

Intelligence MEMOS



From: Jon Johnson
To: Global Affairs Canada
Date: December 20, 2018
Re: The Art of Breaking the Deal is Back on the Table

On December 2 at the close of the G20 conference, Donald Trump asserted: “I will be formally terminating NAFTA shortly.”

His stated objective is to force congressional approval of the USMCA by making Congress choose between approving the USMCA or having no trade deal at all with Canada and Mexico.

We have seen this playbook before. While the USMCA was being negotiated, Mr. Trump periodically threatened to terminate NAFTA to apply pressure on Canada and Mexico to conclude a deal. Now he is using this same tactic to pressure the US Congress into approving the USMCA.

A reality check is in order here.

NAFTA Article 2205 provides that a party (here the US) may withdraw from NAFTA after giving the other parties six months notice. A notice delivered by the US under NAFTA Article 2205 does not have the effect of withdrawing the US from NAFTA. The notice requirement in Article 2205 is based on Article 125(a) of the Trade Act of 1974 that requires that the US must be able to withdraw from trade agreements after giving six months notice. US law does not specify who has the power to deliver the notice and does not set out any procedural steps to be followed before such notice is given.

While US trade law does not specify what procedures must be followed to withdraw the US from a trade agreement, it is obvious that withdrawing from NAFTA has a large legislative component that only Congress fulfil. While the US NAFTA implementing legislation empowered the president to bring certain NAFTA provisions into effect through proclamation, much of NAFTA is deeply embedded in US law that only Congress can reverse. Despite his assertion, Mr. Trump simply does not have the power to terminate NAFTA.

However, this brings us to USMCA Article 32.6 that reads:

A Party may withdraw from this Agreement by providing written notice of withdrawal to the other Parties. A withdrawal shall take effect six months after a Party provides written notice to the other Parties. If a Party withdraws, this Agreement shall remain in force for the remaining Parties. (emphasis added)

Unlike a notice under NAFTA Article 2205, which merely permits a party to withdraw, but which by itself, has no effect, a notice given by a party under USMCA Article 32.6 has the effect of withdrawing the party from the USMCA after six months. Canada should urge members of Congress to retain control over US trade law and policy as is constitutionally mandated under the commerce clause in US Constitution, and suggest that Congress insist that the USMCA implementing legislation provide that no notice of withdrawal will be given under USMCA Article 32.6 without express congressional approval and only under strict congressional oversight.

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

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