[2009] CCJ 4 (OJ)

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No. OA 1 of 2009

Between

Trinidad Cement Limited **Claimant**

And

The Caribbean Community **Defendant**

THE COURT,

composed of M de la Bastide, President and R Nelson, A Saunders, D Bernard and J Wit, Judges

having regard to the originating application filed at the Court on 19th January 2009 and amended on 4th February 2009, together with the annexures thereto, the defence filed on 16th February 2009, the exhibits to the Defence filed on 5th March 2009, the written submissions filed on behalf of the State of Jamaica on 13th March 2009, the witness statements filed on behalf of the Defendant on 25th March 2009 and to the public hearing held on 31st March 2009 and 1st April 2009

after considering the written submissions and the oral observations made on behalf of:

- the Claimant, by Dr C Denbow, SC, Attorney-at-Law
- the Defendant, by Mr A Astaphan SC, Attorney-at-Law
- The State of Jamaica, by Mr D Leys QC, the Solicitor General and by Dr K Brown

issues on the **10th day of August , 2009** the following

JUDGMENT

Introduction

[1] On 11th December, 2008, Trinidad Cement Limited ("TCL"), the Claimant in this matter, filed an application for special leave to commence these proceedings as a private entity pursuant to Article 222 of the Revised Treaty of Chaguaramas ("RTC"). TCL is the parent company of the TCL Group of Companies. The principal activity of the TCL Group is the manufacture and sale of cement throughout the Caribbean Community. The Group manufactures cement through Caribbean Cement Company Limited in Jamaica ("Caribbean Cement"), Arawak Cement Company Limited in Barbados ("Arawak"), and TCL itself in Trinidad and Tobago.

[2] In all, the Group currently consists of eight operating companies located in the territories of Trinidad and Tobago, Barbados, Jamaica, Guyana and Anguilla. TCL's shares are listed on the following five Caribbean Stock Exchanges: in Trinidad and Tobago, Barbados, Jamaica, the Eastern Caribbean and Guyana. The Group presently employs approximately 1,000 persons comprising nationals of all the States of CARICOM. The Caribbean Community ("the Community"), the Defendant in this matter, admitted, and it is not without significance, that the TCL Group is probably the only major Caribbean manufacturer of products using exclusively indigenous raw materials. The limestone, gypsum, shale and pozzolan it uses in the production of cement are sourced exclusively from within the Caribbean.

[3] At the same time that it filed its application for special leave to commence the proceedings, TCL also filed two other applications. One of these was an application for the proceedings to be determined on an expedited procedure pursuant to Part 13 of the Original Jurisdiction Rules of the Court. The other was an application for interim measures against the Community pursuant to Part 12 of those Rules.

[4] On the 15th January, 2009 after a hearing convened for that purpose the Court announced that it had granted the application for special leave to commence the proceedings against the Community. It was held: that TCL was a person of a Contracting Party; that TCL had advanced an arguable case that it had satisfied the conditions laid down in Article 222(a) and 222(b) of the RTC; that the relevant Contracting Party, Trinidad and Tobago, had omitted to espouse TCL's claim and that the interests of justice required that TCL be allowed to espouse this claim. It was also determined then that in lieu of adjudicating TCL's application for interim measures the Court would proceed to hear the Originating Application on an expedited procedure. The Court gave its written reasons for the grant of special leave on 5th February, 2009. These reasons have been published as [2009] CCJ 2 (OJ).

[5] TCL filed its Originating Application together with annexures on 19th January, 2009. Pursuant to Part 10 Rule 3 of the Rules, the same were served on the Defendant and as the proceedings were being heard on an expedited basis, the Originating Application was also served on all the Member States of the Community. In consequence, the States of Jamaica, St Kitts and Nevis, Antigua and Barbuda, Dominica, Saint Lucia, Grenada and Suriname respectively indicated a desire to be heard. Together with the parties to the proceedings, these States participated in hearings by teleconference to consider issues of discovery and such other matters as were conducive and necessary for the management of the further progress of the matter.

[6] TCL's Originating Application was heard on 31st March and 1st April, 2009 respectively. The Court received oral testimony from His Excellency Dr Edwin Carrington, Secretary-General of the Caribbean Community and from Ms Desiree Field-Ridley, Adviser to the Secretary-General of the Community on the Single Market and Sectoral Programmes. Oral submissions were made by Dr. Claude Denbow SC for TCL; Mr. Anthony Astaphan SC for the Community; Mr. Douglas Leys QC, Solicitor General of Jamaica and Dr.

Kathy-Ann Brown also on behalf of the State of Jamaica. In addition, the Court received written submissions from the legal representatives of the parties and of Jamaica.

[7] In the written reasons for granting special leave to the Applicant, the Court gave a brief factual background to the case and expressed a view on certain aspects of the facts. In the course of the hearing of the Originating Application counsel sometimes referred to those expressions of the Court as if the same represented conclusive findings from which, during the hearing of the Originating Application, the parties absolutely could not depart. It is important at the outset to indicate that the purpose of special leave proceedings is not to resolve the substantive issues in contention between the parties but rather to answer the single issue as to whether or not special leave should be granted to an Applicant to commence proceedings. The judgment of the Court rendered upon the conclusion of special leave proceedings is tailored to meet that purpose. At a hearing for special leave the parties advance their submissions prior to the making of discovery and before any party has adduced in full the evidence in support of its case. Interested Member States are generally not invited to participate at a hearing for special leave although, due to the presence of peculiar factors, such an invitation was issued in the case of *TCL v The State of the Co-operative Republic of Guyana*[1]. In all the above circumstances extreme caution should be taken before concluding that a finding made by the Court upon the conclusion of a hearing for special leave represents the Court's conclusive view on substantive matters giving rise to such finding.

TCL's Claim

[8] In these proceedings TCL challenges two decisions of the Community each of which resulted in authorisation being granted to suspend the Common

[1] *See*: [2009] CCJ 1 (OJ)

External Tariff ("CET") on imports of grey cement to certain Member States of the Community. In each case the suspension granted was for a period of one year. The first of the two decisions was made by the Secretary-General on or about 23rd September, 2008. It authorised suspension by Jamaica from 10th September, 2008. The quantity of grey cement in respect of which that suspension was sought and granted was 240,000MT.

[9] The second decision challenged was made by the Council for Trade and Economic Development ("COTED") at its 26th Meeting held in Georgetown, Guyana on 24th November, 2008. At that Meeting COTED authorised suspension of the CET on cement for one year for the Member States of Antigua and Barbuda, Dominica, Grenada, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines and Suriname. The quantity of cement in question varied from State to State and ranged from 40,000MT in the case of St. Kitts and Nevis to 175,000MT in the case of Suriname. COTED also decided that the situation be reviewed after one year to take into consideration such factors as adequacy of supply, timeliness of delivery, quality of the product and pricing.

[10] TCL claims that each of the two decisions to authorise suspensions of the CET i.e. the one by the Secretary-General and the one by COTED, is *ultra vires*, irrational and/or illegal and/or unreasonable, null and void and of no effect and should be quashed or revoked by the Court. In support of these claims a central contention of TCL was that it was in a position to satisfy more than 75% of the regional demand for cement and that according to the applicable rules there was no basis for either the Secretary-General or COTED to authorise a suspension of the tariff.

[11] The TCL claim was presented against a broad background that covered the importance and purpose of the CET, the benefit of the CET to the TCL Group generally and in particular to TCL and the manner in which the CET has been

in the past applied to cement. Citing several facts and circumstances, TCL alleged, for example, that over the past three and a half years the Community and the Member States "have treated with the implementation of the CET in a haphazard and whimsical manner which has defied predictability and cast a shadow of uncertainty over the realisation of TCL's investment of millions of dollars in expanding its production capacity…"

[12] Counsel for TCL also indicated that, quite apart from the relief TCL was claiming, the company had instituted these proceedings in order to have the Court establish definitive criteria for the suspension of the CET. The business community needed to know with certainty what the proper procedures were for suspension of the tariff and what was the scope and extent of the powers of the Secretary-General and COTED in that regard.

[13] An important plank of the TCL claim consisted of certain findings of an audit of the supply and demand for cement in the region. This audit had been commissioned by COTED at its 17th Special Meeting on September 9, 2006 in Barbados. It is common ground that the objective of the audit was to verify the actual and anticipated production of, and market for, cement in the region. The Audit Report is dated 10th October, 2008 and it confirms that indeed, at all material times TCL was easily able to satisfy in excess of 75% of the regional demand for cement. In 2008, for example, extra-regional imports of cement would be required to satisfy a mere 7% of regional demand while in 2009, when full expansion of the TCL plants was expected, there would be an excess of 1% in regional supply over regional demand.

[14] TCL also alleged in its pleadings that it had obtained a loan from the International Finance Corporation ("IFC"), an arm of the World Bank, in order to finance its expansion programme in relation to its plants in Jamaica, Barbados and Trinidad and Tobago. The Community, it was said, was involved in the loan arrangements between TCL and the IFC and one of the

primary grounds on which the loan was allegedly obtained was that the TCL Group would continue to have the benefit of the CET and other Tariffs so as to ensure its growth and development towards full international competitiveness. TCL claimed a legitimate expectation that, consequent upon the modernisation and expansion of its production capabilities, it would continue to enjoy the protection of the CET and that this legitimate expectation had been defeated by each of the two decisions to which reference was earlier made. In its oral submissions however, this point was abandoned by Counsel for TCL.

Jurisdiction of the Court and Admissibility of the Claim

[15] The jurisdiction of the Court is laid down in Article 211 of the RTC. The Court has compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the treaty, including applications by persons in accordance with Article 222. It is undeniable that there is here a genuine dispute between the parties concerning the interpretation and application of the RTC. The only reason why the Court may not have jurisdiction in this case is therefore if the case were not brought by a person in accordance with Article 222.

[16] Article 222 of the RTC lays down a number of conditions that must be met by an applicant who seeks to espouse a claim. Some of these conditions were conclusively satisfied at the hearing for special leave. In particular, at the special leave hearing the Court was satisfied, for the reasons set out in its judgment, that TCL was a person within the meaning of that Article; that Trinidad and Tobago, being the Contracting Party entitled to espouse the claim, had omitted to do so and that the interest of justice required that TCL be allowed to present its claim.

[17] On the other hand at the special leave stage an applicant must merely make out an arguable case that the conditions mandated by Article 222(a) and 222(b) can or will conclusively be satisfied at the substantive hearing. The question therefore is whether, in light of all the evidence presented, TCL has now so satisfied the Court.

[18] It is not challenged that TCL is a producer of cement; that TCL supplies cement throughout the region; that the maintenance of the CET on cement yields a direct benefit to TCL and that decisions to suspend or lower the CET on cement will have a prejudicial impact on that company. In light of the foregoing, the Court holds that TCL has satisfied fully the relevant provisions of Article 222. The Court has jurisdiction in this case and the claim is admissible. The Court now considers the merits of the claim.

The Secretary-General's decision to grant Jamaica a suspension

[19] The claims of TCL require a detailed review of the circumstances in which each of the impugned decisions was made. The Court first looks at the circumstances leading to the Secretary-General's decision to authorise Jamaica to grant a suspension.

[20] By letter dated 20th August, 2008 the State of Jamaica made a formal request to the Secretary-General for the suspension of the CET on cement for the period 10th September, 2008 to 9th September, 2009. In keeping with the established practice, the Secretary-General, immediately on receipt of the request by Jamaica, sought from each other Member State "information regarding supplies available from your Member State as per request and where supplies are not currently available, an indication of if and when supplies would be available".

[21] On 3rd September, 2008 the Competent Authority in Trinidad and Tobago responded to the Secretary-General informing him that "Trinidad and Tobago has ***no objections*** to a request from Jamaica for the item for the period specified." The Trinidad and Tobago Competent Authority did not otherwise respond to the request for the information specified in the Secretary-General's letter. TCL complained in these proceedings that it was never consulted before the Trinidad and Tobago Competent Authority responded in this manner to the Secretary-General.

[22] On 5th September, 2008, Caribbean Cement, through its General Manager, wrote to the Jamaica Competent Authority indicating the company's withdrawal from a previous stance it had taken with respect to that State's desire to seek a suspension of the CET on cement. It would appear that Caribbean Cement had previously indicated to the Jamaica Competent Authority that it would agree to a request by Jamaica for a suspension of the CET on imports of cement into Jamaica for a period limited to eight months and an amount of 85,000 tonnes. The General Manager of Caribbean Cement in his letter of 5th September, 2008 sought to renege on that stance and requested instead "full re-instatement of the CET".

[23] On that same day, 5th September, 2008, the Secretary-General advised the Competent Authority in Jamaica that he had received correspondence from the State of Barbados indicating that State's ability to supply Jamaica with the cement required by Jamaica. In view of the correspondence from Barbados, stated the Secretary-General in his communication to the Jamaica Competent Authority, he regretted that he was unable to accede to Jamaica's request for a suspension. The Secretary General advised the Jamaica Competent Authority that, in this regard, it should communicate directly with the General Manager of Arawak whose address and full contact details were also forwarded by the Secretary-General to the Jamaica Competent Authority.

[24] TCL, in its Originating Application, alleged that subsequent to this communication to the Jamaica Competent Authority from the Secretary-General, "politics" then stepped in; that the General Manager of Arawak was encouraged to "review" the plant's production and export statistics and that the matter was referred to the Arawak Board, which refused to alter the company's position of being ready and willing to supply Jamaica with the required cement. TCL further alleged that there followed "a high level discussion" between the Prime Ministers of Jamaica and Barbados and that in consequence Barbados withdrew its objection to the request for a suspension by Jamaica. At the hearing before us, TCL provided no evidence of these disturbing allegations and the Court, therefore, places no reliance on them.

[25] At any rate, by a letter dated the 22nd September, 2008, the Secretary-General was informed by the Barbados Competent Authority that "[T]he results of further investigation have shown that Barbados cannot supply the cement and the Government wishes to withdraw its objection". That same day, 22nd September, 2008, the Chief Executive Officer of the TCL Group wrote to the Secretary-General expressing surprise that TCL had not been contacted with respect to its ability to supply the quantities of cement demanded by Jamaica. TCL requested an explanation of what could have contributed to its not receiving this vital correspondence. The following day, 23rd September, 2008, the Secretary-General authorised the Government of Jamaica to suspend the CET on cement for one year in an amount of 240,000MT.

The COTED's suspension

[26] One of the principal features of COTED's authorisation to suspend that gave rise to TCL's complaint was that this decision represented an unexplained *volte face* from refusals of such suspension by the Secretary-General on behalf of COTED shortly before the meeting on November 24 and 25, 2008. The point is best illustrated by the following table:

REQUESTING STATE	DATE OF REQUEST	DATE OF REFUSAL	COTED APPROVAL ULTIMATELY GIVEN
Antigua and Barbuda	September 24, 2008	October 22, 2008	60,000 MT – 1 year
St. Lucia	September 12, 2008 October 29, 2008	October 8, 2008 November 18, 2008	50,000 MT – 1 year
Suriname	September 4, 2008 October 13, 2008	November 7, 2008	175,000 MT – 1 year

[27] TCL submitted that the COTED decision to authorise the suspensions, like the Secretary-General's decision on Jamaica, was vitiated on the grounds of illegality, *ultra vires*, irrationality and procedural impropriety.

[28] The applications to COTED for suspension of the CET, each for a period of two years, by the six OECS states and Suriname, were all made on the ground (confirmed by Ms. Field-Ridley in cross-examination) that those Member States had difficulties in obtaining supplies of cement from the TCL Group. Prior to the TCL expansion of 2006-2009 several countries experienced such difficulties, a fact which prompted the 17th Special Meeting in September 2006 to commission the Audit Report.

[29] At the meeting in Guyana on November 24 and 25, 2008 Ms. Field-Ridley presented the Audit Report. She highlighted the Report's forecast that TCL would meet the total regional demand in 2009 but that in 2008 and 2010 importers would have to rely on importation of some extra-regional cement. She explained the conclusion in the Audit Report that the distribution system was adequate but not "in terms of access to supplies". The Audit Report had recorded some dissatisfaction on the part of Member States with allegations being made that TCL was guilty of abusing its dominant position in the

cement market and that there was a lack of sufficient information on price increases. The Report considered that the main concerns of Member States were as to (1) availability of cement in a timely manner and (2) stability of prices. As to the first of these, the Audit Report pinpointed as a matter of history the reasons for shortages of cement over the period 2001 to 2007. These were: (1) the ongoing construction activity undertaken to expand the TCL plants; (2) increase in local demand; (3) vessel unavailability; (4) adverse sea conditions; (5) inadequate storage capacity and (6) inadequate port facilities.

[30] Following the presentation by Ms. Field-Ridley, the COTED Ministers discussed the Audit Report and the applications for suspension. The discussion by the Ministers focused on the two issues above, namely, the availability of a regular, consistent and timely supply of cement from TCL and secondly, TCL's prices. The Audit Report, especially its forecast of a supply of TCL cement in excess of regional demand, was taken into account when the meeting came to consider the length of the suspension. Ms. Field-Ridley emphasized that a blanket two year suspension was inconsistent with the supply forecast for 2009 with the result that the meeting settled for a suspension for one year instead of two.

[31] Significantly, in the course of the deliberations on whether or not to authorise the suspensions, Barbados, Saint Lucia, Antigua and Barbuda and Suriname strongly advocated the principle that even if the authorisations were granted, their dealings in the market would follow the rule: "no matter what, we source first from within". The experiences of Member States appear to bear out such a practice. Although Trinidad and Tobago had obtained a derogation from the CET in September 2006, it purchased no extra-regional cement during that period. (*See:* p. 9 of the Audit Report). Also, the OECS States and Suriname had the benefit of a suspension of the CET from May 2005 to September 2008. Indeed the CET (when not suspended) has always been 10

per cent for St. Vincent and the Grenadines (*See:* Audit Report at p. 138). Notwithstanding the fact that in the years between May 2005 and September 2008 the OECS States were permitted to import non-regional cement free of CET, TCL supplied 100 per cent of the Grenada market and over 75 per cent of the market in the other territories except Antigua and Barbuda (25 – 30 per cent) and St. Lucia (50 per cent) (*See*: Table 26 of the Audit Report). TCL did suggest that the practice of Member States seeking and obtaining authority to suspend but never using the same was a device aimed at price suppression. Forcing down the price of TCL cement in this fashion would be highly inappropriate but this point was never developed or pressed at the hearing and the Court makes no finding on it.

[32] The COTED Meeting ultimately agreed to authorise the suspensions, not for two years as had originally been requested by the respective States, but for one year.

The relevant principles of judicial review

[33] Before the Court considers the challenge made by TCL to the two decisions, it is necessary to address briefly the issue of the scope of the judicial review which this Court may conduct and the remedies it is entitled to give. In this regard the Court derived some assistance from the written and oral submissions of Jamaica.

[34] TCL has claimed that it is entitled to mandatory orders quashing the decisions of the Secretary-General and COTED respectively on the ground that the decisions were *ultra vires*. The State of Jamaica, through its Solicitor General, submitted that in the absence of a provision in the RTC similar to that contained in Article 230[2] of the EU Treaty the Court had no power of

[2] Article 230 states "The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions

review; that if the Court were to adopt the concept of *ultra vires* it could do no more than affirm or reject an allegation that a policy making organ did not act in accordance with its constituent instrument. According to the Solicitor General, coercive measures are not appropriate remedies against Organs of the Community. The questions that therefore arise are these. Is this Court, in an appropriate case, entitled to grant injunctive or other coercive relief or is the Court limited to the issuance of a declaration? Should the Court merely assume that the Community, or Member States for that matter, will in good faith implement their international obligations as clarified by the Court?

[35] Article 187 is the first of the Articles of the RTC that address Dispute Resolution. The Article is headed "***Scope of the Chapter"*** and it states***:***

> *"The provisions of this Chapter shall apply to the settlement of disputes concerning the interpretation and application of the Treaty, including:*
>
> *(a) allegations that an actual or proposed measure of another Member State is, or would be, inconsistent with the objectives of the Community;*
>
> *(b) allegations of injury, serious prejudice suffered or likely to be suffered, nullification or impairment of benefits expected from the establishment and operation of the CSME;*
>
> *(c) allegations that an organ or body of the Community has acted ultra vires; or*
>
> *(d) allegations that the purpose or object of the Treaty is being frustrated or prejudiced."*

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brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives. Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

[36] Although Article 187(a) relates exclusively to a suit brought by a Member State, in the judgment of the Court the other provisions are applicable to "applications by persons in accordance with Article 222 concerning the interpretation and application of this Treaty".[3] This includes entertaining allegations by a private entity that an organ or body has acted *ultra vires* (*See:* Article 187(c)).

[37] By Article 216(1) of the RTC and Article XVI (1) of the Agreement Establishing the Caribbean Court of Justice ("the Agreement"), the Member States have recognised the jurisdiction of the Court as compulsory *"ipso facto and without special agreement.*" That jurisdiction is to hear and determine disputes relating to *"the interpretation and application*" of the RTC. In the event of a dispute as to whether the Court has jurisdiction, the Court has been granted the power itself to determine that question: *See:* Article 216(2) of the RTC and Article XVI (2) of the Agreement.

[38] These provisions illustrate a fundamental difference between the 1973 Treaty of Chaguaramas Establishing the Caribbean Community and Common Market and the RTC. While in Article 11 of the Annex the former treaty provided for States Parties only a voluntary disputes régime, the provisions of the RTC make it plain that the RTC has made available to States and to private entities, mandatory resolution of disputes by the Court in accordance with the rule of law. The RTC represented a transformation of the CARICOM Single Market and Economy "into a rule-based system, thus creating and accepting a regional system under the rule of law": *See*: *TCL v The Caribbean Community* [2009] CCJ 2 (OJ) at [32]. This necessarily means that the Court has the power to scrutinise the acts of the Member States and the Community to determine whether they are in accordance with the rule of law which is a fundamental principle accepted by all the Member States of the Caribbean Community. It would be almost impossible to

[3] *See*: Article 211 of the RTC

interpret the RTC and apply it to concrete facts unless the power of judicial review was implicit in that mandate. It is the judgment of the Court that the impugned decisions to authorise suspensions in this case are subject to judicial review by the Court.

[39] In carrying out such review the Court must strike a balance. The Court has to be careful not to frustrate or hinder the ability of Community organs and bodies to enjoy the necessary flexibility in their management of a fledgling Community. The decisions of such bodies will invariably be guided by an assessment of economic facts, trends and situations for which no firm standards exist. Only to a limited extent are such assessments susceptible of legal analysis and normative assessment by the Court. But equally, the Community must be accountable. It must operate within the rule of law. It must not trample on rights accorded to private entities by the RTC and, unless an overriding public interest consideration so requires, or the possibility of the adoption of a change in policy by the Community was reasonably foreseeable[4], it should not disappoint legitimate expectations that it has created.

[40] The Court must seek to strike a balance between the need to preserve policy space and flexibility for adopting development policies on the one hand and the requirement for necessary and effective measures to curb the abuse of discretionary power on the other; between the maintenance of a Community based on good faith and a mutual respect for the differentiated circumstances of Member States (particularly the disadvantages faced by the LDCs) on the one hand and the requirements of predictability, consistency, transparency and fidelity to established rules and procedures on the other.

[41] It is not the role of the Court to attempt to re-evaluate matters which were properly placed before a competent policy making organ for a decision. The

[4] See for example: Johann Luhrs v Hauptzollamt Hamburg-Jonas, Case 78/77 of 1978

Court accepts the submission of the Solicitor General that the power to review the decisions of COTED is limited in circumstances where COTED has exercised a discretion.[5] The ability to authorise suspension of the CET is inherently a power to cater to the kind of flexibility that is required in the carrying out of policy. But applications for suspensions must be dealt with in a principled, procedurally appropriate manner. The occasion for suspension may only lawfully arise if one of the conditions laid out for it in the RTC is present and suspension should not be sought or granted for improper purposes.

[42] Finally, as to possible remedies, it must be borne in mind that the Agreement establishing the Court has been incorporated into the domestic law of each of the CARICOM Member States. Pursuant to the Agreement and the RTC, the Court has power to prescribe interim measures. *See*: Article 218 of the RTC and Article XIX of the Agreement. Article XV of the Agreement states that Member States, Organs, Bodies of the Community or persons to whom a judgment of the Court applies, shall comply with that judgment. Further, Article XXVI of the Agreement enjoins all the Contracting Parties to ensure that all authorities of a Contracting Party act in aid of the Court and that any judgment, decree, order, sentence of the Court given in exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of that Contracting Party.

[43] Given the Court's duty to enforce the rule of law and to render the RTC effective, competence to review the legality of acts adopted by Community institutions must perforce include competence to award appropriate relief to private entities that have suffered and established loss as a result of an illegal act or omission on the part of the Community. If the Court were restricted to

[5] See also Osieke: Legal validity of ultra vires acts (1983) 77 AJIL 239 @ 247. See also *Adler v Secretary-General of the UN*, Judgment No. 267, UN Doc. AT/DEC/267

the issuance of mere declarations, none of the enforcement mechanisms referred to in the previous paragraph would have been required. In the judgment of the Court, coercive remedies are therefore available to the Court.

The CET regime

[44] The CET was originally provided for in an Annex to the 1973 Treaty of Chaguaramas ("the original Treaty") but agreement was never concluded on implementation of the measure until almost two decades later. There are two official published documents on the CET. The document titled "Administrative Arrangements Relating To The Alteration or Suspension of Rates under the Common External Tariff" was published in January 1992 ("the 1992 document"). The other document - "Common External Tariff of the Caribbean Common Market -An Explanation of its Scope, Structure and Other Features" - was published in March 1993 ("the 1993 document"). These publications to this day remain the only existing authoritative documents on the CET emanating from official circles. As such, they suffer from the serious deficiency that each was published before the entry into force of the RTC the relevant provisions of which are different from the corresponding provisions of the original Treaty. The RTC is, however, a successor treaty and a protocol exists[6] specifically continuing the rights and obligations assumed by the Parties to the original Treaty and catering for the succession of the CARICOM Single Market and Economy under the RTC to the Caribbean Community and Common Market under the original Treaty. Moreover, the testimonies of both the Secretary-General and Ms Field-Ridley in these proceedings confirm that the 1992 and 1993 documents are still currently in use as official guides for the Community and its organs and the general public. The Court therefore holds that the two publications reflect the policies of COTED and that, until disavowed by the Community or disapproved by this Court, the guidelines and prescriptions contained in them

[6] *See:* Protocol on the Revision of the Treaty of Chaguaramas http://www.caricomlaw.org/docs/revisedtreaty-protocol.htm

should be taken as being still in force so far as they are consistent with the relevant provisions of the RTC.

[45] Although the 1992 and 1993 publications contained historical instances of departure from the CET that were authorised by the Common Market Council, they offered no guidance on how COTED, its successor, would exercise its discretion pursuant to Article 83(2) of the RTC. Accordingly, these publications, contrary to TCL's written submissions, did not create any legitimate expectation that a private enterprise would have an opportunity to make representations to the Secretary-General or to COTED.

[46] In light of the relative dearth of information available on the CET and its operational features, the Court accepts the submission of TCL that it is important that private entities should be provided with appropriate information regarding the operation of the CET and in particular the suspension of the tariff. In this judgment the Court undertakes part of this task. The CET is a fundamental pillar in the establishment of a Caribbean Single Market and Economy. Its primary purpose is to encourage and promote the production of goods within CARICOM. It is but one of a range of measures identified by the Member States as necessary in order to strengthen the productive sector and to accelerate the process towards making their exports internationally competitive.[7] At their Meeting in 1984 the Heads of Government of Member States singled out the Customs Tariff as the principal instrument of protection in the Community, replacing the use of quantitative restrictions[8]. The CET is not to be divorced from the overall aim of the implementation of a common protective policy so as to further integrate the economies of the Member States by creating an enlarged and more assured market for regional producers and manufacturers[9].

[7] *See:* Foreword to the '93 document
[8] *See:* Para 3 of the '93 document
[9] *See:* Para 1 of '93 document

[47] Each of the two official publications emphasises the flexible and dynamic nature of the tariff and the need to cater in its application and further development for differences in economic circumstances of individual Member States and changing conditions in the regional and international economic environment[10]. Indeed, Article 163 of the RTC records the agreement of Member States that in the implementation of the CET, the special needs of the less developed countries shall be taken into account. Paragraph [41] of the 1993 document outlines that the OECS and Belize may be given tariff suspensions for reasons having to do with *inter alia* "the reliability of supplies" and cement is specifically listed as one such commodity.

[48] The 1993 document speaks to the implementation of the CET "in a flexible and dynamic manner, its scope and application being adapted in response to developments within the region and in the international community". The document is nevertheless quick to point out that "This responsiveness should not, however, create a situation of instability and uncertainty in the operation of the tariff"[11].

[49] COTED, replacing the Common Market Council, has the task of seeking to ensure that in the process of implementing the CET, the needs of regional industries are being met, recognising at the same time that such industries must be geared towards greater production efficiency and competitiveness in international markets. In order to strengthen the productive sector within the Community and to accelerate the process towards achieving increased export competitiveness, other supporting policy measures are to be put in place.

[10] *See:* Chapter 1 Para 2 of the '92 document
[11] *See:* Para 65 of the '93 document

The establishment of a rate and the 75% Benchmark

[50] The CET regime applies to all commodities imported into the Community from Third States which do not qualify for Community treatment[12]. Every such commodity imported into the Community has a tariff rate assigned to it, zero being the lowest possible applicable rate. The rate assigned is determined firstly by deciding into which of two broad categories the commodity falls, namely: the competing or the non-competing category. There is a range of rates in respect of commodities that fall in the competing category and a much lower range of rates for those that fall in the non-competing category.

[51] A simple basis exists for distinguishing the two categories. Where current regional production, or immediate production potential from existing capacity, exceeds 75% of regional demand for a particular product, imports of that product from outside the Community are deemed to be competing and regional producers of that product are normally assured a certain level of protection. If regional production (or the productive capacity of regional producers) does not satisfy the 75% benchmark, then imports from non-Community sources of the product in question will be deemed to be non-competing and hence regional producers of that product will not have similar, or sometimes any, level of protection[13]. *Protective* tariff rates are therefore established for commodities where the current level of Community production of any commodity is sufficient to satisfy a minimum of 75% of regional demand for the commodity[14]. Where regional production achieves the 75% benchmark this circumstance ought automatically to trigger the establishment of a rate in the competing range for the particular commodity. The rate currently established for extra-regional cement, 15%, lies at the low end of the rates usually prescribed for goods in the competing category.

[12] *See:* Para 1 of Chapter 1 of '92 document and Article 82 of the RTC
[13] *See:* Para 10 of '93 document
[14] *See:* Chapter 2 Para 16 of '92 document

Alteration or suspension of the tariff

[52] Article 82 of the RTC records the establishment of the CET and Article 83 provides a skeletal outline of its intended operation. For ease of comprehension the relevant provisions are set out below:

> **"ARTICLE 82**
>
> **Establishment of Common External Tariff**
>
> The Member States shall establish and maintain a common external tariff in respect of all goods which do not qualify for Community treatment in accordance with plans and schedules set out in relevant determinations of COTED.
>
> **ARTICLE 83**
>
> **Operation of the Common External Tariff**
>
> 1. Any alteration or suspension of the Common External Tariff on any item shall be decided by COTED.
>
> 2. Where:
>
> (a) a product is not being produced in the Community;
> (b) the quantity of the product being produced in the Community does not satisfy the demand of the Community; or
> (c) the quality of the product being produced in the Community is below the Community standard or a standard the use of which is authorised by COTED,
>
> COTED may decide to authorise the reduction or suspension of the Common External Tariff in respect of imports of that product subject to such terms and conditions as it may decide, provided that in no case shall the product imported from third States be accorded more favourable treatment than similar products produced in the Member States.
>
> 3. The authority referred to in paragraph 2 to suspend the Common External Tariff may be exercised by the Secretary-General on behalf of COTED during any period between meetings of COTED. Any exercise of such authority by the Secretary-General shall be reported to the next meeting of COTED.

4. Each Member State shall, for the purpose of administering the Common External Tariff, appoint a competent authority which shall be notified to COTED.

5. COTED shall continuously review the Common External Tariff, in whole or in part, to assess its impact on production and trade, as well as to secure its uniform implementation throughout the Community, in particular, by reducing the need for discretionary application in the day to day administration of the Tariff."

[53] Beyond establishing the fundamental conditions that must exist for authorising any reduction or suspension of the tariff, these articles of the RTC shed little or no light on how such an authorisation is procured. Decisions as to whether a rate is to be maintained, increased, reduced or suspended are left for determination by COTED but the Secretary-General, on behalf of COTED and between COTED Meetings, may exercise the authority of COTED but only in respect of suspensions[15].

[54] A distinction is to be made between a suspension of a rate and the alteration (i.e. increase or reduction) of a rate. In relation to a final product, a rate is normally suspended when there is a *temporary* interruption of regional supplies[16]. Alteration of an established tariff rate is decided upon in circumstances where the relationship between production and supply of the particular commodity is of a more permanent nature. For example, where regional production has been discontinued, this will normally lead to the lowering of a rate. Or, if new regional production comes on stream, that circumstance may result in the increase in a rate[17]. Further support for recognising a distinction between alteration and suspension of a rate may be gleaned from Article 83(3) which gives to the Secretary-General the authority between Meetings of COTED to authorise a suspension but not a reduction, or indeed other alteration, of a rate.

[15] *See*: Article 83(3) of the RTC
[16] *See*: Para 11 of Chapter 1 of the '92 document
[17] *See*: pares 12-14 of Chapter 1 of the '92 document

The proper construction of Article 83(2)(b)

[55] In construing Article 83, the Court rejects the argument of TCL that the CET on cement may not or ought not to be suspended if a supplier was in a position to satisfy in excess of 75% of regional demand. The RTC makes no such suggestion. Article 83(2)(b) of the RTC gives as one of the criteria for triggering the exercise by COTED of its discretion to authorise a suspension of the CET the circumstance that "the quantity of the product being produced in the Community does not satisfy the demand of the Community". This criterion does raise a question of interpretation. Taking the example of cement, does COTED have the power to authorise a suspension of the 15% rate on cement under Article 83(2)(b) only if TCL's actual production does not satisfy regional demand? Or is it that quite apart from and without prejudice to that circumstance, COTED's power to authorise a suspension of the rate also extends to situations where a particular Member State is not having its unique demand met by regional producers?

[56] Bearing in mind that a suspension of a rate is intended to be a temporary measure and that authorisation to suspend is granted only to a particular Member State or Member States in response to a specific request from that or those Member States, the Court holds that Article 83(2)(b) must be interpreted in a sensible manner. COTED may authorise a suspension of a rate not only where the quantity of the product being produced in the Community does not satisfy the demand of the Community as a whole but also where the ongoing demand of a particular Member State will not be met either on a timely basis or at all by the regional producers of the commodity.

The procedure in applying for suspension

[57] The Administrative Arrangements relating to the alteration or suspension of tariff rates are set out in paragraphs 15 to 18 of the 1992 document. Given that these represent the existing practice the Court considers it necessary to set out these arrangements in full.

"15. Any Member State may seek the approval of the Common Market Council for the alteration or the suspension under Article 32 of the Annex to the Treaty of the rate under the Common External Tariff on any item. Requests of this nature are ordinarily considered at meetings of the Common Market Council.

16. An individual or firm desiring an alteration or suspension of a tariff rate must approach the appropriate Ministry or Department in the Member State concerned, informing it of the circumstances giving rise to the request for alteration or suspension of the Common External Tariff. If the Government of the Member State considers that the matter should be brought before the Common Market Council, it will make a submission to Council through the CARICOM Secretariat.

17. To cater for situations where an urgent decision regarding the alteration or suspension of a rate under the CET is being sought between meetings of the Common Market Council because of the sudden and unforeseen interruption in regional supplies of a particular commodity, the Common Market Council has delegated to the Secretary-General the powers vested in the Council under Article 32 of the Annex to the Treaty.

18. The procedures governing the exercise by the Secretary-General of the powers delegated to him under Article 32 involve the following steps:

(a) the importer of the commodity who is unable to obtain supplies from within the Common Market must inform the Competent Authority (i.e. the Minister designated by each Member State for this purpose) of the situation;

(b) upon being satisfied of the correctness of the report made to him, the Minister will promptly inform the Secretary-General and the Competent Authorities of the other Member States' of the situation and request the suspension of the protective tariff rate on the commodity in question;

(c) the Secretary-General will immediately formally acknowledge receipt of the request for suspension of the tariff;

(d) the Secretary-General will also promptly enquire of the Competent Authorities of the other Member States as to the ability of those States to supply the commodity that is required. Such enquiries will be copied to the

Ministries of Member States responsible for Foreign/External Affairs. Enquiries by the Secretary-General will be made by telex, telefax or similar speedy means of communication;

(e) the Member States to whom the Secretary-General's enquiries are directed are required to respond within three working days of the dispatch of those enquiries copying their replies to the Competent Authority in the requesting Member State;

(f) within a period of fourteen days commencing from the date of his acknowledgement of the request the Secretary-General will make a decision whether to grant approval, on behalf of the Common Market Council, of the suspension of the rate under the Common External Tariff on the commodity in question, and he will advise the Competent Authority in the requesting Member State. The failure of one or more of the Member States to respond to the Secretary-General's enquiries regarding their ability to supply the required commodity, will not prevent a decision by the Secretary-General within the stipulated fourteen day period;

(g) the Secretary-General will report to the Council at its next meeting, giving particulars of any action taken by him under Article 32 of the Annex to the Treaty."

[58] The same document also sets out in the following manner the procedure involved in making requests for the alteration or suspension of rates under the CET:

"19. Where an importer of any goods, whether an input or a final product, is desirous of obtaining a change, or the temporary suspension of a rate of import duty under the CET, he should submit a request to that effect together with the following information to the relevant Ministry or Department of his State:

(a) the Tariff heading number(s) and precise description of the goods together with all relevant technical specifications;
(b) the name and address of the requesting individual or firm;
(c) the quantity and estimated value of the goods that are required;

(d) the rate(s) of import duty being applied currently in the particular Member State;
(e) the rate of import duty proposed in lieu of the current rate;
(f) where a suspension of the current rate is requested, the proposed duration of the suspension;
(g) the reasons for the request for a change or a suspension of the rate that is being applied in the Member State along with the name(s) of the Member State(s) from which supplies were previously obtained;
(h) the efforts that have been made to source the product(s) from within the Common Market, and the result of those efforts.

20. Having investigated the representation made by the importer, if the relevant authorities in the Member States are satisfied that the matter should be brought before the Common Market Council, a submission will be made to that effect through the Secretariat. A specimen of the form to be used in the submission of requests for the alteration or the suspension of a tariff rate is presented at Annex II.

21. Notifications of the approval of the suspension or alteration of rates under the CET will be sent by the Secretariat to Ministries of Member States responsible for the Foreign/External Affairs and Trade and copied to the individual or firm which had initiated the request for the suspension."

[59] If we consider the above procedure as commencing with the desire of the importer to obtain the commodity and ending with a decision by COTED or, in the case of suspension, the Secretary- General, it is evident that the process comprises both a domestic and an international component. At the domestic level a private entity interfaces with its Competent Authority. The Member State concerned may or may not bring to the attention of the CARICOM Secretariat a request by the private entity to reduce or suspend the CET. The CARICOM Secretariat becomes involved in the process at the point in time when a Member State chooses to bring the matter before the COTED or the Secretary-General.

[60] This practice, commenced under the original Treaty, continues under the RTC. There are, however, at least four circumstances that create a very

significant difference between the conditions giving rise to the practices established under the original Treaty and the ones that should properly exist under the RTC. Firstly, in the original Treaty decisions of the Common Market Council in relation to the alteration or suspension of the CET were made by unanimous vote[18]. The need for unanimity perhaps explains why the guidelines make no provision for the Member States to consult with local producers before replying to a request for information made by the Secretary-General. The need for unanimity also explains why the Secretary-General was required to round robin all Member States including those who it was known had no capacity to produce or who were not currently producing the commodity in question.

[61] The requirement of unanimity meant that effectively, each Member State had a veto. This may have accounted also for the development of the practice, as alleged by the Secretary-General in his testimony, that it was sufficient for a Member State, in response to the Secretary-General's inquiry as to the ability of that State to supply the commodity that was required, simply to indicate that it had or did not have an objection to a request for suspension of the CET made by another Member State. Under the RTC, there is no longer a requirement of unanimity. Decisions on alteration or suspension of the CET are now taken by a qualified majority vote which means three-quarters of the membership of COTED[19]. This change from unanimity under the original Treaty to a three-quarters majority under the RTC is significant as it clearly suggests that under the latter regime the Member States have agreed to compromise their entitlement as sovereign States to impose or remove unilaterally duties on all goods entering their ports.

[62] Secondly, the original Treaty did not specifically grant to the Secretary-General any power to authorise a suspension of the CET. It was a decision of

[18] *See:* Article 32(1)
[19] *See*: Article 29 of the RTC

the Common Market Council that delegated certain powers to him. The Council agreed[20]

> "that if the Secretary-General considers it necessary or expedient that the powers vested in the Council under Article 32 of the Annex to the Treaty Establishing the Caribbean Community be exercised during any period between meetings of Council, these powers may be exercised by him on behalf of the Council, subject to the condition that the matter be reported by him to the next Meeting of Council."

[63] The Secretary-General therefore was a mere agent, a delegate. This is no longer the case as the Secretary-General's power to authorise suspensions, though exercised on behalf of COTED, is derived from the RTC itself. The RTC at Article 83(3) specifically confers on the Secretary-General between meetings of COTED *the same authority conferred on COTED* to authorise the suspension of the CET. The Secretary-General under the RTC is no longer a mere delegate or agent. In his own right he must exercise his discretion and apply the terms of the RTC, even though he does so nominally on behalf of COTED.

[64] Thirdly, there is not to be found in the original Treaty any provision comparable to Article 26 of the RTC. Article 26 of the RTC states:

> **"ARTICLE 26**
>
> **The Consultative Process**
>
> 1. In order to enhance the decision-making process in the Community, the Community Council, assisted by the Secretary-General, shall, in collaboration with competent authorities of the Member States, establish and maintain an efficient system of consultations at the national and regional levels.
>
> 2. The system of consultations shall be structured to ensure that determinations of Community Organs and the Legal Affairs Committee are adequately informed by relevant information

[20] *See*: Annex II

> inputs and are reinforced by consultations undertaken at successively lower levels of the decision-making process."

[65] Finally, as this Court had occasion to hold in *Trinidad Cement Limited and another v The State of the Co-operative Republic of Guyana*[21], under the RTC private entities are accorded certain rights which, conditionally, may be espoused before this Court. The Court said then:

> "18. Given the important role envisaged for private economic entities in achieving the objectives of the CSME, the Contracting Parties clearly intended that such entities should be important actors in the regime created by the RTC; that they should have conferred upon them and be entitled to enjoy rights capable of being enforced directly on the international plane.
>
> ……
>
> 32. Unless specifically otherwise indicated, the obligations set out in the RTC are imposed on Member States (or a class of Member States) collectively. Where an obligation is thus imposed, it is capable of yielding a correlative right that enures directly to the benefit of private entities throughout the entire Community."

[66] These four circumstances, in the opinion of the Court, produce a number of important consequences some of which are explored in the course of this judgment. Chief among these consequences is that under the RTC, both at the domestic and the international level, a duty exists to ensure that all the processes involved in making and determining requests for the reduction or suspension of rates under the CET should be transparent and efficient.

The Consultative Process in the context of applications for suspension

[67] The Court has alluded to the consultative process in the Community and at [64] above Article 26 of the RTC was reproduced. The Court was not informed in these proceedings of the precise nature of the "system of consultations" that currently exists "at the national and regional levels" or

[21] CCJ Application No. AR 1 of 2008

indeed, whether a defined system exists. If one did exist, then according to TCL, it failed in relation to the request by Jamaica for a suspension because TCL alleges, and it has not been contradicted, that it was ready, willing and able to meet Jamaica's demand for cement but it was not consulted.

[68] Under Article 26 of the RTC the Community Council is given the responsibility of establishing and maintaining "an efficient system of consultation at the national and regional levels", the object being to enhance the decision-making process in the Community. The Article further provides that in discharging this responsibility the Community Council is to be assisted by the Secretary-General and shall operate in collaboration with Competent Authorities of the Member States. The duty to maintain an efficient system of consultation would include a duty to monitor the operation of that system once it has been established, as well as a duty to try and correct any weaknesses that emerge in the system and to ensure as far as possible scrupulous adherence to that system. These are duties which rest primarily on the Community Council but in the performance of which that Council is entitled to the assistance of the Secretary-General. There are of course limits on both the competence and the capacity of the Secretary-General to insert himself into the domestic plane. Member States therefore have a duty to provide the Secretary-General and COTED with accurate, relevant and timely information. The Secretary-General is ordinarily entitled to assume where a Competent Authority supplies information that ought to have been obtained as a result of consultation, that the necessary consultation has in fact taken place. Given his duty, however, to assist in maintaining an efficient system of consultation, the Secretary-General has a residual responsibility not to look the other way if it comes to his attention that the consultative process has not been followed by a Competent Authority at the domestic level, or that it is at best doubtful whether it has been followed. He must do what he reasonably can in order to ascertain from the Competent Authority whether the appropriate consultation has been held and if it has not, to encourage it to remedy that omission. It is not without significance that Article 26 makes it

explicit that the system of consultations shall be structured to ensure that Community Organs are adequately informed by relevant information inputs.

The role of the Secretary-General in applications for suspension

[69] During any period between meetings of COTED where a request for a suspension is made to the Secretary-General by a Member State the Secretary -General has the responsibility of discovering from the various Competent Authorities which, if any of them, has the ability to supply the commodity that is required. Since unanimity is no longer a guiding principle and the relevant Articles of the RTC provide for criteria relating to the production and quality of the particular commodity, COTED and the Secretary-General might consider whether under the RTC it is still necessary for the Secretary-General to make inquiry of the Competent Authority of Member States which clearly do not produce the relevant commodity. In any event, the Member States inquired of are required to respond and to give (and the Secretary-General should insist upon receiving at least from those Member States known to be producers of the commodity in question) a specific answer to the question posed.

[70] As regards the letters written on 5th September, 2008 by Caribbean Cement to the Jamaica Competent Authority and on 22nd September, 2008 by TCL to the Secretary-General (*See:* [18] and [21] above), the Court makes the following points. Without prejudice to Caribbean Cement's ability in other proceedings to place reliance on their letter of 5th September, 2008, that letter strictly formed part of the domestic process and cannot be relied upon in these proceedings against the Community. As to TCL's letter of 22nd September, 2008, the same is dated the day before the Secretary-General issued his authorisation to Jamaica to suspend the CET on cement. In these circumstances, the Court was concerned as to whether it could make a finding that this letter was actually received by the Secretary-General before he

issued his authorisation. The Secretary-General does not admit receiving the TCL letter before he issued his authorisation although he received and acted upon a letter of the very same date written to him by the Barbados Competent Authority (See: [25] above).

[71] Dr Denbow for TCL assured the Court that the TCL letter was sent by fax on the said 22nd September and offered to provide proof to this effect but the Court did not receive any such evidence. On balance, the Court cannot make a finding that TCL's letter of 22nd September 2008 was in fact received by the Secretary-General before he issued his authorisation. The Court, however, considers that while the Secretary-General has no duty to solicit the provision of information by private entities, if information comes to his attention from a private entity that contradicts or casts a different light on the submission received from a relevant Competent Authority then, as indicated above, the Secretary-General has a responsibility to ascertain from the relevant Competent Authority whether there has been the requisite level of consultation between the Competent Authority and all relevant producers of the commodity in question. There may be serious implications if there is a failure of the duty to consult.

[72] In view of the flexibility and dynamism of the CET, the wide policy considerations which impact on decisions to authorise a suspension of a rate and the evidence that COTED meets as frequently as three times annually, applications for authority to suspend the CET should be made to the Secretary-General only in the context of great urgency and secondly, authorisations granted by the Secretary-General should be for as short a period of time as practicable and generally, for not more than one year.

[73] With reference to the specific facts of this case, the State of Trinidad and Tobago was served with TCL's Originating Application in which TCL alleged that it had not been consulted in relation to the Jamaica request for a

suspension. In the absence of any response from Trinidad and Tobago to this allegation the Court accepts the contention of TCL and concludes for the purpose of this case that Trinidad and Tobago failed to discharge its implied obligation to consult with TCL before responding to the Secretary-General that it had "***no objections***" (emphasis added by the Trinidad and Tobago Competent Authority) to the Jamaica request.

[74] The practice by the Secretary-General of accepting as a sufficient answer to his inquiry as to a Member State's ability to supply the needs of another Member State which is seeking permission to suspend CET, the response that the first Member State has "no objections" is wrong and must cease. It is a practice born out of the peculiar provisions of the original treaty as to unanimity but it does not comport with the terms of the RTC. Before the Secretary-General may exercise his discretion to authorise a suspension, the treaty provisions require that he must be satisfied as to the relationship between demand and supply with respect to the commodity concerned and not with whether a Member State objects or does not object to a request for suspension.

[75] TCL has not claimed damages in this action. The relief sought is the quashing and revocation of the decision of the Secretary-General. The Court notes firstly that, in accepting and acting upon the "no objections" letter of Trinidad and Tobago, the Secretary-General acted throughout in good faith and in conformity with a practice (now declared obsolete by this Court) that he inherited when he assumed office. Secondly, while the Secretary-General's procedural flaw must attract an appropriate declaration, it is not in these circumstances of a sufficiently serious nature to warrant the annulment of his decision. There would certainly have been a stronger basis for the Court to make such an order if it had been established clearly that the TCL letter of 22nd September, 2008 was received by the Secretary-General before the latter issued his authorisation to Jamaica. Finally on this point, the Court notes in

passing that a reversal of the commercial trade arrangements put in place by private sector bodies in Jamaica on the strength of the Secretary-General's decision may take some time, perhaps months, to be realised in an orderly manner. A decision to annul a decision of this nature without an adequate grace period being provided can cause serious disruption of commercial transactions already concluded. Even though this case was accorded urgent treatment, it was not possible to hear and conclude it before the beginning of April 2009 by which time the suspension had only some months left to run.

[76] The Secretary-General, before authorising a suspension, must satisfy himself that he has received from Competent Authorities, in response to the inquiry which he is required to pose to them, specific answers that would allow him to determine whether the quantity of the product being produced in the Community can satisfy the demand of the requesting State. It appears to the Court that the best way of ensuring this is for the Secretariat to have a Form drawn up and provided to Competent Authorities for them to complete and submit to it. This Form should require the Authority to disclose, *inter alia*, what entities, if any, a Competent Authority has consulted and whether there is a local producer able and willing to satisfy the demand on a timely basis of the Member State requesting permission to suspend. This would greatly assist the Secretary-General in the discharge of his functions.

[77] The Court also finds that, even in the context of an emergency measure, three working days (*See:* Paragraph [53] (18) (e) above) may not always afford sufficient time to allow for full consultation at the national level. This requirement is therefore one which COTED and the Secretary-General may wish to re-visit.

Was the COTED suspension ultra vires?

[78] It is manifest that the issues raised at the COTED Meeting as to anti-competitive conduct by the TCL were not relevant to the suspension. Within

the Caribbean Community there is a forum for investigating and challenging conduct that appears to be anti-competitive. It would be unjust and illegal for COTED to rely on unproven allegations of such behavior to support a decision to suspend the CET. Notwithstanding the concerns expressed about TCL's prices and the irrelevance of those concerns in the making of a decision as to the suspension of the CET, however, all the facts relating to supply and demand for cement, and the Audit Report in particular, were before COTED. The dominant and operative consideration was that Member States were not prepared to treat the Audit Report supply forecast as guaranteeing them actual on time deliveries in view of their past experiences with the TCL Group. This Court is unable to say that COTED in the exercise of its discretion to authorise the suspension could not rationally rely on its past supply experience and use that as a basis for being sceptical about the actual delivery of supplies of cement in a timely manner. The amount of cement in respect of which the suspensions were given and the fact that the suspensions were only for a one year duration, although suspension for two years was sought, indicates an observance of the principle of proportionality which must at all times be adhered to by COTED. As previously indicated, in reviewing COTED's discretion this Court is not entitled to substitute its own judgment for that of COTED. If COTED's decision is so wholly disproportionate as to be unconnected with the facts, the decision might be set aside and the application for the suspension remitted to COTED for fresh consideration. Moreover, as previously indicated (*See:* [27] above), COTED deliberations properly emphasised that their dealings in the market would follow the rule: "no matter what, we source first from within". The Court wholly endorses this principle and considers that it should at all times be reflected in the actions of the Member States.

[79] The *volte face* referred to at [22] above and the reason for the same were not explored at the hearing. The Court considers, however, that the Secretary-General acted properly in refusing the requests made of him based on the

information available to him at the time. It would not be proper to draw any adverse inferences from the alleged *volte face*. COTED always is in a better position than the Secretary-General to assess whether a suspension of the CET should be authorised.

[80] The Court is nevertheless concerned that, like the Secretary-General, COTED too must be supplied with accurate, relevant and timely information when it meets to consider a suspension of the tariff. In this regard also appropriate forms must be devised for both importers at the domestic level as well as for Competent Authorities. The importer should provide evidence of unfulfilled orders; evidence of the response of the regional producer including transportation logistics (*force majeure* excepted) and information showing what efforts they have made to obtain regional supplies.

Conclusion

[81] As the Court has previously indicated, the Secretary-General's authorisation of the suspension for Jamaica suffered from a procedural flaw, but for the reasons expressed above at [75] the Court is content to issue the following declaration: it was wrong for the Secretary-General to accept as a sufficient answer to his inquiry regarding a request for suspension by Jamaica, the response of Trinidad and Tobago that it had "no objections" to Jamaica's request. The Court also concludes that in the future when the Secretary-General takes a decision to authorise a suspension it is a good practice for his authorisation to be supported by a brief statement of the reason or reasons for arriving at his decision. As to COTED's authorisation, in all the circumstances, the Court can find no basis for regarding the decision made by COTED as being *ultra vires*. The Court dismisses all the other claims for relief made by the Claimant.

Costs

[82] TCL acted properly in bringing this action. TCL had earlier requested the Secretary-General to seek from the Court an Advisory Opinion on some of the matters discussed in this judgment. The Court considers that it was important not just to TCL but to the entire private sector in the region that the Court should pronounce on many of these issues that are relevant to suspensions of the CET. Although the only relief obtained by TCL is the making of the declaration referred to above, in all the circumstances, the Court orders that the Community should bear one half of the costs of TCL.

/s/

The Rt Hon Mr Justice M. A. de la Bastide (President)

/s/

The Hon Mr Justice Rolston Nelson

/s/

The Hon Mr Justice Adrian Saunders

/s/

The Hon Mme Justice Desiree Bernard

/s/

The Hon Mr Justice Jacob Wit