

Opinion on certain maritime aspects of the draft Bill for an Act to Amend the Constitution of the Republic of Trinidad and Tobago to accord self-government to Tobago, to repeal the Tobago House of Assembly Act, Chap. 25:03 and for related matters

The policy to which the draft Bill seeks to give legislative expression is the grant of full internal self-government to Tobago as an integral part of the sovereign democratic Republic of Trinidad and Tobago. It is noteworthy that the policy of conferring greater autonomy on the proposed Tobago Island Government (**TIG**) is consistent with the thrust in Trinidad to grant greater devolution of authority to the Municipal Corporations.

Clause 4 of the draft Bill seeks, *inter alia*, to amend the Constitution to provide for definitions of the Island of Trinidad and the Island of Tobago in relation to the archipelagic baselines as well as the archipelagic waters and the territorial sea now appertaining to the republic of Trinidad and Tobago. The draft Bill in Clause 4(5) seeks to delineate a maritime area over which the Tobago Island Government would have jurisdiction. There is also language in Clause 4 which refers to the exercise by Trinidad and Tobago of sovereign rights over the living and non-living resources of the Exclusive Economic Zone (**EEZ**) and “**its**” continental shelf. It is to be noted in this regard that Trinidad and Tobago’s claim to the continental shelf is not restricted to the seabed and subsoil of the 200-mile EEZ but extends much further to 350 nautical miles from the territorial sea baselines and beyond.

In treating with the delineation of a maritime area over which the relevant Tobago institutions would have jurisdiction, taking into account the island’s constitutional history and the separation of its population by sea from Trinidad, consideration would need to be given to:

- (a) whether the jurisdiction to be conferred on the proposed TIG should extend to a designated area of maritime space around the island of Tobago (hereinafter referred to as the “Tobago Maritime Zone”);
- (b) how should the Tobago Maritime Zone be delineated or demarcated;
- (c) the envisaged spatial extent of the Tobago Maritime Zone; and
- (d) the powers and responsibilities exercisable by the TIG in the proposed Tobago Maritime Zone.

***Whether the jurisdiction to be conferred on
the proposed Tobago Island Government
should extend to the Tobago Maritime Zone***

It is not unreasonable to adopt the position that the TIG should possess the power to enforce its laws in the sea surrounding Tobago. If it were otherwise, the TIG would lack the authority to enforce certain laws relating to activities or operations in the waters adjacent to Tobago. For example, as part of its regulation of the use of certain equipment in the waters surrounding Tobago, the TIG may decide to impose restrictions on where such equipment may be used. It would need to have the requisite jurisdiction conferred by Parliament in order to enforce any such laws. As part of its responsibilities in telecommunications, the TIG would need to be vested with the authority to deal with violators of the relevant laws who might base their operations at sea in the waters surrounding Tobago in order to avoid the reach of a Government whose remit extends only to the terrestrial sphere and stops at the low-water mark.

Likewise, if the powers and responsibilities of the TIG include fisheries, it would need to have a clearly delineated maritime space over which its jurisdiction could be exercised. It is relevant to note in this regard that fisheries is one of those areas in respect of which the Republic of Trinidad and Tobago maintains, by treaty or agreements and arrangements made pursuant to various treaties, obligations to the other States of the international community which can only be properly carried out by the Central Government.

Accordingly, it is important to consider that any conferment of authority on the TIG for fisheries in the Tobago Maritime Zone would have to be made subject to the continuing authority of the Central Government to treat in that Zone with those fisheries matters for which it continues to have international responsibility on behalf of the Republic of Trinidad and Tobago. Any fisheries laws made by the Tobago Legislature would need to respect this existing separation of powers and responsibilities.

Management of the operational issues which would inevitably arise, in fisheries and other sectors, when two different entities exercise concurrent jurisdiction in the same space would need to be addressed and clarified in memoranda of understanding or protocols developed by the relevant divisions of the Central Government and the TIG.

In this regard, it is noteworthy that s.4 of the Tobago House of Assembly Act states in pertinent part as follows:

“4. No provision of this Act or of an Assembly Law shall be construed or interpreted so as to authorise—

(a) ...

(b) any operation of any Assembly Law beyond the confines of the island of Tobago and such part of the territorial sea of Trinidad and Tobago comprising those areas of the sea having as their inner limits the baselines of Tobago as determined in accordance with section 5 of the Territorial Sea Act, and as their outer limits, a line measured seaward from those baselines, every point of which is distant six nautical miles from the nearest point of those baselines unless the contrary is expressly stated therein;

(c) ...”

It is evident that the current *Tobago House of Assembly Act (THA Act)* envisages in *s.4(b)* that the operation of any Assembly Law would extend up to a distance of six nautical miles measured from the territorial sea baselines of Tobago as determined in accordance with *s.5* of the *Territorial Sea Act*. The territorial sea baselines mentioned in *s.5* of the *Territorial Sea Act* are in fact the archipelagic baselines of Trinidad and Tobago from which the breadth of the territorial sea of the State of the Republic of Trinidad and Tobago is measured. It is not known whether this provision of the THA Act has ever been operationalised.

In the course of extending the reach of Assembly Laws to the territorial sea, *s.4(b)* creates an implementation gap that could not have been intended when it describes the space over which the Laws would apply as constituting “*the island of Tobago and such part of the territorial sea ...*” By completely ignoring the archipelagic waters intervening between the land and the territorial sea, this description leads to an irrational result in which Assembly Laws would be capable of being applied on land and in the territorial sea but not in the intervening archipelagic waters.

Section 4(b) of the THA Act suffers from a second major defect. In the effort to define Tobago so as to include some maritime space over which Assembly Laws would be applied, Tobago is defined with reference to “*the baselines of Tobago as determined in accordance with section 5 of the Territorial Sea Act*”. Manifestly, no such separate archipelagic baselines exist for Tobago (or for Trinidad) in accordance with *s.5* of the *Territorial Sea Act*.

Whether or not *s.4(b)* has ever been operationalised, there is no gainsaying that this important provision of the existing THA Act is so defective as to render its effective implementation unlikely or problematic at best. Section 4(b) of the THA Act is relevant to a consideration of Clauses 4(4) and 4(5) of the draft Bill because they are both premised on the existence of archipelagic baselines separately around Trinidad and separately around Tobago. The draft Bill avoids the first defect of *s.4 (b)* of the THA Act by making specific mention of the archipelagic waters around Tobago, but it nevertheless imports the second major defect where it purports to define the Island of Trinidad and the Island of Tobago in relation to non-existent baselines around Trinidad and Tobago respectively. It bears repeating that the straight archipelagic baselines referred to in *s.5* of the *Territorial Sea Act* are baselines around Trinidad and Tobago and not baselines separately around Trinidad and separately around Tobago.

The first question may, therefore, be answered in the positive by virtue of the arguments advanced above as well as by reference to the intendment, not the actual operation, of *s.4(b)* of the THA Act. In sum, as a practical matter, the TIG would need to exercise some jurisdiction in the waters adjacent to the shores of Tobago. But, importantly, *s.4(b)* of the THA Act does not offer an appropriate guide as to how the Tobago Maritime Zone should be delineated or demarcated.

***How should the Tobago Maritime Zone
be delineated or demarcated***

The current draft Bill produced by the Tobago House of Assembly proposes that there should be a definition for the Island of Trinidad and the Island of Tobago as constituent parts of the Republic of Trinidad and Tobago. The Island of Trinidad is defined by reference to the archipelagic waters and the territorial sea of the Republic of Trinidad and Tobago adjacent to it. Likewise, the Island of Tobago is defined by reference to the archipelagic waters and the territorial sea of the Republic of Trinidad and Tobago adjacent to it. The resulting overlapping archipelagic waters and territorial sea between the Island of Trinidad and the Island of Tobago are then delimited by an equidistant line between north east Trinidad and south west Tobago.

It is noted that the approach to the creation in the draft Bill of what is here referred to as the Tobago Maritime Zone appears to be guided by the language and intent of s.4 (b) of the Tobago House of Assembly Act. Nevertheless, this approach is seriously flawed for the following reasons:

- (a) it presupposes that the archipelagic baselines can be divided up so as to allocate, attribute or otherwise appropriate some baselines or parts of some baselines and the waters they enclose as well as the seabed and subsoil and air space thereof separately to Trinidad and to Tobago; and
- (b) it assumes that proximity is a proper basis for allocation, attribution or appropriation of archipelagic waters and associated territorial sea and the rights associated therewith, notwithstanding the fact that the whole Republic of Trinidad and Tobago, from Charlotteville to Cedros, contributed to Trinidad and Tobago satisfying the water to land ratio of between 1 to 1 and 9 to 1 provided for in Article 47(1) of UNCLOS for the designation of archipelagic status.

Like the archipelagic baselines, the archipelagic waters and territorial sea, the sovereignty of the Republic of Trinidad and Tobago is not divisible and may not be shared in the way that Clause 4 of the draft Bill may unintentionally suggest.

UNCLOS, other rules of international law and the practice of States provide no support for the bifurcation of the archipelagic waters and territorial sea as proposed in the draft Bill.

Relevant International Law

It is settled international law that in the archipelagic waters and territorial sea the coastal State enjoys sovereignty and may exercise rights analogous to those exercised on its land territory, subject to the right of innocent passage by ships of other States.

The 1982 United Nations Convention on the Law of the Sea (**UNCLOS**) accordingly provides at Articles 2 and 49 as follows:

“Article 2

Legal status of the territorial sea, of the air space

over the territorial sea and of its bed and subsoil

- 1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.*
- 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.*
- 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.*

Article 49

Legal status of archipelagic waters, of the air space

over archipelagic waters and of their bed and subsoil

- 1. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.*
- 2. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.*
- 3. This sovereignty is exercised subject to this Part.*

4. *The regime of archipelagic sea lanes passage established in this Part shall not in other respects affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic State of its sovereignty over such waters and their air space, bed and subsoil, and the resources contained therein."*

Article 2 of UNCLOS unquestionably embodies both conventional and customary international law on the legal status of the territorial sea, of the air space over it and of the seabed and subsoil below it. Similarly, Article 49 of UNCLOS, in terms wholly coincident in substance and largely coincident in language with Article 2, embodies both conventional and customary international law on the legal status of archipelagic waters, of the air space over it and of the seabed and subsoil below it.

There are no archipelagic baselines separately enclosing Trinidad and no archipelagic baselines separately enclosing Tobago. The archipelagic baselines are indivisible. Map 1 demonstrates the existing fact that Trinidad and Tobago together satisfies the requirement in Article 47(1) of UNCLOS for the designation of archipelagic status. The total water area of the established archipelagic waters is approximately 7128.8 sq km versus the total land area contained within which is approximately 5181.2 sq km. The ratio of the two works out to approximately 1.376 to 1.

On the other hand, Maps 2 and 3 demonstrate that, separately, neither Trinidad nor Tobago can satisfy the requirement in Article 47(1) for the designation of archipelagic status. Regarding Map 2, the total water area of the possible claim of archipelagic waters for Trinidad is approximately 3282.4 sq km versus the total land area contained within which is approximately 4863.6 sq km. The ratio of the two works out to approximately 0.675 to 1. Regarding Map 3, the total water area of the established archipelagic waters for Tobago is approximately 125.8 sq km versus the total land area contained within which is approximately 317.6 sq km. The ratio of the two works out to approximately 0.396 to 1.

Assuming, therefore, that it was possible to divide the archipelagic baselines between Trinidad and Tobago, on the basis of the evidence contained in Maps 1, 2 and 3, it is difficult to discern any rational basis exists for attributing, even notionally, part of the archipelagic baselines to Trinidad and part to Tobago.

There is nothing to suggest in either Article 2 or 49 that it is possible to segment or apportion the archipelagic waters or the adjacent belt of territorial sea, qua archipelagic waters and territorial sea, and the sovereignty over the archipelagic waters, territorial sea, the air space above these areas as well as the seabed and subsoil below these waters to parts of the coastal State. Territorial sovereignty and sovereign rights in respect of the resources of the continental shelf adjacent to their coasts are attributes of coastal States themselves and not of their constituent parts.

The Practice of States in their Municipal Law

Several federal States including, the United States of America and Canada and unitary States with special constitutional arrangements such as the United Kingdom have had to deal with demands from those political divisions of the State with coastal frontages for ownership of maritime space, or ownership of the mineral resources of the seabed and subsoil, or for equitable sharing of the revenue generated by the development of the mineral resources, particularly, hydrocarbons, of the Continental Shelf.

United States of America

In the United States pursuant to the *Submerged Lands Act* passed by Congress in 1953, the seaward extent of the jurisdiction of the littoral states of the Federation are as follows:

- Texas and the Gulf coast of Florida are extended 3 marine leagues (9 nautical miles) seaward from the baselines from which the breadth of the territorial sea is measured.
- Louisiana is extended 3 U.S. nautical miles seaward of the baselines from which the breadth of the territorial sea is measured.
- All other States' seaward limits are extended 3 International Nautical Miles seaward of the baselines from which the breadth of the territorial sea is measured.¹

Although power over navigation, commerce and international affairs was specifically retained by the United States under the Act, the grant to the states was quite broad, including the mineral, fishery and plant resources of the seabed and water column.

When in 1976 Congress passed the *Fishery Conservation and Management Act* which extended United States fisheries management jurisdiction to 200 miles seaward of the territorial sea baselines, state control over the fishery within the three mile zone was retained. The states continue to manage fisheries in the territorial sea subject to constitutional restraints, pre-emption by inconsistent federal law, and the possibility of federal override of state jurisdiction by the Secretary of Commerce in the case of fish stocks found predominantly within the 197-mile zone seaward of state jurisdiction.²

Canada

In Canada the Courts have consistently ruled that sovereignty of the territorial sea was vested in the State and not the provinces, unless the constitutional and historical record of the province indicated that a different outcome was legally merited.

¹ U.S. nautical mile = 6080.2 feet; International nautical mile = 6076.10333 feet.

² Thomas J. Schoenbaum & Frank Parker Jr., *Federalism in the Coastal Zone: Three Models of State Jurisdiction and Control*, 57 N.C. L. Rev. 231 (1979).

In Newfoundland and Labrador given its peculiar constitutional position when it joined the Union in 1949, the provincial Court of Appeal held that the province exercises jurisdiction from the low-water mark on the coast to three (3) miles offshore; jurisdiction from three (3) to twelve (12) miles rests with Canada. The Court of Appeal decided in favour of Canada in respect of rights available on the continental shelf.

In the *Hibernia Reference*, the *British Columbia Reference* and the *Newfoundland Reference*³, the Supreme Court of Canada has decided in favour of Canada with respect to continental shelf rights. The Court has held for a province to sustain a claim to continental shelf rights, there would need to be clear evidence from the constitutional or historical records that the province had been in a position to acquire, and had acquired extra-territorial rights of a nature that allowed it to claim jurisdiction over the Continental Shelf.

The main jurisdictional disputes over rights to the continental shelf ended in 1985 when the Government of Canada entered into joint management and revenue-sharing agreements with the provinces in respect of the hydrocarbon resources of the Continental Shelf. The provinces will be entitled to collect revenues from continental shelf operations as if the resources were located on land.

United Kingdom

In 2010 it was estimated that the Scottish share of total oil production in the United Kingdom Continental Shelf was more than 95% while for gas it was 58%. The Scottish share of total hydrocarbon production (including natural gas liquids) was 80%. The Scottish share of tax revenues generated from the oil and gas industry exceeded 90%. This reflected the much higher value of oil compared to gas.

It was estimated in 2010 that if Scotland were to obtain a "geographical share" of revenues based on the median line, about 90% of the United Kingdom's oil resources would be under Scottish jurisdiction.

Notwithstanding its dominant contribution to hydrocarbon production in the United Kingdom, as part of the unitary State, Scotland receives a per capita share of the revenues accruing to the Government from the production of oil and gas in the North Sea.

Revenue sharing

The draft Bill does contemplate equitable revenue sharing from the mineral resources of Trinidad and Tobago's Continental Shelf. Presumably, the request for revenue sharing would apply as well to the Extended Continental Shelf in respect of which the United Nations Commission on the Limits of the

³ Ian Townsend Gault, *Jurisdiction over the Petroleum Resources of the Canadian Continental Shelf: The Emerging Picture*, XXIII No. 1 Alberta L. Rev. 75 (1985)

Continental Shelf (**CLCS**) now has for consideration a submission from Trinidad and Tobago made in 2009 to extend the State's continental shelf jurisdiction beyond 200 nautical miles from the territorial sea baselines.

To the extent that the draft Bill seeks to define Tobago by reference to the archipelagic waters and the territorial sea, it may also contemplate ownership of the mineral resources located within the waters of Tobago as defined. For the reasons already adumbrated, such a claim would be technically fraught and could give rise to some foreseeable constitutional difficulties, including on equal treatment grounds. The revenue-sharing provisions addressed later in the draft Bill would avoid this potential constitutional hurdle.

In any event, from a practical standpoint, it is worth considering whether advancement of such a claim would be a worthy issue for negotiation and compromise, especially when regard is had to the fact that the geology and geomorphology of the seabed and subsoil of the area near to Tobago suggests that the prospects of finding hydrocarbons in commercial quantities within the territorial sea so close to the shores of Tobago may not be particularly promising.

Being geographically the most easterly and therefore the most seaward part of the Republic of Trinidad and Tobago, Tobago contributes to the unitary State by permitting Trinidad and Tobago to project its claim to the Continental Shelf and the Extended Continental Shelf appertaining to its landmass much deeper into the Atlantic Ocean than would be the case if Tobago did not exist or was not part of the Republic of Trinidad and Tobago. Accordingly, a strengthening of the draft provisions on revenue-sharing from the resources of the Continental Shelf located in deeper waters, including the resources of the Extended Continental Shelf, is likely to yield a greater return to Tobago than an arguably misplaced focus on the prospects of ownership or even revenue-sharing from the hydrocarbon resources of the subsoil of the territorial sea. Such strengthening could conceivably include provisions for the deposit of a percentage of revenue earned from deep water development of hydrocarbons into a recast Tobago Development Fund in which political control is lessened and citizen involvement is magnified.

Since the national budget currently is based in part on revenues received from the development of the hydrocarbon resources of the Continental Shelf and Tobago presently receives a share of the budget based on the recommendation of the **Dispute Resolution Commission**, if a formula is devised to permit the deposit of a share of the revenue from the development of the resources of the Continental Shelf and Extended Continental Shelf into the Tobago Development Fund, such a formula would need to avoid Tobago being seen to dip twice into the same revenue stream.

Definition of Trinidad and Tobago

Section 1(2) of the Constitution of the Republic of Trinidad and Tobago provides as follows:

“Trinidad and Tobago shall comprise the Island of Trinidad, the Island of Tobago and any territories that immediately before the 31st day of August 1962 were dependencies of Trinidad and Tobago, including the seabed and subsoil situated beneath the territorial sea and the continental shelf of Trinidad and Tobago (“territorial sea” and “continental shelf ” here having the same meaning as in the Territorial Sea Act and the Continental Shelf Act, respectively), together with such other areas as may be declared by Act to form part of the territory of Trinidad and Tobago.”

The opportunity should be taken to amend this sub-section of the Constitution to introduce the concept of archipelagic waters before mention is made of the territorial sea. The definition of the Republic of Trinidad and Tobago used in current Double Taxation and Air Services Agreements may be adopted or adapted for this purpose.

The envisaged spatial extent

of the Tobago Maritime Zone

Assuming that the stated defects did not impair the definitions of Trinidad and Tobago in Clauses 4(4) and 4(5) of the draft Bill, the mere attribution of part of the archipelagic waters and territorial sea to Trinidad and part to Tobago, without more, might lead to the impression that, subject to the right of innocent passage by other States, these two constituent parts of the Republic of Trinidad and Tobago would enjoy in their respective maritime areas, sovereignty over the waters, the living resources of the water column, the non-living resources of the seabed and subsoil, and the air space above these areas. If, rather, it is intended that Parliament would confer certain limited, shared or negotiated rights on the Tobago Legislature and the TIG, in the context of a purely domestic arrangement between the Tobago House of Assembly and the Central Government of the Republic of Trinidad and Tobago, then the definition of the Island of Tobago and the Island of Trinidad as proposed in the draft Bill is not necessary.

Of course, the indivisibility of both the archipelagic waters and the territorial sea appertaining to the Republic of Trinidad and Tobago as well as the sovereignty which the coastal State enjoys in these maritime areas does not mean that the State is unable, as part of a purely domestic arrangement, to confer certain powers and responsibilities on constituent parts of the coastal State. Bearing in mind that Trinidad and Tobago’s rights in respect of the territorial sea, archipelagic waters and Continental Shelf arise not from domestic law but from its legal basis of title under international law, the State is free to confer powers and responsibilities on its political divisions, while respecting the international obligations that it is tasked with fulfilling on the international plane.

Whether a delimitation of the maritime space between Trinidad and Tobago would be necessary or desirable would depend, in part, on:

- (a) the powers and responsibilities which are to be conferred on the Tobago Legislature and the TIG;
- (b) the powers and responsibilities which would continue to reside with the Central Government in relation to Tobago; and
- (c) the arrangements proposed in the draft Bill for enhanced sharing of revenue derived from the development of the hydrocarbon resources of the continental shelf and extended continental shelf.

It would in the circumstances be sufficient to delineate or demarcate an area around Tobago that is up to eleven (11) miles from the low-water mark on the coast of Tobago. Eleven miles is suggested as the upper limit for delineation of the Tobago Maritime Zone because anything in excess of 11 miles would involve a delimitation of the maritime space off the north east tip of Trinidad and the south west coast of Tobago.

In any event, a Tobago Maritime Zone drawn from the low-water mark could result in a larger maritime area falling under the jurisdiction of the Tobago Legislature and the TIG than would have been possible from the application of a s.4 (b) of the Tobago House of Assembly Act, assuming that the provision could have been operationalised if it had been amended to cure the deficiency posed by the absence of any straight baselines off Tobago's west coast.

***The powers and responsibilities exercisable by
the TIG in the proposed Tobago Maritime Zone***

It is recognised that the powers and responsibilities of the Tobago Legislature and the TIG would be subject to the stated residual powers and responsibilities of the Central Government in Tobago. Likewise, the jurisdiction conferred in respect of the Tobago Maritime Zone would need to be subject to:

- (a) applicable constitutional restraints;
- (b) pre-emption by inconsistent laws of the Republic of Trinidad and Tobago; and
- (c) the possibility of Central Government override of Tobago jurisdiction in the case of fish stocks found in the EEZ predominantly outside of the Tobago Maritime Zone or which are subject to international rules and regulations binding on the Republic of Trinidad and Tobago.

Conclusion:

The Republic of Trinidad and Tobago as a whole contributed to Trinidad and Tobago being able to satisfy the formula for drawing archipelagic baselines in accordance with Article 47(1) of UNCLOS. The archipelagic baselines are therefore indivisible.

It is not necessary to distinguish between the various maritime zones - archipelagic waters, territorial sea, EEZ and Continental Shelf – appertaining to Trinidad and Tobago under international law when conferring powers and responsibilities on political divisions of the State, provided it is recognised that, subject to the right of innocent passage, rights of the coastal State in the archipelagic waters and territorial sea are analogous to the rights on land, but the rights in the EEZ and Continental Shelf include sovereign rights in respect of the natural resources which do not extend to sovereignty over these two maritime zones.

The equidistant line provision in Clause 4 of the draft Bill is undesirable because it is designed to bifurcate the archipelagic waters and territorial sea and to attribute part of these maritime zones, over which the State is sovereign under international law and domestic law, to Trinidad and to Tobago, respectively. It is also unnecessary because a similar outcome can be secured by a maritime zone established seaward of the low-water mark off Tobago, without reference either to archipelagic waters or the territorial sea and without recourse to maritime delimitation between the island of Trinidad and the island of Tobago.

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