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ORGANISATION OF EASTERN CARIBBEAN STATES

**EVALUATION OF EXISTING OECS
LEGISLATIVE PROCEDURES AND THE
ESTABLISHMENT OF A ROAD MAP FOR
GOING FORWARD**

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LIST OF ACRONYMS

CARICOM	Caribbean Community including the CARICOM Single Market and Economy
ECJ	European Court of Justice
EC	European Community
ILC	International Law Commission
JCPC	Judicial Committee of the Privy Council
OECS	Organisation of Eastern Caribbean States
OECSEU	Organisation of Eastern Caribbean States Economic Union
RTB	Revised Treaty of Basseterre Establishing the OECS
RTC	Revised Treaty of Chaguaramas Establishing Caricom
UNCLOS	United Nations Convention on the Law of the Sea 1982
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

SUMMARY OF CONCLUSION AND RECOMMENDATIONS

CONCLUSIONS

- The Nature of Treaty obligations is eminently reflected in the well-known principle *pacta sunt servanda* which requires treaties to be fulfilled in good faith as encapsulated in Article 26 of the Vienna Convention on the Law of Treaties (VCLT). And the rights and obligations of States parties to treaties may be augmented by the subsequent practice of states which incontrovertibly exemplifies the interpretation of these international instruments.
- Monism and Dualism are international law constructs conceptualised by authoritative publicists to explain the differential incidence of treaties in the jurisdictions of states of the international community. In states subscribing to monism, treaties concluded by the executive at the international plane have direct legal effect for private entities at the municipal plane, while in dualist jurisdictions such treaties have to be enacted into law by legislatures in order to have legal effect for private entities at the municipal plane. Consequently, dualism operates as a prophylactic juridical principle insulating the ordinary citizen from the consequences of executive lawlessness. Analysis of these constructs tends to confirm the supremacy of international law over municipal law.

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- Article 5 of the RTB in the ultimate analysis suffers from normative dissonance in attempting to encourage parties to the RTB to contract out of the primordial obligation to fulfil treaty obligations in good faith without engaging responsibility for noncompliance with obligations undertaken. This stratagem was an attempt by competent decision-makers not constitutionally entitled to delegate to treaty bodies the authority to legislate with direct effect, to avoid biting the bullet of resorting to referendums to bring national constitutions in compliance with international obligations voluntarily assumed in good faith.
- As an attribute of sovereignty OECS independent states may enter reservations to multilateral treaties or plurilateral treaties like the RTB provided such reservations are not incompatible with the object and purpose of that instrument and are accepted by all the States parties of the collectivity and the competent organ of the Organisation.
- Functions of the principal organs are clearly allocated and articulated in the RTB and relevant rules of procedure but some procedural requirements for arriving at decisions tend to be obscure or indeterminate in effects.
- In establishing procedures for the development and enactment of legislation for the OECS Economic Union the Commission should be mandated to play a coordinating and supervisory role in

relevant institutional arrangements and its services should be effectively utilised in that behalf.

RECOMMENDATIONS

- The most decisive and determinative option available to competent decision-makers of the OECS Economic Union in terms of desirable institutional arrangements is to bite the political bullet and amend their national constitutions to bring them in compliance with the RTB as the basis of sustainable economic integration and internationally competitive production of goods and services. This would also bring to an end the persistent implementation deficit.
- Another viable option open to competent decision-makers in this context is to adopt the “abundance of caution” approach so as to ensure the effectiveness and sustainability of existing institutional arrangements. However, exercise of this option is not likely to be efficient and cost effective.
- In developing and enacting convergent legislation for states participating in the OECS Economic Union, the OECS Commission should be given a coordinating and supervisory role and the Director General should be given executive powers to make and implement decisions.

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- As a prelude to expeditious sustainable regional economic integration competent decision-makers should accelerate and complete institutional arrangements for free circulation of goods and services in the OECS Economic Union.
- In developing enactments for the OECS Economic Union, relevant provisions of the British European Union Communities Act 1972 should be accorded very careful consideration, since the Organisation has much to learn from the experience of the United Kingdom in terms of according treaty bodies to legislate with direct effect.
- The decision-making procedures of principal organs should be revisited for clarity and consistency.

INTRODUCTION

On the 18th day of March, 2015 the consultant signed an agreement with the University of the West Indies to undertake a consultancy relating to Access to Justice in the Commonwealth Caribbean. The consultancy required addressing various issues concerning the establishment of the OECS Economic Union and, in particular, the revision of the Treaty of Basseterre 1981 establishing the OECS Economic Union with competence to legislate for the states of the collectivity with direct effect in order to promote and facilitate legislative convergence which was perceived to be required for the timely and expeditious economic integration of the OECS economies as a viable basis of sustainable competitive regional economic development. The legal implications of this initiative by competent decision-makers of the sub-region are addressed by the consultant in the legal opinion set out below.

The consultant was required to draft a legal opinion on the following:

- a) the nature of treaty obligations and the duty of implementation, including the extent to which the silence of a treaty on an issue can be supplemented;
- b) the theories of monism and dualism and their impact on the implementation of international obligations, constitutional supremacy and parliamentary procedure;
- c) the implications of Article 5 of the Revised Treaty of Basseterre, including the nature of the doctrine of direct

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effect for full Member States; and the nature of reception by non-independent Member States;

d) whether and the extent to which reservations can be made by a Member State to Article 5.3 of the Revised Treaty of Basseterre concerning the direct effect of legislation;

e) the functions of OECS Organs and the manner in which they should be exercised as provided in the Revised Treaty of Basseterre and the Rules of Procedure;

f) whether and the extent to which privileges and immunities attach to members of the OECS Assembly;

g) the process for developing and enacting OECS legislation, including:

1. formalities for the use of documents such as proposals through the relevant stages of the legislative process, and templates for same;
2. the “abundance of caution” approach on “enacting” OECS legislation using national parliamentary/ legislative systems;
3. procedures for cooperation among the OECS Assembly and clerks of national Parliaments/ Legislatures;
4. the creation of an OECS gazette, legal mechanisms needed to ensure its legality; the procedures that must be followed for proper publication, citation and cataloguing of OECs legislation;



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5. coherence, if necessary, between the OECS and national gazettes.

I.BACKGROUND¹

1.1 The Organization of Eastern Caribbean States (OECS) came into being on June 18, 1981 when seven Eastern Caribbean Countries agreed, through the Treaty of Basseterre, to cooperate with one another and promote political and economic unity and solidarity among members.

1.2 At the 34th Meeting of the OECS Authority, the² OECS Heads of Government decided to deepen economic integration by creating an Economic Union, through a new treaty. The Revised Treaty of Basseterre Establishing the OECS Economic Union (RTB) entered into force on January 21, 2011. The purpose and functions of the OECS, as set out in Article 4 of the Revised Treaty of Basseterre include:

- a) promoting co-operation among Member States and at the regional and international levels having due regard to the Revised Treaty of Chaguaramas and the Charter of the United Nations;
- b) assisting Member States in the realisation of their obligations and responsibilities to the international community

¹ Subject to minor grammatical corrections, this background is a replication of the one appearing in the terms of reference of the consultant and for which the consultant is truly grateful.

² The decision was unanimous, hence the insertion of “the” before “OECS”. Consider in this context the juridical and political implications of the omission of “the” from Security Council Resolution 242 which required the evacuation of Israel from Arab lands occupied after the Six Day War in 1967.

with due regard to international law as a standard of conduct in their relationship;

c) establishing the Economic Union as a single economic and financial space; and

d) being an institutional forum to discuss and facilitate constitutional, political and economic changes necessary for the successful development of Member States and their successful participation in the regional and global economies.

1.3 The Revised Treaty of Basseterre provides, inter alia, for new governance structures and mechanisms for improving the implementation of treaty obligations; for the abolition of the obstacles to the free movement of the factors of production- persons, technology, capital; and the progressive harmonisation of various social and economic policies. Among the innovations of the Revised Treaty of Basseterre is the grant by OECS Member States to the OECS as an organisation of legislative competence in the following areas:

- 1) common market, including the customs union;
- 2) monetary policy;
- 3) trade policy;
- 4) maritime jurisdiction and maritime boundaries;
- 5) civil aviation;
- 6) common commercial policy;
- 7) environmental policy; and
- 8) immigration policy.

1.4 The OECS Commission seeks to assist Member States in implementing the legal and governance commitments arising from the Revised Treaty of Basseterre. In pursuing the objectives of the OECS Economic Union, legal and governance frameworks must ensure the timely and harmonious implementation of policies and laws in not only the areas in which legislative competence has been assigned, but in other programmatic areas, including education, social protection, agriculture, and public administration.³

II. NATURE OF TREATY OBLIGATIONS AND THE DUTY OF IMPLEMENTATION

2.1 The nature of treaty obligations is encapsulated in Article 26 of the Vienna Convention on the Law of Treaties (VCLT) 1969 which provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”. This provision is generally regarded as a fundamental principle of treaty law⁴ which, in the present submission, is virtually assimilable to a peremptory norm or a norm of *jus cogens* admitting of no derogation. In point of fact, the International Law Commission (ILC)⁵ submitted that this fundamental principle of treaty law was underlined by the fact that it was enshrined in the Preamble to the Charter of the United Nations. As to the Charter itself paragraph 2 of Article 2 expressly provided that the Members were to ‘fulfil in good faith the obligations assumed by them in

³ It is proposed to qualify “implementation” by the insertion of the words “timely and” before “harmonious implementation,” given the generally accepted implementation deficit perceived to compromise the effectiveness of economic integration initiatives in Caricom.

⁴ See D.S. Berry, *Caribbean Integration Law*, OUP, 2014, p.138.

⁵ See Report of the International Law Commission, 17th Session, 3-28 January, 1966, p.42.

accordance with the present Charter’. The ILC in its Report went on to state that the principle of good faith was a legal principle which was an integral part of the *pacta sunt servanda* rule. And it is submitted that in analysing Article 5 of the RTB, very careful consideration must be accorded to the question of good faith on the part of signatories to the RTB, given the remedial context in which the OECS Authority and Council of Ministers of the OECS Economic Union were accorded legislative competence in the legislative carve out in Article 14.⁶

2.2 In one submission “...if a new law or modification to existing law, is needed in order to carry out the obligations which will be laid upon it by the treaty, a negotiating state should ensure that this is done at least by the time the treaty enters into force for it. If this is not done, not only will the state risk being in breach of its treaty obligations, but it will be liable in international law to another party if as a result that party, or its nationals, is later damaged”.⁷

2.3 Quite apart from discerning the existence or absence of good faith of the States parties to the RTB from the context of its elaboration, being one of persistent implementation deficit by the States parties, it is submitted that a literal construction of the provisions of Article 5 of the RTB should operate to underscore the real intention of the negotiating states. Indeed, the very language of commitment employed in Article 5.4 of the RTB speaks volumes in terms of establishing an intention to consider the omission of States parties to

⁶ The context addressed the imperative of economic integration for the collectivity of small OECS States as the basis for sustainable economic and social development. See the preambular paragraphs of the RTB and the Protocol of the Eastern Caribbean Economic Union.

⁷ See Anthony Aust, *Modern Treaty Law and Practice*, OUP, 2002 at p.144.

discharge obligations assumed in Articles 5.1 and 5.2 as constituting compliance therewith.

2.4 In exemplification of the critical importance of the *pacta sunt servanda* principle in treaty law, Article 27 of the VCLT which is a corollary of Article 26 of the said instrument, provides that no State may invoke the provisions of its domestic law as justification for failure to perform a treaty obligation. In point of fact, the Draft Articles of the ILC's Rights and Duties of States provide that a State may not even invoke provisions of its constitution as a ground for not fulfilling a treaty obligation.⁸ And when it is considered that the constitutions of all independent OECS States have been expressed to be the supreme law⁹, it must be easy to appreciate the primordial significance attaching to treaty obligations and the imperative to perform them in good faith.

2.5 In the context of the RTB, it is important to recall that OECS States are parties to the Vienna Convention on the Law of Treaties¹⁰ and, even if they were not, the *pacta sunt servanda* norm is a customary rule of international law operating *erga omnes*. And the requirement of OECS States to comply with this fundamental rule imposes a peremptory burden on such States in terms of simultaneously fulfilling the different provisions of Article 5 of the RTB which, in the present submission, appear to defy normative

⁸ See D. J. Harris, *Cases and Materials on International Law*, 6th Edition, Sweet and Maxwell, 2004, p.69.

⁹ See, for example, sec. 2 of the Constitution of Antigua and Barbuda, 1981; sec. 117 of the Constitution of Dominica, 1978; sec. 106 of the Constitution of Grenada, 1973; sec. 120 of the Constitution of St. Lucia, 1978; sec. 2 of the Constitution of St. Kitts, Nevis, 1983 and sec. 101 of the Constitution of St. Vincent and the Grenadines 1979.

¹⁰ For example, St. Vincent and the Grenadines acceded to the Vienna Convention on the Law of Treaties on the 27th April, 1999.

consistency. Thus, Article 5.1 requires OECS States parties to the RTB to take all appropriate measures to carry out obligations arising out of the RTB or resulting from decisions of the Organization. Such measures, in the present submission, cannot be reasonably construed as excluding amendments to national constitutions where necessary, since the ILC's Draft Articles on Rights and Duties of States provide in Article 13 that states may not invoke their constitutions as justification for noncompliance with provisions of a treaty ratified by them. Equally relevant, Article 5.2 requires OECS States parties to the RTB to "take all steps to secure the enactment of such legislation as is necessary to give effect to the RTB and decisions taken thereunder".

2.6 With a view to achieving legislative convergence and facilitating implementation of required measures, Article 5.3 (a) obliges OECS States parties which are full Member States of the Organization to delegate their legislative competence in specified areas to the Organization and to incorporate Acts and Regulations of the Organization in specified areas as part of their laws by according such Acts, Regulations and Orders direct effect. However, in recognition that these provisions of the RTB would require important amendments to their national constitutions, even perhaps, by way of referendums, Article 5.4 purports to have such States contract out of their treaty obligations required to be discharged in good faith and to purport to consider such aberrational conduct to be in compliance with relevant provisions of Articles 5.1 and 5.2. In the present submission, however, such conduct cannot be construed as complying in good faith with the relevant provisions of the RTB.



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2.7 Furthermore, these initiatives of the OECS States must be perceived as being juridically misconceived and normatively unsustainable. OECS States, like any other State in the international community, are not entitled to turn the applicable rules of treaty law set out in Articles 26 and 27 of the Vienna Convention on the Law of Treaties (VCLT) 1969 on their heads by contracting out of them and assimilating noncompliance to the satisfaction of obligations set out in Articles 5.1 and 5.2. OECS States, not unlike other emerging sovereignties in the international community, are required to take international law as they find it¹¹, and may explore ways of changing it. But, in the absence of legitimate modification, such laws have to be complied with as a condition of continuing membership in the international community.

2.8 As indicated below, the principle of *pacta sunt servanda* as a fundamental norm of treaty law is virtually assimilable to a norm of *jus cogens* which is a peremptory norm within the meaning of Article 53 of the Vienna Convention on the Law of Treaties 1969 admitting of no derogation and only subject to modifications by the emergence of a new peremptory norm of general international law in conflict therewith in accordance with Article 64 of the VCLT.¹² In this context attention must be drawn to the provisions of Article 71 of the VCLT which

¹¹ See P. Birnie and A. Boyle, *International Law and the Environment*, OUP, Second Edition, 2004, p.11.

¹² Article 64 provides as follows: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”.

addresses the consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law.¹³

2.9 Finally, the provisions of Article 5.4 of the RTB are not only juridically misconceived but are suggestive of normative incompatibility in as much as the Article, contrary to the operation of law, presumes to absolve States parties to the RTB from the normal consequences of noncompliance with the law. It is trite law that States cannot rely on their national constitutions as justification for noncompliance with treaty obligations.¹⁴ Consequently, where the amendment of national constitutions is required to bring States in compliance with treaty obligations, States may not, as an attribute of sovereignty, self-servingly disregard this requirement as Article 5.4 purports to do. In effect, the scheme of drafting employed in Article 5 of the RTB constitutes a bold, innovative but uninformed attempt to spare OECS States the political trauma of constitutional amendment in order to promote legislative convergence perceived by some competent decision-makers to be required for the achievement of sub-regional economic integration. Indeed, it is submitted by way of indulging a

¹³ Article 71 reads as follows:

“1. In the case of a treaty which is void under Article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law”.

¹⁴ See Article 13 of the ILC’s Draft Articles on the Rights and Duties of States, (1947).

measure of candour, that persistent perceptions of poor national governance explain the apparent resurgence of colonial paternalism to trump judicial self-determination in some Caricom jurisdictions. Unfortunately, however, the premises on which these initiatives are based appear to be juridically unsustainable in my respectful opinion. Emerging States entities in the international community as mentioned above must take international law as they find it until they can effect legitimate change to the normative landscape.¹⁵

2.10 Quite apart from addressing the nature of treaty obligations and the duty of implementation, the consultant has been mandated to examine the extent to which the silence of a treaty on an issue may be supplemented. In this connexion, it is submitted that the rights and obligations of States parties to a treaty may be enlarged either by the subsequent practice of such States parties or by the terms constituting an ineluctable implication from the provisions thereof. In terms of subsequent practice affecting the rights and obligations of States parties to a treaty, attention must be drawn to the provisions of Article 31 (3) (b) of the VCLT which provides that in interpreting a treaty, there shall be taken into account together with the context “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. In effect, the jurisprudence of competent international tribunals supports the view that “[h]owever, precise a text appears to be, the way in which it is actually applied by the parties is a good indication of what they understood it to mean, provided the practice is consistent, and is

¹⁵See footnote 11 supra.

common to, or accepted by, all the parties”.¹⁶ The outstanding example of the application of this principle is to be found in the interpretation given to Article 27(3) of the United Nations Charter by the International Court of Justice in the **Namibia case**.¹⁷

2.11 In addition to the practice of States as a viable indication of the construction to be accorded to a treaty, consideration must be given to the implied terms of the treaty although competent international tribunals must not compulsively revise treaties by implying terms, it is sometimes necessary to imply terms of a treaty purposively in order to give the instrument effect. An excellent example of this is to be found in the **Reparations case** where the International Court of Justice relied heavily on implied terms to support the finding that the United Nations possessed international legal personality with competence to espouse an international claim before competent tribunals despite the United Nations Charter’s silence on this issue.¹⁸

III. MONISM AND DUALISM: IMPACT ON THE IMPLEMENTATION OF TREATY OBLIGATIONS

3.1 Monism and dualism are essentially viable juridical constructs conceptualised by authoritative publicists to explain the differential incidence of treaties in various national jurisdictions. The monist/dualist dialogue which is wont to adorn the regional debate on normative choices in the Caribbean Community, including the Caricom Single Market and Economy (CSME), and, latterly, in the

¹⁶ See Anthony Aust, *Modern Treaty Law and Practice*, CUP, 2nd Edition, 2002 at p.194.

¹⁷ See ICJ Reports 1971 p.16 at Paris 20-22.

¹⁸ [1949] 1 ICJ Refs.174.

OECS Economic Union with a view to charting the way forward in discrete economic integration movements, is perceived to be informed by the persistent implementation deficit bedeviling the exiguous gains discerned to be issuing from the hesitant, deplorably unstructured and feeble attempts at regional integration which, in recent times, has generated intractable challenges for the more sophisticated and professionally tailored advanced economies of the European Union.¹⁹ In terms of the impact of these juridical concepts on developments in international relations, the inquisitive observer merely has to look at the language of commitment set out in Article 240 (1) of the Revised Treaty of Chaguaramas (RTC) and which, significantly, is not replicated in the Revised Treaty of Basseterre (RTB).²⁰

3.2 In exemplification of the determinative impact of dualism on municipal systems, attention is drawn to the extremely apposite dicta of Lord Hoffman which reads as follows:

“(i)n the law of England and the Bahamas (whose constitution is representative of those in the Caribbean Community), the right to enter into treaties is one of the surviving prerogative powers of the Crown... the Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government. *But the corollary of this unrestricted treaty-making power is that treaties form no part of the domestic law unless enacted by the legislature.* This has two consequences. The first is that the domestic courts have no jurisdiction to construe or apply a treaty: See *J.H. Rayner (Mincing Lane Ltd) Ltd. V Department of Trade and Industry* (1990) 2 AC... The second consequence is that unincorporated treaties cannot change the law of the land. They have no effect upon the rights and duties of citizens in common or statute law; see the classic judgement of

¹⁹ See, for example, J. Steiner and L Woods, *Textbook on EC Law*, OUP, 8th Edition, 2003, Ch.5; A. Kaczorowska, *European Union Law*, Routledge, 2nd Edition, 2009, Ch. 11 & 12; P. Craig and G. DeBurca, *EU Law, Text Cases and Materials*, OUP, 3rd Edition, 2003, Ch. 5.7.

²⁰ The RTB aspiring to legislation by its principal organ of the Organisation by direct effect could not accommodate Article 240 (1).

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Sir Robert Phillimore in the Parlement Belge (1879) 4 PD 129. They may, however, have indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations. Or the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty: see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 C.L.R. 273... *The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle which was settled by the Civil War and the Glorious Revolution in the 17th Century.*²¹

In effect, with the outstanding exception of events caught by the provisions of Article 222 of the RTC, determinations made at the regional level have to be enacted into law by national legislatures in accordance with Article 240 (1) of the RTC before becoming law for Caricom nationals. And herein is to be found the provenance of the persistently intractable regional implementation deficit.

3.3 “The essence of the monist approach is that a treaty may, without legislation, become part of the domestic law once it had been concluded in accordance with the constitution and has entered into force for the State”.²² In the narrative of international law addressing monism and dualism, Switzerland and the United Kingdom occupy opposite ends of the juridical spectrum. Under the Swiss constitution treaty-making powers reside in the executive. And although the constitution provides for the legislature to approve treaties, in practice, the majority of treaties are not approved by the legislature. The executive may conclude “executive treaties” provided the legislature approved them beforehand. The executive has a discretion to submit a

²¹ John Junior Higgs v Minister on National Security and Others [2000] 2 AC, at 228.

²² Anthony Aust, op. cit., at p. 146.



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treaty for approval and this is normally done between signature and ratification. Some important treaties must be approved by a referendum of all Swiss nationals. Treaties which enter into force for Switzerland automatically become part of Swiss law whether or not they were approved by the legislature and may be invoked before Swiss municipal courts provided they are self-executing.²³

3.4 In France, the executive has the responsibility for concluding treaties, but since treaties are supreme under the constitution specified treaties must be approved by the legislature, for example, treaties restricting sovereignty, or those that modify existing legislation. The Constitutional Council determines the constitutionality of treaties and once found to be constitutional and published in the Official Journal they are applied by the courts from the date of entry into force. In Germany, the executive is responsible for the conclusion of treaties only a limited number of which require the approval of the legislature. The Constitutional Court determines whether Parliamentary approval is required.²⁴

3.5 Where, as in France, treaties enjoy supremacy under the constitution the legislature must authorise ratification of treaties if they are concerned with peace, trade, expenditure or the modification/enactment of legislation.²⁵ The Constitutional Council has the power to pronounce on the constitutionality of a treaty where so requested by the President, Prime Minister, President of the Senate or National

²³ Anthony Aust, op. cit, at p. 150.

²⁴ Anthony Aust, op. cit, at p. 147.

²⁵ Anthony Aust, op. cit, at p. 146.

Assembly. Treaties affecting the rights and obligations of citizens must be published in the Official Journal. In Germany, the conclusion of treaties is the function of the executive but the consent of Parliament is required for ratification of the instrument where it is of major political significance or requires legislation. In the Netherlands all treaties require Parliamentary approval, especially where they are in conflict with the constitution.²⁶ In Switzerland, too, the constitution makes provision for the approval of treaties by the Assembly. But the executive enjoys wide discretion in submitting treaties for Parliamentary approval. Some treaties must be subjected to a national referendum and when treaties enter into force they automatically become law in Switzerland.²⁷

3.6 In dualist jurisdictions the constitution accords no special legal status to treaties and obligations assumed by States under them have no force in municipal law unless enacted by the legislature. Consequently, dualism in the present submission must be perceived as a prophylactic constitutional international law principle operating to protect the average citizen from executive lawlessness as required.²⁸ In effect, dualism signifies, on the one hand, the constitutional power of the executive generally to commit the State to a treaty without the prior consent of the legislature, and, on the other hand, the supreme constitutional power of the legislature to enact laws. Where enacted, treaties by the operation of law, are incorporated into domestic law,

²⁶ Anthony Aust, *op. cit.*, at p. 148.

²⁷ Anthony Aust, *op. cit.*, at p. 150.

²⁸ See D.E.E. Pollard, *Unincorporated Treaties and Small States*, *Commonwealth Law Bulletin* Vol. 33 No.3, September 2007, at p. 397.

and the executive has power to bind the State internationally without the prior consent of the legislature. In England, the bifurcation of governmental powers was a product of the seventeenth century struggle between the Crown and Parliament which resulted in the executive achieving power in foreign affairs including the conclusion of treaties, and legislation being confined to Parliament.²⁹ In dualist States treaties enacted by the Parliament become part of the domestic law and may be amended in accordance with the constitution. If such amendments result in a breach of a treaty obligation, there would be no remedy in the domestic law and reparations would have to be pursued at the international plane before a competent tribunal. But, in limited circumstances, municipal courts will have regard for unincorporated treaties. The attraction of dualism as a juridical construct is to be found in the protection which it affords the ordinary citizen from executive indiscretions.

3.7 The constitutional practice of England demonstrates the various ways treaty provisions may be incorporated in domestic law. Firstly, the Crown's, treaty-making powers are exercised by the Secretary of State for Foreign and Commonwealth Affairs. Although there is no requirement for Parliament to consent to treaties, there is a constitutional convention known as the Ponsonby Rule whereby treaties subject to ratification or similar procedures are laid in the Parliament for twenty one days with a brief explanatory note while Parliament is in session. If the treaty is of great political significance

²⁹ Idem.

requiring legislation for implementation, the government will arrange for Parliament to debate it.

3.8 Where legislation is required such legislation may take three forms. An act of Parliament for incorporating the treaty into domestic law is enacted. This is done by scheduling the treaty to the act and expressly providing that the provisions of the treaty “shall have the force of law in the United Kingdom”. Thus, the Geneva Convention of 1949 and the two additional Protocols of 1977 are not law in the United Kingdom because the relevant draft legislation inadvertently did not provide that the provisions of these instruments should have the force of law in the United Kingdom.³⁰ However, many provisions were implemented by administrative regulations. Where there is no authentic text of the treaty in English, the original text is annexed with an English translation. Alternatively, the treaty is not scheduled to the act but the act makes changes to give effect to the treaty or simply authorises expenditure to give effect to the treaty as the case may be. Secondly, an act may be passed conferring powers on the executive to carryout obligations under future treaties, for example, bilateral air services agreements. Thirdly, the act may be in the form of framework legislation which authorises the Crown to make secondary legislation to give effect to certain types of treaties. Thus, the United Nations Act 1946 empowers the Crown to make orders in council to carryout decisions of the Security Council under Chapter VII of the Charter.

³⁰ Anthony Aust, *op. cit.*, at p. 152.

3.9 Since treaties are not supreme law in the United Kingdom, Parliament may make laws inconsistent with treaty obligations. Where Parliament enacts legislation declared by the European Court of Human Rights to be in breach of the European Convention on Human Rights, Parliament may enact corrective amending legislation although it is not bound so to do. The Human Rights Act 1998 required United Kingdom courts to apply existing and future legislation to be in compliance with the European Convention on Human Rights or, where necessary, to make a declaration of incompatibility for Parliament to take appropriate corrective action.

3.10 In interpreting and applying treaties, the English courts adopt certain principles. Where, for example, the language of legislation is clear and unambiguous, the courts will not look behind it. Where the language is ambiguous, the court will look at the treaty to resolve the ambiguity. Ambiguous legislation will normally be interpreted so as to place the United Kingdom in compliance with the treaty. Where the treaty is attached to legislation the court will interpret it in accordance with the applicable rules of international law, for example, Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

3.11 In the OECS States whose jurisdictions are dualist and where the doctrine of constitutional supremacy prevails³¹, treaties must be enacted by the legislature before becoming law for nationals.³² In countries ruled by Parliamentary supremacy as in the United Kingdom, Parliament has had to compromise its legislative supremacy to

³¹ See footnote 9 supra above.

³² See, for example, 240 (1) of the RTC.

facilitate the doctrine of direct effect prevailing in the European Community. Similarly, Parliament in the United Kingdom has had to compromise its legislative supremacy in order to accommodate the European Convention on Human Rights by formulating the doctrine of incompatibility. In the OECS States, however, Parliamentary legislation is subject to the constitution which is supreme.³³

IV. ANALYSIS OF ARTICLE 5.3 OF THE RTB

4.1 The gravamen of the issue falling to be determined here is whether the undertakings given by full Member States of the OECS in Article 5.3 (a) (i) to delegate legislative powers in specific areas and in Article 5.3 (a) (ii) to receive (give effect in their municipal systems) Acts, Regulations and Orders of the Authority and Council of Ministers may be legitimately discharged without required modifications to their constitutions. In this context, consideration must be given to Articles 26 and 27 of the Vienna Convention on the Law of Treaties (VCLT) which, in the present submission, encapsulate customary international law.

4.2 Any credible analysis of the provisions of legal instruments relating to the constitutions of OECS States cannot fail to bear in mind that these instruments have been famously characterised as Westminster model constitutions having their provenance either in an Order in Council of the United Kingdom or an Act of the Imperial Parliament of this country. Such constitutions in the celebrated characterisation of Lord Diplock possess organs whose legislative,

³³ See footnote 9 supra.

executive and judicial powers are **“exercisable exclusively by the Legislature, by the Executive and by the Judicature respectively”**. Significantly, too, such powers of governance are exercised separately **“and the allocation to the various organs of the legislative, executive or the judicial powers may be altered... by elected representatives in the Parliament acting by specified majorities which is generally all that is required, though exceptionally as respects some provisions the alterations may be subject also to confirmation by a direct vote of the majority of the people themselves”**.³⁴ Provisions allocating legislative powers fall into this exceptional category.³⁵

4.3 These submissions of Lord Diplock, transposed to the political arena of the OECS must be construed as affirming that the powers of the legislature attributed to this organ in Westminster model constitutions into which classification OECS constitutions fall, cannot be allocated by national Parliaments as required by the RTB to political organs like the OECS Authority and the Council of Ministers outwith OECS constitutions, unless these instruments were amended in accordance with the applicable procedures and in the manner specified therein. In effect, competent decision-makers may not legitimately perform the obligations assumed in Article 5 of the RTB in the absence of required constitutional amendments. And in this context, reference must be made again to Lord Diplock who submitted “(a) breach of a

³⁴ See *Hinds v the Queen*, op. cit., at p. 6.

³⁵ See footnote 35, supra.

constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law”.³⁶

4.4 Article 26 of the VCLT virtually aspires to the status of a *jus cogens* norm at best, and, at worst, is a fundamental principle of international law admitting of no qualification, or out of which States parties to treaties may not legitimately contract. **As such, the provisions of Article 5.4 purporting to relieve States parties to the RTB from the obligation to perform treaties in good faith and to render non-performance of treaty obligations compliant with the general obligation as to implementation in Article 5.1 and, in particular, the obligation to “take all steps to secure the enactment of such legislation as is necessary to give effect to this treaty and decisions taken thereunder”, are in the present submission, juridically misconceived and constitutionally invalid.**

4.5 A fortiori, the provisions of Article 5.4 of the RTB may aspire to nothing more than a juridical fantasy utterly bereft of credible normativity in presuming to turn the provisions of Article 26 of the VCLT, a fundamental and seminal principle of treaty law, on their heads. In effect, this provision appears to be in the nature of a colourful device. But, as the Judicial Committee of the Privy Council determined, “Parliament cannot evade a constitutional restriction by a colourful device”.³⁷ There is, in effect, a limit to the powers of sovereign states which, at first blush, may not go beyond what the generally accepted rules of international law prescribe. For, as a

³⁶ See *Hinds v the Queen*, op. cit., at p.

³⁷ *Hinds v the Queen*, op. cit., at p. 17.

constitutional international law principle, sovereignty speaks to the totality of rights, powers, privileges and immunities which international law as a normative corpus of rules permits states to exercise in relation to a determinable area of the globe.³⁸ Article 27 of the VCLT precludes States from invoking the provisions of their internal law as justification for their failure to perform a treaty obligation. And Article 13 of the International Law Commission’s Draft Articles on the Rights and Duties of States goes even further to preclude States from invoking their constitutions, the supreme law, as justification for not performing international obligations. In the premises, OECS States, which have given a solemn undertaking as to implementation in Article 5.1 to “take all appropriate measures whether general or particular to ensure the carrying out of obligations arising out of this treaty or resulting from decisions taken by the institutions of the organization” and “to facilitate the achievement of the purposes of the organization” may not contract out of an obligation to amend their constitutions in order to bring them in compliance with a treaty obligation under Article 5.1 or 5.2 and, in a manner worthy of a juridical oxymoron, to provide that such action is not in breach of a general obligation as to implementation set out in Article 5.1 and 5.2.

4.6 And this, in the present submission, is the fundamental, not to mention, the virtually incorrigible weakness of the RTB. This submission is not intended to cast aspersions on the professional competence of the draftsman who was apparently given a juridically

³⁸ See D. E. E. Pollard, *the Caribbean Court of Justice: Closing the Circle of Independence*, Ian Randle, 2004, at p. 45.

impossible task to perform in the first place and who obviously made a valiant and admirable attempt to discharge his mandate. In all of this it is appreciated that the OECS States must be painfully aware of the drawbacks visited on entities of small size in the international community and the urgent need to integrate their miniscule economies in order to achieve international competitiveness and sustainable economic development. At the same time these States cannot fail to appreciate the formidable constraints standing in the way of such economic integration in the form of virtually insuperable political impediments to constitutional renewal. Nevertheless, the applicable norms for the achievement of desired goals operate as real constraints and may not be circumvented nor ignored by the stratagem sought to be employed.

4.7 In the characterization of Lord Diplock, "...in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica neither the courts of Jamaica, or their Lordships' Board are concerned with the propriety of the law impugned. **They are concerned only with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision**".³⁹ And the Judicial Committee of the Privy Council had determined that any deviation, however

³⁹ See *Hinds v The Queen* op. cit., at p. 6.

slight, from the procedure prescribed by the constitution for effecting amendments thereto constitutes an amendment.⁴⁰

4.8 In the premises, it is necessary to appreciate the implications of the Westminster type constitutions in which class OECS constitutions fall. These instruments allocate the powers of governance to the executive, legislature and judiciary. Constitutions of OECS States are informed by the rule of law and the doctrine of constitutional supremacy which precludes the conferment of the legislative function on institutions external to them unless required modifications are made to these constitutions in the manner provided therein. Procedures for their amendment to achieve the objectives of the RTB are daunting but may not be circumvented in the manner suggested in Article 5 of the RTB. In short, the referendum route, if required, cannot be bypassed.⁴¹

4.9 An examination of the OECS constitutions does appear to confirm that relevant provisions addressing legislative competence of organs are deeply entrenched requiring both qualified majorities in the Parliament and majorities in national referendums.⁴² Consequently, according legislative competence to the Authority and the Council does appear to require amendment of the constitutions through majority votes in Parliament and national referendums in the absence of which undertakings to enact relevant legislation would be impossible to discharge.

⁴⁰ Independent Jamaica Council for Human Rights v Syringa Marshall Burnett and Attorney General of Jamaica.PC.No.41 of 2004 p.14.

⁴¹ Consider in this context Independent Jamaica Council for Human Rights v Syringa Marshall Burnett and Attorney General of Jamaica.PC.No.41 of 2004.

⁴² See footnote 35, *infra*.

4.10 In this connexion, relevant submissions of the Judicial Committee of the Privy Council appear to be extremely apposite. “Their Lordships therefore are unable to accept that the words of s. 97(1), upon which the Attorney General relies, entitles Parliament by an ordinary law to vest in a new court composed of members of the lower judiciary a jurisdiction that forms a significant part of the unlimited civil, criminal or supervisory jurisdiction, that was... exercised by the Supreme Court of Jamaica... which would have the consequence that all cases dealing within the jurisdiction of the new court would in practice be heard and determined by it instead of by a court composed of judges of the Supreme Court”.⁴³

4.11 By parity of reasoning, it is submitted that a court of competent jurisdiction would be unable to accept that national Parliaments of OECS States, in the absence of required amendments of their constitutions⁴⁴, would be competent to approve the delegation of the legislative authority of OECS States to the OECS Authority and to endow such delegated legislation with direct effect in pursuit of legislative convergence. Such legislation by national Parliaments must be perceived as compounding an inadmissible juridical infeasibility, firstly, by purporting to delegate far-reaching legislative authority by ordinary legislation and, secondly, by giving such legislation direct effect in a manner worthy of monist jurisdictions. Fortunately, however, for the sustainability of existing institutional arrangements,

⁴³ See *Hinds v the Queen*, op. cit., at p.12.

⁴⁴ See sec. 38 (3) of the Constitution of Saint Kitts and Nevis 1983; sec. 41(6) of the Constitution of Saint Lucia 1979; sec. 38 (3) of the Constitution of Saint Vincent and the Grenadines 1979; sec. 42 (3) of the Constitution of Dominica 1978; sec. 39 (4) of the Constitution of Grenada 1973 and sec. 47 (5) of the Constitution of Antigua and Barbuda 1981.

the OECS States out of an abundance of caution appear to have agreed on a fall-back position whereby Acts of the OECS Authority and Regulations of the Council of Ministers will be approved in the national Parliaments in order to accord them the force of law in municipal systems. This option is discussed below.⁴⁵

V. IMPLICATIONS OF ARTICLE 5 OF THE RTB

5.1 Perusal of the provisions of Article 5 of the RTB does appear to confirm that these provisions have important implications for the viability of the structure and operations of the OECS as an intergovernmental organization and as an economic union. In terms of composition or structure, it does appear that competent decision-makers omitted to make adequate provision for the peculiar juridical status of Montserrat. Montserrat was at the material time presumably facilitated with an appropriate instrument of entrustment from the United Kingdom government in order to sign on to the Treaty of Basseterre 1981.⁴⁶ And Article 3 of the RTB accords all States parties to the Treaty of Basseterre 1981 the status of full membership of the OECS. Granting that in effect, Montserrat is considered a full member of the Organization, it appears that the provisions of Article 5.3 do not have Montserrat within its contemplation since Montserrat is still a dependent state and Article 5.3 (a) addresses full Member States which are independent states, and Article 5.3(b) addresses Member States which are not independent States. **In effect, Montserrat as a full**

⁴⁵ See para. 9.3 infra.

⁴⁶ This approach was adopted to allow Montserrat to sign on to the treaty establishing the Caricom Community and Common Market 1973.

member, being a dependent state is not within the contemplation of Article 5.3 - a virtually unacceptable lapse in drafting.

5.2 Turning now to the substantive juridical provisions set out in Article 5.1, 5.2, and 5.4 it is submitted that, collectively, these provisions exhibit fundamental juridical inconsistencies. Firstly, it must be recognised that Articles 5.1 and 5.2 are informed by Article 9 of the Revised Treaty of Chaguaramas (RTC) which in effect replicated the provisions of Article 5 of the Rome Treaty 1957, now Article 10 of the Maastricht Treaty 1992. In this context, it is important to bear in mind the determination of the European Court of Justice (ECJ) in the Francovich Case⁴⁷ where it was determined that the provisions of Article 5 of the EEC Treaty established the basis of state liability for damage issuing from the omission to take steps to implement determinations of collective integration organs.⁴⁸ Given, therefore, the critical and fundamental importance of state liability, provisions of an economic integration enterprise and the primordial significance of the *pacta sunt servanda* principle, it is submitted that States parties to the RTB:

- a. may not self-servingly contract out of their obligations to amend their Constitutions if compliance with the provisions of Article 5.3 (a) so requires;
- b. may not deem noncompliance with the requirement to carryout obligations arising from the RTB to be compliant with the implementation imperative set out in Article 5.1.

⁴⁷ C6 & 9/90.

⁴⁸ See J. Steiner and L. Woods, Textbook on EC Law, 8 Edition OUP, 2000, pp. 111ff.

5.3 It is important to bear in mind that the OECS’ legal order like that of other Commonwealth Caribbean States is predicated on constitutional supremacy, separation of powers and the rule of law which provides the basis of OECS Westminster-type constitutions. In view of the foregoing, OECS Parliaments are not competent to delegate to extra-constitutional bodies legislative competence not within the contemplation of such constitutions at the time of their establishment. In order to achieve this, competent authorities would be required to amend their constitutions in the manner provided for therein, be it by simple or qualified majority vote and/or referendums as required.⁴⁹

5.4 At first blush, it does appear that competent decisions-makers of the OECS States were attempting to legislate for a regime of direct effect in the manner employed by the United Kingdom in the European Communities Act 1972.⁵⁰ Such a change in the United Kingdom’s legal order required a revolution which resulted from that country’s accession to the European Communities. In the characterisation of one outstanding publicist, “[t]he European Communities Act 1972 laid down that Community law should prevail over British law, including

⁴⁹ *Hinds v The Queen*; and *Independent Jamaican Council of Human Rights v Syrinja Marshall and Attorney General of Jamaica*.

⁵⁰ Sec. 2(1) of the European Communities Act 1972 reads as follows: “All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the treaties, and all such remedies and procedures from time to time provided for by or under the treaties, as in accordance with the treaties were without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable community right’ and similar expressions shall be read as referring to one to which this subsection applies”.

‘any enactment passed or to be passed’; by those last four words Parliament attempted to bind its successors and to subordinate all future legislations to Community law. And the attempt has succeeded.”⁵¹ In the characterisation of Lord Denning “(a)ny rights or obligations created by the treaty are to be given effect in England without more ado”.⁵² And as directly applicable law, EC law became capable of forming the basis of rights and obligations enforceable by individuals before national courts.

5.5 It is submitted, however, that whereas the United Kingdom’s legal order is based on Parliamentary supremacy allowing for the approach employed by the United Kingdom, the legal order of the OECS States is qualitatively different based as it is on constitutional supremacy as exemplified in the Westminster-type constitutions⁵³ to which the national Parliaments are subjected. In the premises, the provisions of Article 5.3 of the RTB appear to be juridically misconceived and incorrigibly flawed. And this being the case, it is not necessary to canvas in any measure the related issues of constitutional supremacy and parliamentary supremacy which are both subsumed in the immediately foregoing discussion. However, it must be recalled that where the constitution is expressed to be the supreme law as is the case in the OECS, neither parliament nor the court may make determinations contrary to it.⁵⁴ Postulated in other terms, the courts, as

⁵¹ See H.W.R Wade and C.F. Forsyth, *Administrative Law*, 9th Edition, OUP, 2004, at p.28.

⁵² *H.P. Bulmer Ltd v J Bollinger SA* [1974] CH 401.

⁵³ See footnote 9, *supra*.

⁵⁴ See Basu, Durga Das. (1965) *Commentary on the Constitution of India* 5th Edition. (Calcutta; SC Sankar Sons Limited, at p. 338.

the guardians of the constitutions, must not presume to arrogate the right to attach modifications in the agreed allocation of governmental powers contrary to politically determined and constitutionally sanctioned amendment procedures. “Where the constitution excludes specified questions from curial scrutiny, the courts lose their jurisdiction to entertain those questions altogether because they have no power to override the constitution and the questions accordingly become non-justiciable”.⁵⁵

5.6 It is not without considerable significance that the provisions of Article 5.3 (a) require OECS States parties to the RTB to enact legislation “with the intention that the Acts, Regulations and Orders of the Organization have direct effect in the laws of the Member States...” For whereas the doctrine of direct effect prevailing in the European Union is a function of a determination of the European Court of Justice clearly indicating the criteria for the satisfaction of this status⁵⁶, the relevant provisions of the RTB where complied with would expressly confer this status on the aforementioned instruments. It is submitted that in the result Acts, Regulations and Orders, whether or not they satisfy the required conditions specified by the European Court of Justice, would automatically enjoy the status of direct effect requiring the national courts to protect relevant rights of OECS nationals. In any event relevant determinations of the European Court

⁵⁵ See D. E. E. Pollard, Unincorporated Treaties and Small States, Commonwealth Law Bulletin, Vol. 33 No. 3, Sept. 2007 at p.394-5.

⁵⁶ The European Court of Justice in **Van Gend en Loos** intimated that for provisions of the Rome Treaty to have direct effect, they must be clear, unconditional and operable not requiring legislative drafting.

of Justice in **Van Gend en Loos** are, *stricto juris*, not legally binding on OECS Member states but constitute *res inter alios acta*.

5.7 In addressing the juridical requirements of direct effect⁵⁷ in the European Union's normative regime it is important to recall that the European Court of Justice determined in **Van Gend en Loos** that Article 12 of the Rome Treaty (1957) produced direct effects and created for individuals rights which the national courts were required to protect.⁵⁸ The ECJ also determined that the provisions of Article 12 of the Rome Treaty 1957 were infringed not only where there was an increase in the actual rate of duty for the commodity in question, but also where a rearrangement of the national tariff resulted in a classification of a commodity under a higher tax heading.

5.8 The ECJ dismissed the submission of the competent authorities that the answer to the question referred to it by the national court was to be found in the constitutional law of the Netherlands and not in the interpretation of Article 12 of the Rome Treaty. As such, the referral fell squarely within the jurisdiction of the ECJ under Article 177 of the Rome Treaty. And in interpreting the referral, the court determined that it was required to address the spirit, the general scheme and the wording of the general provisions. The ECJ further held that in considering the spirit of the Rome Treaty it noted that the objective was the establishment of a common market the functioning of which was of concern to the parties of the communities which were both

⁵⁷ See para. 5.8 *infra*

⁵⁸ See P. C. Hartley, *Foundations of European Community Law*, OUP 4th Ed. 1998, at p. 187.

States and their peoples. In effect, the community constituted a new legal order of international law for the benefit of which participating States parties had limited their sovereign rights. As such, community law imposed obligations and conferred rights on nationals as well as States and its institutions.

5.9 Commenting on the language of commitment of Article 12, the court determined that it contained “a clear and unconditional prohibition, constituting a negative obligation whose implementation was not dependent on further action by national legislatures and produced direct effects in the relationship between Member States and their subjects. The fact that the provisions of Article 12 were directly addressed to Member States did not preclude their nationals from relying on them. If their nationals were precluded from relying on infringements of the treaty in proceedings before national courts, nationals would be deprived of the protection of their rights before national courts. As a corollary to the principle established in **Van Gend en Loos**, the directly effective provisions took precedence over inconsistent provisions of national law”.⁵⁹ The last determination appears to be a subtle enunciation of the primacy of European Union law.

5.10 In addressing the implications of Article 5 of the RTB, one important issue to be determined is whether the relevant provisions of this Article will create rights for OECS citizens through the issue of

⁵⁹ See, J. Steiner and L. Woods, *op. cit.*, at p.

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Acts, Regulations and Orders irrespective of the satisfaction of the express requirements of direct effect by the aforementioned instruments. In the present submission, an enactment by sovereign independent legislatures of OECS States conferring direct effect on relevant instruments must be construed to prevail over any third state judicial determination of the expressed requirements of such a status, subject to appropriate amendments of their national constitutions.⁶⁰ In any event, as mentioned above, third state judicial determinations must be dismissed as *res inter alios acta*. However, this submission is without prejudice to any relevant determination of the OECS Supreme Court which may be required to pronounce on the nature and parameters of direct effect. As such, it would be within the jurisdiction of the Supreme Court to determine that for Acts, Regulations and Orders to be of direct effect certain criteria would have to be satisfied—these instruments must be sufficiently clear and precise, unconditional leaving no room for executive discretion in implementation.⁶¹

5.11 As concerns Article 5.3 (a) (1) of the RTB, full independent members undertake to enact legislation to delegate to the Organisation legislative competence of their governments as provided in Article 14 and to receive Acts of the Authority and Regulations and Orders of the Council in the areas of competence set out in Article 14. Three important issues arise in this context. Firstly, Montserrat has been

⁶⁰ For example, it was submitted that with the passing of the European Communities Act 1972 “all community law became in the language of international law directly applicable, that is, applicable as part of the British internal legal system”. See, J. Steiner and L. Woods, *op. cit.*, at p.88.

⁶¹ See, J Steiner and L. Woods, *op. cit.*, at p. 94.

identified as a full member in Article 2.1 (d). But Montserrat's position is unique in the OECS and has not been catered for in the RTB. Article 5.3(a) addresses full Member States which are independent and Article 5.3 (b) addresses Member States which are not independent. Secondly, Montserrat which is a full member but not independent is not addressed as such and, consequently, is not required to do anything concerning the competences of principal organs, for example, the OECS Authority and Council. Thirdly, and most importantly, it is submitted that Article 5.3 (a) (i) appears to have ignored the juridical principle, common to all systems, namely *nemo dat non habet*. For significantly, enough, the Member States within the contemplation of this article unlike the United Kingdom with no written constitution and governed by the doctrine of parliamentary supremacy, are not in a position to delegate to the Organisation the competence to legislate with direct effect in the areas indicated, a competence which they do not possess. In this context, it must be recalled that the OECS States as dualist jurisdictions with written constitutions expressed to be the supreme law, cannot legislate with direct effect and, as such, are not in a position to delegate such a competence to the Organisation. The Organisation as a treaty body created by the executive of a Westminster model constitution in exercise of its prerogative power in international law would be affronting the doctrine of separation of powers, an implied normative requirement of their constitutions by purporting to delegate a legislative competence to an extra-territorial treaty body. Consequently, even if national constitutions are amended to permit the delegation of the legislative competence such a delegation

must be without power to enact legislation with direct effect. Treaty bodies like the OECS Authority in dualist jurisdictions are creatures of the executive in the exercise of their competence in international law and should they be in a position to legislate would be affronting the normative requirement of the constitution concerning the separation of powers.

5.12 And even assuming but not admitting that the constitutions of OECS States may be amended by referendum to allow legislative competence to be conferred on a treaty body of the OECS Economic Union, like the OECS Authority in parity with the legislature under existing constitutions, the question remains whether such legislative competence may be greater than that enjoyed by the legislatures under existing constitutions with no power to enact laws with direct effect. Similarly, it is questionable whether constitutions may be amended to allow the Council of Ministers to make Regulations with direct effect, a competence which is not enjoyed by legislatures under existing constitutions. These queries require clarification since, even though the foregoing proposed amendments might be subject to referendums of a majority of the electorates concerned, there is no provision in OECS constitutions similar to those in sec. 9 of the Guyana constitution which deliberately and determinatively located sovereignty in the people where it legitimately belongs thereby enabling such a foundational constitutional amendment. Consider in this context **Bowen v Attorney General of Belize (Civil Appeal No. 7. of 2009)** and **Kesavananda Bharati v State of Kerala and Another (Civil Appeal No.135 of**

1970) where it was determined that legislative amendments even though sanctioned by referendums may not emasculate normative requirements of constitutions, thereby substituting the impermissible exercise of parliamentary supremacy for the established doctrine of constitutional supremacy encapsulated in the national constitutions.

5.14 As concerns Article 5.3 (a) (ii) Member States undertake to enact legislation required to receive Acts, Regulations and Orders having direct effect (i.e. without the need for legislation by Member States). As regards non-independent Member States, this grouping is subject to the Colonial Laws Validity Act (1865) and relevant Parliamentary Acts and Orders in Council of the Imperial Parliament. The doctrine of parliamentary supremacy, therefore, would allow the British Parliament to accord them instruments of entrustment permitting them to enact required legislation but Parliament, consistently with its status may refuse. And Member States within the contemplation of Article 5.3 are not in a position to ignore Parliament and would be unable to plead their constitutions or other national law as a bar to the performance of a treaty obligation as prescribed in Article 27 of the VCLT and prescribed by Article 13 of the ILC's Draft Articles on Rights and Duties of States.

5.15 Adverting now to Article 5.3 (b) of the RTB, it is submitted that non-independent entities like Anguilla and the British Virgin Islands will only be in a position to assume obligations contained therein if the United Kingdom is admitted as an associate member and



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extended the RTB to Anguilla and the British Virgin Islands only, or, in the alternative, facilitated Anguilla and the British Virgin Islands with appropriate instruments of entrustment to allow them to sign on to the RTB and to enact the legislation required by Article 5.3 (b). In either of the aforementioned scenarios, an appropriate enactment of the United Kingdom's Parliament or an Order in Council issuing from the Crown would be effective to enable Anguilla or the British Virgin Islands to receive Acts, Regulations and Orders of the Organization without an amendment to the constitutions of these political entities. However, it is submitted that absent appropriate constitutional amendments, full members of the OECS except Montserrat which is governed by parliamentary supremacy will be unable to enact the required legislation in order to accord the necessary competence to the OECS Authority or Council of Ministers.

5.16 In respect of Article 5.4 of the RTB, it is submitted that the provisions of Article 5 are both self-contradictory and juridically infeasible. As concerns the first issue this provision purports to relieve OECS States of the obligation to perform acts customarily inuring to States parties and yet provides, contrary to all applicable law, that non-performance of such obligation does not constitute a breach of the undertaking as to implementation set out in Article 5.1 of the RTB. This issue has been addressed in the preceding section.



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VI. JURIDICAL FEASIBILITY OF ENTERING RESERVATIONS TO ARTICLE 5 OF THE RTB

6.1 According to Article 2 (1) (d) of the Vienna Convention on the Law of Treaties (VCLT), “reservation means a unilateral statement made by a state when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effects of certain provisions of the treaty in their application to that state”.⁶² Generally speaking, states tend to employ reservations sparingly.⁶³ The Vienna Convention on the Law of Treaties radically transformed traditional rules regarding reservations in relation to treaties, particularly as concerned the universality of these instruments. In one submission, the right to make reservations to a treaty is the dominant feature of general multilateral conventions.⁶⁴ Indeed, the exercise of this right is an essential attribute of sovereignty, of the political independence of states to be a reality in state interaction. Exponential enlargement of the community of states following the Second World War 1945 and the intensification of multilateralism during this period⁶⁵ witnessed an increase in the incidence of reservations in the absence of which the elaboration of international legislative instruments would have been adversely affected, given the tendency of national interests to be divergent and the disposition of states to have their interests preferred.

⁶² See Vienna Convention on the Law of Treaties 1969.

⁶³ See Paul Reuter, *op cit.* at p. 81.

⁶⁴ See Paul Reuter, *op. cit.*, at p.81.

⁶⁵ See D.E. E. Pollard, *Law and Policy of Producers Association*, OUP, 1984, pp. 14-19.



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6.2 *Stricto juris* sovereign states are free to participate or not in treaty regimes, in traditional international law, and, unless a treaty expressly prohibited reservations, like Article 309 of the United Nations Convention on the Law of the Sea (UNCLOS) 1982, or permitted only certain types of reservations to treaties like the International Convention for the Regulation of Whaling (1946)⁶⁶, any state was free to make a reservation, provided that it was not incompatible with the object and purpose of the treaty, even if the treaty did not specifically permit reservations.

6.3 Given the diversity of human values and the atomisation of national interests, however, there is nothing unusual, undesirable or disparaging about formulating a reservation by a state to multilateral treaties. In fact, the competence to enter reservations to multilateral treaties is available to any state, as an attribute of sovereignty. Reservations are but one incident in the conclusion of a treaty and spell out the conditions under which a state consents to be bound by a treaty provided that certain legal effects of the instrument did not apply to the reserving state.⁶⁷ But the effect of any such reservation is likely to be a function of the operation of law.⁶⁸ Article 19 of the Vienna Convention on the Law of Treaties stipulates the basic rule that a State may make a reservation to a treaty unless:

- a) the reservation is prohibited by the treaty;

⁶⁶ See Anthony Aust, *op. cit.*, at pp. 108-109 for reservations prohibited or specified.

⁶⁷ See Paul Reuter, *op. cit.*, p.77.

⁶⁸ It is important to note, however, that reservations are a feature of multilateralism and cannot operate in bilateral arrangements where a reservation is regarded as a counter proposal and not legally binding.

- b) the treaty provides that only specified reservations which do not include the reservation in question, may be made or;
- c) in cases not falling under subparagraphs a) and b), the reservation is incompatible with the object and purpose of the treaty.

Of particular significance in this context are the provisions of Article 20 (2) and (3) of the Vienna Convention on the Law of Treaties which provide:

“2. Where it appears from the limited number of negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organisation, and unless it otherwise provides, a reservation requires acceptance of the competent organ of that organisation”.

6.4 In the present submission, it appears that the States parties to the RTB, and which are severely limited in number, are peculiarly caught by the provisions of Article 20(2) of the Vienna Convention on the Law of Treaties identified above in as much as the overriding purpose and object of the treaty, inter alia, is to facilitate economic integration by convergent legislation of OECS States parties of the RTB, and which the provisions of Article 5.3 strive to ensure.

Consequently, a reservation to this provision would require the consent of all States parties since it does appear to be incompatible with the purpose and object of the RTB⁶⁹ whose preambular paragraph 3 reads as follows:

“CONVINCED that at the time it is necessary to deepen the level of integration and the pursuit of a common economic purpose which has obtained under the Treaty of Basseterre 1981 and the Agreement Establishing the East Caribbean Common Market;”

and preambular paragraph 5 which provides:

“DETERMINED to enhance the level of regional co-operation between States that are parties to the Treaty of Basseterre 1981”.

6.5 It is in the nature of an axiomatic assumption, therefore, from the development of the East Caribbean Common Market and the economic context of its establishment, both nationally, regionally and internationally, that economic integration and transformation of the OECS sub-region by enhanced international competitiveness in the production of goods and services, was within the contemplation of competent decision-makers. It must also have been assumed that the objectives indicated above could have been achieved only by enhanced co-operation of States parties to the RTB, as exemplified in the pursuit of greater legislative convergence which was sought to be achieved by the enactment of legislation with direct effect by the OECS Authority

⁶⁹ *Stricto juris*, however, determination of incompatibility with the object and purpose of an instrument is for each state to make.

and Council of Ministers in the carve out created by Article 14 of the RTB. In the premises, it is submitted that States parties to the RTB are not at liberty to enter reservations to Article 5.3 where such reservations are incompatible with the purpose and object of the RTB and are not expressly permitted by the competent organ of the organisation, for example, the OECS Authority. And it is extremely unlikely that such permission would be granted by the OECS Authority. It is also submitted that it is sometimes necessary to imply terms of a treaty in order to give the instrument the desired effect. An excellent case in point is to be found in the Advisory Opinion of the International Court of Justice (ICJ) in **the Reparations case** where the court was called upon to determine the competence of the United Nations to espouse a claim for damages to one of its officials suffering injury in a member state of the United Nations in the course of duties.⁷⁰

6.6 In terms of procedure, the chapeau of Article 1(9) of the VCLT does not prohibit reservations at a time other than signing, ratifying, accepting, approving or acceding to a treaty, and a reservation may be made at any time other than that which the treaty allows. If a reservation is made on signature of a treaty subject to ratification, it must be formally confirmed by the reserving state when expressing consent to be bound in order to be effective. Different rules may apply to reservations made to constituent instruments of intergovernmental organisations. Thus, a reservation to amendment of the constituent instrument of the International Telecommunications Union (ITU) may

⁷⁰ See, Reparations Case, 1949 ICJ Reps p.174.

only be made at the time of adoption.⁷¹In practice, a reservation or an express acceptance of a reservation must be made in writing and communicated by the depository to contracting states and other states entitled to become parties.⁷²A reservation may be included in the instrument of ratification or may accompany such an instrument and referred to therein.⁷³

VII. ADEQUACY OF THE FUNCTIONS OF OECS ORGANS FOR OPTIMAL PERFORMANCE

7.1 Article 7 of the Revised Treaty of Basseterre (RTB) established the following principal Organs of the Organization of Eastern Caribbean States Economic Union:

- a) The Authority of Heads of Government of Member States;
- b) The Council of Ministers;
- c) The OECS Assembly;
- d) The Economic Affairs Council; and,
- e) The OECS Commission.

7.2 These principal organs were accorded functions and powers designed to achieve the purposes and objectives of the RTB Establishing the Organisation of Eastern Caribbean Economic Union. The compelling, implied purpose and object of the Organisation were

⁷¹ See Anthony Aust, *op. cit.*, at p. 126.

⁷² *Idem.*

⁷³ See Anthony Aust, *op. cit.*, at p. 127.

the enhanced production of goods and services by OECS Member States through the integration of their national economies by appropriate policies as reflected in legislative convergence in order to promote international competitiveness as a viable basis for sustainable economic development in an international economy progressively dominated by the ubiquitous imperatives of liberalisation and globalisation.

7.3 In the institutional arrangements of the RTB devised for the Organisation, the OECS Authority of Heads of Government of the Member States (“the OECS Authority”) was intended to be a supranational organ which was accorded pride of place in the Organisation’s institutional architecture. Consistently with this position, full independent Member States undertook in Article 5.3(a) (i) to delegate to the Organisation their authority to legislate in areas identified in Article 14, and in Article 5.3 (a) (ii) to receive Acts, Regulations and Orders of the Organisation being legislative instruments having direct effect. And the inarticulate, incontrovertible intention of these provisions was the achievement of legislative convergence in the areas identified in Article 14 as a basis of economic integration and sustainable, competitive economic development. Article 8.5 of the RTB endowed the OECS Authority with “power to make decisions on all matters within its competence” and “(a)ll such decisions other than decisions on procedural matters shall require the affirmative vote of all full Member States present and voting at the meeting of the OECS Authority at which such decisions were taken

provided that such decisions would have no force and effect until the Heads of Government of those full Member States, if any, which were not present at that meeting had within the consideration periods expressed either support for, or abstention in relation to the decision”.

7.4 The Article also provided that a failure to respond to a request for a vote during the consideration period would be assimilated to an abstention. In this event it must be assumed that the decision was not approved since an abstention would have operated to defeat the determination. **The provisions did not indicate the status of a determination of the OECS Authority where a full member refused or omitted to participate in the vote.** In this connexion, it is important to note that in the evolving state practice of the United Nations, an abstention differs from an omission to participate in the vote unless otherwise indicated. Consider in this context the provisions of Article 28 (3) of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single market and Economy which endorsed this practice. Where Member States of the United Nations find it politically inconvenient for one reason or another to support, oppose or abstain from voting, resort is not infrequently made to a refusal to participate in the voting.

7.5 The provisions of this Article must be read in conjunction with Article 5.3(a) of the RTB whereby full independent Member States of the OECS Economic Union undertook to delegate to the Organisation the competence to legislate with direct effect on issues identified in



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Article 14 of the RTB. The juridical infeasibility of this undertaking has already been addressed in paragraph 5.3 above. The foregoing submissions relate to the legislative competence of the OECS Authority and do not purport to affect the determinations of the OECS Authority in other areas of competence. In this connexion, it is important to draw attention to Article 8.9 (b) which appears to be somewhat obscure. The language of commitment appears to deny abstentions the status of a vote. But, in the present submission, a person who abstains is both present and expressing a will even though not voting affirmatively or negatively. Such a person, however, is not omitting to participate in the vote although such participation is not expressed positively or negatively. But, given that decisions of the OECS Authority require the affirmative votes of all full members, abstentions by full members, as a matter of legal necessity, must result in no positive determination being taken on substantive issues. Subject to the foregoing, the OECS Authority has a wide competence to make determinations for the smooth functioning of the Organisation, including the establishment of organs required for the achievement of the purposes of the Organisation and the financial arrangements for meeting its expenses.⁷⁴

7.6 Next in importance to the OECS Authority is the Council of Ministers which comprises Member States as represented by Ministers designated by the OECS Authority. Like the Council of the European Union, the portfolios of Ministerial representatives on the Council may

⁷⁴ See Article 8.12 and 8.4 of the RTB.

correspond to the items falling to be discussed. The Council of Ministers is responsible to the OECS Authority and must take appropriate action on the matters referred to it by the OECS Authority. In particular, the Council considers and submits reports on recommendations of the OECS Commission to the OECS Authority for enactment of legislation and issues regulations and other implementing instruments to give effect to Acts of the OECS Authority. In discharging the immediately foregoing functions, the Council is required to consult with the OECS Authority if so instructed. The Council may choose to consult *proprio motu*. The regulations made by the Council have legally binding force like the Acts of the OECS Authority. And, not unlike decisions of the OECS Authority, determinations of the Council require the affirmative votes of all full Member States present and voting as well as the affirmative votes of Member States absent from the meetings.

7.7 Decisions of the Council are expressed to be binding on all Member States and organs of the Organisation except the OECS Authority. In the present submission, however, it is difficult to appreciate how decisions of the Council can be binding on Member States but not on the OECS Authority which epitomises Member States. There appears to be a lapse in drafting here. Unless this provision means that decisions of the Council are legally binding on all Member States unless the OECS Authority, pursuant to Article 8.11 reverses the decisions without prejudice to acquired rights. Decisions of the Council are taken by unanimity but the votes of Member States

in arrears of contributions are not taken into account. Strangely enough, however, failure by a Member State to pay up its contributions to the Organisation adversely affects its vote in the Council of Ministers but not in the OECS Authority or any other organ. This too appears to be another lapse in drafting.

7.8 Article 9.8 expressly provides that Member States whose financial contributions to the Organisation are in arrears shall not be considered as present and voting but shall be deemed to be absent. Article 9.9 provides that references in the treaty to a unanimous decision of the Council of Ministers means a reference to a decision taken in compliance with the preceding paragraphs other than a decision on procedural matters. Surprisingly, however, there appears to be no reference in the treaty to a “unanimous decision of the Council of Ministers”. In the result, the proviso which follows, addressing Member States in default of their contribution, may not be construed as having any legally binding effect. Similarly, the provisions of Article 9.8 appear to be tainted by sloppy drafting in as much as they provide that decisions of the Council of Ministers shall be binding on all Member States and on all Organs of the Organisation other than the OECS Authority. In the present submission, however, it is difficult appreciate how decisions of the Council will not bind the OECS Authority which represent Member States but bind the said Member States. Further, decision of the Council binds all Member States provided they are within their sovereign competence to implement them. But, *stricto juris* this provision does not exclude decisions which

require constitutional amendment by referendum prior to implementation.

7.9 The provisions of Article 9.6 also appear to be skewed. They provide that decisions of the Council other than those on non-procedural matters require the affirmative vote of all full Member States present and voting. This may only be construed to mean that the validity of a Council decision is not impaired where full Member States were present and did not participate in the vote! And here again it is extremely important to make a distinction between “abstention” and “omission to participate in the vote” unless omission to participate in the vote is expressly assimilated to an abstention. Article 9.6 expressly provides that where a full Member State is absent from the vote and does not indicate within the consideration period if it was in favour or against the motion, the omission to respond shall be construed as an abstention.

7.10 The OECS Assembly comprises representatives of the Parliaments and Legislatures of Member States of the Organisation. Full members are allotted five representatives each and other Member States three representatives each. Representatives of Parliaments and Legislatures shall, so far as practical, reflect their composition in such institutions in terms of government and opposition members provided that the Head of Government and Leader of the Opposition of Member States are always represented in person. Both Speaker and Deputy Speaker of the OECS Assembly are to be elected from members of



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civil society. The OECS Assembly is required to report to the OECS Authority on proposals for enactments of the OECS Authority and on any other matter referred to the Assembly by the OECS Authority and to the Council of Ministers on regulations proposed for the Council of Ministers. The OECS Authority may issue directions to the Assembly concerning their rules of procedure.

7.11 The Economic Affairs Council as the principal organ of the OECS Economic Union has primary responsibility for exercising the powers conferred on it by the Protocol and supervising its application as well as keeping its operations under review. Subject to the direction of the OECS Authority, the Economic Affairs Council is responsible for implementation of decisions concerning the Economic Union and, in this context, makes binding decisions for Protocol Member States.⁷⁵ Both decisions and recommendations of the Economic Affairs Council must be unanimous provided that not less than two thirds of all Protocol Member States vote in the affirmative. The OECS Authority has the power to establish financial arrangements for defraying the administrative expenses of the Economic Union which must be borne by the Member States in equal shares.

7.12 The OECS Commission, as the workhorse of the Organisation, shall be its principal administrative organ as well as the principal administrative organ of the Economic Union. The Commission comprises the Director General and one commissioner of

⁷⁵ Protocol Member States are states which have ratified the protocol and for which this instrument is in force.

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ambassadorial rank from each of the Member States. The Commission is responsible for the provision of secretarial services for the organs of the Organisation and for taking action on decisions made at such meetings. The importance of the Commission may be readily discerned from its functions which include making recommendations to the OECS Authority and Council of Ministers on the issuing of Acts, and Regulations in addition to:

- a) making reports of activities and an annual report to the OECS Authority on the work of the Commission;
- b) keeping the function of the Organisation under continuous review and reporting its findings to the relevant organs;
- c) making recommendations to the OECS Authority and the Council of Ministers and the making of Acts, Regulations of the organisation and providing drafts of such Acts and Regulations to be considered for enactment;
- d) monitoring the implementation of Acts and Regulations of the Organisation;
- e) overseeing the preparation of the draft agenda for meetings of the OECS Authority and submitting the draft agendas to the Authority for its approval; and
- f) undertaking such other work and studies and performing such other services relating to the functions of the Organisation as may be required under the treaty or by the OECS Authority or by any other organs from time to time and also making proposals relating thereto as may assist in



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efficient and harmonious functioning and development of the Organisation.

Decisions of the OECS Commission are reached by a simple majority vote and given the important functions of the Commission including the making of recommendations to the Authority and Council of Ministers for the enactment of Acts and Regulations of the Organisation and which are to be legally binding, it is submitted that careful consideration ought to be given to the voting procedures of the Commission especially in terms of weighted representation on this body as is the case with the European Commission.⁷⁶

VIII. ENTITLEMENT OF OECS ASSEMBLY TO DIPLOMATIC PRIVILEGES AND IMMUNITIES

8.1 By Article 21.4 of the RTB it was agreed that the privileges and immunities to be recognised and granted to the members of the OECS Commission and to the senior officials of the Organisation at its headquarters and in the Members States “shall be the same accorded to members of a diplomatic mission accredited at the headquarters of the Organisation and in the Member States under the provisions of the Vienna Convention on Diplomatic Relations of 18th April, 1961”. The Article went on to provide: “Similarly the privileges and immunities granted to the OECS Commission at the headquarters of the Organisation shall be the same as granted to diplomatic missions at the

⁷⁶ The largest states of the European Union have two Commissioners each and other Member States one each. See, J Steiner and L Woods, *op. cit.*, at p. 29.

headquarters of the Organisation under the said Convention”.⁷⁷ It will be discerned from the foregoing that the RTB confined itself to according diplomatic privileges and immunities to the OECS commissioners and senior officials of the Organisation at the headquarters of the Organisation and accorded similar privileges and immunities to the OECS Commission on par with diplomatic missions accredited to the headquarters of the Organisation. As concerned other categories of persons like the representatives of Member States on organs of the Organisation, Article 21.4 merely provides: “Other privileges and immunities to be recognised and granted by the Member States in connexion with the Organisation shall be determined by the OECS Authority”.

8.2 In light of the foregoing, it will be determined what privileges and immunities, if any, are appropriate for representatives of the OECS Assembly. Bearing in mind that the OECS Assembly is a principal organ of the Organisation and comprised of representatives of national Parliaments and Legislatures, it is submitted that the privileges and immunities accorded to this class of representatives should be similar to those accorded to traditional diplomatic agents with the important difference that greater emphasis was likely to be placed on the functional necessity of such privileges. Since, however, as mentioned above, it was determined to accord diplomatic privileges to senior officials of the Organisation, and the Assembly is a principal organ of the Organisation, it is submitted that the Speaker, and Deputy Speaker

⁷⁷ Since Article 12.2 of the RTB requires Commissioners to have ambassadorial rank, diplomatic privileges and immunities were accorded to them.

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and Clerk of the Assembly being the equivalent of senior officials, would enjoy diplomatic immunity and other representatives sitting in the Assembly would enjoy functional immunities which are not as extensive as diplomatic immunities to ensure that they are in a position to perform their duties effectively. Such functional immunities would consist of immunity from suit for words spoken or acts done in the course of their employment as members of the Assembly in addition to the personal immunities identified in the next paragraph. As such, the representatives of the Assembly would be subject to two regimes of immunities, diplomatic immunities in respect of senior officials or their equivalents and functional immunities for other than senior officials of this organ.

8.3 In this context, two approaches may be discerned in the practice of States. On the one hand, there was a tendency to accord this category of personnel privileges and immunities normally accorded diplomatic agents of comparable rank. Thus, a representative of ministerial rank was likely to be accorded greater privileges than a junior administrative officer. On the other hand, a more restrictive approach was likely to accord some measure of immunity “in respect of words spoken or written and all acts done by them in their capacity as representatives”.⁷⁸ This latter terminology was more restrictive than the first mentioned regime.

⁷⁸ See P. Sands and P Kleim, *Bowett’s Law of International Institutions*, Sweet and Maxwell, 2009, at p. 504 ff.



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8.4 Generally speaking, the immunities accorded to representatives of intergovernmental organisations are personal immunities and relate to immunity from arrest, seizure of personal baggage, national service obligations, immigration restrictions, inviolability of relevant papers and documents associated with the Organisation, right of communication and exemption from customs duties in respect of personal baggage as opposed to imports for personal use. Due to the current abuse of privileges and immunities by diplomatic personnel and the escalating incidence of terrorism and drug trafficking among new arrivals on the diplomatic scene, host countries are understandably reluctant to accord privileges and immunities to foreign representatives and it is progressively difficult to achieve consensus in the international community on a comprehensive multilateral convention on privileges and immunities.⁷⁹

8.5 As concerns the according of privileges and immunities in respect of the OECS Assembly, the issue appears to have had its provenance in the appearance of intergovernmental organisations which proliferated after the birth of the United Nations and the greater likelihood that beneficiaries under relevant regimes would be more likely to abuse their privileges and immunities. And given the relatively low status of representatives of the Assembly compared to representatives of the Authority and the Council of Ministers, and the seminal importance of the latter's role in the achievement of the

⁷⁹ To date, three multilateral conventions exist on immunities as follows: The Vienna Convention on Diplomatic Immunities 1961; The Vienna Convention on Consular Immunities 1963 and the United Nations Convention on Special Missions 1949.

purposes and objectives of the OECS Economic Union, it is submitted that subject to the above this category of representatives of the Assembly other than senior officials, need not be accorded full diplomatic privileges and immunities if they are to discharge their functions effectively and competently.

VIII. PROCESS OF DEVELOPING AND ENACTING OECS LEGISLATION

9.1 Given the critically important role to be performed by the Commission in submitting proposals for the development and enactment of legislation for the Organisation, the principal legislative draftsman of the Commission should be mandated to initiate and coordinate proposals for Acts, Regulations and Orders as required. In this context, meetings of the national Chief Parliamentary Counsel should be organised by the Commission preparatory to meetings of national Attorneys General/ Ministers of Legal Affairs. After the national Attorneys General/ Ministers of Legal Affairs have definitively examined and adopted the aforementioned draft instruments to be informed by regional policies, the principal drafterperson of the Commission should be required to prepare appropriate proposals, including draft legislation and draft regulations for transmission to the OECS Authority and the Council of Ministers, as the case may require, to be reported on by the OECS Assembly pursuant to relevant provisions of the RTB. Such draft instruments would have to be appropriately identified, classified and numbered prior to distribution to Attorneys Generals/ Ministers of Legal Affairs of the Member States and the



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OECS Assembly for consideration before approval and enactment by the OECS Authority. Following their enactment such instruments should be gazetted in the OECS Gazette and in national gazettes for publication before entry into force.

9.2 In respect of “the abundance of caution approach” on enacting OECS legislation, it may be recalled that the principle of *ex abundante cautela* was introduced into the narrative concerning the enactment of OECS legislation with direct effect as one means of safeguarding the integrity of institutional arrangements devised by competent decision-makers in establishing the OECS Economic Union. The emergence of globalisation and liberalisation as imperatives of sustainable economic development driven by internationally competitive production of goods and services, constituted a wakeup call for competent decision-makers of Caricom. The miniscule economies of the sub-region and, in particular, those of the OECS sub-sub region were constrained to consider regional economic integration as an option in order to augment productive resources and enhance market size as a prelude to international competitiveness through cheaper unit costs of commodities produced in the sub-region. However, one intractable impediment to the achievement of these objectives was the implementation deficit which plagued economic integration of the sub-region, including the OECS sub-sub-region.

9.3 The States of Caricom and the OECS being dualist jurisdictions constrained by the juridical doctrine of dualism encapsulated in Article 240 (1) of the RTC were anxious to achieve legislative convergence,



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especially in the area of economic integration and were disposed to conceptualise and implement a system of governance approximating that which was developed and enunciated in Section 2 of the European Communities Act 1972 of the United Kingdom. The OECS States, a tighter sub region than Caricom, devised a regime which was set out in Section 5 of the RTB. However, this regime did not elicit the support of all OECS States which considered that it could not achieve the purpose intended due to the omission to require interested Member States to amend their constitutions in order to bring them in compliance with the RTB. In order to satisfy this class of states it was decided to require all Member States to put in place arrangements for their national Parliaments or Legislatures, as the case may require, to re-enact legislation issuing from the Organisation to take effect in their municipal jurisdiction. In this way, assuming that the Member States discharged their obligation relating to legislation in good faith and in a timely manner, legislative convergence would be achieved and the implementation deficit would be remedied.

9.4 There can be no doubt that the achievement of legislative convergence and the resolution of the implementation deficit in the manner described above appears to be both circuitous and costly, and it is to be hoped that in the very near future the Member States of the OECs would bite the bullet and take steps to amend their constitutions in order to allow the Authority to legislate in the manner contemplated by the RTB. In the absence of such an initiative the abundance of caution approach is calculated to achieve the objective desired and may be



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maintained despite its obvious juridical untidiness and lack of institutional cost effectiveness.⁸⁰

9.5 In respect of procedures for cooperation among Clerks of the OECS Assembly and the Clerks of national parliaments/legislatures, it is submitted that here again the OECS Commission may be expected to play an important coordinating role. As an organ of the Organisation mandated to prepare and submit draft Acts and Regulations to the OECS Authority and the Council of Ministers for enactment in the OECS Customs Union, the OECS Commission would be in a position to determine the form and procedure for the preparation of draft enactments for the OECS Authority. In this context, the Principal Draftsperson of the OECS Commission should be required to liaise with national Chief Parliamentary Counsel to ensure that all Member States are singing from the same Sankey in terms of draft legislation for enactment by the OECS Authority. In this way legislative convergence would be secured such that Acts and Regulations issuing from the OECS Authority based on draft legislation submitted by the Commission are uniform and convergent throughout the entire OECS sub-region subject to such adjustments peculiar to one or another Member State. And assuming a decision by all OECS Member States to have such legislation re-enacted by national Parliaments/Legislatures then legislative convergence should be assured throughout the sub-region.

9.6 As concerns the establishment of an OECS Gazette and mechanisms required for establishing its legality in the sub-region,

⁸⁰ It is assumed that the “abundance of caution approach” would be superimposed on institutional arrangements currently obtaining in the OECS Economic Union.



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several approaches may be adopted. One approach commending itself for consideration may be the elaboration of a protocol to the RTB providing for an OECS Gazette. The protocol may be enacted into municipal law by OECS Member States according to legal authority to endow instruments registered therewith with the status of law from the date of registration or some other date in the jurisdictions of the States parties to the protocol. In this way legislation would take effect simultaneously in all OECS jurisdictions. The OECS Commission may be mandated to register and publish regional legislative instruments in the Gazette. And the offices of the Gazette may be located in the premises of the Commission for ease of administration and cost effectiveness.



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