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Published in:
European Law Review

Publication date:
2019

Document Version
Peer reviewed version

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):

Hartmann, J. (2019). The Faroe Islands: Possible Lessons for Scotland in a New Post-Brexit Devolution Settlement. *European Law Review*, 44(1), 110-122.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909543

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The Faroe Islands: possible lessons for Scotland in a post-Brexit devolution settlement

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Abstract: The Brexit referendum saw millions of people voting to “take back control” from Brussels. The decision to leave the EU and the return of powers to the UK has created new constitutional complexity, especially for Scotland, which overwhelmingly voted to remain. The Scottish Government has made clear that, despite the overall result, it wants to retain key benefits of EU membership, even if the rest of the UK leaves the EU and the Single Market. The difficulty now is finding a constitutional compromise that addresses the concerns of the Scottish Government as the UK leaves the EU in March 2019. The Faroe Islands’ reserved powers model can potentially yield important lessons for Scotland. Despite refusing to accede with Denmark in 1972, the Faroes has developed a close relationship with the EU. The case of the Faroes shows that there are no legal barriers in EU or international law for Scotland to follow a similar path. A constitutional compromise can be achieved through the use of international legal personality and the political will to find a settlement.

A. Introduction

In the 2016 EU referendum, the Scottish people voted overwhelmingly to stay in the EU.¹ Since then, the Scottish Government has published a series of papers – including *Scotland's Place in Europe* – in which the Scottish Government considered options for retaining key benefits of EU membership even if the rest of the UK left the EU and the Single Market.² In a policy paper on Brexit, the UK Government clearly stated its intention to leave the Single Market, but also “agreed to undertake bilateral official-level discussions on the Scottish Government’s proposals”.³ The Scottish Government’s proposals recognises that a range of differentiated arrangements within the EU and Single Market framework already exist and, *inter alia*, uses the Kingdom of Denmark (consisting of Denmark, the Faroe Islands – hereafter the “Faroes” – and Greenland) as an example of a unitary state where parts of the country (Denmark) are in the EU, while others (the Faroes and Greenland) are not. The “reverse Greenland” option, whereby Scotland would take on the UK’s existing EU membership while the rest of the UK would leave the EU, has already received some scholarly attention.⁴ This option, however, seems politically and legally impossible and might require a change of the EU’s foundational treaties.⁵ This article argues that more interesting inferences may be drawn from the experience of the Faroes which, though outside the EU, have established extensive relations with the Union. Although the population of the Faroes is 100 times smaller than that of Scotland (50,927 as compared to 5,424,800) and the landmass

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¹ 62% voted to remain. See <http://www.electoralcommission.org.uk/> [Accessed 6 August 2018].

² Scottish Government, *Contribution to the UK Government's White Paper on the Future Relationship with the European Union* (2018). The Scottish Government’s contribution draws on a wide range of publications setting out the position on Scotland’s interests in the future UK-EU relationship. This include: Scottish Government, *Scotland's Place in Europe* (2016), *Response to the Migration Advisory Committee call for evidence* (2017), *People, Jobs and Investment* (2018), *Population Needs and Migration Policy* (2018), *Security, Judicial Co-operation and Law Enforcement* (2018), *Economic Impacts of Scenarios for Scottish and UK Seafood Industries Post EU Exit* (2018), and *Developing an Environment Strategy for Scotland* (2018).

³ HM Government, *The United Kingdom's exit from and new partnership with the European Union* (The Stationery Office, 2017), Cm.9417. The intention to leave was restated in the more recent HM Government, *The future relationship between the United Kingdom and the European Union* (The Stationery Box, 2018), Cm.9593.

⁴ See, e.g. U. P. Gad, “Could a ‘reverse Greenland’ arrangement keep Scotland and Northern Ireland in the EU?” (The London School of Economics and Political Science, 2016). *EUROPP Blog*, <http://blogs.lse.ac.uk/europpblog/2016/07/07/reverse-greenland-arrangement/> [Accessed 6 August 2018].

⁵ Art. 29 of the 1969 Vienna Convention on the Law of Treaties states: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” A few States, including Australia, Denmark, New Zealand, the Netherlands, and the UK, have developed a practice, whereby they declare that a treaty will only apply to the metropolitan territory alone or to specified overseas territories as well. Such statements of intent, however, always occur at the time of signature or ratification. See generally C.J. Tams and A. Tzanakopoulos A, *Research Handbook on the Law of Treaties* (Edward Elgar Publishing 2014) pp.209-218.

is similarly dwarfed in size (1,399km² as compared to 80,077 km²), the Faroes still provides an important reference of comparison.⁶ As noted by Emerich de Vattel:

“A dwarf is as much a man as a giant; a small republic is not less a sovereign state than the most powerful kingdom.”⁷

Thus, it is the attributes of sovereignty – or in the case of the Faroes the partial attributes – that determines status of an entity and not its physical size. As such, the history of the Faroes may hold important lessons for Scotland. This article suggests that there are no international or EU law obstacles for Scotland to follow a similar path to that of the Faroes, and unilaterally negotiate a special relationship with the EU after Brexit. This would not be easy. Negotiations would require significant political will among the remaining 27 EU Member States as well as a fundamental change of the existing constitutional arrangement and of the devolution settlement within the UK. Even so, the argument still stands: no international or EU law prevents a special relationship between Scotland and the EU.⁸ To support this argument, the first part of this article provides a short history of the Faroes and their relationship to the Kingdom of Denmark. This is followed by an overview of the evolution of the Faroes’ devolved powers and an examination of how these powers have been used in practice, focusing on external self-governance. The next part focuses on the Faroes relations with the EU, explaining how 98 per cent of the Faroese most important export – fishery products – are exported duty-free to the EU. The final part highlights lessons for Scotland as it seeks to negotiate further devolution and EU relations post-Brexit.

B. The Faroe Islands: A short history

The Faroes – located in the North Atlantic midway between Scotland, Iceland and Norway – is a devolved region within the Kingdom of Denmark. It consists of 18 islands, of which 17 are inhabited. The capital, Tórshavn, is located on the largest and most populated island, Streymoy. Like Scotland, the Faroes have a distinct history, culture, and language.⁹

The earliest archaeological evidence suggests that human colonisation took place in the 4th–6th centuries AD.¹⁰ Yet today’s population mainly comprises descendants of Norwegians who settled on the islands around 800 AD.¹¹

⁶ For data about the Faroes and Scotland, see the Faroes Statistical Database and the National Records of Scotland, available at <http://www.hagstova.fo> and <http://www.nrscotland.gov.uk>, respectively [Accessed 6 August 2018].

⁷ E. de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Indianapolis: Liberty Fund, 1797), §18.

⁸ On devolution, see generally A. Page, *Constitutional Law of Scotland* (Edinburgh: W. Green, 2015).

⁹ The Faroes flag and language are recognised in the Home Rule Act, Act no. 137 of 23 March 1948 (Lov om Færøernes Hjemmestyre). An English translation is available at http://www.stm.dk/_a_2956.html. (Lov om Færøernes Hjemmestyre 1948).

¹⁰ M. J. Church and others, “The Vikings were not the first colonizers of the Faroe Islands” (2013) 77 *Quaternary Science Reviews* 228.

¹¹ S. V. Arge and others, “Viking and Medieval Settlement in the Faroes: People, Place and Environment” (2005) 33 *Human Ecology* 597.

The islands were independent until 1035 when they became part of the Kingdom of Norway. King Olaf IV Haakonsson joined the crowns of Norway and Denmark, when his father died in 1380.¹² In 1397 Denmark-Norway joined with Sweden to form the Kalmar Union, which encompassed all Nordic countries as well as the Orkneys, the Shetlands, Greenland and Iceland. Sweden left the Union in 1523, whereas Norway remained part of it until 1814. For most of this time, the Faroes retained self-government, but were officially incorporated into the Kingdom of Denmark in 1709.¹³

The Danish-Norwegian union ended with the Napoleonic Wars. With the 1814 Treaty of Kiel, ending hostilities between Denmark and Sweden, Norway was ceded to Sweden, but the Faroes – together with Iceland¹⁴ and Greenland – remained part of the Kingdom of Denmark.¹⁵

Unlike Greenland, the Faroes were never a Danish colony. In 1816, the islands were given the status of county (amt), and the Faroese Parliament (Løgting) was abolished, only to be re-established as a county council (amtsråd) in 1852.¹⁶ In 1849 Denmark adopted its first constitution, which encompassed the Faroes.

The end of the 19th century saw the emergence of a Faroese nationalist movement which sought to protect the islands' language and culture.¹⁷ The first official proposal for more devolved powers to the islands was put to the Faroese Parliament in 1919, but never debated.¹⁸ The Second World War brought about new impetus for devolution. During the German occupation of Denmark (1940-1945), the Faroes were *de facto* self-governing, albeit under British military occupation. Fish export to the UK provided a considerable boost for the Faroese economy, thus rendering unthinkable a return to the old system of governance.¹⁹ Negotiations on a new constitutional settlement started in 1946 but soon broke down.²⁰ The Copenhagen Government issued an ultimatum whereby the Faroes could either accept an offer for more devolved powers or secede. A referendum held in September 1946 delivered a narrow majority in favour of secession. The Copenhagen Government, however, refused to accept the result and dissolved the Faroese Parliament. In the subsequent parliamentary

¹² The union was formally enshrined in the Treaty of Bergen of 1450.

¹³ As part of the Diocese of Zealand (Sjællands Stiftsamt).

¹⁴ Denmark recognised Iceland as an independent state under the Danish Crown in the Act of Union of 1918, but Iceland declared independence in 1944.

¹⁵ The dissolution of the of the exiguous ties between Norway and the Faroes has sometimes been seen as a result of ignorance, diplomatic skulduggery, or Sweden's lack of interest in the impoverished North Atlantic colonies, whereas other have attributed it to British geopolitical interests. Cf. J. Wylie, *The Faroe Islands: Interpretations of History* (Kentucky: University Press of Kentucky, 1987), pp.89-90.

¹⁶ O. Spiermann, *Danmarks Rige i Forfatningsretlig Belysning* (Copenhagen: Jurist- og Økonomforbundets Forlag, 2007), pp.47-48.

¹⁷ K. Rógvi, *Faroese Governance* in N. Loukacheva (ed), *Polar Law Textbook II* (Copenhagen: Norden, 2015), p.222.

¹⁸ O. Spiermann (n 16), p.48.

¹⁹ Cf. P. Holm, "World War II and the 'Great Acceleration' of North Atlantic Fisheries" (2012) 5 *Global Environment* 66, p.74.

²⁰ O. Spiermann (n 16), p.49.

election, the unionists prevailed, but the botched referendum prompted further negotiations on devolution, which resulted in the so-called “home rule” arrangement of 1948.²¹

C. Devolution of powers: The Home Rule Acts of 1948 and 2005

The Home Rule Act of 1948 transferred powers and responsibilities from Copenhagen to Tórshavn.²² The Act recognised the Faroes’ exceptional national, historical, and geographical conditions, granting them status as a “self-governing community within the Kingdom of Denmark”.²³

Following a conferred power model, the Home Rule Act included a catalogue of competences for the Faroes authorities. The Act listed areas where the Faroes authorities could immediately assume responsibility, or which could be transferred at a later stage, at the request of either the Tórshavn or the Copenhagen Government. These included provisions concerning the Faroese Parliament and Government; municipal affairs; health service; public welfare; certain areas of taxation; education; and agricultural matters and fisheries. The Act also named areas that could become devolved, subject to further negotiations, namely: certain ecclesiastical affairs; policing; subsoil resources; broadcasting; aviation; and import and export controls. The Act did not mention judicial affairs, monetary and currency matters, defence, or foreign policy, which remained within the authority of the Copenhagen Government. Alf Ross, one of the main architects of the new constitutional setup, later wrote that the Home Rule Act had established a system of local self-governance with an “unusually broad devolution of powers”.²⁴

On Faroese request, in 2005 the Home Rule Act was amended, and the competence of the Faroese Parliament was substantially expanded with the so-called “Takeover Act”, by which the Danish Parliament devolved more powers to the islands.²⁵ The Act refers the Danish and Faroese Governments as “equal partners” and enables the Faroes to unilaterally extend their powers in all matters not already within their competence. The only areas exempt are exhaustively listed and include: issues relating to the Danish Constitution; citizenship; the Supreme Court; monetary and currency matters; as well as foreign policy, defence and security.²⁶ Therefore, the Takeover Act turns the approach embedded in the Home Rule Act on its head, by adopting a reserved power model, enabling the Faroes to exercise competence in all areas, save for those explicitly excluded. Although crucial for the power relationship

²¹ In 2000 formal negotiations were held between the Faroese and Danish Governments on a Faroese draft treaty providing full sovereignty for the islands. The main obstacle for the negotiations was how to phase out the existing financial transfers (bloktilskud) from Denmark to the Faroes. The negotiations were never completed.

²² Act no. 137 of 23 March 1948 (n 9).

²³ Ibid s.1.

²⁴ A. Ross, *Dansk Statsforfatningsret*, Vol II (Copenhagen: Nyt Nordisk Forlag A/S, 1980), p.496. The author’s own translation.

²⁵ Act no. 578 of 24 June 2005 (Lov om de færøske myndigheders overtagelse af sager og sagsområder). An English translation is available at http://www.stm.dk/_a_2956.html.

²⁶ Ibid s.1(4). Although foreign policy falls within the responsibility of the Danish Government, the Faroese authorities have the right to be consulted on external affairs which are of special concern to the islands and have a special adviser at the Ministry of Foreign Affairs and may post attaches at Danish embassies.

between Tórshavn and Copenhagen, the Takeover Act does not define the areas explicitly excluded from devolution. The meaning hereof is therefore open to interpretation and commonly settled in practice. Some of the limitations are derived from the Danish Constitution. Thus, the limitation on foreign policy derives from s.19 of the Constitution, according to which “The King shall act on behalf of the Realm in international affairs...”²⁷ This and other limitations have traditionally been interpreted restrictively.²⁸

As a result of the Takeover Act, the Faroese authorities can unilaterally decide what powers are devolved and when. Presently, the Faroes enjoy full authority over many areas, including external trade relations; import and export; taxation and financial policy; business regulation (except the banking sector); regulation of fisheries and other natural resources; energy and the environment; the labour market; social security, emergency preparedness; education; research; and culture. Most recently, the Faroese authorities took authority over family and inheritance law.²⁹ The devolution of immigration and border controls is currently under review.³⁰ Devolution of an area normally also includes financial responsibility. An annual grant (bloktilskud), negotiated between the Copenhagen and Tórshavn Governments, is provided in accordance with the Home Rule Act. Under the latest settlement, the Faroes will receive a yearly grant of €86 million (642m DKK) between 2016-2019.³¹

The Faroese Government has decided that for the foreseeable future it will not exercise powers on matters such as the administration of justice; policing; prison and probation services; and financial regulation and supervision, which therefore continue to be regulated by Danish law. Conversely, the Faroese authorities have complete legislative and executive authority within the devolved areas, although any exercise of such authority must comply with the Kingdom of Denmark’s international obligations, such as, for example, those assumed under the European Convention on Human Rights.

D. External self-government

The extension of the Faroes’ internal powers in 2005 was simultaneously complemented with substantial external self-government powers. The 2005 Authorisation Act endowed the Faroes with a considerable degree of international legal personality, granting them the power

²⁷ The Constitutional Act of Denmark 1953 (Danmarks Riges Grundlov). An English translation is available at http://www.stm.dk/_p_10992.html [Accessed 6 August 2018].

²⁸ The Danish Government has been accused of using the Constitution as an excuse not to expand the powers of the Faroese Parliament to act in international affairs. See, e.g. P. Michelsen, “Færøerne har behov for og krav på en mere selvstændig udenrigspolitik”, (Jyllands-Posten, 2017). *Jyllands-Posten Debat*, <https://jyllands-posten.dk/debat/breve/ECE9639450/faeroerne-har-behov-for-og-krav-paa-en-mere-selvstaendig-udenrigspolitik/> [Accessed 6 August 2018]. The critic is not without merit as other provision of the Constitution had been interpreted more leniently. Most importantly, s.3 which seems to prohibit any transfer of legislative power from the Danish Parliament. See, e.g. O. Spiermann, “Vore grundlovsstridige hjemmestyreordninger” (2008) 90 1 *Juristen* 5-15.

²⁹ A list of devolved areas is available at http://www.stm.dk/multimedia/FO_UK_oversigt_sagsomraader_010811.pdf [Accessed 6 August 2018].

³⁰ Statsministerens redegørelse om rigsfællesskabet 2016. Available at <http://www.folketingstidende.dk/samling/20151/redegoerelse/R14/index.aspx> [Accessed 6 August 2018].

³¹ Act no. 1660 of 20 December 2016 (Lov om tilskud til Færøernes hjemmestyre for 2016-2019).

to negotiate and conclude international agreements with foreign states and international organisations on all devolved issues.³²

It is not unusual for units of states to enjoy international legal personality. In Australia, Belgium, Canada, Germany, Switzerland and the United States sub-national entities all possess some degree of international treaty-making capacity.³³ Whether a sub-national entity has such capacity, *viz.* international legal personality, depends on two factors. Firstly, the attribution of international competence to the sub-national entity under domestic law; and, secondly, the recognition of the sub-national entity by other international law subjects, most importantly, states.³⁴

In the case of the Faroes, the first requirement is satisfied with the Authorisation Act 2005. With regard to the second, a “circular note” by the Ministry of Foreign Affairs of Denmark to the United Nations and its members unequivocally spells out the powers bestowed upon the Faroes:

“[The Danish Parliament (Folketing)] ...in agreement with the Faroese... Authorities... has adopted legislation providing statutory full powers for the Government of the Faroes... to conclude certain international agreements on behalf of the Kingdom of Denmark...”³⁵

Recognition of the Faroes’ international legal personality is evident from the fact that, since 2005, they have negotiated several international agreements, including a special economic treaty with Iceland (the Hoyvík agreement) which established a single economic area between the parties.³⁶

Even before 2005, however, the Faroes had established the practice of negotiating international agreements with only nominal involvement of the Danish authorities.³⁷ This is especially true of fisheries agreements, but it is equally true of other areas. Thus, the Hoyvík agreement replaced a previous agreement from 1992. Moreover, in 1997 and 1998 the Faroes entered into free trade agreements with Estonia and Poland. These agreements were terminated in 2004 when the latter joined the EU. Today, the Faroes have free trade agreements with Norway, Switzerland, and Turkey.³⁸ Currently, the Faroes are trying to establish agreements with Brazil, China, Japan, South Korea, Ukraine as well as the Eurasian Customs Union.³⁹

³² Act no. 579 of 24 June (Lov om Færøernes landsstyes indgåelse af folkeretlige aftaler 2005). An English translation is available at http://www.stm.dk/_a_2956.html [Accessed 6 August 2018].

³³ Cf. G. I. Hernández, *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, D. French (ed) (Cambridge: Cambridge University Press, 2013), pp.540-561.

³⁴ Cf. J. Wouters and D. S. Leen, “The Legal Position of Federal States and their Federated Entities in International Relations - The Case of Belgium” (2001) 1 *Institute for International Law* 5-6.

³⁵ Available at http://www.stm.dk/multimedia/CirkularNote_GR.pdf [Accessed 6 August 2018].

³⁶ Agreement between the Government of Iceland, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part 2005, art.1. Available at <https://www.government.fo/en/foreign-relations/foreign-trade/hoyvik-agreement/> [Accessed 6 August 2018].

³⁷ O. Spiermann (n 16), p.126 and K. Rógvi (n 17), p.235.

³⁸ A list of the agreements is available at <http://www.government.fo/foreign-relations/the-faroe-islands-in-the-international-community/> [Accessed 6 August 2018].

³⁹ Beretning, Rigsombudsmanden på Færøerne (2018), p.120. Available at http://www.stm.dk/multimedia/Beretning_2018.pdf. [Accessed 6 August 2018].

Implied recognition of the Faroes international legal personality may furthermore be inferred from their membership of international organisations. The Authorisation Act allows the Faroes to apply, in their own name, for membership of international organisations that are open to entities other than states and associations of states.⁴⁰ In 2009, the Faroes used this power to join the United Nations Educational, Scientific and Cultural Organization (UNESCO).⁴¹

Also in relation to membership of international organisations, the Faroes had established a practice of joining international organisations before 2005, including: the North Atlantic Marine Mammal Coordination Organisation (NAMMCO),⁴² the Northwest Atlantic Fisheries Organization (NAFO),⁴³ the North Atlantic Salmon Conservation Organization (NASCO),⁴⁴ and the North East Atlantic Fisheries Commission (NEAFC).⁴⁵ Since all these organisations concern fisheries, which is an exclusive EU competence, the Kingdom of Denmark is party to these organisations only in “respect of the Faroe Islands and Greenland”, whereas Danish interests are handled by the EU.

Before the adoption of the Authorisation Act in 2005, negotiations of international agreements or membership of international organisations depended on a political agreement with the Copenhagen Government. The possibility of providing the Faroese Authorities with a mandate to negotiate on their own behalf had, however, already been considered in the Home Rule Act in 1948.⁴⁶

The Faroes’ capacity to enter into international agreements or join international organisations is limited. Firstly, any agreement must fall entirely within the Faroes’ devolved competences. This limitation, among others, means that the Faroes cannot enter into agreements in relation to defence or security policy, or any other matters excluded from devolution. The exercise of the Faroes’ international law powers must, moreover, be geographically limited to their territory.⁴⁷ Finally, at least in principle, the Faroes cannot join

⁴⁰ Authorisation Act 2005 (n 32), s.4.

⁴¹ See <http://en.unesco.org/countries/faroes> [Accessed 6 August 2018].

⁴² NAMMCO was established by the 1992 Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, to which Norway, Iceland and the Greenland and Faroese Governments are parties.

⁴³ NAFO was established by the 1978 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, as a successor to the International Commission of the Northwest Atlantic Fisheries (1949-1978). Denmark, in respect of Faroe Islands and Greenland, became a party in 1979, whereas Denmark is represented via the EU.

⁴⁴ NASCO was established by the 1982 Convention for the Conservation of Salmon in the North Atlantic Ocean. Denmark in respect of the Faroe Island became a party in 1982, whereas Denmark is represented via the EU.

⁴⁵ NEAFC was established by the 1980 Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries. Denmark in respect of the Faroe Island became a party in 1982, whereas Denmark is represented via the EU.

⁴⁶ Home Rule Act 1948 (n 22), s.8.

⁴⁷ Non-compliance by the Faroes of an international obligation will create State responsibility for the Kingdom of Denmark as a whole. Cf. Authorisation Act 2005 (n 32), s1(5). See also the International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (2001), art. 4 and commentaries hereto, especially International Law Commission, *Yearbook of the International Law Commission* (2001) Vol II Part II 40, para.10.

international organisations of which the Kingdom of Denmark is already a member. The Faroes have nevertheless secured associate memberships of organisations to which Denmark was already party. One example is the International Maritime Organization (IMO), which Denmark joined in 1959. The Faroes obtained associate membership in 2002.

E. Relations with the EU

When Denmark joined the EU (then EEC) in 1972, the Faroes opted to stay out. The Copenhagen Government hoped that the Faroes would later change their mind. To facilitate this, the Danish accession protocol left open the option for the Faroes to join within three years.⁴⁸ In 1974, however, the Faroese Parliament unanimously decided not to use this option. As a result, similarly to earlier EU treaties, art.355(5) of the Treaty on the Functioning of the European Union states that “This Treaty shall not apply to the Faroe Islands”.⁴⁹ The Faroes are thus exempt from the application of all EU law. It follows that the so-called “four freedoms”, i.e. the free movement of people, goods, services, and capital do not apply to the Faroes and the islands are not part of the EU Single Market.

Indirectly, however, EU law may still apply to the Faroes in non-devolved areas, to the limited extent to which Danish laws implements EU legislation, but only if the Faroese authorities accept the application of such laws. As all other entities wishing to export into the EU, the Faroes are also under pressure to comply with EU standards on products, even though formally they are not obliged to do so.⁵⁰ This pressure is commonly known as the “Brussels effect”.⁵¹

As the Faroes is not a member of the EU it is not directly affected by the Unions membership of international organisations. For example, the Faroes are not directly affected by the EU’s membership of the WTO. Member States of the EU are, however, also WTO members in their own right. The Faroes has been covered by Denmark’s GATT commitments since 1952 and by its WTO membership since 1995. The Faroese Government is currently looking into the possibility of obtaining an independent membership.⁵²

The peculiar position whereby parts of the Kingdom of Denmark have different relations with the WTO can create conflict of interests. In 2013, for example, Denmark became the first EU Member State to request consultations with the EU under the WTO’s Dispute Settlement Understanding in relation to EU sanctions imposed against the Faroes for alleged overfishing.⁵³ The dispute was settled in 2014, when the Faroes, Norway, and EU concluded

⁴⁸ Documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, protocol 2 on the Faroe Islands [1972] OJ L073, art.25.

⁴⁹ Treaty of Rome, art.299(6)(a).

⁵⁰ See, e.g. J. Scott, “From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction” (2009) 57 *The American Journal of Comparative Law* 897.

⁵¹ A. Beattie, “Why the whole world feels the ‘Brussels effect’” (16 November 2017) *Financial Times*, <https://www.ft.com/content/7059dbf8-a82a-11e7-ab66-21cc87a2edde> [Accessed 6 August 2018].

⁵² See <https://www.government.fo/en/foreign-relations/foreign-trade/> [Accessed 6 August 2018].

⁵³ J. Hartmann and M. Waibel, “The ‘Mackerel War’ Goes to the WTO” (13 November 2013) *EJILTalk* <https://www.ejiltalk.org/the-mackerel-war-goes-to-the-wto/> [Accessed 6 August 2018].

a joint arrangement for the conservation and management of the North East Atlantic mackerel stock.⁵⁴ So far, however, this has remained an isolated incident.

Presently, the Faroes' relationship with the EU is primarily governed by a series of agreements, which largely relate to fisheries and the free movement of goods. Because of the Faroes' *ad hoc* relation with the EU, special rules concerning the free movement of people also apply.

(a) Movement of goods

As a consequence of its accession to the EEC, the Kingdom of Denmark withdrew from the European Free Trade Association (EFTA) in 1973 and the withdrawal also affected the Faroes. A special EU Council Regulation maintained the duty-free regime between Denmark and the Faroes.⁵⁵ The regime extended to all goods of Faroese origin intended for consumption in Denmark. These goods were not, however, deemed to be in free circulation within the EU and were thus subject to customs rules upon re-export from Denmark to other Member States.⁵⁶

Though no longer a member of EFTA, in the years following their withdrawal the Faroes established relations with remaining EFTA members, signing trade agreements with Iceland, Norway, Sweden, Finland, Switzerland and Austria. The agreements with Sweden, Finland, and Austria were terminated when the latter joined the EC (now EU) in 1995.

EFTA provides a framework for the liberalisation of trade in goods amongst its Member States. With the exception of Switzerland, members of EFTA and the EU form the European Economic Area (EEA). EEA members are required to align with EU law on most areas covered by the EU treaties, including the four freedoms and competition policy. Important exclusions include the Common Agricultural and the Common Fisheries Policies, so trade in agricultural and fisheries products between EFTA and EU Member States are subject to tariffs. The Faroes have, however, managed to secure special arrangements in this respect.

At the beginning of the 1990s, the Faroes aligned their tax system with GATT rules, and by reflex, with rules in other European countries. An agreement adopted in 1991 in preparation for the creation of the Single Market provided some free trade arrangements between the Faroes and the EC in manufactured goods, most agricultural and some fisheries products.⁵⁷ The agreement also set quotas for duty-free imports on certain products, most importantly fisheries products. A new trade agreement was drawn up when Sweden, Finland,

⁵⁴ J. Hartmann and M. Waibel, "Mackerel War Called Off?" (9 April 2014) *EJILTalk* <https://www.ejiltalk.org/mackerel-war-called-off/> [Accessed 6 August 2018].

⁵⁵ Regulation 2051/74 on the customs procedure applicable to certain products originating in and coming from the Faroe Islands [1974] OJ L 212/33–42.

⁵⁶ Documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland (n 48), protocol 1, art.1.

⁵⁷ Council Decision 91/688/EEC concerning the conclusion of the Agreement between the European Economic Community of the one part and the Government of Denmark and the Home Government of the Faroe Islands of the other part [1991] OJ L371/1.

and Austria joined the EC in 1995.⁵⁸ The new agreement removed many of the quantitative restrictions in the 1991 Agreement.⁵⁹ Yet more restrictions were removed with a 1999 protocol on tariff treatment and arrangements for fish and fishery products.⁶⁰ In 2000, the trade agreement with the EU was further expanded to include veterinary matters, which gave the Faroes unfettered access to the Single Market for most fisheries products.⁶¹ With the veterinary agreement, Faroese fishery products have in effect the same easy access the EU market as products from EFTA countries. One disadvantage of the bilateral agreements was that the rules of origin were stricter for fishery products than for industrial products. The stricter rules meant that Faroese companies could not process fishery products with ingredients from outside the Faroes without prejudicing their duty-free access to the EU. This changed when the Faroes adopted the preferential rules of origin deriving from the Regional Convention on pan-Euro-Mediterranean (PEM Convention) in 2005. The PEM Convention allows for the application of diagonal cumulation between the EU, EFTA states, Turkey, the countries which signed the Barcelona Declaration⁶², the Western Balkans and the Faroes.

As a result of these arrangements, the Faroes have wide access to the Single Market. The Faroes allow duty-free access to all EU products, including industrial, fishery and agricultural products, with the exemption of dairy products and sheep meat. Whereas, the EU allows duty-free access to all Faroese industrial products, most fishery products and selected agricultural products. After the 1999 protocol, an estimated 98 per cent of the Faroese fisheries exports to the EU are duty-free.⁶³ Despite their already broad access to European markets, the Faroes are attempting to negotiate a new trade agreement with the EU and to establish closer relations, among others, by applying to become a member of the EFTA.

There are no general rules of international law preventing sub-national entities, such as the Faroes, from joining an international organisation such as EFTA. Rather, the matter depends on the specific rules concerning membership of that organisation and, in some cases, on domestic law.⁶⁴ Many international organisations limit membership to states only. EFTA seems to be a case in point. The 1960 Convention establishing the EFTA says that “Any State” may accede.⁶⁵ The article does not mention sub-national entities, nor are there any

⁵⁸ Council Decision 97/126/EC concerning the conclusion of an agreement between the European Community, on the one hand, and the Government of Denmark and the Home Government of the Faroe Islands, on the other [1997] OJ L53/1.

⁵⁹ Council Decision 97/126/EC concerning the conclusion of an agreement between the European Community, on the one hand, and the Government of Denmark and the Home Government of the Faroe Islands, on the other, [1996] OJ L53/1.

⁶⁰ Decision 1/1999 of the EC/Denmark-Faroe Islands Joint Committee of 22 June 1999 replacing protocol 1 of the Agreement concerning the tariff treatment and arrangements applicable to certain fish and fishery products released for free circulation in the Community or imported into the Faroes [1999] OJ L178/58.

⁶¹ Council Decision 1999/778/EC concerning the conclusion of a Protocol on veterinary matters supplementing the Agreement between the European Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part [1999] OJ L305/25.

⁶² Barcelona Declaration, adopted at the Euro-Mediterranean Conference (27-28 November 1995).

⁶³ High Commissioner of the Faroe Islands, *Report* (2015), p.113. Available at http://www.stm.dk/multimedia/Beretning_2015_til_hjemmesiden.pdf [Accessed 6 August 2018].

⁶⁴ Cf. Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, ICJ Reports 1948, p. 57.

⁶⁵ Convention Establishing the European Free Trade Association (Stockholm Convention), art. 56(1).

precedents for such entities joining. Whether and how sub-national entities may join the EFTA pragmatically depends on the existing members' political will to allow the Faroes to become party. The Copenhagen Government has for its part expressed support and the Danish Minister of Foreign Affairs wrote to the EFTA members in 2016 to assure them of this and to probe their views on Faroese membership.⁶⁶ Thus, despite the clear wording of the EFTA treaty and a lack of domestic legal authority, the Copenhagen Government seems to think that membership is open to non-state entities.⁶⁷ So far, however, a formal application has not been made.⁶⁸

(b) Movement of people

EU citizens have no special right to work or establish themselves on the Faroes. Faroese people, on the other hand, are Danish nationals, and may, depending on their residency, enjoy the same rights as EU citizens. Article 4 of Protocol No. 2 on Danish accession to the EEC stipulates that Danish nationals living in the Faroes can only be regarded as EU nationals when the EU treaties become applicable to the islands.⁶⁹ For the purpose of EU law, Danish nationals living on the Faroes are therefore not Danish nationals and thus not entitled to EU citizenship.⁷⁰ Danish law, however, does not distinguish between Faroese and other nationals of the Kingdom and nothing prevents people residing on the islands from moving their residency to mainland Denmark. Moving residency is relatively straight forward and only requires a person to register a new address on a municipal website. Such a registration is mandatory for anyone staying in Denmark over six months but can in principle happen before.⁷¹ It is the municipality that verifies changes of residency and a fraudulent change is civil offence, punishable by fine.⁷²

After changing their residence, Faroese people have the right to move and reside freely within the EU. As workers, they also enjoy freedom of movement and establishment. Whether all Faroese residents actually change their residency before enjoying these rights is doubtful, and it is a longstanding practice of the Danish and Faroese authorities to issues

⁶⁶ Beretning, Rigsombudsmanden på Færøerne (n 39), p.121. The author has unsuccessfully tried to obtain a response to the Danish letter. In this connection, a representative from Liechtenstein wrote:

“the Government of Liechtenstein is open to look into ways to strengthen the economic ties between EFTA and the Faroe Islands. No decision has been taken however on the position of Liechtenstein on a possible membership of the Faroe Islands to EFTA so far.” Reply of 19 July 2018. On file with the author.

⁶⁷ Membership would be by “the Kingdom of Denmark in respect of the Faroes”.

⁶⁸ The Authorisation Act (n 32) only explicitly allow the Faroes to join international organisations that “allow entities other than states and associations of states to attain membership in their own name”. For the constitutional debate, see O. Spiermann (n 16), pp. 131-136.

⁶⁹ Documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, protocol 2 on the Faroe Islands (n 48), art.4: “Danish nationals resident in the Faroe Islands shall be considered to be nationals of a Member State within the meaning of the original Treaties only from the date on which those original Treaties become applicable to those Islands.”

⁷⁰ Cf. art.20 TFEU.

⁷¹ Act no. 646 of 2 June 2017 (Lov om Det Centrale Personregister), s.16(1) in accordance with s.23(2).

⁷² Ibid s.57.

standard Danish passports to all Danish nationals, even if domiciled on the Faroes.⁷³ It would therefore be very difficult for authorities in other Member States to check their residency.⁷⁴ Unlike the Faroese, the inhabitants of Scotland would not be nationals of an EU member State after Brexit. Thus this is one area where the parallels between the two nations are imperfect.

The Danish accession agreement to the Schengen Convention does not apply to the Faroes.⁷⁵ The Faroes are therefore not part of the free travel zone between participating EU and EFTA Member States.⁷⁶ In practice, however, their exclusion from the Schengen Convention is of limited effect, as the Faroes are part of the Nordic Passport Union. Citizens of Member States can travel freely and reside in the Nordic countries (Denmark, Finland, Norway, Sweden, and Iceland).⁷⁷ Because of the Passport Union, EU citizens travelling between the Faroes and Schengen countries are exempt from border checks.⁷⁸

F. Lessons for Scotland

Scotland can draw some important lessons from the Faroes' experience with external governance and international legal personality. The devolved powers progressively conferred on the Faroes have enabled them to reach almost complete internal self-government, as well as a large degree of external self-government.

The current suggestion by the UK Government according to which cross-border trade in goods and agricultural products with the EU would continue unimpeded possibly makes Scotland's concerns less urgent.⁷⁹ But according to the Scottish Government the UK proposal still "falls short" in many areas.⁸⁰

⁷³ Redegørelse for konsekvenserne for Færøerne og Grønland af forfatningstraktaten, m.v. 2005. Available at <http://tilfar.lms.fo/logir/alit/2005.03%20Redegoerelse-groenland-Foeroyar.pdf>. [Accessed 6 August 2018].

⁷⁴ Unlike some EU Member States, Danish passports do not indicate residency. Special passports do exist for the Faroese, but it is an individual choice and not required by law.

⁷⁵ Agreement on the Accession of the Kingdom of Denmark to the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders signed at Schengen on 19 June 1990 [2000] OJ L239/97-105, art.5(1).

⁷⁶ The Schengen Borders Code provides Member States with the capability of temporarily reintroducing border control where a serious threat to public policy or internal security has been established. Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ 2016 L77/1, arts.25-29.

⁷⁷ Passport controls and residency is primarily governed by the 1954 Protocol exempting Nordic nationals from the requirement to hold a passport and residence permit when residing in a Nordic country other than their home country and the 1957 Agreement on the waiving of passport controls at the internal borders of the Nordic Region.

⁷⁸ Agreement on the Accession of the Kingdom of Denmark to the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders signed at Schengen on 19 June 1990 (n 72), art. 5(2) states: "Taking into account the fact that the Faeroe Islands... apply the provisions on the movement of persons laid down within the framework of the Nordic Passport Union, persons travelling between the Faeroe Islands... of the one part, and the States parties to the 1990 [Schengen] Convention... shall not be subject to border checks."

⁷⁹ *The future relationship between the United Kingdom and the European Union* (n 3), para.1.2.

⁸⁰ See statement by Cabinet Secretary for Culture, Tourism and External Affairs, Fiona Hyslop MSP on Brexit White Paper (12 July 2018). See <https://beta.gov.scot/news/brexit-white-paper-2018-07-12/> [Accessed 6 August 2018].

Moreover, the outcome of the negotiations are still far from certain and the prospect of a ‘no deal’ scenario is still very real.⁸¹ The option of retaining key benefits of EU membership even if the rest of the UK leaves the EU is therefore still important for Scotland.

One area where there is a clear difference between Westminster and Holyrood is the free movement of people. The Scottish Government set out its position in *Scotland’s Place in Europe*, where it stated that it wanted to continue the free movement of people.⁸² Whereas the UK government stated that:

“It is simply not possible to control immigration overall when there is unlimited free movement of people to the UK from the EU.”⁸³

Allowing free movement of people to one part of the British Isles while restricting it in another is naturally difficult. However, a similar arrangement to the Faroe-Danish system whereby change of residency must be registered with municipal authorities and subject to fines for lacking or incorrect reporting would go a long way to alleviate most problems. Scotland could also introduce their own passports.

As the example of the Faroes illustrates, there are formally no obstacles in either international or EU law for Scotland to follow a similar path, and unilaterally negotiating a special relationship with the EU post-Brexit. The possibility of doing so would, however, require a change of current constitutional arrangements. Such a change is already on the cards. The Scottish Government has made it plain that Scotland’s interests within the UK demand that the powers of the Scottish Parliament be fundamentally revisited.⁸⁴ After the EU Withdrawal Bill received its royal assent in June 2018, Scotland reiterated its desire for a change.⁸⁵ Naturally, any change can only be done with the agreement of the UK Government – unless Scotland is to secede unilaterally from the rest of the UK. The UK Government’s position on Northern Ireland, where it wants to preserve the “constitutional and economic integrity of the UK” might make it difficult for Scotland to negotiate differentiated arrangements with the rest of the UK.⁸⁶ At the same time, the UK Government has been very innovative in its suggestions of how to facilitate continued relations with the EU. Similar innovations could be applied within the UK. Thus “maximum facilitation” does not need to be limited to relations between the UK and the EU.

One important element in any future negotiations between Westminster and Holyrood is international legal personality, including powers to “conclude international agreements in areas of Scottish Parliament responsibility.”⁸⁷ In this connection, the experience of the Faroes tells an important tale. The Faroes have been remarkably proactive in using their devolved powers externally, even before formally obtaining international legal capacity. Over the

⁸¹ As late as 15 July 2018, the Prime Minister still insisted that no deal was better than a bad deal on the BBC’s The Andrew Marr Show.

⁸² *Scotland’s Place in Europe* (n 2). See also *Response to the Migration Advisory Committee* (n 2), *People, Jobs and Investment* (n 2), and *Population Needs and Migration Policy* (n 2).

⁸³ *The United Kingdom’s exit from, and new partnership with, the European Union* (n 3), para 5.3.

⁸⁴ *Scotland’s Place in Europe* (n 2), pp.3 and 39.

⁸⁵ BBC, “Scottish government wants devolution changes over Brexit row” (12 June 2018) <https://www.bbc.co.uk/news/uk-scotland-44457271> [Accessed 6 August 2018].

⁸⁶ White Paper (n 3) p.7.

⁸⁷ *Scotland’s Place in Europe* (n 2), p.vii.

years, they have entered into an increasingly complex web of external relations on matters closely linked with their devolved powers. Upon conferral of international legal personality in 2005, the Faroes have become even bolder in their efforts to pursue their interests, even when these were at loggerheads with those of Denmark.

International legal personality could enable Scotland to negotiate arrangements with the EU similar to those obtained by the Faroes, and beyond. A key question to be explored is whether the customs arrangement between the Faroes and the EU could be translated to Scotland? In its Brexit White Paper, the UK Government stated that it will prioritise “securing the freest and most frictionless trade possible in goods and services between the UK and the EU”, albeit without membership of the Single Market.⁸⁸ Scotland, however, wants to go further.⁸⁹ Scotland could explore avenues to join the EEA, for example through associate membership of EFTA.⁹⁰ However, there are important obstacles standing in Scotland’s way to match the Faroes’s achievements. After Brexit, Scotland will no longer be part of a union which is an EU Member State. Conversely, the fact that Denmark is an EU Member State is likely to have had a positive influence in the EU’s relations with the Faroes. This distinguishing feature renders the parallel between the Faroes and Scotland incomplete. Yet, as the Faroes experience abundantly seems to suggest: where there is a will there is a way. The debate on Brexit has already shown that some flexibility on the part of the EU seems possible.⁹¹ Moreover, the UK government has agreed to discuss the Scottish Government’s proposals.⁹² Future bilateral negotiations with the EU could, for instance, help Scotland maintain membership of the Single Market, which the UK Government wants to leave.

These *ad hoc* arrangements are no substitute for full EU membership. Nevertheless, they may be a stepping-stone in that direction, if Scotland decided to go independent.⁹³ Furthermore, from the perspective of Scotland, bilateral agreements have particularly convenient characteristics. While EU membership can be vetoed by individual Member States, in most cases bilateral trade agreements are approved by a mere qualified majority in the Council of the European Union and consent by the European Parliament.⁹⁴ Thus not all Member States need to agree for Scotland to enter into a trade agreement with the EU and

⁸⁸ *The United Kingdom’s exit from and new partnership with the European Union* (n 3), p.35.

⁸⁹ Statement by Cabinet Secretary for Culture, Tourism and External Affairs (n 77).

⁹⁰ See *Scotland’s Place in Europe* (n 2), para. 108.

⁹¹ K. Nutt, “Jean-Claude Juncker tells Salmond: Scotland’s earned the right to be listened to” (15 December 2016) *The National* http://www.thenational.scot/news/14966793.Jean-Claude_Juncker_tells_Salmond_Scotland_s_earned_the_right_to_be_listened_to/ [Accessed 6 August 2018].

⁹² *The United Kingdom’s exit from and new partnership with the European Union White Paper* (n 3). See also the UK Prime Minister’s speech on 17 January 2017. Available at <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> [Accessed 6 August 2018].

⁹³ Currently, membership of the EU is open only to states.

⁹⁴ In certain areas, however, such as negotiation and conclusion of agreements in trade in services, the commercial aspects of intellectual property, and foreign direct investment, the Council must vote unanimously. Cf. arts 3 and 218(6) and (8) of TFEU.

individual Member States' political resistance to Scotland forging stronger ties with the EU would be of lesser importance.⁹⁵

Only time will tell whether Scotland will manage to realise its ambition to maintain close ties with the EU post-Brexit. This article demonstrates that the Faroes have set important precedents how other sub-national entities' can have bilateral relations with the EU. The attribution of international legal personality under domestic law and its recognition by other subjects of international law are essential milestones in this connection. One cannot but recall David Cameron's pledge to turn Scotland into "the strongest devolved government anywhere in the world".⁹⁶ The Faroes are a highly pertinent term for comparison. Seeking a similar form of devolution could create a pathway for Scotland to maintain close ties with the EU after Brexit. What such ties might look like depends in part on what relationship the (rest of the) UK has with the EU, and on arrangements concerning the movement of goods, persons, services and capital between Scotland and the rest of the UK following the conclusion of a UK-EU agreement under a putative Scotland-EU agreement. This is currently hard to predict. Even so, the case of the Faroes clearly illustrates that different parts of a unitary state may have different relationships with the EU.

⁹⁵ See, e.g. T. Peterkin, "Spanish prime minister says Spain will block Scots EU deal" (29 June 2016) *The Scotsman* <https://www.scotsman.com/news/spanish-prime-minister-says-spain-will-block-scots-eu-deal-1-4164935> [Accessed 2 August 2018].

⁹⁶ E. Rigby, "David Cameron pledges 'one nation' government" (8 May 2018) *Financial Times* <https://www.ft.com/content/440e26f2-f57c-11e4-bc6d-00144feab7de> [Accessed 6 August 2018].