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Political decolonization and self-determination : the case of the Netherlands Antilles and Aruba

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9 | The Right to Self-Determination in Relation to the European Union

Most remaining overseas territories of European states maintain more or less close relations with the European Union. Twenty-one of them,¹ including the Netherlands Antilles and Aruba, belong to the category of Overseas Countries and Territories (OCT) of the European Union. The OCTs are a very diverse group, located in the Pacific, Indian, and Atlantic Ocean, in the Caribbean Sea and in Antarctica. They have almost no common characteristics apart from their OCT status and the fact that they are all islands² located far from their respective mother countries, Denmark, France, the Netherlands and the UK. Five OCTs have no – or a very small – permanent population, and the others have populations between 2.000 (Falklands) and 246.000 (French Polynesia).³ Together they have a population of approximately one million. Their land area is small, if one does not count the ice covered areas of Greenland and Antarctica, but they have an exclusive economic zone that is much larger than the total area of the European Union.⁴ All of the inhabited OCTs were originally NSGTs, and most of them still are. The other overseas territories of the EU member states are either Ultra-Peripheral Territories (UPTs), or have a special protocol-based relationship with the EU.

1 Most sources count only 20 OCTs, because they do not include Bermuda, which is an OCT according to Annex II to the EC Treaty, but is not treated as such in OCT Decisions at its own request. The other OCTs are Anguilla, British Virgin Islands, Cayman Islands, Falkland Islands, Montserrat, Pitcairn, St. Helena, Turks and Caicos Islands, British Antarctic Territory, the British Indian Ocean Territory, and the South Georgia and Sandwich Islands of the UK, Greenland of Denmark, Mayotte, New Caledonia, French Polynesia, the French Southern and Antarctic Territories, Saint Pierre and Miquelon, Wallis and Futuna of France, and Aruba and the Netherlands Antilles of the Netherlands.

2 Not counting the territorial claims of France and the UK on the continent of Antarctica, which are part of the OCTs French Southern and Antarctic Territories and the British Antarctic Territory.

3 See the brochure published by the Overseas Countries and Territories Association (OCTA), 'Overseas Countries and Territories and the European Union: a shared history, a partnership for prosperity', December 2003.

4 Geographical data on the OCT as a group are hard to find. I have added up the EEZ of the territories as listed on the website of Sea Around Us (www.seaaroundus.org), which leads to roughly 15 million square kilometres. The land area of the EU is less than 4 million square kilometres. The total EEZ of the EU is some 5 million square kilometres, half of which belongs to the Ultra-Peripheral Territories of the EU (again based on the data of Sea Around Us). For some other geographical and demographical data on the OCTs and UPTs, see Ziller 1991, p. 178 et seq.

Their political and economic importance to the European Union is usually considered to be very limited. The general literature on the EU offers a familiar view to readers of literature on international law interested in overseas territories. Almost none of the studies on European law pay any substantial attention to the OCTs.⁵ Those that do, often warn their readers that this subject has little importance,⁶ or treat it as an annex to the EU-ACP association.

In recent years the question has been raised whether the Netherlands Antilles and Aruba should not become part of the EU as 'ultra-peripheral territories' (UPT) or obtain another relation with the EU. This question has become a part of the status debate in the Kingdom, since a choice for a different relation with the Netherlands may also require a different status in or outside of the EU. In some cases, the cooperation of the EU and its member states may be required to realize a process of decolonization and self-determination in the Kingdom of the Netherlands. For this reason it would be interesting to see whether the international law of decolonization also applies to the relations between the EU and its overseas territories. I will also discuss the differences between the status of OCT and UPT and how a choice between these options could be made.

9.1 OBLIGATIONS FOR THE EU RESULTING FROM THE LAW OF DECOLONIZATION?

As an organisation that has its roots in international law, and as an international person, the EU is bound to respect international law.⁷ General international law must be considered to be of a higher order than EU law, and the peremptory norms of international law, or *jus cogens*, form part of the legal order of the EU, both in its internal application and in relation to third states.⁸ As the right to self-determination is considered to be part of *jus cogens*, the EU will therefore have to respect it. It has been argued that the EU is also bound by treaties of which it is not a party, if it concerns a law-making treaty that codifies general principles of law.⁹ Both the UN Charter and the UN Human Rights Covenants qualify for this criterion. Article 103 of the UN Charter furthermore provides that the obligations of the member states under the Charter prevail over their obligations under any other treaty. While this may not in itself create an obligation for the EU to adhere to the Charter, it does

5 Notable exceptions are the German commentaries to the EC Treaties by Groeben, Thiesing & Ehlerman and by Calliess & Ruffert.

6 See for instance Verhoeven 2001, p. 97.

7 Schermers & Blokker 2003, para. 1335 and 1572 et seq., Bowett/Sands/Klein 2001, para. 14-034, and Vanhamme 2001, p. 96. See also the Advisory Opinion of the International Court of Justice on the interpretation of the Agreement of March 25, 1951 between the WHO and Egypt, *ICJ Reports* 1980, p. 73.

8 Vanhamme 2001, p. 71 et seq. and p. 100, and Lawson 1999, para. 219-38.

9 Schermers & Blokker 2003, para. 1577. In a different sense, see Lawson 1999, para. 198-218.

imply that the member states should make sure that the EU does not violate the Charter. Decisions of the UN General Assembly and the Security Council may also affect the EU, if they are binding on its member states.¹⁰ Some of the GA resolutions discussed in the previous Chapters, mainly 1514, 1541 and 2625, which have determined the content of the right to self-determination and decolonization, are binding on the EU in that they provide evidence of peremptory norms of international law, and perhaps also because they constitute interpretations of the Charter that are binding on the member states. The EU must therefore be considered obligated to respect the right to self-determination of 'colonial countries and peoples' when exercising its powers.

The Preamble of the EC Treaty shows that the signatories were aware of this obligation in 1957, since it states:

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations (...)

Part IV of the EC Treaty, which deals with the OCT association, should therefore be read in the light of the UN Charter, most importantly Article 73,¹¹ which the founding states of the EEC had in mind when drafting Part IV (*see below*). It is not hard to see the similarities between these provisions. Both create an obligation to further the development of the territories, whereby the interest of the overseas populations should be paramount. Part IV, read in conjunction with the Preamble and Article 3 of the EC Treaty, can be seen as a partial attempt to realise the goals of Chapter XI of the UN Charter in the economic development of the NSGTs.

Through the substitution theory, as accepted by the Court in *International Fruit Company III*, it could be concluded that the EC (and the EU) are bound by Article 73 of the Charter 'in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States' in the area governed by that Article.¹² In the *International Fruit Company* case, the treaty concerned was the GATT, to which the EEC was also not a party. The Court considered that since the EEC Treaty and the subsequent practice of the EEC organs showed that the EEC had been granted the authority to exercise the functions of its member states under the GATT, the EEC should also take on the obligations arising from that treaty.

This outcome cannot be simply copied to Article 73 of the Charter, because the member states have certainly not (yet) transferred entirely their authority

¹⁰ Schermers & Blokker 2003, para. 1580.

¹¹ In a similar sense, *see* Vanhamme 2001, p. 56-7, p. 71-5, and p. 133.

¹² Judgment of the Court of 12 December 1972 (*International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*), joined cases 21 to 24-72, *European Court reports* 1972, p. 01219. For the substitution theory, *see* Lawson 1999, p. 55 et seq.

to deal with their overseas territories to the EC or the EU. Through the European integration process and the establishment of the OCT association, the member states have lost some of their abilities to fulfil their obligations, notably with regard to economic measures. Most of the areas of the OCT Association concern subjects which can be handled by the EU or the member states, but with regard to the preferential trade, and to some extent the four freedoms, the EU has exclusive powers in relation to the OCTs. Paragraphs *a* and *d* of Article 73 state that the Administering States should further the economic development of the NSGTs. When it regards the exclusive powers of the EU, the reference in Article 73 to 'the Administering States' should now presumably refer to the EU.¹³ When it exercises its shared powers with regard to the OCTs, the EU is also obligated to strive towards the economic goals of Article 73, and as the European integration progresses, other areas of Article 73 might become of importance to the EU policies as well.

Should this mean that the interpretation of Article 73 by the General Assembly, and the customary law based on it, should be applied to the relations of the EU with the OCTs as well? The EC nor the EU have co-operated with this development of Chapter XI, nor have they consented to it. Most of the EU member states have played an important role in developing the law of self-determination and decolonization at the UN, but normally this would only mean that the member states have adopted obligations under this law, and not the EC/EU. On the other hand, the explicit reference to the principles of the UN Charter in the EC Treaty could imply a wish to be bound by their subsequent development by the organs of the UN as well. The development of Article 73 had already come a long way in 1957, with the adoption of GA Res. 742 (VIII) in 1953. The Committee of Six which would draw up the Principles of GA Res. 1541 (XIV) was established only one year after the EEC Treaty came into force, and included two of the current EU member states (the UK and the Netherlands). Also, a number of the Resolutions dealing with self-determination and decolonization are considered to reflect customary law, and perhaps even *jus cogens*, which is binding on the EU in any case. It must be assumed, therefore, that the content of such Resolutions as 1514, 1541 and 2625 is binding on the EU when it deals with the OCTs. The OCT group largely coincides with the list of NSGTs used by the GA, and the Netherlands Antilles and Aruba should probably be considered to fall under the application of the law of decolonization as well (see Chapter 6).

13 A corollary of this reasoning is that the EU should report to the UN Secretary-General under Article 73 *e* of the Charter on the OCTs that are still considered NSGTs, together with the Administering State. This practice is not followed, although the EU Presidency does sometimes speak on behalf of the EU member states in the debates in the Fourth Committee of the GA on decolonization, see for example the statement of 16 October 2001, UN Doc. A/56/23.

The EU should therefore not frustrate an attempt by an OCT to become independent or to achieve some other political status in a process of decolonization and self-determination. It also means that the EU should not change the status of the OCTs without their consent. The Commission has recognised that it is not for the EU to unilaterally determine the future of the OCT association, and that major choices in this area can only be made by the overseas peoples themselves.¹⁴ But the EU is not only obligated to allow the territories to exercise their freedom of choice with regard to their mother countries, it can – and in some cases must – play a role in the realisation of these political choices.

Positive obligations for the EU can be construed in two areas, which will be discussed in the next paragraphs. First, in the formulation of the content of the OCT Association, which is an exclusive competence of the Council of Ministers of the EU, and which may affect the measure of self-government achieved by the OCTs and the choices they have made with respect to their mother country. Second, the EU should, in certain circumstances, cooperate with status changes that are desired by an OCT, although this duty will in many cases dissolve into a duty for the member states because it will usually require an amendment of the EC Treaty.

9.2 OCT STATUS

9.2.1 History

The association with the OCTs was created at the request of France at the very end of the negotiations on the EEC in 1957. France still had substantial economic interests in its African territories, which were based on monopolies and trade preferences that would conflict with the economic community.¹⁵ Full membership for these territories was out of the question, mainly because the Netherlands and Germany were not prepared to pay for the French '*mission civilatrice*' in Africa.¹⁶ There also existed fears that the EEC could be accused of continuing or renewing colonial rule in Africa. The Soviet Union and some Third World countries denounced the proposals of France as colonial, and the issue

14 Communication of 20 May 1999 by the Commission to the Council and the European Parliament, 'The Status of OCTs Associated with the EC and Options for "OCT 2000"' (COM (1999) 163 def).

15 See Van Benthem van den Bergh 1962b, p. 15 et seq. for the French economic relations with its TOMs in the 1950s and p. 45 et seq. for France's reasons why it needed a relation between the EEC and the TOMs.

16 Olyslager 1958, p. 13, Van Benthem van den Bergh 1962b, p. 48, Houben 1965, p. 12-14, and Agarwal 1966, p. 19.

was raised at the UN.¹⁷ In the prospective OCTs, complaints were uttered about the fact that the overseas territories were not allowed to participate in the negotiations.¹⁸

After France threatened not to join the EEC, an agreement was reached that imports from the overseas territories would be allowed preferential access to the EEC, while similar imports from other tropical countries would become subject to high customs duties. Also, the EEC would contribute substantially to the development of the territories.¹⁹ It seems Germany and the Netherlands agreed to this mainly because they wanted to keep France on board, but it was also expected that the association might have some political advantages. Many Western Europeans at the time hoped for the creation of 'Eurafrica', meaning that Africa would remain within the sphere of influence of Western Europe. The association would offer opportunities for companies from the other member states to venture into the French and Belgian territories, thereby perhaps contributing to the development of these territories. It was hoped the association would foster democracy in Africa after independence (which was expected to come soon). Africans would not mistrust the EEC as they did the French and Belgians. Thus, the new states might be prevented from becoming dependent on the Soviet Union or the USA.²⁰ According to *Nehring* this consideration was decisive in the end, but *Van Benthem van den Bergh* thought that Germany and the Netherlands were not receptive to this argument at all.²¹ In any case, the member states decided to contribute the equivalent of US\$ 581 million in economic aid to the French, Dutch, Belgian and Italian territories that became OCTs in 1958.²²

The Treaty provisions on the OCT were intended to comply with Chapter XI and XII of the UN Charter.²³ All of the original OCTs were NSGTs or Trust Territories, and the Netherlands government considered that the association was only intended for such colonial territories.²⁴ The Administering States could use an organisation as the EEC to realise their obligation under paragraph *d* of Article 73 of the UN Charter 'to co-operate with one another and, when and where appropriate, with specialised international bodies with a view to practical achievement of the social, economic, and scientific purposes set forth in this Article'. In a sense, Germany and Luxembourg – the only founding

17 See for instance the debate in the Committee on Information from Non-Self-Governing Territories, a fore-runner of the Decolonization Committee (UN GAOR (XIV), Supplement No. 15 (A/4111), p. 8-9.

18 Van Benthem van den Bergh 1962b, p. 51.

19 Olyslager 1958, p. 11 et seq. and Van Benthem van den Bergh 1962b, p. 53 et seq.

20 Agarwal 1966, p. 19-20.

21 Nehring 1963, p. 11, and Van Benthem van den Bergh 1962b, p. 48.

22 Houben 1965, p. 14. The Dutch territory was Netherlands New Guinea. Surinam and the Netherlands Antilles became OCTs in 1962 and 1964, see below.

23 Agarwal 1966, p. 23.

24 *Kamerstukken II* 1956/57, 4725, nr. 3, p. 42.

members of the EEC that were not Administering States – thus accepted part of the ‘sacred trust’ of Chapter XI to develop the NSGTs and Trust Territories towards self-government, and to ‘promote the well-being of the inhabitants of these territories’. By creating the association with the OCTs the founding states wished to make clear that the relations with the overseas territories would not be characterised by Euro-centric economic exploitation, but by the desire to develop the territories in the interest of the overseas peoples. The EEC thus became a participant in the process of decolonization.

The initial fears about the negative political and economical consequences that the OCT association might have for the EEC were soon proven unfounded. In a debate in the European Parliament in 1960, the association was stated to be advantageous for both sides and a German study showed that there was no evidence of trade deflections.²⁵ Accusations of colonialism were silenced when most of the original OCTs became independent around 1960. Their preferential treatment was continued for the most part through the agreement of Yaoundé, which created an association with the independent African states, later widened to cover a number of Pacific and Caribbean former colonies as well, through the agreements of Lomé. The association with these African, Caribbean and Pacific (ACP) states was economically and politically much more important to the Community than the association with the remaining OCTs, which were few and small, especially before Denmark and the UK had joined the Community. For a short period around 1962, there were even hardly any OCTs left.²⁶ The Council decisions which detailed the OCT association therefore did not take the trouble to create any specific measures for the OCTs, but merely copied the provisions of the development agreements with the ACP states.

The attitude of the E(E)C between 1962 and 1991 was characterised by the ‘OUT’ perspective, as EU Commissioner *Pinheiro* has termed it.²⁷ According to *Pinheiro*, the association’s ambiguity and the member states’ ambivalence towards it, was caused by two different perspectives which battled for dominance since 1957. On the one hand, the ‘IN’ perspective stressed that the OCTs belonged to member states and should therefore share as much as possible in the results of European integration. This perspective had been dominant in the formulation of Part IV of the EEC Treaty. On the other hand, the Council’s policy of treating the OCTs similar to the independent ACP states, stressed that the OCTs were not part of the EC, and were similar to third states.

25 Nehring 1963, p. 63 et seq.

26 Only French Somaliland, the Comoros, New Caledonia, French Polynesia and a number of very small French territories remained. Surinam became an OCT in 1962, the Netherlands Antilles in 1964. A number of new OCTs were added after the UK entered the Community in 1973, and in 1986 the Danish territory of Greenland became an OCT. The Portuguese and Spanish overseas territories became UPTs upon the accession of their mother countries (see below).

27 *Pinheiro* 1999, p. 11.

The Court of Justice's case law clearly supports this 'OUT' perspective. But the parallelism with the ACP states has become increasingly considered as a handicap for the OCTs.²⁸

In 1991, the 'IN' perspective became prominent again by a concerted effort of the OCTs (especially the Netherlands Antilles) and their mother countries. In the Council, it was the Netherlands that convinced the other member states to stop treating the OCTs as if they were ACP states. The OCT Association has since developed into a *sui generis* form of association, with characteristics distinctly different from the relation EU-ACP and from associations with other third countries.

9.2.2 Terms of the Association

The OCTs are not part of the EC or the EU. According to the Court of Justice of the EC, the OCTs are in a position towards the EC that is similar to third countries.²⁹ The provisions of the Treaties and the secondary legislation do not apply in the OCTs, unless the EC Treaty explicitly states otherwise.³⁰ Currently, probably only the provisions of Part IV of the EC Treaty and the secondary legislation based on Part IV are applicable to the OCTs. Even though the territory of the OCTs is not part of the EU, most of their inhabitants are European citizens, because they have the nationality of a member state.³¹ For that reason, the Treaties and the legislation regarding European citizenship may also have application in the OCTs, although it is not yet certain to what extent. Whether Part II of the EC Treaty (Citizenship of the Union) applies to the habitants of the OCTs who possess EU citizenship.³²

The secondary legislation under Part IV of the EC Treaty consists of the Council's OCT Decision, which is a 10-yearly decision *sui generis* based on

28 De Bernardi 1998, p. 141. Pisuisse 1991, p. 327 thinks the OCTs actually benefit from the parallelism with the ACP states, because of the stronger position of these states, and because the 'development country-friendly' European Parliament has to consent to the ACP Conventions but not to the OCT Decisions, at least not formally.

29 Opinion 1/78 of the Court of Justice of 4 October 1979 (International Agreement on Natural Rubber), *European Court Reports* 1979, p. 2871.

30 Judgement of the Court of Justice of 12 February 1992 (Bernard Leplat v. Territory of French Polynesia), case C-260/90, *European Court reports* 1992, p. I-00643.

31 Article 17, para. 1 of the EC Treaty declares that all persons in possession of the nationality of a member state are European citizens. Only the inhabitants of the UK OCTs did not have the nationality of their mother country, but in 2001 they were granted the option to acquire UK nationality and since then most OCT citizens are also EU citizens.

32 See the decision of the Court of Justice of 12 September 2006 in case of *Eman & Sevinger* (C-300/04).

unanimity between the member states, in which the terms of the association are detailed, and a small body of further Council and Commission legislation which implements the OCT Decision (mainly dealing with imports from the OCTs). No other EU legislation is applicable to the OCTs, a fact that appears to be sometimes overlooked in practice.³³

The member states with OCTs have remained authorised to formulate separate policies for their OCTs, also in most areas where the EU has exclusive competence. For the Kingdom of the Netherlands this means that since only the Country of the Netherlands is member of the Community, the Kingdom may still represent the Netherlands Antilles and Aruba in foreign affairs independently of EU policies, and for instance conclude trade conventions that will only have application in one or both Caribbean Countries (*see below* in paragraph 4).

Free Trade

The EC Treaty's provisions on the OCT association deal mainly with the establishment of an incomplete free trade area between the EC and the OCTs, with elements of a common market.³⁴ The OCTs are not part of the territory of the Community, but they have more free access to it than third countries. Article 3, paragraph 1 (s) of the EC Treaty lists the association with the OCTs as one of the activities the EC will undertake 'in order to increase trade and promote jointly economic and social development'. The purpose of the association is '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'. Although according to the Court of Justice the EC takes 'a fundamentally favourable approach' towards the OCTs,³⁵ this does not mean that the EC Treaty intends to integrate the OCTs into the European market or the customs union. The Court of Justice has remarked that such an interpretation 'goes far beyond what was envisaged by the Treaty'.³⁶ Before the OCTs

33 Von der Groeben/Thiesing/Ehlermann 1999, p. 3/2096. The Netherlands government also considers that EU law as such does not apply to the Netherlands Antilles and Aruba, apart from Part IV of the EC Treaty, *see Kamerstukken II* 2003/04, 29 394, nr. 6, p. 14. Article 183, paragraph 5 of the EC Treaty provides an exception in that it declares the EC's rules regarding freedom of establishment applicable to the OCTs. But this provision has been virtually annulled by the OCT Decision of 2001. Another exception is the Council Decision that introduced the euro as legal tender in Saint Pierre and Miquelon and Mayotte (31 December 1998, 1999/95/EC). These territories (which are more integrated with France than the other French OCTs) used the French franc before, and France wished to maintain this parallelism.

34 Lauwaars 1991, p. 27.

35 Judgment of the Court (Sixth Chamber) of 26 October 1994 (Kingdom of the Netherlands v. Commission), case C-430/92, *European Court reports* 1994, p. I-05197, para. 22.

36 Judgment of the Court of 22 April 1997 (Road Air BV v Inspecteur der Invoerrechten en Accijnzen). Case C-310/95, *European Court reports* 1997, p. I-02229, para. 34.

could be granted the same treatment as the European parts of the member states, the EC and the OCTs would first have to agree on common economic policies, which they clearly have not.³⁷ The OCT trade has therefore remained subject to several EU import restrictions, especially with regard to agricultural products.

Part IV clearly bears the traces of a hurried political compromise,³⁸ which means that the wording is rather vague and leaves many issues open to debate. An example is Article 183 of the EC Treaty (originally Article 132), which provides that member states shall apply to their trade with the OCTs the same treatment as they apply to trade with each other. In the doctrine, this provision was generally interpreted to lay down a concrete obligation for the member states. Until 1999, most authors thought that Article 183 did not merely lay down objectives, as the Article itself claims, but created obligations for the member states, the OCTs and the EC to take concrete measures.³⁹ This was probably an historical and textually correct interpretation of the Treaty and reflected the intentions of the founding states to let the OCTs share in the removal of trade barriers in Europe, but the Court of Justice decided otherwise in a series of rather poorly motivated judgements. The Court has decided that Article 183 merely lays down the objectives of the association, which are 'to be achieved by a dynamic and progressive process'.⁴⁰ The Court has also granted the Council an exceptionally wide margin of discretion to decide on the methods and the time-frame to be adopted, and has thereby left it to the Council to decide how and when these objectives are to be achieved.⁴¹

The Court has also rejected the notion that the Council should not be allowed to retrace its steps once it has provided a measure in furtherance of the objectives of the association. In spite of the Court's interpretation that the goals of Part IV should be achieved by a progressive process, this does not prohibit the Council from taking regressive steps. Part IV does not contain a 'locking mechanism', as a committee of experts had considered in an advisory

37 In its judgement of 8 February 2000 (*Emesa Sugar (Free Zone) NV v. Aruba*), case C-17/98, the Court of Justice noted that the EC was allowed to take measures to protect the common market against agricultural products imported from the OCTs since there existed no common agricultural policy between the OCTs and the Community (para. 47).

38 Van Benthem van den Bergh 1962b, p. 51.

39 See for instance Olyslager 1958, p. 27, Van Benthem van den Bergh 1962, p. 53 et seq, Lauwaars & Bronckers 1991, Martha 1991, Dekker 1998, and Von der Groeben/Thiesing/Ehlermann 1999, p. 3/2105.

40 Judgement of 11 February 1999 of the Court in the case C-390/95P (*Antillean Rice Mills (and others) v. the Commission*). See also the annotation by C.T. Dekker to this judgement in *Sociaal-Economische Wetgeving*, 2000, p. 184-6.

41 Judgment of the Court of 22 April 1997 (*Road Air BV v Inspecteur der Invoerrechten en Accijnzen*), case C-310/95, and the Judgement of 8 February 2000 (*Emesa Sugar (Free Zone) NV v. Aruba*), case C-17/98. See Oliver 2002 for a review of the Court's case law.

opinion requested by the Kingdom of the Netherlands.⁴² Although it may be assumed that a complete abolition of the preferential treatment of the OCTs would be incompatible with the Treaty,⁴³ the Court has not given an indication as to the extent that the OCTs may rely on their acquired rights.⁴⁴ The reasoning of the Court even suggests that the interests of the OCTs will always have to give way if the Common Agricultural Policy (CAP) of the EU is disturbed, in which case the Council is authorised to take 'any measure' capable of removing the disturbance.⁴⁵

The OCTs in return also remain free to determine their own trade policies with regard to the EU. They are only obligated to treat the member states similarly to the way they treat their mother country. The OCTs are allowed to levy customs duties on imports from EU member states or other OCTs in order to promote their own development, as long as they do not exceed the customs duties levied on imports from the mother country.⁴⁶

Sugar and Rice

The relatively vague Treaty provisions on the trade relations with the OCTs were clarified somewhat during a 10-year conflict between the EU and the Netherlands Antilles and Aruba over the imports of rice and sugar. In 1991, the Netherlands 'after months of heated debate' convinced the Council to open the European market to agricultural products originating in the OCTs.⁴⁷ This was not an important innovation in itself because most OCTs do not produce agricultural exports, but the Decision also created free access of goods that

42 'Advies commissie van deskundigen inzake de juridische aspecten van Deel IV van het EG-verdrag en het Zesde LGO-besluit', 3 April 1997. The committee's membership consisted of H.C. Posthumus Meyjes, T. Koopmans (a former judge in the Court of Justice of the EC), R.H. Lauwaars, and J.S. van den Oosterkamp. The advice had been requested by the Kingdom government in the sugar and rice conflict, *see below*.

43 Van der Wal 2003, para. 39. *See also* the Antillean Rice Mills case where the Court decided that products originating in the OCTs are to be treated preferentially in comparison to products from third countries.

44 Oliver 2003, p. 350. In a similar sense, *see* Raad van State 2003, p. 33.

45 In the Emesa case, the Court stated that 'the Council, after weighing the objectives of association of the OCTs against those of the common agricultural policy, was entitled to adopt, in compliance with the principles of Community law circumscribing its margin of discretion, *any measure* capable of bringing to an end or mitigating such disturbances, including the removal or limitation of advantages previously granted to the OCTs' (emphasis added by me). Judgement of 8 February 2000 (Emesa Sugar (Free Zone) NV v. Aruba), case C-17/98, para. 40. The text of the judgement provide no support for Van der Wal's interpretation that the Court has formulated heavy conditions before the Council may revoke privileges (Van der Wal 2003, para. 39). *See also* Dekker 1998, p. 278, who considers (based on the Court's judgement in the Road Air case) that 'the common agricultural policy simply takes precedence' over the OCT association.

46 Article 184 of the EC Treaty.

47 Article 101, para. 1 of the 1991 OCT Decision. *See* COM(1999) 163 def, p. 17.

were produced in an ACP state or the EU, and imported into an OCT where they received some minor 'working or processing'.⁴⁸ The OCTs would now be able to profit from the substantial difference in prices for agricultural products in the ACP states and the EU.

These rules of 'cumulated origin' had already been proposed by the Netherlands Antilles in 1959, even before it became an OCT, because it was expected such rules might attract a whole new type of industry to the islands.⁴⁹ The new rules were quickly used in the Netherlands Antilles, Aruba, and some UK overseas territories, to start exporting rice and sugar to the EU that had been produced in ACP states and had only been milled or re-packaged in the OCT, or received some other marginal working. It seems that considerable profits were made by the producers in the ACP states and by the trading companies, at first mainly through the rice trade, the volume of which increased exponentially between 1991 and 1996.⁵⁰ Whether the economy of the Antilles and Aruba really profited from this trade has been a subject of debate.⁵¹

Italy, Spain and France soon called for safeguard measures. The imports from (mainly) the Netherlands Antilles were considered to frustrate the Community's CAP which at this time aimed to stimulate rice producers in southern Europe to switch to long grain rice, because there was a surplus on the market for other types of rice. Rice producers in Europe claimed that the prices for

48 Article 6, para. 2 of Annex II to the OCT Decision (91/482/EEC: Council Decision of 25 July 1991).

49 Houben 1965, p. 17.

50 The entire export to the EU of long grain rice produced in Surinam and Guyana was redirected through the Netherlands Antilles. The import of OCT/ACP rice into the EU through the Netherlands Antilles increased from 58,000 metric tons in 1991 to 224,280 metric tons in 1996. In that year, the rice trade accounted for 0,9 percent of the GDP of the Netherlands Antilles. See Bekkers, Boot & Van der Windt 2003, p. 26-7.

51 See Oostindie & Klinkers 2001c, p. 282 et seq. *Martha* claimed (Martha 1991a, p. 307) that the restrictive rules of origin of the OCT Decisions were one of the reasons why the investment climate in the OCTs did not improve. *Besselink* thinks that the rules of cumulated origin of 1991 had been 'much to the benefit of the economies of the overseas countries' (Besselink 2000, p. 177). However, Korthals Altes 1999, p. 206, note 144, claims that only a few entrepreneurs enjoyed the profits of this '*windhandel*' (speculative trade). This allegation was described as 'really not true' in a joint statement by the three parliaments of the Kingdom ('*Contactplan*') see *Kamerstukken I/II* 2000/01, 27 579, nr. 1, p. 7. The EU Council of Ministers in 2001 considered that 'in view of the minimal, low value-added operations that currently suffice to obtain the status of a product originating in the OCTs in the sugar sector, the contribution of these exports to the development of the territories can only be small at best and, without a doubt, out of all proportion to the disruption caused to the Community sectors concerned' (2001/822/EC, para. 11 of the Preamble). Some authors think the trade never had much of a long-term future anyway, because of the developments at the WTO and the global trend towards the break-down of trade barriers. See Bekkers, Boot & Van der Windt 2003, p. 28 for an economic analysis of the preferential OCT trade.

long grain rice had dropped considerably due to the ACP/OCT imports.⁵² ACP states complained that the OCTs unfairly competed with the ACP states on the European market.⁵³ Allegations were also made of fraud and improper use of the rules.⁵⁴

The EU was allowed, under the 1991 OCT Decision to take safeguard measures if there was evidence of trade deflections, or if a certain element in the OCT Decision did not benefit the sustainable economic development of the OCTs. The Commission and the Council therefore started from 1993 to take safeguard measures to protect the Community market from trade deflections, imposing minimum prices and creating quota for the imports of rice and sugar of cumulated origin, professedly also because the new industries in the OCTs were not a form of sustainable economic development.⁵⁵ These measures and the 1997 revision of the OCT Decision, have been the subject of a long string of legal actions before the Court of Justice of the EC, most of which involved the import of rice or sugar by companies based in the Netherlands Antilles and Aruba. The Court of Justice's digest of cases shows that since 1990 the majority of cases concerning the OCT association deal with safeguard measures by the Commission against imports from the OCTs.⁵⁶ Almost all of these cases were decided in favour of the Commission or the Council, which were allowed, according to the Court to take safeguard measures to protect the CAP and to revoke trade preferences accorded to the OCTs.⁵⁷

For the mid-term revision of the 1991 OCT Decision, which according to Article 136 (now 187) of the EC Treaty required unanimity, the Commission proposed to limit the rules of cumulated origin. The Netherlands Antilles and Aruba were against the proposal.⁵⁸ The Netherlands Antilles considered that the adoption of the decision fell within the category of economic and financial agreements by which it could not be bound without its consent, according

52 Bekkers, Boot & Van der Windt 2003, p. 26. The three parliaments of the Kingdom declared in a joint statement ('Contactplan') that these allegations were never supported by objective research, see *Kamerstukken I/II* 2000/01, 27 579, nr. 1, p. 7. A study by the Netherlands Economic Institute commissioned by the Netherlands Antilles showed that the imports did not materially affect the European rice market, see IOB 2003, p. 141.

53 COM (1999), 163 def., p. 30.

54 Oostindie & Klinkers 2001c, p. 282. During the 1990s criminal proceedings were started in the Netherlands Antilles regarding a criminal conspiracy to commit fraud in the OCT sugar trade. At least one person, a leading figure of the political party Frente Obreiro Liberashon 30 di Mei, was convicted in this case, see *Amigoe* 14 August 2003.

55 European Commission 1999, p. 24.

56 *Répertoire de jurisprudence communautaire*, under heading B-17. In one of the cases before the Court of Justice, the French government even accused the Aruban company Emesa Sugar of conducting a juridical guerrilla against the EU, see the Opinion of Advocate-General Ruiz-Jarabo Colomer in the case of *Emesa v. the Netherlands et al.* (C-17/98), note 4.

57 See Oliver 2003 for a review of the most important cases.

58 According to *Van Rijn*, the Caribbean Countries did not notify the Kingdom government early enough to enable the Kingdom to conduct a successful opposition against the Committee proposal (Van Rijn 2001, p. 135).

to Article 25 of the Kingdom Charter. It therefore wished the Kingdom government to use its right of veto on the proposed decision in the Council of Ministers of the EU. The Netherlands government at first agreed, but when it became clear that all other member states supported the proposed Decision, it decided that the Kingdom should retract its opposition and accept the compromise that had been proposed. The compromise met a number of the objections of the Netherlands Antilles, but still established quota for rice and sugar that effectively annihilated the new industry. Under considerable political pressure from the other member states,⁵⁹ the Netherlands agreed to the compromise. It considered (perhaps somewhat paternalistically) that the Caribbean Countries would not benefit from a continued opposition. A number of companies from the Netherlands Antilles and Aruba continued their opposition in the Dutch and European courts with little to no success.⁶⁰ I will discuss the conflict between the Netherlands and the Caribbean Countries on this subject *below*.

After 1997, the trade routes for rice from Surinam and Guyana took their old course again.⁶¹ Experiments with importing other products through the Netherlands Antilles and Aruba to the EU were not very successful, and it is not generally expected that they will be in the near future.⁶² It is widely expected that the EU's trade barriers for agricultural products from the Third World will disappear during the coming decades. At WTO meetings in 2004, the EU promised to remove such trade barriers, which would probably mean that the OCT trade preferences will lose most of their importance.

Future of the OCT Association

There exists some dissatisfaction with the functioning of the association, both in the EU and in the OCTs. As a form of development aid, the association does not appear to have been very successful, nor as a means towards integrating the OCTs economically with the EU. The association has been described as an

59 See IOB 2003, p. 140. The European Parliament in 1997 debated the issue and called on 'the member state that caused difficulties' to cooperate with the adoption of the OCT Decision, and the Netherlands considered there was a clear threat that continued opposition would lead to repercussions in other areas, see *Kamerstukken II* 1996-97, 25 382, nr. 1, p. 6.

60 Mid-Term Revision of the 1991 OCT decision, 97/803/EC. For the final decision making process in the Council of Ministers of the Kingdom, see *Kamerstukken II* 1997-98, 25 382, nr. 2 and 3, and Besselink et al. 2002, p. 202 et seq.

61 The import through the Netherlands Antilles dropped to 4,000 metric tons in 2002, see Bekkers, Boot & Van der Windt 2003, p. 34-5.

62 Bekkers, Boot & Van der Windt 2003, p. 27-9. In 2004, the Commission granted the Netherlands Antilles the right to import dairy products into the EU, for which there exist no quota yet. A number of companies on Curaçao announced that they would use this opportunity to produce butter from milk fat imported from the US and Australia, which is then exported to the EU. This trade is expected to be profitable because the price of butter in the EU is kept artificially high. See *Amigoe* of 15 September 2004.

anachronism,⁶³ and its potential was certainly never fully realised. The Council and the OCTs appear to have had rather different views on how the association should develop. The OCTs want more free access to the European market, but the EU wants the OCTs to comply to European standards. This has created a stalemate during the past 45 years, but to say that the association is an empty shell goes too far. It has facilitated the development and maintenance of some economic relations, and the EDF has made a contribution to the development of the OCTs, albeit a modest one.

During the 1990s the association has been somewhat upgraded. The EU member states have indicated their readiness to renew the association. In a declaration annexed to the Treaty of Amsterdam all of the signatories stated that the difficult circumstances of the OCTs caused them to lag far behind, and that the special arrangements of 1957 could 'no longer deal effectively with the challenges of OCT development'. The Council was therefore requested to review the association in order to promote the economic and social development of the OCTs, and their relations with the EU, more effectively.⁶⁴

In 1999, the first real evaluation of the association by the Commission described the EU-OCT relations as ambiguous and ambivalent. The Commission noted that the debates in the EU showed that some member states thought the mother countries should pay for the development of their OCTs themselves, although this was never stated explicitly. At the same time, the EU had affirmed and reaffirmed its commitment to the development of the OCTs at numerous instances during the previous decades.

The Commission stressed that new approaches would be difficult to find. The 1990s showed that compromises between the 15 member states were difficult to achieve, and the growth of the EU with 10 new members was not expected to make things easier. Meanwhile, the Treaty text is open to more than one interpretation, and the compromises reached so far are of a fragile nature. This makes for a situation where states will not be readily inclined to reopen the negotiations.⁶⁵

The difficult negotiations might be simplified if there were less participants. With a view to the interests that are most directly involved, it would seem logical to create a situation where the Commission negotiates directly with each OCT. This would mean that the member states, including the mother countries, would have to take a step back in favour of the OCTs and the Commission. This may seem politically unlikely, but it should be remembered that such a situation already exists between the EU and Greenland, which appears

⁶³ Bernardi 1998, p. 134 et seq.

⁶⁴ Declaration nr. 36, annexed to the Treaty of Amsterdam of 1997. The European Parliament supported this initiative, after hearing a number of representatives of the OCTs. PE 228.210 of 1 December 1998.

⁶⁵ Communication of 20 May 1999 by the Commission to the Council and the European Parliament, 'The Status of OCTs Associated with the EC and Options for "OCT 2000"' (COM (1999) 163 def).

to function adequately (*see below* in the paragraph on Greenland). Such a direct relation also does more justice to the OCTs right to self-determination, as will be explained in the next paragraph.

9.2.3 Participation of the OCTs in the Formulation of the OCT Decision

Part IV of the EEC Treaty was formulated in 1957 without consulting the prospective OCTs. As was explained in the previous paragraphs, Part IV and the OCT Decisions deal mainly with development aid and preferential trade. These may be considered as 'gifts' to the OCTs. Whether trade and development policies may not in fact exercise a large and perhaps even undue influence on a country's internal affairs is an interesting question in this respect, but it falls outside the scope of this study and will be hard to answer anyway on the basis of legal arguments.

But the OCT Decisions also contain a number of elements which take the form of legal obligations for the OCTs. Whereas the Decisions used to have the character of extensive subsidy schemes, mainly laying down obligations for the EC and the member states, and providing the conditions under which the OCTs could qualify for funding, the 1991 Decision was more akin to a form of legislation, instructing the OCTs to strive towards certain objectives, compelling them to prohibit certain activities, and calling on them to create 'overall, long-term policies' in an extensive area of public affairs.⁶⁶ In exchange, the OCTs were granted more access to the European market.

The 2001 OCT Decision has mitigated this development, which had not proven to produce the desired results.⁶⁷ The current Decision mainly lays down the conditions under which the Community shall assist and cooperate with the OCTs, but it also creates new obligations, such as the duty to implement 'efficient and sound competition policies', to protect intellectual property rights, and to guarantee the right to bargain collectively on labour conditions. These obligations are probably intended to function only in the sphere of the relations with the EU, but they are nonetheless laid down as general obligations for the OCTs.

It seems doubtful whether these obligations should be considered as legally binding on the OCTs. The Council's authority to provide legislation for the OCTs can only be derived from Article 187, which authorises the Council to 'lay down provisions as regards the detailed rules and the procedures for the

⁶⁶ The OCT Decision of 1991 contained provisions on the protection of the environment, agriculture, food security, rural development, fisheries, commodities, mining, industrial development, manufacturing and processing, energy development, employment, encouragement of entrepreneurship, services and the trade in services, tourism, transport, communications, information technology, trade and economic development in general, and regional and international cooperation between OCTs and foreign states and organizations.

⁶⁷ Pinheiro 1999.

association'. Other forms of EU law are not binding on the OCTs because the OCTs are not part of the EU.⁶⁸ The OCT Decision can therefore not create binding obligations outside the scope of Part IV of the EC Treaty, although the Council may take the other principles of the EC Treaty into account, according to the Court of Justice.⁶⁹

As was outlined above, the scope of the association is potentially broad and somewhat vague. Its objectives are to promote the economic and social development of the OCTs and to establish close economic relations between them and the Community. The Council has used these objectives as a basis to determine the areas of cooperation between the EU and the OCTs in the OCT Decisions. It has laid down a number of 'basic elements' which 'shall be common to the Member States and the OCTs linked to them'. These are liberty, democracy, respect for fundamental human rights and freedoms and the rule of law. Any form of discrimination based on sex, ethnicity, religion, age, etc. is entirely prohibited within the scope of the OCT association.⁷⁰ It could easily be argued that it is not necessary to lay down all of these principles in order to be able to promote the economic and social development of the OCTs, and that the Council has therefore stretched its authority beyond the limits of Article 187 by creating a quasi-constitutional regime for the OCTs, especially since this regime has been created without their formal consent. Any other interpretation of the EC Treaty would mean that the OCTs are at the mercy of the Council, which is inconsistent with their position outside of the EU.

The obligations that perhaps exist or may be created for the OCTs through the European citizenship of their inhabitants are of a special nature and still remain to a large extent uncertain. It is also currently unclear whether the incorporation of the Charter of Fundamental Rights of the Union into the EU Constitution will create an obligation for the OCT governments to respect these rights with regard to their citizens.

In order to shed some light on this unclear area of EU law, the OCTs and their mother countries have proposed to the Commission that lists could be drawn up of the EU rules that apply in each OCT, jointly by the OCT, the member state, and the Commission.⁷¹ It is as yet uncertain whether this proposal will be taken up.

68 Von der Groeben/Thiesing/Ehlermann 1999, p. 3/2096.

69 Judgement of 11 February 1999, *Antillean Rice Mills (and others) v. the Commission* (C-390/95 P), para. 37.

70 Article 2 of the 2001 OCT Decision.

71 Paragraph 1.2 of the Joint Position Paper signed by the OCTs and their mother countries on 4 December 2003 (available on www.octassociation.org).

Increased Participation by the OCTs in the Formulation of the OCT Decision

The provisions of Part IV of the EC Treaty, in the interpretation of the Court of Justice, have put the OCT in 'a very precarious position', as *Van der Burg* puts it.⁷² The OCT Decisions are created without the formal consent of the OCTs, which are dependent on the 'patronage' of the metropolitan governments, which have many other interests to protect as well. This lack of direct representation of the overseas peoples cannot be blamed on any one single authority or factor, and has not been created purely in Europe. One of the reasons has probably been that many of the OCTs have for a long time simply not sent anyone to Brussels, either because they were not aware of the importance of the EC, or because they did not have adequate human and/or financial resources to become involved in European affairs, or perhaps because the metropolitan government did not allow it.

The association is based on the somewhat outdated principle that the OCTs fall completely under the sovereignty of their mother countries, and that the European organs can therefore not deal directly with the OCTs but only through their mother countries. The UK and France retain full legislative powers over most of their OCTs, and can therefore probably invest the EU with the authority to take unilateral decisions with regard to these territories.⁷³ For the Dutch OCTs (and probably the Danish as well) this is not legally possible because the OCT decision mainly concerns subjects which are not Kingdom affairs but are within the autonomous realm of the Caribbean Countries. With regard to Greenland this problem was solved by providing that the fisheries agreement and the protocols to it are signed by 'the authority responsible for Greenland', which was interpreted by the Kingdom of Denmark to mean that the agreements should be signed by both Denmark and Greenland. The government of Greenland has thus obtained a separate position, and negotiates directly with the Commission on catch quota and corresponding compensation and development aid.⁷⁴

The example of Greenland is of limited value to the other OCTs, because none of them has a bargaining chip comparable to Greenland's fish quota. But since the 1980s, there has been a steady development towards allowing the other OCTs to take part in the negotiations as well. This process was stimulated by a stronger presence of some of the OCTs in Brussels. The first notable result was the OCT decision of 1991, which ended to a certain extent the parallelism with the ACP regime and for the first time created provisions that were specifically tailored to the OCTs. Moreover, the concept of 'partnership'

⁷² Van der Burg 2003, p. 195.

⁷³ The recently increased autonomy of New Caledonia and French Polynesia seems to have created the need to involve the authorities of those territories more directly with the EU, see De Bernardi 1998.

⁷⁴ See the paragraph on Greenland below.

was introduced as a new foundation to the association, which meant that 'Community action shall be based as far as possible on close consultation between the Commission, the Member State responsible for a country or territory and the relevant local authorities of such countries or territories'.⁷⁵ The Council considered that 'the participation of the elected representatives of the population concerned should be stepped up' because there was an 'evident lack of democratic dialogue'.⁷⁶

A consultation procedure was set up between the Commission, the OCTs and their mother countries, including working parties for regions with more than one OCT. This consultation procedure was used in the preparation of the mid-term revision of the 1991 Decision and the drafting of the 2001 Decision, and some of the recent new aspects of the OCT association can probably be attributed to the fact that the OCTs can now directly communicate their problems and wishes to the Commission. The 2001 OCT Decision also created an EU-OCT Annual Forum at which the Commission and representatives of the OCTs and the member states are present.⁷⁷

To be able to exercise a larger influence over the OCT Decision, representatives of the Netherlands Antilles, French Polynesia and the British Virgin Islands tried to coordinate their position during a series of meetings in 2000. According to the Netherlands ministry for Foreign Affairs, the OCTs were nevertheless unable to influence the negotiations, because of their diverse interests, and a lack of solidarity among them.⁷⁸ The initiative did lead to the establishment of the Association of Overseas Countries and Territories of the European Union (OCTA) in 2002, of which 14 OCTs became a member.⁷⁹ The objectives of the OCTA are information sharing, and defending the collective interests of the OCTs vis-à-vis the institutions of the EU. In 2003, the OCTA formulated a Joint Position Paper on the future of the OCT association, that was also signed by the four metropolitan states of the OCTs.⁸⁰

No progress was made in this area during the drafting of the constitutional treaty for the EU. The EU Constitution as it took form in August 2004 introduced no instruments for consultation of the OCTs on the OCT Decisions.⁸¹

75 Article 234 of the 1991 OCT Decision.

76 Communication of the Commission to the European Parliament (COM (94) 538 of 21 December 1994).

77 Article 7, para. 2 of the 2001 OCT Decision.

78 IOB 2003, p. 152.

79 The 7 OCTs which did not join the OCT had no – or a very small – permanent population, or were being prepared for UPT status (Mayotte), or did not want to be considered as an OCT (Bermuda).

80 'Joint Position Paper of the Governments of the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands, the United Kingdom, and the Overseas Countries and Territories on the Future of Relations between the Overseas Countries and Territories and the European Union', attached to the Final Declaration of the OCT-2003 Ministerial Conference, 4 December 2003 (*see* www.octassociation.org).

81 Treaty establishing a Constitution for Europe, 6 August 2004, CIG 87/04.

Transforming the OCT Decision into an Agreement?

The language which the Council and the Commission currently use to describe the association, as well as the recent practice of consulting with the OCTs in different ways before adopting the OCT Decision, suggests that the relation is now to some extent based on mutual consent.⁸² But the unilateral character of the OCT Decisions still formally exists, and combined with the fact that the OCTs have had participation in the formulation of Part IV of the EC Treaty either, this means that the regime is still determined without the explicit approval of the OCTs.⁸³

This does not necessarily mean that the association would have had a different form if it had been based on agreement with the OCTs, but the EU's professed need to create a 'democratic dialogue' with the OCTs, and the OCTs insisting on a right to fully participate in the decision making process, indicates that the procedure provided by the EC Treaty is insufficient. It furthermore seems reasonable to assume that the OCTs will be more inclined to pursue the objectives and live up to the standards of the OCT Decisions if they have formally agreed to them, and this might make the whole scheme more effective.

The idea of giving the OCTs a say in the formulation of the rules governing the association has been proposed by such authors as *Vanhamme*, who considers that the EC Treaty rather bluntly denies the OCTs any right of participation in the formulation of their rights and duties under Part IV, which the author finds hard to reconcile with the principle of self-determination as guaranteed by the UN Charter,⁸⁴ and also by *De Bernardi* and other authors.⁸⁵ The idea was advocated in the Joint Position Paper of 2003 by the OCTs and the four member states with which they are associated.⁸⁶ The notion has always been an attractive one, at least for the Netherlands Antilles, which already asked to become associated with the EEC based on a special treaty under Article 238 in 1959, a request that was denied, also with respect to Surinam (*see below*). *Pisuisse* thinks the EU cannot enter into such agreements with the OCTs because they do not have international personality.⁸⁷ Whether this is correct, is uncertain. The EU does not consider it impossible to enter into agreements with OCTs *per se*, because it has done so with Greenland. Perhaps the best solution

82 It is probably for this reason that *The Courier ACP-EU* in 2002 mistakenly described the 2001 OCT Decision as an 'agreement' (Sutton 2002, p. 19.)

83 The Netherlands Antilles and Surinam were allowed to decide whether they wanted to become OCTs (*see below*), but they were not allowed to participate in the negotiations on the formulation of part IV of the EEC Treaty itself, nor were any of the other OCTs.

84 Vanhamme 2001, p. 72.

85 De Bernardi 1998, p. 176 et seq and Van Benthem van den Bergh 1962a, p. 596.

86 Para. 1.4 of the Joint Position Paper (*see above*).

87 Pisuisse 1991, p. 321.

would be if the EC Treaty would provide that the consent of the OCT governments is required for the adoption of the OCT Decisions.

Direct communication between the EU and the OCTs – which already takes place to some extent – avoids the difficult trilateral relationship involving the metropolitan governments, which always has the potential of introducing all sorts of (post-)colonial attitudes and resentments into the relations. The recent creation of partnership meetings and the Annual Forum are a considerable improvement, and this could be developed into some form of permanent and separate representation at the EU, as *Van Benthem van den Bergh* already proposed in 1962.⁸⁸

9.2.4 Conclusion

The OCT association was originally created as part of a process that led to the independence of most of the OCTs by 1962. The member states of the EEC wished to comply with the UN law of self-determination and decolonization, and considered Part IV of the EC Treaty as fulfilling their duties under Article 73 of the UN Charter with regard to their overseas territories. The EEC thereby accepted a (small) part of the 'sacred trust' to promote the well-being of the inhabitants of these territories, and to develop self-government. It must be assumed that GA Res. 1541 (XV), which gave an authoritative interpretation of Article 73, is also binding on the Community and the EU, as far as it is within the organisation's powers to ensure its realisation.

The main aspects of the association are development aid supplied by the EU, and an incomplete free trade area between the EU and the OCTs, wherein both parties are allowed to uphold considerable trade barriers. The rice and sugar conflict between the EU and the Netherlands Antilles and Aruba showed that the EU will give precedence to its common agricultural policy over the preferential imports from the OCTs.

Although most EU law should not apply in the OCTs, the Council of Ministers of the EU wishes to create certain legal standards for the OCTs through its OCT Decision, which is adopted without the consent of the OCTs. The participation of the overseas representatives has been increased in recent years, and this development should perhaps lead to the adoption of OCT agreements to (partly) replace the unilateral OCT Decision.

⁸⁸ Van Benthem van den Bergh 1962a, p. 596.

9.3 THE NETHERLANDS ANTILLES AND ARUBA AS OCTS

When the Netherlands joined the EEC in 1957, the Netherlands Antilles and Surinam did not become part of the Community. It is not clear whether the Caribbean Countries would have been allowed to join the EEC. This question simply was not discussed, as far as the historical sources show. The Netherlands government did inform the Caribbean Countries that it would be a good idea if they became OCTs. In 1957, it was not yet clear to the Netherlands Antilles and Surinam what would be the consequences of becoming associated with the organisation. The Kingdom therefore negotiated a protocol to the Treaty that recognised its right to ratify the Treaty only on behalf of the Country in Europe⁸⁹ and for Netherlands New Guinea, which would remain an OCT until it was handed over to Indonesia in 1963. The six prospective member states of the EEC declared that they would be prepared to enter into negotiations on treaties of economic association of the Netherlands Antilles and Surinam with the EEC.⁹⁰

In 1959, the three Countries of the Kingdom agreed that Surinam and the Netherlands Antilles should become associated with the EEC based on a treaty of association under Article 238 (currently Article 310) of the EEC Treaty. Such an association agreement is concluded with the Community, which means that it does not require the ratification of the member states, and because Part IV does not apply to such associations, it would make it possible to take account of the circumstances of the Netherlands Antilles, which were quite different from the original OCTs that were all relatively undeveloped territories with little or no autonomy.⁹¹ The Netherlands government considered that the OCT association was intended for Trust Territories and NSGTs only, and in light of UN GA Resolution 945 (X) of 1955, the Netherlands was of the opinion that the Netherlands Antilles were no longer a NSGT (*see* Chapter 6).⁹² But a majority of the member states thought that Article 238 of the EEC Treaty

89 Van der Burg 2003, p. 191-2 for this reason considers that the Country of the Netherlands is the member state of the EC, and not the Kingdom. Most other authors think the Kingdom is the member state, which seems to be more correct in view of the Kingdom Charter and the text of the EC Treaty which states that 'the Kingdom of the Netherlands' is a member of the EC. It should be recognized however, that the EC/EU usually distinguishes between OCTs and the 'member states that have special relations with these countries and territories'. The situation is therefore somewhat ambiguous, which has led to a rather inconsistent practice with regard to the ratification of the European treaties by the Kingdom. *See* on this subject Besselink et al. 2002, p. 192 et seq., and Raad van State 2003, p. 67.

90 For these negotiations, *see* Van Benthem van den Bergh 1962a, Houben 1965, and Oostindie & Klinkers 2001b. *See* Meel 1999 for the negotiations on Surinam.

91 Olyslager 1958, p. 19.

92 *Kamerstukken II* 1956/57, 4725, nr. 3, p. 42.

could not be used because it referred to treaties with third states, which the Netherlands Antilles was not.⁹³

The member states rejected all of the other specific wishes of the Netherlands Antilles, because granting them was considered unfair towards the existing OCTs, and because their effects would be unclear and might be disadvantageous for the economies of the member states. The Kingdom government, after two years of unsuccessful negotiations, decided that the Netherlands Antilles would apply for normal OCT status. In exchange for the guarantee that oil products from the Netherlands Antilles would be considered as originating from that Country, the EEC *and* its member states gained the right to take safeguard measures against the importing of those products, and quota were established that determined the maximum amounts of oil products to be imported per member state of the EEC. Because the right to take safeguard measures went further than Articles 115 and 226 of the EEC Treaty allowed, the agreement was laid down in a special oil protocol that was attached to the Treaty.⁹⁴ The normal procedure for amending the EEC Treaty needed to be followed for this, for which reason the member states also took the opportunity to place the Netherlands Antilles on Annex IV (now Annex II). This was not considered absolutely necessary to attain OCT status, as the procedure with regard to Surinam had shown (*see below*).⁹⁵

Even though it had been expected that the association with the Netherlands Antilles would 'increase the strength of the EEC considerably',⁹⁶ the oil protocol does not appear to have had any measurable effect on trade between Europe and the Netherlands Antilles, nor did the OCT association as a whole before 1991.⁹⁷ The development aid provided through the European Development Fund has been of somewhat more importance. The funding provided is not very large⁹⁸ in comparison to the aid provided by the Netherlands, but it has played an independent role in the development of the islands. In rare cases the EDF has funded projects that were first refused by the Nether-

93 Houben 1965, p. 46-7. Olyslager 1958, p. 20 assumed that it had been the intention of the member states to conclude a treaty based on Article 238 EEC Treaty with the Netherlands Antilles and Surinam.

94 Van Benthem van den Bergh 1962a, p. 595.

95 Convention 64/533/EEC of 13 November 1962 amending the Treaty establishing the European Economic Community with a view to rendering applicable to the Netherlands Antilles the special conditions of association laid down in Part Four of that Treaty, *Journal Officiel* 1964, 150, p. 2414. These amendments to the EEC Treaty entered into force on 1 October 1964.

96 Olyslager 1958, p. 20. It was expected that the oil refineries of Curaçao and Aruba could become important for the supply of oil products to Europe, which at this time had few oil refineries. But the Antillean refineries continued to deal mainly with the US and the region.

97 Palm 1985, p. 148.

98 The Netherlands Antilles is allocated some 20 million euro every 5 years, Aruba currently does not receive any funding. *See* IOB 2003, p. 151 and De Jong 2002, p. 246.

lands government, notably the extension of the landing strip of the airport on Bonaire, which appears to have been the main reason why tourism started to grow on the island after 1975.⁹⁹ The EDF focuses on infrastructural improvements, and in the Netherlands Antilles and Aruba it has been used to build and improve roads, harbours, etc., but also to build schools and provide housing. During the 1990s, the EDF has nonetheless suffered from considerable underspending – especially with regard to the funds available for the Netherlands Antilles. This was attributed by the Netherlands Antilles to the ‘bureaucratic procedures’ of the EDF, which was confirmed in a report by the Court of Auditors of the EU, and which the EU has promised to improve,¹⁰⁰ but the Court of Auditors also put the blame with ‘the complex structure of the Netherlands Antilles, both geographically and in terms of the distribution of competences between the main actors in the decision-making process, and the absence of an overall development concept for the different islands which gave rise to numerous projects scattered both financially and geographically’.¹⁰¹

Loans from the European Investment Bank have not played a large role in the Antillean and Aruba economies. These loans are available for projects in the OCTs under attractive conditions.¹⁰² The EIB financed a few projects in the 1970s and 1980s, but the Countries never succeeded to obtain the EIB’s approval for enough projects to use up all the funding earmarked for them.¹⁰³ This problem persisted and has become even worse, so that at present there are no projects at all in the Netherlands Antilles and Aruba that are financed by the EIB.

9.3.1 Consequences of the Association for the Kingdom Relations

The EU membership of the Country of the Netherlands combined with the OCT status of the Netherlands Antilles and Aruba creates a constitutionally and politically complex situation within the Kingdom. It means that the members of the Council of Ministers of the Kingdom have to show loyalty to three different political entities: the EU, the Kingdom, and the Country to

99 Haan 1995, p. 197.

100 Sutton 2002, p. 19.

101 Special Report No 4/99, concerning financial aid to overseas countries and territories under the sixth and seventh EDF accompanied by the replies of the Commission (1999/C 276/01), p. 5. The Report is highly critical of the efficiency of the aid to the Netherlands Antilles, which suffers from poor planning by the local authorities and insufficient monitoring by the EU, *see* p. 8 of the Report. The aid relation with Aruba was considered satisfactory (De Jong 2002, p. 93-4).

102 *See* the brochure ‘Financing for the OCTs. The Overseas Association Decision of 27th November 2001. The Investment Facility and Loans from EIB’s own resources: *Outline of Terms and Conditions*’, available on www.eib.org.

103 Haan 1995, p. 197.

which they belong. During almost 50 years, these three loyalties hardly ever seriously conflicted, and during this time the practice of decision making by consensus within the Kingdom Council of Ministers was firmly established. But in the rice and sugar conflict of the 1990s (*see above*) it became clear that this 'loyalty triangle' does have the potential to create serious problems between the three Countries, and between the Kingdom and the EU.

When the ministers of the Netherlands decided (as ministers of the Kingdom) that the Kingdom (as member of the EU) would agree to the revision of the OCT Decision in 1997, they had to balance the interests of the EU's Common Agricultural Policy, the interests of the Country of the Netherlands, the interests of the Kingdom of the Netherlands, and the interests of the Caribbean Countries, all at the same time. The Kingdom Charter does not provide guidelines or special procedures in case of a conflict of interests, other than a form of internal appeal, which is available to the Ministers Plenipotentiary against decisions of the Kingdom government (*see* Chapter 4).

In the rice and sugar conflict, the Netherlands Antilles and Aruba claimed that Article 25 of the Charter applied to the adoption of the mid-term revision of the OCT Decision in 1997. Article 25 gives the Caribbean Countries a right of veto on the application of an economic or financial agreement to their territories, if they expect it will negatively affect them. After the Dutch ministers decided that the Kingdom should agree to the compromise on the mid-term revision, internal appeal was instituted. The continued deliberations did not lead to a different decision,¹⁰⁴ after which the Netherlands Antilles obtained a court injunction that forbade the Dutch minister to vote in favour of the proposed OCT Decision in the Council of Ministers of the EU, and later to forbid the government to cooperate with the execution of the OCT Decision, but this judgement was overturned on appeal.¹⁰⁵

In the meantime, several Antillean politicians publicly uttered their disappointment about the Netherlands' decision in no uncertain terms. The chairman of the *Staten* of the Netherlands Antilles, which had sent a delegation to the Hague to express its displeasure, considered that the Netherlands had chosen to support European protectionism instead of its own Kingdom partners. This showed, according to the chairman, that the Caribbean countries were still in a 'severely colonial situation'.¹⁰⁶

According to *Oostindie & Klinkers* the Netherlands government did indeed decide to give preference to its own interests in Europe over those of the

104 Contrary to Article 12 of the Kingdom Charter, the premiers of the Caribbean Countries took part in the continued deliberations instead of the Ministers Plenipotentiary, *see* Oostindie & Klinkers 2001c, p. 283 and IOB 2003, p. 142.

105 The judgement of the *rechtbank* of The Hague was overturned by the *Gerechtshof 's-Gravenhage* (judgement of 20 November 1997, *JB* 1997, 272). The Dutch *Hoge Raad* confirmed this decision (judgment of 10 September 1999, *AB* 1999, 462).

106 Mr. L.A. George-Wout, cited in Oostindie & Klinkers 2001c, p. 284.

Netherlands Antilles and Aruba.¹⁰⁷ A number of political parties in the Lower House blamed the government for not properly protecting the interests of the Caribbean Countries, and some authors have considered that the Netherlands' decision was reprehensible.¹⁰⁸ The Netherlands government defended its decision by stating that it had been in the best interest of the Caribbean Countries, and also protected the interests of the Netherlands, which were at stake because of the severe political pressure of the other member states. Leaving aside the question whether a continued opposition to the OCT Decision could have led to a better result, this raises an issue of self-determination. Was the Netherlands allowed to decide this matter on behalf of the Caribbean Countries, or could it allow to let its own interests play a role in the decision? And more concretely, did the Netherlands Antilles and Aruba indirectly have a power of veto over the OCT Decision?

Veto Power for the Netherlands Antilles and Aruba on the OCT Decision?

It has been argued on legal grounds that the ministers of the Kingdom were not free to make a decision on the mid-term revision of the OCT Decision based on a balancing of the interests of the Countries, the Kingdom and the EU, but that the decision should have been based solely on the opinion of the governments of the Netherlands Antilles and Aruba. This argument rests on the assumption that either the OCT Decision should be considered as an international agreement to which Article 25 of the Kingdom Charter applies, or that the practice of the Kingdom before 1997 supported the conclusion that a customary rule had evolved which gave the Caribbean Countries the power of veto over OCT Decisions.

Martha considered that the intention of Article 25 of the Kingdom Charter – to prevent any disadvantageous effects for the Netherlands Antilles and Aruba from international economic or financial agreements concluded by the Kingdom – meant that it should be applied to the OCT Decision as well.¹⁰⁹ This interpretation was supported by the Netherlands Antilles government, by *Alkema, De Werd*, and by a research group of the University of Utrecht that was asked in 1997 to study this issue by the Netherlands Antilles government.¹¹⁰ *Borman* on the other hand, considers that the Caribbean Countries cannot claim a right of veto analogously to Article 25, because that would make

107 Oostindie & Klinkers 2001c, p. 284.

108 See *Kamerstukken II 1997/98*, 25 382, nr. 4, Besselink 1998, and Nap 2003b, p. 78.

109 Martha 1991, p. 14-15.

110 Martha 1991, p. 15 refers to a memorandum by the Netherlands Antilles government on this subject of 20 December 1990. See also Alkema 1995, p. 134, and De Werd 1997, p. 1851. Besselink 1998, p. 1295, note 23 refers to the report of the research group, which was not published, as far as I am aware. *Alkema* agreed with *Martha* that the Caribbean Countries should not be bound against their will by a decision of the member states on the OCTs, but also noted that the practice did not support this proposition.

it impossible for the Kingdom government to balance the Dutch interests in the EU against the interests of the Caribbean Countries as OCTs.¹¹¹

A fully analogous application of Article 25 to the OCT Decision is not possible, as *Nap* has pointed out.¹¹² Article 25 does not really create a right of veto with regard to the contested international agreement, but only with regard to the application of the agreement to the territory of the Country that opposes it. Paragraph 2 of Article 25 creates the possibility that a Country opposes the revocation or annulment of a treaty, but again only with regard to its own territory, leaving the Kingdom free to revoke the treaty for the other Country or Countries, if the treaty in question allows such a partial revoke-ment.¹¹³ It was obviously not possible for the Kingdom to agree to the proposed mid-term revision of the OCT Decision while leaving the 1991 Decision intact with regard to the Caribbean Countries. The OCT Decision is indivisible in this respect, which forces the Kingdom to take a decision as a whole.¹¹⁴

The Kingdom government in 1997 denied that Article 25 applied to the OCT Decisions, because the text of Article 25 only refers to international agreements and not to decisions of international organisations.¹¹⁵ The doctrine after 1997 has accepted this interpretation, since the text of Article 25 is quite clear and the *travaux préparatoires* provide no support for a different interpretation.

Many authors nonetheless think the Kingdom government was not authorised to overrule the opposition of the Netherlands Antilles and Aruba to the revision of the OCT Decision in 1997 because they think there exists, or existed, a rule of customary constitutional law which states that the Kingdom may not agree to an OCT Decision if a Caribbean Country opposes it.¹¹⁶ *Besselink* derives an *opinio juris* from two statements. The first was made by foreign minister Luns in 1962 during the debate in the Lower House on the ratification of the EEC Treaty on behalf of Surinam. Luns explained that when 'typically Surinam interests' were involved, the Kingdom would speak in the Council of Ministers of the EEC with 'I do not want to say "his master's voice" – but

111 Borman 2005, p. 154.

112 *Nap* 2003b, p. 81.

113 Van Helsdingen 1957, p. 411-2.

114 Applying Article 25 to this situation would give the Caribbean Countries a 'chain veto', as *Nap* calls it, because a veto by the Country directly leads to a veto by the Kingdom as a whole. There is of course one situation in which a veto similar to Article 25 *could* be exercised by the Caribbean Countries without dragging the whole Kingdom along with it. If a Country expects that it will not benefit from a proposed OCT Decision, it can decide that it does not want to fall under the scope of the new Decision. The example of Bermuda has shown that this is possible. In such a case, the Kingdom could vote in favour of the OCT Decision, while still respecting the economic autonomy of the Caribbean Country.

115 *Kamerstukken II* 1997/98, 25 382, nr. 4, p. 14.

116 Besselink 1998, p. 1295 (Besselink's publications of 2002 and 2003 contain similar passages on this subject), Hoogers & De Vries 2002, p. 214-5, and *Nap* 2003b, p. 78 et seq.

still “Surinam’s voice”.¹¹⁷ The second statement is a declaration attached to the 1991 OCT Decision. It reads:

The government of the Kingdom of the Netherlands draws attention to the constitutional structure of the Kingdom resulting from the Statute of 29 December 1954, and in particular to the autonomy of the countries of the Kingdom so far as concerns the provisions of the Decision and the fact that the Decision was, in consequence, adopted in cooperation with the Governments of the Netherlands Antilles and Aruba pursuant to the constitutional procedures in force in the Kingdom.¹¹⁸

Besselink claims this declaration aimed to inform the member states of the ‘special veto power of the overseas countries’, and that it stated ‘that the decision needed the consent of the Netherlands Antilles and Aruba’.¹¹⁹ ‘Co-operation’ does not mean exactly the same as ‘consent’, but it would be difficult to maintain that when a Caribbean Country votes against an OCT Decision in the Council of Ministers of the Kingdom it has ‘co-operated’ with the decision.¹²⁰

The declaration also indicates that the Caribbean Countries are autonomous as regards *all* of the subjects covered by the OCT Decision. From 1964 until 1986, the Kingdom had issued similar declarations to the OCT Decisions, but these had referred to ‘the autonomy of the non-European parts of the Kingdom so far as concerns *certain* provisions of the Decision’ (emphasis added).¹²¹ The words ‘in consequence’ furthermore suggest that the ‘cooperation’ of the Caribbean Countries was indispensable. It therefore seems hard to read the declaration of 1991 in any other way than to indicate that the Caribbean Countries had a decisive say over the position of the Kingdom with regard to OCT Decisions, although if the Kingdom government really wished to state this, it could have said so more clearly.

The *Raad van State* of the Kingdom interpreted the declaration as evidence that the Kingdom followed the practice of only agreeing to an OCT Decision if the governments of the Netherlands Antilles and Aruba did not object. The *Raad van State* considered that the Kingdom had treated the OCT Decision in practice as if they were economic agreements under Article 25, which the *Raad van State* considered to be in line with the purpose of Article 25, namely to prevent the Caribbean Countries from suffering negative consequences through

¹¹⁷ *Handelingen II* 1961-1962, p. 1207.

¹¹⁸ See Annex VIII to the 1991 OCT Decision (91/482/EEC).

¹¹⁹ Besselink 2000, p. 177-78. See also Besselink 1998, p. 1295, Besselink 2002, p. 201, and Besselink 2003.

¹²⁰ Vanhamme 2001, p. 72 interprets the declaration to mean that the Netherlands Antilles and Aruba have *consented* to the OCT Decision.

¹²¹ See for instance Annex VIII of the 1980 OCT Decision (80/1186/EEC, *OJ* 80/L361) and Annex VIII of the 1986 OCT Decision (86/283/EEC, *OJ* 86/L175).

international agreements concluded by the Kingdom.¹²² The Kingdom government interpreted the opinion of the *Raad van State* to mean that 'in the end none of the countries of the Kingdom has the power to block the decision making process'. The government will in the future do its utmost to reach consensus, but failing that, the votes in the Council of Ministers of the Kingdom will decide the Kingdom's position on the OCT Decision, i.e. the Netherlands has the final say.¹²³ This interpretation is hard to reconcile with the text of the declaration attached to the OCT Decision in 1991, and the Kingdom has therefore not issued it anymore.

The argument that the decision to vote in favour of the mid-term revision of 1997 was in breach of a customary rule of customary law is hard to defend in the absence of clear evidence of a steady practice and an *opinion juris*. The declarations which the Kingdom government issued on the OCT Decisions before 1991 could not really be interpreted as giving the Caribbean Countries a right of veto over the OCT Decision as a whole, and the declaration of 1991 was issued only once. The doctrine before 1991 also does not support the conclusion that the Kingdom always followed the practice of only agreeing to an OCT Decision if the Caribbean Countries agreed to it, as *Besselink* claims.¹²⁴ Only one author discussed this problem, namely *Houben*.¹²⁵ He is cited by virtually all authors who have written on the rice and sugar conflict, and must be considered authoritative.

Houben differentiated between two types of situations. On the one hand there were cases in which clearly only the interests of one Caribbean Country were involved, such as a decision by the EU Council of Minister to finance projects in that Caribbean Country, or when the Council deliberates on the trade policies of that Caribbean Country with respect to a third country. In such a case, the Kingdom's actions were guided by the opinion of the Country involved, *Houben* states. On the other hand, there are cases where the interests of two or three Countries are involved, for example when the Council takes measures as part of the CAP or when it takes decisions on the trade policies of the EEC with regard to the OCTs. In these cases, the Kingdom government itself takes the decision, by which *Houben* probably meant that the normal decision making procedures were followed in which the Dutch ministers have a majority vote.¹²⁶ *Houben* does not state what practice was followed in case

122 Advice nr. W01.98.0081 of 5 October 1998, published in the *Staatscourant* of 13 November 2001 (*Bijvoegsel Stcrt. nr. 220*).

123 Reaction by the Kingdom government ('*Nader Rapport*') to the *Raad van State's* advice (*Bijvoegsel Stcrt. nr. 220*).

124 Besselink 1998, p. 1295.

125 Pissuisse in 1991 merely noted that the declaration of the Kingdom was issued to 'avoid problems', but that it would cause a problem if the Netherlands Antilles or Aruba refused to agree to an OCT Decision (Pissuisse 1991, p. 327). No other authors discussed this issue before 1991, as far as I am aware.

126 Houben 1965, p. 98.

a decision (such as the OCT Decision) contained provisions which only concern a Caribbean Country, as well as provisions that fall in the second category. It seems logical to assume that since all three Countries have an interest in such a decision, the normal decision making process within the Kingdom would be followed. Only when the Council of Ministers of the EU deliberated on a certain element of the decision that only concerned one Caribbean Country, could that Country determine the Kingdom's position independently of the other Countries. When it came to a vote on the OCT Decision as a whole, the Caribbean Countries could probably not overrule the Netherlands.¹²⁷

There is no evidence that the Kingdom government followed this practice after 1964, but neither is there any evidence that it did not. The negotiations on the OCT Decisions were probably conducted on the basis of consensus between the Countries, as in most other areas, there being no need (or no wish) to force the issue of who has the final say. But it seems unlikely that the Netherlands would ever have allowed a Caribbean Country to overrule it on the OCT Decision when its own interests were at stake as well.¹²⁸ The statement by Luns in 1962 should be interpreted to mean that Surinam determined the position of the Kingdom in the Council of Ministers of the EU when its 'typical' interests were under discussion, but it did not mean that when the Council discussed or decided issues that affected the other Countries as well, Surinam could have its own way at the cost of the other Countries, simply because its interests were involved.

Seeing that the conflict of 1997 concerned the trade policies of the EU towards the OCTs, as well as the CAP, the Caribbean Countries would probably not have had a right of veto if the early practice of the Kingdom (as described by *Houben*) had been followed. The interests of all three Countries were clearly involved in this Decision. The declaration issued by the Kingdom in 1991 was perhaps somewhat at odds with the practice, or reflected the wish to create a new practice whereby the Caribbean Countries would have a stronger say in the formulation of the OCT Decision. The situation has become legally somewhat uncertain because of the declaration, and the conflicting interpretations of the Kingdom law as defended by the three Countries, the *Raad van State*, and the legal scholarship.

In view of these differing opinions and the absence of evidence that there exists a steady practice, it can only be concluded that the Countries are at least obligated to *try* to achieve consensus on OCT Decisions, because this obligation is supported quite unanimously. But the law should be clearer on the issue of who has the final say as long as the Kingdom has only one vote on the OCT Decision. The Countries' interests in the decisions of the Council may differ

127 *Houben* calls the declaration issued by the Kingdom government on the first OCT Decision 'superfluous' but he does not explain why. Apparently he did not think it was in conflict with the practice as described by him.

128 See Alkema 1995, p. 134.

considerably, and this may lead to further conflicts if the constitutional law of the Kingdom does not stipulate how such conflicts of interests should be resolved.

Possible Solutions

The advice of the *Raad van State* recommends that the Countries should formulate an arrangement on how to exercise the right to vote in the Council of the EU on affairs that concern the Netherlands Antilles and Aruba. This recommendation was supported by many writers, such as *Besselink, Hoogers & De Vries* and *Nap*.¹²⁹ *Van Benthem van den Bergh* had already stressed the need for such an arrangement even before the first OCT Decision had been adopted.¹³⁰ Along with these authors, I think that such an agreement should ideally be laid down in a Kingdom act or in the Charter itself.

However, I do not think that under the current circumstances the rule should be that the Caribbean Countries have a right of veto on the OCT Decisions and other decisions of international organisations which affect them economically, similarly to Article 25 of the Charter. As long as the Kingdom only has one vote in the Council of the EU, and the OCT Decision has not been transformed into an agreement with the OCTs, the Kingdom has to take account of the legitimate interests of each Country and the Kingdom as a whole when using its vote in the Council. Under some circumstances this could mean that prevalence should be given to other interests than the economic or financial interests of one or both of the Caribbean Countries. A right of veto would moreover create potentially unsolvable situations, namely when the Caribbean Countries disagree with each other on a certain decision. If one of them expects economic advantages from it, while the other expects to be negatively affected, a right of veto would not provide a solution.

I agree that any rules on this subject should start from the economic autonomy of the Countries, which is one of the cornerstones of the Kingdom order. It reflects the reality that the Caribbean Countries are economically in a different position from the European part of the Kingdom, and this requires different policies. Based on the Kingdom Charter and the economic right to self-determination the Countries should be allowed to determine these policies for themselves. This does not mean, however, that other Countries, states, or international organisations can be forced to create or maintain beneficial arrangements for the Caribbean Countries.

The rule described by *Houben* would be a good basis for an arrangement between the Countries, since it does justice to the right to self-determination of the Caribbean Countries while not ignoring the interests of the Netherlands.

129 Besselink 2002, p. 205-6 and p. 216-7, Hoogers & De Vries 2002, p. 212 and Nap 2003b, p. 83.

130 Van Benthem van den Bergh 1962a, p. 595-6.

The arrangement should provide that when only the interests of *one* Country is concerned, that Country decides the position of the Kingdom. The arrangement should also provide a way of resolving a deadlock which could be the result of a disagreement between the Caribbean Countries in a case where both their interests are at stake, while guaranteeing that the Kingdom will still be able to act effectively. These rules could perhaps also take their inspiration from the federal member states of the EU, for example Germany, a federation which allows its states (*Länder*) to represent Germany in the EU when only their interests are concerned.

The arrangement should also provide for a form of arbitration or judicial settlement of disputes on the interpretation of the arrangement, and especially to determine in concrete cases whether only the economic or financial interests of one Caribbean Country are involved, or whether the decision directly affects the interests of the other Countries or the Kingdom as a whole. This task could be attributed to the *Raad van State* of the Kingdom or to the Supreme Court, or to a constitutional court that could be established to resolve conflicts between the Countries.¹³¹

The three Countries have not come to any sort of agreement on this issue, nor taken steps towards such an agreement, perhaps because their interpretations of the Kingdom Charter appear to differ fundamentally on this point. If this is the case, it would provide an additional argument for transforming the OCT Decision into an agreement between the EU and the OCTs so that the Netherlands Antilles and Aruba will be able to defend their own interests in a direct relation with the EU, which would do more justice to their right to self-determination.¹³²

This does not necessarily mean that the Caribbean Countries will lose their influence over the position of the Kingdom as the member state of the EU. The Kingdom government could decide that if the Netherlands Antilles and Aruba obtain a way of negotiating directly with the EU, it will only continue to represent the Country of the Netherlands in the EU.¹³³ In that case, the Caribbean Countries would have to decide whether they prefer to deal directly with the EU, or through the Kingdom and with the help of the Netherlands.

131 De Werd 1997.

132 Article 28 of the Kingdom Charter, which opens the door to separate membership for the Caribbean Countries of international organisations, could perhaps accommodate a direct relation between the EU and the Caribbean Countries. Van Benthem van den Bergh 1962a, p. 596 already proposed this. See Van Helsdingen 1957, p. 396 et seq. for the meaning of Article 28.

133 Van Rijn 2001, p. 135.

9.3.2 Conclusion

The Caribbean Countries expressed a desire to conclude separate agreements with the EEC, but the member states were only prepared to give them OCT status. Because of this, the Kingdom of the Netherlands has to use its vote in the Council to represent all three Countries, which creates the need for a way to settle differences of opinion and conflicts of interest between the Countries regarding the EU. Instead of creating such an arrangement, the Countries have chosen to strive towards consensus on each issue, which they appear to have achieved in all but one case. The rice and sugar conflict of the 1990s showed that the Countries differ in opinion on the role of the Caribbean Countries in determining the Kingdom's position during the negotiations on the OCT Decisions. These differences have not yet been resolved, and the situation remains legally unclear.

The Kingdom Charter or a separate Kingdom act should provide rules to determine in which cases a Country can determine the position of the Kingdom independently, or jointly with another Country. In all other cases, the Kingdom Council of Ministers should decide the Kingdom's position via the normal procedure of trying to achieve consensus, since a Caribbean Country, in spite of its right to economic self-determination, cannot be allowed to overrule the other Countries when the interests of those Countries or the Kingdom as a whole are at stake as well. In these cases, the Dutch ministers will have a majority vote in the Kingdom Council of Ministers. Future conflicts could of course also be prevented if the OCTs were to gain a separate negotiating position on the formulation of the terms of their association.

9.4 SHOULD THE NETHERLANDS ANTILLES AND ARUBA REMAIN OCTS?

Doubts and dissatisfaction about the OCT association are occasionally expressed, both in the EU and in the OCTs. In The Hague, it is often assumed that the Kingdom will disintegrate if the three Countries continue to have a different status with regard to the EU. For that reason, it has often been suggested that the Netherlands Antilles and Aruba should achieve another status within or outside of the EU, especially since the Treaty of Amsterdam created a special preferential position for the outermost regions of France, Spain and Portugal, called 'ultra-peripheral' status, which is considered by some to be an attractive alternative to OCT status.

9.4.1 Ultra-Peripheral Status

The Ultra-Peripheral Territories (UPTs) consist of the French *départements d'outre-mer* (Martinique, Guadeloupe,¹³⁴ French Guyana, and Réunion), the Spanish autonomous community of the Canary Islands, and the Portuguese autonomous overseas regions Madeira and the Azores. These territories are different from most OCTs, because they have substantially larger populations, and have traditionally more important economic ties with Europe.

Under Article 299, paragraph 2 of the EC Treaty, the UPTs fall entirely within the territorial scope of the Treaty, although the Council 'shall adopt specific measures' with regard to the application of EU law, 'taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Community legal order'. Under this provision, the UPTs have been granted a number of exceptions to the full application of EU law to their territories.¹³⁵ To what extent such exceptions are allowed, is still somewhat uncertain.¹³⁶

Since the 1970s, the fate of the UPTs has become inseparably linked with that of Europe,¹³⁷ and they have definitively moved through the 'IN' door, in the terminology of the Commission. The EU provides extensive funding to improve the struggling economies of the UPTs, and to integrate them in Europe. For the period 1994-1999 the UPTs were granted € 4.7 billion, and for the period 2000-2006 they were allocated € 7.7 billion euro under the Structural Funds, representing the largest grant per capita anywhere in the EU.¹³⁸ The EU has also developed specific programmes for the UPTs, which concentrate on improving infrastructures, promoting productive sectors which generate jobs, and human resources development. There are also many other initiatives, which take account of the handicaps of these regions, such as their remoteness, insularity and reduced competitiveness.

For the Netherlands Antilles and Aruba, a change towards ultra-peripheral status would mean the incorporation of the entire *acquis communautaire*, unless the EU would be prepared to grant certain exceptions. It will involve a huge effort by the Countries, the Kingdom and the EU, but it seems to have been rather successful in the Azores, Madeira and the Canary Islands, which became

134 The UPT of Guadeloupe currently still includes Saint-Martin, which is the French half of the island which is called St. Maarten on the Dutch half. The Netherlands Antilles therefore shares a land border with the EU. If Saint-Martin obtains a separate status in relation to France, it will probably continue to be a UPT, but this is still uncertain at the time of writing.

135 See Brial 1998, p. 644 and Puissochet 1999. Since 1997, these exceptions can be created by the Council by a qualified majority of the votes, and no longer by unanimity (Article 299, para. 2 of the EC Treaty).

136 Brial 1998, p. 658 and Puissochet 1999, p. 495.

137 Brial 1998, p. 654.

138 The UPTs are all classified in category nr. 1 of the Structural Funds, which means that they are considered structurally underdeveloped. See Brial 1998, p. 648.

part of the EEC in 1986 and have since become considerably integrated with the Community. This has resulted in a substantial growth of the GDP of these islands, which used to be much poorer than the Netherlands Antilles and Aruba. Whether the Netherlands Antilles and Aruba could profit from a similar development became a subject of much debate in 2003.¹³⁹

The economic outcome of a change towards UPT appears to depend on a large number of factors, most of which cannot be controlled completely by the Caribbean Countries or the Kingdom. It cannot be determined beforehand, for example, which exceptions to EU law would be granted by the EU, or how much funds would be made available. It is also not possible to determine with any great amount of certainty the economic future of the OCT association. The only thorough economic comparison of both options published so far, conducted by researchers of the Erasmus University at the request of the Bank of the Netherlands Antilles, tentatively concluded that UPT status for the Netherlands Antilles would produce 0.6% more growth per year in comparison to OCT status.¹⁴⁰ Some have questioned whether the researchers started from the right assumptions,¹⁴¹ or have dismissed the advantages of UPT status as 'purely theoretical'.¹⁴²

From a legal point of view, the UPT status of a Caribbean Country would mean a considerable increase in the Kingdom's duty to guarantee the correct implementation of international obligations by the Caribbean Countries. In practice, this could lead to a decrease of the Caribbean Country's autonomy in relation to the Kingdom. Up till now, the risk of the Kingdom being held liable for a violation of international law in the Caribbean Countries has been

139 During meetings in March 2003 of the biannual 'Contactplan' of the three parliaments of the Kingdom, parliamentarians of the Netherlands Antilles and Aruba proposed that the Kingdom should investigate if the Caribbean Countries should opt for UPT status (*Kamerstukken I/II* 2002-03, 28 829, nr. 1, p. 4-5, 'Parlementair contactplan', 24-28 March 2003). See also the position paper of the Aruban AVP of March 2003, 'Koninkrijks- en Europese verhoudingen; een appel voor een nieuwe benadering', available on www.fesca.org. The Netherlands minister for Kingdom affairs requested the *Raad van State* of the Kingdom to provide information on this subject (see below). The Netherlands government did not wait for the outcome of this study, but announced that the Netherlands would strive towards the realisation of the UPT status of the Caribbean Countries (see 'Hoofdpijnenakkoord' of 16 May 2003, *Kamerstukken II* 2002/03, 28 637, nr. 19, p. 14). The governments of the Netherlands Antilles and Aruba protested that they had not been informed of this, and furthermore rejected the idea of becoming UPTs.

140 Bekkers, Boot & Van der Windt 2003.

141 Van Beuge 2004. The Van Beuge committee has been criticized itself for implicitly choosing against UPT status based on the political outlook of a majority of its membership, see the *Amigoe* of 17 July 2004. The Aruban opposition party AVP protested against the fact that it was not involved in the appointment of the members of the Committee, in spite of earlier promises.

142 Rosaria 2003, p. 41.

relatively small,¹⁴³ and the Kingdom government has not found it necessary to formally intervene in the autonomous affairs of a Caribbean Country for this reason. But the obligations created by EU law are of a different nature, and are furthermore supervised by the EU organs, which may impose considerable penalties on the Kingdom if a Caribbean Country does not live up to the Kingdom's obligations. This will provide an incentive for the Netherlands to make sure that the Caribbean Countries correctly implement EU law, and will undoubtedly lead to a stronger Dutch involvement.

On the other hand, it has been suggested in Aruba that UPT status might increase Caribbean autonomy in a political sense, because the relation with Europe, and the extra funding that might become available, creates new possibilities for Aruba to pursue its own culture and education policies and to strengthen its own identity in relation to the Netherlands.¹⁴⁴ This certainly seems possible, but much will depend on the Caribbean Country's ability to implement EU law and ensure its observance on the one hand, and on the other hand the degree of trust that the Netherlands will have in the Country's ability to do so on its own.

9.4.2 Disintegration of the Kingdom

Apart from these issues of economics and autonomy, there is also the question whether the Kingdom does not face the threat of disintegration if the Countries continue to have a different relation with the EU.¹⁴⁵

The *Raad van State* of the Kingdom, in its advice on the future of the Netherlands Antilles and Aruba in relation to the EU, noted that the Netherlands currently has a double relationship, on the one hand with the EU and on the other hand with the Caribbean Countries. This creates 'competing commitments' which lead to tensions within the Kingdom which will only increase in the future, the *Raad van State* predicts.¹⁴⁶ The *Raad van State* also

143 An isolated example can be found in the European Court of Human Rights' judgement in the case of A.B. v. The Netherlands (Application no. 37328/97) of 29 January 2002, in which the Court held that Article 8 had been violated in the Pointe Blanche prison of St. Maarten (Netherlands Antilles) for which no effective remedies had been available (Article 13).

144 Alberts 2003. This report was the result of a fact-finding mission by FESCA, the think tank of the Aruban christian-democratic AVP, to Madeira and the Canary Islands in 2003

145 See for instance Hirsch Ballin 2003.

146 Raad van State 2003. The advice lists a few examples of these frictions: most inhabitants of the Netherlands Antilles and Aruba are European citizens but they are not allowed to vote in the elections for the European parliament; the Kingdom is obligated to execute decisions of the Council regarding defence and foreign policy, even though these subjects are Kingdom affairs; and there is less concordance between the legislation of the Countries in non-Kingdom affairs because EU law generally does not apply in the Caribbean Countries.

considers that it is far from certain the OCT association will be continued in the future, and concludes that the Netherlands Antilles and Aruba should probably choose between a closer relation with the EU, either as UPTs or through some other arrangement, or accept that the integration of the Country of the Netherlands into Europe will gradually lead to the dissolution of the Kingdom (i.e. independence for the Netherlands Antilles and Aruba).¹⁴⁷

The *Raad van State*'s arguments against the OCT status can be grouped into two categories. On the one hand, there is uncertainty about the future of the association, which is true, but it will not be ended any time soon. The EU Commission thinks major choices about the future of the OCT association can only be made by the overseas peoples, none of which have as yet expressed themselves in that sense.¹⁴⁸ The other arguments of the *Raad van State* are based on the notion of the incompatibility of the European integration with the Kingdom in its present form,¹⁴⁹ because the law of the Countries will increasingly differ, and because the Kingdom will become bound to European decisions, also in Kingdom affairs such as defence and foreign affairs.

Whether the differences between the law of the Countries will in the future increase, depends for a large part on the Caribbean Countries' willingness to continue copying Dutch law. The fact that the Netherlands is increasingly bound to EU law, does not really change this situation, because the Country of the Netherlands has never attached much consequences to its obligation under Article 39 of the Kingdom Charter to maintain legal concordance between the Countries in a number of important areas of the law. The Caribbean Countries still appear to be prepared to follow the legal developments in the Netherlands. Whether these are of European or Dutch origin does not really make a difference.

The Caribbean Countries are also occasionally requested to cooperate with implementing EU decisions in the entire Kingdom, for instance with regard to visa, and other measures in the 'wars' on drugs and terrorism.¹⁵⁰ But as OCTs, the Netherlands Antilles and Aruba cannot be compelled to adhere to EU law that is not based on Part IV of the EC Treaty, and the implementation

147 Raad van State 2003, especially p. 22, 38, and 48-51.

148 Except perhaps Mayotte, which in a referendum in 2000 approved a plan for closer ties with France, which had promised to attempt to realize more European funds for the island, which the French government interpreted as a choice for UPT status.

149 This notion is endorsed by some authors, for example Hoeneveld 2004 and Alberts 2003, and denied by others such as Van der Wal 2003 and Martha 1997.

150 IOB 2003, p. 163 et seq. for visa, and p. 97 et seq. for the war on drugs. In these cases, an Aruban research group concluded, Aruba really has no choice but to implement EU law. See 'Aruba en de Europese Unie. Rapport van de Studiegroep Aruba-Europese Unie', Oranjestad, 1 October 2003. This situation appears to exist in the other OCTs as well, see paragraph 1.2 of the Joint Position Paper signed by the OCTs and their mother countries on 4 December 2003 (available on www.octassociation.org).

of such law can therefore only be realised voluntarily by the Caribbean Countries.¹⁵¹

But there exists another, perhaps stronger threat to the integrity of the Kingdom, namely the EU's growing capacity to represent its member states externally.

9.4.3 The Ability of the Kingdom to Represent the Caribbean Countries Externally

Alkema has wondered whether the Kingdom might not in the future lose its ability to represent the Netherlands Antilles and Aruba independently of the EU if the EU develops its own foreign policy. This problem has already led to conflicts when member states wished to represent their OCTs internationally while the Commission considered the member states should adhere to the common policies. In 1978, the Court in Luxembourg was asked to give an advisory opinion on the participation of the UK and France in an international conference on behalf of their overseas territories, even though the subject matter was within the exclusive competence of the EEC. The Court stated that the UK and France (and by extension the Netherlands) had 'a dual capacity: on the one hand in so far as they are members of the Community and on the other hand in so far as they represent internationally certain dependent territories which are not part of the sphere of application of Community law'. This dual capacity means that the member states are allowed to act internationally on behalf of their OCTs independently of the EU.¹⁵²

In 1989, the four states with OCTs and the Commission reached an agreement on the representation of overseas interests at international conferences, in order to 'resolve these problems in a pragmatic way without prejudging any legal positions'.¹⁵³ The member states and the Commission promised to consult each other on possible conflicts of interests between the EU and the

151 *Kamerstukken II* 2003/04, 29 394, nr. 6, p. 14. The *Raad van State* has a long-standing difference of opinion with the Kingdom government on this subject, which is reflected in a number of advices concerning seagoing vessels (see *Kamerstukken II* 1999/00, 26 878, B for an overview). The *Raad van State* considers that all seagoing vessels with Dutch nationality, therefore including those registered in the Netherlands Antilles and Aruba, have to comply with EU (and other international) standards, because the safety of seagoing vessels is an affair of the Kingdom according to the Charter, and because nationality is indivisible under international law. The Kingdom government has consistently rejected the *Raad van State*'s position (*Kamerstukken II* 2003/04, 29 200 XII, nr. 136, and *Kamerstukken II* 2003/04, 29 476, nr. 4).

152 Opinion 1/78 of the Court of Justice of 4 October 1979 (International Agreement on Natural Rubber), *European Court Reports* 1979, p. 2871. Similarly in Opinion 1/94 of 15 November 1994 (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property) *European Court Reports* 1994, p. I-05267.

153 The text of the Declaration is annexed to Maurice 1991, p. 247-9.

OCTs and attempt to reach an agreement in each case before the start of the conference. Failing such an agreement, the member state will represent the interests of the OCT in the way it sees fit, but it will inform the Commission beforehand of its intentions. A similar declaration was annexed to the Final Act of Maastricht in 1992, which applies this principle to all instances of possible conflicts of interest between the EU and the OCTs.¹⁵⁴ As a result of this, the Kingdom has remained capable to represent the Caribbean Countries in international affairs, at least for the time being.

The Caribbean Countries are not fully satisfied with the way the Kingdom uses this ability, which is partly due to the fact that the ministries in the Hague seem to be increasingly focussed on European developments and policies, also in international affairs. While the Kingdom remains legally capable of representing the Caribbean Countries, the Netherlands ministers which represent the Kingdom may not be politically willing to do so, or even be aware of the possibility. *Van Rijn* considers that this development will lead to the Netherlands Antilles and Aruba being forced to develop their own foreign policies in a large number of fields.¹⁵⁵ An example of this tendency is that the Netherlands Antilles government has expressed a wish to obtain separate membership of the WTO.¹⁵⁶ Another solution might be that the EU organs assume the responsibility for the foreign affairs of the OCTs to the extent that the European integration incapacitates the metropolitan states to conduct the foreign affairs of their territories.¹⁵⁷

9.4.4 Conclusion

It is controversial whether UPT status might be a realistic and attractive option for the Netherlands Antilles and Aruba. Their OCT status may in the future lead to the disintegration of the Kingdom, which might create a conflict with their right to self-determination. The OCTs may not be forced by the EU or the metropolitan states to move towards either independence or integration with the EU against their will. A choice to move in either direction must be left to the populations of the OCTs themselves. The EU Commission has taken this principle as a guideline for the future development of the OCT Association. As this principle does justice to the right to self-determination of the Nether-

154 Declaration (nr. 25) on the representation of the interests of the overseas countries and territories referred to in Article 299 (ex Article 227)(3) and (6)(a) and (b) of the Treaty establishing the European Community.

155 *Van Rijn* 1999, p. 149.

156 IOB 2003, p. 130.

157 The European Commission may be venturing in this direction already with regard to Greenland. It wishes to participate on behalf of Greenland and the EU in various Arctic cooperation projects, *see* the communication to the Council and the European Parliament on Greenland of 3 December 2002 (COM(2002) 697 final).

lands Antilles and Aruba, the Kingdom should adopt it as well and not strive towards the termination of the OCT status of the Caribbean Countries, unless the populations of those Countries express a wish for another relation with Europe.

The Kingdom for the time being remains free to represent the Netherlands Antilles and Aruba externally independent of the EU, even in areas where a common foreign and security policy is realised. If this would change in the future, a solution will have to be found for the Netherlands Antilles and Aruba which does justice to their right to self-determination. Perhaps the EU should take on a greater role in representing the OCTs in external affairs to prevent the territories from becoming international orphans.

9.5 PROCEDURES FOR STATUS CHANGE

Seeing that the UPT status of a Caribbean Country would lead to substantial changes to the law and the international position of such a Country, such a status change should preferably be seen as an exercise of the right to self-determination in order to guarantee that the freedom of choice of the population of the Country is not undermined. If a Country chose to become a UPT, it would abdicate a number of its autonomous powers to the EU organs, and it would come to fall under the supervision of the Kingdom with regard to the correct implementation of, and abidance by, EU law. Politically and economically, the Country would become closer to Europe, which would represent a consequential change for the Netherlands Antilles and Aruba in their trade relations, monetary policies, and most of their other economic policies. For these reasons, the right to self-determination should be taken into account when determining which procedure to follow before a Dutch OCT could obtain another relation with the EU.

9.5.1 Under European Union Law

Formally, the list of OCTs in Annex II to the EC Treaty determines whether a territory is an OCT or not. The Annex can only be amended through the procedure for amendments to the Treaty, of which it is an integral part.¹⁵⁸ The consent and ratification by all member states is therefore necessary for a territory to become an OCT, or to stop being an OCT under EU law. But in practice some status changes have nonetheless been made without the explicit consent of the member states, and usually the Annex has not been amended to realise a status change.

158 Von der Groeben/Thiesing/Ehlermann 1999, p. 3/2101-2, and Pisuisse 1991, p. 325.

UPT status can only be achieved through amendment of Article 299, paragraph 2, which lists the UPTs. An exception perhaps exists for France, which does not appear to need the consent of the other member states to create UPTs, because all of its DOMs are automatically UPTs, or so Article 299 suggests.¹⁵⁹ But the consent of the member states is indispensable to obtain the support of the EU needed to integrate the territory with the Union, and to realise exceptions to the application of EU law in a UPT.

The draft EU Constitution creates a procedure for status change, which will allow UPTs to become OCT and vice versa. Article IV-440, paragraph 7 states that:

The European Council may, on the initiative of the Member State concerned, adopt a European decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 2 and 3. The European Council shall act unanimously after consulting the Commission.¹⁶⁰

The draft Constitution does not stipulate any principles or guidelines for the European Council to base its decision on, thereby apparently leaving it free to decide on whichever grounds it sees fit.

Independent of the question whether the Constitution will come into force, any status change of the Dutch OCTs will, at least in the near future, require the consent of all member states. But the freedom of the member states to deny a request for status change is limited by the right to self-determination and decolonization. Through the EC Treaty all of the member states have adopted obligations towards the OCT, in the fulfilment of which they are bound to take the right to self-determination into account (*see above*). It is possible for the OCTs to invoke the right to self-determination when a significant change in their status is discussed, especially since most of the OCTs, including the Netherlands Antilles and Aruba, have not been able to make a really free choice on their relation with Europe in the past.

The obligations for the EU and the member states are probably most clear in a situation where a Caribbean Country exercises its right to self-determination in relation to the Netherlands, resulting in a full integration with the Netherlands. If the EU or one or more of the member states would oppose the application of the Treaties to that Caribbean Country, it would prevent or seriously frustrate a process of decolonization. EU law has become an important part of the law of the Netherlands, and any territory that would want to become fully part of the Netherlands would have to comply with the obliga-

¹⁵⁹ Ciavarini Azzi 2004, p. 7.

¹⁶⁰ Treaty establishing a Constitution for Europe, CIG 87/04 of 6 August 2004. The territories referred to in paragraphs 2 and 3, are the UPTs and the OCTs. I do not know why the British OCTs are excluded. The new procedure will also not apply to such territories as the Faeroe Islands, Gibraltar and the Åland Islands. For these territories the current procedure involving treaty amendment will stay in place.

tions arising from EU law. A refusal to accord such a territory the beneficial aspects of EU membership would seriously hinder the integration of the territory in the Netherlands.

In any case, if one of the Caribbean Countries or an island of the Netherlands Antilles chooses to become integrated with the Country of the Netherlands, such a choice should not be treated in the same way as the accession of a foreign state to the EU. Firstly, because the Kingdom is already a member of the EU, and will be responsible for the adherence to EU law in any part of its territory where the Treaties apply, and secondly because the EU already has a relation with the OCTs on the basis of the EC Treaty to which the right to self-determination and decolonization as laid down in the UN Charter applies. The freedom of choice, which is the essence of this right, should be respected by the EU and its member states.

This does not mean, however, that the Caribbean Countries could force the EU to accept it as UPTs, because this is not the same as merely extending the territorial scope of the Treaties to those Countries. UPT status creates the obligation for the EU to create beneficial measures for the territory. It would be hard to argue that such a preferential status could be chosen as a direct result of the exercise of the right to self-determination. Full integration with the Netherlands almost inevitably means that a Caribbean Country would have to become part of the EU, but UPT status would not be absolutely necessary. On the other hand, seeing that the historical, social and geographical circumstances of the Dutch OCTs are rather similar to those of the existing UPTs, and also that the application of EU law in the Dutch OCTs would probably lead to similar problems, a member state opposing the UPT status of the Netherlands Antilles or Aruba might find it difficult to present a convincing case.

The situation is less clear when a Caribbean Country would prefer to change its status in relation to the EU *without* changing its relation with the Netherlands. Such a change could take the form of a special protocol as in the case of the Åland Islands, or some other tailor-made status established through an agreement between the Kingdom and the other member states, or it could take the form of UPT status. These status changes could – at least in theory – be achieved without any major constitutional changes in the relation with the Netherlands. It therefore concerns status changes that can only be realised by the EU. The right to self-determination could certainly be used by a Caribbean Country presenting such a request, with reference to the Preamble of the EC Treaty's promise of adhering to the principles of the UN Charter, but it cannot be maintained that the member states would be obligated to grant such a request, at least not when it is purely based on the right to self-determination.

9.5.2 European Practice with Regard to Status Change

The European practice with regard to the status of overseas territories has been somewhat careless.¹⁶¹ Many changes were realised during the 1970s and 1980s without updating Annex II of the EC Treaty. Annex II was finally updated in 1997¹⁶² and has remained correct since. It may be expected that the EU will in the future insist on the adherence to the procedure of Treaty amendment before a territory can become OCT or UPT. An exception might still be made for territories which secede from an existing OCT.¹⁶³ The EU may probably not consider a territory as an OCT if such a recognition conflicts with international law.¹⁶⁴ This could occur when an OCT is broken up in violation of the principle of *uti possidetis* (see Chapter 8).

The EU has accepted a number of status changes of overseas territories, notably that of Greenland, which chose to leave the EEC in a referendum. Other examples are Saint Pierre and Miquelon, and Bermuda. Of course, Brussels has also respected the right to self-determination of the approximately 25 OCTs that have become independent states since 1958, but it did not really have a choice in these cases, since it was not considered possible to extend the application of Part IV to independent states.¹⁶⁵

161 See also Martha 1991b, p. 9, who calls the EEC's practice disturbingly sloppy.

162 See Vignes 1991, p. 360-2 on the political reasons why some member states (especially France) refused to remove a number of independent states from Annex II.

163 The practice shows that once a member state allows an island to secede from an overseas territory and become a separate overseas territory, the EU (as well as other international organisations) starts to treat this new territory on a similar footing as the entity of which it formerly was a part. Thus, Mayotte was treated as an OCT from 1976, Anguilla from 1980, and the Council of Ministers also accepted Aruba's decision to leave the Netherlands Antilles and become a separate Country within the Kingdom in 1986. Martha in 1991 wondered whether Aruba had really become an OCT because it was not yet listed on the Annex to the EEC Treaty (Martha 1991b, p. 10). Other authors considered that Aruba inherited the rights and obligations of the Netherlands Antilles as a form of state succession (for instance Hoogers & De Vries 2002, p. 245).

164 Such a problem exists with regard to the French and British claims to Antarctica, which are part of their OCTs. The Antarctica Treaty does not allow any actions which constitute a basis for claiming sovereignty over a part of the continent, for which reason some authors think that OCT status should not be interpreted as recognition of the international status of a territory. This conclusion is probably not correct. The recognition by the EU of a certain territory as an OCT of a member state would seem to indicate that the EU considers that the member state in question exercises sovereignty over that territory. The French and British Antarctic claims are exceptions, or more properly, the EU should make clear that these territories are not OCTs (see in a similar sense Vanhamme 2001, p. 76-7). In all other instances, the OCT status of a territory means that the EU recognizes that one of its member state has 'special relations' with that territory, which should logically be interpreted to mean that the member state exercises sovereignty over that territory.

165 The OCT Decisions do make it possible that the association is temporarily continued until the former OCT has been able to ratify the ACP convention.

The EU Commission in 1999 stressed that 'it is not for the Commission or the Council to impose such options' as integration with the EU or joining the ACP Conventions. According to the Commission, such a decision is 'a political choice that only the peoples concerned can make within their own constitutional frameworks'.¹⁶⁶

According to *Von der Groeben* a territory cannot change its status in relation to the EU simply through an expression of its (or its mother country's) will, but only through an amendment of Annex II to the EC Treaty.¹⁶⁷ Nonetheless, there have been many examples where this procedure was not followed. Obviously, all of the OCTs that have become independent have changed their status in relation to the EC through a unilateral act. Bermuda is another example, as it is not treated as an OCT at its own request, but still remains on Annex II to the EC Treaty, and is also on the same Annex to the EU draft Constitution. *Von der Groeben's* rule perhaps does apply when a territory wishes to become OCT or UPT. I will discuss three such cases in order to determine whether OCT or UPT status requires treaty amendment.

Surinam

After the Surinam government decided to request an association with the EEC,¹⁶⁸ the Commission of the EEC announced that it was in favour of Surinam becoming an OCT. Surinam's request to be allowed to send a representative to participate in the negotiations on its future status was denied, because according to France and Germany these negotiations were an internal affair of the EEC.¹⁶⁹ The Council of Ministers of the EEC asked a special legal working group to give advice on the proper procedure to be followed. It considered that the EEC Treaty needed to be amended in order to add Surinam to the list of OCTs in the Annex. The Commission rejected this advice because it thought such a partial amendment of the Treaty might inspire other member states to request Treaty changes as well. The Commission proposed that the Netherlands should ratify the EEC Treaty again, but this time for Surinam. The member states did not object, and the Netherlands seized this opportunity to quickly realise the OCT status of Surinam, even though an amendment to the Treaty was 'a legally more thorough form', according to the Netherlands government.¹⁷⁰ Surinam was not placed on the Annex to the Treaty, which

166 COM(1999) 163.

167 Von der Groeben/Thiesing/Ehlermann 1999, p. 3/2101-2.

168 Oostindie & Klinkers 2001b, p. 454, note 2. See Meel 1999, p. 281 et seq. and Houben 1965, p. 43 et seq. for (differing) accounts of the negotiations within the Kingdom and with the EEC.

169 Meel 1999, p. 296-97.

170 *Handelingen II* 1961/62, p. 1200. The EEC Treaty was ratified for Surinam by the Kingdom statute of 19 July 1962, *Staatsblad* 1962, nr. 285. For the debates in the Netherlands parliament, see *Kamerstukken II* 1961/62, 6701 (R 275), *Handelingen II* 1961/62, p. 1175 et seq., and

strictly speaking meant that Surinam did not become an OCT, and the Treaty applied to the Country without restrictions.¹⁷¹ But seeing that it had been the clear intention of the Netherlands and the other member states to create OCT status for Surinam, it was treated as such.¹⁷²

Saint Pierre and Miquelon

The status change of Saint Pierre and Miquelon was part of an attempt by France during the 1970's to terminate the constitutional irregularity which represented the *territoires d'outre-mer* (TOM).¹⁷³ France thought that the remaining TOMs should either become independent or fully integrated into the republic in the form of *départements d'outre-mer*. Saint Pierre and Miquelon, an archipelago located near Newfoundland, served as a test-case for the transformation of TOM into DOM. There existed no independence movement in the territory and it was considered to be very French already. The *Conseil général* (parliament) of the territory was opposed to the transformation, but the French legislator went ahead with the integration of the territory into the republic in 1976 as a DOM.

The DOMs were (and are still) not listed in the text of the EEC Treaty, which thereby implicitly left it to France to decide which of its territories should be covered by 227, § 2 (currently 299, § 2) of the Treaty. This represents an exception to the rule that the member states decide together on the territorial scope of application of the Treaty.¹⁷⁴ None of the organs of the EEC, nor the member states, opposed or accepted France's decision to transform Saint Pierre and Miquelon into a DOM and thereby bringing it under the full application of EEC law.¹⁷⁵ But France's choice would not be without financial consequences for the EEC, because the DOMs qualify to receive funding which are not available to the OCTs.

The *départementalisation* quickly ran into legal and political difficulties due to the '*réalités locales*' as Branchet puts it,¹⁷⁶ and also because the French government apparently had not anticipated the Court of Justice's 1978 decision in

Handelingen I 1961/62, p. 525 et seq.

171 Maas 1962, p. 597.

172 Houben 1965, p. 48. The OCT Decisions of 1964 until 1976 treated Surinam as an OCT. After Surinam became independent, it joined the group of independent ACP states.

173 Ziller 1991, p. 189. On the status changes of Saint Pierre and Miquelon, see Branchet 1991.

174 In this sense, see Ziller 1991 and Ciavarini Azzi 2004. Von der Groeben/Thiesing/Ehlermann 1999, p. 3/2101-2 thinks the member states have to agree to a TOM becoming a UPT, but this would be in contradiction to the text of the EC Treaty.

175 Saint Pierre and Miquelon remained on Annex IV to the EEC Treaty, but this Annex would not be updated -until 1997. The French decision must be considered to have somehow annulled or overridden the inclusion of Saint Pierre in Annex IV. The archipelago was removed from the more accurate Annex to the OCT Decisions in 1980 (80/1186/EEC, *OJ* 1980, L361).

176 Branchet 1991, p. 300.

the Hansen case, which meant that EEC law fully applied in the DOMs.¹⁷⁷ France came to the realisation that the full integration of the territory into the EEC would be economically disadvantageous. 75 percent of the archipelago's imports came from Canada and the US, which would now fall under the import regulations of the EEC, which meant that these imports became considerably more expensive. To replace these with products from Europe was not an attractive option because of the costs of transportation.

Negative consequences were also expected in the area of fisheries, which is an important part of the islands' economy. The creation of a common European fisheries policy in 1983, meant that the EEC gained control over the access of foreign fleets to the fishing grounds of the islands. This threatened to worsen the longstanding territorial dispute with Canada, which refused to recognise Saint Pierre's new status because it did not want to deal with the EEC in this matter, and furthermore feared the advent of the European fishing fleet.¹⁷⁸

These difficulties, combined with the local opposition to the entry into the common market, led France to decide that Saint Pierre and Miquelon should not be an integral part of the EEC after all. For this reason, the status of the islands under the French Constitution was changed. It became a *collectivité territoriale de la République française* in 1985, a category that had been created for Mayotte in 1976, and which is somewhere in between TOM and DOM status. This time, the islands were in favour of the status change.¹⁷⁹

The new status of 1985 meant that Saint Pierre and Miquelon reverted to OCT status. Its inclusion in Annex IV (currently Annex II) was 'revived', since the member states had not yet taken the trouble of striking the name of the territory from it,¹⁸⁰ and the Council of Ministers again simply accepted the French decision. The OCT Decision of 1986 lists Saint Pierre and Miquelon as a 'territorial collectivity' without any comment.¹⁸¹

The EU draft Constitution proposes to put an end to this French prerogative by listing all of the DOMs by name in Article III-424 and IV-440, paragraph 2. France's wish to change Mayotte into a UPT in the near future therefore had to be accommodated during the intergovernmental conferences of 2003 and

¹⁷⁷ Ziller 1991, p. 189. For the Hansen case, *see above*.

¹⁷⁸ Branchet 1991, p. 303-4 and Ziller 1991, p. 189.

¹⁷⁹ Branchet 1991, p. 309, states that the choice was put to the voters of Saint Pierre and Miquelon on 27 January 1985, but I have not found any other references to this consultation. Ziller 1991, p. 189 only states that the local assembly agreed to the new status. Maurice 1991, p. 228 claims that *both* status changes were at the request of the population, but he does not substantiate this claim.

¹⁸⁰ Ziller 1991, p. 190 doubts whether it was legally possible to revive an annulled provision by a unilateral act of a member state.

¹⁸¹ Council Decision of 30 June 1986 (86/283/EEC, *OJ* 1986, L.175). Von der Groeben/Thiesing/Ehlermann 1999, p. 3/2102 claim that the Council issued an internal explanatory declaration in which it explicitly recognized the new status of the islands.

2004 by the adoption of a declaration that Mayotte may be added to the list of UPTs when France requests it.¹⁸²

Greenland

Greenland had become part of the EC in 1973 when it was still an integral part of Denmark. The accession referendum which had been held in the entire Kingdom of Denmark showed that 70% of the Greenlanders did not want to join the EC, but as the majority of the Danish population as a whole voted in favour of accession, the Kingdom of Denmark became member of the EC as a whole. After Greenland achieved its Home Rule in 1979,¹⁸³ another referendum was held in 1982 on the question whether it should leave the EC. The Inuit population of Greenland resented the fact that European fishermen had obtained generous catch quota in Greenland's fishing grounds, which were the mainstay of the island's economy, and were unhappy about the EC's decision to ban seal hunting.¹⁸⁴ Nonetheless, the opposition to the EC had become smaller since 1973, with only 52 percent of the Greenlanders voting in favour of leaving the EC. Denmark respected the outcome of the referendum, and requested the other member states to cooperate in granting Greenland's wish.

Many member states were not keen on Greenland's departure, because the island's fishing grounds were of considerable importance to the EC. The Danish proposal to grant the island OCT status also met with opposition because the territory was considerably wealthier than the average OCT.¹⁸⁵ After 'a strenuous and time-consuming process',¹⁸⁶ an agreement was reached on a treaty of withdrawal for Greenland,¹⁸⁷ which states in its Preamble that, whilst OCT status is deemed to provide an appropriate framework, 'additional specific provisions are needed to cater for Greenland'. A new Article was added to Part IV of the EC Treaty which provides that Part IV applies to Green-

182 See Declaration nr. 28 of the intergovernmental conference of 6 August 2004 on Article IV-440(7): 'The High Contracting Parties agree that the European Council, pursuant to Article IV-440(7), will take a European decision leading to the modification of the status of Mayotte with regard to the Union in order to make this territory an outermost region within the meaning of Article IV-440(2) and Article III-424, when the French authorities notify the European Council and the Commission that the evolution currently underway in the internal status of the island so allows.' (CIG 87/04, add. 2.) See also the French '*Accord sur l'avenir de Mayotte*' of 27 January 2000, JO, No. 32 of 8 February 2000.

183 The move towards Home Rule was inspired by the outcome of the referendum on the accession of Denmark to the EEC (Fægteborg 1989, p. 32). It was expected that Home Rule would enable Greenland to get out of the EC without becoming independent from Denmark, see Havel 1992, 122.

184 Fægteborg 1989, p. 33

185 Von der Groeben/Thiesing/Ehlermann 1999, p. 3/2118-9.

186 Fægteborg 1989, p. 33 cites the president of the Home Rule Government of Greenland.

187 Treaty amending, with regard to Greenland, the Treaties establishing the European Communities, OJ Nr. L 29/19, of 13 March 1984, which entered into force on 1 February 1985.

land, subject to the Protocol on special arrangements for Greenland, annexed to the EC Treaty. This protocol guarantees that fishery products from Greenland will have completely free access to the EC, if the EC obtains a satisfying amount of access to Greenland's fishing grounds.¹⁸⁸

A 10-year fisheries agreement between the EC and 'the authority responsible for Greenland', which can be renewed for 6-year periods, and the protocols to it, determine the access of the EC to the fishing grounds of Greenland, and also the funding provided to Greenland by the EU.¹⁸⁹ It also makes it possible for the EU to trade its catch quota with third countries such as Norway and Iceland, which is considered to be very important for the EU's fishery policies. Because the 'authority responsible for Greenland' is interpreted to mean both the governments of Denmark and of Greenland, this agreement and the subsequent protocols were signed by Denmark and Greenland. Greenland has negotiated directly with the Commission on these protocols.

The EU does not provide funds for Greenland through the EDF, but only through the protocols. If Greenland fell under the rules of the EDF, the Commission estimates it would receive only 10% of the € 42 million per year it receives currently as compensation for the EU's catch quota, and as development aid under the Fourth Protocol. The Commission has expressed its dissatisfaction with this situation because the real catches of European fishing vessels are worth less than half the amount paid as compensation, due to the near depletion of some species. But the renewed protocol of 2002 nonetheless granted roughly the same amount of financial aid as before.¹⁹⁰

9.5.3 Under the Constitutional Law of the Kingdom of the Netherlands

The Netherlands and the other states maintaining 'special relations' with overseas territories generally seem to consult their territories before taking a decision on their relations with the EU. But the legal status of such consultations can be very different in each state.

In the Kingdom of the Netherlands the application of international economic and financial agreements such as the EC Treaty to the territories of the Netherlands Antilles and Aruba is constitutionally a matter for the governments of those territories, as Articles 25 and 26 of the Kingdom Charter stipu-

188 Protocol on special arrangements for Greenland, attached to the Greenland Treaty, Article 1, para. 1. *See also* Council Regulation No. 223/85 of 29 January 1985, and Von der Groeben/Thiesing/Ehlermann 1999, p. 3/2120.

189 'Agreement on fisheries between the European Economic Community, on the one hand, and the Government of Denmark and the local Government of Greenland, on the other' signed at Brussels on 13 March 1984, and annexed to Council Regulation (EEC) No 223/85 of 29 January 1985.

190 Communication of the Commission to the Council and the European Parliament of 3 December 2002, COM(2002) 697 (final), p. 8.

late. The overseas governments have a right of veto on the application and the termination of the application of such treaties to their territory,¹⁹¹ and they may request the conclusion of such treaties, which the Kingdom will conclude if they only apply to (one of) the Caribbean Countries, 'unless this would be inconsistent with the partnership of the country in the Kingdom'.¹⁹² The Kingdom therefore in 1957 left it to the Caribbean Countries to decide for themselves whether they wanted to become OCTs or not, although the initiative for the decision was taken by the Netherlands. It must be assumed that any future decision with regard to a change in the relation with the EU should also be taken by the Netherlands Antilles and Aruba themselves.¹⁹³ Presumably, this situation would not change by the adoption of the EU draft Constitution.¹⁹⁴

It could be argued that it would not be wise for a Caribbean Country to seek another relation with the EU against the will of the Netherlands – especially if it would be a closer relation with the EU. While this may be true because of the political preponderance of the Netherlands within the Kingdom, it does not detract from the legal rule that the Caribbean Countries should be allowed to make an autonomous decision on their relation with the EU.

9.6 CONCLUSION

The law of decolonization and self-determination should be applied analogously as far as possible to the OCT association, because the OCTs were all, or are still, NSGTs, and the EEC has in 1957 taken on part of the 'sacred trust' towards

191 Article 25 of the Kingdom Charter.

192 Article 26 of the Kingdom Charter.

193 In a similar sense, *see* Martha 1991b, p. 9.

194 The EU draft Constitution provides a new procedure for status changes of the OCTs. These could be realized by a European decision, which means that the EU Constitution will not have to be amended. It would also seem to mean that Article 25 and 26 of the Kingdom Charter formally no longer apply, because those Articles only apply to international agreements, and not to decisions of international organisations (*see above*). That would mean that the same uncertainty surrounding the adoption of the OCT Decisions would also surround status changes of the Dutch OCTs. Perhaps to prevent this, the Kingdom issued a declaration on this Article, to be attached to the Constitution, which reads that a Kingdom decision to request a status change for the Netherlands Antilles and Aruba will be taken in conformity with the Kingdom Charter (*see* CIG 85/04, Presid. 27, of 18 June 2004). This statement could be taken to mean that the Kingdom intends to apply the normal decision making procedure of Article 12 of the Charter instead of Article 25 and 26 to a status change after the Constitution comes into force. This would be a rather improper way of realising a majority vote for the Netherlands in a decision that is currently still within the exclusive domain of the Caribbean Countries. In this context it should also be remembered that the Netherlands took the initiative (together with France) to realise an easier procedure for status change, professedly in order to keep as many as possible options open to the Netherlands Antilles and Aruba.

these territories. In so far as the metropolitan states are no longer capable to take measures to realise the goals of Chapter XI of the UN Charter for their OCTs because of the European integration, these measures should be taken by the EU. The relations of the OCTs with the EU have gained some importance for the overseas territories, for which reason these relations should be considered part of the political status of those territories.

For EU law to conform to the right to self-determination of the OCTs, and their separate status under international law, the OCTs will have to be given a form of participation in the adoption of the OCT Decision under Article 187 of the EC Treaty, and the EU and the member states should not frustrate a legitimate exercise of the right to self-determination of an OCT, including the Netherlands Antilles and Aruba.

The EU Commission and the OCTs have been working on the modernisation of the association for the last 15 years. The new view of the character of the association that is currently taken by all the parties involved should also be reflected by the EC Treaty (or the EU Constitution), especially in its procedures for the adoption of the OCT Decision, and for status changes of the OCTs.

The consent of all member states is formally required under EU law for a status change of an OCT because the OCTs are listed in Annex II to the EC Treaty. But if such a status change is part of a self-determination process in relation to the mother country, the other member states should not frustrate that process. The EU and the member states cannot be forced, however, to grant the territory a preferential status as UPT. That would be a matter for negotiations between the Kingdom, the EU, and the other member states.

The application of the right to self-determination and decolonization to the relation EU-overseas territories means that a status change can only be realised in agreement with the overseas people involved. Within the Kingdom of the Netherlands, Articles 25 and 26 of the Kingdom Charter entail that the Caribbean Countries determine the Kingdom's position with regard to the Treaty amendments needed to change from OCT to UPT or another status.