Post-separation Québec's NAFTA Accession: Un Blocage Permanent?

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Recommended Citation
Available at: https://scholarsarchive.byu.edu/sigma/vol15/iss1/4
Introduction

The world is becoming increasingly interdependent. As interdependence among states increases, so does the number and significance of international treaties. Treaties involve any number of states and can be political, economic, or both. Because the international system is not static, but is constantly shifting as states change in number and power, treaties are often tested by changes in circumstance. International law develops as treaty members establish customary precedent, solving dilemmas presented to them by changing circumstances.

The case of Québec and the North American Free Trade Agreement (NAFTA) provides an interesting example of this phenomenon. In this paper, I will address the status of an independent Québec relative to NAFTA. Doing this provides an illustration of the establishment of international legal precedent. First I will present a brief summary of Québec’s political and economic background. Next, I will analyze the separatists’ arguments and the NAFTA text. Finally, I will consider Québec’s probable course and briefly discuss its international law implications.

Background

On 17 December 1992, the United States, Canada, and Mexico signed NAFTA, forming the largest free-trade bloc in the world. This event is part of an international trend—freer trade through regional, multilateral treaties. Although discussion continues over the possible accession of additional countries, and President Clinton has expressed a desire to form a Hemispheric Trade Zone, additional NAFTA membership is unlikely, at least in the near future. For the time being and the near future, NAFTA will be a trilateral treaty between its original members.

At the time of the signing, there was great concern over Mexico’s socio-political stability. Many worried that Mexico’s unstable political system would be a detriment to NAFTA because of Mexico’s economy, which remains vulnerable to political turmoil. With such a focus on problems south of the U.S. borders, less attention was given to our northern neighbor, Canada. Ironically, the threat of politics adversely affecting economics, specifically the trade relationship, is currently greatest in Canada. Québec, a province of Canada, threatens secession, and their threat is becoming more and more serious. In 1980, a referendum on Québec secession lost, 60 percent voting against Québec sovereignty. In 1995, however, the margin of victory for the federalists was a mere 1.2 percent, 49.4 percent voting “yes” and 50.6 percent voting “no” on the secession issue (Farnsworth 1995, A-1).

Any political disturbance north of U.S. borders directly affects the United States because the U.S.-Canada trade relationship is the largest in the world. In 1995, this relationship produced $330 billion in trade (U.S. Department of State 1996, Internet). Québec is a major contributor to U.S.-Canada trade. In fact, Québec does more trade with many Northeastern states than the rest of Canada and Mexico together. The province’s 6.9 million people make up 25 percent of Canada’s population, and Québec is Canada’s largest geographic province. Québec’s geographic size represents great potential wealth because, according to the World Bank, 69 percent of Canada’s national wealth is in its natural resources (1992, Annex 1). Overall, Québec’s economy constitutes one fourth of Canada’s economic base (Bookman 1992, 54). Thus, it is certain that any change in the province’s political or economic structure, especially the sort that would result from secession, would reverberate south of the border. Actually, NAFTA assures such reverberations; some claim that a Québec secession would throw the U.S.-Canada and the U.S.-Québec trade relationship into a bind for five to ten years (Fry 1997).

Québec’s secession would not only involve internal costs, it would also be costly to the United States, Mexico, and the rest of Canada. Because trade involves mutual benefits, the lack of trade forfeits benefits; this is especially costly when people rely upon such benefits for their livelihood. If Québec trade was eliminated or seriously hindered, the entire market...
would suffer. In addition, a political-economic NAFTA crisis, even on a small scale, may drive investors away from the North American market, causing some to invest in Europe instead (Barnhart 1995). Even temporary exclusion and re-entry negotiations will involve significant costs for Québec and the entire North American market. Perhaps the Québécois accept these costs as the price of their desired freedoms.

SEPARATIST ARGUMENTS

The implications of Québec’s separation have not gone unconsidered by separatist leaders. Separatists—primarily leaders of the Bloc Québécois, Parliament’s opposition party, and the Parti Québécois, Québec’s majority party—counter the costly NAFTA exclusion argument with the proposal of an immediate post-secession Québec-Canada trade agreement. In fact, the text of the most recent referendum question conditioned separation on a Québec-Canada economic union. This, according to separatists would allow Québec to access Canada’s markets until full NAFTA access was negotiated. Following such negotiations, they claim, Québec would gain access to the agreement on terms similar to those is now enjoys.

The separatists make several assumptions in their arguments. First, they assume that a Canada-Québec free-trade agreement would be acceptable to Canada. Second, they assume that Québec will gain access to NAFTA. Finally, they assume that Québec’s eventual NAFTA access will be on terms similar to those currently enjoyed. These assumptions are questionable and may all be denied in the course of events.

The first separatist assumption, the possibility of a Québec-Canada trade agreement, is problematic. Québec’s secession would not please Canadians nor would it please Parliament. If such an action embitters Western Canada, a bilateral trade agreement will be less likely. Canada will retain its NAFTA membership and will not be as dependent on Québec’s trade, retaining at least three-fourths of its economic base. The Canadians may use this leverage to punish Québec or to secure concessions. For instance, the Canadian government is saddled with an immense debt, much of which they attribute to Québec. While the exact figure of debt that Québec is responsible for is unclear, Canada may grant Québec access to its trade markets only if the Québécois assume a large portion of the debt. Although Canada is in the stronger position, Québec brings some chips to the table as well. Concerning the debt issue, Québec could threaten refusal to pay for any of it unless a bilateral trade agreement were implemented. Another potential cost to Canada from excluding Québec is a devalued currency. Québec uses the Canadian dollar, and they claim they will continue to do so after separation. If Québec is uses the Canadian dollar and Canada continues to isolate Québec’s economy, Canada would, in a sense, be shooting itself in the foot. The probability of each of these events taking place remains in question; therefore, the validity of the first separatist assumption also remains in question.

The second separatist assumption, Québec will gain NAFTA access, is also uncertain. NAFTA’s accession clause requires unanimous consent, giving each member veto power. Thus, Canada could also prevent Québec from entering NAFTA. Québec could then turn to the United States for support, but such support may not be found because of U.S. concern over the larger trade relationship. The separatists argue that because of Québec’s robust economy and trade, they will be a natural NAFTA addition. While the strength of Québec’s economy may be obvious today, separation, involving currency and debt problems, may considerably weaken it.

The final assumption made by the Québécois separatists is Québec’s NAFTA accession, when it comes, will be on favorable terms—terms similar to those Québec currently enjoys relative to other NAFTA markets. This seems particularly unlikely for political and economic reasons. Each member-state has veto power, and it is certain that each state will use this power to secure concessions from Québec. Currently, NAFTA members grant several concessions to various Québécois markets. For example, the dairy farmers of Québec are protected by a set of import restrictions and tariffs (NAFTA 1992, Annex 703.2). This, according to dairy farmers of the Northeastern U.S., is driving them out of business (Fry 1996). Most of Québec’s industry fears any renegotiations because of probable added restrictions.
Each Separatist assumption is questionable. While they may hold true, there is no guarantee. It is certain that Québec will not have an easy road to NAFTA accession. Regardless of Québec’s present economic strength, future international political and economic factors may block Québec from becoming the fourth NAFTA member. Indeed, a sovereign Québec could encounter a blocage permanent from NAFTA.

NAFTA’s Text

Because NAFTA is a treaty among three nations, international law allows these three nations to formulate the treaty’s conditions, as long as they conform to prevailing international standards. The parties are not bound to give external states any concessions, or, in this case, access to the treaty’s benefits. This is an area of debate in international law, and, as regional trade blocs increase in number and importance, the debate intensifies. Turkey seeks membership in the European Union (EU), but EU members, for various political and economic reasons, will not allow Turkey’s entry. The case of Québec is unique because it will have unique status as a past key player on the inside that pushed for NAFTA’s creation and ratification. NAFTA, however, gives no special consideration to any outside state, even if the state was once a part of the agreement. Because NAFTA’s accession clause empowers its members, as does the EU’s, Québec may find itself in a similar situation to Turkey’s.

NAFTA defines the three original and current member-states by defining their territory. Canada is defined as the following:

The territory to which its customs apply, including any areas beyond the territorial seas of Canada, with-in which, in accordance with international law and its domestic law, Canada may exercise rights to the seabed and subsoil and their natural resources. (NAFTA 1992, Annex 201.1)

Thus, if Québec remains a part of Canada, even under a revised constitutional system, they will remain a part of NAFTA, and their trade relations will continue unchanged. If, however, Québec secedes, severing itself from Canada’s customs laws, it would no longer be a NAFTA member.

According to NAFTA, “A party may withdraw from [the] agreement six months after it provides written notice of withdrawal to the other parties. If a party withdraws, the Agreement shall remain in force for the remaining parties” (NAFTA 1992, Article 2205). There are no special clauses for state fragmentation. Thus, only the original member-government retains its membership, and only this government is bound by the six-month rule. Therefore, Québec will not enjoy six months of additional membership, and for the purposes of the treaty, nothing will have changed—the agreement will remain trilateral between its three original members.

External states must rely solely on member-states’ acceptance to gain NAFTA accession. The treaty’s accession clause states the following:

1. Any country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed between such country or countries and the Commission and following approval in accordance with the applicable legal procedures of each country.
2. This agreement shall not apply as between any Party and any acceding country or group of countries if, at the time of accession, either does not consent to such application. (NAFTA 1992, Article 2204)

The ambiguity and brevity of this clause leaves the preponderance of power and work to the NAFTA Commission, which will handle accession bids on a case-by-case basis.

The treaty empowers the Free Trade Commission. Article 2001 of NAFTA outlines the composition and functions of this commission. It is comprised of each country’s selected cabinet members or other designated representatives. Many duties are listed in the treaty’s text, some are obliged and others are optional. One requirement is that “all decisions of the Commission . . . [be] . . . taken by consensus, except as the Commission may otherwise agree” (1992). Each member’s possession of veto power does not increase the
likelihood of reaching a decision, especially on an issue as significant as accession with all of its economic and political ramifications.

The Institute for International Economics published NAFTA: An Assessment, reviewing certain elements of the treaty. In their discussion of their accession clause, they identify several flaws:

First, several of the industry-specific provisions of the pact (e.g., auto and textiles origin rules) were designed without reference to their possible extension to additional countries. Second, the three countries did not spell out either the application procedures or the criteria that new members would have to meet to join the club. In addition, each country remains free to form its own network of FTAs with other countries that do not wish to join NAFTA or are blackballed from NAFTA membership. (Hufbauer and Schott 1993, 114-15)

NAFTA's ambiguity on these issues is either a sign of a hastily constructed treaty or a set of intended loopholes. Because four years have passed since the treaty was first ratified and no changes have been made, it seems likely that these "flaws" are planned loopholes, providing flexibility.

This flexibility creates some interesting possibilities. First, the various concessions in the treaty, which were not drafted with additional members in mind, would certainly require amendment before more states gain NAFTA accession. For instance, if nations of the Caribbean Basin, a very low-cost textile producer, were admitted, current members would have to renegotiate portions of the agreement concerning textiles. The extent of such renegotiations is unclear and would depend on the situation. The United States has expressed a desire to avoid large-scale NAFTA renegotiations, and, if such negotiations would accompany a country’s accession bid, the United States would likely block it.

The second flaw, NAFTA's lack of specific requirements, allows politics to have a greater role in Commission decisions. In, Québec's case, this would probably be detrimental. Québec, even after an immediate post-secession recession, would likely meet any major requirements concerning economic strength. They will probably have a more difficult time winning unanimous Commission support for their accession bid.

The failure of NAFTA to restrict members from forming bilateral treaties in addition to the agreement could be the saving factor for Québec. Chile, another nation vying to be the fourth NAFTA member, currently has bilateral trade agreements with Canada and Mexico, allowing it access to a significant portion of the NAFTA market. If Québec formed bilateral agreements with either the U.S. or Canada, its economy would stabilize and could subsist even during an extended NAFTA exclusion period.

**SOVEREIGN QUÉBEC'S BID FOR NAFTA ACCESSION: UN BLOCAGE PERMANENT?**

There are many possible scenarios of a sovereign Québec seeking NAFTA accession. International law does not provide answers as Québec's case involves a dispute within an economic treaty that has not been tested in such a manner. Québec's situation as a new state seeking access to a trilateral economic treaty to which it was a party as a part of one of the charter members is unique, and this scenario is not addressed by the treaty. Thus, the results of Québec's NAFTA dispute will create new precedent.

Québec's first move following secession will be to apply with Canada for a Québec-Canada economic union. This union will benefit Québec because of trade and investment flows between the two nations, and it will ease currency-sharing dilemmas. Québec will face serious difficulties if it creates a new currency. Canada, however, will not enter into such an agreement unless Québec assumes a large part of the federal debt, perhaps larger than separatist leaders feel Québec is responsible for. Québec could also use the debt issue in an attempt to coerce Canada into an agreement by threatening to refuse all debt payment; however, this is unlikely as its negative effects on Québec's economic and political image would cancel any short-term economic gains.

If Canada does not allow a Québec-Canada economic union package, Québec will seek to form a similar agreement
with the United States and Mexico. Because there are no NAFTA restrictions against forming bilateral agreements, the dilemma faced by the United States would be whether agreement to such a treaty would damage U.S.-Canada relations. Out of frustration or anger, Canada could use political leverage and economic threats to block Quebec’s entry into a bilateral agreement with the United States. However, the Northeast relies heavily upon Quebec trade, and it is doubtful that the United States would sever such trade relations. In fact, Quebec is the U.S. eighth largest trading partner and tremendous cross-border investment links the regions (Nunez 1996, Lexis Nexis). Canada’s threats could be minimized by considering that a U.S.-Quebec agreement would probably not be enough to cause Canada to sever itself from the largest economy in the world. Thus, it is quite possible that Quebec would at least have access to the U.S. market through some sort of bilateral agreement. However, any agreement made by Quebec will be costly for the Quebecois. Renegotiations give states a time to assess the costs and benefits of agreements; when the renegotiations are between two parties not on equal grounds, the weaker party suffers. In this case, Quebec would suffer. NAFTA gives certain sectors of the Quebecois economy certain benefits and protections (NAFTA 1992); these protections would not last through renegotiations. Such incentives are usually mutually granted at the time of original treaty negotiation, but when one party already has these protections, reciprocity for the sake of being friendly is unlikely.

Once Quebec has secured a bilateral agreement, it will seek membership in NAFTA. A preceding bilateral agreement is significant for two reasons. First, NAFTA accession negotiations will take time, and a bilateral agreement will provide Quebec’s economy with some sustenance during that time. Second, because NAFTA’s accession clause is vague, with so much depending on the Commission, the favor of one or more members will be significant in negotiations.

The NAFTA accession clause states that a country can gain access to the agreement “subject to such terms and conditions as may be agreed between such country . . . and the Commission and following approval in accordance with the applicable legal procedures of each country” (NAFTA 1992, Article 2204). Quebec’s bid must pass through the Commission and meet the legal standards of each country. The NAFTA Commission is the central player in accession cases. The Commission consists of cabinet-level representatives from each member-state. Because all binding decisions of the Commission must be by consensus, each state has veto power. Canada will be able to block Quebec’s accession via the Commission. Quebec will have compelling arguments to make before the Commission. First is Quebec’s economic strength, placing them far ahead of any non-NAFTA countries in the Western Hemisphere (Nunez 1996, Lexis Nexis). Second, Quebec has always been an advocate of free trade. Both the Bloc Quebecois and the Party Quebecois were behind NAFTA, and their strong support made a difference in NAFTA’s successful ratification, compensating for the rest of Canada’s noncommittal attitude (Lexis Nexis).

In order to gain NAFTA accession, Quebec must obtain consensus and meet each member’s applicable legal standards. Meeting such legal procedures could include receiving congressional support and the support of the Canadian Parliament. Again, Canada will likely be the biggest obstacle. Parliament will be even less likely to support Quebec’s accession than the Commission members because it will be more representative of the views of the Canadian people, who are most likely to be embittered against Quebec. There is also some question over whether or not Canada will even recognize Quebec’s secession. Canada may declare Quebec’s claim of sovereignty unconstitutional. This would render parliamentary ratification impossible, and an international self-determination fiasco would ensue.

It seems that immediately following Quebec’s secession, Canada would act to punish Quebec, blocking their entry into trade agreements or, at least, requiring stiff terms of entry. In the long run, however, Canada could not afford to ignore the markets of Quebec. Ontario and Western Canada depend on trade with Quebec and investment in Quebec’s markets, and over time these concerns will likely prevail. For Quebec, the critical variable is the duration of the long run. A severance from all of NAFTA’s markets for five to ten years would cripple Quebec economically. Even a bilateral
agreement with the U.S. over this period of time would not be able to completely replace the trade Québec does with the rest of Canada. Unfortunately for Québec, there is no way to circumvent the Canadian Free Trade Commission veto. Québec could submit the matter to the World Trade Organization (WTO) or the United Nations (UN), assuming that Québec gains membership in these organizations. In these forums, they could argue that Canada is only blocking their NAFTA entry out of anger and frustration and that Canada’s actions are an unfair form of punishment. Québec’s legal case would be weak at best. Québec would not have any case at all until it had completely exhausted its options under the treaty, and this would take some time.

Secession from Canada will inevitably be costly to Québec. The price of statehood for the Québécois would be exclusion from the world’s largest free-trade agreement. Although it seems likely that Canada and the U.S. will eventually allow Québec to enter their markets via bilateral agreements and or NAFTA, this will only occur after political tensions have subsided; this could take ten years or more (Fry 1997). Thus, although Québec’s secession will not result in a blocage permanent from NAFTA, it will sever the region from its economic lifeblood for an undetermined period of time—a blocage significant.

CONCLUSIONS

Québec’s secession presents a new occurrence in the realm of international law. Never has a treaty such as NAFTA been faced with state fragmentation and a re-accession bid. The situation is especially interesting because of NAFTA’s vague accession clause. The Free Trade Commission will make the decision, which must be unanimous. Thus, if Québec does not have the good favor of all members, they will not gain accession to NAFTA. The dynamics of the international legal system will be especially interesting to watch should one state, Canada, for instance, block Québec’s entry for an extended period of time.

The precedent created by a sovereign Québec’s NAFTA bid will be of special interest to other nations of the Western Hemisphere. Chile, which has the support of two-thirds of the NAFTA members, if not already the fourth NAFTA member, will watch intently. Other nations will also watch and learn from Québec’s scenario as they make their own cases for NAFTA accession.

North America will not exclude Québec from NAFTA indefinitely; Québec’s markets are too valuable. Thus, the question is how long Québec’s accession will take. If Québec is blocked from NAFTA for an extended period of time, say ten years, the Québécois economy may whither; this would certainly have adverse effects on its neighbors. If Québec gains quick access, nations like Chile will argue their accession cases more vehemently, claiming some form of discrimination or unfair treatment. Such states may even call for an international tribunal or an arbitration panel under the WTO to rule on their right to NAFTA access. The possibilities are endless in the ever-changing field of international law. Thus, while Québec’s separation will not be an blocage permanent; it will be an blocage significant, resulting in new international legal precedent.

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