OVERSEAS TERRITORIES IN THE WTO

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Abstract In the wake of the Faroe Islands fishing dispute, this article seeks to clarify the status of overseas territories in the World Trade Organization (WTO). The article considers the rule of public international law regarding the territorial application of treaties, the impact of territorial limitations in WTO goods and services schedules and the treaty actions of individual States responsible for the international relations of overseas territories. The article then explores the implications of WTO rights and obligations in respect of Members' overseas territories, including limitations on free riding and preferential treatment.

Keywords: depositary, multilateral treaty, Overseas Association Decision, territorial application, WTO.

I. INTRODUCTION

The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)[2] contains no provision on its territorial scope but it does set out unique conditions for membership that create a link to territory in practice. This has cast doubt on whether the WTO Agreement applies throughout the entire territory of those Members responsible for the international relations of overseas territories. The issue arose recently when Denmark resorted to the WTO dispute settlement mechanism in a fishing case between the Faroe Islands and the European Union.[3] Observers may have been surprised that the Faroe Islands claimed to be part of the organization at all; they offered no tariff concessions in the Uruguay Round that led to the establishment of the WTO and even the WTO's own website showed them as 'non-Member' territory throughout the duration of the dispute.[4] Yet this was not the first time that rights had

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[2] 1867 UNTS 154; 33 ILM 1144 (1994).

[3] The WTO Dispute Settlement Body (DSB) established a panel to examine the complaint: see minutes of the DSB meeting of 26 February 2014, WT/DSB/M/342, Item 6, regarding *European Union–Measures on Atlanto-Scandian Herring*. See also request for establishment of a panel by Denmark in respect of the Faroe Islands, WT/DS469/2, 10 January 2014. The matter was later settled: see (n 35) below. In parallel, Denmark in respect of the Faroe Islands initiated an arbitration proceeding under Annex VII to the United Nations Convention on the Law of the Sea: *The Atlanto-Scandian Herring Arbitration* (The Kingdom of Denmark in respect of the Faroe Islands v The European Union). The Permanent Court of Arbitration acted as the Registry.

[4] See the map of disputes at <https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm> as it appeared in 2013–14, available in the Internet Archive. Contrast the status of Greenland as indicated on that map at that time and today.

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been asserted in respect of an overseas territory and similar claims may be raised in future. Clarification is required of the scope of the WTO Agreement vis-à-vis Members' overseas territories.

This article surveys the relevance of overseas territories in WTO affairs (Section II), applies the general rule of public international law on territorial application of treaties in light of the terms of the WTO Agreement and treaty practice (Section III) and then considers the implications of the WTO Agreement for overseas territories, their responsible States and other WTO Members, in terms of both rights and obligations (Section IV). The article does not examine territorial disputes.

II. OVERSEAS TERRITORIES IN WTO AFFAIRS

Overseas territories' trade volumes are in some cases larger than those of existing WTO Members[5] and they can be substantial suppliers of particular products. For example, New Caledonia is one of the world's major suppliers of nickel, Puerto Rico produces world-famous Bacardi rum, the Faroe Islands have rights to important fish stocks while Greenland has strong potential in rare earths and other raw materials. Some overseas territories are major financial service centres and some operate international shipping registries while the Isle of Man is also a substantial supplier of online gambling services. Tokelau has the internet's most popular country code top-level domain.[6]

A. Definition

Overseas territories can be defined for the purposes of this article as non-independent territories.[7] They are a diverse group both in terms of their status under the domestic law of the responsible States and the degree of autonomy that they enjoy.[8] They include not only the 'overseas countries and territories' listed in the Treaty on the Functioning of the European Union (TFEU)[9] but also UK crown dependencies, the Faroe Islands and the overseas territories of Australia, New Zealand and the United States. Overseas territories do *not* include distant territories that are regarded as part of a State's metropolitan territory.[10]

The European Union is a WTO Member in its own right, as are the 28 EU Member States, and it is this arrangement that has generated most of the uncertainty regarding the

[5] Sources: COMTRADE and US Census Bureau. cf the WTO Committee on Trade and Development Dedicated Session on Small, Vulnerable Economies (WT/COMTD/SE/ document series).

[6] Source: Verisign, 'The Domain Name Industry Brief' 12(3) (September 2015). The domain is '.tk'.

[7] For an illustrative list see A Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007) Appendix Q. Uninhabited territories are not considered in this article.

[8] G Novak, 'Overseas Territories, Australia, France, Netherlands, New Zealand, United Kingdom, United States of America' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 1122, 1136.

[9] TFEU, Pt IV and Annex II. See generally D Kochenov (ed), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Wolters Kluwer 2011); F Murray, *The European Union and Member State Territories: A New Legal Framework under the EU Treaties* (TMC Asser Press 2012).

[10] These include Guadeloupe, French Guiana, Martinique, Mayotte, Réunion, Saint-Martin, the Azores, Madeira and the Canary Islands: TFEU, arts 349 and 355(1), as amended.

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status of overseas territories in the WTO. The reason is that certain territories of Denmark, France, the Netherlands and the United Kingdom are not part of the European Union but those States did not annex new goods and services schedules for each of those territories at the establishment of the WTO in 1994.

Separate customs territories can be WTO Members in their own right but that is not a source of uncertainty. There are three such Members: Hong Kong, China; Macao, China; and Chinese Taipei. They are not the subject of this article because their WTO status is clear.[11] Certain overseas territories are associate members of other international organizations[12] but there is no category of associate membership in the WTO.[13]

B. Current WTO Practice

The WTO Agreement is a multilateral treaty and contains no provision on its territorial application. The position is different in bilateral and regional free trade agreements, which often contain detailed definitions of the territory of each party. US free trade agreements from NAFTA to the Trans-Pacific Partnership have defined US territory for the purposes of those agreements in terms that include free trade zones, Puerto Rico and the continental shelf but exclude other US insular possessions.[14] EU free trade agreements also contain an express provision on territorial application that refers to the territories in which the Treaty on European Union and TFEU are applied and under the conditions laid down in those treaties.[15]

There is no official list of territories to which the WTO Agreement is applied. Such a list was produced and updated periodically for its predecessor, the General Agreement on Tariffs and Trade (GATT).[16] The Secretariat compiled the list based on notifications by contracting parties until 1969 but the practice was abandoned after controversies stemming from territorial disputes. Nowadays certain other multilateral treaty depositaries maintain online treaty databases but the WTO treaty depositary, who is the WTO Director-General,[17] does not.

Curiously, it is necessary to consult national treaty databases to obtain comprehensive information on the legal instruments sent to the WTO treaty depositary in respect of overseas territories.[18] The depositary produces an annual *Status of WTO Legal Instruments*[19] that each year fails to disclose some instruments in respect of overseas

[11] WTO Agreement, arts XI:1 and XII:1.

[12] cf eg the United Nations Educational, Scientific and Cultural Organization, which has nine Associate Members (Anguilla; Aruba; British Virgin Islands; Cayman Islands; Curaçao; Faroes; Macao, China; Sint Maarten and Tokelau); the United Nations Economic and Social Commission for Asia and the Pacific also has nine Associate Members (American Samoa; Cook Islands; French Polynesia; Guam; Hong Kong, China; Macau, China; New Caledonia; Niue; and the Northern Mariana Islands). Associate Members do not vote. In the WTO the customary practice is not to vote at all but to take decisions by consensus.

[13] cf UNESCO Constitution, art II, para 3; FAO Constitution, art II, para 11; WHO Constitution, art 8.

[14] eg North American Free Trade Agreement, art 201 and Annex 201.1.

[15] eg the free trade agreement between the European Union and its Member States, and the Republic of Korea, art 15.15. The EU GATS schedule contains an earlier version of this provision: see (n 117) below.

[16] GATT, 'Application of the General Agreement', L/3166, 21 January 1969.

[17] WTO Agreement, art XIV:3.

[18] See (nn 69, 71 and 84).

[19] See the latest version at <https://www.wto.org/english/res_e/booksp_e/wto_status_legal_inst15_e.pdf>.

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territories that relate to the multilateral WTO agreements.[20] The depositary does provide such information when it relates to the plurilateral agreements, which are subject to different acceptance procedures.[21]

The WTO treaty depositary's practice reflects uncertainty as to the status of overseas territories in the WTO. Although the *Status of WTO Legal Instruments* includes a disclaimer that it does not affect Members' rights and obligations,[22] the depositary's practice may inadvertently lend support to one particular view of their status within the WTO. This raises awkward questions when a Member asserts its rights in respect of an overseas territory.

C. Dispute Settlement and Prevention

Claims in respect of overseas territories are not new in the GATT/WTO dispute settlement system but no WTO body has ruled on their status since the establishment of the organization, when new provisions on membership and treaty acceptance took effect.

Three GATT panel reports ruled on claims filed in respect of overseas territories prior to the establishment of the WTO. The 1980 GATT panel report in *Norway–Restrictions on Imports of Certain Textile Products*[23] and the 1983 GATT panel report on *EEC–Import Restrictions*[24] both found in favour of the United Kingdom, acting on behalf of Hong Kong.[25] Hong Kong was a UK crown colony but not a GATT contracting party in its own right at the time.[26] Both panel reports were adopted by the GATT Contracting Parties. The 1994 GATT panel report in *US–Tuna II*, regarding an import embargo on fish, found in favour of the Netherlands acting in the interest of the Netherlands Antilles, and the European Economic Community (EEC). The Netherlands noted in its complaint that the Netherlands Antilles were an integral part of the Kingdom of the Netherlands, which was a GATT contracting party.[27] This report was not adopted but for reasons unrelated to the status of the Netherlands Antilles.[28]

In the WTO era, France asserted the entitlement of New Caledonia to obtain most-favoured-nation (MFN) treatment when China continued to levy higher duties on

[20] cf the functions of depositaries set out in the Vienna Convention on the Law of Treaties, art 77.

[21] Regarding the Agreement on Trade in Civil Aircraft 1979, the Agreement on Government Procurement 1994 and their respective amending protocols, see *Status of WTO Legal Instruments* (2015) (n 19) 118–29.

[22] *Status of WTO Legal Instruments* (2015) (n 19) preliminary page facing page 1.

[23] GATT document L/4959, BISD 27S/119, Panel report adopted 18 June 1980.

[24] *EEC–Quantitative Restrictions against Imports of Certain Products from Hong Kong*, GATT document L/5511, BISD 30S/129, Panel report adopted 12 July 1983.

[25] In the latter case, the UK delegation spoke for both the complainant and the respondent when the matter was raised in the GATT Council, due to the fact that the United Kingdom held the rotating EC presidency at the time. The same delegation read out one statement then 'expressed surprise' as it responded to that statement: see minutes of the meeting of the GATT Council of 7–8 December 1981, C/M/154, Item 11.

[26] Hong Kong succeeded to GATT contracting party status on 23 April 1986 (BISD 34S/27).

[27] *United States–Restrictions on Imports of Tuna*, Request for consultations under art XXIII:1 by the Kingdom of the Netherlands, DS33/1, 10 July 1992. See also Recourse to art XXIII:2 by the Kingdom of the Netherlands, DS29/3, 14 July 1992.

[28] GATT document DS29/R, 16 June 1994 (not adopted).

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imports from that territory after its accession to the WTO. France raised the matter in the Committee on Market Access in 2002, arguing that WTO rights and obligations applied to all its overseas territories because it was an original Member of the WTO.[29] The point was that French overseas territories could be covered by France's own WTO membership even though they are not part of the European Union. After bilateral consultations, China confirmed that it would grant MFN treatment to French territories' exports from 2003.[30] The matter was resolved without multilateral examination of the merits of France's claim.

The same position was taken by Denmark in respect of the Faroe Islands when it initiated a WTO dispute against the European Union in 2013. The measures at issue banned the introduction into EU territory of Atlanto-Scandian herring (and mackerel) caught under the control of the Faroe Islands.[31] The measures also closed EU ports to Faroese-flagged vessels that fish for those species as well as to other vessels transporting the fish caught by them or by any other vessel authorized by the Faroe Islands.[32] The claims alleged discriminatory treatment, denial of freedom of transit and the imposition of quantitative restrictions contrary to basic GATT obligations. A WTO panel was established to examine the complaint in 2014.[33] Denmark noted that the Faroe Islands were a self-governing territory forming an integral part of its Kingdom and asserted that they were therefore covered territorially by its WTO membership.[34] The WTO proceeding was terminated in 2014 without an examination of the merits.[35]

A remarkable feature of the two WTO cases is that neither France nor Denmark made any tariff concessions in respect of these overseas territories during the Uruguay Round.[36] While an EU goods schedule that covered the metropolitan territories of those two States was annexed to GATT 1994, neither of those two States annexed a new goods schedule for its overseas territories at that time and they still have not done so today. France and Denmark reject the view that an overseas territory (specifically, New Caledonia and the Faroe Islands) required two new WTO schedules for them to be covered by the responsible State's WTO membership. However, the WTO treaty depositary omits information on instruments received in respect of such overseas territories where they lack two such schedules (specifically, Aruba, the Netherlands Antilles and the Isle of Man). If the annexure of these schedules is a precondition for the application of the WTO Agreement, then neither France nor Denmark ever possessed any WTO rights in respect of the overseas territories concerned.

[29] France specifically identified the territories of New Caledonia, Wallis and Futuna, French Polynesia, the French Southern and Antarctic lands and St Pierre and Miquelon (as well as Mayotte, which is no longer an overseas territory) in a non-exhaustive list. See the minutes of the meeting of the Committee on Market Access held on 23 September 2002, G/MA/M/33, paras 8.20–8.23.

[30] ibid.

[31] Commission Regulation (EU) No. 793/2013 of 20 August 2013 establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock, art 5(1).

[32] ibid, art 5(2).

[33] See (n 3).

[34] ibid. The European Union did not address the issue in its statements to the Dispute Settlement Body.

[35] The matter was settled without a panel report: see WT/DS469/3, 25 August 2014.

[36] Another curiosity of the Faroese case was the fact that the European Union was sued in the WTO by one of its own Member States. This had a precedent in the 1983 GATT case against the EEC brought by the United Kingdom on behalf of Hong Kong: see (n 25).

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D. Other Contentious Issues

Overseas territories can be relevant to disputes between their responsible State and other WTO Members in other ways. They can affect the standing of respondents and the substantive justification of measures. Territory can also generate disputes.

No State has ever been a respondent in the GATT/WTO dispute settlement mechanism on account of an overseas territory but that possibility exists. The Dispute Settlement Understanding (DSU) procedure regarding the initial consultations stage provides that a dispute may cover 'measures affecting the operation of any covered agreement taken *within the territory*' of a respondent Member (emphasis added) even though it does not define what that territory is.[37]

In terms of standing, the 1997 panel report in *EC–Bananas III* noted that the United States produces bananas in Puerto Rico, even though the dispute principally concerned market access for bananas from other WTO Members. The panel did not establish the status of that US possession because it determined that the United States had standing to pursue its claim even without an actual trade interest.[38] An overseas territory might also provide a Trojan horse for an EU Member State to intervene in a WTO body on an issue of general concern where it is dissatisfied with the common position taken by the European Union[39] but that possibility has not been realized.

In terms of defences, the 1998 Appellate Body report in *US–Shrimp* noted that the sea turtles protected by the measure at issue swam through waters over which the United States exercised jurisdiction.[40] While it is an open question whether WTO law justifies policy measures directed at circumstances occurring outside a Member's jurisdiction,[41] a connection to an overseas territory or its waters is an expedient means of avoiding complex issues of extraterritorial jurisdiction.

Conversely, much of the evidence in the 2013–14 case on *EC–Seal Products* concerned Inuit community seal hunts in Greenland, an overseas territory of Denmark. An EU product ban was found WTO-inconsistent because it contained an exemption that discriminated in favour of products from Greenland as opposed to those from Canada and Norway.[42] It was not necessary to decide whether Greenland was covered by Denmark's WTO membership because, in any event, Greenland is not part of the European Union.[43] However, it is questionable whether the European Union would have designed the exemption in the way that it did if Greenland were not an overseas territory of an EU Member State.[44]

[37] DSU, art 4.2. Footnote 3 defers to different provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member: see (n 97).

[38] Panel report, *EC–Bananas III,* WT/DS27/R, para 7.50. Note that in a later dispute the measure at issue was applied in an area that included the exclusive economic zone of Clipperton Island, a French territory, but France was not the complainant: Appellate Body report, *US–Tuna II (Mexico)*, WT/DS381/AB/R, para 172 and fn 356.

[39] Anecdotal evidence suggests that was the reason France negotiated commitments on trade in services in respect of New Caledonia.

[40] Appellate Body report, *US–Shrimp*, WT/DS58/AB/R, para 133.

[41] Appellate Body report, *EC–Seal Products*, WT/DS400/AB/R, para 5.173.

[42] ibid, para 6.1(b)(ii).

[43] Canada appeared to accept that Greenland was covered by Denmark's WTO membership: see Panel report, *EC–Seal Products*, WT/DS400/R, para 7.143 and n 187. Note the EU comments at para 6.3.

[44] ibid, para 7.317.

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Territory in general can be the underlying cause of a trade dispute but the WTO Agreement does not define national territory.[45] In 2000, the WTO established a panel to examine a complaint regarding Nicaragua's imposition of a tax on Colombian and Honduran goods and services and the cancellation of fishing licences of vessels from those countries. The measures at issue were a response to the ratification of a bilateral treaty on maritime delimitation in the Caribbean Sea.[46] In parallel, Nicaragua submitted the territorial dispute to the International Court of Justice, which issued its judgment in 2007.[47] The WTO panel was never composed. It is not the WTO's role to resolve boundary disputes or competing claims to overseas territories.[48]

The issue of overseas territories has arisen in GATT/WTO dispute settlement where a responsible State asserts the *rights* of its own overseas territory rather than where other parties assert that State's duty to comply with *obligations* in respect of a territory. It may arise again in a future dispute but there has been no multilateral review of whether and how overseas territories are entitled to the benefits of the WTO Agreement. The WTO treaty depositary's practice regarding overseas territories and multilateral treaties does not help matters. Clarification is required.

III. APPLICABLE RULES ON TERRITORIAL APPLICATION

As a treaty, the territorial application of the WTO Agreement is a matter to be determined in accordance with the rules of public international law. The WTO dispute settlement mechanism has already applied a rule of public international law on the temporal application of treaties[49] and it should also apply the rule on territorial application as and when the issue arises.

The rule on territorial scope set out in Article 29 of the Vienna Convention on the Law of Treaties[50] is usually considered to reflect general international law.[51] It provides as follows:

> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

[45] National territory can expand: see 'German Unification' – Communication from Germany, 22 October 1990, L/6747. State succession is not addressed either. In the GATT, a definitive decision on the Contracting Party status of Yugoslavia was reached only after the United Nations General Assembly adopted a resolution on the matter: see minutes of the meeting of the GATT Council of 16 June 1993, C/M/264, Item 1.

[46] See minutes of the DSB meeting on 7 April 2000, WT/DSB/M/78, Item 4, and the DSB meeting on 18 May 2000, WT/DSB/M/80, Item 2, *Nicaragua–Measures affecting imports from Honduras and Colombia*, WT/DS188 (complaint by Colombia). See also WT/DS201/1 (complaint by Honduras).

[47] *Maritime Delimitation between Honduras and Nicaragua in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, ICJ Reps 2007, at 659.

[48] Issues of territorial scope may yet be raised by the treatment of products originating in occupied territories. See Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-01289.

[49] Regarding art 28 of the Vienna Convention on non-retroactivity of treaties, see Appellate Body report, *Brazil–Dessicated Coconut*, WT/DS22/AB/R, 15; Appellate Body report, *Canada–Patent Term*, WT/DS170/AB/R, para 71.

[50] Done at Vienna 23 May 1969, 1155 UNTS 331, 8 ILM 679.

[51] S Karagiannis, '1969 Vienna Convention, Article 29' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011) 731, 735.

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The Convention does not define the 'entire territory' but that term was chosen during the decolonization period to avoid the colonial overtones of the phrase 'all the territory or territories for which the parties are internationally responsible'.[52] The idea was to refer to all territories under the sovereignty of a party.[53]

Therefore, Article 29 of the Vienna Convention combines a general rule of integral territorial application with an exception in two parts. The general rule is that a treaty, such as the WTO Agreement, is binding on a party in respect of its overseas territories. However, this rule will not apply if (i) a different intention appears from the WTO Agreement (for example, in a provision on territorial application); or (ii) a different intention is established on a basis outside the WTO Agreement (for example, in statements of parties on acceptance of the treaty). These possibilities can be considered in turn.

A. Intention That Appears from the WTO Agreement

Any different intention that may appear from the WTO Agreement should be established in accordance with the customary rules of treaty interpretation. The general rule set out in Article 31 of the Vienna Convention sets out an approach based principally on the text of the treaty at issue but recourse may also be had to supplementary means in accordance with Article 32.

The WTO Agreement not only creates an institutional framework but also contains all the organization's substantive treaties in accordance with the 'single undertaking' approach. Acceptance of the institutional agreement applies to all the annexed multilateral trade agreements as well.[54] However, the WTO Agreement does not state for which territories Members accept any of these agreements.

The apparent source of uncertainty regarding the territorial application of the WTO Agreement lies in the conditions for original membership, which are related in practice to an issue of territorial application. Two conditions had to be satisfied in order for a GATT contracting party or the EEC to become an original Member. These were: (a) the party had to accept the WTO Agreement and the annexed multilateral trade agreements; and (b) schedules of goods concessions and services commitments had to be annexed for it to GATT 1994 and GATS.[55] There is a difference between the instruments referred to in each of these conditions: the trade agreements in the first condition set out rules of general application that apply 'horizontally' to all Members whereas the

[52] The phrase was associated with the 'colonial clause' which allowed a colonial power to determine whether a treaty would apply to its colonies: see Report of the International Law Commission on the work of its sixteenth session (1964), *Yearbook of the International Law Commission 1964*, A/CN.4/SER.A/1964/Add.l (Pt 2), vol II (1965) 179–80. See further S Karagiannis, 'The Territorial Application of Treaties' in DB Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 305, 309–11.

[53] Third Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook of the International Law Commission 1964*, A/CN.4/SER.A/1964/Add.l (Pt 2), vol II (1964) 13.

[54] WTO Agreement, art XIV, governs acceptance, entry into force and deposit of multilateral WTO agreements. There are two remaining plurilateral agreements, which are subject to separate acceptance procedures: see WTO Agreement, art XIV:4.

[55] WTO Agreement, art XI:1. The terms agreed with every acceding Member under art XII:1 also include a schedule of goods concessions and a schedule of services commitments.

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schedules in the second condition contain individual market access concessions and commitments that apply 'vertically' to a given Member. New schedules were not attached to both GATT 1994 and GATS for any overseas territory which, on one view, might affect membership.

It can be observed that both membership conditions apply to each original *Member*, not to each customs territory. Schedules of goods concessions and services commitments were indeed annexed to GATT 1994 and GATS for every original Member, including the two separate customs territories that were original Members in their own right (Hong Kong and Macao). The membership conditions say nothing about separate customs territories that are *not* Members in their own right. The conditions do not even require each original Member to annex separate schedules for itself; the form of words allowed the EU schedules to cover the EU Member States. Therefore, the vital question is whether the scope of an original Member's individual schedules determines the territorial application of the WTO Agreement.

Most WTO rules of general application can apply throughout the entire territory of a Member regardless of the content of its schedules. Members assume obligations under all the multilateral WTO agreements even in sectors where they have made no concessions or commitments: these include MFN obligations (in trade in goods and services) as well as national treatment and the prohibition on quantitative restrictions (in trade in goods).[56] MFN treatment in trade in goods covers tariffs as applied whether the rates are bound in a schedule or not. Most WTO rules can therefore apply to overseas territories for which no schedules are annexed, creating both rights and obligations.

Schedules are negotiable within the framework of WTO rules. Goods concessions are given effect through Article II of GATT 1994 'subject to the terms, conditions or qualifications set forth' in each individual schedule. A schedule does not need to apply to all goods. Nor does a concession need to apply at all times, as there can be seasonal limitations. Similarly, services commitments are given effect through Articles XVI and XVII of GATS 'under the terms, limitations and conditions agreed and specified' in each individual schedule and in the service sectors inscribed 'subject to any conditions and qualifications' set out in each individual schedule, respectively. A schedule does not need to cover all service sectors or modes of delivery; even quantitative limitations and national treatment are negotiable for trade in services. Schedules give effect to the object and purpose of the WTO Agreement to reduce tariffs, as well as other barriers to trade.[57] However, the level and coverage of individual concessions and commitments in a given negotiation is a matter to be assessed by the negotiators.

Schedules may not derogate from WTO rules without some authorization in the WTO agreements[58] but none of the above articles creates an obligation to make scheduled concessions or commitments applicable throughout the entire territory of a Member.[59] For example, several old GATT schedules were divided into different sections for different customs territories under the same sovereignty, while many limitations in

[56] GATT 1994, arts I:1, III:2 and III:4 and XI:1; GATS, art II:1.

[57] WTO Agreement, preamble, 3rd recital.

[58] GATT Panel report, *US–Sugar*, para 5.3; Appellate Body report, *EC–Export Subsidies on Sugar*, WT/DS265/AB/R, paras 219–20.

[59] The applicability of a schedule to a particular territory, once the protocol or certification takes effect, is another matter.

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services schedules are confined to different states of a federation. Throughout successive Rounds of tariff negotiations, GATT contracting parties considered it quite acceptable to conclude negotiations without new schedules for every overseas territory. In this sense, the Marrakesh Protocol, through which new goods schedules were annexed to GATT in 1994, is no different from the GATT tariff protocols that preceded it. Initial concessions in earlier schedules could remain applicable to overseas territories—as they can now.[60]

Admittedly, a failure to offer improved market access in accordance with any agreed negotiating modalities constitutes 'free riding'. Participants in the Uruguay Round agreed to reduce their customs duties for agricultural products[61] and the earlier goods schedules for overseas territories do not comply with that modality. Participants in the Uruguay Round also agreed to create a new type of schedule—on trade in services—and there are no earlier service schedules to fall back on if none was annexed with respect to a particular territory in 1994. A failure to comply with agreed negotiating modalities, or the absence of services commitments, with respect to a particular territory may be considered anomalous.[62]

However, these anomalies could have been raised during the verification process that led to the establishment of formal schedules in the Uruguay Round. If an agreed negotiating modality is not reflected in the final text of a WTO agreement[63] or otherwise useful as a supplementary means of treaty interpretation,[64] the remedy now for any dissatisfied Member is to request concessions or commitments in respect of such a territory in a new negotiation.

This reading is confirmed by contrasting the WTO Agreement with an arrangement that it was designed to replace. Unlike the 1947 Protocol of Provisional Application of the GATT, the 1994 WTO Agreement does *not* indicate that any party signed 'in respect of its metropolitan territory' and it does *not* set out a procedure for parties to extend the application of the Agreement to their non-metropolitan territories.[65] Like other multilateral treaties concluded in postcolonial times, the WTO Agreement does not address its territorial application, which confirms that it discloses no intention different from the general rule of public international law.

No intention appears from the WTO Agreement different from the general rule that a treaty should be binding upon each Member in respect of its entire territory. Schedules

[60] See (n 103).

[61] Uruguay Round, 'Modalities for the Establishment of Specific Binding Commitments under the Reform Programme', Note by the Chairman of the Market Access Group, MTN.GNG/ MA/ W/ 24, 20 December 1993.

[62] Nevertheless, tariff concessions make little sense in a small territory with no customs administration.

[63] For example, compare the modalities at note 61 with the final text of the Agreement on Agriculture. Art 4.1 simply refers to the concessions specified in Members' schedules, omitting the modalities used to calculate them, whereas art 4.2 restates the coverage of the modality on tariffication.

[64] See generally Appellate Body report, *Korea–Various Measures on Beef*, WT/DS161/AB/R, para 115; Appellate Body report, *EC–Export Subsidies on Sugar*, WT/DS265/AB/R, para 199; Appellate Body report, *US–Gambling*, WT/DS285/AB/R, paras 178 and 196.

[65] Protocol of Provisional Application, paras 1 and 2. As regards the extension of the application of GATT to other territories, see GATT/CP.3/SR.5, 20 April 1949, Item 3. Many of those territories later succeeded to Contracting Party status under art XXVI:5(c) of GATT 1947. Neither the Protocol of Provisional Application nor GATT 1947 is now in effect.

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are irrelevant to the operation of most WTO rules and they do not dictate the territorial application of the WTO Agreement.

B. Intention That Is Established Otherwise Than from the WTO Agreement

The other part of the exception to the general rule on the territorial scope of a treaty allows limitations based on an intention established otherwise than from the treaty itself. States responsible for overseas territories can and do express their respective intentions regarding territorial application and territorial extension under multilateral treaties, including the WTO Agreement.[66] Plurilateral WTO agreements are subject to separate acceptance procedures and are not considered here.[67]

One State responsible for overseas territories has expressly confirmed the general rule that the WTO Agreement applies to its entire territory. The Netherlands initially accepted the WTO Agreement in 1994 only for 'the Kingdom in Europe and the Netherlands Antilles'—a formula that excluded Aruba.[68] However, the Netherlands deposited a note extending its application to Aruba in 1995.[69] The Netherlands also accepted the Protocol Amending the TRIPS Agreement for the Netherlands Antilles and Aruba in 2008.[70] The Netherlands deposited a note in 2010 with the WTO treaty depositary; from Dutch government information it can be gathered that the note advised of the dissolution of the Netherlands Antilles and the continued application of the WTO Agreement to those islands according to their respective constitutional statuses.[71]

The more common scenario is that States responsible for overseas territories have not expressed any intention in their instruments of acceptance regarding the territorial application of the WTO Agreement.[72] This is the case as regards Australia, with respect to its external territories, Denmark with respect to the Faroe Islands and Greenland,[73] France with respect to its territorial communities,[74] New Zealand with respect to Tokelau, and the United States with respect to Puerto Rico and its other

[66] The United Nations Secretary-General circulates these to all parties when he is the depositary of the treaty: see United Nations Treaty Section, *Multilateral Treaties Deposited with the Secretary-General; Status as at 1 April 2009*, ST/LEG/SER.E/26, passim.

[67] See (n 21).

[68] WTO, *Status of WTO Legal Instruments* (2015) 33. Aruba obtained autonomy as a separate country within the Kingdom of the Netherlands as of 1986: see 'Status of Aruba', Communication from the Netherlands, GATT doc L/5952, 21 January 1986; and United Nations Treaty Section, *Multilateral Treaties Deposited with the Secretary-General* (n 66) XXXIII, 'Historical information – Netherlands'.

[69] Communication from the Netherlands, 12 November 1995, not circulated by the WTO treaty depositary: see *Status of WTO Legal Instruments* (2015) 33. cf the Netherlands government online treaty database: <https://treatydatabase.overheid.nl/>.

[70] WT/Let/611, dated 5 February 2008. See further M Kennedy, 'When Will The Protocol Amending the TRIPS Agreement Enter Into Force?' (2010) 13 JIEL 459, 466.

[71] Communication from the Netherlands, 10 October 2010, not circulated by the WTO treaty depositary but see *Status of WTO Legal Instruments* (2015) 33 fn 74. The Netherlands government online treaty database (n 69) indicates that the WTO Agreement now applies to Netherlands (Bonaire), Netherlands (Sint Eustatius), Netherlands (Saba) and to Curaçao and to Sint Maarten rather than to the 'Netherlands Antilles'.

[72] See the description of signatories at 1869 UNTS 489, 493–494, 500–501 and 506–507 and declarations at 511.

[73] See Constitutional Act of Denmark of 5 June 1953.

[74] French Constitution of 4 October 1958, as amended, Title XII – On territorial communities, arts 72–74.

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insular possessions.[75] Thus, according to the general rule, the Agreement is binding on them in respect of their entire territory.

This position is consistent with certain declarations and statements made by some of these States elsewhere. Denmark informed the UN Secretary-General in 2003 that its ratifications normally include the entire Kingdom of Denmark including the Faroe Islands and Greenland.[76] It reiterated that position regarding the Faroe Islands in the WTO Dispute Settlement Body in 2014.[77] France expressed this position in the WTO Committee on Market Access in respect of all its territories in 2002.[78] New Zealand notified the UN Secretary-General in 2002 that its acceptance of a treaty normally covers the non-self-governing territory of Tokelau.[79] The United States explained to the OECD in 1987 that its ratification normally covers all territory under US authority and jurisdiction.[80]

On the other hand, the United Kingdom accepted the WTO Agreement for the 'United Kingdom of Great Britain and Northern Ireland'.[81] Overseas territories (including crown dependencies) do not form part of the United Kingdom and the British government does not consider that its instruments of treaty acceptance cover them until it extends its application of a treaty to them.[82] In accordance with its constant treaty practice,[83] the British government consulted all its overseas territories on whether the WTO Agreement should be extended to them and most did not indicate that it should. In 1997, the United Kingdom deposited a notification of extension of its application of the WTO Agreement to the crown dependency of the Isle of Man only.[84]

[75] These include American Samoa, Guam, the Northern Mariana Islands and the US Virgin Islands.

[76] See United Nations Treaty Section, *Multilateral Treaties Deposited with the Secretary-General* (n 69) XV, 'Historical information – Denmark'. The obligation of the Danish government under national law to consult with home rule governments before depositing such an instrument is another matter.

[77] See (n 36) and accompanying text.

[78] See (n 29) and accompanying text.

[79] United Nations Treaty Section, *Multilateral Treaties Deposited with the Secretary-General* (n 69) XXXIII, 'Historical information – New Zealand'.

[80] In an exchange of correspondence with the Legal Directorate of the OECD dated 24 November 1987, the US Mission declared: 'Where a treaty does not require special notice concerning application to territories, US law and practice are that ratification for and in the name of the United States constitutes ratification with respect to all territory under the US authority and jurisdiction, except as the United States may otherwise expressly declare.' It can also be noted that the United States applied GATT in all its territorial possessions prior to the establishment of the WTO: see GATT, 'Application of the General Agreement', L/3166, 21 January 1969, 4.

[81] WTO, *Status of WTO Legal Instruments* (2015) 11.

[82] UK Foreign and Commonwealth Office Treaty Section Guidance, 'Extension of Treaties to Overseas Territories' available at <https://www.gov.uk/guidance/uk-treaties>. The United Kingdom applied GATT in these crown dependencies and overseas territories prior to the establishment of the WTO: see GATT, 'Application of the General Agreement', L/3166, 21 January 1969, 4–5.

[83] Aust (n 7) 206–8.

[84] Communication from the United Kingdom, 3 March 1997, WT/Let/154; see also WT/Let/349. This extension is omitted from the *Status of WTO Legal Instruments* but shown on the UK government online treaty database at <http://treaties.fco.gov.uk/treaties/treaty.htm>. Regarding UK treaty practice in relation to crown dependencies, see further Third Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur (n 53) 13.

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There is no unanimous view as to whether a unilateral declaration excluding territories from the scope of application of a treaty is effective.[85] However, it is clear that the WTO Agreement does not *need* to apply to any overseas territory to be effective. The constant treaty practice of the United Kingdom and general lack of objections from other States may have established an intention different from the general rule.[86] In any case, in the WTO the issue of territorial application tends to arise where a responsible State asserts the rights of its own overseas territory rather than where other Members try to enforce the obligations of a State responsible for a territory. Terms of WTO accession are demanding and other Members may be only too pleased to acquiesce in the exclusion of free riders. Other Members might actually object if the United Kingdom were to extend its application of the WTO Agreement to another overseas territory (say, the Cayman Islands) without renegotiating specific commitments first.[87]

Self-governing States are not overseas territories. New Zealand lodged a declaration with the United Nations Secretary General in 1988 indicating that its treaty actions would not thereafter extend to the Cook Islands and Niue, unless expressly stated.[88] New Zealand did not state otherwise in its instrument of acceptance of the WTO Agreement in 1994.[89]

No declarations have been filed by other Members regarding the territorial application of the WTO Agreement by any of the Members responsible for overseas territories. The subsequent practice of other Members in their treatment of goods and services from overseas territories could be relevant but there has been no review of that practice in the WTO. The grant of WTO benefits to overseas territories of other Members may be voluntary without any acknowledgement of an entitlement. On the other hand, the denial of WTO benefits would imply a view that those territories are not within the scope of the WTO. Subject to that caveat, certain conclusions can be drawn.

This review of treaty practice *does* establish an intention different from the general rule that a treaty should be binding upon a Member in respect of its entire territory, but only as regards the United Kingdom. Accordingly, in light of the general rule, the terms of the WTO Agreement and relevant treaty actions, the overseas territories of Australia, Denmark, France, the Netherlands and the United States, plus Tokelau and the Isle of Man, all fall within the territorial scope of the WTO Agreement while other UK overseas territories do not.

[85] Third Report on reservations to treaties by Mr Alain Pellet, Special Rapporteur, A/CN.4/491/Add.3, 253–5, discussed in the Report of the International Law Commission on the work of its fiftieth session (1998) A/53/10, 104–6. cf. WTO Agreement, Article XVI:5 on reservations. See further Aust (n 83); Karagiannis (n 52) 308–9.

[86] United Nations, Treaty Section of the Office of Legal Affairs, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7/Rev.1 (1999) para 285.

[87] The tariff rates and other trade policy measures that an overseas territory actually applies would be relevant factors to take into account.

[88] See United Nations Treaty Section, *Multilateral Treaties Deposited with the Secretary-General* (n 69) X and XXXIV, 'Historical information' – Cook Islands and Niue.

[89] See the New Zealand government online treaty database at <http://www.treaties.mfat.govt.nz/home>, which indicates no territorial applications for the WTO Agreement.

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IV. IMPLICATIONS FOR OVERSEAS TERRITORIES

Territorial application does not simply concern the subject matter of a treaty or rights and obligations concerning a particular area such as, say, a frontier zone.[90] Rather, territorial application refers to the territories in respect of which the treaty binds the parties. These are the territories affected by the rights and obligations derived from the treaty.[91] Members cannot claim rights under the WTO Agreement in respect of overseas territories without also assuming responsibility for the obligations in respect of those territories. Preferential treatment granted to those territories also raises questions regarding the basic WTO principle of non-discrimination.

A. Rights and Obligations under WTO Rules in Respect of Overseas Territories

Responsible States are entitled to the benefit of the WTO Agreement in respect of products and services originating in the overseas territories to which they apply that Agreement[92] but they must also comply with their WTO obligations in respect of these territories.

The benefits of the WTO Agreement comprise not only fundamental rights such as MFN treatment (initially denied by China to nickel from New Caledonia) but also more specific rights such as freedom of transit (breached by the EU ban on herring and mackerel from the Faroe Islands).[93]

The benefits are inseparable from obligations. WTO rules cover not only customs administration but also domestic regulation and subsidies, which can require considerable technical capacity to administer. For example, transparency obligations require the publication and administration of trade regulations, the establishment of enquiry points and notifications to WTO bodies.[94] The SPS Agreement and TBT Agreement contain a raft of disciplines on health and plant health measures, technical regulations and conformity assessment procedures. The TRIPS Agreement requires Members to implement intellectual property protection and make enforcement procedures available throughout their entire territory. Members might extend national intellectual property systems to their overseas territories but no Member appears to have implemented the TRIPS border enforcement provisions in areas outside its customs territory.[95]

The responsibility of Members for regional and local governments and authorities is specifically addressed in certain agreements.[96] These governments and authorities

[90] GATS, art II:3.

[91] Third Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur (n 53) 12; Karagiannis (n 51) 732–4.

[92] As to rights based on the nationality of service suppliers and intellectual property right holders, see below.

[93] See also notifications of sanitary measures listing overseas territories among the regions or countries likely to be affected: G/SPS/N/COL/69 (25 February 2003); G/SPS/N/NZL/355 (3 August 2006).

[94] In particular, GATT 1994, art X; SPS Agreement, art 8 and Annex B; TBT Agreement, art 10; GATS, art III.

[95] TRIPS Agreement, Pt III, Section 4.

[96] GATT 1994, art XXIV:12 and Understanding on the Interpretation of art XXIV of GATT 1994, paras 13–15; TBT Agreement, arts 3 and 7; GATS, art I:3(a). See D Palmeter and PC Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge University Press 2004) 22–3.

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include those administering overseas territories to which that Member applies the WTO Agreement. There is a general provision in the DSU allowing retaliation in response to non-compliance with DSB recommendations regarding measures of those governments and authorities.[97]

States may not be enthusiastic about bringing their overseas territories' measures into compliance but this is not optional if their WTO membership covers those territories. Separate customs territories are eligible for WTO membership in their own right if they possess full autonomy in the conduct of their external commercial relations and the other matters covered by the WTO agreements.[98] The adoption of WTO-implementing legislation might set an overseas territory on the path to separate WTO membership. Nevertheless, the territorial application of the WTO Agreement to overseas territories involves not only rights but also obligations.

B. Scheduled Concessions and Commitments in Respect of Overseas Territories

States responsible for overseas territories must also comply with the individual concessions and commitments scheduled for each given territory. There are two types of schedule: goods schedules annexed to GATT 1994 and services schedules annexed to GATS.[99] Each of these is considered in turn below. In terms of form, an overseas territory can be covered as part of the responsible State's national territory, without differentiation, or it can be covered by a separate section of the responsible State's schedule.

1. Goods schedules

At the establishment of the WTO, no new goods schedule dedicated to an overseas territory was annexed to GATT 1994. New sections of the Netherlands' goods schedule were negotiated for two territories but not given legal effect.[100] Nevertheless, the US goods schedule covers Puerto Rico as part of US customs territory[101] and the EU goods schedule has covered the Isle of Man since the UK notification of extension in 1997.[102]

[97] DSU, art 22.9.

[98] WTO Agreement, art XII:1. Chinese Taipei acceded on this basis.

[99] Coverage schedules annexed to the plurilateral Agreement on Government Procurement are not considered here.

[100] Later renegotiations of Schedule II—Section D for the Netherland Antilles and Aruba have never been certified: see G/MA/223 and G/MA/224.

[101] Harmonized Tariff Schedule of the United States, General Note 2; 19 CFR section 101.1 Definitions. US import and export statistics include data on trade between the US Virgin Islands and foreign countries even though those islands are not officially part of US customs territory. The United States does not compile data on trade between its other possessions and foreign countries. See US Department of Commerce and US Census Bureau, 'US Trade with Puerto Rico and U.S. Possessions', 2014, FT895/14.

[102] See (n 87). The Isle of Man is part of EU customs territory: TFEU, art 355(5)(c); UK Act of Accession to the EU, Protocol 3; Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, art 3, as amended. The same arrangements under EU law apply to the Channel Islands, to which the United Kingdom has *not* extended its application of the WTO Agreement. As for Gibraltar, see TFEU, art 355(3).

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Overseas territories covered by the WTO Agreement can still have a valid goods schedule even though none was negotiated for them in the Uruguay Round. The WTO built on the foundation of GATT. The goods schedules annexed to GATT 1994 include not only new schedules annexed to the Marrakesh Protocol in 1994 but also old schedules annexed to protocols from earlier tariff negotiations since 1947.[103]

Dedicated sections of *old* goods schedules are still in force for the Netherlands Antilles and Aruba,[104] French Establishments in Oceania (now French Polynesia), New Caledonia and Dependencies and St. Pierre and Miquelon.[105] Denmark applied its old goods schedule to Greenland[106] and the Faroe Islands[107] but, when Denmark joined the EEC, the extension of Denmark's EEC membership to the Faroe Islands was never agreed.[108] Greenland was covered by Denmark's EEC membership but withdrew in 1985[109] and Denmark never renegotiated concessions with respect to that territory.

These old goods schedules date from up to 60 years ago, when expectations were lower and schedules were shorter. They offer little trade liberalization by today's standards. They also lack two Parts introduced by the Uruguay Round, one of which was mandatory.[110] Part IV was created for individual commitment levels on domestic support and export subsidies for agricultural products.[111] Certain disciplines in the Agreement on Agriculture depend on these commitments. Given that EU Member States have no agriculture commitments of their own and that the EU schedule does not apply to their overseas territories, the overseas territories have no permissible aggregate measurement of domestic support above zero unless some commitment level can be certified.[112] Export subsidies for agriculture in those overseas territories are prohibited for the same reason.[113] On any other approach, the rules in this

[103] GATT 1994, art 1(b)(i) and (ii) incorporating earlier tariff and accession protocols. Art 1(d) incorporates the results of the Uruguay Round annexed to the Marrakesh Protocol.

[104] Schedule II—(Benelux), Section D. See 'Status of Aruba' (n 68) listing the protocols which applied to the Netherlands Antilles and which would continue to bind Aruba.

[105] Schedule XI—France, Sections E, K and M.

[106] GATT, 'The Territorial Application of the General Agreement. A list of Territories to which the Agreement is applied', G/5, 17 March 1952. Greenland was omitted from later lists as was Zealand and other Danish islands.

[107] Schedule XXII—Denmark; GATT, The Territorial Application of the General Agreement. A list of Territories to which the Agreement is applied, G/5/Add.1, 21 May 1952; GATT, 'Application of the General Agreement', L/3166, 21 January 1969 (specifically listing the Faroe Islands, which already had a home rule government). This was the last version of the list circulated.

[108] The GATT Secretariat listed only the EC schedule for Denmark in 1992: see TAR/W/85. However, the Community had no authority to withdraw a schedule as regards a non-EC territory. In any case, the unilateral withdrawal of Member States' schedules prior to the entry into force of a renegotiated Community schedule is of questionable legal effect in the WTO. Regarding the generally relaxed attitude of the WTO dispute settlement mechanism to this practice, see M Kennedy, 'Two Single Undertakings: Can the WTO Implement the Results of a Round?' (2011) 14 JIEL 77, 99–100.

[109] Treaty amending, with regard to Greenland, the Treaties establishing the European Communities, OJ L 29/1 (1 February 1985).

[110] Part III was created for non-tariff measures in Uruguay Round schedules. It is optional.

[111] Agricultural products, as defined, exclude fish but include furskins: Agreement on Agriculture, art 2 and Annex 1.

[112] Exemptions are still available through the so-called *de minimis* and Green Box exemptions and the Blue Box under art 6.1, 6.4 and 6.5 of the Agreement on Agriculture.

[113] Agreement on Agriculture, art 8. All the subsidies disciplines in Pts I, II and III of the Agreement on Subsidies and Countervailing Measures apply to them.

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agreement, which is an integral part of the WTO Agreement, could not apply to overseas territories.

2. Services schedules

At the establishment of the WTO, three services schedules were annexed to GATS for overseas territories. These were Aruba,[114] the Netherlands Antilles[115] and New Caledonia.[116] The European Communities (as they then were) and their Member States jointly annexed a services schedule that applies only to territories where the treaties establishing the European Communities are applied and under the conditions laid down in those treaties.[117] The United Kingdom's commitments have presumably covered the Isle of Man since the UK notification of extension in 1997.[118] The US services schedule contains no commitments in respect of Puerto Rico.[119]

In addition to schedules of services commitments, Members were also entitled to annex a list of individual exemptions from the MFN obligation in GATS. None was annexed specifically for an overseas territory.[120]

In summary, there are both valid *goods* and *services* schedules for Aruba, for the islands that succeed to the Netherlands Antilles, for New Caledonia and presumably for the Isle of Man. Valid *goods* schedules are applicable to Puerto Rico, the other overseas territories of France and presumably the overseas territories of Denmark. Other overseas territories may have no schedule but still fall within the territorial application of the WTO Agreement by virtue of the WTO membership of the State responsible for their international relations. Given that WTO schedules contain not only trade concessions but also agricultural subsidy commitment levels, and that they were annexed simultaneously with lists of MFN exemptions for services, the lack of WTO instruments can work both to the advantage and disadvantage of overseas territories.

[114] WTO document GATS/SC/5, Schedule of specific commitments, the Kingdom of the Netherlands with respect to Aruba, 15 April 1994.

[115] WTO document GATS/SC/3, Schedule of specific commitments, the Kingdom of the Netherlands with respect to the Netherlands Antilles, 15 April 1994.

[116] GATS/SC/61, Schedule of specific commitments, France in respect of New Caledonia, 15 April 1994.

[117] GATS/SC/31, Schedule of specific commitments, European Communities and their Member States, 15 April 1994, Introductory note 1, 1. The same limitation may apply to the additional commitments accepted by EU Member States in the GATT Protocols from 1996 to 1998. This is confirmed in the case of the Netherlands by its acceptances of the GATS Protocols for 'the Kingdom in Europe' only: WTO, *Status of WTO Legal Instruments* (2015) 99–111.

[118] The EU Treaties apply to the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for that island set out in the UK's terms of accession to the EU: TFEU, art 355(5)(c). Under those terms, the Isle of Man does not benefit from the free movement of persons or services in the European Union: UK Act of Accession to the EU, Protocol 3.

[119] GATS/SC/90, 15 April 1994, 1, see the first horizontal commitment in all sectors covered by this schedule.

[120] No overseas territory was specifically excluded either. See eg GATS/EL/90, United States, Final List of art II (MFN) Exemptions, 15 April 1994. Further, note that the schedules of specific commitments for Aruba and the Netherlands Antilles (n 114 and n 115) include a note that each 'does not prejudice or influence in any way the relations between [the relevant territory] and the European Community'.

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C. Preferences Granted by the Responsible State

Preferential treatment granted by responsible States to their overseas territories, and vice versa, also requires reconciliation with WTO non-discrimination obligations. Most of these obligations apply whether the beneficiary of the preference is a WTO Member or not.

GATT 1994 expressly addresses its territorial application in a manner that concerns preferences granted to overseas territories. Certain contracting parties to GATT divided their goods schedules into different parts for their metropolitan territory and their separate customs territories. The parts applicable to certain overseas territories remain in force today. Article XXIV:1 provides that '[e]ach such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party'. This ensured among other things that colonial powers had to respect their MFN obligations in Articles I:1 and XIII:1 of GATT 1994 as between their colonies and third country suppliers.[121] Today, it still ensures that Members must respect those MFN obligations vis-à-vis the treatment granted to their overseas territories.

There is a limited exception in Article I:2 of GATT 1994 for historical tariff preferences granted between responsible States and their overseas territories whether the latter fall within the territorial scope of the WTO or not.[122] This exception can still authorize tariff preferences within a certain historical margin granted by Australia[123], New Zealand[124] and the United States[125] to their respective dependent territories. Duty-free treatment granted by the United States to another Pacific territory is authorized by a specific waiver first granted in 1948 and renewed many times since then, which is currently due to expire in 2016.[126] Other exceptions from the MFN obligation in Article I of GATT 1994 may justify preferences above the historical margin.[127]

The historical preferences exception does not apply to the European Union. That exception did cover preferences granted by the United Kingdom, the Netherlands and France to their own respective territories[128] but those preferences have been superseded by the European Union's Overseas Association Decision (OAD).[129] The OAD applies as between the European Union *as a whole* and overseas territories of those three EU Member States plus Greenland.[130] Therefore, the OAD is discussed

[121] See generally GATT, *Analytical Index: Guide to GATT Law and Practice* (WTO 1995) 794.
[122] GATT 1994, art I:2, in respect of import duties and other charges.
[123] GATT 1994, Annex A.
[124] GATT 1994, Annex A.
[125] GATT 1994, Annex D. The United States has identified these territories as the US Virgin Islands, Guam and American Samoa: see Report of the Government of the United States, 7 July 2011, WT/L/816, para 3. The historical preferences exception does not cover territories for which the United States assumed responsibility after 1 July 1939: see GATT 1994, art I:2(b).
[126] General Council Decision of 27 July 2007, United States – Former Trust Territory of the Pacific Islands, WT/L/694, regarding preferences for the Northern Mariana Islands, a commonwealth in political union with the United States. The waiver also applies to the Republic of the Marshall Islands, the Federated States of Micronesia and the Republic of Palau, three independent nations in free association with the United States.
[127] For example, art XXIV of GATT 1994 on free trade agreements or the Enabling Clause.
[128] GATT 1994, Annexes A, B and C. Annex B also covered Belgian colonies. Denmark only acceded to GATT later.
[129] Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union OJ L 344/1 (19 December 2013).
[130] The overseas countries and territories are listed in TFEU, Annex II.

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below as a form of preference granted by other Members rather than by the State responsible for a territory's international relations. As for the Faroe Islands (which are not covered by the OAD), the European Union entered into a free trade agreement with that territory in 1996 and notified it accordingly to the WTO.[131]

The historical preferences exception does not cover non-tariff measures. The potential difficulty for overseas territories is that, where they obtain national treatment by virtue of the application of their responsible State's domestic law, this creates an MFN problem because they are treated as separate Members for the purposes of the territorial application of GATT 1994. Accordingly, any non-tariff preferences would require justification under another exception or a waiver.

There are MFN obligations in other WTO agreements as well[132] but these agreements do not provide that separate customs territories within the same Member should be treated as separate Members for the purposes of territorial application. Therefore, no discrimination problem should arise and no historical preferences exception is required under their provisions.[133] In the case of TRIPS, the MFN obligation depends on the nationality of persons but, as long as overseas territory residents possess the nationality of their responsible State, the treatment that they receive from that State is a domestic matter.

The position is different as regards an overseas territory of an EU Member State, because it is indeed part of a separate WTO Member from the European Union. Preferential treatment between those States and their territories under measures falling within the scope of any of the above agreements could breach an MFN obligation in one of these agreements. For example, freedom of movement of workers between them could breach MFN obligations under GATS.[134]

Preferential treatment by a State for its own overseas territories breaches at least one WTO obligation to grant MFN treatment to other WTO Members, whether the overseas territory falls within the scope of territorial application of the WTO or not. This treatment can be justified under WTO law if it falls within an existing exception for historical tariff preferences, a specific waiver or particular types of preferential trade agreements.

D. Preferences Granted by Other Members

Certain overseas territories receive tariff preferences under developed countries' Generalized System of Preferences (GSP) programmes. Unilateral preferences are allowed for developing countries, which are defined to include 'developing territories' in the Enabling Clause.[135]

[131] Agreement between the European Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part, done at Brussels, 6 December 1996.

[132] SPS Agreement, art 2.3; TBT Agreement, arts 2.1 and 5.1.1; GATS, art II.

[133] Further, where natural and legal persons in an overseas territory possess the nationality of their responsible State, the treatment of their service suppliers would not fall within the scope of GATS: see art I:2 and art XXVIII(k) and (m).

[134] The European Union and its Member States have not entered a specific exemption from MFN treatment for overseas territories under GATS: see GATS/EL/31, 15 April 1994.

[135] GATT Contracting Parties Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, L/4903 ('Enabling Clause'), n 1.

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The eligible beneficiaries of the US GSP programme include certain overseas territories of Australia, France, New Zealand and the United Kingdom on the basis of their level of development.[136] The United States graduates overseas territories and countries from the scheme when they meet the definition of 'high income' countries.[137] The beneficiaries of Japan's GSP programme also include specific overseas territories of New Zealand, the United Kingdom and the United States.[138]

The eligible beneficiaries of the EU GSP programme ceased to include overseas territories from 2014 but most of those territories for which EU Member States are responsible somehow continue to benefit from preferences under the OAD.[139] Earlier versions of the OAD were notified as a free trade agreement[140] but its current version has not been notified to the WTO. The OAD allows the overseas territories to retain and introduce import duties and charges or quantitative import restrictions 'as they consider necessary in view of their respective development needs'[141] whereas a free trade agreement must eliminate duties and other restrictive regulations of commerce on 'substantially all the trade' between the parties.[142] If the OAD were renotified under the 2006 Transparency Mechanism for Regional Trade Agreements[143] the WTO Secretariat would make a factual presentation that could highlight the actual nature of this arrangement.

The OAD has not been notified under the 2010 Transparency Mechanism for Preferential Trade Arrangements either.[144] It only benefits a closed list of territories based on historical and political connections to an EU Member State whereas preferences in a GSP programme must be non-discriminatory. Some OAD beneficiaries are economically more advanced than certain WTO Members.[145] In the case of Greenland, EU preferences are conditional upon access to fishing zones.[146] The OAD also provides for preferential treatment in trade in services.[147] Nor has the

[136] General Note 4(a) of the Harmonized Tariff Schedule of the United States, under the heading 'Non-independent countries and territories' available at <http://www.usitc.gov/tata/hts/bychapter/index.htm>. The only French territory covered today is Wallis and Futuna Islands.

[137] Aruba, the Netherlands Antilles, Greenland and the Cayman Islands graduated in 1998: Presidential Proclamation 6942 of October 17, 1996 (61 Fed. Reg. 54719). French Polynesia and New Caledonia graduated in 2002: Presidential Proclamation 7328 of 6 July 2000 (65 Fed. Reg. 42595).

[138] See the full list at <http://www.mofa.go.jp/policy/economy/gsp/explain.html#section1>. The only US territory covered is American Samoa. The beneficiaries also include the Canary Islands which form part of EU territory.

[139] Council Decision 2013/755/EU (n 129). This applies to the overseas countries and territories of France, the Netherlands and the United Kingdom, plus Greenland.

[140] The 1970 version was notified in GATT document L/3467 and examined in the GATT Working Party Report on Association between the EEC and Certain Non-European Countries and Territories, L/3611 and Corr.1, 1 November 1971. Reports on subsequent versions were submitted to the WTO in the WT/REG106/R series.

[141] Council Decision 2013/755/EU (n 129), art 45.

[142] GATT 1994, art XXIV:8(b).

[143] General Council Decision of 14 December 2006, Transparency Mechanism for Regional Trade Agreements, WT/L/671.

[144] General Council Decision of 14 December 2010, Transparency Mechanism for Preferential Trade Arrangements, WT/L/806.

[145] cf the conditions that may be applied to GSP preferences, clarified in Appellate Body report, *EC–Tariff Preferences*, WT/DS246/AB/R, paras 162–165.

[146] TFEU, art 204, and Protocol (No 34) on Special Arrangements for Greenland, sole art, para 1.

[147] Both sides grant most favoured treatment but for one side (the overseas territories) this is more narrowly defined: see Council Decision 2013/755/EU (n 129), art 51.

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European Union requested a waiver for the OAD.[148] It is not clear on what basis the OAD preferences are permitted under WTO rules.

V. CONCLUSION

Overseas territories are treated as a grey area in the WTO and there is a non-negligible risk that the issue of their status will be squarely raised in a future WTO dispute settlement proceeding. As a matter of law, it can be noted that the territorial application of the WTO Agreement does not depend on the annexure of schedules of market access concessions for every part of a Member's territory, as the terms of scheduled concessions are a matter for negotiation. According to the general rule of public international law, the evidence available indicates that the overseas territories of Australia, Denmark, France, the Netherlands and the United States, plus Tokelau and the Isle of Man, all fall within the territorial scope of the WTO Agreement, while other UK crown dependencies and the UK overseas territories do not.

The territorial application of a treaty entails not only rights but also obligations. The States responsible for the international relations of overseas territories are entitled to claim the benefits of the WTO Agreement in respect of those territories to which they apply that agreement but they must also comply with WTO obligations in respect of them. These obligations concern not only customs administration but also domestic regulation of regional and local governments. Responsible States must also comply with goods concessions and services commitments scheduled for a given territory, including those in pre-WTO goods schedules that remain in force.

The lack of two schedules for certain overseas territories creates an anomalous situation that may allow a certain amount of free riding. If other Members are dissatisfied, they can request further concessions and commitments in respect of overseas territories in a new negotiation. A lack of WTO schedules does not always work to the benefit of the overseas territories concerned as it can leave them with no commitment levels for agricultural domestic support and export subsidies.

Preferential treatment for a Member's own overseas territories, and those of other Members, can require justification under WTO rules, whether those territories fall within the scope of application of the WTO Agreement or not. It is unclear on what basis the EU Overseas Association Decision in favour of most of the overseas territories of four EU Member States can be reconciled with all WTO non-discrimination obligations.

WTO Members may seek clarification of these issues now. They can call on the WTO treaty depositary to circulate all communications that he receives relating to overseas territories and to include them in information on the status of WTO legal instruments. WTO committees provide a forum in which to request responsible States to notify the legislation through which they implement their obligations under each agreement in respect of their overseas territories. Members can also seek a factual presentation of the EU Overseas Association Decision in a WTO transparency mechanism and seek clarification of its legal justification in the Trade Policy Review of the European Union.

[148] Waivers are difficult to obtain for preferential trade arrangements but any request for a waiver for the OAD would face the added obstacle of Argentina's claims to the Falkland Islands (Islas Malvinas), South Georgia and the South Sandwich Islands, which are beneficiary territories.

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