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COMMENTS ON THE FAST-TRACK PROCESS FOR REVIEW OF NAFTA

PHILIP H. POTTER*

An article on the fast-track process was written by Jeff Lang, who in 1988 was the Chief Counsel for the Senate Finance Committee. Janet Nuzum, of the Trade Subcommittee of the House Ways and Means Committee, was his counterpart on the House side. Both of them were involved in preparing the 1988 Omnibus Trade and Competitiveness Act, in which the fast-track provisions were amended. Some of the participants have raised questions about exactly how the schedule works on fast-track and what is going to happen next; therefore, I am going to outline the fast-track process.

First of all, we are now in the "Notification Period." Formal notification was given on September 16, 1992. There is a ninety-calendar-day period after which the President can enter into NAFTA. That generally means that they are going to sign the Agreement, but the statutory language says "enter into." Keep in mind, this is a "not less than ninety day" provision. The next period of time involves the enabling legislation once the Agreement is formally introduced. There is a sequence of periods that are "not more than" time periods in the House and the Senate. The current period we are in could actually end up to be longer than the second period of time. The perception, however, is that this stretches out to be a long period of time in Congress. This may or may not be correct. There have already been hearings in the Senate and the House. During this notification period, there will be more consultations between the Administration and the Congress, but essentially this is a review period.

In 1974, when the fast-track procedure was originally adopted, the notification period was intended to be a period of time for close Congressional scrutiny. It was assumed that if there were any major changes to be recommended, they would be made during this period. In 1988, however, when the U.S.-Canada Free Trade Agreement was being considered, what was submitted under the procedures for notification was barely an outline of what the FTA was. The actual text was completed

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after the formal notification was given. The Administration did it that way because they were running out of time under the fast-track process. They had to start the ninety-calendar-day clock running and hope they could finish everything before the fast-track process expired.

The authorization of fast-track procedures currently expires on May 31, 1993. The benefit of the fast-track process is essentially that Congress has to vote on the final enabling legislation without amendment. Congress must vote up or down, and must do so within specified time periods; thus, the legislation cannot be delayed in the House or Senate committees or filibustered in the Senate. As long as NAFTA itself is signed before May 31, 1993, it will be eligible for the fast-track process. The signature does not have to occur immediately after ninety days; it could be delayed for any period of time, but the signature must occur before the enabling legislation is submitted.

There will be a mark-up period, which is the interim period between the signing and the formal submission to Congress of the enabling legislation and the statement of administrative action by the President. Congress and the Administration must work out and agree to these documents before the formal documents are submitted under fast-track. If there is a change in administration, the same process applies. A change in administration may either accelerate or delay the process; it is impossible to say at this point. What occurs after the hearings, and after NAFTA has been reviewed, is a normal legislative mark-up process. Essentially, there is negotiation with the congressional committees on implementing language and on the statement of administrative action. There is no set time period for this process. There are multiple committees involved in both the House and the Senate. During the consideration of the U.S.-Canada Free Trade Agreement ("FTA"), two committees in the House and six in the Senate were involved. Each of the committees has to review and develop the implementing language under its jurisdiction. Everything then must be brought together through a conference with the Senate Finance and the House Ways and Means Committees. The important thing for present purposes is that there is no set time period under the fast-track provisions for this informal mark-up process.

Once the congressional committees, in consultations with the Administration, have agreed upon final draft language, it is reviewed by the President. This is where the unwritten, but implicit, deal is made between the Congress and the President under fast-track. If the President submits the language drafted and agreed to by the congressional committees and leadership without changes, there is a very high likelihood it will be passed. If the President decides to make changes in the congressional draft, there is a greater risk that Congress could vote down the enabling legislation.

With changes or without, the fast-track process starts and the strict time limits occur when the President submits the legislation. Under NAFTA, the first time period will be forty-five legislative days for consideration by the House committees; thus, they must report the bill on or before forty-five legislative days. Once it is reported, the House then has fifteen legislative days to vote up or down. The bill then goes to the Senate. The Senate committees have fifteen legislative days to report the bill and another fifteen legislative days to vote on it. This is particularly important. Because of the nature of the Senate rules, normally extended debate or filibusters can occur and legislation can be delayed. Under the fast-track rule, however, the vote on the legislation cannot be delayed. The legislation itself cannot be amended, so a vote will occur, up or down, on a certain day in the Senate.

In conclusion, one may assume that there will be some drafting of the enabling legislation in 1992. Certainly the efforts will start on the statement of administrative action, which is an equally important part of this. As it makes required changes in all of the federal regulations, it is also a critical process.

3. A legislative day is a day in which either the House or the Senate is in session, whichever the case may be.