Sovereignty, Self-Determination and the South-West Pacific

A comparison of the status of Pacific Island territorial entities in international law

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ABSTRACT

This paper compares the constitutional arrangements of various territorial entities in the South-West Pacific, leading to a discussion of those entities' status in international law. In particular, it examines the Cook Islands, Niue, Tokelau, Norfolk Island, French Polynesia, New Caledonia and American Samoa – all of which are perceived as 'Territories' in the international community – as a way of critically examining the concept of 'Statehood' in international law.

The study finds that many of these 'Territories' do not necessarily fit the classification that they have been given. In particular, most of the territorial entities listed above have significant competence to control their own domestic affairs. Some have also begun to develop their own international legal personality by virtue of *de facto* control over their own external affairs. The United Nations' focus on ensuring self-determination also indicates that these territorial entities are likely to gain more autonomy as time goes on.

As a result, this paper argues that some of the 'Territories' are not necessarily Territories at all; instead, they possess independent control over their own domestic and external affairs, and therefore act as *de facto* States on the global stage. However, many of these territorial entities still remain heavily associated with recognised sovereign States, with none of the included territorial entities possessing their own *de jure* Head of State or citizenship: both of which are arguably key foundations of an independent identity. Consequently, there are still questions over the extent to which the territorial entities can be considered sovereign, especially given that the relevant 'administering States' still seem to take economic responsibility for their territorial entities if they believe the situation warrants it.

Given these points, this paper argues in favour of a reconceptualisation of the concept of Statehood. It argues that the rise of territorial entities which not only have independent control over their affairs, but which also have significant links to existing States, means that terms such as *independence* and *sovereignty* are not either/or concepts. Instead, these concepts should be seen as spectrums, giving rise to a broader definition of Statehood that does not restrictively define States as independent, sovereign entities, but that embraces the concept of 'Freely Associated States'.

STATEMENT OF CLARIFICATION

This piece of work was completed while the author was employed by the New Zealand Treasury. Despite this, the opinions contained herein are those of the author alone, and do not necessarily constitute the opinion of the Treasury, the New Zealand Government, the University of Waikato, or any other organisation that the author is connected to.

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INTRODUCTION

The second half of the twentieth century saw major change in the global international system. With the Second World War leaving most European powers in tatters, and with a rise of nationalism throughout the world, the post-war period saw an extraordinary rise in the number of States due to the tsunami of decolonisation. No continent was immune, with the end of British, French, Italian, Dutch and other empires' Territories in Africa, Asia and South America. The peoples of these former-Territories fought doggedly to exercise their right to self-determination by seceding from the control of their previous colonisers, taking on their own legally separate identity in international affairs.

In contrast, one area that seems to have only partially embraced decolonisation is the South-West Pacific. Although about half of the former Pacific Territories are now independent, sovereign States, the other half are still widely classed as 'Territories' in international law. In fact, several of these Pacific Territories explicitly decided not secede, but have instead entered into freely associated relationships with their former controlling State. Other Territories have chosen to retain a status that the United Nations considers 'non-self-governing'. This has led some commentators to state their doubts that small Territories might not have the capacity to operate as States, and therefore some Territories might not want to take on that status.[1]

This paper will explore the actual status of communities in the South-West Pacific region, including an examination of the concepts 'State', 'Territory', 'Free Association', and 'Self-Determination' – and the applicability of these concepts to Pacific communities. In particular, this study focuses on those communities – or territorial entities – in the Pacific who are not commonly classed as independent, sovereign States, but who are instead commonly seen as Territories that are represented in the international system by an 'administering State'. A key focus is on the constitutional links between these Territories and their administering

[1] John Key, Leader of the National Party, "Speech: New Zealand National Party" (Speech to NZ Institute of International Affairs, Wellington, New Zealand, 9 April 2008). See also: Alison Quentin-Baxter "Sustained Autonomy – An Alternative Political Status for Small Islands? (1994) 22 VUWLR 1.

States, and what these imply for maintaining a formal State-Territory relationship at international law.

The rationale for doing this is two-fold. First, comparatists are generally curious about other systems. Scholarly literature has paid relatively less attention to the Pacific region than other areas that have undergone significant decolonisation in the UN era. Exploring the constitutional structures of Pacific territorial entities is therefore interesting and useful in itself. Second, a *comparison* of the territorial entities of the Pacific allows the elucidation of findings that might not result from singular studies. In particular, this paper aims to compare how the different Territories are treated in order to examine whether the reasonably rigid traditional definitions of ‘State’ and ‘Territory’ can still hold in twenty-first century international law and scholarship.

RESEARCH METHOD

Comparative Law Methodology

Comparative law can be a useful tool for examination. Curran, for example, argues that "comparison is central to all legal analysis, as it is central even to the very process of understanding".[2] Hirschel agrees, arguing that "comparison is a fundamental tool of scholarly analysis. It sharpens our power of description and plays a central role in concept formation by bringing into focus potential similarities and differences among cases".[3] In particular, comparative studies like this paper use comparison to explore and flesh out legal concepts, and explore how similar concepts are put into practice in very different ways by different legal systems. Reitz, for instance, argues that "by asking how one legal system may achieve more or less the same result as another legal system without using the same terminology or even the same rule or procedure, the comparatist is pushed to appreciate the interrelationships between various areas of law, including especially the relationships between substantive law and procedure".[4]

This paper uses a comparative law methodology described by Hirschl as "concept formation through multiple description".[5] This methodology explores how different systems deal with similar constitutional issues, and in doing so improves scholars' understanding of key constitutional and international concepts, such as sovereignty, independence and self-determination. This will result in what Vernon Palmer describes as "a pragmatic and inclusive view of comparative methodology",[6] rather than a technical approach that views comparative law as a form of science. In particular, Palmer argues that "each legal culture is a unique, culturally contingent product which is incommensurable and untranslatable except through a deep understanding of the surrounding social context".[7]

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[2] VG Curran "Cultural Immersion, Difference and Categories in US Comparative Law" (1998) 46(1) Am J Comp L 43, at 45.
[3] R Hirschel "The Question Case Selection in Comparative Constitutional Law" (2005) 53 Am J Comp L 125, at 129.
[4] J Reitz "How to do Comparative Law" (1998) (Issue 4) 46 Am J Comp L 617, at 621.
[5] Hirschel, above n 3.
[6] VV Palmer "From Lerotholi to Land: Some Examples of Comparative Law Methodology" (2005) (Issue 1) 53 Am J Comp L 261.
[7] Ibid.

Therefore, comparative scholarship requires more than just a focus on the technicalities of the law, but also an examination of how that law is influenced by the cultural and social context of the legal system being studied. Berger agrees, arguing that a key aspect of comparative law methodology is understanding the fundamental norms underpinning a legal system before attempting to compare how different systems treat legal issues.[8] Berger's study, for example, established the importance of a Muslim / non-Muslim divide in Egyptian law as an important norm impacting on how family law issues are dealt with in Egypt. Geoffrey Palmer also notes that any comparative constitutional study requires the scholar to understand the constitutional core of each system before moving on to do any actual comparison.[9] Essentially, both Berger and Palmer advocate that it is important that comparative scholars develop an "*organic method* which incorporates both law and social underpinnings into the same comparative act".[10]

One of the difficulties of comparative law, however, is from being an 'outsider', or being unfamiliar with (some of) the legal systems being studied. Reitz notes that "good comparatists should be sensitive to the ever present limitations on information available about foreign legal systems and should qualify their conclusions if they are unable to have access to sufficient information or if they have reason to suspect that they are missing important information".[11] However, other scholars point out that provided appropriate care is taken, studying a system as an 'outsider' can actually be beneficial. Bussani and Mattei, for instance, argue that "often, the circumstances that operate explicitly and officially in one system … operate secretly [in another system], silently between the formulation of the rule and its application by the courts".[12] Bussani and Mattei's argument is that a lack of familiarity actually allows a comparatist to see those 'silently operating principles' more easily than those with inside knowledge of the system.[13] Curran makes a similar point, arguing that "comparatists need to retain their stance as outsiders… otherwise, they will fail to perceive with sufficient acuity those

[8] M Berger "Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law through the Backdoor" (2002) 50 Am J Comp L 555.
[9] G Palmer "The Hazards of Making Constitutions: Some Reflections on Comparative Constitutional Law" (2002) 33 VUWLR 201.
[10] VV Palmer , above n 6.
[11] Reitz, above n 4.
[12] M Bussani and U Mattei "The Common Core Approach to European Private Law" (1996-1997) 3 Columbia J Eur L 339, at 343.
[13] Ibid.

fundamental, powerful aspects of target legal cultures which are so entrenched as to be unarticulated and even unconscious".[14]

To that end, scholars note that the best comparative law studies are therefore those that explicitly point out similarities and differences. Reitz argues the importance of drawing explicit comparisons between systems, and actively comparing how different systems treat similar issues.[15] Similarly, Curran points out that as "comparison involves understanding one entity or domain in terms of an *other* entity or domain",[16] effective comparative law studies should therefore actively contrast one legal system with another, rather than being implicit. However, a good comparative law study is not just about pointing similarities in two different legal systems. Reitz, for instance, argues that "the real power of comparative analysis arises precisely from the fact that the process of comparing 'apples' and 'oranges' forces the comparatist to develop constructs like 'fruit'".[17] In other words, to realise the full benefits of comparative law, scholars need to do more than just make explicit comparisions, but should instead also analyse and explain the reasons for those similarities and differences. Consequently, this paper will attempt to not only describe the different administering State-External Territory relationships, but will also attempt to critically analyse the reasons behind these processes.

This essentially means that this paper follows a 'Cornell method' style of comparative law. This is the idea that when a comparatist examines different legal systems, he or she does not just compare in abstract, but instead should "think explicitly about the circumstances that matter, by forcing [the comparatist] to answer identically formulated questions".[18] In particular, the paper follows Reitz's[19] advice that it is useful to move comparative law away from abstract comparisons, and to instead focus on how different legal systems approach the same real-life problem. Bussani and Mattei agree, arguing that comparative law studies yield the most benefit when they are structured around identical questions

[14] Curran, above n 2, at 57.
[15] Reitz, above n 4.
[16] Curran, above n 2, at 45.
[17] Reitz, above n 4, at 625.
[18] Bussani and Mattei, above n 12, at 344.
[19] Reitz, above n 4.

posed to various legal systems, with the study focussing on the answers to these questions in different systems.[20]

Given this methodology, this paper seeks to examine the overarching question: how are each Pacific Island External Territory's constitutional affairs structured with its administering sovereign State? An answer to this question will therefore require an examination of how the concept of self-determination is applied in the Pacific context, the ways in which Pacific Territories are members of the international system, the way in which External Territories are legally linked to the States that exercise sovereignty over them, the rights and responsibilities that citizens of the External Territories have, and the relationship between constitutional control and economic sustainability. Following the Cornell method, this allows an examination of the concept of 'self-determination', as well as broader examinations of what ideas such as 'State' and 'Territory' actually mean.

Territory Selection

Although it would be ideal to examine all External Territories, the scope of this paper is limited by the fact that it is a three-paper thesis, and therefore carries a specified word limit. Furthermore, a great deal has been written about the principle of self-determination and its applicability to the African and Caribbean colonies that seceded and formed their own States, as well as the applicability of the doctrine to minorities within existing States.

Consequently, this paper focuses on those inhabited Territories whose constitutional structure, history and experiences are most educational for New Zealand: the other Territories of the South-West Pacific who are geographically separate from their administering State. This means that this paper focuses on the External Territories that are classified as being in the 'South-West Pacific' region – the area that is East of Australia (150°E), West of the Pitcairn Islands (135°W), South of the Equator (0°), and North of New Zealand (35°S). This encompasses eight territorial entities that are not commonly classified as 'States' in international law. However, for practical reasons, this study focuses on seven of these entities, excluding Wallis and Futuna due to the practical difficulty in

[20] Bussani and Mattei, above n 12.

sourcing accurate information.[21] This study therefore includes the External Territories set out in table one below:

Table One: External Territories included in this Study

Sovereign State	External Territories included in this study	Relationship Status (as classified by the Sovereign State)	On UN List of Non-Self-Governing Territories?[22]
Australia	Norfolk Island	Self-governing External Territory	
New Zealand	Cook Islands	Self-governing in free association with New Zealand since 1965.	
	Niue	Self-governing in free association with New Zealand since 1974.	
	Tokelau	Territory of New Zealand.	Yes
France	French Polynesia	Territorial Collectivity since 2003.[23]	
	New Caledonia	*Sui generis* (or Special-Status) Collectivity since 1999.	Yes
United States of America	American Samoa	Unincorporated and unorganised Territory administered by the Office of Insular Affairs, U.S. Department of the Interior	Yes

A map of the South-West Pacific, with a clear illustration of External Territories in the South Pacific is contained in Appendix A at 145.

Paper Structure and Core Research Questions

The overarching research question of this paper is to examine the different ways in which administering States structure constitutional relationships with their External Territories in the South-West Pacific. This first requires two introductory chapters:

- Chapter I focuses on unpacking some of the core terms that this paper will use. It explores the conceptual and practical differences between 'States' and 'Territories', and how they differ as subjects of international law. It then examines the right of 'self-determination' that many 'External Territories'

[21] It is also important to note one major limitation with using a comparative law methodology: the difficulty in ensuring that all information is accurate. As the comparatist is not a 'legal native' to all of the systems covered in a comparative study, he or she faces difficulty when sources may conflict.

[22] Special Committee on Decolonisation "List of Non-Self-Governing Territories" (2011) United Nations <http://www.un.org/en/events/nonselfgoverning/nonselfgoverning.shtml>

[23] French Polynesia is further classified as an 'overseas country' within its designation of a territorial collectivity.

have used to become their own State, including a brief discussion of to whom the concept of self-determination applies, and for what outcomes it provides.

- Chapter II provides some background information about each of the Territories included in this paper, including their constitutional frameworks, and what moves each Territory's people have made toward achieving self-determination.

The paper then moves to answering the above overarching research question on a thematic basis:

- Chapter III looks in more detail at the notion of *identity,* given that a separate identity is required for self-determination, and that the development of a separate identity affects the perception of territorial entities' status in international law.
- Chapter IV examines the concept of *independence* in each of the Territories, given that independent control over domestic affairs is a core element of Statehood in international law.
- Chapter V then considers the recognition of *sovereignty* of each of the Territories, given that being recognised as sovereign – with an unencumbered international legal personality – is a critical way in which States are distinguished from other international actors.

In addition to these chapter-specific themes, the paper will also attempt to address the 'so what' question. In particular, this paper examines whether there needs to be a new category developed at international law for States who have *de facto* independence over both domestic and external affairs, but may not have *de jure* sovereignty in international law.

CHAPTER I: STATES, TERRITORIES, AND SELF-DETERMINATION

Independent Legal Personality

As pointed out by Malcolm Shaw, "in any legal system, certain entities, whether they be individuals or companies, will be regarded as possessing rights and duties enforceable at law".[24] Entities who do gain rights and responsibilities in law are referred to as 'legal persons'. Most systems also create different categories of legal personality. In New Zealand domestic law, for example, a 'natural person' has a legal personality that is able to do more things than an incorporated company, which has a much more restricted form of legal personality.[25] In international law, there are many actors, including 'territorial entities' (such as 'States' and 'Territories'), International-Governmental Organisations (such as the United Nations or the International Monetary Fund), Multinational Corporations, and Non-Governmental Organisations. Of these, the traditional view in legal literature is that 'States' have the most unencumbered legal personality, with full capacity to enter into agreements and join international organisations.

'States' are therefore very important entities in international law. The difference between 'States' and other types of 'territorial entities' is therefore essential for an international law scholar to understand. This chapter explores what the term 'State' means, and how a 'State' differs from the other traditional territorial entity – a 'Territory'. The chapter will also explore how a 'Territory' can become a 'State' and a full legal participant in international law.

'States' in International Law

Oppenheim once famously wrote that "States solely and exclusively are the subjects of international law".[26] Similarly, Shaw notes that States are still "the primary focus for [determining the scope of] social activity of humankind and thus for international law".[27] But where does the concept of a 'State' come from, and what does it mean? These are not easy questions to answer, as there are a

[24] Malcom Shaw, *International Law* (6th ed, Cambridge University Press, United Kingdom, 2008) at 195.
[25] For example, only natural persons can marry as per the Marriage Act 1955 or enter into a civil union as per the Civil Union Act 2004.
[26] L Oppenheim, *International Law: A Treatise* (Vol. 1)(2nd ed. Longmans, United Kingdom 1912) at 19.
[27] Malcom Shaw, above n 24, at 197.

range of views on precisely what a 'State' is in international law. However, as most views tend to be roughly comparable (with only nuanced differences), this section will examine the main international treaties and relevant secondary material in order to define the term 'State' in this paper.

The modern Western definition of a 'State', which dominates international law today, was first developed in international law as part of the Westphalian Peace Treaties.[28] Those treaties were signed at the conclusion of the Thirty Years' War (1618-1648), and developed the concept of a 'Nation-State' in international law: a geopolitical entity made up of a community of people(s) who share economic, political and territorial unity under some form of authority with exclusive control over that Nation-State's territory.[29] This definition has been carried forward into today's international system: as recent as 1991, the Arbitration Commission of the European Conference on Yugoslavia defined a State as "a community which consists of a territory and a population subject to an organised political authority".[30] This opinion reaffirmed the principles of the earlier Montevideo Convention,[31] signed by the United States of America and several South American States in the 1930s, which is now widely agreed to form part of customary international law.[32] Article 1 of the Montevideo Convention notes that States in international law possess four attributes: a permanent population, a defined territory, government, and the capacity to enter into relations with other States.[33]

Both of these definitions set out clear criteria for a territorial entity to meet if it wishes to be considered as a State. Linking back to the 'Nation-State' concept, in order to be considered a State, territorial entities must first show they are a nation: that they have a resident population within a defined territory. Territorial entities must then also show that they meet certain political characteristics: in particular,

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[28] J M Kelly *A Short History of Western Legal Theory* (Oxford University Press, New York, 1992).
[29] Eiki Berg and Ene Kuusk "What makes sovereignty a relative concept? Empirical approaches to international society" (2010) 29 Pol. Geography 40, at 40.
[30] Opinion No. 1 of the Arbitration Commission of the European Conference on Yugoslavia, established pursuant to the Declaration of 27 August 1991 of the European Community.
[31] Montevideo Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 16 December 1934), art 1..
[32] Malcom Shaw, above n 24; Morton Halperin, David Scheffer, and Patricia Small, *Self-Determination in the New World Order* (Carnegie Endowment for International Peace, United States of America, 1991).
[33] Montevideo Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 16 December 1934), art 1.

that they have an authority that acts as a government, and that this government is able to enter into relations with other States. In practice, these latter two criteria are underpinned by the concepts of 'independence' and 'sovereignty', or – as put by Berg and Kussk – "having supreme authority and being rightfully entitled to exercise that authority".[34]

As with the term 'State', there is a wide variety of views on the precise definitions of 'independence' and 'sovereignty'. However, all views tend to focus on the same attributes, including some form of self-government over domestic affairs, non-intervention by other States, control over foreign policy, an unencumbered legal personality, a separate identity, and recognition by other States. Consequently, the next two sections use these characteristics to define the terms 'independence' and 'sovereignty' for the purposes of this paper.

Independence

As the name implies, independence entails an entity being in control of its own affairs – without interference or oversight by other State. In the *Aaland Islands* case, for instance, the International Committee of Jurists was tasked with providing an opinion on whether the Aaland Islands were part of Finland. They noted that Finland did not become a State in international law as soon as it declared independence, but instead that event "did not take place until a stable political organisation had been created" and could assert its authority throughout its territory.[35] In other words, for Finland to truly be classed as *independent,* it needed to have an uncontested government that could exercise autonomous control over the territory of the State, and which was rightfully authorised by the people to govern. In other words, to be considered independent, a territorial entity must show that it has uncontested control over internal matters: that it governs its own affairs and that other States do not intervene in domestic matters. In the *Aaland Islands* case, Finland was not classed as a sovereign State straight after declaring independence partly because there were still foreign troops involved in domestic affairs up until the end of the Finnish Civil War in May 1918.[36] Independence therefore also usually involves a territorial entity developing its

[34] Berg and Kuusk, above n 29, at 40.
[35] *The Report of the Commission of Jurists on the* Aaland Islands *case* (1920) LNOJ Sp. Suppl. No. 4 at. 8-9.
[36] Ibid.

own distinct *identity* in international law. It therefore comes as no surprise that Acquaviva argues "independence ... is the feature distinguishing [State] subjects of international law from other entities".[37]

Sovereignty

Sovereignty, on the other hand, is about being *recognised* as independent and as a full actor in the legal system. A key feature of States is that they are full subjects of international law: in particular, States can enter into international agreements, and enter into relations with other States. However, States can only do this if they are recognised by other international actors (such as other States and international organisations) as having the status of Statehood, or as having the *sovereign* right to interact as an independent entity on the global stage. In effect, States are recognised by other actors as being *sovereign* actors with their own unencumbered international legal personality.

In other words, territorial entities are seen as *sovereign* States once they are recognised by other international legal actors as not just having *de facto* self-government, but also as having the *de jure* right to independently administer their own territory. Shaw, for instance notes that sovereignty is when an entity is seen as having full rights of territory, in contrast to minor rights such as leases over land.[38] Consequently, States are recognised as being rightfully responsible for their own actions both internally and on the international stage. This, in turn, includes the recognition that they are not 'administered' or 'controlled' by another State: in effect, *sovereignty* is the recognition by others that a State is fully and rightfully *independent* – it is free from control by others, and it is a fully responsible actor on the global stage. This recognition is perhaps the key difference between States and other forms of territorial entities.

What is particularly striking about this recognition criterion, however, is its subjectivity. Acquaviva, for instance, notes that the concept of States being sovereign has an important consequence in international law: the fact that all States refuse to think of other entities as superior to them means that all States are

[37] Guido Acquaviva "Subjects of International Law: A Power-Based Analysis" (2005) 38(2) Vand.J.Transnat'l L 345, at 381.

[38] M Shaw "Territory in International Law" in M Shaw (ed) *Title to Territory* (Ashgate, United Kingdom, 2005).

treated as equal legal subjects.[39] Unlike the criteria of a 'permanent population' and a 'defined territory', which can (for the most part) be measured reasonably objectively, each State is free to choose which other States it recognises as sovereign and possessing full legal personality on the international stage. As a result, a territorial entity may be recognised as a sovereign State by some States, but not by others.[40] Israel is a good example of this, as it is recognised by some States (and by the United Nations), but not by other States. It therefore has a full international personality when dealing with those States and international organisations who recognise it as *sovereign,* and a limited (or even no) international personality when dealing with those entities which do not recognise it. After all, those States who do not recognise Israel as a State with a full international legal personality are not going to enter into agreements with the Israeli government.

The Israel example also indicates the political nature of international law. Many States do not recognise Israel: not necessarily because of a belief that the Israeli government does not control its own affairs, but because they believe Israel does not have *the right* to control its own affairs. In other words, Israel is not viewed as rightfully *sovereign* in those States' eyes because they believe another government should be (or is) the legal entity in control of the territory and/or people currently governed by Israel. A similar example is seen in the case of Taiwan, which is not recognised by many States on the basis that the People's Republic of China asserts that it is in control of the territory of the island of Taiwan (also known as the island of Formosa).

Recognition of sovereignty is therefore important, although somewhat circular in logic. This is because territorial entities are more likely to be classed as States by international organizations if they are recognised as *sovereign* by a large number of existing States. This means that, somewhat paradoxically, States gain an international legal personality by being recognised as having that international legal personality (i.e. being sovereign) by other States – who, of course, have their own international legal personalities already.

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[39] Acquaviva, above n 37, at 383.

[40] This is also in contrast to legal personality recognition in most legal systems, which set objective criteria for recognition. For instance, in New Zealand, a natural person gains full recognition and full legal personality at the age of 18 years old.

Nevertheless, for the purpose of this paper, a 'State' means an entity with a clear territory and population, and with a government that meets the 'Statehood' criteria: in particular, that government must exercise *independent* control over domestic affairs, and be recognised as a *sovereign* actor on the global stage by at least some other States. It should be noted, however, that this is a traditional view of 'States' in international law. A key question that this paper considers is whether this view still holds in the twenty-first century and in light of the various territorial entities often considered as 'Territories' in the Pacific. However, this leads to the question that if a territorial entity does not meet the criteria of Statehood, how ought that entity be classified as in international law? The most simplistic answer (which this paper will address in more complexity) is that these entities are 'Territories'.

'Territories' in International Law

To that end, this section outlines what 'Territories' are, and what type of legal personality they have in international law. Again, as there is a wealth of literature on this issue, this section will set out the traditional view. A key focus of this paper is exploring whether this traditional view still holds given an analysis of what are considered 'Territories' today against the definition in this section: in particular, is the classification of some of the territorial entities in the Pacific as 'Territories' defensible?

Perhaps the best way to approach a definition of 'Territory' in international law is to begin with the broadest interpretation of a commonly used noun: 'territory', which is the geographic area enclosed by a sovereign State's borders. The concept of States above implies that all parts of a State's territory forms an internally homogenous political unit. However, in many States (and especially so in federal systems) this is not the case – instead, various parts of a State's territory form their own sub-State territorial entity. These sub-State units can generally be classified into two groups: 'states'[41] and 'Territories'. In most federal systems, 'states' retain certain legal competencies (as spelled out in the State's

[41]To avoid confusion, this paper will use the term 'States' (with a capital S) for actors on the global stage, and the term 'states' (with a lower-case s) for those sub-national entities that are part of a federal State. Similarly, 'Territories' (with a capital T) means those entities that are part of a State's geographic area, or 'territory' (with a lower-case t).

constitution), having ceded other competencies to the federal State government. Many federal systems also protect the interests of states in their legislative systems by ensuring each state has relatively equal representation in an upper house in the legislative process. Territories, on the other hand, usually have less autonomy and/or representation in the State legislature than states, and usually do not have any explicit legal competencies enumerated in the State's written constitution. Instead, any legislative competence a Territory has is provided by a domestic statute passed in the State legislature.

This can be shown by a number of examples. The United States of America (US), for instance, comprises not just the fifty federal states which each have full representation in both chambers of the US Congress (and which each have equal representation in the US Senate),[42] but also comprises a number of Territories which do *not* have voting representatives in chamber of Congress,[43] despite the fact that the US is responsible for these communities in international law. Similarly, in both Canada and Australia, the federal government has more control over national territories than it does over the federal states (called 'provinces' in Canada). Both the Canadian[44] and Australian[45] constitutions set out clear legal competencies that are the exclusive domain of the states (or provinces) and that that the federal government is therefore not authorised to legislate on. In contrast, Territories in both Australia and Canada have less representation in the federal legislature, and do not retain specific competencies under the relevant constitution: instead, the Australian or Canadian federal legislature is able to legislate for their Territories as they see fit.

Relating this back to the criteria of States discussed earlier, this means that a 'Territory' does not possess full independence nor can it be recognised as sovereign. Instead, a Territory is a sub-State unit whose authority is not

[42] US states are entitled to representatives in the House of Representatives based on their population as per Article 1of the United States Constitution. Similarly, Article 3(1) provides for two representatives per state in the US Senate. This can be compared with Article 4(3), which guarantees Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States:.

[43] That said, US Territories each elect a non-voting delegate to the House of Representatives.

[44] Canada Act, 1982 (Canada). See s 32(1) which delegates legislative powers to the provinces of Canada but ensures power for legislating in respect of the Territories remains with the federal government.

[45] Commonwealth of Australia Constitution Act 1900 (Imp). It is useful to compare the provisions of Chapter V granting legislative competencies to the states, with s 122, which allows the Federal Parliament to make laws for any territory of the Commonwealth.

autochthonous (unlike many states which have *joined* larger federal units) but whose governing authority is dependent on rescindable powers granted to it by a sovereign State (known as the 'administering State'). There are two main types of Territory. Internal Territories are part of the State's integral territory – for example Australian Capital Territory is an Internal Territory of Australia. External Territories (which are the focus of this paper) are geographically separated from the State's 'mainland'[46] – for example, Norfolk Island is an External Territory of Australia because it is not contiguous to 'mainland' Australia nor is it included in 'mainland' Australia's Exclusive Economic Zone. External Territories, just like their internal counterparts, are instead *usually* represented in international law by a sovereign State.

This study specifically focuses on what are often referred to as 'External Territories' (or sometimes as 'Dependent Territories'). These are a special type of Territory that is not geographically contiguous[47] to the integral territory of the administering State responsible for them in international law. Furthermore, although External Territories often have some form of internal government, this is often perceived by other States as subordinate to the 'domestic' legislature of the administering State (even if this is not actually the case). In other words, External Territories are seen as 'dependent' on the administering State. Nevertheless, as will be explored in this study, External Territories tend to have more autonomy than internal territories that form part of a State's integral territory. However, despite this extended autonomy, External Territories are not usually recognised as having a full international legal personality, as otherwise they would be considered States in international law.

States, Territories, and Self-Determination

The reason that External Territories are important in international law is because they are often perceived as relics of colonisation. Before the twentieth century, External Territories were not a contentious issue in international law. This was because most External Territories were parts of colonial empires without a form of voice in the international system: they were instead represented by their

[46] Appendix B (at 146) contains a map of External Territories in the early twenty-first century.
[47] This includes any declared exclusive economic zone under the United Nations Convention on the Law of the Sea 1833 UNTS 3 (signed 10 December 1982, entered into force 16 November 1994), art 55.

administering States. However, as these administering States were the dominant players in international law and politics at the time, it was seen as entirely appropriate to those players for the European States to maintain large empires throughout the world.[48] Although there was some discussion about the applicability of self-government and the right of a people to determine their system of government, this discussion was rarely extended beyond the rights of the peoples of European States.

This situation changed with the establishment of the United Nations (UN), and the focus of the UN on eradicating colonialism. In particular, Chapter XI of the UN Charter set out specific rules for dealing with non-self-governing Territories, with UN members[49] recognizing "the principle that the interests of the inhabitants of these [T]erritories are paramount".[50] The Charter also proclaimed that UN members accepted "as a sacred trust the obligation to ... develop self-government [and] to take due account of the political aspirations of the peoples"[51] of non-self-governing Territories throughout the world. This focus on ending colonialism[52] was in turn part of a broader goal of the UN, enshrined in the organisation's founding purpose to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples…".[53]

The inclusion of the term 'self-determination' in the opening Article of the UN Charter highlights the importance of the concept to the United Nations' members. In general, self-determination "refers to a claim on the part of any group of people to determine their collective actions",[54] which – although a useful starting point – is not particularly helpful in determining what self-determination means.

[48] J M Kelly *A Short History of Western Legal Theory* (Oxford University Press, New York, 1992).
[49] Interestingly, a number of founding UN Members were not actually *de jure* States at the time they joined: India, for example, was still under British colonial rule, while the Philippines was still in a Commonwealth with the United States. Similarly, although New Zealand was a *de facto* State when the UN was founded, it had not yet passed the Statue of Westminster Adoption Act 1947, casting doubt on whether New Zealand had *de jure* sovereignty.
[50] Charter of the United Nations, art 73.
[51] Charter of the United Nations, art 73.
[52] This focus on self-determination was pushed by the US, whose goal was likely motivated in part to deconstruct the United Kingdom and French empires and therefore reduce British and French power in global politics.
[53] Charter of the United Nations, art 1.
[54] Richard George "The Myth of the Collective Right to Self-Determination" in William Twining *Issues of Self-Determination* (Aberdeen University Press, United Kingdom) at 1.

However, a number of UN resolutions have since clarified what the concept means.

United Nations General Assembly Resolution 1514 (XV) clearly sets out the right of all peoples to self-determination, and what achieving self-determination actually means. It states that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[55] The same definition was then used in the major human rights treaties written in the 1960s, elevating it to customary international law status: Article 1(1) of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that self-determination gives rise to the right for all peoples "to freely determine their political status and freely pursue their economic, social and cultural development".[56;57] The inclusion of self-determination in these human rights conventions indicates that it is a principle concerned not just with geopolitics and the legal status of External Territories (as per the UN Charter), but also with peoples' social and political rights (ICCPR) and with the right of each people to preserve their cultural, history and way of life (IECSCR).

Given this, Halperin, Scheffer and Small's summary that "the principle of self-determination is best viewed as entitling a people to choose its political allegiance, to influence the political order under which it lives, and to preserve its cultural, ethnic, historical, or territorial identity"[58] is useful as an all-inclusive definition. This indicates that a key focus of self-determination is the right of a people to 'call the shots' or choose how they wish to be governed – provided that this happens in consultation so as to protect the territorial integrity of existing States.[59] Furthermore, George reasons that the self-determination right is paramount in the international system, and is "limited only by the right of other

[55] GA Res 1514, XV (1960).
[56] International Covenant on Civil and Political Rights 99 UNTS 171 (signed 19 December 1966, entered into force 23 March 1976), art 1(1).
[57] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (signed 16 December 1966, entered into force 3 January 1976), art 1(1).
[58] Morton Halperin, David Scheffer, and Patricia Small, *Self-Determination in the New World Order* (Carnegie Endowment for International Peace, United States of America, 1991), 47.
[59] See discussion below (at 21) on secession.

groups similarly so to act".[60] This point was affirmed by the International Court of Justice in the *East Timor* case where the Court declared self-determination to be "one of the essential characteristics of contemporary international law" and that it has "an *erga omnes* character" (i.e. self-determination is a right that applies toward all).[61] However, Knop notes that a key problem with the concept of self-determination is its "unhelpful generality".[62] In particular, a major concern is the definition of the term 'people', which is not defined in the UN Charter, and has not been particularly well clarified by international law. [63] Anna Michalska, for instance, argues that "the notion [of] 'people' is ambiguous and used in different contexts",[64] making it difficult to clearly define who does – and who does not – have the right to self-determination in international law.

However, these criticisms are more focused on defining a 'people' within the integral territory of a State. In fact, the UN Charter and associated resolutions make it clear that the principle of self-determination is applicable to External Territories. United Nations General Assembly Resolution 1541 (XV) is particularly useful in achieving this, as it set out criteria to assess whether a UN member had to provide information to the UN about non-self-governing Territories[65] - as is required under the UN Charter's provisions dealing with decolonisation. Principle IV of that Resolution established that a' people' must show that they live within a clear geographic area and that they have their own ethnicity or culture. Furthermore, Principle IV also notes that members are required to transmit information as per Article 73(e) of the Charter "in respect of a [T]erritory which is geographically separate and is distinct ethnically and/or culturally from the country administering it" – i.e. an External Territory, such as all the subjects of this paper (each of whom fit the Principle IV criteria). Given Chan's assertion that Resolution 1541 provides "the most authoritative criteria for

[60] Richard George "The Myth of the Collective Right to Self-Determination" in William Twining *Issues of Self-Determination* (Aberdeen University Press, United Kingdom) at 1.
[61] *East Timor (Portugal v. Australia)* [1995] 105 ILR 226.
[62] Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press, United Kingdom, 2002) at 1.
[63] Thomas Musgrave, *Self-Determination and National Minorities* (Clarendon Press, United Kingdom, 1997).
[64] Annah Michalska "Rights of Peoples to Self-Determination in International Law" in William Twining *Issues of Self-Determination* (Aberdeen University Press, United Kingdom) at 73.
[65] GA Res 1541, XV (1960).

a people to be recognised as possessing the right to self-determination",[66] the importance of the provisions in Principle IV should not be underestimated.

Achieving Self-Determination

The concept of self-determination is important to this paper because it is explicitly linked to External Territories. In other words, the UN Charter and General Assembly Resolutions discussed above show that the UN has a keen interest in ensuring that all peoples of External Territories have achieved self-determination. This means that a major focus of this paper is examining whether or not the External Territories have indeed done this by assessing whether they have taken control of their own political, economic and cultural destiny. In particular, the paper will examine whether each External Territory is 'calling the shots' regarding how it is governed. Before doing this, it is important to first examine what paths the United Nations has set out as ways to achieve self-determination. This section therefore overviews General Assembly Resolutions (and associated literature) to assess the criteria that must be fulfilled before the United Nations will accept that a people have exercised their right to self-determination.

The most important document for this assessment is General Assembly Resolution 1541 (XV), which established that External Territories can attain self-government by one of three means: seceding from the controlling State and becoming an independent, sovereign State in their own right, integrating to become part of an existing State, or freely associating with an existing State.[67] These three categories were also included in General Assembly Resolution 2625 (XXV), which also noted that self-determination would be exercised when a territorial entity was "possessed of a government representing the whole people belonging to [that Territory] without distinguishing as to race, creed or colour".[68] Self-determination, therefore, is largely concerned with achieving self-government, which also makes sense given that the United Nations still maintains a list of non-self-governing Territories as per Chapter XI of the UN Charter (which deals with

[66] Phil Chan "The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwain Strait Conflict" (2009) 8 Chinese JIL 1 35.
[67] GA Res 1541, XV (1960).
[68] GA Res 2625, A/Res/8018 (1970).

decolonisation).[69] Musgrave for instance, argues that these resolutions imply the United Nations links self-determination linked to the concept of representative government.[70] Nevertheless, the three routes to achieving self-determination (secession, integration, and free association) will now each be briefly considered.

Secession: Forming a new State

The first option, secession, is well-covered by international law literature. Secession occurs when a non-self-governing Territory makes a "formal withdrawal from a central political authority by a member unit or units on the basis of a claim to independent sovereign status".[71] In other words, people can exercise their right to self-determination by deciding to form their own sovereign State – an action that Buchanan describes as "the most extreme form of political separation".[72] Secession has been by far the most common outcome of successful self-determination movements, and particularly so for External Territories which have wanted to become fully self-governing. Christopher asserts that between 1945 and 1999, "some 95 new [S]tates have formed [and been recognised by other States] as a result of decolonization".[73] The *Yale Law Journal* notes that this should come as no surprise, as secessionist claims "highlight the failure of the [State] system to provide mechanisms for the orderly emergence of new communities".[74] This argument highlights the assumptions behind the State-model: the idea that the community that makes up a State is one homogenous people who all subscribe to the authority of the government. This may not necessarily be true, especially in the case of an External Territory which is geographically distant from its administering State.

However, secession is not a unilateral right. General Assembly Resolution 2625 (XXV)[75], for instance, proclaims that no international actor has the right to "dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with

[69] Special Committee on Decolonisation "List of Non-Self-Governing Territories" (2011) United Nations <http://www.un.org/en/events/nonselfgoverning/nonselfgoverning.shtml>. There are currently 16 Territories on the list, 5 of which are in the Pacific.
[70] Musgrave, above n 63.
[71] Michael Hechter "The Dynamics of Secession" (1992) 35:1 Acta Sociologica 267 at 267.
[72] Stephen Buchanan "Introduction" in in S Macedo and A Buchanan (eds) *Secession and Self-Determination* (New York University Press, United States of America, 2003) at 1.
[73] AJ Christopher "New States in a new millennium" (1999) 31(4) Area 327 at 327.
[74] Yale Law Journal "The Logic of Secession" 89:4 (1980) Yale L.J 802 at 802.
[75] GA Res 2625, A/Res/8018 (1970).

the principles of equal rights and self-determination of peoples".[76] Musgrave explains that the resolution therefore only "appears to sanction secession in the case of sovereign and independent [S]tates if part of a [S]tate's population is not represented in the [S]tate's government".[77] In other words, unilateral secession is only legal in international law in the case of oppression.[78] This is because although secession is a legitimate way in which a Territory can become self-governing, it is problematic when it occurs unilaterally – primarily because it undermines the important (and self-serving) customary international law principle of territorial integrity[79] that is enshrined in the UN Charter.[80]

For instance, in the *Kosovo Independence Declaration* decision, which dealt with the legality of Kosovo's unilateral declaration of independence from Serbia, the International Court of Justice noted that "the Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations".[81] This affirmed an earlier decision made by the Supreme Court of Canada when it considered the potential right of Quebec to secede from the rest of Canada. In that case, the Court summarised that "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign [S]tates and consistently with the maintenance of territorial integrity of those [S]tates".[82] It is therefore unsurprising that in the UN era, very few Territories have successfully unilaterally seceded (i.e. without the controlling State's consent) from sovereign States and then had that secession recognised widely by the international community, with Bangladesh being the one of the few examples.[83]

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[76] GA Res 2625, A/Res/8018 (1970).

[77] Musgrave, above n 63, at 188. However, even this argument in itself has problems, as the concept of territorial integrity is argued by some authors to be stronger than that of self-determination. See for instance D Horowitz "A Right to Secede?" in in S Macedo and A Buchanan (eds) Secession and Self-Determination (New York University Press, United States of America, 2003) at 50.

[78] D Murswiek "The Issue of a Right of Secession – Reconsidered" in n C Tomuschat (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Netherlands, 1993) at 38.

[79] Musgrave, above n 63, at 181.

[80] See art 2(4) of the Charter of the United Nations, which states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State"

[81] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, at 30.

[82] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para 122.

[83] See discussion regarding the secessions of Bangladesh and Eritrea in AJ Christopher "New States in a new millennium" (1999) 31(4) Area 327 at 330.

Integration

The second option, integration, occurs when a non-self-governing Territory chooses to become part of the integral territory of the administering State, with the same rights and qualities as other sub-State units in that State. Upon integration, an External Territory is no longer administered separately by the State. Resolution 1541 (XV) notes that "integration with an independent [S]tate should be on the basis of complete equality between the people of the erstwhile non-self-governing Territory and those of the independent country with which it is integrated".[84] Integration, although uncommon, is not unheard of as a way for people to express their right to self-determination: for example, several French External Territories voted in the 1940sto integrate and become part of France's integral territory.[85] Similarly, Puerto Ricans have recently voted in favour of their government advocating that Puerto Rico should become a state within the US.[86] Lustick, Miodownik and Eidelson explain that integration is often promoted by States to Territories as a way of preventing secession and ensuring territorial integrity; in particular, States may focus on making commitments towards policies of inclusiveness of different cultures, as well as moving from a unitary to a more federal system of organisation.[87] A relevant example is the Cocos Islands, whose people voted in favour of integration with Australia in 1984 following a commitment by the Australian Government to protect the religious beliefs, traditions and culture of the Cocos Islands people.[88]

Free Association

The third option in General Resolution 1541– free association – is a less clear-cut concept than secession or integration. The most authoritative explanation of free association is set out in Principle VII of that Resolution, which states that free association means that the "associated [T]erritory should have the right to

[84] GA Res 1541, XV (1960).
[85] French Guiana, Guadelope, Martinique, Réunion, and Mayotte are all classified as French 'overseas departments', making them part of France's integral territory and therefore part of France. All five departments have representation in the French National Assembly, Senate and Economic and Social Council.
[86] "Puerto Rico wants to become the 51st state of the US" (7 November 2012) BBC News <www.bbc.co.uk>
[87] Ian Lustick, Dan Miodownik and Roy Eidelson "Secessionism in Multicultural States: Does Sharing Power Prevent or Encourage It?" (2004) 98:2 Am.Pol.Sci.Assoc 209 at 225.
[88] Department of Regional Australia "Cocos (Keeling) Islands Governance and Administration" (2 February 2012) <www.regional.gov.au>

determine its internal constitution without outside interference".[89] The use of the term 'internal constitution' here implies that free association involves some form of independence over internal affairs, or in other words, that the Territory becomes self-governing. Furthermore, according to Principle VII, a freely associated relationship should "respect the individuality and cultural characteristics of the [T]erritory".[90] Note that Resolution 1541 also instructs that for there to actually be *free* association, the Territory must always have the ability to end the relationship. Beyond this, however, Resolution 1541 sheds little light on what is required of a relationship based on free association, other than simply stating that the choice to enter into such a relationship must be made freely by the Territory as per the doctrine of self-determination.

Nevertheless, we can take these provisions and combine them with two other points: the fact that free association is presented as an alternative to secession and integration; and the fact that the UN links self-determination to self-government. Consequently, one can argue that free association is not the formation of a new State, nor the integration into an existing State, but instead is a status where the Territory is linked (or 'associated') with an Administering State in some way that provides the Territory with *independent* self-government over domestic matters. However, one can also surmise from these General Assembly Resolutions that free association does not make a Territory *sovereign*, as otherwise it would be recognised as a State in international law.

The Resolutions indicate that free association is not the same as secession, and secession is the forming of a new State. Fairbairn, Morrison, Baker and Groves[91] note that the option of free association was originally included in case Territories wanted a 'temporary' arrangement to exercise self-determination before moving on to full secession and Statehood, which helps to explain the lack of parameters within UN documentation regarding what free association entails. Despite this, some entities that are in free association have been recognised as States,[92] indicating that the view of free association as incompatible with Statehood may be out of date. Furthermore, as is discussed in Chapter II, relationships based on free

[89] GA Res 1541, XV (1960).
[90] GA Res 1541, XV (1960).
[91] Te'o IJ Fairbairn and others, *The Pacific Islands: Politics, Economics and International Relations* (1991, University of Hawaii Press, United States of America).
[92] See Chapter V at page 121: the discussion of the Freely Associated Micronesian States.

association have endured – and even succeeded – in the South-West Pacific. Consequently, this paper now turns to examine seven key territorial entities (the Cook Islands, Niue, Tokelau, Norfolk Island, American Samoa, New Caledonia and French Polynesia) and their levels of identity, independence and sovereignty to draw conclusions about the status and definitions of States, Territories, Self-Determination and Free Association in international law in the twenty-first century.

CHAPTER II: INTRODUCING THE PACIFIC TERRITORIES

Chapter II overviews the various subjects of this paper – the external Territories of the South-West Pacific. It provides background on each of the Territories covered in this paper by outlining each Territory's legislative,[93] executive and judicial branches,[94] as well as providing some brief information regarding each Territory's administering State. Basic population and geographic data on each Territory is contained in Appendix C at page 147.

The Realm of New Zealand

New Zealand is the major focus of this study, and the 'home nation' to which the other legal approaches are compared. This paper also examines three Territories - the Cook Islands, Niue, and Tokelau – for which 'New Zealand'[95] is considered the administering State in international law. New Zealand also used to administer Samoa (previously called the Territory of Western Samoa); however, Samoa is now an independent, sovereign State as per s 3 of the Western Samoa Act 1961. Together, New Zealand, the Cook Islands, Niue and Tokelau share the Queen in right of New Zealand as their Head of State, and are collectively known as the 'Realm of New Zealand'.

Interestingly, this term (the Realm of New Zealand) is an artificial construct created by the Letters Patent 1983 to form a relationship between New Zealand, the Cook Islands, Niue, and Tokelau.[96] The term does not appear to exist anywhere else, and is not used in international law: for instance, New Zealand does not enter into international agreements under the name 'the Realm of New Zealand'. Nevertheless, for the purpose of this study, the term 'the Realm of New Zealand' or 'the Realm' will be used as a means of distinguishing 'New Zealand' from the construct that comprises New Zealand, the Cook Islands, Niue and Tokelau.

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[93] Note that in this chapter, unless stated otherwise, legislatures are considered to be directly elected by the local population on the basis of universal suffrage.

[94] However, as the judicial systems are compared in more depth in Chapter IV (see the discussion beginning at 92), this Chapter will only cover each Territory's briefly.

[95] 'New Zealand' here means the State located approximately 2000 km South East of Australia, and comprising the islands known as the North Island, the South Island and Stewart Island (plus the various territory that falls in the exclusive economic zones extending from these islands).

[96] Letters Patent Constituting the Office of the Governor-General of New Zealand 1983.

New Zealand

New Zealand is a parliamentary democracy which does not have a 'written constitution' (there is no one document laying out constitutional provisions, and many constitutional provisions are actually conventions). New Zealand has a unicameral legislature called the House of Representatives ('the House') or the New Zealand Parliament,[97] which is strongly dominated by political parties. The House usually has 120 members, elected for three-year terms by the people of New Zealand under a mixed member proportion system – approximately half of the members are elected from direct constituencies (known as 'electorate seats'),[98] while the other half are elected from party lists (known as 'list seats'). Overall, however, it is the 'party list' vote that determines what representation each political party has in the House: if a party receives 58% of the 'party vote', the number of electorate seats it has received is topped up by members on the party list until that party has 58% of the seats in the House. The House has sovereign legislative powers and, in theory, can legislate as it pleases.

The Prime Minister of New Zealand is the head of the Executive, and therefore the Head of Government. The Prime Minister is a member of the House and must retain the confidence of the House to continue in his or her role. In effect, this means that the Prime Minister is usually the leader of the largest party in Parliament. The Prime Minister and his or her Cabinet of Ministers (who are selected from the House) advise the Head of State – The Queen of New Zealand, who is usually represented by the Governor-General. It is legally possible, but conventionally and historically unheard of for the Governor-General to deviate from the Prime Minister's advice. The Governor-General also signs Bills passed by the House into law.

New Zealand is perceived by the international community as the administering State for three Territories: the Cook Islands, Niue, and Tokelau. All four 'realm countries' share New Zealand citizenship. However, each of these parts of the realm form different electoral constituencies: Cook Islanders, Niueans and

[97] The New Zealand Parliament is defined by s 14 of the Constitution Act 1986 as the House of Representatives plus the Queen in right of New Zealand (or her representative).

[98] An interesting feature of the New Zealand system is that there are two electoral rolls for the constituency seats: a General roll (open to anyone to enrol on) and a Māori roll (open only to Māori). The number of 'Māori seats' in each election is proportion to the number of people on the Māori roll compared to the General roll.

Tokelauans for instance, cannot necessarily vote for members of the New Zealand Parliament, and (similarly), New Zealanders cannot vote for the Cook Islands Parliament, the Niue Assembly or the Tokelau Fono.[99]

The Cook Islands

New Zealand considers the Cook Islands to be "self-governing in free association with New Zealand".[100] The Cook Islands achieved this status in the early 1960s after New Zealand offered the-then Cook Islands Legislative Assembly four options for its status in the future: integration with New Zealand, becoming self-governing in free association with New Zealand, becoming an independent State, or integration into an eventual Pacific federation.[101] The Cook Islands Government opted for free association, and was successfully re-elected by the Cook Islands people on this basis.[102] This act of self-determination legitimised two core constitutional documents for the Cook Islands: the Constitution of the Cook Islands[103] and the Cook Islands Constitution Act 1964.[104] The Constitution removed the power of New Zealand to legislate for the Cook Islands,[105] although New Zealand law force in the Cook Islands on Constitution Day continued to remain in force.[106]

The Cook Islands Constitution sets up a unicameral legislature called the Cook Islands Parliament ('the Parliament'). The Parliament comprises twenty-four members, elected on four-year terms from single-member constituencies in a first-past-the-post electoral system.[107] Each constituency roughly corresponds to traditional tribal boundaries.[108] The Parliament is the main legislative organ, and

[99] Of course, New Zealand citizens who meet the requirements for voting in more than one realm country are entitled to vote in multiple elections.
[100] New Zealand Ministry of Foreign Affairs and Trade "Cook Islands: Country Paper" (7 November, 2012) <www.mfat.govt.nz>
[101] *Proceedings of the Legislative Assembly of the Cook Islands* (5th sess, 1962) at 104-106.
[102] Stephen Smith "Unchartered Waters: Has the Cook Islands become eligible for Membership in the United Nations?" (2010) 8 NZJPL 169.
[103] This is set out in New Zealand legislation as a schedule to the Cook Islands Constitution Act 1964 (NZ).
[104] Section 3 of the Cook Islands Constitution Act 1964 (NZ) states that the Cook Islands shall be self-governing.
[105] Ibid, art 46.
[106] Ibid, art 77.
[107] Ibid, art 27.
[108] J T M Jonassen "Cook Islands" in S Levine *Pacific Ways: Government and Politics in the Pacific Islands* (Victoria University Press, New Zealand, 2009) 35 at 40.

has the sole power to make laws under the constitution.[109] Bills become law when they are passed by majority vote in the Parliament and are assented to by the 'Queen's Representative', who may return a bill to Parliament for reconsideration (though if Parliament again passes the bill, the Queen's Representative must assent to it).[110] Law is interpreted by the High Court of the Cook Islands,[111] which can in turn be appealed to the Cook Islands Court of Appeal,[112] and from there to the Privy Council in London.

There is also an advisory legislative body: the House of Ariki, which comprises twenty-four members appointed to their positions based on island groups.[113] The House of Ariki is essentially a Council of Chiefs. It carries out a largely ceremonial function, but is mandated to act as an advisory council when requested by the Parliament.[114] In practice, the House of Ariki tends to advise on Acts regarding land or which require consideration of traditional Cook Islander values.[115]

The Head of the Cook Islands Government (and therefore the Cook Islands Executive) is the Cook Islands Prime Minister, who forms a Cabinet of Ministers comprising himself or herself plus up to five other members from the Parliament[116] and up to one other person who does not necessarily have to be a member of Parliament but meets other specific criteria.[117] The Prime Minister continues in his or her role as long as he maintains the confidence of a majority of the members of Parliament. Similar to its counterpart in New Zealand, the Cabinet is responsible for "the general direction and control of the executive government of the Cook Islands",[118] with Cabinet Ministers responsible for various Cook Islands ministries. The Cook Islands Head of State, on the other hand, is the Queen in right of New Zealand, whose functions are carried out in her absence by

[109] Constitution of the Cook Islands, art 39.
[110] Ibid, art 44.
[111] Ibid, art 47.
[112] Ibid, art 56.
[113] Ibid, art 8.
[114] Ibid, art 9.
[115] Tony Angelo *The Cook Islands/New Zealand* (Kreddha Autonomy Mapping Project, December 2007).
[116] Constitution of the Cook Islands, art 13(3).
[117] Ibid, art 13(3A).
[118] Ibid, art 13(3).

the 'Queen's Representative'.[119] This is interesting given that the Queen herself has issued Letters Patent nominating the New Zealand Governor-General as her representative in the Cook Islands,[120] not a separate 'Queen's Representative'. In practice, however, the 'Queen's Representative' still acts as the *de facto* Head of State, and this representative is appointed by the Queen in right of New Zealand on the advice of the Governor-General of New Zealand, who in turn acts on advice of the Cook Islands' Government. This means that the Cook Islands shares a *de jure* Head of State (and her legal agent) with New Zealand, but that in practice the Governor-General of New Zealand merely acts as a 'postman' for the Cook Islands.[121]

Niue

Niue entered into a free association relationship with New Zealand just over a decade after the Cook Islands. Niue's constitutional arrangements are very similar to the Cook Islands, with core documents including the Niue Constitution Act 1974, and the Constitution of Niue, which is contained as a schedule to the Act. In terms of self-determination, Niueans were originally offered free association at the same time as the Cook Islands, but asked for this decision to be deferred.[122] However, in 1974, Niueans voted to accept a new relationship with New Zealand based on free association.[123] Niue originally became a colony of New Zealand after the first King of Niue (elected by the island chiefs) petitioned Queen Victoria for British protection in the late 1800s.[124]

Like the Cook Islands, Niue is considered self-governing,[125] and its legislature (the Niue Assembly) has supreme powers to legislate for Niue.[126] Under the Constitution of Niue, the Niue Assembly comprises the Speaker and twenty members – fourteen of whom are elected from village-based single-member constituencies and six of whom are elected at large 'from the common roll'.[127]

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[119] Constitution of the Cook Islands, art 2.
[120] Letters Patent Constituting the Office of the Governor-General of New Zealand 1983.
[121] Smith, above n 102.
[122] R Parsons "Self-Determination and Political Development in Niue" (1968) 77 Journal of the Polynesian Society 242.
[123] *Question of Niue* GA Res 3285, A/Res/3285 (1974).
[124] New Zealand Ministry of Foreign Affairs and Trade "Niue: Country Paper" (19 July, 2012) <www.mfat.govt.nz>
[125] Niue Constitution Act 1974, s 3.
[126] Constitution of Niue, art 36.
[127] Ibid, art 16(2)(b).

The Speaker is elected by a majority of members of the Niue Assembly,[128] normally following a general election. The Speaker can be anyone who meets the requirements to stand for election to the Assembly,[129] and has always been someone from outside the Assembly's ranks. The Speaker does not have voting rights, but presides over the Assembly and also gives assent to Bills which have been passed by the Assembly by majority vote:[130] at this point they become law.[131] Article 33 prescribes additional procedural requirements for legislation that deals with Niuean land. Similar to the Constitution of the Cook Islands, the Constitution of Niue contains clear statements granting the Assembly the power to make laws,[132] and preventing the New Zealand Parliament from legislating for Niue without Niue's consent.[133] Existing law continues to be in force,[134] which in some cases includes law that doesn't explicitly refer to 'Niue', as Niue was included as part of the Cook Islands prior to the 1960s.[135] As with the Cook Islands, the Constitution creates a High Court and a Court of Appeal to interpret the law and to settle disputes.[136]

Niue's head of government is the Premier, who is elected by an absolute majority of the members of the Assembly.[137] The Premier appoints a Cabinet comprising himself and three other members of the Niue Assembly.[138] As in the Cook Islands, the Cabinet is mandated with "the general direction and control of the executive government of Niue.[139] The Premier and Cabinet hold office as long as they hold the confidence of the Assembly.[140] Tony Angelo notes that this means that the Cabinet controls both the governing of Niue and the legislative programme and agenda of the Assembly[141] - just like in the Cook Islands (and in New Zealand prior to the advent of MMP and minority governments). As with the Cook Islands, the *de jure* Head of State is the Queen in right of New Zealand, represented by her

[128] Constitution of Niue, art 20(1).
[129] Ibid, art 20(2).
[130] Ibid, art 22.
[131] Ibid, art 34.
[132] Ibid, art 28.
[133] Ibid, art 36.
[134] Ibid, art 71.
[135] See, for example, the Cook Islands Act 1915.
[136] Constitution of Niue, pt III.
[137] Ibid, art 4.
[138] Ibid, art 5(1).
[139] Ibid, art 2(2).
[140] Ibid, art 6.
[141] Tony Angelo "Pacific Constitutions – Overview" (2009) 15 Revue Juridique Polynésienne 157 at 168.

Governor-General. In practice, however, the Speaker of the Niue Assembly carries out most domestic Head of State functions.

Tokelau

Unlike the Cook Islands and Niue, Tokelau is not in free association with New Zealand. In terms of self-determination, Tokelau conducted referendums in 2006 and 2007 on whether it should take on a relationship similar to that between the Cook Islands and New Zealand, complete with a Constitution of Tokelau. However, as the requisite two-thirds majority to trigger free association was not reached, Tokelau today remains a "part of New Zealand",[142] administered under the Tokelau Act 1948. Nevertheless, under the Tokelau Act, legislative power has been devolved to a legislature known as the General Fono ('the Fono'), which "may make rules for the peace, order and good government of Tokelau".[143] However, these rules cannot override any statute of the New Zealand Parliament that is in force in Tokelau.[144] Similarly – and in contrast to the situation in the Cook Islands and Niue – any rule made by the Fono may be disallowed by the 'Administrator of Tokelau',[145] who is appointed by the New Zealand Minister of Foreign Affairs and Trade.[146] Although this does not occur in practice, this nevertheless highlights that Tokelau's Fono does not have parliamentary sovereignty.[147] This aside, statute law of New Zealand does not apply in Tokelau unless it expressly says so,[148] although existing laws prior to the Act continue in force.[149] As per the Tokelau Amendment Act 1986, the High Court of New Zealand is also the court of law for Tokelau.[150]

Little mention is made in the Tokelau Act of the membership of the General Fono. However, in practice, the Fono is made up of an elected *Faipule* (Representative/Ambassador) and an elected *Pulenuku* (Mayor) from each of Tokelau's three villages (Fakaofo, Atafu, Nukunonu), plus one additional

[142] Tokelau Act 1948, s 3.
[143] Ibid, s 3A.
[144] Ibid, s 3B.
[145] Ibid, s 3F.
[146] Ibid, s 9.
[147] In practice, the New Zealand Ministry of Foreign Affairs and Trade has input into the drafting of legislation for the Fono so any issues tend to be worked through before any 'veto' might be required.
[148] Tokelau Act 1948, s 6.
[149] Ibid, s 4A.
[150] However, note that the Supreme Court Act 2003 does not extend to Tokelau, meaning that Tokelau retains the ultimate right of appeal to the Privy Council in London.

representative from each village for every 100 inhabitants in that village.[151] These arrangements are also set out in the proposed Constitution of Tokelau (which would have come into force had the free association referendum received the requisite majority). The three sets of *Fapule* and *Pulenuku*, plus the population-based representatives, comprise the Fono, which comprises 20 members in 2012. In a system very different to that of the classic Westminster Parliament, the Fono meets 3-4 times (for 3-4 days per session) each year in the village of the *Ulu-o-Tokelau* (the head of Government). The *Ulu* rotates among the three *Faipule* so that each village takes a turn hosting the Fono. As there are three villages, it is no surprise that the *Faipule* and *Pulenuku* are elected every three years: each village therefore holds the *Ulu-o-Tokelau* position once per electoral cycle.[152] As Tokelau is a Territory of New Zealand, the Queen in right of New Zealand is the Head of State.[153]

Despite the establishment of the Fono as a national legislature, governance in Tokelau in practice revolves around the three villages. In 2006 the Administrator of Tokelau formally delegated his powers to each of the village councils, essentially giving them authority to govern their own individual affairs.[154] Each village is therefore governed by its *Faipule* and *Pulenuku*, plus an elected council (the *Taupulega*), and has in turn ceded responsibility for issues of national importance - such as fishing rights – to the General Fono to deal with on a national level. Each Village also has its own Commissioner's Court, which settles disputes.[155] This can be appealed to each village's Village Appeals Council.[156] Consequently – and in direct contrast to New Zealand, the Cook Islands, and Niue – the Tokelauan system is, in practice although not in law, heavily federalised

[151] Tony Angelo "Tokelau" in S Levine *Pacific Ways: Government and Politics in the Pacific Islands* (Victoria University Press, New Zealand, 2009) 221.
[152] Tokelau Government "How Tokelau is Governed" <www.tokelau.org.nz>
[153] Letters Patent Constituting the Office of the Governor-General of New Zealand 1983.
[154] Neil Walter *Report of the Administrator of Tokelau for the period ended 30 June 2006* (E.14, 30 June 2006).
[155] Interview with C Russell, Statistics Officer: Office of the Council for the Ongoing Government of Tokelau, (the author, 30 November 2012).
[156] Ibid. Note that the Village Appeals Courts can be appealed to the High Court of New Zealand as per the Tokelau Amendment Act 1986, though this has never actually happened.

The Commonwealth of Australia and its External Territories

Australia

Australia is a parliamentary democracy modelled on the Westminster system, but with federal characteristics (federal institutions in Australia are referred to as the 'Commonwealth'): it is made up of five states and several Territories.[157] The Commonwealth Parliament in Canberra is bicameral and consists of the House of Representatives and the Senate.[158] The House of Representatives (currently 150 members) must constitutionally comprise double the number of members of the Senate, and is elected every three years by the Australian people using instant-run off voting in single-member constituencies which are roughly the same size in population. The Senate is also elected by the Australian people, but is elected by a proportional voting system in state-based constituencies. Each state must have the same number of senators (this is currently twelve each). The Constitution does not require the territories to have representation in the senate; however both the Northern Territory and the Australian Capital Territory have been granted the ability elect two members each.

The Commonwealth Parliament is the primary law-making institution in those areas where it has competence. Bills must pass through both chambers to become law; however, as Australia is a federal State, the Commonwealth Parliament can only legislate on certain issues for the states, set out under sections 51, 52, and 90 of the Australian Constitution.[159] However, the Commonwealth Parliament has full legislative powers regarding the Australian Territories.[160]

The Prime Minister is the Head of Government and the Head of the Executive. He or she leads a Cabinet of Ministers, which is made up of Ministers selected by the Prime Minister from the House and the Senate. The Queen of Australia is the Head of State and is represented by her Governor-General, but in practice both

[157] Australian states include New South Wales, Victoria, Queensland, South Australia and Western Australia. Territories tend to be divided into the mainland territories (Northern Territory and Australian Capital Territory), and the External Territories (such as Norfolk Island, Christmas Island, and the Cocos Island), even though there is no distinction between them in the Constitution.

[158] Commonwealth of Australia Constitution Act 1900 (Imp), pt IV.

[159] Commonwealth of Australia Constitution Act 1900 (Imp). This includes competence over issues such as trade and commerce with other countries, taxation, postal and telephone services, defence, quarantine, fisheries, currency, bankruptcy, intellectual property, naturalization and immigration, marriage, criminal law, and external affairs.

[160] Commonwealth of Australia Constitution Act 1900 (Imp), s 122.

conventionally act on the advice of the Prime Minister, based on the conventional provision that the Prime Minister retains the confidence of the House of Representatives.[161]

Norfolk Island

Norfolk Island is one of Australia's external territories, ceded by the United Kingdom to Australia in 1844. As a Territory, Norfolk Island falls under s 122 of the Australian Constitution, which grants the Commonwealth Parliament full powers to legislate for the government of any Territory.[162] Norfolk Island's 'Constitution' is therefore contained in a Commonwealth statute: the Norfolk Island Act 1979 (Cth) ('the Norfolk Island Act') – developed by the Australian federal government in the late 1970s as a result of increasing demands for self-government by Norfolk Islanders. A key position created by that Act is the Administrator, who is appointed by the Governor-General (on the advice of the responsible Commonwealth Minister[163]),[164] and who bears some similarity to the Administrator of Tokelau. The Administrator acts as a *de facto* Head of State for Norfolk Island, although he or she is subordinate to the Australian Commonwealth Governor-General.

The Norfolk Island Act creates a unicameral Legislative Assembly, which comprises nine members[165] elected for three year terms.[166] The electoral method is a weighted first-past-the-post system: Norfolk Island residents have nine votes each to cast among the various candidates, and can cast up to four for a single candidate.[167] The nine candidates with the most votes are elected. At their first meeting, the members of the Legislative Assembly nominate one of their number to be the 'Chief Minister of Norfolk Island',[168] and an additional one of their

[161] Interestingly, there is no convention that the Prime Minister needs the confidence of the Senate; however, as was established in the 'Whitlam Constitutional Crisis', a Prime Minister may be forced to resign if he or she is not able to pass supply bills through the Parliament because he or she does not have the confidence of the Senate.
[162] For a discussion of the implications of this section, see: *Teori Tau v The Commonwealth* (1969) 119 CLR 564; *Wurridjal v Commonwealth* (2009) 237 CLR 309.
[163] This term is used frequently throughout the Act, and should be taken to mean the Commonwealth Minister who has been assigned the responsibility of Norfolk Island. This is currently the Minister for Regional Australia.
[164] Norfolk Island Act 1979 (Cth), s 5.
[165] Ibid, s 31.
[166] Ibid, s 35,
[167] Legislative Assembly Act 1979 (Norfolk Island).
[168] Norfolk Island Act 1979 (Cth), s 12.

number to be a 'Minister'.[169] The Chief Minister also nominates another one or two Ministers from the Legislative Assembly.[170] These Legislative Assembly members are then appointed to their positions as Ministers by the Administrator,[171] and together comprise the Executive Council, whose role is to "advise the Administrator on all matters relating to the government of the Territory".[172] The Chief Minister must retain the confidence of the Legislative Assembly.[173]

Besides holding the Chief Minister to account, the Legislative Assembly has extensive powers to propose law. In particular, the Legislative Assembly has the power to make laws for the peace, order and good government of the Territory.[174] In practice, this has been interpreted as essentially making Norfolk Island self-governing, and providing the Legislative Assembly with the ability to legislate on most domestic affairs' matters with some exceptions – namely, the acquisition of property on just terms, defence matters, the coining of money, and euthanasia. In fact, the Commonwealth Joint Standing Committee on the National Capital and External Territories stated in 2002 that the Norfolk Island Government "has a considerably wider range of powers than the states, including responsibility for important, [normally] exclusive, Commonwealth functions such as immigration, customs, and quarantine matters".[175]

The Norfolk Island Act creates significant opportunities for Commonwealth Australia to prevent legislation from coming into force. Once proposed laws are passed by a majority in the Legislative Assembly,[176] they are then presented to Administrator for assent, and do not enter into force until the Administrator has agreed to them.[177] The Administrator may assent, withhold assent, return the proposed law to the Legislative Assembly for reconsideration, or forward the

[169] Norfolk Island Act 1979 (Cth), s 13(1).
[170] Ibid, s 13(2).
[171] Ibid, s 13.
[172] Ibid, s 11.
[173] Ibid, s 14.
[174] Ibid, s 19.
[175] Joint Standing Committee on the National Capital and External Territories *Norfolk Island Electoral* Matters (June 2002) at 17.
[176] Norfolk Island Act 1979 (Cth), s 42(5).
[177] Ibid, s 21.

proposed law to the Governor-General for assent.[178] However, what happens in practice depends on the type of issue being proposed. In particular, the Norfolk Island Act provides that:

- In the case of proposed laws that solely deal with 'schedule 2 matters' (which are matters usually performed by state or local governments),[179] the Administrator follows the advice of the Executive Council or the Commonwealth Minister responsible for Norfolk Island.[180]
- In the case of proposed laws that deal with 'schedule 3 matters' (which are matters usually performed by the Commonwealth Parliament) [181] the Administrator relies on the advice of the responsible Commonwealth Minister.[182]
- For all other matters, the Administrator must send the proposed law to the Governor-General for assent.[183]

In all three scenarios above, the Commonwealth Governor-General can also disallow a law, provided he or she does so within six months of the Administrator's assent.[184] Given that the Governor-General acts on the advice of the Commonwealth Government, this means that Canberra effectively has the power to disallow Norfolk Island legislation. The Governor-General also has the power to introduce a proposed law into the Legislative Assembly.[185] Finally, the Commonwealth Parliament retains the power to legislate for Norfolk Island, although Commonwealth Acts do not apply to the Territory unless they explicitly state otherwise,[186] or were in force prior to the Norfolk Island Act.[187] In terms of interpretation, the Norfolk Island Act 1979 (Cth) continues the existence of the Supreme Court of Norfolk Island (which was established by the Norfolk Island

[178] Norfolk Island Act 1979 (Cth), s 21(2)(a). Note that the Governor-General can also withhold assent or return the proposed law to the Administrator and from there to the Legislative Assembly.
[179] See Schedule 2 of the Norfolk Island Act 1979 (Cth). This includes almost everything not ruled out by the s 19 exceptions or contained in schedule 3; it therefore includes matters ranging from quarrying to cemeteries to postal services to fences to the protection of birds.
[180] Norfolk Island Act 1979 (Cth), s 21(5)
[181] See sch 3 of the Norfolk Island Act 1979 (Cth). These include matters regarding fishing, customs, immigration, education, quarantine (human, animal or plant), labour and industrial relations, moveable cultural heritage objects, or social security.
[182] Norfolk Island Act 1979 (Cth), s 21(6)
[183] Ibid, s 21(2)(b)
[184] Ibid, s 23
[185] Ibid, s 26.
[186] Ibid, s 18.
[187] Ibid, s 16.

Act 1957 (Cth)).[188] Decisions of this Court can be appealed to the Australian federal court system.

Australian citizenship law extends to Norfolk Island; however, the Norfolk Island Legislative Assembly is given competency over its own immigration laws. Consequently, Australian citizens from the mainland do not have the automatic right to reside on Norfolk Island, and must carry a passport or document of identity to travel to Norfolk Island for a short-term stay. Norfolk Islanders who hold Australian citizenship are entitled to move to and work on the mainland. They are also entitled to enrol to vote in the Australia Federal elections, even if they do not live in mainland Australia – however, as Norfolk Island does not have a specific constituency represented in the Australian Parliament, Norfolk Islanders normally enrol and vote as though they live in Canberra.[189] Overall, this means Norfolk Island is partially integrated into Australia's integral territory.

The Republic of France and its Territories in the Pacific

France

The Constitution of the 'French Republic' (also known as 'France' or 'the Republic') differs from the constitutions of Australia and New Zealand because it is not a parliamentary democracy, but a presidential republic. Legislatively, France has a bicameral legislature (called 'the Parliament') consisting of the National Assembly and the Senate. The National Assembly comprises 577 députés elected for five year terms (in a two-round system[190]) from single-member constituencies, while the Senate comprises 348 senators elected by an electoral college (made up of elected local officials such as regional councillors and mayors, plus national assembly members) for six-year terms.[191]

Approval from both chambers is normally required for a Bill to become law; however, the Constitution does allow for the National Assembly to overrule the Senate in the case of disagreement, provided that a 'joint committee' of both

[188] Norfolk Island Act 1979 (Cth), s 52.
[189] Australian Electoral Commission "Norfolk Island Electors" (29 October 2012) <www.aec.gov.au>
[190] The first round comprises all candidates standing in a constituency. If no candidate achieves an absolute majority of votes, then there is a second round comprising only the top two candidates from the first round.
[191] Constitution of France, art 24.

houses first examines the Bill and attempts to recommend amendments agreeable to both houses.[192] The Constitution allows the Parliament to create 'Organic Laws' (sometimes called 'Institutional Acts'), which set up constitutional arrangements outside the written constitution. Organic Laws have a similar legislative process to normal legislation, but have additional 'cooling off' periods before voting, have restrictions on the ability of the National Assembly to overrule the Senate in the case of disagreement (an absolute majority is required), and cannot be promulgated until the French Constitutional Council (a Constitutional Court) has declared their conformity with the Constitution.[193]

Where the French system differs from the Westminster constitutions is that the French Head of State is the President of the Republic, who is directly elected by the people of France (in a two-round system) for a five-year term. Just like other Heads of State, the President summons and dissolves the Parliament, and calls for elections; however, he or she also has clear constitutional competencies over external affairs.[194] The Head of Government is the Prime Minister, who is appointed by the President on the basis that the Prime Minister has the confidence of the National Assembly. Although the Prime Minister is the *de jure* head of the Executive, in practice, when the President's party has control of the National Assembly, the President also plays a major role in shaping all government policy.

Unlike in the Realm of New Zealand, the French Territories participate in the electoral process. French citizenship law extends to all French Territories, meaning that French citizens (from mainland France) have automatic right of entry into both New Caledonia and French Polynesia.[195] As a result, all French citizens in French Polynesia and New Caledonia are entitled to representation in the French National Assembly and Senate based on their population size.[196] Of the Territories covered in this paper, both French Polynesia and New Caledonia each elect two députés for the National Assembly. French Polynesia elects two senators to the French Senate, while New Caledonia elects just one senator to the French

[192] Constitution of France, art 45.
[193] Ibid, art 46.
[194] Aalt Heringa and Philipp Kiiver *Constitutions Compared – An Introduction to Comparative Constiutitonal Law* (Intersentia, The Netherlands, 2007).
[195] Philip Raworth (ed) *Constitutions of Dependencies and Territories: National Dependencies and Territories of France* (looseleaf ed, Oceania Publications, 1998).
[196] Constitution of France, art 24.

Senate. Nevertheless, despite the ability of the Territories to elect members to the Parliament, the fact that they each only elect one or two members out of several hundred means that the make-up of the National Assembly and the Senate is predominantly determined by mainland France. All French citizens present in French Polynesia have the right to vote in French Polynesian elections; however, the situation is not the same in New Caledonia, where a 'New Caledonian citizenship' requirement means that only those French citizens who meet additional residency criteria have the right to vote in New Caledonian elections.[197]

French Polynesia

The French Constitution designates French Polynesia as an overseas territory.[198] French Polynesia's 'constitution' is therefore laid out in the Statute of Autonomy of French Polynesia ('the Statute of Autonomy), which is an Organic Law passed by the French Parliament.[199] In terms of self-determination, French Polynesia (along with all other French Territories) voted in the late 1950s not to secede from France.[200] However, French Polynesians have not accepted via referendum the Statute of Autonomy and their new status in French constitutional law.

The Statute of Autonomy creates a unicameral legislature called the Assembly of French Polynesia. It comprises fifty-seven members elected by party lists[201] for five year terms from multi-member constituencies.[202] The Assembly has the power to legislate on all matters within its jurisdiction.[203] This jurisdiction is spelled out in Article 140: the Assembly can make 'territorial laws' on matters not specifically retained by the French Republic,[204] and also on matters "taken by way of the participation of French Polynesia in the exercise of the powers of the State

[197] A further discussion on citizenship occurs in Chapter III at 65
[198] Constitution of France, art 73.
[199] Staute of Autonomy of French Polynesia 2004 (France) – also cited as the Organic Law 2004-192 of February 27, 2004 (As Amended to 2008).
[200] New Zealand Ministry of Foreign Affairs and Trade "French Polynesia: Country Paper" (22 August 2011) <www.mfat.govt.nz>.
[201] Party lists must ensure gender balance: parties cannot rank members of the same gender sequentially after one another (ie: the rank must be female, male female or vice versa).
[202] Statute of Autonomy of French Polynesia 2004 (France), art 104. The election itself can be more than one round. If one party gets an absolute majority in the first round, then no more second round – seats distributed to all parties above 5%. Otherwise, there is a second round of voting just for the parties who received 12.5% of votes in the first round.
[203] Statute of Autonomy of French Polynesia 2004 (France), art 102.
[204] Article 14 of the Statute of Autonomy outlines the retained matters, which include nationality, public freedoms, foreign policy, defence, immigration, public order and security, coinage, air links, maritime security, the administration of the communes, civil and public services of the State, audiovisual communication, university instruction.

under the conditions set out in Articles 31 to 36".[205] However, the French Republic also retains the power to legislate for French Polynesia, including on the areas listed above. Furthermore, Republic legislation that covers certain issues will automatically apply to French Polynesia, even if French Polynesia is not explicitly mentioned.[206] As noted above, because the Statute of Autonomy is a French Organic Law, it can also be modified unilaterally by the Parliament of the French Republic.

The President of French Polynesia is the Head of Government,[207] and is elected by the French Polynesia Assembly by secret ballot.[208] Once elected, the President appoints a Vice-President and up to fifteen Ministers, who (along with the President) form the Council of Ministers,[209] which leads the government. Ministers must meet the requirements to be elected to the Assembly, but do not have to be members.[210] According to Article 63, the Council of Ministers holds Executive power and sets policy. Consequently, the President of French Polynesia (as head of that Council) enforces acts, directs the administration of French Polynesia, makes regulations and represents French Polynesia.[211] The High Commissioner of the Republic to French Polynesia (who is appointed by the French Government, and who is similar to an Ambassador) is the *de facto* Head of State, with the power to call elections and overall oversight of the administration of French Polynesia.[212] The High Commissioner is also the "depository of the powers of the Republic".[213]

The French Polynesia Assembly is the main legislative organ, and passes Bills by majority vote.[214] However, the Statute of Autonomy sets up two other advisory legislative bodies:

- the High Council of French Polynesia, which is tasked with "advising the President of French Polynesia and the [Council of Ministers] in the

[205] Statute of Autonomy of French Polynesia 2004 (France), art 140. These matters include (among others) the status of persons, criminal law, immigration, and audiovisual communications.
[206] Statute of Autonomy of French Polynesia 2004 (France), art 7.
[207] Ibid, art 64.
[208] Ibid, art 69.
[209] Ibid, art 73.
[210] Ibid, art 74; note that one cannot be a Minister and a member of the Assembly (seat filled by next person on the list, until you stop being a Minister- then you take your seat back).
[211] Statute of Autonomy of French Polynesia 2004 (France), art 64.
[212] Ibid, art 3 .
[213] Ibid, art 3.
[214] Ibid, art 142.

preparation of acts provided for in Article 140, designated as 'territorial laws,' and of decisions and regulatory instruments".[215] The High Council is made up of members appointed by the Council of Ministers for non-renewable six-year terms based on their competence in legal matters.[216]

- the Economic, Social and Cultural Council, which comprises representatives of professional groups, trade unions and bodies and associations that participate in the economic, social and cultural life of French Polynesia.[217] The Economic, Social and Cultural Council provides an opinion on Bills of an economic and social character[218] at the request of the French Polynesia Assembly.

Government Bills must be submitted to the High Council for its non-binding opinion before they are adopted by the Government in Council.[219] Private Members' Bills must be submitted to the High Council for its opinion before they are placed on the agenda.[220] Acts are then submitted to both the President of French Polynesia and the High Commissioner for approval. Either of these actors can return the Bill to the Assembly for reconsideration – if passed again, the High Commissioner must approve it and it becomes law (no consent is required in this instance from the President of French Polynesia).[221]

There is therefore significant overlap in legislative powers between the Council of Ministers, the High Commissioner, the Republic, and the French Polynesia Assembly, especially as the approval of the Council of Ministers and the High Commissioner is usually needed to pass laws. The Assembly may also move a vote of no-confidence in the President,[222] and the President of the French Republic may (on advice from the Council of Ministers) dissolve the Assembly "where the operations of the institutions of French Polynesia proves to be impossible".[223] Finally, a number of actors can request judicial review of a territorial law: any of the High Commissioner, the President, the President of the

[215] Statute of Autonomy of French Polynesia 2004 (France), art 163.
[216] Ibid, art 164.
[217] Ibid, art 140. This allows the Assembly to pass its own legislation regarding the membership and appointment/election method of the Economic, Social and Cultural Council.
[218] Ibid, art 151.
[219] Ibid, art 141.
[220] Ibid, art 141.
[221] Ibid, art 143.
[222] Ibid, art 156.
[223] Ibid, art 157

Assembly of French Polynesia, or any six members of the Assembly may refer a territorial law to the *Couseil d'Etat* (the French Council of State), who will then review whether the law conforms with "the Constitution, the organic laws [including the Statute of Autonomy], international commitments and the general principles of law".[224]

New Caledonia

The French Constitution designates New Caledonia as a special-status or *sui-generis* community.[225] Like French Polynesia, New Caledonia is governed under a French Organic Law, passed by the French Parliament in Paris, known as the 'Organic Law relating to New Caledonia' ('the Organic Law'). The Organic Law relating to New Caledonia and the Statute of Autonomy of French Polynesia bear many similarities, laying out which competencies are retained by the French Republic and which are delegated to each territory; however, a key difference is that the New Caledonia Organic Law sets up a federal structure in New Caledonia. Consequently, the Organic Law also lays out clear legal competencies between the New Caledonian Congress (the national legislature) and the New Caledonian Provincial Assemblies (the regional legislatures).

Another major difference is that unlike the Statute of Autonomy of French Polynesia, the New Caledonia Organic Law is based on an international treaty between the French State and New Caledonia, known as the Nouméa Accord.[226] Signed in 1998, and ratified by a referendum of New Caledonians in an act towards achieving self-determination[227] the focus of the Nouméa Accord is to allow New Caledonia to progressively become more autonomous over two decades, leading to an eventual series of referenda on whether New Caledonia should become independent.[228] The Nouméa Accord therefore set out a clear progressive transfer of powers from the French State to New Caledonia, which is

[224] Statute of Autonomy of French Polynesia 2004 (France), art 176.
[225] Constitution of France, art 72.
[226] Nouméa Accord, France-New Caledonia (signed 5 May 1998, entered into force 12 March 1999)
[227] Arguably, acceptance of the Nouméa Accord is not an act of self-determination in itself, because it does not result in one of the three 'accepted' outcomes: secession, integration or free association.
[228] See art 217 of the Organic Law relating to New Caledonia 1999 (France), which sets out that there must be a referendum in the term of Congress beginning on 2014. If a majority of votes reject New Caledonia seceding to become its own State, another referendum may be organised at the written request of a third of Congress. This takes place within eighteen months of the first referendum.

in turn reflected in the Organic Law and New Caledonia's *sui-generis* community status. This is important, because it means that while the French State can unilaterally change some parts of the Organic Law (like it can with the Statute of Autonomy of French Polynesia), it is restricted from doing so for the provisions in the Organic Law that are based on the Nouméa Accord and therefore have international treaty status.

In any case, the Organic Law sets up a federal structure,[229] with two sets of local legislatures (the Provincial Assemblies and the New Caledonian Congress), plus the Parliament of the French Republic. The legislative powers retained by the French Republic are set out in Article 21, including (among others) jurisdiction over matters such as nationality, justice, defence, currency, and maritime and air services. Article 22 sets out the areas that New Caledonia has competency in, including (among others) taxation, social protection, customary law, roading, public health, and electricity.[230] Matters not mentioned in Articles 21 or 22 are the domain of the Provincial Assemblies.[231] The Organic Law also sets out several powers of the Republic that have now been transferred to New Caledonia, including jurisdiction over education, civil security and criminal law.[232] The French Republic can legislate on the matters for which it retains competency, provided that the legislation expressly mentions New Caledonia (there are exceptions on constitutional, defence and administrative law issues).[233]

The Organic Law sets up three Provincial Assemblies: one for the Loyalty Islands (15 members), one for the Southern part of Grand Terre[234] (40 members) and one for the Northern part of Grand Terre (22 members). Provincial Assembly members are elected for five-year terms using a proportional representation system.[235] Fifty-four members drawn from the Provincial Assemblies based on their positions on party lists are also members of the New Caledonian Congress – the national legislature. [236] The Congress then elects (by a method of proportional

[229] Organic Law relating to New Caledonia 1999 (France), art 20.
[230] Ibid,), art 22.
[231] Ibid, art 20.
[232] Ibid, arts 21-26.
[233] Ibid, art 6-2.
[234] Grand Terre is the main island of New Caledonia.
[235] Organic Law relating to New Caledonia 1999 (France), art 191.
[236] Ibid, art 62. Seven members come from the Loyalty Islands Assembly, thirty-two from the Southern Assembly, and fifteen from the Northern Assembly.

representation) the President of New Caledonia and up to eleven Ministers, who are together known as the 'Government in Council' (or 'the Government')'.[237] Maclellan explains the rationale behind the proportional electoral system for the Government: it is designed to encourage collegiality in a multi-ethnic, multi-party society with many different views as this method means each of the major parties in Congress will get at least one Minister from its ranks.[238] Nevertheless, once elected, the Government "prepares and enforces the decisions of Congress".[239] As in French Polynesia, the Head of State in New Caledonia is the President of the French Republic, who is in turn represented by the High Commissioner to New Caledonia.[240]

As seen in French Polynesia, the Organic Law grants the Congress the power to pass 'territorial laws' on the areas that New Caledonia has competency, plus on a number of issues set out in Article 99, ranging from national symbols to employment to rules of property. Bills are passed by a simple majority,[241] and are then adopted by the 'Government in Council.'[242] However, any one of the High Commissioner, the Government, the President of the Congress (the Speaker), the President of a Provincial Assembly or eleven members of Congress can ask for a new decision by Congress. If Congress again passes the bill by a simple majority, it becomes law,[243] with one exception: if the High Commissioner, the Government, the President of Congress, the President of a Provincial Assembly or eighteen members of Congress submit the Bill to the Constitutional Council of the French Republic for its opinion. The Constitutional Council has the power of judicial review and can declare bills invalid if it thinks they breach the New Caledonian Organic Law.[244] Other judicial institutions include the 'Judicial Courts of New Caledonia', which deal with all non-administrative law matters. District courts' decisions can be appealed to the Nouméa Court of Appeal. Administrative matters, on the other hand, are not dealt with in New Caledonia at all – instead,

[237] Note that as per Article 110 of the Organic Law, the Government may comprise people outside the membership of the Congress (although they must meet electoral requirements,
[238] Nic Maclellan "New Caledonia" in S Levine *Pacific Ways: Government and Politics in the Pacific Islands* (Victoria University Press, New Zealand, 2009) 35 at 40.
[239] Organic Law relating to New Caledonia 1999 (France), art 126.
[240] As in French Polynesia, the High Commissioner is similar to an Ambassador and is appointed by the French Government in Paris.
[241] Organic Law relating to New Caledonia 1999 (France), art 101.
[242] Ibid, art 100.
[243] Ibid,), art 103.
[244] Ibid, art 104.

any administrative matters are heard by the Administrative Court of France (in Paris), which can then be appealed to the Administrative Court of Appeal, and then to the *Couseil d'Etat* (Council of State).

The Organic law also sets up three other advisory legislative bodies: the Economic and Social Council,[245] the Mines Council,[246] and the Customary Senate.[247] The Government and the French Republic are obligated to consult the Customary Senate on all matters that relate to Kanak identity (the Kanaks are the indigenous people of New Caledonia). The Economic and Social Council is consulted by the Government on matters that have an economic or social character.[248] The Mining Council provides opinions on matters on natural resource extraction.[249] All three bodies can be overruled by the National Congress.

The United States of America and its South-Pacific Territory

The United States of America

The United States of America (the US) is a presidential federal democracy comprising fifty states which (like the states in Australia) have ceded through enumeration certain powers to the federal government.[250] The federal legislature (the Congress) is bicameral, and is made up of the House of Representatives and the Senate.[251] The House currently comprises 435 members who serve two-year terms and who are elected from single-member constituencies by a first-past-the-post system. Each state is entitled to roughly the same proportion of House members as its proportion of the population, and the borders of each constituency are determined on a state-basis (i.e. not by a federal agency). The Senate

[245] Organic Law relating to New Caledonia 1999 (France), art 153. The Economic and Social Council comprises 28 representatives of professional groups, trade unions and bodies and associations that participate in the economic, social and cultural life of New Caledonia, plus 2 members from the Customary Senate, plus 9 members designated by the Government (after consulting with the presidents of the Provincial Assemblies. on the basis that they representative the economic, social or cultural life of New Caledonia

[246] Organic Law relating to New Caledonia 1999 (France), art 42. The Mines Council comprises the President of the Government, the presidents of the Provincial Assemblies, and the High Commissioner to New Caledonia (who is the Chair of the council, but does not have a vote).

[247] Ibid, art 137. The Customary Senate comprises sixteen members designated by customary councils.

[248] Organic Law relating to New Caledonia 1999 (France), art 155

[249] Ibid, art 42.

[250] These federal competencies include (among others) jurisdiction over taxation, immigration, currency, postal services, defence and war, and the regulation of commerce.

[251] Constitution of the United States, art I.

comprises two representatives ('senators') from each state, who are now directly elected for six year terms by the members of that state. Legislation must be approved by both chambers.

The Head of State and the Head of Government is the President of the United States of America,[252] who is elected every four years via a directly elected electoral college, and who does not need the confidence of the US Congress to remain in his or her role (although the President can be impeached for high crimes and misdemeanours[253]). The President leads the Executive Branch of Government. The President sets the policy of the US Government, and nominates people to serve as Secretaries (similar to Ministers) in his or her Cabinet.

American Samoa

American Samoa is the only inhabited American Territory fully located in the Southern Hemisphere. It also presents an interesting case because unlike most of the Territories discussed in this paper, the islands of American Samoa voluntarily ceded sovereignty to the United States under the Treaty of Cession of Tutuila and the Treaty of Cession of Manu'a.[254] These treaties were then ratified by the Ratification Act of 1929,[255] which officially made American Samoa a United States territory. The US Constitution gives Congress full legislative competency over territories of the Union.[256]

The US Ratification Act transferred all powers of government of American Samoa to any person directed by the President of the United States. President Truman therefore used that Act to transfer administration of American Samoa to the Secretary of the Interior, via Executive Order 10264 in June 1951.[257] In 1967, the Secretary of the Interior approved the Constitution of American Samoa, following that constitution's acceptance via referendum by the people of

[252] Constitution of the United States, art II.
[253] Ibid, art II, s 4.
[254] Treaty of Cession of Tutuila, United States of America-Tutuila (signed 17 April 1900, ratified 20 February 1929); Treaty of Cession of Manu'a, United States of American-Manu'a (signed 16 July 1904, ratified 20 February 1929). Note that these are not perceived as having treaty status by the US, but instead are seen as 'Deeds of Cession'. Some commentators also note that the Treaty of Cession of Manu'a was not necessarily signed 'voluntarily' but under duress by the Chiefs of Manu'a.
[255] Islands of Eastern Samoa [Ratification Act 1929] 48 USC § 1661.
[256] Constitution of the United States, art IV, s 3.
[257] Executive Order 10264 of June 29, 1951, 16 FR 6417. Prior to this Executive Order, American Samoa was governed via the US Navy.

American Samoa. This acceptance can be considered an act toward achieving self-determination by the People of American Samoa.[258]

As the Constitution of American Samoa is not a law of the United States Congress, American Samoa is classified as an unorganised,[259] unincorporated[260] territory. This has implications for the applicability of the US Constitution as supreme law. In particular, the US Supreme Court ruled in the 'Insular Cases'[261] that Territories *belonged* to, but were not *part of* the United States. The implication of this is that the US Constitution is not automatically applicable to unincorporated US Territories. Robert Statham Jr asserts that this means core provisions such as equality before the law (as seen in the Fourteenth and Fifteenth Amendments to the US Constitution) are "not currently applied fully to American Samoa, and to do so would place American law in direct conflict with local customs and traditions",[262] especially given that the American Samoan Constitution essentially sets up specific provisions protecting local nobility (the *matai*) and restricting ownership of land (to American Samoans only). Presumably because of this, American Samoans are US nationals, rather than US citizens, and therefore do not vote in federal elections or pay federal taxes, but do have the right to enter (and work) in the United States. American Samoa elects one delegate (for a two-year term) to serve as a non-voting member of the US House of Representatives.

Under the American Samoa Constitution, the head of Government is the Governor of American Samoa. The Governor is now locally elected by a popular vote (on a ticket with the Lieutenant-Governor) using a first-past-the-post electoral method for a four-year term.[263] The Governor is responsible for the "supervision and

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[258] However, as with New Caledonia, the acceptance of the Constitution is not an act of self-determination in itself, because it does not result in one of the three 'accepted' outcomes.

[259] Because Congress is yet to organise a government via an Organic Act

[260] Because Congress does not intend to incorporate American Samoa into the Union as a state

[261] The 'insular cases' are a series of US Supreme Court cases regarding the status of US Territories, and the applicability of the US Constitution outside of the US states. The cases established that the US Constitution fully applied only in incorporated Territories, and not in unincorporated Territories (such as American Samoa). For a full discussion on each of the insular cases, see Daniel F Aga "An Examination of American Samoa's Political Status" (Doctor of Public Administration Thesis, Golden Gate University, 2001) at 126.

[262] E Robert Statham Jr *Colonial Constitutionalism: The Tyranny of United States' Offshore Territorial Policy and Relations* (Lexington Books, Maryland, 2002) at 90.

[263] Constitution of American Samoa, art 4, s 2. Before 1980, however, the Governor was appointed by the Secretary of the Interior.

control of all executive departments, agencies and instrumentalities of the Government of American Samoa".[264]

The American Samoa Constitution also sets up a bicameral legislature ('the Fono') consisting of a Senate and a House of Representatives. The House comprises twenty voting members elected from 17 territorially based districts of American Samoa (3 districts have two representatives) in a first-past-the-post system every two years, and also one non-voting member elected by a public meeting on Swains Island.[265] The Senate is made up of 18 members from three territorially based districts.[266] Senators must be *matai* (Chiefs), are elected by local custom in village meetings of *matai*, and hold office for four years.[267]

Article II, s 9 of the Constitution of American Samoa sets out legislative procedure. Bills can originate in either chamber, and must pass three readings in each chamber by majority vote (either chamber may amend or reject the Bill at any stage). Bills are then sent for approval by the Governor, who may approve the Bill and make it law, at which point the Governor must also deposit the Bill with the US Secretary of the Interior. Alternatively, the Governor may refuse to approve the Bill and instead return it to the chamber in which it originated. The Fono can then re-pass the Bill with a two-thirds absolute majority of each chamber. If the Governor still refuses to sign the Bill, he or she must send it to the US Secretary of the Interior who has ninety days to decide to approve the Bill – if the Secretary does not, the Bill does not become law.[268] American Samoan law, including questions on the American Samoa Constitution, is interpreted by the District Courts and the High Court of American Samoa.[269]

However, the Fono does not have supreme power to legislate. Although the Fono may pass legislation in respect of American Samoa, the American Samoa Constitution expressly states that no legislation may be inconsistent with the

[264] Constitution of American Samoa, art 4, s 7.
[265] Ibid, art 2, s 2.
[266] Ibid.
[267] Ibid, art 2, s 6.
[268] Daniel F Aga "An Examination of American Samoa's Political Status" (Doctor of Public Administration Thesis, Golden Gate University, 2001) notes that only two Bills have gone through this process.
[269] Constitution of American Samoa, art 3, s 1

Table Two: Summary of the Pacific Territories

	Cook Islands	Niue	Tokelau	Norfolk Island	New Caledonia	French Polynesia	American Samoa
Legislature (Lower / Upper chamber)	Parliament	Niue Assembly	General Fono	Legislative Assembly	Congress	French Polynesia Assembly	Fono (House / Senate)
Other Legislative Bodies (Advisory unless noted otherwise)	House of Ariki	---	---	---	Government in Council (adopts Acts) Customary Senate Economic and Cultural Council Mines Council	Council of Ministers (adopts Acts) High Council Economic and Cultural Council	---
Is the Legislature Supreme?	Yes	Yes	No, can be overruled by NZ Parliament. Laws subject to Administrator approval	No, can be overruled by Australian Commonwealth Parliament. Laws subject to Administrator approval	On the enumerated powers that have been delegated to New Caledonia: yes. On other powers: can be overruled by France.	No, can be overruled by France.	No, can be overruled by US Federal Actors.
Head of Government (and method of selection)	Prime Minister, holds the confidence of Parliament.	Premier, holds the confidence of the Assembly.	Ulu-o-Tokelau, shared between the three villages	Chief Minister, holds the confidence of the Assembly.	President of New Caledonia, elected by the Congress	President French Polynesia, elected by secret ballot of the Assembly	Governor, elected by the American Samoan people
Court System	High Court and Court of Appeal of the Cook Islands. Can appeal to the Privy Council.	High Court and Court of Appeal of Niue. Can appeal to the Privy Council.	Tokelauan Commissioners' Councils and Village Councils act as courts - can be appealed to the High Court of NZ	High Court of Norfolk Island. Can be appealed to the Federal Court of Australia	Administrative Courts are in France. New Caledonia has its own Judicial Court system, which can be appealed to the Civil Supreme Court in France.	Administrative Courts are in France. French Polynesia has its own Judicial Court system, which can then be appealed to the Civil Supreme Court in France.	High Court of American Samoa
Is there an Appellate Court in the administering State?	No	No	Yes, but in practice has never been used	Yes	Yes	Yes	In theory no. In practice, can sue Secretary of the Interior
De Jure Head of State	Queen in right of NZ	Queen in right of NZ	Queen in right of NZ	Queen in right of Australia	President of the French Republic	President of the French Republic	US President
De Facto Head of State	Queen's Representative	Speaker of the Niue Assembly	Administrator of Tokelau	Governor-General of Australia, but also the Administrator of Norfolk Island	High Commissioner to New Caledonia	High Commissioner to French Polynesia	US Secretary of the Interior

American Samoa Constitution, with the laws of the United States applicable in American Samoa, or with treaties or international agreements to which the US has acceded.[270] Furthermore, the American Samoa Constitution can be administratively overridden at the US Federal Level – Article IV, Sections 1 and 2, for instance, were amended by the US Secretary of the Interior so that the Governor was elected by popular vote.[271] Similarly, in 1983, the US Congress passed a law modifying the amendment provisions of the Constitution of American Samoa from requiring approval of the US Secretary of the Interior to also requiring approval via an Act of the US Congress.[272]

Conclusion

This chapter shows that there are myriad approaches to setting up constitutional structures within Territories, just as there are as many different independent constitutional structures as there are independent, sovereign States. Table Two (on the previous page), for instance, summarises the very different structures present in the South-West Pacific Territories.

The following chapters will analyse these structures in order to assess the level of independence and sovereignty that Territories have compared to States. In particular, Chapter III will examine the extent to which each Territory's constitution acknowledges that Territory's culture and identity. Chapter IV will then consider the extent to which each Territory can be considered independent (as per the definition in Chapter I), including a discussion of the extent to which each Territory is still linked (or associated) with its administering State. Finally, Chapter V will examine the extent to which any of the Territories covered in this paper can be said to be sovereign, and whether this means that any of the 'Territories' considered in this paper should actually be classified as 'States' in international law.

[270] Constitution of American Samoa, art 2, s 1. Note that because of the insular cases, local American Samoan legislation does not have to be consistent with the US Constitution.
[271] Section 1 previously stated that the Governor would be appointed as provided in the laws of the US. In practice, the Governor was appointed by the US Secretary of the Interior.
[272] Amendment of Constitution of American Samoa 48 USC § 1662a.

CHAPTER III: CULTURE & IDENTITY

Culture – or the traditions, values and rituals that are inherently accepted within a society – is a major part of a nation's identity. Article 27 of the International Covenant of Civil and Political Rights (the ICCPR), for instance, declares that States have a duty to make sure that minorities are not denied the right to enjoy their own culture.[273] Identity is also important for determining who a 'people' are regarding the right to self-determination. Consequently (and as established in Chapter I), the recognition of identity in a Territory's constitution can provide an indication of that Territory's independence in international law. However, Henderson asserts that despite the importance of culture to a nation's identity, "the importance of tradition and culture is stressed in the [Pacific] constitutions – but generally in sections confined to the preamble".[274] This chapter assesses this claim, examining the extent to which the constitutions of the Pacific Territories show recognition of that Territory's identity, including the protection of cultural traditions and local land, the composition and design of local legislatures and each Territory's Head of State, the 'officialisation' of local languages, and the creation of legal identity via citizenship.

Constitutional Structure and Design: Protection of Local Culture

Perhaps the most striking thing when examining the constitutional structures of the Pacific Territories is how Western they are in design. All the Territories have relatively prescriptive constitutions, which is at odds with the oral tradition of the Pacific Islands.[275] Furthermore, a focus on elected representatives who make national decisions is at odds with traditional Pacific society. Fairbairn, Morrison, Baker, and Groves, for instance, note that "both Polynesia and Micronesia have aristocratic, hierarchical social structures with traditional authority vested in chiefs".[276] Helu argues that in an ideal world, Pacific Island constitutions would localize power as much as possible, primarily because the small population size of

[273] International Covenant on Civil and Political Rights 99 UNTS 171 (signed 19 December 1966, entered into force 23 March 1976).
[274] J Henderson "Governance and Constitutional Issues: Restrictions on Current Problems and Future Options" in Michael Powles (ed) *Pacific Futures* (Pandanus Books, Canberra, Australia, 2006) 10 at 17.
[275] Ron Crocombe and others (eds) *Culture and Democracy in the South Pacific* (Institute of Pacific Studies, Fiji, 1992).
[276] Te'o IJ Fairbairn and others *The Pacific Islands: Politics, Economics and International Relations* (University of Hawaii Press, Hawaii, 1991) at 17.

the Pacific Islands means that "party politics always poses a threat of fragmenting the communities into tiny ineffective pieces, thus weakening them as systems or throwing them into chaos".[277] However, in the former Pacific colonies that are now States, "the Pacific Island constitutions [largely reflect] the political structure of the colonial power" that administered them,[278] with most power concentrated in a nationally-elected legislature and the national executive, rather than at the village level.

The same can be said of the Pacific Territories: Norfolk Island, the Cook Islands and Niue are largely parliamentary systems but with strong executives, as per the Westminster tradition in Australia and New Zealand. All use (at least in part) some form of first-past-the-post method to elect their legislative bodies, and the executive itself is formed out of the legislature, rather than elected by the people – just as is seen in 'mainland' Australia and New Zealand. Similarly, French Polynesia and New Caledonia are quasi-presidential systems, like the Republic of France. Both French Territories also feature a number of bodies which have an advisory role in the legislative process[279] – similar to the Economic, Social and Environmental Council in France, which is mandated by the French Constitution.[280] Finally, the American Samoan constitution reflects that of its administering State (the US). Just like the US has a bicameral legislature (the Congress) and a President as Head of Government and Head of State, American Samoa has a bicameral legislature (the Fono) and a Governor as Head of Government and Head of State.[281] Henderson argues that this similarity is an issue, as the imposition of foreign political models (and especially the adversarial Westminster system) into the Pacific Islands has negative social implications, as "the division between government and opposition accentuates internal divisions

[277] 'I Futa Helu "Thoughts on political systems for the Pacific Islands" in Werner vom Busch and others (eds) *New Politics in the South Pacific* (Institute of Pacific Studies, Fiji, 1994) 319 at 325.
[278] Henderson, above n 274, at 15.
[279] For instance, the Economic, Cultural and Social Council in French Polynesia, and the Economic and Social Council in New Caledonia.
[280] Constitution of France, art 69.
[281] Similarly, just as the US President can veto legislation and send it back to the US Congress for a new decision, the American Samoan Governor can veto legislation and send it back to the American Samoan Fono for a new decision.

within society and fosters instability".[282] This, in turn, is at odds with the traditional Pacific-culture of stable decision-making and family consensus.[283]

However, not all Territories have whole-heartedly adopted a foreign system into their constitutions. Tokelau's constitutional structure reflects New Zealand influence but has clearly been adapted for Tokelauan circumstances – each village, for example, takes a turn having the honour of holding the *Ulu* position and hosting the Fono. Similarly, the Niuean constitution integrates the Westminster system with local culture – fourteen voting members (out of twenty) of the Niue Assembly are elected from the traditional villages of Niue, and – perhaps as a result of this – Niue has not developed political parties nor a formal opposition,[284] which in turn helps to overcome any potential political instability.

Legislative Bodies in the Constitution

Several Pacific Territories also include some form of legislative body whose purpose is to advise on how laws meet cultural traditions. Secondary legislative bodies are by no means unique to the Pacific: De Smith notes that throughout the world, "the will of the majority in the popularly elected house of the legislature [is often] offset by a second chamber in which minority and regional interests and traditional elements may be guaranteed special representation".[285] The question is: to what extent do the secondary legislative bodies found in the Pacific Territories actually protect those minorities and traditional cultures? Can they act as an effective brake on the legislative process, or are they advisory only?

The Cook Islands Constitution, for instance, sets up the House of Ariki – essentially a council of Chiefs (Ariki) – which is tasked with considering matters relative to the welfare of the people of the Cook Islands submitted to it by the Cook Islands Parliament. Interestingly, the House of Ariki was not included in the original version of the Cook Islands Constitution, but added in 1967 by Cook Islands Premier Albert Henry to recognise the royal heritage of the Cook Islands

[282] Henderson, above n 274, at 15.
[283] Crocombe and others, above n 275.
[284] Tony Angelo "Pacific Constitutions – Overview" (2009) 15 Revue Juridique Polynésienne 157.
[285] Stanley De Smith *The New commonwealth and its Constitutions* (Stevens & Sons, London, 1964), at 108.

and to help the Cook Islands define its national identity.[286] Similarly, the Organic Law relating to New Caledonia sets up the Customary Senate, which is made up of Kanak members from each of the customary areas of New Caledonia. The Customary Senate is consulted on all proposals affecting the Kanak identity and can suggest amendments to laws regarding distinctive symbols, rules regarding land, and any other matter that the National Assembly refers to it.[287] The New Caledonian and French Polynesian Organic Laws also set up an Economic and Social Council in New Caledonia and French Polynesia.[288] In both Territories, the relevant Economic and Social Council is tasked with considering proposals for territorial laws that have an economic or social character.

However, none of the bodies mentioned in the above paragraph have the ability to unilaterally pass legislation, or to prevent it from passing. In effect, they are advisory bodies only, and can be overruled by the main legislative chamber by a simple majority (the Cook Islands Parliament, the French Polynesia Assembly, and the New Caledonian Congress). Henderson asserts that this means "the role of these bodies is limited, and generally does not challenge the imported Western political structures".[289] Furthermore, the inclusion of the Economic and Social councils in the French territories seems almost a throw-back to the legislative system of the French Republic - which has an Economic and Social council of its own[290] – rather than a genuine attempt to include cultural traditions in the legislative process of New Caledonia or French Polynesia.[291] Niue and Tokelau, on the other hand, do not have any such form of advisory body to the legislature; however, as noted already, both Niue and Tokelau have legislative systems that reflect the traditional village system and are therefore less Westminster in design.

In contrast to the Cook Islands and the French territories, the Constitution of American Samoa sets up a culturally based upper house with power of its own.

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[286] Albert Henry, quoted in J Sissons *Nation and Destination: Creating Cook Islands Identity* (Institute of Pacific Studies, Fiji, 1999) at 61.

[287] Organic Law Relating to New Caledonia 1999 (France), arts 142-143.

[288] Organic Law Relating to New Caledonia 1999 (France), art 153; and Statute of Autonomy of French Polynesia (France), arts 147-151. Note that in French Polynesia this is called the Economic, Social and Cultural Council.

[289] Henderson, above n 274, at 17.

[290] Now called the Economic, Social and Environmental Council.

[291] The Customary Senate, however, seems much more genuine, given that issues relating to Kanak identity must receive an opinion from the Customary Senate, although this opinion can be overruled.

Article 2 of the Constitution of American Samoa establishes the American Samoan Senate, which is made up of eighteen members selected in local village meetings. Notably, candidates must be *matai* (Chiefs) in order to be nominated to the Senate. Although the Constitution is silent on the specific role of the Senate, its membership suggests that its core purpose is to ensure that Bills are not in conflict with American Samoan values and culture – similar to the House of Ariki and the Customary Senate. Furthermore, in contrast to the Cook Islands and the French territories, there is no mechanism in the Constitution of American Samoa for the population-based, directly elected American Samoan House of Representatives to overrule the Senate: Bills must pass by three readings majority in each chamber,[292] and either chamber may amend or reject the Bill at any stage.[293] Robert Statham Jr provides a potential reason for this: "from the Samoan perspective, the primary purpose of initially agreeing to the United States' annexation of the islands was rooted in the quasi contradictory desires of being a part of the American family while at the same time preserving local communal land and Matai systems, the basic core of the Samoan way of life".[294] Consequently, although the Constitution of American Samoa sets up a bicameral legislature which is in some ways very similar to the US Congress, this model has been significantly modified to defend the very reason American Samoa decided to cede sovereignty to the Union in the first place – the protection of local customs and the *matai* system.

Cultural and Local Land Protection

Several of the constitutions for the Pacific Territories include provisions regarding local customs. The strongest example of this is Article 3 of the American Samoan Constitution, which states: [295]

> It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons. No change in the law respecting the alienation or transfer of land or any interest therein, shall be effective unless the same be

[292] Constitution of American Samoa, art 2, s 15.
[293] Ibid, art 2, s 9.
[294] E Robert Statham Jr *Colonial Constitutionalism: The Tyranny of United States' Offshore Territorial Policy and Relations* (Lexington Books, Maryland, 2002) at 87.
[295] Constitution of American Samoa, art 3.

> approved by two successive legislatures by a two-thirds vote of the entire membership of each house and by the Governor.

The inclusion of such a strong protection clause seems to be a direct result of American Samoa *choosing* to join the US in return for cultural protection.[296] However, Article 3 is not the only example of this. As noted in Chapter II, even though American Samoa is a territory of the US, the doctrine of territorial incorporation developed in the insular cases means that because American Samoa is an unincorporated Territory, the US Constitution does not automatically apply and is not supreme law in American Samoan courts.[297] This means that provisions such as 'equality before the law' which are inherent in the US constitution, are overruled by the provisions in the Constitution of American Samoa that protect local culture, such as the *matai* system.[298]

Special cultural provisions are also seen in other Territories' constitutions, most commonly to do with land. Article 33 of the Constitution of Niue, for instance, prescribes special provisions with regard to any proposed laws affecting Niuean land. In particular, the Article sets up additional legislative procedures for the Niue Assembly if it wants to pass a Bill regarding the customary title to Niuean land; the alienation of Niuean land; or the purchase, taking or other acquisition of Niuean land for any public purpose.[299] Angelo notes that this is important given that "land in Niue is almost extensively held in accordance with custom".[300]

In the French Territories, the Statute of Autonomy of French Polynesia contains very minor provisions on land: it requires the establishment of a council of experts to advise the institutions of French Polynesia on matters of land and property.[301] In contrast, the Organic Law relating to New Caledonia establishes the concept of 'customary lands', which are governed by custom and which are inalienable, unassignable, non-transferable, and exempt from attachment.[302] That organic law

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[296] Robert Statham Jr, above n 294, at 87.
[297] See n 261 at 49 for more discussion on the 'insular caes'.
[298] After all, the concept of having *matai*, or hereditary chiefs, as the only 'class' of citizens who can stand for the Senate and (in practice) purchase land is at odds with the principle of 'equality before the law'.
[299] Constitution of Niue, art 33(1). In particular, the Niue Legislative Assembly must establish a Commission of Inquiry to analyse and report on the legal, constitutional and policy issues raised by the relevant law. The report is non-binding, but must be considered by the Niue Assembly.
[300] Angelo, above n 284, at 170..
[301] Statute of Autonomy of French Polynesia 2004 (France), art 58.
[302] Organic Law relating to New Caledonia 1999 (France), art 18.

also establishes the concept of customary civil status in New Caledonia: persons who have customary civil status are governed in civil law by their customs.[303] The New Caledonian organic law also provides New Caledonia with the ability to freely determine its own distinctive symbols and its name.[304]

Interestingly, neither the Cook Islands nor Tokelau nor Norfolk Island have explicit constitutional provisions regarding local culture or land ownership. However, the Tokelau Act 1948 contains specific provisions regarding the application of common law and equity: ss 4B and 5A note that in general, English common law and the principles of equity are in force in Tokelau, unless those principles are "inapplicable to the circumstances of Tokelau".[305] Furthermore, the would-be Constitution of Tokelau, which would have come into force if Tokelau had chosen to change its relationship-status with New Zealand to free association, does have specific provisions for land,[306] including provisions preventing any non-Tokelauan from gaining an interest in Tokelauan land.

Nevertheless, for the most part, the constitutions of the Pacific Territories do not feature many provisions surrounding cultural protection, beyond what has been noted above regarding including advisory bodies in the legislative process to *protect* cultural traditions. However, some Territories' constitutions do contain specific provisions restricting the use of land.

Head of State

A territorial entity's Head of State is also an important determination of identity. A Head of State is literally the representative of a territorial entity – normally with significant ceremonial and constitutional functions. A Head of State tends to have an important role in calling elections, summoning and dissolving the legislature, and being the overall person in charge of defence. The Vienna Convention on the Law of Treaties also implies that a key function of the Head of State is to represent a territorial entity in international affairs.[307] Consequently, whether or not each of the Territories has its own Head of State is important for determining

[303] Organic Law relating to New Caledonia 1999 (France), art 7.
[304] Ibid, art 5.
[305] Tokelau Act 1948, s 4(1)(b).
[306] Proposed Constitution of Tokelau (2006), art 15.
[307] Vienna Convention on the Law of Treaties 1155 UNTS 331 (signed 23 May 1969, entered into force 27 January 1980).

the extent to which each Territory has developed its own identity, as well as playing a role in the determination of each Territory's level of independence.

Given this, it is important to note that that none of the Territories have their own *de jure* Head of State. The Constitution of the Cook Islands, for instance, states that "Her Majesty the Queen in right of New Zealand shall be Head of State of the Cook Islands".[308] Similarly, the Niue Constitution states that "the executive authority of Niue is vested in Her Majesty the Queen in right of New Zealand, and the Governor-General of New Zealand is accordingly the representative of Her Majesty the Queen in relation to Niue".[309] This means that the Queen in right of New Zealand, rather than a separate Queen in right of the Cook Islands or Niue, is the *de jure* Head of State in both Territories. However, do these semantics matter? After all, 'the Queen in right of New Zealand' is a title held by Queen Elizabeth II – the same person who is the Queen of several Commonwealth States. For instance, Queen Elizabeth II is also the Queen in right of Australia, the Queen in right of Canada, the Queen in right of Papua New Guinea, and so forth.[310] The fact that there is not a separate Queen in right of the Cook Islands or Niue perhaps indicates that the Cook Islands and Niue are not as independent as those Commonwealth States who have their 'own' Queen.

However, for most Commonwealth States, Queen Elizabeth II is simply the *de jure* Head of State – the *de facto* Head of State is the Queen's representative, or Governor-General. Importantly, each State (rather than the Queen) nominates its own Governor-General. However, in the Cook Islands and Niue, the *de facto* Head of State is supposed to be the New Zealand Governor-General, who acts as the *de facto* Head of State for the entire realm of New Zealand.[311] However, despite this, the Cook Islands has in fact set up its own 'Queen's Representative' as its *de facto* Head of State,[312] and it is this Queen's Representative who carries out the functions of the Head of State in the Cook Islands. This allows a locally nominated position: in practice, the Queen's Representative is nominated by the Cook Islands' Government and appointed by the Governor-General of New

[308] Constitution of the Cook Islands, art 2
[309] Constitution of Niue, art 1.
[310] Stephen Smith "Unchartered Waters: Has the Cook Islands become eligible for Membership in the United Nations?" (2010) 8 NZJPL 169.
[311] Letters Patent Constituting the Office of the Governor-General of New Zealand 1983.
[312] Constitution of the Cook Islands, art 3.

Zealand – the latter of whom acts as 'postman' for the Cook Islands given his or her role as an intermediary between the Queen's Representative and the Queen in right of New Zealand.[313] In Niue, the Governor-General remains the official *de facto* Head of State; however, in practice some of the Head-of-State functions are carried out by the Speaker of the Niue Legislative Assembly.[314]

In both New Caledonia and French Polynesia, the *de jure* Head of State is the President of France. This is because both French Polynesia and New Caledonia are considered Territories of the Republic, and therefore fit under Title XII of the French Constitution. However, the Statute of Autonomy of French Polynesia identifies a representative: the High Commissioner of the Republic to French Polynesia, who is appointed by the French Government in Parliament as "the depositary of the powers of the Republic".[315] A similar position exists regarding New Caledonia (the High Commissioner to New Caledonia).[316] As with the Cook Islands, there is a shared *de jure* Head of State with the administering State, but also a local representative. However, in this case that representative is nominated and appointed by the administering State (France), rather than by the local government. A similar situation exists in Norfolk Island: although the Governor-General of Australia is still the Head of State of Norfolk Island, in practice the Governor-General is represented by an Administrator, who is capable of being sued, entering into contracts, and acquiring property.[317] All proposed laws must also be presented to the Administrator for his or her assent.[318] However, the key thing is that the Norfolk Island Administrator is nominated and appointed by the Australian Commonwealth Government, rather than being a locally nominated position as seen in the Cook Islands.

Interestingly, the American Samoan Constitution notes that the Governor is the Head of Government but is silent on whom the Head of State is. This may be because the US system – on which the American Samoan Constitution is based – is a Presidential system where the Head of Government is also the Head of State

[313] Smith, above n 310.
[314] In particular, the Speaker of the Assembly gives assent to Bills, making them law; and also dissolves the Niue Assembly.
[315] Statute of Autonomy of French Polynesia 2004 (France), art 3.
[316] Organic Law relating to New Caledonia 1999 (France), art 2.
[317] Norfolk Island Act 1979 (Cth), s 5(3).
[318] Ibid, s 21

at the same time. One approach to this issue could be that the American Samoan Head of State is the same as their administering State: after all, the President of the US implicitly represents American Samoans on the international stage.[319] This is an important point given that a key role of a Head of State is to represent a territorial entity on the global stage.[320] On the other hand, one can argue that American Samoa has a *de facto* Head of State in the form of its administering-State-appointed official: the US Secretary of the Interior. This is especially true given that the Secretary of the Interior appoints Justices to the High Court of American Samoa,[321] decides on legislation that is rejected by the Governor of American Samoa,[322] and used to nominate and appoint the Governor of American Samoa.[323] One can similarly argue that the Administrator of Tokelau is also a *de facto* Head of State, given that the Administrator is able to disallow rules made by the Tokelau General Fono.[324]

Language

Martin and Nakayama argue that language is a key foundation of identity.[325] After all, it is through language "that we are able to identify ourselves, others, and to be identified by others".[326] Exploring what each of the constitutional documents of the Pacific Territories says about language is therefore particularly important for a discussion on culture and identity, especially given William Mackey's argument that "language is a reflection of economic and cultural power".[327] In fact, Colin Williams goes so far as to argue that "the ecology of language has much to do with questions of power";[328] after all, if one language is legally mandated as the 'official' language of a State or Territory, this means that government agencies,

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[319] Australian Department of Foreign Affairs and Trade "American Samoa: Country Paper" (September 2012) <www.dfat.gov.au>
[320] See discussion above at 59
[321] Constitution of American Samoa, art III, s 3. In practice these are nominated by the Governor of American Samoa. Refer n 263 at 49.
[322] Constitution of American Samoa, art II, s 9.
[323] See the discussion at 94.
[324] Tokelau Act 1948, s 3F.
[325] JN Martin and TK Nakayama, *Intercultural Communication in Contexts* (5th ed, McGraw-Hill, United States of America, 2010).
[326] Gabrielle Hogan-Brun and Stefan Wolff "Minority Languages in Europe: An Introduction to the Current Debate" in Gabrielle Hogan-Brun and Stefan Wolff, *Minority Languages in Europe: Frameworks, Status, Prospects,* (Palgrave Macmillon, United States of America, 2003) at 3.
[327] William Mackey "Bilingual Education and its Social Implications" in John Edwards, *Linguistic Minorities, Policies and Pluralism* (Academic Press, United Kingdom, 1984) at 157.
[328] Colin Williams "Linguistic Minorities: West European and Canadian Perspectives" in Colin Williams, *Linguistic Minorities, Society and Territory* (Longdunn Press Ltd, United Kingdom, 1991) at 4.

legal documentation, and education systems will use that language – often to the exclusion of other languages.

The Cook Islands Constitution states that "all debates and discussions in Parliament shall be conducted in the Maori language as spoken in Rarotonga and also in the English language",[329] and that Bills and Acts must have both Maori and English versions.[330] However, the Cook Islands Constitution also notes that if there is conflict between a Maori version and an English version of any Bill or Act, the English version takes precedence.[331] Article 23 of the Niuean Constitution is similar – essentially establishing that Niuean and English are equal languages. Where Niue differs from the Cook Islands, however, is where there is conflict between translations. In that case "regard shall be made to all the circumstances that tend to establish the true intent and meaning of that provision".[332] Similarly, if there is a conflict in any record of proceedings or enactment of the Niue Assembly, the Assembly may resolve one version as the superior one.[333]

In French Polynesia, the situation is very different. The Statute of Autonomy of French Polynesia declares that French is the official language of French Polynesia.[334] Although the Statute of Autonomy does allow private-law contracts to be drawn up in some indigenous languages,[335] and notes the importance of the Tahitian language for cultural identity, [336] French is still the obligatory language for legal public-law issues, "as well as for users in their relations with the public administrations and departments".[337] In contrast, the Organic Law relating to New Caledonia does not include a provision on the use of French; however, in practice, French is the *lingua franca* of the Territory. A similar situation is true for Norfolk Island and Tokelau, where the issue of language is absent from the Norfolk Island Act 1979 (Cth) and the Tokelau Act 1948 – in effect, no language is given an official status in these Territories. In contrast, in American Samoa, although

[329] Constitution of the Cook Islands, art 35(1).
[330] Ibid, art 35(2). Note: Parliament can resolve to just put them in English if it wants.
[331] Constitution of the Cook Islands, art 35(4).
[332] Constitution of Niue, art 23(4).
[333] Ibid, art 23(5).
[334] Statute of Autonomy of French Polynesia 2004 (France), art 30.
[335] Ibid, art 57. In particular, private-law contracts may be drawn up in French, Tahitian, Marquesan, Tuamotuan and Mangarevan.
[336] Ibid
[337] Ibid, art 57.

Samoan is not mentioned as an 'official language' of the Territory, the Constitution of American Samoa protects local language via the Article 3 'cultural protection' provisions.[338]

Nevertheless, a common problem in most of the Territories seems to be the use of a dominant language – even if it is not embedded in the constitution. Hunkin and Mayer note that "for island-based cultures today, the greatest threat of language loss is from the influence of an introduced dominant language and its accompanying world view, which has become accepted over the years with little question".[339] In the Cook Islands, for instance, although the Constitution recognises Maori (as spoken in Rarotonga) as almost legally equal to English,[340] this is not the only language. Hunkin and Mayer note that the focus on Cook Islands Maori has resulted in fewer speakers of other languages: 16,800 people now speak Cook Islands Maori, but only 600 people speak Penrhyn, only 840 people speak Pukapuka, and only 2,500 people speak Rakahanga-Manihiki. Hiti Tepari'i believes that the declaration of French as the official language of French Polynesia is a major issue, and argues that the imposition of the French language is a form of twenty-first century colonialism: "French colonialism, as a political system, still continues stronger than ever, through its new form – Francophony".[341] Tepari'i argues that the constitutional requirement to use French means that the language has become all-encompassing in French Polynesia to the point that it strangles indigenous cultural development. These examples indicate that the imposition of specific languages through constitutional mechanisms can have wide effects due to the power that it gives the culture that 'owns' the official language, and (in turn) the identity of minority cultures within nations.

However, issues arise even in Territories where language is not constitutionally prescribed. Hunkin and Mayer note that in New Caledonia, where language is not specified in the Constitution, the importance of French as a lingua franca means that apart from Vanuatu-Bislama (1,200 speakers) and Tayo, (2,000 speakers), only six of the remaining Pacific languages are spoken by more than 4,000

[338] See the discussion at 57.
[339] GAL Hunkin and FLJF Mayer "Language and Culture Loss in the Pacific" in Michael Powles (ed) *Pacific Futures* (Pandanus Books, Canberra, Australia, 2006) 62 at 67
[340] Ibid, at 66.
[341] H Tepari'i, "Culture: A Product of Colonialism in French Polynesia" in Werner vom Busch and others (eds) *New Politics in the South Pacific* (Institute of Pacific Studies, Fiji, 1994) 62 at 67.

speakers. Furthermore, twelve languages have between 1,000 and 4,000 speakers and nineteen languages have populations of fewer than 1,000 speakers. Two languages – Waamang and Zire – have become extinct.[342] Similarly, fewer and fewer people are learning Tokelauan on the basis that Samoan is more useful given its status as a *lingua franca* in that region of the world.[343] Perhaps then, the issue is less a result of what is stated in constitutional documents, but what has become accepted practice. Nevertheless, the inclusion of 'official language' clauses in constitutional documents legitimises certain languages and cultures at the expense of others.

Citizenship

Almost all of the administering States of Pacific Territories have taken the same approach regarding citizenship for the people of their Territories: for the purpose of citizenship legislation, the Territory is covered by the same law as the administering State.[344] This is important because citizenship is a legal form of identity: it informs others which territorial entity a person is associated with. In the Realm of New Zealand, s 29 of the Citizenship Act 1977 extends New Zealand citizenship law to the Cook Islands, Niue and Tokelau; consequently Cook Islanders, Niueans and Tokelauans who met standard New Zealand citizenship criteria have the right to move and reside in New Zealand, and also have the same rights to visas in other countries as other New Zealand citizens. Similarly, s 11 of the Australian Citizenship Act 1948 extends Australian citizenship to the Australian External Territories (including Norfolk Island), with the resulting effect that Norfolk Islanders are Australian citizens and therefore have free-movement rights to live in 'mainland' Australia.

However, this right is not reciprocal. Neither 'mainland' New Zealanders nor 'mainland' Australians have the automatic right to legally reside in the Cook Islands, Niue and Tokelau or in Norfolk Island respectively, as in all three cases

[342] Hunkin and Mayer, above n 539, at 66.
[343] It is also noteworthy that the Office of the Council for the Ongoing Government of Tokelau is based in Apia, Samoa, rather than in Tokelau itself.
[344] This does not mean citizenship automatically flows to denizens of the Territory, as normal citizenship requirements must be met first. For example, a baby born in the Cook Islands to two people who were there on tourist visas wouldn't gain NZ citizenship as the normal requirements (at least one parent must be a NZ citizen or resident) have not been met.

the Territories maintain their own immigration regimes.[345] In contrast, in the French Territories, French Polynesians and New Caledonians are both classified as citizens of the French Republic,[346] therefore providing them with the right to reside in France. However, in contrast to the situation in the Cook Islands, Niue, Tokelau or Norfolk Island, citizens of the French Republic have the automatic right to reside in the French Territories.

In contrast to the other State-Territory relationships detailed above, the US does not extend US citizenship to American Samoans. Instead, American Samoans are classified as 'US Nationals'. Although US Nationals gain US passports, they do not have the same rights as citizens – in particular, although US Nationals do have the right to reside and work in the United States without restrictions, they are not able to vote in federal or state elections.[347]

However, lack of voting rights is by no means exclusive to American Samoa. Cook Islanders, Niueans and Tokelauans do not have an automatic right to vote in New Zealand elections until they have met the standard New Zealand residence criteria[348]. On the other hand, French Polynesians and New Caledonians automatically gain the right to vote in the French Republic elections: as noted in Chapter II, French Polynesia and New Caledonia each elect two députés for the National Assembly. French Polynesia also elects two senators to the French Senate, while New Caledonia elects one senator to the French Senate. Similarly, Norfolk Islanders are entitled to enrol and vote in Australian elections.[349] In contrast, New Zealand, Australian, US citizens do not gain the automatic right to vote in a Territory's elections without meeting additional residence criteria, with the same being true of French citizens entering French Polynesia (but not New Caledonia[350]).

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[345] All three Territories have competence over immigration.

[346] Philip Raworth (ed) *Constitutions of Dependencies and Territories: National Dependencies and Territories of France* (looseleaf ed, Oceania Publications, 1998).

[347] Note that there is no US constitutional provision preventing non-citizens from voting in the US.

[348] Under s 74 of the Electoral Act 1993, to be able to vote in a New Zealand General election, a person must be above eighteen years old, a New Zealand citizen or permanent resident, and have lived in New Zealand's integral territory (which does not include the wider Realm) for at least one or more continuous years.

[349] See the discussion in Chapter II at 36.

[350] This is because of New Caledonia citizenship under Article 4 of the Organic Law.

Table Three: Approaches to Citizenship

	Citizenship Type	Do Territory citizens have residence rights in the administering State?	Do administering State citizens have automatic residence rights in the Territory?	Do Territory citizens have the right to vote in State elections without meeting further residency criteria?
Cook Islands	NZ citizen	Yes	No	No: Must reside in NZ for one year
Niue				
Tokelau				
Norfolk Island	Australian citizen	Yes	No	Yes
French Polynesia	French citizen	Yes	Yes	Yes
New Caledonia			Yes, but not automatic voting rights on entry	
American Samoa	US national	Yes	No	No: Must become US citizens

The situation can therefore be summarised by Table Three above. This table indicates a relatively clear link between residency, citizenship and voting rights. In almost all cases, Territories who do not gain automatic voting rights in the administering State similarly tend to immigration into their own territory: Cook Islanders, for example, cannot automatically vote in New Zealand General Elections, but also restrict automatic access for New Zealanders into the Cook Islands. On the other hand, New Caledonians can vote for the French Republic legislature, but French citizens also have the automatic right to emigrate to New Caledonia. The exception to this is Norfolk Island, which controls its own immigration regime but whose residents (if Australian citizens) have the right to vote in Commonwealth elections even if not resident in mainland Australia – potentially due to the large role that the Commonwealth institutions *can* play in Norfolk Island.[351]

Conclusion

As discussed in Chapter I, identity is a major part of the right to self-determination and also helps to set out the extent to which a territorial entity is independent. How the identity of the Pacific Territories is nurtured is therefore important, as the displacement of identity can have significant ramifications.

[351] See the discussion on Commonwealth oversight in Chapter II at 36 and in Chapter IV at 71.

This chapter has explored how some common dimensions of legal identity are treated in each Territory's constitution. For the most part, the administering States have transferred their own constitutional structures into the Territories, with the structures adapted to varying degrees to take into account local culture. Local languages and cultural values have been protected in the constitutional documents of some of the Territories (notably Niue and American Samoa), with significant 'cultural imperialism'[352] seen in the constitutional documents of other Territories (particularly French Polynesia). Similarly, none of the Territories have their own unique (and locally appointed) *de jure* Head of State, although the Cook Islands nominates its own *de facto* Head of State: the 'Queen's Representative'. In most Territories, however, the *de facto* Head of State is nominated and appointed by the administering State's government. Finally, none of the Territories have their own citizenship: Cook Islanders, Niueans and Tokelauans are New Zealand citizens, Norfolk Islanders are Australian citizens, French Polynesians and New Caledonians are French citizens, and American Samoans are US Nationals.

Interestingly enough, most of the Pacific Territories seem relatively comfortable with the current citizenship arrangements, given the free-access rights these arrangements in turn give to the relevant State. However, these citizenship rights – in addition to the imposition of Western constitutional structures – may create problems for the Pacific Territories as they potentially indicate a lack of independent identity for the Territory. Similarly, the designation of 'official languages' comes at the potential expense of minority language and culture. Overall, one can conclude that the extent to which a unique identity can be seen is rather limited in some Territories. This in turn has important implications for each Territory's independence and sovereignty – each of which will be discussed in the following chapters.

[352] J Henderson "Micro-States & the Politics of Free Association: The Future of New Zealand's Constitutional Links with the Cook Islands & Tokelau" in Werner vom Busch and others (eds) *New Politics in the South Pacific* (Institute of Pacific Studies, Fiji, 1994) 99, at 103.

CHAPTER IV: STATE-TERRITORY LINKS AND ASSOCIATIONS

As established in Chapter I, two criteria that distinguish States from other territorial entities in international law is that States are both *independent* and *sovereign.* That chapter also established that in order to be independent, a territorial entity should have an uncontested government that can exercise autonomous control over that entity's territory. Critically, a core principal of customary international law is that States do not intervene in other State's domestic affairs.[353] However, this doctrine does not extend to Territories, which – by virtue of their status – retain many links with their administering State. In particular, for those communities who have exercised self-determination freely associating with an existing State, those links – or associations – are the very characteristics that define the international status of their governments.

Independence can also be measured by the extent to which a territorial entity protects its own identity and culture. The extent to which a territorial entity can be considered independent is therefore important when determining that entity's status – as is the nature of any links between a Territory and its administering State. Consequently, this chapter examines the constitutional links between each of the Territories in this paper with their administering States in order to clarify each Territory's international legal status.[354] In particular, this chapter will examine the extent to which each Territory can be classified as independent, as well as explore the degree to which each Territory remains linked with its administering State. To do this, the chapter focuses on five key areas: identity links, legislative competence, constitutional change provisions, economic links, and judicial associations.

Identity-Based Links, including Territories' citizenship and Heads of State

Chapter III examined the extent to which each Territory has constitutionally forged its identity. In particular, that chapter examined how each Territory's

[353] Charter of the United Nations art 2.

[354] It is important to note that the term 'Territories' and 'administering States' are used in this chapter (as well as Chapter V) to signify how these entities are usually classified by the international legal system, rather than in an attempt to classify or pre-assume the status of the Cook Islands, Niue, Tokelau, American Samoa, Norfolk Island, French Polynesia or New Caledonia. One could replace the term 'Territory' with "the territorial entity normally seen by the international system as a Territory"; however, for brevity this has not been done.

constitution mirrored that of its administering State, the extent to which legislative bodies and constitutional provisions protected local culture and languages, how citizenship laws applied to each Territory, and whether or not each Territory had its own distinct *de jure* and *de facto* Head of State.

Table Four: Approaches to Identity

	How does the constitution recognise local culture?	Are local languages protected?	Which citizenship law applies?	Does the Territory nominate its own *de facto* Head of State?
Cook Islands	Westminster system, though the House of Ariki has an advisory legislative role	Cook Islands Maori has some protection, but not other local languages	NZ Citizen	Yes: Queen's Representative
Niue	Westminster system, with some provisions protecting land	Niuean is given equal status to English		In practice: Speaker of the Niue Assembly
Tokelau	Village-based system, relatively unique	Not mentioned in Tokelau Act		
Norfolk Island	Heavily modelled on Westminster system	Not mentioned in Norfolk Island Act	Australian Citizen	No: Administrator of Norfolk Island
French Polynesia	Heavily modelled on the French system	No: French is the official language	French Citizen	No: High Commissioner of the Republic
New Caledonia	Heavily modelled on the French system, although the Customary Senate has an advisory legislative role. Some provisions regarding customary civil status and customary land	Not mentioned in the Organic Law, but French, is the *lingua franca* of the Territory		
American Samoa	Significant focus on upholding cultural values, including explicit constitutional provisions	Not mentioned in Constitution	US National (not full US citizenship)	No: Secretary of the Interior

As shown in Table Four above, Chapter III established that for the most part, the administering States have transferred their own constitutional structures into the Territories, with the structures adapted to varying degrees to take into account local culture. Local languages and cultural values have been protected in the constitutional documents of some of the Territories (notably Niue and American Samoa), with significant 'cultural imperialism' seen in the constitutional documents of other Territories (particularly French Polynesia). Finally, no Territory has its own citizenship, nor does any Territory have its own distinct *de jure* Head of State. However, the Cook Islands does nominate a 'Queen's

Representative' who acts as the *de facto* Head of State, and the Speaker of the Niue Assembly carries out many Head of State functions.

All of this indicates that there are still significant identity and cultural links between all of the Territories and their administering States, and some of the Territories have yet to see their own independent cultural identity promoted in their constitutional texts. This is particularly important in the case of shared citizenship and shared Heads of States, as both of these are often associated with becoming independent.[355] However, when considering constitutional links, a crucial element to consider is the extent to which each Territory can be considered 'self-governing', or in charge of its own domestic affairs – especially given that some of the Heads of States outlined above have significant powers to prevent legislation entering into force in the Territories. Consequently, the next section will examine the extent to which each of the Pacific Territories has full legislative competence over domestic affairs.

Legislative Competence over Domestic Affairs

This section outlines how much 'legislative competence' each Territory has over its own domestic affairs, or – in other words – to what extent each Territory has authority to legislate on domestic matters, or the extent to which each Territory can be considered 'self-governing'. It will overview the three main approaches taken by the relevant administering States (a *de jure* transfer of competence, legislative competence with oversight, and a *de facto* transfer of competence) before moving on to consider each Territory's ability to change its own constitution.

A *De Jure* Transfer of Legislative Competence: The Cook Islands and Niue

In the Realm of New Zealand, the approach has been to transfer legislative competence from the New Zealand Parliament to the respective legislatures of the other realm countries. The Cook Islands Constitution Act 1964 (which was enacted by the New Zealand Parliament, and which contains the Constitution of the Cook Islands), for instance, declares that "the Cook Islands shall be self-governing".[356] Similarly Article 46 of the Cook Islands Constitution expressly

[355] Refer to the discussions in Chapter III at 59 and 65.
[356] Cook Islands Constitution Act 1964, s 3.

notes that Acts passed by the New Zealand Parliament after the Cook Islands Constitution enters into force shall no longer extend to the Cook Islands, effectively removing the ability of the New Zealand Parliament to legislate for the Cook Islands.[357] Analogous provisions are seen in the Niue Constitution Act 1974 (which was also enacted by the New Zealand Parliament). Section 3 of that Act states that Niue shall be self-governing, while Article 36 of the Constitution of Niue[358] prevents the New Zealand Parliament from legislating on behalf of, or over the top of, the Niuean Legislative Assembly – with the exception that the New Zealand Parliament can legislate on behalf of Niue with Niue's consent.[359] In effect, these statutes mean that the New Zealand Parliament has explicitly chosen to transfer *de jure* legislative competence from the New Zealand Parliament to the Cook Islands Parliament and the Niue Legislative Assembly.

Although the Cook Islands Constitution Act 1964 and Niue Constitution Act 1974 reassign legislative competence from the New Zealand Parliament to the Cook Islands Parliament and the Niue Legislative Assembly, this is arguably not a complete transfer in practice. As a Westminster Parliament, the New Zealand House of Representatives cannot bind its successors, meaning that a future House of Representatives could (in theory) repeal the Cook Islands Constitution Act 1964 or the Niue Constitution Act 1974.[360] However, the likelihood of New Zealand actually doing this is incredibly low – a unilateral act by New Zealand to change the Cook Islands' or Niue's constitutional arrangements (and especially their free-association status) would be met with significant disapproval from the United Nations, especially given previous General Assembly declarations that the Cook Islands and Niue are both self-governing.[361]. Doing so would in effect put New Zealand at odds with a customary international law norm that New Zealand has limited involvement in Cook Island and Niuean domestic affairs.

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[357] The Cook Islands Constitution originally allowed the NZ Parliament to legislate for the Cook Islands if requested and consented to by the Cook Islands Legislative Assembly. This provision was repealed by the Cook Islands.

[358] The Constitution of Niue is contained as a schedule to the Niue Constitution Act 1974.

[359] Tony Angelo gives an example of when this was used to extend the Citizenship Act 1977 (NZ) to Niue. See Tony Angelo "Pacific Constitutions – Overview" (2009) 15 Revue Juridique Polynésienne 157 at 172.

[360] P Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed) (Brookers Ltd, Wellington, 2001).

[361] *Question of the Cook Islands* GA Res 2064, A/Res/2064 (1965); *Question of Niue* GA Res 3285, A/Res/3285 (1974).

However, there are less overt ways that New Zealand can influence Cook Islands and Niue. In particular, the fact that New Zealand citizenship is extended to Cook Islanders and Niueans provides New Zealand with ample opportunity to still influence Cook Island and Niuean policy-making. Notably, in 1974, New Zealand Prime Minister Norman Kirk stated in a letter to the Cook Islands Premier that "the bond of citizenship does entail a degree of involvement [of New Zealand] in Cook Islands affairs. This is reflected in the scale of New Zealand's response to the Cook Islands' material needs; but it also creates an expectation that the Cook Islands will uphold, in their laws and policies, a standard of values generally acceptable to New Zealanders".[362]

This was expanded on in the Joint Centenary Declaration between the Cook Islands and New Zealand, where the Prime Ministers of both countries agreed that both countries would "share a mutually acceptable standard of values in their laws and policies, founded on respect for human rights, for the purpose and principles of the United Nations Charter, and for the rule of law".[363] This implies that the Cook Islands (and also Niue) are required to show respect for fundamental human rights in their laws, with the risk of losing New Zealand citizenship if this is not followed. This is significant, as the New Zealand citizenship link is particularly important to everyday Cook Islanders and Niueans. Teaiwa and Koloamatangi, for instance, draw attention to the fact that there are 20,000 Niueans in New Zealand (compared to 1300 in Niue) and 25,000 Cook Islanders in New Zealand (compared to approximately 11,000 in the Cook Islands).[364] Consequently, it comes as no surprise to find that Henderson argues that "it would be political suicide for a Cook Islands politician to suggest any move that might threaten New Zealand citizenship rights".[365] The citizenship link is also important should the Cook Islands or Niue ever wish to alter their legal relationship with New Zealand – Chapter V discusses this issue in more detail.[366]

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[362] Letter from N.E. Kirk (Prime Minister of New Zealand) to A.H. Henry (Premier of the Cook Islands) regarding the special relationship between the Cook Islands and New Zealand (4 May, 1973).

[363] Joint Centenary Declaration of the Principles of the Relationship between New Zealand and the Cook Islands, New Zealand-Cook Islands (signed 11 June 2001), cl 2.

[364] Teresia Teaiwa and Malakai Koloamatangi "Democracy and its Prospects in the Pacific" in Michael Powles (ed) *Pacific Futures* (Pandanus Books, Canberra, 2006), 20 at 27.

[365] J Henderson "Micro-States & the Politics of Free Association: The Future of New Zealand's Constitutional Links with the Cook Islands & Tokelau" in Werner vom Busch and others (eds) *New Politics in the South Pacific* (Institute of Pacific Studies, Fiji, 1994) 99, at 103.

[366] See the discussion at 119.

Legislative Power, with Oversight: Norfolk Island and the French Territories

The situation in Norfolk Island, French Polynesia and New Caledonia is very different to that in the Cook Islands and Niue. Instead of a full transfer of power, what we see in Norfolk Island (administered by Australia) and the French Territories is the relevant administering State granting some local autonomy to its territory. For instance, the Norfolk Island Act 1979 (enacted by the Australian Commonwealth Parliament) gives Norfolk Island competence to make laws regarding the "peace, order and good government of the Island",[367] which in practice includes almost all matters except for external affairs, defence and currency. On the other hand, the French Parliament's transfer of powers to New Caledonia and French Polynesia is more specific: the Statute of Autonomy of French Polynesia and the Organic Law on New Caledonia (both of which were passed by the French Parliament) gives these Territories competence to legislate on specific constitutionally listed matters, such as employment, communications, civil and commercial law, and education.[368] This is similar to a federal situation, but in reverse. Rather than the states ceding some power to the national legislature,[369] in Norfolk Island, New Caledonia and French Polynesia we see the administering State taking a subsidiarity approach by devolving some of its powers to the Territories.

However, this is not as complete a transfer of powers as seen in the Cook Islands and Niue. The (Australian) Joint Standing Committee on the National Capital and External Territories, for instance, wrote in its report on Norfolk Island that sections 52 and 122 of the Australian Constitution[370] mean that "the Commonwealth has ultimate responsibility for the Territory's good governance and for ensuring representative democracy and proper financial management".[371] Furthermore, neither the Norfolk Island Act 1979 nor the Statute of Autonomy of French Polynesia nor the Organic Law of New Caledonia are part of Australia's or France's written constitutions (although the French Constitution does imply

[367] Norfolk Island Act 1979 (Cth), s 19.
[368] See the discussion in Chapter II, especially at 41 and 44.
[369] For example, as we see in the US, where Congress gains legislative competence for the enumerated powers granted by the states.
[370] These sections provide the Commonwealth Parliament with the power the govern Territories of Australia as it sees fit. See the discussion at 36 in Chapter II.
[371] Joint Standing Committee on the National Capital and External Territories *Norfolk Island Electoral* Matters (June 2002) at 7.

that Territories should make their own decisions as much as possible[372]). Instead, these texts are domestic legislation, and can therefore be amended in Canberra or Paris with normal domestic legislative processes.[373] What we essentially have then, is a system where there is some transfer of power, but with oversight by the administering State, who still retains overall legislative competence responsibility for its Territories, including the ability to overrule local legislation by a statute of the administering State's own legislature. The exception to this is the transfer of limited enumerated powers from the French State to New Caledonia, which is guaranteed under the Nouméa Accord – a recognised treaty in international law.[374]

Norfolk Island, French Polynesia and New Caledonia also all have 'quasi-veto provisions built into their relevant legislation. The French High Commissioner to French Polynesia, for instance, is able to send previously passed Bills back to the French Polynesia Assembly for reconsideration (although the High Commissioner must approve them if the Bill is again passed by the Assembly).[375] However, the High Commissioner of French Polynesia is also able to request that the French Council of State considers whether a Bill passed by the French Polynesia Assembly conforms with the French Constitution, French organic laws, international commitments and the general principles of law (in other words, the High Commissioner can ask for judicial review of the Bill).[376] Nearly identical powers are enshrined in the Organic Law of New Caledonia: the French High Commissioner to New Caledonia has the power to send previously passed Bills back to the Congress for reconsideration,[377] as well as the power to send a Bill to the Constitutional Council of the French Republic for judicial review.[378]

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[372] Constitution of France, art 72

[373] However, in the case of Norfolk Island, unilateral change is easier said than done. The Norfolk Island Amendment Bill 1999 (Cth), which sought to amend the requirements to vote in Norfolk Island elections, failed to pass in the Australian Commonwealth Senate because the senators did not think Norfolk Island had effectively been consulted. For a larger discussion on this see Maev O'Collins *An Uneasy Relationship: Norfolk Island the Commonwealth of Australia* (Pandanus Books, Canberra, Australia, 2002).

[374] For more information on this, see Nic Maclellan "New Caledonia" in S Levine *Pacific Ways: Government and Politics in the Pacific Islands* (Victoria University Press, New Zealand, 2009) 130 at 134.

[375] Statute of Autonomy of French Polynesia 2004 (France), art 143.

[376] Ibid, art 176.

[377] Organic Law relating to New Caledonia 1999 (France), art 103.

[378] Ibid, art 103.

Similarly, in Norfolk Island, laws passed by the Legislative Assembly must be approved by the Administrator before they enter into force.[379] In all the examples above, the relevant gatekeeper is not a 'local': instead, the High Commissioners to French Polynesia and New Caledonia are nominated and appointed by the French State, and the Administrator of Norfolk Island is nominated and appointed by the Australian Commonwealth Government. This therefore highlights the oversight that Australia and France have over their Territories' potential 'independence'.

It also appears that these are not just *de jure* constitutional provisions that are never actually used. Instead, the Commonwealth Parliament of Australia has twice rejected Norfolk Island bills which would have changed the voting method for the Norfolk Island Assembly to a method that had "inadequate means of ensuring fair representation".[380] Similarly, the French State has at times unilaterally altered the Statute of Autonomy of French Polynesia and the Organic Law on New Caledonia – mostly recently in July 2011.[381] Tepari'i consequently criticises the Statute of Autonomy of French Polynesia as 'political manipulation', on the basis that although, "on the one hand, the Polynesians appear to be free to decide for themselves[,] on the other hand, the real power is with the French state".[382] The same could be said of the Organic Law on New Caledonia, although at least in New Caledonia the Nouméa Accord means that delegated powers cannot be rescinded by the French Republic.

A *De Facto* Transfer of Legislative Competence: Tokelau and American Samoa

A third approach to legislative competence is seen in the cases of Tokelau (administered by New Zealand) and American Samoa. Tokelau's and American Samoa's legislative competence are different to the near-complete *de jure* transfer of competence to the Cook Islands and Niue, and also different to the subsidiary transfer of competence (with oversight) seen in Norfolk Island, French Polynesia and New Caledonia. Instead, what we see in Tokelau and American Samoa is a limited *de jure* transfer of competence, but a significant *de facto* reassignment: in

[379] Norfolk Island Act 1979 (Cth), s 21.
[380] Joint Standing Committee on the National Capital and External Territories *Norfolk Island Electoral* Matters (June 2002) at 10.
[381] Patrick Decloître "France tidies up politics in New Caledonia, Polynesia in bid to stem instability" (4 July 2011) Pacific Scoop <http://pacific.scoop.co.nz>
[382] Hiti Tepari'i "Culture: A Product of Colonialism in French Polynesia" in Werner vom Busch and others (eds) *New Politics in the South Pacific* (Institute of Pacific Studies, Fiji, 1994) 55 at 61.

other words, although legally, neither Tokelau nor American Samoa have really gained much power, in practice both operate with significant competence to determine their own affairs.

Tokelau, for instance, is governed by the Tokelau Act 1948 (enacted by the New Zealand Parliament), which sets up a different regime than that in place for the Cook Islands and Niue. Although the Tokelau Act allows the General Fono of Tokelau the power to create rules for the good government of Tokelau,[383] the Act does not prevent the New Zealand Parliament from legislating for Tokelau if it sees fit. The Act also allows the Administrator of Tokelau (who in practice is an official within the New Zealand Ministry of Foreign Affairs) to disallow any rule passed by the Tokelau General Fono.[384] Thus, as seen in Norfolk Island, New Caledonia and French Polynesia, *de jure* legislative competence in the case of Tokelau still ultimately remains with New Zealand. However, this is not necessarily how things work on the ground: in practice, the Administrator rarely disallows rules passed by the Fono. Angelo, for instance, notes that "it is now ... almost unthinkable that the New Zealand Government would use its legal rights to override a General Fono decision on a Tokelau domestic matter".[385] In fact, in 2004 the Administrator "formally delegated his administrative responsibilities to the three Village Councils" of Tokelau" (at the villages' request), who in turn ceded responsibility to the Tokelau General Fono to deal with specific matters deemed best handled at a national level (such as fisheries policy, shipping services and external relations).[386] Consequently, the *de facto* situation is that Tokelau governs its own affairs, although the New Zealand Parliament can theoretically amend the Tokelau Act 1948 as it sees fit.

A similar situation exists for American Samoa. Although the United States Constitution legally provides the US Congress with the power to legislate for US Territories, in American Samoa's case, Congress has delegated that responsibility for American Samoa to the US President,[387] who has in turn delegated that

[383] Tokelau Act 1948, s 3A.
[384] Ibid, s 3F.
[385] Tony Angelo "Establishing a Nation - Kikilaga Nenefu" (1999) 30 VUWLR 75 at 85.
[386] Neil Walter *Report of the Administrator of Tokelau for the period ended 30 June 2006* (E.14, 30 June 2006).
[387] Islands of Eastern Samoa [Ratification Act 1929] 48 USC § 1661.

responsibility to the Secretary of the Interior.[388] The American Samoan Constitution, therefore, exists because it was approved by the Secretary for the Interior in 1960 (and a revised version then approved in 1967).[389] This essentially means that although the American Samoan Constitution is supreme law in American Samoa, it can be unilaterally amended at any time by either the Secretary for the Interior, the US President (who could rescind the delegation to the Secretary for the Interior), or the US Congress (who could repeal the Ratification Act 1929). However, as the current version of the American Samoan Constitution was explicitly approved by American Samoans via referendum in 1966 (giving it significant legitimacy), such an action would be unlikely.

Nevertheless, any of the above listed US actors can still regulate or legislate for American Samoa, as seen in the case of the Minimum Wage Act 2007.[390] Besides the minimum wage example, however, the US Federal Government seems to have taken a 'hands off' approach to American Samoa since the late 1960s.[391] Instead, the relatively prescriptive American Samoan Constitution sets up a *de facto* transfer of complete legislative competence over domestic matters, given that it provides for the American Samoa Fono to legislate for American Samoa.[392] However, the American Samoa Constitution does allow – in very limited circumstances[393] – the US-nominated Secretary of the Interior to veto laws passed by the American Samoan House of Representatives.

Table Five, overleaf, summarises the legislative processes in the South-West Territories of the Pacific. That table indicates that although there are clearly different levels of independence regarding legislative competence, there is some evidence of the principle of subsidiarity in each of the Territories covered in this paper. In particular Table Five shows that there is at least some focus on ensuring that the locally elected legislature has control over domestic affairs. In the Cook Islands and Niue, this takes the form of *de jure* competence over all internal

[388] Executive Order 10264 of June 29, 1951, 16 FR 6417
[389] Constitution of American Samoa, preamble.
[390] This is discussed more detail below at 88.
[391] Before the 1960s, however, American Samoa's strategic position in the Pacific made it important for US Navy efforts, hence why it was governed by the Navy prior to Executive Order 10264.
[392] Constitution of American Samoa, art II, s 1.
[393] Ibid, art II, s 9. See also the discussion in Chapter II at 50.

Table Five: Legislative Competence

	Legislative Institutions (Excluding Advisory only)	Legislative Process
Cook Islands	Parliament: elected by Cook Islanders Queen's Representative: nominated by the Cook Island Government	Bills must pass by majority in the Parliament. They are signed into law by the Queen's Representative
Niue	Niue Assembly: elected by Niueans	Bills must pass by majority in the Assembly. They are signed into law by the Speaker of the Assembly
Tokelau	Tokelau General Fono: elected by Tokelauans Administrator: nominated by NZ	Bills must pass by majority in the Fono. They are subject to disallowance by the Administrator
Norfolk Island	Norfolk Island Assembly: elected by Norfolk Islanders Administrator: nominated by Australia	Bills must pass by majority in the Assembly. They must then be approved by the Administrator
French Polynesia	French Polynesia Assembly: elected by French Polynesians Council of Ministers: elected by the Assembly High Commissioner: nominated by France	Bills must pass by majority in the Assembly. They must then be approved by the High Commissioner and the Council of Ministers, although if either does not approve, they can be overruled by a second majority in the Assembly
New Caledonia	Congress: elected by French Polynesians Government in Council: elected by the Congress[394] High Commissioner: nominated by France	Bills must pass by majority in the Assembly. They are then adopted by the Government in Council. The Government or the High Commissioner can ask for a new decision by Congress: if Congress passes the Bill by majority vote again, it becomes law.
American Samoa	House: elected by American Samoans Senate: selected by *matai* Governor: elected by American Samoans Secretary of the Interior: nominated by the US	Bills must pass by majority in each chamber of the legislature (the House and the Fono). They must then be approved by the Governor. If the Governor does not approve, but both chambers each pass the Bill again (this time with a two-thirds majority), it goes to the Secretary of the Interior for his or her decision on whether to the Bill

matters, while in Tokelau and American Samoa, this is the case in practice, if not necessarily what is strictly written in law. In the French Territories and Norfolk Island, the situation is more complex: Norfolk Island has broad powers to make laws for 'good government', but at the same time is subject to significant *de jure* and *de facto* oversight. In the French Territories, the relevant legislature has fewer competencies, but the oversight provisions are less intrusive (as the relevant High Commissioner can usually be overruled). However, in addition to general

[394] Note that in New Caledonia and French Polynesia, it is not the 'Government in Council' of the 'Council of Ministers' that is elected by the legislature, but the President (Head of Government), who then chooses the people who make up his or her Council.

legislative competence, it is also useful to look at the extent to which each Territory can alter its constitutional structure.

Legislative Competence for Constitutional Change

As noted above, the ability for each Territory to amend its constitutional structures is also an important consideration to assess independence and status in international law. After all, if a territorial entity can modify its constitution, then it also has the capacity to modify its own status in international law. Consequently, a comparatist's initial hypothesis might be that administering States would desire Territories to have relatively stable constitutional structures, and that constitutional amendment provisions would therefore be reasonably strict – and especially so in the case of Territories where autonomy had been gained with some reluctance from an administering State. Helpfully, Ferreres-Comella[395] argues that constitutional rigidity can be measured based on three factors regarding constitutional change procedures: federalism, the need for a supermajority in the legislature, and the inclusion of ordinary voters in the constitutional amendment process. In the case of the Territories – which are already sub-units of a wider State – we can replace 'federalism' with a more appropriate criterion: consent or consultation of the administering State. Consequently, this section assesses constitutional change provisions in the Territories against these criteria.

The Constitution of the Cook Islands sets out an amendment provision at Article 41. Proposed constitutional amendments require a two-thirds majority at both second and third reading in the Cook Islands Parliament, and there must have been a 90 day interval between the actual second and third reading votes. Any changes to Article 2 (which makes the Queen in right of New Zealand the Head of State) or to Article 41 (the amendment provision) of the Constitution of the Cook Islands must also then be approved a two-thirds majority in a referendum of Cook Islanders entitled to vote as an elector in the Cook Islands Parliamentary elections.[396] Changes do not require the consent of the New Zealand Government; however, the referendum provision also applies should the Cook Islands wish to change section 2, 3, 4, 5 or 6 of the Cook Islands Constitution Act 1964, which

[395] Víctor Ferreres-Comella "A Defence of Constitutional Rigidity" (2000) Analisi e diritto, 45.
[396] Constitution of the Cook Islands, art 41(2).

deal with the Cook Islands' constitutional status.[397] This essentially means that the Cook Islands can alter its free-association status with New Zealand, but cannot do so without the support of two-thirds of the populace in a referendum.[398] Nevertheless, this process indicates that for most part, constitutional change in the Cook Islands is a relatively simple process, provided that the proposal for change does not alter the Cook Islands' Head of State or free-association status. Consequently, it comes as little surprise that the Cook Islands Constitution has been amended no fewer than 28 times: once by New Zealand and twenty-seven times by the Cook Islands.[399]

The provisions to amend the Constitution of Niue are set out in Article 35 of that constitution. The amendment provisions are relatively similar to the provisions the Cook Islands must go through for amending the Cook Islands Constitution Act 1964: Niuean proposals to amend its constitution must be passed by a two-thirds majority at both second and third reading (with a thirteen week interval between the two votes), and then must also be approved by a referendum of eligible Niuean electors. In the case of a Bill proposing to amend sections 2 to 9 of the Niue Constitution Act, or Articles 1, 35 or 69 of the Constitution of Niue, the referendum must be approved by a two-thirds majority.[400] In the case of a Bill proposing to amend anything else, the referendum must be approved by a simple majority.[401] The key difference here to the Cook Islands is that *all* proposed amendments must be approved by the Niuean populace – not just those that relate to the free association status as in the Cook Islands, although (as with the Cook Islands) the consent of the New Zealand Government is not required in either case. As a result of this stricter process, it is perhaps unsurprising that Niue has

[397] In the Cook Islands Act 1964, s 2 makes the Cook Islands Constitution in force in the Cook Islands; s 3 states that the Cook Islands will be self-governing; s 4 makes the Cook Islands Constitution supreme law of the Cook Islands, s 5 preserves the 'responsibilities' of the Queen of New Zealand regarding the external affairs and defence of the Cook Islands, and s 6 preserves the extension of the British Nationality and New Zealand Citizenship Act 1948 (NZ) to the Cook Islands (although that Act is now repealed in New Zealand).

[398] Presumably, any changes made to the Cook Islands Constitution Act 1964 (CI) under this process would require a subsequent update by the New Zealand House of Representatives to the Cook Islands Constitution Act 1964 (NZ). Interestingly, changes the Cook Islands has made to its Constitution have not been updated in the New Zealand statute, meaning that Schedule 1 of the Cook Islands Constitution Act 1964 (NZ) is now out-of-date.

[399] As at 1 December 2004.

[400] Constitution of Niue, art 35(1)(b)(i).

[401] Ibid, art 35(1)(b)(ii).

only amended its constitution once, and that amendment was via an omnibus Bill that made several changes at once.[402]

Unlike the Cook Islands, Niue has not repealed the provision of its Constitution which allows the New Zealand Parliament to legislate for Niue (on the request and with the consent of the Niuean Government).[403] Angelo argues that this means constitutional change could theoretically happen by the Niuean Government asking the New Zealand Government to amend the Schedules to the Niue Constitution Act 1974, and then allowing those Schedules to enter into force in Niue (thereby replacing the current Niuean Constitution) – rather than including voters as per the constitutional change section in the Niuean Constitution. The likelihood of New Zealand doing this in practice, however, seems low as it would essentially be a way of overriding a mechanism to allow Niueans to choose for themselves.[404]

Article V, Section 3 of the Constitution of American Samoa sets out an amendment procedure, which requires agreement by the American Samoan Legislature, the American Samoan people, and the United States Congress. Amendments may be proposed in either chamber of the American Samoan Fono, but must be agreed to by three-fifths of all members of each House (voting separately). Following this, the proposed amendment must then be agreed to by a majority of American Samoans: this is a hurdle that should not be underestimated given that the last attempt to amend the American Samoan constitution was rejected by 70% of voters.[405] Once the amendment is approved by the populace, it must then also be approved by the United States Congress.[406] The Constitution of American Samoa states that only the approval of the Secretary of the Interior is required;[407] however, in 1983 the US Congress passed a law ruling that future

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[402] These changes included the creation of a specific judiciary for Niue, a requirement for those wishing to stand for election in Niue to also be New Zealand citizens, and the repeal of a provision requiring the Chief Justice to issue an opinion regarding the effect of changes to criminal law or law that would alter the status of people (eg: changes to the law regarding divorce, adoption, and maintenance). As with the Cook Islands, these changes are not reflected in the Schedules to the Niue Constitution Act 1974 (NZ).

[403] Constitution of Niue, art 36.

[404] Though of course, very few of New Zealand's own constitutional arrangements require acceptance via referendum, and can be amended by a normal Act of Parliament.

[405] Associated Press "Faleomavaega wins 12th election to Congress" (4 November 2010) Hawaii News <http://www.kpua.net/news.php>

[406] Amendment of Constitution of American Samoa 48 USC § 1662a

[407] Constitution of American Samoa, art V, s 3.

amendments to the American Samoa Constitution could be approved only by an Act of Congress.[408] This congressional requirement is therefore an interesting example of the American Samoan Constitution's status outside of domestic US (federal) law. Nevertheless, overall the amendment procedure is relatively similar to that of the Cook Islands and Niue with one major exception: unlike in the Cook Islands and Niue, where constitutional change can proceed without New Zealand consent, the United States legislature must agree to any changes proposed by American Samoa. This is perhaps representative of the fact that American Samoa is not officially in a freely associated relationship with the United States, despite its large amount of internal autonomy.

In comparison, the relevant legal texts for Tokelau, New Caledonia, French Polynesia and Norfolk Island do not allow the Territories to amend their own Constitutions. No provisions for amendment exist in the Tokelau Act 1948, the Organic Law on New Caledonia, the Statute of Autonomy of French Polynesia or the Norfolk Island Act 1979. Instead, should any of these Territories wish to modify their constitutional documents, they would have to petition the New Zealand (for Tokelau), French (for New Caledonia and French Polynesia), or Australian Commonwealth (for Norfolk Island) Governments, with an explicit provision allowing such a petition in the Statute of Autonomy of French Polynesia.[409] No such petition provision exists in the case of the Tokelau Act 1948; however, New Zealand has been open to suggestions from Tokelau in recent years, including a major re-write of the Tokelau Act in 1996 when the Tokelauan Fono requested greater power to make rules for the Territory.[410] Similarly, the Norfolk Island Act 1979 is silent on the question of amendment, although in practice most amendments are made by the Australian Commonwealth Parliament either subsequent to a request from, or in consultation with, the Norfolk Island Government.[411]

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[408] Amendment of Constitution of American Samoa 48 USC § 1662a

[409] Article 133 of the Statute of Autonomy of French Polynesia 2004 (France) allows the French Polynesian Legislative Assembly to adopt resolutions aimed at "repealing, amending or supplementing [French] legislative or regulatory provisions that apply to French Polynesia", which presumably includes the Statute of Autonomy itself. These resolutions are sent to the Overseas Minister of the Republic, although there is no requirement for the Minister to act.

[410] Tokelau Amendment Act 1996, preamble.

[411] See the discussion in n 373 at 75.

Overall, the above discussion indicates that there is a myriad of administering-State-approaches to managing the issue of constitutional change in its Territories. For the most part, the hypothesis of reasonably rigid constitutional structures seems to be correct: as shown in the Table Six overleaf, four Territories (Tokelau, Norfolk Island, French Polynesia and New Caledonia) cannot even amend their own constitutions, as this can only be done by the relevant administering State.

Table Six: Constitutional Change Provisions

<table>
<tr><td rowspan="2"></td><td rowspan="2">Constitutional Change Approach</td><td colspan="3">If the Territory can amend its Constitution…</td></tr>
<tr><td>Is a legislative supermajority required?</td><td>Is a referendum required (and by what percentage of voters)?</td><td>Does the administering State need to consent?</td></tr>
<tr><td>Cook Islands</td><td rowspan="2">The Cook Islands and Niue have full power to amend their Constitutions</td><td>Yes: Two-Thirds in Parliament</td><td>For a change in constitutional status, yes (two-thirds). Otherwise, no.</td><td rowspan="2">No</td></tr>
<tr><td>Niue</td><td>Yes: Two-Thirds in the Niue Assembly</td><td>Yes: two-thirds for constitutional status. Otherwise: majority.</td></tr>
<tr><td>Tokelau</td><td colspan="4" rowspan="4">No provisions are included to amend these Territories' constitutional texts, indicating that it can only be done by the administering State. In Tokelau and Norfolk Island, this is usually done by the administering State in consultation with (or on the request of) the Territory. In French Polynesia and New Caledonia, France has shown a willingness to amend its Territories' constitutional documents unilaterally.</td></tr>
<tr><td>Norfolk Island</td></tr>
<tr><td>French Polynesia</td></tr>
<tr><td>New Caledonia</td></tr>
<tr><td>American Samoa</td><td>American Samoa can amend its Constitution with the consent of the US</td><td>Yes: Three-Fifths in each House</td><td>Yes: Majority</td><td>Yes: Must be approved by an Act of the US Congress</td></tr>
</table>

Similarly, in American Samoa, the approval of the US Congress is required for constitutional cahnge, even if a supermajority of members of the Fono and a majority of American Samoan voters have accepted the changes. The only Territories where administering-State-consent is not required are the Cook Islands and Niue. However, even in these Territories we can see Ferreres-Comella'scriteria creating rigidity,[412] as in both Territories a supermajority is still required in the relevant legislature, and in Niue (and in some cases in the Cook Islands) a referendum is also required.

[412] Ferreres-Comella, above n 395.

Economic Links between Territories and Administering States

Economic links between the States and Territories in this paper are also remarkably strong. Overall, it seems that – at least in an economic sense – the Territories in the Pacific seem to have done better than those countries that have become independent, sovereign States. Werner vom Busch and others, for example, argue that Territories in free association with an administering State "have higher per capita incomes, higher standards of health and education, more human rights and greater personal freedom than the constitutionally independent nations".[413] This is not particularly surprising given that some of the Territories have explicit provisions included in their constitutional documents regarding support from the administering power. Other research reveals that there are still significant economic business links between Territories and their administering States, primarily due to the large amounts of natural resources in some Pacific Territories. The Asian Development Bank, for instance, notes that the Exclusive Economic Zones of the Pacific contain much of the world's richest tuna fishery,[414] while New Caledonia is often credited as having one of the largest deposits of Nickel in the world.[415] Consequently, this section overviews the extent to which these legal and in-practice economic links exist.

Economic Support as 'Foreign Aid' – the New Zealand Approach

New Zealand has made significant commitments to economically support the Cook Islands, Niue and Tokelau. For instance, New Zealand Prime Minister Norman Kirk's letter to the Cook Islands indicated that in his view, it was New Zealand's responsibility to be 'involved' in Cook Island affairs by providing material assistance to the Cook Islands as long as there was a citizenship link between the two countries.[416] However, an even stronger commitment to economic assistance is seen in the Niue Constitution Act 1974, which explicitly states that "it shall be a continuing responsibility of the Government of New Zealand to provide necessary economic and administrative assistance to Niue".[417]

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[413] Wener vom Busch and others "Introduction" in Werner vom Busch and others (eds) *New Politics in the South Pacific* (Institute of Pacific Studies, Fiji, 1994) 97, at 97.

[414] AV Hughes *A Different Kind of Voyage: Development and Dependence in the Pacific Islands* (Asian Development Bank, February 1998) at 12.

[415] United States Geological Society *Nickel* (Mineral Commodities Summaries, January 2010).

[416] Letter from N.E. Kirk (Prime Minister of New Zealand) to A.H. Henry (Premier of the Cook Islands) regarding the special relationship between the Cook Islands and New Zealand (4 May, 1973).

[417] Niue Constitution Act 1974, s 7.

Similarly, the preamble to the Tokelau Amendment Act 1996 notes that even though the purpose of the Act was to move Tokelau closer to self-government, "the needs of Tokelau at a national level are the responsibility of the Government of New Zealand".[418] A major aid initiative of the New Zealand Government is also to charter a ship (PB Matua) between Apia (Samoa) and Tokelau, ensuring that Tokelau has some transport links with the rest of the world.[419]

In practical terms, this means that a significant amount of New Zealand's development aid goes toward supporting the Realm countries: in the year ended 30 June 2012, for instance, over 10% of New Zealand's total aid went to the Cook Islands, Niue and Tokelau, with New Zealand providing NZD 19.37 million to the Cook Islands, NZD 16.185 million to Niue, and NZD 23.324 million to Tokelau in overseas development assistance. On this note, it is interesting that all three Territories fall under the jurisdiction of the New Zealand Ministry of *Foreign* Affairs and, similarly, that all three Territories receive economic assistance classed as *overseas* development assistance.[420] However, the Cook Islands, Niue and Tokelau also all use the New Zealand dollar as their currency.[421]

Economic Support as 'Domestic Aid' in France, the US and Australia

The decision by New Zealand to have its Territories receive overseas development assistance from the Ministry of Foreign Affairs and Trade is even more interesting when one realises that this is different to the approach of other administering States in this paper. France, for example, provides assistance via its Ministry of Overseas Territories. Article 210 of the Organic Law relating to New Caledonia states that "multiannual development contracts are concluded between the State, on the one hand, and New Caledonia and the provinces, on the other hand ... for a duration of five years".[422] The State's focus here is constitutionally on training, young people, economic development, improving living conditions, and cultural

[418] Tokelau Amendment Act 1996, preamble.

[419] Ensuring the Pacific has adequate transport links has been a previous focus of the New Zealand Government, as seen by its previous part-ownership of the Pacific Forum Line. See: Crown Ownership Monitoring Unit "Pacific Forum Line" < www.comu.govt.nz>

[420] This can be compared to the Chatham Islands, which despite being geographically separated from New Zealand (although still in New Zealand's Exclusive Economic Zone) falls under the Depart of *Internal* Affairs.

[421] This seems to be a relatively informal arrangement, as there is no legislation that states that the New Zealand dollar extends to the wider Realm of New Zealand. It is worth noting, however, that the Cook Islands previously used the 'Cook Islands dollar', which was suspended during the Cook Islands Financial Crisis in 1995/1996. See the discussion at 90 below.

[422] Organic Law relating to New Caledonia 1999 (France), art 210.

development.[423] Similarly, Article 169 of the Statute of Autonomy of French Polynesia notes that "at the request of French Polynesia, and by way of agreements, the State may offer, within the limits of the financial laws, its financial and technical assistance for economic and social investments, notably for training and promotional programs".[424]

What is particularly interesting about the wording in the French Territories is that the provisions are not structured as obligations of support - as seen particularly in the case of Niue's section 7 "continuing responsibility'" provision. Nevertheless, in practice the Republic of France provides significant support to its Pacific Territories: the New Zealand Ministry of Foreign Affairs and Trade estimates that France annually provides approximately NZD 2 billion in aid to New Caledonia and to French Polynesia each year.[425] As Territories of the European Union, both French Territories also receive aid via the EU's five-yearly Overseas Countries and Territories aid programme: under that programme, New Caledonia will receive 19.81 million euro and French Polynesia will receive 19.79 million euro over the period 2007-2013.[426]

However, in practice the economic links between France and its territories are largely conducted by European immigrants from mainland France, rather than by the indigenous people of New Caledonia and French Polynesia. Fraser, for instance, notes that in New Caledonia "[t]he mining sector is dominated by European settlers, who also own most of the arable land and control the mining industry",[427] while Henry points out that in French Polynesia, "most of the business community wish to retain integration with France".[428] It is therefore unsurprising that the Organic Law relating to New Caledonia contains specific provisions regarding mining: Article 39 requires the New Caledonian Congress to create a plan for the exploitation of mineral wealth, while Article 42 establishes a Mines Council, which is consulted by Congress on government and private

[423] Organic Law relating to New Caledonia 1999 (France)..
[424] Statute of Autonomy of French Polynesia 2004 (France), art 169.
[425] New Zealand Ministry of Foreign Affairs and Trade "New Caledonia" (23 July 2012) <www.mfat.govt.nz>
[426] European Commission "EU relations with Overseas Countries and Territories" (17 February 2012) Development and Cooperation – EuropeAid <http://ec.europa.eu/europeaid>
[427] Helen Fraser *New Caledonia: Anti-Colonialism in a Pacific Territory* (Australian National University, Canberra, 1988) at 3.
[428] Geoffrey Henry "Political Futures for the Pacific Islands" in Werner vom Busch and others (eds) *New Politics in the South Pacific* (Institute of Pacific Studies, Fiji, 1994) 17, at 20.

members' proposals regarding the exploitation of mineral resources.[429] Both French Polynesia and New Caledonia (along with Wallis and Futuna) use the CFP Franc as their currency.[430] The CFP Franc is pegged to the euro (ie: the currency used in the Republic of France).[431]

The American Samoan Constitution contains only one clause regarding US-American Samoa economic links: Article II, s 1(c) of that constitution establishes a requirement for the Governor of American Samoa to prepare a preliminary budget plan for approval of the Fono and to point out any requests for federal funds to the Congress of the United States. However, no provisions are included that require the US Congress to provide these funds. Despite this, in 2011, the United States Department of the Interior (which formally administers American Samoa[432]) provided American Samoa with USD 35.899 million of development assistance.[433] Again, it is important to note that this assistance does not constitute 'foreign aid' from the US Department of State, but is instead seen as an internal matter (especially given the American Samoan Constitution's own framing as a request for 'federal' funds). In addition, Faleomavaega notes that American Samoa has a unique economic opportunity in that it "is a gateway to the largest consumer market in the world".[434] This is particularly important given the large tuna industry in American Samoa: canned tuna sold to the US is American Samoa's primary export, and the tuna cannery is one of the largest employers in American Samoa.

Interestingly, although in general American Samoa is considered to be self-governing, some US federal laws do apply, such as the Minimum Wage Act, which was extended to American Samoa in late 2007.[435] Interestingly, American Samoa's delegate to Congress strongly opposed that law extending to American

[429] The Mines Council comprises the President of the Government, the presidents of the Provincial Assemblies, and the High Commissioner to New Caledonia (who is the Chair of the council, but does not have a vote). There is also an advisory council on mining, which works with the Mines Council to develop a strategic plan regarding mineral resources.

[430] CFP used to stand for *Colonies Françaises du Pacifique* (the Colonies of the French Pacific), but today stands for *Comptoirs Français du Pacifique* (the French Pacific Banking Agreement)

[431] The pegged rate is €1 = CPF 119.33. Similarly, CPF 1 = €0.00838.

[432] Islands of Eastern Samoa [Ratification Act 1929] 48 USC § 1661.

[433] Office of Insular Affairs *Budget Justifications and Performance Information Fiscal Year 2013* (The United States Department of the Interior, 2012) at 8. Available from <www.doi.gov>

[434] Eni Faleomavaega "American Samoa: A Unique Relationship in the South Pacific" in Werner vom Busch and others (eds) *New Politics in the South Pacific* (Institute of Pacific Studies, Fiji, 1994) 113, at 119.

[435] Fair Minimum Wage Act 2007 Pub.L. 110-28 § 8102, 121 Stat 188 (2007).

Samoa on the basis that it would increase business costs and could lead to the tuna industry shifting jobs to the continental US (with a potential loss of 8,118 jobs – 45.6 percent of total employment).[436] Sure enough, in 2009, one of the (then) two tuna canneries closed in American Samoa, citing that its costs were too high as a result of the Minimum Wage Act extension. That said, American Samoan Governor Togiola Tulafono argued that the canneries could have reduced salaries and bonuses of top-tier employees instead of making minimum wage workers redundant.[437] Nevertheless, the example shows there are clear economic links between American Samoa and the continental US, even though these are not mentioned in the American Samoan Constitution. American Samoa also uses the US Dollar as its currency.

The Norfolk Island Act 1979 (Cth) does not set out a requirement for Australia to provide development assistance, although that Act does set out provisions allowing Norfolk Island to borrow funds from the Commonwealth if needed. Interestingly, s 50C of that Act prevents Norfolk Island from entering into any other borrowing arrangements beyond this,[438] unless they are approved by the Commonwealth Finance Minister.[439] Furthermore, Norfolk Island is required to keep both its responsible Commonwealth Minister and the Commonwealth Finance Minister informed about its budget.[440] Residents of Norfolk Island do not pay federal taxes; however the Australian Commonwealth Government does control the Exclusive Economic Zone around Norfolk Island.[441] Beyond this, there has traditionally been very limited Commonwealth involvement in Norfolk Island's economy, to the point that the Commonwealth Grants Commission in 1997 described Norfolk Island as receiving less support from Canberra than any other Australian Territory or state.[442]

However the global financial crisis led to large deficits for the Norfolk Island budget. The Commonwealth Government stepped in to manage this issue, and

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[436] Peter Schiff "Congress sacks Samoan Economy" (22 January, 2010), Euro Pacific Capital Inc <www.europac.net/commentaries>
[437] Associated Press "American Samoa Gov. Tulafono criticizes StarKist" (30 August 2010) Businessweek <www.businessweek.com>
[438] Norfolk Island Act 1979 (Cth), s 50C.
[439] Ibid,, s S 50(1)(b).
[440] Ibid, pt VI, division IV.
[441] Australian Fisheries Management Authority "Norfolk Island Fishery at a glance" <www.afma.gov.au>
[442] Commonwealth Grants Commission *Report on Norfolk Island 1997* (August 1997) at xiii.

provided AUD 6.4 million to assist Norfolk Island in 2010-2011 and AUD 14.1 million to support Norfolk Island in 2011-2012.[443] In return, Norfolk Island agreed to make changes to its economic arrangements (including introducing taxes) to help ensure its financial sustainability into the future.[444] The Commonwealth Government also amended (with the Norfolk Island Government's support) the Norfolk Island Act 1979 to "improve Norfolk Island's governance arrangements and strengthen the accountability of the Norfolk Island Government".[445] This is an interesting development, as Norfolk Island has essentially been required to trade some of its subsidiary economic sovereignty back to Australia in return for financial aid from the Commonwealth Government.

Financial Responsibility in the Global Economy

There are therefore some significant links between each of the Territories in this paper and their administering states. What is less clear is the extent to which each administering State is responsible for its various Territories. Clearly, the Commonwealth Government of Australia felt that it was responsible for Norfolk Island's debts, and so acted to solve this problem. Jacqueline Tepaeru Evans notes that a similar situation happened in the Cook Islands in the early 1990s, when the Cook Islands Government debt rose to NZD 160 million.[446] This, plus a sharp decline in the number of tourist arrivals, led the Cook Islands Government to declare a financial crisis for the 1995/1996 financial year.[447] The New Zealand Government played a major role in helping resolve this financial crisis, helping to negotiate a debt-write-off for the Cook Islands Government, and also helping to organise finance so that the Cook Islands could follow New Zealand and Asian Development Bank recommendations to reduce its public service.[448] It seems that, like in the case of Australia and Norfolk Island, New Zealand felt at least partially

[443] Department of Regional Australia "Norfolk Island" (14 June 2012) Territories of Australia <www.regional.gov.au>
[444] Ibid.
[445] Territories Law Reform Act 2010 (Cth), explanatory note. See also: Department of Regional Australia "Services to Territories: Major Achievements" (Annual Report 2010-2011, 2011) <www.regional.gov.au>
[446] Jacqueline Tepaeru Evans "Political Ecology, Structural Adjustment and Coral Reef Change in the Cook Islands, a Micro-State" (MA Thesis, University of Auckland, 2006).
[447] Asian Development Bank *Cook Islands Economic Report: Policies for Progress* (2001).
[448] Jacqueline Tepaeru Evans, above n 446. See also: Asian Development Bank *Programe Performance Audit Report on the Economic Restructuring Program in the Cook Islands* (December, 2002) at 47 for a summary of events of the financial crisis.

responsible for the Cook Islands' financial issues,[449] and so acted to solve this problem. In both cases, however, we see the administering State 'advising' significant economic reforms to the Territory's economy, implying that perhaps these Territories' *de facto* independence over economic sovereignty is conditional on things going well. On the other hand, there is not so much difference between the events outlined above, and what is often seen in international lending contracts, such as the International Monetary Fund's imposition of 'conditionality' when it provides loans to members.[450]

Nevertheless, the issue of economic accountability is an important point to consider given the increase in development assistance loans to Territories: China, for instance, has recently offered to provide the Cook Islands with a RMB 165 million (approximately NZD 32 million) loan to help develop the Cook Islands' water infrastructure. The question is: would New Zealand be responsible for paying this loan back if the Cook Islands defaulted – even though New Zealand approval was not required for the Cook Islands to receive the funds? The answer to this is unclear, but would probably depend on the extent to which a Territory could be considered to be economically independent,[451] in charge of its external affairs,[452] and whether or not there are specific constitutional provisions linking a Territory and its administering State economically.[453] From the analysis above, very few of the Territories in this paper can be said to have complete economic independence and responsibility, especially given the oversight provisions that some administering States have incorporated into their Territories' constitutions.[454] In the end, however, this question is heavily linked to the question of whether a Territory can be considered to have developed its own international legal personality, which is discussed further in Chapter V.

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[449] Similarly, section 7 of the Niue Constitution Act 1974 implies New Zealand could be considered responsible for Niue's economy.

[450] 'Conditionality' is when the IMF imposes strict conditions on a country that takes out an IMF loan. These conditions usually take the form of major economic reforms, and are designed to make sure that the borrowing country changes its economic structure so that it will not need to request further IMF loans in the future.

[451] As discussed already in this chapter, particularly at 85.

[452] As discussed in Chapter V, particularly at 106.

[453] As discussed in this section.

[454] It is interesting to compare this relationship to that of contracting with a minor in civil law in New Zealand. In particular, a contract for sale with a 14 year old is simply not enforceable in domestic law – importantly, responsibility for the 14 year old's parents. Why then should an administering State be responsible for the debt incurred by its Territories?

Judicial Links between Territories and Administering States

In the originally enacted version of the Cook Island and Niuean constitutions, both the Cook Islands and Niue used the New Zealand Court system as their judiciary. However, both the Cook Islands and Niue have now amended their constitutions to create their own judicial systems. The Cook Islands Constitution, for instance, sets up the High Court of the Cook Islands,[455] which can be appealed to the Court of Appeal of the Cook Islands.[456] There is no appeal to a New Zealand Court; rather, appeals lie to the Privy Council in London, which is no longer a Court for New Zealand.[457] Judges in the Cook Islands are appointed by the Queen's Representative, acting on the advice of the Cook Islands Executive Council tendered by the Prime Minister.[458] Interestingly, Article 49(2) restricts who can become a Judge of the Cook Islands High Court, noting that "a person shall not be qualified for appointment" unless they have been either a barrister for at least seven years or a judge in either New Zealand, or another Commonwealth country.[459] The Cook Islands Court of Appeal comprises the Judges of the Cook Islands High Court, plus at least one Judge of either the Court of Appeal of New Zealand (or a person who has held office as a Judge of that Court) or the High Court of New Zealand.[460]

The judicial situation in Niue is very similar to the Cook Islands. The Niuean Constitution sets up the High Court of Niue,[461] decisions of which can be appealed to the Court of Appeal of Niue.[462] Judges of the High Court are appointed by the New Zealand Governor-General, but on the advice of the Niuean Cabinet tendered by the Niuean Premier.[463] Judges of the High Court are also Judges of the Court of Appeal by virtue of their office,[464] although a Judge of the Court of Appeal cannot sit on a hearing which is an appeal of a decision made by

[455] Constitution of the Cook Islands, art 47.
[456] Ibid, art 56.
[457] This is because the Supreme Court Act 2003 (NZ) is not in force in the Cook Islands and Niue. Consequently, the right to appeal to the Privy Council is the same as it would be in New Zealand had that Act not been enacted.
[458] Constitution of the Cook Islands, art 52(a).
[459] Ibid, art 49(2). Judges from other 'designated' countries may also be appointed. It is unclear who determines what a 'designated country' is.
[460] Ibid, art 56(a). Note that these judges are appointed in the same manner as Judges of the High Court of the Cook Islands.
[461] Constitution of Niue, art 37.
[462] Ibid, art 52.
[463] Ibid, art 42.
[464] Ibid, art 52(2)(a).

him or by a Court which he sat on as a member.[465] Unlike in the Cook Islands, the Niuean Constitution does not set out the requirements to become a Niuean Judge; however Angelo notes that in practice, "the Chief Justice and other Judges of the [Niue] High Court have typically been New Zealand judges closely connected with the Maori Land Court",[466] primarily because most Niuean cases are to do with Niuean land and customary law. Nevertheless, what this sets up is a system where Niue has an independent judiciary that is separate from New Zealand, but also is able to tap into members of the New Zealand judiciary should it so please.

In contrast to the Cook Islands and Niue, Tokelau has retained a clear link to the New Zealand judicial system. On one hand, the court of first instance in Tokelau is the Commissioner's Court and Village Appeal Committee in each village,[467] which deal with minor criminal and civil matters.[468] Each Village Appeal Committee is made up of three people nominated and appointed by that village's council. Serious criminal and civil matters are dealt with at first instance in the High Court of New Zealand.[469] On the other hand, the High Court of New Zealand is also the appellate court from the Village Appeal Committees; however, in practice no appeal has been made from Tokelau.[470]

The American Samoan situation is somewhat similar to that of Niue and the Cook Islands. In American Samoa, the District Courts are the courts of first instance.[471] They can be appealed to the American Samoan High Court[472] and no appeals are possible to the Federal Court system in the continental US – similar to the inability to appeal from the Cook Islands or Niue to the New Zealand court system. However, Laughlin notes that there are indirect appeal options: "a review of sorts can be had in the Article III courts by suing the United States Secretary of

[465] Constitution of Niue, art 53.
[466] Tony Angelo "Pacific Constitutions – Overview" (2009) 15 Revue Juridique Polynésienne 157 at 175.
[467] Commissioners are lay judges, appointed by the New Zealand Governor-General. They are nominated by the Minister of Foreign Affairs following consultation with the relevant village council.
[468] Interview with C Russell, Statistics Officer: Office of the Council for the Ongoing Government of Tokelau, (the author, 30 November 2012).
[469] Tokelau Amendment Act 1986.
[470] Interview with C Russell, Statistics Officer: Office of the Council for the Ongoing Government of Tokelau, (the author, 30 November 2012).
[471] Constitution of American Samoa, art III, s 1.
[472] Ibid

the Interior in his official domicile, the District of Columbia)".[473] In particular, American Samoans who are unhappy with a decision of the High Court of American Samoa can use a miscarriage of justice rationale to sue the US Secretary of the Interior.[474] Furthermore, in American Samoa, the judicial appointment process is not localised like it is in Niue; instead, the Chief Justice and Associate Justices of the American Samoan court system are all nominated and appointed by the US Secretary of the Interior, rather than by the American Samoans themselves.[475] That said, in practice, the Associate Justices tend to be *matai* in line with the American Samoan Constitution's strong focus on protecting local culture and the *matai* system.[476]

In contrast to the above Territories, The Norfolk Island judicial system is heavily linked to that of its administering State (Australia). For example, the court of first instance in Norfolk Island is the Court of Petty Sessions, which has jurisdiction over minor criminal matters and of disputes that are less than AUD 10,000 AU.[477] Magistrates for that Court are nominated and appointed by the Norfolk Island Minister in charge of the judiciary,[478] and tend to either be Magistrates from the Australian Capital Territory or Norfolk Island residents. The Court of Petty Sessions can be appealed to the Norfolk Island Supreme Court, which is also the court of first instance for serious criminal and civil matters.[479] However, the Supreme Court does not appear to have a bench that solely deals with Norfolk Island – instead, the Governor-General of Australia can appoint persons to become Judges of the Supreme Court if they are "a Judge of another court created by the [Australian Commonwealth] Parliament".[480] In this regard, the Governor-General acts on the advice of the responsible Commonwealth Minister; however, the Commonwealth Minister must receive comments from the Norfolk Island Executive Council before tendering his or her advice to the Governor-General.[481]

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[473] S Laughlin "Constitutional structure of the courts of the United States Territories: the case of American Samoa" (1991) 13 U.Haw.L.Rev. 379, at 386.
[474] Mary McCormick "American Samoa" in Michael Ntumy (Ed) *South Pacific Legal Systems* (University of Hawaii Press, Hawaii, 1993) 433 at 440.
[475] Constitution of American Samoa, art III, s 3.
[476] Faleomavaega, above n 434, at 23.
[477] Court of Petty Sessions Act 1960 (Norfolk Island) s 36, s 107.
[478] Ibid, s 6.
[479] Norfolk Island Act 1979 (Cth), s 52; Court of Petty Sessions Act 1960 (Norfolk Island), s 230.
[480] Ibid, s 53(1).
[481] Ibid, s 53(2).

Appeals lie from the Supreme Court of Norfolk Island to the Federal Court of Australia.[482]

In New Caledonia and French Polynesia, the judiciary remains a competence of the French State. Consequently, the judicial system in both French Territories is set up by a separate organic law passed in Paris, rather than by the French Polynesian Legislative Assembly or the New Caledonian Congress. As a result, the judicial systems of both the French Territories look similar to the French system with two types of courts. As in France, 'Administrative Courts' deal with public law matters. In both French Polynesia and New Caledonia, these matters are directly referred to the Administrative Court of France (in Paris), which can then be appealed to the Administrative Court of Appeal, and then to the Conseil d'Etat (Council of State).[483] Given that the Administrative Courts are on the other side of the world to the French Pacific Territories, and therefore costly to access, this has important ramifications for access to justice.

On the other hand, and as also seen in France, 'Judicial Courts' deal with disputes between private individuals, as well as "disputes involving the Government, the French State or a New Caledonia/French Polynesian institution when it is acting in a commercial capacity".[484] Judicial courts therefore have jurisdiction over (as examples) civil law, commercial law, labour law, criminal law, and commercial law. In New Caledonia, there are various judicial courts of first instance that deal with these matters: for instance, a labour issue would go to the New Caledonian Labour Court. This could then be appealed to the Nouméa Court of Appeal.[485] A smaller structure exists in French Polynesia: there are the Courts of First Instance, which can be appealed to the French Polynesian Court of Appeal (located in Papeete – the administrative centre of French Polynesia).[486] However, in both French Polynesia and New Caledonia, judicial matters can then be appealed to the Civil Supreme Court *(Cour de Cassation*) in Paris, which has jurisdiction over all

[482] Federal Court of Australia Act 1976 (Cth), s 24(1)(b)
[483] Ministère de la Justice "Cour D'Appel de Nouméa" <http://www.ca-noumea.justice.fr>. A good English summary of the New Caledonian court system can be found at Jones Day *New Caledonia Investment Guide* (2009) at 11: available from <www.jonesday.com>
[484] Ministère de la Justice "Cour D'Appel de Nouméa" <http://www.ca-noumea.justice.fr>
[485] Note that Nouméa is the capital city of New Caledonia. Interestingly, the Nouméa Court of Appeal is also the appellate court for another French Territory: Wallis and Futuna.
[486] Ministère de la Justice "Cour D'Appel de Papeete" <www.ca-papeete.justice.fr>

French territories. All judges in New Caledonia and French Polynesia are nominated and appointed by France.[487]

What does this tell us about Independence?

One can therefore argue that the 'Territories'[488] covered in this paper still have significant constitutional, legal, economic and judicial links with their administering States. In particular, none of the Territories covered in this paper have their own Head of State, citizenship, or currency – although several do impose their own immigration regimes, as well as residency criteria for voting in local elections. Similarly, only the Cook Islands and Niue have complete legislative competence over all matters, primarily because all of the other Territories can be subjected to significant interference by their administering State. That said, in terms of the amount of power each Territory has to determine its own affairs, a good case could be made for arguing that not only the Cook Islands and Niue, but also American Samoa, Norfolk Island and (to an extent) New Caledonia, are reasonably self-governing – and therefore have at least some degree of legislative independence. On the other hand, several Territories have explicit provisions in their constitutional documents which imply economic assistance will be provided by the State.

In any case, all of the Territories covered in this paper currently receive some form of financial assistance from the administering State, and there are also many business and economic ties between the two. Judicially, all of the Territories covered in this paper have their own court system, although these courts are often presided over by judges appointed by the administering State (and particularly so in the French Territories). Furthermore, in Norfolk Island, New Caledonia and French Polynesia (and to an extent in American Samoa), a clear judicial link remains – decisions can be appealed to an Appellate Court in the administering State.

[487] Organic Law Relating to New Caledonia 1999 (France), art 21; Statute of Autonomy of French Polynesia 2004 (France), art 14.

[488] As noted above n 354 at 69, the use of the term 'Territories' in this paragraph should not be taken as an attempt to classify each of the territorial entities, but is instead used for brevity instead of the phrase '[the] territorial entities that are normally perceived as Territories rather than States in the international system'.

Several conclusions can be drawn from this about the concept of 'independence'. First, this discussion indicates that most of the Territories have strong constitutional connections to their administering State, especially in terms of their global identity. Although this is discussed further in Chapter V in terms of each Territory's control over its external affairs,[489] it is worth noting again that none of the Territories in this paper have their own unique citizenship, their own currency, or their own *de jure* Head of State. Many Territories also have strong judicial connections to the administering State.

However, these sorts of arrangements are not seen just in the context of State-Territory relationships; instead, 'independent' States often share these important identity issues too. For instance, in terms of economic links and monetary policy, many States are part of currency unions or have their currency pegged to another, with the Euro-zone perhaps being the most well-known of these arrangements. Similarly, Smith draws attention to the fact that many States shared British citizenship for most of the twentieth century[490] – Canada, for instance, did not develop its own citizenship until 1946, and Australia did not develop its own citizenship until 1948. However both Canada and Australia were considered 'States' prior to this point.[491] Finally, many States share judicial ties: prior to the Supreme Court Act 2003, for instance, New Zealand's highest Appellate Court was the Judicial Committee of the Privy Council in the United Kingdom. Despite these points, what is particularly striking about the constitutional Territory-State links covered in this chapter is the sheer number of them, and the fact they still remain at a time where many States are focused on forging their own independent identity with their own Head of State, their own citizenship, and their own judicial system.

Second – and building on the first point above - this discussion helps to highlight the distinction in international law between States, which are able to act independently to manage their domestic and external affairs, and Territories, which are not.[492] In particular, although the Territories in this paper do have the

[489] See in particular the discussion at 106.
[490] Stephen Smith "Unchartered Waters: Has the Cook Islands become eligible for Membership in the United Nations?" (2010) 8 NZJPL 169 at 208.
[491] For instance, both Australia and Canada were classified as founding member States of the United Nations: see Charter of the United Nations, art 3.
[492] See in particular the discussion in Chapter I at 9 on States and Territories.

competence to legislate on most issues that would be considered domestic affairs, most lack full competence in areas such as immigration control, administrative law, race relations, police and security, and defence. Furthermore, in Norfolk Island, Tokelau, American Samoa, and French Polynesia (and to an extent, New Caledonia), the relevant administering State retains the ability to legislate on behalf of the Territory, and the laws of the administering State's legislature over-rule any local legislation or customs.

Third, the number of links between the Cook Islands and New Zealand, and between Niue and New Zealand, helps explain why these two Territories are considered to be 'in free association' New Zealand. As the name suggests, it is in part because of the number of 'associations' between the Cook Islands or Niue (as the Territory) and New Zealand (as the administering State), although there are fewer links in the Cook Islands-New Zealand relationship compared to that of Niue-New Zealand. Nevertheless, this helps to explain what the term 'in free association' means in practice, especially as the term 'free association' is not defined particularly well in any of the General Assembly Resolutions dealing with self-determination.[493] In any future research, it would be useful to compare the New Zealand-Cook Islands and New Zealand-Niue free association relationships with the other countries formally in a free association relationship: the United States with (separately) the Marshall Islands, the Federated States of Micronesia, and Palau – all of which are considered as independent sovereign States in international law. This would be particularly interesting as while the New Zealand-Cook Islands and New Zealand-Niue free association relationships have been created constitutionally,[494] the United States' free association relationships have been created via international treaties.

Given these points, it would therefore be quite a stretch to argue that most of the Territories in this paper could be considered to be 'independent'. While economic links (which are common in the twenty-first century), and Head of State, judicial and citizenship links (which have been common in the past) are relatively understandable, the fact that most of the Territories do not possess full legislative competence over their own domestic affairs – or can be overridden on these

[493] Especially in GA Res 1514, XV (1960).
[494] Via the Cook Islands Constitution Act 1964 and the Niue Constitution Act 1974.

matters by the administering State – is a very difficult point to overcome. The fact that many of the Territories do not possess the ability to alter their own constitutional documents (while the administering State can do this unilaterally) is another major issue challenging these Territories' status as independent entities in international law.

However, the above arguments do not hold as well in the Cook Islands and Niue, where (in both cases) the local legislature has complete competence over domestic affairs, and the New Zealand House of Representatives has explicitly renounced its ability to unilaterally legislate on Cook Islands or Niuean affairs, including any ability to amend the Cook Island or Niuean constitutions.[495] Furthermore, the Cook Islands has no provisions in its constitution regarding economic links with New Zealand, and has also created an independent Cook Islands' representative for the Queen in right of New Zealand. Overall, this suggests that the Cook Islands (and perhaps Niue) could be considered 'independent' in some form.

Conclusion

Overall, significant links between the Territories and their Administering States remain. These extend into multiple areas, including shared citizenship, currencies and Heads of State; constitutional provisions limiting the Territories' ability to legislate on their domestic affairs without interference; economic links beyond development assistance; and judicial links in terms of both where appeals lie from each Territory's courts and in terms of which judges sit on each Territory's highest local Court. Overall, these links undermine the ability for most of the Territories to be considered fully 'independent'. On the other hand, the lack of many of the characteristics listed above gives weight to arguments suggesting the Cook Islands (and perhaps Niue) meet the 'independence test'.

Nevertheless, this chapter has – for the most part – confined itself to a discussion of internal affairs and constitutional links, with a key goal of focusing on whether or not each Territory could be said to meet the 'independence citerion' of Statehood. Although this is useful for a discussion of whether or not the Territories are self-governing, or in complete control of their domestic affairs,

[495] Cook Islands Constitution Act 1964, s 3 (and sch 1); Niue Constitution Act 1974, s 3 (and schs 1-2).

questions still remain: can some of the Territories with significantly more powers (in particular, the Cook Islands, who appears to be a *de facto* independent territorial entity) be classified as sovereign, and therefore a 'State' in international law, with a full international legal personality? Chapter V attempts to answer this all-important question.

CHAPTER V: MOVING FROM SELF-DETERMINING TERRITORIES TO SOVEREIGN STATES

Chapter IV has examined whether or not the various 'Territories'[496] covered in this paper can be classed as independent. However, this is not the only criterion a territorial entity must meet to be considered a State. Instead, territorial entities must also show that they are *sovereign*, which is when a Government is seen as "having supreme authority and being rightfully entitled to exercise that authority".[497] In particular, sovereignty means that a State has an unencumbered international legal personality, and can therefore enter into bilateral and multilateral international agreements.

Consequently, this chapter sets out to examine the extent to which each Territory can be considered sovereign, by focussing on three key aspects. First, the chapter considers the current status of each Territory, including an examination of whether that Territory can be said to have exercised self-determination. Second, the chapter compares the extent to which each Territory has control over its external affairs – a key requirement in order to be considered sovereign.[498] Third, the chapter compares how each Territory interacts with and is recognised by other members of the international community. These three sections allow for a discussion of the 'so what?' question – whether or not any of the 'Territories' can be considered 'States'. In particular, the chapter concludes by examining the definition of 'Statehood' laid out in Chapter I, and whether or not this definition is appropriate given the characteristics of twenty-first century Pacific Island Territories.

A Review of Self-Determination in the Pacific Territories

Before moving on to questions of 'Statehood' and 'international legal personality', however, it is useful to re-examine the concept of self-determination, and the implications of this concept for the Pacific. Chapter I established that a

[496] As in Chapter IV, the terms 'Territories' and 'administering States' are used in this chapter to signify how these entities are usually classified by the international legal system. Refer above n 354 at 69.

[497] Eiki Berg and Ene Kuusk "What makes sovereignty a relative concept? Empirical approaches to international society" (2010) 29 Pol. Geography 40, at 40.

[498] After all, if a Territory does not have control over its external affairs, how can it develop an international legal personality?

people do not necessarily have to achieve Statehood to have exercised their right to self-determination.[499] General Assembly Resolution 1541 (XV)[500] instead outlines three avenues of self-determination: forming a new State, free-association with an existing State, or integration with an independent State. To that end, Chapter II provided information on each Pacific Territory's status in international law (as classified by each Territory's administering State). This section focuses on the implications of that status for each Territory's recognition as a *sovereign* State, set out in the table below.

Table Seven: The Status of each Territory (as per its administering State)

	Status	How was this status achieved?	On the UN List of Non-Self-Governing Territories?
Cook Islands	Self-Governing in Free Association with NZ[501]	The Cook Islands and Niue Governments chose to enter into free association, following consultation with New Zealand. This was then endorsed by a subsequent election of that relevant Government.	
Niue			
Tokelau	Territory	Classified by New Zealand as per the Tokelau Act 1948. Two referendums in the early 2000s failed to reach the requisite majority to change the status quo.	Yes
Norfolk Island	External Territory	Classified in this way by the Australian Government as per the Norfolk Island Act 1979. No referendum, but significant consultation with Norfolk Island.	
French Polynesia	Territorial Collectivity	Classified by the French State. No referendum.	
New Caledonia	Special Status Community	Based on the Nouméa Accord, which was approved at a referendum by New Caledonians.	Yes
American Samoa	Territory	Chiefs of American Samoa ceded their Territory to the US in the early 1900s. Current constitution approved via referendum in 1966.	Yes

The Self-Determination Movement in the Pacific

The path to greater autonomy in the Pacific took a very different course than in other parts of the world. The Asian Development Bank notes that "the steady drumbeat of [Pacific] political independence ... was generally accepted as a

[499] See the discussion at 20 in Chapter I.
[500] GA Res 1541, XV (1960).
[501] It is interesting that when New Zealand defines the Cook Islands and Niue, it does not classify them as either States or Territories, but merely notes that they are "Self-Governing in Free Association with New Zealand".

natural and proper course of events, whose benefits were widely anticipated, but whose costs were given less consideration".[502] Similarly, Sir Geoffrey Henry, previous Prime Minister of the Cook Islands, writes that in the Pacific "there was little violent upheaval, no overreactions as in Africa, for example, where much was lost in the show of 'throwing the rascals out'".[503] This perhaps explains why the Pacific region contains such a large number of Territories relative to other areas in the world. Nevertheless, the 1950s-1980s period saw the Pacific nations become more autonomous, even if not all previous colonies became completely independent. Ghai argues that the rationale for this slow process was because the primary goal was not actually independence in itself.[504] Instead, Ghai's argument is that "the major issues for decolonisation [in the Pacific] became the size and the shape of the financial package and the provisions of the constitution – in that order, at least for the colonised".[505]

What is particularly striking about Table Seven is that while some of the Territories chose the status that they have now, others have not. In particular, New Caledonians accepted the Nouméa Accord (which set out New Caledonia's status as a Special Status Community) by referendum, and will have another referendum in the near future to determine their status. Similarly, the people of the Cook Islands and Niue chose their current status by re-electing Governments that proposed freely associated relationships with New Zealand (after those Governments were in turn offered a choice of the status quo (Territory status), free association, or full Statehood by New Zealand). Both the Cook Islands and Niue are also able to change their status via referendum. This was aso attempted in Tokelau, where Tokelauans voted on whether or not to also be in free association with New Zealand. However, as the requisite two-thirds majority was not reached, Tokelau remains a Territory of New Zealand.[506]

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[502] AV Hughes *A Different Kind of Voyage: Development and Dependence in the Pacific* Islands (Asian Development Bank, February 1998) at 12.

[503] Geoffrey Henry "Political Futures for the Pacific Islands" in Werner vom Busch and others (eds) *New Politics in the South Pacific* (Institute of Pacific Studies, Fiji, 1994) 17, at 18.

[504] Yash Ghai "Reflections on Self-Determination in the South Pacific" (Law Working Paper Series, Paper No 12, University of Hong Kong, 1994).

[505] Ibid, at 6.

[506] It is important to note that these referendums both saw a majority of votes cast in favour of free association, just not the two-thirds majority that the UN and the Tokelau Government agreed beforehand would be the threshold to trigger change. This is interesting, as it essentially means that a minority of voters have determined Tokelau's current status as a Territory.

In American Samoa, the situation is not so clear. American Samoan leaders in the early 1900s ceded their territory to the US, and while this was not put to a referendum at the time, American Samoans have voted to accept the current constitution, implicitly endorsing their current status. This can be contrasted to Norfolk Island and French Polynesia, which are classed as Territories by the will of the administering State.

The UN List of Non-Self Governing Territories

What then, determines whether the people of a Territory have exercised their right to self-determination? The United Nations maintains the List of Non-Self-Governing Territories ('the list') of all the Territories that it considers are not self-governing, or in other words, a list of territories that it feels have not effectively exercised their right to self-determination.[507]

Entry onto the list is theoretically based on the obligation for States to provide information about their Territories to the United Nations.[508] However, what really strikes a comparative scholar is which Territories are on the list and which are not. General Assembly Resolution 1541 establishes that there is an obligation to "transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it",[509] until that territory exercises self-determination by emerging as a new State, freely associating with an independent State, or integrating with an existing State.[510] In other words, States are required to transmit information about Territories that are not self-governing. In particular, States are required to transmit information about Territories where the latter is in a position of subordination to the former.[511]

Given this, what differentiates the situation in American Samoa (which is on the UN List of Non-Self Governing Territories) from the situation in French Polynesia (which is not)? French Polynesia's Statute of Autonomy, for instance, is simply an Organic Law of the Parliament of France, and can be altered by the French Republic at any time, even if it does not consult with French Polynesia. That situation is not too different to the American Samoan Constitution being at

[507] See the discussion at 20 in Chapter I.
[508] As per the Charter of the United Nations and GA Res 1541, XV(1960).
[509] GA Res 1541, XV (1960), principle IV.
[510] Ibid, principle VI.
[511] Ibid, principle V.

the whim of the Ratification Act 1929.[512] Legally, French Polynesia and American Samoa are therefore both 'subordinate' to their administering States (the French Republic and the USA), especially given that in both cases local legislation can be overruled or not come into force via the actions of the administering State. Furthermore, French Polynesians have not voted on their current status (although, like other French Territories, French Polynesia did take part in a referendum in the 1950s as to whether they should secede from France), while there are at least treaties signed by American Samoan leaders ceding the territory to the United States in 1900 and 1904. Similarly, it is noteworthy that Tokelau remains on the list even though there is clearly not enough support in Tokelau to change that Territory's current status.

What helps to explain the listing of the above Territories (compared to those who are listed) is that originally, it was deemed the responsibility of States to determine whether or not their Territories were on the list.[513] This helps explain the case of French Polynesia, as it was France who decided that French Polynesia (along with New Caledonia and Wallis and Futuna) no longer 'qualified' to be on the List of Non-Self Governing Territories, citing a 'change in status' as the rationale for removal in 1947.[514] However, as more and more former colonies became States and joined the UN in their own right, the balance of power shifted, and the General Assembly became more involved in the administration of the list. Consequently, it seems New Caledonia on the list is because the General Assembly ruled that New Caledonia was still a non-self-governing Territory and therefore placed it *back on the list*, against the wishes of the French State.[515] Furthermore, despite the fact that in practice Tokelau and American Samoa conduct their own domestic affairs,[516] both appear on the UN List of Non-Self Governing Territories – a situation that pleases neither Tokelauans nor American Samoans.

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[512] Islands of Eastern Samoa [Ratification Act 1929] 48 USC § 1661.
[513] United Nations *Repertory of Practice of United Nations Organs* (Vol V: Articles 73-91 of the Charter, 2006) at 37. Available at <www.un.org/law/repertory>
[514] Carlyle Corbin "Governance, Dependency and Future Political Development in the Non-Independent Caribbean" (paper presented to the SALISES Conference, Barbados, 15 January 2002).
[515] *Question of New Caledonia* GA Res 41/41, A/Res/41/41 (1986).
[516] See the discussion at 76 for more information.

What then, does this tell us about self-determination and sovereignty? Perhaps the key issue is that self-determination in the United Nations' context is heavily underpinned by a decolonisation discourse. In other words, it seems that a people have only exercised their right to self-determination if they have explicitly chosen to become independent, to become self-governing via free association, or to become integrated with the administering State. Importantly, the lack of other choices in GA Resolution 1541 (XV),[517] combined with the examples of Tokelau and American Samoa remaining on the UN List of Non-Self Governing Territories, indicates that even if a people explicitly choose to have dependent Territory status, they have not exercised the right to self-determination as far as the United Nations is concerned, and are therefore perceived as lacking sovereignty in the international system.

In effect, there is a 'right way' to exercise self-determination, which is heavily geared towards secession – as is evidenced by the limited discussion in UN documents regarding free association or integration as self-determination options. Retaining Territory status, it seems, is not acceptable. In some ways this is almost a reverse form of neo-colonialism, and is an example of what Gay Morgan terms the 'liberal paradox':[518] in this case, United Nations' members are trying to *impose* the 'correct' way to exercise self-determination on other Territories. This is an issue, given that many Territories are reluctant to alter their status so that they do not lose economic support: Quentin-Baxter, for instance, asserts that taking on full responsibility for complete self-government is too expensive for some very small states.[519] Pursuing full sovereignty, therefore, may too expensive fpr some Territories, who are more than happy to have a different status than Statehood.

Control of External Affairs

As a result, although the above findings about self-determination are useful for this paper, they do not in themselves answer some of the other questions still remaining; in particular, do the Territories covered in this paper have their own effective international legal personality, and are they (therefore) sovereign

[517] GA Res 1541, XV (1960).
[518] Gay Morgan ""Reflections on Pluralist Conundrums" (1998) 2(1) Yearbook of New Zealand Jurisprudence 71, at 83.
[519] Alison Quentin-Baxter "Sustained Autonomy – An Alternative Political Status for Small Islands? (1994) 22 VUWLR 1.

independent States? Self-determination therefore seems focussed on ensuring self-government[520] rather than on achieving sovereignty per se. As established in Chapter I, sovereignty is more than just independent control over domestic affairs; instead, self-determination and self-government are necessary but not sufficient for a would-be State to be considered sovereign in the international system. Instead, sovereignty is about being recognised as having an international legal personality, with full control and full rights of governance over territory.

Consequently, a major consideration as to whether a territorial entity is sovereign is whether or not it has full, independent control of its external affairs – after all, a territorial entity can hardly develop an international legal personality unless it is responsible for pursuing its own foreign policy. Consequently, this section therefore discusses the extent to which the Territories covered in this paper have competence over their external affairs.

'Responsibility' for External Affairs: The Cook Islands and Niue

The Cook Islands Constitution Act 1964, for instance, contains provisions regarding control over external affairs and defence. Section 5 of that Act states:

> Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands ...

A nearly identical provision is seen in s 6 of the Niue Constitution Act 1974, where external affairs are again a 'responsibility' of the Queen in right of New Zealand. The use of the term 'responsibility' in these sections is interesting, as it neither clearly assigns the competence of external affairs to the Cook Islands or Niue nor restricts either New Zealand Realm country from pursuing its own foreign policy. The sections seem to reflect the historical context in which they were enacted: Smith argues that in the 1960s and 1970s, the concept of 'free association' was relatively new, and most States simply saw it as a legal status that confirmed a Territory was in control of its domestic affairs but in association with an administering State regarding foreign policy.[521] To that end, it is likely that the intention of the sections was for New Zealand to retain control over the Cook Islands' and Niue's external affairs.

[520] Through either secession, free association (and control over domestic affairs) or integration.
[521] Stephen Smith "Unchartered Waters: Has the Cook Islands become eligible for Membership in the United Nations?" (2010) 8 NZJPL 169.

However, the ambiguous wording has led to a different outcome in practice. Over time the Cook Islands and Niue have taken control of their own external affairs. The Cook Islands, for instance, has entered into significant treaties with other States (both bilaterally and multilaterally), has established diplomatic relations with 21 countries, and has become a member of a range of international organisations, including a full member of the Pacific Islands Forum, the Secretariat of the Pacific Islands Community, The United Nations Educational, Scientific and Cultural Organisation (UNESCO), the Asian Development Bank and the World Health Organisation (WHO) – some of which are open only to 'States'.[522] New Zealand has not raised any public objections over this development of competence in external affairs, going so far as to note in the Joint Centenary Declaration with the Cook Islands that "in the conduct of its foreign affairs, the Cook Islands interacts with the international community as a sovereign and independent state".[523] It is important to note, however, that the Joint Centenary Declaration does not go so far as to explicitly state that New Zealand considers the Cook Islands *to be* an independent, sovereign State, but simply that the Cook Islands *acts* like one.[524]

Laws for 'Good Government': Norfolk Island, Tokelau and American Samoa

The Norfolk Island Act 1979 (Cth), on the other hand, implies that external affairs are not within the competence of the Norfolk Island Legislative Assembly. The Act instead only authorises "laws for the peace, order and good government of the Territory".[525] Only a very broad interpretation would read this provision as including control over external affairs, especially seeing as s 19(2) of the Act explicitly states that the Norfolk Island Legislative Assembly does not have competency over defence matters (although Norfolk Island does control its own immigration regime). A similar situation exists in Tokelau: s 3A(1) of the Tokelau Act 1948 uses almost exactly the same language as s 19(1) of the Norfolk Island

[522] In particular, both the World Health Organisation and UNESCO require members to be States. Note that Niue is also a full member of UNESCO and the WHO. Tokelau is an Associate Member of UNESCO. None of the other Territories included in this paper have joined UNESCO or the WHO.

[523] Joint Centenary Declaration of the Principles of the Relationship between New Zealand and the Cook Islands, New Zealand-Cook Islands (signed 11 June 2001), cl 4.

[524] A more in-depth discussion of New Zealand's view on the Cook Islands' international status begins at 116. In essence, it appears that New Zealand recognises that the Cook Island has *de facto* State status, but does not believe the Cook Islands is a *de jure* independent sovereign State.

[525] Norfolk Island Act 1979 (Cth), s 19(1).

Act, providing the Tokelau General forum with the ability to make rules that "it thinks necessary for the peace, order, and good government of Tokelau".[526] Again, what is implicit in this section is that the General Fono does *not* have the power to make rules relating to external affairs, as these are beyond its mandate of 'peace, order and good government of Tokelau' – i.e. domestic affairs.

The American Samoan Constitution is more explicit, stating that "the Legislature shall have authority to pass legislation with respect to subjects of local application",[527] again restricting the Territory from exercising competence of external affairs. The American Samoan case is particularly interesting given the relatively restricted constitutional links between American Samoa and the continental US, leading Robert Statham Jr to note that "the United States and American Samoa treat each other as unified under American sovereignty internationally, and as separate foreign nations domestically",[528] a situation which is not dissimilar for how the US treats Native American tribes.[529]

A Developing External Affairs Competence: the French Territories

Things are different again in the French Territories. In New Caledonia, the Nouméa Accord states that "international relations remain the responsibility of the State"; however the interpretation of 'responsibility' here is more restrictive than in the case of the Cook Islands and Niue. Instead, Section 2 of the Organic Law on New Caledonia sets out that external affairs is a 'shared power': New Caledonia is able to join some international organisations (mostly Pacific and UN regional bodies) and establish diplomatic relations with Pacific States and Territories in its own right. The Government of New Caledonia also has the authority to negotiate and sign international agreements with those organisations and entities, but only in the areas that New Caledonia has legal competence over. This means that as the French Republic maintains control over defence, New Caledonia may not enter into defence agreements.[530] However, Articles 28 and 29 also explicitly state that while the New Caledonian Government can sign these

[526] Tokelau Act 1948, s 3A(1).
[527] Constitution of American Samoa, art II, s 1.
[528] E Robert Statham Jr *Colonial Constitutionalism: The Tyranny of United States' Offshore Territorial Policy and Relations* (Lexington Books, Maryland, 2002) at 93.
[529] Perry Dane "The Maps of Sovereignty: A Meditation" 12 Cardozo L. Rev.959.
[530] In particular, Article 29 of the Organic Law relating to New Caledonia allows New Caledonia to enter into agreements (relating to areas that it has competence) with the regional bodies of the specialised institutions of the United Nations, and with regional bodies of the Pacific.

agreements, they must still be ratified by the French Republic under the provisions of the French Constitution.[531] New Caledonia's competence over external affairs is therefore heavily restricted, and appears to be mostly concerned with providing New Caledonia with the opportunity to engage with the Pacific community, rather allowing it to establish a full international legal personality.

A similar approach is taken in the State of Autonomy of French Polynesia, although the provisions are not the same. Instead, French Polynesia is able to negotiate agreements with *any* State, Territory or international body regarding a matter that is within its competence; however, French Polynesia must inform the French State that it is doing this, and France has the power to oppose the negotiations.[532] This is important, because it means that although French Polynesia has the authority to negotiate agreements, it does not have an automatic right to sign these agreements. As with New Caledonia, ratification is done by the French State under the provisions of the French Constitution.[533] French Polynesia may also – with the agreement of the French Republic – become a member or associate member of international bodies of the Pacific, where it is represented by the President of French Polynesia.[534] Overall, French Polynesia's competence over external affairs is heavily restricted, and the little competence it is provided under the Statute of Autonomy is subject to French oversight.

Interaction and Recognition in International Law

It is important to also examine the implications of control over external affairs. While a Territory may have the *ability* to control its own external affairs, this does not mean it is sovereign. Instead it is important to examine each Territory's status, recognition and interaction with the international community: in particular, how are the Territories in this paper seen by others?

[531] Articles 52 and 53 of the Constitution of the French Republic set out a ratification process for Treaties (which would include those signed by New Caledonia): Treaties must be approved by the President of the Republic, and in some specific instances (notably relating to trade, war or the status of persons), must also be approved by an Act of the French Parliament.
[532] Statute of Autonomy of French Polynesia 2004 (France), art 39.
[533] See above: n 531 regarding French ratification.
[534] Statute of Autonomy of French Polynesia 2004 (France), art 42.

What's in a name?

The Cook Islands, for instance, has also amended its original Constitution to 'upgrade' some of its terminology in an attempt to improve its status. While the original constitution declared that the Cook Islands had a 'Legislative Assembly' and a 'Premier', the Constitution today sets up the Cook Islands 'Parliament', led by the Cook Islands 'Prime Minister'. Smith notes that this change was made by the Cook Islands to assert itself as an international player: the former terms are those used in sub-national entities such as regional parliaments in federal systems,[535] while the new terms are those that are commonly seen in the constitutions of independent States.

Table Eight: Names of Constitutional Organs

<table>
<tr><th></th><th>Administering State Legislature (Lower/Upper Chamber)</th><th>Territory Legislature (Lower/Upper Chamber)</th><th>Administering State Head of Government</th><th>Territory Head of Government</th></tr>
<tr><td>Cook Islands</td><td rowspan="3">NZ House of Representatives</td><td>Parliament</td><td rowspan="3">Prime Minister</td><td>Prime Minister</td></tr>
<tr><td>Niue</td><td>Niue Assembly</td><td>Premier</td></tr>
<tr><td>Tokelau</td><td>General Fono</td><td>Ulu o Tokelau</td></tr>
<tr><td>Norfolk Island</td><td>Australian Parliament (House/Senate)</td><td>Legislative Assembly</td><td>Prime Minister</td><td>Chief Minister</td></tr>
<tr><td>French Polynesia</td><td rowspan="2">French Parliament (National Assembly/Senate)</td><td>French Polynesia Assembly</td><td rowspan="2">Prime Minister</td><td>President</td></tr>
<tr><td>New Caledonia</td><td>Congress</td><td>President</td></tr>
<tr><td>American Samoa</td><td>Congress (House/Senate)</td><td>Fono (House/Senate)</td><td>President</td><td>Governor</td></tr>
</table>

As shown in the table above, this does seem to be the case in the other Territories: highlighted cells in the table indicate a subordinately named legislature or head of government. American Samoa, for instance, is led by a 'Governor' (as is seen in the US states) rather than a President, while Norfolk Island is led by a 'Chief Minister' and Niue by a 'Premier' rather than by 'Prime Ministers'. Similarly, Norfolk Island, Niue and French Polynesia have 'Assemblies' rather than 'Parliaments' (as seen in the Westminster system) or 'National Assemblies' (as seen in the French system).

[535] For example, in Australia, state heads of government are known as 'Premiers' (cf. Prime Minister of Australia) and state lower-houses are known as 'Legislative Assemblies' (cf. House of Representatives of Australia). Similarly, in the US, state heads of government are known as 'Governors (cf. President of the USA).

However, the names used for constitutional organs simply signifies how a territorial entity itself *wishes* to be perceived by others. What is more useful for determining a territorial entity's status is the extent to which it is *recognised* by others.

International Recognition via Diplomatic Relations

The interaction of the Pacific Territories with the international community can be broadly divided into three groups. First, while Tokelau, Norfolk Island and American Samoa are all given explicit power to legislate on domestic affairs – or for the 'peace, order and good government of the Territory' – this does not seem to constitutionally give rise to any power to control external affairs. Certainly in practice, each of these Territories is represented by their administering State in almost all regional and international bodies, including the Pacific Islands Forum (although Tokelau and American Samoa both have Observer status). The only exception is the Secretariat of the Pacific Community, of which Tokelau and American Samoa are full members.[536]

Second, in the French Territories, the analysis above indicates that neither French Territory has full competence over its own external affairs, and neither certainly has its own international legal personality: although French Polynesia and New Caledonia can enter into international treaties, ratification must still be done by the French State. Furthermore, in French Polynesia, the power of the French State to oppose negotiations and prevent an agreement being signed is a clear indication of where competence for external affairs (and therefore control over French Polynesia's interaction with the international community) ultimately lies: with the French Republic. Nevertheless, the French Territories' competency to interact with regional organisations has meant that both French Polynesia and New Caledonia are Associate Members of the Pacific Islands Forum. Both are also full members of the Secretariat of the Pacific Community, which is headquartered in Nouméa (the capital city of New Caledonia). New Caledonia's ability to enter into diplomatic relations with other Pacific States and Territories also does provide it with some degree of sovereignty; however this is limited by the restriction on

[536] For more information about the Secretariat of the Pacific Community, see <www.spc.int>

diplomatic relations outside of the Pacific, and the need for New Caledonia to inform the French State of what diplomatic relations it has developed.[537]

Third, and in comparison to all of the Territories discussed above, New Zealand has not attempted to publicly curtail how the Cook Islands and Niue interact with the international community.[538] Consequently, one could argue that both the Cook Islands and Niue have control over their external affairs, lending strength to the argument that the Cook Islands and Niue ought to potentially be classed as sovereign, independent States. In particular, both 'Territories' have established diplomatic relations with several States.[539] Both are also active members of the Pacific Islands Forum and a host of other multilateral organisations, including UNESCO and the WHO. Membership of UNESCO is particularly important because UNESCO's Constitution declares that only States "may be admitted to membership of the Organization",[540] but that Territories "not responsible for the conduct of their international relations" may be admitted as Associate Members.[541] Given that both the Cook Islands and Niue are full – rather than Associate – UNESCO members, this implies that the Cook Islands and Niue are both 'States' in international law, or at the very least are seen as responsible for the conduct of their international relations.

However, diplomatic recognition does not necessarily mean that the Cook Islands or Niue are seen as independent, sovereign States, but merely that a territorial entity has recognised them as having *some* form of international legal personality: the US, for instance, has diplomatic relations with the Cook Islands, but still includes it on the US Department of State's list of 'Dependencies and Areas of Special Sovereignty'.[542] This indicates that the US may not consider the Cook

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[537] Organic Law relating to New Caledonia 1999 (France), art 32.

[538] Of course, it is highly unlikely that 'quiet words' have never been said by the New Zealand Ministry of Foreign Affairs to the Cook Islands regarding the Cook Islands' foreign affairs policy.

[539] In particular, the Cook Islands has accredited diplomatic relations with over twenty states, plus the European Union. Niue, while having fewer diplomatic links, has accredited diplomatic relations with over five states, including Australia, China and the European Union. See <http://www.mfai.gov.ck/> for the full list of relations between the Cook Islands and other states.

[540] Constitution of the United Nations Education, Scientific and Cultural Organization (signed 16 November 1945, entered into force 4 November 1946), art II. Note that United Nations members are automatically members of UNESCO.

[541] Ibid, art III.

[542] US Department of State "Dependencies and Special Areas of Sovereignty" (29 November, 2011) <www.state.gov>

Islands to have a full international legal personality. Furthermore, the Cook Islands has also faced difficulty in having its voice heard in international forums: at the Rio+20 summit in December 2011, for instance, the Cook Islands had to fight to gain speaking rights after UN General Assembly Resolution 66/197 limited participation at the Rio+20 summit solely to State members of the United Nations.[543]

The Rio+20 example illustrates that it is not just States who matter in international law, but that sovereignty can also be influenced by membership of international organisations. For instance, the Cook Islands' and Niue's membership of UNESCO raises questions about their status in international law, given that UNESCO membership is only open to States.[544] To fully examine a territorial entity's international status, then, it is important to examine that entity's recognition by the most prominent global organisation – the United Nations itself (rather than one of its and the Bretton Woods' Institutions. Notably, none of the Territories considered in this paper have applied to join the UN. Consequently, this section now turns to examining the UN's membership criteria, and whether the Cook Islands (as the Territory with the most unencumbered international legal personality) *could* successful apply to join that organisation.[545]

The United Nations

Article 4 of the UN Charter states that "Membership in the United Nations is open to all other peace-loving [S]tates which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations".[546] To join the UN, a State must have its application recommended by the UN Security Council and then approved by a decision of the UN General Assembly.[547] Key here is the explicit use of the word 'State', which – as was established in Chapter I – implies that a territorial entity is both

[543] GA Res 66/197, A/Res/66/197 (2012). See also: Cook Islands News "Cook Islands stands up for smaller island States in lead up to Rio+20" (13 June, 2012) Pacific Scoop <http://pacific.scoop.co.nz>

[544] See above discussion on UNESCO at 113.

[545] Note that this analysis is based on the idea that New Zealand would not actively encourage or oppose any application by the Cook Islands. Explicit lobbying one way or the other by New Zealand would likely have a large influence on the outcome of a Cook Islands UN-membership application.

[546] Charter of the United Nations, art 4(1).

[547] Ibid, art 4(2). This requires a vote in favour from 9 out of the 15 Security Council Members (with none of the five permanent members voting against)

independent and sovereign. This seems to be particularly important in the case for the United Nations, given that Chapter VII of the UN Charter provides the UN Security Council with the ability to make binding resolutions regarding defence – resolutions which (given their subject matter) only a fully sovereign State would always be able to carry out.

None of the Territories covered in this paper are members of the United Nations, although the Cook Islands and Niue are members of some UN organisations that restrict membership to 'States'. However, as neither the Cook Islands nor Niue has ever officially applied for UN membership, it is not yet clear whether they would meet the membership criteria for full United Nations membership in practice. This is especially true given that the decision is essentially a political one made by the Security Council and General Assembly, rather than a technical one made by UN officials. This is important because sovereignty comes from recognition by other States: in other words, the Cook Islands would only be able to join the UN if at least a majority of UN Members in the General Assembly recognised it as sovereign.[548]

In 1948 the International Court of Justice issued an advisory opinion that Article 4 implied there were five criteria for membership: a candidate had to (1) be a State, (2) be peace-loving, (3) accept the obligations of the UN Charter, (4) able to carry out these obligations, and (5) willing to carry out these obligations.[549] These criteria were seen as all-interlinked: Stephen Smith argues that a candidate would only be able to meet criterion (1) if it could meet the other criteria:[550] in other words, only a State would be able to accept the obligations of the Charter, as only a State would actually have the necessary independence and sovereignty to carry those obligations out.

Given this, one potential argument is that some of the Territories covered in this paper would be able to meet the conditions of UN Membership. In particular, Smith argues that the Cook Islands and Niue are not really 'Territories' at all, but – due to their competence in external affairs – would be able to accept and carry

[548] See the discussion in Chapter I at 12 regarding recognition of sovereignty.
[549] *Conditions of Admission of a State to Membership in the United Nations (Advisory Opinion)* [1948] ICJ Rep 57.
[550] Smith, above n 521.

out the obligations of the UN Charter, and are therefore 'States' as far as UN Membership is concerned.[551] However, a dissenting argument is that an application for membership would be rejected on the basis that both the Cook Islands and Niue are still too connected to New Zealand. In particular, as discussed in Chapter IV, both are officially still part of the Realm of New Zealand, both still have the Queen in right of New Zealand as their *de jure* head of state, both still use the New Zealand dollar as their currency, and both still do not have their own citizenship, but instead still use New Zealand citizenship.[552] Consequently, if either joined the United Nations, the connection to New Zealand might be seen as so strong that it was essentially giving New Zealand multiple votes – a key issue given that in the United Nations, each member only gets one vote, regardless of its size. This in turn could limit any recognition of the Cook Islands' and Niue's *sovereignty*, and therefore restrict those territorial entities' ability to join the UN.

Recognition and Sovereignty of Pacific Territories

Overall, this presents a confusing picture as to whether the Cook Islands would be able to successfully apply for UN membership – and consequently, whether any of the 'Territories' in this paper can be also classed as a sovereign State. On the one hand, the Cook Islands theoretically meets the UN's membership requirements – it is clearly self-governing, has control over its domestic affairs, and acts as if it has its own international legal personality. On the other hand, the Cook Islands' administering State (New Zealand) has explicitly stated that although the Cook Islands is in control of its external affairs, "this does not mean that the Cook Islands is, in constitutional terms, an independent sovereign state".[553] Instead, New Zealand's Ministry of Foreign Affairs and Trade (MFAT) has advised that for the Cook Islands to become an independent sovereign state, the Cook Islands would have to go through its internal constitutional change provisions – including a referendum and amendments to the Cook Islands' constitution[554] – presumably to amend s 3 of the Cook Islands Constitution Act

[551] Smith, above n 521.
[552] Note, however, that both the Cook Islands and Niue run their own immigration regimes, and that New Zealand citizens do not automatically have the right to reside in the Cook Islands or Niue.
[553] New Zealand Ministry of Foreign Affairs and Trade *Cook Islands: Constitutional Status and International Personality* (May 2005) at 3, available from <www.mfai.gov.ck>
[554] See the discussion on constitutional change provisions in Chapter IV at 80.

1964 so that the Cook Islands was no longer 'in free association' but instead 'independent and sovereign'. MFAT also noted that such a change would "have implications in terms of Cook Islanders' eligibility for New Zealand citizenship".[555] A similar MFAT opinion has not been written about Niue;[556] however, one would presume that the same points would apply. In other words, MFAT seems to have taken the view that despite what the *de facto* situation is, the Cook Islands is not a *de jure* sovereign State.

This is a key issue given the political nature of international organisation membership, where New Zealand would surely be asked its opinion on the Cook Islands' status should UN membership be pursued. In particular, it would be unlikely that the Cook Islands would gain the necessary support of the UN General Assembly if New Zealand did not support a declaration that the Cook Islands is a 'State', primarily due to fear from existing States of encouraging unilateral secessionism in areas of their own territory.

This reflects the fact that no matter what a purely legal analysis might conclude, international law is heavily political. In this case in particular, for instance, the Cook Islands has a *prima facie* case that it is a sovereign State: it is clearly an independent, self-governing entity that is in control of its own domestic affairs, and acts on the international stage as if it has a full independent legal personality and control over its external affairs. Notably it also exercises these functions independently and without the oversight of New Zealand. However, as many United Nations' members still perceive New Zealand as the Cook Islands' administering State, significant issues are raised as to whether the Cook Islands (or any of the other Territories in this paper) can indeed be considered sovereign.

Altogether, this analysis therefore indicates that most of the territorial entities have a reasonably clear status: they are perceived as Territories due to their limited control over external affairs, their limited capacity to enter into international agreements, and their limited membership of international organisations. However, in the case of the Cook Islands – which has developed its own foreign affairs policy, has entered into several international agreements,

[555] New Zealand Ministry of Foreign Affairs and Trade *Cook Islands: Constitutional Status and International Personality* (May 2005) at 3, available from <www.mfai.gov.ck>

[556] Or at least, is not in the public domain if one has been written.

and is a member of many international organisations – this is not necessarily the case. Instead, the Cook Islands acts as though it is a *de facto* State. That said, this does not mean that the Cook Islands is *sovereign*, as not all other States view it as such. Furthermore, the New Zealand view appears to be that because the Cook Islands is "self-governing in free association with New Zealand", and is not, in constitutional terms, a sovereign independent State, the Cook Islands is precluded from Statehood in international law.[557]

Free Association and Sovereignty: Should 'Statehood' be redefined?

What is particularly interesting is the way New Zealand prefaces its descriptions of the Cook Islands' status with the term 'in constitutional terms'. The issue appears to lie around s 3 of the Cook Islands Constitution Act 1964, which states that "the Cook Islands shall be self-governing" rather than declaring the Cook Islands as a sovereign State. This can be compared to the Western Samoa Act 1961, where New Zealand explicitly legislated for the independence of Western Samoa (today known as Samoa).[558] Today, New Zealand recognises Samoa as a sovereign State while classifying the Cook Islands as "self-governing in free association with New Zealand".[559]

Does Free Association exclude sovereign Statehood?

The issue for New Zealand regarding the Cook Islands' status appears to be that as the New Zealand House of Representatives has not explicitly legislated that the Cook Islands is independent, New Zealand is prevented from informing the United Nations that the Cook Islands is a sovereign State. However, because it has renounced its ability to legislate for the Cook Islands, New Zealand is also prevented from amending s 3 of the Cook Islands Constitution Act 1964 unless a clear referendum of the Cook Islands' people shows support for altering the Cook Islands' constitutional status. In other words, New Zealand is unable to inform the United Nations that the Cook Islands has a new *de jure* status, until this has been 'approved' by the Cook Islands – which has not actually happened. This argument is supported by the New Zealand Ministry of Foreign Affairs and Trade's view that "free association is a status distinct from that of full independence in that it

[557] New Zealand Ministry of Foreign Affairs and Trade "Cook Islands: Country Paper" (7 November, 2012) <www.mfat.govt.nz>
[558] Western Samoa Act 1961 (NZ), s 3.
[559] New Zealand Ministry of Foreign Affairs and Trade "Cook Islands: Country Paper" (7 November, 2012) <www.mfat.govt.nz>

allows the Cook Islands to maintain New Zealand citizenship, while administering its own affairs".[560] Consequently, (in New Zealand's view) New Zealand's only response to questions about its Territory's status can be that the Cook Islands (and Niue) are *constitutionally* still in free-association but have competence over their domestic and external affairs. One would also suspect that New Zealand would be unlikely to support a declaration that the Cook Islands and Niue were independent States while they continued to be subject to New Zealand citizenship laws.[561]

Essentially, then, this means that the Cook Islands and Niue are classed as 'in free association' with New Zealand – *rather* than as independent and sovereign States. After all, General Assembly Resolution 1541 (XV) presents three *alternate* options for how non-self-governing territories (most of which were external territories) could become self-governing: "emergence as an independent sovereign state" or "integration with an independent state" or "free association with an independent state".[562] Given that these paths to self-determination are presented as *contrasting* options in the resolution, one could conclude that free association does not mean a country has become "an independent sovereign state".[563] As noted earlier, for instance, the Cook Islands' and Niue's status can be compared to Western Samoa, which is explicitly classed as 'independent' in New Zealand legislation.[564] A similar contrast is seen in GA Resolution 2625 (XXV), where the exercise of self-determination is again seen as being fulfilled by a people either seceding and becoming a sovereign State, or becoming part of or the integral territory of an administering State, or associating with an existing State. Musgrave argues that the language of Resolution 1541 (XV) "emphasized that independence was to be regarded as the normal outcome for non-self-governing territories".[565]

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[560] New Zealand Ministry of Foreign Affairs and Trade "Cook Islands: Country Paper" (7 November, 2012) <www.mfat.govt.nz>

[561] This is an important issue, as it seems that Cook Islanders value their New Zealand citizenship (and consequently free access to New Zealand and Australia) far more than symbolic international status – consequently, one suspects that if New Zealand forced this issue to a referendum, the people would likely choose to retain New Zealand citizenship rather than amend s 3 of the Cook Islands Constitution Act, thereby making UN membership unlikely in such a scenario. See the discussion at 73.

[562] GA Res 1541, XV (1960).

[563] Ibid.

[564] Western Samoa Act 1961 (NZ), s 3.

[565] Thomas Musgrave, *Self-Determination and National Minorities* (Clarendon Press, United Kingdom, 1997) at 73.

This restrictive view of free association is another example of the 'liberal paradox' referred to earlier.[566] Again, the focus seems to be that secession is the 'usual' or 'right' outcome to self-determination, and this focus seems to have gone relatively unchallenged in the UN-era. An example of this is the provisions in New Caledonia's constitution allowing a second referendum on whether New Caledonia should become a State, even if a majority of voters vote against this proposal in a constitutionally ordained referendum eighteen months earlier.[567] Similarly, it seems that to be an international player, especially in the UN, Territories should follow the examples of existing post-colonial States and secede rather than freely associate.[568]

Or can a territorial entity be a Freely Associated State?

However, it must be borne in mind that international law – just like domestic law – develops over time through practice and custom, and the General Resolutions referred to above are now several decades old. Consequently, just because a 1960s General Assembly Resolution implies that the 'correct' option for a Territory to achieve Statehood is via secession, does not mean that this is the only way to become a State in the twenty-first century. For instance, General Resolution 1514 (XV), while adopted the day prior to GA Resolution 1541, advocates strongly for all peoples to enjoy self-determination and independence by the "transfer of all powers to the peoples of those territories".[569] Similarly, as noted in Chapter I, the still-recognised Montevideo Convention established that a State in international law must possess "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other [S]tates".[570]

Consequently, could the Cook Islands (or Niue) be considered a 'sovereign state' *while* remaining in free association with New Zealand? Both territorial entities have a permanent (although declining due to emigration) population and a defined

[566] Morgan, above n 518.
[567] See n 228 at 45 in Chapter II.
[568] This again underlies the politicised nature of international law. To some extent, one wonders whether the reason post-colonial States do not challenge the idea that self-determination is best exercised via secession is because they have a vested interest in seeing Territories cutting all ties to an existing State. This would mean that the new State would be more likely to join the post-colonial non-aligned movement, giving that movement more power in the UN. If a Territory freely associated, however, that Territory might be more likely to 'side' with its existing power.
[569] GA Res 1514, XV (1960), at (5).
[570] Montevideo Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 16 December 1934), art 1.

territory. Each also has, by virtue of the Cook Islands Constitution Act 1964 and the Niue Constitution Act 1974 respectively, an independent government, and both have entered into relationships with and been legally recognised by other States. In line with General Assembly Resolution 1514 (XV), New Zealand has also transferred 'all powers' to the Cook Islands and Niue. This implies that the Cook Islands and Niue *are* both 'States' in international law, even if there are difficulties in arguing that they are universally recognised as *sovereign* with unencumbered international legal personalities.

Furthermore, one can compare the Cook Islands' and Niue's free association relationships with New Zealand to the free association relationships between several territorial entities in Micronesia and the US. In particular, three of the countries emerging out of the United States Trust Territory of the Pacific Islands (Federated States of Micronesia (FSM), the Republic of the Marshall Islands, and the Republic of Palau) are full members of the United Nations, indicating that all three are considered to be sovereign States in international law. However, all three of those Micronesian States are also considered to be in free association with the United States, indicating that 'free association' in practice is not necessarily a mutually exclusive alternate to sovereign Statehood.

That said, all three of those States have their own citizenship,[571] indicating a clear separation of identity from the US that is not seen in the New Zealand-Cook Islands and New Zealand-Niue relationships. As discussed above, the New Zealand Ministry of Foreign Affairs and Trade noted that if the Cook Islands wished to become independent, then this would "have implications in terms of Cook Islanders' eligibility for New Zealand citizenship".[572] Furthermore, unlike the New Zealand-Cook Islands and New Zealand-Niue free association relationships, which have been created through statutes passed by the New Zealand House of Representatives, the US-FSM, US-Marshall Islands and US-

[571] This can be compared to the fourth country which was previously part of the TPPI – The Commonwealth of the Northern Mariana Islands – which is not a member of the United Nations. Importantly, the Commonwealth of the Northern Mariana Islands shares US citizenship. However, its status is less clear-cut than FSM, Palau and the Marshall Islands as rather than being under a compact of free association it is considered a 'commonwealth', and is not formally recognised as having a freely associated relationship with the United States.

[572] New Zealand Ministry of Foreign Affairs and Trade *Cook Islands: Constitutional Status and International Personality* (May 2005) at 3, available from <www.mfai.gov.ck>

Republic of Palau compacts of free association have been created through international treaties between the US and the former trust territories.

What this indicates is that although General Assembly Resolutions 1541 (XV)[573] and 2625 (XXV)[574] imply that 'free association' and 'secession' (i.e. becoming a sovereign State) are mutually exclusive terms, the *de facto* situation appears to be that a territorial entity can be both a 'State' and 'in free association'. This is true in the case of several Micronesian States, which, as members of the United Nations, are considered to be sovereign States, but which are also considered to be in free association with the US. Similarly, both the Cook Islands and Niue are in free association with New Zealand, yet at the same time, both are members of organisations that are traditionally open only to 'States'.

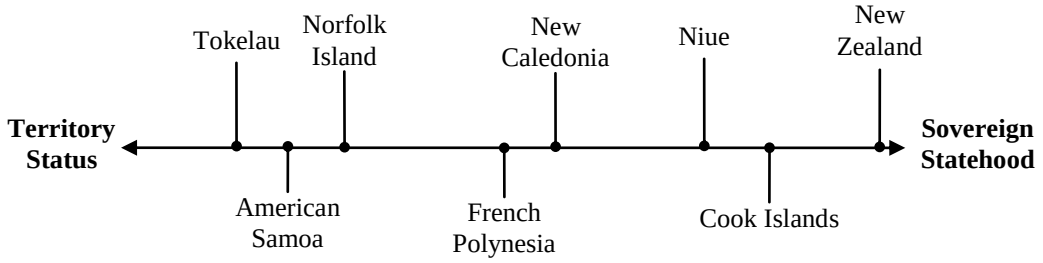
However, perhaps the issue is our definition of 'State', which (as noted in Chapter I), is very traditional. It is noteworthy, for instance, that the New Zealand Ministry of Foreign Affairs and Trade always notes that the Cook Islands is nota 'sovereign, independent State' rather than simply not a 'State'. Perhaps then, this indicates that the concept that Statehood automatically implies notions of sovereignty is out-of-date? Such an argument would help to explain the Cook Islands' and Niue's own status – both are members of several organisations that require applicants to be 'States' (but not necessarily sovereign States), but are not members of the United Nations (where full sovereignty and a full international legal personality seem to be required). This also would fit with other analysis in this thesis – such as the significant identity-based links that still remain between New Zealand and the Cook Islands, as well as the ambiguity as to whether New Zealand would be liable in international law for any debt incurred by the Cook Islands' government. Furthermore, despite the Cook Islands' impressive diplomatic relations, it is not yet fully recognised as sovereign by other major States such as the US.[575] One can therefore argue that while the Cook Islands may not have an entirely unencumbered international legal personality (due to limited recognition of full sovereignty), it is – at least in some form – a 'State'.

[573] GA Res 1541, XV (1960).
[574] GA Res 2625, A/Res/2625 (1970).
[575] See the discussion above at 113 regarding the recognition of the Cook Islands.

Conclusion: Sovereignty as a Spectrum

Consequently, a major conclusion that can be drawn from this chapter is that the dividing line between a 'Territory' and a 'sovereign State' has become increasingly blurred since the formation of the United Nations. Similarly, there is growing evidence that 'States' do not necessarily have to be have full independence, full sovereignty and a completely unencumbered international legal personality. Part of the issue, in fact, is that the term 'sovereignty' seems to have been classified in absolute terms – territorial entities are either fully sovereign, or they are not. Although some of the Territories in this paper clearly meet the 'standard' view of what a Territory is (some control over domestic affairs, with no international legal personality), others have more power and status than the standard definition of 'Territory' would entail. One can instead perhaps view things as a spectrum, with 'Territory status' being at one end, and 'sovereign Statehood' at the other.

Figure One: A Spectrum of Sovereignty



Using this approach, Norfolk Island, Tokelau and American Samoa sit at the 'Territory' end of the spectrum: all three can be considered to be reasonably self-governing and in control of their domestic affairs;[576] however, it would be incredibly difficult to argue any of these Territories have any significant international legal personality.[577] French Polynesia and New Caledonia, on the other hand, sit near the middle: both have some competence over external affairs, and constitutionally can engage internationally with other Pacific Nations on areas that they have been given competence over; however, France retains significant veto power regarding the ratification of agreements that its Territories have entered into. Furthermore, while New Caledonia's external affairs provisions are based on an international treaty (the Nouméa Accord), and are therefore difficult

[576] A full discussion on domestic affairs is covered in Chapter IV at 71..
[577] Although Tokelau is an Associate Member of some organisations, such as UNESCO.

to modify, France can still alter the Statute of Autonomy of French Polynesia to further restrict French Polynesia's ability to engage on the international stage. Finally, the Cook Islands and Niue sit close to the 'sovereign Statehood' end of the spectrum – both have *de facto* control over their external affairs, have diplomatic recognition from many other States, and are members of international organisations (including those that are restricted to 'States').

However, perhaps the strongest theme in this chapter is the reinforcement that international law is highly contextual and more than just a little politicised, and whether or not criteria have been met may be superseded by political considerations. For instance, the concept of self-determination – and whether a people have exercised it – appears to be heavily influenced by a political discourse of decolonisation, as does the UN List of Non-Self Governing Territories. Similarly, whether or not any of the 'Territories' in this paper would be able to successfully apply for membership of the United Nations is likely to be heavily influenced by political considerations: one cannot see States facing secessionist action in parts of their territory readily agreeing to the Cook Islands becoming a member of the United Nations without New Zealand's explicit blessing and support for Cook Islands as an independent, sovereign State.

CONCLUSION

This paper finds that even though the United Nations-era has seen an extraordinary rise in the number of States in the international system, independent, sovereign Statehood is by no means that only status that territorial entities may take in international law. In particular, despite a significant United Nations' focus on all peoples exercising their right to self-determination, including three UN-ordained 'International Decades for the Eradication of Colonialism',[578] Territories still remain as a feature of international law, and especially so in the South-West Pacific.

Control over Domestic and External Affairs: A Comparison

What is even more interesting is the South-West Pacific Territories[579] have differing degrees of autonomous power. As an illustration, Table Nine below summarises the main findings of this paper regarding each of these Territories control over domestic and external affairs.

Table Nine: Control of Domestic and External Affairs

	Competence over domestic affairs	Competence over external affairs
Cook Islands	Full independence. New Zealand cannot legislate and does not intervene in domestic affairs.	*De facto* control over external affairs. Both are developing their own international legal personality.
Niue		
Tokelau	Each village deals with its own affairs, and the General Fono deals with national issues. In theory, the Administrator of Tokelau can overrule local legislation.	Limited participation in the international system. Usually represented by New Zealand where needed.
Norfolk Island	Can legislate for domestic affairs, but legislation must first be approved by the Australian-appointed Administrator.	Represented by Australia in the international system.
French Polynesia	Can legislate on specific enumerated matters, although the French-appointed High Commissioner can require reconsideration of legislation. French State can modify constitution.	Limited international legal personality. Allowed to engage with the Pacific, subject to some oversight by France.
New Caledonia	Can legislate on specific enumerated matters. French State can modify constitution.	
American Samoa	Can legislate for domestic affairs. In limited circumstances the US Secretary of the Interior can veto legislation.	Represented by the US in the international system.

[578] The three decades have been 1990-2000, 2000-2010, and 2010-2020:
International Decade for the Eradication of Colonialism GA Res 43/47, A/Res/43/47 (1988);
Second International Decade for the Eradication of Colonialism GA Res 55/146, A/Res/55/146 (2000);
Third International Decade for the Eradication of Colonialism 65/119, A/Res/65/119 (2010).

[579] Although, as discussed at 6, Wallis and Futuna is excluded from this study.

Freely Associated States: the Cook Islands and Niue

As shown in the table above, the Cook Islands and Niue, are both fully *independent* when it comes to exercising legislative competence over domestic affairs. Both the Cook Islands Constitution Act 1964 and the Niue Act 1974 declare that the Cook Islands and Niue are "self-governing", and the respective Cook Islands and Niue Constitutions clearly state that New Zealand cannot legislate for the Cook Islands or Niue.[580] Similarly, although these statutes note that foreign affairs remain the "responsibility" of the Queen in Right of New Zealand, both the Cook Islands and Niue have *de facto* control over their external affairs, and have pursued their own foreign policy, complete with accredited diplomatic relations with other States and full membership of some international organisations. The Cook Islands and Niue also have the ability to alter their constitutional status as "self-governing in free association with New Zealand".[581] Given this, one can see why it is possible to argue that the Cook Islands and Niue and not really Territories, but could instead be classed as States in international law.

Traditional Territories: Norfolk Island, Tokelau and American Samoa

Norfolk Island, Tokelau and American Samoa, on the other hand, fit far more within the traditional view of a 'Territory'. All three have some form of control over domestic affairs, subject to oversight by the relevant administering State. The American Samoan Fono, for example, has competence to legislate for "subjects of local application", which in practice has meant complete competence over domestic affairs. Similarly, both the Tokelau Act 1948 and the Norfolk Island Act 1979 provide local governments with the authority to pass legislation necessary for the "good government" of Tokelau and Norfolk Island respectively.[582] However, in all three cases this power is subject to some form of oversight. In Norfolk Island and Tokelau, local legislation is subject to disallowance by an administering-State-appointed Administrator. This disallowance also possible in American Samoa, although only in very limited cases (notably when the American-Samoan-elected Governor refuses to sign a piece of legislation passed

[580] That said, it is important to note that art 36 of the Constitution of Niue provides the New Zealand House of Representatives with the ability to legislate for Niue if Niue requests legislation is enacted, and then consents to that legislation entering into force.

[581] New Zealand Ministry of Foreign Affairs and Trade "Cook Islands: Country Paper" (7 November, 2012) <www.mfat.govt.nz>

[582] Tokelau Act 1948, s 3A; Norfolk Island Act 1979 (Cth), s 19.

by the Fono into law). Furthermore, in all three cases, the administering State retains the ability to pass legislation for the relevant Territory. All three Territories also have very little participation in international affairs, with foreign policy instead being the domain of the administering State.

Something inbetween: French Polynesia and New Caledonia

New Caledonia and French Polynesia occupy a different space than the 'Associated States' of the Cook Islands and Niue, and the 'Traditional Territories' of Norfolk Island, American Samoa and Tokelau. In particular, the Statute of Autonomy of French Polynesia and the Organic Law on New Caledonia (both of which were passed by the French Parliament) give these Territories competence to legislate on specific constitutionally listed matters, such as employment, communications, civil and commercial law, and education. However, in French Polynesia the French-appointed High Commissioner has the power to refer previously passed Bills back to the French Polynesia for consideration before he or she signs them into law. Similarly, in both French Polynesia and New Caledonia, the relevant High Commissioner has the power to refer Bills for judicial review in France (regarding that Bill's applicability under the relevant constitutional document).[583] The French Parliament also retains the right to modify the Statue of Autonomy of French Polynesia or the Organic Law on New Caledonia – and has done so in the past unilaterally. In effect, this means that France retains control over its Territories' constitutional documents. The exception to this is the transfer of limited enumerated powers from the French Republic to New Caledonia, which is guaranteed under the Nouméa Accord – a recognised treaty in international law.[584]

What this indicates is that both New Caledonia and French Polynesia have some competence over domestic affairs, but this is subject to oversight by the French State. However, unlike American Samoa, Tokelau and Norfolk Island, both New Caledonia and French Polynesia have some competence over external affairs – both are able to enter into diplomatic relations and treaties with Pacific territorial entities and relevant regional and international organisations, although French

[583] In New Caledonia, this judicial review is conducted by the French Constitutional Council, while in French Polynesia this judicial review is conducted by the French Council of State.
[584] Nic Maclellan "New Caledonia" in S Levine *Pacific Ways: Government and Politics in the Pacific Islands* (Victoria University Press, New Zealand, 2009) 130 at 134.

Polynesia is more restricted than New Caledonia in doing this. Finally, it is worth noting that New Caledonia's status is not set in stone – instead the Organic Law sets up a series of transitional transfers of competence over domestic affairs from the French State to New Caledonia, culminating in a series of referenda of New Caledonians as to whether New Caledonia should become an independent, sovereign State in international law, with full competence for both domestic and external affairs.

The link between Self-Determination and Competence

What the above summary illustrates is that the Territories which have formally achieved self-determination (as defined by the United Nations[585]) appear to again have more legislative competence than those who have not. In particular, the Cook Islands and Niue have both previously moved from Territory status to being considered by New Zealand as "self-governing in free association with New Zealand"[586] as a way of exercising self-determination. Similarly, New Caledonia is moving towards self-determination progressively – and New Caledonians did approve via referendum the Nouméa Accord. It is therefore striking that these three 'Territories' have far greater *de jure* independent control over their own affairs (and in the case of the Cook Islands and Niue, to alter their own constitutional arrangements – including their current status) than what is seen in Tokelau, Norfolk Island, French Polynesia, and American Samoa.

Thoughts on Free Association

It is clear that the concept of 'free association' has developed significantly since the 1960s, when it was included in General Assembly Resolution 1541 as one of the three alternate options that a people could pursue to achieve self-determination. At that time, 'free association' seems to have been synonymous with a Territory becoming self-governing over its domestic affairs, and was implied as a status that was not full Statehood in international law.[587]

[585] See for instance, GA Res 1541, XV (1960), which sets out three options for exercising self-determination: secession from, freely associated with, or integrating with an existing State.
[586] New Zealand Ministry of Foreign Affairs and Trade "Cook Islands: Country Paper" (7 November, 2012) <www.mfat.govt.nz>
[587] See for instance, the discussion at 24 in Chapter I regarding how communities can achieve self-determination via free association.

However, it now seems erroneous to think of free association as an *alternative* to full independence, especially as that view seems to create a 'liberal paradox' of forcing Territories to become free.[588] For instance, although they are not covered in great detail in this paper,[589] the Federated States of Micronesia, the Marshall Islands and Palau are all considered to be 'in free association' with the United States of America, while also being recognised as sovereign States.[590] Furthermore, the analysis in Chapters IV and V indicates that although there are some links between New Zealand and the Cook Islands, the Cook Islands has both *de jure* and *de facto* control over its domestic affairs as a self-governing country, and similarly also exercises independence over its external affairs. It is therefore *independent* and has some form of *sovereignty*. In fact, the reasons why New Zealand seems reluctant to declare that the Cook Islands is a sovereign State are due to constitutional complexity and ongoing constitutional links given the Cook Islands' membership of the Realm of New Zealand.

Given that New Zealand's own Ministry of Foreign Affairs and Trade has stated that the Cook Islands *acts* as though it is a sovereign, independent State, it is clear that the way in which 'free association' is considered by the United Nations needs to be reviewed. 'Free association' should not be seen as a contrast to Statehood, but instead as a constitutional structure that territorial entities (whether they are States or Territories) may adopt as a way of formalising a solid, collaborative relationship, where a smaller partner links or 'associates' itself in several ways to a larger partner. In fact, free association can work in tandem with Statehood (as seen in the Micronesia States), and a freely associated relationship should not indicate a territorial entity lacks Statehood. Indeed, a growing number of constitutional scholars now refer to territorial entities such as the Federated States of Micronesia, the Marshall Islands, Palau and the Cook Islands as 'Freely Associated States', indicating the growing blur between the statuses of 'Territories', 'Free Association', and 'Statehood' in international law[591].

[588] Gay Morgan ""Reflections on Pluralist Conundrums" (1998) 2(1) Yearbook of New Zealand Jurisprudence 71, at 83.
[589] Because they are in the North Pacific
[590] See the discussion in Chapter IV at 98 and Chapter V at 121.
[591] Ibid

Reconceptualising 'Statehood' in International Law

Chapter I set out that the 'traditional' and commonly used definition of statehood is a territorial entity that is recognised as *sovereign*, due to that entity's independent identity, independent legal personality, and independent control over its own affairs (which in turn means the absence of any provisions allowing another State to intervene in that entity's affairs). Most States, therefore, are seen as having 'independent, sovereign Statehood'

However, the above discussion on free association indicates that the traditional definition of Statehood may be too strict in twenty-first century international law. In particular, the acceptance of concepts such as 'Associated States' in the international community may be establishing a customary international law norm that Statehood does not necessarily require *complete* independence and recognition of full sovereignty, as was expected in the past. This is supported by the growing acceptance of Associated Statehood by international organisations: the Cook Islands and Niue, for instance, are members of UNESCO, which is only open to States in international law. However, the analysis in Chapter V indicates that the Cook Islands and Niue would likely face significant difficulty in joining the United Nations, due to a perception that neither entity is fully *de jure* sovereign. After all, Chapter III indicated that there are still significant identity, economic and judicial links between all of the Territories covered in this paper, and their administering States, including those questions surrounding what would happen should a Territory ever default on a loan contract in international law.

Consequently, this paper argues that the 'old' view of seeing Territories and States as either/or options does not effectively take into account the state of affairs in the twenty-first century. Territories are no longer usually seen as sub-State units that 'belong' to an administering State, with competencies over small matters of domestic affairs. Instead, the Territories covered in this paper have significant *de jure* and *de facto* control over their domestic affairs, and operate as semi-autonomous units within a fully sovereign State's wider realm, and in some cases operate as a partner alongside that sovereign State. Furthermore, as seen in recent developments such as the Nouméa Accord (1998), the Statute of Autonomy of French Polynesia (2004), and the Tokelau Amendment Act 1996, Territories are gaining *more* autonomy and control, rather than States restricting Territories'

power to control their own destiny. There is therefore a growing blur between where the definition of ‘Territory’ ends, and where the definition of ‘State’ begins. Similarly, it seems no longer appropriate to classify an entity as either having an international legal personality, or not having one at all. Instead, just like in many domestic jurisdictions, there are varying degrees of international legal personality, ranging from the ability to gain some form of diplomatic recognition from other entities, and the ability to enter smaller international organisations as an associate member, right up to full capacity to ratify international treaties and enter the United Nations as a fully sovereign State.

Accordingly, when considering the ‘status’ of South-West Pacific ‘Territories’ in international law, it is important not to fall into the trap of solely examining the *de jure* status of these entities, as defined in legislation passed by the administering State. Far more useful is to look at what happens in practice, and to make a *prima facie* assessment of which elements of Statehood an entity possesses. Only then, can an effective analysis occur.

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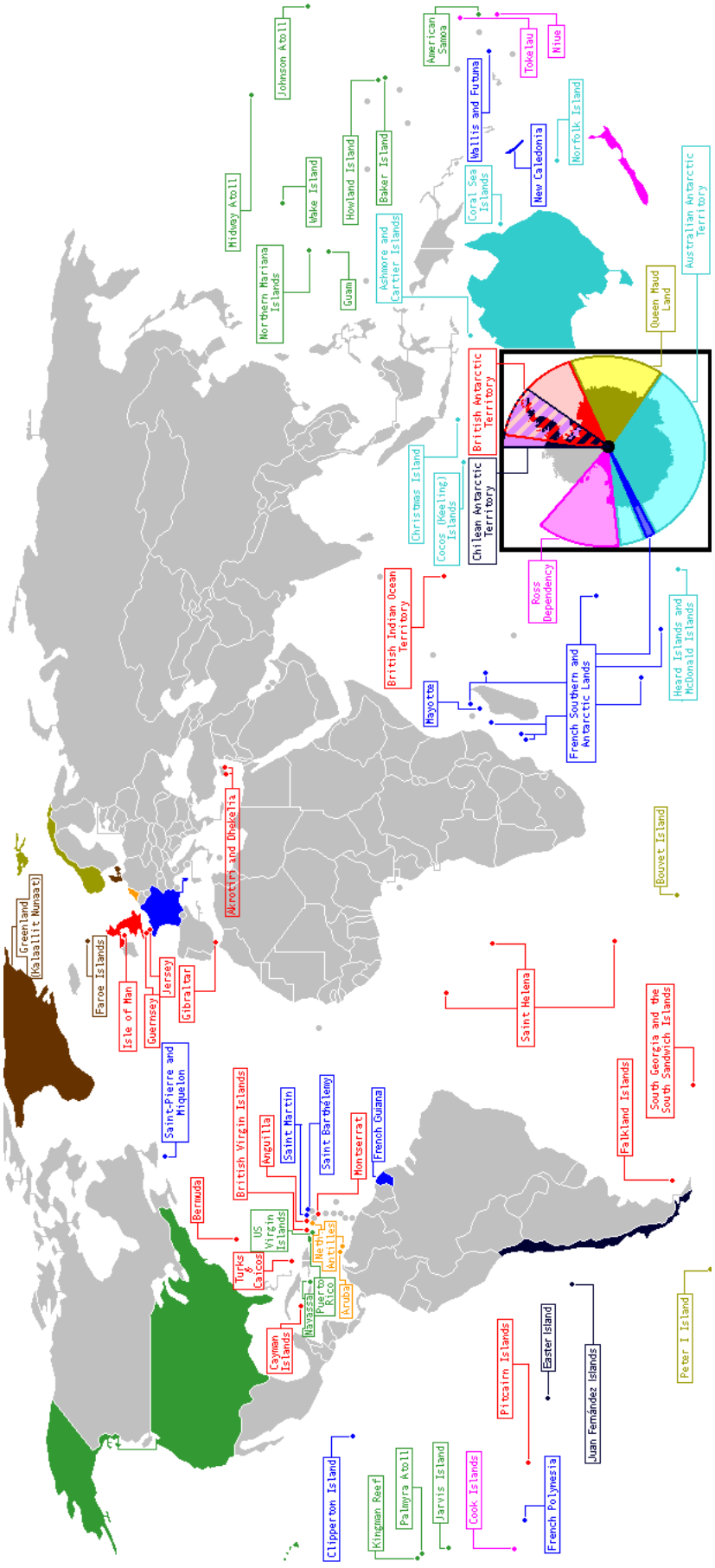
APPENDIX A: MAP OF THE SOUTH-WEST PACIFIC

APPENDIX B: EXTERNAL TERRITORIES IN THE 21ST CENTURY



APPENDIX C: BACKGROUND INFORMATION ON THE PACIFIC TERRITORIES

This appendix provides some background demographic and constitutional information on each of the territorial entities ('The Pacific Territories') covered in this paper. Demographic and geographical information is sourced from the CIA Factbook.[592] Constitution information is from the author's own research.

Cook Islands

Entity Name	Cook Islands
Administering State	New Zealand
Administrative Centre	Avarua (Rarotonga)
Head of State (*De Jure*)	Queen in right of New Zealand
Head of State (*De Facto*)	Queen's Representative
Head of Government	Prime Minister of the Cook Islands
Legislature	Cook Islands Parliament
Status (according to administering State)	Self-Governing in Free Association with NZ
Population	10,777 (July 2012 est.)
GDP (Total)	$183.2 million (2005 est.)
GDP per capita	$9,100 (2005 est.)
Land (Territory) size	236 sq km

Niue

Entity Name	Niue
Administering State	New Zealand
Administrative Centre	Alofi
Head of State (*De Jure*)	Queen in right of New Zealand
Head of State (*De Facto*)	Governor-General / Speaker of Niue Assembly
Head of Government	Premier of Niue
Legislature	Niue Assembly
Status (according to administering State)	Self-Governing in Free Association with NZ
Population	1,269 (July 2012 est.)
GDP (Total)	$10.01 million (2003 est.)
GDP per capita	$5,800 (2003 est.)
Land (Territory) size	260 sq km

[592] Central Intelligence Agency "World Factbook" (2010) <www.cia.gov/library/publications/the-world-factbook>

Tokelau

Entity Name	Tokelau
Administering State	New Zealand
Administrative Centre	Apia (Samoa: a different State)
Head of State (*De Jure*)	Queen in right of New Zealand
Head of State (*De Facto*)	Administrator of Tokelau
Head of Government	Ulu-o-Tokelau
Legislature	General Fono / Village Councils
Status (according to administering State)	Territory
Population	1,368 (July 2012 est.)
GDP (Total)	$1.5 million (1993 est.)
GDP per capita	$1,000 (1993 est.)
Land (Territory) size	12 sq km

French Polynesia

Entity Name	French Polynesia
Administering State	France
Administrative Centre	Papeete (Tahiti)
Head of State (*De Jure*)	President of France
Head of State (*De Facto*)	High Commissioner to French Polynesia
Head of Government	President of French Polynesia
Legislature	French Polynesia Assembly
Status (according to administering State)	Territorial Collectivity
Population	274,512 (July 2012 est.)
GDP (Total)	$4.718 billion (2004 est.)
GDP per capita	$18,000 (2004 est.)
Land (Territory) size	3,827 sq km

New Caledonia

Entity Name	New Caledonia
Administering State	France
Administrative Centre	Nouméa
Head of State (*De Jure*)	President of France
Head of State (*De Facto*)	High Commissioner to New Caledonia
Head of Government	President of New Caledonia
Legislature	Congress
Status (according to administering State)	Special Status (*Sui-generis*) Collectivity
Population	260,166 (July 2012 est.)
GDP (Total)	$3.158 billion (2003 est.)
GDP per capita	$15,000 (2003 est.)
Land (Territory) size	18,575 sq km

Norfolk Island

Entity Name	Norfolk Island
Administering State	Australia
Administrative Centre	Kingston
Head of State (*De Jure*)	Queen in right of Australia
Head of State (*De Facto*)	Administrator of Norfolk Island
Head of Government	Chief Minister of Norfolk Island
Legislature	Norfolk Island Assembly
Status (according to administering State)	External Territory
Population	2182 (July 2012 est.)
GDP (Total)	Not available
GDP per capita	Not available
Land (Territory) size	36 sq km

American Samoa

Entity Name	American Samoa
Administering State	United States of America
Administrative Centre	Fagotogo / Pagopago
Head of State (*De Jure*)	President of the United States of America
Head of State (*De Facto*)	US Secretary of the Interior
Head of Government	Governor of American Samoa
Legislature	American Samoa Fono (House / Senate)
Status (according to administering State)	Territory
Population	54,947 (July 2012 est.)
GDP (Total)	$575.3 million (2007 est.)
GDP per capita	$8,000 (2007 est.)
Land (Territory) size	199 sq km