <http://www.dickinson-wright.com/>.

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