

Intelligence MEMOS



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

From: Konrad von Finckenstein

To: Chrystia Freeland, Minister of Global Affairs

Date: December 19, 2017

Re: **ACCEPTING THE INEVITABLE, IT IS TIME TO PREPARE FOR A ZOMBIE NAFTA**

It is by now reasonably clear that Donald Trump does not seriously want to renegotiate NAFTA; rather he is seeking two things, a political victory and more investment in the US rather than Canada or Mexico, which he believes will wipe out the negative trade balance with Mexico.

Given the peculiar way the US has implemented NAFTA, he may well get his way.

Congress has the exclusive authority for trade with foreign nations. However as it is technically impossible for Congress to negotiate, it enacted the Trade Promotion Authority:

“a legislative procedure, written by Congress, through which Congress defines U.S. negotiating objectives and spells out a detailed oversight and consultation process during trade negotiations. Under TPA, Congress retains the authority to review and decide whether any proposed U.S. trade agreement will be implemented.” (USTR website)

Congress approved NAFTA, passed the necessary implementing legislation and gave the president explicit power to sign the agreement. While there is provision for a six-month notice to terminate, the agreement is silent as to who can give the notice or terminate. It is unclear whether the President can do so without express congressional authority and what effect a notice lacking authorization would have. Legal scholars in the US have expressed different opinions. The issue will clearly be contested in US courts and be the subject of lengthy litigation.

The legislation implementing NAFTA is still on the books after a presidential termination and remains valid until altered by Congress. It is to be expected that the US administration will administer it slowly, use any discretion provided therein against its former trading partners and lengthy litigation may ensue, unless Congress acts.

However parts of the business community will lobby vociferously against repeal. In addition, since NAFTA brings considerable benefits to agricultural and automotive states, a majority may not be found to repeal the NAFTA legislation. A unilateral NAFTA termination by Trump also raises the question whether CUSFTA springs back to life or not. Under an exchange of notes between Canada and the US, it was only suspended, except to the extent that some parts were incorporated in the NAFTA. But, this again, is far from clear and jurists differ on the interpretation. Again, lengthy litigation is likely.

This will result in border issues and access to the US market will be far from certain as it is now under NAFTA. It will also drive business to place new investments into the US, as access to the largest market in North America is the paramount goal for most new investments.

All of this leads to an outcome Trump will like. He will be the man who tore up NAFTA. Investment into the US will increase, and any failure to deal with the legislation implementing NAFTA can be blamed on Congress.

This outcome of a zombie NAFTA, officially still on the books, but repudiated by the president and tied up in litigation is the likely outcome of the present negotiations. It is high time we contemplate a bilateral agreement with the US to take NAFTA out of its probable zombie state and make it into a working bilateral agreement. As we have a trade deficit with the US, this should be acceptable even to Donald Trump.

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