

The Implications for U.S. Trade Policy of an Independent Quebec

Charles E. Roh, Jr.

Decision Quebec Series

October 5, 1995

Center for Strategic and International Studies Americas Program
Washington, D.C.
Centre for Trade Policy and Law
Ottawa, Ontario

The Center for Strategic and International Studies (CSIS), founded in 1962, is an independent, tax-exempt, public policy research institution based in Washington, DC.

The mission of CSIS is to advance the understanding of emerging world issues in the areas of international economics, politics, security, and business. It does so by providing a strategic perspective to decision makers that is integrative in nature, international in scope, anticipatory in timing, and bipartisan in approach. The Center's commitment is to serve the common interests and values of the United States and other countries around the world that support representative government and the rule of law.

The Centre for Trade Policy and Law (CTPL), established in 1989, is jointly sponsored by The Norman Paterson School of International Affairs at Carleton University and the Faculty of Law at the University of Ottawa. CTPL was established to promote greater public understanding of trade policy issues, to foster independent analysis and research of trade policy issues, and to encourage the development of trade policy professionals.

*** * ***

CSIS and CTPL, as a public policy research institutions, do not take specific policy positions. Accordingly, all views, positions, and conclusions expressed in this report should be understood to be solely those of the authors.

This paper is part of a series of papers published through a joint project of the Center for Strategic and International Studies in Washington, DC, and the Centre for Trade Policy and Law of Carleton University and the University of Ottawa in Ottawa, Ontario. This series, Decision Quebec, is supported by the Donner Canadian Foundation of Toronto.

©1995 by the Center for Strategic and International Studies.

This study was prepared under the aegis of the Decision Quebec Series. Comments are welcome and should be directed to:

**CSIS Americas Program
1800 K Street, NW
Washington, DC 20006
Phone: (202) 775-3180
Fax: (202) 775-3199**

**Centre for Trade Policy and Law
Room 106
Social Sciences Research Building
Carleton University
Ottawa, Ontario K1S 5B6
Phone: (613) 788-6697
Fax: (613) 788-3981**

Contents

Executive Summary1

Background2

The Quebec Government’s Proposal3

 The Referendum Process3

 Economic and Political Partnership with Canada4

 Declaration of Independence5

Quebec Secession Without Prior Agreement6

Issues for Accession Negotiations10

 The WTO Agreement10

 The Auto Pact13

 The NAFTA14

Charles E. Roh, Jr. is a partner with Weil, Gotshal & Manges, and was formerly Assistant United States Trade Representative for Canada and Mexico. The views expressed herein are those of the author, and not necessarily those of Weil, Gotshal & Manges, CSIS, or CTPL.

The author gratefully acknowledges the assistance of Lisa M. Yarmoshuk in the preparation of this paper.

Executive Summary

On October 30, 1995, Quebec's voters will decide in a provincial referendum whether to authorize the Quebec government to declare Quebec an independent country. If a majority vote "yes" in this referendum, then about one year from now, after first seeking to negotiate an economic and political partnership with the rest of Canada, the Quebec government will declare independence from the rest of Canada.

Americans are better off staying out of this emotional issue between Quebec's citizens and between Quebec and the rest of Canada. However, it is fair and prudent for the United States to take a close look at the consequences for U.S. interests if Quebec opts for secession. Canada is by far our largest trading partner, and we benefit from the strong, mutually preferential relationship established under the North American Free Trade Agreement (NAFTA) and other agreements. The prospect that a significant part of Canada might separate raises legitimate questions whether beneficial economic relationships will be disrupted and how they might be repaired. This paper focuses on the issues that arise under the NAFTA, the World Trade Organization (WTO) Agreement, and the Auto Pact. The main conclusions are:

1. An independent Quebec would not have any automatic rights or obligations under existing trade agreements, including the NAFTA, the WTO Agreement, and the Auto Pact. Instead Quebec must negotiate terms of accession to those agreements.
2. The U.S. president has no authority under U.S. law to give an independent Quebec the preferential trade benefits Quebec now enjoys as part of Canada, unless and until Quebec has acceded to the NAFTA and Congress has approved and implemented that accession. The termination of those preferences, even for a short time, would be most costly and disruptive for Quebec, but would also hurt U.S. interests.
3. Despite historic friendships, negotiations for an independent Quebec's accession to the WTO, the NAFTA, and the Auto Pact would likely prove difficult. Many of Canada's obligations would produce a different substantive result if transposed without change to an independent Quebec, and thus require substantive negotiations. U.S. negotiators, pressed by Congress and the private sector, are likely to seek improvements in sensitive areas—sectors such as agriculture, textiles, cultural industries, and review of unfair trade rulings.
4. The need for new legislation from Congress to approve and implement Quebec accession to the NAFTA or the Auto Pact would enhance the leverage of U.S. private sector groups seeking different terms from Quebec than the current NAFTA provides with Canada.
5. The U.S. trade relationship with Quebec would be almost impossible to resolve until Quebec and Canada have resolved the relationship between themselves. The

United States cannot properly even negotiate with a province unless the Canadian federal government agrees.

Some uncertainty and disruption in economic relations is unavoidable if Quebec opts for independence. The duration and degree of harm, especially to Quebec but also to the United States, will be greatest if Quebec and Canada are unable to agree on a close relationship, including free trade between themselves, and if Quebec does not negotiate accession to the NAFTA before declaring independence. The corollary, if Quebec opts for independence, is that the best scenario for the United States would be for Quebec and the rest of Canada to come as close as possible to replicating their current economic and trading relationship, because U.S. interests are best served by close relations among healthy neighbors.

Background

On October 30, 1995, the people of the province of Quebec will vote in a referendum on whether to authorize the Quebec government to declare Quebec "sovereign"—that is, a separate country, independent of Canada. If that vote is affirmative, the Quebec government will declare independence a year later, after first offering to negotiate some form of economic and political arrangements with the rest of Canada.

The most dramatic effects of a declaration of independence would be felt in Quebec and (to a lesser degree) in the rest of Canada, especially if Quebec has not been able to reach agreement on a close and harmonious post-independence relationship with Canada. However, Americans can ill afford to underestimate the seriousness of the issues which would arise for the United States if Quebec votes to become independent of Canada.

This paper examines one set of those issues for the United States: international trade. The focus of this assessment is on relations under the three main agreements now governing the U.S.-Canada trade relationship: the World Trade Organization (WTO) Agreement (which includes the old GATT in expanded form), the U.S.-Canada Auto Pact (Auto Pact), and—most importantly— the North American Free Trade Agreement (NAFTA).

The assessment that follows is necessarily hypothetical, because it is not clear as of this writing that Quebec voters will endorse the proposed declaration of sovereignty, nor is it clear what form of post-sovereignty relationship Quebec might negotiate with Canada, nor how the rest of Canada would react. Nevertheless, it is prudent for Americans to begin considering the implications for U.S. trade interests when a significant part of our largest bilateral trading partner publicly contemplates forming a separate country. Further, there is a certain finality to the October 30 vote; the Quebec government, dominated by men with a longstanding commitment to Quebec's independence, is unlikely to reconsider, and neither Quebec's Sovereignty Bill nor the referendum legally require a reconsideration.

The stakes are high for all parties concerned, even looking only at the trade issues involved. Canada is by far the United States' largest trading partner, and Quebec is a substantial participant in that trade. In 1994, two-way merchandise trade with Canada exceeded US\$245 billion; trade in goods and services exceeded US\$295 billion. While statistics on trade with

individual Canadian provinces are not as reliable, in 1994 U.S. trade with Quebec alone was approximately US\$34 billion, which would have made Quebec our eighth or ninth largest trading partner (Canada, even without Quebec, would still be by far the largest U.S. trade partner).

Beyond its sheer size, the current trading relationship between the United States and Canada is special and privileged on both sides. Under the terms of international agreements and U.S. implementing law, the United States accords Canada economic preferences that are shared in comparable degree only by Mexico and Israel. Canada reciprocates those preferences. The president does not have authority to grant such privileges to other countries without new legislation. The possible split of Canada thus would create far more serious questions of trade law and policy for the United States than, for example, did the break-up of the former Soviet Union, where the trading relationship was far smaller and clearly not preferential.

The assessment of the implications for U.S. international trade policy of an independent Quebec in this paper begins by summarizing the Quebec government's proposals for independence as they relate to trade policy issues. The paper then considers the effect on U.S. trade interests if Quebec secedes from Canada without having reached any agreement with the United States on the treatment of an independent Quebec under the trade agreements that now govern U.S.-Canada trade relations. Having concluded that Quebec would need to negotiate accession arrangements, the paper then considers the main trade issues likely to arise during such accession negotiations and Congressional consideration of the required implementing legislation.

The Quebec Government's Proposal

The Parti Québécois won the Quebec provincial elections in 1994 on a platform that featured a call for Quebec independence or "sovereignty." In September of this year, the Quebec government, in accordance with its campaign pledges, introduced into the Quebec National Assembly Bill 1 "An Act respecting the future of Québec,"¹ (hereinafter referred to as the "Sovereignty Bill"). The Sovereignty Bill gives some guidance as to the Quebec government's intentions regarding Quebec's sovereignty and its possible relations with Canada and the rest of the world, including the United States.

The Referendum Process

The Quebec government's view of the process for independence is reasonably clear. A referendum will be held in Quebec on October 30, 1995, in which Quebec voters will be asked to vote on the following question:

"Do you agree that Quebec should become sovereign, after having

1. Québec Official Publisher 1995, tabled Sept. 7, 1995.

made a formal offer to Canada for a new Economic and Political Partnership, within the scope of the Bill respecting the future of Quebec and of the agreement signed on June 12, 1995?"

If a majority votes "yes," then the government will attempt to negotiate an "Economic and Political Partnership" with the rest of Canada. The Sovereignty Bill allows one year for negotiations to be concluded between Quebec and the rest of Canada for this Economic and Political Partnership. After an offer of partnership has been made, whether or not the negotiations succeed (or even take place), the Quebec National Assembly can declare independence at the end of the one year negotiating period.

Given the commitment of the governing Parti Québécois to independence for Quebec, and given its majority position in the Quebec National Assembly, Americans must therefore assume that in the event of a "yes" vote on October 30, 1995, Quebec will declare independence one year later.² An extension of the one-year negotiating period is possible if the Quebec Government (acting through the Quebec National Assembly) so decides. Equally, the Sovereignty Bill would allow the Quebec National Assembly to declare independence earlier than October 30, 1996, if negotiations with the rest of Canada prove "fruitless." For reasons that are evident in the analysis set out below, it would be very costly economically for Quebec (and to a lesser extent for the rest of Canada and the United States) if Quebec declared independence without agreement with the rest of Canada and the United States. One would therefore expect Quebec to take more, not less, time, even conceding that those advocating Quebec's independence do not appear to be motivated by economics.

Economic and Political Partnership with Canada

While independence thus appears certain if Quebec votes "yes" in the referendum, it is much less certain what form of economic and political relationship an independent Quebec might negotiate with the rest of Canada. The nature of the relationship between Canada and an independent Quebec would have a substantial impact on U.S. interests. In the trade area, as will be discussed, Quebec would need to negotiate accession to the main trade agreements that now govern U.S.-Canadian relationships. While in a mercantilist sense the United States would have more leverage in those negotiations if relations between an independent Quebec and Canada are distant and difficult, it would also be more difficult to avoid disruption of beneficial commercial ties. Put bluntly, if Quebec's relations with Canada are bad, Quebec will be more dependent on the United States. The United States on the whole, however, is certainly better off economically with a strong, economically unified northern neighbor than with two squabbling, economically weaker neighbors, even if U.S. negotiating leverage would be greater in the latter case.

The tone of comments from pro-sovereignty leaders in Quebec and from the rest of Canada suggest very different views of the prospects for close cooperation in the event Quebec opts for independence. Quebec's proponents of independence suggest that, whatever the rhetoric before the Quebec referendum, the rest of Canada will want to swiftly create a close and

2. Given the strict party discipline of the parliamentary system, the Parti Québécois' majority position virtually assures passage of the Sovereignty Bill.

cooperative relationship once Quebec voters have opted for independence. Political leaders in the rest of Canada, as well as opponents of independence within Quebec suggest, to the contrary, that

an independent Quebec should expect no special relationship with Canada, let alone the kinds of benefits it has enjoyed as a province of Canada.

From a U.S. trade perspective, perhaps the most salient point is that even those pro-sovereignty groups in Quebec that most favor a close post-independence economic and political association with Canada do not contemplate an arrangement that the United States or the rest of the world could view as merely another form of Canadian federalism. Quebec's separatist leaders, even while evoking the possibility of a customs union with Canada, insist that Quebec shall acquire the "exclusive power to pass all its laws, levy all its taxes and conclude all its treaties."³ With respect to trade agreements, if Quebec did not insist on separately joining the agreements and if Canada and Quebec were to continue as a single customs union with one external trade regime, speak uniformly with one voice, and with one authority responsible for compliance with all obligations, then arguably the United States and other countries would see no need for a separate Quebec accession to the various trade agreements like the WTO and the NAFTA. It does not appear, however, that such a quasi-federal outcome is intended even by Quebec. Political leaders in the rest of Canada meanwhile have rejected the notion that such close relations with an independent Quebec are possible.

Declaration of Independence

The United States and other countries must be prepared for a range of possible outcomes. A "no" vote in the referendum would end the issue, at least for the time being. A "yes" vote in the referendum is likely to create a period of substantial uncertainty on all sides. The possible outcomes range from an abrupt and early declaration of independence by Quebec (if the rest of Canada quickly and definitively decided not to negotiate) to amicable and orderly negotiation between Canada and Quebec, as well as with the United States and other countries, such that all outstanding issues could be resolved before Quebec became independent in the next year.

Neither of the extremes is likely. As discussed below, a precipitous declaration of independence is unlikely given the high costs of independence without prior agreement between Quebec and the rest of Canada. On the other hand, the issues that would require resolution for an amiable and orderly transition to independence are too numerous and difficult to expect a rapid and amicable solution. The economic issues alone between Quebec and the rest of Canada will be much more problematic than those involved in putting together a free trade agreement, and the Sovereignty Bill's one-year time frame for negotiations seems extraordinarily optimistic. By way of comparison, the negotiation of the NAFTA, a less comprehensive and sensitive task, required a year of preparatory talks, 18 months of negotiations and many months for domestic approval.

3. Sovereignty Bill, art. 2.

The political atmosphere is also likely to be very difficult in the aftermath of a "yes" vote. Not surprisingly, Canada does not have a constitutional plan for its own dismemberment. It is therefore unclear who would negotiate for Canada with Quebec, and based on what legal authority. Ironically, Canadian Prime Minister Jean Chrétien himself represents a Quebec constituency and the Official Opposition in the Canadian Parliament is the separatist Bloc Québécois Party. Perhaps these issues would be readily resolved if Quebec's separation were welcomed on all sides, but that is not the case. In the event of a Quebec referendum vote endorsing sovereignty, the United States and the rest of the world therefore must be braced, at the very least, for a substantial period of uncertainty about the relationship between Quebec and the rest of Canada.

Pending the outcome of talks between Quebec and the rest of Canada, the United States and other countries are likely to be wary of negotiations on Quebec's accession to international agreements unless the rest of Canada has assented. If Quebec becomes independent, the United States will want good relations with Quebec—but not at the price of bad relations with the rest of Canada. In negotiating with Quebec, the United States and other countries will naturally wish to see if they can negotiate an improved agreement from their perspective, which will further delay matters. The United States will also need legislation to extend certain trade preferences to Quebec, which will be very difficult to obtain, especially in a presidential election year. The obstacles to completing negotiations are thus formidable in any time frame, and probably are insurmountable within a year.

Quebec Secession Without Prior Agreement

Under U.S. and international law, if Quebec secedes from Canada before the United States and Quebec have reached an agreement that keeps in force the WTO Agreement, the Auto Pact, and the NAFTA, then those agreements will all lapse at the same moment that Quebec's independence takes effect. Further, the United States could not continue to grant Quebec the preferences it has enjoyed under the NAFTA and the Auto Pact, even on a provisional basis, unless and until so authorized by enactment of new legislation.

The importance of this issue should not be underestimated. The disruption of trade relations would be intense during any lapse of NAFTA and Auto Pact relations, whether the cause was an acrimonious breakup of Canada or a breakup that was "agreed" between Quebec and the rest of Canada, but which took effect before Quebec's accession (especially to the NAFTA) had been agreed to by the United States and approved by Congress. To note just a few important examples of the problems that would arise:

- Quebec would immediately lose all tariff preferences into the U.S. market, as U.S. duties on products of Quebec would increase to normal, non-preferential (MFN) levels;
- In calculating whether products of the rest of Canada qualified for preferences under the NAFTA/ Auto Pact rules of origin, any Quebec materials or labor would

no longer count—with disruptive effects not only for Quebec, but for businesses throughout the rest of North America that had been using Quebec content to qualify for preferences;

- On matters such as the size and allocation of the NAFTA tariff-rate quotas on textiles and apparel, the United States not only would automatically eliminate Quebec's benefits, but also would be under pressure to reduce the quota for the rest of Canada as well (since those benefits were premised largely on Quebec's prior trade performance);
- The rules on investment, services, and dispute settlement would all be canceled between the United States and Quebec;
- Quebec would almost certainly impose its own tariffs (perhaps at the level of Canada's WTO commitments) on imports from the United States.

These consequences would in turn have highly adverse practical effects, hurting both trade and investment. While Quebec would suffer most, U.S. exports and U.S. investment in Quebec would both suffer losses as well. Such adverse effects would continue until the United States and Quebec agreed to apply the NAFTA and Congress enacted the necessary domestic legislation. For the reasons discussed below, neither of those conditions will be quickly or easily met, even under favorable circumstances.

The problem for U.S.-Quebec trade relations is not a lack of expressed will on the part of the Quebec Government for continuity of trade relations with the United States. Quebec has always been a strong supporter of free trade with the United States and of the NAFTA. In keeping with this position, the Sovereignty Bill calls for an independent Quebec to be a party to the NAFTA and the WTO Agreement, as well as other international agreements and organizations to which Canada is now a party. Articles 15 and 16 of the Sovereignty Bill state, in relevant part:

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.

The Government is authorized to apply for the admission of Québec to the United Nations Organization and its specialized agencies. It shall take the necessary steps to ensure the participation of Québec in the World Trade Organization, the Organization of American States, the Organization for Economic Cooperation and Development, the Organization for Security and Co-operation in Europe, the Francophonie, the Commonwealth and

other international organizations and conferences.

These provisions of the Sovereignty Bill should be welcomed as a declaration of the Quebec government's policy, but the Sovereignty Bill of course does not and could not purport to bind the United States or other countries as a matter of law. The Sovereignty Bill inaccurately suggests that Quebec would be able to automatically assume the rights and obligations of the NAFTA on the effective date of independence.

As discussed below, the existing Parties to those agreements and Quebec can, of course, negotiate arrangements for Quebec to become a party to all of the relevant trade agreements on such terms as the Parties and Quebec may agree. However, under international law and practice, and under the terms of the agreements themselves, none of these results are automatic. The United States could not automatically hold Quebec accountable for compliance with the obligations Canada has had, nor could Quebec claim an automatic right to succeed to the benefits Canada has enjoyed. Further, under U.S. domestic law, the president would not have domestic legal authority to accord the preferential benefits of the NAFTA and the Auto Pact to Quebec (such as duty free treatment of Quebec products).

These conclusions stem from international law, the terms of the trade agreements themselves, and U.S. law and practice. Aside from the provisions of one international convention that has never entered into force, there is no serious legal argument that the United States must accept application of the WTO Agreement, the Auto Pact, or the NAFTA to an independent Quebec.

The only argument to the contrary derives from the Vienna Convention on Succession of States in Respect of Treaties ("the Vienna Convention")⁴, a treaty that has never been accepted by the United States, Canada, or most of the world. Article 34 of the Vienna Convention would have created a presumption in favor of Quebec, as a separating State, having the right to succeed to the same rights and obligations as Canada.⁵ The Vienna Convention is not in force for any country

4. U.N. Doc A/CONF. 80/31, reprinted in 17 I.L.M. 1488 (Nov. 1978).

5. Article 34 provides that:

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;
 - ...
2. Paragraph 1 does not apply if:
 - (a) the States concerned otherwise agree; or
 - (b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 34 is an exception to the Convention's own general rule of application for newly independent States, which is the way most new States are created. For example, Article 17 provides that:

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multinational treaty which at the date of the succession of States was in force in respect of the territory to which the succession of states relates.

because it has not attracted sufficient adherents anywhere in the world.

...

3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the newly independent State may establish its Status as a party to the treaty only with such consent.

The practice of the United States, as noted in the Restatement of The Foreign Relations Law of the United States,⁶ is different from that of Article 34 of the Vienna Convention with respect to separating States. The United States (and many other countries, including Canada) considers that a newly sovereign state "does not succeed to the international agreements to which the predecessor state was party, unless, expressly or by implication, it accepts such agreements and the other party or parties thereto agree or acquiesce."⁷ As pointed out in the Restatement, therefore, the general rule is that a newly separated state starts with a "clean slate" in its international relations and agreements need to be confirmed by both the separating State and the existing Party or Parties in order to remain in force. The same point was reaffirmed by The Legal Adviser of the Department of State, in a speech to the April 1992 Annual Meeting of the American Society of International law.⁸

In deciding how to exercise that right in practice, the United States may weigh a variety of policy factors, but must conform with the agreements themselves and the requirements of U.S. law. Policy considerations normally lead to a preference to maintain in force existing agreements with a newly independent State, providing that so applying the agreement does not unfavorably upset the balance and the operation of the agreement for the United States. On that basis, there may well be agreements between the United States and Canada that the United States will agree should be continued in force with respect to an independent Quebec without the need for any new accession or other negotiating process. This policy presumption, though, would not necessarily apply if Quebec's secession were contested by Canada.

In the case of the WTO Agreement, the Auto Pact, and the NAFTA, however, the terms of the agreements and the nature of the relevant U.S. implementing legislation lead very strongly to the conclusion that the United States (and probably other member countries) would not accept

6. The American Law Institute, Restatement (Third) of the Law, The Foreign Relations Law of the United States ("Restatement") (1987).

7. Id. § 210(3). However, pre-existing agreements governing boundary and territorial matters are binding on the separating state.

8. This speech was the basis for the article by the Hon. Edwin D. Williamson and John E. Osborn, "A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia", 33 *Va.J. Int'l L.* 281, 263 (1993) ("where a portion of the State breaks away from the primary, predecessor State, the practice tends to support a "clean slate" approach.")

application of the agreements to Quebec without an accession process—and, in the case of the NAFTA and the Auto Pact, authorizing or implementing legislation. An attempt by a U.S. administration to apply to an independent Quebec, even on a provisional basis, those benefits under U.S. law that depend on being a Party to those agreements would almost certainly be successfully challenged in U.S. courts.

The reasons for these conclusions are set out below in more detail with respect to the three main trade agreements. While there are formal reasons for concluding that accession will be required (such as the accession processes built into the texts of the WTO Agreement and the NAFTA), the more important reason is likely to be the perception that the material effect of each agreement is simply not the same if an independent Quebec were to become a separate Party without negotiated adjustments.

Issues for Accession Negotiations

*The WTO Agreement*⁹

It is virtually certain that the members of the WTO would require an independent Quebec to accede to the WTO, an outcome the Sovereignty Bill seems to anticipate by calling for Quebec to "take the necessary steps" to become a member of the WTO.¹⁰ There are several reasons for this conclusion.

1. Necessity of Accession. First, the WTO has a formal accession process¹¹ for new Parties to join. The accession procedure involves negotiation of terms for the acceding member, and approval by vote of a two-thirds majority of WTO members. For almost all nations, the practice in the case of membership in international organizations has been to look to the membership rules and conditions of the organization.¹²

Second, as a matter of practice, the Contracting Parties to the GATT¹³ already demonstrated, in the case of the division of Czechoslovakia into two new States, that it would require an accession process.¹⁴ In the case of the breakup of Czechoslovakia, two new States of roughly comparable size were created and both were required to negotiate separate accessions (an

9. Agreement Establishing the World Trade Organization ("WTO Agreement"), Apr. 15, 1994, 33 I.L.M. 1144 and Ministerial Decision: Acceptance of and Accession to the Agreement Establishing the World Trade Organization, Apr. 14, 1994, 33 I.L.M. 1265.

10. Sovereignty Bill, art. 16.

11. Art. XII.

12. Vienna Convention, art. 4; Restatement, § 222(2), 24.b., Rep. Nts. 1.

13. General Agreement on Tariffs & Trade, Oct. 30, 1947, 55 U.N.T.S. 187.

14. The Czech Republic and the Slovak Republic acceded to the GATT on Apr. 15, 1993.

outcome that served another practical purpose, since the old Czechoslovakia had also been a non-market economy until very recently). The outcome in the case of Czechoslovakia suggests that at least Quebec would be required to accede. It is less likely that the WTO would attempt to require Canada to re-accede following Quebec's separation, but WTO members probably would want to look at whether the secession of Quebec had materially altered the effect of particular Canadian schedules.¹⁵

Finally, the WTO Agreement also has substantive provisions that would produce a different balance of benefits if Canada became two separate states as a result of Quebec secession. A number of the most important WTO provisions are implemented through individual country schedules of concessions and exceptions. Canada has such schedules, for example, for tariffs, agricultural exports subsidies, agricultural support programs, textiles, services, trade-related investment measures, and government procurement. Those schedules will not have the same effect in all respects if carried over without modification to an independent Quebec.

The most easily understood example of the problem is the case of the WTO's Government Procurement Agreement. That agreement applies only to federal government procurement at this point, so none of Quebec's provincial government purchases are subject to any obligations. Other WTO members who are parties to the procurement agreement clearly will not be willing to accord an independent Quebec the benefits of that agreement unless and until Quebec agrees to accept the obligations of the agreement for a satisfactory portion of its procurement.

The agricultural commitments of the WTO are a more complex and sensitive example. WTO members are required:

- to eliminate non-tariff barriers to agricultural imports;
- to reduce export subsidies relative to an agreed base year; and
- to reduce domestic support programs, again relative to an agreed base year.

Original members of the WTO, including Canada and the United States, were allowed to "tariffy" their non-tariff barriers, i.e. to increase tariffs on agricultural imports in accordance with a negotiated formula that was intended to replicate the protective effect of non-tariff barriers that had to be eliminated (including import quotas on dairy and poultry products). Members also had to accord a minimum access commitment in proportion to the size of their respective domestic markets.

Canada's existing agricultural schedules would not have the same effect if applied to an independent Quebec and a smaller Canada. One obvious difference is that trade between Canada and Quebec would count as international trade, rather than internal commerce within Canada.

15. Canada will retain its legal identity as a sovereign State subsequent to Quebec separation, and will in all likelihood, therefore, retain its membership in the WTO.

WTO members would want Quebec to provide a separate minimum access guarantee that is not eroded by Quebec's imports from Canada. The United States and other WTO members would almost certainly object to the notion that Canada's commitments to grant minimum access for imports from other WTO members could be fulfilled by imports from a newly independent Quebec and vice versa.

Canada's WTO schedules for reductions in domestic support and export subsidies for agricultural products and Canada's agricultural tariff schedules were negotiated based on formulas that used a national average for a united Canada. The average level of export subsidies or domestic support for the products of Quebec by itself is almost certainly different than the average for all of Canada. As to tariffs, neither existing WTO members nor Quebec would be bound by the formulas used to produce Canada's agricultural tariffs, since those "tariffication" formulas are not binding with respect to acceding members, who start from scratch in their negotiations.

Thus, WTO members will expect to negotiate new schedules for Quebec on all these issues. In addition, there may be calls for adjustment of the schedules of Canada, especially in those cases where the main reason for Canadian protection was an industry based in Quebec or a subsidy granted by Quebec. The United States will have an especially strong interest in the schedules concerning domestic and export subsidies because the WTO Agreement provides greater discipline in those respects than does the NAFTA.

In addition to government procurement and agriculture, there are a number of other areas where separate membership status for Quebec would require adjustments. Quebec will need to negotiate its own industrial tariff schedule and its own commitments for liberalization of services measures. Canada's schedule might serve as a suitable basis for tariff negotiations, but neither WTO members nor Quebec would be obliged to accept the existing tariff schedule of Canada as binding. With respect to services, WTO members may well seek greater access to Quebec's market, since they will no longer have to go through the Canadian federal government to seek concessions in the Quebec market.

The question of textile restrictions will not concern the United States directly, but developing countries subject to Canadian restrictions will doubtless press for greater liberalization from Quebec (and the rest of Canada). Paradoxically, an independent Quebec will have a greater practical need, but a weaker legal claim, for continuing the textile protection that a united Canada has maintained.

With respect to product standards (technical barriers to trade), Quebec will automatically become bound by the relevant WTO obligations, whereas under existing WTO rules provincial standards of Quebec have been subject to lesser discipline.

The United States and other WTO members are likely to insist that an independent Quebec could not simply continue in effect antidumping or countervailing duties under antidumping or countervailing duty orders determined previously by and for a united Canada. In order to impose antidumping or countervailing duties on imports following independence, the United States (and the WTO members) could insist that Quebec investigate whether there is injurious dumping or injurious subsidized imports into the Quebec market considered by itself. WTO members might also insist that Canada reexamine orders where a significant portion of the domestic industry that was found to be injured was located in Quebec.

The secession of Quebec would automatically limit regions of Quebec that can be granted

regional aids without fear of countermeasures by other WTO members, including the United States. An element of the WTO formula for permissible regional aids is that the region must be disadvantaged relative to the average income or employment within the territory, which will be the smaller and somewhat less wealthy territory of Quebec.

2. U.S. Negotiating Position. The prospect of Quebec's accession negotiations for the WTO should not be a cause of concern for the United States. U.S. negotiating leverage vis-à-vis an independent Quebec will, if anything, be greater than the leverage that the United States has with respect to a larger, united Canada. While U.S. negotiators should not overplay their hand (since Quebec's participation in the WTO is in the interest of the United States as well as in Quebec's own interest), they should also not find it difficult to reach an agreement with an independent Quebec that is, if anything, more favorable to U.S. interests than the current terms of a united Canada.

As a matter of U.S. domestic law, Quebec's failure to become a member of the WTO would pose few problems for the United States, but a couple of significant problems for Quebec. Most U.S. trade laws implementing GATT 1994 obligations automatically apply to all countries, unless exceptional treatment is specifically provided for. Thus, U.S. law would automatically result in Quebec receiving the same MFN tariff treatment required by GATT 1994, even if Quebec is not a member. The exceptions are specifically legislated: worse treatment for some Communist and former Communist countries; and better treatment for many developing countries and free trade agreement partners (including Canada).

There are, however, some significant benefits under U.S. law that an independent Quebec would not receive until it acceded to the WTO. First, products and services of Quebec would not be eligible for the benefits of the Government Procurement Agreement of the WTO and indeed would be disqualified from considerable U.S. procurement. Second, subsidized products of Quebec would be subject to U.S. countervailing duties without an injury test. Third, if Quebec remained outside the WTO, the president would have specific legislative authority to raise import duties against Quebec as a non-member of the WTO. Finally, without the protection of the WTO, should a trade dispute arise with Quebec, the United States would not be subject to WTO limitations on retaliation, nor could WTO dispute settlement procedures be invoked by either the United States or Quebec for any dispute between them, including a Section 301 case or Section 301 retaliation.

The Auto Pact¹⁶

The Auto Pact is a purely bilateral agreement that has provided for free trade in automotive products between the United States and Canada since 1965. This agreement, which was approved and implemented through legislation, would not automatically apply to an independent Quebec. Whether the United States (and Canada) would negotiate some form of Quebec adherence to the

16. Agreement Concerning Automotive Products Between the Government of the United States of America and the Government of Canada ("Auto Pact"), Jan. 16, 1965, U.S.-Can., 17 U.S.T. 1372, reprinted in 1965 U.S.C.C.A.N. 3670, 3689.

Auto Pact, and whether Congress would approve that adherence, is uncertain.

U.S. concessions in trade in automotive products under the Auto Pact are explicitly reserved for Canada. These concessions are authorized by implementing legislation.¹⁷ The statute explicitly states that the Auto Pact is in force only as between the Governments of Canada and the United States,¹⁸ and the Agreement refers repeatedly to "the two governments." Neither the Auto Pact itself, nor the statute implementing it, provide a definition of what is understood as "Canada" for purposes of the Auto Pact. The Auto Pact includes no accession article, although provision is made for either country to provide access to its markets to other countries "on similar terms."¹⁹ However, the NAFTA has in effect modified the Auto Pact by requiring use of the NAFTA automobile rules of origin and prohibiting the addition of new companies to those eligible for duty free import privileges in Canada.

As a practical matter, a request by an independent Quebec to join the Auto Pact would create a policy quandary for the United States. At times the Auto Pact has been very controversial in the United States, and Quebec's independence might be seized as a pretext to terminate it. On the other hand, U.S. companies operating in Canada under the Auto Pact like the benefit of duty free importation into Canada from any country. Perhaps the safest prediction about the fate of the Auto Pact for an independent Quebec is that it will be linked to NAFTA accession. If the Parties can agree to Quebec's accession to the NAFTA, then Quebec probably would be permitted to join the Auto Pact as well, though the terms might be adjusted in the negotiating process.

17. 19 U.S.C. § 2001.

18. 19 U.S.C. § 2001(1)

19. *Id.*, art. V.

The NAFTA²⁰

The relationship of an independent Quebec to the NAFTA is the most important trade issue from a U.S. perspective, because the NAFTA and its implementing legislation form virtually the entire basis for the preferential trade and investment treatment that the United States and Canada now grant to each other. In the absence of a NAFTA relationship approved and implemented by legislation, the United States cannot accord—and therefore cannot expect—preferential benefits in its trade and investment relationship with Quebec.

It is clear that Quebec would need to accede to the NAFTA in order to obtain its rights and obligations. Both the text of the NAFTA and an analysis of its substance support this conclusion. Further, U.S. domestic law on its face would not allow the United States to apply NAFTA benefits to an independent Quebec.

1. The NAFTA Text. There are two substantive provisions relevant to the treatment of an independent Quebec under the NAFTA. First, the text of the NAFTA explicitly states that it is an agreement between the Governments of the United States, Canada and Mexico,²¹ and includes the following definition of Canada:

the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may exercise rights with respect to the seabed and subsoil and their natural resources.²²

This definition on its face would not include an independent Quebec, with its own customs territory.

Second, Articles 2204(1) and (2) of the NAFTA provide the mechanism for the accession of new parties:

20. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 (1993).

21. See NAFTA Preamble.

22. NAFTA, Annex 201.1.

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 [NAFTA] Commission and following approval in accordance with the applicable legal procedures of each country.

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.

As a declared sovereign country, Quebec would appear to fall clearly within these accession provisions. As already noted with respect to the WTO, normal practice in instances where there is an accession clause is to follow the provisions of that clause with respect to separating states wishing to become a party to the agreement.²³ Canada, in contrast, even after the secession of Quebec, still falls squarely within the definition of Canada provided in the NAFTA and plausibly would not be required to accede anew. However, as in the case of the WTO, there may be a few issues for which the NAFTA Parties may press for adjustments from Canada—such as the wool suit question—where the effect of a provision is altered more substantially by the independence of Quebec.

2. Implementing Legislation. U.S. domestic law would not allow the United States to apply the benefits of the NAFTA to an independent Quebec (or to any other new Party to the NAFTA) without new legislation. Under U.S. law, the NAFTA is not self-executing (*i.e.*, automatically enforceable under domestic law). Congress approved the NAFTA in implementing legislation, but that legislation explicitly provides that federal law prevails over any inconsistent provision of the NAFTA.²⁴ The implementing legislation, which amends U.S. law in various ways that enable the United States to comply with NAFTA obligations, specifically limits NAFTA benefits to Canada and Mexico²⁵ and provides that Congressional approval of the NAFTA "may not be construed as conferring Congressional approval of the entry into force of [NAFTA] for the United States with respect to countries other than Canada and Mexico."²⁶

23 Vienna Convention, art. 4; Restatement, § 222(2), 24.b, Rep. Nts. 1.

24. 19 U.S.C. § 3312 (a)(1).

25. *Id.* § 3301(4).

26. *Id.* § 3317(a).

Similar evidence of the Congressional intent to confine the benefits of the NAFTA to Canada and Mexico is found

throughout the implementing law. The implementing law also makes clear that benefits accorded under the law expire automatically when the NAFTA ceases to be in force.²⁷

Since the president has no other general authority under U.S. law that could be used to grant an independent Quebec NAFTA benefits or their equivalent, Quebec will lose all preferences into the U.S. market on the day it declares itself an independent country, unless the United States and Quebec have negotiated a free trade agreement between themselves (e.g., through Quebec's accession to the NAFTA) and Congress has passed legislation approving and implementing such benefits for Quebec. As previously noted, timely congressional approval may well prove problematic, since the Administration currently lacks the kind of "fast track" trade negotiating authority from Congress which facilitated relatively smooth Congressional approval and implementation of agreements such as the NAFTA and the WTO. This need for new legislation will also serve to increase the leverage of U.S. industries pressing to improve their gains under the NAFTA, which in turn will greatly magnify negotiating difficulties.

3. Significant Negotiating Issues for NAFTA Accession. There are two basic ways to arrive at a free trade agreement between the United States and an independent Quebec. The first, and most sensible way, would be for Quebec to accede to the NAFTA through the mechanism of Article 2204. The alternative, if Canada were to exercise its veto of a Quebec attempt to accede to the NAFTA, is for the United States (together with Mexico, and perhaps by that time Chile) to negotiate a separate free trade agreement with Quebec, which might replicate the terms of the NAFTA in whole or in part. The latter alternative would be very difficult, both because of the U.S. desire for good relations with the rest of Canada and because several issues are much more difficult to resolve absent a close and harmonious relationship between an independent Quebec and the rest of Canada.

From a U.S. perspective, the negotiating issues for Quebec accession could be divided into three broad categories: (1) those where the NAFTA or its annexes must in some sense be amended to account for the addition of a new Party (Quebec); (2) issues where modification, even if not technically required, would be necessary to ensure that the substantive effect of the agreement with an independent Quebec is not less favorable to U.S. interests than the effect of the agreement with a united Canada; and (3) issues where the United States is likely to seize the opportunity of Quebec's accession to seek improvements in the NAFTA from a U.S. point of view, even if such change is not technically or substantially necessary.

The first category, technical adjustments, such as adjusting the rosters of dispute

27. Id. § 3451(a).

settlement panelists to reflect the addition of a new member country, should be relatively easily handled. Indeed, if Chile's accession has preceded that of Quebec, the Parties may already have resolved this category of issues. Over the longer term, a more thorough reorganization of the NAFTA's institutions may be necessary if more and more countries accede, but these issues should not be difficult while there are still only four or five countries in the NAFTA.

The second category of issues includes the provisions of the NAFTA that depend on schedules and annexes to determine the pace and degree of liberalization. Since neither Quebec nor the existing NAFTA parties will be bound by the same rights and obligations as Canada, in principle all areas of negotiation could be revisited. In practice, Quebec's accession would be facilitated by starting with a presumption that Quebec would take on the same rights and obligations as Canada, modified only as necessary in the view of the parties. There are areas of the NAFTA for which the assumption by Quebec of the rights and obligations of Canada would not produce the same substantive effect, including areas where there must be some equitable partitioning of benefits between Quebec and the rest of Canada. The United States would clearly not wish to see any reduction of benefits under the NAFTA as a result of Quebec's accession.

The main issues in this category requiring negotiation would probably be as follows:

- Textiles. There are tariff rate quotas that would require allocation between Quebec and Canada (the United States would probably use this occasion to seek elimination or substantial modification of the quotas favorable to Quebec producers of wool suits).
- Government Procurement. Quebec will have to negotiate a government procurement schedule and open up its purchasing by government departments. Currently, government procurement disciplines under the NAFTA and WTO do not apply to provincial governments so Quebec has been able, as a province, to favor local suppliers.
- Agriculture/Tariffs. The United States is now arguing in a NAFTA dispute settlement case that, under the NAFTA, Canada must eliminate its tariffs on U.S. dairy and poultry products; the United States will probably insist on elimination of those barriers in Quebec, as part of the price of NAFTA admission (regardless of the outcome of the dispute settlement case).
- Technical Barriers to Trade/Standards. Quebec as an independent country will have to comply with these provisions, whereas Quebec as a province is largely exempt.
- Restrictions on Foreign Investment and Trade in Services. As an independent country, Quebec will be expected to bring more of its measures into conformity with the NAFTA, with fewer exceptions.
- Financial Services. Quebec will be subject to the higher disciplines and expectations imposed on national governments, and will accordingly be

expected to liberalize its financial services regime to a greater extent.

- Tariffs. While much of the current Canadian tariff schedule might be satisfactory if adopted by an independent Quebec, NAFTA members may wish to seek greater liberalization, especially in those instances where the purpose of a high Canadian duty is to protect a non-Quebec industry.

The third category of potential negotiating issues are those which various interests groups are likely to press to have reopened, even though the separate accession of an independent Quebec would not require such re-opening as a technical or substantive matter. The NAFTA did not resolve all U.S.-Canada issues to the satisfaction of the United States or Canada. The occasion of Quebec seceding from Canada will certainly be viewed by discontented U.S. industries and interest groups as an opportunity to try to improve on the terms of the U.S.-Canada relationship, at least vis-à-vis Quebec—and perhaps with the rest of Canada as well. The following are:

- Cultural Exception. The United States has always opposed the NAFTA's cultural exception and the other reservations that Canada has taken for specific cultural industries. Accession negotiations will provide an opportunity to try to eliminate or scale back the protection of cultural industries, at least for Quebec.
- Chapter 19. Chapter 19 is the system of binational panel reviews of national determinations under antidumping and countervailing duty laws. There is an increasingly active coalition of U.S. industries that frequently invoke U.S. antidumping and countervailing duty laws and who oppose Chapter 19. That coalition would almost certainly oppose application of Chapter 19 to an independent Quebec.
- Industrial Subsidies. While the NAFTA has fewer direct disciplines on subsidies than the WTO, U.S. industries concerned about Quebec's subsidization of industry might use the occasion of Quebec's accession—and the need for implementing legislation—to try to gain greater discipline over Quebec's practices either in the NAFTA, or in the WTO, or both.
- Wine and Distilled Spirits. The agreement negotiated under the original U.S.-Canada FTA, and incorporated into the NAFTA by reference, in some respects fell short of U.S. objectives for liberalizing practices of provincial liquor boards, partly because of political limits on the Canadian Government's ability to control provincial practices. An independent Quebec could not claim the same lack of control over its own practices, which could be addressed in the accession negotiations.

- Investment. Canada reserved the right to review and reject acquisitions by U.S. investors of certain high value Canadian corporations. The United States will not want to accept a comparable right of investment review for an independent Quebec.
- Labor and the Environment. The accession of Quebec could raise difficult political problems regarding labor and the environment. Environmentalists in the United States may see this as an opportunity to revisit the controversy about Quebec hydroelectric projects. The Clinton Administration is torn in opposite directions, on the one hand, by Republicans who control Congress and who object to linking trade with labor and the environment and, on the other hand, by environmental activists who believe the labor and environment side agreements should be much stronger. Quebec has not been bound by those agreements up to this point, because the side agreements do not apply to a Canadian province unless the province agrees with the federal government to accept application. It is difficult to predict what U.S. negotiators might seek on these issues, given the conflicting pressures.

The United States of course is not assured of obtaining concessions in these or other areas. An independent Quebec could not be compelled to accept demands that it finds excessive. There would be costs for the United States and other NAFTA parties if Quebec stayed out of the NAFTA, since Quebec is unlikely to unilaterally grant preferences to NAFTA countries and mutually beneficial commercial relationships would be disrupted by the reimposition of barriers that the NAFTA has removed. There would then be substantial disruption to important commercial channels. This disruption will be most painful for an independent Quebec, as the smallest and most trade-dependent of the North American countries, but there would be some cost for the United States as well.

It would make a considerable difference for NAFTA accession negotiations whether Quebec has first achieved agreement with the rest of Canada. If Quebec and Canada have come to terms on a close and mutually supportive economic agreement, then Quebec would be less economically dependent on achieving agreement with the United States and the United States would not face the problem of choosing sides between antagonistic neighbors. While the United States could not be compelled to accept the terms that Quebec and the rest of Canada might collectively propose for Quebec's NAFTA accession, such a Quebec-Canada agreement would have considerable weight in negotiations.

On the other hand, if Quebec and Canada have not reached agreement, Quebec will be much more dependent on achieving success in negotiations with the United States, because Quebec could be facing massive disruption of its commercial relations with Canada. While U.S. leverage would be increased, the United States would find it very difficult to resolve some issues that involve choosing between Quebec and the rest of Canada. Further, as a technical matter, administering different rules of origin for Canada and Quebec would become extraordinarily cumbersome for businesses, as well as government officials.

In either case, the United States can realistically expect to negotiate terms with Quebec that constitute some improvement over the existing terms of the NAFTA as it applies between

the United States and Canada. Put simply, Quebec has proportionately more at stake than does the United States. However, U.S. negotiators would be wise to dampen excessive expectations that some in Congress and the U.S. private sector may harbor for Quebec accession negotiations. Quebec will not accept unlimited U.S. demands, and the overall interest of the United States is best served by a close relationship with a healthy neighbor.