

# THE EXTERNAL RELATIONS OF THE TERRITORY OF FRENCH POLYNESIA

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*The question of the sharing of power between the state and the territory of French Polynesia can be approached in at least two ways. The interest is either in the principles which govern this sharing and in their operation, or the focus can be on a specific subject-matter. From this latter point of view what the law provides for the benefit of the territory of French Polynesia, with reference to external relations, is particularly interesting.*

*Le thème de la répartition des compétences entre l'Etat et le territoire de la Polynésie française peut être abordé au moins de deux manières. Soit on s'intéresse aux principes guidant cette répartition et à leur mise en œuvre, soit on s'attache à une matière spécifique. De ce dernier point de vue, ce que le droit prévoit en matière de relations extérieures au profit du territoire de la Polynésie française est particulièrement intéressant.*

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Sharing of powers between the French state and the territory of French Polynesia can be approached in at least two ways. It is possible to be interested in principles which guide this sharing and their operation, or to direct interest to a specific-matter. From this latter point of view, the way the law organises the external relations of the territory of French Polynesia is especially interesting.

First of all, the law could well have made no provision at all for the external relations of a territory. Indeed, "the study of international relationships includes traditionally all the relationships and all the external links of states".<sup>1</sup> That is to say the totality of the relationships that are established between states. Since French Polynesia is not a state, international relations could in

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1 B Soccol, *Relations internationales* (Centre de Publications Universitaires, 2001) 23.

principle only concern the French state. There are traces of this idea of international relations both in public international law<sup>2</sup> and in the Constitution of the Fifth Republic.<sup>3</sup>

It is also a fact that this traditional concept has today been exceeded, and that the territorial entities of France have been recognised as having some powers in international matters. It is said that the powers which the territories exercise are in respect of external, and not international, relations in order to indicate clearly that it is a question of powers being exercised in the international arena by non-state entities.

It is therefore not without interest to consider what is the benefit of the external relations powers for the French territorial entities, and to examine also what is provided for in the particular case of French Polynesia.

### ***I "DECENTRALISED COOPERATION"<sup>4</sup> FOR THE FRENCH TERRITORIAL ENTITIES***

The involvement of the French territorial entities on the international scene is of relatively long standing and it has for some time been encompassed within the single idea of linkages. A decree of 24 January 1956,<sup>5</sup> which was amended on 23 June 1956, gives an extensive definition of linkages which includes all relationships established between French and foreign communities.

After that the legislature acted once in 1982 in order to allow regional councils "to organise regular contacts with non-central-government foreign authorities".<sup>6</sup> This possibility, was among other restrictions, subject to authorisation by central government and limited to regions.

The new law of 6 February 1992<sup>7</sup> took into account established practice, which had not respected the limits imposed by the law of 1982<sup>8</sup> very well, and generalised the provisions for the

2 In addition, in international law the principle of the unity of the State forbids any components of territories (sub-state entities) getting involved in the field of international law, unless they have been specially authorised to do that, for fear that the liability of the State of which they are part might be incurred against its will.

3 See Title VI of the Constitution of 1958, "Des traités et accords internationaux" [Treaties and international agreements] (especially article 52), which seems to vest in state authorities a monopoly in matters of international relations.

4 On the wisdom of the use of the expression "decentralised cooperation" ["coopération décentralisée"] chosen by the legislator in 1992, see C. Autexier, "L'action extérieure des collectivités locales françaises dans le cadre européen" ["External relations of the French territorial entities in the European context"] (*Encyclopédie Dalloz des Collectivités Territoriales*, 1996-2, F-P Bénéot, dir) 4408-1, esp 4408-7.

5 L. Touvet, J. Ferstenbert and C. Cornet, *Les grands arrêts du droit de la décentralisation* [Great sentences of decentralisation right] (Dalloz, 1999) 403.

6 Law of 2 March 1982, art 65, para 2.

benefit of all territorial entities and their groupings, and at the same time amended the law in order to facilitate external relationships by the territorial entities and to permit a greater range of those relationships.

So, for example,<sup>9</sup> the legislator adopted a rule which provides that "[t]erritorial entities and groups of territorial entities can conclude agreements with territorial entities and groups outside France, within the limits of their powers and with full respect for the international obligations of France" (Article L 1112-1 of the CGCT).

Finally, in 1995,<sup>10</sup> the legislator tightly controlled the possibility given to territorial entities, and groups of them, in respect of joining a foreign public law entity, or of participating in the capital of a foreign corporation (Article L 1112-4 of the CGCT). Moreover the legislation states that "[n]o agreement of any kind can be made between the territorial entity or a group of territorial entities and a foreign state" (Article L 1112-5 of the CGCT). This latter provision followed up on the opinion of the Council of State of 25 October 1994<sup>11</sup> which set out the legal nature of such agreements - they are not international undertakings.

Though not negligible, the powers that have been given to French territorial entities in respect of external relations are nevertheless fairly limited and very constrained in nature. Such however is not the case for the territory of French Polynesia.

## **II INVOLVEMENT OF THE TERRITORY OF FRENCH POLYNESIA IN INTERNATIONAL ACTION BY THE STATE**

In respect of French Polynesia, the legislator has gone much further and continues to extend the powers of the territory. From 1984<sup>12</sup> a quite special place was made for the territory of French Polynesia with reference to external relationships. Thus although the statute for the territory placed

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7 Orientation Law no 92-125 of 6 February 1992 about Territorial Administration of the Republic (referred to as the "ATR" law) Titre IV.

8 Concerning this practice see: Y Delahaye, "L'action extérieure des collectivités territoriales: ouverture d'un nouvel espace de liberté" ["External relations of territorial entities : opening a new area of freedom"], *Les nouvelles relations Etat-collectivités locales [New relation State-Local entities]* - Colloque de [Talk of] Rennes Avril 1990 (La Documentation Française, 1991) 285 and J Bourdon, J-M Pontier et J-C Ricci, *Droit des collectivités territoriales [Right of territorial collectivities]* (PUF, 1998) 366-367.

9 See articles L 1112-1 to L 1112-4 of the CGCT (Code Général des Collectivités Territoriales).

10 Law no 95-115 of 4 February 1995, art 83, amended by law no 99-533 of 25 June 1999, art 28-I and 28-II.

11 Avis no 356381, EDCE (La Documentation Française, 1994) 379.

12 Law no 84-820 of 6 September 1984 on the status of French Polynesia.

external relations among the powers of the State authorities (article 3, 1°) that power was exercised "subject to the provisions of Article 38". That article had four sub-paragraphs.

In the application of these provisions the authorities of the State within the Pacific region could delegate to the government of the territory the powers that permit it to negotiate agreements<sup>13</sup> which deal with matters relating to the power of the territory in economic, scientific, technical and cultural fields (Article 38, para 4). And, "subject to international undertakings and the relevant legislative provisions", the President of the government of the territory could propose to the government of the Republic that negotiations should be entered into for the purpose of concluding agreements with one or more states or territories of the Pacific region in economic, scientific, technical and cultural fields which are of interest to the territory. If this proposal was accepted, the President of the territorial government was to be associated with, and participate in, the negotiations (Article 38, para 1).

In respect of international air and sea matters (which were within the control of the authorities of the State – Article 3, 3°), the territorial government was associated with and participated in the negotiation of agreements which related to the provision of services for French Polynesia (Article 38, para 3). Finally, the President of the territorial government could also be authorised to represent, with the High-Commissioner, the government of the Republic in Pacific regional organisations (Article 38, para 2).

Although the practical operation of these provisions was the subject of a clarification in 1992,<sup>14</sup> the difficulties arising from their application have remained largely unexplored, perhaps because of their particularly subtle (and also sometimes, perhaps, excessive) nature. The organic law of 12 April 1996<sup>15</sup> significantly increased the territory's powers with reference to external relations. This power still resides with the State authorities, "including in relation to financial and commercial matters",<sup>16</sup> but with the exception of "quantitative restrictions on importation, the annual import programme and the regime applicable to direct foreign investment projects, the customs regime for

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13 With the exclusion of agreements relating to the provision of international air and sea services for French Polynesia.

14 D Dormoy, "Les relations internationales et l'outre-mer: l'exemple polynésien" ["International relations and over-sea: the polynesian example"] AJDA (Daloz, 1992) 575.

15 Organic law no 96-312 of 12 April 1996 about the autonomous status of French Polynesia.

16 Which, for J Peres, refers respectively to the international monitoring of financial movements and to the World Trade Organisation ("Application des lois et règlements en Polynésie française-Répartition des compétences" ["Application of laws and decrees in French Polynesia-Sharing of power"] RJP 2002 (Vol 8) 191.

the import and export of goods, the rules for animal and plant health inspections, and subject to Articles 40 and 41".

Two articles have therefore been added to the list that restricts the power of the state with reference to international relationships. Article 41 follows substantially the spirit and conditions of what is provided in relation to decentralised cooperation for French territorial entities (paragraphs 2, 3 and 4). It further permits the President of the government to negotiate and sign "administrative arrangements"<sup>17</sup> with the territorial administrations of the states of the Pacific, or with Pacific regional organisations, in the fields of competence of the territory (para 1).

But it is particularly Article 40 that warrants attention. This article in fact permits the authorities of the State to "hand over" (no longer just to the government of the territory but also to the President of the government) the power to negotiate and to sign agreements in the fields of competence of the State or of the territory with "one or more states, territories or regional organisations of the Pacific and with regional organisations which are subordinate to the specialised agencies of the United Nations"<sup>18</sup> (para 1).

Furthermore, even if the State authorities do not hand the power to the President of the territorial government, the latter has the right, as a matter of law, to be associated with and participate as a member of the French delegation to any negotiation of agreements, which relate to the fields of competence of the territory, with one or more States, territories or regional organisations of the Pacific and with the regional organisations which are under the specialised agencies of the United Nations. And the President can be associated with and participate in the same manner in the negotiation of agreements of the same nature, that concern the fields of competence of the State itself (para 2).

Given these advances, (which, however, do not seem to result in placing French Polynesia among the "marginal or disputed cases" because they can "be considered as the exception which confirms the rule about the unity of the State in respect of external relations"<sup>19</sup>), it is hard to explain the disappearance of the provision which in 1984 allowed the President of the territorial government, along with the High Commissioner, to be authorised to represent the government of the Republic in regional Pacific organisations.

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17 On these "arrangements" see: V Goesel-Le Bihan, "Sur quelques aspects récents du droit constitutionnel français des relations extérieures" ["About some recent aspects of French constitutional right of external relations"] AFDI (CNRS, 1998) 58, esp 70-74.

18 On these powers see V Goesel-Le Bihan, above n 17, and "Les relations internationales : le dispositif juridique" ["International relations : the right"], *La loi d'orientation pour l'outre-mer du 13 décembre 2000* [*Orientation Law for the over-sea of 13 December 2000*], M. Elfort and al, dir. (P.U.A.M., 2001) 527.

19 D Dormoy, above n 14, 576.

The fourth and final paragraph of article 40 indeed provides that "The president of the government can be authorised by the authorities of the Republic to represent it in Pacific regional organisations, or in Pacific regional organisations which are under specialised agencies of the United Nations".

Consequently there is a diminution in the extent of the powers given to the President of the government with reference to external relations. Of course this could be a grammatical gender error: "ce dernier", the 'it' of the quotation (which would necessarily refer back to the government of the territory) having been written instead of, and in the place of, "cette dernière" (which would then refer to the Republic).

The practical operation of these provisions will require a presentation every bit as detailed as that which explained the provisions of the 1984 law. And there have as yet been no law-suits about this sharing of power. It is known that "[t]he exercise of powers by the territory has led the Government of French Polynesia to propose to the Assembly the creation of an International Relations Office which would assist the institutions of French Polynesia. The High Commissioner of the Republic, seeing in this proposal an encroachment on the powers of the state, referred the matter to the judgment of the Administrative Tribunal of Papeete which in turn sought the advice of the Council of State. In its advice<sup>20</sup> the Council of State said that it did not see in the statutory provision anything which forbade the creation of such a service subject to respect of the sharing of powers between the State and the territory".<sup>22</sup>

If there is an area where the territory of French Polynesia is, in both domestic and international law, something of an exception, it is definitely in this matter of foreign relations. The intensity of international activity undertaken by the territory shows (if there was any need for that) that the provisions put in place correspond to a real aspiration of the local decision-makers. It would be interesting, although obviously difficult, to be able to establish the degree of importance that the local populace place on this matter of the external relations of the territory of French Polynesia. According to the Minister for the Overseas Territories, Madame Brigitte Girardin, if there is an intention to modify the current system, any change would have to be approved by the population of the territory.<sup>23</sup>

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20 Avis no 235145 of 16 November 2001.

22 J Peres, *opcit*, RJP. 2002 (vol 8) 192. For a comparative perspective see: Y-L Sage, "Remarques sur la représentativité des îles Cook dans les rapports internationaux" ["About the representing of the Cook Islands in international relations"], RJP 1994 (vol 1) 183.

23 B Girardin, Discours d'ouverture du Congrès de l'Assemblée des départements de France [Opening speech, Congress of the Gathering of French departments], 18 September 2002, Saint-Denis de la Réunion (source: Les Nouvelles de Tahiti [Tahiti-News], 19 September 2002, 2).