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VOLUME I

COMMUNICATION FROM THE COMMISSION

THE STATUS OF OCTs ASSOCIATED WITH THE EC AND OPTIONS FOR "OCT 2000"

CONTENTS

INTRODUCTION

1. At the signing of the Treaty of Amsterdam, the Conference included in the Final Act a "Declaration on the Overseas Countries and Territories". In it the Conference compares the development of the Community and the OCTs since 1957 and "invites the Council, acting in accordance with Article 136 of the Treaty establishing the European Community, to review the association arrangements by February 2000, with *a* fourfold objective ..." (cf. Annex 1).

   Article 136 of the Treaty (cf. Annex 2), now Article 187 after updating and amendment at Amsterdam (cf. Annex 3), stipulates that:

   "The Council, acting unanimously, shall, on the basis of the experience acquired under the association of the countries and territories with the Community and of the principles set out in this Treaty, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Community."

2. Since the Commission has drafted proposals to the Council on the association arrangements every five years, it is duty-bound to draw on its long experience and unique overview to compare the various developments that have taken place in the Member States and review the OCTs' position with regard to Community law. The Conference rightly emphasised the considerable changes that have occurred over the past 40 years.

   The Commission could thereby lay down the options for their future status and propose them to the Council, with due regard for the four objectives laid down by the Conference:

   - promoting the economic and social development of the OCTs more effectively;
   - developing economic relations between the OCTs and the European Union;
   - taking greater account of the diversity and specific characteristics of the individual OCTs, including aspects relating to freedom of establishment;
   - ensuring that the effectiveness of the financial instrument is improved.

3. To do so, it seems politically crucial to implement the Commission/Member State/OCT partnership arrangements introduced by the Council in 1991 at the Commission's proposal. These arrangements provide that "Community action shall be based on close consultation between the Commission, the Member State responsible for a country or territory and the relevant local authorities of such countries or territories."[1] A major partnership conference will be held on 29 and 30 April and its conclusions will be used over the following months as a basis for a proposal from the Commission to the Council on the Association of the OCTs in 2000.

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[1] Articles 234 to 236 of Council Decision 91/482/EC, as revised by Decision 97/803/EC.

4. For its part, the European Parliament has adopted, on 11 February 1999, a resolution on relations between the OCTs, ACP States and most remote regions of the EU[2] based on an own initiative report of its Committee on Development and Co-operation (rapporteur: Mr Blaise Aldo).

On 1 December 1998 many leading figures from the OCTs were heard. Parliament's resolution includes the following guidelines:[3]

- capitalising on the geographical scope conferred on the Union by its outermost regions and OCTs;
- increasing integration into world trade, with due regard for the specific character and legitimate interests of each;
- decentralised partnerships within the framework of the coming ACP-EU regional agreements;
- close involvement in the design of regional political, economic and trade partnerships, notably through the ACP-EU Joint Assembly;
- a thorough recasting of the OCTs' association, enshrining a recognition of the constitutional, demographic, cultural, economic and social realities that give the relationship its originality and more accurately reflecting the Union's solidarity with them;
- the setting-up of a European Fund for the development of the OCTs that better reflects the local institutional and administrative realities;
- maintenance of the trade arrangements offering total and unlimited access, albeit with tighter controls on the origin of products;
- amendment of the legal basis for Association Decisions (the new Article 187) in order to replace unanimity with qualified majority voting.

In tune with some of these guidelines, the Rocard report and the Parliament resolution on the negotiation of new agreements with the ACP States[4] advocate integrating the OCTs into their regional economies and granting them permanent observer status in the ACP-EU Joint Assembly.

5. As will be seen, the exercise involves - and therein lies the rub - 20 cases divided by their geography, size, population, standard of living and status vis-à-vis central government.

That status is, moreover, mutable: in some OCTs "centrifugal" forces are seeing a transfer of powers from central government to local authorities, in others "centripetal" forces are causing OCTs to be treated like a Member State's regions.

This is why the options suggested sometimes offer alternative solutions on various aspects of Community law.

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2 The 4 DOMs (Guadeloupe, Guyane, Martinique, Réunion), the Canaries, the Azores and Madeira.

3 Doc. PE 228.210, 1.12.1998.

4 Doc. PE 224.708/def, 4.3.1998.

6. This communication consists of the following:

Part One

- a brief description of the OCTs;
- an analysis of their varying status vis-à-vis the Member States concerned;
- a history of their status under Community law.

Part Two

- a thorough review of EU-OCT relations;
- a recapitulation of the global changes framing the debate.

Part Three

options for decisions to be taken by the Council of Ministers, or even the European Council, on the main themes of EU-OCT relations:

- the trade arrangements
- the financial instrument
- the right of establishment

and various other topics that need to be addressed.

PART ONE: NATURE AND HISTORY OF THE ASSOCIATION

I. The 20 OCTs - scattered, disparate and vulnerable

The present association embraces 20 overseas countries and territories:

- 11 linked to the United Kingdom:[5] Anguilla, the Cayman Islands, the Falkland Islands, the South Sandwich Islands and South Georgia, Montserrat, Pitcairn, Saint Helena and dependencies, the British Antarctic Territories, the British Indian Ocean Territories, the Turks and Caicos Islands, the British Virgin Islands and Bermuda.
- 6 linked to France: New Caledonia and dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis et Futuna and Saint-Pierre-et-Miquelon.
- 2 linked to the Netherlands: Aruba and the Netherlands Antilles (Bonaire, Curaçao, Saba, Sint Eustatius and Sint Maarten).
- 1 linked to Denmark: Greenland.

The total population of the 20 OCTs is slightly over a million. All are islands and only three boost a population of over 150 000 (French Polynesia, New Caledonia and the Dutch Antilles), the rest having small populations around the 10 000 mark.

Note that statistics concerning the OCT should be treated with extreme caution.

Their social and economic features vary enormously, notably as regards:

- geographical location (Caribbean, Pacific, Indian Ocean, south Atlantic, north Atlantic and the polar regions);
- size (ranging from Greenland's 2 166 000 km2 to Pitcairn's 47 km2);
- population (220 700 inhabitants in French Polynesia compared to just 50 on Pitcairn);
- history and culture;
- resources;
- per capita GNP (USD 24 000 in the Cayman Islands down to USD 600 in Mayotte).

The per capita GNP difference is extremely wide, ranging from relative wealth to real underdevelopment. Keeping in mind the earlier word of warning concerning the reliability of statistical extrapolations in the case of very small populations, one is above the Community average (the Cayman Islands) and three are between average and 75% of the average (Aruba, the Falkland Islands and French Polynesia). A large group cluster between the 75% and 30% marks, while four have a per capita GNP of less than 30% of the Community average (Montserrat, Saint Helena, Wallis et Futuna and Mayotte - see Annex 4.9).

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[5] Bermuda is included in Annex IV to the Treaty as revised after Britain's accession (now Annex II to the Treaty of Amsterdam) but the Council does not mention it in the Association Decision.

But all the OCTs, however rich or poor, are vulnerable to some extent because of their high dependence on a few sectors of activity that are sensitive to external factors, a dearth of many natural resources or large markets, their isolation and distance from import/export markets, their small populations, all of which leads to high infrastructure, management and repayment charges because of the small tax base, charges which are sometimes hiked up still further by the perceived risk of natural disasters linked with their geographical situation.

OCT trade balances are usually in deficit, often badly so. Their trade is tightly bound up with the Community and, in spite of a series of Association Decisions designed to open up Community markets to OCT products, there has been little diversification in their trade relations, still dominated by the Member States to which they are linked (see Annex 5).

II. Status of the OCTs *vis-à-vis* the Member States concerned

Although all generalisations on this subject are dangerous, the OCTs can be broadly defined as self-governing entities enjoying autonomy in economic, and often legislative, matters under the jurisdiction of a Member State. The powers retained by the Member State are usually in the sphere of foreign affairs, justice, monetary policy and defence.

However, the powers devolved to the local authorities under the constitutions of the Member States concerned vary greatly. Indeed, the status of OCTs belonging to the same Member State can differ.

Whatever their status, it is the result in all the Member States of a democratic process, usually in the form of local referendums (for instance, Mayotte in 1975, Greenland in 1978 and the Netherlands Antilles and Aruba in 1996) or basic laws adopted by national parliaments following consultations with local authorities.

The Commission and the Member States have always stressed this fact at the UN General Assembly, especially in the context of the work of the Fourth Committee (Special Political and Decolonisation Committee).

All the OCTs have local institutions which include at least an executive and an assembly. There is also provision for social dialogue between representatives of the two sides of industry, the professions and other parts of society.

Talks with representatives of the Member States concerned have shown that **none of the OCTs have any desire for a fundamental change in their status.** Even the most recent local consultation, the referendum held in New Caledonia on 8 November 1998, kept the options open for another 15 to 20 years, after which a new referendum on self-determination will be held.

A. British OCTs

The British OCT are subject to the jurisdiction of the Crown and their Head of State is Queen Elizabeth II. They are not part of the United Kingdom and they have all freely chosen to remain UK dependencies, lacking full autonomy.

1. They are administered locally by a mixed system consisting of elected representatives and appointed officials. They all enjoy a considerable degree of autonomy, but some

powers remain the exclusive province of Governors appointed by the Foreign Secretary. These powers usually comprise foreign affairs, defence, internal security and justice. Some Governors are also in charge of personnel administration, and in the Caribbean they are also responsible for off-shore financial arrangements. Other administrative tasks are performed by locally elected ministers.

The key governing body is the Executive Council, chaired by the Chief Minister or the Governor and consisting of elected Ministers and senior civil service appointees.

Most territories have a single Assembly which passes territorial legislation, in compliance with UK and international legislation.

The OCTs have their own budgetary resources but the UK government also provides development aid and technical cooperation in most cases.

2. The citizenship status of the inhabitants of these OCTs varies.

The UK has on two occasions defined its interpretation of the term "nationals" with regard to Community legislation, once when the UK joined the EEC, and again with the adoption of the British Nationality Act of 1981:

- in most cases, OCT nationals are "British subjects" (rather than "British citizens") with only the right of abode in the UK;
- the people of the Falkland Islands are defined as "British Dependent Territories citizens", a status they share with the people of Gibraltar, which entitles them to all the rights and privileges of British citizenship.

Nevertheless, in February 1998 the British Government announced a reform whereby full British citizenship and related advantages would be conferred on a non-reciprocal basis on nationals of all the Dependent Territories known as British Overseas Territories. Most recently, in a White Paper published in March 1999, the UK Government announced its intention to grant all OCT nationals full British citizenship rights.

B. French OCTs

The French OCTs are an integral part of the French Republic. There are two different types: the four *Territoires d'Outre-Mer* (TOM - Overseas Territories) and the two *Collectivités Territoriales* (Territorial Communities).

1. The TOM (New Caledonia and dependencies, French Polynesia, Southern and Antarctic Territories, Wallis et Futuna) are each covered by a basic law establishing their institutions and delegating extremely varied degrees of power to the territorial authorities.

After the national referendum of November 1988 conducted in the wake of the Matignon Agreements, *New Caledonia* was governed by an interim law that was to remain in force until the self-determination referendum scheduled for 1998. But a new agreement was signed in Nouméa on 5 May 1998 and approved by local referendum on 8 November. It gives the territory a new status that will gradually lead to independence in 20 years time. The Territory's institutions consist of a Congress comprising the Assemblies of the three Provinces (North, South, Iles Loyauté), a senate of customary chiefs and an Economic and Social Committee. The executive (previously incarnated by the High Commissioner) is now a collegiate government elected by the Congress and answerable to it. The new

process now under way (amendment of the French constitution, its approval by the local electorate, a new basic law, congressional elections, setting up of the government) should make the new local authorities operational by the end of 1999. The agreement provides for the transfer of many powers to New Caledonia at five-year intervals, the last phase of which could lead, depending on the result of the referendum, to the transfer of sovereign powers and full independence. Note that this could lead also to a fully fledged New Caledonian citizenship if approved in the referendum.

French Polynesia has a large degree of independence, its territorial government and assembly being endowed with legislative autonomy. The French state is represented by a High Commissioner who promulgates the laws adopted by the territorial government after they have been debated by the territorial assembly. Partly under the influence of developments in Caledonia, this year is likely to see constitutional and legislative steps to create a Polynesian "citizenship" that would help protect local jobs in some areas.

The Wallis and Futuna Islands are governed by a government-appointed Senior Administrator, assisted by a Territorial Council operating on the basis of opinions delivered by the Territorial Assembly.

The Southern and Antarctic Territories (the islands of St Paul and Amsterdam, the Crozet Islands, the Kerguelen Islands and Adélie Land) are governed by a government-appointed Senior Administrator and assisted by an Advisory Council.

2. Although the two *Collectivités Territoriales* (Mayotte, St Pierre and Miquelon) are each governed by specific laws on their organisation, their status is much closer to that of a full *département*. The French government designates a representative with the rank of Prefect, and the Territories have a General Council elected by direct universal suffrage.

Regardless of the administrative status of the Territory from which they come, French OCT citizens enjoy full French citizenship, and thus hold European passports like any other French citizen.

They are eligible to vote for, and be elected to, the French National Assembly (one or more members per territory), the Senate (one or more senators per territory) the French Presidency, and (unique among the OCTs) the European Parliament.

C. Dutch OCTs

The Charter of the Kingdom of the Netherlands of 22 October 1954 established a tripartite realm in which the Netherlands, the Netherlands Antilles and Suriname (now independent) deal with their domestic affairs autonomously and handle matters of common interest jointly on a basis of equality.

The Dutch sovereign is the head of state of both the kingdom and each of the "countries" (the Netherlands Antilles and Aruba), where the sovereign is represented by a governor.

The Charter rests on two essential principles:

- the association of the two "overseas countries" in all affairs of State (namely affairs of common interest such as defence, foreign affairs, nationality, the admission and expulsion of Dutch citizens and foreigners, extradition and regulation of sea-going vessels and flags);

- autonomy in the administration of internal affairs, Aruba having a larger degree of independence than the Netherlands Antilles.

1. The Charter provides for reciprocal representation in the administrative, political and even judicial bodies of the Netherlands and the overseas countries; this provision plays an important role.

The Crown "member countries" are associated with the affairs of the kingdom which are administered "in cooperation". The plenipotentiary ministers of the associated countries sit on the Council of Ministers of the Kingdom, and take part in the Council's deliberations and all its special meetings on matters of common interest having an impact on their country. They can thus oppose the adoption of any measure that would be disadvantageous to their country. They also take part in the debates of the Kingdom's Assembly that concern legislation applicable to them. Mirroring the representation of the overseas countries in The Hague, the Dutch sovereign is represented in the Antilles and Aruba by a Governor who exercises executive power jointly with the local Council of Ministers, with the assistance of an Advisory Council.

2. Each of the two overseas countries has its own constitution, its own government and its own parliament, and runs its internal affairs independently. However, there are some restrictions concerning those of the kingdom's affairs held to be "of common interest".

This list is not exhaustive, and can be extended with the consent of all the parties. Thus, any matter not explicitly recognised as being "of common interest" is held to be an "internal affair".

Citizens of the two Dutch OCTs have full Dutch nationality, and therefore, like French OCT citizens, have the same European passport.

The citizens of each of the three parts of the kingdom can vote for, and be elected to, their own parliaments.

Netherlands Antilles and Aruba nationals residing in the Netherlands are eligible to vote and stand for the European Parliament.

D. Greenland

On 1 May 1979, Greenland acquired the status of a "distinct community within the Kingdom of Denmark", along the same lines as the "home rule" granted to the Faroe Islands in 1948. It elects two members to the Danish Parliament.

The home rule system is based on the principle of preserving the unity of the Kingdom of Denmark; the constitutional status of the "home rule authority", which is made up of a legislative assembly and an executive, is governed by Danish law (the Greenland Home Rule Act), under which the national parliament delegates some of its authority to Greenland.

Most local matters are dealt with by the Greenland authorities, including: the organisation of local government, tax, trade regulation, fisheries and hunting, education, transport and communications, security, social affairs and health, environmental protection, nature conservation and, since 1 July 1998, mining resources. Areas in the province of central government are justice, nationality, defence and monetary policy.

International relations are handled by the Danish authorities, which consult Greenland on issues affecting it. Since 1991, the Government of Greenland has had a representation in Brussels.

The people of Greenland are full Danish citizens on the same footing as those of Denmark and the Faroe Islands and enjoy all the resultant rights and privileges.

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Relations between the Member States and their overseas countries and territories have evolved over time, sometimes marked by:

- centrifugal forces in the form of calls for greater autonomy and independence, what we might call the "OUT" trend;
- a trend towards closer relations with the parent country and central government control, the "IN" trend.

We shall be looking at the OCTs' status under Community law in these "IN" and "OUT" perspectives. **Neither of these terms should be seen as carrying any political connotation or reflecting any kind of preference.**

III. The status of OCTs under Community law

We should look at the history of this association in order to understand how it has developed.

A. Treaty of Rome 1957

According to Article 227(3) of the Treaty the OCTs are part of "special arrangements for association set out in Part Four of this Treaty".[6] The "Association of Overseas Countries and Territories" established by Articles 131 to 136 is based on the principle that "the Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands" (Article 131). Since then the make-up of the group of Member States has changed, now consisting of Denmark, France, the Netherlands and the United Kingdom.

Annex IV to the Treaty of Rome lists the OCTs linked to the States referred to in Article 131. At that time the group included many countries and territories that became independent in the 1960s, especially in Africa.

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6 It is important to distinguish between the OCTs and the DOM, the latter being an integral part of the Community (Article 227(2), now Article 299(2) of the Amsterdam Treaty. The High Contracting Parties, the Court of Justice (Hansen judgment of 1978) and the Council have all decisively affirmed this principle: the Treaty is applicable to them as it is to the Azores, Madeira and the Canary islands, though for these regions, qualified as the outermost regions, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the present Treaty to those regions, including common policies" (Article 299(2) of the Amsterdam Treaty).

The aim of the Association is "to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole".

The substance of the Association, namely the trade regime, right of establishment and the free movement of workers, is set out in Articles 132 to 135.

The provisions of these article can be qualified as "IN":

- trade: the Treaty points towards free trade between the Community and the OCTs, laying down that "Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to this Treaty." (Article 132(1) and that "customs duties on imports into each country or territory from Member States or from the other countries or territories shall be progressively abolished" (Article 133(2), the last words being amended to "shall be prohibited" by the Amsterdam Treaty;
  Nevertheless, there is not provision for total reciprocity since Article 133(3) adds "the countries and territories may, however, levy customs duties which meet the needs of their development and industrialisation...";
- right of establishment: this is governed by the relevant chapter (Articles 52 to 58), "subject to any special provisions" of the Association Decisions (Article 132(5), this being the only instance where the Treaty takes a clear "IN" stance;
- free movement of workers: Article 135 lays down that movement in both directions "shall be governed by agreements to be concluded subsequently", but the Member States have never adopted any such agreements.

There is also an implementing convention attached to the Treaty which set up the first EDF and laid down its procedures and the basis for the Member States' contributions to it (Articles 1 to 7 of the Convention), the decision-making procedure for gradually extending the right of establishment (qualified majority on a proposal from the Commission - Article 8) and the elimination of quantitative restrictions between Member States (Articles 9 to 15).

Note that Part Four of the Treaty and the Implementing Convention lay the foundations for the Community's future development policy in affirming the principle of Community solidarity with the OCTs and encouraging "the Community as a whole" to establish close economic relations with them.

Still in the "IN" perspective, the provisions on the EDF and the right of establishment also apply to the DOM (which received EDF funding until 1997 when they became eligible for the structural funds).

B. 1963-91: OCT/AAMS and OCT/ACP parallelism

The policy provided for in Part Four of the Treaty and in the Implementing Convention came under two new and separate legal instruments in 1963:

- the Yaoundé Convention with 18 former OCTs that had become independent, the Associated African States and Madagascar;
- the Council Decision on the association with the nine remaining OCTs (the Netherlands Antilles are added to the other OCTs).

Since then the Council has unanimously adopted seven Decisions on the EC-OCT Association, each covering a five-year period.

This unanimity has been maintained despite the problems raised by the innovations brought in by the 1991 Association Decision and, still more so, at the mid-term review.

The Turin European Council asked the Intergovernmental Conference to examine the status of the overseas countries and territories but despite a proposal backed by a number of Member States, a qualified majority could not be found.

The two acts of 1963 both came into force on 1 June 1964. **This common origin is the reason why there has always been a parallelism between the provisions governing the AAMS (later ACP States) and the OCTs, i.e. trade arrangements, right of establishment, etc.**

As a result of this parallelism, the OCTs have enjoyed the fruits of the negotiations held every five years between the Community and the 18 AAMS States and later the 46 ACP States signatory to Lomé I: the EDF (an internal financial agreement common to the ACP States and the OCTs), improved trade arrangements, Stabex, Sysmin, etc.

The first Lomé Convention of 1975 was followed by a Council Decision on the association with the OCTs in 1976. Protocol 22 to the Act of Accession of the United Kingdom brought in 24 new ACP States, out of a total of 46, and 20 of the 30 OCTs were now British. Half of them became independent in the 1980s and acceded to Lomé II or Lomé III.

Thus between 1963 and 1991 the Council's choices can be seen in the "OUT" optic, the OCTs gradually joining the developing countries signatory to the Yaoundé and Lomé Conventions.

C. 1991: Decision covering ten-year period with a mid-term review

At the conclusion of the Lomé IV negotiations in 1991 the Council adopted new provisions for the OCTs that diverged from the ACP regime in four respects.

1. Trade. Following a request from the Netherlands Antilles, the Dutch delegation at the Council raised the issue of the application of Articles 132(1) and 133(1) of the Treaty of Rome. Arguing that "Member States shall apply to their trade with the countries and territories the same treatment as they accord each other" the Dutch managed to obtain totally free access for imports into the Community of OCT originating products (Article 101(1) of the Association Decision, although only after months of heated debate within the Council (this was not a Commission proposal).

This can be categorised as an "IN" choice since the Member States had not imposed customs duties on trade with each other for years but there is also an "OUT" dimension since the OCTs are allowed to retain or introduce customs duties or quantitative restrictions they deem necessary at their borders (just like the ACP States but unlike the DOM) and imports of OCT products into the Community are subject to a safeguard clause. To sum up, the OCTs are not part of the Community customs territory and remain free to make their own decisions on import duties but enjoy free access to the Community market.

It is this ambiguity that has been the cause of many legal wrangles between the Netherlands Antilles and the Commission and Council. Since the cumulation rule for ACP and OCT products was not abolished when free access was accorded to imports from the OCTs, ACP rice ended up being imported via the OCTs, which signalled the start of a major headache for the Commission, the Council and the Court of Justice (safeguard measures, rules of origin, health and plant health regulations and so on). It was a sticking point in the mid-term review and the Member States were unable to reach agreement on a Commission proposal presented at the end of 1995 until the end of 1997.

The rulings on the OCT trade regime by the Court of First Instance and the Court of Justice have tended to take an "OUT" perspective, stressing the fact that the OCTs are not part of the customs territory. The recent meeting by the Court in case C-390/95 P, of 11 February 1999 confirmed that "*a safeguard clause does not in any way infringe the principles of Part Four of the Treaty*".

2. **Transhipment.** An original element in the trade regime that is not found in any other preferential agreement is the transhipment system by which any country or territory can levy Community customs duties on third-country products and then treat them as products in free circulation on the Community market (Article 101(2) of the Association Decision).

The developmental aspect to this system is that the country or territory, not the Community budget, gets the duty (unlike Community regions). However, certain products are excluded and duties may not be refunded to operators. This provision is supplemented by Annex III to the Decision introducing a specific export certificate.

3. **Right of establishment.** The Council also amended the rules on establishment and the provision of services: the OCT authorities were authorised to give preference to employment of their nationals in certain sensitive sectors, once they had obtained Commission approval and on condition they did not discriminate between the Member States. This provision, which was proposed by France at the request of some of its OCTs, must be classed as "OUT", since it derogates from the principle laid down in the chapter on establishment in the Treaty.

4. **Commission/Member State/OCT partnership.** This partnership was set up by the Council (Articles 234 to 236 of the Decision) on a proposal from the Commission, which wanted to make good the lack of institutional machinery in a relationship that had hitherto been run solely by the governments of the Member States concerned. The reasons for this move are clearly set out in the recitals of the Decision, reference being made to both the regions of the Community and non-member countries, and must be seen in an "OUT" perspective: "Whereas there is general recognition of the active participation of local authorities of both the Community regions and of non-member countries in the implementation of common policies or in relations with the Community; whereas the association with the OCT has no provision for such participation, apart from the implementation of development finance cooperation in some OCT or in a more general way in others; whereas the participation of elected representatives of the population concerned should be stepped up, while respecting the constitutions of the Member States responsible for the OCT; whereas the principle of partnership between the Commission, the Member State and the country or territory meets this double objective."

Furthermore, the preparatory discussions in 1990 envisaged for the first time the possibility of applying some internal market directives (financial services, insurance, etc.) to the OCTs, a proposal that came from the Netherlands. Since these directives extended to the European Economic Area, argued the Dutch OCTs, they should also apply to them as they were part of the Kingdom of the Netherlands. But they also clung to their autonomous status and refused to subject themselves to the authority of the central government. This proposal can be seen as both "IN" and "OUT" but met with fierce opposition from the other Member States with OCTs, namely France and the UK.

D. December 1997-February 2000: the current association

The current Association Decision, a revised version of the 1991 Council Decision, can be summed up as follows:

1. **Trade regime**. Since 1991 this has been the most generous of the preferential agreements concluded by the Community, offering as it does free access for all products (agricultural and industrial) originating in the OCTs combined with advantageous origin rules.

   These rules are based on the principle that the products must be produced or sufficiently processed locally. There is an additional facility in the form of a cumulation of ACP and OCT origin for ACP products that means that a lesser degree of working is required in a country or territory. However, there are annual quantitative restrictions on cumulation of origin for two sensitive products, rice and sugar. The Commission had tried but failed to make ACP/OCT cumulation more restrictive to take account of the difference in the two access regimes; the ACP's regime is less favourable for agricultural products and this led to artificial trade flows in these products that did little to help the development of the OCTs but were very disruptive to the Community market.

   The transhipment system set up in 1991 has also been maintained.

2. **Financial instrument**. (Annex 6) Financial and technical cooperation is funded by:

   - 8th EDF resources (165 Mio € for five years, i.e. 33 Mio €/year), divided into programmable resources of 115 Mio € (indicative programmes for each country or territory plus regional cooperation) and non-programmable resources of 50 Mio € for instruments such as risk capital, Stabex, Sysmin, interest-rate subsidies, emergency aid and refugees);
   - EIB loans from own resources.

   The overall financial package accorded the OCTs under the 8th EDF places them, in terms of per capita financing, between the ACP States (EDF) and the DOM (1994-2000 structural funds). This supports the theory of concentric circles, according to which the Community regions get the best treatment, followed by the OCTs and then non-member countries.

   The programmable aid is divided among the groups of OCTs (F, NL and UK). It is then up to the Member State concerned to allocate these resources among the individual countries and territories. Greenland does not receive EDF funding

since it gets financial compensation under the fisheries protocol concluded with the Community (37,7 Mio €/year, third Protocol 1995-2000).

The areas of cooperation are very varied, as they are for the ACP States, meaning that the indicative programmes can be tailored to the development priorities of each country and territory.

On the subject of commitment and payment rates, it should not be forgotten that the 1986 and 1991 Association Decisions were adopted a year after the relevant Lomé Convention. The mid-term review was adopted in November 1997, two years after the signing of the revised Lomé IV at Mauritius. Taking this time-lag into account, the take-up rates are satisfactory, apart from a few specific cases (Annex 5).

3. **Development of industry and services.** The OCTs are eligible for the services of the Centre for the Development of Industry (CDI) on the same footing as the ACP States, financing their contribution from the indicative programme. But since the 1997 Decision they have also benefited from programmes aimed at the private sector in the Community (Interprise, Europartenariat, BC-Net, Euromanagement and Seed Capital) and research/development/innovation programmes.

   Thus the tertiary sector and above all services, which are crucial for OCT economies that generally have few natural resources, enjoy both the benefits offered by the Lomé Convention ("OUT" perspective) and internal Community aid programmes ("IN" perspective).

4. **Information.** The OCTs have been covered by the Euro Info Centres since 1991 in an effort to provide information mitigate their isolation but no Info Centre has yet opened in a country of territory.

5. **OCT nationals**. The provisions on the right of establishment and provision of services are based on the principle of non-discrimination between Member States. A special clause authorises the OCTs to give local inhabitants priority for jobs in sensitive sectors, subject to Commission approval.

6. **Education-training**. In addition to EDF funding for training projects, the OCTs are eligible for the Leonardo, Socrates and Youth for Europe under the 1997 Decision, in accordance with the principle of EU citizenship enshrined in the Maastricht Treaty.

7. **Qualifications**. Recognition of some professional qualifications obtained in the OCTs is under way.

8. **Institutions**. On a proposal from the Commission, which was reacting to the OCTs' wishes, the Council had provided for annual partnership meetings, here possible. No meeting was held in 1998 for reasons that are explained in Part Three.

PART TWO: THE BASIC ISSUES AND THE GENERAL BACKGROUND

I. The basic issues: ambiguities and decisions reaffirmed

A This review of the past, as set out in the first part, shows that the concept of the Community's contributing to the development of the OCTs **was strongly affirmed in March 1957** at the highest level of the Community authorities, i.e. the High Contracting Parties.

- It is clearly affirmed in the very preamble to the Treaty where the High Contracting Parties "intend to confirm the solidarity which binds Europe and the overseas countries."

- It is given practical effect by the inclusion in the Treaty of a Part Four stating that the purpose of "association is to establish close economic relations between the countries and territories and the Community as a whole."

- It is implemented by the addition to the Treaty of an Implementing Convention establishing "a Development Fund for the OCTs" whereby the Member States "supplement the efforts made by the authorities responsible for those countries and territories."

Thus, a number of concepts saw the light of day: Community solidarity, then deployed for the first time, but now a familiar concept that has been extended to many other beneficiaries; association with the Community; complementarity; the responsible authorities.

The semantics set the tone. The terminology was negotiated, political and binding.

B. Forty years on, at the dawn of the 21st century, the association endures **but the partners have changed a great deal:** the Treaty of Rome was, of course, conceived at a time when the EC had only six Member States and when the association of the OCTs referred to a relationship between four of them (B, F, I, NL) and their many colonies, most of them in Africa. The latter gained independence in the 60s and the Community has undergone four successive enlargements. The EC-OCT association now consists of a Union with fifteen Member States and 380 million inhabitants and twenty OCTs linked to four of them (DK, F, NL, UK), with no more than a million nationals.

During the past forty years, the Community has, as we have seen, accorded parallel treatment to the OCTs and the African States (under the Yaoundé Conventions) and, later, the ACP States (under the Lomé Conventions).

However, for the purposes of certain areas of secondary legislation, they are treated as if they formed part of the Community:

- either because this was expressly provided by the Treaty with regard to certain specific aspects (and by no means the least important: trade arrangements, to some extent, and certain principles governing the right of establishment);

- or because their nationals are also nationals of the Member State to which they are linked, so that the law governing natural persons is indirectly applicable to them. In the case of one Member State, they may even elect or be elected as Members of the European Parliament.

It is on account of this ambivalence that about twenty cases have been brought before the Court in recent years, some of which are still pending, concerning various aspects of the implementation of Community law in their regard.

C. Politically, too, **there have been questions about the Community's role** in their development: representatives of other Member States have sometimes asked why the European taxpayer should bear the cost of Community aid to OCTs rather than the Member States to which they are linked. Discussions in the EDF Committee bear witness to this attitude, which, although not openly admitted, is sometimes quite obvious.

Conversely, the representatives of the OCTs and the authorities of the Member States with which they are linked insist that they, as parts of a Member State, are entitled to more consideration than third countries.

The Community may therefore appear to suffer from an identity crisis as regards the OCTs: it may have adopted successive Association Decisions, but it has virtually no clear-cut position on them as a group. Although discharging its basic development role with respect to the *"former African OCTs"*, it is uncertain about its remit in regard to those that have retained that status. It does not know whether it should back up the efforts of an OCT or the Member State to which it is linked or leave the Member State in question to support such development itself without involving the other fourteen.

Furthermore, according to the Treaty, the OCTs' status is governed by a procedure requiring the Council to act unanimously, a feature retained in the Amsterdam Treaty. In the last two years this situation has brought wrangling over a few thousand tonnes of certain products, which may appear laughable if the highly political nature of these discussions for certain Member States with divergent opinions is left out of account.

There is clearly virtually no consensus!

D. For all the ambiguities, opinions and indeed doubts, the response to these questions is clear. The political commitment made in 1957 to joint solidarity vis-à-vis the OCTs did not end when the new African States gained their independence. On the contrary, **it was clearly reaffirmed by the Union's authorities** at various stages of building the Community.

Thus, the Treaty acquired at Maastricht a new Article 3(r) (specific to the OCTs), whereby the signatories to the Treaty decided "to promote jointly the economic and social development" undertaken within the framework of the association with the territories in question.

The Treaty of Amsterdam, likewise, retained and updated Part Four of the Treaty. It even strengthened the guidelines by specifying - a new element - that the Council must act "on the basis of the experience acquired under the association of the countries and territories with the Community."

Most recently, as was stated in the introduction, the Conference of Heads of State and Government reviewed this matter in Amsterdam. By means of a Declaration included in the Final Act, it reiterated this common objective and gave an entirely affirmative response to the question, "solemnly" restating that the purpose of association "is to promote the economic and social development of the OCTs and to establish close economic relations between them and the Community as a whole", entrusting the Council with the task of reviewing the arrangements.

E. These clear political guidelines are therefore wholly consistent with the geopolitical decisions governing Community action in these or similar areas.

- The decision to reaffirm throughout the world **European values,** such as respect for and enjoyment of basic human rights, recognition and application of democratic principles, strengthening the rule of law and good governance. The close link between this decision and development policy has been reaffirmed by the Council and the Commission in their dealings with the ACP countries and in every development cooperation agreement concluded with third countries. As the summary of their constitutional status shows, the OCTs are territories where, by virtue of their history and their decision to retain constitutional ties with Member States of the EU, these values are put into practice; these territories scattered around the world enjoy this privilege but there is a price to pay, with the support of their historic partner but also of the various European states that have, together, reaffirmed these guiding principles.

- The decision to support, especially in those regions in which the OCTs are situated, efforts made by the **different neighbouring countries,** irrespective of their status or political sensitivity since regional cooperation between them can boost joint development. The Caribbean, Pacific and Indian Ocean regions are striking examples: they were, by and large, artificial constructs, dependent on the economies of Britain, Spain, France or Holland, resulting in a human, cultural, racial, religious, family or economic patchwork. These neighbours, be they ACP States, OCTs or Overseas Departments, should receive from a Europe now united support for their joint endeavours and sense of belonging to a region in the interests of their collective development.

- The decision to provide backing for the **development of the small islands,** which account for 19 of the 20 OCTs (Greenland excepted): taking account of the specific needs of these island territories is entirely in line with action taken by the international community. A comprehensive action programme for the sustainable development of the small island states was adopted in 1994 at the international conference of the United Nations in Barbados. This action programme identifies a number of priority areas and specific projects that are to be carried out with the cooperation and assistance of the international community, in order to help such small island states to deal with the specific problems and risks that they face. Note that the Union is a signatory to the action programme.

- The decision to implement policies with **greater flexibility** in order to take "greater account of diversity", in the words of the Amsterdam Declaration. This is what the Community has done in respect of its own "outermost regions", regarding which a new Article 299(2) was included in the Treaty at Amsterdam in order to take account of characteristics very similar to those of certain OCTs. This Article allows implementation of the Union's policies to be adjusted in the outermost regions and

Community legislation to be adapted to "their specific characteristics and special constraints".

II. The general background to the discussion

No review of the relationship between the European Community and the OCTs can be carried out without firmly placing the discussion in the much wider context of the changes under way in the OCTs' regions and the wider world.

The development objective underlying the EC-OCT relationship entails constant adjustment to the trends that have emerged or become facts of life in recent years.

Such adjustment concerns both trade arrangements and the financial assistance to be granted to the OCTs. It is all the more necessary in that successive Association Decisions have been wholly successful in their development role despite the Community's generous efforts in the shape of open-handed trade concessions and substantial financial flows.

The global changes clearly described in the Green Paper on relations between the EU and the ACP countries on the eve of the 21st century,[7] which highlights the massive numbers involved in the EU-ACP relationship (380 million and 550 million nationals, respectively), also affect the OCTs.

Certain statements in the part entitled "A world in turmoil" are perfectly relevant to the general discussions concerning the OCTs:

"The growth of trade, the unification of capital markets and the globalisation of production and distribution networks represent both opportunities and new risks."

"Action on a national scale appears increasingly inadequate as the growing interdependence between the social and economic systems of various regions, the appearance of new systemic environmental dangers, migration, terrorism, drugs, and international organised crime, call into question the notion of national sovereignty. Global regulation is progressing very slowly; it seems likely that the parallel trends apparent today - a stronger multilateralism and regionalism - will continue."

A. At regional level, most of the OCTs are near neighbours of ACP States or Overseas Departments in areas undergoing far-reaching changes: seven in the Caribbean (two NL + five UK), four in the Pacific (three F + one UK) and one in the Indian Ocean (F). Other OCTs, such as the Falkland Islands, Greenland, St Helena or Saint-Pierre-et-Miquelon, are geographically very distant from the ACP States.

A number of regional integration initiatives are already under way, notably in the Caribbean: links between the members of Caricom, Cariforum for the purposes of Community aid and Caricom links with its neighbours in the context of the Free Trade Area for the Americas.

In some cases their location leads to OCTs becoming full members of regional organisations: the UK OCT of Montserrat is a full member of CARICOM; the other UK

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7 Doc. COM(96)570 final, 26.11.1996.

OCTs in the Caribbean have observer status and the 8th EDF Caribbean Regional Indicative Programme (CRIP) has long been calling for the inclusion of the OCTs.

Changes in their regions obviously concern the OCTs. And these changes will prompt them, in ways that are appropriate to their status, to take account of future changes in their environment when deciding on their future.

Furthermore, the Community has for many years consistently supported regional cooperation between neighbouring OCTs, Overseas Departments and ACP States as both a development tool and a factor for human, economic and political convergence. However, in spite of the resources made available to the various partners concerned, the involvement of OCTs in joint projects with their neighbours has, for reasons of culture, politics or rivalry, not been entirely satisfactory.

Changes under way in the regions and the relative failure of the OCTs' integration in them raise questions about the kinds of trade and financing arrangements needed to meet the new challenges up ahead more effectively.

B. At world level, a continuing process of trade liberalisation is already largely under way. It has far-reaching consequences for trade policy and decisions concerning financial support. The Green Paper summarises them as follows:

"While globalisation has reduced trade barriers and the cost of engaging in international trade, access to international markets is becoming more complex and dependent on other non-tariff barrier trade-related considerations. In the market access equation, the level of tariffs plays an increasingly reduced role and other aspects such as competition policies, technical, sanitary and phytosanitary standards, subsidies, anti-dumping and countervailing policies, environmental and social regulations, intellectual property laws, investment codes, etc, have come increasingly to the fore as major determinants of market access."

Consideration must therefore be given to the future guidelines for Community aid to the OCTs in order to help them expand their trade and develop their policies in the trade-related areas referred above.

1. As far as reducing trade barriers is concerned, the Community in the process of dismantling tariffs: the average tariff protection rate is currently only 3%.

As a consequence of the Uruguay Round, trade is being liberalised:

- in the case of agricultural products, by dismantling tariffs by 36% over six years from 1 July 1995;
- in the case of industrial products, by reducing the developed countries' weighted average rate by 40% over six years from 1 January 1995.

The Community concessions granted to the ACP States under the revised Lomé IV Convention give them a 2.5% preferential margin vis-à-vis the countries covered by the GSP.

All these factors clearly demonstrate that the OCTs' preferential margin is declining in relation to their main competitors; to this must be added any additional tariff concessions secured by the ACP States in the post-Lomé context.

2. The declining value of tariff preferences and the need to cooperate in trade-related areas have prompted the Community to propose a development partnership for its future relations with the ACP States. This new approach is bound to have implications for the OCTs in view of the OCT-ACP geographical and trade context.

According to the Community negotiating directives[8], the new ACP trade arrangements are geared towards regional economic partnership agreements (REPAs) which provide for the phased establishment of free trade areas.

These agreements provide not only for liberalisation of trade in goods, and sometimes even services, but for far-reaching cooperation in trade and trade-related areas (e.g. intellectual and commercial property, standardisation and certification, health measures, competition and investment security). This approach, the aim of which is to establish broadly integrated EU/ACP economic areas, would be implemented by stages:

- 1998-2000: negotiation of an EU/ACP framework agreement which will specify the objectives, the principles and the basic elements of the regionalism economic partnership agreements (REPAs);
- 2000-2005: negotiation of REPAs; the current Lomé Convention trade arrangements would be retained during this period;
- 2005-2017 or later: introduction of REPAs and reciprocity, both in stages.

A process involving far-reaching changes is therefore under way. It may result in broadly integrated economic areas encompassing the ACP States and the EU, areas in which the bulk of trade is liberalised and potential traders and investors are mobilised by a stable, predictable and transparent economic environment.

C. The question is whether a similar approach should be taken to the OCTs, which face similar challenges - whether at regional or world level - on the basis of the experience gained through the Association.

Before considering possible responses with regard to the trade and financing aspects, it is necessary to consider the trade arrangements that have given rise to so much discussion and caused so many difficulties in recent years (cf. Part One).

These arrangements were based on the greatest preferential access of any agreement, and their actual contribution to the development of the OCTs and OCT-EU trade needs to be examined.

1. The arrangements had three objectives: expansion of trade, development of the local economy and regional cooperation.

In theory, offering OCT products access to the vast solvent market of a Union that now has 380 million consumers is a major development advantage; preferential agreements are based on this premise.

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8 Council Doc. 10017/1/98, rev. 1, 30.6.1998.

(a) In fact, such access has not really helped to expand trade, except in the case of a few products from various OCTs, and in particular rice and sugar from Caribbean OCTs (see Annex 5).

(b) Likewise, the trade arrangements put in place in 1991 have been unable to make a major contribution towards creating new production lines, processing activities, diversification or exports. In general, the concessions have not resulted in genuine local development based on a strengthening of the economic fabric: they have mainly been exploited with the sole aim of gaining unimpeded access to the Community market via artificial channels involving minor processing that adds little value.

Some very encouraging diversification activities have, however, been carried out in some OCTs (particularly Saint-Pierre-et-Miquelon) by combining the origin rules with third countries and free access to the Community, or by applying Article 101(2) of the Association Decision (levying CCT and subsequent exportation). These are, however, isolated cases.

The same goes for derogations from the rules of origin, which afford unimpeded access to the Community for exports which do not yet fully meet the requirements applicable to products originating in the OCTs. Here also, the provisions of the Association Decision are the most favourable of all the preferential agreements concluded by the Community. Of course, all derogations necessarily involve time limits and quantitative restrictions if they are not to undermine fundamental principles but simply support efforts to launch new activities. Derogations have, therefore, inevitably been of limited value as far as development is concerned.

(c) Lastly, the Council has granted unimpeded access to all products originating in the OCTs (which was not the case for ACP products under the Lomé Convention), without modifying the rules of origin, including the cumulation arrangements with the ACP States, which are designed to strengthen economic cooperation between them and the OCTs. Shrewd analysis of products enjoying differentiated treatment under the two schemes has resulted in products from ACP States transiting through certain OCTs without helping to strengthen ACP-OCT economic cooperation.

The three objectives of expanding trade, developing the local economy and regional cooperation have as a result not been fully achieved.

2. However, the trade arrangements have created difficulties as regards the relationship of the OCTs, not only with the Community but also with the ACP States.

(a) It has obviously not been possible to grant major tariff concessions to the ACP States in the case of the most sensitive Community products. It is therefore these same products that have proved to be the most attractive as far as use of the ACP/OCT/EC channels is concerned. Difficulties have therefore arisen on the Community market in these sensitive products.

The discussions concerning the mid-term review showed fairly clearly that there is a contradiction, if not, at least a difficulty of interpretation between, on the one hand Article 132(1) of the Treaty "Member States shall apply to their trade with

the OCTs the same treatment as they accord each other pursuant to this Treaty" and Article 133(1) and, on the other hand, the objectives of the CAP (unity of the market, financial solidarity and Community preference).

As regards this dilemma, the many cases dealt with by the Court of Justice or the Court of First Instance have shown that the expression "pursuant to this Treaty" makes it perfectly possible to respect the requisite consistency between the various common policies, by reaffirming that the CAP constitutes one of them (Articles 39 to 43 of the Treaty), which the Council must take into account when implementing Part Four of the Treaty. It is on this basis that the mid-term review was finally approved at the end of 1997: it includes an understanding on trade, including the fixing of certain maximum annual quantities for ACP/OCT origin cumulation in respect of the two sensitive products, sugar and rice.

Note in this respect that when the understanding was adopted, the Council and the Commission made a number of declarations, notably with regard to the long term (OCT 2000), the wording of which clearly illustrates the still radically differing standpoints of the Member States (see Annex 7).

Finding a response at this time to the new challenges is therefore a delicate matter: a Treaty whose wording poses interpretation difficulties, a hard-fought compromise in the Council and declarations attesting to a fragile equilibrium.

(b) The ACP States complain that the OCT arrangements mean that they are competing on the Community market with their own products. Thus, the ACP negotiating mandate for the current negotiations on a post-Lomé development partnership agreement states, under "Protocols and Other Special Arrangements", that "with respect to rice which is covered by a Special Arrangement the ACP requests that: the OCT route for ACP rice exports to the EU be discontinued completely in the successor Agreement; post-2000 the quota for ACP traditional rice exporters for rice shipped directly to the EU be substantially increased annually up to 2005 and thereafter all quotas and other quantitative restrictions be completely removed; significant further reductions in the levy on rice exported by the direct route to the EU."[9]

This specific reference to the most sensitive product is a clear illustration of the ACP Working Party's wish to be rid of the ACP/OCT/EC channel.

In light of their rather mixed achievements and the new challenges at regional and world level, the trade arrangements applicable to the OCTs need to be reviewed. Such a review is impossible without a fundamental decision on the OCTs' longer-term situation in the light of the coming changes affecting the Community and their ACP neighbours.

A debate geared solely to the OCT-EC relationship would be purely theoretical, or even futile if it failed to consider the economy of the OCTs against the general background of the changes in world trade which implicate the Community itself, the OCTs' principal trading partner, and the future situation of their ACP neighbours.

The various alternative policies discussed in Part Three are set against this background.

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9 Doc. ACP/28/028/98, rev.2, neg. 30.6.1998, point 46.

In the Amsterdam Declaration the Heads of State and Government set a fourfold objective for the review of the association arrangements:

- promoting the economic and social development of the OCTs more effectively;
- developing economic relations between the OCTs and the European Union;
- taking greater account of the diversity and specific characteristics of the individual OCTs, including aspects relating to freedom of establishment;
- ensuring that the effectiveness of the financial instrument is improved.

What are the options for achieving these goals, given the state of the OCT-EC association, which needs improving in various ways, and the far-reaching changes at regional and world levels? **Whatever option is chosen, it must take account of the specific characteristics of the OCTs, their special links with the EU and the political choices which they have made in their own constitutional framework.**

I. Trade arrangements

In its simplest terms, the choice might be expressed as two opposites:

- **an ACP-type status**, i.e. the 'OUT' option; or
- **belonging to the Community customs territory** (like the French overseas departments which are an integral part of the EU), i.e. the 'IN' option.

Either choice would put an end to the ambiguity of OCT status:

- the first would put an end to total freedom of access and tie in with the concessions under Lomé;
- the second would involve a customs union which suppose:
  a) the rights: free access to the Community market;
  b) the obligations: the collection of customs duties for the Community budget and the alignment of the commercial policy of the OCTs on the EC's common commercial policy, as well as the application of provisions and implementing measures which are substantially similar to those of the Community.

However, neither of these options would take account of the political choices expressed by the OCTs, which have not chosen either of them. Both these options would require amendments to the Treaty. The Council chose a third formula in July 1991. But it is not for the Commission or the Council to impose such options, in any case, it is a political choice that only the peoples concerned can make within their own constitutional frameworks. Whatever option is chosen, the impact on the EC's outermost regions would need to be evaluated.

A. The trading arrangements adopted at the end of 1997 could be continued unchanged : ie free access cumulation of ACP/OCTs origin, limited cumulation for rice

and sugar. This would have the advantage, without reopening discussions, of consolidating the political balance between the fifteen Member States, achieved after lengthy negotiations. These arrangements recognize both the diversity of the OCTs and their special links with the EU. For OCTs located away from potential EU-ACP Regional Economic Partnership Agreements (REPAs), this is probably their only viable option.

B. However, to meet the concerns set out in Part Two, the problem of differences in tariff arrangements between the ACP States and OCTs within the same area could be remedied through formulas that provide a stable and predictable trading environment and guarantee European producers Community preference for sensitive products.

Two options could be considered: (1) access to the Community market and (2) ACP/OCT cumulation of origin or even the origin rules themselves.

1. EC market access

(a) Alignment of the OCT trade arrangements with those of the ACP countries, maintaining unlimited ACP/OCT cumulation and putting an end to the problem of "artificial flows".

This solution implies a partial loss of freedom of access to the EC market in cases where the arrangements differ.

(b) So another option is available, consisting of collecting duties equivalent to Community duties on imports into the OCTs, i.e. CCT duties on products from third countries and revised Lomé IV import duties on products originating in the ACP.

As is already the case with the Article 101(2) procedure under the current Association Decision, revenue from such duties would go towards the local OCT budget and not the Community budget. Although the OCT would lose autonomy over tariffs they would keep the revenue.

But what gain is there to the OCTs in exporting products to the Community if duties have already been charged on them? Is it still worth exporting products at the price inclusive of duty? The answer is yes in cases where the duties are charged on the CIF value because the OCTs are a long way from the Community: the cif price of a product imported by a Caribbean or Pacific country or territory from a large neighbouring country or from an ACP country would justify the detour.

The collection of duty on importation into the OCTs is not at all incompatible with freedom of access to the Community as this could no longer be disputed by Member State producers of sensitive products (even though, as pointed out above in relation to the lower cif price, the price on entry into the Community would be slightly lower than for products originating elsewhere).

This measure would also put a stop to artificial ACP/OCT/EU flows.

On the other hand, it would require strict controls, notably tighter administrative cooperation procedures.

(c) If the purpose is to put a stop to artificial ACP/OCT/EU flows, a duty similar to CCT duties could simply be collected on products where the ACP rules and the OCT free-access arrangements differ. In this way the duty would only be collected on sensitive products in artificial trade flows.

2. ACP/OCT rules of origin:

(a) Restricting ACP/OCT cumulation of origin, as proposed by the Commission in 1995, would help put a stop to the problem of artificial ACP/OCT flows whilst maintaining full freedom of access to the EC market for products originating in the OCT.

This solution is in keeping with freedom of access for the OCTs but implies an effort on their part to adjust to stricter rules on products on which the ACP and OCT arrangements differ.

(b) An alternative solution would be to base the origin system on value added. The Netherlands Antilles have already asked for such a system with the aim of generating local employment through the processing of imported raw materials.

The raising of this issue in the Council at the end of 1997 led to the adding of Article 108(2) to the Association Decision: "The Council, acting unanimously on a proposal from the Commission, shall decide on the adjustment of the rules of origin set out in Annex II for products of particular interest for the present and future development of the OCT, in order to meet the specific problems linked to the OCT's economic and geographical structure, in the light of the objectives set out in Articles 3(r) and 132(1) of the Treaty".

The Commission wrote to the four Member States concerned first in February, then November 1998 to ask them to specify the products for which they wanted the origin rules to be adjusted. Neither inquiry has been followed up by the Member States, who wanted to postpone debate on this issue until the post-2000 arrangements.

A value-added based system would of course also imply the abolition of automatic ACP/OCT cumulation as the two sets of arrangements would be based on different definitions of origin.

Such a system would appear simple. However, checking the accuracy of the amounts on which the added value is based can clearly pose problems, not to mention the fact that the Essen European Council's guidelines on the harmonisation of origin rules advocated the opposite course of action.

(c) For some OCTs (cf note 10), ACP/OCT cumulation is of no interest. Their geographical context is that of the European Economic Area or of certain countries in Central or Eastern Europe, and that is the context in which the question of cumulation of origin arises for them. This issue needs to be more closely analysed so that appropriate conclusions can be drawn.

The latter alternatives are hardly in keeping with the regional integration solution or with the potential benefits to the OCTs of joining the REPAs but they do maintain the special relationship between the OCTs and the Community.

C. Through involvement in future regional integration, the OCTs could enjoy a status which conferred all the advantages ensuing from Regional Economic Partnership Agreements (REPAs). In view of their small size, this option would clearly be a factor in the development of the OCTs by integrating them into a larger economic area.[10]

1. They would qualify for access to the Community market and to regional markets under future free trade arrangements and for cooperation in trade-related areas, providing the sort of stable, safe and transparent economic climate conducive to investment.

The benefits of regional integration would give the OCTs a central role in relations between the EU and the region and put them in a position of some strength: the experience gained from their close links with the Member States to which they are linked equips them well for the interplay of an open regional market that may be extended to services. Under the present Association Decision they are also eligible (unlike the ACP States) for 19 Community programmes which they can use to help improve their competitiveness.

On the other hand, this form of integration would require:

- alignment of the OCT arrangements on the ACP regime that emerges from the current negotiations (which will be more generous than the concessions under the current Convention) - this would therefore not entail dramatic changes for the OCTs;
- the participation of the OCTs in the negotiations on the REPAs on the questions of relations with the Community and of OCT-ACP free trade - not constitutionally possible for every territory.

2. To pave the way for integration, one possible proposal is that the OCTs be given time to prepare themselves and consider the alternatives before committing themselves to the REPA option. It will take several years to see how this option maps out in each area.

This phase could last until at least 2005 and would allow the OCTs to:

- observe the REPA set-up;
- qualify for financial assistance to prepare for and support the future free-trade arrangements in the REPA framework (see financial instrument below);
- continue to enjoy the trade arrangements resulting from the November 1997 compromise.

These are the fundamental choices underlying the long-term alternatives of regional integration or local isolation through special ties with Europe. Whatever option is chosen,

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[10] By definition, the regional option is not open to the most isolated OCTs (the Falklands, Greenland, Pitcairn, Saint Helena, Saint-Pierre-et-Miquelon). In their case the problem will be finding arrangements for them if the other OCTs commit themselves to regional integration.

For political reasons relating to the Comoros Islamic Republic, Mayotte is the only territory in the Indian Ocean not to belong to the Indian Ocean Commission, a model of regional integration.

it must take account of the specific characteristics of the OCTs and the political choices which they have made in their own constitutional framework.

II. The financial instrument

Amongst the objectives which the Amsterdam Conference set for the Council was "improving the effectiveness of the financial instrument".

As we have seen above, the EDF has been applied in the same way to the OCTs as to the ACP countries and its procedures adopted in full (programmable/non-programmable aid, programming, project management).

The main criticisms levelled at the current instrument relate to:

- the total amount allocated to the OCTs from the EDF: OCT leaders compare their *per capita* allocations to the bigger allocations to the overseas departments under Objective 1 of the Structural Funds; they believe the Community should consider resources allocated to OCT development as resources for citizens of Member States and thus citizens of the EU, who therefore have priority over third countries;
- the mismatch between programming, project management, commitment and payment procedures and the amounts handed out to most OCTs (see Annex 6); there are a number of OCTs whose five-year indicative programmes, often for less than ECU 3 million, cover a single project;
- the unwieldiness of project management procedures, especially when one considers that the OCT authorities have capacity in management and supervision through their links with three of the Member States; leaders of all the OCTs have therefore asked for a more important role in the partnership and the matter has been raised in debates in Parliament too.

Meanwhile the Commission is not only anxious to simplify procedures and decentralise in a transparent way but aware of the need to economise on human resources. It wants greater emphasis on the concepts of partnership, or "ownership", based on an overall agreement on the country or territory's development strategy and targeted local project management, backed up by ex-post evaluation.

To respond to these criticisms and flesh out these ideas, three possibilities have been aired in partnership meetings, in the 1996 French memorandum and during debates in Parliament:

- OCT eligibility for the Structural Funds
- overhauling the EDF
- or including a special OCT fund in the EC budget.

A. Of the three scenarios, the first to discard would appear to be the idea of full OCT eligibility for the Structural Funds: the aim of the Structural Funds (ERDF, ESF and EAGGF-Guidance) is to help reduce excessive disparities between the various regions of the Community making up the internal market. These regions are subject to the obligations ensuing from the Treaty and secondary legislation (in particular, they

contribute to own resources by means of the customs duties collect and the share of VAT levied).

As the OCTs are neither part of the internal market nor subject to the above obligations, eligibility for the Structural Funds does not seem to be an option for them. Furthermore, preparing the European Council's political commitment for the years 2000-2006 is too sensitive a task for the introduction of novel ideas on the use and allocation of appropriations.

However, this solution would be feasible in the case of the "IN" scenario, i.e. a radically different fundamental policy option under which the OCTs would acquire Overseas Department (DOM) status, which would of course require a drastic change to the Treaty.

B. Nevertheless, the revamped EDF could be based on the guidelines of the Structural Funds.

1. **Administrative procedures**:

- a multiannual political decision binding Community bodies to their annual budget decisions: as long as it is multiannual, programming can continue on the basis of a strategy for the medium term;
- a broader partnership, implying that the association of partners should be the norm throughout the programming process right up to the ex-post evaluation. For maximum coherence, such a partnership should be based on the dual principles of subsidiarity and complementarity.

Subsidiarity would involve the adoption, at the start of the multiannual period, of an overall financing decision (on the same lines as the SPDs, single programming documents for the Community regions) and handing responsibility for project management to the OCT authorities, subject to regular meetings of a monitoring committee and ex-post evaluation.

Complementarity would involve allocating resources to other activities in addition to the budgetary contributions of the OCT itself and of the Member State. This principle, applied since the reform of the Structural Funds in 1989, offers the major political advantage of deliberately linking up the OCTs' budgets, Member State support and the additional Community support.

There is one more political argument in favour of such a method for the OCTs: Agenda 2000 includes provision for pre-accession aid as part of the overall allocation for 2000-2006. This covers a contribution for the applicant countries as a group as well as a contribution for new members immediately on accession. In view of their links to the Member States, OCTs would find it politically unacceptable to be treated with a lesser degree of commitment than third countries negotiating with the EU.

2. **Areas of assistance**: one of the main purposes of the Community's contribution would be carry out targeted poverty alleviation measures, particularly where justified by a low level of development and to foster a climate conducive to gradual integration into the world economy.

In response to the changes at regional and world levels referred to above, the first area of assistance would be to promote the integration of the OCTs in the economic area to

which they belong. In the event of their future membership of Regional Economic Partnership Agreements (see I B), such a step would constitute preparation for that change by intensifying cooperation in trade and trade-related areas (e.g. intellectual and commercial property, standardisation and certification, health measures, competition and investment security).

For the very isolated OCTs (the Falkland Islands, Greenland, Pitcairn, St Helena and Saint-Pierre-et-Miquelon) that obviously could not fit into such region agreements, one of the four objectives of the Amsterdam Declaration on the OCTs, namely "taking greater account of the diversity and specific characteristics of the individual OCTs", would have to be called into play. This objective could by achieved by provision for targeting the financial instrument on the specific needs of these OCTs.

In addition, more use could be made of the 19 Community programmes that have been open to the OCTs since 1997, while other programmes might meet any new needs of these OCTs (environment, research, energy, raw materials). An example would be the research that needs to be carried out around the Falkland Islands and Greenland, using either Community instruments or the private sector to top up the proceeds of current and future fishery agreements.

3. **The amount**: For the reasons given above, i.e. the difference between the OCTs and the regions of the Community, full application of the 2000-2006 criteria for the underdeveloped regions cannot be envisaged. It would result in a drastic increase, which is sure to be unacceptable to the Member States.

On the other hand, applying the method of calculation used for the ERDF Objective 1 regions - bar the "political coefficient" - to the OCTs is quite conceivable.[11]

Although this method is totally in keeping with the diversity criterion referred to in the Amsterdam Declaration, it should be borne in mind that it dispenses with the breakdown by Member State practised the Council hitherto.

Furthermore, on the basis of GDP and population criteria, some OCTs would end up being denied their allocation on the grounds that their *per capita* GDP is higher than 75% of the average EU GDP. Provision should therefore be made for an extra allocation on top of the allocations for individual countries and territories, which would be open to all OCTs (including the better-off ones) for financing thematic activities (CDI, EICC, regional cooperation, etc).

4. The advantage of maintaining the EDF while revamping it, lies in the similarity of the approach with that of the ACP States. In practice, most of OCTs are located within the ACP geographical regions (as described in the chapter on trade) and this similarity would largely facilitate the financing of common regional projects.

However, the EDF is on the whole targeted to the ACP Member States ; over 12 Billion Euro for the 8th EDF over five years as opposed to 165 Million Euro for the OCT. As a

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[11] Select the regions with a *per capita* GDP less than 75% of the average *per capita* Community GDP for 1994-95-96 (ECU 17 377 x 0.75 = ECU 13 033). Work out the difference between ECU 17 37 and their *per capita* GDP. Apply a coefficient of 3% to the difference. Multiply by the population of the region.

result, all considerations as regards the EDF are set in the ACP context. Furthermore, the choices made on the EDF are viewed in light of the third countries' individual situations rather than those of territories of the Member States.

C. A third option is a special OCT Fund in the EC Budget. This was requested by the Parliament in its Resolution on February 11, 1999 (point 35).

The recommendations formulated in section B above, as regards the administrative procedures, the areas of assistance or in calculating the amount would be the same as for the revamped EDF.

The specificity of the OCT would then be recognised in contrast to the third states. In addition, the rules regulating budgetary expenditures, in particular the forfeit of funds following non-engagement might incite the OCT beneficiaries, when faced with these new requirements, to become more active in order to accelerate the process of financial engagement.

However, the OCT Fund option has not been taken into account in the negotiations on the new financial perspectives for 2000-2006, which foresee a tight ceiling on expenditure for external action (heading IV). Therefore the realisation of the option would be possible only through the redeployment within heading IV which does not seem feasible, at least not in the short term.

III. Right of establishment

A. Current arrangements for the right of establishment and the provision of services

1. In the EC Treaty, the right of establishment for national of the Community and the OCTs is laid down in Article 132(5). According to this article, the right of establishment is regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a non-discriminatory basis. Articles 52 to 58 of the Treaty therefore apply, subject to any provisions to the contrary in the Association Decision.

Bearing in mind that the legal framework for relations with the OCTs is derived solely from Part Four of the Treaty and from the Association Decisions, the instruments of secondary legislation do not apply to the OCTs unless otherwise stipulated.

Reciprocal freedom of movement for workers is also mentioned in Article 135, which states that it must be the subject of special provisions governing its implementation. However, none of the series of Association Decisions adopted since 1964 has included provisions for its implementation and the article has therefore proved a dead letter.

2. The Association Decision itself includes arrangements both for the right of establishment and the provision of services. It states that the OCTs should treat nationals of Member States on a non-discriminatory basis, including those of the State to which they are linked.

The establishment and provision of services by OCT nationals in the Community, conversely, is regulated by a negative reciprocity clause by virtue of which OCTs whose nationals are not granted non-discriminatory treatment in a Member State are entitled to impose restrictions on nationals of that Member State (see Article 232(3)). This provision has been frequently criticised as it seems to leave the conditions governing establishment or the provision of services in the Community by inhabitants of the OCT or companies established in the territories to the discretion of the Member States.

In reality, the powers of discretion are very theoretical and one has to wonder whether the provision still serves any practical purpose. In fact, as inhabitants of the OCTs possess the nationality of the Member State to which they are linked, the rights in question are already conferred by Community law, in particular Articles 52 and 59 of the Treaty, and by the directives on the mutual recognition of national qualifications which make no distinction based on the place of origin of nationals of the Member States.

The only case in which the provision is likely to apply concerns nationals of the British OCTs who still do not enjoy full British citizenship. However, as we have seen above, a bill to grant them full citizenship is currently under discussion.

Finally the Decision also contains a derogation clause (Article 232(2)) which allows the OCT authorities to adopt regulations designed to support local employment in derogation from the rules normally applicable to the establishment of Community nationals in their territory. Such derogations are confined to sensitive sectors of the OCTs' economies and apply to all Member States. This clause, which was introduced in 1991 at France's request, has never been implemented. As such derogations would apply equally to all Community nationals, they would have resulted in discrimination in the treatment of French citizens of the overseas territories and of metropolitan France in breach of the French constitutional principle of equality of all citizens before the law.

Moreover, adoption of the derogations by the OCTs is subject to a somewhat unwieldy procedure for obtaining the prior approval of the Commission.

B. Changes in the status of OCTs *vis-à-vis* the Member State to which they are linked

Two significant developments should be mentioned:

1. The first concerns the Agreement on the status of New Caledonia signed on 15 May 1998 and the possible adoption of similar provisions on French Polynesia's status.

The Agreement establishes a status which will evolve over the next 20 years and includes provision for substantial transfers of powers, in stages, to New Caledonia. The final stage could see New Caledonia acquire full sovereignty following a territory-wide referendum. The reform of the French constitution in 1998 saw recognition of New Caledonian "citizenship" which might become "nationality" following this final referendum.

Amongst the powers to be transferred immediately to New Caledonia are those relating to the right to employment, the fundamental principles of employment law and the right to work and the right of establishment of foreign nationals. The local executive will also be involved in implementing the entry and residence rules for foreign nationals. New measures will also be adopted to encourage local employment. The right of establishment

may be restricted for self-employed persons not resident in New Caledonia while rules will be laid down on salaried workers and the Territorial Civil Service to give inhabitants of New Caledonia preferential access to employment.

Lastly, recognition of French Polynesian citizenship could give rise to a change in the constitution in 1999 allowing the Polynesian authorities to reserve certain jobs for the territory's inhabitants.

By bringing about differential treatment for French overseas and metropolitan citizens, the above changes will in future help the OCTs concerned to apply the right of establishment in a non-discriminatory fashion by laying down the same restrictions for citizens of metropolitan France as for other Community nationals.

2. The second development concerns the status and citizenship of the British overseas territories. In February 1998 the Foreign Secretary announced that a reform was being studied which would result in full British citizenship being conferred on all nationals of the British overseas territories. The award of citizenship would allow them to set up business and work on British soil on a non-reciprocal basis as regards UK nationals who wanted to settle in the territories concerned. As Community citizens, they would also be able to exercise these rights in other Member States.

In March 1999, the UK Government's White Paper on Overseas Territories confirmed the UK's intention to implement these changes.

The changes in the status of the OCTs are geared, at national level, to systems of non-reciprocity as regards establishment and access to employment in the OCTs. As nationals of the Member State to which the OCT is linked, citizens of the OCT have the right to set up business and work in that State whereas, in theory, local authorities in the OCTs can restrict the right of establishment on their territory of metropolitan nationals.[12]

The same situation arises at Community level as a result of a lack of coherence between the application of the Treaty provisions to territories and to individuals. As associated territories, the OCTs are subject to the Association Decision which simply obliges them not to discriminate against nationals of Member States wishing to set up business there. The inhabitants of the Territories, on the other hand, as nationals of a Member State and citizens of the Union are free to set up business in the Community.

Lastly, the non-reciprocity principle also turns up in the trade chapter of the Association Decision under which the Community grants free access to products originating in the OCTs whereas the OCT authorities are allowed to maintain or establish such customs duties or quantitative restrictions as they deem necessary and still be in compliance with the rule of non-discrimination between Member States.

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[12] Similar restrictions already exist in the Netherlands Antilles where the local authorities introduced a system of prior authorisation for the establishment of foreign nationals which also applied to Dutch nationals resident in the Netherlands.

C. Some ideas on reforming these provisions

Considering the existing arrangements and the developments underway, a series of modifications could be envisaged, both to the text of the Treaty itself and to the Association Decision.

1. In the body of the Treaty

As Part Four of the Treaty of Rome has never been amended (other than to add Article 136a on Greenland), we find ourselves in a situation where we have provisions on the establishment and movement of workers between the OCTs and the EC which are put into effect by an Association Decision containing its own set of provisions on establishment and services.

We could therefore consider deleting Article 135 of the Treaty on the free movement of workers between the Community and the OCTs. This article has existed since 1957 and includes provision for its implementation by agreements which were to be concluded subsequently (but were not). Moreover, given the invitation to the Council in the Amsterdam Declaration to take greater account of the specific characteristics of the OCTs, the inevitable conclusion is that we are moving in the general direction of local employment protection in the OCTs for employees and public service workers.

In order to bring the Treaty into line with the Association Decision and the practical framework of the Association, Article 132(5) of the Treaty, enshrining the principle of freedom of establishment in relations between the OCTs and the Member States, could be expanded to include the principle of freedom to provide services, which featured in the first Association Decision in 1964 and is covered by Article 232 of the current Decision.

2. In the Association Decision

(a) Article 232(3) which states that "If a Member State is not bound under Community law, or else national law, to accord non-discriminatory treatment for a given activity to inhabitants of an OCT who are nationals of a Member State (...), the authorities of that OCT shall not be bound to accord such treatment" should be deleted. As stated above, this clause has stirred up much controversy as it appears to allow the Member States to maintain or create discrimination between nationals of one or more OCTs and nationals of the Community. Inhabitants of the OCTs who are nationals of a Member State (or will be in the case of the British OCTs) and therefore citizens of the Union are in fact already covered by the relevant Treaty provisions (Articles 52 and 59) as far as establishment and services are concerned.

(b) The question also arises as to the utility of maintaining Article 232(2) allowing the authorities of the OCTs to adopt regulations intended to support local employment in derogation from the rules normally applicable to Community nationals in their territory, together with the procedure for obtaining the Commission's prior authorisation for such measures, a provision that is politically unacceptable to the authorities of the OCTs, which let us repeat, are not an integral part of the Community and generally enjoy a large degree of autonomy..

3.. In a protocol to the Treaty

Some OCTs, though wanting to restrict access to their local labour markets to their own population, have nevertheless often expressed the wish to maintain special relations with the Member State to which they are linked and its nationals. This could be achieved by adopting a protocol to the Treaty allowing them to adopt special measures, by way of derogation from Article 132, in favour of nationals and companies of the Member State concerned.

Clearly, we should be aware that this could lead to discrimination against national of other Member States. But that would be a political choice in line with the objectives of the association, namely "further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire." (Article 131) and the objective of the Amsterdam Declaration concerning "taking greater account of the diversity and specific characteristics of the individual OCTs, including aspects relating to freedom of establishment".

What is more, the adoption of such measures would have minimal implications at Union level and could not serve as a precedent for similar measures between the Member States as the OCTs are not part of the Community territory.

IV. Tackling drug-trafficking and money-laundering

Some OCTs, particularly those in the Caribbean, are potential targets for the drugs trade. As a region of small islands forming the ideal route between North and South America, the Caribbean is widely used by traffickers. It is the main area of transit for drugs intended for the European and US markets (40% of all cocaine imported into the United States each year travels via the West Indies).

OCTs are often also offshore financial centres providing confidentiality and a permissive legal environment for financial activities which makes them particularly vulnerable to the risks of money laundering and financial fraud. In some cases the public sector is so small that adoption of the appropriate legislation is difficult, especially when the growth of financial services has outstripped that of the regulatory powers.

The Community made provision to help the OCTs combat drug-trafficking by including this as an objective of regional cooperation (Article 93(j) of Association Decision No 91/482). In view of the scale of the problem, a new Article 88a was later added under the mid-term review of the Association Decision to specify the type of measures which are eligible for support so as to tackle the drugs problem and money laundering.

The Barbados Conference of May 1996 saw the adoption of a regional action plan for cooperation on drugs control measures in the Caribbean. This programme, of which the West Indian OCTs are members, provides a comprehensive, multisector approach to combating drug-trafficking. It covers activities designed to stem both production of and demand for drugs in the region and to combat trafficking by covering different priority sectors, e.g. improved staff training, strengthening legal structures, maritime cooperation, customs/police cooperation and promoting systems for the exchange of information, in general.

The plan was initiated and strongly supported by the EU and is the first comprehensive action plan on an international scale to be adopted by the common accord of the states,

countries and territories of the Caribbean and jointly coordinated at regional level. The OCTs make a significant contribution as partners under the programme.

Political dialogue under the OCT/EU/Member State partnership should therefore be stepped up on the same lines so as to identify the priority action areas of all the OCTs (not just those in the West Indies), on the basis of an assessment of each individual country's and territory's requirements, and build capacity and structures for dealing with matters of common interest such as tackling organised crime and corruption, illegal drug-trafficking and money laundering.

Cooperation in these areas should be based on integrated multisectoral programmes, jointly developed and coordinated at national and/or regional level, which make allowance for genuine cultural differences between the OCTs so as to ensure the social and political viability of the action taken.

Joint efforts to promote the establishment of an area of freedom, security and justice for the benefit of the citizens of the Union, as most of the nationals of the OCTs are, concurs fully with the Union's objectives as laid down in the Amsterdam Treaty.

V. Institutions

The institutional innovation in the form of the Commission/Member State/OCT partnership set up in 1991 and further developed in 1997 was a political choice designed to give the OCT local authorities a voice, and was greatly appreciated by them.

We should not lose sight of the fact that relations between the OCTs and the EEC from 1957 to 1990 were conducted solely through the Member States concerned; despite much talk of ACP/OCT parallelism, there was not even any joint EDF programming. It was not until the 7th EDF that indicative programmes were signed in the country or territory between the Commission representatives, the OCT concerned and the Member State. The current 8th EDF programming exercise has been similarly conducted.

Some OCT representatives are dissatisfied with the way the partnership has been put into effect and it must therefore be evaluated to draw conclusions for the future.

A. Meetings of the partnership have been held in the West Indies between the UK and Dutch OCTs: in November 1993 in the British Virgin Islands, in November 1994 on Aruba and in November 1995 on Montserrat. The UK OCTs met again in Barbados in June 1997 but the planned meeting of all the OCTs in the Netherlands Antilles at the end of 1996 was postponed, then cancelled before being rescheduled during the mid-term review negotiations of 1996 and 1997. Against a background of safeguard measures and legal action, it was no easy matter for the Community Institutions, governments or OCTs involved to adopt a position at this time.

On the same subject, the Commission called on all the OCTs concerned to attend partnership consultations before the safeguard measures on rice were adopted by the Commission and then the Council between 1993 and 1997.

A large high-level meeting was also organised with all the French OCTs in Brussels in May 1994.

B. But the Partnership is not just conducted in such forums, involving logistics, travel arrangements, costs and commitment procedures; debates have sometimes also

been frustrating because of the length of the agenda, the time spent on each item and the matters which are only of interest to some of the participants (cf. diversity of situations).

Partnership is a concept which implies a constant relationship, involving the presence of the Commission's delegations on the spot, missions by officials from Commission headquarters and visits to Brussels by OCT representatives.

The options put forward in section II on the post-2000 financial instrument tend towards a deepening of the partnership, even referring to the concepts of subsidiarity and complementarity. Based on the ERDF system, these options also include a monitoring committee, which is by definition a sort of partnership.

C. The above suggestions dovetail nicely with recent developments concerning the representation of OCTs to the Community authorities.

Although the OCTs are officially covered by the Member State Permanent Representations (which normally have officials responsible for the ACP states and OCTs or for the OCTs and outlying regions), there are increasing calls for the OCT authorities to be represented in Brussels themselves. This could take a number of forms:

- British OCTs: the three OCTs in the eastern Caribbean (Anguilla, British Virgin Islands and Montserrat) are frequently represented by the Ambassador of Saint Lucia, an ACP country which provides the headquarters of the OECS; the Cayman Islands use a consultancy based in Brussels;
- French OCTs: the Government of French Polynesia opened a local office several years ago; the General Council of Mayotte has appointed a delegate in Paris to liaise with the Commission; lastly, according to the recent agreement with New Caledonia, international and regional relations remain the State's responsibility but New Caledonia will be able to join certain international organisations, have representations in countries of the Pacific region and to the European Union and be involved in the negotiation of the EU-OCT Association Decision.
- Dutch OCTs: the Netherlands Antilles has a plenipotentiary ministerial post within the Dutch Permanent Representation; of all the OCTs, this was the only one to be represented (on the Dutch table) during the two years of negotiation of the mid-term review; Aruba's representative in the Hague travelled to meetings as required, especially those organised in the context of the partnership to consult the OCTs on safeguard measures

During debates in the European Parliaments on the status of the OCTs, many speakers have spoken in favour of a representative body equivalent to the ACP-EU Joint Assembly to represent the people of the OCTs alongside the EU's elected representatives. The Parliamentary resolutions referred to in the Introduction advocate that the OCTs be represented within the ACP-EU Joint Assembly at least in the capacity of observers.

This suggestion merits some consideration so that a way can be found of involving the OCTs in meetings organised by the Joint Assembly. However, the choice as to whether or not to institutionalise the OCT presence should be left to the judgment of the Member States most directly concerned in view of the different constitutional arrangements governing the representation as described in Part One.

VI. Currencies used and the Euro

Each Member State must decide for itself whether it wants OCTs to be included when it introduces the Euro, assuming of course that it belongs to the Euro zone.

The currencies used in the OCTs are again illustrative of the extremely diverse nature of the options chosen: some are linked to the currency of the Member State concerned; some are linked to the US dollar or the currency of a neighbouring country; others depend on sub-regional central banks.

A. British OCTs

The UK does not belong to the Euro zone. The British OCTs cover the whole gamut of currency options.

In the West Indies the degree of diversity is extreme:

- the **British Virgin Islands** and **Turks and Caicos** use the US dollar;
- the **Cayman Islands** use the Cayman Islands dollar (KYD) which is linked to the US$ at a rate of USD 1 = KYP 0.84;
- **Montserrat and Anguilla** use the Eastern Caribbean dollar (XCD) which is also linked to the US$ at a rate of USD 1 = XCD 2.70. Both OCTs are members of the region covered by the Eastern Caribbean Central Bank (ECCB) along with six ACP countries (Antigua-Barbuda, Grenada, Dominica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines). The ECCB's headquarters are in Saint Kitts.

  The currencies of the other British OCTs, on the other hand, are linked to the currency of their Member State.
- the **Falkland Islands** use the Falkland Islands pound;
- **South Georgia** and the **South Sandwich Islands** use the pound sterling;
- **Saint Helena and its dependency Tristan Da Cunha** also use the pound sterling (and the Saint Helena pound).

And finally the Pitcairn Islands, Britain's sole little territory in the Pacific region, are linked to the currency of one their big neighbours, the New Zealand dollar (NZD).

B. The French OCTs

France belongs to the Euro zone.

The territories of Mayotte and Saint Pierre and Miquelon both use the French franc.

The three Pacific overseas territories, New Caledonia, French Polynesia, Wallis and Futuna, use the Pacific Franc (CFP franc): XFP 1 F = FF 0.055.

When the Maastricht Treaty on European Union was signed, the French delegation asked for a Protocol to be annexed on this point to the effect that: "France will keep the privilege of monetary emission in its overseas territories under the terms established by its national laws, and will be solely entitled to determine the parity of the CFP franc".

More recently the text of the Agreement on New Caledonia approved in the local referendum of 8 November 1998 contains the following lines on this point at paragraph 4.2.4: "The Executive will be consulted on decisions regarding monetary policy. New Caledonia will be represented on the Board of the Institut d'émission (Currency Issuing Institute)."

C. The Dutch OCTs

The Netherlands belong to the Euro zone.

The Netherlands Antilles and Aruba use the Netherlands Antilles guilder (ANG) which is linked to the US dollar at a fixed parity of USD 1 = ANG 1.78.

D. Greenland

Denmark does not belong to the Euro zone.

Greenland's currency is the Danish krone.

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If we look at these two elements in conjunction - the diversity of situations and whether the Member State is in the Euro zone or not - we arrive at the conclusion that the only question mark concerns the French OCTs. These are the only OCTs linked to one of the eleven Euro countries and their currency is either the franc itself or is linked to the franc at a fixed parity. The Protocol annexed to the EU Treaty clearly puts this matter in the hands of the French authorities.

Nevertheless, taking a more proactive approach, should we not be looking at the historical opportunity that some OCTs could grasp? Could they not be persuaded by the political and economic benefits of Euro membership to rethink their choice and realise their ambition, as we have so often heard, of being Europe's "bridgehead" in their regions?

The most obvious case in the above list, besides the French OCTs, would be the Dutch OCTs, since they are part of the Kingdom of the Netherlands.

But, despite the fact that the UK is not one of the eleven Euro countries, the possibility even arises in the case of the UK OCTs when you consider the variety of dollar-linked options they have chosen.

VII. Grey areas

Various questions have been raised concerning the treatment of the OCTs on a wide range of issues.

In some cases the appropriate solution must take account of their status as dependencies of the Member States and calls for action by the Member State itself in its own domestic legislation rather than the creation of new Community legislation in favour of the OCTs.

Nevertheless, there are strong arguments for concerting such action, perhaps by recourse to the legal device - already used in this context - of decisions by the Member States concerned meeting within the Council or joint statements by their representatives.

There will be some cases, however, where the solution will involve amending Community law in order to clarify the situation of the OCTs.

A. Free movement of persons

A conflict exists between the territorial scope and the personal scope of Community law which lies at the root of much confusion concerning the applicability of primary and secondary legislation to OCT nationals.

As nationals of a country or territory which does not form part of the Community, in theory they are subject solely to the special arrangements under Part Four of the Treaty and the Association Decision.

Thus, Article 232 of the Decision imposes on Member States only the obligation not to discriminate against companies and nationals of the OCTs wishing to set up business or provide services in the Community, a clause based on a territorial criterion.

However, nationals of the OCTs also possess the nationality of the Member State to which they are linked and are therefore citizens of the Union. As such, other provisions of the Treaty apply to them as individual citizens, notably those concerning the free movement of persons on the Community territory.

Note that this problem does not arise in the case of legal persons, who are not entitled to benefit from the provisions on freedom of movement in the Community if their registered office or principal place of business is in a country or territory.

The reference in Part Four of the Association Decision (freedom of establishment and services) to the concept of "OCT nationals" should therefore be clarified to make it clear that, as individuals and nationals of a Member State, OCT nationals generally enjoy the right to freedom of movement and the ensuing secondary legislation as regards their access to the Community.

The issue has already been raised on a number of occasions in relation to students who are nationals of the OCTs and wish to study in other Member States. It might also arise in future in other areas of the freedom of movement, e.g. persons not in active employment, employees or professionals holding national qualifications.

B. Qualifications

On the subject of qualifications, the new Article 233b, included at the mid-term review, speaks of recognition of professional qualifications obtained in the OCTs. It does not state explicitly whether the relevant criterion is the geographical location of the school or its status (i.e. local school or national education diploma).

One way of removing any ambiguity might be to specify that the education courses are run locally and lead to an OCT qualification.

OCT nationals holding national qualifications obtained in the OCT are in fact already eligible for the directives on the recognition of qualifications.

C. Situation in relation to the World Trade Organisation

Most OCTs are not members of the WTO as such. It has not been clearly established whether or not they may be deemed to be implicitly covered by the WTO membership of the Member State to which they are linked. Denmark has included Greenland in its WTO membership status. The Kingdom of the Netherlands expressly adhered to the WTO as on behalf of the Netherlands Antilles and the European part of the Kingdom. Schedules of specific commitments under the GATS have been lodged for three OCTs: Aruba, the Netherlands Antilles and New Caledonia.

The General Agreement on Tariffs and Trade of 1947 was actually applied to a number of OCTs. The schedules of tariff concessions accorded to specific OCTs were also attached to the 1947 GATT. Where they were still applicable when the WTO became operational, they were included in the 1994 General Agreement, which is now one of the WTO agreements. The Netherlands adhered on behalf of Aruba to the Agreement on public procurement (plurilateral agreement under the GATT).

Trade in goods (GATT)

Trade relations between the Community and the OCTs have been studied by GATT working parties on three occasions: to study Part Four of the Treaty of Rome and the EC-OCT Association Decisions of 1963 and 1970.

In these working parties the Community consistently stood by its position that the EC-OCT Agreements established a free trade area within the meaning of Article 24 of the GATT and so was covered by the general exemption from GATT obligations (like the MFN clause) provided for in that article. The Agreements satisfied all the special conditions of Article 24, argued the Community. Since some of the other members of the working parties remained unconvinced, the reports adopted confined themselves to recording this difference of opinion. Thus, no conclusion was reached as to the compatibility of these Agreements and the Community's GATT obligations (such inconclusive results were typical of most Article 24 working parties).

Trade in services (GATS)

So far services under the EC-OCT Association have never been queried within the WTO.

Compatibility of future EC-OCT Association Decision with the WTO

The Community laid down the principle, recently confirmed by the 1997 Amsterdam European Council that all regional trade agreements entered into by the Community must by WTO-compatible. The decision on whether to maintain the existing framework of a free trade area with the OCTs or to include them in the Community customs union will affect which WTO rules will apply to trade in the future Association. But whatever the case, any restrictive obligations and measures will have to be substantially reduced in all trade between the parties. No important sector can be excluded and no transition period can last longer than 10 years (other than in exceptional circumstances).

Article V of the GATS lays down that WTO members entering into preferential agreements must ensure that such agreements cover a substantial number of sectors and

imposes a standstill on the introduction of any new discriminatory measures or their elimination, either on entry into force of the agreement or on the basis of a reasonable time-frame. The substantial sectoral coverage condition encompasses the number of service sectors, the volume of trade in question and type of provision. To satisfy this condition, no type of provision may be excluded from an agreement *a priori*.

In both the GATT and GATS there are a number of specific rules and procedures designed to safeguard the interests and rights of members not party to such preferential regional agreements. They lay down that market access conditions for third parties to a preferential agreement should not be disadvantaged by its conclusion. If the conclusion or extension of a customs union or a preferential agreement covering services were to entail the retraction or modification of GATT or GATS commitments to market access, compensation may be claimed by any WTO member so unfavourably treated.

The current Association Decision

Various questions have also been raised concerning Article 233a, the purpose of which is to extend the benefit of commitments entered into by the Community under GATS to the OCTs under the present Decision.[13]

The reasons for its inclusion in the Decision were twofold:

- it met the requirements of Article 113(3) of the Association Decision according to which the Decision could be amended to take account of the results of multilateral trade talks within GATT;
- the OCTs were in an ambiguous position in that not only were they excluded from the commitments entered into by the Community and the Member States under GATS (most of the OCTs are WTO contracting parties) but also the other provisions in the EC Treaty on services did not apply directly to them (because the OCTs do not form part of the "European territory" of the Member State to which they are linked).

The question then arose of the relationship between Article 233a and Article 132(1) of the Treaty according to which "the Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to this Treaty". Since trade in services is by definition covered by the word "trade", this would amount to according them less favourable treatment than provided for in the Treaty.

The second question, again, is whether nationals of the OCTs, as citizens of the Community, are already covered by Article 59 of the Treaty on the freedom of nationals of the Member States to provide services within the Community. If so, then surely the compatibility of Article 233a on this point should be examined?

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[13] Article 233a: "The Community shall apply to the OCT its undertakings under the General Agreement on Trade in Services (GATS) under the conditions laid down in the said Agreement and in accordance with this Decision.
As regards the arrangements governing trade in services, the OCT shall afford nationals, companies or enterprises of the Member States treatment that is no less favourable than that which they extend to nationals, companies or enterprises of third countries."

D. Veterinary and health regulations

The application to the OCTs of certain directives or decisions concerning the implementation of veterinary and health regulations laid down by EC legislation with a view to placing food products on the Community market or importing them into the Community is also problematic in view of their special status in that they do not form part of the Community and enjoy a different status compared to that of non-member countries.

Some Member States consider that, as the OCTs generally enjoy a large degree of autonomy from the Member State to which they are linked, they should be treated the same way as non-member countries and included on the special non-member country lists prepared by the Commission by type of product.

Meanwhile other Member States believe that, for political and legal reasons, the OCTs could not be treated in the same way as they have a special status governed by Part Four of the Treaty.

Note that the Court of Justice has been asked for a preliminary ruling concerning the application of Directive 92/46/EEC[14] (on health rules for the production and placing on the market of milk and milk products) to butter imported from the Netherlands Antilles; it should provide guidance to the application of veterinary and health regulations to the OCTs.

There even appears to be a certain amount of confusion between the Member States and the local authorities themselves on occasions when or other and sometimes both invoke the particular nature of their status, with the result that they are exempted from the field of application of the legislation concerned and the obligations ensuing from it.

Directive 97/78/EC,[15] for example, requires the Member States, in accordance with the procedures and the conditions laid down in that Directive, to carry out veterinary checks on products from third countries introduced into one of the (Community) territories listed in the Annex. The list in question expressly excludes from the Directive's field of application the Danish, Dutch and British OCTs ("The Territory of the Kingdom of Denmark with the exception of Greenland", "The territory of the Kingdom of the Netherlands in Europe", "The territory of the United Kingdom of Great Britain and Northern Ireland"), while no mention is made of excluding the French OCTs. In this case the local authorities consider that the French OCTs should be considered as third countries and expressly excluded from the obligation to carry out the veterinary checks required by the legislation like the other OCTs.

Likewise, with reference to the preliminary ruling referred to the Court of Justice (quoted above), Chapter 2 of Directive 92/46/EEC sets out the requirements to be met in the production of milk and milk-based products in the Community. Chapter 3, and in particular Article 23, lays down the conditions applicable to imports of milk products from third countries. On the basis of this Directive, a provisional list was also adopted of third countries from which milk products could be imported into the Community (the list was based on the lists of establishments inspected and approved by the competent

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14 OJ L 268, 14.9.1992, p. 1.

15 OJ L 24, 30.1.1998, p. 9.

authorities once the Commission had first ensured that they complied with the principles and general rules laid down in the Directive).

The case concerned a company based in the Netherlands Antilles which was not allowed to import butter into the Community on the grounds that Curaçao was not on the list of third countries authorised to import milk and milk-based products. The French Government and the Netherlands Antilles argued that, as the OCTs had the status of associated countries, they should not be considered as third countries and that the Directive did not apply to the OCTs covered exclusively by Part Four of the Treaty unless it was declared applicable pursuant to Articles 131 to 136a of the Treaty.

So once again the debate over the "IN" or "OUT" status of the OCTs crops up in the area of the application of Community secondary legislation.

However, note that a solution has been found for fishery products under Commission Decision 98/419/EC[16] (updating the list of third countries from which the import of fishery products is authorised for human consumption) which includes an annex listing "the countries *and territories* from which the import of fishery products (...) is authorised". This list therefore includes both third countries and OCTs.

16 OJ L 190, 4.7.1998, p. 55.

CONCLUSIONS

The High Contracting Parties to the Treaty of Rome emphasised the ties of solidarity between Europe and the OCTs by including in the Treaty a Part Four concerning the association of the OCTs.

The Treaty of Amsterdam confirmed these guidelines by retaining and amending Part Four. The Amsterdam Conference of Heads of State and Government "solemnly restates" them in a Declaration appended to the Final Act. It invited the Council to review the association arrangements by February 2000, considering that the arrangements "as they were conceived in 1957 can no longer deal effectively with the challenges of OCT development".

These challenges are:

- diversity - whether physical, economic, cultural or a question of status - and vulnerability
- the need to respect the democratic choice to remain citizens of Member States - and therefore of the Union - without being part of the single market
- a system paralleling that applicable to the ACP States whereas the Treaty is based more on the arrangements accorded by Member States to one another by virtue of its provisions
- the need for consistency between the OCT arrangements and other common policies that have entered the secondary legislation since 1957
- the choices to be made in response to present and future changes affecting their main partners: the Union, which is in the process of liberalising trade, and the OCTs' ACP neighbours, who are gearing up for regional economic partnership agreements providing for the gradual establishment of free-trade areas, including the gradual introduction of reciprocity with the Union
- and, as a result, the resulting challenge to the identity of OCTs caught between integration into their region and their special ties with the Union

The review of forty years of association and the options proposed in response to the above challenges address various aspects of the EU-OCT relations.

1. Trade arrangements

There is a clear and radical choice between:

– ACP-type status, or

– inclusion in the Community customs territory.

However, it does not reflect the political choices expressed by the communities concerned.

The trading arrangements adopted at the end of 1997 could be continued unchanged, ie free access, cumulation of ACP/OCT origin, limited cumulation for rice and sugar. However, the current arrangements have disadvantages.

Any solution will ultimately entail a fundamental choice between (a) integration into the **regional economic partnership agreements** and its attendant advantages and (b) **specific ties** with the Community leaving the OCTs relatively isolated in their areas.

In the first scenario, the OCTs could be given **until at least 2005 to reflect and prepare.** They would receive financial support for their preparations and retain the current trade arrangements.

In the second scenario, the options relate to access to the Community market:

- alignment of the OCT arrangements on **the ACP arrangements** with continuing unlimited ACP/OCT cumulation,
- levying by the OCTs of **duties equivalent to Community duties** for their own budgets and free access to the Community,
- restriction of this levy to situations in which ACP and OCT products are subject to **different tariffs**.

Other options concern the origin rules:

- **limitation of ACP/OCT cumulation**, as proposed by the Commission in 1995, with continuing free access for the OCTs to the Community market,
- origin rules based on **value added**.

A particular reference is made to the case of the most isolated OCTs which do not have ACP neighbours.

2. The financial instrument

This could take the form of a revamped EDF or a special OCT Fund to be managed like the structural Funds: agreement on a collective development strategy, local project management, ex-post evaluation.

The latter method would apply two principles:

- **subsidiarity**, with management powers and responsibilities being delegated to the local authorities in a close partnership;
- **complementarity**, combining the budget of the OCT, the contribution of the tutelary Member State and Community aid.

Such a Fund would be earmarked for creating favourable conditions for increasing integration into the world economy, though not to the exclusion of targeted measures against poverty.

3. Right of establishment

- reaffirmation of the principle of reciprocal non-discrimination between the EU and the OCTs and the OCTs and the EU (Article 132 of the Treaty);
- insertion of the principle of freedom to provide services alongside the right of establishment in Article 132(5) of the Treaty;
- deletion of Article 135 of the Treaty concerning the freedom of movement of workers;

- possibility for the OCTs to adopt measures to protect local jobs, with due regard for the principle of non-discrimination between Member States; deletion of the clause in Article 232(2) of the Association Decision requiring the Commission's prior approval;
- addition to the Treaty of a protocol allowing certain OCTs, by derogation from Article 132, to retain a special relationship with their tutelary Member State by adopting special measures in favour of that country's nationals and companies.

4. Drugs and money-laundering

Full involvement of the OCTs in the worldwide and multidisciplinary approach to drugs adopted in the wake of the 1996 Barbados Conference.

Strengthening of political dialogue to identify areas for priority action in each OCT, including those not part of the regional action plan for the Caribbean.

5. Institutions

Extension of the partnership to encompass all EU-OCT relations, especially in terms of the management of the financial instrument (see above).

Response to European Parliament's proposals concerning the setting-up of an EC-OCT Forum modelled on the Joint Assembly: one option would be to include the OCTs in the activities of the ACP-EC Joint Assembly.

Any decision must respect the powers assigned to the OCTs by their respective constitutions.

6. Currencies and the Euro

The 20 OCTs use 11 different monetary units. Some are linked to that of the tutelary Member State, others to that of a larger neighbour.

France is alone in that it is a member of Euro zone and its OCTs' currencies are hitched to the national currency. The relevant Protocol to the Treaty of Maastricht clearly empowers France to decide in the case of these OCTs.

The political and economic clout of the Euro may, however, lead some other OCTs to reconsider their choice of reference currency.

7. Grey areas

- **Free movement of persons**

  Affirm that OCT nationals benefit from the freedom of movement of persons and the secondary legislation derived therefrom.

- **Diplomas**

  Stipulate that the recognition of diplomas provided for in the current Decision concerns education organised at local level leading to an OCT diploma (holders

of national diplomas obtained in an OCT already benefit from the directives on the recognition of diplomas).

- **The WTO**

  Clarify the OCTs' obligations under the GATT and the GATS, depending on whether or not they are parties (directly or indirectly), and draw the necessary conclusions as to the regime applicable to them under Community law.

- **Veterinary and health rules**

  Draw on the solution found for fishery products (Commission Decision 98/419/EC) to handle the conditions for importing products from OCTs.

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As for the form of the act to be adopted, the Council could, acting unanimously on a proposal from the Commission, take two distinct courses of action:

– Adopt **a framework decision** far less detailed and voluminous than today's Association Decision 91/482EEC, as amended by Decision 97/803/EC. This framework decision would contain the key issues and policies chosen by the Council, implementation of which would be carried out under secondary legislation adopted by the Council (qualified majority) or the Commission.

– Draw up policy guidelines for **future amendments to Part Four of the Treaty**.

The broad lines of the response to the Amsterdam Declaration would thus be laid down.

To give this framework decision greater resonance, it could be given a name rather than yet another number. Such a name would refer to the geographical location of the 20 OCTs, their constitutional status and a new Association:

The OCEANS Decision

L'Outre-mer Constitutionnellement lié à l'Europe:

l'Association, Nouveau Statut.

Overseas territories Constitutionally linked to Europe:

the Association, New Status.

Overzeese landen en gebiedsdelen Constitutioneel geliëerd aan Europa:

Associatie, Nieuwe Status.

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