

LEGAL SCENARIOS FOR THE EUROPEAN UNION'S RELATIONS WITH NEW STATES EMERGING FROM A SECESSION PROCESS FROM A MEMBER STATE

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Introduction

The current debate on the consequences for the European Union if there were a declaration of independence within a Member State seems to revolve around the presumably irrefutable fact of a *sine die* exclusion of the new State, in view of a set of juridical and political considerations. However, these considerations must be analysed in greater detail in order to clarify on a debate which has become excessively polarised, influenced by the zeal to proffer arguments in favour of or against independence.

In order to determine what the legal consequences of a situation of this kind might be, we shall analyse four clearly interrelated issues: the identification of general international legal norms or European Union legal norms which regulate the succession of States within international organisations; the European Union's current position on succession matters regarding the organisation and especially the case of secession within a Member State; the factors that the European Union might bear in mind when responding to a request for succession with member status for the new State that emerged from the secession from a Member State; and finally, the European Union's possible responses in the case of secession within a Member State in terms of the succession of its member status within the organisation.

1. Applicable legal framework within an international organisation of a Member State in the case of secession: Special attention to the case of the European Union

To determine the applicable legal framework regarding the member status of the new State in this international organisation in the event of a secession from a European Union Member State, we must first analyse whether there is any general norm in international law which must obligatorily be applied in this kind of situation.

However, we must first note that when we talk about succession, we are referring to "the replacement of one State by another in the responsibility for the

international relations of territory”¹. The international legal system stipulates that cases of succession also include the separation of one or several parts of the territory of a State, regardless of whether or not the parent State continues, and dissolution when the parent State ceases to exist, which leads to the creation of two or more successor States.

The succession of States poses a wide range of juridical problems which have been the subject of a slow codification process by the International Law Commission (ILC). To date, the results of this codification have been:

- The 1978 Vienna Convention on the succession of States in respect of treaties, which entered into force on the 6th of November 1996, although only four European Member States are signatories (Croatia, the Czech Republic, Slovakia and Poland).
- The 1983 Vienna Convention on the succession of States in respect of State property, archives and debts, which has not yet entered into force.
- The International Law Commission’s adoption of draft articles on the nationality of natural persons in relation to the succession of States in 1999.

We should also note that in 1987 the decision was made to table the process of codifying the norms on succession regarding membership in international organisations.

However, these conventions do not exhaust the international norms on this topic. In addition to different treaties that resolve the problems stemming from a specific process of State succession, *a priori* we cannot exclude the existence of customary norms on the issue, even in areas that are not expressly regulated in the international conventions, which have been applied in numerous processes involving the peaceful resolution of controversies.

Therefore, when the succession of States entails the creation of a new State, one of the problems posed is whether this new State succeeds the parent State in its status as member of the international organisations to which it belonged. The ILC’s abandonment of this issues leaves us with a single precept from the 1978 Vienna Convention on the succession of States in respect of treaties which mentions this issue, namely article 4, which regulates the scope of application of the 1978 Vienna Convention by stating the following:

¹ As stated in article 2.1 *b*) of the 1978 Vienna Convention on the succession of States in respect of treaties, and article 2.1 *b*) of the 1983 Vienna Convention on the succession of States in respect of State property, archives and debts.

“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.”*

However, we should previously note that this international treaty has not fared very well, because very few States have ratified it, so we can hardly claim that for the States that have not ratified it the Convention contains customary rules or has helped to crystallise customary norms which are obligatorily applicable. Despite this, some of its provisions have been drawn on in different succession processes.²

However, the obligatory application of these specific rules is quite complicated for the States that have signed them, because even if it stipulates that the 1978 Vienna Convention is generally applied to the succession of States in respect of the constituent instruments of international organisations, it then goes on to claim that this general rule should be applied without prejudice to the rules on acquisition of member status and any other relevant rules of the organisation. In the doctrine, the interpretation of the scope of this precept is not entirely homogeneous, even though the solution to the issue of a possible succession in member status in an international organisation³ is generally determined by the rules of the organisation itself. This interpretation would be in line with the International Law Commission in its comments on the draft articles of the

² The solutions provided by the 1978 Vienna Convention on the succession of States that did not emerge from a decolonisation process are upheld on the principle of continuity, such that if they want, the successor States can remain parties to the treaties that the parent State has signed with a simple written notification of succession. In the specific case of the republics that succeeded the Soviet Union, bearing in mind that the treaty was not in force then and that there were doubts as to whether or not a simple codification of the pre-existing norms on this matter had taken place, this principle was accepted in the Alma-Ata Declaration dated the 21st of December 1991. With regard to German reunification, a treaty was signed between the GDR and the FRG which stipulated the continuation of the FRG’s treaties for the entire territory of the State and the examination of the GDR’s treaties to determine whether they remained in force, had to be adapted or should expire.

³ On this issue, see the analysis by BÜHLER, Konrad G. *State succession and membership in international organizations: Legal theories versus political pragmatism*, The Hague: Kluwer Law International, 2001, pp. 30-35.

Convention that this organisation adopted in 1974, when it states that: “*while the rules of succession of States frequently do not apply in respect of a constituent instrument of an international organization, it would be incorrect to say that they do not apply at all to this category of treaties. In principle, the relevant rules of the organization are paramount, but they do not exclude altogether the application of the general rules of succession of States in respect of treaties in cases where the treaty is a constituent instrument of an international organization.*”⁴

Therefore, we can claim that in order to resolve this issue, we should refer to international organisational law, although this does not mean that the general rules on State successions can never be applied to international organisations under any circumstances. Therefore, we must determine the compatibility of these norms with the rules of the international organisation, and include the written rules and customs of the organisation⁵ in this category, as the ILC does.

Thus, we shall analyse whether the European Union has its own rules which would provide a clear solution to the question of the succession of member status in the organisation. However, before answering this question we must make two important notes: first, we cannot ignore the fact that the European Union is a unique international organisation which has clear features of a federal model; and secondly, the European Union has created its own legal system which is independent from and different to both international legal norms and the internal legal systems of its Member States. These two considerations are crucial when identifying the legal framework in the event of a State succession within the European Union.

First, we should note that there is no norm in the treaties establishing the European Union that expressly regulates cases of a State succession in relation to member status in the EU. Once we have established that, we must determine whether there is any other norm in the EU’s legal system that regulates succession either generically or particularly. Throughout the more than 50 years of European construction, which started with the creation of the European Communities and is materialised today in the current European Union, several cases of State succession involving Member States have occurred, including Saarland’s shift in sovereignty, the

⁴ INTERNATIONAL LAW COMMISSION. “Report from the Commission to the General Assembly. Draft articles on Succession of States in respect of Treaties with commentary”, *Yearbook of the International Law Commission*, 1974, vol. II, Part I, p. 180.

⁵ *Ibid.*

independence process in Algeria and German reunification. Along with these three events is the change in status of some of the territories within the European Union, such as Greenland and the island of Saint Barthélemy. However, none of these cases is exactly the same as separation or secession within a Member State in which the new State also wishes to be a European Union member.

The first case of State succession which took place within the framework of European construction was the shift in sovereignty of Saarland, which went from being under French domain to being annexed by the Federal Republic of Germany on the 1st of January 1957, without changes to the European Coal and Steel Community Treaty. In fact, a reform of the treaty was unnecessary because it did not specify its territorial scope of application, and because there was an exchange of letters between the German and French governments as an annexe to the treaty in which both parties recognised that the signing of the treaty did not mean that both States recognised the German government's status on Saarland at that time and that this would be definitively determined in a specific treaty on the issue.⁶

In the case of German reunification, the European institutions deemed that this entailed the reintegration of the Democratic Republic of Germany into a unified Germany and that, in consequence, the constituent treaties did not need to be amended. Instead, the State simply had to internally adopt all the measures needed to ensure that the entire EU legal system would be harmoniously applied in the territory of the former DRG. Initially, this process took place through a series of transitory measures which were negotiated with the authorities of both States prior to reunification.⁷

Previously, the European Communities had had to deal with a complex legal problem as a result of the position given to Algeria after it achieved independence, bearing in mind the provisions of the treaties establishing the European Communities. The treaties

⁶ “Échange de lettres entre le gouvernement de la République fédérale d'Allemagne et le gouvernement de la République française concernant la Sarre”, *Mémorial du Grand-Duché de Luxembourg*, no. 41, 9 July 1952. Luxembourg: Service Central de Législation. “Traité instituant la Communauté Européenne du Charbon et de l'Acier”, pp. 742-743, [online].
<http://www.cvce.eu/obj/traite_instituant_la_ceca_echange_de_lettres_entre_les_gouvernements_de_la_rfa_et_de_la_france_paris_18_avril_1951-fr-685dee87-1c63-403f-aef5-5086dfbf71a2.html>

⁷ EUROPEAN COMMUNITIES — COMMISSION. “The European Community and German Unification”, *Bulletin of the European Communities*, supplement 4/90. Luxembourg: Office for Official Publications of the European Communities, 1990.

regarded Algeria as a territory of the European Communities in that it was part of the French Republic, but furthermore, article 227.2 of the TEEC expressly mentioned this and stipulated a specific application regime of some of the provisions of the treaties for this territory. Thus arose the problem when Algeria declared independence. As Valay said: *“l’indépendance de l’Algérie représentait l’accession au statut d’Etat indépendant d’une fraction d’un Etat membre, ce qui a posé le problème de la succession d’Etat,”*⁸ and therefore the juridical problem regarding the legal obligations towards Algeria before EU law had to be resolved, bearing in mind that the new State could not become a member of the European Communities because it did not fulfil the only requirement stipulated expressly in article 237 of the TEEC, namely that it be a European State. The solution ultimately adopted was that Algeria had to renounce the application of article 227.2 of the TEEC, and the European Community Member States had to find a solution that would allow it to enjoy the benefits called for in this precept. Thus, *“par une lettre du 24 décembre 1962, le gouvernement algérien a fait savoir à la C.E.E. qu’il envisageait ‘de rechercher par voie de pourparlers avec les organismes de la Communauté quelles seront pour l’avenir les relations possibles entre l’Algérie et la Communauté’. En attendant, le gouvernement algérien demandait que lui soit conservé le bénéfice de l’article 227. Bien qu’aucune décision formelle n’ait été prise par le Conseil, le régime de l’article 227 a été maintenu de facto, étant entendu qu’ainsi était créée une situation qui ne pouvait être que provisoire.”*⁹ From that moment on, a stage of what is regarded as the *dynamic status quo*¹⁰ got underway, in which the initial legal system was gradually adapted to the new circumstances, until the cooperation agreement between the EEC and Algeria stipulating a new regime of relations between the two parties was signed in 1976.

Beyond these three cases of succession which the European Union has dealt with throughout the course of its history, we should recall that it has also had to respond to two episodes in which the regime of application of the treaties had to be amended in part of the territories of its Member States.

⁸ VALAY, Georges. “La Communauté Economique Européenne et les pays du Maghreb (à suivre)”, *Revue de l’Occident musulman et de la Méditerranée*, no. 2, 1966, p. 214, [online]. <http://www.persee.fr/web/revues/home/prescript/article/remmm_0035-1474_1966_num_2_1_936>

⁹ Ibid, p. 216.

¹⁰ Ibid, p. 221.

Greenland's status within the European Community was modified as a result of the referendum that was held there on the 23rd of February 1982. Greenland had achieved political autonomy from Denmark in 1979, and as the outcome of this referendum, the majority decided to leave the European Union. Even though the treaties did not provide for the possibility that part of the territory of a Member State might leave, a treaty amending the constituent treaties of the European Union was negotiated which stipulated that the new regime would be considered an overseas country and territory in its relations with the EC, in accordance with the provisions contained in the Treaty Establishing the European Economic Community at that time.¹¹

The change in the island of Saint Barthélemy's regime within the European Union was prompted by its change in legal status with France; on the 22nd of February 2007 it ceased being part of the French overseas department of Guadeloupe and became a French Overseas Collectivity as a result of the referendum held on the 7th of December 2003. To adapt to this new situation, in accordance with article 355.6 of the TFEU, France requested that the European status of this island be shifted from an ultra-peripheral region, as contained in article 349 of the TFEU, to an overseas country and territory, as regulated by the fourth part of the TFEU. Finally, on the 29th of October 2010, the European Council adopted the decision which amended the treaties so that the island could have the status of overseas country and territory effective the 1st of January 2012.¹²

Despite the differences in the five cases analysed, all of these processes share two features worth noting: first, the European Union and the Member States which were directly involved respected the democratic will expressed by the collectives that wished to amend their relationship with the European Union at all times; secondly, the European Union has shown remarkable flexibility and political pragmatism when adapting to the new situations, which in some situations even affected the application of numerous provisions from the treaties, meaning that regulatory gaps on the form and

¹¹ "Treaty amending, with regard to Greenland, the Treaties establishing the European Communities", *OJEC L*, 29, 1 February 1985.

¹² EUROPEAN COUNCIL. "European Council Decision of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy", *OJEU L*, 325, 9 December 2010, pp. 4-5. (2010/718/EU)

substance of the solution to be adopted had to be overcome in detriment to a rigorous, immediate application of the revision procedures of the treaties.¹³

Finally, we should also note that none of these cases entails an independence process from the territory of a Member State on the European continent associated with the new State's desire to become a member of the European Union; therefore, it cannot be denied that the organisation in practice has filled the regulatory gaps in the constituent treaties in this kind of situation. In contrast, Martín Mangas believes that "the consequences of secession affect the European Union regulations in place, and there is no gap in terms of the consequences or effects; there are applicable European norms".¹⁴ However, even though it is true that there are EU norms that could be applied in these situations, it is equally true that these norms serve to fill the regulatory gap that does arise when there is no norm that expressly regulates the consequences that a secession would have for the European Union.

2. The European Union's position on succession in the status of member of the organisation in the case of secession of a Member State

Before starting, we should say that, as discussed above, there is no general norm of international law nor any specific European Union norm which expressly regulates cases involving the succession of States within international organisations and which therefore legally prevents a State that emerges from an independence process from a European Union Member State from becoming a new member of the organisation without it having to face, in the best-case scenario, an accession process as if it were a third State totally outside the process of European construction.

Despite this, some scholars claim that it would only be possible to apply article 49 TEU to this kind of situation. They claim that article 49 TEU, which regulates the accession of a third State to the European Union, would be applicable because based on the wording of this precept it cannot be ascertained that States emerging from secession

¹³ PALOMARES AMAT, Miquel. "Las decisiones de los jefes de estado y de gobierno, en el seno del Consejo Europeo, como categoría jurídica para regular transitoriamente la participación en la Unión Europea de nuevos estados surgidos de la separación de estados miembros", *Revista d'Estudis Autònoms*, no. 17, April 2013, p. 165.

¹⁴ MANGAS MARTÍN, Araceli. "La secesión de territorios en un Estado miembro: efectos en el derecho de la Unión Europea", *Revista de Derecho de la Unión Europea*, no. 25, July-December, 2013, p. 57.

from a Member State¹⁵ were meant to be excluded from its scope of application. However, this statement is based on the assumption that all the articles of an organisation's constituent treaties that regulate enlargement processes are automatically applicable to succession processes if succession is not the subject of a specific regulation. However, international practice categorically denies this conclusion. In this sense, we should consider that the reference in the 1978 Vienna Convention on the succession of States in respect of treaties refers solely to specific rules of international organisations on this specific issue. A very different issue is if in the absence of this specific regulation, international organisations have decided to use the general rules regulating the entry of new States into the organisation in cases of succession. In fact, this has occurred many times, even though international practice to date shows that a wide range of solutions have been adopted. If we analyse the practices of international organisations in this kind of situation, we can see that they have ranged from the use of accession procedures provided for in the constituent treaties for the entry of third States

¹⁵ “First of all, in our opinion there is no regulatory gap in the European Union treaties on the question of succession as a Member State. For this gap to exist, the lack of a provision that specifically addresses the problem is not enough; rather it is also necessary for no solution to be found by applying the entire set of norms in the system. And the fact is that the case at hand, that is, the membership in the Union of a new State born as a consequence of secession of part of the territory of a Member State, fits in perfectly with article 49 TEU. This precept effectively regulates the accession requirements and procedure, in very general terms, of ‘any European State’. For the EU, the new State would be considered a third State or non-Member State, and in consequence, it would fall within this generic category of ‘any European State’ which must request accession. In other words, the wording of this provision does not allow one to sustain that the potential States emerging from secession from a Member State are excluded from its scope of application. In fact, a comparison with article 50 TEU seems to confirm this conclusion. This article recognises that a Member State has the right to decide to withdraw from the Union. However, if it wants to re-enter after having withdrawn, ‘its request shall be subject to the procedure referred to in Article 49’. That is, it must follow the ordinary or common accession procedure. The fact that it had already been a member, even if it still fulfils the conditions required for accession, does not only not exempt it from having to undergo a new procedure but does not even justify a special or more simplified route to membership. No one forces a Member State to withdraw, but if they do so voluntarily they should know that if they wish to rejoin in the future, they will not receive privileged treatment. So something similar might hold true with the successor State: no one has forced it to become independent; that is, no one has forced the secession, but if it voluntarily decides to secede it cannot assume that it will receive privileged treatment when striving to join the Union within the European regulatory framework currently in place.” GALÁN GALÁN, Alfredo. “Secesión de Estados y pertenencia a la Unión Europea: Cataluña en la encrucijada”, *Istituzioni del Federalismo, Rivista di studi giuridici e politici*, no. 1, 2013, p. 111.

to the automatic admission of new States, as well as simplified ad hoc admission processes which have been agreed upon for the specific occasion.¹⁶

Having reached this point, we should analyse the subjective scope of application of the precepts in the Treaty of the European Union which regulate entry into the organisation. Articles 2 and 49 of the TEU regulate this issue. These precepts contain two particularities compared the norms that regulate entry into the majority of international organisations. First, they establish a complex procedure to accept the request, in which a range of European institutions and the national parliaments of the Member States participate. This immediately gives rise to negotiations between the applicant State and the Member States. Secondly, the end result of these negotiations is an accession treaty which must be ratified by all the Member States and the applicant State; this treaty regulates the conditions of accession and any amendments that must be made to the legal system of the European Union, including its constituent treaties.

Article 49 TEU does not specify the subjective scope of application of the entry process it regulates, beyond outlining the conditions which must be fulfilled in order for the application to move forward. To date, this precept has been applied to all applications by third States which expressed the desire to become EU Member States. These include applications from States totally outside the European Union process. However, the uniqueness of the procedure in place to join the Union may pose serious doubts as to its suitability to regulate particular situations regarding States that have not been totally outside the European construction process. In my opinion, a literal, blanket application of article 49 TEU ignores its unsuitability for resolving enlargements that occur from a separation process within the European Union itself, because this precept has the capacity not only to articulate the accession of a State but also to help this process take place with the guarantee that it will properly adapt to the new status of all the members involved in order to minimise the negative impact that the application of all European Union law might have for both the new member and the other members, and even for the functioning of the organisation, which does not occur when dealing with a territory where European Union law was already applied ordinarily until the moment it became a new State.

¹⁶ See a more detailed analysis of the different kinds of solutions given by the provisions of the constituent treaties of international organisations in the case of the succession of States in their status as members in BÜHLER, Konrad. G., *op. cit.*, pp. 18-30.

These doubts would be confirmed by the fact that article 50 TEU, which regulates the procedure for withdrawing from the organisation, expressly stipulates that a State that has ceased being a member of the organisation but that in the future wishes to reinstate its membership has to follow the accession procedure described in article 49 TEU. Therefore, the situations created by succession processes of European Union Member States in the case of secession or dissolution of a Member State are not resolved, because to date neither any article in the treaties establishing the European Union nor the Union's practice has dealt with this particular situation.

Having said this, we should ask about the European institutions' positions on the matter. If we ignore the contradictory statements of the members of the European Commission when they speak individually, to date only the European Commission has issued a statement on the matter. It says that it will only issue an opinion on the juridical consequences according to European norms which the creation of a new State through separation from a Member State would have for the European Union if a Member State requests it and outlines a specific scenario. However, this situation has not yet occurred. Thus, what it is indirectly telling us is that there is no single answer and that everything will depend on the circumstances in each particular case.

Likewise, the European Commission has also stated that in its opinion, from the moment it was created, the new independent State would be considered a third State where the treaties establishing the European Union would not be applied, and it often refers generically to the enlargement procedure provided for in article 49 TEU. From the juridical standpoint, it should come as no surprise that the new State would be considered part of the founding treaties and that European law would not automatically be applied to it, since in order for European law to be applied there, this new State would have to request it and the European Union would have to accept it. However, the crux of the matter is determining how this process would take shape and how long it would take, and on this issue it is important to outline the legal procedure that would be used to respond to the new State's request.

Therefore, with different potential situations of secession in European Union Member States, the institutions are acting quite cautiously today in order not to stir up these pro-independence processes. As Gounin states, "the European institutions have been hostile to State instability, internally because they are limited by article 4 TEU, and internationally because of the caution which has always been used in processes of

this kind outside their borders.”¹⁷ However, Gounin also notes that people who are against these pro-independence processes will wield all the arguments possible to dissuade citizens from taking this step, but that once the Rubicon of independence has been crossed, the European Union Member States will have a great deal to lose if they place these new States in quarantine.¹⁸ And regarding the European Commission’s arguments, he states that “*l’argument juridique invoqué par la Commission européenne n’est pas dirimant. Quand bien même les textes ne prévoient pas expressément cette hypothèse, la pratique doit trouver une solution réaliste et efficace à l’éventuelle accession à l’indépendance d’un territoire d’un État membre. Les Suisses l’ont fait lorsque le Jura a quitté le canton de Berne. La Cour suprême canadienne y invite, au cas où l’indépendance du Québec se concrétiserait.*”¹⁹

3. Factors that the European Union could bear in mind when responding to the request for accession by a new State emerging from secession from a Member State

If it received a request from a new State to join the organisation, the European Union would be forced to respond, and in my opinion, it would have to do so bearing in mind factors as diverse as: the specific circumstances of the independence process; respect for the democratic principle stipulated in article 2 of the Treaty of the European Union; and the social, juridical, political and economic consequences that the decision would have for both the Union and the citizens and companies of the Member States.

First, we have spoken about the circumstances of the process that led to the independence of the new State as a key factor in the European Union’s response. In this sense, there is beginning to be a clear consensus in the doctrine that, in the case of a consensual separation, the European Union’s response should be to find a solution that keeps the new State from breaking with the organisation. Likewise, a non-consensual secession might have a huge bearing on the EU’s response. The Spanish government expressed this in a letter addressed to the European Commission in in which it claimed that article 4.2 TEU would prevent any new State that had unilaterally declared

¹⁷ GOUNIN, Yves. “Les dynamiques d’éclatements d’États dans l’Union Européenne: casse-tête juridique, défi politique”, *Politique étrangère*, no. 4/2013, pp. 18-20.

¹⁸ Ibid, p. 22.

¹⁹ Ibid, p. 22.

independence from being accepted. This statement is upheld on the fact that, according to the Spanish government's viewpoint, article 4.2 TEU has created a general European Union principle in which if the territorial integrity of a Member State is violated, the European Union cannot accept the new State that emerged from this violation. This interpretation ignores the fact that the only purpose of this article is to establish that the essential functions of the Member States, including maintaining the integrity of the State, cannot be the target of any interference by the European institutions. However, in any case this precept would cease to be applicable once the new State effectively existed. However, this article should be interpreted in light of article 2 TEU, which requires the Member States to act always in line with the democratic principle. Having reached this point, we should reflect on whether, in a situation of conflict in a secession process that materialises through a unilateral declaration of independence as the only possible way to implement the majority democratic will of the citizenry of a territory, the European Union would let article 2 TEU prevail which, along with article 7 TEU, requires States to respect the democratic principle, or instead whether it would let article 4.2 TEU prevail, which states that the Union could not act in the event that the territorial integrity of a State was violated as the result of a secession. Therefore, this would truly be a case of trial by fire for the European Union.

Secondly, in fulfilment of the democratic principle recognised in article 2 TEU, the EU would be forced to respect and defend the decisions adopted democratically by the majority of citizens in part of its territory, and this would include a secession process that occurred as the result of a democratic process.²⁰ Therefore, this respect for the democratic principle would have to be a determining factor in the European Union's decision.

In this sense, in recent years the international practice of different democratic States which have had to deal with secession requests from sub-State governments is contributing to shaping the standards that should be borne in mind when interpreting the democratic principles with regard to this kind of situation. The two most paradigmatic cases have taken place in Canada and the United Kingdom with the aims of the Quebecois and Scottish peoples, respectively.

²⁰ In the same vein, see EDWARD, David. "Scotland and the European Union", *SCFF Blog*, 17 December 2012, point 9 [online].
<<http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>>

In Quebec, two referendums on independence have been held, even though until that time the Canadian Constitution did not provide for this possibility. Therefore, in 1998 the Supreme Court had to issue a ruling on the constitutionality of Quebec's possible secession. In this case, the Supreme Court stated that even though the Constitution did not provide for this possibility, if the majority of Quebec citizens voted favourably on a clear question on the independence of Quebec, this would automatically create the obligation to negotiate a constitutional amendment which would put into effect the desire of the majority of Quebecois to become a new independent State.

The Canadian Supreme Court claimed that its ruling was grounded upon the four fundamental principles that inform the Canadian Constitution, namely: federalism, democracy, constitutionalism and the primacy of law, and finally, the respect for minorities. Based on these four principles, the Canadian Supreme Court stated that a unilateral declaration of independence ran counter to Canadian internal law, but that it was possible for the populace of a province to express a clear rejection of the legal order in force and a clear desire for secession. And in this case, this desire would automatically confer legitimacy on a territorial separation plan and would impose an obligation for the rest of the State to take this desire into consideration and to respect this expression of democratic will as it embarked upon negotiations in good faith to bring it to fruition.

In turn, the Scottish regional government publicly expressed its desire to hold a referendum on its possible independence from the United Kingdom, even though this was not one of the competences held by the Scottish Parliament. In order to carry out the will of the Scottish government, on the 15th of October 2012 an agreement was signed in Edinburgh between the governments of the United Kingdom and Scotland which set the stage for a referendum on the independence of Scotland to be held. This agreement stipulated the steps that had to be taken so that the Scottish Parliament would temporarily be given the authority to call the referendum under the conditions stipulated in the agreement. In this way, the British government responded to the desire expressed by Scotland's citizenry upon the 2011 electoral victory of the SNP, whose platform included the desire to hold a referendum on Scotland's independence.

Therefore, the experiences of Canada and the United Kingdom cannot be ignored when giving content to the democratic principles in relation to the secessionist aims of the parties winning the regional elections, in terms of both the attitude that the European Union should take on fulfilment of the value of democracy as contained in

article 2 TEU and the action to be taken regarding the decisions of part of the citizenry when responding to their aims with regard to the European Union.

Thirdly, logic tells us that when deciding whether it should automatically be excluded or whether the goal is to seek avoiding a rupture with the new State, the European Union should weigh the juridical, economic, social and political consequences of its decision both for the new State and its citizens and for companies in the remaining Member States. It goes without saying that those who are against the independence of Catalonia claim that its exclusion from the European Union would be permanent, or that it would at least last a long time if it earned this independence from a unilateral declaration, because not only would the parent State, in this case Spain, have the power of veto, but so would other States with internal tensions that threaten their territorial integrity.²¹ We cannot discard the possibility of this happening, just as we cannot discard the possibility that once independence has been consummated, the interests of certain States would not lead to a rupture, and thus a power play and series of intertwining influences would arise which would determine the definitive solution to the process.

Associated with this issue is the question of determining the institution or institutions which would respond to this request for membership. The constituent treaties do not provide a definitive answer, because they do not regulate the issue or contain closure clauses. One possible solution to the problem would be to allow the European Council to do it, in that it is the institution that is supposed to provide the impetus needed for the development of the European Union (article 15 TFEU). However, by virtue of the principle of faithful cooperation among the institutions, the European Parliament and Commission should also actively participate in this act of recognition, similar to the way they participate in ordinary enlargement processes.

A related issue is determining the rule that the European Council would use to take this decision. On this topic, article 15.4 TEU states that the European Council should issue an opinion by consensus, unless the treaties stipulate otherwise. That is, in

²¹ In this vein, Mangas Martín refers to the negotiations to join the European Union when she states that “these negotiations are always complex and sometimes quite lengthy, and in the event of Catalonia’s unilateral secession, their request would most likely not even be accepted. Only the passage of the years, dozens and dozens of years, would allow an act of disloyalty like a unilateral secession to be handled without rancour. An internal secession and then asking this parent or predecessor State to welcome it into Europe is incongruent.” MANGAS MARTÍN, Araceli, *loc. cit.*, p. 66.

the absence of a formal vote, the decision would be considered adopted if no State expressed its desire to explicitly oppose the adoption of the decision. This is a formula that makes it easier to adopt agreements because it means that States do not have to explicitly express their support for a decision, although it does not prevent a single Member State from blocking or vetoing it. The crux of the matter is knowing to what extent this State has the political capacity to block a decision that could affect the political, economic and social interests of the other Member States, or even the international prestige or credibility of the European Union. At this point, Politics – with a capital “P” – enters the fray.

4. Possible responses to a request for membership in the European Union from a State that emerges from secession from a Member State

Because of the unique features of the European Union, it does not seem very likely for a new State to automatically be allowed to join without a request and corresponding response. Based on this premise, the European Union’s decision can range from *sine die* exclusion to simultaneous accession at the same moment of that the independence of the new State is effectively proclaimed, along with transitory solutions that would facilitate the application of the EU’s legal system in the territory of the new State until the entire body of norms were adopted to allow the parent State and new State to adapt to this situation permanently. The treaties establishing the European Union and the organisation’s practice allow it to draw from a variety of formulas and procedures to implement any of these responses.

4.1. Application of the accession procedure contained in article 49 TEU

If the European Union’s decision was automatic exclusion, with the subsequent application of article 49 TEU if the new State wanted to become a European Union member, a process would get underway that would initially entail a total rupture between the EU and the new State. However, we cannot ignore the fact that if the EU’s decision is automatic exclusion, the economic and social interests of both the Member States and the new State might suffer very negative consequences. Along the same lines, it seems totally illogical that if a territory within the EU gains independence, the EU would agree to automatically exclude it without taking into account the negative

effects that this would have for all the members involved. This is particularly true because article 50 of the Treaty of the European Union states that in order to withdraw from the European Union, negotiations must be held to regulate the new mutual relationships with the goal of avoiding the negative effects that a sudden rupture would have on all the States, and only if two years have elapsed without reaching an agreement would the State effectively be allowed to withdraw.

Therefore, it seems that the defence of applying article 49 TEU is clearly instrumental and pursues the goal of spotlighting the possibility of a veto on the enlargement or the lengthy period of time that the new State would have to wait outside the Union until the entire process of carrying out an accession treaty were finished. In this sense, Mangas Martín states that the use of article 49 TEU, the only possible solution in her opinion, would also mean the possibility that a request could not be accepted from a State that has not been internationally recognised by all the European Union Member States.²² And in this same vein, she then states that “the veto could be ‘eternal’ or could last dozens of years, among other reasons because it is incongruent and nonsensical and, of course, disloyal to separate from an EU Member States and then want to return to the organisation of European unification”.²³ Finally, the same author stresses that “the governability and prosperity of Europe will not be guaranteed by its almost 300 European regions”.²⁴ Regardless, it is undeniable that the European Council is an institution which is heavily influenced by purely political considerations, so we cannot in any way discount the possibility that the ultimate solution adopted would be automatic exclusion of the new State and strict application of article 49 TEU.

Within this context, the negative effects of *sine die* exclusion could be palliated by the European Union and the new State reaching an agreement which allowed EU law to be applied in their mutual relations, similar to the agreements that created the European Economic Area, or by adopting a pragmatic solution that would prevent a rupture between the new State and the EU, as long as the former fulfilled the requirements needed to become a Member State and requested membership. In this vein, Gounin claims that “*il n’y aurait donc ni adhésion automatique, ni mise en œuvre de la procédure de droit commun de l’article 49 du TUE. L’absence de précédents transposables, le flou juridique et l’ampleur de l’enjeu obligeront les parties à*

²² Ibid, p. 64.

²³ Ibid, p. 65.

²⁴ Ibid, p. 65.

négocié. Ce n'est pas la réponse la plus éclairante à la question posée. C'est sans doute la plus réaliste."²⁵ Following this train of thought, several solutions have been proposed recently which seek to fend off a rupture between the new State and the European Union to ensure the continuity of the territory and citizenship of the new State in terms of the rights and obligations stemming from the European Union's legal order.

4.2. Accession negotiations before the new State is effectively established in order for accession and the establishment of the new State to occur at the same time

As mentioned above, starting an accession process following the procedure established in article 49 TEU, at the moment that the new State is effectively created, would lead to a rupture in legal, economic and social relations which could seriously harm the nationals of both the new State and the other European Union members.²⁶ However, in the case of Scotland, Avery has suggested the possibility of starting the accession process from the moment that the result of the referendum was favourable to the independence of Scotland, such that when it actually became a State it would simultaneously join the European Union, ensuring continuity in the territorial and personal application of the European Union's legal system.

This possibility is grounded upon the way in which the European Union made internal modifications on the material rules of secondary law during German reunification. In this case, the European Commission led the negotiations with Berlin and Bonn to determine the changes that had to be made in European Union norms, and the proposals stemming therefrom were swiftly approved by the Council and the European Parliament.²⁷ In the same vein, Avery suggests that the European Union adopt a simplified procedure in which the European Commission could launch exploratory

²⁵ GOUNIN, Yves, *loc. cit.*, p. 22.

²⁶ In this same vein, Palomares states: "The process of regulating the conditions through which the constituent treaties would cease to be applied in a territory of the European Union Member States would require a period of time to formalise, in a treaty, the consequences and effects for the EU, for the predecessor State and for the territory that is separating from it. This process would obviously pose a set of major juridical and political problems. Inasmuch as these new States express their desire to belong to the Union, once the negotiation process of the consequences and effects of non-application of the treaties has concluded, a new negotiation process for accession must begin. This solution is absurd in political terms, and highly costly in legal terms. Given this framework, Professor Pescatore's observation that the legal interpretation should lead to a result that is operative in practice is relevant." PALOMARES AMAT, Miquel., *loc. cit.*, pp. 166-167.

²⁷ AVERY, Graham., *loc. cit.*, ap. 5.

talks with the Scottish and British governments and the other capitals with the goal of developing proposals that could serve as the basis of an intergovernmental council to formalise the agreement, which would then have to be ratified by all the Member States to enter into force on the day of Scotland's independence.²⁸ We should note that Avery does not specifically state whether this would be a kind of simplified accession agreement or an agreement modifying the constituent treaties.

Finally, the proposal that the Scottish government has made to articulate its status as a European Union member is the following:²⁹ It believes that once the referendum has been called, assuming that the separation is conducted in a consensual way in line with the legislation and that Scottish citizens are also citizens of the European Union, the best formula should be sought to ensure that the democratic will of the Scottish people is fulfilled and that there is no rupture in the existing economic, legal and social relations, because any other alternative would affect both the new State and the remaining Member States, as well as their citizens and companies. Therefore, a formula must be sought that ensures Scotland's transition to the status of full European Union Member State. In this sense, it believes that article 49 TEU is inadequate for regulating this kind of situation and suggests that negotiations get underway based on article 48 TEU, which is a more appropriate precept for establishing a legal roadmap that allows for what it calls the *transition process*. The primary problem posed by this option is the entry into force of the modifying treaty, which in practice could happen long after the timeframe initially planned for the proclamation of independence. This situation could be avoided if a provisional application of the treaty were agreed upon, given the special circumstances of the case.

4.3. Internal enlargement through an internal EU agreement, the establishment of a transitory system and an agreement to amend the constituent treaties³⁰

²⁸ Ibid, ap. 10 & 11.

²⁹ THE SCOTTISH GOVERNMENT. "Scotland's Future: Your Guide to an Independent Scotland", 26 November 2013 [online].

<<http://www.scotland.gov.uk/Publications/2013/11/9348/10#>>

³⁰ This possibility has been analysed in further detail in MATAS, Jordi; GONZÁLEZ, Alfonso; JARIA, Jordi; ROMAN, Laura. *L'ampliació interna de la Unió Europea: Anàlisi de les conseqüències juridicopolítiques per a la Unió Europea en cas de secessió o de dissolució d'un Estat membre*. Barcelona: Fundació Josep Irla, 2010.

This proposal is grounded upon a formalisation of succession as a European Union Member State which would take place in several phases. The first step would consist of the new State notifying the European Union of the succession and its desire to succeed the predecessor State as a member of the organisation. Then the succession must be recognised by the European Union. The third step would be establishing the transitory regime. And to conclude the process, the constituent treaties would have to be amended.

The expression of the new State's desire to succeed the parent State in its status as European Union member would have to materialise, as it has in other international organisations, through a "notification of succession" by the new State, in which it communicates the new situation and its desire to succeed the parent State in its status as European Union member as a new State that respects the principles and conditions required to be an EU member, as well as its pledge to accept all the European Union norms. The notification should also express the desire to immediately begin the process which would allow European Union law to adapt to the new situation, along with the decision to adopt any acts that would allow it to fulfil all the international obligations taken on by States as European Union members. After that, the European Union would have to recognise this situation and take any decisions needed to make it effective. First, the European Union would have to adopt an "act recognising the succession of a new State that emerged from secession or dissolution of another European Union Member States as a member of the Union". If the conditions required for recognition were met, this should be an official act, and therefore it would not have to be subject to political discussion. It would entail recognition of the parent State, if it still exists, and of the successor State(s) as European Union members, and it should contain the initial provisions needed to ensure the smooth functioning of the EU.

The third phase would entail establishing the transitory regime, which would have to happen immediately in order to ensure the smoothing functioning of the European Union and the fulfilment of the rights and obligations of the new State and its nationals. This transitory regime would be upheld on the following principles:

- The application of the principle of continuity of the norms of primary law and material secondary law which require no adaptations.

- The regularisation of the composition of the institutions, bodies and organisms of the European Union and the application of the constituent treaties in order to ensure the representation of the new State and its citizens.
- The gradual modification of the norms of secondary law, both institutional and material, to adapt them to the new situation. Until all the modifications are completed, both the parent and the new State would be obligated to adopt any agreements needed to fulfil the obligations previously attributed to the former, in accordance with the principle of cooperation established in article 4.3 TEU.
- The application of the norms of international law on succession in the international agreements of the European Union / Member States with third States and/or international organisations.
- The application of the norms of international law on succession in the European agreements reached among the Member States as members of the European Union. In parallel, the process of modifying the constituent treaties should get underway with the goal of adapting primary law to the new situation. In this sense, a treaty amending the treaties establishing the European Union should be negotiated following the procedure provided for in article 48 TEU. The aspects that would have to be modified are the establishment of the signatories of the treaties and their territorial scope of application, including article 52 TEU. Furthermore, if needed, the protocols appended to the treaties would also have to be amended to include new declarations and protocols that regulate specific situations stemming from the accession of the new State. This modifying agreement would enter into force as soon as it was ratified by all the European Union Member States, and it would conclude the accession process of the new State that emerged from the secession or dissolution of a Member State.

4.4. The adoption of a decision by the Heads of State and Government which establishes a transitory period and the subsequent application of article 49 TEU

Palomares has described a procedure which would avoid this rupture using a common practice in the European Union as an intermediate step towards a definitive solution. It entails the Heads of State and Government of the Member States gathering in the European Council to adopt a decision as the best way to initially deal with the legal and institutional problems posed. In this sense, he claims that “the nature of these

decisions, as international agreements reached in a simplified way, would enable us to overcome the problems stemming from the need to initially negotiate the consequences of non-application of the treaties, and then later the subsequent request for accession by the new States emerging from the separation from a territory of the Member States. This simplified conclusion would bring the advantage of its speed and the ease of developing and adopting the agreement.”³¹

Further exploring this possibility, he states that “the decisions of the Heads of State and Government, meeting in the European Council, as a specific category of the aforementioned acts of the States’ representatives on the Council, could also become a legal mechanism for transitory agreement which would be ideal to regulate a situation like the one discussed in this study: a new State that emerges from the separation from a Member State remaining in the European Union. This legal formula would allow the status of these States within the European Union to be temporarily formalised, while it would also avoid the problems stemming from the necessary negotiation of the consequences and effects of non-application of the treaties in the event that these States expressed their desire to be part of the European Union.”³²

4.5. The parallel application of articles 49 and 50 TEU to allow the new State to simultaneously withdraw from and join the European Union

Starting with the premise that it is impossible for the new State that emerges from secession from a Member State to automatically join the European Union, Chamon and Van Der Loo outline a process which would minimise the negative impact on the European Union of the “contraction” that would come with the secession of a region of a Member State while also easing its entry into the EU without a rupture in the relations between the new State and the EU.³³

The proposed formula would be the one cited in article 50 TEU to regulate the “contraction” of the European Union, namely that for at most two years the new State and the European Union could negotiate the new stage of relations, including the

³¹ PALOMARES AMAT, Miquel., *loc. cit.*, p. 177.

³² *Ibid*, p. 178.

³³ CHAMON, Merijin; VAN DER LOO, Guillaume. “The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?”, *European Law Journal*, 22 May 2013 [online]. | DOI: 10.1111/eulj.12057 <<http://onlinelibrary.wiley.com/doi/10.1111/eulj.12057/pdf>>

adoption of temporary measures for the period in which the new State would provisionally become a European Union member. In parallel, they could use article 49 TEU to negotiate the conditions under which it would join the EU.³⁴ All of these negotiations would be joined by the talks between the parent State and the new State to regulate their mutual relations. Therefore, there would be three simultaneous rounds of negotiations with the goal of ensuring a smooth transition from being a region of a Member State to being a full Member State.³⁵ Despite this, this strategy, as the authors themselves acknowledge, would come with the added temporary difficulty that all three rounds of negotiations would have to be concluded in a relatively brief period of time to avoid a rupture between the European Union and the new State.³⁶

4.6. The adoption of the accession model of Cyprus, but inversely

If we analyse the hypothetical case of Catalonia seceding from Spain, Lang suggests a solution that would alleviate the negative consequences this would have for all parties involved. He notes that the inverse of the Cyprus model could be proposed: the entire island of Cyprus is a European Union member, but the entire body of EU law is only applied in part of the territory. In the event of secession, at first only the parent State would continue being a European Union member, but EU law would also be applied in the new State that emerged from secession.³⁷ Even though this is a promising option and would provide an imaginative solution which has a precedent in the way Cyprus' membership was handled, it is also true that we would have to explore what legal underpinning would allow it to be implemented, and the fact that, regardless, it would still require a request from the new State and a response from the European Council which would contain this formula.

Conclusions

³⁴ Ibid, pp. 9-12.

³⁵ Ibid, p. 16.

³⁶ Ibid, p. 16.

³⁷ LANG, Kai-Olaf. "Katalonien auf dem Weg in die Unabhängigkeit? Der Schlüssel liegt in Madrid", *SWP-Aktuell* 2013/A 50, 8 Seiten, August 2013 [online]. <http://www.swp-berlin.org/fileadmin/contents/products/aktuell/2013A50_Ing.pdf>

In short, this article has attempted to show that it is not entirely accurate to roundly state that the creation of a new State within the European Union would entail its permanent exclusion from the EU and therefore a rupture between the two sides.

Indeed, there are no norms of international or European Union law which imperatively impose any given response to a request for membership by a State that has emerged from secession from an EU Member State. Yet there are legal principles which would allow for a response that would prevent a rupture between the new State and the European Union. Thus, an independence process sustained on fulfilment of the democratic principles, based on article 2 TEU, would require the European Union to facilitate the membership of the new State without a rupture in the application of the EU legal system in the territory of that State. This is the majority doctrinal position, even though Spain and some prominent authors who are also against non-consensual secession processes have expressly objected to it.

Currently, the European Commission and particularly its president have expressed a position that scrupulously respects the desire not to facilitate secession processes, but that does not prevent solutions from being adopted in the future that allow the new State to ease into membership in the European Union.