

# Greenland, the Faroes and Åland in Nordic and European Co-operation – Two Approaches towards Accommodating Autonomies

*Sarah Stephan*

Doctoral candidate, Public International Law, Åbo Akademi University, Finland;  
Project Officer, OSCE High Commissioner on National Minorities  
*sstephan@abo.fi*

## Abstract

This article looks at the perplexing encounter between territorial autonomies and international organizations by exploring the legal-institutional frameworks for accommodating Greenland, the Faroe Islands and the Åland Islands within the Nordic Council/Nordic Council of Ministers (Norden) and the European Union (EU). In Norden an attempt has been made to translate the very core of autonomy, namely constitutionally protected legislative power, into a legal-institutional framework for multi-level governance. The small number of autonomies and the scope and scale of Norden allows for a one-size-fits-all solution. The encounter between autonomies and an international organization is not only more challenging in the case of the EU, it is also broader in scale and in scope. Despite the EU's individually and often densely regulated relationships with OCTs and sui generis arrangements, dependent territories remain to some extent uncharted territories in the context of the EU.

## Keywords

self-governance – autonomy – multilevel governance – Greenland – Faroe Islands – Åland Islands – Nordic Council – European Union (EU)

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## 1 Introduction

Seen through the lenses of international law, self-governing or autonomous territories are hard to spot and, if recognized, they are challenging to make sense of. Autonomy is largely conceptualised as an internal principle of the legal-institutional organization of a State and it is from the perspective of constitutional and comparative law that autonomy is studied in order to better understand and systematize the particularities of such domestic arrangements. It is mainly where an autonomy arrangement is entrenched in an international peace agreement, as a solution to territorial or ethno-political conflict, that it experiences some form of international legal endorsement and is studied from the perspective of international law, as object rather than subject.

Here, we may be guilty of being “distracted by a simplistic either/or concept of sovereignty where non-sovereign entities pass below the radar”, and as a consequence “current IR scholarship produces an empirically cursory and theoretically narrow understanding of world politics and the Nordic region”.<sup>1</sup> This observation aptly made by political scientists Rebecca Adler-Nissen and Ulrik P. Gad can be extended to cover the related discipline of international law and to apply far beyond the Nordic region.

Adler-Nissen and Gad carried out an investigation into the “sovereignty games”<sup>2</sup> played by Iceland and the Nordic autonomies – Greenland, the Faroe Islands and the Åland Islands – by comparing the negotiation of sovereignty in public debate and specific forms of diplomatic praxis and, in so doing, they make an extremely valuable contribution to our understanding of the international lives of autonomies.<sup>3</sup> As part of their study, Adler-Nissen and Gad point to the “perplexing encounter between two types of non-sovereign polities: the international organization (EU) and self-government arrangements”.<sup>4</sup>

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1 Rebecca Adler-Nissen and Ulrik P. Gad, ‘Introduction: Post-imperial sovereignty games in the Nordic region’, 49 *Cooperation and Conflict* (2014) p. 7.

2 Adler-Nissen and Gad define sovereignty games as “[i]n line with this conceptualization of a game, a sovereignty game involves two or more players who, in their interaction, make strategic claims about authority and responsibility with reference to a traditional ‘either/or’ concept of sovereignty. Contemporary sovereign states and polities, which qualify as *potential* states, manoeuvre between dependence and self-determination – and sovereignty is a card that can be played in the manoeuvrings – or played on – in different ways. Notably, the articulation of the either/or concept of sovereignty need neither be explicit nor affirmative in order for it to be vital for the game”. Adler-Nissen and Gad, *ibid.*, p. 19.

3 *Ibid.*, p. 21.

4 *Ibid.*, p. 16.

This encounter is not only perplexing for international relations scholars but also for those approaching the issue from the perspective of international law, and remains underexplored from within the legal discipline.

International law and international politics “cohabit the same conceptual space”,<sup>5</sup> in which sovereignty features as a foundational conceptual category. To international legal scholars all encounters, except those between States, appear as perplexing if viewed from within the traditional conceptual framework of international law, which has for a long time been dominated by the idea of sovereign statehood. Of course, the picture is more fragmented today and a lot of work is being devoted to studying the implications of the appearance of international organizations, transnational corporations and individuals on the international scene. Autonomy or self-government<sup>6</sup> arrangements, however, have remained conspicuously absent from the discourse on subjects or actors in international law.

Political scientists have paid much more attention to the appearance of such entities in international arenas, *e.g.* when studying the dynamics between two types of regionalisms – supra-State regional integration and sub-State regionalism.<sup>7</sup> In political science and international relations a number of concepts have been advanced to capture and explain the interplay of a diverse range of actors, including self-government arrangements and international organizations, across functional or territorial spheres, such as multi-level governance.<sup>8</sup> Ian Bache has described multi-level governance as “a concept that directs attention to increasingly complex vertical and horizontal relations between actors and sharpens questions about the mechanisms, strategies, and tactics through which governing takes place in these contexts”.<sup>9</sup> In contrast to the neighbouring discipline of international relations, international law tends to be interested primarily in the legal ‘mechanisms’ governing relations between actors exercising legislative, executive and/or judicial functions on the international level. And indeed, such mechanisms have been developed in the

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5 Ann-Marie Slaughter, ‘International Law in a World of Liberal States’, 6 *European Journal of International Law* (1995) p. 503.

6 The terms ‘autonomy’ and ‘self-government’ are used interchangeably.

7 *Cf. e.g.* Michael Keating, ‘Rethinking Territorial Autonomy’, in Alain-G. Gagnon and Michael Keating (eds), *Political Autonomy and Divided Societies. Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan, New York, 2012) p. 17.

8 *Cf. e.g.* Lisbet Hooghe and Gary Marks, ‘Unraveling the Central State, but How? Types of Multi-Level Governance’, 97 *The American Political Science Review* (2003) pp. 233–243.

9 Ian Bache, ‘Europeanization and multi-level governance: Empirical findings and conceptual challenges’, 16 *ARENA Working Paper* (2008) p. 7.

institutional or substantive laws of international organizations as a response to the perplexing encounters with autonomies.

Certainly, not all encounters between autonomies and international organizations are governed by law. In some cases, there may be no demands for the creation of such frameworks and in other cases such demands may not have been satisfied by legal means, if at all. In certain cases, accommodation is not achieved on the institutional level but rather through systems of opt-outs, exceptions and derogations mitigating the effect of substantive laws on self-government arrangements. The term 'accommodation' is used here to encompass a wider spectrum of legal mechanisms than references to specific solutions such as membership, consultative rights, observer status or opt-outs would allow.

As indicated above, accommodation raises legal-doctrinal questions touching *i.a.* upon conceptions of sovereignty and legal personality. However, the encounter between autonomies and international organizations also raises questions concerning the legal-institutional arrangements governing the interplay of competencies, whether framed as expressions of sovereignty or not, when they are dispersed and possibly intersecting at different levels. It is this latter question that this paper shall explore by looking specifically at the current frameworks for accommodating Greenland, the Faroe Islands and the Åland Islands within two international organizations – the Nordic Council/Nordic Council of Ministers (Norden) and European Union (EU). The aim is modest – the question is not how these organizations should accommodate each autonomy arrangement but how they do accommodate Greenland, the Faroes and Åland.

The scope of the present paper does not allow for a detailed presentation of the legal status of Greenland, the Faroe Islands or Åland, nor of Norden or the EU. Among many differences, one common denominator of the three autonomy regimes is that they are all equipped with exclusive legislative competencies in a wide range of policy areas.<sup>10</sup> What both international organizations have in common, again among many differences, is that membership is reserved to States so that alternatives had to be found to accommodate the distinct demands of the autonomy regimes either within or outside the frameworks applicable to the metropolitan States they are part of.

10 Cf. Act no. 473 of 12 June 2009 (Denmark)(Act on Greenland Self-Government); Act no. 137 of 23 March 1948 (Denmark) (the Faroe Islands Home Rule Act) read in conjunction with Act no. 578 of 24 June 2005 (the Takeover Act); Act on the Autonomy of Åland of 1991 (Finland) (FFS 16.8.1991/1144).

## 2 Nordic Co-operation

Nordic co-operation has experienced renewed interest since Gunnar Wetterberg's proposal for the creation of a Nordic federation and Johan Strang's report proposing a less synchronised pace of integration within what he calls 'Nordic communities'.<sup>11</sup> The fact that the Åland Islands, Greenland and the Faroe Islands occupy institutionalised positions within Nordic co-operation thus places them within a lively and highly topical Nordic integration debate.<sup>12</sup>

The Nordic Council and the Nordic Council of Ministers are the political bodies governing the co-operation between the Nordic countries – Denmark, Norway, Sweden, Finland, Iceland – and the three autonomous territories – the Åland Islands in Finland as well as Greenland and the Faroe Islands in Denmark. Nordic co-operation is governed by the Helsinki Treaty of 1962.<sup>13</sup> The Helsinki Treaty is an international agreement between the five Nordic countries, who are the High Contracting Parties and thus the Member States of 'Norden', as the overall institution is often referred to. Nordic co-operation is broad and encompasses legal, cultural, social and economic co-operation, co-operation on transport and communications and co-operation in the area of environmental protection.<sup>14</sup>

The Nordic Council is an inter-parliamentary body. It was established in 1952 and thereby preceded the Nordic Council of Ministers by almost two decades. In the Nordic Council, the popularly elected assemblies of the Nordic countries and the Nordic autonomies co-operate.<sup>15</sup> The Council is currently equipped with 87 seats to which each parliament elects delegates from among its own members for a one-year term.<sup>16</sup> The delegates of the Nordic Council are thus simultaneously members of their own national parliaments or the parliaments of the autonomous territories. The Nordic Council of Ministers, an inter-governmental decision-making body, was established first in 1971. The Nordic Council of Ministers is the institutionalized forum for the

11 Gunnar Wetterberg, *The United Nordic Federation*, TemaNord 2010:583 (Nordic Council of Ministers, Copenhagen, 2010); Johan Strang, *Nordiska Gemenskaper. En vision för samarbetet*, Nord 2012:009 (Nordic Council, Copenhagen, 2012).

12 Sia Spiliopoulou Åkermark (ed.), *The Åland Example and its Components – Relevance for International Conflict Resolution* (The Åland Islands Peace Institute, Mariehamn, 2011) p. 11.

13 Finland joined first in 1956.

14 Cf. Arts. 8–32 Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden (hereafter Helsinki Treaty).

15 Art. 44 Helsinki Treaty.

16 *Ibid.*, Arts. 47(1) and (4).

co-operation of the governments of the Nordic countries, in which also the governments of the Nordic autonomies participate.<sup>17</sup> The prime ministers of the Nordic countries are responsible for the overall co-ordination of matters of Nordic co-operation.<sup>18</sup> Decision-making in the Council of Ministers is unanimous.<sup>19</sup> Decisions are binding but have no direct effect and thus need to be implemented on the national level.<sup>20</sup> The fundamental difference between the Nordic Council and the Council of Ministers is that the former makes no binding decisions. Nonetheless, both tiers of governance are closely integrated and have extensive mutual reporting obligations. The Nordic Council acts largely as an advisory body to the Council of Ministers.<sup>21</sup> In 1971 Nordic co-operation opened up for the Faroes and Åland. Greenland first became a self-governing territory in 1979 and was effectively admitted to Nordic co-operation in 1983, when the status of the other two autonomies was also elevated.

The legal-institutional framework for accommodating the autonomies within Norden has been crafted under the auspices of the Nordic Council, from 1969 to 1970 by the so-called Kling Committee and from 1980 to 1983 by the so-called Petri Committee. In 2005 the issue was taken up within the Council of Ministers. The questions of whether and how to accommodate the Nordic autonomies has essentially revealed three underlying dimensions. These dimensions pertain to the status of the 'applicants' and the quality of the autonomy regimes, to the implications of international law and to the modalities of possible accommodation.<sup>22</sup>

At present, the Faroe Islands, Greenland and Åland each hold two seats in the Nordic Council.<sup>23</sup> These seats are filled by delegates elected from among the members of the regional parliaments.<sup>24</sup> The autonomies, just as the

17 *Ibid.*, Arts. 60(1) and (2).

18 Each Prime Minister is assisted by his or her respective Minister for Co-operation and an Under-Secretary of State or government official, who is a member of the national Standing Committee on Nordic Co-operation, *cf.* Arts. 61(2) and (3).

19 Art. 62(3) Helsinki Treaty.

20 *Ibid.*, Art. 63.

21 Frantz Wendt, *Cooperation in the Nordic Countries* (Almqvist & Wiksell International, Stockholm, 1981) p. 81.

22 For an in-depth analysis of the preparatory works that took place within Norden see Sarah Stephan, 'Making Autonomies Matter: Sub-State Actor Accommodation in the Nordic Council and the Nordic Council of Ministers. An Analysis of the Institutional Framework for Accommodating the Faroe Islands, Greenland and Åland within "Norden"', 3 *European Diversity and Autonomy Papers* (2014).

23 *Cf.* Art. 47(2) Helsinki Treaty.

24 *Ibid.*, Arts. 44 and 47(3).

Members States, may delegate a desired number of representatives of their governments to participate in the work of the Council.<sup>25</sup> The delegates and government representatives of the self-governing territories constitute their own, that is, the Faroese, Greenlandic and Ålandic delegations.<sup>26</sup> However, these delegations in turn are part of the national delegations.<sup>27</sup> This could be described as a system of ‘double delegations’, which pays regard to the actual status of autonomies, which in turn form their own systems of government while being part of a larger sovereign entity. A large part of the Nordic Council’s work takes place in parliamentary committees. Due to the fact that there are only two elected representatives from each autonomous territory, many committees will lack representatives for the autonomies. In such committees, representatives from the Faroe Islands, Greenland or Åland may nonetheless take part in the meetings and, if so agreed with the Danish or Finnish members of the committee, replace a Danish or Finnish representative in the decision-making process.<sup>28</sup> Delegates elected by the parliaments of the autonomous territories may hold certain offices only as members of national delegations. This concerns primarily the Presidium. Delegates from the autonomies are not excluded from being elected as full members, president or vice-president of the Presidium. However, in these cases they are technically representing the national delegations.<sup>29</sup> In fact, an elected member from Åland is holding the Presidency for Finland at the time of writing in 2017,<sup>30</sup> exactly 20 years after a representative from Åland held the Presidency for the first time.<sup>31</sup> In all Presidium meetings where matters affecting the Faroe Islands, Greenland or Åland are discussed, one of their delegates has the right to be present, speak and

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25 *Ibid.*, Art. 47(5).

26 *Ibid.*, Art. 48(2).

27 *Ibid.*, Art. 48(1).

28 Cf. §33(1) and (2) Rules of Procedure of the Nordic Council.

29 Nordiska ministerrådet, *De självstyrda områdena och det nordiska samarbetet. Generalsekreterarens kartläggning*, ANP 2006:743 (Nordiska ministerrådet, Copenhagen, 2006) p. 18.

30 See webpage of Norden, *Britt Lundberg, President of the Nordic Council 2017*, <<http://www.norden.org/en/nordic-council/bag-om-nordisk-raad/president/nordic-council-president/britt-lundberg-president-of-the-nordic-council-2017>>, visited on 27 March 2017.

31 See webpage of Norden, *Former Presidents of the Nordic Council*, <<http://www.norden.org/en/nordic-council/organisation-and-structure/nordic-council-president/former-presidents-of-the-nordic-council>>, visited on 27 March 2017.

submit proposals.<sup>32</sup> It is established practice that the autonomies themselves determine whether a matter affects them.<sup>33</sup>

While the Nordic autonomies are 'represented' in the Nordic Council, where their delegates 'co-operate' with their peers representing the national parliaments, the legal framework of the Nordic Council of Ministers employs a clear linguistic distinction and uses the term 'participation' with respect to the autonomies. In the context of the Nordic Council of Ministers 'co-operation' is reserved for the High Contracting Parties, *i.e.* the Member States. Decision-making in the Council of Ministers is reserved for the Member states. The autonomies, however, participate in the decision-making process, whenever their competencies are concerned, with the explicit right to participate in the work of all committees.<sup>34</sup> Decisions are binding on the Faroe Islands, Greenland and the Åland Islands only insofar as they accede to the decision in accordance with their statutes of self-government.<sup>35</sup>

There has been a high level of engagement, not only by the autonomies but also by the Nordic Council and the Nordic Council of Ministers in the question of autonomy accommodation. The revision of the autonomies' status within Norden was initiated upon their requests.<sup>36</sup> However, Norden has shown the willingness and capacity to deal with the issue of autonomy accommodation and, most importantly, to adapt its institutional framework to allow for representation (with respect to the Nordic Council) and participatory structures (with respect to the Nordic Council of Ministers). It could be argued that Norden has worked its way successfully around full membership and tried to find solutions to the detailed demands without opening up for accession. It has allowed for the autonomies to create their own delegations and has opened the doors to all committees as well as the Council of Ministers. Decision-making in the Council, however, is a door that remains closed for the autonomies. With regard to the Nordic Council of Ministers, the autonomies are neither members nor mere observers but participants as they may submit their views and thereupon decide on what could be called an 'informed opt-in'.

32 Cf. §23 Rules of Procedure of the Nordic Council.

33 Nordiska ministerrådet, *supra* note 29.

34 §11(1) Rules of Procedure of the Nordic Council of Ministers.

35 Art. 61(2) Helsinki Treaty.

36 Cf. *e.g.* Nordiska Ministerrådet, Betänkande från arbetsgruppen med uppgift att föreslå initiativ som kan förstärka de självstyrda områdenas deltagande i nordiskt samarbete, Åland, 5 September 2007, Bilaga 2. Önskemål från Färöarna, Bilaga 3. Önskemål från Grönland and Bilaga 4. Önskemål från Åland.



Considering that decision-making in the Nordic Council is unanimous, Norden remains first and foremost a platform for co-operation. Decisions cannot be imposed on any Member State against its will. Supranational decision-making is a different matter and poses different demands on representation and democratic participation that are more complex to solve. In the very encounter between sub- and supra-national entities lies, in the words of Michael Keating, a “twin challenge” to the nation state.<sup>37</sup>

### 3 The European Union

The EU has experienced many of the same demands and challenges for accommodation as Norden, however, concerning a yet broader range of actors, each with its own constitutional status. And indeed, the solutions that have been found are rather different.

The EU’s jurisdiction is broad, not just in terms of the scale of its competencies but also in terms of its geographic scope, encompassing 28 Member States and a considerable number of what, in summary, is often called ‘regions with legislative powers’, including autonomies, but also federal or devolved entities and former overseas colonies. In the European Union, decisions made by qualified majority voting are binding, also on those Member States that have not voted in favour.<sup>38</sup> Certain EU directives are directly applicable in the Member States and in their autonomous territories.<sup>39</sup> The EU does not only have straightforward law-making powers but also an executive and a judicial system and is thus quite clearly discernible, not only as a system of governance, but also as a level of government.<sup>40</sup>

Just as in Norden, membership in the EU is reserved for States. In contrast to Norden, the EU has not adopted a unified approach to accommodating all entities that have mobilized for accommodation as distinct actors, including *i.a.* federal entities and autonomies. While federal entities are generally not accorded any special status, many autonomous island territories fall within one of the following categories – Outermost Regions (OR), Overseas Countries and Territories Associated with The Union (OCT) and *ad hoc* arrangements

37 Michael Keating, ‘Europeanism and Regionalism’, in Barry Jones and Michael Keating (eds.), *The European Union and the Regions* (Clarendon Press, Oxford, 1995) p. 1.

38 See Art. 294 TFEU.

39 See case C-26/63 *Van Gend en Loos* (NV Algemene Transporten Expeditie Ondernemning) v. *Nederlandse Administratie der Belastingen* [1963] ECR I.

40 Keating, *supra* note 7, p. 19.

which are applicable to that particular territory only. In the words of Dimitry Kochenov:

[r]oughly speaking, the starting assumption applicable to the ORs is that the EU *acquis* applies in full unless the contrary is stated, which is reversed in the case of the OCTs. [...] In practice, however, this division is much less obvious than what one might expect: both main legal statuses seem to converge in a number of important respects, while territories *sui generis* offer an example of flexible arrangements which can largely be turned either way.<sup>41</sup>

The specific national-constitutional status of different territories vary, as do their aspirations; *e.g.* to either accede to or remain outside the EU, to benefit from close association or substantive derogations. The Nordic autonomies have chosen different trajectories. Consequently, the legal frameworks governing the relationships between the Faroe Islands, Greenland and Åland and the EU differ on numerous counts. One commonality, however, is that all three island autonomies have had the opportunity to either opt to remain outside the EU or to join the EU along with their metropolitan states. The possibility to remain outside the EU is not regulated by law but is rather an object of accession negotiations. Kochenov aptly notes that:

[t]he presumption is always absolutely clear: unless there is an unequivocal statement to the contrary, EU law, including the principle of the inclusive unitary interpretation of a Member State territory, will be applicable to the whole of the territory of each of the Member States in full. In other words, even the total non-application of EU law, which can be witnessed in the context of some *sui generis* statuses, such as that enjoyed by the Faroe Islands, for instance, is still to be regarded as a derogation or opt-out granted in EU law.<sup>42</sup>

41 Dimitry Kochenov, 'The EU and the Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union, and Territories Sui Generis', in Dimitry Kochenov (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories Sui Generis* (Kluwer Law International, Alphen aan den Rijn, 2011) p. 13.

42 Dimitry 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', 20:3 *Michigan State International Law Review* (2012) p. 725.

Strictly speaking, neither the Faroe Islands nor Greenland are encompassed by the EU's jurisdiction. Their relationships with the EU are governed by distinct arrangements. Greenland was granted autonomy first after Denmark joined the EU but was later given the opportunity to leave. While Greenland is an OCT, both the Faroe Islands and Åland are governed by *sui generis* arrangements, the former not being part of the EU along with its metropolitan state Denmark and the latter being part of the EU along with Finland.

### 3.1 *Greenland*

Denmark acceded to the European Union in 1973.<sup>43</sup> At that time Greenland was a county and not yet a self-governing territory. Unlike the Faroe Islands, Greenland was thus not awarded the opportunity to decide on its relationship with the EU separately upon accession. The Danish referendum on EU membership, however, clearly indicated that, unlike the majority of voters in the rest of the country, a majority in Greenland voted against membership.<sup>44</sup> Being a part of the EU did not change perceptions and when given the opportunity for a consultative vote on continued membership *versus* withdrawal, a slight majority shifted the vote in favour of the latter.<sup>45</sup> Denmark followed the subsequent request of Greenland's Government and successfully proposed to transform Greenland from being governed as an integral part of the EU<sup>46</sup> into an OCT.<sup>47</sup> The Greenland Treaty acknowledged that OCT status provides for an appropriate status for Greenland but that further specific provisions were necessary to cater to the needs of Greenland.<sup>48</sup> Just as the other autonomies

43 Treaty of Accession of Denmark, Ireland and the United Kingdom [1972] OJ L 73 (**hereinafter 1972 Accession Treaty**).

44 Fredrik Harhoff, 'Greenland's Withdrawal from the European Communities', 20 *Common Market Law Review* (1983), p. 17.

45 Maria Ackrén, 'Grönlands politiska utveckling efter andra världskriget till våra dagar' in Sia Spiliopoulou Åkermark and Gunilla Herolf (eds.), *Självstyrelser i Norden i ett fredsperpektiv – Grönland, Färöarna och Åland* (Nordiska rådet och Ålands fredsinstitut, Mariehamn, 2015) p. 90.

46 Denmark's Accession Treaty contained a number of special provisions on Greenland and Protocol No. 4 on Greenland further allowed for Denmark to retain its national provisions on the requirement for commercial activities on Greenland, namely a prior six-month residence on Greenland, and provided that the institutions of the Community will seek, within the framework of the common organization of the market in fishery products, adequate solutions to the specific problems of Greenland.

47 Harhoff, *supra* note 44, p. 13.

48 Treaty amending, with regard to Greenland, the Treaties establishing the European Communities [1985] OJ L 29/1 (hereinafter Greenland Treaty).

scrutinized here, Greenland's economy is heavily dependent on a few sectors. While mineral exploitation is expected to grow in importance, Greenland's economy remains dominated by the fishing industry and the effects of the EU's fisheries policy for Greenland have been the main reason for withdrawal.<sup>49</sup> As Fredrik Harhoff noted at the time when Greenland's withdrawal was negotiated, "[t]he Community's returning of the power to control Greenland's fishery to the Home Rule is so essential that Greenland is willing to waive the substantial Community financial grants for this purpose".<sup>50</sup> As shall be seen, Greenland does not remain without EU financial support but has effectively achieved a higher degree of autonomy concerning its fisheries policy.

Greenland remains outside the EU today but is associated with the EU according to Art. 355(2) of the Treaty on the Functioning of the European Union (TFEU)<sup>51</sup> circumscribing the territorial scope of the Union and Annex II TFEU where Greenland is listed as an OCT. The association of the OCTs is regulated in more detail in Part Four TFEU, Council Decision 2013/755/EC (Overseas Association Decision)<sup>52</sup> and a multitude of specific agreements adopted by the Council. Part Four TFEU sets the main aims and principles that are to govern the association of OCTs. According to Art. 198(2) TFEU, 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. Association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories.<sup>53</sup> The main principle of association is non-reciprocity, *i.e.* non-reciprocal conditions of access to the common market, creating an asymmetry in the relationship between OCTs and Member States to the benefit of the OCTs.<sup>54</sup> The OCTs may for example levy customs duties which meet the needs of their development and industrialization or produce revenues for their budgets.<sup>55</sup> An OCT is to

49 Harhoff, *supra* note 44, p. 22.

50 *Ibid.*, p. 32.

51 Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115.

52 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') [2013] OJ L 344/1 (hereinafter Overseas Association Decision).

53 Art. 198(3) TFEU.

54 Kochenov, *supra* note 41, pp. 48 et *seqq.*; Jacques Ziller, 'The European Union and the Territorial Scope of European Territories', 38:1 *Victoria University of Wellington Law Review* (2007) p. 56.

55 Art. 200(3) TFEU.

apply to its trade with EU Member States and other OCTs the same treatment as that which it applies to the Member State with which it has special relations, *i.e.* its metropolitan state. This effectively means that Greenland may *e.g.* not levy more favourable duties on Denmark than on other Member States.<sup>56</sup> Member States shall apply to their trade with the OCTs the same treatment as they accord each other, pursuant to the Treaties, and may thus as a rule not levy duties on goods originating in an OCT.<sup>57</sup> According to Art. 199(5) TFEU, the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in Chapter 2 TFEU relating to the right of establishment and on a non-discriminatory basis, subject to any special provisions laid down pursuant to Article 203. The Overseas Association Decision specifies that OCTs and Member States have to accord most-favoured-nation-treatment to natural and legal persons for the purposes of trade in services and the establishment of economic activities.<sup>58</sup> OCTs may derogate from this rule with a view to promoting or supporting local employment.<sup>59</sup> It is noteworthy that OCTs are merely required to notify the Commission of a derogation in this respect, while earlier association decisions required prior consent; something the OCTs have successfully challenged with reference to their broad autonomy.<sup>60</sup>

The Overseas Association Decision provides for rather detailed rules specifying the modalities of the association between the EU and Member States' overseas countries and territories. According to Art. 4 of the Decision, the management of the association shall be conducted by the Commission and the OCTs' authorities, and only where necessary by the Member States to which they are linked.<sup>61</sup> Thus, in this respect, the relationship between the European Commission and the OCTs is a direct one and the Member States do not automatically act as intermediaries in the daily management of the association. The relevant actors of co-operation in the OCTs are listed as the governmental authorities, local authorities, public service providers, civil

56 Art. 199(2) TFEU; Art. 45(2) Overseas Association Decision further stipulates that the OCTs shall grant to the Union a treatment no less favourable than the most favourable treatment applicable to any major trading economy as defined further below in that article.

57 Art. 199(1) TFEU.

58 Art. 199(5) TFEU and Art. 51(1) Overseas Association Decision; Iris Goldner Lang and Tamara Perišin, 'Free Movement of Services and Establishment in the Overseas', in Kochenov (ed.), *supra* note 41, pp. 194 *et seqq.*

59 Art. 51(3) Overseas Association Decision.

60 Goldner Lang and Perišin, *supra* note 58, pp. 195 *et seq.*

61 Art. 4 Overseas Association Decision.

society organizations and regional and sub-regional organizations.<sup>62</sup> While association clearly creates a legal relationship with provisions regulating the modes of co-operation between the OCTs and the EU, it is also described as a framework for policy dialogue<sup>63</sup> and opens up participation for the OCTs in other EU fora, such as the European Groupings of Territorial Cooperation.<sup>64</sup> The Overseas Association Decision establishes what it calls ‘instances’ of association, rather than institutions, – the OCTs-EU forum for dialogue, tri-lateral consultations and working parties. The OCTs-EU forum meets annually and brings together OCT authorities, Member State representatives, the Commission and, where appropriate, Members of the European Parliament, representatives of the European Investment Bank and representatives for the Outermost Regions.<sup>65</sup> Trilateral consultations are more frequent, take place at least four times a year, and bring together the Commission, the OCTs and the Members States to which they are linked.<sup>66</sup> Finally, working parties are of an *ad hoc* nature, are to be constituted to lead more technical discussion on issues of special concern, and may be convened upon request of any and by the agreement of all three parties.<sup>67</sup>

The principle of non-reciprocity may benefit the OCTs in terms of access to EU markets. However, it is not sufficient in living up to aims of association, which include the economic and social development of the OCTs. The Overseas Association Decision provides a dense list of areas of co-operation and provides for a number of instruments for sustainable development. These include the allocation of adequate financial resources and appropriate technical assistance aimed at strengthening the OCTs’ capacities to implement strategic and regulatory frameworks as well as long term financing to promote private sector growth.<sup>68</sup> OCTs are eligible for funding within the framework of the 11<sup>th</sup> European Development Fund (EDF), funding within Union programmes, as well as instruments provided for in the Union’s general budget and funds managed by the European Investment Bank.<sup>69</sup> Greenland, however, does not benefit from a large share of the allocation of funds to the OCTs under the 11<sup>th</sup> European Development Fund.<sup>70</sup> While Greenland may be granted EDF funding

62 *Ibid.*, Art. 11(1)(a)–(d).

63 *Ibid.*, Art. 5(1).

64 *Ibid.*, Art. 8.

65 *Ibid.*, Art. 14(1)(a).

66 *Ibid.*, Art. 14(1)(b).

67 *Ibid.*, Art. 14(1)(c).

68 *Ibid.*, Art. 74.

69 *Ibid.*, Art. 77.

70 *Ibid.*, Art. 3(1)(1) Annex II Overseas Association Decision.

to support regional integration and co-operation with other partners,<sup>71</sup> it is not eligible to receive EDF funding for initiatives referred to in its programming document.<sup>72</sup> According to Art. 75(1)(b) of the Overseas Association Decision, a programming document is the document which sets out an OCT-specific strategy, priorities and arrangements and translates the objectives and targets of the OCTs for its sustainable development in an effective and efficient way to pursue the objectives of the association. The funding available for Greenland to realize its programming document is instead regulated under Council Decision 2014/137/EU on the relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other (Partnership Decision).<sup>73</sup> The Partnership Decision defines the framework for policy dialogue on issues of common interest.<sup>74</sup> Art. 3(4) of the Partnership Decision states that co-operation activities shall be decided upon in close consultation between the Government of Greenland, the Government of Denmark and the Commission. It further states that such consultations shall be conducted in full compliance with the respective institutional, legal and financial powers of each of the three parties, thereby acknowledging the specific governance arrangement between Denmark and Greenland. The main areas of co-operation as agreed upon in the Partnership Decision are broad and include education, training, tourism and culture, natural resources, energy, climate, environment and biodiversity, arctic issues, the social sector and research and innovation.<sup>75</sup> While it is Greenland's responsibility to formulate its specific sector policies in the main areas of co-operation in its Programming Document for the Sustainable Development of Greenland (PDSG),<sup>76</sup> the document is subject to the exchange of views between all stakeholders<sup>77</sup> and the approval of the document is governed by the Examination Procedure following Regulation No. 182/2011 (Comitology Regulation).<sup>78</sup> Union financial assistance shall be provided mainly through budget support for reforms and projects in line with Greenland's

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71 *Ibid.*, Art. 3(1)(2).

72 *Ibid.*, Art. 3(1)(1); Programming Document for the Sustainable Development of Greenland 2014–2020 (2014/137/EU).

73 Council Decision 2014/137/EU of 14 March 2014 on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other [2014] OJ L 76 (hereinafter Partnership Decision).

74 Art. 2(2) Partnership Decision.

75 *Ibid.*, Art. 3(2)(a)–(f).

76 *Ibid.*, Art. 4(1).

77 *Ibid.*, Art. 4(4).

78 *Ibid.*, Arts. 4(5) and 8(2); Art. 5(1) Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles

PDSO, institutional development, capacity building and the integration of aspects of environmental and climate change and technical co-operation programmes.<sup>79</sup> The indicative financial assistance for the implementation of the Partnership Decision for its current timeframe from 2014 to 2020 amounts to 217,800,000 EUR.<sup>80</sup>

Fisheries has been mentioned above as a key area of mutual concern, which is reflected in both primary and secondary EU law. EU primary law in Part Four TFEU provides for one provision concerning Greenland in particular. Art. 204 TFEU renders the application of Arts. 198 to 203 TFEU to Greenland subject to the specific provisions set out in Protocol 34 to the Treaty on European Union. Protocol No. 34, in its sole article, in turn renders the exemption from customs duties and the absence of quantitative restrictions on fisheries imports from Greenland conditional upon satisfactory possibilities for access to Greenland fishing zones granted to the Union.<sup>81</sup> Access to Greenland's fishing zones has been governed by fisheries agreements since 1985. It is currently governed by the Fisheries Partnership Agreement of 2007<sup>82</sup> and a Fisheries Protocol which entered into force in 2016.<sup>83</sup> In terms of institutions, the fisheries partnership is governed by a Joint Committee made up of Union representatives and representatives for Greenland and is tasked with serving as a forum for monitoring the application of the Agreement and ensuring its implementation.<sup>84</sup>

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concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L 55; Art. 6(4) and (5) TEU.

79 Art. 9 Partnership Decision.

80 *Ibid.*, Art. 10.

81 Protocol No. 34 on Special Arrangements for Greenland to the Consolidated Version of the Treaty on European Union [2008] OJ C 115/13, sole article (1).

82 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 L 172 (hereinafter Fisheries Partnership Agreement).

83 Council Decision (EU) 2015/2103 of 16 November 2015 on the signing, on behalf of the European Union, and provisional application of the Protocol, setting out the fishing opportunities and the financial contribution provided for by the 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 [2015] OJ L 305 and Protocol setting out the fishing opportunities and the financial contribution provided for by the 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 [2015] OJ L 305.

84 Arts. 2(f) and 10(1) Fisheries Partnership Agreement.



The Joint Committee under its own rules of procedure meets at least once a year, alternately on Greenland and in the EU.<sup>85</sup>

Based on the above, the legal and institutional framework governing the association can be considered as rather dense. Firstly, the ‘instances’ of association identified in the Overseas Association Decision govern the general framework. Secondly, the Partnership Agreement defines how co-operation between Greenland, Denmark and the Commission is to be conducted, most notably in producing Greenland’s Programming Document. Thirdly, the Fisheries Agreement, governed by the Joint Committee, regulates a core area of mutual concern. What is interesting to note is that in 2003 the OCTs and their respective metropolitan states have expressed the wish to move towards a genuine partnership based on an agreement instead of a Council decision.<sup>86</sup>

Moving from the specific to the general, no conclusive statement about the relationship between the OCTs and the institutions of the Union – the European Parliament, the European Council, the Council, the Commission, the Court of Justice, the European Central Bank and the Court of Auditors<sup>87</sup> – can be made. According to Dimitry Kochenov and Jacques Ziller, the parts of the Treaties addressing *i.a.* institutions should be deemed to have at least potential legal effects on the OCTs.<sup>88</sup> Kochenov disagrees with the jurisprudence of the Court,<sup>89</sup> which has maintained that “(...) the OCTs are subject to the special association arrangements set out in Part Four of the Treaty (Articles 182 EC to 188 EC) with the result that, failing express reference, the general provisions of the Treaty do not apply to them”.<sup>90</sup> This assessment is indeed too sweeping and calls for qualification. Already, it emanates from the case law of the Court itself that the situation is more permeable and that OCTs are in fact not situated outside the Union framework at all times. In joint cases C-100/89 and 101/89, *Peter Kaefer and Andréa Procacci v. French State*,<sup>91</sup> the Court held unequivocally that

85 *Ibid.*, Arts. 10(3) and (4).

86 European Commission, *Green Paper. Future relations between the EU and the Overseas Countries and Territories*, COM(2008) 383 final, p. 6.

87 Art. 13 (1) TEU.

88 Kochenov *supra* note 42, p. 723; Jacques Ziller, ‘Outermost Regions, Overseas Countries and Territories and Others after the entry into Force of the Lisbon Treaty’, in Kochenov (ed.), *supra* note 41, pp. 77 *et seqq.*

89 Kochenov, *supra* note 42, pp. 691 *et seqq.*

90 Case C-300/04 *M.G. Eman and O.B. Sevinger v. College van burgermeester en wethouder van Den Haag* [2006] ECR I-8079.

91 Joined Cases C-100/89 and C-101/89 *Peter Kaefer, Andrea Procacci v. the French State* [1990] ECR I-4667.

the *Tribunal administratif* of French Polynesia is a French Court and may thus submit a request for a preliminary ruling under what today is Art. 267 TFEU.<sup>92</sup> France retains certain competencies for the administration of justice in French Polynesia and the court systems in French Polynesia and metropolitan France remain integrated at the level of appeal.<sup>93</sup> However, the competence to request a preliminary reference has also be affirmed for courts of the Channel Islands and the Isle of Man – territories with *sui generis* status – which do not form part of the United Kingdom's court system.<sup>94</sup> Requests for a preliminary ruling by OCT courts have to concern the interpretation and validity of EU law as applicable to them.<sup>95</sup> The scope of the questions submitted to the Court by an OCT court or tribunal is thus limited.<sup>96</sup> This holds true also for cases brought under Art. 263(4) TFEU, according to which any natural or legal person may institute annulment proceedings against an act addressed to that person or which is of direct and individual concern to them. Whereas Member States may seek the annulment of Union acts on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers,<sup>97</sup> OCTs and other sub-State entities have to demonstrate direct and individual concern,<sup>98</sup> which has thus far been found to apply in cases concerning State aid and structural funds.<sup>99</sup> If they can demonstrate direct and individual concern sub-State entities may challenge an act and thus have direct access to the court. They cannot bring actions against a Member State,<sup>100</sup> nor are they considered eligible to

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92 *Ibid.*, I-4670.

93 Opinion of AG Mischo in Joined Cases C-100/89 and C-101/89 *Peter Kaefer, Andrea Proccci v. the French State* [1990] ECR I-4647, para. 15; Morten Broberg, 'Access to the European Court of Justice by Courts in Overseas Countries and Territories', in Kochenov (ed.), *supra* note 41, pp. 140 *et seq.*

94 Case C-355/89 *Barr and Montrose Holdings* [1991] ECR I-3500 *et seq.*; Broberg, *supra* note 93, p. 146.

95 Art. 267 TFEU; Broberg, *ibid.*, pp. 148 *et seq.*

96 Broberg, *ibid.*, p. 148.

97 Art. 263(2) TFEU.

98 Joined cases T-32/98 and T-41/98 *Nederlandse Antillen v. Commission* [2000] ECR II-00201 paras. 43, 45.

99 Piet Van Nuffel, 'What's in a Member State? Central and Decentralized Authorities before the Community Courts', 38 *Common Market Law Review* (2001) 872; See cases T-214/95 *Vlaams Gewest v. Commission* [1998] ECR II-717; T-238/97 *Comunidad Autónoma de Cantabria v. Council* [1998] ECR II-2271.

100 Case C-95/97 *Région Wallone v. Commission* [1997] ECR I-1787, para. 6.

stand as respondents in infringement proceedings brought by the Commission as shall be discussed in more detail below when turning to the Åland Islands.

The institutional relationships between the EU and the OCTs that have been addressed by the Court have not only concerned the judiciary itself but also the European Parliament. In case C-300/04 *Eman & Sevinger v. College van burgermeester en wethouder van Den Haag*, a Netherlands court requested a preliminary ruling concerning the right to vote in the European Parliament election of two nationals of the Netherlands and resident in Aruba, an OCT. The Court held that

[s]ince the provisions of the Treaty do not apply to the OCTs, the European Parliament cannot be regarded as their 'legislature' within the meaning of that provision. On the other hand, it is within the bodies created within the framework of the association between the Community and the OCTs that the population of those countries and territories can express itself, through the authorities which represent it.<sup>101</sup>

EU law does not prevent a Member State from opening up elections for residents in the OCTs – France has done so – however, there is no such legal obligation stemming from EU law. Likewise, OCTs are not automatically represented in any other stage of the decision-making process or in the Economic and Social Committee and the Committee of the Region; the EU's advisory bodies. Decisions, as a rule, do not apply to the OCTs, so there is no participatory requirement, as the Court argues above. Questions concerning the exact scope of the applicable law remain, however; for example, with regard to the application of the *acquis ratione personae* based on Union citizenship.<sup>102</sup>

### 3.2 *The Faroe Islands*

When Denmark joined the EU in 1973, the Faroe Islands decided to remain outside the framework of the Union. A back door remained open until 31 December 1975, whereby, following a resolution of the Government of the Faroe Islands, Denmark would have been able to declare the Accession Treaty, and thereby the *acquis*, applicable to the Faroe Islands.<sup>103</sup> For this scenario Protocol

101 Case C-300/04 *M.G. Eman & O.B. Sevinger v. College van burgermeester en wethouder van Den Haag* [2006] ECR I-8080.

102 Cf. D. Kochenov, 'EU Citizenship and the Overseas', in Kochenov (ed.), *supra* note 41.

103 Art. 25 Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands (Member States of the European Communities), the Kingdom of

No. 2 to the Accession Treaty provided that special solutions shall be sought to manage fisheries and that the Faroe Islands may retain appropriate measures to ensure milk supplies.<sup>104</sup> The Protocol also explicitly stated that Danish nationals resident in the Faroe Islands shall be considered nationals of a Member State within the meaning of Community law only once the Treaty is declared applicable to the Faroe Islands.<sup>105</sup> A declaration to that effect has not been made. The Faroes did not consider the proposed 10 years' derogation from the principle of equal access to fishing waters as sufficient to protect an industry so vital to the Faroese economy.<sup>106</sup>

The Faroe Islands are not either encompassed by the OCT regime, and are thus not embedded in the structures described above about Greenland. Art. 355(5)(a) TFEU expressly states that the Treaties shall not apply to the Faroe Islands whereby the Faroe Islands maintain a *sui generis* status, being part of a Member State but remaining a non-associated third country in relation to the EU. The legal-institutional framework governing the relationship between the Faroe Islands and the EU is thus not as dense. The relationship has been subject to conflict nonetheless, not least in relation to what is often referred to as the 'Mackerel War'. This 2013–2014 conflict concerning fishing quotas shall be discussed in more detail below.

The agreements currently governing the relationship between the Faroe Islands and the EU are the Free Trade Agreement of 1997<sup>107</sup> and specific fisheries agreements,<sup>108</sup> which are in turn governed by a Framework Agreement on

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Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland 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 L/73 and Protocol No 2 thereto.

104 Art. 2 Protocol 2 Accession Treaty of Accession of Denmark, Ireland and the United Kingdom.

105 *Ibid.*, Art. 3.

106 Fiona Murray, *The European Union and Member State Territories: A New Legal Framework under the EU Treaties* (T.M.C. Asser Press, The Hague, 2010) p. 141.

107 Agreement between the European Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part (hereinafter Free Trade Agreement) [1997] OJ L 053/2.

108 For the current record of fisheries consultations concerning the Faroe Islands, see European Commission, *Fisheries*, <[http://ec.europa.eu/fisheries/cfp/international/agreements/faeroe\\_islands/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/international/agreements/faeroe_islands/index_en.htm)>, visited 27 March 2017.

fisheries of 1980.<sup>109</sup> In 2014 the Faroe Islands and the EU for the second time concluded an agreement on scientific and technological co-operation, providing for the Faroes to participate in ‘Horizon 2020’; the EU’s current Framework Programme for Research and Innovation (2014–2020).<sup>110</sup>

The Free Trade Agreement reiterates the vital importance for the Faroes of fisheries, as it constitutes an essential economic activity, with fish and fisheries products being their main export articles.<sup>111</sup> The Free Trade Agreement applies to products only and thus not to services, capital or the free movement of persons.<sup>112</sup> It is not to affect the functioning of the Fisheries Agreement.<sup>113</sup> Responsible for the administration of the Agreement is a Joint Committee, consisting of representatives of the contracting parties and acting in mutual agreement.<sup>114</sup> The Joint Committee has the power to adopt its own rules of procedure and act as a forum for seeking solutions to possible disputes.<sup>115</sup> It repeals and adopts protocols to the Agreement.<sup>116</sup>

While the Framework Agreement of 1980 is an agreement between the EU (then EC) on the one part and Denmark and the Faroe Islands on the other part, Denmark does not feature in the denomination of the parties to the specific fisheries agreements, which refer to only the Faroe Islands.<sup>117</sup> The fisheries agreements essentially regulate access to fishing grounds and set fishing quotas for different species of fish for a given period. Some agreements are bilateral agreements between the EU and the Faroes and others include further

109 Agreement on fisheries between the European Economic Community, of the one part, and the Government of Denmark and the Home Government of the Faeroe Islands, of the other part [1980] OJ L 226/12.

110 Agreement for scientific and technological cooperation between the European Union and the Faroe Islands associating the Faroe Islands to Horizon 2020 – the Framework Programme for Research and Innovation (2014–2020) [2015] OJ L 35/3.

111 Free Trade Agreement, preamble.

112 Art. 2 Free Trade Agreement.

113 *Ibid.*

114 Art. 31(1) and Art. 32 Free Trade Agreement.

115 Art. 29 Free Trade Agreement.

116 *Cf. e.g.* Decision No. 1 of the EU/Denmark-Faroe Islands Joint Committee of 12 May 2015 replacing Protocol 3 to the Agreement between the European Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part, concerning the definition of the concept of ‘originating products’ and methods of administrative cooperation [2015/844] [2015] OJ L 134/29.

117 Mihail Vatsov, ‘The Mackerel War: testing the limits of the exclusive jurisdiction of the Court of Justice under Article 344 TFEU’, 39:6 *European Law Review* (2014) p. 867.

North Atlantic Coastal States.<sup>118</sup> Agreements are negotiated annually within the framework of coastal state consultations but may fail as the case of the so-called ‘Mackerel War’ or herring dispute that escalated in 2013 illustrates.<sup>119</sup> Until 2013 the Atlanto-Scandian herring stock was managed jointly by Norway, Russia, Iceland, the Faroe Islands and the EU through an agreed long-term management plan and pre-established fishing quotas.<sup>120</sup> In 2013 the Faroe Islands unilaterally decided to triple their previously agreed quota.<sup>121</sup> This led the European Commission to consider the Faroe Islands in breach of their obligations under Article 61(2), Article 63(1) and (2) and Articles 118, 119 and 300 of the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) and Articles 5 and 6 and Article 8(1) and (2) of the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA).<sup>122</sup> Ultimately the EU adopted a trade ban measure under Art. 4 of Regulation No 1026/2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing.<sup>123</sup> For the purpose of the present paper, the most interesting aspect of this dispute, which was finally resolved through negotiations, is how their *sui generis* position allowed the Faroe Islands to seek legal fora outside the EU to challenge the trade ban.

EU Member States are under an obligation to submit disputes concerning the implementation or application of the Treaties to the Court of Justice of the European Union according to Art. 344 TFEU,<sup>124</sup> non-members are under no such obligation, however. Member States are furthermore bound by the

118 European Commission, *Bilateral agreements with countries outside the EU*, <[https://ec.europa.eu/fisheries/cfp/international/agreements\\_en](https://ec.europa.eu/fisheries/cfp/international/agreements_en)>, visited on 2 April 2017.

119 Vatsov, *supra* note 117, p. 865.

120 European Commission, *Commission adopts trade measures against Faroe Islands to protect the Atlanto-Scandian herring stock*, press release IP/13/785 (20 August 2013).

121 *Ibid.*

122 Commission Implementing Regulation (EU) No. 793/2013 of 20 August 2013 establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock (Text with EEA relevance) [2013] OJ L 233/2.

123 Regulation (EU) No. 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing [2012] OJ L 316/34.

124 See also Case C-459/03 *Commission of the European Communities v. Ireland* [2006] ECR I-04635, para. 123.

principle of sincere co-operation, under which, pursuant to Art. 4(3) Treaty on European Union (TEU)<sup>125</sup> they shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. This effectively means that also where mixed agreements are concerned, falling only partly within the competencies of the Union, Member States are required to seek a resolution of their disputes first and foremost within the framework of the Union.<sup>126</sup>

However, Denmark responded to the ban by initiating proceedings under Annex VII of UNCLOS and requested consultations with the EU and the World Trade Organization (WTO) on behalf of the Faroe Islands.<sup>127</sup> Denmark is responsible for the external relations of the Faroe Islands and thus exercises a dual capacity, which may in fact mean that it represents two opposing opinions on the same issue – the Union position as well as the Faroes' or Greenland's position.<sup>128</sup> Such an understanding of Denmark's dual capacity allows the self-governing territories to act through, though independently of Denmark, and to give effect to their position as a territory outside the EU. As Kári á Rógvi has aptly noted, the fact that the Faroes did not join the EU has contributed to the setting of Faroese and Danish laws on different paths.<sup>129</sup> However, this also means dual paths for Denmark as it remains charged with representing the Faroe Islands too in international fora and the recognition of this being legitimate by third parties. The acceptance of such legal constructs and an interpretation of the *acquis* accordingly is required in order for the self-governing territories' status to become fully functional vis-à-vis the EU. In its most basic form this is also enshrined in the principle of sincere co-operation, which binds the EU to respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, both political and constitutional, and inclusive of regional and local self-government.<sup>130</sup>

125 Consolidated version of the Treaty on European Union [2008] OJ C 115.

126 Case C-459/03 *Commission of the European Communities v. Ireland* [2006] ECR I-04635, paras. 174 *et seqq*; Vatsov, *supra* note 117, p. 872.

127 Vatsov, *ibid.*, p. 865.

128 Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty – International Agreement on Natural Rubber (Opinion 1/78) [1979] ECR I-02871 para. 62; Vatsov, *supra* note 117, p. 873.

129 Kári á Rógvi, 'Faroese Governance', in Natalia Loukacheva (ed.), *Polar Law Textbook*, TemaNord 2010:538 (Nordic Council of Ministers, Copenhagen, 2010) p. 233.

130 Art. 4(2) TEU; Vatsov, *supra* note 117, p. 872.

The Mackerel War was eventually brought to an end through a negotiated solution and the Commission was not pressed to submit the issue to the Court.<sup>131</sup> There is no indication, however, that the Commission questioned Denmark's capacity to act on behalf of the Faroe Islands. In fact, the situation in which a Member State may need to act in a dual capacity, i.e. separately in the interest of an overseas country or territory, without this affecting the Union's interest, has been addressed outright in an opinion given by the Court in 1979<sup>132</sup> and by the Intergovernmental Conference in Declaration 25 to the Maastricht Treaty.<sup>133</sup> As Mihail Vatsov has remarked, dependant territories remain to a large extent uncharted territories and many question marks remain as to the exact legal implications of their specific and divergent statuses.<sup>134</sup> The relationship between the Åland Islands and the EU is the next case in point.

### 3.3 *The Åland Islands*

Unlike Greenland and the Faroe Islands, Åland is an integral part of the EU. Finland acceded to the EU in 1995, i.e. more than 20 years after Denmark. Upon accession, Åland's final status within the Community framework was not yet defined. Two paths remained open until the ratification of the Accession Treaty by Finland in December 1994. Art. 28 of the Treaty of Accession of Austria, Finland and Sweden<sup>135</sup> provided for the possibility to declare the so-called Åland Protocol, Protocol 2 to the Accession Treaty which outlines the exceptions and derogation applying to Åland, applicable upon ratification. Without such a declaration, the EC Treaty would not have become applicable to Åland and

131 European Commission, *Agreed Record on a Fisheries Arrangement between European Union, the Faroe Islands and Norway on the management of mackerel in the North-East Atlantic from 2014 to 2018*, London 12 March 2014, <[http://ec.europa.eu/fisheries/cfp/international/agreements/faeroe\\_islands/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/international/agreements/faeroe_islands/index_en.htm)>, visited on 27 March 2017.

132 Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty. – International Agreement on Natural Rubber. – Opinion 1/78 of the Court of 4 October 1979, [1979] ECR 02871.

133 Treaty on European Union, signed at Maastricht on 7 February 1992, Declaration on the representation of the interests of the overseas countries and territories referred to in Articles 227(3) and (5)(a) and (b) of the Treaty establishing the European Community [1992] OJ C 191/103.

134 Vatsov, *supra* note 117, p. 866.

135 Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands,



its status would have resembled that of the Faroe Islands. Finland was able to solicit Åland's consent to EU membership, a referendum had been held on Åland, and declared Protocol 2 to the Accession Treaty applicable when submitting its Document of Ratification to the depository on 8 December.<sup>136</sup> Thus, Åland acceded to the European Community along with Finland. The *acquis* applies to Åland, however, with limited but substantial derogations.

Today, Art. 355(4) TFEU simply refers to Protocol 2. Protocol 2 to Finland's Accession Treaty has three articles, preceded by an introductory clause that makes reference to the special status that the Åland Islands enjoy under international law. Art. 1 then grants Åland the right to derogate, notably on a non-discriminatory basis, from the Treaties with regard to restrictions on the right of natural persons who do not enjoy regional citizenship in Åland and for legal persons, to acquire real property in Åland without permission by the competent Åland authorities. Further, Protocol 2 Art. 1 grants Åland the right to maintain its legislation restricting the right of establishment and the right to provide services by natural persons who do not enjoy regional citizenship, and by legal persons without permission by the competent authorities of the Åland Islands, again on a non-discriminatory basis.<sup>137</sup> Art. 2 excludes Åland from the territorial application of the Union legislation in the fields of harmonization of the laws of the Member States on turnover taxes and on excise duties and other forms of indirect taxation.<sup>138</sup> Art. 2 clearly states that this derogation is aimed at maintaining a viable local economy in the islands and shall not have any negative effects on the interests of the Union nor on its common policies. It stipulates that if the Commission considers that the provisions are no longer justified, particularly in terms of fair competition or own resources, it shall

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the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Kingdom of Norway, the Republic of Austria, the Republic of Finland, the Kingdom of Sweden, concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union [1994] OJ C 241.

136 Declaration by the Government of Finland on the application of the EC Treaty, the ECSE Treaty and the Euratom Treaty to the Åland Islands, done in Helsinki on 8 December 1994.

137 Art. 1 Protocol No. 2 on the Åland Islands to the Treaty between the Member States of the European Union and the Kingdom of Norway, the Republic of Austria, the Republic of Finland the Kingdom of Sweden, concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union [1994] OJ C 241.

138 *Ibid.*, Art. 2.

submit appropriate proposals to the Council, which shall act in accordance with the pertinent articles of the EC Treaty.

Åland's status within the Union differs fundamentally from the status of both Greenland and the Faroe Islands. The fact that it is an integral part of the Union necessitates much less specific legislation or agreements regulating the relationship. Åland remains closer to the default position, not of a Member State but of any other sub-State entity, such as the constitutive entities of a federation. As such, the Åland Islands are represented in the Committee of the Regions, a consultative body, with one of 344 seats.<sup>139</sup>

There is no Union mechanism that would provide for the representation of any sub-State entity, whether autonomous or not, to be represented in the Council or any other EU institution directly involved in the decision-making process. Art. 203 of the Treaty of Maastricht explicitly allowed Member States to delegate a regional level minister to represent the Member State in the Council. While Art. 16 TEU does not contain a corresponding provision, Member States remain free to do so also under the current framework. The European Parliament, which has a central role in the decision-making process, is open to thirteen democratically elected representatives from Finland. The Åland Islands have no electoral constituency of their own for the purposes of European Parliament elections but demands to that effect have been voiced since accession. Such demands are first and foremost directed toward the Government of Finland and are currently being discussed within the framework of the ongoing revision of the Åland Autonomy Act.<sup>140</sup>

Two infringement proceedings brought against Finland before the European Court of Justice have concerned the Åland Islands directly and gave rise to an amendment of the Act of Autonomy in 2009. In cases C-344/03 *Commission v. Finland*<sup>141</sup> and C-343/05 *Commission v. Finland*,<sup>142</sup> Finland was considered to

139 Committee of the Regions, *Finland*, <<http://cor.europa.eu/en/regions/Pages/country.aspx?Country=Finland&MemberList=Member>>, visited on 9 April 2017.

140 Ministry of Justice of the Republic of Finland, *Den i Ålandskommitténs delbetänkande avsedda utredningen om en ny internationell och kollektiv klagomålsmekanism för att trygga Ålands svenskspråkiga status enligt språkbestämmelserna i självstyrelselagen och vilken internationell institution som kunde anförtras en sådan uppgift, Presidiets beslut fattat i skriftligt förfarande*, JM 60/08/2013 (22.6.2015), pp. 52 et seqq.

141 Case C-344/03 *Commission of the European Communities v. Republic of Finland* [2005] ECR I-11033.

142 Case C-343/05 *Commission of the European Communities v. Republic of Finland* [2006] ECR I-00066.

be in breach of Community law for infringements that had been committed by the authorities on the Åland Islands. Case C-344/03 concerned the infringement, in this case by authorities both on mainland Finland and on Åland, of the Council Directive on the Conservation of Wild Birds<sup>143</sup> by allowing the spring hunting of certain aquatic wild birds. Case C-343/05 concerned the failure to transpose certain provisions laid out in the tobacco directives concerning oral tobacco, which was still sold on Ålandic ferries in Finnish waters, despite a prohibition to place oral tobacco on the market. For the present purposes, what is more interesting than the substance of the case is the standing of the Åland Government in the proceedings, or rather the lack thereof. The legislation in question fell within Åland's exclusive legislative competencies, effectively prohibiting Finland from implementing EC legislation on the Åland Islands. So, while the Åland authorities were charged with the implementation of the relevant Community legislation, the Court does not grant standing to a sub-State authority *per se* and States may not simply plead their internal circumstances to justify failure to comply.<sup>144</sup> To remedy such situations, where there is essentially a mismatch between the offender and the respondent, accommodation has been sought on the domestic level.<sup>145</sup> The Act on Autonomy has been amended and now grants Åland the right to represent itself in proceedings before the Court.<sup>146</sup> This is just one example of the profound impact that EU membership has had on the domestic autonomy arrangement pertaining to Åland.

#### 4 Conclusions

What is clearly visible from Norden's quest for accommodation, and equally so from parallel processes in the EU, is that

[ ] by being neither formally sovereign nor simply hierarchically subordinated to their metropole, the self-governing countries are political

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143 Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds [1979] OJ L 103/01.

144 Case C-263/88 *Commission v. France* [1990] ECR I-4611, para. 7.

145 See also Piet van Nuffel, 'What's in a Member State? Central and Decentralized Authorities before the Community Courts', 38 *Common Market Law Review* (2001) p. 880.

146 Art. 59c Åland Act on Autonomy.

entities that do not readily fit the conceptual categories offered by the conventional theory addressing international politics and international law.<sup>147</sup>

New mechanisms had to be designed. Norden's and the EU's approaches are rather different and they may not address all of the concerns of each stakeholder, but they are nevertheless examples that can serve to highlight challenges and opportunities in developing legal-institutional frameworks governing the perplexing encounters between autonomies and international organizations.

In Norden an attempt has been made to translate the very core of autonomy, namely constitutionally protected legislative power, into a legal-institutional framework for multi-level governance. The small number of autonomies and the scope and scale of Norden allows for a one-size-fits-all solution. The General-Secretary of the Nordic Council has emphasized that the autonomies are able to participate in practically all contexts of Nordic co-operation, the Council of Ministers included, and that they make good use of these opportunities. He has described the system of accommodation found for the Nordic autonomies in Norden as one of the broadest in global comparison. While the scope for participation and indeed representation of the autonomies in the institutional framework for Nordic co-operation is comparatively broad, the limits of accommodation are tied to the domestic frameworks on the one hand, and limited by prevailing principles of international law on the other. In between, however, there has been space for the creation of legal-institutional relationships that have been carefully crafted.

The encounter between an autonomy and an international organization is not only more challenging in the case of the EU, it is also broader in scale and in scope. Despite the EU's individually and often densely regulated relationships with OCTs and *sui generis* arrangements, dependant territories remain to some extent uncharted territories in the context of the EU.<sup>148</sup> Many question marks remain as to the exact legal implications of their specific and divergent statuses, both concerning the relationship of these territories with the EU institutions and the applicability of certain laws.

The perplexing encounters between self-governing territories and international organizations certainly warrant greater attention. Studying the legal-institutional relationships of autonomies and international organizations can

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147 Adler-Nissen and Gad, *supra* note 1, p. 7.

148 Vatsov, *supra* note 117, p. 866.

contribute to our understanding of the institution of self-government and its functioning within multi-level systems. Self-government is often discussed as a tool for the resolution of territorial conflicts, for protecting minorities and for managing diversity. Whether a proposed self-government arrangement is to gain support and can function for the benefit of peace is no longer only a question of national accommodation but also of the ability of international organizations to engage and possibly accommodate autonomies. In a similar vein, international organizations are expected to respond to challenges of broad international concern and they have to prove to be suitable fora, which in many cases demands that they are able and willing to accommodate diverse realities and provide for an inclusive platform.