

Intelligence MEMOS



As NAFTA renegotiations proceed through the fall C.D. Howe Institute Intelligence Memos will be looking at what to expect and provide analysis on the latest developments at the table. This post is part of that series.

From: Konrad von Finckenstein
To: The Honourable Chrystia Freeland, Minister of Global Affairs
Date: November 14, 2017
Re: **NAFTA PLAN B: AMEND THE TRADE PRIORITIES ACT**

As we go into the fifth round of the NAFTA renegotiation on Friday, it is useful to revisit the rules that govern our US neighbours. Especially in the context of an administration that appears to be unenthusiastic about reaching an agreement.

The US Constitution established a system of separation of powers. The president holds executive powers:

The executive Power shall be vested in a President of the United States of America.

However Congress has the power over trade:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises ... and to regulate Commerce with foreign Nations

To bridge this division, two years ago Congress passed the *Trade Priorities and Accountability Act. (TPA)*. The US Trade Representative's website defines it as follows:

TPA does not provide new power to the Executive Branch. TPA is a legislative procedure, written by Congress, through which Congress defines U.S. negotiating objectives and spells out a detailed oversight and consultation process for during trade negotiations. Under TPA, Congress retains the authority to review and decide whether any proposed U.S. trade agreement will be implemented.

The TPA in broad terms sets out five steps:

- 1 the President gives notice to Congress of intended negotiations
- 2 negotiations ensue with onerous reporting and consultation obligations to Congress
- 3 the draft agreement is presented to Congress with proposed implementing legislation
- 4 Congress approves or rejects the agreement and implementing legislation
- 5 if approved, the President signs the trade agreement.

Interestingly, the TPA is completely silent on withdrawal or termination. Equally, the US *NAFTA Implementation Act* gives the President power to issue proclamations regarding NAFTA implementation but there is no power to revoke such proclamations.

Meanwhile, the NAFTA treaty itself provides: *A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.*

A hot debate has ensued among legal scholars as to a president's powers and whether he could withdraw without being authorized by statute. The issue is far from clear and should President Trump act unilaterally the matter will undoubtedly wind up in the courts. The outcome is anything but certain.

However, it is clear that a Trump withdrawal from NAFTA, whether authorized or not. would cause major uncertainty and serious economic harm to Canada and Mexico. The border would thicken, supply chains would be interrupted and markets would react negatively.

To avoid the negative effects of possible unilateral actions by Trump, Canada and Mexico should adopt a Plan B strategy. They should urge their allies in Congress to amend the TPA. The amendments would explicitly deal with withdrawal from trade agreements and should establish an equally balanced sharing of powers in case of withdrawal.

Given that Congress jealously guards its powers under the Constitution, such an effort would likely gain the support of representatives from most states, not only those with an economic interest in maintaining NAFTA.

It would also mean that a withdrawal from NAFTA, should it occur, would be an orderly process rather than the legal and economic chaos that unilateral withdrawal under the present legislative set up is guaranteed to produce.

Finally it would give Trump a face saver for not "tearing up NAFTA."

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