

EU AND WORLD TRADE LAW – ECONOMIC PARTNERSHIP AGREEMENTS AND CONSIDERATIONS FOR NEW CALEDONIA

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This paper concerns international and regional integration and in particular, it addresses how regional integration is a positive first step for countries in the Pacific to conform to international demands. The trade preferences that are currently available to ACP states and the liberalisation of trade in the Pacific promoted by the Cotonou Agreement are considered as is the proposed comprehensive EPA between the EU and the Pacific region. The paper discusses the potential relevance of the EU/ACP trade arrangements to New Caledonia and argues that it would be in New Caledonia's interests to become actively involved in the EPA negotiations with the prospect of joining the Pacific EPA. The paper then addresses whether there is any constitutional impediment to New Caledonia's increased participation in the EPA negotiations or membership of a free trade agreement. The conclusion is that New Caledonia should be more actively involved in the Pacific region by fully participating in the EPA negotiations as a potential member of the Pacific Group.

Les accords commerciaux entre la Nouvelle-Calédonie et l'Union Européenne viennent à expiration en 2012. Cet article s'intéresse au bénéfice que pourrait d'ores et déjà retirer la Nouvelle-Calédonie de participer au processus de négociations entre les pays ACP et l'Union Européenne dans la perspective de pouvoir bénéficier du régime des EPA.

I INTRODUCTION

New Caledonia¹ as an overseas territory (OCT) of France,² presents unique issues concerning free trade. Although not a WTO member, New Caledonia's trading arrangements with the European

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Union (EU) have been subject to WTO influence. And, being an OCT of France, there are certain expectations from third countries that New Caledonia comply with international trade rules and objectives.

The EU is supportive of international trade liberalisation and therefore has been fostering the OCT into the world market.³ Consequently, the current trade arrangement between OCT and the EU, which provides the OCT with non-reciprocal trade preferences is temporary only.⁴

Like the OCT, many African, Caribbean, and Pacific (ACP) countries currently benefit from non-reciprocal preferential treatment from the EU. The trade regime between the ACP states and the EU was regulated by the Cotonou Partnership Agreement (CPA) and in effect still is until 'Interim' Economic Partnership Agreements are superseded with binding final Economic Partnership Agreements (EPAs).⁵ The CPA is a descendant of the Lomé IV Convention.⁶ Since 1975, Lomé had provided a framework for trade, aid, and political relations between the EU and 78 ACP

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- 1 New Caledonia is situated 1,500km north-east of New Zealand (and therefore effectively New Zealand's closest foreign neighbour). The population estimates are between 220,000 and 235,000 (2005 statistics). Its main resources are minerals. New Caledonia is not independent. The political and administrative structures of New Caledonia are set out in the Nouméa Accord, signed in May 1998 between the Government of France, the pro-independence Front de libération national kanak socialiste and the integrationist Rassemblement pour la Calédonie dans la République. For further information about geopolitical and economic issues see, New Caledonia: Yesterday, Today, and Tomorrow <<http://www.otago.cc.nz/otagofps/pdfs/Deckker.pdf>> (last accessed 18 November 2006). See also, UNGA "New Caledonia" (29 March 2005) Working Paper prepared by the Secretariat A/AC.109/2005/13 2.
 - 2 It is a territory of France now called a "pays" (country). However, there is some debate on its exact status. See below, Part IV,B,1. The Treaty Establishing the European Community (25 March 1957) 298 UNTS 3 (EC Treaty) Part Four (art 182) and annex II together refer to New Caledonia as being one of the EU's Overseas Countries and Territories (OCT). An OCT is defined in art 227.3 of the EC Treaty. And, in relation to the OCT trade regime, New Caledonia is listed as an OCT to which it applies: Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, annex IA.
 - 3 Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 16.
 - 4 The OTC/EU trade arrangement contains a sunset clause. The current trade regime will therefore need to be reviewed/replaced in 2012. See Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 63.
 - 5 Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part signed on 23 June 2000 (CPA).
 - 6 Lomé I was successor to Yaoundé II. The Yaoundé Agreement of July 1963 lasted until 1969; Yaoundé II followed and ended in 1975. The first Lomé Convention came into force in April 1976; The Convention was renegotiated and renewed three times. The subsequent agreements were: Lomé II (January 1981-February 1985); Lomé III (which came into force in March 1985 (trade provisions) and May 1986 (aid) and expired in 1990); Lomé IV (December 1989-1999).

countries.⁷ The CPA, signed on 23 June 2000 in Benin, emphasised the move away from treating aid as the main instrument of development cooperation to focus instead on trade.⁸

The CPA and now the 'Interim' EPAs, like the OCT arrangement, provide transitory trade arrangements and generally promote the liberalisation of trade. More particularly, the current preferential arrangements available to ACP states by the EU have been deemed WTO-inconsistent.⁹ Thus, negotiations for free trade agreements (the final EPAs) are currently underway. Although originally to be negotiated by 2008, an extension of time was granted for the ACP states to enter binding EPA's. The 'Interim' agreements have been introduced until the conclusion of a comprehensive EPA.

While trade liberalisation has benefits, it is first desirable for both the OCT and the ACP states to be regionally integrated.¹⁰ The paper therefore discusses the EU/ACP trade arrangement and its potential relevance to New Caledonia. Given the scheduled demise of New Caledonia's current trade regime with the EU in 2012, the paper concludes that New Caledonia should become actively involved in EU/ACP negotiations with the prospect of joining the Pacific EPA.¹¹ This way, the benefits of regional integration and global trade liberalisation objectives can become a reality. Inevitably, it is in New Caledonia's interests to have a voice in trade negotiations that directly or indirectly affect its market – the EPA therefore will have ramifications for New Caledonia, whether or not it becomes a party.

II TRADE LIBERALISATION THROUGH REGIONAL INTEGRATION

A Internationalisation

No country weak or strong "can escape the pressures of globalisation".¹² The WTO¹³ has a major influence on freeing trade in the international context by promoting the worldwide

7 Welcome to the DTI's Website for Europe & World Trade <www.dti.gov.uk/ewt/lomé.htm> (last accessed 20 August 2006). This paper is concerned with the Pacific countries. See below, n 38 for a list of the countries that form part of the Pacific ACP group.

8 Jane Kelsey "A People's Guide to the Pacific's Economic Partnership Agreement" (World Council of Churches, Suva, March 2005) 13. This report is available at <<http://www.arena.org.nz/REPA.pdf>> (last accessed 2 February 2007). The CPA was concluded for a 20-year period (2000-2020) and, among other things; it regulates trade and cooperation between the EU and ACP states. The CPA deals with areas other than trade. For example it has a comprehensive political dimension (covering topics such as human rights). This paper is only concerned with its trade provisions.

9 See below, Part III, A 1 and 2.

10 For example an enlarged production base enables small states to better overcome their vulnerabilities to ultimately compete in the world market. See below Part II, B.

11 This is because the EU/ACP relations affect the South Pacific region generally.

12 EU Trade Commissioner, Pascal Lamy "ACP/EU Joint Ministerial Trade Committee" (2003 JMTC Address, St Lucia, 1 March 2003) 2.

liberalisation of trade through its policies and rules.¹⁴ Although globalisation entails risks for less developed countries, it also offers opportunities.¹⁵

No country simply experiences globalisation passively, nor can any country base its domestic strategies on permanent protection from it. Rather [countries]...must become pro-active. [Countries]...have to do all in [their] power to maximize the benefits deriving from globalisation and...must do everything...to address the dark side of globalisation which tends, if not properly harnessed, to make the big stronger and the small weaker.

The WTO supports the comparative advantage theory which is predicated on the belief that if each country exports the product of what it can do best, this increases efficiency overall and accordingly long-term financial benefits are gained domestically.¹⁶ Generally speaking, the notion of free trade at the international level becomes a reality when countries conform to the main objectives of the WTO – Most Favoured Nation Treatment (MFN) which requires equally favourable treatment of imports from all WTO members;¹⁷ and National Treatment (NT) which requires equally favourable treatment of imports as compared to domestic products.¹⁸ The WTO supports the view that economic prosperity at the domestic level is achieved through the internationalisation of markets.

WTO initiatives have a global impact even on non-WTO members.¹⁹ However, those countries less prominent in the world market struggle to meet all the consequential demands from the international community. The WTO is largely influenced by the large developed states, which are the main players in international organisations. Those main players are often quite unaware of the vulnerabilities and local conditions (such as the extent of and lack of human and economic

13 There are currently 139 WTO members. Apart from the size of the WTO (which, in itself, suggests the WTO has a global impact), it has ramifications for non-WTO members. An exchange of preferential treatment between the WTO-member and non-WTO members may give rise to a violation by the WTO member of the MFN treatment obligation of the WTO agreement – the very situation which gave rise to the demise of the ACP preferences by the EU (discussed in this paper). See generally, Won-Mog Choi "Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States" (2005) 8 J Int'l Econ L 827.

14 For example the Most Favoured Nation Treatment and National Treatment principles.

15 EU Trade Commissioner, Pascal Lamy "ACP/EU Joint Ministerial Trade Committee" (2003 JMTC Address, St Lucia, 1 March 2003) 2.

16 For further information on the evolution of international trade theory and policy see, Michael Trebilcock and Robert Howse *The Regulation of International Trade* (2ed, Routledge, New York, 1999) Ch 1, 1-24.

17 General Agreement on Tariffs and Trade (GATT) (1 January 1948) 55 UNTS 194, art I.

18 GATT (1 January 1948) 55 UNTS 194, art III.

19 WTO Pacific Islands Forum Secretary General *Ministerial Conference Fourth Session* (WT/MIN(01)/ST/29, Doha, 2001).

resources) of smaller countries such as the Pacific island countries (PIC). The concept of regional integration has therefore become an important ideal for less developed countries such as those in the South Pacific. If the PIC are united as a region then they have a better chance of strengthening their economies than were they to compete on an individual basis in the world market. Regional integration provides the platform for ultimate integration into the global economy.

B Regionalisation

Regional integration is of the utmost importance to alleviating the natural handicaps of smallness and vulnerability. Regional integration will enlarge the production base, allow more rational exploration of resources, improve specialisation and increase attractiveness for investment.²⁰

Regional integration encourages countries to network and share responsibility in achieving international goals.²¹ This shared responsibility means countries can more effectively voice their concerns and vulnerabilities to the international community and in turn goals, such as trade liberalisation, have a better chance of eventuating.²² Given the rapid proliferation of preferential trading arrangements within and outside the Pacific region, regional integration will help raise the less influential countries' capacity in trade negotiations and policy analysis.²³ The Pacific office

20 EU Trade Commissioner, Pascal Lamy "ACP/EU Joint Ministerial Trade Committee" (2003 JMTC Address, St Lucia, 1 March 2003) 2-3.

21 Shared responsibility is a positive way to achieve global goals. An analogy can be made with the responses PICs have made in responding to United Nations initiatives. The members of the Pacific Islands Forum (PIF) worked together to devise counter-terrorism model laws to be put in place by PIC and the Forum provides assistance to help improve their infrastructure. The same approach of shared responsibility through regionalisation could assist, for example, the reform of legislation and policy analysis to reflect WTO objectives. The PIF could develop strategies to increase human and economic resources that align with the development of free trade. See Rebekah Plachecki "Beyond the Southern Cross – International Counter-Terrorism Initiatives from a Pacific Perspective" (2006) 12 RJP 55, 65.

22 A particular example of shared representation is the Pacific WTO Office in Geneva: see EU-ACP: Pacific Islands Get Permanent Representation to WTO <http://www.delfji.ec.europa.eu/en/whatsnew/eu-acp_pacific_islands_get_permanent_representation_to_wto.htm> (last accessed 1 November 2006). Other specific reasons for regional integration are contained in the Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 16. For example regional integration can foster the gradual integration of the OCT into the world economy, accelerate economic cooperation, and promote the free movement of persons, goods, and services. For a scholarly article see, The Pacific Island Nations: Towards Shared Representation <http://www.wto.org/English/res_e/booksp_e/casestudies_e/case33_e.htm> (last accessed 31 August 2006).

23 See, A Study on Regional Integration and Trade: Emerging Policy Issues for Selected Developing Member Countries <http://tcbdb.wto.org/trta_project.asp?ctry=998&prjcd=35234-01> (last accessed 24 December 2006). See also above, n 22.

based in Geneva is one example of how the countries of the South Pacific can have a stronger impact in multilateral trade negotiations than were they to negotiate independently.²⁴

Regional integration can lead to ultimate integration into the world market and "WTO agreements recognise that regional arrangements and closer economic integration can benefit countries."²⁵ Further, the EU has argued that regional integration not only makes sense organisationally, but would benefit countries more than were they to interact bilaterally with the EU.²⁶ The EU sees itself as a regional role model that should have impact on other regions.²⁷

C Examples

In recent years the South Pacific has been a hive of regional activity.²⁸ Although the CPA and the EPA are the focus of this paper, it is relevant to note other Pacific agreements and organisations mentioned in this Part. This is because, generally speaking, they support the trend to liberalise markets through regional integration. For example the Pacific Island Countries Trade Agreement (PICTA) is a regional trade agreement which provides for the gradual establishment of a free trade area among members of the Pacific Islands Forum (PIF);²⁹ the PIF³⁰ is concerned with developing

24 Many of the PIC could not afford to have their own office in Geneva. An office representing the entire region is cost-effective.

25 Regionalism: friends or rivals? <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm> (last accessed 24 December 2006).

26 Governance, Capacity and Legitimacy: EPAs, EBA and the European Union's Pacific Regionalism after Cotonou <http://www.otago.ac.nz/otagofps/FPS%2005/fps2004/pdfs/Holland_Koloamatangi.pdf> (last accessed 24 November 2006).

27 See, Governance, Capacity and Legitimacy: EPAs, EBA and the European Union's Pacific Regionalism after Cotonou <http://www.otago.ac.nz/otagofps/FPS%2005/fps2004/pdfs/Holland_Koloamatangi.pdf> (last accessed 24 November 2006). See also, Tony Angelo and Rebekah Plachecki "The Pacific and Europe – 50 year Jubilee of the European Communities" (2007) 38 VUWLR 5.

28 See, Geoff Leane and Barbara von Tigerstrom (ed) *International Law Issues in the South Pacific* (Ashgate, 2005) 259.

29 PICTA came into force in 2003 and trading under PICTA was scheduled to begin in 2006. The PIF is a regional body that deals with various political and economic issues in the Pacific. Its mission is "to work in support of Forum member governments, to enhance the economic and social well-being of the people of the South Pacific by fostering cooperation between governments and between international agencies, and by representing the interests of Forum members in ways agreed by the Forum." Pacific Islands Forum Secretariat <<http://www.sidsnet.org/pacific/forumsec/>> (last accessed 2 February 2007). Further information about the PIF can be obtained at: Pacific Islands Forum Secretariat Website <<http://www.forumsec.org.fj/>> (last accessed 22 November 2006).

30 Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu are all members. New Caledonia became an observer in 1999 and an associate member in 2006. French Polynesia is an associate member; Tokelau and Timor-Leste are observers.

international trade to improve the quality of life in the Pacific region; the Pacific Agreement on Closer Economic Relations (PACER) provides a framework for trade negotiations in the Pacific region;³¹ and regional economic integration is supported by the Pacific Plan.³² Furthermore, New Zealand and Australia as the larger developed nations in the Pacific have assumed responsibility for many PIC. Regional trade agreements therefore already exist between certain PIC and Australia and New Zealand. For example, the South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA), in force since 1981, provides "for non-reciprocal duty free access to New Zealand and Australian markets for products" from members of the PIF.³³ Finally, the CPA and now the 'Interim' EPAs between the EU and countries of the Pacific region are further stepping-stones toward free trade in the Pacific and trade liberalisation.³⁴ The CPA provided a framework for the development of a free trade agreement, which is still being negotiated via the Pacific EPA.³⁵

III FROM CPA TO EPA

This Part considers EU/ACP trade relations which have led to the development of EPAs. It will consider the WTO-incompatible trade preferences available to ACP states and how the WTO has played a major role in the imminent demise of those preferences. It also addresses how the change to EPAs will affect ACP states and more particularly, the Pacific states of the ACP group. This Part is divided into two sub-Parts: The first is concerned with the CPA; the second discusses the Pacific EPA.

31 Leane and von Tigerstrom, above n 28, 263.

32 "The Pacific Plan was endorsed by Leaders at the Pacific Islands Forum meeting in October 2005. It is a 'living' document ensuring flexibility so that the Vision of the Leaders and the goal of regional integration extend far into the future. This revised version of the Pacific Plan follows decisions taken by Leaders at the Forum meeting in October 2006 where they welcomed the considerable progress made in implementing the Pacific Plan, noted the key challenges that need to be overcome in order for the Plan to continue to be effectively implemented, and agreed on a number of key commitments in order to move the Plan forward": Pacific Islands Forum Secretariat "The Pacific Plan for Strengthening" (25 October 2006). Available at: <<http://www.sidsnet.org/pacific/forumsec/>> (last accessed 2 February 2007).

33 This Agreement is distinguishable from Free Trade Agreements (FTAs) such as the FTA between Australia and New Zealand. See also PACER which provides a legal framework for future negotiations of FTAs between certain PIC and Australia and New Zealand. The Pacific Agreement on Closer Economic Relations (PACER) (18 August 2001) is available at: Pacific Islands Forum Secretariat <<http://www.forumsec.org.fj>> (last accessed 2 February 2007).

34 There will be one EPA for each region. The focus of this paper is on the EPA for the Pacific region.

35 CPA arts 36-37.

A *The CPA*

1 *WTO-Incompatible Trade Preferences*

The Lomé IV trade preferences incorporated into the CPA³⁶ were incompatible with WTO rules and accordingly scheduled to be abolished by 2008.³⁷ The CPA, which superseded Lomé IV, allowed ACP states³⁸ to maintain the trade preferences from the EU but only until WTO-compatible EPAs were devised. It therefore provided a transitory trade arrangement until 2008. However, because the deadline was missed by several states, 'Interim' EPAs have been introduced adding yet another tier to the process for the removal of trade preferences.

Although several of the ACP states are not WTO members, the EU must comply with WTO rules in the trade arrangements it makes with them. Countries within the EU are WTO members and therefore the WTO binds any of its members which enter into regional trade agreements on goods and/or services with another state regardless of whether that other state is a WTO member or not.³⁹

Until the final EPAs come into force, ACP countries maintain tariff preferences, which "grant an advantage to ACP products imported into Europe in relation to competing products from other countries."⁴⁰ The preferences are not reciprocal. Therefore, ACP countries are "not obliged to offer special access to EU products in their own markets, and are able to restrict their entry by taxing them."⁴¹ These preferences contradict the principle of non-discrimination under article I of GATT.⁴² Although there are exceptions to this GATT principle, none of them applies to the

36 CPA art 36(3).

37 Title II of the CPA provided for a transitional trade arrangement between the EU and ACP states. From 2002 until 31 December 2007, the parties were required to negotiate new trading agreements – EPAs. See CPA art 37(1). Effectively, Title II of the CPA was intended to become redundant once the EPAs were in force from 2008.

38 The Pacific Group of the ACP states includes 14 countries: the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Nauru, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

39 "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 29. See the wording of GATT 1947 art I in Appendix 3 (particularly the words: "any other country"). Based on GATT article I, a WTO member may be subjected to challenge by another WTO member if it offers more preferential trade arrangements to other countries (whether or not they are WTO members). More particular issues arise in the context of GATT art XXIV, see below, Part III, A, 3, (a) where a Free Trade Agreement contains both WTO and non-WTO signatories.

40 Cotonou Infokit – From Lomé to Cotonou <[www.http://www.ecdpm.org](http://www.ecdpm.org)> (last accessed 10 August 2006). There are some specific arrangements for example in regard to manufactured and processed products and tropical products.

41 Cotonou Infokit – From Lomé to Cotonou <[www.http://www.ecdpm.org](http://www.ecdpm.org)> (last accessed 10 August 2006).

42 This is the MFN principle. See Appendix 2.

preferential trading arrangements between the EU and the ACP states. Special arrangements may only be permitted under the following reservations: They can be reciprocal in accordance with article XXIV of GATT. The trading arrangement between the EU/ACP states as mentioned, is non-reciprocal. Alternatively, they may be granted by a developed country to developing countries (or to LDC) in accordance with the 'Enabling Clause' permitting special and differential treatment of developing countries.⁴³

The Enabling Clause was established as an indirect⁴⁴ response to the recommendations of the United Nations Conference Trade and Development (UNCTD). The UNCTD hoped to establish:⁴⁵

a mutually acceptable system of *generalized, non-reciprocal and non-discriminatory preferences* beneficial to developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries.

The 'Enabling Clause' applies as part of GATT 1994 under the WTO.⁴⁶ However, there has been some debate whether the Enabling Clause requires that special treatment must be made available to all developing countries. For the time being, *EC-Tariff Preferences*⁴⁷ suggests that the answer is no. That case provided insight on the relationship between the Enabling Clause and GATT 1994 article I.⁴⁸ The Appellate Body in *EC-Tariff Preferences* ruled that the Enabling Clause, as the

43 *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause)* (28 November 1979) L/4903. The Enabling Clause "allows derogations to the most-favored nation (non-discrimination) treatment in favour of developing countries. In particular, its paragraph 2(c) permits preferential arrangements among developing countries in goods trade.": Differential and more favourable treatment reciprocity and fuller participation of developing countries <http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm> (last accessed 2 February 2007). Further general information can be found in: Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis *The World Trade Organization – Law, Practice, and Policy* (2ed, Oxford University Press, New York, 2005) 219.

44 The word 'indirect' is used because the direct response was the granting of a waiver in 1971 under GATT 1947 art XXV:5. The Enabling Clause replaced the waiver and provides a permanent legal solution to allow for trade preferences.

45 Lorand Bartels "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program" (2003) 6 J Int'l Econ L 507, 512 (emphasis in original).

46 See Appendix 2.

47 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC-Tariff Preferences)* (7 April 2004) WT/DS246/AB/R (AB). In this case, India argued that the special arrangements to combat drug production and trafficking under the EC Council Regulation No. 2501/2001 violated GATT 1994 art I.1 despite the provisions of the Enabling Clause.

48 For clarity it should be noted that GATT 1994 and GATT 1947 are compatible. GATT 1994 confirms that after the establishment of the WTO, the GATT 1947 continues to apply. Hence, the MFN (GATT 1947 art I) is an integral part of GATT 1994.

more specific rule, prevails over the GATT article I.⁴⁹ However, the instances in which a country cannot offer preferences to all developing countries are limited. The *EC-Tariff Preferences* case suggests that a country could validly have a scheme that was tailored to the needs of all similarly situated countries.⁵⁰ In theory, this could exclude some developing countries. Nevertheless, this paper proceeds on the assumption that even after this case, the WTO would still find the Lomé IV trade preferences in breach of the GATT. This is because the benefits extend to *all* and *only* ACP developing countries. Thus, whether the developing country is part of the ACP group is the sole determining factor (and not whether the country has similar economic development challenges or similar production possibilities) to benefit from the preferences.

2 *The WTO Waiver*

The question therefore arises what the legal basis was for the continuance of the Lomé IV trade preferences in the absence of WTO compliance. Responding to this issue was largely due to the *EC – Bananas*⁵¹ decision which confirmed the EC had trading arrangements with ACP countries which were incompatible with WTO rules. In that case, the issue was whether the Lomé preferences for ACP banana products violated the GATT. Although the original complaint to the GATT was unsuccessful,⁵² when the WTO was established in 1995 a subsequent complaint to the WTO led to a decision that the EC were in breach of the GATT. It was this ruling that prompted the EC to obtain a temporary waiver from the WTO until the Lomé IV trade preferences were removed. This waiver was granted on 14 November 2001 pursuant to GATT article IX(3) and continued until 31 December 2007.⁵³ The waiver allowed the EU temporarily to grant preferential treatment to products from ACP countries without being required to grant the same preferential treatment to

49 *EC - Tariff Preferences* (7 April 2004) WT/DS246/AB/R paras 101-102 (AB). The Appellate Body upheld the Panels decision. See, *EC - Conditions for the Granting of Tariff Preferences to Developing Countries* (1 December 2003) WT/DS246/R (Panel) para 7.45.

50 *EC - Tariff Preferences* (7 April 2004) WT/DS246/AB/R paras 175-176 and 180 (AB).

51 *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (22 May 1997) WT/DS27/4/USA (Panel).

52 This was because the EC "had been able to block any such findings under the old GATT dispute system, which gave it a power of veto. That veto was removed when the WTO was created in 1995": "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 19.

53 *European Communities – the ACP-EC Partnership Agreement Decision of 14 November 2001* <http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm> (last accessed 20 August 2006). Note that the waiver contains some special requirements for the trade of bananas in the annex. Before 2008, the new tariff regime takes effect; members of the CPA will conduct a consultation process of which the ACP states will be informed of the EC intentions concerning the rebinding of the EC tariff of bananas. Article IX(3) GATT provides that: "In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph."

similar products of other WTO members. However, the waiver has restrictions - it only applied temporarily and it did not waive all WTO principles – only the MFN one.⁵⁴

It should be noted that the *EC-Bananas* decision was made while the Lomé IV Convention was in force. Thus, following the *EC-Bananas* decision and the WTO's granting of the waiver, new trade arrangements under the CPA came into force. The CPA provided for a transitory trade regime, which corresponded with the waiver requirements and the Panel's decision.⁵⁵ Accordingly, although the Lomé IV trade preferences continued under the CPA they were only temporarily available and therefore consistent with the WTO waiver.

3 WTO Compatibility

The CPA actively encouraged the ACP countries to comply with WTO objectives. This is evidenced throughout the CPA. For example, the Preamble confirms generally that the commitments within the framework of the WTO were significant to the conclusion of the agreement. Also, one of the CPA's aims was to integrate ACP countries into the global economy. This too is consistent with trade liberalisation ideals. To achieve this long-term goal, regional integration and cooperation is promoted.⁵⁶ Finally, and more particularly, the CPA expressly provided that the new trade framework between the EU and ACP states will be WTO compatible:⁵⁷

Economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the Parties' mutual interests and their respective levels of development.

[T]he parties agree to conclude new WTO compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.

54 European Communities – the ACP-EC Partnership Agreement Decision of 14 November 2001 <http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm> (last accessed 20 August 2006). See also, Abou Abass "The Cotonou Trade Regime and WTO Law" (2004) 10 European Law Journal 439, 451.

55 It is interesting to note that negotiations for the CPA and the signing of the CPA occurred before the waiver was granted – the negotiations started in September 1998 (COM(97)537 final of 29 October 1997 "Guidelines for the negotiation of new cooperation agreements with the African, Caribbean and Pacific countries"); and the CPA was signed on 23 June 2000. However, the coming into force of the CPA followed the waiver. The CPA came into force on 1 April 2003. It seems that the EU argued for the waiver (the deadline originally being 31 December 2007) to fit with what had been negotiated in the development of the CPA. See, The Cotonou Agreement <<http://www.concordeurope.org/download.cfm?media=pdfUK&id=478>> (last accessed 11 February 2007).

56 CPA art 28(a). See also CPA arts 29(d) and 30.

57 CPA arts 34(4) and 36. It should be noted that the reference to special and differential treatment in this article would offer options to ACP states that are not free trade arrangements but are nevertheless WTO-compatible. See below, Part III, A, 3, (b).

The CPA arrangements were to be superseded in 2008 by the WTO compatible trading arrangements referred to as EPAs. However, it became clear that not all ACP states would realistically be able to negotiate before the deadline. Now that 'Interim' EPAs⁵⁸ have been introduced countries that did not agree to binding EPAs (such as those of the Pacific) have further time but must commit themselves to eliminate trade restrictions such as export subsidies within an acceptable time frame.

Although, certain ACP states may continue to have preferences post 31 December 2007, the 'Interim' EPAs are consistent with WTO rules as they establish binding commitments for countries to eventually remove trade barriers. They will gradually be replaced by full comprehensive EPAs. Such final EPAs are currently still being negotiated and will effectively be the implementation of the CPA's trade provisions.

(a) GATT article XXIV

(i) Objective

The idea behind the change from the Lomé Convention to EPAs is free trade.⁵⁹

[T]he way to strengthen the participation of ACP countries in the global economy was to embrace...(reciprocal) free trade. Opening their markets and allowing unrestricted foreign investment offered the ACP greater opportunities for growth than continuing to rely on non-reciprocal tariff preferences.

Accordingly, the EPA will progressively remove the barriers to trade between the EU and the PIC pursuant to article XXIV of the GATT.⁶⁰

(ii) Legality

Article XXIV of the GATT allows WTO members to enter into free trade agreements subject to restrictions. Article XXIV requires parties to a free trade agreement to "remove the tariffs on substantially all trade between them, normally within 10 years."⁶¹ The Pacific EPA will in effect

58 Their purpose was to prevent trade disruption although they have also created policy space for the ACP regions who, free of divisive deadlines and the threat of legal challenges to non-LDC market access, can be certain they are approaching EPA negotiations on their own terms: <trade.ec.europa.eu/doclib/html/138457.htm>

59 "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 19. For greater detail on the EU perspective, see: European Commission "Green Paper on Relations between the European Union and the ACP Countries on the Eve of the 21st Century" (20 November 1996, Brussels) available at <http://aei.pitt.edu/1206/01/ACP_21st_gp_COM_96_570.pdf> (last accessed 2 February 2007).

60 Welcome to the DTI's Website for Europe & World Trade <www.dti.gov.uk/ewt/lomé.htm> (last accessed 20 August 2006). See CPA art 36(1)-(2).

61 "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 28.

provide for a free trade agreement (FTA) and therefore it must be reciprocal in accordance with Article XXIV. However, complex issues arise where the FTA includes non-WTO members. One scholar has discussed this particular issue and doubts whether a FTA that includes non-WTO-member signatories is exempt from MFN requirements under GATT article I. This is because the wording of article XXIV refers to "contracting parties". If this view is accepted, new complications arise as to legality of the proposed EPA. As will be discussed shortly, the structure of the proposed EPA will be to have an annex on goods which PIC may choose to sign. Thus, article XXIV will only apply to the PIC that do sign the goods annex (which is effectively an FTA) with the EU. So far two non-WTO members of the Pacific group⁶² have expressed an interest in signing this FTA. Accordingly, if these countries do wish to join, and subsequent other non-WTO members such as New Caledonia, then it seems that approval by the WTO under paragraph 10 of the GATT article XXIV may be necessary:⁶³

[I]f an [FTA] comprises even one single state not a member to the GATT, it must either obtain approval under paragraph 10 of Article XXIV in order to entertain some degree of flexibility in meeting conditions stipulated in the article, or receive a waiver from GATT obligations.

In the absence of such approval the EPA may be subject to challenge and, ironically, have to comply with GATT article I.⁶⁴

(b) Other WTO compatible options

The CPA and the 'Interim' EPAs take into account that not all ACP countries are in a position to benefit from a free trade agreement. Accordingly, while the EPA annex on goods will be reciprocal⁶⁵ and consistent with article XXIV of the GATT, there are other options available to LDC and developing countries that are WTO-compatible. Therefore, ACP states must consider whether a trading regime under the EPA is the most appropriate option. The alternatives to the EPA for LDC and developing countries will now be addressed. It should be noted that the CPA

62 Vanuatu and Samoa. Other interested countries were Fiji, Solomon Islands, PNG, and Tonga. Minutes of the PACP Trade Ministers Meeting, Nadi, June 2006. See also Jane Kelsey "The Pacific's EPA Negotiations with the European Union" (2007) 38 VUWLR 79, 85.

63 Won-Mog Choi "Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States" (2005) 8 J Int'l Econ L 825, 834.

64 Further discussion on this issue can be found in "Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States" above n 63, 825.

65 See, Jane Kelsey "Free Trade Agreements – Boon or Bane?: Through the Lens of PACER" (2006) 37 VUWLR 391, 392; and "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 28.

distinguishes LDC from developing countries.⁶⁶ And, it acknowledges that even developing countries are at different levels of development.⁶⁷

(i) LDCs

A GSP scheme is a preferential tariff system extended by a developed country to developing countries (including LDCs). It allows reduced MFN tariffs or duty-free entry of eligible products exported by the developing countries to the markets of developed countries. Under the Enabling Clause, tariff preferences granted by developed countries must not discriminate among developing countries. However, there is an exception to this non-discrimination principle – a developed country may provide more generous preferences to all least-developed countries than those offered to the developing countries.⁶⁸ Thus, the EU may grant preferential treatment solely to all LDCs and still be in compliance with WTO obligations.

At the time the CPA was drafted, the EU had in mind a special regime for LDCs. This is reflected in article 37(9) of the CPA:⁶⁹

The Community will start by the year 2000, a process which by the end of multilateral trade negotiations and at the latest 2005 will allow duty free access for essentially all products from all LDC building on the level of the existing trade provisions of the Fourth ACP-EC Convention and which will simplify and review the rules of origin, including cumulation provisions, that apply to their exports.

The EU has therefore (since the drafting of the CPA) altered its trading regime to allow duty free access for essentially all products from all LDC pursuant to this article.

The process began in 2000. The new regime avoids the problem of WTO inconsistency "by extending unilateral EU trade preferences to all LDC, including those that are not members of the ACP group."⁷⁰ Consequently, the EC has adopted a regime that provides zero-duty access for all products except arms from the LDC.⁷¹ This arrangement is consistent with the Enabling Clause.

66 CPA arts 29(b) and 35(3).

67 See CPA art 35.

68 *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause)* (28 November 1979) L/4903. See also, *The Status of Trade Preferences in WTO* <<http://www.fao.org/DOCREP/004/Y2732E/y2732e08.htm>> (last accessed 2 February 2007).

69 CPA art 37(9).

70 *The Status of Trade Preferences in WTO* <<http://www.fao.org/DOCREP/004/Y2732E/y2732e08.htm>> (last accessed 1 September 2006).

71 EC Council Regulation No 2501/2001. See also, *The Status of Trade Preferences in WTO* <<http://www.fao.org/DOCREP/004/Y2732E/y2732e08.htm>> (last accessed 1 September 2006). This is known as the 'Everything but Arms (EBA)' arrangement.

ACP states that are LDC, therefore have the choice to either maintain the status quo (and benefit from EBA), or be party to an EPA. The CPA foresees that LDC which have decided not to conclude EPAs:⁷²

will continue to benefit from non-reciprocal preferential tariff treatment, which means that the future trade regime between a LDC regional group member and the EC could be different from the regime applicable to trade relations between the latter and the other (non-LDC) members of the same grouping.

(ii) Developing Countries

The CPA provided that ACP countries that are non-LDC, which decide that they are not in a position to sign EPAs, will be able to benefit from another trade regime that will govern their relations with the EC. Developing ACP states have three options available – they can become party to an EPA, benefit from the General System of Preferences (GSP), or may seek an alternative framework. However, what those other 'alternative' arrangements might be remains unclear. The chances of another alternative framework (that is neither an EPA nor falls into the GSP category, but is nevertheless WTO-compatible) being developed is slim – hence that option has not yet been taken up by the ACP states.

A GSP is WTO-compatible if it is in accordance with the Enabling Clause.⁷³ Such arrangement does not necessarily have to benefit all developing countries.⁷⁴ However, the determining factor of which developing countries could benefit from the arrangement cannot be solely based on whether they form part of the ACP group as that would render the regime discriminatory. Therefore, the current GSP offered by the EU, benefits developing countries regardless of whether they form part of a particular geographical group.⁷⁵ It should also be noted that a GSP is unilaterally devised by the developed country offering the preference (here the EU), and any amendment or withdrawal of the benefits are at the discretion of the developed country.⁷⁶

72 "The Cotonou Trade Regime and WTO Law", above n 54, 458.

73 Agreement on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause) Decision of 28 November 1979 (L/4903).

74 The *EC Tariff Preferences* case suggests that a country could validly have a scheme that was tailored to the needs of all similarly situated countries. In theory this could exclude some developing countries. See above, Part III, A, 1.

75 "A new GSP regulation, the third of the 10-year cycle, (Council Regulation (EEC) 2501/2001 as last amended by Council Regulation (EEC) 2211/2003) implements the current scheme from 1 January 2002 to 31 December 2005. New guidelines for the next 10-year cycle 2006-2015 are currently being prepared": The European Union's GSP < http://trade-info.cec.eu.int/doclib/docs/2004/march/tradoc_116448.pdf> (last accessed 11 February 2007).

76 "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 27. See also, Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis *The World Trade Organization – Law, Practice, and Policy* (2ed, Oxford University Press, New York, 2005) 774.

B The Pacific EPA

Because of the strong emphasis on regional integration under the CPA,⁷⁷ the ACP countries were divided by region and each region is negotiating its own EPA if they have not already done so.⁷⁸

The aims and objectives of economic trade cooperation between the EU and the Pacific region include:⁷⁹

Enabling the Pacific ACP States to play a full part in international trade, to manage the challenges of globalisation and to adapt progressively to new conditions of international trade in a manner and at a pace conducive to overall economic and social development; enhancing the production, supply and trading capacity of the Pacific ACP States as well as their capacity to attract investment; supporting regional economic initiatives in the Pacific ACP region; creating a new trading dynamic between the Pacific ACP States and the EU; strengthening the trade and investment policies of the Pacific ACP States; and improving the capacity of the Pacific ACP States to handle all issues related to trade.

Because goods and most agricultural products from ACP countries already enter the EU duty free, the EPA will not have much effect on the EU imports from ACP states.⁸⁰ It is "the ACP States that will have to remove their tariffs on substantially all trade with the EU within a finite period."⁸¹

It should be noted that the EU's continuance of external relations with the Pacific was addressed in 2006 – "Communication from the Commission to the European Council of June 2006." The EU is committed to the long-term support of initiatives that increase development and multilateralism particularly those which concern the ACP group.⁸²

77 See below Part IV,A,2. Regionalisation is a fundamental principle of the CPA: CPA art 2.

78 It should also be noted that the section in the CPA on economic trade cooperation covers a number of areas. It first has a chapter on new trading arrangements - EPAs. Then, there are separate chapters on: trade in services; trade-related areas of competition policy, intellectual property rights, technical standards and certification, quarantine-type measures, trade and environment, trade and labour standards, and consumer protection; and special provision for cooperation on fisheries and food security. This paper is primarily concerned with the chapter concerning EPAs.

79 Pacific ACP – EC EPA Negotiations Joint Road Map 10 September 2004 <http://www.forumsec.org.fj/docs/Gen_Docs/PacificACP-ECEPANegotiations.pdf> (last accessed 1 September 2006).

80 Except of course the OCT of the EU which may be indirectly affected. See below, Part IV.

81 "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 28.

82 Commission of the European Communities (Brussels, 08.06.2006 COM (2006) 278 final) Communication from the Commission to the European Council of June 2006 – Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility <http://ec.europa.eu/comm/external_relations/euw_com06_278_en.pdf> (last accessed 24 December 2006).

The new Development Strategy and comprehensive policies towards Africa, the Caribbean, and the Pacific, demonstrates the EU's major role in support of the Millennium Development Goals and effective multilateralism, in the context of globalisation.

This communication, which addressed specifically the EU's future external relations, confirms the EU's interest in PIC which may have been doubted given the main trading region is Africa.⁸³

The countries which have decided to negotiate an EPA with the EU as part of the Pacific region are: the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, the Republic of the Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.⁸⁴ It is notable that any formal involvement of the French territories has been denied by the EU.⁸⁵ Thus, New Caledonia for example, has not appeared individually in the negotiations.

1 Structure

The EPA negotiation process was originally divided into two stages but now there is a third tier with the introduction of 'Interim' EPAs. The first stage, which began in October 2004 and ended in December 2006, dealt mainly with finding solutions to substantive issues⁸⁶ and the second stage (January 2007 to 31 December 2007) was intended to finalise those findings in a binding text. Many of the ACP states missed the deadline and now the 'Interim' EPAs allow further time for those countries to agree on final trading arrangements.

The EPA between the EU and Pacific region will obviously involve reciprocal free trade between parties who are not in the LDC category.⁸⁷ Therefore, it becomes a relevant enquiry whether all PIC are ready for a reciprocal relationship with the EU. If the answer is no, would that mean not all PIC should participate in the EPA?

83 "When the EU released its Green Paper reviewing the Lomé Convention in 1996 its underlying concern was to refocus its attention and resources on Africa, where it competes with the US for influence, and minimize its obligations to the Caribbean and Pacific." Jane Kelsey "Regionalism: An Opportunity or an Imposition on Fiji" (Workshop on Globalisation and Challenges to Fiji's Diplomacy, Lautoka, 22-24 June 2006) 17.

84 The LDCs have preferred to pursue the EPA as opposed to the EBA option. It is unclear exactly why that is so but it may be that there is a fear that they might lose access to EDF money if they do not retain a formal special link with the EU. Or, maybe they are hoping for the proposed EPA two-tier structure to be accepted by the EU – in which not all countries will have to comply with GATT art XXIV. This is explained in Part III, B, 1.

85 This is discussed below in Part V.

86 Such as the principles, scope, and content of the EPA, "rules to cover special and different treatment, financing of adjustment, rules of origin, sanitary and phytosanitary rules, framework agreement on services, development aspects of services, fisheries, trade-related issues, [and] investment and promotion": "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 36.

87 Unless of course they choose to opt out and instead benefit from the EU's existing GSP. See above, Part III, A, 3, (b).

In answering this question it must be noted that while the PIC share many characteristics, they are at different levels in economic capacity. Some PIC are categorised as LDC,⁸⁸ others as developing countries.⁸⁹ Some have more trade exports than others.⁹⁰ Therefore the answer is no - not all PIC have the capacity to implement commitments to reciprocal free trade. In order to deal with the different peculiarities of each PIC, it has been proposed that the EPA should be structured to accommodate all PIC. This can be achieved by the EPA involving a master agreement and a series of subsidiary agreements.⁹¹ This is what the PIC have proposed to the EU.

Flexibility would be built into the broadly agreed framework of the EPA to allow each PIC to "adjust the pattern and schedules of implementation consistent with their national circumstances, while pursuing the objective of regional integration."⁹² This master agreement would not contain any specific commitments to reciprocal free trade in goods.⁹³ Therefore compliance with Article XXIV GATT is not necessary. That commitment would be contained in the separate subsidiary agreement on trade in goods – which is the focus of this paper.⁹⁴ Only PIC that are ready to implement commitments to reciprocal free trade in goods would join that agreement.⁹⁵ However this structure is subject to acceptance by the EU. Even if the EU agreed, issues for PIC still arise such as whether the master agreement should exclude anything that could fall within the ambit of the subsidiary agreements.⁹⁶

88 Of the PIC who are WTO members only Solomon Islands is a LDC. However, Samoa and Vanuatu (which are in the accession process) have been categorised as LDCs.

89 Of the PIC who are WTO members, Fiji and PNG are categorised as developing countries.

90 For example Niue's exports in 2006 totaled about US\$200,000 (see Niue Exports <<http://indexmundi.com/niue/exports.html>> (last accessed 2 February 2007)). Compare Fiji: in 2005 its exports were about US\$700,000,000 (see Fiji <<https://www.cia.gov/cia/publications/factbook/print/fj.html>> (last accessed 2 February 2007)).

91 The Way Forward <http://www.forumsec.org.fj/docs/Gen_Docs/Wayforward.pdf> (last accessed 1 August 2006).

92 Pacific ACP – EC EPA Negotiations Joint Road Map 10 September 2004 <http://www.forumsec.org.fj/docs/Gen_Docs/PacificACP-ECEPANegotiations.pdf> (last accessed 1 September 2006).

93 The Way Forward <http://www.forumsec.org.fj/docs/Gen_Docs/Wayforward.pdf> (last accessed 1 August 2006).

94 The Way Forward <http://www.forumsec.org.fj/docs/Gen_Docs/Wayforward.pdf> (last accessed 1 August 2006).

95 Countries which have expressed interested in signing the goods annex are Fiji, Samoa, Solomon Islands, PNG, Tonga and Vanuatu. Minutes of the PACP Trade Ministers Meeting, Nadi, June 2006. See also Jane Kelsey "The Pacific's EPA Negotiations with the European Union" (2007) 38 VUWLR 79, 85.

96 For example, Fiji would have an interest in protecting its sugar. And, assuming New Caledonia's potential involvement, it would have an interest in protecting its nickel industry. See below, Part IV.

2 Coverage

The coverage of the EPA will be broad. Fishing, agriculture, tourism, investment, trade facilitation, trade promotion as well as trade in goods and services are areas that have been subject to the EPA negotiations.⁹⁷ Every topic that the agreement will potentially include requires careful negotiation by PIC. However the most critical issue has concerned 'goods':⁹⁸

The EU interpreted the Cotonou Agreement to mean that EPAs must cover trade in goods. Pacific ACP states had ample reason to be cautious about a deal that would replace their one-way preferential access into the European market with reciprocal access to their own.

PIC with exports destined for the EU must consider how the EPA annex on goods (as a free trade agreement) will require them to make tariff adjustments so as to conform to GATT article XXIV.

PIC therefore, are currently in the process of negotiating with the EU to develop an EPA that is suited to its needs. In light of the proposed EPA and the current negotiations, the next Part of this paper discusses particular considerations for New Caledonia.

IV CONSIDERATIONS FOR NEW CALEDONIA

As an OCT, New Caledonia has an interesting status in the trade world. It is constitutionally and internationally a territory of France, but geographically part of the Pacific region. New Caledonia is not traditionally considered a PIC and therefore does not form part of the ACP group in terms of the CPA nor the EPA negotiations. Its trade regime with the EU is separate to that of the ACP states. However, the EU has expressed that its trade arrangements with the OCT should in principle have identical rules to those of the ACP states.⁹⁹ The EU supports both the integration of the ACP states and the integration of the OCT into the world economy.

New Caledonia shares many of the geographical characteristics of the Pacific states.¹⁰⁰ From an international perspective it is small in size and population.¹⁰¹ However, unlike many of the

97 See, State Play in Pacific Negotiations <www.oxfam.org.nz/imgs/pdf/state%20of%20play%20in%20pacp%20negotiations%20oct%202006.pdf> (last accessed 11 January 2007).

98 And hence has been the focus of this paper. "Regionalism: An Opportunity or an Imposition on Fiji", above n 83, 6.

99 Commission Regulation (EEC) 2304/2002 implementing Council Decision 2001/822/EC on the Association of the Overseas Countries and Territories with the European Community (Overseas Association Decision) [2002] OJ L 348, Preamble. See below, Part IV,A,1.

100 It is surrounded by water and has a warm climate. It is relatively isolated which makes the country less threatening to other countries. Terrorism has been much less of a concern for PIC and New Caledonia than for example environmental and economic development concerns. Like many PIC a main resource in New Caledonia is fish. It is also, like Fiji, the Cook Islands and French Polynesia, attractive to tourists.

101 See above n 1.

PIC,¹⁰² New Caledonia's economy is currently secure. In fact, it is the third largest economy in the Pacific.¹⁰³ Nevertheless, the country's inability to be self-sufficient let alone competitive cannot be ignored.¹⁰⁴ Apart from nickel (which accounts for 90 per cent of New Caledonia's export earnings) New Caledonia's other industries are very small and the country depends heavily on imported products.¹⁰⁵

Like the PIC, New Caledonia benefits from non-reciprocal preferential treatment from the EU and it has barriers to trade in place to protect its domestic industry.¹⁰⁶ The EU is New Caledonia's main trading partner both in terms of imports¹⁰⁷ and exports.¹⁰⁸ And, as an OCT, New Caledonia also receives aid from the EU via the Economic Development Fund (EDF).¹⁰⁹ Accordingly, the EU is an important link for New Caledonia for both aid and trade.

This Part will consider how the EU/ACP trade arrangements are relevant to New Caledonia's trade future. It finds that there are positive reasons for New Caledonia's increased involvement in

102 As at 2003 the GDP per capita of PIC (of the ACP group) was as follows: Cook Islands (US\$7,332); Fiji (US\$2,762); Kiribati (US\$781); Marshall Islands (US\$1,600); Nauru (US\$3,465); Niue (US\$3,600); Papua New Guinea (US\$577); Samoa (US\$1,807); Solomon Islands (US\$568); Tonga (US\$1,626); Tuvalu (US\$2,285); and Vanuatu (US\$1,140).

103 Behind Australia and New Zealand. The island has a GDP per capita of US\$14,128: Accordingly, it would not be a LDC in WTO terms. Statistics (as at 2001) were produced by the Worldbank; Available at <<http://ec.europa.eu/comm/development/oct/docs/statistics%20trade%202004%20.pdf>> (last accessed 22 November 2006).

104 The reason New Caledonia is arguably unable to be self-sufficient is because even though it has a large nickel industry, its GDP figure includes subventions from France. In absence of the French subventions, the GDP figure would be lower. See, <<https://www.cia.gov/cia/publications/factbook/print/nc.html>> (last accessed 11 February 2007).

105 See Appendix 1.

106 It was only in 1982 that income tax was introduced. Previous to this the only tax received by the government was by way of customs duty.

107 Sixty per cent of New Caledonia's imports come from the EU: Fiche Pays N Caledonia <<http://ec.europa.eu/comm/development/oct/docs/statistics%20trade%202004%20.pdf>> (last accessed 22 November 2006).

108 Forty-one per cent of New Caledonia's exports are destined for the EU; 25 per cent go to Japan; 10 per cent to South Korea; eight per cent to Australia, and 16 per cent to other countries. Facts were obtained from: Fiche Pays N Caledonia <<http://ec.europa.eu/comm/development/oct/docs/statistics%20trade%202004%20.pdf>> (last accessed 22 November 2006).

109 The EU provides financial aid to ACP states through the 9th EDF. Aid from the EU to ACP states was formerly part of the Lomé conventions since 1975 (see above Part I). The current official document for the regulation of the fund is: Council Decision (EEC) of 12 July 2002/647 Rules of Procedure of the European Development Fund Committee [2002] OJ L 212. For allocation of EDF money under the current 9th EDF (due to expire in 2007 and will be replaced by the 10th EDF), see Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, annex II A.

EU/ACP trade relations. Increased involvement could be either by New Caledonia as part of the EU or as part of the ACP Pacific group.

A Conformity with WTO Objectives

A positive reason for New Caledonia's involvement in the EPA negotiations is because the EPA will conform to WTO objectives. New Caledonia's current preferential trade regime with the EU is non-reciprocal and expires in 2012.¹¹⁰ Given the worldwide erosion of trade preferences and the evolution of free trade, for New Caledonia, closer participation in the EPA negotiations is desirable. This would allow New Caledonia to be better integrated into the Pacific region. Ultimate integration into the world market therefore becomes a genuine and realistic goal.¹¹¹ This sub-Part will first discuss why the expiry of New Caledonia's current trade regime with the EU is a positive reason for its active participation in the EPA negotiations; and second, how regional integration (and therefore ultimate integration into the world market) is a feature of both the OCT trade regime and the CPA.

1 Expiry of the OCT trade regime

Although France signed the CPA,¹¹² the OCT do not fall within the EU custom union.¹¹³ Therefore, special trade arrangements apply for New Caledonia (and other OCT) notwithstanding the CPA. This is consistent with Part Four of the EC Treaty - which makes special allowances for the OCT of the European signatories of the Treaty.¹¹⁴ The segregation of the OCT markets from those of the EU must necessarily be taken into account in the application of the CPA. However,

110 Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 63.

111 Although New Caledonia, would not want to give up trade preferences, the EU (which gives the preferences) actively supports trade liberalisation and is trying to prepare the OCT for integration into the world market. See Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, arts 12 and 16(2).

112 This is confirmed in art 92 of the CPA: Subject to the special provisions regarding the relations between the ACP States and the French overseas departments provided for therein, [that is, Part Four of the EC Treaty and the Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314] this Agreement shall apply, on the one hand, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty and, on the other hand, to the territories of the ACP States. Two Bills ratifying the CPA and the EDF were unanimously adopted by the Senate on February 2002 and National Assembly on 21 February 2002.

113 Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, preamble para 6. Therefore, despite a Member State of the EU (that is not an OCT) being a WTO member, its OCT is not automatically included. Ie France is a WTO member but New Caledonia is not.

114 Part Four of the EC Treaty provides for a special relationship between the EU and OCT. For example the OCT are formally not part of the EU customs union.

what equally must be considered is that Part Four of the EC Treaty should not be used to completely subvert common EU standards.¹¹⁵

(a) Trade preferences under the OCT trade regime

Similarly to the PIC under the CPA, the OCT benefit from an advantageous trade regime. The EU Decision of 2001 governs the current OCT trade regime.¹¹⁶ Like the CPA for PIC, the OCT trade regime allows for non-reciprocal arrangements. That is, products originating in the OCT imported into the EU are not subject to import duties or quantitative restrictions, but products originating in the EU are subject to the import duties established by the OCT. The preferential measures are found in article 40 of the Council Decision:¹¹⁷

In view of the present development needs of the OCTs, the authorities of the OCTs may retain or introduce, in respect of imports of products originating in the Community, such customs duties or quantitative restrictions as they consider necessary.

- (a) The trade arrangements applied to the Community by the OCTs may not give rise to any discrimination between Member States nor be less favorable than most-favoured-nation treatment.
- (b) Notwithstanding specific provisions of this Decision, the Community shall not discriminate between OCTs in the field of trade.
- (c) The provisions of (a) shall not preclude a country or territory from granting certain other OCTs or other developing countries more favorable treatment than that accorded to the Community.

Although this preferential treatment is granted to countries based on whether they are an OCT, the OCT regime is an 'internal' trade arrangement and is therefore not discriminatory under WTO principles. Unlike the external trade arrangement the EU had with the ACP states, justification for the OCT regime's continuance did not require a WTO waiver.¹¹⁸

115 This proposition is based on an analogy to the decision: CJCE, 22 novembre 2001, *Royaume des Pays-Bas contre Conseil de l'Union européenne*, aff C-110/97, Rec 2001, 1-08763. The conclusion of that decision was that Part four must be taken into account in the application of EU law to OCT. However, other EU principles must equally be taken into account. Part Four could not be used to subvert the EU Common Agriculture Policy.

116 Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 40.

117 Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 40(1) and (2).

118 Some might dispute this. See below, Part IVB for arguments under GATT art XXIV:12.

(b) Replacement/Renewal of trade regime

Like the CPA, the OCT trade regime provides only for a temporary arrangement.¹¹⁹ It contains a 'sunset clause'¹²⁰ and is due to expire in 2012. Its replacement is uncertain. However, it is a reasonable prediction that a new trade regime will reflect the trade regime of the EU and ACP states. WTO objectives are becoming more predominant in relations between WTO and non-WTO members.¹²¹ To support this proposition, it should be noted that the EU actively supports the integration of the OCT into the world economy. This is clearly expressed in article 16(2) and implied in article 12 of the Council Decision,¹²² and the Commission Regulation implementing the Council Decision states in the preamble that "[in] order to facilitate regional cooperation and integration between OCT and ACP countries, identical rules in principle should apply."¹²³ Furthermore in respect of services, the WTO framework is relevant to the implementation of the Council Decision Rules.¹²⁴ A contextual interpretation therefore suggests that WTO influence is great and there is no guarantee that non-reciprocal arrangements will extend beyond 31 December 2011.

The replacement trade regime for OCT in 2012 might take a number of forms: the status quo (that is, another OCT regime); the GSP (that has been unilaterally composed by the EU¹²⁵); the Pacific EPA.¹²⁶

119 The Decision will remain in force until 31 December 2011. The Decision was implemented in the Commission Regulation (EEC) 2304/2002 of 20 December 2002; and Corrigendum to the Commission Regulation (EEC) 2304/2002 of 20 December 2002.

120 Article 63 of the Decision makes it clear that the Decision is applicable until 31 December 2011.

121 Jane Kelsey discusses WTO-compatibility in respect of PACER and notes that WTO compliance extends to both WTO and non-WTO members. See "Free Trade Agreements – Boon or Bane?: Through the Lens of PACER", above n 65, 401.

122 The implication in article 12 is from the trade development aims increasing self-reliance of the OCT.

123 Commission Regulation (EEC) 2304/2002 Implementing Council Decision 2001/822/EC on the Association of the Overseas Countries and Territories with the European Community [2002] OJ L 384, para 5.

124 See, Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 44. For example, the OCTs cannot discriminate among countries in respect of their provision of services: Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 45(2)(b).

125 New Caledonia can be merely associated in any future discussions. See below, Part IV, A 1(e); and Nouméa Accord art 3.2.1.

126 For those countries in the Pacific region. Other OCT – for example those in the Caribbean – might raise a similar argument for the replacement of the OCT trade with the Caribbean EPA.

Given the demise of the OCT regime, the EU's general support for the involvement of the OCT in the EPA negotiations is not surprising.¹²⁷

It will come as no surprise that the Commission encourages OCT's to proceed in the direction of more regional integration, among others through EPAs, especially given the erosion of the trade regime applicable to OCT's due to the progressive liberalization of international trade. Indeed, there is added value for OCT's in exploring – and effectively making use of – the advantages of regional trade integration.

New Caledonia's eligibility for involvement in the EPA negotiations should therefore be considered.

(c) New OCT regime for New Caledonia

The Pacific EPA will indirectly impact on any new OCT regime.¹²⁸ This is because the current trade preferences between the EU and OCT might no longer be tenable were the PIC to expect unrestricted access to the EU's OCT under the EPA.¹²⁹ The OCT therefore ought to be voicing their opinion and concerns while the EPA negotiations are in progress.¹³⁰

Although New Caledonia is one of the world's largest producers of nickel,¹³¹ and the country does not currently face the same economic challenges as most PIC, its integration into the world market needs careful consideration. New Caledonia consistently runs a trade deficit.¹³² Liberalisation of its trading regime would mean it would have to compete in the world market. It will face the same problems as other PIC – imports will overwhelm the local producers. This is a concern whether the imports are from a PIC such as Fiji or from an EU member. While the country may be able to survive through its tourism and production of nickel, there is no level playing field

127 Closure by DG DEV <http://ec.europa.eu/comm/development/oct/index_en.htm> (last accessed 25 November 2006).

128 The EPAs of other regions will also have impact.

129 The PIC would not be successful in arguing this in respect the current CPA trade arrangements because there are special conditions for the OCTs – CPA art 92. The CPA is subject to special provisions that apply to the OCT. However, the move to EPAs might suggest a change. The future EPA trade arrangement will be reciprocal. The PIC which sign the annex on goods will be expected to open their markets to the EC. Thus, it seems that the PIC, may expect the same of the OCT by virtue of their status within the EU. Fiji as a potential signatory to the EPA FTA would have an interest in making this argument given the increased trade with New Caledonia in recent years. See below n, 154.

130 Fiji's exports to New Caledonia are increasing. New Caledonia therefore would have a strong interest in voicing its concerns to the PIC – particularly Fiji. See below, n 154.

131 Behind Russia and Canada.

132 New Caledonia <<http://www.mfat.govt.nz/Countries/Pacific/New-Caledonia.php>> (last accessed 20 November 2006).

on the international scale. If local industries are unable to compete, there may be an increase in unemployment. Whether New Caledonia's concerns would be adequately catered for by the EU in a new OCT trade regime remains uncertain. There exists a disparity of power between OCT and the EU. In respect of New Caledonia, although there is a special provision in the Agreement signed at Nouméa on 5 May 1998 (Noumèa Accord)¹³³ allowing New Caledonia to be associated in discussions concerning the re-negotiation of an OCT agreement, association is different to full participation.¹³⁴ To a large extent New Caledonia must rely on France.

(d) EPA for New Caledonia

Ideally, New Caledonia should become formally involved in the EPA negotiations with the prospect of joining the EPA as a potential member of the Pacific group. If the EPA were to replace the OCT regime for New Caledonia, then both the interests of the EU and New Caledonia could be addressed. Liberalisation of trade will be a predominant feature of the EPA. Simultaneously, trade vulnerabilities can be taken into account.¹³⁵ New Caledonia's economic position can be voiced with other PIC who also lack exports. Importantly, the EU does not have the power to impose an EPA unilaterally. The CPA (which has regulated the development of the EPA) fosters a relationship of partnership in which cooperation between the EU and ACP states is based on the principle of equality.¹³⁶

133 Published in the Journal Officiel of the French Republic on 27 May 1998.

134 See the GSP scheme - set out in EC Council Regulation No 2501/2001. See also, "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 22. Other disadvantages result from the limited life of the scheme requiring "periodical renewal, heavy administrative requirements and more often a lack of awareness of the availability of the preferences among Government trade officials and private sector representatives": Bonapas Onguglo and Taisuke Ito "Challenges and Opportunities in Multilateral and Regional Trade Policy Environment for Commodity-Based Development of Pacific Island Countries" (Regional Workshop on the Constraints, Challenges and Prospects for Commodity-Based Development in the Pacific Island Countries, Fiji, 18-20 September 2001) 3.2.1.

135 "[F]or the purposes of implementing the objectives of the partnership, the ACP States shall determine the development strategies for their economies and societies in all sovereignty and with due regard for the essential elements described in Article 9; the partnership shall encourage ownership of the development strategies by the countries and populations concerned": CPA art 2. However, how the EU will agree to address the vulnerabilities remains uncertain. One issue of on-going debate is special arrangements for Fiji's sugar exports. Fiji wants an arrangement that will not trigger GATT art XXIV compliance. See above Part III, B, 1 and above n 99. See also "Regionalism: An Opportunity or an Imposition on Fiji", above n 83, 4; and "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 58.

136 CPA art 2. It should be noted that the provision has been subject of some debate. Jane Kelsey for example, doubts whether true equality can exist between a powerful region (the EU) and small vulnerable states (PIC). See, "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 37.

(e) GSP for New Caledonia

Given the uncertainty of continued non-reciprocal trade preferences, if New Caledonia is not actively involved in EPA negotiations then it may eventually find itself in a difficult position. Supposing the current OCT trade preferences were ended from 2012, the EU's GSP might be the only realistic option left for New Caledonia. The GSP is a WTO-approved system that allows a 'developed' country (the EU) to grant preferences to 'developing' countries on a non-discriminatory basis.¹³⁷ The kind and extent of preferences that the developed country gives under a GSP is discretionary and can be withdrawn unilaterally.¹³⁸ Rather than a relationship of partnership, which the EPA entails, benefiting from a GSP means the EU will have a superior status to New Caledonia in the trade relationship.

(f) Summary

The EU is supportive of the gradual removal of trade preferences whether or not the beneficiaries are WTO members. The OCT trade regime is an example of such influence. The EU's development strategies for OCT seek to avoid the marginalisation of those countries by the effects of globalisation.¹³⁹

Toute action de ce type a pour objectif d'éviter la marginalisation des territoires concernés que ce soit économiquement, socialement ou plus généralement culturelle. De ce point de vue, le régime d'association des PTOM à la Communauté a pour objectif essentiel d'essayer d'éviter autant que se peut une telle marginalisation.

New Caledonia would benefit from active participation in the re-negotiation of its trade arrangements with the EU and increased economic ties with the PIC. It is desirable that New Caledonia should be involved in the EPA negotiations regardless of what form its future trade arrangement with the EU might have – whether it be another OCT regime or an EPA.¹⁴⁰

2 Regional Integration

As the trend to liberalise trade has become a live issue, regional integration has equally become an important ideal for countries with less substantial markets. The formal involvement of New

137 "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 19. See above, Part III, A, 3, (b).

138 "A People's Guide to the Pacific's Economic Partnership Agreement", above n 8, 19.

139 Charles-Etienne Gudin "Le Statut Communautaire de la Polynésie Française" in *Le Pacifique et L'Europe* (2007) *Revue Juridique Polynésienne* (Vol VII, Hors Série) 65, 74: It is the object of all actions of this kind to avoid the marginalisation of the territories involved whether economically, socially, or more generally culturally. From this point of view, the regime of association of the OCT has the primary objective of seeking to avoid such marginalisation as much as possible." (Author's translation.)

140 Whether it can become involved in the EPA negotiations is addressed below in Part V.

Caledonia in the Pacific EPA negotiations would be a positive first step to assist the country to ultimately integrate into the world market.¹⁴¹ The legal basis to support the integration of New Caledonia into the Pacific region is therefore relevant.

(a) Legal basis

Regional integration is expressly supported in both the current OCT regime¹⁴² and the CPA.¹⁴³ In the context of these agreements, it does not appear as a right but rather as a 'vision' yet to be tested.¹⁴⁴ However, for the reasons pointed out in Part II, this paper acknowledges the potential benefits of regional integration. Although 'regional integration' might be argued as idealistic rhetoric,¹⁴⁵ because trade liberalisation has become a reality, it is proposed that the PIC and the OCT should unite in a common endeavour as opposed to 'fighting the tide'. The EU Trade Commissioner supported this perspective in his statement to the Joint Ministerial Trade Committee:¹⁴⁶

[Regional integration] requires a common vision for the appropriate pooling of sovereignty, the definition of solidarity mechanisms, the building of markets. We ourselves in Europe have experienced this with plenty of ups and downs along the way. Nevertheless there is no alternative.

Regional integration is a core feature of the OCT trade regime appearing in the preamble to the Commission Regulation and in article 16 of the Council Decision. Particularly, cooperation with ACP states is encouraged.¹⁴⁷ The objectives of cooperation are to:¹⁴⁸

141 Integration into the world market is what the EU envisions for the OCT. Trade liberalisation is an unavoidable consequence for New Caledonia if the trade preferences by the EU are removed.

142 Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 16.

143 CPA arts 2 and 28.

144 In respect of the Pacific there are few studies. Kelsey has pointed this out in her paper: "Regionalism: An Opportunity or an Imposition on Fiji", above n 83, 1. Kelsey criticises the concept of regionalism.

145 "Regionalism: An Opportunity or an Imposition on Fiji", above n 83, 1.

146 EU Trade Commissioner, Pascal Lamy "ACP/EU Joint Ministerial Trade Committee" (2003 JMTC Address, St Lucia, 1 March 2003) 3. For information on the Joint Ministerial Trade Committee see below Part V, A, 2, (b).

147 This is implied in the preamble to the Council Regulation (EEC) 2304/2002 Implementing Council Decision 2001/822/EC on the Association of the Overseas Countries and Territories with the European Community [2002] OJ L 348. And, expressed in Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 16.

148 Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 16.

- (a) foster the gradual integration of the OCT's into the world economy;
- (b) accelerate economic cooperation and development within the regions of the OCT and between them and the regions of the ACP States;
- (c) promote the free movement of persons, goods, services, capital, labour and technology;
- (d) accelerate economic diversification and the coordination and harmonisation of regional and sub-regional cooperation policies;
- (e) promote and foster inter-OCT and intra-OCT trade as well as trade with the most remote regions, ACP States or other third countries.

Moreover, regional integration was also reflected in the CPA. Differentiation and regionalisation were two fundamental principles of the CPA.¹⁴⁹ Regional cooperation and integration is reinforced in article 28. Notable is the particular reference to the OCT:

Cooperation shall provide effective assistance to achieve the objectives and priorities which the ACP States have set themselves in the context of regional and sub-regional cooperation and integration, including inter-regional and intra-ACP cooperation. Regional Cooperation can also involve Overseas Countries and Territories (OCT's) and outermost regions. In this context cooperation support shall aim to:

- (a) foster the gradual integration of the ACP States into the world economy;
- (b) accelerate economic cooperation and development both within and between the regions of the ACP States;
- (c) promote the free movement of persons, goods, services, capital, labour and technology among ACP countries;
- (d) accelerate diversification of the economies of the ACP States; and coordination and harmonisation of regional and sub-regional cooperation policies; and
- (e) promote and expand inter and intra-ACP trade and with third countries.

The provisions of the CPA are strikingly similar to the OCT regime - closer association of the OCT with neighbouring countries is encouraged. However, if the objectives that were set out in the CPA and OCT regime are to eventuate, there must be transparency in terms of EU-ACP/OCT relations. Remaining an 'outsider' to the ACP group (although geographically within the Pacific region) may be a disincentive for PICs to form close ties with New Caledonia. And equally, from New Caledonia's perspective, integration is restrictive if it must constantly rely on France to

149 CPA art 2.

formally interact with Pacific states on its behalf. Allowing New Caledonia to participate with its neighbours in the EPA negotiations is a first step to harmonisation in the South Pacific.

(b) Evidence of New Caledonia's current participation in the Pacific region

Leaving aside the Pacific EPA negotiations, New Caledonia's affiliation with other Pacific agreements and organisations suggests 'regional integration' is a genuine goal. New Caledonia's increased integration into the Pacific region is confirmed by the following examples: New Caledonia is a long-standing member of the Pacific Community,¹⁵⁰ initial steps have been taken to associate New Caledonia more closely with the PIF¹⁵¹ and, New Caledonia is currently developing regional integration instruments within the Pacific region¹⁵² (for example it is strengthening ties with PICTA).¹⁵³ In addition to the closer legal involvement of New Caledonia with PIC, in more practical terms, trade between Fiji and New Caledonia, and New Caledonia's imports from Australia, are increasing.¹⁵⁴

150 See, New Caledonia Country Brief – July 2006 <http://www.dfat.gov.au/geo/new_caledonia/new_caledonia_brief.html> (last accessed 20 November 2006) and SPC <<http://www.dfat.gov.au/spc/>> (last accessed 20 November 2006). The Pacific Community is the former South Pacific Community (SPC). Information can be obtained at SPC <<http://www.spc.int/>> (last accessed 11 February 2007).

151 See Steve Thomas "Euphoria in the Pacific? Regional Economic Partnership Agreements – Implications for the Pacific" (New Zealand Asia Pacific European Studies Association Conference, Christchurch, 9-11 September 2004) 25. New Caledonia became an Observer to the PIF in 1999 and in 2006 it applied for the new PIF category of Associate Member: New Caledonia Country Brief – July 2006 <http://www.dfat.gov.au/geo/new_caledonia/new_caledonia_brief.html> (last accessed 20 November 2006).

152 EC – OCT Forum 2005 5 December <http://ec.europa.eu/comm/development/oct/ec_oct_forum_2005-en.htm> (last accessed 20 November 2006).

153 EC – OCT Forum 2005 5 December <http://ec.europa.eu/comm/development/oct/ec_oct_forum_2005-en.htm> (last accessed 20 November 2006). New Caledonia may well wish to join PICTA. Whether it could join without French input or participation is a complex matter of French constitutional law and is beyond the scope of this paper.

154 For information about the growing trade relationship with Fiji see, <<http://www.fijiembassydc.com/default.asp?contentID=589>> (Last accessed 20 November 2006). Fiji's current export items to New Caledonia include prepared food stuffs, beverages, spirits, tobacco, textiles, paper etc: Fiji Stands Trade & Investment News <<http://www.ftib.org.fj/ftib.news.cfm?monthld=70year=2006>> (last accessed 20 November 2006). "According to Fiji Foreign Minister Kaliopate Tavola, Fiji's exports to New Caledonia have grown by almost 60 per cent since 2002." <<http://www.fijiembassydc.com/default.asp?contentID=589>> (last accessed 20 November 2006). In regard to trade between Australia and New Caledonia see, New Caledonia Country Brief – July 2006 <http://www.dfat.gov.au/geo/new_caledonia/new_caledonia_brief.html> (last accessed 20 November 2006) and SPC <<http://www.dfat.gov.au/spc/>> (last accessed 20 November 2006).

Finally, the Government of New Caledonia has expressed its desire to:¹⁵⁵

Mieux appréhender les enjeux économiques et sociaux de la région Pacifique, Se doter de méthodes et d'outils pour négocier des accords commerciaux avec les pays voisins, Participer au développement de sa région et contribuer au développement des relations entre les pays de sa région et l'Union européenne [and to support] Meilleure intégration de la NC dans la région Pacifique [et] Contribution à la politique de coopération de l'Union européenne dans la région Pacifique.

This again implies support for the integration of New Caledonia into the Pacific region.

(c) Summary

For regional integration to reach its full potential, New Caledonia's formal inclusion in EPA negotiations should be encouraged. Both the OCT regime and the CPA have encouraged cooperation between OCT and the ACP States. New Caledonia already has a close network with PIC via the Pacific Community and the PIF and various other regional arrangements. WTO objectives can be promoted through regionalisation. It is foreseeable that the EPA will prepare the countries for integration into the world market. Given both the OCT regime and the CPA have been subject to WTO influence New Caledonia should form stronger ties with its Pacific neighbours. Transparent interaction is best achieved through New Caledonia joining with the PIC of the ACP Group.

B Conformity with WTO Rules

GATT article XXIV:12 affects the territories of WTO members. This sub-Part considers GATT article XXIV:12 and the responsibility of France and/or the EU in respect of New Caledonia.

As mentioned earlier in this Part, New Caledonia benefits from a non-reciprocal preferential trade arrangement with the EU because it is an internal part of an EU member. The arrangement is analogous to the preferential treatment ACP States had under the CPA. Part III of this paper has pointed out that the trade preferences offered by the EU to the ACP states were incompatible with WTO rules as they violated the MFN principle. Unless the EU offers an arrangement that falls within scope of the Enabling Clause, a preferential arrangement must meet the requirements of GATT XXIV – that is, it must be reciprocal. The EU has an obligation to comply with WTO rules regardless of whether the beneficiaries are WTO members or not. Although the arrangements under the OCT regime and the CPA are substantively similar, the relationship of the parties to the CPA is

¹⁵⁵ Gouvernement of Nouvelle-Calédonie "La politique d'intégration régionale de la Nouvelle-Calédonie : développement et perspectives" (Séminaire sur les APE : Bruxelles, 13-15 juin 2005). "To better understand the economic and social issues in the region; acquire skills and procedures to negotiate commercial agreements with neighbouring countries; to participate in the development of its region and to contribute to the development of relations between the countries of the region and the EU [and to support] better integration of New Caledonia into the Pacific region and contribution to the EU cooperation policy for the Pacific region" (Author's translation).

different to that of the OCT regime. The CPA was an agreement between states. Therefore it provided an external trade arrangement. In comparison, the OCT regime applies to non-States. The OCT fall within the realm of the EU. Thus, as noted earlier, the agreement is internal. However, whether such arrangement can disregard WTO rules completely or whether it simply allows more flexibility in terms of its framework becomes a relevant enquiry. GATT article XXIV:12 sheds some light on the issue. The Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that:¹⁵⁶

Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

Although there has been no case directly on the interpretation of the 1994 article,¹⁵⁷ its ambiguity has prompted scholarly debate.¹⁵⁸ Given the changing notion of sovereignty over recent years, the interpretation of the article makes interesting discussion. GATT article XXIV:12 provides yet another reason for New Caledonia's closer involvement with a WTO-compatible EPA.

1 Status of New Caledonia

Article XXIV:12 is often referred to as a "federal clause".¹⁵⁹ This is because, inter alia, it addresses the distribution of power in federal systems.¹⁶⁰ However, article XXIV:12 is not limited to federations by its wording and thus could apply to an OCT. The status of New Caledonia is interesting. Although New Caledonia has been defined as an OCT throughout this paper it should be noted that:¹⁶¹

[f]ollowing the ratification of the Nouméa Accord by the people of the Territory and the codification of its provisions into French Law, New Caledonia is no longer considered an Overseas Territory. Instead,

156 Understanding on the Interpretation of Article XXIV of the GATT 1994 art XXIV:12.

157 There have been cases but they were in respect of GATT 1947.

158 Much of this debate has concerned the federal systems of the United States or the Canadian provinces. See for example: John Jackson *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge, United Kingdom, 2006) 128; Edward Hayes "Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories" (2004) 25 NW J Int'l & Business 1.

159 This is probably because the scholarly debate has concerned primarily federal systems such as Canada, the USA, the EU, and Australia. See Edward Hayes "Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories" (2004) 25 NW J Int'l & Business 1, 5.

160 A federation is a union of a number of partially self-governing states or regions united by a central, or federal, government. See, Hogg P W *Constitutional Law of Canada* (Thomson, Toronto, 2004) 104.

161 UNGA "New Caledonia" (29 March 2005) Working Paper prepared by the Secretariat A/AC.109/2005/13 5.

the Government of France describes it as a community *sui generis*, which has institutions designed for it alone to which certain non-revocable powers of State will gradually be transferred.

From a constitutional law perspective, defining the status of New Caledonia has been difficult. A 'community *sui generis*' means a community of a specific or unique kind. Thus, it is a description of New Caledonia's position within France and not a generally accepted 'status' in constitutional/international law. One comment has admitted that following the Nouméa Accord:¹⁶²

no-one has been able to suggest a legal category which would allow New Caledonia to be described as "the new institutional structure". At the most theory has identified the fact that New Caledonia is "less than a federated state within a federation".

Whatever the exact constitutional status of New Caledonia, it is not a federated state,¹⁶³ but is a 'sub-national' entity - it has a special place in the EU structure (the EU continues to categorise it as an OCT); until independence it is a part of France and has a regional government within France.

With the establishment of the EU, a two-tier legal system evolved. The EU Council is the ultimate body setting legal requirements and minimum standards for its members to observe.¹⁶⁴ Below that are the national legal systems of each sovereign state. The OCT form a third tier in the EU structure.

Accordingly, the EC and France may have potential responsibility under GATT article XXIV:12 because they are WTO signatories. This paper focuses on France as the signatory which has responsibility for New Caledonia, given the specific derogation in Part IV of the EC Treaty of the OCT from the Common Market.

2 *Analysis of GATT Article XXIV:12*

Sub-national states are not direct signatories of the WTO or the GATT.¹⁶⁵ Therefore the threshold for a sub-national's compliance with GATT is not the same as that of a direct signatory. In fact the obligation is not on the sub-national entity at all; it is on the signatory. The Understanding

162 See below Part V.

163 France is a unitary state. See art I of the French Constitution of 4 October 1958.

164 "The EU is a WTO member in its own right as are each of its 15 member States – making 16 WTO members altogether. While the member States coordinate their position in Brussels and Geneva, the European Commission alone speaks for the EU and its members at almost all WTO meetings and in almost all WTO affairs. For this reason, in most issues, WTO materials refer to the "EU", or the legally-official "EC": European Union or Communities? <http://wto.org/english/thewto_e/countries_e/european_communities_e.htm> (last accessed 11 January 2007).

165 With the exception of the EU States within the EU. This paper does not address the EU's responsibility for EU 'states'. The paper is only concerned with New Caledonia which is a sub-national non-signatory to the WTO. Michael Trebilcock *The Regulation of International Trade* (3ed Routledge, New York, 2003) 36.

on the Interpretation of Article XXIV of the GATT 1994 makes this clear – the onus is on "[e]ach Member".¹⁶⁶

The way the article is framed, it creates both an obligation¹⁶⁷ for the signatory - it "reaffirms nation/state responsibility for acts omissions of its component government units"; and it provides an exception for the WTO member – that is, where the issue falls in the ambit of the constitutional prerogative of the sub-national, the responsibility of the signatory might be limited.¹⁶⁸

It is clear what the obligation imposed by article XXIV:12 is not; it clearly falls short of imposing on a signatory the full implementation of GATT in a sub-national entity.¹⁶⁹ However, it is ambiguous as to what the scope of the obligation is. GATT article XXIV:12 leaves open the question of what constitutes "reasonable measures" – that is, when a signatory might be exempted from the obligation imposed by the article.¹⁷⁰ Obviously the article requires a balancing of the inherent tension between supranational regulation (such as in the EU) and nation sovereignty (such as France vis a vis New Caledonia). To some extent, cases which interpreted GATT 1947, have assisted but have not completely resolved the ambiguity.

The WTO Panel in *Canada-Measures Affecting the Sale of Gold Coins*¹⁷¹ concluded that in respect of the 'reasonable measures' exception:¹⁷²

166 Understanding on the Interpretation of Article XXIV of the GATT 1994, art XXIV:12.

167 Such obligation is consistent with customary international law. "As a general rule, customary international law imposes responsibility on federal nation/states for acts or omissions of their component governmental units, that violate international obligations of the nation/states." Edward Hayes "Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories" (2004) 25 NW J Int'l & Business 1, 20. Vienna Convention on the Law of Treaties (27 January 1980) 1155 UNTS 331.

168 "Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories", above n 159, 8.

169 *Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies (Canada – Alcohol I)*, adopted 22 March 1988, BISD 35S/37; and *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (Canada – Alcohol II)*, adopted 18 February 1992, BISD 39/27, para 5.36.

170 Understanding on the Interpretation of Article XXIV of the GATT 1994, art XXIV:12. See, "Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories", above n 159, 25.

171 *Canada-Measures Affecting the Sale of Gold Coins* (17 September 1985) L/5863.

172 *Ibid*, 15.

[a]rticle XXIV:12 applies only to those measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence.

Further, the Panel considered that:¹⁷³

as an exception to a general principle of law favouring certain contracting parties, Article XXIV:12 should be interpreted in a way that meets the constitutional difficulties which federal States may have in ensuring the observance of the provisions of the [GATT] by local governments, while minimizing the danger that such difficulties lead to imbalances in the rights and obligations of contracting parties. Only an interpretation according to which Article XXIV:12 does not limit the *applicability* of the provisions of the [GATT] but merely limits the obligations of federal States to secure their *implementation* would achieve this aim.

Also:¹⁷⁴

in determining which measures to secure the observance of the provisions of the [GATT] are 'reasonable' within the meaning of Article:12, the consequences of their non-observance by the local government for trade relations with other contracting parties are to be weighed against the domestic difficulties of securing observance.

*Canada Alcohol II*¹⁷⁵ interpreted "reasonable measures" narrowly. The Panel in that case ruled that a federal government must take "serious, persistent and convincing efforts" to secure compliance by sub-national authorities.¹⁷⁶

3 *Application to New Caledonia*

The GATT does not suggest that France should impose requirements on New Caledonia to remove trade barriers to force compliance with MFN objectives. To do so would be ironic because it is the OCT regime (devised and authorised by the EU) that is potentially WTO-incompatible. The OCT regime has in principle put New Caledonia outside WTO requirements. The EU and France as WTO members created the discriminatory treatment to OCT, not the other way around.

France therefore may have responsibility under GATT article XXIV:12 for New Caledonia. France could be in breach of its obligations if, constitutionally, external trade relations remain within its prerogative. French constitutional law makes clear that the 'external trade' power is shared

173 Ibid, 17 (emphasis in original).

174 *Canada – Measures Affecting the Sale of Gold Coins* (17 September 1985) L/5863 (Panel) 18.

175 *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (Canada – Alcohol II)* (18 February 1992) BISD 39/27 (GATT).

176 *Canada – Alcohol II* (18 February 1992) BISD 39/27 para 5.37 (GATT).

between France and New Caledonia.¹⁷⁷ Therefore the lack of complete autonomy of New Caledonia suggests that intervention by France (to ensure GATT compliance) is not unreasonable. In theory, France could be subject to challenge by a WTO member.¹⁷⁸ The legality of the OCT regime therefore ought to be revisited in light of this argument. New Caledonia's closer participation with the WTO-compatible EPA should be encouraged.

C Other – Potential Independence

The Nouméa Accord establishes a framework for the transfer of powers from France to New Caledonia – the ultimate step is full sovereignty.¹⁷⁹ The Noumea Accord committed France to conduct as many as three referenda between 2013 and 2018 on whether New Caledonia should assume complete sovereignty and become fully independent.¹⁸⁰ Pending a majority vote, France has acknowledged that it is "appropriate that New Caledonia achieve complete emancipation."¹⁸¹ If New Caledonia were to become independent then it would no longer be an OCT¹⁸² and therefore whether it can continue to benefit from the OCT trade regime is a relevant enquiry.

Article 61 of the current OCT regime provides that:

If an OCT becomes independent:

- (a) the arrangements provided for in this Decision may continue to apply provisionally to that country or territory under conditions laid down by the Council;
- (b) the Council, acting unanimously on a proposal from the Commission, shall decide on any necessary adjustments to this Decision...

177 Nouméa Accord art 3.2.1. See below, Part V,A,1.

178 Based on the fact that France allows New Caledonia to benefit from a non-reciprocal preferential trade arrangement that is only available to the OCT. However, whether the challenge would be accepted by the WTO requires a detailed analysis of the GATT and French constitutional law. That is beyond the scope of this paper. Instead this paper has simply pointed out that such a challenge is, in theory, a possibility to provide another reason to support New Caledonia's potential involvement with the Pacific EPA.

179 See Nouméa Accord preamble, arts 3 and 5.

180 New Caledonia Country Brief – July 2006 <http://www.dfat.gov.au/geo/new_caledonia/new_caledonia_brief.html> (last accessed 20 November 2006).

181 Nouméa Accord art 5.

182 Although constitutional lawyers have disputed the status of New Caledonia as an OCT after the Nouméa Accord was implemented (see above Part IV,B,1), international law and in particular, for the purposes of this paper, the EU still categorises a non-independent 'part' of a country as an OCT. Notwithstanding the Nouméa Accord, New Caledonia is listed as an OCT in the Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314 and in the EC Treaty Part Four.

Accordingly, New Caledonia could in theory continue to benefit for a time, from the current OCT trade regime if it became independent. However, New Caledonia's poll is not scheduled until after the expiry of the OCT regime.¹⁸³ Whether the replacement OCT regime would include a provision similar to the above mentioned article 61 is uncertain. Assuming that it did, continuance of New Caledonia in the OCT trade regime is 'permissible' but not guaranteed. The OCT regime merely says that it "may continue to apply provisionally."¹⁸⁴ The Council therefore has the discretion to unilaterally alter or terminate the application of the trade arrangements to New Caledonia after it becomes independent.

Additionally, if New Caledonia did become independent then its trade relationship with the EU becomes 'external' – the EU have a relationship with another 'State' therefore requiring WTO-compatible arrangements.¹⁸⁵ The legality of article 61 is debatable if the status quo is maintained. Since, the OCT receive non-reciprocal trade preferences (outside the scope of the Enabling Clause) those arrangements would have to be adjusted.¹⁸⁶

Accordingly, if New Caledonia is moving to decolonisation, the uncertainty of its trade future with the EU as an OCT is another reason for New Caledonia's increased participation in the negotiations for an EPA which would be WTO-consistent.

V *INCREASING NEW CALEDONIA'S INVOLVEMENT*

Increasing New Caledonia's involvement in EPA negotiations is desirable. As noted in Part IV, this increased involvement might be for New Caledonia to be formally involved in the EU/ACP negotiations with the prospect of joining the EPA as part of the Pacific Group. Or, it might simply increase its voice in the EPA negotiations but remain part of the EU. The former option is more desirable. Whether there is any constitutional impediment to New Caledonia's external trade capacity therefore becomes a relevant inquiry. International support for New Caledonia's involvement in the EPA negotiations is addressed in the second sub-Part.

183 OCT regime expires in 2012. New Caledonia's poll will be any time from 2013-2018. Independence before that date would require a constitutional amendment.

184 Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 61.

185 See above, Part III, A1.

186 Or given to all WTO members as well to be compliant with GATT 1947 art I.

A *External Trade Capacity*

1 *Domestic Constitutional Law*

Because New Caledonia is a territory of France, it is subject to the French Constitution¹⁸⁷ which provides that the development of New Caledonia shall be as set out in the Nouméa Accord.¹⁸⁸

The Nouméa Accord was implemented into the Organic Law of 1999.¹⁸⁹ In that regard:¹⁹⁰

the participants at the January 2002 meeting of the signatories of the Nouméa Accord agreed on the importance of developing trade and other relations with the larger actors in the Pacific region (Australia and New Zealand), as well as with other island States, and of building on existing links with regional organizations. Another concern expressed was the need to establish better links with the European Union, given its political, commercial and financial importance.

The Nouméa Accord (and the consequent Organic Law)¹⁹¹ establishes a timetable for New Caledonia to eventually assume full responsibility for government affairs and to have a poll for potential independence.

Powers transferred to New Caledonia under the Nouméa Accord are as follows:¹⁹² some were transferred at the start of implementation of the new political organisation in 2000 (existing powers);¹⁹³ some were transferred in 2004 and others will be transferred in 2009;¹⁹⁴ some will be

187 EC law applies to New Caledonia to the degree that it is an integral part of the French Republic. EC arrangements are subject to French constitutional law. See, CJCE, 10 octobre 1978, *Hansen*, aff 148/77:Rec 1978, 1787 and, Charles-Etienne Gudin "Le Statut Communautaire de la Polynésie Française", above n 139, 6.

188 See French Constitution of 4 October 1958 arts 72, 76, and 77. It should be noted that the reason a 1998 agreement (the Nouméa Accord) appears in the 1958 Constitution is because there was a constitutional amendment – the constitutional reform of 28 March 2003.

189 Organic Law of 19 March 1999 (*Loi organique relative à la Nouvelle-Calédonie*, #99-209, 19 March 1999, published in the *Journal Officiel* on 21 March 1999).

190 UNGA "New Caledonia" (29 March 2005) Working Paper prepared by the Secretariat A/AC.109/2005/13 9.

191 May 1999.

192 Nouméa Accord art 3.

193 Economic affairs, industrial relations and external trade (this paper argues shortly that external trade has a narrow meaning. See Nouméa Accord art 3.1.1.

194 These powers appear in the Nouméa Accord under "Powers to be transferred at a second stage" in article 3.1.2. They include civil registration rules, policing and security regulations for domestic air and sea traffic, drawing up of rules and implementation of measures for civil defence, accounting and financial regulations, civil and commercial law, fundamental principles governing land and real property rights, legislation on delinquent and endangered children, rules for administration of communes, administrative control over local government entities and their public corporations, secondary education, and regulations pertaining to private school teachers under contract.

shared between the State [France] and New Caledonia;¹⁹⁵ and others, termed 'reserved powers', cannot be transferred to New Caledonia until independence.¹⁹⁶ A referendum for independence could be at any time between 2013 and 2018.¹⁹⁷ The ultimate is full sovereignty – which may or may not eventuate depending on the result of the referendum.¹⁹⁸ It should be noted that once a power is transferred to New Caledonia, it "may not revert to the State, reflecting the principle of irreversibility governing these arrangements."¹⁹⁹ Nevertheless, this does not mean that France loses its sovereignty in this respect.²⁰⁰ This is because "a constitutional law which makes another constitutional law can also unmake it."²⁰¹ The irreversible nature of the transfer of power to New Caledonia "is purely a political affirmation, a moral undertaking, and nothing prevents this sovereign constituent power from going back on that undertaking."²⁰²

It is now relevant to determine whether the power for New Caledonia to become party to an EPA and/or join in EPA negotiations has been transferred by France. Of particular relevance in the Nouméa Accord are its 'shared powers' provisions concerning international and regional relations in article 3.2.1.²⁰³

- (a) International relations remain the responsibility of the State [France]. The latter will take New Caledonia's specific interests into account in international negotiations conducted by France and will associate it to the discussions.
- (b) New Caledonia will be entitled to become a member or associate member of certain international organizations, depending on their constitutions (Pacific international organisations, United Nations Organisation, UNESCO, ILO, etc)

195 International and regional relations, regulation making power regarding aliens, broadcasting, right to information concerning law and order, mining regulations, international air services, tertiary education and scientific research: See Nouméa Accord art 3.2.

196 The reserved powers include justice, law and order, defence and currency and external affairs: See Nouméa Accord art 3.3.

197 See, New Caledonia Country Brief – July 2006 <http://www.dfat.gov.au/geo/new_caledonia/new_caledonia_brief.html> (last accessed 20 November 2006) and Nouméa Accord art 5.

198 See, New Caledonia Country Brief – July 2006 <http://www.dfat.gov.au/geo/new_caledonia/new_caledonia_brief.html> (last accessed 20 November 2006).

199 Nouméa Accord Preamble.

200 Sage Y-L "Shared Sovereignty" in Kennedy Graham (ed) *Models of Regional Governance* (Canterbury University Press, Christchurch, 2008).

201 Luchaire "La réserve constitutionnelle de réciprocité" (1999) RDP 39.

202 Unless of course New Caledonia becomes independent.

203 Note that the provision does not list the powers in alphabetical order as this paper has done. This paper has inserted 'letters' for easy reference.

- (c) New Caledonia will be entitled to have representation in countries of the Pacific region and with the above mentioned organizations and in European Union.
- (d) It will be entitled to enter into agreements with these countries within its areas of responsibility.
- (e) It will be associated with the re-negotiation of the Europe-OCT Association Decision.
- (f) Training will be initiated to prepare New Caledonians for exercising responsibilities in the sphere of international relations.
- (g) Relations between New Caledonia and the Territory of the Islands of Wallis and Futuna will be addressed in a separate agreement. The State's services will be organised separately in New Caledonia and in this Territory.
- (a) Power to become a party

It appears that New Caledonia might have the power to become party to an EPA if the EPA concerns an area of New Caledonia's responsibility – paragraph (d). Article 3.1.1 of the Nouméa Accord makes clear that the list is exhaustive of areas of responsibility. The list includes 'external trade' and this power was assumed by New Caledonia in 2000.²⁰⁴

Because external trade appears in a list, to determine its scope, it should be read alongside the other areas of responsibility. The other areas of responsibility include: aliens' right to work; external communications; navigation and international shipping services; environment; employment law; vocational training; customary mediation in sentencing; setting of penalties for breaches of the laws of the country; rules for the administration of the Provinces; curriculum content for primary schools and teacher training/inspection; and the public maritime zone transferred to the provinces.

It is notable that the areas are 'inward' focused. Therefore, although 'external trade' is mentioned it should not be interpreted broadly to include power to enter an international free trade agreement for instance. An example of what would fall in scope of an external trade agreement pursuant to article 3.2.1 would instead be something along the lines of the Trade and Economic Relations Arrangement signed by the governments of Australia and New Caledonia in 2002.²⁰⁵ This Agreement provides a framework for expanding bilateral trade and investment flows. It is therefore

204 The principle of transfer will apply as soon as the institutions provided for this Accord have been set up [2000]: this decision will be implemented during the Congress's first term, in respect of the following powers: ... External trade, including import regulations and approval of foreign investments: Nouméa Accord art 3.1.1. See also, New Caledonia Country Brief – July 2006 <http://www.dfat.gov.au/geo/new_caledonia/new_caledonia_brief.html> (last accessed 20 November 2006).

205 Trade and Economic Relations Arrangements (8 March 2002). Recent talks pursuant to the Agreement in 2005 included New Caledonia's willingness to explore options for reduction of duties. See, New Caledonia Country Brief – July 2006 <http://www.dfat.gov.au/geo/new_caledonia/new_caledonia_brief.html> (last accessed 20 November 2006).

an international agreement concerning external trade but is of very modest significance in comparison with a free trade agreement.

Additionally, article 3.1.1 provides that "external trade, including import regulations and approval of foreign investments" are New Caledonia's areas of responsibility. Whether those particular examples of what might be considered 'external trade' imply some limitation in the interpretation of 'external trade' is debatable. Although the word 'including' in article 3.1.1, should be read as 'such as, but not limited to',²⁰⁶ again the examples imply a limited scope to 'external trade'.

Article 3.2.1 of the Nouméa Accord has yet further limitations – New Caledonia can only enter agreements with countries of the Pacific region and the EU.²⁰⁷ And, even if New Caledonia has the power to enter an international agreement within an area of responsibility with the Pacific or EU, that power is not absolute - it is 'shared' with France.²⁰⁸

"Among the powers which suggest that there is a sharing of sovereignty is the power of international relations."²⁰⁹ This reflects the notion of shared sovereignty as mentioned in the preamble to the Nouméa Accord: "The sharing of responsibilities between the State and New Caledonia will signify shared sovereignty."²¹⁰ The Nouméa Accord therefore builds on the idea that although France might restrict New Caledonia's powers, New Caledonia retains sovereignty.²¹¹

The nature of the exercise of the powers matters less than that the entity at the sub-state level can "be involved" in these "matters". For this reason, although the signing of international treaties could be denied by France to New Caledonia "shared sovereignty" is not excluded.

Implicit is that article 3.2.1 does not authorise New Caledonia to enter into international agreements irrespective of its relationship with France. Instead, New Caledonia might initiate its desire to become a party to a trade agreement but, in conjunction with France. Article 3.2.1 of the Nouméa Accord suggests a general framework for the relationship between New Caledonia and France but does not itself suggest the full autonomy of New Caledonia. Conventionally the 'royal power' remains until New Caledonia becomes fully independent.²¹² Until there is a successful 'yes'

206 This is consistent with the French version.

207 This is because of the words 'these countries'.

208 See "Shared Sovereignty", above n 200.

209 Ibid.

210 Nouméa Accord Preamble.

211 "Shared Sovereignty", above n 200.

212 Norbert Rouland "L'Etat français et le pluralisme. Histoire politique des institutions publiques de 476 à 1792, Odile Jacob (1995) 67.

vote for independence, New Caledonia does not have full autonomy.²¹³ During the interim, New Caledonia cannot enter a free trade agreement as an independent state. The EPA will provide for a free trade agreement between the Pacific countries and the EU.²¹⁴ Accordingly, based on the above analysis, New Caledonia cannot itself become an independent signatory to the EPA. However, if France is a party then New Caledonia might have some rights and obligations pursuant to the agreement as part of France. The CPA which was signed by France has a similar effect. It indirectly applies to New Caledonia.²¹⁵

This paper proposes that ideally France should remove the constitutional impediment by allowing New Caledonia to become party to the EPA as an independent member. If that proposal is rejected, then New Caledonia should nevertheless fully participate in the EPA negotiations as either a potential member of the Pacific group (if it becomes independent) or as an OCT of France but with an independent representative from New Caledonia.²¹⁶

(b) Power to formally negotiate

Leaving aside New Caledonia's becoming party to the EPA as a member of the ACP group, New Caledonia might benefit from simply being actively involved in the negotiations. The real question is not whether it should join the negotiation sessions, but rather, and more particularly, to what extent it can be involved and have an impact on the development of the EPA. Obviously, it would benefit from having a formal role and being able to voice its concerns and interests.

Article 3.2.1 paragraph (d) of the Nouméa Accord is therefore relevant. The article provides that New Caledonia may become a member of certain organisations depending on their constitutions. Whether New Caledonia has the capacity to be formally involved in the EPA negotiations is a matter for international law – that is, the institutions established under the CPA regulate whether or not New Caledonia is eligible to participate fully.

2 *International constitutional law*

The EU has supported the potential involvement of OCT in the EPA process.²¹⁷ Therefore, the EU should make allowances for the OCT to be involved in meetings that concern the EPAs.

213 Which could be from 2013.

214 For commentary on 'external relations' powers from a generic and structural sense see, Jean Pères "La Nouvelle Répartition des Compétences entre l'Etat et la Polynésie Française" (2004) 10 RJP 455.

215 Because it is part of France. See CPA art 92.

216 Relying on France to voice its issues and concerns is inadequate. Therefore, a representative from New Caledonia who has knowledge of the local conditions is likely to best promote New Caledonia's interests.

217 Closure by DG DEV <http://ec.europa.eu/comm/development/oct/index_en.htm> (last accessed 25 November 2006). See below Part V, B and below, n 231.

(a) The ACP-EU Joint Parliamentary Assembly

This body is established under article 17 of the CPA. The role of the Joint Parliamentary Assembly as a consultative body is to:²¹⁸

promote democratic processes through dialogue and consultation; facilitate greater understanding between the peoples of the European Union and those of the ACP States and raise public awareness of development issues; discuss issues pertaining to development and the ACP-EU Partnership; and adopt resolutions and make recommendations to the Council of Ministers with a view to achieving the objectives of [the CPA].

The ACP-EU Joint Parliamentary Assembly meets regularly to discuss issues in relation to the CPA. It is not a 'trade specific' body and therefore although its sessions could involve discussions on the EPA, detailed issues might be left to the Joint Ministerial Trade Committee. However, if the OCT such as New Caledonia are going to be either directly or indirectly affected by its recommendations or resolutions, they should have some involvement.

The ACP-EU Joint Parliamentary Assembly Rules of Procedure, were adopted in 2003 in accordance with article 17 (4) of the CPA. It is clear that those rules allow certain countries to be observers in its sessions who are not (yet) signatories to the CPA.²¹⁹ New Caledonia might fall into this category as a potential signatory.²²⁰ Or, it might simply rely on its OCT status to participate as an observer. The EU has expressed in the Council Decision that OCT may be observers in sessions of the ACP-EU Joint Parliamentary Assembly.²²¹ However, 'observer' status is restrictive. Although, observers may attend the sessions, full participation and voting is prohibited.²²²

218 The Council of Ministers is established under art 15 of the CPA. The functions of the Council of Ministers are to: "(a) conduct the political dialogue; (b) adopt the policy and take the decisions necessary for the implementation of the provisions of [the CPA], in particular as regards development strategies in the specific areas provided for by [the CPA] or any other area that should prove relevant, and as regards procedures; (c) examine and resolve any issue liable to impede the effective and efficient implementation of [the CPA] or present an obstacle to achieving its objectives; (d) ensure the smooth functioning of the consultation mechanisms...It may make decisions that are binding on the Parties and frame resolutions, recommendations and opinions. It shall examine and take into consideration resolutions and recommendations adopted by the Joint Parliamentary Assembly": CPA art 15(2)-(3).

219 New Caledonia might fall into this category as a potential signatory, or it might simply rely on its OCT status and the expressed authorisation for it to participate as an observer in accordance with the Council Decision.

220 That is likely to be rejected as New Caledonia has constitutional restrictions from France until independence. See above, Part V,A,I.

221 Council Decision (EEC) 2001/822 Overseas Association Decision [2001] OJ L 314, art 8.

222 The ACP-EU Joint Parliamentary Assembly Rules of Procedure (adopted on 3 April 2003 and revised on 25 November 2004) art 4.

Therefore, in terms of matters relating to the EPA negotiations, New Caledonia may receive information by attending the sessions but it cannot make any formal response.

(b) The Joint Ministerial Trade Committee

The Joint Ministerial Trade Committee is a 'trade' specific body. It has been established in accordance with article 38 of the CPA.²²³

The Ministerial Trade Committee shall pay special attention to current multilateral trade negotiations and shall examine the impact of the wider liberalisation initiatives on ACP-EC trade and the development of ACP economies. It shall make any necessary recommendations with a view to preserving the benefits of the ACP-EC trading arrangements. The Ministerial Trade Committee shall meet at least once a year. Its rules of procedure shall be laid down by the Council of Ministers. It shall be composed of representatives of the ACP States and of the Community.

The Council of Ministers decided in 2005 the rules of procedure to regulate the Joint ACP-EC Ministerial Trade Committee.²²⁴ Importantly, article 12 of the Rules states that:²²⁵

[t]he Trade Committee shall make recommendations on all trade issues, including issues relating to...economic partnership agreements...by mutual agreement between the parties.

The participants of the Committee are set out in article 1 of the Rules. Article 1 provides that:²²⁶

[t]he Joint Ministerial Trade Committee...shall be composed, on the one hand, of a minister from each Member State of the European Community and a member of the Commission of the European Communities and, on the other hand, on a parity basis, of ministers from the ACP States.

It is clear that there is a "representative from each Member State"²²⁷ of the EU. New Caledonia and the other OCTs are not 'states' and were not independent signatories to the CPA. Implicit therefore is that the French Minister acts as a representative for both France and its OCT.

It is notable though, that an interested non-member or representative of a regional organisation (such as the PIF) might attend its meetings. Article 5 of the Rules provides that:

The Trade Committee may, by agreement between the parties, invite non-members to attend its meetings. [And,] [r]epresentatives of regional or sub-regional organizations of the ACP engaged in an

223 CPA art 38.

224 Decision No 2/2005 of the ACP-EC Council of Ministers of 8 March 2005 concerning the Rules of Procedure of the Joint ACP-EC Ministerial Trade Committee (2005/298/EC).

225 Above n 224, art 12.

226 Above n 224, art 1.

227 Ibid.

economic integration process may attend the meeting as observers, subject to prior approval by the Trade Committee.

Therefore New Caledonia might attend as a non-member. However, it is not completely correct to refer to the OCT as 'non-members' as they do form part of the EU. It is ironic that a true non-member (for instance New Zealand) might attend but New Caledonia which is indirectly affected by France signing the CPA should be excluded. Thus, 'non-member' should not have a literal and narrow reading. Instead, the implication should be drawn that OCT might be invited to attend the Committees meetings. Alternatively, or additionally, New Caledonia might benefit from a representative of the PIF attending the meetings. New Caledonia is an associate member of the PIF and thus could obtain information concerning the negotiations through this avenue. However, like the Joint Parliamentary Assembly, New Caledonia's involvement is restricted. It may attend the meetings but there is no right to actively participate. And, if a PIF representative were to attend, then he or she would be merely there to observe.

3 Summary

There are constitutional impediments preventing New Caledonia from fully participating in the EPA negotiations. New Caledonia is not completely autonomous. The Nouméa Accord sets out the powers that New Caledonia has. This sub-Part has found that entering a free trade agreement is not one of them. However, New Caledonia might become involved in the negotiations. Yet, to the extent that New Caledonia has a voice impacting on the development of an EPA, is not yet permitted. The EU have not authorised the full participation of OCT in the formal EPA negotiation process. Consequently, the negotiations which began in 2004 have to date not included New Caledonia (or other OCT).

B Support for Involvement

This paper proposes that New Caledonia should participate in the EPA negotiations. Therefore, ways should be found to involve interested OCT in the EPA process. The responsibilities for doing so are shared between "the Commission, EU Member States, the OCT themselves and even ACP countries."²²⁸ However, given the EPA is currently being negotiated, the issue must be addressed promptly.²²⁹ It should be noted that France has already expressed its general support for EPA initiatives.²³⁰ Also, the EPA Seminar in Brussels, 13-15 June 2005 positively discussed the

228 EC – OCT Forum 2005 5 December <http://ec.europa.eu/comm/development/oct/ec_oct_forum_2005-en.htm> (last accessed 20 November 2006).

229 The EPA negotiation process was originally divided into two stages – see above Part III, B, 1.

230 C Stanbrook President of OCTA Speech <http://ec.europa.eu/comm/development/oct/index_en.htm> (last accessed 25 November 2006).

potential involvement of OCT in the EPA process. As pointed out earlier, it was noted in the closing session that:²³¹

It will come as no surprise that the Commission encourages OCT's to proceed in the direction of more regional integration, among others through EPAs, especially given the erosion of the trade regime applicable to OCT's due to the progressive liberalization of international trade. Indeed, there is added value for OCT's in exploring – and effectively making use of – the advantages of regional trade integration.

PIC have shown a general interest in forming trade relations with New Caledonia. In respect of another proposed free trade agreement – the Forum Island Countries Free Trade Agreement,²³² the PIC have indicated a firm interest in extending the agreement to include the French and United States Pacific territories.²³³ Further the OCT were invited by the Pacific ACP states to attend the EPA ministerial opening in 2004.²³⁴

Finally, there has been interest from New Caledonia itself.²³⁵

New Caledonia asked whether it could contribute to the future Communication on the EU's relations with the Pacific. New Caledonia is developing regional integration instruments within its region...It pointed to the need of improved communication on EPAs with a view to enabling OCTs to face common challenges related to the harmonious development of their respective regions. In this context, New Caledonia requested to be associated to the EPA negotiations as silent observer, even though full participation in the negotiations is ruled out by the EC Treaty. OCT involvement in EPA negotiations would allow them to adapt their position within their region in view of the progressive erosion of OCT trade preferences.

There appears to be a general consensus for New Caledonia's increased participation in the EPA negotiations by the EC, France, PIC, and New Caledonia itself. Accordingly, the legal impediments preventing New Caledonia formal involvement in the negotiations ought to be dealt with as a matter

231 Closure by DG DEV <http://ec.europa.eu/comm/development/oct/index_en.htm> (last accessed 25 November 2006). See above Part IV, A, 1, (b).

232 For information on this agreement, see, Robert Scollay *Regional Trade Agreements and Developing Countries: The Case of the Pacific Islands' Proposed Free Trade Agreement* (United Nations Publication, Geneva, 2001) 12.

233 New Caledonia, French Polynesia, Wallis and Futuna; Guam, Commonwealth of the Northern Mariana Islands, and American Samoa. See, Scollay, above n 232, 25.

234 See Africa, Caribbean, Pacific Regional Negotiations of Economic Partnership Agreements <http://ec.europa.eu/trade/issues/bilateral/regions/acp/regneg_en.htm> (last accessed 11 January 2007).

235 EC-OCT Forum 2005 <http://ec.europa.eu/comm/development/oct/ec_oct_forum_2005_en.htm> (last accessed 13 October 2006).

of priority. The first step might be for the EC to reform its rules of procedure relating to the EPA negotiation process.

VI CONCLUSION

This paper has considered the impact of trade liberalisation on the regional trade arrangements in place between the EU and the ACP states and the implications and consequences for New Caledonia as an OCT within the Pacific.

The WTO and its rules and objectives have had a major influence on regional trade arrangements whether they involve WTO members or not. This has been seen in this paper in the discussion of the CPA and the OCT trade regime.

The CPA provided a transitory trade arrangement for EPAs that comply with GATT article XXIV to come into force. The paper has found that the current trade regime between the EU and the OCT is similar to the CPA. Both the CPA and OCT regime were intended to be temporary and have been subjected to trade liberalisation pressures. The EU has encouraged the increasing of self-reliance of the OCT/ACP states and their ultimate integration into the world market. Importantly, the EU has clearly expressed the view that the OCT trade regime and the trade regime for ACP countries should eventually have identical rules. Thus, it is appropriate for the OCT in the Pacific region, that the EPA replace the OCT trade regime. Accordingly, New Caledonia should be involved in the current EPA negotiations. However, if OCT such as New Caledonia were denied an independent status in an EPA, the paper has argued that they should still become involved in the negotiation process. This is because France's obligations as an EPA signatory will indirectly affect New Caledonia.

Both the CPA and the OCT regime have supported the ultimate goal of trade liberalisation, however, the benefits of trade liberalisation are not immediate. Particularly for the less developed countries, liberalisation could be disastrous if their economies are not weaned gradually. Regional integration has been identified an important first step. The increased contact and exchange of information between OCT and PIC therefore ought to be promoted. The paper has pointed out that the benefits of regional integration can eventuate through the formal involvement of interested OCT in the EPA negotiations. Namely, the EPA will attract external traders and investors to New Caledonia and New Caledonia will penetrate international markets more effectively.

Apart from the general objective to liberalise trade, GATT article XXIV:12 has been identified as another reason for the involvement of New Caledonia with the Pacific EPA. Given New Caledonia's semi-autonomous status, external trade matters to some extent fall within the prerogative of France. The conclusion is that France should initiate a WTO compatible trade framework for New Caledonia. This can be achieved through its transition from the OCT regime to the Pacific EPA.

Finally, and quite a separate matter is that, as well as facing an end to its current trade regime in December 2011, New Caledonia could face an end to its relationship with France and become independent pursuant to the Nouméa Accord. New Caledonia is in a development process both constitutionally and economically. Accordingly, from a political perspective, the incentive for its formal involvement in the EPA process is increased. In addition to the political perspective, potential independence of an OCT also has legal consequences. This paper has argued that if New Caledonia were to continue to benefit from the OCT regime after independence, the trade arrangements become 'external'. Thus, any WTO-incompatible trade preferences must be eliminated.

There are several reasons to suggest that New Caledonia's increased participation in the Pacific EPA negotiations as a potential signatory is desirable. This paper has identified the constitutional barriers (both internal and international) preventing this proposal from taking effect. These constitutional legal impediments ought to be removed. Given the general support for New Caledonia's increased participation in the Pacific region, particularly by the EU, New Caledonia should not continue to be excluded from the EPA negotiations.

New Caledonia should be more actively involved in the Pacific region by fully participating in the EPA negotiations as a potential member of the Pacific Group. Eventually, when New Caledonia's trade regime expires on 31 December 2011 France should cooperate with New Caledonia to make New Caledonia's independent membership of the EPA possible. During the interim, the EU should authorise the formal participation of interested OCT in the negotiations as a preparatory step. In short, this proposal has the following consequence: OCT regime to EPA; regional integration to trade liberalisation; and non-reciprocal preferential trade arrangements to WTO-compatible free trade agreements.

APPENDIX I:
NEW CALEDONIA – FACTS AND FIGURES²³⁶

OCT	YES
ACP member	NO
LDC	NO
WTO member	NO
PIF	Associate Member
PICTA member	NO
PACER member	NO
GDP per capita	US\$14,128
GSP beneficiary	YES
Export (to EU)	93% Minerals 7% Other
Import (from EU)	Vehicles 24% Aircraft 9% Chemicals 13% Machinery 33% Other 21%
Imports into EU	France €139,118,000 (55.8%) Spain €70,820,000 (28.4%) Italy €24,587,000 (9.9%) Belgium €12,253,000 (4.8%)
Exports from EU	France €584,208,000 (82%) Germany €37,402,000 (5.2%) Italy €23,598,000 (3.3%) UK €16,313,000 (2.3%) Belgium €15,820,000 (2.2%) Spain €14,590,000 (2%) Netherlands €8,444,000 (1.2%)

236 Information concerning imports and exports (as at 2001) was obtained at <<http://ec.europa.eu/comm/development/oct/docs/statistics%20trade%202004%20.pdf>> (last accessed 22 November 2006).

APPENDIX 2: RELEVANT PROVISIONS

A WTO Agreements

1 GATT Article I

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2 Enabling Clause

DIFFERENTIAL AND MORE FAVOURABLE TREATMENT RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES

Decision of 28 November 1979 (L/4903)

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries,²³⁷ without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:²³⁸

- (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,²³⁹
- (b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

237 The words "developing countries" are used to refer also to developing territories.

238 It would remain open for the contracting parties to consider on an ad hoc basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

239 As described in the Decision of the contracting parties of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

- (c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of nontariff measures, on products imported from one another;
- (d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

- (a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;
- (b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;
- (c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:²⁴⁰

- (a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;
- (b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the

240 Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

B Cotonou Partnership Agreement

1 CPA Article 28

Cooperation shall provide effective assistance to achieve the objectives and priorities which the ACP States have set themselves in the context of regional and sub-regional cooperation and integration, including inter-regional and intra-ACP cooperation. Regional Cooperation can also involve Overseas Countries and Territories (OCTs) and outermost regions...

2 CPA Article 34

1. Economic and trade cooperation shall aim at fostering the smooth and gradual integration of the ACP States into the world economy, with due regard for their political choices and development priorities, thereby promoting their sustainable development and contributing to poverty eradication in the ACP countries.

2. The ultimate objective of economic and trade cooperation is to enable the ACP States to play a full part in international trade. In this context, particular regard shall be had to the need for the ACP States to participate actively in multilateral trade negotiations. Given the current level of development of the ACP countries, economic and trade cooperation shall be directed at enabling the ACP States to manage the challenges of globalization and to adapt progressively to new conditions of international trade thereby facilitating their transition to the liberalised global economy.

3. To this end economic and trade cooperation shall aim at enhancing the production, supply and trading capacity of the ACP countries as well as their capacity to attract investment. It shall further aim at creating a new trading dynamic between the Parties, at strengthening the ACP countries trade and investment policies and at improving the ACP countries' capacity to handle all issues related to trade.

4. Economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking into account of the Parties' mutual interests and their respective levels of development.

3 CPA Article 35

1. Economic and trade cooperation shall be based on a true, strengthened and strategic partnership. It shall further be based on a comprehensive approach which builds on the strengths and achievements of the previous ACP-EC Conventions, using all means available to achieve the objectives set out above by addressing supply and demand side constraints. In this context, particular regard shall be had to trade development measures as a means of enhancing ACP States' competitiveness. Appropriate weight shall therefore be given to trade development within the ACP States' development strategies, which the community shall support.

2. Economic and trade cooperation shall build on regional integration initiatives of ACP States, bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy.

3. Economic and trade cooperation shall take account of the different needs and levels of development of the ACP countries and regions. In this context, the Parties reaffirm their attachment to ensuring special and differential treatment for all ACP countries and to maintaining special treatment for ACP LDCs and taking due account of the vulnerability of small, landlocked and island countries.

4 CPA Article 36

1. ...the Parties agree to conclude new World Trade Organization (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.

2. The Parties agree that the new trading arrangements shall be introduced gradually and recognize the need, therefore, for a preparatory period.

3. In order to facilitate the transition to the new trading arrangements, the non-reciprocal trade preferences applied under the Fourth ACP-EC Convention shall be maintained during the preparatory period for all ACP countries, under the conditions defined in Annex V to this Agreement.

4. In this context, the Parties reaffirm the importance of the commodity protocols, attached to Annex V of this Agreement. They agree on the need to review them in the context of the new trading arrangements, in particular as regards their compatibility with WTO rules, with a view to safeguarding the benefits derived therefrom, bearing in mind the special legal status of the Sugar Protocol.

5 CPA Article 37

1. Economic partnership agreements shall be negotiated during the preparatory period which shall end by 31 December 2007 at the latest. Formal negotiations of the new trading arrangements shall start in September 2002 and the new trading arrangements shall enter into force by 1 January 2008, unless earlier dates are agreed between the Parties.