

NAFTA Renegotiations - Likelihood of possible outcomes

As Canada, the US and Mexico engage in Round Seven of the renegotiations of the North American Free Trade Agreement (NAFTA), the results remain uncertain. However, a few plausible outcomes have emerged. These scenarios are as follows, along with our assessment of the likelihood of each scenario materializing within the foreseeable future (a roughly 18-month horizon). The likelihood is assessed on a 5-point scale with 5 being "highly likely" and 1 being "least likely". The numerical likelihood reflects our assessment of the range of credible expert opinion. Note that scenarios are not necessarily mutually exclusive (e.g. NAFTA 2.0 may follow a "Zombie NAFTA") and that the likelihoods are subject to change at any time.

Outcome	Likelihood	Duty Impact
Status quo - NAFTA continues unchanged.	2-3	Free
NAFTA 2.0 - Successful renegotiation of NAFTA.	3-4	Unknown. Likely free.
"Zombie NAFTA" - Trump Administration issues notice of intent to withdrawal (NAFTA Art. 2205) but does not actually move forward with the withdrawal.	2-3	Free
"Presidential withdrawal" - Termination by Trump Administration with Congress opposing any required legislative changes. Status of duties on merchandise unclear. Possible differentiated treatment as between commodities.	2-3	Unknown. Likely free.
Hard termination - Trump Administration terminates with Congressional support and all free trade benefits end for Canada and Mexico.	1-2	Most Favored Nation (MFN)
Asymmetrical termination - Mexico loses free trade status, 1989 Canada US FTA reinstated.	1-2	Free for Canada MFN for Mexico

1. Status quo

Notwithstanding all the heated Trump Administration rhetoric around NAFTA, it is conceivable that the negotiations drag on and that pro-NAFTA interests in the US make sufficient headway to avoid an effective termination before the next election. While this may seem unlikely now, in light of the current heated climate around the negotiations, concerted lobbying by various US pro-NAFTA forces may convince the Trump Administration that it is better not to pull the termination trigger, even if the negotiations have not resulted in the desired changes to the agreement. Once the current Round of negotiations is completed in Mexico on March 6, we may have better insight into what that overall compromise might involve.

2. NAFTA 2.0 - Successful negotiations

Reports we have received indicate that senior government leadership in Canada and Mexico firmly believe that this is the most likely outcome and that sufficient progress is being made on a variety of issues. Negotiators are working on

a variety of outcomes that would provide sufficient changes to the Trump Administration to declare success without forcing Canada and Mexico to make concessions that are clearly unacceptable. Once the current Round of negotiations is completed in Mexico on March 6, we may have better insight into what that overall compromise might involve.

3. Zombie NAFTA

The term Zombie NAFTA is being used to describe the state of affairs that would prevail if President Trump invokes the termination provisions of NAFTA (Art. 2205), but, then, does not actually take any further steps to terminate. While this would create significant uncertainty, during this “zombie” period the current duty treatment of merchandise would continue.

4. Presidential termination

In this scenario, President Trump takes all necessary steps to terminate NAFTA, but Congress refuses to pass any legislation dismantling essential elements of the agreement. The situation that would prevail would likely be marked by intense uncertainty (and related litigation) around applicable import duties and the continuation of various border measures. The analysis commissioned by the National Association of Customs Brokers (attached at Appendix A) provides some insight into the legal uncertainty that would arise. An analysis commissioned by the National Association of Customs Brokers provides some insight into the legal uncertainty that would arise.¹

5. Hard termination

In this scenario, the Trump Administration invokes the termination provisions of NAFTA and Congress adopts legislation required to implement the termination. The benefits of the agreement would effectively terminate for Canada and Mexico. The likely outcome regarding merchandise trade would be reversion to current WTO tariffs. While certain provisions of the US NAFTA implementation legislation (reference below) suggest that duties higher than WTO tariffs could be imposed, we consider this outcome unlikely (although it cannot be ruled out all together). This unlikely possibility is considered in the NACB paper referred to above.

6. Asymmetrical termination

In this scenario, NAFTA is terminated for Mexico but for Canada, the parties revert to the 1989 Canada – United States Free Trade Agreement (CUSFTA). There is expert disagreement on whether the reversion to the CUSFTA would be automatic or if it would require the US and Canada to actively take legislative steps (this controversy is also reviewed in the NACB paper referred to above).

Relevant legislative measures

Canada	<i>North American Free Trade Agreement Implementation Act</i> (S.C. 1993, c. 44)
United States	<i>Omnibus Trade and Tariff Act of 1988</i> (Pub. Law No. 100-418) <i>North American Free Trade Agreement Implementation Act</i> (Pub. Law No. 103-182)

1. Available at <http://ghy.com/images/uploads/default/NCBFAA-NAFTA-Withdrawal.pdf>. ↩

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