Could President-Elect Trump Withdraw from NAFTA?

11.17.2016

President-elect Donald Trump stated during his campaign that he would renegotiate or withdraw from the North American Free Trade Agreement ("NAFTA"). He cites the United States' $58-billion trade deficit with Mexico and refers to examples like Ford's recent decision to build a plant in Mexico as evidence that NAFTA has displaced jobs that otherwise would have remained in the United States. The President-elect has also promised to raise tariffs on trade partners, potentially ushering in a trade war and paving the way for protectionist U.S. policies that critics argue could diminish U.S. influence.

This article is limited to a discussion of whether a sitting President of the United States has the authority to withdraw from an international agreement such as NAFTA and/or impose tariffs without first seeking and/or obtaining congressional approval. The discussion is framed under the premise that President-elect Trump seeks to renegotiate NAFTA or withdraw from the deal altogether, under his plan for his first 100 days in office laid out at the end of October in a widely covered speech at Gettysburg.

While President-elect Trump has stated that he would fight to get a better deal for American workers, he has not specifically stated what his renegotiated trade deal would look like. For purposes of this analysis, we will therefore assume that (1) Mr. Trump would begin by imposing burdens on job mobility and demanding that Mexico accept higher tariffs, and (2) Mexico and/or Canada would oppose those policies. Under those facts, would President Trump be able to follow through with his stated intention to withdraw from NAFTA and/or impose tariffs, presumably to build the proposed wall?

The answer is not straightforward. Legal precedent exists for various scenarios, and past presidents have acted: (A) under their own authority, (B) with the Senate consistent with the Treaty Clause of the Constitution[1], or (C) in coordination with Congress.

Related Services

International Business

Mexico International Team

1. NAFTA Withdrawal

(A) Withdrawal Based Solely on Executive Authority

Through the Office of the United States Trade Representative, the Executive Branch has the power to negotiate and/or renegotiate trade agreements with foreign powers as it deems convenient to U.S. interests. There is no precedent, however, for withdrawing from an international agreement with the current relevance and magnitude of NAFTA. Previous repealed treaties and agreements lacked a real economic and business significance. Complex integrated supply chains have sprung from the adoption of NAFTA. The most relevant example is the auto industry. Vehicles and their components sometimes cross the border eight times before they are fully assembled.

NAFTA is an international trade agreement; it was ratified through the NAFTA Implementation Act, Pub. L. No. 103-182 (codified as amended at 19 U.S.C. §§ 3311-3473), which passed the House on November 17, 1993 (234-200 vote), then passed the Senate on November 20, 1993 (61-38 vote), and then was signed into law by President Clinton on December 8, 1993. The agreement went into effect on January 1, 1994. NAFTA, in hierarchical terms, is part of the "supreme law of the land" under the Supremacy Clause, U.S. Const., Art. VI, Cl. 2, like the Constitution of the United States and previously adopted federal laws. Within NAFTA's twenty-two chapters, Article 2205 provides the following withdrawal mechanism:

> *A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.*

By simple interpretation of Article 2205, Canada, Mexico, or the United States may give a notice of withdrawal to each other and exit the agreement six months later. The United States could withdraw from NAFTA as early as July 21, 2017, assuming the President sends proper notice one day after his inauguration. The text of Article 2205 does not require either Canada's or Mexico's approval for the United States' withdrawal. Rather, member parties have implicitly consented to a party's withdrawal, provided that the proper notification procedure is followed.

The next step is to address whether the U.S. Constitution empowers the Executive to withdraw unilaterally from a congressional-executive agreement approved by the Senate. There is no clear indication in precedent or law that the power to terminate an international agreement rests exclusively with the Executive Branch. Whether the President could unilaterally terminate NAFTA by giving notice is up for debate. The arguments that favor unilateral action by the President lie in the broad powers entrusted to him or her to direct foreign relations in Article II of the Constitution. Indeed, there is Supreme Court precedent for refusing to hear a challenge to a President's termination of a treaty, as in *Goldwater v. Carter*, 444 U.S. 996 (1979)[2]. In *Goldwater*, the Supreme Court cited the political question doctrine as a basis for refusing to adjudicate the underlying controversy. There is little additional guidance on the matter, although, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936), the Supreme Court acknowledged the "delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations--a power which does not require as a basis for its exercise an act of Congress, but which, of course, like

every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."

Because of the previous precedents and the broad wording in the Constitution, it would seem that the President has the power to provide a notice of withdrawal to the other NAFTA countries without permission from the Senate or Congress. However, unilateral executive action would become fertile grounds for judicial review and very well could become the subject of preliminary injunctions (*i.e.*, court orders suspending the effect of the withdrawal until the ultimate resolution of the underlying issues, likely by the Supreme Court).

(B) Senate Approval

One of the key grounds for challenging a unilateral withdrawal from NAFTA by the President would be that Senate approval is required. The argument would rely by analogy on the law governing treaties and would assert that the Senate's authority to approve treaties carries with it a corresponding authority to terminate them (precedent for this situation exists; see President Franklin Pierce's termination of the Treaty with Denmark)[3]. The same logic arguably applies to congressional-executive agreements like NAFTA. Accordingly, the Senate would presumably seek to exercise authority over the President's withdrawal from NAFTA. The Republicans will control both the Senate and House as of 2017, and Republican ideology has long favored free trade. Most of NAFTA's negotiation occurred under George H.W. Bush's administration. Legislators from states whose economies have benefited from NAFTA would likely seek to restrict presidential authority.

(C) Congressional Approval

The third scenario is that the power to withdraw from NAFTA rests with Congress. The basis for this argument is that NAFTA, once ratified, prevails over subsequent conflicting state and federal laws and constitutes the supreme law of the land. Since congressional action is needed to abrogate laws, the same is arguably also true of a treaty (or, in this case, a congressional-executive agreement). Like the two previous scenarios, precedents exist where Congress has acted to terminate treaties (e.g., "Abrogation of the Convention of August 6, 1827, the Oregon Treaty")[4].

2. Tariffs on Imports

The last issue is whether President-elect Trump could raise tariffs on imports. Two things should be considered in this analysis. First, the power to impose tariffs rests with Congress under the U.S. Constitution, which states in relevant part as follows:

> *Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.*

Second, imposing tariffs on imports from Mexico or Canada would violate NAFTA. As stated above, NAFTA is considered to supersede subsequently adopted federal laws. Therefore, and as long as NAFTA remains in effect, neither the President nor Congress may contravene it. A final note is that the

President-elect has also stated that he intends to hold remittances going into Mexico. The legal grounds for such an action are not apparent, and the courts are unlikely to allow a President to seize remittances without due process.

Conclusion

In summary, if President-elect Trump unilaterally issues a notice of withdrawal from NAFTA, it will not be without opposition, particularly from parties whose interests depend heavily on international trade. It is also quite plausible that courts will suspend the effectiveness of the withdrawal until the underlying constitutionality of the President's decision is resolved. To that end, while President-elect Trump may very well begin laying the foundation for withdrawing from NAFTA, withdrawal is unlikely to become effective immediately, and the process of disentangling North America's complex and already integrated economies will inevitably take years.

Raul Rangel Miguel
202.454.2841
rangel@butzel.com

About the Author:

Raul Rangel is a corporate attorney, who is licensed to practice law in New York and Mexico. His practice areas include business law, international trade, investment and commerce, business-government relations, technology services, and financial services.

Mr. Rangel is a graduate of the Northwestern University School of Law (LL.M.) and of the Instituto Tecnologico y de Estudios Superiores de Monterrey (J.D.). Mr. Rangel holds a certificate in Business Administration from the Kellogg School of Management.

Acknowledgments:

Special thanks to Ira E. Hoffman, David J. DeVine, Cynthia J. Haffey, Richard E. Rassel who contributed with comments, edits and ideas for this article.

[1] Treaty Clause of the United States Constitution, Art. II, § 2, Cl. 2. ("The President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

[2] The Supreme Court dismissed the case on the grounds that it presented a "political question" and therefore was not subject to judicial review. Senator Barry Goldwater filed suit against President Carter for terminating the treaty with the Republic of China without the approval of the Senate or a majority of both Houses of Congress.

[3] In 1854-1855, President Pierce requested that the Senate approve the termination of the Treaty with Denmark. The Senate approved the termination. When the validity of such action was questioned, the Committee on Foreign Relations stated that the authority to terminate a treaty resides in treaty-making authorities, such as the Senate. The Committee added that previous instances in which Congress had acted on its own were improper.

[4] Congress, by joint resolution, resolved to authorize the President, James Polk, to give termination notice to Great Britain concerning the Oregon Treaty, thereby ending joint occupation by British and American forces.