

Intelligence MEMOS



From: Jon Johnson
To: US Senators and Representatives who support the inclusion of a Sunset Clause in NAFTA (2)
Date: August 20, 2018
Re: **WOULD THE US NOT BE WORSE OFF WITH A NAFTA SUNSET CLAUSE?**

US negotiators are demanding that NAFTA (2) include a “sunset clause” under which the new agreement would automatically terminate after five years unless all parties agreed to extend it.

Canada and Mexico are resisting this demand for the obvious reason that a five-year horizon would create an unacceptable degree of uncertainty. Certain members of Congress, as well as the US business community, have similar concerns, which is reason enough for you to reject the inclusion of a sunset clause. Moreover, a sunset clause also has the significant downside of putting each of the NAFTA parties, including the US, into a straitjacket.

Suppose that as the five-year time limit approaches, the US administration is unhappy with certain aspects of NAFTA (2). Under the current NAFTA rules, the US administration may request a renegotiation without having the entire agreement terminate. A NAFTA party (here the US) can apply pressure by notifying the other parties that it intends to withdraw from the agreement after six months. However, the notice does not withdraw the US from the agreement, which remains in effect, and the US has an unlimited time to renegotiate. Six months after giving the notice, the US would be able to withdraw if it so chose.

Under the proposed sunset clause, the US administration will have a choice between giving notice that it agrees to NAFTA (2) being extended, or, not giving notice. If the US gives notice, NAFTA (2) continues unchanged. If the US does not give the notice, NAFTA (2) terminates.

Renegotiating an entirely new agreement to replace a terminated NAFTA (2) would be extremely difficult. The US administration cannot negotiate a new trade agreement without congressional authority and the current version of the Trade Promotion Authority expires on July 1, 2021. If a new TPA statute is in effect, the administration must fulfil the statutory conditions required before negotiations can even begin, and there is no guarantee that a new statute will be in place. While the administration would face similar trade promotion authority issues with the current NAFTA withdrawal regime, at least the agreement continues in effect while the TPA issues are sorted out.

The US position with a sunset clause has interesting similarities to the UK position with Brexit and Article 50 of the Treaty of Lisbon. The effect of a US administration failing to serve notice agreeing to an extension (which effectively terminates NAFTA) is analogous to that of the UK serving a notice under Article 50 (which withdraws the UK from the EU). However, the withdrawal from the EU does not occur for two years, during which time the UK and the EU can negotiate withdrawal terms. Article 50 also permits the UK to change its mind and request re-entry into the EU which can then be negotiated.

Of the three withdrawal regimes (current NAFTA, Lisbon Treaty Article 50, and the proposed sunset), the current NAFTA regime provides the US with the greatest flexibility. Article 50 comes a distant second, but at least provides a two-year window for negotiating withdrawal terms or requesting re-entry. The proposed sunset clause comes a distant third, with no flexibility, and is clearly the worst of the three.

Jon Johnson is a former advisor to the Canadian government during NAFTA negotiations and is a Senior Fellow at the C.D. Howe Institute.

To send a comment or leave feedback, email us at blog@cdhowe.org.

The views expressed here are those of the author. The C.D. Howe Institute does not take corporate positions on policy matters.