QUEBEC INDEPENDENCE AND UNITED STATES SECURITY: A QUESTION OF CONTINUING RIGHTS AND DUTIES

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> "You know, I've thought and thought, and I don't understand where one life ends and another begins."
>
> Janette Turner Hospital[1]

I. INTRODUCTION

Hospital might have been describing Quebec's succession as an independent state to pre-separation defense treaty obligations of Canada. Or she might have been thinking of a continuing relationship over time between any close friends and neighbors.

The United States and Canada are more than just good neighbors, sharing the longest undefended border in the world. We are also partners in mutual self-defense, combining strength of arms and strategic location against a sometimes hostile world outside the region. We stood together throughout the Cold War to deter aggression at home and abroad, and we stand together today to help keep the peace and promote other vital interests around the globe.

From the United States point of view, two good neighbors might be better than one. But it is important to try to think carefully about how U.S. national security interests might be affected by the separation of Quebec from the rest of Canada. (Defense implications for Canada are certainly no less profound, but lie outside the scope of this paper.)

The answer lies in the consideration of regimes, the central theme of this conference. We begin with the understanding that sovereign states are recognized as legitimate only by other states, and that, with some important exceptions to be noted herein, states are bound only by those international obligations to which they voluntarily agree. The secession of Quebec from Canada would require the unforming and reforming of various regimes (or relationships). I assume that a seceding Quebec would be recognized as a new state by other nations, including Canada (although the mechanics of separation

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1. JANETTE TURNER HOSPITAL, CHARADES 87 (1988).

are as yet far from clear). The reforming of relationships, at least for regional defense purposes, would be carried out by federal institutions (the national governments of the three surviving states), with very little direct input from those most affected by the change. The reforms would be guided by the rule of law, although law probably would not be the most important influence in determining the final shapes of those relationships.[2]

The purpose of this article is to try to determine whether an independent Quebec would be bound to discharge bilateral and multilateral defense obligations undertaken by Canada before secession and whether, in turn, it would benefit from existing defense arrangements. To help focus our analysis, we begin with a review of official government policies on Quebec separation, then briefly describe some of the most important current defense treaties and agreements. Next we examine competing theories of continuing responsibility for new states. At the end of the article we consider how all this might affect the behavior of an independent Quebec and the United States. The remarks that follow focus more on legal issues than on political or diplomatic considerations, recognizing that law may strongly affect both the conduct and the resolution of the debate.

II. IMPLICATIONS OF A QUEBEC SECESSION: OFFICIAL POSITIONS

As I began this inquiry, I spoke to an attorney I know on the Joint Chiefs' staff at the Pentagon. I was surprised to learn that no one in the U.S. Defense Department had conducted a study of the defense issues raised by an independent Quebec (or so I was told).[3] Similarly, a lawyer in the State Department Legal Adviser's Office of European and Canadian Affairs told me that no such study was "available." (I took that to mean simply that I could not see the study that had been done.) One of my research assistants, who is Canadian, got a "no comment" from the Office of the Prime Minister of Quebec.[4]

I should not have been surprised. The "mantra" repeated throughout the Clinton administration is that the United States should never anticipate and analyze hypothetical developments like the secession of Quebec. Such a study

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2. Political, strategic, and economic concerns are addressed in Rémi Hyppia, *An Independent Quebec in NORAD and NATO: A Long and Winding Road?*, AM. REV. CANADIAN STUD., Spring 1997, at 105; John S. Mikulaninec, *Some Thoughts on a U.S.-Quebec Defense Relationship*, AM. REV. CANADIAN STUD., Spring 1997, at 121.

3. My informant also remarked that the U.S. military had "more important things to worry about." Far from an insult to our Canadian and Quebecois neighbors, I took this comment as reflecting a conviction that our regional interests are inseparably coincident—all in the family, as it were.

4. *See generally* Hyppia, *supra* note 2 (describing the difficulty of discerning Quebec intentions).

would invariably be leaked, the argument goes, and the United States would be drawn unwittingly into a debate about the internal affairs of another state.[5] At a minimum, such U.S. expressions might be resented as meddling. More serious, official U.S. opinion could strongly and improperly influence the debate.[6] On the other hand, it would seem terribly irresponsible for the United States to watch the unfolding of such a dramatic political event on its border without at least drawing up contingency plans to address this nation's vital interests, even if it did not wish to influence the outcome.

In the Canadian and U.S. systems of government, even the gravest matters of state are seldom resolved without some public discussion–nor should they be.[7] Those of us outside the governments have a special contribution to make to the process of deciding, since we operate free of the diplomatic concerns and political constraints affecting those we have chosen to represent us.

III. U.S.—CANADA AGREEMENTS CONCERNING DEFENSE: WHAT ARE THE STAKES?

Throughout the 1950s and 1960s, the United States depended heavily upon its neighbor to the north to provide a first line of defense against–or at least fair warning of–a Soviet strategic attack across the Arctic.[8] That dependency waned as the two superpowers began to rely more on intercontinental ballistic missiles and less on long-range bombers to maintain their balance of terror, since the missiles are indefensible.[9] The deployment of sensitive surveillance satellites also reduced U.S. reliance on early warnings from Canadian stations.[10] More recently, the development by the Soviet Union of low-flying, long-range cruise missiles rekindled interest in land and aircraft–based early-warning systems.[11] The end of the Cold War made attack from the north seem much less likely, though certainly not impossible.

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5. Telephone Interview with Professor Joseph T. Jockel, St. Lawrence University (Apr. 28, 1997). *See also* David T. Jones, *An Independent Quebec: Looking into the Abyss*, WASH. Q., Spring 1997, at 21, 33.

6. For evidence that the United States has already tried to interfere, see Jones, *supra* note 5, at 31-32.

7. The implications of a Quebec secession were the subject of a recent U.S. congressional hearing. *See generally* Situation in Quebec: Hearing before the Subcomm. on the Western Hemisphere, House Comm. on Int'l Rel., 104th Cong. (1996), *available e.g.*, 1996 WL 556503, 548973, 546026 (F.D.C.H.).

8. *See generally* JOSEPH T. JOCKEL, SECURITY TO THE NORTH: CANADA-U.S. DEFENSE RELATIONS IN THE 1990S (1991) (analyzing North American air defenses at the end of the Cold War).

9. *See id.* at 1.

10. *See id.* at 2.

11. *See id.* at 2-3.

Still, we live in a dangerous and unpredictable world. The emergence of new threats–especially international terrorism and the flood of illicit drugs–only underscores the importance of regional military cooperation. An independent Quebec would not change that. Indeed, it should be as important to Quebec as to its neighbors to preserve arrangements that would keep it strong and secure.

Treaties addressing defense issues between the United States and Canada date at least as far back as the Rush-Bagot Agreement of 1817, which strictly limited the number, size, and armaments of naval warships on the Great Lakes and Lake Champlain.[12] Modern defense agreements deal with a wide range of issues, from navigation aids to telecommunications, and from the location of bases to overflight rights. Here we look briefly at just five treaties that would be of special concern to the United States and to an independent Quebec alike.[13]

A. NORAD

A succession of agreements, beginning with the Continental Defense Radar System in 1951,[14] provide for cooperation in the peacetime surveillance and control of airspace over Canada and the United States for air defense and missile warning. The most recent North American Aerospace Defense Command (NORAD) Agreement was concluded in 1981,[15] then extended at five-year intervals. The agreement calls for NORAD to monitor and report on space activities with strategic or tactical importance.[16] It also contemplates the deployment of U.S. military forces on Canadian soil under a coordinated

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12. *See* Rush-Bagot Agreement, Apr. 28, 1817, U.S.-U.K., 8 Stat. 231, as modified by "interpretations" found at 61 Stat. 4069 (1939), 61 Stat. 4077 (1940), 61 Stat. 4080 (1942), and 61 Stat. 4082 (1946).

13. Other treaties relevant to this inquiry include: Quarantine Inspection of Vessels Entering Puget Sound or Great Lakes via St. Lawrence River, Oct. 10 and 23, 1929, U.S.-Can., 47 Stat. 2573; Defense: Aerial Refueling Facilities, June 20, 1958, 9 U.S.T. 903 (permitting U.S. aerial refueling facilities in Canada); Military Overflights, September 16, 1932 (as extended and amended), Canada Treaty Series, 1932, No. 4 (permitting Canadian aircraft to fly over Maine when traveling between New Brunswick and Quebec); and various agreements concerning defense procurement and logistical support, e.g., Memorandum of Understanding Between the Department of Defense of the United States of America and the Department of National Defence of Canada Concerning Mutual Support, June 6, 1989, T.I.A.S. 11974.

14. *See* Agreeement on a Continental Radar Defense System, Aug. 1, 1951, U.S-Can., 5 U S.T. 1721.

15. *See* Agreement on North American Aerospace Defense Command (NORAD), Mar. 11, 1981, U.S.-Can., 33 U.S.T. 1277.

16. *See id.* at 1281.

command for the purposes of the agreement.[17] NORAD might be relegated to the scrap heap of the Cold War were it not for the continued existence of several thousand nuclear-tipped missiles in Russian arsenals, where they are managed by a restive, underpaid, and very secretive military force. Nor can we afford to forget about the growing nuclear capability of China, whose friendship we yearn for but whose unpredictability we rightly fear.

B. St. Lawrence Seaway

In 1952, Canada and the United States agreed to cooperate in the construction and maintenance of improvements to the St. Lawrence Seaway.[18] Canals and locks built and operated under the agreement provide better access to the Great Lakes system from the Atlantic. Both parties agreed to avoid placing "unreasonable restrictions" on the use of the Seaway, and to consult before adopting any rules that might affect shipping.[19] A number of later agreements deal with issues of maintenance and the collection of tolls.[20] The strategic importance of this waterway to the United States, and the need for Quebec's cooperation in keeping it open, should be obvious.

C. NATO

Canada, like the United States, has been a member of the NATO alliance since its founding in 1949,[21] and has long played a critical role in military affairs throughout the North Atlantic area. NATO's central purpose is to provide for collective defense against armed attack, using troops and equipment from member states.[22] In Canada, it provides the framework within which the NORAD agreement is implemented. Military forces of one member state stationed on the soil of another state are bound by rules set out in a 1951 Status of Forces Agreement[23] (and various bilateral arrangements) dealing with issues ranging from criminal jurisdiction, tort liability, and driver's licenses, to the wearing of uniforms.

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17. *See id.* at 1283-84.

18. *See* Agreements regarding the Saint Lawrence Seaway, June 30, 1952 and Aug. 17, 1954, U.S.-Can., 5 U.S.T. 1784.

19. *Id.* § 6.

20. *See, e.g.*, Agreement on Icebreaking Operations in the Great Lakes and St. Lawrence Seaway System, Oct. 28-Dec. 5, 1980, U.S.-Can., 32 U.S.T. 4334.

21. *See generally* North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

22. *See id.* arts. 3, 5.

23. *See* Agreement on Status of Forces, Jun. 15, 1951, 4 U.S.T. 1793, 199 U.N.T.S. 67.

D. Smuggling

A 1924 treaty dealing with the suppression of smuggling is of great contemporary importance to Quebec and the United States.[24] Drawn up during Prohibition, it calls for cooperation in the arrest and conviction of persons trafficking in narcotics or illegal liquor.[25] The United States and Canada promise to exchange information and to interdict vessels carrying contraband into either country.[26] This agreement is relevant to the ongoing "war on drugs" being waged by both nations, as well as to the detection of illicit arms shipments and international terrorists.[27]

E. Non-Proliferation of Nuclear Weapons

Finally, both Canada and the United States are parties to the Nuclear Non-Proliferation Treaty.[28] It is clearly in the interest of the United States to see that nuclear weapons are never deployed in Quebec, and it is equally important to Quebec to have the United States abide by its promise in Article VI of the treaty to pursue negotiations toward a nuclear disarmament.

If Quebec secedes, one scenario for the breakup of the Canadian military would leave existing forces substantially in situ. The Canadian army currently is divided into three parts, one of them entirely French-speaking and stationed in Quebec. Similarly, one of two Canadian Air Force divisions speaks French and

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24. *See* Convention on Suppression of Smuggling, June 6, 1924, U.S.-U.K., 44 Stat. 2097.

25. *See id.* arts. IV, V.

26. *See id.* arts. I, II.

27. The treaty on smuggling might have had some relevance to the so-called Oka crisis of 1990, when Quebec police and Kanesatake Mohawks exchanged gunfire in a protest over plans to develop a golf course on what the Mohawks claimed were ancestral lands. There was speculation that Indian protestors were armed with weapons brought in illegally from the United States. *See Police "Knew" About Oka Guns*, VANCOUVER SUN, Dec. 5, 1994, at A4; *Mohawks See Oka Stand as Pivotal in Rights Effort*, BOSTON GLOBE, Sept. 16, 1990, at 84; *Canada Shuns Quebec Dispute with Mohawks*, L.A. TIMES, July 15, 1990, at 10.

28. *See* Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature*, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (extended May 11, 1995, 34 I.L.M. 959).

is deployed in the Province of Quebec. If forces stationed in Quebec could simply put on new uniforms with the creation of a new state, their ability to carry out existing defense arrangements might be little changed on the most basic level. This possibility might have prompted a Bloc Quebecois member of Parliament to send an invitation to members of the Canadian military, just before the 1995 referendum, to join the army of an independent Quebec. But some called his action seditious.[29]

IV. THE INTERNATIONAL LAW OF SUCCESSION: STATES IN A STATE OF CONFUSION

The law concerning the obligations of new states is in a muddle. The only point on which all authorities seem to agree is that new states, like all others, will be bound by customary international law norms.[30] Beyond that, there are several competing theories about continuing responsibility, made more confusing by an uneven nomenclature.[31] Even more perplexing, actual state practice varies widely and may not correspond closely to any of the theories.[32] Moreover, states may claim that they subscribe to one or another theory while in fact they do something quite different.[33] My conclusion is that while the various theories may influence state behavior, practical political concerns probably play a larger role. An independent Quebec and the United States presumably would be driven by the same combination of forces in shaping their new relationship.

It is not my purpose here to try to describe all of the possible relationships growing out of the breakup or separation of existing states, except insofar as it may be important to help understand the different theoretical bases for Quebec's continuing obligation under Canadian treaties and agreements.[34] It

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29. *See Publication Ban Put on Sedition Case*, MONTREAL GAZETTE, Nov. 16, 1995, at A6; Diane Francis, *BQ's Press Release to Military Personnel Sounds Like Sedition*, FINANCIAL POST, Nov. 9, 1995, at 21.

30. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 669 (4th ed. 1990); RESTATEMENT (THIRD) OF THE LAW OF THE FOREIGN RELATIONS OF THE UNITED STATES § 210, cmt. i (1987) [hereinafter RESTATEMENT].

31. *See* RESTATEMENT, *supra* note 30, § 208, Reporters' Note 1.

32. *See infra*, text accompanying notes 42, 47.

33. *See infra*, text accompanying notes 64-69.

34. A flurry of articles and student notes following the breakup of the Soviet Union has done this job nicely. *See, e.g.*, Carsten Thomas Ebenroth & Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753 (1996); Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 VA. J. INT'L L. 299 (1993); Oscar Schacter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253 (1993); Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 VA. J. INT'L L. 275 (1993); Caroline S. West, *State Succession and Relations with Federal States*, 86 AM.

should be noted that while the emphasis here is on arrangements affecting the security of the United States and Quebec, the principles discussed will apply equally to other kinds of treaty obligations.

According to some authorities, the treaty obligations of a new state are based in part on the process by which that state came into existence.[35] At one end of the spectrum of possibilities, there is general agreement about the dissolution of a state into one or more new states, each of which was previously a separate sovereign state. The split-up of Sweden and Norway in 1905 provides a clear example. In such a case, it is thought that the component states in the dissolving union played an equal role in creating obligations undertaken while the new states were joined, and that they therefore bear an equal responsibility for discharging those obligations.[36]

At the other extreme, new states that were formerly colonies of European powers are said to be burdened by none of the treaty obligations of their former masters, since they had nothing to say about the creation of those obligations initially.[37] The principle of self-determination compels this result. Such states begin with a "clean slate," and they may create new international

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SOC'Y INT'L L. PROC. 1 (1992); 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 (1994); 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); Andrew M. Beato, Note and Comment, *Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 AM. U. J. INT'L L. & POL'Y 525 (1994); Sari T. Korman, Note, *The 1978 Vienna Convention on Succession of States in Respect of Treaties: An Inadequate Response to the Issue of State Succession*, 16 SUFFOLK TRANSNAT'L L. REV. 174 (1992); Lucinda Love, Note, *International Agreement Obligations After the Soviet Union's Break-up: Current United States Practice and Its Consistency with International Law*, 26 VAND. J. TRANSNAT'L L. 373 (1993); Marco A. Martins, Note, *An Alternative Approach to the International Law of State Succession: Lex Naturae and the Dissolution of Yugoslavia*, 44 SYR. L. REV. 1019 (1993). *See also* BROWNLIE, *supra* note 31, at 654-75; LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); D.P. O'CONNELL, THE LAW OF STATE SUCCESSION (1956); 1 LASSA OPPENHEIM, INTERNATIONAL LAW 156-69 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992).

35. See RESTATEMENT, *supra* note 30, § 210, Reporters' Note 4; Vagts, *supra* note 34, at 287-88.

36. The treatment of Sweden and Norway is described in ARNOLD D. MCNAIR, THE LAW OF TREATIES 612-15 (1961); *see also* Williams, *supra* note 34, at 14.

37. *See* Vienna Convention on Succession of States in Respect of Treaties, *opened for signature* Aug. 23, 1978, U.N. Doc. A/CONF. 80/31, reprinted in 17 I.L.M. 1488, 1496, 72 Am. J. Int'l L. 971 (1978) [hereinafter Vienna Convention], Art. 16. The rationale for this distinction is spelled out in RESTATEMENT, *supra* note 30, § 210, Reporters' Note 3.

relationships or pick and choose among existing ones to suit their new circumstances.[38]

In between the above two extremes are new states, neither originally independent nor colonial, that are thought to have played some significant role in the creation of existing treaty obligations with other states.[39] The assessment of continuing responsibility in this category, into which Quebec clearly falls, is more difficult. Indeed, within this intermediate category opinions vary widely.

According to the Restatement of Foreign Relations Law, each new state begins, regardless of the circumstances of its creation, with a "clean slate" on which to write new relations, unless both the new state and other states that are parties to existing treaties agree that rights and duties under those treaties ought to continue.[40] Preexisting boundary and territorial agreements, however, continue to be binding.[41] While the Restatement position has the great virtue of simplicity, some feel that it does not accurately reflect contemporary state practice.[42]

The 1978 Vienna Convention on Succession of States in Respect of Treaties,[43] by contrast, holds that a "successor" state, formed by the separation of territory from an existing state, inherits all the international privileges and obligations of the state from which it is created, provided those privileges and obligations concern the entire territory of the predecessor state or particular territory of the successor state.[44] However, if application of an existing treaty to a successor state would be "incompatible with its object and purpose or would radically change the conditions for the operation of the treaty," it will not be enforced.[45] Some feel that the Vienna Convention fairly reflects customary international norms.[46] Others insist that it merely contains various customary law rules useful for determining the continuation of treaty rights and duties, but that, like the Restatement, it does not reflect contemporary practice.[47]

Considering these authorities in light of recent state practice, one commentator argues that:

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38. Vienna Convention, *supra* note 37, arts. 17-30.

39. *See* RESTATEMENT, *supra* note 30, § 210, Reporters' Note 4.

40. *Id.* § 210(3).

41. *See id.* § 210(4).

42. *See, e.g.*, Williams, *supra* note 34, at 9-10.

43. *See* Vienna Convention, *supra* note 37.

44. *See id.* art. 34, para. 1.

45. *Id.* para. 2(b).

46. *See, e.g.*, MARIAN NASH LEICH, OFFICE OF THE LEGAL ADVISOR, DEPARTMENT OF STATE, 1980 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1041 n. 43 (1986), expressing the view of the State Department Legal Adviser that the Convention is "generally regarded as declarative of existing customary law."

47. *See* BROWNLIE, *supra* note 30, at 668; Williams, *supra* note 34 at 8, 17; RESTATEMENT, *supra* note 30, § 208, Reporter's Note 4. *See also* Vagts, *supra* note 34, at 294-96.

> 1) A successor state is neither clearly entitled to deny continuance of the treaty obligations of the predecessor state nor is it clearly obligated to fulfill all of the treaty obligations of the predecessor state; 2) There exists a presumption of continuity of treaty rights and obligations, but this presumption must be confirmed either by a binding action on behalf of the successor state or by an agreement between the successor state and the other party to the treaties.[48]

Although this approach ultimately leaves new states free to decide whether or not they will be bound, it provides a practical solution that may promote stability and predictability in existing arrangements.[49]

Under both the Restatement and the Vienna Convention, the duties of a new state under an existing treaty may be linked to location.[50] If the very object of a treaty is, for example, to enable one state to occupy a particular land area in another state, the treaty should be enforceable against a new state in whose territory that land is found.[51]

Treaty obligations that are more "personal" in nature may not be so easily preserved, since they are conceptually based more in contract than in property.[52] Thus, a mutual defense pact or economic covenant may not be binding on a new state that separates itself from one of the original parties to the treaty.

Almost all of these distinctions are flatly rejected by Professor Brownlie, who maintains that every new state starts with a clean slate.[53] Arguments to the contrary, he insists, are not supported by law or by the practice of states, and they belie the practical difficulty of drawing such distinctions in individual cases.[54]

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48. Williams, *supra* note 34, at 19.

49. *See* Schacter, *supra* note 34, at 258-60; Williamson & Osborn, *supra* note 34, at 264.

50. *See* RESTATEMENT, *supra* note 30, § 210; Vienna Convention, *supra* note 37, arts. 12, 34.

51. According to the Vienna Convention, however, the new state will not be bound by an agreement for the establishment of a foreign military base on its territory. *See* Vienna Convention, *supra* note 37, art. 12, para. 3.

52. *See* Schacter, *supra* note 34, at 255-56; MCNAIR, *supra* note 36, at 601. *See also* PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 113 (Jose Mico & Peter Haggenmacher trans., Printer Publishers 1995) (1972). This distinction was rejected by the drafters of the Vienna Convention, *supra* note 37. *See* 3 *United Nations Conference on Succession of States in Respect of Treaties* 94, U.N. Doc. A/CONF.80/16/Add.2 (1979).

53. *See* BROWNLIE, *supra* note 30, at 668-75.

54. *See id.*

Reviewing the theories just described, as well as state practice, the State Department's Legal Adviser declared in 1992 that "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. This view is consistent with our efforts to foster respect for the rule of law around the world."[55] He also indicated that exceptions to a "strict rule of continuity" should exist for a treaty "relevant only to the area" of one state, or for an agreement that it is "simply not feasible to continue on its terms."[56]

Recent (and ongoing) experience with the breakup of the former Soviet Union provides an opportunity to apply the distinctions just described, and perhaps to learn something about the possible consequences of a Quebec secession. As the largest and strongest of the new states, Russia has effectively assumed the bulk of the treaty rights and obligations of the former Soviet Union.[57] It is sometimes referred to as a "continuing" state.[58] Like Canada, it exercised complete control over the Soviet military and over the former superpower's foreign relations. (Ukraine and Belarus at least nominally conducted relations with other nations on their own behalf before the breakup;[59] they have no exact counterpart in modern Canada.) For the same reasons, the Canadian government after Quebec secession presumably would enjoy all the benefits and discharge the obligations of existing treaties, except for those related specifically to Quebec territory. The Baltic nations–Latvia, Estonia, and Lithuania–assumed none of the obligations of Soviet treaties, since they regarded themselves and were regarded by most of the world as unwilling partners in the Soviet system.[60] More like Quebec are such states as Kazakhstan, Armenia, and Uzbekistan. Each was unmistakably an integral part of the Soviet state, yet while none had an independent government or separate foreign relations, each has a distinct ethnic identity. Each agreed in the Alma Ata Declaration of December 1991 to assume the treaty obligations of the Soviet Union.[61] The State Department's Legal Adviser called the voluntary nature of the successor states' declaration the "most important factor" in assessing their continuing responsibility.[62]

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55. Edwin D. Williamson, *State Succession and Relations with Federal States: Remarks by Edwin D. Williamson*, 86 AM. SOC'Y INT'L L. PROC. 10, 12 (1992).

56. *Id.*

57. *See* Mullerson, *supra* note 34, at 302-08.

58. For concern that the Russian commitment to honor Soviet treaties may be less than absolute, see Williams, *supra* note 34, at 22-23.

59. *See* George Bunn & John B. Rhinelander, *The Arms Control Obligations of the Former Soviet Union*, 33 VA. J. INT'L L. 323, 330 (1993).

60. *See* Mullerson, *supra* note 34, at 308-10.

61. *See* text reprinted in *"Mutual Recognition" and "An Equal Basis,"* N.Y. TIMES, Dec. 22, 1991, at A12.

62. Williamson, *supra* note 55, at 12.

However, another former State Department attorney interprets the breakup of the Soviet Union quite differently.[63] In late 1991, he notes, the United States informed some but not all of the successor states that they were *obligated* by international law to abide by the treaty obligations of the Union of Soviet Socialist Republics.[64] But the United States then seemed to retreat from that position when it said it would require each new state *to agree* that it was so bound as a condition for the establishment of diplomatic relations with the United States.[65] Except for Belarus, each of the successor states responded either ambiguously or not at all to the U.S. demand, yet every one was granted full diplomatic recognition.[66] Thus, the United States abandoned its insistence that new states were automatically bound by existing arrangements, while it failed to insist that new states abide by the announced precondition for diplomatic recognition.[67] Despite its insistence on the stability of international commitments, in other words, the United States decided that other values were more important. To the extent that a commitment still exists to continue the treaties, according to this commentator, it may be viewed as a political rather than a legal commitment, and thus unenforceable except by political means.[68]

One way to temper the effect of a discontinuity is to create a "grace period" of several years, at the end of which any treaty obligations not expressly accepted by the new state would be regarded as terminated. This solution was adopted by several former East African colonies.[69]

Another possible meliorating tactic for treaty obligations not tied to any particular territory is to apportion them between the new state and the predecessor state. Thus, if a treaty called for the expenditure of large sums, the contribution of each state might be calculated according to the advantage it gained from compliance.

V. CANADA—U.S. DEFENSE TREATIES: HOW WOULD THE LAW OF SUCCESSION APPLY TO AN INDEPENDENT QUEBEC?

A spokesperson in the headquarters of the Parti Quebecois assured my research assistant that Quebec intended to honor each and every treaty commitment between Canada and the United States, "subject to future review if not in the interest of Quebec."[70] Despite this faint reassurance, one prominent

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63. *See* Williams, *supra* note 34.
64. *See id.* at 23.
65. *See id.* at 24-27.
66. *See id.*
67. *See id.* at 31-32.
68. *See id.* at 33.
69. *See* BROWNLIE, *supra* note 30, at 668-69.
70. The respondent spoke only on condition of anonymity.

commentator is convinced that Quebec separatists "have plausibly promised continued commitment to the NATO and the NORAD."[71] Moreover, far from being a threat in its own right, he says, "any Quebec military is likely to be small, lightly equipped, and focused on United Nations peacekeeping, as Quebec's interest in military security is marginal."[72]

The United States government obviously hopes that such a sanguine assessment is justified. Still, an independent Quebec–as sovereign state–clearly would want to judge its own interests and chart its own course in the future. All we know for certain is that the law and the policies underlying it, undergirded in turn by world opinion, would most likely influence the choices Quebec would have to make about its succession to Canadian treaty rights and duties. Therefore, it seems worthwhile to apply the principles outlined above to an independent Quebec and to existing treaty relationships in an effort to predict both Quebec's choices and the United States response.

If continuing responsibilities depend on the process by which a new state becomes independent, Quebec clearly would fall into that intermediate category between colonies, which invariably start with a clean slate, and formerly sovereign states, which succeed to all the obligations of their previous union. Arguing for succession, Quebec has had no fully independent government and no distinct foreign policy separate from that of Canada.[73] Arguing for a clean slate, on the other hand, the majority population in Quebec has a very distinctive linguistic identity, and Quebec's separation from Canada certainly would not be on terms agreeable to Canada. This is not the sort of case in which there might be said to be a voluntary transfer of sovereignty from the continuing state to the new state that would carry with it the treaty rights and duties of the former. By asserting its independence, Quebec might free itself not only from the control of Canada but also from existing entanglements with other states.[74]

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71. Jones, *supra* note 5, at 33.

72. *Id.*

73. In many respects, of course, the government of Quebec has acted quite independently from the rest of Canada in recent years. For example, its French language outdoor sign law helped provoke the constitutional crisis that led to the 1987 Meech Lake accord, see Peter W. Hogg, MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED (1988), which would have recognized Quebec as "within Canada a distinct society," and to the collapse of that accord in 1990. And while Quebec has had no comprehensive, separate foreign policy, it has participated in meetings of La Francophonie, a conference of the heads of state of 39 French-speaking nations. *Contemporary Quebec*, (visited January 7, 1998) <http://www.mri.gouv.qc.ca/introan.htm>. In addition, like other Canadian provinces, Quebec has negotiated hundreds of separate agreements with foreign nations on issues ranging from agriculture to transportation and the environment. *See Quebec in the World*, (visited January 7, 1998) <http://www.mri.gouv.qc.ca/monde/mondea.htm>.

74. *See* BROWNLIE, *supra* note 30, at 674. Some of the same factors that might be said to give Quebec a distinct "personality" for succession purposes are advanced as justifications for Quebec's right to secede from Canada, in Gregory Marchildon & Edward

Both the Restatement and the Vienna Convention indicate that obligations tied to the territory of Quebec would have to be honored by the new state.[75] Thus, the NORAD treaty should continue to bind Quebec, since the very object of the agreement is the location and operation of radar installations and other air defense facilities in particular places on Quebec soil (among others).[76] Similarly, the St. Lawrence Seaway agreements would be meaningless without reference to the river itself, a critical portion of which lies entirely within Quebec. Accordingly, unless we subscribe to Professor Brownlie's absolutist clean slate theory, an independent Quebec would seem to be bound by both agreements.

Concerning existing agreements applicable to Canada generally, the resolution is far less clear. The Restatement would bind a newly independent Quebec only if it elected to be bound.[77] The Vienna Convention, contrariwise, would require Quebec to assume all such obligations, unless such an assumption would be incompatible with the object and purpose of a treaty or would radically change the conditions for its operation.[78] Assuming that an independent Quebec would become a new member of the NATO (see below), succession to at least a portion of Canada's duties under the North Atlantic Treaty by Quebec would be perfectly consistent with the object and purpose of the treaty.[79] Likewise, as pointed out above, Quebec would have the strongest possible interest in continuing to honor the treaties on smuggling and non-proliferation, and so ought to be bound by their terms. While it is true that these three agreements are perhaps more "personal" or contractual in nature than those tied to a particular territory, an independent Quebec would not have a substantially different "personality" from the rest of Canada, at least for the purposes of these treaties.

Based on our experience with the breakup of the Soviet Union, we might expect the United States to apply a presumption that existing treaty obligations would continue in force, although it could, as with the former Soviet republics, ask Quebec to confirm its intent to adhere to those obligations. If Quebec voluntarily confirmed that intent, of course, it would only remain to decide whether its commitment was legal or merely political.

If it is decided that Quebec would be bound by existing treaty provisions, Quebec might nevertheless seek to abrogate those obligations according to the terms of a particular treaty or familiar principles of international

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Maxwell, *Quebec's Right of Secession Under Canadian and International Law*, 32 VA. J. INT'L L. 583, 608-19 (1992).

75. *See* RESTATEMENT, *supra* note 30, § 210, Reporters' Note 5; Vienna Convention, *supra* note 37, art. 34, para. 1. Cf. BROWNLIE, *supra* note 31, at 669.

76. Recall, however, that Vienna Convention, *supra* note 37, art. 12, para. 3, would free new states from obligations concerning foreign military bases on their soil.

77. *See* RESTATEMENT, *supra* note 30, § 210(4).

78. *See* Vienna Convention, *supra* note 37, art. 34.

79. *See supra*, text accompanying notes 22, 23.

law, although it would have to weigh the political costs of doing so. It might, for example, claim that separation from Canada represented a fundamental change in circumstances, unforeseen, that went to the "essential basis of the consent of the parties" to the treaty originally,[80] or that the new circumstances made it impossible to perform the treaty.[81] At least with regard to the treaties we have examined, neither of these grounds would seem to excuse Quebec from compliance. Thus, withdrawal would be unlawful, unless Quebec could demonstrate somehow that the original parties to the treaty "intended to admit the possibility of a denunciation or withdrawal" or the right of denunciation or withdrawal could be "implied by the nature of the treaty."[82] Only the NATO Status of Forces agreement explicitly provides for withdrawal,[83] and except for the agreement on smuggling, withdrawal would seem inconsistent with the purposes of the other pacts.

Whatever the law is concerning inheritance of rights and responsibilities under treaties, it has no application to membership in international organizations.[84] New states generally must apply for membership under the rules governing each organization.[85] Nevertheless, according to one former State Department Legal Adviser, membership might pass to a new state markedly different in territory or government from the original one, provided it inherits the "essential legal identity" of the former member.[86] Applying these principles, if Quebec secedes, Canada presumably would retain the seat it currently occupies in the United Nations, NATO, and the OAS, since it would continue to control the original seat of government, as well as the bulk of its original population and land area. It thus would emulate Russia when, in 1991, that state took over the United Nations seat previously held by the Soviet Union.[87] A newly independent Quebec, like the other former Soviet republics, would have to apply for admission as a new member.[88] Because each organization has important security powers and responsibilities, we might assume that Quebec would immediately seek to become a member, and that no other state would oppose Quebec's admission. As a practical matter, however, Quebec might have second thoughts about the financial burden of defending itself while trying to promote economic

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80. Art. 62 of the Vienna Convention on the Law of Treaties, adopted May 22, 1969, U.N. Doc. A/C. 3927 (1969), reprinted in 8 I.L.M. 679 (1969), provides this ground for termination by any party to a treaty.

81. *Id.* art. 61.

82. *Id.* art. 56.

83. *See* Art. XIX, 4 U.S.T. at 1818, 1820 (withdrawal upon one year's notice).

84. *See* BROWNLIE, *supra* note 30, at 672; RESTATEMENT, *supra* note 30, § 210, Reporters' Note 6.

85. *See* BROWNLIE, *supra* note 30, at 672.

86. Williamson, *supra* note 55, at 14.

87. *See* Mullerson, *supra* note 34, at 304.

88. Ukraine and Belarus are the exception, because they had retained seats in the General Assembly since its founding in 1945.

growth and reduce unemployment, and might instead seek an arrangement with Canada to provide for the new state's security.[89]

My guess is that if Quebec secedes, questions about its responsibility for existing treaty obligations, like its membership in the United Nations and other international organizations, will be resolved principally through negotiations and through the application of shared interests by all parties involved. Yet it seems likely that the legal principles outlined above will have a significant influence on the negotiations and on the outcome, even if they are not finally controlling.

89. Particularly onerous would be NATO's requirement that each member state devote a minimum of 2% of its gross domestic product to defense spending. *See* Jockel, *supra* note 8, at 184-87, 197-99; Hyppia, *supra* note 2, at 108-13.