Scotland's Place in Europe

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Executive Summary

The Constitution Unit is carrying out a study of Scottish Independence, funded by a grant from the Esm6e Fairbairn Charitable Trust: how Scotland might gain independence, and the consequences for Scotland and the rest of the UK if she did. As part of this study we have examined the place of an independent Scotland in Europe. Would Scotland remain a member of the EU?

1. The SNP claims that an independent Scotland would automatically succeed to the United Kingdom's treaty rights and obligations, including membership of the European Union. However, there is no automatic right to membership of the European Union. Continued membership would only be possible with the approval of all Member States.

2. Realistically, Scotland can. expect negotiations for EU membership to begin before independence is gained. There would

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the dossiers comes out in support of smooth and rapid accession to the EU. French advocate Maitre Xavier de Roux summarises the argument in the following terms:

"Scotland is part of the Common Market territory by virtue of the United Kingdom's accession to the Treaty of Rome and by application of the Treaty of
Union 1707. If the Treaty of Union was revoked and if Scotland recovered its international sovereignty, it would be accepted within the

1. Background of the Vienna Convention on State Sziccession in Respect of Treaties
The SNP's claim to succession to EU Treaty rights and obligations stands or falls on the application of the Vienna Convention on State Succession in Respect of Treaties (henceforth the Con~ention).~ Their claim will be examined in greater detail below. A closer look at the Convention, however, is required beforehand.

The Convention is concerned mainly with the position of the 'newly independent State', which Article 2(l)(f) defines as "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible". The focus on colonies is not coincidental. The Convention is concerned with State creations in the post-colonial context which is important when thinking about its relevance for Scotland.

Newly independent and other successor States are treated differently under the Convention. Controversially, the former are presumed to begin life unencumbered with a clean slate ('negative1 theory), whereas other successor States are presumed to continue automatically the treaty obligations of the predecessor State ('universal succession'). Article 2(l)(b) of the Convention defines the succession of States as the "replacement of one State by another in the responsibility for the international relations of territory". Does the SNP hope that Scotland would fall into the latter category and be the successor State in international law to the United Kingdom? would Scotland be resurrecting its age-old historic claim to statehood rather than establishing a brand new one? According to international practice, rUK rather than Scotland would be the successor State (or better: the continuing State). Continuity is presumed for the sake of legal certainty (Articles 34 and 35 of the Convention). In practice there is a clear tendency to succeed to multilateral treaties and conventions of a legislative or universal nature.

The Convention targets only the above two scenarios of State succession (neither of which applies to Scotland) and does not consider the various routes succession can take (continuation, separation, dissolution, merger, cession etc). Under the two available definitions Scotland would have to be squeezed into the category of a newly independent

h Adopted 22 August 1978; see 17 ILM (1978) 1488,. or http: / /www.~~n.org/law /ilc/ texts/ treas~cchtm (visited 08 February 2001). The Convention has been ratified by more than the necessary fifteen states and entered into force on 6 November 1996 in accordance with Article 49(1). By the end of

State within the colonial context. What the framers of the Convention had in mind, however, were in the first instance colonial territories that were granted independence and could not be expected to continue the bilateral treaty obligations of their colonial ruler (Article 16 of the Convention).' Ideally there should have been included a third category of "'quasi-newly independent States' which would have included States emerging outside a colonial context but in circumstances resembling the emergence of a newly independent State" (Kamminga 1996: 471). Indeed, the International Law Commission had proposed such a category

However, there are numerous and severe difficulties relating to the assumption that the EU Treaty will continue to apply by virtue of Article 34(1).

First, the EU Treaty establishes its own legal regime and creates an international organisation that is fundamental to the substantive legal regime established. The general rules of succession in international law do not apply to this case. Rather, Article 4 of the same Convention governs treaties establishing international organisations to which the predecessor State was a party. It provides that:

The present Convention applies to the effects of a succession of States in respect
of:

a) any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership
and without prejudice to any other relevant rules of the organization;

b) any treaty adopted within an international organization without prejudice to
any relevant rules of the organization..

(emphasis added)

The Convention in one of its very early provisions places paramount emphasis on the rules of accession and the rules of the international organisation in question. In other words, the Convention does not override the regime set up by the EU Treaty.

Second, paragraph (1) of Article 34 of the Convention has to be read in conjunction with paragraph (2) of the same provision which states that the former paragraph does not apply if:

b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible
with the object and purpose of the treaty or would radically change the conditions for its operation.

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EU Treaty. It would be adding a new

the fact that at the date of the

internal negotiations are sorted out amicably and prior to an Intergovernmental Conference which recognises Scotland (either as a new or as a successor State).

Realistically, Scotland can expect - more or less automatically - negotiations for EU membership to begin before independence is gained. In the event that the negotiations are not completed at the date of independence there would be a continuation of the imposition of the acquis communautaire on an agreed basis until negotiations are completed and all sides ratify the agreement.

Scotland's options are two-fold and subject to external pressure. It can keep a low profile and go for smooth and rapid acceptance by the EU. By conforming to the UK's terms of membership and adopting the acquis in its entirety, Scotland would continue its place in Europe in a spirit of co-operation and continuation that is unlikely to raise objections from other Member States.

Alternatively, Scotland could decide to make use of its newly gained independence and re-negotiate the terms of membership. It might, for instance, try and secure a better deal on fisheries than the UK did or demand more money for the Highlands and Islands out of the Structural Funds. Once Scotland starts cherry picking, adopting the legislation it likes and rejecting the legislation it does not, it will meet with resistance from and tough negotiations with other Members. The question then becomes how much time and resources the other Member States want to invest if Scotland enters negotiations in a spirit of confrontation and conflict. Scotland's strategy could easily backfire and

What would happen if Scotland became independent but did not - for whatever reason - negotiate with the EU? The position of Professor Neil MacCormick (SNP MEP) is that the application of the EU Treaty in Scotland would continue post-independence. In a letter to the Glasgow Herald

would no longer be "UK nationals".14 The Treaty provisions would not apply unless Scotland became a member. Scotland could also not be taken to the ECJ under Article 228; ex Article 171 EC), bring an action under Article 232 TEC (ex Article 175 EC) or seek its guidance under Article 234 TEC (ex Article 177 EC).

IV The Political Knock-On Effects

The above scenario is unrealistic but it illustrates the crucial link between membership and the application of EU law. In a real-life case, continued membership in the EU depends as much on political negotiations as on European law. Politics may or may not work in Scotland's favour. Where there is political will within the EU there is without doubt a way in for Scotland. Without such a will, however, Scotland may find itself staring in the face of politics. Accession to the EU requires unanimity. Germany, France, Italy and Spain are the big boys of Europe and are anxious to avoid splintering their states. Some commentators cannot imagine that they would watch Scottish independence without any form of resistance. According to Professor Clive Archer from the University Association for Contemporary European Studies, such idleness would "defy both logic and politics". The implication is that Catalonia, Lombardy, Corsica, Brittany, Flemish Belgium, and even Bavaria would be casting a keen eye on Scotland, acutely observing the follow-on improvements and drawbacks that are significant not least for their own regions. This was the position held by Robin Cook, the Foreign Secretary, in the past. In November 1998 he suggested that EU Member States, many of whom have secessionist movements of their own which their central governments are not keen to encourage, would veto Scottish membership.15

Others, however, do not share these worries. Secessions and the break-up of states happen all over the world. Would the mere fact that Scottish secession took place in the context of the EU set a dangerous precedent for other Member States? Would the same not be true for all other separ.308

The EEA brings together the 15 EU Member States with the three EFTA EEA States. Together they form a huge single market that is g0verned.b~ a common set of rules, which the EFTA EEA countries are

The final question is whether the EEA would at all be open for new members. One could certainly not count on any goodwill from the EU to re-invigorate the EEA. There would be a great reluctance to open it up for new membership.

For these reasons Scotland's future lies either within the EU or outside it.

Conclusions:

a The Vienna Convention on State Succession in Respect of Treaties was drawn up against a colonial background and lays down the rules relating to newly independent States (which are given a clean slate) and other successor States (which are presumed to succeed automatically to the treaty heritage of their predecessors), which do not accurately reflect customary law and have not proved generally acceptable.
There is no automatic right to membership of the European Union. State succession to
treaties has to be governed by the nature of the treaty. Continued cover by the EU Treaty
of the Scottish territory would thus only be possible with the approval of all Member
States.

Realistically, Scotland can expect - more or less automatically - negotiations for EU
membership to begin before neisj 0 Tc 1EMC T /T1_0 1 Tf -0.375 0 0 11.375 322264 507642275 0 (th

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Accession to the European Union

There is no principled reason why Scotland should not be able to meet the acquis. Rather, the hurdles it needs to surmount are practical. Many of the physical structures like central banks, tax collection structures and securities regulators have yet to be set up and implemented. The same can be said for customs, free movement of capital and other institution^.'^ But such difficulties are neither new nor insoluble. According to the European Commission Representation in Scotland, the system that had been in place to communicate the adoption of national legislation emanating from EU legislation has already had to adapt

the intermediary phase: the new member has acceded to the EU Treaty and participates fully in the Single Market whilst progressively integrating its monetary policy with the euro zone and participating in the exchange rate mechanism;
and finally, participation in the euro zone.

Conclusion

There is nothing to suggest that Scotland would not be able to meet the criteria set out above. But meeting the accession criteria is not the be all and end all for applicant states. There will still be plenty to quarrel over, ranging from the number of votes in the Council to financial contributions and such like. There will in practice have to be a whole raft of negotiations with the Commission in the preparatory stage and the EU members in the negotiation of an accession treaty. The process of negotiation is discussed in "Application of EU Law" in the context of deciding whether continued membership in the EU would be prompt or problematic. The next section will continue examining the case where Scotland has to apply to join any applicant state.

I I The Process

Scotland cannot be compared to the other applicant countries currently queuing to be admitted to the EU. Crucially, the Scots have enjoyed EU rights and obligations for almost 30 years. The following will provide an indication of the laboriousness of the process although it is extremely probable that most of this process will be side-stepped for Scotland unless Member States seriously want to make an awful example of Scotland for their own

reasons.

1. Negotiations
The guidelines for the negotiations approved by the Luxembourg European Council (1997) and the Helsinki European Council (1999) provide that each applicant country proceeds at its own pace. The level of preparedness is a crucial factor. Applicants are assessed on their own merits and join the EU when they are found ready to meet the Copenhagen criteria. This is not anticipated to be problematic for Scotland.

Negotiations are generally carried out in bilateral accession conferences (i.e. between the existing Member States and Scotland). With respect to the dozen or so applicant countries currently waiting to 'sail' into the EU under the 'regatta principle' or 'flotilla system' as

to nominate judges in the European Court of Justice (Article 221 TEC (ex Article 165 EC));

Court of Justice?
Member of the Court of First Instance? No Yes

Member of the European Court of Auditors? No Yes
Member of the European Investment Bank? No Yes
Member of the Committee of No Yes
Representatives COREPER?
Beneficiary of balance in the 28,000 No Yes
civil service jobs among nationalities?

Even if the SNP's predictions were correct the continued inclusion of Scotland in the European Union is more problematic than automatic. The above table lists the numerous necessary changes to be made to the EU Treaty in order to give full effect to Scottish membership. As discussed above, there can be no question of Scotland demanding that such changes be made as of right. They have to be negotiated and discussed at an

Ill Effectiveness of Scottish Representation

The SNP's slogan "Independence in Europe" once more brushes over the specific issues and the nuts and bolts of EU membership. From a dispassionate Scottish perspective the question is not so much whether Scotland could be an independent player in Europe (for there can be no doubt that it could) but whether independent Scottish representation in the EU would be more effective than its current representation via the United Kingdom. This section considers the

The Scottish Office recognised these difficulties early on and helped draft a Concordat

rUK would either keep its current 29 or face a reduction but to no fewer than 27 votes (equal with Spain). The joint force of those votes would be a remarkable 34-36 votes - provided that Scotland and rUK vote together. But the conclusion that Scottish interests are therefore better or more efficiently represented

IV Terms of admission

If it were the case that an independent Scotland found itself outside the European Union and had to negotiate its re-admittance into the EU it is worth considering on what terms it might be re-admitted. Scotland would most likely lose its

Scotland has been in receipt of EU funding ever since the Structural Funds were set up in 1975. Until 1988, no specific funds were set aside for Scotland. The European Commission approved individual projects on a case-by-case basis, as and when they were

19nds

were

of

other areas. Three programmes are devoted to Western, Eastern and Southern Scotland with a total allocation of Euro 807 million (or £521 million).

Objective 3: The new programme amalgamates the previous Objectives 3 and 4 and provides funding from the European Social Fund to support the adaptation and modernisation of policies and systems of education, training and employment. It will fund assistance outside the areas covered by Objective 1 and 2, which will receive ESF allocations as part of their programmes, and provide a framework for all measures to promote human resources in each Member State. The UK's total allocation is Euro 4,568 million (£2,947 million), of which 10.5 %, or Euro 481 million (£310 million), has been allocated to Scotland.

For the 2000-06 period, Scotland has been allocated Structural Funds of £1,094 million (10.8% of the total UK allocation). There has thus been a marked drop in Scotland's share from 24.9% of the UK total in 1975-88 to 10.8% in 2000-06. The question the European Committee of the Scottish Parliament sought to answer was whether the UK government has allocated Scotland sums under the Structural Funds of a similar value to those the EU would expect Scotland to re~eive.~'

The European Committee of the Scottish Parliament concluded that the allocation process by the UK is "relatively transparent and objective", and that (as far as it can tell) Scotland receives "an appropriate share of the Structural Funds allocated to the UK by the EU".32 There is also no evidence to suggest that over the 2000-6 period "Scotland is losing

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members will likely take place from the end of

References

Books

Shaw, M.N. (1997), International Law, (4th edn., Cambridge: Cambridge University Press).

Articles

Happold, M. (2000), "Independence: In or Out of Europe?",

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