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NAFTA fix may bring new problems

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During the presidential primaries last year, Sens. Barack Obama and Hillary Clinton outdid each other in their harsh criticism of the North American Free Trade Agreement.

They promised to renegotiate NAFTA to incorporate enforceable labor and environmental provisions and threatened to withdraw from the pact if Canada and Mexico refused to cooperate.

While the rhetoric softened and threats of withdrawal ceased, in recent meetings with Mexican President Felipe Calderón and Canadian Prime Minister Stephen Harper President Obama reiterated his intention to modify NAFTA's labor and environmental provisions.

Why not renegotiate NAFTA? Isn't it reasonable to assume that any 15-year-old agreement could benefit from some improvements? Certainly, NAFTA could be made to function more effectively in facilitating labor and environmental law compliance and there are likely other aspects that could be improved.

However, daunting political challenges will be faced by the United States if NAFTA is reopened.

Harper wants to address trade and environment issues without "opening the whole NAFTA." His hope is unlikely to be met.

Changes in NAFTA will require a formal protocol subject to approval by three national legislatures. Some in the U.S. Congress may demand new restrictions on intra-regional trade. Canadian interests may want to weaken the short supply provisions of the energy chapter and Mexico could raise immigration issues. An unsuccessful negotiation could seriously undermine U.S. relations with Mexico and Canada.

The NAFTA parties probably could amend only the labor and environmental "side" agreements. They could replace the useless dispute-settlement mechanisms in those agreements through incorporating by reference the NAFTA government-to-government arbitral mechanism, a flawed process that nevertheless calls for binding arbitration and trade sanctions if a party fails to correct its practices.

The parties could add compliance with various multilateral environmental agreements and the International Labour Organization "core" labor standards as obligations of the trade agreement subject to dispute settlement and trade sanctions, again by amending the side agreements.

Congress might provide approval without objecting to such tougher rules being applicable to the United States as well as Mexico and Canada.

However, more effective compliance with labor and environmental laws in North America does not require amendment of NAFTA or the side agreements. The NAFTA governments could simply agree to adequately fund and staff the National Labor Offices and the Commission on Environmental Cooperation created under the side agreements.

They could also agree to cooperate instead of stonewall when responding to a complaint. Trade sanctions would remain unavailable under this approach, but given the weaknesses of the NAFTA mechanism, this isn't a critical shortcoming.

As a further caveat, if binding dispute settlement is implemented for labor and environmental violations under NAFTA it is likely that all three countries would be frequent respondents to citizen complaints and potential sanctions.

Here as elsewhere in international law and politics, the United States should be cautious about insisting on changes in NAFTA that in retrospect officials may wish they had not initiated.

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