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U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions

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Summary

The United States is party to 14 international free trade agreements (FTAs) with 20 countries. These agreements impose a wide variety of international obligations on the United States and its trading partners. Such obligations address import tariffs, as well as potential nontariff trade barriers. A country that is party to an FTA and that maintains laws, regulations, or practices that violate one of these obligations may be subject to trade retaliation (e.g., other FTA parties may increase tariffs on the country's exports) or may have to pay a fine or monetary compensation to an FTA partner or injured investor. During the past decade, some have suggested that the United States should attempt to renegotiate—and possibly withdraw from—the North American Free Trade Agreement (NAFTA). Such statements have prompted congressional interest in domestic and international legal issues pertaining to U.S. termination of, or withdrawal from, an FTA.

U.S. FTAs have historically been approved as congressional-executive agreements by a majority vote of each house of Congress rather than as treaties ratified by the President after Senate approval by a two-thirds majority vote. FTAs are not self-executing agreements. Thus, legislation is required to provide U.S. bodies with domestic legal authority necessary to enforce and comply with the agreements' provisions. FTAs are legally binding agreements under international law.

All U.S. FTAs that have entered into force as of the date of this report contain provisions allowing for a party's withdrawal from, or termination of, the FTA upon advance notice to the other parties. Questions have arisen regarding whether the President can unilaterally withdraw the United States from such agreements without the consent of Congress. The Constitution does not specifically address withdrawal from treaties or congressional-executive agreements. In some cases, the United States has withdrawn from international legal agreements pursuant to the joint action of the political branches. However, the weight of judicial and scholarly opinion suggests that the President possesses the exclusive constitutional authority to communicate with foreign powers, and such authority might provide the President with a constitutional basis for withdrawing from at least some types of international agreements. The agreement's subject matter, however, might be relevant to a legal analysis. As a practical matter, the President's communication of a notice of withdrawal from an FTA to trade partners in accordance with the FTA's terms would likely release the United States from its international obligations from the effective date of withdrawal onward as provided in the Vienna Convention on the Law of Treaties, which the United States has not ratified but considers to reflect, in many aspects, customary international law. Congress may thus find it difficult to *prevent* the President from terminating or withdrawing from an FTA. On the other hand, if Congress wanted to pressure the President to withdraw, it could enact a statute (over any presidential veto) that would repeal its approval and implementation in domestic law of an FTA.

Even in the event that the President could properly withdraw from an FTA unilaterally, the President cannot make laws, and thus repeal of federal statutory provisions implementing U.S. FTA obligations requires congressional action. Congress has enacted provisions that appear to delegate to the President authority to repeal some provisions of federal statutory law implementing FTA obligations upon termination of, or U.S. withdrawal from, the agreement. However, the President might not be able to exercise this authority if a court struck down such provisions as unconstitutional or Congress amended or repealed them. Although the President cannot repeal other statutory provisions implementing FTA obligations without further congressional action, if the President identified a federal regulation, order, or practice that implemented FTA obligations, the President may be able to rely on constitutional or statutory authority to repeal or limit the effect of the measure. Such actions by the President may be subject to judicial review.

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The United States is party to 14 international free trade agreements (FTAs) with 20 countries.[1] These agreements impose a wide variety of international obligations on the United States and its trading partners. Such obligations address import tariffs, as well as potential nontariff trade barriers in areas such as agriculture, customs procedures, foreign investment, government procurement, intellectual property protection, and services trade.[2] A country that is party to an FTA and that maintains laws, regulations, or practices that violate one of these obligations may be subject to trade retaliation (e.g., increased tariffs imposed by other FTA parties on its exports) or may have to pay a fine or monetary compensation to an FTA partner or injured investor.[3]

During the past decade, some have suggested that the United States should attempt to renegotiate—and possibly withdraw from—the North American Free Trade Agreement (NAFTA). These people have argued, among other things, that the United States' elimination or reduction of tariffs on imported products in accordance with the agreement has negatively impacted U.S. workers.[4] Such statements have prompted congressional interest in domestic and international legal issues pertaining to U.S. termination of, or withdrawal from, an FTA. No U.S. FTA has been terminated; one has been suspended. The United States and Canada agreed to suspend operation of the U.S.-Canada FTA when NAFTA entered into force on January 1, 1994.[5]

This report provides brief answers to frequently asked legal questions about withdrawal by the United States from an FTA. The answers in the report assume that a court would find a case raising these questions to be justiciable (i.e., that a court could hear the case) and that the plaintiffs had standing (i.e., that a party had a legal right to bring a dispute before a court or other tribunal for possible resolution of the issues in the party's complaint).[6] The report does not analyze other implications (e.g., economic) of U.S. withdrawal from an FTA.

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[1] U.S. Department of Commerce, International Trade Administration, U.S. Free Trade Agreements, http://2016.export.gov/fta/. For a list of the countries with which the United States has an FTA that has entered into force, see Office of the United States Trade Representative (USTR), Free Trade Agreements, https://ustr.gov/trade-agreements/free-trade-agreements. This report does not discuss other international trade or investment agreements to which the United States is party.

In addition, the President has signed a regional FTA with 11 other Pacific Rim countries (including Canada and Mexico) known as the Trans-Pacific Partnership (TPP) agreement. For more on the TPP, see CRS Report R40502, *The Trans-Pacific Partnership Agreement*, by Ian F. Fergusson and Bruce Vaughn. However, Congress has not approved this agreement, and it has not entered into force. The United States is also negotiating an FTA with the European Union: the Trans-Atlantic Trade and Investment Partnership (T-TIP). For more on that agreement, see CRS Report R43387, *Transatlantic Trade and Investment Partnership (T-TIP) Negotiations*, by Shayerah Ilias Akhtar, Vivian C. Jones, and Renée Johnson.

[2] *See, e.g.*, Korea FTA chs. 3, 7, 11, 12, and 18, 46 I.L.M. 642 (2007).

[3] *E.g.*, NAFTA chs. 11, 20, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 and 605 (1993); Korea FTA chs. 11, 22.

[4] *See, e.g.*, Vicki Needham, Trump Says He Will Renegotiate or Withdraw from NAFTA, THE HILL (June 28, 2016), http://thehill.com/policy/finance/285189-trump-says-he-will-renegotiate-or-withdraw-from-nafta-without-changes; Clinton, Obama Threaten to Withdraw from NAFTA, CBC News (February 27, 2008), http://www.cbc.ca/news/world/clinton-obama-threaten-to-withdraw-from-nafta-1.696071. For more on NAFTA generally, see CRS Report R42965, *The North American Free Trade Agreement (NAFTA)*, by M. Angeles Villarreal and Ian F. Fergusson.

[5] *See* NAFTA Implementation Act, P.L. 103-182, §107, 107 Stat. 2065 (1993) (amending 19 U.S.C. §2112 note); USTR, *Canada*, https://ustr.gov/sites/default/files/Canada_0.pdf.

[6] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 996-1006 (1979) (vacating the judgment of the United States Court of Appeals for the District of Columbia Circuit and remanding to the United States District Court for the District of Columbia for dismissal on jurisdictional grounds a case brought by certain Members of Congress challenging President Carter's withdrawal of the United States from a defense treaty with Taiwan without the consent of Congress). In *Goldwater*, none of the Court's opinions garnered a majority of votes. *Id.* Four Justices agreed that the case presented a nonjusticiable political question; one Justice concluded that the Court should dismiss the case because it was not ripe

General Questions

How Does the United States Approve and Enter into FTAs?

The President negotiates FTAs with foreign countries and submits to Congress legislation that would implement the agreements by making "necessary or appropriate" changes to U.S. law.[7] U.S. FTAs have historically been approved as congressional-executive agreements by a majority vote of each house of Congress rather than as treaties ratified by the President after having received the "advice and consent" of a two-thirds majority vote of the Senate.[8] During several periods from 1974 onward, Congress has agreed to make such implementing bills eligible for consideration under expedited ("fast track") procedures if the President adheres to certain trade agreement negotiating objectives defined in statute, and meets other requirements for informing and consulting with Congress.[9] Following congressional enactment of the implementing law, the President exchanges notes with FTA partners and proclaims the agreement to have entered into

for review; and one Justice concurred in the judgment without further elaboration. *Id. See also* Kucinich v. Bush, 236 F. Supp. 2d 1, 18 (D.D.C. 2002) (dismissing a legal challenge brought by 32 Members of the House of Representatives to President George W. Bush's unilateral withdrawal of the United States from the 1972 Anti-Ballistic Missile Treaty because the case presented a political question and plaintiffs lacked standing); Beacon Products Corp. v. Reagan, 633 F. Supp. 1191, 1198-99 (D. Mass. 1986) (dismissing on political question grounds a legal challenge to President Reagan's unilateral termination of a friendship, commerce, and navigation treaty with Nicaragua). All of these cases involved a challenge to the President's unilateral withdrawal from *treaties* ratified by the President following advice and consent of the Senate by a two-thirds majority, whereas this report addresses FTAs approved as *congressional-executive agreements* by a majority vote in both houses of Congress.

[7] *See generally* NAFTA Implementation Act. Accompanying the implementing bill is a Statement of Administrative Action (SAA) describing "significant administrative actions" the administration proposes to implement FTA obligations. An SAA "represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Agreement, both for purposes of U.S. international obligations and domestic law." *E.g.*, U.S.-Korea FTA Implementation Act, Statement of Administrative Action, http://waysandmeans.house.gov/UploadedFiles/KOREA_Statement_of_Administrative_Action.pdf.

[8] *See generally, e.g.*, NAFTA Implementation Act; Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) Implementation Act, P.L. 109-53, 119 Stat. 462 (2005) (codified at 19 U.S.C. §4001 note). For more information on the constitutionality of the approval of FTAs as congressional-executive agreements instead of treaties, see CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than Treaties*, by Jane M. Smith, Daniel T. Shedd, and Brandon J. Murrill.

[9] *See, e.g.*, Bipartisan Congressional Trade Priorities and Accountability Act of 2015, P.L. 114-26, §103 (June 29, 2015) (codified at 19 U.S.C. §4202). For more on expedited consideration of trade agreement implementing legislation, see CRS Report RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, by Ian F. Fergusson, and CRS Report R44584, *Implementing Bills for Trade Agreements: Statutory Procedures under Trade Promotion Authority*, by Richard S. Beth.

force.[10] Such proclamations may also include changes to tariff schedules and rules of origin necessary to implement FTA obligations.[11]

How Do Implementing Laws Change Domestic Law?

FTAs are not self-executing agreements (i.e., implementing legislation is required to provide U.S. bodies with the domestic legal authority necessary to enforce and comply with the agreements' provisions).[12] Thus, if FTA obligations require changes to U.S. federal statutory law, Congress must enact legislation that implements those changes.[13] Although many trade agreement obligations may not require changes to U.S. laws or regulations—or are already implemented in U.S. law—others require Congress to amend, repeal, or create provisions in federal statutory law to eliminate inconsistencies with FTA obligations or make any necessary or appropriate changes to U.S. federal statutory law needed to implement specific obligations contained in the FTA.[14]

Although implementing laws vary, they often alter—or authorize to the President to modify or waive—tariff schedules; rules of origin; government procurement domestic content restrictions; and customs user fees, among other things.[15] Implementing laws may also authorize the President to promulgate or amend regulations to implement FTA obligations.[16] As noted below, most FTA implementing laws provide for their full or partial repeal in the event that the underlying trade agreement terminates.[17] It is also important to note that not all U.S. laws consistent with a particular trade agreement obligation are contained in the act implementing that trade agreement.[18]

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[10] *See, e.g.*, Presidential Proclamation No. 8783, United States-Korea FTA, 77 Fed. Reg. 14,265, 14,265-67 (March 6, 2012), *available at* https://www.whitehouse.gov/the-press-office/2012/03/06/presidental-proclamation-united-states-korea-free-trade-agreement. Laws implementing U.S. FTAs typically contain language stating that the President is authorized to exchange notes with representatives of foreign governments in order for the agreement to enter into force, provided certain conditions are satisfied. *E.g.*, NAFTA Implementation Act §101(b) ("The President is authorized to exchange notes with the Government of Canada or Mexico providing for the entry into force, on or after January 1, 1994, of the Agreement for the United States with respect to such country" if the President determines certain conditions are satisfied); U.S.-Korea FTA Implementation Act (Korea FTA Implementation Act), P.L. 112-41, §101(b), 125 Stat. 430 (2011) (codified at 19 U.S.C. §3805 note) ("At such time as the President determines that Korea has taken measures necessary to comply with those provisions of the Agreement that are to take effect on the date on which the Agreement enters into force, the President is authorized to exchange notes with the Government of Korea providing for the entry into force, on or after January 1, 2012, of the Agreement with respect to the United States.").

[11] *E.g.*, Presidential Proclamation, 77 Fed. Reg. at 14,265-67.

[12] *See, e.g.*, Korea FTA Implementation Act §102. For more on the difference between self-executing and non-self-executing agreements, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Michael John Garcia.

[13] *See, e.g.*, Korea FTA Implementation Act §102.

[14] The SAA for the U.S.-Korea FTA contains a general discussion of the extent to which U.S. implementation of FTA obligations requires changes in U.S. law or regulations, as well as how Congress may alter domestic law to implement these obligations. *See* SAA, U.S.-Korea FTA, at 2-3, *available at* http://www.finance.senate.gov/imo/media/doc/KOREA%20Statement%20of%20Administrative%20Action.pdf.

[15] *E.g.*, Korea FTA Implementation Act §§201, 202, 203, 401.

[16] *E.g.*, *id.* §103. Other federal laws may also authorize federal agencies to promulgate implementing regulations.

[17] See "How Do U.S. FTA Implementing Laws and the Trade Act of 1974 Address Termination or Withdrawal?" below.

[18] *See, e.g.*, SAA, U.S.-Korea FTA, at 2, *available at* http://www.finance.senate.gov/imo/media/doc/KOREA%20Statement%20of%20Administrative%20Action.pdf ("In many cases, U.S. laws and regulations are already in conformity with the obligations assumed under the Agreement."). Any provisions in U.S. statutory law not covered by a repeal, waiver, or sunset provision would likely have to be repealed in a law passed by Congress and

Are FTAs Legally Binding Agreements Under International Law?

As noted above, as a matter of domestic law, FTAs have historically been approved as congressional-executive agreements by a majority vote of each house rather than as treaties ratified by the President after advice and consent of a two-thirds majority of the Senate.[19] However, under international law, FTAs are legally binding agreements (i.e., they are "treaties" under international law, which has a more expansive meaning than the term under U.S. domestic practice, which only refers to those international legal agreements that are submitted to the Senate for advice and consent to ratification).[20] A violation by a party to an FTA of an obligation under the agreement may subject that party to state-to-state dispute settlement or investor-state arbitration proceedings before international tribunals in accordance with the terms of the FTA.[21]

Under the terms commonly employed by FTAs, if the United States violates an FTA obligation, it may be subject to such sanctions as trade retaliation by a complaining country (e.g., increased tariffs on U.S. exports), payment of a fine to an FTA partner country, or payment of compensation to an injured foreign investor.[22] However, under terms of FTAs that have been approved by Congress, neither the decisions of dispute settlement panels nor those of international investment tribunals constituted under an FTA's provisions alter U.S. law.[23]

Domestic and International Law on Termination of, or Withdrawal from, FTAs

How Does International Law Address Termination of, or Withdrawal from, Binding International Agreements?

As noted above, U.S. FTAs are international agreements that impose legally binding international obligations on the United States.[24] The Vienna Convention on the Law of Treaties (Vienna Convention) addresses withdrawal of a party from, and termination of, a binding international

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signed by the President or enacted by Congress over the President's veto.

[19] See "How Does the United States Approve and Enter into FTAs?" above.

[20] Vienna Convention on the Law of Treaties, entered into force January 27, 1980, 1155 U.N.T.S. 331 (hereinafter "Vienna Convention"), art. 2 (May 23, 1969) ("'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."); *id.* art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."). The United States has not ratified the Vienna Convention but considers it to reflect, in many respects, customary international law. U.S. Department of State, Vienna Convention on the Law of Treaties, http://www.state.gov/s/l/treaty/faqs/70139.htm. U.S. courts also rely upon the Vienna Convention. *E.g.*, Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423 (2d Cir. 2001) ("[W]e rely upon the Vienna Convention here as an authoritative guide to the customary international law of treaties ... [b]ecause the United States recognizes the Vienna Convention as a codification of customary international law ... and [it] acknowledges the Vienna Convention as, in large part, the authoritative guide to current treaty law and practice.") (citations and internal quotation marks omitted); *see also, e.g.*, NAFTA art. 105 ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments."); U.S.-Korea FTA art. 1.3 (same).

[21] *See, e.g.*, NAFTA chs. 11 and 20; U.S.-Korea FTA chs. 11 and 22.

[22] *See, e.g.*, NAFTA arts. 1135, 2018-2019; U.S.-Korea FTA arts. 11.26 and 22.12-.13.

[23] *E.g.*, NAFTA Implementation Act §102, U.S.-Korea FTA Implementation Act §102.

[24] See "Are FTAs Legally Binding Agreements Under International Law?" above.

agreement in Part V of the Convention.[25] Article 54 states that "termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty.... "[26] As discussed below, all U.S. FTAs that have entered into force as of the date of this report contain provisions allowing for a party's withdrawal from, or termination of, the FTA upon advance notice to the other parties.[27]

The Vienna Convention does not specifically state which government officials of a treaty party have the power to give notice of termination or withdrawal. However, Article 67 states that "Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty ... shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers" (i.e., a document showing that the representative has authority to terminate the agreement on behalf of the state).[28] This language suggests that if the President (i.e., the "head of state" for the United States) communicated a notice of withdrawal from an FTA to the other parties, that action would effectively withdraw the United States from, or terminate, the agreement as a matter of international law.

As described in more detail below, unless the United States and other parties to the FTA otherwise agree or the FTA otherwise provides, termination of an FTA in accordance with its provisions would release the United States from FTA obligations from the date that withdrawal or termination became effective.[29]

How Do U.S. FTAs Address Termination or Withdrawal?

FTAs that have entered into force with respect to the United States contain short provisions addressing termination of, or withdrawal of a party from, the agreements.[30] These provisions generally require a party that wishes to terminate or withdraw from the agreement to provide advance notice to other parties to the agreement. For example, Article 2205 of NAFTA states that "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."[31]

Withdrawal provisions in U.S. FTAs set forth a specific amount of time that must pass after a party delivers its notice of withdrawal to the other parties before the withdrawing party is released from its international obligations under the agreement.[32] Although the U.S.-Israel FTA establishes

[25] The United States has not ratified the Vienna Convention but considers it to reflect, in many respects, customary international law. *See supra* note 20.

[26] Vienna Convention art. 54. Article 57 provides similar language with respect to *suspension* of a treaty. Termination pursuant to the treaty's provisions "shall be carried out through an instrument communicated to the other parties." *Id.* art. 67. This report does not examine alternative bases for terminating a treaty under international law outside of termination in accordance with the terms of the treaty.

[27] See "How Do U.S. FTAs Address Termination or Withdrawal?" below.

[28] Vienna Convention art. 67. Article 2 of the Convention defines "full powers" as "a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty."

[29] See "What Would Withdrawal Mean Under International Law?" below.

[30] *E.g.*, NAFTA art. 2205; U.S.-Chile FTA art. 24.4(3), 42 I.L.M. 1026 (2003).

[31] NAFTA art. 2205. NAFTA is a regional FTA among the United States, Canada, and Mexico.

[32] Bilateral agreements are terminated upon withdrawal of either party, whereas regional FTAs appear to continue in

a 12-month period between a party's notice of withdrawal and termination of the agreement,[33] subsequent U.S. FTAs, including NAFTA, set forth a six-month period between notice to other parties and termination of, or withdrawal of a party from, the agreement.[34]

As noted above, no U.S. FTA has been terminated, and only one has been suspended. The United States and Canada agreed to suspend operation of the U.S.-Canada FTA when NAFTA entered into force on January 1, 1994.[35]

How Do U.S. FTA Implementing Laws and the Trade Act of 1974 Address Termination or Withdrawal?

For the purposes of this section, "termination" refers to a situation in which the FTA ceases to have effect under international law for all parties to the FTA, whereas "withdrawal" refers to a situation in which a multilateral FTA ceases to have effect under international law only for the United States. Section 125 of the Trade Act of 1974, which, among other things, sets up the procedure for Congress's consideration of implementing legislation, specifically addresses termination of FTAs.[36] Historically, the act by which Congress has approved an FTA has also enacted or amended federal laws in order to implement the agreement by bringing the United States into compliance with its international trade obligations in the FTA.[37] Many of these FTA implementing laws contain provisions addressing repeal of implementing provisions in the event that the agreement terminates or a party withdraws from the agreement.[38]

Section 125 of the Trade Act of 1974

Section 125 of the Trade Act of 1974, which Congress has made applicable to most FTAs entered into by the United States, including NAFTA,[39] is also relevant to U.S. withdrawal from an FTA.

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force for the remaining parties. *Compare* U.S.-Australia FTA art. 23.4, 43 I.L.M. 1248 (2004) *with* CAFTA-DR art. 22.7, 43 I.L.M. 514 (2004). A country that has withdrawn from an FTA may still have obligations stemming from situations that arose prior to the effective date of withdrawal. See "What Would Withdrawal Mean Under International Law?" below.

[33] U.S.-Israel FTA art. 22(3), 24 I.L.M. 653 (1985) .

[34] *E.g.*, U.S.-Australia FTA art; 23.4; U.S-Chile FTA art. 24.4(3) ("This Agreement shall expire 180 days after the date of such notification."). Beginning with the U.S.-Australia FTA, some U.S. FTAs have included a provision allowing FTA parties to agree that the FTA should terminate as to the withdrawing party more than six months after notification. *E.g.*, U.S.-Australia FTA art. 23.4; CAFTA-DR art. 22.7; Korea FTA art. 24.5(3).

Article 30.6 of the final text of the proposed TPP agreement establishes a six-month period between the withdrawing party's written notice to the TPP depositary and termination of the agreement with respect to the withdrawing party. It allows TPP parties to agree that termination of the agreement as to the withdrawing party will occur more than six months after that party's notification. *See* USTR, *TPP Full Text*, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

[35] *See* NAFTA Implementation Act §107 (amending 19 U.S.C. §2112 note); USTR, *Canada*, https://ustr.gov/sites/default/files/Canada_0.pdf.

[36] 19 U.S.C. §2135.

[37] See "How Does the United States Approve and Enter into FTAs?" above.

[38] *E.g.*, U.S.-Australia Free Trade Agreement Implementation Act, P.L. 108-286, 118 Stat. 919, §106(c) (2004) (codified at 19 U.S.C. §3805 note). For more on how these provisions might operate, see "How Would the Repeal Provisions in Implementing Laws Operate?" below.

[39] Congress appears to have made this section of the Trade Act of 1974 applicable to several U.S. FTAs in Trade Promotion Authority (TPA) legislation. For example, Section 110(b) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 states the following:

> For purposes of applying sections 125, 126, and 127 of the Trade Act of 1974 (19 U.S.C. 2135,

In particular, subsection (e) of that section, which is titled "Continuation of duties or other import restrictions after termination of or withdrawal from agreements," states the following:

> Duties or other import restrictions required or appropriate to carry out any trade agreement entered into pursuant to this chapter ... shall not be affected by any termination, in whole or in part, of such agreement or by the withdrawal of the United States from such agreement and shall remain in effect after the date of such termination or withdrawal for 1 year, unless the President by proclamation provides that such rates shall be restored to the level at which they would be but for the agreement. Within 60 days after the date of any such termination or withdrawal, the President shall transmit to the Congress his recommendations as to the appropriate rates of duty for all articles which were affected by the termination or withdrawal or would have been so affected but for the preceding sentence.[40]

This provision, which does not appear to have been interpreted by a court, appears to provide for the continuation of preferential tariff rates on imports of products from former FTA partner countries for a year from U.S. termination of, or withdrawal from, the FTA, unless the President by proclamation adjusts the rates to those that would be in effect if not for the FTA. Within 60 days after termination of, or U.S. withdrawal from, an FTA, the President "shall" recommend to Congress the appropriate rates of duty for affected imports. This recommendation process would presumably assist Congress in enacting new tariff rates for these products when imported from former FTA countries.

In addition, subsection (b) of Section 125 of the Trade Act of 1974 states that "The President may at any time terminate, in whole or in part, any proclamation made under this chapter."[41] This provision arguably allows the President to terminate proclamations implementing FTA obligations (e.g., proclaimed modifications rules of origin that establish when an imported product is eligible for preferential tariff treatment) for a particular FTA. It is unclear whether it might also cover termination of executive orders, regulations, or policies implementing FTA obligations.

FTA Implementing Laws

Most U.S. FTA implementing laws provide for repeal of most or all of the statutory provisions in the law upon termination of the agreement.[42] In addition, the NAFTA implementing law states that several provisions of the implementation law will cease to have effect with respect to an FTA

> 2136, and 2137)—(1) any trade agreement entered into under section 103 shall be treated as an agreement entered into under section 101 or 102 of the Trade Act of 1974 (19 U.S.C. 2111 or 2112), as appropriate; and (2) any proclamation or Executive order issued pursuant to a trade agreement entered into under section 103 shall be treated as a proclamation or Executive order issued pursuant to a trade agreement entered into under section 102 of the Trade Act of 1974 (19 U.S.C. 2112).

P.L. 114-26 §110(b) (codified at 19 U.S.C. §4209); *see also, e.g.*, Trade Act of 2002, P.L. 107-210, §2110(b) (August 6, 2002) (codified at 19 U.S.C. §3810); Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, §1105 (August 23, 1988) (codified at 19 U.S.C. §2904).

[40] 19 U.S.C. §2135(e).

[41] 19 U.S.C. §2135(b).

[42] *E.g.*, U.S.-Australia Free Trade Agreement Implementation Act §106(c) ("On the date on which the Agreement terminates, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to be effective."); U.S.-Colombia Trade Promotion Agreement Implementation Act, P.L. 112-42, §107(c) (2011) (codified at 19 U.S.C. §3805 note); CAFTA-DR Implementation Act, P.L. 109-53, §107(d) (2005) (codified at 19 U.S.C. §4001 note).

partner that "ceases to be a NAFTA country."[43] It could be argued that this provision would be triggered if the United States withdrew from the agreement. The NAFTA implementing law defines "NAFTA country" as those countries (i.e., Canada and Mexico) with respect to which the United States "applies the Agreement."[44] Arguably, the United States would no longer "apply the agreement" with respect to Canada or Mexico after it withdrew from the agreement. Thus, it appears that certain provisions in the implementing law would cease to have effect with respect to Canada and Mexico after U.S. withdrawal.[45]

Congress may enact legislation altering this language on repeal, as it did when the U.S. and Canada agreed to suspend the U.S.-Canada FTA.[46] In that situation, Congress amended the U.S.-Canada FTA implementing act to suspend certain provisions in the act while allowing others to continue to operate.[47]

Presidential vs. Congressional Authority over U.S. Termination of, or Withdrawal from, FTAs

Can the President Withdraw from an FTA Approved as a Congressional-Executive Agreement Without the Consent of Congress?

As noted above, FTAs have historically been approved and implemented in domestic law as congressional-executive agreements by a majority vote in both houses of Congress.[48] Questions have arisen regarding whether the President can unilaterally withdraw the United States from such agreements without the consent of Congress.[49]

The Constitution does not specifically address withdrawal from treaties or congressional-executive agreements. In addition, there is no historical precedent for the President's unilateral withdrawal from an FTA approved as a congressional-executive agreement. Although FTA implementing laws typically provide for repeal of most of their provisions in the event that an FTA terminates,[50] these provisions do not state whether the President may withdraw from an FTA without Congress's approval.[51]

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[43] NAFTA Implementation Act, P.L. 103-182, §109(b) ("During any period in which a country ceases to be a NAFTA country, sections 101 through 106 shall cease to have effect with respect to such country."); *id.* §415 ("Except as provided in subsection (b), on the date on which a country ceases to be a NAFTA country, the provisions of this title (other than this section) and the amendments made by this title[, which pertain to dispute settlement in antidumping and countervailing duty cases,] shall cease to have effect with respect to that country.").

[44] NAFTA Implementation Act §2(4).

[45] *See* sources cited *supra* note 43.

[46] NAFTA Implementation Act §107.

[47] *Id.*

[48] See "How Does the United States Approve and Enter into FTAs?" above.

[49] This section does not examine presidential authority to suspend such agreements.

[50] *E.g.*, U.S.-Australia Free Trade Agreement Implementation Act, P.L. 108-286, §106(c) (2004) ("On the date on which the Agreement terminates, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to be effective."); U.S.-Colombia Trade Promotion Agreement Implementation Act, P.L. 112-42, §107(c) (2011).

[51] However, these provisions arguably contain an implied delegation of authority to the President to determine when

The Constitution apportions authority over international trade between the President and Congress. The President's executive power under Article II of the Constitution has been interpreted as granting the President the "vast share of responsibility" for conducting foreign relations.[52] This authority includes specific Article II powers to appoint ambassadors with advice and consent of the Senate; submit treaties to the Senate; ratify treaties; and act as the Commander in Chief of the armed forces. In addition, the Supreme Court has suggested that the President has exclusive authority to negotiate treaties.[53] On other hand, Article 1, Section 8 of the United States Constitution gives Congress the authority to (1) "lay and collect taxes, duties, imposts, and excises," (2) "regulate commerce with foreign nations," and (3) "make all laws which shall be necessary and proper" to carry out these specific powers. FTAs regulate foreign commerce, which is an area in which Congress has specific constitutional authority.

It could be argued that because international trade is an area of shared constitutional authority, Congress must have a role in any decision by the United States to terminate or withdraw from an FTA. In some cases, the United States has withdrawn from international legal agreements pursuant to the joint action of the political branches.[54] Because FTAs regulate foreign commerce, Congress could also potentially enact legislation that would largely ensure that the United States adheres to, for example, tariff rates established under an FTA.[55]

However, some commentators and the Supreme Court have suggested that the President possesses exclusive constitutional authority to communicate with foreign powers.[56] In the 2015 case *Zivotofsky v. Kerry*, the Supreme Court described several exclusive powers possessed by the President related to communication with foreign sovereigns, stating that

> The President, too, nominates the Nation's ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers.... Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.[57]

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termination of, or U.S. withdrawal from, the FTA has occurred, and thus when certain provisions of the implementing laws are repealed. See "How Would the Repeal Provisions in Implementing Laws Operate?" below.

[52] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (citations and internal quotation marks omitted).

[53] Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015) ("The President has the sole power to negotiate treaties.... ") (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.")).

[54] CONG. RESEARCH SERV. STUDY FOR SEN. FOREIGN RELATIONS COMM., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 201-02 (S. Prt. 106-71) [hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS].

[55] *Cf. Zivotofsky*, 135 S. Ct. at 2085 ("If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.").

[56] *Id.*; EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 214 (Randall W. Bland et al. eds., 5th rev. ed. 1984) ("[T]here is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (2d ed. 1996) ("That the President is the sole organ of official communication by and to the United States has not been questioned and has not been a source of significant controversy.").

[57] *Zivotofsky*, 135 S. Ct. at 2086. In *Zivotofsky*, the Court determined that the President had the exclusive power to recognize formally a foreign sovereign and its territorial boundaries and that Congress could not require the President to issue a formal statement contradicting the President's policy on recognition. *Id.* at 2096.

In addition, Justice Thomas argued in *Zivotofsky* that the Vesting Clause of Article II vests the President with the

Thus, if a reviewing court characterized that the President's unilateral withdrawal from an FTA as an exercise of the President's power to communicate with foreign sovereigns, the court might be more likely to uphold such an action. However, not all commentators would agree with such a characterization.[58]

As a practical matter, the President's communication of a notice of termination of an FTA to trade partners in accordance with the FTA's terms[59] appears sufficient to release the United States from its international obligations from the effective date of withdrawal onward in accordance with the terms of withdrawal provisions in existing FTAs and the rules for withdrawal from treaties in the Vienna Convention.[60] However, additional questions may arise as to what effect the President's termination of the FTA has on provisions implementing FTA obligations in domestic law, as well as to the extent to which the President could effect a withdrawal as to provisions of domestic law that implement an FTA. These questions are addressed below at "Effects and Implementation of Withdrawal."

Can Congress Prevent the President from Withdrawing from an FTA?

As discussed above, the President's delivery of a notice of withdrawal to other FTA partners appears sufficient to terminate the agreements as a matter of international law. However, the

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residual foreign affairs powers of the federal government not allocated expressly to Congress, the Executive, or both in the Constitution. The Vesting Clause of Article II provides that the "executive power" shall be vested in the President. U.S. CONST. art. II, §1, cl. 1; *Zivotofsky*, 135 S. Ct. at 2098 (Thomas, J., concurring in the judgment in part and dissenting in part) ("By omitting the words 'herein granted' in Article II, the Constitution indicates that the 'executive Power' vested in the President is not confined to those powers expressly identified in the document. Instead, it includes all powers originally understood as falling within the 'executive Power' of the federal government."); *id.* at 2097 ("Neither of the political branches is expressly authorized, for instance, to communicate with foreign ministers.... Yet the President has engaged in such conduct, with the support of Congress, since the earliest days of the Republic.") (citation omitted).

[58] *E.g.*, Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 782 (2014) (arguing that the President's preeminent role in communicating with foreign powers does "not necessarily establish ... that the President has unilateral authority to terminate a treaty. After all, it is understood that no treaty can be ratified except through presidential action, and yet the President is required to obtain the advice and consent of two-thirds of the Senate before engaging in such ratification."); David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 955 (2014) (criticizing some aspects of the sole organ doctrine).

In addition to arguments based on the text and structure of the Constitution, a court might consider other arguments relevant to an exclusive presidential power to terminate FTAs. On the one hand, it could be argued that the President should have such a power because the nation must have a "single policy" regarding which international agreements remain in effect, and that multiple pronouncements from Congress on the issue could result in confusion. *See Zivotofsky*, 135 S. Ct. at 2086; *see also*, *e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414, 424, 429 (2003) (striking down a California law that "compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments.") (citation and internal quotation marks omitted). A unilateral termination power could arguably be justified on the grounds that the United States needs a means to make decisive, quick, and clear decisions on FTA withdrawal. *Zivotofsky*, 135 S. Ct. at 2086, 2090, and that it would make it easier for the President to threaten FTA partners with U.S. withdrawal from an FTA as a means of leverage to renegotiate the FTA. *Cf.* Bradley, *supra*, at 823. On the other hand, it could be argued that a unilateral presidential termination power could, among other things, undermine the ability of the United States to make convincing international commitments because the President acting alone could withdraw from an FTA as a matter of international law. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1316 (2008).

[59] All U.S. FTAs contain an explicit provision allowing a party to withdraw from the FTA. This report does not analyze whether the President could withdraw from an FTA that lacked such a provision.

[60] See "How Do U.S. FTAs Address Termination or Withdrawal?" and "How Does International Law Address Termination of, or Withdrawal from, Binding International Agreements?" above.

President could not repeal federal statutes implementing the FTA in the absence of congressional action because the Constitution gives Congress the authority to impose duties and to "regulate commerce with foreign nations."[61] Although most FTA implementing laws appear to provide for repeal of some provisions of federal statutory law upon termination,[62] Congress could enact legislation over any presidential veto to ensure that federal statutes implementing FTA obligations will remain in effect.

In addition, some commentators have suggested that Congress could include conditions in legislation approving an FTA to prevent the President from terminating or withdrawing from an FTA; prohibit termination or withdrawal unless certain conditions are met; or prohibit termination or withdrawal unless Congress consents.[63] However, such provisions appear insufficient to prevent the President from delivering a notice of termination in accordance with the terms of an FTA, thereby ending U.S. international obligations under the FTA.[64]

Congress might pressure the President not to withdraw from an FTA in other ways, such as by holding hearings or conducting investigations; attempting to use the appropriations process; refusing to approve treaties or agreements the President has submitted; or declining to consider presidential nominees for other positions.[65]

Could Congress Force the President to Withdraw from an FTA?

In the past, legislation has been introduced in Congress that would repeal congressional approval of NAFTA and direct the President to deliver a notice of withdrawal to other NAFTA parties.[66] Such legislation raises questions about how Congress might pressure the President to withdraw from an FTA. Courts and commentators have indicated that the Constitution gives the President, and not Congress, the power to communicate with foreign states.[67] Thus, if Congress wanted the

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[61] U.S. CONST. art. I, §8.

[62] See "How Would the Repeal Provisions in Implementing Laws Operate?" below for more on these provisions.

[63] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 54, at 208 ("To the extent that the agreement in question is authorized by statute or treaty, its mode of termination likely could be regulated by appropriate language in the authorizing statute or treaty."); Hathaway, *supra* note 58, at 1236, 1326-27 & n.268; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §339 cmt. a (1987) ("Congress could impose [a condition requiring Senate or congressional consent for withdrawal] in authorizing the President to conclude an executive agreement that depended on Congressional authority.").

However, at least one commentator has questioned whether Congress may condition the President's withdrawal from an FTA on Congress's future consent in the form of a vote in the Senate or both houses (without presentment to the President) in light of the Supreme Court's decision in *INS v. Chadha*. Hathaway, *supra* note 58, at 1336 n.293. In *Chadha*, the Supreme Court held that one House of Congress could not by resolution curtail the statutory authority of the Attorney General. 462 U.S. 919, 923, 946 (1983). Under the Constitution's bicameralism and presentment clauses in Article I, Sections 1 and 7, laws with subject matter that is "legislative in character or effect" require passage by a majority in both houses and presentment to the President for his signature or veto. *Id.* at 952, 54-55.

[64] See "How Does International Law Address Termination of, or Withdrawal from, Binding International Agreements?" above.

[65] *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2095 (2015) ("This is not to say Congress may not express its disagreement with the President in myriad ways.").

[66] *E.g.*, H.R. 156, 113th Cong.

[67] *E.g.*, *Zivotofsky*, 135 S. Ct. at 2090 ("The President does have a unique role in communicating with foreign governments.... "); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES §468 (1910) ("It is, of course, improper for the Senate or any other organ of the Federal Government, by resolution or otherwise, to attempt to communicate with a foreign power except through the President."); Hathaway, *supra* note 58, at 1330 n.278 ("[T]he President is empowered to act as the formal legal representative of the United States and is therefore uniquely empowered to speak with foreign

United States to withdraw from an FTA and the President did not, it appears that Congress could not deliver notice of withdrawal to FTA partners itself but would have to rely on other means of effecting withdrawal. Of course, even if Congress cannot itself deliver notice of withdrawal, it does not necessarily mean that Congress cannot direct the President to do so. However, the overriding power of the President in communications with foreign entities might likely be interpreted to preclude such action by Congress, and in any case, if Congress attempted such action, the question would arise of how it could enforce performance of its directive.

The Constitution gives Congress the authority to impose duties and to "regulate commerce with foreign nations."[68] One option would be for Congress to enact a statute (possibly over a presidential veto) that would repeal its approval and implementation in domestic law of an FTA.[69] Because courts apply the "last in time" rule, a reviewing court would likely find that the later-in-time inconsistent statute superseded the earlier-in-time implementing law.[70] Such a law, to the extent the President could not avoid implementing or enforcing it consistent with other constitutional or statute-based executive powers, could negate the domestic law effects of the FTA. This might pressure the President to withdraw from the FTA in order to minimize the extent to which the United States would be subject to international dispute settlement or investor-state arbitration for violations of the FTA.[71] The United States would still have an obligation under international law up until the time the President submitted a notice of withdrawal in accordance with the terms of the FTA and that withdrawal became effective.[72]

Congress could also pressure the President in other ways, such as by holding hearings; attempting to use the appropriations process; refusing to approve treaties or agreements the President has submitted; or declining to consider presidential nominees for other positions.[73]

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entities on behalf of the United States. This does not mean that Congress has little or no role in foreign affairs, but simply that this power to represent the nation is granted exclusively to the President.").

[68] U.S. CONST. art. I, §8.

[69] Hathaway, *supra* note 58, at 1337 n.296. Congress might have to be explicit about its intentions to repeal implementation of trade agreement obligations in domestic law, as courts may construe laws in a manner that is consistent with international obligations in the absence of a clear statement to the contrary. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, J.) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains ...").

[70] *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject.")

[71] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §339 cmt. a (1987) ("If Congress enacts legislation that makes it impossible for the United States to carry out its obligations under an international agreement ... the President normally should take steps to terminate the agreement. If the legislation affects the United States obligation only in part, other steps, such as seeking the other party's acquiescence in the change, may be appropriate."). Of course, one of the potential consequences of the United States violating an FTA is that a complaining party may be authorized to suspend tariff concessions and other preferential treatment accorded to United States goods and services. However, other countries party to the FTA might decide to stop according these concessions to U.S. goods and services if Congress has repealed laws implementing U.S concessions.

[72] See "What Would Withdrawal Mean Under International Law?" below.

[73] *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2095 (2015) ("This is not to say Congress may not express its disagreement with the President in myriad ways.").

Effects and Implementation of Withdrawal

What Would Withdrawal Mean Under International Law?

Unless the United States and other parties to the FTA otherwise agree—or the FTA otherwise provides—withdrawal from, or termination of, an FTA in accordance with its provisions would release the United States from its international obligations under that FTA from the date that withdrawal or termination became effective.[74] Thus, generally speaking, the United States would not be subject to dispute settlement or investor-state proceedings under the FTA for breaches of agreement obligations that took place after the effective date of withdrawal.[75] However, dispute settlement or investor-state arbitration proceedings that had commenced prior to withdrawal or termination—and potentially those that commenced after termination but were based on alleged violations preceding termination—could likely proceed unless the parties agreed otherwise or the FTA provided otherwise.[76]

How Would the Repeal Provisions in Implementing Laws Operate?

Most U.S. FTA implementation laws contain language providing for repeal of most provisions in the implementing law in the event that the FTA terminates. For example, the U.S.-Korea FTA Implementation Act states the following in Section 107:

> (c) Termination of the Agreement.—On the date on which the Agreement terminates, this Act (other than this subsection and title V) and the amendments made by this Act (other than the amendments made by title V) shall cease to have effect.[77]

As a further example, CAFTA-DR states the following in Section 107:

> On the date on which the Agreement ceases to be in force with respect to the United States, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to have effect.[78]

The NAFTA implementing law, by contrast, lacks clear language on repeal of provisions implementing the agreement. However, it does contain language that could potentially be construed as repealing some provisions of the NAFTA implementing law at the time the United States determines not to apply the agreement with respect to a NAFTA partner country as a result of U.S. withdrawal from the agreement.[79] Of course, Congress may enact legislation altering these repeal provisions, as it did when the United States and Canada agreed to suspend the U.S.-

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[74] *See* Vienna Convention art. 70.

[75] *See id.*

[76] *See id.*

[77] Korea FTA Implementation Act §107(c) (2011) (codified at 19 U.S.C. §3805 note). Title V of the act contains provisions not directly related to implementation of agreement obligations. *See also* CAFTA-DR Implementation Act, P.L. 109-53, §107(d) (2005) (codified at 19 U.S.C. §4001 note) (similar language).

[78] *Id.*

[79] NAFTA Implementation Act §109(b) (codified at 19 U.S.C. Chapter 21) ("During any period in which a country ceases to be a NAFTA country, sections 101 through 106 shall cease to have effect with respect to such country."); *id.* §415 ("Except as provided in subsection (b), on the date on which a country ceases to be a NAFTA country, the provisions of this title (other than this section) and the amendments made by this title[, which pertain to dispute settlement in antidumping and countervailing duty cases,] shall cease to have effect with respect to that country.").

Canada FTA.[80] In addition, it is important to note that not all U.S. laws consistent with a particular trade agreement obligation are contained in the act implementing that trade agreement.[81]

Presentment Clause Issues

Although these repeal provisions do not specifically mention the President, they arguably represent an implied delegation of authority from Congress to the President to determine unilaterally when the agreement has terminated, and thus when the law implementing the agreement, and amendments thereto, become ineffective. Such a delegation by Congress to the President of authority to repeal, unilaterally and permanently, existing provisions of law upon termination of an FTA may raise an issue of whether the delegation violates separation-of-powers principles by contravening the Presentment Clause of the Constitution, which requires that legislation passed by Congress be presented to the President for his signature or veto before it can become law.[82]

In *Clinton v. City of New York*, the Supreme Court struck down the Line Item Veto Act (LIVA), a law that authorized the President, within five days of signing a bill into law, to make partial cancellation of certain tax and spending provisions in the law if the President determined certain criteria were met.[83] The Court held that the LIVA violated the bicameralism and presentment requirements of the Constitution[84] because the President could effectively repeal acts of Congress without going through the regular legislative process involving House and Senate passage of legislation and presentment of it to the President for his signature or veto.[85] Although the Court's opinion does not provide clear guidance as to when a law violates these constitutional requirements, the Court did indicate that Congress may grant another branch of government the authority to "repeal" laws "upon occurrence of a particular event through provisions of law known as contingent legislation."[86] The Court's opinion also suggests that a provision may be deemed constitutional when (1) it authorizes the President to suspend or repeal a law contingent upon a condition that did not exist when Congress passed the law; (2) it imposes a duty on the President to suspend or repeal the law upon determining the contingency had occurred; and (3) suspension or repeal of the law was "executing the policy that Congress had embodied in the

[80] NAFTA Implementation Act §107.

[81] *See, e.g.*, SAA, U.S.-Korea FTA, at 2, *available at* http://www.finance.senate.gov/imo/media/doc/KOREA%20Statement%20of%20Administrative%20Action.pdf ("In many cases, U.S. laws and regulations are already in conformity with the obligations assumed under the Agreement."). Any provisions in U.S. statutory law not covered by a repeal, waiver, or sunset provision would likely have to be repealed in a law passed by Congress and signed by the President or enacted by Congress over the President's veto.

[82] U.S. CONST. art. I, §7, cls. 2-3. This section does not analyze whether such provisions violate the non-delegation doctrine. Courts rarely hold that a delegation by Congress to the President violates this doctrine.

[83] Clinton v. City of New York, 524 U.S. 417, 436 (1998).

[84] "[E]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it." U.S. CONST. art. I, §7, cl. 2.

[85] *Clinton*, 524 U.S. at 439.

[86] *Id.* at 446 & n.40. It cited with approval two examples of statutes that contained permissible delegations of such authority: (1) the Tariff Act of 1890, 26 Stat. 567, which authorized the President to suspend by proclamation a law providing for duty-free treatment of certain products when the President made certain factual findings; and (2) the Rules Enabling Act, 28 U.S.C. §2072(b), which allows the Supreme Court to issue rules of procedure for the federal judiciary. *Clinton*, 524 U.S. at 442-47.

statute."[87] Finally, the Court also suggested that Congress might be able to delegate a greater degree of authority to the President in the areas of foreign trade and foreign affairs.[88]

Although application of the *Clinton* decision to an FTA repeal provision may present difficulties for a reviewing court, this decision presents a few reasons why a court might deem the "repeal" provisions in FTAs to be constitutional. First, the President's authority to exercise the power depends on a condition that did not exist when Congress passed the FTA implementing law: termination of the underlying FTA. Such an event will likely take place long after the President has signed the bill into law. Second, the repeal provisions do not appear to give the President discretion as to whether to repeal the law upon termination of the FTA. Instead, the provisions set forth which FTA implementing law provisions "shall cease to have effect" on the date the agreement terminates.[89] Third, repeal of the implementing laws would arguably execute Congress's policy in enacting the trade agreement insofar as it ensured that when the agreement terminated as a matter of international law, its implementation in domestic law (e.g., tariff concessions for imports from FTA partners) would also cease. Fourth, the repeal provisions do not allow the President to choose which provisions will terminate. Thus, it does not appear that the President may "effect the repeal of laws for his own policy reasons."[90] Finally, the repeal provisions delegate to the President authority in the area of foreign trade and foreign affairs, where a court would likely accord to Congress's delegations more deference.[91]

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[87] *Id.* at 443-44. The *Clinton* Court referred to an 1892 Supreme Court decision holding that Congress's delegation of authority to the President to suspend by proclamation a law providing for duty-free treatment of certain products when the President made certain factual findings was not an unconstitutional delegation of legislative power to the President. Field v. Clark, 143 U.S. 649, 681-694 (1892). The Court in *Field* did not consider Presentment Clause issues, however.

[88] *Clinton*, 524 U.S. at 445; *Field*, 143 U.S. at 691 ("[I]n the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments ... to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.").

[89] *Clinton*, 524 U.S. at 445 (indicating that it would not be problematic if Congress were to "itself [make] the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and [leave] only the determination of whether such events occurred up to the President."); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 407 (1928) ("Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive."); *Field*, 143 U.S. at 693 ("As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.").

On the other hand, it could be argued that because the President apparently has discretion to determine when the FTA has terminated, the President has discretion to determine whether and when repeal would occur.

[90] *Clinton*, 524 U.S. at 444-45.

[91] *Field*, 143 U.S. at 691.

Could the President Unilaterally "Restore" Tariff Rates to What They Would Be in the Absence of the FTA?[92]

The Constitution grants Congress the power to impose tariffs on imports of products from other countries.[93] The Supreme Court has upheld Congress's authority to delegate to the President the power to set tariffs in accordance with limits set forth in statute.[94] In FTA implementing laws, Congress has authorized the President to proclaim modifications to tariff rates to implement U.S. obligations under the agreements.[95] Subsequently, the President has issued proclamations altering tariff rates in the Harmonized Tariff Schedule of the United States (HTSUS) to implement FTA obligations in accordance with the terms of the delegation from Congress.[96]

In order to adjust tariff rates on products imported from FTA partner countries to what they would be in the absence of the FTA (generally, a higher Most Favored Nation (MFN) rate in column 1 of the HTSUS marked "General"), the President would have to rely upon statutory authority. As noted above, many FTA implementing laws contain provisions providing for automatic repeal of the implementing laws upon termination of (and arguably, U.S. withdrawal from) an FTA.[97] Assuming such provisions are constitutional and that Congress did not amend or repeal them, these provisions would repeal tariff modification authority granted to the President under the FTA implementing bill, arguably rendering invalid presidential proclamations reducing tariffs under these authorities.[98] Generally speaking, tariff rates would then return to what they would be in the

[92] This section does not consider whether the President may unilaterally adjust tariff rates under the authority of federal statutes that do not specifically address implementation of, or withdrawal from, FTAs. For example, in *United States v. Yoshida Int'l, Inc*., the Court of Customs and Patent Appeals upheld President Nixon's imposition of an import duty surcharge on certain products to address a declared national emergency under the Trading with the Enemy Act pertaining to a balance of payments deficit. 526 F.2d 560, 567, 578-80 (C.C.P.A. 1975); *see also, e.g.*, 19 U.S.C. §1338 (granting the President authorities to modify tariffs, including authority to impose new or additional duties on products of foreign countries by proclamation to counter discriminatory practices of foreign governments (e.g., imposition by a foreign government of an "unreasonable charge, exaction, regulation, or limitation" on U.S. products that the government has not also imposed on products of a third country) or discrimination in fact against the commerce of the United States); *id.* §2411 (granting the Executive Branch the authority to modify certain tariff rates when "the rights of the United States under any trade agreement are being denied" or "an act, policy, or practice of a foreign country ... (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce.").

[93] U.S. CONST. art. I, §8 (granting Congress the authority to "lay and collect taxes, duties, imposts, and excises"); *Yoshida Int'l*, 526 F.2d at 572 ("[N]o undelegated power to regulate *commerce*, or to set tariffs, inheres in the Presidency.").

[94] *E.g.*, *Field*, 143 U.S. at 693; J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise".); *see also* Star-Kist Foods, Inc. v. United States, 275 F.2d 472, 481-83 (C.C.P.A. 1959).

[95] *E.g.* NAFTA Implementation Act §201 (codified at 19 U.S.C. Chapter 21); Korea FTA Implementation Act §201 (codified at 19 U.S.C. §3805 note).

[96] *E.g.*, Presidential Proclamation No. 8894, Implementation of the United States-Panama Trade Promotion Agreement, 77 Fed. Reg. 66,505 (October 29, 2012), https://www.whitehouse.gov/the-press-office/2012/10/30/presidential-proclamation-implementation-united-states-panama-trade-prom. Section 604 of the Trade Act of 1974 authorizes the President to modify the HTSUS to reflect modifications to tariffs implemented under trade agreement implementing laws. 19 U.S.C. §2483.

[97] See "How Do U.S. FTA Implementing Laws and the Trade Act of 1974 Address Termination or Withdrawal?" above.

[98] *See* Falcon Sales Co. v. United States, 199 F. Supp. 97, 103 (Cust. Ct. 1961) (holding a proclamation issued by the President related to tariff rates invalid because it "exceed[ed] the authority delegated to the President by the

absence of proclamations issued by the President under the authority of the implementing law for that particular trade agreement.[99] If the implementing law was not repealed upon termination of, or U.S. withdrawal from, the FTA, on the other hand, then the President might rely on certain provisions in that law to adjust tariff rates to what they had been before the FTA.[100]

In addition, Section 125(e) of the Trade Act of 1974, which Congress has made applicable to most FTAs entered into by the United States,[101] specifically addresses changes to tariff authority when an FTA is terminated or the United States withdraws from it.[102] That provision authorizes the President to proclaim the restoration of tariff rates to what they would be without the FTA (generally, the MFN rate), but states, in general, that the President must recommend to Congress within 60 days of termination or withdrawal "appropriate rates of duty for all articles which were affected by the termination or withdrawal."[103]

What Could the President Do About Federal Laws Implementing Non-tariff FTA Obligations?

The President cannot make laws, and thus repeal of federal statutory provisions implementing U.S. FTA obligations requires action from Congress.[104] Although provisions in FTA implementing laws may delegate to the President the authority to effect the repeal of some federal statutory provisions implementing non-tariff trade agreement obligations,[105] such provisions do not apply to all federal statutes implementing FTA obligations. In addition, Congress could enact legislation

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Congress"). This assumes the tariff reductions were not authorized by some other provision of federal statutory law.

[99] An analysis of which tariff rates would apply to imports of Canadian origin if the NAFTA implementing law ceased to have effect is beyond the scope of this report.

[100] For example, NAFTA Implementation Act §201(b) states the following:

> Subject to paragraph (2) and the consultation and layover requirements of section 103(a), the President may proclaim—
>
> (A) such modifications or continuation of any duty,
>
> (B) such modifications as the United States may agree to with Mexico or Canada regarding the staging of any duty treatment set forth in Annex 302.2 of the Agreement,
>
> (C) such continuation of duty-free or excise treatment, or
>
> (D) such additional duties,
>
> as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Canada or Mexico provided for by the Agreement.

[101] See "Section 125 of the Trade Act of 1974" above.

[102] 19 U.S.C. §2135. Section 125(b) contains broad language stating that "The President may at any time terminate, in whole or in part, any proclamation made under [the Trade Act of 1974]." Although it could be argued that this would allow the President to terminate proclamations modifying tariff schedules to implement the FTA without having to notify Congress as required by subsection (e), a canon of statutory construction holds that specific terms in a statute prevail over more general terms. *E.g.*, Radlax Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012). Thus, the President probably must follow the process in Section 125(e) in order to adjust tariff rates under the authority of Section 125 of the Trade Act of 1974.

[103] 19 U.S.C. §2135(e). For the full text of the provision, see "Section 125 of the Trade Act of 1974" above.

[104] *E.g.*, U.S. CONST. art. I, §8 (granting Congress the authority to (1) "lay and collect taxes, duties, imposts, and excises"; (2) "regulate commerce with foreign nations"; and (3) "make all laws which shall be necessary and proper" to carry out these specific powers.); Hathaway, *supra* note 58, at 1326-27 n.268 ("Yet the President cannot unilaterally undo the legislation giving rise to the congressional-executive agreement. To the extent the legislation creates domestic law that operates even in the absence of an international agreement, that law will survive withdrawal from the international agreement by the President.").

[105] See "How Would the Repeal Provisions in Implementing Laws Operate?" above.

altering this language on repeal. This section addresses what the President could do to avoid enforcement of federal laws implementing FTAs.

Broadly speaking, if the President identified a federal regulation, order, or practice that implements FTA obligations, the President might be able to rely on constitutional or statutory authorities to repeal or limit the effect of the measure. For example, a federal executive branch agency acting within, and consistent with, existing statutory authority could repeal a rule implementing an FTA obligation; issue a new rule that narrowed the regulatory scope of the rule;[106] or alter or issue guidance documents or interpretive rules to indicate less enforcement or more relaxed interpretations of a rule.[107] To the extent that an FTA requires the United States to enforce certain of its laws, the executive branch could also exercise enforcement discretion in order to avoid implementing FTA obligations.[108]

In circumstances in which the executive branch's implementation of a particular FTA obligation depends on the President's exercise of discretionary statutory authority, the President could choose to exercise that authority in a manner that would not implement trade obligations. For example, many U.S. FTA implementing laws amend the Trade Agreements Act of 1979 to authorize the President to waive domestic content restrictions for federal procurement (e.g., the Buy American Act) for eligible goods and services of FTA partner countries.[109] The President could rescind waivers of these restrictions in contravention of FTA procurement obligations.

Such actions by the President or an executive branch agency could potentially be subject to judicial review on various grounds, including that an agency has exceeded its statutory authority or failed to enforce the law.[110]

[106] This might occur when a statute directed an agency to issue a regulation but left that agency with discretion to later modify that regulation so that it was narrower than before, reducing the scope of the rule.

[107] Other options might include writing a new regulation that interprets the statute in a way that would result in less enforcement (e.g., narrowing the scope of prohibited behavior); appointing agency officers who will not enforce the law or would do so less often; and directing agency officials who adjudicate disputes to rule a certain way.

[108] For more on the exercise of executive enforcement discretion by federal agencies and potential legal challenges thereto, see CRS Report R43710, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion*, by Daniel T. Shedd and Todd Garvey. For more on the exercise of enforcement discretion by the President, see CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

[109] Korea FTA Implementation Act §401 (amending 19 U.S.C. §2518). The Trade Agreements Act allows the President to waive "the application of any law, regulation, procedure, or practice regarding Government procurement" that would discriminate against eligible products or suppliers from "designated countries" so that the United States may comply with its obligations under various international trade agreements and accomplish certain other goals. 19 U.S.C. §2511(a).

[110] *See generally, e.g.*, 5 U.S.C. §706 (setting forth grounds on which a reviewing federal court may set aside administrative agency actions, including that the agency's action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); Heckler v. Chaney, 470 U.S. 821, 832 (holding that an "agency's decision not to take enforcement action should be *presumed immune from judicial review*.").

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