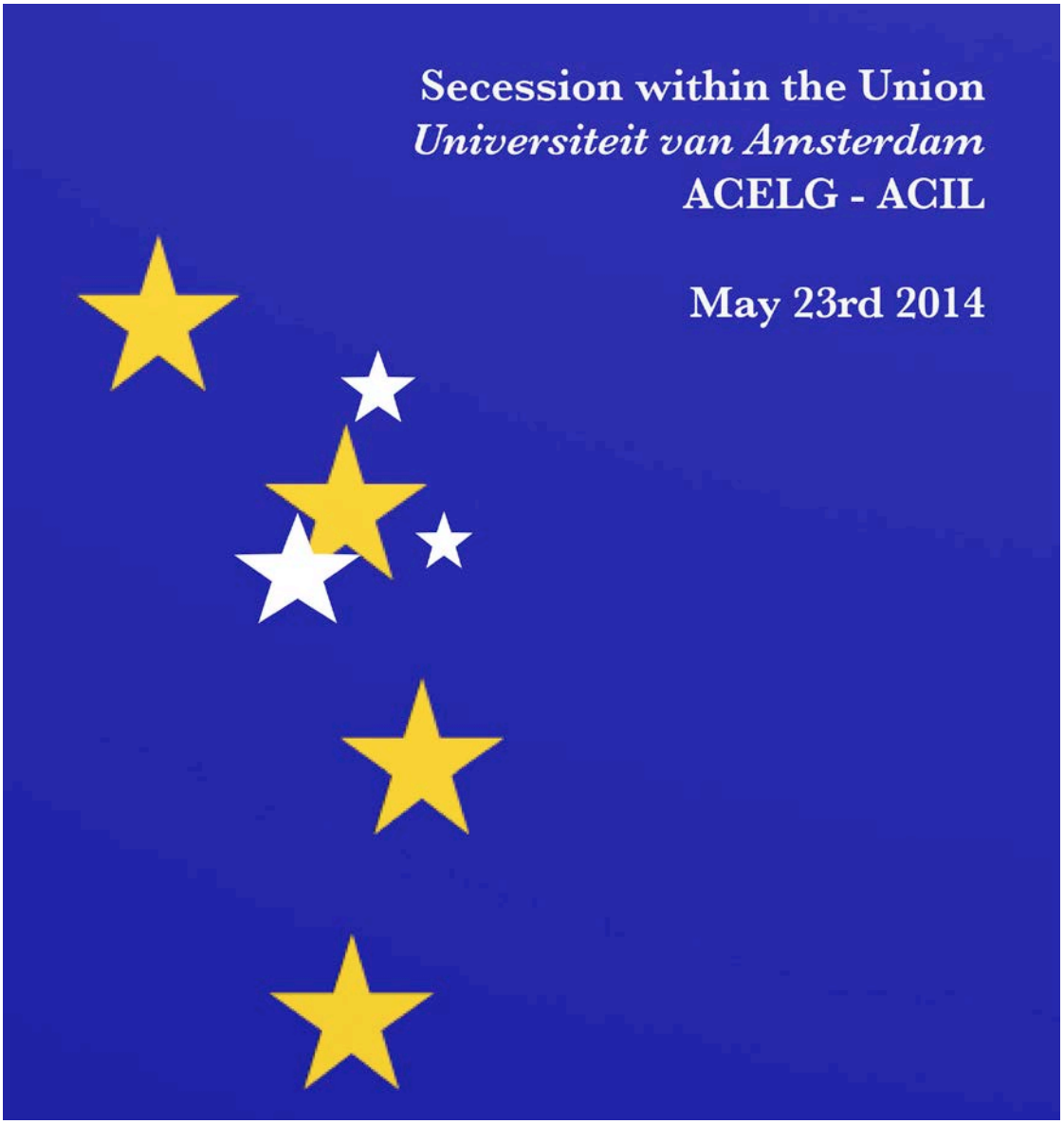

Collected Think Pieces

Succession and EU Treaty Obligations

Paul Dermine

Secession within the Union

Intersection points of International and European Law

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July 2014

Succession and EU Treaty Obligations

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I. State Succession to EU Membership in the event of secession

1. When addressing the topic of 'Succession and EU Treaty Obligations', one should first examine how the phenomenon of State secession can be captured through the rules of State succession as regard to EU membership. Would a newly independent State created by secession succeed to membership, thus automatically entering the EU as a fully-fledged member State (*dual succession* thesis)? Or would it exit, having thus to go through the entire accession process, as any other candidate country would (*ex novo accession* thesis)?
2. When scrutinizing EU Law, it must simply be conceded that it does not deal with succession issues regarding membership, or at least, that it does not convincingly support dual succession.
   A first observation to make is that the EU Treaties remain deafeningly silent on the issue of succession: there is no provision that sets out what would happen in the event of part of a member State becoming independent. Primary law does address situations of territorial enlargement (Article 49 TEU) or contraction (Article 50 TEU), but does not deal with phenomenons of fragmentation (*internal* enlargement scenarios) [1].
   A thorough review of the territorial evolutions of the EU also fails to provide conclusive elements. There is indeed a clear lack of fully relevant precedents. Neither the Algerian secession case, nor the Greenland (withdrawal without secession) or the German reunification (enlargement by absorption) precedents could be successfully applied by analogy to the scenario of part of a member State seceding[2]. Those precedents however reveal the existence in

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[1] M Chamon and G van der Loo, 'The Temporal Paradox of Regions in the EU Seeking Independence : Contraction and Fragmentation versus Widening and Deepening ?', [2013] *European Law Journal* (published online on 22 5 2013).

[2] A Ortega *et al*, 'Scission et permanence au sein de l'Union Européenne', [2002] *Politique Etrangère* 2,

EU law of a 'moving treaty boundaries' principle[3], that could potentially rule out dual succession. They also show that the EU institutions, when facing major and unforeseen territorial upheavals, have been able to display pragmatism, flexibility and innovation.

The 'EU Citizenship' argument proves equally inconclusive when it comes to support dual succession. Arguments derived from the *Rottman* and *Ruiz Zambrano* rulings[4] are clearly too weak to back such claims[5].

The dual succession thesis can thus find no favor in the eyes of EU law.

3. The inconclusiveness of EU law regarding this issue of State succession to EU membership forces us to turn to another set of rules, those of public international law, the relevance of which has been convincingly established by Crawford and Boyle[6].

   When it comes to State succession to membership in international organizations, one has to concede that international law lacks uniformity.

   It has been shown that the 1978 Vienna Convention on Succession of States, the main conventional instrument in the field, is insufficiently helpful here, despite the fact that it generally consecrates the principles of *de jure* continuity and universal succession (article 34, § 1): on the one hand, because the Convention places paramount emphasis on the rules of accession of the international organization (article 34, § 2), its object, purpose and internal functioning (article 4), and on the other, because it has been scarcely ratified, especially in Europe[7].

   The relevant practice of the international organizations, especially that of the UN, has proven much more enlightening. The numerous UN precedents and the 1946 'Sixth Committee' principles strongly suggest that in the event of secession, there could only be one

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[3] See the Commission's document « The Community and German Unification », *Bull. EC*, Suppl. 4-1990, 27

et seq. ; T Giegerich, 'The European Dimension of German Unification', [1991] *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 421.

[4] Case C-184/99 *Grzelczyk* [2001] I-06193 ; Case C-34/09 *Ruiz Zambrano* [2011] I-01177.

[5] See, for example, A O'Neill, 'A Quarrel in a Faraway Country?: Scotland, Independence and the EU', published on 14 November 2011, http://eutopialaw.com.

[6] J Crawford and A Boyle, 'Referendum on the Independence of Scotland-International Law Aspects', Opinion published in annex to the UK Government's Report on 'Devolution and the Implications of Scottish Independence', February 2013, para 184.

[7] See ibid, paras 120-125.

successor, namely the continuator state, i.e the state continuing the legal personality of the predecessor state[8]. In the reference publication on the topic, Bühler has made it very clear: within political international organizations (that he distinguishes from technical organizations) such as the UN, or the EU, '*a stronger community character seems to prevail among the member states, which makes membership a personal right*'. As a result, those political organizations tend to be '*closed to universal succession to membership*'[9].

4. There is thus no general rule, neither in EU law, nor in international law, that supports dual succession, and that would *a priori* allow a seceding entity in Europe to automatically succeed to the system of the Treaties and to EU membership. This entity would face a legal obligation to re-apply for its 'lost' membership. This is the stance the European Commission has always defended. A breakaway from the mother State is also a breakaway from the EU.

II. Avoiding the Limbo - The Paths to EU Membership

5. The conclusion reached on this first legal issue is not satisfying in itself. As there will be no succession to EU membership, one should thus seek ways to reconcile this fact with the constraints of the practice.
   It has been shown that a rigorist application of the abovementioned conclusion could have a devastating impact concretely. If it were to be strictly apply without any form of anticipation, Europe would end up with this new State born by secession being sent in some kind of legal limbo vis-à-vis the rest of the EU, until an accession treaty is signed and ratified, which is not to be taken for granted, or which will at least take some considerable time[10].
   This section intends to explore the ways to minimize disruption and to push towards synchronicity between formal independence and accession to the EU?

a) The EU institutions facing imminent secession

8 The continuator state being identified on the basis of a set of criteria that have already been discussed (see Scharf, 'Musical Chairs: The Dissolution of States and Membership in the United Nations', *Cornell ILJ* (1995), 67.

9 KG Bühler, *State Succession and Membership in International Organizations-Legal Theories versus Political Pragmatism* (Kluwer 2001), 302.

10 D Edward, 'EU Law and the Separation of Member States', *Fordham JIL* (2013) 36, 1165.

6. In the event of imminent secession, we are of the opinion that the EU institutions should try by all means to avoid disruption in the application of EU law, simply because the breakaway region will have been part of the EU for decades, and naturally belongs to it.
7. In this regard, Sir David Edward, quite convincingly in our view, has inferred from several elements of EU law that the EU institutions, and the other member States, would have to take a proactive stance and enter in pre-independence talks, even before independence is officially proclaimed, in order to avoid as much as possible disruption in the application of EU law[11].

b) Three simultaneous and interconnected rounds of negotiations

8. In order to ensure a transition as seamless and smooth as possible, negotiations could be structured around three rounds of talks, based on the following basic principles: pragmatism, flexibility, good faith, timing, interconnection, synchronization and inclusiveness.
9. The EU has shown pragmatism and innovation in the past. It could do so again. The EU institutions and the member States do enjoy some room for manoeuvre. While relying on the existing procedures of the Treaties, original *ad hoc* solutions could be designed.
    i. First round: Internal negotiations between the seceding entity and the "mother state"
10. This first purely internal round of negotiations will aim at settling anything that needs to between the newly independent entity and the State it is seceding from, such as nationality, financial, monetary or territorial issues.
    i. Second round: External negotiations on membership
11. We saw an independent Scotland, Catalonia or Flanders, could not bank on automatic membership, but would have to re-apply for it. But on the basis of which legal provision? There is still intense debate on this question.

[11] This duty of pre-separation negotiation can be inferred from the following elements: Article 2 TEU (democracy and minority rights), Article 4 TEU (respect of national identities), Article 20 TEU (EU Citizenship), the principles of sincere cooperation and federal loyalty, the spirit of Article 50 TEU (the emphasis it puts on pre-withdrawal negotiations), the Greenland and German precedents (where EU has displayed flexibility and inventiveness as it had to face unprecedented internal territorial upheavals, with a very high potential for disruption).

12. The Scottish Government has claimed that Article 48 of the TEU, which organizes the Treaty revision procedures, was the suitable legal route to EU membership for Scotland[12]. In its view, since the Treaties already apply to Scotland as part of the UK, they should continue to do so after independence, through their renegotiation and revision under Article 48.
    This view has been successfully challenged by Kenneth Armstrong and Jean-Claude Piris[13], who have raised numerous arguments against using Article 48 to extend the scope of the Treaties to a newly independent State. First, Article 48 has never been used for internal enlargement. Secondly, the case law of the ECJ is very clear on the fact that a Treaty provision cannot be chosen freely; this choice must be based on the aim and the content of the act to be taken. Moreover, specific articles should take precedence on general ones. In the case of a seceding entity seeking membership, a consistent analysis of the decision at stake clearly indicates Article 49 as the most specific and suitable legal basis. Article 48 and the revision procedures it organizes have solely been set up for altering the legal relationship existing between current member States. From a constitutional point of view, the eventual accession of a new member State triggers major political change and alters the composition and the balance of the institutions, thus justifying the strict procedural requirements of article 49 to be met.
    Article 49 appears to be the most plausible legal basis. As things stand, an accession based on Article 48, through the back door, does not seem likely.
13. Under which tempo could membership be negotiated from outside, under Article 49? The lodging of the application for membership, the signature of an accession treaty and the initiation of the ratification procedure could only occur once the applicant State has formally gained independence and has emerged as a fully-fledged subject of international law.
    However, one could argue that negotiation talks might be launched earlier. There is indeed no reason why proper negotiations could not start informally once independence has become certain. In the case of Scotland for example, talks could be initiated right in the aftermath of the referendum (in the event of a Yes vote, of course).

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[12] Scottish Government, *Scotland's Future – Your Guide to an Independent Scotland* , White Paper on
Independence, November 2013, 221.

[13] See Armstrong's and Piris' written evidences submitted to the European and External Relations Committee of the Scottish Parliament in January 2014.

Objections related to legal personality seem unduly formalistic. More crucial is the fact that the State-to-be is able to negotiate on its own behalf, without any interference from the mother-state. Under such a scheme, full accession could theoretically have been pre-negotiated once Scotland gets independent.

14. The content of those negotiations would be rather classical. As for any accession, the applicant State would need to meet the legal, procedural, political and economic criteria for membership (known since 1993 as the 'Copenhagen' criteria). Concerning Scotland or Catalonia, this could be quickly achieved, regarding their long-standing familiarity with the structures and processes of the EU. The 1995 enlargement towards EFTA countries has been usefully pinpointed by Armstrong, and might be an enlightening precedent[14]. Swift and easy negotiations should however not be taken for granted, as potential sticking points may naturally pop up.
15. An important hurdle could appear if the new State claimed to inherit, as an EU member State, the opt-outs and other preferential treatments its former mother-state had secured within the EU. The issue is particularly salient concerning Scotland, since its SNP-led government has promised its electorate that an independent Scotland would, as fully-fledged member State of the EU, inherit all the opt-outs and special regimes the UK has secured through its EU history. This would be so for the financial rebate, EMU membership or Schengen membership[15].

    Those claims are however not legally supported, neither by EU law nor by international law. An independent Scotland would not succeed to EU membership, and would thus not be legally entitled to claim a British-like status under EU law. Legally speaking, it would have to accept, as any other acceding state, full membership without any *a priori* preferential treatment. Under EU law, no applicant state can claim a natural right to this opt-out or to that specific arrangement.

    It may of course happen differently in the practice, depending on the results of the 'internal' negotiations and the negotiating approach privileged by the EU institutions.
16. The most important hurdle is of course the procedural one: accession under Article 49 requires unanimity among existing member States - in the Council when receiving the application for membership, at the national level when ratifying the accession treaty according to internal constitutional requirements – which is

[14] Armstrong, n13, para. 33.
[15] See the Scottish Government's White Paper, 221-24.

clearly not to be taken for granted, considering the fear of some European capitals to open Pandora's box and create a precedent.

ii. Third round: External negotiations on the transitory regime

17. The applicant country will face a hiatus between its formal independence and its entry in the EU, since its accession treaty, if it could be pre-negotiated before independence, would be at best signed the day of that formal independence. It would then have to be ratified by all member States, in accordance with their constitutional requirements. For reasons we have already evoked, this could take some time.
18. This transitional gap will have to be filled with sound practical solutions, such as an interim arrangement, in order to ensure continuity in the application of EU law. The idea is that in practice, firms, workers, students, citizens do not perceive any concrete disruption in the application of EU law.
19. In this regard, the spirit and *rationale* of Article 50 TEU may be relevant. It is true this provision is not fully applicable to situations under discussion here[16]. Those situations could however be analyzed as withdrawals, although unwanted and occurring in a totally different context than the one Article 50 was designed to address. Nevertheless, Article 50 was set up to ensure smooth and negotiated transitions in situations where the geographical scope of application of EU law may contract from one day to the next, and this is exactly what is at stake here. Therefore the spirit of Article 50, and the emphasis it puts on the necessity of an organized transition, should be used as prevailing sources of inspiration in the event of secession within the EU.
20. Some plausible solutions to secure minimal continuity in the application of EU law have already been put forward. Kenneth Armstrong, for example, has suggested that the accession treaty could be agreed on as having provisional effect pending on formal ratification[17]. This is rather unprecedented, but we saw the EU has displayed inventiveness and flexibility in the past. It could do so again, if facing yet another exceptional territorial upheaval.

III. Conclusion

21. One has to recognize the scenario we have sought to sketch out here remains an ideal model, the various involved actors should

[16] For the main reason that Article 50 only applies to withdrawal of whole member States.
[17] Armstrong, n13, paras 37-39.

however try to strive for in the event of imminent secession within the EU. It is clear that the various negotiation rounds will be profoundly complex, and that potential seceding states should be ready to enter uncharted waters, and face many hurdles on their way to membership.

22. However, we also showed that there is a certain room for manoeuvre, innovation and flexibility. Continuity can be ensured, disruption can be avoided and seceding entities may finally not end up in the legal limbo.
23. In the end, one has also to admit that this entire legal debate is resting upon one fundamental moral issue : to what extent does European regionalism and secessionism run against the essence of the European project?