LEGAL PERSPECTIVES ON THE PLACE OF AN INDEPENDENT QUEBEC IN THE NORTH AMERICAN AUTO INDUSTRY

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Automotive products represent one of the most important exports to the Quebec economy, yet the effects that independence would have on this crucial industry have failed to be studied. Currently, Quebec participates in the legal regime governing trade in auto products in North America through the Autopact, FTA, and NAFTA as a sub-federal unit in Canada.

Rules of public international law indicate that Quebec could not expect to participate in either the Autopact or FTA, thereby losing advantages accruing thereunder. Further, it seems unlikely that Quebec could negotiate its own Autopact to replace those advantages forfeited through independence. Eventual Quebec accession to NAFTA would likely be possible, though it would involve a negotiating process and would be neither immediate, nor automatic, as some have suggested.

Unless properly planned for, the transitory period following Quebec independence but preceding NAFTA membership could prove crippling for Quebec's auto industry, whether its exports were directed towards the U.S. or the rest of Canada. Furthermore, were Quebec able to join NAFTA, the regime created thereunder would likely offer fewer advantages than it currently enjoys, especially with respect to the ability to offer duty waivers and remissions to select manufacturers, and Quebec's ability to attract automotive industry investment would accordingly be hampered.

L'exportation des produits automobiles est une des plus importantes exportations de l'économie québécoise, pourtant les effets que l'indépendance pourrait avoir sur cette industrie capitale n'ont pas été étudiés. Actuellement, le Québec participe, en tant que membre de la fédération canadienne, au régime juridique qui régit le commerce des produits automobiles en Amérique du Nord, grâce au Pacte de l'automobile, à l'ALE et à l'ALENA.

Selon les règles du droit international public, le Québec ne pourrait pas s'attendre à devenir partie au Pacte de l'automobile ou à l'ALE et, par conséquent, il perdrait les avantages que ces accords lui procurent. De plus, il semble improbable que le Québec puisse négocier son propre Pacte de l'automobile pour remplacer les avantages que l'indépendance lui ferait perdre. Le Québec pourrait probablement adhérer à l'ALENA, mais il lui faudrait entreprendre des négociations et son adhésion ne serait pas immédiate ni automatique, comme certains l'ont prétendu.

À moins qu'elle soit bien planifiée, la période de transition qui suivra l'indépendance du Québec mais précédera son adhésion à l'ALENA pourrait s'avérer désastreuse pour l'industrie automobile du Québec, que ses exportations soient destinées aux États-Unis ou au reste du Canada. Par ailleurs, si le Québec était en mesure de devenir partie à l'ALENA, le régime qui en résulterait lui procurerait probablement moins d'avantages que ceux dont il jouit actuellement, notamment en ce qui concerne la capacité d'offrir des exemptions et des

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remises de droits de douane à certains manufacturiers. En conséquence, le Québec aurait beaucoup de difficultés à attirer des investissements dans le secteur de l'industrie automobile.

TABLE OF CONTENTS

I. THE IMPORTANCE OF THE AUTO INDUSTRY IN QUEBEC

On October 30, 1995, Quebeckers rejected, by the narrowest of margins, the sovereignist option proposed by the Parti Québécois. In the lead up to the referendum on sovereignty, past and present Quebec governments had commissioned various studies, some well know, but others mostly obscure, on the impact that Quebec secession would have on the local economy. Curiously, no efforts had been made to document the effects of Quebec independence on the auto industry, and this despite the recommendations of the *Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté* that

> L'analyse sommaire des relations commerciales d'un Québec souverain a fait ressortir l'importance d'études additionnelles permettant:
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> > {...}d'examiner les impacts de l'accession du Québec à la souveraineté sur certains secteurs *vulnérables* tels que le textile-vêtement, l'agro-alimentaire *et l'automobile*....[1]

The following, then, is an effort at fulfilling one of the recommendations of the *Commission*, which through either inadvertence, lack of interest, or wilful omission, the Government of Quebec seems to have failed to implement.

Despite having few high profile players, Quebec's auto industry has long been one of the province's biggest dollar value exporters. In 1994, for example, international exports (figures for export to the rest of Canada were unavailable at this writing) of automobiles and chassis lead all Quebec exports accounting for nearly $3.8 billion, while international exports in auto parts contributed $444 million to the province's economy. Corresponding figures for 1995, while down somewhat, were in the order of $3.4 billion and $452 million, respectively, making autos the number four dollar value export, and car parts Quebec's number 25 dollar value export for 1995.[2] Provincial employment in the industry is also substantial. Estimates suggest that roughly 11,000 jobs in Quebec are directly related to the manufacture and assembly of vehicles and parts.[3] A further 70,000 jobs in the province are related to sales, distribution and maintenance of vehicles, though it is generally agreed that the effects of Quebec secession would be felt mostly, if not exclusively on the manufacturing side of the industry.[4]

Therefore, even when abstraction is made of the value of exports from Quebec to

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[1] Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, *Partenariats économiques: les relations commerciales d'un Québec souverain* (Québec: Assemblée nationale, 16 January, 1992) at 13. [Emphasis added] TRANSLATION: "A summary analysis of the trade relationships of a sovereign Quebec reveals the need for additional studies... to assess the impact of Quebec's accession to sovereignty on certain vulnerable economic sectors such as textiles, agriculture and automotive goods."

[2] The Quebec Ministry of Industry, in its publication *Activités Conjoncturelles* 1996 (vol 6., no.3) attributes this decline to the weak demand for American automobiles and the reduction of production at GM's Boisbriand facility by one shift and 30,000 units.

[3] Québec, "Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté", in *Journal des débats*, no 33 (11 mars 1992) at 1089 [hereinafter CEAS].

[4] *Ibid.*

other Canadian provinces, the employment and gross domestic product generated by the industry in the province is sufficient to cause it to be a strategic industry, important in both economic and political terms. It is surely in consideration of these facts that the *Commission* recommended a study of the effects of Quebec independence on the local auto industry.

II. THE CURRENT REGIME OF NORTH AMERICAN TRADE IN AUTOS

The current legal regime governing North American trade in autos and parts is characterized by the overlay of successive trade agreements which have at once significantly modified the rules applicable to more recent participants joining the industry while substantially preserving the advantages of past regimes for established, powerful, indigenous manufacturers. Consequently, before one can competently address the question of where an independent Quebec might fit in this dynamic, an analysis of both the juridical regime governing the industry, and the political forces shaping, it must be undertaken.

A. *The* Autopact *of 1965*

Prior to 1965, Canada-U.S. trade in automotive products was not regulated by any particular agreement. A standard 17.5% MFN tariff[5] was applicable to all cars and parts entering Canada, except for engines and transmissions, which were assessed a 25% duty. The Americans maintained their own MFN tariff on auto products. Eager to expand the local industry, the Canadian government introduced a duty remission scheme whereby duty paid on parts imported into Canada could be reclaimed provided that certain export levels for completed vehicles were met by the importing manufacturer, and that these same vehicles met prescribed Canadian content or value-added levels. American industry participants considered this arrangement a subsidy to exports, and were calling for countervailing action. The subsequent negotiation of the *Agreement Concerning Automotive Products Between the Government of Canada and the Government of the United States*[6] consequently had as its impetus the aversion of a brewing Canada-U.S. showdown in automotive sector trade.

The terms of the agreement were quite simple. Canadian cars, original equipment parts, and semi-finished original equipment parts would enter into the U.S. duty-free, provided that foreign inputs or components, defined as those originating elsewhere than in Canada or the United States, did not constitute more than 50% of the value of the product destined for export to the U.S.[7] For its part, Canada would allow duty-free entry of automobiles imported *by a manufacturer*, a term specifically defined within the *Autopact*, as well as any original equipment parts used by a manufacturer in the production of automobiles in Canada.[8] In order to qualify as an *Autopact* manufacturer, an automobile producer had to (i) have been producing cars in Canada in the 1963-64 base year, (ii) produce cars in Canada in the year of import in proportion of not less than

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[5] The "Most-Favoured Nation Tariff" is a tariff imposed on goods originating in any GATT contracting party country, see *infra* note 34.

[6] 16 January 1965, Can T.S. 1966 No. 14 [hereinafter *Autopact*].

[7] *Ibid.* art. I(b) and annex B.

[8] *Ibid.* art. II(a) and annex A, s. 1.

the ratio of the value of units sold in Canada in the base year to the value of Canadian produced units in the base year, and in no case less than 75% of the total value of units sold by the producer in Canada, and (iii) ensure that Canadian "value-added" matched or exceeded that of the 1963-64 base year.[9] Additionally, manufacturers agreed, letters of undertaking filed with the Canadian Minister of Industry, to increase the Canadian value-added by 60% of any increase in sales in the Canadian market in any given year.

The principal consequences of the agreement were that, on the one hand, American manufacturers would be interested in qualifying for and maintaining *Autopact* status since it would allow rationalization of production across North America while circumventing duty on export sales to the Canadian market. The Canadian government, for its part, assured itself of a robust auto production industry with a strong export component, contingent, however, on continued Canadian consumer demand for *Autopact* manufacturers' products.

B. *Effects of the Canada-U.S. Free Trade Agreement*

The regime established by the *Autopact* continued unaltered until the 1989 adoption of the Canada-U.S. Free Trade Agreement.[10] The terms of this new agreement provide that the *Autopact* should be maintained,[11] though numerous other articles of the agreement point to a radically altered regime of Canada-U.S. trade in auto products. The thrust of these changes was to address American concerns that the Canadian government was using the *Autopact* and a new set of duty waiver schemes (not unlike the ones which had nearly provoked a trade row with the Americans in the 1960s) to attract Japanese transplant manufacturers to Canada to the detriment of the United States. In fact, in a letter of transmittal to the Speaker of the House of Representatives, then President Ronald Reagan, in enumerating the major accomplishments of FTA, stated that the agreement "Freezes coverage of the United States-Canada 'Auto Pact' and limits future Pact-like provisions; [and it] eliminates Canadian duty remission programs linked to performance requirements."[12]

While article 1001 of FTA boldly announces that the regime created by the *Autopact* is to be continued, the fact of the matter is that essential elements of *Autopact* treatment were preserved only in respect of North American companies, with the exception of Volvo, to whom the prior regime also continued to apply. For example, article 1002 of FTA provides that neither party may grant duty waivers in respect of auto products to firms not listed in Annex 1002.1. Those manufacturers listed in Part Two of the Annex would be eligible for export-based waivers of duty until 1998 at the latest, while manufacturers listed in Part Three would be eligible to receive production based waivers only through December 1995. The possibility of maintaining duty waivers, including of course, those conceded within the context of the *Autopact*, existed only in respect of those manufacturers enumerated in Part One of the Annex. While Part One manufacturers were comprised almost exclusively of indigenous manufacturers

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[9] *Ibid.*, annex A, s. 2(5).

[10] *Canada-U.S. Free Trade Agreement*, 22 December 1987, Can T.S. 1989 No. 3, 27 I.L.M. 281 [hereinafter FTA].

[11] *Ibid.*, art. 1001.

[12] Letter of President Ronald Reagan to House Speaker Jim Wright (July 25, 1988) Washington D.C.

having previously qualified for full *Autopact* treatment,[13] other foreign manufacturers having established a presence in Canada, most noteworthy among them Honda (with facilities in Alliston, Ontario), Toyota (Cambridge, Ontario), and Hyundai (Bromont, Quebec), were relegated to Parts Two and Three of the Annex. Since article 1002 of FTA effectively delimited and circumscribed *Autopact* application to include Annex 1002.1 Part One manufacturers only, the net effect was an implicit abrogation of article 3 of Annex A of the *Autopact*, whereby the Canadian government had reserved its right to extend *Autopact* treatment to new industry participants,.

To add insult to injury, article 1005 of FTA prescribed that the general rules of origin applicable to all products under FTA should be applied to automotive products entering the United States (including those products produced by manufacturers for whom *Autopact* status was to be maintained) as well as all vehicles and parts entering Canada not covered by the *Autopact*. As a consequence, manufacturers still had to meet 50% North American content requirements,[14] though now measured against a much more stringent standard of cost of all materials plus direct cost of assembling and processing.[15] Simply put, costs incurred in North America but related to administration or promotion and advertising would not enter into the North American content calculation, thus forcing manufacturers to spend more on North American parts and labour. Article 1005 did not affect the ability of *Autopact* manufacturers to import complete vehicles or component parts into Canada on a duty-free basis, regardless of levels of North American content or county of origin.

Whereas the *Autopact*, which had often been seen as a lop-sided deal favouring Canadian interests, had created a number of interesting incentives for foreign automakers to choose Canada over the United States as a North American manufacturing base, FTA could be seen as a "clawback" of these incentives on the part of the Americans. By eliminating duty remission schemes made available to the so called "transplant" manufacturers and subjecting them to more stringent rules of origin, foreign manufacturers employing high proportions of non-North American parts would almost always find it more prudent to establish new facilities in the United States, since, in the event that it failed to meet the prescribed North American content requirements, it would be hit with duty only on its Canadian export sales, not on sales to the U.S. market, which would likely be many times larger. However, while the auto provisions of FTA did strip Canada of potential future benefits related to increased transplant activity, it did preserve the essential elements of the *Autopact* which had established substantial export requirements for indigenous manufacturers operating in Canada.

C. *Forces Shaping NAFTA Negotiations and their Ramifications*

The first multilateral trade agreement dealing with the North American auto industry came in 1993 with the adoption of the *North American Free Trade*

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[13] In addition to the previously mentioned exception of Volvo Canada Limited, which has maintained facilities in Nova Scotia since before 1965, another exception was made in favour of a relative newcomer, CAMI Automotive Inc., though it is worth noting that CAMI was a Suzuki-General Motors joint-venture with facilities to be set up in Ontario for the production of Suzuki Sidekick and Geo Tracker vehicles.

[14] *Supra*, note 10 annex 301.2, 4(a).

[15] *Ibid.* art. 304, "value of the goods when exported to the territory of the other party."

Agreement.[16] Like its predecessor FTA, NAFTA, through incorporation of the *Autopact* and articles 1001 through 1005 of FTA,[17] purports to preserve the essence of the prior regime applicable to trade in the auto sector. While this, again, may be mostly true as concerns manufacturers which were listed in Part One of Annex 1002.1 of FTA, nothing could be further from the truth as concerns those manufacturers not benefiting from *Autopact* status.

At the time of NAFTA negotiations, voices within the American auto industry were calling for a more protectionist stance. The general feeling was that the 50% North American content requirement embodied in FTA had failed to adequately protect American interests.[18] Case in point,

> Imports now account for almost 30 percent of the U.S. market. For the first time, more than half of the passenger cars in the United States are being sold by companies other than the Big Three, if fleet sales are not included. The Big Three have closed seven plants over the past three years, while Japanese transplants have opened an equal number of plants in the United States.[19]

Faced with flagging market shares, U.S. manufacturers lobbied for new content rules requiring between 60 and 75% North American content before qualifying for duty-free treatment, as well as for the elimination of "roll-up" treatment for component parts (Under the "roll-up" created by Annex 301.2 of the FTA, a component part imported into an FTA member state and meeting the 50% North American content requirement, then subsequently incorporated into a larger good destined for re-export to the other FTA state would contribute 100% of its value, not just that proportion of the component part actually produced using North American inputs, towards the North American content of the larger product).[20] Given this concerted industry lobbying, and considering the relative bargaining strengths of the NAFTA parties, it is not surprising to see increased protectionism embodied within NAFTA. Pursuant to Appendix 300-A.1, article 1, the products of all manufacturers will be subject to the rules of origin provided

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[16] *North American Free Trade Agreement* (Ottawa: Queen's Printer, 1992) [hereinafter NAFTA].

[17] *Ibid.*, appen. 300-A.1, art. 1.

[18] See U.S. Representative Sander Levine (Mich.) in *Customs Enforcement of the Rules-of-Origin Provisions of the United States-Canada Free Trade Agreement* (Hearings before the Subcommittee on Trade and the Subcommittee on Oversight of the Ways and Means of the House of Representatives), 102d Congress, 1st Sess., October 16, 1991, Serial 102-67 (Washington: U.S. Government Printing Office, 1992) at 17 [hereinafter *Subcommittee Hearings*].

[19] *Ibid.*

[20] In testimony during the *Subcommittee Hearings, ibid.* at 89, John Eby, Executive Director of the Office of Corporate Strategy of the Ford Motor Company, indicated that Ford and Chrysler recommended the adoption of a 70% regional content threshold for duty-free treatment, while General Motors advocated a 60% threshold. In a separate presentation, the association representing American original equipment parts manufacturers recommended adoption of a 75% standard, as well as the elimination of the roll-up treatment, stating that "the NAFTA rule of origin provisions must be structured to eliminate or reduce opportunities for vehicle producers to count non-North American imported content used in North American manufacturing operations to show compliance with *NAFTA* rules. This loophole, known as 'roll-up', is a short-coming of the present FTA rules," (*ibid.* at 120).

for in Chapter 4 of the NAFTA text.[21] Article 402(8) establishes that "regional value content," or North American content, is to be calculated against total cost less sales, promotion, shipping, packing, royalty, marketing, after sales service, and certain interest costs, thereby creating a close proxy for FTA's "direct cost" measure. However, the big change comes at article 403(5)(a) which boosts required regional value content for duty-free treatment for automotive goods to 56% in 1998, climbing to 62.5% by 2002! Furthermore, article 403(1) eliminates the aforementioned roll-up treatment for automotive goods, though no effort was made to eliminate the roll-up in respect of any other class of complex manufactured goods. Clearly, American auto industry interests had prevailed in NAFTA negotiations, just as they had done previously in FTA talks.[22]

Consequently, the successive trade agreements have created a stratified regime of automotive trade in North America, with indigenous producers enjoying a place of preeminence and considerable influence. Additionally, the successive layers of trade agreements reflect a frittering away of Canadian advantages in the sector. Finally, the move from *Autopact* to FTA and ultimately to NAFTA represents a significant shift to multilateral "free trade" in autos and parts, even if NAFTA fails to completely govern the top tier of the industry occupied by the indigenous producers. Armed with this understanding of the mechanics of the North American auto trade, and those forces influencing the industry, we may now turn to an examination of the principles of public international law applicable to the instruments governing auto sector trade.

III. GETTING IN ON THE ACT: ACCESSION UNDER RULES OF PUBLIC INTERNATIONAL LAW

While article V of the *Autopact* preserved the possibility of negotiating other "Pact-like" agreements with third party countries for both Canadian and American governments, the actual agreement reached in Johnson City, Texas in 1965 was a purely bilateral affair. When one considers that the *Autopact* was a response to a particular set of circumstances existing exclusively within the context of Canadian-American trade, it is not surprising to note that the *Autopact* embodies no accession mechanism, and as such remains a closed treaty. Consequently, a third party country, such as an

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[21] Note, though, that the ability of indigenous manufacturers to import cars and parts into Canada within the terms of the *Autopact* remains unaffected under NAFTA, as per Annex 300-A.1, art. 1 of NAFTA, *supra* note 16, which preserves their special treatment in conformity with art. 1005 of FTA, *supra* note 10.

[22] Should the reader doubt the political clout of the U.S. industry lobby, or doubt its ability to shape international trade deals, annex 403.3 of the NAFTA, *supra* note 16 text should put all doubts to rest. CAMI Automotive, having failed to qualify itself for Part One treatment under annex 1002.1 of FTA, *supra* note 10 would have found itself ineligible for any kind of duty remission or waiver after January 1996. However, under the terms of annex 403.3 of NAFTA, *supra* note 16, provided that General Motors owns 50% or more of the CAMI common shares, and provided that 75% of CAMI production in any given year be purchased by GM, GM Canada, GM de Mexico, or "any subsidiary directly or indirectly owned by any of them," CAMI may *average its calculation of regional value content with that of General Motors of Canada for the same class of vehicle in order to meet the higher regional value content requirement for shipments originating in Canada and destined for the U.S. or Mexico.* The icing on the cake may be found at 403(3), which allows this calculation to be spread over a two year period in the event of production stoppages at either GM or CAMI related to either labour troubles or downtime for retooling.

independent Quebec, would be left with only three possible avenues via which it might attempt to obtain *Autopact* benefits, namely: i) direct succession under rules of public international law; ii) renegotiation of the existing treaty with simultaneous participation on the part of the United States and the rest of Canada (ROC); and iii) negotiation of successive "Pact-like" treaties with both the ROC and the United States.

A. *State Succession Generally*

The general principle applicable to bilateral treaties, as expressed in customary law, maintains that a state has no right to adhere to a treaty to which it is not a signatory.[23] Therefore, an independent Quebec, *prima facie* would not see itself accorded a right to participate in the current *Autopact* arrangement. If these rules of customary law represent a clear picture, though, the situation has been somewhat muddied by the work of the United Nations' International Law Commission.

The work of this commission, culminating in the promulgation of the *Convention sur la succession d'États en matière de traités*,[24] sought to address the problem of treaty rights and obligations inuring to new or newly independent states.[25] In the case of a seceding territory, though, article 34 of the convention calls for an *ipso jure* continuity of treaty rights in the new state, stating that:

> 1. Lorsqu'une partie ou des partie du territoire d'un État s'en sépare pour former un ou plusieurs États, que l'État prédécesseur continue ou non d'exister:
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> a) tout traité en vigueur à la date de la succession d'États à l'égard de l'ensemble du territoire de l'État prédécesseur reste en vigueur à l'égard de chaque État

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[23] V. Loungnarath, "Quelques réflexions d'ordre juridique sur la clause d'adhésion de l'ALÉNA," 40 McGill L.J. 1 at 6: "Un État ne dispose pas d'un droit d'adhésion vis-à-vis d'un traité auquel il n'est pas partie. Cette proposition est l'expression du droit positif contemporain et ne soulève pas de difficulté particulière dans le cas des traités bilatéraux ou des traités ayant un caractère politique marqué."

[24] UN Doc. A/CONF.80/16/add.2 (1978) 199 [hereinafter *Vienna Convention*]; also reproduced in J.-Y. Morin, F. Rigaldies & D. Turp, eds., *Droit international public: notes et documents*, t.1, 2d ed. (Montréal: Éditions Thémis, 1987) at 253.

[25] One of the overriding intentions of the commission in this respect seems to have been to accord preferential treatment to newly decolonized countries. On the one hand, automatic continuation of treaties effecting the territory negotiated by the former colonial power would reduce the decolonization to a largely symbolic act, in many cases, while a strict application of the principle of *tabula rasa* might leave the newly independent former colony in trade, defense, and legal vacuums susceptible of hobbling its new-found sovereignty (See generally J.-M. Arbour, *Droit international public*, 2d ed. (Cowansville: Éditions Yvon Blais, 1992) at 313-23). The compromise reached would allow the decolonized territory to accede to any multilateral treaty effective in its territory immediately prior to the time of decolonization provided that the newly independent territory's participation in the treaty would not be incompatible with the objects of the treaty, would not radically alter the character or functioning of the treaty, and would not be, either under explicit or implied terms of the treaty itself, subject to the unanimous consent or ratification by signatory parties (*ibid.* art. 17). Accession to bilateral treaties would be possible where there was an express agreement or where conduct on the part of the parties tended to point to such agreement (*ibid.*, art. 24).

successeur ainsi formé....[26]

The rest of the article provides that the seceding states may convene with other parties to exclude the application of article 34. While the article further provides that *ipso jure* continuity will not apply where its effects would radically alter the functioning of the treaty or be incompatible with its objects, article 34 nevertheless represents a marked and radical departure from the aforementioned traditional customary norms of international law which consider that bilateral treaties are to be treated as "closed."

While not in force, due to an insufficient number of signatory countries, the *Vienna Convention* remains meritorious of consideration if only because of its position as a leading reform initiative in this area of international law. Most authors, though, seem to doubt the footing of article 34, including Quebec's own "Committee to examine matters relating to the accession of Quebec to sovereignty"[27] which states that:

> A number of observers have pointed out that the foregoing Article [34 of the *Vienna Convention*], centred on continuity, goes against the traditional policies of States and that it does not represent a codification of customary law. Consequently, they suggest adopting international custom with respect to the succession of States to treaties in the event of succession, i.e. the principle of the clean slate. Jurist Zidane Meriboute has made the following observation:
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> *TRANSLATION For example, if the successoral trend favours the ipso jure continuity of treaties when States are dissolved, it does not favour such a situation in the case of the separation of one part of a State (secessions). The solution based on continuity adopted conclusively in article 34 of the Vienna Convention of 1978 reflects neither former practice nor the modern practice of States in the realm of secession. In our view, the future of this article is already compromised....*[28]

Later, in discussing "matters on which there is broad agreement," the committee opines that

> With regard to bilateral or restricted treaties [defined in the text as those which "associate a number of States for *economic*, political or military purposes," emphasis added], the Vienna Convention [sic] and international common law propose that the new State reach agreement with the State(s) concerned in order to renew the treaties or renegotiate their terms. *It is the latter approach which is usually adopted.*[29]

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[26] *Supra* note 24, art. 34.

TRANSLATION: When a portion or portions of a State secede to form a new State or States, and whether or not the predecessor State continues to exist;

a) every treaty in force in the territory of the predecessor State at the date of State succession continues in force with respect to each successor State so formed....

[27] Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté.

[28] Committee to examine matters relating to the accession of Quebec to sovereignty, *State Succession: Succession to Treaties* (Quebec: 1992) at 5 [footnotes omitted]. Paper prepared for MNAs sitting on the committee.

[29] *Ibid.* at 7 [emphasis added].

B. *Prospects for Participation in the Autopact*

Accordingly, as a bilateral economic treaty, the *Autopact* would likely be subject to renegotiation if Quebec were to be included. This presents a number of problems on the political front. Former FTA Deputy Chief Trade Negotiator Gordon Ritchie suggests that "In the event of a breakup [of Canada], it is highly probable that the United States would seize the opportunity to terminate the auto pact and to set very stringent terms for any renegotiation."[30] Though it is not the opinion of this author that the Americans would immediately take actions to terminate the *Autopact*,[31] the current situation affecting North American auto assembly as well as the relatively weak bargaining position of Quebec make renegotiation of the *Autopact* an unlikely prospect. Rodrigue Tremblay points out that "one of the primary reasons the Canadian government decided to ask the U.S. government to negotiate an overall free trade agreement was the fear that the 1965 Auto pact would have to be renegotiated in isolation."[32] Accordingly, any efforts to trilateralize the *Autopact* would be met with stiff opposition from Canada, which would be unwilling to jeopardize the production safeguards included in the original 1965 deal, and which have been successfully protected, though, as seen earlier, not without cost, through successive FTA and NAFTA negotiations. Further, as pointed out by Wonnacott, "the constituency in the United States that opposes the pact is growing in strength"[33], the principle objections centering around production safeguards in respect of the Canadian industry, with no correlative or offsetting advantage accruing to the United States. Accordingly, the *Autopact* favours assembly in Canada and creates

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[30] G. Ritchie, "Putting Humpty Dumpty Together Again: Free Trade, the Breakup Scenario" in J. McCallum, ed., *Broken Links: Trade Relations After a Quebec Secession* (Toronto: C.D. Howe Institute, 1991) 1 at 16. It is important to remember at this point that art. VII of the *Autopact* allowed either party to terminate the agreement, subject to a 12 month written notice being served upon the other party [hereinafter *Broken Links*].

[31] In this respect it should be remembered that the existence of the *Autopact* creates marked advantages for Ford, Chrysler, and General Motors which are not enjoyed by competitors locating plants in North America. For example, those manufacturers qualifying for *Autopact* status may import any vehicle for sale in Canada duty free regardless of country of origin or North American content, whereas others must currently meet a 50% content rule on the basis of a "direct costs" proxy. It will also be remembered that this threshold is slated to rise to 56% in 1998 and again in 2002 to 62.5%. In other words, GM, Ford and Chrysler currently enjoy the option of using much higher levels of foreign source parts in their vehicles imported into Canada, without any adverse customs duty consequences, than any of their foreign rivals, and this independent of whether that rival is shipping to Canada from Yokohama or Flat Rock, Michigan. Due to this greater flexibility in the use overseas parts (or even wholly foreign-made vehicles), GM, Ford, and Chrysler should theoretically enjoy a price advantage over rivals in the Canadian market until such time as Canada's MFN tariff on vehicles falls to negligible levels. The tariff is currently pegged at 6.1%. Accordingly, while American labour groups, anxious to see Canadian Big Three production repatriated to the United States, may see significant advantage in abrogating the *Autopact* and its guaranteed Canadian production levels, the large corporate lobbies of the American manufacturers would likely see things differently since ending the *Autopact* would subject their vehicles to the same regional value requirements as their transplant and overseas competitors within the Canadian marketplace.

[32] R. Tremblay "Constitutional Political Economy and Trade Policies between Quebec and Canada" in *Broken Links, supra* note 30, 70 at 75.

[33] R.J. Wonnacott, "Reconstructing North American Free Trade following Quebec's Separation: What Can be Assumed?" in *Broken Links, supra* note 30, 20 at 32.

a situation where the Canadian industry is a net exporter of completed vehicles, a situation which has long frustrated organized American labour. From a Canadian perspective, then, any renegotiation of the *Autopact* to include a sovereign Quebec would clearly be unacceptable, given that it would once again jeopardize Canadian production safeguards, without affording the possibility of any new benefit to Canada. Of course, without the consent of Canada, it would be impossible to reopen the purely bilateral *Autopact*.

Another possible avenue available to an independent Quebec would be to negotiate its own pact-like deal with the United States. From a purely juridical perspective, there is nothing in either the FTA or NAFTA which would prevent the United States from concluding a distinct bilateral auto products trade agreement with a sovereign Quebec. However, pursuant to article 1002 of the FTA, the U.S. would be unable to offer duty waivers, in respect of automotive goods originating in Quebec, to any manufacturer not listed in Annex 1002.1 of the FTA. Furthermore, the same article would preclude the establishment of American production or export requirements in order to qualify for duty-free treatment on auto products from Quebec. Contravention of this rule would open the U.S. up to countervailing action from Canada (allowed under Chapter 19 of NAFTA where a U.S. duty remission or waiver on parts imported from Quebec could be seen as a subsidy to exports) or Canadian action under the NAFTA dispute resolution mechanism found in Chapter 20.

Of course, any such treaty concluded between the United States and a sovereign Quebec would *prima facie* violate the Americans' (and eventually, in all likelihood, Quebec's) obligations under article I of the *General Agreement on Tariffs and Trade*.[34] Unless such an arrangement was part of a larger undertaking to eliminate duties and other trade barriers "with respect to substantially all the trade" between Quebec and the U.S., specific approval of the GATT Contracting Parties would be required.[35] The U.S. sought and obtained such an approval on December 20, 1965 in relation to the *Autopact*. GATT Parties approved the waivers contained therein on the grounds that "the automotive industries of the United States and Canada are characterized by an exceptionally high degree of integration."[36] Furthermore:

> [B]y reason of the close similarity of market conditions in the two countries and the relationship which exists and could be further developed in their production facilities of automotive products, there are special factors which offer exceptional opportunities further both to rationalize the production of automotive products in the two countries and integrate production facilities and to increase the efficiency of United States/Canadian automotive production.[37]

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[34] *General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 187 [hereinafter GATT].

[35] Multi-sector free trade agreements are allowed under art. XXIV of the GATT, *ibid.* However, a purely sectoral agreement would not meet the requirements for a "free-trade area" as defined at XXIV(8)b) of GATT, *ibid.*, thereby necessitating approval of the kind provided for by art. XXV(5) of the GATT, *ibid.*, which allows a 2/3 majority of Contracting Parties to waive a Party's obligations under the agreement.

[36] *United States Import of Automotive Products*, GATT C.P. Dec. (20 December 1965), 23rd Sess. B.I.S.D. (1966) at 37.

[37] *Ibid.*

Given these foundations for approval of the 1965 *Autopact*, it seems at least plausible that a Quebec-U.S. deal would gain GATT approval. Many of the factors driving the 1965 approval, such as existing high levels of integration and the benefit of rationalized production would be present, albeit on a more modest scale, in the context of a Quebec-U.S. accord. The case could be made even more compelling by drafting such an agreement so as to cover not only automobiles and OEM parts, but also buses and trucks such as those hitherto produced at the Kenworth truck plant in Boisbriand.[38] Accordingly, it would seem that GATT approval might well be obtained, leaving no significant legal barriers to a Quebec-U.S. *Autopact*-like agreement.

Legal considerations notwithstanding, though, the possibility of a Quebec-U.S. *Autopact* is generally considered highly unlikely. Auto industry analyst Dennis Desrosiers, in his presentation before the Bélanger-Campeau Commission describes it as "impossible. No option at all,"[39] pointing out that the original *Autopact* tied Canadian production to participating manufacturers' volume of vehicle sales in Canada. According to Desrosiers, Quebec's total annual consumption of 350,000 to 400,000 vehicles would constitute a relatively small market less important than that of the rest of Canada and smaller than that of at least 14 American states. However, even this doesn't tell the whole story since:

> Your real power is how many GM, Ford and/or Chrysler you buy and Quebec significantly underperforms the rest of Canada in terms of their contribution to domestic industry, with GM being only one example. This is the same with Ford and Chrysler. You have one of the highest import penetration in Canada.[40]

In short, the feeling is that the Quebec market for American cars is not sufficiently large to mobilize the political will to negotiate a Quebec-U.S. pact, especially when one considers the U.S.'s inability to impose production requirements in connection with duty waivers on imported Quebec products. Furthermore, Wonnacott points out that such a deal would likely be opposed by Ford and Chrysler, since, following the *Autopact* model, they would have to locate facilities in Quebec in order to benefit from duty-free treatment, or find themselves in a position inferior to that enjoyed by GM, which already operates facilities in Quebec.[41] Therefore, it seems unlikely that Quebec would be successful in setting up its own *Autopact* with the Americans.

It seems *very* unlikely, then, that a sovereign Quebec could maintain its current position within the *Autopact*. Furthermore, though the strictly legal impediments are minor, practical considerations would make a Quebec-U.S. bilateral treaty an implausible alternative. Therefore, an independent Quebec would find itself shut out from the first of the instruments underpinning the North American auto trade.

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[38] At the time of this writing, the Kenworth truck plant in Boisbriand remains dormant, though recent plans have been announced which would see the facility retooled and reopened. Production, which Kenworth's parent, PACCAR of Seattle (an *Autopact* manufacturer), had announced would be shifted to it's facilities in northern Mexico, was apparently only saved by the intervention of federal and provincial governments, which provided loans and grants, respectively, in a bid to cause PACCAR to reconsider its decision.

[39] CEAS, *supra* note 3 at 1093.

[40] *Ibid.* at 1095.

[41] Wonnacott, *supra* note 33 at 36.

C. *FTA, NAFTA, or Both?*

Proponents of Quebec sovereignty have always recognized that the best interests of Quebec as an independent entity would be best served by maintaining access to the liberalized trade regimes affecting North America. This is well reflected in the preamble of *Bill 1*, which states that an independent Quebec "shall marshal a particular effort to strengthen our ties with the peoples of the United States and France and with those of other countries both in the Americas and in the Francophonie."[42] Participation in either FTA or NAFTA could satisfy Quebec's desire in this regard, at least within the North American context.

Participation in FTA raises a number of legal and conceptual problems. The *United States-Canada Free Trade Agreement*, like the *Autopact* before it, was conceived as a purely bilateral arrangement creating strictly *inter partes* rights and obligations. Consequently, a sovereign Quebec wishing to succeed directly to FTA would face the same legal hurdles as those discussed in relation to problems of state succession to the *Autopact*, above. The general opinion seems to be that,

> in the event of Quebec independence, there is simply no basis for assuming that the FTA would automatically continue to apply. The FTA is an agreement between the national governments of two sovereign states, the United States and Canada. The breakup of Canada would invalidate the agreement, certainly with respect to Quebec and very possibly, in practice, with respect to the rest of Canada.[43]

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[42] Bill 1, *An Act respecting the future of Quebec*, 1st Sess., 35th Leg., Quebec, 1995 [hereinafter *Bill 1*].

[43] Ritchie, *supra*, note 30 at 10. Similar conclusions were reached by the *Secretariat de la Commission sur l'avenir politique et constitutionnel du Québec* (Bélanger-Campeau secretariat) in "L'Accès du Québec aux marchés extérieurs et à l'espace économique canadien" in *Éléments d'analyse économiques pertinents à la révision du statut politique et constitutionnel du Québec* (Document de travail, n° 1) (Québec: Publications du Québec, 1991) at 35 where it is stated that even in the scenario most favourable to Quebec involving the application of art. 34 of the *Vienna Convention*:

> L'introduction d'un troisième partenaire dans un accord originalement conçu comme bilatéral changerait radicalement, par la force des choses, les conditions d'exécution du traité. La commission binationale prévu à ce traité devrait être modifiée en conséquence, tout comme plusieurs des règles concernant la constitution et le fonctionnement des groupes de travail envisagés à l'Accord, ainsi que les règles régissant les groupes binationaux mis sur pieds pour faciliter le règlement des différends. Ces changements seraient assez importants eux-mêmes pour écarter toute idée d'une succession automatique.
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> Il y a donc lieu de croire qu'en l'absence d'un accord entre les États-Unis et le Canada pour modifier de l'Accord de libre-échange existant en vue d'y intégrer le Québec, il ne serait être question pour ce dernier, d'une succession d'État de plein droit.
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> * * * * * *
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> TRANSLATION: Introduction of a third party to an agreement originally conceived as a bilateral instrument would necessarily radically alter its execution. The binational commission would have to be accordingly modified, as would numerous rules

Accordingly, any Quebec participation in FTA would have to be negotiated with the United States and the rest of Canada.

Given the policy established by the Bush administration under the moniker "Initiative for the Americas" calling for trade liberalization in the Americas to be pursued within the context of NAFTA,[44] it seems unlikely that the U.S. would be interested in reopening FTA, which in many areas has been largely superseded by NAFTA. The more plausible scenario would involve proceeding directly to discussion of Quebec participation in this latter agreement. Furthermore, given a sovereign Quebec's intention to eventually participate in NAFTA,[45] participation in FTA, at least as far as concerns the automotive sector, likely represents an irrelevant exercise.

As seen earlier, article 1002 FTA forbids the granting of duty waivers, whether or not conditioned on either production or export requirements. It also calls for a gradual phase-out of existing waivers, except in respect of those manufacturers listed in Part One of Annex 1002.1, corresponding to those manufacturers qualifying for *Autopact* treatment (many of whom have facilities within the province of Quebec). Were this to be the governing provision, a sovereign Quebec participating in FTA could simulate some of the advantages of the *Autopact* for local producers by offering them blanket duty waivers on imported parts to the extent that they were listed in Part One of Annex 1002.1. However, assuming that a sovereign Quebec were to eventually take its place within NAFTA, duty waiver and drawback programmes affecting the auto sector would presumably be governed by articles 303 and 304 of NAFTA. Article 304 reads in part:

> 1. ... [N]o Party may adopt any new waiver of customs duties, or expand with respect to existing recipients or extend to any new recipient the application of an existing waiver of customs duties, where the waiver is conditioned, explicitly or implicity, on the fulfilment of a performance requirement.
>
> 2. Except as set out in Annex 304.2, no Party may, explicitly or implicitly, condition on the fulfilment of a performance requirement the continuation of any existing waiver of customs duties.[46]

Accordingly, just as if FTA was applicable, Quebec would be unable to allow *any* manufacturer duty waivers *based on export requirements, production level safeguards,*

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concerning the composition and operation of the various working groups contemplated by the Agreement. As well, the rules governing the binational panels instrumental in the dispute resolution process would have to be modified. These changes, in and of themselves, would be of sufficient magnitude to dispel any thoughts of automatic accession.

Accordingly, in the absence of an agreement between the United States and Canada modifying the Free Trade Agreement to bring in Quebec as a third party, there does not seem to be any possibility of an accession of right to the Agreement.

[44] See M.J. Trebilcock & R. Howse, *The Regulation of International Trade* (New York: Routledge, 1995) at 96.

[45] See *Bill 1*, *supra* note 42, art. 15.

[46] NAFTA, *supra* note 16, art. 304.

or conditioned on levels of value added in Quebec.[47] However, the more significant changes between the FTA and NAFTA rules in this area are found at article 303, dealing with duty drawback or deferral programmes. In a nutshell, two salient points emerge from a reading of article 303. Firstly, there is no prohibition against a party offering duty remission or drawbacks to any manufacturer of any goods whatsoever importing goods into its territory, subject of course to article 304. In this respect, the regime is significantly more liberal than that created by article 1002 FTA. Secondly, however, where a good subject to such a duty remission scheme is subsequently re-exported to another NAFTA country, whether on its own or as a component of a larger product, the original duty drawback will be limited to the *lesser of*: (a) the duty ordinarily paid or payable on that part or parts as a result of entering the country offering the duty remission; or (b) the duty payable on the *total product* exported to the other NAFTA country. This has the effect of severely limiting the value of any duty remission programme. For example, were an independent Quebec participating in NAFTA, to offer certain manufacturers a duty drawback on foreign auto parts, and completed cars or subassemblies incorporating these parts were subsequently exported to Canada, the U.S., or Mexico, the following would occur: (a) if those automobiles or subassemblies failed to meet the regional value content requirements established by article 403(5)(a), then the Quebec duty paid or payable on the imported parts could be refunded to the Quebec manufacturer, up to the value of the duty assessed by the NAFTA Party importing the cars or subassemblies; or (b) if the cars or subassemblies met the regional value content requirements prescribed at 403(5)(a) for duty-free treatment, *no duty remission or deferral would be allowable under article 303(1)*. Duty remission or deferral programmes affecting goods or parts so exported to non-NAFTA countries would, however, remain fully effective, not being subject to article 303.

This effective abrogation of article 1002 FTA signifies that a sovereign Quebec anxious to join NAFTA would be wasting time and effort, as far as trade in automotive goods was concerned, in trying to be included in an expanded FTA as well, since Chapter 3 of NAFTA forecloses the opportunities hitherto made available by FTA for the simulation of *Autopact* benefits favouring manufacturers listed in Part One of Annex 1002.1 of the FTA, except by Canada, as a direct result of its continued participation in

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[47] Pursuant to NAFTA, article 318:

"*performance requirement*" means a requirement that:[emphasis in original]

(a) a given level or percentage of goods or services be exported;
(b) domestic goods or services of the Party granting a waiver of customs duties be substituted for imported goods or services;
(c) a person benefitting [sic] from a waiver of customs duties purchase other goods or services in the territory of the Party granting the waiver or according a preference to domestically produced goods or services;
(d) a person benefitting [sic] from a waiver of customs duties produce goods or provide
services, in the territory of the Party granting the waiver, with a given level or percentage of domestic content; or
(e) relates in any way the volume or value of imports to the volume or value of exports or tot the amount of foreign exchange inflows.

the *Autopact*. Furthermore, it should be noted that articles 303 and 304 actually reflect a marked hardening of American policy as concerns duty waivers and remissions in the auto sector. NAFTA Annex 304.2(d) exempts Canada from article 304 as concerns auto sector trade, in the manner provided for by Annex 300-A. Annex 300-A.1 reads as follows:

> Canada and the United States may maintain the *Agreement Concerning Automotive Products between the Government of Canada and the Government of the United States of America* [*Autopact*] signed at Johnson City, Texas, January 16, 1965 and entered into force on September 16, 1966, in accordance with Article 1001, and Article 1002(1) and (4) (as they refer to Annex 1002.1, Part One), Article 1005(1) and (3), and Annex 1002.1, Part One (Waivers of Customs Duties) of the *Canada-United States Free Trade Agreement*, which provisions are hereby incorporated into and made a part of this Agreement *for such purpose*, except that for purposes of Article 1005(1) of that agreement, Chapter Four (Rules of Origin) of this Agreement shall be applied in the place of Chapter Three of the *Canada-United States Free Trade Agreement*.[48] [Emphasis added].

By incorporating article 1002(1) and Annex 1002.1 of the FTA into NAFTA for the exclusive purpose of maintaining the *Autopact*, the U.S. has assured itself that in the event that the *Autopact* is abrogated by serving notice under article VII thereof, Canada will be unable to rely on article 1002 of the FTA to continue its duty waivers, and be subject instead to the default rules of article 304 of NAFTA. Given this stance taken by the Americans, it would seem unlikely that a sovereign Quebec could negotiate on behalf of itself, as a condition of entry into NAFTA, an exception to articles 303 and 304, especially in the absence of its own Quebec-U.S. auto pact.

D. *NAFTA Membership*

NAFTA clearly represents a sovereign Quebec's most realistic prospect for participation in an instrument having a direct bearing on the North American auto industry as it currently exists. As with the *Autopact* and FTA though, and despite facile comments made by the Quebec Minister of Finance and Vice-Premier Bernard Landry to the effect that a sovereign Quebec's accession to the accord would be as effortless "as snow melting in the sun,"[49] an independent Quebec would not automatically succeed to NAFTA by operation of law.[50] However, unlike the *Autopact* and FTA before it,

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[48] NAFTA, *supra* note 16, Annex 300-A.1.

[49] B. Landry, "ALENA: des intérêts communs pour un Québec indépendant et le Canada" *La Presse [de Montréal]* (10 October 1996) B3.

[50] See R. Hétu, "Pas d'adhésion automatique à l'ALENA" *La Presse [de Montréal]* (26 September 1996) A1. In its opening lines, the story affirms that:

> Un Québec souverain ne pourrait se prévaloir automatiquement des avantages de l'Accord de libre-échange nord-américain, ont unanimement soutenu quatre experts américains devant les élus de la Chambre des représentants, hier à Washington.
>
> En s'exprimant ainsi, les experts ont endossé la position formulée par le secrétaire d'État américain, Warren Christopher, lors de la campagne référendaire de 1995, au grand dam des leaders souverainistes.

NAFTA was designed as an open-ended treaty, complete with an accession mechanism provided for in article 2204, and though this mechanism has never yet been used, there exists good reason for believing that a sovereign Quebec would be in a position to eventually avail itself of it.

Article 2204 of the NAFTA states that:

> 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.[51]

Several important points flow from article 2204. From the standpoint of those advocating Quebec independence, subparagraph 2 goes a long way towards assuaging their fears: if any meaning is to be put on its construction, then it must follow that Canada could not, whether out of sheer spite or other more valid reasons, block, deny or veto Quebec accession to NAFTA.[52] The second, and perhaps more important

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> TRANSLATION: Four American experts addressing the House of Representatives yesterday in Washington unanimously indicated that a sovereign Quebec could not automatically avail itself of the benefits of the North American Free Trade Agreement.
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> In so doing, these experts echoed the position taken by American Secretary of State Warren Christopher during the 1995 referendum campaign, to the great frustration of the sovereignist leaders.

[51] NAFTA, *supra* note 16 art. 2204.

[52] This is substantially the same conclusion reached by Loungnarath, *supra* note 23 at 23, where he states that:

> Aucun élément de l'article 2204 de l'ALÉNA ne laisse cependant croire que le défaut d'approbation par un des protagonistes emporte automatiquement le rejet de l'adhésion. En fait, le deuxième paragraphe de l'article 2204 de l'ALÉNA suggère le contraire.... Ce paragraphe établit donc que la conséquence du défaut d'approbation par une des parties à l'ALÉNA est la non-application de l'ALÉNA entre cette partie et l'Adhérent, ce qui suppose que l'adhésion serait maintenue et effectif à l'égard des autres parties à l'ALÉNA. D'ailleurs, si le défaut d'approbation par une des parties à l'ALÉNA entraînait le rejet pur et simple de la candidature, le deuxième paragraphe de l'article 2204 de l'ALÉNA ne pourrait jamais recevoir application.
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> [TRANSLATION] Nothing in the text of NAFTA article 2204 suggests that lack of approval by one of the protagonists automatically entails rejection of the application. In fact, the second paragraph of article 2204 suggests quite the opposite.... This paragraph establishes that the consequence of one party's failure to approve the accession is the non-application of NAFTA as between the adhering party and that party withholding approval, suggesting that as between the adhering party and the other NAFTA parties, the accession would be maintained. If the objection of one of the NAFTA parties to the new adherent entailed rejection of the application, then the second paragraph of article 2204 would never be susceptible being applied.

element of article 2204, is that accession is a *negotiated* process, subject to the terms and conditions agreed upon by the adherent and the Commission created by the agreement. Accordingly, NAFTA, though open-ended, is not fundamentally of the same character as, say GATT, for which many believe membership is virtually automatic for a splinter state of a Contracting Party achieving certain prescribed levels of commercial sovereignty.[53] This requirement of negotiation, though, does not seem to weigh heavily on certain observers such as Professor Bernier, who considers that:

> [I]l apparaît peu plausible qu'ils [les américains] cherchent à profiter de l'accession du Québec à la souveraineté pour exclure ce dernier, pour lui imposer des conditions d'adhésion plus onéreuses ou encore pour exiger du Québec et du Canada une renégociation de cet accord.[54]

Others offer a more sober view, indicating that the Americans tend to look upon subsequent negotiations as mechanisms for clawing back concessions made under previous trade agreements.[55] While each of these viewpoints remain largely speculative, our brief analysis of successive trade agreements shaping trade in the North American auto sector above, seems much more consistent with, and supportive of, the contentions of those espousing the more sober viewpoint. What seems certain, though, is that it would be *very* unlikely, in light of the foregoing, to see Quebec negotiate for itself better treatment in the auto sector than that which it would gain within the context of the "default regime" created by NAFTA. This contention is supported by Oswaldo Nunez, former Bloc Québécois Member of Parliament for the riding of Henri-Bourrassa, who suggests that, based on indicators of NAFTA readiness developed by Huffbauer and Schott, the economy of a sovereign Quebec would be sufficiently robust to allow for NAFTA participation. However, this characterization depends on two underlying assumptions, namely, maintenance of the Canadian currency by a sovereign Quebec, with the attendant control of the Bank of Canada on monetary policy, and *de facto* acceptance of Canadian customs tariffs. If these assumptions are met, Nunez concludes that "Quebec is ahead of all Latin American countries, including Chile and Mexico, as a candidate for membership,"[56] while indicating that Quebec "is the United States' eighth largest trading partner, far ahead of any other country in the hemisphere with the exception of Canada and Mexico."[57] While this leads to the belief that a sovereign Quebec could, without too much economic restructuring, accede to NAFTA as a full member, Nunez is nevertheless of the opinion that "[a] sovereign Quebec would most likely not request renegotiation of certain articles of NAFTA in order to ensure that its

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[53] See GATT, *supra* note 34, art. XXVI: 4(c) and I. Bernier, "Le maintien de l'accès aux marchés extérieurs: certaines questions juridiques soulevées par l'hypothèse de la souveraineté du Québec" in *Éléments d'analyse économique pertinents à la révision du statut politique et constitutionnel du Québec* (Document de travail, no°1) (Québec: Publications du Québec) 1 at 4.

[54] Bernier, *ibid.* at 15.

[55] See Ritchie, *supra* note 30 at 18; R.G. Lipsey, "Comments on the Bélanger-Campeau Commission's Papers on Trade Relations" in J. McCallum, ed., *supra* note 30, 58 at 61-63.

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

[57] *Ibid.* at 283.

interests are met,"[58] in a clear reference to the very limited relative bargaining power which an independent Quebec would bring to the negotiating table.

Accordingly, then, by examining the juridical regime governing North American trade in autos and parts from the perspective of a sovereign Quebec, a reasonably clear picture begins to emerge. Quebec membership in NAFTA, though neither automatic nor effortless, should be considered to face few legal impediments. Quebec would, therefore, be subject to the usual rules found in Chapters 3 and 4 of the NAFTA text concerning trade in goods, including automotive goods. In the absence of a particular sector-specific regime applicable to the auto trade of a sovereign Quebec before NAFTA membership, though, Quebec would be unable to avail itself of industry-specific derogations to Chapter 3 and 4 rules, such as those laid out in Appendices 300-A.1 through 300-A.3 of NAFTA. These specific exceptions were created to give "grandfather" status to existing auto sector arrangements, though in the case of Mexico's *Decree for Development and Modernization of the Automotive Industry*[59] and related legislation, this grandfather status is limited to a phase-out period slated to expire January 1, 2004.[60] While Appendix 300-A.1 protects the *Autopact*, as modified by FTA in favour of Canada, the application of this exception is predicated on *Autopact* and FTA participation.[61] As discussed earlier, the participation by a sovereign Quebec in the linchpin *Autopact* or a similar arrangement is highly unlikely. Furthermore, any legislative efforts by the National Assembly aimed at regulating the local industry, either through imposition of export, value-added, or other requirements in the period following independence but preceding NAFTA membership, would likely be seen by the NAFTA Commission as a colourable attempt at influencing the outcome of NAFTA membership negotiations. In the best case, though unlikely scenario, such measures could be subject to a phase-out period such as that accorded to the Mexican legislation, though under no circumstances could such a phase-out period be extended beyond January 1, 2004, since it would conflict with the requirement that the Parties "review, no later than December 31, 2003, the status of the North American automotive sector and the effectiveness of the measures referred to in this Annex to determine actions that could be taken to strengthen the integration and global competitiveness of the sector."[62] Accordingly, the most likely scenario, based on currently existing trade arrangements, would see auto products moving between a sovereign Quebec and the rest of Canada, the United States, and Mexico under the Chapter 3 rules of NAFTA.

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[58] *Ibid.* at 292.

[59] *Decreto para el Fomento y Modernizacion de la Industria Automotriz.*

[60] NAFTA, *supra* note 16, appen. 300-A.2, art. 1.

[61] See discussion, *supra*. Accordingly, any argument that *Autopact* status for *Autopact* manufacturers operating in Quebec is part and parcel of NAFTA membership is simply not borne out by the text of annex 300-A.1 which announces that the goal of this annex is to allow that "Canada and the United States may maintain the *Agreement Concerning Automotive Products between the Government of Canada and the Government of the United States of America* [*Autopact*] signed at Johnson City, Texas, January 16, 1965...." Maintenance of the agreement presupposes either initial participation or accession *de plano*, without which the opening text of the annex becomes meaningless. The implication is quite clear for a sovereign Quebec—loss of availability of the *Autopact* as a bilateral treaty entails loss of *Autopact* advantages which may not be otherwise regained simply through accession to NAFTA.

[62] NAFTA, *supra* note 16, Annex 300-A, art. 2.

IV. IMPLICATIONS FOR A QUEBEC AUTO INDUSTRY

A. *The NAFTA Regime*

An independent Quebec which is also a full member of NAFTA, will put all local participants in the auto and parts industry on an equal footing. Access to markets would be generally unimpeded, though additional cost burdens imposed on numerous industry participants would be relatively heavier than those existing at present. For producers selling into either the rest of Canada or the United States, Quebec goods could continue to travel duty-free so long as they met NAFTA's regional value content requirement of 50-56-62.5% as per article 403. The situation would accordingly be one of "business as usual" for those manufacturers not currently benefitting from *Autopact* status. For these participants, access to the United States would be unimpeded. Even where they sold parts to manufacturers in Canada, provided that aforementioned regional value requirements were met, the parts so sold would be deemed to originate in a NAFTA member country, and accordingly, would contribute to the regional value content of the goods of the purchasing manufacturer at the same tenor as those same parts would have contributed had they originated in a Quebec which was part of a confederate Canada. Consequently, manufacturers in the rest of Canada would have no economic reason to discriminate against NAFTA-approved parts originating in an independent Quebec. The situation would be somewhat different, though, if parts nominally manufactured in Quebec failed to meet NAFTA's regional value content thresholds, a situation made particularly acute by the escalator threshold clause at article 403(3). A non-*Autopact* manufacturer in Canada would likely avoid such parts offered by a Quebec manufacturer on two grounds. Firstly, by failing to meet the definition of "originating goods," the parts would not benefit from duty-free entry into Canada, as provided by article 302. Because production-based waivers of duty accorded to certain non-*Autopact* manufacturers by the Canadian government, most notably Honda and Toyota operating facilities in Ontario, have now expired as per article 1002(3)(a) FTA, and since export waivers (net of exports to the United States) to these and other manufacturers must terminate no later than January 1, 1998, pursuant to article 1002(2)(b) FTA, fully dutiable parts from Quebec would be unattractive from a purely economic perspective, especially if comparable parts were available from Canadian, American, or Mexican sources at similar prices. However, there is a second, more fundamental reason why manufacturers in the rest of Canada would avoid Quebec parts failing to meet NAFTA regional value content requirements. Regional value content is of critical importance to Canadian-based arms of overseas manufacturers, such as Honda Canada and Toyota Motor Manufacturing Canada, who produce for the entire North American market and rely on NAFTA provisions to ship duty-free to the large and lucrative U.S. market. Furthermore, evidence in the form of the 1990 U.S. Customs Service audit of Honda's North American operations[63] and the decision of an FTA Binational Review Panel involving Toyota,[64] suggests that such transplant manufacturers already operate at regional value content levels barely sufficient to qualify their goods for duty-free

[63] See Subcommittee Hearings, *supra* note 18 at 97 (Statement of Scott Whitlock, Executive Vice-President of Honda of America Manufacturing).

[64] *In the Matter of Article 304 and the Definition of Direct Cost of Processing or Direct Cost of Assembling* (1992), 8 T.T.R. 290.

treatment. Honda's failure to meet threshold levels due to a "roll-down" problem cost the company $20 million (USD) in American Customs duties for 1989 alone.[65] Accordingly, a non-qualifying part, or a part from Quebec incorporating significant non-originating materials, which may subject the purchasing firm to possible future customs audits, would be very unattractive to these manufacturers, notwithstanding that the harshness of the rule as its stood under FTA has been somewhat mitigated by the elimination of the "roll-down" in article 403(1), allowing the incorporating manufacturer to at least build reliance on the regional value content that part of the value of a non originating part, which was added in a sovereign Quebec participating in NAFTA.

Moreover, more serious problems would be caused to manufacturers in Quebec currently benefitting from *Autopact* status.[66] These manufacturers, including General Motors of Canada, insofar as its Quebec operations were concerned, would lose the blanket duty waivers currently in place on all imported parts and vehicles set up by Annex A of the *Autopact,* and protected by articles 1002 and 1005 of the FTA. Consequently, to the extent that local producers used materials or parts imported from non-NAFTA countries, such as Seimens electric motors and actuators, they would see their cost structure increased by the amount duty charged by Quebec on such parts or materials upon entry. While NAFTA, as seen earlier, would not prevent the Quebec government from setting up its own duty waiver or remission plan, article 303(1) of the NAFTA text severely circumscribes the effectiveness of such schemes where completed products are ultimately exported to other NAFTA member countries.[67] The bottom line for a North American producer, such as Ford, Chrysler, or General Motors, currently benefitting from *Autopact* status would be that any planned expansion of operations into Quebec in the future would offer no tangible advantage over expansion in Kalamazoo, Lafayette, or Tijuana, and in fact would be disadvantaged relative to similar expansion in the rest of Canada, which would preserve greater flexibility in foreign parts sourcing choices.

Perhaps the greatest loss for a sovereign Quebec would be the loss of its participation in guaranteed production levels embodied in subsection 2(5) of Annex A of the *Autopact.* Current *Autopact* manufacturers are required to produce in Canada units representing at least 75% of their Canadian sales volume by unit, a situation which has lead not only to significant employment in the Canadian auto industry, but has also been instrumental in contributing to Canada's position as a net exporter of auto products. While this arrangement ensured that Canada would never be a large net importer of automotive products, the reality has been, perhaps owing to the inherent "lumpiness" of investment and production levels in the auto sector, that *Autopact* manufacturers have consistently exceeded their minimum production requirements, thus creating a large Canada-U.S. trade surplus in the auto sector in Canada's favour.[68] Quebec participates in this benefit through the General Motors facility in Ste-Thérèse, which houses the

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[65] See P.R. Hayden, "Honda Case Exposes Serious Flaw in Free Trade Agreement" in P.R. Hayden & J.H. Burns, eds., *Foreign Investment in Canada: A Guide to the Law* (Scarborough: Carswell, 1996) at 63.

[66] A quick reading of Part One of annex 1002.1 of FTA, *supra* note 10 reveals that at least 19 companies could be directly affected.

[67] See discussion, *ibid.*

[68] P. Wonnacott, *U.S. and Canadian Auto Policies in a Changing World Environment* (Washington: Canadian-American Committee (C.D. Howe Institute/National Planning Association), 1987).

world production of GM H-body (Chevrolet Camaro and Pontiac Firebird) cars. Since a sovereign Quebec would not participate in the *Autopact*, GM would have no specific production targets to meet in Quebec, whether on its own or as part of larger Canadian production requirements, and would have no additional incentive to increase or maintain local production. Furthermore, it should be remembered that construction of the Ste-Thérèse facility was effected in 1966 precisely in response to General Motors' production obligations under the *Autopact*. As a consequence, the long-term viability of the facility could be compromised.

Accordingly, other than a blip on the cost structure of some local participants, the near-term effects on the auto sector of a sovereign Quebec participating in NAFTA are somewhat more muted than one might expect. All important access to the geographical space constituting exterior markets in Canada and the United States would be substantially preserved, even though the attractiveness of Quebec-made parts could be compromised in the eyes of certain customers. The trade-off, however, comes in the form of loss of local production guarantees. It should be remembered that Canada has negotiated 2 successive trade agreements in which it identified those guaranteed production levels as central to the *Autopact* and essential to the continued viability of a Canadian auto industry. Fallout from the loss of these safeguards would not immediately be felt in a sovereign Quebec since the capital intensive nature of the industry prevents rapid changes in the shift of production locales.[69] Over the long term, though, the loss of these guarantees are exactly that: lost guarantees in terms of employment and gross domestic product. Whereas the province of Quebec, as a substantial beneficiary of the *Autopact* could reasonably expect the GM facility to produce 150,000 units per year, and employ several thousand people, such an assumption may or may not be valid in a sovereign Quebec. Furthermore, article 303 of NAFTA considerably limits the types of incentive a Quebec government could offer auto producers in order to obtain some sort of production guarantee. While it remains impossible to accurately forecast the long-term prospect of an auto and parts industry in a sovereign Quebec, it nevertheless remains that the regime created solely through NAFTA participation suffers from a number of deficiencies relative to the existing situation. This would not bode well for the long term prospects facing the auto industry of an independent Quebec.

B. *Joining NAFTA and the Transitory Regime*

The discussion thus far has focussed on the consequences facing the auto industry of a sovereign Quebec as a NAFTA member. However, except for irresponsible comments made by Cabinet level members of the Quebec government[70], and a bald assertion that "Québec shall assume the obligations and enjoy the rights set forth in the relevant treaties and international conventions and agreements to which Canada or Québec is a party on the date on which Québec becomes a sovereign county, in particular in the North American Free Trade Agreement,"[71] separatist forces have taken no steps to ensure or abet Quebec accession to NAFTA. These comments were made despite the fact that article 2204 of NAFTA makes it painfully clear that any and all

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[69] CEAS, *supra* note 3 at 1088.

[70] See Landry, *supra* note 49.

[71] *Bill 1*, *supra*, note 42 art. 15.

accessions are to occur at the end of a negotiation process, followed by ratification by the legislative bodies of the concerned countries. Failure to consider this last requirement alone may potentially cause serious problems for a sovereign Quebec, which would inadvertently position itself as a pawn in a game of political brinkmanship being played out in Washington. The U.S. Constitution confers upon the Congress the exclusive power "to regulate commerce with foreign nations."[72] In order to circumvent the logistical nightmare of negotiating a treaty with 100 U.S. Senators and 435 Representatives, the Americans created the "fast track procedure". Congress delegates negotiating authority to the President with the understanding that any resultant trade deal will be put to straight votes in the Congress without modification. Loungnarath, suggests that accession under article 2204 of NAFTA would be subject to the fast track procedure: "Le recours à la «fast-track procedure» implique que la branche exécutive obtienne du Congrès un mandat pour négocier et signer un éventuel traité d'adhésion et ce, même si les négociations sont pilotées par la Commission du libre-échange"[73] However, since the summer of 1994, the Clinton administration, through its ongoing battles with Congress, has seen its requests for fast-track authority refused (the administration had originally requested a seven year authorization without targeting specific trade negotiation priorities).[74] With the recent return of the Clinton administration to a second term in the White House, coupled with the return of Republican majorities in both the U.S. Senate and House of Representatives, the prospects for a speedy reinstatement of executive branch fast-track authority seems dubious.

Accordingly, the situation faced by Chile may aver itself instructive to a sovereign Quebec. Notwithstanding significant political will to include Chile in NAFTA (to this effect see comments of U.S. Trade Representative Mickey Kantor in "Report to the President and the Congress on Significant Market Opening"[75]) executive-legislative bickering as well as other internal political factors[76] have made joining NAFTA a practical impossibility at the present time, leading Chile to conclude its own bilateral deal with Canada to supplement its existing arrangement with Mexico.

However, even with a properly functioning fast-track procedure, the response time may not be sufficiently rapid to deal with the imperatives associated with Quebec independence. For example, in describing fast-track requirements 19 U.S.C. §2903(a)(1) states that an agreement entered into by the President:

> [S]hall enter into force with respect to the United States if (and only if) --
>
> > (A) the President, at least 90 calendar days before the day on which he enters into the trade agreement, notifies the House of Representatives and the Senate

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[72] U.S. Const. art. I, §8, cl. 3.

[73] Loungnarath, *supra*, note 23 at 19-20. TRANSLATION: Recourse to the "Fast-Track" procedure requires that the executive branch obtain from Congress the authority to negotiate and sign any eventual accession treaty, and this notwithstanding that any accession talks would be orchestrated by the Free Trade Commission.

[74] See P. Behr, "White House Floats Trade Talks Plan" *The Washington Post* (17 June 1994) F1.

[75] (Washington, D.C.: Office of the United States Trade Representative, May 1994).

[76] See M.G. Wilson, *Building on NAFTA: Forging a Free Trade Agreement with Chile* (27 June 1994) [Unpublished].

> of his intention to enter into the agreement, and promptly thereafter publishes notice of such intention in the Federal Register.[77]

A further 60 day delay is set up at 19 U.S.C. §2902(3) which provides that:

> A trade agreement may be entered into under paragraph (1) [this paragraph provides for the general delegation of negotiating authority] with any foreign country only if {...}
> (C) the President, at least 60 days before the date notice is provided under section 2903(a)(1)(A) of this title [*supra*] -
> (i) provides written notice of such negotiations to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives, and
> (ii) consults with such committees regarding the negotiation of such agreement.[78]

Accordingly, then, even in the best case scenario where fast-track was fully operational and Quebec was essentially rubber-stamped into NAFTA, its participation with respect to the United States could not be effective for *at least 5 months from the date of the beginning of talks with the Free Trade Commission.*

It is therefore not unlikely that for at least some period following Quebec's independence, the nascent state would not participate in NAFTA. Similar unpreparedness with respect to GATT/WTO admission is also characteristic of the sovereignist position. The much vaunted "offer of partnership" with the rest of Canada, which might mitigate some of the noxious effects felt during Quebec's transition to sovereignty, has never progressed to even the incipient stage. A cursory reading of the "particulars," as they are, of the proposed *Treaty on a New Economic and Political Partnership*, which has been approved by the leaders of the Parti-Québécois, Bloc Québécois, and Action Démocratique[79], reveals that the text is little more than a shopping list of areas problematic to the idea of Quebec independence. Far from proposing a tangible partnership, the text fails even to establish the goals which a sovereign Quebec might envisage. For example, the text states that:

> As a priority, the treaty will ensure that the Partnership has the authority to act in the following areas:
> • customs union;
> • free movement of goods;
> • free movement of individuals;
> • free movement of services;
> • free movement of capital;
> • monetary policy;
> • labour mobility;
> • citizenship.[80]

The French language rendition is equally vacuous, bearing all the earmarks of a hastily cobbled effort at legerdemain to be used for political gain rather than to address

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[77] 19 U.S.C. §2903(a)(1)(A) (1988).
[78] 19 U.S.C. §2902(2)(3)(C) (1988).
[79] Schedule to *Bill 1*, *supra* note 42.
[80] *Ibid.*

the necessarily serious and complex issues surrounding Quebec accession to independence.

Given this seemingly cavalier attitude towards trade relationships coupled with the very constrictive one-year timetable envisaged for negotiating the said "partnership" with Canada before a declaration of independence,[81] it seems plausible that a newly independent Quebec, in its impetuosity to obtain "statehood" might well plunge itself into a trade vacuum, with disastrous effects on automotive and other economic sectors.

Quebec's largest problem, by far, would be the normalization of trade relationships with the rest of Canada. While opinion generally seems to support eventual GATT and NAFTA membership following proper planning and implementation of both government policies and negotiations aimed at bringing Quebec into these arrangements,[82] the problem of reconstituting the pan-Canadian economic space remains a much thornier issue. In the *Text of the Agreement Between the Parti-Québécois, the Bloc Québécois and the Action démocratique du Québec*, Messrs. Parizeau, Bouchard, and Dumont assert that "[T]he new rules and the reality of international trade will allow a sovereign Quebec, even without a formal Partnership with Canada, continued access to external markets, including the Canadian economic space."[83] Nothing could be more misleading. As a sovereign country, Canada enjoys full autonomy with respect to the regulation of its external commerce with other sovereign actors. This notion of absolutism in the concept of sovereignty has been very eloquently described by the U.S. Supreme Court:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of sovereignty, to the same extent in that power which could impose such restriction.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced to the consent of the nation itself. They can flow from no other legitimate source.[84]

While economic imperatives might favour the establishment of a Quebec-Canada preferential trade regime absent the formal agreement of Canada in the event of a

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[81] *Bill 1*, *supra* note 42, art. 26.

[82] See A.L.C. deMestral, "Economic Integration Under the GATT, the FTA, the Treaty of Rome, and the Canadian Constitution" in J. McCallum, ed., *Tangled Web: The Legal Aspects of Deconfederation* (Toronto: C.D. Howe Institute, 1992) 31 at 32 "If Quebec separates, its accession to the GATT is a virtual certainty. But that accession would involve negotiating a complex set of tariff arrangements with 107 other countries and making a host of other arrangements...."; Lipsey, *supra* note 55, 58 at 58 "[T]he entry of an independent Quebec into the General Agreement on Tariffs and Trade (GATT) would be relatively automatic under GATT article XXVI"; D. Schwanen, *Break Up to Make Up: Trade relations after a Quebec Declaration of Sovereignty* (Toronto: C.D. Howe Institute, 1995) executive summary at 1: "While an independent Quebec, if recognized by Canada, would likely acceede [sic] to the GATT and the NAFTA, it would have to modify certain policies in order to do so, for example regarding public sector procurement."

[83] Schedule to *Bill 1*, *supra* note 42.

[84] *The Schooner Exchange* v. *McFaddon*, 116 at 136, 3 L.Ed. 287 at 293.

Quebec secession, there is simply no juridical basis for concluding that Canada-Quebec trade flows could continue unimpeded as of right. Comments to the contrary, which amount to a denial of Canadian sovereignty, should therefore be dismissed as pure acts of political posturing or secessionists' wishful thinking.

In the absence of a specific Quebec-Canada treaty slated to come into force on the date of a Quebec secession, and given the time lags associated with Quebec accession to GATT and NAFTA, trade flows between Quebec and the provinces would be subject, at Canadian control points, to the rules enunciated in the *Customs Tariff Act*,[85] which at section 46 calls for the imposition of a minimum 35% tariff on all goods entering Canada from countries for which special tariffs such as the GATT MFN or Mexico-U.S. Tariff, do not apply. As Quebec is not one of the countries eligible for any of these special tariff rates, goods entering Canada from a sovereign Quebec would *prima facie* be subject to the 35% general tariff.

In the context of the auto sector, such a situation could not subsist for long without triggering disastrous effects on manufacturing within Quebec. In addition to being priced out of the Canadian market, Quebec parts would quickly be spurned by Canadian manufacturers not benefitting from *Autopact* rules because they would no longer count towards NAFTA regional value content.[86] The concerns of those Canadian manufacturers covered by the *Autopact*[87] would be far less acute since Annex A of the *Autopact* would allow them to sidestep Canadian duties on imported Quebec parts. Completed vehicles originating from the Ste-Thérèse plant would be another story altogether. While General Motors could definitely import these vehicles duty-free into Canada, it is unlikely, given the amount of value added in Quebec, that these vehicles would contain sufficient regional value content to allow them to be shipped from Canada to the United States duty-free under NAFTA. One possible solution for GM would be to convert the Ste-Thérèse facility to parts production as opposed to vehicle assembly. Two fundamental problems stem from this solution, though. Firstly, until Quebec gained admission to NAFTA, the only outlet for GM Quebec's production would be GM assembly plants in Ontario, leaving Quebec, in this critical industry, more beholden to decisions taken in Canada than before independence. Even where Quebec acceded to GATT, such a situation could be expected to subsist until full NAFTA membership were obtained. As Wonnacott points out, the 2.5% MFN tariff that Quebec goods would face entering the U.S., while not large in absolute terms, would represent a large percentage of profits. This would lead to a clear preference to export to GM's Ontario plants.

The second, and perhaps more vexing problem facing such a solution is that General Motors of Canada has recently shown its intention to *reduce* its parts production activities.[88] Accordingly, tooling up Ste-Thérèse for parts production would likely prove unattractive to GM, as it would run against current corporate strategy.

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[85] R.S.C. 1985 (3rd Supp.), c. 41.

[86] See discussion, *ibid.*

[87] And who generally employ North American parts in much higher proportion than required by NAFTA, thus muting concerns regarding regional value content: see testimony of John T. Eby in *Subcommittee Hearings*, *supra* note 18 at 94.

[88] V. Lawton, "General Motors to sell 4 plants," *The [Montreal] Gazette* (20 November 1996) C3. Also note that a GM engine and brake plant in St. Catharines, Ontario is reputed to be in danger of closing: B. Came, "Inking and Auto Truce: Thousands of union jobs could still be lost" *Maclean's* (4 November 1996) 48.

Since the problems stemming from a Quebec-Canada trade vacuum are related principally to problems engendered by NAFTA rules of origin as opposed to pricing problems resulting from the imposition of the 35% general tariff, even emergency action taken by the Canadian Governor in Council to reduce this tariff on auto parts, under authority of §68(a) of the *Customs Tariff Act*[89] would have little to no effect on the principle problems related to the auto sector.[90] At best, such an action might alleviate price discrimination against Quebec parts by intermediary Canadian manufacturers not benefitting from *Autopact* status, though even these customers might be concerned about regional value content, depending on who their own clients are.

Accordingly, Quebec's independence creates a situation where, at least in the context of the auto industry, its membership in GATT is relatively unimportant when compared with the imperatives of acceding to NAFTA and/or establishing a comprehensive bilateral trade agreement with Canada. In the absence of either of these solutions, the tariff, and more pressingly, rules of origin problems, considering the definition of "originating goods" under articles 401 and 402 of NAFTA, arising out of Quebec's independence could be expected to cause serious turmoil in the industry. While it is impossible to say what the exact reaction of industry participants would be, a very high degree of instability and uncertainty would be introduced in the auto sector immediately following a declaration of independence, unless, of course, the foregoing problems had been adequately addressed and resolved by the time Quebec declared its independence. Auto industry analyst Dennis DesRosiers came to substantially the same conclusions in considering a similar scenario:

> The second option was related to GATT, but maintaining tariff levels in GATT. This was perhaps the most undesirable option that we looked at from an industry perspective. It puts virtually all of your automotive manufacturing jobs vulnerable in this province. You create inefficiencies on both the market side and the production side from an automotive perspective. Now, though I did not pick up any sense of immediate reaction, should that option come forward — a GATT with duties — no executive that we talked to said: Boy, that happens in the next day. I think there is some sympathy that would be allowing to play out that option and to see what the true implications were before anybody reacted to it. But it certainly puts a vulnerability to your automotive assets on

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[89] *Customs Tariff Act, supra* note 85.

[90] As a point of interest, section 68 action or full legislative action on the part of a co-operative Canada could indeed be employed to reduce the 35% tariff affecting goods imported from Quebec. However, under no circumstances could Canada consent to tariff reductions below the MFN rates in favour of Quebec goods for any class of products without breaching its art. I commitments under GATT. None of the exceptions to the most favoured nation principles set out at arts. XIX, XX, XXI or article I itself would be available to allow Canada to legally accord Quebec treatment better than that accorded by Canada to other Contracting Parties. Consequently, the only way for Quebec to secure preferential access to the Canadian economic space would be through negotiation of a comprehensive trade agreement under GATT art. XXIV(5) or following the approval of the Contracting Parties of a Canadian request to allow special concessions to be offered to Quebec notwithstanding art. I, pursuant to the extraordinary procedure set out at article XXV(5). Accordingly, any assertion that "The new rules and reality of international trade will allow a sovereign Quebec, even without a formal Partnership with Canada, continued access to external markets, including the Canadian economic space," (schedule to *Bill 1, supra* note 42) must be predicated on "rules" newly confected by Messrs. Parizeau, Bouchard, and Dumont, since such assertion is clearly at odds with existing conventional norms of international law.

the production worker side.[91]

Clearly, much better planning than currently exists would be required to safeguard Quebec auto sector production and jobs.

One possible solution to the immediate trade problems facing an "independent" Quebec could come in the form of some sort of "sovereignty-association" with the rest of Canada. Were such an arrangement to maintain the Canadian union, or create some sort of supra-Canadian union capable of representing a pan-Canadian constituency to the international community, then presumably NAFTA (and perhaps FTA and *Autopact*) access would be automatic (since for all intents and purposes, externally, nothing would have changed in respect of Canada). As well, preferential access to Canadian economic space, above and beyond NAFTA would presumably be part of such an arrangement. While this option remains superficially attractive from a purely trade related viewpoint, it nevertheless suffers from a number of shortcomings, which appear to make it impracticable in a Canada-Quebec context.

Perhaps the most important conceptual problem associated with this option, sometimes dubbed the "Maastricht model" and proposed at least in sketchy form by the text of the Parti-Québecois, Bloc Québecois, Action Démocratique agreement,[92] is that it is completely antithetical to the notion of "sovereignty." Instead, it rests on a premise of mutual interdependence calling for subordination of national powers in favour of supranational power wielding bodies. For example, the "partnership" calls for a Quebec-Canada customs union. As pointed out by Peter Leslie:

> [A] customs union that provided for only a common policy on tariff levels would have little significance in today's world. The control of external trade relations now covers the gamut of policies affecting trade and *a customs union must be able to get the member states to commit themselves correspondingly.*[Emphasis added] [93]

Accordingly, in key areas Quebec's National Assembly (and indeed a reconstituted Canadian Parliament) would have to subordinate itself to bodies created for the government and representation of the partnership. Under such a scenario, Quebec would be no closer to its goal to acquire "the exclusive power to pass all its laws, levy all its taxes and conclude all its treaties."[94]

Leslie, above, further points out that current proposals for such a partnership remain vague at best. Though seeming to be based loosely on the structure retained by the European Union, Quebec sovereignists have failed to address fundamental questions related to the actual powers and functioning of the requisite supranational bodies and their ancillary organs. The question may be academic, though, since Leslie sees tremendous practical problems in adapting a multi-lateral European-style arrangement to a situation involving only two players of differing economic and demographic size and strength. According to Leslie:

> The difficulties of making Maastricht-type institutions work in the Canada-Quebec

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[91] CEAS, *supra* note 3 at 1093-94.

[92] *Supra*, note 79.

[93] P.M. Leslie, *The Maastricht Model: A Canadian Perspective on the European Union* (Queen's University, 1995) [unpublished].

[94] *Bill 1*, *supra*, note 42, article 2.

> context would be especially great, given that what is envisioned is an association of only two states. In the EU, the essence of the political decision-making process is the give an take that is involved in continuing, multi-issue negotiations among multiple partners. Introduction of the qualified majority voting rule led to the success of the Single Market program, and it was the key reform in the relaunching of the Community in the mid-1980s. Today, qualified majority voting lies at the heart of the institutional system in the EU; without it, the institutions and processes would lack the flexibility to work effectively.
>
> A two-member association cannot have such flexibility. A proportional weighting of votes (by population) could not be acceptable to the smaller state, as it would be outvoted every time. To the smaller state, then, the only conceivably acceptable voting rule would be unanimity, as Quebec secessionists have proposed. This would give each state an almost comprehensive veto over the other's economic policies. In the Canada-Quebec case, Quebec would gain a voice equal to that of the nine provinces and two territories combined. This would be so obviously unacceptable to Canada as to be not worth discussing. "Maastricht for two" is an impossible concept.[95]

This leads Leslie to identify the concept of the Canada-Quebec partnership as a "non-starter."[96]

There may exist an even more fundamental barrier, though, to the realization of a formal Quebec-Canada partnership. Namely, the absence of a legally competent negotiator for Canada, since "there is no one with the constitutional authority or necessary political base to enter such negotiations on behalf of Canada. It is a near-certainty that provinces would insist on being involved in any bargaining with Quebec in order to protect or advance their own interests."[97] Moreover, Quebec secession, or irrevocable commitment thereto, would likely cause the Canadian Parliament and provincial governments to focus their efforts on a reconstituted Canada without Quebec, their own political survival necessarily taking precedence over trade talk with a renegade province.[98]

Consequently, it would appear that reliance on an ethereal partnership plan to solve an independent Quebec's trade related woes represents an overly optimistic position at this stage. Were concrete proposals on the table and being discussed, and were palatable solutions to the problems envisaged by Leslie being suggested, then a re-evaluation of the partnership model might be warranted. However, as enunciated in the *Text of the Agreement Between the Parti-Québecois, the Bloc Québecois and the Action*

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[95] Leslie, *supra* note 95 at 69.

[96] *Ibid.* Other commentators seem to be of a similar opinion. Lipsey, *supra* note 55 at 66 citing Canadian trade policy analyst Murray Smith indicates that:

> Maintaining a customs union requires some minimal degree of political union, because of the divergence in regional interests. Conversely, the rupture of the Canadian political union seems to almost inevitably imply the dismantling of the Canadian Customs Union. What is difficult to anticipate with precision is whether the Canadian Customs Union could be dismantled without leading to any significant impairment of the internal economic union within Canada. Even at a technical level, this seems impossible. For example, if Quebec and the rest of Canada had any separate external commercial policies then there would be need of internal trade restrictions to police the external non-tariff barriers of either part of Canada, just as the European Community continues to maintain internal non-tariff trade restrictions....

[97] Leslie, *supra* note 95 at 59.

[98] *Ibid.*

démocratique du Québec, supra, the partnership idea has failed to progress beyond the "wishful thinking" stage, and as such its realization remains extremely speculative, at best. Therefore, it would be highly premature to rely on such a plan to predict the nature of Canada-Quebec trade relations following a Quebec secession.

V. CONCLUSION

With the quasi-totality of Quebec automotive exports heading to the rest of Canada and the United States,[99] the situation of "sleepwalking to independence" which the government is asking Quebeckers to approve is clearly unacceptable. The foregoing clearly demonstrates that, at least as far as the auto industry is concerned, major tenets of the sovereignist rhetoric detailing what would happen following a declaration of Quebec independence are clearly at odds with existing trade agreements and norms of international law. While it goes far beyond the scope of this paper to debate the merits of Quebec independence in its own right, the promotion of the idea of independence without "counting the costs" seems, at the very least, irresponsible, if not intellectually dishonest. In the context of the auto sector, the foregoing analysis clearly demonstrates that the costs associated with independence would be quite high, both in terms of employment and economic output.

However, the above analysis reveals that many of the most critical problems facing the auto industry of a newly independent Quebec would come at the transition stage immediately following a declaration of independence, but preceding such time as Quebec could accede to NAFTA and other trade agreements and organizations. Accordingly, if independence is to be as painless as many sovereignists would have us believe, then much more energy needs to be focussed on this transitory period. The absence of a cohesive and coherent plan to address the difficulties faced by Quebec industry participants would create a situation where virtually all of the jobs in auto manufacturing in Quebec would be put in peril. Accordingly, any responsible government advocating Quebec independence must take steps to ensure that the "trade vacuum" scenario will not develop.

The principle problem with such "planned sovereignty," though, is that it may not be effected unilaterally. As we have seen, accession to NAFTA would involve negotiations with the Free Trade Commission, which in turn would require American Congressional action. Unless steps were taken to conclude such negotiations before sovereignty was declared (in which case the U.S. Congress would have to be convinced to accord fast-track negotiating authority towards a political body other than a "foreign country" as required by Title 19 of the U.S. Code[100]), then Quebec would necessarily face a minimum five month trade vacuum from the time which fast-track authority would be accorded to the President and the Free Trade Commission. As the case of Chile demonstrates, anything short of iron-clad guarantees of Congressional action would put Quebec in a precarious situation with respect to NAFTA. Access to Canadian economic space would also be unavailable, except to those Quebec parts producers fortunate enough to sell to *Autopact* manufacturers in the rest of Canada, unless negotiations were taken up with Canada before independence was declared.

The unattractiveness of these solutions, though, should be apparent to anyone

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[99] See A. Krol "A la remorque de l'Oncle Sam" Revue Commerce no 5 (mai 1996) 31.

[100] 19 U.S.C. §2902(c)(1).

familiar with the Quebec nationalist movement. A mainstay of the movement has always been that any negotiations with Canada on the rupture of the country which were not progressing to Quebec's satisfaction would provoke an immediate declaration of sovereignty. This tactic was thought to produce a situation where Canada would negotiate "under the gun" or with "a knife to its throat." The latest incarnation of this tactic is to be found in the second paragraph of article 26 of *Bill 1*, which maintains that:

> The proclamation of sovereignty may be made as soon as the partnership treaty has been approved by the National Assembly *or as soon as the latter, after requesting the opinion of the orientation and supervision committee, has concluded that the negotiations* [with Canada] *have proved fruitless.* [Emphasis added] [101]

The reality, however, is that the negotiations with Canada would far more resemble a situation where Canada would be pleading with Quebec "don't jump!" rather than one where Canada was the party under relative duress, since, at least in respect of the auto industry, a Quebec unilaterally implementing article 26 would find itself in a very quiet and lonely situation, as seen earlier. Were Quebec to realize the fallacy of this nationalist dogma and to submit to realistic negotiations with Canada with respect to some sort of sovereignty association or perhaps renewed federalism, as proposed very recently by new Bloc Québécois candidate and party adviser Daniel Turp,[102] then, provided regard was had to the problems mentioned by Leslie, Quebec could avoid noxious transitory effects on its auto industry, by continuing to present itself to the outside world as part of a united Canadian State entity.

Of course, even were Quebec to assure itself of a speedy entry into NAFTA to forestall the effects of a trade law vacuum, the long term health of Quebec's auto industry might still be better served by renewed federalism. While the foregoing demonstrates that a sovereign Quebec participating in NAFTA would not deal a death-blow to its auto industry, it would find itself in a less than optimal situation. The loss of *Autopact* privileges could be expected to cause a cost bump in the products of all Quebec manufacturers currently enjoying *Autopact* status, to the extent that non-North American components or raw materials are used in their products, and the Quebec government would be severely limited in the types and levels of incentives that it could offer manufacturers to offset such increased costs. Furthermore, even proponents of the sovereignist movement acknowledge that Quebec's bargaining power would not be sufficient to allow it to demand special treatment with respect to duty waivers within the context of the NAFTA regime.

While rising regional value content requirements and elimination of the "roll-up" treatment in FTA and NAFTA have crystallized Canada as a second choice location for overseas automakers seeking a toe-hold in North America, it remains a fairly attractive location for investment from *American* investors eligible for *Autopact* treatment. Loss of *Autopact* privileges, with, as we have seen, little prospect for replacement or substitution, would likely crystallize Quebec as "Canada's ugly sister" in respect of these investors as well.

Accordingly, even when one ignores the problems associated with Quebec's

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[101] *Bill 1, supra*, note 42, article 26.

[102] T. Wills "Quebeckers have always preferred renewed federalism, Bloc adviser says" *The [Montreal] Gazette* (6 December 1996) A12.

transition to NAFTA membership, the long term growth prospects in terms of foreign investment of a Quebec auto industry are best served within the context of Canadian federalism, in whatever form, whereby *Autopact* privileges could be preserved.

In conclusion, then, what is the place of an independent Quebec in the context of a North American auto industry? In a worst case, though not necessarily implausible scenario, poor planning on the part of a Quebec legislature would leave industry participants in a lurch. Where a trade vacuum existed for any amount of time, many smaller participants selling directly into Canadian and American markets could be expected to go out of business altogether when faced with import duties and loss of "originating goods" status. Larger participants, such as General Motors, would likely be better equipped to weather the financial storm, though it is unclear what their long term reaction would be. In a best case scenario, Quebec would hamstring the juridical regime currently affecting trade in automotive goods with the effect of foreclosing foreign investment in a province which already has a dismal record in attracting and retaining foreign auto investments, even without the additional burdens imposed by independence.