European Union Territory from a Legal Perspective: A Commentary on Articles 52 TEU, 355, 349, and 198–204 TFEU

Dimitry Kochenov[*]

Forthcoming in M Kellerbauer, M Klmert and J Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press, 2018). This is just a draft, please consult the book for the final polished version.

Abstract

Since the founding of the Communities the Treaties have paid very significant attention to the legal articulation of the territorial scope of European law. By the time of the entry into force of the Treaty of Lisbon the number of Treaty provisions directly dealing with EU territory and establishing different statuses for particular overseas or autonomous regions/countries of the Member States in EU law has grown to ten. The aim of this overview, which has been produced to make part of a much larger Oxford University Press commentary covering all the Treaties in force and the Charter of Fundamental Rights, is to provide a concise analysis of all the ten 'territory' provisions in the Treaties and to specify the meaning of all the different statuses in EU law that particular Member State territories can acquire, the substance of EU law associated with each of the statuses in question, as well as to outline the procedures for status change as they stand today. The overview is arranged to present the relevant provisions in the order of generality and importance, rather than chronologically, giving a solid introduction into the current state of the law on EU territory and EU Law of the Overseas.

Contents

[*] Chair in EU Constitutional Law, University of Groningen (The Netherlands), Fellow of Europainstitut, University of Basel (Switzerland). This commentary in a slightly more concise form will make part of M Kellerbauer, M Klamert and J Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press, 2018). I am very grateful to the editors and to Laurent Pech and Jacquelyn Veraldi for the help in preparing this work as well as to the staff of Frühling and Unternehmen Mitte cafés in Basel and Café Macondo in Cali where this text was produced.

Article 52 TEU

1. The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.
2. The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union.

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Ziller, "Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories", in de Búrca and Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing, 2000)

Ziller, "The European Union and the Territorial Scope of European Territories" 38 *Victoria University Wellington Law Review* (2007) 51

Essential case-law

ECJ, 61/77, *Commission* v. *Ireland*, ECLI:EU:C:1977:88
ECJ, 148/77, *Hansen and Balle* v. *Hauptzollamt de Flensburg*, ECLI:EU:C:1978:173
ECJ, 34/79, *R* v. *Henn and Darby*, ECLI:EU:C:1979:295
ECJ, C-100 & 101/89, *Kaefer and Procacci* v. *French State*, ECLI:EU:C:1990:456
ECJ, C-34/09, *Gerardo Ruiz Zambrano* v. *Office national de l'emploi*, ECLI:EU:C:2011:124

Commentary

1. What has been regulated together in Article 299 EC-ToN, was split up by the ToL between Article 52 TEU and Article 355 TFEU.[1] In absence of clarifications in secondary law, Article 52 TEU in conjunction with Article 355 TFEU also applies to secondary law.
2. Article 52 TEU provides that EU law applies in the **combined territories of the MSs**. This includes their territorial waters[2] and ships and aircraft under the rules of the flag,[3] and other traditional aspects of territory below and above land and territorial waters, thus including airspace. MSs retain the competence

[1] On the Euratom-Treaty, see Article 198(1) Consolidated Version of the Treaty establishing the European Atomic Energy Community [1957] OJ C327/1.
[2] ECJ, 61/77, *Commission of the European Communities v Ireland*,ECLI:EU:C:1977:88
[3] Vaughan (ed.), *Law of the European Communities Service*, London: Butterworths, Issue 34, para 643.

concerning the geographical demarcation of their borders (see Article 77(4) TFEU on border policy). Given that there is no mechanical overlap between the sum of the territories of the MSs and the territory of the EU, many areas under MSs sovereignty lying outside of the scope *ratione loci* of EU law (cf. Article 355 TEFU), it is clearly possible to speak of the emergence of the concept of **Union territory**, given the autonomous demarcation of the territorial application of EU law defined in the Treaties, which follows strict procedural requirements of Articles 48 TEU and 355(6) TFEU.

3. Article 52 TEU implies that a **broad meaning of a 'Member State' applies**, including territories which are not part of a MS under MS's internal constitutional arrangements, while being under MS's sovereignty, which is the case, for instance of numerous territories connected to the UK, or the Channel Islands.[4]

4. The principle of '**unitary concept of territory**'[5] consisting of the full application of the *acquis* to the whole territory of the Member States as understood in the national Constitution[6] applies, which is the main rule, **derogations are authorized** by Article 52(2) TEU with a reference to Article 355 TFEU (see Article 355 TFEU).

5. Importantly, **non-Article 355 TFEU derogations are possible**. The Treaties of Accession and Acts of Accession and other primary law instruments outside the framework of TEU and TFEU can be a source of derogations from the main rule of Article 52 TEU. While the majority of the special legal regimes created in this way are codified in Article 355 TFEU via 355(5)(a), (b), and (c) some are not, as, for instance, the status of the Holly Mount Athos, where EU law does not apply.[7] Derogations via secondary law which limits the application of particular areas of the *acquis* to particular areas under MSs sovereignty,[8] e.g. under the Customs Code are also possible, but will then lack general character, applying only sectorally.[9]

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[4] Hendry and Dickinson, *British Overseas Territories Law*, (Hart 2011). Cf. Claes, 'Europees-rechterlijke aspecten van kiesrecht van Nederlandse onderdanen die in de Antillen en Aruba woonachtig zijn', *Ticom Paper* (Tilburg University 2010).

[5] ECJ, 34/79, *Regina v Maurice Donald Henn and John Frederick Ernest Darby*, ECLI:EU:C:1979:295: "the fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not thereby prevent that state from applying a unitary concept [of territory]" (para 16).

[6] The ECJ respects the Member States' own approaches to territory: ECJ, 148/77, *Hansen jun. & O. C. Balle GmbH & Co. v Hauptzollamt de Flensburg*, ECLI:EU:C:1978:173, para 10. In some cases Member States tried to challenge the inclusive vision of territory and national institutional structure embraced by the ECJ *vis-à-vis* other Member States, but to no avail. See *e.g.* the British position in Joined cases C-100&101/89, *Kaefer and Procacci*, ECLI:EU:C:1990:456, paras 6–7. The British government submitted that a Polynesian court could not be regarded as a 'court or tribunal of a Member State' in the sense of Art. 267 TFEU [then Art. 234 EC], an argument which failed to convince the Court. See also Broberg, 'Access to the European Court of Justice by Courts in Overseas Countries and Territories' in Kochenov (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Kluwer Law International 2011) 137; Mischo, 'The Competence of the Judiciary of the Netherlands Antilles and Aruba to Request Preliminary Rulings from the Court of Justice of the European Communities' (1991) *Tijdschtift voor antilliaans recht – Justicia* 140, 142.

[7] Documents concerning the accession of the Hellenic Republic to the European Communities, Final Act, Joint Declaration concerning Mount Athos (19 November 1979). Since Mount Athos is in Europe and is not associated with the UK the non-application of EU law to it is obviously not covered by Art. 355(2)(1) TFEU. Another similar example is provided by the Nordic territories inhabited by Sami people (Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Protocol No. 3 – on the Sami people (29 August 1994).

[8] History shows that a third country can be part, for instance, of the customs territory of the EU while not being a Member State, as used to be the case of Monaco (ex Art. 3(2)(b) Customs Code, now obsolete) and San Marino (ex Art. 3(2)(c) Customs Code, now obsolete).

[9] E.g. Art. 3(1), Council Regulation (EEC) 2913/92 establishing the Community Customs Code [1992] OJ L302/1 (as amended), listing the parts of the Member States' territories, which are outside the scope of the Customs Union. The consequences of such exclusion are far-reaching, since the Customs Union is at the core of the Internal Market, the [Union] being 'based upon the customs union': Rec. 5, Preamble to the Council Regulation (EEC) 2913/92. Such territories include *e.g.*

6. The **unified approach to Union territory** established by Article 52 TEU applies to both TEU and TFEU, which is a fundamental improvement compared with the pre-ToL framing of EU territory.[10] Moreover, this is in derogation to the regulation of territory in the founding Treaties, which knew the principle of differentiation in their *ratione loci*. Therefore, while European Coal and Steel Community (ECSC) law only applied to the European territory of the Member States,[11] the situation with European Atomic Enetgy Community (Euratom)[12] and the European Economic Community (EEC)[13] was drastically different, as both of them approached the territorial scope of application of the law differently from the ECSC.

7. ECJ case law supports the importance of **Union territory as a trigger of jurisdiction** in EU citizenship cases: a prospect of being forced to 'leave the territory of the Union' activates the protections of EU law in wholly internal situations.[14]

8. The simple wording of Artilce 52 TEU notwithstanding, significant practical differences exist between the scopes *ratione loci* of EU law depending on the subject area of regulation, introducing a certain **complexity** into the understanding of 'territory'.[15]

Melilla (Art. 3(1)(4) Customs Code), **Ceuta** (Art. 3(1)(4) Customs Code), **the Island of Heligoland** (Art. 3(1)(3) Customs Code), **Buesingen** (Art. 3(1)(3) Customs Code), **Livigno** (Art. 3(1)(8) Customs Code), **Campione d'Italia** (Art. 3(1)(8) Customs Code)).

[10] The pre-Lisbon EU Treaty did not contain *any* provisions specifying the extent of its territorial scope, thus providing an example of the approach to the definition of such scope which is different from all the three other Treaties then in force. Pre-Lisbon reality generated confusion notwithstanding the fact that according to Art. 29 of the Vienna Convention on the Law of Treaties (1155 UNTS, 1969, 331) treaty law in such cases should apply, binding the whole territories of the Member States, which was clearly not the case: Ziller, 'Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories', in de Búrca and Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 113, 115; Ziller, 'Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International 2011), 81.

[11] Art. 79 Treaty constituting the European Coal and Steel Community ECSC [1951].

[12] As per Art. 198 Consolidated Version of the Treaty establishing the European Atomic Energy Community [1957] OJ C327/1, the Treaty applies to the European territory of the Member States and 'to the non-European territories within their jurisdiction'. Exceptions are only made for the Færœ Islands, Greenland and the UK Sovereign Bases on Cyprus. A special regime applies to the Isle of Man and the Channel Islands. All in all, it is clear that the inclusive approach to territory demonstrated by Euratom lost much of its force upon the gaining of independence of the African colonies rich in the relevant resources. Cf. Custos, 'Implications of the European Integration for the Overseas', in Kochenov (ed), *EU Law of the Overseas*, Kluwer Law International, 2011) 91.

[13] EEC Treaty introduced several classes of territory in its law, with varied application of the Treaty provisions in each. This system of *ratione loci* variation, entirely different from the ECSC – which embraced the general principle of exclusion – and the Euratom Treaty – which embraced the general principle of inclusion – can be placed between the two. It provided the foundations of the current system of *ratione loci* in the current Art. 355 TFEU.

[14] ECJ, C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi*, ECLI:EU:C:2011:124; ECJ, C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277 . Cf.: Kochenov, 'A Real European Citizenship; A New Jurisdiction Text; A Novel Chapter in the Development of the Union in Europe' (2011) 18 CJEL 56.

[15] Thus the **Customs territory** of the Union (See Council Regulation (EEC) 2913/92 establishing the Community Customs Code [1992] OJ L302/1 (as amended); Gormley, *EU Law of Free Movement of Goods and Customs Union* (Oxford 2009) does not overlap with **Schengen territory** (Schengen provisions, although forming part of the *acquis* for all the Member States except the UK and Ireland – and enjoying a special status in Denmark – apply to EEA States and Switzerland (as well as *de facto* in a number of European micro-states), though not in full in some new Member States of the Union, such as Romania, Bulgaria, and Cyprus. Moreover, the overseas parts of the Member States are also excluded from the application of the Schengen system by the Schengen Convention. See, in this regard, Art. 138, The Schengen *acquis* – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/19. France has appended a special declaration to the Treaty of Amsterdam when the rules of the Convention were moved to what used to be the First Pillar of the Union: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Declarations of which the Conference took note – Declaration by France concerning the situation of the overseas

Article 355 TFEU

In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply:

1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349.

2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II.

The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.

3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

4. The provisions of the Treaties shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article:

(a) the Treaties shall not apply to the Faeroe Islands;

(b) the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and in accordance with the terms of that Protocol;

(c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member

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departments in the light of the Protocol integrating the Schengen acquis into the framework of the European Union [1997] OJ C340/144. For a general analysis see *e.g.* Zaiotti, *Cultures of Border Control: Schengen and the Evolution of European Frontiers* (University of Chicago Press 2011).

The territorial scope of application of both aforementioned 'territories' does not overlap with the scope *ratione loci* of the secondary law on **Turn-over taxation** (Sixth Council Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment [1977] OJ L145/1 (as amended)), whose territorial scope of application is similar to that of the Community Customs Code and similarly differs from the stipulations of Art. 355 TFEU. See also in this regard ECJ, 283/84, *Trans Tirreno Express SpA*, ECLI:EU:C:1986:31, para 20, or with the territorial scope of the **EMU and the Euro**, let alone **the statistical territory** (Council Regulation (EC) 1172/95 on the statistics relating to the trading of goods by the Community and its Member States with non-member countries [1995] OJ L118/10 (as amended)). To illustrate the differences: Art. 1 of Council Regulation (EC) 476/97 amending, with respect to statistical territory, Regulation (EC) 1172/95 on the statistics relating to the trading of goods by the Community and its Member States with non-member countries [1997] OJ L75/1, included the Island of Helgoland (which is outside the Customs territory) into the statistical territory of the Community. Moreover, and probably more importantly, Eurostat strangely does not include the French Overseas Departments (DOM) into the territory of France as a Member State of the European Union: Brial, 'La place des régions ultrapériphériques au sein de l'Union européenne' (1998) CDE 639, 641, note 9.

With regard to a number of other fields of law, numerous variations abound. Particularly unclear is the understanding of EU territory for the purposes of **EU criminal law** (e.g. Fletcher, 'EU Crime and Policing and the OCTs', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International 2011) 291) and **EU external action** (e.g. Blockmans, 'Between the Devil and the Deep Blue Sea? Conflicts in External Action Pursued by OCTs and the EU', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International 2011) 307).

States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.
6. The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission.

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ECJ, C-126/94, *Société Cadi Surgelés et al.* v. *Ministre des Finances and Directeur général des douanes*, EU:C:1996:423

ECJ, C-390/95 P, *Antillean Rice Mills NV, European Rice Brokers AVV and Guyana Investments AVV* v. *Commission of the European Communities*, EU:C:1999:66

ECJ, C-110/97, *The Netherlands* v. *Council*, EU:C:2001:620

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Main legal instruments

Council Decision 2013/755/EU on the association of the overseas countries and territories with the European Union (25 November 2013)

Commentary

1. Background

1. Article 355 TFEU contains a **non-exhaustive list of derogations from Article 52 TEU** and the principle of full application of EU law throughout MSs' territories. Such derogations are expressly authorized by Article 52(2) TEU. Not all derogations established under primary EU law are codified in Article 355 TFEU (see the analysis in Article 52 TEU commentary).

2. Article 355 TFEU applies to non-European territories of the MSs and territories not constitutionally incorporated into the MSs in full. Although the process of **decolonisation** has diminished the extent of the Member States' territorial reach (see commentary to Part IV TEU), leading to the abandonment of the Eurafrican common market project,[16] the scale of the EU's involvement with non-European and/or not fully incorporated territories of the MSs is considerable. At issue are continental territories,[17] as well as thousands of islands, islets and archipelagos in all the Oceans, belonging to Denmark, Finland, France, the Netherlands, Portugal, Spain and the UK.

3. Derogations are necessary for numerous reasons, ranging from the upholding of a particular territory's status under international law (eg Åland Islands, see *Sui generis* territories below) to the protection of minority cultures (eg Isle of Man and the Channel Islands, see *Sui generis* territories below), the reflection of the attained level of autonomy in national law (eg Greenland, cf. Article 204 TFEU), and are underpinned by decolonization. At least two territories under the sovereignty of EU MSs are still placed on the UN list of 'territories whose peoples have not yet attained a full measure of self-government' pursuant to the 1960 GA Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples.[18] **Two main reasons for differentiation** emerge. The first is related to the need to adapt the application of EU law in particular territories to the discrepancies in the level of wealth, socioeconomic development, climate and a number of other similar factors, which distinguish the territory in question from the main territory of the EU where the *acquis* applies in full (this is the main principle of Article 349(1) TEU). The second consists in reflecting the special status of such territories in national law (this is the main principle behind Part IV TFEU).

4. EU's involvement with such territories is mostly channeled through **three main statuses in EU law** granted to each particular territory in question by Article 355 TFEU, including:

1. Outermost Region (OR) status[19] (355(1) TFEU and 349 TFEU)
2. Overseas Country or Territory Associated with the Union (OCT) status (355(2) TFEU and Part IV TFEU, Annex II))[20]
3. *ad hoc* arrangements applicable to MS territories which do not fall squarely within the above two, covering territories *sui generis* (355(3)(4) and (5) TFEU).[21]

5. EU law knows **exclusive lists of territories** enjoying OR and OCT statuses. Territories not on the list of Article 355(1) TFEU are not ORs and territories not in

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[16] Hansen and Jonsson, *Eurafrica: The Untold Story of European Integration and Colonialism* (Bloomsbury Academic, 2014); Palayret, 'Les mouvements proeuropéens et la question de l'Eurafrique du Congrès de La Haye à la Convention de Yaoundé (1948–1963)', in Bitsch and Bossuat (eds.), *L'Europe unie et l'Afrique. De l'idée d'Eurafrique à la Convention de Lomé I* (Peter Lang, 2006) 185.

[17] French Guiana (355(1) TFEU), Gibraltar (355(3) TFEU).

[18] New Caledonia and Bermuda are on the UN list of 'territories whose peoples have not yet attained a full measure of self-government'. New Caledonia was struck from this list in 1947, but got reintroduced on the list in 1986 by UN General Assembly Resolution 41-41A of 2 December, 1986.

[19] *E.g.* Saint-Martin, La Réunion, Madeira. The full list is contained in Art. 349(1) TFEU.

[20] *E.g.* Bermuda, Greenland, Wallis-et-Futuna. The full list is contained in Annex II TFEU.

[21] *E.g.* Færœ Islands, Gibraltar, Isle of Man. Although Art. 355(3) TFEU does not mention Gibraltar, this is the only territory covered by this provision alongside w Art. 28 of 1972 Act of Accession [1972] OJ L73/163; Khachaturyan, 'Applying the Principle of Good Neighbourliness to the EU: The Case of Gibraltar', in Kochenov and Basheska (eds.), *Good Neighbourliness in the European Legal Context* (Brill Nijhoff, 2015).

Annex II are not OCTs. To avoid any confusion, Article 355(2)(2) even reasserts the latter specifically with regard to the UK, which was historically connected to the status of Hong Kong and Rhodesia.[22] The Commission seemed, in relation to the Clipperton Island, to suggest that also non-UK territories could be neither OR or OCT without being expressly mentioned in Article 355 TFEU.[23] This position is disputed in the literature as going against the text of Article 355(2)(2), which limits the non-application of EU law – unless expressly stated in Article 355 TFEU – to UK territories.[24]

6. Article 355 TFEU is a result of the **splitting by the ToL of a single former provision** covering all the special statuses of the territories not falling squarely within the principle of the full application of EU law in full in the totality of the territories of the MSs (Article 299 TEC-ToN) into two instruments (besides also inserting a general provision to this effect into the TEU: Article 52 TEU): Article 355 TFEU, which outlines the full range of derogations from Article 52 TEU and Article 349 TFEU, which focuses on ORs (ex Art 299(2)(2), (2)(3) and (2)(4) TEC respectively). Since the former single provision functioned alongside Part IV TEC (now Part IV TFEU) focusing on EU law applicable to OCTs, the split introduced full **structural symmetry between the ORs and OCTs**: both statuses are now governed by special provisions outside Article 355 TFEU which outlines all the panoply of the relevant legal statuses.

7. The starting assumption behind OR and OCT statuses is that in the ORs EU *acquis* applies in full unless the contrary is stated, which is reversed in the case of the OCTs, as set out with clarity in Article 355(1) and (2) TFEU respectively. The OCTs are, according to the ECJ, neither parts of the Union, nor third countries.[25] According to established case law, 'failing express provisions, the general provisions of the Treaty do not apply to [such] countries and territories'.[26] See the commentary of Part IV TFEU.

8. OR and OCT **statuses converge in a number respects**,[27] while territories *sui generis* offer an example of flexible arrangements which can largely be turned either way. Historically, the distinction between OR and OCT statuses barely existed in practice before the *Hansen* decision of the ECJ,[28] which laid the essential foundations for the distinctions existing between the OCTs and the ORs, pushing the Institutions and the MSs to take the Treaty language seriously. Nevertheless, a strikingly similar landscape of legal regulation can arise in practice in the context of the regulation of certain fields, *de facto* virtually removing the practical difference between the two statuses. The story of the *octroi de mer* levies (*i.e.* dock dues)[29] in the ORs[30] and the OCTs[31] provides a telling illustration of this.

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[22] For an analysis of the legal position of Macao and Hong Kong in Community law before these territories were transferred to China (also differentiating between the *sui generis* statuses applicable to these territories) see Karagiannis, 'A propos du règlement des conflits d'intérêts entre les territoires dépendant d'États membres et les Communautés européennes' (1998) *Revue de droit international et de droit compare* 330, 338, note 26.

[23] Written Question No. 1007/84 OJ C62/34, 11 March 1985 by John Ford to the Commission on the status of Clipperton Island.

[24] Murray, *The European Union and Member State Territories: A New Legal Framework under the EU Treaties* (TMC Asser Press, 2012), 97 (and references therein).

[25] ECJ, C-390/95 P, *Antillean Rice Mills NV, European Rice Brokers AVV and Guyana Investments AVV v Commission of the European Communities*, EU:C:1999:66, para 36.

[26] ECJ, 260/90, *Leplat v Territory of French Polynesia*, EU:C:1992:66, para 10**;** ECJ, C-110/97, *The Netherlands v Council*, EU:C:2001:620, para 46.

[27] Custos, 'Implications of the European Integration for the Overseas', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011).

[28] ECJ, 148/77, *Hansen and Balle* v. *Hauptzollamt de Flensburg*, EU:C:1978:173.

[29] ECJ, 126/94, *Société Cadi Surgelés, Société Sofrigu, Société Sofroi and Société Sofriber v Ministre des Finances and Directeur général des douanes*, EU:C:1996:423. Slotboom, 'L'application du Traité CE au commerce intraétatique? Le cas de l'octroi de mer' (1996) *Cahiers de droit européen* 9; Puissochet, "Aux confins de la Communauté européenne: les régions ultrapériphériques", in Rodríguez Iglesias et al. (eds), *Melanges en hommage à Fernand Schockweiler* (Nomos, 1999) 491, 504–506.

[30] See Council Decision 2004/162 of 10 February 2004 concerning the dock dues in the French overseas departments and extending the period of validity of Decision 89/688/EEC [2004] OJ L 52/64.

9. In **international relations** the Member States act in 'dual capacity', acting, sometimes, not as EU MSs but as representatives of the OCTs or territories *sui generis* on the international plane. As the ECJ clarified in Opinion 1/78 the 'fact that those States belong to the Community does not … affect their position in so far as they act as international representatives of the territories concerned'.[32] Such conflicts are addressed in Declaration No. 25 appended to the ToM by the conference of all the MSs, requiring a MS acting in the interests of one of its OCT or *sui generis* territories which are not alighned with the interests of the EU to 'give notice to the Council and the Commission' when such action 'proves unavoidable'.[33]

2. History of the special statuses in Article 355 TFEU

10. At the moment of signing of the EEC Treaty, OCT status was granted to a huge number of Belgian, Dutch,[34] French and Italian territories not fully incorporated into the constitutional structure of these Member States,[35] marking a huge success of the French policy, which made French participation in the EEC directly dependent on the incorporation of all the African colonies into the common market in the medium- to long-term as well as immediate co-funding of their development by the six founding MSs, thereby driven by the **Eurafrican ideal**[36] only to be extended further upon the accession of the UK to the Communities and the acquisition of home rule by Greenland, combined with its swap of full application of EU law in its territory for an OCT status (Article 204 TFEU).[37]

11. The origins of OR status, explaining its current contents, lie in the **constitutional incorporation of some territories in full** into the structures of the respective MS. During the negotiations of the Treaty of Rome France, having particular ties with its four Overseas Departments (*DOM*), including Guadeloupe, Martinique, French

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[31] Eg ECJ, C-260/90, *Leplat* v. *Territory of French Polynesia*, EU:C:1992:66. Ziller, 'L'Union européenne et l'outre-mer' (2005) 113 *Pouvoirs* 149.

[32] ECJ Opinion 1/78 *International Agreement on Natural Rubber* [1979] ECR I-2871 para. 62.

[33] Miller, 'Declaration 25 of the Treaty on European Union: Danish Territories and Whaling' (House of Commons, International Affairs and Defence, SN 5980, 24 May 2011).

[34] The Kingdom of the Netherlands only signed EEC Treaty for the Kingdom in Europe and the New Guinea, leaving out Suriname and the Netherlands Antilles. A special protocol to this end has been appended to the EC Treaty: Coussirat-Coustère, 'Article 227', in Constantinesco et al. (eds.), *Traité instutuant la CEE: Commentaire article par article* (Economica, 1995) 1419, 1422. The Treaty was later extended to the Dutch Antilles (de Overeenkomst tot wijziging van het Verdrag tot oprichting van de Europese Economische Gemeenschap ten einde de bijzondere associeatieregeling van het vierde deel van het Verdrag op de Nederlandse Antillen te doen zijn of 13 November 1962, JO 2413/64, 1964) but has never applied to Surinam.

[35] First OCTs were the Belgian territories of the Congo and Rwanda-Burundi, the Italian protectorate of Somalia, Netherlands New Guinea, and French equatorial Africa (Côte-d'Ivoire, Dahomey, Guinea, Mauritania, Niger, Senegal, Sudan and Upper-Volta), French East Africa (Moyen-Congo, Gabon, Oubangui-Chari and Chad), the protectorates of Togo and Cameroon, the Comoros Islands (Mayotte, separated from them and is now an OR), Madagascar and Côte Française des Somalis. To be added to this list are the present French OCT, including the French Polynesia, which used to be called Etablissements français de l'Océanie; Wallis-and-Futuna, which is still a French protectorate; New Caledonia and Dependencies, French Southern and Antarctic Territories and Saint-Pierre-et-Miquelon. Cf.: Ziller, 'L'Union européenne et l'outre-mer' (2005) 113 *Pouvoirs*, 145–147.

[36] Hansen and Jonsson, *Eurafrica: The Untold Story of European Integration and Colonialism* (Bloomsbury Academic, 2014; Custos, 'Implications of the European Integration for the Overseas', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011).

[37] Treaty concerning the accession of the Kingdom of Denmark, Ireland,
the Kingdom of Norway and the United Kingdom of Great Britain and Northern
Ireland to the European Economic Community and to the European Atomic Energy Community [1972] OJ L73/5. Following the UK accession, the list of the associated countries and territories became much longer, including (in addition to the countries and territories still included in Annex II TFEU, such as Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands, and Bermuda) the Bahamas, Brunei, the Caribbean Colonies and Associated States (including Antigua, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, St. Vincent and Anguilla, and British Honduras), the Gilbert and Ellis Islands and the Line Islands, the Anglo-French Condominium of the New Hebrides, Solomon Islands, and Seychelles: ECJ, 260/90, *Bernard Leplat* v. *Territory of French Polynesia*, EU:C:1992:66. Ziller, 'L'Union européenne et l'outre-mer' (2005) 113 *Pouvoirs* 145–147.

Guiana La Réunion and Algeria,[38] all fully incorporated into the French Republic, demanded the inclusion into the Treaty, in addition to the association provisions and an eventual chance to join the internal market for other possessions (which were infinitely more important economically) of a special clause granting **limited differentiated treatment** to the incorporated territories overseas – which, albeit under a specific regime and with some derogations, were to fall within the scope of Community law under the former Article 227(2) EEC (now Art. 349 TFEU), giving birth to what is now an OR legal regime. Azores and Madeira joined the *DOM* in benefiting from the OR status arrangements upon the accession of Portugal to EEC.[39] The Canary Islands came to be within the scope of the OR status in 1991 after a period of reflection.[40] The OR status was thus designed to differentiate between constitutionally incorporated territories and colonies/non-incorporated territories.

12. Although two different regimes applied, the ultimate goal of full incorporation into the internal market marked both. The main difference between the two concerned the **precise timing of full incorporation**, as while Article 227 EEC contained clear deadlines for possible adjustments of some parts of the *acquis* to the objective realities of the *DOM* different from Europe,[41] the OCT status did not provide for any clear timetables.

3. EU Law applicable to the ORs: Article 355(1) TFEU

13. The main principle of application of EU law in the ORs is marked by the **presumption of application of EU law in full**. The derogations from this presumption should be construed narrowly and rooted strictly in the logic of remedying the handicaps the ORs suffer from enumerated in Article 349 TFEU (see Article 349 TFEU).

4. EU Law applicable to the OCTs: Article 355(2) TFEU

14. The ECJ's standard formula is that 'failing express provisions, the general provisions of the Treaty do not apply to [such] countries and territories.'[42] The core question, thus, is whether Part IV TFEU provides an exhaustive *lex specialis* applicable in the OCTs mentioned in Annex II. The Treaties are silent on any 'principle of non-application' of the general EU *acquis* in the OCTs. Such full non-application beyond Part IV TFEU would be difficult to justify without harming the coherence of EU law and threatening the essence of association. Consequently, Article 355(2) TFEU and Part IV TFEU is ***lex specialis vis-à-vis*** **the rules found elsewhere in the Treaties** – not as *all the law* applicable to the OCTs.[43]

15. The procedure contained in Article 203 TFEU allows the Council to **legislate for the OCTs**, detailing the rules of Part IV TFEU and other *acquis* applicable to them (see Article 203 TFEU).

16. Beyond Part IV TFEU Principles of EU law set out in Part I TEU definitely apply to the OCTs:[44] they at least bind the Council when adopting Association

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[38] On Algeria in the EEC, see, Tavenier, 'Aspects juridiques des relations économiques entre la CEE et l'Algérie' (1972) 8 *Revue trimestrielle de droit européen* 1.

[39] Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities [1985] OJ L302/0.

[40] Council Regulation (EEC) 1911/91 on the application of the provisions of Community law to the Canary Islands [1991] OJ L171/1.

[41] See Art. 227(2)(2) EEC (now obsolete).

[42] ECJ, C-260/90, *Leplat*, EU:C:1992:66, para 10; ECJ, C-110/97, *The Netherlands v Council*, EU:C:2001:620, para 49; ECJ, C-300/04, *Eman and Sevinger*, EU:C:2006:545, para. 46.

[43] Ziller, 'Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011) 69, 73; Ziller, 'Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories', in de Búrca and Scott *Constitutional Change in the EU* (Bloomsbury, 2000) 119; Kochenov, 'The Application of EU Law in the EU's Overseas Regions, Countries, and Territories After the Entry into Force of The Treaty of Lisbon' (2012) 20 *Michigan State International Law Review* 669.

[44] This is also by reference from Article 203 TFEU. Joined cases T-480&483/93, *Antillean Rice*

Decisions,[45] but should also apply to the interpretation of such Decisions and all the other relevant law. The absolute majority of the OCTs' inhabitants are European citizens.[46] Part II TFEU, has no exhaustive link with territory, as clarified by ECJ in *Eman en Sevinger*: one cannot lose the status of EU citizenship by moving outside the territory of the Union.[47] No reference from Part IV TFEU is needed for the provisions on Institutions (Title III TEU, Part VI TFEU) or for Part VII TFEU on the General and Final Provisions to govern the legal position of the OCTs. **A significant body of EU law beyond Part IV TFEU applies in the OCTs**: a crucial consideration for the correct reading of Part IV TFEU (see the commentary on it above).

17. Moreover, the ECJ found in *Kaefer and Procacci* that the Courts of the OCTs are courts or tribunals of a MS in the sense of Article 267 TFEU,[48] making **preliminary references from the OCTs** possible.

5. EU law in territories *sui generis*

18. The legal regime of the application of the *acquis* to the *sui generis* territories is regulated by Article 355(3)–(5) TFEU, alongside other primary law of the Union. The TFEU thus incorporates specific provisions limiting the application of EU law to the Channel Islands, the Isle of Man[49] and the Åland Islands.[50] It also contains a list of the territories to which EU law does not apply, including the Færœ Islands and the UK Sovereign Base Areas in Cyprus (SBAs).[51] Just as with the OCTs, such **non-application does not concern some non-territorial aspects of EU law**: the population of the Færœ Islands, for instance, is Danish nationals and, consequently, EU citizens.

19. Under Article 355(2)(1) and (5)(a) and (b) TFEU the **non-application of EU law is to be interpreted broadly**, to include also the jurisdiction of the ECJ, as is illustrated by Færœ-EU Mackerel War, which did not fall within Article 344 TFEU, allowing Denmark to act under Declaration No. 25 ToM strictly in the capacity of the sovereign on the Islands, rather than as an EU MS.[52]

20. Some relevant sections of Article 355 TFEU contain references to the specific provisions of the Acts of Accession, which entered into force at the moment of the

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Mills NV et al. v. *Commission*, EU:T:1995:162, para 93.

[45] ECJ, C-390/95P, *Antillean Rice Mills NV et al.* v. *Commission*, EU:C:1999:66, para 37.

[46] As explained in Kochenov, 'EU Citizenship in the Overseas', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011) 199, 209.

[47] Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, para. 72.

[48] Joined cases C-100&101/89, *Kaefer and Procacci*, EU:C:1990:456, para 8; Broberg, 'Access to the European Court of Justice by Courts in Overseas Countries and Territories', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International 2011) 137**,** 138.

[49] Done to protect the local culture: Protocols No. 2 and No. 3 to the 1972 Act of Accession ([1972] OJ L73/164); Massey, 'Modernizing Government in the Channel Islands' 82 (2004) *Public Administration* 421; Kochenov, 'The Summary of Contradictions: Outline of the EU's Numerous Approaches to Minority Protection' (2008) 31 *Boston College International and Comparative Law Review* 1.

[50] Done to accommodate international law: Resolution of the Council of the League of Nations of June 24, 1921 on the Åland Islands and the Guarantee to be given to the Population of the Aaland Islands adopted by the Council of the League of Nations in June 27, 1921, in 'The Aaland Islands Question', September 1921, O.J.L.N. 691. The special regime for the Islands dates back to the Treaty of Paris of 1856, aimed at guaranteeing the demilitarisation of the Islands (then a territory within the Russian Empire). See Ekman, 'The Right to Be Small and Different' (2006) 10 *Jersey Law Review*; Haanikainen, and Horn (eds.), *Autonomy and Demilitarisation in International Law* (Kluwer Law International, 1997). See also Kochenov, 'Regional Citizenships and EU Law: The Case of the Åland Islands and New Caledonia' (2010) 35 *European Law Review* 307.

[51] The exceptional status of the Sovereign Base Areas is related to the non-economic nature of the British presence on Cyprus, as clarified in a relevant Declaration appended to the 1972 Act of Accession: Final Act, Joint Declaration on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus [1972] OJ L73/194. For analysis see *e.g.* Lauhlé-Shaelou, 'The Principle of Territorial Exclusion in the EU: SBAs in Cyprus – A Special Case of *Sui Generis* Territories in the EU', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011) 153.

[52] Vatsov, 'The Mackerel War' 39 (2014) *Euroepan Law Review* 864.

accession to the Union of the Member States in charge of particular *sui generis* territories.[53] Direct **reference to the provisions of the Treaties of Accession is not necessary** in Article 355, since the primary law status of such Treaties is undisputed. Even failing to mention a territory in Article 355 TFEU directly does not exclude the possibility of a *sui generis* status for it. Examples of Gibraltar – which is covered by Article 355(3) TFEU – or the Holy Mount Athos – covered only by a Declaration Appended to an Act of Accession[54] – are cases in point.

21. The *de facto* territorial disapplication of either particular elements or even the whole body of the *acquis* can also stem from the **particular circumstances** when a MS is unable to exercise sovereignty over the whole territory, which is the case of the Republic of Cyprus for instance, partly under Turkish occupation.[55]

22. The *sui generis* statuses recognized by primary law are a testimony to high degree of flexibility for accommodating a broad array of far-reaching derogations, meeting the specific needs of those territories which are not satisfied with OR or OCT status. In other words, it is theoretically possible for the MSs to **negotiate 'in-between' statuses** for specific territories, which could be helpful in Scotland and similar cases.[56]

6. Status change procedures

23. All the three statuses in Article 355 TFEU are provided by EU law and are thus **removed from the realm of unilateral action by the MSs**. Any change of the status has to follow established EU law procedures.

24. There are **two procedures for status change**: general Treaty revision procedure (see Article 48 TEU) and the simplified procedure of Article 355(6) TFEU, introduced for the first time by the ToL.

25. Article 355(6) TFEU requires a unanimous decision of the European Council, with Commission consultation, on a proposal from the Member State connected with the territory subjected to the status change, which is a **much lower procedural threshold** compared with Article 48 TEU.

26. The simplified procedure of Article 355(6) TFEU only applies to the changes of status of the Danish, Dutch and French territories. Many instances of eventual status change are thus **not covered by the simplified procedure**, including any status change of UK, Spanish, Finnish and Portuguese territories. Moreover, it is not entirely clear whether Article 355(6) would cover any change from OCT or OR to any *sui generis* status. The wording seems to allow for this: 'amending the status with regard to the Treaties'.[57] It is undisputed, however, that *sui generis* territories

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[53] The Treaties of Accession and Acts of Accession (making integral parts of the former) regulate the special status of Gibraltar (Art. 28 of 1972 Act of Accession ([1972] OJ L73/20)); Ceuta and Melilla (Art. 115 of 1985 Act of Accession ([1985] OJ L302)), as well as (in the past) the Canary Islands (Art. 25 of the 1985 Act of Accession ([1985] OJ L302)) before the latter became an OR upon the expiration of a period of reflection.

Protocols appended to the Acts of Accession also play an important role in the delimitation of the territorial scope of application of the Treaties: see *e.g.* Protocols No. 2 and 3 to the 1972 Act of Accession (on the Færœ Islands, the Channel Islands and the Isle of Man [1972] OJ L73/164); Protocol No. 2 to the 1985 Act of Accession (on the Canary Islands, Ceuta and Melilla [1985] OJ L302/400); Protocol No. 3 to the 1994 Act of Accession (on the special regime applicable to the regions traditionally inhabited by Sami people [1994] OJ C241/352).

The same applies to the Declarations appended to the Acts of Accession: see *e.g.* The Declaration on the Sovereign British Base Areas on Cyprus (appended to the 1972 Act of Accession ([1972] OJ L73/194)); Joint Declaration on Mount Athos (appended to the 1979 Act of Accession ([1979] OJ L 291/186)).

[54] Joint Declaration concerning Mount Athos (19 November 1979) (appended to the 1979 Act of Accession ([1979] OJ L 291/186)).

[55] Skoutaris, 'The Status of Northern Cyprus under EU Law: A Comparative Approach to the Territorial Suspension of the *Acquis*', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011) 401; Skoutaris, *The Cyprus Issue: The Four Freedoms in a Member State under Siege* (Hart Publishing, 2011).

[56] Skoutaris, 'From Britain and Ireland to Cyprus: Accommodating "Divided Islands" in EU Political and Legal Order' (2016) *EUI Working Paper* AEL 2016/02.

[57] Perrot, 'Les régions ultrapériphériques françaises selon le Traité de Lisbonne' (2009) 45 *Revue*

cannot benefit from this procedure: while the simplified procedure could, for example, enable Greenland to retune its status in EU law to OR, it is not applicable to the Færœ Islands, which, although Danish, enjoy a *sui generis* status under Article 355(5)(a) and are thus not covered by Article 255(6) TFEU.

27. Changes not covered by Article 355(6) TFEU – as well as, obviously, the changes falling within the scope of Article 355(6) TFEU if that provision is not used – follow the general Treaty change procedure and are not covered by Article 48(6) TEU, **simplified Article 48 TEU revision procedures are not applicable** (see Article 48 TEU).

28. The simplified procedure is **mute about democracy**, not requiring taking the preferences of the local population of the territory in question into account, which led the Dutch government to append to the Treaties a Declaration to remedy this deficiency.[58]

29. Status change procedures should be distinguished from introducing amendments merely to keep the Treaties up to date following the constitutional-territorial reshuffles in the MSs and secessions from MSs. The dissolution of the Netherlands Antilles in 2010, in one example, was reflected by ToL in Annex II. Such an amendment does not amount to a legally-consequential change and is thus not, strictly speaking, required.[59] Even the islands which became fully incorporated into the constitutional structure of the Netherlands in Europe in 2010: Bonaire, Sint Eustatius and Saba have been included in Annex II. The principle is simple: **constitutional change of status under national law does *not* automatically lead to a status change in EU law**.[60]

30. Numerous **examples** of such changes from OR to OCT and back are known:[61] Mayotte, a French island between Madagascar and the African continent was the last to go through the process of such change (from OCT to OR),[62] anticipated by a

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trimestrielle de droit européen 717, 736.

[58] Declaration No. 60 by the Kingdom of the Netherlands on Article 355 of the Treaty on the Functioning of the European Union [2010] OJ C83/358. See also its predecessor, Declaration No. 43 by the Kingdom of the Netherlands on Article IV-440, appended to the TCE [2004] OJ C310/473 (never entered into force).

[59] It took the MSs 30 years to exclude Algeria from the list of the ORs, which was done by the ToM.

[60] Saint-Pierre-et-Miquelon is the only precedent known today of an attempt at a unilateral change of a status of a territory by a Member State. This territory, lying off the North-Eastern coast of Canada, was unilaterally proclaimed by France to have changed its status from an OCT to an OR (a status entirely reserved for the French *DOM* at the time, following the independence of Algeria) since it became a *DOM* in French law in 1976. France assumed that being a *DOM* in national law was enough to qualify as a *DOM* in the sense of Article 227(2) EEC then in force, which made a general reference to the constitutional status of such territories in French law, instead of naming them all, which the Treaty of Lisbon has introduced. Consequently, according to the French, Saint-Pierre-et-Miquelon held the *DOM* status in the sense of national law and, also, in the sense of Community law until 1985 when a reverse switch occurred, making it an OCT again. A number of French legal scholars assumed that such a change had legal effects in Community law (Coussirat-Coustère, 'Article 227', in Constantinesco et al. (eds.), *Traité instutuant la CEE: Commentaire article par article* (Economica, 1995) 1419, 1425, note 28). The study of the Community documents demonstrates, however, that Saint-Pierre-et-Miquelon was in fact treated as an OCT, not as an OR during its short-lived 'éphémère période départementale' (Ziller, 'L'Union européenne et l'outre-mer' (2005) 113 *Pouvoirs* 149, 151) between 1976 and 1985. Therefore, it was not made part of the customs territory of the Community, which can be regarded a necessary element of the OR status. Moreover, it has always been mentioned in the Annex to the EEC Treaty listing the associated countries and territories [now Annex II TFEU]. Nevertheless, in an answer to a written question, the Commission stated unequivocally that it was covered by the status of Article 227(2) EEC, *i.e.* that it was in fact an OR (Written Question No. 400/76 by Mr. Lagorce to the Commission concerting the situation of the islands Saint-Pierre-and-Miquelon [1976] OJ C294/16, para 1). The fact that it was not treated as one in Community law is indicative of the fact that *de facto* the change of status has never occurred.

[61] Zuber, 'Changement de statut de Mayotte et Saint-Barthélemy: les enjeux de la mise en oeuvre de l'acquis dans ces territoires' (2012) *Revue de droit de l'Union européenne* 473.

[62] Béringer, 'Départementalisation de Mayotte: Un changement de régime statutaire aix enjeux internationaux', (2010) 2 *Revue juridique et politique* 176. See also Béringer, 'La question de Mayotte devant le Parlement français', in Gohin and Maurice (eds.), *Mayotte* (2nd edn, Université de la Réunion, 1996) 199.

Declaration appended to the Treaty of Lisbon.[63] Saint-Barthélemy, initially endowed with an automatically-acquired OR status upon splitting from Guadeloupe, moved in the opposite direction, having acquired an of OCT status in 2012.[64]

Article 349 TFEU

Taking account of the structural social and economic situation of Guadeloupe, French Guiana, Martinique, Mayotte, Réunion, Saint-Martin, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies. Where the specific measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act on a proposal from the Commission and after consulting the European Parliament.

The measures referred to in the first paragraph concern in particular areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes.

The Council shall adopt the measures referred to in the first paragraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies.

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[63] Declaration No. 43 on Article 355(6) of the Treaty on the Functioning of the European Union [2010] OJ C83/351. See also its predecessor, Declaration No. 28 on Article IV-440(7) appended to the TCE [2004] OJ C310/463 (never entered into force).

[64] European Council Decision 2010/718/EU amending the status with regard to the European Union of the island of Saint-Barthélemy OJ L325/4; Béringer, 'Collectivités d'outre-mer: Saint-Barthélemy; Saint-Martin', *Jurisclasseur Europe*, Fasc. 460, 2011; Oraison, 'Le statut nouveau de collectivité d'outre-mer des îles de Saint-Barthélemy et de Saint-Martin' (2008) 1 *Revue du droit public* 153, 164.

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Essential case law

ECJ, 148/77, *Hansen*, EU:C:1978:173
ECJ, C-58/86, *Coopérative agricole d'approvisionnement des Avirons*, EU:C:1987:164
ECJ, C-163/90, *Legros*, EU:C:1992:326
ECJ, C-363&407–411/93 *Lancry* EU:C:1994:315
ECJ, C-212/96 *Chevassus-Marche*, EU:C:1998:68
ECJ, C-37&38/96 *Sodiprem SARL*, EU:C:1998:179
ECJ, C-132–136/14 *Parliament and Commission* v. *Council*, ECLI:EU:C:2015:813

Main legal instruments

Council Decision establishing a Programme of options specific to the remote and insular nature of the French overseas departments (POSEIDOM) (22 December 1989)
Council Decision setting up a programme of options specific to the remote and insular nature of Madeira and the Azores (POSEIMA) (26 June 1991)
Council Decision setting up a programme of options specific to the remote and insular nature of the Canary Islands (POSEICAN) (26 June 1991)
Council Decision concerning the dock dues in the French overseas departments and extending the period of validity of Decision 89/688/EEC (10 February 2004)
European Commission report on the measures to implement Article 299(2) - the outermost regions of the European Union (COM(2000)147)
European Commission, A stronger partnership for the outermost regions (COM(2004)343)
European Commission, The outermost regions: An asset for Europe (COM(2008)642)
European Commission, The outermost regions of the European Union: Towards a partnership for smart, sustainable and inclusive growth (COM(2012)287)

Commentary

1. Article 349 TFEU, which used to be part of what is now Article 355 TFEU before ToL (ex Article 299(2) TEC) sets out the essential details on the Outermost Regions **(OR) regime** established by Article 355(1) TFEU in derogation from the main rule of Article 52 TEU.

2. The **closed list of the territories** where the special regime established by Article 349 TFEU applies is contained in the article itself.[65] This list can be changed either via ordinary Treaty revision or the special procedure of Article 355(6) TFEU and is not subject to unilateral decisions by the MSs. Older versions of the provision contained a reference to the French *DOM*, without naming each of such territories separately creating an illusion that the status of an OR could be attained by a territory following a change in the Constitutional status of this territory within the Frence, which caused some problems, particularly with regard to the legal status of Saint-Pierre-et-Miquelon in European law (see Article 355(6) TFEU).

3. The main rule governing OR status in EU law is the goal of the **full incorporation** of these territories within the scope *ratione materiae* of EU law,

[65] See answer given by Mr. Prodi on behalf of the Commission to Written Question E-2225/00 by Sebastiano Musumeci to the Commission (3 July 2000) on the Application of Article 299 (*ex* Article 227) of the EC Treaty, [2001] OJ E81/176. The question concerned the possibility of applying the special regime of (then) Article 299(2) EC to the islands of Sicily and Sardinia. At the same time, Art. 299(2) EC (now Art. 349 TFEU) has been used by the Council as one of the legal bases for a measure to change the application of structural funds to 'outlying Greek islands which are under a handicap due to their distant location': Art. 1(1), Council Regulation (EC) 1447/2001 amending Regulation (EC) 1260/1999 laying down general provisions on the Structural Funds [2001] OJ L198/1. In other words, although Article 349 TFEU contains a closed list of regions where OR status applies, a specific regime which would be in some way *de facto* similar to this arrangement can also be granted to other territories.

while taking into account the natural handicaps and specificity of these regions. Established ECJ case law refuses to view the ORs as essentially different from the European territories of the Member States,[66] and requires, in principle, full application of EU law.[67]

4. The list of **handicaps** in Article 349(1) TFEU is the key to understanding of the OR status. Only the particularities of ORs climate, geographical position, and other factors mentioned in Article 349(1) permit the justification of the possible deviations from the *acquis*.[68] It is not necessary to combine the handicaps in question. One is presumably enough.

5. ToL made this principle of full application less rigid: while the now obsolete Article 299(2) EC, similarly to Article 227(2) EEC, used to state unequivocally that '[t]he provisions of [the EC] Treaty shall apply to the [ORs]', the text of the current Article 355(1) TFEU is very different, the restatement of full application of EU law has been replaced with 'in accordance with Article 349'. This gives the Council more room to adapt the application of the *acquis* to the special situation of the ORs.

6. The Council uses a **special procedure** contained in Article 349(1) TFEU to offset the list of handicaps the regions in question suffer from, which is contained in the same para. The ECJ has ruled that the special procedure enjoys preference over the sectoral legal bases when the situation of ORs is dealt with. Article 349(3) TFEU contains a safeguard against the abuse of this procedure: integrity and coherence of the EU legal order should not be undermined through its use.[69] The procedure, copy-pasted from the pre-ToL version requires QMV, much preferable to the unanimity in Council required by the first OR provision in the EEC Treaty, which allowed Germany to block special measures regarding the banana market.[70] If the contemporary QMV rules are compared to the unanimity of pre-ToA times, especially since the number of Member States in charge of ORs has not grown at all, it becomes clear that QMV might not be very easy to reach.[71] The outcomes of the employment of the special legislative procedure of Article 349 TFEU only concern the application of EU law in the territories of a minority of the MSs. The Treaty provision does not introduce any qualifications to the QMV rule to reflect this reality, though it is possible to imagine that no measure would be adopted under the Article against the will of the Member State exercising sovereignty over an OR whose status is at stake.[72] Moreover, ideally, the OR in question itself should be consulted as well, although no binding legal provision to this effect is to be found anywhere in the *acquis.*

7. The special procedure of Article 249(1) TFEU is **equally applicable to derogate from primary and secondary law** of the EU, as clarified by the ECJ in *Parliament and Commission* v. *Council*.[73]

8. The **aim and scope of derogations** is 'to meet the needs of those territories'.[74] In practice, the Institutions did not feel any constraints on the content of the measures to be adopted as long as these were aimed at remedying 'the special geographic, economic and social situation'.[75] The Council adopted the POSEI (Programme d'Options Spécifiques à l'Éloignement et à l'Insularité) Decisions, dealing with

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[66] ECJ, C-58/86, *Coopérative agricole d'approvisionnement des Avirons*, EU:C:1987:164, para 17; *ECJ,* F-*43/05, Olivier Chassagne, EU:F:2007:14 (action dismissed).*

[67] ECJ, 148/77, *Hansen*, EU:C:1978:173 paras 10-11.

[68] Vitalien, 'Les régions ultra-périphériques entre assimilation et différenciation' (2002) 101 *Revue française d'administration publique* 115, 122.

[69] Cf. Perrot, 'Intégrité et cohérence de l'ordre juridique comunautaire', in *Le Droit de l'Union européenne en principes:* Liber Amicorum *en l'honneur de Jean Raux* (Apogée, 2006) 615.

[70] Omarjee, "Le traité d'Amsterdam et l'avenir de la politique de différenciation en faveur des départements français d'outre-mer" 34 *Revue trimestrielle de droit européen* (1998) 515, 520.

[71] Perrot, 'Les régions ultrapériphériques françaises selon le Traité de Lisbonne' (2009) 45 *Revue trimestrielle de droit européen* 717, 732.

[72] Cf. Omarjee, "Le traité d'Amsterdam et l'avenir de la politique de différenciation en faveur des départements français d'outre-mer" (1998) 34 *Revue trimestrielle de droit européen* 515, 521; Ziller, 'L'Union européenne et l'outre-mer' (2005) 113 *Pouvoirs* 145, 154.

[73] ECJ, C-132–136/14 *Parliament and Commission* v. *Council*, ECLI:EU:C:2015:813.

[74] ECJ, 148/77, *Hansen*, EU:C:1978:173, para 11. Puissochet, 'Aux confins de la Communauté européenne' (1999), 499.

[75] ECJ, 148/77, *Hansen*, EU:C:1978:173, para 10.

French, Portuguese and Spanish ORs and establishing the framework of the OR *acquis*: 'the backbone of the policy for supporting the outermost regions'.[76] These included: POSEIDOM,[77] POSEIMA[78] and POSEICAN.[79] Moreover, the status of the *DOM* gained in specificity due to the Dock Dues (*octroi de mer*) Decision[80] to allow for a special taxation regime in the *DOM*. A large number of secondary legislation complements the OR *acquis*.[81] In *Legros*[82] and *Lancry*[83] the ECJ nuanced the 'full application' *Hansen* rule, by introducing into its case law an idea of the hierarchy of norms within the *acquis* as applied to the ORs. Having first appeared in the Opinion of AG Jacobs in *Legros*,[84] a very simple argument was accepted by the ECJ in *Lancry*. The ECJ used the list of areas of Community law that had to be applicable in the ORs immediately upon the entry into force of the EEC Treaty which used to be included in the provisions preceding Article 349 TFEU as a clear indication of the overwhelming importance of the areas of law mentioned on the list compared with the rest of the *acquis*.

9. The idea that some elements of EU law, especially the Internal Market and free-movement of goods should enjoy a higher level of protection that other areas is now reflected in Article 349(3) TFEU. The **derogations form the 'core' *acquis*** are allowed, under *Chevassus-Marche*[85] and *Sodiprem-SARL*,[86] as long as these are *'necessary, proportionate and precisely determined'.*[87] *This reasoning* allowed the Court to rule in *Chevassus-Marche* that exemptions from the *octroi de mer* of the locally produced goods on Réunion were compatible with the Treaty.[88] The ECJ thus allows even derogations from the principles of Article 110 TFEU on the basis of what is now Article 349 TFEU.

10. While **EMU** ***acquis*** is applicable in the ORs, derogations from it should be possible, as long as these are necessary to deal with the handicaps enumerated in Article 249 TFEU.[89]

11. Although put in place to deal with permanent handicaps, **the derogations under Article 349 TFEU cannot be permanent in nature**. This provision thus cannot be viewed as being exempt from the main principles of EU law governing the employment of derogations: they have to be construed as strictly as possible, be proportionate to the stated goals and be temporary.[90] However, the extension of previously granted derogations is obviously possible.

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[76] European Commission report on the measures to implement Article 299(2) - the outermost regions of the European Union (COM(2000)147), introduction.

[77] Council Decision 89/687/EEC POSEIDOM [1989] OJ L399/46 (on *DOM*)

[78] Council Decision 91/315/EEC POSEIMA [1991] OJ L171/10 (on Madeira and Azores).

[79] Council Decision 91/314/EEC POSEICAN [1991] OJ L171/5 (on the Canary Islands).

[80] Council Decision 89/688/EEC dock dues arrangement [1989] OJ L399/46. For the second extension of this Decision (now in force) see Council Decision 2008/439/EC amending Decision 2004/162/EC concerning the dock dues in the French overseas departments OJ L155/17. Cf. Slotboom, 'L'application du Traité CE au commerce intraétatique? Le cas de l'octroi de mer' (1996) *Cahiers de droit européen* 9; Puissochet, 'Aux confins de la Communauté européenne: les régions ultrapériphériques', in Rodríguez Iglesias et al. (eds), *Melanges en hommage à Fernand Schockweiler* (Nomos, 1999) 504–506.

[81] More than 700 acts have been adopted under the POSEI Decisions: Commission report on the measures to implement Article 299(2) (COM/2000/147), Annex I (also listing the most important of these documents).

[82] ECJ, C-163/90, *Legros*, EU:C:1992:326, para 18.

[83] ECJ, C-363&407–411/93 *Lancry* EU:C:1994:315.

[84] Opinion of AG Jacobs in ECJ, C-163/90, *Legros*, EU:C:1991:436, para 17. The Court refused to follow the conclusion of the AG in that case, not ruling on the validity of the *Octroi de mer* Decision and dealing solely with the *octroi de mer* levied preceding its entry into force.

[85] ECJ, C-212/96 *Chevassus-Marche*, EU:C:1998:68. Before this case was decided, scholars tended to regard the regime approved by the Court as being contrary to Community Law, as it clearly deviated from the main principles of the Internal Market: Slotboom, 'L'application du Traité CE au commerce intraétatique? Le cas de l'octroi de mer' (1996) *Cahiers de droit européen* 9, 25–28.

[86] ECJ, C-37&38/96 *Sodiprem SARL*, EU:C:1998:179.

[87] ECJ, C-212/96 *Chevassus-Marche*, EU:C:1998:68, para 49.

[88] ECJ, C-212/96 *Chevassus-Marche*, EU:C:1998:68.

[89] Amtenbrink, 'EMU and the Overseas', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International 2011) 291.

[90] Omarjee, "Le traité d'Amsterdam et l'avenir de la politique de différenciation en faveur des départements français d'outre-mer" 34 *Revue trimestrielle de droit européen* (1998) 515, 520.

12. The **Commission plays the leading role** in the assessment of the need to extend derogations. Upon the request of the European Council, the Commission submits general Reports on the measures designed to ensure the application of the OR provision of the Treaty, analysing the opportunities the *acquis* offers to deal with the natural handicaps of the ORs.[91] Along with the general Reports, the Commission also releases progress Reports assessing the effect of the special measures already adopted on the basis of Article 349 TFEU and its predecessors.[92]

13. The 2004 **Communication on the Stronger Partnership with the Outermost Regions**[93] outlined four key aspects of future development of the outermost regions *acquis*. These are competitiveness, access and offsetting of other constraints, and integration into the regional area[94] – the main fields to mark the use of Article 349 TFEU in the near future.

EU'S ORS

OR	MS	Location	Capital	Surface Area	Population
Azores	Portugal	Atlantic	Ponta Delgada	2.333 km2	237.900
Canary Islands	Spain	Atlantic	Las Palmas	7.447 km2	1.755.700
Guadeloupe	France	Caribbean	Pointe-à-Pitre	1.710 km2	425.700
French Guiana	France	South America	Cayenne	84.000 km2	161.100
Madeira	Portugal	Atlantic	Funchal	795 km2	244.800
Martinique	France	Caribbean	Fort-de-France	1.080 km2	383.300
Mayotte	France	Indian Ocean	Mamoudzou	370 km²	212.600
Réunion	France	Indian Ocean	Saint-Denis	2.510 km2	715.900
Saint-Martin	France	Caribbean	Marigot	53 km2	35.000

PART FOUR TFEU

ASSOCIATION OF THE OVERSEAS COUNTRIES AND TERRITORIES

Introduction

1. Part IV TFEU, alongside with and by reference from Article 355(2) TFEU guides the scope of EU law applicable in the Overseas Countries and Territories of the MSs associated with the EU (OCTs). This is done in derogation from the principle of application of EU law in full in the territories of the MSs established in Article 52 TEU. Part IV contains procedural rules for legislating for the OCT while following the main **principle of limited territorial application** of EU law in these territories. The closed list of all the territories falling under the special regime of Part IV TFEU is contained in Annex II. Part IV TFEU contains a provisions specifying the limits of the application of the core of the Internal Market *acquis* in the OCTs, as well as providing a legal basis, Article 203 TFEU, for designing and managing further rules of OCT association.

[91] See *e.g.* Commission report on the measures to implement Article 299(2) – the outermost regions of the European Union (COM/2000/147); Communication from the Commission, A stronger partnership for the outermost regions (COM(2004)343). These should not be confused with the Reports regularly submitted by the Commission on the progress made in implementation of POSEI programmes. See *e.g.* Commission report on the progress made in the implementation of POSEIDOM from 1992 to 1998 (COM(2000)790).

[92] See *e.g.* Report from the Commission on implementation of Article 299(2) of the EC Treaty: measures to assist the outermost regions (COM(2002) 723 final).

[93] European Commission, A stronger partnership for the outermost regions (COM(2004)343).

[94] European Commission, A stronger partnership for the outermost regions (COM(2004)343), introduction.

Background

2. MSs' territorial configuration was quite different from today at the moment of the negotiation of the founding Treaties. The six exercised sovereignty over a huge territory in the form of colonial possessions, protectorates, overseas departments etc., situated all over the world, but mostly on the African continent. The majority of these territories were not fully incorporated into the MSs. Different law applied to them, compared with the metropolitan centres. These included the (Belgian) Congo, Rwanda-Burundi; the (Italian) protectorate of Somalia; the Netherlands New Guinea, The Netherlands Antilles, Suriname; (French) Algeria, French Equatorial Africa – including Côte-d'Ivoire, Dahomey, Guinea, Mauritania, Niger, Senegal, Sudan and Upper-Volta – French East Africa – comprising Moyen-Congo, Gabon, Oubangui-Chari and Chad – the protectorates of Togo, Cameroon and Wallis-et-Futuna, Comoros Islands, Madagascar, Côte Française des Somalis, and the Etablissements français de l'Océanie (now French Polynesia). Given the huge economic potential of these territories, incorporating them into the internal market was one of the priorities of the founding MSs and amounted to a crucially important factor behind the integration initiative reflected also in the Schuman Declaration. Under pressure from France the concept of Eurafrica was introduced, aiming at the establishement – in the medium- to long-term – of a common market comprising also the non-incorporated territories and colonies of all the MSs. The European powers saw the success of their future integration as directly related to the success of the gradual incorporation of the African dependent territories: the initial **EEC was a colonial project**.[95]

3. The level of economic development of all the territories in question, as well as their level of incorporation into the legal-political systems of the MSs varied. The territories fully incorporated into the constitutional structures of the 'mother countries', like Algeria and La Réunion, received the Outermost Region (OR) status (see Articles 349 and 355 TFEU), while the absolute majority of other territories came within the scope of the association regime of what it now Part IV TFEU. With the fast progress of decolonization the number of the associated countries and territories (OCTs) has shrunk dramatically: a reduction whch was not offset by the joining of the UK and Denmark with their huge overseas possessions in the beginning of the seventies. **Brexit** will significantly reduce the number of OCTs, since remaining an OCT upon the departure of the UK from the EU will not be possible for them: Part IV TFEU is only about the territories under the sovereignty of a MS.

Overview

Article 198 established the OCT status as well as purposes and principles of association.
Article 199 outlines the objectives of association.
Article 200 specifies the relationship between the OCTs and the Customs Union.
Article 201 contains a safeguard clause which has lost its *effet utile*.
Article 202 contains rules on the free movement of persons which partly lost their *effet utile*.
Article 203 established the special legilative procedure applicable to the OCTs.
Article 204 contains special rules applicable to Greenland.

[95] Hansen and Jonsson, Eurafrica: The Untold Story of European Integration and Colonialism (Bloomsbury Academic, 2014).

Article 198 TFEU

The Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom. These countries and territories (hereinafter called the 'countries and territories') are listed in Annex II.
The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole.
In accordance with the principles set out in the preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.

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Kochenov (ed), *EU Law of the Overseas* (Kluwer Law International, 2011)

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van Rijn, "Brussel, Den Haag en de landen en gebieden overzee" in de Groot et al. (eds), *Onze Keus: Pirouettes in het gemeenschapsrecht* (Pels Rijcken & Drooglever Fortuijn, 2001)

Ziller, "L'association des pays et territoires d'outre-mer à la Communauté européenne" 101 *Revue française d'administration publique* (2002) 127

Ziller, "Les outre-mers face à l'intégration européenne" 101 *Revue française d'administration publique* (2002) 115

Essential case law

ECJ, C-100&101/89, *Kaefer and Procacci*, EU:C:1990:456
ECJ, C-260/90, *Leplat*, EU:C:1992:66
ECJ, C-390/95P, *Antillean Rice Mills*, EU:C:1999:66
ECJ, C-300/04, *Eman and Sevinger*, EU:C:2006:545

Main legal instruments

European Commission, Communication on the Status of OCTs Associated with the EC and Options for "OCT 2000" (COM (1999)163)

European Commission, Green paper: Future relations between the EU and the Overseas Countries and Territories (COM(2008)383)

European Commission, Elements for a new partnership between the EU and the overseas countries and territories (OCTs) (COM(2009)623)

Council Decision 2013/755/EU on the association of the overseas countries and territories with the European Union (25 November 2013)

Commentary

1. Only the territories listed in Annex II (see the list below) benefit from the special regime of Part IV TFEU.[96] Notwithstanding the proclaimed unity of the legal status applicable to all the Annex II territories in EU law, such single legal status of the OCT has never actually materialised in EU law, as it seems to unite territories where the application of EU law is often profoundly dissimilar.[97] The ECJ clarified that the OCTs '**do not form part of the Union**',[98] their close association with one of the MSs notwithstanding. Recital 7 of the preamble to TFEU refers to the bonds of solidarity bind the EU and the OCTs associated with it.

2. Legally speaking, the nature of OCT association amounts to a ***lex specialis* system of Part IV TFEU and secondary EU law** which governs the specific rules of application of EU law in the territories listed in Annex II TFEU (see, for a detailed exposé, Article 355 TFEU). Consequently, the OCTs' association does not entail any negotiations or the signing of any agreements with the OCTs themselves and has nothing in common with Article 217 TFEU or Article 8 TEU associatons, which are based on agrements with third countries. All the day-to-day rules of association are stated in a Decision adopted on the basis of Article 203 TFEU, which requires the Council to act unanimously on the proposal of the Commission – no negotiations and ratifications are required. The OCTs are currently goverened by the regime of Decision 2013/755/EU of November 25 2013 in force since January 1 2014 (OAD).[99]

3. In practice, however, the **opinion of the OCTs could be heard**. Since 2003 all the OCTs are united in the Overseas Countries and Territories Association (**OCTA**), a non-for-profit under Belgian law providing an opportunity to influence the Council when a new Association Decision is being drafted.[100] This accords well with Article 198(3) TFEU, where the emphasis is put on the aspirations of the OCTs themselves, no only the will of the EU institutions. Aruba and Greenland have been particularly active in OCTA aiming to achieve more flexibility for the OCT status and arguing for a shift in the underlying philosophy of EU-OCT relations, sponsoring a move away from unhelpful ACP parallels.

4. While the **goals of association** are clearly set out and include 'the promotion of economic and social development' it is not clear how far Article 198(2) TFEU binds the MSs in practice. The ECJ has so far had no chance to clarify the nature of this provision, while such clarification is acutely needed given that national courts of the MSs tend to take this provision as a merely a proclamation of **no practical legal value**, which results in approving of MS actions leading to the total non-consensual removal of population from OCTs with only minimal or no compensation directly to those affected,[101] thus making any economic and social development impossible, since and local culture and society is destroyed through mass deportation as was the case, for insrance, in the BIOT saga, following the lease of the island of Diego

[96] Bermuda is the only example of an OCT as per Annex II TFEU which remained for a while *de facto* disassociated from the Union by virtue of the non-application to it, upon its own request of the previous Association Decision of the Council: Recital 22, Preamble, Council Decision on the association of the overseas countries and territories with the European Community (27 November 2001) (not in force). This arrangement, discontinued under the current OAD amounted to the amendment of the Treaty by secondary law: Karagiannis, 'A propos du règlement des conflits' (1998) *Revue de droit international et de droit comparé* 330, 338, note 27.

[97] Cf. Custos, 'Implications of the European Integration for the Overseas', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011).

[98] ECJ, C-390/95P, *Antillean Rice Mills*, EU:C:1999:66, para 36.

[99] Council Decision 2013/755/EU on the association of the overseas countries and territories with the European Union (25 November 2013)

[100] Cf. Baetens, 'The Overseas Countries and Territories Association (OCTA) and its Relationship with the European Community: The Added Value of a Concerted Approach', in Kochenov (ed.) *On Bits of Europe Everywhere – Overseas Possessions of the EU Member States in the Legal-Political Context of European Law* (Koninklijke Brill NV, 2011) 383.

[101] ECtHR *Chagos Islanders* v *UK* [2012] App no 35622/04.

Garcia to the US for military purposes.[102] While the House of Lords found the depopulation of BIOT by forse fully legal under UK law,[103] the Court of Appeal dismissed the arguments of the islanders that depopulation of the territory amounts to an illegal disassociation of an OCT from the EU by making the attainment of the objectives of association set out in Article 198 TFEU impossible, thus amounting, albeit without following any prescribed EU law procedures, to BIOT's status change.[104] Part IV TFEU has thus been entirely helpless, if not practically irrelevant, in the face of a MS government willing to undermine the development of an OCT.

5. The key logic of achieving the objectives of association of the OCTs with the EU is that of aid and assistance and dates back to the idea of developing the African part of 'Eurafrica' to the level when it is ready to participate in the internal market, later replaced with assistance to the newly-decolonised ACP states via Yaoundé, Lomé and Cotonou agreements. OCTs thus landed in a 'bad company' as it were. It is DG **Development Cooperation** that is responsible for the OCT, with a special OCT Task Force.[105] This approach is deeply flawd, since many of the OCTs are much better developed that the new MSs and boast GDP per capita levels at times by far superceding the EU average. Bermuda, with GDP per capita at USD 96,018 in 2015 (as against USD 7,498 in Bulgaria and USD 35.089 EU average) is, even if somewhat exceptional, a case in point. Treating the OCTs as ACP countries, while justifiable in some cases, is generally highly problematic.[106]

6. The **MSs are not free to change the status of OCTs unilaterally** vis-à-vis EU law: depending on the MS to which the territory in question is attached either a general Treaty amendment procedure or a special procedure of Article 355(6) TFEU applies. As with the ORs and territories *sui generis*, the status of a particular territory under EU law does not follow a national constitutional determination, but is subjected to an EU law procedure.

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[102] Sand, 'The Chagos Archipelago Cases: Nature Conservation between Human Rights and Power Politics', in Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence 2013, Volume I* (Oxford University Press, 2014) 125; Gifford and Dunne, 'A Dispossessed People: The Depopulation of the Chagos Archipelago 1965–1973' (2014) 20 *Population Space and Place* 37.

[103] UKHL, *R (on the application of Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, 4 All E.R. 1055 (2008); Hendry and Dickson, *British Overseas Territories Law* (Hart Publishing, 2011).

[104] EWCA *R (on the application of Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708. Kochenov, 'Opinion on the Duty of Loyalty and the *de Facto* Disassociation of the Chagos Archipelago from the European Union by the UK Authrities in Breach of EU Law' (Submitted to EWCA in *Banvoult No.3*, available at http://ssrn.com/abstract=2955154)

[105] For the exceptional position of Greenland in this regard, see, Article 204 TFEU.

[106] As acknowledged also in Declaration No. 36 on the Overseas Countries and Territories, appended to Treaty of Amsterdam [1997] OJ C340/1, 138. Cf. Bartels, 'The Trade and Development Policy of the European Union', in Cremona (ed.), *Developments in EU External Relations* (Oxford University Press, 2008) 171; European Commission, Green paper: Future relations between the EU and the Overseas Countries and Territories (COM(2008)383).

EU's OCTs

OCT	Member State	Location	Capital	Surface Area	Population
Anguilla	United Kingdom	Caribbean	The Valley	91 km2	11.430
Aruba	Netherlands	Caribbean	Oranjestad	180 km2	90.508
Bermuda	United Kingdom	Atlantic	Hamilton	53 km2	62.059
Bonaire	Netherlands	Caribbean	Kralendijk	288 km2	15.414
British Antarctic Territory	United Kingdom	Antarctica	Rothera	1.709.400 km2	250
British Indian Ocean Territory	United Kingdom	Indian Ocean	Diego Garcia	60 km2	4.000
British Virgin Islands	United Kingdom	Caribbean	Road Town	153 km2	27.000
Cayman Islands	United Kingdom	Caribbean	George Town	264 km2	60.456
Curaçao	Netherlands	Caribbean	Willemstad	444 km2	142.180
Falkland Islands	United Kingdom	Atlantic	Stanley	12.173 km2	3.140
French Polynesia	France	Pacific Ocean	Papeete	4.167 km2	26.000
French Southern and Antarctic Territories	France	Indian Ocean, Antarctica	Port-aux-Français	439.781 km2	140
Greenland	Denmark	Arctic	Nuuk	2.166.086 km2	56.452
Montserrat	United Kingdom	Caribbean	Plymouth (Brades)	102 km2	4.655
New Caledonia and Dependencies	France	Pacific	Nouméa	18.575 km2	249.000
Pitcairn	United Kingdom	Pacific	Adamstowm	47 km2	50
Saba	Netherlands	Caribbean	The Bottom	13 km2	2.000
Saint-Barthélémy	France	Caribbean	Gustavia	25 km2	8.300
Saint Helena and Dependencies	United Kingdom	Atlantic	Jamestown	122 km2	4.255
Saint-Pierre-et-Miquelon	France	Atlantic	Saint-Pierre	242 km2	7.063
Sint Eustasius	Netherlands	Caribbean	Oranjestad	21 km2	3.100
Sint Maarten	Netherlands	Caribbean	Philipsburg	34 km2	71.000
South Georgia and South Sandwitch Islands	United Kingdom	Atlantic	King Edward Point	3.903 km2	30
Turks and Caicos Islands	United Kingdom	West Indies	Cockburn Town	430 km2	36.605
Wallis and Futuna Islands	France	Pacific	Mata-Utu	264 km2	15.289

Article 199 TFEU

Association shall have the following objectives.
1. Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the Treaties.
2. Each country or territory shall apply to its trade with Member States and with the other countries and territories the same treatment as that which it applies to the European State with which is has special relations.
3. The Member States shall contribute to the investments required for the progressive development of these countries and territories.
4. For investments financed by the Union, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a Member State or of one of the countries and territories.
5. In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a nondiscriminatory basis, subject to any special provisions laid down pursuant to Article 203.

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Smit, "The Position of the EU Member States' Associated and Dependent Territories under the Freedom of Establishment, the Free Movement of Capital and Secondary EU Law in the Field of Company Taxation" 39 *Intertax* (2011) 40

Tryfonidou, "The Overseas Application of the Customs Duties Provisions of the TFEU", in Kochenov (ed), *EU Law of the Overseas* (Kluwer Law International, 2011) 221

Essential case law

ECJ, C-390/95P, *Antillean Rice Mills*, EU:C:1999:66
ECJ, C-106/97, *Dutch Antillean Dairy Industries*, EU:C:1999:433
ECJ, C-24/12 & C-27/12, *X BV and TBG Limited*, EU:C:2014:1385

Main legal instruments

Council Decision 2013/755/EU on the association of the overseas countries and territories with the European Union ('Overseas Association Decision') (25 November 2013)

Commentary

1. Article 199 TFEU provides a further detalisation of the substance of the OCT regime building on Article 198 TFEU. The key emerging principle is that of **assymetry** in the relationship between the OCTs and the MSs. The preference is always given to the OCTs – which can be illustrated by a number of examples, ranging from free movement of goods (Articles 200, 201 TFEU) to free movement of persons (Article 202 TFEU). Whether the fundamental freedoms *acquis* applies, varies depending on the **direction of movement** of goods and persons between the EU and the OCTs.
2. While MSs are bound to treat OCTs as MSs, the OCTs in turn are merely bound by an obligation not to discriminate between the MS to which they are constitutionally attached and all the other MSs. This version of the non-

discrimination principle does not mean that unrestricted free movement applies,[107] similarities between the regime applicable to the movement of goods between the MSs and goods entering the MSs from the OCTs notwithstanding.[108] As per ECJ, free movement of goods 'does not exist unrestrictedly at this stage'.[109] Artilce 199(1) and (2) TFEU puts an obligation on the EU to ensure **preferencial treatment** for the goods coming from an OCTs in the course of a 'dynamic and progressive' process 'which is not automtic'.[110]

3. MSs are **obliged to invest in the OCTs** as per Article 199(3) TFEU. This obligation is further detailed in Part IV OAD.[111] Significant funds in the range of hundreds of millions of Euros are provided.

4. Discrimination on the basis of nationality in the context of tenders and supplies financed by the Union is outlawed through a special clause: Article 199(4) TFEU. Local OCT entities should not, thus, be entitled to any preferencial treatment in the area of public procurement. The provision is worded to accommodate the possible deviations between MS nationality (and thus Union citizenship) and OCT nationalities, thus boasting a **broader scope than the general prohibition of discrimination on the basis of nationality** in Article 18 TFEU. This is due to the fact that a share of population of the British Overseas holds British Overseas Territories Citizenship which is, unless acquired via association with Gibrltar, not a 'MS nationality' in the sense of Article 9 TEU,[112] thus entitling the holders to no protection against discrimination on the basis of nationality under Article 18 TFEU.[113]

5. Although the OAD allows for it, there is no direct mention of **free movement of capital** in Article 199 TFEU.[114] Taken into account the nature of some of the OCTs as tax havens, the ECJ to allows for a limited restriction of this freedom as long as the restriction is 'pursuing the objective of comating tax avoidance in an effective and proportionate manner'.[115]

6. There **EMU *acquis* does not apply to the OCTs**, leaving them, together with the metropoles, free to chose different options in terms of currency arrangements. Some have local or regional currencies, while others opted for US dollar, the Euro or the currency of the MS they are connected to which is outside of the Eurozone.[116]

7. Freedom of **establishment** does apply, as Aricle 199(5) TFEU contains a direct reference to the provisions of the mainstream *acquis* (see Article 49 TFEU) allowing, however, for derogations on the basis of Art. 203 TFEU. [117] Indeed, the

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[107] Tryfonidou, 'The Overseas Application of the Customs Duties Provisions of the TFEU', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011) 221. See also Dekker, 'The Ambit of the Free Movement of Goods under the Association of Overseas Countries and Territories' (1998) 23 *European Law Review* 272. Lauwaars and Bronckers, "Passen communautaire origineregels in het handelsverkeer met de Landen en Gebieden Overzee?" (1991) *Tijdschrift voor Antilliaans Recht – Justicia* 34.

[108] ECJ, C-106/97, *Dutch Antillean Dairy Industries*, EU:C:1999:433, para 38.

[109] ECJ, C-390/95P, *Antillean Rice Mills*, EU:C:1999:66, para 36.

[110] ECJ, C-310/95, *Road Air*, EU:C:1997:209, para 40.

[111] Cf. Annex II of Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision') OJ L344/1, 32.

[112] Cf. Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights' (2009) 15 *Columbia Journal of European Law*, 191.

[113] Although a possibility of registering as a UK citizen exists since 2003, there is no obligation for the British Overseas Territories citizens to register: British Overseas Territories Act (2002 (c. 8, § 3, sched. 1)).

[114] For an analysis: Geursen, 'The Free Movement of Capital with the OCT', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011) 245; Smit, 'The Position of the EU Member States' Associated and Dependent Territories under the Freedom of Establishment, the Free Movement of Capital and Secondary EU Law in the Field of Company Taxation' (2011) 39 *Intertax* 40.

[115] ECJ, C-24&27/12, *X BV and TBG Limited* v. *Staatssecretaris van Financiën*, EU:C:2014:1385, para 54.

[116] Amtenbrink, 'EMU and the Overseas', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011) 271.

[117] Cf Goldner Lang and Perišin, "Free Movement of Services and Establishment in the Overseas", in Kochenov (ed), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and*

first case referred to the ECJ from an OCT concerned residence rights for Community nationals based on the exercise of the freedom of establishment.[118] In the area of establishment full reciprocity seems to be the main principle, if not the qualifications in Article 51(1)(a) OAD, which *de facto* comes down to a familiar non-discrimination applicable also to persons and goods.

Article 200 TFEU

1. Customs duties on imports into the Member States of goods originating in the countries and territories shall be prohibited in conformity with the prohibition of customs duties between Member States in accordance with the provisions of the Treaties.
2. Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be prohibited in accordance with the provisions of Article 30.
3. The countries and territories may, however, levy customs duties which meet the needs of their development and industrialisation or produce revenue for their budgets.
The duties referred to in the preceding subparagraph may not exceed the level of those imposed on imports of products from the Member State with which each country or territory has special relations.
4. Paragraph 2 shall not apply to countries and territories which, by reason of the particular international obligations by which they are bound, already apply a non-discriminatory customs tariff.
5. The introduction of or any change in customs duties imposed on goods imported into the countries and territories shall not, either in law or in fact, give rise to any direct or indirect discrimination between imports from the various Member States.

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[118] ECJ, C-100&101/89, *Kaefer and Procacci*, EU:C:1990:456.

Commentary

1. Customs duties are goverened by the **principle of asymmetry** established in Article 199(1) TFEU: MSs are prohibited from levying customs duties on imports from the OCTs: Artile 200(1) TFEU treats the latter simply as part of their MSs for this purpose. The OCTs themselves are however empowered under Article 200(3) TFEU to 'levy customs duties which meet the needs of their development and industrialisation or *produce revenue for their budgets*' (emphasis added). This exception from the general rule prohibiting such duties contained in para. 2 is more important than the main rule and is further worked out in the OAD: Article 45(1) OAD permits OCTs 'to retain or introduce, in respect of imports of products originating in the Union, such customs or quantitative restrictions as they consider necessary in view of their respective developmental needs'.
2. The freedom to levy customs duties is limited by the principle of **non-discrimination**, since such duties 'may not exceed the level of those imposed on imports of products from the Member State with which each country or territory has special relations' as per Article 200(3)(2). Moreover, para. 5 prohibits both direct and indirect discrimination 'either in law or in fact' between imports from various MSs is prohibited. Article 46(1) OAD dresses this relationship, tongue in cheek, into the garb of mutual non-discrimination: 'The Union shall not discriminate between the OCTs and the OCTs shall not discriminate between MSs of the Union'. The ECJ explained that

> although the OCTs are countries and territories which have special links with the [EU], they do not, however, form part of the [Union], and free-movement of goods between the OCTs and the Community does not exist unrestrictedly at this stage.[119]

3. As a result of this approach, the OCTs enjoy much more freedom in economic affairs than the ORs. In one example, unlike the ORs, the OCTs were allowed more flexibility in the field of taxation and had no trouble levying *octroi de mer*-like taxes.[120] There is thus **no customs union** – let alone the internal market – with the movement of EU goods to the OCTs in place.

Article 201 TFEU

If the level of the duties applicable to goods from a third country on entry into a country or territory is liable, when the provisions of Article 200(1) have been applied, to cause deflections of trade to the detriment of any Member State, the latter may request the Commission to propose to the other Member States the measures needed to remedy the situation.

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[119] ECJ, C-390/95P, *Antillean Rice Mills*, EU:C:1999:66, para 36.
[120] ECJ, C-260/90, *Leplat*, EU:C:1992:66. Ziller, 'L'Union européenne et l'outre-mer' (2005) 113 *Pouvoirs* 145, 149.

Main legal instruments

Council decision 2013/755/EU on the association of the overseas countries and territories with the European Union ('Overseas Association Decision') (25 November 2013)

Commentary

1. This provision initially entered the Treaties to deal with possible distortions caused by the OCTs applying duties below the Common Customs Tariff (see Article 31 TFEU) to third country goods which would later be exported to the customs territory of the Union of which the OCTs do not make part, without being subject to the payment of the difference between the duties set by the OCT and the Common Customs Tariff, since Article 200(1) TFEU prohibits imposition of duties on imports originating in the OCTs. Given the fine-tuned regime on the rules of origin in the OAD, however, this provision has **no practical value**.[121]

Article 202 TFEU

Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be regulated by acts adopted in accordance with Article 203.

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Essential case law

ECJ, C-124/94, *Boukhalfa*, EU:C:1996:174
ECJ, C-300/04, *Eman and Sevinger*, EU:C:2006:545

Main legal instruments

Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State (29 April 2004)

[121] See Annexes VI, VII and VIII to Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision') OJ L344/1.

Commentary

1. The **principle of asymmetry** applies to free movement of persons between the EU and the OCTs. While full-fledged free movement is applicable to the movement of EU citizens *from* the OCTs to the EU (with the exception of movement to the metropole falling under the wholly internal situations where EU law is not applicable[122]), movement in the opposite direction is subject to the OCTs' own regulation.[123]

2. No further 'acts' which Article 202 TFEU alludes to have ever been adopted due to the change in the circumstances of the OCTs. The provision featured in the Treaty of Rome and had been writted for the reality of the building of the Eurafrican common market, where the citizenship status of the inhabitants of the colonies was not always the same as the citizenship of the metropole, making the special arrangements referred to in Article 202 necessary. Since the ECJ connected the enjoyment of free movement rigths in the Treaties to the possession of a MS nationality,[124] however, and given that the inhabitants of the OCTs still associated with the Union received full nationality of their respective MSs,[125] the logic of Article **202 TFEU does not reflect the logic of EU free movement law**.[126]

3. The right to move freely within or into the territory of the Union depends, chiefly, on the possession of the citizenship of the Union (see Part II TFEU). As the ECJ clarified in *Eman and Sevinger*, **EU citizenship status is not terriotorial, but personal in nature**.[127] The MSs are prohibited from disregarding any EU nationality conferred by their peers[128] and discrimination on the grounds of acquisition of nationality is not tolerated,[129] which undoubtedly includes nationalities acquired through connection to the territories under MS sovereignty lying outside of the territorial scope of EU law. Consequently, any citizen of the Union residing in the OCT enjoys free movement rights in the territory of the Union. Solely geographical limitations of EU citizenship rigths connecting to the OCT origin of a particular citizen are unknown to EU law.[130] Since the OCTs are not part of Union territory, however, as they do not form part of the Union,[131] no free movement rights for EU citizens in the OCTs can exist on the basis of EU law *sensu stricto*.[132] This explains

[122] See the ECJ's reasoning in ECJ, C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639.

[123] See, for the analysis of this issue, Kochenov 'EU Citizenship in the Overseas' in *Outermost Regions, Associated Overseas Countries and Territories, Territories* Sui Generis (Kluwer Law International, 2011) 199, 211.

[124] ECJ, 75/63, *Hoekstra*, EU:C:1964:19; ECJ, 61/65, *Vaassen-Göbbels*, EU:C:1966:39.

[125] The last MS to extend a possibility to register as a full citizen to the inhabitants of the OCTs holding a second-class post-colonial natinoality in relation to the Overseas Territory concerned, rather than the Metropole as a whole was the UK: British Overseas Territories Act (2002 (c. 8, § 3, sched. 1)).

[126] Before the non-territorial logic of the status of a 'worker' became absolutely cear, however, there existed an intention to use the predecessor of Article 202. Deciding on the Regulation 1612/68 the Council adopted the following declaration: 'Les représentants des Gouvernements des États-Membres, réunis au sein du Conseil, experiment leur volonté de conclure une convention visant à appliquer les règles concernant la libre circulation des travailleurs aux ressortissants du Surinam et des Antilles Néerlandaises si ces parties du Royaume des Pays-Bas le souhaitent': Edens and Patijn, 'The Scope of the EEC System of Free Movement of Workers' (1972) 9 *Common Market Law Review* 322.

[127] ECJ, C-300/04, *Eman and Sevinger*, EU:C:2006:545, para 72.1. There is a contradiction here with a Protocol to the Act oof Accession of Denmark to the EEC, stating that 'Danish citizens in the Faroe Islands are not Danish nationals for Community law purposes'. Since it is now impossible to lose EU citizenship by simply changing geographical location, the wording of the Protocol is very much out of date: Protocol No. 2 to the Act of Accession, Relating to Færoe Islands, art. 4, 1972 O.J. (L 73) 163.

[128] ECJ, C-369/90, *Micheletti*, EU:C:1992:295.

[129] ECJ, C-124/94, *Boukhalfa*, EU:C:1996:174.

[130] This concerns both Primary Law and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L15//77.

[131] ECJ, C-390/95P, *Antillean Rice Mills*, EU:C:1999:66, para 36.

[132] Kochenov, 'The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community' (2009) 36 *Legal Issues of Economic Integration* 239.

the unidirectional nature of the OCT-EU free movement of persons.

4. Although truly unequivocal ECJ case-law on the issue is missing, it is clear that the general principle of non-discrimination applies (see Artilce 9 TFEU) in the OCTs vis-à-vis EU citizens holding this status in connection with different MSs: **OCTs cannot discriminate non-settled EU citizens on the basis of nationality**.[133] Extending this argument, also discrimination on the basis of nationality in the context of application for the settlement status in the OCT should be suspect too,[134] notwithstanding the fact that there is no ECJ case-law on this and the practice is very widespread: only a French citizen can become a citizen of New Caledonia, for instance.[135]

5. While **derogations** are theoretically possible under Article 203 TFEU, as long as they are adopted by the Council unanimously and are grounded in the principles of the Treaties,[136] such derogations will only apply to the EU citizens moving to the OCTs, not to those to the territory of the EU, since the latter movement in not (and cannot be) based on either Part IV TFEU or the OAD in force.

Article 203 TFEU

The Council, acting unanimously on a proposal from the Commission, shall, on the basis of the experience acquired under the association of the countries and territories with the Union and of the principles set out in the Treaties, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Union. Where the provisions in question are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after consulting the European Parliament.

Essential case law

ECJ, C-390/95P, *Antillean Rice Mills*, EU:C:1999:66

Main legal instruments

Council Decision 2013/755/EU on the association of the overseas countries and territories with the European Union ('Overseas Association Decision') (25 November 2013)

Commentary

1. Article 203 TFEU contains a special legislative procedure to be applied to establish the detailed rules of OCT Association, i.e. to set out which EU law – besides the non-territorially applicable, of coruse (see Article 355 TFEU) – will apply to the OCTs. It provides for a **regular update** of the constitutional framework of the OCTs status and a regular review of the substance of EU law applicable there. The current legal regime is based on Decision 2013/755/EU.[137]

[133] Kochenov, 'The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community' (2009) 36 *Legal Issues of Economic Integration* 239.

[134] Kochenov, 'Regional Citizenships and EU Law: The Case of the Åland Islands and New Caledonia' (2010) 35 *European Law Review* 307.

[135] Garde, 'Brèves observations sur la loi organique du 19 mars 1999 relative à la Nouvelle-Calédonie', in Faberon and Agniel (eds.), *La souveraineté partagée en Nouvelle Calédonie et en droit compare* (La documentation française, 2000) 249, 251.

[136] ECJ, C-480&483/93 *Antillean Rice Mills*, EU:T:1995:162, para 93.

[137] The past OADs included: Decision 64/349/EEC of 25 February 1964 (OJ 1964/1472); Decision 70/549/EEC of 25 September 1970 (OJ 1970 L282/83); Decision 76/568/EEC of 26 June 1976 (OJ 1976 L176/8); Decision 80/1186/EEC of 16 December 1980 (OJ 1980 L361/1); Decision

2. The legislator acting under Article 203 TFEU is bound by the framework of Article 199 TFEU and the objectives of Article 198 TFEU. Article 3(2) OAD expressely refers to the objectives of Article 199 TFEU. Besides, the general framework of principles and values of EU law (see Article 2 TEU) binds the legislator too.[138] Consequently, the **substance of the OAD** cannot deviate radically from the core of EU law. Besides these pointers, Article 202 TFEU leaves it entirely to the legislator what the OCT *acquis* is to be.

3. Every regular update of the OCT *acqus* results in the passing of an OAD, which is a *sui generis* decision having nothing in common with the decisions under Article 288(4) TFEU. Given its direct applicability and general application, OAD is undoubtedly **a *de facto* regulation** (see Article 288(2) TFEU). Sufficiently precise, clear and unconditional provisions of the OAD have direct effect.[139]

4. The procedure of Article 203 TFEU generally adopts a one size fits all approach, which is highly problematic given the drastic differences between the individual OCTs. When Pitcairn is treated like Aruba and French Polynesia like Anguilla, it is clear that the necessary level of **systemic differenciation is lacking**. This will be becoming a recurrent topic of discussion in the future – just as the splitting up of approaches in dealing with the OCTs and ACP countries has been, given that the development of the OCTs and their needs are very far fro uniform.

5. The most notable element of the procedure is the **lack of any formal involvement of the OCTs** themselves, even though such involvement is in fact strong informally via OCTA.[140] No formal approval of the Association in the OCTs is required, reminding of the **legislation for the colonies** in the old-fashioned empires or the UK today (where the 'colonies' is exchanged for a synonym in the official constitutional language).[141]

6. The special legislative procedure contained in Article 203 TFEU poses potential problems: unanimity is a **very high threshold**, especially in the Union where the majority of the MSs, unlike the situation when the procedure first appeared in the Treaty of Rome, do *not* have own OCTs. The procedure thus allows the use of the OCT *acquis* as a bargaining chip by MSs without any territories of thus status.[142]

7. The Article requires the Council the Commission (the latter when submitting the proposal) and also, presumably, the EP, which is consulted, to **learn from the past experience** of the OCT association arrangements. The evidence of this happening in practice is underwhelming as the OCTs still suffer from the unfortunate connection with the ACP countries, i.e. the former OCTs in the mind of the EU legislator, which is utterly counterproductive (see Artcle 198 TFEU).

8. Given that OCT courts are courts and tribunals in the sense of Article 267 TFEU,[143] questions of validity and interpretation of the provisions of the OADs as well as any other relevant secondary legislation or the interpretation of the provisions of the Treaties applicable in the OCTs can be submitted to the ECJ following the **preliminary ruling procedure**.

86/283/EEC of 30 June 1986 (OJ 1986 L175/1); Decision 91/482/EEC of 25 July 1991 (OJ 1991 L263/1) as amended by Decision 97/803/EC of 24 November 1997 (OJ 1997 L329/50); Decision 2001/822/EC of 27 November 2001 (OJ 2001 L314/1). For a brief overview, see, Murray, *The European Union and Member State Territories: A New Legal Framework under the EU Treaties* (TMC Asser Press, 2012) 105–112.

[138] ECJ, C-390/95P, *Antillean Rice Mills*, EU:C:1999:66, para 37.

[139] ECJ, C-430/92, *Netherlands v Commission*, EU:C:1994:373; ECJ, C-110/97 *Netherlands v Council*, EU:C:2001:620.

[140] Baetens, 'The Overseas Countries and Territories Association (OCTA) and Its Relationship with the European Community: The Added Value of a Concerted Approach', in Kochenov (ed.) *EU Law of the Overseas* (Kluwer Law International, 2011), 137.

[141] Hendry and Dickson, *British Overseas Territories Law* (Hart Publishing, 2011).

[142] This is not a hypothetical consideration: even the QMV applicable with regard to ORs in Article 349 TFEU gave rise to similar concerns, Germany acting against certain measures with regard to the banana market: Omarjee, 'Le traité d'Amsterdam et l'avenir de la politique de différenciation en faveur des départements français d'outre-mer' (1998) 34 *Revue trimestrielle de droit européen* 515, 520.

[143] ECJ, C-100&101/89, *Kaefer and Procacci*, EU:C:1990:456. Cf. Broberg, 'Access to the European Court of Justice by Courts in Overseas Countries and Territories', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011), 137.

Article 204 TFEU

The provisions of Articles 198 to 203 shall apply to Greenland, subject to the specific provisions for Greenland set out in the Protocol on special arrangements for Greenland, annexed to the Treaties.

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Main legal instruments

Treaty amending, with regard to Greenland, the Treaties establishing the European Communities (1 February 1985)

Fisheries Partnership Agreement between the European Community on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand (30 June 2007)

Joint Declaration by the European Community, on the one hand, and the Home Rule Government of Greenland and the Government of Denmark, on the other, on partnership between the European Community and Greenland, OJ L208/32, 27 July 2006.

Council Decision on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the Other (14 March 2014)

Commentary

1. Greenland acquired OCT status as a result of leaving the internal market as a follow-up of a home-rule referendum, when the territory acquired sufficient powers to frame its position vis-à-vis the EEC.[144] As a consequence, Greenland has been included in Annex II TFEU upon the entry into force of the **Greenland Treaty**, which put into law the negotiated response to reflecting the decision of the Greenlandic people in EU law. It would thus be a mistake to state that Greenland 'left the EU': only a MS can do this udner Article 50 TEU. Greenland only went through a status change comparable to OR (or the presumption of full application of the *acquis*) to OCT status, what now covered by Article 355(6) TFEU after the ToL. Greenland is thus unquestionably part of Denmark, a MS of the EU and is subject to all the relevant EU law including Part IV TFEU and all the other law which does not know purely territorial framing.

2. Greenlanders are full EU citizens enjoying EU citizenship rights in the territory of the Union, see the discussion of Article 203 TFEU.

3. Rather than opting for a *sui generis* status for Greenland, the parties agreed to make it an OCT, which is the reason for the inclusion of Article 204 TFEU into the Treaties.[145] To reflect the special position of Greenland among the OCTs as a matter

[144] The colony of Greenland became fully incorporated into Denmark in 1953, but acquired a home rule status in 1979, following the Faroe Islands, which enjoyed the same since 1949.

[145] The possibility of Greenland's OCT status was on the table even before the actual accession of

of size but also as a matter of its road to the OCT status which is different from all the other OCTs (only Greenland became an OCT under a separately negotiated Treaty[146]), the provision refers to the '**special arrangements**' for Greenland.[147]

4. The core of the special arrangements as outlined in Protocol 34 consists in subjecting tariff-free access of Greenlandic fisheries products to the Internal Market to an agreement between the two parties. Such an agreement established the degree of access of EU fishing boats to the Greenlandic exclusive economic zone: putting **fisheries at the heart of EU-Greenland** relationship.[148] The agreements emphasise sustainable fishing and establish clear rules on quotas to avoid the Faroese situation when overfishing led to international legal disputes between the EU and the Faroe Islands.[149]

5. Financial assistance to Greenland comes from the general EU budget and not the EDF as is the case with other OCTs.[150] Both Greenland and the EU noted their interest in **extending cooperation beyond fisheries** in a Joint Declaration by Greenland, Denmark and the EU.[151]

Denmark to the EEC. See *e.g.* Boye Jacobsen, 'The Færœ Islands and Greenland and the European Communities', in Bathurst et al. (eds.), *Legal Problems of an Enlarged European Community* (Stevens and Sons, 1972).

[146] Treaty amending, with regard to Greenland, the Treaties establishing the European Communities (1 February 1985).

[147] Protocol on Special Arrangements for Greenland [1985] OJ L29/7

[148] See Fisheries Partnership Agreement between the European Community on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand [2007] OJ L172/4.

[149] Vatsov, 'The Mackerel War' (2014) 39 *ELRev*. 864.

[150] Council Decision 2014/137/EU on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the Other [2014] OJ L76/1.

[151] Joint Declaration by the European Community, on the one hand, and the Home Rule Government of Greenland and the Government of Denmark, on the other, on partnership between the European Community and Greenland [2006] OJ L208/32.