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An Independent Quebec: State Succession to NAFTA

by Rex J. Zedalis¹

I. Introduction.

During 1995, two-way trade in goods between the United States and Canada totalled (US)\$271.1 billion.² This represents a ten percent increase from 1994, the first year of operation for the North American Free Trade Agreement (NAFTA),³ and reflects (US)\$126 billion in exports to Canada from sellers in the United States⁴ and (US)\$145.1 billion in exports to the United States from sellers in Canada.⁵ Indeed, much to the surprise of some who may think that the constant media attention to international economic disputes with Japan indicates that the Asian nation is the United States' largest trading partner, its neighbor to the north stepped into that position immediately after the Second World War and has continued to occupy it ever since.⁶ Accurate statistics regarding trade between the United States and individual Canadian provinces may prove difficult to identify, but some analyses place U.S.- Quebec trade during 1994 at approximately (US)\$37 billion, and during 1995 at approximately (US)\$43 billion.⁷ If accurate, Quebec is approximately our eleventh

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 2. See FAX from William Shpiece, Office of Economic Affairs, Office of the U.S. Trade Representative to Rex J. Zedalis, Professor of Law and Director, Comparative and International Law Center, University of Tulsa (June 6, 1996) (on file with author).
 3. *Id.* In 1994 two-way trade totaled (US)\$242.8 billion. As of the first two months of 1996, it has been reported by Statistics Canada that the U.S.-Canadian merchandise trade figures show Canada with a trade surplus of (US)\$4.07 billion, up 8.2% over the corresponding period in 1995. See *Canadian Trade Surplus in February Down to C\$1.89 Billion, Data Show*, 13 INT'L TRADE REP. (BNA) 684, Apr. 24, 1996.
 4. *Id.*
 5. *Id.*
 6. See generally BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 (Part 2) (1975) indicating at 903, Series U 317-334 ("Value of Exports of U.S. Merchandise, by Country of Destination: 1790-1970") that in 1946 Canada overtook the United Kingdom as our largest export market; and at 906, Series U 335352 ("Value of General Imports, by Country of Origin: 1790-1970") that Canada overtook the United Kingdom as our largest foreign supplier beginning in 1917.
 7. This is based upon an assumed exchange rate of (US)\$1 to (C)\$1.25, which undoubtedly somewhat overstates the value of the Canadian dollar during 1994-95, and the following trade levels reported by official Quebec sources: 1994—(C)\$49.8 billion; 1995—(C)\$57.1 billion. See *Commerce international de marchandises du Quebec*, Ministère des Relations internationales, Direction générale des relations commerciales, Service de données, Fiche: Etats-Unis, tbl. 1: Valeur des échanges commerciaux du Quebec 1994-1995 (on file with author).
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largest export market,⁸ and we would represent Quebec's largest such market.⁹ Thus, given the liberalizations in cross border flows of goods and services envisaged by NAFTA, any circumstance raising questions about an independent Quebec's ability to succeed to that Agreement's rights and obligations poses a matter of substantial practical significance.

The recent history is quite familiar. Provincial elections in 1994 resulted in Parti Quebecois (PQ) coming to power within the provincial government.¹⁰ In September of 1995, under the leadership of Quebec Premier Jacques Parizeau, the government introduced before the provincial National Assembly the so-called "Sovereignty Bill." The Bill envisioned a Quebec-wide referendum on the issue of separation from Canada, following a one year period during which negotiation with the federal government in Ottawa would seek some form of economic and political partnership.¹¹ The October 30, 1995 referendum resulted in 50.6% of voters registering opposition to the proposal, and 49.4% signifying support. The margin of difference was about 52,000 votes. Indications suggest that roughly 4.7 million voters participated in the referendum, representing 94% of those eligible, and that about 87,000 votes were disqualified.¹² Despite much speculation by pundits regarding the rea-

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8. See U.S. DEPARTMENT OF COMMERCE NEWS, FT-900 Supp., Exhibit 6 ("Exports, Imports and Trade Balance by Country and Area, Not Seasonally Adjusted: 1996") at 8-11 (Mar. 1996) showing exports from the U.S. to specific country destinations for the first quarter of 1996 as follows: Canada, \$33 billion; Japan, \$16.9 billion; Mexico, \$13 billion; U.K., \$7.4 billion; Korea, \$6.3 billion; Germany, \$5.9 billion; Taiwan, \$4.36 billion; Singapore, \$4.3 billion; Netherlands, \$4.14 billion; France, \$3.71 billion; Belgium, \$3.09 billion; China, \$3.07 billion. See also *Commerce international de marchandises du Quebec*, supra note 6 at Fiche: Etats-Unis, Tbl. 1: Valeur des échanges commerciaux du Quebec 1994-1995, showing total imports into Quebec from the U.S. running at \$(C)18 billion for all of 1995. On the assumption of an exchange rate of \$(US)1.00 for \$(C)1.25, a continuation for 1996 of U.S. export performance to Quebec during 1995, and a replication during the last three quarters of 1996 of export performance reported by the U.S. Commerce Department for the first quarter, total imports into Quebec from the U.S. should run about \$(US)13 billion, placing it between Belgium and China in terms of export markets. For all of 1995, U.S. Department of Commerce News, FT-900 Supp., Exhibit 13 ("Exports, Imports and Trade Balance by Country and Area, Not Seasonally Adjusted: 1995:") at 22-26 (Jan. 1996) shows the exports to specific country destinations as follows: Canada, \$127.2 billion; Japan, \$64.3 billion; Mexico, \$46.3 billion; U.K., \$28.9 billion; Korea, \$25.4 billion; Germany, \$22.4 billion; Taiwan, \$19.3 billion; Netherlands, \$16.6 billion; Singapore, \$15.3 billion; France, \$14.2 billion; Belgium, \$12.5 billion; China, \$11.8 billion.
 9. See 12 INT'L TRADE REP. (BNA) 242, Feb. 1, 1995 (indicating that, at \$(US)\$18.8 billion during 1993, up from \$(US)\$14.6 billion during 1992, the U.S. represented Quebec's single largest export market).
 10. These elections were held during September of 1994 and resulted in the Liberal Party, under the leadership of Premier Daniel Johnson, being unseated. For references to NAFTA and the election before it was held, see U.S. *Denies Giving Assurances of Quebec's Accession to NAFTA*, 11 INT'L TRADE REP. (BNA) 1207, Aug. 3, 1994.
 11. See Act tabled Sept. 7, 1995, QUEBEC OFFICIAL PUBLISHER (respecting the future of Quebec).
 12. See *Canada Tries to Get Back on Track After Defeat of Quebec Sovereignty*, 12 INT'L TRADE REP. (BNA) 1805, Nov. 1, 1995.
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sons for the referendum's failure on May 22, 1996, the provincial legislature, under the leadership of the new Premier, Lucien Bouchard, who replaced Parizeau in January, voted in favor of another referendum on separation, though no specific date was set.¹³

Given the extent of the U.S.- Quebec trading relationship, and the distinct possibility that, at some point, a sovereign Quebec could become a reality, there is every reason to be concerned with the question of whether the province automatically succeeds to rights and obligations under the NAFTA. Immediately prior to the Fall 1995 referendum, statements by officials within the Clinton administration¹⁴ and the Canadian federal government¹⁵ indicated succession would not be automatic, but would depend upon negotiations. Statements by officials in the PQ and the Quebec government, though not explicitly indicating the exact opposite, certainly suggested a more liberal perspective.¹⁶ While unlikely to be admitted publicly, the divergence in these positions reflected Quebec's concern about continued trade flows, Canada's interest in avoiding a dicey situation with the province and the United States' interest in demonstrating support for the federal government in Ottawa. What makes the divergence especially interesting, however, is that, in its starkest form, it mirrors an almost identical divergence between Article 34 of the Vienna Convention on Succession of States in Respect to Treaties¹⁷ and § 210 (3) of the RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES.¹⁸

Article 34 (1) of the Vienna Convention on Succession of States enunciates the basic rule applicable to situations in which a part of one state separates from another and establishes itself as an independent entity, the exact kind of environment contemplated by Quebec's 1995 Sovereignty Bill. The essence is that the treaties to which the state separated

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13. See Mark Clayton, *In US, Quebec Premier to Mute Secession Talk*, THE CHRISTIAN SCI. MONITOR, June 3, 1996, Int'l sec., at 5. Apparently, under provincial law, the majority in Quebec's National Assembly, the PQ, must call another election prior to holding another referendum on separation, and under the Canadian Federal Constitution, must follow a favorable referendum vote with negotiations with Ottawa. Further, the recent legislative action was in part a reaction to federal government intervention in a Quebec Superior Court law suit challenging the right of the province to secede unilaterally. See *Quebec Premier Bouchard Says No Hurry for Election*, REUTERS FIN. SERV., Canadian Financial sec., available in LEXIS (June 3, 1996); Gwynne Dyer, *Separatists Put Quebec Back on Crisis Footing*, THE DAYTON DAILY NEWS, May 15, 1996, at 15A.
 14. See *supra* note 11, at 1806 (noting comments of White House spokesperson Mike McCurry).
 15. See *Independent Quebec's Access to WTO, NAFTA is not a Given, Minister Warns*, 12 INT'L TRADE REP.(BNA) 1644, Oct. 4, 1995 (quoting federal Finance Minister Paul Martin).
 16. See *supra* notes 13 and 14 (noting statements of Bloc Quebecois members within the federal parliament in Ottawa and Quebec government officials intimating that state party status to the World Trade Organization and NAFTA would come easily). It should be stressed that there was often confusion over whether the issue was one of automatic succession or automatic accession to NAFTA and GATT. See, e.g., *Quebec Introduces Legislation to Approve NAFTA and GATT Deals*, 12 INT'L TRADE REP.(BNA) 18, Jan. 4, 1995 (seeming to be concerned with the matter of accession, not succession). Herein, no attempt will be made to deal with issues arising out of questions of accession. The focus will be strictly confined to the matter of succession.
 17. See U.N. Doc. A/CONF. 80/31, reprinted in 17 INT'L LEGAL MAT. 1488, 1509 (1978) [hereinafter, "Vienna Convention"].
 18. See 1 RESTATEMENT (THIRD) OF THE LAW, FOREIGN RELATIONS OF THE UNITED STATES § 210 (A.L.I. 1987) [hereinafter, "RESTATEMENT (THIRD)"].
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from is still in force with respect to the state formed by the portion which undertook separation.¹⁹ This differs from the usual rule contained in the Succession Convention and applicable to former dependent territories or colonies which, upon being made "newly independent States,"²⁰ are in a position of choosing whether to establish their status as party to treaties of the former protector or administering nation.²¹ The rule in situations of

19. The precise language of art. 34 (1), Vienna Convention, *supra* note 17, reads:

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;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

20. This term of art is employed in the Convention and is defined in art. 2(1)(f), Vienna Convention, *supra* note 17, at 1490, as meaning "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible." Illustrations provided by the negotiating history include those in which separations did not leave a predecessor state in existence (e.g., separation of Great Colombia in 1829-31, Norway and Sweden in 1905, Austro-Hungarian Empire in 1918, Iceland and Denmark in 1944, and the United Arab Republic in 1971) and those in which such a state was left in existence (e.g., separation of American colonies or territories from Great Britain and Spain, Belgium from Netherlands in 1830, Cuba from Spain in 1898, Panama from Colombia in 1903, Finland from Russia after the First World War, Czechoslovakia and Poland from the Austro-Hungarian Empire after the First World War, the Irish Free State from the United Kingdom in 1922, Pakistan from British India in 1947, and Singapore from Malaysia in 1965). See *Report of the International Law Comm'n on the Work of its Twenty-Sixth Session*, II INT'L L. COMM'N 157, 260-64 (PT. ONE) (1974); U.N. Doc. A/9610/rev.1/1974.

21. See arts. 16 (General), 17 (Multilateral Treaties), and 24-25 (Bilateral Treaties), Vienna Convention, *supra* note 17 at 1496-97 and 1501-02. Art. 16 proclaims:

A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect to the territory to which the succession of States relates.

Art. 17 provides:

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 multilateral 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.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

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

the latter sort has been termed the "clean slate" rule. Section 210 (3) of the RESTATEMENT (THIRD) also reflects the clean slate rule.²² In contradistinction to Article 34(1), however, the RESTATEMENT (THIRD) applies the clean slate rule not just to states newly freed from previous colonial, trust, protectorate, or other dependent status, but also to states arising from the separation of part or parts of another state.²³ In the context of an independent Quebec, perhaps it is therefore understandable, especially given that the Succession Convention has not yet entered into force,²⁴ why officials of the Clinton administration expressed the position they did regarding the sovereignty referendum and NAFTA.

Herein an attempt will be made to determine the accuracy of claims regarding Quebec and succession to rights and obligations under NAFTA. This will proceed by examining the position of the rule of continuation enunciated in article 34 (1) of the Vienna Succession Convention to ascertain its status in customary international law, and then by scrutinizing the provisions of exception contained in article 34 as a whole to determine if the circumstances surrounding any eventual separation of Quebec from the rest of Canada might warrant departure from the standard rule in this particular case. The basic thesis is that the exact nature of the controlling customary rule is much less certain than some would represent. Further, while greater certainty exists about the exact dimensions of exceptions to the rule of continuation, the likelihood of these being relied upon in the context of Quebec, though it cannot be entirely discounted, seems less than pronounced.

of all the parties, the newly independent State may establish its status as a party to the treaty only with such consent.

Art. 24 declares:

1. A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party when:

(a) they expressly so agree; or

(b) by reason of their conduct they are to be considered as having so agreed.

2. A treaty considered as being in force under paragraph 1 applies in the relations between the newly independent State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established.

Art. 25 states:

A treaty which under article 24 is considered as being in force between a newly independent State and the other State party is not by reason only of that fact to be considered as being in force also in the relations between the predecessor State and the newly independent State.

22. RESTATEMENT (THIRD), *supra* note 18, reads:

When part of a state becomes a new state, the new 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.

23. *Id.* § 210, Comment f, at 110 ("This principle applies both to newly independent states and to a state separated from another by secession or other circumstances").

24. See Henry J. Steiner, *et. al.*, TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT 278 (4th ed. 1994).

II. Article 34 (1) as Customary International Law: The International Law Commission.

The essential legal argument advanced by the RESTATEMENT (THIRD) for not adhering to the continuation rule adopted in the Succession Convention concerns the claim that Article 34(1) "does not reflect consistent practice"²⁵ within the international community. Presumably, the position is that the RESTATEMENT (THIRD) adopts those rules on succession which form part of the larger corpus of general international law. Since the 1978 Succession Convention has not entered into force as a component of international treaty law, it constitutes that part of the binding international law known as custom only to the extent that the behavior it captures represents the "consistent practice" of states.²⁶ Given the absence of consistent practice until the United States and the requisite number of other members of the world community have seen fit to adopt the Succession Convention through their respective constitutional processes, the rules of the Convention cannot be said to contribute to the general international law which independent and sovereign nations are obligated to obey.²⁷

The negotiating history of Article 34(1) may be seen as lending support for this sort of argument. The immediate predecessor of Article 34 appeared in Article 33 of the International Law Commission's (ILC's) 1974 Draft Articles on Succession, the document which formed the basis for what ultimately became the 1978 Convention.²⁸ Article 33 (1)(a) plainly indicates treaties, with respect to a state from which territory has separated, continue in force with respect to the state formed by the separating territory.²⁹ Yet the predecessor to Article 33(1)(a), found in Article 28(2) of the ILC's 1972 Draft Articles,³⁰ explicitly provides the exact opposite. In situations in which part of a state's territory separates to form another state, the language of Article 28(2) declares that "the individual State emerging from the separation is to be considered as being in the same position as a newly independent State."³¹ As newly independent states are subject to the clean slate rule, the effect is to subject states formed by separation to the same rule.³² Certainly it

25. See *supra* note 17 n. 4, at 113. From the practical perspective, note 4 also suggests that the rule of continuation is too difficult to apply.

26. RESTATEMENT (THIRD), *supra* note 17, at 24.

27. Clearly, the RESTATEMENT (THIRD) also acknowledges that international law may arise from general principles common to the major legal systems of the world. That recognition is not especially relevant, though, in the context of succession of states.

28. See *Report of the International Law Commission on the Work of its Twenty-Sixth Session*, Doc. A/9610/Rev.1, II Y.B. INT'L L. COMM'N 157, 162 (Pt. 1)(1974).

29. *Id.* at 260. Art. 33 (1)(a) reads:

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.

30. See *Report of the International Law Commission on the Work of Its Twenty-Fourth Session*, Doc. A/8710/REV.1, II Y.B. INT'L L. COMM'N 219, 223 (1972).

31. *Id.* at 296.

32. See art. 11 of the 1972 Draft Articles, *id.* at 250, stating the clean slate rule for newly independent states.

would be impossible to explain the rule of continuation articulated in Article 34(1) of the 1978 Succession Convention as reflecting a mere codification of prevailing customary international law if, prior to 1974, the ILC itself considered it customary that states formed by separation operated under a clean slate regime. How could the Commission in 1972 think custom required states formed by separation be freed from the treaty commitments of their predecessor states, and just two years later come at the matter the other way around? All this would suggest that the rule of continuation set forth in Article 34(1) may be as much an effort at formulating a progressive development in international law—a task entrusted to the ILC since its inception—as an effort at capturing extant customary practice of states.

There are at least two reasons why interpreting the negotiating history concerning the precise textual language of Article 34(1) proves troublesome. The first is that the ILC's official commentary to the 1974 Draft Article 33(1)(a) indicates the apparent shift in positions in 1974 had absolutely nothing to do with understanding the practice of states in a way different from an earlier understanding in 1972. Nor did it have anything to do with a sudden, wide-spread, and radical change in the practice itself. The basic idea appears to be that, at its Twenty-Sixth Session in 1974, the ILC simply recognized that the 1972 Draft and all discussion concerning it was grounded on a distinction between situations in which states emerged from an environment where the territory involved previously had little if any role to play in shaping its own destiny, and situations in which states emerged from an environment where they were fully able to participate in determining the destiny of the territory involved.³³ Given this recognition, it would be perfectly reasonable to interpret the shift

33. There is no doubt the relevant portions of the ILC's commentary to Article 33(1)(a) do not make this point in explicit and clear terms. See *Report of the International Law Commission on the Work of Its Twenty-Sixth Session*, *supra* note 27 paras. 19-32, at 264-66 (discussing article 33 in the context of the ILC's views on the 1972 Draft Article 28). The discussion concerns the 1972 Draft's distinction in treatment between states emerging from dissolution of a union of states (rule of continuation) and those emerging from separation of a part of a state (clean slate). The former is seen as involving states which, prior to union, had independent personalities. See *id.* para. 22, at 265. The latter is seen as involving states which had broken from colonial domination, and thus were considered newly independent states. See *id.* paras. 20, 25-29, at 264-66. The language throughout the 1974 commentary on Draft Article 33(1)(a) is couched not in terms of self-determination or control over one's destiny, but in terms of dissolution, separation, disappearance or continuation of a predecessor state. Nonetheless, it certainly appears that the theme the ILC perceives resides in the difference between the absence or presence of the ability to influence the future course of events relative to a particular territorial area. See *id.* paras. 25 and 29, at 265-66. Influence results in the rule of continuation, and the absence of such in clean slate. As states forming from separation could fall into either category, the 1974 Draft switches from distinguishing between dissolution of a union of states and separation of a part of a state, to newly independent states and states forming by way of separation from another state. Especially illuminating with regard to the ILC's focus being on the absence or presence of self-determination is the fact the Commission chose to distinguish between states formed from separation under circumstances in which they were like newly independent states (i.e., former colonies or territories), and those formed from separation in circumstances in which they had previously maintained some individual identity and control over the destiny of a particular territorial area. See art. 33 (3), *id.* at 260; and *id.* paras. 29 and 32, at 266.

between 1972 and 1974 as not at all undercutting the possibility of the rule of continuation expressed in Article 34(1) of the 1978 Succession Convention representing the extant customary international law.

The second reason has to do with the fact that language is present in the commentary to the 1974 Draft of Article 33(1)(a) that can be construed as supporting the view that the rule of continuation that the article enunciates represents the prevailing customary international law. In discussing the formation of a state from the dissolution of, or from the separation of a part of, another state the Commission indicated that, "although some discrepancies might be found in State practice, still that practice was sufficiently consistent to support the formulation of a rule which...would provide that treaties in force at the date of the dissolution [or separation] should remain in force *ipso jure* with respect to each State emerging..."³⁴ The notion that the practice of states, though not invariable, was "sufficiently consistent" to support the spelling-out of a clear rule of continuation may foreclose arguments about the existence of a customary standard prior to the preparation of the 1974 Draft. In such a case, even though a distinct switch occurred between 1972 and 1974 in the substantive text of what ultimately became Article 34(1) of the 1978 Convention, given the negotiating history relative to that switch,³⁵ the legal obligations of members of the international community would seem clear.

Any effort to draw upon the language of the 1974 Commentary to support the position that the rule of continuation reflects customary international law could prove troublesome. After all, as the language references sufficient consistency in state practice to "support the formulation of a rule," it seems possible to read this as meaning either the practice then manifesting itself was susceptible to being committed to a written prescription as it is to read it as meaning the practice represents a pre-existing customary rule capable of being codified in conventional form. That a practice is sufficient to support the formulation of a rule need not be taken as implying the rule already exists. Simply stated, the practice may have evolved enough to allow a rule to be articulated "de lege ferenda." Again, the ILC does have a role to play in the progressive development of international law.

But even beyond this hypertechnical point, there is other complicating, though seemingly explicable, language elsewhere in the negotiating record of Article 34(1). In particular, commentary to the ILC's 1972 Draft of Article 28 (2) indicates clearly the practice in the context of states forming by separation follow the clean slate approach, not the rule of continuation.³⁶ What must be kept in mind with regard to such commentary, however, is that in 1972 the Commission was distinguishing between states forming from the dissolution of a union of states, to which the rule of continuation applied, and states forming from

34. See Commentary on arts. 33 and 34 of the 1974 Draft Articles, *id.* para. 25, at 265.

35. See text accompanying note 33.

36. See *Report of the International Law Commission on the Work of Its Twenty-Fourth Session*, *supra* note 29, paras. 2-12, at 296-98 (1972). With reference to pre-UN practice, para. 7, the Commission reported that "in cases of separation the practice prior to the United Nations era, if there may be one or two inconsistencies, provides strong support for the 'clean slate' rule..." With reference to post-UN practice, para. 10, the Commission reported "[t]he available evidence of practice does not therefore support the thesis that in the case of a separation of part of a State,...treaties continue in force *ipso jure* in respect to the territory of the separated State."

separation of territory, to which the clean slate rule applied. As has been indicated, the real distinction evident in state practice was between states emerging from subjugation, and those emerging from a past in which they maintained the ability to influence the destiny of a particular territorial area.³⁷ By 1974 the ILC came to appreciate this, and it would thus seem inappropriate to make too much out of the language in the commentary to its 1972 Draft Articles.³⁸

III. Article 34(1) as Customary International Law: The 1977-78 Vienna Conference on Succession.

It would be difficult for any cautious and thoughtful person to consider the evidence set forth above regarding the ILC's perception as making out a clear case for or against Article 34(1) representing a customary international law standard. As a consequence, it is imperative that something be said about the understanding of that provision held by the nations represented at the international conference officially responsible for putting together and requesting formal action on the Succession Convention itself. The Vienna Conference on Succession of States in Respect of Treaties was convened under the auspices of the United Nations at sessions spanning the periods of April 4 - May 6, 1977,³⁹ July 31 - August 22, 1978,⁴⁰ and August 23, 1978.⁴¹ Discussion of Article 34(1) at the Conference basically focused on a joint proposal submitted by Switzerland and France⁴² which sought to overturn the ILC's 1974 rule of continuation, substituting the clean slate approach for newly independent states.⁴³

In large measure, the discussion of the joint proposal dealt with whether the ILC's distinction in treatment between newly independent states and states formed by separation of territory from another state made sense in terms of international political realities, or was justified by the hardships endured by those who had recently emerged from colonialism. For example, remarks were made about how any rule other than continuation might serve to encourage the disintegration of states.⁴⁴ And other remarks were offered about how the

37. See *supra* text accompanying note 33.

38. On the 1974 Draft Articles, see the study by the then U.S. representative to the ILC, Richard D. Kearney, *The Twenty-Sixth Session of the International Law Commission*, 69 AM. J. INT'L L. 591 (1975).

39. See I Off. Rec. U.N. Conf. on Succession of States in Respect of Treaties, U.N. Doc. A/CONF.80/16 (1977).

40. See II Off. Rec. U.N. Conference on Succession of States in Respect of Treaties, U.N. Doc. A/CONF.80/16/Add. 1 (1978).

41. See III Off. Rec. U.N. Conf. on Succession of States in Respect of Treaties, U.N. Doc. A/CONF.80/16/Add.2 (1978).

42. See U.N. Doc. A/CONF.80/C.1/L.41/Rev.1, Report of the Committee of the Whole (Resumed Session) A/CONF.80/30, III U.N. Conf. on Succession, *supra* note 41, at 144, 160 (1979).

43. Discussions took place during 40th-42d and the 47th-49th meetings of the Committee of the Whole. See II U.N. Conf. on Succession of States, *supra* note 40, at 52-70, 103-110.

44. During the 41st meeting of the Committee of the Whole, see comments by Mr. Arthur Rovine (United States), II U.N. Conf. on Succession, *supra* note 40, paras. 17-18, at 58; Sir Ian Sinclair (U.K.), *id.* para. 30, at 60; Mr. Nakagawa (Japan), *id.* para. 38. During the 42d meeting, see comments by Mr. Perez Chiriboga (Venezuela), *id.* para. 18, at 65.44.

Swiss-French proposal failed to account for differences in historical facts relative to the newly independent state, as compared with the state established by territorial separation.⁴⁵ Of especial importance, however, is that during the course of the discussion, various statements were offered by delegates regarding the relationship between what eventually became Article 34(1) and prevailing customary international law. Unfortunately, these comments seem no more conclusive on this matter than do the earlier statements from the ILC.

At the 40th meeting of the Committee of the Whole, the delegates from Switzerland and France explained their joint proposal to amend Article 33(1)(a) of the ILC's 1974 Draft Articles. Jean-Pierre Ritter of Switzerland indicated that, the general approach taken by the ILC in Articles 33 and 34 of the 1974 Draft "had departed from existing international law to propose an innovative solution involving progressive development."⁴⁶ Then, with specific reference to the rule of continuation enunciated in the Draft Article 33 (1)(a), he observed that, in abandoning the clean slate approach, "[i]t was quite clear that...[the ILC] was not simply reflecting the present state of the law, but was proposing progressive development."⁴⁷ The observations of the French delegate, Mr. Museux, followed immediately upon those shared by Mr. Ritter. Curiously, while they are predictably supportive of the thrust of the joint proposal, they suggest a less unequivocal view of the state of antedating customary law and state practice. Indeed, in prefacing his remarks in explanation of the joint proposal, Museux indicated "[t]he French delegation considered that in customary international law, the 'clean slate' principle co-existed with the principle of continuity and that both were found in practice."⁴⁸ Moreover, "France had opted for a mixed system, applying the 'clean slate' principle to treaties concluded 'intuitu personae' and the principle of continuity to other treaties."⁴⁹

In the light of France's sponsorship of the proposal to switch from the rule of continuation to the clean slate rule in the context of states emerging out of the separation from another state, it is likely that France did not understand treaties of the predecessor state separated from as being treaties entered into with a view to the new state formed by the separation. Nonetheless, the language used by Museux to express his state's position is not free from ambiguity, as it is doubtful the government of the predecessor separated from would have negotiated any international commitment without regard to the territory and constituency of the new state eventually to emerge from separation. Since it would appear, according to Mr. Museux, that such a lack of consideration is integral in order to trigger the notion of clean slate, it could only be the rule of continuation which would operate in the context of separation of territory.

The 41st meeting of the Committee of the Whole gave witness to interesting comments by delegates of four countries. Mr. Dogan, of Turkey, mentioned that his nation supported the joint proposal of amendment and considered "[i]nternational practice in the matter and particularly that of the Ottoman Empire...abundant" in rejecting the rule of

45. During the 41st meeting, see comments by Mr. Dieng (Senegal), *id.* para. 43-44, at 61; Mr. Boubacar (Mali), *id.* para. 51, at 62. During the 42d meeting, see comments by Mr. Sette Camara (Brazil), *id.* paras. 5 and 7, at 64; Mr. Breckenridge (Sri Lanka), *id.* para. 54, at 705. See also the defensive remarks of Mr. Ritter (Switzerland), *id.* paras. 44-51, at 68-69.

46. See *id.* para. 26, at 52.

47. *Id.* para. 31, at 53.

48. *Id.* para. 4, at 54.

49. *Id.* (Emphasis in original).

continuation.⁵⁰ The response of the U.S. delegate, Arthur Rovine, is interesting both for the contrast it provides with the contention in the RESTATEMENT (THIRD) about state practice, and for its inconsistency with the underlying assumption of the earlier position expressed in late Fall 1995 by the Clinton Administration in connection with Quebec's referendum on separation. Speaking in unqualified support of the ILC's draft Article 33(1)(a), Rovine declared, though without explicitly challenging the representations by the delegate from Turkey, that "in his delegation's view, Article 33 accorded with the bulk of international practice" and "rights freely accorded under a treaty should not be cut off because one State united with another, under Article 30, or separated into two or more parts, under Article 33."⁵¹ The delegate from Spain, Mr. Font Blazquez, without contravening the delegate from the United States, articulated his perception that Article 33(1) "did not accord with State practice, whereby the principle of continuity was applied to the dissolution of unions of States and the 'clean slate' principle to that of the typical cases of separation."⁵² Following that statement, the representative from the United Kingdom, Sir Ian Sinclair, further muddied the water by professing that in his nation's estimation "State practice in cases of separation of parts of a State was largely inconclusive, owing to the variety of circumstances under which such a separation might take place."⁵³ In addition he suggested that "State practice was not a wholly reliable guide and the international community must have regard to progressive development rather than codification in determining the basic rule."⁵⁴

Two other remarks, one by the representative of Sri Lanka, Mr. Breckenridge, provided at the 42d meeting, and the other by Sir Francis Vallat, Expert Consultant to the Vienna Conference, and Special Rapporteur for the ILC on its 1974 Draft Articles, provided at the 48th meeting, bear reference as well. Mr. Breckenridge's statement represented, not so much an assessment of general state practice and the precise rules of customary international law as an evaluation of the illustrations set forth in paragraphs of the commentary to the ILC's 1974 Draft Articles on Succession. He indicated that "it was clear from the analysis of State practice in paragraphs 26 and 27 of the commentary...that there was a fundamental difference between...[cases of separation and those of dissolution], and that in the case of separation the successor State generally tried to secure application of the 'clean slate' principle."⁵⁵ Vallat's statement was put forward in explanation of paragraph 3 of Draft Article 33, which allowed departure from the rule of continuity in instances in which separation of territory occurred under circumstances like those existing in connection with newly independent states.⁵⁶ The indications from him were that "[t]he rule stated in paragraph 3 of Article 33 was not based either on established practice or on precedent; it was a matter of the progressive development of international law rather than of codification."⁵⁷

50. *Id.* para. 14, at 58.

51. *Id.* para. 16.

52. *Id.* para. 26, at 59. *See also* identical remarks made by Mr. Font Blazquez at the 48th meeting of the Committee of the Whole, *id.* at para. 33, at 105, 108.

53. *Id.* para. 28.

54. *Id.* at 60.

55. *Id.* para. 53, at 70.

56. *See supra* note 33 (citing Article 33(3) of the 1974 Draft Articles).

57. *Id.* para. 10, at 105.

Both of these statements seem to support the view that those who offered them conceived international custom to be clean slate. Why would Breckenridge have suggested what he did had his impression been to the contrary? And would it not be reasonable to conclude that Vallat's impressions regarding Draft Article 33(3) imply that the custom in all situations of separation is that of clean slate? Whether the response is to the conclusion drawn from the statement of Mr. Breckenridge or of Sir Francis Vallat, there seems just as much reason to conclude that they do not hold implications of clean slate as the prevailing custom, as there is to conclude that they do. Breckenridge's statement is susceptible to being read as nothing but a commentary on the specific cases recounted in the two referenced paragraphs of the ILC's 1974 commentary. It need not be perceived as an evaluation of the entirety of state practice regarding separation of territory. And Vallat's acknowledgement that Article 33(3) reflects progressive development and not codification of pre-existing custom could be read as meaning that, in all cases of separation, irrespective of the fact they may involve territory in circumstances analogous to a newly independent state, the rule of continuity controls. The reality is that neither these two comments, nor those appearing elsewhere in the record of the Vienna Conference, definitively resolve the nettlesome question whether the language that ultimately became Article 34(1) of the 1978 Convention simply captured existing custom or established a rule binding only through the route of conventional international law.

IV. Practice Evident in Post-Cold War World.

The transformation of the Soviet Union into the Commonwealth of Independent States (CIS), the disintegration of Yugoslavia into separate national entities based on ethnic and historic animosities, and the split-up of the former nation of Czechoslovakia all cast light on the practice of states, and thus on customary international law, with regard to succession to treaties entered into by a predecessor nation. The official position taken by the United States government, at least with respect to the matter of succession in the context of the CIS and the countries comprising the former Yugoslavia, is based on a presumption that treaty relations remain in force with both continuing and new successor states.⁵⁸ Upon close analysis, this position appears to be founded more on consistency with United States foreign policy objectives, and the general interest in promoting stability in international relations, than on an understanding of what actual state practice supports as a customary rule of international law.⁵⁹ Some distinguished commentators have indicated the developments concerning treaty commitments of the former Soviet Union and the former nation of Yugoslavia suggest a strengthening of any notion within the international community that obligations of predecessor states be accepted by successors.⁶⁰ Others take the position

58. See Edwin D. Williamson & 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. 261 (1993).

59. Compare *id.* at 263 ("As a matter of practice, there are equally divergent approaches that have been employed with respect to treaty succession in this century.") with *id.* at 264 ("U.S. interests in maintaining the stability of legal rights and obligations are, on balance, better served by adopting a presumption that treaty relations remain in force.") and 271 (suggesting that with regard to Yugoslavia the rule of continuation would be to be applied whether the dissolution or break-away models of separation were used).

60. See generally, Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253 (1993).

that any indications of such derive largely from the special circumstances involved with those expired members of the world community.⁶¹ There is every reason to believe, however, that while the practice evident in the context of the CIS, the former Yugoslavia, and the Czech and Slovak Republics is instructive on the issue of state succession, idiosyncratic aspects of each situation undermine claims that the practice clarifies the customary international legal rules that would be applicable to Quebec in regard to succession to the NAFTA.

The events that shaped the transformation of the U.S.S.R. into the twelve republics of the CIS, plus the independent Baltic States of Estonia, Latvia, and Lithuania, occurred between August 1991 and late December of that same year.⁶² As the independent Baltic States could be considered sovereign nations that suffered under illegal occupation dating from 1940,⁶³ the only concern is the practice regarding succession by the twelve members of the CIS⁶⁴ to the treaty commitments of the former Soviet Union. On that score, the evidence suggests the United States considered each of the new states as successors to the international agreements of the U.S.S.R.⁶⁵ To the extent that the agreements related to specific subjects not within the purview of some of the new republics, or had territorial dimensions which limited the applicability of provisions to particular portions of the former U.S.S.R., exceptions to this general approach were recognized.⁶⁶ Support for the United States position was found in the fact that, in the so-called Alma Ata Declaration of December 1991, each republic proclaimed its commitment to the "discharge of the international obligations deriving from treaties and agreements concluded by the former Union of Soviet Socialist Republics."⁶⁷

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61. See generally, Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 VA. J. INT'L L. 299 (1993).
 62. August 1991 is instrumental, as it represents the time of the failed hard-line communist coup in Moscow and its precipitation of a series of declarations of independence from Soviet Republics and Baltic States. By early December of 1991, formal declarations of disintegration of the Soviet Union began to appear. And by late December, all former republics, with the exception of Georgia, agreed to join together to form the CIS. See Alma Ata Declaration, Dec. 21, 1991, reprinted in 31 INT'L LEGAL MAT. 148-49 (1992). See also Text of Declaration: 'Mutual Recognition' and 'an Equal Basis,' N.Y. TIMES, Dec. 22, 1991, at A12.
 63. On the historical background, see generally Rene Albrecht-Carrie, A DIPLOMATIC HISTORY OF EUROPE SINCE THE CONGRESS OF VIENNA 541-51 (rev. ed. 1973); Gregory Gleason, FEDERALISM AND NATIONALISM: THE STRUGGLE FOR REPUBLICAN RIGHTS IN THE U.S.S.R. (1990); Walter C. Clemens Jr., BALTIC INDEPENDENCE AND RUSSIAN EMPIRE (1991). On the idea of the legal position of these three states, see Mullerson, *supra* note 61, at 308-15.
 64. These republics are Ukraine, Armenia, Kazakhstan, Belarus, Kyrgyzstan, Moldova, Turkmenistan, Azerbaijan, Tajikistan, Georgia, and Uzbekistan.
 65. See *State Succession and Relations with Federal States*, 86 AM. SOC'Y INT'L L. PROC. 1, 10 (1992) (remarks by Edwin D. Williamson (Legal Adviser, U.S. Department of State) on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR).
 66. See Williamson & Osborn, *supra* note 58, at 266-67. Examples of the latter would include certain aviation agreements or fisheries agreements. Examples of the former would include agreements relating to a military or weapons capacity had only by certain republics.
 67. See Alma Ata Declaration, *supra* note 62, para. 14.
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The European Community was similarly inclined to allow succession by the new republics of the CIS to the treaties of the Soviet Union.⁶⁸ In fact, this inclination was supported by statements made by the chair of a conference of public international law legal advisers convened by the Committee of Ministers for the Council of Europe to address issues connected with state succession in the U.S.S.R. and Yugoslavia.⁶⁹ With regard to bilateral agreements, the chair indicated the approach which appeared acceptable to most delegates was the practical one that "States should arrive at a common list containing agreements which should apply between them," apparently despite the fact that this would involve succession for newly created states to agreements signed only by others.⁷⁰ Multilateral treaties were also viewed by some legal advisers in attendance as subject to the rule of continuity. Others took the position that this should depend upon the nature of the treaty.⁷¹ In attempting to capture the general consensus of the group, the chair indicated that, in connection to multilateral agreements, while succession was a distinct possibility, "a new State should make a declaration of succession in order to avoid a legal vacuum."⁷²

Clearly, though the practice of the United States and the E.C. in relation to the CIS suggests a favoring of the rule of treaty continuation, there are reasons to wonder whether it buttresses claims that such represents custom. First, to the extent that reliance is placed upon succession by the republic of Russia, questions of relevancy exist in connection with succession by Quebec. If Russia succeeds because of being the continuation of the former Soviet Union,⁷³ this provides little justification for claiming a break-away Canadian province is entitled to succeed to NAFTA.⁷⁴ Second, focusing on just the other eleven republics of the CIS, neither the United States nor the E.C. appears to have operated on a presumption of instantaneous succession.⁷⁵ In the United States, the Department of State's

68. See Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," Dec. 16, 1991, reprinted in 31 INT'L LEGAL MAT. 1486-87 (1992). The Declaration affirms the E.C.'s readiness to recognize those new states which "have accepted the appropriate international obligations." Since these presumably include those of the predecessor state, there would seem to be a belief that new states succeed to the international commitments of predecessors.
69. See Committee of Legal Advisers on Public International Law for the Council of Europe, Extraordinary Meeting (Jan. 16, 1992), and 4th Meeting (Sept. 14-15, 1992) cited in Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?*, 23 DENV. J. INT'L L. & POL'Y 1, 8, n. 43 (1994). Williams served as attorney-adviser, Office of the Legal Adviser for European and Canadian Affairs, U.S. Department of State, from 1991-1993.
70. Committee, *supra* note 69, at 5.
71. *Id.* at 3.
72. *Id.* at 5.
73. See George Bunn & John B. Rhinelander, *The Arms Control Obligations of the Former Soviet Union*, 33 VA. J. INT'L L. 323, 330 (1993); Mullerson, *supra* note 61, at 302-08.
74. In the context of the CIS, Russia continues as the original predecessor state and is perceived as obligated on that basis. In the context of Quebec, however, the pared-down version of the predecessor state of Canada continues, and the separating state is the one argued to be fixed with the obligations of the former.
75. However, there can be no doubt, at least with regard to the U.S., that some sort of presumption of continuity existed. See Williamson & Osborn, *supra* note 58, at 264. While the idea of a presumption suggests that a particular consequence follows from some factual arrangement, assuming certain circumstances are subsequently determined to be or not be present, instantaneous succession would mean that a new state succeeds to a predecessors treaties upon statehood.

official listing of Treaties in Force for 1993 can be seen as not conclusive in carrying over all of those international commitments of the U.S.S.R. to which one might expect succession of such a nature to apply.⁷⁶ Further, both the United States and the E.C. linked full diplomatic relations with the issuance by the new republics of declarations promising adherence to the U.S.S.R.'s treaties;⁷⁷ a peculiar position if succession were presumed to follow statehood as a matter of course.⁷⁸ Third, since the United States' view about succession was based, at least in part, on the strength of the Alma Ata Declaration,⁷⁹ this document also contained language which provided that the twelve new states' promise to fulfill the U.S.S.R.'s treaties operated only to the extent the promise was "in accordance with...consti-

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76. To illustrate, U.S. DEP'T OF STATE, TREATIES IN FORCE 6 (1993) (regarding the nation of Armenia), lists four bilateral agreements entered into between the United States and the new republic following its recognition in late December of 1991. In excess of one hundred bilateral and other agreements with the Soviet Union are listed in U.S. DEP'T OF STATE, TREATIES IN FORCE 247-251 (1992). Nonetheless, the 1993 listing does preface the specific identification of the four bilaterals with language providing: "For agreements prior to December 31, 1991, see UNION OF SOVIET SOCIALIST REPUBLICS." The implication might seem to be that all such agreements continue to the new republics. Complicating the drawing of that conclusion is the fact that, under the listing for the Union of Soviet Socialist Republics, *see id.* at 252-57, prefatory language preceding the listing of agreements indicates "[t]he United States is reviewing the continued applicability of the agreements listed..." and that the Russian Federation—republic of Russia—has committed itself to continuing the agreements of the U.S.S.R. As observed in Williams, *supra* note 69, at 33-34, the first suggests that the Department of State may ultimately conclude that the treaties of the Soviet Union do not carry over to the new republics; the second that only Russia may wind-up being held to all such treaties. Admittedly, however, the final result may be to hold only Russia to those agreements of the U.S.S.R. which having neither topic or territorial connection with the other republics, and hold each of the twelve republics to those agreements not peculiar to Russia alone. In any case, the clarity of the situation leaves much to be desired in the context of a search for state practice which could help to solidify a customary rule.
77. For the E.C. position, *see* Declaration on the "Guidelines," *supra* note 68, at 1487, providing that "[The members of the E.C.] affirm their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, accepted 'appropriate international obligations....' The U.S. position appears in a series of communications between President Bush and the leaders of the various republics of the CIS. *See* Williams, *supra* note 69, at 24-28, discussing the exact wording of those communications and their conditional nature regarding the establishment of diplomatic relations.
78. Surely the idea was not that the new states were regarded as bound by the obligations of treaties entered into by the Soviet Union, but were entitled to invoke the benefits of such only after officially declaring an intention to honor the commitments of the predecessor state. If only obligations were covered by the presumption of succession, representations about such would have been disingenuous. In the event succession were truly instantaneous, then the new states would have taken on both the burdens and the benefits of treaties of the U.S.S.R., and there would have been no need to condition the establishment of diplomatic relations upon a declaration of preparedness to honor such treaties. Linkage between treaties and diplomatic relations would certainly seem inaccurate in the context of multilateral treaties, and even in the context of bilateral treaties, as the existence of full international relations seems a separate matter from that of the observance of treaty commitments.
79. *See* Williams, *supra* text accompanying note 67.
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tutional procedures.”⁸⁰ Set against the so-called Minsk Accords, issued two weeks earlier and unconditionally obligating Russia, Belarus, and Ukraine to the Soviet Union’s treaties,⁸¹ the Declaration seems substantially less than unequivocal.

Though the practice regarding succession to treaties by the states emerging from the disintegration of the former Yugoslavia is much the same as with the republics of the CIS, there is reason to question whether it serves to support any contention which Quebec might make to succession under the NAFTA. In terms of recent history, ethnic turmoil began to eat away at coherence within Yugoslavia in late December of 1990. Over a year and a half, the nation split into five separate states.⁸² The United States eventually took the position that the international agreements of the predecessor state of Yugoslavia were presumed to continue to each of the successor states.⁸³ In part, this was thought justified by the fact that, under the constitutional structure of the predecessor, each republic’s parliament had to ratify an international agreement before it was subjected to action by the federal parliament.⁸⁴ It appears that only Croatia and Slovenia have explicitly connected their successor status to formal assurances to the United States that Yugoslavia’s treaty commitments

80. *Id.*

81. See Agreement Establishing the Commonwealth of Independent States, *done in* Minsk, December 8, 1991, *reprinted in* 31 INT’L LEGAL MAT. 143-46 (1992). Article 12, *id.* at 145, provides: “The High Contracting Parties undertake to discharge the international obligations incumbent on them under treaties and agreements entered into by the former Union of Soviet Socialist Republics.”

82. These are the republics of Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, and Serbia-Montenegro. Slovenia voted for separation on December 23, 1990 and, with Croatia, declared independence on June 25, 1991. Macedonia conducted a similar referendum on September 8, 1991, and declared independence in November of 1991. Bosnia-Herzegovina followed suit in late February-early March of 1992. On April 27, 1992, the republics of Serbia and Montenegro formed the joint state of the Federal Republic of Yugoslavia, which they represented to be the continuation of the former nation of Yugoslavia. See Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia (Jan. 11 & July 4, 1992), *reprinted in* 31 INT’L LEGAL MAT. 1488-1526 (1992). All of the new states, except for Serbia-Montenegro and Macedonia, quickly were recognized by the United States and the European Union. Eventually, both the United States and the European Union recognized Macedonia. The problem regarding quick recognition had to do with the fact that the northern portion of Greece is also named Macedonia, and there was apprehension that recognition of a new state by that name could imply acceptance of some territorial claim to northern Greece.

83. See Williamson & Osborn, *supra* note 58, at 270-71 (U.S. position).

84. *Id.* at 271-72. It should be noted, however, that another major justification had to do with the U.S. view that the rule of continuation served international relations well, whether in situations of break-away states or the dissolution of a nation into separate national entities, and that it was suggested by state practice.

will be observed.⁸⁵ Further, despite claims by Serbia-Montenegro to the status as the continuation of Yugoslavia, neither the United States, the E.U., nor the United Nations have shown a willingness to recognize such a continuation.⁸⁶

The new Slovak and Czech republics were both formed effective January 1, 1993, on the basis of a late November 1992 law adopted by the Federal Assembly of Czechoslovakia.⁸⁷ The law acknowledged the complete extinction of the predecessor state, formed out of the Austro-Hungarian Empire after the First World War, and the succession by two newly formed independent states.⁸⁸ Though this stands in contrast to the claim of Serbia-Montenegro to the status as the continuing representative of the former nation of Yugoslavia, given the reaction to that claim by most of the world community,⁸⁹ it also places the two entities emerging from the former nation of Czechoslovakia in an identical position to the five states emerging from disappearance of the former Yugoslavia. Specifically, whether seen as arising out of the dissolution or the break-up of former nations, the new states exist where there is no continuation of the predecessor state itself.⁹⁰ Additionally, it

85. See Williams, *supra* note 69, at 29-30, discussing letters from Croatia, Slovenia, Bosnia-Herzegovina, Serbia-Montenegro, and Macedonia to the United States. The letter from Serbia-Montenegro speaks of "participation in international treaties ratified or acceded to by Yugoslavia." And the Bosnian letter indicates that it is "ready to fulfill the treaty and other obligations of the former SFRY." Serbia-Montenegro, however, offered participation in the context of it being the continuation of the state of Yugoslavia, a position most nations have rejected. See *infra* text accompanying note 86. Consequently, its commitment seems somewhat conditional. Note also that the Bosnian commitment is susceptible to being read as a promise standing apart from successor status. It apparently makes no reference to its readiness to fulfill Yugoslavia's commitments being based on its status as a successor to that nation. The situation with Macedonia is complicated by the desire of the U.S. to avoid unnecessarily irritating Greece. Nonetheless, assurances have been made by Macedonia to the United States regarding the treaty commitments of the former Yugoslavia. From the Williams study, however, *supra* note 69, it is unclear whether these have been explicitly associated with Macedonia's status as a successor. Given all of this, it would appear that only Croatia and Slovenia have explicitly so connected their commitments to adhere to Yugoslavia's treaty commitments.
86. See Chuck Sudetic, *In Disputed Region, Belgrade Foes Reject New Yugoslav State*, N.Y. TIMES, Apr. 29, 1992, at A10 (U.S. position); Committee of Legal Advisers, 4th meeting, *supra* note 69, at 2 (European position that Serbia-Montenegro not continuation, and all states equal); U.N. SCOR, 47th Sess., 3116th mtg. at 1, U.N. Doc. S/RES/777 (1992) (indicating Yugoslavia has ceased to exist and claim by Serbia-Montenegro to automatic continuation of its U.N. membership is rejected). See also Conference on Yugoslavia Arbitration Commission, Opinions No. 9 & 10, *supra* note 82, at 1523-26 (rejecting notion of Serbia-Montenegro as continuation of predecessor state). Implicit in the refusal to view Serbia-Montenegro as the continuation of the former Yugoslavia is the idea that all five new states are break-away republics emerging from a complete disintegration. On the request of the International Court of Justice to Serbia-Montenegro and the applicability of earlier Yugoslavian agreements concerning the genocide convention, see *Belgrade is Urged to Control Serbs*, N.Y. TIMES, Apr. 9, 1993, at A5.
87. See Constitutional Law on the Termination of the Czech and Slovak Federal Republic, art. 1 (Nov. 25, 1992); Stephen Engelberg, *Czechoslovakia Breaks in Two, To Wide Regret*, N.Y. TIMES, Jan. 13, 1993, at A1.
88. See Norman F. Cantor, *THE MODERN HERITAGE—WESTERN CIVILIZATION ITS GENESIS AND DESTINY: FROM 1500 TO THE PRESENT* 914, 940, 945 (1971).
89. See *supra* text accompanying note 86.
90. See Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 VA. J. INT'L L. 275, 289 (1993) (taking the position that there is no continuing state in context of Czechoslovakia).

must be observed that, as with some of the new states of the former Yugoslav nation, formal statements have been offered by both the Slovak and the Czech republic confirming the earlier international agreements of Czechoslovakia.⁹¹

There are two types of complications which make it difficult to view the continuation of the treaties of Yugoslavia and Czechoslovakia as supportive of the formation of a customary rule Quebec could invoke in the context of the NAFTA. First, as with the treaties of the former Soviet Union, there appears to have been no notion of instantaneous succession operating in the context of the new states arising from the collapse of Yugoslavia and Czechoslovakia. In the United States, the relevant volumes of *Treaties in Force* present essentially the same problem extant with regard to the republics of the new CIS.⁹² Similarly, the declarations offered to the United States by many of the new states, promising continued adherence to commitments of their predecessor, appear again to be intertwined with the securing of full diplomatic relations.⁹³ And additionally, several of the states emerging from the disintegration of the two former Communist-bloc countries have taken actions concerning predecessor state treaty commitments suggestive of a view inconsistent with

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91. See Williams, *supra* note 69, at 30-31 (discussing the content of an exchange of letters between the United States and the two new states).
92. For a review of the problem connected with the Soviet Union, see *supra* text accompanying note 76. On Yugoslavia, see U.S. DEP'T OF STATE TREATIES IN FORCE (1993)(bilateral treaties with Croatia are listed). With reference to carry-over treaties, it simply provides: "For agreements prior to the independence of Croatia, see YUGOSLAVIA." The same kind of language appears with regard to Slovenia. Under Yugoslavia, *id.* at 275, language comparable to that appearing in connection with the Soviet Union is used. Even U.S. DEP'T OF STATE, TREATIES IN FORCE (1995), the most recent volume at the time of the completion of this study, contains no listings for Macedonia, despite the fact of its recognition by the United States. See materials in Williams *supra* note 85 for discussion of fact all the new Yugoslav states, except Serbia-Montenegro, were recognized by the United States as of early 1994. Bosnia-Herzegovina is listed in U.S. DEP'T OF STATE, TREATIES IN FORCE (1994) with the same reference to YUGOSLAVIA appearing in connection with Croatia and Slovenia. On Czechoslovakia, see U.S. DEP'T OF STATE, TREATIES IN FORCE (1994). The Czech Republic appears, *id.* at 60, with the reference: "For agreements prior to the independence of the Czech Republic; see CZECHOSLOVAKIA." The same reference is used in connection with the Slovak Republic, *id.* at 229. Under Czechoslovakia, the headnote indicates that the country ceased to exist and was succeeded by the Czech and Slovak republics, and that "[t]he status of the agreements listed below is under review." *Id.* at 60.
93. See text accompanying notes 77-78 (discussing new republics of the CIS). The language of some of the declarations from the successors to Yugoslavia are reported *supra* note 85. For an examination of all of the letters, see Williams, *supra* note 69, at 28-30. These declarations responded to U.S. offers to extend diplomatic relations to the new nations of Croatia, Slovenia, Bosnia-Herzegovina, and Macedonia. The offers to the first three were dated April 14, 1992. The offer to Macedonia was dated February 4, 1994. The language of the declarations from the successor states to Czechoslovakia appeared in letters responding to January 1, 1993 offers to establish diplomatic relations. The language used by both new states indicated recognition of their status as successors to the predecessor nation, and that they are "committed to fulfilling the treaty and other obligations of the Czech and Slovak Federal Republic." See Williams, *id.* at 31.
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succession as a matter of course.⁹⁴ Secondly, and quite distinct from the situation involving the Soviet Union, there exists the important fact that, irrespective of whether the collapse of Yugoslavia and Czechoslovakia are characterized as examples of dissolution, separation, or break-up, none of the successor states is generally recognized as the continuation of the predecessor. While it might be accepted that the treaties of these two former nations have in practice carried over to the successor states, thereby imparting greater credence to assertions that the practice has ripened into a customary rule of continuation, it is not entirely clear that any such rule would have developed so as to necessarily extend to situations in which one of the successor states is a continuation of the predecessor. Perhaps the reach of the rule would be limited by the precise factual situations under which the practice occurred. In such an event, as a separation of Quebec from the rest of Canada would obviously leave a predecessor in place, a rule of continuation solidified by events surrounding the disintegration of Yugoslavia and Czechoslovakia would provide the Quebecois without much solace.

V. Exceptions to the Rule of Continuation.

The evidence considered in the preceding pages raises real and substantial problems for those who would argue international law is clear in selecting between a rule of continuation and a clean slate rule guiding inquiry into whether an independent Quebec would be entitled to succeed to the NAFTA. The perceptions of representatives to the 1972 and 1974 sessions of the ILC and to the 1977-78 Vienna Conference on Succession, as well as the recent practice of states relative to the post-Cold War reconfiguring of Europe's geo-political map, suggest a cautious approach to any claims of clarity concerning the exact parameters of the law.⁹⁵ However, even if one were to start from the highly tenuous position that Article 34 of the Vienna Succession Convention enunciates what was then or has subsequently become the customary international law, it would only seem appropriate to recognize that, beyond its rule of continuation stated in paragraph (1)(a), there is also present in

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94. For example, Slovenia deposited on September 7, 1992, an instrument of accession to the Convention Establishing a Customs Co-operation Council (1950), an agreement to which Yugoslavia was a party. See *Recent Actions Regarding Treaties to which the United States is a Party*, 32 INT'L LEGAL MAT. 598 (1993). Such is inconsistent with the idea of succession. Further, Croatia, on February 12, 1993, as well as the Czech and the Slovak republics, on September 27, 1993, deposited instruments of acceptance of the Statute of the International Atomic Energy Agency (1956), despite the fact both Yugoslavia and Czechoslovakia were states parties to the agreement. See *Recent Actions Regarding Treaties to which the United States is a Party*, 32 INT'L LEGAL MAT. 927, 1689 (1993). Again, unilateral acceptance is inconsistent with the notion of succession as a matter of course. Other examples exist. However, it must be noted that on occasion, instruments deposited with depository states or institutions regarding some international agreements have been styled instruments of succession.
95. But see CHARLES E. ROH, JR., CENTER FOR STRATEGIC & INTERNATIONAL STUDIES AMERICAS PROGRAM, THE IMPLICATIONS FOR UNITED STATES TRADE POLICY OF AN INDEPENDENT QUEBEC 8 (1995) (taking the position that "there is no serious legal argument that the United States must accept application of the...NAFTA to an independent Quebec"). Mr. Roh is a former Assistant U.S. Trade Representative for Canada and Mexico, and his study is one of the few published examinations on the trade implications of Quebec separating from the rest of Canada.
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paragraph (2)(b) the important proviso that it not appear "from the treaty or otherwise...that the application of the treaty in respect of the successor State...be incompatible with the object and purpose of the treaty or...radically change the conditions for its operation."⁹⁶ It may be recalled that in the context of the new republics of the CIS, the United States has taken the closely related position that continuation not apply to treaties dealing with subjects or territory not within the competence of a new state.⁹⁷

From the records of the 1974 session of the ILC, it appears the reference to "or otherwise" in the proviso which ultimately became paragraph (2)(b) was designed to allow the incompatibility or radical change tests to be applied in situations where the treaty thought to extend to the successor state contained no language suggesting non-extension. This reference appeared in Article 33(2)(b) of the ILC's 1974 Draft,⁹⁸ the predecessor to paragraph (2)(b) of Article 34. It found its way into the provision in response to The Netherlands observation that what was then Article 28 of the 1972 Draft Articles mentioned only language in a treaty itself as permitting refusal to continue to the new state the international commitments of the predecessor.⁹⁹ With this addition to the draft article, it became possible for evidence supporting the application of the proviso to be found in either the phraseology of the treaty of concern or to be established on the basis of materials or factors outside the very terms of the treaty.¹⁰⁰ In the context of Quebec and the NAFTA, though it may be contended words in the treaty implying the incompatibility of succession exist,¹⁰¹ the strongest arguments may be based on other indicia standing apart from what the NAFTA itself provides.¹⁰² In that light, the real significance is the meaning of Article 34(2)(b)'s concepts of incompatibility and radical change.

96. U.N. Doc. A/CONF.80/31, *supra* note 17.

97. See *supra* text accompanying note 66.

98. See *Report of the International Law Commission*, *supra* note 28, at 260.

99. See *Succession of States in Respect of Treaties*, U.N. Doc. A/CN.4/278/ ADD.1-6, reprinted in II Y.B. INT'L L. COMM'N 1, 71 (Pt. 1) (referencing page 69 at para. 390), and paras. 414-15, at 72 (1974).

100. See *id.* para. 415, at 72 (mentioning as one other source "the instrument of ratification").

101. See Roh, *supra* note, 94 at 14-15 (relying on the use in NAFTA's Preamble of the word "Canada" and its definition in Annex 201.1, and the inclusion of an accession mechanism in Article 2204 (1) and (2), for the view that the treaty itself contains terminology incompatible with succession). Arguments of this character draw upon the language in Article 34(2)(a) of the Vienna Succession Convention referencing the inapplicability of the rule of continuation in cases where such would be inconsistent with the terms of the treaty to which succession is to apply.

102. Reliance on the fact that the NAFTA applies to "Canada" and then defines that in a way which, necessarily, would exclude Quebec in the event of separation, begs the question of whether the treaty contains language incompatible with succession. After all, every treaty which indicates that it applies between named countries would be affected in the event territory separates from those countries or the countries themselves, by name, cease to exist (e.g., Czechoslovakia or Yugoslavia). Nor does it seem acceptable to infer that the presence of an accession provision in a treaty means succession is incompatible therewith. The presence of such a provision can be explained as allowing nations not controlling territory under the sovereign authority of extant states party to commit themselves to the treaty's terms. It need not be understood as having but a single meaning—succession is inoperative.

This language appeared in numerous provisions of both the 1972 and 1974 ILC Draft Articles.¹⁰³ However, since the 1972 Draft apparently applied a clean slate rule to states formed from the separation of territory,¹⁰⁴ when the language is used in article 28, the draft predecessor to Article 34 of the Succession Convention, it is not used in reference to a separating state escaping treaty commitments of a predecessor. Rather, it is used in reference to the state separated from being able to escape some of its commitments relating to the territory that has separated.¹⁰⁵ Given this, the most relevant official commentary on the language of the proviso is that accompanying Article 33(2)(b) of the 1974 Draft. Unfortunately, that commentary did not elaborate on the interpretation of the incompatibility and radical change tests.¹⁰⁶ Nonetheless, the commentary to Draft Article 14, which eventually became Article 15 of the 1978 Succession Convention¹⁰⁷ (the provision addressing the "moving treaty-frontiers" rule)¹⁰⁸ did offer some insight on identical language appearing therein. This was done by drawing on the ILC's commentary to one of its 1972 provisions explaining incompatibility and radical change as coming from the 1969 Vienna Convention on the Law of Treaties (Treaty on Treaties).¹⁰⁹ The Commission also offered that, while the same two tests were used elsewhere in the draft Succession Convention, the explanation provided in the context of Article 14 of the 1974 version would not be repeated, and the concept of radical change was "an adaptation" of the Treaty on Treaties idea of fundamental change of circumstances.¹¹⁰ The clear suggestion is that, no matter where it is used throughout the 1974 Draft Articles, including in Article 33(2)(b), incompatibility and radical change (i.e., fundamental change in circumstances) have much the same meaning they have in the 1969 Treaty on Treaties.

Five basic conditions are specified in Article 62(1) of the Treaty on Treaties¹¹¹ for use of the idea of fundamental change in circumstances as a ground for escaping obligations under an international commitment. These conditions are: (1) a change that is fundamental, (2) affecting the circumstances existing at the time the treaty was concluded, (3) involving facts not foreseen at that time, (4) the facts constitute an essential basis of the consent to be bound, and (5) the change therein radically transforms obligations still to be performed.¹¹² The rigor inherent in these criteria is exemplified by the tough interpreta-

103. For the 1972 Draft, *see* arts. 25, 26, and 27. For the 1974 Draft, *see* arts. 14-18, 26, 29-34.

104. *See supra* text accompanying notes 25-38.

105. *See* art. 28 (1)(b), ILC's 1972 Draft Articles, *Report of the International Law Commission on the Work of its Twenty-Fourth Session*, U.N. Doc. A/8710/REV.1, reprinted in II Y.B. INT'L L. COMM'N 219, 223 and 295 (1972).

106. *See Report of the International Law Commission, supra* note 28, para. 31, at 266.

107. Art. 15, U.N. Doc. A/Conf.80/31, *supra* note 17.

108. Rule dealing with situations in which one already existing nation gains territory previously under the sovereignty of another nation.

109. *See* U.N. Doc. A/CONF.39/27, 63 AM. J. INT'L L. 875 (1969), entered into force Jan. 27, 1980.

110. *See Report of the International Law Commission* (1974), *supra* note 27 paras. 13-14, at 210; *Report of the International Law Commission* (1972), *supra* note 104, at 292 (discussing draft article 26 (1)(a), which uses incompatibility and radical change).

111. *See supra* note 109, at 894-95.

112. *Id.*

tions attributed by international adjudicative bodies to some specific elements. It has been said that a change is fundamental when it "imperil[s] the existence or vital development of one of the parties,"¹¹³ and radically transforms obligations when it increases "the burden...to be executed to the extent of rendering the performance something different from that originally undertaken."¹¹⁴ Incompatibility with the object and purpose of an international commitment is not addressed in the 1969 Treaty with the same degree of clarity as changed circumstances. Article 61(1), however, provides some assistance.¹¹⁵ It addresses the topic of supervening impossibility as a grounds for terminating or suspending a treaty, and basically states that it may be invoked if there is a "permanent disappearance or destruction of an object indispensable for the execution of the treaty."¹¹⁶ Again, the standard is extremely rigorous. It appears to deal only with those situations in which an element central to the treaty commitment itself is irretrievably lost or eliminated.¹¹⁷

When the 1977-78 Vienna Conference on Succession of States in Respect of Treaties¹¹⁸ considered the ILC's 1974 Draft Articles, it spent very little time, in its discussion on article 33, with the intricacies of incompatibility and radical change. The principal matter of debate concerned the advisability of the ILC's proposed rule of continuation in cases of separation of parts of a state, not the exceptions contained in paragraph (2)(b).¹¹⁹ In fact, records for the meetings of the Committee of the Whole indicate that, while several delegates referenced the incompatibility and radical change tests appearing in that paragraph,¹²⁰ substantive comments were offered by representatives of just two countries, with only the comments from the 41st meeting offered by the U.S. delegate, Mr. Rovine, casting any light on the meaning of the tests.¹²¹ Rovine inquired "why, under the terms of [Article 33] the vast bulk of nations should forgo their rights under...treaties."¹²² He indicated that

113. See *The Fisheries Jurisdiction Case (U.K. v. Iceland)*(1973), I.C.J. 3, 19 at para. 38.

114. *Id.* para. 43, at 21.

115. See *supra* note 109, at 894.

116. *Id.*

117. See Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 541 (1970)(indicating the ILC used as illustrations of art. 61 "the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty").

118. See *supra* notes 39-41 (official records of Conference).

119. See the records of the 40th, 41st, 42d, 47th-49th meetings, II Off. Rec., *supra* note 40, at 52-56, 57-63, 63-71, 103-05, 105-09, and 109-10, respectively.

120. See, e.g., Mr. Gorog (Hungary), *id.* para. 54, at 56 (40th mtg.); Mr. Rassolko (Byelorussian Soviet Socialist Republic), *id.* para. 10, at 58 (41st mtg.); Mr. Castren (Finland), *id.* para. 31, at 66 (42d mtg.); Sir Francis Vallat (Expert Consultant, and Rapporteur, 1974 ILC Draft Articles), *id.* para. 33, at 103 (47th mtg.).

121. The other substantive comment regarding Draft Article 33(2)(b) was offered by the representative of Guyana, Mr. Scotland, during the 42d meeting of the Committee of the Whole. The essence of the comment concerned the need for paragraph (2)(b), given his delegation's inability to conceive of an instance in which paragraph (2)(a)—excepting states arising out of separation from the rule of continuation in cases where the states concerned otherwise agree—would be insufficient to cover all situations that might surface. See *id.* para. 33, at 67.

122. See *supra* note 120, para. 17, at 58.

the terms of paragraph 2's proviso, which presume the continuation of treaties, was "entirely fair, if the rights of the vast majority of nations were compared with those of a single State which separated" from another.¹²³ The thrust of this uncontested intimation suggests that the incompatibility and radical change tests were not included as easy and readily available bases for avoiding international commitments of a predecessor state.¹²⁴ In any case, there is absolutely no reason to believe the delegates to the Vienna Conference on Succession of States thought the language of what was to become article 34 (2)(b) of the 1978 Succession Convention meant something different from the like concepts in articles 61 and 62 of the 1969 Treaty on Treaties. The ILC in 1972, and again in 1974, expressed this understanding of the language, and nothing indicates the Vienna Conference delegates desired to move in an opposite direction.

Article 34 (2)(b)'s reference in the 1978 Succession Convention to the notion of radical change, seem to mean complications exist in trying to show the rule of continuation would not operate upon an independent Quebec. Two complications spring readily to mind. The first is that the idea of a separate Quebec has been around since at least the 1970s and as early as May 1980, a decade before NAFTA negotiations commenced,¹²⁵ a provincial referendum on the matter was sponsored by the ruling government.¹²⁶ Given this, it would be difficult to persuade most that, at the time the NAFTA was negotiated, facts which could lead to separation were not foreseen. The second, but less acute, complication has to do with radical change (like fundamental change of circumstances) requiring a transformation of treaty obligations which renders performance different from what was originally agreed.¹²⁷ Separate and independent trading status would require additional attention be devoted to Quebec by the other NAFTA countries, however since it already participates in trade under the NAFTA, the burden for those countries of succession is unlikely to render performance essentially different from what was originally undertaken.¹²⁸ Far more vexing

123. *Id.*

124. There can be no doubt that Mr. Rovine supported the ILC's continuation approach with respect to states formed by separation, and that several other delegates disagreed and formally said so. However, no one specifically disputed his assessment of the rigorous nature of draft article 33 (2)(b).

125. See Ralph H. Folsom & W. Davis Folsom, UNDERSTANDING NAFTA AND ITS INTERNATIONAL BUSINESS IMPLICATIONS 120 (1996)(indicating the opening of "fast track" negotiations began in July of 1991).

126. See *Canada Tries to Get Back on Track*, *supra* note 11, at 1806 (Premier Parizeau's statement that Quebec will not wait 15 years again until the next referendum—referring to 1980 to 1995 period).

127. See *supra* text accompanying notes 113-114.

128. The requirements that the change in circumstances be of such a nature that they imperil existence or vital development (i.e., that they be "fundamental"), that they affect conditions existing at the time a treaty be concluded, and that they be to circumstances constituting an essential basis of the consent expressed in a treaty, see *supra* text accompanying notes 111-114, are much more capable of being shown to exist.

than these two complications is that change of circumstances is not an automatic, unilateral basis for suspending or terminating the application to some particular territory of a treaty or other international commitment.¹²⁹ Therefore, the best the NAFTA countries could ever claim under radical change is the right to call for non-application to Quebec of NAFTA's liberal trading regime, triggering Quebec's right to insist on authoritative dispute settlement.¹³⁰

With regard to article 34 (2)(b)'s reference to incompatibility with the treaty's object or purpose, any understanding of it as requiring disappearance or destruction of an object indispensable for the execution of NAFTA¹³¹ is likely to preclude its use to avoid succession by Quebec. Such an understanding erects a tough condition that is not easily met in cases in which the only matter is the application of liberal international trade and investment policies.¹³² Reading the term incompatibility so it includes inconsistency or conflict increases the potential for use in preventing an independent Quebec from accessing NAFTA. Nonetheless, since the precise language of paragraph (2)(b) speaks of incompatibility with "the" object or purpose, it would be essential to show succession as in conflict with the NAFTA's basic market opening goal. Proof that succession is inconsistent with one of the NAFTA's many constituent sector aims would be insuffi-

129. See *supra* note 108, at 895-95 (indicating that termination or suspension options under the Treaty on Treaties simply provides the invoking state with a right to call for such and submit the call to dispute resolution if contested). See also *The Fisheries Jurisdiction Case*, *supra* note 112 paras. 44-45, at 21-22. Admittedly, in the case of Quebec, it would be article 34 of the Succession Convention, and not article 62 (fundamental change in circumstances) of the Treaty on Treaties that would be in play. As article 34 (2)(b)'s reference to radical change is informed by article 62 of the Treaty on Treaties, it makes sense that if the latter only entitles one to call for suspension or termination, then the former should be subject to the same limitation.

130. See *The Fisheries Jurisdiction Case*.

131. See *supra* text accompanying notes 114-16.

132. By way of contrast, what if the concern was not over the mere extension to or by an independent Quebec of some favorable tariff treatment contained in NAFTA, but over the ability of the customs service of an independent Quebec to competently administer the trade liberalizations inherent in NAFTA. In a case in which an independent Quebec lacked officials with qualifications to appropriately implement liberalizations contained in a tariff and trade agreement like NAFTA, the benefits of the agreement could disappear or be destroyed by separation from the larger federal unit earlier administering such. Under circumstances of that sort, it would seem entirely inappropriate to expect the other NAFTA members to view Quebec as a successor to the rights of that agreement when the likelihood of receiving reciprocal treatment is non-existent.

cient. Furthermore, and consonant with recourse to the notion of radical change, invocation of incompatibility would simply set in motion dispute settlement concerning treaty succession. Automatic or unilateral action would be impermissible.¹³³

VI. Conclusion.

Whether the desire on the part of many Francophones resident in Quebec to see the province separate from the rest of Canada will become a reality anytime soon remains an open question. Pressure to move in that direction has continued to build in recent years, and the call within the Quebec National Assembly this past May for a third referendum on the matter highlights the acute nature of the situation. Just as the October 1995 referendum served to prompt facile statements regarding either the absence or presence of a right in an independent Quebec to succeed to NAFTA, one can be sure that the scheduling of another vote on the matter will stimulate the "public spirited" to again offer their insights. It seems that a strong case can be made that it is unclear whether customary international law provides to separating parts of a state a rule of continuation through which they can claim to succeed to treaties of the predecessor state. The exceptions to such a rule, assuming one is disposed to read state practice as establishing a right of continuation, have a clearer and more definite content. Nonetheless, in the context of Quebec and NAFTA, difficulties exist in relying upon incompatibility with the object or purpose of the treaty, or radical change in circumstances, as bases for denying that an independent Quebec has succeeded to what Canada negotiated with the United States and Mexico. It is not impossible to hypothesize a factual configuration that would allow denial. Even in such a case, however, automatic, unilateral action upon a denial would be forbidden.

133. It should be noted that when the 1972 and 1974 ILC reports discussed the meaning of incompatibility, as well as radical change, *see supra* text accompanying note 110, they made no distinction or differentiation between the tests on the procedural side. In fact, while neither the 1972 nor the 1974 ILC Draft Articles contained provisions on the settlement of disputes such as appear in articles 41-45 of the 1978 Succession Convention, when the delegates at the 1977-78 Vienna Conference on Succession of States took up consideration of the provisions, several indicated quite clearly direct linkage to ambiguities concerning incompatibility and radical change. *See, e.g.,* II Off. Rec., *supra* note 40 para. 2, at 85 (45th mtg., comments of Mr. Treviranus, Federal Republic of Germany). Given this, it would seem reasonable to expect that automatic, unilateral suspension or termination would be objectionable. As if to emphasize this very point, Article 41 of the 1978 Succession Convention provides that a dispute regarding the "application" of the Convention triggers consultation and negotiation obligations. While it may be contended that a dispute does not arise until after suspension or termination has occurred, in the event it were to be seen as arising whenever a state has decided, though not yet acted, to invoke incompatibility in circumstances in which another state clearly feels such would be inappropriate, Article 41 would require resort to consultation and negotiation. Article 42-45 provide for further more formal settlement devices.
