



Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 16 January 2014¹

Joined Cases C-24/12 and C-27/12

X BV and TBG Limited

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(Article 63 TFEU — Territorial scope of the free movement of capital — Movement of capital from a Member State to an overseas country and territory (OCT) belonging to it — Notion of a third country under Article 63 TFEU — Article 64(1) TFEU — Standstill clause — Restrictions existing on 31 December 1993)

I – Introduction

1. Pursuant to Article 56(1) EC, which has become Article 63(1) TFEU, free movement of capital is operative in EU law not only between the Member States but also in relation to third countries. However, none of the Treaties' fundamental freedoms apply to situations which are purely internal to an individual Member State. Thus, the interesting question arises as to whether allegedly discriminatory taxation of dividends issued by a Member State resident company to a shareholder resident in a territory of the same Member, but which is not part of the European Union, amounts to a restriction of movement of capital towards a third country within the meaning of Article 56(1) EC, or whether a transaction of this kind is purely internal to the Member State concerned. If the latter is the case, Article 56(1) EC will not apply.

2. Joined Cases C-24/12 *X BV* and C-27/12 *TBG Limited* concern allegedly discriminatory rules on withholding tax applicable to the issue of share dividends in the Netherlands, with dividends paid to companies established in the Netherlands Antilles being subjected to different treatment than those received by companies established in the Netherlands.

3. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has referred to the Court of Justice three preliminary questions concerning the legal status of the Netherlands Antilles, in relation to the Netherlands, for the purposes of the free movement of capital between the European Union and third countries.

4. More specifically, the Hoge Raad wants to find out whether movements of capital from the Netherlands to the Netherlands Antilles fall within the scope *ratione materiae* of Article 56(1) EC, or whether the situation is purely internal. If Article 56(1) applies, the Hoge Raad would like guidance on the approach to be taken to the so called 'standstill clause' provided by Article 57 EC (Article 64 TFEU).

¹ — Original language: English.

5. Here the problem lies in identifying the pertinent legal framework. When deciding whether there has been an increase in a restriction that existed on 31 December 1993, should account be taken exclusively of an increase in Netherlands withholding tax, or should the national court also consider a contemporaneous tax exemption granted by the Netherlands Antilles? If the latter is the case, should earlier Netherlands Antilles implementation arrangements (the ‘Netherlands Antilles rulings’ practice) which reduce the effective tax rate on an individual basis, also be taken into account?

6. The cases to hand therefore afford the Court the opportunity to build on Case C-384/09 *Prunus and Polonium*² with regard to the applicability of Article 63(1) TFEU to capital movements between Member States and overseas countries and territories (‘OCTs’) under Part Four of the FEU Treaty. It also entails consideration of Council Decision No 2001/822/EC of 27 November 2001 on the association of overseas countries and territories with the European Community,³ and whether or not it is pertinent to the resolution of disputes of this kind. The cases to hand differ, however, from that considered in *Prunus*, in that the Netherlands Antilles belong to the Netherlands (‘its own OCT’) whereas *Prunus* concerned a movement of capital between France and the British Virgin Islands.

II – National constitutional and legal framework, facts, procedure and the questions referred

A – Constitutional background

7. In 2005 and 2006, the time relevant to the main proceedings, the Kingdom of the Netherlands was made up of three entities, each of which had its own constitution and organised its own institutions. They were the Netherlands (formerly the Netherlands and New Guinea), the Netherlands Antilles and Aruba.⁴

8. The constitutional relationship between these three entities was set out in the Statuut voor het koninkrijk der Nederlanden (the Charter of the Kingdom of Netherlands, as amended) of 1954.⁵ Decisions on matters of the Kingdom were taken by the Council of Ministers of the Kingdom (De raad van ministers van het Koninkrijk) which was composed, up until 10 October 2010, of the members of the Council of Ministers of the Netherlands and the ministers plenipotentiaries of, respectively, the Netherlands Antilles and Aruba.⁶

9. In addition to the subjects reserved in the Charter of the Kingdom as kingdom matters, consensual legislation can be made, in accordance with Article 38 of the Charter, with respect to other matters.

2 — [2011] ECR I-3319.

3 — OJ 2001 L 314, p. 1 (the ‘OCT Decision’). Note that OCT Decision was repealed by Article 98 of Council Decision 2013/755/EU of 25 November 2013 on the Association of the overseas countries and territories with the European Union (Overseas Association Decision). OJ 2013 L 344 p. 1. Council Decision 2013/755/EU entered into force on 1 January 2014. Thus, Decision No 2001/822/EC governs the case to hand *ratione temporis*.

4 — See point 26 of the Joined Opinion of Advocate General Tizzano in Case C-145/04 and Case C-300/04 *Spain v United Kingdom and Eman and Sevinger* [2006] ECR I-7917 and his discussion entitled ‘Constitutional arrangements in the Kingdom of the Netherlands’.

5 — Bulletin of Acts and Decrees 1954, No 503 as amended by Kingdom Act of 7 September 1998 (Bulletin of Acts and Decrees 1998, No 579) (Rijkswet van 28 oktober 1954 (Stb. 503; PB 121) houdende aanvaarding van een Statuut voor het Koninkrijk der Nederlanden, zoals gewijzigd bij de rijkswet van 7 september 1998 (Stb. 579; PB 1999, 22).

6 — The Netherlands Antilles was disbanded on 10 October 2010 into two new countries, Curaçao and St Maarten, while the islands of Bonaire, Saba and Sint Eustatius came under the direct rule of the Netherlands.

B – *Legislative background*

10. The fiscal relations between the three entities were regulated by the Belastingregeling voor het Koninkrijk (taxation rules for the Kingdom of the Netherlands, 'BRK') which is consensual legislation agreed upon by the Council of Ministers of the Kingdom and thereafter enacted under the usual legislative procedure of the Kingdom of the Netherlands. Each of the three State entities of the Kingdom of the Netherlands exercised its own taxing powers within the limits set out by the BRK.

11. Up until 1 January 2002, including the time period running from 1993, pursuant to Article 11(3) of the BRK, a withholding tax rate of 7.5 or 5% was applicable to dividends payable to a company established in the Netherlands Antilles by a company established in the Netherlands. In contrast, in the Netherlands Antilles, under Articles 8A, 8B 14 and 14A of the (old) Landsverordening op de winstbelasting (National Ordinance on the taxation of profits) a profit tax was levied at a minimum of 2.4 to 3%, or a maximum rate of 5.5%. If account was not taken of the Netherlands Antilles rulings practice on the levying of Netherlands Antilles profit tax, the resulting combined tax burden was about 10% on participation dividends.⁷ It should be added that dividends paid to Netherlands resident companies are exempted from tax pursuant to the Wet op de dividendbelasting 1965 (1965 Law on the taxation of dividends).

12. However, Article 11(3) of the BRK was amended from 1 January 2002. Since then, participation dividends paid from the Netherlands to a company established in the Netherlands Antilles have been subject to a new withholding tax rate of 8.3%. Also from 2002, dividends paid on participations (25% of issued shares) in subsidiary companies established in the Netherlands have been totally exempt from profit tax in the Netherlands Antilles. As a result, the effective tax burden on participation dividends has, since then, been equal to the withholding tax rate of 8.3%.

C – *Facts and litigation in the main proceedings*

13. X BV is incorporated under Netherlands law and has its registered office in the Netherlands. It is engaged in the international transportation of goods by sea. All the shares in X BV are held by Stichting A. The share certificates issued are held by B NV, whose registered office has been in the Netherlands Antilles. On 27 June 2005 X BV issued a dividend, but pursuant to Article 11(3) of the BRK, 8.3% of it was withheld as dividend tax.

14. Hollandsch-Amerikaansche Beleggingsmaatschappij Holland-American Investment Corporation NV ('HAIC')⁸ was a public limited company incorporated under Netherlands law whose sole shareowner was TBG Holding NV, a company incorporated under the law of the Netherlands Antilles. On 1 September 2006 HAIC issued a dividend to TBG but, pursuant to Article 11(3) of the BRK, 8.3% of it was withheld as dividend tax.

15. TBG Limited and X BV both lodged objections to the payment of this dividend tax, and requested its repayment. These were dismissed by the competent Netherlands tax authority. Appeals were lodged before the Rechtbank te Haarlem (District Court, Haarlem) but these were declared to be unfounded.

⁷ — The result of these individual arrangements may have been that prior to 1 January 2002 – including in 1993 – the actual tax liability in respect of dividends received by a Netherlands Antilles company from a subsidiary company established in the Netherlands was substantially lower than 8.3%.

⁸ — According to the case file, in 2009 TBG Holding NV moved from Curaçao to Malta and was transformed into TBG Limited, a limited liability company governed by Maltese law. Thereafter, HAIC fused with the latter and ceased to legally exist. Consequently, TBG Limited has assumed the claims of both TBG BV and HAIC with respect to the withholding tax paid.

16. Consequently, appeals were lodged before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam), but it upheld the decisions of the Rechtbank. The Gerechtshof was of the view that Article 56 EC was not applicable in the general sense to OCTs. Further, in the light of the OCT Decision, from a European Community perspective, the relationship between the Netherlands and the Netherlands Antilles had to be regarded as an ‘internal situation’. That being so, the dispute was governed exclusively by Netherlands law.

17. Appeals were further lodged, before the Hoge Raad, which chose to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘1. For the purposes of Article 56 EC (now Article 63 TFEU), can an own OCT be regarded as a third State, in which case it would be possible to rely on Article 56 EC in respect of the movement of capital between a Member State and the own OCT?
- 2(a) If question 1 is answered in the affirmative, is it necessary in order to determine whether, for the purposes of Article 57(1) EC (now Article 64(1) TFEU), there has been an increase, for account to be taken in the present case – in which the withholding tax on participation dividends paid by a subsidiary company established in the Netherlands to its holding company established in the Netherlands Antilles was increased from the 1993 rate of 7.5 or 5% to 8.3% as from 1 January 2002 – exclusively of the increase in the Netherlands withholding tax, or must account also be taken of the fact that, as from 1 January 2002, the Netherlands Antillean authorities have – in conjunction with the increase in the Netherlands withholding tax – granted an exemption in respect of participation dividends received from a subsidiary company established in the Netherlands, whereas previously those dividends formed part of profits taxed at a rate of 2.4 to 3% or 5%?
- 2(b) If account must also be taken of the tax reduction in the Netherlands Antilles effected by the introduction of the participation exemption referred to in question 2(a) above, should Netherlands Antillean implementation arrangements (in the present case: Netherlands Antillean rulings practice), the result of which may have been that prior to 1 January 2002 – including in 1993 – the actual tax liability in respect of dividends received from the/a subsidiary company established in the Netherlands was substantially lower than 8.3%, also be taken into consideration?’

18. On 27 February 2012, Cases C-24/12 and C-27/12 were joined by order of the president of the Court. Written observations were lodged by TBG Limited, the governments of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, and the Commission. All of them participated at the hearing that was held on 23 October 2013.

III – Preliminary observations

19. At the outset, it is important to note that the relevant facts of the main litigation took place before the entry in force of the Lisbon Treaty. The key dates on which dividend tax was withheld were 27 June 2005 for X BV and 1 September 2006 for TBG Limited, while the Lisbon Treaty entered into force on 1 December 2009. Therefore, the applicable Treaty provisions are those of the EC Treaty and not those of the FEU Treaty.

20. While this does not seem to have any material importance in so far as the provisions on free movement of capital are concerned, the Lisbon Treaty has to a certain extent altered the provisions on the scope of application of the Treaties.

21. The Member States to which the ‘Treaties shall apply’, is now set out in Article 52(1) TEU whereas, in the past it appeared in Article 299(1) EC.⁹ Prior to Article 52(1), the EU Treaty did not include a provision on its territorial applicability. For this reason there was uncertainty as to whether the provisions on common foreign and security policy and police and judicial cooperation in criminal matters were, pursuant to Article 29 of the Vienna Convention on the Law of Treaties,¹⁰ applicable in the entire territory of the Member States or whether the EU Treaty extended only to territories to which the EC Treaty applied in accordance with Article 299 EC.¹¹

22. Article 52(1) TEU includes, of course, the ‘Kingdom of the Netherlands’. The detailed rules governing the territorial scope of the Treaties are provided in Article 355 TFEU, corresponding with former Articles 299(2), first subparagraph, EC and Article 299(3) to (6) EC. The Netherlands Antilles, despite it being a part of the Kingdom of the Netherlands, is excluded from the territorial scope of application of the Treaties.

23. This follows from Article 299(3) EC, now Article 355(2) TFEU and Annex II of these two Treaties. Annex II of the EC Treaty, entitled ‘Overseas Countries and Territories to which the provision of Part Four of the Treaty apply’ includes the Netherlands Antilles. The Government of the Kingdom of the Netherlands, by the ‘Protocol on the application of the Treaty establishing the European Economic Community to the non-European parts of the Kingdom of the Netherlands’ of 25 March 1957, ratified the Treaty on behalf of the Kingdom in Europe and Netherlands New Guinea only.¹²

24. According to Article 182 EC (now Article 198 TFEU) the purpose of the association is to promote the economic and social development of the OCTs and establish close economic relations between them and the Community as a whole. Article 183(1) EC (now Article 199 TFEU) states that the Member States were to apply to their trade with the OCTs the same treatment as they accord to each other pursuant to the Treaty.

25. Pursuant to Article 187 EC (now Article 203 TFEU) the Council adopted several decisions laying down the detailed provisions and procedures for the association of the OCTs with the Community. The OCT Decision, as referred to in point 6 of this Opinion, is the version of this series applicable *ratione temporis*, to the present dispute.

26. Therefore, irrespective of the status of the Netherlands Antilles either under Netherlands constitutional law or public international law, as far as EU law is concerned, the Netherlands Antilles were not a part of the European Economic Community at the outset and are not at present part of the European Union.

27. Failing express reference, the general provisions of the EU Treaty and the FEU Treaty do not apply to the OCTs,¹³ which self-evidently include the Netherlands Antilles. The Court has stated that the OCTs ‘therefore benefit from the provisions of European Union law in a similar manner to the Member States only when European Union law *expressly* provides that OCTs and Member States are to be treated in such a manner’.¹⁴ This is the starting point from which any assessment can be made of whether the Netherlands Antilles amount to a third country under Article 56 EC.

9 — Now repealed.

10 — Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. *United Nations Treaty Series*, vol. 1155, p. 331.

11 — The first interpretation was defended by the Finnish Government during its accession negotiations whereas, for example Stapper (cf. Stapper, V.: *Europäische Mikrostaaten und Autonome Territorien im Rahmen im der EG*, Nomos Verlag, Baden-Baden 1999, p. 17-18) defends the second alternative.

12 — Case C-181/97 *van der Kooy* [1999] ECR I-483, paragraph 4.

13 — Case C-260/90 *Leplat* [1992] ECR I-643, paragraph 10; *van der Kooy*, paragraph 37.

14 — *Prunus*, paragraph 29. Emphasis added.

28. Further, while the Court is yet to rule on whether a movement of capital from a Member State to one of its own OCTs is caught by Article 56(1) EC, the Court has ruled on the interpretation of the OCT Decision in a context of other relations between the Netherlands and the Netherlands Antilles.¹⁵ There is, therefore, no a priori reason why a dispute involving a Member State's own OCT should be any different from a dispute arising between a Member State and any OCT.

29. Two examples illustrate this point. In one case the Court held that a vessel that had been moved from the Netherlands Antilles into the Netherlands had to be regarded as constituting an entry into the Community for the purposes of Article 7(1) of the Sixth VAT Directive.¹⁶ In another it was held that the provisions of Chapter III of Council Directive 92/46/EEC of 16 June 1992 laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products,¹⁷ and which laid down health rules for imports of milk based products from third countries, must be interpreted as applying to the placing on the Community market of such products from OCTs like the Netherlands Antilles.¹⁸

30. Thus, relations between the Netherlands and the Netherlands Antilles are primarily governed by the special arrangements for association set in Part Four of the EC Treaty, as provided in Article 299(3) EC given that the Netherlands Antilles is listed in Annex II.¹⁹ This means that the OCT Decision and any provisions of the Treaties that are pertinent to its interpretation govern the relationship between the Netherlands Antilles and the European Union as a whole,²⁰ even when a dispute arises concerning relations between it and the Netherlands.

31. However, as I have already mentioned, failing express reference, the general provisions of the Treaties do not apply to the OCTs,²¹ but this does not preclude the application of the rules on the free movement of capital to the Netherlands Antilles. This is so because, pursuant to Article 56 EC, restrictions on the movement of capital are prohibited not only between Member States but also between 'Member States and third countries'.

IV – Analysis

A – *The answer to the first question*

32. The first question concerns movement of capital between a Member State and its own OCT. It must primarily be sought on the basis of interpretation of the OCT Decision, which implements the special EU regime required by both the EC Treaty and the FEU Treaty that is applicable to all OCTs. Hence, the OCT Decision is *lex specialis* that is to be afforded priority over any potentially competing EU law rules. However, as was pointed out by Advocate General Cruz Villalón in *Prunus*, it does not follow that this is the exclusive source of law on which the Court is entitled to draw, as if the OCT Decision and Part Four of the EC Treaty existed in some sort of a legal vacuum. Provisions of the Treaties that are pertinent to both of them, and more broadly to the resolution of the dispute, also need to be taken into account.²²

15 — See e.g. Case C-106/97 *DADI and Douane-Angenten* [1999] ECR I-5983; *van der Kooy*.

16 — *Van der Kooy*, paragraph 42.

17 — OJ 1992 L 268, p. 1.

18 — *DADI and Douane-Angenten*, paragraph 46.

19 — Originally, the Netherlands Antilles did not appear on the list of non-European countries and territories which the Member States agreed to associate with the community. They were inserted by Agreement 64/533/EEC of 13 November 1962 amending the Treaty establishing the European Economic Community to make the relationship set out in Part Four of the Treaty applicable to the Netherlands Antilles (JO 1964 150, p. 2414). See *DADI and Douane-Angenten*, paragraph 13.

20 — See the Opinion of Advocate General Cruz Villalón in *Prunus*, points 33 to 35.

21 — *Van der Kooy*, paragraph 37; *Leplat*, paragraph 10.

22 — See the Opinion of Advocate General Cruz Villalón in *Prunus*, points 33 to 35.

33. In the second place it is necessary to acknowledge that, as was pointed out by Advocate General Cruz Villalón in *Prunus*, the Court has, in certain situations, treated OCTs as third countries, and in others as normal Member State territories as prescribed in Article 299(1) EC.²³ Thus, even though the Court has stated, in two opinions concerning international agreements, that OCTs fall outside the scope of EU law and therefore ‘are, as regards the Community, in the same situation as non-member countries’,²⁴ it is necessary to reflect on which of the two approaches is more appropriate for the purposes of interpreting the ‘third countries’ clause in Article 56(1) EC.

34. Here, of course, it should be kept in mind that the classification of a Member State’s own OCT as a third country will lead to the *applicability* of Article 56(1) EC and *not* as is the case with respect to other fundamental freedoms, to its *exclusion* from the scope of the freedom. However, if the Court were to conclude that relations between the Netherlands and the Netherlands Antilles amounted to, as far as EU law is concerned, a purely internal situation, then the case to hand would fall outside of the scope of the Treaty and thereby outside of any of the fundamental freedoms.²⁵

35. I also note that the last part of recital 6 of the OCT Decision states that OCTs ‘must comply with the obligations imposed on third countries in respect of trade, notably rules of origin, health and plant health standards and safeguard measures’.²⁶ This corresponds with the conclusion of Advocate General Cruz Villalón in *Prunus* that in ‘the event of silence’, in the sense of there being no special rule in the OCT Decision governing the relevant situation ‘a general freedom laid down in the Treaty, which, in very specific terms, is applicable to all third countries without exception, must be construed as applying equally to OCTs’.²⁷

36. Therefore, the answer to the first question must primarily be sought on the basis of the OCT Decision as a *lex specialis*. However, in my opinion the United Kingdom is wrong in contending that the case to hand is governed by Article 47(1)(b) of the OCT Decision, and that the tax carve-out clause in Article 55 of the OCT Decision therefore applies.²⁸

23 — At points 36 to 38 of his Opinion in *Prunus*. At points 37 to 38 the Advocate General observes that in Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] ECR I-4647, Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, and Case C-470/04 *N* [2006] ECR I-7409, the Court took an approach in which the OCT concerned were treated as belonging to the European Union, while in *van der Kooy, DADI and Douane-Agenten*, Opinion 1/78 [1979] ECR 2871 and Opinion 1/94 [1994] ECR I-5267, the Court held that OCTs warrant equivalent treatment to that afforded to a third country.

24 — Opinion 1/78, paragraph 61, and Opinion 1/94, paragraph 17.

25 — There are, however, circumstances in which disputes entailing purely internal situations will be admissible before the Court. See e.g. Joined Cases C-197/11 and C-203/11 *Libert and Others* [2013] ECR, paragraphs 32 to 36.

26 — See also *DADI and Douane-Agenten*.

27 — At point 57 of his Opinion in *Prunus*.

28 — Article 47(1) of the OCT Decision provides as follows under the heading ‘Current payments and capital movements’:

‘1. Without prejudice to paragraph 2:

(a) Member States and the OCT authorities shall impose no restrictions on any payments in freely convertible currency on the current account of balance of payments between residents of the Community and of the OCTs;

(b) with regard to transactions on the capital account of balance of payments, the Member States and the OCT authorities shall impose no restrictions on the free movement of capital for direct investments in companies formed in accordance with the laws of the host Member State, country or territory and to ensure that the assets formed by such investment and any profit stemming therefrom can be realised and repatriated.’

Article 55 of the OCT Decision states as follows under the heading ‘Tax carve-out clause’:

‘1. Without prejudice to the provisions of Article 56, the most-favoured-nation treatment granted in accordance with the provisions of this Decision shall not apply to tax advantages which the Member States or OCT authorities are providing or may provide in the future on the basis of agreements to avoid double taxation or other tax arrangements, or domestic fiscal legislation in force.

2. Nothing in this Decision may be construed to prevent the adoption or enforcement of any measure aimed at preventing the avoidance or fraud of taxes pursuant to the tax provisions of agreements to avoid double taxation or other tax arrangements, or domestic fiscal legislation in force.

3. Nothing in this Decision shall be construed to prevent the respective competent authorities from distinguishing, in the application of the relevant provisions of their fiscal legislation, between taxpayers who are not in the same situation, in particular with regard to their place of residence, or with regard to the place where their capital is invested.’

37. In my opinion Article 47(1)(b) of the OCT Decision is primarily although not exclusively concerned with the protection and promotion of inward investment into OCTs from Member States, and not the other way around. This is the only interpretation that is consistent with the policy goals reflected in Articles 182 and 183 EC, and particularly the promotion of the economic and social development *of the OCTs*. This interpretation is also supported by the legislative history of Article 47(1)(b) of the OCT Decision itself.²⁹ While promoting investment from the European Union to OCTs, Article 47 of the OCT Decision protects the return of income derived therefrom as well.

38. Given that under its Article 1(1), the OCT Decision intends to establish close economic relations between the OCTs and the Community as a whole, and that the European Union has unilaterally liberalised capital movements from and to third countries, it would be inconceivable for the European Union to have reserved itself a right to apply to OCTs *less favorable* treatment in this respect than it applies to third countries that lack any special ties to the European Union. For this reason, and despite the fact that the wording of Article 47 of the OCT Decision does not differentiate between the obligations of the Community, the Member States and the OCTs, the only reasonable interpretation of the scope of that provision is that it defines the *standard of liberalisation* the OCTs are bound to apply in relation to the European Union and its Member States.

39. Thus, the Netherlands Antilles authorities are bound by Article 47 of the OCT Decision with regard to inward investments from the Member States. They also have to apply Article 47 of the OCT Decision to outward capital movements such as dividend payments towards EU Member States, the latter representing another though a less important aspect of establishing closer economic ties.

40. Similar logic must be applied to the tax carve-out clause in Article 55 of the OCT Decision. Here as well the interpretation must be based on the assumption that the European Union does not intend to apply to the OCTs less favorable treatment than it extends to third countries in general.³⁰ Hence, paragraphs 2 and 3 of Article 55 of the OCT Decision, as properly construed, intend to set out the standard of liberalisation the OCTs are bound to afford to investors in terms of taxation of inward and outward payments and capital flows from and towards the EU Member States.

41. Thus, once it has been confirmed that specific provisions of the OCT Decision are not applicable to a particular case, it is necessary to ascertain, having regard to the objectives of Part Four of the EC Treaty, whether it is appropriate to rely on a provision of the Treaty which concerns third countries,³¹ even when the problem in issue concerns a Member States' own OCT. In my opinion, the answer must be affirmative. Due to the special relationship of association between the European Union and the OCTs, Treaty provisions that are relevant to that relationship must be interpreted to the benefit of OCTs and not otherwise.

42. Moreover, as was pointed out by the Commission at the hearing, if an exceptional rule were created for dealings between a Member State and its own OCT, a distortion would result in the EU internal market. This is so because Member States would not have to respect the same rules with regard to their own OCTs as the other Member States.

29 — See in particular point 50 of the Opinion of Advocate General Cruz Villalón in *Prunus*.

30 — Notwithstanding the possibility of derogating from the most-favored-nation principle in tax matters in the context of bilateral tax agreements, as provided in the first paragraph of that Article 55 of the OCT Decision.

31 — See point 54 of the Opinion of Advocate General Cruz Villalón in *Prunus*.

43. This argument, I would add, is supported by the judgment of the Court in *Prunus*, in which the Court approached the dispute by noting that it was ‘necessary to determine, first, whether, for the purposes of the application of the Treaty provisions on free movement of capital, OCTs are to be treated as Member States or non-Member States’.³² In other words, nothing turned on the fact that problem in issue in *Prunus* concerned capital movements between France and a United Kingdom OCT, namely the British Virgin Islands.

44. Furthermore, in my opinion, the territorial scope of application of EU law in general is a separate legal question from the scope of individual rules of EU law, particularly when the latter contain specific clauses bringing third country activities within their rubric.

45. As I have already mentioned, the territories in which EU law is ‘valid’ law are specified in Article 299(1) and (2) EC. This does not mean, however, that any individual rule of EU law which, by its nature, may have certain extra-territorial effects, is inapplicable to the OCTs. The classic example of this arose in the consideration of anti-competitive conduct taking place outside of the European Union in Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others v Commission*,³³ but it can happen whenever the subject matter regulated by EU law necessarily encapsulates conduct or legal relations occurring outside the borders of the European Union.³⁴

46. Thus, with respect to the fundamental freedoms, purely internal situations arise when there is no relevant geographical division between two parts of a Member State under EU law governing the matter. This is the case, for example, with respect to capital movements between England and Scotland.³⁵ On the other hand, and to take another example, the movements of goods between a Member State and its territory outside EU customs and/or fiscal territory in terms of free movement of goods are not purely internal situations because there is a geographical division defined by EU law.

47. Finally, I would like to point out that the situation considered by the Court in *Eman and Sevinger*, is distinguishable from the cases to hand. *Eman and Sevinger* concerned the scope of the rights of EU citizens, part of the *acquis communautaire*, but the territorial application of which is not delimited, either in the EU Treaties or elsewhere.³⁶ For example, there is no express rule obliging the Member States to preclude their nationals who are resident in OCTs from EU citizenship law, and the rights and obligations that it entails. The Court held that ‘persons who possess the nationality of a Member State and who reside or live in a territory which is one of the OCTs referred to in Article 299(3) EC may rely on the rights conferred on citizens of the Union in Part Two of the Treaty’.³⁷

48. Thus, movements of capital between the Netherlands and the Netherlands Antilles, in other words two territories having a different status with regard to the applicability of EU law, do not represent a purely internal situation. Therefore Article 56(1) EC is applicable and the Netherlands Antilles has to be considered as being in the same position in relation to the Netherlands as third countries.

32 — *Prunus*, paragraph 28.

33 — [1988] ECR 5193.

34 — See for example the issues considered in my Opinion of 25 June 2013 in Case C-131/12 *Google Spain and Google*.

35 — In Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraphs 37 and 38, the Court held that exclusion from a care insurance scheme of Belgian nationals working in the territory of the Dutch-speaking region, or in that of the bilingual region of Brussels-Capital but who lived in the French- or German-speaking region and had never exercised their freedom to move within the European Community, was a purely internal situation falling outside the scope of EU law.

36 — Ziller, J., ‘The European Union and the Territorial Scope of European Territories’ (2007) 38 *Victoria University of Wellington Law Review*, 51, pp 56 to 57.

37 — *Eman and Sevinger*, paragraph 29.

B – *The answer to the second question*

– Preliminary observations

49. Questions 2(a) and 2(b) are concerned with the factors which the national referring court is bound to take into account in determining whether the so-called ‘standstill’ clause appearing in Article 57 EC applies to save a putatively unlawful restriction on the free movement of capital. In determining whether a restriction existed on 31 December 1993, should the national referring court consider only the Netherlands law imposing the withholding tax in question, or should the national court also consider a contemporaneous tax exemption granted by the Netherlands Antilles (question 2(a))? If the answer to this question is in the affirmative, should Netherlands Antillean implementation arrangements, as reflected in the Netherlands Antilles rulings practice, also be taken into account (question 2(b))?

50. At the outset I point out that according to the national referring court, it is apparent from the legislative history of the BRK that the 2002 amendment was intended to rid the Netherlands Antilles of the image of being a ‘tax haven’ and that the existing effective tax burden on participation dividends paid from the Netherlands to the Netherlands Antilles would be maintained.

51. Further, I observe that no question has been referred on whether the standstill provision featured in Article 57 EC in fact saves the Netherlands withholding tax that is the subject of the main proceedings. Questions 2(a) and 2(b) are confined to identification of the pertinent sources of law to which the national court should turn when undertaking this assessment.

– The relevance of the Netherlands Antilles legislation

52. As is clear from the order for reference, the BRK coordinates the use of taxing powers between two autonomous fiscal areas, namely the Netherlands and the Netherlands Antilles, and sets the level of effective tax rates on trans-border dividends issued from the former to the latter. In this respect the BRK has a function that is analogous to a bilateral tax convention, even though it is a consensual instrument adopted by a Member State in collaboration with its own OCT.

53. For this reason, the Court’s case-law on bilateral tax treaties seems pertinent to the resolution of the dispute. In this context the Court has held that ‘it is for the Member States to determine whether, and to what extent, economic double taxation of distributed profits is to be avoided and, for that purpose, to establish, either unilaterally or through double taxation conventions concluded with other Member States, procedures intended to prevent or mitigate such economic double taxation. However, this does not of itself mean that the Member States are entitled to impose measures that contravene the freedoms of movement’.³⁸

54. From this case-law it would seem that the national referring court could take into account both the BRK and the relevant Netherlands Antilles measures when determining both the issue of whether or not a restriction exists, and whether the requirements for the application of the standstill provision have been made out. This is because the BRK and corresponding Netherlands Antilles tax relief form a mutually agreed and legally binding framework.

38 — Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 24. See also paragraphs 49 to 51 of Case C-265/04 *Bouanich* [2006] ECR I-923.

– The relevance of the Netherlands Antilles rulings

55. With regard to question 2(b), and the pertinence of the Netherlands Antilles rulings practice to assessment of Article 57 EC, I recall that the Court has held that if ‘the provision is, in substance, identical to the previous legislation or is limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, it will be covered by the derogation (contained in Article 57 EC). By contrast, legislation based on an approach which is different from that of the previous law and establishes new procedures cannot be regarded as legislation existing at the date set down by the Community measure in question’.³⁹

56. Furthermore, a useful analogy might be made in the context of VAT law, and more particularly expenditures eligible for deduction of VAT, where the Court has held that ‘it is not only legislative acts in the strict sense that must be taken into account, but also administrative measures and practices of the public authorities of the Member State concerned’.⁴⁰

57. Given that, according to the case-law of the Court, an analysis of ‘approach’ and ‘procedures’ is crucial in the assessment of whether a restriction on capital is saved by the standstill clause, in my opinion the Netherlands Antilles rulings practice must necessarily be taken into account in the conduct of this exercise. In my opinion, the benchmark has to be the effective tax rate charged on the distributions towards Netherlands Antilles shareowners in 1993.⁴¹ Here it is useful to recall that this practice was based on individual administrative decisions relieving taxpayers from some of the corporate tax and thereby lowering the effective tax rate.⁴²

– Subsidiary observations

58. As I have observed above, the national court is seeking guidance concerning the factors relevant for the application of Article 57 EC, not an appreciation of whether or not Member State law is saved by that provision. Nevertheless, if the Court finds that, in order to give a useful answer to the national court, the issue should be pursued further, I would make the following observations.

59. The new regulatory framework adopted in 2002 is based on a different conceptual approach than the previous one. The earlier scheme entailed a combination of Netherlands withholding tax and Netherlands Antilles corporate tax, mitigated by individual rulings. After 2002 the Netherlands withholding tax was accompanied by an exemption operative in the Netherlands Antilles. The national court has acknowledged that this new approach leads to higher effective tax rates for similar revenue, even though the objective of the Netherlands legislator was to preserve the same effective level of taxation.

60. From this it seems to follow that the new system is not saved by the standstill clause in Article 57 EC.

61. Finally, I would like to acknowledge the fact that the revenue gathered by the Netherlands withholding tax is passed from the Netherlands Government to the Government of the Netherlands Antilles. The Netherlands Government observed at the hearing that it would not accept this kind of arrangement with an arbitrary third country, and pursuant to which one contracting State collects the tax but transfers the tax revenue entirely to the other contracting State.

39 — Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 192 and case-law cited.

40 — Case C-371/07 *Danfoss and AstraZeneca* [2008] ECR I-9549, paragraph 42.

41 — Case C-35/11 *Test Claimants in the FII Group Litigation* [2012] ECR.

42 — Here I would note that the factual circumstances to hand are distinguishable from those considered by the Court in Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others* [2012] ECR, and in particular the findings at paragraph 38 that a lenient administrative practice could not save an otherwise discriminatory tax legislation.

62. This line of argument seems to suggest that there is no restriction imputable to the Netherlands because, in economic terms, the Member State does not tax the outbound dividends paid to Netherlands Antilles shareowners but simply collects a tax on behalf of its OCT and then transfers it to the treasury of the Netherlands Antilles. In other words, the Netherlands withholding tax should, from an economic perspective, be considered a Netherlands Antilles tax. As a result of this, there would be no difference of treatment between domestic and outbound dividends, given that no charge is levied to the benefit of the Netherlands treasury.

63. In my opinion it is neither necessary nor advisable to pursue this issue, given that it was not raised by the national court.

V – Conclusion

64. On the basis of these reasons I propose that the Court should answer the questions of the Hoge Raad as follows:

1. For the purposes of Article 56 EC (now Article 63 TFEU) a Member State's own overseas country or territory is to be regarded as a third country in relation to that Member State.
- 2(a) For the purposes of Article 57(1) EC (now Article 64(1) TFEU), when a withholding tax is levied on participation dividends paid by a subsidiary company established in a Member State to its holding company established in the Member State's own overseas country or territory, but which forms part of an autonomous fiscal territory, the question whether there has been an increase in restrictions applicable on 31 December 1993 must be assessed by taking into account relevant taxation measures in both the Member State and the overseas territory concerned, if the combined level of taxation is determined by a legal instrument mutually binding on both of them.
- 2(b) In the application of Article 57 EC (now Article 61 TFEU), account must also be taken of the reduction in tax resulting from the overseas territory implementation arrangements, when those arrangements had the effect that, in 1993, the actual tax liability with respect to dividends received from a Member State subsidiary was substantially lower than the combined tax rate resulting from the measures introduced after 31 December 1993.