Renegotiated NAFTA Likely to Require Congressional Approval, CRS Says

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President Trump would likely have to secure congressional approval for any substantive changes to U.S. law that would be required to implement a renegotiated NAFTA, according to a recent Congressional Research Service report.

CRS states that the negotiation of international agreements is generally considered to be the exclusive prerogative of the executive branch, which consequently does not appear to need approval from Congress to discuss changes to NAFTA with representatives of Canada and Mexico. There has been speculation that a future renegotiation of this agreement might cover issues such as tariff rates on goods trade, rules of origin, elimination of investor-state dispute settlement provisions, modifications to the general dispute settlement system, immigration and border security, and cooperation on migration from Central America, drug trafficking, and the illegal flow of arms and money.

Instead, attention will likely focus on whether any revised agreement resulting from such negotiations must be approved by Congress before it may take effect. Federal statutes that provided the foundation for the negotiation, legislative consideration, and implementation of NAFTA do not appear to address the role of Congress in amending the agreement, the report states. While any modifications or additions to the agreement are subject to approval by the applicable legal procedures of each party, there has been no clarification as to whether in the U.S. such procedures include congressional approval.

The report notes that 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. Congress has also delegated authority to the president to adjust tariffs in various provisions of federal law, but these provisions establish conditions and limitations on the exercise of this authority that may limit their usefulness in the implementation of a renegotiated agreement.
CRS concludes that an agreement requiring changes to federal law or that otherwise makes major changes to NAFTA would likely require congressional assent. The Constitution gives Congress specific authority over international trade, and free trade agreements have historically been approved and implemented as congressional-executive agreements by a majority vote of the House and Senate. Congress approved NAFTA, so major changes to it 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.

The president could argue that he may amend NAFTA without congressional approval if such amendments do not require changes to U.S. statutory law. However, the report states, in that event Congress’s enactment of a resolution expressing its opposition to the amended agreement might make a court more likely to refrain from giving it legal effect.

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