European Community and Union, Association of Overseas Countries and Territories
Freya Baetens

Subject(s):
Regional organizations — EU Treaty

Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Professor Anne Peters (2021–) and Professor Rüdiger Wolfrum (2004–2020).
A. The Overseas Countries and Territories

1 Historically, the list of overseas countries and territories (‘OCTs’) associated with European States was much longer, but most of these became independent sovereign States (mostly African, Caribbean, and Pacific States; ‘ACP States’) during the period of → decolonization. The remaining 25 OCTs are constitutionally linked with Denmark (→ Greenland), France (French Polynesia, Mayotte, New Caledonia and Dependencies, Saint Pierre and Miquelon, French Southern and Antarctic Territories, and Wallis and Futuna Islands), the Netherlands (Aruba, Bonaire, Curaçao, Saba, Saint Eustatius, Sint Maarten), or the UK (Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, → Falkland Islands/Islas Malvinas, Montserrat, Pitcairn Islands, Saint Helena and Dependencies, South Georgia and the South Sandwich Islands, and Turks and Caicos Islands).

2 The OCTs enjoy various degrees of → autonomy and since 1964 have also been associated with the → European (Economic) Community (now European Union; ‘EU’) itself in accordance with Part Four Treaty on the Functioning of the European Union (‘TFEU’; → European Community and Union, Actor in International Relations). Part Four TFEU almost literally repeats the provisions of the EC Treaty. The → Lisbon Treaty brought only minor modifications, changing references to the ‘Community’ into ‘Union’, and ‘Treaty’ into ‘Constitution’.

3 Although OCTs are not third countries and their nationals are in principle EU citizens, they do not form part of the single market and must comply with third country obligations regarding trade, notably → rules of origin, (plant) health, and safeguard measures. The OCTs are not part of the EU, hence EU law applies to them only insofar as necessary to implement the association agreements. In January 2014 Bermuda became the last OCT to join the OCT-EU association arrangements. Prior to this date, Bermuda had chosen not to participate.

4 To avoid possible confusion, it needs to be borne in mind that there are two associations involved here. On the one hand, there is the Overseas Countries and Territories of the European Union Association (‘OCTA’), which is a non-governmental actor that defends the interests of the OCTs and is as such not linked to any EU legislation on the OCTs. On the other hand, there are the association agreements (‘Overseas Association Decisions’) governing the relationship between the OCTs and the EU (→ European Community and Union, Association Agreements).

B. The EU-OCT Relationship

1. Legal Basis in the TFEU

5 The first pillar of the Association with the EU is based on Arts 198–204 (Part Four) TFEU (Association of the Overseas Countries and Territories). Art. 198 TFEU states the purpose of the association with the countries and territories listed in Annex II to the TFEU: ‘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’. Moreover, the 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’ (ibid). Art. 199 TFEU outlines the objectives which include reciprocal most-favoured-nation and national treatment, in particular as compared with the treatment applied to the EU Member State with which they entertain special relationships (→ Most-Favoured-Nation Clause; → National Treatment, Principle). This treatment is to be accorded with respect to trade and investment promotion and protection, including investments financed by the EU. Finally Art. 199 (5) TFEU provides for a right of establishment for
nationals and companies, to be applied on a non-discriminatory basis, but possibly subject to special measures. Art. 200 TFEU entirely abolishes customs duties on imports into EU Member States, while OCTs are only allowed to levy customs duties ‘which meet the needs of their development and industrialization or produce revenue for their budgets’ (Art. 200 (5) TFEU) without giving rise to ‘either in law or in fact ... any direct or indirect discrimination between imports’ (Art. 200 (3)–(5) TFEU). Under Art. 201 TFEU, Member States can request the Commission to propose ‘measures needed to remedy the situation’. Art. 202 TFEU deals with freedom of movement for workers which is governed by unanimously approved agreements, subject to ‘provisions relating to public health, public security or public policy’ (Movement, Freedom of, International Protection). Arts 203 and 204 TFEU provide for the competence of the Council to lay down further rules and procedures and refer to Protocol No 34 on Special Arrangements for Greenland (annexed to the TFEU).

6 In other words, OCTs were offered the possibility of opting in to EU provisions on freedom of movement for workers (Art. 202 TFEU) and freedom of establishment (Art. 199 (5) TFEU) without becoming subject to the EU’s common external tariff (Art. 200 (1) TFEU) as they may still claim customs on goods imported from the EU on a non-discriminatory basis (Art. 200 (3) and (5) TFEU).

2. The Overseas Association Decisions

7 Under Art. 240 (4) Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (applicable until 1 December 2001; ‘Overseas Association Decision of 1991’), the Council of the EU had the competence to act unanimously on a proposal from the European Commission in order to establish the provisions for the application of the principles set out in Arts 131–35 EC Treaty (now 198–202 TFEU; → European Common Foreign and Security Policy; → European Community and Union, Decision-Making and Competences on International Law Issues). In addition, Declaration No 36 annexed to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts of 1997 invited the Council to review the association arrangements with the OCTs in accordance with Art. 136 EC Treaty (now Art. 203 TFEU, the wording has been amended) with a fourfold objective: promoting the OCTs’ economic and social development; developing the EU–OCT economic relations; considering each OCT’s diversity and characteristics; and ensuring financial effectiveness. Subsequently, the European Parliament adopted two resolutions: one resolution on relations between the OCTs, the ACP States, and the outermost regions of the EU (European Parliament ‘Resolution on Relations between Overseas Countries and Territories [OCTs], the ACP States and the Outermost Regions of the European Union’ [11 February 1999] [1999] OJ C 150/439); and another on the Commission’s proposal for a Council Decision on the association of the OCTs with the EC (European Parliament Resolution on the Proposal for a Council Decision on the Association of the Overseas Countries and Territories with the European Community [‘OCTs’]) [not yet published COM[2000] 732—C5-0070/2001—2001/2033[COS]]. In its Communication of 20 May 1999 entitled ‘The Status of OCTs associated with the EC and options for “OCT 2000”’ (COM[1999] 163 final [20 May 1999]), the Commission assessed the OCT–EC relationship since 1957, identified the basic principles, and drafted a policy proposal.

8 The Council Decision which is currently regulating the EU–OCT association is Council Decision 2013/755/EU on the Association of the Overseas Countries and Territories with the European Union (‘Overseas Association Decision’). Part One of this Decision first sets out a number of general provisions confirming the objectives and principles outlined in the then-EC Treaty, particularly in relation to the eradication of poverty, the promotion of
sustainable development, and the gradual integration of economies. Although Art. 3 Overseas Association Decision of 2013 prohibits discrimination, Art. 9 provides for specific treatment of isolated OCTs, as listed in Annex I. Chapters 2 and 3 Part One Overseas Association Decision of 2013 deal with cooperation within the OCTs and the institutional framework of the association. Part Two focuses on areas of cooperation for sustainable development, including environmental issues, energy, climate change, and disaster risk reduction. Part Three addresses trade and trade-related cooperation. The Decision has explicit regard for the OCTs’ precarious situation as ‘fragile island environments requiring adequate protection, including in respect of waste management’ (para. 23 [Preamble] and Art. 22 Overseas Association Decision of 2013) and radioactive waste. Part Four regulates the instruments for sustainable development, including financial resources and technical assistance. For the period 2014–20, the OCTs have been allocated €364.5 million of European development funding, as outlined in more detail in the annexes to the Decision.

C. OCTA

9 The first OCT ministerial conference took place on 16 and 17 November 2000 during which the OCT governments put forward a proposal to formally establish an Association of Overseas Countries and Territories of the European Union. This proposal met with the approval of the EU expressed in the Overseas Association Decision of 2001 (European Community and Union, Membership in International Organizations or Institutions; European Community and Union, Party to International Agreements). At the second OCT Ministerial Conference on 18 September 2002, the OCT governments reached agreement on the Articles of Association and elected the first executive committee of OCTA. They also nominated a chairman and a vice chairman of the ministerial meeting of OCTA, which is the highest political body of the Association convened at least once every year.

1. Organization and Activities

10 The OCTA is formed by its constitution, the OCTA ASBL (association sans but lucratif) Articles of Incorporation of a non-profit association, incorporated on 5 March 2003 according to Belgian law in Brussels, pursuant to the Inter-governmental Agreement signed between the OCTs on 18 September 2002. It outlines the organizational aspects of the Association, such as name, seat, membership, ministerial meeting, and financial resources.

11 Art. 3 OCTA Articles of Incorporation detail the objectives of the Association as follows:

i. to provide a forum for exchange of ideas and discussion of issues of common interest;

ii. to work for the mutual benefit of the Members;

iii. to share specific information on issues of interest and benefit to all OCTs;

iv. to make recommendations, where necessary, to the governments of all OCTs and the related EU-Member States on the appropriate courses of action;

v. to develop effective working relationships, as a group, with the EU institutions, the ACP-Group and its Secretariat and other relevant international, multi-lateral and regional organisations and institutions;

vi. to share best practice among Members in relevant areas;
vii. to defend the collective interests of the Members and to represent these interests vis-à-vis the institutions of the European Union for all matters outlined in the OCT-Decision.

12 OCTA operates through both internal and external activities. The latter include conferences, forums, and workshops which aim to raise public awareness of OCTA as an organization and of its members. Internal activities consist mainly of trilateral meetings (involving the European Commission, all OCTs, and the relevant EU States) of the annual OCT Forum, of the executive committee (the reports of which may in some cases be classified), and of the Partnership Working Parties (‘PWPs’). These are executive sub-committees which identify the necessary tools for raising the OCTs’ profile in order to ensure that their interests are considered in the EU. Having received an official mandate, the following PWPs are currently working on their tentative agenda:

- PWP-1: Financial Services;
- PWP-2: Trade and Regional Integration;
- PWP-3: Environment, Climate Change, Prevention and Management of Natural Disasters (→ Climate, International Protection)

The focus of future PWPs may encompass (non-exhaustively) matters of budgetization, access to budget lines, and community programmes.

13 In accordance with the special arrangements, Greenland participates in all discussions but has been particularly involved in the PWP working on environmental issues due to the obvious consequences of climate change for the → Arctic region. The current emphasis on matters relating to the environment will be enhanced in the future as all parties have expressed their intention to create a trilateral strategy between the EU Member States, the European Commission, and the OCTs in this field.

14 In the Extraordinary Ministerial Conference of June 2015, the Executive Committee of OCTA presented the Interim Strategic Plan 2015–2020. This Interim Strategic Plan is based on three pillars: improving policy dialogue; promoting strategic partnerships; and fostering sustainable development in the OCTs. Under the first pillar, improving policy dialogue is aimed at developing a more active partnership between the EU and the OCTs so as to achieve the objectives of the Overseas Association Decision. The dialogue will allow for the expression of the OCTs’ views, concerns, and perspectives in such a way that these are taken into account in the formulation of EU strategies, policies, and programmes. Moreover, the goal of this dialogue is ‘[t]o facilitate the elaboration and the implementation of development strategies’ as well as ‘[t]o increase awareness in Europe and globally about OCTs and policy issues that they face, thus raising OCTs’ and OCTA’s profiles, while also enhancing OCTs’ interest in the EU and its institutions’ (Strategic Plan 11). Under the second pillar, the Strategic Plan is intended ‘[t]o strengthen the partnership between OCTA and the EU, as well as with Member States to which OCTs are linked’; to ‘voice OCTs’ interests/perspectives on the global scene’; and ‘[t]o promote projects of common interest with partners as appropriate’ (Strategic Plan 15). Under the third pillar, the Strategic Plan focuses ‘on opportunities for OCTs to diversify their economies and increase their regional
integration, based on growth levers that can bring policies and activities in the fields of innovation, competitiveness, blue and green growth and cooperation’ (Strategic Plan 18).

2. An International Organization?

The Strategic Plan advocates that OCTA be more of a public international organization than a private non-profit association, which might encounter objections from experts in international institutional law. There is currently no agreed definition of an international organization, but several definitions have been formulated in the field of public international law, some by treaty drafters and some by academic scholars (for an elaborate comparison of various definitions, see Baetens). Both the Vienna Convention on the Law of Treaties (1969) (‘VCLT’) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) are very brief in their definition, stating that an “international organization” means an intergovernmental organization’ (common Art. 1(i)). In its Commentaries to the Draft Articles preceding the 1986 VCLT, the ILC explained that members of international organizations can include States, other international organizations, and ‘associate members which are not yet States’ (UN ILC ‘Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations with Commentaries’ [1982] GAOR 37th Session Supp 10, 25, at para. 19). OCTs could arguably fit within the latter category.

The ILC expanded on the matter in its Draft Articles on the Responsibility of International Organizations, where international organizations are defined as organizations ‘established by a treaty or other instrument governed by international law and possessing its own international legal personality. International Organizations may include as members, in addition to States, other entities’ (UN ILC ‘Draft Articles on Responsibility of International Organizations’ [2009] GAOR 64th Session Supp 10, 19, at Art. 2 (a)). It is problematic to apply this definition to OCTA as it was not established by a treaty and it could be said that the choice for incorporation under Belgian law implies that OCTA is not governed by international law. However, OCTA does have a legal personality separate from that of its members which could arguably fall under the term ‘other entities’.

Alternative definitions have been put forward by international institutional law experts. For example Klabbers viewed international organizations as ‘social constructs created by people in order to help them achieve some purpose, whatever that purpose may be’ (Klabbers 8). This definition certainly applies to OCTA as it is a social construct created by the OCTs to achieve a certain number of objectives, as outlined in the Articles of Incorporation. Klabbers, as well as other authors such as Blokker and Schermers (International Institutional Law: Unity within Diversity [Nijhoff The Hague 2003]), outlined a set of three criteria which have to be fulfilled in order to indicate the existence of an international organization (at 9–13): first, it has to be created between States; second, on the basis of a treaty; thereby establishing, third, an organ with a distinct will.

Here it seems that OCTA fails on all three counts. First, it was not created by independent States but by semi-independent countries and territories. However, this criterion is not a hard rule—for example the EU, not itself being a State, is one of the founding members of the World Trade Organization (‘WTO’) nevertheless. Second, OCTA was not created by a treaty but by incorporation as a non-for-profit organization according to Belgian law. However, the Nordic Council, for example, also emerged from cooperation between parliaments, without ever any treaty being signed. Third, do the OCTA Ministerial Meeting and the Executive Committee form organs with a will distinct from their members? This criterion has been widely discussed in the literature because it touches upon the core relationship of an organization with its members. Some commentators regard any international organization as no more than a tool in the hands of the members, and from
this point of view, a ‘distinct will’ is a fiction (Klabbers 12, referring to R Reuterswärd ‘The Legal Nature of International Organizations’ [1980] 49 Nordisk Tidsskrift for International Ret 14–30). However, what would in such case be the point of creating an organization if a mere common spokesperson would suffice? The key is not to try to define a vague concept such as ‘distinct will’ but rather to check for negative evidence. In other words, could the objective of this organization be achieved as easily without the presence of an international organization? Particularly in the light of a possible extension of its competences and functions, OCTA could definitely present an added value.

19 Whether OCTA could be qualified as an international organization according to a strict application of the contemporary public international law rules on international organizations is uncertain. However, support for classifying OCTA as an international organization can also be found in the general pragmatic and functional approach which often characterizes the application and interpretation of public international law. For example, when determining statehood, this element of pragmatism features in the requirement that an entity needs to prove that it has the capacity to enter into international relations. Whether an entity is capable thereof will be evidenced, for example, by the fact that it has concluded treaties with other States. Similarly, it can be argued that an entity can exercise the powers of an international organization, if it is recognized as such by other international organizations and States. Hence, whether OCTA is an organization under public international law is a determination that should be postponed until it is clear whether States such as the ACP States and international organizations such as the EU treat OCTA as an international organization in practice.

D. Evaluation and Specific Problems

20 Poverty, under-development, environmental degradation, and social and economic inequalities will remain the most pressing challenges for the OCTs in the future which will need to be addressed under any sustainable development policy. Moreover, the OCTs are inevitably constrained by adverse factors such as their small size and limited resources, and further compounded by the consequences of climate change on their fragile ecosystems. The establishment of an organization such as OCTA is a step in the direction of a concerted effort to take into account the special needs of the OCTs. It also fits within the general set of EU principles, such as → subsidiarity which aims at ensuring that matters are handled by the smallest, lowest, or least centralized competent authority, or, formulated in the negative: a central authority should perform only those tasks which cannot be performed effectively at a more intermediate or local level (incorporated, eg in former Art. 5 EC Treaty which was replaced by Art. 5 TEU). In this context, it makes sense to involve the OCTs in any rulemaking process which may affect development at their level.

21 The current focus on economic and trade co-operation (with favourable rules of origin and an advantageous trade system for OCT products and services) was to be expected in light of the EU’s own history as a mainly economic cooperation project. Yet, in order to succeed in achieving its aims, a significant positive impact on regional cooperation and integration will need to be made through the creation of a real support system (as opposed to well-intended declarations) for economic cooperation and development, free movement of people, goods, services, labour, and technology, liberalized trade and payments, and sectoral reform policies at regional level. Only this will provide a considerable contribution to sustainable development (beyond its economic aspects) in the OCTs through policies and strategies relating to production, trade development, human, social and environmental development, and cultural and social cooperation. However, this endeavour runs the risk of getting lost in ‘Brussels bureaucracy’, or even creating a fragmented development policy. Already at this relatively early stage, initiatives seem to develop along two parallel lines: proposals originating in the OCTs and the ministerial meeting of OCTA on the one hand, and
EU decisions, green papers, and communications on the other. Hence, the major challenge in the future will entail an effort to make these two lines of policy-making converge so that economic, environmental, and other development efforts can be synchronized so as to maximize their effectiveness.

Select Bibliography

F Murray The EU and Member State Territories: The Special Relationship under Community Law (Palladian Law 2004).

Select Documents

Commission of the European Communities ‘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 (6 November 2009).