Briefing Note

How to reverse Greenland's "semi-divorce" from the EU

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Greenland's relationship with the European Union is best described as a "semi-divorce" rather than a clean break. Greenland left the European Communities on 1 January 1985 following a narrow 1982 referendum, but it did not become a third country in the conventional sense. It became an Overseas Country and Territory (OCT) associated with the European Union through Denmark. Greenlanders also remain Danish—and therefore EU—citizens. Today, Greenland is outside the EU single market, customs territory and Schengen area, but enjoys preferential economic relations, fisheries arrangements, EU funding and access to a range of EU programmes. However, becoming an OCT is not a "one-way"-out. It can be reversed. EU Treaties even foresee a kind of "fast-track" procedure back into the EU. If there is a political will, Greenland could become a totally integrated part of the EU within a short time.

Introduction

Contrary to widespread belief, Greenland did not leave the EU in 1985. Only member states can withdraw from the EU. Greenland, as a region of Denmark, joined the European Communities in 1973. In the years that followed, Greenland's autonomy rights were strengthened, while at the same time dissatisfaction grew. It was believed that Greenland's special needs, due to its exposed location as the world's largest island, and moreover, in the Arctic region, were not being sufficiently taken into account by the EC.

In the search for a political solution, a so-called change of status presented itself: As a result, the Danish region of Greenland became an EU overseas territory. This means that European regulations now apply to Greenland only to a limited extent, but at the same time,

Greenland is closely associated with the EU. In short, one could say that Overseas Countries and Territories (OCTs) enjoy many of the EU's benefits without being subject to the full EU regulatory framework. In addition to the OCTs, European law also recognizes so-called "outermost regions" (ORs). These are full-fledged parts of the EU that are, however, geographically far removed from

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the European continent; in simple terms, they are "EU - far, far away". Under European law, there is a degree of flexibility between the status of an OCT and that of an OR. A change in status is possible in both directions and has occurred repeatedly over the years. The legal basis for this is provided by Article 355(6) TFEU. It would therefore be possible, within a very short time, to reverse Greenland's 1985 "semi divorce" from the EU and to fully reintegrate Greenland back into the EU.

Current OCT status of Greenland

OCTs, which includes Greenland (but also some of the Dutch and French territories), are subject to 'special arrangements' set out in Part Four TFEU and the Overseas Association Decision. According to Article 198 TFEU, the purpose of association is 'to promote the economic and social development' of the territories and 'to establish close economic relations between them and the Union as a whole'. This is done by conferring advantages on the OCTs, which consist mainly of customs exemptions on imports into the EU of products originating in the OCTs. Greenlanders also continue to be Union citizens by virtue of being Danish citizens.

There is an additional provision in respect of Greenland on fish (Article 204 TFEU and Protocol 34), which has been used to maintain EU quotas in Greenland's waters in return for a financial contribution. Tariff-free access for Greenlandic fisheries products to the internal market is subject to an agreement between the two parties. There is a separate Fisheries Partnership Agreement between the EU and Denmark and the Home Rule Government of Greenland.

Can Greenland join the EU? Since it is not a 'state', it cannot formally join under the general accession process under Article 49 TEU. However, it can move from OCT to OR status, meaning that it would again become part of the EU. As an OR, Greenland would become subject to provisions of the EU Treaties and may benefit from Article 349 'specific measures', but it would not have the independent voting rights of a full member state.

The shift from OCT to OR is done via the simplified process in Article 355(6) TFEU, introduced by the Lisbon Treaty where the European Council may, on the initiative of, in this case, Denmark, and acting unanimously after consulting the Commission, 'adopt a decision' amending Greenland's OCT status. Mayotte, a French island between Madagascar and the African continent, most recently changed from OCT to OR status.

Status change procedures in EU law

All statuses offered by EU law to the outlying territories of the Member States are provided by EU law and are thus removed from the realm of unilateral action by the Member States. Any change of status has to follow established EU law procedures.

Currently there are two procedures for status change:

- the general Treaty revision procedure of Article 48 TEU and
- the simplified procedure under Article 355(6) TFEU introduced by the Treaty of Lisbon.

Article 355(6) TFEU requires a unanimous decision of the European Council, with consultation of the Commission, on a proposal from the Member State connected with the territory subject to the status change, which is a much lower procedural threshold compared with ordinary Treaty

revision. Yet the simplified procedure of Article 355(6) TFEU only applies expressis verbis to changes of status of the Danish, Dutch and French overseas territories.

While the simplified procedure could e.g. enable Greenland to return its status in EU law to that of an OR, it is not applicable to the Færœ Islands, which although Danish, enjoy a sui generis status under Article 355(5)(a) TFEU and are thus not covered by Article 355(6) TFEU.

One of the most puzzling features of this simplified procedure is that it is entirely mute about democracy and including no requirement to take the preferences of the local population of the territory in question into account, which led for example the Dutch government to append to the Treaties a Declaration to remedy this deficiency.

Because the background of integration for the ORs and association for the OCTs is intimately related to the idea of the self-determination of the former colonies under Article 73 of the UN Charter and the related principles of UN Resolution 1541 on the right to self-determination of former colonies, a status change should therefore be firmly rooted in the principle of democracy, allowing full participation of the populations of the regions concerned.

Numerous examples of changes from OR to OCT and back are known: Mayotte, a French island between Madagascar and the African continent was the most recent to go through the process changing from OCT to OR, anticipated by a Declaration appended to the Treaty of Lisbon. Saint Barthélemy, initially endowed with automatically acquired OR status upon splitting from the OR Guadeloupe, moved in the opposite direction, and acquired OCT status in 2012.

When an OCT becomes an OR, that territory becomes part of the internal market and therefore EU primary and secondary law on the internal market also applies. At the time of Mayotte's status change, France had requested a transitional period for specific secondary EU law, which, as indicated previously, can be honoured for ORs on the basis of Article 349 TFEU. The Council of the EU decided on a tailor-made temporary derogation for certain Regulations and Directives. These exceptions show that the change of status from OCT to OR under Article 355(6) TFEU coincides with a change in territorial scope accompanied by a tailor-made temporary exemption on the basis of Article 349 TFEU.

Summary

So, although the legal process for Greenland to rejoin the EU would be relatively straightforward, the policy questions at stake mean that the re-entry would not be guaranteed or without difficulty. Whether Greenlanders decide that it should be attempted, and how such an attempt would be received especially in Washington under the Trump government, will be an important question for the geopolitics of the High North and the EU's role in it. From a pure legal point of view, however, it would be a quite easy exercise to reverse Greenland's "semi-divorce" from the EU.

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