

Intelligence MEMOS



From: Jon Johnson
To: The Minister of International Trade and the Minister of Foreign Affairs
Date: April 28, 2017
Re: **TRUMP CAN'T UNILATERALLY WITHDRAW U.S. FROM NAFTA**

Last week saw high drama on the NAFTA front, with President Trump threatening to sign an executive order giving notice of the US intention to withdraw from the tripartite trade agreement and then changing his mind. The threat of withdrawal remains a bargaining chip in his back pocket if renegotiations don't go his way. But could he use it?

Trade agreements like NAFTA fall squarely within the constitutional powers of Congress under the Commerce Clause of the US Constitution. NAFTA was entered into pursuant to powers delegated by Congress and required the express approval of Congress to come into effect.

NAFTA Article 2205 provides that a NAFTA Party may withdraw from NAFTA six months after giving notice to the other Parties. Unlike Article 50 of the Treaty on European Union that governs Brexit and triggers a withdrawal, Article 2205 is a notification requirement only and does not trigger anything. Also, there is nothing in US law that authorizes the president to give notice under Article 2205. It is hardly conceivable that a notice to withdraw from NAFTA, an agreement expressly approved by Congress, could be validly given without the concurrence of Congress.

President Trump maintains that he has the authority to terminate NAFTA. Some in the United States maintain that Section 125 of the Trade Act of 1974 confers this authority. This is not correct. Section 125(a) sets out the 6 months' notice requirement before withdrawal from a trade agreement carried forward in NAFTA Article 2205, but it neither triggers a withdrawal nor grants authority to the President to withdraw from a trade agreement. Section 125(b) empowers the President to terminate any proclamation made under the Trade Act of 1974, but a proclamation is not a trade agreement. NAFTA was brought into effect in part by Proclamation 6641 authorized under the NAFTA implementing legislation. Certain technical changes to the US Tariff Schedule in Proclamation 6641 were authorized under Section 604 of the Trade Act of 1974. Terminating these would not terminate NAFTA, although it would create administrative confusion.

The Bipartisan Congressional Trade Priorities and Accountability Act of 2015 sets out precise requirements that must be followed by the President when negotiating or renegotiating a trade agreement, beginning with at least 90 days' notice given to Congress before negotiations begin. Consultations with committees of Congress, including the House Ways and Means Committee and the Senate Finance Committee, must take place. Because the appointment of the United States Trade Representative has not yet been finalized, this process has not commenced with respect to NAFTA or any other US trade agreement.

Other than the notice requirement in Section 125(a), US trade legislation does not set out formal procedures to be followed to withdraw the United States from a trade agreement. However, given that trade agreements come into effect only through legislation enacted by Congress pursuant to the Commerce Clause, it follows that the only manner in which the United States can withdraw from a trade agreement is for Congress to repeal the implementing legislation.

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