Dalhousie Journal of Legal Studies

Volume 6 Article 9

1-1-1997

Things Fall Apart? NAFTA after Quebec Secession

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THINGS FALL APART? NAFTA AFTER QUEBEC SECESSION

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I. INTRODUCTION

The extremely close result of the 30 October 1995 referendum indicates that the possibility of Quebec secession is far from remote. It is therefore incumbent on those with an interest in the future of North America to consider carefully the ramifications of separation now, before another referendum becomes imminent, in the hope of achieving a cooler, less partisan debate. This note will examine the implications of Quebec secession on the continuation of the North American Free Trade Agreement (NAFTA) within the province. During the last referendum this issue was fiercely contested: the sovereigntists argued that joining the agreement would be simple, if not automatic, while the federalist forces predicted a long, difficult, and possibly futile negotiation. The importance of resolving this dispute is highlighted by a recent comment of the president of General Motors of Canada Ltd.: "If there was any uncertainty at all that Quebec would be part of free trade agreements, that could create a significant issue for us with respect to future investment."[1] It is also vital that questions regarding post-separation institutional and legal structures be clarified as much as is possible, in order that more accurate and comparable economic predictions of the cost of separation may be made,[2] assertions as to the high price of sovereignty lose credibility when they appear to be based on partisan premises.

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[1] A. Gibbon, "GM President Pins Quebec Investment on Free Trade" *The Globe and Mail* (10 January 1996) B3.

[2] S. H. Hartt, "Sovereignty and the Economic Union" in J. McCallum, series ed., *Tangled Web: Legal Aspects of Deconfederation*, Canada Round Series no. 15 (Toronto: C.D. Howe Institute, 1992) 3.

This note will proceed by first examining Quebec's position regarding free trade: its political support of the agreements; the economic benefits it has enjoyed under the agreements; and the province's readiness to be part of a reconstituted NAFTA. Next, the accession clause in the agreement will be discussed, and it will be shown that there could be significant difficulties with this route. In that light a brief examination of the positions of Quebec, Mexico, Canada and the United States regarding Quebec's options will be conducted. Finally, a discussion of the law of state succession will be presented with a view to determining whether such succession to the NAFTA is probable or even possible.

II. QUEBEC'S POSITION

1. Historic Support of Free Trade

Quebec has a long history of supporting free trade. In the divisive 1988 federal election fought over the Canada-United States Free Trade Agreement (FTA), it was the Quebec vote that ultimately carried Canada into the agreement.[3] More recently the Quebec government adopted Bill 51, *An Act Respecting the Implementation of International Trade Agreements*.[4] The preamble to this legislation indicates that "Quebec subscribes to the principles and rules" of, *inter alia*, the NAFTA. This largely symbolic enactment was intended to indicate to the world Quebec's commitment to free trade. Additionally, it was an attempt by the Quebec government to demonstrate the importance of the province in the international treaty making process and to signal its readiness to succeed to the NAFTA in the event of separation.[5]

Bill 51 also serves to explain the apparent paradox of a sovereigntist, interventionist province supporting treaties that many fear will reduce national sovereignty and domestic autonomy. In supporting free trade, Quebec feels that it is increasing its power

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[3] G. Lachapelle, "Quebec Under Free Trade: Between Interdependence and Transnationalism" in G. Lachapelle, ed., *Quebec Under Free Trade: Making Public Policy in North America* (Sainte-Foy: Presses de l'Université du Québec, 1995) 3 at 3.

[4] (1994) 1st Session, 5th Legislature.

[5] R. Séguin, "Quebec Signals its Approval of Free Trade" *The Globe and Mail* (20 December 1994) A4.

over the economy by reducing federal influence.[6] Furthermore, while the rest of Canada (ROC) is greatly concerned about increasing American cultural hegemony and the loss of "Canadian identity" with free trade, Quebec is more concerned with the influence of English culture generally, with American influence being only a part of the overall "problem."[7] Additionally, there is a feeling in the province that the language barrier protects the culture from domination: Jacques Parizeau noted in 1994 regarding the reopening of the cultural exemption within the NAFTA that "for Quebec, there would be little consequence, but English Canadians won't like it, that's for sure."[8]

2. Economic Benefits of Free Trade

As with the ROC, the vast majority of Quebec's external trade is with the U.S.[9] Maintaining access to this market is of obvious importance. Studies on the effect of the free trade agreements on Quebec's economy demonstrate a broadly beneficial impact. In between 1988 and 1992 there was a "very substantial increase" in bilateral trade of products covered by the agreement.[10] Furthermore, despite initial concerns that Quebec's relatively greater reliance on "traditional" sectors, such as the textile industry, would disadvantage the province in hemispheric trade, the agreement has produced gains across all sectors of the economy, with losses occurring intra-sectorially.[11]

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[6] A. Turcotte, "Uneasy Alliances: Quebecers, Canadians, Americans, Mexicans and NAFTA" in Lachapelle, ed., *supra* note 3, 239 at 243.

[7] K. V. Mulcahy, "Public Culture and Political Culture", in Lachapelle, ed., *supra* note 3 , 335 at 355.

[8] R. Séguin, "PQ Would Seek U.S. Backing for NAFTA Membership" *The Globe and Mail* (28 July 1994) A4.

[9] For example, estimates of the percentage of Quebec's export of products that go to the U.S. usually run between seventy-five and eighty percent. See *e.g.* G. Duruflé & B. Tétrault, "The Impact of the Free Trade Agreement on Bilateral Trade Between Quebec and the United States" in Lachapelle, ed., *supra* note 3, 131 at 137, noting that in 1992 76.3 percent of Quebec's goods exports went to the U.S.

[10] *Ibid.* at 137.

[11] *Ibid.* at 155.

3. Readiness to Join

It has been argued that as a current subnational part of a NAFTA country, a newly independent Quebec would already be "in compliance with all the rules and requirements of [the] agreement from the outset . . . with the exception of its government procurement policies."[12] O. Nuñez has suggested that according to the seven indicators developed by Hufbauer and Schott (price stability, budget discipline, external debt, exchange rate stability, market oriented policies, reliance on trade taxes, functioning democracy) of a country's readiness to join the NAFTA, Quebec would rank ahead of Mexico and only behind Canada as a whole only by reason of its greater relative debt load. This is based on the assumption that Quebec would maintain Canada's currency and external tariff.[13] These assumptions may, of course, be called into question—it might prove difficult, for example, for an independent Quebec to use the Canadian dollar—but the underlying point that a sovereign Quebec would be in at least as good a position as countries such as Mexico and Chile remains a valid one. Of greater difficulty is the assertion that the only internal policy Quebec would have to adjust is government procurement. It is probably the case that Quebec would need to tighten up many of its internal interventionist policies, especially subsidization and interference in the financial services sector in order to comply with NAFTA discipline as a national party.[14] Nevertheless, it is suggested that these are in no way overwhelming hurdles, and in the event of secession Quebec would be ready and willing to take part in free trade.

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[12] O. Nuñez, "Quebec's Perspective on Social Aspects and the Broadening of Free Trade in the Americas" (1996) 11 Connecticut J. Int'l L. 279 at 291.

[13] *Ibid.*

[14] G. Ritchie, "Putting Humpty Dumpty Together Again: Free Trade, the Break-Up Scenario" in J. McCallum, ed., *Broken Links: Trade Relations after a Quebec Secession.*, Canada Round Series, No. 4 (Toronto: C.D. Howe Institute, 1991) 1 at 12. Ritchie is discussing the FTA, but the same considerations apply to the NAFTA.

III. JOINING NAFTA: SUCCESSION OR ACCESSION?

The normal method for becoming a member of NAFTA is provided in Article 2204, the Agreement's accession clause:

> 1. Any country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed between such country or countries and the Commission and following approval in accordance with the applicable legal procedures of each country.
>
> 2. This Agreement shall not apply as between any Party and any acceding country or group of countries if, at the time of accession, either does not consent to such application.

That this clause does not allow for easy or automatic entry is demonstrated by the difficulties Chile has faced. If Quebec were to attempt to join by this mechanism it is likely that a protracted negotiation would ensue with all privileges suspended in the interim. Among the many problematic areas that Quebec negotiators might be forced to deal with in an accession negotiation are subsidies, investment, labour and the environment, and alcoholic beverages.[15] From Quebec's point of view, such a negotiation immediately following separation would be doubly difficult because the existing power imbalance would be heightened by a desire to gain entry quickly. It is also probable that any negotiation with Canada conducted in the aftermath of separation would not be amicable, and it is possible that Canada would use its approval of Quebec's accession to the NAFTA to bargain concessions in other areas of the negotiation.[16] All of which is to say that while eventual Quebec accession is a probable outcome, the likelihood of protracted uncertainty and delay militate in favour of exploring other options. If Quebec were not currently part of Canada, accession would be the only method by which it could join the agreement. Different considerations apply in the event of a secession. It is possible that Quebec could *succeed* to the NAFTA, either as of right, or, more likely, by agreement between the parties.

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[15] Roh, *infra* note 36 at 18. See also *supra note 14.*

[16] R. A. Young, *The Secession of Quebec and the Future of Canada* (Montreal: McGill-Queen's University Press, 1995) at 211.

This would mean that Quebec would, immediately upon attaining independence, become a national party to the agreement. Before examining the law of state succession it will be helpful to review the positions of the parties.

1. Quebec

The position of the Quebec government in the lead up to the last referendum was not always clear. The original draft bill on sovereignty suggested that the government would "take all necessary steps" to become a member of the NAFTA following independence.[17] This formulation could denote either succession or accession. In fact Jacques Parizeau's remarks towards the end of 1994 regarding the "obviousness" of Quebec's joining the free-trade zone would seem to favour the latter option.[18] However, section 15 of the final draft of the sovereignty bill tabled before the legislature read:

> In accordance with the rules of international law, Québec shall assume the obligations and enjoy the rights set forth in the relevant treaties and international conventions and agreements to which Canada or Québec is a party on the date on which Québec becomes a sovereign country, in particular in the North American Free Trade Agreement.[19]

This section can have only one meaning: that Quebec wishes to, and believes it can, succeed to the NAFTA as of right. Of course, it might also be suggested that the wording is reflective more of the province's desires and political stance rather than a considered legal opinion.

2. Canada

The federal government has maintained that Quebec would have to proceed through the normal accession procedure in the event of

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[17] Quebec, *Draft Bill: An Act Respecting the Sovereignty of Quebec, Tabled by Mr. Jacques Parizeau, Premier*, 7 December 1994 (Quebec: Quebec Official Publisher, 1994) at section 9.

[18] P. Authier, "Easy for Separate Quebec to Join NAFTA: Parizeau" *The [Montreal] Gazette* (6 December 1994) A6.

[19] Bill 1, *An Act Respecting the Future of Québec*, 1st Sess., 35th Leg., Quebec 1995.

separation.[20] However, in keeping with a general refusal to discuss the specifics of hypothetical secession scenarios, the government has not suggested that it would necessarily block Quebec's entry. Rather the government has emphasized that a renegotiation with the U.S. might be difficult.[21]

3. Mexico

The Mexican government has, in line with the Canadian position, indicated that a newly sovereign Quebec would have to avail itself of the NAFTA accession clause in order to join. Mexican Ambassador Sandra Fuentes suggested that succession would not be possible as the NAFTA negotiation was with Canada and not the provinces.[22] It has been argued that the Mexican view is premised on its interest in keeping NAFTA a closed club in order to enjoy greater relative advantage from its preferential treatment in the American market.[23] Additionally, it has been argued that Mexico might wish to take advantage of the relatively weak bargaining position Quebec would be in during accession negotiations following secession.[24] However, it is also notable that Quebec and Mexico have certain common interests in cultural and environmental matters that could make them allies in an expanded NAFTA,[25] this factor could lead to a softening of Mexico's position. Furthermore, it should be kept in mind that, as with the ROC, Quebec's trading interest in Mexico is relatively slight, so that, despite a growth in trade under the NAFTA,[26] both countries are more likely to be concerned with any change in their positions vis-à-vis the U.S. rather than with each other.

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[20] See *e.g.* J. Brown, "Don't Bank on Joining NAFTA, PM Warns PQ" *The [Montreal] Gazette* (21 December 1994) B1.

[21] *Ibid.*

[22] S. McCarthy, "PQ Gets Trade Warning" *The Toronto Star* (20 September 1994) D1.

[23] M. I. Studer, J. F. Prud'homme, "Quebec-Mexico Relationships: A New Partner" in Lachapelle, ed., *supra* note 3, 101 at 122.

[24] *Ibid.* at 123.

[25] *Ibid.* See also Nuñez, *supra* note 12.

[26] *Ibid.*

4. The United States

The official U.S. policy towards Quebec sovereignty is generally stated in a sentence used by U.S. officials that has been characterized as "the Mantra: 'The United States enjoys excellent relations with a strong and united Canada. The future of Canada, however, is for Canadians to decide.'"[27] In the lead-up to the 1995 referendum there was a slight shift in this position when, with regard to the NAFTA: a "no assurances" caveat was added[28] in response to hints by then Premier Parizeau that such assurances had been given. This position is reflective of several underlying factors at work. First, it represents the "genuine first preference" of the U.S..[29] Amongst other things, American economic interests would be negatively affected, at least in the short term, by the break-up of its largest trading partner. Second, the U.S. does not wish to appear to be meddling in the internal affairs of another sovereign nation. Finally, the mantra highlights the "inherent tension" between U.S. policy as it exists before and as it would exist after secession.[30] Before secession the U.S. does not wish to do anything that would encourage a split; after secession, however, it would be in its interest to do everything possible to immediately normalize trade relations with Quebec.[31] Thus, by refusing to enter into the debate the U.S. keeps its options open.

IV. THE LAW OF STATE SUCCESSION

The law of state succession is widely considered to be an area of "great uncertainty and controversy."[32] Generally, the law of succession to treaties is concerned with the transmission of rights

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[27] C. Sands, Testimony (prepared statement) before the United States House of Representatives Committee on International Relations Subcommittee on the Western Hemisphere, (25 September 1996) [unpublished].

[28] *Ibid.* See also "NAFTA Entry Not Guaranteed for Quebec: U.S. Ambassador" *The Financial Post* (25 January 1995) 4.

[29] C. F. Doran, "Will Canada Unravel?" (1996) 75:5 *Foreign Affairs* 97 at 105.

[30] J. T. Jockel, Testimony (prepared statement) before the United States House of Representatives Committee on International Relations Subcommittee on the Western Hemisphere, (25 September 1996) [unpublished].

[31] *Ibid.*

[32] I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) at 655.

and obligations of states undergoing change.[33] In the instant case, the situation would be that of a separation in which a predecessor state (Canada) continues to exist with a successor state (Quebec) emerging. It is an accepted principle of international law that where a predecessor state continues, it will maintain all existing treaty relationships, except those localized to the seceding territory. Thus Canada will still be a party to all antecedent treaties, including the NAFTA.[34] This will be subject to the principle of *rebus sic stantibus*, which would leave open the possibility that the other parties could denounce the treaty if they felt that the resulting change in circumstances was incompatible with the object and purpose of the treaty or would radically change its conditions of operation.[35] Even though this is unlikely, it is reasonable to suspect that the U.S. may wish to renegotiate parts of the agreement with Canada to keep the NAFTA in line with the changed reality. For example, C. E. Roh, Jr. suggests that there would have to be changes to the Canadian tariff rate quota structure.[36]

Quebec's position as a successor state will be far different and much less certain. It is useful to begin a discussion of this position by examining some general principles of treaty law that may have application. It is a basic rule that treaties are binding only upon the parties.[37] This position is roughly analogous to the doctrine of privity in contract law. In the event of separation of states, though, this principle is of questionable application. Quebec would not be a"third party" inasmuch as it is already part of the agreement as a

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[33] O. Schachter, "State Succession: The Once and Future Law" (1993) 33 Va. J. Int'l L. 253.

[34] S.A. Williams, *International Legal Effects of Secession by Québec*, Background Study No. 3 of the York University Constitutional Reform Project (North York: York University Center for Public Law and Public Policy, 1992) at 37.

[35] *Ibid.* Note that as codified in Article 62 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 8 I.L.M. 679 [hereinafter *Treaty Convention*], the doctrine can only apply if the changed circumstances are such that the parties could not have anticipated them. Given that both the FTA and NAFTA negotiations were conducted after there had already been one referendum in Quebec, and during a time of constitutional unrest in Canada, it is unlikely that any party could legitimately invoke *rebus sic stantibus* with respect to these agreements.

[36] C. E. Roh, Jr., *The Implications for U.S. Trade Policy of an Independent Quebec* (Ottawa: Center for Trade Policy and Law, 1995).

[37] See *Treaty Convention, supra* note 35, Article 34, and accompanying discussion.

subnational part of a state party. If Quebec is already a "party" to the agreement then the next accepted principle of treaty law that must be considered is that of *pacta sunt servanda*: treaties are intended to be binding on the parties. It is this doctrine that has given rise to the "universal" principle of state succession, whereby all successor states are bound by all the obligations and acquire all the rights of their predecessor states.[38] The "universal" principle, although theoretically elegant, is fraught with difficulty and is not reflective of state practice. The primary flaw in the universalist position is its conflict with state sovereignty. New states, particularly former colonies, have been unwilling to be bound by agreements entered into without their participation or consent.[39] It is the principle of state sovereignty that gives rise to the second major theoretical position of state succession, the clean slate doctrine, whereby new states are bound by none of the obligations entered into previously.[40]

It is these two positions that the *Vienna Convention on Succession of States in Respect of Treaties*[41] attempts to reconcile in a principled way. Article 16 provides that the clean slate doctrine forms the basis for the general rule applicable to former colonies, while separating states, such as Quebec, potentially are governed by Article 34(1):

> When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed. . . .

The reason this distinction is drawn is that in the case of separation, as opposed to decolonization, the separating territory is presumed

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[38] See T. Kunugi, *State Succession and Multilateral Treaty Relations in the Framework of International Organizations* (Ph.D. Thesis, Columbia University, 1970) at 24.

[39] O. Udokang, *Succession of New States to International Treaties* (New York: Oceana Publications, 1972) at 481.

[40] Kunugi, *supra* note 38 at 26.

[41] 23 August 1978, 17 I.L.M. 1488 [hereinafter *Succession Convention*].

to have played a role in the completion of the original agreement.[42] The *Succession Convention* would appear to resolve the question of Quebec's rights to succeed to the NAFTA were it not for the fact that it is not in force and has attracted but a paucity of signatories, none of which are Canada, the U.S., or Mexico.[43] Therefore, the question becomes whether its provisions are reflective of customary international law.

In the *Restatement (Third) of the Foreign Relations Law of the United States* the distinction drawn by the *Succession Convention* is explicitly rejected on the grounds that the status of the territory prior to independence is not determinative of the role it may have played in negotiating all or any of the treaties applicable to it.[44] The *Restatement* holds that state practice is compatible with the application of the clean slate rule across the board.[45] This would appear to suggest that Article 34 of the *Succession Convention* was an attempt at progressive development of the law, rather than a codification of pre-existing custom. This argument has been questioned by R. J. Zedalis in a helpful survey of the conferences leading up to the formation of the convention.[46] Particularly interesting is a comment of the American delegate to the effect that the Article was in accord with "the bulk of international practice."[47] However, as Zedalis also notes, commentary from other nations supports the contrary position. Furthermore, Canada questioned the usefulness and applicability of the treaty generally.[48] Given the equivocal nature of the evidence, examining the *travaux preparatoires* of the convention would appear to be of very limited utility. Even if all States had made similar representations this would only provide moderate evidence of *opinio juris*; without corresponding state practice such statements cannot establish a rule of customary international law. Additionally, according to F.

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[42] Schachter, *supra* note 33 at 256.

[43] Williams, *supra* note 34 at 33.

[44] (Philadelphia: American Law Institute, 1987), para. 210, reporters, note 4 at 113 [hereinafter *Restatement*].

[45] *Ibid.* at para. 210(3).

[46] R. J. Zedalis, *Independent Quebec and Succession to NAFTA: Perspective of an American Academic* (Professor of Law and Director, Comparative and International Law Center, University of Tulsa, 1996) [unpublished].

[47] *Ibid.* at 11.

[48] Williams, *supra* note 34, at note 124.

Vagts, since 1978 there has been little indication that states view the substance of Article 34 as binding law.[49] Among the few instances to the contrary is a memorandum of Robert Owen, Legal Advisor of the U.S. State Department, indicating that the *Succession Convention* could generally be regarded as "declarative of existing customary law."[50] The Canadian position on state succession is still summarized by a 1970 External Affairs memorandum stating: "Where a newly independent state has announced that it intends to be bound. . . . Canada has, as a rule, tacitly accepted such a declaration."[51] This, again, is an endorsement of the clean slate rule.

Older state practice also accords with the clean slate rule. The vast majority of instances of state succession this century have arisen because of decolonization. It is in this context that the rule articulated in the *Restatement* arose.[52] The decolonized countries generally declared their right not to be bound by the treaties of the predecessor states. That is not to say, however, that the states did not succeed to many of the treaties. States employed various instruments including devolution agreements with predecessor states, unilateral declarations, and more piecemeal approaches to indicate that they wished to be bound by all or some of the existing agreements.[53] Moreover, with respect to commercial and administrative treaties and conventions "the practice has been to accept the position created by the . . . treaties and conventions of the predecessor until such a time that the individual treaties are terminated or amended."[54] Also notable is that "except in a few isolated instances [third states] have always acquiesced in the

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[49] F. Vagts, "State Succession: The Codifiers' View" (1993) 33 Va. J. Int'l L. 275, at 295.

[50] Quoted in G. Bunn, J. Rhinlander "The Arms Control Obligations of the Former Soviet Union" (1993) 33 Va. J. Int'l L. 323 at 328. The authors note that since that opinion the U.S. government has been less clear in its position.

[51] November 26, 1970, 9 C.Y.B.I.L. 304. This memorandum is still cited as the source for the law in the *Canadian Encyclopedic Digest* (Ontario), vol. 17, 3rd ed., (September 1995) at 171, para 132.

[52] Vagts, *supra* note 49.

[53] Kunugi, *supra* note 38 at 30-38.

[54] Udokang, *supra* note 39 at 493. Udokang appears to be echoing a statement made in 1921 by then Irish Prime Minister De Valera regarding Irish practice, see The International Law Association, *The Effect of Independence on Treaties* (South Hackensack, Fred B. Rothman & Co., 1965) at 52.

various practices and devices adopted by new states to avoid sudden discontinuities in treaty relations."[55]

The recent break-up of Czechoslovakia, Yugoslavia, and the Soviet Union provides further evidence of both the continuing use of the clean slate rule and the general practice of maintaining existing treaties. As P.R. Williams notes, following the dissolution of these countries the U.S. government initially formulated a policy designed to ensure treaty continuity: "as a matter of public international law [the successor states] were obligated to continue the treaties."[56] The U.S. policy also asked for a "commitment to be bound" from the governments in question,[57] which suggests a weakness in the legal force of the presumption of continuity. And, as Williams notes, as time passed the U.S. became more interested in receiving political assurances rather than relying on any notion of legal obligation,[58] thus undercutting the possibility of the emergence of a new customary rule of succession. The European Community maintained a similar position, asking for a commitment from the new states to "settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession."[59] In light of this, some commentators have gone so far as to suggest that there is a general, if still inchoate, "presumption of continuity."[60] However, even if such a presumption exists, it is acknowledged that it is not "black-letter" law,[61] and that any rules must be applied in a "reasoned, flexible manner."[62] This would seem to suggest that if Quebec were to secede, it would, given its stated preference, in all likelihood succeed to the NAFTA,

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[55] Kunugi, *supra* note 38 at 39.

[56] P. R. Williams, "The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?" (1994) 23 Denv. J. Int'l L. & Pol'y 1 at 23.

[57] *Ibid.*

[58] *Ibid.* at 42.

[59] EPC Press Release 128/91 (16 December 1991), quoted in R. Mullerson "New Developments in the Former U.S.S.R. and Yugoslavia" (1993) 33 Va. J. Int'l L. 299 at 320.

[60] Schachter, *supra* note 33 at 258. See also E. D. Williamson, J. E. Osborn, "A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the U.S.S.R. and Yugoslavia" (1993) 33 Va. J. Int'l L. 261.

[61] Schachter, *Ibid.*

[62] Williamson and Osborn, *supra* note 60 at 273.

not as of right but in keeping with a general preference for continuity.

That being said, it remains necessary to examine any special factors that may apply to the situation to rebut the presumption of succession. Roh argues that there are several reasons why the U.S. would not be able to allow Quebec successor status to the NAFTA.[63] He posits first that the text of the agreement explicitly indicates that it is between the United States, Canada and Mexico, thus precluding the succession of an unnamed party.[64] This argument appears terribly specious; as noted by Zedalis, it begs the question of state succession and could be applied equally to every treaty between named countries.[65] Roh also suggests that the American implementing legislation disallows the possibility of succession; he quotes 19 U.S.C. Paragraph 3317(a) in support of this position.[66] However, while the operative provision does specify that Congressional approval of the NAFTA "may not be construed as conferring Congressional approval of the entry into force of the Agreement for the United States with respect to countries other than Canada and Mexico," Paragraph 3317 is clearly headed "Congressional intent regarding future *accessions.*" [emphasis added] The legislation is silent on the possibility of succession. Furthermore, as noted in the *Restatement*, the Executive has authority to accept a state as a successor unilaterally because such an acceptance constitutes "not a new agreement but an extension of the old."[67]

Roh also argues that the existence of an accession clause, Article 2204, within the agreement precludes succession. In support of his contention that "normal practice in instances where there is an accession clause is to follow the provisions of that clause with respect to separating states," he cites Article 4 of the *Succession Convention* and para. 222(2) of the *Restatement.* Both of these provisions, however, govern succession to international organizations. The NAFTA is not an international organization, and thus does not fall within the purview of these provisions.

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[63] Roh, *supra* note 36.
[64] *Ibid.* at 14.
[65] Zedalis, *supra* note 46 at 110.
[66] Roh, *supra* note 36 at 15.
[67] *Supra* note 44, para. 210, comment h, at 110.

Nonetheless, if one considers that the reason for a different rule applying to international organizations is that they create "multiple rights and obligations that extend beyond the comparatively limited and explicit obligations found in most treaties,"[68] there might be reason to suggest that there should be no succession to the NAFTA as it is a complex agreement creating a similar multiplicity of rights and obligations. However, it is also notable that new states were allowed to succeed to the General Agreement on Tariffs and Trade (GATT), pursuant to Article XXVI (5)(c), instead of joining through operation of the accession clause, Article XXXIII.[69] T. Kunugi notes that this practice became the preferred entry method for newly independent states despite the fact that "it [did] not appear that [Article XXVI(5)(c)] was originally intended by the drafters to deal with state succession *per se*"[70] because of the "cumbersome" nature of the accession process.[71] Although there is no comparable "succession clause" within the NAFTA, it is not unreasonable to suggest that by operation of customary law succession a similar outcome might obtain. Certainly the GATT procedure indicates that the presence of an accession clause does not preclude succession.

Another possible reason for Quebec not being able to succeed to the NAFTA is suggested by Article 34(2)(b) of the *Succession Convention*: this Article provides that the automatic continuity of Article 34(1) will not apply if succession "would be incompatible with the object and purpose of the treaty or radically change the conditions of its operation." As noted above the convention is not in force; however, this caveat, essentially a variation on the customary international law doctrine of *rebus sic stantibus*,[72] likely forms part of the law of succession.[73] What constitutes such incompatibility or

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[68] Williamson & Osborn, *supra* note 60 at 267.

[69] T. Kunugi, "State Succession in the Framework of GATT" (1965) 59 Am. J. Int'l L. 269.

[70] *Ibid.* at 270.

[71] *Ibid.* at 271.

[72] See *supra* note 35 and accompanying text.

[73] See Mullerson, *supra* note 59 at 317. Mullerson argues that paragraph 2 of Article 34 of the *Succession Convention*, which also prescribes that automatic succession does not occur if the States otherwise agree, is more reflective of general customary law than paragraph 1. He points out that as most treaties cannot automatically be applied unchanged the overriding principles of succession are

radical change is not readily apparent. In discussing the possibility of Quebec's succession to the FTA, I. Bernier posited that the very fact of including a third party in the bilateral agreement would constitute a radical change preventing succession because of the necessary modifications to the binational panel process and other institutional arrangements.[74] While this may prevent Quebec from succeeding as of right, Bernier suggests that it might still be possible for Quebec to succeed to the treaty after an agreement with the other parties, allowing for an ongoing *de facto* application of the agreement in a manner similar to succession to the GATT.[75] Given that the NAFTA has already incorporated a third party and is designed as a framework agreement amenable to the addition of new state parties, it could well be that the addition of Quebec would not constitute a radical change. Furthermore, it would seem that Quebec's joining would be very compatible with the objective set forth in Article 102(f) of the NAFTA: to "establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefit of the agreement." In fact, if the object and purpose of the agreement is to establish a free trade area, one might argue that this purpose would be less frustrated by the succession of Quebec, which would maintain the integrity of the trade area, than it would be by Quebec's forced withdrawal.

In discussing the customary international law analog of Article 34(2)(b) of the *Succession Convention*, Zedalis goes even further and suggests, by way of analogy to Article 62 of the *Treaty Convention*,[76] that if states may succeed to treaties as a matter of right, then all that the other parties could do, if they felt that the excepting "clause" applied, is call for arbitration.[77] This argument, it is suggested, is rather tenuous. The law regarding the rights and obligations of parties to treaties is a great deal more settled than the

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based around agreement and changed circumstances. It could be that Mullerson's argument is another manifestation of the need for flexibility suggested by Williamson & Osborne, see text accompanying note 60 *supra.*

[74] I. Bernier, "Le maintien de l'accès aux marchés extérieurs: certaines questions juridiques soulevées dans l'hypothèse de la souveraineté du Québec" in *Éléments d'Analyse Économique Pertinents À la Révision du Statut Politique et Constitutionnel du Québec,* Document de travail, no. 1 (Quebec: Commission sur l'avenir politique et constitutionnel du Québec, 1991) 1 at 13-14.

[75] *Ibid.* See also Kunagi, *supra* note 69.

[76] *Supra* note 35.

[77] Zedalis, *supra* note 46 at 24.

law of succession; even accepting Zedalis's premise that state succession as of right exists, it is unlikely that the doctrine of *rebus sic stantibus* as applied to succession is such firm law as to be analogous to Article 62 in this regard. At a more general level it is important to keep in mind while considering succession to the NAFTA that Article 2205 of the Agreement provides that any party may withdraw after six months notice: any call for succession as of right or forced arbitration is, therefore, to a certain extent moot.

Much of the above discussion has focused on the application of succession law by the U.S. While customary international law is equally applicable to Mexico and Canada, it must be remembered that both of these countries have indicated that Quebec would have to proceed through accession to gain entry to the NAFTA. It is suggested, however, that as Mexico's main reason for participation in the NAFTA is trade with the U.S., it may modify its position under American pressure.

Canada's position presents different concerns. It is of course possible, if not likely, that Canada's current stance would be altered following an irrevocable move towards separation; certainly Canada should then be more concerned with its own prospects, rather than with the integrity of the federation, or, for that matter, Quebec's position.[78] Another point for consideration is raised by the operation of succession law with respect to bilateral treaties. The general rule, as reflected in Article 24 of the *Succession Convention*, is that when a new state succeeds to a bilateral treaty the effect is to create parallel treaties rather than tripartite agreements. Much of the analysis of Quebec's succession to the FTA failed to take this into account.[79] With general multilateral treaties, on the other hand, succession will bind the successor and predecessor as between each other. The NAFTA is a trilateral agreement and so is, by that fact, multilateral. But in light of the fluidity of state practice and the need for contextual solutions to treaty succession problems it might be that the bilateral model would apply. The NAFTA is very much a treaty based on reciprocal concessions between the parties, an element characteristic of bilateral agreements. Additionally, it is not

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[78] On Canada's responsibilities after secession see D. Stairs, *Canada and Québec After Québec Secession: "Realist" Reflections on an International Relationship* (Halifax: Center for Foreign Policy Studies, Dalhousie University, 1996).

[79] See *e.g.* Bernier, *supra* note 74 and accompanying text.

a "law making" treaty, rather its nature is contractual. There are also reasons for suggesting that its application between Canada and Quebec by way of succession would be impractical: in the event of secession the two countries would not have an existing international trade relationship upon which to superimpose the terms of the agreement. It would not be at all clear at the outset what conditions would apply to the (significant) trade between the countries. Quebec has indicated that it does not wish to erect tariff barriers with respect to Canada; it would seem that a continuation of the current freedom of movement of goods and services is the rational, if not probable, outcome.[80] Furthermore, the terms of NAFTA Article 2204(2) would appear to suggest that the non-application of the agreement as between certain parties would not be incompatible with its object. Nonetheless, if Quebec's succession to the agreement in parallel to Canada's participation were to become a permanent feature, one might suggest that such an arrangement would be unwieldy, especially as the treaty becomes increasingly multilateral. It is possible, though, that the threat of a hub-and-spoke situation arising,[81] adverse to the interests of both Quebec and Canada, could work to enhance the likelihood of an agreement being reached between the two.

IV. CONCLUSION

The foregoing discussion leads to several conclusions regarding possible Quebec entry to the NAFTA following secession:

i) It is extremely unlikely that international law recognizes succession as of right to treaties such as the NAFTA. In any event, the consensual nature of the agreement and the presence of a

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[80] See Ritchie, *supra* note 14. See also F. S. Demers and M Demers, *European Union: A Viable Model for Québec Canada,* 2nd ed., (Ottawa: Center for Trade Policy and Law, 1995).

[81] The hub-and-spoke model illustrates the problem faced when one country (the hub) enjoys preferential trade arrangements with two or more countries (the spokes) who do not have such arrangements as between each other. The prudent trader or investor will work from the hub country under such an arrangement so as to gain access to all markets. See G. R. Winham, "NAFTA and the Trade Policy Revolution of the 1980s: a Canadian Perspective" (1994) 49 International Journal 472 at 494.

withdrawal provision makes any arguments in that direction somewhat moot.

ii) International law does, on the other hand, favour a general presumption of succession to treaties.

iii) The continuation of the NAFTA with respect to Quebec is possible, and at least with respect to the U.S., probable, given that U.S. practice of favouring treaty continuation and its interest in quickly normalizing trade relations with Quebec following a breakup.

These conclusions, however, do not completely simplify matters. Recently, C. Sands has argued that the U.S. should clarify whether it would consider Quebec a successor state to Canada's treaty rights and obligations.[82] His argument appears to be premised on the assumption that the U.S. would not grant Quebec such status. An examination of U.S. policy towards succession in Eastern Europe and general international practice would seem to support a contrary presumption. If it is the case that the U.S. would permit Quebec to succeed to the NAFTA then clarifying its position could increase the likelihood of separation. Likewise, if the NAFTA countries were to pursue a general agreement on succession in order to prevent uncertainty, similar effects would be felt. Thus, unless Canada is prepared to allow an increased chance of separation in order to achieve greater certainty in its investment and trade climate, the problem would appear intractable. There will be uncertainty as long as the threat of separation exists and such uncertainty will continue to be problematic.

A final consideration of note is that even if Quebec were to succeed to the NAFTA this fact does not diminish the necessity of coming to an agreement with Canada that would preserve as much as possible the "Canadian economic space." The NAFTA would be a

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[82] Sands, *supra* note 27. Sands actually appears to be arguing for a general statement applicable to all treaties. Such a position is unrealistic. Certainly some treaties (for example, boundary and other dispositive agreements) would continue in force, see Williams, *supra* note 34. Additionally it is probable that many "smaller" bilateral treaties, easily amenable to succession, would continue with little argument.

woefully inadequate substitute for the current borderless trade Quebec enjoys with its Canadian partners. As Gordon Ritchie's memorable image of the ceaseless traffic along the 401 being halted by customs barriers suggests, such an outcome would not be beneficial for Quebec or Canada.[83]

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[83] Ritchie, *supra* note 14.