



New NAFTA's sunset clause is a ticking time bomb

Simon Lester and Inu Manak

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The United States, Mexico and Canada just finished renegotiating the North American Free Trade Agreement (NAFTA), but the future of the new NAFTA remains uncertain.

The United States was able to include a toned-down version of one of its so-called “poison pills” in the new deal: a "sunset clause" that will force new negotiations six years after the agreement comes into effect and could lead to it ending after 16 years.

The new NAFTA's sunset clause is one of the most convoluted and unnecessary provisions ever seen in a trade agreement, and Congress should scrutinize the provision carefully and consider alternatives before approving the deal.

The sunset provision states that the agreement shall terminate 16 years after it enters into force unless certain conditions are met. The conditions start with a "joint review" of the agreement after six years. At this review, the governments can express their desire to continue the agreement.

If they do so, the term gets extended for 16 years from the time of the sixth year review. After another six years have elapsed from the time of the first review, there will be another review and possible extension, and the process will be repeated.

If all three parties do not confirm their desire to extend the agreement at the six-year review, they meet again in the seventh year, and they do so each year thereafter until the 16th year. If they cannot agree by the 16th year, the agreement terminates.

While there is nothing wrong with updating agreements to keep up with changes in the economy and to fix flaws that have been discovered, this provision takes "review" of the agreement a step too far. The possibility of automatic expiration after only 16 years adds an element of uncertainty to the whole enterprise.

If the United States was looking for a way to review the agreement, there were much simpler approaches that already exist. First of all, given that the new NAFTA is a renegotiation based on a review of the old NAFTA, it is obvious that a review of the agreement is already possible. No additional provision was required.

Furthermore, there is also a permanent mechanism embedded in the original NAFTA (and carried over into the new NAFTA) through which the parties can carry out regular reviews: The Free Trade Commission.

The commission is made up of ministerial level representatives of the government, usually the United States Trade Representative, Canada's Minister of International Trade and Mexico's Secretary of the Economy. These ministers can and should conduct regular meetings to review the functioning of the agreement.

In addition, the commission oversees various committees, which address all of the wide ranging technical issues covered by NAFTA.

Historically, the commission has done remarkably little. The original NAFTA requires the commission to meet at least once a year, but in reality, these meetings have been rare and have accomplished little. In fact, the most recent joint statement by the commission that appears on the Government of Canada's website dates back to 2012.

The new NAFTA makes this worse by only requiring the commission to meet within one year of the agreement's entry into force, "and thereafter as the Parties may decide."

If the Trump administration wants a periodic review of NAFTA, it should push for a reinvigorated commission and committees that meet regularly, rather than a high-stakes game of chicken at six-year intervals. Such a negotiating environment may produce short-term "wins," but it will undermine the countries' relationship over the long-term.

For these reasons, Congress should take a hard look at the structure of the sunset clause and compare it to alternatives. There is no need for it, and it will distract from the existing review mechanisms that already exist but have been underutilized.

Congress should also clarify its own role here. The sunset provision references "the Parties" as being responsible for deciding whether or not the agreement will continue and to make recommendations to the commission for the joint review, but does not make clear who within each country's government has the ultimate power to terminate the agreement.

Without a clearly defined role for Congress, the provision may put the fate of NAFTA entirely in the hands of the executive branch. But should President Trump and his successors have the exclusive power to decide whether NAFTA serves U.S. interests, or should Congress have a role here?

Recall that the Constitution gives power over trade to Congress, but Congress has delegated a lot of power to the president on trade over the years. It should be wary of giving away more.

There is no reason to place a ticking time bomb in the new NAFTA. We already have the means to reopen trade agreements and fix what doesn't work. The sunset provision adds uncertainty and undermines our relationship with our closest trading partners. The new NAFTA is better off without it.

Simon Lester is the associate director of the Cato Institute's Herbert A. Stiefel Center for Trade Policy Studies, where Inu Manak is a visiting scholar.