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After Brexit: The Legal Relationship of the UK-OCTs
with the EU

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ABSTRACT

The precise implications of the United Kingdom's (UK's) departure from the European Union (EU) are currently the subject of both political and academic debate. The only point of consensus would appear to be that there will be an extended period of uncertainty for all concerned, including the UK's Overseas Countries and Territories (UK-OCTs).

This paper examines a lacuna in both EU case law and the academic literature. That lacuna surrounds the issue of whether as a matter of EU law, the termination of the UK's membership in the EU will alter the status of the UK-OCTs association with the EU, and if so, what will that alteration look like?

The present work builds on Professor Kochenov's work on EU law relating to the OCTs, and in that regard utilises a selective literature review that includes legal-historical elements, as well as a selective case law review. Variations and exceptions in the scope of the territorial application of the EU *acquis* that are applicable to each territory are noted to be rooted in the colonial history of each OCT, and complicated by the fact that the legal authority of Member States to change the legal status of overseas territories is circumscribed, non-uniform and in general, infrequently applied.

The paper concludes that if the UK leaves the EU and the EU takes no steps to modify the Treaties in relation to the UK-OCTs, then the 2013 Overseas Association Decision that sets out the specifics of the legal framework for the EU's relationship with all OCTs would continue to apply to UK-OCTs. It also concludes that the status of that legal relationship may make little practical difference to what happens on the ground.

CHAPTER 1 – THE UK-OCTS AND UNCERTAINTIES ARISING FROM BREXIT WITH REGARD TO THE UK-OCTS

Introduction

The current overseas territories of the Member States of the European Union (EU) are sovereignly attached to Denmark, France, the Netherlands, Portugal, Spain, and the United Kingdom (UK). As noted by Prof Kochenov,¹ their legal histories and current statuses are complex, and further;

*while the implications of the specific legal position of the overseas regions and territories under the sovereignty or control of the EU Member States for the interaction between the legal orders of municipal, European, and international law are extremely far-reaching, they remain dangerously under-researched.*²

Centuries of colonial history have shaped the constitutional relationships between individual overseas territories and their respective Member States.³ These relationships have in turn influenced the perceived value to the Member States of these outposts of empire, and have ultimately determined the varying statuses in EU law that were assigned to each of the overseas territories over time. Arguably the same will be true in relation to any change in the status of the UK-OCTs as may be occasioned by ‘Brexit’, the term coined to refer to a future exit of the UK from the EU. Brexit will undoubtedly alter the lives of numerous EU citizens, including those living in the UK-OCTs, as well as the economies of EU Member States, Outermost Regions (ORs) and Overseas Countries and Territories (OCTs). What such change will look like is at present far from clear. The factors that will influence any change of status of UK-OCTs are also unclear.

¹ Kochenov D., ‘The Application of EU Law in the EU’s Overseas region, Countries and Territories After the Entry into Force of the Treaty of Lisbon’ (2012) 20 Michigan State International Law Review 3, <<http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1095&context=ilr>> accessed 30 Nov 2016.

² *ibid.* Kochenov further opined; ‘These people, like the innumerable companies registered in such territories, often find themselves in a difficult position, as it is sometimes virtually impossible to answer the simplest of possible questions: which law should apply?’

³ The term ‘overseas territories’ is used in this paper to refer to the collective of ORs and OCTs.

Background

The legal histories and current statuses of the overseas territories of the EU Member States are diverse and complex.⁴ The colonial relationships between individual overseas territories and the states exercising sovereignty over them have in turn shaped the legal form of association of each such overseas territory with the EU.⁵

The legal basis of the relationship between the overseas territories and the EU is set out in Part Four of the Treaty on the Functioning of the European Union (TFEU)⁶ and the Overseas Association Decision (OAD).⁷ The Treaty of the European Union (TEU), Art 51 TEU provides that Annex II to the TFEU, which lists the overseas countries and territories (OCTs) to which the Treaty applies, constitute part of the primary law of the EU.⁸ As noted by Kochenov,⁹ a proper understanding of that legal basis and that relationship and what each means in practice requires some understanding of how that legal basis has evolved.

The EU currently classifies each of the overseas territories of its Member States as either an Outermost Region (OR) or one of the Overseas Countries and Territories (OCT).¹⁰ All of the overseas territories of the UK are classified by the EU as OCTs and are listed in Annex II TFEU. That classification has its origins in the divergent jurisprudence and colonial practices of the Member States.¹¹

The classification of an overseas territory as either an OR or an OCT, determines the access of that overseas territory to both the EU market and to EU development funding, and arguably reflects the perceived ‘value’ of that OCT to the EU. As a result, that classification has a significant impact on the welfare of the nationals of the overseas territories, virtually all of whom are also EU citizens.¹² Similarly, such classification also produces a degree of discrimination between EU citizens.

⁴ Kochenov (note 1).

⁵ Colonial history has ultimately determined the status in EU law that has been assigned by the EU to each of the overseas territories.

⁶ Part IV TFEU, Art 198-204.

⁷ The Overseas Association Decision (OAD), as provided by Art 288 TFEU, is secondary legislation that is adopted on the basis of Art 203 TFEU and is periodically revised. The OAD provides the operational framework which governs the specific rules of application of EU law with regard to the OCTs. The most recent Council Decision is: 2013/755/EU of 25 November 2013, OJ L344, Vol 56, 19 December 2013. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2013:344:FULL&from=EN> accessed 12 December 2016.

⁸ Article 51 TEU provides; The Protocols and Annexes to the Treaties shall form an integral part thereof.

⁹ Kochenov (note 1).

¹⁰ It is recognized that some overseas territories are in a *sui generis* category. These include the Isle of Man, the Channel Islands and the Åland Islands. Kochenov (note 1).

¹¹ All of the Member States that have overseas territories other than the UK, have or had ORs. The legal system and colonial practices of the UK did not, and do not, provide for a designation corresponding to the EU’s OR construct.

¹² The access of OCTs and ORs to EDF funding is discussed in Chapter 2, under section entitled ‘Association Regime’.

Part Four TFEU provides that one of the EU's objectives in its relationship with all of its overseas territories is to promote economic development in the overseas territories.¹³ The Treaties provides no explicit basis for discrimination between classes of overseas territories either in the manner, or in the extent, to which the EU promotes development. To the contrary, Article 198 TFEU expressly provides a basis for understanding that there ought not to be discrimination in the treatment of overseas territories, at least in the context of the objectives of association:

*198. Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to **the Treaties**.*¹⁴ (emphasis added)

However, in general ORs enjoy greater access to the EU markets and greater development assistance than the OCTs. The lesser access to the EU market that is afforded the OCTs affects the movement of capital and other factors of production between that overseas territory and the EU and thus limits economic development in the relevant overseas territory.¹⁵ That discrimination arises not from any express provision in the Treaties, but from the EU's agreed implementation of Part Four TFEU as set out in the OAD.

The OAD,¹⁶ a system of secondary EU law adopted under Art 203 TFEU,¹⁷ provides the operational framework that governs specific rules of application of EU law with regard to the OCTs, including the UK-OCTs. Each OAD is subject to express periodic revision and may be modified by the unanimous agreement of the Member States of the EU.¹⁸

Hypothesis

The hypothesis of this paper is: The relationship between the EU and the UK-OTC as set out in the 2013 Overseas Association Decision (OAD) would be not be directly affected by the termination of the UK's membership in the EU *per se*.

¹³ Article 73, Charter of the United Nations, <<http://www.un.org/en/sections/un-charter/chapter-xi/>> accessed 12 Jan 2017; Art 198 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 as a whole.'

¹⁴ Art 198 TFEU

¹⁵ WW Bratton and others, *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States* (Clarendon Press, Oxford 1996) 1.

¹⁶ OAD (note 7).

¹⁷ Article 288 TFEU provides that legal acts of the EU are; regulations, directives, decisions, recommendations and opinions.

¹⁸ OAD (note 7).

Methodology

The hypothesis of this paper is assessed by means of an analysis of the relevant legislation as well as selective case law and literature reviews. A number of points are examined including: the current legal basis of the relationship between the EU and the UK-OCTs; the legal history and policy objectives underlying the legal relationship between the EU and the OCTs; the main factors that influenced the current shape of that relationship; and the factors that are most likely to influence the shape the post-Brexit relationship of the EU with the UK-OCTs. This work will include a focus on the legal requirements within the EU *acquis* relating to ‘change of status’ for the UK-OCTs.¹⁹

This work is divided into five chapters. The first chapter sets out the hypothesis and the methodology used to test the hypothesis as well as the general structure of the paper. It also provides a contextual overview of the evolution of the EU’s current legal relationship with the OCTs as provided in the Overseas Association Decision (OAD).

The second chapter briefly traces the evolution the EU *acquis* relevant to the status of an OCT and identifies contexts in which legal outcomes may be influenced by an alignment of interests between the EU and the OCT. The third chapter provides an overview of the underlying legal structure of the EU in relation to the OCTs. The fourth chapter provides an analysis of the progression of EU’s position with regard to recognition, within the EU *acquis*, of any change of status of the ‘overseas territories’ of Member States. The fifth chapter summarises the findings in the context of Brexit and provides some concluding comments.

¹⁹ In this work the term EU *acquis* refers to the accumulated legislation, legal acts and court decisions of the EU.

CHAPTER 2 – THE ‘ASSOCIATION REGIME’ FOR OCTS

The UK-OCTs are subject to the EU’s ‘Association Regime’, as provided under Art 203 TFEU and the OAD.²⁰ There is no explicit provision within that ‘Regime’ that refers to, or provides for any ‘exit clause’ that is equivalent to Art 50 TFEU.²¹ Neither is there any explicit provision within Art 50 TEU for what happens to the application of the ‘Association Regime’ in relation to the overseas territories of a departing Member State. In the absence of explicit provision, the likely manner in which the departing Member State and the EU will deal with the application of the ‘Association Regime’ to the overseas territories of a departing state may be illuminated at least in part by an analysis of the prior behaviours of the relevant Member State and the EU.

The content of the ‘Association Regime’ set out in the EU’s periodically revised OADs did not arise ‘*de novo*’ with the signing of the Treaty of Rome (ToR).²² Rather, that content was shaped by, and may be understood by viewing it through the lens of both, (1) the legal histories of the Member States that signed the ToR and their overseas territories, and (2) the evolving EU law.²³

Four of the six states that negotiated and signed the founding Treaties,²⁴ were at the times of those signings, *Herren der Verträge*,²⁵ colonial masters, who exercised sovereignty over

²⁰ OAD (note 7).

²¹ Art 50(1) TEU provides; *Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*

²² There have been a total of eight OADs, with current practice being to revise the OAD approximately every ten years. These are as follows: Decision 64/349/EEC of 25th Feb 1964. Subsequent OAD were as follows: #2 – Decision 70/549/EEC of 29 September 1970 (5 yrs), #3 - Decision 76/568/EEC of 29 June 1976 (5 yrs), #4 – Decision 80/1186/EEC of 16 December 1980 (5 yrs), #5 - Decision 86/283/EEC of 30 June 1986 (5 yrs), #6 – Decision 91/482/EEC of 25 July 1991 (10 yrs) and, #7 - Decision 2001/822/EC of 27 November 2001 (10 yrs & extended in 2007 to 31 December 2013 to coincide with the EDF and multiannual financial framework for 2007-2013).

²³ Kochenov, D., ‘The EU and the Overseas: Outermost Regions Overseas Countries and Territories Associated with the Union, and Territories Sui Generis’ in ‘Kochenov, D. (ed) *EU Law of the Overseas: Outermost Regions, Associated Countries and Territories, Territories Sui Generis* (2011) The Netherlands: Kluwer Law, (Chapter 1), part 1.1.

²⁴ The six founding Member States were: Belgium, Germany, France, Italy, Luxembourg, the Netherlands. Only Germany and Luxembourg did not have colonies at the time of the founding treaties, the former having lost its colonial possessions as a result of European wars. Some of the colonial possessions were: (Belgian) Congo, Rwanda-Burundi, the (Italian) protectorate of Somalia, the Netherlands New Guinea, The Netherlands Antilles, Suriname, 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).

²⁵ Lord of the Treaties.

geographically large and heavily populated colonies scattered across the planet.²⁶ The UK also controlled large colonial territories at the time of its subsequent accession.²⁷

The majority of the overseas territories subject to the ‘Association Regime’ were acquired by a European power centuries prior to the relevant treaties by means of the forced subjugation of indigenous peoples and transfers in colonial control.²⁸ A few overseas territories were not populated at the time of Europeans settlement.²⁹ The legal and economic relationships between many of the overseas territories and their controlling Member States were also forged by the legal systems needed to enforce and regulate colonial economic systems, and in particular, those based on slavery and the mass transportation of non-white indentured labour to the then colonies in the 19thC.³⁰ More recently those relationships have been influenced by the historical desire of at least some Member States to restrict the migration of their non-white subjects.³¹

The current legal relationships of the EU as a legal entity with the overseas territories of the current EU Member States is also very much a function of historical colonial policies. Of particular import is the fact that the current scope of the application of the EU *acquis* in the overseas territories differs significantly among the geographically diverse overseas territories in a manner that is clearly a function of historical colonial policies.³²

²⁶ As observed by Fawcett, the geographic separateness ought not be confused with constitutional plurality. Discussed in Chapter 3. Fawcett, JES, ‘Treaty Relations of the British Overseas Territories’ (1949) 26 BYIL pp. 86-107.cett JES

²⁷ Denmark: The Faroe Islands; UK: 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, Bermuda.

²⁸ Some OCTs, such as the British Virgin Islands (BVI), where there was an indigenous Amerindian population, were originally acquired by one European power, but then passed to the control of another European power. In 1648 a permanent settlement was established by the Dutch in Tortola which was in 1672 captured by the English who, in 1680, also annexed Anegada and Virgin Gorda, forming the BVI. In 1733, Denmark gained control over Saint Thomas, Saint John and Saint Croix which was later, in 1917, sold to the United States (US) for US\$25 million, thus forming the US Virgin Islands. Dookhan, I., *A History of the British Virgin Islands, 1672 to 1970* (1975) (Barbados: Caribbean Universities Press).

²⁹ By way of examples, the Cayman Islands, Ascension Island and the Island of St. Helena.

³⁰ Lawson, G., & Seidman, G., *The Constitution of Empire: Territorial Expansion and American Legal History* (2004) New Haven, CN: Yale University Press; *Bailey v Bailey* (1884) 13 QBD 855 at 859 in Bennion on Statutory Interpretation/Division One Interpreter, Instrument and Enactment/Part I The Interpreter/Introduction to Part I, fn 259.

³¹ Cesarani, D., ‘The Changing Character of Citizenship and Nationality in Britain’ in Cesarani, D., & Fulbrook, M., (eds.) *Citizenship, Nationality, and Migration in Europe* (1996) London: Routledge. p. 57. The 1914 British Nationality Act and the 1962 and 1968 Commonwealth Immigration Acts were designed to restrict the rights of non-white British citizens to enter the UK. The sentiments underlying these Acts are consistent with the UK having no status for overseas territories equivalent to OR status and with no UK-OCT having OR status. Following the transfer of sovereignty of Hong Kong 1997, the UK restored the immigration rights of citizens of its overseas territories by means of the Overseas Territories Act 2002.

³² Geographic scope: The geographic scope of the application of the 1951 Treaty of Paris, forming the European Coal and Steel Community (ECSC), not only excluded the overseas territories controlled by the signatories, but was expressly restricted to the ‘European territory of the Member States’. In contrast, the Euratom Treaty, which was signed in 1957 extended the geographical scope of its applicability to the overseas territories and provided as follows: ‘*Save as otherwise provided, this Treaty shall apply to European Territories and to non-European Territories under their jurisdiction.*’ (emphasis added). Discussed below in the Annex of this paper.

From a current static perspective, the differentiated application of EU Law to a particular overseas territory of a Member State is largely based on the substantial rule underlying the status granted to that given territory in EU law and the general rules on the territorial scope of European law.³³ However, the EU's designation of a specific status for an overseas territory is very much a 'path-dependant' process,³⁴ a process that is a function of the colonial legal history and the colonial socio-economic history of the relevant Member State and its overseas territory.

In the context of the UK-OCTs, at the time of the UK's accession to the EEC, the UK had relatively recently terminated equality of citizenship for non-white British Citizens living in its overseas territories.³⁵ At that juncture, the UK no more perceived its overseas territories as integrated into the UK, or as 'Outermost Regions' of the UK, than it thought that non-white British citizens born and raised in those overseas territories ought to be afforded the same rights as British citizens born and raised in London.³⁶ As a consequence, at the time of UK accession to the EEC, the EEC incorporated those prejudices and the limited application of the EU *acquis* into the relationship between its UK-OCTs and what is now the EU. The views of the UK in the late 1960's and early 1970's remain frozen in time in the relationship of the EU with the UK-OCTs.

Territorial scope of the EU *acquis* and Brexit

The EU, being neither a state nor an international organisation in the classical sense, does not have a geographic territory of its own.³⁷ Rather, the concept of EU territoriality, in relation to the scope the EU *acquis*, is derived from and defined by the extent of the territory of each of the Member States that the Member States agree by unanimity would be subject to the EU *acquis* from time to time.³⁸ Thus, geographic areas of a Member State for purposes of its domestic law may be excluded by unanimous agreement of the Member States from the

³³ The statuses granted include: The Outermost Regions (ORs), the Overseas Countries and Territories (OCTs) and, the African Caribbean Pacific Countries (ACP). Discussed in further detail below.

³⁴ WB Arthur, *Increasing Returns and Path Dependence in The Economy* (University of Michigan Press, Ann Arbor 1994) 33; B Reszat, 'Evolution, Spatial Self-Organisation' (2000) Hamberg Institute of International Economics HWWA Discussion Paper 93 <<http://opus.zbw-kiel.de/volltexte/2003/690/pdf/93.pdf>> accessed 12 February 2008; MP Hampton and J Christensen, 'Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-configuration of Global Finance' (2002) 30 *World Development* 9.

³⁵ Cesarani (note 31).

³⁶ Powell, E., 'Rivers of Blood' <<http://www.toqonline.com/archives/v1n1/TOQv1n1Powell.pdf>> accessed 14 Jan 2017. By way of example the 1968 speech by Enoch Powell criticised the proposed Commonwealth immigration and anti-discrimination legislation.

³⁷ Ziller, J., 'The European Union and the Territorial Scope of European Territories' (2007) 38 *Victoria University of Wellington Law Review* 1, <<http://www.austlii.edu.au/nz/journals/VUWLawRw/2007/6.html>> accessed 14 Dec 2016; Kochenov, D., 'Substantive and Procedural Issues in the Application of European Law in the Overseas Possessions of European Union Member States' (2008-9) 17 *Michigan State Journal of International Law* 2, pp. 195-288.

³⁸ Shaw, M. *International Law* (2008) Cambridge: CUP, p. 487-520

<<http://jpkc.fudan.edu.cn/picture/article/460/05/56/944404884db8857880997b8500b1/694d8cb6-b013-42a3-837a-2298e170ed58.pdf>> accessed 17 Dec 2016.

application of some or all of EU law.³⁹ This possibility of disapplication of EU law applies to geographic areas of Member States both within continental Europe as well as outside continental Europe.⁴⁰

This selective disapplication of EU treaty provisions in relation to agreed geographic territories is an exception to the general rules applicable to treaty interpretation. As observed by Kapteyn, ‘[U]nder general rules of international law it is clear that the Treaty is binding in relation to all the territory, including non-European parts falling under the sovereignty of the Parties, at least in so far as the Treaty does not provide for exceptions or otherwise make special provision.’⁴¹ Accordingly, under the general rules applicable to international treaties the territorial scope the EU *acquis* ought to cover all of the territory, *ratione loci*, including the ships and aircraft under the rules of the flag,⁴² of the Member State as well as all the citizens, *ratione personae*, of the Member States unless EU law provides for the contrary.⁴³

Notwithstanding the established interpretive rules of international law and the fact that the pre-Lisbon Treaties were silent with regard to any principle of ‘non-application’ of the EU *acquis*, a general practice of differentiated application of the EU *acquis* arose and persisted in relation to the overseas territories. This differentiated practice was in large part dependent on the interpretation of the constitutional relationship between each overseas territory and the relevant Member State as well as political and economic considerations.

The position in EU law of differentiated application of the EU *acquis* was clarified to an extent by the ECJ decision in *Hansen*.⁴⁴ The *Hansen* decision laid out a rationale for the differentiated application of EU law in the overseas territories, the ECJ noting that the territory of a Member State, ‘is primarily defined by reference to the [national] Constitution.’⁴⁵ The ECJ also indicated an expectation that in this context Member States were expected to apply a ‘unitary

³⁹ Mount Athos, commonly referred to as the ‘Holy Mountain’ with monastic traditions that date back to 800AD, is part of the Greek Member State but outside the Schengen Area. A declaration attached to the Greek accession treaty states; ‘*The Union respects the special status of Mount Athos under the Hellenic Constitution on grounds of ‘a spiritual and religious nature’.* Doe, N., ‘Towards a “Common Law” on Religion in the European Union’ (2009) 37 Religion State and Society 1-2. Taft, R. ‘Mount Athos: A Late Chapter in the History of the Byzantine Rite’ (1998) 42 *Dumbarton Oak Papers* pp. 179-194.

⁴⁰ *Ibid.* Within continental Europe, Mount Athos serves as one example.

⁴¹ Kapteyn, P.J.G. & VerLoren van Themaat, P., *Introduction to the Law of the European Communities: From Maastricht to Amsterdam*, (1998) Kluwer Law: London, p. 93.

⁴² Vaughan, D., (ed), ‘Vaughan: Law of the European Communities Service’, Butterworths Legal Services, Issue 34, 1990, para 643.

⁴³ *Kochenov* (note 37).

⁴⁴ Case C-148/77, *H. Hansen Jun. & O.C. Balle GmbH & Co. v. Hauptzollamt de Flensburg*, 1978 E.C.R. 1787, para. 10.

⁴⁵ *Ibid.*

concept' of territory within their domestic legislation so as to ensure the same functioning of EU *acquis*, albeit in different parts of the territory of the Member States.⁴⁶

Whether, and if so how, *Hansen* will inform the Brexit process is unclear. None of the EU institutions, the UK, nor indeed the UK-OCTs operate on the basis that the UK-OCTs form part of the territory to which the EU *acquis* applies. However, in view of the changes to the rights of EU citizens living in the UK-OCTs that Brexit may bring about, arguably the *acquis* ought to apply in relation to that Brexit process. The legal history of differentiated application of the *acquis* provides further insight in this regard.

Differentiated application of EU *acquis*

The founding treaties were negotiated during a period of time when the degree of economic development of the overseas territories as well as the level of incorporation into the legal and political structure of the *Herren der Verträge* varied significantly. As a result of France's strong influence in the drafting of those early Treaties,⁴⁷ the Treaties did not award identical status to all parts of the overseas territories of the founding Member States. The subsequent evolution of greater and lesser integration of the territories of individual Member States constitute a series of divergent path-dependent processes

It is beyond the scope of this paper to provide a complete account of the legal history that shaped the current legal framework that governs the relationship between the EU and the overseas territories, however highlights of fundamental import are provided in the attached Annex.⁴⁸ What emerges as particularly noteworthy among those highlights is that France, and its constitutional relationship with its overseas territories, played a seminal role in the establishment of the differentiated statuses of the overseas territories.⁴⁹

At the time of the negotiation of the founding Treaties, France exercised sovereignty over a vast colonial empire of overseas territories, many of which were located in Africa.⁵⁰ For purposes of the administration of its colonial empire, France had established a tiered

⁴⁶ Case C-34/79, *Regina v. Henn*, 1979 E.C.R. 3795, para. 16.

⁴⁷ Discussed below in the Annex of this paper.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ These included: 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) in *Kochenov* (note 1) p. 685.

constitutional relationship with its overseas territories which differentiated between those that were fully integrated into the national law, *départements d'outre-mer* (DOMs),⁵¹ and those with a greater degree of internal self-governance that France understood to be likely to seek political independence in the then near future, *collectivité d'outre-mer* (COMs). Under French law the COMs were afforded greater autonomy in relation to their internal affairs.

France sought to translate its colonial administrative regime into the EU treaty framework. It insisted that the French DOMs, and Algeria,⁵² were included as French territory in the Treaty. France further proposed that the vast natural resources of the African COMs,⁵³ could be secured for its European project,⁵⁴ by means of a scheme entitled EurAfrica.⁵⁵ In addition, France proposed that access to the Common Market be extended to the other overseas territories to the benefit of the founding states.⁵⁶ These economic and geo-political ambitions provided the impetus and much of the initial framework for the 'Association Regime',⁵⁷ and the status in EU law of the Overseas Countries and Territories.⁵⁸

OCT status was subsequently granted to all the overseas territories of the founding Member States that were not fully integrated into the legal and constitutional structure of their relevant Member States at the time of the signing of the founding Treaties.⁵⁹

⁵¹ There were four DOMs: The French West Indies (Guadeloupe & Martinique), French Guyana, and Réunion.

⁵² The four DOMs and Algeria were legally inseparable from France and were included into the customs territory of the Republic. Puissochet, P., 'Aux confins de la Communauté européenne: les régions ultrapériphériques', in Inglesias, G.C.R., & Due, O., et al., *Mélanges en Hommage à Fernand Schockweiler* (1999) Baden Baden: Nomos, p. 491; Custos, D., 'New Caledonia, a Case of Shared Sovereignty within the French Republic: Appearance or Reality?' 13 EUR. Pub. L. 97 (2007); *Kochenov* (note 1), p. 736.

⁵³ Raw material and natural resources. Discussed below in the Annex of this paper.

⁵⁴ The term European Project in this context represents the nascent European Union and is discussed below in the Annex of this paper.

⁵⁵ EurAfrica is discussed below in the Annex of this paper.

⁵⁶ Ziller, J., 'Flexibility in the Geographic Scope of EU law: Diversity and Differentiation in the Application of Substantive Law on the Member States Territories', in de Búrca, G., and Scott, J., (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* Oxford: Hart, 2000, p. 119; Custos, D., 'Implications of the European Integration for the Overseas' in Kochenov, D. (ed), 'EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories and Territories Sui Generis' (2011) Kluwer Law Int'l, the Netherlands, Chapter, 3; Berman, A., '1998 and Beyond in New Caledonia: At Freedom's Gate?', 7 Pac Rim Law & Pol'y Jrl; Berman, A., 'Future Kanak Independence in New Caledonia: Reality or Illusion?', (1998) 34 Stan J. Int'l Law.

⁵⁷ The 'Association Regime,' in conjunction with the European Development Fund (EDF), was intended to secure both the political and economic development objectives of the European project, as well as European aspirations for the OCTs. Spaak, former Belgian Prime Minister and one of the 'founding fathers of European Union', considered the formation of the 'association regime' and EDF to be a '*great political decision ... [and] ... a great forward looking policy.*' Spaak, P.H., 'L'Alliance occidentale et le destin de l'Europe' 3 Mar et Mercure, 1957, 7-9 in *Custos*, (note 56).

⁵⁸ *Custos*, (note 56).

⁵⁹ This policy was extended to the UK and Denmark upon their accession to the EU in 1973. The OCT status was initially granted to:

- the Italian protectorate of Somalia;
- the Belgian territories of the Congo and Rwanda-Burundi;
- 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, Madagascar and Côte Française des Somalis.
- French Polynesia (Etablissements français de l'Océanie); Wallis-and-Futuna.; New Caledonia and Dependencies, French Southern and Antarctic Territories and St. Pierre-et-Miquelon.

Ziller, J., 'The European Union and Overseas Territories', (2005) 113 *Pouvoirs*; Ziller, J., 'Les outre-mers face à l'intégration européenne et à la mondialisation—L'association des pays et territoires d'outre-mer à la Communauté européenne', (2002) 101 *Revue Française d'Administration Publiques* 127.

Differentiated status as a source of legal and commercial uncertainty

The legal form of any separation agreement between the UK and the EU, and therefore indirectly the effect of Brexit on the UK-OCTs, will inevitably be shaped by perspectives of the UK's and the EU's of their own interests. Those perspectives will likely be shaped by their understandings of the historical relationships between legal and commercial certainty vis-à-vis the UK-OCTs. To the extent that the UK-OCTs are considered at all, history would suggest that such consideration would include, if not be dominated by, how the UK-OCTs will best serve those interests post-Brexit.

The legal nexus between the founding Member States and the African continent, created by the assignment of OCT status to African colonies, embodied the economic promise of an extension of the European project to the resources of the overseas territories and to dreams of Eurafrika. However, the advent of the political independence of many of the African OCTs in the 1960s,⁶⁰ prompted the founding Member States to devise a salvage strategy in an effort to maintain a legal relationship with the newly independent resource rich African countries.⁶¹ That strategy was given effect in the form of the African Caribbean and Pacific Countries (ACP) agreements.⁶²

Both the EurAfrica project and the ACP agreements may be viewed as efforts to enhance the viability of the European market as well as the viability of overseas resource production. Markets seeks commercial certainty,⁶³ and economic development is in large part based on

⁶⁰ The decolonization of African countries in the 1960s reduced the number of OCTs from 25 to 9.

- France – (4): Saint Pierre and Miquelon, French Settlements in Oceania, Southern and Antarctic Territories, and New Caledonia and dependencies
- Belgium – (2): The Belgian Congo (Democratic Republic of the Congo) and Rwanda-Burundi.
- Italy – (1): The trust territory of Somaliland under Italian administration.
- The Kingdom of the Netherlands – (2): The Netherlands New Guinea and the Netherland Antilles (the Netherland Antilles became an OCT, by way of the Brussels Convention signed on 13 Nov 1962, in force since 1 Oct 1964 – 64/533/EEC [1964])

⁶¹ The 'Eurafrika' vision for the Overseas focused on an intercontinental linkage, in the form of an association, that would ensure that recipient 'territories would remain within the sphere of influence of the West'. This position was largely based on development gap between Europe and Africa and the ensuing potential economic benefits that would to Europe. Spaak, P-H., 'L'Alliance occidentale et le destin de l'Europe', 3 Mars et Mercure, 1957, 7-9 in *Custos*, (note 56).

⁶² The Yaoundé Convention was signed with 18 of the newly independent African countries and Malagasy. Convention d'association entre la Communauté économique européenne et les Etats africains et malgache associés à cette Communauté (First Yaoundé Convention), Yaoundé, 20 Jul 1963.

⁶³ Legal and commercial certainty are important elements in all transactions and is reflected in various contract narratives including: freedom of contract, the enforcement of contractual terms, and the limitation of non-contractual duties. Justice Rix stated; 'Unless the banking commitment can be insulated from disputes between merchants, international trade would become impossible.' *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, 203 (Rix J); *United City Merchants (Investments) Ltd and Glass Fibres and Equipment Ltd v Royal Bank of Canada* [1983] 1 AC 168 (HL) 184 (Lord Diplock); *Try as I may, I can see no ground for sympathy with the first defendant in being required to pay for the losses which he incurred through unsuccessful speculation in the commodity market.* *SCF Finance Co Ltd v Masri* [1986] 2 Lloyd's Rep 366 (CA) 369 (Slade LJ); J Beatson and D Friedmann, 'Introduction: From "Classical" to "Modern" Contract Law' in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford 1995) 8. *'The rejection of good faith intervention in the individual case in international commodity sales owes much to the perceived*

commercial and legal certainty.⁶⁴ In the case of the overseas territories, this commercial and legal certainty was and is dependent at least in part on an element of trust in the stability of both EU institutions and the relationships of the overseas territories with the EU, specifically stability in relation to long term market access.⁶⁵

That is not to say that the treaties provide the OCTs with either absolute legal certainty or absolute commercial certainty. In many regards the OCTs are treated as third countries, a treatment that creates uncertainty. Indeed, the ECJ has drawn a parallel between the OAD and agreements with third countries and applied case law on agreements with third countries as analogous when addressing cases based on the OAD.⁶⁶

Further, a degree of legal and therefore commercial uncertainty exists with regard to the non-tariff barriers imposed on OCTs relative to that impose on third countries which enjoy more favourable tax treatment.⁶⁷ Specifically, there is an absence of certainty on whether Article 63 TFEU which guarantees free movement of capital with third countries can be extended to OCTs. Tax-driven structure resulting in the movement of capital between a Member State and an OCT are taxed at a less favourable rate than comparable capital movements within the internal EU market despite Art 199 TFEU. This gives rise to legal issues that the unfavourable tax treatment is in contravention of the free movement of capital under the OAD and Art 63 TFEU.⁶⁸

A new paradigm – will the UK-OCTs be ‘assets’ of the EU post-Brexit

It is likely that the UK-OCT’s fate arising from any separation agreement between the UK and the EU will be determined by whether the UK-OCTs are viewed as assets or liabilities.

need to ensure certainty in a systemic sense for the trade’; Salomon v Salomon [1897] AC 22 (HL) 53 (Lord Macnaghten); Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] QB 159 (CA), 176 (Geoffrey Lane LJ).

⁶⁴ Xanthaki, H., ‘The Problem of Quality in EU Legislation: What on Earth is Really Wrong?’(2001) 38 CMLR 3 pp. 651-676; Xanthaki, H., ‘Effective Judicial Protection at the National Level: The current utopia of procedural hurdles. (2004) EJLR. <<https://core.ac.uk/download/pdf/73603.pdf>> accessed 30 Dec 2016.

⁶⁵ Lange, B., ‘The Emotional Dimension in Legal regulation in New Directions’ in S Picciotto and D Campbell (eds), *New Directions in Regulatory Theory* (Blackwell, Oxford 2002) 197. If that trust is undermined, it is foreseeable that a relevant market may migrate to a jurisdiction that provides greater commercial certainty, resulting in any previously acquired position of market dominance being lost.

⁶⁶ Joined cases C-100 & 101/89 Peter Kaefer and Andréa Procacci v French State [1990] ECR I-4647, para 23-24.

⁶⁷ Geursen, W., ‘The Free Movement of Capital with the OCT’ in ‘Kochenov, D. (ed) EU Law of the Overseas: Outermost Regions, Associated Countries and Territories, Territories Sui Generis (2011) The Netherlands: Kluwer Law, Chapter 10.

⁶⁸ *Ibid.*

The original primary focus of the EU's relationship with the OCTs was on trade and the maintenance of the historical legal relationship between the Member States and the overseas territories. Following the failure of the EurAfrica project, the EU's perspective of the remaining OCTs was, until recently,⁶⁹ characterised the perception of the overseas territories as net-payers.⁷⁰ As suggested by Custos, this could be seen as a regrettable lack of vision in light of the potential geostrategic benefits the scattered OCTs offered and the long-term political ambitions of the EU.⁷¹ The UK-OCTs are relatively prosperous and currently receive very little 'hard' development aid from the EU or the UK. They also offer 'soft' benefits to both the EU and the UK as has been recently acknowledged.

Geostrategic Advantages

In a 2009 paper the Commission identified the following opportunities created by the OCTs; outposts of the European Union in the world; ideal location for experimentation to combat the effects of climate change; remarkable biodiversity and wealth of marine ecosystems; and scientific portals for their geographical areas.⁷²

Bio-diversity and Marine Territory

The UK-OCTs provide geostrategically-dispersed locations that contribute to both biodiversity and maritime territory. By way of example, the UK-OCTs account for 94% of the know endemic British species and 303 of globally threatened species.⁷³ This may not be widely recognised as the contribution of the OCTs is not include in the Natura 2000 Network, nor were their endangered species included in the listing under the Bird Directive or the Habitat Directive.⁷⁴ Notwithstanding these omissions, in its 2006 communication,⁷⁵ the Commission highlighted, 'the international importance for biodiversity' of both the ORs and the OCTs⁷⁶

⁶⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Elements for a new partnership between the EU and the overseas countries and territories (OCTs)' COM (2009) 623 final.

⁷⁰ Custos, (note 56).

⁷¹ *Ibid.* p. 111

⁷² COM (2009) 623 final. (note 69).

⁷³ European Commission, 'Biodiversity and Ecosystem services in territories of European Overseas, 'Caribbean'', <<http://ec.europa.eu/environment/nature/biodiversity/best/pdf/hubfactsheet-caribbean.pdf>> accessed 12 Jan 2017

⁷⁴ European Commission, 'Natura 2000' <http://ec.europa.eu/environment/nature/natura2000/index_en.htm> accessed 12 Jan 2017; European Commission, The Bird Directive <http://ec.europa.eu/environment/nature/legislation/birdsdirective/index_en.htm> accessed 12 Jan 2017; European Commission, The Habitats Directive <http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm> accessed 12 Jan 2017.

⁷⁵ European Commission, 'Halting the loss of biodiversity by Sustaining service for human well-being' COM (2006) 216 final.

⁷⁶ *ibid.*, p.7. 'The outermost regions and overseas countries and territories of Member States are of international importance for biodiversity but most of these areas are not covered by the nature directives.' (Emphasis added) <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0216&from=EN>> accessed 12 Jan 2017.

and called for a new policy that would, *'recognise our interdependence with nature and the need for a new balance between development and the conservation of the natural world.'*⁷⁷

Regional cooperation

The Commission also identified the aim of strengthening regional integration: *'the reinforcement of regional cooperation and integration, strengthening of the role that OCTs could play as outposts of the EU in their respective regions.'*⁷⁸ In addition, the Commission recognised the importance of the geographic positions of its OCTs as; *'a privileged channel to promote the EU's values and standards on as wide a geographical basis as possible.'*

Trade

The apparent recent acceptance of the principle that trade with developing countries should not be discriminatory in conjunction with the ability to enforce this principle within the WTO, may have shifted the EU's development policy to one of equity among developing countries and one that is based on principle rather than history.⁷⁹ The Commission has also recently focused on the mutual advantage to be gained by assisting the OCTs in upgrading and aligning their legislation with EU standards; *'upgrading local legislation as well as assisting operators to adjust to the resulting new framework would reduce regulatory heterogeneity and non-tariff barriers, standardise customs procedures and facilitate regional and international trade, including with the EU.'*

Legal convergence

The Commission also noted that; *'In addition to the promotion of OCTs as centres of excellence, the future association should encourage and assist all OCTs (financially or otherwise) to 'upgrade' local legislation in relevant policy areas to the level of the Community acquis, where that is not yet the case. Such upgrading should always be voluntary.'*⁸⁰ In effect, the upgrading of local legislation could transform OCTs into norm-setting 'examples' of 'EU values and standards' in their regions, and thus establish a further alignment of interest between the EU and the OCTs.

⁷⁷ COM (2006) 216 final (note 75).

⁷⁷ *ibid*, p.7.

⁷⁸ COM (2009) 623 final (note 69), p.4.

⁷⁹ Bartels, L., 'The Trade and Development Policy of the European Union' (2007) 18 Eur J of Int Law 4.

⁸⁰ COM (2009) 623 final (note 69), p.4.

In this regard it is noteworthy that any such ‘voluntary’ adoption of EU rules and standards by OCTs would, in effect facilitate the diffusion of EU law without the need for EU legislative procedures. In turn, the spread of the ‘simulated’ EU *acquis* in the OCTs would align with the EU’s interest in having OCTs serve as promoters of EU values and standards.

Specifically, the EU law applicable in the OCTs would emanate from two different sources; the first being the EU law applicable in the OCTs that is formulated according to regular EU legislative procedures, and the second being a locally enacted simile of EU law in the OCT formulated to be substantively identical or similar to the EU law proper, although legally distinct from it.⁸¹

It follows that in the EU’s quest for the legal globalization of EU rules and standards, the OCTs could play a pivotal role in the legal networks among norm producers to ensure the effective expansion of the EU law. Further, the looming issue of the need for greater clarity on the territorial criterion of the applicability of EU law would be minimized.⁸² In this context the EU may view the UK-OCT in a positive light for continued future positive relations.

The importance to the UK-OCTs of identifying alignments of mutual interests

History has shown that absent the recognition of an alignment of interest between the parties, the termination of a relationship such as France’s relationships with Haiti,⁸³ and Algeria,⁸⁴ can have adverse consequences for the weaker party. Accordingly, it is of paramount importance that the UK, as well as the UK-OCTs, endeavour to identify, inform and education themselves and their EU counterparts on their mutual interests and benefits, in order to promote a positive and realistic agenda in the exit negotiation process.

⁸¹ *Custos*, (note 56).

⁸² *ibid.*

⁸³ In return for recognising its independence in 1825, France extract a commitment of 150 million gold francs from Haiti which took 122 years to repay. A helpful perspective can be gleaned from the 1803 selling price of the Louisiana territory of 60 million gold franc, an area that was 74 times the size of Haiti. Macintyre, B., ‘The Fault Line in Haiti runs straight to France’ (21 Jan 2010) *The Times* . <<http://sahayaselvam.org/wp-content/uploads/2012/05/Haiti.pdf>> p. 15.

⁸⁴ There has been much academic scholarship focused on the Algerian war of independence. Connelly, M., ‘Rethinking the Cold War and Decolonization: The Grand Strategy of the Algerian War for Independence’ (2001) 33 *International Journal of Middle East Studies* 2; Alexander, M. & Keiger, J.F.V., ‘France and the Algerian War: Strategy Operations and diplomacy’ (2002) 25 *Journal of Strategic Studies* 2: ‘The Erosion of Colonial Trade Links after Independence’ (2011) 81 *Journal of International Economics* 1.

CHAPTER 3 - THE LEGAL STRUCTURE OF THE EU IN RELATION TO THE OCTS

The legal relationship between the EU and the OCTs

The legal relationship between the EU and each OCT is based on EU law.⁸⁵ A principal source of EU law in this regard is set out in Part Four TFEU entitled ‘Association of overseas countries and territories’. As noted in Chapter 2, that legal relationship is also heavily influenced by the legal history and current domestic law of the Member State exercising sovereignty over that OCT.⁸⁶

In addition to the Treaty of Lisbon (ToL), and the Overseas Association Decision (OAD),⁸⁷ the current legal relationship between the EU and the OCTs is also based on the case law from matters arising before the European Court of Justice (ECJ) as well as, in accordance with Art 203,⁸⁸ the recent communications of the Commission.⁸⁹ Taken together these sources of EU law comprise a complex web of legal factors that must be considered in the likely exit of the UK and the UK-OCTs from their respective relationships with the EU. As noted by Kochenov, a proper understanding of that relationship and what it means in practice requires some understanding of how that legal basis has evolved.⁹⁰

⁸⁵ In the legal order of the EU, the Treaties and the general principles are at the apex of the hierarchy, form the primary legislation of the EU. Secondary legislation is the next level down in the hierarchy and is made by the EU Institutions, within the limits of their competence. Article 288 TFEU provides that legal acts of the EU are; regulations, directives, decisions, recommendations and opinions (ie secondary legislation). The principle of conferral underpins the limits of the EU’s competencies, and any competencies not conferred upon the EU in the Treaties remain with the Member States. As a general rule, secondary legislation is only valid if it is consistent with primary legislation and acts and agreements which have precedence over it.

⁸⁶ By way of example, in the 2003 case, the European Court made it abundantly clear that UK/Cayman Islands constitutional arrangements were outside the competence of the Court and the Commission. See: Case T-85/03 R Government of the Cayman Islands, v Commission of the European Communities, the Court held; ‘*this consequence [of the Savings Direct having effect in the Cayman Islands], if it comes to pass, will not flow legally from the directive itself. Whether any such measures would be valid would appear to depend entirely on the constitutional arrangements applicable in fiscal matters between the United Kingdom and the Cayman Islands. This is matter which falls entirely outside the competence not only of the Commission but also of the Community judicature.*’ (emphasis added).

⁸⁷ OAD (note 7).

⁸⁸ Art 203 TFEU provides: 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.

⁸⁹ Commission of the European Communities, ‘Green Paper: Future Relations between the EU and the Overseas Countries and Territories’, COM(2008) 383 final, <https://ec.europa.eu/europeaid/sites/devco/files/communication-green-paper-relations-eu-oct-com2008383-20080625_en.pdf> accessed 12 Dec 2016; COM (2009) 623 final (note 69).

⁹⁰ Kochenov (note 22).

The Origins of EU law applicable to the UK-OCTs

The populated UK-OCTs that are constitutionally permitted a degree of internal self-government were either acquired by settlement,⁹¹ or they were conquered or ceded to the Crown and administered by the Crown under its prerogative powers,⁹² or under a specific Act of Parliament.⁹³ For purposes of this paper, only the populated UK-OCTs that have a form of internal self-government are considered.

As noted in Chapter 2, the status assigned to an overseas territory of a Member States was notionally based in large part on the degree of integration of that territory vis-à-vis the legal structure of the Member State.⁹⁴ However, EU law provides little clarity in relation to the metrics used to determine the relevant degree of integration for each status and no means by which uniformity of classification could be determined. By all appearances, the initial status assigned to an overseas territory was that determined by the states exercising sovereignty over their colonies at the time each such state became part of the European Community.

The legal relationships between the UK and its permanently populated OCTs are governed by UK domestic law.⁹⁵ The UK permits those OCTs a degree of self-determination on matters pertaining to the internal affairs of the OCT's, but the UK-OCTs remain dependent on the UK for the conduct of all of their international relations.⁹⁶ In general, treaty commitments made by the United Kingdom are not enforceable in the domestic courts of the UK. This includes treaty commitments made by the UK in relation to the UK-OCTs.⁹⁷

⁹¹ *Campbell v. Hall* (774), 20 S.T. 239.

⁹² It was held that it was possible and lawful that Malta had, by itself during the Napoleonic wars, ceded and taken authority for themselves. *Sammut v. Strickland*, [1938] A.C. 678, at p. 697

⁹³ Jessup, *A Modern Law of Nations*, p. 32. The British Settlements Act 1887 provided that in any settlement not acquired by conquest or cession and not under the jurisdiction of a legislature, the Crown may establish laws, institutions, and courts, for the peace, order, and good government of the settlement, and all or any of these powers may be delegated to three or more persons within the settlement. By way of example, the British Antarctic Territory is an UK-OCT that does not have internal self-government but rather is administered by the Crown in accordance with the provisions of the British Settlements Act.

⁹⁴ See: section on Differentiated application of EU *acquis* (47) and further discussion in the Annex of this paper.

⁹⁵ The supremacy of Parliament may be gleaned from its enactment of statutes that have general application in the UK and its overseas territories, and which in the event of any conflict is in supreme over the acts of any colonial legislation. Eg. Foreign Enlistment Act, 1870; Extradition Acts, 1870-1932; Territorial Waters Jurisdiction Act, 1878; Geneva Convention Act, 1911; Copyright Act, 1911; and Air Navigation Act, 1920. Similarly, the Colonial Laws Validity Act, 1865, s. 2, provides: '*Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.*' (emphasis added).

⁹⁶ The Interpretation Act, 1889, s.18(2) and (3). < http://www.legislation.gov.uk/ukpga/1889/63/pdfs/ukpga_18890063_en.pdf> accessed 17 Dec 2016.

⁹⁷ A convention has evolved where either a 'colonial application clause' is inserted into bilateral treaties or the UK does not accept treaties unless it has been made clear that; firstly, its acceptance does not extend the treaty *ipso facto* to its overseas territories, and secondly, that any extension of the treaty to those overseas territories shall be accepted by the parties to the treaty at a later time, when, after consultation between the UK and those overseas territories, the UK's acceptance on their behalf is necessary. *Fawcett* (note 26) pp. 86-107.

The legal relationships between the EU and the UK-OCTs as set out in Part Four of the Treaties have a very different legal basis when compared with the relationship between the UK and its OCTs.⁹⁸ The legal form adopted in respect of these relationships, as well as the relationships between the EU and the other overseas territories of the Member States, did not arise *de novo*. Rather, the language of Part Four borrows from the de-colonisation language incorporated into Chapter XI of the UN Charter in 1945, which the founding members all subscribed to.

Chapter XI of the United Nations Charter, entitled ‘Declarations Regarding Non-Self-Governing Territories’ lays down the overarching principle of government for ‘territories whose peoples have not yet attained a full measure of self-government...’;

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, ..’⁹⁹ (emphasis added)

Art 131 of the 1957 Treaty of Rome (ToR), used similar, although less imperative language, to describe the obligations of the Community (rather than individual Member States) to the overseas territories;

The Member States hereby agree to bring into association with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands. These countries and territories, hereinafter referred to as “the countries and territories”, are listed in Annex IV to this Treaty.

⁹⁸ The UK- OCTs have no direct input in any of the EU legislative or decision making processes. However, in matters that relate to a question regarding the provisions of the OAD, the UK-OCTs would appear to have standing to bring such matters to the Court of Justice of the European Union. Similarly, in matters of Human Rights, the nationals of UK-OCTs have the right to have their case heard at the European Court of Human Rights (ECHR). Case T-85/03 R Government of the Cayman Islands, v Commission of the European Communities.

⁹⁹ Article 73 of Chapter XI of The Charter of the United Nations <<http://www.un.org/en/sections/un-charter/chapter-xi/>> accessed 12 Jan 2017. The Charter of the United Nations was signed on 26 June 1945, in San Francisco, and came into force on 24 October 1945.

The purpose of this 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 Community as a whole.

In conformity with the principles stated in the Preamble to this Treaty, this association shall in the first place permit the furthering of the interests and prosperity of the inhabitants of these countries and territories in such a manner as to lead them to the economic, social and cultural development which they expect. (emphasis added)

That language has been incorporated, with minor changes, in each iteration of the relevant treaties.¹⁰⁰

There has been limited academic debate, much of which is beyond the scope of this paper, on whether sections of the EU treaties, other than the relevant sections of Part Four, are applicable to OCTs.¹⁰¹ The position taken by the courts on the specific issues that have come before them has been that Part Four TFEU is the only part of the EU Treaties that is applicable to the OCTs as *lex specialis*.¹⁰² In contrast, several academics take the position that while Part Four TFEU undoubtedly applies to the OCTs as *lex specialis*, other specific parts of the treaties also apply to the OCTs and therefore that a *lex generalis* approach to EU law of the OCTs is also required.¹⁰³ The implications of this latter approach are discussed in further detail below.¹⁰⁴

Brexit in the context of the evolving policy bases of the OAD

The implications of Brexit for the UK-OCTs may be viewed in the context of the trajectory of the perceived ‘value’ of the OCTs to the EU. The recent shift in the focus of the most recent OAD serves to illustrate this point.

¹⁰⁰ Discussed below. See (notes 105 & 110).

¹⁰¹ Ziller (note 37); Custos, (note 56); Kochenov (note 37).

¹⁰² Case C-17/98 Emesa Sugar (free zone) NV v Aruba [2000] ECR I-675; Case C-106/97 Dutch Antilles Dairy Industry Inc. and Verenigde Douane-Agenten BV v Rijksdienst voor de keuring van de Vee en Vlees [1999] ECR I-5983; Case C-181/97 A. J. van der Kooy v Staatssecretaris van Financiën [1999] ECR I-483.

¹⁰³ Blockmans, S., ‘Between the Devil and the Deep Blue Sea? Conflicts in External Action Pursued by OCTs and the EU’, in Kochenov, D. (Ed) *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (2011) Kluwer Law Int’l, The Netherlands; Ziller, J., *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in Kochenov, D. (Ed) *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (2011) Kluwer Law Int’l, The Netherlands, (Chapter 2); Custos, (note 56).

¹⁰⁴ See discussion on Art 48 TEU (note 161).

There have been a total of eight OADs in the period from 1957 to the present,¹⁰⁵ with current practice being to revise the OAD approximately every ten years. The current and eighth OAD, came into effect on 1 January 2014 and will expire in 2024 as provided under Art. 203 TFEU.¹⁰⁶

Each OAD sets out a specific time-limited operational framework that governs specific aspects of the application of EU law with regard to the OCTs.¹⁰⁷ The OCTs are not parties to the OAD and neither is the OAD addressed to the OCTs.¹⁰⁸ While generally there has been a degree of consultation with the OCTs prior to each of the more recent OADs being published, there are no actual negotiations nor are there any collateral agreements with the OCTs that set out the terms of each successive OAD.¹⁰⁹

The policy positions underlying the early iterations of the OAD, as was the case in relation to the earliest iterations of Part Four of the relevant treaties, was based on the founding Member States adoption of Chapter XI of the United Nations Charter.¹¹⁰ The initial seven OAD's adopted a post-WWII perspective from which the smaller less resource rich colonies of the Member States were seen as being economic burdens. In particular, the first seven iterations of the OAD indicated that the overarching fourfold objectives of the EU's association arrangements with the OCTs were as follows:

- promoting the economic and social development of the OCTs more effectively;
- developing economic relations between the OCTs and the European Union;
- taking greater account of the diversity and specific characteristics of the individual OCTs, including aspects relating to freedom of establishment; and
- ensuring that the effectiveness of the financial instrument is improved.

The current and eighth iteration of the OAD,¹¹¹ arguably has moved significantly from both the perspective adopted in the first seven iterations of the OAD, and also its legal foundation

¹⁰⁵ Decision 64/349/EEC of 25th Feb 1964. Subsequent OAD were as follows: #2 – Decision 70/549/EEC of 29 September 1970 (5 yrs), #3 - Decision 76/568/EEC of 29 June 1976 (5 yrs), #4 – Decision 80/1186/EEC of 16 December 1980 (5 yrs), #5 - Decision 86/283/EEC of 30 June 1986 (5 yrs), #6 – Decision 91/482/EEC of 25 July 1991 (10 yrs) and, #7 - Decision 2001/822/EC of 27 November 2001 (10 yrs & extended in 2007 to 31 December 2013 to coincide with the EDF and multiannual financial framework for 2007-2013).

¹⁰⁶ OAD (note 7).

¹⁰⁷ Article 288 TFEU provides that legal acts of the EU are: regulations, directives, decisions, recommendations and opinions. See (note 85).

¹⁰⁸ As a general rule of construction in EU law a 'decision' is only binding on those to whom it is addressed.

¹⁰⁹ However, in the instance of the most current OAD, there was a consultation process with the OCTs that was organized by the Commission.

¹¹⁰ Article 73 of Chapter XI of The Charter of the United Nations (note 109).

¹¹¹ OAD (note 7).

in Art 198 TFEU.¹¹² Specifically the eighth OAD has adopted a set of policy objectives as follows:

*The Council endorsed the Commission's proposal to base the future partnership between the Union and the OCTs on three key pillars: (1) enhancing competitiveness, (2) strengthening resilience and reducing vulnerability and (3) promoting cooperation and integration between the OCTs and other partners and neighbouring regions.*¹¹³

However, rather than the current OAD being invalid as in inconsistent with the language of Art 198 TFEU,¹¹⁴ it may very well be that, as of 2014, the three key pillars set out in the most recent OAD are in fact the best way to achieve the stated purpose of association set out in Art. 198 TFEU.

The changes in the express policy objectives set out in the eighth OAD are largely reflective of the 2008 European Commission's 'Green Paper on the Future relations between the EU and the OCTs',¹¹⁵ which served to redefine the position on the 'essential elements' for a new partnership between the EU and the OCTs.¹¹⁶

The Commission's 2008 proposed redefinition of the EU's relationship with the OCTs entailed a recognition of the OCTs as assets and downplayed the earlier perception of OCTs as net-payers.¹¹⁷ The Commission's Green Paper also highlighted that the exclusionary perception of the territorial scope of the EU *acquis* in relation to the OCTs was contrary to the special relationship between the OCTs and their relevant Member States.¹¹⁸

¹¹² Art 198 TFEU provides;

- *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. (emphasis added)*

¹¹³ OAD (note 7).

¹¹⁴ *ibid*; Art 198 TFEU. As a general rule, secondary legislation is only valid if it is consistent with primary legislation and acts and agreements which have precedence over it.

¹¹⁵ COM(2008) 383 final (note 89).

¹¹⁶ COM (2009) 623 final (note 69).

¹¹⁷ *Custos*, (note 56), para 3.2.

¹¹⁸ Notwithstanding this recognition, para 4 of the preamble of the most recent OAD specifically limits the territorial scope of the treaties to exclude OCTs. This paragraph in the most recent OAD, as secondary legislation, would appear to be inconsistent with the primary legislation, specifically art. 52 TEU and art 366 TFEU of the Treaty of Lisbon, which specifically extends the scope of the treaties. It is noted that a voluntary adoption of EU rules and standards differs from pure integration into EU policy. This approach serves to ensure a diffusion of EU law without resorting to EU legislative procedures.

If, as suggested by the Commission,¹¹⁹ it is the case that the traditional exclusionary perception of the territorial scope of the EU *acquis* in relation to the OCTs is inconsistent with the proper interpretation of the treaties, what does that imply with respect to any process for removing the UK-OCTs entirely from the scope of the EU *acquis*?

Brexit and the shifting scope of EU law relative to the OCTs

Whether or not any consideration of the scope of the application of EU *acquis* to the OCTs and their EU citizens will be given in the approaches of the EU and the UK to Brexit is a matter of conjecture. There is no doubt however, that such consideration ought to be given. On the assumption that it will be given, the question arises as to the nature of that scope.

The accepted territorial scope, *ratione loci*, and the personal scope, *ratione personae*, of EU law applying to the OCTs as set out in the treaties have varied over time and with subject matter.

The pre-Lisbon version of the EU Treaties contained no express provision with respect to the territorial scope of the application of the EU *acquis* to the overseas territories. As noted above, the default legal position on the territorial scope of treaties as set out in the Vienna Convention on the Law of Treaties provides, that ‘*unless a different intention appears from the Treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory*’.¹²⁰ It must be presumed that the architects of the Pre-Lisbon version were aware of this.

The Community Treaties contained provisions that specified the territorial scope of their application.¹²¹ As discussed in Chapter 2, the relevant territorial scope clauses were different in the ECSC, EEC and the Euratom Treaties,¹²² providing a reference point for the definition of the relationship between the EU and the OCTs. The entry into force of the Lisbon Treaty unified the territorial scope of the application of the EU *acquis* for all EU policies, regardless

¹¹⁹ COM(2008) 383 final (note 89), p. 6.

¹²⁰ Article 29, Vienna Convention on the Law of the Treaties.

¹²¹ Geographic scope (note 32).

¹²² *ibid.* The territorial scope of the Euratom (Art 198 Euratom) extended to all the territories of the members of the Community while the ECSC (Art 79 ECSC Treaty) was limited the territorial to the European territory only. Discussed further in the Annex of this Paper.

of whether they fall under the TEU or the TFEU.¹²³ In this context the implications of Art 52(2) TEU are significant.¹²⁴

Art 52(2) TEU provided for a number of significant changes, not least of which was the unification of the territorial scope of the EU Treaties.¹²⁵ It also consolidated the concept of ‘territorial scope’ in EU law, and further, it referred to the TFEU for details on derogations and specifications to the general rule of the TEU.¹²⁶ However, the extent to which Art 52(2) assists in shedding light on the degree of exclusion of the OCTs from the application of the EU *acquis* has been the subject of dispute in academic circles.

The introductory language to Art 355 provides:

*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:*¹²⁷

The details of the application of the territorial scope of the EU *acquis* set out in Art 355 (1) TFEU reiterate the OR-OCT dichotomy in part.¹²⁸ However, Art 355 (3) also specifies in inclusive language that:

*3. The provisions of **the Treaties shall apply to the European territories** for whose external relations a Member State is responsible.*¹²⁹ (emphasis added)

A number of elements contribute to the uncertainty surrounding the scope of application of the EU *acquis*. Firstly, as observed by Ziller, the EU Treaties are silent on any ‘principle of non-application’ of the general EU *acquis* to the OCTs.¹³⁰ Secondly, the European Court of Justice (ECJ) has determined that with respect to the OCTs:

¹²³ Under the ToL, the EU acquired a consolidated legal personality which means that it can negotiate and enter into international agreements with one or more third countries (such as the UK will become post-Brexit) or international organisations, and can become a member of international organisations.

¹²⁴ Art 52(2) TEU: 2. *The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union.*

¹²⁵ Ziller, J., ‘Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Treaty of Lisbon’ in Kochenov, D. (ed), ‘EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories and Territories Sui Generis’ (2011) Kluwer Law Int’l, the Netherlands, Chapter, 2, para 2.1.

¹²⁶ Art 355 TFEU

¹²⁷ *ibid.*

¹²⁸ Art. 355(2) TFEU: *The special arrangement for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II.*

¹²⁹ Art. 355(2) TFEU.

¹³⁰ Ziller (note 56), p. 119.

...[T]he reference to the 'principles set out in this Treaty' is not merely to the principles set out in Part Four of the Treaty but to all the principles set out in the Treaty, in particular those listed in Part One, entitled 'Principles'.¹³¹

Thirdly, in a number of regards, the accepted applications of EU law in the context of OCTs and their EU citizens suggest that the EU *acquis* may indeed apply in the OCTs more than has been recognised in any of the OADs. By way of example, there can be no doubt that when the inhabitants of the OCTs vote in the EU Parliament (EP) elections,¹³² that process, including those provisions on the rules of formation and powers of the EP, falls within the EU *acquis*. Similarly, when the Minister representing the OCTs of a relevant Member States serves as that Member State's Minister in the Council then clearly the relevant EU law applies in the context of that representation. Finally, and perhaps most significantly, the ECJ has determined that the courts of the OCTs can also be regarded as courts or tribunals of Member States, within the meaning of Art 267 TFEU (ex Art 234 EC).¹³³ All of these facts call into question any interpretation of Art 355 that would exclude OCTs from the scope of EU law that is established outside of Part Four TFEU.

In a similar vein, the European Commission, applying *ratione personae*, has questioned the applied parallelism in the EU's treatment of OCTs and ACP countries, which parallelism has been a cornerstone of EU policies for decades.¹³⁴ The Commission's questioning is based largely on the fact that OCT nationals are in general EU citizens who have a basket of rights in EU law whereas that is not the case in the context of ACP countries. If it is correct that Part Two (TFEU) (Non-Discrimination and Citizenship of the Union), which applies to persons who are EU citizens within continental European parts of the EU, as well as the ORs, also applies to the OCTs and the EU citizens therein, then the notion that only Part Four TFEU is applicable to OCTs is incorrect.

¹³¹ Case C-390/95P *Antillean Rice Mills NV, European Rice Brokers AVV and Guyana Investments AVV v Commission* [1999] ECR I-769, para 36.

¹³² Case C-300/04 *M.G. Emanand O.B. Sevinger v College Van burgemeester en wethouders van Den Haag* [2006] ECR I-08055. At issue was the fact that Dutch nationals who were resident in non-member countries were allowed to vote, and stand, in European Parliament elections, while those who were resident in the OCT of Aruba were not allowed to do the same. The Court ruled that EU citizens who reside in an OCT, within the meaning of Art 355(2) TFEU may rely on the rights conferred in Part II TFEU and that the treatment of Dutch national resident in Aruba amounted to a difference in treatment that was contrary to the general principle of equality in EU law.

¹³³ Joined cases C-100 & 101/89 *Kaefer and Procacci v. Francs* [1990] ECR I-4647, para 8; *Kochenov* (note 37).

¹³⁴ Joined cases - *Kaefer and Procacci* (note 66).

The Commission's rationale recognised firstly a network of relationships in which the relevant Member State plays an integral role, and secondly the role of the OCT nationals as European citizens. Viewed together, these factors create a degree of solidarity between the EU and OCTs that the Commission termed as 'belonging to the same European Family'.¹³⁵

Thus emerges a view that the OCTs and their citizens are increasingly under the influence of EU law, not because of the specific wording of the Part Four TFEU, or the OAD, but by virtue of the composition of the EU legal system.¹³⁶ Accordingly, in the view of Prof Ziller, Part Four of the EU Treaties does not impede the application of the general EU *acquis* to the OCTs. Rather, '*Part Four establishes a special legal basis for association for Union policies and internal actions, as an exception to Part Three TFEU*'.¹³⁷ Undoubtedly, it will require further time before the case law catches up to the current academic analysis and concludes that a much greater body of EU law is applicable to the OCTs than that contained in Part IV TFEU and the OAD.

If it is correct that more EU law is applicable to the relationship between the EU and the OCTs than is set out in Part Four of the Treaty, then what does that mean in the context of Brexit and any 'change of status' for the UK-OCTs occasioned by Brexit?

¹³⁵ COM (2009) 623 final (note 69), p. 4.

¹³⁶ Prof Ziller has concluded that, with the exception of Part III TFEU, all of the general EU *acquis* is applicable to the OCTs.

¹³⁷ Ziller, J., 'Outermost Regions, Overseas Countries and Territories and Others after the Entry into force of the Lisbon Treaty' Chapter 2 in Law of the Overseas. para 2.1

CHAPTER 4 - HISTORICAL INCIDENTS OF ‘CHANGE OF STATUS’ FOR THE ‘OVERSEAS TERRITORIES’

Legal requirements for change in status of an OCT

As noted in Chapter 1, the Brexit referendum results and subsequent political pronouncements have introduced multiple layers of uncertainty for UK-OCTs. It is unclear as to whether a change of status for UK-OCTs vis-à-vis the EU will occur, when that change is likely to occur, (assuming as seems highly likely that there is going to be a change), and what the new status of UK-OCTs would look like at each stage going forward.¹³⁸ It is not even clear what procedures would be followed in order to secure the any change of status in the EU *acquis* occasioned by the UK’s withdrawal from the EU.

Other questions also arise. On the assumption that the separation of the UK from the EU will result in a change of status for the UK-OCTs, then, will the UK-OCTs become merely non-sovereign appendages of the UK as a ‘third country’, will the UK-OCTs acquire APC or something akin to APC status, or will some new *sui generis* status will be created?

The legal history of the EU with regard to change of status and changes to its relationships with overseas territories of its member states provides one basis for answering those questions.

St. Pierre-et-Miquelon

In 1976, the Government of France unilaterally changed the French domestic legal status of St. Pierre-et-Miquelon, a French territory situated in the Gulf of St. Lawrence off the Eastern coast of Canada, from an OCT to a DOM.¹³⁹ At that time St. Pierre-et-Miquelon was an OCT for purposes of the relevant treaties.

¹³⁸ For the purposes of this paper, a ‘change of status’ has the broadest interpretation and may include a change from an OCT to a newly create *sui generis* category or even to no association at all.

¹³⁹ The “seemingly illegal” example of 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. Ziller, (note 56), p. 119.

France asserted that by its unilateral 1976 alteration of the status of St. Pierre-et-Miquelon in French domestic law, it was also able to transform St. Pierre-et-Miquelon from an OCT to a DOM within the meaning of Article 227(2) EEC (then in force). The initial response of the European Commission to a question regarding the ability of France to unilaterally amend the status of an OCT with respect to Article 227(2) suggested that France had this capacity. However, the subsequent refusal of the Commission to recognise any change in the status of St. Pierre-et-Miquelon suggests that the Commission quietly recognised its initial error and determined that France had no right to unilaterally change the status of an OCT for purposes of EU law.¹⁴⁰ As opined by Kochenov, ‘*The fact that [France’s unilateral change in the domestic status of St. Pierre-et-Miquelon] was not treated as one in Community law is indicative of the fact that de facto the change of status has never occurred.*’¹⁴¹ Similarly, Ziller maintained that France’s internal change in the status of St. Pierre-et-Miquelon did not have any consequence in EU (then EEC) law.¹⁴²

The principal element in the proposition that France’s unilateral change could not change the position in EU law is relatively straight forward. The territories that comprise the OCTs for purposes of EU law are listed in Annex II of the Treaty. Annex II, as discussed above, is primary legislation. Absent a revision to the Treaty, or at least Annex II of the Treaty, which revision would require the agreement of all Member States, the list of territories that comprise the OCTs is fixed.

In 1984, France reversed the 1976 unilateral change of status of St. Pierre-et-Miquelon within its domestic legislation, returning of St. Pierre-et-Miquelon to the French domestic status of an OCT.

The 1976 French attempt to unilaterally change the status of Saint-Pierre-et-Miquelon with respect to EU law is the only known precedent of a Member State attempting a unilateral change of a status of an OCT for purposes of EU law.¹⁴³ The procedures employed in the

¹⁴⁰ This in effect meant that agricultural funds were not made available for St. Pierre-et-Miquelon. Similarly, St. Pierre-et-Miquelon was not made part of the customs territory of the Community, which is generally regarded a necessary element of the OR status. Further, it has always been in the list of associated countries and territories in the Annex to the EEC Treaty (now TFEU Annex II).

¹⁴¹ Kochenov (note 1). p. 736.

¹⁴² Ziller (note 125).

¹⁴³ Ziller, J., Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on the Member States Territories’, in de Búrca, G., and Scott, J., (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* Oxford: Hart, 2000.

‘misunderstanding’ with regard to the change of status of St. Pierre-et-Miquelon provides a sharp contrast with those employed at the time of Greenland’s change of status.

Greenland

In 1972 Denmark held a referendum on joining the EEC. At that time, Greenland was an integral part of Denmark, its colonial status having been ended in 1953.¹⁴⁴ Seventy percent of the electorate of Greenland voted against accession based primarily on their concern that the European fishing fleet would decimate the fish stock in Greenland’s fishing banks. Notwithstanding, Greenland was obliged to comply with the decision carried by the Danish majority. When Denmark joined the Communities in 1973,¹⁴⁵ Greenland was included in the application of the ECSC Treaty and as a result, Greenland was subject to the Euratom Treaty rules.

In 1979 following the introduction of Greenland Home Rule Act within the domestic legislation of Denmark,¹⁴⁶ Greenland acquired the status of ‘distinct community within the Kingdom of Denmark’ and the issue of EEC membership arose again. In 1982 a consultative referendum was conducted among Greenland voters. The majority supported leaving the EEC.

The 1984 Greenland Treaty providing for the exit of Greenland from the EEC and the acquisition by Greenland of OCT status was agreed by all Member States.¹⁴⁷ Further, Article 1 of the Greenland Treaty [1985] OJ L29 removed Greenland from the scope of the ECSC Treaty and Art 5 removed Greenland from the Euratom Treaty rules.¹⁴⁸ Greenland is now included in Annex II.¹⁴⁹

¹⁴⁴ Møller, H., ‘Notes on the Colonial History of Greenland’ Ph.D Thesis <University of Alberta, <<https://www.lakeheadu.ca/sites/default/files/uploads/53/outlines/2014-15/GEOG3671/Lecture%208%20Moller%20Notes%20on%20the%20Colonial%20History%20of%20Greenland.pdf>> accessed 14 Jan 2017.

The European colonization in Greenland may be traced to the Norse in the 900s. Following the demise of the Norse settlements in the early 1400s, the Danish Christian missions commenced colonial and trade activities in 1721. Greenland acquired equal status to Denmark in 1953 when its colonial status was abandoned. However, the 1960s influx of Danes into Greenland resulted in tensions arising from a perception by Greenlanders that they were being discriminated against by the Danes who secured a greater share of the available jobs, payments and privileges. This perception was further exacerbated by Greenland being forced joining of the EEC in 1972, even though they had voted against joining.

¹⁴⁵ Treaty on accession of Denmark, Ireland and the United Kingdom [1972] OJ L73.

¹⁴⁶ The Home Rule Act transferred responsibility, previously exercised by the Danish Authority, to the autonomous authority of Denmark. Lyck, L., ‘Greenland: Ten Years of Home Rule’, (1989) 25 Polar Record, pp. 343 -346..

¹⁴⁷ Greenland Treaty [1985] OJ L29.

¹⁴⁸ Treaty amending, with regard to Greenland, the Treaties establishing the European Community - [1985] OJ L29 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1985:029:FULL&from=EN>> accessed 12 Dec 2016.

¹⁴⁹ The OCT status granted Greenland fish-products free access to the European Market. In addition, Greenland signed a ten-year fishing agreement with the EEC granting continued access to Greenland’s fishing bank in return for an annual payment of several hundred million Danish Kroner. [1985] OJ L 29/9. Weiss, F., Greenland’s Withdrawal from the European Communities, (1985) 10 Eur. L. Rev. 173.

The ToL introduction of a 'passerelle clause'

The 2009 Treaty of Lisbon (ToL) introduced a simplified procedure for the change of status of the overseas territories of some EU Member States known as a 'passerelle clause' into Article 355(6) TFEU.¹⁵⁰ The application of this 'passerelle clause' is limited to the ORs or OCTs of Denmark, France and the Netherlands, and in effect means that in relation to the overseas territories of those Member States, a change of status will no longer require Treaty amendment.¹⁵¹ The 'passerelle clause' mechanism does not apply to the UK or UK-OCTs.¹⁵²

The adoption of the 'passerelle clause' ought to mean that a repetition of the Saint-Pierre-et-Miquelon 'misunderstanding' will not recur,¹⁵³ as no connection can be made between the legal status of an OR or OCT in national law of the relevant Member State and EU law.¹⁵⁴

Mayotte

In a consultation referendum held on 29 Mar 2009 the nationals of Mayotte voted by 95% in favour of change of status from OCT to OR. In order to facilitate the implementation of this change of status, a special declaration was appended to the 2009 ToL.¹⁵⁵

On 11 July 2012, following the coming into force of the ToL, the European Council having regard to the Article 355 (6) TFEU 'passerelle clause' decided that Mayotte would change its status and cease to be an OCT within the meaning of Part IV TFEU, and would become an OR within the meaning of Article 349 TFEU.¹⁵⁶

¹⁵⁰ Art 355 (6) TFEU provided; 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.* (emphasis added)

¹⁵¹ Article 355 (ex Article 299(2), first subparagraph, and Article 299(3) to (6) TEC) provides as follows:

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.*

¹⁵² There was no indication at the time of the negotiation of the ToL that any of the UK-OCTs were interested in changing their status from OCT to OR, therefore the UK choose not to be included in Art 355(6) TFEU. Murray, F., 'The European Union and Member States Territories: A New Framework Under the EU Treaties' (2012) The Hague: TMC Asser Press, p.108.

¹⁵³ Article 349 TFEU mentions all of the OR by name, rather than as in the ex. Art. 299 (2) TEC under the collective status of ORs.

¹⁵⁴ Omarjee, I., 'Specific Measures for the Outermost Regions after the Entry into Force of the Lisbon Treaty' in Kochenov, D. (Ed) *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (2011) Kluwer Law Int'l, The Netherlands, (chapter 4).

¹⁵⁵ Declaration No. 43 on Art 355 (6) on the Treaty on the Functioning of the European Union [2010] OJ C 83/351.

<<http://eyc2013.ypes.gr/wp-content/uploads/2013/08/ConsolidatedLisbonTreaty.pdf>> accessed 15 Dec 2016.

¹⁵⁶ European Council Decision of 11 July 2012 (2012/419/EU) - amending the status with regard to the European Union of the island of Mayotte <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0419&from=EN>> accessed 17 Jan 2017.

St Barthélemy

In 2007 the French Caribbean communes of St Barthélemy and Saint-Martin were officially detached from Guadeloupe (an OR in French law and EU law), and became separate ORs under French law. In order to achieve conformity within EU law it became necessary to have St Barthélemy and Saint-Martin included in the list of EU ORs even though their status as ORs was never at issue.¹⁵⁷ As at 2007 this was not possible without a treaty change. It was therefore only after the entry into force of the ToL that St Barthélemy and Saint-Martin became ORs in their own right by operation of the Art 355 TFEU.¹⁵⁸

St Barthélemy subsequently chose to change its status from an OR to an OCT with effect from 1 Jan 2012.¹⁵⁹ As with the change of status of Mayotte, the European Council having regard to the Article 355 (6) TFEU ‘passerelle clause’ also decided that St Barthélemy would change its status and would cease to be an OR within the meaning of Article 349 TFEU OCT and would become an OCT within the meaning of Part IV TFEU.¹⁶⁰

Post-Brexit Change of Status for the UK-OCTs

As noted above, the procedure for a change of status of UK-OCTs must be based on application of the ordinary treaty amendment procedure or *lex generalis* in all situations that require a change of status, even the most uncomplicated ones. The *lex generalis* applicable to UK-OCTs is provided by Article 48 TEU which sets out the procedure for a Treaty amendments.¹⁶¹

¹⁵⁷ In 2003 Saint Barthélemy and Saint Martin voted in favour of secession from Guadeloupe in order to form a separate overseas collective of France. In February 2007 the French Parliament granting TOM (overseas collective) status to both Saint Barthélemy and Saint Martin. However, their status in the EU did not change until the entry into force of the TOL when they gained OR status.

¹⁵⁸ European Council Decision 2010/718/EU of 29 of 29 Oct 2010 amending the status with regard to the European Union of the island of St Barthélemy <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0718&qid=1481069342919&from=en>> accessed 4 Jan 2017.

¹⁵⁹ Saint Barthélemy ceased to be an OR and part of the EU (within the meaning of Article 349 TFEU) as of 1 January 2012 and instead became an OCT (within the meaning of Article 355(2) TFEU) on the same date. European Council Decision 2010/718/EU of 29 Oct 2010 amending the status with regard to the European Union of the island of St Barthélemy <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0718&qid=1481069342919&from=en>> accessed 4 Jan 2017; European Council Decision 538//2012/EU <<http://publications.europa.eu/en/publication-detail/-/publication/a0729a7f-0bb4-11e2-8e28-01aa75ed71a1/language-en>>

¹⁶⁰ European Council Decision of 11 July 2012 (2012/419/EU) - amending the status with regard to the European Union of the island of Mayotte <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0419&from=EN>> accessed 4 Jan 2017.

¹⁶¹ Article 48 (ex Article 48 TEU) provides as follows:

1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures.
Ordinary revision procedure
2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, *inter alia*, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.
3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional

Article 48 TEU provides for two approaches to Treaty amendments; an ordinary revision procedure, and a simplified revision procedure. However, given that Article 48 (6) limits the application of the simplified revision procedure to the specific subject addressed in Part III of the TFEU, only the ordinary revision would be applicable to any change of status of UK-OTCs.

The application of the *lex generalis* ordinary revision procedure under Article 48 TEU is laced with a multitude of procedural complications that require the involvement of several different actors.¹⁶² It also requires the convening of a Convention that is ‘*composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission*’ as well as the requirement for a common accord between all Member States and ratification by all the Member States.¹⁶³ A change of status

changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4. The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.
5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

Simplified revision procedures

6. The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union. The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.
7. Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence. Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure. Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.
8. For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members. (emphasis added)

¹⁶² The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area.

¹⁶³ TEU art. 48(3).

relating to one or more OCTs does not have to be a ‘stand-alone’ amendment to the Treaty and can be made, along with other unrelated treaty amendments during the course of the broad mandate of an Intergovernmental Conference (IGCs).¹⁶⁴

The UK-OCTs will have little influence over any change of status occasioned by the separation of the UK from the EU. Historically the Member States have paid little attention to issues that are important to ORs or OCTs during the IGC when negotiating amendments of Treaty clauses that may apply to OCTs and ORs,¹⁶⁵ and as observed by Baetens, the constitutional status of OCTs does not allow them to participate at a high level in negotiations with the EU.¹⁶⁶ Further, the European Commission maintains the view in relation to the application of the *lex generalis* process, that unless the EU Treaties have been appropriately amended by way of the unanimity of all the Member States, the position of an OR or OCT under EU law remains unchanged.¹⁶⁷

Post- Brexit – EU Law ‘on the ground’ vs EU law ‘in the books’

The uncertainty that exists in relation to the likely legal status of the UK-OCTs post-Brexit is compounded by the fact that historically, the European Community did not always feel compelled to ensure that a political and functional change of status of a former colony was reflected in changes to the relevant treaty provisions.¹⁶⁸ To the extent that the experience of one former colony has predictive value in relation to the likely experience of the UK-OCTs post-Brexit, the experience of Algeria may be informative.

Algeria, a former French colony was granted integration for purposes of the 1957 EEC treaty,¹⁶⁹ but became independent in 1962. Despite gaining independence in 1962, Art 227 (2) EEC, which expressly listed Algeria, was not amended until the Maastricht Treaty revisions in 1992, a for a full thirty years post-Algerian independence.¹⁷⁰ Notwithstanding being so listed in Art 227 (2) EEC, Algeria was not afforded any of the entitlements provided for in the

¹⁶⁴ IGCs are conferences of representatives of the governments of the Member States are convened to discuss and agree EU treaty changes.

Before the entry into force of the Lisbon Treaty in 2009, this was the only procedure for treaty revision. In accordance with Article 48 TEU it is now termed the ‘ordinary revision procedure’.

¹⁶⁵ Indeed, some of the French politician have been overheard saying with regard to the OR and OCTs ‘tout le monde s’en fout’ (ie. who cares), in Ziller (note 125).

¹⁶⁶ Areas that are generally excluded from the competence of OCTs include; foreign policy, security and defence. Baetens, F., ‘The Overseas Countries and Territories: The Added Value of a Concerted Approach’ in Kochenov, D. (Ed) *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, (2011) Kluwer Law Int’l, The Netherlands.

¹⁶⁷ By way of example, altering the constitutional status of an OR or OCT under national law does not alter its status under EU law. Kochenov (note 1), p. 734.

¹⁶⁸ Algeria gained independence from France in 1962 but was not removed from the list of territories where the territorial scope of Art 227(2) EEC Treaty applied with the Maastricht revision of the Treaty in 1992, some 30 years later.

¹⁶⁹ Treaty Establishing the European Economic Community - Art. 227(2), Mar. 25, 1957, (note 214).

¹⁷⁰ *Ibid.*

Treaties, the Commission and the Member States apparently ignoring the relevant treaty provisions.¹⁷¹

On the basis of the behaviour of the EEC in the relation to Algeria, it may be that the legal position of the UK-OCTs as set out in the Treaties will also be treated as irrelevant, or at least of so little importance that no one bothers to make any change in the treaty provisions for a prolonged period of time.

¹⁷¹ As a former colony, Algeria fell entirely outside the scope of Community law when it gained independence from France in 1962. *Kochenov* (note 37), p. 259.

CHAPTER 5 – SUMMARY OF FINDINGS AND CONCLUSION

The distinct Brexit processes that will apply to the UK and the UK-OCTs

The decision of the UK to exit the EU will have many significant effects in the UK-OCTs, yet it is highly unlikely that these effects will be given any significant weight in the implementation by the UK and the EU of that decision. The UK-OCTs will have no formal role, and likely no role at all, in shaping whatever exit agreements are negotiated between the UK and the EU.

As noted in the foregoing chapters, the Treaties provide a general framework for the exit of a member state from the EU. However, there is no corresponding language in either Part Four of the Treaty or the current OAD in relation to the process involved in transitioning an OCT to the status of former OCT. There is also very little in either EU case law or the academic literature relating to this subject. What can be discerned is that the legal process that would be required for the UK-OCTs to cease being OCTs within the meaning of EU law, differs from the process by which the UK will leave the EU.

Art. 50(2) TEU provides that the UK as the exiting Member State, and in its capacity as a sovereign state, will enter into one or more international agreements with the EU that will constitute a withdrawal agreement. In that context, the UK as the ‘other’ party to the exit negotiations, would be treated as a non-EU member state, or as a third country, and therefore would not be privy to discussions in the European Council or the Council regarding the withdrawal negotiations.¹⁷²

The relevant withdrawal agreement, as an international agreement, would not require any changes to the current Treaties nor would the withdrawal agreement form part of EU primary law. Rather, in accordance with Art. 50(3) TEU, upon the entry into force of the withdrawal agreement, or the expiry of the two years notice period provided for in Art 50 TEU,¹⁷³ the Treaties shall cease to apply to the exiting state.

¹⁷² European Union Committee, ‘The Process of Withdrawal from the European Union’ 11th 2015-16, published 4 May 2016, HL Paper 138, para. 19 <<http://www.publications.parliament.uk/pa/ld201516/ldselect/lducom/138/13802.htm>> accessed 4 Jan 2017.

¹⁷³ Article 50(2) provides that a Member State which decides to withdraw shall notify the European Council of its intentions.

It is noteworthy that Article 50(2) provides that a '*framework for its future relationship*' shall be taken into account. This language would appear to indicate that there is intended to be a separate framework document addressing future relationship issues that will have been negotiated before the withdrawal agreement goes into effect.¹⁷⁴ Given the apparently intended comprehensiveness of the framework document and the withdrawal agreement, it appears probable that the negotiation of these documents will engage subject areas that touch upon both the exclusive competency of the EU as well as subject areas that fall within the scope of shared competency.¹⁷⁵ The combination of both areas of exclusive competence and shared competence within a single suite of documents potentially raises multiple issues, not least of which being that to the extent that areas of shared competence are involved, then any such agreement would require the agreement of the UK, the EU, the remaining member states and the relevant regions of those member states that have constitutional provisions requiring the consent of sub-national legislative bodies.¹⁷⁶

Professor Craig has observed that in these regards, the advent of Art 216 TFEU represents a significant change in relation to the EU's external power to make international agreements.¹⁷⁷ Specifically, when Art 216 is viewed in conjunction with Art 3(2) TFEU,¹⁷⁸ the EU has four justificatory rationales for the exercise of its exclusive competency to make international agreements. This exclusive competence is subject to the caveat, as provided by the Treaty, that

¹⁷⁴ Sir David and Professor Wyatt concurred that there would be a separate agreement in addition to the withdrawal agreement. European Union Committee, 'The Process of Withdrawal from the European Union' 11th 2015-16, published 4 May 2016, HL Paper 138, para. 31 <<http://www.publications.parliament.uk/pa/ld201516/ldselect/ldcom/138/13802.htm>> accessed 4 Jan 2017.

¹⁷⁵ There are three main categories of competencies:

- Exclusive competences: areas in which the EU alone is able to legislate and adopt binding acts.
Areas of exclusive competency include: customs union; the establishing of competition rules necessary for the functioning of the internal market; monetary policy for euro area countries; conservation of marine biological resources under the common fisheries policy; and common commercial policy.
- Shared competences: the EU and member states are able to legislate and adopt legally binding acts.
Areas of shared competency include: internal market; social policy, for the aspects defined in this Treaty; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health matters, for the aspects defined in this Treaty.
- Supporting competences: The EU can take measures to ensure that member states coordinate their economic, social and employment policies at EU level.

¹⁷⁶ The procedural consequence of a mixed-agreement is that 28 member states (27 in the case of Brexit) have to ratify the agreement according to their own 'constitutional' ratification procedures. Van der Loo, G., and Blockmans, S., 'The Impact of Brexit on the EU's International Agreement' <<https://www.ceps.eu/publications/impact-brexit-eu%E2%80%99s-international-agreements>> accessed 4 Jan 2017.

¹⁷⁷ Craig, P., *The Lisbon Treaty: Law, Politics and Treaty Reform* (2013) OUP: Oxford, p.

¹⁷⁸ Article 3 (2) TFEU. 'The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.' (emphasis added)

the conclusion of an agreement by the EU is without prejudice to the Member State's competence to negotiate and conclude an agreement in the relevant area.¹⁷⁹ Thus, in accordance with Art 216(2) TFEU,¹⁸⁰ the UK would cease to be bound by any international agreements negotiated under the exclusive competency of the EU, but would likely continue to be bound by agreements entered into on the basis of shared competence, at least for a period of time.¹⁸¹

The UK-OCTs are in a very different situation.¹⁸² As a matter of EU law, the process by which UK-OCTs will cease to be OCTs within the meaning of Part Four of the Treaty will likely require; (1) an amendment to the language of Part Four of the Treaty so as to remove reference to the overseas territories of the United Kingdom from Art 198, and (2) an amendment to Annex II so as to remove each reference to the individual UK overseas territories currently listed in Annex II.

There is no published information at present relating to the position of either the EU or the UK in relation to the UK-OCTs and Brexit. However, given the relative economic insignificance of the UK's OCTs and the absence of any constitutional standing for the UK-OCTs to negotiate directly with the EU,¹⁸³ any decision on any change of status relating to the UK-OCTs will require some impetus from one or more of the remaining member states or the Commission.

It appears unlikely that a formal change of status for the UK-OCTs would be a high priority for either the EU or the remaining member states. The legal historical evidence set out above,

¹⁷⁹ Craig, P., *The Lisbon Treaty: Law, Politics and Treaty Reform* (2013) OUP: Oxford, p.

¹⁸⁰ Art 216 (2); Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

¹⁸¹ Article 216 TFEU:

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.
2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

¹⁸² In order to extract itself from a mixed agreement, it will be necessary for the UK to repeal its act that approved the ratification of the agreement as well as either terminate or denounce that agreement in accordance with the terms provided in that agreement's termination or denunciation clause. Van der Loo, G., and *Blockmans* (note 176). Given the complexity of this process, and the ensuing practical and economic uncertainty generated, the UK may choose to remain a contracting party to most of the EU's mixed agreements. This approach is likely to be viewed favourably by the UK's Department of International Trade as it would eliminate the necessity, and associated uncertainty, of the UK embarking on the multitude of complex extraction negotiations from the mixed agreement and then entering into bilateral negotiations as a significant smaller player. In this context, it is recognised that any desire on the part of the UK to remain a part of a mixed agreement would require a protocol or legal instrument, which would have to be ratified by the other 27 member states, confirming that the UK's assumption of the rights and obligations it held previously as an EU member state. Van der Loo, G., and *Blockmans* (note 176).

¹⁸³ Other than through the Overseas Countries and Territories Association (OCTA). OCTA, a non-profit association based in Brussels, has provided a forum for the exchange of ideas and a degree of access to the EU Commission where the OCTs can lobby for support in specific issues such as their vulnerability to climate change and rising sea levels.

including that evidence relating to events and changes in EU law occasioned by the independence of former colonies such as Algeria, suggests that the EU may be content to leave the Treaties unchanged and the UK-OCTs among the overseas territories listed in Annex II for as long as is convenient for them. Past practice has been to ignore the Annex II list in all practical matters whenever that list has no congruity with the legal status of relevant overseas territory.

It therefore follows that there is more than a mere possibility that the UK-OTCs will continue to be listed in Annex II of the Treaty for a period of years after the UK has concluded its withdrawal agreement and exited the EU. If this were to transpire, it would mean that there would be no immediate change of status in EU law for the UK-OTCs until a point in time at which it would suit the EU's convenience to amend the relevant Treaty provisions. At the latest, it would seem likely that the status of the UK-OCTs will be addressed during the time-period leading up to the renewal of the OAD in 2024.

What post-Brexit relationships, if any, the EU will decide to pursue with respect to the UK-OCTs is also unclear. Borrowing from the historical context of the independence of the African colonies, it is likely that any post-Brexit relationships will be shaped by what the EU sees as its economic and political interests. It is noteworthy in this context that the policies and activities of the EU in the Caribbean region, where the majority of the UK-OCTs are located, are a complex mix of distinct programmes implemented through a number of organisations which have overlapping responsibilities and areas of competence.¹⁸⁴ In addition to multiple bilateral elements that the EU operates with some independent countries in the Caribbean region,¹⁸⁵ the EU also pursues a concurrent set of bilateral policies in relation to the UK and other Caribbean OCTs.¹⁸⁶ The overarching policy objective of regional cooperation and

¹⁸⁴ Examples of these organisations include; bilateral engagements with independent countries at a Member State level, the ACP, the ORs and the OCTs.

¹⁸⁵ The EU has a bilateral engagement with countries such as Cuba and, in part, the Dominican Republic. In Sutton, P., 'The European Union and the Caribbean Region: Situating the Caribbean Overseas Countries and Territories' (2012) 93 *European Review of Latin American and Caribbean Studies*, pp. 79-94. <http://www.cedla.uva.nl/50_publications/pdf/revista/93RevistaEuropea/93-Sutton-ERLACS-ISSN-0924-0608.pdf>

¹⁸⁶ The objective of regional cooperation is concentrated in the organisations of CARICOM the OECS which aims include the promotion of a multifaceted process of economic, functional and political integration along with the completion of the Caribbean Single Market and Economy (CSME). CARICOM is comprised of full members and associate members. The full members are: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname and Trinidad and Tobago. The Associate Members are the British OCTs of: Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands and the Turks and Caicos Islands. The observer countries are Aruba and the Netherlands Antilles observers. The OECS is also comprised of full members and associate members. Full members are: Antigua and Barbuda, Dominica, Grenada, Montserrat, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines. The associate members are the British OCTs of: Anguilla and the British Virgin Islands. The CSME represents a broader objective of political dialogue and regional cooperation and is institutionalised in the relationship the EU has with the OCTs and the OR as well as in CARIFORUM which is comprised of the CARICOM members (except

regional integration has been central to the EU's engagement with the Caribbean region, including its engagement with the OCTs.¹⁸⁷ In this light, and in light of the Commission's recent recognition of the 'assets of the OTCs' and the stated policy objective of further integrating the OTCs into the 'European family' in pursuit of the EU's political objective that the OTCs serve as outpost of EU 'values and standards', there is a remote possibility that the EU may continue to view the UK-OCTs as 'assets' post-Brexit.¹⁸⁸

Post-Brexit the UK's role in any future relationship between the EU and the UK-OCTs will also be critical. The UK will pursue its own interests. How the UK will see its interests in relation to any post-Brexit relationship between the UK-OCTs and the EU is unclear. As a matter of UK law, all external relations of the UK-OCTs fall within the jurisdiction of the UK. If Brexit results in an alignment of UK interests with those of the EU then it is possible that the UK would support the Commission's recent position and facilitate a positive relationship between the EU and the UK-OCTs. In this context, the observations of Blockmans is useful;

What should be hoped or lobbied for is that the Council then advises the European Council to define a strategy of territorial cohesion that enhances the prosperity of these island territories, supports local populations, helps the EU strengthen the security of its ultimate frontiers and serves the external policy interest of the OCT, the Member State and the OCT alike.¹⁸⁹

It is noteworthy that, even if post-Brexit, the EU no longer views the UK-OCTs as 'assets' to be integrated into the 'European family', the EU's recognition that at least in the context of the Caribbean region the interests of their Caribbean OCTs cannot be separated from the interests of other Caribbean territories, may temper the EU's approach to the UK-OCTs post-Brexit. On

Montserrat) plus Cuba and the Dominica Republic. Sutton, P., 'The European Union and the Caribbean Region: Situating the Caribbean Overseas Countries and Territories' (2012) 93 *European Review of Latin American and Caribbean Studies*, pp. 79-94.

¹⁸⁷ By way of example, in the March 2006 Communication from the European Commission to the European Council, outlining the overarching policy framework regarding the EU's relations with the Caribbean, the Commission proposed that the objective, which was accepted by the European Council, should be to promote closer regional integration between the countries of the Caribbean Community (CARICOM) and enhanced cooperation between the DOM, OCT and CARICOM. European Commission 'EU-Caribbean Partnership for growth, stability and development', <http://eur-lex.europa.eu/resource.html?uri=comnat:COM_2006_0086_FIN.EN.html> accessed 12 Dec 2016. More recently, in an initiative to update its policy, the EU has launched the idea of a Joint Caribbean-EU Partnership Strategy to be agreed by the EU and Caribbean governments, which also emphasised the objective of regional integration and regional cooperation. Council of the European Union, 'Council Conclusions on the Joint Caribbean EU Partnership Strategy', (19 Nov 2012), <https://eeas.europa.eu/sites/eeas/files/partnership_strategy.pdf> accessed 12 Dec 2016.

¹⁸⁸ Given that the OTCs do not have stores of natural resources, the term 'assets', as stated by the Commission, is used in the political context only.

¹⁸⁹ Blockmans, S., 'Between the Devil and the Deep Blue Sea? Conflicts in External Actions Pursued by OCTs and the EU', in 'Kochenov, D. (ed) *EU Law of the Overseas: Outermost Regions, Associated Countries and Territories, Territories Sui Generis* (2011) The Netherlands: Kluwer Law, Chapter 13.

that basis, it may be possible for the UK-OCTs to participate in regional EU programmes post-Brexit, however it must be noted that the EU does not at present include the colonies and dependencies of non-EU developed countries in EDF or other similar regional development programmes.¹⁹⁰

In summary, consistent with the hypothesis of this paper, the relationship between the EU and the UK-OCTs as set out in the 2013 Overseas Association Decision (OAD) would be not be directly affected by the termination of the United Kingdom's (UK) membership in the EU *per se*. However, in the longer term if not the shorter, the relationship between the EU and the UK-OCTs will certainly change. What that change will look like will no doubt be heavily influenced by the relationship between the UK and the EU post-Brexit. Indeed, in the longer term, provided that political, economic and legal analysis prevails, and that the imagination does not triumph over common sense, it is arguable that the policy objectives of the EU would be best served by the continuation, and even the enhancement, of the EU's relationships with the UK-OCTs. There is little doubt that the UK-OCTs, would welcome such an outcome.

¹⁹⁰ By way of example, US protectorates such as the US Virgin Islands and Puerto Rico do not have access to the EDF Caribbean region funding.

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ANNEX

European colonialism of the 15th through 20th centuries together with the post-WWII economic experience of rapid decolonisation provides the historical context for the relationships between the EU as a legal entity and the non-sovereign OCTs over which EU Member States hold sovereignty.¹⁹¹ These factors also provide the historical context for the current relationship of the EU with former colonies of EU Member States in what are referred to in EU parlance as African Caribbean and Pacific countries (ACPs).

The evolution of the EU's relationship with the OCTs.

The relationships between individual EU Member States, that still have colonies, and their colonies typically extend back hundreds of years. In part because of highly varied colonial practices, no two Member States afford their remaining colonies the same legal status as a matter of their domestic law. This non-uniformity in colonial practices and domestic law among the founding Member States shaped the initial iteration of the OCT as an EU construct and it continues to shape the relationship of the OCTs with the EU.

The first iteration of the formal relationship between what is now the EU and the OCTs of EU Member States may be traced back to the 1957 Treaty establishing the European Economic Community (EEC) which is also known as the Treaty of Rome (ToR).¹⁹² Annexed to the ToR was an implementing convention that provided the rules for the association of OCTs with the European Community for the first five years following the entry into force of the ToR.¹⁹³ Article 136 of ToR included the following mandate;

...the Council shall, acting unanimously, lay down provisions for a further period, on the basis of the experience acquired and of the principles set out in this Treaty.

¹⁹¹ TFEU Annex II includes the following: Danish, French and the Netherlands territories and the territories under the sovereignty of the UK: Greenland; New Caledonia; French Polynesia; Wallis-and-Futuna; Mayotte; Saint-Pierre-and-Miquelon; French Austral and Antarctic Territory; Aruba; the Netherlands Antilles (now divided into five separate entities separately included in the Annex. i.e. Bonaire, Curaçao, Saba, Saint Eustasius and Saint Maarten); Anguilla; British Virgin Islands; Cayman Islands; Montserrat; the Turks and Caicos Islands; the Falkland Islands; Saint Helena and its Dependencies; British Indian Ocean Territory (Chagos archipelago); Pitcairn; the South Sandwich Islands and Southern Georgia; British Antarctic Territory; and the Bermuda Islands.

¹⁹² Articles 131 to 136, The Treaty of Rome, Part four, Association of Overseas Countries and Territories, p. 46.

<<http://www.gleichstellung.uni-freiburg.de/dokumente/treaty-of-rome>> accessed 30 Nov 2016.

¹⁹³ i.e. Until 31st Dec 192. COM(2008) 383 final (note 89).

In accordance with Article 136, Part Four of the ToR, the first Overseas Association Decision (OAD), having a duration of five years, was adopted by the Council on 25th Feb 1964.¹⁹⁴ Multiple varied OADs followed, the eighth and most recent was enacted as OAD 2013/755/EU,¹⁹⁵ and came into effect on 1st Jan 2014.

Historical context of the Overseas relationship with the EU

The EU Treaties recognise that the treatment to be afforded to the territories of its Member States is, among other factors, a function of geography. The OCTs are outside continental Europe and the Treaties apply *ratione loci* to recognise the geographic specificity of the OCTs and the limited application of the *acquis* in relation to the OCTs. This may be contrasted with the territories of the Member States that are within Continental Europe. Specifically, the EU *acquis* is fully applicable without exception in the territories of the Member States within continental Europe. The evolution of the treatment of OCTs by the EU illustrates how economic and other European interests have changed over time.

The three decades following WWII saw European colonial powers shedding colonies that could no longer be justified economically or politically. During the period during which that the initial European Treaties were being negotiated four of the six founding Member States still retained overseas possessions scattered over Africa, South America, the North Atlantic, the West Indies, and the Pacific. Some remaining colonies had natural resources that were attractive to European interests but many did not. Accordingly, the pragmatic issues of how to retain access to valuable natural resources, while limiting any long term costs associated with maintaining relationships with economically weak and geo-politically insignificant overseas territories and their predominantly non-European populations could not be avoided.¹⁹⁶

Treaty of Paris (1951 European Coal and Steel Community (ECSC))

At the time that the Treaty of Paris (1951 - ECSC) was being negotiated,¹⁹⁷ the overarching concerns among those instructing the non-French negotiators in relation to the non-European

¹⁹⁴ Decision 64/349/EEC of 25th Feb 1964. Subsequent OAD were as follows: #2 – Decision 70/549/EEC of 29 September 1970 (5 yrs), #3 - Decision 76/568/EEC of 29 June 1976 (5 yrs), #4 – Decision 80/1186/EEC of 16 December 1980 (5 yrs), #5 - Decision 86/283/EEC of 30 June 1986 (5 yrs), #6 – Decision 91/482/EEC of 25 July 1991 (10 yrs), #7 - Decision 2001/822/EC of 27 November 2001 (10 yrs & extended in 2007 to 31 December 2013 to coincide with the EDF and multiannual financial framework for 2007-2013), and #8 – Decision 2013/755/EU.

¹⁹⁵ OAD (note 7).

¹⁹⁶ These Member States were: France, the Netherlands, Belgium and Italy.

¹⁹⁷ The Treaty of Paris, formally the Treaty Establishing the European Coal and Steel Community (ECSC) was signed in April 1951.

territories of the negotiating states were not economic in nature.¹⁹⁸ Rather their concerns were more politically-based, centred on a fear that the then ‘High Authority of the ECSC’,¹⁹⁹ would not be able to supplant France’s authority over non-European territories controlled by the French.²⁰⁰ As a result, applying *ratione loci*, the geographic scope of the application of the 1951 Treaty of Paris, forming the European Coal and Steel Community (ECSC), not only excluded the overseas territories controlled by the signatories, but was expressly restricted to the ‘European territory of the Member States’,²⁰¹ and did not provide for the integration of overseas territories into the, then, projected EU.

This outcome was consistent with then prevailing European attitudes towards the colonial territories in the developing world. The seminal Schuman’s Declaration had mentioned the overseas territories, and Africa territories in particular, not as participants in the projected EU but rather as a source of potential economic resources that could be exploited by a united and more powerful Europe.²⁰² One of the mechanisms envisioned as early as the Treaty of Paris for maintaining European access to valuable non-European resources was a notional ‘most-favoured provision that would be extended to non-sovereign non-European territories, then controlled by Member States.’²⁰³

Euratom (1957 - European Atomic Energy Community)

The important role of access to uranium during the initial decade of the nuclear arms race provides a case in point demonstrating how European colonialism would operate within the new European regime.²⁰⁴

There were, and are, no commercially viable uranium deposits on the European continent. However, such deposits existed on the African continent in territory that had been subjected to

¹⁹⁸ It is noteworthy that, with regard to the French overseas territories, that coal had been discovered in Malagasy in 1908 and an underground mine had been operating there since 1941, thus these economic considerations could have been persuasive toward inclusiveness rather than the resulting exclusionary geographic scope. Stewardson, M.C. ‘Technical Report on the Proposed Exploration of the Sakoa South Coal Project, Madagascar’, 2007

¹⁹⁹ The High Authority of the ECSC was an executive branch of the former European Coal and Steel Community (ECSC) which was created in 1951 and ultimately, in 1967, became the European Commission.

²⁰⁰ Débats, Assemblée Nationale, Communauté européenne de défense: Suite de la discussion du projet de loi, Débat du 29 Aug 1954 (1ère séance), Intervention du député M. Sourou-Migan Apithy, JORF, 30 Jul. 1954, 4416-1429

²⁰¹ Article 79 of the Treaty of Paris provides as follows: ‘The present Treaty is applicable to the European territories of the Member States. It is also applicable to those European territories whose foreign relations are assumed by a Member State’. This Treaty expired in 2002.

²⁰² Schuman Declaration of 9 May 1950 noted; ‘...[w]ith increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African Continent’. *Custos*, (note 56).

²⁰³ Specifically, each High Contracting Party was required to extend to the other Member States the preferential treatment it enjoyed with regard to coal and steel in the non-European territories under its jurisdiction. However, its application was confined to the Member States exports, as opposed to the imports of the overseas territories into the ECSC and thereby imposed most-favored-nations obligations, rather than benefits, on the overseas territories. Article 79(2) of the Treaty of Paris forming the European Coal and Steel Community (ECSC).

²⁰⁴ Palayret, ‘Les Mouvements Proeuropéens’ (2006) in *Custos*, (note 56).

Belgian colonisation.²⁰⁵ The control and exploitation of these African resources,²⁰⁶ under the auspices of Euratom was of critical importance in implementing the energy supply and military strategies of the founding Member States.²⁰⁷ Unsurprisingly, Article 198 of the Euratom Treaty, which was signed in 1957, applied *ratione loci* and extended the geographical scope of its applicability to the overseas territories and provided as follows: ‘*Save as otherwise provided, this Treaty shall apply to European Territories and to non-European Territories under their jurisdiction.*’²⁰⁸

EEC (1957 - European Economic Community)

The EEC Treaty was also signed in 1957. In the negotiation leading up to the signing of the EEC in 1957, the French considered it of paramount importance to put in place a mechanism that would bind Africa to Western Europe and in this regard assigned considerable importance to the geopolitical concept of ‘Eurafrica’.²⁰⁹ The peripheral role to be played by non-African (non-resource rich) overseas territories did not garner much attention and remained vague in EEC discussions. As viewed from relevant seats of European governments, the small size, remoteness, and limited reported natural resources of non-African colonies did not justify much consideration in the quest for securing potential European economic riches.²¹⁰

The French Government were champions of the inclusion within the proposed Common Market of the non-European territories controlled by European states. Christian Pineau, the then French Foreign Affairs Minister,²¹¹ painted a persuasive picture to the other European metropolises of the potential economic gains that would flow to them from the access to new resources and the expansion of export markets if they would shoulder the burden of the development of the infrastructure in the overseas territories and extend free movement of goods

²⁰⁵ Belgium was one of the ‘inner six’ founding members of the EU. Other members of the ‘inner six’ were: France, the Netherlands, Italy, Luxembourg and West Germany.

²⁰⁶ The uranium supplies which has been mined since the 1930’s in the former Belgian Congo had provided for the construction of the two atomic bombs that were dropped on Japan in 1945. Denuit, D. ‘L’Euratom: Internationalisation ou nationalisation de l’énergie atomatique?’, *Le Soir* 25 Dec 1955

Struye, P., ‘Statement on Euratom and Congolese uranium (16 Mar 1956)

²⁰⁷ *Custos*, (note 56), para 2.2.1.

²⁰⁸ Article 198, Euratom Treaty, signed in 1957.

²⁰⁹ The ‘Eurafrica’ vision for the Overseas focused on an intercontinental linkage, in the form of an association, that would ensure that recipient ‘*territories would remain within the sphere of influence of the West*’. This position was largely based on development gap between Europe and Africa and the ensuing potential economic benefits that would to Europe. Spaak, P-H., ‘L’Alliance occidentale et le destin de l’Europe’, 3 Mars et Mercure, 1957, 7-9 in *Custos*, (note 56).

²¹⁰ *Custos*, (note 56).

²¹¹ At the the Venice conference of 24-25 May 1956 <http://www.cvce.eu/content/publication/2001/9/24/15b7aff0-41e9-4da9-b9a6-6ca19a33acea/publishable_en.pdf> accessed 12 Jan 2017.

to overseas products.²¹² Further, France conditioned its participation in the Common Market on the integration of the overseas territories,²¹³ and posited that the French Union already operated an integrated Common Market ‘of sorts’ in which French overseas territories were interdependent participants. The French argued that to exclude certain – but not all – of non-European territories controlled by the French would undermine French interests in sensitive parts of the world in what was, then, a problematic period of decolonisation.²¹⁴ Given that it was then generally accepted that France’s participation was vital to the success of the European project, France’s demands were largely satisfied by the inclusion of the former Article 227 in the EEC.²¹⁵ Specifically, again applying *ratione loci*, the then French Overseas Departments (DOMs) and colonial Algeria were fully integrated within the geographic scope of the applicability of the EEC. In contrast, the other non-European territories controlled by the signatories,²¹⁶ including the African colonies, would be offered ‘association status’ and would fall within a purpose-built ‘association regime’.²¹⁷

²¹² Bossuat, G., ‘L’engagement de la Quatrième République dans les Traités de Rome, Palais du Luxembourg’, in Journée d’études organisée au Sénat, L’Europe au Parlement de Victor Hugo à nos Jours, Paris, 6 Apr 2007

<http://www.senat.fr/colloques/europe_parlement_vh/europe_parlement_vh7.html#fnref23> accessed 30 Nov 2016, in Custos

²¹³ This position was based on the recommendation of Gaston Defferre, the then French Overseas Affairs Minister, in a letter dated 17 May 1956 to Guy Mollet, the then French Prime Minister. As observed by Custos, this position had been previously articulated by Pierre-Henri Teitgen, then the French Minister of the Overseas, in the negotiations regarding the aborted European Political Community (EPC) in 1952. Custos, (note 56).

²¹⁴ The integration of the French with the Overseas in the ‘Common Market’ of sorts resulted from both the supply of overseas markets by French exports and by preferential access to metropolitan France for overseas products, and thus generated economic, financial and monetary integration. Boucier de Carbon, ‘L’Association des PTOM à la CEE (1957)’, p.281, 290.

²¹⁵ The French Overseas Departments (DOMs) and Algeria were granted full integration, whereas the OCT fell under an association regime. Article 227 of the Treaty Establishing the European Economic Community (EEC) provides as follows:

Article 227

1. *This Treaty shall apply to the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands.*

2. *With regard to Algeria and the French overseas departments, the general and special provisions of this Treaty relating to:*

- *the free movement of goods,*
- *agriculture, with the exception of Article 40, paragraph 4,*
- *the liberalisation of services,*
- *the rules of competition,*
- *the measures of safeguard provided for in Articles 108, 109 and 226, and*
- *the institutions,*

shall apply as from the date of the entry into force of this Treaty.

The conditions for the application of the other provisions of this Treaty shall be determined, not later than two years after the date of its entry into force, by decisions of the Council acting by means of a unanimous vote on a proposal of the Commission.

The institutions of the Community shall, within the framework of the procedures provided for in this Treaty and, in particular, of Article 226, ensure the possibility of the economic and social development of the regions concerned.

3. ***The overseas countries and territories listed in Annex IV to this Treaty shall be the subject of the special system of association described in Part IV of this Treaty.***²¹⁵

4. *The provisions of this Treaty shall apply to European territories for whose external relations a Member State is responsible.*

²¹⁶ Article 227 (3) of the Treaty Establishing the European Economic Community (EEC), which was signed on 25 Mar 1957 and entered into force on 1 Jan 1958.

<http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1957_treaty_establishing_eec.pdf>.

²¹⁷ Article 136 of the Treaty Establishing the European Economic Community (EEC) provides as follows:

Article 136

The Association Regime

The dichotomy revealed by the differences in the applicability of the geographic scope of the Treaty of Paris (ECSC) versus Euratom Treaty illustrates what may be viewed as the appropriate territory by territory and resource by resource ‘purchase price’ warranted by the European political objective of ensuring that individual non-European territories would remain anchored within the influence and resource pool of the European camp.

The purpose-built ‘association regime,’ in conjunction with the European Development Fund (EDF), was aimed at securing both the political as well as the economic development objectives of Europe, as well as European aspirations for the non-European non-self-governing territories and populations they controlled.²¹⁸ While there is no evidence that the design of the ‘association regime’ was entirely altruistic, in contrast with the asymmetrical most-favoured-nation status of the 1951 ECSC,²¹⁹ the rules attached to the ‘association regime’ and EDF held out the apparent possibility of a more reciprocal arrangement as well industrial development for the OCTs that would extend beyond the mere export of tropical agricultural produce.

There were however pragmatic limits. Many of the non-continental-Europe territories controlled by European states were viewed as challenging and resource depleting rather than of any geo-strategic beneficial potential.²²⁰ Their small size, and minimal natural resources did not cast them as priority areas for the envisioned European expansion.²²¹

The low priority assigned to non-continental-Europe territories controlled by European states was further compounded in the early 1960s when many of the then African colonies that secured their independence rejected a role as only a ‘resource source’ to Europe.

For a first period of five years as from the date of the entry into force of this Treaty, an Implementing Convention annexed to this Treaty shall determine the particulars and procedure concerning the association of the countries and territories with the Community.

Before the expiry of the Convention provided for in the preceding sub-paragraph, the Council, acting by means of a unanimous vote, shall, proceeding from the results achieved and on the basis of the principles set out in this Treaty, determine the provisions to be made for a further period.

²¹⁸ Spaak, former Belgian Prime Minister and one of the ‘founding fathers of European Union’, considered the formation of the ‘association regime’ and EDF to be a ‘great political decision ...[and]...a great forward looking policy.’ Spaak, P.-H., ‘L’Alliance occidentale et le destin de l’Europe’ 3 Mar et Mercure, 1957, 7-9 in Custos

²¹⁹ Discussed above ECSC (note 197).

²²⁰ This may have been, in part, due to the then state of development of the Law of the Sea that the maritime assets of these non-continental OCTs were not taken into consideration. Custos, (note 56).

²²¹ As observed by Custos, their maritime assets were overlooked which may be attributed to the state of development of the law of the sea. Custos (note 56), para 2.2.3.

The African resource dowry that France and Belgium were expected to deliver to the union of European states, failed to materialize. Without unlimited access to the promised ‘dowry’ of African resources, the dream of ‘Eurafrica’ as well as the plans for the Eurafrica Common Market were significantly thwarted.²²² The full integration of the geographic scope model that was hard-won by the French only a few years before, was from that point forward, only applicable to two continental countries and three small islands.²²³

The European Community was left to content itself with the limited economic potential of its residual colonies. As a result, the independence of countries that were potential sources of natural resources, such as the Belgian Congo, Algeria, Niger and Malgasy, led to an increasingly accepted perspective that the applicability of the wider geographic scope of Euratom to the overseas territories was to be viewed as a ‘one off’ occasioned by a unique resource requirement.²²⁴ As opined by Custos; ‘*The Overseas were perceived as instrumentalities towards a project designed by and for Europeans*’.²²⁵

De-colonialization greatly reduced the number of overseas territories controlled by Member States during the late 1960s, when the number of OCTs fell from 29 to 9.²²⁶ It was not until the accession of the United Kingdom and Denmark in 1973 that the number of OCTs rose again to 30,²²⁷ but as a result of ongoing decolonisation fell again to 20 by the 1980s.²²⁸

The ensuing structure in EU law relating to the OCTs

The contraction of the OCT category in the 1960’s required a redefinition of the framework regulating the relationship between the newly independent, primarily African, former colonies and the Member States. Accordingly, in an effort to mitigate the ‘still-births’ of the Eurafrica

²²² The decolonization of African countries in the 1960s reduced the number of OCTs from 25 to 9.

- France – (4): Saint Pierre and Miquelon, French Settlements in Oceania, Southern and Antarctic Territories, and New Caledonia and dependencies
- Belgium – (2): The Belgian Congo (Democratic Republic of the Congo) and Rwanda-Burundi.
- Italy – (1): The trust territory of Somaliland under Italian administration.
- The Kingdom of the Netherlands – (2): The Netherlands New Guinea and the Netherlands Antilles (the Netherlands Antilles became an OCT, by way of the Brussels Convention signed on 13 Nov 1962, in force since 1 Oct 1964 – 64/533/EEC [1964])

²²³ These are: French Guiana, Algeria, Martinique, Guadeloupe and La Réunion.

²²⁴ Custos (note 56), para. 2.2.

²²⁵ *ibid.*

²²⁶ In the context of being able to exert influence at the central European level, it is noteworthy that the number of Member States with OCTs was also reduced when, with the independence of Somalia in 1960, Italy was no longer a Member State with OCTs.

²²⁷ Twenty of these thirty were British, European Commission, ‘The Status of OCTs associated with the EC and options for “OCT 2000”’, COM (1999) 163 final 13.

²²⁸ Countries which gained independence from the UK in the 1980’s include: Antigua and Barbuda, Belize, Cyprus, Saint Kitts and Nevis, Vanuatu (jointly administered with France) and Zimbabwe.

initiatives and Eurafrika Common Market , the EEC signed the Yaoundé Convention in 1963.²²⁹ This Convention created a new form of legal relationship that could be used by the Member States of the EEC, to build ties of economics and influence with African Caribbean and Pacific (ACP) countries .

The Yaoundé Convention also failed to meet the highest expectations of the EEC. The subsequent political upheavals that destabilised many newly independent ACP countries, the failure of the ACP regime to provide any significant economic stimulus for the ACP countries and the vicissitudes and vagaries of geopolitics, both European and global, subsequently led to a decline in EEC interest in the overseas territories controlled by the Member States. Indeed, when long-promised action was finally taken in relation to the overseas territories of Member States, there was significant confusion within the apparatus of the EEC with regard to the status of OCTs.²³⁰ By way of example, although DOMs (future ORs), OCTs and ACPs stood on different legal footings vis-à-vis the geographic scope of the applicability of the EEC, the application of the European Development Fund (EDF) provided for equal treatment to DOMs, OCTs and ACPs. This has led to the view that the EEC simply could not bother to develop a defined plan for the remaining overseas territories of its Member States.²³¹ As opined by Custos, *'it was as if the development cooperation goal encapsulated in the conventional association designed for the African continent after the independences was applied by default to the remaining European Overseas'*.²³²

In years that followed, both the DOMs and OCTs were initially subjected to similar abeyance. It was only following the ECJ's 1978 clarification in the Hansen case that,²³³ based on the integration status enshrined in Article 227 of the EEC, DOMs have been able to secure a status of their own within the EU. As a result, in the 1980s the DOMs, as a category subject to full integration,²³⁴ became known as the Overseas Regions (ORs) and received initial Treaty recognition 1999 with the coming into effect of the Amsterdam Treaty.²³⁵

²²⁹ The Yaoundé Convention was signed with 18 of the newly independent African countries and Malagasy. Convention d'association entre la Communauté économique européenne et les Etats africains et malgache associés à cette Communauté (First Yaoundé Convention), Yaoundé, 20 Jul 1963.

²³⁰ Custos (note 56), para.3.

²³¹ As observed by Custos, *'It was as if the development cooperation goal encapsulated in the conventional association designed for the African continent after the independence was applied by default to the remaining European Overseas.'* Custos (note 56).

²³² As observed by Custos, *'It was as if the development cooperation goal encapsulated in the conventional association designed for the African continent after the independence was applied by default to the remaining European Overseas.'* Custos (note 56),

²³³ Case 148/77 H. Hansen jun. & O.C. Balle GmbH & Co. v Hauptzollamt de Flensburg [1978] ECR 017/87.

²³⁴ Under Articles 349 (1) and (2) TFEU, ORs are entitled to differentiated integration which in effect means that the Commission, European Parliament and the Council are under a treaty-based obligation to factor in the specificity of the ORs in their decision making.

²³⁵ Treaty of Amsterdam [1997] OJ C 340. The Amsterdam Treaty was signed on 2 October 1997, and entered into force on 1 May 1999.

In contrast, not only have the OCTs continued to be subjected to protracted disinterest,²³⁶ they remain ‘pigeon-holed’ in the exclusionary category.²³⁷ It is this OR-OCT divide, originally derived from the 1957 EEC Treaty, that has become a significant analytical tool in the analysis of the relationship of the EU with the OCTs in uncharted territory such as that posed by Brexit.

²³⁶ European Commission ‘The Status of OCTs associated with the EC and options for “OCT 2000”, p. 18
<<http://aei.pitt.edu/4963/1/4963.pdf>> accessed 12 Jan 2017.

²³⁷ i.e. in contrast to ORs (previous DOMs), the OCTs remain outside the full integration of the geographic scope of the Treaties.