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Legal Sidebar

Renegotiation of the North American Free Trade Agreement (NAFTA): What Actions Do Not Require Congressional Approval?

04/27/2017

On April 26, news outlets reported that the Trump administration was drafting an executive order addressing the potential withdrawal by the United States from the North American Free Trade Agreement (NAFTA) among the United States, Canada, and Mexico. However, later that day, President Trump announced that he had decided not to terminate NAFTA "at this time" but would instead seek a renegotiation of the agreement.

NAFTA entered into force on January 1, 1994 and governs the imposition of tariffs on imported products, as well as nontariff trade barriers (e.g., customs procedures or government procurement practices). The President's announcement raises questions about the extent to which the executive branch may unilaterally renegotiate the agreement—and implement amendments to the agreement in domestic law—without further action from Congress. This Sidebar post briefly addresses these questions. It does not discuss presidential authority to withdraw from NAFTA or policy implications of U.S. renegotiation of NAFTA (e.g., economic or labor consequences that might result from U.S. action).

The nature and scope of modifications to NAFTA by the Trump Administration that are under consideration are currently unclear. Some observers have speculated that a future renegotiation of NAFTA might touch upon a number of issues, such as:

- Tariff rates on merchandise trade among the three NAFTA partners;
- Immigration and border security;
- Cooperation on migration from Central America, drug trafficking, illegal flow of arms and money;
- Elimination of investor-state dispute settlement provisions that allow an injured investor of one NAFTA party to sue another NAFTA party before an international tribunal;
- Rules of origin that set forth the percentage of a product's content that must originate in the NAFTA region for the product to qualify for preferential tariff treatment; and
- Modifications to NAFTA's general dispute settlement system.

As discussed in more detail in a CRS study, the negotiation of international agreements is generally considered to be the exclusive prerogative of the Executive. Consequently, the Executive does not appear to need approval from Congress to discuss changes to NAFTA with representatives of Canada and Mexico. Attention will likely focus on whether the agreement resulting from these negotiations must be approved by Congress before it may enter into force and take effect in domestic law.

Federal statutes that provided the foundation for the negotiation, legislative consideration, and implementation of

NAFTA do not appear to address Congress's role in amending the agreement. The applicable statutes include the Trade Act of 1974, which sets up the procedure for Congress's consideration of implementing legislation; the Omnibus Trade and Competitiveness Act of 1988, which established the eligibility of NAFTA implementing legislation for expedited legislative consideration; and the NAFTA Implementation Act, which implemented the agreement in domestic law. By contrast to the lack of a clear statutory requirement governing Congress's role in the amendment of NAFTA, the law implementing the World Trade Organization agreements specifically addresses Congress's role in amendments to those agreements.

Article 2202 of NAFTA, which Congress approved in the NAFTA Implementation Act, provides that "[t]he Parties may agree on any modification of or addition to this Agreement." It further provides that "when so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement." However, NAFTA does not specify whether the "applicable legal procedures" of the United States include approval of amendments by Congress. In addition, neither the text of the agreement, the context in which it appears, nor the subsequent practice of the NAFTA parties sheds light on the meaning of this phrase.

In the past, the executive branch has negotiated limited changes to NAFTA not involving formal amendment and implemented these changes in domestic law without Congress enacting additional legislation. For example, changes to NAFTA's rules of origin appear to have been implemented by presidential proclamation pursuant to existing statutory authority in the NAFTA-implementing law. This implementation followed congressional consultation but not specific legislative approval. Congress has also delegated authority to the President to adjust tariffs in various provisions of federal law (detailed in this CRS Report), including Section 201(b) of the NAFTA Implementation Act, Section 125(c) of the Trade Act of 1974, and Section 103 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015. However, these provisions establish conditions and limitations on the exercise of this delegated tariff authority that may limit their usefulness in the implementation of a renegotiated agreement. It is unclear whether the President could implement a renegotiated agreement on other matters (e.g., border security and dispute settlement provisions) under existing authority without Congress making changes to U.S. statutory law.

While the NAFTA-implementing law and the agreement itself appear to contemplate limited changes to certain aspects of the agreement and their implementation in domestic law (e.g., tariff rates and rules of origin) without further legislative approval, an agreement requiring changes to federal statute, or which otherwise makes major changes to NAFTA, would likely require congressional assent. The Constitution gives Congress specific authority over international trade, including powers to impose and collect tariffs and duties and to regulate international commerce. U.S. free trade agreements , including NAFTA, have historically been approved and implemented as congressional-executive agreements by a majority vote of each house of Congress. In the NAFTA-implementing law, Congress approved NAFTA as it existed in 1993. Accordingly, major changes to the agreement would arguably require legislative approval. Furthermore, the President arguably lacks the authority to terminate the domestic effect of federal statutes implementing NAFTA without going through the full legislative process for repeal.

Historical practice supports this view. NAFTA superseded, to a large extent, the prior U.S.-Canada Free Trade Agreement. When Congress approved NAFTA, it amended the act implementing the prior U.S.-Canada free trade agreement to suspend certain provisions in the act while allowing others to continue to operate. Nevertheless, the President might argue that he could enter into and implement amendments to NAFTA without congressional approval because such amendments did not require changes to U.S. statutory law. In that event, Congress's enactment of a resolution expressing its opposition to the agreement might make a court more likely to refrain from giving the agreement legal effect.

Posted at 04/27/2017 03:10 PM