

**THE TOBAGO TEAM'S COMMENTS ON THE PROVISIONS OF THE CONSTITUTION
(AMENDMENT) (TOBAGO) BILL 2013**

1.0 Legislative Powers

1.1 Provision for Legislative Powers in the 2013 Bill

It is argued that the 2013 Bill provides the THA with law making power as it establishes a "Legislature of Tobago," comprising a House of Assembly and the President. This is provided in **Chapter 11A, Section 141A. (1)** of the Bill. By virtue of this section, the Legislature is named "**the Tobago House of Assembly,**" and the Tobago House of Assembly is made up of the President and a House of Assembly. By subsection (2), the composition is broadened to include a Presiding Officer and other members. However, the definition section which is section (4) of the Bill indicated that the Assembly is the Tobago House of Assembly.

The Bill is unclear as it establishes four (4) distinct bodies. These are as follows:

- The Assembly;
- A House of Assembly;
- The Tobago House of Assembly; and
- The Executive Council.

Chapter 11A, Section 141B (2) erodes any vestige of law making power. Chapter 11A, Section 141B (3) further reinforces this erosion in a state of emergency.

1.2 The status quo regarding Legislative Powers

By Section 29 of the Tobago House of Assembly Act, 1996, the Assembly was provided with the power to make laws in 32 areas under the Fifth Schedule of the Tobago House of Assembly Act, 1996. The unfulfilled challenge of that section is the mechanism for law-making.

1.3 Advantages and disadvantages of the 2013 Bill regarding Legislative Powers

The 2013 Bill provides for the President to be a part of the Tobago Legislature. This seems to expedite the format for law making by the Tobago House of Assembly. Under the Tobago House of Assembly 1996 Act, proposed Assembly laws had to be submitted through Cabinet, Parliament and then the President.

Positively, the Bill also specifically provides for a functionary who would guide the law making in the Assembly through a Secretary specifically responsible for legal matters by Section 141C. (1).

One disadvantage of the provision for law-making in the 2013 Bill is that the areas for which laws can be made are reduced. In the 2013 Bill, the Fourth Schedule List II – TOBAGO LIST, omits the following areas whereas they were within the jurisdiction of the Fifth Schedule of the Tobago House of Assembly Act, 1996.

Law making powers have been taken away in the following areas:

- The maintenance of the residences of the President and the Prime Minister
- Infrastructure, including air and sea transportation, wharves and airports and public utilities
- Telecommunications
- Highways and roads (changed to public infrastructure including roads and bridges)
- Industrial development
- Customs and Excise
- Tertiary Education
- Marketing
- Valuations
- Postal services and collection of revenue therefrom
- Statistics and information
- Plant and animal quarantine

Not only is the “Tobago List” reduced, but the 2013 Bill states that Parliament may unilaterally make laws to override the lawmaking power of the Tobago Legislature. All that Parliament is required to do, in certain circumstances is to consult with the Tobago Legislature before this is done. Given the history of lack of meaningful consultation in Trinidad and Tobago, safeguards for ensuring meaningful consultation should have been inserted in the legislation. There is no provision that the desires of the Tobago Legislature will be fulfilled. Added to this, since the Tobago Legislature includes the President, consultation may be held with the President as part of the Legislature. The Bill failed to adopt the basic safeguard of providing for the Government to Act in accordance with the consultation with the Executive Council of the Assembly.

Further to this, Parliament may override or make laws for Tobago in the national interest, or in a state of emergency. By the 2013 Bill, only Parliament may make laws with regard to Customs and Excise whereas previously this was within the Fifth Schedule of the Tobago House of Assembly Act 1996.

In further derogation of the powers of the Tobago House of Assembly, the 2013 Bill introduces a new concept of a Concurrent List in Clause 6(c)(2)(b) of the 2013 Bill and the Fourth Schedule List I – CONCURRENT LIST. Under the Concurrent List, the Tobago Legislature was given power to make laws in Tobago for the following areas:

- Air and sea transportation;
- Airports and wharves;
- The Central Statistical Office;
- The Exclusive Economic Zone;
- Inter-governmental Affairs;
- Legal Affairs including the registration of legal documents;
- Plant and animal quarantine;
- Telecommunications;
- Tertiary education;
- Public utilities;
- Land use policy and valuations; and
- Energy and energy affairs.

To say that the Tobago House of Assembly would have lawmaking powers for matters in the Concurrent list is deceptive, as any law made by Parliament which contradicts the law made in Tobago would render the Tobago law null and void. Therefore, the Tobago Legislature could make a law and if the central Government does not approve of that law, the Parliament can by a simple majority pass a new law to make the law in Tobago null and void¹... Clause 6 of the 2013 Bill proposes an amendment to Section 53 of the Constitution whereby any law made by the Tobago House of Assembly in respect of matters on the “Concurrent List” will be rendered null and void if inconsistent with any law made by the Parliament, whether made before or after that made by the Tobago Legislature. It is material to note the crucial areas of concern that are included in the “Concurrent List” such as Air and Sea Transport.

Added to this, the Parliament would not need to consult Tobago or inform the Tobago Legislature of any intention which Parliament has to override Tobago’s laws. By a simple majority, Parliament would nullify the Tobago laws for matters on the Concurrent List.

The situation is similar with regard to policy making. The 2013 Bill at Clause 8 (1) (b) states that the Cabinet would consult with the Executive Council in relation to the matters on the Concurrent List. There is no provision that Cabinet has to take the advice of the Executive Council or that there has to be agreement.

1.4 Tobago's Position

It is the responsibility of the Tobago Administration to formulate and implement policy on all matters affecting the lives of people resident in Tobago and that the Tobago administration should have the freedom to make laws to govern Tobago. Consequently, the Tobago Administration should have the power to make laws for the peace, order and good government of Tobago and in respect to the matters for which it has responsibility.

2.0 Executive Authority – Cabinet

2.1 Provision for Executive Authority - Cabinet in the 2013 Bill

It is purported that the 2013 Bill imbues the Assembly with executive authority through the Executive Council.

Under the Constitution Amendment Act 39 of 1996 and the Tobago House of Assembly Act, Number 40 of 1996, Section 3, the definition of the Tobago House of Assembly included the Executive Council. In the 2013 Bill, the Executive Council is no longer a part of the Tobago House of Assembly. Instead Section 141C. (2) clearly states that the Executive Council would be collectively responsible to the Assembly. Should this definition of the Assembly include the President, the decision-making of the Executive Council can be called into question by the President, as well as Cabinet and Parliament. By virtue of Clause 8 (1) (a) of the 2013 Bill, Cabinet has “***the general direction and control of the Government of Trinidad and Tobago***”. Further to this, by Clause 8 (1) (e) of the 2013 Bill, Cabinet is collectively responsible to the Parliament.

2.2 The status quo regarding Cabinet

By Section 25 of the Tobago House of Assembly Act, 1996, the Assembly was provided with the power to formulate and implement policy in 32 areas under the Fifth Schedule of the Tobago House of Assembly Act, 1996. This power was without prejudice to Section 75 (1) of the Constitution and not subject to it.

2.3 Advantages and disadvantages of the 2013 Bill regarding Cabinet

The provisions of the 2013 Bill remove from Tobago the power of formulation and implementation of policy on nine of the thirty-two critical matters now under the responsibility of the Assembly.

2.4 Tobago's Position,

In keeping with the fundamental requirements expressed by the people of Tobago, the decisions of the Tobago Executive can only be overridden by the Tobago Legislature, on the basis established by that Legislature. Any other arrangements would be undemocratic and would be contrary to the principles of democratic Self- Governance.

3.0 Budgetary Allocation

3.1 Provision for Budgetary Allocation in the 2013 Bill

In the 2013 Bill, the minimum budget allocation is locked in. There is no provision for alteration and no provision for attaining equity in terms of development. Review can only be done based on certain specific conditions, which are not yet prescribed.

3.2 The status quo regarding Budgetary Allocation

Based on the Dispute Resolution Commission (DRC), the annual budget allocation is 4.03 to 6.9% of the national budget, which must be credited to the Assembly Fund in quarterly releases, in advance, 'en bloc'.

3.3 Advantages and disadvantages of the 2013 Bill regarding Budgetary Allocation

Clause 10 of the 2013 Bill deals with the provision of resources to Tobago from the Consolidated Fund. The 2013 Bill states that the provision to Tobago in any financial year shall be between 6.9% and 8% of the annual budget. However, over the period of application of the DRC's formula, the allocation to Tobago exceeded the threshold of 4% on only one occasion.

Such a provision in the 2013 Bill guarantees that Tobago has some level of predictability. It provides reliance in terms of budgetary support. However, the provision for this guarantee needs to be reformulated and take into consideration the developmental disadvantages that exist between the islands. The provision for a grant by a single percentage point does not adequately treat with the development needs of Tobago and its ability to contribute meaningfully to the development of the country.

Added to this, such a provision is at odds with the principle of self-determination stated by ANR Robinson and reiterated by the Prime Minister, the essence of which is the meaningful participation in decision-making and development processes. This deprives Tobago of any participation in the share in the economic main vein of the country and being able to determine its own long term development indicators.

3.4 Tobago's Position

The mechanisms for funding Tobago's development must include a Grant element of predictability in an annual allocation of 8% of the national budget and access to funds through other means as follows:

- a) Ability to access donor funds
- b) Ability to impose taxes and grant concessions.
- c) Ability to raise loans on its own credibility
- d) Revenue-sharing mechanism

4.0 Maritime Boundaries

4.1 Provision for Maritime Boundaries in the 2013 Bill

It is argued that the 2013 Bill imbues the Tobago House Assembly with broader physical jurisdiction in terms of the territorial sea.

4.2 The status quo regarding Maritime Boundaries

By Section (4) of the Tobago House of Assembly Act 1996 [not by the Constitution], the Assembly has jurisdiction up to six nautical miles in which to operate.

4.3 Advantages and disadvantages of the 2013 Bill regarding Maritime Boundaries

Another deceptive provision is the one that purports that Tobago can make laws in Tobago for the EEZ (Fourth Schedule, List I – CONCURRENT LIST No. 4)². Such a provision cannot be implemented as it is at variance with the jurisdictional limit of Tobago as set out in Clause 141F of the 2013 Bill (11 nautical miles). In terms of internal waters, an equidistant arrangement will lead to a fair sharing of resources between the Islands. This formula will aid in promoting certainty in the exercise of the jurisdiction of the legislative powers of the Legislature of Tobago or the Parliament when making laws for Trinidad.

With regard to the EEZ, the Constitution should be amended so that it provides for Tobago to have the management and control of the resources over an agreed area of the EEZ. The Tobago Administration will then lead in decisions on the investment and exploitation contracts within that area and access the benefit of these resources.

The Tobago Team proposes the establishment of a Fiscal Commission for Trinidad and Tobago. Part of the mandate of that Fiscal Commission should be to work out an agreed share of resources from within a certain area of the EEZ for Tobago. However, initial proposals can be worked out based on recognized experiences from other jurisdictions, which can be used to provide guidance.

The Minister of Energy and Energy Affairs [*at that time*], Ms. Carolyn Seepersad-Bachan in July 2011, is quoted, in a document of a working committee on the Law of the Sea and Tobago's rights as follows:

“Here, too, I want to assure you that under my watch as Energy and Energy Affairs Minister, Tobago will finally receive equity in the distribution of our energy wealth.”

Consequently, there is recognition on the government's side that greater equity needs to be applied in the sharing of the nation's resources to its component parts.

4.4 Tobago's Proposals

Delineation of the boundaries is supported by the Constitution. Therefore, one must apply universally accepted methods of establishing boundaries between entities as a method for demarcation of the boundaries of the island of Trinidad and of Tobago. In terms of internal waters, an equidistant arrangement should apply and the full limit of the territorial waters be established as the points of demarcation.

² Again, see footnote No.1 above

5.0 Power to borrow

5.1 Provision for the Power to borrow in the 2013 Bill

The 2013 Bill purports to empower the Tobago House Assembly to obtain additional funds through borrowing. Chapter 11A, Section 141E provides the Tobago House of Assembly with the limited ability to borrow up to 15% of its Public Sector Investment Programme (PSIP) in the first year and an unknown prescribed percentage thereafter.

The provision for borrowing is inadequate and formalizes the perpetual state of underfunding and underdevelopment that exists. It perpetuates the undesirable maintenance of the inequitable relationship between Trinidad and Tobago that currently exists. It does not provide the impetus to enter into a higher trajectory of development.

The borrow provision is gravely restrictive since it ties that power to the percentage of the National budget given to Tobago through the (PSIP). It is further restrictive since it also limits that power to the aggregate of such percentage for the subsequent year³.

5.2 The status quo regarding the Power to borrow

Section 51 of the Tobago House of Assembly Act 1996 provides for the Secretary of Finance with the Assembly's approval to borrow, by way of overdraft, sums considered necessary to discharge the Assembly's functions, or with the approval of the Minister of Finance, to borrow by way of term loans for capital investment.

5.3 Advantages and disadvantages of the 2013 Bill regarding the Power to borrow

The Bill recognizes the need to allow the Tobago Administration to borrow without recourse to the Minister of Finance. However, it limits such borrowing to 15% of the Tobago PSIP. It **does not** allow for borrowing on overdraft that is necessary to meet shortfalls on a short-term basis, as is currently available by Section 51 of the Tobago House of Assembly Act 1996. Furthermore, the limit of 15% on PSIP is restrictive and appears to be an arbitrary imposition that does not take cognizance of the myriad factors that influence budgetary allocations. The PSIP allocated to Tobago traditionally amounts at best, to a mere

³ See Section 11 of the Bill as it proposes to introduce Section 141E of the Constitution.

18% of the development proposals put forward. Borrowing 15% of that would consequently allow an aggregate of 21% of the amount budgeted and requested by the Assembly. Furthermore there is the compounded lag effect of the underfunding that requires major injections to catch up. The provision in 2013 Bill will not give impetus to the developmental thrust.

5.4 Tobago's Proposals

Analysis of revenues collectable and projections of the size and structure of its economy are the proper bases for leveraging developmental funding. A debt limit can be calculated based on generally acceptable principles that are used in operation for national and sub-national budgeting and planning. To guide borrowing, Tobago has obtained the applicable rating of BAA from Moody's, on terms similar to national governments. Tobago must have the right and power to borrow on its own accord, subject to sound principles at the Tobago level. These principles will be entrenched in Tobago Law and overseen by the Tobago Legislature.

6.0 Other Legislative Changes

6.1 Provisions in the 2013 Bill

The 2013 Bill purports to give Tobago law making power.

6.2 Advantages and disadvantages of the 2013 Bill regarding Other Legislative Changes

While the 2013 Bill makes provisions in certain areas of concern to Tobago, the provisions made, do not advance the self-determination of Tobago which include:

- i. Equality of Status between the islands and a constitutional, legislative and administrative framework reflecting such equality;
- ii. A Federal-Type System of Governance;
- iii. Authority and responsibility in the Tobago Administration to formulate and implement fiscal policy, including taxation measures;
- iv. Legal framework providing for the wider participation of society in the decision-making process of the Tobago Administration;
- v. Management and control for the inter-island transportation system to reside in Tobago.

Consequently, the Bill fails to advance the requirements of the people of Tobago even in basic areas. It also fails to address the fundamental human rights issue of self-determination.

6.3 Tobago's Position

The Tobago Legislature must have the unfettered power to make laws for the peace, order and good government of Tobago.

7.0 Conclusion

The Government Team is urged to review and give due consideration to the Tobago Position in the manner in which the Tobago Team has considered the 2013 Bill. Legislation should be drafted to accomplish the desired rights-based outcomes necessary for Tobago to attain democratic self-government, giving the island and its people the chance to address the matters that affect their lives directly.