# Congress and the Canada-United States Free Trade Agreement

*Raymond J. Ahearn and Francis T. Miko*

When President Reagan notified Congress shortly before midnight on October 3, 1987 of his intent to enter into a free trade agreement (FTA) with Canada, he was fulfilling one of many requirements set forth in sections 102 and 151 of the 1974 *Trade Act* (P.L. 93-619), as amended by the *Trade Agreements Act* of 1979 (P.L. 96-39) and the *Trade and Tariff Act* of 1984 (P.L. 98-573). The key elements of U.S. law as they affect congressional-executive branch consultations, the introduction of implementing legislation, and floor procedures for the consideration of the FTA are as follows:

- The President must notify the House of Representatives and the Senate of his intention to enter a trade agreement not less than 90 days before doing so. Since the President's authority to have agreements considered under special legislative procedures expires on January 2, 1988 at midnight: October 3, 1987 was the latest day by which the President could have notified Congress of his intent to enter into a trade agreement with Canada.

- During the October 3, 1987-January 2, 1988 90-day period, and prior to concluding the agreement, the Administration is required to consult about the agreement and its implementation with the House Ways and Means Committee and the Senate Finance Committee and with every other congressional committee having jurisdiction over matters affected by the agreement. The law does not specify the nature of the consultative process, but the legislative history of the 1974 *Trade Act* indicates the period was intended to provide Congress an opportunity to register its reactions to the agreement and to recommend modifications before it is entered into.[1]

*Raymond J. Ahearn and Francis T. Miko specialize in trade and international relations at the Congressional Research Service, Library of Congress, Washington. The views expressed are their own and should not be attributed to any legislative branch agency.*

- After signing the agreement, the President must submit the text to the Senate and House of Representatives, proposing a bill approving the agreement together with changes in United States law necessary or appropriate to implement it. In addition, the administration must submit a statement of any administrative actions proposed to implement the agreement and a statement of reasons why the agreement serves the interests of U.S. commerce. The law does not specify any time frame for the submission of this implementing legislation.

- Special procedural rules involving time limits, discharge petitions, limitations on debates and a prohibition of amendments govern congressional consideration of the implementing bill. These so-called "fast-track" procedures are intended to assure that trade agreements negotiated by the Executive would be given an up-or-down vote by the Congress within a definite timeframe.

- In considering the Canadian agreement, Congress will have at the maximum 90 working days following submission of the package to take an up-or-down vote. In both chambers, each committee to which the bill was referred is given up to 45 days to report the measure out. Committees which fail to report out within the 45 days will be automatically discharged, and the bill will be placed on the appropriate calendar.

- Each chamber votes on the bill within 15 working days after the measure has been received from the committees. A simple majority in each chamber is required for approval.

While these procedures appear straight-forward, it remains in early December uncertain how the implementing legislation will be drafted, when the agreement and legislation will be submitted to Congress, and whether the "fast-track" procedures will be modified. Answers to these questions will depend on numerous political factors, including the state of executive-congressional relations and

**The principles of a free trade agreement were accepted in October 1987, by (L-R) Canadians Pat Carney, International Trade Minister and Finance Minister Michael Wilson; US Treasury Secretary James Baker and US Trade Representative Clayton Yeutter. (*Canapress Photo Service*)**

the congressional calendar. Key decisions that affect the consideration of the Canada- U.S. FTA can be viewed as part of the larger trade policy process in which Congress and the President share power.

It is important to remember that the United States Constitution grants Congress sole power "to regulate commerce with foreign nations" and "to lay and collect duties." The role of the President in trade policy stems from his constitutional power to "conduct foreign relations," to negotiate international agreements on behalf of the United States, and from powers delegated by the Congress. This division of responsibility necessitates a close working partnership between the executive and legislative branches of government on foreign trade matters. From 1934 until the Tokyo Round of multilateral trade negotiations held in the 1970s (an era when tariffs were the central trade issue) the framework for executive-legislative branch cooperation was clear-cut. During this period Congress provided the President advance authority to cut or raise tariffs within well-defined limits and to implement the agreements without further congressional approval.

The Tokyo Round of negotiations, with its emphasis on non-tariff barriers, posed new obstacles to cooperation. Non-tariff barriers such as subsidies, technical standards, and discriminatory procurement policies, affect domestic laws in numerous ways. Agreements bringing greater discipline over non tariff barriers require changes in domestic laws that are difficult to predict in advance of the actual negotiations.

To provide U.S. negotiators with credibility that agreements struck with foreign governments would have a high probability of being implemented by Congress, a new framework to bridge executive-legislative constitutional responsibilities was developed in the *Trade Act* of 1974. In return for congressional acceptance of the "fast-track" approval procedures for these types of agreements, the executive branch was expected to keep Congress informed of the progress of the agreement throughout the stages of negotiation and implementation.

As the final package of Tokyo Round agreements began to take shape in early 1978, key members of the executive branch and the Congress addressed the issue of how the required consultations on the substance of implementing legislation were to be conducted. An account of this episode by I.M. Destler and Thomas R. Graham bears repeating:

> As the final package of agreements began to take shape in Geneva...it was clear that if the responsible committees were to influence the negotiations and implementation, they would have to do so before non-amendable legislation was formally submitted. Reciprocally, the Administration needed close collaboration with the committees in shaping the legislation, in order to assure their strong endorsement. If, instead, the Congressional committees were sharply dIvided, the inflexibility of the process would become a disadvantage; and the floor votes could be negative. The nature of trade politics seemed to increase this risk, for if the industries that were affected by imports saw a real prospect of defeating the implementing legislation, they might join together to do so, rather than each seeking separately its own accommodation. Yet the *Trade Act*

offered little guidance on how such consultations should take place, other than the point that consultations should be comprehensive in scope.2

The arrangement agreed to for the Tokyo Round 90-day consultation period (which is equivalent to the October 3, 1987 - January 2, 1988 consultation period for the Canadian agreement) was a series of "informal" mark-up sessions. President Carter submitted the formal 90-day notification on January 4, 1979, and the relevant committees met in mostly closed sessions over the next four months to evaluate the agreements and make legislative recommendations. An implementing bill was, in turn, drafted mostly by Congress and released for public comment in early June.

Following this extensive process, President Carter on June 19, 1979 formally proposed the implementing legislation to Congress for consideration. Less than five weeks later, both the House of Representatives and the Senate overwhelmingly approved the agreements.

The closed and informal mark-up sessions during the official 90-day notification period of the Tokyo Round provided Congress with the opportunity to react to the agreements and recommend modifications before they were entered into. This process has not been duplicated to date for the Canadian agreement.

An important reason is that the final text of the free trade agreement is still being negotiated. In the Tokyo Round notification period, texts of the agreements were classified but made available to congressional committees. Although the relevant committees have been briefed by administration officials on the elements of the agreement, the lack of a final text until mid December makes it nearly impossible to formulate legislation that will implement the agreement.

Although a final text became available just before Congress adjourned for Christmas, many members of the lead trade committees have been absorbed in the budget reduction negotiations and legislation. They will need time to examine the provisions on the trade bill. Priority attached to reducing the budget deficit also has contributed to delays on final consideration of H.R. 3, the omnibus trade bill, whose passage is a legislative priority of the Democratic leadership of both chambers. Decisions on how and when the implementing legislation for the Canadian agreement will be drafted have to be made before the President formally submits the bill to Congress. Whether the Reagan Administration will still follow in modified form the example set in the Tokyo Round, allowing a large congressional role in drafting the implementing legislation, remains to be seen. Given the heavy demands of the congressional calendar, if Congress does play a large role in drafting the implementing legislation, a bill is unlikely to be ready for submission until March or April 1988. In this case, a final vote might not occur until summer or early fall when the 1988 election cycle is in full swing.

Some officials in the Reagan Administration would prefer an earlier vote in an attempt to prevent the Presidential and congressional election campaigns from playing a possible role in the final vote. The executive branch presumably could develop implementing legislation on its own for submission in January or early February. Under this scenario, final consideration could occur as early as May or June of 1988.

A final uncertainty relates to the expedited procedures governing consideration of the implementing legislation. As explained above, special "fast-track" procedures involving time limits, limitations on debate and prohibitions on amendments provide the bill with a favorable status, increasing the chances of approval.

These expedited and "fast-track" procedures, however, can be changed. The *Trade Act* of 1974 (section 151 (a) expressly recognizes the constitutional right of each chamber to change its rules of procedure at any time. The mechanism in each chamber would vary. In the House of Representatives, the House Rules Committee could issue a special rule to make one or more amendments in order. In the Senate, attempts to change the expedited procedures would likely require unanimous consent. The Senate Rules Committee already has reported out a resolution that would allow amendments to the maritime provisions of the implementing bill. But the Senate Finance Committee, which has primary jurisdiction over the FTA, has placed a hold on the resolution making it extremely difficult to bring the resolution to the floor.

In the event either chamber altered the fast-track procedures, it is hard to predict what the effect would be. Clearly, much would depend on the nature of the amendment and whether its practical effect contradicted the letter or spirit of the FTA text. ☆

## Notes

1. U.S. Congress. House Committee on Ways and Means. H.Rpt. No. 93-571, to accompany H.R. 10710, October 10, 1973, p.23.

2. I.M. Destler and Thomas R. Graham. "United States Congress and the Tokyo Round: Lessons of a Success Story," *The World Economy*, Vol. 3, June 1980, p. 60.