

# THE EUROPEAN UNION AND THE TERRITORIAL SCOPE OF EUROPEAN TERRITORIES

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*In this paper Professor Ziller addresses the intriguing question of the relationship of the European Union – which is not a state and which has no territory of its own – to the territories of EU Member States. The paper provides a survey of the overseas territories affected and the evolution of the case law of the European Court of Justice on the extent to which the provisions of the EC Treaty apply to the European territories overseas.*

*Dans cet article le Professeur Jacques Ziller s'intéresse à la nature particulière des relations qui existent entre l'Union Européenne - laquelle, stricto sensu, ne peut ni être considérée comme un Etat, ni se prévaloir d'un territoire propre - avec les territoires ultra-marins de ses Etats membres.*

*L'auteur qui dresse un état des lieux exhaustif des conséquences qui s'attachent à pareille situation, nous expose les évolutions jurisprudentielles de la Cour de Justice Européenne lorsqu'il s'agit de déterminer le domaine d'application des dispositions du Traité Européen sur ces différents territoires ultra-marins.*

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## **I INTRODUCTION**

The European Union is not a state and has no territory of its own. There is no correspondence in the geographical scope of application of the Treaties establishing the European Communities and European Union: Paris Treaty of 1951 (European Coal and Steel Community- ECSC); Rome Treaties of 1957;<sup>1</sup> Maastricht Treaty of 1992 on the European Union (EU ). Neither the Maastricht Treaty 1992, nor the Amsterdam Treaty of 1997, nor the Nice Treaty of 2001 has changed this situation. It is to be noted, however, that the treaty establishing the European Union takes over the territorial scope of application of the EC Treaty, hence unifying this regime. Within the EC Treaty,

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<sup>1</sup> European Economic Community (now European Community-EU) and Euratom.

substantial differences in the territorial scope of application are to be found, as established under article 299.<sup>2</sup>

The definition of the territorial scope of each of the three Communities differs and is clearly limited by the principle of speciality. Euratom has the broadest geographical scope as article 198 of the relevant treaty specifies that it applies to the entire territory of all member states: "European territory" as well as "non-European territories within their jurisdiction", with selected exceptions for Danish and United Kingdom territories.<sup>3</sup> The EC has a much smaller territorial scope: According to article 299 the TEC normally applies to the entire territory of all member states, but with a variable intensity (section 2) and with a specific position for Overseas Countries and Territories (OCTs) which means in practice their exemption from the biggest part of EC law.

The ECSC had a much narrower territorial scope of application, as article 79 of the relevant treaty limited its application to "European" territories of member states, thus excluding all territories which are not geographically European. The ECSC Treaty expired on 23 July 2002, thus automatically expanding the scope of EC rules, to products formerly covered by the ECSC, to all territories included in the internal market, but not to OCTs.

The existence of different geographical scopes of application for different sets of legal rules is not unknown to modern states, but in the case of the EU, the definition of the "territory" is not in the hands of the Union itself. Two aspects are to be taken into account. As for all other clauses of the treaties, unanimity is necessary in order to change the definition of the territories to which the law applies. Thus, in order to exempt Greenland from the application of EC law, Denmark had to negotiate a treaty amending the Communities' treaties – from 1982 to 1984.<sup>4</sup>

The territorial scope of application of EU law can be changed unilaterally by a member state giving independence (decolonisation) to a territory or incorporating a territory. Decolonisation has not meant a dramatic change for numerous territories, because of the definition of the territorial scope of the treaties: In the biggest number of cases, association on the basis of the EC treaties themselves (as an OCT) has been replaced by association on the basis of a treaty between the EC and newly independent states (Yaounde/Lome Cotonou conventions). But increase in a member state's territory has clearly shown where the competence lies in delimiting the EC territory: The reunification of Germany, which legally speaking needed no approval of EC institutions and member

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2 Previously art 227. The text is reproduced in the Annex to this paper.

3 The Faroe Islands and Greenland, British sovereign zones on Cyprus, and only a partial application to the Channel Islands and the Isle of Man.

4 France did not do the same in the case of Saint-Pierre-et-Miquelon, which should have constantly remained an OCT, but were considered as part of the EC territory between 1976 and 1985 by the EC institutions and member states only because of changes in French law. The precedent however seems not relevant, as the other members states and the Commission did not object to this unilateral change, and the ECJ never had to give its view.

states, was the decision solely of a member state and led to an increase of 4.66% in the territory submitted to EC law, and a new population of 16.5 million. This clearly differentiates the EU from any federation.

This latter issue shows a certain consistency in the links between the EU and state components. In the same way as the size of the EU "population" relies on member states' unilateral decisions because of the link between citizenship of the Union and citizenship of a member state, the size of EU "territory" relies on member states' unilateral decisions. Once again, it shows that the EU lacks at least two of the three major components of a state: It has no territory and no population of its own and no unilateral control over these two.

European legal literature has paid little attention to the issue of the territorial scope of EC law. This is not too surprising as its relevance varies from one member state to the other. Since the early 1990s, it is mainly French literature that has shown a real interest in the topic.<sup>5</sup> The difference in points of view is linked to the existence of different categories of member states in this respect. For 20 member states, the national territory coincides entirely with the scope of application of undifferentiated EU/EC law. It is only natural if lawyers and scholars from those countries show little interest in the issue of territorial differentiation and even less understanding of the underlying political economic and social issues, which may appear to them as a strange residue of colonialism.<sup>6</sup> The diversity of the territories for the other member states concerned and

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5 See especially D Dormoy "Association des pays et territoires d'outre-mer (PTOM) à la Communauté européenne" in *JURIS-CLASSEUR EUROPE*, fasc 573; D Custos "Champ d'application territorial du droit communautaire - Départements d'outre-mer" in *JURIS-CLASSEUR EUROPE*, fasc 572; J-L Dewost "L'application territoriale du droit communautaire. Disparition et résurgence de la notion de frontière" in *La frontière, colloque SFDI* (Pedone, Paris, 1980) 253 s; M Dony *Territoire communautaire* in A Barav & C Philip (eds) *Dictionnaire juridique des Communautés européennes* (PUF, Paris, 1994) 1070 s; J Groux "Territorialité" et droit communautaire" (1998) *Revue trimestrielle de droit européen* 1987, 5 s; S Karagiannis "A propos du règlement des conflits d'intérêts entre les territoires dépendant d'Etats membres et les Communautés européennes" in *Revue de Droit International et de droit comparé* 330; F Neri *Le champ d'application du droit communautaire en matière de libre circulation des travailleurs* (Franco Angeli, Milan, 1982) I Omarjee, "Le Traite d'Amsterdam de l'avenir de la politique de différenciation en faveur des départements français d'outre-mer", (1998) *Revue trimestrielle de droit européen* 515; D Perrot & F Miatti "Les Lapons et les îles Åland dans le quatrième élargissement - Contribution à l'étude de la différenciation juridique au sein de la Communauté européenne" (1997) *Revue du Marché commun et de l'Union européenne* 670; A Rigaux "Territoire communautaire" in *Répertoire communautaire* (Dalloz, Paris, 1995); as well as J Ziller "Champ d'application territorial du droit communautaire" in *JURIS-CLASSEUR EUROPE*, fasc 470; J Ziller "Flexibility in the geographical scope of EU law: diversity and differentiation in the application of substantive law on member states' territories" in G De Burca and J Scott (eds) *Constitutional Change in the EU - From Uniformity to Flexibility?* (2000) 113; J Ziller, "Les collectivités des outre-mers de l'Union européenne" in Faberon, Jean-Yves, (dir), *L'outre-mer français, la nouvelle donne institutionnelle* (La Documentation Française, Paris, 2004) 105-114; J Ziller "L'Union européenne et l'Outre-mer" *POUVOIRS* n° 113, avril 2005, 145-158.

6 In the case of Belgium and Italy, this could be reinforced by the fact that those two countries still had overseas dependencies in the 1950s, but none since the early 1960s.

the diversity of their legal status should however show that the issue goes far beyond that of post-colonialism.

Out of 27 member states of the EU, only 7 exercise sovereignty over territories which partially or entirely escape the application of EU/EC law: Denmark (Faroe Islands and Greenland), Spain (Canary Islands, Ceuta and Melilla), France (overseas departments and territories), the Netherlands (Dutch Antilles and Aruba), Portugal (Azores, Madeira<sup>7</sup>), Finland (Åland Islands, and "Lapland" as far as some specific rights of their traditional population are concerned) and the United Kingdom (UK) (Channel Islands and the Isle of Man, Crown colonies and territories). The Finnish territories as well as the Channel Islands and Isle of Man as European territories are not part of the EU of beyond the seas.

The constitutional standing of these territories varies considerably from one member state to the other and can evolve in time with a potential of new difficulties in the relationship between EU/EC law and domestic law. The main difference is between the UK territories on one hand, which are not legally speaking part of the British state, and whose inhabitants do not normally benefit from UK citizenship<sup>8</sup> and the other countries, whose dependencies are part of the state even if substantially autonomous, and whose inhabitants benefit from EU citizenship. This constitutional difference as such has important consequences for the scope of European citizenship.

The member state with the greatest diversity of territories in terms of EU status happens to be France. Comparing the European and national constitutional status of overseas "departments" (French West Indies, French Guiana, and Réunion), which are highly integrated from a constitutional and social point of view, and that of "overseas territories" which may enjoy a very important degree of autonomy (as in the case of New Caledonia and French Polynesia) raises an unresolved question. On one side the neutrality of EU/EC law towards the internal constitutional organisation of member states leaves untouched the essential attribute of sovereignty which permits giving independence to a territory or incorporating a new one: This issue is not governed by EU/EC law. However there is a severe constitutional constraint on member states as regards the possibility of subtracting part of their territory from the application of EU/EC law: Contrary to classical international law, where this is usually dealt with by unilateral reservations, unanimity of the member states is necessary by way of a revision of the founding treaties. The case of the territorial scope of Schengen is particularly complex: the French overseas departments, which are part of the EC territory, have been excluded from the Schengen area by article 138. 1 of the relevant convention, and a declaration of the French government, annexed to the Amsterdam

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7 Macao, even before its return to China at the end of 1999, was considered as a third country without any special link to the EC, like Hong Kong until July 1998.

8 Except for Gibraltar and the Falklands.

Treaty, perpetuates this exclusion. The question could arise as to whether this exclusion has a constitutional basis in the Schengen acquis, or is based on a French unilateral declaration.<sup>9</sup>

Contrary to the Maastricht Treaty, the Treaties of Rome and Paris defined their territorial scope, but they proceed in different ways. Adding to the complexity of having a different scope for each of the three Communities, even the EEC treaty defined a highly complex and differentiated set of "territories". With the enlargement of the EC and the revisions of the treaties, this complexity has constantly grown, and has never been seriously questioned.

In principle, the treaty applies to the whole territory of all member states (article 299 § 1) as "primarily defined by reference to [their] constitution",<sup>10</sup> with clearly stated exceptions. The treaty expressly provides for the exclusion of certain territories (article 299 § 3 - second sentence and § 6). The OCTs are submitted to a specific set of rules (article 299 § 3 combined with Annex II [ex Annex IV] TEC). Outermost regions follow special rules allowing for an evolving differentiation (Part IV of this paper). This diversity of regimes is as such a most obvious exemplification of flexibility in EC law.

## **II THE OVERSEAS COUNTRIES AND TERRITORIES: ASSOCIATION WITH THE EUROPEAN COMMUNITY**

When the Treaty of Rome was drafted it was decided to set up a special association regime for the colonial empires/overseas dependencies of Belgium, France, Italy and the Netherlands in Part IV of the EEC treaty (Association of the Overseas Countries and Territories). As these territories were not fully integrated in the domestic market of the relevant countries, this was most logical. Most of them have become independent states, the remainder still have the status of OCTs. The treaty in this respect contains only an enabling provision (in article 299 para 3), which has to be confirmed in each "association decision". Bermuda, which is in Annex II, never wanted to become an OCT and is therefore not mentioned in the different association decisions.

The list of OCTs is established in Annex II of the Treaty. It includes the following, covering about 2 296 904 km<sup>2</sup>, with a total of 1 200 800 inhabitants (among which 1 104 000 are citizens of an EU member state and thus EU citizens):

- for Denmark: Greenland), 2 166 600 km<sup>2</sup>, 56 900 inhabitants (Danish citizens)
- for France 529 799 km<sup>2</sup>, 718 300 inhabitants (French citizens) ie in the Pacific Ocean/ New Caledonia (19 103 km<sup>2</sup>, 219 200 inhabitants; French Polynesia (4 200 km<sup>2</sup>, 274 600 inhabitants ); Wallis-and-Futuna (280 km<sup>2</sup>, 16 200 inhabitants; in the Indian Ocean Mayotte

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9 In my view, the answer is very simple. The Schengen acquis is based on the wording of the convention unless stated otherwise in the Amsterdam treaty. But why then did the French government deem the above-mentioned declaration to be necessary, other than for the purpose of emphasising an obvious legal point?

10 *Hansen v Hauptzollamt Flensburg*, case 148/77 10 Oct 1978, ECR p 1787, point 10.

(374 km<sup>2</sup>, 201 200 inhabitants); in the Northern Atlantic Ocean Saint-Pierre-and-Miquelon (242 km<sup>2</sup>, 7 000 inhabitants ); and the French Austral and Antarctic Territory: (7 600 km<sup>2</sup> (without claims on the Antarctic, «frozen» by the relevant multilateral treaty), no permanent inhabitants);

- for the Netherlands 993 km<sup>2</sup>, 298 200 inhabitants (Dutch citizens) ie, in the Atlantic Ocean/Caribbean Sea: Aruba (193 km<sup>2</sup>, 84 200 inhabitants ) and the Federation of the Netherlands Antilles (Bonaire, Curaçao, Saba, Saint Eustache, Saint Martin - total of 800 km<sup>2</sup>, 221 700 inhabitants );
- under UK sovereignty 17 200 km<sup>2</sup>, 98 900 inhabitants, of whom fewer than 2 000 are British citizens: in the Atlantic Ocean/Caribbean Sea, Anguilla (91 km<sup>2</sup>; 13 500 inhabitants), the British Virgin Islands (153 km<sup>2</sup>, 23 100 inhabitants), the Cayman Islands (264 km<sup>2</sup>, 45 400 inhabitants), Montserrat (102 km<sup>2</sup>, 600 inhabitants) and the Turks and Caicos Islands (193 km<sup>2</sup>, 21 100 inhabitants); in the Southern Atlantic: the Falkland Islands (12 173 km<sup>2</sup>, 2 100 inhabitants - British citizens), Saint Helena and its Dependencies (159 km<sup>2</sup>, 7 400 inhabitants); the British Indian Ocean Territory (Chagos archipelago: 60 km<sup>2</sup>; no permanent inhabitants); in the Pacific Ocean, the island of Pitcairn (4,5 km<sup>2</sup>, 50 inhabitants), the Southern Sandwich Islands and Southern Georgia 4 000 km<sup>2</sup>, no permanent inhabitants; and the British Antarctic Territory: 5 320 km<sup>2</sup> (without claims on the Antarctic, «frozen» by the relevant multilateral treaty), no permanent inhabitants. Not included in OCTs, as the association decision is not applicable although on the list of Annex II are the Bermuda Islands (54 km<sup>2</sup>, 65 800 inhabitants).

The special regime of OCTs is a system of association, mainly based on non-reciprocal conditions of access to the market. However the combination of this special regime with other EC law provisions is subject to differentiated interpretation, and is as such an unresolved issue in EU constitutional law. There could be a contradiction between the geographical scope of application and the personal scope of application of EC law in the case of Danish, French and Dutch OCTs. There are very delicate problems for the application of free movement of workers to OCTs. The limitation of the territorial scope of EC law involves limitations for the free movement of persons, whereas the territorial origin of citizens of a member state on the territory of the state should have no consequence according to the constitutional principles of non-discrimination which is embodied in all the written constitutions of member states and could thus be easily considered as a general principle of law common to member states. Giving priority to the territorial scope, as many scholars do, would infringe upon the most basic principles of member states' constitutional law, namely the exclusion of discrimination amongst citizens according to their origin.

This is to be linked to an unresolved dispute on the applicability to OCTs of other treaty provisions than those of Part IV (Association of The Overseas Countries and Territories). Whereas the ECJ and most scholars seem to limit applicable treaty provisions to Part IV (Provisions on OCTs) and the articles formally referred to in this part, I maintain that only Part III (internal

market) is not applicable to OCTs and specially that Part I (general principles), Part II (citizenship), Part V (institutions) and Part VI (general and final provisions) must apply to those territories, unless Part IV foresees exemptions. The case law of the ECJ on this issue has not always been clear-cut. While in *Kaefer and Procacci*,<sup>11</sup> the court clearly avoided answering the question which could have been relevant, in *Leplat*<sup>12</sup> it insisted on the fact that "failing express provisions, the general provisions of the Treaty do not apply to the countries and territories" (point 10). However, the Maastricht Treaty was not applicable to the case, and it should be taken into account that it reorganised the structure of the TEC in order to give a special prominence to Part II on Citizenship. There is no argument that can be made that the rules on citizenship do not apply to OCTs. On the contrary they obviously apply to all but the British OCTs because of the national constitutional principle of equality between citizens. The TFI, in *Antillan Rice Mills*<sup>13</sup> seemed to follow this latter line of argumentation,<sup>14</sup> but the court still quotes its sentence in *Leplat*, even after the entry into force of the Maastricht Treaty.<sup>15</sup> My view is that the court, not having had to solve an issue about citizenship (Part 2) or general principles (Part 1), has had no opportunity to better formulate its position.

As noted earlier, whereas the member states may unilaterally include or exclude a territory from the EC scope of application through giving it independence or incorporating it, unanimity of all member states is required to give a special status (like that of OCTs or outermost regions) to specific territories. The precedent of Greenland in 1984 should be seen as prevailing over the seemingly illegal precedent of Saint-Pierre-et-Miquelon between 1976 and 1985. The apparent contradiction between those two possibilities demonstrates the lack of relevance of classical concepts such as sovereignty or the opposition between monism and dualism in order to resolve EU constitutional issues. The solution of such issues relies on a mix of national unilateral decisions and multilateral treaty provisions based upon unanimity: Flexibility in space depends mainly on EC member states individually or collectively, as "masters of the treaties".

As distinct from OCTs some overseas territories of EU member states are outermost regions, integrated in the European Community. They cover a total of 102 203 km<sup>2</sup>, 3 587 000 inhabitants:

- for Spain in the Atlantic Ocean: the Canary Islands (7 242 km<sup>2</sup>, 1 300 000 inhabitants);

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11 12 Dec 1990, cases C-100/89 and C-101/89, ECR p 4647.

12 Feb 1992, *Leplat v Territory of French Polynesia*, case C-260/90, ECR I-643.

13 14 Sept 1995, cases T-480/93 and T-483/93, ECR II-2305.

14 However, as the TFI seems to have misinterpreted *Hansen* in this decision, it seems difficult to rely on its argumentation in that case. The Court did neither follow nor condemn the relevant formulation in its decision 1999 – quoted hereunder in n 15 – in the same case.

15 See especially *Antillan Rice Mills/Commission*, 11 Feb 1999, point 36. C-390/95 and Advocate General Ruiz-Jarabo Colomer's in Conclusions case C-17/98, 1999-06-01, I, *Emesa Sugar* point 29.

- for France in the Atlantic/Ocean: the Guadeloupe archipelago (1 705 km<sup>2</sup>, 444 400 inhabitants) the island of Martinique (1 128 km<sup>2</sup>, 428 100 inhabitants); in Southern America: French Guiana (83 934 km<sup>2</sup>, 195 800 inhabitants); and in the Indian Ocean the island of La Réunion (2 512 km<sup>2</sup>, 773 000 inhabitants).

### **III THE FRENCH DEPARTMENTS D'OUTRE-MER AND THE VARIATIONS IN TREATY INTERPRETATION**

When the Treaty of Rome was drafted an exception had to be made for Algeria and the French overseas departments (DOM: *départements d'outre-mer*). Contrary to other European overseas dependencies, the four "old colonies" of Guadeloupe, French Guiana, Martinique and Réunion and their inhabitants enjoyed the same legal status (with very few exceptions) as the European territory of the French Republic. They had participated in the French Revolution, especially when slavery was abolished in 1794. The reintroduction of slavery by Napoleon in 1802 had led to the independence of Saint-Domingue, becoming the Republic of Haiti in 1804. The definitive abolition of slavery in 1848 led to the total assimilation of the entire population of these colonies, as the former slaves – of African descent – enjoyed French citizenship on an equal footing with Europeans. This was particularly important in the context of the French republican school system from 1880 onwards, as it led to a very high degree of cultural assimilation in all classes of society. Eventually the local political class asked for total legal assimilation of the four "old colonies", which were transformed into "départements", while the other elements of the Empire kept a special legal status and were called Overseas Territories (*territoires d'outre-mer* – TOM), with the exception of Algeria which had its own special status until independence in 1962. There were thus constitutional and political arguments to support the request for a specific treatment of those territories in the Treaty of Rome. Article 227 § 2 EEC treaty provided for a partial immediate integration in the Common Market, as far as its core principles were concerned, and for a special adaptation mechanism for other Treaty provisions. Although these adaptive measures had to be adopted before 1 January 1960 according to the Treaty, almost nothing had been done at that date (due to the war in Algeria). In the 1960s and 1970s the Commission and the Council, with the full agreement of the French government, progressively introduced a series of adaptations for the DOM. However it was clear that the institutions did not feel bound by the time limit set in article 227 § 2. Treaty provisions not quoted in article 227 were considered as not applicable to the DOM, unless duly specified in secondary EC legislation. The core provisions and principles of the Common Market and Customs Union were applicable, but common policies were only very partially applicable. The situation remained unchanged until the late 1970s, when local politicians and the French government started to question the appropriateness of this regime.

German importers of alcoholic beverages were quicker, as they originated a preliminary ruling of the ECJ. In the *Hansen* case of 1978,<sup>16</sup> the question at stake was whether rum produced in

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<sup>16</sup> See above n 10.



Guadeloupe should be exempted from German taxes like other French products, or whether Guadeloupe should be considered as outside of the Common Market for the purpose of taxation. The French government claimed that after expiration of the time limit set in article 227 § 2, the whole EEC treaty was applicable to the DOM, unless specified otherwise in secondary legislation – thus applying the same principles to French and EC legislation. Advocate General Capotorti and later the Court accepted the views of the French government – even formally quoting its position. This led to a radical change of the EEC legal regime of DOM. According to the Court's interpretation in the *Hansen* case, the time limit set in article 227 § 2 only meant a period during which the provisions not quoted would not apply unless specified by delegated legislation. However, once this deadline was reached, all the provisions of the treaty became applicable as on the rest of the Common Market territory, but the Council kept the possibility of adapting them through delegated legislation in order to enable "the economic and social development of these areas".<sup>17</sup>

During the 1980s the EC institutions as well as academia, local politicians and the French Government stuck to the following interpretation of *Hansen*, supported by a strict reading of the decision's wording: The DOM had to be considered as an integral part of the Common Market, but they could be exempted from the application of specific aspects of legislation by unanimous decision of the Council. Thus EC legislation could be adapted, as long as the purpose of adaptation was social and economic development. But no difference was to be made between the core provisions listed in article 227 § 2 al 2 and other provisions of the Treaty: They were all eligible for adaptation.

On the basis of this interpretation, the Commission prepared a series of special measures in view of the achievement of the internal market, which were ready at the end of 1988. They took the form of two Council decisions of December 1989:<sup>18</sup> POSEIDOM, which contained specific framework principles for the DOM but made no exceptions to treaty provisions, and a decision on the "dock dues" (*octroi de mer*), a taxation regime specific to the DOM, which clearly provided for a series of exemptions. With the accession of Portugal and Spain, three other member states' regions shared the same type of geographic, economic and socio-cultural characteristics as the French DOM. Some specific provisions had been put in the accession treaties, but they had not been mentioned in article 227. In the framework of the regional policy it was decided to apply the same set of standards to these so-called "Outermost regions". POSEIDOM served as a model to two other framework programmes POSEIMA<sup>19</sup> and POSEICAN.<sup>20</sup> The three framework

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17 Article 227 § 2 TEEC last sentence quoted by the ECJ in the *Hansen* case.

18 Council decisions n° 89/687/EEC POSEIDOM and n°89/688/EEC dock dues arrangement of 22 December 1989, OJ 1989 L 399, 46.

19 Council decision 91/315/EEC of 26 June 1991, OJ 1991 L 171 of 29 June for Madeira and the Azores.

20 Council decision 91/314/EEC of 26 June 1991, OJ 1991 L 171 of 29 June for the Canary Islands.

programmes led to a whole series of regulations and decisions.<sup>21</sup> In addition, lobbying from local politicians at the end of the 1991 IGC led to the drafting of a declaration (Annex C) which had to be adopted together with the new treaty, clearly a restatement of the *Hansen* doctrine, in favour of all seven Outermost regions.

Everything seemed clear until 2 November 1991, when Advocate General Jacobs' conclusions in a case on the dock dues opened the way to a much more restrictive interpretation of article 227 § 2. In the *Legros* case,<sup>22</sup> the court clearly indicated that the exemption power of the Council was to be limited to the provisions not quoted in article 227 § 2 para 2. This was confirmed by the *Lancry* decision of 1994,<sup>23</sup> which invalidated the part of the December 1989 decision on dock dues which allowed France to maintain a derogatory taxation regime in the DOM until December 1992. The court seemed not only to change its case law,<sup>24</sup> but also to be aiming at a restriction of the Commission and Council's powers as stated in the Declaration on Outermost regions.

It has to be stressed that, while drafting his conclusions in the *Legros* case, Advocate General Jacobs also had to examine the status of OCTs, with a case of local taxation showing some similarities with the dock dues regime at stake in the *Legros* case. His conclusions for the *Leplat* case<sup>25</sup> show that he had to compare in some way or other the regime of OCTs and that of Outermost regions. It is most probable that he, and the court, wanted to underline that flexibility within the internal market should not lead to situations identical to association.<sup>26</sup> Either a region is fully integrated, with some flexibility, and it accepts both the benefits and burdens linked to the internal market, or the relevant governments should start to negotiate an association status for the region in question as Denmark had done for Greenland. Academia and politicians in France, Portugal and Spain often criticised the court's decision in the *Lancry* case for reverting to simplification and to priority of economic considerations over socio-political ones and for ignoring the clear will expressed at the 1991 IGC in the Declaration on Outermost regions by reducing the scope of flexibility.

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21 See D Custos, above n 5.

22 16 Jul 1992, *Legros*, case C-163/90, ECR p I-4685.

23 Aug 1994, *Lancry*, case C-363/93, ECR p I-3978.

24 Contrary to the statement made by the court itself in point 37 of the *Lancry* decision, I still think, together with other scholars that the *Hansen* decision clearly made no difference between provisions that could be adapted and others that could not. See also D Perrot *A propos de l'arrêt Legros, réflexion sur le statut communautaire des départements d'outre-mer* (1993) *Revue du Marché Commun* 427.

25 See above n 12.

26 There is a great temptation to quote this line of reasoning of the court as the *jurisprudence Legros-Leplat* (if translated from French: *Fatman/Flatman doctrine*).

#### IV THE EU'S OUTERMOST REGIONS: INTEGRATION AND ADAPTATION

Since the beginning of the 1990s local politicians in the Outermost regions, which include not only the French overseas departments, but also the Canary Islands – which are Spanish territory – and the Azores archipelago and Madeira – which are Portuguese territories. These politicians started lobbying their governments in order to obtain a revision of article 227 § 2, considered as obsolete in its formulation and not safeguarding well enough these regions' interests. The Treaty of Maastricht only proceeded to a very minor revision of the EC Treaty itself – the suppression of the word Algeria – accompanied by a declaration without legal consequences. The new course of the ECJ since the *Legros* case probably helped to achieve in the Amsterdam revisions what had not been done in those of Maastricht.

Apart from the French, Portuguese and Spanish governments, the other member states could be at best indifferent if not hostile<sup>27</sup> to the special status for the Outermost regions. But during the 1995-1997 IGC several other governments – including the German and British governments – shared a latent hostility towards the court. This was probably the most favourable environment in order to draft a new formulation of article 227 § 2 which would reaffirm the standard *Hansen* doctrine as a response to the perceived escalation in the ECJ case law shown in *Legros* and *Lancry*. A new request for a preliminary ruling in the *Chevassus-Marche* case,<sup>28</sup> directly questioning the core of the December 1989 Council decision on the dock dues was under way, leading to some anxiety in the relevant government departments and Outermost regions. This led to the adoption of the new text, of article 299 § 2, which obviously draws on proposals put forward by representatives of the outermost regions during the period of the IGC.<sup>29</sup>

As there is no written evidence and no testimony of the IGC negotiations, I can only put forward a personal hypothesis. It seems to me a highly interesting hypothesis from the point of view of constitutional powers. The argument could be the following: In its case law from 1992-1994 (*Legros* + *Lancry*), the ECJ seemed to ignore the common will of the Commission, the Council and the Parliament as expressed in the 1989 POSEIDOM and dock dues decisions and – probably worse – the clear will of the unanimous member states as expressed in the Declaration on Outermost regions annexed to the Maastricht Treaty in 1992. This attitude of the Court started to be expressed (in Advocate General Jacobs' conclusions) at the time when the draft text of the 1992 Declaration was published, and was confirmed in the period following the Danish and French referenda of 1992. As a reaction five years later, member states used their powers as "masters of

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27 The outermost regions are largely at stake in the conflict on bananas.

28 19 Feb 1998, *Chevassus-Marche*, case C-212/96, ECR I-743.

29 See: Proposition de modification de l'article 227-2 du Traité de Rome, adoptée à Point-à-Pitre le 29 mars 1995 and Déclaration des présidents des régions ultrapériphériques - Funchal, 14 mars 1996, both in L Grard & A de Raulin (eds), *Le développement des DOM et la Communauté européenne* (Paris, La Documentation Française, 1998) 173.

the treaties" by putting into the text of the TEC what formerly only was expressed in a declaration. Only a few months later the court had to decide on the validity of the core part of the 1989 Council decision on the dock dues regime based on articles 227 and 235 EC, allowing for a special new regime of dock dues for the period after 1 January 1993. To the surprise of interested officials and scholars, the court accepted the validity of the 1989 Council decision. I am inclined to argue that with this decision in the *Chevassus-Marche* case,<sup>30</sup> the court wanted to acknowledge the signal sent by the IGC, ie by the member states acting as "masters of the treaties".

The new text of the EC Treaty no longer includes a list of automatically applicable provisions. This means on one side that adaptation is not limited any more to certain provisions only, but can apply in principle to the whole of the treaty and secondary legislation – a return to the classical *Hansen* doctrine. On the other side, the very complicated formulation of article 299 § 2 is not a mere reproduction of the final sentence of article TEC (ex 36): Flexibility does not allow "undermining the integrity and the coherence of the Community legal order."

## V CONCLUSION

The Treaty establishing a Constitution for Europe contains only one innovation as regards the overseas territories. Article IV – 440, which reproduces article 299 of the EC treaty (with the exception of the paragraph on overseas regions, which is transferred to article III-424), adds a new clause in its paragraph 7:

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.

The purpose of this clause, as explained by a declaration which was adopted at the time of signing of the Treaty, was to allow for the transformation of Mayotte into an Outermost region, and possibly of the two islands of Saint Martin and Saint Barthélemy, which belonged to the Region of Guadeloupe, into OCTs. It was however wrongly interpreted in La Réunion as a sign that that island could be forced to become an OCT against its will. This explains why, unlike all other French Outermost regions and OCTs which were in favour of the Treaty, La Réunion had a majority of voters who rejected the constitutional treaty at the referendum of 29 May 2005.<sup>31</sup>

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30 19 Feb 1998, *Chevassus-Marche*, case C-212/96, ECR I-743.

31 See J Ziller "L'avenir régions ultrapériphériques face à la crise des ratifications de la Constitution européenne" in Jean-Yves Faberon (dir) *Les collectivités françaises d'amerique au carrefour des institutions* (La Documentation française, Paris, 2006) 275-288.

## *ANNEX*

### *Article 299 TEC (ex article 227)*

1. This Treaty shall apply to the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

2. The provisions of this Treaty shall apply to the French overseas departments, the Azores, Madeira and the Canary Islands.

However, taking account of the structural social and economic situation of the French overseas departments, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the present Treaty to those regions, including common policies.

The Council shall, when adopting the relevant measures referred to in the second subparagraph, take into account areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Community programmes. The Council shall adopt the measures referred to in the second subparagraph taking into account the special characteristics and constraints of the Outermost regions without undermining the integrity and the coherence of the Community legal order, including the internal market and common policies.

3. The special arrangements for association set out in Part Four of this Treaty shall apply to the overseas countries and territories listed in Annex II to this Treaty.

This Treaty shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.

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

5. This Treaty shall apply to the Åland Islands in accordance with the provisions set out in Protocol No 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

6. Notwithstanding the preceding paragraphs:

- a. this Treaty shall not apply to the Faeroe Islands;
- b. this Treaty shall not apply to the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus;
- c. this Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.

