EU Law of the Overseas

Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis

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Between the Devil and the Deep Blue Sea? Conflicts in External Action Pursued by OCTs and the EU

Steven Blockmans*

1. INTRODUCTION

The Overseas Countries and Territories (OCTs) are located in more or less remote geographical regions all over the world. Despite being located outside the Union’s European borders, the OCTs themselves and the four Member States to which they are linked (Denmark, France, the Netherlands and the United Kingdom) often point to the strategic importance of the OCTs as the ‘ultimate frontiers of Europe’ or the ‘outposts of the EU’. Strikingly though, the strategic value of the OCTs as the Union’s outposts and the potential risks they pose to the EU are not reflected in the European Security Strategy of 2003 and its review of 2008.1

* The author is grateful to Marja-Liisa Laatsit, research assistant at the Centre for the Law of EU External Relations (CLEER) for the empirical research underpinning the findings in this contribution. The usual disclaimer applies.


looking out – which is the perspective adopted in this chapter – this raises two main questions. Firstly, what is the actual strategic importance of the OCTs for the EU as a whole? Secondly, what kind of responsibilities do the OCTs – and the Member States to which they belong – have vis-à-vis the Union in the development and implementation of the Common Foreign and Security Policy towards the regions in which they are located, and indeed towards the rest of the world? While brief remarks on the former will not be shunned (2), this contribution to the legal debate will focus mainly on the second question. Special attention will be paid to the duty of loyal cooperation resting upon the OCTs and Member States according to which they have to align their positions and actions in the foreign and security policy field with the CFSP (5). To that end, this contribution will expose the national legal frameworks in which certain OCTs have been empowered to develop their own external relations (3) and draw parallels with subnational entities of federal Member States that conduct their own foreign affairs (4).

2. OCTS AND GEOPOLITICS

In the definition of foreign policy, size and geographical location matter a great deal. It is therefore essential to take into account the enormous diversity of the OCTs and their geostrategic dimensions. A key characteristic of most OCTs is that in addition to being islands they are also peripheral regions situated on the EU’s external borders. They are more exposed to specific risks: proximity to conflict zones, exposure to clandestine immigration and/or various kinds of trafficking, vulnerability to accidental or deliberate marine pollution, etc. In some cases, their remoteness, insularity, small size, difficult topography and climate, demographic fragmentation and economic dependence on a few products weigh heavy on OCTs’ structural social and economic conditions and restrains their development severely. Another important challenge relates to the role played by certain countries as regional powers – such as the United States, Brazil and Venezuela in the Caribbean, or the United States, Japan, China, Australia and New Zealand in the Pacific – and the not necessarily benevolent influence these countries exert on the OCTs. It has been argued that ‘by implementing a policy of territorial cohesion that enhances the prosperity of these island territories and supports local people, the EU [would] help to strengthen the security of its borders, and thus its own stability’.3

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2. The scope of this contribution thus falls beyond Part Four of the TFEU dealing with economic, social and cultural association of OCTs with the Union. The only publication which comes close to the scope of the current research but which is wider in ratione materiae and slightly dated, is Karagiannis, S., ‘À propos du règlement des conflits d’intérêts entre les territoires dépendant d’Etats Membres et les Communautés européennes’, 75 Revue de Droit International et de droit comparé, 1998, 330.

However, not all is doom and gloom. The OCTs’ geostrategic positions, ecological richness and climatic conditions can also be regarded as sources of great potential. French Polynesia, for example, houses research institutes from France and the United States active in biodiversity research, while Greenland can gain new opportunities from the exploitation of hydrocarbons and other minerals, and new sea routes around the North Pole. In the Caribbean, Pacific and Indian Ocean regions, the OCTs are neighbours of ACP states. Similarly to the French outermost regions in the Caribbean and the Indian Ocean, some of these OCTs have know-how that is not always available in their neighbouring countries and could usefully be shared with them, thereby creating an export market for the OCTs. Similarly, OCTs could also actively contribute to the promotion of ‘European’ values in their respective regions.

One key message of the European Commission in a 2009 Communication is that the OCTs, as outposts of Europe all over the world, should be seen as assets for the EU rather than as a burden. An idea was proposed in this Communication to help establish ‘centres of experience and expertise’ in the OCTs that would facilitate the OCTs’ role as bridgeheads between the EU and their respective regions. This could, for example, relate to the implementation and promotion of high standards in the field of the environment, rule of law, good governance, respect for human rights (including minority rights), promotion of good neighbourly relations, or principles of market economy, innovation and sustainable development.

The European Commission is a keen proponent of the development of a more active partnership with the OCTs as regards cooperation in areas such as economic policy, enterprise, employment and social policy, trade and investment, infrastructure (including the Galileo system, as the OCTs are potential or real candidates for the development of ground infrastructure), research, maritime affairs and governance of the sea, energy supply, energy efficiency and renewable energy sources, good governance (including in the tax, financial and judicial area), civil society development, cultural exchanges, the media, education and training, migration,

4. African, Caribbean and Pacific countries which are signatories to the 2000 Cotonou Agreement with the EU. See 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 Jun. 2000 – Protocols – Final Act – Declarations [2000] OJ L 317/3. The Cotonou Agreement is aimed at the reduction and eventual eradication of poverty, while contributing to sustainable development and to the gradual integration of ACP countries into the world economy. The 2005 revision of the Cotonou Agreement was, inter alia, concerned with the fight against impunity and the promotion of criminal justice through the International Criminal Court (Art. 11(6)). The Agreement gives a stronger political foundation to ACP-EU development cooperation. Political dialogue is one of the key aspects of the Agreement and addresses issues which had previously been outside the scope of development cooperation, such as peace and security, arms trade and migration. See s. 4, infra.

5. This has been recognized in the European Commission’s Communication ‘Elements for a New Partnership between the EU and the Overseas Countries and Territories (OCTs)’, COM(2009) 623 final, which built upon the European Commission’s Green Paper, ‘Future Relations between the European Union and the Overseas Territories’, COM(2008) 383 final. See, for a detailed analysis, the contribution by Dominique Custos to this collection.
and the fight against organized crime, trafficking of human beings, terrorism, money laundering, tax fraud, tax evasion, drugs and illegal, unreported and unregulated fishing, as well as administrative, police and judicial cooperation. Moreover, cooperation in the field of both sea and air transport – including the Common Aviation Area – can contribute significantly to the integration of OCTs within their own region and establish a closer relationship between the OCTs and the European Union.

In any event, the possibilities for action in the mutual interest of a given OCT and the EU depend on that OCT’s potential and willingness to develop and share certain assets, and on the attractiveness of these assets for the EU, the neighbouring countries or other potential partners. Also, the EU’s readiness to cooperate more actively with the OCTs is important. As noted above, it is essential that the enormous diversity of the OCTs – and in particular the isolation of certain OCTs owing to geographical, political or other factors – be taken into account. These factors will ultimately define the EU’s and even more the OCTs’ outlook on the world and – depending on the degree of devolution granted to them in the constitutional system of the EU Member States to which they belong – the foreign policy and relations with third countries and international organizations of the OCTs. This last point merits some closer attention.

3. NATIONAL LEGAL FRAMEWORK FOR OCTS’ EXTERNAL RELATIONS POLICY

Even if the national legal frameworks within which OCTs can develop and conduct their own domestic policies differ a great deal, foreign policy, security and defence are generally excluded from the competence reach of the OCTs. There are only a handful of examples of OCTs which have devolved powers in this respect. These powers are mostly of an executive nature, under the ultimate supervision of the Ministries of Foreign Affairs in the metropolitan capitals. New Caledonia and Bermuda are cases in point. Greenland is another and, from a European integration perspective, perhaps the most striking. These cases will be discussed in turn.6

3.1. NEW CALEDONIA

Since 1986 the United Nations Committee on Decolonization has included New Caledonia on the UN list of Non-Self-Governing Territories. New Caledonia has a special status of ‘sui generis collectivity’ of France, a status which reflects it gradually acquiring more state autonomy and its own administrative structures and institutions. As a result of the 1998 Nouméa Accord, New Caledonia is set to decide whether to remain within the French Republic as an autonomous overseas

6. This selection of cases is not exhaustive. French Polynesia, for instance, also enjoys a very important degree of autonomy from France, also in the sphere of external and regional relations.
collectivity or become an independent state in a referendum which will be held between 2014 and 2019. Relations between New Caledonia and France in the area of external affairs have also been enshrined in the Accord:

La Nouvelle-Calédonie peut aujourd’hui:

– négocier directement, dans le respect des engagements internationaux de la République, des accords avec un ou plusieurs États, territoires ou organismes régionaux du Pacifique et avec les organismes régionaux dépendant des institutions spécialisées des Nations unies. Il s’agit ici de la consécration d’un droit d’initiative autonome en matière de relations extérieures;
– avec l’accord des autorités de la République, être membre, membre associé d’organisations internationales ou observateur auprès de celles-ci. Elle y est représentée par le président du gouvernement ou son représentant;
– disposer d’une représentation auprès de l’Union européenne et des États ou territoires du Pacifique.
– La Nouvelle-Calédonie est donc dotée d’outils juridiques lui permettant d’élaborer sa propre politique extérieure, toujours dans le respect des obligations internationales de la France, en renforçant ses liens avec l’Union européenne, ainsi qu’avec les autres États et Territoires du Pacifique (au sens large) en vue d’améliorer son intégration régionale.

New Caledonia and France thus share responsibility for New Caledonia’s regional relations, allowing the archipelago to join international organizations in its own right. Accordingly, New Caledonia became an Observer to the Pacific Islands Forum (PIF) in 1999 and was welcomed into the new PIF category of Associate Member in 2006. The government in Nouméa signalled an intention to lodge a request for full membership of the PIF as well as representation at the Melanesian Spearhead Group. New Caledonia is a long-standing member of the Secretariat of the Pacific Community (SPC), which has its headquarters in Nouméa. The New Caledonian government has asked the French state to support the training of local representatives to set-up New Caledonian representative offices in the Pacific region, with the assistance of the French diplomatic missions in Australia, New Zealand, Vanuatu, Fiji and Papua-New Guinea.8 The Nouméa Accord also allows New Caledonia to negotiate international agreements,9 but not to conclude

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8. For more information, see <http://gouv.nc/portal/page/portal/gouv/presidence/cooperation_reg>.
9. A right confirmed by the French legislature in the Organic Law No. 99-209 of 19 Mar. 1999. However, New Caledonian partners have been cautious in entering into negotiations with this Pays d’Outre Mer, as they did not perceive it as a fully-fledged and accountable subject of international law. The virtual actoriness of New Caledonia in the international domain should therefore not be overstated. See Custos, D., ‘New Caledonia, a Case of Shared Sovereignty within the French Republic: Appearance or Reality?’ 13 Eur. Pub. L., 2007, 109.
them. The latter remains the prerogative of France. An example thereof is the Cooperation Agreement between New Caledonia and Vanuatu, which entered into force on 31 May 2010.\textsuperscript{10}

3.2. Bermuda

Like New Caledonia, Bermuda is included in the list of Non-Self-Governing Territories managed by the UN Committee on Decolonization. The island was granted internal self-government through the 1968 Bermuda Constitution Order.\textsuperscript{11} According to Article 62, Bermuda’s external affairs, defence (including the armed forces), internal security and police are overseen by a Governor who is appointed by the UK government. As such, Bermuda does not have independent international relations at the political level.\textsuperscript{12} It participates through British delegations in the United Nations and some of its specialized and related agencies. It is, however, an Associate Member of the Caribbean Community and Common Market (CARICOM). Bermuda also participates in the Caribbean Conservation Cooperation, the International Confederation of Trade Unions, the sub-bureau of Interpol, and the International Olympic Committee. While all this does not amount to great legal potential for developing a solid external relations agenda, the government in Hamilton has shown some initiative in unilaterally defining Bermuda’s external action.\textsuperscript{13}

3.3. Greenland

In the context of the European integration process, the most remarkable example of an autonomous ‘foreign’ policy implemented by an OCT is that of Greenland, which effectively ‘withdrew’ from the European Economic Community (EEC).\textsuperscript{10}

\textsuperscript{10} The agreement is available at <http://gouv.nc/portal/pls/portal/docs/1/11408004.PDF>. The formula under which the agreement has been concluded is the following: ‘Le Gouvernement de la République française, représenté par le Président du Gouvernement de la Nouvelle Calédonie’.


\textsuperscript{12} Bermuda’s policy reach is similar to that of the Falkland Islands, where a new constitution took effect on 1 Jan. 2009, replacing a charter adopted in 1985. The new document, approved by Queen Elisabeth II, formalizes the system of self-government on the South Atlantic Archipelago. The UK government in London retains responsibility for external affairs, defence, internal security and the administration of justice. The new constitution clarifies the relationship between the Executive Council and the islands’ Governor, who is appointed by Britain. It makes clear Council members are responsible for most domestic policies, but the Governor retains a veto power that can be exercised ‘in the interests of good governance’. The isolation of the Falkland Islands and the fact that they are not located in an ACP region complicates regional integration and cooperation. Moreover, the tense relations between the UK and Argentina over the Falkland Islands also limit the possibilities of further regional integration and cooperation.

\textsuperscript{13} Much to the dismay of the UK government, as will be shown in s. 5, infra.
in 1985. This created a precedent that has not been repeated since.\(^\text{14}\) When Denmark organized the 1972 referendum on joining the EEC, 70% of Greenland’s electorate voted against accession yet was obliged to comply with the decision carried by the Danish majority. In Denmark, the arguments in favour of membership centred around the advantages it offered to industry and agriculture. For Greenland, the decision to accede to the EEC meant that European fishing fleets could not be prevented from fishing in the waters around Greenland. The issue of EEC membership was taken up again following the introduction of the 1979 Greenland ‘Home Rule Act’, which transferred nearly all responsibilities hitherto exercised by the Danish authorities to the autonomous authorities of Greenland.\(^\text{15}\) The ‘no’ result was repeated in a consultative referendum. In 1985, Greenland ‘left’ the EEC but maintained an OCT provision that granted Greenland’s fish produce free access to the European market. At the same time, a ten-year fishing agreement was signed between Greenland and the EEC, ensuring the Member States continued access to Greenland fishing banks in return for an annual payment of several hundred million Danish kroner.\(^\text{16}\) Since 1988, Greenland’s parliament has had a foreign and security policy committee.

Under the terms of Chapter 3 of the Home Rule Act, Denmark remains responsible for the Realm’s foreign affairs but in practice, Greenland’s involvement in these areas has gradually increased. Today, Greenland has relative autonomy within the Kingdom of Denmark at the international level. On Tuesday, 25 November 2008, the people of Greenland voted ‘yes’ for self-governance and on 21 June 2009, thirty years after the first step was taken in Greenland towards greater autonomy from Denmark with the introduction of ‘Home Rule’, the Act on Greenland Self-Government was adopted.\(^\text{17}\) However, the move to ‘Self Rule’ did not change the constitutional arrangements between Denmark and Greenland, as the new arrangement is to be placed ‘within the framework of the existing unity of the Realm’, taking as its point of departure Greenland’s present constitutional position, that is the Danish Constitution. Greenland also remains associated to the EU via the Overseas Association Decision.

Although foreign policy is thus formally still the responsibility of the Danish authorities,\(^\text{18}\) the government in Nuuk can participate in the vast majority of all negotiations relevant to Greenland society. In certain cases, the Greenland


\(^{17}\) A translation of Act No. 473 of 12 Jun. 2009, including Ch. 4 on ‘Foreign Affairs’, is available at <http://uk.nanoq.gl/emner/government/~media/6CF403B6DD954B77BC2C33E9F02E3947.ashx>.

\(^{18}\) Ibid., s. 11(3): ‘The powers granted to Naalakkersuisut in this Chapter [on Foreign Affairs] shall not limit the Danish authorities’ constitutional responsibility and powers in international affairs, as foreign and security policy matters are affairs of the Realm.’
Self-Government can conduct independent negotiations but only in cooperation with the Danish Foreign Service. Agreements under international law which are of particular importance to Greenland must be submitted to the Naalakkersuisut for comments before conclusion or termination. If the government of Denmark deems it necessary to conclude the agreement without the consent of the government of Greenland, this shall, to the widest extent possible, have no effect on Greenland. Reservations to treaties can be made for Greenland.

Greenland’s international relations concentrate primarily on areas which are geographically and historically close, such as the Nordic countries, North America (the Arctic Regions) and the European Union. The international cooperative organization of the Inuit, the Inuit Circumpolar Conference, is an important factor in Nuuk’s external relations. Where international organizations allow entities other than states and associations of states to attain membership in their own name, the government of Denmark may, subject to a request by the Naalakkersuisut, decide to submit or support such an application from Greenland where this is consistent with the constitutional status of Greenland. In 1984 Greenland joined the Nordic Council on a par with two other autonomous Nordic regions: the Faeroe Islands (Denmark) and Aland (Finland).

4. DEPARTURES FROM THE CFSP BY MEMBER STATES’ (SEMI-) AUTONOMOUS REGIONS

4.1. UNILATERAL EXTERNAL ACTION OF THE OCTs

While there are no substantial examples of external actions of OCTs that depart from the European Union’s Common Foreign and Security Policy as yet, such conflicts should not be ruled out in the future. After all, the strategic interests of those OCTs which are increasingly operating under a system of self-rule – New Caledonia and Greenland, to name the two most prominent – may compel their governments to take external action that diverges from the interests, policies and legal obligations of the Member States to which they belong. In turn, this may conflict with the position held by the collective of Member States in the Council of the European Union.

19. Ibid., ss 12 and 13.
20. The territorial application of EU law, CFSP in particular, to Greenland will be discussed in s. 5 infra.
21. The Nordic Council is composed of Finland, Sweden, Norway, Iceland and Denmark. The Greenland parliament appoints two members to the Council. The Greenland government has also participated in the Nordic Council of Ministers since 1984. For a good overview of the facts about Greenland, including its activities on the international scene, see <http://explorenorth.com/library/facts/greenland2000.html#16>.
22. Karagiannis, ‘Règlement des conflits d’intérêts’ (1998), 343–350, lists a series of (potential) conflicts about which the ECJ was requested to render an advisory opinion in the sphere of the Common Commercial Policy (ex Art. 228(6) TEC).
A case which came close to the hypothetical situation described above concerned the Bermuda government accepting five Uighur detainees cleared from the US detention facility in Guantanamo Bay. No common position had been adopted by the Council of the EU. However, according to a Joint Statement (which, although non-binding under EU law could be construed under international law so at to reflect the intent of the promulgators to be bound), decisions on the reception of former detainees fall within the sole responsibility and competence of the receiving EU Member State.\textsuperscript{23} Therefore, the constitutional arrangements within the Member States apply. By negotiating directly with the Bermuda government without the awareness of the UK, the US therefore failed to adhere to the framework as outlined in the Joint Statement.\textsuperscript{24} Theoretically, an agreement concluded between the US and Bermuda on the matter could have even breached Article 46 of the Vienna Convention on the Law of Treaties, since a third party concluding a treaty with an entity situated within the federal structure of a state is obliged to ensure that the entity has all necessary powers and cannot invoke its ignorance of domestic law. Whereas the Bermuda government had classified the matter as one of immigration, thus falling within the powers delegated to it by London, the UK government insisted that the government in Hamilton should have consulted it in order to establish whether the reception of the five former detainees concerned an immigration issue or a foreign affairs or security matter. In the case of the latter, the issue would have fallen within the competence of the UK. Unsurprisingly, the question of whether or not Bermuda’s authority to conduct external relations on behalf of London also extended to issues of international security and the fight against terrorism was answered in the negative by the Foreign Office.\textsuperscript{25}

4.2. REGIONS AND COMMUNITIES OF FEDERAL MEMBER STATES

In the absence of clear-cut cases of conflict involving OCTs, a helpful parallel to the hypothetical situation described at the beginning of the previous section can be


\textsuperscript{24} Discussions between the US and Bermuda started in May 2009, the UK was informed on 12 Jun. 2009. See for more information, <www.independent.co.uk/news/world/americas/bermuda-solution-angers-britain-1704147.html>.

drawn by addressing the law and practice of external relations pursued by the semi-autonomous regions and communities in, for instance, Germany and Belgium.\footnote{See, generally, Keating, M., ‘Regions and International Affairs: motives, opportunities and strategies’, \textit{9 Regional and Federal Studies}, 1999, 1.}

According to the German \textit{Grundgesetz} (i.e., the 1949 Constitution, hereinafter \textit{GG}), the \textit{Länder} can conclude treaties with ‘foreign states’ – and, by implication, all international legal subjects – within the limits established by Article 32(3), that is only on matters within their legislative competence and only with the previous consent of the federal government. This consent ensures that the \textit{Länder} do not exercise their \textit{jus tractati} in conflict with federal foreign policy. However, the government’s right of approval is limited by its duty to be loyal to the \textit{Länder}. This implies that it may not abuse its power. For example, consent cannot be denied for reasons which are used as pretexts.\footnote{See Pernice, I., ‘Comment to Art. 32 GG’, in Dreier, H. (ed.), \textit{Grundgesetz. Kommentar} (2nd edn), vol. 2, Tübingen: Mohr Siebeck, 2006, 793.} The general rule, however, aims to prevent the \textit{Länder} from developing what is called a \textit{Nebenausßenpolitik}.\footnote{See Panara, C., ‘In the Name of Cooperation: the external relations of the German \textit{Länder} and their participation in the EU decision-making’, \textit{6 EuConst}, 2010, 68.}

An examination of the \textit{Länder}’s international practice between 1949 and 2004 reveals a relatively small number of international agreements entered into: the total is 144, an average of 2.6 agreements per year or 9 per \textit{Land} over the entire period.\footnote{\textit{Ibid.}, 82.} Those treaties mainly deal with general cooperation, administrative and police cooperation, transport networks, environmental protection, taxation, etc. When the federation concludes a treaty on an issue that falls within the exclusive competence of the \textit{Länder}, the latter are obliged to implement the treaty within their respective territories. Under Article 84 \textit{GG}, implementation by the \textit{Länder} is supervised by the federal government. Non-compliance could legitimize the exercise of federal intervention, which would coerce the \textit{Land} to comply with its duties.\footnote{By early 2006, the Flemish region had concluded about thirty exclusive treaties and taken part in about 300 ‘mixed agreements’, \textit{i.e.}, in conjunction with the federal state. See Jans, T. and Stouthuysen, P., ‘Federal Regions and External Relations: the Belgian case’, \textit{42 International Spectator}, 2007, 215.} The failure of the \textit{Länder} to implement EU law (including CFSP decisions and common positions) would also constitute an infringement of the principle of federal loyalty. So far, Article 37 \textit{GG} has never been applied.\footnote{\textit{Ibid.}, 382, who draws on an earlier study by Beyerlin, U. and Lejeune, Y. (eds), \textit{Sammlung der internationalen Vereinbarungen der Länder des Bundesrepublik Deutschland}, Berlin: Springer, 1994.}

Another example concerns Belgium. In the federal reform process over the last forty years, Belgian regions and communities have achieved external powers similar to those enjoyed by the German \textit{Länder}. They can conclude treaties,\footnote{Article 16(2) TEU.} represent the Kingdom in the Council of the European Union,\footnote{Article 37 \textit{GG}.} and have attachés
and representatives embedded in Belgian embassies abroad. Moreover, several regions and communities have set up delegations in third countries to serve their special interests. What is striking in the case of Belgium is that the regions exercise these external powers with little or no supervision from the federal government. This is the consequence of the constitutional arrangements in which the two biggest linguistic groups agreed that prerogatives attributed to one level of government (federal, regional or community) would be of an exclusive nature. The emphasis is on regional autonomy, with no hierarchy between the levels of government. In this context, the regions and communities are only required to inform the federal government, which can suspend the conclusion and ratification of a treaty only on the basis of four objective and well-defined grounds, including the breach of Belgium’s international and supranational obligations. The federal capacity to block a region’s treaty-making is therefore clearly limited. Fortunately, hundreds of exclusive and mixed agreements have been concluded without any serious conflicts of interest, policy or law. An infamous and widely covered case where the unilateral actions of one of the regions undermined the unity and cohesion of not only Belgian but also European Union foreign policy centred on the granting of arms export licenses. Despite its small size, Belgium is a major small arms exporter in the world and a weak link amongst EU Member States in terms of adopting restrictive exporting guidelines. In 2005 the Walloon Minister of Research, New Technologies and External Relations signed an export license for a Walloon company to export machines for the production of ammunition to Tanzania. The previous Prime Minister of Wallonia had rejected the same company’s request for a license one year earlier on the grounds that the massive availability of small arms would undermine peace efforts in the Great Lakes region. This earlier reading fell in line with the 1998 EU Code of Conduct on Arms Exports’ stated objective to ‘prevent the export of equipment which might be used for internal repression or international aggression or contribute to regional instability’. In March 2003, Belgium had voluntarily transposed the Code of

34. Regional and community delegations were set up for Flanders in eleven countries and for Wallonia in fifteen countries. See Velaers, J., ‘In foro interno et in foro externo: de internationale bevoegdheden van de gemeenschappen en de gewesten’, in Judo, F. and Guedens, G. (eds), Internationale betrekkingen en federalisme, Brussels: De Boeck en Larcier, 2006, 16.
35. The other red lines concern situations in which Belgium (i) does not recognize the other contracting entity as a state; (ii) does not maintain diplomatic relations with the state; and (iii) has severely strained relations with the state concerned (e.g., has recalled its ambassador).
37. As the decision of the Belgian government in 2002 to permit the sale of 5500 machine guns to Nepal (a country most observers considered to be at civil war) shows. The Belgian licensing decision followed an earlier German decision to deny exports, thereby undercutting unity in the Council to obtain a commercial competitive advantage and violating the EU Code of Conduct (see infra).
Conduct into national law. Following the signature of the export license in January 2005, the Federal Minister of Foreign Affairs requested that the Walloon authorities reconsider the matter, providing the Walloon government with a confidential report on the likely impact of the exported goods. Subsequently, the Walloon regional government revised its position and revoked the export license in June 2005, thereby bringing the region’s external action in line with Belgium’s commitments under the Common Foreign and Security Policy.

5. DUTY OF LOYAL COOPERATION IN THE DOMAIN OF EU EXTERNAL ACTION

One way out of the potential conflict-of-interest conundrum sketched out above was already provided in 1992, when Declaration 25 on the Representation of the Interests of the Overseas Countries and Territories was appended to the Final Act of the Maastricht Treaty.

The Conference, noting that in exceptional circumstances divergences may arise between the interests of the Union and those of the overseas countries and territories referred to in Article 227(3) and (5)(a) and (b), agrees that the Council will seek to reach a solution which accords with the position of the Union. However, in the event that this proves impossible, the Conference agrees that the Member State concerned may act separately in the interests of the said overseas countries and territories, without this affecting the Community’s interests. The Member State concerned will give notice to the Council and the Commission where such a divergence of interests is likely to occur and, when separate action proves unavoidable, make it clear that it is acting in the interests of an overseas territory mentioned above (...).

While offering a practical solution, Declaration 25 effectively allowed the attainment of the Union’s – not the Community’s – general interest to be sacrificed to that of a single OCT. Although not recycled in the context of subsequent Treaty revisions, Declaration 25 is still indicative of the low levels of trust the Member States have in their ability to assemble a truly Common Foreign and Security Policy (CFSP) when the OCTs are concerned. Indeed, the flagrant lack of common


40. Section 4.1.

vision on how to deal with the European Union’s outposts is due to the lack of unity among Member States on how to define such a strategy. In the face of the looming desires of four individual Member States to develop ‘spheres of influence’ around their own OCTs, internal decision-making procedures that require unanimity, allow any one of those states to block proposals they dislike and may make it difficult to develop a CFSP centred on the geopolitical dimensions of the OCTs.

Of course, all of this is symptomatic of the inherent weakness of the CFSP writ large. The real test of the EU’s position on the international plane and its effectiveness on the ground comes at the level of cohesion among Member States. A Union that is divided will achieve little but to attract derision, both at home and abroad. However, time and again, Member States seek their own selfish interests in bilateral deals with third countries while others stubbornly block decisions defining EU positions and actions to draw attention to their own concerns. The ‘commonality’ in the concept and practice of the Common Foreign and Security Policy is often no more than a fig leaf for the lowest shared denominator of Member States’ positions. In fact, the Union is completely exposed if, in spite of a common position agreed to in the métropole, it is undermined by unilateral action overseas. Obviously, a European Union united around clearly defined objectives will stand a much better chance of playing a bigger role on the international scene and being taken seriously in the far-flung corners of the globe.

There seems to be one relief though. Where a common foreign and security policy has been adopted, even in fields where the OCTs are not directly concerned, the Member States are under a legal obligation to actively and unreservedly support the Union’s CFSP in a spirit of loyalty and mutual solidarity, and to comply with the Union’s external action in this area. The Member States have to work together to enhance and develop their mutual political solidarity and must refrain from any action contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. Member States’ central authorities cannot hide behind the argument that they were unaware of or had not control over the unilateral actions of regional or OCT governments. After all, the European Court of Justice applies the unitary concept of state in the application and enforcement of EU law. The argument that EU law in the pre-Lisbon sense – and

42. Article 24(3) TEU.
the legally irrelevant Common Foreign and Security Policy in particular—does not apply to Greenland, New Caledonia and the other OCTs should be discarded. According to the new Article 52(1) TEU, the Treaties signed at Lisbon apply in principle to the entire territory of the Member States. Whereas Article 355 TFEU establishes exemptions to this rule by reducing the geographical scope of application of the Treaty on the Functioning of the EU, the subject matter of the former ‘second pillar’—CFSP, still in the separate TEU—escapes a territorial exclusion. In a way this is logical when one considers that foreign and security policy is potentially affecting ‘foreign countries’, that is territories that are not in any way under a Member State’s jurisdiction. Therefore, as the TEU—contrary to the TFEU—does not foresee exemptions to its geographical scope of application, it could even be argued that only the common policy on foreign and security matters normally applies to the entire territories of Member States, including the OCTs. Since the scope of the CFSP has slowly but surely acquired a legally binding character, this is no longer an issue that is ‘hardly relevant’.

6. CONCLUDING REMARKS

Do OCTs and the Member States to which they belong have to choose between an infringement of their constitutional duty of loyalty towards each other and a breach of the duty of loyal cooperation at Union level? Preferably not. Potential conflicts of interest, policies and legal obligations can be avoided by tying all actors into a process of coordinating a multi-level response to the political, geopolitical, economic, social and cultural challenges and opportunities with which the

44. See Ziller, J., ‘Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States’ Territories’, in de Bürca, G. and Scott, J. (eds), Constitutional Change in the EU: From Uniformity to Flexibility?, Oxford: Hart Publishing 2000, 115: ‘hardly relevant’. See also the contribution of Broberg to this volume, who seconds the motion that the territorial application of the Treaties does not extend CFSP law to the OCTs.


46. After all, the definition of the territorial scope of EU law can only be changed by unanimous vote, after a Member State unilaterally gives independence to a territory, or incorporates one. Thus, in order to exempt Greenland from the application of EC law, Denmark had to negotiate a treaty amending the Communities’ treaties – from 1982 to 1984. As the Treaty of Maastricht created a new international organization operating within a wider legal regime, one cannot assume that the E(EE)C treaty regime – with all its specificities, including exemptions of territorial application – would automatically be succeeded by the Treaty on European Union.


OCTs – along with their metropolitan Member States and the EU in the background – are faced. Under the terms of Article 22 TEU, the High Representative of the Union for Foreign Affairs and Security Policy and the Commission – respectively responsible for the CFSP, and other areas of external action – may submit joint proposals to the Council. The Council may then recommend that the European Council identify the strategic interests and objectives of the Union. Decisions by the European Council may concern the relations of the Union with a specific country or region or may be thematic in approach. With its 2008 Green Paper and 2009 Communication, the European Commission has taken the initiative to define the elements for a new partnership between the EU and the OCTs. It is reasonable to expect that the hybrid European External Action Service will support the HR/VP in defining a new and comprehensive approach to EU-OCT relations that also takes account of the geostrategic dimensions and wide variety of foreign policy interests of the OCTs. 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 to strengthen the security of its ultimate frontiers and serves the external policy interests of the OCTs, the Member States and the EU alike.